

Criminal Law and Practice

Workbook



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Introduction to Criminal Law and Practice

Criminal Law and Practice, sometimes called criminal litigation, will give you an understanding of the applicable court rules and procedures for cases progressing through the criminal justice system. This understanding will enable you to guide your clients through a criminal case against them, including advising them on the strengths of any defence they might have. Understanding the criminal litigation process allows you to put your substantive legal knowledge, for example in relation to criminal law on non-fatal offences or burglary, to practical use. Even if you do not intend to practise in a criminal defence firm or for the Crown Prosecution Service, studying Criminal Law and Practice will provide you with an opportunity to develop your skills in advising clients on challenging circumstances that have arisen in their lives. Many commercial firms also have regulatory practices which require a knowledge of these procedures.



Introduction

1 Criminal justice process

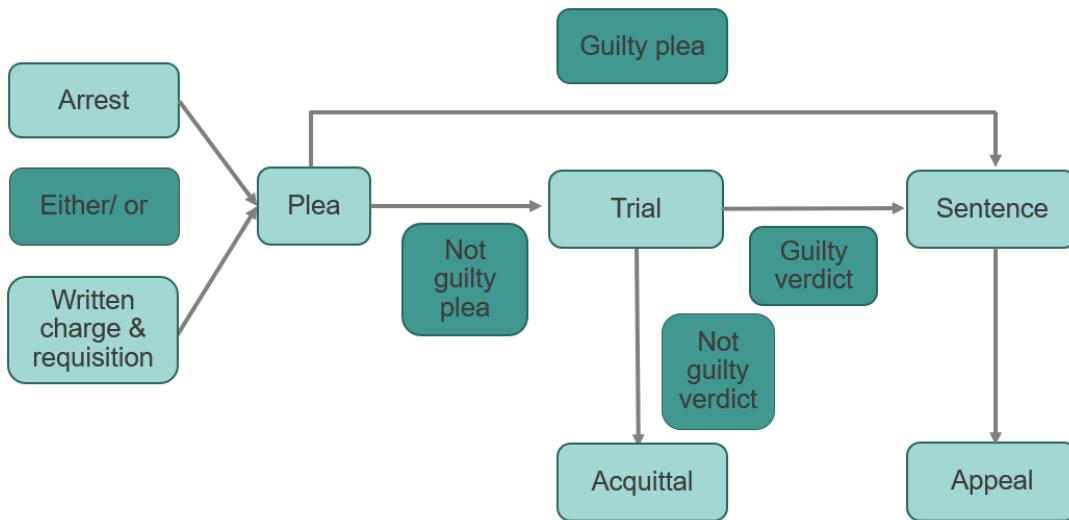


Figure 1.1: The criminal justice process

1.1 Introduction

The criminal justice process begins with a person being arrested and brought before the magistrates' court. In the alternative, the magistrates' court issues a written charge and requisition to secure their attendance.

They are asked to enter a plea:

- (a) If they plead guilty, the court moves to sentence.
- (b) If they plead not guilty, there is a trial and the court comes to a verdict.
 - (i) If the verdict is guilty, the defendant must be sentenced.
 - (ii) If they are not guilty, the defendant is acquitted of the charge and is free to go.

A person who is sentenced following either a guilty plea or verdict may appeal.

Let's consider each of those stages in turn.

1.2 Arrest

The police may arrest a person where they have reasonable grounds for doing so. The conduct of the police during an investigation is governed by the Police and Criminal Evidence Act (PACE) 1984 and the PACE Codes of Practice. At the conclusion of an investigation, a person is either released from police custody and no further action is taken, or charged with an offence approved by the Crown Prosecution Service (CPS). This is the method by which the vast majority of prosecutions are commenced.

1.2.1 Written charge and requisition

As an alternative to arrest, a person can be made to appear before a court via a process known as a '**written charge and requisition**', where the appropriate prosecuting body has the power to compel a person's attendance before a court to enter a plea for an offence. This process was historically confined to: corporate bodies, persons in breach of a court order, driving offences and regulatory offences (eg offences contrary to environmental protection laws) but is now used increasingly for common offences.

The overwhelming majority of prosecutions are brought by the Crown Prosecution Service which prosecute matters investigated by the police, HMRC and government departments. Private individuals can bring prosecutions too but the CPS has the right to intervene and take over such cases. Should it do so, it becomes the sole arbiter of how that prosecution is run, including using its power to discontinue proceedings.

1.3 Plea

Once before a court, a defendant is asked to enter their plea. This may take place at their first hearing before a court or, in other cases, at a subsequent hearing. What happens at this stage determines whether the next stage is a trial or sentence.

If a defendant pleads **not guilty** to an offence, **there must be a trial**. Conversely, if a defendant pleads **guilty** to an offence, **there will not be a trial**.

1.4 Trial

At a criminal trial the prosecution's role is to prove the defendant committed the alleged offence by adducing evidence.

Both parties may call evidence, and the court determines whether the defendant is guilty, or not guilty.

A defendant who is found not guilty is acquitted of the charge(s) they face and may go free.

1.5 Sentence

If a defendant is found guilty or pleads guilty to an offence, then they must be sentenced.

The type of sentence available to a court along with ancillary orders such as costs varies depending on the seniority of the court in which a defendant appears.

1.6 Appeal

A defendant who pleads guilty can appeal against the sentence imposed upon them. A defendant who is found guilty can appeal against their conviction and/or sentence.

No leave or grounds of appeal are required to appeal from the magistrates' or Youth Court to the Crown Court where the appeal takes the form of a rehearing of the case.

Leave and grounds of appeal are required for appeals from the Crown Court to the Court of Appeal and from the Court of Appeal to the Supreme Court. In addition, the Supreme Court may only hear the case where an appeal raises a point of general public importance.

1.7 Summary

The criminal justice process:

- Begins with a person being arrested and brought before the magistrates' court or the magistrates' court issues a written charge and requisition to secure their attendance.
- The defendant is asked to enter a plea and if the defendant pleads guilty, the court moves to sentence.
- If the defendant pleads not guilty, there is a trial and the court comes to a verdict. If the defendant is found not guilty, the defendant is acquitted of the charge and is free to go.
- If the verdict is guilty, the defendant must be sentenced.
- A person who is sentenced following either a guilty plea or verdict may appeal.

- Defendants in criminal proceedings can either fund their defence privately or make an application to the Legal Aid Agency for public funding.

2 Classification of offences

2.1 Which court?

There are a variety of different courts in the criminal court structure, listed opposite.

In order to understand where a person enters their plea and is tried and/or sentenced, it is necessary to understand how offences are classified.

- Supreme Court
- Court of Appeal (Criminal Division)
- High Court
- Crown Court
- Magistrates' Court
- Youth Court

2.2 What are the classification of offences?

There are three classifications of offence.

- Summary only offences;
- 'Either-way' offences (also known as 'indictable' offences, in other words, capable of being tried on indictment); and
- 'Indictable only' offences.

Note. classifications are only relevant to adults.

With youths, the potential sentence determines where their trial is held.

2.3 How can I determine the classification?

2.3.1 Common law offences

All matters that are contrary to common law (ie are not a creation of statute) are indictable only and the maximum sentence is 'at large' which means any sentence up to and including life imprisonment, may be imposed by the Crown Court. Murder is an example of a common law offence.

2.3.2 Statutory offences

There are two simple ways of checking:

- Consult a practitioner text; or
- Look at the sentencing guidelines for the relevant offence.

2.4 Summary only offences

Summary only offences are only capable of being tried and sentenced in the magistrates' court. Therefore:

- Plea** – A plea is usually entered at the first hearing before a magistrates' court.
- Trial** – If one is necessary, it can only occur in the magistrates' court.
- Sentence** – If a defendant needs to be sentenced for a summary only matter, it can only take place in the magistrates' court.

2.5 Indictable only offences

Only capable of being tried and sentenced in the Crown Court.

- Plea** – Whilst the defendant will have their first hearing in the magistrates' court, this is just an administrative hearing to start the court process. The magistrates' court is incapable of taking a plea. A plea will be entered at the Crown Court.

- **Trial** – If needed, it can only occur in the Crown Court.
- **Sentence** – If a defendant needs to be sentenced for an indictable only matter, it can only take place in the Crown Court.

2.6 Either-way offences

As the name would suggest, either-way offences are capable of being tried and sentenced in either the magistrates' court or the Crown Court.

Later elements will concentrate on this in greater detail, but the next page will provide an overview of the plea, trial and sentencing stages for either-way offences.

2.7 Either-way offences: procedural overview

- **Plea** – The defendant has the first hearing in the magistrates' court where the court will decide on the appropriate venue for the trial. If the magistrates' court decides that the case must be heard in the Crown Court (known as declining jurisdiction) then that is where it will go. If the magistrates' court decides that the case is suitable to be retained in the magistrates' court (known as accepting jurisdiction), then the defendant can consent to this or exercise their right to trial by jury in the Crown Court.
- **Trial** – If needed, it will take place in either the magistrates' court or the Crown Court as set out above in the plea stage.
- **Sentence** – If the defendant has their trial in the Crown Court is convicted then the Crown Court will sentence. Where a defendant is convicted after trial in the magistrates' court then they can either be sentenced there or, if the magistrates find that their sentencing powers are insufficient, be committed to the Crown Court for sentence.

2.8 Summary

This section explored:

- The definition of the classes of offences: summary only offences, either-way offences and indictable only offences.
- How to determine which class an offence is in:
 - Common law offences are indictable only; and
 - Statutory offences- either consult a practitioner text or look for the maximum sentence set out in the statute.
- The impact classification has on the criminal justice process: broadly it impacts the location of where the defendant's plea is taken, where the trial takes place if there is to be one and where the defendant will be sentenced if found guilty.

3 The criminal courts structure

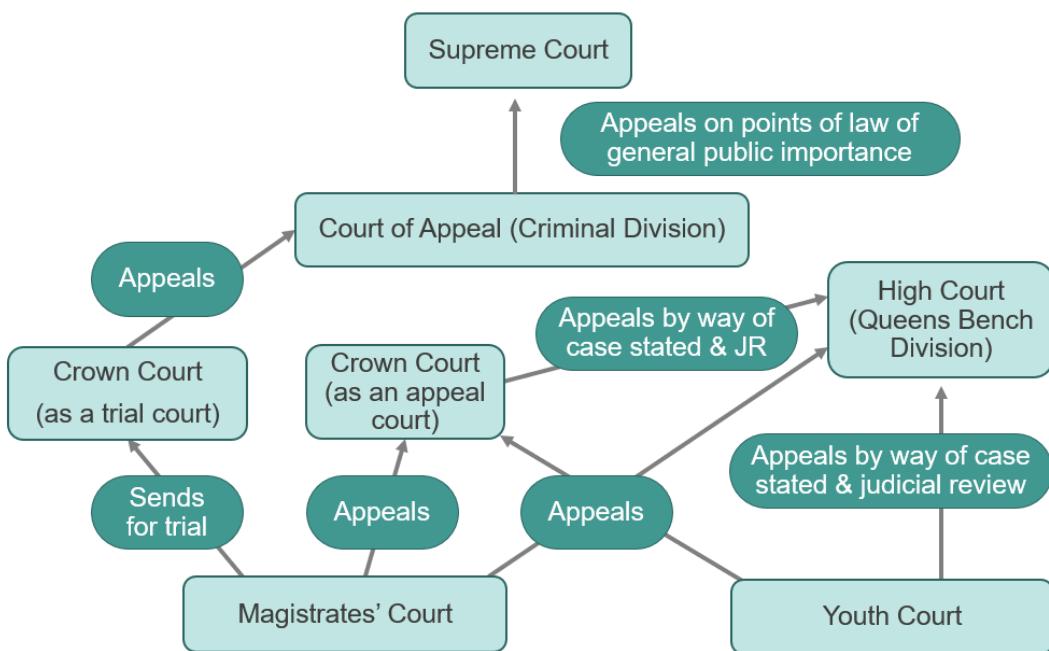


Figure 1.2: The criminal courts structure

3.1 What does each court do?

There are two concepts that you need to be familiar with from this point:

- **Tribunal of fact:** the person or persons who make a decision as to disputed facts.
- **Tribunal of law:** the person or persons who make a decision as to disputed points of law.

3.2 The magistrates' court

All adults (18 and over) have their first hearing at the magistrates' court. The magistrates' court hears summary trials and has no criminal appellate jurisdiction.

- **Judge:**
 - District Judge (magistrates' court); or
 - Deputy District Judge (a Barrister or Solicitor authorised to sit part time as a District Judge); or
 - Two or three lay magistrates (members of the public who are appointed to the Magistracy) and a legal adviser (a legally qualified person who advises the lay magistrates on the law).
- **Mode of address:**
 - Sir/ Madam: District Judge or Deputy District Judge
 - Sir/ Madam: Lay magistrates (as appropriate to the gender of the chair who sits in the middle).
- **Jury:** No.
- **Tribunal of fact:** The District Judge or lay magistrates
- **Tribunal of law:** The District Judge or lay magistrates
- **First hearing:** All adults have their first hearing before this court along with youths jointly charged with adults
- **Trials:**
 - All summary only offences
 - Either-way offences where the magistrates accept jurisdiction and the defendant consents to a trial in the magistrates' court

- **Sentencing powers:**
 - Imprisonment: 6 months (or less if the maximum penalty is lower). 12 months for two or more either-way offences.
 - Fines: Unlimited (or less if the maximum penalty is lower).
 - Committal for sentence: For either-way offences the magistrates' court has the power to commit the defendant for sentence to the Crown Court where they can then face the maximum sentence available on indictment.
 - Costs and make ancillary orders.
- **Appeals and powers on appeal:** The magistrates' court has no criminal appellate jurisdiction.

3.3 The Crown Court

The Crown Court is predominantly a trial court.

The Crown Court also hears appeals and committals for sentence from the magistrates' court.

- **Judge:**
 - a Circuit Judge; or
 - High Court Judge; or
 - a Recorder (a Barrister, Solicitor or judge of another lower, or equal court, authorised to sit in the Crown Court on a part-time basis).
- **Mode of address:**
 - Your Honour: a Recorder and the vast majority of Circuit Judges.
 - My Lord/My Lady: High Court Judge. Any Judge sitting at the Central Criminal Court (Old Bailey). A Circuit Judge who has been designated as a Senior Circuit Judge and the Honorary Recorder of a place, eg The Recorder of Westminster.
- **Jury:** Yes, for trials only. A jury of 12 members of the public. The jury decide whether defendant is guilty or not. They play no role at sentence.
- **Tribunal of fact:** At trial, the jury (there are limited circumstances in which the judge is the tribunal of fact).
- **Tribunal of law:** The judge.
- **First hearings:** Defendants have their first hearing in the magistrates' or Youth Court.
- **Trials:**
 - All indictable only offences.
 - Either-way offences where either the magistrates' court has declined jurisdiction, or they accepted jurisdiction and the defendant elected trial in the Crown Court.
 - In certain circumstances the Crown Court can take a plea and/or sentence a summary only offence where it is joined to an indictable or either-way offence.
- **Sentencing powers:**
 - Imprisonment: Life or less where the statutory maximum is lower
 - Fines: Unlimited or less if the statutory maximum is lower
 - Costs and ancillary orders
 - Committals for sentence: Where a defendant pleads guilty or is found guilty of an either-way offence in the magistrates' court they can be committed to the Crown Court for sentence and receive any sentence that the Crown Court could pass for that offence.
- **Appeals and powers on appeal:** The Crown Court hears appeals against sentence and conviction from the magistrates' court and the Youth Court. Where exercising this function, the court is a Crown Court judge with two lay magistrates. The judge advises the lay magistrates on the law, but they have equal decision-making power. An appeal is a re-hearing of the case. The Crown Court has the power to make any decision that the lower court could have made. A defendant could receive a more severe sentence on appeal.

3.4 The High Court

The High Court has limited jurisdiction as regards criminal matters, these will be explored in another section.

In short, there is a power to ‘state a case’ or judicially review decisions of the magistrates’ or Youth Court, or the same case where it has been heard on appeal by the Crown Court.

Importantly, the Administrative Court has no jurisdiction to judicially review matters relating to trial on indictment itself but the court can consider matters not so related like an irrational failure to grant bail.

3.5 The Court of Appeal (Criminal Division)

The Court of Appeal hears appeals from the Crown Court. Leave is required from the court for a case to be heard except in cases of contempt where appeal lies as of right.

- **Judge:**
 - Judges of the Court of Appeal (usually);
 - High Court Judges (usually); or
 - Crown Court Judges authorised to sit in the Court of Appeal (note, however, they are unable to sit on an appeal where the trial was conducted in the Crown Court by a High Court judge).
- **Mode of address:** My Lord/ My Lady.
- **Jury:** No.
- **Tribunal of fact:** the Judges.
- **Tribunal of law:** the Judges.
- **First hearing:** The Court of Appeal is not a trial court so there are no ‘first hearings’.
- **Trials:** The Court of Appeal does not hear trials but may in exceptional circumstances receive new evidence.
- **Sentencing powers:** The Court of Appeal does not pass sentence on a defendant. However, it does have the power to alter sentence on appeal.
- **Appeals and powers on appeal:** Appeals against sentence from the Crown Court (including where the defendant has been committed for sentence): Can dismiss the appeal or uphold it and replace the sentence with anything that is on par or less than the Crown Court originally imposed (i.e. cannot sentence more severely).
- **Appeals against conviction from the Crown Court:** Can dismiss the appeal or uphold it and quash the conviction. On application by the prosecution, can order a retrial.
- **Appeal against conviction and sentence:** As above.
- **Appeal against a terminatory ruling:** Where the Crown Court makes a ruling of law that brings proceedings to an end, the prosecution can appeal that ruling: Court of Appeal can dismiss the appeal or reverse the ruling of the trial judge and remit the matter back to the Crown Court.
- **Appeal against a ruling made at a preparatory hearing in a serious fraud case:** Court of Appeal can dismiss the appeal or reverse the ruling of the trial judge and remit the matter back to the Crown Court.
- **Application by the Attorney General for the Court of Appeal to increase a sentence where it is unduly lenient:** Only available for certain offences; Court of Appeal can dismiss the appeal or increase the sentence to any sentence that the Crown Court could have passed.
- **Application by the Attorney General on a point of law following an acquittal:** Where a person is found not guilty but the Attorney General wishes for the Court of Appeal to clarify the law, the Court of Appeal can give their opinion but it has no effect on the acquittal of the defendant.
- **Determining a reference from the Criminal Cases Review Commission:** Court of Appeal can dismiss the reference or quash the conviction. On application by the prosecution, can order a retrial.

3.6 The Supreme Court

The prosecution and defence have the right to appeal decisions of the Court of Appeal to the Supreme Court. Leave is required from the Court of Appeal or Supreme Court to do so.

Leave will only be granted on a point of law of general public importance.

The Supreme Court consists of Supreme Court Justices who are addressed as My Lord/My Lady.

3.7 Summary

This section considered:

- What each criminal court in England and Wales does. Generally:
 - Trial courts: Youth Court, the magistrates' court and the Crown Court
 - Appeal courts: the Crown Court, the High Court, the Court of Appeal (Criminal Division) and the Supreme Court.
- Who sits in each court
 - There will be a tribunal of fact and a tribunal of law in each court- sometimes the judge will undertake both of these roles (as in the magistrates' courts) and in other courts the roles will be split (with the tribunal of fact being the jury and the tribunal of law being the judge in the Crown Court).
- The powers of each court- these vary greatly in terms of sentencing and appeals.

4 Criminal procedure rules

4.1 Introduction

The Criminal Procedure Rules are a single statement of statutory and common law provisions governing the management and operation of criminal matters. **The Criminal Procedure Rules ('CrimPR')** are regularly amended to give effect to legislative changes.

The CrimPR apply to all criminal cases in the criminal courts including the magistrates' court, Crown Court and criminal division of the Court of Appeal. The CrimPR include an 'overriding objective' (**Rule 1**) and more detailed case management powers (**Rule 3**) to which all parties to a case are required to adhere in order that criminal cases might be managed effectively.



Exercise: Read alongside

Cross refer to your CrimPR as you continue reading

4.2 The overriding objective

Part 1 CrimPR sets out the overriding objective and the duties of those involved in the criminal process to achieve/further the objective, which is to deal with cases justly.

The factors listed in **1.1 (2)** make clear that the courts consider the interests of all involved, not just the defendant, and sometimes a balancing act needs to be performed in order to achieve the overriding objective.

Conflicts can sometimes arise for defence advocates between their duties to the court and to their client.

The overriding objective

1.1.—

(1) The overriding objective of this new code is that criminal cases be dealt with justly.

4.3 Dealing with a criminal case justly

1.1(2) Dealing with a criminal case justly includes:

- (a) acquitting the innocent and convicting the guilty;
- (b) dealing with the prosecution and the defence fairly;
- (c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
- (d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
- (e) dealing with the case efficiently and expeditiously;
- (f) ensuring that appropriate information is available to the court when bail and sentence are considered; and
- (g) dealing with the case in ways that take into account:
 - (i) the gravity of the offence alleged,
 - (ii) the complexity of what is in issue,
 - (iii) the severity of the consequences for the defendant and others affected, and
 - (iv) the needs of other cases.

4.4 Duties of the participants of the case

1.2.—

- (1) Each participant, in the conduct of each case, must:
 - a) prepare and conduct the case in accordance with the overriding objective;
 - b) comply with these Rules, practice directions and directions made by the court; and
 - c) at once inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by these Rules, any practice direction or any direction of the court. A failure is significant if it might hinder the court in furthering the overriding objective.
- (2) Anyone involved in any way with a criminal case is a participant in its conduct for the purposes of this rule.

A ‘participant’ could include: prosecutors, defence solicitors, the defendant, witnesses, expert witnesses, probation officers, police officers, organisations bringing prisoners to court and possibly jurors.

The application by the court of the overriding objective

- 1.3 The court must further the overriding objective in particular when:
- a) exercising any power given to it by legislation (including these Rules);
 - b) applying any practice direction; or
 - c) interpreting any rule or practice direction.'

4.5 Case management

Part 3 of the CrimPR provides for the effective case management of criminal cases:

- 3.2 sets out the court’s duty; and

- **3.3** sets out the parties' duty to assist the court in exercising its duty under **3.2**.

There is therefore some overlap.

The pages that follow set out some of the factors given in **Rule 3.2 (2)** along with some examples of how these might work in practice.

4.5.1 The real matters in dispute

Rule 3.2(2)(a)

What are the real matters in dispute between the defence and the prosecution?



Example: Matters in dispute

- The defendant alleges mistaken identification.
- The defendant will challenge the admissibility of a confession.

Early indication of issues prevents an ambush at trial.

4.5.2 Presentation of evidence

Rule 3.2(2)(e)

Ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way.

The defence will have the statements of the prosecution witnesses in the initial details of the prosecution case ('IDPC'). By considering the issues in the case and the client's instructions it will be possible to decide whose evidence is in dispute and whose is not.



Example: Presentation of evidence

If the defence challenges the identification of the defendant by a witness it will be necessary to call that witness so that they can be cross examined about the purported identification.

By comparison, if the offence is one of burglary and the owner of the property was at work and can say nothing other than the goods were there when the owner left and on return, the house had been broken into and goods stolen, there is little for the defence to challenge. Here, the owner's statement can probably be read.

4.5.3 Discouraging delay, encouraging co-operation

Rule 3.2(2)(f)

Discouraging delay, dealing with as many aspects of the case as possible and avoiding unnecessary hearings.

Historically, criminal cases had a tendency to be adjourned, often because the defence would require sight of the IDPC and the need to take instructions. Now if the CPS repeatedly fail to serve the papers then the case could be discharged.

Rule 3.2(2)(g)

Encouraging the participants to co-operate in the progression of the case.

The court will require the advocate attending the case management hearing to confirm that they have advised the defendant that trial may go ahead in the defendant's absence, if the defendant fails to attend the day of trial.

4.5.4 Directions

Both the Crown Court and the magistrates' court can issue directions under **Rule 3.5** and any party can seek a direction. Looking at **3.5** it is clear that the courts' case management powers are wide.

Examples of directions could be in relation to timescales, disclosure, expert evidence, or reporting restrictions.

The courts have also adopted standard directions.

For example, when a case is allocated for summary trial, the magistrates' court will then make standard directions, which may, with the consent of the court, be amended or varied upon request by the parties.

4.5.5 Standard directions

An outline of these standard directions is as follows:

- Not more than 20 days after a not guilty plea has been entered, the prosecution must serve notice of any intention to introduce a defendant's bad character or to introduce hearsay evidence.
- The defence must serve a defence statement, if one is to be served, within 10 business days of the prosecution complying with initial disclosure.
- The defence must notify the prosecution and the court that a witness is required to attend court to give live evidence not more than 5 business days after service of the witness statement.
- Not more than 10 business days after service of a notice to introduce bad character evidence or hearsay evidence, the defence must indicate if the application is to be opposed.
- If the defence intend to rely on hearsay evidence, they must give notice of such intention as soon as reasonably practicable.
- The defence must make any application to introduce the bad character of a prosecution witness not more than 10 business days after prosecution disclosure.
- The defence must serve any statements of its own where a witness is not to be called to give live evidence at least 10 business days before trial.
- Any point of law must be identified with skeleton arguments at least 10 business days before trial.
- Both parties must serve a certificate of readiness 10 business days before trial.

4.5.6 Sanctions

Rule 3.5 (6) sets out the possible sanctions if these directions are not complied with.

If a party fails to comply with any rule or a direction, the court may:

- Fix, postpone, bring forward, extend, cancel or adjourn a hearing;
- Exercise its powers to make a costs order; and
- Impose such other sanction as may be appropriate.

The additional notes to **Rule 3.5(6)** state that sanctions for non-compliance may also result in the following consequences:

- The court may refuse to allow that party to introduce evidence;
- Evidence that the party wants to introduce may not be admissible; or
- The court may draw adverse inferences from the late introduction of an issue or evidence.

4.6 Case preparation and conduct of a trial

As mentioned above, the courts are anxious that cases are not delayed unnecessarily. **Rule 3.8** deals with case preparation and progression and allows for a case to progress in a defendant's absence if necessary. The court will also expect a plea to be entered to ensure the appropriate timetable can be set.

Rule 3.13 deals with the conduct of a trial or an appeal. With the active assistance of the parties, the court will manage cases by establishing the disputed issues, setting a timetable, considering witnesses and perhaps limiting the duration of any stage of the hearing.

4.7 Summary

This section focused on:

- The importance and application of the Criminal Procedure Rules:
 - The overriding objective is that criminal cases be dealt with justly.
- The case management functions of the court:

- Judges and participants in criminal matters are required to actively consider the way in which the case is conducted and managed, ensuring that the issues are identified at an early stage and that cases come to trial quickly, without any undue delay.
- Deadlines on the parties should be observed.
- Parties should not ambush each other by failing to serve documents or applications.
- Judges can, in serious cases, sanction parties by refusing to admit evidence or refusing to hear an application to exclude evidence.

5 Professional conduct in criminal litigation

5.1 Professional conduct and the defence solicitor

Professional conduct issues in criminal cases are most likely to arise in the following contexts:

- Third party instructions eg can I attend a police station to represent a detainee if asked to do so by a relative or third party?
- Conflicts, or potential conflicts of interest eg can I represent more than one defendant in the same case?
- Confidentiality eg can I use information from one client's case if I know it will help another client's defence?
- Duties to the court and specific duties on advocates eg can I represent a defendant who has told me he is guilty? Can I represent a client who has told me that he is not guilty but wants to plead guilty?

5.2 Third party instructions for police station attendances

- CCS 1.1 provides that you are generally free to decide whether or not to take on a particular client provided that you do not unlawfully discriminate.
- However, the CCS sets out a number of situations where a solicitor must not accept instructions. The most relevant for criminal litigation is contained in CCS 3.1 'You only act for clients on instructions from the client, or someone properly authorised to provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your client's wishes, you do not act unless you have satisfied yourself that they do.'

This situation may arise where you receive a telephone call advising you that a potential client has been arrested; perhaps from the client's friend or relative meaning you are being instructed to act by someone other than the client.

- The guidance in PACE COP C Annex B paragraph 4 specifically states that 'access to a solicitor cannot be delayed on the grounds that they might advise the detainee not to answer questions or **the solicitor was initially asked to attend the police station by someone else** (emphasis added). In the latter case, the detainee must be told the solicitor has come to the police station at another's request and must be asked to sign the custody record to signify whether they want to see the solicitor.'
- Therefore, in these circumstances you should contact the police station yourself and advise them that you have been contacted. The police should be asked to speak to the suspect and confirm whether they wish to instruct you. If they do, the police will contact the Defence Solicitor Call Centre ('DSCC') (which manages and allocates police station duty solicitor work) and, assuming your firm is contracted to undertake publicly funded work, the DSCC will contact you to instruct you to attend and advise the client.
- However, you also need to bear in mind that once a suspect has been arrested and has been taken to the police station he will have been informed of his right to consult with a solicitor under s.58 PACE. The DSCC may already have been contacted and either his solicitor of choice or the duty solicitor may already have been retained.

5.3 Conflicts of interests between clients

- This is governed by CCS 6.2 but the real guidance is located in the practice note 'Conflicts of interest in criminal cases' issued by the Law Society ('LSPNCI').

- If there is a conflict, or a significant risk of a conflict, between two or more current clients, you **must not act** for all, or possibly any, of them.
- Although CCS 6.2 (a) & (b) refers to exceptions to this principle the LSPNCI makes it clear that these exceptions are **not** applicable in criminal litigation.
- The situation is very clear; if there is a conflict of interests or a risk of one, **you must not act**.
- Because of the expense and disruption caused when conflicts arise you should not accept instructions to act if there is a significant risk of a conflict happening.
- You should also bear in mind that conflicts of interests may also affect your duties of confidentiality and disclosure.

5.3.1 Identifying conflicts of interest

- In publicly funded cases, regulations require that one litigator is appointed to act for all co-defendants in a legal aid case unless there is, or is likely to be, a conflict of interest. The purpose of this is to ensure economy in the use of public funds where it is proper to do so.
- The obligations under the CCS apply from an early stage, and you must be satisfied that accepting instructions on behalf of a client prior to a police interview does not place you in conflict with another client who is also to be interviewed.
- In order to assess whether you can act for both clients it is important that you do not interview the clients together and that you get instructions which are as full as possible from the first client before you have any substantive contact with the second client.

In almost all cases there will be some possibility of differences in instructions between the clients but the rules do not prevent you acting unless the risk of conflict is 'significant'.

5.3.2 Conflict of interests: Examples

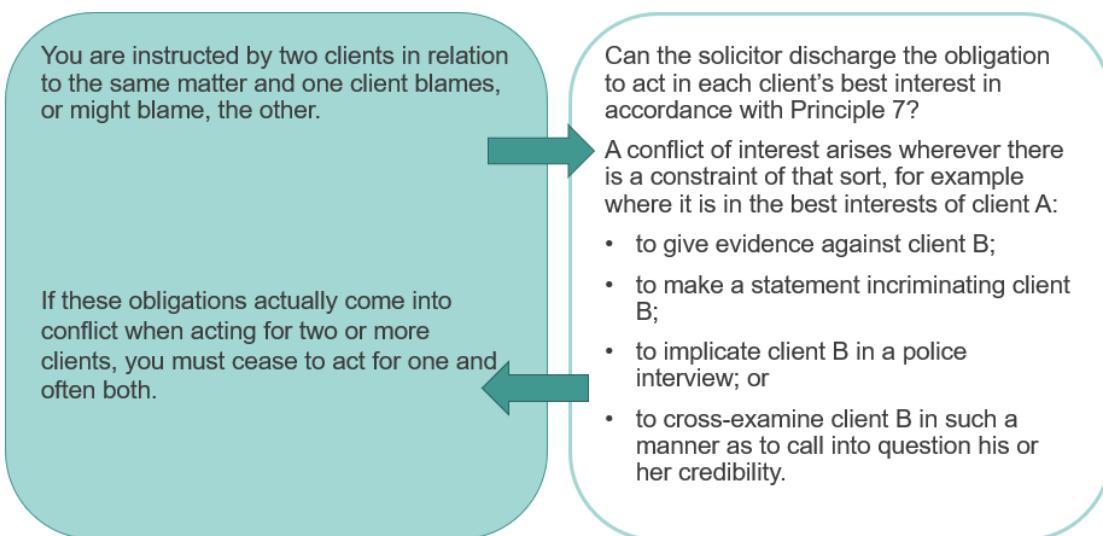


Figure 1.3: Conflict of interests - example 1

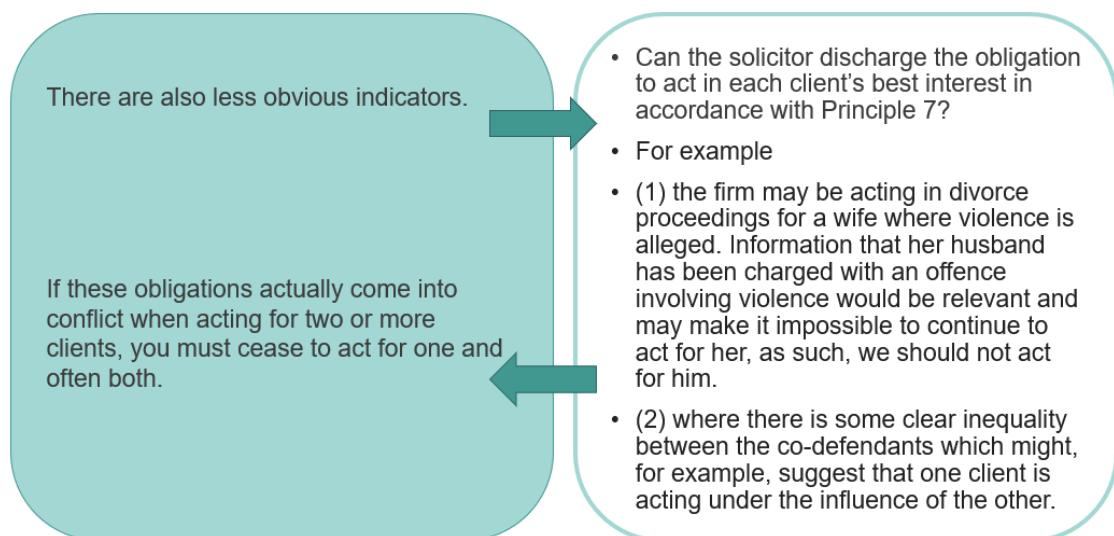


Figure 1.4: Conflict of interests - example 2

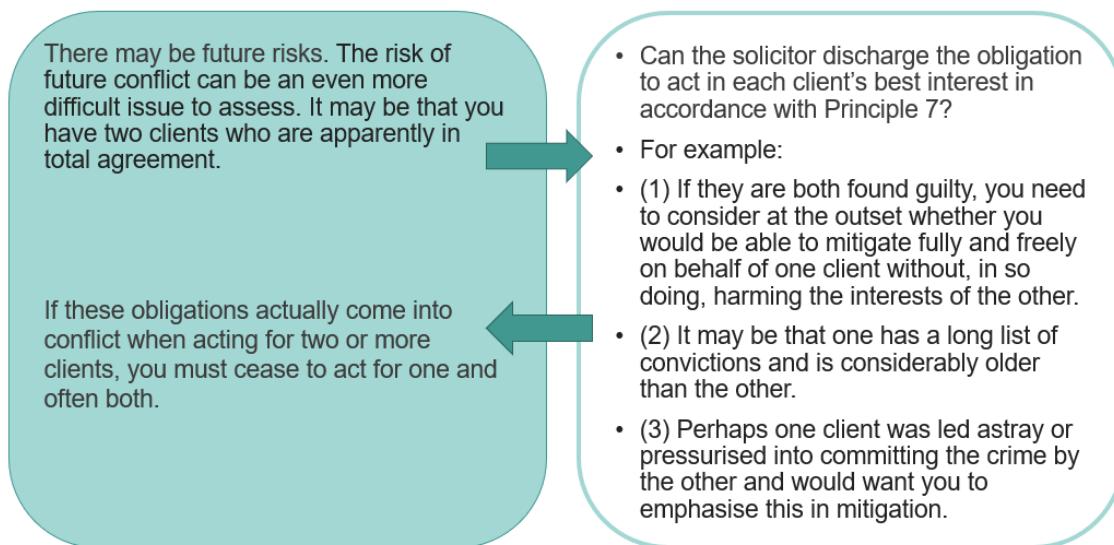


Figure 1.5: Conflict of interests - example 3

5.3.3 Guide: Attempting to avoid conflicts

To minimise the potential for conflicts when the solicitor already acts for client 1 (C1) and is then asked to act for client 2 (C2) the solicitor should take the following steps:

- Take instructions from C1 and when doing so advise C1 that you have also been asked to act for C2 and that you can only do so if there is no conflict.
- Ask C1 if he is aware of any conflict; if he states that there is, or might be, a conflict ask C1 for full details. If these amount to a conflict, you cannot act for C2. If they do not amount to a conflict, inform C1 of this and that you will be able to act for C2. Inform C1 that if, at any stage, you come into possession of confidential information which is confidential to C1, but which is relevant to C2, you will have to disclose it to C2, at which stage you will need his consent to disclose it to C2.
- Take instructions from C2 and when doing so advise C2 that you also act for C1 and follow the same process as set out at (b) above.

5.4 Confidentiality and disclosure

5.4.1 Confidentiality

CCS 6.3 ‘You keep the affairs of current and former clients confidential unless disclosure is required or permitted by law or your client consents.

The duty to protect confidential information lasts forever, even after termination of the retainer or the client’s death, unless the client allows disclosure or waives the confidentiality or if the duty is overridden eg by statute or by the information coming into the public domain.

5.4.2 Disclosure

- CCS 6.4 ‘Any individual advising a client must make that client aware of all information material to that retainer of which the individual has personal knowledge.’
- CCS 6.5 confirms that you should not usually act for A, where you hold confidential information for another client, B, which is material to A unless that confidential information can be protected.
- **CCS 6.5 (a) &(b) do not apply.** Information barriers do **not** exist in criminal cases.

5.4.3 Dealing with confidential information

If at any stage you receive confidential information from one client (C1) that is relevant to the other client (C2) you must inform C1 of this and seek his consent to disclose it to C2.

It should be made clear that there is no obligation upon C1 to give consent.

If C1 does not consent to such disclosure, you must cease to act for C2 as he is the client to whom you are required to disclose the information.

This is because the duty of confidentiality always overrides the duty of disclosure but as you cannot comply with your duty of disclosure you cannot continue to act for C2.

You must not disclose your reasons for ceasing to act.

In addition, you can only continue to act for C1 if the duty of confidentiality to C2 is also not put at risk.

5.5 When a conflict arises

- Despite best practice, a conflict might arise. This might happen where one defendant changes his or her plea, or evidence.
- A decision will then have to be taken as to whether it is proper to continue to represent one client or whether both will have to instruct new firms.

It will be necessary to decide whether your duty to disclose all relevant information to the retained client will place you in breach of your duty of confidentiality to the other client; you need to decide whether you hold confidential information about the departing client which is now relevant to the retained client.

- If you do have such information then you must not act for either client.

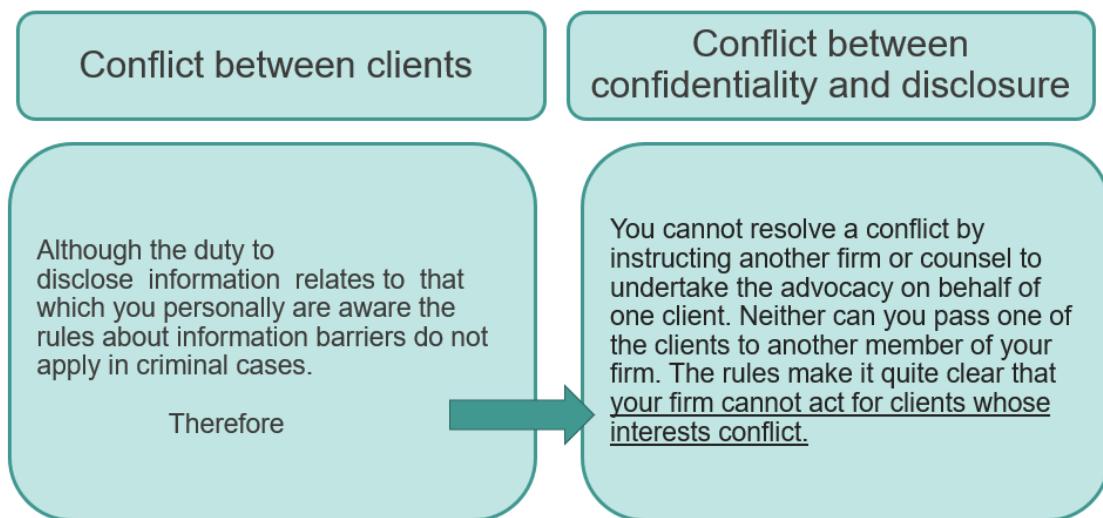


Figure 1.6: Continuing to act

5.6 Duties to the court

A solicitor is an ‘officer of the court’ (s.50(1) Solicitors Act 1974). This is an overriding duty which must be paramount for any solicitor who might, at any time, potentially be involved in any form of court proceedings.

This is also reflected in the Principles which require a solicitor to uphold the rule of law and the proper administration of justice, and to act with integrity, independence, honesty and to act in the best interests of each client.

For a solicitor, issues may well arise where these Principles conflict with Principle 7 namely the duty to act in the best interests of the client.

5.6.1 Duty not to mislead the court

CCS 1.4 states that,

You must not mislead or attempt to mislead your client, the court or others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your client).

If your client insists on a course of action which would or could lead to you misleading the court then you would have to stop acting for them.

- CCS 2.1 You do not misuse or tamper with evidence or attempt to.
- CCS 2.2 You do not seek to influence the substance of evidence, including generating false evidence or persuading witnesses to change their evidence.
- CCS 1.4 You must not call a witness whose evidence you know is untrue.
- CCS 2.7 you must draw to the court’s attention relevant cases and statutory provisions or procedural irregularities of which you are aware and which are likely to have material effect on the outcome of proceedings.

5.6.2 The guilty client

What is our professional position representing clients who tell you that they have committed the offence but wish to deny involvement?

Remember that this is an adversarial system and it is for the prosecution to prove the guilt of the defendant not for them to prove their innocence.

Entering a not guilty plea is NOT in itself misleading the court.

The defendant is perfectly within their rights to sit back and wait for the prosecution to do just that. It may well be that the prosecution is unable to prove a vital element of the offence with

which the defendant is charged. Provided the defendant does nothing to actually maintain their innocence your position as their solicitor is not in jeopardy.

You are not misleading the court as you are not allowing them to put forward false evidence.

If, however, you conducted the case in any way as to suggest they had not committed the crime then you would be misleading the court; for example, by suggesting to a prosecution witness that they were mistaken in their identification of the defendant (when clearly they were not)

5.6.3 Perverting the course of justice

There are some instances when breaching the CCS may also amount to perverting the course of justice. This offence may be committed in any number of ways such as: manufacturing false evidence, destroying or concealing evidence, interfering with potential witnesses, knowingly acting for a defendant who has assumed a false name with intent to deceive the court and deliberately assisting your client to evade arrest.

5.7 When duties conflict

There are occasions when the various duties conflict and a solicitor will need to be able to justify their choice of course of action. The Code states that where there is a conflict between a duty and a Principle, the factor in determining precedence will be the public interest in the administration of justice. However we cannot breach our duty of confidentiality.

It is therefore necessary that you explain to your client that you owe a duty to the court which requires you to provide information to the court so that the overriding objective may be achieved by active case management. You must, however, reassure the client that you cannot divulge anything which is confidential without his consent.

As an example a client instructs you to withhold documentary evidence which is prejudicial to his case, but which is required to be disclosed pursuant to a court order. CCS 2.5 requires you to comply with court orders. Your duties to the court will mean that you cannot continue acting for the client unless he authorises disclosure of the prejudicial document.

- Suppose you have been ordered to give details of your client's witnesses in a trial but you cannot do so because you have no instructions from your client. What is your position?
- You must inform the court that you are unable to comply with any directions made but you cannot give the reasons for non-compliance. The court may ask whether you have instructions from your client; it would not be a breach of your duty to the client for you to indicate whether or not you have instructions.
- However, the court cannot require you to go further and indicate what instructions have been taken.

5.8 Summary

- You cannot act for clients if you are unable to act in their best interests.
- If there is a conflict or a significant risk of one you must not act.
- You cannot mislead the court. A client pleading 'not guilty' does not in itself mislead the court.
- You owe your clients a duty of confidentiality. You cannot disclose confidential information without consent or when required by law (eg Statute).

6 SQE syllabus offences



Assessment focus point

Assessment tip:

- Generally, offences are classified as: summary only, either-way or indictable only offences.
- In most circumstances, you are not required to recall specific case names, cite statutory or regulatory authorities. However, we suggest you memorise the classification of the following specified offences and statutory references.

- A multiple-choice question on your assessment might contain a scenario with a theft in it (for example) and you should be able to recall that theft is an indictable offence.

6.1 Summary only offences

6.1.1 Attempt to commit a summary only offence

- Assault and battery cannot be the object of a criminal attempt (as summary only offences).

Summary only offences

- Assault
- Battery
- Simple criminal damage where the value is £5,000 or less is treated as summary only.
- An attempt to commit simple criminal damage £5,000 or less is treated as summary only.

6.2 Either-way offences

- Theft- s 1 Theft Act 1968
- Burglary – s 9(1)(a) or s 9(1)(b) Theft Act 1968
- Fraud:
 - By false representation
 - By abuse of position
 - By failing to disclose
- Assault occasioning actual bodily harm – s 47 Offences Against the Person Act (OAPA) 1861
- Wounding or inflicting grievous bodily harm – s 20 OAPA 1861
- Simple criminal damage where the value exceeds £5,000
- Simple arson

Attempts to commit either-way offences will be triable either way.

6.3 Indictable only offences

- Robbery – s 8 Theft Act 1968
- Wounding or causing grievous bodily harm with intent – s 18 OAPA 1861
- Aggravated burglary – s 10 Theft Act 1968
- Aggravated arson
- Aggravated criminal damage
- Murder – where a verdict of voluntary manslaughter can be a possible outcome
- Involuntary manslaughter:
 - Unlawful act manslaughter
 - Manslaughter by gross negligence

Attempts to commit indictable only offences will be triable only on indictment.

6.4 Criminal damage

Criminal damage is an important exception to the rule that all offences fall into one, and only one, of the three classifications of offences.

Criminal damage can be:

- A summary only; or
- An either-way offence.

Section 22 Magistrates' Court Act (MCA) 1980 states that the value of the damage determines the classification of the offence. However, this does not apply where criminal damage is caused by fire – arson is always an either-way offence.

The relevant sum is £5,000. Where the value of the damage is £5,000 or below, the offence is summary only. Above £5,000 and the offence is triable either-way.

6.4.1 Calculating the damage

Where there are multiple offences the court must consider whether they form part of a series of offences. If so, the court can aggregate the value of the damage in deciding which side of the £5,000 figure the damage falls.

The value of the damage is the cost of replacement where the property was destroyed. Where the property was damaged it is the cost of repair or replacement, whichever is the less.

In determining the value of the damage, the court must hear representations from the parties. There is no requirement for the court to hear evidence on the value, though it can do so. The representations of the parties may include the production of documents such as invoices or estimates for repairs or replacement.

6.4.2 The value of the criminal damage is £5,000 or below

The offence(s) are categorised as summary only. The maximum sentence for criminal damage when tried as a summary only offence is three months' imprisonment or a fine at level 4 on the standard scale. The defendant cannot be committed for sentence.

6.4.3 The value of the criminal damage is over £5,000

The offence(s) are triable either way. If they are tried in a magistrates' court then the maximum sentence is six months' imprisonment or a fine at level 5 on the standard scale. The defendant can be committed for sentence. The maximum sentence on indictment is ten years' imprisonment.

6.4.4 The value is uncertain

Where the value of the damage is uncertain, ie it is not known whether or not it exceeds £5,000, the defendant is asked if they consent to be tried summarily. If so, that will take place and the maximum sentence will be limited to three months or a level 4 fine. If the defendant does not consent then the offence(s) will be treated as either-way and the higher sentencing powers will apply on conviction.

6.5 Low value shoplifting

Low value shoplifting, where the value does not exceed £200, is now said to be a summary only offence.

When read fully, however, the statute still allows an adult defendant to elect trial in the Crown Court. You should therefore continue to treat shoplifting as a theft which is an either-way offence.

Note. 'Shoplifting' is not an offence in any event. Where a person has allegedly shoplifted, they are properly charged with theft.

In reality the only difference that the supposed reclassification of the offence makes is that a magistrate's court cannot decline jurisdiction at the mode of trial hearing.

6.6 Summary

This section considered the classifications of the SQE syllabus offences that we recommend you memorise for the assessment. In particular, this element considered special rules relating to:

- **Criminal damage:**
 - Where the value of the damage is £5,000 or below, the offence is treated as summary only.
 - Above £5,000 and the offence is triable either-way.
 - Where the value of damage is uncertain, the defendant is asked if they consent to be tried summarily. If the defendant does not consent then the offence(s) will be treated as either-way and higher sentencing powers will apply on conviction.
- **Low value shoplifting:** Low value shoplifting, where the value does not exceed £200, is now said to be a summary only offence. However, the statute still allows an adult defendant to elect trial in the Crown Court, so you should therefore continue to treat shoplifting as a theft which is an either-way offence.



Preliminaries to prosecution

1 Detention

1.1 Legal authority and lawful exercise

For the purposes of this section, we are going to focus on only one of the powers contained in the **Police and Criminal Evidence Act (PACE) 1984**: detention without charge.

A police officer will have to be able to demonstrate:

- Legal authority to exercise the power; and
- The police officer has exercised the power lawfully.

When you are asked to consider police powers, adopt a similar approach. You can use **PACE** as a mnemonic:

P: Identify the power

A: What is the legal authority granting the power?

C: What criteria need to be met and are they met on the facts?

E: How should the power be exercised and has it been exercised correctly on the facts?

Apply the **criteria** to the facts provided to decide if the police have the **power** and then look at how it was **exercised**.

1.2 Action following arrest

Usually a person arrested must be taken to a police station as soon as practicable.

The exception is where their presence at a place other than a police station is necessary to carry out such investigations as it is reasonable to carry out immediately. This can include:

- Being searched;
- Being taken to premises being searched; or
- Being taken to a place to check their alibi.

The person can be taken to any police station unless it is anticipated that they will be detained for more than 6 hours, in which case, the person must be taken to a designated police station.

Instead of being taken to a police station, the person arrested can be granted bail to attend a police station at a later date. This is referred to as 'street bail'. Conditions can be attached to the bail.

1.3 At the police station: Procedural overview

When the arrested person arrives at the police station, a number of things will happen to that person:

- The detainee will see the custody officer who must authorise continued detention.
- The detainee will be informed of their rights.
- The detainee will have certain non-intimate samples taken.
- The detainee may see the appropriate healthcare professional if necessary.

- If the detainee requests, they will speak to a solicitor.
- The detainee may be interviewed, often with their solicitor present.
- After the interview, the detainee may be:
 - Released under investigation or on police bail;
 - Charged and released on police bail to appear at the magistrates' court at a later date; or
 - Charged and remanded in police custody to appear at the magistrates' court on the following day.

1.4 The role of the custody officer

On arrival at the police station the arrested person will be presented to the custody officer as soon as possible. The custody officer:

- Is responsible for the handling and welfare of suspects in detention at the police station
- Must be a police officer of the rank of at least sergeant.
- Must be unrelated to the process of the investigation of the offence.

The procedure that should be followed by the custody officer upon arrival at the police station of the detainee is governed by s. 37 PACE and **Code of Practice (COP) C 2, 3 and 4**.

The reason for arrest must be explained to the custody officer, who can then authorise detention of the person arrested. The custody officer must order the release of the person detained if the custody officer becomes aware that the grounds for detaining the person have ceased to exist. A person can only be detained at the police station on the authority of the custody officer, and may be released only on the custody officer's authority.

If the custody officer is not available, their role may be performed by another officer, though that officer must not normally be involved in the investigation of an offence for which the person is in detention.

The custody officer will firstly determine whether or not there is sufficient evidence to proceed to charge the detainee. If not, then the arrested person must be released unless there are reasonable grounds for believing that detention is necessary to:

- Secure or preserve evidence; or
- Obtain such evidence by questioning.

If there are grounds to detain, the custody officer will then:

- Authorise detention of the suspect;
- Open a custody record;
- Inform the detainee of the reason for their arrest;
- Inform the detainee of the reason for their detention; and
- Advise the detainee of their rights.

The custody officer is responsible for the welfare of each detainee. Additional duties include:

- Conducting a risk assessment procedure for each detainee.
- Making special arrangements, if necessary, for detainees who may be physically or mentally incapacitated.
- Arranging for interpreters to be present, where appropriate.
- Dealing with a detainee's property.
- Contacting healthcare professionals, if needed.

The role of the custody officer is a vital one. The custody officer is responsible for ensuring that a detained person is treated in accordance with the provisions of the Codes of Practice. Custody officers are well aware that if there are any procedural flaws in the detention process, the result might be the subsequent exclusion of evidence and that ultimately it is they who can be held accountable.

1.4.1 The custody record

A separate custody record must be opened as soon as practicable for each detainee whether a person is brought to the police station under arrest, or arrested at the police station, or surrenders

voluntarily at the police station, or surrenders to bail at the police station. All information required to be recorded under **COP C** must be recorded on the custody record.

Basic information to be recorded must include:

- The requirement to inform the person of the reason for his arrest;
- The circumstances of the arrest;
- Why the arrest was necessary; and
- Any comments made by the arrested person.

It is essential that the solicitor attending the police station view this record as it should contain everything that has happened to, been said to or been said by the detainee. A solicitor has the right to consult their client's custody record as soon as practicable after arrival at the police station and at any time while their client is still detained.

'Solicitor' in **COP C** means: a solicitor who holds a current practising certificate or an accredited or probationary representative included on the register of representatives maintained by the Legal Aid Agency.

1.5 Reviews of detention

Reviews of detention must be carried out during the detention of a suspect (s.40 PACE). The review officer must be satisfied that the detention is still necessary. They must therefore consider whether the grounds for the detention, as authorised by the custody officer under s.37, still exist. The review officer must be an officer of at least the rank of inspector who is not connected with the investigation of the offence and is not the custody officer.

Section 40 stipulates that the first review of the suspect's detention will take place not more than six hours after the suspect's detention was first authorised by the custody officer and then periodically every nine hours thereafter.

At the time of the review, the detained person must be reminded of their right to free legal advice, and be given the right to make representations unless they are unfit to make such representations or asleep at the time of the review.

1.6 Detention time limits ('detention clock')

Under s.41 PACE, the maximum period that a suspect can be kept in custody, before being charged, is 24 hours from the 'relevant time'.

In most cases, where the arrest has taken place within the particular police area, the relevant time begins at the moment the suspect arrives at the police station. The relevant time is indicated on the custody record.

Do not confuse the relevant time with the time detention is authorised, as they will generally be different.

Before the 24 hour limit on detention has expired the suspect must either be charged or released.

1.7 Power to extend beyond 24 hours

1.7.1 Authority

Section 42 PACE allows for detention to be extended for a further 12 hours, taking the maximum period of detention in the police station to 36 hours calculated from the relevant time.

1.7.2 Exercise

Section 42 stipulates that:

- Authorisation to extend must be given before the expiry of the initial 24 hours but after the second review has occurred;
- The grounds for the extension must be explained to the suspect and noted in the custody record; and
- The suspect and/or the suspect's solicitor should be allowed an opportunity to make representations.

1.7.3 Criteria

Section 42 specifies that for detention to be extended:

- An officer of at least the rank of superintendent must authorise the continued detention;
- The superintendent or above has reasonable grounds for believing detention is necessary to secure or preserve evidence or obtain evidence by questioning;
- The offence must be an indictable offence; and
- The investigation must be being conducted diligently and expeditiously.

1.8 Power to detain beyond 36 hours

If the police want to detain beyond 36 hours then they must apply to the magistrates' court for a warrant of further detention under ss.43 and 44 PACE.

The warrant may authorise continued detention for a further 36 hours on a first application and 36 hours (up to a maximum of 96 hours) on a second application.

The same criteria apply as under s.42 and ss.43 and 44 stipulate that:

- The magistrates' court is satisfied that there are reasonable grounds for believing further detention is necessary to secure or preserve evidence or obtain evidence by questioning;
- The offence must be an indictable offence; and
- The investigation is being conducted diligently and expeditiously.

1.9 Detention time limits: A summary

- The starting point is therefore that the maximum period of detention without charge is 24 hours from 'the relevant time'.
- The relevant time is the time that the person arrested first arrives at the police station or 24 hours after arrest, whichever is the sooner.
- Where the offence being investigated is a summary-only offence, that time limit cannot be extended.
- Where the offence being investigated is indictable, the time limit can be extended up to a maximum of 36 hours after the relevant time by an officer of the rank of superintendent or above. Thereafter the maximum period of detention without charge can be extended by the magistrates' court up to a maximum of 96 hours after the relevant time.
- The relevant times to remember are therefore 24, 36 and 96.

1.10 Summary

This section considered detention:

- At a police station as soon as practicable after arrest.
- **The role of the custody officer-** must be a rank of sergeant or above and is responsible for the handling and welfare of suspects in detention at the police station.
- **The custody record-** which the solicitor has a right to consult as soon as practicable after their arrival at the police station. It should contain everything that has happened to, been said to or been said by the detainee.
- **Reviews of detention-** the review officer who is at least the rank of inspector and not the custody officer, must be satisfied that detention is still necessary.
- **Time limits-** the maximum period of detention without charge is 24 hours from 'the relevant time'. Where the offence being investigated is indictable, the time limit can be extended up to a maximum of 36 hours after the relevant time by an officer of the rank of superintendent or above. Thereafter the maximum period of detention without charge can be extended by the magistrates' court up to a maximum of 96 hours after the relevant time.

2 Suspect's rights

2.1 The rights of a detained person

The custody officer must make sure that a person arrested and taken to a police station or attending a police station voluntarily is told clearly about the following continuing rights which may be exercised at any stage during the period in custody:

- The right to consult privately with a solicitor and that free independent legal advice is available;
- The right to have someone informed of their arrest; and
- The right to consult the Codes of Practice (**COP**).

There are also circumstances where there is a right to an appropriate adult and/ or an interpreter. We will look at some of these rights in greater detail in this section.

The custody record will record that these rights have been given and any response made by the suspect (eg the name of the solicitor or person to be notified).

These rights are very important to the suspect but the **Police and Criminal Evidence Act (PACE) 1984** allows for the police to delay a suspect from exercising these rights in certain limited circumstances which we shall examine in this section.

2.2 The right to consult a solicitor

The right under s.58 PACE is the fundamental right to free and independent legal advice. This includes consulting with a solicitor either in person, on the telephone, or in writing.

The person detained must be told again of the right to free legal advice immediately before:

- The commencement or recommencement of an interview
- Being asked to provide an intimate sample
- An intimate drug search
- An identification parade or video identification procedure
- If legal advice is declined, that should be noted on the custody record
- Where legal advice is sought, it must be provided as soon as is practicable
- Police should usually await the arrival of a solicitor before beginning an interview
- Nothing should be done to dissuade the suspect from obtaining legal advice
- If a detained person initially declined legal advice but subsequently changes their mind then the interview should cease and can recommence once the detainee has exercised their right to seek legal advice

'Solicitor' in **COP C** means: a solicitor who holds a current practising certificate or an accredited or probationary representative included on the register of representatives maintained by the Legal Aid Agency.

2.2.1 Power to delay the right

The decision to delay a suspect's right to legal advice is a serious step and must be justified by the police, as it can have major implications for any evidence obtained against the suspect as a result. A number of domestic and European cases have reinforced the position that the right to legal advice is a fundamental one.

Authority

It can only be delayed in accordance with s.58 and **COP C Annex B**.

Exercise

This right can only be delayed up to a maximum of 36 hours.

Where the grounds are authorised they must be recorded and the suspect must be informed.

If the suspect is interviewed before he has been able to consult with a solicitor because this right has been delayed, then there are restrictions on the drawing of adverse inferences at court. Adverse inferences will be dealt with in other sections.

Criteria

In order to delay the right in accordance with s.58 (see also **COP C Annex B**):

- The person must be in detention for an indictable offence; and
- The authority to delay the exercise of the right is granted in writing by a police officer of at least the rank of superintendent; and
- The superintendent has reasonable grounds to believe that the exercise of the right will lead to any or all of the following consequences:
 - Interference with/harm to evidence connected with an indictable offence;
 - Interference with/harm to others;
 - Alerting of other people suspected of committing an indictable offence but not yet arrested for it; and/or
 - Hinder the recovery of property obtained in consequence of the commission of such an offence.

The right might also be delayed if the person has been detained for an indictable offence and has benefited from their criminal conduct ie they have obtained property which they might take steps to try to conceal, such as moving the property outside the jurisdiction. This is property that upon conviction might be confiscated by virtue of the **Proceeds of Crime Act 2002 ('POCA')**.

COP C Annex B provides helpful guidance regarding the power to delay this right.

Authority to delay may only be given if there are grounds to believe that the solicitor might pass on a message or act in some other way that would lead to the consequences mentioned previously. But although this suggests that, on rare occasions, the police might be justified in delaying access to a **named** solicitor if the grounds can be made out, this would not usually provide justification to delay the right to legal advice generally and the suspect must be allowed to choose an alternative solicitor.

2.3 The right to have someone informed of the arrest

Section 56 PACE provides that an arrested person has the right to have a friend, relative or other person told that they are under arrest.

This right to have one person known to them or likely to take an interest in their welfare informed of their whereabouts as soon as is practicable, is at public expense.

The right can be exercised every time the suspect is taken to a different police station.

2.3.1 Power to delay the right

Authority

This right can only be delayed if the necessary criteria are met under s.56 PACE.

Criteria

In order to delay the right:

- The person must be in detention for an indictable offence (an offence that may be tried in the Crown Court ie indictable only and either way offences); and
- The authority to delay the exercise of the right is granted in writing by a police officer of at least the rank of inspector; and
- The inspector has reasonable grounds to believe that the exercise of the right will lead to any or all of the following consequences:
 - Interference with/harm to evidence connected with an indictable offence;
 - Interference with/harm to others;
 - Alerting of other people suspected of committing an indictable offence but not yet arrested for it; and /or
 - Hinder the recovery of property obtained in consequence of the commission of such an offence.

The right might also be delayed if the person has been detained for an indictable offence and has benefited from their criminal conduct, ie obtained property which the person might take steps to

try to conceal, such as moving the property outside the jurisdiction. This is property that upon conviction might be confiscated by virtue of **POCA**.

Exercise

It is easier to justify the delay under s.56 than it is under s.58. Often the police may want to search a suspect's property and will not want anyone 'tipping off' so that evidence can be disposed of before they get there.

However, any delay or denial of the rights in this section should be proportionate and should last no longer than necessary. In any event, the exercise of this right can only be delayed up to a maximum of 36 hours. Therefore, as soon as the search has been conducted or other suspects arrested the appointed person should be notified.

2.4 The right to an appropriate adult (where required)

If a person is, or appears to be, under 18, they must have an appropriate adult present at the police station.

The right to an appropriate adult also applies to anyone whom a police officer suspects may be:

- Mentally disordered or otherwise mentally vulnerable;
- Anyone whom an officer has been told in good faith may be mentally disordered or otherwise mentally vulnerable.

2.4.1 Who can act as an appropriate adult?

In the case of a young detainee, the appropriate adult is defined as:

- A parent; or
- A guardian; or
- In the case of a young person looked after under the **Children Act 1989**:
 - A representative of the care authority or voluntary organisation; or
 - A social worker.

Failing these, any person aged 18 or over who is not a police officer or police employee suffices.

In the case of a detainee who is mentally disordered or otherwise mentally vulnerable, the appropriate adult can be:

- A parent; or
- A guardian; or
- A relative; or
- Someone who has experience in dealing with such persons.

The appropriate adult must be 18 or over and must not be a police officer or police employee.

2.4.2 Who cannot act as an appropriate adult?

A solicitor/ legal representative attending the police station for the suspect should not act as the appropriate adult.

A person cannot act as an appropriate adult if they are:

- Suspected of involvement in the offence;
- The victim of, or a witness to, the offence;
- Involved in the investigation;
- A person who has received admissions from the person detained before acting as appropriate adult;
- Of low IQ and unable to appreciate the gravity of the situation; or
- An estranged parent whom an arrested juvenile does not wish to attend and specifically objects to.

2.4.3 The role of the appropriate adult

The role of the appropriate adult is to:

- Ensure that the detained person understands what is happening and why;

- Support, advise and assist the detained person;
- Observe whether the police are acting properly and fairly and to intervene if they are not;
- Assist with communication between the detained person and the police; and
- Ensure that the detained person understands their rights and that those rights are protected and respected.

An appropriate adult can request a solicitor/ legal representative on behalf of the person detained, though the person detained does not have to see the solicitor if they do not want to.

2.4.4 Proceeding without an appropriate adult

A young or mentally disordered or vulnerable detainee should not be interviewed or asked to provide a written statement without the presence of an appropriate adult unless delay would be likely to lead to:

- Interference with or harm to evidence connected with an offence;
- Interference with or physical harm to other people;
- Serious loss of or damage to property;
- Alerting other suspects not yet arrested; or
- Hindering the recovery of property obtained in consequence of commission of the offence.

2.5 The right to an interpreter (where required)

Where the custody officer has determined that a suspect requires an interpreter, that suspect must not be interviewed without an interpreter unless authorisation is given by an officer of the rank of superintendent or above who is satisfied that delaying the interview will lead to:

- Interference with, or harm to, evidence; or
- Interference with or physical harm to other people; or
- Serious loss of, or damage to, property.

2.6 Treatment of suspects in a police station

COP C 8 gives details on conditions of detention which include:

- So far as practicable, not more than one detainee should be detained in each cell;
- Cells must be adequately heated, cleaned and ventilated;
- Bedding must be supplied;
- Toilet and washing facilities made available;
- If a detainee's clothes have been removed, replacement clothing of a reasonable standard shall be provided; and
- Two light meals and one main meal should be provided every twenty-four hours.

2.7 Summary

This section considered the rights of a suspect being detained by the police for questioning:

- The right to consult privately with a solicitor and that free independent legal advice is available;
- The right to have someone informed of their arrest; and
- The right to consult the Codes of Practice.

This section also considered the circumstances where there is a right to:

- An appropriate adult- to support and assist the detained person when they are, or appear to be, under 18 or a police officer suspects, or has been told in good faith the detained person may be mentally disordered or otherwise mentally vulnerable.
- An interpreter.

Authorisation to delay these rights can be given in narrow circumstances.

3 Interviews

3.1 Introduction

The police interview is an extremely important part of the police investigative process.

In order to ensure that a suspect is not in any way coerced or misled into making statements which would incriminate themselves, **Police and Criminal Evidence Act 1984 (PACE) Code of Practice (COP) C paragraphs 11 and 12** set out in detail the procedures which must be followed when an arrested person is being interviewed.



Interviews: An interview is widely defined by **Code C, para 11.1A** as:

'the questioning of a person regarding their involvement or suspected involvement in a criminal offence or offences ...'.

3.2 Caution

Interviews **must** be carried out under caution, therefore a person **must** be cautioned before they are asked any questions about their suspected involvement in the commission of an offence.

The person should be cautioned again at the recommencement of an interview after a break.

The words of the caution are:

'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.'

3.3 Police station process

It is important to see where the interview fits in to the police station process. The detainee:

- Will see the custody officer who must authorise their continued detention.
- Will be informed of their rights.
- Will have certain non-intimate samples taken.
- May see the appropriate healthcare professional, if necessary.
- Will speak to a legal representative, if the detainee requests.
- **Will be interviewed.**
- May be:
 - Released under investigation or on police bail, after the interview; or
 - Charged and released on police bail to appear at the magistrates' court at a later date; or
 - Charged and remanded in police custody to appear at the magistrates' court the following day.

3.4 Police rankings

Statutory powers often require authority from a particular police rank, so it is important to understand the rankings:

- Constable
- Sergeant
- Inspector
- Chief Inspector
- Superintendent
- Chief Superintendent

There are also detectives in the Criminal Investigation Department ('CID') who follow the same ranking system eg Detective Chief Superintendent or Detective Sergeant.

3.4.1 The investigating officer

The Investigating Officer ('IO'):

- Can be a police officer of any rank;
- Is usually the officer who is in charge of investigating that particular offence, also referred to as the 'Officer In the Case' ('OIC');
- Is the officer the suspect's legal representative would speak to at the police station to obtain pre-interview disclosure;
- Will most likely lead the interview.

3.5 Location of interview

Where an officer has decided to arrest a person, that person should be interviewed at a police station or other authorised place of detention.

The requirement that an interview be conducted at a police station is subject to exceptions, where delay would be likely to:

- Lead to interference with or harm to evidence connected with an offence;
- Lead to interference with or physical harm to other persons; or
- Lead to serious loss of, or damage to, property; or
- Lead to the alerting of other persons suspected of having committed an offence but not yet arrested for it; or
- Hinder the recovery of property obtained in consequence of the commission of an offence.

3.6 Disclosure

There is no general 'right to disclosure' with the exception of:

- A significant statement (see next section); and
- The custody record.

However, **PACE COP C 11.1A** states that before interview a:

'... solicitor must be given sufficient information to enable them to understand the nature of any such offence and why they [the client] are suspected of committing it.'

The defence solicitor and police will often have competing interests when it comes to disclosure:

- The investigating officer will want to hold back as much information as possible so that they can obtain, so far as possible, an untainted account from the defendant.
- The solicitor will want to have as much information as possible, to be able to give advice that is in the best interests of the client, and will do this by assessing the nature and the quality of the evidence against the client.

3.6.1 Disclosure: Significant statements

At the beginning of an interview, but after caution, any **significant statement** made by the person interviewed in the presence of a police officer or member of police staff must be put to them.



Significant statement: A significant statement is one that appears to be capable of being used in evidence, and in particular any direct admission of guilt (ie a confession).

3.7 Recording and fitness for interview

3.7.1 Recording

The general rule is that all interviews must be contemporaneously recorded.

Interviews under caution for any indictable offence must be audio recorded.

An exception exists to the general rule. The interview can be recorded in writing where:

- It relates to some minor offences;
- The person has not been arrested; and

- It takes place other than at a police station.

3.7.2 Fitness for interview

Generally, no person should be interviewed if they are unable to:

- Appreciate the significance of the questions asked and their answers; or
- Understand what is happening because of the effects of drink, drugs or any illness, ailment or condition.

However, an officer of the rank of **superintendent** can authorise an interview in these circumstances.

3.8 Practicalities

3.8.1 Before the interview

The solicitor should:

- Obtain pre-interview disclosure; and
- Have an opportunity for a private consultation with their client to:
 - Discuss the case; and
 - Advise the client on their options for the interview.

3.8.2 The interview

A properly conducted interview:

- Takes place in an interview room in a designated police station;
- Is recorded;
- Is in the presence of a lawyer, if the suspect has exercised their right under s 58 Police and Criminal Evidence Act 1984;
- Gives the client the option to suspend the interview and have further consultations with their solicitor.

3.9 In the interview

Your role as a solicitor at the police station is to protect your client's interests and advance their case. As such a solicitor should consider intervening in a number of circumstances:

- Information or evidence is referred to or produced that was not disclosed before the interview;
- Clarification on any matter is required at any time;
- There is inappropriate questioning (see next section);
- There is inappropriate behaviour;
- Further advice to the client is needed;
- A break is required; or
- The circumstances require.

3.10 Purpose of the interview

It is important to note that the purpose of an interview is to gather evidence. It is therefore necessary to step in where officers use inappropriate questioning techniques.

Examples of inappropriate questioning include:

- Misrepresenting information, such as upgrading responses, misrepresenting key items of information or inaccurate summarising;
- Hypothetical questions;
- Repetitive questioning; or
- Disruptive listening, such as not listening to your client's response, or assuming knowledge of your client's response before your client answers or finishes their answer.

3.11 Confessions

Ideally, the investigating officer would like the suspect to admit the offence in the interview.

The evidential starting point for confessions is that they are admissible. However:

- Section 76(2) PACE 1984 sets out circumstances when a confession can be excluded from evidence as a result of 'oppression' or 'unreliability'.
- Section 78 PACE 1984 gives the court the discretion to exclude evidence that 'would have such an adverse effect on the fairness of proceedings that the court ought not to admit it'.

3.11.1 Section 76(2) PACE 1984

- Oppression is 'torture, inhuman or degrading treatment, or the use or threat of violence' (s 76(8)). The oppression must have **caused** the confession.
- Unreliability means the confession was obtained as the result of something said or done which renders it unreliable. This might include breaches of PACE including how the interview was conducted. Again, the thing said or done must have **caused** the confessions unreliability.
- The existence of either oppression or unreliability does not automatically exclude such evidence, instead the court must grant the defence's application.

3.11.2 Section 78 PACE 1984

- Section 78 may be used to exclude any evidence upon which the prosecution seeks to rely (in contrast to section 76 which can only be used in relation to confessions).
- Section 78 can also be used to exclude confessions where there is no suggestion that either limb of section 76(2) has been breached.

3.12 Summary

This section considered what an interview is and the requirements the police must adhere to when interviewing a person suspected of an offence.

- The definition of an interview can be found in the **Police and Criminal Evidence Act (PACE) 1984 Code of Practice C, para 11.1A:**

'An interview is the questioning of a person regarding their involvement or suspected involvement in a criminal offence...'

- An interview must be carried out under caution and an accurate record made.
- Before the interview the solicitor must be given sufficient information to allow them to understand the nature of the offence their client is suspected of committing and why their client is suspected of committing it. A 'significant statement' that appears to be capable of being used in evidence, and in particular any direct admission of guilt (ie a confession) must be disclosed at the start of the interview.
- It is a solicitor's duty to intervene in the interview in order to protect the suspect's rights and advance their case.
- Confession evidence can be excluded through applications under s 76 or s 78 PACE.

4 Role of the solicitor at a police station

4.1 Code of Practice (COP) C

The role of the solicitor is set out in the **Police and Criminal Evidence Act (PACE) 1984 COP C Notes for Guidance paragraph 6D:**

'The solicitor's only role in the police station is to protect and advance the legal rights of their client. On occasions this may require the solicitor to give advice which has the effect of the client avoiding giving evidence which strengthens a prosecution case. The solicitor may intervene in order to seek clarification, challenge an improper question to their client or the manner in which it is put, advise their client not to reply to particular questions, or if they wish to give their client further legal advice'.

4.2 Active defence

A solicitor should actively defend and promote their client's interests.

A solicitor's role is not:

- A passive one; nor
- To sit by and take notes.

Active defence should include:

- Obtaining as much information from the police as is possible.
- Advising your client fully and in accordance with your professional obligations.
- Advising on issues which arise during the police investigation, such as whether to provide samples, extensions of periods of detention, searches of premises and bail.
- Attending and advising during the interview.

4.3 Practical aspects of active defence

- Be familiar with both PACE and the Codes of Practice.
- Avoid confrontation with officers, instead make notes of apparent breaches of PACE and/ or the COP.
- Where interviewing officers have refused a reasonable request, speak to the custody officer and ask them to make a note in the custody record.
- Don't be rushed. Take as much time as you need to properly advise your client.

4.3.1 Take notes

- It is vital that you maintain a comprehensive contemporaneous record.
- You may have to give evidence at a subsequent trial concerning disclosure, police conduct or your advice to your client. Clear and detailed notes are vital if you are to give evidence with credibility.
- Taking notes on the go is not always easy, but an important aspect of police station practice.

4.4 Vulnerable suspects

In general terms, a solicitor should be even more conscious of their role and responsibilities when dealing with a vulnerable client.

4.4.1 Who is not a 'vulnerable' client?

Generally, a person under the influence of drink or drugs should not be treated as vulnerable.

4.4.2 Code of Practice C Annex E

Summarises provisions relating to vulnerable persons. Annex E sets out:

- When a suspect should be treated as vulnerable
- Appointment of an appropriate adult and their role
- Duties of the custody officer with regard to a vulnerable suspect
- When the vulnerable suspect can (and cannot) be interviewed

COP C 1.13(d) states that "vulnerable" applies to any person who, because of a mental health condition or mental disorder:

- (a) May have difficulty understanding or communicating effectively about the full implications for them of any procedures and processes connected with:
 - Their arrest and detention; or (as the case may be)
 - Their voluntary attendance at a police station; or their presence elsewhere...for the purpose of a voluntary interview; and
 - The exercise of their rights and entitlements.
- (b) Does not appear to understand the significance of what they are told, of questions they are asked or of their replies;
- (c) Appears to be particularly prone to:

- Becoming confused and unclear about their position;
- Providing unreliable, misleading, or incriminating information without knowing or wishing to do so;
- Accepting or acting on suggestions from others without consciously knowing or wishing to do so; or
- Readily agreeing to suggestions or proposals without any protest or question'.

4.5 When a suspect should be treated as vulnerable

- At the beginning of the suspect's detention, the custody officer will undertake a risk assessment and identify whether the suspect is or might be 'vulnerable'.
- If so, the vulnerable suspect will be provided with access to an appropriate adult.
- The custody officer must inform the appropriate adult of the grounds for detention, where the suspect is being detained and ensure the appropriate adult attends the police station as soon as possible.

4.6 Suspecting a person is vulnerable

COP C Annex E states that if at any time an officer (such as the investigating officer) suspects that a person is vulnerable then the person will be treated as vulnerable unless there is clear evidence to the contrary.

The officer must then make reasonable enquiries to ascertain whether the person falls within the definition of vulnerable and record that information.

The notes for guidance state that relevant information might include:

- The behaviour of the person;
- Their mental health and capacity;
- What the person says about themselves;
- Information from police officers, staff and records;
- Information from health and social care and other professionals who know or have had previous contact with the person.

4.7 Interviewing without an appropriate adult

Generally, a vulnerable person must not be interviewed or asked to provide or sign a written statement in the absence of the appropriate adult. However, an urgent interview can take place if a superintendent or above is satisfied it would not significantly harm the person's physical or mental state **and** delay would lead to:

- Interference with or harm to evidence connected with an offence;
- Interference with or physical harm to other persons; or
- Serious loss of, or damage to, property; or
- The alerting of other persons suspected of having committed an offence but not yet arrested for it; or
- Hindering the recovery of property obtained in consequence of the commission of an offence.

These provisions are contained in **COP C paragraphs 11.1, 11.18- 11.20**. Questioning in these circumstances may not continue in the absence of the appropriate adult once sufficient information to avert the risk has been obtained.

A record must be made of the grounds for any decision to begin an interview in these circumstances.

4.8 Representing vulnerable clients

There are ways a solicitor can help protect the interests of a vulnerable client such as:

- Ensure that:
 - An appropriate adult has been appointed.
 - The custody officer has requested a medical assessment where appropriate.

- Take as much time as is necessary to take your client's account and to clearly advise them.

Ensure the client understands:

- Your role.
- Everything that is happening.
- What will happen in the interview and how to approach the 'no comment' interview if that is the option taken.
- What happens after interview.

In the interview:

- Request regular breaks.
- Be especially mindful of the language and tone used by officers- intervene if necessary.

4.9 Summary

This section considered the role of the solicitor at the police station including the concept of 'active defence' and the conduct of a solicitor when representing a vulnerable client.

- The solicitor's role in the police station is to actively protect and advance the legal rights and interests of their client through:
 - Advising their client, including on whether to answer police questions
 - Intervening to seek clarification of questions or to challenge improper questions asked
- Solicitors must take additional steps when representing vulnerable suspects at the police station including:
 - Slower and clearer explanations
 - Taking breaks during interview
 - Ensuring the tone of questions is appropriate

5 Formulating advice to suspects

5.1 Advising the client

The consultation with the client should take place in private and is confidential.

The lawyer **should not** breach any professional conduct issues by, for example taking instructions from:

- A relative or third party unless you are satisfied that the person giving instructions has authority to do so on behalf of your client; or
- Two clients in relation to the same matter and one client blames, or might blame, the other.

The lawyer should:

- Be supportive and explain their role.
- Assess the client's fitness to be interviewed.
- Provide advice on the legal position.
- Explain the options the client has in the interview and consider which option would be best.
- Explain and advise of the consequences of those options.
- If necessary, provide advice on samples.

5.1.1 The client's account

Once the lawyer has outlined the circumstances as provided by the police, the client should be asked for their version of events:

- Do they accept involvement?
- Do they have a legal defence eg self defence?

5.2 Options in the interview

There are three options in the police interview for the client:

- Answer questions
- Don't answer questions ('go no comment')
- Provide a written statement and 'go no comment'

Anything that the client says can be used in evidence, so it is important to undertake an assessment and balance the risks of answering questions or remaining silent.

Whilst a client is entitled to remain silent in an interview the lawyer must explain the consequences of any silence.

Consequences might include a court drawing '**adverse inferences**'.

Basically, an adverse inference is a common sense conclusion that is adverse to the interests of a party in proceedings. If a man with a gun in his hand is found standing next to a body with gunshot wounds, an 'inference' can be drawn that he has just shot the person on the ground.

5.2.1 Handing in a prepared written statement

Handing in a prepared written statement is a strategy sometimes used to try and avoid later adverse inferences.

A statement is handed in at the beginning of the interview which sets out the defence.

It is often used where there are facts which will be later relied on at trial but the lawyer thinks that there are reasons why the client should not participate in answering questions.

It can be difficult to ensure that sufficient information is contained in the statement as any fact relied on later that is not mentioned could still attract an adverse inference.

A prepared statement should not be thought of as a 'best of both worlds' option between answering questions and not answering any questions as:

- Avoiding adverse inferences using a statement is very difficult.
- The client will still have to answer 'no comment' to questions put in the interview.

5.2.2 Mixed interviews

A mixed interview (stating 'no comment' to some questions and answering others) is not a valid option in the interview, and you should advise your client in the strongest terms to avoid this approach because:

- The transcript of the interview will be read in court. A 'no comment' interview is not read as evidence. Imagine a jury hearing a suspect apparently avoiding some questions.
- The interviewing officers will use tactics and techniques to push the suspect into talking about matters they had intended not to speak about.
- The suspect is likely to become confused as to what they have already said.

5.2.3 Should the client answer questions?

Deciding whether to advise the client to answer questions is a careful balancing exercise. There are numerous factors to consider:

- Amount of disclosure
- Admissibility and strength of evidence- that you are aware of or that might become available in the future.
- Your client's account/ instructions
- The state of your client
- Significant statements
- Possible adverse inferences

5.3 Amount of disclosure

Prior to interview a solicitor must be given sufficient information to enable them to understand the nature of any offence and why their client is suspected of committing it (**Code of Practice C paragraph 11.1A**).

Case law has held that if the police disclose little or nothing of the case against the suspect so that a legal advisor cannot usefully provide advice to their client, then this may be a good reason for the solicitor to advise the suspect to remain silent.

Where an investigating officer has not provided sufficient disclosure to allow you to usefully advise your client it can be worth reminding the investigating officer that courts are reluctant to draw adverse inferences where disclosure was insufficient.

5.4 Admissibility of evidence

It might seem a little early in the criminal justice process to be considering admissibility of evidence, but this must be considered when weighing up the strength of the evidence.

- Have witnesses provided written statements?
- Are witnesses compellable? You will learn in other sections that some witnesses cannot be compelled to give evidence. Most can, but some cannot.
- Were any significant statements (eg confessions) unlawfully obtained?
- Will any s 78 Police and Criminal Evidence Act (PACE) 1984 applications have to be made at court (for breach of PACE Codes of Practice for example)?

5.5 Strength of evidence

If there is little evidence to suggest that the client is involved then the matter is unlikely to get to trial.

Remaining silent can be a good option as there is:

- No risk of the client providing incriminating information; and
- Little risk of an inference being drawn from silence as the matter is unlikely to proceed.

However, further evidence could become available and if so, silence in this interview could then be relevant. What evidence has yet to be obtained?

If the client has admitted their guilt to you then remaining silent can still be an option, especially if the evidence is weak.

5.6 Your client's account/instructions

If the client has a defence then the risks of not putting that forward in the interview must be considered carefully. There are two possible consequences of waiting until trial to put forward a defence:

- Adverse inferences; and
- Losing credibility.

There are therefore advantages in putting forward the defence at this early stage especially if the defence might be one of alibi or where the defence has the evidential burden of raising the defence (eg self-defence).

5.7 The state of your client

Remember that a police interview can be a frightening experience and you should prepare your client for what to expect. For example, if your client is going to go 'no comment' then you will have to prepare them for attempts by officers to engage them in what seems like only friendly conversation.

The lawyer needs to assess whether, irrespective of the client's instructions in relation to the offence, they would be able to handle the interview.

A number of cases have confirmed that the court should not draw inferences from silence where the suspect's condition, such as ill-health (especially mental), confusion, intoxication or shock gives the lawyer cause for concern. Such factors are referred to as 'Argent factors', from the case of *R v Argent* [1997] 2 Cr App R 27.

The lawyer should check on the custody record to see whether the forensic medical examiner has certified the suspect fit for interview.

5.8 Summary

This section considered how to formulate advice to a suspect prior to police interview and the options available to the suspect during that interview.

- The options available to the suspect: answer questions, go no comment, or hand in a prepared written statement.
- ‘Mixed interviews’ – answering some questions but not others should be avoided.
- Factors the solicitor should consider when formulating their advice:
 - Amount of disclosure
 - Admissibility and strength of evidence- that you are aware of or that might become available in the future
 - Your client’s account/ instructions
 - The state of your client- prepare them for the interview
 - Significant statements
 - Possible adverse inferences

6 Inferences

6.1 Right to silence

The basic principle is that every suspect has a right to silence. This means that there is no obligation to answer questions in a police interview.

However, if a suspect exercises their right to silence at interview then, provided certain statutory conditions are met, a court is allowed to draw **inferences** at a later trial.



Adverse inference: An adverse inference is a common sense conclusion that is adverse to the interests of a party in proceedings.

If a man with a gun in his hand is found standing next to a body with gunshot wounds, an ‘inference’ can be drawn that he has just shot the person on the ground.

6.2 Adverse inferences

We will look at three inferences that can be drawn under the **Criminal Justice and Public Order Act 1994** in this section:

- Section 34 – if a fact is later relied on at trial and it would have been reasonable to have mentioned it now.
- Section 36 – if there is a failure to account for a mark, object or substance. This is why careful consideration of the custody record is important so that you are not ambushed in interview.
- Section 37 – if there is a failure to account for presence at the scene. Where was the suspect arrested? Can this be linked to their involvement?

Section 38- contains the safeguard that no defendant may be convicted solely based on an adverse inference.

Section 35- if the accused is silent at trial, will be considered in a separate section.

6.3 Section 34

Section 34 Criminal Justice and Public Order Act 1994 allows for an inference to be drawn by the jury or magistrates in circumstances when the defendant **later relies on a fact in their defence that was not offered at the time of questioning**.

A court does not have to draw any inference but, if it does, any inference that is drawn must be ‘proper’. As such an inference can range from:

- An acceptance that the defence as presented in court is true but the defendant chose not to reveal it in their interview; to

- An inference that the defendant's account in court is untrue and they are in fact guilty.

6.3.1 The suspect must be cautioned

If the suspect is not cautioned then no inference can be drawn.

The words of the caution explain to the suspect the consequences of not mentioning a fact later relied upon.

The Police and Criminal Evidence Act 1984 (PACE) Code of Practice C paragraph 10.5 states the caution shall be in the following terms:

'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.'

6.3.2 Reasonable to have mentioned

It must have been reasonable to have mentioned the fact at the time, bearing in mind all the circumstances existing at the time.

Court of Appeal guidance in *R v Argent [1997] Crim LR 346* states 'circumstances existing at the time' should be widely interpreted.

Guidance from the Law Society states that 'circumstances existing at the time' can include:

- What disclosure had been made to the suspect, or their lawyer, by the police;
- What information the prosecution can demonstrate the suspect knew at the time of questioning or charge;
- The condition and circumstances of the suspect; and
- Any legal advice that the suspect received.

6.3.3 Effect of an adverse inference

The ultimate effect of an adverse inference being drawn at trial from a defendant's silence at interview is that it undermines their defence. When the jury or magistrates draw an adverse inference, they are effectively saying that:

- The explanation given at trial has been fabricated since the time of the interview; or
- The defendant withheld their account at interview as they knew that it would not stand up to police questioning (the ambush defence); or
- At the time of the interview the defendant had no reasonable explanation which would refute the prosecution case.

6.4 Inferences under section 36 & 37

Section 36 Criminal Justice and Public Order Act 1994- when the suspect fails to account for **an object, substance or mark** found on them at the time of arrest.

Section 36 might include a failure to account for bruising or a hammer in the suspect's rucksack.

Section 37- when the suspect fails to account for their **presence on arrest at a particular place** at or about the time the offence was allegedly committed.

Section 37 might include failing to explain why they were found on a burglary victim's driveway.

In contrast with section 34 (failure to mention facts), the ability to draw inferences under sections 36 and 37 arise as soon as there is a failure by the defendant to account for their possession of the object in question or presence.

It is not a requirement that there is a failure to mention something later relied upon.

Both sections 36 and 37 are restrictively worded. They require the defendant to be given an 'ordinary language caution', known as a 'special warning'. The requirements of the special warning can be found in PACE Code of Practice C paragraph 10.11. They must be told:

- What offence is being investigated;
- What fact they are being asked to account for;
- This fact may be due to them taking part in the commission of the offence;

- A court may draw a proper inference if they fail or refuse to account for this fact; and
- A record is being made of the interview and it may be given in evidence if they are brought to trial.

6.5 Safeguards

There is an important safeguard within s 38 Criminal Justice and Public Order Act 1994 which states that no defendant may be convicted solely based on an adverse inference.

Importantly, no adverse inference can be drawn where the suspect has not been allowed access to legal advice (PACE Code C paragraph 6.6 and Annex C).

6.6 No trial: No inferences

It is important to understand that an adverse inference under any section will **only** be relevant if the defendant has a trial. If the case never gets to trial or your client pleads guilty then adverse inferences are irrelevant.

This is an important concept to grasp when advising clients prior to interview at the police station. The lawyer will have to balance the likelihood of a trial actually happening against the risk of an inference if it does.

6.7 Summary

This section considered the adverse inferences that can be drawn by a court under the Criminal Justice and Public Order Act 1994 sections 34, 36 and 37.

- Right to silence- suspects are not obliged to answer police questions in interview. However, an inference can be drawn under the **Criminal Justice and Public Order Act 1994**:
 - Section 34 – if a fact is later relied on at trial and it would have been reasonable to have mentioned it in the interview. The suspect must have been cautioned.
 - Section 36 – if there is a failure to account for a mark, object or substance. The suspect must have been given a special warning.
 - Section 37 – if there is a failure to account for presence at the scene. The suspect must have been given a special warning.
- As the effect of an adverse inference is to undermine the defence case safeguards exist:
 - Section 38- no defendant may be convicted solely based on an adverse inference.
 - No adverse inference can be drawn where the suspect has not been allowed access to legal advice.
- If the case never gets to trial or your client pleads guilty then adverse inferences are irrelevant.

7 Visual identification: Investigative stage

7.1 Introduction

In every criminal trial, the prosecution must prove beyond reasonable doubt that the person in the dock is responsible for committing the crime.

When identification is disputed, the prosecution can establish that the defendant committed the crime in a number of ways, for example:

- DNA evidence
- Telephone evidence
- Fingerprint evidence
- Testimony from witnesses

7.2 Visual identification from an eye-witness

- One of the most common methods of proving that the defendant committed the crime is through a visual identification from an eye-witness.
- An eye-witness:

- Might recognise the suspect as someone they have seen before, as a friend or acquaintance, family member or a stranger who travels on the same bus every day; or
- May never have seen the suspect before the crime was committed but were able to give police a description. They may also express an ability to recognise the person if they saw them again.

7.3 Visual identification evidence

It is important not to confuse visual identification evidence with other evidence that is capable of supporting the prosecution's case.

The following are examples of evidence that do not constitute visual identification evidence:

- Mere description of clothing/vehicle ('I couldn't see his face but he was wearing a purple jumper')
- The suspect has a connection to a particular place or others at the scene (eg 'I thought it was Maria because I know she is always at the café on a Saturday morning')
- A description of the suspect ('He was 5'7" with dark hair and blue eyes')

7.4 The special need for caution

The reliability of eyewitness identification has attracted concern from legal professionals and academics for over a century as:

- Experience has shown that it is easy for an honest and convincing witness to be mistaken even if the suspect is well known to them.
- A confident identification is no more likely to be reliable than a hesitant one.

A series of miscarriages of justice arising from inaccurate eyewitness testimony led to a wholesale review of investigatory and trial procedure in the latter part of the 20th century. As a result, safeguards were introduced at every stage of the process to ensure that identification evidence before a jury is reliable as possible:

- Investigation stage: Police and Criminal Evidence Act 1984 (PACE) Code of Practice D; and
- Trial: *Turnbull* guidelines.

This section focuses on the investigation stage.

7.5 Investigation stage

Following the codification of police powers in **PACE, Code D Code of practice for the identification of persons by police officers** was issued.

Amongst other things such as the taking of fingerprints and samples, **PACE Code D** deals with the process to be adopted by the police where a witness purports to identify a suspect or expresses an ability to make a visual identification.

It was introduced for two reasons:

- To protect an innocent suspect from an incorrect identification; and
- To make a successful identification as watertight and 'challenge-proof' as possible.

7.5.1 Cases when a suspect not known

If the suspect's identity is **not known** to the police, then the eye-witness:

- May be taken to a particular neighbourhood or place to see whether they can identify the person they saw on a previous occasion.
- Can be shown photographs in accordance with **Code D, Annex E**

7.5.2 Cases when a suspect is known

Duty to hold identification procedures

Code D paragraph 3.12 states that an identification procedure **shall be held** (unless an exception exists) where:

- An offence has been witnessed and an eye-witness:
 - Has identified a suspect or purported to have identified them; or

- Is available who expresses an ability to identify the suspect; or
- Has a reasonable chance of being able to identify the suspect.
- The suspect disputes being the person the eye-witness claims to have seen.

An identification procedure does not need to be held if it is not practicable or it would serve no useful purpose in proving or disproving the suspect was involved in the offence eg the suspect is already known to the eye-witness.

7.6 Identification procedures

If the suspect's identity is **known** to the police and they are **available**, the identification procedures that may be used are:

- **Video identification**- the eye-witness is shown moving images of a known suspect, together with similar images of others who resemble the suspect.
- **Identification parade**- the eye-witness sees the suspect in a line of others who resemble the suspect.
- **Group identification**- the eye-witness sees the suspect in an informal group of people.

The arrangements for, and conduct of, the identification procedures above shall be the responsibility of an officer not below inspector rank who is not involved with the investigation ('the identification officer').

7.7 Video identification procedures

- In the first instance the suspect shall be invited to participate in a video identification procedure unless:
 - A video identification procedure is not practicable; or
 - An identification parade is more suitable.
- If the suspect refuses, then an alternative can be considered.
- Covert procedures should be used as a last resort and only if all other procedures have been considered and refused.

7.7.1 Formalities

- A record shall be made of the description of the suspect as first given by the eye-witness.
- A copy of the record shall be given to the suspect or their solicitor before any identification procedures are carried out.
- A notice must be given to a suspect and the following must be explained:
 - The purpose of the procedure
 - Their entitlement to free legal advice
 - The procedures for holding it, including their right to have a solicitor or friend present;
 - That they do not have to consent to or co-operate in the procedure;
 - That if they do not consent to, and co-operate in, a procedure, their refusal may be given in evidence in any subsequent trial **and** police may proceed covertly without their consent or make other arrangements.
- The suspect shall be invited to participate in a video identification procedure first.

7.7.2 Video identification

- The detailed arrangements for a video identification are contained in **Code D Annex A**.
- It takes the form of VIPER (Video Identification Parade Electronic Recording).
- Officers film the suspect asking them to face the camera and be filmed from the right, left and centre.
- The identification officer, suspect and legal representative select lookalikes from over 10,000 video clips on the VIPER system.
- A video clip is produced with the suspect placed amongst at least **eight** other individuals who, so far as possible, resemble the suspect in age, general appearance and position in life.

- If the suspect has an unusual physical feature eg a facial scar, tattoo, distinctive hairstyle or hair colour which does not appear on the images of the other people that are available to be used, steps may be taken to:
 - Conceal the location of the feature on the images of the suspect and the other people; or
 - Replicate that feature on the images of the other people.
- The suspect, their solicitor, friend or appropriate adult must be given a reasonable opportunity to see the complete set of images before it is shown to any eye-witness.
- If the suspect has a reasonable objection to the set of images or any of the participants, the suspect shall be asked to state the reasons for the objection.
- Immediately before the images are shown, the eye-witness shall be told that the person they saw on a specified earlier occasion may, or may not, appear in the images.
- The video clip is then shown to the witnesses.
- The suspect's solicitor may only be present at the video identification procedure on request and with the prior agreement of the identification officer.
- The video identification procedure must be recorded on video with sound. The recording must show:
 - All persons present within the sight or hearing of the eye-witness whilst the images are being viewed;
 - What the eye-witness says; and
 - What is said to the eye-witness by the identification officer and by any other person present.
- Care must be taken not to direct the eye-witness' attention to any one individual image or give any indication of the suspect's identity.
- A supervised viewing of the recording of the video identification procedure by the suspect and/or their solicitor may be arranged on request, at the discretion of the investigating officer.
- Eye-witnesses are not able to communicate with each other. One eye-witness may see the set of images at a time.

7.8 Identification parades

- The detailed arrangements for identification parades are contained in **Code D Annex B**.
- A suspect must be given a reasonable opportunity to have a solicitor or friend present.
- An identification parade may take place either:
 - In a normal room; or
 - One equipped with a screen permitting witnesses to see members of the identification parade without being seen.
- Once the identification parade has been formed, everything afterwards, in respect of it, shall take place in the presence and hearing of the suspect and any interpreter, solicitor, friend or appropriate adult who is present.
- A video recording or colour photograph must normally be taken of the identification parade and supplied, on request, to the suspect or their solicitor within a reasonable time.
- The identification parade shall consist of at least **eight** people (in addition to the suspect) who, so far as possible, resemble the suspect in age, height, general appearance and position in life.
- If the suspect has an unusual physical feature eg a facial scar, tattoo, distinctive hairstyle or hair colour which cannot be replicated on other members of the identification parade, steps may be taken to conceal the location of that feature on the suspect and the other members. For example, by use of a plaster or a hat, so that all members of the identification parade resemble each other in general appearance.
- The suspect may select their own position in the line.
- Witnesses must not be able to:
 - Communicate with each other;
 - Overhear a witness who has already seen the identification parade;
 - See any member of the identification parade; or

- See the suspect before or after the identification parade.
- Witnesses shall be brought in one at a time.
- Immediately before the witness inspects the identification parade, they shall be told the person they saw on a specified earlier occasion may, or may not, be present.
- The witness can ask to hear any identification parade member speak, adopt any specified posture or move.

7.9 Group identification

The detailed arrangements for group identification are contained in **Code D Annex C**.

- Group identifications may take place either:
 - With the suspect's consent and co-operation; or
 - **Covertly without their consent.**
- The location should be one where other people are either passing by or waiting around informally, in groups such that the suspect is able to join them and be capable of being seen by the witness at the same time as others in the group. Examples given include people leaving escalators, pedestrians walking through a shopping centre, passengers on railway and bus stations.
- A colour photograph or video should be taken of the general scene, if practicable, to give a general impression of the scene and the number of people present.
- As in other procedures the witnesses should not be able to communicate with each other.

7.10 Confrontation by an eye-witness

- Confrontation by an eye-witness is contained in **Code D Annex D**.
- Before the confrontation takes place, the eye-witness must be told that the person they saw on a specified earlier occasion may, or may not, be the person they are to confront and that if they are not that person, then the witness should say so.
- The confrontation should normally take place in the police station, either in a normal room or one equipped with a screen permitting the eye-witness to see the suspect without being seen.

7.11 Breach of Code D: Consequences

The first issue for a trial judge in these circumstances is to determine if a breach of **Code D** has in fact occurred. This can usually be achieved without a *voir dire* (trial within a trial). However, there may be circumstances when evidence around the alleged breach is disputed. In those circumstances, a *voir dire* may be required and the judge will have to hear evidence under oath.

If there has been a breach of **Code D**, the remedy for the defendant is to apply to exclude evidence obtained in breach of the code under s 78 PACE 1984.

A breach of the code does not automatically lead to the exclusion of the evidence.

The key issue for the trial judge to decide is whether there has been any **significant prejudice** to the accused. If the judge has determined that there is prejudice, they must then decide if the admission of the evidence would have such an adverse effect on the fairness of proceedings that the court ought not to admit it.

Identification evidence will usually be excluded when important safeguards have been flouted, such as the right to a formal identification procedure.

The defendant has the right to have the correctness of the visual identification tested under formal conditions.

Where identification evidence is admitted into evidence despite a breach of **Code D**:

- Defence advocates are still permitted to comment on the breach in their closing speech.
- The trial judge ought to draw the jury's attention to the breach and invite them to consider the reasons why the code has been drawn in the way it has.
- The jury should assess whether in their estimation the breaches were such as to cause them to have doubts about the safety of the identification.

7.12 Summary

This section considered visual identification evidence at the investigation stage.

- An ID procedure must be held where: an offence has been witnessed and an eye-witness:
 - Has identified a suspect or purported to have identified them; or
 - Is available who expresses an ability to identify the suspect; or
 - Has a reasonable chance of being able to identify the suspect.

The suspect disputes being the person the eye-witness claims to have seen.

- The types of visual identification procedure: video identification, identification parade, group identification and confrontation by an eye-witness.
- Suspects are generally invited to participate in a video identification procedure and covert procedures should be used as a last resort.
- The defendant can apply to exclude evidence obtained in breach of **Code D** under s 78 PACE 1984.

8 Commencing criminal proceedings

8.1 Who makes charging decisions?

In general the decision to charge is taken by a Crown Prosecutor.

Crown Prosecutors exercise the powers of the Director of Public Prosecutions (DPP), who is required to take over the conduct of all prosecutions commenced by the police. The DPP also has a discretion to take over the conduct of prosecutions commenced privately. All charging decisions for indictable-only offences are taken by a crown prosecutor.

The police retain discretion as to whether to charge for a number of summary offences including various road traffic offences, offences contrary to s.5 Public Order Act 1986, criminal damage where the value of the damage does not exceed £5,000, and low-value shoplifting. Where the decision is one for the police, it is made by the custody officer.

8.1.1 Crown Prosecutors

The DPP may delegate powers to agents who are lawyers with rights of audience. Agents must act subject to the instructions given by a Crown Prosecutor. Crown Prosecutors exercise the powers of the DPP. Uniformity in the approach taken by different Crown Prosecutors in relation to charging decisions is sought through the Code for Crown Prosecutors, issued by the DPP.

The DPP may also appoint “associate prosecutors” who are CPS employees who are not lawyers to represent the CPS on bail applications and other pre-trial applications. They may conduct trials where the offence charged is a non-imprisonable summary offence.

8.2 The different forms of commencing criminal proceedings

We will consider three different forms of commencing criminal proceedings:

- Arrest and charge;
- Written charge and requisition; and
- Laying an information.

8.2.1 Arrest and charge

This is the most common way of commencing criminal proceedings.

The charge may come:

- At the end of the period of detention at the police station after an arrest;
- After a period of police bail when the suspect re-attends the police station; or
- After a period on police bail while the CPS decides what the appropriate charge, if any, is.

Practice point

Pre-charge police bail can be imposed in a number of different circumstances including:

- (a) Where there is insufficient evidence to charge a suspect and they are released pending further investigation (ss 34(2), 34(5) and 37(2) of PACE).
- (b) Where police consider there is sufficient evidence to charge, but the matter must be referred to the CPS for a charging decision (s.37(7)(a) PACE).

It is for the police to decide whether a suspect is released with or without bail and if released on bail, whether any conditions of bail should be imposed. Where it is practicable to do so investigators should seek the views of victims on bail and possible bail conditions.

If a suspect is not released on police bail but the police are still looking into the matter, then they are referred to as having been 'released under investigation' (RUI).

Pre-charge bail was reformed by schedule 4 of Police, Crime, Sentencing and Courts (PCSC) Act 2022.

8.2.2 Written charge and requisition

This is a method of commencement created by s.29 Criminal Justice Act (CJA) 2003. A public prosecutor may commence proceedings by issuing a written charge charging a person with an offence. There is no requirement that the person charged has been arrested when this method of commencement is used. At the same time the public prosecutor issues a requisition, which requires the person charged to attend a magistrates' court. The charge and requisition must be served on the person charged and on the magistrates' court at which that person is to attend. This method of commencement is available only to 'relevant prosecutors', broadly speaking, those who prosecute on behalf of the state ie Crown Prosecution Service, Health and Safety Executive, Driver and Vehicle Standards Agency and the Environment Agency.

8.2.3 Laying an information

Another way to commence proceedings is for the prosecutor to serve an information alleging an offence on a magistrates' court. The court will then issue a summons or an arrest warrant requiring the accused to attend. Private prosecutions may only be commenced by summons as they are not brought by 'relevant prosecutors' for the purposes of the written charge and requisition procedure under s.29 CJA 2003.

8.3 Content of the written charge/information or summons/requisition

The written charge or information must contain:

- A statement of the offence which describes the offence in ordinary language;
- A reference to the statutory provision that creates the offence (if it is a statutory offence); and
- Sufficient particulars of the conduct complained of for the accused to know what is alleged.

A summons or requisition must:

- Contain a notice setting out when and where the accused is required to attend court; and
- Specify each offence in respect of which it has been issued.

A summons must identify the issuing court.

A requisition must identify the person under whose authority it was issued.

8.4 Timing of the charge

There is no 'Statute of Limitation' requiring that a charge be brought within a specified period after the commission of the offence.

The only exception is that s.127(1) Magistrates' Courts Act 1980 provides that where the alleged offence is 'summary only', a magistrates' court shall not try an information or hear a complaint unless the information was laid or the complaint made within six months of the date of the alleged offence.

There is no time limit for charging the accused with any indictable offence.

If there is any dispute as to whether a charge has been brought within the specified period then the prosecution have the burden to satisfy the court to the criminal standard that proceedings were correctly brought in time.

8.5 Summary

This section considered:

- Who makes charging decisions:
 - Generally, Crown Prosecutors exercising the powers of the Director of Public Prosecutions.
 - The police retain discretion as to whether to charge for a number of summary offences, a power exercised by the custody officer.
- Different ways of commencing criminal proceedings:
 - **Arrest and charge**- the most common way of commencing criminal proceedings.
 - **Written charge and requisition**- available only to “relevant prosecutors” such as the Crown Prosecution Service and the Environment Agency.
 - **Laying an information**- such as private prosecutions.
- The timing within which charges should be brought:
 - For ‘summary only’ offences, information must be laid or the complaint made within six months of the date of the alleged offence.
 - For indictable offences, there is no time limit for charging the accused.



3

Pre-trial criminal litigation

1 Bail: presumption and objections



Adjournment: In any case where the defendant is presented to court, and the court cannot conclude the case in one hearing, the case will have to be **adjourned**. It is important to note the word ‘adjournment’ applies to the **case**. It does not describe what happens to the defendant.



Remand: When a defendant is sent away and told to come back another day, it is called a ‘**remand**’. A defendant on remand is obliged to come back to court to continue with the case. The remand may either be served in custody, or served in the community on bail.

1.1 Remanded into custody

1.1.1 Who applies?

It is for the prosecution to apply to have the defendant **remanded into custody** if that is its desire.

1.1.2 How?

To have the defendant remanded into custody the prosecution present objections to bail, due to the presumption in favour of bail.

1.1.3 What objections?

The objections that one can raise are finite and defined by law. They vary according to the type of offence involved. There are more and broader objections for more serious offences and fewer and more qualified objections for more trivial offences.

1.1.4 Why the variety of objections?

If a defendant is refused bail and is kept in custody for a more trivial offence, then the worry is that the defendant will be in custody for longer whilst awaiting trial than the defendant would ever be in custody as part of a sentence for the offence. This is clearly undesirable.

Learning what the objections to bail are is one of the core tasks in this area.

1.2 Bail

1.2.1 Who applies for bail and when?

Once a prosecution objection to bail has been raised, it is then for the defence to apply for bail. All cases commence in the magistrates' court, and so the first decision in relation to bail is made by that court (except in murder cases, where only a Crown Court Judge can grant bail). The defence and the prosecution can appeal decisions on bail from the magistrates.

1.2.2 Conditional bail

Bail can be granted subject to conditions, and it is important for a defence advocate to consider what sort of conditions might alleviate the court's concerns in relation to the defendant's behaviour on bail.

1.2.3 Ongoing issue of bail

Bail is an ongoing consideration, and can evolve during the currency of proceedings, for example if a defendant breaches the terms of D's bail.

1.3 The right to bail

- The prosecution needs to apply for the remand into custody of a defendant. This is because of a principle commonly referred to as the 'right to bail'. Following the Bail Act 1976 s.4, the court must presume that a defendant is entitled to bail, and it is only if an objection is properly made out that bail can be refused.
- The purpose of the right to bail is to secure the notion that the prosecution has to apply to remove bail as a matter of normal practice. In all cases where the right to bail applies, it is therefore the prosecution that has to make the first move and apply for the defendant to be remanded into custody, ie to rebut the right to bail on a legally specified objection.
- The idea of the presumption in favour of bail has been made more complicated by offences like murder, where the language of the statute appears to remove the presumption.
- The right to bail still applies to a person after conviction when the case is adjourned reports to assist in sentencing, although the concerns about a defendant absconding may be more serious following a conviction. The right to bail also applies when a person is alleged to have breached a requirement of a community order.
- Note that there are time limits for getting a defendant through the criminal justice system, and the right to bail usually becomes absolute if the case has not progressed according to the time limits.

1.3.1 When the right to bail does not apply

The right to bail does **not apply** to:

- (a) Those **appealing** their conviction or sentence; or
- (b) To defendants being **committed for sentence** from the Magistrates' Court to the Crown Court.

Bail can be granted in both these cases; it is simply that the presumption does not apply.

Both exceptions are logical in that if, in relation to the first, a defendant is appealing, it is because a court has already concluded that the defendant is guilty (and may have sentenced D already). The courts are less anxious about putting a person already determined to be guilty into custody than those who are still awaiting their trial.

Similarly, if a defendant is committed for sentence from the magistrates' court to the Crown Court, it is the view of the magistrates' court that the defendant is deserving of a sentence of more than six months (or more if the magistrates' limit is higher). It is therefore a very low risk that a defendant put into custody at this point will receive a lesser sentence than the time the defendant will serve in custody waiting for the case to be moved from the magistrates' to the Crown Court.

1.4 Grounds on which the prosecution can object

The grounds for applying for bail are now rather complex. The regime is driven in large part by the seriousness of the offence(s) charged. The objections then, for the most part, follow the 'classification' of the offence. **The Bail Act 1976** has had many amendments made to it to create a plethora of objections – but the primary demarcation is between the following types:

- (a) '**Indictable**' cases- are those that are either 'indictable only' or 'either-way' cases. Most familiar offences in crime are indictable, and the objections for these offences are therefore the most important to learn.

- (b) **Summary cases, imprisonable**- Not all summary only cases carry custody as an available sentence. Common assault would be a good example of an offence which is summary only, but can attract a custodial sentence.
- (c) **Summary non-imprisonable**- There are hundreds of these offences, many related to 'road traffic'. These offences present an obvious problem – what do you do if a defendant simply won't attend court, but is only charged with a minor offence for which the defendant cannot be punished with custody (eg having a defective fog lamp on D's car)? Do we really allow for the courts to remove bail for trivial offences?

1.5 Grounds of objection

The objections that one can take to bail being granted are called 'grounds' of objection. The prosecution can take as many or as few as it wishes within those grounds which are permitted, and only needs to succeed in showing that one of the grounds is made out in order to have bail denied.

If the court considers that the ground would be made out if the defendant were to be simply released, but considers that conditions put upon the release of the defendant would alleviate the concerns about the defendant's behaviour such that the concerns about the grounds are no longer 'substantial', then the defendant should be granted conditional bail.

1.6 Indictable offences

Most offences that engage lawyers are indictable offences. All thefts are indictable, most violence offences are indictable, all the main sexual offences are indictable, and almost all drugs offences are indictable.

There are three primary grounds for objecting to bail for the large amount of offences that classify as 'indictable'. These 'big three' (a BPP reference term, not a legal term of art) are the original and core grounds, onto which lots of other law has been appended.

The test, set out in the **Bail Act 1976, Schedule 1, para 2**, is whether, if the defendant is released on bail, there are 'substantial grounds' for believing that the defendant would either:

- (a) Fail to attend a subsequent hearing (failure to surrender to custody);
- (b) Commit further offences on bail; and/or
- (c) Interfere with witnesses, or otherwise obstruct the course of justice eg witness intimidation or destruction of evidence.

1.7 Substantial grounds for believing

The threshold to which these grounds must be made out is 'substantial grounds for believing' that if granted bail, the defendant will behave in a way that the ground specifies (eg will commit further offences on bail). This is not a particularly high test.

It is not for the court to conclude that the defendant would behave in the way specified in the ground, or even that D's behaviour would be more likely than not to include the behaviour in the ground. It is not enough for the judge simply to have a subjective perception of one or more of these three risks.

It is only necessary to show that the fears of the behaviour happening have substance and merit. This enquiry is a factual one, and is not a trial per se, and so there are no formal rules of evidence in determining if the ground is made out. Representations will be made by both the prosecution and the defence but generally neither party needs to call witnesses or produce documentary evidence. Witnesses can be called (such as a police officer or the person proposed as a surety although it's rare) and hearsay evidence is permitted (ie statements made out of court presented in evidence as proof of its contents). The magistrates have an inquisitorial role in this process and may ask questions of either party or insist that sureties are called to give evidence of their means and relationship with the defendant.

1.8 No real prospects

A recent addition to the law is a final filter on considering bail under one of the 'big three' objections.

The final filter is that bail should not be removed under one of these grounds if the defendant is charged with an offence (or offences) where there are ‘no real prospects’ of the defendant receiving a custodial sentence.

Theft is an indictable offence, and so, strictly speaking, even stealing a banana is indictable. If there is no real prospect of the sentence for the offence being custodial, then the ground of objection cannot succeed.

The ‘big three’ grounds are available for any indictable offence (carrying imprisonment).

1.9 Summary offences

For lesser summary offences, the general rule is that they are only available if a defendant, having been given bail, breaches a condition of that bail in these proceedings or has a conviction for ‘fail to surrender’ in their past.

The logic is that for offences of lesser seriousness, it is broadly assumed that a defendant would not risk absconding or interfering with witnesses and is not so committed to crime that the defendant will offend on bail.

However, if the defendant’s behaviour on bail suggests otherwise and D breaches a condition of bail (or has a history of this), then the grounds for objection become eligible grounds to remand D in custody. The grounds therefore are only activated by a trigger event – namely the defendant being arrested for a breach of bail.



Example: Summary offences

If D is charged with criminal damage by way of graffiti with a low value of damage done, the maximum penalty is three months imprisonment.

It is presumed that D will not be so anxious about the court case that D would not attend court, given that the maximum penalty is not very long. Similarly, as the offending is modest, it is presumed that D would not be a risk in terms of interference with witnesses, nor would D risk committing further offences whilst on bail.

As a result, none of the ‘big three’ objections are initially available in this case and, if there are no other grounds applicable, D will be granted bail.

It may be that there are conditions attached to bail (eg to sign on at a police station regularly to secure D’s attendance, and a curfew to keep D out of trouble).

If D breaches a condition, eg the curfew condition, then D can be arrested under the Bail Act 1976, s.7 and brought to court.

At this point in proceedings, objection to D’s bail can now be raised on the ‘big three’ grounds.

In this case, it is the likelihood of further offences which seems to be activated as a concern given D’s arrest for breaching bail.

1.10 Need not be granted bail

In terms of importance, after the main three grounds, the next most common and most important trio of grounds that are widely applicable are:

- (a) A remand in custody would be for the defendant’s own protection;
- (b) The court has insufficient information to deal with the issue of bail, and so remands in custody for a (short) period for the production of sufficient evidence; and/or
- (c) The defendant is already serving a sentence in custody.

For these three grounds, the test is simply that the defendant ‘need not’ be granted bail if one of these conditions exist.

1.11 Specialist grounds

In addition to the ‘big three’ and the other trio of objections, there are a number of other grounds, but these are all relatively uncommon or rather more specialist.

We have grouped a series of them together under two broad headings, namely:

- (a) Serious cases with high penalties; and
- (b) Cases of a particular nature that affect the assessment of the risk posed by a defendant on bail.

Under the latter heading, the most notable ground of objection to bail relates to defendants who might commit offences and cause physical or mental injury (or fear of it) to an ‘associated person’. This is an important ground used frequently in domestic violence cases.

1.12 Four groups of offences

The law has been added to and amended so often now that reading the list of the grounds and when they apply is a fraught experience.

Four diagrams/tables seek to assist your understanding as to when grounds are available. We have tried to group the offences helpfully. In short, there is special provision for:

- (a) Serious cases (such as murder and rape) where it is harder to get bail because of the gravity of the consequences of such offending;
- (b) Cases of a particular character (such as drugs and domestic violence) where a different approach needs to be taken because of the particular behavioural difficulties commonly encountered with defendants who commit these offences;
- (c) Cases where the defendant infringes bail;
- (d) The remaining cases - dealt with in relation to their classification and, even with the ‘standard’ cases, there are a number of provisos to watch out for.

1.13 Process: bail objections

In terms of process:

- Check whether your defendant falls into the provisions of one of the special categories (either serious crime, or crimes of particular character).
- If the provisions in relation to serious cases (eg murder) are satisfied, the courts must follow the more stringent test and the more general objections cease to apply.
- For cases of a particular character, the prosecution can either use these additional grounds or rely on the more general grounds.

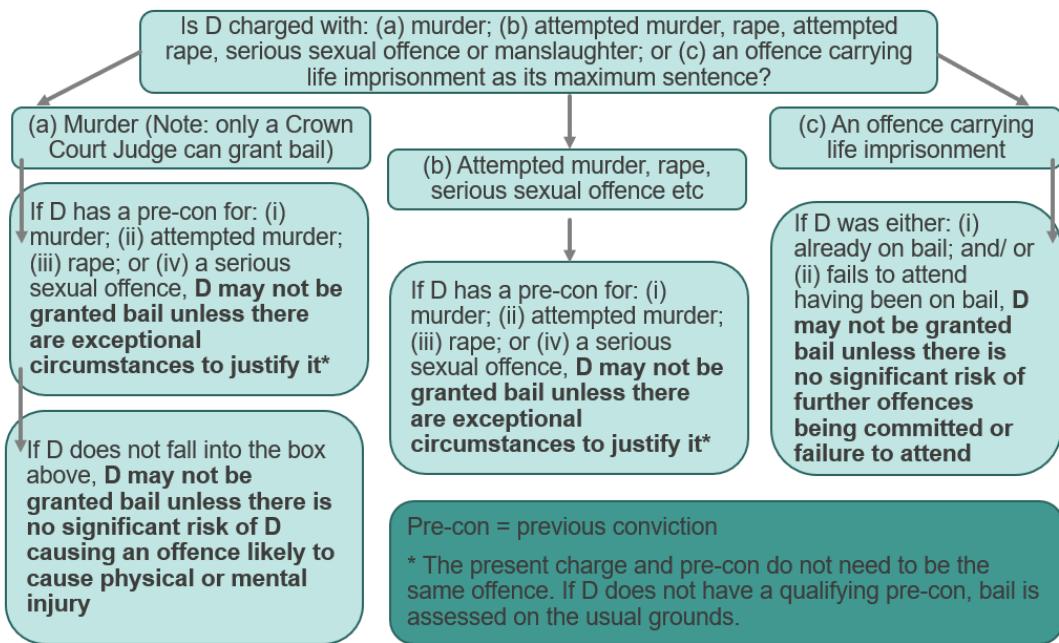


Figure 3.1: Serious crime cases

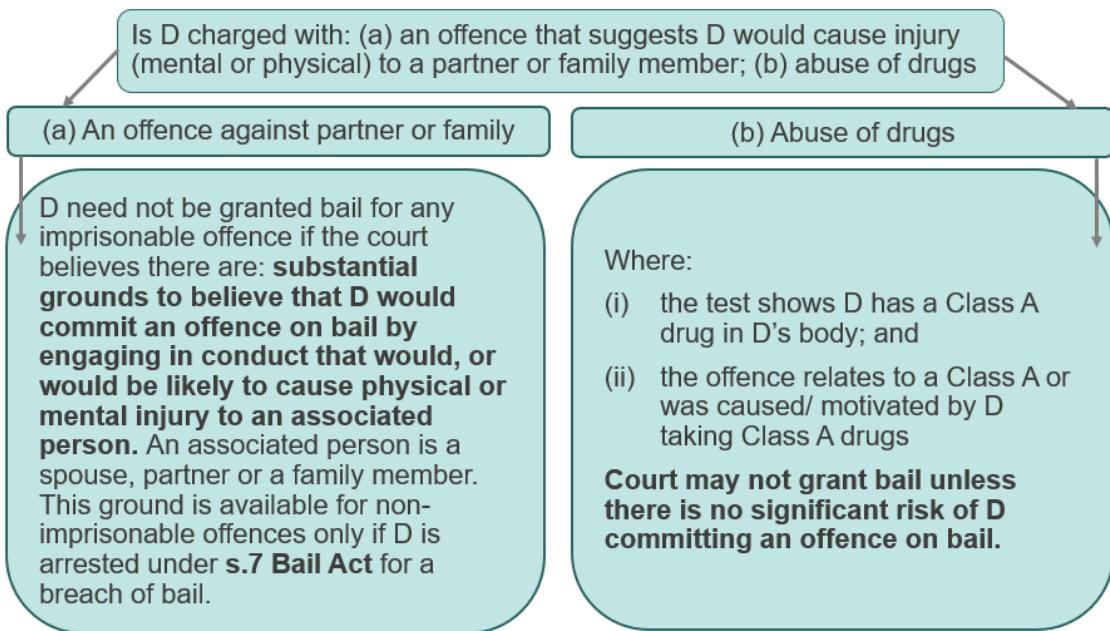


Figure 3.2: Dealing with cases with particular characteristics that affect risk

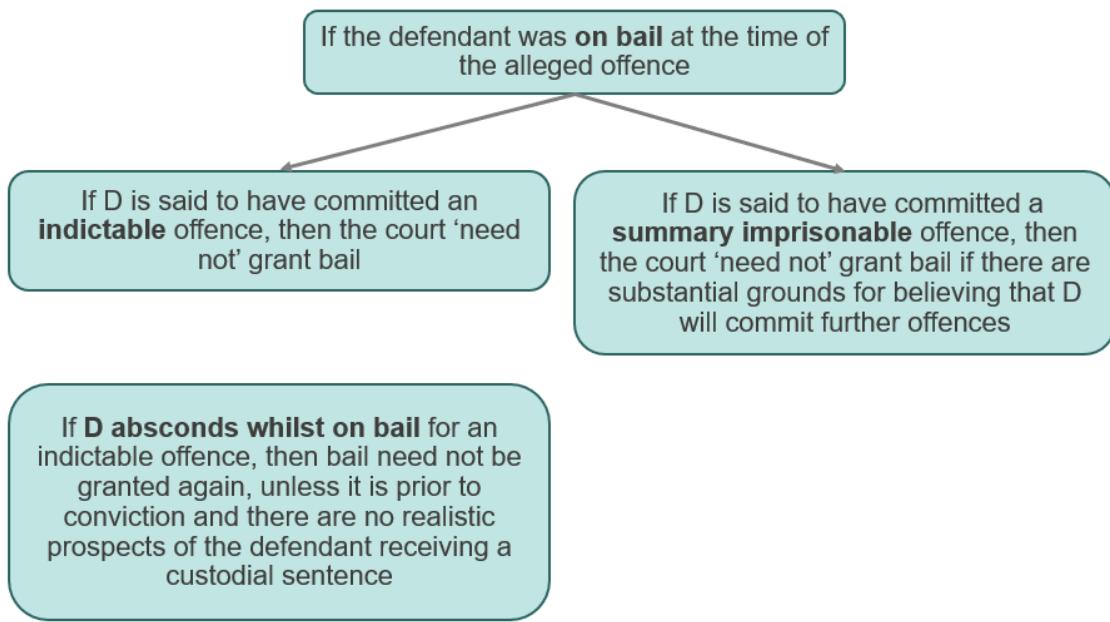


Figure 3.3: Dealing with cases where there has been a bail infringement

Grounds	Is ground available?		
	Imprisonable offence (indictable)	Imprisonable offence (summary only)	Non-imprisonable offence
Substantial grounds for believing D will...	Fail to surrender (FTS)	✓ If: (i) D has a prior FTS; or (ii)	✓ If: D has been convicted in the

Grounds	Is ground available?		
	Imprisonable offence (indictable)	Imprisonable offence (summary only)	Non-imprisonable offence
...unless there is no real prospect D will receive a custodial sentence			following s.7 Bail Act arrest
Commit further offences (CFO)	✓	✓ If: (i) D was on bail at the date of the alleged offence; or (ii) following s.7 Bail Act arrest	✓ If: D has been convicted and D is then subject to a s.7 Bail Act arrest
Interfere with witnesses or obstruct the course of justice	✓	✓ If: following s.7 Bail Act arrest	✓ If: D has been convicted and D is then subject to a s.7 Bail Act arrest
Need not be granted bail...	For their own protection	✓	✓
	If already in custody	✓	✓
	If insufficient time	✓	✗

1.14 The factors

When considering the grounds for objecting to bail, there are 'factors' to be taken into consideration. These factors are not grounds themselves, but help the court determine if the grounds are made out, as form the evidence base. The factors are mandatory considerations for the main three grounds:

- (a) **The nature and seriousness of the offence and the likely disposal (ie sentence)-** if convicted of a serious offence, D is likely to receive a long sentence and will therefore be tempted to abscond
- (b) **The character of the defendant, D's antecedents, associations and community ties;**
 - Antecedents refers to previous convictions which can make a custodial sentence more likely.
 - Character might include any personal circumstances such as drug addictions.
 - Associations might include friends with criminal records.
 - Examining the 'community ties' helps to see how easy it could be for the defendant to abscond and how much D has to lose by absconding. If D is married with children or in a job, then D might be less likely to 'disappear' compared to someone of 'no fixed abode'.
- (c) **The defendant's bail record in the past-** whether D has absconded in the past can be seen as indicative that D may do so again. Here, the court will also look at whether D has a tendency to commit offences on bail.

- (d) **The strength of the evidence**- a D who knows there is a good chance of being acquitted is arguably less likely to abscond than one who anticipates almost certain conviction.
- It is unclear the extent to which the court would expect to hear reference to these factors in any of the other grounds.
- These factors give the court a wide discretion.

1.14.1 Factors: Examples

If we are considering if someone will attend the next hearing (which is a valid ground) we should consider what incentives there are (or not) to attend the next hearing.

If the evidence against the defendant is strong, and the penalty will be severe, then these are factors making the ground more likely to be made out. However, if the defendant has very strong associations in the area, it would be much less likely that they would abscond and ‘go on the run’.

In this example then, there are two factors from the list of legitimate factors that seem to be relevant to the ground of ‘fail to surrender’.

Most factors have some relevance to each of the grounds.

For example, the ‘nature and seriousness of the offence’ can be tied to each of the ‘big three’ objections.

If a defendant is charged with a drugs offence involving an addictive drug, it is more likely the defendant will commit offences whilst on bail. The seriousness of an offence (such as drug supply) will also indicate the risk of failing to surrender, and the risk that the defendant will interfere with witnesses.

1.15 Grounds and factors

Ensure you learn:

- (a) What the factors are, and
- (b) The difference between a factor and a ground for objection.

It is a common mistake for courts to appear to remove bail on the basis of a factor. The factor may indeed be relevant, but the ultimate denial of bail must be on the basis of a legitimate ground of objection.



Example: Grounds and factors

So, for example, it would be wrong to say ‘Mr Jones, you are hereby remanded in custody due to the seriousness of the offence with which you are charged.’

It would be legitimate to say ‘Mr Jones, I have substantial grounds for believing that if granted bail, you would commit further offences. I take this view on account of the seriousness of the offences before me.’

1.15.1 Factors to support the grounds

Here is a chart to show pictorially the sort of connections that might be made between the ‘big three’ grounds, and the factors. Take a moment to consider how these connect.

Grounds	Factors
	The nature and seriousness (likely disposal)
1. Fail to surrender	The character of the defendant, D's antecedents, associations and community ties
2. Commit further offences	D's bail record in the past
3. Interfere with witnesses	The strength of the evidence

Figure 3.4: Factors to support the grounds

1.16 Summary

- If the case is not dealt with at the defendant's first appearance, the court will have to adjourn. When the court adjourns, the magistrates may either remand the defendant on bail (with or without conditions) or remand D into custody.
- Bail can be defined as 'the release of a person subject to a duty to surrender to custody at an appointed time and place'.
- Section 4 Bail Act 1976- There is a general right to bail at all appearances before the magistrates or Crown Court up to the occasion on which the defendant is convicted or acquitted. Following conviction there is a right to bail if the case is adjourned for reports prior to sentencing. The right to bail does **not apply** to:
 - (i) Those **appealing** their conviction or sentence; or
 - (ii) To defendants being **committed for sentence** from the Magistrates' Court to the Crown Court.
- In order for bail to be refused the court must find that there is an exception to the right to bail under s. 4. The grounds for objection differ depending on whether the offence is indictable, summary imprisonable or summary non-imprisonable. When considering the grounds for objecting to bail, there are factors to be taken into consideration.

2 Bail: Conditions and breach

2.1 Bail conditions

A person granted bail in criminal proceedings is under a duty to surrender to custody, by attending court at the time and date specified (Bail Act 1976, s3(1)).

In order to overcome any objections to bail, the defence can offer conditions to be attached to bail, which would lessen any risk associated to the granting of bail.

The court can impose 'such conditions as appear necessary' meaning technically that there is no limit to the conditions that a court could choose to impose.

Before attaching a condition of bail the court must consider if the condition is relevant, proportionate and enforceable.

European Convention on Human Rights, article 5(3) provides that every person who has been arrested or detained must be brought promptly before a judge and is entitled to trial within a reasonable time or to release pending trial.

Article 5(3) expressly provides that release may be conditioned by guarantees to appear for trial. This makes it permissible to attach conditions to the grant of bail.

2.2 Common bail conditions

There are, however, common conditions which include:

- **Residence at a given address-** a condition that the defendant must live and sleep at a specified address. This helps solicitors and the court communicate with the defendant by post, and the police to know where to find the defendant if the defendant doesn't attend court. This will be imposed to reduce the risk of the defendant absconding.
- **Curfew-** curfews are designed to prevent further offences being committed while on bail. A curfew requires the defendant to remain indoors during certain hours. These are often imposed for offences which occur at night ie burglary. A curfew is only appropriate where the time of day/night is relevant to the pattern of offending.
- **Reporting to a local police station at given times-** to check the defendant is still 'in town'. This condition would be imposed to reduce the risk of the defendant absconding.
- **Surety-** the offer of money made by someone with influence over the defendant to secure the defendant's return to court. A surety is usually required where there is a risk of the defendant absconding. The surety will agree to forfeit a sum of money if the defendant absconds. The defendant cannot stand as a surety in their own case. Sureties do not deposit the sum of money, referred to as a recognisance, at the time bail is granted. They merely promise to pay that sum of money if the defendant fails to surrender to the court and the court then orders all or part of the recognisance to be forfeited.
- **Security-** the defendant, or someone on the defendant's behalf, putting up money or some other valuable item to be forfeited if the defendant does not answer bail and attend court. The taking of a security is another means of trying to reduce the risk of the defendant absconding. Note the difference between a surety, which can only be given by a third party and a security which can be given by either a third party or the defendant. Securities are deposited with the court or the police before the defendant is released on bail.
- **Restriction on where a defendant may go during bail-** prohibiting the defendant from going into a certain area or to a specific place. This condition could be imposed to reduce either: the risk of the defendant committing any further offences while on bail and/or (depending on the circumstances) interfering with witnesses.
- **Restriction on who the defendant might have contact with during bail-** The court can direct that the defendant does not approach or contact, either directly or indirectly, named individuals (these can be victims or prosecution witnesses), in order to reduce the risk of interference with witnesses and/or obstructing the course of justice, or co-defendants to prevent further offending.
- **Electronic monitoring (tagging)-** A curfew can be subject to electronic monitoring (tagging). In addition to preventing further offences being committed on bail, electronic monitoring requirements can also be imposed to address fears of failure to surrender and interference with witnesses.
- **Bail hostels-** Residence at a bail hostel and a further condition that the defendant complies with the rules of the bail hostel can be used to try to prevent the defendant absconding, and/or interfering with witnesses and/or committing further offences on bail. A bail hostel may be used if the defendant does not have a fixed address. It provides a residence and a curfew while the defendant is on bail. The bail hostel will also place upon the resident its own rules with which the defendant must comply eg not to bring alcohol or controlled drugs onto the premises. If the rules are breached, the resident would have to leave and would consequently be in breach of the court imposed bail condition of residence.
- **Surrender of passport-** In some circumstances it may be necessary for the court to impose a condition that the defendant surrenders their passport to prevent the risk of them absconding.

2.3 Varying bail conditions

Applications to vary bail conditions can be made by the defence or the prosecution on advance notice to the other party.

The application should be made to the court which granted bail (or the Crown Court if the accused has been sent for trial or committed for sentence).

If the parties agree on the variation, the court may decide to vary a bail condition without a hearing.

2.4 Breach of bail conditions

Breach of bail conditions may result in the accused being arrested under the Bail Act 1976, s 7(3) and D is at risk of either having the bail conditions tightened or being remanded in custody, ie bail being withdrawn.

It is routine for courts to impose conditions on bail.

If a defendant is found in breach of a condition, the defendant is not actually committing an offence. There is no offence of ‘breaching a bail condition’.

The Bail Act s.7 provides that there is a power of arrest allowing officers to arrest those either who are in breach, or who are about to be so.

If D is given bail with a condition to be indoors at home in London by 8pm, and D is found in a field in Glastonbury at 7:30pm, the officer does not have to wait until 8pm to arrest D for breaching bail.

Given that the breach of bail is not an offence, the defendant who is arrested for a breach of bail must then be brought forthwith to a magistrates' court, and then the question to determine is simply whether the defendant should have bail going forward.

2.5 Not surrendering to custody

There are a number of instances whereby the breach of bail will introduce more grounds of objection which might not have been previously available.

Even if the breach does not trigger any new grounds, the assessment of whether the defendant gets bail will be likely to alter against the defendant's interests if there's been a breach of a condition. D faces a real possibility of being remanded in custody until the case is concluded.

The only bail breach which is a criminal offence is failing, without reasonable cause, to surrender to custody. This offence is commonly known as failing to surrender ('FTS'). This is an offence punishable summarily by up to three months' imprisonment and/ or an unlimited fine or 12 months and/ or an unlimited fine on indictment.

2.6 Summary

- If there is a risk that D might fail to surrender, commit further offences or interfere with witness while on bail for example, the defence can offer conditions to be attached to D's bail, which would lessen any risks.
- Bail conditions must be relevant, proportionate and enforceable.
- Common bail conditions include any or a combination of the following: residence, curfew, reporting, surety, security, restrictions on D's movement or who D may contact, electronic monitoring, bail hostel and surrender of passport.
- Applications to vary bail conditions can be made by either party on notice generally to the court that granted bail. A hearing is not always necessary.
- Breach of bail conditions- may result in the accused being arrested under the Bail Act 1976, s 7(3) and bail being withdrawn.
- There is no offence of ‘breaching a bail condition’. However, it is a criminal offence to fail, without reasonable cause, to surrender to custody. This offence is commonly known as failing to surrender ('FTS').

3 Bail: Procedure

3.1 Procedure for applying for bail

If the defendant has been refused bail by the police, D will appear before the next available magistrates' court in custody.

On D's arrival at the court the defence advocate will first check with the prosecutor to see if the prosecutor intends to object to bail being granted. If the prosecutor has no objections then this will be stated to the court.

If however the prosecution objects to the grant of bail, the prosecutor will outline the objections to the court. Where the accused has previous convictions, these are handed to the court.

The defence then presents its arguments for bail to be granted.

After hearing both the prosecution and the defence submissions, the court will announce its decision. Where the defendant has a right to bail under s. 4 Bail Act 1976 the court must give its reasons if it refuses bail or imposes conditions. A form setting out the decision of the court will also be completed.

3.2 Bail attempts

The general rule is that a defendant who is having a trial in the magistrates' court can have two attempts at getting bail at the magistrates' court, and one attempt on appeal to the Crown Court.

3.2.1 Magistrates' Court

There are some complications around this general principle. If bail is refused, then D can repeat the same application and have a second attempt at getting bail at the next hearing. Thereafter, D has either to appeal the decision against granting bail to the Crown Court, or to find fresh points to make (eg by finding a surety which D didn't have available before).

3.2.2 Crown Court

A defendant whose trial will be heard in the Crown Court has one attempt at bail at the first hearing in the magistrates' court (unless charged with murder; the magistrates' court has no jurisdiction to consider bail where a person is charged with murder) and a further application as of right in the Crown Court.

3.3 Bail timeline: The usual case

- The defendant attends court the first time the case is listed and applies for bail.
- If the defendant is unsuccessful, the case will be returned to court a week later where the issue of bail can be raised a second time without any restriction or qualification, and the defendant can apply again. In principle it is possible for the defence advocate to make identical applications at the first and second hearings and to find that the same application is denied first but then allowed by a different bench of magistrates (or District Judge).
- Once the defendant has had both applications, the defendant must secure a 'certificate of full argument' from the magistrates' court before then appealing (if D wishes to do so). The certificate is simply a short summary that the magistrates produce so that the Crown Court knows what has transpired in the court below. Appeals are heard one business day after an appeal notice is served.
- D can only apply again if there has been a change in circumstances.

3.4 Bail timeline: Urgent cases

In urgent cases, the defence may wish to exercise its appeal right more quickly than would be allowed by waiting a week for a second attempt in the magistrates' court.

The Crown Court will hear a bail appeal no later than one business day after the appropriate notice is served, but clearly this is still a quicker route to being heard than waiting for a week to pass and applying again in the magistrates' court.

If a defendant appeals to the Crown Court after only one application in the magistrates' court, then the defendant loses the right to a second application in the magistrates' court.

D can only apply again if there has been a change in circumstances.

3.5 The magistrates' court grants bail

It is very rare for the prosecution to appeal against the granting of bail. It is possible, and the very basic process, is that the:

- (a) Prosecution must have opposed bail originally
- (b) Offence must be punishable by imprisonment

- (c) Prosecution indicates orally at the hearing when bail is granted that they will appeal (the defendant is then held in custody)
- (d) Intention to appeal is confirmed in writing and served on the court and defence within two hours
- (e) Appeal is heard within 48 hours - excluding weekends
- (f) Appeal is heard by a Crown Court Judge

3.6 Where the Crown Court grants bail

Equally rare is the prosecution appealing the grant of bail by the Crown Court.

The procedure is the same as for a magistrates' court appeal save that the appeal is heard by a High Court Judge sitting in the High Court.

3.7 Custody time limits

There are rules that seek to prevent unduly long periods of time being spent on remand in custody awaiting trial.

The incentive for the prosecution to bring cases to trial within a proper time frame is that the prosecution cannot hold a defendant beyond the '**custody time limits**' unless the court has sanctioned an extension.

The limits themselves depend upon the classification of the offence.

The numbers to remember are:

- 56 days for trials in the magistrates' court of summary only or either-way offences; and
- 182 days for trials in the Crown Court of indictable only or either-way offences, less any days spent in custody prior to the case being sent to the Crown Court (usually zero).

3.7.1 Custody time limit expiry

A trial must commence before the expiry of the custody time limit.

- In the magistrates' court the start of the trial is defined as when the court begins hearing evidence from the prosecution.
- In the Crown Court the start of the trial is defined as when a jury is sworn.

If the limits expire, then the defendant will be released, unless the prosecution applies to extend the time limits and can show that it has acted with 'all due diligence and expedition' and that there is 'good and sufficient cause' to have the defendant further remanded into custody.

3.8 First and onward remand in the magistrates' court

3.8.1 Sent to the Crown Court

Where a defendant is charged with an offence that is sent to the Crown Court (ie indictable only or an either-way where the magistrates decline jurisdiction or the defendant elects crown court trial), the custody time limit is 182 days and they will not make a further appearance in the magistrates' court.

3.8.2 Trial in the magistrates' court

There are, however, particular rules about how long a person can be remanded into custody for where they are going to be tried in the magistrates' court.

If a defendant is remanded into custody at their first hearing and their trial will take place in the magistrates' court, their first remand must be for no more than eight clear days.

3.8.3 What does that mean?

They must be brought back to court within eight clear days so that another bail application could be made, though the defendant may choose not to make one.

3.8.4 Does this mean that the courts are clogged up with people making a ‘second appearance’ which may be pointless?

Yes, to an extent. To get around this, a second appearance can be via video link and most courts now operate this as the default position. The defendant is considered to be ‘present in the courtroom’ despite appearing on a screen.

After the ‘second appearance’ the defendant must be brought back to court every 28 days or fewer just so that the court can ‘remand them onwards’ to their trial. This truly is a waste of time and resources! A defendant can therefore, at any point, consent to these ‘onward remands’ being conducted in their absence. No video link; the magistrates simply have to remember to say on an appointed day ‘I remanded Bob Smith for a further 28 days in the absence’.

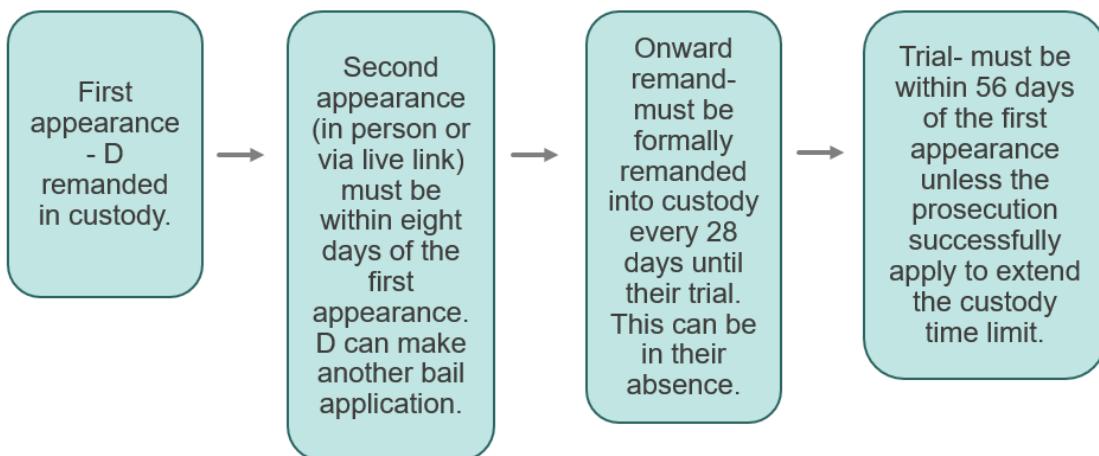


Figure 3.5: First and onward remand in the magistrates’ court

3.9 Summary

This section considered:

- **The procedure for applying for bail-** if the prosecution has objections to bail, after hearing both the prosecution and the defence submissions, the court will announce its decision. Where the defendant has a right to bail under s. 4 Bail Act 1976 the court must give its reasons if it refuses bail or imposes conditions.
- **Further applications for bail-** the general rule is that a D who is having a trial in the magistrates’ court can have two attempts at getting bail at the magistrates’ court, and one attempt on appeal to the Crown Court which will be listed no later than one business day after receipt of the appropriate notice. The timeline for bail attempts varies depending on whether it is a usual or urgent case.
- **Appeals against decisions on bail-** it is very rare for the prosecution to appeal against the granting of bail.
- **Custody time limits-** the prosecution cannot hold a defendant beyond this unless the court has sanctioned an extension: (i) 56 days for trials in the magistrates’ court of summary only or either-way offences; and (ii) 182 days for trials in the Crown Court of indictable only or either-way offences, less any days spent in custody prior to the case being sent to the Crown Court (usually zero).

4 First hearings: Overview

4.1 Format of the first hearing

All adult defendants have their first hearing before a magistrates’ court irrespective of the offence that they are charged with. The exact nature and format of the hearing along with the location of their subsequent appearance is determined by the category of offence that they are charged with:

- **Summary only offences**- can only be dealt with in the magistrates' court;
- **Either-way offences**- can be dealt with in the magistrates' court or the Crown Court; and
- **Indictable only offences**- can only be dealt with in the Crown Court.

Either-way offences and indictable only offences are also known as 'indictable' offences.

Separate elements will deal with how the court deals specifically with summary only offences and with either-way offences.

4.2 Timing of first hearing

Where the defendant is on bail, the first hearing must be within:

- **14 days of being charged**- if the prosecutor anticipates a guilty plea which is likely to be sentenced in a magistrates' court;
- **28 days of being charged**- where it is anticipated that the defendant will plead not guilty, or the case is likely to go to the Crown Court for either trial or sentence.

If a defendant was detained in police custody following charge they must be brought before the next available court.

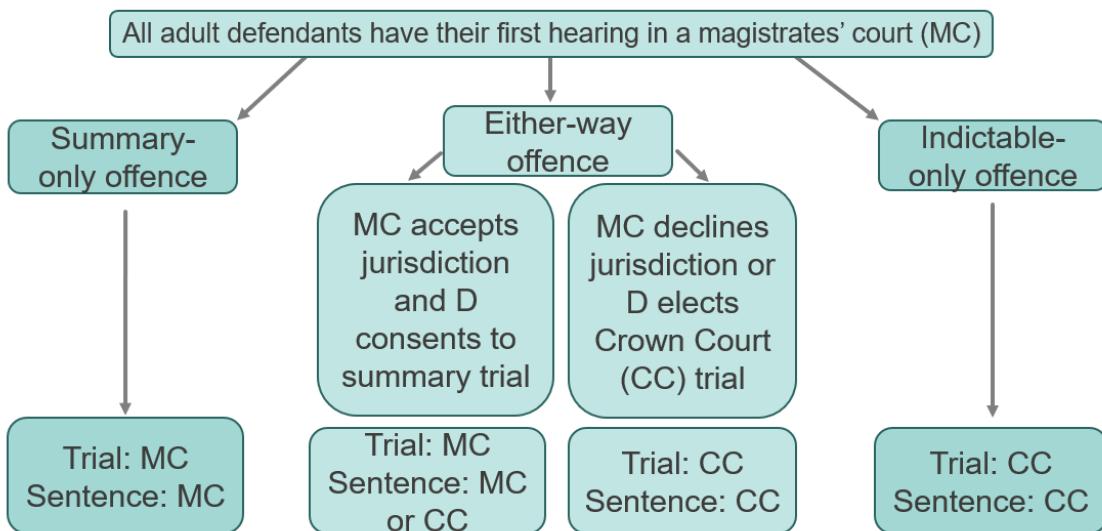


Figure 3.6: Location of the first hearing (adults)

4.3 Defendant's presence

The defendant must be present at the first hearing. If the defendant was bailed by the police to attend court and fails to attend, the court can issue a warrant for the defendant's arrest. Failure to surrender to bail at the appointed time is an offence under the Bail Act 1976.

When the defendant does not attend as required then the court will consider whether it can proceed with the hearing anyway.

This will not usually be possible if the hearing will deal with allocation of an either-way offence or sending an indictable (either-way or indictable only) case to the Crown Court.

If the defendant has been summonsed to court (typically used for non-imprisonable, minor or road traffic offences) the defendant does not commit any offence for non-appearance. Provided the prosecution has served the statements and the defendant has been warned of the hearing, then the case can proceed in the absence of the defendant. If convicted, then the penalty can also be imposed in absentia.

4.4 Initial details of the prosecution case (IDPC)

4.4.1 Criminal Procedure Rules, Part 8

The prosecution is obliged to serve the initial details on the court officer as soon as practicable and in any event, no later than the beginning of the day of the first hearing.

Where a defendant requests those details, the prosecutor must serve them on the defendant as soon as practicable and, in any event, no later than the beginning of the day of the first hearing.

A solicitor would almost certainly request the documents. The Crown Prosecution Service now uses electronic case files. These can be sent to defence representatives via secure email.

Ordinarily, the failure to supply initial details does not constitute a ground upon which a court may dismiss a charge or give rise to an abuse of process application. The usual remedy is for the court to adjourn a first hearing and/or award costs to the defence for the prosecution's failure to serve.

4.4.2 Initial details

Initial details must include:

- A summary of the circumstances of the offence;
- Any account given by the defendant in interview;
- Any written statements and exhibits that are available and material to plea and/or mode of trial or sentence;
- Victim impact statements; and
- The defendant's criminal record.

The rules prescribe that where the defendant was in **police custody** immediately before the first hearing, initial details need **only** comprise:

- A summary of the circumstances of the offence; and
- The defendant's criminal record.
- The information supplied must be sufficient at the first hearing to allow the court to take an informed view on plea and venue for trial.
- Where no guilty plea is anticipated, they should be sufficient to assist the court in identifying the real issues and in giving directions. The information required for the Preparation for Effective Trial (PET) form must be available and where there is to be a trial, the parties must complete the form.

4.5 First hearings

4.5.1 Summary and either-way offences

The first hearing will be the hearing that deals with matters such as:

- Plea;
- Bail;
- Representation and legal aid.

Depending on the type of offence it might progress to sentence.

4.5.2 Indictable only

The magistrates' court has no jurisdiction to deal with an indictable only offence and so a defendant charged with an indictable only offence makes only a brief first appearance in a magistrates' court.

The court will deal with bail and legal aid then the defendant is sent to the Crown Court where they will enter a plea. The hearing at the Crown Court is three or four weeks later depending on the defendant's bail status.

4.6 Summary only offences in the Crown Court

- There is an important exception to the rule that summary only offences never go to Crown Court.

- This happens when a defendant is charged with an offence that is to be tried in the Crown Court **and** there is a summary only offence which is connected to the indictable offence.
- If the summary only offence is one of those listed below and is before the magistrates' court at the same hearing as the indictable offence, it **must** be sent to the Crown Court.

Related summary matters that must be sent for trial and included on an indictment

(s 40 CJA 1988)

- Common assault
- Assaulting a prison or secure training centre officer
- Taking a motor vehicle or other conveyance without authority
- Driving a motor vehicle while disqualified
- Criminal damage

A summary offence that is on the s 40 Criminal Justice Act (CJA) 1988 list and is related to the matter that has been sent to the Crown Court for trial can be included on the indictment and the jury will consider it then return a verdict.

Related summary matters that must be sent for plea only

(s 51(3) CDA 1998)

Any summary matter not listed in s 40 CJA 1988 but that is punishable by disqualification from driving or imprisonment

Where a summary only offence is not on the list in s 40 it will not appear on the indictment. When the trial for the indictable offence is over, the accused will be asked to enter a plea in relation to the summary only offence. If D pleads guilty, the Crown Court may deal with the offence in any way that would have been open to a magistrates' court. If D pleads not guilty, the Crown Court has no further power to deal with the offence. If there is to be a trial it is remitted to a magistrates' court.

4.7 Summary

This section considered first hearings and case management in the magistrates' court for adult defendants.

- **First hearings-** All adult defendants have their first hearing before a magistrates' court irrespective of the offence that they are charged with. Exactly what happens at the first hearing depends on the classification of offence which the defendant is charged with.
- **Pleas-** At a first hearing for a summary only or an either-way offence the defendant will be asked to enter their plea to a charge.
- **Initial details-** The prosecution is obliged to serve 'initial details' as set out in **Criminal Procedure Rules, Part 8** which includes a summary of the circumstances of the offence and the defendant's criminal record and sometimes other documents. The information supplied must be sufficient at the first hearing to allow the court to take an informed view.
- **Summary only offences in the Crown Court-** exception for related linked offences. Whether or not the related offences will be tried on the indictment depends if the offence is listed in s 40 Criminal Justice Act 1988.

5 First hearings: Either- way offences

5.1 Plea before venue

At a first hearing when the offence is one which is **triable either-way**, the defendant will be asked to indicate their plea. The defendant is supplied with a copy of the initial details by the prosecutor

in accordance with **Criminal Procedure Rules, Part 8**. The charge is written down and read out to the defendant.

The defendant can:

- Indicate guilty;
- Indicate not guilty; or
- Give no indication.

Where no indication is given, it is treated as a not guilty indication.

This is part of the hearing is known as '**plea before venue**' and this procedure is set out in s 17A Magistrates' Courts Act 1980.

Before they indicate their plea, the defendant must be warned that if they plead guilty, they can be:

- Sentenced by the court; or
- Committed to the Crown Court for sentence under s 14 Sentencing Act 2020 if a magistrates' court is of the opinion that its sentencing powers are insufficient to deal with the offence.

A guilty plea must be unequivocal; that is to say, it must be one free of any suggestion or statement that the defendant is not guilty, either because they purport to rely on a defence or refuse to accept an section of the offence. If a plea is equivocal, it will be treated as a not guilty plea rather than a guilty plea. Examples of an equivocal plea are:

- To an allegation of inflicting grievous bodily harm- 'Guilty, but I was acting in self-defence'
- To an allegation of theft- 'Guilty, but I was going to give it back'

5.2 Guilty plea

If the defendant indicates a guilty plea the court will treat that as a formal plea of guilty and proceed to sentence.

As an either-way offence can be sentenced in either a magistrates' court or the Crown Court, a magistrates' court must consider whether its sentencing powers would be sufficient in the circumstances given.

A magistrates' court does not have power to impose more than 6 months imprisonment in respect of any summary only or single either-way offence (s 224 Sentencing Act 2020).

For two or more either-way offences in the magistrates' court, the maximum sentence is 12 months imprisonment.

If the court decides that its powers **are** sufficient then sentence may be passed immediately or adjourned for the preparation of a pre-sentence report ('PSR'). The sentencing process is considered in more detail in another section.

Where the court adjourns sentence for the preparation of a PSR, it must be careful not to create an expectation that the offender will be sentenced in a magistrates' court if there is a possibility of committal for sentence.

The court should make it clear that all sentencing options, including committal to the Crown Court for sentence, remain open.

5.3 Committal for sentence

If the court decides that its powers are insufficient either because the sentence exceeds their maximum, or because the defendant should be made subject to a sentence of a kind that they cannot pass, then the defendant will be committed for sentence to the Crown Court.

A magistrates' court should order a PSR for use by the Crown Court if it considers that:

- There is a realistic alternative to a custodial sentence; or
- The defendant may be a dangerous offender; or
- There is some other appropriate reason for doing so.

The defendant will make their next appearance at the Crown Court to be sentenced by a Crown Court Judge who will be able to pass a sentence of anything up to the Crown Court limit for the offence.

5.4 Not guilty plea

If a defendant indicates a not guilty plea then the court moves on to consider where the trial will be held. This is known as **allocation** and is set out in s 19 Magistrates' Courts Act 1980. Additionally, the court must follow the allocation guideline.

The court must take into account the allocation guideline which indicates that either-way offences should generally be tried summarily unless:

- The court's sentencing powers would be insufficient ie the outcome **would clearly be a sentence in excess of the court's powers for the offence(s)** after taking into account personal mitigation and any potential reduction for a guilty plea; or
- For reasons of unusual legal, procedural or factual complexity, the case should be tried in the Crown Court.

5.5 Allocation hearing

The allocation guideline states that in cases with no factual or legal complications the court must bear in mind its power to commit for sentence after trial (s14 Sentencing Act 2020) and, crucially, may retain jurisdiction notwithstanding that the likely sentence might exceed its powers.

This means that, in practice, cases are likely to be retained and tried in the magistrates' court unless the offence was clearly so serious that only the Crown Court should have the power to deal with the defendant.

Given the key consideration for a magistrates' court when deciding whether to accept jurisdiction is whether its sentencing powers are adequate, the court will need to consider the relevant sentencing guidelines and any associated case law.

The court should also take into account the submissions of the parties.

The prosecution

- Opens with the facts.
- Outlines the defendant's offending history (if any).
- Makes submissions as to where the trial should be held consistent with the allocation guidelines.

The submissions will cover the nature and seriousness of the offence including any particular aggravating and mitigating features.

The defence

- Can make submissions as to venue.
- Where they agree with the prosecution it may be no more than saying that.
- However, if the prosecution submits that the case should be heard in the Crown Court and the defence disagree, they will need to make fuller, more persuasive submissions at this point.

The court must then decide whether to allocate the case to a magistrates' court (accept jurisdiction) or send it to the Crown Court.

If they decide to allocate it to the Crown Court, the matter is sent pursuant to s 51 Crime and Disorder Act 1998 and the defendant will make their next appearance at the Crown Court. The defendant has no right to elect a magistrates' court trial in these circumstances.

If the court decides to retain jurisdiction (s 20 Magistrates' Courts Act 1980), there are further steps in this process.

The court will explain to the defendant that:

- The court has decided that summary trial is more suitable.
- The defendant can consent to be tried summarily or, if D so wishes, be tried by a jury.
- If D is tried summarily and is convicted, D may still be committed to the Crown Court for sentence.

5.6 Indication of sentence

- The defendant is able to ask for an **indication of sentence** if they were to plead guilty instead.
- The court has the discretion as to whether they will give an indication.

- The court can decline to give an indication.
- If they do, it must be confined to telling the defendant whether the sentence would be custodial or non-custodial.
- If the defendant asks for an indication and one is given, they can change their plea to guilty and the process followed will be as if they had pleaded guilty from the outset.
- Where a non-custodial sentence is indicated, that indication will be binding on any later magistrates' court.

5.7 Election

If the defendant does not ask for an indication, or if the court refuses to give one, or if having heard the indication the defendant sticks with their not guilty plea, the court asks the defendant:

- If they consent to being tried in a magistrates' court, meaning the case will be adjourned; or
- If they want to elect to be tried by a jury meaning the case will be transferred to the Crown Court.

This is known as '**election**'.

The defendant will be told that even if they consent to summary trial, the court still has the power to commit them to the Crown Court for sentence.

Note. If the defendant chooses not to change their plea to guilty then the indication given will not bind any later court in the event that the defendant fails to be sentenced.

5.8 Advice on election

It is one of the duties of the defendant's legal representative to advise the defendant on whether to consent to summary trial or to elect trial.

5.8.1 Elect trial on indictment

Quite often the advice will be to elect trial on indictment in the Crown Court:

- The acquittal rate is higher in the Crown Court; and
- The separate tribunals of law and fact in the Crown Court can be advantageous to the defendant. *Voir dire* procedures allow the judge to hear arguments to exclude evidence in the absence of the jury.
- It is not always the case that a Crown Court Judge will sentence more harshly than a magistrates' court.

5.8.2 Consent to summary trial

Proceedings in a magistrates' court:

- Are less formal
- The waiting time before the trial date is much shorter
- The trial itself is much quicker.
- Do not require a defendant to serve a defence statement.
- Are less expensive than the Crown Court.
- Magistrates have to provide reasons for their decision whereas juries do not give reasons.
- Magistrates have less sentencing powers than those of the Crown Court. However, the magistrates' court has a power to commit to the Crown Court for sentence even after trial.

5.9 Next steps

5.9.1 D consents to summary trial

If the defendant consents to summary trial then the court:

- Progresses as if the case were a summary only offence
- Sets a trial date
- Conducts any case management that is required.

5.9.2 D elects Crown Court trial

If the defendant elects trial at the Crown Court then:

- The matter is sent pursuant to s 51 Crime and Disorder Act 1998;
- The defendant will make their next appearance at the Crown Court.
- The court will complete the ‘Case sent to the Crown Court for trial – case management questionnaire’.

5.10 Exceptions to the rule

The simple rule that summary only offences must be dealt with in the magistrates’ court, indictable only must be sent to Crown Court and either-way can be dealt with in either court is, naturally, subject to some exceptions.

In relation to either-way offences there are some key ‘special cases’ which affect the jurisdiction of some offences nominally classed as either-way by making some into summary only and others indictable only.

The key ones are:

- Low value shoplifting
- Criminal damage
- Cases involving complex fraud or where children may be called as witnesses

5.10.1 ‘Special’ cases

Low-value shoplifting

Low value shoplifting is stealing goods valued at £200 or less.

Although theft is an either-way offence low value shoplifting is treated as summary only.

The maximum sentence is 6 months.

Somewhat oddly, the defendant still has the right to elect to be tried at the Crown Court under s 22A(2) Magistrates’ Courts Act 1980.

Criminal damage

Although classed as either-way the offence can be dealt with at the Crown Court **only** when the damage is:

- Over £5000; or
- Caused by fire (arson).

If £5000 or less, the offence becomes summary only and must be dealt with in the magistrates’ court. When this is the case, the maximum penalty that can be imposed is 3 months’ imprisonment or a level 4 fine. This is an exception to the normal rule regarding magistrates’ powers.

Section 50A Crime and Disorder Act 1998 provides that cases involving complex fraud or where children may be called as witnesses should be sent directly to the Crown Court, if notice has been given under:

- Section 51B (regarding fraud); or
- Section 51C (regarding children).

Although the offences themselves might be classed as either-way, these type of cases will be sent to the Crown Court without going through the plea before venue or allocation procedure.

For all intent and purposes, they are indictable only.

5.10.2 Complex fraud

To be complex fraud, **at least two** of the following must be present:

- The amount is alleged to exceed £500,000
- There is a significant international dimension
- The case requires specialised knowledge of financial, commercial, fiscal or regulatory matters such as the operation of markets, banking systems, trusts or tax regimes

- There are numerous victims
- There is substantial and significant fraud on a public body
- The case is likely to be of widespread public concern or the alleged misconduct endangered the economic well-being of the United Kingdom, for example by undermining confidence in financial markets

5.11 Sending cases to the Crown Court

Indictable only

- Always sent to the Crown Court

Either-way offences

- Committed for sentence following a guilty plea.
- Committed for sentence after trial in the magistrates' court.
- Sent for trial where the court has declined jurisdiction following a not guilty plea.
- Sent for trial where the court has accepted jurisdiction following a not guilty plea but the defendant elects Crown Court trial.
- Cases involving complex fraud or where children may be called as witnesses when notice has been given.

Except for 'special' cases of low value shoplifting where D has not elected trial in the Crown Court and simple criminal damage to the value of £5,000 or below.

5.12 Summary

This section considered first hearings at the magistrates' court for adult defendants charged with an either-way offence:

- **First hearing-** deals with matters such as plea and allocation, along with bail. The defendant generally must be present at the first hearing.
- **Special cases:**
 - **Low value shoplifting-** while theft is an either-way offence, low value shoplifting valued at £200 or less is treated as summary only (although D still has the right to elect trial in the Crown Court).
 - **Criminal damage-** while an either-way offence, simple criminal damage to the value of £5,000 or below, is summary only.
 - **Complex fraud cases** or where children may be called as witnesses- while these offences might be classed as either-way, they will be sent to the Crown Court without allocation.
- **Plea before venue-** the defendant will be asked to indicate their plea to a charge.
- **D indicates an unequivocal guilty plea-** the court will sentence the defendant unless of the opinion that it is necessary to commit the defendant to Crown Court for sentence.
- **D indicates a not guilty plea-**
 - **Allocation-** the court will decide whether to allocate the case to a magistrates' court (accept jurisdiction) or send it to the Crown Court (decline jurisdiction).
 - **Indication of sentence-** the defendant is able to ask for an indication if they were to plead guilty instead and the court has the discretion as to whether they will give it.
 - **Election-** If the court decides to accept jurisdiction D can consent to being tried in a magistrates' court or elect to be tried by a jury in the Crown Court. It is one of the duties of the defendant's legal representative to advise the defendant on whether to consent to summary trial or to elect trial.
- The court conducts any case management that is required.

6 First hearings: Summary only offences

6.1 Case management

Each party must actively assist the court in furthering the overriding objective.

This includes:

- Communication between the prosecutor and the defendant at the first available opportunity and in any event no later than the beginning of the day of the first hearing and after that, communication between the parties and with the court officer until the conclusion of the case.
- Establishing, among other things:
 - Whether the defendant is likely to plead guilty or not guilty,
 - What is agreed and what is likely to be disputed,
 - What information, or other material, is required by one party of another, and why, what is to be done, by whom, and when (without or if necessary with a direction), and
 - Reporting on that communication to the court.

6.2 Pleas

The ‘initial details’ as set out in **Criminal Procedure Rules, Part 8** must at the very least include a summary of the circumstances of the offence and the defendant’s criminal record. If the defendant is on bail, it will include other documents. It must be supplied to the defendant if they request it.

The defendant will be asked to enter their plea.

6.2.1 Summary only - guilty plea

If the defendant pleads guilty the court will proceed to sentence. Sentence will often be passed immediately but can be adjourned for further information. The sentence most used by magistrates is a fine. The maximum sentence that a magistrates’ court can impose for summary only offences is a total of 6 months imprisonment.

Sentencing is dealt with further in a separate section.

6.2.2 Summary only - not guilty plea

If the defendant pleads not guilty then the court will set a trial date and do any necessary case management to ensure that the trial is effective on that date. This includes completing the case progression form ‘Preparation for Effective Trial form’ (‘PET’):

- The defendant’s and legal representative’s contact details;
- Names, numbers, types of witness and which party requires their attendance at court;
- The estimated length of trial;
- Identification of trial issues;
- Advance warning whether any applications are to be made (e.g. special measures, bad character and hearsay);
- Whether any prosecution statements can be read;
- Whether any special arrangements need to be made (e.g. interpreter, wheelchair access, hearing loop system) for anyone attending the trial, and
- That the defendant advocate has advised D of credit for early guilty plea and that trial will go ahead in D’s absence if D fails to attend on the trial date.

Setting out what the issue(s) at trial will be and which witnesses are required to give live evidence allows the court to actively manage the case, by ensuring that only those witnesses whom the defence want to challenge on their evidence come to court.

The court should set a timetable for the trial and an estimate of how long the trial will take. Magistrates’ courts are encouraged to scrutinise with the utmost vigour any time estimate in excess of a day for a summary trial.

Most courts have standard directions about how the parties should prepare the case. These standard directions must be complied with unless the magistrates direct otherwise.

Directions (standard or otherwise) usually concern issues pertaining to bad character evidence, hearsay evidence, special measures to protect witnesses when they are giving evidence, disclosure, expert evidence, editing transcripts of interviews and serving certificates of readiness for trial. The magistrates’ court also has a case progression officer to monitor directions made by

the court. In addition, both CPS and defence advocates must indicate a nominated person in their respective offices who will be responsible for complying with the directions.

Pre-trial hearings

Where a case has been set down for summary trial, the court can conduct pre-trial hearings at which pre-trial rulings can be made. These can cover matters such as admissibility of evidence and fitness to plead. Rulings can be made on the application of the defence or prosecution, or of the court's own motion.

A pre-trial ruling is binding until the case is disposed of by:

- Conviction or acquittal of the defendant; or
- A prosecution decision not to proceed; or
- The dismissal of the case.

The court can, however, discharge or vary a pre-trial ruling if it is in the interests of justice to do so and the parties have been given an opportunity to be heard. A party can apply to have a pre-trial ruling varied or discharged only if there has been a material change of circumstances.

6.2.3 Pleading guilty by post

In summary only cases where:

- The matter has been commenced by summons or requisition; and
- The prosecutor has served a summary of the evidence on which the prosecution case is based; and
- The prosecutor has served information relevant to sentence

The defendant can complete the necessary documentation and plead guilty in writing without the need to attend court at all.

The court may accept such a guilty plea and pass sentence in the defendant's absence.

This procedure is used for minor non imprisonable offences such as speeding or driving without insurance.

6.3 Summary

This section considered:

- **Pleas** - At a first hearing for a summary only or an either-way offence the defendant will be asked to enter their plea to a charge. Guilty pleas must be unequivocal.
- **Sentence** - If the defendant pleads guilty then the court will sentence. This can be done in the defendant's absence.
- **Trial** - If the defendant pleads not guilty then the court will issue directions to allow the case to be tried at a later date.
- **Initial details** - The prosecution is obliged to serve 'initial details' as set out in **Criminal Procedure Rules, Part 8** which includes a summary of the circumstances of the offence and the defendant's criminal record and sometimes other documents. The information supplied must be sufficient at the first hearing to allow the court to take an informed view.

7 Disclosure: Prosecution

7.1 Disclosure

During a criminal investigation the police or other prosecuting authority will often speak to a number of witnesses and take statements from them. They will often look through documents, check CCTV and follow various avenues in their search for evidence. The result, depending on the nature of the case, is that a significant volume of material builds up, some of which will be relevant to proving the case and some of which will not.

It is predominantly from this investigative material that the prosecution decide which material will be:

- Used - ie relied upon at trial; and

- Unused - ie not relied upon at trial.

7.1.1 Used material

Used material is the material the prosecution will rely upon at trial to prove its case against a defendant. Used material consists of the case papers and other material that forms part of the evidence in the case, so it will include such items as:

- Statements from the prosecution witnesses
- The defendant's record of taped interview
- Other documentary exhibits such as plans and diagrams that are relevant to proving the case.

It is from these materials that defendants will know what the cases against them are.

7.1.2 Unused material

Unused material is material that is not being relied upon by the prosecution. Unused material will include items such as:

- Statements from witnesses that the prosecution is not relying upon at trial to prove its case
- Records of previous convictions of prosecution witnesses
- Disciplinary findings against police officers.

7.2 The importance of unused material

Unused material can be extremely important to a defendant in a criminal trial. Often a case will be based on a number of witnesses whose evidence, if believed, is sufficient to convict the defendant of a criminal charge. In the same case there might be other witnesses who throw doubt on this.

If the prosecution, having reviewed all the material available, considers that there is a realistic prospect of conviction and that it is in the public interest to prosecute the case, it would clearly be wrong to only reveal to the defendant the material that supports its case and not the material that does not.

Fairness demands that material in the hands of the prosecution that might help a defendant is served on that defendant.

The defendant may choose to present that material in defence at trial.

It follows that full and proper disclosure is at the heart of a fair system of criminal justice. It is a vital part of the preparation for trial and for this reason rules have developed as to both the duty to disclose unused material and the duty to retain material during a criminal investigation.

R v H and C [2004] UKHL 3; [2004] 2 AC 134; [2004] 2 Cr App R 10

The (then) House of Lords put it this way:

‘Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.’ [2004] 2 AC 134, at 147.

7.3 Main disclosure provisions

The principal provisions relating to unused material can be found in:

- The Criminal Procedure and Investigations Act (CPIA) 1996, Part 1 (ss.1 to 21)
- The Code of Practice on Disclosure, issued under s.23 CPIA (the Disclosure Code of Practice)
- Criminal Procedure Rules (CrimPR) Part 15
- The Attorney General’s Guidelines on Disclosure - for Investigators, Prosecutors and Defence Practitioners (the A-G’s Guidelines)
- The Judicial Protocol on the Disclosure of Unused Material in Criminal Cases (the Judicial Disclosure Protocol)

The disclosure provisions in this section relate to offences in relation to which criminal investigations commenced on or after 1 April 1997.

7.4 The four stages of disclosure

The general scheme of disclosure falls into four stages:

- (a) The investigation stage- the duty to record and retain material during the investigation;
- (b) The initial duty of disclosure on the prosecution;
- (c) Defence disclosure; and
- (d) The continuing duty on the prosecution to keep disclosure under review.

This section will deal with points (a) and (b).

Defence disclosure and the continuing duty on the prosecution to keep disclosure under review are dealt with in separate sections.

7.5 The investigation stage

7.5.1 The duty to retain and record relevant material

Under the Disclosure Code of Practice, during a criminal investigation all material (including information) which may be relevant to the investigation must be recorded in a durable or retrievable form and retained.

Every investigation will have:

- **An officer in charge of the investigation**- who is responsible for directing the investigation and ensuring that proper procedures are in place for recording information and retaining records of information and other material;
- **An investigator**- namely any police officer conducting the investigation; and
- **A disclosure officer**- who is responsible for examining material retained and revealing material to the prosecutor and to the defence at the prosecutor's request.

In routine cases all these functions may be carried out by the same person, although in complex cases the roles will be individually assigned.

- **The investigator**- must follow all reasonable lines of enquiry, whether these point towards or away from the suspect and the investigator must be 'fair and objective'.
- **Disclosure officers**- must inspect, view, listen to or search all relevant material that has been retained by the investigator and must provide a personal declaration that this has been done. Where there is doubt as to whether any material is disclosable, the disclosure officer must seek the advice and assistance of the prosecutor.

All material which may be relevant to a criminal investigation must be retained. This includes, in particular:

- Crime reports
- Records from tapes or telephone messages (such as 999 calls) containing the description of an alleged offender
- Witness statements (and drafts if they differ from the final version)
- Exhibits
- Interview records
- Experts' reports and communications between the police and experts for the purposes of criminal proceedings
- Records of first descriptions of suspects and any material casting doubt on the reliability of a witness.

In addition, the duty to retain relevant material includes information provided by an accused person which indicates an explanation for the offence charged and any material which casts doubt on the reliability of a confession.

The duty to retain material lasts at least until a decision is taken whether to institute proceedings against a suspect for a criminal offence.

Once proceedings are commenced, all material must be retained until the accused is acquitted or convicted, or the prosecutor decides not to continue with the case.

Where the defendant is convicted, the material must be retained at least until the defendant is released from custody (or discharged from hospital) or, in cases which did not result in a custodial sentence or a hospital order, until six months from the date of conviction.

In cases where an appeal against conviction is in progress all material that may be relevant must be retained until the appeal is concluded. Where material comes to light after proceedings have concluded which throws doubt upon the safety of the conviction, the prosecutor must consider disclosure of the material.

7.5.2 Provision of unused material to prosecutor

The Disclosure Code of Practice sets out a procedure for the prosecutor to be notified by the disclosure officer of every item of unused material.

- In Crown Court cases the disclosure officer prepares a schedule known as an MG6C which individually lists the items of unused material.
- In magistrates' court cases where a Not Guilty plea is anticipated the unused material is listed on a streamlined disclosure certificate.

In cases involving sensitive material (ie material the disclosure officer believes would give rise to a real risk of serious prejudice to an important public interest) the sensitive material is listed in a separate schedule or, in exceptional circumstances where its existence is so sensitive that it cannot be listed, it is revealed to the prosecutor separately. This may form the subject of a Public Interest Immunity Application at a later stage.

Disclosure officers must certify that to the best of their knowledge and belief they have complied with their duties under the Disclosure Code of Practice.

This will include ensuring that all relevant unused material is clearly listed and brought to the attention of the prosecutor so that full and proper disclosure can be made in accordance with the test set out in the next section.

It is worth noting that the disclosure officer should exercise judgement and be directed by the prosecutor as to what is likely to be the most relevant and important material for disclosure.

7.6 Prosecution duty of disclosure

7.6.1 The prosecutor's initial duty of disclosure

The initial duty of disclosure is contained in the Criminal Procedure and Investigations Act (CPIA) 1996 s 3:

's 3(1) The prosecutor must:

- (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, or
- (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).'

The duty of disclosure relates to 'prosecution material' – this is defined in s.3(2) as material:

- (a) which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or
- (b) which, in pursuance of [the Disclosure Code of Practice], he has inspected in connection with the case for the prosecution against the accused.'

(See s.3(2) and s.7A(6) CPIA.)

The disclosure test under s.3 CPIA is an objective one. In essence, where there is in existence prosecution material which might help the defence then it should be disclosed.

The A-G's Guidelines add further detail to the disclosure test, namely that in deciding whether or not material should be disclosed under s.3 CPIA, prosecutors should consider, amongst other things:

- (a) The use that might be made of the material in cross-examination;
- (b) Its capacity to support submissions that could lead to:
 - (i) The exclusion of evidence;
 - (ii) A stay of proceedings as an abuse of process, where the material is required to allow a proper application to be made;
 - (iii) A court or tribunal finding that any public authority had acted incompatibly with the accused's rights under the ECHR.
- (c) Its capacity to suggest an explanation or partial explanation of the accused's actions;
- (d) The capacity of the material to have a bearing on scientific or medical evidence in the case (including relating to the defendant's mental or physical health, intellectual capacity, or to any ill treatment which the accused may have suffered in custody).

The A-G's Guidelines go on to state that it should also be borne in mind that while items of material viewed in isolation may not be reasonably considered to be capable of undermining the prosecution case or assisting the accused, several items together can have that effect.

As such, when considering if unused material must be disclosed, prosecutors must take into account all those circumstances in which such material might reasonably be capable of supporting the defence case or undermining the prosecution case.

Material which is supportive of the prosecution case (and which the prosecution chooses not to rely upon) or which is neutral in its effect need not be disclosed as unused material because it does not satisfy the disclosure test.

What is of paramount importance is that the prosecution fulfil its duty of considering all material in light of the disclosure test and acting in accordance with it.

In R [2016] 1 WLR 1872 the Court of Appeal addressed those problems facing the prosecution in long and complex cases where large volumes of material are seized, including electronic data, during the course of the investigation:

- (a) The prosecution are in the driving seat at the initial disclosure stage - the prosecution must adopt a considered and appropriately resourced approach to giving initial disclosure and must explain what it was doing and what it would not be doing at this stage, ideally in the form of a "Disclosure Management Document";
- (b) The prosecution must encourage dialogue with the defence and engage promptly with them - the defence had then to engage with the prosecution and assist the court in fulfilling its duty of furthering the overriding objective;
- (c) The law is prescriptive of the result, not the method of disclosure - at the initial disclosure stage the prosecution should formulate a disclosure strategy, then canvass that strategy with both the court and the defence and should use technology to make an appropriate search or conduct an appropriate sampling exercise of the material seized;
- (d) The disclosure process should be subject to robust case management by the judge - the court was entitled and obliged to give orders and directions to address disclosure failings with which it was confronted;
- (e) Flexibility is critical - disclosure was not a 'box-ticking' exercise and the constant aim was to make progress.

7.6.2 Time limits for initial disclosure

The prosecution will serve initial details of the prosecution case (used material) no later than the beginning of the day of the first hearing in accordance with CrimPR Part 8.

The details must include sufficient information to allow the defendant and the court at this first hearing to take an informed view:

- (a) On plea;
- (b) On venue for trial (for either-way offences);
- (c) For the purposes of case management;

(d) For the purposes of sentencing (including committal for sentence for either-way offences).

Concerning the disclosure of unused material by the prosecution, this statutory duty under the **CPIA** (the initial duty of disclosure) arises:

- In the magistrates' court only when a defendant pleads not guilty and the case is adjourned for summary trial; and
- In the Crown Court when a defendant is sent for trial or where a Voluntary Bill of Indictment has been preferred against a defendant (s.1 CPIA).

However, even when this statutory duty has not arisen, a responsible prosecutor has to be alive to the need for advance disclosure of material which the prosecutor recognises should be disclosed at this early stage in the interests of justice and fairness, such as which might assist the defence with the early preparation of their case or at a bail hearing; this is known as the common law duty of disclosure.

The CPIA section 12 provides for statutory time limits for prosecution initial disclosure to be set by regulation but none has yet been made. The default position under CPIA section 13 is that the prosecutor must act 'as soon as is reasonably practicable' once the initial duty of disclosure arises.

7.7 Summary trial

In practical terms, at the first hearing in the magistrates' court, where a defendant pleads not guilty and the case is adjourned for summary trial:

- If there is any further prosecution evidence still to be served the court will give a date by which this must be done.
- If the prosecution has not complied with its initial disclosure of unused material at this stage, a date will be given for this to be completed.

In any event, prosecutors should serve initial disclosure in sufficient time to ensure that the trial date is effective.

7.8 Crown Court trial

If the case is sent to the Crown Court for trial, a Plea and Trial Preparation Hearing (PTPH) will take place usually 28 days after sending. The prosecution should serve sufficient evidence in advance of or at the PTPH to enable the court to case manage effectively without the need for a further case management hearing, unless the case falls within certain exceptional categories such as murder or cases involving children where a further hearing will be envisaged. At the PTPH, if there is more prosecution evidence still to serve and/or if initial disclosure has not been complied with, dates will be given by when this must be done.

Once the prosecution has complied (or purported to comply) with its initial duty of disclosure, this does not bring to an end the prosecution's duty in this regard because the prosecution is under a continuing duty to review disclosure throughout the criminal proceedings. Following initial disclosure by the prosecution, there is a duty on the defence (mandatory in the Crown Court and optional in the magistrates' court) to provide a defence statement which sets out the accused's defence to the allegation. This defence statement will allow the prosecution to review disclosure in light of what it is told about the nature of the defence.

7.9 Summary

This section considered:

- Used materials (ie relied upon at trial) and unused (ie not relied upon at trial).
- The duty to record and retain material during a criminal investigation:
 - **A disclosure officer**- is responsible for examining material retained and revealing material to the prosecutor and to the defence at the prosecutor's request. In Crown Court cases the disclosure officer prepares an MG6C which individually lists the items of unused material. In magistrates' court cases where a Not Guilty plea is anticipated the unused material is listed on a streamlined disclosure certificate.

- **The duration of the duty to retain material**- varies depending on whether proceedings are commenced, whether the defendant is convicted, what sentence the defendant received or whether an appeal against conviction is in progress.
- **The disclosure test**- under s.3 CPIA is an objective one. In essence, where there is in existence prosecution material which might help the defence then it should be disclosed.
- **Time limit**-
 - The prosecution will serve initial details of the prosecution case (used material) no later than the beginning of the day of the first hearing in accordance with **CrimPR Part 8**.
 - Disclosure of unused material by the prosecution arises in the magistrates' court only when a defendant pleads not guilty and the case is adjourned for summary trial and in the Crown Court when a defendant is sent for trial.

8 Disclosure: Defence

8.1 Defence statement

In the Crown Court, s.5 Criminal Procedure and Investigations Act (CPIA) 1996 imposes a duty on a defendant to serve a defence statement on the Crown Court and the prosecution.

A defence statement is a written statement which sets out the nature of the accused's defence.

It should not be confused with a defendant's proof of evidence to D's own legal advisers which is a privileged document and, thus, not disclosable to the prosecution.

Defence disclosure should also not be confused with prosecution disclosure in that there is no duty on the defence to serve material which might be helpful to the prosecution; rather, the defence statement is all about setting out with reasonable clarity what the defence case is.

8.1.1 Defence statement: Contents

Section 6A CPIA 1996 provides that a defence statement must contain:

'6A Contents of defence statement

(1) For the purposes of this Part a defence statement is a written statement:

- (a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely,
- (b) indicating the matters of fact on which he takes issue with the prosecution,
- (c) setting out, in the case of each such matter, why he takes issue with the prosecution, and
- (d) setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence, and
- (e) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.

(2) A defence statement that discloses an alibi must give particulars of it, including:

- (a) the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given;
- (b) any information in the accused's possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in paragraph (a) are not known to the accused when the statement is given.'

8.1.2 Defence statement: Time limits

Crown Court

A defence statement is compulsory only in the Crown Court and must be served on the prosecution and the court (**CrimPR r.15.4(2)**) within 28 days of the date when the prosecution complies with its duty of initial disclosure (or purports to do so).

This time limit can be extended but only if the application to extend is made within the time limit and only if the court is satisfied that it would not be reasonable to require the defendant to give a defence statement within 28 days.

Magistrates' court

In the magistrates' court a defence statement is not compulsory, but if a defendant chooses to serve a defence statement in such a case standard directions in the magistrates' court provide that the defendant must do so within 10 business days of the prosecution complying (or purporting to comply) with the initial duty of disclosure. It is worth noting here that although there is no obligation to serve a defence statement in the magistrates' court, failure to do so will mean that the defence will be unable to make an application for specific disclosure.

The **Judicial Disclosure Protocol para 17** provides that:

'Service of the defence statement is a most important stage in the disclosure process, and timely service is necessary to facilitate proper consideration of the disclosure issues well in advance of the trial date. Judges expect a defence statement to contain a clear and detailed exposition of the issues of fact and law. Defence statements that merely rehearse the suggestion that the defendant is innocent do not comply with the requirements of the CPIA.'

8.2 Defence statement: Exemplar

IN THE CROWN COURT AT SOUTHWARK

REX

v

DANIEL PARKER

DEFENCE STATEMENT

Nature of the accused's defence, including any particular defences on which he intends to rely:
The defendant, Daniel Parker, is charged with an offence of Causing Grievous Bodily Harm with Intent to Stephen Holmes on the 1st day of June contrary section 18 of the Offences against the Person Act 1861. The defendant denies this allegation. Specifically he denies that he was present on Castle Street, at or around 10.30 am on the 1st of June.

The matters of fact on which he takes issue with the prosecution:

The defendant did not attack Stephen Holmes as described in the statement of Stephen Holmes dated 2nd June or at all. In particular he did not approach the complainant, swear at him or punch him multiple times to his face.

In the case of each such matter, why he takes issue with the prosecution:

The defendant was not present during any attack. Stephen Holmes is mistaken in his identification of Daniel Parker as the person who attacked him.

Particulars of the matters of fact on which he intends to rely for the purposes of his defence:

The defendant was in bed at his mother's address at 14 Queen Street, at this time. He had arrived at that address at approximately 7pm on 31st May and did not leave that address until 4pm on 1st June. The defendant's mother, Ethel Parker (d.o.b. 12/06/1982), will give evidence in support of this alibi.

Any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose:

It is further contended on behalf of the defendant that the purported identification of the defendant should be excluded pursuant to section 78 of the Police and Criminal Evidence Act 1984 (PACE) for the following reasons:

- (a) No initial record of the suspect's description was taken by Police Constable Smith as required by PACE Code D 3.1 and 3.2(a);
- (b) When the initial street identification took place PC Smith had alighted from his vehicle and pointed the defendant out to the complainant as a likely suspect in breach of Code D 3.2(b);
- (c) In all the circumstances admission of the street identification evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
- (d) A skeleton argument has been produced separately in support of this argument which is attached to this Defence Statement.

Signed: Daniel Parker

Daniel Parker

Dated: 14th September

8.3 Defence witnesses

In both the Crown Court and the magistrates' court, the defendant must disclose to the court and the prosecutor a notice indicating:

- If D intends to call any witnesses at trial (other than the defendant being a witness); and
- If so, identifying the witness by name, address and date of birth or any information to locate and identify the witness.

Alibi witnesses should be included in the defence statement and do not need to be repeated in the Notice of Intention to Call Defence Witnesses.

The Notice of Intention to Call Defence Witnesses must be given within 10 business days (magistrates' court standard directions) and 28 days (Crown Court) of the prosecution complying or purporting to comply with initial disclosure.

The notice may be amended to add or remove witnesses.

8.4 Disclosure failure by the defence

A number of consequences may follow, where a defendant in the Crown Court:

- (a) Fails to serve a defence statement
- (b) Fails to do so within the required time limits
- (c) Serves a defence statement which is deficient in its content (such as not adequately setting out the defence relied on at trial or not including an alibi witness called at trial)
- (d) Relies on a defence at trial which is different to that contained in the defence statement.

8.4.1 Consequences: Defence disclosure failure

Under s.11 CPIA the jury may draw such adverse inferences as appear proper against the defendant for such a failure although a defendant cannot be convicted solely or mainly on the basis of such an adverse inference.

In addition, the prosecution or co-defendant may comment on such failure without the leave of the court, other than where it relates to a point of law where leave is required.

Section 6E(2) CPIA provides that a judge can warn the defendant at the PTPH or other pre-trial hearing that failure to comply with the relevant provisions may lead to comment being made or adverse inferences being drawn.

Similarly, the **A-G's Guidelines** state that

'Prosecutors should challenge the lack of, or inadequate, defence statements in writing, copying the document to the court and the defence and seeking directions from the court to require the provision of an adequate statement from the defence.'

(para 33).

Section 11 CPIA contains the only sanctions available to the court for failure by the defence to comply with its duties of disclosure. Accordingly, for example, it is not open to the court to prevent a defendant calling an alibi witness D has failed to include in a defence statement. The appropriate sanction here is comment/adverse inference.

In the magistrates' court, no adverse inference can be drawn against a defendant for failing to serve a defence statement because there is no duty to do so under the CPIA.

However, if the choice is made to serve a defence statement in the magistrates' court, an adverse inference could be drawn for the same reasons as in the Crown Court, such as for serving it out of time or for putting forward a different defence at trial to that contained in the defence statement.

If a defence statement is not served in the magistrates' court or the Crown Court the defendant will not be able to make an application for specific disclosure under s.8 CPIA.

Moreover, failure to serve a defence statement in either the magistrates' court or the Crown Court will mean that the prosecution will not have the opportunity to review disclosure in light of the issues that would otherwise have been set out within them.

8.5 Summary

This section considered defence duties of disclosure in relation to defence statements:

- A defence statement is a written statement which sets out the nature of the accused's defence with reasonable clarity eg the matters of fact on which D takes issue with the prosecution and why, any points of law D wishes to take including authority in support and particulars of any alibi witness (name, address and date of birth).
- A defendant must serve a defence statement in the Crown Court but not in a magistrates' court.
- Consequences of failing to disclose in the Crown Court are:
 - The jury may draw such adverse inferences as appear proper
 - The prosecution or co-defendant may comment on such a failure
- Consequences of failing to disclose in the Crown Court or a magistrates' court are:
 - The defendant will not be able to make an application for specific disclosure
 - The prosecution will not have the opportunity to review disclosure in light of the issues
- Defence witnesses- in the Crown Court and magistrates' court, the defendant must disclose to the court and the prosecutor a notice indicating if D intends to call any witnesses at trial (other than D) and if so, identifying the witness by name, address and date of birth or any information to locate and identify the witness.

Time limits for the defence statement and Notice of Intention to Call Defence Witnesses:

- A defendant must do so within 28 days of the date when the prosecution complies with its duty of initial disclosure (or purports to do so) in the Crown Court; or
- A defendant must do so within 10 business days of the date when the prosecution complies with its duty of initial disclosure (or purports to do so) in a magistrates' court (standard directions).

9 Disclosure: Additional issues

This section considers additional disclosure issues such as:

- The continuing duty of disclosure by the prosecution
- Applications for specific disclosure
- Failure to disclose by the prosecution
- Third party disclosure
- Public interest immunity

9.1 Continuing duty of disclosure by the prosecution

9.1.1 The duty to keep disclosure under review

Service of the defence statement provides the prosecution with a reasonable outline of what the defence to a particular charge is and should prevent the prosecution being ambushed at trial with a surprise defence. The defence statement also allows prosecutors, in conjunction with disclosure officers and investigators, to revisit disclosure in light of any particular matters raised in the accused's defence. It is therefore of assistance to the prosecution in informing them of what the defence is and to the defence in ensuring that disclosure is carried out in an informed way.

The **A-G's Guidelines para 39** advise that:

'Defence Statements are ... intended to help focus the attention of the prosecutor, court and co-defendants on the relevant issues in order to identify exculpatory unused material.'

Section 7A(2) Criminal Procedure and Investigations Act (CPIA) 1996 provides that there is a duty on prosecutors to keep disclosure under review throughout the case and in particular when a defence statement is served.

The **Judicial Disclosure Protocol para 20** puts it like this:

'In order to secure a fair trial, it is vital that the prosecution is mindful of its continuing duty of disclosure. Once the Defence Statement has been received, the Crown must review disclosure in the light of the issues identified in the Defence Statement.'

This continuing duty means the prosecutor must keep under review whether there is any material that should be disclosed, even after it has carried out a review following service of the defence statement.

This also means that material must be disclosed even if it is discovered at a late stage in proceedings (eg even after close of the prosecution case at trial) and this duty lasts until the defendant is convicted, acquitted or the prosecutor decides not to proceed with the case.

The **A-G's Guidelines para 42** provide as follows:

'The prosecution's continuing duty to keep disclosure under review is crucial, and particular attention must be paid to understanding the significance of developments in the case on the unused material and earlier disclosure decisions. Meaningful defence engagement will help the prosecution to keep disclosure under review. The continuing duty of review for prosecutors is less likely to require the disclosure of further material to the defence if the defence have clarified and articulated their case, as required by the CPIA.'

9.2 Applications for specific disclosure

Under s.8 CPIA the defence can make an application to the court where it has reasonable cause to believe that there is prosecution material which should have been disclosed under s.7A(5) CPIA (namely disclosure following service of the Defence Statement) but which has not been disclosed.

This is commonly known as a 'section 8 application' or an 'application for specific disclosure'.

In order to make an application for specific disclosure, the defendant must have served a defence statement (in the magistrates' court or the Crown Court) and the prosecutor must have either provided further disclosure in light of that Defence Statement or notified the defendant there is no further disclosure to be made (s.7A(5) CPIA).

Note that failure to serve a defence statement (even in the magistrates' court where there is no statutory obligation to do so) will mean that an application for specific disclosure cannot be made.

The **Judicial Disclosure Protocol para 26** provides that:

'defence requests for disclosure of particular pieces of unused prosecution material which are not referable to any issue in the case identified in the defence statement should be rejected'.

As such the defence statement must set out the issues clearly as a prerequisite to applying under s.8 for specific disclosure. The procedure is governed by CrimPR r.15.5 - the defendant must serve

the application on the court and the prosecution. The application must describe the material the defendant wants to be disclosed and explain why there is reasonable cause to believe:

- (a) That the prosecutor has the material; and
- (b) That it is material that should be disclosed under the **CPIA**.

The defendant should ask for a hearing if one is required and explain why it is needed. The prosecution has 10 business days to respond in writing to any such application.

It is worth noting that applications of this nature should be seen as a last resort. Discussion and co-operation between the parties outside court is encouraged in order to ensure that the court is asked to make a ruling only when strictly necessary.

9.3 Disclosure failure by the prosecution

Disclosure by the prosecution and the defence is an important matter in any criminal trial and can form a significant part of case management in court, particularly in the Crown Court where a defence statement is mandatory.

Even though there are clear guidelines and rules regarding disclosure of unused material, proper disclosure still relies on trusting the prosecution to do its job properly.

Given the importance of disclosure in criminal cases, where it becomes apparent that the prosecution has failed in its duty to disclose relevant material the consequences can be serious:

- The defence could bring an application to stay the indictment on the ground that to continue the case would be an abuse of process of the court.
- It could result in a conviction being quashed on appeal due to being unsafe.
- It would be likely to result in delay and the imposition of wasted costs for unnecessary hearings or a refusal to extend custody time limits.
- It could also potentially result in the exclusion of evidence in the case due to unfairness.

Prior to making any such formal application the defence should write to the prosecution specifying the material which they seek and make a formal application for specific disclosure. Particularly in large and complex cases, legal representatives are encouraged to cooperate.

9.4 Third-party disclosure

The **Disclosure Code of Practice** and the **A-G's Guidelines** impose a duty on investigators and prosecutors to pursue all reasonable lines of enquiry.

Sometimes it will become clear during an investigation that material which is relevant to the prosecution case may be held by third parties such as local authorities, health and education authorities, or financial institutions.

No duty of disclosure under the **CPIA** rests upon such third parties but, if the material might be considered capable of undermining the prosecution case or of assisting the case for the accused, then prosecutors should take appropriate steps to obtain it.

An approach has been developed to obtain third-party disclosure where it is properly required. The **A-G's Guidelines** and the **Judicial Disclosure Protocol** contain guidance for dealing with material held by third parties.

In cases where it is believed the third party holds relevant information, they should be informed of the investigation and a request should be made for the material in question to be retained in case a request for disclosure is made.

There must be some reason to believe that the third party holds relevant material, so speculative inquiries of third parties are not required.

Where material is requested from a third party but access or disclosure is refused, the prosecution can consider (in the Crown Court) seeking a summons under s.2 Criminal Procedure (Attendance of Witnesses) Act 1965 for production of the material, or (in the magistrates' court) under the similar provisions in s.97 of the Magistrates' Court Act 1980.

9.5 Public interest immunity

Circumstances may arise where the prosecution is under a duty to disclose material to the defence (because it satisfies the disclosure test under s.3 CPIA) but the prosecution does not wish to disclose the material, believing that to do so would give rise to a real risk of serious prejudice to an important public interest.

In such circumstances the prosecution cannot simply hold this sensitive material back and keep quiet. The required course of action under the **CPIA** is to apply to the judge for non-disclosure in the public interest. This is called a Public Interest Immunity (usually abbreviated to 'PII') Application.

The court will consider the material and may withhold disclosure of such material to the minimum extent necessary to protect the public interest, whilst always ensuring that the defendant(s) can have a fair trial.

Sensitive material of this nature must be recorded at the investigation stage in the Sensitive Material schedule in which investigators must state:

- Why the material is sensitive and to what degree
- The consequences of disclosing the material to the defence (including the involvement of third parties in bringing the material to the attention of the prosecution)
- The relevance of the material to the issues in the case
- The implications for continuing the prosecution if the material is ordered to be disclosed
- Whether it is possible to make disclosure without compromising its sensitivity.

9.6 Summary

This section considered additional disclosure issues such as:

- **The continuing duty of disclosure by the prosecution-** it lasts until the defendant is convicted, acquitted or the prosecutor decides not to proceed with the case.
- **Applications for specific disclosure-** defence can make an application to the court where it has reasonable cause to believe that there is prosecution material which should have been disclosed, as long as a defence statement has been served and the prosecution have either provided further disclosure or notice of no further disclosure.
- **Failure to disclose by the prosecution-** can lead to abuse of process applications, quashed convictions, wasted costs orders, refusal to extend custody time limits, exclusion of evidence.
- **Third party disclosure-** if there is material held by third parties that might be considered capable of undermining the prosecution case or of assisting the case for the accused, then prosecutors should take appropriate steps to obtain it. Where material is requested from a third party but access or disclosure is refused, the prosecution can consider seeking a summons for production of the material.
- **Public interest immunity-** the prosecution must make this application if it does not wish to disclose material, believing that to do so would give rise to a real risk of serious prejudice to an important public interest.

10 Pre-trial matters

10.1 What are 'pre-trial matters'?

'Pre-trial matters' are all those matters that can be resolved pre-trial, as the name would suggest. The term covers a wide range of issues including, for example, selecting a trial date, applying for a witness summons or resolving legal arguments.

Pre-trial matters will be considered either:

- At a first hearing;
- At a hearing on a date after the first hearing and before the trial date (for example a PTPH); or
- On the day of trial itself before the trial starts.

10.1.1 Magistrates' court

In simple, summary only cases in the magistrates' court, many if not all pre-trial matters can be resolved at the first hearing. In more complex cases further pre-trial hearings may be required.

10.1.2 Crown Court

In cases to be dealt with at the Crown Court, there will be at least one hearing in the Crown Court, the PTPH, to deal with pre-trial matters. In more complex Crown Court cases further pre-trial hearings may be necessary in order to ensure parties are trial ready.

10.1.3 The Criminal Procedure Rules

The Criminal Procedure Rules have a clear aspiration running through them that the parties and the court resolve all pre-trial matters before the day of trial where possible. The expectation is that on the day of trial parties will be ready to start immediately unless something unexpected has arisen.

10.2 Pre-trial matters in the magistrates' court

Where a trial takes place in the magistrates' court the parties will be expected to deal with case management issues at the first hearing. There is a magistrates' court case management form that the court will expect parties to complete before the first hearing commences.

At the first hearing the court will give directions for:

- Service of documents between the parties (should any be needed)
- Either resolve there and then any matters of law (rarely) or set out a timetable as to when they will be resolved either at a pre-trial hearing or on the morning of trial.

The court will also set a trial date.

If the magistrates' court holds a pre-trial hearing to for example, decide the admissibility of a piece of evidence, that ruling is binding on the magistrates' court that hears the trial (whether composed of the same lay justices/District Judge, or not, unless one party applies for the ruling to be discharged or varied).

In short, you cannot make an application to vary or discharge based on the same arguments and facts. Such an application can only be made if either:

- (a) There has been a material change in circumstances; or
- (b) Something was not brought to the attention of the court when they made the ruling which could justify variation or discharge.

The types of applications that might be made are largely the same in both courts save that in the magistrates' court, the lay justices or District Judge hear the application and then rule on it. This causes difficulties with applications to exclude evidence for example. The lay justices or District Judge hears the potentially prejudicial evidence and, if they agree it should be excluded, somehow have to ignore it when they decide the case at trial. You can try to avoid this by having a differently constituted magistrates' court decide the point in advance, but this rarely happens.

10.3 How is the evidence served on the defence?

Where the magistrates' court sends the case for trial to the Crown Court:

- It must set a date for a **Plea and Trial Preparation Hearing** (PTPH) within 28 days.
- The magistrates' court will complete a 'sending sheet'- a notice specifying the offences for which the defendant is being sent and the Crown Court where the defendant will be tried. This notice should be sent to the defendant and the Crown Court. There is no prescribed form for such a notice.
- **Evidence must be served** within:
 - 50 days (if the defendant is in custody); or
 - 70 days (if the defendant is on bail)of the date on which the defendant has been sent for trial in the Crown Court.
- **Evidence** is uploaded on to the **Crown Court Digital Case System**: ie copies of the documents containing the evidence on which a charge is based.

- **Draft indictment** must be served by the prosecutor on the Crown Court officer not more than 20 business days after serving prosecution evidence.

10.4 Pre-trial matters in the Crown Court

There are no more hearings in the magistrates' court for:

- Indictable only matters; or
- Triable either way matters where:
 - The defendant is sent for trial by the magistrates' court; or
 - The defendant elects Crown Court trial.

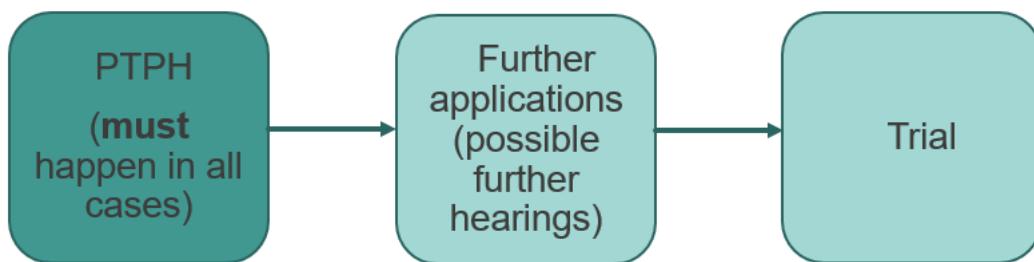


Figure 3.7: Pre-trial matters in the Crown Court

10.5 Plea and trial preparation hearing (PTPH)

The PTPH is the main, and often only, pre-trial Crown Court hearing.

At the first hearing in the magistrates' court when the case is sent 'forthwith' by s.51 Crime and Disorder Act (CDA) 1998, the magistrates' court will make a series of standard directions for the prosecution to serve its case on the defence and for a defendant to serve a defence statement in response. The PTPH is scheduled shortly after this.

Where a trial is anticipated the parties are required to fill in a PTPH form in advance of the hearing as the judge uses it when the hearing is conducted.

The PTPH consists of two parts:

- First 'plea'; and
- Second either 'sentence' or 'trial preparation' stage.

The PTPH form can be found online via the www.justice.gov.uk website.

10.6 Plea stage

If the defence want to make an application to dismiss the charges, they must do so before a plea is taken.

At the plea stage, the indictment is put to the defendant and they enter a plea of guilty or not guilty to each count on the indictment, this is known as arraignment.

- If the defendant pleads guilty to the sole count on the indictment/all of the counts on a multi-count indictment: the case moves to sentence.
- If the defendant pleads not guilty to the sole count on the indictment/all of the counts on a multi-count indictment: the court proceeds to the 'trial preparation' of the hearing.
- Where a defendant enters at least one guilty plea and at least one not guilty plea on an indictment consisting of two or more counts: the prosecution will need to consider how it wishes to proceed, the result being either that the court moves to sentence or if there is to be a trial the 'trial preparation' stage needs to take place.

10.6.1 Unfit to plead?

If the judge has determined that the defendant is unfit to plead (a judge can make that determination after hearing medical evidence), then no plea is taken.

The court will have to hold a trial with a jury to determine whether the defendant committed the act (ie the *actus reus* of the offence, but not *mens rea*) and so the ‘trial preparation’ stage of the hearing will need to take place.

Please note that a defendant who is found unfit to plead and a jury finds they have committed the act can only be made subject to:

- An absolute discharge
- Supervision order; or
- A hospital order.

10.7 Trial preparation stage

Where the court needs to go on to the ‘trial preparation’ stage of the hearing, it will go on to deal with the following matters. These are all subject to a question on the PTPH form that the advocates must complete before the hearing. Directions at PTPH are standardised and the court sets 4 “stage dates” with the parties required to comply with certain standard directions by the staged dates.

- **Trial date.** If a trial date has not already been set, a trial date will be set at the PTPH taking into account the likely estimate of the length of the trial and witness availability.
- **Prosecution evidence.** The prosecution will have to confirm if it has served all of its evidence or, if not, what is still left and when it will be served.
- **Expert evidence.** If the prosecution or defence intend to rely on expert evidence, directions will be given for service and for seeking agreement between experts.
- **Witness requirements.** The defence must inform the prosecution and set out on the form those prosecution witnesses they require to attend court to give evidence, as well as estimating how long it will take to question each witness. The defence must also give details of any defence witnesses it intends to call.

Standardised directions will apply for dealing with matters such as:

- **Special measures.** Directions will apply for any special measures (such as live link and screens) sought by witnesses.
- **Bad character.** Directions will apply for any bad character applications by the prosecution and defence and timetables set for the service of bad character applications and responses.
- **Witness summons.** If a witness summons is required, details must be given and the application can be made at the PTPH or a timetable given for making the application.
- **Agreed facts and issues.** The defence must set out what factual matters are agreed so that they can be drafted as admissions for use at trial.
- **Disputed facts and issues.** The defence must set out those matters where there is a dispute with the prosecution case so that the issues for the trial are clear.
- **Defence statement.** The defence must serve a defence statement at stage 2 which sets out the defence case.
- **Disclosure.** If there are issues relating to advance disclosure of unused material, this can be dealt with or the standard directions will deal with this.
- **Defendant’s interview.** A timetable will apply for the prosecution and defence to agree an edited interview record for use at trial.
- **Hearsay.** Directions will apply on the service of applications to rely on hearsay evidence.
- **Admissibility and legal issues.** All issues relating to the admissibility of evidence and other legal issues should be notified. Directions will be given or apply on when these applications will be made (eg at or before trial) and on the service of any documents in support, such as skeleton arguments.

At the end of the hearing the parties should know the trial date, the timetable for any further preparatory work to be completed and whether the case needs to be listed in court again before trial (although this may only become apparent at some later stage). Where a party fails to comply with any directions, they may be required to come to court and explain their failure to do so. The expectation is that no further hearings will be required, either because there are no further issues to resolve before trial or because they can be dealt with on the day the trial is listed.

10.8 Further applications

Some cases require no further hearings post PTPH. That's either because there is nothing to determine or because the PTPH judge decided that the trial judge could deal with any outstanding matters on the day of trial, usually before the trial begins.

What follows is an examination of some of these further applications. As you read them, please bear in mind that they could be made:

- In either the magistrates' court or Crown Court;
- At the PTPH, or another pre-trial hearing (with the exception of a change of plea); or
- On the day of trial, before the trial starts or at some convenient point during the trial.

10.9 Applications to exclude evidence or introduce otherwise inadmissible evidence

The defence may wish to exclude evidence that the prosecution proposes to adduce using s.78 of the **Police and Criminal Evidence (PACE) Act 1984**; either party may want to introduce otherwise inadmissible evidence such as bad character or hearsay (which are covered in separate sections).

This can be dealt with at:

- The PTPH (rare as the judge would not usually have time)
- At a hearing on a day at some point between PTPH and trial (less common); or
- On the day of trial before the trial starts (most common).

10.10 Special measures

Special measures are the arrangements put in place to assist witnesses in giving evidence before a court. The purpose behind them is to allow children, the vulnerable and those in fear or distress about testifying, to testify in an environment that best enables them to give their evidence. The court must consider which measures will maximise the quality of the evidence.

A screen, for example, is not a slight on the defendant or a presumption of their guilt (and a jury must be told this if one is used) but a measure to enable the witness to give their best evidence.

10.10.1 Special measures: Types

In order to assist witnesses to give evidence in the criminal courts a number of 'special measures' are available. **The Youth Justice and Criminal Evidence Act (YJCEA) 1999** sets out the range of special measures available. These are as follows:

- The use of screens (the witness will be screened from the defendant and the public gallery) (s.23 YJCEA)
- Live TV link (where the witness sits in a room away from the courtroom) (s.24)
- Giving evidence in private (public gallery cleared) (s.25)
- Removing wigs and gowns by barristers and judges (s.26)
- Video recording of evidence in chief (s.27)
- Pre-recording cross-examination and re-examination (s.28 – partially in force)
- Questioning of a witness through an intermediary (s.29)
- Aids to communication (s.30)

Please note that testifying through an intermediary and aids to communication are not available for witnesses who are eligible for special measures due to being in fear but the other special measures will be available for such witnesses.

10.10.2 Special measures: Eligibility

Eligibility for special measures is dealt with by s.16 to s.18 of the **YJCEA**. The following categories of witness are eligible for special measures:

- All witnesses aged under 18 at the time of trial (or video recording) are automatically eligible (s.16 YJCEA).

- Witnesses who have a mental disorder, or a significant impairment of intelligence and social functioning, or a physical disability/disorder are eligible where the court considers that due to any such matter the quality of their evidence is likely to be diminished (s.16 YJCEA).
- Witnesses who are in fear or distress about giving evidence and the court is satisfied that the quality of their evidence will be diminished because of this (s.17 YJCEA).
- All adult complainants of sexual offences (s.17 YJCEA).
- All adult complainants in certain offences under the **Modern Slavery Act 2015** (including forced labour and human trafficking).
- All witnesses in a case involving a ‘relevant offence’, namely serious offences, including offences of homicide or involving firearms or knives (s.17 and Sch 1A YJCEA).

10.10.3 Special measures: Additional types

In addition to the special measures available to witnesses mentioned already, other measures exist or can be put in place to protect witnesses. These include:

- Witness Anonymity Orders (**Coroners and Justice Act 2009 Part 3 Chapter 2**)
- Automatic anonymity of complainants in sex cases (**Sexual Offences (Amendment) Act 1992**)
- Prohibition of cross-examination by defendants in person of complainants in sex cases and of child witnesses in certain cases involving violent and sexual offences (YJCEA ss.34 to 38)
- Restricting the reporting of witnesses’ identity (YJCEA s.46)

10.11 Vulnerable defendants

In certain circumstances the defence can apply for measures to assist particularly vulnerable defendants in order to facilitate their effective participation in the trial process.

An application can be made for the defendant to give their evidence via a ‘live link’.

The court must be satisfied that it would be in the interests of justice and the ‘live link’ would improve the quality of accused’s evidence because either:

- The accused is **under 18** and the accused’s ability to participate effectively as a witness giving oral evidence is compromised by their ‘level of intellectual ability or social functioning’ (s.33A(4) YJCEA 1999), or
- The accused is **18 or over** and the accused is unable to participate effectively as a witness giving oral evidence because the accused has a mental disorder or a ‘significant impairment of intelligence and social function’ (s.33A(5) YJCEA 1999).

The court also has the power to direct that a vulnerable defendant be assisted by an intermediary to help the defendant understand what is going on. But only those defendant’s most in need, such as those with comprehension or communication difficulties, will be entitled to one.

The role of an intermediary is to assist communication of evidence. They are independent and owe their duty to the court. An intermediary might be used to assist a disabled defendant with communication difficulties, for example.

Intermediaries can also be used to assist witnesses, such as very young witnesses or those with learning difficulties, for example. Before questioning of the witness begins, the intermediary can assist the judge and counsel to understand what types of questions are likely to confuse so that the advocates can carefully prepare their questioning. When the witness or defendant is being questioned by counsel, the intermediary will usually stand near to the witness and can help by explaining the questions and answers. In practice, advocates will usually question the witness directly and the intermediary will only step in if there is some kind of miscommunication.

10.12 Witness summons and warrants

In the majority of cases, the police are responsible for securing the attendance of prosecution witnesses and defence solicitors are responsible for ensuring that defence witnesses attend court when required to do so.

However some witnesses are not keen to be witnesses and try to avoid attending court. They may be giving evidence against a notorious and dangerous criminal, or a friend or relative of theirs, or

they might hold information that they think should be confidential. In those cases, either the prosecution or defence can ask the court to issue a witness summons.

The summons can either be for the person to attend on the day of trial to give live evidence, or for the witness to produce a document. Both the Crown Court and magistrates' court has the power to issue a witness summons.

The test for the party seeking the summons is that:

- The witness is likely to be able to give evidence that is likely to be material evidence (or to produce a material document); and
- It is in the interests of justice to issue a summons.

If a witness disobeys a witness summons and does not attend without a 'just excuse' then the courts can issue a warrant for the arrest of the witness. Failure to act as required to do so by the summons can be punishable as a contempt of court.

10.13 Applications to change plea

We will consider two situations here:

- From not guilty to guilty; and
- From guilty to not guilty.

10.13.1 From not guilty to guilty

Defendants can change their mind and choose to change their plea from not guilty to guilty.

A defendant who has pleaded not guilty can, at any time before the jury return their verdict, ask through their Counsel that the 'indictment be put again' (or charge sheet in the magistrates' court). The clerk will read the indictment and the defendant can plead guilty. This usually happens before trial but from time to time a defendant might decide midway through a trial that they want to end the process by pleading guilty. It is rare, but it can and does (occasionally) happen. Usually though, defendants change their minds on the day of trial either for tactical reasons or because they were hoping that prosecution witnesses would not attend to give evidence, but realise they now have. Strictly speaking, you need the leave of the judge/magistrates to have the indictment/charge sheet put again, but asking that it be put again is sufficient. If the trial is taking place in the Crown Court and the jury have already been put in charge of the case, they should be directed to return a formal verdict of guilty.

10.13.2 From guilty to not guilty

This is significantly more difficult! Defendants who plead guilty can, at any time before they are sentenced, apply to the court for leave to change their plea from guilty to not guilty, but judges should exercise their discretion judicially and sparingly, although even where the plea was unequivocal the discretion to allow it to be changed still exists.

Where a defendant has been represented properly a court would invariably reject the application to vacate their guilty plea and allow them to enter a fresh not guilty plea.

Represented properly means:

- Proper advice has been given to the defendant;
- No undue pressure has been exerted on the defendant; and
- The defendant's plea was clearly unequivocal.

An application of this nature will frequently feature a defendant waiving privilege to establish matters such as the nature of the advice they acted upon.

In practice, then, although it is always a matter for the court, the two most common scenarios in which the rarely exercised discretion will properly be applied are where either:

- The defence can show that the prosecution has no evidence of an essential ingredient of the offence; or
- The defendant was improperly placed under undue pressure to plead guilty or was materially misadvised by D's legal team.

Both of those scenarios are likely to result in criticism of Counsel who appeared when the defendant pleaded guilty and perhaps the solicitor too. It is therefore usual practice that Counsel

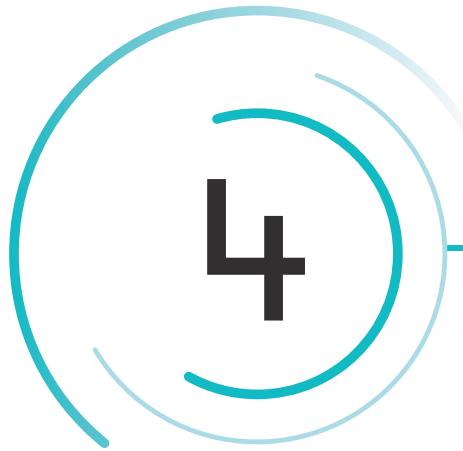
or both Counsel and the solicitor withdraw from the case and the defendant seeks fresh representation. Where that happens, defendants may want to give evidence of their conference with Counsel or seek that Counsel explain how and why they advised the defendant to plead guilty. Both require the defendant to waive legal privilege.

10.14 Summary

This section considered pre-trial matters:

- Pre-trial matters will be considered either (i) at a first hearing; (ii) at a hearing on a date after the first hearing and before the trial date (for example a PTPH); or (iii) on the day of trial itself, before the trial starts:
 - **Magistrates' court**- in simple cases, many if not all pre-trial matters can be resolved at the first hearing.
 - **Crown Court**- there will be at least one hearing, the PTPH, to deal with pre-trial matters. In complex cases, the Crown Court will hold a preliminary hearing soon after the first hearing to ensure the PTPH is effective.
- The PTPH has two stages: (i) 'plea'; and (ii) either 'sentence' or 'trial preparation':
 - At plea stage, the indictment is put to the defendant and they enter a plea of guilty or not guilty to each count on the indictment, this is known as arraignment.
 - At the end of the trial preparation stage, the parties should know the trial date, the timetable for any further preparatory work to be completed and whether the case needs to be listed in court again before trial.
- Further applications and hearings that may occur after the Preparation Hearing in the Crown Court, in particular:
 - **Evidence applications**- the defence may wish to exclude evidence that the prosecution proposes to adduce using s.78 PACE or either party may want to introduce otherwise inadmissible evidence such as bad character or hearsay.
 - **Special measures**- to assist witnesses in giving evidence before a court.
 - **Measures to assist vulnerable defendants**- to facilitate their effective participation in the trial process such as giving evidence via live link or intermediary assistance.
 - **Witness summons and warrants**- either party can ask the court to require a witness to attend on the day of trial to give live evidence or produce a document.
 - **Changes of plea**- To guilty- can take place at any time before the jury return their verdict. To not guilty- can take place at any time before the defendant is sentenced. D must apply to the court for leave to change their plea from guilty to not guilty, but judges should exercise their discretion judicially and sparingly.

These applications could be made: (i) in either the magistrates' court or Crown Court; (ii) at the PTPH, or another pre-trial hearing (with the exception of a change of plea); or (iii) on the day of trial, before the trial starts or at some convenient point during the trial.



Evidence

1 Basic principles

1.1 Preliminary evidential matters

In talking about evidence, it is helpful to agree on some commonly used language, and some fundamental themes. This section will consider:

- facts in issue;
- proving a fact by means other than calling live evidence;
- types of evidence;
- admissibility, relevance and weight of evidence;
- tribunals of fact and law.

1.2 Facts in issue

Let's start with asking what it is that evidence is called for. That is not a difficult concept; you call evidence to prove your case.

We will look in a moment at what burdens there may be on either side to prove a case, but what we can agree on right away is that evidence is called by any party in order to prove the 'facts in issue'.

The facts in issue are the facts that any party needs to prove in order to prove its case.

For the prosecution then, the facts in issue are those facts that are needed to prove the offence(s) charged. The obvious place to start here is to simply list the ingredients of the offence. So, for a theft, the prosecution has to prove that the defendant appropriated property, belonging to another, dishonestly, with an intention of permanently depriving another of it.

The job of the court is then to try to narrow the issues as much as possible, by seeing what elements, if any, the defence agree upon. They still require proof, but you would be able to prove these elements by means other than calling live evidence (see the next pages).

1.3 Proving a fact

There are several ways in which evidence can be established other than by a witness giving live evidence which we will consider in more depth:

- agreeing a witness statement as true by consent of the parties, **Criminal Justice Act 1967, s.9**;
- agreeing any fact between the parties, **Criminal Justice Act 1967, s.10**; and
- a judge or a jury to take 'judicial notice' of the fact.

1.3.1 Agreeing a witness statement as true by consent of the parties

s.9 Criminal Justice Act 1967

The witness's statement can be agreed as accurate and true in its written form.

The statement is then simply read out, and carries the same weight as if the witness had attended in person, sworn (or affirmed), and given the evidence from the witness box.

Evidence will only be agreed in this way if there is no challenge to the evidence. If the evidence is disputed, then the witness must be called and challenged orally, so that the court can see and assess the dispute being aired openly and decide upon the dispute accordingly.

1.3.2 Agreeing any fact between the parties

Criminal Justice Act 1967, s.10

Another way to prove a fact is simply for the advocates in a case to agree that the fact is so. The fact is reduced to writing, and both parties (the lawyers, not the witnesses) agree and sign the agreement.

So, for example, if a defendant is found with someone else's credit card, the prosecution would need to prove that the owner of the card had not given anyone authority to take and use the card. One could either acquire a witness statement from the original owner of the card or, more simply, just agree that the defendant was not the owner of the card and did not have permission to have it. We assume in this scenario that the defendant is challenging guilt on some other basis and is not challenging that the card was someone else's.

1.3.3 Judicial notice

The next way in which a fact may be 'proven' without evidence is for a judge or a jury to take 'judicial notice' of the fact. It is clearly the case that we all know some things without needing to have them proven to us. We know if we are in a recession, or if the economy is doing well. We know that traffic in city centres at rush hour is pretty much universally awful. It would be remarkably tedious for the parties in trial to have to prove every last fact which might help the jury understand a case when much of the factual context for a case is simply 'known'. Where facts are generally and widely known, then formal proof of them is therefore not required.

The doctrine of 'notice' goes a touch further, in that a judge is permitted to take judicial notice of a fact 'on enquiry'. This simply means that judges might not know a particular fact 'off the top of their head' but could find out very easily, from a source that would be incontrovertible. So, for example, which counties border Staffordshire? If this was relevant to the case, the parties would have the option of asking the judge to take judicial notice 'on enquiry' and simply let the judge look up the answer. Jurors are **not** allowed to do their own research at any time.

The final point on taking notice is that the jurors cannot take notice on **personal** matters that they happen to know, but are not generally known. If a juror has personal knowledge of matters that are relevant to a case, they should let the court know, and the judge can deal with any issues that might arise.

1.4 Types of evidence

Evidence can come in a variety of forms:

- (a) oral evidence given by a witness in court – the most common
 - (b) written form:
 - (i) agreed statements (**s. 9 CJA 1967**);
 - (ii) admitted facts (**s. 10 CJA 1967**)
 - (c) 'real' evidence
 - (d) 'direct' evidence
 - (e) 'circumstantial' evidence
 - (f) a 'view'.
- **Real evidence** – simply means objects and things which are brought to court for inspection. Some real evidence will be in the form of documents that are exhibited by a witness who can vouch for their origin.
 - **Direct evidence v circumstantial evidence** – the other way in which it is important to classify evidence is according to whether it is 'direct evidence', namely evidence that a witness gives of having had direct experience of a matter in issue, or circumstantial evidence, ie evidence from which facts are inferred. An example of the difference might be (in a case where it is in issue where the defendant was at midnight) witness 1 saw the defendant at the station at midnight

(direct oral evidence) and a train ticket found in the defendant's pocket showing a train ticket for a train arriving just before midnight at the station (circumstantial real evidence).

- **A view** – occasionally juries can visit a scene of a crime, or leave court to view an object that cannot be brought into court. This is called a 'view'. Their observations become evidence in the case.

1.5 Admissibility, relevance and weight of evidence

For any evidence to be admissible, it must be relevant. This is the first and most fundamental principle of evidence.

Relevance is established by whether the evidence is 'logically probative' of a fact in issue – ie does the evidence tend to prove or disprove a fact in issue.

If evidence is **irrelevant**, it is **inadmissible**, and if the evidence is **relevant**, it is **admissible**.

R v Usayi [2017] EWCA Crim 1394

In the case of *R v Usayi* a trial took place where the defendant was charged with a sexual assault.

The defence had, in its possession, a note that tended to suggest that the complainant had earlier incorrectly indicated that her mother had died. The defence argued that this showed her to be dishonest.

In the trial, there had been an argument about the admissibility of this evidence (on the basis of 'hearsay' – that a statement made out of court may not be presented in evidence as proof of its contents).

The Court of Appeal indicated that the evidence was insufficiently relevant regardless of the hearsay arguments, and should not have been admitted as it had insufficient bearing on the issues at hand.

1.5.1 Exclusionary rules

That is, of course, not the end of the matter in terms of admissibility. Having first considered relevance, you then consider whether the relevant evidence is nonetheless subject to an exclusionary rule. There are rules to protect the fairness of trials to prevent evidence which is relevant, but should still not be admitted because of the effect on the fairness of a trial.

For example, if the police acquired relevant information by using an illegal phone tap, then the courts would consider an exclusionary rule to prevent the use of the evidence in court.

1.5.2 Weight

The final concept is that of 'weight'. All evidence varies in terms of how strong, reliable and valuable it is.

Attaching the right degree of weight to a piece of evidence is a matter for the jury. Advocates will typically devote considerable effort into persuading the jurors as to what weight they should attach to the evidence.

However, if the evidence looks to be very problematic (eg a drunken man catching only a fleeting glimpse of a person committing a crime) then the judge may intervene to rule the evidence as inadmissible. This would be on the basis that although it may be relevant, no one could reasonably put any reliance on the evidence. So in extreme examples of poor-quality evidence, the weight of the evidence may affect its admissibility.

1.6 Tribunals of fact and law

We use the word 'tribunals' when asking these questions:

- Who in this case determines what the facts are; and
- Who in this case determines the law?

The answer to question one is that the 'tribunal of fact' is responsible for determining the facts. In the Magistrates' Court, the tribunal of fact is the bench of magistrates (or District Judge). In the Crown Court, the tribunal of fact is the jury.

The second question is answered in similar terms, namely that the tribunal of law is responsible for the law, and in the Magistrates' Court, the tribunal of law comprises the magistrates (or District

Judge) and in the Crown Court, the tribunal of law is the judge. Issues of admissibility of evidence are matters of law for the tribunal of law to determine.



Example: Tribunals of fact and law

It is rarely necessary to use these terms in everyday practice, but sometimes questions do arise as to whether a question is one for the tribunal of fact, or the tribunal of law.

A good example is the tricky question of who has what role when the defence put forward an outrageous argument, for example, on self-defence. To run the defence of self-defence, the force a defendant uses must be reasonable and proportionate. That's the law. If a young child threatened the defendant with a toy sword and, when the young child turned away from the defendant, the defendant nonetheless shot the young child 'in self-defence', the question is which tribunal is engaged? Is it for the jury to determine on the facts that self-defence is not made out, or is it for the judge to determine that these facts cannot, in law, amount to self-defence? When dealing with issues such as this, it is helpful to talk about the tribunal of fact and the tribunal of law, and to describe how these two interact.

In this example the Judge would direct the jury that the defence of self defence could not apply in law on the facts and the jury would be bound to conclude that the defendant was not acting in self defence. Crucially, a Judge cannot "strike out" a criminal defence, the ultimate question of whether the defence was made out would remain with the tribunal of fact, the jury.

1.7 Crown Court

The other critical point to note is that the tribunals are different in the Crown Court (i.e. judge and jury take one role each) but in the magistrates' court, it is the same person (or people) playing both roles. This has huge practical implications. As an example, a defendant might confess in a criminal case, but then challenge the admissibility of the confession, perhaps saying that officers used force to extract the confession. In the Crown Court, the judge alone will hear the application to exclude as inadmissible the evidence of the confession. If the application is successful, the jury (as tribunal of fact) will never be told that there had been a confession. In the magistrates' court, it is the same bench that hears the application to exclude the confession that will ultimately consider guilt. Having ruled the confession as inadmissible, the magistrates must then 'put out of their mind' the confession and not let their knowledge of the confession influence their consideration of the facts of the case. It is like the dramas we all see from the U.S. where attorneys use foul play or some trick in the courtroom and the judge says 'strike that from the record' and the jurors have to pretend that they never heard the improperly adduced evidence.

The fact that in the magistrates' court, the tribunals and fact and law are the same is regularly a strong reason for defendants to prefer trial in the Crown Court.

1.8 Summary

This section considered some of the basic principles of evidence.

- **Facts in issue** – the elements that any party needs to prove in order to prove its case.
- **Proving a fact** – by means other than calling live evidence:
 - agreeing a witness statement as true by consent of the parties, **Criminal Justice Act 1967, s.9**;
 - agreeing any fact between the parties, **Criminal Justice Act 1967, s.10**; and
 - a judge or a jury to take 'judicial notice' of the fact.
- **Types of evidence** – oral evidence, written evidence (agreed statements and admitted facts from **s.9** and **s.10 CJA 1967**), real evidence (such as objects), direct evidence, circumstantial evidence and a view (an observation).
- Evidence will be admissible if:
 - **relevant** – 'logically probative' of a fact in issue – ie does the evidence tend to prove or disprove a fact in issue;
 - not subject to an **exclusionary rule** of evidence; and

- not so poor-quality evidence, that no one could reasonably put any reliance (**weight**).
- **Tribunals of facts** – determine what the facts of the case are. **Tribunals of law** – determine the law, such as issues of admissibility of evidence.

2 Legal and evidential burden

2.1 Burden and standard of proof

If you have been to any criminal court, or seen any legal drama, you will doubtless have heard words along the lines of:

members of the jury, the prosecution brings this case, and it is the prosecution that has to prove it. The standard to which the prosecution has to prove the case is ‘so that you are sure of guilt’

This is a simple statement of the burden and standard of proof.

- The burden of proving the elements of the offence is always on the prosecution.
- The standard to which prosecution proof is put is always “so that you are sure of guilt” which is simply a modern way of saying ‘beyond reasonable doubt’.

2.2 Legal burden

You may also have heard a judge or advocate say ‘the defendant has nothing to prove in this case’. This will be true in most cases – but not all. In some cases, the defendant has the burden to prove something too.

So far, the burden to prove an element of your case that we’ve been referring to is the **legal burden**.

A legal burden is simply the requirement to prove an element of your case to a prescribed standard. The standard varies between prosecution and defence.

An example where the defendant has the burden to prove something would be one of the defences, such as insanity. It is not proper or reasonable for the prosecution to prove every single defendant in the world is sane. It is up to individual defendants to indicate (through their advocates) that they are asserting a lack of mens rea by virtue of insanity. That assertion needs to be made by the defence, and proved by the defence. The standard for anything that the defence has to prove is the balance of probabilities.

2.3 Evidential burden

All that we now have to do is to explain the ‘evidential burden’ without losing sight of how simple an idea the legal burden is.

In the previous examples you will have noted that it’s a question of **fact** for the tribunal of fact as to whether the legal burden of proof has been discharged. In the Crown Court, it’s the jury that’s being addressed when there are discussions about the prosecution proving its case beyond reasonable doubt.

However, **before** any issue is put before the jury, the judge has to be happy that the jury has heard **some** evidence on which it **could** find that the issue has been proved. There is a function here for the **judge** (as tribunal of law) to ensure that some evidence has been raised on an issue or fact, before the jury (as tribunal of fact) can find if the fact or issue is proved. The burden to raise some evidence to satisfy the judge that the matter should be argued before the jury is the **evidential burden**.

2.4 Burden on the defence

It is very important to understand that if the defence simply challenges the prosecution case and asserts that the prosecution is wrong, this does not create any burden on the defence.

The defence can call evidence and make positive assertions such as ‘it was not me’, ‘you are lying’ and ‘your view was not good’, and none of these mean that a burden has passed to the defence. It is simply that the defence is engaging and contesting issues that the prosecution has to prove.

There are relatively few examples of where the law puts a burden on the defence, and it is reserved for cases where an active defence is being run, such as automatism, insanity and diminished responsibility.

2.4.1 Legal and evidential burden

In every case, if you have a legal burden to prove a fact in issue, you have the evidential burden of 'passing the judge' with the same evidence.

However, in very rare cases, the legal burden and the evidential burden become detached. The only example that surfaces with any regularity at all is 'self-defence'. This is a very special and rare breed, where the judge requires some evidence to be raised in order to put the issue before the jury, but where there is no actual standard of proof required. In the case of assaults generally, it is presumed that any use of force is unlawful. It is, however, possible that the defendant used force in self-defence lawfully. The courts simply require that the defence raise 'some' evidence to 'pass the judge' that the defendant did act in self-defence. If the judge is content, then the prosecution is on notice that to prove that the use of force was lawful, it has to disprove self-defence. The burden was always upon the prosecution to prove that the force was unlawful, so in a way nothing has changed, except that we now know that proving that the force was unlawful requires proof that the force was not in self-defence.

The evidential burden on the defence here has simply meant that the defence can't make a speech to the jury calling on the jury to acquit on the basis of self-defence without actually having raised some evidence of self-defence earlier in the trial. To that extent, the rule simply gives force to common sense that the defence can't raise a matter like this without at least some evidence of it.

2.5 Examples of legal and evidential burden

Below are some examples of the legal and evidential burden. The tables show the facts in issue, and how the burden works on those facts in issue.



Example: Theft

The first is a theft case, where there is no dispute that the defendant took some items from a store. The defence is that the defendant took the items off the shelf intending to pay for them. D could not carry a basket because D's hands were full pushing a baby buggy. D therefore put the items up D's jumper. D says that he got distracted on the phone and left the store forgetting that the items were still there. A store detective witnessed a man acting very furtively and taking items in a suspicious manner. The defendant disputes that this was him, and suggests that there was someone else shoplifting at the time.

Below is a simple table showing the flow of evidence from left to right. If you start by reading the left-hand column from top to bottom, you are simply reading the 'facts in issue' on a theft. As you read from left to right, you will see in the second column where the defence has conceded the fact in issue (meaning that it's no longer in issue) and the evidential burden to adduce evidence is thereby lifted. Where the fact in issue has not been agreed, the prosecution has called evidence.

You can see in the next column that the judge has checked that the evidence is sufficient to raise a case on that fact and so gives approval to the prosecution to continue with the case. When the evidential burden is satisfied, the judge is approving the sufficiency of the evidence, to make it viable to argue that the fact is proved before a jury.

The penultimate column then has an example of the jury being asked to consider if the legal burden has been discharged. Reference is made to the familiar standard of proof on the prosecution.

The final column looks at how the defence is contesting the evidence (or not) and shows if the defence, in asserting its case, acquires a burden. In this example, the defence has no burden, so the legal and evidential burdens exist for the prosecution alone, and the judge is not called upon to check the sufficiency of the defence evidence.

P's legal burden to prove that	P calls evidence or evidence agreed	Passes the judge (ie evidential burden)?	Jury told ...	Elements that fall on defence to prove?
The defendant	Store detective called; picked out D on a video ID	Yes, evidence raised	'P to prove beyond reasonable doubt that it was the defendant'	D can challenge ID without incurring a burden
On 25 Jan	Date agreed between parties	Yes, by agreement	'Date agreed between parties'	N/A
Dishonestly	Evidence called that thief put goods up his jumper	Yes, evidence raised	'P to prove beyond reasonable doubt that the act was dishonest'	D can make P prove dishonesty – no burden to prove honesty
Appropriated	Appropriation agreed	Yes, by agreement	'Appropriation agreed'	N/A
Property belonging to another	Agreed between parties that store owned the goods	Yes, by agreement	'Agreed between parties that store owned the goods'	N/A
Intention to permanently deprive	Evidence called that the 'thief' left the store	Yes, evidence raised	'P has to prove, by inference, that D so intended, beyond reasonable ...'	D can challenge that P has proven this, no burden attaches



Example: Burglary

The next example shows the prosecution failing to discharge the evidential burden. This is a bad oversight and very rare in practice!

The charge is burglary, and the prosecution has omitted to call any evidence to show that the defendant was a trespasser. There are lots of variations of burglary, but let's say here that the charge is that whilst on the property D caused criminal damage.

The judge therefore can and must intervene when the evidential burden is not discharged, as it is not possible for the legal burden to be discharged without evidence.

The submission that the defence can make is that there is 'no case to answer' and this application is a matter of law for the judge.

P's legal burden to prove that ...	P calls evidence or evidence agreed	Passes the judge?	D's legal burden to prove?	Jury told ...
The defendant	ID agreed	Yes, by agreement	N/A	ID agreed
On 25 Jan	Date agreed	Yes, by	N/A	Date agreed

P's legal burden to prove that ...	P calls evidence or evidence agreed	Passes the judge?	D's legal burden to prove?	Jury told ...
		agreement		
Entered 23 Laburnum Avenue	Address agreed	Yes, by agreement	N/A	Address agreed
As a trespasser	P neglects to adduce evidence that D not permitted entry	No, no evidence	D would have argued that D had consent to enter, but won't be called upon to do so	Issue withdrawn from the jury as a matter of law. Case will be dismissed
Therein did unlawful damage	P calls evidence of damage done	Yes, evidence raised	D would have argued that someone else must have done it (no burden acquired)	Case won't reach jury (see above); would otherwise have been told that it was for P to prove that D did the damage



Example: Murder

The next example is where there **is** a defence burden.

The case is one of murder, and the act that caused the murder not disputed.

The defence argue that the defendant had been brainwashed and was acting as an automaton under hypnosis. The legal burden to prove the defence has an evidential burden too, to show some evidence.

Both parties therefore have both a legal and an evidential burden, and the jury is advised accordingly.

P's legal burden to prove that...	P's evidence	Passes the judge?	D's legal burden to prove...	D's evidence	Passes the judge?	Jury told ...
The defendant	Agreed	Yes	N/A	N/A	N/A	Agreed between the parties
On 25 Jan	Agreed	Yes	N/A	N/A	N/A	Agreed between the parties
Unlawfully killed	Agreed	Yes	N/A	N/A	N/A	Agreed between the parties
The victim	Agreed	Yes	N/A	N/A	N/A	Agreed between the parties

P's legal burden to prove that...	P's evidence	Passes the judge?	D's legal burden to prove...	D's evidence	Passes the judge?	Jury told ...
With malice aforethought	Eyewitness account of D saying 'take this, I hate you'	Yes, evidence raised	Automatism	D explains D was kidnapped and brainwashed and hypnotised	Yes, evidence raised	'P must show that there was malice ... and you must be sure of that beyond reasonable doubt. The defence asserts that D was brainwashed, you should only accept that if you think it more likely than not to be true ...'
Under the king's peace	Agreed	Yes	N/A	N/A	N/A	Agreed between the parties



Example: Self-defence

We look finally at the last variant, which is where the defence has an evidential burden only.

Here, the defence must 'raise' self-defence, and raise it well enough to 'pass the judge' which puts the issue into play and causes the prosecution to have to disprove it as part of proving its case that the application of force was unlawful.

P's legal burden to prove that	P's evidence	Passes the judge?	D's legal burden to prove...	D's evidence	Passes the judge?	Jury told ...
The defendant	Agreed	Yes	N/A	N/A	N/A	Agreed between the parties
On 25 Jan	Agreed	Yes	N/A	N/A	N/A	Agreed between the parties
Intentionally	Agreed	Yes	N/A	N/A	N/A	Agreed between the parties
Used	The victim	Yes,	Self-	But D must	Yes,	'Because

P's legal burden to prove that	P's evidence	Passes the judge?	D's legal burden to prove...	D's evidence	Passes the judge?	Jury told ...
unlawful violence	gives evidence of D's attack	evidence raised	defence does not create a legal burden	call some evidence before raising 'self-defence' with the jury. D says the victim attacked first	evidence raised	the defence has raised 'self-defence' you have to be sure beyond reasonable doubt that the force used by D was unlawful and not in self-defence"
Against the victim	Agreed	Yes	N/A	N/A	N/A	Agreed between the parties

2.6 Duress and alibi

- The prosecution are not required to predict that a defence of duress will be relied upon but if sufficient evidence is raised to leave it as a live issue it is the prosecution who must disprove it beyond a reasonable doubt.
- In a case of alibi the Judge must direct the jury that although the defence have raised the defence, it is not a matter for them to prove. The prosecution retain the burden of disproving the alibi so the jury are sure.

2.7 Summary

- The burden of proving the elements of the offence is always on the prosecution.
- A legal burden** – is simply the requirement to prove an element of your case to a prescribed standard. The standard varies between prosecution and defence:
 - The standard to which prosecution proof is put is always to convince the jury of guilt "so that they are sure" which means the same as 'beyond reasonable doubt'.
 - The standard for almost everything that the defence has to prove is the 'balance of probabilities'.
- An evidential burden** – is where you have to raise some evidence to satisfy the judge that the matter should be argued before the jury.
- In every case, if you have a legal burden to prove a fact in issue, you have the evidential burden of 'passing the judge' with the same evidence. However, in very rare cases, the legal burden and the evidential burden become detached, such as self-defence.

3 Excluding evidence

3.1 Excluding evidence or seeking to stop a case

It will often be necessary to make or respond to a legal application to exclude evidence in a criminal case. Sometimes, depending on the importance of the evidence, a successful application of this nature can result in the case coming to an end. Similarly, there are methods of applying to stop a case where it would be unfair or legally improper for it to continue, or where there is insufficient evidence in support of those charges the prosecution is pursuing.

The principal ways of excluding evidence and/or seeking to bring a prosecution case to an end are as follows:

- Applications for dismissal;
- Submissions of no case to answer;
- Applications to exclude evidence under s.78 of the Police and Criminal Evidence Act 1984 (PACE);
- Applications to exclude confessions under s.76 PACE;
- Applications to exclude evidence under the preserved common law provisions – s.82(3) PACE;
- Abuse of process applications.

3.2 Applications for dismissal

An application for dismissal is a pre-trial application to have the charges against a defendant dismissed.

Such an application can be made:

- (a) only after a defendant is sent by the magistrates' court for trial to the Crown Court;
- (b) only after the defendant has been served with the evidence relating to the offence; and
- (c) only before the defendant is arraigned (ie the offence is put to D and D pleads guilty or not guilty).

The power to make the application is contained in **Schedule 3 of the Crime and Disorder Act (CDA) 1998** and the procedure is set out in **CrimPR r.9.16**.

The application is made to a Crown Court Judge and if the defendant wishes to make an oral application D must give written notice of D's intention to do so.

The test for dismissing the charge is set out in **Schedule 3 para 2(2) CDA**:

'The judge shall dismiss a charge (and accordingly quash any count relating to it in any indictment ...) ... if it appears to him that the evidence against the applicant would not be sufficient for him to be properly convicted.'

This amounts to the same test to be applied where the defence make a submission of no case to answer, as set out in the case of *R v Galbraith* [1981] 73 Cr App R 124, CA, namely that the judge should stop the case:

- (a) where there is no evidence that the crime has been committed by the defendant; or
- (b) where the prosecution evidence, taken at its highest, is such that a properly directed jury could not properly convict on it.

R (on the application of Inland Revenue Commissioners) v Crown Court at Kingston [2001] 4 All ER 721; [2001] EWHC Admin 581

The Divisional Court held that a judge considering an application to dismiss must take into account the whole of the evidence and not view matters in isolation from their context or other evidence; where the prosecution seeks inferences to be drawn from the evidence the judge should assess whether such inferences could properly be drawn by the jury.

R (Snelgrove) v Woolwich Crown Court [2005] 1 Cr App R 18; 1 WLR 3223 (DC)

It was held that judicial review cannot be used to challenge a decision by the Crown Court on an application to dismiss. Nonetheless, the ruling in *R (on the application of Inland Revenue*

Commissioners) v Crown Court at Kingston regarding the approach to be applied in such applications remains valid.

3.3 Submissions of no case to answer

During a trial and after the prosecution has presented all of its evidence, the defence are entitled to submit to the judge that there is no case to answer on any one or all of the charges faced by the defendant. The application can be made in the magistrates' court and the Crown Court.



Key case: *R v Galbraith [1981] 73 Cr App R 124*

In the case of *R v Galbraith [1981] 73 Cr App R 124* Lord Lane CJ set out the following principles to be applied:

'(1) if there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case; (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury ...'

A submission of no case to answer is made at the close of the prosecution case because it is only at this stage that the entirety of the prosecution case against a defendant can be considered. It is for this reason that a submission of no case to answer is often referred to as a 'half-time submission' (ie after the prosecution case but before the defence case).

In the Crown Court the application will take place in the absence of the jury; if the application is unsuccessful the jury will not be informed that such an application has been made. However, if the application is successful, the jury will be informed that there is insufficient evidence on the count or counts involved and the judge will instruct the foreman to enter a verdict/verdicts of not guilty.

As can be seen from the **Galbraith** test, where there is no evidence to support the charge then there will be no difficulty in stopping the case. This would be an application under the first limb of **Galbraith**, such as where a witness accepts that the person who committed the offence is not the person standing in the dock. In these circumstances, assuming there is no other evidence available to the prosecution, there is no evidence that the offence has been committed by the defendant and the case will be stopped.

The difficulty arises, as set out in the **Galbraith** test itself, when there is some evidence, albeit the integrity of that evidence is open to question. This is where the judge/magistrates will have to consider whether that evidence, taken at its highest, is such that a conviction can properly be founded upon it. This is an application under the second limb of **Galbraith**, such as where a witness has given inherently weak, vague or contradictory evidence, or where the credibility of the witness is open to question, such that the evidence presented by the prosecution could not properly found a conviction. In general, issues of credibility are matters for the tribunal of fact (the jury/magistrates) to weigh up in reaching a verdict and will not normally result in a case being stopped on a submission of no case to answer.

In the magistrates' court the procedure is contained in **CrimPR r.24.3(3)(d)** and in the Crown Court **CrimPR r.25.9(2)(e)**, both of which provide that, at the conclusion of the prosecution case, on the defendant's application or on its own initiative, the court (i) may acquit on the ground that the prosecution evidence is insufficient for any reasonable court properly to convict, but (ii) must not do so unless the prosecutor has had an opportunity to make representations (ie the prosecution must be given the right to reply to such an application). The test here is taken from **Galbraith** and there is no material difference between the two. There is no obligation in the

magistrates' court or the Crown Court for reasons to be given when rejecting a submission of no case to answer.

3.4 Abuse of process applications

Sometimes there is an issue of unfairness or impropriety so fundamental that for the trial to continue would be an abuse of the process of the court. Such cases often go beyond applications to exclude evidence; rather, they go to the heart of whether or not a case should be allowed to continue. In such cases the defence can apply to stay proceedings as an abuse of process of the court.

R v Crawley [2014] 2 Cr App R 16; [2014] EWCA Crim 1028

Sir Brian Leveson P summarised the power to stay proceedings as an abuse of process as follows:

"there are two categories of case in which the court has power to stay proceedings for abuse of process. These are, first, where the court concludes that the accused can no longer receive a fair hearing; and, second, where it would otherwise be unfair to try the accused or, put another way, where a stay is necessary to protect the integrity of the criminal justice system. The first limb focuses on the trial process and where the court concludes that the accused would not receive a fair hearing it will stay the proceedings; no balancing exercise is required. The second limb concerns the integrity of the criminal justice system and applies where the court considers that the accused should not be standing trial at all, irrespective of the potential fairness of the trial itself."

He went on to say,

"Furthermore, it is clear from the authorities and beyond argument that there is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is a remedy of last resort. As Lord Bingham of Cornhill observed in **Attorney General's Reference (No.2 of 2001)** ... 'The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances.'"

R v Maxwell [2011] 2 Cr App R 31, SC

Dyson LJ put it like this:

'It is well established that the court has the power to stay proceedings in two categories of case, namely: (i) where it will be impossible to give the accused a fair trial; and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will offend "the court's sense of justice and propriety" (per Lord Lowry in *R v Horseferry Road Magistrates' Court Ex p. Bennett [1994]* 98 Cr App R 114 at 135; [1994] 1 A.C. 42 at 74) or will "undermine public confidence in the criminal justice system and bring it into disrepute" (per Lord Steyn in *R v Latif [1996]* 2 Cr App R 92 at 100; [1996] 1 W.L.R. 104 at 112).'

There are numerous examples of where the defence might apply to have the proceedings stayed as an abuse of the process of the court. These include:

- where a defendant has been tricked or coerced into committing an offence the defendant would not otherwise have committed
- where a defendant is prosecuted despite an unequivocal promise by the prosecution that the defendant will not be
- where the police have acted in such a way as to undermine public confidence in the criminal justice system and bring it into disrepute, such as by deliberately destroying evidence that would have assisted the defence

- where the prosecution has manipulated or misused the process of the court so as to deprive a defendant of a protection afforded by law.

Delay can amount to an abuse of process of the court. If the prosecution has deliberately delayed proceedings in order to gain a tactical advantage this is likely to amount to an abuse of process. Even if the defence cannot assert that the prosecution has deliberately delayed proceedings, inordinate or unconscionable delay due to the inefficiency of the prosecution in bringing a case coupled with prejudice caused to the defence as a result may be sufficient for an abuse of process application to succeed (*R v Gateshead Justices, ex parte Smith* [1985] 149 JP 861).

The application is to **stay** the proceedings as an abuse of process. This means that, if the application is successful, the prosecution case will not be able to proceed. This is not the same as a ‘not guilty’ verdict, albeit there will be no conviction and the defendant’s record will not be tarnished. In bringing such an application the defence will have to prove abuse of process on the balance of probabilities. Abuse of process applications are mainly dealt with in the Crown Court (where the application is to stay the indictment as an abuse of process). They can, however, be brought in the magistrates’ court but only on the ground that a defendant is unable to have a fair trial (and not on the ground that the integrity of the justice system has been brought into disrepute – an application on this basis would have to be made to the Divisional Court by way of judicial review).

3.5 Common law discretion to exclude evidence

PACE Section 82(3)

‘82(3) Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.’

Section 82(3) PACE preserves the common law discretion of the courts to exclude evidence where its prejudicial effect outweighs its probative value; this includes the discretion to exclude evidence if it is necessary in order to secure a fair trial for the accused.

This discretion to exclude evidence applies only to prosecution evidence. As such, at common law, it is not open to the prosecution to apply to exclude defence evidence, or for one defendant to apply to exclude evidence which a co-defendant seeks to admit. If significant unfairness would result to a defendant from a co-defendant’s evidence in such circumstances the defendant could apply to be tried separately from the co-defendant.

In practice, the common law discretion to exclude evidence has little relevance.

This is due to the wide-ranging statutory powers to exclude evidence, particularly under s.78 and s.76 PACE.

As you have read, the court also has considerable powers in a number of circumstances to stay the indictment where to allow the case to continue would be an abuse of process.

3.6 Section 78 applications

Section 78 Police and Criminal Evidence Act 1984 (PACE)

’Exclusion of unfair evidence

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given 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 the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.’

Section 78 PACE is concerned with the fundamental concept of fairness and is the principal and most important means by which the defence can seek to have prosecution evidence excluded.

Section 78 only applies to ‘evidence on which the prosecution proposes to rely’ so it cannot be used by the prosecution or a co-defendant to exclude evidence that a defendant seeks to admit.

R v Quinn [1990] Crim.L.R. 581

Lord Lane CJ explained the nature of the court's exclusionary discretion under s.78:

'... The function of the judge is therefore to protect the fairness of the proceedings, and normally proceedings are fair if a jury hears all relevant evidence which either side wishes to place before it, but proceedings may become unfair if, for example, one side is allowed to adduce relevant evidence which, for one reason or another, the other side cannot properly challenge or meet.'

Being of general application, s.78 has been used in a wide variety of cases to seek to exclude any prosecution evidence which the defence consider would result in unfairness. This often, but not always, includes taking into account matters which the defence contend amounts to such evidence having been obtained unlawfully, improperly or unfairly. This could include situations in which evidence was obtained in breach of the **European Convention on Human Rights** or the provisions of **PACE** (or the **Codes of Practice** issued under **PACE**).

Section 78 is also commonly utilised alongside **s.76 PACE** to seek to exclude evidence of confessions which the prosecution seek to rely upon (the sections on confessions will cover this in more detail).

It is worth bearing in mind that simply because evidence has been irregularly obtained does not per se render it inadmissible.

The key test for the court in deciding whether to exclude prosecution evidence under s.78 is whether the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

The court is not concerned with marking its disapproval of police conduct by excluding evidence, or otherwise seeking to punish the prosecution for the way in which evidence has been obtained, it is simply concerned with whether fairness dictates that the evidence should be excluded in the circumstances.

However, where there has been bad faith on the part of the police when acting in breach of **PACE** or the **Codes of Practice** that is a factor which is likely to lead to exclusion of the evidence.

3.7 PACE Codes of Practice

Since s.78 refers to having regard to all the circumstances, including the circumstances in which the evidence was obtained the defence will, where applicable, refer to breaches of the **Codes of Practice** under **PACE** when making a s.78 application.

The **Codes of Practice** are issued under **s.66 PACE** and set out the procedures that the police (or other investigators) must follow in the exercise of their powers under **PACE**. As such, it will often be the case that the defence will rely on a breach of the code as the basis for seeking to exclude the evidence under s.78.

Under **s.67(11) PACE** the codes are admissible in evidence; this means that where a breach of a code is alleged the defence are entitled to rely in court on the content of the code which sets out those procedures which should have been followed.

There are eight Codes of Practice, namely:

- Code A (Stop and Search);
- Code B (Entry, Search and Seizure);
- Code C (Detention, Treatment and Questioning of Non-Terrorist Suspects);
- Code D (Identification);
- Code E (Audio Recordings of Interviews);
- Code F (Visual Recording of Interviews with Sound);
- Code G (Arrest); and
- Code H (Detention, Treatment and Questioning of Terrorism Suspects).

3.8 Code C

To take an example, **Code C (the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers)** contains, amongst many others, the following provisions which must be followed by the police:

- (a) **Paragraph 3.1** provides that detained suspects must be informed of:
 - (i) their right to consult privately with a solicitor and that free independent legal advice is available;
 - (ii) their right to have someone informed of their arrest; and
 - (iii) their right to consult the Codes of Practice.
- (b) **Paragraph 10.1** provides that a person whom there are grounds to suspect of an offence must be cautioned before any questions about the offence are put to them, if either the suspect's answers or silence may be used in evidence against them.
- (c) **Paragraph 10.3** requires the caution to be given on arrest.
- (d) **Paragraph 10.5** states that the caution should be in the following terms: '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.' Minor deviations are permissible (**para 10.7**).
- (e) **Paragraph 11.1A** defines an interview as 'the questioning of a suspect regarding their involvement or suspected involvement in a criminal offence'.
- (f) **Paragraph 11.1** requires an interview to take place at a police station, except where the delay would:
 - (i) lead to interference or harm to evidence connected with an offence
 - (ii) interference with or physical harm to other people
 - (iii) serious loss or damage to property
 - (iv) lead to alerting other suspects who have not yet been arrested; or
 - (v) hinder the recovery of property obtained as a result of the offence.
- (g) **Paragraph 11.15** requires juveniles (under 18s) or those with mental disorders or who are mentally vulnerable only to be interviewed in the presence of an appropriate adult.

See **Pace Code C Note 1G** – 'Mentally vulnerable' applies to any detainee who, because of their mental state or capacity, may not understand the significance of what is said, of questions or of their replies.

An appropriate adult (see **Code C Note 17G** and **Annex E para 2** for definition) should not be confused with a legal adviser and an appropriate adult will attend the interview in addition to the legal adviser. The appropriate adult gives advice to the suspect, observes whether the interview is conducted properly and fairly and assists with communication – see **para 11.17 Code C**.



Example: Code C breaches

Now imagine you are representing a defendant charged with shoplifting. The police arrive and arrest him and then ask him if, as alleged, he took the bottle of wine and left the store without paying. He admits that he did and is then taken to the police station. You can see that there have been breaches of **Code C** here because:

- **para 10.3** requires the caution to be given on arrest;
- **para 10.1** requires the caution to be given before questions are asked; and
- **para 11.1** requires this interview to take place at the police station.

As such, you would argue that the defendant had been denied those safeguards that should have been afforded to him under these parts of **Code C**. You would submit that as a result of these breaches the court should exclude the prosecution evidence of the defendant's confession under **s.78 PACE**, namely that having regard to the circumstances in which this evidence was obtained its admission would have such an adverse effect on the fairness of the trial that the court ought not to admit it. This is an example of how a breach of the **Codes of Practice** and **s. 78** work hand in hand in many applications to exclude evidence.

3.8.1 Section 78 application examples

To this end s.78 has been used variously to exclude evidence obtained where:

- the 'fundamental right' of access to legal advice has been improperly denied;

- where waiver of the right of access to legal advice was not voluntary, informed or unequivocal;
- where there has been a failure to caution a suspect before questioning;
- where an appropriate adult has not been provided for a youth, mentally disordered or mentally vulnerable suspect;
- where identification procedures have not been followed.

In the sections on confessions you will see more examples of how s.78 is used as a further or alternative argument to exclude confession evidence.

3.9 Significant and substantial breaches of the codes

Charles v Crown Prosecution Service [2009] EWHC 3521

Moses LJ stated (concerning **Code C**):

'These provisions are not a mere rigmarole to be recited like a mantra and then ignored. The provisions of the PACE Act and the code relating to caution are designed to protect a detainee. They are important protections. They impose significant disciplines upon the police as to how they are to behave. If they can secure a serious conviction in breach of those provisions that is an important matter which undermines the protection of a detainee in the police station. That is not to say, by any means, that every breach will lead to the exclusion of the evidence obtained in consequence of that breach; far from it. It is merely to emphasise the general importance of the breaches when exercising the judgment in Section 78. Their significance must be taken into account.'

Where breaches of the codes are significant and substantial this may well result in exclusion under s.78.

In *R v Keenan*, a case concerning the 'Verballing' Provisions of **Code C** (requirement to make accurate record of interview and for the suspect to sign the record as accurate), Hodgson J said:

'It is clear that not every breach or combination of breaches of the codes will justify the exclusion of interview evidence under section 76 or section 78 ... They must be significant and substantial. If this were not the case, the courts would be undertaking a task which is no part of their duty: as Lord Lane CJ said in *Reg v Delaney*, The Times, 30 August 1988: 'It is no part of the duty of the court to rule a statement inadmissible simply in order to punish the police for failure to observe the Codes of Practice. But if the breaches are "significant and substantial", we think it makes good sense to exclude them.'

R v Roberts [1997] 1 Cr App R 227

The Court of Appeal gave guidance on the approach that should be adopted to questionable police conduct. Hirst LJ:

'In our judgment ... the true test is whether, having regard to the circumstances of the case as a whole, the conduct of the police, either wittingly or unwittingly, led to unfairness or injustice: and we consider that the proper adjudicator of this question is the trial judge himself, who has seen the witnesses, and who has a wide margin of discretion under section 78 which should only be disturbed in this court if it can be shown that he erred in principle or was plainly wrong.'

It is important to remember that when considering an application under s 78 the principal consideration is not the seriousness of any breach per se, but rather the effect of the breach, namely whether the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. The position is therefore that the more significant and substantial the breach, the more likely it is to result in unfairness and, thus, exclusion. Conversely, even major breaches will not lead to exclusion if the court reaches the view that no unfairness was caused in the circumstances.

See *R v Quinn* [1995] 1 Cr App R 480

and *R v Dures* [1997] 2 Cr App R 247

for the proposition that the Court of Appeal will not interfere with a judge's decision under s.78 unless satisfied that the decision was perverse, ie no reasonable judge having heard the evidence could have reached the conclusion that he did.

R v Ryan [1992] Crim LR 187

The Court of Appeal held that it was far from inevitable that where there had been a substantial breach of the **PACE Codes** the evidence was always required to be excluded. In this case the judge could properly conclude that despite a breach of Code D no prejudice had been caused to the defendant.

3.10 Making a section 78 application

An application under **s.78 PACE** can be made:

- before the trial;
- at the commencement of the trial; or
- just prior to the prosecution seeking to admit the evidence which the defence wish to be excluded.

Where an application to exclude evidence under s.78 would, if granted, result in the prosecution case being fatally weakened (because the prosecution would be left with no or insufficient remaining evidence to proceed) a judge will often want that argument to take place at a pre-trial hearing or at the commencement of the trial; in the Crown Court this would often be before a jury is sworn. On the other hand, where the application relates to a matter of less significance the judge may direct that the matter is dealt with at a convenient moment during the trial itself. If the argument is not heard before the case commences, the prosecution should avoid making any reference to the disputed evidence in the opening speech. The key point is that a s.78 application should be made before the evidence to which objection is taken is adduced.

Where the point of law is clear from the case papers or becomes clear following initial disclosure, the defence should include the point of law in the Defence Statement together with any authorities relied upon (s.6A(1)(d) Criminal Procedure and Investigations Act (CPIA) 1996).

In practice, the defence representative will often draft a skeleton argument in support of D's application and the prosecution will draft a skeleton argument opposing it.

Directions will be given by the judge in the Crown Court, usually at the Plea and Trial Preparation Hearings (PTPH), as to when a s.78 application will be heard.

Similar directions will be given when dealing with case management at the magistrates' court.

3.11 Voir dire

Since a s.78 application is an application by the defence (to exclude prosecution evidence), the defence representative will address the court first followed by the prosecution advocate responding.

In the Crown Court, where there is a dispute on the facts between the defence and the prosecution, the judge will not be able to determine the s.78 application until the factual matter has been resolved. For example, if the defendant is advancing an argument that the police acted in a way that was in breach of the **PACE** codes but the police officers concerned deny this, then the judge will have to hear evidence and make a decision on the facts before the judge can decide how the law should be applied. The normal burden and standard of proof in criminal cases apply, so in order to find in favour of the prosecution version of the facts the judge will have to be satisfied of that factual position beyond reasonable doubt. If the judge concludes after hearing the evidence that the police acted appropriately, the legal argument will fail. On the other hand, if the judge concludes that the police misbehaved and that there had been a significant and substantial breach of the code resulting in unfairness to the defendant, then the evidence concerned is likely to be excluded.

Hearing evidence in this way on a legal argument is called a trial 'on the voir dire' (commonly referred to simply as a 'voir dire') and is a type of mini-trial or 'trial within a trial'. The evidence called by the prosecution and defence will relate only to the matters in dispute. In a *voir dire* the witnesses testify on a special form of oath/affirmation

'that I will true answer make to all such questions as the court shall demand of me'.

Being a legal argument, in the Crown Court a *voir dire* takes place in the absence of the jury. In the magistrates' court, the magistrates (being both the tribunal of fact and law) can rule on a s.78 application when it arises or hear all the evidence (including the disputed evidence relating to the legal argument) before ruling on admissibility. However, the interests of justice may dictate that a ruling on admissibility is made early enough to allow the defendant to know whether that evidence forms part of the case, to deal with it in cross-examination and in D's evidence and, if appropriate, to make a meaningful submission of no case to answer. This is particularly the case where the disputed evidence is a confession which forms the main evidence against a defendant. As such, disputed confessions should be determined as a preliminary issue. When the application is under both s.76 and s.78 PACE a *voir dire* should be held as a preliminary issue.

3.12 Summary

Main methods to exclude evidence or stop a case

- **Application for dismissal** – for cases sent to Crown Court. A pre-trial application made after evidence is served and before arraignment. Same test as submission of no case to answer (*Galbraith*).
- **Submission of no case to answer** – only available during trial at the close of the prosecution case *Galbraith* test.
- **Application to exclude a confession** – s.76 PACE. The main provision for excluding confessions. Often used in conjunction with s.78 PACE.
- **Application to exclude evidence under the common law** – s.82(3) PACE. May be used only to exclude prosecution evidence.
- **Abuse of process application** – an application to stay the indictment where either (1) the defendant cannot have a fair trial; or (2) continuing the prosecution offends the court's sense of justice and propriety or would undermine public confidence in the criminal justice system and bring it into disrepute.

This section also considered applications to exclude evidence under s.78 PACE:

- The key test for the court in deciding whether to exclude prosecution evidence under s.78 is whether the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
- Section 78 only applies to 'evidence on which the **prosecution proposes** to rely' so it cannot be used by the prosecution or a co-defendant to exclude evidence that a defendant seeks to admit, nor can it be used **after** evidence is adduced.
- This could include situations in which evidence was obtained in breach of the **European Convention on Human Rights** or the provisions of PACE (or the **Codes of Practice** issued under PACE). The codes are admissible in evidence. Simply because evidence has been irregularly obtained does not per se render it inadmissible.
- Directions will be given by the judge as to when a s.78 application will be heard. A s.78 application should be made before the evidence to which objection is taken is adduced. A *voir dire* will be necessary where there is a dispute on the facts between the defence and the prosecution.

4 Excluding confessions – s.76

4.1 What is a confession?

'Section 82

In this Part of this Act—

"confession", includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise.'

The definition of a confession in the **Police and Criminal Evidence Act 1984 (PACE)**, s. 82(1) is deliberately wide and the following will fall within the definition:

- unequivocal confessions of guilt (ie wholly inculpatory statements such as ‘I did it’).
- mixed statements (those which are partly inculpatory and partly exculpatory, such as ‘I had nothing to do with it but I was glad to see the victim die’). These fall within the definition of a confession because they are partly adverse to the maker.
- depending on the context, a nod, sign or gesture can be sufficient, as a confession does not have to be articulated in words.

Wholly exculpatory statements (‘It was nothing to do with me’) do not fall within the definition of a confession.

4.2 Admissibility of confessions

Section 76 PACE

Section 76 – Confessions.

(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—

(a) by oppression of the person who made it; or

(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 him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

(3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.

(4) The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence—

(a) of any facts discovered as a result of the confession; or

(b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.

(5) Evidence that a fact to which this subsection applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf.

(6) Subsection (5) above applies:

(a) to any fact discovered as a result of a confession which is wholly excluded in pursuance of this section; and

(b) To any fact discovered as a result of a confession which is partly so excluded, if the fact is discovered as a result of the excluded part of the confession.

(7) Nothing in Part VII of this Act shall prejudice the admissibility of a confession made by an accused person.

(8) In this section “oppression” includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).’

It follows that there are two main ways under s.76 to challenge a confession:

- (a) under s.76(2)(a) – ‘oppression’; or
- (b) under s.76(2)(b) – ‘anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof’.

Note that s.76 does not automatically come into play to challenge confessions. Rather, it only operates where ‘it is represented to the court’ by the defence that s.76(2)(a) or (b) apply. However, even where there is no defence challenge, s.76(3) provides that the court itself can require the prosecution to prove that the confession was not obtained as set out in s.76(2)(a) or (b).

4.3 Limb 1 – Exclusion for oppression – s.76(2)(a)

Section 76(2)(a) provides that where it is represented to the court that the confession was or may have been obtained by oppression of the person who made it, then the court shall not allow the confession to be given in evidence against him except insofar as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

‘Oppression’ is widely defined in s.76(8) to include torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture). This wording reflects that contained in **European Convention on Human Rights, Article 3**.

R v Fulling [1987] QB 426, 85 Cr App R 136- The Court of Appeal held that ‘oppression’ in s.76(2)(a) should be given its ordinary dictionary meaning:

‘The Oxford English Dictionary as its third definition of the word runs as follows: “exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc., or the imposition of unreasonable or unjust burdens.” One of the quotations given under that paragraph runs as follows: “There is not a word in our language which expresses more detestable wickedness than oppression.” We find it hard to envisage any circumstances in which such oppression would not entail some impropriety on the part of the interrogator.’

What might be oppressive to one person might not be oppressive to another, so it is legitimate to consider the character and attributes of the accused.

Once the defence represent that the confession was obtained by oppression, or the court chooses to act of its own motion under s.76(3), the prosecution must prove beyond reasonable doubt that it was not so obtained.

If the prosecution cannot prove beyond reasonable doubt that the confession was not obtained by oppression, then the confession must be excluded as inadmissible evidence and this applies even if the confession may have been true.

If, however, the judge is satisfied beyond reasonable doubt that the confession was not obtained by oppression (and is therefore admissible), this does not prevent the defence during the trial seeking to discredit the same evidence by cross-examination and making reference to it in their closing speech, ie that it was obtained by oppression and is therefore unreliable. Of course, it would then be for the jury to decide for themselves whether to rely upon the alleged confession or not.

4.4 Limb 2 – Exclusion for unreliability – s.76(2)(b)

Section 76(2)(b) provides that:

- where it is represented to the court that
- the confession was or may have been obtained 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 him in consequence thereof
- the court shall not allow the confession to be given in evidence against him
- except insofar as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid

4.5 How to approach s.76(2)(b) cases

The Court of Appeal in *R v Barry* [1991] 95 Cr App R 384 set out the approach to adopt in cases involving s.76(2)(b). Where a defendant alleges that their confession is unreliable within s.76(2)(b) PACE, the correct approach is:

- First, to identify the thing said or done, which requires the trial judge to take into account everything said and done by the police.
- Secondly, to ask whether what was said and done was likely in the circumstances to render unreliable a confession made in consequence. The test is objective taking into account all the circumstances.
- Thirdly, to ask whether the prosecution has proved beyond reasonable doubt that the confession was not obtained in consequence of the thing said and done, which is a question of fact to be approached in a common sense way.

4.6 1. Identify the thing said or done

The first step is to identify the thing said or done.

There are numerous examples of what the thing said or done can be.

These can be positive acts, such as a promise, inducement or trick. Examples are:

- a promise to release someone promptly from police custody only if they ‘tell all’; or
- a promise of bail from the police station conditional on a full and frank confession; or
- a threat to arrest a suspect’s partner or other family members if the suspect does not ‘cooperate’.

The thing said or done can also be an omission or failure to act, such as interviewing a young or mentally vulnerable suspect without an appropriate adult.

The thing said or done must not simply be something from the suspect, but from something external to the person. A suspect who makes an admission because they consider this is likely to get them bail (when the suspect has not been induced into believing this) cannot subsequently rely on s.76(2)(b).

Often when s.76(2)(b) is invoked the defence will be submitting that what was said or done was itself a breach of **PACE Code C – the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers**. **Code C** contains numerous provisions concerning the detention and questioning of suspects; these include the right not to be held incommunicado, the right to legal advice and the right to be cautioned prior to being questioned. **Code C** also contains provisions regarding the right to appropriate rest at the police station and the right (for juveniles, the mentally disordered and the mentally vulnerable) to an appropriate adult. This is not to say that the thing said or done will always include an alleged breach of **Code C**, or that it must involve such a breach, but it will often do so.

There will be occasions where the conduct of the police or other investigator amounts both to ‘oppression’ within s.76(2)(a) and to ‘anything said or done’ within s.76(2)(b). These provisions are disjunctive and therefore either or both can be used to challenge a confession depending on the circumstances of the particular case.

4.7 2. Ask whether what was said and done was likely in the circumstances to render unreliable a confession made in consequence

Having established what was said or done, the second step is to ask whether what was said or done was likely in the circumstances to render unreliable a confession made in consequence.

When an application is made under s.76(2)(b) the court does not consider the reliability of the confession which has been made, but a hypothetical question – the court must decide whether there is a likelihood that any confession would be unreliable in the circumstances prevailing at the time (*R v Gill* [2004] EWCA 3245).

Re Proulx [2001] 1 All ER 57

Mance LJ stated:

‘the test is not whether the actual confession was untruthful or inaccurate. It is whether whatever was said or done was, in the circumstances existing at the time of the confession, likely to have rendered such a confession unreliable.’

4.7.1 What does ‘unreliable’ mean?

R v Crampton [1990] 92 Cr App R 369, CA

Stuart-Smith LJ put it as follows:

‘The word “unreliable”, in our judgment, means “cannot be relied upon as being the truth”. What the provision of subsection 2(b) is concerned with is the nature and quality of the words spoken or the things done by the police which are likely to, in the circumstances existing at the time, render the confession unreliable in the sense that it is not true. It is quite plain that if those acts and words are of such a quality, whether or not the confession is in fact true, it is inadmissible.’

The test is an objective one taking into account all the circumstances. For example, even if the police were not aware at the time of the need to call an appropriate adult (and as such are not deliberately breaching the provisions of **PACE Code C**), if the suspect was in fact mentally vulnerable and should, therefore, have had the assistance of an appropriate adult and – viewed objectively – the absence of an appropriate adult would have been likely to render any confession unreliable, then the confession should have been excluded under s.76(2)(b).

In *Gill* it was put this way:

‘The relevant question is whether, having regard to the purpose for which an appropriate adult is required, the absence on this occasion of the protection which such presence would have provided is likely to have rendered any confession made at that time unreliable.’

4.8 Examples of unreliable confessions

4.8.1 Deprivation of sleep

R v Trussler [1988] Crim LR 446

The defendant had been 18 hours without rest prior to his confession during interview. This was a clear breach of **Code C** and his confession was unreliable and should have been excluded under s.76(2)(b) PACE.

4.8.2 Failure to caution

R v Doolan [1988] Crim.L.R. 747, CA

The appellant argued that there had been breaches of **PACE Code C** during his robbery trial and that his interview containing a confession should have been excluded. Amongst other things there had been a failure to caution the appellant at interview or to remind him of an earlier caution. The court held that the confession had been wrongly admitted – the failure to caution was likely, in the circumstances existing at the time, to render the confession unreliable.

4.8.3 Denial of access to legal advice

R v McGovern (1990) 92 Cr App R 228, CA

When she was arrested for murder, the appellant was 19 years old and 6 months pregnant. She was of limited intelligence. She was refused access to a solicitor in breach of **Code C**. She was ill, distressed and not readily able to understand the caution. During her first interview she confessed to taking part in the killing. During her second interview she made further admissions in the presence of a solicitor. She was convicted of manslaughter at trial.

On appeal against her conviction, she argued that her confessions should have been excluded. The Court of Appeal allowed the appeal on the basis that the first confession was made as a result of a denial of access to a solicitor and was therefore likely to be unreliable under s.76(2)(b) PACE, even though it was later admitted to be true. Concerning the second interview, the court found that because the first interview was conducted in breach of **Code C** the subsequent interview was similarly tainted.

4.9 3. Ask whether the prosecution has proved beyond reasonable doubt that the confession was not obtained in consequence of the thing said and done (s.76(2)(b))

Having identified the thing said or done and whether what was said and done was likely in the circumstances to render unreliable a confession made in consequence, you must now ask whether the prosecution has proved beyond reasonable doubt that the confession was not obtained in consequence of the thing said and done.

As stated in *Barry [1991] 95 Cr App R 384*, this is a question of fact for the judge and must be approached in a common sense way.

By way of reminder, Defence Counsel will be acting on the instructions from the defendant or from other evidence. Once it is represented by Defence Counsel to the court that the confession ‘was or may have been obtained’ by anything said or done which was likely in the circumstances to render any confession unreliable (s.76(2)(b)), ‘the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.’

4.10 Evidence discovered as a result of an excluded confession

PACE s.76(4)

Section 76(4) PACE provides: the fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence—

- ’(a) of any facts discovered as a result of the confession; or
- (b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.’

4.10.1 Facts discovered – section 76(4)(a)

Even where a confession is excluded, this does not prevent facts discovered as a result of it being relied upon in evidence. If, for example, the police locate the body of a murder victim following the confession of a defendant, even if that confession is excluded under s.76(2)(a) or (b), the fact of the discovery of the body in that place is still admissible under s.76(4)(a). There is, therefore, no rule excluding the ‘fruit of the poisoned tree’.

However, in these circumstances it would **not** be open to the prosecution to suggest that the body was discovered by reason of something said by the defendant (eg ‘Members of the jury, we cannot tell you what the defendant said, but as a result of what the defendant said the police discovered the body of the deceased.’). To do so would be to circumvent the exclusion of the confession itself.

This rule is contained in s.76(5) PACE:

’Evidence that a fact to which this subsection applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf.’

4.10.2 The speech, writing or expressions of the accused – section 76(4)(b)

Section 76(4)(b) concerns situations where, even though the words of the confession have been excluded, the prosecution wants to use such part of the confession as is necessary to show the accused speaks, writes or expresses himself in a particular way.

R v Nottle [2004] EWCA Crim 599

The appellant was convicted of criminal damage by scratching ‘F*ck you Justin’ on a number of cars. The most potent piece of evidence against him derived from what had emerged when the appellant had attended a police interview with his solicitor. The interviewing officer said this: ‘On four of the cars was some writing. I want you to write it for me. It does not matter the style of the writing, how it is spelt, just make it as you see fit. The words are: “F*ck you, Justin”.’ The officer said that he wanted it written out 12 times. The appellant then wrote out the words ‘F*ck you Justin’ and later admitted during the course of the interview that he spelt the word ‘Justin’ J-U-T-I-N. The defence applied to exclude the evidence under s.76 but the judge refused to exclude it.

On appeal it was held that under s.76(2)(b) PACE there was nothing said or done which was likely, in the circumstances existing at the time, to render what was said in interview unreliable. In any event, the words could be relied upon to show how Nottle spelt ‘Justin’ under the provisions of s.76(4)(b). There was no error or unfairness to Nottle in the admission of the evidence given in interview as to how he spelt the name ‘Justin’. In any event, even if what was said otherwise was to be excluded under s.76, the words could be relied upon to show how the appellant spelt ‘Justin’ under the provisions of s.76(4)(b).

4.11 Summary

- s.82(1) PACE – “confession”, includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise.’
- This section considered the main provision through which the admissibility of a confession can be challenged, s.76 PACE. There are two main ways under s.76 to challenge a confession:
 - under s.76(2)(a)- ‘oppression’; or
 - under s.76(2)(b)- ‘anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof’.
- Aside from a defence challenge, the court under s.76(3) can require the prosecution to prove that the confession was not obtained as set out in s.76(2)(a) or (b).
- Even where a confession is excluded, this does not prevent facts discovered as a result of it being relied upon in evidence (section 76(4)(a)) nor does it prevent the prosecution using part of the confession if necessary to show the speech, writing or expressions of the accused (section 76(4)(b)).

5 Excluding confessions – s.78

5.1 Section 78 PACE and confession evidence

Section 78 Police and Criminal Evidence (PACE) Act 1984

Exclusion of unfair evidence

‘(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given 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 the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.’

5.2 Applications to exclude confessions under s. 76 and/or s. 78

It is perfectly appropriate and common practice for the defence to seek to exclude evidence of a confession under s.76 and, as an alternative, s.78.

Beeres v Crown Prosecution Service [2014] EWHC 283 (Admin)

The defence practice to seek to exclude evidence of a confession under s.76 and s.78 was considered in this case concerning **PACE Code C** breaches.

In giving judgment Green J stated:

'Finally, the position under s.78 PACE 1984 which concerns fairness will not normally differ from that based upon the application to the same facts of s.76 PACE 1984: see Gill para [68(5)] where the court concluded that on the facts of the case no difference between ss.76 and 78 PACE 1984 arose.'

Mr Rasiah accepted, however, that s.78 could in principle exert a broader protective sweep than s.76 and therefore that it acted as an override protection for a detainee. He gave by way of example the hypothetical case of a detainee who was woefully deprived of adequate legal advice but in circumstances where it could not be said that an interview without legal representation was "likely to render any confession unreliable". He said that s.78 PACE 1984 might nonetheless intervene to exclude the confession in order to reflect the fact that s.78 incorporates broader **Article 6 (ECHR)** type considerations and a court might reflect the seriousness of the violation in an order excluding the confession. It seems to me that in principle this is correct: s.78 PACE and the common law will enable a court to examine a case, including one also engaging s.76, from a perspective of overall fairness. Hence in principle a tailpiece to any s.76 application as to reliability will be a "fairness" appraisal. The fact that there may be substantial overlap and that a s.76 analysis might normally indicate the result of a fairness test does not mean that the two tests are always or necessarily identical and that s.76 precludes the operation of s.78 PACE 1984.'

5.3 Example of exclusion under s.78

R v Keenan [1990] 2 Q.B. 54; 90 Cr App R 1

The Court of Appeal held that evidence of a confession should have been excluded under s.78 due to significant and substantial breaches of **Code C** which caused unfairness to the appellant. The appellant had been charged with possessing an offensive weapon recovered from a car. The defence case was that the appellant had only recently purchased the car and had no idea the weapon was there. The prosecution relied on a confession (which the appellant denied making) that he knew about the weapon. The confession was allegedly made to police officers in the charge room at the police station. At trial the defence objected to the admissibility of this confession on the basis of a number of breaches of **Code C** (commonly known as the 'verballing' provisions of the code) which included requirements to make a record of any interview and to allow a suspect the opportunity to read the record of the interview and to sign it as correct or to indicate the respects in which he considered it inaccurate. The defendant was convicted after the judge allowed the confession to be admitted.

On appeal (on the grounds that the confession had been wrongly admitted in evidence) the conviction was quashed. In giving the judgment of the court Hodgson J said that **Code C**:

'addresses two main concerns. First, it provides safeguards for detained persons and provides for their proper treatment with the object of ensuring that they are not subjected to undue pressure or oppression. Equally importantly, these code provisions are designed to make it difficult for a detained person to make unfounded allegations against the police which might otherwise appear credible.'

Second, it provides safeguards against the police inaccurately recording or inventing the words used in questioning a detained person. These practices are comprehensively described by the slang terms "to verbal" and "the verbals". Again, equally importantly, the provisions, if complied with, are designed to make it very much more difficult for a defendant to make unfounded allegations that he has been "verballed" which appear credible.'

He continued, 'We think that in cases where there have been "significant and substantial" breaches of the "verballing" provisions of the code, the evidence so obtained will frequently be excluded.'

The court went on to explain that unfairness had been caused to the appellant; he had been put at a substantial disadvantage because, amongst other things, he had been denied the contemporaneous opportunity to correct any inaccuracies in what the police alleged he had said.

The *R v Keenan* case is helpful in highlighting the importance of the **Codes of Practice** in safeguarding not only the interests of a suspect but also the interests of the police when it comes to confession evidence.

If, for example, a suspect confesses to an offence outside a formal interview at a police station, the requirements under **Code C** are that a record of the confession is made (and timed and signed by the maker) and the suspect is asked to read the record and sign it as correct or indicate how the suspect considers it inaccurate, and that the confession is put to the suspect at the commencement of the interview at the Police Station when the suspect should be asked to confirm or deny it. These measures allow the suspect to deal with the alleged confession at the time it is said that the suspect made it. They also provide some measure of protection for the police should it be suggested subsequently that they invented the confession.

It is worth bearing in mind that simply because evidence has been irregularly obtained (for example, in breach of the codes) does not per se render it inadmissible.

The key test for the court in deciding whether to exclude prosecution evidence under s.78 is whether the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

The court is not concerned with marking its disapproval of police conduct by excluding evidence, or otherwise seeking to punish the prosecution for the way in which evidence has been obtained, it is simply concerned with whether fairness dictates that the evidence should be excluded in the circumstances.

However, where there has been bad faith on the part of the police when acting in breach of **PACE** or the **Codes of Practice** that is a factor which is likely to lead to exclusion of the evidence. The court will consider how, if at all, the defendant has been unfairly prejudiced.

5.4 Summary

This section considered when it is appropriate to make applications to exclude confessions under s. 76 and/or s. 78 PACE:

- The key test for the court in deciding whether to exclude prosecution evidence under s.78 is whether: the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
- Simply because evidence has been irregularly obtained (for example, in breach of **PACE** or the **Codes of Practice**) does not per se render it inadmissible.
- It is perfectly appropriate and common practice for the defence to seek to exclude evidence of a confession under s.76 and, as an alternative, s.78.
- s.78 PACE allows the court to examine a case from a perspective of overall fairness and can in principle offer broader protections to the defendant than s.76.

6 Excluding confessions – applications

6.1 Making or challenging applications to exclude confessions

This section considers the practical steps required to make an application to exclude evidence of a confession in a criminal trial.

The four key aspects to making an application are:

- advance notification;
- timing;
- *voir dire*; and
- submissions.

Each of these will be considered in turn.

6.2 Advance notification

Criminal Procedure and Investigations Act 1996, section 6A requires that a defence statement (optional in a magistrates' court and mandatory in the Crown Court cases only) should include

any points of law, including any point as to the admissibility of evidence. At the Plea and Trial Preparation Hearing or Further Case Management Hearing at the Crown Court, the judge will review the Defence Statement and is likely to order, with time limits, the defence to serve a skeleton argument in support of any s.76/78 arguments and the prosecution to serve a response to the same. The judge will also direct when the arguments will be heard.

When dealing with case management in a magistrates' court, standard case preparation time limits require any defence skeleton argument in support at least 10 business days before trial and the prosecution response 5 business days after that. It should be noted that these time limits are contained on the magistrates' court 'Preparation for Effective Trial' form and not within any specific criminal procedure rule, although **Criminal Procedure Rule 1.1** contains the 'overriding objective' which includes dealing with cases efficiently and expeditiously.

6.3 Timing

In the Crown Court, the application to exclude the confession can be made at a pre-trial hearing listed specifically for this purpose or it can be dealt with just prior to opening the case to the jury (and in the absence of the jury).

Making an application prior to trial would be most suitable either if the prosecution needs to know if the confession is admissible or not in order to open its case in a full and meaningful way, or if the result of the legal argument will be decisive as to whether the prosecution can continue with its case, such as where the confession is the only significant evidence in its possession.

Alternatively, the application can be made during the trial itself where there is no pressing need to deal with it at the outset. When the prosecution is on notice that the defence are challenging the admissibility of evidence, it is incumbent on it not to adduce that evidence before the court or to refer to it in an opening speech.

In a magistrates' court, any application under s.76 should be dealt with as a preliminary issue.

6.4 Voir dire

Where a challenge is raised under s.76(2)(a) and/or (b) the prosecution must prove beyond reasonable doubt that the confession was not obtained by:

- (a) oppression; and/or
- (b) by anything said or done which was likely in the circumstances to render any confession unreliable.

Where the facts on both sides are disputed the judge will have to make findings of fact. This is done by way of a hearing called a *voir dire* (also known as a 'trial within a trial') where evidence is called.

During the *voir dire* the prosecution will call its evidence. The defence likewise are entitled to call evidence on a *voir dire*. Having heard the evidence, the judge will then resolve the disputed facts before ruling on the admissibility of a confession. A *voir dire* takes place in open court in the presence of the defendant and (when taking place in the Crown Court) in the absence of the jury.

If a judge fails to resolve disputed facts on a *voir dire* before ruling on the admissibility of a confession, even where not specifically invited to do so, any resulting conviction is likely to be quashed because it is logically impossible for a judge to be satisfied that the prosecution has proved beyond reasonable doubt that a confession has not been or might not have been obtained by either of the means set out in s.76(2)(a) or (b) if the judge has heard no evidence either way.

In a magistrates' court, the magistrates should consider an application under s.76 as a preliminary issue and should, where the relevant evidence is in dispute, hear evidence to resolve the matter. If they decide to exclude the evidence, they are then (being judges of both fact and law) required to exclude from their minds the excluded confession evidence, a 'position in which justices are commonly placed and one with which they are well capable of coping both by training and by disposition.' (*Hayter v L* [1998] 1 WLR 854, QBD, Poole J.). In a magistrates' court, where the application is under both s.76 and s.78 and the evidence is disputed, the magistrates should hear evidence on the matter and decide the applications as a preliminary issue. If, however, the application in a magistrates' court is only under s.78, the magistrates have a discretion to hear all the evidence in the usual way and decide upon its admissibility at a later stage.

In the Crown Court a *voir dire* is required where the application is made under s.76 (or both s.76 and s.78) and the evidence founding the application is in dispute.

6.5 Submissions

A *voir dire* is only required if a factual matter relating to the substance of the legal argument requires resolution for the argument to proceed.

If the background facts are agreed then there is no need for a *voir dire* and the legal argument can be made on the agreed factual basis.

For example, where the defence rely for their s.76 argument on **Code C** breaches and the prosecution agrees these breaches occurred (but simply wish to argue they do not amount to oppression/unreliability), there will be no need for the prosecution to call evidence. At the hearing the defence will make their submissions on s.76 and, should they wish, s.78. They will do this orally, relying also on any previously submitted skeleton argument. The prosecution will respond, first making submissions to demonstrate beyond reasonable doubt that the confession was not obtained within s.76(2)(a) or (b) and, secondly, to deal with any defence s.78 arguments. Having considered the submissions, the judge would then make a ruling in open court.

If the ruling was to exclude the confession, the prosecution could not refer to it during the trial. If the effect of an excluded confession was to deprive the prosecution of its only real evidence in the case, it would have no option but to offer no evidence against the defendant which would result in a 'not guilty' verdict being entered.

If the judge concluded that the confession was admissible, the prosecution would be entitled to adduce it. However, this would not deprive a defendant of raising the same issues before a jury. For example, a defendant suggests that their confession was unreliable because of threats during interview. A *voir dire* is held and the interviewing officers give evidence. The defendant also gives evidence. The defence and prosecution make their submissions. Having listened to the evidence and submissions, the judge is sure that the threat did not occur. The judge is sure s.76(2)(a) and (b) do not apply and the judge also refuses to exclude the confession under s.78. As such, the prosecution can adduce the confession. In these circumstances the defence can still put the same allegations (namely the threats) to the police during the trial itself. It will then be for the jury (who are the judges of the facts) to decide whether they consider this to be a confession they can actually rely upon.

6.6 Summary

This section considered the practical steps required to make an application to exclude evidence of a confession in a criminal trial.

- If the ruling excludes the confession, the prosecution can not refer to it during the trial.
- If the judge concludes that the confession is admissible, the prosecution would be entitled to adduce it. However, this would not deprive a defendant of raising issues of oppression, unreliability or unfairness before a jury for them to decide whether to rely on the confession.
- The following summarises the practical steps required to make an application to exclude evidence of a confession in a criminal trial in the:
 - Magistrates' court; and
 - Crown Court.

In the magistrates' court:

- **Advance notification:** any defence skeleton argument in support at least 10 business days before trial and the prosecution response 5 business days after that.
- **Timing:** In a magistrates' court, any application under s.76 should be dealt with as a preliminary issue.
- **Voir dire:** where the application is under s.76 or both s.76 & s.78 and the evidence is disputed, the magistrates should hear evidence on the matter and decide the applications as a preliminary issue. If, however, the application in a magistrates' court is only under s.78, the magistrates have a discretion to hear all the evidence in the usual way and decide upon its admissibility at a later stage.

In the Crown Court:

- **Advance notification:** generally at the PTPH, the judge is likely to order, when the defence is to serve a skeleton argument in support of any s.76/78 arguments, when the prosecution serve a response and when the arguments will be heard.
- **Timing:** the application to exclude the confession can be made at a pre-trial hearing listed specifically for this purpose or it can be dealt with just prior to opening the case to the jury (and in the absence of the jury).
- **Voir dire:** required where the application is made under s.76 (or both s.76 and s.78) and the evidence founding the application is in dispute.

7 Hearsay

7.1 Evidential principles

7.1.1 Relevance

Subject to the exclusionary rules, all evidence, which is sufficiently **relevant** to the facts in issue, is admissible. All evidence which is irrelevant to the facts in issue should be excluded.

7.1.2 Excluding evidence

It does not follow that all relevant evidence is admissible. If an **exclusionary rule** applies it does not matter how relevant the evidence in question may be, it will be inadmissible.

7.1.3 Hearsay

The rule against hearsay states that a statement made out of court may not be presented in evidence as proof of its contents.

The general rule is that hearsay is inadmissible which is an example of an exclusionary rule.

7.2 Tackling potential hearsay

The **exclusionary rule** as it relates to hearsay evidence is one that causes problems for many practitioners of criminal law, even those who are very experienced.

It is important to address possible hearsay evidence in a structured manner.

There are two questions to be asked and they must be kept separate. Any attempt to tackle both questions at once will lead to confusion.

- Does the evidence fall within the definition of hearsay evidence? If the answer to this question is 'yes', then it is *prima facie* inadmissible.
- Does it fall within one of the exceptions to the general exclusionary rule?

7.3 History and rationale

The common law excluded statements other than statements made in oral evidence given in court from being admitted as evidence of the truth of their contents.

The main reason for this was that the maker of the out of court statement was not available to be cross-examined so the quality of the evidence could not be tested.

For example, in D's trial for the murder of V, A gives evidence that B said that D killed V.

The problem is that only A is in court to be cross-examined. There is no way of testing the credibility of B's statement.

B may have had a motive for wanting to get D into trouble. B may be passing on what someone else said. B may simply be mistaken. What B said may have been misunderstood.

In any event, it could not be safe for a conviction to be founded on this evidence.

To avoid unfairness, the common law developed a number of exceptions to the general rule where it appeared that hearsay evidence could properly be relied on.

There was, however, no general 'interests of justice' rule whereby hearsay evidence could be admitted until the coming into force of the **Criminal Justice Act (CJA) 2003, s.114(1)(d)**. As a

result, some of the pre-2003 case law involves appellate courts taking a broad view of the rules in order to avoid an unfair outcome.

Because hearsay evidence cannot be tested by cross-examination in court, there is an obvious risk of unfairness to the defendant where it is admitted. That risk gets greater as the importance of the hearsay evidence to the prosecution case increases. The **ECHR Article 6** right to a fair trial may be engaged where hearsay evidence is admitted.

7.4 Fair trial

The UK Supreme Court and the European Court of Human Rights have considered the effect of hearsay evidence on the fairness of trials. The principles that emerge from the decided cases are:

- The UK statutory framework for the admission of the evidence of absent witnesses is sufficient, properly applied, to provide for a fair trial.
- The court must always be satisfied that there is a sufficient basis for the absence of the witness and that a fair trial will be possible.
- It will be harder for the court to be satisfied that a fair trial will be possible if the evidence of the absent witness is the sole or decisive evidence against the accused.
- Where the hearsay evidence is critical to the case, the question of whether there can be a fair trial depends on three principal factors:
 - Whether there is a good reason to admit the evidence pursuant to the **CJA 2003**;
 - Whether the evidence can be shown to be reliable; and
 - The extent to which counterbalancing measures have been properly applied, eg exclusionary discretion, proper directions to the jury in summing up.

7.5 The Criminal Justice Act (CJA) 2003

There is a general rule that hearsay evidence is inadmissible.

Section 114 CJA 2003 provides that hearsay is admissible if, but only if, it falls within one of the exceptions in s.114(1).

Section 114(1) CJA 2003 reads:

'114 Admissibility of hearsay evidence

- (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—
- (a) any provision of this Chapter or any other statutory provision makes it admissible,
 - (b) any rule of law preserved by section 118 makes it admissible,
 - (c) all parties to the proceedings agree to it being admissible, or
 - (d) the court is satisfied that it is in the interests of justice for it to be admissible.'

7.6 Statements and matters stated

Section 115 CJA 2003 reads:

'115 Statements and matters stated

- (1) In this Chapter references to a statement or to a matter stated are to be read as follows.
- (2) A statement is any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form.
- (3) A matter stated is one to which this Chapter applies if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been—

- (a) to cause another person to believe the matter, or
- (b) to cause another person to act or a machine to operate on the basis that the matter is as stated.'

7.7 Is it hearsay?



Key case: *R v Twist [2011] EWCA Crim 1143.*

The effect of s.114(1) and s.115 taken together was considered in *R v Twist*.

The Court of Appeal reformulated the sections as a test that determines whether or not a communication is hearsay. It is in three parts:

- (a) Identify what relevant fact (matter) it is sought to prove.
- (b) Ask whether there is a statement of **that matter** in the communication.
 - If no, then no question of hearsay arises (whatever other matters may be contained in the communication).
- (c) If yes, ask whether it was one of the purposes (not necessarily the only or dominant purpose) of the maker of the communication that the recipient, or any other person, should believe **that matter** or act upon it as true.
 - If yes, it is hearsay.
 - If no, it is not.

7.8 Not hearsay

- **Private diary** – It follows from the definition of hearsay that anything written in a private diary where the writer did not intend that anyone else should ever read it cannot be hearsay. This is because there is no intention on the part of the maker of the statement that any other person should believe anything.
- **CCTV – section 115(2)** contains the words ‘... made by a person ...’, so no issue of hearsay arises where the piece of evidence in question was created entirely by a device such as a CCTV system without any human input.
- **Questions** – Where there is no statement of a matter, eg where the communication consists only of the asking of a question, the court in *Twist* thought that no issue of hearsay could arise.

In *Twist* the communications in question were text messages received by the defendant asking for drugs. There was no statement that he was a drug dealer (which was the matter that the prosecution sought to prove), so the messages were not hearsay and were admissible. The court went on to say that even if on these facts there was an implied statement that the recipient of the messages was a drug dealer, it was certainly not the intention of the sender of the message to make the recipient believe that fact. Applying s.115(3) means that on that interpretation the messages are still not hearsay.

- **To show the effect of words** – In general, if the purpose of adducing evidence of words spoken out of court is to show the effect that the words had on the person to whom they were said, rather than to show the truth of what was said, the evidence is not hearsay. Therefore where a defendant wants to reveal solicitor’s advice to show why a “no comment” interview was given, that evidence is not hearsay.
- **Legally significant words** – Where the words spoken have significance as a matter of law, they are not hearsay. Therefore an offer of sexual services in exchange for money is admissible to show that the premises on which the words were spoken is a brothel. In this example the making of the offer is itself part of the definition of “brothel”.
- **Falsehoods** – It follows from the definition of hearsay in s.114 that there can be no hearsay where a party adduces evidence of what was said out of court while asserting that it is not true. Therefore the prosecution can give evidence of the defendant giving a false alibi to show that the defendant was trying to avoid being convicted of the offence.

7.9 Hearsay and original evidence

Very often evidence of words spoken out of court will be admissible as **original evidence**. In many cases the purpose of the party adducing the evidence will be to show that the words were spoken, rather than that they were true. If that is the case, the evidence is not hearsay because it is not being admitted as ‘evidence of any matter stated’.

Original evidence can also be adduced to show the state of mind of the maker of the statement.

Examples of original evidence include evidence of threats made to a person. Where the threat is along the lines of, ‘if you don’t do what I say, I shall harm you’, the evidence is usually being adduced to show that the threat was made, not that the maker of the threat would indeed cause harm to the person addressed.

In *Ratten v R* [1972] AC 378 the defence to an allegation that D murdered his wife was that the gun had gone off by accident. Evidence of a 999 call made by the deceased shortly before the killing was admitted to show that she was in a distressed state at that time.

7.10 Summary

This section provided an introduction to hearsay, as distinguished from original evidence:

- The rule against hearsay states that a statement made out of court may not be presented in evidence as proof of its contents. The general rule is that hearsay is inadmissible which is an example of an exclusionary rule. However, **section 114 CJA 2003** provides that hearsay is admissible if, but only if, it falls within one of the exceptions in s.114(1).
- When addressing hearsay, ask these two questions:
 - (i) Does the evidence fall within the definition of hearsay evidence? If the answer to this question is ‘yes’, then it is *prima facie* inadmissible.
 - (ii) Does it fall within one of the exceptions to the general exclusionary rule?
- Use the three part test in *R v Twist* [2011] to determine whether a communication is hearsay.
- The **ECHR Article 6** right to a fair trial may be engaged where hearsay evidence is admitted.

8 Hearsay – exceptions

8.1 Exceptions to the exclusionary rule

A statement is hearsay if:

- it is made out of court; and
- the person that made it intended another person to believe it; and
- it is adduced as evidence of the matter stated (s.114(1) and s.115 Criminal Justice Act 2003).

Section 114(1) provides that hearsay is not admissible unless it falls into one of the four exceptions to the general exclusionary rule:

- any of the statutory exceptions in the **CJA 2003** apply;
- any of the common law exceptions preserved under the **CJA 2003** apply (s.118 will be covering in detail in a separate section);
- all the parties agree; or
- the court uses its statutory discretion to admit the hearsay, in the interests of justice.

8.2 Admissible hearsay

This section will consider some of the exceptions to the rule against hearsay in the **Criminal Justice Act 2003**.

Hearsay may be admissible if:

- the witness is unavailable (s.116);
- it is a business document (s.117) – however, the court has the discretion to exclude such a business document if it is satisfied that the statement’s reliability is doubtful (s.117(6) and (7)); or

- it is in the interests of justice to admit it (s.114(1)(d)).

Note the court has discretion to exclude unfair prosecution evidence (s.78 PACE).

8.3 Witness is unavailable

Section 116 reads:

'116 Cases where a witness is unavailable

- (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—
 - (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,
 - (b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and
 - (c) any of the five conditions mentioned in subsection (2) is satisfied.
- (2) The conditions are:
 - (a) that the relevant person is dead;
 - (b) that the relevant person is unfit to be a witness because of his bodily or mental condition;
 - (c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;
 - (d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken;
 - (e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.'

Section 116 requires that the maker of the statement is identified, so it cannot be used to introduce anonymous hearsay. It does not allow in evidence that would have been inadmissible in live evidence, such as evidence of bad character that is not admissible through one of the gateways in ss.100 or 101.

8.3.1 Unfitness to be a witness (s.116(2)(b))

Unfitness of a person to be a witness because of their bodily or mental condition refers not to their fitness to physically attend court, but to their ability to give evidence once there. There is no requirement that the condition that makes a person unfit should be a medical condition. The trauma of having been the victim of a sexual assault can qualify.

8.3.2 Witness outside the UK and it is not reasonably practicable to secure attendance (s.116(2)(c)) Witness cannot be found (s.116(2)(d))

In deciding whether it is reasonably practicable for the witness to attend or whether steps taken to find the witness were reasonably practicable, the court has to consider the normal steps taken to secure the attendance of a witness. Cost is a relevant factor and it has to be balanced against the importance of the evidence that the witness would give. Subsection 116(2)(c) should be read as referring to the impracticability of securing the attendance of the witness either in person or by videolink.

8.3.3 Fear

¹Section 116

(3) For the purposes of subsection (2)(e) "fear" is to be widely construed and (for example) includes fear of the death or injury of another person or of financial loss.

(4) Leave may be given under subsection (2)(e) only if the court considers that the statement ought to be admitted in the interests of justice, having regard:

(a) to the statement's contents,

(b) to any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement if the relevant person does not give oral evidence),

(c) in appropriate cases, to the fact that a direction under section 19 of the Youth Justice and Criminal Evidence Act 1999 (c 23) (special measures for the giving of evidence by fearful witnesses etc.) could be made in relation to the relevant person, and

(d) to any other relevant circumstances.'

There is no requirement that the fear that is felt by the witness should have been caused by the defendant.

Authorities differ as to how the court should approach an enquiry as to whether the reason for the absence of a witness is fear.

In *Davies* [2007] 2 All ER 1070 it was said that courts are ill-advised to seek to test the basis of fear by calling witnesses before them.

In later cases, especially *Shabir* [2012] EWCA Crim 2564 the Court of Appeal took the view that every effort should be made to get the witness to court to test the issue of 'fear'.

It is very important that when police officers seek to persuade a witness to attend court to give evidence, they do not give the witness any assurance that their witness statement can be read to the court if they are afraid to attend. This would provide the witness with an obvious incentive to say that they are in fear.

The court has to be satisfied to the criminal standard that the witness does not give evidence through fear. A causative link between the fear and the failure to give evidence must be established.

8.3.4 Intimidation

In *Selllick* [2005] EWCA Crim 651 the Court of Appeal made clear that where intimidation of a witness by a defendant is either clearly proved or the court believes to a high degree of probability that that is the case, the defendant cannot complain that the right to a fair trial has been infringed on the basis that the defence was not able to cross-examine the witness. See also s.116(5) of the CJA 2003.

9 Business documents, etc

The CJA 2003, s.117 reads (in part):

'(1) In criminal proceedings a statement contained in a document is admissible as evidence of any matter stated if:

(a) oral evidence given in the proceedings would be admissible as evidence of that matter,

(b) the requirements of subsection (2) are satisfied...

(2) The requirements of this subsection are satisfied if:

(a) the document or the part containing the statement was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office,

(b) the person who supplied the information contained in the statement (the relevant person) had or may reasonably be supposed to have had personal knowledge of the matters dealt with, and

(c) each person (if any) through whom the information was supplied from the relevant person to the person mentioned in paragraph (a) received the information in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office.

(3) The persons mentioned in paragraphs (a) and (b) of subsection (2) may be the same person.'

The wording of s.117(2)(a) is wide enough to ensure that the section covers a lot of documents that are not in any sense business documents.

It covers, for example:

- medical records; and
- any statement written down by a police officer in the course of duty.

9.1 Documents prepared for criminal proceedings

There are extra rules that apply to documents prepared for the purposes of pending or contemplated criminal proceedings.

Subsections (4) and (5) of s.117 require that for those documents to be admissible, either:

- one of the five conditions mentioned in s.116 is satisfied; **or**
- the person who supplied the information contained in the statement cannot reasonably be expected to have any recollection of the matters dealt with in the statement (having regard to the length of time since the information was supplied and all other circumstances).

The question of whether or not a document was prepared for the purposes of pending or contemplated criminal proceedings will usually be easy to answer once the circumstances in which the document was made are known.

Generally all witness statements and all entries in police notebooks made in the course of an investigation into an alleged offence will fall within the definition.

9.2 Exclusion

Sections 117(6) and (7) add to the general exclusionary discretion in **s.78 PACE 1984** in that they allow the court to exclude evidence that would otherwise be admissible under s.117 if it is satisfied that the statement's reliability is doubtful in view of:

- (a) its contents;
- (b) the source of the information contained in it;
- (c) the way in which or the circumstances in which the information was supplied or received; or
- (d) the way in which or the circumstances in which the document concerned was created or received.

When considering whether to admit or exclude evidence through the gateways created by ss.116 and 117, the court should take into account the factors listed in s.114(2) that are relevant to decisions on admission of evidence in the interests of justice.

9.3 Interests of justice

CJA 2003, s.114(1)(d) allows the admission of hearsay evidence where the court is satisfied that it is in the interests of justice to admit it.

Section 114(2) requires the court when deciding whether it is in the interests of justice to admit evidence of the following (and anything else it considers relevant):

- (a) How much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case
- (b) What other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a)

- (c) How important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole
- (d) The circumstances in which the statement was made
- (e) How reliable the maker of the statement appears to be
- (f) How reliable the evidence of the making of the statement appears to be
- (g) Whether oral evidence of the matter stated can be given and, if not, why it cannot
- (h) The amount of difficulty involved in challenging the statement
- (i) The extent to which that difficulty would be likely to prejudice the party facing it

The application of s.114(1)(d) should be approached with caution. It is not intended to be a way of getting round the failure of a particular piece of evidence to fit into any of the other exceptions to the exclusionary rule.

For example, an attempt to use s.114(1)(d) failed in a case where a witness was reluctant to come to court to give evidence because she did not want to relive the trauma of the sexual assaults that would have been the subject of her evidence. The Court of Appeal held that the prosecution was trying to circumvent s.116, which does not recognise that reason for admitting hearsay evidence.

Section 114(1)(d) certainly cannot be used to repair failings on the part of the party seeking to adduce the evidence.

Where the Crown has failed to take reasonable steps to find a witness or to secure the witness's attendance, so that s.116(2)(c) or (d) cannot be used, they cannot fall back on s.114(1)(d) and say that the evidence should be admitted in the interests of justice.

9.4 Common law exceptions

Section 118 Criminal Justice Act 2003 preserves some common law exceptions to the rule against hearsay. This element considers the following common law exceptions:

- public information;
- evidence of reputation;
- *res gestae*;
- confessions;
- statements in furtherance of common enterprise; and
- body of expertise.

9.4.1 Public information

Admissible public information includes:

- published works dealing with matters of a public nature such as dictionaries and maps;
- public documents such as public registers; and
- records such as court records and public treaties.

Also, a person may give evidence of their age and the place of their birth despite the fact that they will have been told these things by someone else.

9.4.2 Evidence of reputation

The common law rule allowing the admission of evidence of reputation as to character, to prove character, is preserved.

9.4.3 Res gestae

Section 118 also preserves the common law rule that a statement is admissible as evidence of any matter stated if:

- (a) The statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded;
- (b) The statement accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement; or
- (c) The statement relates to a physical sensation or a mental state (such as intention or emotion).

R v Andrews [1978] AC 281

The leading case. The res gestae rule does not require that the statement is made as part of the action of the offence. What is required is that the possibility of concoction can be excluded. The court must be satisfied that the event to which the statement relates was so unusual or startling or dramatic as to dominate the thoughts of the victim so that the utterance was an instinctive reaction to that event. The statement must be made at a time when the mind of the person making the statement was still dominated by the event.

Where res gestae evidence is admitted, it must be made clear to the jury that they must be satisfied that there was no mistake on the part of the witnesses as to what had been said to them. They must be satisfied that there was no concoction on the part of the maker of the statement. Where there are special features that bear on the possibility of mistake, the attention of the jury must be drawn to them.

In **domestic violence** cases the res gestae exception provides the prosecution with an alternative to s.116(2)(e) as a way of admitting the evidence of a complainant who does not give evidence at trial. What is said by the complainant in a 999 call or to officers immediately after the alleged incident will usually be admissible as res gestae evidence. The latter is becoming much more important and reliable as a source of evidence now that most officers have body-worn cameras that record both audio and video. The prosecutor can play the footage from the body-worn device as evidence both of the demeanour of the complainant straight after the incident as of the truth of what the complainant says.

9.4.4 Confessions

The common law rule to the effect that evidence of confessions is admissible is preserved.

9.4.5 Statements in furtherance of common enterprise

There is a broad common law rule that the statements of one party to a common criminal enterprise in furtherance of that enterprise are admissible against all the parties to the joint enterprise. This is of particular significance in conspiracy cases.

9.4.6 Body of expertise

The common law rule that an expert witness may draw on a body of expertise is preserved. Without this rule, it would be impossible for experts to give evidence of any of the learning within their field, except that which they themselves had contributed to the field.

9.5 Statutory exceptions – previous statements

9.5.1 Previous inconsistent statements

Section 119 CJA 2003 provides that:

- a previous inconsistent statement that a witness admits to having made; or
 - a previous inconsistent statement that the witness is proved to have made
- is admissible as evidence of the matter stated.

This is an exception to the rule against hearsay. It was introduced by the **CJA 2003**. Prior to the Act, previous inconsistent statements were evidence only of inconsistency.

9.5.2 Previous consistent statements

Sections 120(2) and 120(4) make admissible as evidence of any matter stated, previous consistent statements admitted to rebut a suggestion of recent fabrication or as recent complaint evidence.

Again, this is an exception to the rule against hearsay and was a novelty in the Act, before which such evidence was only evidence that the statements had been made.

9.6 Multiple hearsay

An example of an oral hearsay statement would be that a witness ('X') testifies to what Y said. In contrast, an example of multiple hearsay would be X testifies to what Y said Z told Y.

CJA 2003, s.121 provides that a hearsay statement is not admissible to prove the fact that an earlier hearsay statement was made unless:

- (a) Either of the statements is admissible under ss.117, 119 or 120;

- (b) All parties to the proceedings so agree; or
- (c) The court is satisfied that the value of the evidence in question, taking into account how reliable the statements appear to be, is so high that the interests of justice require the later statement to be admissible for that purpose.

The effect of the rule is that multiple hearsay is never allowed through any of the exceptions in s.116 or through any of the preserved common law exceptions in s.118.

9.7 Evidence affecting the credibility of admissible hearsay

Because the maker of a hearsay statement is not present in court to be cross-examined, it is necessary to allow the person's credibility to be challenged in other ways.

CJA 2003, s.124 allows an opposing party to put into evidence anything that could have been put to the witness to challenge credibility in cross-examination. It goes further than that in allowing the admission of evidence as to matters on which the witness's answers in cross-examination would have been final.

9.8 Unconvincing hearsay

CJA 2003, s.125 allows the judge to stop a case where the case depends wholly or partly on hearsay evidence and that evidence is so unconvincing that, considering its importance to the case against the defendant, the defendant's conviction of the offence would be unsafe.

Under those circumstances, the judge must either discharge the jury and order a retrial, or direct the jury to acquit the defendant.

9.9 Superfluous hearsay

CJA 2003, s.126 allows the court to exclude hearsay evidence that would otherwise be admissible where the admission of the evidence would result in undue waste of time.

This is a provision that can be used to exclude hearsay evidence proffered by either the prosecution or the defence. It is intended to avoid time being wasted on peripheral issues.

9.10 Directing the jury

The jury must be reminded that a hearsay statement that has been admitted at the trial was not given on oath and that it was not tested in cross-examination.

The risks of relying on hearsay evidence should be pointed out and the jury should be warned to scrutinise it with particular care.

Where the court has concerns about the quality of a particular piece of hearsay evidence, the attention of the jury should be drawn to the limitations on the usefulness of that piece of evidence.

9.11 Hearsay procedure

Criminal Procedure Rules Part 20 applies to the admission of hearsay evidence.

Notice

Notice is required where a party intends to introduce hearsay evidence under:

- s.114(1)(d) (interests of justice);
- s.116 (witness unavailable);
- s.117(1)(c) (document prepared in contemplation of criminal proceedings); or
- s.121 (multiple hearsay).

9.12 Notice

The notice must be served on the court and on every other party. It must:

- (a) Identify the hearsay evidence
- (b) Set out the facts relied on that make the evidence admissible
- (c) Explain how those facts will be proved if they are disputed
- (d) Explain why the evidence is admissible

The evidence must be attached to the notice if it has not already been served.

The prosecution must serve notice not more than:

- (a) 20 business days after a not guilty plea in the magistrates' court; or
- (b) 10 business days after a not guilty plea in the Crown Court.

A defendant must serve notice as soon as reasonably practicable.

9.13 Opposing the introduction of hearsay evidence

A party objecting to the introduction of hearsay evidence must serve an application on the court and every other party as soon as reasonably practicable and in any event not more than 10 business days after either of the following, whichever of those happens last:

- (a) Service of the notice to introduce the evidence;
- (b) Service of the evidence objected to, if that is evidence for which no notice is required; or
- (c) The defendant pleads not guilty.

The application must explain:

- (a) Which, if any, facts set out in the notice to introduce the evidence the party disputes;
- (b) Why the evidence is not admissible; and
- (c) Any other objection to the evidence.

9.14 Summary

A statement is hearsay if:

- it is made out of court; and
- the person that made it intended another person to believe it; and
- it is adduced as evidence of the matter stated (**s.114(1)** and **s.115 Criminal Justice Act 2003**).

Hearsay is admissible if all the parties agree or one of the exceptions apply:

- the witness is unavailable (**s.116**);
- it is a business document (**s.117**)
- it falls under a common law exception (**s.118**);
- it is a previous inconsistent or consistent statement of a witness (**ss.119 and s.120**).

If any of the exceptions apply, the court has the discretion to exclude otherwise admissible hearsay if:

- a business document etc and the court is satisfied that the statement's reliability is doubtful (**s.117(6) and (7)**);
- by stopping the case, where the case depends wholly or partly on unconvincing hearsay evidence (**s.125**);
- it is superfluous (**s.126**);
- it is unfair prosecution evidence (**s.78 PACE**).

If the parties don't agree and the exceptions do not apply, the court has discretion to admit hearsay if it is in the interests of justice to admit it under: **s.114(1)(d)** in respect of hearsay or **s.121(1)(c)** in respect of multiple hearsay.

10 Visual identification – trial stage

10.1 Turnbull Guidelines



Key case: *R v Turnbull [1977] QB 224*

In *R v Turnbull [1977] QB 224*, the Court of Appeal issued guidelines to be followed in all cases where the case against the accused depended wholly or substantially on evidence of identification which the suspect alleged to be mistaken. In *Turnbull*, the Court of Appeal gave guidance:

- on what a judge should say to a jury when a case depended wholly or substantially on disputed identification evidence; and
 - to judges on when identification evidence can safely be left to the jury and when a case must be withdrawn to protect the defendant from an unsafe conviction.
-

Safeguards were introduced at every stage of the criminal justice process to ensure that identification evidence before a jury is reliable as possible:

- Investigation stage: **Police and Criminal Evidence Act 1984 (PACE) Code of Practice D**; and
- Trial stage: *Turnbull* guidelines.

10.2 When should a *Turnbull* direction be given?

The Court of Appeal in *R v Turnbull* [1977] QB 224 prescribed rules to guide judges faced with contested visual identification evidence. A ***Turnbull*** direction should be given when the case against the accused depends '**wholly or substantially**' on the **correctness of the visual identification**.

In essence this usually means those situations where the defendant was picked out in formal ID procedure but maintains that the witness was mistaken in that identification.

A ***Turnbull*** direction should be given even in cases of alleged recognition; many times someone has seen a stranger in the street and thought they recognised them, even when on closer inspection they discover they were wrong.

If presence at the scene is admitted but the defendant disputes their role in an incident, then it is likely that a ***Turnbull*** direction will not be required. However, each case turns on its own facts, and the court should be alive in every case to the possibility of a direction being required. This should be discussed between judge and advocates in the absence of the jury prior to speeches and summing up.

10.3 What is a *Turnbull* direction?

The guidelines are aimed at assessing the quality of the identification. Where the case against an accused person depends wholly or substantially on the correctness of an identification of the accused which the defence allege is mistaken:

- The judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification, whenever the prosecution case against an accused depends wholly or substantially:
 - on the correctness of one or more identifications of the accused; and
 - the defence alleges the identification to be mistaken.
- This special ***Turnbull*** warning has three key elements. The judge should:
 - instruct the jury as to the reason for the need for such a warning; mistaken witnesses can be convincing ones.
 - direct the jury to examine the circumstances in which the identification by each witness came to be made.
 - remind the jury of any specific weaknesses in the identification evidence.

10.4 Other evidence supporting the identification

The trial judge will direct the jury to consider if there is any other evidence to support the correctness of the identification. The trial judge should identify to the jury the evidence capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might consider to be supporting when it did not have this quality, the judge should say so.

Evidence capable of supporting the identification includes:

- Scientific evidence, for example footwear, facial mapping, telephone evidence
- Multiple identifications by different witnesses (as long as the identifications are of sufficient quality so as to be left to the jury to assess)
- The accused's bad character or previous convictions (if admissible)

- The accused's silence on interview (if it is proper for an adverse inference to be drawn)
- The accused's admissions at the scene / in interview / in the witness box

10.5 Withdrawing the case from the jury

Judges are also required to examine the state of identification evidence at the close of the prosecution case and to stop the case if it is poor and unsupported.

In cases of visual identification, the judge must answer two principal questions:

- What is the quality of the identification evidence?
- Is there other evidence to support the correctness of the identification?

In assessing the quality of the identification evidence, the judge will need to consider lighting, distance, length of time of observation and qualities relating to the witness themselves, such as their eyesight.

10.5.1 Assessing the quality of visual identification evidence

The jury should be directed to carefully examine the surrounding circumstances of the evidence of identification, in particular:

- the time during which the witness had the person under observation; in particular the time during which the witness could see the person's face;
- the distance between the witness and the person observed;
- the state of the light;
- whether there was any interference with the observation (such as either a physical obstruction or other things going on at the same time);
- whether the witness had ever seen D before and if so how many times and in what circumstances (i.e. whether the witness had any reason to be able to recognise D);
- the length of time between the original observation of the person (ie the incident) and the identification by the witness of D at an identification procedure;
- whether there is any significant difference between the description the witness gave to the police and the appearance of D.

To assist in considering the strengths and weakness of the evidence as outlined in **Turnbull** above, the mnemonic ADVOKATE summarises the required checks.

A	Amount of time under observation	How long did the witness have the accused in view?
D	Distance	What was the distance between the witness and the accused?
V	Visibility	What was the visibility like at the time?
O	Obstruction	Were there any obstructions to the view of the witness?
K	Known or seen before	Had the witness ever seen the accused before? If so, where and when?
A	Any reason to remember	Did the witness have any special reason for remembering the accused?
T	Time lapse	How long has elapsed between the witness seeing the accused and the ID procedure being held?
E	Error or material discrepancy	Are there any errors or material discrepancies between the first description given by the witness and the actual

		appearance of the accused?
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10.6 Quality of identification evidence

- When the quality of the identification is good, the jury can be safely left to assess the value of the identifying evidence, regardless of whether there is other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution.
- When the quality of the identifying evidence is poor – i.e. a fleeting glance or an observation made in difficult conditions – the judge should consider whether there is other evidence to support the correctness of the identification.
 - If there is not, the judge should withdraw the case from the jury and direct an acquittal.
 - If there is some supporting evidence, for example scientific evidence, then the judge can leave the weak identification to the jury to be assessed alongside the supporting evidence.

10.7 Dock identification

- Identification of the defendant by a witness for the first time in court (a ‘dock identification’) is exceptional and rare.
- It is an undesirable practice, as it leaves the witness with no other alternative than the defendant and the fact that the defendant is already standing in the dock is highly prejudicial.
- A well-meaning witness may simply assume that the person responsible for the crime is the defendant because it is the defendant in the dock.
- A trial judge retains a discretion to permit a dock identification. In considering this, the judge will need to consider whether such a course of conduct will jeopardise the fairness of the accused’s trial. For example, in a case of alleged recognition, the judge may be of the view that it would not be unjust to allow a dock identification.



Example: ID as a live issue

Imagine a scenario where an eye witness saw D run from a burgled warehouse and later picks D out on an ID procedure.

- If D accepts being at the scene of the burglary but D denies being part of the burglary then identification is not the issue for trial; D’s **participation** is the live or disputed issue.
- If D disputed being at the scene of the burglary and there was no CCTV, forensics or witness statements to implicate D then that would be a situation where identification was a live issue.

So, before you decide that identification is a live issue there must be two pre-conditions:

- D disputes the identification evidence; and
- the identification evidence is wholly or substantially the only evidence implicating D.

10.8 Summary

Turnbull Guidelines – what a judge should say to a jury when a case depends wholly or substantially on disputed identification evidence.

If the judge decides the witness evidence is so weak it would lead to an unsafe conviction, the judge will withdraw the case from the jury and direct the jury to acquit the defendant. Without the identification that was all or the main part of the evidence against D, there is no evidence left of any weight for the jury to decide on.

If the judge decides that the evidence given by the witness at trial is strong enough to be left to the jury or is weak but supported by some other evidence, then the trial will proceed. During summing up, the judge will explain to the jury that they must decide whether D was the person seen by the witness. At this stage the judge will give the jury a specific **Turnbull warning** – a direction in relation to how they should assess the weight of the identification evidence.

11 Bad character- introduction

11.1 Bad character definition

Bad character is defined in s.98 Criminal Justice Act (CJA) 2003 thus:

'References in this Chapter to evidence of a person's "bad character" are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which—

- (a) has to do with the alleged facts of the offence with which the defendant is charged, or
- (b) is evidence of misconduct in connection with the investigation or prosecution of that offence.'

'Misconduct' is defined in s.112 CJA 2003 as 'the commission of an offence or other reprehensible behaviour'.

'Reprehensible behaviour' is not further defined in the Act, though there is case law on the issue. 'Reprehensible' connotes some degree of moral blameworthiness. Behaviour is not necessarily reprehensible just because it is morally lax, having an affair, for example, would not be considered in law bad character. It is well established that evidence of membership of a gang is evidence of reprehensible behaviour.

11.2 Sources of bad character evidence

Bad character may be shown by any of the following:

- Previous convictions in the UK
- Previous convictions in a foreign court where such offences have a domestic equivalent. Blasphemy, for example, would be unlikely to be considered bad character.
- Cautions
- Acquittals, where the prosecution contends that in fact the defendant was guilty of the previous offence of which D was acquitted
- Agreed facts that amount to reprehensible behaviour
- Witness evidence of a reputation for reprehensible behaviour

11.3 Acquittals and previous convictions

Where the prosecution relies on evidence of previous acquittals, it is open to it to assert that the defendant did commit the offence(s) of which D was previously convicted.

The double jeopardy rule is not transgressed so long as the prosecution does not seek to have the defendant punished for the previous offences.

Z [2000] 2 AC 483

In this case (a rape case where the defence was consent) it was permissible for the prosecution to rely on four previous rape allegations where the same defence was advanced, three of which resulted in acquittals, to show that **Z** had a propensity to rape and to assert that consensual intercourse had taken place. All four previous complainants were allowed to give evidence and the jury were entitled to assess their credibility regardless of the verdicts reached in the previous trials.

The logical corollary of this position is that evidence of a previous conviction is in law a rebuttable presumption that the defendant committed the said offence thus the defendant is entitled to adduce evidence tending to show they were wrongly convicted.

11.4 Conduct which falls outside s.98

Section 98 CJA 2003 specifically excludes evidence of misconduct which:

- (a) Has to do with the alleged facts of the offence with which the defendant is charged; or
- (b) Is committed in connection with the investigation or prosecution of that offence.

Evidence which falls within the s.98 definition does not have to satisfy any of the conditions set out in ss.100 (gateways to admissibility of non-defendant's bad character) or 101 (gateways to admissibility of defendant's bad character).

If a defendant tells a demonstrable lie during interview, subject to relevance, that is not a matter which would require the prosecution to make a bad character application by virtue of s.98(b).

Where it is necessary as part of the prosecution case to prove criminal conduct by the defendant or another, evidence of that conduct will fall outside s.98.

Examples are offences of driving while disqualified where the prosecution will have to prove that the defendant committed an earlier offence and was disqualified as a result.

Attempts at jury tampering or witness intimidation are examples of misconduct connected with the investigation or prosecution of the offence, so evidence of those matters is not bad character evidence.

The decided cases seem to accept that evidence of the motive of the accused to commit the offence is evidence that has to do with the alleged facts of the offence.

11.5 Summary

- A defendant or non-defendant will exhibit bad character if their behaviour falls within the definition in s.98 CJA 2003.
- Bad character may be shown in lots of different ways: previous convictions, witness evidence, agreed facts and acquittals for example.
- The bad character evidence must go through a gateway to be admissible:
 - S.100(1) sets out the gateways for non-defendant bad character
 - S.101(1) sets out the gateways for defendant bad character
- Many of the gateways require a bad character application to be made.
- Conduct is admissible without going through a gateway if it:
 - has to do with the alleged facts of the offence with which the defendant is charged; or
 - is committed in connection with the investigation or prosecution of that offence.

Examples include lying in police interview and jury tampering.

12 Bad character – defendant

12.1 Section 101: Gateways for admissibility of defendant bad character evidence

There are seven gateways through which evidence of the bad character of a defendant can become admissible. They are set out in **s.101(1)(a–g) Criminal Justice Act (CJA) 2003**.

Evidence of bad character is admissible if, but only if, it falls within one of the gateways. Once evidence is admitted through any one of the gateways, it can be used for any purpose for which it is relevant.

It is useful to be able to remember all the gateways. A mnemonic that might help is:

- (a) **A**greement
- (b) **B**lurts it out
- (c) **C**ontext
- (d) **D**one it before
- (e) **'E** did it
- (f) **F**alse impression
- (g) **G**ets at the witness

12.2 Section 101(1)(a): Agreement of the parties

Section 101 CJA 2003:

'1 In criminal proceedings evidence of the defendant's bad character is admissible if, but only if, -

(a) all parties to the proceedings agree to the evidence being admissible'

There is no need to make an application to the court for leave to adduce evidence through this gateway.

There are no formal requirements as to the recording of the agreement or how it is reached. A tacit agreement is enough.

12.3 Section 101(1)(b): Evidence adduced by the defendant

This allows defendants to introduce evidence of their own bad character.

'Section 101(1)(b) "the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it".'

There are a number of reasons why D may wish to do so. Reasons include:

- To come clean about an old conviction in order to receive a modified good character direction
- To show that D has never been convicted of an offence of the type with which D is now charged
- To put forward a defence, e.g. to show that D was in prison at the time of the alleged offence
- To show why police officers might have a bias against D

Leave of the court is not required to adduce evidence through this gateway.

12.4 Section 101(1)(c): Important explanatory evidence

Section 101(1)(c): 'it is important explanatory evidence'. 'Important explanatory evidence' is defined in s.102 CJA 2003 thus:

'For the purposes of section 101(1)(c) evidence is important explanatory evidence if—

(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and

(b) its value for understanding the case as a whole is substantial.'

This gateway allows the prosecution to adduce evidence of past misconduct of the defendant where it is needed to explain the prosecution case in the current trial.

Often the evidence will be to show the previous relationship between people involved in the trial without which it would not be possible to understand the narrative put forward by the prosecution.

Leave of the court is required to adduce evidence through this gateway.

12.5 Section 101(1)(d)

Section 101(1)(d):

'it is relevant to an important matter in issue between the defendant and the prosecution'.

Section 112 says that 'important matter' means a matter of substantial importance in the context of the case as a whole.

Section 103 further explains the meaning of s.101(1)(d):

'(1) For the purposes of section 101(1)(d) the matters in issue between the defendant and the prosecution include -

(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;

(b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect.

(2) Where subsection (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of—

(a) an offence of the same description as the one with which he is charged, or

(b) an offence of the same category as the one with which he is charged.

(3) Subsection (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case.

(4) For the purposes of subsection (2)—

(a) two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms;

(b) two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this section by an order made by the Secretary of State.

(5) Only prosecution evidence is admissible under section 101(1)(d).'

Section 101(3) provides that:

'The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'

12.5.1 Propensity to commit offences of the kind with which D is charged



Key case: *R v Hanson and others [2005] EWCA Crim 824*

R v Hanson and others [2005] EWCA Crim 824 is the leading case on whether evidence of bad character does establish a propensity to commit offences of the kind with which the defendant is charged. The court formulated the following questions to be posed when an application is made to admit bad character evidence to show propensity:

- Does the defendant's history establish a propensity to commit offences of the kind charged?
- Does that propensity make it more likely that the defendant committed the offence charged?
- Where the previous offences are of the same description or category as the offence charged, would it be unjust to rely on them (s.103(3))?
- In any event, would proceedings be unfair if the evidence were to be admitted (s.101(3))?

In the same case, the court held that the following principles apply:

- There is no minimum number of previous convictions required to establish a propensity. The fewer the number of previous convictions, the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category as the offence charged might show propensity where it shows a tendency towards unusual behaviour.
- The strength of the prosecution case should be considered. It is unlikely to be just to admit bad character evidence where there is no or little other evidence against the defendant.

While propensity is usually shown by evidence of conduct before the alleged offence, it can be demonstrated by evidence of the existence of the propensity after the offence, provided that it is likely that the propensity is ongoing. For example, propensity to be involved in a racist murder can be shown by evidence of the expression by the accused of racist beliefs after the commission of

the offence. It is for the jury to decide whether the accused's racism is a recently-acquired character trait.

12.5.2 Important matters in issue

It is important to remember that while gateway d is often described as the 'propensity gateway', it is in fact concerned with all manner of important matters in issue between the prosecution and defence. An example of an issue other than propensity in a trial is that of identity. In such trials the prosecution may seek to adduce bad character evidence to support their case on identification.

Where the facts of previous convictions are so unusual as to constitute a 'signature' of the offender's mode of offending, the propensity itself is likely to be very powerful evidence against the defendant. In the pre-2003 case law these were termed 'striking similarity' cases and based on the principle of 'similar fact evidence'.

Straffen [1952] 2 QB 911

An example of striking similarity. Where in a trial for murdering a young girl by strangulation evidence was adduced that the defendant had previously been convicted of two similar offences. All three offences had the unusual feature that there had been no attempt at sexual assault and no attempt to conceal the body. In that case the only additional evidence against the defendant was that he was in the area and he had recently been released from Broadmoor secure psychiatric hospital. In such a case it is not necessary for the judge to give the usual warning not to convict solely or mainly on evidence of bad character.

12.5.3 Propensity to be untruthful

Also in *R v Hanson* the court held that a propensity to be untruthful is not the same as a propensity to be dishonest. Previous convictions are only likely to be capable of showing such a propensity where:

- There was a plea of not guilty to the previous offence and the defendant gave evidence at trial which the jury must have disbelieved; or
- The way in which the offence was committed involved being untruthful, e.g. fraud by false representation.

In practice this means that while burglary is categorised as a dishonesty offence, it does not logically follow that each and every burglar is untruthful. A person can commit a burglary and go onto admit it in interview and plead guilty, in such circumstances, it would incorrect to describe their behaviour as general untruthful.

12.5.4 Cross-admissibility

Where a defendant faces multiple charges in the same proceedings, the bad character provisions apply as if each offence were charged in separate proceedings. Therefore a gateway is required to allow cross-admissibility of evidence of one offence as evidence of the other. The most likely gateway to fulfil this function is s.101(1)(d).

For example, where a man is accused of sexual assaults on both of his stepdaughters (A and B), evidence from A that she was assaulted is **only** evidence that the defendant committed offences against her **unless** it is admissible through gateway (d) to show a propensity to commit offences of the kind alleged, in which case it also becomes evidence against the defendant when the jury are considering the allegations made by B. In such a case, if a jury were sure that the defendant was guilty in respect of A and they were further sure that that conviction established a propensity to offend in a manner relevant to B's case, the evidence can be lawfully deployed in that way.

12.5.5 Functions of the judge and jury

The judge is to determine whether evidence is **capable** of establishing a propensity.

If evidence is admitted to show propensity, it is a matter for the jury whether it does actually show the propensity that is asserted.

Leave of the court is required to admit evidence through this gateway.

12.6 Section 101(1)(e): Important matter in issue between the defendant and a co-defendant

Section 101(1)(e):

‘it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant’.

Section 104 CJA 2003 states:

‘1 Evidence which is relevant to the question whether the defendant has a propensity to be untruthful is admissible on that basis under section 101(1)(e) only if the nature or conduct of his defence is such as to undermine the co-defendant’s defence.

2 Only evidence—

(a) which is to be (or has been) adduced by the co-defendant, or

(b) which a witness is to be invited to give (or has given) in cross-examination by the co-defendant, is admissible under section 101(1)(e).’

Note that the fairness test in s.101(3) CJA 2003 does not apply to s.101(1)(e). Also, because by definition evidence that comes in through this gateway is not prosecution evidence, s.78 PACE Act 1984 does not apply to it. Therefore it is very hard for a defendant (D1) to exclude evidence of D1’s bad character where it is a co-defendant rather than the prosecution that seeks to adduce it.

While the propensity of the co-accused to commit offences of the type charged is not itself an issue between the co-defendants, evidence of such a propensity becomes admissible where one of them asserts that they have no such propensity, in which case the other defendant can adduce evidence of a propensity.

The effect of s.104 is that evidence of the co-defendant’s propensity to be untruthful is only admissible where the nature of the defence is such as to undermine the defence of the co-defendant that seeks to adduce the evidence.

Leave of the court is required to admit evidence through this gateway.

12.7 Section 101(1)(f): Correcting a false impression

Section 101(1)(f):

‘it is evidence to correct a false impression given by the defendant’.

Section 105 states:

(1) For the purposes of section 101(1)(f):

(a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant;

(b) evidence to correct such an impression is evidence which has probative value in correcting it.

(2) A defendant is treated as being responsible for the making of an assertion if:

(a) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him),

(b) the assertion was made by the defendant:

(i) on being questioned under caution, before charge, about the offence with which he is charged, or

(ii) on being charged with the offence or officially informed that he might be prosecuted for it,

and evidence of the assertion is given in the proceedings,

(c) the assertion is made by a witness called by the defendant,

(d) the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so, or

(e) the assertion was made by any person out of court, and the defendant adduces evidence of it in the proceedings.

(3) A defendant who would otherwise be treated as responsible for the making of an assertion shall not be so treated if, or to the extent that, he withdraws it or disassociates himself from it.

(4) Where it appears to the court that a defendant, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading, the court may if it appears just to do so treat the defendant as being responsible for the making of an assertion which is apt to give that impression.

(5) In subsection (4) ‘conduct’ includes appearance or dress.

(6) Evidence is admissible under section 101(1)(f) only if it goes no further than is necessary to correct the false impression.

(7) Only prosecution evidence is admissible under section 101(1)(f).’

Leave of the court is required to admit evidence through this gateway.

It is possible for s.101(1)(f) to have an effect even where it is the prosecution that adduces the evidence that creates a false impression.



Example: Correcting a false impression

For example, where the defendant says in police interview, ‘I have never acted dishonestly’, and the prosecution adduces evidence of what was said in the interview as part of the prosecution case, s.101(1)(f) allows the prosecution to adduce evidence of previous convictions for offences of dishonesty to correct the false impression given in interview.

12.8 Section 101(1)(g): Attack on another person’s character

Section 101(1)(g):

‘the defendant has made an attack on another person’s character’.

Section 106 says:

’1 For the purposes of section 101(1)(g) a defendant makes an attack on another person’s character if:

(a) he adduces evidence attacking the other person’s character,

(b) he ... asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so, or

(c) evidence is given of an imputation about the other person made by the defendant—

(i) on being questioned under caution, before charge, about the offence with which he is charged, or

(ii) on being charged with the offence or officially informed that he might be prosecuted for it.

2 In subsection (1) ‘evidence attacking the other person’s character’ means evidence to the effect that the other person:

(a) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one), or

(b) has behaved, or is disposed to behave, in a reprehensible way;

and “imputation about the other person” means an assertion to that effect.

3 Only prosecution evidence is admissible under section 101(1)(g).’

Note that this gateway can be used to admit evidence of dishonesty, not just of a propensity to be untruthful, as is the case where evidence is admitted through the s.101(1)(d) gateway.

The reason is that the purpose of the s.101(1)(g) is to allow the jury to assess how likely it is that the attack on the other person’s character is true. In assessing this, the jury are entitled to know the character of the person who makes the allegation.

This subsection is triggered where an attack is made on any person, living or dead. It is also unimportant whether the person whose character has been attacked is or is not a witness in the case.

Leave of the court is required to admit evidence through this gateway.

The fairness test in s.101(3) CJA 2003 applies to this gateway.

12.9 Directing the jury

It should be made clear to the jury that the weight to be placed on evidence of bad character that has been adduced during the trial is a matter for them.

The jury must be warned not to place too much reliance on bad character evidence. It should be stressed that bad character evidence cannot be used to bolster a weak case, or to prejudice the jury against the defendant. The jury should be directed that:

- they should not conclude that the defendant was guilty or untruthful merely because D had previous convictions; and
- a propensity is not enough to show that the defendant committed the offence alleged in this case.

The significance of bad character evidence should be assessed in the light of all the evidence in the case.

Where an allegation of conduct that did not result in a conviction is relied on as evidence of propensity and it is disputed, the jury should be directed that they should not rely on it unless they are sure that it is true.

12.10 Summary

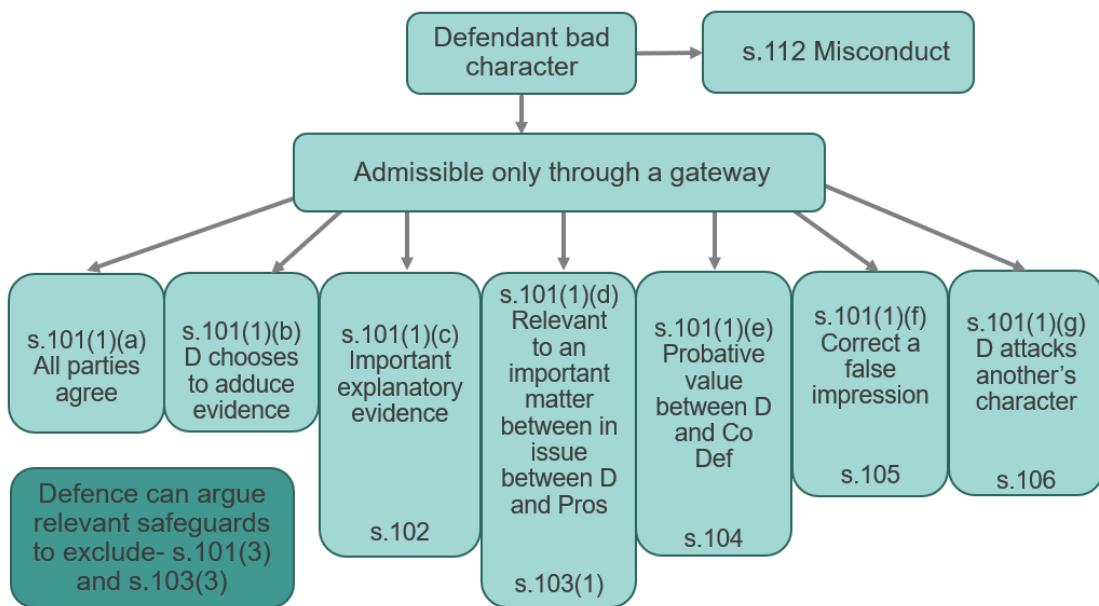


Figure 4.1: Summary I

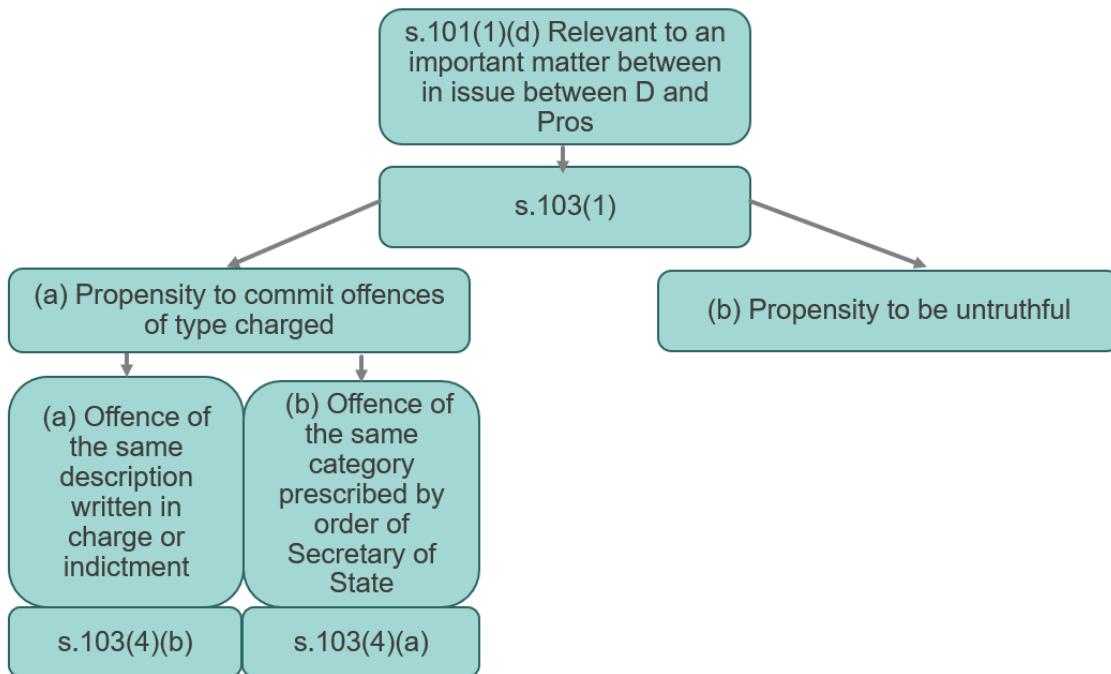


Figure 4.2: Summary II

13 Bad character – non defendant

13.1 Section 100: Gateways for admissibility of non-defendant bad character evidence

Section 100 CJA 2003 states:

'1 In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if:

- (a) it is important explanatory evidence,
- (b) it has substantial probative value in relation to a matter which:
 - (i) is a matter in issue in the proceedings, and
 - (ii) is of substantial importance in the context of the case as a whole, or
- (c) all parties to the proceedings agree to the evidence being admissible.

2 For the purposes of subsection (1)(a) evidence is important explanatory evidence if:

- (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
- (b) its value for understanding the case as a whole is substantial.

3 In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors (and to any others it considers relevant):

- (a) the nature and number of the events, or other things, to which the evidence relates;
- (b) when those events or things are alleged to have happened or existed;
- (c) where:
 - (i) the evidence is evidence of a person's misconduct, and
 - (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,
- the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;
- d) where
 - (i) the evidence is evidence of a person's misconduct,
 - (ii) it is suggested that that person is also responsible for the misconduct charged, and
 - (iii) the identity of the person responsible for the misconduct charged is disputed,
- the extent to which the evidence shows or tends to show that the same person was responsible each time.

4 Except where subsection (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court.'

Evidence under s.100 can be adduced by any party.

Leave of the court is required unless all parties agree to the admission of the evidence.

13.1.1 Section 100(1)(a)

Important explanatory evidence

The definition of 'important explanatory evidence' (s.100(2)) is the same as the one given in s.102 in relation to defendant bad character evidence:

- without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case; and
- its value for understanding the case as a whole is substantial.

The same considerations apply.

13.1.2 Section 100(1)(b)

Substantial probative value in relation to a matter in issue and of substantial importance in the context of the case as a whole

'Matter in issue' can refer to either credibility or a disputed fact. Although there is no specific reference to propensity as a possible matter in issue as we have seen in s.103, propensity can be a matter in issue for the purposes of s.100. The effect of this is that a defendant can adduce evidence of another person's propensity to commit offences of the type charged to show that that person, and not the defendant himself, committed the offence.

The inclusion of the word 'substantial' in the subsection indicates that in order to be admissible, the evidence must be capable of having an impact on the way in which the jury could assess the evidence of a witness or the case as a whole. Whether the misconduct of a non-defendant has substantial probative value depends on the nature, number and age of the instances of misconduct. So recent misconduct is likely to have greater probative value than misconduct long ago. Where it is alleged that the non-defendant committed the offence charged, the similarity of the past misconduct to the facts of the offence charged will be important.

13.2 Summary

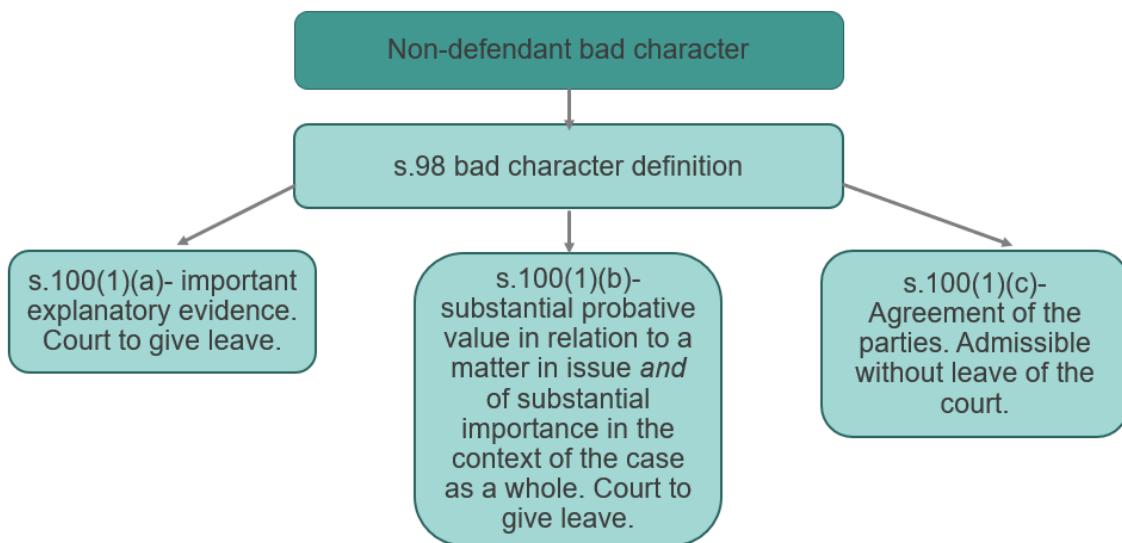


Figure 4.3: Summary

14 Bad character – procedure

14.1 Exclusion and safeguards

14.1.1 Section 78 PACE Act 1984

This section allows a judge discretion to exclude any evidence that the prosecution seeks to adduce on the ground that its admission would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted.

It has no application where one defendant seeks to adduce evidence against another.

Section 101(3) reads:

‘The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.’

14.1.2 Section 101(3) Criminal Justice Act 2003

This subsection applies to evidence of the defendant’s bad character that is to be admitted through gateways **101(1)(d)** or **(g)**.

The wording is very similar to that of **s.78 PACE Act 1984**, with the exception that the word ‘must’ appears in **s.101(3)**, whereas the word ‘may’ appears in **s.78**.

It is hard to see in what circumstances the difference in the wording would make a practical difference, but for the defence advocate it is obviously preferable to use **s.101(3)** because of stricter wording.

14.1.3 Sections 101(1)(d) and 103(3) CJA 2003

These sections allow the court to exclude evidence of the commission by the defendant of an offence of the same description or type as the offence charged if the court is satisfied that, by reason of the time that has elapsed since the earlier conviction or for any other reason, it would be unjust to admit the evidence.

14.1.4 Section 107 CJA 2003

This section gives the court discretion to stop the case where it is satisfied at any time after the close of the case for the prosecution that bad character evidence that has been admitted is contaminated and the contamination is such that the conviction of the defendant of the offence with which D is charged would be unsafe.

14.1.5 Section 110 CJA 2003

Section 110 requires the court to give reasons in open court for any ruling it makes on the issue of bad character.

14.2 Proving convictions under ss.73–75 PACE Act 1984

14.2.1 Section 73: Proving convictions and acquittals

Where there is a dispute as to whether a person has in fact been convicted or acquitted of an offence in the past, whether in the UK or in another EU Member State, s.73 provides that the conviction or acquittal may be proved by the production of the certificate of conviction (signed by the proper officer of the court) from the court where the conviction or acquittal took place.

The certificate must be accompanied by evidence that the person named in it is the person whose conviction or acquittal is in issue.

14.2.2 Sections 74 and 75 PACE Act 1984 Using convictions as evidence that an offence was committed

Section 74 provides that where a person is proved to have been convicted of an offence by any court in the UK or other EU Member State, that person shall be taken to have committed the offence unless the contrary is proved.

The burden of proving that the offence was not committed by the person whose conviction of the offence has been proved is on that person. The burden can be discharged by showing on the balance of probabilities that the offence was not committed by that person.

Section 75 makes various documents including the information, charge sheet and/or indictment admissible as evidence of the facts on which the conviction was based.

14.3 Procedural requirements

The procedural rules to be followed when a party wishes to adduce bad character evidence are found in **Part 21** of the **Criminal Procedure Rules**.

14.3.1 Notices, applications and responses

Rule 21.2 requires that a party wishing to adduce bad character evidence must, in the case of:

- non-defendant bad character evidence, make an application under **rule 21.3**; or
- defendant bad character, give notice under **rule 21.4**.

14.4 Rules 21.2 and 21.4: Defendant bad character

14.4.1 Time Limit

Prosecution Evidence

- Magistrates' court – Not more than 20 business days after the defendant pleads not guilty
- Crown Court – Not more than 10 business days after the defendant pleads not guilty

Co-Defendant's Evidence

- As soon as reasonably practicable, and in any event not more than 10 business days after the prosecutor discloses the material on which the notice is based

Response

- Not more than 10 business days after service of the notice

14.4.2 Contents

Prosecution Evidence and Co-Defendant's Evidence

- Set out the facts of the misconduct on which that party relies;
- Explain how that party will prove those facts (whether by certificate of conviction, other official record, or other evidence), if another party disputes them; and
- Explain why the evidence is admissible.

Response

In the application explain, as applicable-

- Which, if any, facts of the misconduct set out in the notice that party disputes;
- What, if any, facts of the misconduct that party admits instead;
- Why the evidence is not admissible;
- Why it would be unfair to admit the evidence; and
- Any other objection to the notice.

14.5 Rules 21.2 and 21.3: Non-defendant bad character

14.5.1 Time Limit

Magistrates' court and Crown Court

- As soon as reasonably practicable; and
- In any event not more than 10 business days after the prosecutor discloses material on which the application is based (if the prosecutor is not the applicant)

Response

- Not more than 10 business days after service of the application

14.5.2 Contents

Magistrates' court and Crown Court

- Set out the facts of the misconduct on which that party relies;
- Explain how that party will prove those facts (whether by certificate of conviction, other official record, or other evidence), if another party disputes them; and
- Explain why the evidence is admissible.

Response

In the notice explain, as applicable-

- Which, if any, facts of the misconduct set out in the application that party disputes;
- What, if any, facts of the misconduct that party admits instead;

- Why the evidence is not admissible; and
- Any other objection to the application.

14.6 The court's powers

The court can determine an application with or without a hearing in public or in private. The decision must be announced at a hearing in public, but in the absence of the jury.

The court has a discretion to shorten or extend time limits or to allow an application or notice to be given in a different form. Extensions to time limits can be granted after the time limit has expired.

In practice, written notices in the form required by the rules are usually served where the prosecution proposes to adduce evidence through the s.101(1)(c) or (d) gateways. Evidence that becomes admissible through the other gateways in s.101 is likely to do so 'on the hoof' as a result of something said or done in the course of the trial. In those circumstances the application is likely to be made orally.

14.7 Summary

This section considered:

- the powers for exclusion of defendant bad character and safeguards:
 - s.78 PACE – prosecution evidence only
 - s.101(3) CJA 2003 – discretion to exclude applies to defendant's bad character under these gateways only:
 - s.101(1)(d) – relevant to an important matter in issue between D and P
 - s.101(1)(g) – D attacked another person's character
 - s.101(1)(d) and s.103(3) – offences may be excluded by length of time since conviction or for any other reason it would be unjust to admit the evidence.
 - s.107- stopping the case where evidence is contaminated
 - s.110- requires the court to give reasons in open court on bad character rulings
- proof of convictions under ss.73- 75 PACE
- the procedure for adducing and opposing the introduction of bad character evidence– defendant and non-defendant.



Trial

1 Witnesses: Preliminary issues

This section considers four preliminary issues relating to witnesses:

- Competence
- Compellability
- Opinion evidence and experts
- Privilege

1.1 Competence

When we talk about the competence of a witness, we simply mean whether the witness is permitted to give evidence to the court.

In more formal language, a witness is competent if a person ‘may lawfully be called to testify’.

Generally speaking, anyone is a competent witness.

There are a few exceptions, ie a few instances where a witness, even if willing, is simply not competent to give evidence for one party or another.

- **The defendant/accused**– The defendant is not competent to be a prosecution witness. Where there are multiple defendants, none of them can be prosecution witnesses for the other. The proceedings must be completed against any one of them so that they are no longer defendants in the case before they can be competent as witnesses for the prosecution. Defendants are, of course, competent to give evidence on their own behalf, and are competent to give evidence on behalf of a co-defendant.
- **Children and persons with a disorder or disability**– Age is **not** the determining factor of whether a child is competent; the only test is whether the child can (1) understand questions, and (2) can give comprehensible answers. The test is the same for those operating with a disorder or disability.
- **Spouse/civil partner**– A spouse or civil partner of a defendant is competent to give evidence for any party in the case.
- **Deaf or speech impaired witness**– These witnesses are competent so long as they understand the solemnity of taking the oath or affirmation. They can give evidence using interpreters, handwriting, sign language or any combination of these.

1.2 Compellability

Some witnesses cannot be compelled to give evidence. Most can, but some cannot.

The primary exceptions, ie those who are not necessarily compellable, are as follows:

1.2.1 The defendant

The defendant is not competent for the prosecution and so clearly can't be compelled by the prosecution. The defendant may give evidence on D's own behalf, but cannot be compelled to do so.

1.2.2 Children and persons with a disorder or disability

If competent, these witnesses are compellable.

1.2.3 Special rules

There are also rules for diplomats, sovereigns and bankers, but these are most unlikely to be examined.

1.2.4 Spouses/civil partners

Spouses and civil partners can be compelled to give evidence for their spouse or civil partner (ie for the defence) but **only** for the prosecution if the offence charged against their partner is (PACE s 80):

- (a) Assault on, or injury, or threat of injury to that spouse or partner (ie domestic violence)
- (b) Assault on, or injury, or threat of injury, to a child under 16
- (c) A sexual offence against someone under the age of 16
- (d) Attempts, conspiring, aiding and abetting any of the above

The logic is clear. Spouses and civil partners should not normally have to act against the interests of their partners, and this is generally accepted, unless the partner is inflicting domestic violence or abusing children. At that point, the courts can require spouses to attend to give evidence even if they do not want to do so. If they refuse to attend, they can be arrested, and if they refuse to answer questions they can be held in contempt.

1.3 Opinion evidence and experts

There is a rule which is simple in expression (but quite hard in practice) which is that witnesses are, generally speaking, called upon only to be witnesses of fact. Analysis of those facts is argued by advocates, and it is for the jury to ultimately decide on what inferences they draw and what conclusions they should come to from the factual evidence provided. The courts will receive opinions from witnesses, but only if:

- (a) The opinion is given in relation to commonplace occurrences about which the witness's perception appears relevant and proper; or
- (b) If the witness is an expert.

1.3.1 Opinion evidence

There are so many different types of opinion that might be given by a witness, that it is not possible to have a list of matters that require (or do not require) an expert.

A good example of an admissible perception of a non-expert is an opinion as to drunkenness. Many people involved in crime or who are witnesses to it have consumed alcohol. A witness could give factual evidence to indicate that a relevant person's speech was slurred, pupils were dilated, or was walking unsteadily. In reality, though, witnesses would tend to simply say 'the man was drunk'. This is, strictly, an opinion, and so would normally not be admissible.

However, the law does not restrict such a statement in court on the basis that it is a way of expressing in summary the factual observations that the witness had made, and that the assessment of drunkenness is sufficiently commonplace a task that the witness's perception would be received by the court.

It remains best practice to focus questions in examination on the observable facts rather than only eliciting the opinion.

The list of other permissible non-expert opinions would be a truly huge list.

Many of the items on the list would be under the heading of 'identification' as witnesses tend to combine facts (eg 'the attacker wore a blue cardigan') with opinion based on observations (eg 'he was young and male').

Similarly, recognition of voice and handwriting are examples of opinions which are acceptable as having been derived from observed facts and represent an inference, the like of which is commonplace and will be received as admissible perceptions.

1.3.2 Expert evidence

Issues that would require expertise include more technical matters of science, medicine, psychology etc. Doctors who have tended to a victim's injuries may be tempted to give an opinion as to whether the injury presented could have been caused in the way that was described by the victim.

Occasionally the law specifies what level of expertise would be required before the court would receive such an opinion. In this case (ie the opinion as to the likely cause of injury) it is clear that a doctor, and specifically not a nurse, would be the only person with sufficient expertise to give such evidence. Expertise can be acquired either through a course of study or by practical experience (or a combination of both). It is for the party seeking to rely on the expert evidence to establish that the expert has sufficient expertise.

Witnesses that are deemed as experts are treated slightly differently to other witnesses. They are regarded more as independent consultants than partisan witnesses, and experts are asked to consider their role as being neutral and objective. Where there are multiple experts in a case, they are encouraged to meet to establish the matters on which they agree and disagree, and to narrow the issues between them and to explain the basis on which any disagreement is founded.

Experts should always be clear in defining the boundaries of their expertise and to indicate if the questioning is straying into areas in which their expertise may be less clearly relevant.

As a matter of good practice, an advocate should not ask an expert to give an opinion directly on the 'final' issue in the case. So if, for example, the question for the jury is whether the defendant caused death by dangerous driving, one should not ask (without prior leave) the witness 'Is it your opinion that the defendant caused this death by dangerous driving?'. Opinions as to the component parts of the driving would be better (eg giving an opinion as to the speed of the car by reference to skid marks). The jury would then conclude the final question for itself.

The jury is not obliged to accept expert evidence, even if it is not contradicted. In every case where there is an opinion that has not been directly contradicted, the judge has to decide how to sum the case up to the jury and, if there is other evidence that tends to a conclusion which is not the conclusion of the expert, the jury would still be empowered to prefer the alternative conclusion. Only in cases where the expert's opinion **and** all the other evidence leads inevitably to only one conclusion should the jury be directed to accept the opinion as correct.

1.4 Privilege

We will consider two main forms of privilege:

- Against self-incrimination; and
- Legal professional privilege which can be sub-divided into:
 - Litigation privilege; and
 - Advice privilege.

1.4.1 Against self-incrimination

There is a general principle (under the common law) that courts will uphold a witness's right (and we are talking about witnesses **other** than the defendant) to refuse to answer questions or disclose documents if to do so would make that person liable to incriminate themselves. It is important to note that the person cannot claim privilege to protect another person, even a spouse, and cannot be invoked in order to protect against possible liability in a civil court.

A **defendant's** (ie someone 'charged in criminal proceedings') right to refuse to answer questions was removed from the common law by the **Criminal Evidence Act 1898**, and is now governed by the rules on 'adverse inferences', dealt with in separate sections.

If a person claims privilege against self-incrimination to protect information, the person cannot prevent the same information being acquired by other routes. The privilege only extends to that person, and any investigatory body is entitled to consider how else to access the information.

1.4.2 Legal professional privilege

Legal professional privilege is the privilege that exists when a client communicates with a lawyer. There are two sub-divisions at play, and are whether:

- (a) The purpose of the communication with a lawyer is to advance or act in a process of litigation (litigation privilege); or
- (b) To obtain advice more generally (advice privilege).

There are slightly different rules in relation to these two purposes and privileges. Clearly there is a lot of communication with lawyers which is not effected with litigation in mind. All the direct communication between lawyer and client is privileged, but the distinction comes into play in relation to third parties. If the third-party communication is generated during, or in contemplation of, litigation, then privilege is likely to attract, but if there is no litigation involved, then documents supplied to a lawyer from a third party for more general advice is usually not protected by privilege.

The privilege can be waived either explicitly or by conduct, and as a rule a person cannot waive privilege partially. Only the person entitled to claim privilege can waive it. In the case of legal professional privilege, the right to waive privilege is the right of the client rather than the law firm.

1.5 Summary

This section considered four preliminary issues relating to witnesses:

- The courts will receive opinions from witnesses, but only if:
 - The opinion is given in relation to commonplace occurrences about which the witness's perception appears relevant and proper; or
 - If the witness is an expert.
- Privilege:
 - Against self-incrimination- witnesses (other than the D in this context) have rights to refuse to answer questions or disclose documents if to do so would make that person liable to incriminate themselves.
 - Legal professional privilege:
 - All the direct communication between lawyer and client is confidential unless the client chooses to waive this.
 - Communications with third parties will be privileged in the case of litigation but not general advice.

Generally speaking most people are competent and compellable as witnesses. The table shows an overview of competence and compellability.

Overview of competence and compellability

Witness	Competent	Compellable
Defendant	<ul style="list-style-type: none"> • Not for prosecution • Yes on D's own behalf or for a co-defendant 	<ul style="list-style-type: none"> • Not for prosecution • Cannot be compelled to give evidence on D's own behalf
Children and persons with a disorder or disability	<ul style="list-style-type: none"> • Yes if can understand questions and give comprehensible answers 	<ul style="list-style-type: none"> • If competent they are compellable
Spouse/civil partner	<ul style="list-style-type: none"> • Yes for any party 	<ul style="list-style-type: none"> • Can only be compelled for the prosecution in specified cases of domestic violence and/ or child abuse • Can be compelled to give evidence for their spouse/ civil partner
Deaf or speech impaired		

Witness	Competent	Compellable
	<ul style="list-style-type: none"> • Yes so long as they understand the solemnity of taking the oath or affirmation 	<ul style="list-style-type: none"> • If competent they are compellable

2 Examination of witnesses

2.1 Oaths and affirmations: Overview

As a general rule, all witnesses must either take an oath before giving evidence, or make an affirmation. There is no difference between the two in the eyes of the law. The only real exception where evidence may be received unsworn is in the case of children and those of ‘unsound mind’. In these cases, the courts can receive evidence, but it would be wrong to make the witness take the oath. The test for children and those with unsound mind is whether they:

‘have sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath,’

Youth Justice and Criminal Evidence Act, s.55.

The court usher should have to hand a number of oath cards to cover all main religions. The ultimate issue is not whether the words on the card perfectly match the variant of the religion that the witness might adhere to, but rather to assess if the oath is one that the witness would find ‘binding on one’s conscience’. Following this principle, a Muslim witness was deemed properly sworn after swearing on the New Testament.

Refusal to take an oath or affirmation can be punished as a contempt of court.

2.2 Examination in chief

There are various issues relating to examination in chief that we will consider:

- Form of questioning
- Memory refreshing
- Hostile witnesses
- Previous consistent statements
 - Res gestae
 - Suspect’s response to police allegation
 - Complaints
 - Recent fabrication

2.2.1 Form of questioning

For examination in chief, the questions should be non-leading.

Evidence adduced from a leading question may be considered to be inadmissible or to carry less weight.

The big exceptions are that leading may be allowed on issues that are not in dispute, or where the witness has been deemed hostile.

2.2.2 Memory refreshing

Statements made out of court are considered to be hearsay (if they seek to prove the truth of their contents etc). There are three ways in which an out of court written witness statement may be used in court:

- (a) The statement may be read out if the contents of the statement are agreed. The hearsay objection is overcome by saying that the jury should regard the evidence read out in the statements as if the witness had come into court and given the evidence from the witness box.

- (b) The witness can ask to 'refresh their memory' from their statement. This is normally uncontroversial, and witnesses are generally free to spend a moment reminding themselves of their evidence from their statements. There are a few points of best practice, though:
 - Try to observe the statute that says that refreshing memory is permissible where the earlier written account provides a 'significantly better' recollection than could be achieved without it, Criminal Justice Act, s.139.
 - Allow witnesses to read the statements back to themselves and then ensure that the evidence is given apparently from a recovered memory rather than by simply reading out the statements.
- (c) In cross-examination on a previous inconsistent statement (see later).
 - A witness does not have to read their statement in the witness box where it would be undesirable, for example, a dyslexic witness may wish to withdraw to a quiet room so to do.
 - When a witness refreshes their memory they may be cross examined on the contents of the statement used to refresh their memory without the statement coming into evidence. Where material other than that which the witness used to refresh their memory is raised in questioning, this entitled the other side to apply to put the statement into evidence so the jury can form their own view about the basis for the cross examination.

2.2.3 Hostile witnesses

It is occasionally the case that a witness known to have evidence that could assist the prosecution then indicates they are not going to give that evidence in court.

This is most common in domestic violence cases, where a partner reports having been assaulted, but then some time before the trial retracts that statement. This is often under pressure from the offending partner who has been promising to change and regains the partner's affection.

If the witness is then called to give evidence and gives an account inconsistent with their original statement to the point the judge forms the view the witness is not 'desirous of telling the truth', the party calling that witness may apply to the judge to treat them as hostile. A party is free to cross examine a hostile witness and put their previous statement to them as the truth of the matter.

Any inconsistent statement presented to a witness can be used to prove the truth of its contents notwithstanding that the statement was (or might have been) deemed as inadmissible hearsay before the witness contradicted it in evidence.

2.2.4 The use of previous consistent statements

As a general principle of evidence, it is thought that an allegation made by a witness does not become more reliable simply because the witness repeated the allegation on numerous occasions. It was therefore the general rule that the court hears the witness make the allegation in court, and it is **not** generally admissible to elicit evidence that the witness made earlier consistent allegations or statements. This has been substantially altered by s.120 of the Criminal Justice Act 2003.

There are some exceptions, ie where the court **will** hear the evidence of an earlier consistent complaint or statement. Where an exception exists, one needs to consider if the earlier consistent statement can be used to prove the statement itself is true, or only to prove the consistency of the person who made the earlier statement. We will note what use the consistent statement can be put to under each section. The main exceptions are as follows:

- Res gestae
- Suspect's response to police allegation
- Complaints
- Recent fabrication

2.2.5 Res gestae



Res gestae: This is a statement made as an immediate reaction to a crime being committed against the statement maker.

This is covered in the hearsay sections in more detail. In short, however, if a victim of a crime reacts instantaneously or in the immediate heat of the incident, that reaction is admissible.

This is because the person would not have had any time to conjure up a false response if you only look at what was said in the immediate aftermath of an incident.

So, for example, if someone suddenly jumps up and shouts out on the tube ‘what are your hands doing there you pervert!?’ that would seem to be an immediate response to a potential sexual assault, and would be admissible. This would be admissible to prove the truth of the (implied) allegation.

2.2.6 Suspect's response to police allegation

The police, as a matter of course, will ‘accuse’ all suspects of an offence when they arrest, interview and charge a suspect. The responses to all police allegations are admissible, whether they are confessional or involve self-serving denials of guilt.

The only difference is the use to which they are put. If a suspect wholly denies an offence to the police, it may be useful to the jury to assess the overall conduct of the defence, and the consistency of the defendant’s denials. It cannot go further and prove the truth of the denials.

2.2.7 Complaints

There is a common law principle that the quicker that someone complains about an allegation, the more likely the complaint is to be reliable. The common law therefore developed a doctrine called the ‘doctrine of recent complaint’. The **Criminal Justice Act 2003** took the principle a lot further and simply made complaints admissible where the complainant testifies that the earlier complaint was made and was true. This statutory provision (s.120) does not replace the common law, but as it is much wider it makes the common law somewhat redundant. The Act also allows the earlier complaint to show consistency in complaining and to prove the truth of the complaint.

2.2.8 Rebuttal of ‘recent fabrication’ allegation

If a witness is challenged in the box, and it is suggested that something that the witness has just said has only just been made up, then the witness is permitted to try to prove that this is not the case.

The witness is therefore allowed to negate the allegation of ‘recent fabrication’ by showing that earlier statement was made to the same effect as the statement impugned as being a recent fabrication.

Again, the court must consider s.120 CJA 2003 in deciding whether there is an earlier complaint that can rebut the allegation of recent fabrication.

2.3 Cross-examination

We will consider:

- Form of questioning
- Previous inconsistent statements
- Restrictions

2.3.1 Form of questioning

In cross-examination, advocates may ask leading questions, ie questions that contain factual statements that indicate what answer the advocate wants the witness to make.

Indeed, there is a principle that is part of the Code of Conduct for barristers that states that unless a witness’s account is challenged on a particular point, it is deemed to have been tacitly accepted.

This rule applies to both factual challenges, where the advocate has to promote the alternative factual case to the one being expressed by the witness, and to imputations on the witness’s character which must be done plainly to the witness’s face.

The case that first set up this principle is the ancient and famous case of *Browne v Dunn* [1893] 6 R 67, HL. There has been case law in many ex-UK jurisdictions about just how fully and meticulously it is necessary to convey every minute disagreement between the witness and the party for the other side, but the broad principle of ‘putting’ your case where it is in conflict with the witness remains fundamental.

Witnesses should generally only deal in facts.

Witnesses should not be encouraged to give opinions unless they are on very ‘everyday’ matters such as giving the opinion that someone was drunk.

A practice that has been seen regularly in courts, but which is deemed to be improper, is the question type that asks one witness to comment on another witness, particularly when they have given inconsistent evidence. So one shouldn’t say something like ‘Well, you can’t both be right, so are you calling X a liar?’ That is comment, not a question, and should be reserved for your closing speech.

2.3.2 Previous inconsistent statements

The courts do not generally admit into evidence a police witness statement. It classifies as hearsay.

It can become admissible, under s.119 Criminal Justice Act 2003 however, if the witness in the box giving live evidence departs materially from the statement, either by contradicting the statement or adding something to it which was not there originally.

In either case, the original statement can be produced and shown to the witness in order to challenge the discrepancy in the accounts provided.

The party using the statement in cross-examination can refer to the fact that the original statement was made much closer to the incident and it is a signed and sworn statement (as is the live evidence). Given how readily memories fade, and how easy it is for witnesses to get flustered and make mistakes, it is quite common for inconsistencies to arise between the evidence in the box and the evidence in the statement.

Minor discrepancies should be expected and would not normally lead to an advocate picking them up and cross-examining upon them, but more major changes in an account can provide valuable insights into the credibility of the witness.

2.3.3 Restrictions on cross-examination

Cross-examination can be robust, and it can lead to a witness being upset, vilified or annoyed.

For example, the Bar Standards Board Handbook for professional practice is clear, however, that upsetting a witness should never be done gratuitously, for its own sake, and it should never be done unless it serves a clear and useful purpose. The judge will determine if the questions ‘cross the line’.

The judge can also determine if a matter has been sufficiently explored and can put time limits on time dedicated to issues that are peripheral or already covered sufficiently.

The law in relation to what questions can be put to victims/complainants of sexual offences is quite carefully guarded by law. Questions about the victim’s general promiscuity or other sexual behaviour are not allowed without leave of the court (Youth Justice and Criminal Evidence Act 1999, s.41).

2.3.4 Finality on collateral matters

The rule of finality to collateral matters prevents trials from splintering into multiple insignificant disputes about credibility related matters collateral to the issues in the case. Therefore, if a witness to a bank robbery is asked in cross examination whether they once lied on a mortgage application and they say no (imagining that to be (i) relevant and (ii) to have passed the necessary bad character hurdles), the defence would be prohibited from adducing evidence of the mortgage application because the matter was collateral to main issues and the answer ‘no’ was final in the eyes of the law.

The courts are more lenient in allowing evidence to be admitted on the ‘collateral’ issue of a witness being ‘biased or partial’ and even when a witness denies such, counter-evidence will be admissible.

2.4 Re-examination

2.4.1 Form of questions

In any case, if matters are raised in cross-examination which could not reasonably have been covered in examination in chief, then the party calling the witness may ask further questions after the cross-examination in re-examination.

These questions should follow the same rules as examination in chief – namely no leading questions unless the matter is not in dispute, and witnesses can refresh their memory if necessary.

2.5 Summary

This section considered:

- Oaths and affirmations
- Examination in chief
 - Form of questioning
 - Memory refreshing
 - Hostile witnesses
 - Previous consistent statements
 - Res gestae
 - Suspect's response to police allegation
 - Complaints
 - Recent fabrication
- Cross-examination
 - Form of questioning
 - Previous inconsistent statements
 - Restrictions including finality on collateral matters
- Re-examination
 - Form of questioning

3 Summary trial

3.1 Introduction to summary trial

Trials are only necessary when the defendant pleads ‘not guilty,’ and their guilt needs to be determined by the hearing of evidence. Most defendants plead guilty (around 90% in the Magistrates’ and 60% in the Crown).

Trial in the magistrates’ court is known as summary trial. Summary trials involve:

- ‘Summary only’ offences (offences that can only be tried in the magistrates’ court); or
- ‘Either-way’ offences (offences that can be tried in either the magistrates’ court or the Crown Court) where the magistrates have retained jurisdiction following the allocation procedure.

In the Crown Court a defendant is tried on indictment. Each indictment has a number of counts reflecting the allegations against the defendant.

The overall process of a trial is the same irrespective of the court it is heard in. For example:

- The burdens of proof.
- The rules of the admissibility of evidence
- The possible inferences which can be drawn under the CJPOA 1994.
- How witnesses give evidence and which witnesses.
- The order of the evidence. A trial is adversarial, so the prosecution will always open the case as it carries the evidential and legal burden of proving the case beyond reasonable doubt. If, at the close of its case, the prosecution has failed to introduce sufficient evidence, then an application of ‘no case to answer’ can be made.

3.2 Magistrates' court trial procedure (Criminal Rules Part 24)

3.2.1 The bench

All summary trials take place before a 'bench' of at least two, but usually three, lay magistrates (also known as 'justices of the peace') or before a single District Judge.

District Judges are professional lawyers. Rather than sitting as part of a bench of three, a District Judge usually sits alone.

Lay magistrates are not professional lawyers; they are unpaid volunteers. They receive training to assist them with the law and procedure in the court but also have a court legal adviser to help them.

3.2.2 The authorised court officer

Previously referred to as the justices' clerk, the court clerk or legal adviser.

The authorised court officer will provide assistance to justices of the peace with both the relevant law and procedure when required during the summary trial process. The authorised court officer takes no part in deciding upon the verdict in a summary trial. The authorised court officer must be present during a trial judged by a bench of lay magistrates but is not required to be present in a summary trial presided over by a District Judge.

3.2.3 Judges of fact and law

In a summary trial the magistrates or District Judge are the judges both of the fact and the law.

As such, any legal applications requiring them to rule certain evidence as inadmissible require, if successful, the same magistrates/District Judge to ignore that material they have previously heard about.

This is just one reason why a defendant might be advised, in an appropriate **either-way** case, to elect trial before judge and jury in the Crown Court.

3.2.4 Legal arguments

In the magistrates' court, the magistrates usually have a discretion as to when to determine questions of admissibility.

As such, they can rule on an s.78 application when it arises or hear all the evidence (including the disputed evidence relating to the legal argument) before ruling on admissibility.

3.2.5 Prosecution opening speech

Prosecution summarise the prosecution case, concisely identifying the relevant law, outlining the facts and indicating the matters likely to be in dispute.

3.2.6 Defence identify matters in issue

Where the magistrates or District Judge feel it would assist them to understand the case and resolve any issue, they are entitled to ask the defence (ie the defence representative or the defendant in person if unrepresented) to identify concisely what is in issue in the case (ie what is in dispute, CrimPR r.24.3(3)(b)). This is particularly helpful in summary trials because, unlike in cases that are sent to the Crown Court, there is no requirement for a defence statement.

3.2.7 Prosecution evidence

Having opened its case, the prosecution will present its evidence to the court.

Evidence can be presented by:

- Calling witnesses;
- Reading witness statements under s.9 Criminal Justice Act ('CJA') 1967 when the evidence of that witness is not in dispute or where the prosecution have made a successful application to read a witness statement or part of it under the hearsay provisions;
- Reading admissions under s.10 CJA 1967 ie facts which are agreed by the prosecution and defence.

3.2.8 Submission of no case to answer

On the defendant's application or on its own initiative, the court may acquit on the ground that the prosecution evidence is insufficient for any reasonable court to properly convict.

3.2.9 Right to give evidence and adverse inferences

Defendant must be informed of:

- The right to give evidence, and
- The potential effect of not doing so at all, or of refusing to answer a question while doing so.

3.2.10 Defence evidence

Like prosecution evidence, defence evidence can be given by witnesses live from the witness box in court; alternatively, where the evidence is agreed by the prosecution, evidence can be read from witness statements or presented in the form of written admissions.

It is also open to the defence to apply to read witness statements under the hearsay provisions of the **Criminal Justice Act 2003**, see the hearsay sections for more detail.

Witnesses will be examined in chief, cross-examined and re-examined in the same order as the defendant.

3.2.11 Prosecution closing speech

The first closing speech they will hear is from the prosecution, but the prosecution is only entitled to make a closing speech where:

- The defendant is represented; or
- Whether or not they are represented, the defendant has introduced evidence other than their own.

As such, the prosecution cannot make a closing speech in a case involving an unrepresented defendant who does not rely on any evidence other than what the defendant in person says in the witness box.

3.2.12 Defence closing speech

After the prosecution closing speech (if there is one) the defendant's legal representative will make a closing speech on behalf of the defendant.

The defence are always entitled to make a closing speech.

3.2.13 Legal advice

Before retiring to consider their verdict, the legal adviser will advise the magistrates in open court on any matters of law that are required.

When a District Judge is hearing the case, even if an authorised court officer was present, there would rarely be any need for such advice to be given.

3.2.14 Magistrates retire

After receiving any legal advice the magistrates will retire to consider their verdict.

If the magistrates require assistance from the authorised court officer after retirement they should request this in open court. If any legal advice is given to the magistrates other than in open court the authorised court officer should inform them this advice is only provisional; the authorised court officer should then repeat the substance of the advice in open court to allow representations from the prosecution and defence.

3.2.15 Verdict

The magistrates/District Judge will announce the verdict in open court.

Where there is disagreement amongst three lay magistrates the view of the majority prevails; however, if only two magistrates were able to hear the case and they are evenly divided, they must adjourn the case for a rehearing before a new bench.

3.2.16 Guilty: Duty to give reasons

If the magistrates/District Judge convict a defendant sufficient reasons must be given to explain the decision.

3.3 Summary

This section provided an overview of the procedural steps in a summary trial.

Some key differences between summary and Crown Court trials include:

- The role of the legal adviser to assist the bench; and
- The judges (who are the judges of law and facts in magistrates' court trials).

Magistrates' Court trial procedure (Criminal Procedure Rules Part 24):

- Legal arguments
- Prosecution opening speech
- Defence identify matters in issue
- Prosecution evidence
- Conclusion of the prosecution case
- Submission of no case to answer
- Right to give evidence and adverse inferences
- Defence evidence
- Prosecution closing speech
- Defence closing speech
- Legal advice
- Magistrates/District Judge retire to consider verdict
- Verdict

4 Trial in the Crown Court

Trials are only necessary when the defendant pleads 'not guilty,' and their guilt needs to be determined by the hearing of evidence. Most defendants plead guilty (around 90% in the magistrates' and 60% in the Crown Court).

Crown Court trials are also referred to as 'trials on indictment' and offences which can be tried in the Crown Court are 'indictable' offences that is **either-way** or **indictable only** offences.

These will often be the more serious **either-way** offences where the magistrates have considered that their sentencing powers in the event of conviction would be insufficient and have sent the case for trial to the Crown Court. A defendant also has the right to elect to be tried on indictment.

The Crown Court is the only court where **indictable only** offences can be tried. These are offences such as murder, attempted murder, manslaughter, causing grievous bodily harm with intent and robbery.

The Crown Court differs from a magistrates' court in that it has to incorporate space for a jury of 12 people. Often in the Crown Court there will also be more space both for the public to watch cases and for the legal representatives to sit. Invariably therefore a Crown Court is larger than a magistrates' court.

It is worth noting at this stage that the court clerk in the Crown Court is not the same as the authorised court officer in the magistrates' court. Although they both carry out some similar administrative functions, the Crown Court Clerk is:

- Not legally qualified and never gives legal advice
- Responsible for many of the duties relating to:
 - Selecting and taking verdicts from the jury; and
 - For arraigning defendants.

Trials in the Crown Court take place before a judge and a jury, save for a few exceptional occasions (not dealt with in this section) where trials by a judge alone can take place.

The judges who sit in the Crown Court are:

- **Circuit Judges**- referred to as ‘Your Honour’. They wear a violet and black robe and a red tippet (sash) over their left shoulder;
- **Recorders**- referred to as ‘Your Honour’. Recorders are barristers or solicitors who sit as part-time judges. They wear black robes; and
- **High Court Judges**- referred to as ‘My Lord, My Lady’. Occasionally, the most serious Crown Court cases are heard by High Court Judges who are distinguished by their red robes, hence often being referred to as ‘red’ judges.

4.1 Role of the judge and jury

The judge:

- Is the arbiter of the law.
- Makes rulings about the admissibility of evidence (in the absence of the jury).
- Directs the jury about matters of law (eg explaining what has to be proved and who by).
- Can direct a jury to find a defendant not guilty (for example following a successful submission of no case to answer) but cannot direct a jury to find a defendant guilty.

The jury:

- Is the sole decider/arbiter of facts.
- Decides whether the defendant is guilty.
- Must accept and apply the judge’s directions about the law.
- Must reach its decision only based on the evidence it hears in court. It will:
 - Determine whether, and to what extent, the evidence is to be believed; and
 - Decide whether to draw inferences from the evidence or from a defendant’s silence.

4.2 Crown court trial procedure (Criminal Procedure Rules Part 25)

4.2.1 Legal arguments

Crown Court cases are actively managed in the lead up to trial in order that the trial itself runs as smoothly as possible.

Sometimes pre-trial hearings before the trial judge take place specifically for the purpose of dealing with legal arguments.

In practice, however, many legal arguments take place on the first day (or first few days) of trial.

Legal arguments in the Crown Court can be heard before or after the jury are sworn.

Voir dire

Where a *voir dire* is required, this still takes place in the absence of the jury, since it is a procedure for the judge to resolve a factual dispute which is relevant to a legal argument.

In practice, when a legal representative says to the judge that ‘a matter of law’ has arisen, the judge will take this as the cue to ask the jury to briefly retire whilst the legal argument is dealt with.

Common legal arguments dealt with just prior to the commencement of a jury trial in the Crown Court are:

- Applications relating to bad character;
- Hearsay applications;
- Applications to exclude evidence under section 76 or 78 Police and Criminal Evidence Act 1984; and
- Abuse of process applications.

4.2.2 Jury selection and swearing in the jury

Twelve jurors are required to start a Crown Court trial. A ‘jury panel’ of about 16 people go into court from which the 12 will be chosen at random. As each juror is called from the panel they will take their place in the jury box. When the jury box is full but before each juror takes the jury oath

or affirmation, the defendant is told by the court clerk that they have the right to object to any juror. Each jury member is then sworn.

The jury **selection** process that takes place in the USA is very different.

4.2.3 Judge's preliminary instructions to the jury

The judge will tell the jury that the evidence upon which they must decide the case is the evidence that will be presented to them in court and they must not discuss it with anyone else who may have a view but will not have heard the evidence.

The judge will also explain that matters of law are for the judge alone, so if any legal applications are made during the trial the jury will be asked to leave court while they are dealt with.

4.2.4 Prosecution opening speech

In the Crown Court, the prosecution opening speech is focused on the facts and issues in the case, namely on what the case is about, what the areas of dispute are and why the prosecution says the defendant is guilty of the offence or offences with which the defendant is charged.

The prosecutor will tell the jury what counts the defendant faces.

The prosecutor should avoid the use of overly emotive language.

4.2.5 Defence identify matters in issue

To help the jury to understand the case, the judge can invite the defence to confirm or clarify what the issues in the case are (ie what precisely is in dispute).

4.2.6 Prosecution evidence

The prosecution case has been served on the defence at the outset of the proceedings.

All witnesses the defence wish to question will have been included in the Plea and Trial Preparation Hearing form. The defence will only want to question a prosecution witness if there is some disagreement with the contents of that witness's statement.

The prosecution will start by calling all the prosecution witnesses that the defence asked to be called. The prosecutor will then take the witness through evidence in chief. The witness is then cross-examined by the defendant's legal representative.

When the defence has no dispute with the content of a prosecution witness's statement no purpose would be served in calling the witness to give live evidence and instead, where the defence agree, the prosecution can read the statements of prosecution witnesses.

Just before the prosecutor reads a witness statement to the jury, the judge will explain to the jury that they can receive evidence in various ways and that this is agreed evidence which is why it is being read to them.

The defendant's 'record of taped interview' (ROTI) with the police will be produced in an edited form containing the salient questions and answers. The jury will get a copy of the ROTI and the prosecution will also read the interview out in court.

Where the defendant has made a 'no comment' interview, rather than presenting a ROTI to the jury the prosecution will often instead present agreed written admissions stating what the defendant was asked about and that the defendant replied 'no comment' to all questions put. This will allow the jury to consider whether it would be proper to draw an inference from the defendant's silence.

4.2.7 Conclusion of the prosecution case

The case for the Crown is concluded.

4.2.8 Submission of no case to answer

At the end of the prosecution evidence, on the defendant's application or on its own initiative, the judge may direct the jury to acquit on the ground that the prosecution evidence is insufficient for any reasonable court properly to convict, but must not do so unless the prosecutor has had an opportunity to make representations.

This is known as a submission of no case to answer and is often referred to as a 'half time' submission due to the stage in the trial at which it is made.

The submission will be made in accordance with the test laid down by Lord Lane CJ in *R v Galbraith* [1981].

4.3 Defendant's right to give evidence or not

After the prosecution has closed its case the judge will ask the defendant's legal representative in the presence of the jury if the defendant is going to give evidence.

If the answer is yes, the case will proceed.

If the answer is no the judge will ask, 'Have you advised your client that the stage has now been reached at which the defendant may give evidence and, if the defendant chooses not to do so or, having been sworn, without good cause refuses to answer any question, the jury may draw such inferences as appear proper from the defendant's failure to do so?'

If the legal representative says the defendant has been so advised the case can proceed; if the defendant has not been so advised the case will be adjourned briefly for the advice to be given.

There is no obligation on the defendant to give evidence, but failure to do so can result in adverse inferences being drawn pursuant to s 35 Criminal Justice and Public Order Act 1994.

The final decision as to whether or not to give evidence is for the defendant to take, but the defence advocate should advise the defendant and, should the defendant decide not to give evidence, it should be recorded in writing that the defendant has received advice and has decided freely not to testify.

4.3.1 Defence opening speech

When the prosecution case has ended, or following a rejected submission of no case to answer, the defence case will start. The defence do have the right to make an opening speech at this stage but only if one or more defence witnesses, other than the defendant in person, will be called to give factual (as opposed to merely character) evidence.

Even though there is a right to a defence opening speech, it is rarely used.

4.3.2 Defence evidence

If the defendant is represented and the defendant chooses to give evidence, the defence advocate will call the defendant and take the defendant through evidence in chief.

The defendant will then be cross-examined by any other defendants and the prosecution.

Any other defence witnesses will be examined in chief, cross-examined and re-examined in the same order as the defendant.

4.3.3 Legal discussions

When the defence case is closed it is common practice for the jury to be sent out in order to allow the judge and the prosecution and defence advocates an opportunity to consider those matters of law which should be raised during the judge's summing up.

This allows submissions to be made on all the legal matters that have arisen in the course of the trial and which will form part of the judge's directions on law to the jury. This is a convenient way of ensuring, so far as possible, that any problems are ironed out prior to speeches and the summing up and, therefore, that an appeal is less likely in the event of a conviction.

4.3.4 Closing speeches

The prosecution can make a closing speech where the defendant is legally represented, or has called at least one defence witness (other than the defendant in person) to give factual evidence, or where the court otherwise so permits.

The prosecution closing speech is always first. The defence is always entitled to make a closing speech which will follow that of the prosecution.

4.3.5 The judge's summing up

After closing speeches have been delivered by the prosecution and defence, the judge will sum the case up to the jury.

The summing-up falls into two parts: the law and the facts. This means that the judge will deal with all necessary legal directions and then move on to sum up the prosecution and defence cases.

Both prosecution and defence advocates should be alert to errors in the summing-up and draw them to the judge's attention at its close so that corrections can be made.

The judge will direct the jury that they have different functions:

- The judge is the arbiter of the law; the judge will give the jury directions on the law which they must accept.
- The jury, on the other hand, are the arbiter of the facts. They must reach their own conclusions on the evidence.

Every case is different and the legal directions the judge gives to the jury will be tailored accordingly.

In summing up the case to a jury, the judge will deal with the following:

- Burden and standard of proof
- The ingredients of the offence and any defences
- A written route to verdict
- Other legal directions relevant to the case
- Electing a foreman
- Unanimity
- Separate considerations of counts and defendants if needed

To assist the jury to focus on the issues during retirement, the judge should provide:

- A reminder of the issues;
- A summary of the nature of the evidence relating to each issue;
- A balanced account of the points raised by the parties; and
- Any outstanding directions.

It is not necessary for the judge to recount all relevant evidence or to rehearse all of the significant points raised by the parties.

Foreman

The judge will tell the jury to appoint a foreman (a person of any gender) to deliver the jury's verdict in due course.

Unanimity

Just before the jury bailiffs are sworn and the jury retire to consider their verdict, the jury will be told that they may have heard of majority verdicts, but the only verdict the judge can accept is a unanimous verdict.

The judge will go on to say that if the time should come when a majority verdict can be accepted from them, the judge will call the jury back into court and give them a further direction.

4.3.6 Jury bailiffs sworn and jury retires

The jury bailiffs swear/affirm to keep the jury 'in some private and convenient place' and not to allow anyone to speak to them or to speak to them themselves without the leave of the court other than to ask them if they have reached a verdict.

The jury bailiffs are court ushers who become jury bailiffs once they take the jury bailiff's oath/affirmation.

The jury will go to their retirement room to deliberate on their verdict.

They are entitled to ask questions of the judge by giving a note to the jury bailiff who will pass it to the judge. The judge may give further directions during retirement.

Majority direction

The Juries Act (JA) 1974 permits a majority verdict to be given by a jury after they have deliberated for at least 2 hours although in practice the minimum period is 2 hours and 10 minutes as required in the **Criminal Practice Direction VI Trial 26Q Majority Verdicts**. This is to take account of any time not spent deliberating, such as getting to the jury room and electing a foreman.

A majority verdict should not be accepted unless it appears to the court that the jury have had such period of time for deliberation as the court thinks reasonable having regard to the nature and complexity of the case.

As such, what is reasonable will be different in every case and in long and complex cases involving multiple defendants the jury could be out for many days before any thought is given to their receiving a majority direction.

4.3.7 Verdict

Once the jury have reached a verdict they will inform the jury bailiff.

The court will reassemble and the foreman will be asked to stand.

If the jury have not received a majority direction the court clerk will ask the foreman if the jury have reached a verdict on which they are all agreed. If the answer is yes, the clerk will ask ‘What is your verdict?’ and the foreman will reply ‘Guilty’ or ‘Not guilty’.

Convicting of alternative offences

In certain circumstances the jury can convict of a lesser offence which is an alternative to a count on the indictment.

For example, an offence of inflicting grievous bodily harm contrary to s 20 Offences Against the Person Act 1861 is included in (and therefore a direct alternative to) the more serious offence of causing grievous bodily harm with intent, contrary to s 18 Offences Against the Person Act 1861. In essence, s 20 is the same as s 18 without the element of intent, so the lesser offence is included in the greater offence.

Guilty verdict

A defendant who is found guilty will either be sentenced immediately or, if reports are required to assist with sentencing, such as a pre-sentence report or a psychiatric report, the case will be adjourned for sentence to a later date.

It is common practice for the judge, whether a defendant is acquitted or convicted, to thank the jury for carrying out their public duty.

Not guilty verdict

A defendant who is acquitted will be entitled to be discharged.

The defendant will therefore be free to leave so long as no further matters facing the defendant are before the court.

4.4 Summary

This section considered Crown Court Trial Procedure (Criminal Procedure Rules Part 25) as follows:

- Legal arguments
- Jury selection and swearing in the jury
- Judge's preliminary instructions to the jury
- Prosecution opening speech
- Defence identify matters in issue
- Prosecution evidence
- Conclusion of the prosecution case
- Submission of no case to answer
- Right to give evidence and adverse inferences

- Defence opening speech
- Defence evidence
- Legal discussions
- Closing speeches
- Judge's summing up
- Jury bailiffs sworn and jury retire
- Verdict



Sentencing

1 Overview

1.1 The Sentencing Code

The ‘Sentencing Code’ is a consolidation of existing sentencing procedure law. It brings together over 50 pieces of primary legislation relating to sentencing procedure into one single **Sentencing Act 2020** (‘SA 2020’).

Parts 2 to 13 of the SA 2020 make up a code called the ‘**Sentencing Code**’ (the ‘Code’).

Unless referring specifically to sections **1 or 2 of the SA 2020**, it is acceptable to refer to either the SA 2020 or the Code.

As well as the Code, courts also refer to sentencing guidelines published by the Sentencing Council.

1.2 Types of sentence

There are a variety of disposals available to a court when dealing with an offender; all of which meet, to a greater or lesser degree, the principles of sentencing.

They fall into custodial and non-custodial sentences.

One of the main advantages of the SA 2020 is that it brings the wide range of disposals together ‘under one roof’ as it were.

1.3 Purposes of sentencing (adult)

When determining the proportionate sentence to be imposed, the court will have regard to the various purposes of sentencing.

Section 57 SA 2020- In cases involving those aged 18 and over (at the date of conviction) the court must have regard to:

- (a) The punishment of offenders,
- (b) The reduction of crime (including its reduction by deterrence),
- (c) The reform and rehabilitation of offenders,
- (d) The protection of the public, and
- (e) The making of reparation by offenders to persons affected by their offences.

The purposes are given equal weight though in a particular case some may be more important than others.

1.4 Approach to sentencing

The mechanics of how a court sentences an offender is essentially the same irrespective of which court is dealing. The only key differences are:

- The availability of certain sentences; and
- The limits to the powers of the magistrates’ and youth courts.

In order to decide both the type and length of any particular sentence, the court must assess the seriousness of the case before it. To do so, it will refer to the sentencing guidelines.

1.5 Sentencing procedure

Sentencing happens once a defendant is convicted. This occurs either by the defendant entering a guilty plea or being found guilty after a trial.

The magistrates' court, youth court and Crown Court are all courts of first instance with powers of sentence.

It is important to appreciate the difference between the maximum sentence which can be imposed for a specific offence and the maximum sentence which can be imposed by a particular court for that offence.

This means that statute also allows for defendants, where necessary and appropriate, to be committed for sentence to the Crown Court which has greater powers.

Section 14 SA 2020 for example, provides that magistrates can commit an adult for sentence to the Crown Court for offences triable either way where greater sentencing powers are required.



Example: Example of section 14 at work

- (a) The defendant pleads guilty in the magistrates' court to an offence of burglary of a dwelling.
 - (b) Burglary is an either way offence which means that the magistrates have the jurisdiction to deal with the matter.
 - (c) Their powers of sentence are limited, however.
- s.224 SA 2020: A magistrates' court does not have power to impose imprisonment ...for more than 6 months in respect of any one offence.
- (d) Once the magistrates hear about the circumstances of the offence, they might form the view that it is so serious that the Crown Court needs to pass sentence as it has the power to deal with the defendant as if they had been convicted on indictment.
 - (e) In these situations, the defendant would be committed for sentence to the Crown Court where the maximum sentence available for burglary (dwelling) is 14 years under s.9 Theft Act 1968.

1.6 Powers of the courts

The following tables summarise which courts can sentence depending on the type of offence involved:

- Summary only
- Either-way
- Indictable only

1.6.1 Summary only

Plea / Trial	Sentenced in the magistrates' court?	Sentenced in the Crown Court?
The defendant pleads guilty to a summary only offence in the magistrates' court	Yes. Can only be sentenced in the magistrates' court	No. Can't be sent to the Crown Court for sentence
The defendant pleads not guilty to a summary only offence in the magistrates' court and therefore has a trial in	Yes. Can only be sentenced in the magistrates' court	No. Can't be sent to the Crown Court for sentence

Plea / Trial	Sentenced in the magistrates' court?	Sentenced in the Crown Court?
the magistrates' court. At trial they are found guilty		

1.6.2 Either-way

Plea / Trial	Sentenced in the magistrates' court?	Sentenced in the Crown Court?
The defendant pleads guilty to an either-way offence in the magistrates' court	Yes, but may commit for sentence to the Crown Court	Yes, if committed for sentence
The defendant pleads not guilty to an either-way offence in the magistrates' court and the matter stays in the magistrates' court for trial. At trial, the defendant is found guilty	Yes, but may commit for sentence to the Crown Court	Yes, if committed for sentence
The defendant pleads not guilty to an either-way matter in the magistrates' court. The case is sent to the Crown Court for trial. At trial, the defendant is found guilty	No. Once a matter has been sent to the Crown Court, it cannot be sent back to the magistrates' court for sentence	Yes. The defendant must be sentenced by the Crown Court

1.6.3 Indictable only

Plea / Trial	Sentenced in the magistrates' court?	Sentenced in the Crown Court?
The defendant is charged with an indictable only offence which is sent to the Crown Court. They plead guilty at their plea and trial preparation hearing in the Crown Court	No. Once a matter has been sent to the Crown Court, it can't be sent back to the magistrates' for sentence	Yes. The defendant must be sentenced by the Crown Court
The defendant is charged with an indictable only offence which is sent to the Crown Court. They plead	No. Once a matter has been sent to the Crown Court, it can't be sent back to the magistrates' for sentence	Yes. The defendant must be sentenced by the Crown Court

Plea / Trial	Sentenced in the magistrates' court?	Sentenced in the Crown Court?
not guilty at their plea and case management hearing in the Crown Court and are subsequently found guilty at trial		

1.7 On what basis is the defendant being sentenced?

For the purposes of this section, let's use a simple example.

The defendant is charged with a single count of Assault Occasioning Actual Bodily Harm (s.47 Offences against the Person Act 1861). The prosecution alleges that he punched the complainant in the face twice. The complainant fell to the ground. The defendant is alleged to have kicked the complainant twice in the ribs whilst the complainant remained on the ground.

Let us assume that the defendant's instructions are that he did assault the complainant, and he accepts that this did cause actual bodily harm, but that he takes issue with the facts asserted by the prosecution. If this is his position, he would need to:

- Enter a guilty plea, but on a written basis, the prosecution would indicate whether they viewed the basis as acceptable; if accepted
- The court will then proceed to consider whether this basis is an acceptable one; and
- The court will consider whether or not a Newton hearing is required.

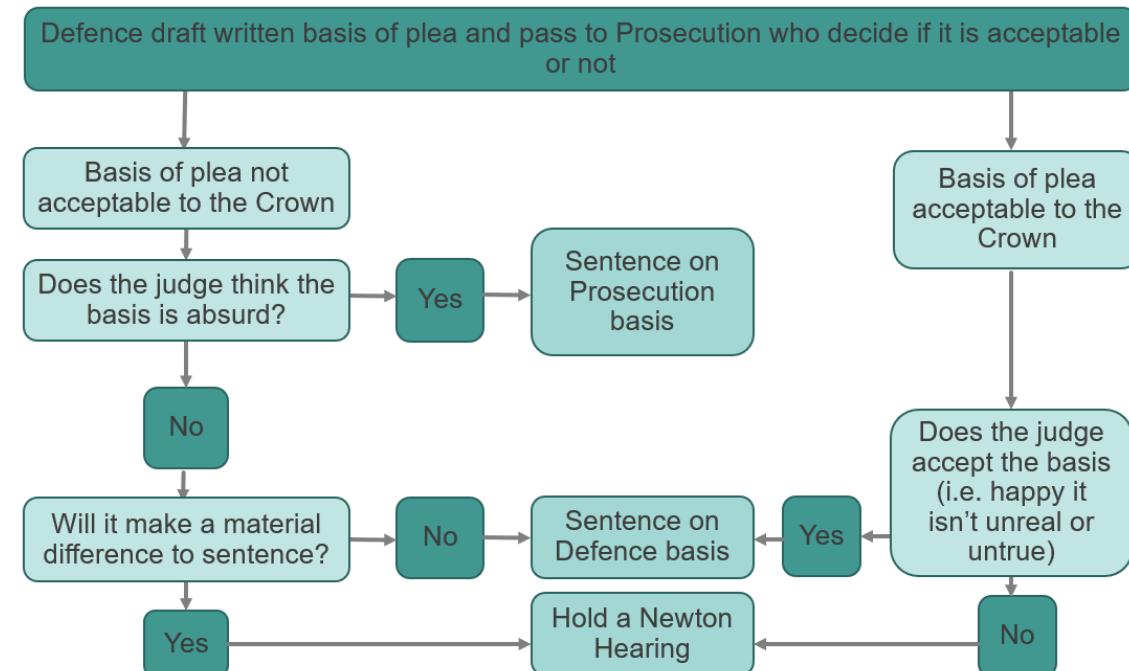


Figure 6.1: Basis of sentence

1.8 Newton hearings

Where a defendant pleads guilty on a basis that will make a material difference to sentence, the court must hold a Newton hearing to decide the factual basis upon which it should pass sentence (*R v Newton*).

What happens at a Newton hearing?

In the magistrates' court, a Newton hearing is presided over by magistrates or a District Judge much like a regular trial. In the Crown Court it takes place **without** a jury. This is one of the limited number of occasions where a Crown Court Judge acts as the arbiter of both law and fact.

A Newton hearing is an exception to the rule that where a defendant enters a guilty plea there is no 'trial' phase to the process.

The prosecution makes an opening speech and calls evidence in the usual way and their witnesses can be cross-examined by the defence. The defendant is able to give evidence and call witnesses if they so wish. Both parties are entitled to address the judge by way of a closing speech.

At the conclusion of the hearing the court must decide whether the prosecution has proved its version of the facts beyond reasonable doubt. If it has, the defendant will be sentenced **on the prosecution version of the facts**. If it has failed to prove their factual basis to that standard, the defendant will be sentenced **on the defence version of the facts as set out in their basis of plea**.

If the prosecution is able to prove their case beyond reasonable doubt and the defendant sentenced on their version of the facts, a further consequence for the defendant is that they lose some of the credit that they receive for pleading guilty. The Reduction in Sentence for a Guilty Plea guideline says that the reduction which would have been available at the stage of proceedings the plea was indicated should normally be halved. Where witnesses are called, it may be appropriate to further decrease the reduction. The rationale must be that the defendant has used up some court time that otherwise would have been saved due to their plea and/or that witnesses who would have been spared from giving evidence due to their plea instead had to come to court and give evidence at the Newton hearing.

1.9 Totality

When sentencing for more than one offence, a court must consider what the total sentence should be and arrive at one that is just and proportionate.

This is not as simple as adding the two (or more) sentences together, the judge will consider whether consecutive or concurrent sentences are more appropriate in the circumstances.

Where the various offences arise out of the same facts it will usually be appropriate to pass concurrent sentences for each, and where they arise out of different facts, consecutive sentences are likely to be passed.

1.10 Deferring sentence

A court can defer sentence for up to six months, the idea being that the defendant is allowed this time to prove to the court that D has either 'changed' or that the offence was an absolute 'one-off' and thus allowing D the ability to present to the court at the end of the deferral period in a much better light, and often, receive a lighter sentence as a result.

The deferral period cannot be extended save for where the magistrates' court defers sentence for a period, at the end of which they commit to the Crown Court for sentence, the Crown Court then has the option of deferring for a further six month period.

1.11 Indications of sentence

There are two formal procedures for seeking an indication of sentence in the event of a guilty plea. One in each court:

1.11.1 Magistrates' court

The offence is either-way and the court has accepted jurisdiction during the allocation process.

At this stage, D is entitled ask for an indication of what their sentence would be were they to remain in the magistrates' court and plead guilty.

The court does not have to give an indication of sentence but, if it does it can only say whether the sentence would be a custodial or a non-custodial sentence.

Only binding if D then pleads guilty.

1.11.2 Crown Court: Goodyear indication

D can ask for an indication of the sentence either before the PTPH or at any stage of the proceedings before the jury return their verdict.

Before asking for an indication D must:

- (a) Either accept the prosecution facts or a written basis of plea must be agreed by the parties and the court
- (b) Give clear instructions to their counsel that D wishes to ask for an advance indication of sentence.

The giving of an indication is discretionary and it remains the decision of the judge whether to give one or not.

1.12 Summary

This section considered the principles of sentencing contained in the **Sentencing Act 2020**:

- The purpose of sentencing
- Sentencing powers in both the magistrates' court and the Crown Court
- The purpose of Newton hearings.
- Totality of sentence
- Indications of sentence

2 Sentencing: Determining sentence

2.1 Seriousness

In order to decide on the appropriate sentence, the court will consider the Sentencing Code 2020 alongside any relevant sentencing guidelines.

The court must determine the **seriousness** of the offence.

The starting point to determine seriousness is to consider culpability and harm.

Section 63 SA 2020: Where a court is considering the seriousness of any offence, it must consider

- (a) The offender's culpability in committing the offence, and
- (b) Any harm which the offence (i) caused, (ii) was intended to cause, or (iii) might foreseeably have caused.

2.1.1 Thresholds

Where appropriate the court must consider whether either statutory threshold has been passed to justify imposing a custodial or community order.

Section 230 SA 2020:

- (a) The court must not pass a custodial sentence unless it is of the opinion that:
 - (i) The offence, or
 - (ii) The combination of the offence and one or more offences associated with it, was **so serious** that neither a fine alone nor a community sentence can be justified for the offence'

Section 204 SA 2020:

- (b) The court must not make a community order unless it is of the opinion that:
 - (i) The offence, or
 - (ii) The combination of the offence and one or more offences associated with it, was **serious enough** to warrant the making of such an order.

2.1.2 Culpability

Culpability is essentially blameworthiness and is assessed with reference to the offender's role, level of intention and/or premeditation and the extent and sophistication of planning.

The mere presence of a factor that is inherent in the offence should not be used in assessing culpability – so for example, intention to cause serious harm is a necessary element in a section 18 OAPA. What would increase culpability might be how the injuries were inflicted eg with a weapon.

2.1.3 Harm

Harm is an assessment of the damage caused to the victim.

So, in an assault it is a consideration of how injured the victim was and whether the assault was sustained or repeated.

In a theft it will be assessed by the financial loss resulting from the theft and any additional harm suffered by the victim or anyone else, for example injury or emotional distress.

2.2 Sentencing Guidelines

Every court **must** follow any sentencing guidelines which are relevant to the offender's case unless the court is satisfied that it would be contrary to the interests of justice to do so.

Sentencing guidelines are available for most of the significant offences sentenced in the magistrates' court **Sentencing guidelines for use in the magistrates' courts** and for a wide range of offences in the Crown Court **Sentencing guidelines for use in Crown Court**

There are also overarching guidelines on general sentencing issues and principles such as **Sentencing children and young people**.

Where no offence-specific sentencing guideline exists, courts will refer to the **General guideline: overarching principles**. Judges in the Crown Court might also refer to Court of Appeal judgments to look at how sentences have been reached for similar cases.

The General guideline can also be used with offence-specific guidelines where factors are not covered, and overarching guidance is required.

2.3 What happens at a sentencing hearing?



Figure 6.2: Sentencing hearings

2.3.1 Prosecution

The duties of a prosecutor extend to reminding the court of the following:

- Any previous convictions
- Any ancillary orders that the prosecution seeks (eg costs, compensation, restraining order)
- Any relevant sentencing guidelines
- Any general sentencing issues necessary to ensure that a lawful sentence is passed (eg the mandatory minimum sentence provisions)
- Any victim impact statement which has been produced.

It is not the role of the prosecution to tell the court or to suggest to the court what the ultimate sentence may be.

2.3.2 Defence

As with the prosecutor, the defence are under a general duty to ensure that a lawful sentence is passed.

Legal representatives must ensure that what they put forward is consistent with their instructions and their duties not to mislead the court.

The defence may ask for a pre-sentence report should they want one. It is, however, more common to ask for one before the prosecution goes through the process of opening the case. If a pre-sentence report is ordered by the court the case will ordinarily be adjourned for a period for this to happen

Pre sentence reports can be ordered at the Plea and Trial preparation hearing or even at the time of sending.

2.3.3 Pre-sentence reports

Section 30 SA 2020 states that a court **must** obtain a pre-sentence report before passing a custodial or community sentence, unless it considers it unnecessary to do so.

The report is to assist the court in determining the most suitable method of dealing with an offender. Probation input is needed before a community order can be imposed to assess the defendant's suitability for any programmes.

The probation officer will meet the defendant and discuss the offence and the defendant's attitude towards it.

2.3.4 Other reports

Sometimes other reports will be obtained, either by order of the court or by the defence.

These can include medical reports (if the defendant has a physical condition) or a psychiatric report.

If the court is contemplating a sentence pursuant to the Mental Health Act 1983 then it must receive evidence from two medical practitioners stating that in their opinion the defendant is suffering from a mental disorder.

2.4 The Code: Approach to sentencing

The Code confirms the approach the court should take:

- (a) Determine offence seriousness (ie harm and culpability).
- (b) Consider aggravating factors (ie those increasing seriousness), both statutory (eg previous relevant convictions, on bail, racial, religious, disability or sexual aggravation) and other non-statutory matters (eg alcohol, abuse of power, breach of trust).
- (c) Consider mitigating factors (ie those reducing seriousness), eg those relating to the offence, such as provocation or excessive self-defence; and those relating to the offender, such as positive good character, offender's vulnerability, mental health, remorse or other personal mitigation.
- (d) Consider any assistance given to the prosecution.
- (e) Consider the appropriate reduction for any guilty plea.
- (f) Consider totality.
- (g) Appropriate ancillary orders must be considered eg compensation, disqualification, forfeiture, restraining order, costs, surcharge, Criminal Courts Charge.

2.5 Determining sentence

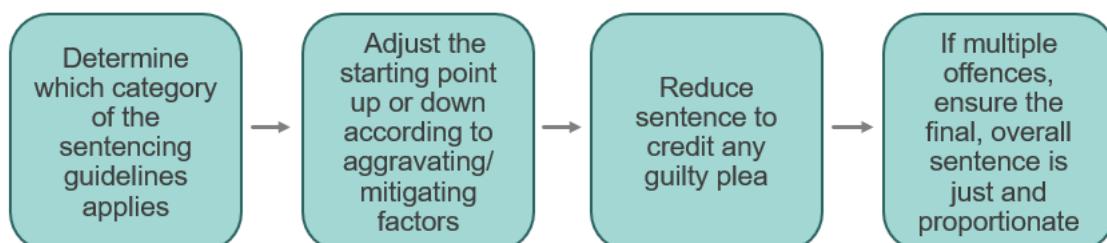


Figure 6.3: Determining sentence

2.5.1 Category

For most offences, the sentencing guidelines set out the appropriate range of sentence based on:

- (a) Greater culpability and greater harm.
- (b) Greater culpability and lesser harm, or greater harm and lesser culpability.
- (c) Lesser culpability and lesser harm.

The highest level of offence category would be 1, the lowest 3, and the middle category 2.

The guideline will then provide a sentence starting point and range for each category.



Example

Let us consider an offence of wounding with intent (s 18 OAPA 1861).

V and D were in a house where drugs are bought and used. D alleged his drugs had been stolen and became very aggressive. When V refused to be strip searched D stabbed her in the thigh. She attempted to grab the knife and suffered deep cuts to her fingers as well as a penetrating wound to her thigh. D fled the scene leaving V bleeding.

D has previous for drugs.

The appropriate category here is Category 2. The use of a knife indicates higher culpability.

Offence category	Starting Point (Applicable to all offenders)	Category Range (Applicable to all offenders)
Category 1	12 years' custody	9 - 16 years' custody
Category 2	6 years' custody	5 - 9 years' custody
Category 3	4 Years' custody	3 - 5 years' custody

2.5.2 Aggravating and mitigating factors

Once the category has been determined the judge will have a starting point and range of sentence. Aggravating and mitigating factors will then result in an upward or downward adjustment from the starting point.



Figure 6.4: Aggravating and mitigating factors

Common aggravating factors

Statutory factors

- Previous conviction(s), particularly where a pattern of repeat offending is disclosed

- Offence committed whilst on bail for other offences
- Offence was racially or religiously aggravated
- Offence motivated by, or demonstrating, hostility to the victim based on his sexual orientation (or presumed sexual orientation) or on the victim's disability (or presumed disability)
- Commission of an offence while under the influence of alcohol or drugs
- Planning of an offence
- Offenders operating in groups or gangs
- 'Professional' offending
- Commission of the offence for financial gain (where this is not inherent in the offence itself)
- High level of profit from the offence
- An attempt to conceal or dispose of evidence
- Failure to respond to previous sentences
- Offence committed whilst on licence
- Offence motivated by hostility towards a minority group, or a member or members of it
- Use of a weapon to frighten or injure victim
- Multiple victims
- Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence
- An especially serious physical or psychological effect on the victim, even if unintended
- Victim is particularly vulnerable
- Deliberate targeting of vulnerable victim(s)
- An intention to commit more serious harm than actually resulted from the offence
- Location of the offence (for example, in an isolated place)
- A sustained assault or repeated assaults on the same victim
- Offence is committed against those working in the public sector or providing a service to the public
- Presence of others eg relatives, especially children or partner of the victim
- Additional degradation of the victim (eg taking photographs of a victim as part of a sexual offence)
- Abuse of a position of trust
- Abuse of power

Common mitigating factors

Common mitigating factors for any offence:

- A greater degree of provocation than normally expected
- Mental illness or disability
- Youth or age, where it affects the responsibility of the individual defendant
- The fact that the offender played only a minor role in the offence
- Good character and/or lack of previous convictions
- Any personal mitigation



Example (continued from above)

There are a number of relevant facts here:

- Use of a knife
- Lack of remorse
- Fleeing from the scene, leaving the victim bleeding
- Reasonable recovery from physical injuries but ongoing psychological effect on the complainant
- D has no previous convictions involving serious violence

- No previous custodial sentences
- Incident can be viewed as a relatively isolated incident involving a single blow
- D in full time employment
- Partner and children

Note the following:

- As the use of a knife has been used to indicate higher culpability it cannot also be used also as an aggravating factor. That would be double counting.
- The ongoing psychological effect on the complainant, however, was not regarded as indicating greater harm and therefore did not elevate this offence into category 1. Instead, its effect is that of an aggravating factor which raises the seriousness of the offence within the category range.
- Although the presence of remorse is often a mitigating factor, its absence is not necessarily to be regarded as an aggravating one.

2.5.3 Credit for a guilty plea

Defendants are given ‘credit’ or a discount on their sentence if they plead guilty. The amount of credit depends on when the guilty plea was entered.

The Reduction in sentence for a guilty plea guideline says that the first stage of proceedings will normally be the first hearing at which a plea or indication of plea is sought and recorded by the court. However, the safest way the defendant can obtain maximum credit is either by:

- (a) Entering a guilty plea to a summary only or either way offence; or
- (b) Where the matter is indictable only by indicating that D intends to plead guilty and that D’s defence team will contact the Crown Court to arrange for this to happen imminently.

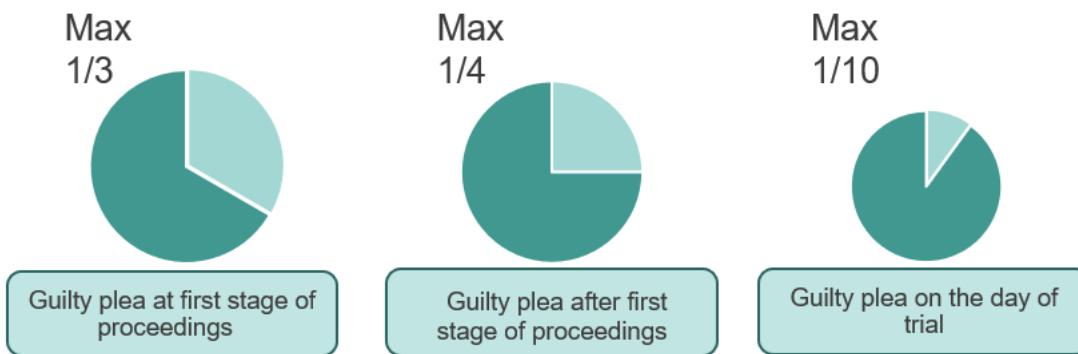
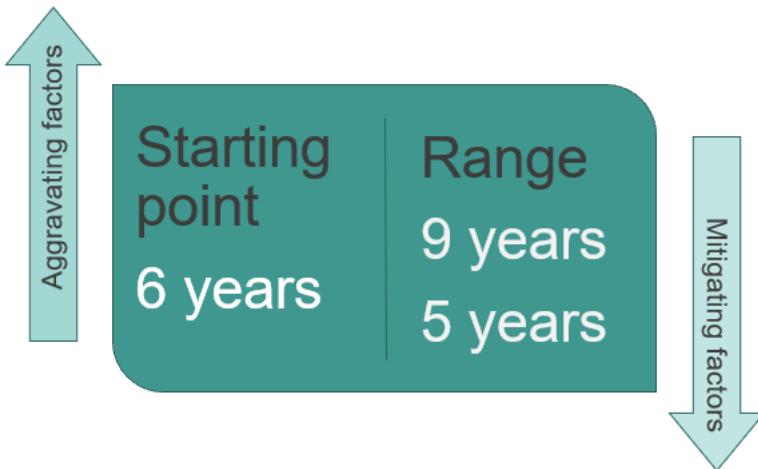


Figure 6.5: Credit for a guilty plea



Example (continued from above)

In our case the defendant pleaded guilty on the day of trial. Sentence was reduced by 10% accordingly resulting in a sentence of 7 years; just up from the starting point but well within the upper range.



2.6 Passing sentence

When passing sentence, the court must:

- Explain to the defendant in non-technical language the sentence that has been passed
- Identify the sentencing guidelines that it followed or why it decided not to follow guidelines that exist
- Explain why the defendant passes the custody threshold if a custodial sentence is passed
- Explain what credit has been given for a guilty plea and why it is at that level
- Set out any particular aggravating and mitigating factors that the court considered in arriving at sentence

2.7 Summary

This section considered the steps the judge will go through to arrive at an appropriate sentence:

The court must bear in mind the general principles and:

- Determine which category of the sentencing guidelines applies- the court will assess which category a defendant's conduct falls into, in terms of culpability and harm.
- Adjust the starting point up or down according to aggravating/mitigating factors.

Reduce sentence to credit any guilty plea:

- Guilty plea at first stage of proceedings – maximum 1/3
- Guilty plea after first stage of proceedings – maximum 1/4
- Guilty plea on the day of trial – maximum 1/10

3 Types of sentence: Non custodial

The SA 2020 separates the sentences into parts, making them easily accessible.

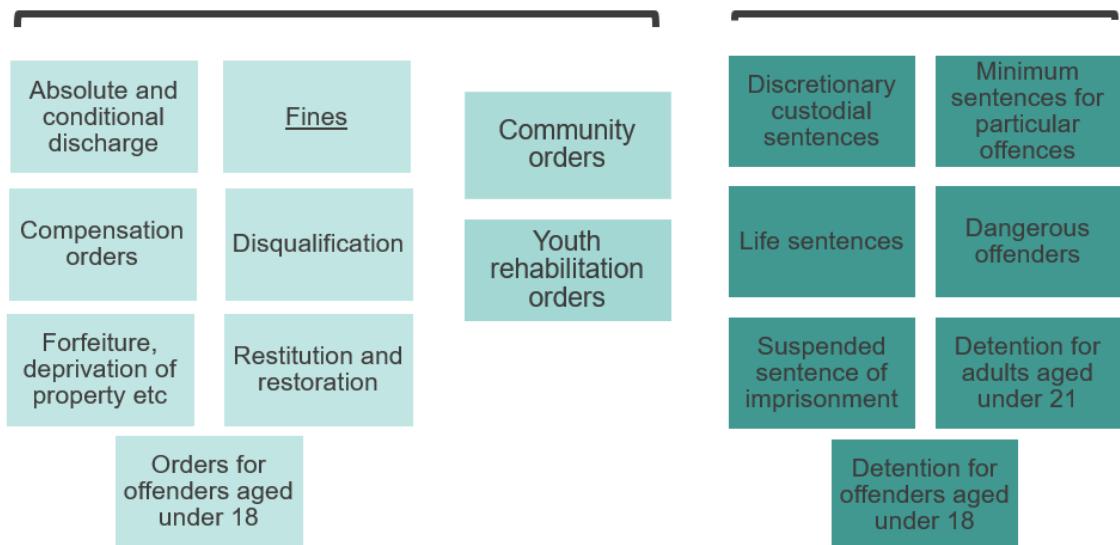


Figure 6.6: Classification of sentences

This section considers the following non-custodial sentences:

- Bind over
- Absolute discharge
- Conditional discharge
- Fines
- Community order

3.1 Bind over

It can be imposed in the magistrates' court and the Crown Court.

A bind over, however, stands apart from the other sentencing options in that it can be, and often is, imposed on someone instead of them entering a guilty plea or being tried for an offence. It can even be imposed following an acquittal or on a witness in a case.

A person can be bound over by a court to 'keep the peace' for a sum of money that they forfeit if they fail to do so.

If a defendant breaches the peace they are liable to pay the monetary sum that they were bound over for.

3.2 Absolute discharge

S.79 SA2020

An absolute discharge is the lowest form of sentence available to the magistrates' court and the Crown Court. It is usually imposed to reflect either the triviality of an offence, the circumstances in which an offender came to be prosecuted or special factors relating to the offender. It is in effect no punishment at all since there is nothing that the defendant must do or not do to comply with it.

3.3 Conditional discharge

S.80 SA 2020

A conditional discharge, as the name suggests, is a discharge (so again, no actual punishment) but with a condition attached to it. The condition is that if the defendant commits another offence during the period specified, they can be re-sentenced for the original offence and sentenced for the new offence. The specified period must be no more than three years.

The magistrates' court and the Crown Court can both impose a conditional discharge.

3.4 Fines

The magistrates' court and the Crown Court can both impose fines. In the Crown Court, the power to fine is for any amount with no upper limit. In the magistrates' court, fines are set on a standard scale from Level 1 (£200) to Level 5 (unlimited).

A fine is a financial penalty that requires a defendant to pay a certain sum of money to the court on conviction. The amount is due immediately and can only be paid in instalments with the agreement of the court.

Fines can be imposed on conviction (guilty plea or verdict) of any offence unless specifically prohibited by statute (eg an offence that imposes a mandatory minimum sentence). A fine can be imposed alongside any other sentence except for a hospital order or alongside a discharge (conditional or absolute) when sentencing for a single offence. Although there is no general prohibition on doing so, it is generally accepted as undesirable to combine a fine with imprisonment.

Fines are the most common type of sentence given by the courts (about 80% of offenders receive a fine) mainly because they are given for lower-level crimes such as minor driving offences and theft.

Before imposing a fine, the court can either enquire of the defendant (in person or through their advocate) as to their means. This is usually by asking the defendant to fill in a means form in which they set out their income and outgoings.

If an offender fails to pay their fine, they may be brought back before a magistrates' court (irrespective of which court issues the fine) and as a last resort D can be sentenced to a period of imprisonment in default.

3.5 Community Order

A Community Order is a sentence that requires a defendant to comply with one or more requirements to punish and/or rehabilitate a defendant in the community.

The court must not make a community order unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was serious enough to warrant the making of such an order.

s.204 Sentencing Act 2020

The offender must be over 18 and the offence must be punishable with imprisonment.

When making a Community Order, the court must impose at least one of the requirements set out in s.201 and Sch 9 SA 2020. Multiple requirements must be compatible one with another.

- The maximum length of a community order is three years.
- A community order must have at least one requirement, including a punitive element unless a fine is imposed or there are exceptional circumstances that would make it unjust (s.208 (10) – (11)).
- Requirement/s must avoid conflict with the offender's religious beliefs and/or interference with the offender's times of work and/or education.
- The court may have regard to any period spent on remand, or qualifying electrically monitored curfew, when determining the restrictions/s on liberty which such a sentence imposes.

A court must specify a period of operation for a Community Order and that in effect is an overall limit within which the requirements must be completed, unless a specific time period is designated for a particular requirement.

Where a defendant completes their order within the time period specified, they or the Probation Service may apply for the order to be discharged.

Section 30 SA 2020 states that a court should obtain a pre-sentence report before imposing a Community Order unless it thinks it unnecessary to do so. In practice, the Probation Service write reports and supervise Community Orders so courts will want a report unless it's obvious that a requirement is suitable.

3.5.1 Community Order requirements

Name of requirement		
Unpaid Work Requirement	Carry out unpaid work as directed by the Probation Service.	40 – 300 hours to be completed within 12 months
Rehabilitation Activity Requirement	Attend appointments or participate in activities as directed by the Probation Service.	The maximum number of days that the defendant must attend as instructed.
Programme Requirement	Participate in an accredited programme (eg anger management, alcohol treatment).	That a programme is needed and the number of days upon which the defendant must attend.
Prohibited Activity Requirement	Not do a certain thing as defined by the court (eg attend a football match).	What the prohibited activity is and whether it is at specified days and/or times and/or a period of time.
Curfew Requirement	Stay at the specified place (usually a specific address) during the times specified.	2-16 hours in any 24 hours; maximum term 12 months; must consider those likely to be affected; must be electronically monitored unless a person whose cooperation is necessary does not consent or it is otherwise inappropriate.
Exclusion Requirement	Not enter a specific area or keep away from a particular person.	Maximum period two years: may be continuous or only during specified periods; must be electronically monitored unless.
Residence Requirement	Live at a particular address	To reside as directed
Foreign travel prohibition requirement	Prohibit travelling, on a particular day or days, or for a particular period, to a particular country or countries.	Not to exceed 12 months.
Mental Health Treatment Requirement	Undergo mental health treatment	The length of the treatment, that the defendant has a condition susceptible to treatment, that they are willing to undergo treatment, that a hospital order is not required.
Drug Rehabilitation Requirement	Submit to treatment and take a drug test as and when required to prove that they are not taking drugs.	Offender needs to be dependent on drugs and require treatment. Must be suitable for the treatment and must consent.

Name of requirement		
Alcohol Treatment Requirement	Attend treatment under the direction of a specified person to reduce or eliminate their dependency on alcohol.	Offender needs to be dependent on alcohol and require treatment. Must be suitable for the treatment and must consent.
Alcohol abstinence and monitoring requirement	Abstain from consuming alcohol, or not consume alcohol so there is more than a particular level of alcohol.	Maximum of 120 days
Attendance Centre Requirement	For defendants 18–24 only. Attendance centres punish the offender by loss of their free time but also provide a disciplined learning environment.	The total number of hours that they must attend (between 12 and 36)
Electronic Monitoring Requirement	Apply when the defendant must be subject to a community order requirement that must be monitored by an electronic tag.	An electronic monitoring requirement must be imposed where a curfew or exclusion requirement has been made unless the court considers it inappropriate to do so. It can use an electronic monitoring requirement in conjunction with any other requirement if it wishes to do so.

3.5.2 The consequences of breach?

If an offender fails without reasonable excuse to comply with any requirement of their Community Order, they must be warned that their failure is unacceptable. If they fail without reasonable excuse to comply with any requirement of their Community Order again, breach proceedings must be instituted against the offender.

The offender will be brought back before the court and have the breach put to them. They can either admit or deny the breach; if they choose the latter, the court will hold a trial as to whether there was a failure without reasonable excuse.

If the offender admits the breach or the court finds that there was a breach following a denial, then it **must** deal with them in one of the following ways set out in **Sch 10 SA 2020**:

- By amending the order to make it more onerous.
- By fining the offender up to £2,500.
- By revoking the Community Order and re-sentencing the offender for the offence in respect of which the order was made. Where the court decides to do this, they must take into account the extent to which the offender has complied with the order.

The court is able to extend (once only) the period of the Community Order by up to six months beyond the usual three-year limit if necessary.

Where the offender has **willfully and persistently breached** the requirements of the community order, and the court decides to revoke the Community Order and re-sentence the offender for the offence in respect of which the order was made it is important to note that the court does have the power to impose a custodial sentence not exceeding six months, even in respect of an offence which was not an offence punishable with imprisonment.

3.6 Summary

This section considered the key non- custodial sentences for adults.

A Community Order is a sentence that requires a defendant to comply with one or more requirements to punish and/or rehabilitate a defendant in the community.

The court must not make a community order unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was serious enough to warrant the making of such an order.

A person can be bound over by a court to 'keep the peace' for a sum of money that they forfeit if they fail to do so.

An absolute discharge is the lowest form of sentence available to the magistrates' court and the Crown Court

A conditional discharge with the condition that if the defendant commits another offence during the period specified, they can be re-sentenced for the original offence and sentenced for the new offence.

The magistrates' court and the Crown Court can both impose fines. There is no limit in the Crown Court.

Type of sentence	Magistrates' court power?	Crown Court power?
Bind over	Yes	Yes
Absolute discharge	Yes	Yes
Conditional discharge	Yes	Yes
Fine	Yes, subject to any statutory maximum	Yes, subject to any statutory maximum
Community order	Yes	Yes

4 Types of sentence: Custodial

4.1 Discretionary sentences

Most imprisonable offences carry discretionary custodial sentences— ie a court may send them to prison provided the custodial threshold under s 230 Sentencing Act 2020 has been reached.

A custodial sentence must not be passed unless the court is satisfied that the offence or offences are so serious that neither a fine nor a Community Order can be justified.

Where a custodial sentence is imposed it must be for the shortest possible period to reflect the purpose of the sentence (such as the punishment of offenders, reduction of crime, reform and rehabilitation of offenders, protection of the public and the making of reparation by offenders).

The court uses sentencing guidelines to assist in determining the seriousness of an offence and the length of any sentence. The process a court goes through is covered in another section.

There are a number of different types of custodial sentences:

- Determinate custodial sentences
- Suspended determinate custodial sentences
- Minimum sentences for certain offences
- Extended determinate sentences (EDS)
- Mandatory life sentence for murder
- Other statutory life sentences

4.2 A determinate custodial sentence (immediate imprisonment)

A prison sentence for a defined period of time eg 6 weeks, 12 months, 3 years or 8 years.

These are the most usual custodial sentences passed.

Where a defendant falls to be sentenced to a period of imprisonment for more than one offence, the court must consider whether to make the sentences concurrent or consecutive to each other, ie

- (a) Two 12-month sentences to run concurrently with each other = a total sentence of 12 months
- (b) Two 12-month sentences to run consecutive to each other = a total sentence of 24 months

The judge must consider totality when passing custodial sentences for multiple offences and this includes whether sentences run consecutively or concurrently. Generally speaking, offences that arise out of the same events will attract concurrent sentences. Consecutive sentences are generally used where the defendant has done something that needs to be punished separately, eg committing an offence whilst on bail for another offence.

4.2.1 Who has the power to impose this sentence?

The magistrates' court can impose a maximum of:

- 6 months for a summary only offence;
- 6 months for a single either way offence; or
- 12 months for two or more either way offences.

The Crown Court has unlimited powers of imprisonment subject to the statutory maximum for each offence.

In both cases it must be noted that these are the **maximum** powers. If an offence has a statutory maximum below the court's overall maximum sentencing power, then the court must follow the statute (eg criminal damage £5000 or below is summary only and has a maximum of 3 months).

If a defendant has been remanded in custody for any period prior to sentence, then that period is automatically counted towards their sentence. This is administered by the Home Office once the defendant is serving.

Depending on the length of the sentence there might be a period of post sentence supervision as well.

In addition, if a defendant has been on bail with a curfew condition, which was electronically monitored, where the number of hours under curfew was at least nine, they are entitled to credit towards their sentence.

This is not automatic (unlike time on remand) and the court must expressly state that the time under curfew counts. Each day on bail is calculated as equal to half a day serving a prison sentence and rounded up to the nearest whole number. Note, any days upon which the curfew was breached does not count towards this calculation.

4.3 A suspended sentence of imprisonment

A suspended sentence of imprisonment must be for offending that crosses the custody threshold but the defendant does not go into immediate custody and if they fulfil certain criteria, they can avoid prison entirely.

A magistrates' court may suspend any determinate custodial sentence of between 14 days and 6 months.

The Crown Court may suspend any determinate custodial sentence of between 14 days and 2 years.

A suspended sentence has three elements to it:

- (a) **The custodial term:** How long a custodial term they would have received but for it being suspended.
- (b) **The operational period:** How long the custodial term is suspended for. This must be between six months and two years.
- (c) **The supervision period:** How long the defendant must be supervised by the Probation Service for. This is optional, but if used, must be between six months and two years and equal to or shorter than the operational period.

When passing a suspended sentence, the court may (but not must) make the defendant subject to any one or more of the Community Order requirements set out in Schedule 9 SA2020



Example of suspended sentence

Mr Smith is told that his 1-year sentence of imprisonment is being suspended for 2 years. His supervision period is 18 months and he has to complete 200 hours of unpaid work. What does that mean?

- (a) The prison sentence that he is at risk of having to serve is 1 year long.
- (b) If he breaches this suspended sentence over the next 2 years, then he might have to serve some or all of the 1-year sentence.
- (c) He will be supervised by the Probation Service for 18 months.
- (d) He must complete 200 hours of unpaid work.

If Mr Smith does not commit another offence for 2 years, complies with the supervision requirement (ie turns up to appointments with the Probation Service) and does his 200 hours of unpaid work as directed, he will not serve a single day of the 1-year sentence of imprisonment.

However if Mr Smith breached the suspended sentence by one or more of:

- (a) Committing another offence during the operational period
- (b) Failing to comply with the Probation Service where there is a supervision period
- (c) Failing to comply with any Community Order requirement where one has been imposed

Where a breach is alleged by virtue of (b) or (c) above, the same process as with breach of a Community Order exists, ie the defendant must be warned on their first breach and if they commit another breach within 12 months of a warning, breach proceedings will then be instituted.

If the breach is found proved or is admitted then the court must activate the suspended custodial sentence in part or whole having regard to the extent to which the defendant had complied with the order prior to breach, unless it would be unjust to do so.

4.4 Minimum sentences for a third domestic burglary or third Class A drugs offence

For some serious offences, statute prescribes minimum sentences that must be imposed unless there are exceptional circumstances:

- Seven years' imprisonment for a third Class A drug trafficking offence
- Three years for a third domestic burglary
- Five years for certain firearms offences
- Six months for a second offence of possessing a weapon
- Six months for threatening with a weapon.

4.4.1 Minimum sentences: Third Class A drugs offence

Only the Crown Court has jurisdiction to impose this sentence.

For the Class A drug trafficking offence:

- (a) The defendant must have committed three Class A drug trafficking offences.
- (b) They must chronologically have occurred in this order:
 - (i) Commission of offence 1
 - (ii) Conviction (plea/verdict of guilty) of offence 1
 - (iii) Commission of offence 2
 - (iv) Conviction (plea/verdict of guilty) of offence 2
 - (v) Commission of offence 3
 - (vi) Conviction (plea/verdict of guilty) of offence 3

If convicted of offence 3, the court must pass a minimum custodial sentence of seven years unless it would be unjust to do so. If the defendant enters a guilty plea at the first opportunity then the reduction must be such that the final sentence is still at least 80% of the minimum seven-year term.

That is, unless the court states that it would be unjust to pass the minimum term, in which case the final sentence can be below the 80% of the prescribed minimum term.

4.4.2 Minimum sentence: Third domestic burglary

For burglary, all of the qualifying offences must be domestic burglaries, ie those where the place burgled was in some way a dwelling. Burglary is ordinarily an either-way offence. Where a defendant faces a third potential conviction, they must be committed to the Crown Court as the prescribed minimum is three years.

Defendants are often sentenced for more than one burglary offence at a time.

A defendant may therefore commit:

- (a) 12 domestic burglaries and be convicted of those. One of those will count as commission 1 and conviction 1.
- (b) 18 further domestic burglaries after the first 12, which will count as commission 2 and conviction 2.
- (c) 20 further domestic burglaries which will count as commission 3 and conviction 3.

However, given these are minimum terms the court is, of course, at liberty to pass a longer sentence than the three years.

There is a maximum of 20% reduction on a guilty plea.

4.5 Extended determinate sentence

Extended sentences are imposed in certain types of cases (specified violent, sexual or terrorism offences) and where the court has found that the offender is dangerous.

It is the licence period which is extended not the period of custody as an extended licence period is required to protect the public from risk of harm.

4.5.1 s. 254-257 SA 2020

The extension period must—

- (a) Be at least 1 year, and
- (b) Not exceed—
 - (i) 5 years in the case of a specified violent offence;
 - (ii) 8 years in the case of a specified sexual offence or a specified terrorism offence.

The overall term of an EDS imposed cannot exceed the maximum term permitted for the offence.

A prisoner serving an EDS is eligible to apply for parole at the 2/3 point of the custodial term and must be released at the end of the custodial period.

4.6 Mandatory life sentence for murder

Where a defendant is convicted of murder, (which is indictable only) the court must pass a mandatory life sentence. It has no discretion to pass any other sentence. A mandatory life sentence is not available for any other offence than murder.

On sentence the court will fix a minimum term. Once that minimum term has expired the defendant can apply for release to the Parole Board who has ultimate discretion as to when a defendant is released. If released the defendant remains on licence for life.

The minimum term for murder is based on the starting points set out in Schedule 21 of the Sentencing Code. The judge will decide which starting point applies and then adjust it based on the aggravating and mitigating factors present.

For the most serious cases of murder, an offender may be sentenced to a life sentence with a ‘whole life order.’ This means that their crime was so serious that they will never be released from prison. There are never usually more than about 100 prisoners serving whole life orders.

The remaining starting points are 30, 25 and 15 years.

4.7 Statutory life sentences

Offenders who are considered dangerous or who are convicted of a second, very serious offence may be sentenced to imprisonment for life. The provisions are contained in the SA 2020.

Unlike the life sentence for murder which is mandatory there is still an element of discretion in the imposition of these life sentences.

There are also offences such as rape or robbery for which the maximum sentence is life imprisonment. It is, however, unheard of for offenders convicted of these offences to get a life sentence without fulfilling the statutory provisions under the SA 2020.

4.7.1 Life for dangerous offenders

Where an offender is:

- Convicted of an offence set out in Schedule 19 of the Sentencing Code; and
- The court is of the view that the offender is dangerous; and
- The offence justifies a life sentence.

4.7.2 Life for second listed offence

Where an offender is:

- Convicted of an offence set out in Schedule 15 of the Sentencing Code; and
- Both the sentence condition and the previous conviction condition are satisfied;
- Unless it would be unjust to impose a life sentence.

4.8 Summary

Summary of custodial offences

Type of sentence	Magistrates' court power to use them?	Crown Court?
A suspended sentence of imprisonment	Yes, though the custodial term that is suspended is subject to the same maximums below for determinate sentences.	Yes
A determinate custodial sentence	Yes, subject to a maximum of 6 months or 12 months where a person is charged with 2 or more either-way offences.	Yes
Mandatory minimum sentence for a third domestic burglary/ Class A drugs offence	No	Yes
Mandatory life sentence-murder	No	Yes
Life sentence under SA 2020	No	Yes
EDS	No	Yes



Appeals

1 Appeals – Magistrates' decisions

1.1 The power to rectify mistakes

If the defendant is unhappy with the decision of the magistrates' court the first step to consider is whether the magistrates have made an error which they themselves can correct. Section 142 of the Magistrates' Court Act 1980 gives the magistrates court the power to vary a sentence or set aside a conviction if it is in the interests of justice to do so. This applies to sentence, other orders and conviction – whether following conviction by the magistrates or after a guilty plea. The latter is understandably rare. It may occur, for example, if the defendant was wrongly advised as to the law, albeit he would have the difficult burden of proving this.

The power, commonly known as the 'slip rule', is a narrow one and is not intended as an alternative avenue for the defendant to simply re-argue their case.

Case law has made it clear that it is a power to rectify mistakes in law and procedure, whether at trial or sentencing, and is most likely to be appropriate (and to succeed) where all parties agree that a mistake was made.

It is not intended to permit a defendant to argue that the magistrates' decision on their case was wrong – that is a matter for an appeal.

While the defendant will usually make an application, the court can make an amendment under this provision of their own volition. An application can be heard by the same magistrates who convicted the defendant but if the conviction is set aside the case will be re-tried by a different bench.

A finding of guilt might be set aside, for example where the:

- legal adviser provided the magistrates with incorrect legal advice; or
- defendant did not attend for trial and no explanation for the defendant's absence was available at the time. The defendant was therefore tried in their absence and found guilty. A few days later the defendant attends court with a medical certificate stating that an emergency hospital admission on the day of trial was the reason that the defendant was not fit to attend court. In these circumstances it would clearly be in the interests of justice that the conviction is set aside.

On applications to vary sentence the power is more properly used where the sentence needs to be reduced, for example where a financial penalty was imposed which was higher than the statutory maximum for the offence. However, exceptionally, a sentence can be increased under s.142, for example, if the court was misled by the defendant.

1.2 Challenging magistrates' court decisions

If a defendant feels that the magistrates have reached the wrong decision on the substantive merits then the appropriate course is to appeal. The three means of challenge open to the defendant are as follows:

- (a) Appeal to the Crown Court, by way of re-hearing;
- (b) Appeal to the High Court, by way of case stated; or

(c) Application to the High Court for judicial review of the decision.

The choice of either (a), (b) or (c) depends upon the decision that is to be challenged.

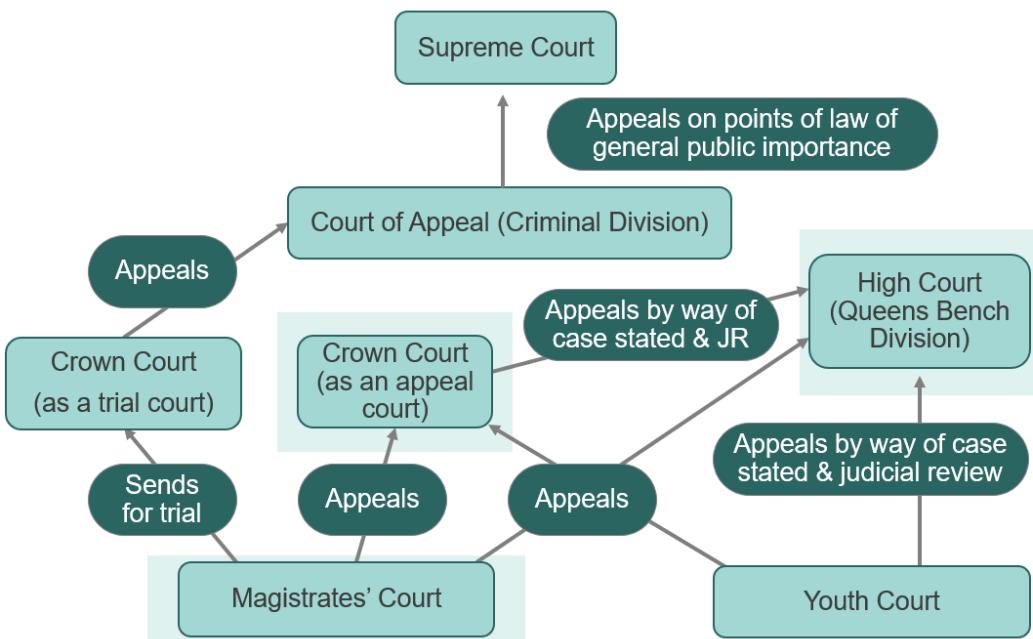


Figure 7.1: Challenging magistrates' court decisions

1.2.1 Which appeal route?



Key case: *R v Hereford Magistrates' Court ex p Rowlands [1997] 2 Cr App R 340*

The court considered this and advised the following approach:

- Where the defendant complains that the magistrates made an error of fact or mixed fact and law, the defendant should appeal to the Crown Court.
- Where the defendant complains that the magistrates made an error of law or acted in excess of their jurisdiction, the defendant should appeal by way of case stated.
- Where the defendant alleges unfairness, bias or procedural irregularity the defendant should apply for judicial review of the decision.

1.3 Appeals from the magistrates' court to the Crown Court

Section 108 of the Magistrates' Court Act 1980 provides a right of appeal from the magistrates' court to the Crown Court. It is by far the most common route out of the three means of challenge. It is an automatic right that does not require leave. It provides that a person convicted by a magistrates' court may appeal to the Crown Court:

- If the defendant pleaded guilty, against sentence; or
- If the defendant pleaded not guilty and was found guilty after a trial, against the conviction or sentence.

It is important to note that:

- The prosecution cannot appeal via this route. Its options of redress are limited to the other two means of challenge: case stated or judicial review.
- Even if the defendant appeals against conviction only, once in the Crown Court sentence is 'at large'. This means that, if the conviction is upheld, the Crown Court can pass any sentence that the magistrates' court could have passed. This includes one that is more severe than the original sentence.
- If the defendant pleaded guilty, an appeal against sentence is the only option, unless the defendant can demonstrate that their plea was equivocal.

1.3.1 Procedure on appeal to the Crown Court

Notice of appeal must be lodged within 15 business days **of sentence**, irrespective of whether the appeal is against conviction or sentence. The notice of appeal must be served on the magistrates' court and the prosecution. It must specify the following (**CrimPR Pt 34.3**):

- The conviction, sentence, order or decision which the appellant wishes to appeal, including the court and date of this.
- Summarise the issues.
- State whether the magistrates' court has been asked to reconsider its decision (under s.142 MCA 1980) or why this is not applicable.
- List the parties on whom the appeal notice has been served.

If the Notice is served outside the 15 business day limit it must be accompanied by an application for an extension of time, with reasons for the delay (**Pt 34.2**).

Part 34 of the Criminal Procedure Rules sets out the procedural requirements.

CPR Pt 34.3 (b - d) go into detail of what must be included, eg the issues at trial / which witnesses are required. You should read and be familiar with this.

1.3.2 The hearing

The appeal is by way of a re-hearing. A conviction appeal will proceed in precisely the same way as the original trial, with speeches, witnesses giving live evidence and any relevant submissions. Parties are not limited to the evidence that was called during the trial. Importantly, the information (the written charge on which the appellant was convicted) cannot be amended by the Crown Court. The appeal will be heard by a judge of the Crown Court and two lay magistrates. Exceptionally, the court can proceed with just one lay justice if the hearing of the appeal might otherwise be unreasonably delayed. At a sentence appeal the hearing proceeds as if it is the original sentence hearing, with the facts presented and mitigation heard.

1.3.3 Bail

Bail pending appeal can be applied for in the magistrates' court (s.113 MCA 1980). If refused an appellant may apply for bail from the Crown Court. Under **the Bail Act 1976** there is no right to bail pending appeal.

1.3.4 Abandonment

The appellant may abandon their appeal at any time. Once an appeal has been abandoned the Crown Court has no power to vary the magistrates' decisions. In order to abandon an appeal, the appellant should give notice in writing to the magistrates' court, the Crown Court and the prosecution (**CrimPR 34.9**). If the appellant fails to attend and is not represented, the appeal is treated as abandoned. If they fail to attend and they are represented, the appeal will go ahead. Permission from the Crown Court is required to abandon once the hearing has started.

1.3.5 Powers on appeal

Section 48(2) of the Senior Courts Act 1981 provides the powers of the Crown Court on appeal from the magistrates'.

It can:

- confirm, reverse or vary the decision appealed against or any part of it;
- remit the matter with its opinion to the magistrates;
- make any other order which the court thinks is just, so long as they exercise only the power the magistrates could have.

1.3.6 Conviction appeal

In a conviction appeal, the Crown Court will hear the evidence and must give reasons for the verdict reached.

The reasons do not involve a formal re-examination of the magistrates decision.

1.3.7 Sentence appeal

In a sentence appeal, again, the magistrates' sentence is not formally re-examined. The appeal panel will consider whether, in light of all they have heard, the sentence imposed by the magistrates was correct.

Sentence can be both increased and reduced.

1.3.8 Costs

A successful appellant may be awarded a defence costs order. An unsuccessful appellant may be required to pay the prosecution's costs (sections 16(3) & 18(1)(b) Prosecution of Offences Act 1985 and CrimPR Pt 45.6). Where an appeal is abandoned costs can be awarded against the appellant but in practice this usually occurs only where the notice of abandonment is served within 24 hours of the appeal hearing or on the day itself.

1.4 Appeal by way of Case Stated

Section 111 Magistrates' Court Act 1980 provides for an appeal by way of case stated. This a form of appeal to the High Court on the basis that the decision made was wrong in law or in excess of jurisdiction.

The defendant applies to the magistrates' court to 'state a case' for the opinion of the High Court. This will take the form of a question (or questions) about decisions of law or procedure which the defendant asserts were wrongly decided.

An example of a question might be 'were the magistrates correct to find that the police officer was acting in the execution of duty when striking the appellant ten times with a baton?'. The example may be extreme but it demonstrates the point!

The final 'case stated' will be agreed by all parties and will include a summary of the evidence heard at trial, legal arguments on the disputed decision and the details of the decision itself. For this reason this is not the appropriate route of appeal where a matter of fact is disputed.

The procedure for the application and stating of the case is dealt with in **Crim PR Pt 35**. Once the case has been stated by the magistrates it is treated as a civil matter for procedural purposes and regulated by **Part 52E of the Civil Procedure Rules**.

The appeal is heard by the Divisional Court of the Queen's Bench division of the High Court. The court will comprise at least two judges, usually three. No evidence is heard, it is based on legal submissions by the parties.

The main points to note are:

- Both the prosecution and defence can appeal by way of case stated.
- It can only be used after the final determination of proceedings in the magistrates' court. If trial proceedings are adjourned the right cannot be exercised in this period.
- The deadline is 21 days from the date of the decision sought to be appealed, save that: where sentence is adjourned following conviction the date of decision is deemed to be the date of sentence, even where conviction is being appealed.
- Magistrates can refuse to state a case if it is considered vexatious.
- Bail pending appeal can be granted by the magistrates or, if refused, the High Court.
- If you appeal by way of case stated you lose your right to appeal to the Crown Court under section 108.
- If you appeal to the Crown Court under section 108 and the Crown Court upholds the decision of the magistrates, you can appeal by way of case stated from the Crown Court.
- The powers of the Divisional Court are that it may reverse, affirm or amend the magistrates' court decision; remit the case with an opinion or make any other order as it sees fit.
- An appeal from the High Court in relation to an appeal by way of case stated is direct to the Supreme Court.

1.5 Application for Judicial Review

Judicial review is the means by which the High Court (again the Divisional Court of the QBD) polices inferior tribunals and public bodies. The principal grounds where a review can be applied

for are – error of law on the face of the records (i.e. an error disclosed by the court records), excess of jurisdiction and a breach of natural justice. The latter has been widely interpreted and includes matters such as the prosecution failing to disclose a statement of a witness that might assist the defence, the magistrates failing to grant an adjournment to allow a witness to attend and failing to give the defence adequate time to prepare their case.

The main points to note are:

- Both the prosecution and defence can apply for judicial review.
- The proceedings should have been concluded before an application is made, although a decision to prosecute can be subject to review.
- Applications for judicial review must be lodged promptly and in any event within three months after the grounds arose. A failure to lodge promptly can lead to the application being rejected even when lodged within three months.
- Only the High Court has power to grant bail to an applicant for judicial review.
- A decision made by the Crown Court on appeal from the magistrates' court can be subject to judicial review. Where it concerns an error of law it should be by way of case stated (*Gloucester Crown Court ex parte Chester* [1998] COD 365).
- Where an exercise of discretion is involved the standard is 'Wednesbury unreasonableness' (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).
- An appeal from the High Court in relation to a judicial review is direct to the Supreme Court.

1.6 Case stated or judicial review?



Key case: *R (P) v Liverpool City Magistrates* (2006) 170 JP 453

The court offered some guidance on which route to pursue:

- The normal route where it is alleged that there has been a misdirection or an error of law is by way of case stated;
- It would be wrong to seek judicial review where case stated was appropriate, merely in order to avoid the more stringent time-limit;
- However, judicial review is more appropriate where there is an issue of fact to be raised and decided which the justices did not decide themselves;
- Judicial review may also be appropriate where it is alleged that there has been unfairness or bias in the conduct of the case by the justices.

1.7 Summary

This section explored:

- the power to rectify mistakes; and
- appeals against decisions of the magistrates' court to:
 - the Crown Court- if D complains there was an error of fact or fact and law;
 - the High Court by way of case stated- if D complains there was an error of law or the magistrates' acted in excess of jurisdiction; or
 - the High Court, making an application for judicial review if D alleges unfairness, bias or procedural irregularity.

2 Appeals – Crown Court decisions

2.1 The power to rectify mistakes at sentence - slip rule

The Crown Court has its own version of the 'slip rule' although it only applies to sentences and other orders, such as a driving ban or compensation.

Section 385 Sentencing Act 2020 empowers a judge to vary or rescind a sentence (or other order) within 56 days of it being made. The judge who passed sentence must be the judge who makes

the variation. It can be used following sentence on an appeal from the magistrates' court, however, in this instance the lay magistrates do not need to attend the slip rule hearing.

The purpose of the slip rule is to save both time and money in removing the need for either party to appeal in cases where a recognisable error has been made in the sentence. Therefore if an appeal, or application for leave to appeal, has been decided by the Court of Appeal then the Slip Rule can no longer be used.

The use of the slip rule is not limited to amending the length of the sentence or correcting minor technical errors, but permits amending the type of sentence or requirements attached to a community based sentence.



Example: Slip rule

For example, if a defendant presented mitigation that they were the sole carer for a sick relative and on this basis a sentence of imprisonment was suspended, the Court can amend this to impose immediate custody if they discover that the mitigation was false.

On the other hand, a defendant who, a week after receiving a community order, obtains work on a nightshift may have a curfew removed to enable this. It would almost certainly be replaced by an alternative requirement.

2.2 The Court of Appeal

The Court of Appeal Criminal Division has jurisdiction to hear certain types of case from the Crown Court. We are primarily concerned with the following (non-exhaustive) list:

- (a) Appeals against conviction on indictment;
- (b) Appeals against sentence passed following conviction on indictment;
- (c) Appeals against sentence passed on committal for sentence;
- (d) References by the Attorney-General of unduly lenient sentences, for offences triable only on indictment and some either-way offences specified by the Home Secretary;
- (e) References by the Attorney-General for opinions on points of law following acquittal on indictment;
- (f) References by the Criminal Cases Review Commission;
- (g) Prosecution appeals against terminatory rulings;
- (h) Appeals against rulings made at preparatory hearings in serious fraud cases.

The first three are necessarily defence appeals.

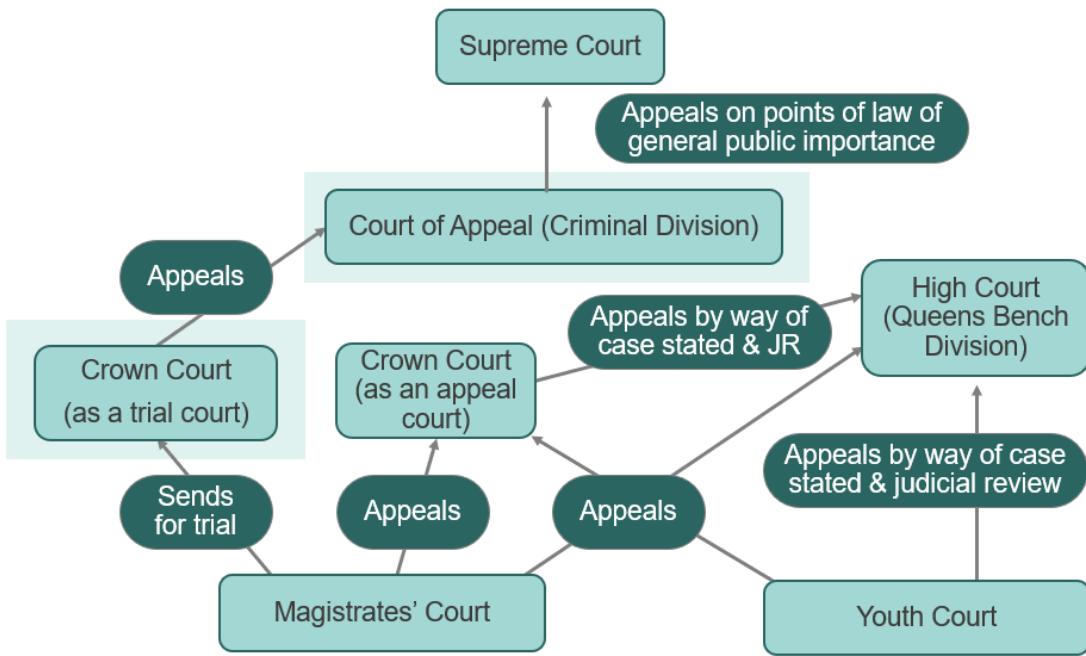


Figure 7.2: Challenging Crown Court decisions

2.3 Appeal against conviction or sentence

These powers of appeal come from the following sections of the **Criminal Appeal Act 1968**:

- Against conviction – ss. 1 & 2
- Against sentence following conviction on indictment – ss. 9 & 11
- Against sentence following committal for sentence – ss. 10 & 11

Leave is required to appeal to the Court of Appeal. Appellants from the Crown Court need to convince a single judge that their appeal is arguable on the merits before it can proceed to an oral hearing before a 2 judge court (sentence appeals) or a 3 judge court (conviction appeals). If leave is refused by the single judge a party may renew an application for leave orally before the relevant panel.

The law and procedure is largely the same for both appeals against conviction and sentence so can be dealt with together.

2.3.1 Time limits for lodging grounds

The Notice of Appeal (Form NG) must, since October 2018, be served on the Registrar of the Criminal Division of the Court of Appeal. The notice must be served within 28 days of the conviction, in conviction appeals, and within 28 days of sentence, in sentence appeals. This time limit can be extended - the extension must be applied for when serving Form NG, giving reasons for the delay. Whether to permit this is a matter of the Court's discretion. In practice, if the Court finds merit in the grounds of appeal they are likely to allow the extension in order to prevent injustice. The rest of this section will refer to court forms by their abbreviation which makes it easier to describe.

2.3.2 Advising on appeal: Duties of Counsel

Counsel should advise promptly.

Oral advice should be given immediately after conviction/sentence.

If there are no grounds a negative advice should be prepared and sent to the defendant's solicitors.

If there are grounds, they should be clearly and precisely drafted and sent to the defendant's solicitors.

Counsel must draft an Advice, setting out their advice on the merits of an appeal and Grounds, setting out the proposed grounds on which they advise an appeal has merit.

The Advice and Grounds should be drafted as one document. It should identify any transcripts which are necessary. In practice this is done by keeping good notes and keeping track of dates and times of any rulings during the trial. This enables the Registrar to obtain the transcripts to assist the single judge and enable counsel to ‘perfect’ their grounds (see later). Counsel should also provide a list of authorities, if they seek to rely upon any.

Counsel should only draft grounds which are reasonable, have some real prospect of success and that they are prepared to argue before the court. Unmeritorious appeals risk a ‘loss of time’ order (see later) and counsel’s positive advice does not guarantee protection from this.

Once the Advice and Grounds have been received by the solicitor they should be sent to the defendant for approval. Form NG can be signed by the solicitor on the defendant’s behalf, if they have instructions to do so. Form NG will be sent to the Registrar, along with counsel’s Advice and Grounds. The Crown Court will send the relevant papers from their file to the Court of Appeal along with the defence appeal documents. This enables the Registrar to confirm what happened at the lower court e.g. what sentence has been recorded and when the appellant was convicted.

2.3.3 Certificate of Trial Judge

In exceptional cases the trial judge may certify the case as ‘fit for appeal’. This is unusual as it would require the judge to consider that they had made an error. It is certainly not a routine application at the end of a trial that you have lost.

An example of where a certificate may be granted is where a judge is required to interpret a new piece of legislation; they take a view but can equally see the force of the losing party’s argument and it is something on which the Court of Appeal’s guidance is sought.

If a certificate is granted, then leave is not required but counsel do have to comply with the appeal procedure in the usual way.

2.3.4 Transcripts

All Crown Court proceedings are digitally recorded. Transcripts are ordered by the Registrar if they are required in order to resolve the appeal.

For example, if one of the Grounds of Appeal is that the judge made an incorrect ruling on a matter of law counsel should, in the Advice, provide the date and time that the judge gave that ruling. The Registrar can then obtain the transcript of the ruling so that the Court of Appeal can determine exactly what was said.

In conviction cases the summing up and proceedings up to and including the verdict are usually obtained as a matter of course. In sentence cases, the sentencing remarks are obtained and any prosecution opening of facts where the sentence takes place following a guilty plea.

2.3.5 Perfecting grounds

When transcripts are received counsel will be sent a copy and invited to ‘perfect’ grounds within 14 days i.e. adding references to the transcripts to support the arguments advanced or reconsidering the grounds and perhaps amending / deleting or advancing new ones in light of the transcripts.

If counsel does not wish to perfect, they should notify the Registrar.

Perfecting grounds should be in a fresh document and clearly marked as such.

If counsel decides that the appeal is no longer arguable, counsel should advise the appellant’s solicitors of this in writing. This advice should not be sent to the Registrar but the Registrar should be informed.

2.3.6 Respondent’s Notice

The Registrar may direct that the prosecution serve a response to assist the single judge on Form RN.

The single judge may also order that a Respondent’s Notice be obtained if it was not previously ordered by the Registrar.

It may be directed, for example, where there is an issue regarding public interest immunity or where there is criticism of the trial judge. A response may be invited in other cases, such as complex fraud or serious sexual offences.

2.3.7 Consideration of leave to appeal by the single judge

Usually the application, including any bail application, will be considered by the Court of Appeal on the papers alone, without oral argument, by one judge sitting alone. The single judge will consider the merits of the application for leave and come to a decision, giving reasons. The single judge may:

- grant the application wholly or in part;
- refuse the application;
- refer it to the full Court of Appeal without granting leave.

2.3.8 Renewal

If leave is refused by the single judge, or granted on some grounds but not others, the appellant can renew the application for leave to appeal. The appellant must serve the form on the Court of Appeal within 10 business days of receipt of the notification of the single judge's decision. This can be extended in a similar way to the application for leave. A renewed application for leave to appeal will be heard orally by the full court of 2 or 3 judges. No representation order is available but counsel may appear either privately or on a pro bono basis. If they intend to do so they must notify the court in writing as soon as possible. Notification of the single judge's decision, is on Form SJ. It may indicate that the single judge found the application to be wholly without merit and that the full court should consider a 'loss of time order' if the application is renewed.

2.3.9 Referral to the full court

Rather than sending a case to the single judge, the Registrar can refer a case to the full court instead, effectively bypassing the single judge and asking the full court to decide the application for leave.

This power is used where:

- there is an unlawful sentence which must be amended; or
- there is a novel point of law.

It may also be used where the matter requires expedition e.g. a seriously ill or elderly appellant.

The single judge may also refer to the full court if the single judge identifies an issue requiring the full court's attention.

2.3.10 Summary: the chronology of an appeal to the Court of Appeal (CoA) from the Crown Court

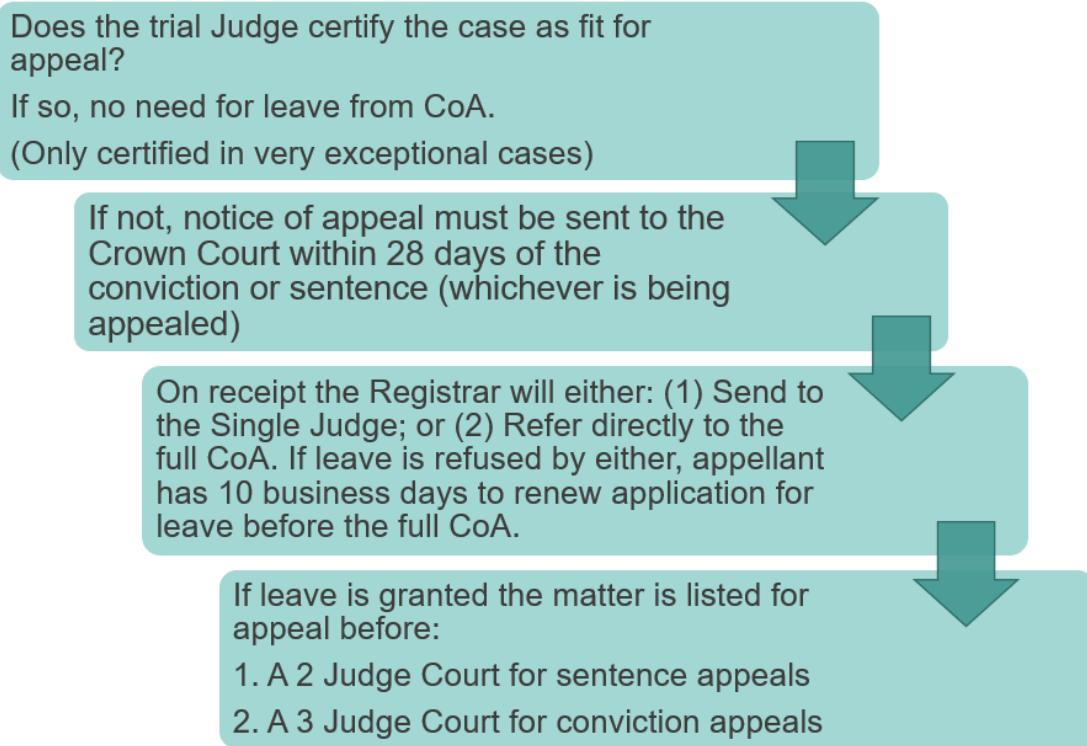


Figure 7.3: Summary: the chronology of an appeal to the Court of Appeal

2.3.11 Common grounds of appeal

Common grounds for an appeal against conviction include, but are by no means limited to:

- Wrongful admission / exclusion of evidence;
- Wrongful rejection of a submission of no case to answer;
- Wrongful withdrawal of issues from the jury;
- Misdirection on law / facts in the course of summing up;
- Conduct of the trial judge;
- Inconsistent jury verdicts;
- Fresh evidence;
- Defects in the Indictment;
- Conduct of lawyers.

Common grounds for an appeal against sentence include:

- Wrong in law;
- Wrong in principle;
- Manifestly excessive;
- Legitimate expectation;
- Judge fails to take account of relevant matters;
- Judge takes account of improper considerations;
- Unjustified disparity between co-defendants or a failure to distinguish between offenders.

2.4 Common grounds of appeal

It is perfectly proper for a defendant to appeal a conviction to the Court of Appeal even where the defendant pleaded guilty to the charge in the Crown Court. It is open to the court to rule a plea as a nullity and quash the conviction. The most common such ground is if the guilty plea was

entered following a legal ruling by the trial judge which left no option but to plead guilty. If that ruling is itself appealed and held to be incorrect the resultant guilty plea will be quashed.

Appeals can be mounted on the basis of incorrect legal advice, although it would be more usual to apply first to the Crown Court to vacate the plea. If the advice is correct and the plea was entered of the defendant's own free will then it is unlikely to be interfered with – by either court. This highlights the importance of advising a client accurately on plea, ensuring that they know it is their choice how to plead and getting an endorsement that the client has been so advised and makes the decision freely.

2.5 The appeal

The Registrar or single judge will usually grant a representation order for junior counsel when leave is granted. If work is necessary it may be extended to cover a solicitor. The Registrar will send a brief to counsel.

The respondent is not usually represented at a sentence appeal but will be on a conviction appeal.

A summary to assist the court will be prepared by a Criminal Appeal Office Lawyer.

A skeleton must be served where the appeal notice does not sufficiently outline the grounds. In practice, a skeleton is most commonly needed in cases involving a novel point of law or complex issues are raised which require additional input from counsel. If skeletons are to be served the appellant must serve theirs 21 days prior to the hearing and the respondent 14 days before the hearing, unless otherwise directed. Authorities are to be used sparingly and must be justified.

As a general rule, the appellant is entitled to be present, if the appellant wishes, at the hearing of the appeal. There are some exceptions if the appellant is in custody, whereby the court's permission is required. You will find them at s.22 Criminal Appeal Act 1968 if you are interested.

2.6 The test on appeal

If leave is granted (on paper or at an oral hearing) the court must proceed to consider the merits of the appeal.

- In an appeal against conviction the court can allow an appeal only if they think that the conviction is unsafe (s.2 Criminal Appeal Act 1968).
- In an appeal against sentence the appeal can be allowed if the court thinks the defendant should have been sentenced differently (s.11(3) Criminal Appeal Act 1968).

The next page shows the powers the Court of Appeal may exercise if they find the appropriate test to be met and allow the appeal.

2.7 Powers on appeal

2.7.1 Conviction

- Quash the conviction.
- If it appears to the court that the interests of justice so require they may order the appellant to be retried.
- The court may also substitute a verdict of guilty for an alternative offence if:
 - the jury would have been able to convict of the alternative offence at trial; and
 - the jury must have been satisfied of facts which proved him guilty of the offence.
- The sentence may need to be amended to reflect this.

2.7.2 Sentence

- Quash any sentence or order which is the subject of the appeal; and
- In place of it pass any such sentence or make such order as they think appropriate, but which the court below had power to pass or make; and
- They must ensure that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was in the court below.

2.8 Loss of time order

The Court of Appeal can direct that some or all of the time spent in prison between the date of lodging the appeal and the date of its dismissal may be ordered not to count towards the appellant's sentence. This is known as a 'loss of time' order.

This may be imposed where the application is considered to be wholly without merit. It can be made by the single judge considering the paper application for leave, but this is unusual in practice. It is most likely to be made by the full court following refusal of a renewed application for leave, especially, but not only, where the single judge has marked the appropriate box on Form SJ (described previously).

2.9 Fresh evidence

Section 23 of the Criminal Appeal Act 1968 allows the Court of Appeal to admit evidence on appeal, including evidence which was not called at the original proceedings - this applies to sentence appeals but is more likely to be used with conviction appeals.

The section states that the Court of Appeal may, if they think it **necessary or expedient in the interests of justice**:

- (a) order the production of any document, exhibit or thing connected with the proceedings if it is necessary for the determination of the case;
- (b) order any witness to attend for examination (regardless of whether they were called in the original proceedings);
- (c) receive any evidence which was not adduced in the proceedings from which the appeal lies.

In considering whether to receive any evidence the court will have regard to the following, as per s.23(2). This is not an exhaustive list:

- (a) Whether the evidence appears to be capable of belief;
- (b) Whether it appears that the evidence may afford any ground for allowing the appeal;
- (c) Whether the evidence would have been admissible in the proceedings from which the appeal lies, on an issue which is the subject of an appeal;
- (d) Whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

The provision means that jurors and legal representatives (subject to waiver of privilege) can be compelled to attend and give evidence on appeal. Furthermore, it applies equally to the respondent (i.e. the prosecution) who can therefore call new evidence, except where its purpose is to argue a new basis for conviction.

2.10 References by the Attorney-General

2.10.1 Reference on a point of law following acquittal

The Attorney-General (AG) may ask for the opinion of the Court of Appeal on a point of law where the defendant was acquitted following trial on indictment. This does not affect the acquittal – the acquittal stands whatever the Court of Appeal's decision.

The power is intended to clarify the law. However, the defendant is entitled to be represented at the hearing.

The Court of Appeal can refer to the Supreme Court if it sees fit or where either party requests this.

2.10.2 Reference for review of sentence

The Attorney General (AG) may refer a case to the Court of Appeal where the AG considers the sentence imposed to be 'unduly lenient'. The AG can only refer cases for offences which are triable only on indictment or specified in the **Criminal Justice Act 1988 (Reviews of Sentencing) Order 2006**.

It is a matter for the AG to consider whether leave should be sought for a reference and the time limit to do so is 28 days. If leave is granted the Court of Appeal will proceed according to the facts before the sentencing judge.

A sentence can be increased under the reference procedure if it is found to be ‘unduly lenient’. Some discount will, however, be given for ‘double jeopardy’. This means compensating a defendant for having to wait before knowing if their sentence will be increased.



Assessment focus point

You are not expected to know the list of offences specified in the **Criminal Justice Act 1988 (Reviews of Sentencing) Order 2006** for your assessment.

2.11 The Criminal Cases Review Commission (CCRC)

The Criminal Cases Review Commission (CCRC) is an independent body created by the **Criminal Appeal Act 1995**. It has the power to refer, at any time, any conviction on indictment or sentence to the Court of Appeal or to the Crown Court if the conviction/sentence is a summary one. The question the CCRC asks itself is whether there is a real possibility that the Court of Appeal will quash the original conviction or sentence. If the CCRC chooses to make such a reference it is usually only in respect of an argument or information not available in the court of first instance or on appeal, save for where exceptional circumstances exist.

2.12 Prosecution appeals against terminatory rulings

Prior to the implementation of the **Criminal Justice Act 2003** it was extremely difficult for the prosecution to challenge an adverse decision of a judge made at trial. Section 58 CJA 2003 changed the situation by providing for prosecution appeals against any terminatory ruling made in the course of a Crown Court trial on indictment i.e. those rulings that would otherwise bring the case to an end. The provision does not apply to rulings to discharge the jury. The appeal is to the Court of Appeal.



Assessment focus point

There are provisions providing a similar appeal in respect of evidentiary rulings which significantly weaken the prosecution case but these are not yet in force and so not required for your assessment.

2.12.1 Prosecution appeals against terminatory rulings – requirements

There are three main requirements for such an appeal to take place.

- The ruling must be made before summing up;
- An acquittal agreement must be given by the prosecution;
 - This means that the prosecution must give an assurance to the court and the defendant that if leave to appeal is refused and the appeal abandoned before it is decided by the Court of Appeal, the defendant will be acquitted on that count(s).
- The ruling must not be appealable to the Court of Appeal by other means.

2.12.2 Prosecution appeals against terminatory rulings – procedure



Exercise: Read alongside

See Part 38 CrimPR

There are various ways to proceed where an appeal may be appropriate.

- (a) Prosecution counsel should notify the judge that they wish to appeal immediately; or
- (b) Ask for a short adjournment if they want to speak to the CPS lawyer;
- (c) Any adjournment will usually be until the next business day, when notification must be given;
- (d) Thereafter, counsel should serve written notice of appeal on the court, Registrar and defendant;

- (e) The prosecution has five business days to serve written notice in non-expedited cases or the next business day in an expedited appeal case. Expedited cases will be dealt with by the Court of Appeal in a matter of days without the need for the jury to be discharged.

Alternatively, the prosecutor can apply orally to the trial judge for leave to appeal:

- The trial judge will hear representations from the defence on the same day as the application unless it is in the interests of justice to allow further time for them to respond;
- The trial judge will decide if there is a real prospect of success on appeal.

The prosecution has a second chance if their application to the trial judge fails in that they can still lodge notice of appeal and proceed to the Court of Appeal.



Example: Appealable rulings

Some examples of rulings which would be appealable under this section are:

- Staying proceedings as an abuse of the court's process;
- Rulings of no case to answer;
- Evidential ruling which leaves the prosecution with no evidence to offer.

2.13 Appeals against rulings at Preparatory Hearings

A preparatory hearing is a form of case management hearing held in long, complex or fraud cases.

There is a power for both prosecution and defence to appeal rulings made at these hearings, to the Court of Appeal.

Practice point: it is worth being aware that this power exists.

2.14 Appeals to the Supreme Court

- The Supreme Court (formerly the House of Lords) is the highest court of the UK. Sections 33 and 34 of the Criminal Appeal Act 1968 allow either the prosecution or defence to appeal a decision of the Court of Appeal to the Supreme Court, but this is not an appeal as of right.
- The Court of Appeal or the Supreme Court would need to certify that the case involved a point of law of general public importance.
- **Part 43 of the Criminal Procedure Rules** governs procedure. An application to the Court of Appeal for leave to appeal to the Supreme Court must be made no more than 28 days after the court gives reasons for its decision (and no more than 14 days after the court's reasons in an AG Reference case).

2.15 Summary

This section explored:

- The slip rule in the Crown Court to vary or rescind a sentence or other order.
- Appeals from the Crown Court to the Court of Appeal (Criminal Division) against conviction or sentence in particular:
 - the procedure
 - test on appeal
 - against conviction – the court can allow an appeal only if they think that the conviction is unsafe
 - against sentence – the appeal can be allowed if the court thinks the defendant should have been sentenced differently
 - powers on appeal against conviction and/ or sentence
 - admission of fresh evidence on appeal if the Court of Appeal think it necessary or expedient in the interests of justice.
- References by the Attorney-General for opinions on points of law following acquittal on indictment;

- References by the Attorney-General of unduly lenient sentences, for offences triable only on indictment and some either-way offences specified by the Home Secretary;
- References by the Criminal Cases Review Commission;
- Prosecution appeals against terminatory rulings; and
- Appeals against rulings made at preparatory hearings in serious fraud cases.

This section also explored further appeals to the Supreme Court for cases which involve a point of law of general public importance.



Youths

1 Youth court - overview

1.1 Introduction

If a young person between the ages of 10 and 17 commits an offence their route through the criminal justice system will be different to that which an adult will follow. This is because the youth justice system has two specific aims which guide the way in which youths will be dealt with at the various stages of the process. The aims are:

- to prevent children and young people from offending s. 37 Crime and Disorder Act 1998 ('CDA'); and
- to have regard to the welfare of the child or young person Section 44 Children and Young Persons Act 1933 ('CYPA').

The majority of young people will be tried and sentenced in the youth court.

Different terms are used to refer to those aged between 10 and 17 who pass through the criminal justice system. Age is the key factor that determines which term will be used. Age also plays a significant role in the sentence that a defendant aged 17 and under will receive in the event of a conviction.

For ease of reference, the term 'youth' will be used throughout these sections when addressing specific points applicable to all offenders who are aged 17 and under, unless otherwise stated.

1.2 Age of criminal responsibility

It is conclusively presumed that no child under the age of 10 years can be guilty of an offence.

Different terms are used to refer to those aged between 10 and 17 who pass through the criminal justice system.

Age is the key factor that determines which term will be used.

Age also plays a significant role in the sentence that a defendant aged 17 and under will receive in the event of a conviction.

Term	Details
Juvenile	A person who is under the age of 18.
Adult	Aged 18 or over. With reference to sentencing procedure 'adult' sometimes means a person aged 21 or over, as that is the age an offender becomes liable to imprisonment rather than detention in a Young Offender Institution.
Child	The Children and Young Persons Act 1933 s.107 defines a 'child' as a person under the age of 14 years old.

Term	Details
Young Person	The Children and Young Persons Act 1933 s.107 defines 'young person' as a person aged between 14 and 17 (inclusive).
Persistent Young Offender (PYO)	No statutory definition. Guidance contained within the Sentencing Council publication <i>Sentencing Children and Young People: Definitive Guideline</i> states that a young person is likely to be categorised as a PYO if they have been convicted of, or made subject to a pre-court disposal that involves an admission or finding of guilt, in relation to imprisonable offences on at least 3 occasions in the past 12 months. Some sentences are only available to a PYO (e.g. a Detention and Training Order when offender is under 15 years old).

1.3 Court process for youths

There are certain circumstances where a youth can appear before the adult magistrates' court or the Crown Court and these will be addressed in a separate section.

For those youths who are prosecuted the procedure which follows differs in a number of ways from that which applies to adults and there are particular rules that apply to youth court proceedings.

Youth courts are essentially magistrates' courts. This means that trials in the youth court are a form of summary trial. However, the jurisdiction of the youth court is different to the adult magistrates' court.

There is a presumption that youths will be dealt with by the youth court for nearly all offences, even those classed as indictable only for adults.

1.4 Youth court- composition and procedure

A youth court will consist of either:

- District Judge sitting alone (as in the adult magistrates' court); or
- Not more than three magistrates.

Magistrates and District Judges are required to undergo specialist training to sit in the youth court.

Reporting restrictions apply automatically to those who appear in the youth court. They can be lifted although this is rare, especially before conviction. This is different to the adult magistrates' court and Crown Court where reporting restrictions are discretionary.

1.5 Persons present

The youth court is not a public court, unlike the adult magistrates' court or Crown Court (unless sitting in chambers). Only the following can be present in a youth court (s.47 CYPA 1933):

- Members and officers / officials of the court (i.e. the magistrates, court ushers etc);
- Parties to the case before the court (the accused and their parents or guardians) and their legal representatives (lawyers in other cases cannot enter the courtroom);
- Witnesses and other persons directly concerned in the case (i.e. probation officers and social workers);
- *Bona fide* representatives of newspapers or news agencies (but note reporting restrictions);
- Such other persons as the court may specially authorise to be present (for example pupil barristers, other relatives of the accused).

While the public are excluded from the youth court they are not excluded from the adult magistrates' court or the Crown Court even when a youth is appearing there as a defendant or as a witness (unless they are sitting in chambers).

1.6 Parents or guardians

If the accused is under 16 the court **must** require a parent or guardian to attend with the youth at all stages of the proceedings 'unless and to the extent that the court is satisfied that it would be unreasonable to require such attendance, having regard to the circumstances of the case' (s.34A CYPA 1933).

If the accused is aged 16 or 17 the court **may** require a parent or guardian to attend. 'Guardian' is defined as anyone who 'has for the time being the care of the child or young person' (s.107 CYPA 1933). 'Parent' includes an adoptive parent.

If the youth is under the care of the local authority their representative must (or may) attend court instead of, or sometimes in addition to, the parent.

1.7 Youth court informalities

Proceedings are more informal than in the adult magistrates' court and Crown Court.

For example:

- Lawyers and witnesses remain seated
- Lawyers are not robed
- The youth sits in a chair not in the dock and usually their parent or guardian sits next to the youth and lawyers may sit next to their clients.
- Rather than communicating via the solicitor, magistrates prefer to talk directly with the defendants and their parents.
- Justices who sit on youth court benches are specially trained.
- The youth and any youth witnesses are addressed by their first names;
- If the youth or youth witness needs to take an oath this will be 'to promise' to tell the truth, as opposed 'to swear', as in the adult magistrates' court.
- The language used is different – e.g. 'finding of guilt' is a conviction and 'order made on a finding of guilt' is a sentence.

1.8 Making modifications in adult courts

The European Court of Human Rights said a child must have a broad understanding of the trial process and what is at stake. There are a number of ways that changes can be made to the way that adult courts normally work:

- Arrange a familiarisation visit to the court
- Remove wigs and gowns in the Crown Court
- Refer to a child by their first name
- Have a child sitting out of the dock
- Have a child sitting close to an appropriate adult
- Have a child sitting close to their lawyer
- Arrange for regular breaks
- Avoid complicated language, use clear and simple questions
- Be proactive in ensuring the child has access to support
- Keep public access to a minimum
- Use an intermediary to help communication
- Use a live link to give evidence
- Take time to explain court proceedings a child what is going on

Any other change to ensure effective participation

1.9 Summary

This section provided an introduction to youths in the criminal justice system:

- The majority of youths will be tried and sentenced in the youth court summarily.
- Youth court proceedings are more informal than adult court hearings.
- Reporting restrictions apply to youth court proceedings and parents/ guardians are generally present.

2 Youths- arrest and detention

2.1 The police station

Juveniles (those aged 17 and under) have the same protection under PACE as adults but there are a number of additional safeguards. A juvenile is treated as a vulnerable suspect and consequently further protective measures are imposed to protect the juvenile suspect.

One of the main protections afforded to juveniles detained at the police station is the attendance of the Appropriate Adult ('AA'). An AA is someone who attends the police station to look after the welfare of the suspect. AAs are not exclusive to juveniles.

'Anyone who appears to be under 18, shall, in the absence of clear evidence that they are older, be treated as a juvenile.'

The necessity for 'clear evidence' that a detainee is 18 or older means that where there is any doubt, a precautionary approach must be adopted by the custody officer and the police must treat the detainee as a juvenile; any dispute as to age will be for a court to determine if the suspect is charged with an offence.

2.2 Who should be informed of the juvenile's arrest?

The person responsible for the juvenile's welfare must be informed as soon as practicable that the juvenile has been arrested, why he has been arrested and where he is being detained.

The AA, who may or may not be the same person who has responsibility for the welfare of the child, must also be contacted. The AA must be informed of the grounds for the juvenile's detention and the whereabouts of the juvenile and must be asked to attend the police station.

2.3 Appropriate adults

The following persons can act as AAs:

- the parent, guardian or anyone else with parental responsibility;
- a social worker; or
- any other responsible adult who is not a police officer.

A person should NOT be an AA if they:

- are suspected of involvement in the offence;
- are the victim;
- are a witness;
- are involved in the investigation; or
- have received admissions prior to attending to act as the AA.

A solicitor or independent custody visitor who is present at the police station and acting in that capacity, may not be the appropriate adult.

An estranged parent should NOT be asked to act as AA if the juvenile specifically objects to it.

Youth Offending Teams (YOT) may have individuals available to act as AA if necessary or there may be groups of trained volunteers available to carry out the role.

If a juvenile admits an offence to, or in the presence of, a social worker or member of a youth offending team other than during the time that person is acting as the juvenile's appropriate adult, another appropriate adult should be appointed in the interest of fairness.

In the case of someone who is vulnerable, it may be more satisfactory if the appropriate adult is someone experienced or trained in their care rather than a relative lacking such qualifications. But if the person prefers a relative to a better qualified stranger their wishes should, if practicable, be respected.

An appropriate adult who is not a parent or guardian in the case of a juvenile, or a relative, guardian or carer in the case of a vulnerable person, must be independent of the police as their role is to safeguard the person's rights and entitlements.

2.4 The role of the Appropriate Adult

It is important that the AA understands their role in the interview.

The AA is not expected to simply act as an observer.

The purpose of their presence is to:

- (a) advise the juvenile being questioned;
- (b) observe whether the interview is being conducted properly and fairly; and
- (c) facilitate communication with the juvenile being interviewed.

The AA's presence is to help the juvenile cope with the demands of custody and questioning and to appreciate the seriousness of the situation. Although the police will brief the AA of their role at the beginning of any interview, it is always worth checking for yourself that the AA understands their role.

The AA can instruct a solicitor on behalf of the juvenile.

The AA also has the right to consult with the juvenile in private at any time and also to consult the custody record.

A detainee should always be given an opportunity, when an appropriate adult is called to the police station, to consult privately with a solicitor in the appropriate adult's absence if they want. An appropriate adult is not subject to legal privilege

Problems can arise in relation to the disclosure of information. There is no duty of confidentiality owed by an AA. A confused, upset or angry parent may volunteer information to a police officer which would otherwise be confidential. A solicitor should always be alert to this danger and it is always advisable to see the juvenile, at least initially, in the absence of the AA.

AAs should be present when the juvenile is:

- being read their rights;
- being strip searched or subjected to an intimate search;
- being interviewed;
- attending an identification procedure; or
- being charged.

A juvenile must not be interviewed or asked to sign anything in the absence of an AA unless authorised by a superintendent or above and only if they believe delay will have certain consequences and is satisfied that the interview would not significantly harm the juvenile's physical or mental state.

If a juvenile is cautioned in the absence of an AA, the caution must be repeated in the AA's presence.

The consent of the juvenile's parent/guardian, as well as their own, is required for participation in any ID procedure. If the juvenile is under 14, the consent of their parent alone is sufficient.

2.5 Options after interview

In dealing with any offence committed by a child or young person, the police and prosecution have a range of options:

- (a) no further action
- (b) community resolution
- (c) youth caution
- (d) youth conditional caution

(e) charge

2.6 Detention of youths after charge at the police station

The decision to charge follows a similar process as adult offenders, including referral to the CPS. Following charge, the same principles apply to youths as apply to adult offenders in deciding whether the youth should be bailed or whether detention is necessary (s.38 PACE).

The first decision that must be made therefore is, of course, whether bail should be refused. The youth should be released on bail unless one or more of the grounds contained in s.38 exists. These grounds are almost identical to the exceptions found within the Bail Act 1976 except that there is an additional ground allowing the youth to be detained in their “own interests”.

If a youth is detained for court, then they should be placed in local authority accommodation unless:

- (a) it is impracticable for the custody officer to do so i.e. physically impossible; or
- (b) in the case of a youth aged 12 – 17, no secure accommodation is available and other local authority accommodation would not be adequate to protect the public from serious harm.

2.7 Secure accommodation

Custody officers should however do everything practicable to ensure that the place of detention is local authority accommodation as opposed to the police station. neither a juvenile's behaviour nor the nature of the offence provides grounds for the custody officer to decide it is impracticable to arrange the juvenile's transfer to local authority care. The obligation to transfer a juvenile to local authority accommodation applies as much to a juvenile charged during the daytime as to a juvenile to be held overnight.

It was established in **R (on the application of M) v Gateshead Metropolitan Borough Council CA March 2006** that local authorities are not under a duty to provide secure accommodation whenever a request is received under s. 38(6) PACE.

Where the youth has been arrested pursuant to an alleged breach of bail or breach of remand conditions, the above does not apply and the youth can be detained in police custody.

2.8 Alternatives to prosecution

There are occasions where youths who have committed an offence can be dealt with by giving them an out of court disposal without the need to prosecute them. The purpose of such disposals is to reduce the risk of further offending by the youth and serve as a proportionate response to the crime committed. The police have a range of options available depending on the seriousness of the offence and the circumstances of the offender.

A youth caution is a formal out-of-court disposal as set out in the **Crime and Disorder Act 1998**.

It is the final step before prosecution.

The police must refer a youth who has received a youth caution to the youth offending team.

2.9 Cautions

Youth cautions can be used for any offence provided that the statutory criteria are satisfied:

- the police are satisfied that there is sufficient evidence to charge the youth with an offence;
- the youth admits the offence to the police;
- the police do not consider that the youth should be prosecuted or given a youth conditional caution for the offence.

The police cannot issue a youth caution for an offence that is indictable only in the case of an adult without the authority of the CPS.

There is no statutory restriction on the number of youth cautions that a youth can receive, and a youth may receive a youth caution even if he or she has previous convictions, reprimands, warnings, youth cautions and youth conditional cautions.

2.10 Summary

This section provided an introduction to youths in the criminal justice system when in the police station.

- Youths need an appropriate adult present at certain points in the detention process.
- PACE COP C sets out who can and who cannot be an appropriate adult.
- The role is not passive.

It also considered alternatives to prosecution by way of cautions.

Youths who are detained for court should ideally be provided with secure local authority accommodation

3 Youths- court procedure

3.1 Court procedure for youths

For those youths who are prosecuted the procedure which follows differs in a number of ways from that which applies to adults and there are particular rules that apply to youth court proceedings.

Youth courts are essentially magistrates' courts. This means that trials in the youth court are a form of summary trial. However, the youth court can also try indictable only offences. There is a presumption that youths will be dealt with summarily, even for indictable offences. Ideally this will be by the youth court. There are, however, certain circumstances where a youth can appear before the adult magistrates' court or the Crown Court which will be discussed later.

This section will focus on the plea and trial aspects of the criminal justice process.

3.2 Location of first hearing

Most youths will have their first hearing before the Youth Court; however, there are of course exceptions to this rule. A youth will have their first hearing before the adult magistrates' court in the following circumstances:

- The youth is jointly charged with an adult;
- The youth is charged with aiding and abetting an adult to commit an offence;
- An adult is charged with aiding and abetting a youth to commit an offence;
- The youth is charged with an offence that arises out of the same circumstances as, or is connected with, an offence that an adult is charged with.

Other than where a youth becomes an adult during the course of proceedings (i.e. after the first hearing) there are no circumstances whereby an adult can appear before the Youth Court.

3.3 Pleas

The court must ask the youth to enter a plea on the first occasion. If a request to adjourn the hearing is made and granted the case will be adjourned for the shortest possible time.

If the youth enters a guilty plea the court should endeavour to pass sentence on the same day but may need to adjourn for the preparation of a pre-sentence report.

If the youth enters a not guilty plea the parties will be asked to complete a case management form and directions will be made for the future management of the case, just as in the adult magistrates' court.

3.4 Where will a youth be tried?

A trial in the youth court is essentially the same as a trial in the adult magistrates' court and **part 24 of the CrimPR** applies to both.

Most youths are tried in the youth court, notwithstanding the seriousness of the offence. This presumption applies even in the case of indictable only offences (s.24 MCA 1980) except homicide and certain firearms offences.

A youth will only be tried in the adult magistrates' court where they are jointly charged with an adult.

A youth has no right of election to the Crown Court when charged with an either-way offence.

3.5 Crown Court trial for youths

There are certain situations where a youth **must** be tried in the Crown Court and not a youth court:

- (a) Youth charged with homicide (murder or manslaughter);
- (b) Youth charged with certain firearms offence or offences of minding a weapon under s28(3) VCRA 2006, where, if convicted, the youth would be subject to a mandatory minimum sentence under s311 Sentencing Act (SA) 2020;
- (c) Youth charged with an offence to which s.249 SA 2020 applies **and** the youth court has determined that, if convicted, a sentence beyond its powers should be available (thus it is a '**grave crime**');
- (d) Youth charged with a specified offence under s306 SA 2020 and it appears to the court that if the youth is found guilty or pleads guilty the criteria for imposing an extended sentence under s.254 SA 2020 will be necessary ('**dangerous offender**');
- (e) Youth jointly charged with an adult who has been sent to the Crown Court **and** it is in the **interests of justice** to send the youth to the Crown Court for trial.

3.6 Plea before venue / Mode of trial

Generally there will be no plea before venue / mode of trial in the youth court. However, it applies in the following circumstances:

- Youth charged with an offence capable of being a 'grave crime' under s.249 SA 2020;
- Youth jointly charged with an adult with an either-way or indictable only offence.

Exercise: Read alongside

Sections 24A-D of the Magistrates' Court Act 1980 set out the plea before venue procedure that applies to youths. It is similar to the procedure that applies to an adult who is charged with an either-way offence. However, the youth has no right to elect Crown Court trial - the youth can only make representations for or against youth court trial.

When deciding mode of trial the youth court should hear representations from both the prosecution and defence and the facts should be presented in a fair and balanced way by both parties. The court is entitled to have regard to the youth's previous convictions.

Where several defendants, all under 18, are charged together the court must consider each defendant separately. This means that one youth can be sent for Crown Court trial while the others remain in the youth court, although this would be rare.

If the accused behaves in a disorderly manner the plea before venue procedure can be carried out in the youth's absence provided the youth is legally represented. The procedure can be administered by a single justice. Proceedings can also be adjourned, as in the adult magistrates' court.

The 'Grave Crimes' and 'Youth Charged with an Adult' pages to follow provide further details regarding mode of trial in each circumstance.

3.7 What are 'grave crimes'?

Section 250 SA 2020 provides for the punishment of youths convicted on indictment of certain serious offences, known as 'grave crimes'. Section 249 SA 2020 defines what is capable of being a grave crime as:

- (a) Any offence that in the case of an adult carries 14 years or more imprisonment;
- (b) Offences under ss.3, 13, 25 and 26 of the Sexual Offences Act 2003.

Section 250 SA 2020 allows a Crown Court to sentence a youth to any length of detention which would be possible if they were an adult. It is a power used where the maximum sentences available to the youth court are not sufficient. Essentially this is two years' detention but youth sentencing will be covered in a separate section.

3.8 Grave crimes- plea before venue/ mode of trial

The plea before venue / mode of trial procedure is used where s.249 SA 2020 applies. The youth is asked to indicate a plea. If the indication is not guilty the youth court must consider whether, if convicted of the offence, it 'ought to be possible' (s.51A(3)(b) CDA 1998) to impose a sentence under s.250 SA 2020. If they consider it should be, then they must send the youth to the Crown Court for trial. In other words they are considering whether their maximum sentencing powers of two years' detention would be sufficient. The youth's previous convictions can be taken into account at this stage.

Originally no indication of plea was taken so there was a mode of trial decision but no plea before venue. The decision therefore had to be made on the basis that it would be a not guilty plea as there was no power to commit for sentence after guilty plea or trial in the youth court, even on a s.249 offence. A youth could therefore find themselves in the Crown Court pleading guilty at the first opportunity and, taking into account credit for that guilty plea, receiving a sentence that would have been within the youth court's powers. To circumvent this, the provisions have been amended to include an indication of plea and the power to commit for sentence on summary conviction of an offence to which s.249 SA 2020 applies (s16 SA 2020).

If a guilty plea is indicated in the youth court, this is taken as a plea of guilty, in the same way as in the adult magistrates' court. The court then moves on to consider whether their sentencing powers are sufficient. They can now make a fully informed decision on whether a sentence of over two years' detention is necessary.

The procedure for deciding whether s.250 SA 2020 applies can be thought as a two stage test, whether it is a guilty or not guilty indication:

- Is it an offence capable of being a grave crime? i.e. is it one to which s.249 SA 2020 applies? If yes, then:
- Is the appropriate sentence one of over two year's detention?

Where a youth is charged with multiple offences and s.249 SA 2020 applies to one or some of the offences, but not all of them, the court can consider the combined seriousness of all the offences when determining whether s.250 SA 2020 applies. Those that are related may be sent for trial if s.249 SA 2020 is found to apply. However, on conviction, the Crown Court can only order long-term detention for the offence(s) to which s.249 SA 2020 applies.



Key case: *R (H) v Southampton Youth Court [2005] 2 Cr App R (5) 171*

In *R (H) v Southampton Youth Court [2005] 2 Cr App R (5) 171* it was emphasised that youths, especially those under 15, should be tried in the youth court wherever possible, with the Crown Court being 'reserved for the most serious cases'.

3.9 Dangerous offenders

Section 51A (2) and (3)(d) of the Crime and Disorder Act 1998 provides for youths who are considered dangerous to be sent to the Crown Court. This applies where:

- (a) The offence is a specified offence within the meaning of s.306 SA 2020; and
- (b) It appears to the court that, if he is found guilty, the criteria for the imposition of a sentence of extended detention under s.254 SA 2020 would be met.

If both are met then the youth **must** be sent directly to the Crown Court for trial. There is no plea before venue or mode of trial procedure.

Any related offences **may** also be sent.

The criteria for imposing a sentence of extended detention for youths under s.254 SA 2020 are similar to adults, but not quite the same. They are:

- (a) The youth is convicted of a specified offence (as per s.306 SA 2020);
- (b) The court considers there is a significant risk of serious harm to the public from the youth committing further specified offences; **and**
- (c) The offence warrants the equivalent determinate sentence of at least four years.

An extended sentence, as in the case of an adult, is made up of an appropriate custodial term plus an extended licence period. Also as in the case of adults, s.308 SA 2020 details the factors to be taken into account by the court when assessing dangerousness.

If jurisdiction is retained and further information comes to light during or after the trial which leads the court to conclude, on conviction, that the youth should be sentenced under the dangerousness provisions, they have the power to commit to the Crown Court for sentence under s.17 SA 2020.

The Sentencing Children and Young People: Definitive guideline makes it clear that the power to send youths to the Crown Court for trial under the dangerousness provisions should be rarely used. This is not least because there will often not be sufficient information about the offence in order to be able to make a fully informed decision.

3.10 Dangerous offences and grave crimes

Certain serious violent and sexual offences are capable of being both specified (within s.306 SA 2020) and grave crimes (within s.249 SA 2020).

It may seem logical to deal firstly with whether the offence is a grave crime, as if a sentence of over two years is not required then dangerousness (which requires a sentence of at least four years) cannot be a live issue.

However, the Youth Court Bench Book, which provides guidance for youth courts, indicates that dangerousness should be considered first.

3.11 Youth charged jointly with an adult

If a youth is jointly charged with an adult the youth may appear in the adult magistrates' court for first appearance with the adult.

The court will consider firstly where the adult should be tried, then go on to consider where the youth should be tried.

If the youth has their first appearance at a different time to the adult then it will take place in the youth court but the court still has to consider where the adult who is jointly charged is being tried.

The plea before venue / mode of trial procedure applies here. The first stage is plea before venue and the youth will be asked to indicate a plea.

Over the next few pages, we will look at four combinations of a youth jointly charged with an adult, beginning with when an adult is sent for trial in the Crown Court and the youth indicates a not guilty plea.

3.11.1 Adult is sent for Crown Court trial - youth indicates not guilty plea

If the magistrates have determined that the adult should be tried in the Crown Court then they must proceed to the mode of trial procedure. The criterion is whether it is 'necessary in the interests of justice' to send the youth to be tried with the adult (s.51(7) Crime and Disorder Act 1998). If the youth is sent for trial under this provision the youth can also be sent for trial for any related indictable offences with which the youth is charged. If the youth is charged with related summary only offences they can only be sent if they are also punishable with imprisonment or involve disqualification from driving (s.51(8) & (11) CDA 1998).

The prosecution and defence make representations as to whether it is in the interests of justice to send the youth to the Crown Court or not. There are often conflicting interests that the court has to weigh in the balance. If the youth's trial is separated from the adult's the prosecution witnesses will have to give evidence twice. It may be that the youth court hearing the youth's trial will reach a different and therefore inconsistent verdict to the jury hearing the Crown Court trial of the adult. This would obviously be undesirable. However, sending the youth to the Crown Court means that the youth would not be tried in the court best equipped to deal with youths. Younger defendants particularly may find the Crown Court intimidating.

When considering in which court the youth should be tried the court is required to consider the guidance contained in the *Sentencing Children and Young People: Definitive Guideline*. This lists, at paragraph 2.12, examples of factors to be considered. It is not an exhaustive list but is reproduced here:

- (a) whether separate trials will cause injustice to witnesses or to the case as a whole (consideration should be given to the provisions of sections 27 and 28 of the Youth Justice and Criminal Evidence Act 1999);
- (b) the age of the child or young person; the younger the child or young person, the greater the desirability that the child or young person be tried in the youth court;
- (c) the age gap between the child or young person and the adult; a substantial gap in age militates in favour of the child or young person being tried in the youth court;
- (d) the lack of maturity of the child or young person;
- (e) the relative culpability of the child or young person compared with the adult and whether the alleged role played by the child or young person was minor; and/or
- (f) the lack of previous findings of guilt on the part of the child or young person.

The guideline goes on to state that the court should bear in mind that it now has a general power to commit for sentence under s.16 SA 2020. You should note that this provision only applies to offences which fall under s.249 of that same act, as discussed earlier in this section.

If the court decides that the youth should be tried with the adult, the youth's case will be sent to the Crown Court for a Plea and Trial Preparation Hearing, alongside the adult.

If the court decide not to send the youth to the Crown Court for trial then, if the youth's first appearance is taking place in the youth court, their trial will remain there.

Once a youth is lawfully before the Crown Court for trial there is no power to remit the youth back to the youth court for trial even if the adult with whom the youth was sent pleads guilty (*R v W (a minor) v Leeds Crown Court [2012] 1 Cr App R 162*). This means that the youth would face trial alone in the Crown Court.

If the youth is appearing in the adult magistrates' court they must now decide whether to remit the youth's trial to the youth court. They do have the power to keep it in the adult court but usually cases are remitted to the youth court in such situations, as it is the venue best equipped to deal with youth defendants.

It may be that the joint offence is one capable of being a grave crime under s.249 SA 2020. If the adult is sent to the Crown Court for trial the court will need to consider whether, if the youth is convicted, a sentence under s.250 SA 2020 should be available. This is clearly a relevant consideration in whether the interests of justice criteria are met, although the court would also have the power to send for trial under the s.249/250 SA 2020 provisions themselves.

3.11.2 Adult to be tried summarily - youth indicates not guilty plea

If the adult consents to summary trial, or the joint charge is a summary only offence, the youth could be tried in the adult magistrates' court if any of the following apply:

- (a) Youth and adult jointly charged with any offence = adult magistrates' court **must** try them both;
- (b) Youth charged with aiding and abetting adult (or vice versa) = adult magistrates **may** try them both together;
- (c) Youth and adult charged with offences arising out of the same circumstances = adult magistrates **may** try youth;

If, in scenario (b) and (c), the adult court do not try the youth and adult together they will remit the youth to the youth court for trial.

3.11.3 Adult pleads guilty - youth indicates not guilty plea

If the adult pleads guilty at the plea before venue stage and the youth indicates a not guilty plea the adult magistrates **may** try the youth without the adult but are more likely to remit to the youth court for trial as this is the most appropriate venue for a youth to be tried.

3.11.4 Youth indicates guilty plea or is found guilty

If the youth indicates a guilty plea then the magistrates need to consider whether their sentencing powers are appropriate. The powers of the adult magistrates' court are restricted in relation to sentencing youths; another section sets out which sentences are available. If none of these sentences are appropriate then the court will remit the youth to the youth court to be sentenced (s.25 SA 2020). This also applies if the youth has been tried and found guilty in the adult magistrates' court.

If the case is one which attracts a mandatory referral order the magistrates may remit the case to the youth court but they are not obliged to do so.

3.12 Summary

This section explored aspects of youth court procedure such as plea, trial and what happens when youths are jointly charged with adults.

- Youth court is essentially a magistrates' court in the format of a summary trial. Generally:
 - **First hearing**- takes place before the youth court
 - **Plea**- is taken on the first hearing and no plea before venue/ mode of trial procedure takes place
 - **Trial**- the presumption is trial will take place in the youth court except in homicide and certain firearm offences
 - **Sentencing**- in the youth court.

This element looks at times when the general rules above do not apply such as:

- **First hearing**- when a youth will have their first hearing before an adult magistrates court (e.g. when jointly charged with an adult)
- **PBV/ Mode of trial procedure**- circumstances when this takes place (e.g. 'grave crimes')
- **Trial**- circumstances when a youth must or may be tried in the adult magistrates' court or the Crown Court
- **Sentencing**- when a youth must or may be committed to the Crown Court for sentence.

4 Youths and adults court procedure

4.1 Youth jointly charged with adult

The first appearance will be in the adult magistrates' court.

What happens to the youth depends on several factors.

- (a) Is the youth pleading guilty or not guilty?
- (b) Is the adult pleading guilty or not guilty?
- (c) What type of offence is the youth charged with?
- (d) What type of offence is the adult charged with?

If the youth is charged with homicide, firearms with mandatory three year minimum sentence, served with a notice in serious fraud or child case or charged with a specified offence and meets the dangerous criteria they will ALWAYS be sent to the Crown Court.

If the adult is sent to the Crown Court for a trial and the youth is to be tried on the same matter then the magistrates' court will have to consider whether it is in the interests of justice (IOJ) for the child or young person and the adult to be tried jointly.

This is a very different test to that which is applied for grave crimes and which is centered around the likely sentence.

IOJ is concerned with the trial.

The overarching guideline *Sentencing Children and Young People* makes it clear that the proper venue for the trial of any child or young person is normally the youth court. Subject to statutory restrictions, that remains the case where a child or young person is jointly charged with an adult. If the adult is sent for trial to the Crown Court, the court should conclude that the child or young

person must be tried separately in the youth court **unless it is in the interests of justice** for the child or young person and the adult to be tried jointly.

4.2 When is it in the interests of justice?

The overarching guideline *Sentencing Children and Young People* provides the following examples:

- whether separate trials will cause injustice to witnesses or to the case as a whole (consideration should be given to the provisions of ss.27 and 28 of the Youth Justice and Criminal Evidence Act 1999);
- the age of the child or young person; the younger the child or young person, the greater the desirability that the child or young person be tried in the youth court;
- the age gap between the child or young person and the adult; a substantial gap in age militates in favour of the child or young person being tried in the youth court;
- the lack of maturity of the child or young person;
- the relative culpability of the child or young person compared with the adult and whether the alleged role played by the child or young person was minor; and/or
- the lack of previous findings of guilt on the part of the child or young person.

4.2.1 Deciding the interests of justice

The prosecution and defence make representations as to whether it is in the interests of justice to send the youth to the Crown Court or not.

There are often conflicting interests that the court must balance.

If the youth's trial is separated from the adult's the prosecution witnesses will have to give evidence twice. It may be that the youth court hearing the youth's trial will reach a different, and therefore inconsistent, verdict to the jury hearing the Crown Court trial of the adult. This would obviously be undesirable.

However, sending the youth to the Crown Court means that the youth would not be tried in the court best equipped to deal with youths. Younger defendants particularly may find the Crown Court intimidating.

If the court decide not to send the youth to the Crown Court for trial then, their trial will take place in the youth court.

4.3 Procedure after allocation

If the court decides that the youth should be tried with the adult, the youth's case will be sent to the Crown Court for a Plea and Trial Preparation Hearing, alongside the adult.

Once a youth is lawfully before the Crown Court for trial there is no power to remit the youth back to the youth court for trial even if the adult with whom the youth was sent pleads guilty (*R v W (a minor) v Leeds Crown Court [2012] 1 Cr App R 162*). This means that the youth would face trial alone in the Crown Court.

4.4 Remittal from the Crown Court for sentence

If the adult and youth have been sent to the Crown Court for trial then it will take place before a judge and jury in the usual way.

Once the trial has been concluded and if the child or young person is found guilty the court **must** remit the case to the youth court, unless it would be undesirable to do so.

The only exception to this is where the offence is homicide.

In considering whether remittal is undesirable, a court should balance the need for expertise in the sentencing of children and young people with the benefits of the sentence being imposed by the court which determined guilt given that the judge who heard the trial will reserve sentencing of the adult (if convicted).



Example: Youth jointly charged with adult (either way offence) - First

appearance: Mags court

- (a) Not a grave crime
 - (b) PBV for **adult**: Court takes a plea from the **adult**
 - (c) If **adult** pleads not guilty, court makes a decision on 'adult allocation'
 - (d) If court accepts jurisdiction and **youth** pleads **not guilty** both will be tried in magistrates' court.
 - (e) If court declines jurisdiction or adult elects, court will apply the 'interests of justice' test
 - If IOJ test met, **youth** sent to CC for trial with the **adult**
 - If test not met, **youth** will be tried in the **youth** court
 - (f) If either **adult** or **youth** pleads guilty then each dealt with separately according to usual principles
-



Example: Youth jointly charged with adult (either way offence)- First appearance: Mags court

- (a) Offence IS grave crime
 - (b) Take plea for **youth**.
 - (c) If **youth** pleads not guilty court asks: should a sentence substantially in excess of 2 years be available.
 - (d) If 'two year' test met, **youth** sent to CC for trial.
 - (e) PBV for **adult** > if **adult** pleads not guilty, sent for trial to CC with the **youth**.
 - (f) If 'two year' test not met do PBV for **adult**.
 - (g) If **adult** pleads not guilty and is sent to CC for trial then apply IOJ test. If IOJ test met, **youth** sent to CC for trial with the **adult**. If not met remit to **youth** court for trial.
 - (h) If **adult** pleads not guilty and remains in the Mags Ct for trial then **youth** remains in Mags C for trial with the **adult**.
 - (i) If **adult** pleads guilty then each dealt with separately according to usual principles. **Youth** remitted to **youth** court for trial
-



Example: Youth jointly charged with adult (either way offence)- First appearance: Mags court

- (a) Offence IS grave crime
 - (b) Take plea for **youth**.
 - (c) If **youth** pleads guilty court asks, 'should a sentence substantially in excess of two years be available?'
 - (d) If 'two year' test met, **youth** committed to CC for sentence
 - (e) If 'two year' test not met **youth** sentenced or remitted to **youth** court for sentence.
 - (f) PBV for **adult** > dealt with accordingly
-

Is the adult charged with an EW offence? Deal **with youth** as follows.

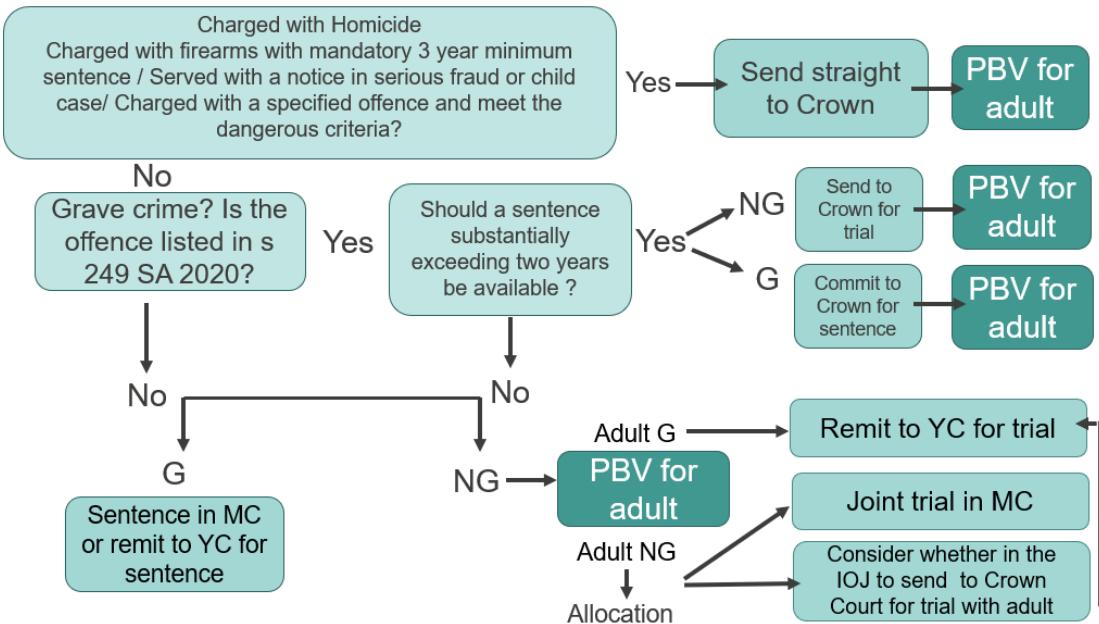


Figure 8.1: Youth jointly charged with adult (indictable only offence) -First appearance: Mags court



Example: Youth jointly charged with adult (indictable only offence) - First appearance: Mags court

- Adult will be sent to Crown Court.
- If **youth** charged with homicide etc send to Crown Court.
- If **youth** charged with grave crime and the ‘two year’ test is met then send to Crown Court for trial with **adult** if NG or commit for sentence if G.
- If not a grave crime or ‘two year’ test not met is the **youth** pleading G or NG?
- If G then sentence or remit to **youth** court for sentence.
If NG then apply IOJ test.
 - If IOJ test met, **youth** sent to CC for trial with the **adult**
 - If test not met, **youth** will be tried in the **youth** court

Is the adult charged with an IO offence? If yes send the adult immediately to Crown Court then deal with **youth** as follows.

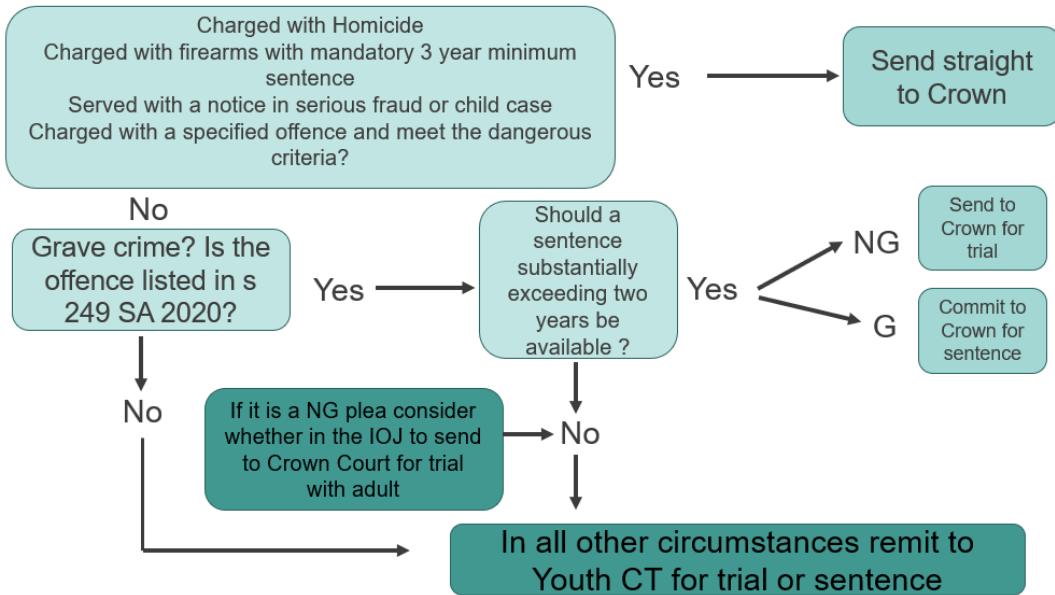


Figure 8.2: Youth jointly charged with adult (indictable only offence)

4.5 Summary

This section considered:

First hearing- a youth will have their first hearing before an adult magistrates' court when jointly charged with an adult.

Trial- circumstances when a youth must or may be tried in the adult magistrates' court or the Crown Court.

How the magistrates' court decides if it is in the interests of justice

5 Youths- sentencing

5.1 General principles

The youth court is the court with the expertise in the sentencing of children and young people.

The court must have regard to:

- the principal aim of the youth justice system (to prevent offending by children and young people); and
- the welfare of the child or young person.

All courts must have regard to the **Overarching guideline – sentencing children and young people** when sentencing offenders aged under 18

The Sentencing Act 2020 applies

5.2 Overarching guidelines

In determining the sentence, the key elements to consider are:

- the principal aim of the youth justice system (to prevent re-offending by children and young people);
- the welfare of the child or young person;
- the age of the child or young person (chronological, developmental and emotional) which requires a different approach to that which would be adopted in relation to the age of an adult;

- the seriousness of the offence which is determined in the same way as for adults by assessing the culpability and harm;
- the likelihood of further offences being committed; and
- the extent of harm likely to result from those further offences.

5.3 Parenting Order

For any child or young person aged under 16 appearing before court, there is a statutory requirement that parents/guardians attend all stages of proceedings unless deemed unreasonable.

Additionally, the court has a duty to make a **parental bind over** or impose a **parenting order**, if it would be desirable in the interest of preventing the commission of further offences.

There is a discretionary power to make these orders where the young person is aged 16 or 17.

Any breach by the parent will amount to an offence punishable by fine. The CPS will conduct the prosecution in the magistrates' court.

5.4 Significance of age

Sometimes (primarily turning 12, 15 or 18 years old) an increase in the age of a child or young person will have an effect on the maximum sentence available

The relevant age for the purpose of sentence is the age of the offender at the **date of conviction**.

5.5 Persistent offenders

Some sentences can only be imposed on children and young people if they are deemed a persistent offender.

There is no statutory definition but:

- if there have been three findings of guilt in the past 12 months for imprisonable offences of a comparable nature then the court could certainly justify classing the child or young person as a persistent offender; or
- a child or young person is being sentenced in a single appearance for a series of separate, comparable offences committed over a short space of time then the court could justifiably consider the child or young person to be a persistent offender even if no previous convictions.

So, for example, a series of robberies committed over a period of two days qualified a defendant as a persistent offender even though they had no previous convictions.

Similarly, a youth aged 14 appeared for sentence for offences of burglary and aggravated vehicle taking committed on four different days over a two-month period were sentenced as a persistent offender.

5.6 Committal for sentence

The youth court (or the adult magistrates' court if the youth is appearing there) can commit a youth to the Crown Court for sentence where they are charged with certain serious offences. Three powers of committal to the Crown Court for sentence apply to youths:

- (a) Youth is convicted of a 'grave crime' offence under s.249 SA 2020 and the court considers a Crown Court should have power to deal with the offender by imposing a sentence of detention under s.250 SA (i.e. a sentence in excess of two years' detention is required) (s 16 SA 2020).
- (b) Committal for sentence of dangerous young offenders (s.17 SA 2020).
- (c) Committal for sentence for related offences (s.19 SA 2020).

Where a youth has been committed in accordance with these provisions the Crown Court can deal with the youth in any way in which it could deal with the youth if they had just been convicted of the offence on indictment before the court.

5.7 Available sentences

There are particular sentences which apply only to youths such as detention and training orders, referral orders and youth rehabilitation orders.

There are certain sentences which are only available to youths of a certain age.

It should be noted that not all sentences are available to each court. It is for this reason that the adult magistrates' court should remit the sentence of a youth back to the youth court unless their sentencing powers are appropriate.

There is an individualistic approach to youth sentencing- so that sentences are flexible enough to meet the differing needs of the youths who appear in the youth court.

5.8 Types of sentences

Just like adult offenders there are a range of sentences available

- Absolute or conditional discharge and reparation orders for the least serious offences
- Financial orders (fines)
- Community orders are called **youth rehabilitation orders (YRO)**. The offence must be 'serious enough' in order to impose a YRO
- A referral order is the mandatory sentence in a youth court or magistrates' court for most children and young people who have committed an offence for the first time and have pleaded guilty to an imprisonable offence
- Custodial sentences are called **detention and training orders (DTO) and can only be imposed if the statutory threshold has been passed**

5.9 Non-custodial sentences

There are a variety of non-custodial sentences available for youths

The principal ones are:

- youth rehabilitation orders (no statutory minimum, maximum 36 months);
- referral orders (minimum 3 months, maximum 12 months).
- reparation orders; and
- orders against parents, e.g. binding the parents over or making a parenting order.

5.9.1 Youth Rehabilitation Orders

These fall within the community orders band. Before a YRO can be passed the court must be satisfied that the offence is "serious enough" to warrant it although the offence does not have to be imprisonable.

Courts are able to select from a wide range of sentences and tailor interventions to suit the particular offender. YROs can be used a number of times.

The menu of possible requirements in a YRO includes:

- activity requirement;
- supervision requirement;
- unpaid work requirement
- programme requirement;
- attendance centre requirement;
- prohibited activity requirement;
- curfew requirement;
- exclusion requirement;
- electronic monitoring requirement;
- residence requirement;
- local authority residence requirement;
- fostering requirement;
- mental health treatment requirement;

- drug treatment requirement;
- intoxicating substance requirement;
- education requirement; and
- intensive supervision and surveillance requirement.

5.9.2 Restrictions on certain requirements

These requirements are only available for young people aged 16 or 17 years old on the date of conviction:

- unpaid work requirement
- residence requirement

These requirements can only be imposed if the offence is an imprisonable one AND the custody threshold has been passed. For children and young people aged under 15 they must be deemed a persistent offender:

- intensive supervision and surveillance requirement.
- fostering requirement.

5.10 Referral orders

A “referral order” requires an offender to attend each of the meetings of a youth offender panel established for the offender by a youth offending team, and to comply, for a particular period, with a programme of behaviour to be agreed between the offender and the panel. Essentially, they are in the form of a contract.

They may be regarded as orders which fall between community disposals and fines.

The minimum term of a referral order is 3 months and the maximum term is 12 months. The length depends on the seriousness of the offence.

A referral order is spent when it is discharged, which leaves the youth with a clean slate.

5.10.1 Mandatory referral order

A referral order is a **mandatory** if the ‘compulsory’ referral order conditions are satisfied. These are:

- where the young offender has not previously been convicted of an offence, and
- The young offender pleads guilty to an imprisonable offence and any other offence being dealt with by the court at the same time (these other offences are called ‘connected’ offences).

However, the compulsory referral order conditions do not apply if the sentence is fixed by law or the court proposes to impose a custodial sentence, hospital order, or absolute or conditional discharge. In these circumstances the court cannot give a referral order.

5.10.2 Discretionary referral order

A referral order is **discretionary** in the following situations. An offender may receive a referral order:

on their second (or later) conviction;

and/or

if the offender pleads guilty to the offence or a connected offence being dealt with by the court.

The offence or connected offence(s) need not be punishable with imprisonment.

A referral order cannot be given where:

the sentence is fixed by law; or

the court feels that an absolute or conditional discharge is justified; or

the court is proposing to make a hospital order; or

the court considers that custody is the only correct disposal.

5.10.3 Breaches

If the young offender breaches a **referral order**, or is convicted of another offence while subject to a referral order, he may be referred back to the youth court. The youth court may then revoke the referral order and deal with the youth in any manner in which he could have been dealt with for that offence. Alternatively, the court may order the young offender to pay a fine or extend the length of the contract period.

Where a child or young person is in breach of a **YRO** the following options are available to the court:

- take no action and allow the order to continue in its original form;
- impose a fine (up to £2,500) (and allow the order to continue in its original form);
- amend the terms of the order; or
- revoke the order and re-sentence the child or young person.

5.11 Detention and training orders

A Detention and Training Order (DTO) is the only custodial sentence available to the youth court.

A custodial sentence should always be used as a last resort and only where an offence is ‘so serious that neither a fine alone nor a community sentence can be justified.’

They can only apply when a child or young person has been convicted of an offence which is punishable with imprisonment in the case of an adult;

- No DTO can be imposed by the Youth Court on any offender aged 10 or 11;
- No DTO can be imposed by the Youth Court on anyone aged 12-14, **unless they are a persistent offender**;
- The minimum length of a DTO is 4 months;
- The maximum length of a DTO is 24 months;
- A DTO may only be 4, 6, 8, 10, 12, 18 or 24 months long;
- Consecutive DTOs can be imposed up to an aggregate of 24 months.

The court should take account of the circumstances, age and maturity of the child or young person.

When considering the relevant offence guideline, the court may feel it appropriate to apply a sentence broadly within the region of **half to two thirds** of the adult sentence for those aged 15–17 and allow a greater reduction for those aged under 15. This is only a rough guide.

A DTO can also be imposed by the Crown Court.

The first half of the DTO is spent in secure youth detention and the second in the community under supervision. Such supervision is overseen by the YOT and the court is not involved in deciding what the supervision must entail.

An intensive supervision and surveillance requirement and a fostering requirement are both **community alternatives** to custody.

The offence must be punishable by imprisonment, cross the custody threshold and a custodial sentence must be merited before one of these requirements can be imposed.

An order of this nature may only be imposed on a child or young person aged below 15 (at the time of the finding of guilt) if they are a persistent offender.

The **Overarching guideline – sentencing children and young people** says:

The term of a custodial sentence must be the shortest commensurate with the seriousness of the offence.

Any case that warrants a DTO of less than four months **must** result in a non-custodial sentence.

5.12 Long term detention under s 250 ‘grave crimes’

A child or young person may be sentenced by the Crown Court to long-term detention under s.250 Sentencing Act 2020 if found guilty of a grave crime and neither a community order nor a DTO is suitable.

These cases may be sent for trial to the Crown Court or committed for sentence only. It is possible that, following a guilty plea, a two year detention order may be appropriate as opposed to a sentence of long term detention to account for the reduction.

5.13 Other custodial sentences

Dangerous Offenders	Detention at His Majesty's pleasure	Detention in a Young Offenders Institution
<ul style="list-style-type: none"> If a child or young person is found to be dangerous, they can be sentenced to extended detention or detention for life. 	<ul style="list-style-type: none"> This is the mandatory sentence for any child or young person found guilty of committing a murder. The starting point for the minimum term is 12 years. 	<ul style="list-style-type: none"> Although sentenced as adults this is the usual custodial sentence for those aged between 18 and 21

Figure 8.3: other custodial sentences

Youth Court	Adult magistrates' court	Crown Court
Absolute discharge	Absolute discharge	Absolute discharge
Conditional discharge	Conditional discharge	Conditional discharge
Fines - limited	Fines - limited	Fines (no limitation)
Referral order	Referral order	
Reparation order		Reparation order
Youth rehabilitation order		Youth rehabilitation order
Detention and training order		Detention and training order
Parenting order	Parenting order	Parenting order
Parental bind over	Parental bind over	
		Detention for a specified period s. 250 Sentencing Act 2020
		Extended detention for 'dangerous offenders'
		Life for 'dangerous offenders'
		Detention at His Majesty's Pleasure (murder)

5.14 Summary

This section explored:

- The principle aims of the youth justice system- preventing offending and having regard to youth welfare, as stated in the **Sentencing Children and Young People: Definitive Guideline**.
- The relevant age for the purpose of sentencing being the date of conviction.

- Youths can be remitted back to the youth court for sentencing if the powers of the adult magistrates' court are not appropriate.
- Youths can be committed to the Crown Court for sentencing where they are charged with certain serious offences.

This section also considered the different sentences available to youths both in the summary courts and the Crown Court.

Community order are called Youth Rehabilitation Orders.

There are also referral orders which must be made in some instances.

The limit in the Youth court is two years DTO.

The Crown Court can impose lengthier custodial terms but these are reserved for the most serious of cases