Neutral Citation Number: [2015] EWCA Crim 175

Case No: 201405057 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CHESTER
HIS HONOUR JUDGE DUTTON
T20140065

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2015

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
MR JUSTICE ANDREW SMITH
and
MR JUSTICE PHILLIPS

- -

Between :

THE QUEEN	**Appellant**
- and -	
DAVID BOARDMAN	**Respondent**

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- -

Mr Ian Unsworth Q.C. for the Appellant
Miss Frances Willmott for the Respondent

Hearing date : 3 February 2015

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Approved Judgment

Sir Brian Leveson P :

1. It is beyond argument that there is considerable pressure on all involved in the criminal justice system to maximise the use of limited resources and to ensure that cases are processed as efficiently as possible. The recent Review of Efficiency in Criminal Proceedings makes it clear (at para. 22);

> "It is ... necessary to ensure that the scarce resources are not wasted or used inefficiently. Demands on public funds must be kept to a minimum while, at the same time, ensuring that the delivery of justice is effective and meets the highest standards that any democratic society is entitled to expect."

2. The Review goes on to deal with the critical importance of the Criminal Procedure Rules (CPR) and the role of the judges in effectively managing the work of the court. It emphasises (at para. 199):

> "Whatever we do, we must encourage a reduced tolerance for failure to comply with court directions along with a recognition of the role and responsibilities of the Judge in matters of case management. It cannot be right that a 'culture of failure' has developed in the courts, fed by an expectation that deadlines will not be met. If a deadline (e.g. for service of a document(s) or an application) is not met, there must be good reason for it and there must be an expectation that the party which failed to comply can provide that reason. A failure to tackle this culture leads to a general indifference to rule compliance. Whichever party has failed to comply or failed to meet the deadline, the opponent perceives objection as a waste of time because it will be largely pointless: there is no sanction that can be applied. Perhaps most significantly, it allows cases to 'drift', and for further hearings to take place unnecessarily."

3. This case is another example of the problems that arise when cases are not progressed properly or in accordance with the CPR or other directions of the court. The upshot was that, on 15 October 2014, in the Crown Court at Chester before His Honour Judge Dutton, when the respondent was due to face trial on an indictment alleging a number of counts of stalking contrary to s. 4A(1) of the Protection from Harassment Act 1997, the judge was faced with an application by the respondent to adjourn on the grounds that significant material had only been served a few days before and required expert analysis which would take three weeks. The prosecution (in the form of the CPS) agreed that it was appropriate to adjourn the trial.

4. In the event, Judge Dutton was not prepared to take that agreed course. He ruled that due to delay on the part of the prosecution, evidence of telephone call data records and telephone cell site data would be excluded pursuant to the provisions of s. 78 of the Police and Criminal Evidence Act 1984 (the 1984 Act). This ruling effectively brought the prosecution to an end and, as a result, the Crown Prosecution Service (CPS) apply for leave to appeal the terminating ruling pursuant to the provisions of s. 58 of the Criminal Justice Act 2003 (the 2003 Act).

5. The facts which formed basis of the indictment can be shortly summarised. Thus, it is alleged that between 3 July 2013 and 22 August 2013 the respondent had sent a total of 112 text messages and made 5 telephone calls of a sexually explicit and abusive nature to 8 women and to have made 2 indecent, obscene and menacing telephone calls to 2 other women. CCTV footage was seized in relation to the purchase of a mobile phone top up for a phone from which offending texts and calls were made. On 24 September 2013, the respondent was arrested and interviewed; he admitted that he was the person on the CCTV (stating that he had bought the top up for a friend, Mr Black). He denied sending the messages or making the obscene calls.

6. The respondent admitted that he knew two of the victims (one of them only professionally), had met a third and had previously attended the home of a fourth. His mobile phone was seized at the time of his arrest and was found to have contacted 18 numbers which were also called by the mobile phone for which the top up had been purchased, one of the numbers being the daughter of his partner.

7. Following charge, on 25 November 2013, the respondent appeared before the magistrates. The police thereafter provided the CPS with relevant information (including statements). These included a statement from Det. Con. Matthew Gagan who received information pursuant to a request under the Regulation of Investigatory Powers Act 2000 for communications data in the form of incoming and outgoing call data with cell site, IMEI and IMSI information in respect of the mobile phone used to send the relevant text messages (the 513 phone) and the respondent's phone (the 291 phone). Having received the data from the communication service provider O2 via what he describes as the ABM Pegasus database, the results were contained in folders identified as exhibits EF/1 and MG/6 (apparently in pdf format). He also exhibited as MG/3 a copy of the resultant data from both applications which he had burned to disc; this last was replaced by MG6 (or, according to the chronology) MG/7 which did not include all the information on MG/6) in a format (Excel) that the CPS could read. In addition, an intelligence analyst produced a cell site analysis of the product in relation to both numbers: hard copies were exhibited as LD/03 and LD/04; a CD of these documents was created and produced MG/8.

8. On 14 March 2014, the case papers were served. Included within the list of exhibits were MG/7 (described as a master CD of call data to incorporate MG/6 and EF/1) as well as the CD MG/8 and hard copies LD/03 and LD/04. However, although the paper exhibits were copied with the file and attached, the CDs were not enclosed or sent to the respondent's solicitors. A letter dealing with disclosure of unused material (dated 6 March) was also served; further unused material was disclosed on 7 May.

9. On 9 May, the CPS received an unsigned defence case statement dated 7 May served pursuant to s. 5 of the Criminal Procedure Investigations Act 1996 (the 1996 Act). The respondent identified 291 as his phone and denied that 513 either belonged to him or, to his knowledge, had ever been used by him. He accepted that he had met four of those who complained about receiving texts or calls which he ascribed to coincidence. He said that emergency and other services had been sent to his address when he had not requested them and that he had come home to find it in a different state to when he left.

10. This document paid lip service to the need to identify details of any witness to be called (by requesting an extension of time to do so) and sought disclosure of a wide

range of documents, many of which do not fall properly within a request for unused material but effectively constituted a request of the police to undertake investigative work on behalf of the defence. This is not the purpose of s. 8 of the 1996 Act which places a burden on the prosecutor to disclose material held or inspected by the prosecutor or which the disclosure officer must supply to the prosecutor or allow to be inspected, if requested to do so. The court will be assiduous to ensure that defence requests are limited to that which the law provides. We shall return to this point below.

11. Having said that, in this case, the defence solicitor also made requests which were entirely legitimate, not least because they were exhibits in the case and, to such extent as they had been summarised in other forms, also fell within the framework of the 1996 Act. Thus, the prosecution were asked to provide a full copy of MG/6, MG/3, MG/7 and MG/8. MG/6 included all the calls made to and from the 513 and 291 phones. Three days later, on 12 May 2014, the Plea and Case Management hearing (PCMH) took place: the respondent pleaded not guilty and an order for trial on 15 October (estimated length three days) was made. No specific order was made (or sought) in respect of the telephone or cell site data: the defence had asked the prosecution and there was no reason to believe that the CPS would not comply with the request to produce copies of what were, after all, exhibits in the case. In the absence of compliance, however, on 24 June 2014, a follow up letter was sent.

12. On 18 August, the relevant CDs had not been sent and the respondent's solicitors sent a letter repeating the contents of the defence case statement and indicated that consideration was being given to the instruction of a cell site expert (for which legal aid had been extended). By letter dated 1 September (received 3 September), further evidence was served which included a copy of the CD MG/8 which consisted of a digital version of the analysis of the data previously served in hard copy.

13. There was ongoing disclosure and, on 3 September, the defence case statement and letter of 18 August was forwarded by the CPS to the police who, on 4 September were unable to provide copies of MG/6 for what we believe were technical reasons. On 12 September, a copy of MG/7 was served: this contained all the data specific to complainants in relation to 513 along with the material which supported the analysis served in hard copy in March. It did not include the data from 513 which did not relate to the complainants. On 1 October, MG/6 (which included the additional data for 513) was sent by the CPS to the defence in pdf format: it was apparently received on 7 October. The defence expert then required it in Excel format: we are told that this was because that was the format in which it would have been provided by the relevant service providers although Judge Dutton was told that it was because the data was not searchable in pdf format.

14. It is not difficult to see why the prosecution and defence were interested in different aspects of this evidence. The prosecution were interested in proving the suspect calls and texts from 513 which formed the basis of the allegations, along with the coincident calls or texts made from 291 to numbers which featured on 513 call data: this was to provide evidence of similar use to justify the inference that the phones were being used by the same person. A similar inference was to be argued based on the distribution map prepared by the analyst of the cell sites utilised by both phones to make these calls: this was on the basis that the same cell sites were being used by the two phones in roughly the same proportions.

15. The defence wanted all the data to check its validity and to seek to support the argument that the phones were in different hands. Thus, if different cell sites had been used to make phone calls from both phones at the same time, there would be clear evidence that the phones were with different people. If that was so on any occasion, it was arguable that the jury could not conclude that they were necessarily in the same hands when the relevant offensive calls were made or texts sent. In that event, it would support the argument that the 513 phone was sometimes used by someone other than the respondent and might therefore have been used by someone else to make and send the relevant calls and texts.

16. Returning to the chronology, on 7 October, notwithstanding that the material which was sought had not been provided, the defence a certificate of readiness which identified that the case was not ready for trial. With only one week to go, it is a matter of comment that no prior application had been made to the court. Additionally, the request was for the case to be mentioned on 10 October which, given the nature of the material the defence was seeking, would itself have been too late to protect the trial date.

17. There were telephone calls between the parties and on Sunday 12 October, there was a letter from the CPS to the defence confirming that the phone evidence and cell site evidence would be available on 13 October. Further evidence was then also supplied on the basis that a formal notice would follow. It being clear that the defence expert required 3 weeks to produce his report, on 13 October, an application was made to the Recorder of Chester to adjourn the case.

18. Having had some of the history explained, Judge Elgan Edwards made it clear that he was not prepared to adjourn the trial not least because a case listed in May for a trial in October could not be subject to what would be a further six month delay (with the attendant consequences on court resources) on the basis that prosecution evidence had only been served that week. He adjourned consideration of the matter until the following day; on that day, he further postponed consideration of the application until 15 October (the intended trial date) and said that the trial judge, Judge Dutton, would be able to decide whether the case justified adjournment for what would be a further eight months.

19. Judge Dutton spent the time available on 15 October going through the history, not only in relation to the expert evidence but also concerning what prosecution counsel explained was a cautionary bad character application (on the basis of his primary contention that the relevant evidence was admissible without such an application being made). The date on which prosecution counsel was instructed was also explored from which it was clear that little (if anything) had been done over a period of some months before he was: it was, for example, clear that there had been no response to letters from the respondent's solicitors.

20. Not all the facts then explained to Judge Dutton were accurate; he understood that, when served, the information was incapable of use by the defence expert to check or draw data from it. This court should, of course, proceed on the facts as the judge was told (or found on a reasonable basis) that they were but with fairness characteristic of her conduct of the case and this appeal, Miss Frances Willmott for the respondent has been entirely content that this court proceeds on the basis of the true position as we have sought to explain it.

21. When it came to giving a judgment, Judge Dutton described the situation as "invidious and appalling", referring to a number of complainants having made serious allegations alleging offences committed by the respondent who contended that the back-up material provided by technology was "a crucial aspect of the case". Having referred to other failings in the case (including the service of four notices of further evidence, some recently and none foreshadowed in the PCMH along with a bad character application served in October), he observed that counsel had only been instructed in mid-August. It is important to set out a large part of the rest of his judgment extensively. He said:

> "As far as the court's responsibilities are concerned, case management and efficient and effective case management is an essential aspect of the conduct of criminal cases in these courts. Everybody well knows that the culture of adjournments is a thing of the past. There were days and times when cases would almost automatically be adjourned for one reason or another at the trial hearing because various things hadn't been done. But that has well and truly gone in accordance with the criminal rules. Efficient case management in pursuit of the overriding objective as set out by the rules is vital. The judge must deal efficiently and expeditiously with the case while dealing fairly, of course, to both sides, recognising the rights of the accused and of course respecting the interest of victims and witnesses and therefore, as Rule 3 indicates, adjournment should be refused unless absolutely necessary and justified.
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> .... The reality is that the defence is entitled to have access to the call data and full cell site data to which the Crown have had access, and to have access to it before either the 3rd September, the 12th September or the 7th October, which is when that service of information is now said to have actually been completed.
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> ... I am extremely anxious that in a case of this kind there has been a lamentable failure on the part of the prosecution, whether it be the police to provide the proper data, or whether the CPS to manage that data and to transfer it on in an acceptable form and I feel, I am afraid, that those who are victims will feel badly let down by the rather lackadaisical manner in which this serious case has been prosecuted. I am the first to acknowledge that all agencies within the criminal court process are currently under pressure of time and of monetary consideration but none of that, I am afraid, is any excuse for lamentable inefficiency and inactivity."

22. The judge was not prepared to put the case off to June 2015 "if not beyond", the trial date having been set five months previously. In the circumstances, he determined, pursuant to s. 78 of the 1984 Act that it would be unfair to allow the telephone evidence "in its entirety" to be used by the prosecution "at this very late stage". Thus, as the judge appreciated, the ruling effectively brought the prosecution to an end. He declined to expedite the hearing of this application. Although documentation in

support of this appeal was lodged in time, it was not lodged in the appropriate form under Rule 67.4 CPR. Without objection from Miss Willmott, we extend time pursuant to Rule 67.4(e)(ii) CPR.

23. In this court, Mr Ian Unsworth Q.C. (who did not appear in the Crown Court) recognised that the 513 phone was at the heart of the prosecution and he equally recognised that the respondent was from the outset entitled to copies of the material that had been exhibited. In the grounds of appeal, he advanced three arguments. The first was that the judge took into account matters that were irrelevant to the consideration of the evidential issues namely, actual or perceived failings by the prosecution in the service of material in this and other unrelated cases and the length of time that it would take for the matter to be heard again. Secondly, he submitted that the judge failed to take into account the fact that an adjournment would cause no prejudice to the defendant. Thirdly, as a consequence, he argued that the judge was wrong to exclude the whole of the telephone evidence.

24. As to the first ground, Mr Unsworth modified the submission by recognising that the failings of the prosecution were not irrelevant but that they had been accorded too much weight. While recognising that the position had not been put to the judge with the clarity or accuracy to be expected, in fact, the respondent was not entitled to the 513 calls which did not involve complainants; that material was not part of the evidence and did not undermine the prosecution or assist the defence. Furthermore, the judge did not address what could be discerned from the material that had been served as long ago as March 2013 and failed properly to consider that as at 12 September the defence team had extensive data, missing only the complete billing for 513.

25. Although the judge had been given information that was not accurate (about which Mr Unsworth recognised that the prosecution could not complain), he pointed to the absence of any application under s. 8 of the 1996 Act or, indeed, any earlier application to the court of any sort. This was the first trial listing and the case had not previously been adjourned: there was no prejudice to the respondent. In the circumstances, it was unreasonable (in a *Wednesbury* sense) for the judge to exercise his discretion under s. 78 as he had done and it would have been sufficient for him to mark his frustration with the police and/or the CPS in some other way not least because of the consequence of 'punishing' the CPS was that eight complainants were not afforded the opportunity to have their complaints aired in court. The court should recognise the pressure under which the CPS was having to work and the resulting caseload for each lawyer.

26. Miss Willmott responded by underlining that there had been no response to correspondence from the respondent's solicitors explaining the position so as to justify an application to the court. In fact, the full call data and full cell site data were first served on 7 October and it was only thereafter that the expert was able to recommend what work needed to be done. It was not material to which the defence were not entitled: the relevant CDs were produced in statements and listed as exhibits served as part of the prosecution case. Neither was this the only delay in the service of evidence. She referred to the skeleton argument prepared for the hearing in October which complained that 13 witness statements had been served on 12 October (including a statement of complaint from a new victim) and that whilst telephone data served on 13 October purported to be unused material, reliance had been placed on it

in the draft opening. These were serious failings in the timeous preparation of the case.

27. There were other complaints. Thus, the response to the defence case statement had been dated 9 October 2014 and exhibits in relation to the topping up of the phone 513 were also received that week. The call data had been served in pdf format i.e. not that in which the providers had supplied it. The paypoint card had not been analysed for fingerprints and nothing had been received in relation to the range of the cell sites or the number of telephones connected to them.

28. Without deciding the matter, on the face of it, these complaints are less impressive. We repeat that it is not the purpose of the 1996 Act to allow the defence to require the police to investigate matters or obtain evidence which is not in their possession but which may help the defence. The Act is designed solely to require the prosecution to disclose to the defence material already in its possession which might assist the defence or undermine the prosecution. The facility to request documents or material which has not been the subject of primary disclosure is specifically to put the prosecution on notice that specific material which might not be thought to undermine its case or to assist the defence in fact does so and must be considered in this light.

29. Further, whether it was necessary that this material be served in one specific format (i.e. Excel as opposed to pdf for even paper copy) is also a separate issue. For our part, we do not accept that the defence could object if the material from the relevant service providers had been served by way of print out rather than searchable digital form. It is not open to the defence to specify what is acceptable although, obviously, a responsible prosecutor should co-operate with the defence if it causes no greater difficulty to do so. In particular, if the material had been provided in a form which fitted with the defence expert's requirements, that is what should have happened: reasonable requests should always be entertained. Failure to comply which such a request, however, will not justify an adverse ruling as to service if, in fact, the information has been provided.

30. Moving on from the facts, Miss Willmott emphasised that her primary application had been for the trial to be adjourned not least because the expert had only had the call data in its original format that week and had recommended a full cell site survey. Further, there had been no opportunity to take the respondent through the recent material. It was an alternative submission that, in default of adjournment, the telephone and cell site evidence should be excluded on the basis that the proceedings would otherwise be unfair as one side would be allowed to adduce relevant evidence which, for one reason or another, the other side could not properly meet: see *R v Quinn* [1990] Crim LR 581.

31. In that regard, it was submitted that Judge Dutton was entitled to find the facts that he did and, although he had expressed his frustration in relation to other cases during argument, there was nothing in his ruling to justify the conclusion that he had made his decision other than as a consequence of the failings in the present case. In relation to prejudice, on any showing, the respondent was prejudiced: a prosecution that had been hanging over his head since 2013 and which he had expected to be resolved that month would be postponed for what could be 8 or more months. The judge had fully reflected the gravity of the allegations and the impact on the victims and had specifically referred to these features of the case. In short, she argued that the

conclusion reached by Judge Dutton was a case management decision well within the proper exercise of his discretion and, thus, a decision with which this court should not interfere.

32. It is appropriate to go back to the terms of the Criminal Procedure Rules 2015 and to identify that the overriding objective to deal with criminal cases justly set out in CPR 1.1. (1) is then explained in CPR 1.1 (2) in these terms:

> "Dealing with a criminal case justly includes—
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> (a) acquitting the innocent and convicting the guilty;
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> (b) dealing with the prosecution and the defence fairly;
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> (c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
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> (d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
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> (e) dealing with the case efficiently and expeditiously;
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> (f) ensuring that appropriate information is available to the court when bail and sentence are considered; and
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> (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."

33. It is abundantly clear from his judgment that Judge Dutton had these factors in mind when he considered how to manage this case. He referred to the requirements of efficient case management and expressed concern for the victims (who he said would feel let down) but equally spoke of the rights of the accused and the prosecution failures which he rightly described (in language which Mr Unsworth did not challenge) as 'lamentable'.

34. Neither do the arguments which Mr Unsworth valiantly presented advance the prosecution further. The suggestion that the failings of the prosecution were irrelevant was rightly abandoned and the submission that the defence were not entitled to material that had been exhibited to the evidence served from the outset clearly misplaced: in any event, given the nature of the defence, a request for the original call data and full cell site evidence was clearly justified. It was accurate to say that the defence could have made an application under s. 8 of the 1996 Act and if a letter had been written denying entitlement to the material, doubtless that is what would have happened: in fact, there was no response to their legitimate request at all.

35. Further, it is beyond argument that the respondent would have suffered prejudice: this complaint (dating back to 2013) had been hanging over his head for many months and he was being asked to wait a further 8 months before it would be resolved. Finally, whereas we have no doubt that the judge fully recognised the pressure under which

the CPS was working, if effective case management is to mean anything, that could never be an answer for it would effectively be to abnegate responsibility for trial progress and make it subject to the vagaries of CPS preparation.

36. Neither is it just the CPS that is under pressure. If repeated applications have to be made, defence lawyers on a fixed fee must attend more hearings than would otherwise be necessary thereby reducing the rate at which they are being remunerated. Further, HMCTS loses sitting days which could have been used to try other cases: this did not occur in this case because it was known that the trial could not proceed so that another trial could be listed although a substantial time was taken up arguing both the adjournment and the effect of a refusal to adjourn. But having said that, court resources were expended because there were three hearings to deal with this issue and, had there not been a warned or floating list (which itself gives rise to issues of efficiency) the court would have been left empty.

37. It is now ten years since the decision in *R v Jisl* [2004] EWCA Crim 464 in which Judge LJ (as he then was) emphasised that case management was "an essential part of the judge's duty". Referring to the issue of trial preparation and the objective of "greater efficiency and better use of limited resources", he went on (at para. 118):

> "When trial judges act in accordance with these principles, the directions they give ... in the exercise of their case management responsibilities, will be supported in this court. Criticism is more likely to be addressed to those who ignore them."

38. The directions at the Plea and Case Management hearing were plain; the CPS were not entitled to expect that no sanction would follow unless the case had been brought back to the court for a further order: the resources of the court cannot be expected necessarily to extend to what might be described as the provision of a 'yellow card'. Obviously, every case will depend on its own facts but the willingness of this court to support trial judges in the exercise of their discretion in discharging these responsibilities is equally clear in cases of this nature.

39. It is not in the slightest surprising that the Recorder of Chester and Judge Dutton became exasperated with the conduct of the prosecution. Whatever stringencies that the CPS face, far too much time and money has had to be spent dealing with the failures of the prosecution; this would have been much better spent processing this and other cases to ensure that they receive expeditious and efficient treatment. Suffice to say that Judge Dutton was fully entitled to reach the conclusion that he did and equally entitled to support from this court.

40. Before leaving this case, however, it is necessary to sound notes of warning. First, although nothing was made of the point before the judge or before this court, the fact that the defence solicitors did not alert the court to the problems of non-disclosure at a time when something could have been done about it (but left the complaint so late that the trial date could not be met) meant that the court was deprived of the opportunity of an earlier listing to resolve the issues could be resolved and maintain the trial date. It would be perfectly open to the judge to decide that the consequences of such a failure of duty on the part of the defence should be to reject a complaint of prejudice consequent upon the need for an adjournment. In each case, the impact of whatever

breaches are established will be for the judge to assess, bearing in mind the particular circumstances of the case and the overriding objective.

41. Second, the court will not support (and, to the contrary, will be extremely critical of) attempts to administer interrogatories of the type that this defence case statement contained, going beyond a request for disclosure of unused material but, rather, on the face of it, seeking to impose a burden on the police to undertake investigations on their behalf. It takes time and effort to respond to these requests (even if only to refuse them); the defence also have the responsibility of ensuring that their requests are addressed to no more than the law permits and to seek to go further is to abuse the process that the 1996 Act set up. Similarly, merely to assert that an extension will be sought before notifying defence witnesses is insufficient to comply with the rules and is not acceptable.

42. Finally, it should not be thought that this decision can be used to create a trap for the prosecution generally or the CPS in particular by the over-zealous pursuit of inconsequential material which does not go to the issue all in the hope that the CPS will fall down and that an application can be made which has the effect of bringing the prosecution to an end. Such conduct is itself an abuse of the process of the court and judges will be assiduous to identify it and impose sanctions on those who seek to manipulate the system.

43. In the event, having considered the issues in this case in some detail, it is appropriate that we grant leave to appeal; the appeal itself, however, is dismissed. For the sake of the victims, it is only right to emphasise that there has been no suggestion that they were not subjected to offensive texts and calls and we recognise that a full trial has not been undertaken (for which they each deserve an apology from the CPS). Nevertheless, pursuant to s. 61(3) of the 2003 Act, the respondent is acquitted of the offences which are the subject of the appeal.