IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2024/00374/B2
[2024] EWCA Crim 952

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 23rd May 2024

B e f o r e:

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MRS JUSTICE MAY DBE

MR JUSTICE BOURNE

R E X

- v -

A Y P

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Mr T Falkner appeared on behalf of the Applicant Crown

Miss H Douglas appeared on behalf of the Respondent

J U D G M E N T
(Approved)

Thursday 23rd May 2024

LORD JUSTICE HOLROYDE:

1. The respondent to this appeal, to whom we shall for convenience refer as "the defendant", was charged on the indictment with an offence of having an article with a blade or point, contrary to section 139(1) of the Criminal Justice Act 1988.

2. On 19th January 2024, in the Crown Court at Exeter, His Honour Judge Climie ordered the indictment to lie on the file, not to be proceeded with without the leave of the Crown Court or of this court.

3. The appellant, to whom for convenience we shall refer as "the prosecution", applies pursuant to section 57(4) and section 58 of the Criminal Justice Act 2003 for leave to appeal against that order. The Registrar has referred the application to the full court.

4. The proceedings are subject to the statutory reporting restrictions imposed by section 71 of the 2003 Act. For that reason the defendant has been named in the listing of the case not by his true name but by the randomly chosen letters, AYP. We shall return to the issue of reporting restrictions at the conclusion of this judgment.

5. The facts giving rise to these proceedings can be very shortly stated. On 4th December 2023, the defendant went into a Citizens Advice Bureau and said to a member of staff: "Can you tell me who to talk to, I'm hearing voices in my head and they're telling me to kill someone". The police and an ambulance were called. The defendant spoke to the call handler of the Ambulance Service and was asked if he had a knife. He said that he did and produced from his pocket a butter knife, which he handed to a member of staff at the Citizens Advice Bureau.

6. The police quickly arrived. The defendant was arrested for possession of a bladed article in a public place. At the police station he was interviewed under caution. A solicitor was present to assist him. He made a prepared statement in which he said that he was of no fixed abode; that he was carrying the butter knife in his pocket; and that he had gone into the Citizens Advice Bureau because he was hearing voices in his head and wanted to obtain help. He emphasised that he had not threatened anybody either physically or verbally: the knife had stayed in his pocket until he was asked about it, at which point he immediately handed it over. He expressed his belief that the incident was a result of his not taking antipsychotic medication. He said that there was no current plan in place for his mental health. He had recently seen a medical practitioner at an Accident and Emergency Department, and it had been suggested on that occasion that he see a mental health professional, but unfortunately none had been available. The defendant went on to say that he had the knife for the purposes of food preparation (he being homeless), but added that it was partly carried for self-defence. He said that the voices in his head had been telling him to stab someone in the eye. When asked what he would do if released from custody, the defendant said that he would try to obtain another knife and would probably stab someone in the eye. He added that he wanted to be remanded in custody as he did not feel he could be responsible for his actions.

7. Those simple facts have given rise to criminal proceedings which raise a number of issues. We begin by summarising the procedural history. Later on 4th December 2023, the defendant was charged with the offence to which we have referred. At a magistrates' court the following day he entered a not guilty plea and elected trial in the Crown Court. The case was committed for trial to the Crown Court at Exeter. At a plea and trial preparation hearing in that court on 4th January 2024, the judge asked the Crown Prosecution Service ("CPS") to review whether there was a public interest in continuing with the prosecution, and adjourned the matter overnight so that that could be done.

8. On 5th January 2024, in the absence of the reviewing lawyer, a duty lawyer gave instructions to continue with the prosecution. When that position was relayed to the court, the judge adjourned the matter for a further week so that the reviewing lawyer could consider the case. The reviewing lawyer did so and, we are told, also consulted senior colleagues. The decision was made to continue with the case. That was indicated to the judge at a hearing on 12th January 2024. The judge at that stage indicated that he was considering ordering the matter to lie on the file and urged a further review. He adjourned the case for a further week so that that could be done by senior management at the CPS.

9. Such a further review took place and on 19th January 2024 the matter came back before the court. The hearing of the case on that day initially took place during the short period between 14.38 and 14.42. Mr Faulkner, then as now appearing for the prosecution, took part in the hearing via video link. Counsel, Miss Dean, then acting for the defendant, also took part via video link. The short hearing began even before the defendant had been brought up. The judge enquired of Mr Faulkner what was the position. Mr Faulkner replied that, following review by senior CPS representatives, the decision had been made that it was in the public interest for the prosecution to continue. The judge asked whether Mr Faulkner wished to say anything about the possibility of the judge ordering the indictment to lie on the file. Mr Faulkner indicated that his instructions were to seek for the matter to proceed to trial. To this the judge responded:

> "Well, it will not. I will be ordering it to lie on the file. I will indicate the defendant can be released. He has been in custody for a period way beyond any sentence that he would have to serve if convicted … If the Crown seek to re-open it, they may get leave to re-open it, but if it is in front of me, I will then stay it as an abuse of process…"

10. The defendant was then brought into the dock. The judge indicated to him that the prosecution wanted to proceed with the case but he (the judge) had told them that they could not. He went on to say this:

> "… whilst I understand the Crown thinking it is in the public interest, this is a case which is simply wasting the court's time when we have far more important and serious things to do, added to which you have been in custody now for a period beyond any sentence that could reasonably be imposed in the circumstances, should you be convicted. So for those reasons I am stopping the prosecution proceeding. We call it leaving the indictment to lie on the file and you will be processed downstairs by the officers and then released."

The judge then thanked counsel and concluded the hearing.

11. It will be noted that nothing had been said during that four minute hearing as to whether the prosecution wished to appeal against the judge's decision.

12. Thereafter, the judge dealt with an unrelated case. He returned to this case at about 16.27. By this time Mr Faulkner had hurried to court. Neither Miss Dean, nor anyone else representing the defendant was present, and nor was the defendant himself. Mr Faulkner's clerk had emailed the court approximately 45 minutes after the conclusion of the earlier hearing to give notice that an application for leave to appeal would be made. It is clear that the judge had been forewarned of that, because even before Mr Faulkner arrived the judge had engaged in an informal discussion with other counsel who chanced to be present in court as to whether there could be an appeal against a ruling of the kind he had made, in a case which was triable either way. At that point of the debate, Mr Faulkner arrived and was asked by the judge: "Is that what you are seeking, leave to appeal?" Mr Faulkner confirmed that it was. The judge adjourned further submissions on the topic until the next working day, Monday 22nd January, so that consideration could be given to the point which he had raised.

13. On 22nd January, the CPS wrote to the judge explaining in some detail why they wished to proceed with the charge and asking the judge to consider the application for leave to appeal against his order at a hearing later that day.

14. The hearing which thereafter took place was again very short. Mr Faulkner was present, but there was no representative of the defendant. The judge began by saying: "Mr Faulkner, the answer is unsurprising, no." The judge went on to outline the various evidential and legal difficulties which he thought the prosecution would face. He referred to the amount of court time which would be taken if the case were to proceed, and he referred to the length of the period of remand in custody in a case which he felt would not result in immediate imprisonment, even if the defendant were convicted. The judge concluded with these words:

> "The order I have made does not preclude, in the event of a future possession incident, the Crown from seeking to lift the stay, as opposed to an abuse of process stay, which is why I am not necessarily persuaded it is a terminatory ruling and in those circumstances it seems to me it is a proper course for the court to take. We have far more important and difficult matters to be dealing with, and it would not be a useful use of the court's time to allow the case to proceed. However, the public are protected by virtue of the fact there is a stay of the proceedings, rather than a final ruling, and that stay can be lifted …"

15. Turning to the appeal to this court, the grounds of appeal and the extremely helpful submissions of Mr Faulkner on behalf of the prosecution and Miss Douglas, now representing the defendant, give rise to three, and potentially four, principal issues. We preface our consideration of those issues by referring to the relevant provisions of the Criminal Justice Act 2003, and to the relevant provision of the Criminal Procedure Rules.

16. Part 9 of the 2003 Act, not all of which is yet in force, contains provisions relating to

prosecution appeals. Section 57 provides that an appeal under Part 9 lies to this court, but only with leave of the judge or of this court. The key provision for present purposes is section 58 which, so far as is material, provides:

> "**58 General right of appeal in respect of rulings**
>
> (1) This section applies where a judge makes a ruling in relation to a trial on indictment at an applicable time and the ruling relates to one or more offences included in the indictment.
>
> (2) The prosecution may appeal in respect of the ruling in accordance with this section.
>
> (3) The ruling is to have no effect whilst the prosecution is able to take any steps under subsection (4).
>
> (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.
>
> (5) If the prosecution requests an adjournment under subsection (4)(a)(ii), the judge may grant such an adjournment.
>
> …
>
> (8) 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.
>
> (9) Those conditions are —
>
> (a) that leave to appeal to the Court of Appeal is not obtained, and

(b) that the appeal is abandoned before it is determined by the Court of Appeal.

(10) If the prosecution informs the court in accordance with subsection (4) that it intends to appeal, the ruling mentioned in subsection (1) is to continue to have no effect in relation to the offence or offences which are the subject of the appeal whilst the appeal is pursued.

(11) If and to the extent that a ruling has no effect in accordance with this section —

(a) any consequences of the ruling are also to have no effect,

(b) the judge may not take any steps in consequence of the ruling, and

(c) if he does so, any such steps are also to have no effect.

(12) Where the prosecution has informed the court of its agreement under subsection (8) and either of the conditions mentioned in subsection (9) is fulfilled, the judge or the Court of Appeal must order that the defendant in relation to the offence or each offence concerned be acquitted of that offence.

(13) In this section 'applicable time', in relation to a trial on indictment, means any time (whether before or after the commencement of the trial) before the [time when the judge starts his] summing-up to the jury."

17. By section 74 "ruling" is defined as follows:

"'ruling' includes a decision, determination, direction, finding, notice, order, refusal, rejection or requirement".

18. The Act contains no further provision as to the time referred to in section 58(4) for giving the necessary information or making the necessary request. However, rule 38.2 of the Criminal Procedure Rules, made pursuant to section 73 of the Act, states as follows:

"**Decision to appeal**

38.2.— (1) An appellant must tell the Crown Court judge of any decision to appeal —

(a) immediately after the ruling against which the appellant wants to appeal; or

(b) on the expiry of the time to decide whether to appeal allowed under paragraph (2).

(2) 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. We note finally at this stage that sections 61 and 67 of the Act contain provisions as to the powers of this court on determining an appeal; and section 71 contains provisions relating to reporting restrictions.

20. The first issue which arises is whether section 58 of the Act ("section 58") permits the prosecution to appeal against an order that an indictment, or one or more counts in an indictment, should lie on the file, not to be proceeded with without the leave of the Crown Court or the Court of Appeal. In this regard, we note that a ruling which is the subject of an appeal under section 58 is often referred to as a "terminating" or "terminatory" ruling. As the transcript of the discussion in the present case in the Crown Court illustrates, those phrases may perhaps be a convenient shorthand, but they are apt to mislead. The Act itself does not contain either phrase, though counsel tell us that it may be that in the initial Bill, which ultimately became the Act, the phrase did appear, although it was not part of the Act itself.

21. Section 74 defines "ruling" in wide terms. It says nothing which limits its ambit to

rulings which bring an end to a prosecution case. As a matter of common sense, the rulings which are the subject of prosecution appeals under section 58 often will be rulings which, if left to stand, would have the effect of bringing the prosecution to an end. That is because section 58(8), conveniently referred to as "the acquittal undertaking", requires the prosecution to agree that if the appeal is not successful, the defendant will be acquitted.

22. As Hughes LJ (as he then was) put it in [20] of *R v Y* [2008] EWCA Crim 10:

> "… In effect the Crown is bound to accept, as the price of bringing an interlocutory appeal under section 58, the consequence that if it fails the Defendant must be acquitted (as well as the possibility that this Court may order such acquittal on the grounds that it is necessary in the interests of justice to do so). …"

Hence, obviously, an appeal will generally not be brought if the prosecution case is able to continue, notwithstanding the ruling concerned. But if the prosecution is prepared to pay the price required by section 58(8), any ruling within the definition in section 74 may be the subject of an appeal.

23. We recognise that in *R v B* [2009] EWCA Crim 99, the phrase "terminating ruling" was used by the court, but we note that it was there held that even a case management decision may be capable of being a terminating ruling. In any event, we accept Mr Faulkner's submission that it is unnecessary to consider whether the judge's order in this case can or cannot fairly be described as a terminating ruling. Whatever the answer to that question might be, the ruling is plainly within the definition in section 74 of the Act and, the prosecution having given the acquittal undertaking, it can properly be the subject of an appeal under section 58.

24. We do not wish to leave this first issue without repeating what Hughes LJ said later in [20] of *R v Y*:

> "… But whilst the expression 'terminating ruling' may have, and has had, its convenience as shorthand, its use is best avoided when considering how the Act must be construed, for it appears nowhere in the statute. For that reason, we do not think that it is helpful to try to answer the jurisdictional question by asking whether or not the ruling presently in question would bring the prosecution to an end. …"

It is more than 16 years since those wise words were spoken, and we once again emphasise their importance. The present case illustrates the misdirected focus which may result if a phrase which can be no more than a convenient shorthand is given an undue status.

25. The second issue is whether the procedural requirements of section 58(4) and rule 38.2 were complied with. Miss Douglas has very helpfully drawn to our attention a number of cases which are relevant to this issue. In *R v Mian* [2012] EWCA Crim 792, there had been a delay of only about ten minutes between the judge's ruling and prosecuting counsel giving notice of the prosecution's intention to appeal. This court held that in the circumstances of that case the conditions precedent to an appeal had not been fulfilled. At the time, rule 67.1 of the Criminal Procedure Rules 2005 was in force, the terms of which were identical to the present rule 38.2. At [28] the court said:

> "It is clear that either an adjournment must be sought immediately, or the decision to appeal and the acquittal agreement must be notified to the court immediately. In any event, the acquittal agreement must be provided by at latest the time when a decision to intend to appeal is notified. What in this context does 'immediately following the ruling' mean? In our judgment it means there and then and in any event before anything important has happened. We think that it would be going too far to say that it means simultaneously with the conclusion of the ruling, and section 58(3) suggests that the requirement has functional rather than merely temporal bite.

> Otherwise there would be no need for any provision to stop the clock (in the absence of an adjournment). But plainly there is no room whatsoever for temporising. …"

26. That decision, and a number of subsequent cases were referred to by this court in *R v Quillan* [2015] EWCA Crim 538. At [33] Lord Thomas CJ said that what constitutes immediate notice under section 58 in the Criminal Procedure Rules will depend upon the circumstances. He noted that ten minutes was held to be too long in *R v Mian*, but that notice given the day after a ruling had been held to be sufficient compliance in the circumstances in *R v O* [2008] EWCA Crim 463. At [35] the Lord Chief Justice said this:

> "In each case therefore a careful examination of the facts is required to determine whether the prosecution has acted 'immediately' in the context of the case under consideration. Much will depend on the complexity of the case, whether the ruling is oral or handed down and whether the prosecutor has had an opportunity of discussing the position with the alleged victim or other interested parties. In simple cases, such a discussion can well be had, as the CPS guidance suggests, before the ruling. In other cases, where the issues are complex and the ruling complex, time must be afforded for proper consultation; the word 'immediately' must therefore allow time for such consultation. A sensible allowance for the requirements of justice and the practicalities of criminal trials must therefore be made. What the prosecution must not do is to 'temporise' and cause delay except in accordance with s.58(4) and the provisions of Crim PR 67."

27. What then are the relevant circumstances here? Mr Faulkner has explained, candidly, that whilst he might, with hindsight, have immediately indicated that he wished to appeal against the judge's ruling, or, alternatively asked for an adjournment to consider whether to do so, he did not take that opportunity for two related reasons. The first was that he wished to check his instructions with the CPS before committing them to a course of action. The second was that the observation which the judge had just made, about an intention to stay proceedings as an abuse of the process, added an element of additional complexity which Mr

Faulkner was anxious to discuss with those instructing him.

28. Miss Douglas submits that the relevant considerations are these. It was a simple case; the judge's ruling was brief and straightforward; the prosecution had been on notice since 10th January that the judge was at least considering whether to order the indictment to lie on the file, and there had therefore been time for consideration and the taking of instructions. Further, it could not be said that the application to adjourn was made before anything important had happened, because the judge had directed the defendant's release. She points out that if time was needed to reflect on the powers of the court, all prosecution counsel had to do was to ask immediately for an adjournment. She submits that the procedural requirements were not met and that this court has no jurisdiction to hear the appeal.

29. We accept that the matters mentioned by Miss Douglas are all relevant considerations, and we see the force of her argument. As against that, we must have regard to the practicalities of criminal proceedings. At the time when the judge made his order, Mr Faulkner was not present in court and the link was swiftly terminated after the judge's ruling. It seems to us that had Mr Faulkner been physically present, then what would have happened would have been that he would immediately have telephoned the CPS and within minutes would have been seeking an opportunity to address the judge. In the event, Mr Faulkner hastened to court, preceded by a message through his clerk to alert the judge, within about 45 minutes of the ruling, that an application for leave to appeal would be made. We also see force in Mr Faulkner's point that what might otherwise have been a comparatively straightforward ruling had acquired an additional element of complication by the judge's reference to a proposed staying of proceedings as an abuse of the process if the prosecution sought to proceed. We think it was entirely proper of Mr Falkner to want an opportunity to consider with the CPS whether that was a risk they wished to take.

30. In all the circumstances, it seems to us that the indication of an application for an adjournment was made so soon after the judge's order as fairly to be categorised as "immediate". We recognise that in the meantime the judge had explained his ruling to the defendant and had told the defendant that he would be discharged. Nonetheless, in our view, appropriate notice of the application to adjourn was given and this court accordingly has jurisdiction to hear this appeal.

31. That brings us to the third issue. Was the judge's decision, as the prosecution contend, wrong in law (section 67(a) of the Act), or a ruling which it was not reasonable for the judge to have made (section 67(c))? The submissions in this regard have involved some discussion of the nature of the discretionary power of the judge in the Crown Court to direct that an indictment, or a count (or counts) in an indictment, should lie on the file, not to be proceeded with without leave. Authority on the topic is very limited. As Miss Douglas suggests, this is on doubt because the prosecution right of appeal did not exist before the Criminal Justice Act 2003. There does not appear to be any route by which a defendant aggrieved by such an order could appeal against it to this court; and since such an order relates to a trial on indictment, it is not amenable to judicial review: see section 29(3) of the Senior Courts Act 1981 and *R v Central Criminal Court, ex parte Raymond* (1986) 83 Cr App R 94. Moreover, such an order is generally made with the agreement of both parties and in circumstances where neither side is likely to wish to appeal.

32. As to whether the consent of both parties is a necessary pre-condition of the Crown Court having jurisdiction to order an indictment or counts to lie on the file, Mr Faulkner relies on what was said by Lord Pearce in *Connolly v DPP* [1964] AC 1254 at page 1365:

> "… When an order is made by consent of both parties that the indictment shall remain on the file and shall not be prosecuted without the leave of the court, the matter is within the court's

judicial discretion."

33. Miss Douglas responds to that argument by saying that the quotation from Lord Pearce does not unequivocally require the consent of the parties; it merely refers to a situation when there is consent.

34. Although we have been assisted by these submissions, we do not regard this as a case in which it is necessary or appropriate to explore the boundaries of the power to order a case to lie on the file. Such exploration must await a case in which a decision directly upon it is necessary and in which accordingly much fuller submissions can be made. We take that view because in our judgment, and with all respect to the judge, it is clear that his decision was wrong in law and was not one which it was reasonable for him to take. Even assuming that in principle the Crown Court may order an indictment to lie on the file, notwithstanding that one party does not consent to that course being taken, it is in our view clear that the judge was wrong to make such an order in this case.

35. The CPS was the prosecuting authority with the duty and responsibility to make prosecutorial decisions. Its constitutional independence in that role is important and must be respected. The judge was of course entitled to express his own views so that they could be considered and taken into account by the decision maker. He was entitled to do so in strong terms. But, having done so, and his views having been considered, it was not for him to impose his own view as to who should or should not be prosecuted. It is for the prosecuting authority to decide whether or not to prosecute, not for the trial judge.

36. We of course understand and sympathise with a judge's wish to be able to give priority to other, more substantial cases at a time when the Crown Court is under very great pressure of work, and judges, advocates and court officials are working flat out. We also understand the

judge's observations about the likely sentence in this case and the time which the defendant had spent remanded in custody. But those matters had been carefully considered by the CPS, more than once and at a high level. With all respect to the judge, it was not for him to substitute his own opinion for that of the prosecuting authority whose responsibility it is to assess whether a prosecution is in the public interest. Concerns about the length of time the defendant would spend in custody could be addressed by a bail application. Any consideration of whether the prosecution was an abuse of the process would arise, if at all, at a later stage, and was not to be circumvented by the judge simply preventing the prosecution from proceeding even as far as argument on that point. We would add the observation that any application to stay proceedings as an abuse of the process is an invocation of an exceptional remedy and one which will always require careful consideration.

37. We would further add that the terms in which the judge explained his decision, referring to the possibility of an application to remove the stay on proceedings in certain circumstances, may be thought inconsistent with the proposition that a prosecution at any stage would inevitably be an abuse of the process.

38. Finally, whilst, as we say, understanding the frustrations of a judge seeking to cope with busy lists, we are bound to say that the use of the power to order a case to lie on the file cannot properly be used as a means of managing the court list.

39. We have said enough to explain why, in our judgment, the decision cannot stand. It is, therefore, unnecessary for us to consider what might have been a fourth issue: namely whether, if we had concluded that the procedural requirements had not been fulfilled, the court should have gone on to consider whether to treat this appeal as the hearing of an application by the prosecution for this court to order that the case should no longer lie on the file and should instead continue.

40. In our judgement, the decision must be reversed and the Crown Court proceedings must continue. Given the nature of the debate which had taken place in January and the views then publicly stated by the judge, it seems to us that it would be desirable for the matter to be listed not at Exeter, but at a different court venue and before a different judge

41. We therefore reverse the judge's decision ordering that the indictment lie on the file. We order that the proceedings be resumed in the Crown Court at a venue and before a judge to be determined by the Presiding Judges of the Western Circuit.

42. We return finally, as we said we would do, to the statutory reporting restrictions under section 71 of the 2003 Act. We are grateful to counsel for their submissions in that regard.

43. This judgment is anonymised by the use of randomly chosen letters in place of the defendant's name. The judgment is for the most part concerned with matters of law and procedure, which are, frankly, unlikely to be of interest to most persons who are not lawyers, but may be of practical importance to judges and practitioners. We see no realistic scope for prejudice to the fair trial of the continuing proceedings if the judgment in its present form is published.

44. We therefore order that the provisions of section 71 of the Act shall not apply to this appeal, save that nothing may be included in any report which names or otherwise identifies the defendant.

45. We will contact the Presiding Judges, and no doubt the CPS will take steps to arrange for the matter to be listed for mention as soon as practicable.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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