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Archbold Review

Cases in Brief

Appeal—reference from the CCRC—whether appellants entitled to argue a ground where appeal allowed on another ground—if appellants not so entitled, whether court should permit such argument—factors

HAMILTON [2021] EWCA Crim 21; 15 January 2021

The CCRC referred the convictions of 41 Post Office employees secured on the basis of a discredited accounting system. The grounds were based on both species of abuse of process: that a defendant could not have a fair trial (ground 1); and that his or her trial was an affront to the conscience of the court (ground 2). In respect of 34, the prosecution did not oppose the appeals on ground 1, but did do so on ground 2. In advance of the hearing of the substantive appeals, the Court listed those cases for a hearing to determine, first, if each appellant was entitled as of right, as a result of the CCRC's reasons (Criminal Appeal Act 1995, s.14(4) and (4A)) to rely on ground 2. Secondly, if not, on what basis the Court should allow them to do so (1995 Act s.14(4B)). Some of the appellants submitted that their appeals should be allowed on the basis of ground 1 as soon as possible; others that their proper vindication relied on consideration of ground 2.

(1) In respect of the first question, it was clear that the Court could not properly dismiss an appeal without first considering all the grounds of appeal. As to whether the Court may properly allow an appeal against conviction without considering all the grounds, it was a well-established practice that the Court would sometimes allow an appeal on one ground without deciding, or hearing argument upon, another ground: *Berry (No 3)* (1994) 99 Cr.App.R 88; *Mandair* [1995] 1 AC 208; *Mears* [2011] EWCA Crim 2651; and *Sadeer* [2018] EWCA Crim 3000. In performing its statutory duty under the Criminal Appeal Act 1968 s.2, the Court must resolve all matters which were necessary to determine whether the convictions were unsafe, but was not required to resolve matters which were not necessary to that resolution. This was consistent with the general rule that an appellant was required to raise all the grounds on which it was wished to rely. An appeal could not be presented on some grounds, the appellant hoping to be permitted to advance others at a later date if the first were unsuccessful: *Wallace Duncan Smith (No 2)* [1999] 2 Cr.App.R 444. In many cases, the Court would wish to hear submissions on all grounds. If, however, the Court concluded that an appeal must be allowed on one ground, it was not required to hear argument on another ground. The Court had the right and duty to regulate the way in which appeals were conducted. In all cases, therefore, it was for the Court to decide whether it needed to hear argument on all grounds. As a result, if the Court decided to allow an appeal on ground 1 (a decision for the Court, regardless of the prosecution's stance), the appellant was not entitled as of right to argue ground 2.

(2) As to the second question, the guiding principle was that the Court must act in the interests of justice. When considering whether a further ground should be determined, the factors the Court would usually consider included: (a) the ECHR Art.6 rights of the appellant; (b) the overall importance to the parties and to the public of the further ground; (c) the furtherance of the overriding objective in accordance with the Crim PR; (d) whether the additional ground raised issues of particular importance in relation to the character and/or reputation of the appellant or others; (e) whether the additional ground related to an issue which should be resolved in order to maintain public confidence in the criminal justice system; (f) whether it raised a legal issue which might be important in other cases; (g) the desirability of an appellant being able to seek appropriate vindication; (h) the time and expense involved in determining the additional ground; (i) whether it would give rise to

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undesirable delay to the instant appeal, or to linked cases; (j) whether the additional ground was necessary in order to establish the proper basis on which a retrial would be conducted; and (k) whether any party may have a collateral reason for wishing to argue, or to avoid having to argue, the additional ground, and if so, the legitimacy of the reason.

Evidence—Investigatory Powers Act 2016—penetrated secure communication system—whether product admissible in evidence; construction of statutes—contradictory provisions in very complex statutes

A, B, D AND C [2021] EWCA Crim 128; 2 February 2021

EncoChat was an encrypted mobile phone system using dedicated handsets marketed as totally secure and used by criminals. French police authorities acting legally uploaded an implant to devices using the system which initially transmitted seven days of un-erased data to the police, and thereafter collected new messages. The material so obtained was then transferred to the British authorities. Defendants appealed against the first instance judge's ruling at a preliminary hearing that material obtained in this way was admissible at trial.

(1) The principal question was whether the communications fell within Investigatory Powers Act 2016 s.4(4)(b), as the prosecution submitted or s.4(4)(a), as the appellants submitted. This involved deciding whether, at the point when they were intercepted, they were "stored in or by" the telecommunications system by which they were transmitted, or whether they were "being transmitted" at that point. Section 6(1)(c) provided that interception of stored communications (i.e s.4(4)(b)) under a warrant issued under Pt.5 of the Act was lawful. Material so produced was also admissible by virtue of Sch.3 para.2, which excluded it from s.56, the general provision excluding intercepted material from admission in proceedings. Part 5 provided for Target Equipment Interference Warrants (defined s.99).

(2) The court agreed with the judge's analysis of the facts in relation to this system. The material was not taken during transmission, but formed data held on the device – whether the sending or receiving device – a copy of which was sent to the French authority's server. As a matter of ordinary language, s.4(4)(b) was clear and unambiguous. It extended to all communications which were stored on the system, whenever that might occur. That broad meaning cohered with the structure of the 2016 Act considered in overview, and with the different types of warrants for which the Act provided: under Pt 5 for the interception of stored material, and Pt2 for material which was to be intercepted while being transmitted.

(3) Given this conclusion on the meaning of "stored" it was not necessary to define exactly when transmission started and ended. The court did not accept that transmission started when the user pressed "send". That action caused the device to prepare the message in its final form and then to initiate the process of transmission. A mobile phone was a computer and a transmitter. Transmission took place after the communication has been put into its final form by the computer – here, that included the encryption. That took place after the user pressed "send", but before the message was transmitted by the device. On receipt by the recipient's device it was decrypted. The transmission was complete when the communication arrived on the receiving device so that the device could begin work decrypting it and making it legible. Even in this unusual type of system, the transmission occurred when a device was in contact with the rest of the system for the purpose of sending or receiving a communication, and when the communication was travelling through other parts of the system.

(4) The court did not need to determine the Crown's broad argument that Pt.5 warrants, when they related to communications, fell outside the exclusionary rule in s.56(1) altogether. However, were that so, the Sch.3, para.2 exclusion from s.56 would be unnecessary. The court noted that in very complex statutes such as the 2016 Act it was sometimes possible to find anomalous provisions which appeared to be unnecessary, but that conclusion should be a last resort when all attempts to give a meaning to the language chosen by Parliament had failed.

(5) The court doubted whether handsets ordinarily formed part of a "public telecommunications system", but the issue was not argued, it being agreed between the parties that they were, so the court proceeded on that basis, without deciding the point.

Gross negligence manslaughter—causation—act by victim—whether requirement additional if jury found act not fully free, voluntary and informed

REBELO [2021] EWCA Crim 306; 8 March 2021

R was retried for an offence of gross negligence manslaughter on a retrial ordered on his successful appeal ([2019] EWCA Crim 633). R ran a business selling a dangerous chemical (DNP) for use as a food supplement promoting weight loss. A woman, EP, bought and consumed a number of tablets of DNP and as a result died. She suffered from mental health problems, including an eating disorder. On this appeal, R argued that the directions on causation did not accord with the approach laid down in his previous, successful, appeal. The jury should have been told that, even if the jury found that EP's choice to take the DNP was not fully free, voluntary and informed, they then still had to assess whether the decision to take the amount of DNP that she did was such that it could be said "to eclipse" the appellant's gross negligence, in reliance on a suggested direction at [76] of the earlier judgment. The submission was misconceived. First, that passage was suggestive only of the sort of direction that might be given and was not intended to be prescriptive. Secondly, the relevant passage was not authority for the proposition that before the jury could safely convict, the prosecution were required to surmount a further hurdle. The use of the phrase "eclipsed the defendant's grossly negligent breach of the duty of care" was in a passage in which the court was explaining what was meant by "fully free, voluntary and informed", and not an additional step. Although the word "eclipsed" did not appear in the (agreed) written directions, the jury were accurately directed on the issue of causation and their approach to the core issue.

Reporting restrictions—Children under 18—Youth Justice and Criminal Evidence Act 1999 s. 45(4)—excepting direction allowing reporting—whether amenable to judicial review—whether Court of Appeal has concurrent jurisdiction to entertain appeal—procedure in Crown Court

KL [2021] EWCA Crim 200; 19 February 2021

KL, 16 at the time of trial, sought to object to an excepting

direction under the Youth Justice and Criminal Evidence Act 1999 s.45(4) made at sentencing. The court considered whether such a challenge could be made on judicial review, and whether the Court of Appeal had jurisdiction to hear an appeal against the making of an excepting direction.

(1) The first point was undecided, although there was authority on the same issue in relation to orders made by the Crown Court under the predecessor Children and Young Persons Act 1933 s.39. The court reviewed the partially conflicting authorities: *Re Smalley* [1985] A.C. 622; *Re Sampson* [1987] 1 W.L.R. 194; *R v. Manchester Crown Court, ex p. DPP* [1993] 1 W.L.R 1524; *R v. Central Criminal Court ex parte Crook*, *The Times* 8 November 1984; *R v. Leicester Crown Court ex parte S (a minor)* [1993] 1 W.L.R 111; *Lee* [1993] 1 W.L.R 103; *R v Harrow Crown Court, ex parte Perkins*, *R v. Cardiff Crown Court, ex parte M (a minor)* (1998) 162 JP 162; *R v Winchester Crown Court ex parte B (a minor)* [1999] 1 W.L.R 788; *R v Crown Court at Manchester, ex parte H* [2000] 1 W.L.R; *R(Y) v Aylesbury Youth Court* [2012] EWHC 1140 (Admin); and *R (JC) v. Central Criminal Court* [2014] EWHC 1041 (Admin), [2014] 1 W.L.R 3697. The Court concluded that the courts had tended to consider that s.39 orders made by the Crown Court were amenable to judicial review by the child affected (cf Sir Brian Leveson, in *JC*). By parity of reasoning, this power of review should be available in respect of excepting directions made under the 1999 Act. If there remained any doubt, the reasoning in *Winchester* (and *Crook*) should no longer to be followed.

(2) The Court would have reached the same conclusion as a matter of principle – the making of an excepting direction after conviction was not a matter relating to trial on indictment (Senior Courts Act 1981 s.29(3)). It was not a matter arising in the issue between the Crown and a defendant on an indictment; it was a challenge to a variation of a previous order providing protection of a child's right that was incidental and collateral to the trial process; and it did not give rise to the danger of satellite litigation to the criminal trial.

(3) As to the second question, the Court of Appeal did not enjoy a concurrent jurisdiction with the Divisional Court to entertain freestanding appellate challenges to excepting directions (answering a question left open in *Aziz (Ayman)* [2019] EWCA Crim 1568). The jurisdiction of the court was entirely statutory (*Jefferies* (1968) 52 Cr.App.R 654) and no such jurisdiction had been conferred. Criminal Justice Act 1988 s.159 permitted an appeal only by a party aggrieved by an order "restricting" publication, not one aggrieved by an order discharging or revoking reporting restrictions; and the powers of the court under s.45 itself were only to make ancillary orders when dealing with a substantive appeal, and did not give rise to a discrete right of appeal against a decision in the Crown Court.

(4) In cases of this nature, it would be helpful for a judge to indicate in open court after a conviction, the court's intention (if it be such) to consider the s.45 restrictions at the sentencing hearing; and further, that any specific applications with regard to the relevant restrictions must be made and notified to the parties as soon as reasonably practicable in accordance with the process identified in the Crim PR.

(5) The Court, constituted as a Divisional Court, declined the application for judicial review of the first instance judge's decision.

SENTENCING CASE

Sexual Harm Prevention Orders; variation

McLOUGHLIN [2021] EWCA Crim 165, 4 February 2021

The appellant was convicted of two offences of failure to comply with notification requirements and two breaches of a sexual harm prevention order (SHPO) which had been imposed following the appellant's conviction of nine offences of possession of indecent images of children in 2016. He was sentenced to one year's imprisonment (concurrent) for each of the breaches of the notification requirements, and two years' imprisonment (concurrent to each other, but consecutive to the other sentence of imprisonment) for the each of the breaches of the SHPO. The sentencing judge also purported to vary the terms of the SHPO that was then in place.

The appellant's appeal against the substantive sentence was refused. The sentencing judge had applied the Sentencing Council Guideline in relation to breach offences, which contains individual guidelines in relation to breach of notification requirements and breach of a SHPO, entirely appropriately.

The court allowed the appellant's appeal against the variation of the existing SHPO. The offences in respect of which he had been convicted are not listed in Schs.3 or 5 of the Sexual Offences Act 2003. The sentencing court therefore had no power to make a fresh SHPO (see *Hamer* [2017] EWCA Crim 192).

For an existing SHPO to be amended an application must be made to the appropriate court. The Sexual Offences Act 2003 strictly defines the people who can make such an application (see s.103E of the Sexual Offences Act 2003, and s.350 of the Sentencing Act 2020). Here the relevant person would be the Chief Officer of Police for the area in which the defendant resided. No such application had been made. The judge therefore had no power to make the amendments that he had purported to make at the sentencing hearing. (Considering *Ashford* [2020] EWCA Crim 673, which held that Parliament intended that a court should have jurisdiction to vary an order only on the application of one of the relevant persons; and *Rowlett* [2020] EWCA Crim 1748, which held that in the absence of such compliance neither the Crown Court nor the Court of Appeal has jurisdiction to vary the order.)

The Court therefore quashed the SHPO in its amended form, with the result that the original SHPO remained in force. The relevant Chief Officer of Police could now apply to the Crown Court for the order to be varied and it had been indicated that this would now be done.

Features

Private prosecutions – cutting them down to size?

By Jonathan Rogers[1]

On Thursday 4 March 2021 the Ministry of Justice (MoJ) announced that it intends to introduce legislation to reduce the legal costs recoverable by "private prosecutors"[2] from central funds under the Prosecution of Offences Act 1985, s.17 (hereafter, s.17). It said:

> … the costs recoverable from central funds by a private prosecutor should be limited in the same way that costs so recoverable by an acquitted defendant already are, by being capped at legal aid rates. This will require an amendment of the existing legislation.[3]

Private prosecutors do indeed pay high legal costs up front, and seek to recover them later under s.17. But not through choice. Any reputable firm will charge more, possibly several times more, than the work might have cost the CPS or than would be recoverable on legal aid rates. Yet some convictions for multi-million-pound frauds, and consequent confiscation orders bringing millions of pounds to the Treasury, have nonetheless resulted from prosecutions brought not by the overstretched public authorities but by determined private individuals[4] or companies.

That such prosecutions serve the public interest is not doubted. In the words of the MoJ:

> We agree that since not every offence worthy of prosecution can be prosecuted by the CPS, SFO or other appropriate public authority, there are circumstances where prosecutions brought by victims of crime themselves (whether corporate or individual) still have a valuable part to play.[5]

There has apparently been no assessment of the impact of so reducing the costs recoverable under s.17 from central funds. But then, we surely suspect that we know the answer; that those "valuable parts" which private prosecutions have to play, at least in regards to white-collar crime, will largely cease to be played altogether.

My overall argument here is simple and hopefully uncontroversial: that it would be much preferable to clarify how cost awards from central funds may be properly reduced on a case-by-case basis under s.17. But this is an argument that needs to be made, and made by many. After all, defendants to unsuccessful private prosecutions, already facing the same restriction to recovery on legal aid terms, are likely to find the MoJ's announcement fair. So too does the Justice Select Committee (JSC).

Indeed, it is with the JSC that we start. The MoJ portrays the idea as having originated from the JSC and is likely to continue to do so. But when their differing perspectives are examined closely it seems that the idea is much closer to the heart of the MoJ.

The Perspectives of the Justice Select Committee

The JSC invited and heard evidence from witnesses in July 2020 concerning safeguards against the misuse of private prosecutions by large companies who regarded themselves as victims. It did this following a request from the Criminal Cases Review Commission, which had just referred 47 cases arising from prosecutions brought by Post Office Ltd against their own sub-postmasters for fraud and false accounting. The CCRC references focus on the serial non-disclosure of known software problems which were capable of undermining or destroying the prosecution's case.[6]

On 2 October, the JSC published its recommendations.[7] The most far-reaching was that

> … the Government should consider enacting a binding code of standards, enforced by a regulator, that applies to all private prosecutors and investigators.[8]

It added that:

> There is a strong case that organisations which bring significant numbers of private prosecutions should be subject to inspections.[9]

The JSC was concerned too that the CPS seemed to have heard nothing of the Post Office's extraordinarily high rate of prosecution of its own sub-contractors. So it also recommended that "HMCTS establish a central register of all private prosecutions in England and Wales"[10] and that "HMCTS should ensure that the CPS is notified when a private prosecution is initiated."[11]

The JSC also called for a change in the Criminal Procedure Rules to require all defendants summonsed to meet a private prosecution to be informed that they could ask the DPP to take over and discontinue it, pursuant to his power under the Prosecution of Offences Act 1985, s.6(2).[12] This followed the revelation that few, if any, of the defendants prosecuted by Post Office Ltd seemed to know that making such an approach was even possible.

By contrast, its recommendation to cap costs awards from

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2 The phrase "private prosecutor" appears nowhere in any statute. But Prosecution of Offences Act 1985, s.17(6), lists those bodies (chiefly, the CPS) which are not entitled to recover legal costs from central funds under s.17(2), having instead their own publicly-funded budget on which to draw.

3 https://committees.parliament.uk/publications/4916/documents/49317/default/ at Annex, para.3.

4 Perhaps the best-known case is the prosecution of Ketan Somaia, brought by Murli Mirchandani. The confiscation order of over £20 million was upheld by the Court of Appeal in *Somaia v R* [2017] EWCA Crim 741.

5 See n3 at Annex, para 2.

6 See further the Guest Editorial "Private Prosecutions and Safeguards" [2020] Crim LR 769-771. See further *Hamilton*, summarised in this Issue on p. 1 above.

7 Justice Committee's Ninth Report of Session 2019-21 *Private Prosecutions and Safeguards* (HC 497), accessible at: https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/497/49702.htm.

8 Para.60.

9 Para.76.

10 Para.65.

11 Para.71.

12 Para.73.

public funds under s.17 was not directly related to the Post Office saga. The main reason appears to be that private prosecutions may be unduly attractive on account of the possibility of recovery of legal costs in the event of aquittal (and because no costs would be payable by them to the defendant).[13] This overlooks the assumed public interest in a prosecution which is allowed to proceed, as we shall see. But the key point is that saving money from the public purse was not the paramount concern of the JSC. As though to make its priorities entirely clear, its final words in its Report were:

> It is incumbent on the Government to ensure that the rise in the number of private prosecutions does not result in the development of a parallel system where the public interest, accountability and transparency are secondary to private interests.[14]

The Perspectives of the Ministry of Justice

We might usefully contrast the JSC's concluding words with the MoJ's response:

> We share the Committee's concern about the rise in the number of private prosecutions and the resulting cost to the public purse; the increase in itself justifies the Committee's detailed examination of the effectiveness of the present arrangements.[15]

As introductions go, this one could hardly be more revealing. For a start, whilst the JSC did call, inter alia, for an urgent review of funding arrangements, nowhere did it link the rise in private prosecutions to its concerns for the public purse. Their supposed concern over costs is quite wrongly attributed to it by the MoJ.

The wording also suggests that cost to the public purse is the main or only concern of the MoJ. Any notion of any system of regulation and inspection of regular private prosecutors was briefly dismissed as "disproportionate", though a commitment is made to considering unspecified other measures to improve accountability and transparency.[16]

Routine notification to the CPS of private prosecutions commenced in the magistrates' courts by HMCTS was also rejected, even though the Ministry is already working with HMCTS to develop a register with the relevant information(!).[17] The MOJ fears for the extra burdens placed on the CPS, who would feel obliged to read and process every piece of information received.

Then the Ministry rejected the simpler measure suggested by the JSC, that defendants themselves should be told, when summonsed or when answering a summons, that it is open to them to approach the CPS. It is assumed that this would be to invite defendants to open the floodgates to their local CPS Areas. This may be doubted. Defendants do not routinely do everything possible in their defence, even when it can be done for free; otherwise figures on the uptake of legal advice at police stations would be radically different.

More likely, those extra persons who might (if informed) approach the DPP would be those who have some reason to hope that to do so might make some difference – such as those many sub-postmasters prosecuted when they knew they had done nothing wrong but did not know where to turn for help. In the event, many pleaded guilty, which underlines the point that innocent defendants need to be helped and encouraged to fight their corner.

By this stage, one can be forgiven for wondering whether the attribution of cost-cutting motives to the JSC is the MoJ's way of disguising its own disinterest in any cost-incurring measures which might avoid another repeat of the Post Office saga.

At any rate, since amendment to s.17 is the only reform currently to be pursued by the MoJ, and was only of tangential importance to the JSC, our instinct should be to regard the decision primarily as theirs.

But we should still reflect, of course, on whether there are ways in which the proposal can be defended.

Possible reasons for the proposed cost-cutting

To be sure, costs awarded from central funds that are unjustifiable should be cut. This is the second of the two reasons given by the MOJ:

> … that the present arrangements for funding private prosecutions are inequitable as between prosecutors and defendants, and do not always represent a cost-effective use of public money.

Probably these are the two most natural reasons for the proposal, and we examine them below, followed by some less strong reasons only briefly mentioned by the JSC.

Cases do not always represent a cost-effective use of public money

Those are the words of the MoJ, though the apparent concession that costs do not "always" reflect value for money is already a red light, since the MoJ proposes to radically cut recoverable costs to legal aid rates in *all* cases, and not just those where the costs incurred are excessive.

We should start by noting that since 23 June 2009 the DPP's policy has been to take over and discontinue any prosecution referred to him or her which did not meet the same evidential and public interest tests that apply to CPS prosecutions.[18] This already drastically reduces the number of cases and claims that would otherwise be made under s.17. But it also means that, assuming that the DPP has reviewed the case – and the reader will recall that the JSC called for every defendant to a private prosecution to be informed that he might alert the DPP to it – then, in deciding that the public interest test is met, the DPP can be taken to have resolved that the expenditure of at least some public money and court time is cost-effective.[19]

Then the court and taxing master have their say as to the final amount, another matter on which both the JSC and MoJ say far too little. The relevant wording of s.17 is

> (1) Subject to subsections (2) and (2A) below, the court may—
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> (a) in any proceedings in respect of an indictable offence; and
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> (b) in any proceedings before a Divisional Court of the Queen's Bench Division or the Supreme Court in respect of a summary offence;

13 Paras.31-32.
14 Para.77.
15 See n3 at Annex, para.1.
16 See n3 at Annex, para.4.
17 See n3 at Annex paras 5-6.

18 The current version of the policy, unamended in this respect, can be found at: https://www.cps.gov.uk/legal-guidance/private-prosecutions

19 The current Code for Crown Prosecutors recognises the relevance to the public interest test of the "cost to the CPS and the wider criminal justice system, especially where it could be regarded as excessive when weighed against any likely penalty": https://www.cps.gov.uk/publication/code-crown-prosecutors at para.4.14(f)i.

> order the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings.
>
> …
>
> (2A) Where the court considers that there are circumstances that make it inappropriate for the prosecution to recover the full amount mentioned in subsection (1), an order under this section must be for the payment out *of central funds of such lesser amount as the court considers just and reasonable.* [italics added]

So, the court's discretion is almost unrestrained by statute. The word "may" in s.17(1) makes it clear that any recovery is discretionary. Then s.17(2A) allows the court instead to reduce awards to below those costs actually incurred.

Thus, there is already nothing to stop the court from awarding less where the prosecution was unsuccessful. Similarly, nothing prevents it from awarding less where the prosecutor did not try to involve the police at an early stage, or the CPS at a later stage. It might also award less where it considers that the prosecutor has paid more than necessary to achieve an effective prosecution conducted to appropriate professional standards.

Certainly, lawyers advise would-be prosecutors of the possibility of such reductions under the banner "just and reasonable". This is to say nothing of the fact that s.17 applies only to "indictable" offences, and so costs for, say, prosecutions by privatised companies for fare evasion on public transport are not recoverable from public funds. Further, it remains (at the time of writing) controversial to what extent s.17 permits recovery of investigative costs.

It should be possible to amend s.17 so as to clarify further those grounds on which cost awards may be reduced. Arguably it would also be "just and reasonable" to award less where the prosecutor is a serial victim who hopes that his strategy of preferring prosecutions will bring other benefits, such as reduced incidents of shoplifting in his store, or reduced incidents of minor violence against his staff. For while there may still be sufficient public interest to justify the CPS allowing the prosecution to proceed, there is no need for the court, when deciding the appropriate division of costs between the private and public purse, to overlook the extra benefits that certain victims may receive as a result of criminal law enforcement.

The proper grounds for cost reductions in individual cases, and whether s.17 should include investigative costs, is what we should be debating – if we both value the stronger private prosecutions and wonder whether there are principled ways in which keep down cost awards.

Cost regime is inequitable between prosecutors and defendants

This was the first reason mentioned by the MoJ (see above), but whether its word "inequitable" is appropriate should be challenged.

Certainly the situation is unequal, in that a prosecutor is still likely to recover more from central funds than the successful defendant, whose incurred legal costs can only be repaid on legal aid rates.

But whether it is inequitable is another matter. That there is deemed public interest in the matter being heard in the criminal court, unless the DPP intervenes as already indicated, necessarily changes matters. Where there is public interest in bringing the case, some recovery should be open to the prosecutor even when unsuccessful – but no one would suggest that the same would be as true for the defendant if he were "unsuccessful". It may be recalled too that a challenge to the reduced costs recoverable by defendants under s.18 by virtue of the comparison with the scheme under s.17 was rejected in *R (The Law Society of England and Wales) v The Lord Chancellor*.[20]

Besides, there is an opportunity to reduce another type of inequality. When the defendant is convicted, the court may make "such order as to the costs to be paid by the accused to the prosecutor as it considers just and reasonable" under Prosecution of Offences Act 1985, s.18 (1). Private prosecutors, having no publicly-funded budget behind them, are thought to ask for much greater amounts than does the CPS. But, especially if it is accepted that the primary source of recovery for the costs of a proper private prosecution should be from public funds, there is no good reason why convicted defendants should pay an unusually large amount in costs to the private prosecutor. It is one thing to say that a criminal cannot object to a private prosecution simply on the ground that his victim (perhaps a department store) is unusually determined to seek justice or that the police themselves had been (wrongly) disinterested. But it is another thing to say that, when he is privately prosecuted, he should also pay extra costs.

(One wonders, too, if the prospect of paying excessive costs to the prosecutor on conviction may be coercive. This thought was prompted by the Post Office saga, and it was on that basis that Criminal Law Reform Now had suggested to the JSC that costs recoverable under s.18 should be limited to those likely to have been awarded to the CPS. But the Network had not proposed any comparable cap under s.17.)[21]

For its part, the JSC was attracted by caps to recovery under both s.17 and s.18. The MoJ says that it is "minded" to agree to a cap on recovery under s.18 too[22] but wishes to consult further. Alas, the MoJ does not explain why it saw no equivalent reason to consult more widely on its reductions to recovery under s.17.

The CPS would typically prosecute the same cases more cheaply

The JSC mentioned this briefly.[23] But the point is weak in cases where, for one reason or another, the CPS would not prosecute at all, even though the Code tests might be met.

It is reasonable to speculate that most private prosecutions are explained by the police not being interested (animal welfare) or not having the resources (low-level fraud) nor expertise (intellectual property offences) to investigate. The CPS too might decline to prosecute, e.g, a complex fraud referred to it by a potential private prosecutor, not because of the merits of prosecuting but because it is concerned about the amount of attention it will take (where a freezing order is in place, potentially a lot of attention in satellite litigation.)[24]

Ultimately, with complex fraud, more lawyers are required to combat the menace than the state alone can retain.

In each case the inaction might be justifiable. But whatever its

20 [2010] EWHC 1406 (Admin) at [63]-[68]: though the judicial review succeeded on an unrelated ground.

21 https://committees.parliament.uk/writtenevidence/8316/html

22 See n 3 at Annex, para.3.

23 See n 7 at para.30.

24 For example, where the spouse of the accused seeks a separation in the family courts.

reason, it would be no reason to restrict the private prosecutor to recovery at a tiny fraction of his expenditure when, by necessity, he incurred large costs by instructing firms who are not purpose-built to provide the same public benefit.[25]
In any event, where the private prosecutor has chosen not to request the public authorities to prosecute the judge might, as noted above, already award reduced costs under s.17.

Costs regime encourages suitable civil claims to be prosecuted instead
The JSC alludes to this too.[26] Certainly, the criminal courts should not become the default arena where the prosecutor was primarily concerned at the outset to recover some debt. But again, where the matter is more appropriately dealt with in the civil courts, the DPP might be invited to take over and discontinue it, on the basis that the matter is inappropriately taking up the time of the criminal courts. The court itself may stay such a case for abuse of process, if sufficiently offended by the perceived motives of the prosecutor.
Some might think that such safeguards are not strong enough. But if so, the case needs to be made. Apparently, neither the MoJ nor JSC itself believes it. The Minister's opening response to the JSC was that:

> The Government welcomes the Committee's conclusion that "existing safeguards in place to regulate private prosecutions are effective at filtering out weak claims", and that "the judicial process that applies to all prosecutions ensures that private prosecutions are rigorously tested".[27]

More generally, regulation and inspection of industrial scale private prosecutors (as proposed by the JSC) would offer more appropriate ways of dealing with over-zealous companies who routinely prosecute. In some such cases the prosecutor is prosecuting for summary offences and thus not eligible to recover costs under s.17 anyway.

25 The argument was accepted by the High Court in *Fuseon Ltd v Senior Courts Costs Office* [2020] EWHC 126 (Admin) where the prosecutor had unsuccessfully tried to involve the police.
26 See n 7 at para.32.
27 See n 3 at Appendix: Government's Response.

Concerns about a two-tiered criminal justice system, where only the wealthy can afford to start cases
It is tempting to reply that if the JSC was serious when it said that "Private prosecutions should be available to all,"[28] it would hardly be recommending that recoverable costs should be capped to legal aid rates. In fact, concerns about a two-tiered system should lead them rather to advocate abolition of private prosecutions altogether. But, if one acknowledges, however grudgingly, that private prosecutions have a valuable part to play, there can be no discrete backtracking by reference to their (undeniable) deficit in accessibility.

Conclusions
It remains to be seen whether the MoJ will be minded to reconsider its decision to cut the costs recoverable under s.17. Lobbying against it would likely be required, and not only by wealthy litigants and their lawyers. Everyday victims of fraud who find it impossible to get justice through the public authorities should also be heard, especially since the recent lockdowns have surely only led to escalating incidents of fraud. Some years ago, the then Lord Chief Justice warned that the CPS should be:

> … properly resourced to conduct such difficult and complex proceedings. The consequence of the CPS not being so resourced is detrimental to the public purse.[29]

This warning is evidently yet to be heeded, but a reform which just discourages valuable private prosecutions alone should be strongly resisted from all sides. For now, we should work towards agreement on how costs awards under s.17 might instead transparently be reduced in principled ways on a case-by-case basis. It doubtless is possible to value properly brought private prosecutions and to consider principled reductions in costs from central funds, but we must be serious about both.

28 See n 7 at para.36.
29 *R (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 1823 at [43].

Fewer Sitting Days, More Delay and the Failure of Criminal Justice

By HH Peter Collier QC, Recorder of Leeds 2007-2018

I begin with a disclaimer. When I was in practice at the bar and then subsequently as a Circuit Judge I was always sceptical of letters to the paper written by those who had retired from the fray. I now appreciate that a little distance from that fray doesn't mean that you no longer have a real interest. In recent months I have continued to watch what has been happening to the courts, particularly the Crown Court. During the last few months in lockdown, I have watched with concern what has been happening to the backlog of cases and noted what has been said about this by Ministers and officials. Much of what I have read has indicated the absence of any institutional memory by many of the decision-makers in Government and the apparent loss of that memory by officials in the Courts Service.

Statistics are thrown about but more often than not they confuse rather than give understanding of what is actually happening in the criminal justice system. Waiting times, average lengths of time, backlogs, and more, are enumerated. But what do they mean in relation to the delivery of justice?
To take some examples, first there have been statements about waiting times. But those usually quoted are averages for all cases (both guilty pleas and not guilty pleas leading to trials). They do not take into account the introduction of Better Case Management in 2016. That had two impacts: (i) there was an increase in the percentage of guilty pleas; and (ii) the first hearing was happening several weeks earlier than hitherto.

These two factors taken together significantly reduced at a stroke overall average waiting times from that point onwards, thus appearing to show "improvements" when nothing had changed in the case timings that really matter. That probably explains why many comparisons take as their starting point the 2015 figures. The only statistic that really matters is the time that it takes to bring a case to a conclusion. Justice delayed is justice denied. The only person who wants to postpone the verdict and/or sentence is the guilty defendant, and it is not all of those, but it is a significant group of repeat offenders who know how to game the system. They are the ones who will put off the day of reckoning for as long as they can. It is only when they know that the witnesses have turned up at court and that there are a judge, a jury and an empty court room ready to try their case, that they will finally admit what they have known all along, namely their guilt of the crime alleged. It was a common experience to hear from the listing officer mid-morning that she had been told by the advocates that the floating trial was still a trial. She would ask from time to time during the day if that was still the position and be given the same assurance. Then in mid-afternoon when a judge and court came free and the defendant was told to go to court 6 where Judge Smith and the jury were waiting, on arrival at the court door the defendant would finally plead guilty.

Of course there are other cases where the defendant pleads guilty at an early stage, and there are cases where the defendant will go to trial. But the longer it takes to bring the case to trial the less likely that there will be a just outcome. As trial dates become further and further distant from the events that gave rise to them, so complainants and witnesses increasingly disengage. They have moved on and don't want to have to go back and relive those events. Towards the end of my time in post, I was increasingly asked to deal with applications for witness summonses because of such disengagement. And even the witnesses who did come to court often found it more difficult to recall the events in their detail, with the result that submissions were made to juries that the evidence was unreliable and they couldn't be sure of guilt.

When I was appointed as Resident Judge at Leeds in the autumn of 2007 very few cases were not disposed of well within six months of arriving in the Crown Court. The Custody Time Limit Regulations required such listing in all custody cases, but additionally it was possible to deal with bail cases within the same time frame, and there was an expectation of the listing officers that they would achieve that in 78% of cases.

It is important to understand the skill required for an experienced listing officer to achieve that target. They need to understand the mix of cases they have to process, knowing the local guilty plea rate, and the local cracked trial rate, which for various reasons differ across the country. They then have to maximise the resources they have. Running a court requires not only a court room but also a judge and staff. A court clerk and usher are the minimum staff.

Personnel cost money and so there is a limit imposed on each court as to how many court (room) days they can use each year. They are known as the allocated "sitting days". The Resident Judge and listing officer then decide how to use those days. Normally they will be spread fairly evenly across the year, but larger court centres will usually sit fewer court rooms in holiday periods, knowing that it may be more difficult to get the witnesses to court at such times and also that there will be more pressure on some staff to take their own holidays in those periods. They will also decide how to use the court rooms they have. In any given week: how many for trials, how many for the type of trials that require to be fixed before a suitably authorised or "ticketed judge", such as rape cases, how many for shorter trials a number of which are likely to plead at the last minute and how many court rooms to use for Plea and Trial Preparation Hearings (PTPHs), sentences, interlocutory applications and Proceeds of Crime Act hearings. It is an art not a science capable of being translated into an algorithm.

In a large court centre the usual mix is some long trials, running for perhaps two or three months each. They clearly each need a full-time judge. Occasionally they plead guilty on the first or second day, freeing up that judge. But what you cannot do is slot another long case into its place. The judge can pick up other trials and pleas in the weeks that follow, but you cannot rely on that happening. Then there are the serious cases that need ticketed judges, such as homicides and serious sexual assaults. These cases will often be four to ten days in length, effectively tying up one of the court rooms for one or two weeks. When these are fixed for trial it will be in a given court with a specific judge in mind. Then there will be a number of cases to list for trial, of which it is anticipated that some will plead guilty at the last minute and so some cases are listed as back-up cases for those courts. Then there will be the cases sent for trial, some of which will plead guilty at their PTPH and require sentencing and there will be other cases committed for sentence or appealing against the magistrates' court outcome. Different courts deal with these new arrivals in different ways, some allocating one or more court rooms to them, some slotting them around the trial work.

Each court will have been allocated a number of sitting days for the year. Often the allocation for a particular year will not be announced until well into the year and of course the court will have already listed many trials well into that year in the expectation of what the allocation will be, but allowing for the fact that it may be less than the previous year. It is always easier to add courtrooms to a list and fill them with work than to remove them with nowhere to put the cases they were to have held.

The allocation is made by Government – the Ministry of Justice – which decides how many days to allocate to the Courts Service for all its work. In a letter to the Bar Council on 27 August 2019 Macur LJ, the Senior Presiding Judge, said about that year's allocation:

> This figure was calculated by MoJ analysts as that necessary to maintain the number of outstanding criminal cases in the backlog at the same level and considering significantly reduced Crown court receipts over the previous 12 months, and before that. The decision not to further reduce the backlog was a political decision.[1]

That political decision can have no other explanation than that it was Treasury driven and part of the public service austerity agenda. (I will touch on how misleading a figure the "backlog" is in due course.)

Once the total number of days has been decided there are then a series of consultations as that global sum is divided

1 https://www.lawgazette.co.uk/news/crown-court-sitting-days-decision-political-senior-presiding-judge/5101368.article (accessed 10 March 2021).

between the different jurisdictions. The senior judiciary plays a role in that process, distributing the days according to need. There are times when there is more pressure in some areas than others. There may be an increase in the number of family cases, which include urgent applications in relation to care orders and the like; there may be a decline in receipts in the Crown Court, for a variety of reasons. Doing the best they can they allocate the days to cause as little damage as possible. Having divided them between jurisdictions and Circuits there is then a further consultation regionally before each court is told what it has been given. The problem is that this process is always behind the curve. Increase in demand cannot be met as and when it arises, it can only be compensated for in the following year. But listing officers are always listing ahead. So if the court receives more cases than might have been anticipated, those additional cases that will be trials are squeezed further along a narrow tube of allocated days. And of course, the requirement to ensure that additional custody cases are disposed of within their six-month time-limit means that the bail cases get pushed further and further down the tube.

If you look at a daily list for a large Crown Court centre you will see the combination of cases described above with different courtrooms dealing with cases that have been listed in them. Some trials were given their trial date many months beforehand, and some cases, such as sentences, were listed quite recently as they have only just arrived to start their Crown Court journey. For me, as a Resident Judge, the test as to how well we were managing the caseload was how quickly we could list the newly arrived case alleging rape or other serious sexual assault where the defendant was on bail. They needed to be given a fixed date for trial, before a judge who was qualified to hear them. They were cases that rarely pleaded guilty at the last minute. In order to cater for this in forward planning the listing officer would work on the basis that we received an average of two bail and one custody cases of rape per week. She would therefore allocate two courts for the bail cases at the earliest opportunity given the rest of the workload and the custody case would be listed in the earliest slot held back for such custody cases. In the forward planning she would also have had in mind that we would be receiving homicide and other serious crimes that also required listing for trial within six months and before suitably "ticketed judges". So looking at when to list the bailed rape cases she would have to leave some court rooms free for yet to be received custody trials. As time went by the dates free for such bail cases slipped back further and further, because as the listing officer looked at any week in the forward diary, she already had several courtrooms committed to long trials, several being kept for the plea and sentence hearings, and some being held back to cater for custody trials yet to arrive, and some needed to deal with the run of the mill shorter trials whether on bail or in custody yet to be listed. The result was that these bailed rape cases kept getting pushed ever later. The only way they could be listed sooner would be if there was an additional court for one or two weeks to try them in at a sooner date – which would require an increase in sitting days.

It is a fallacy to think that a drop in receipts can be reflected by a similar cut in sitting days without there being a significant impact on future trial dates. What the cut achieves is always a reduction in available trial courts. If the trial courts are still filled up or reserved for cases that you know will come and need a date within six months, the future trial dates will continue to slip further and further back, although the increase in the total number of cases in the backlog will be barely noticeable.

When I was appointed in 2007 we could list all such rape cases, both custody and bail, within four to five months of the Plea and Case Management Hearing. However, as time went by there was a steady slippage. By 2010 the bail cases had slipped back to six months, by 2014 to nine months and by 2015 to eleven months.

The reason for this is now well recognised. Jimmy Savile's exposure through the Panorama programme happened in 2012 and resulted in more cases of sexual assault being reported, both recent and non-recent cases. It took a while for them to come through to the Crown Court, following the police investigation and the CPS processing the files referred to them.

This table shows what happened to that timeframe over that period. Cases that came in for a preliminary hearing in the first week in January were given trial dates as follows:

	1day+bail	**1 day+ custody**	**5 day rape fixture (deft on bail)**
2008	03.04.08	01.05.08	12.05.08
2009	29.04.09	May	May
2010	June	June	June
2011	May	June	June
2012	Late May	June	June
2013	Late May	June	June
2014	Late July	June	September
2015	October	July	November

Why these three types of case? "One day+ cases" were the commonest and simplest cases – burglaries, assault occasioning actual bodily harm, possessing drugs with intent to supply. They typically have one or two witnesses for the prosecution and the defendant to give evidence. They were eminently suitable for putting into floating lists. A floating case in Leeds was a case given a fixed date (not a reserve list when a case might be called in on any day in a given week). We knew our average guilty plea on day of trial rate and so were able to make reasonably accurate estimates as to how many would get on and we also knew that a similar percentage of the floating trials would inevitably plead when the defendant finally knew that a judge and jury were available and ready. Custody cases had to be tried within six months because of the Custody Time Limits (CTLs). We managed to do that, but it sometimes meant taking out a bail case that had been listed in order to accommodate a custody case within its six- month limit.

It is not the number of cases that a court has in its backlog, or the average time that it takes to deal with all cases (including those pleading guilty at their first hearing) that determines your productivity. If productivity has anything to do with convicting the guilty, acquitting the innocent and bringing closure on offences committed for all concerned it is how quickly you can bring to trial all those cases that need trying.

What is illuminating is to see what was happening to us in relation to receipts and sitting days.

	Receipts	Sitting Days	Days per case
2007/8	1979	2364	1.19
2008/9	2271	2477	1.09
2009/10	2785	2779	0.99
2010/11	2547	2659	1.04
2011/12	2387	2318*	0.97 (0.92 for Leeds cases)
2012/13	2485	2412	0.97
2013/14	2924	2480	0.84
2014/15	2755	2513	0.91
* Included 100 days to sit and hear Bradford cases			

Experience showed us that to keep on top of the work-load and bring cases to trial within what was recognised as a reasonable time frame you need an average of a day for a case. Obviously guilty pleas take less than that and trial lengths vary, but the regular mix of cases received in Leeds required about a day per case to keep pace. As the allowance decreased so the time to trial got further away.

Recently (2 February 2021) the Justice Minister Chris Philips was asked in a Parliamentary Question about the increased number of cases in the national backlog of cases (i.e. the total number of cases in the court system waiting to be finalised) and he acknowledged that it was greater than at the start of the pandemic. But he was keen to score a political point against his opposite number and asserted that the backlog was significantly lower at the start of the pandemic than when the Conservatives came to power. It went like this

> David Lammy: In 2010, Crown Court cases took, on average, 391 days to complete. By 2019, the Government had closed half of the courts and had 27,000 fewer sitting days, meaning that each case took an average of 511 days. A total of 30% fewer cases were completed, but they took 75% longer.
>
> Chris Philip: The Right Hon. Gentleman asked about the past, but he rather conveniently skated over the fact that the outstanding caseload in the Crown Court before the pandemic in 2020 was 39,000, whereas in 2010, under the last Labour Government, it was 47,000.

What he may not have known, because he was not told and did not know to ask, is that in the same period there had been a decrease in the number of cases being sent to the Crown Court for trial. Over the same period, 2010 to 2019, the number of receipts for trial decreased from 97,668 in 2010[2] to 62,006 in 2019[3]. It follows that the percentage of all cases received and still waiting for final disposal at the end of the year had increased from 48% to 62%, which was perhaps not something to boast about if he had understood the figures he was using.

The only way to bring trial dates forward is to increase significantly the number of days that can be sat in the Crown Courts. The trial slot allocations in each Crown Court for forward fixtures is now full up to well into 2022 and there are reports that even now (March 2021) some cases are being listed in 2023. Any rape case coming to the Crown Court now cannot be given an earlier date, unless the court is given significant additional sitting days in order to sit more trial courts. For each rape case to be tried sooner the court realistically needs an average of five additional days. Many court-houses have court rooms that are not being used. They can call on additional judges, there are fee paid recorders who are authorised to try such cases, the court can recruit agency staff who could be trained by the time the case comes on for trial: what is needed are those extra sitting days.

Sitting with smaller juries, a judge sitting with two magistrates, and recalling retired judges have all been suggested as ways of cutting the backlog. None of those proposals will provide any cuts in the backlog, as they will each require a courtroom and several extra days in that courtroom to hear the case. It is those days that are not allowed by Government to be there. If Leeds Crown Court were to start listing its rape cases at the rate of two per week until it brings us back to trial with six months for all cases that would be ten additional days per week and over five hundred days per year. What is needed is the political will accompanied by the necessary money to fund those days. Claims to be tough on crime ring very hollow if criminals are not brought speedily to justice and victims enabled to have closure on the harm they suffered.

2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217516/judicial-court-stats.pdf p 99 (accessed 03.03.2021).

3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944735/ccsq_tables_jul_sep_2020.ods Table C1 (accessed 03.03.21).

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