Neutral Citation Number: [2024] EWCA Crim 493

Case No: 2024/01083/B1; 2024//01084/B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CANTERBURY
HIS HONOUR JUDGE JAMES (THE HONORARY RECORDER OF CANTERBURY)
T20220084

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2024

Before:

THE LADY CARR OF WALTON-ON-THE-HILL
THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE EDIS
and
MR JUSTICE PEPPERALL

- -

Between:

The King	**Appellant**
- and -	
(1) Katie Ng	**Respondents**
(2) Antony O'Reilly	

- -
- -

Tom Little KC (who did not appear below) (instructed by **The Crown Prosecution Service**) for the **Crown**
Kieran Brand (assigned by the Registrar) for **the First Respondent**
Charlie Austin-Groome (assigned by the Registrar) for **the Second Respondent**

Hearing date: 9 May 2024

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APPROVED JUDGMENT

The Lady Carr of Walton-on-the-Hill, LCJ:

Introduction

1. Judges sitting in the criminal courts deal on a daily basis with challenges arising out of under-resourcing of the criminal justice system. In this case, the judge had to deal with non-attendance of prosecuting trial counsel. His response was to stay the proceedings as an abuse of the process of the court (the Terminating Ruling).

2. This is an application under s. 58 of the Criminal Justice Act 2003 for leave to appeal the Terminating Ruling and, if leave is granted, for an order to set aside the stay so that the trial can proceed. The relevant procedural steps necessary for an appeal against a terminating ruling have been complied with. At the commencement of the hearing we made an order under s. 71(3) of the Criminal Justice Act 2003 lifting the reporting restriction under s. 71(1). A reporting restriction remains in force over one discrete aspect of the oral argument before us which is not referred to below. Accordingly, there are no reporting restrictions over this judgment.

3. We grant leave and proceed to address the appeal. Our reasons below consider the merits and we also provide guidance to judges facing difficulties arising out of non-attendance by trial counsel.

The procedural history

Alleged criminality

4. It is not necessary to set out in any detail the alleged facts of the alleged offending. The allegations arise out of events said to have taken place on 7 March 2022. The prosecution case is as follows. The Respondents, Ms Ng and Mr O'Reilly, were in a relationship at the time. Mr O'Reilly, using Ms Ng's mobile telephone, sent abusive and threatening messages to Ms Ng's former partner, Mr Jay Ingram. Mr O'Reilly and Ms Ng then drove to Mr Ingram's workplace. They encountered a man, Mr Craig Robertson, saying that they wanted to kill Mr Ingram. Mr Robertson told them that Mr Ingram was not there. Mr O'Reilly and Ms Ng proceeded to assault Mr Robertson, including with a hammer. Ms Ng also assaulted another man, Mr James Lukey, and made threats to kill him. By this stage, Mr Ingram and two others had come out. Ms Ng then struck Mr Ingram on the side of his head with a hammer.

The early proceedings

5. The police attended and arrested the Respondents, who were charged as follows: Ms Ng with assault occasioning actual bodily harm against Mr Ingram and Mr Robertson (counts 1 and 2); possession of an offensive weapon (count 3) and assault by beating against Mr Lukey (count 4); Mr O'Reilly with malicious communication to Mr Ingram (count 5) and assault by beating against Mr Robertson (count 6). They appeared in the Magistrates' Court where their cases were sent to the Crown Court.

The first adjournment: November 2022 to July 2023

6. At a PTPH on 19 April 2022, both Respondents pleaded not guilty and the case was placed in a warned list for trial in the week commencing 7 November 2022. At a hearing on 18 October 2022, the case was removed from that list on the ground that it was not considered in the interests of justice for Ms Ng to stand trial alongside Mr O'Reilly until the conclusion of other proceedings. This case was therefore adjourned and placed in the warned list for the week commencing 3 July 2023.

The second adjournment: July 2023 to January 2024

7. However, the case was not listed in the week of 3 July 2023 and was adjourned administratively to a warned list commencing 29 January 2024. The judge said in his ruling that the case had been removed from the warned list at the prosecution's request because of lack of counsel. There is nothing on the digital court file to record this, and our enquiries have not been able to confirm it. But we proceed on the basis that the judge's understanding was accurate.

The third adjournment: January 2024

8. On Friday 26 January 2024, the chambers of prosecuting counsel asked for the case not to be listed on Monday 29 January 2024 due to the unavailability of counsel. That request was granted. The case thus came into the warned list on 30 January 2024 as a "backer" trial not to commence before noon.

9. On 29 January 2024, the Criminal Prosecution Service (CPS) wrote to the court setting out the unsuccessful steps that had been taken to secure trial counsel for the next day, and requesting that the matter not be listed on 30 January. The CPS stated that chambers had explained that prosecution counsel had "*an important matter later [that] week"*. Chambers stated that they had contacted "*over 120 sets of chambers*" without success. The CPS indicated that it had looked at their Crown Advocates' Diary, and no one was available, as well as contacting all other 13 CPS areas for cover. They were yet to receive responses from their counterparts.

10. Further, just after 4.30pm on 29 January 2024, solicitors for Mr O'Reilly emailed the court to indicate he was now in custody and would have to be produced the next day.

11. The request for the matter not to be listed on 30 January 2024 was refused. However, on 30 January 2024 ,the priority case ahead of the trial of Mr O'Reilly and Ms Ng was effective and went ahead. Further, Mr O'Reilly was not produced.

12. On the same day, the judge made the following widely shared comment on the digital case system in relation to the index matter:

> *"No advocate attends (Ct emailed by instructed counsel's clerk and CPS this morning to say he is not available because 'he has important matters this week that they (sic)must cover'")*

Trial is adjourned to be re fixed (although likely first available date for a 5 day bail fixture is going to be in 2025 in this court)…

1. *Def must submit abuse arguments no later than 16 Feb*

2. *P must respond (including a detailed account as to what other commitments the instructed P advocate decided to prioritise over this case and when instructions on that matter were received) by 1 March*

3. *Matter to be listed ELH ½ a day…on 8 March where it will be expected that a full explanation as to exactly why instructed counsel was unavailable and when the CPS were notified of this.*

   NB after the hearing I learn that who I believe was instructed counsel was appearing in other cases via XCV at this court, as confirmed by the [widely shared note] he placed on the [digital system] in another case…"

The hearing and the Terminating Ruling

13. The hearing of the abuse of process application took place on 8 March 2024. By this stage prosecution counsel had explained why they had come to the "*difficult decision*" on 29 January 2024 that they were obliged to be available for a sentencing hearing with a substantial dispute as to the factual basis of conviction following trial, to be heard on 1 February 2024.

14. Both Respondents submitted broadly the same argument, namely that the failure of the CPS to secure the attendance of prosecution counsel when the matter was listed for trial on 30 January 2024 amount to an abuse of process such that the proceedings should be stayed.

15. The judge acceded to that submission. He opened by identifying that the unavailability of counsel was a problem which the court was being forced to deal with on "*an alarmingly regular basis*", resulting in cases not being able to be tried. He cited the current significant back log of Crown Court cases. He rehearsed the background of the proceedings as he understood it, finding that the court had been unable to list the case for trial on three occasions "all because of difficulties caused by the prosecution". The hearing on 30 January 2024 had not proceeded as "*a direct consequence*" of the absence of a prosecutor "*despite the attendance of the defendants, their respective advocates and the prosecution witnesses*".

16. He went on to explore how such delays were "*regrettably not uncommon*". He referred to the Bar's Code of Conduct (Code of Conduct). He stated that it appeared in this case that a deliberate and conscious decision had been taken "somewhere along the line" that other prosecutions were more important. He saw no point in disciplinary action or wasted costs orders. But the regularity of the situation would not be remedied "*unless and until a judge, confronted with the inability of the prosecution to present its case because of a lack of an advocate, is willing to declare such a situation as unacceptable*". He referred to the right to a fair trial that includes a trial within a reasonable time. Where the

reason for failure was "*completely the fault of the state*", that demanded "*censure*". When the court was confronted with "*potential unfairness*", there were only a very few tools at its disposal.

17. The judge recognised that staying indictments as an abuse of the process should be a matter of last resort, and not be used to punish the prosecution for mistakes in the absence of bad faith:

> "*However, if I do nothing, I have absolutely no confidence that the situation will change…"*

18. He stated that it was unfair for a citizen to be forced to wait years to be tried simply because the state was unable to provide a lawyer to prosecute them. The adverse impact of uncertainty on a defendant was often underestimated.

19. He concluded:

> "*I have, therefore, decided that I have little option to take the highly unusual step of staying this indictment. In my judgment condoning further delay in this particular case, caused by a failure by the Crown to ensure it is in a position to present the allegations amounts to an abuse of the process because it would be a decision which has a clear and obvious capacity to undermine the integrity of the criminal justice system.*
>
> *To allow the prosecution to continue in the circumstances I have outlined, offends my sense of justice and propriety and to condone the circumstances behind the delay and simply to do nothing would be something which would have a clear capacity to undermine public confidence in the criminal justice system and consequently risk bringing it into disrepute.*"

Abuse of process

20. It is not necessary for present purposes to look further than the recent decision in *R v BKR* [2023] EWCA Crim 903; [2024] 1 WLR 1327 (at [34] to [50]) for an examination of the authorities and identification of the relevant legal principles, which are non-controversial.

21. In summary, the power to stay criminal proceedings as an abuse of process is an important though exceptional remedy to be exercised with care and restraint. A stay of proceedings is the exception, not the rule; it is a measure of last resort.

22. There are two species (or limbs) of abuse justifying a stay, each of which is separate and distinct. The first is when a fair trial is not possible. The second is where it offends the court's sense of justice and propriety, or public confidence in the criminal justice system would be undermined, for the defendant to be tried in the particular circumstances of the case. The abuse must amount to an affront to the public conscience.

23. Within the second category fall cases where the police or prosecuting authorities have engaged in misconduct. Category 2 abuse is by its nature very rarely found

– such cases will be "*very exceptional*". As it was put in *R v BKR* at [34], the second limb does not arise "*unless the defendant, charged with a criminal offence, will receive a fair trial…something out of the ordinary must have occurred before a criminal court may refuse to try a defendant charged with a criminal offence when that trial will be fair*".

24. There is a two-stage approach when considering limb 2 abuse. First, it must be determined whether and in what respect the prosecutorial authorities have been guilty of misconduct, such as very serious examples of malpractice and unlawfulness (as opposed to state incompetence or negligence). Secondly, it must be determined whether such misconduct justifies a stay on the ground of abuse of process. This requires an evaluation on the particular facts and circumstances of each case, weighing in the balance the public interest in ensuring that those charged with crimes should be tried against the competing public interest in maintaining confidence in the criminal justice system.

25. Unfairness to the defendant is not required; rather the focus should be on whether the court's sense of justice and propriety is offended or public confidence in the criminal justice system would be undermined. Equally, a stay should not be imposed for the purpose of punishing or disciplining prosecutorial misconduct. The focus must be on whether a stay is appropriate in order to safeguard the integrity of the criminal justice system.

Analysis on the facts

26. At the outset, we sympathise with the judge's frustration at the non-attendance of prosecuting counsel; his irritation was both palpable and understandable. The current pressures to reduce the backlog of cases and delays in the Crown Court are immense. Judges are working day in and day out to alleviate these problems, not least through pro-active case management and long working hours, both in and out of court.

27. However, there are obvious flaws of fact and principle in the decision at which he arrived.

28. First, it appears that the judge proceeded on the basis of a materially inaccurate procedural history:

    i) He stated that the adjournment from November 2022 to July 2023 was the result of the prosecution not being "trial ready". This was not correct. As set out above, the matter was removed from the November 2022 list, not through any fault of the prosecution but in fairness to the Respondents;

    ii) He proceeded on the basis that the non-attendance of prosecution counsel on 30 January 2024 was the reason why the trial could not proceed. That was simply not the case: the matter could not have proceeded on 30 January 2024 because i) Mr O'Reilly was not produced and ii) the priority trial went ahead. Whether or not the trial could have

> proceeded later on in the same or following week was not identified in the judge's ruling. Mr Little KC informed us that prosecuting counsel would have been able to conduct the trial from Friday 2 February 2024 onwards; Mr Brand indicated that the court was of the firm view that no further slot in the relevant fortnight would be found.

29. These errors were central to the judge's reasoning. Contrary to his assumption that the court had been unable to proceed with the trial on three occasions "*all because of difficulties caused by the prosecution*", there were in fact only two earlier occasions when prosecutorial absence could be said to have caused delay: July 2023 to January 2024 (causing a delay of six months) and 29 to 30 January 2024 (causing a delay of a day).

30. But our more fundamental concern is one of principle. The judge failed to have regard to the settled principles of law identified above. The judge commented at the end of the Terminating Ruling that it seemed *"unlikely [to him] that the law as it currently stands regarding staying cases was developed at a time when it could have been conceived that judges would be confronted with circumstances where advocates are simply unavailable to conduct listed cases*". It may therefore be that he thought that he was justified in departing from those settled principles. But, for the avoidance of doubt, we do not consider there to be any proper basis for doing so. The principles will always be applied flexibly to the specific facts of each case, but applied they must be.

31. He should have approached each category of abuse separately. As to the first limb of abuse, there was (rightly) no finding that a fair trial in the future (whether later this year or in 2025) was impossible.

32. As to the second limb of abuse, the exercise starts with a search for prosecutorial misconduct. The judge referred to an (unspecified) "departure from the Code of Conduct and an acknowledgment that the system used to instruct counsel is unable to secure the services of lawyers to prosecute some cases". He went on to state that "*whilst that does not amount to deliberate bad faith, it does ask me to ignore an obvious problem and by ignoring it to effectively condone the status quo*". He went on to say that he "*simply [could] not accept that it was 'fair or reasonable for an innocent person to have to wait for more than 3 years to be tried in respect of a simple and straightforward allegation when the main reason is that a prosecutor cannot be sourced to present the case against them by the very body who is insisting that the public interest demands that they are tried"*".

33. It is difficult to recognise in the above any finding of prosecutorial conduct coming close to the sort of executive misconduct sufficient to justify a stay. The Respondents do not suggest that prosecution trial counsel breached the Code of Conduct. Although the judge referred to various parts of the Code of Conduct, and stated later that there appeared to have been "*a departure from the Code of Conduct*", he drew back from determining whether the rules had been obeyed as "*not necessarily a matter for me to resolve*". The judge referred to the "capacity" to undermine the integrity of the criminal justice system; again, that

is not the relevant test. And there is force in the criticism that the judge confused questions of delay and a fair trial with the issues arising on category 2 abuse.

34. In our judgment, there was no prosecutorial conduct in this case that could justify a stay. In any event, there was a failure to carry out the necessary balancing exercise. Rather, the judge's approach was to focus on the Respondents and to punish the CPS in the hope that lessons would be learned and the situation improved. What he should have done is to balance the public interest in ensuring that those charged with crimes should be tried against the competing public interest in maintaining confidence in the criminal justice system and not giving the impression that the end will always be treated as justifying any means.

35. In summary, there was no proper justification for the exceptional step of a stay for abuse of process being imposed in the circumstances and the judge was wrong to proceed otherwise.

Considerations going forward

36. To hold that the failure of the CPS to field a prosecutor to conduct this trial was not capable of amounting to an abuse of process justifying a stay of proceedings is not to accept that the court is powerless. The court retains the ability to manage proceedings, but must do so in the interests of justice. The shortage of advocates to conduct criminal work in the Crown Court is not a problem which the court can solve. It is for the professions to recruit, train and retain members and it is for the Executive, and other agencies engaged in this process, to take steps to ensure that the need for Crown Court advocacy is met. In the meantime the court must manage its work so that the system functions in the best way possible. We will identify in summary some ways in which that may be achieved.

37. In doing this we are not identifying any failures in the management of the present case, but simply summarising the ways in which the shortage of advocates may be addressed so that the inevitable disruption is minimised as far as possible. In this case, the court operates a two week warned list. The parties were told in July 2023 that it would be in the warned list for 29 January 2024. We consider that the judge was quite entitled to be disappointed that the court was not given full information about counsel's availability at any stage. The court was not told of any difficulty at all with the trial listing until it was asked not to list the case on the 29 January (which it accommodated) and then on that day was told this by the CPS:-

> "On 29th January 2024, the CPS were notified that chambers could no longer cover this case. Chambers explained that prosecution counsel has an important matter later this week that they must cover and that attempts were made to avoid this trial from being listed."

38. We identify below the obligation of participants, which includes advocates and their clerks, to communicate with the court promptly. We have held above that

the behaviour of the prosecution in this case does not amount to misconduct for the purposes of an abuse of process application, but this should not be seen as excusing this very late provision of information. The judge was also entitled to be disappointed that the court was not told that counsel's "important matter" was a sentencing hearing. Had that been said, the court would have been able to start the trial, not sit while counsel attended to the sentencing hearing, and then resume after a delay of, perhaps, a day. As we have pointed out above, there were other reasons why the case could not proceed as a trial on 30 January 2024, but this appears to be a classic case of late and inadequate communication with the court and the CPS by prosecuting counsel then instructed (not Mr. Little) and his chambers. Mr Little fairly did not seek to argue otherwise.

Listing, case management and remote access

39. Listing is a judicial function. The Criminal Practice Direction makes this clear:-

> *"5.6.1 Listing is a judicial responsibility and function. The purpose is to ensure that all cases are brought to a hearing or trial in accordance with the interests of justice, that resources available for criminal justice are deployed as effectively as possible, and that cases are heard by an appropriate judge or bench with minimum delay."*

40. The Listing Advice published by the Senior Presiding Judge on 9 January 2023 at paragraph 6 says this:-

> *"I do recommend that courts consider carefully the value of the kind of warned list (particularly a two week warned list) which results in cases being listed across a lengthy period and are called in for trial, if at all, at very short notice. The shortage of criminal advocates means that this is likely to fail in many cases. Courts which continue to use warned lists must carefully monitor their effectiveness in getting all cases listed in the warned list on for trial during the warned period. As a general rule I would suggest that in modern conditions a warned list is likely to be most useful in smaller court centres. Whatever method is used for providing additional work to fill gaps, it is always necessary to consider with care what kind of cases can properly be listed 'at risk'."*

41. It is not necessary that all cases are given fixed dates at PTPH, although this may often happen and should usually happen in very serious cases. There are listing systems in which cases are allocated at PTPH to a particular week, but then given a fixed date 2 or 3 weeks before that week. If a date can be fixed in consultation with the clerks to the advocates in this way, the chances that they will be able to attend or return the case elsewhere will be higher. It should be apparent at that time whether the instructed advocate will be available or if there is a significant risk that he or she will not. This should result in prompt communication with the court and with the CPS or defence instructing solicitor.

42. The court has a role to play by ensuring that lists are drawn up with the interests of advocates in mind. This is true generally, but is a factor of greater weight now than it was because of the shortage of advocates. Those interests cannot always be the determining factor in listing decisions. Witnesses, defendants and complainants and are the principal focus of listing decisions, which must seek to ensure that justice is not delayed more than is necessary. The needs of other cases must be taken into account.

43. At whatever stage a date is given for a trial everyone concerned must operate on the basis that this is when the trial will be, and all parties must give the court timely information of any threat to that date. Such threats may include the inability to identify counsel to prosecute or defend that trial. This requirement has been set out in the Criminal Procedure Rules, which establish the overriding objective, the duty of the court to manage cases and the duty of the parties to provide active assistance to the court in fulfilling that duty (CrimPR 3.3). CrimPR 3.12 provides (with added emphasis):-

> *"3.12.—(1) This rule applies to a party's preparation for trial or appeal, and in this rule and rule 3.13 'trial' includes any hearing at which evidence will be introduced.*
> *(2) In fulfilling the duty under rule 3.3, each party must—*
> *(a) comply with directions given by the court;*
> *(b) take every reasonable step to make sure that party's witnesses will attend when they are needed;*
> *(c) make appropriate arrangements to present any written or other material; and*
> *(d)* ***promptly inform the court and the other parties of anything that may—***
> ***(i) affect the date or duration of the trial or appeal, or***
> *(ii) significantly affect the progress of the case in any other way."*

44. Courts should also ensure that local practices are aligned with the Lord Chief Justice's guidance on remote hearings in the Crown Court, published in February 2022 (amended April 2024) and available within the Better Case Management Revival Handbook on the guidance page of the Digital Case System. More consistent practices across the courts will enable the available counsel to be more efficiently used and increase the productivity of the advocates. PTPH, trial and sentencing should generally have advocates present in person, but a great deal of other work can be done remotely.

Options when counsel is absent

45. Where one side or the other is not represented by counsel at a PTPH, trial or sentencing hearing the court has a range of options. If it is a PTPH or sentencing case, one option in appropriate cases is to proceed without the prosecution. If it is defence counsel who is absent then obviously a PTPH or trial cannot proceed. If the court has full information about a defendant and is proposing to impose a non-custodial sentence it may be possible to sentence in the absence

of a defence advocate. Courts must, of course, observe the restriction in section 226 of the Sentencing Code on the imposition of custodial sentences on unrepresented persons.

The power of the court when the prosecution is not represented at trial

46. Where a trial cannot proceed because of the absence of prosecuting counsel the court may often have no choice but to re-fix it. It is strongly in the public interest that criminal proceedings should reach a conclusion on the merits. The innocent should be acquitted and the guilty should be convicted. Those who have suffered harm from the commission of a crime should see their desire for justice vindicated. The court should prevent that from happening only as a last resort, and only when the interests of justice, properly balanced, require that outcome.

47. There is, in our judgment, a route by which a judge can terminate proceedings in which the prosecution are not represented at trial by an advocate. This is unlikely to constitute an abuse of process as we have said. However, such a situation will usually involve some form of application for an adjournment so that the prosecution can be represented at a new trial date. Even if no-one has managed to articulate any such application, the simple absence of an advocate will require the court to consider whether to adjourn the trial. In deciding whether to adjourn proceedings, the court is required to consider the interests of justice and to deal with the case justly in the sense described in CrimPR 1.1: the overriding objective. This is an exercise which addresses all aspects of the case and in which the judge will decide what factors carry most weight in determining the outcome. Each limb of CrimPR1.1 will need to be considered. Amongst other things, the judge will have in mind the public interest in criminal allegations being decided, the seriousness of the case and prejudice to the defendant caused by further delay (although such prejudice may be lessened by the fact that it may not be appropriate to extend custody time limits). The interests of witnesses and complainants will be taken into account as will any impact on public safety. In most cases an adjournment, or even a further adjournment for the same reason, will be the right answer. The more serious the case, obviously, the more likely this is to be true. It is to be hoped that failures to attend trials by advocates in the most serious cases will be rare and, where they happen, explicable by things like sudden illness rather than double booking. It is almost inconceivable that such cases will be terminated by the refusal of an adjournment simply on the ground that there is no prosecution advocate.

48. It is worth identifying the route by which the refusal of an adjournment because no advocate has attended or is imminently available to prosecute the case may terminate a trial on indictment. This will involve two decisions:

i) A refusal to adjourn a trial;
ii) The entry of a verdict of not guilty under s. 17 of the Criminal Justice Act 1967 ("s. 17").

49. Section 17 provides as follows:-

> "***17. Entry of verdict of not guilty by order of a judge.***
>
> *Where a defendant arraigned on an indictment or inquisition pleads not guilty and the prosecutor proposes to offer no evidence against him, the court before which the defendant is arraigned may, if it thinks fit, order that a verdict of not guilty shall be recorded without any further steps being taken in the proceedings, and the verdict shall have the same effect as if the defendant had been tried and acquitted on the verdict of a jury or a court."*

50. In our judgment, where the prosecution requires an adjournment because it cannot prosecute the case unless one is granted, there is an implied proposal to offer no evidence if that adjournment is refused. Often that consequence will be acknowledged explicitly in order to underline the importance of the application, but it will always be there by implication.

51. Although this approach has not been articulated in precisely this way before, as far as we have been able to discover, there are some instances in past cases where s. 17 has been considered in broadly similar circumstances:see *R v Clarke* [2007] EWCA Crim 2532; *R v B* [2014] EWCA Crim 2078; and *R v Buttigieg* [2015] EWCA Crim 837. These authorities are not inconsistent with our approach but supportive of it.

52. In *R v Clarke* the Crown Court refused to adjourn the trial of an indictment including an allegation of rape because the complainant had refused to attend, having repeatedly said she did not wish to support the prosecution. She could not be found and there had been previous adjournments of trials, with juries discharged, because of her conduct. This is a very different factual situation from the non-attendance of prosecution counsel. At [28] Sir Igor Judge P, giving the judgment of the Court of Appeal, gave these reasons for finding that the refusal of the adjournment was a terminating ruling against which an appeal may lie to this court:

> "*Section 74 [of the Criminal Justice Act 2003] therefore defines the 'ruling' in very wide terms, and this provides the answer. Whatever else it may be, a ruling on whether to grant an adjournment is a judicial decision, and in this particular case its effect, unless successfully appealed, would have been to require the prosecution to offer no further evidence thus in effect terminating the trial. The ruling made by Judge Milmo, therefore, was a terminating ruling, and the answer to the first question is 'yes, it can' and the prosecution's right to appeal applies to his decision.*"

53. At [21] Sir Igor articulated the consequences of the refusal of the adjournment for the prosecutor in these terms:

> "*The Crown was offered a stark choice: it had to choose either to offer no evidence against the defendant or to seek to appeal the decision of Judge Milmo Q.C.*"

54. In other words, the effect of the refusal of the adjournment was to require the prosecution to offer no evidence. This was why the prosecution was willing to give the necessary undertaking that the defendant should be acquitted in their appeal against that refusal was not successful. In *R v B* the court refused leave to appeal because it had no jurisdiction to entertain the prosecution appeal under s. 58 of the Criminal Justice Act 2003. The prosecution had failed to comply with the statutory requirements for invoking that jurisdiction. The comments of the court about s. 17 are therefore of limited weight, but the court did accept that a judge could enter "not guilty" verdicts after refusing an adjournment:

> "*18. We see no merit in the applicant's argument that "section 17 Criminal Justice Act 1967 had no application" in order to seek to avoid the jurisdictional point. This was not a case of a judge "jumping the gun" (See R v Mian [2012] 2 Cr App R 9, at paragraph 30). The ruling in issue is the judge's refusal to adjourn the case at all. The fact that the prosecution did not formally concede the case does not disenfranchise the judge from entering verdicts in the absence of evidence. To argue otherwise would permit a prosecutor to sit on his hands in defiance of any adverse ruling to the prosecution which would have the effect of terminating the case.*"

55. In *R v Buttigieg* the court addressed a number of issues. The significant feature of the case in the present situation is that the court did not criticise a trial judge who had ruled that it would not be fair to continue with the trial if the prosecution witnesses were absent, which they were, and therefore decided to enter verdicts of not guilty. The criticism was not that he had no power to do this, but rather that he failed to do it by the use of clear words in open court. It is implicit in that criticism that the judge did have the power which he had failed to exercise in a valid way.

56. It may be thought that the existence of this power should mean that the prosecution appeal in this case should fail, because the judge achieved an appropriate outcome by an inappropriate route. We reject that approach. In holding that the prosecution was an abuse of process and then staying it, the judge focussed only on the conduct of the prosecution and did not take into account all the other factors relevant to the exercise of the power to adjourn criminal proceedings. Had he refused to adjourn the case, and had the prosecution appealed, we would have been reviewing an entirely different decision. Nothing in this judgment should be taken as indicating whether or not the judge should have refused an adjournment on the facts of this case.

A practical point

57. When refusing an adjournment in circumstances where that will be terminating ruling, the court must take steps to ensure that the prosecution is able to consider an appeal to this court. Necessarily, there will be no trial advocate present in cases of this kind, and fairness requires that the refusal is communicated to the prosecution in such a way that it can either give notice of its intention to appeal immediately after the ruling, or to seek an adjournment to allow it to consider doing so as required by CrimPR 38.2. If the prosecution, having had a fair opportunity to do so, does not give notice of its intention to appeal accompanied by the acquittal undertaking, that will be the moment at which the court should enter not guilty verdicts under s.17. That power will be validly exercised whether or not the prosecution explicitly "proposes to offer no evidence" (to echo the words of s.17).

Conclusion

58. For all these reasons, the appeal is allowed. The Terminating Ruling is reversed. It was based on mistakes of fact; involved an error of law and principle and was a ruling that it was not reasonable for the judge to have made.

59. We order a resumption of the proceedings in the Crown Court, with the case to be listed as a fixed trial on the first available date.