

Covid-19 and the extension of the custody time limit in the Crown Court: A Defence Perspective

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Custody time limits (CTL) were introduced to ensure that defendants in custody would be tried within a reasonable time frame.

Prior to the pandemic, restrictions on the number of sitting days at each court centre had created a backlog of cases and defendants in custody awaiting trial. At the end of March this year trials were abandoned for safety reasons thus increasing the backlog. Last week, at Minshull Street crown court, one of the first trials since lock down was completed. This pivotal case may serve as a very informative reality check on court centre's inability to conduct multiple trials at the same time, for practical reasons. This trial required three court rooms to be used to ensure the safety of the jury and all involved. It appears that multiple jury panels sitting in safe conditions may be impractical in some court centres due to the need for social distancing. Even if logistically possible the number of trials being conducted will be severely limited and this will increase the difficulty of listing cases within their CTL.

The priority for Re-listing cases is at the discretion of the Senior Presiding Judge for the court centre. The criteria for consideration may include the CTL, vulnerability of witnesses, level and seriousness of the case. Trials with estimates of over two weeks, or cases with multiple defendants may be difficult to accommodate.

I would predict a large number of applications to extend the CTL. The defence will be able to contest the application and in any event there will be a 'change of circumstance'. The pandemic will be 'a good and sufficient cause' to re-list. In many cases the fault will not lie with the crown, who will have acted with 'all due diligence and expedition'. Where a defendant is awaiting trial in custody the crown must have already proven the reasons for refusing bail; further offences, interfere with witnesses, fail to surrender etc.

So what guidance is available?

There are 2 main pieces of guidance:

1. There has been the Coronavirus Crisis Protocol for the effective handling of custody cases in the Magistrates and the Crown Court, dated the 7th of April 2020. This deals with the listing of CTL cases, a re-statement of the law and the process of application but does not give assistance as to how to balance the new circumstances of the case and the weight to be attributed to each factor.
2. The Code for Crown Prosecutors Covid-19 and Custody extensions, in cases that will not result in a substantial custodial sentence (mainly magistrates cases).

In the crown court the learned judge has a discretion to extend the CTL. As stated there is a change of circumstance and a formal application for bail could be made at the extension hearing. A balancing exercise has to be performed between the risks presented by the crown if the defendant is bailed, against defence arguments that bail conditions can help protect against the risk factors, the hardship and unfairness to the defendant.

I believe lawyers and the judiciary need further guidance on how to reach this decision to deal with Covid-19, and thereby avoid a 'rubber stamp Approach'. The case of R v Christopher Manning [2020] EWCA CRIM 592 illustrates in part the realities and hardship being endured by those in custody. Paragraph 41 of the Judgement:

"The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence."

The court went on to state that it is well established that courts can take into account the likely impact of a custodial sentence on an offender. The court further commented:

"Those in the Custody are, for example, confined to their cells for much longer periods than would otherwise be the case- currently , 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19."

I believe the case of Manning can be of some assistance in arguing against the application to extend the CTL. Some Judges are extremely proactive in these applications but a consistent and transparent protocol would be of great assistance to those involved in advising and presenting the case.

Some CTL cases are being re-listed for October and beyond. It seems likely, if not highly foreseeable, that some cases may have to be moved for a second time. If the CTL is extended there is a very limited and difficult avenue of appeal by way of judicial review (form N461 or expedited 463). The test is 'Wednesbury Unreasonableness', "it is so unreasonable (or irrational) no reasonable person acting reasonably could have made it." Under these exceptional circumstances parliament could consider a new right to appeal a CTL decision to a high court judge on a factual rehearing.

It is conceivable after an extension is granted that there is an acquittal on part or all of the charges. The crown may offer no evidence for unforeseen reasons or because of witness difficulties (not uncommon in domestic abuse cases).