Court's jurisdiction to order a writ of venire de novo (R v Stromberg)

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Corporate Crime analysis: Following the Court of Appeal's decision in R v Stromberg, Jonathan Elystan Rees, barrister at Apex Chambers and 5 Paper Buildings, explains why, if a person wishes to argue that his conviction is invalid and should be annulled, they can and must do so within the context of an application for leave to appeal.

Analysis

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

What are the practical implications of this case?

Despite observations that there is now (or at least should be) a single basis for allowing an appeal under Part I of the Criminal Appeal Act 1968 (CAA 1968), namely that the Court of Appeal thinks that the conviction is unsafe (see *R v Williams (Malachi)* [2017] EWCA Crim 281, [2017] 4 WLR 93 per Lord Thomas at para [33]), this case appears to confirm that there are two distinct remedies available on appeal under CAA 1968, s 1:

• quashing a conviction, and

• setting aside and annulling a conviction

with two distinct tests as to whether the appeal will be successful. CAA 1968, s 2, ie the safety test', is concerned only with the circumstances in which the Court of Appeal may quash the conviction.

Where the earlier proceedings were a nullity, instead of seeking to invoke the safety test under CAA 1968, s 2, a convicted person can appeal under CAA 1968, s 1, on the sole ground that the proceedings were invalid and that the conviction should be set aside and annulled accordingly, without reference at all to CAA 1968, s 2 and the safety or otherwise of the conviction. However, where an appeal is out of time, the approach to an extension of time to apply for leave to appeal will be the same, whether the applicant seeks to have their conviction quashed on the basis that the conviction is unsafe or whether the applicant seeks to have their conviction set aside and annulled on the basis that it is invalid.

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 is a historical writ, the effect of which is to set aside and annul the conviction and judgment of the Crown Court and order a new trial. The existence of the writ can be traced back to before 1848, but the power to issue it now rests with the Court of Appeal (Criminal Division) (see section 53(2)(d) of the Senior Courts Act 1981 (SCA 1981)).

The writ will be issued in narrow circumstances only—namely, where there has been no trial validly commenced or, where validly commenced, the trial had come to an end without a properly constituted jury ever having returned a valid verdict (that is, where the proceedings in the crown court were 'invalid' or a 'nullity').

What was the background?

In 2008 the applicant, Stromberg, had been convicted of conspiracy to commit an offence outside England and Wales, an offence which requires the consent of the Attorney-General before the institution of proceedings. That consent was not granted until after proceedings had commenced.

In *Welsh*[2015] EWCA Crim 1516, [2015] All ER (D) 76 (Sep), on an application for an extension of time to apply for leave to appeal, the Court of Appeal held that the effect of that failure was to invalidate the proceedings that followed. However, the court also refused to extend time on the basis that the applicant in that case could not demonstrate that he had suffered substantial prejudice as a result (by implication rejecting the proposition that the fact that a defendant was serving a term of imprisonment as a result of invalid proceedings was prejudice enough). As far as the researches of both applicant and respondent in *Stromberg* could identify, that was the first time that the Court of Appeal had refused to order a remedy on the basis that the applicant was out of time and/or could not demonstrate prejudice, where proceedings would otherwise have been found to have been a nullity.

The question raised by the applicant in *Stromberg* was whether CAA 1968, Pt I, and the time limits to appeal set out therein, properly applied to an application for a writ of venire de novo on the ground of nullity at all. Relying upon observations of Lord Diplock in *R v Rose* [1982] AC 822, [1982] 2 All ER 731, it was argued that where there has been no valid verdict of guilty or not guilty by the jury, CAA 1968, Pt I has no application, since there would have been no conviction within the meaning of that Act.

The jurisdiction to issue a writ of venire de novo is thus separate from the appellate jurisdiction under CAA 1968, Pt I (deriving instead from SCA 1981, s 53(2)(d)), and the time limits set out in CAA 1968, Pt I do not apply when the Court of Appeal is asked to exercise its jurisdiction to order a writ of venire de novo.

What did the court decide?

Although 'ingenious', the court disagreed with the applicant's argument. The court held that the jurisdiction of the Court of Appeal to consider a conviction is a single jurisdiction, which is exercised when a person applies to the court for leave to appeal.

Once the application has been made and leave granted, the court will consider whether to allow the appeal or to uphold the conviction. It may determine that it cannot uphold the conviction because the conviction is null and void, and the court may then order the issue of a writ of venire de novo. It is not then exercising some separate jurisdiction—rather it is dealing with the position by way of a particular remedy.

If a person wishes to argue that their conviction is invalid and should be annulled they can, and must, do so within the context of an application for leave to appeal. By virtue of CAA 1968, s 1, they are thereby subject to leave provisions and the associated time limits. The annulment of a conviction is a remedy distinct from quashing a conviction under CAA 1968, s 2, but can only be provided by the Court of Appeal (Criminal Division) considering an appeal against conviction.

Jonathan Elystan Rees is one of the leading juniors at the criminal Bar and is known for his record in heavyweight and complex fraud. He has appeared in leading cases on the ambit of preparatory hearings and interlocutory appeals, the scope of conspiracy to defraud, the jurisdiction to issue a voluntary bill of indictment, the jurisdiction to order costs in the Crown Court on the basis of unnecessary or improper acts by another party, and the handling of digital material subject to legal professional privilege. In Stromberg, Jonathan was instructed by Bowden Jones Solicitors.

Interviewed by Kate Beaumont.

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