Court suggests a modern approach should be taken on nullity (R v Stromberg)

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Corporate Crime analysis: Following the Court of Appeal's judgment in R v Stromberg, Paul Taylor QC at Doughty Street Chambers, explains the practical effects of this case for those advising a defendant convicted after what are thought to be wholly flawed proceedings.

R v Stromberg [2018] EWCA Crim 561, [2018] All ER (D) 150 (Mar)

What is a writ of venire de novo? What is its effect and what are the situations that it applies to?

A writ of venire de novo can be issued by the Court of Appeal (Criminal Division) to set aside a conviction and order a fresh trial where the proceedings have amounted to a total mis-trial or a nullity. The statutory basis for the exercise of this power is section 53(2)(d) of the Senior Courts Act 1981.

The writ declares the original proceedings null and effectively re-starts the matter with an order for new trial. It is not a 'retrial' because the first proceedings are declared to have been so flawed that they did not amount to a 'trial'. (Consequently, the new trial does not breach the rule against double jeopardy.) This should also mean that the original 'conviction' cannot be 'quashed' because it was never a conviction. However, the Court of Appeal (Criminal Division) has not been consistent in its use of the terms 'nullity' and 'unsafe', sometimes even using both terms in the same judgment. (See for example *R v Nightingale* [2013] EWCA Crim 405, para [17].)

The Court of Appeal (Criminal Division) has issued this writ where, for example, a guilty plea was entered after pressure had been placed on the defendant or counsel by the judge, where there was personation of a juror, or the judge was unqualified to act as such.

What are the practical implications of this case?

The practical effects of this case for those advising a defendant convicted after what are thought to be wholly flawed proceedings are threefold.

First, the correct method of challenge is to launch an application for permission to appeal under Part 1 of the Criminal Appeal Act 1968 (CAA 1968) and to seek a writ of venire de novo as a remedy. This means that the usual appeal procedures apply, including time limits for lodging and renewal. (If the appeal route has been exhausted an application to the Criminal Cases Review Commission may be an option.) There is no alternative route outside of this framework to seek a writ as a freestanding application.

Second, the Court of Appeal (Criminal Division) remarked incidentally that in future cases the concept of nullity should be replaced with a fair trial test with an emphasis on 'safety'. In practice this is likely to mean that the strengths and weaknesses of the cases at trial will need to be analysed in detail to identify the potential impact of the procedural flaw on the fairness of the trial, rather than just quantifying the extent of the flaw.

Third, the proposed move from a finding of 'nullity' to one of 'unsafe' would also affect the ultimate disposal. If the conviction is unsafe and is quashed, the court can substitute an alternative verdict and re-sentence or order a retrial; if the proceedings were a nullity it can only issue a writ of venire de novo and order a fresh trial or set the matter aside without ordering anything further (see R v

Booth and ors [1998] Lexis Citation 3181, [1998] All ER (D) 620 and R v McCarthy [2015] EWCA Crim 1185, [2015] All ER (D) 113 (Jul)).

What was the background?

In 2008, Paul Stromberg was convicted of conspiracy to commit an offence outside the UK (a planned import of cocaine) under section 1A of the Criminal Law Act 1977 (CLA 1977). In 2008, Stromberg applied for leave to appeal against conviction (on different grounds to those before the Court of Appeal (Criminal Division)). This was refused by the single judge. The application for leave was never renewed.

The present 2016 proceedings related to CLA 1977's requirement that the consent of the Attorney-General be obtained prior to proceedings being instituted. At the time of Stromberg's trial this was understood to mean prior to the plea and case management hearing (PCMH).

In Stromberg's case consent was given after the magistrates' court had sent the case to the crown court but before the PCMH. However, in *R v Welsh and others* [2015] EWCA Crim 1516, [2015] All ER (D) 76 (Sep), the Court of Appeal (Criminal Division) decided that an indictable only offence is 'instituted' when it is sent from the magistrates' court to the crown court, so the consent is required before that point and failure to do so invalidated the proceedings which followed.

In October 2016, following *Welsh*, Stromberg applied to the Court of Appeal (Criminal Division) for a writ of venire de novo. He argued that the Attorney-General's consent had not been given in time and so his conviction was a nullity. Crucially, the application was not put forward as a renewed application for leave to appeal (over eight years out of time), but as a freestanding application outside CAA 1968, s 1.

The case raised questions concerning the scope, availability and procedure surrounding the issue of a writ of venire de novo, and whether the writ could be sought only 'as part of an application for leave to appeal against conviction (and then the subsequent appeal)…or whether it can be made as a freestanding application, and thus unconstrained by the need for leave or any time limits'.

What did the court decide?

The Court of Appeal (Criminal Division) concluded that an application for an order to issue a writ of venire de novo cannot be made as a free-standing application. The issue of such a writ is a remedy available upon an appeal against conviction, subject to the ordinary rules relating to time limits and leave.

Although it was not necessary for the Court of Appeal (Criminal Division) to specifically decide the merits of the 'nullity' argument, it stated that it did not think that the *Welsh* case finally determined the impact of the complaint regarding the impact of the Attorney-General's late consent. Moreover, the Court of Appeal (Criminal Division) suggested that in future a more purposive approach should be taken to complainants based on technical procedural breaches, relying on the comments of Lord Thomas CJ in *R v Williams* [2017] EWCA Crim 281:

'We would hope that in the future the court would take the view that the highly technical law in relation to nullity is an outdated concept that should no longer prevail, that a modern approach should be taken, which is to decide on the fairness of the trial, the prejudice to a defendant and the safety of the conviction.'

Paul Taylor QC specialises in criminal appeals. He appears frequently before the Court of Appeal (Criminal Division), and has extensive experience of drafting submissions to the Criminal Cases Review Commission. He has also appeared in capital and other cases before the Privy Council. Paul

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