GENERAL CRIME BRIEFING NOTE

R v Ng & O'Reilly (Abuse of process and non-attendance of counsel)

Date: 9 May 2024

Case: *R v Ng; R v O'Reilly* [2024] EWCA Crim 493

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The Court of Appeal has recently given guidance on the options for the criminal courts when dealing with non-attendance of counsel, particularly prosecution counsel, at hearings and at trials.

What was the case being appealed?

The two defendants Katie Ng and Anthony O'Reilly were jointly charged with alleged violent offending relating to Ng's former partner and his associates. Their trial had been adjourned twice (each in circumstances that were not due to the fault of the defendants). It appeared that the second adjournment had been because of a lack of prosecution counsel. When the case was called on for trial the third time, no advocate attended to appear on behalf of the prosecution as previously instructed counsel had become required elsewhere and no replacement could be found despite extensive efforts.

The trial judge, HHJ James (the Honorary Recorder of Canterbury), acceded to an application by the defence to stay the proceedings on the grounds that it was necessary to do so to protect the integrity of the criminal justice system due to the failure of the prosecution properly to secure attendance of counsel at trial (i.e. a 'Category 2' abuse of process under the well-known categorisations in *Maxwell* [2011] 2 Cr. App. R. 31 and *Warren v Att.-Gen. for Jersey* [2012] 1 A.C. 22). An appeal was brought by the prosecution under section 58 of the Criminal Justice Act 2003 to reverse the stay as a 'terminating ruling'.

What was the result of the specific case under consideration?

The Court of Appeal allowed the prosecution's appeal, and the terminating ruling was reversed. The court found that the ruling had been based on mistakes of fact, and errors of law and principle. The proceedings were ordered to be resumed.

The Court of Appeal ruled that the Judge's ruling was mistaken in fact because his reasoning was on the basis that all three adjournments were caused by a lack of prosecuting counsel. In fact, it was only the second and third adjournments that appeared to have been due to that reason.

More fundamentally, the Judge made errors of law in failing to have regard to the relevant principles surrounding 'Category 2' abuse of process stays. He did not make a finding of *misconduct* on behalf of the prosecution sufficient to justify the exceptional course of staying the proceedings. Instead, the Judge had incorrectly focused on unfairness to the respondents and punishment of the prosecuting authorities. He had applied the wrong test, and conflated issues.

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What did the Court of Appeal say about the power to stay proceedings for abuse of process?

The Court referred to the recent case of *R v BKR* [2023] EWCA Crim 903 as containing a 'full' review of the relevant authorities (and therefore there is, it seems, no further need to ever refer again to *Maxwell* and *Warren*). The Court of Appeal reminded itself that it is an established matter of principle that a stay in criminal proceedings for abuse of process is the exception not the rule and reaffirmed that there are two categories of cases in which an 'abuse of process' can justify a stay in proceedings:

1) Where a fair trial is not possible.
2) Where trying the defendant offends the court's sense of justice and propriety, or would undermine the public confidence in the criminal justice system.

Category 2 cases will be, said the Court, '*very exceptional'.* Such cases require a balancing of the public interest in ensuring those charged with offences are tried, against the public interest in maintaining the integrity of the criminal justice system. Unfairness to the defendant is not required and the stay cannot be used to punish the prosecution. The focus must be on whether the stay is required to safeguard the integrity of the criminal justice system.

The Court recognised the shortage of advocates to conduct criminal work in the Crown Court, but stated that was not a problem which the courts could solve – it was a matter for the professions and the relevant executive agencies.

In their judgment, the Court went on to issue particular guidance of importance on three topics:

1) Preventing non-attendance of counsel,
2) The court's options when counsel is absent, and
3) The court's powers when the prosecution is not represented at trial.

Preventing non-attendance of counsel

The Court reiterated that listing was a judicial function, but lists should be drawn up with advocates availability in mind, particularly now given the shortage of counsel. (That is not the only consideration of course as the needs of others e.g. witnesses must also be considered). The Court re-emphasised existing guidance encouraging a move away from 'warned lists'. At the very least Crown Court listing offices should consider the provision of a fixed date for trial within the warned list two or three weeks before the case is due to be called on.

When a date is set for trial, the parties must operate on the basis that the trial will be effective and give the court adequate notice of any risk of non-attendance in accordance with Criminal Procedure Rule 3.12(2)(d) (duty to promptly inform court of anything which may affect the date or duration of the trial).

Judges in the Crown Court were also advised to ensure local practices align with the LCJ's guidance on remote hearings as amended in April 2024 (contained within Annex 1 of the Better Case Management Revival Handbook available here) as more consistent practices will increase the efficiency of court proceedings and the productivity of advocates.

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The court's options when counsel is absent

At PTPH and sentencing, it may be right that the court can proceed without the prosecution being represented. The court cannot proceed without defence counsel at PTPH or trial. At sentence, it may be possible to proceed without defence counsel if the court has full information about the defendant and is not intending to impose a custodial sentence (as per section 226 of the Sentencing Code 2020).

The court's powers when the prosecution is not represented at trial

The most likely scenario is that the court will have no option but to re-fix the trial in the case of non-attendance of prosecuting counsel, as 'it is strongly in the public interest that criminal proceedings should reach a conclusion on the merits'. The court should only prevent that from happening as a last resort when the interests of justice (including the interests of victims), properly balanced, require that outcome. That will not likely be via the route of a stay on the grounds of abuse of process.

Where prosecuting counsel is not in attendance though, there will usually be an application to adjourn. In determining that application, the court must bear in mind Criminal Procedure Rule 1.1 and each and every limb of that provision must be considered carefully. For reference, CPR1.1 reads as follows:

1.1.—*(1) The overriding objective […] is that criminal cases be dealt with justly.*

(2) Dealing with a criminal case justly includes—

(a) acquitting the innocent and convicting the guilty;

(b) dealing with the prosecution and the defence fairly;

(c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;

(d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;

(e) dealing with the case efficiently and expeditiously;

(f) ensuring that appropriate information is available to the court when bail and sentence are considered; and

(g) dealing with the case in ways that take into account - (i) the gravity of the offence alleged, (ii) the complexity of what is in issue, (iii) the severity of the consequences for the defendant and others affected, and (iv) the needs of other cases.

Proceedings may therefore be terminated if the Court, having properly considered all of the above parts of CPR1.1, refuses to adjourn the trial, and enters a verdict of 'not guilty' under section 17

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of the Criminal Justice Act 1967. That section provides that a judge can direct that a verdict of 'not guilty' be entered against a defendant without any further steps being taken if 'the prosecutor proposes to offer no evidence against him'. The Court of Appeal in this case ruled that, if the prosecution requires an adjournment because they cannot prosecute the case until one is granted, then ***always implicit*** in that application is a proposal to offer no evidence if the adjournment is refused, providing the route through which s.17 CJA 1967 can be used to stop the proceedings.

The guidance directs that steps must be taken to inform the prosecution of the decision, so that the prosecution can properly undertake an appeal of the decision as a terminating ruling under s.58 CJA 2023 (in accordance with the relevant notice requirements). If the prosecution does not give notice of its intention to appeal with the necessary undertaking, that is the point at which the court ought to enter a not guilty verdict under section 17.

What is the major impact of this case likely to be?

It has long been settled law that '*the purpose of the stay in such cases is not to punish or to express the court's disapproval of official conduct.'* Those words have been the last sentence of the relevant paragraph in Archbold for over a decade (see e.g. the 2013 edition of Archbold at 4-87). This decision is therefore unsurprising in reaffirming that cases cannot be stayed in order to send a message to the authorities that *systemic* failings (of whatever nature) are unacceptable.

With the guidance issued in this judgment, the courts now have clearly defined options to consider in relation to non-attendance of counsel at all stages of the court process. That includes now a route, other than a stay, whereby the courts *can* properly terminate proceedings on the basis of an issue such as non-attendance of prosecution counsel at trial, provided that each of the limbs of the overriding objective have been properly considered (and the prosecution is given an appropriate opportunity to appeal).

Non-attendance of advocates at trial is an ongoing problem due to the pressures on the criminal justice system. It used to be almost unheard-of for a trial not to proceed because of a lack of counsel, particularly prosecuting counsel, for any reason other than very sudden illness. Prior to 2020 there were normally less than 200 cases a year that were ineffective due to absence of counsel, yet in 2023 there were nearly 1,500 (see the official data here).

Despite the Court of Appeal in this case emphasising that the interests of justice should normally militate against terminating proceedings where prosecution counsel cannot attend, the Lady Chief Justice has set out a very clear route as how properly to achieve that very aim. This judgement may therefore in fact lead to an increase in such rulings, in the absence of clear action by the state as to how to improve the numbers of advocates undertaking criminal work.

This briefing note was produced by Philip Stott, barrister, and Anna Draper, pupil barrister, at QEB Hollis Whiteman. This note should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this note, please contact our clerking team at barristers@qebhw.co.uk. For more information on the expertise of our specialist barristers in criminal and regulatory law please see our website at www.qebholliswhiteman.co.uk.

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