Why we need to go slow on some court hearings and abandon others

What compromises do we need to make and who should pay the price? The courts are faced with two major crises – the risk of covid in courts and the growing backlog of court cases. The backlog is not caused by the pandemic, but has been exacerbated by it, partly because the number of hearings was drastically reduced in the first lockdown and because the need for social distancing has led to few Crown Court trials being listed since then.

Inspectors of the CPS, Police, Probation and Prisons painted a bleak picture of the problems created by the court backlog when giving evidence **to the Justice Select Committee** the other day. “What that backlog means for the CPS is a very large increase in the number of live cases that each individual eye has to deal with. These are not cases that, once they are looked at, can be put aside until they are listed for trial. It does not happen that way. The CPS is under an obligation to keep every file under review. Things do change, and as time passes victims may lose interest in supporting the prosecution. They have to deal with questions from defence solicitors and, therefore, answer questions from the police…These are continually live cases and they are struggling” (Kevin McGinty, Chief Inspector of the CPS). So delay is causing extra work for the police and the CPS.

As Kevin pointed out, the only way of resolving the current crisis is either to delist cases or to hear them. Various organisations and individuals have made radical suggestions to hear more jury trials – from doing away with juries altogether, to reducing the size of juries, to excluding some cases from jury trial altogether. Crown Court trials are particularly difficult to run in the traditional way because many people are involved and lots of extra space is needed for social distancing.

So how will or could the court backlog be reduced without jeopardising the right to trial by jury and other fair trial rights?

1. Lots of cases will fall by the wayside because of the backlog. This is not a positive scenario, but pretty inevitable. The percentage of crimes where the victim does not support prosecution **doubled** in the five years before the pandemic to nearly a quarter. Many victims who had agreed to cooperate also changed their mind as the months wore on. The court backlog will increase the rate of victim withdrawal: “The principal concern is that serious cases have been cancelled at short notice, causing witnesses, victims and suspects significant difficulties. Our concern about the lack of timely consequences could very well mean that cases fall apart...People are unwilling to give evidence and just want to move on with their lives” (Sir Tom Winsor, Chief Inspector of police). It’s terrible that cases will collapse for this reason, but you can’t criticise witnesses for wanting to get on with their lives, rather than wait two years + for a court case. Any desire victims might have had for retribution is likely to diminish with time.

2. I hope the CPS will triage cases better and produce disclosure earlier. The longer the CPS take to disclose, the more time all involved may waste on cases which are no-hopers. Too many cases collapse because the prosecution evidence isn’t, and was never, strong enough (21% of Crown Court trials are ineffective). The CPS could also try to persuade the police to use out of court disposals more often. There are many cases currently being heard in magistrates’ courts which are not worthy to come before a court of law in a pandemic – where often vulnerable people who admit their guilt are sentenced for shop-lifting or criminal damage. Of course these people shouldn’t be “let off”, even now. But let’s save the courts for the most serious crime. Minor offences should be dealt with via out of court disposals or diversion to services. Sir Tom Winsor depicted the use of out of court disposals as a necessary evil, but they are often far more effective in reducing reoffending than court disposals.

3. Reduce the use of the dock and of remand. The courts of England and Wales are keener on using the secure dock than almost anywhere in the

world. Those on bail are asked to spend their whole Crown Court trial in the dock, and everyone who has been remanded is required to wait in court cells and appear in the dock. The use of the dock makes it more difficult for defendants and security staff to socially distance; so makes a court case more difficult to manage in the pandemic. Why do we insist on many low risk defendants (including children) having to use the dock? Let's reduce its use and thus increase the number of cases that can be listed, particularly in non-traditional courts. And let's also reduce remand – at least two thirds of those on remand are released by the court via acquittal or sentence. Remand creates pressure on the system since remand prisoners need to be prioritised for listing (quite rightly), need to liaise with their counsel from prison (practically impossible at the moment) and occupy cramped court cells.

So I'd take cases out of the system (via better triaging) and try to get more cases heard through using a wider variety of "non-secure" courts. But I also fiercely oppose other ways the backlog is being eased:

1. "Video remand" courts. Forcing the police to run courts from police custody does nothing to reduce the backlog, but a lot to prevent defendants effectively participating in their first magistrates' court hearing. **Recently a court decreed** that no one should be sectioned as a result of a virtual assessment. But defendants who appear on video from police custody (many of whom have hidden mental health and/or learning difficulties) are frequently sentenced to imprisonment without anyone involved in that decision seeing them face to face. The answer to reducing footfall of those remanded by the police post charge is for the police to reduce the number they remand. Of all those detained by police after being charged (because they are deemed to pose too high a risk to release), at least half are released by the court into the community on bail/sentence or for some other reason.

2. Summary trials held partly on video or on the phone. Keen to keep the wheels of justice going, and under pressure from lawyers who (understandably and quite rightly) wish to appear remotely, HMCTS and the

> judiciary have done a volte face in their readiness to have parties appear remotely. But in so doing they have gone further than even lawyers would probably want - the judiciary have permitted summary trials for SJP offences (eg for non-payment of the licence fee) to be held wholly on video. Yet the defendants in these cases are nearly always unrepresented and so particularly likely to struggle without in-person support from court staff. And holding trials wholly on video is untested in this country. The **judicial guidance** also says that witnesses can give evidence in summary trials on the telephone. This means no one will be able to check the witness' identity, nor whether they are being coerced by someone else. Had he known, Sir Tom Winsor would have balked at these new backlog-busting provisions. At the Justice Committee he recoiled "in horror at the idea of trials being carried out remotely. How can a jury or, in a summary case, a judge determine the credibility of a witness via a video screen when there is contested evidence? Remote hearings and trials can keep you safe from the pandemic, but they do not keep you safe from injustice".

Unfortunately in our panic to keep the wheels of justice turning, we are failing to shield defendants and witnesses from injustice.