IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT
T20190262

CASE NO 202400948/B4

Neutral Citation: [2024] EWCA Crim 1670

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 6 August 2024

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE McGOWAN
MR JUSTICE BENNATHAN

REX
V

PROSECUTION APPLICATION FOR LEAVE TO APPEAL AGAINST A TERMINATING RULING UNDER S.58 CRIMINAL JUSTICE ACT 2003

"BJF"

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MR O NEWMAN appeared on behalf of the Applicant.
MS M CLARK appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

1. The provisions of section 71 of the Criminal Justice Act 2003 apply to these proceedings. We consider those provisions should not apply. Our decision may be reported. We consider that this is appropriate. The judgment will be anonymised. The defendant in the Crown Court will be referred to as "BJF". The details of the case will be set out in such a way as to prevent any prejudice to the defendant.

2. We have to consider whether we have jurisdiction to hear an appeal by prosecution in relation to a terminating ruling made by a judge in the Crown Court, and, if we do, whether we should allow the appeal. To understand the issues in the case, we shall have to set out the history in some detail. What ought to have been a perfectly straightforward trial became anything but.

Factual Background

3. On the evening of 5 June 2019, BJF's son went to his local hospital. He had a significant wound to his forehead. The police were called. The son gave an explanation to the police as to how he had sustained his injury. He said that he had been at the address he shared with his father. He and his father ran a shop together. During the day, BJF had been at the shop. In the late afternoon, BJF returned home. His son was in the kitchen preparing a meal. He was using a knife to chop vegetables. BJF appeared to be drunk. He began shouting crude obscenities at people walking outside the address. The son told BJF to stop doing this. BJF confronted his son in the kitchen saying, "Don't tell me what to do".

4. According to the son's account, he put down the knife he was using and faced up to his father. BJF scratched his son down the face, causing a scratch mark onto the chin. The son pushed BJF away. There was then an exchange of punches following which BJF picked up the knife which was on a nearby work surface. BJF swung the knife at his son several times. The son initially avoided the attempts made by BJF to slash him. There came a point when the son was crouched down. BJF was able to use the knife to wound his son. The son's evidence was that he ran from the house and flagged down a motorist whom he asked to take him to hospital.

5. Various members of the family went to hospital. They included BJF's sister. BJF spoke to her twice during the evening by telephone. In the first call, he said that he needed help and that something had happened to the son; in the second call he asked his sister to tell his son that he was very sorry and that he did not know what had happened or why.

6. BJF went to the local police station the next morning. He was arrested and interviewed. He said he had spent 5 June (during the day) at the shop. He had drunk a hip flask-sized bottle of brandy. This was not an unusual amount for him to drink. He recalled going home on the bus and entering the address and seeing his son. He could not recall anything else apart from his son jumping back and holding his head after which his son ran out of the house.

The course of the proceedings in the Crown Court

7. BJF was charged with unlawful wounding. On 7 June 2019, he appeared at the Magistrates' Court. He gave no indication of any plea. The case was sent for trial at the

Crown Court. The indictment charged BJF with unlawful wounding. On 13 September 2019, BJF filed a Defence Statement which mirrored what he had told the police. The trial was listed for a date early in 2020. In the event, that date could not be met. The Pandemic then intervened. The trial eventually began on 6 December 2021. On the first day of the trial, an addendum Defence Statement was filed. This provided a positive account quite different from that put forward hitherto. BJF now said that his son had threatened him with the knife he was holding and using to chop vegetables. The two men had struggled, with the son still holding the knife, BJF had pushed his son backwards. The momentum of the son's backwards movement meant that somehow he had caught himself on the forehead with the knife. BJF's case was that he had never had hold of the knife.

8. At the end of the trial, the jury were unable to agree. The prosecution indicated that they wished to re-try BJF. The case was adjourned for a date to be found. A few days later on 21 December 2021, a new indictment was uploaded onto the Digital Case System. This indictment contained two counts: count 1 charged BJF with wounding with intent to do grievous bodily harm; count 2 charged the same offence as the original trial indictment. On the same day, an application to adduce bad character in relation to BJF was uploaded to the Digital Case System. This referred to a conviction in February 2020, in the Magistrates' Court, for an offence of battery. BJF, in October 2019, when in drink, had assaulted his mother.

9. The retrial of BJF did not have any aspect to it which required the case to be given priority. In 2022 and 2023 the effects of the Pandemic continued to affect the progress of

cases which had no priority status. Further delays were introduced in 2022 by the action taken by criminal defence barristers. So it was that the retrial was not listed until 26 February 2024. At the start of the trial, the judge, only as a result of having been alerted to its existence by the court clerk, asked prosecution counsel whether he intended to make an application in relation to the two-count indictment. Nothing had been said by the prosecution up to this point. Counsel then applied to amend the indictment so as to add a count of wounding with intent, namely in line with the indictment uploaded in December 2021. The judge refused this application. The trial proceeded on the single count of unlawful wounding.

10. At some point during the prosecution case, the judge was asked to rule on the application to adduce bad character evidence. The defence asked for further details of the conviction. At no point did the judge make any ruling on the issue.

11. There came a point where police body worn camera footage was to be played to the jury. The ostensible purpose of this was to show the first complaint made to the police by BJF's son. In the course of making his complaint, he gave a demonstration as to how BJF had used the knife. The footage, so it would appear, had not been uploaded to the DCS. Defence counsel agreed to the playing of the footage (which she had not seen) on the understanding that it showed only the complaint made by the son. The footage had not been played at the first trial. In the event, the footage shown to the jury included what was said by members of BJF's family who were at the hospital and by the police officers who were at the hospital. Defence counsel interrupted the showing of the footage. In the absence of the jury, she said that she had not agreed to the jury seeing this

extended footage. She argued that what had been said by others, as recorded on the footage, was prejudicial to BJF. She said that the prejudice could not be remedied. The judge agreed. She discharged the jury.

12. Defence counsel then made a written application for the stay of the proceedings. She submitted that the case was now an abuse of process because of extra elements being introduced by the prosecution which had the appearance of putting pressure on BJF to plead guilty. The actions of the prosecution since the first trial had been unfair. As a result, BJF would not be able to have a fair trial. In the alternative, and very much as an afterthought, it was argued that a stay was required in order to protect the integrity of the criminal justice system.

13. On 29 February 2024, the judge heard argument on the application. She delivered an oral ruling. At no point did she provide written reasons. Due to some technical failure the ruling was not recorded. We have a note of the ruling as taken by a pupil barrister who was in court. It is accepted as an accurate and full note. The judge began by rehearsing the history of the uploading of indictments and how she came to consider an application by the prosecution to proceed on the two-count indictment. The judge said that this indictment was "... out of time, inappropriately made and uploaded without notice to the defence". She said that this was "sinister from the defendant's point of view". The judge wondered whether there had been tactical manipulation in the way that there might be in relation to an application to change venue. However, she had not considered there to have been an abuse of process at that time.

14. The judge went on to consider the playing of the body worn camera footage. Having set out what had happened, the judge said that errors and failings by prosecution counsel had caused a prejudicial situation to arise. She said that what had occurred could be perceived by a member of the public as a deliberate effort to prejudice the defendant. The judge said that, in the current climate, scrutiny is at an all-time high. Case law in relation to abuse of process was said by the judge to date from the 1990s. Things had moved on since then. The judge referred to the uploading of a two-count indictment and said that this could be perceived as having been done with the intent to interfere with a fair trial. Finally, the judge mentioned the application to adduce bad character evidence. She said that, taking the three issues together, it appeared as if the prosecution was not acting neutrally. The issues could be resolved to allow a fair trial. However, the three matters taken together served to undermine the integrity of the criminal justice system. It was not a question of the intention of the prosecution, rather it was an issue of perception.

15. The oral ruling concluded at approximately 3.30 pm on 29 February. The prosecution asked that they be permitted time to consider whether to appeal the ruling. The judge suggested that seven days could be allowed for a decision to be taken. Since this was not a case in which a jury was going to be standing by ready to continue with the trial, if necessary, an adjournment of that length was practicable. The prosecution declined the judge's offer. It appears that they took the view that CPR 38.2 required them to make a decision by the close of play on the next business day. That was the timetable by which they said they would be bound. In the event, no decision was made by that point.
16. Counsel's written advice apparently was required in order for a decision to be made. The advice was not received by the Crown Prosecution Service until 5.30 pm on Friday 1

March 2024. We are told that an email was sent at 5.45 pm to the judge, requesting an extension of time, but that the judge had switched off her judicial laptop for the weekend. The email was also sent to the defence who objected to the extension of time. They sent an email setting out their objections. We have seen the email sent by prosecution counsel to the judge at 8.53 am on Monday 4 March 2024. Counsel set his position out at some length and asked for further time, which he put at "a few hours". Shortly afterwards the judge, by email, extended time for the prosecution to make a decision, until 4.00 pm on that day. At 3.20 pm, an email was sent by the CPS to the court, with a copy to the defence solicitors. It consisted of one line as follows:

> "The Crown will be appealing the decision of the Recorder to stay the proceedings."

At 4.54 pm the CPS sent a further email to the same recipients. It read:

> "Further to my earlier email, I would like to confirm the following.
>
> 1. The intention of the Crown to appeal the Abuse of Process ruling for the sole offence of section 20 OPA 1861.
> 2. Acquittal Guarantee - that the defendant is acquitted of the offence if
>   - leave to appeal to the Court of Appeal is not obtained or
>   - the appeal is abandoned before it is determined by the Court of Appeal.
>
> I believe this covers the requirements under S 58 of the CJA and under r.38 Criminal PR."

17. On 6 March 2024, the Notice of Appeal was uploaded to the Digital Case System. This was sent on 11 March 2024 to an email address, previously but no longer in use by the Court of Appeal Office (albeit one still shown on a GOV.UK website). Since they received no acknowledgment of the Notice of Appeal, the CPS the

next day contacted the Criminal Appeal Office to check that the Notice had been received; it had not. So it was that the Notice of Appeal was served correctly on 12 March 2024 albeit a day out of time.

The jurisdictional issues

18. The statutory provision governing the prosecution right to appeal against the ruling of a trial judge is section 58 of the Criminal Justice Act 2003. Section 58(4) provides:

> "(4) The prosecution may not appeal in respect of the ruling unless —
> (a)following the making of the ruling, it—
> (i)informs the court that it intends to appeal, or
> (ii)requests an adjournment to consider whether to appeal, and
> (b)if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal."

In this case the prosecution did request an adjournment to consider whether to appeal. They requested an adjournment to the end of the following business day. They seemed to have been under a misapprehension as to the extent of the court's power to adjourn. They misread CPR 38.22 which is as follows:

> "If an appellant wants time to decide whether to appeal—
>
> (a)the appellant must ask the Crown Court judge immediately after the ruling; and
> (b)the general rule is that the judge must not require the appellant to decide there and then but instead must allow until the next business day."

19. The prosecution appeared to have believed that, in the first instance, they were not entitled to request an adjournment beyond the end of the next business day. That was and is not the position. The language of section 58(4) imposes no restriction on the length

of the adjournment. The language of the rule refers to "the general rule". By definition there will be cases where the general rule does not apply. All of this was settled by this Court in *R v H* [2008] EWCA Crim 483. Given the nature of the decision to be made by the prosecution, a judge is unlikely to allow a lengthy adjournment. Where it is proposed to keep a jury in charge of the defendant pending the outcome of the prosecution appeal, the general rule of a decision by the next business day is likely to be applied strictly. Where the jury has been discharged (as in this case) a longer adjournment may be appropriate.

20. Why an adjournment of any length was required in this case is not obvious. The judge had ruled that it would be an abuse of process to try BJF. She had not found that he could not have a fair trial, rather she had concluded that it would not be fair to try BJF. Given the exceptional nature of that jurisdiction, it might be thought that it would be straightforward to conclude that the judge's decision needed to be tested. However, that is not strictly to the point. Prosecution wanted time to consider the position. There was no reason why they should not have had it.

21. The prosecution did not make a decision on the next business day. Moreover, they did not seek to extend the time for making a decision until after the period previously granted by the judge had expired. Sending an email to a fee-paid Crown Court judge at 5.45 pm on a Friday cannot be described as being "within a business day". The effective request for an extension of time was made at 8.53 am on the following business day. At a hearing before the judge on 15 March 2024, there was discussion as to whether the judge had had any jurisdiction to extend the period of the adjournment after the original

adjournment period had expired. We do not propose to engage in a detailed analysis of that discussion. With respect to all concerned, it was ill-informed and misconceived. It proceeded on the assumption that only this Court had the power to extend the period of any adjournment. That was wrong. At that point, the case remained in the jurisdiction of the Crown Court. The judge had the power to extend the period of adjournment even after the period had expired. In the absence of any statutory provision to the contrary, a judge in the Crown Court has a general power to extend time in relation to a case management direction (see CPR 3.5(2)(g)).

22. CPR 38.3(2) requires the prosecution to serve an Appeal Notice on the Registrar no less than five business days after telling the judge of the decision to appeal in cases where expedition of the appeal is not ordered - no order for expedition was made here. Therefore, the prosecution were required to serve the Notice of Appeal on the Registrar, on or before 11 March 2024. Because of a defunct email address was used on 11 March 2024, the Registrar was served a day late. A similar position arose in *R v AWQ* [2024] EWCA Crim 898. There the Court had no difficulty in concluding that the interests of justice required an extension of time. The mandatory terms of CPR 38.2(2) did not prevent extending time in an appropriate case. In this instance, the error was discovered and remedied within 24 hours. We are quite satisfied that we should extend time for service of the Appeal Notice.

23. Thus far, the procedural errors which affected the proceedings were not sufficient to deprive this Court of jurisdiction to hear the appeal. More problematic are the emails sent by the prosecution to the Crown Court on 4 March 2024. Where the prosecution

propose to invoke the right to appeal against a ruling by a trial judge, they must give what is known as the "acquittal guarantee". Section 58(8) of the 2003 Act provides:

> "The prosecution may not inform the court in accordance with subsection (4) that it intends to appeal, unless, at or before that time, it informs the court that it agrees that, in respect of the offence or each offence which is the subject of the appeal, the defendant in relation to that offence should be acquitted of that offence if either of the conditions mentioned in subsection (9) is fulfilled."

The conditions in section 58(9) are that the appeal fails or the appeal is withdrawn.

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24. The significance and ambit of section 58(8) was considered in *R v T(N)* [2010] EWCA Crim 711. This was the judgment of a five-judge Court (led by the then Lord Chief Justice) assembled to clarify what had become a confused area. The Court decided that the Court of Appeal has no jurisdiction to hear an appeal by the prosecution against a terminating ruling made by a judge in the Crown Court on a trial on indictment unless the prosecution has complied with the requirement in section 58(8). The prosecution must inform the court, at or before the time it informs the court of its intention to appeal, that it agrees that the defendant should be acquitted of the offence, or each offence which is the subject of the appeal, if leave to appeal to the Court of Appeal is not obtained or the appeal is abandoned before it is determined by the Court of Appeal. The object of this provision is to require the prosecution to commit itself from the outset. In *T(N)* the prosecution announced, in open court, as soon as the relevant ruling had been delivered, that it intended to appeal. It was not until the following day, at a further hearing, that the prosecution stated that they agreed that the defendant would be acquitted were the appeal not to proceed or to succeed. On those facts, the Court held there was no jurisdiction for

this Court to hear the appeal.

25. There was further consideration of the effect of section 58(8) in *R v Mian* [2012] EWCA Crim 792. In that case, the judge had ruled that the defendant had *no case to answer*. At 10.48 am on the day of the ruling the prosecution, in the course of a disjointed discussion in court, stated that they intended to appeal. The jury were at that point on their way up to court. They were brought up to the anteroom. Whilst that was going on, there were submissions about whether the jury should be directed to enter a verdict or whether they should be discharged. In the event, they were discharged. At 11.05, after the jury had left court, the prosecution announced the acquittal agreement. The Court said that the discharge of the jury was a significant event; it brought the defendant's trial to an end without the opportunity for him to be acquitted by the jury. Even though that was on the basis that there would (if leave were given) be an appeal by the Crown, such an appeal would have been incompetent without an acquittal agreement. This Court was "inclined to think" that, relatively brief as the interlude was before the prosecution sought to give the acquittal agreement, it was not given "at or before" the time when the court was informed of the prosecution's intention to appeal.

26. These cases were decided in the context of the prosecution announcing orally, in open court, their intention to appeal the relevant ruling. Announcement of the acquittal agreement at a hearing a day later was obviously not at the time when the court was informed of the prosecution's intention to appeal. To announce the acquittal agreement approximately 15 minutes after the court was informed of the intention to appeal, was not to do so at the time the court was so informed, where a significant event occurred during

that 15 minutes. It is increasingly the experience of this Court that, where there is no need for expedition and the prosecution are given time to make their decision, the court will inform the court of their intention by email. One might expect, in those circumstances, the prosecution to send a single email. That single email will deal with the intention to appeal and should also contain the acquittal agreement. Where it does not, the requirements of section 58(8) will not be met.

27. What we have to consider here is the position where two emails were sent separated by around 90 minutes. First, did the email sent at 3.20 pm amount to the prosecution informing the court that it intended to appeal? If it did, was there sufficient compliance with section 58(8) when the prosecution sent a second email? Second, in any event, what is the significance of the fact that the second email was sent 54 minutes after the expiry of the extension of the adjournment as granted earlier on the same day by the judge?

28. Before us, the prosecution were represented by Mr Newman. He did not appear in the court below. He was not party to any of the events in the Crown Court. We were helped greatly by his oral submissions. His core point is that words "at….that time", as a matter of language, do not mean there is a bright line. So long as the acquittal agreement is given as part of a single transaction, it will not matter that a period elapses between informing the court of an intention to appeal and giving the acquittal agreement. Mr Newman gave the example of an oral submission being made in the Crown Court beginning with an indication of an intention to appeal and concluding with the acquittal agreement. The mere fact that the first is separated from the second by perhaps 10 or 15 minutes of submissions does not mean that they are not made at the same time. He also

offered the scenario of counsel announcing the intention to appeal in open court who then left the courtroom. If counsel immediately realised that no acquittal agreement had been given, he could return to the courtroom in order to give the acquittal agreement. In strict terms, the acquittal agreement would not have been given at the time of the notice of intention to appeal but it would still be within the statutory language.

29. Taking those submissions into account, we first conclude that the email sent at 3.20 pm amounted to the prosecution informing the court that they intended to appeal. The email does not use the language of section 58. But there can be no other sensible meaning of the words: "the Crown will be appealing the decision…to stay the proceedings". The email made no reference to an acquittal agreement. It was over 90 minutes later that the second email was sent in which the acquittal agreement was announced. On the ordinary meaning of the words of "at….that time", the court was not informed of the acquittal agreement at the time the prosecution informed the court that they intended to appeal. It may be that nothing occurred in that period of 90 minutes which was of any significance. In our judgment, that does not matter. The requirement set out in section 58(8) in clear words was not met. The consequence is that we conclude that whatever we may think of the judge's decision, we have no jurisdiction to hear the prosecution's appeal against the judge finding the prosecution of BJF was an abuse of process.

30. The basic error committed by the prosecution in failing to give an acquittal agreement is deeply unfortunate. The judge stayed regular proceedings against a man who, on the prosecution case, had used a knife to inflict a wound which very easily could have had grave consequences. This was not a trivial or minor case. The judge stayed the

proceedings pursuant to what is commonly known as the "second limb" of the abuse jurisdiction. She made an express finding that a fair trial was possible. Her conclusion was that a member of the public could have perceived that the prosecution was not acting neutrally. On that basis, she decided that a further trial would be an affront to the public conscience. The judge wholly failed to recognise the exceptional nature of the jurisdiction. She said that the case law dated back to the 1990s. That was wrong. In *R v BKR* [2023] EWCA Crim 903 at [34] to [50], this Court engaged in a comprehensive review of the authorities relating to the second limb of abuse, those authorities dating principally from 2010 onwards. Clearly that authority was available to the judge. No reference was made to it by her or by counsel. The judge's conclusion that a member of the public would have had a perception of a lack of neutrality was in itself and on the facts unreasonable. But even if that conclusion had been justified, the test for the second limb of the abuse jurisdiction would not have been satisfied. There was no hint of prosecutorial misconduct of the kind required for an abuse application to succeed.

31. However, all of that sadly is irrelevant because we have no jurisdiction. We therefore refuse the prosecution leave to bring this appeal.

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