



**The Rt. Hon. Lord Justice Thomas**  
*Senior Presiding Judge for England and Wales*

**To all Presiding Judges, Resident Judges, Chairmen of Area Judicial Forums, Bench Chairmen, the Chief Magistrate, Justices Clerks and the Magistrates Association**

5 May 2006

## **BAIL AND PROCEEDING IN ABSENCE**

May I trouble you in relation to various issues relating to bail and proceeding in absence?

### **1. Obtaining a means of contact**

A pilot scheme is currently taking place in magistrates' courts in four criminal justice area areas, Devon and Cornwall, Inner London, Thames Valley and Wiltshire, to assess the effectiveness of telephoning defendants to remind them to attend on their trial date. Another pilot will shortly be underway on the Northern Circuit using texts. As most use text or telephone as the primary means of receiving information, this is undoubtedly a better way than sending a letter in a brown envelope. It should be appreciated that these are only reminders and do not in any way discharge the defendant from his obligation to attend when originally told to attend.

However, as is obvious, this can only work if the defendant provides his telephone number and ensures that, if it changes, the court is informed. As a matter of routine, most courts obtain this when the usher asks for contact details outside the court or the legal adviser seeks it in the court.

Where a defendant is reluctant to provide a telephone number and the court considers that conditions are necessary to secure his attendance, the court can consider making as a condition of bail the provision of a telephone number (and notifying the court of any change or of the fact that he/she cannot be contacted on that number). In the usual case, where a scheme to remind defendants by telephone or text is in place, the provision of a number would obviously be a condition that would assist in ensuring that the defendant surrenders to custody.

### **2. Tagging**

There was at some stage doubt as to whether tagging could be required as a condition of bail. The Bail Act 1976 was amended to make it clear when juveniles (under 17 year olds, for these purposes) may be made subject to such a requirement. However, it is now clear that tagging can be imposed as a condition of bail without specific legislative provision.

On 5 September, HMCS provided a note about this (reference BI/241/09/05). It was pointed out that in the past there may have been concern about whether the resources were available for a greater use of tagging on bail, should courts choose to use this option. They made it clear that recent changes to the electronic monitoring contracts meant that tagging is not as expensive as previously and resources were available for greater use of

tagging. The assumption which was made by the Home Office was that the increase in resources would cover tagging used as an alternative to custody and not as a measure in every case.

I am taking the opportunity of writing to you about telephone or text reminders to mention this issue. It is obviously a matter for each Court to consider whether a remand in custody is appropriate where the conditions of the Bail Act are met or whether the objectives can be achieved by imposing on a defendant a curfew backed by electronic monitoring as an alternative to such a remand.

If a Court does decide to use a curfew backed by electronic monitoring, it will be important to consider including in the conditions of bail a condition that it is the responsibility of the defendant to gain the approval of the court for the designated bail address to be changed.

If confidence is to be maintained in the use of tagging, it is clearly necessary that you are satisfied that the equipment will function correctly and cannot be removed. The National Audit Office recently published a report on the electronic monitoring of adult offenders. They carried out tests of the electronic monitoring equipment and technology and found them to be robust and reliable. The tagging contractors would be ready to attend meetings to explain the tagging technology and procedures

It is also essential that there are proper arrangements for breaches to be reported immediately to the police and that any defendant found in breach to be brought before the court at the earliest opportunity. The CPS and ACPO have both assured me that they will take such vigorous action in respect of anyone who breaches his conditions.

### **3. Bail Act Offences**

As you know a survey was undertaken over a two week period in the autumn in all Courts on the way in which breaches of bail were dealt with. The survey results should be treated with some caution, but they indicated that 86% of defendants who breached bail were charged with Bail Act offences; of those convicted, 80% were sentenced straight away and 93% of those were given a separate penalty.

The survey showed that 31% were fined, 27% given a day's detention in court, 14% given a consecutive custodial sentence, 12% given a community sentence and 5% given a custodial concurrent sentence. As you also know, the Sentencing Guidelines Council is currently consulting on sentences for Bail Act Offences.

The survey indicated, somewhat surprisingly, that of those re-bailed, (56% of defendants) were re-bailed on exactly the same conditions. When the offender is to be re-bailed, the court must always consider whether the conditions need strengthening and give reasons for its decision as to continuing the existing terms or strengthening the terms, such as by adding a tagging condition or requiring a surety or security. If a defendant has failed to surrender to bail, it will usually only be in the unusual case that a defendant will be re-bailed on the same terms

### **4. Trials in absence**

As you know the survey also sought to establish whether trials were proceeding in absence and the reasons given for proceeding or not proceeding in absence.

The survey found that about half the trials went ahead in the absence of the defendant in the Magistrates Courts. In a significant number of cases the prosecution were not ready to proceed. The other principal reasons why trials did not were (1) failure to notify or late notification to the defendant of the hearing date and (2) illness.

In the Crown Court, the number of case where the Court proceeds in absence is increasing year on year, but the survey showed numbers are much lower than in the Magistrates Courts. In *O'Hare* [2006] EWCA Crim 471 the Court observed:

“A judge of the Crown Court should not be reluctant to hear a case in the absence of the defendant merely because the charge is a very serious one.”

The Court of Appeal can, as in *O'Hare*, always hear evidence from a defendant convicted in his absence who claims he has a justifiable reason for absence which he did not communicate to the trial court.

Steps are being taken to ensure that the defendant is given proper notice in the Magistrates Courts and to ensure that in both the Crown and Magistrates Courts, the oral warning the defendant is given is reinforced by a card which warns the defendant that the trial may proceed in his absence if he does not attend. The CPS is also taking steps to ensure that the prosecution is ready to proceed in the absence of a defendant.

#### **5. Warning letters in place of warrants backed for bail**

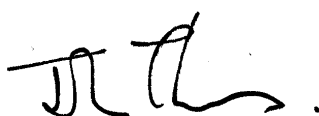
In cases where (1) a defendant does not attend, (2) the court decides not to proceed in absence and (3) the court is considering issue of a warrant backed for bail (which are likely to be uncommon cases), a court should consider whether it is better to send a letter to the defendant directing him to attend and warning him of the consequences of non attendance, instead of issuing a warrant backed for bail. This is because there may be little to be gained by the issue of a warrant backed for bail in such circumstances. Furthermore its execution is not accorded the highest priority; such warrants are, I understand, sometimes viewed as consuming a disproportionate amount of police resource.

If the defendant does not attend the rearranged hearing without good reason, the court should then consider proceeding in absence or issuing a warrant not backed for bail. Unless there were unusual circumstances, any other course of action would undermine the process.

The letter to the defendant should make it clear that, if the defendant did not attend the rearranged hearing, a court might well proceed in absence or issue a warrant not backed for bail.

#### **6. Evidence of inability to attend through sickness**

Proper evidence must be supplied if a defendant claims he is unwell and unable to attend court; the standard “off-work” or “unfit to work” sick note will generally not establish that a person is too ill to attend court. There should normally be a letter from a doctor expressly stating that the defendant is too ill to attend court; this should be provided to the Court before the date the defendant is due to appear. A letter can be followed up by a phone call from the Clerk or legal adviser to the surgery if the Court has doubts about its validity. Unless there is such evidence, the court should consider proceeding in the defendant’s absence.

A handwritten signature in black ink, consisting of stylized initials followed by a long horizontal stroke.