LAW ANGELS

CRIMINAL PRACTICE

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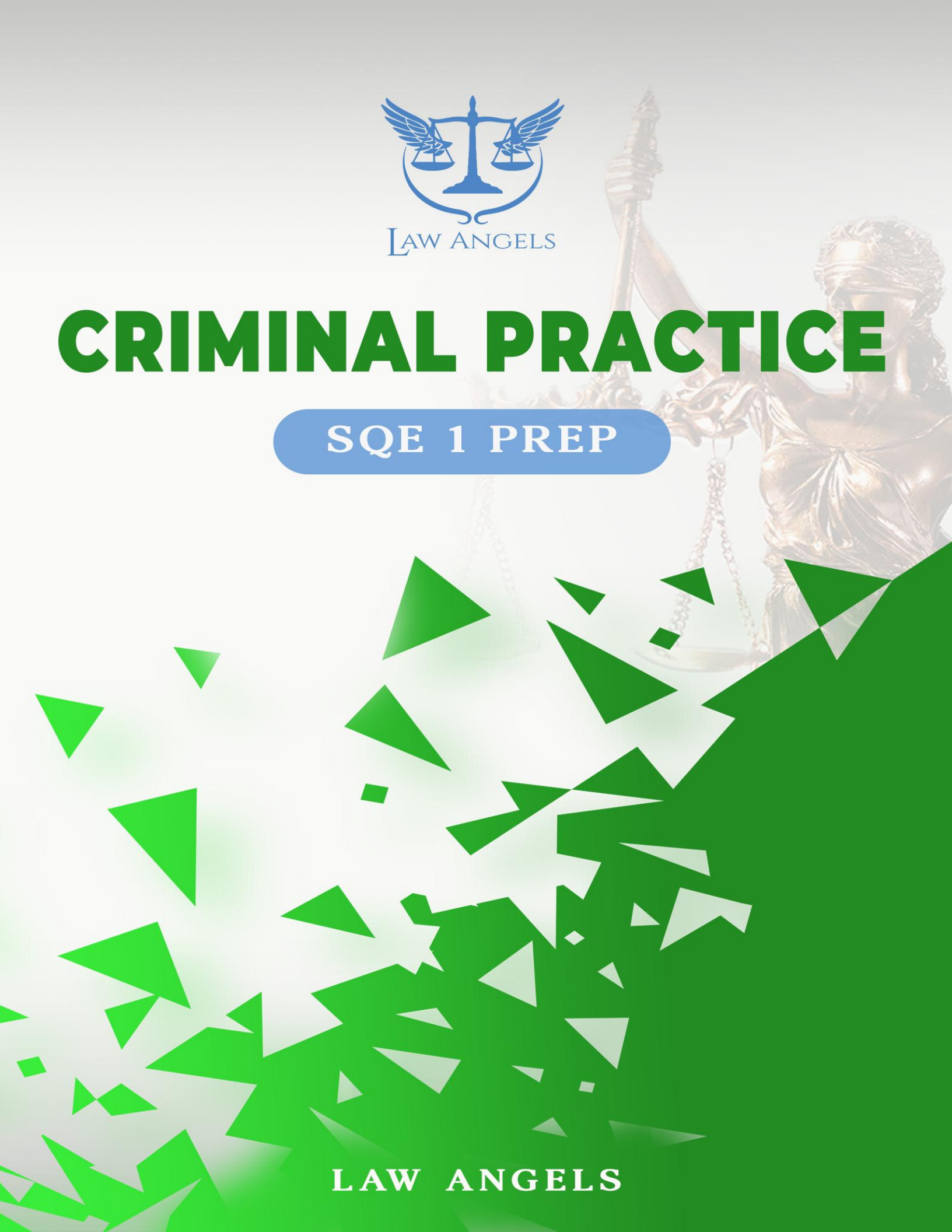

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CRIMINAL PRACTICE

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PREFACE

Criminal practice is the dynamic and demanding arena where the principles of criminal law meet the realities of the justice system. It is a field defined by urgency, strategy, and the profound responsibility of safeguarding individual liberty against the power of the state. This textbook is designed to be your essential guide through this fast-paced world, from the first police station call to the final verdict in the Crown Court.

Our approach is built on a simple belief: to excel in criminal practice, you must be both a diligent technician and a strategic advocate. We have therefore structured this text to provide more than just a description of legal procedures. It offers a strategic roadmap, deconstructing each stage of the criminal process to reveal the tactical decisions, evidential rules, and professional conduct considerations that define successful practice. You will find a consistent focus on client care, defence strategies, disclosure obligations, and the art of effective advocacy.

The SQE1 assessment and your future career demand a deep, practical understanding of criminal litigation. This book is tailored to that challenge. We integrate the *Criminal Procedure Rules (CrimPR)*, the *Police and Criminal Evidence Act (PACE) 1984,*and key case law not as dry legal texts, but as the essential tools of the trade. Practical precedents, bail application tactics, and case studies based on common offences are woven throughout to transform your knowledge into actionable skill.

Our goal is to equip you with the confidence and competence to protect your client's interests at every turn. Whether you are advising at the police station, navigating the complexities of disclosure, or preparing a sentencing plea, the following pages will provide the strategic insight, procedural clarity, and ethical grounding you need to succeed.

Welcome to criminal practice. The stakes could not be higher, and the role of a criminal solicitor has never been more vital.

Law Angels

ACKNOWLEDGEMENTS

The development of this textbook was a significant endeavor, and we extend our sincere gratitude to the collective efforts that made this publication possible.

At Law Angels, we are fortunate to be supported by a dedicated team whose commitment to legal education and excellence is the cornerstone of our work. The collaborative spirit, legal expertise, and tireless effort of our entire organization were instrumental in shaping this text from concept to completion.

We also extend our appreciation to the broader legal community. The insightful feedback from our academic and practitioner reviewers greatly enhanced the accuracy and clarity of the material. Their contributions, offered in a spirit of scholarly collaboration, have been invaluable in ensuring this resource meets the rigorous demands of the SQE curriculum.

We are also thankful for the unwavering support from our personal networks, whose understanding provided the foundation that allowed this project to thrive.

It is our privilege at Law Angels to contribute to the education of future solicitors, and we hope this text serves as a reliable guide for the next generation of legal professionals.

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GLOSSARY OF KEY TERMS

A

Admissibility of Evidence: The legal test that determines whether certain evidence can be presented to the court. Evidence obtained unfairly or in breach of a statutory rule may be excluded under *section 78 of the Police and Criminal Evidence Act (PACE) 1984* if it adversely affects the fairness of the proceedings.

Adverse Inference: A conclusion that a court or jury may draw against a defendant who fails to mention, when questioned under caution, a fact later relied upon in their defence, under *sections 34–37 of the Criminal Justice and Public Order Act 1994*.

Appropriate Adult: A responsible adult, such as a parent, guardian, or social worker, required to be present during police interviews of juveniles or mentally vulnerable suspects to ensure fair treatment and effective communication.

B

Bail: The temporary release of an accused person pending trial or appeal, subject to conditions set by the court to ensure their attendance. Governed by the *Bail Act 1976*, it operates under a presumption in favour of liberty unless exceptions apply.

Burden of Proof: The responsibility of a party, usually the prosecution, to prove the facts of a case. In criminal proceedings, guilt must be established beyond reasonable doubt as laid down in *Woolmington v DPP (1935)*.

C

Case Management: The process by which the court actively manages criminal proceedings to ensure efficiency, fairness, and compliance with disclosure and procedural rules.

Charge: The formal accusation that a person has committed a criminal offence, marking the transition from investigation to prosecution.

Code C (PACE 1984): The Code of Practice governing the detention, treatment, and questioning of persons by police officers. It safeguards suspects' rights during interviews and custody.

Code D (PACE 1984): The Code of Practice governing identification procedures, including video identification, parades, and group identifications, to ensure fairness and reliability of witness evidence.

Conditional Bail: Bail granted subject to conditions designed to mitigate risks such as reoffending or absconding, including curfews, residence requirements, or electronic tagging.

Confession: An admission of guilt by a suspect, governed by *sections 76–78 of PACE 1984*. It must be voluntary and reliable to be admissible, and may be excluded if obtained through oppression or in circumstances likely to render it unreliable.

Continuing Act Doctrine: The legal principle allowing coincidence between actus reus and mens rea to be established when the act extends over a period of time during which the mental element arises.

Crown Court: The higher criminal court in England and Wales dealing with indictable-only offences and appeals from the magistrates' court.

D

Disclosure: The legal duty under the *Criminal Procedure and Investigations Act 1996* requiring the prosecution to reveal material that may undermine its case or assist the defence.

Duty Solicitor: A qualified solicitor available to provide free legal advice and representation at the police station or magistrates' court to individuals who do not yet have their own solicitor.

E

Either-Way Offence: An offence that may be tried either in the magistrates' court or the Crown Court, depending on the seriousness of the case and the defendant's election for jury trial.

Evidential Burden: The responsibility on a party to produce sufficient evidence to raise an issue or defence for consideration by the court.

H

Hearsay: A statement made outside the courtroom that is presented to prove the truth of its contents. Generally inadmissible except where permitted under the *Criminal Justice Act 2003*.

I

Identification Parade: A formal procedure under *PACE Code D* where a suspect stands in a line with similar-looking individuals to test the witness's ability to recognise the offender.

Indictable-Only Offence: The most serious category of criminal offence, triable exclusively in the Crown Court before a judge and jury, such as murder or rape.

Inference from Silence: The court's ability under *section 34 of the Criminal Justice and Public Order Act 1994* to draw conclusions from a suspect's silence when questioned under caution if they later rely on a fact they could reasonably have mentioned.

L

Legal Aid: Public funding provided under the *Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)* to enable defendants of limited means to access legal representation through a Representation Order.

M

Magistrates' Court: The lower criminal court that deals with summary offences, first hearings of either-way and indictable-only offences, and most bail applications.

Mode of Trial: The process in which the magistrates decide whether an either-way offence should be tried summarily or sent to the Crown Court, considering factors like seriousness and sentencing powers.

N

No Comment Interview: A suspect's refusal to answer police questions during interview, which can lead to adverse inferences if they later rely on undisclosed facts at trial.

O

Oppression: Conduct by police or other authorities that overbears the will of a suspect, such as threats or undue pressure, rendering any confession inadmissible under *section 76 of PACE 1984* and as interpreted in *R v Fulling (1987)*.

P

PACE 1984: The *Police and Criminal Evidence Act 1984*, the primary statute regulating police powers and suspects' rights during investigation, arrest, detention, and questioning.

Prepared Statement: A written statement prepared with legal advice and read or handed in at the start of a police interview to put forward the suspect's account without risk of cross-examination.

R

Representation Order: The formal grant of public funding allowing a solicitor or barrister to represent a defendant in criminal proceedings under the Legal Aid Agency's scheme.

Right to Silence: The principle that a suspect is not compelled to answer police questions or give evidence at trial, though silence may carry evidential consequences under the *Criminal Justice and Public Order Act 1994*.

S

Summary Offence: The least serious category of criminal offence, triable only in the magistrates' court, such as common assault or most road traffic offences.

T

Turnbull Guidelines: The judicial directions established in *R v Turnbull (1977)* requiring courts to warn juries of the dangers of mistaken identification and to scrutinise such evidence carefully.

V

Venue: The court in which a criminal case is tried, determined by the classification of the offence (summary, either-way, or indictable-only).

Vulnerable Suspect: A person who, by reason of age, mental disorder, or communication difficulty, may be unable to understand or participate effectively in the criminal process, requiring additional safeguards such as an appropriate adult.

W

Woolmington Principle: The foundational rule from *Woolmington v DPP (1935)* establishing that the prosecution bears the burden of proving guilt beyond reasonable doubt, except in limited statutory exceptions.

Y

Youth Court: A specialist division of the magistrates' court dealing with offenders aged 10–17, conducted with less formality and focused on rehabilitation rather than punishment.

1

INITIAL CLIENT ENGAGEMENT AND POLICE STATION ADVICE

The police station stage is the foundation of any criminal case and often the most decisive point in shaping its eventual outcome. It is here that a suspect's rights, responses, and the legal advice they receive can determine the strength or weakness of the defence that follows. The environment is inherently stressful and intimidating, particularly for individuals unfamiliar with legal procedures.

As a legal adviser, your duty is to ensure that the client is properly informed, protected, and guided through this critical stage. This includes securing adequate disclosure from the police, advising on interview strategy, explaining the implications of silence under the *Criminal Justice and Public Order Act 1994*, and safeguarding vulnerable clients in compliance with *Police and Criminal Evidence Act 1984, Code C*. Effective representation at this stage not only protects the integrity of the process but can also prevent irreversible harm to the client's case.

1.1 Advising Clients at the Police Station

The police station is often the first and most critical stage of a criminal case. The advice given here can fundamentally shape the case's outcome. A suspect is at their most vulnerable, and the pressure of the environment can lead to decisions that severely prejudice their defence. Your role as a legal adviser is to provide clear, firm, and practical advice to protect the client's rights and position.

1.1.1. Commencing investigation

Effective advice is impossible without a clear understanding of the situation. Your investigation begins the moment you are instructed and involves gathering information from three key sources.

1. **The Custody Officer**

   The Custody Officer, who is independent of the investigation, is your first port of call. Under *Police and Criminal Evidence Act (PACE) 1984, Code C*, they maintain the Custody Record. You should request to see this record to ascertain:

2. **The Investigator; the Officer in the Case**

   You are entitled to seek disclosure from the investigating officer. The key question to ask is: "What is the nature of the evidence against my client that has given rise to this arrest and intended interview?"

   The case of ***R (on the application of M) v Commissioner of Police of the Metropolis*** [2001] EWHC Admin 553 confirmed that a suspect's right to legal advice under *s.58 PACE* would be worthless if the solicitor was unable to give informed advice. Therefore, the police must provide sufficient disclosure about the case to allow the solicitor to do their job properly. This might include the general nature of the allegation, the existence of CCTV, forensic evidence, or witness statements.

3. **The Client**

   This is the most important part of the process. You must speak to your client in private. The conversation between the both of you is protected by legal professional privilege.

Example: Sarah is arrested for assault. From the Custody Record, you see she was arrested two hours ago. From the investigator, you learn the allegation is that she punched a colleague, and there is one witness. In private consultation, Sarah tells you she was acting in self-defence because the colleague shoved her first; a detail the police did not mention. This information is crucial for your advice on how to handle the interview.

1.1.2. The Client's Options in Interview and Identifying the Safest Option

Once you have gathered the facts, you must advise your client on how to respond to police questions in the formal interview. There are three main routes, but one is almost always the safest for an unprepared suspect.

1. **Answering All Questions (A "Full Comment" Interview)**

   This is often the most dangerous option. The client is under pressure and may inadvertently say something inconsistent or damaging that can be used as evidence against them. They may also disclose a defence too early, allowing the police to gather evidence to undermine it.

   This option is rarely applied in practice, but may be considered if the client has a clear, innocent explanation that is supported by known evidence and they are capable of putting it across coherently under pressure.

2. **Submitting a Prepared Statement and Answering "No Comment" to All Other Questions**

   Before the interview, you help the client draft a short, written statement that sets out the core of their defence. At the start of the interview, this statement is read out or handed over. For the rest of the interview, the client says "No comment" to all further questions.

   The advantage of this strategy, endorsed by the courts in ***R v Knight*** [2004] 1 WLR 340, is that it allows the client to put their defence on record at the earliest opportunity without being cross-examined on it. It prevents the client from being tripped up or providing inconsistent answers under pressure. The jury at a later trial cannot draw an adverse inference from a "no comment" interview if the defence was already set out in a prepared statement.

3. **A "No Comment" Interview (Remaining Silent)**

   This is a high-risk strategy. Under *s.34* of the *Criminal Justice and Public Order Act 1994*, a court or jury may draw an "adverse inference" from a suspect's silence in interview if they later rely on a defence in court that they could reasonably have been expected to

mention during questioning. This means the jury might be told they can hold the silence against the client.

Nevertheless, it may be used when you have received no or insufficient disclosure from the police, meaning you cannot take instructions to provide meaningful advice. It can also be a valid tactic if the case is very weak and the client has no case to answer.

Identifying the Safest Option

For the vast majority of clients, the second option; the Prepared Statement followed by a "No Comment" interview, is the safest and most recommended course of action. It protects the client from the pressure of the interview room while ensuring their defence is formally recorded, safeguarding them from adverse inferences under *s.34*. Your job as a solicitor is to explain these options clearly, outlining the risks and benefits, so the client can make an informed decision.

Example: Using the case of Sarah above, you would advise her that answering all questions is risky, as she might get flustered. A pure "no comment" interview could lead to a jury drawing a negative conclusion if she later raises self-defence at trial. The safest option is to draft a prepared statement that says: "I was shoved by my colleague first. I acted only to defend myself and used reasonable force. I then walked away." She would submit this and then answer "no comment" to all other questions.

1.3. Advising on the Right to Silence and Adverse Inferences

The right to remain silent during a police interview is a fundamental legal principle. However, this right is not absolute. The *Criminal Justice and Public Order Act 1994* (CJPOA 1994) introduced rules that allow a court or jury to draw "adverse inferences" from a suspect's silence in certain circumstances. This means that if a suspect remains silent when they could reasonably have been expected to mention a fact they later rely on in their defence, the jury may be permitted to hold that silence against them. Understanding these provisions is essential for providing effective advice.

1.3.1 Inferences from Failure to Mention Facts

This is the most common and significant provision concerning the right to silence. *Section 34* of the *CJPOA 1994* states that if an accused person fails to mention a fact when questioned under caution that they later rely on in their defence, and in the circumstances, they could reasonably have been expected to mention it, then the court or jury may draw such inferences as appear proper.

For an adverse inference to be drawn under s.34, all of the following conditions must be triggered:

1. The suspect is questioned under caution (i.e., after being told "you do not have to say anything...").
2. They fail to mention a specific fact.
3. They later rely on that fact in their defence at trial.
4. In the circumstances existing at the time of the interview, it was reasonable to expect them to mention that fact.

Rationale

The purpose is to prevent "ambush" defences, where a suspect springs a new defence on the prosecution at trial, giving them no opportunity to investigate it beforehand. The case of ***R v Argent*** [1997] 2 Cr App R 27 established that the test of "reasonableness" considers all the circumstances, including the suspect's age, experience, mental capacity, health, and the legal advice they received.

Example: David is arrested for theft of a laptop. In his police interview, after receiving legal advice, he remains silent and gives a "no comment" interview. At his trial, his defence is that he had borrowed the laptop from his friend, Michael, with his permission. The prosecution will argue that an adverse inference should be drawn. They will say that David could reasonably have been expected to give this simple, straightforward explanation during his interview, allowing the police to immediately check his story with Michael. His failure to do so may lead the jury to doubt the truthfulness of his defence.

1.3.2 Inferences from Failure to Account for Objects, Substances, or Marks

This section deals with specific physical evidence found on the suspect. *Section 36* of the *CJPOA 1994* applies when a suspect is arrested and a police officer reasonably believes that the presence of an object, substance, or mark on their person or clothing may be attributable to their participation in a crime. If the officer requests an explanation for it and the suspect fails or refuses to do so, adverse inferences may be drawn.

The suspect must be told in ordinary language the officer's belief, what they are being asked to account for, and that a court may draw an adverse inference from a failure or refusal.

Example: Sarah is arrested on suspicion of burglary. Upon arrest, the officer notices fibres on her clothing and a specific, rare type of soil on her shoes. The officer says, "I believe these fibres and this soil came from the house that was burgled. Can you account for how they got on your clothes and shoes? If you fail or refuse to do so, a court may draw an adverse inference." If Sarah remains silent, the jury at her trial may infer that the fibres and soil are, in fact, from the burgled property.

1.3.3 Inferences from Failure to Account for Presence at a Place

This section is similar to *s.36* but relates to the suspect's location at the time of the offence. *Section 37* of the *CJPOA 1994* applies when a suspect is arrested at a place at or about the time an offence was committed. If a police officer reasonably believes their presence at that place at that time may be attributable to their participation in the crime, and the officer requests an explanation, a failure or refusal to account for their presence may lead to adverse inferences.

As with *s.36*, the suspect must be warned in ordinary language about the potential consequences of silence.

Example: Ben is found by police hiding in the car park of a warehouse at 2 a.m., minutes after a silent alarm was triggered inside. The officer says, "I believe you were present here at this time because you were involved in the attempted burglary of this warehouse. Can you account for your presence here? If you fail or refuse to do so, a court may draw an adverse inference." If Ben gives a "no comment" answer, the jury may later infer that his presence was for the purpose of committing the burglary.

1.4. Representing Vulnerable Clients and the Role of the Appropriate Adult

The police station environment is intimidating for anyone, but for vulnerable suspects, it can be overwhelming and can compromise the fairness of the entire process. *PACE Code C* provides specific protections for vulnerable individuals to ensure they understand their rights and can participate effectively.

A vulnerable suspect is typically defined as a juvenile (under 18) or a person with a "mental disorder" or "mental vulnerability" (e.g., a learning disability, a mental health condition, or other conditions that may impair their ability to understand the process or communicate effectively).

1.4.1 The Role of the Appropriate Adult

The key safeguard is the requirement for an appropriate adult. The appropriate adult's role is not to provide legal advice, but to:

1. Support the suspect and ensure they are not distressed.
2. Facilitate communication between the suspect, the legal adviser, and the police.
3. Ensure the interview is conducted fairly and that the suspect understands the questions and their rights.

The appropriate adult must be present for all key procedures, including the caution, the interview, the taking of fingerprints and samples, and any reviews of detention.

1.4.2 Juvenile Suspects

For juvenile suspects, there are additional, specific requirements. *Paragraph 3.13* of the *PACE Code C*, requires that, upon the arrest of a juvenile, the police must inform a person "responsible for [their] welfare." This is typically a parent, guardian, or local authority carer.

This is a separate duty from the suspect's right to have someone informed of their arrest under *s.56*. The person informed may also act as the appropriate adult, but the primary purpose is to ensure that someone with responsibility for the child's wellbeing is aware of their situation.

Example: Chloe, who is 16, is arrested for shoplifting. The police must, as soon as practicable, contact her parent or guardian to inform them of her arrest and her detention at the police station. Her parent should then be asked to attend the station to act as the appropriate adult. The police cannot interview Chloe until the appropriate adult is present, unless a delay would involve an immediate risk of harm to persons or serious loss of, or damage to, property.

1.4.3 Suspects with Language, Hearing, or Visual Impairments

Effective communication is a cornerstone of a fair process. The law makes provision for suspects who have communication difficulties. *Paragraph 3.12* of the *PACE Code C*, requires the police to ensure that a suspect who does not speak or understand English, or who has a hearing or visual impairment, gets the necessary assistance.

Interpreters

For non-English speakers or those who use sign language (e.g., British Sign Language (BSL)), a qualified and independent interpreter must be arranged. The interpreter must be present for the caution, the interview, and when legal advice is given, to ensure the suspect fully understands the proceedings.

Other Assistance

For a suspect with a visual impairment, all written documents, such as the Notice of Rights and the Custody Record, should be read to them. For someone with a hearing impairment, this may involve the use of a sign language interpreter or a lip-speaker.

Example: Mark, who is deaf and uses BSL, is arrested. The police must secure the services of a qualified BSL interpreter before any interview can take place. The interpreter will be present to translate the caution, the questions from the police, and Mark's answers. Mark's legal adviser must also ensure they can communicate effectively with Mark, which may require the interpreter to be present during their private consultation.

1.5 Conclusion

Advice at the police station is not a formality; it is a vital safeguard of justice and due process. The decisions made here, often under pressure, can define the trajectory of a case. A competent adviser must balance legal precision with practical judgment, ensuring the client's rights are upheld while mitigating risks such as adverse inferences or self-incrimination. For vulnerable suspects, the involvement of an appropriate adult and communication support ensures fairness and accessibility. Ultimately, effective police station representation embodies the principle that every suspect, regardless of circumstance, deserves informed and meaningful legal protection from the very first stage of criminal proceedings.

2

IDENTIFICATION AND INTERVIEW PROCEDURES

The investigation of a criminal offence often hinges on two critical, and often fragile, pillars of evidence: the identification of a suspect by a witness, and the account obtained from a suspect during a police interview. Both processes are fraught with potential for error and abuse. Human memory is not a perfect video recording; it is malleable, susceptible to suggestion, and can degrade over time. Similarly, the environment of a police interview is inherently stressful and unequal, creating a risk that a suspect may make admissions that are unreliable, untrue, or obtained through improper pressure.

To guard against these risks and to ensure the integrity of the criminal justice process, Parliament and the courts have established a rigorous regulatory framework. This chapter provides a detailed examination of the procedures governing eyewitness identification and police interviews.

The primary sources of these rules are the *Police and Criminal Evidence Act 1984* (PACE) and its associated *Codes of Practice*. *Code D* concerns the main set of rules for the identification of persons, while *Code C* governs the treatment and questioning of persons in police custody. For any legal practitioner, a thorough and nuanced understanding of these procedures is not merely academic; it is the bedrock of effective advocacy and a crucial safeguard for the rights of the suspect, the witness, and the integrity of the trial itself.

2.1 Identification Procedures under PACE Code D

Eyewitness testimony, particularly a positive identification, can be profoundly persuasive to a jury. However, decades of psychological research and legal analysis have revealed it to be one of the least reliable forms of evidence. The infamous case of ***R v Turnbull*** [1977] QB 224 serves as the cornerstone of the judicial approach to this issue.

The Court of Appeal issued a stark warning, now known as the ***Turnbull*** guidelines, stating that a mistaken witness can be a convincing one, and that a number of such witnesses can all be mistaken. Consequently, where the prosecution case depends wholly or substantially on the correctness of one or more identifications, the judge must direct the jury to exercise extreme caution. The guidelines mandate a specific warning to the jury, highlighting the specific weaknesses in the identification evidence presented.

To mitigate these inherent risks before a case reaches trial, *PACE Code D* sets out a comprehensive regime for the conduct of identification procedures. Its overarching principle is fairness: to test the witness's ability to identify the suspect without prompting or influence, and to provide a clear and auditable record of the procedure.

2.1.1 When an Identification Procedure Must be Held

The obligation to hold a formal identification procedure is not absolute; it is triggered by specific conditions. Under *paragraph 3.12, Code D*, a procedure must be held if the following three conditions are met:

1. A suspect is available to the police.
2. The suspect disputes their identification as a person involved in the commission of the offence.
3. The suspect has been identified by a witness, either by having been seen:

- In person (including at an earlier identification procedure), or
- In a visual media recording (such as CCTV footage).

The critical question is whether the identification is disputed. If a suspect, through their legal representative, admits their presence at the scene and their involvement in the offence, there may be no need to hold a procedure to prove what is not in dispute. However, if the suspect denies being the person the witness saw, a procedure is mandatory.

There are, however, exceptions where a procedure may not be required. These are set out in *paragraph 3.13, Code D*. For example, if the suspect is not known and is unavailable (e.g., has fled the country), no procedure can be held. Furthermore, a procedure is not necessary if it would serve no useful purpose, such as when the suspect is well-known to the witness (e.g., a neighbour or a regular customer), or where there is clear, uncontested evidence of the suspect's involvement, such as being caught in the act by a police officer.

Scenario: David is arrested for a robbery at a local convenience store. The store owner, Mrs. Higgins, tells the police she saw David clearly as he pointed a knife at her. When interviewed, David admits he was in the store but claims he was only buying milk and that Mrs. Higgins is mistaken about his involvement in the robbery. In this scenario, David disputes his identification as the perpetrator, and he is available. Therefore, the police must hold a formal identification procedure.

2.1.2. Types of Identification Procedure

Code D provides for several different types of identification procedure. The choice of procedure is an operational decision for the police, but it must be fair and appropriate in the circumstances. The defence legal representative has a right to be informed of the type of procedure being considered and can make representations.

1. **Video Identification**

   This is now the primary and most frequently used method. It involves the witness being shown a moving film or a series of still images of the suspect and at least eight other 'foils' who resemble the suspect in age, general appearance, and position in life. The images are presented sequentially (one after another) rather than all at once, to prevent the witness from simply picking the person who looks most like their memory of the offender from a group.

The procedure is conducted by a dedicated Identification Officer, who is not involved with the investigation, to prevent any inadvertent influence. Prior to viewing, the witness is told that the person they saw may or may not be in the video and that they should not make a decision until they have seen all of the images. The video is controlled by the Identification Officer to ensure a standardised process. The witness views the video footage alone, and their comments and decisions are recorded.

This method has significant advantages; it can be arranged quickly, it reduces the stress for the witness (who does not have to confront the suspect in person), and it can be used even if the suspect refuses to cooperate. In cases of non-cooperation, the police can use a custody image of the suspect or covertly obtained footage to create the video compilation.

2. Identification Parade

This is the traditional procedure, often depicted in films, where the suspect stands in a line with at least eight other 'foils'. Like the video procedure, the foils must broadly resemble the suspect. The suspect has the right to choose their own position in the line-up (e.g., number 5).

The witness views the line-up, usually through a one-way mirror, and is asked to identify the person they saw. The witness is instructed to state the number of the person they identify, rather than pointing, to maintain the procedure's integrity. While still a valid procedure, it is logistically difficult to organise, requiring the simultaneous presence of the suspect, the foils, legal representatives, and the Identification Officer. As a result, it is used less frequently than video identification.

3. Group Identification

This procedure involves the witness observing the suspect in a group of people within an informal, social setting, such as a busy shopping centre, a railway station concourse, or a public park. The suspect is allowed to choose their position within the group and is not restrained. The witness is taken past the group and asked if they can see the person they saw.

The procedure can be either covert, where the suspect is unaware they are being observed, or overt, where they have consented. The witness's movements are carefully managed by the Identification Officer to ensure they get a fair view of the group without being obvious. This method can be useful if the suspect refuses to take part in a video identification or parade, or if it is thought to provide a more natural context for the identification.

4. **Confrontation**

This is the most direct and potentially prejudicial procedure. It involves the witness being brought face-to-face with the suspect. Due to its highly suggestive nature, it is only permitted under *paragraph 3.21, Code D*, in exceptional circumstances where none of the other procedures are practicable.

For example, it might be used if a witness is critically ill and cannot attend a video suite, and a group identification is impossible. The procedure is strictly controlled: the witness is simply asked, "Is this the person?" and any subsequent dialogue or reaction is recorded. The suspect's legal representative must be present, if possible, to safeguard the suspect's interests and observe the process. A confrontation must be authorised by an officer of the rank of inspector or above.

2.1.3 Cases Where Identification is Not Required

Formal identification procedures under *Code D* are not necessary in every situation. The key principle is that a procedure is only required when the identity of the suspect is disputed or not known to the police. The following are common scenarios where a formal procedure is not required:

1. **When the Suspect is Known to the Witness**

If the witness already knows the suspect well (e.g., a family member, a close friend, a regular colleague), there is no issue of identity to be resolved. The witness can simply provide a statement naming the person. For example, in a domestic assault, the victim naming their partner does not require a video identification.

2. **When the Suspect Admits to Being at the Scene**

If the suspect admits they were present at the scene of the incident but denies their involvement in the offence itself, the issue is one of *what happened* rather than *who was there*. In such cases, the witness's evidence of seeing the suspect there is not disputed, making a formal identification procedure redundant.

3. Recognition from Unavailable Material

Identification can occur from media such as CCTV, photographs, or social media that is not available for use in a formal video identification parade. If a witness recognises someone from such footage, this can be admissible evidence, provided the recognition is properly recorded in a witness statement.

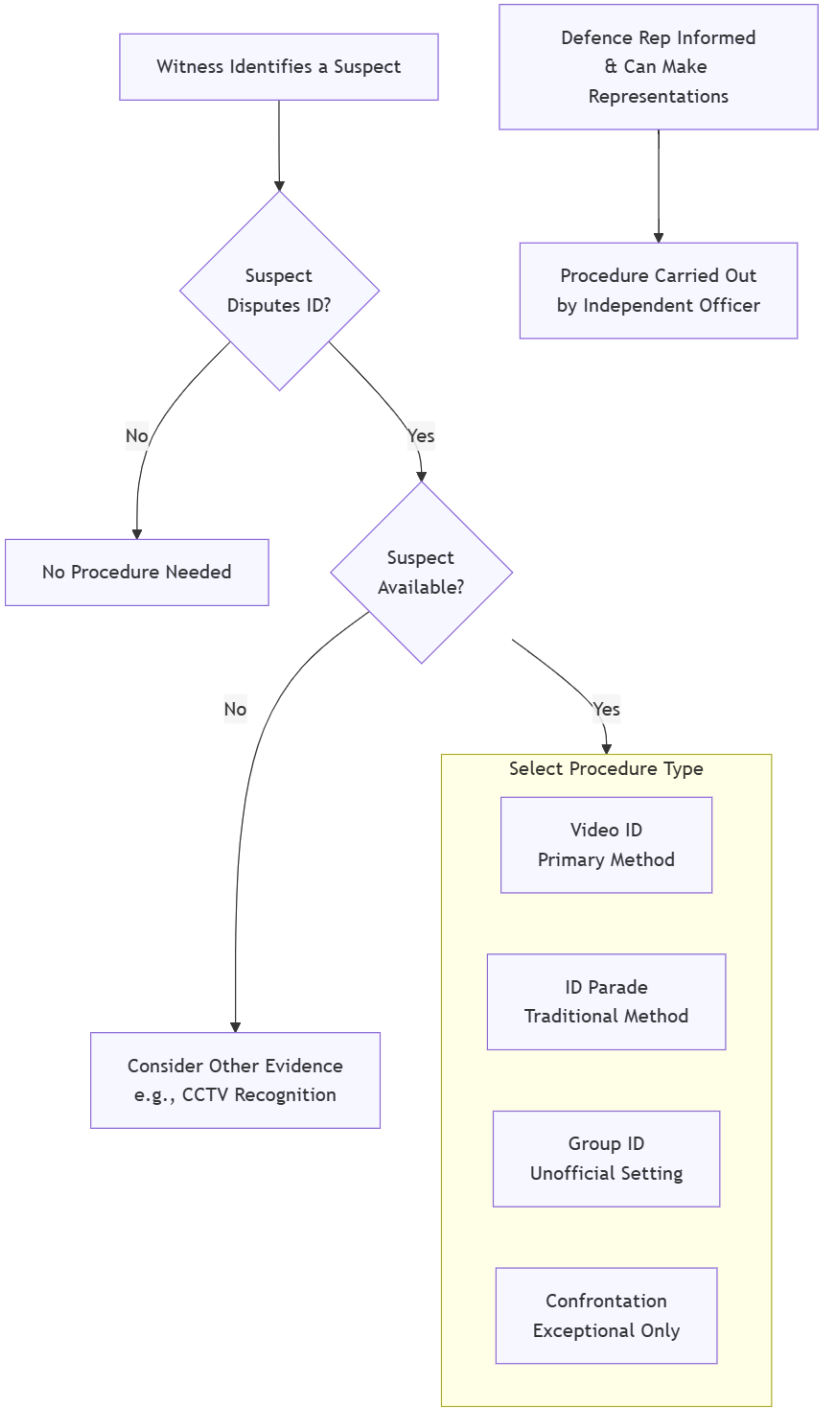
4. Street Identification or "Instant" Identification

This refers to a spontaneous identification shortly after the offence, often near the scene. For instance, if police officers arrest a suspect based on a description and then immediately bring a witness to the location to confirm, "Is this the person?". While this is a form of identification, it falls under the general power to investigate rather than the strict *Code D* procedure, though it must still be conducted fairly.

5. When the Suspect Refuses and No Other Method is Viable

If a suspect refuses to cooperate with any form of identification procedure and the conditions for a group identification or confrontation cannot be met, the prosecution may proceed without one. The court will then have to decide on the admissibility and weight of any other identification evidence presented.

The following diagram illustrates the decision-making process for selecting an appropriate identification procedure:



2.1.4 The Procedure for Carrying out an Identification

The integrity of any identification procedure is paramount. *Code D* imposes strict requirements to ensure this:

1. **The Identification Officer**

   The entire procedure must be conducted by an officer who is not involved with the investigation of the offence (the "Identification Officer"). This is to prevent any conscious or unconscious influence on the witness.

2. **The Role of the Legal Representative**

   The suspect's solicitor (or appropriate adult, if one is present) has the right to be informed of the details of the procedure and to be present before and during the procedure. They can observe the process but must not interfere or communicate with the witness. Their presence is a key safeguard to ensure the procedure is conducted fairly.

3. **Choice of Foils**

   The foils used in video identification, parades, or group identifications must be of a similar age, gender, and general appearance (build, height, dress style, etc.) to the suspect. It would be grossly unfair, for instance, to place a tall suspect with foils who are all significantly shorter.

4. **Instructions to the Witness**

   Before viewing, the witness must be told that the person they saw may or may not be in the procedure, and that if they cannot make a positive identification, they should say so. This is a crucial instruction to prevent the witness from feeling compelled to make a choice.

5. **Recording the Outcome**

   The witness's response must be recorded verbatim by the Identification Officer. If an identification is made, the witness is asked to state how sure they are of their identification (e.g., "very sure," "fairly sure"). The entire procedure is also visually recorded.

A failure to comply with the strictures of *Code D* can have severe consequences for the prosecution case. Under *s.78* of *PACE 1984*, the trial judge has the discretion to exclude evidence if it appears that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted.

In ***R v Forbes*** [2001] 1 AC 473, the House of Lords held that if a suspect disputes identification and is available, the holding of an identification procedure is mandatory. The police cannot circumvent this requirement by simply asking a witness, "Is this the man?" during a chance encounter at the police station. Any identification obtained in breach of this rule is highly likely to be excluded under *s.78*.

2.2. The Police Interview Procedure

The police interview is a pivotal stage in the criminal process. It is the primary mechanism for the police to put their case to the suspect, to test their account, and to seek information or admissions. For the suspect, it is an opportunity to answer the allegations, to put forward their defence, or to exercise their right to silence. The legal framework governing interviews, primarily found in *Code C, PACE 1984*, is designed to regulate this power imbalance and to protect the suspect from oppressive or unfair treatment.

2.2.1. Procedure under *PACE 1984*

An "interview" is defined in *paragraph 11.1A, Code C* as the questioning of a person regarding their involvement or suspected involvement in a criminal offence. The rules apply from the moment a person is cautioned.

1. **The Caution**

   Before any questions are put to a suspect about their involvement in an offence, they must be cautioned. The caution, as set out in *paragraph 10.5, Code C*, is as follows:

   *"*You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."

The caution serves two vital purposes. First, it protects the suspect's right to silence, a fundamental principle of English law. Second, it introduces the possibility of an adverse inference being drawn at trial if the suspect remains silent when questioned but later advances a defence they could reasonably have been expected to mention earlier. This modification to the right to silence was introduced by *ss. 34-37* of the *Criminal Justice and Public Order Act 1994* (CJPOA).

2. The Recording of the Interview

Code C requires that all interviews with suspects must be audio-recorded. The prescribed method is to use a secure digital recording system. The recording creates an incontrovertible record of what was said and how it was said, protecting both the suspect from allegations of verbal abuse or threats and the police from false allegations of misconduct. At the conclusion of the interview, the suspect is given a notice explaining how they can access the recording.

3. The Rights of the Suspect

A suspect in custody possesses several key rights during the interview process:

- **The right to legal advice**: Under *s.58 PACE 1984*, a person arrested and held in police custody has the right to consult a solicitor privately, free of charge. This right is absolute and can only be delayed in very exceptional circumstances, as defined in *Code C, Annex B* (e.g., where there is a risk of alerting other suspects or of harm to persons). The landmark case of ***R v Samuel*** [1988] QB 615 underlined the fundamental importance of this right, stating that its denial was a very serious matter.
- **The right to have someone informed**: Under *s.56 PACE 1984*, an arrested person has the right to have one friend, relative, or other person who is known to them informed of their arrest. This can also be delayed in similar exceptional circumstances.
- **The right to consult the codes of practice**: The suspect has the right to consult the Codes of Practice, which outline their rights and the procedures the police must follow.
- **The right to an appropriate adult**: If the suspect is a juvenile (under 18) or is mentally vulnerable, an appropriate adult must be present during the interview. The

role of the appropriate adult is to safeguard the interests of the vulnerable person, to facilitate communication, and to ensure the interview is conducted fairly.

4. **The Conduct of the Interview**

The police are expected to conduct interviews in a fair and non-oppressive manner. *Paragraph 11.5, Code C*, expressly prohibits the use of oppression, defined in ***R v Fulling*** [1987] 2 All ER 65 as including "exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc.; the imposition of unreasonable or unjust burdens." Leading questions are permitted, but the interview should not become an interrogation designed to break the will of the suspect.

Example: Sarah is arrested on suspicion of fraud. She is taken to the police station, where the custody officer informs her of her right to a solicitor. Sarah requests legal advice. The police cannot begin the interview until her solicitor is present, unless one of the very narrow exceptions applies. When the solicitor arrives, they consult privately with Sarah. In the interview, which is audio-recorded, the officer cautions Sarah and then asks her questions about the fraudulent transactions. Sarah's solicitor may intervene to clarify questions, to advise Sarah on how to answer, or to challenge the fairness of a line of questioning.

2.2.2. Role and Conduct of the Defence Legal Representative

The defence legal representative (solicitor or accredited representative) plays a critical and multifaceted role during the police interview. They are not a mere observer; they are an active participant whose duty is to protect and advance the legal interests of their client.

1. **Pre-Interview Consultation**

The representative's first task is to have a private consultation with the client. During this meeting, they will:

- Explain the caution and the implications of the right to silence under the *CJPOA 1994*.
- Obtain the client's account of the events, or if the client chooses not to give one, to advise on the consequences of that decision.
- Assess the client's state of mind and vulnerability.

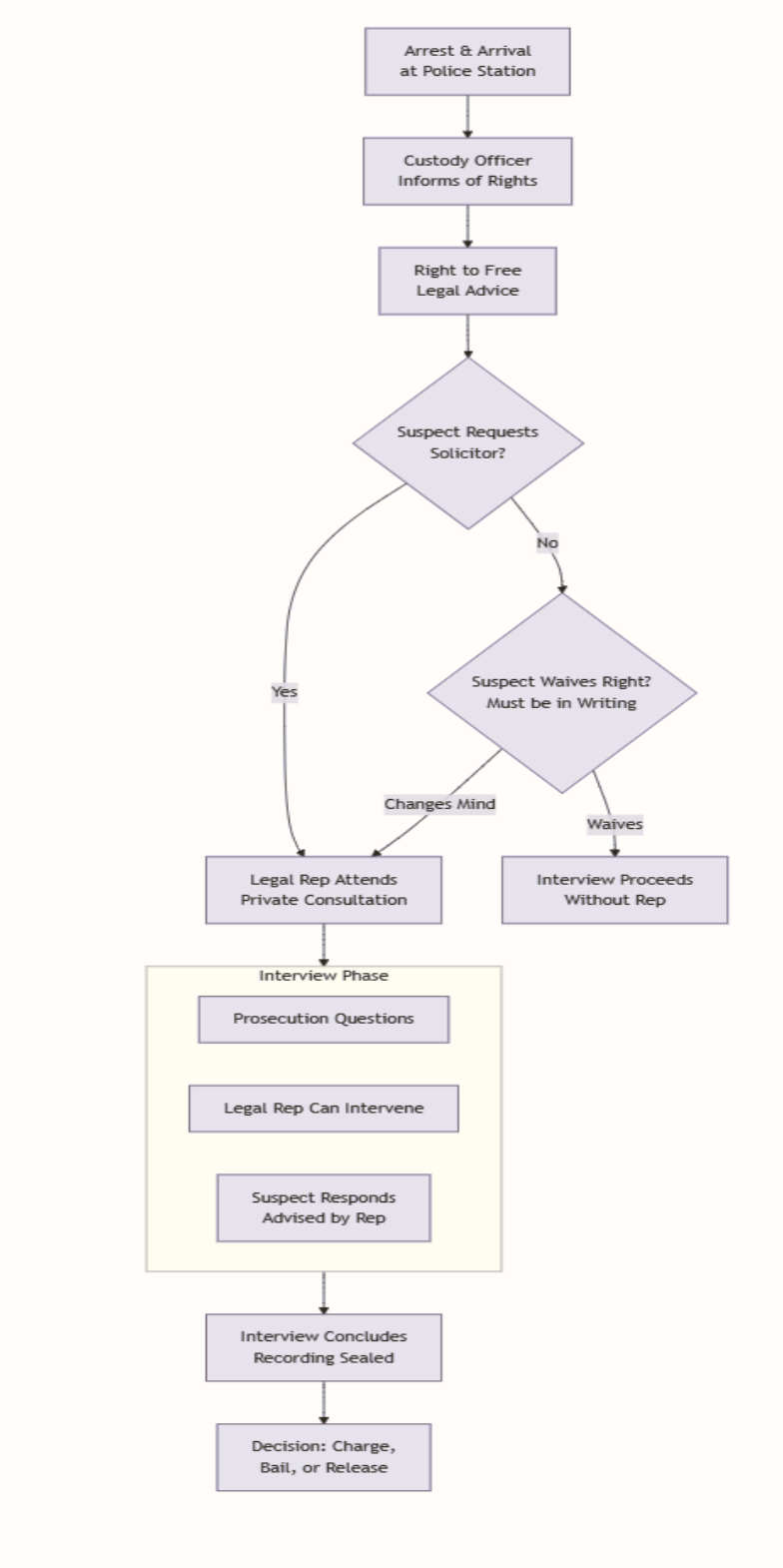
- Provide clear advice on whether to answer questions, to provide a written statement, or to remain silent.

2. Role During the Interview

During the interview itself, the representative's role is both protective and strategic. They must:

- **Observe and safeguard**: The representative should ensure that the interview is conducted fairly and in accordance with *PACE 1984* and *Code C*. They should listen for oppressive, misleading, or improper questions.
- **Intervene when necessary**: The representative has the right to intervene to clarify a question, to challenge its relevance, to prevent their client from being misled, or to advise their client not to answer a particular question if it is improper. A common intervention is to say, "Before my client answers that, could you clarify what you mean by...?"
- **Take a note**: While the interview is recorded, the representative should still take a detailed note. This serves as a personal record, aids in the preparation of the defence case, and can be used to challenge the accuracy of the prosecution's transcript if necessary.
- **Manage the client's defence**: The representative may advise the client to answer some questions but not others, or to read a pre-prepared statement. Under section 6 of the **CJPOA 1994**, if a suspect reads a written statement, the court may draw inferences only in relation to inconsistencies between the statement and their later defence.

The following diagram illustrates the typical structure and key decision points of a police station interview from the suspect's perspective:



3. Ethical Boundaries

The representative must tread a careful line. They are there to give legal advice, not to act as an investigator or to answer questions on the client's behalf. It would be professionally improper for a solicitor to coach their client on what to say or to invent a false defence. In ***R v Imran and Hussain*** [1997] Crim LR 754, the Court of Appeal emphasised that the role of the solicitor is to assist and advise the client. While they can advise a client to remain silent, they must not become the "author" or "prompt" of a false defence. If a solicitor acts improperly, for instance by inventing a story for the client, this could lead to the solicitor being investigated by their professional body and could potentially taint the entire case.

A well-conducted interview, with an engaged and competent legal representative, serves the interests of justice. It provides the suspect with a fair opportunity to respond to allegations, creates a reliable record of their account at the earliest possible stage, and helps to define the issues for any subsequent trial. For the defence practitioner, mastering the law and procedure of the police interview is one of the most vital skills in criminal practice.

2.3 Conclusion

The procedures governing identification and police interviews, as meticulously detailed in *PACE Codes C and D*, represent the criminal justice system's deliberate and essential response to profound evidential vulnerabilities. Recognizing the inherent fallibility of human memory and the coercive potential of the custodial environment, the legal framework erects a series of robust procedural safeguards; from the sequential video identification and the mandatory ***Turnbull*** warning to the absolute right to legal advice and the audio-recording of interviews. For the legal practitioner, mastery of this framework is not a mere technicality but the very foundation of ensuring a fair process, whether by challenging evidence obtained through a *Code D* breach under *s.78* of *PACE* or by providing robust, informed advocacy during a client's interview. Ultimately, the integrity of a prosecution hinges on the scrupulous adherence to these rules, which collectively strive to balance the imperative of effective investigation with the fundamental rights of the suspect and the pursuit of reliable evidence.

3

CLASSIFICATION OF OFFENCES AND FIRST HEARING

The journey of a criminal case through the English legal system is fundamentally determined by the very first decision made after a suspect is charged: how the alleged offence is classified. This classification is not merely a technical label; it dictates the pathway of the case, the court in which it will be heard, the procedures that must be followed, and the sentencing powers available to the judiciary. For the defence solicitor, an in depth understanding of this classification system is not optional, it is the cornerstone of effective early case management and strategic advice to the client.

This chapter provides a detailed examination of the classification of criminal offences and the critical early stages of a case in the magistrates' court. We will explore the three principal categories of offence; summary, either-way, and indictable offence and the unique procedural considerations for hybrid categories like low-value shoplifting.

The chapter will then guide you through the first hearing, a pivotal stage where initial pleas are taken, key decisions on venue are made, and the foundation of the defence case is laid. We will dissect the procedure for securing public funding via a Representation Order and outline the multifaceted and crucial role of the defence solicitor at this initial hearing. Mastery of this early phase is essential, as decisions made here can irrevocably shape the outcome and trajectory of the entire case.

3.1 Classification of Offences

The English system divides criminal offences into three main categories based on their perceived seriousness. This tripartite division is central to the *Magistrates' Courts Act 1980* and the *Powers of Criminal Courts (Sentencing) Act 2000*.

3.1.1 Summary Offences

Summary offences are the least serious category of criminal conduct. They are, as the name implies, summarily dealt with, that is, they are triable exclusively in the magistrates' court.

Characteristics of Summary Offences

1. **Venue**: Summary offences are tried only in the magistrates' court.
2. **Judge**: They are heard by a bench of either three lay magistrates (Justices of the Peace) advised by a legally qualified clerk, or by a single District Judge (a legally qualified professional magistrate).
3. **Jury**: There is no right to a trial by jury.
4. **Sentencing powers**: The sentencing powers of the magistrates' court are limited. For a single summary offence, the maximum custodial sentence is generally six months, and the maximum fine is usually level 5 on the standard scale (unlimited for offences committed after March 2015). Aggregate sentences for multiple either-way offences are limited to 12 months.
5. **Time limits**: Prosecution must generally commence within 6 months of the offence being committed, unless the specific statute dictates otherwise.

Examples of summary offences include: common Assault (contrary to *s.39* of the *Criminal Justice Act 1988*), most motoring offences (e.g., speeding, driving without insurance), being drunk and disorderly in a public place, and criminal damage where the value of the damage is below £5,000 (considered as a summary-only offence for mode of trial purposes under *s.22 Magistrates' Courts Act 1980*, which we will explore later).

Example

Brian is arrested after a scuffle in a pub car park. He pushed another man, who fell over but was not injured. The police charge Brian with common assault, a summary offence. His case will be listed at the magistrates' court. He has no right to elect for a Crown Court trial. The case will be heard and sentenced entirely by the magistrates, whose maximum power of imprisonment for this offence is six months.

3.1.2 Either-Way Offences

Either-way offences occupy the middle ground in terms of seriousness. They are, as the name suggests, triable either in the magistrates' court *or* in the Crown Court. This category includes a vast array of common offences, and the decision on where the case will be tried is a critical strategic juncture.

Characteristics of Either-way Offences

1. **Venue**: Either-way offences can be heard in either the magistrates' court (a "summary trial") or the Crown Court (a "trial on indictment").
2. **Procedure**: The case always starts in the magistrates' court for the "plea before venue" and "mode of trial" hearings.
3. **Sentencing implications**: This is the most crucial factor. The magistrates' court has limited sentencing powers (max 6 months per offence, 12 months aggregate). The Crown Court, however, has far greater sentencing powers, up to and including the maximum penalty for the offence (e.g., life imprisonment for some offences).

The "Plea Before Venue" and "Mode of Trial" Procedure

This is a two-stage process in the magistrates' court.

1. **Indication of Plea (Plea Before Venue)**

   The defendant is asked how they plead to the offence. If they plead GUILTY, the case remains in the magistrates' court for sentencing. However, the magistrates may commit

the defendant to the Crown Court for sentencing if they believe their own powers are insufficient (*s.3 Powers of Criminal Courts (Sentencing) Act 2000*).

However, if they indicate a plea of NOT GUILTY, the court proceeds to the "mode of trial" hearing.

2. Mode of Trial Hearing

The magistrates must decide whether the case is suitable for summary trial or whether it should be sent to the Crown Court. They will consider the nature and seriousness of the offence, the defendant's character and antecedents, and their own sentencing powers.

If the magistrates accept jurisdiction (deem the case suitable for summary trial), the defendant then has the choice. If the magistrates decline jurisdiction (consider the case too serious for them to try), they send the case to the Crown Court regardless of the defendant's wishes.

The defendant can consent to be tried summarily in the magistrates' court. The defendant can elect for trial by judge and jury in the Crown Court.

Strategic Considerations for the Defence

The decision on where to be tried is one of the most important early strategic choices. The defence solicitor must advise their client carefully, weighing the pros and cons.

Magistrates' Court (Summary Trial)	Crown Court (Trial on Indictment)
Pros: Generally faster, less formal, lower costs for a privately paying client. Higher acquittal rate for some offence types.	**Pros**: Right to trial by a jury of 12 peers. Generally more thorough case preparation and disclosure. Greater sentencing powers if guilty, but also more experience with serious cases.

Cons: Limited sentencing powers but a high conviction rate can lead to a "cracked trial" where a guilty plea is entered late. Perceived by some as less thorough.	**Cons**: Much slower process (can take over a year). More stressful for the defendant. If convicted, the sentence is likely to be more severe.

Examples of either-way offences include: theft (contrary to *s.1* of the *Theft Act 1968*), assault occasioning actual bodily harm (contrary to *s.47* of the *Offences Against the Person Act (OAPA) 1861*), most forms of burglary of a dwelling, possession of a controlled drug with intent to supply, and fraud.

Scenario

Chloe is charged with theft after being accused of stealing a laptop from her workplace, valued at £1,200. Theft is an either-way offence. At her first hearing, she indicates a not guilty plea. The magistrates, considering the value of the item and Chloe's lack of previous convictions, accept jurisdiction.

Chloe's solicitor must now advise her. They discuss that in the magistrates' court, the case could be resolved in a few months, and the maximum sentence is 6 months. However, the acquittal rate for theft in the Crown Court is slightly higher. After considering the stress and delay of a Crown Court trial, Chloe, on her solicitor's advice, consents to summary trial in the magistrates' court.

3.1.3 Indictable-Only Offences

Indictable-only offences are the most serious category of crime. They must be tried on indictment before a judge and jury in the Crown Court.

Characteristics of Indictable-only Offences

1. **Venue**: Indictable-only offences are tried in the Crown Court solely.
2. **Procedure**: The case's first hearing is in the magistrates' court, but this is a purely administrative "sending" hearing. The magistrates have no power to deal with the

substance of the case or to take a plea (unless it is a guilty plea and they are asked to commit for sentence, which is rare). The case is sent directly to the Crown Court under *s.51* of the *Crime and Disorder Act 1998*.

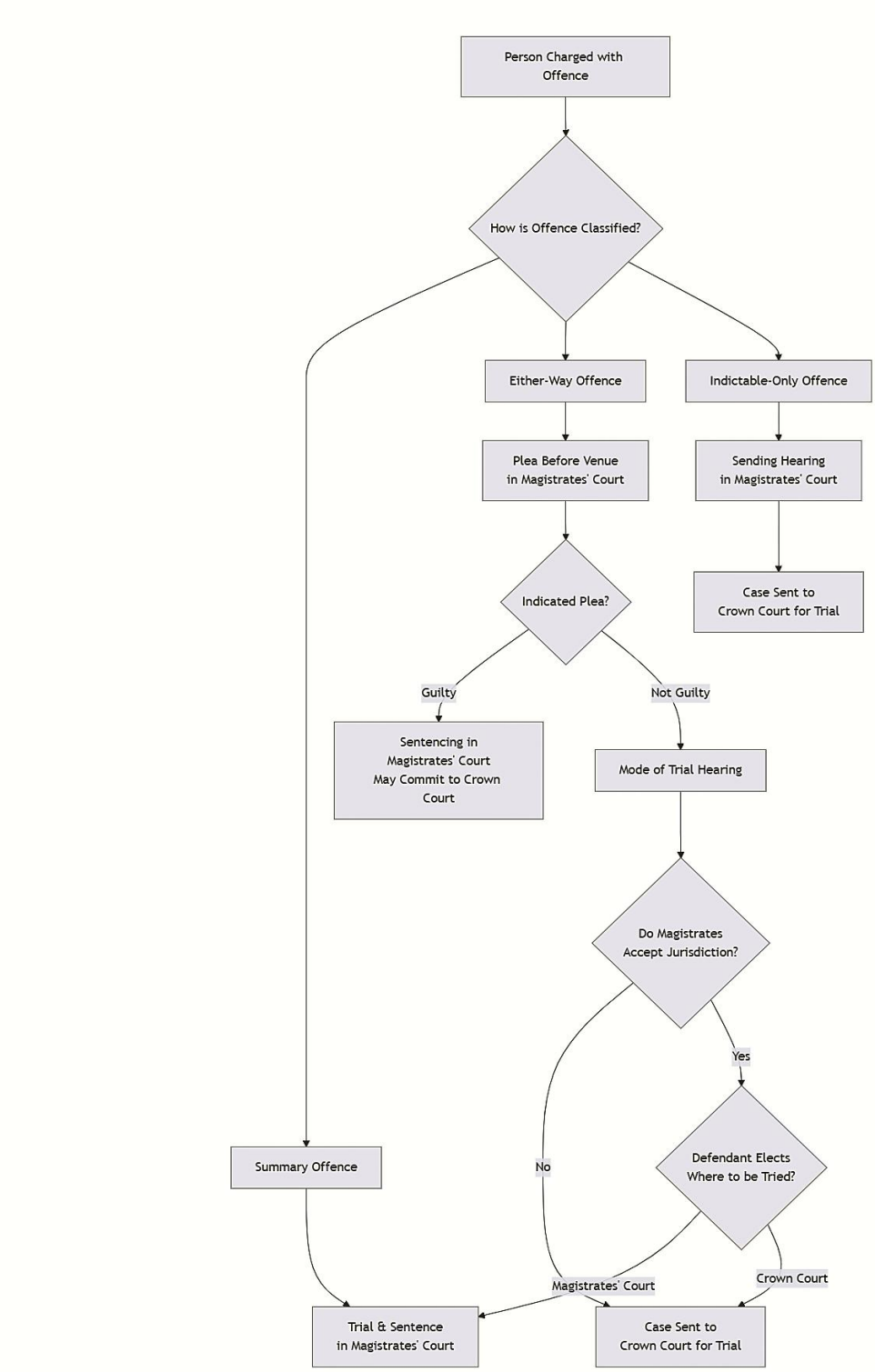
3. **Sentencing powers**: The Crown Court can impose the maximum sentence for the offence, including life imprisonment.

Examples of indictable-only offences include: murder, manslaughter, robbery, rape and other serious sexual offences, and causing grievous bodily harm with intent (s.18 OAPA 1861).

Scenario

David is charged with robbery after allegedly mugging a man in the street and stealing his phone while threatening him with a knife. Robbery is an indictable-only offence. At his first appearance in the magistrates' court, the legal advisor simply confirms David's name and address, and the case is formally sent to the Crown Court. The magistrates do not inquire into the evidence or take a plea. David's solicitor's role at this stage is to ensure the sending is procedurally correct and to make an immediate application for a Crown Court Representation Order.

The following diagram illustrates the journey of a criminal case based on its classification, from the first hearing to trial:



3.1.4 Special Category: Low-Value Shoplifting & Criminal Damage

Parliament has created a special hybrid category for certain low-value offences to streamline the process and ensure proportionality. *Section 22A* of the *Magistrates' Courts Act 1980* applies to low-value shoplifting (where the value of the goods stolen does not exceed £200) and criminal damage (where the value of the loss or damage does not exceed £5,000).

Characteristics

- These offences are treated as summary-only for the purposes of mode of trial.
- This means the defendant has no right to elect trial by jury; the case must be dealt with in the magistrates' court.
- The maximum sentence is a custodial term of 6 months and/or a fine.
- The value is defined as the "normal retail price" for shoplifting, and the "value of the loss or damage" for criminal damage.

Significance

This provision removes a strategic choice from defendants in these cases. Prior to this, low-value shoplifting was an either-way offence, and defendants would sometimes elect Crown Court trial to delay proceedings or in the hope of a better outcome. This is no longer possible.

Exception for "Exceptional Circumstances"

The only way such a case can be sent to the Crown Court is if, alongside the low-value shoplifting or criminal damage charge, the defendant is also charged with a related either-way or indictable-only offence. For example, if during the shoplifting, the defendant assaulted the security guard (actual bodily harm, an either-way offence), both matters can be sent together to the Crown Court.

Scenario

Sophie is arrested for stealing £150 worth of cosmetics from a supermarket. This is low-value shoplifting. At court, her solicitor advises her that, despite her wishing to have a jury trial, the law requires her case to be heard and sentenced in the magistrates' court. The solicitor's focus

is now on preparing a mitigation plea focused on Sophie's personal circumstances, rather than on arguing about the venue for trial.

3.2. First Hearings in the Magistrates' Court

The first hearing in the magistrates' court is the defendant's formal introduction to the criminal justice process. It is a procedural lynchpin where fundamental steps are taken that set the course for the entire case. For the unprepared, it can be a confusing and intimidating experience. For the proficient defence solicitor, it is a critical opportunity to protect the client's interests and lay the groundwork for a robust defence.

3.2.1 Procedural Overview of the First Hearing

The first hearing, often listed as a "First Appearance" or "Plea and Trial Preparation Hearing" (PTPH), follows a standard sequence.

1. The Defendant's Identity and Legal Representation

   The hearing opens with the court clerk confirming the defendant's name, date of birth, and address. The clerk will then ask whether the defendant is represented. If not, they will be asked if they have applied for or wish to apply for legal aid.

2. **The Reading of the Allegation**

   The charges are read out to the defendant. This is the formal articulation of the offence they are alleged to have committed, including the relevant statute and a summary of the facts.

3. **The Plea**

   The defendant is asked how they plead to each charge: guilty or not guilty.

   For summary-only offences, this is a definitive plea. A guilty plea will usually lead to sentencing, either immediately or after reports. A not guilty plea will lead to the listing of a trial date.

For either-way offences, this is the "indication of plea" as part of the "plea before venue" procedure. It is not a binding plea if the case goes to the Crown Court, but it dictates the immediate next steps.

For indictable-only offences, a plea is not taken in the magistrates' court.

4. Mode of Trial (for either-way offences pleading not guilty)

If the defendant indicates a not guilty plea to an either-way offence, the court proceeds to the mode of trial hearing to determine venue.

5. Bail and Custody Time Limits

The court must always consider the issue of bail. The prosecution may oppose bail, and the court will consider the grounds for refusal as set out in the *Bail Act 1976* and Schedule 1 to the Act. These include:

- Risk of failing to surrender to custody (absconding).
- Risk of committing further offences while on bail.
- Risk of interfering with witnesses or otherwise obstructing the course of justice. If bail is refused, the defendant is remanded in custody. Strict custody time limits apply: 56 days from first appearance to summary trial, and 182 days from sending to the start of a Crown Court trial, unless extended by the court for good cause.

6. Case Management and Disclosure

The court will give directions for the efficient progression of the case. In a not guilty case, this will include setting a timetable for the service of initial prosecution disclosure under the *Criminal Procedure and Investigations Act 1996* and for the defence to serve a Defence Statement. The court will set dates for trial, plea, and case management hearings.

3.2.2 Applying for a Representation Order

A Representation Order is the mechanism by which public funding (commonly known as "legal aid") is granted for criminal cases. The application is means-tested and merit-tested.

1. The Means Test

The applicant's financial eligibility is assessed by the Legal Aid Agency (LAA). For magistrates' court cases, this involves providing proof of income and capital.

- **Benefits recipients**: Recipients of certain income-related benefits (e.g., Income Support, Universal Credit) are automatically financially eligible.
- **Gross monthly income**: For those not on benefits, the applicant's gross monthly income must be below a certain threshold. If income is above this threshold, they are unlikely to be eligible and may have to pay for representation privately.
- **Hardship reviews**: Even if the applicant fails the means test, they can apply for funding on the basis that paying for legal representation would cause them or their family financial hardship.

2. The Interests of Justice (Merits) Test

This is the crucial test. It is not enough to be financially eligible; the application must also show that it is in the "interests of justice" for public funds to be granted. The applicant must satisfy at least one of the following criteria, as set out in *Schedule 1* of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)*:

- **Loss of liberty**: The individual is at risk of losing their liberty.
- **Loss of livelihood**: The individual is at real risk of losing their job.
- **Legal complexity**: The case involves substantial points of law.
- **Inability to understand the proceedings**: The individual is unable to understand the proceedings or present their own case (e.g., due to age, mental illness, or learning disability).
- **Tracing and cross-examining witnesses**: The case involves the tracing and interviewing of witnesses, or expert cross-examination.
- **A friend or relative is involved**: It is in the interests of another person that the individual be represented.

In practice, for any either-way or indictable-only offence where a custodial sentence is a realistic possibility, the Interests of Justice test is almost always met.

The Application Process

The application is made by the solicitor, usually online via the LAA's Client and Cost Management System (CCMS) portal. It requires the submission of the client's financial details and a justification addressing the "Interests of Justice" test. For a first hearing, an application can often be processed urgently at court.

Scenario

Thomas is charged with actual bodily harm. He works part-time and is not on benefits. At the police station, he was represented by a duty solicitor. For the court case, his solicitor helps him complete a Representation Order application. They provide his wage slips, which show his income is below the threshold. They also complete the merits test, stating that actual bodily harm is an either-way offence carrying a maximum sentence of 5 years, and Thomas is therefore at clear risk of a custodial sentence, satisfying the "loss of liberty" criterion. The application is granted.

3.2.3 The Role of the Defence Solicitor at the First Hearing

The defence solicitor's role at the first hearing is active, strategic, and multifaceted. It extends far beyond simply "standing next" to the client.

1. **Pre-Hearing Preparation and Client Conference**

   The work begins long before entering the courtroom. The solicitor must:

- **Take detailed instructions**: The solicitor must obtain the client's full account of the events, their personal circumstances, and any potential defence.
- **Obtain and review initial disclosure**: The solicitor should request the Initial Details of the Prosecution Case (IDPC) from the Crown Prosecution Service (CPS). This typically includes the MG5 (summary of facts), MG6 (review sheet), and witness statements. This is essential for informed advice on plea.
- **Advise on plea**: The solicitor must discuss the evidence, the law, and the likely outcomes of a guilty or not guilty plea. The advice must be realistic, objective, and free

from pressure. The solicitor must ensure the client understands that the decision on plea is the client's alone.

- **Explain procedure**: The solicitor ought to demystify the court process for the client, explaining who will be in the courtroom, what will happen, and in what order.

2. Advocacy and Courtroom Duties

Inside the courtroom, the solicitor's duties include:

- **Making representations on bail**: If the client is in custody or bail is opposed, make persuasive arguments to secure the client's release on bail. This may involve proposing conditions (e.g., residence, curfew, surety) to address the prosecution's concerns.
- **Conducting the plea before venue/mode of trial**: For either-way offences, formally indicate the plea and make submissions on venue. For example, a solicitor might persuasively argue that a case is suitable for summary trial, or advise a client to elect Crown Court trial where appropriate.
- **Case management**: Engage proactively with case management, proposing realistic timetables for disclosure and trial dates. This helps to avoid unnecessary adjournments and ensures the case progresses efficiently.
- **Mitigation in guilty pleas**: If the client pleads guilty, the solicitor may be called upon to deliver an initial mitigation plea, highlighting the client's personal circumstances, remorse, and any other factors that may persuade the court to impose a lesser sentence or order pre-sentence reports.

3. Ethical Considerations and Client Care

Throughout, the solicitor must adhere to the highest ethical standards as set out by the SRA Standards and Regulations. This includes:

- **Maintaining confidentiality**: All communications with the client are privileged and confidential.
- **Acting in the client's best interests**: The solicitor's duty is to promote and protect the client's best interests, fearlessly and independently.
- **Managing client expectations**: Providing honest, sometimes unwelcome, advice about the strengths and weaknesses of the case and the likely sentence.

3.3 Conclusion

The early stages of a criminal case are among the most critical. The classification of offences, whether summary, either-way, or indictable-only, immediately sets the legal pathway, determining the court, the procedure, and the potential sentence. The first hearing is where this pathway is activated, and key decisions on plea, trial location, and bail are made.

For a defence solicitor, understanding this process is essential to protect the client's interests. This involves securing legal funding, providing clear advice on the strategic choice between magistrates' and Crown Court trial, and ensuring the case starts on the right foot. Ultimately, the choices made at the beginning of a case have a lasting impact, defining its direction and often its final outcome.

4

BAIL

The principle of liberty is a cornerstone of the English legal system. An individual accused of a crime is presumed innocent until proven guilty, and this presumption extends to the period before trial. The law of bail represents the practical application of this principle, governing the pre-trial release of individuals from custody. For a defence solicitor, navigating the law of bail is a fundamental and often urgent skill, as the outcome of a bail application can have profound consequences for the client's life, their ability to participate in their own defence, and the overall strategy of the case. A client remanded in custody cannot work, support their family, or easily consult with their legal team to build a defence, placing them at a significant disadvantage.

The legal framework for bail is primarily contained within the *Bail Act 1976*, a seminal piece of legislation that creates a statutory presumption in favour of bail. This chapter will provide a comprehensive analysis of the law, procedure, and strategy surrounding bail applications. We will begin by exploring the fundamental right to bail and the exhaustive list of exceptions that allow a court to refuse it, both before and after conviction.

We will then examine the concept of conditional bail, the types of conditions that can be imposed, and the specific regime of electronic monitoring. The procedural steps for making a bail application will be detailed, followed by an analysis of the avenues available if bail is refused, including further applications and appeals. Finally, the serious consequences of absconding and breaching bail conditions will be discussed. Understanding this area of law is not merely about securing a client's release; it is about upholding a core tenet of justice.

4.1 The Right to Bail and Exceptions

The *Bail Act 1976* establishes a powerful starting point. *Section 4(1)* creates a general right to bail for all persons accused of an offence, irrespective of whether they are before the police or the court. This means that the legal burden is not on the defendant to justify why they should be released; rather, it is on the prosecution to demonstrate why bail should be refused. This reflects the foundational principle that detention before trial is the exception, not the rule.

This presumption applies at every stage of the criminal process where a person's liberty is in question, including:

- Upon arrest at the police station.
- At the first hearing in the magistrates' court.
- At any subsequent hearing before conviction or sentence.
- During an appeal to the Crown Court or the High Court.

However, this right is not absolute. The *Bail Act 1976* provides a structured framework of exceptions that permit the court to deny bail. These exceptions are contained in *Schedule 1 to the Act* and are divided into two parts: exceptions applicable to defendants who have not been convicted, and those applicable to defendants who have.

4.1.1 Exceptions to Bail Before Conviction

For a defendant who has not been convicted, the court may refuse bail if it is satisfied that there are substantial grounds for believing that the defendant, if released on bail, would:

1. **Fail to Surrender to Custody (Abscond)**

   This is the fear that the defendant will not return to court for their trial or other hearings. In assessing this risk, the court will consider factors such as:

   - The nature and seriousness of the offence. For example, a defendant charged with murder faces a potential life sentence, creating a powerful incentive to abscond.
   - The probable method of dealing with the defendant for it (e.g., is a custodial sentence likely?).

- The defendant's community ties, including family, job, and property. A homeowner with a long-standing job and family in the area is a lower flight risk.
- The defendant's previous history of answering bail. A record of failing to appear is highly detrimental.
- The defendant's character, antecedents, and associations.

2. Commit an Offence While on Bail

The court may refuse bail if there are substantial grounds to believe the defendant will commit further offences. Relevant factors include:

- The defendant's past criminal record, particularly any pattern of offending while on bail.
- The nature of the current allegations. A defendant charged with a series of burglaries may be considered a high risk for committing further similar offences if released.

3. Interfere with Witnesses or Otherwise Obstruct the Course of Justice

This concerns the risk that the defendant may intimidate witnesses, alert other suspects, or tamper with evidence. Factors include:

- The defendant's known associations with co-accused or witnesses.
- Any evidence of previous attempts to interfere with the investigation, such as phone calls or messages to witnesses.
- The nature of the offence and the proximity of the defendant to the witnesses. In a case of alleged domestic violence where the defendant and victim live near each other, this risk is a primary concern.

Furthermore, the court may deny bail for the defendant's own protection, or, in the case of a juvenile, for their own welfare.

The No Real Prospect Test

For all summary-only and either-way offences, the court's power to refuse bail on the grounds of committing further offences or interfering with witnesses is subject to an important qualification. Under *Paragraph 2A of Schedule 1*, if the defendant has already been granted

bail in the proceedings and the offence is not an imprisonable one, the court cannot refuse bail on these grounds unless it is satisfied that there is, at the time of the application, no real prospect of the defendant receiving a custodial sentence. This is designed to prevent the refusal of bail for minor, non-imprisonable offences.

Scenario

David is charged with burglary of a dwelling, an either-way offence with a likely custodial sentence if he is convicted. He has one previous conviction for a similar offence, for which he received a community order. The prosecution oppose bail, arguing he poses a risk of re-offending. David's solicitor argues that he has strong community ties: he lives with his partner and their child, has a stable job, and has never previously failed to answer bail. The court must weigh these factors. The seriousness of the offence and his previous conviction may lead the court to find substantial grounds that he will commit offences, but his strong community ties may persuade them that the risk can be managed with strict conditions.

The case of ***R v. Kashamu*** [2001] EWHC 1215 (Admin) illustrates the high threshold of "substantial grounds." The defendant was charged with serious drug offences and was considered a significant flight risk due to his wealth and international connections. The prosecution argued he had the means and motive to abscond. The Court of Appeal upheld the refusal of bail, stating that the "substantial grounds" test was met not by mere suspicion, but by a compelling argument based on the specific facts of the defendant's circumstances, which presented a real and tangible risk of flight.

4.1.2 Exceptions to Bail After Conviction

The statutory presumption in favour of bail is significantly weaker after a defendant has been convicted. *Schedule 1, Part II* of the *Bail Act 1976* applies in these circumstances. The court need not grant bail to a convicted person if it is satisfied that:

- It is probable that the defendant will receive a custodial sentence; or
- The defendant has been committed to the Crown Court for sentence under *s.3 Powers of Criminal Courts (Sentencing) Act 2000* (because the magistrates deem their sentencing powers insufficient); or

- In the case of a prison or young offender institution, the defendant need not be granted bail unless the court is satisfied that there is no significant risk of them committing a further offence while on bail.

The key difference is the lower threshold. Before conviction, the court must find "substantial grounds" for believing a risk exists. After conviction, the test is often one of probability, reflecting the fact that the defendant's position has changed following a finding of guilt.

Scenarios

- Chloe pleads guilty to a significant fraud at the magistrates' court. The magistrates decide their sentencing powers are insufficient and commit her to the Crown Court for sentence. At this point, the presumption in favour of bail is effectively reversed. Chloe's solicitor must present compelling reasons why she should be granted bail pending her sentencing hearing, such as demonstrating a very low risk of re-offending or absconding, perhaps by offering a substantial security or surety, or highlighting pressing family responsibilities that require her to remain at liberty for a short period.
- John, a man with no fixed address and a long history of petty theft, pleads guilty to shoplifting. While the offence itself is minor, his extensive record makes a custodial sentence highly probable. Furthermore, as he has been convicted of dozens of similar offences, the court finds there is a significant risk he will commit further offences if released. Therefore, despite the minor nature of the crime, the court remands him in custody to await sentence.

4.2 Conditional Bail

Where the court is persuaded to grant bail but has concerns about one or more of the bail risks (absconding, re-offending, interference), it has the power to impose conditions under *s.3(6)* of the *Bail Act 1976*. The purpose of conditions is not to punish the defendant, but to mitigate the identified risks, thereby making it safe to grant bail.

Conditions must be necessary, proportionate, and enforceable. Common bail conditions include:

- **Residence**: The defendant is required to live and sleep at a specified address.
- **Curfew**: The defendant is mandated to remain at the residence for set hours, typically overnight.
- **Surety/Security**: A surety is a person who agrees to pledge a sum of money that will be forfeited if the defendant fails to surrender. The court must be satisfied the surety is suitable and can afford the amount. A security is a sum of money deposited by the defendant or on their behalf.
- **Reporting**: The defendant is to report to a designated police station at specified times(e.g., daily or weekly).
- **Non-contact**: The defendant is not to contact directly or indirectly specified prosecution witnesses or co-defendants.
- **Exclusion zone**: The defendant is required to not enter a defined geographical area (e.g., the street where the alleged victim lives, or a town centre).
- **Surrender of passport**: The defendant is required to surrender any passport to the police, preventing international travel.

The court can impose any condition it deems necessary to secure the objectives of ensuring surrender, preventing further offences, and preventing interference with witnesses.

4.2.1 Electronic Monitoring (Tagging)

Electronic monitoring, commonly known as "tagging", is a specific condition authorised by *section 3(6ZAA)* of the *Bail Act 1976*. It is used to enforce a curfew condition. A device is attached to the defendant's ankle, which monitors their presence at a specified address during the curfew hours.

The court can only impose electronic monitoring if:

1. The defendant is aged 17 or over.
2. The defendant has been charged with, or convicted of, an imprisonable offence.
3. The court is satisfied that without the electronic monitoring condition, the defendant would not be granted bail.

The court must also be satisfied that the necessary provisions for monitoring are available in the relevant area. The decision to impose a tag is a judicial one, but its practical implementation is managed by the probation service.

Scenario

Sarah is charged with assault. She has no fixed address, which raises concerns about her surrendering to custody. Her solicitor proposes a bail package. A friend of Sarah's agrees to let her live at her address and also acts as a surety. The court agrees to grant bail but imposes conditions: a residence condition at the friend's address, a curfew from 7 pm to 7 am, and electronic monitoring to ensure compliance with the curfew. This package of conditions addresses the court's primary concern about Sarah's surrender.

4.3 Procedure for Applying for Bail

A defence solicitor must be thoroughly prepared to present a persuasive bail application. The process can be broken down into distinct stages.

1. **Taking Instructions and Preparation**

   This is the most critical stage. The solicitor must:

   - Take detailed instructions from the client about their personal circumstances, including their community ties, employment, family, and health.
   - Obtain the client's version of the alleged offence.
   - Obtain and review the evidence, including the MG5 and witness statements, to understand the prosecution case and identify its potential weaknesses. For instance, a weak identification or a disputable account can be highlighted to suggest the case is not as strong as it seems, reducing the incentive for the client to abscond.
   - Gather evidence to support the application, such as character references, proof of employment, proof of address, and details of potential sureties. For a surety, this includes proof of their identity, address, and financial means.

2. **The Bail Application in Court**

   The application itself is an exercise in persuasive advocacy.

- **The prosecution outline**: The CPS representative will first outline the allegations and the reasons for opposing bail, citing the relevant exceptions from *Schedule 1*.
- **The defence submission**: The defence solicitor then responds. A structured submission should:
    - **Address the exceptions**: Systematically address each of the prosecution's concerns. For example, if the prosecution fears absconding, the solicitor should present evidence of the client's strong community ties, employment, and family responsibilities.
    - **Present a positive case**: Actively present the reasons why the client is a suitable candidate for bail. Highlight their stable job, family responsibilities, and good character. Emphasise that they are presumed innocent.
    - **Propose a package of conditions**: If there are identifiable risks, propose a tailored package of conditions that directly mitigates them. For example, an exclusion zone to address the risk of witness interference, or a curfew and surety to address the risk of absconding. Be prepared to explain how each condition will manage a specific risk.
- **Use a bail application form**: Many courts use a standard form (such as a MG5) which helps structure the application and ensures all relevant information is before the court.

4.4 Further Bail Applications and Appeals

A refusal of bail is not necessarily the final word. The defence has several avenues to pursue, each with its own specific procedure and strategic considerations. Understanding these routes is essential for a defence solicitor to persistently and effectively advocate for a client's liberty throughout the pre-trial process.

1. Renewed Applications in the Magistrates' Court

If bail is refused by a magistrates' court, the defendant generally has the right to make a further application to the same court. Under *s.154* of the *Criminal Justice Act 1988*, where

a court refuses bail, it must normally hear a fully argued fresh application at the next hearing, provided the defendant is present and wishes to apply. The key to a successful renewed application is a material change in circumstances. This could be:

- **The passage of time**: With the defendant having spent longer in custody awaiting trial, the argument can be made that the incentive to abscond may have reduced as they have already "faced" some custodial time, or that the delay itself is a new factor to consider.
- **The development of a new proposed bail address**: Securing a stable address, perhaps with a relative who was previously unavailable, directly addresses concerns about the defendant being of no fixed abode.
- **The emergence of a new surety**: A new person coming forward to act as a surety, especially one with substantial assets or strong community standing, can significantly mitigate the risk of absconding.
- **A weakening of the prosecution case**: Following further disclosure, if key evidence appears less robust (e.g., a witness statement is inconsistent, or CCTV footage is inconclusive), it can be argued that the defendant's confidence in defending the case is higher, reducing their motive to abscond, and that the overall strength of the case is weaker.

Without a demonstrable change in circumstances, a court may refuse to hear a renewed application on the basis that it is frivolous or an abuse of process. The solicitor must therefore be prepared to clearly articulate what has changed since the last refusal.

Scenario

Mark was refused bail for a drug offence due to concerns he would re-offend and his lack of a stable address. His solicitor makes a renewed application two weeks later. The change in circumstances put forward is that Mark's aunt has now offered him a room in her house, which is in a different town from his previous associates, and she has agreed to act as a surety, pledging £5,000. The solicitor argues this new package directly addresses the court's earlier concerns about stability and risk.

2. Appeal to the Crown Court

If the magistrates' court refuses bail, the defence has an automatic right of appeal to a judge of the Crown Court. This right is granted by *s.16* of the *Criminal Justice Act 2003*. The appeal must be lodged with the Crown Court and served on the prosecution within the first 48 hours after the magistrates' decision (not including weekends and public holidays).

This is a very tight deadline, requiring immediate action. The Crown Court judge will hear the application afresh (a *de novo* hearing), based on the circumstances as they exist at the time of the appeal. This means they are not merely reviewing the magistrates' decision for error, but are making a completely new decision, which can consider any new arguments or changes in circumstance that have occurred since the magistrates' hearing.

3. Application for Bail to the High Court

A final, and rarely used, option is to apply for bail to a judge in the High Court (King's Bench Division). This is not an appeal on the merits but an application for judicial review. It is only available in exceptional circumstances, typically where there has been some error of law or principle in the lower court's decision, or where the lower court acted irrationally. Examples include: a court misapplying the exceptions in *Schedule 1*, failing to take relevant considerations into account, or imposing conditions that are manifestly unreasonable or impossible to fulfil. It is not a route for simply re-arguing the facts.

4.5 Consequences of Absconding and Breaches of Bail

The bail system relies on the defendant's compliance. Failure to adhere to the terms of bail carries serious consequences, both in terms of new criminal charges and the impact on the original case.

4.5.1 The Offence of Absconding

Under *s.6(1)* of the *Bail Act 1976*, it is a specific criminal offence for a person released on bail in criminal proceedings to fail, without reasonable cause, to surrender to custody at the time and place appointed. This is a separate offence from the original charge.

Mode of Trial

The offence is summary-only, but if committed by a person who was on bail for an indictable-only offence, it becomes either-way. This reflects the increased seriousness of absconding when facing a major charge.

Penalty

The maximum penalty is 3 months' imprisonment and/or a fine on summary conviction, and 12 months and/or a fine on conviction on indictment. Crucially, any sentence for absconding is almost always ordered to run consecutively to any sentence for the original offence.

"Reasonable Cause"

The defendant bears the legal burden of proving, on a balance of probabilities, that they had a reasonable cause for their failure to surrender. This is a high bar; forgetfulness, oversleeping, or a misunderstanding of the date is unlikely to suffice. A medical emergency requiring immediate hospitalisation, supported by contemporaneous medical evidence, would be a typical example of a potentially reasonable cause.

Impact on Original Bail

A defendant who has absconded and is subsequently arrested will almost certainly be remanded in custody for the remainder of their proceedings. The court will have lost all confidence in their reliability.

Scenario

Lisa is on bail for fraud. On the morning of her trial, she is involved in a minor car accident. Rather than proceeding to court, she stays at the scene to exchange details and then goes home, feeling shaken. She does not contact her solicitor or the court. She is arrested later that day for absconding. At her hearing for the bail offence, she argues she had reasonable cause due to the accident. The court is likely to find this insufficient, as she had a duty to contact the court to explain her delay. She is convicted of the bail offence and remanded in custody for her fraud trial.

4.5.2 Arrest for Breach of Conditions

A police officer may arrest without a warrant a person who has been released on bail if the officer has reasonable grounds for believing that person has broken, or is likely to break, any bail condition (*s.7(3)* of the *Bail Act 1976*).

Upon arrest, the person must be brought before a magistrates' court within 24 hours (excluding Christmas Day, Good Friday, and Sundays). The court will then reconsider the question of bail. A defendant who has breached their conditions is in a much weaker position.

The court may decide to remand them in custody, or it may grant bail again, often with more stringent conditions. The court's primary concern will be the nature of the breach; a technical breach (e.g., reporting 30 minutes late) may be treated more leniently than a substantive breach that goes to the heart of the original risk, such as contacting a witness.

Scenario

John is granted bail with a condition not to contact his ex-partner, the complainant. She provides the police with text messages from John, sent from a new phone number, asking her to drop the charges. The police arrest John for breach of bail conditions. When he is brought before the court, the prosecution argue he has directly interfered with a witness, demonstrating a blatant disregard for court orders and confirming the original risk of interference. John's solicitor struggles to propose conditions that would now mitigate this risk, as the trust in John's compliance has been shattered. The court, finding substantial grounds to believe he would continue to interfere, refuses bail and remands John in custody until his trial. At trial, this breach may also be used by the prosecution as evidence of a "guilty mind" or consciousness of guilt.

4.6 Conclusion

In summary, the law of bail represents a critical balancing act between the fundamental right to liberty and the imperative to protect the public and the integrity of the justice system. The statutory presumption in favour of bail, as enshrined in the Bail Act 1976, places the burden firmly on the state to justify why an unconvicted individual should be deprived of their

freedom. For the defence solicitor, navigating this landscape requires a strategic and proactive approach, from constructing a compelling initial application with a tailored package of conditions to pursuing renewed applications and appeals when bail is refused.

However, this system is built on a foundation of trust and responsibility. The severe consequences for absconding or breaching conditions, including new criminal charges and the almost certain loss of liberty pending trial, serve as a powerful reminder that the grant of bail is a privilege contingent on the defendant's compliance. Ultimately, effective advocacy in bail proceedings is not just about securing a client's release; it is about ensuring that the presumption of innocence is meaningfully upheld while robustly addressing legitimate risks to the administration of justice.

5

ALLOCATION, PLEA BEFORE VENUE, AND CASE MANAGEMENT

Following the initial hearing, the criminal justice process enters a critical phase where the case's trajectory is formally determined. This stage, governed by precise statutory procedures, involves deciding where the case will be heard, how the defendant pleads, and how it will be prepared for trial. For the defence solicitor, this represents a period of strategic decision-making that can fundamentally impact the outcome.

The choices made during allocation and plea before venue, and the rigour applied during case management, lay the foundation for a fair and efficient trial. This chapter examines these crucial procedural stages, from the initial indication of plea through to the detailed preparation required for trial in both the magistrates' court and the Crown Court.

5.1 Plea Before Venue; Procedure and Advising on Trial Venue

The "Plea Before Venue" procedure is a mandatory initial step for all either-way offences in the magistrates' court. It requires the defendant to indicate a plea before any decision on trial venue is made, streamlining the process and avoiding unnecessary hearings. This procedure, outlined in the *Crime and Disorder Act 1998*, ensures that defendants who intend to plead guilty are sentenced as quickly as possible, while those pleading not guilty proceed to a consideration of the appropriate trial venue.

5.1.1 Procedure on Indicating a Guilty Plea

If a defendant indicates a guilty plea at the Plea Before Venue hearing, the case remains in the magistrates' court for sentencing. However, this is not the end of the venue consideration. The magistrates must decide whether their sentencing powers are sufficient.

If they believe their powers (generally a maximum of 6 months' imprisonment per offence, or 12 months in aggregate for multiple either-way offences) are adequate, they will proceed to sentence, either immediately or after obtaining a pre-sentence report.

If the case appears so serious that a greater sentence should be available, they will commit the defendant to the Crown Court for sentencing under *s.3* of the *Powers of Criminal Courts (Sentencing) Act 2000*.

The key legal test for the magistrates is whether the offence(s) are "so serious that greater punishment should be inflicted than the court has power to impose." This requires an assessment of the facts of the offence and the defendant's antecedents.

Scenario
Michael is charged with theft, an either-way offence. The value of the stolen goods is high, and he has several relevant previous convictions. At the Plea Before Venue hearing, he indicates a guilty plea. The magistrates, considering the value and his record, decide their sentencing powers are insufficient. They commit Michael to the Crown Court for sentencing, where a judge can impose a sentence of up to 7 years.

The case of ***R v. Portsmouth Crown Court, ex parte Thomas*** [1994] COD 373 reinforces that the magistrates' decision to commit for sentence is a discretionary one, but it must be exercised judicially. The defendant pleaded guilty to two counts of theft. The Divisional Court held that while the magistrates were entitled to consider the defendant's record and the nature of the offences, they should not commit for sentence simply because the Crown Court's greater powers might be "more appropriate." There must be a genuine belief that their own powers are *inadequate*. This principle guides defence submissions against committal for sentence.

5.2. Allocation of Business between Magistrates' Court and Crown Court

The allocation process determines whether an either-way case will be tried in the magistrates' court or the Crown Court. This is a two-stage process involving both the court and the defendant, designed to ensure that cases are heard at the appropriate level based on their seriousness.

5.2.1 Procedure under ss. 19–20 & s. 22A Magistrates' Courts Act 1980

If a defendant indicates a not guilty plea at the Plea Before Venue hearing, the court proceeds to the "mode of trial" or allocation hearing.

The Court's Decision

The magistrates must decide whether the case is more suitable for summary trial or trial on indictment. They consider the nature of the case, its seriousness, and their own sentencing powers. The prosecution will outline the facts, and the defence may make representations about the suitability of summary trial. The magistrates do not determine guilt or innocence at this stage, but rather assess the potential seriousness of the case.

The Defendant's Choice

If the magistrates accept jurisdiction (deem the case suitable for summary trial), the defendant is then given the choice:

1. Consent to summary trial in the magistrates' court.
2. Elect trial by jury in the Crown Court.

This choice is a fundamental right for the defendant and is a critical strategic decision. The defence solicitor must advise the client on the profound implications of this choice.

Strategic Considerations for Venue: Advising the Client

Factor	Magistrates' Court (Summary Trial)	Crown Court (Trial on Indictment)
Speed	Generally faster (weeks or a few months).	Slower process (can take a year or more).
Formality	Less formal, heard by magistrates or a District Judge.	Highly formal, heard by a Crown Court Judge and jury.
Acquittal Rates	Higher conviction rate overall.	Slightly higher acquittal rate for some offence types, but this is not guaranteed.
Sentencing	Limited powers (max 6 months per offence). A key advantage if convicted.	Unlimited powers up to the statutory maximum for the offence. A significant risk if convicted.
Cost	Lower costs for a privately paying client.	Significantly higher costs.
Case Preparation	Can be perceived as less thorough. Disclosure can be slower.	More rigorous pre-trial procedures and case management, often leading to better early disclosure.
Jury	No jury.	Right to trial by a jury of 12 peers. This is often the most significant factor for defendants asserting their innocence.

The case of ***R v. Ashton*** [2006] EWCA Crim 794 highlights the importance of the magistrates' initial jurisdiction decision. The Court of Appeal emphasised that magistrates should not decline jurisdiction too readily. They are well-equipped to handle all but the most complex or serious either-way offences. This provides a basis for a defence solicitor to persuasively argue that a case is suitable for summary trial, emphasising factors like the straightforward nature of the evidence and the absence of complex legal issues.

Scenario illustrating Defendant Election

Chloe is charged with assault occasioning actual bodily harm. The magistrates accept jurisdiction. Chloe's solicitor advises her that while a magistrates' court trial would be quicker and, if convicted, would result in a lesser sentence, the Crown Court offers a trial by jury and a more thorough examination of the evidence. After considering the stress of a prolonged process and the strength of the prosecution case, Chloe, on advice, consents to summary trial.

Special Category; *s.22A MCA 1980*

As previously discussed, for low-value shoplifting (goods under £200) and criminal damage (value under £5,000), the mode of trial is summary-only. The defendant has no right to elect Crown Court trial. The case must be dealt with in the magistrates' court, unless it is linked to a related either-way or indictable-only offence. This removes a key strategic option for defendants in these specific circumstances.

5.2.2 Sending for Trial without Allocation (s. 50A & s. 51 CDA 1998)

For indictable-only offences, the process is simpler and faster. The magistrates' court has no power to try these cases. Under *s.51* of the *Crime and Disorder Act 1998*, the case is "sent" directly to the Crown Court at the first hearing. There is no allocation hearing or plea taken, although a guilty plea can be indicated for administrative purposes. This procedure is designed to expedite the most serious cases to the court with the appropriate jurisdiction and sentencing powers from the outset.

The sending is a mandatory administrative act. The magistrates' role is limited to ensuring the offence is genuinely indictable-only and dealing with ancillary matters such as legal aid

and bail. The case is then transferred to the Crown Court, where the first substantive hearing will be the Plea and Trial Preparation Hearing (PTPH). A similar sending process under *s.50A CDA 1998* applies for either-way offences that are linked to an indictable-only offence (e.g., a co-defendant charged with a lesser, either-way offence will be sent alongside the principal defendant).

Scenario

Ben is charged with robbery, an indictable-only offence. At his first appearance in the magistrates' court, the legal advisor confirms his identity and details. The prosecutor confirms the charge is indictable-only. The magistrate then formally sends the case to the Crown Court under *s.51*. The entire process in the magistrates' court may take only a few minutes. Ben's solicitor does not make a bail application here but will do so at the first Crown Court hearing.

5.2.3 Handling Cases with Different Pleas from Co-Defendants

A complex situation arises when co-defendants take different positions on plea or venue. The general rule is that defendants should be tried together, but the court must balance this with the interests of justice for each individual. The principle of a "jointly preferred indictment" aims to avoid inconsistent verdicts and the duplication of evidence.

Different Pleas

If one defendant pleads guilty and another not guilty, the guilty defendant will usually be sentenced after the trial of the other, unless it is unjust to do so. This allows the judge passing sentence on the guilty defendant to have a complete picture of the overall criminality revealed during the trial. However, if there is a significant delay, the guilty defendant may be sentenced earlier.

Different Venue Choices

This is a critical strategic crossroad. If one defendant elects Crown Court trial, the court will usually send all co-defendants to the Crown Court to be tried together, even if the others would have been content with a summary trial. This is because it is in the interests of justice for all parties involved in a single alleged incident to be tried on the same evidence before the same tribunal.

Scenario

Liam and Jake are co-defendants charged with joint possession with intent to supply drugs. At the Plea Before Venue hearing, Liam indicates a not guilty plea and, when the magistrates accept jurisdiction, he elects for Crown Court trial. Jake had hoped for a quicker, summary trial in the magistrates' court. However, because Liam has elected Crown Court trial, the magistrates' court must send both Liam and Jake to the Crown Court. Jake has lost his choice of venue due to his co-defendant's decision.

5.3 Case Management and Pre-Trial Hearings

Efficient case management is crucial for ensuring that cases proceed to trial fairly and without unnecessary delay. The *Criminal Procedure Rules* (CrimPR) set out the overriding objective: to deal with cases justly and efficiently, which includes acquitting the innocent and convicting the guilty, while respecting the interests of all parties.

5.3.1 Magistrates' Court Case Management

Case management in the magistrates' court is robust and judge-led, often guided by a standardised Advance Information Form or Case Management Form. The court will actively manage the case by:

- Identifying the key issues in dispute.
- Setting a clear timetable for disclosure and other pre-trial steps.
- Setting a firm trial date.

The defence solicitor must be prepared to clearly and concisely state the factual and legal issues in dispute. A failure to engage properly with case management can lead to cost orders or, in extreme cases, the court drawing adverse inferences.

5.3.2 The Plea and Trial Preparation Hearing (PTPH)

The Plea and Trial Preparation Hearing is the main case management hearing in the Crown Court. Its primary purposes are:

- To take the defendant's plea.
- To identify the key issues for trial.
- To give directions for trial preparation, including disclosure, service of defence statements, and expert evidence.
- To set a firm trial date and a timetable for all preparatory work.

The defence advocate is expected to have taken full instructions and be in a position to inform the court of the likely plea and the core of the defence case. The court will complete a PTPH Form which records these issues and the directions made.

Preliminary Hearings in the Crown Court

In complex cases, further preliminary hearings may be held after the PTPH to monitor progress, resolve legal issues (e.g., through legal argument on the admissibility of evidence), and ensure the trial remains on track. In very heavy cases, a Ground Rules Hearing may be held to manage the participation of vulnerable witnesses or defendants.

5.3.3 Disclosure: Prosecution, Defence, and Unused Material

Disclosure is a critical component of a fair trial, ensuring the defence has access to relevant material. The regime under the *Criminal Procedure and Investigations Act (CPIA) 1996* is founded on the principle of equality of arms.

Initial Prosecution Disclosure

Under the CPIA, the prosecution must disclose any material which has not previously been disclosed and which "might reasonably be considered capable of undermining the prosecution case or assisting the defence case." This is a broad duty that requires the prosecution to review all material gathered during the investigation ("unused material") and disclose anything that meets this test.

In ***R v. H and C*** [2004] UKHL 3, the House of Lords emphasised that the prosecution's duty of disclosure is a critical element of the right to a fair trial under *Article 6* of the *European Convention on Human Rights*. The duty is one of continuing review, and failure to disclose relevant material can lead to a conviction being quashed as unsafe.

Defence Disclosure and the Consequences of Failure

In return for initial prosecution disclosure, the defence must serve a Defence Statement outlining the nature of the defence, the matters on which issue is taken, and the reasons. A defence statement must be more than a mere denial; it should set out the positive aspects of the defence case.

Failure to serve a defence statement, or setting out a defence at trial that is different from the one in the statement, can allow the court or jury to draw adverse inferences *under ss. 6E and 11 CPIA 1996*. This could significantly damage the defendant's credibility.

Ongoing Disclosure Obligations

The prosecution's duty to review and disclose unused material is ongoing throughout the case. If new material comes to light, or if the defence statement changes the nature of what is relevant, the prosecution must continuously assess and disclose as necessary.

5.3.4 The Magistrates' Court Trial Preparation Form

This form is a key case management tool. It requires both parties to set out key information ahead of trial, including:

- The facts in issue.
- Witnesses to be called.
- Any special arrangements needed (e.g., for vulnerable witnesses).
- The estimated length of the trial.

Completing this form thoroughly is essential for ensuring an efficient trial. It forces early analysis of the case and prevents "trial by ambush." A poorly completed form can lead to adjournments and potential cost penalties.

5.4 Conclusion

In conclusion, the procedural stages following the initial hearing allocation, plea before venue, and case management are far from mere administrative formalities. They constitute a critical

strategic landscape where the defence solicitor's skill directly shapes the course of the entire case. The decision at Plea Before Venue sets an irrevocable tone, determining whether a case will be resolved swiftly in the magistrates' court or proceed to the more formidable arena of the Crown Court.

The allocation process demands a careful balancing of the risks and benefits of each venue, a calculation that must be meticulously explained to the client. Furthermore, the rigour of modern case management, governed by the *Criminal Procedure Rules* and the disclosure regime under the *CPIA 1996*, requires proactive and disciplined preparation from the outset.

A defence solicitor's effectiveness in identifying the real issues in dispute, compelling timely disclosure from the prosecution, and providing a coherent Defence Statement is not just about procedural compliance; it is the bedrock of building a robust defence and upholding the overriding objective: to ensure that every case is dealt with justly and fairly. Mastery of this phase is, therefore, indispensable to securing the best possible outcome for the client.

6

THE ADMISSIBILITY OF EVIDENCE 1: SILENCE, IDENTIFICATION AND HEARSAY

The criminal trial is a search for the truth, but it is a search conducted within a strict framework of rules designed to ensure fairness. Not all information that appears relevant is admissible before a court. The law of evidence governs what proof can be presented to a jury or magistrates, balancing the pursuit of justice with the protection of the defendant's rights. A mastery of these rules is what separates a competent advocate from an exceptional one.

This chapter examines three of the most complex and frequently contested areas of criminal evidence: the drawing of adverse inferences from a defendant's silence, the inherent dangers of visual identification evidence, and the exclusionary rule against hearsay. Understanding the principles, statutory frameworks, and case law governing these areas is essential for effectively challenging prosecution evidence, safeguarding the defendant's position, and ensuring a fair trial.

6.1 Burden and Standard of Proof

Before delving into specific types of evidence, it is crucial to understand the fundamental principles that underpin the entire trial process: the burden and standard of proof.

6.1.1 The Legal Burden

The legal burden, often called the "persuasive burden," is the obligation on a party to prove a fact in issue to the required standard. In a criminal trial, the golden thread running through the web of English law, as famously articulated in ***Woolmington v DPP*** [1935] AC 462, is that the prosecution bears the legal burden of proving every element of the offence. The defendant is presumed innocent, and it is for the prosecution to rebut that presumption.

There are rare, strictly defined exceptions to this rule where the legal burden shifts to the defence. These typically arise from express statutory language or by implication, such as the defence of insanity or specific statutory defences (e.g., the "lawful authority or reasonable excuse" defence in certain public order offences). The courts have held that such reverse burdens must be proportionate and justifiable under the *Human Rights Act 1998*.

6.1.2 The Evidential Burden

The evidential burden is the obligation to adduce sufficient evidence to raise an issue for the tribunal of fact (the magistrates or jury) to consider. It is a threshold requirement. For example, the prosecution must first discharge an evidential burden by presenting a *prima facie* case before the defendant is even called upon to answer it.

The defence may also bear an evidential burden. If a defendant wishes to rely on a particular defence (e.g., self-defence, alibi, or duress), they must present sufficient evidence to make it a live issue in the case. Once this evidential burden is discharged, the legal burden remains on the prosecution to disprove the defence beyond reasonable doubt.

For example: In a murder trial, the prosecution bears the legal burden of proving the defendant caused the victim's death with the requisite intent. If the defendant wishes to claim self-defence, the defence bears an evidential burden to point to some evidence, whether from the prosecution case or their own, that could support the claim. Once this is done, the prosecution then bears the legal burden of proving, beyond reasonable doubt, that the defendant was not acting in self-defence.

6.2 Inferences from Silence

The so-called "right to silence" is a long-standing principle of English law, protecting an accused from being compelled to answer questions. However, this right was significantly qualified by the *Criminal Justice and Public Order Act (CJPOA) 1994*, which allows a court or jury to draw adverse inferences from a defendant's silence in certain circumstances.

6.2.1 The "Right to Silence" and its Limitations

The key provisions are *ss. 34 to 38* of the *CJPOA 1994*. The most significant is *s.34*, which applies when a defendant fails to mention a fact when questioned under caution or charged, which they later rely on in their defence.

For an adverse inference to be drawn under *s.34*, the following conditions must be met:

1. The defendant was questioned under caution (or charged) before trial.
2. They failed to mention a specific fact.
3. They later rely on that fact in their defence.
4. In the circumstances existing at the time of questioning, the defendant could reasonably have been expected to mention that fact.

The rationale is that an innocent person would be expected to disclose a credible defence at the first opportunity. A failure to do so may lead the court or jury to conclude that the defence has been fabricated later.

Other key provisions include:

- ***Section 35***: Allows inferences to be drawn from a defendant's failure to give evidence at trial.
- ***Section 36***: Allows inferences from a defendant's failure to account for objects, substances, or marks found on their person.
- ***Section 37***: Allows inferences from a failure to account for their presence at a particular place.

The judge must give a careful direction to the jury, explaining that the drawing of an inference is permissible, not mandatory, and that the burden of proof remains on the prosecution. The case of ***R v Argent*** [1997] 2 Cr App R 27 set out the conditions for a section 34 inference, emphasising the need for the fact relied on at trial to be significant and for it to have been reasonable to expect it to have been mentioned earlier.

Scenario

Ben is arrested for a burglary that occurred at 8 pm. When interviewed, he remains silent, on his solicitor's advice. At trial, his defence is that he was at the cinema with a friend at the time of the offence. The prosecution will invite the jury to draw an adverse inference under *s.34*. They will argue that Ben could reasonably have been expected to provide this alibi during his interview, allowing the police to verify it at the time. The jury may conclude that the alibi is a recent fabrication because he failed to mention it when questioned.

6.3 Visual Identification Evidence and the *Turnbull* Guidance

Visual identification evidence is notoriously unreliable. The risk of mistaken identification is a leading cause of wrongful convictions. The judiciary's response to this danger is the landmark case of ***R v Turnbull*** [1977] QB 224, which established mandatory guidelines for judges when dealing with such evidence.

The ***Turnbull*** guidelines acknowledge that a convincing witness can be mistaken. Where the prosecution case depends wholly or substantially on the correctness of identification, the judge must:

1. Warn the jury of the special need for caution before convicting on identification evidence.
2. Instruct the jury on the reason for the need for such a warning.
3. Direct the jury to examine closely the circumstances of the identification, considering factors such as:

- The length of time the witness observed the suspect.

- The distance and visibility.
- Whether the observation was impeded.
- How well the witness knew the suspect before.
- The length of time between the observation and the identification procedure.

If the quality of the identification evidence is poor, the judge must withdraw the case from the jury and direct an acquittal, unless there is other evidence that supports the correctness of the identification.

6.3.1 Challenging Admissibility of Disputed Identification Evidence

The defence should challenge the admissibility of poor-quality identification evidence at the earliest opportunity, often through *a voir dire* (a trial within a trial). The basis for the challenge could be a breach of *PACE Code D*, which renders the evidence unreliable and thus unfair to admit under *s.78* of *PACE 1984*, or that the evidence is so weak that its prejudicial effect outweighs its probative value.

6.3.2 Application of the Turnbull Guidelines in the Magistrates' Court

While ***Turnbull*** is a Crown Court case, the principles apply equally in the magistrates' court. Lay magistrates and District Judges are presumed to know the law and apply the ***Turnbull*** warnings to themselves when evaluating identification evidence. The defence advocate must explicitly invite the court to apply the ***Turnbull*** guidelines and highlight the specific weaknesses in the identification evidence.

6.4 Hearsay Evidence

The rule against hearsay is a fundamental and historically strict principle of English evidence law, designed to safeguard the fairness and reliability of criminal trials. Its core purpose is to ensure that evidence presented to a court is the best available and can be properly tested. While the modern framework under the *Criminal Justice Act 2003* has introduced significant flexibility, understanding the basic rule and its exceptions remains essential for any criminal practitioner.

6.4.1 The Definition and Rationale of the Hearsay Rule

Hearsay is formally defined as "a statement not made in oral evidence in the proceedings that is relied on as evidence of any matter stated in it" (*Section 114(1)* of the *Criminal Justice Act 2003 (CJA 2003)*).

To deconstruct this, a "statement" is any representation of fact or opinion, made by a person, whether verbally, in writing, or by any other conduct. The crux of the rule lies not in the statement itself, but in the purpose for which it is being tendered in court. If the statement is being used to prove the truth of the facts it asserts, it is hearsay. The rationale for excluding such evidence is threefold:

1. **The absence of cross-examination**: The maker of the statement is not present in court to be cross-examined. Cross-examination is the primary tool for testing the accuracy, sincerity, and perception of a witness. Without it, the evidence remains untested and its reliability is suspect.
2. **The risk of inaccuracy**: Hearsay evidence carries a heightened risk of distortion. The court hears the evidence from a second-hand source, which increases the potential for errors in repetition, misunderstanding, or fabrication.
3. **The lack of demeanour evidence**: The tribunal of fact (the magistrate(s) or jury) cannot observe the demeanour of the original maker of the statement when they made it, which is often a factor in assessing credibility.

Illustrative Scenario of Hearsay

A police officer gives evidence: "A woman at the scene, who I cannot now find, told me, 'I saw David stab the victim.'" If the prosecution is presenting this to prove that David did in fact stab the victim, it is classic hearsay. The original witness is not available for cross-examination on her powers of observation, whether she was telling the truth, or whether she might have been mistaken.

Illustrative Scenario of Non-Hearsay (Original Evidence)

The same statement, "I saw David stab the victim," is repeated by the police officer. However, here, the defence lawyer is cross-examining the officer and the purpose is to show that the officer acted with undue haste and arrested David without a proper investigation. The statement is not being used for its truth, but to explain the officer's subsequent conduct and state of mind. In this context, it is not hearsay and is admissible. Another common example of non-hearsay is a statement offered merely to show that it was made, such as a threat uttered by the defendant, which is relevant simply because it was spoken.

6.4.2 The Grounds for Admitting Hearsay Evidence

The *CJA 2003* preserved the general prohibition against hearsay but created a comprehensive and flexible framework for its admission, recognising that a blanket exclusion could sometimes defeat the interests of justice. Hearsay evidence is now admissible in criminal proceedings only if one of the following four gateways under *s.114(1)* is satisfied:

- (a) It is admissible under a statutory provision. This includes the specific gateways created by the *CJA 2003* itself, primarily in *ss. 116 and 117*.
- (b) It is admissible under a common law rule. These are preserved historical exceptions, such as the *res gestae* doctrine (statements made as part of the immediate incident) or the rule concerning public documents like birth certificates.
- (c) All parties to the proceedings agree to it being admissible.
- (d) The court is satisfied that it is in the interests of justice for it to be admissible.

The most frequently invoked statutory gateways are:

- ***Section 116* (Unavailable witnesses)**: This allows for the admission of a statement where the maker is identified and is unavailable for a specified, practical reason. The reasons are exhaustive and include: the witness is dead; is too ill to attend; is kept away by the defendant; is outside the UK and it is not reasonably practicable to secure their attendance; or cannot be found despite diligent inquiry. Fear on the part of the witness is also a ground, but requires the court's permission.

- ***Section 117*** **(Business documents)**: This gateway admits statements contained in a document created or received by a person in the course of a trade, business, profession, or other occupation, provided the information was supplied by a person who had, or may reasonably be supposed to have had, personal knowledge of the matters stated. This covers records like invoices, ledgers, and log books, recognising their inherent reliability due to the professional context in which they are created.

The most discretionary and controversial gateway is the "interests of justice" test under **s.114(1)(d)**. This is a safety valve to prevent injustice where no other gateway applies. The court must have regard to a non-exhaustive list of factors in *s.114(2)*, which include:

- The probative value of the statement.
- The fact that other evidence has been presented on the same matter.
- The importance of the evidence.
- The circumstances in which the statement was made, including its apparent reliability.
- The difficulty of challenging the statement if the maker does not give evidence.
- The extent to which that difficulty would be prejudicial to a party.

6.4.3 The Procedure for Admitting and Challenging Hearsay

A party wishing to adduce hearsay evidence must comply with the strict notice provisions in the *Criminal Procedure Rules* (CrimPR). They must serve a formal notice on the court and all other parties, identifying the hearsay evidence and specifying the gateway under which they seek to admit it. Failure to serve notice does not automatically render the evidence inadmissible, but the court may refuse to admit it, adjourn the proceedings (often at the cost of the defaulting party), or make other procedural orders.

The opposing party has the right to challenge the admissibility of the evidence, both on the basis that no gateway is properly opened and that, even if one is, the evidence should be excluded in the court's discretion. The court will hold a pre-trial hearing, often called a *voir dire*, to determine the issue.

It is crucial to understand that even if hearsay evidence is deemed admissible under one of the *s.114* gateways, the court retains multiple safety nets to exclude it and ensure a fair trial:

- ***Section 126* of the *CJA 2003***: This section gives the court a general power to exclude hearsay evidence if its probative value is substantially outweighed by the undue waste of time its admission would cause.
- ***Section 78* of the *PACE 1984***: The most powerful tool for the defence. The court may exclude evidence if, having regard to all the circumstances, including the circumstances in which the evidence was obtained, its admission would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted. This is particularly relevant where the inability to cross-examine the original maker of the statement would cause significant prejudice to the defendant.

Scenario

In a case of alleged fraud, a key witness who made a detailed statement implicating the defendant dies unexpectedly before trial. The prosecution seeks to adduce the witness's statement as hearsay under *s.116(2)(a)* (witness is dead). The defence objects, arguing that as the witness is dead, they cannot be cross-examined on crucial ambiguities in their statement and their motives for making it.

The court must first determine if the evidence is admissible under *s.116*. Finding that it is, the court must then consider the defence application to exclude it under *s.78* of *PACE*. The judge will weigh the probative value and importance of the statement against the profound prejudice to the defendant, who is denied the chance to challenge it through cross-examination. The ultimate decision will hinge on whether a fair trial can still be conducted with the statement admitted, potentially with a strong judicial direction to the jury about its inherent limitations.

6.5 Conclusion

In summary, the rules governing the admissibility of evidence concerning silence, identification, and hearsay represent the criminal justice system's direct and necessary response to some of the most profound risks of miscarriages of justice. These three distinct areas are unified by a common purpose: to regulate the flow of information to the tribunal of fact in order to protect the integrity of the verdict.

The statutory schemes governing inferences from silence under the *CJPOA 1994* delicately balance the right against self-incrimination with the expectation that an innocent defendant may reasonably be expected to disclose their defence. The ***Turnbull*** guidelines provide a vital procedural shield against the inherent frailties of human perception and memory, acknowledging that even the most confident identification can be tragically mistaken. Finally, the modern hearsay regime under the *CJA 2003* navigates the tension between the fundamental right to confront one's accuser and the practical realities of conducting complex trials, ensuring that evidence is reliable and the trial remains fair.

For the defence advocate, mastery of these rules is not a passive academic exercise but an active and strategic component of case preparation and courtroom advocacy. It involves challenging the admissibility of prejudicial identification evidence, arguing against the drawing of adverse inferences where silence was justified, and rigorously opposing the introduction of un-testable hearsay that would undermine the fairness of the proceedings. Ultimately, a deep understanding of these evidential principles empowers the solicitor and advocate to hold the prosecution to its constitutional duty to prove its case beyond reasonable doubt, using evidence that is not only relevant but also sound, reliable, and obtained in a manner that respects the foundational rights of the accused. The rules of admissibility are, therefore, the essential mechanisms that give practical effect to the golden thread of the presumption of innocence.

7

THE ADMISSIBILITY OF EVIDENCE 2: CONFESSIONS AND BAD CHARACTER

Building on the foundational rules of evidence covered in the previous chapter, we now turn to two of the most potent and prejudicial types of evidence that can feature in a criminal trial: confessions and evidence of bad character. A confession, if true, is the most compelling evidence of guilt. Similarly, evidence that a defendant has a propensity to commit crimes can powerfully influence a jury's perception. However, the potential for injustice in both areas is immense. Confessions may be false, obtained through oppression or in unreliable circumstances. Bad character evidence may lead a tribunal of fact to convict not on the evidence of the offence, but on the basis of the defendant's past misconduct.

The law, therefore, imposes strict regulatory frameworks, primarily under the *Police and Criminal Evidence Act (PACE) 1984* for confessions and the *Criminal Justice Act (CJA) 2003* for bad character, to govern their admissibility. For the defence solicitor, a sophisticated understanding of these rules is essential to protect the client from the unfair prejudice that such evidence can cause.

7.1 Confession Evidence

A confession is often the centrepiece of the prosecution case. The law treats it with caution, recognising the historical prevalence of miscarriages of justice stemming from false confessions.

7.1.1 Definition and Admissibility

Section 82(1) of *PACE 1984* defines a confession broadly as "any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not." This includes a full admission of guilt, as well as a partial admission that places the defendant at the scene or admits to some element of the offence.

As an exception to the rule against hearsay, a confession is admissible under *s.76(1)* of *PACE* to prove the truth of its contents. However, this admissibility is conditional and can be challenged on specific grounds.

7.1.2 Challenging Admissibility

The defence can challenge the admissibility of a confession through two primary routes, which are crucial lines of defence.

1. **The Mandatory Exclusion Rule (*Section 76(2)*)**

   The court must exclude a confession if the prosecution fails to prove beyond reasonable doubt that it was not obtained:

   - (a) By oppression. Oppression is defined in ***R v Fulling*** [1987] 2 All ER 65 as including "exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc." This includes torture, inhuman/degrading treatment, and significant psychological pressure.
   - (b) In consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by the defendant in consequence thereof.

Gateway (b) is broader and more commonly invoked. It focuses not on police misconduct per se, but on the reliability of the confession. The question is whether something external to the defendant (e.g., a promise, a threat, the defendant's own mental state, fatigue, or intoxication) was likely to make any confession they might make unreliable. The case of ***R v Goldenberg*** [1988] 88 Cr App R 285 is an example, where a heroin addict's confession was deemed inadmissible as it was made to get out of custody and obtain drugs.

2. The General Discretion to Exclude (Section 78)

Even if a confession survives a *s.76* challenge, the court has a discretion under *s.78* of PACE to exclude evidence if, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted. This is a broader, catch-all provision that can be used where the police have breached *PACE Codes of Practice*, such as denying access to a solicitor or failing to conduct a proper interview.

7.1.3 Significant Statements and the Procedure for Challenge

Code C of PACE requires that if a "significant statement" (one which appears capable of being used in evidence against the suspect) is made outside of interview, it must be put to the suspect at the beginning of an interview. This gives the suspect an opportunity to confirm, deny, or clarify the statement. Failure to do so may provide grounds for an application to exclude the confession under *s.78*.

The procedure for challenging a confession typically involves *a voir dire* (a trial within a trial). The defence will make an application to exclude, and the judge will hear evidence in the absence of the jury to determine the admissibility of the confession.

7.1.4 Evidence Obtained as a Result of an Inadmissible Confession

Section 76(4) of PACE deals with the "fruit of the poisonous tree." It states that where a confession is wholly excluded under *s.76(2),* any evidence which relates to facts discovered as a result of the confession is not automatically inadmissible. However, such evidence will only be admissible if it was discovered independently of the inadmissible confession. In practice, if the only reason the police searched a location and found a weapon was because of an

excluded confession, the evidence of finding the weapon is likely to be excluded under *s.78* as its admission would be unfair.

7.2 Bad Character Evidence

The law surrounding a person's previous misconduct, known as "bad character," is fundamental to ensuring a fair trial. There is a natural risk that a jury or magistrate, upon hearing that a defendant has a criminal past, might be tempted to convict based on the idea that "once a criminal, always a criminal," rather than on the evidence of the specific charge. To prevent this prejudice, the general rule is that evidence of a defendant's bad character is inadmissible. However, there are carefully defined circumstances where such evidence is so relevant that it must be admitted. The *Criminal Justice Act 2003 (CJA 2003)* created a modern, structured framework for making these decisions, moving away from old, complex common law rules.

7.2.1 Definition of Bad Character

Section 98 of the *CJA 2003* defines "bad character" broadly as "evidence of, or of a disposition towards, misconduct." "Misconduct" itself is defined as "the commission of an offence or other reprehensible behaviour." This means it includes not just previous criminal convictions, but also allegations of behaviour that is morally blameworthy, even if it did not lead to a prosecution. For example, evidence of a defendant having made violent threats on a previous occasion, or being dismissed from a job for dishonesty, could potentially fall within this definition.

7.2.1 The 7 Gateways for a Defendant's Bad Character (s. 101(1) CJA 2003)

The *CJA 2003* establishes seven specific "gateways" through which the prosecution, or a co-defendant, can seek to admit evidence of a defendant's bad character. They gateways include:

1. **Gateway (a)**: All parties agree to the evidence being admissible. This is straightforward; if both the prosecution and defence agree that the evidence can be put before the court, it is admitted.

2. **Gateway (b)**: The evidence is adduced by the defendant themselves. A defendant is free to introduce their own bad character, often to "get their story out first" and try to minimise its impact or to portray themselves as honest for admitting it.
3. **Gateway (c)**: It is important explanatory evidence. This is evidence which is so closely linked to the current charges that without it, the jury would find it impossible or very difficult to understand the context of the case. For example, in a murder trial, evidence of a previous violent argument between the defendant and the victim might be admitted to explain the background and relationship between them.
4. **Gateway (d)**: It is relevant to an important matter in issue between the defendant and the prosecution. This is the most important and frequently used gateway. An "important matter in issue" primarily includes two key concepts:

- **Propensity to commit offences of the kind charged**: The prosecution can use previous convictions or misconduct to show that the defendant has a tendency to commit a specific type of crime. For example, previous convictions for theft would be highly relevant to a new charge of theft. The court will consider how similar and how recent the previous behaviour is.
- **Propensity to be untruthful**: This is not about general dishonesty, but about a specific tendency to be untrustworthy in a legal context. It is often used where the defendant's account is directly contradicted by strong evidence.

5. **Gateway (e)**: It has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant. This allows one defendant to introduce bad character evidence against a co-defendant. For instance, if two people are accused of a robbery and one blames the other, the one being blamed could introduce the other's previous conviction for robbery to support their claim that the co-defendant was the main instigator.

6. **Gateway (f)**: It is evidence to correct a false impression given by the defendant. If a defendant, either explicitly or by their conduct, creates a false impression of their own character, the prosecution can correct it. For example, if a defendant states in court, "I have never been in trouble with the police before," the prosecution can then admit their previous convictions to correct this falsehood.

7. **Gateway (g)**: The defendant has made an attack on another person's character. If the defendant, or their lawyer, aggressively attacks the character of a prosecution witness or the victim (for example, by accusing them of being the real criminal or of being a liar), this "opens the gate" for the prosecution to respond by introducing the defendant's own bad character. The rationale is one of fairness; a defendant should not be able to make such attacks without the jury having a fuller picture of their own character.

7.2.3 The 3 Gateways for a Non-Defendant's Bad Character (s. 100(1) CJA 2003)

The rules for admitting the bad character of a witness (such as a prosecution witness or the victim) are deliberately much stricter to prevent unnecessary and intimidating scrutiny of their past. Under *s.100*, such evidence is only admissible if:

1. It is important explanatory evidence. (Similar to *Gateway (c)* for defendants).
2. It has substantial probative value for a matter in issue which is of substantial importance in the context of the case as a whole. This is a very high threshold. It is often used by the defence to show that a key prosecution witness has a propensity for dishonesty or violence that is relevant to the case. For example, if a key witness has a history of making false allegations, this could be admitted to challenge their credibility.
3. All parties agree to it being admissible.

7.2.4 Procedure and the Court's Discretion to Exclude

A party wishing to admit bad character evidence must follow strict procedural rules by serving a formal notice on the court and the other side, explaining which gateway they are relying on and why.

Crucially, even if evidence passes through one of the gateways, the court has a vital final check. Under *s.101(3),* the court must exclude the evidence if it appears that its admission would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted. This requires the judge to perform a balancing act, weighing the probative value (how strongly it proves a point) of the evidence against its prejudicial effect (the risk that the jury will be

swayed by emotion or a desire to punish the defendant for their past, rather than focusing on the current charge). For instance, a minor and very old conviction for a completely different type of offence might have low probative value but a highly prejudicial effect, and a judge would likely exclude it to ensure a fair trial.

7.3 Conclusion

In conclusion, the legal frameworks governing confessions and bad character evidence represent the criminal justice system's sophisticated and necessary response to evidence of immense power and potential prejudice. The rules under *PACE 1984* for confessions and the *CJA 2003* for bad character are not merely procedural hurdles; they are fundamental safeguards designed to preserve the integrity of the verdict.

The strict exclusionary rules for confessions obtained by oppression or in unreliable circumstances, coupled with the court's general fairness discretion, serve as a critical bulwark against the grave injustice of a false admission. Similarly, the structured, gateway-based approach to bad character evidence carefully channels its admissibility, moving from a position of general exclusion to one of principled inclusion only where its probative value on a specific issue outweighs its inherent prejudicial effect.

For the defence advocate, mastery of these areas is a cornerstone of effective practice. It involves a proactive and strategic approach: rigorously scrutinising the circumstances of a police interview to challenge a confession's admissibility under *ss. 76 and 78 of PACE*, and meticulously analysing the prosecution's bad character application to contest its admission through the precise gateways of the *CJA 2003*.

Ultimately, the advocate's role is to ensure that the tribunal of fact, whether jury or magistrate, decides the case on the reliable and admissible evidence pertaining to the specific charge, and not on the basis of an unreliable statement or a predisposition to believe that a defendant is guilty simply because of their past. These rules collectively affirm that while the search for truth is paramount, it must be conducted within a framework that steadfastly protects the fairness of the proceedings and the core rights of the accused.

8

TRIAL PROCEDURE AND SENTENCING

The criminal trial is the culmination of the entire investigative and preparatory process, a public forum where evidence is tested, and guilt or innocence is determined. For the defence solicitor, trial advocacy is the ultimate test of skill, preparation, and ethical commitment. This chapter provides a comprehensive guide to the procedures, strategies, and ethical considerations that govern criminal trials in both the magistrates' court and the Crown Court.

We will explore the stages of a trial, from opening speeches to the verdict, including key tactical moments such as submissions of no case to answer. The chapter also examines the rules surrounding witnesses, including special measures for vulnerable individuals, and the core principles of cross-examination.

Furthermore, we will detail the sentencing process, outlining the court's powers, the procedural steps, and the crucial role of mitigation. Understanding this process in its entirety is essential for providing effective representation and ensuring that the defendant receives a fair trial and, if convicted, a just sentence.

8.1 Trial Procedure in Magistrates' Court and Crown Court

8.1.1 Stages of a Criminal Trial

The structure of a criminal trial, particularly in the Crown Court, is a carefully calibrated procedural sequence. Its design is not arbitrary; each stage serves a distinct purpose in the overarching goal of achieving a fair and reliable determination of guilt or innocence.

The process ensures that the prosecution, which initiates the proceedings and bears the legal burden of proof, presents its case first, while the defence is afforded a full opportunity to challenge it and present a counter-narrative. This structured progression from allegation to verdict provides a clear roadmap for all participants and safeguards against procedural unfairness.

1. **Prosecution Opening**

   The trial commences with the prosecution's opening speech. Here, the prosecuting advocate stands before the jury (or magistrates) and provides a coherent narrative of the case. This is not the time for argument or rhetorical flourish; rather, it is an opportunity to outline the allegations in a clear and structured manner. The prosecutor will summarise the core facts they intend to prove, introduce the key witnesses and pieces of evidence, and explain how these elements fit together to establish the defendant's guilt.

   A well-delivered opening provides the tribunal of fact with a mental framework, helping them to understand the relevance and significance of the evidence as it is presented. The prosecutor must always be mindful to present the case fairly and without exaggeration, as an overly partisan opening can undermine their credibility later.

2. **Prosecution Evidence**

   Following the opening, the prosecution presents its evidence-in-chief. This phase constitutes the core of the prosecution's case. Witnesses are called one by one. For each witness, a three-stage process of questioning occurs:

- **Examination-in chief**: Conducted by the prosecution advocate, this is the initial questioning designed to elicit the witness's account of events. The rules of evidence

strictly govern this stage; leading questions (those that suggest the answer) are generally prohibited. The goal is to allow the witness to tell their story to the court in their own words. During this stage, the prosecution will also introduce physical exhibits, such as documents, CCTV footage, or forensic reports, through the appropriate witnesses who can authenticate them.

- **Cross-examination**: This is the defence's opportunity to challenge the prosecution's evidence. The defence advocate will question the witness to test their credibility, reliability, and the accuracy of their testimony. This is a fundamental right and a crucial tool for uncovering truth. The advocate may attempt to: highlight inconsistencies in the witness's account; demonstrate a bias or motive to lie; challenge the witness's perception or memory of events; or put the defendant's alternative version of events to the witness. Leading questions are permitted and are the primary tool of cross-examination.
- **Re-examination**: After cross-examination, the prosecution may re-examine the witness. The purpose of re-examination is strictly limited to clarifying issues that arose during cross-examination.

It is not an opportunity to repeat the examination-in-chief or to introduce new evidence. For example, if cross-examination has left a misleading impression about a timeline, re-examination can be used to correct it.

3. Submission of No Case to Answer

At the conclusion of the prosecution's case, the defence has a critical strategic decision to make: whether to make a submission of "no case to answer." This is a legal argument, typically made in the absence of the jury, that asserts the prosecution has failed to establish a prima facie case.

The test, derived from the case of ***R v Galbraith*** [1981] 1 WLR 1039, has two limbs:

- That there is no evidence to prove an essential element of the offence.
- That the prosecution evidence is so weak, tenuous, or inherently unreliable that a properly directed jury could not safely convict upon it.

If the judge agrees with the submission, the case is dismissed, and a not guilty verdict is directed. If the submission is rejected, the trial proceeds to the defence case.

4. Defence Evidence

If the case proceeds, the defence may present its evidence. It is crucial to understand that the defendant is not obliged to prove their innocence. The legal burden of proof remains on the prosecution throughout. Therefore, the defence has no obligation to call any evidence at all. However, if they choose to do so, the defendant has the right to testify on their own behalf.

The decision of whether a defendant should give evidence is a profound one, made after careful consultation with their legal team. If the defendant does testify, they are subject to the same process: examination-in-chief by their own advocate, cross-examination by the prosecution, and re-examination.

The defence may also call other witnesses, such as alibi witnesses or expert witnesses to challenge the prosecution's scientific evidence. A key tactical consideration is that if the defence calls evidence other than just the defendant's own testimony, they secure the right to make a closing speech to the jury in the Crown Court.

5. Closing Speeches

This is the stage for advocacy and argument. Both sides summarise the evidence and attempt to persuade the tribunal of fact to return a verdict in their favour.

- **Prosecution closing speech**: The prosecutor will weave the evidence together into a compelling narrative of guilt, arguing that the evidence is both credible and sufficient to prove each element of the offence beyond reasonable doubt. They will often address the defences raised and argue why they should be rejected.
- **Defence closing speech**: The defence advocate will analyse the evidence, highlighting its weaknesses, inconsistencies, and gaps. They will forcefully remind the jury of the prosecution's heavy burden of proof and the principle of "innocent until

proven guilty." The defence speech will argue that the prosecution has failed to meet its burden and that the only safe verdict is one of not guilty.

6. **The Summing-Up and Directions (Crown Court only)**

In the Crown Court, following the closing speeches, the trial judge delivers a summing-up to the jury. This is a critical and impartial judicial function. The judge has two main duties:

- **Directions on the law**: The judge must accurately instruct the jury on the relevant law. This includes defining the offence and its elements, explaining the legal burden and standard of proof (beyond reasonable doubt), and providing guidance on how to approach specific types of evidence (e.g., identification, hearsay, or the defendant's bad character).
- **Review of the evidence**: The judge must summarise the key evidence presented by both sides, fairly and even-handedly. They should outline the respective cases of the prosecution and defence, but must be careful not to express their own opinion on the defendant's guilt or innocence. The purpose is to help the jury navigate the evidence and apply the law correctly to the facts as they find them.

7. **The Verdict**

After the summing-up, the jury retires to a private room to deliberate in secret. Their task is to reach a unanimous verdict, that is, a verdict upon which they all agree. The judge will initially direct them to strive for unanimity. However, if the jury cannot reach a unanimous verdict after a reasonable period of deliberation (a minimum of 2 hours and 10 minutes for a full jury), the judge may, at their discretion, accept a majority verdict.

In a case with a jury of 12, a majority verdict of 10-2 or 11-1 is acceptable. The foreman of the jury will return to court to deliver the verdict. A verdict of "not guilty" results in the defendant's acquittal and they are free to go. A verdict of "guilty" leads to the sentencing phase of the proceedings. In the magistrates' court, the bench of magistrates or the District Judge will retire to consider their verdict, and no majority verdicts are available.

8.1.2 Submission of No Case to Answer

A submission of no case to answer represents one of the most critical junctures in a criminal trial. It is a procedural mechanism that allows the defence to challenge the very foundation of the prosecution's case before the defence is even called upon to respond. Following the conclusion of the prosecution's evidence, the defence can argue that, as a matter of law, the case should not proceed any further because the evidence presented is legally insufficient to support a conviction. This submission is most commonly associated with the Crown Court and jury trials, but an analogous submission can also be made in the magistrates' court.

The modern legal test for this submission was established in the landmark case of ***R v Galbraith*** [1981] 1 WLR 1039, and it is therefore often referred to as a "Galbraith submission." The judge, in deciding whether to accept the submission, must consider the evidence at its highest for the prosecution and determine if it meets a two-limbed test.

The Two Limbs of the Galbraith Test

1. **No Evidence on an Essential Element**

   The first limb is straightforward. The judge must stop the case if there is no evidence whatsoever to prove an essential element of the offence. For example, in a theft case, if the prosecution has adduced no evidence that the defendant intended to permanently deprive the owner of the property, the judge must direct an acquittal. This is a pure question of law.

2. **Evidence is Inherently Unreliable or Contradictory**

   The second limb is more nuanced and is the one most frequently invoked. The judge should stop the case if the prosecution evidence, even taken at its highest, is so weak, tenuous, or inherently unreliable that a conviction would be "unsafe." This typically arises in situations where:

   - The evidence is so vague or inconsistent that it lacks any probative value.
   - The sole evidence on a key issue comes from a witness who is so thoroughly discredited during cross-examination that their testimony is rendered worthless.

- The evidence for a crucial fact is self-contradictory and cannot be resolved without speculation.

It should be noted that the test is not whether the judge believes the prosecution witnesses or thinks a conviction is likely. The judge's role is to act as a filter, not the ultimate decider of facts. As the test states: "If there is evidence upon which a reasonable jury, properly directed, could convict, the case must be left to the jury." This means that even if the evidence is weak or contradicted, if it is capable of being believed by a reasonable person, the jury must be allowed to hear the defence and make the final decision. The judge cannot usurp the jury's function.

The Procedure for Making a Submission

The process is highly formal and strategic.

1. **Timing**: The submission is made immediately after the prosecution closes its case, before any defence evidence is called.
2. **Forum**: In a Crown Court trial, the jury is asked to leave the courtroom. The submission is argued in legal argument before the judge alone, in the absence of the jury. This prevents them from hearing the defence's assessment of the weaknesses in the prosecution case before they have deliberated.
3. **The defence argument**: The defence advocate will make a concise submission, identifying the specific elements of the offence and arguing, with reference to the evidence (or lack thereof), why the prosecution has failed to meet the *Galbraith* test. They will point to gaps in the evidence, unreliable witnesses, or a failure to corroborate essential facts.
4. **The prosecution response**: The prosecution will then respond, arguing that their evidence, taken at its highest, is sufficient for a reasonable jury to convict.
5. **The judge's ruling**: The judge will consider the arguments and deliver a ruling. If the submission is successful, the judge will direct the jury to return a formal verdict of "not

guilty." If it is rejected, the trial will proceed, and the defence must decide whether to call evidence.

Strategic Importance and Considerations

For the defence, a ***Galbraith*** submission is a powerful tool with no downside. Even if unsuccessful, it forces the judge to conduct an early, critical review of the prosecution's case and provides a clear insight into the judge's perspective on the evidence's strength. A successful submission results in an immediate acquittal for the client, saving them the stress, cost, and risk of presenting a defence.

Scenario

The prosecution case: Where the defendant is charged with assault. The sole evidence is from one witness, who testifies that they saw the defendant punch the victim from a distance of 100 meters, on a foggy night, for a split second. Under cross-examination, the witness admits they are not wearing their prescribed glasses and have a grudge against the defendant.

The submission: The defence makes a ***Galbraith*** submission. They argue that the evidence is so weak and unreliable due to the poor visibility, the witness's admitted poor eyesight, and their demonstrated bias that no reasonable jury could safely rely on it to convict.

The potential outcome: The judge may well agree. While the evidence technically exists, its quality is so poor that a conviction based upon it would be considered unsafe. The judge would likely stop the case and direct an acquittal.

In essence, the submission of no case to answer is a vital safeguard against weak and speculative prosecutions, ensuring that a defendant is only required to answer a case where there is a legally sufficient evidential foundation.

8.1.3 Competence and Compellability of Witnesses

Before any witness can take the oath or affirmation and provide testimony, the court must be satisfied that they are both competent and compellable. These are two distinct legal concepts that form a gateway for receiving evidence. Understanding the difference is fundamental, as it determines not only who *can* testify, but also who *must* testify.

Competence refers to a witness's legal capacity to give evidence. It asks the question: "Is this person legally allowed to be a witness?" The modern approach, underpinned by *s.53* of the *Youth Justice and Criminal Evidence Act (YJCEA) 1999*, is that every person is presumed to be competent to give evidence regardless of their age. This presumption can only be rebutted if it appears to the court that the person is unable to:

1. Understand questions put to them as a witness, and
2. Give answers to those questions that can be understood.

A simple test is conducted by the judge to determine this. The key is not intelligence or the ability to tell the truth, but basic communicative capacity. For example, a very young child or a person with a severe mental disability may be found incompetent if they cannot comprehend the questions or respond coherently. However, the threshold is low, and the court will make every effort to facilitate the testimony of vulnerable witnesses through special measures (e.g., using an intermediary).

Compellability refers to whether a witness can be legally forced to give evidence. It asks the question: "If this person is competent, can the court issue a witness summons to compel their attendance, and can they be punished for contempt of court if they refuse?" The general rule is that all competent witnesses are compellable. However, there are critical exceptions to this rule, which primarily involve the defendant and their spouse or civil partner.

The Defendant as a Witness

The defendant's status is a unique and crucial exception to the general rule.

- **Competence**: A defendant is a competent witness for the defence. This means they have the right to give evidence in their own defence if they choose to do so.
- **Compellability**: A defendant is not a compellable witness for the defence. This is a fundamental principle stemming from the right against self-incrimination. A defendant cannot be forced to testify. The prosecution is forbidden from commenting on the defendant's decision not to give evidence, as this is a protected right.

Furthermore, a defendant is not competent to be called as a witness for the prosecution. The prosecution cannot call the defendant to the stand to testify against themselves.

The case of ***R v Director of Serious Fraud Office, ex p. Smith*** [1993] AC 1 reinforced the principle that an accused person cannot be compelled to testify. The House of Lords held that the prosecution could not obtain a witness summons against a person who had already been charged, as this would fundamentally undermine their right to silence.

The Spouse or Civil Partner of the Defendant

The status of a defendant's spouse or civil partner is a complex area, reflecting a balance between the public interest in securing all relevant evidence and the desire to protect marital harmony.

The rules are primarily governed by *s.80* of the *Police and Criminal Evidence Act (PACE) 1984*. The position can be summarised as follows:

- **For the defence**: The spouse or civil partner is both competent and compellable to give evidence for the defendant. The defendant can compel their partner to testify on their behalf.
- **For the prosecution**: The spouse or civil partner is competent to give evidence for the prosecution. However, they are only compellable for the prosecution in a limited set of circumstances, specifically where the offence charged involves:
    - An assault, injury, or threat of injury to the spouse/civil partner themselves or a person who was under 16 at the time of the offence.
    - A sexual offence alleged to have been committed against a person who was under 16 at the time of the offence.
    - Conspiring or attempting to commit such an offence, or being an accessory to it.

The rationale behind this is that the law recognises that forcing a wife to testify against her husband (or vice versa) in a minor theft case could cause irreparable damage to the relationship for little public benefit. However, where the offence involves violence or sexual abuse against a vulnerable person, the public interest in securing justice overrides the interest in preserving marital confidentiality.

Illustrative Scenarios

1. David is charged with burglary of a commercial warehouse. His wife, Sarah, was at home with him all evening and could provide an alibi. The prosecution believes she may have seen him leave with tools. The prosecution can call Sarah as a witness, as she is competent. However, if she refuses to testify, she cannot be compelled, as burglary is not one of the specified offences in *s.80 PACE*.

2. David is charged with assaulting his wife, Sarah. Sarah is a competent witness for the prosecution. Furthermore, because the offence is an assault upon her, she is also a compellable witness. If she refuses to testify, the prosecution can apply for a witness summons, and she could be held in contempt of court for refusing.

Co-defendants

A person who is jointly charged and tried for the same offence is known as a co-defendant. The general rule is that a co-defendant is not a compellable witness for another co-defendant.

- **Competence**: A co-defendant is a competent witness for a co-defendant. This means one defendant can call their co-accused to the witness stand to testify on their behalf.
- **General rule on compellability**: However, the co-defendant is not compellable. They have the same right to silence as any other defendant and cannot be forced to give evidence that might incriminate themselves.

The Exception: Separate Trials

The crucial exception to this rule arises when co-defendants are tried separately. Once a co-defendant has been acquitted or convicted (i.e., their own trial has concluded and they are no longer "at risk" of prosecution for that offence), they become an ordinary witness.

At this point, the general rule applies: all competent witnesses are compellable. Therefore, a co-defendant whose trial is over is both competent and compellable to testify in the trial of their former co-accused. They can be served with a witness summons and must testify. If they refuse, they can be held in contempt of court, just like any other witness.

Scenario

Liam and Jake are charged with joint robbery. They are to be tried together. Liam wants Jake to testify that Liam was not present during the robbery. At their joint trial, Liam can call Jake as a witness. However, if Jake refuses to testify, Liam cannot compel him to do so, as Jake is a co-defendant and has his own right to silence.

Now, imagine the court orders that Liam and Jake be tried separately. Liam is tried first and is acquitted. At Jake's subsequent trial, the prosecution (or the defence) can now call Liam as a witness. As Liam has been acquitted, he is no longer a defendant. He is now a compellable witness. If he is served with a witness summons, he must attend Jake's trial and give evidence.

Other Witnesses

- **Children**: A child is competent if they pass the basic understanding test. There is no lower age limit. The court will conduct a simple preliminary examination to ensure the child can distinguish between truth and a lie and understands the duty to speak the truth.
- **Individuals with a mental disorder**: As with children, the test is one of understanding. A person with a mental illness or learning disability is competent provided they can understand questions and give intelligible answers. The illness itself does not automatically render them incompetent.

8.1.4 Special Measures

The traditional courtroom environment, with its formality, direct confrontation, and public scrutiny, can be a daunting and traumatic experience for many witnesses, potentially preventing them from giving a complete and accurate account of events. Recognising this, the *Youth Justice and Criminal Evidence Act (YJCEA) 1999* introduced a transformative regime of "special measures." These are a suite of procedural adaptations designed to help vulnerable and intimidated witnesses give their best evidence, thereby strengthening the search for truth while protecting the well-being of those who participate in the justice process. The underlying principle is that the fairness of a trial is enhanced, not diminished, when all witnesses are enabled to testify effectively and without undue distress.

Special measures are not an advantage for one side over the other; they are a tool to ensure the court receives the most reliable evidence possible. The availability of these measures is determined by the witness's specific category and needs.

Categories of Eligible Witnesses

The *YJCEA 1999* defines two main categories of witnesses eligible for special measures:

1. **Vulnerable witnesses**: This group is eligible as of right (they are automatically eligible) and includes:

- **All child witnesses (under 18)**: The court presumes that a child witness will require special measures to give best evidence.
- **Witnesses with a mental or physical disorder or disability**: This includes a wide range of conditions that might impair the witness's ability to communicate effectively or cope with the stress of the trial.
- Witnesses with a Significant Impairment of Intelligence and Social Functioning.

2. **Intimidated witnesses**: This group includes any witness whose quality of evidence is likely to be diminished by reason of fear or distress about testifying. The court assesses the level of intimidation, considering factors such as:

- The nature and alleged circumstances of the offence.
- The age of the witness.
- The behaviour of the defendant, the defendant's family or associates, or any other person.
- The witness's social, cultural, or domestic circumstances.

Key Special Measures and Their Application

The Act provides for a range of specific measures, which can be used individually or in combination to create a tailored solution for the witness.

1. Live Link (*Section 24*)

This measure allows a witness to give their entire evidence (examination-in-chief, cross-examination, and re-examination) from a location outside the courtroom via a live television link.

The witness sits in a separate room with a supporter, while the court, defendant, and legal teams see and hear the witness on a screen. The legal advocates ask their questions remotely. It reduces the witness's stress by physically separating them from the formal courtroom and the defendant, allowing them to focus on the questions rather than their surroundings.

2. Video-Recorded Evidence-in-Chief (*Section 27*)

This allows the witness's initial account (their evidence-in-chief) to be pre-recorded in a formal interview, usually soon after the event, and played as their evidence-in-chief at trial.

A specially trained police officer conducts an interview following best-practice guidelines (the Achieving Best Evidence, or ABE, guidelines). This recording is then edited and admitted as the witness's main evidence. It captures the witness's account when their memory is freshest and before the stress of a trial can affect their recall. The witness then only needs to attend court for cross-examination, which can be done via a live link.

3. Screens (*Section 23*)

A screen can be placed in the courtroom to shield the witness from the direct view of the defendant, the public gallery, and others.

The screen is positioned so that the witness can see the judge and the legal advocates, but not the defendant. The defendant can still see the witness on a monitor and instruct their legal team. It prevents intimidation through direct eye contact or gestures from the defendant, while maintaining the witness's presence in the courtroom.

4. Removal of Wigs and Gowns (*Section 26*)

The judge and legal advocates may remove their wigs and gowns while the witness is giving evidence. It reduces the formality and perceived authority of the courtroom, creating a less intimidating atmosphere for the witness.

5. Evidence in Private (*Section 25*)

The judge can order that the public gallery be cleared, so the witness gives evidence in a courtroom from which members of the public are excluded. This is typically reserved for sexual offence cases or where there is a real fear of intimidation by spectators.

6. Communication Aids and Intermediaries (*Section 29*)

For witnesses with significant communication difficulties, an intermediary can be appointed. An intermediary is a registered communication specialist (e.g., a speech and language therapist) who assesses the witness and assists them in the courtroom. Their role is to explain questions to the witness in a way they can understand and to interpret the witness's answers for the court. They are neutral officers of the court.

It is used to bridge the communication gap, ensuring the witness can understand the proceedings and be understood by the court. This is vital for witnesses with learning disabilities, autism, or a speech impairment.

7. Pre-Trial Video-Recorded Cross-Examination (*Section 28*)

A more recent and significant development, this measure allows for the cross-examination of a vulnerable witness to be pre-recorded and played at trial. Following the video-recorded evidence-in-chief, the witness is cross-examined by the defence advocate at a hearing shortly after the ABE interview, but long before the main trial. This recording is then stored and played to the jury at the trial.

It helps spare the witness the long, anxious wait for trial and to prevent the quality of their evidence from deteriorating over time due to stress.

Procedure and Importance

An application for special measures is typically made by the party calling the witness (usually the prosecution) well before the trial, supported by evidence such as a report from a doctor, psychologist, or the police officer in the case. The defence has the right to make representations, but the court's primary consideration is whether the measure will likely improve the quality of the witness's evidence.

The use of special measures is a cornerstone of a modern, humane, and effective justice system. By adapting the environment to the needs of the witness, the law seeks to reduce the secondary trauma of the trial process, encourage the reporting of crime, and, most importantly, ensure that all relevant and reliable evidence is placed before the court to aid in the pursuit of a just outcome.

8.2 Modes of Address, Etiquette, and Examination of Witnesses

The formalities of the courtroom are far more than mere tradition; they are a vital framework that upholds the authority of the court, ensures orderly proceedings, and maintains a professional and respectful environment for all participants. Adherence to strict etiquette and the rules of evidence during witness examination is a hallmark of a competent advocate and is fundamental to the fair and efficient administration of justice.

8.2.1 Modes of Address and Courtroom Demeanour

Using the correct forms of address is a non-negotiable aspect of professional practice. It demonstrates respect for the court's authority and the integrity of the process.

1. **The Judiciary**

   In the Crown Court, a Circuit Judge is addressed as "Your Honour." A High Court Judge is addressed as "My Lord" or "My Lady." In the magistrates' court, lay magistrates are collectively addressed as "Your Worships," and a District Judge (a legally qualified magistrate) is addressed as "Sir" or "Madam."

2. Other Legal Professionals

Opposing advocates are traditionally referred to as "my learned friend." This convention, even when dealing with a formidable opponent, reinforces the idea that all advocates are officers of the court working within a shared professional framework, not personal adversaries.

3. General Demeanour

When the judge or magistrates enter or leave the courtroom, all present are expected to stand. Advocates typically rise to address the court or examine a witness. This physical respect for the court's authority is a cornerstone of courtroom decorum.

8.2.2 The Art of Witness Examination

The process of questioning witnesses is divided into three distinct stages, each with its own specific rules and strategic purposes.

1. Examination-in-Chief

This is the initial questioning of a witness by the party who called them. The primary goal is to present the witness's account to the court in a clear, coherent, and credible manner.

The Rule Against Leading Questions

The most important rule is that the advocate is generally prohibited from asking leading questions. A leading question is one that suggests the desired answer within the question itself (e.g., "You saw the defendant holding the knife, didn't you?"). Instead, the advocate must use open-ended questions (e.g., "What, if anything, did you see in the defendant's hand?"). This ensures that the evidence comes from the witness's own memory and is not implanted or shaped by the lawyer.

Refreshing Memory

A witness is permitted to refresh their memory from a document they made contemporaneously with the events, such as a witness statement or notebook, before and during their evidence, provided the document is shown to the other side.

2. Cross-Examination

This is the opportunity for the opposing advocate to challenge the witness's evidence. It is often considered the most demanding skill in advocacy. The objectives are to:

- **Challenge credibility**: Show that the witness is biased, has a motive to lie, or has been inconsistent in their account.
- **Challenge reliability**: Question the witness's ability to have accurately perceived or recalled the events (e.g., due to distance, lighting, stress, or intoxication).
- Advance the cross-examiner's Case: Elicit evidence that supports the cross-examiner's own version of events.

The Rule in *Browne v Dunn* [1893] 6 R. 67 (H.L.)

A fundamental rule of fairness is that an advocate must "put their client's case" to the witness during cross-examination. This means that if the defence intends to call evidence or argue that a witness's account is untrue, they must give the witness a chance to respond to that specific allegation. For example, if the defence case is that the witness is mistaken, they must put that suggestion directly to the witness: "I suggest to you that the person you saw was not the defendant." Failure to do so may lead the judge to comment that the allegation is without foundation or prevent the line of argument from being pursued in closing speeches.

Use of Leading Questions

In contrast to examination-in-chief, leading questions are the primary tool of cross-examination. The advocate is expected to control the witness and test their evidence through direct, challenging questions.

3. Re-Examination

This is the final stage, conducted by the advocate who originally called the witness. Its purpose is strictly limited. Re-examination is only permitted to clarify new matters that arose during cross-examination. It is not an opportunity to repeat the examination-in-chief or to fix every problem created by cross-examination.

The prohibition on leading questions applies again during re-examination.

Example: If during cross-examination, a witness's evidence about the timing of an event became confused, re-examination could be used to ask, "You were asked about the time; could you now clarify for the court what time you believe it was?"

8.2.3 Solicitor’s Duty to the Court

A solicitor's professional obligations extend far beyond their duty to their client. As an "officer of the court," a solicitor has an overriding duty to act with integrity in the administration of justice. This duty can, and often does, require actions that are not in the client's immediate tactical interest but are essential to maintain the integrity of the legal system.

1. **Candour and Honesty**

A solicitor must never knowingly mislead the court. This includes presenting evidence they know to be false or making legal submissions they know to be incorrect. If a client admits guilt to the solicitor but insists on pleading not guilty, the solicitor cannot allow the court to be misled and must cease to act if the client insists on testifying falsely.

2. **Duty to Disclose Relevant Law**

A solicitor is obliged to draw to the court's attention any relevant legal authority or procedural rule, even if it is unhelpful to their client's case. This ensures the court can make a properly informed decision based on a complete understanding of the law.

3. **Fair Presentation**

While a solicitor must present the client's case fearlessly, they must do so fairly and without the use of abusive or inflammatory language. They must not make assertions without a proper evidential basis.

4. **Correction of Error**

If a solicitor later discovers that the court has been inadvertently misled on a material point, they have a duty to correct the error at the earliest opportunity, regardless of the consequences for their client.

This ethical framework ensures that the solicitor's role is not simply that of a "hired gun," but that of a key participant in a system dedicated to discovering the truth through fair and honourable means.

8.2.4 Preparing the Defendant to Give Evidence

Preparing a defendant to testify is one of the most critical and sensitive tasks for a defence solicitor. A poorly prepared defendant can inadvertently damage a strong case, while a well-prepared one can withstand a rigorous cross-examination and present as credible. This preparation involves a comprehensive process:

1. **Demystifying the Process**

   The solicitor must explain the physical layout of the courtroom, the sequence of events (examination-in-chief, cross-examination, re-examination), and the roles of the judge, jury, and usher. Reducing the unknown alleviates anxiety.

2. **Substantive Case Review**

   The solicitor and defendant must thoroughly review the evidence, the defendant's proof of evidence, and all disclosure. The defendant must be completely familiar with their own account and the key documents in the case.

3. **Practice and Robust Testing**

   The solicitor should conduct a mock examination-in-chief and a rigorous practice cross-examination. This session should not be a rehearsal for a scripted performance, but a challenging exercise that forces the defendant to confront the weaknesses in their case. The solicitor must play "devil's advocate," posing the toughest questions the prosecution is likely to ask. This prepares the defendant for the pressure of the real courtroom and helps identify any areas where their account is unclear or inconsistent.

4. Demeanour and Presentation

The solicitor must advise on practical matters, such as wearing smart, respectful clothing, speaking clearly and directly to the jury or magistrates, and maintaining a calm and composed manner, even when under pressure.

5. Core Principles

The defendant must be coached on fundamental testifying skills: listen carefully to the entire question, pause before answering to allow for objections, answer only the question asked, and tell the truth consistently. The solicitor must emphasise that if they do not know or cannot remember an answer, it is far better to say so than to guess or invent.

8.2.4 The General Power to Exclude Evidence

While specific rules govern the admissibility of particular types of evidence, such as confessions or bad character, *s.78* of the *Police and Criminal Evidence Act (PACE) 1984* provides the court with a broad, overarching safety valve to ensure the fairness of the proceedings as a whole. This provision is one of the most powerful tools available to a defence advocate, allowing them to argue for the exclusion of evidence that, while perhaps obtained legally in a technical sense, would render the trial unfair if admitted.

The statute states that in any proceedings, the court may refuse to allow evidence on which the prosecution proposes to rely if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted.

To break this down:

The trigger: The power is engaged by the way the evidence was obtained. This often involves a breach of *PACE* or its *Codes of Practice*, but such a breach is not a strict prerequisite. The focus is on the *effect* of admitting the evidence, not solely on the misconduct in obtaining it.

The test: The court must conduct a balancing exercise. It weighs the probative value of the evidence (how strongly it proves the prosecution's case) against the prejudicial effect its admission would have on the overall fairness of the trial.

The outcome: If the prejudice to fairness outweighs the evidence's value, the court has the discretion to exclude it.

Key Circumstances Leading to a Section 78 Challenge

1. **Significant breaches of *PACE Codes***: Not every minor breach will lead to exclusion. However, a substantial and significant breach that undermines a fundamental protection will often trigger *s.78*. Classic examples include:

- **Denial of access to legal advice (*Code C*)**: If a suspect is wrongly denied the right to consult a solicitor, any evidence obtained subsequently (like an interview) is highly likely to be excluded, as it strikes at the heart of the suspect's rights.
- **Unfair identification procedures (*Code D*)**: Failure to hold an identification procedure when required, or using a procedure with biased foils, can lead to the identification evidence being excluded.
- **Improperly conducted interviews (*Code C*)**: This includes failing to caution a suspect, oppressive questioning, or not accurately recording the interview.

2. **Entrapment and agent provocateurs**: Where the police or their agents have incited a person to commit a crime they would not otherwise have committed, evidence of that crime may be excluded as an abuse of process. The courts distinguish between legitimate undercover operations and creating crime that would not have occurred.

3. **Failure to preserve or reveal evidence**: The prosecution's failure to preserve evidence that could have been relevant to the defence (e.g., lost CCTV footage) or a failure to disclose relevant material can lead to the exclusion of related evidence or even the termination of the case.

The Procedure and the "Balancing Exercise"

A challenge under *s.78* is typically made during *a voir dire* (a trial within a trial), held in the absence of the jury. The defence advocate must clearly articulate:

- The unfair action or breach that occurred.
- Why this action adversely impacts the fairness of the trial.
- Why the court should exercise its discretion to exclude the evidence as a result.

The judge will consider all factors, including the seriousness of the breach, the good or bad faith of the police, the gravity of the offence, and, crucially, the importance of the evidence to the prosecution case.

In ***R v Mason*** [1988] 1 WLR 139, the police falsely told Mason and his solicitor that his fingerprints had been found on a fragment of a bottle used in an arson attack. Based on this deception, Mason made incriminating admissions. The Court of Appeal held that the confession should have been excluded under Section 78. The deception, particularly as it misled the solicitor whose role was to advise the suspect, was a significant and unfair trick that justified exclusion to protect the integrity of the process.

In essence, *s.78* acts as the judiciary's conscience, ensuring that a conviction is not secured at the expense of a fair trial. It empowers the court to disapprove of improper police methods and maintain public confidence in the justice system by ensuring that its processes remain clean, even when dealing with those accused of serious crimes

8.3 Sentencing

Sentencing represents the final, decisive stage of the criminal process, where the court translates a finding of guilt into a concrete outcome. For the defence solicitor, this phase is not a passive conclusion but an active and critical opportunity to advocate for the most favourable result for the client. The modern sentencing framework in England and Wales is a highly structured system, designed to promote consistency, transparency, and proportionality.

8.2.1 The Role of Sentencing Guidelines

The work of the *Sentencing Council* has fundamentally transformed sentencing practice. Created by the *Coroners and Justice Act 2009*, the Council produces definitive guidelines that courts are legally obliged to follow. The primary purpose of these guidelines is to promote consistency in approach, ensuring that similar offences committed by offenders in similar circumstances receive similar sentences.

The guidelines typically adopt a step-by-step process that requires the court to:

1. Determine the offence category by assessing the offender's culpability (their level of blameworthiness) and the harm caused by the offence.
2. Consult the corresponding starting point and category range within a sentencing table. The starting point is the position within the category range from which the court should begin its calculation.
3. Consider any aggravating or mitigating factors that may adjust the sentence within the range.
4. Apply any reduction for a guilty plea.
5. Consider the totality principle if sentencing for multiple offences.
6. Give reasons for the sentence imposed.

This structured approach brings a level of predictability and rigour to sentencing, moving away from the more instinctive approach of the past.

8.3.2. Determining Seriousness: Aggravating and Mitigating Factors

The cornerstone of the sentencing exercise is the assessment of the seriousness of the offence, as required by *s.143(1)* of the *Criminal Justice Act 2003*. This assessment is based on two components: the culpability of the offender and the harm caused, intended, or foreseeable.

Aggravating factors are circumstances that make the offence more serious. Common aggravating factors include:

- Previous convictions of a similar nature.
- Offence committed while on bail.
- Leading role in group activity.
- Planning of the offence.
- Targeting a vulnerable victim.
- Use of a weapon.
- Commission of the offence motivated by hostility based on race, religion, disability, sexual orientation, or transgender identity.

Mitigating factors are circumstances that reduce the seriousness of the offence or the offender's culpability. Common mitigating factors include:

- No relevant or recent previous convictions.
- Good character and/or exemplary conduct.
- Genuine remorse.
- A lesser role in group activity.
- Age and/or lack of maturity.
- Mental disorder or learning disability.
- Evidence of positive good character.
- Sole or primary carer for dependent relatives.

Reduction in Sentence for a Guilty Plea

Pursuant to *s.144* of the *Criminal Justice Act 2003* and the definitive *Sentencing Council Guideline*, a court must apply a reduction to the sentence for a guilty plea. The reduction is applied on a sliding scale based on the stage at which the plea is indicated:

- Maximum reduction (one-third): For a guilty plea entered at the first stage of proceedings.
- One-quarter reduction: For a plea entered after the first stage but before the trial date is set.
- Maximum one-tenth reduction: For a plea entered at the "door of the court" or after the trial has begun.

The rationale is to acknowledge the utilitarian benefit of a guilty plea, which saves cost and time and, crucially, spares victims and witnesses the stress of giving evidence. The defence solicitor must advise the client on the significant benefits of an early guilty plea.

The Totality Principle

The Totality Principle is a fundamental and humane rule of sentencing that comes into play when an offender is to be sentenced for multiple, separate offences. Its purpose is to ensure that the final combined sentence remains just and proportionate, reflecting the offender's overall criminal conduct without imposing a crushing sentence that is excessive in light of their total wrongdoing.

The Rationale: Avoiding a "Crushing" Sentence

Without this principle, a court could mechanically impose a separate sentence for each offence and simply add them together, one after the other. This could result in a total sentence that is disproportionately severe when viewed as a whole. For example, a defendant convicted of ten minor thefts might receive ten consecutive six-month sentences, totalling five years, a sentence more typically reserved for a very serious single offence. The Totality Principle prevents this injustice by requiring the court to see the "big picture." The principle recognises that while each offence deserves punishment, the final sentence must be a fair response to the offender's entire course of conduct.

How the Principle is Applied

The application of the Totality Principle is a two-stage process for the judge or magistrate:

1. **Determine the appropriate sentence for each individual offence**: The court first considers each offence in isolation. It assesses the seriousness of each one according to established guidelines, considering the harm caused and the offender's culpability, and arrives at a provisional sentence for each count. These sentences are calculated as if they were the only sentence being imposed.

2. **"Step Back" and consider the total**: The court then adds these individual sentences together to form a provisional total sentence. It is at this point the court must "step back" and consider the following questions:

    - Is this total sentence just and proportionate for the overall criminality?
    - Is it excessive?
    - Does it have a "crushing effect" on the offender, destroying any prospect of their rehabilitation?

If the answer to these questions suggests the total is too high, the court must adjust the sentences to achieve a just and proportionate result.

The Mechanism: Consecutive vs. Concurrent Sentences

The primary tool for applying the totality principle is the decision to order sentences to run either consecutively or concurrently.

Consecutive sentences: These are sentences that are served one after the other. They are generally appropriate for offences that are distinct and separate in nature, time, or place. For example, a sentence for a burglary committed on one day and a separate assault committed a week later would likely run consecutively, as they are unrelated acts.

Concurrent sentences: These are sentences that are served at the same time. They are typically imposed for offences that arise out of the same single incident or a connected course of conduct. For example, if during a single fight, an offender is convicted of both actual bodily harm and criminal damage for breaking a window, the sentences would likely run concurrently, as they form part of one event.

The role of totality: The principle often requires the court to order sentences for even unrelated offences to run concurrently, or to reduce individual sentence lengths, to prevent the total from becoming excessive. The court might decide that while five consecutive one-year sentences are technically justified (totalling five years), a total sentence of three years is a more proportionate reflection of the offender's overall criminality. It would achieve this by making some sentences concurrent.

Illustrative Scenario

Consider a defendant sentenced for three separate offences:

- Offence A (Theft): 12 months' imprisonment.
- Offence B (Assault): 18 months' imprisonment.
- Offence C (Criminal Damage): 6 months' imprisonment.
- Without Totality: If all sentences were run consecutively, the total would be 3 years.
- With Totality: The judge, applying the totality principle, may decide that 3 years is excessive for this collection of medium-severity offences. To achieve a proportionate total, the judge could order:
    - The sentences for Theft and Assault to run consecutively (12m + 18m = 30 months).
    - The sentence for Criminal Damage to run concurrently with the others.
    - Final Total Sentence: 30 months (2.5 years).

Alternatively, the judge might slightly reduce the individual sentences before making them concurrent. The Totality Principle acts as a crucial safeguard against disproportionate sentencing. It ensures that the sentencing process, while punishing individual crimes, never loses sight of the offender as a whole person and the ultimate goal of a fair and just outcome.

Offences Taken Into Consideration

An offender may ask for other outstanding offences to be Taken Into Consideration (TIC). The offender must admit these offences and sign a form listing them. While TICs will not normally increase the sentence for the principal offence(s) from the suggested starting point, they can influence the court's assessment of the offender's overall criminality and reduce the discount they might otherwise have received for good character. The benefit for the offender is that it allows them to draw a line under their past offending.

8.3.3 Mitigation and Newton Hearings

The plea in mitigation is the defence advocate's opportunity to persuade the court to impose the most lenient sentence possible. It is an art that combines legal knowledge, factual analysis, and persuasive advocacy.

The Use of Basis of Plea

Where a defendant pleads guilty but on a factual basis that differs from the prosecution case, a formal "Basis of Plea" document should be drafted and submitted to the prosecution and the court. This document sets out the defendant's version of the facts. If the prosecution accepts this basis, the court will sentence on that basis. If the prosecution does not accept the defence version, a ***Newton*** hearing may be necessary.

A Newton Hearing, established in ***R v Newton*** [1982] 77 Cr App R 13 is a mini-trial held before a judge alone to determine the factual basis for sentence. The prosecution and defence call evidence, and the judge, on the balance of probabilities, decides which version of the facts to accept. The outcome can have a dramatic impact on the sentence, for example, where the difference relates to the defendant's level of involvement or intent.

8.3.4 Types of Sentence: Custodial, Suspended, Community Orders

The court has a hierarchy of sentences at its disposal.

1. **Custodial sentences**: Imprisonment is reserved for offences that are so serious that neither a fine nor a community order can be justified. The length must be the shortest term that is commensurate with the seriousness of the offence.
2. **Suspended sentence orders (SSOs):** Under *s.189* of the *Criminal Justice Act 2003*, a court can suspend a prison sentence of up to two years for an operational period of up to two years. The court can attach one or more requirements (similar to a community order) to the suspended sentence. If the offender commits a further offence during the operational period, or breaches a requirement, they are likely to be sent to prison to serve the original sentence.

3. **Community orders**: Under *s.177* of the *Criminal Justice Act 2003*, a community order can be imposed for any offence that is "serious enough to warrant such a sentence." The court can impose a range of requirements, such as unpaid work, curfew, exclusion, and rehabilitation activity. The requirements must be suitable for the offender and proportionate to the offence.

8.3.5 The Role of Pre-Sentence Reports

A Pre-Sentence Report (PSR), prepared by the Probation Service, is a vital tool in the sentencing process. It provides the court with an assessment of the offender, their background, the reasons for their offending, and the risk they pose. A PSR is mandatory before a court can impose a custodial sentence on a first-time offender, or a community order with specific requirements. A well-prepared PSR can be a powerful source of mitigation, identifying rehabilitative pathways that can persuade the court to impose a non-custodial sentence.

Scenario

Stephen, a 20-year-old with no previous convictions, pleads guilty to two counts of burglary of commercial premises. The offences were committed on different nights. The sentencing guideline suggests a starting point of 18 months' custody. In mitigation, his solicitor highlights his age, his remorse, his underlying issues with drug misuse, and his stable family support.

A PSR confirms he is suitable for a community order with a rehabilitation requirement and unpaid work. The judge, applying the guidelines but giving significant weight to the mitigation and the PSR, decides to impose a suspended sentence order of 18 months, with requirements for drug rehabilitation and 200 hours of unpaid work. This outcome balances the seriousness of the offences with the realistic prospect of rehabilitation.

8.4 Conclusion

The journey from the opening of a trial to the passing of a sentence is a meticulously structured process designed to balance the pursuit of truth with the fundamental principles of fairness and proportionality. As this chapter has detailed, effective representation demands more than a passive understanding of procedure; it requires the active and strategic

application of rules of evidence, the art of persuasive advocacy, and a thorough command of the sentencing guidelines. From challenging the prosecution's case and cross-examining witnesses to presenting powerful mitigation, the defence solicitor's role is pivotal in safeguarding the defendant's rights at every stage. Ultimately, mastery of trial procedure and sentencing empowers the practitioner not only to secure the best possible outcome for their client, whether an acquittal or a fair and proportionate sentence, but also to uphold the integrity of the criminal justice system itself.

9

APPEALS AND YOUTH JUSTICE

The criminal justice process does not always conclude with a verdict or sentence. A party may believe a legal error has occurred, necessitating a challenge through the appellate system. Simultaneously, the system recognises that children and young people who offend require a distinct approach, focused on welfare and rehabilitation.

This chapter explores these two critical, yet distinct, areas: the framework for challenging decisions through appeals, and the specialised procedures and principles that govern the youth justice system. Understanding appeals is essential for rectifying potential miscarriages of justice, while a firm grasp of youth justice is fundamental for representing young clients effectively and safeguarding their long-term interests .

9.1 Appeals Procedure

The appellate system is a cornerstone of justice, providing a crucial mechanism for correcting errors made in lower courts. It ensures that verdicts and sentences are lawful, reasonable, and just. The specific route and procedure for an appeal depend entirely on which court made the original decision, and each route has distinct purposes, grounds, and potential outcomes.

9.1.1 Appeals from the Magistrates' Court to the Crown Court

This is the most common route for a defendant convicted in the magistrates' court. Governed by *s.108* of the *Magistrates' Courts Act 1980*, it provides an accessible right to a fresh hearing.

Grounds for Appeal

A defendant can appeal against their conviction, their sentence, or both. The appeal is as of right, meaning no permission (or "leave") is required from any court to lodge it.

The Procedure; A "Rehearing"

This is the defining feature of this appeal. The case is not just reviewed on paper; it is heard all over again in the Crown Court. The hearing is conducted before a tribunal consisting of a Crown Court judge and two lay magistrates (who were not involved in the original case). The prosecution presents its case again, and the defence can call evidence again, including new witnesses or evidence that was not available at the first hearing.

Powers of the Crown Court

After the rehearing, the Crown Court can:

- Confirm the original decision (uphold the conviction and/or sentence).
- Reverse the decision (overturn the conviction).
- Vary the decision (alter the sentence or amend the conviction to a different offence).
- **Resentence**: Importantly, the Crown Court can impose any sentence that the magistrates' court could have imposed for the offence, even if it is more severe than the original sentence. This is known as the "dismissal of frivolous appeals" power. While judges are cautious about increasing sentences on appeal, the risk exists and must be carefully explained to a client by their solicitor.

Scenario

David was convicted of assault in the magistrates' court. He believes the magistrates misunderstood a key piece of evidence. He appeals to the Crown Court. At the appeal, the case is reheard. The Crown Court judge and magistrates hear all the evidence again and, accepting David's argument, find him not guilty and overturn his conviction.

9.1.2 Appeal to the High Court by Way of Case Stated

This is an alternative, more technical route for challenging a decision from the magistrates' court (and, in some circumstances, the Crown Court when it was acting as an appellate court). It is not a rehearing of the facts, but a challenge on points of law.

Grounds for Appeal

This route is used when the defence or prosecution believes the lower court's decision was wrong in law or that it acted in excess of its jurisdiction. It is entirely unsuitable for challenging the court's findings of fact or the weight it gave to evidence.

The Procedure; "Stating a Case"

The process begins by asking the magistrates to "state a case" for the opinion of the High Court. This means the magistrates must produce a document that sets out the findings of fact they made and the legal question(s) upon which the High Court's opinion is sought (e.g., "Whether we were correct in law to find that the defendant's actions constituted an assault?").

The High Court (a Divisional Court of the King's Bench Division, usually comprising two judges) then considers this document and hears legal arguments from both sides. It does not hear witnesses or re-examine evidence.

Outcome

The High Court can:

- Reverse, affirm, or amend the lower court's decision.
- Remit the case (send it back) to the magistrates' court with its opinion, directing them to act accordingly.

9.1.3 Appeals from the Crown Court to the Court of Appeal

Appeals from Crown Court trials (as opposed to its appellate function) are made to the Court of Appeal (Criminal Division). This is a much more formal process than an appeal to the Crown Court.

Grounds for Appeal

Against conviction: The appeal must argue that the conviction is "unsafe." This can be for various reasons, such as a serious misdirection by the trial judge on the law, the admission of inadmissible evidence, fresh evidence coming to light, or incompetent representation by trial counsel.

Against sentence: The appeal argues that the sentence was "wrong in principle" or "manifestly excessive."

Procedure; A "Review"

Unlike the rehearing in the Crown Court, an appeal here is a review of the trial record. The appellant (the person appealing) must first apply for leave (permission) to appeal, which is usually considered by a single judge based on the written grounds of appeal. If leave is refused, the applicant can renew the application to a full court. The full hearing involves detailed written submissions and oral legal argument; it does not involve recalling witnesses or rehearing the evidence.

Powers of the Court of Appeal

If it finds a conviction unsafe, it will quash the conviction. It can then either order a retrial or simply enter a verdict of not guilty. On a sentence appeal, it can vary the sentence to any sentence the Crown Court could have lawfully imposed.

9.1.4 Prosecution Appeals Against Acquittal and Unduly Lenient Sentences

The principle of "double jeopardy" (not being tried twice for the same offence) heavily restricts prosecution appeals, but some limited rights exist.

Against Acquittal

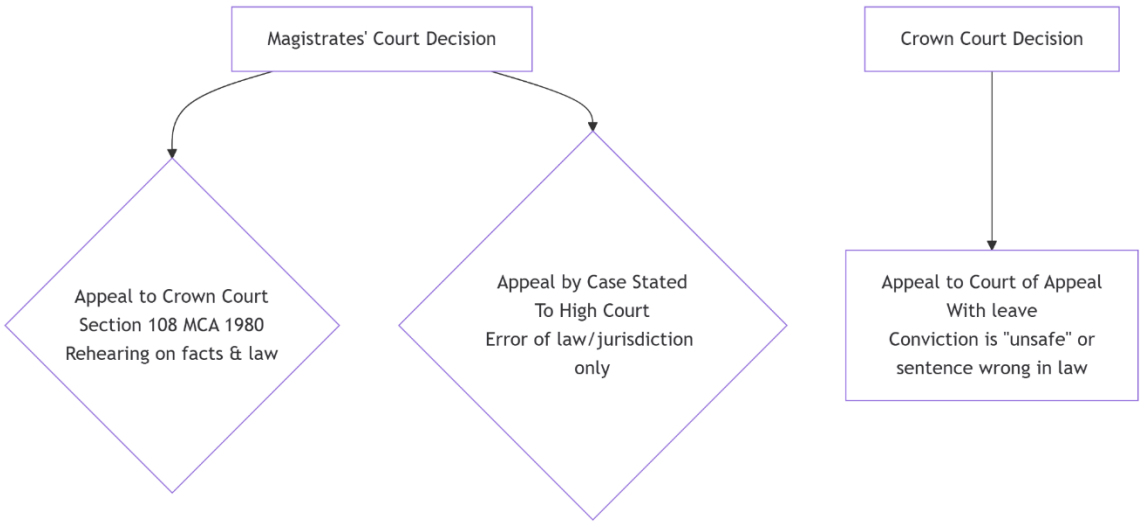
The prosecution cannot appeal a jury's verdict of "not guilty." This is a fundamental principle. However, under *Part 9* of the *Criminal Justice Act 2003*, the prosecution can appeal a ruling made by a trial judge *during the trial* that effectively "terminates the prosecution case." For example, if a judge rules that key evidence is inadmissible and, as a result, the prosecution

has no realistic choice but to offer no evidence, they can appeal that evidential ruling to the Court of Appeal. If successful, the defendant's acquittal is set aside and a retrial ordered.

Against Sentence

Under *s.36* of the *Criminal Justice Act 1988,* the Attorney General (or Solicitor General) can refer a sentence they believe to be "unduly lenient" to the Court of Appeal for review. This applies only to indictable-only and a limited range of either-way offences. If the Court of Appeal agrees the sentence was unduly lenient, it has the power to increase the sentence to one within the appropriate range.

The following diagram illustrates the main appeal routes for a defendant:



9.2 Youth Court Procedure

The youth court is a specialized branch of the magistrates' court designed exclusively to deal with defendants aged 10 to 17. Its entire philosophy, atmosphere, and procedure are distinct from the adult court, reflecting the core legal principle that children in the justice system should be treated as children first and offenders second. The focus is on rehabilitation, welfare, and preventing further offending, while still holding young people accountable for their actions.

9.2.1 Jurisdiction, Allocation, and Grave Crimes

Jurisdiction

The youth court is the default court for nearly all cases involving youths, whether the offence is summary-only (like most motoring offences) or either-way (like theft or burglary).

Grave Crimes

A major exception exists for "grave crimes." Under *s.24* of the *Magistrates' Courts Act 1980*, if a youth is charged with an offence for which an adult could be sentenced to 14 years' imprisonment or more (e.g., robbery, rape, causing grievous bodily harm with intent), the youth court can send the case to the Crown Court.

This happens only if the youth court believes that if the young person is convicted, a sentence longer than the 2-year maximum available to the youth court should be available. This is a significant decision, as it moves the case to a much more formal and potentially intimidating environment.

9.2.2 Youths Jointly Charged with an Adult

A common situation arises when a youth and an adult are alleged to have committed a crime together. The general procedure is:

1. They first appear together in the adult magistrates' court.
2. The court will usually send the adult to the Crown Court (if the offence is either-way or indictable-only).
3. The court will then almost always send the youth back to the youth court to be tried separately.

The courts will only keep them together for a joint trial in the Crown Court if it is deemed "in the interests of justice," for example, if their cases are so intertwined that separate trials would cause unfairness or inefficiency.

9.2.3 Sentencing Youths: Guidelines and Orders

The sentencing framework for youths is completely separate from that for adults. The law requires the court to have regard primarily to the principal aim of preventing offending and the welfare of the child. Key sentences include:

1. **Referral Order**

   A mandatory sentence for most first-time offenders who plead guilty. The young person is referred to a Youth Offender Panel, comprising community volunteers and a YOT officer, where they, along with their parents, agree a "contract." This contract focuses on repair and rehabilitation, such as apologising to the victim, community work, or attending sessions on anger management.

2. **Youth Rehabilitation Order (YRO)**

   This is the most common community sentence. It is a flexible order that can include various requirements tailored to the young person's needs, such as supervision, a curfew, electronic monitoring, or an education requirement.

3. **Detention and Training Order (DTO)**

   This is a custodial sentence for the most serious or persistent young offenders. It can last from 4 months to 2 years. The sentence is split: the first half is spent in a secure youth detention centre, and the second half is spent under strict supervision in the community.

9.2.4 The Aims of the Youth Justice System

The entire system is governed by *s.37* of the *Crime and Disorder Act 1998*, which states: "It shall be the principal aim of the youth justice system to prevent offending by children and young persons." This is supplemented by the welfare principle from the *Children Act 1989*, which requires the court to promote the child's welfare. In practice, this means every decision from bail to sentencing must consider what intervention will best prevent that young person from committing further crimes.

9.2.5 Role of the Youth Offending Team (YOT) and Parents/Guardians

Youth Offending Team (YOT)

The YOT is the multi-agency engine of the youth justice system. It brings together professionals from social services, probation, police, education, and health. The YOT's crucial roles include:

- Preparing Pre-Sentence Reports for the court, which assess the young person's background, the reasons for their offending, and the risk they pose.
- Supervising young people on court orders like Referral Orders and YROs.
- Delivering interventions to address the root causes of offending behaviour.

Parents/Guardians

The involvement of parents is not just encouraged; it is integral. Parents are legally required to attend court with their child. The court can also:

- Bind over the parent: Order a parent to take responsibility for their child's good behaviour, with a financial penalty if the child reoffends.
- Issue a parenting order: Require parents to attend counselling or guidance sessions to help them address their child's behaviour.

9.2.6 Key Differences from the Adult Magistrates' Court

Feature	Adult Magistrates' Court	Youth Court
Atmosphere & Formality	Formal, traditional.	Less formal, more like a meeting room.
Public Access	Hearings are generally public.	Hearings are private; the public and media are excluded to protect the child's identity.

Personnel	Standard magistrates or a District Judge.	Specially trained magistrates; bench must be mixed-gender.
Sentencing Focus	Balance of punishment, rehabilitation, and protection of the public.	Rehabilitation and welfare are the primary aims.
Key Sentencing Orders	Fines, Community Orders, Custody.	Referral Orders, Youth Rehabilitation Orders (YROs), Detention and Training Orders (DTOs).

Scenario

Sophie, aged 15, is charged with theft, her first offence. She pleads guilty in the youth court. The court requests a report from the YOT. The report outlines that Sophie has been easily influenced by peers and has difficulties at school. The magistrates, focusing on the principal aim of preventing reoffending, sentence Sophie to a Referral Order. She will work with the YOT panel to agree activities to address her behaviour and make amends, rather than receiving a punitive sentence. Her parents are required to attend the panel meetings with her.

9.3 Conclusion

In conclusion, the appellate system and the distinct procedures of the youth court are fundamental to the integrity and adaptability of the criminal justice system. The structured hierarchy of appeals, from the rehearing in the Crown Court to the legal scrutiny of the High Court and Court of Appeal, provides essential mechanisms for correcting errors, ensuring the consistent application of the law, and upholding public confidence in judicial outcomes.

Simultaneously, the specialised ethos and rehabilitative focus of the youth court demonstrate the system's capacity to balance accountability with welfare, recognising the unique status and potential for reform of young offenders. Together, these pathways affirm that justice is not a static event but a dynamic process, committed to both procedural fairness and substantive, age-appropriate outcomes.

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