Section D15 Trial on Indictment: General Matters and Pre-trial Procedure

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INTRODUCTION

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D15.1

Once the accused has pleaded not guilty to the charges (see D12), the accused is at the centre of a procedural framework, now governed by the CrimPR (see Supplement, R3.1 ***et seq.)*** and Crim PD I, Part 3 (see Supplement, CPD.3A ***et seq.)***, that is designed to prepare the case for trial. That framework was overhauled under the banner of Better Case Management, giving effect to the recommendations of Sir Brian Leveson's *Review of Efficiency in Criminal Proceedings* (see also D4). The aim is to reduce the number of hearings and to maximise engagement by participants in the process through 'robust' case management.

This section addresses those matters of general preliminary application to trials on indictment, the conduct of hearings pre-trial, and the obligations and safeguards imposed by rules at the pre-trial stage. For special measures and anonymity of witnesses, see D14.

PLACE OF TRIAL

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D15.2

The first issue that arises is the location in which the case is to be tried. Following on from this is the question of transfer of cases between Crown Court centres.

Venue of Trial

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D15.3

This is primarily regulated by the Senior Courts Act 1981, s. 75, which empowers the Lord Chief Justice to regulate both the location of the Crown Court to which an accused is initially sent and the nature of the tribunal before the trial will ultimately take place (i.e. High Court judge, circuit judge or recorder). Proceedings in advance of trial can in large measure be undertaken through the use of live link and telephone facilities, in accordance with Crim PD I, paras. 3N.1 ***et seq***. (see Supplement, CPD.3N), so that the parties and judge are not necessarily in the same place before trial (para. 3N.8).
Senior Courts Act 1981, s. 75

(1) The cases or classes of cases in the Crown Court suitable for allocation respectively to a judge of the High Court, circuit judge, recorder or district judge (magistrates' court), and all other matters relating to the distribution of Crown Court business, shall be determined in accordance with directions given by or on behalf of the Lord Chief Justice with the concurrence of the Lord Chancellor.

(2) Subject to section 74(1) [which requires that when hearing an appeal the Crown Court shall normally consist of a professional judge together with at least two justices of the peace], the cases or classes of cases in the Crown Court suitable for allocation to a court comprising justices of the peace (including those by way of trial on indictment which are suitable for allocation to such a court) shall be determined in accordance with directions given by or on behalf of the Lord Chief Justice with the concurrence of the Lord Chancellor.

In addition, the MCA 1980, s. 7, provides that, when specifying the particular location of the Crown Court to which an accused should be sent for trial, a magistrates' court must have regard, *inter alia,* to the directions given by the Lord Chief Justice under s. 75(1) of the Senior Courts Act 1981. Crim PD XIII contains detailed guidance on listing; para. E deals with the allocation of business within the Crown Court (see Supplement, CPD.XIII.E). Crim PD I, para. 3A.4, requires the prosecution to provide the court at the outset of proceedings with 'sufficient information' to permit an informed view on, amongst other things, venue.

Transfer of Cases between Locations of the Crown Court

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D15.4

Section 76(1) of the Senior Courts Act 1981 provides that the Crown Court may give directions altering the place of any trial on indictment, varying either the venue specified in a notice under the CDA 1998, s. 51D(1), or any earlier decision of the Crown Court itself. Such a change can be brought about in a number of ways:

(a) an officer of the Crown Court may give such directions on behalf of the court (s. 76(2));

(b) either party, if dissatisfied with the place of trial that has been fixed, may apply to the Crown Court for a variation (s. 76(3)), such application to be heard in open court by a High Court judge (s. 76(4)).

The place of trial specified in notices of transfer under s. 4 of the CJA 1987 can be varied in the same way (s. 76(2A)); see also Crim PD XIII, Listing, para. F (see Supplement, CPD.XIII.F).

D15.5

Reasons for Transfer Section 76 provides no assistance as to how the powers it gives are to be exercised. The power given to listing officers of the Crown Court by s. 76(2) to switch a trial from one court centre to another is exercised principally on administrative rather than judicial grounds.

Section 76(1) does contain the qualification that it is 'Without prejudice to the provisions of this Act about the distribution of Crown Court business'. It follows that, on an application by a party under s. 76(3) for variation of the venue, the High Court judge determining the application is entitled to consider any factors not originally taken into account. Such additional factors may include the possible prejudice to the accused of being tried in the area where the offence was allegedly committed if the nature of the charge has provoked exceptional public hostility.

However, in the light of the Court of Appeal's decision in *Ford* [1989] QB 868 (see D13.40), it would be inappropriate to vary the trial venue with a view to obtaining a multiracial jury panel (see also *Bansal* [1985] Crim LR 151).

D15.6
Senior Courts Act 1981, s. 76

(1) Without prejudice to the provisions of this Act about the distribution of Crown Court business, the Crown Court may give directions, or further directions, altering the place of any trial on indictment, whether by substituting some other place for the place specified in a notice under section 51D(1) of the Crime and Disorder Act 1998 (a 'section 51D notice') or by varying a previous decision of the Crown Court.

(2) Directions under subsection (1) may be given on behalf of the Crown Court by an officer of the court.

(2A) Where a preparatory hearing has been ordered under section 7 of the Criminal Justice Act 1987, directions altering the place of trial maybe given under subsection (1) at anytime before the time when the jury are sworn.

(2B) The reference in subsection (2A) to the time when the jury are sworn includes the time when the jury would be sworn but for the making of an order under Part 7 of the Criminal Justice Act 2003.

(3) The defendant or the prosecutor, if dissatisfied with the place of trial specified in a section 51D notice or as fixed by the Crown Court, may apply to the Crown Court for a direction, or further direction, varying the place of trial; and the court shall take the matter into consider-ation and may comply with or refuse the application, or give a direction not in compliance with the application, as the court thinks fit.

(4) An application under subsection (3) shall be heard in open court by a judge of the High Court.

CUSTODY TIME-LIMITS

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D15.7

Section 22 of the Prosecution of Offences Act 1985 (set out at D15.38) was introduced to remedy the manifest inadequacy of the provisions then available to ensure that trials on indictment begin within a reasonable time. It empowers the Secretary of State to make regulations fixing:

(a) the maximum period available to the prosecution to complete any preliminary (pre-trial) stage of proceedings for an offence; and/or

(b) the maximum period for which an accused may be kept in custody while awaiting completion of such a stage.

Periods Applicable

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D15.8

The regulations may prescribe an *overall time-limit* within which the prosecution must complete the stage of the proceedings in question (Prosecution of Offences Act 1985, s. 22(1)(a)). However, no overall time-limits currently apply.

Alternatively or additionally, the regulations may prescribe a *custody time-limit*, that being the maximum period for which the accused may be remanded in custody while the stage is being completed (s. 22(1)(b)).

D15.9

Time-limits The regulations in question, the Prosecution of Offences (Custody Time Limits) Regulations 1987 (SI 1987 No. 299), only impose custody time-limits. These are as follows:

(a) *Between first appearance and committal.* By reg. 4(2) and (4), the maximum period for which an accused charged with an indictable offence may be held in the custody of the magistrates' court between first appearance and committal proceedings is 70 days.

(b) *Between first appearance and summary trial.* If the offence is triable either way and the court determines to try the case summarily, the maximum period in custody between first appearance and the court beginning to hear evidence for the prosecution is again 70 days, unless the decision for summary trial is taken within 56 days, in which case the limit is reduced to 56 days (reg. 4(2) and (3)). In the case of a summary offence, the maximum period is 56 days (reg. 4(4A)).

(c) *Between committal and trial on indictment.* By reg. 5(3)(a), the maximum period for which an accused committed for trial to the Crown Court may be held in custody between 'committal' and the start of trial is 112 days.

(d) *Multiple committals*. If a single indictment is preferred containing counts in respect of which the accused was committed for trial on two or more different occasions, the 112-day limit applies separately in relation to each offence (reg. 6(4)). See also D15.10.

(e) *Section 51 sending.* Where the accused has been sent for trial under the CDA 1998, s. 51, the maximum period is 182 days between the date on which the accused is sent to the Crown Court and the start of the trial. From this maximum must be deducted any period during which the accused was held in custody by the magistrates (reg. 5(6B)).

(f) *Retrial directed by the Court of Appeal.* Where an indictment is preferred by direction of the Court of Appeal, following the ordering of a retrial, the 112-day limit applies from that preferment (reg. 5(2)(b) and (3)(b)). See also *Leeds Crown Court, ex parte Whitehead* (17 June 1999 unreported, DC).

(g) *Voluntary bill.* Where proceedings are by way of a voluntary bill of indictment the 112-day period runs from the date of preferment of the bill (reg. 5(3)(b)).

Separate Time-limits for Each Offence

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D15.10

Each offence with which the accused is charged attracts its own time-limit *(Wirral District Magistrates' Court, ex parte Meikle* (1990) 154 JP 1035). In this case, D was charged with five different offences at different dates, being held in custody from the date of the first charge. In view of the fact that the 1987 Regulations repeatedly refer to 'offence' in the singular, the Divisional Court had no difficulty in concluding that each offence attracts its own custody time-limit.

D15.11

Meaning of Separate Offences In *R (Wardle) v Leeds Crown Court* [2001] UKHL 12, [2002] 1 AC 754, D was originally charged with murder, but the prosecution offered no evidence on that charge and preferred a charge of manslaughter on the day that the original custody time-limit was due to expire. On appeal, the House of Lords considered the question: what constitutes the charging of an offence, such as to trigger a fresh custody time-limit? It concluded:

(a) the word 'offence' in reg. 4 could not be read as including an alternative offence of which the accused could be found guilty under the CLA 1967;

(b) the situation would be different if the new charge was simply a restatement of the original charge with different particulars — it had to be a different offence in law to attract a fresh custody time-limit; and

(c) the bringing of a fresh charge would be an abuse of process if the prosecution could not demonstrate, on the facts of the case, that it was justified and had not been brought solely with a view to obtaining the substitution of a fresh custody time-limit.

Definition of Terms

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D15.12

Inevitably the main concern of practitioners and the courts is the consequences of a time-limit expiring and applications being made to extend it. Before approaching these issues, however, it is of assistance to define some of the relevant terminology.

D15.13

Committal References to 'committal' in this context should be taken to include sending for trial under the CDA 1998, s. 51, and the giving of a notice of transfer under either the CJA 1987, s. 4, or the CJA 1991, s. 53 (subject to specific variations in such cases).

Regulations under the Prosecution of Offences Act 1985, s. 22, have application not only to the time between committal and arraignment, but also to the time between the accused being charged and committal (for offences triable on indictment) or the time between charge and the commencement of summary trial (in other cases). Section 22 is thus relevant to the timing both of committal and summary trial, as well as to the timing of arraignment.

D15.14

Preliminary Stage of Proceedings The general effect of s. 22 of the Prosecution of Offences Act 1985 is that the Secretary of State may by regulation impose time-limits in respect of any specified 'preliminary stage' of proceedings for an offence (s. 22(1)). The regulations may relate to any type of offence, whether triable only on indictment, triable either way or summarily. 'Preliminary stage' is defined as *not* including anything after the start of trial.

D15.15

Start of a Trial on Indictment As far as trial on indictment is concerned, the 'start of trial' is defined as the point when a jury is sworn, or the court accepts a plea of guilty (Prosecution of Offences Act 1985, s. 22(11A)).

This is significant in cases where a preparatory hearing is held, whether for a long or complex case (in accordance with the CPIA 1996, s. 30: see D15.51 ***et seq.)*** or for a serious or complex fraud (in accordance with the CJA 1987, s. 8). Under each of those sections, the beginning of the preparatory hearing is deemed to be the beginning of the trial, and therefore custody time-limits will cease to operate from that moment.

In *Re Kanaris* [2003] UKHL 2, [2003] 1 WLR 443, the House of Lords considered the consequences of the removal of the protection of the custody time-limits regime where a preparatory hearing took place. Lord Hope said:

> ... a judge who is minded to order a preparatory hearing in a long and complex case should be careful not to deprive an accused who is in custody of the protection of the statutory custody time-limit until it has become necessary for him to do so.

He indicated that the judge could, where appropriate, exercise powers under the CPIA 1996, s. 31(4) to (7) (see D15.57), before the preparatory hearing begins to permit effective case management whilst preserving the accused's right to the protection of the statutory custody time-limit.

D15.16

Start of a Summary Trial As far as summary trial is concerned, the start of trial is 'when the court begins to hear evidence for the prosecution at trial' or accepts a plea of guilty (Prosecution of Offences Act 1985, s. 22(11B)). There is an exception where the court begins to consider whether to exercise its power, under the Mental Health Act 1983, s. 37(3), to make a hospital order without convicting the accused.

D15.17

Meaning of Custody As far as custody time-limits are concerned, 'custody' includes:

(a) local authority accommodation or youth detention accommodation to which a juvenile is committed by virtue of the LASPO 2012, s. 91 (Prosecution of Offences Act 1985, s. 22(11));

(b) the detention of a youth charged with an indictable offence — in *Stratford Youth Court, ex parte S* (1998) 162 JP 552, the Divisional Court held that the 56-day custody time-limit imposed for completion of preliminary stages in indictable offences applied to a young person charged with robbery because, in the case of a young person, it was an offence triable either way;

(c) where an accused is unable to provide a surety and so remains in custody, under the terms of the MCA 1980, s. 128 (*Re Ofili* [1995] Crim LR 880).

In *Peterborough Crown Court, ex parte L* [2000] Crim LR 470, the Divisional Court held that the whole period during which D was remanded in custody for the offence in question should be taken into account when calculating the relevant period for custody time-limits. There was no basis on which part of the period could be disregarded on the basis that D was also serving a custodial sentence for an unrelated matter.

Effect of Expiry of Custody Time-limit

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D15.18

If a custody time-limit expires before completion of the stage of proceedings in question, the accused must be granted bail, in relation at least to the offence to which the limit relates. This is made clear by reg. 6(6), which states that, where the Crown Courtis notified that the 112-day time-limit between 'committal' and the start of the trial is about to expire in a certain case, it must bail the accused as from the expiry of the limit, subject to a duty to attend for trial. The regulations do not expressly deal with the procedure for bailing an accused who has the benefit of the 70-day time-limit between charge and committal or summary trial.

D15.19

Grant of Bail The regulations may make provision for the BA 1976 and the MCA 1980 to apply in cases where the accused is bailed as a result of a custody time-limit's expiry with such modifications as the Secretary of State considers necessary (Prosecution of Offences Act 1985, s. 22(2)(d)).

In the case of the BA 1976, its application to accused persons in respect of whom custody time-limits have expired is modified in that:

(a) they are automatically entitled to bail;

(b) on granting bail, the court may not require sureties or the deposit of security; and

(c) following the grant of bail, they may not be arrested without warrant merely on the ground that a police officer believes they are unlikely to surrender to custody (reg. 8).

Other conditions, such as curfew, residence or reporting to a police station, may nevertheless be imposed as in other cases, and the rule that actual or feared breach of such conditions is a ground for arrest without warrant (BA 1976, ss. 3(6) and 7(3)(b)) applies to an accused bailed on expiry of a time-limit just as it applies to an accused granted bail in any other circumstances (see also D7.43).

D15.20

Procedure for Imposing Conditions Regulation 6 requires the prosecution to give notice to the appropriate court and the accused stating whether they intend to ask the court to impose conditions on the bail of an accused in respect of whom a custody time-limit is about to expire. In response to such an indication, the defence must give either:

(a) written notice of a wish to be represented at the hearing of the application;

(b) written notice that the accused does not object to the proposed conditions; or

(c) a written statement of the accused's reasons for objecting.

It is the prosecution's duty to arrange for the accused to be brought before the court within the two days preceding expiry of a custody time-limit (reg. 6(1)(b)).

Where the accused acquires the right to bail as a result of the expiry of a custody time-limit, that right continues until the start of the trial. The decision to the contrary, *Croydon Crown Court, ex parte Lewis* (1994) 158 JP 886, no longer represents the law.

D15.21

Limits on the Effect of Expiry Beyond the grant of bail, the expiry of the custody time-limit otherwise has no effect on the proceedings. This was illustrated in *Sheffield Magistrates' Court, ex parte Turner* [1991] 2 QB 472. D had been unlawfully detained, contrary to the Prosecution of Offences Act 1985, s. 22, for a period culminating in his committal for trial. Although the Divisional Court granted a declaration relating to his period of unlawful detention, it was held that this had no effect on the validity of the committal, the fresh custody time-limit, laid down by reg. 5(3), which commenced on that date, or the lawfulness of his detention thereafter.

Consequences of Absconding

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D15.22

Escape from custody during the running of a custody time-limit automatically leads to the regulations imposing the time-limit being disregarded (Prosecution of Offences Act 1985, s. 22(5)). Similarly, if an accused has been released in consequence of the expiry of a custody time-limit and then fails to attend court in answer to bail, the earlier expiry of the limit is disregarded and the question, once the accused has been arrested, of whether to bail again or remand in custody is therefore entirely in the discretion of the court (s. 22(5)).

Criteria for Extension

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D15.23

The criteria for the extension of a custody time-limit, as set out in the Prosecution of Offences Act 1985, s. 22(3), are that the court must be satisfied (i) that there was good and sufficient cause, and (ii) that the Crown had acted with all due diligence and expedition (the need for 'diligence' was added by the CDA 1998). The authorities since 1985 have provided consider-able assistance both in general terms as to the proper approach of the appropriate court to an application, and more specifically as to the proper meaning and ambit of the two criteria.

D15.24

General Guidance In *Manchester Crown Court, ex parte McDonald* [1999] 1 All ER 805, Lord Bingham CJ set out the principles underlying the custody time-limit provisions in the Prosecution of Offences Act 1985, s. 22, and gave guidance upon the practicalities of interpreting the tests laid down by the statute. As far as the fundamental principles of the provisions are concerned, he emphasised the presumption of liberty set out in the ECHR, Article 5(3): 'Everyone arrested or detained [for trial] ... shall be entitled to trial within a reasonable time or to release pending trial'. With that provision in mind, the overriding purposes of the statutory provisions were said to be:

(a) to ensure that the periods for which unconvicted defendants are held in custody are as short as is reasonably and practically possible;

(b) to oblige the prosecution to prepare cases for trial with due diligence and expedition; and

(c) to give the court power to control any extension of the maximum period for which any defendant may be held awaiting trial.

The main points of practical guidance which emerge from *ex parte McDonald* are:

(1) It is for the prosecution to satisfy the court on the balance of probabilities that the statutory conditions are met.

(2) The necessary standard is that of a competent prosecutor conscious of his duty to bring the case to trial as quickly as is reasonably and fairly possible.

(3) In judging whether this standard was met, the court should consider the nature and complexity of the case, the preparation necessary, the conduct of the defence, the extent to which the prosecutor was dependent on others outside his control and other relevant factors.

(4) What amounts to good and sufficient cause is a matter for the court on the facts of the case.

(5) Staff shortages and sickness will be inadequate reasons for extension. The unavailability of a judge or a courtroom may be good and sufficient cause, but such cases should be approached with 'great caution'.

(6) The court should state the reasons for its decision.

(7) Once the court had heard full argument and decided, the Divisional Court would be most reluctant to disturb its decision, and would do so only on the familiar grounds which support an application for judicial review.

See also *R (Raeside) v Luton Crown Court* [2012] EWHC 1064 (Admin), [2012] 1 WLR2777.

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Good and Sufficient Cause

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D15.25

Factors that have been held not to amount to a good and sufficient cause for the extension of a time-limit include the following.

(1) *The seriousness of the offence charged.* For example, in *Governor of Winchester Prison, ex parte Roddie* [1991] 2 All ER 931, the Divisional Court held that the seriousness of the offence could not represent a good and sufficient cause, because Parliament had provided the same time-limit for all offences except treason. The more serious the charge, the more important it was for the police to get on with preparing the case.

(2) *Public protection.* For example, in *Central Criminal Court, ex parte Abu-Wardeh* [1997] 1 All ER 159, the Divisional Court held that the protection of the public was, in itself, an insufficient ground for the extension of a custody time-limit, disagreeing with *Luton Crown Court, ex parte Neaves* (1993) 157 JP 80. In *Birmingham Crown Court, ex parte Bell* [1997] 2 Cr App R 363, the Divisional Court accepted that, although protection of the public might not be enough in itself to constitute good and sufficient cause, where protection of prosecution witnesses was an issue, that might be capable in conjunction with other factors of giving rise to good and sufficient cause.

(3) *Factors that may be relevant to an application for bail.* For example, in *Sheffield Crown Court, ex parte Headley* [2000] Crim LR 374, the Divisional Court stated that it was wrong for a judge in considering an application to extend custody time-limits to take account of matters relevant to the grant of bail under the BA 1976. The custody time-limits regime was a separate and additional safeguard for those in custody, over and above that provided by the BA 1976. Parliament could not have intended that Bail Act considerations could be determinative of a custody time-limit application (see also *R (Eliot) v Reading Crown Court* [2001] EWHC Admin 464, [2002] 1 Cr App R 3 (32)).

(4) During the Covid-19 pandemic it was identified that 'good and sufficient cause' was established because the 'safety of all concerned within the trial process' could 'not, at present [be] secured to the satisfaction of HMCTS, PHE and the judiciary' (*R (McKenzie) v Crown Court at Leeds* [2020] EWHC 1867 (Admin), [2021] 1 Cr App R 1 (1). This was developed in *R (DPP) v Crown Court at Woolwich* [2020] EWHC 3243 (Admin), [2021] 1 Cr App R 11 (223), in which principles to be applied to custody time-limit applications during the pandemic were identified.

D15.26

Unavailability of a Judge or Courtroom Several cases have turned upon the question of whether the fact that there is no judge or courtroom in which a case may be tried can constitute good and sufficient cause for the grant of an extension. In *Norwich Crown Court, ex parte Cox* (1993) 97 Cr App R 145, the Divisional Court made it plain that, in appropriate circum-stances, the lack of a judge and courtroom is capable of constituting the necessary 'good and sufficient cause'. Mann LJ stated that it 'must depend upon the facts of that instant case including, in particular, whether a trial date has been specified'. However, in *R (Miah) v Crown Court at Snaresbrook* [2006] EWHC 2873 (Admin), it was made clear that listing difficulties had to be exceptional to justify an extension; difficulties caused by the pressure of work on a Crown Court in routine cases would not be sufficient.

The court must consider what measures had been taken to address the listing difficulties; if it was clear that the difficulties were systemic, rather than particular to the case, they would represent routine difficulties and would not therefore be sufficient (*Kalonji v Crown Court at Wood Green* [2007] EWHC 2804 (Admin)). It is incumbent on the court to make inquiries as to whether an earlier trial date is possible, either at that court centre or elsewhere *(Preston Crown Court, ex parte Barraclough* [1999] Crim LR 973). This involves the court in satisfying itself that the court staff responsible for fixing the date for trial have fulfilled their duties scrupulously *(Leeds Crown Court, ex parte Wilson* [1999] Crim LR 378).

The approach adopted in these cases culminated in the decision of the Divisional Court in *R (McAulay) v Coventry Crown Court* [2012] EWHC 680 (Admin), [2012] 1 WLR 2766. The Court restated that unavailability of a court could only exceptionally represent a good and sufficient cause. However, the Court went further. There is a need to keep court resources under review, and to take steps to address a shortfall in those resources. Such a shortfall will 'rarely, if ever' provide proper grounds for an extension of a custody time-limit, and detailed evidence will be required to establish the necessary 'good and sufficient cause' in such circumstances. See also *R (Raeside) v Luton Crown Court* [2012] EWHC 1064 (Admin), [2012] 1 WLR 2777.

The Divisional Court has also addressed the issue of whether the availability of counsel could represent a good and sufficient cause for the extension of a custody time-limit in *Campbell-Brown v Central Criminal Court* [2015] EWHC 202 (Admin), [2015] 1 Cr App R 34 (516). The Court concluded that it could, for example, in the case of 'the trial of a vulnerable defendant who trusts one particular barrister who is well-known to him; or linked fraud trials with common counsel' (per Jay J at [66]). However, the Court also observed that the extension of custody time-limits should be addressed at the time that a trial date was fixed out with the existing limit, rather than after the decision as to listing had already been made.

D15.27

Convenience of Defence and Witnesses In *White v DPP* [1989] Crim LR 375, the Divisional Court found that the reason for the extension of the time-limit in D's case, namely that the defence had successfully applied for an adjournment to consider the prosecution statements that had only just been served on them, could permit an extension. The reasonable requirement of the defence to consider the papers was capable of being a good and sufficient cause for extension of time, although each case must turn on its own facts. Their lordships did not necessarily agree with the Crown Court judge's approach, namely, that he had to be satisfied beyond reasonable doubt of the existence of good cause before granting an extension (see D15.32). See also *O'Dowd v UK* (2012) 54 EHRR 8 (187). The absence or illness of the accused is itself a ground for extension (s. 22(3)(a)(i)).

In *Central Criminal Court, ex parte Bennett* (1999) *The Times,* 25 January 1999, the illness of a prosecution witness, which prevented the trial from taking place, was held to amount to a good and sufficient cause. Likewise, the unexpected non-availability of a prosecution witness may suffice *(Leeds Crown Court, ex parte Redfearn* [1999] COD 437). The fact that a witness is a professional investigator does not make his convenience irrelevant *(Leeds Crown Court, ex parte Wilson* [1999] Crim LR 378).

Due Expedition

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D15.28

In *Norwich Crown Court, ex parte Parker* (1992) 96 Cr App R 68, the Divisional Court said that all concerned with the prosecution were not required to act as though this were their only task at hand; 'all due expedition' meant the expedition appropriate in the circumstances, one of those circumstances being the custody time-limit. In *Governor of Winchester Prison, ex parte Roddie* [1991] 2 All ER 931, however, it was made clear that due expedition had to be measured against some objective yardstick or it would defeat the Act's objects. Therefore, the fact that the police were understaffed and suffered delays in the receipt of typing and scientific evidence did not mean there was due expedition.

The following factors have relevance to the assessment of this question.

D15.29

(a) *The stage of the proceedings to which the time-limit relates.* In considering whether the prosecution had acted with all due expedition, the judge ought to consider the matter by reference to the presence or absence of all due expedition at the stage to which the custody time-limit relates *(Birmingham Crown Court, ex parte Bell* [1997] 2 Cr App R 363). For example, in *Central Criminal Court, ex parte Behbehari* [1994] Crim LR 352, the Divisional Court held that, in determining whether the prosecution had acted with 'all due expedition', the court should take into account whether papers were served on the defence in time to allow adequate consideration of the type of committal. See also *R (CPS) v Ipswich Crown Court* [2010] EWHC 1515 (Admin).

By extension of the same principle, however, the due expedition of the prosecution should be assessed in relation to matters they were obliged to carry out, rather than additional burdens they had assumed *(Southwark Crown Court, ex parte DPP* [1999] Crim LR 394). The decision of the Divisional Court in *R (Hughes) v Woolwich Crown Court* [2006] EWHC 2191 (Admin) underlines the fact that the due expedition of the prosecution in complying with its duties of disclosure will be judged from the time that the obligation in fact arises, rather than necessarily when the formal requirements of the service of a defence statement have been completed (see also *R (Alexander) v Isleworth Crown Court* [2009] EWHC 85 (Admin) for consideration of due expedition in the context of obtaining psychiatric evidence on the issue of fitness to plead and *R (Clarke) v Lewes Crown Court* [2009] EWHC 805 (Admin) in relation to the obtaining of expert evidence more generally).

D15.30

(b) *Who is responsible for any delay.* The other consideration to which the court should have regard is whether the lack of expedition is actually the fault of the prosecution, or whether it is caused by some third party and beyond the prosecution's control. The most obvious third party in this context is the independent science service. In *Central Criminal Court, ex parte Johnson* [1999] 2 Cr App R 51, the Divisional Court recognised that the prosecution would not have failed to show due expedition where delay had been caused by the independent science service, providing that all reasonable steps had been taken to ensure that the evidence in question was provided in proper time. This includes the obligation to make the laboratory aware of the trial date and time-limit. In *R (Holland) v Leeds Crown Court* [2002] EWHC 1862 (Admin), failure to inform the laboratory of the time constraints was fatal to a claim to due expedition.

Similarly, delay occasioned by the non-availability of a prosecution witness will translate into a failure by the prosecution to act with due expedition only where it could not be shown that the prosecution had taken reasonable steps in the circumstances to ensure the attendance of the witness. However, the prosecution cannot be expected to 'nursemaid' their witnesses at all times *(Leeds Crown Court, ex parte Redfearn* [1999] COD 437).

Where the delay to proceedings is the result of, or substantially contributed to by, the conduct of the accused, the court is entitled to take that into account in weighing up whether the prosecution has acted with all due diligence *(O'Dowd v UK* (2012) 54 EHRR 8 (187)).

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Link between Due Expedition and the Need for an Extension

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D15.31

In *Leeds Crown Court, ex parte Bagoutie* (1999) *The Times,* 31 May 1999, Lord Bingham CJ emphasised that the requirement of due expedition was not disciplinary in intention. It aimed to protect the accused from being kept in prison awaiting trial longer than was justifiable. Parliament had intended to insist that prosecutors could not seek extensions where the need for the extension was attributable to their own failure to act with due expedition. Hence, if the court was satisfied that there was good and sufficient cause for the extension, but was not satisfied that the prosecution had acted with all due expedition, it was not obliged to refuse the application if it concluded that the prosecution's failure had neither caused nor contributed to the need for the extension.

In *R (Gibson) v Winchester Crown Court* [2004] EWHC 361 (Admin), [2004] 1 WLR 1623, the Divisional Court held that a judge may properly extend custody time-limits even where the prosecution had not acted with all due diligence, if the prosecution's failure is not itself a cause for the required extension.

Applying the Criteria

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D15.32

In *White v DPP* [1989] Crim LR 375, the Divisional Court expressed doubt over the Crown Court judge's approach to the extension of the custody time-limit in D's case, namely that he had to be satisfied beyond reasonable doubt of the existence of good cause before granting an extension. In *Governor of Canterbury Prison, ex parte Craig* [1991] 2 QB 195, Watkins LJ (giving the judgment of the Divisional Court) referred (at p. 132) to the doubt expressed in *White v DPP* and stated:

> In our view, the standard to be applied is that of the balance of probabilities. That is the standard for determining bail applications. It should apply equally, we think, to related interlocutory questions of the sort here in question.

The onus, then, is on the prosecution to satisfy the court as to the criteria for extension.

In *Wildman v DPP* [2001] EWHC Admin 14, the Divisional Court stated that the prosecution 'have to enable the defendant to test the matters which are relied upon by the Crown'. If the material on which they rely includes oral evidence, the defence must be given an opportunity to cross-examine (*R (DPP) v Havering Magistrates' Court* [2001] 3 All ER 997). However, it is for the prosecution to decide what evidence to call in support of their application, and the defence cannot insist on a witness being called purely to allow the witness to be criticised (*R (Rippe) v Chelmsford Crown Court* [2001] EWHC Admin 1115).

Crown Court applications for extension of a time-limit may and normally would be deter-mined by a Crown Court judge in chambers. In *Leeds Crown Court, ex parte Briggs (No. 1)* [1998] 2 Cr App R 413, the Divisional Court stated that the Crown Court judge dealing with an application should give reasons for granting an extension.

Procedure for Seeking an Extension of Time-limits

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D15.33

At any time before the expiry of a time-limit, the Crown Court, if the accused has already been committed for trial, or the magistrates' court, in other cases, may extend the limit if satisfied of two matters (Prosecution of Offences Act 1985, s. 22(3)):

(a) that 'the prosecution has acted with all due diligence and expedition', and

(b) that there is 'good and sufficient cause for doing so'.

Instances of 'good and sufficient cause' are given in s. 22(3)(a)(i) and (ii), but they are clearly meant to be no more than examples.

An already extended limit may be further extended (s. 22(3)).

The criteria for the extension of the time-limit are discussed in more detail below. As to the timing of the application, in *Campbell-Brown v Central Criminal Court* [2015] EWHC 202 (Admin), [2015] 1 Cr App R 34 (516) the Divisional Court observed that the extension of custody time-limits should be addressed at the time that a trial date was fixed out with the existing limit (in that case to accommodate the convenience of counsel), rather than after the decision as to listing had already been made. Further procedural guidance relating to custody time-limit extensions is contained in Crim PD XIII, Listing, para. F.4 (see Supplement, CPD.XIII.F).

D15.34

Notice Requirement By reg. 7 of the Prosecution of Offences (Custody Time Limits) Regulations 1987 and CrimPR 14.18(2) (see Supplement, R14.18), an application for extension may be made orally or in writing. Notice of the intention to make the application must be given to the defence and the court not less than five days before an application to the Crown Court and not less than two days before an application to a magistrates' court. Notice may, however, be dispensed with if the court is satisfied that it is not practicable for the prosecution to give it in the time specified (reg. 7(4) and CrimPR 14.18(3)).

The effect of a failure by the prosecution to give proper notice was considered in *Governor of Canterbury Prison, ex parte Craig* [1991] 2 QB 195. It was held in that case that the justices still had a discretion under s. 22(3) of the Prosecution of Offences Act 1985 to extend a time-limit 'at any time before … expiry'. Hence they could extend the time-limit despite the prosecution's failure to show that it had been impracticable to give the accused two days' notice of an application for extension.

In *R (Haque) v Central Criminal Court* [2003] EWHC 2457 (Admin), the Divisional Court considered the import of the opening words of s. 22(3): 'The appropriate court may, at anytime before the expiry of a time-limit imposed by the regulations, extend, or further extend, that limit'. It was held that they had to be construed as meaning before the expiry of a time-limit imposed by the regulations *as extended, if appropriate* by the court. They did not mean that the application could only be made within the 182 days provided for in reg. 6B following the date on which the accused first appeared in the magistrates' court.

D15.35

Use of a Chronology In *Chelmsford Crown Court, ex parte Mills* (2000) 164 JP 1, Lord Bingham CJ said that when a contested application was made for an extension, turning wholly or partly on whether the prosecution had acted with all due expedition, the judge should be given a detailed chronology (preferably agreed), showing the dates of all material events and orders. When the judge ruled on such an application, reasons should be given for the decision, which need not be long or elaborate.

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Appeals

Blackstone's Criminal Practice 2022 > PART D PROCEDURE > Section D15 Trial on Indictment: General Matters and Pre-trial Procedure > CUSTODY TIME-LIMITS

D15.36

From the Magistrates' Court to the Crown Court Following an application to a magistrates' court for extension of a time-limit, the party against whom the magistrates' decision goes may appeal to the Crown Court (Prosecution of Offences Act 1985, s. 22(7) and (8)). An appeal by the prosecution against refusal to extend must be commenced before the actual expiry of the limit, but, provided that is done, the limit is deemed not to have expired until after the determination of the appeal (s. 22(9)).

CrimPR 14.19 sets out the procedure to be followed on such appeals, in particular, the requirement for notice to the court and the other party and the contents of the notice. Appeals against magistrates' decisions on applications to extend are matters that may and normally would be determined by a Crown Court judge in chambers.

D15.37

From the Crown Court to the Divisional Court The mechanism of a challenge to the decision of the Crown Court to grant an extension of time-limits will depend on its basis.

(a) If it is on the basis that there was insufficient evidence to justify that decision, the challenge should be made by way of appeal by case stated to the Divisional Court. In that way, the Crown Court judge will be able to set out clearly the facts found and the material on which the findings were based *(Central Criminal Court, ex parte Behbehari* [1994] Crim LR 352).

(b) In other circumstances, it will be appropriate for a challenge to the decision to be by way of judicial review. In such a case, the requirement for promptness under the Civil Procedure Rules, Part 54, will not always be satisfied by commencing proceedings within the three-month period set out therein, but will depend on the circumstances of the case. In *R (Siraju) v Crown Court at Snaresbrook* [2001] EWHC Admin 638, it was stated that a delay which makes it impossible for the matter to be reconsidered by the Crown Court before the original time-limit expires will normally be fatal to a judicial review application.

The exercise of the power to extend a time-limit cannot be used as a ground of appeal should the accused ultimately be convicted (s. 22(10)).

Statutes on Custody Time-limits

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D15.38
Prosecution of Offences Act 1985, ss. 22 and 22B

22. —(1) The Secretary of State may by regulations make provision, with respect to any specified preliminary stage of proceedings for an offence, as to the maximum period—

(a) to be allowed to the prosecution to complete that stage;

(b) during which the accused may, while awaiting completion of that stage, be—

(i) in the custody of a magistrates' court; or

(ii) in the custody of the Crown Court; in relation to that offence.

(2) [Permissible content of the regulations.]

(3) The appropriate court may, at any time before the expiry of a time limit imposed by the regulations, extend, or further extend that limit; but the court shall not do so unless it is satisfied—

(a) that the need for the extension is due to—

(i) the illness or absence of the accused, a necessary witness, a judge or a magistrate;

(ii) a postponement which is occasioned by the ordering by the court of separate trials in the case of two or more accused or two or more offences; or

(iii) some other good and sufficient cause; and

(b) that the prosecution has acted with all due diligence and expedition.

(4) Where, in relation to any proceedings for an offence, an overall time limit has expired before the completion of the stage of the proceedings to which the limit applies, the appropriate court shall stay the proceedings.

(5) Where—

(a) a person escapes from the custody of a magistrates' court or the Crown Court before the expiry of a custody time limit which applies in his case; or

(b) a person who has been released on bail in consequence of the expiry of a custody time limit—

(i) fails to surrender himself into the custody of the court at the appointed time; or

(ii) is arrested by a constable on a ground mentioned in section 7(3)(b) of the Bail Act 1976 (breach, or likely breach, of conditions of bail); the regulations shall, so far as they provide for any custody time limit in relation to the preliminary stage in question, be disregarded.

(6) Subsection (6A) below applies where—

(a) a person escapes from the custody of a magistrates' court or the Crown Court; or

(b) a person who has been released on bail fails to surrender himself into the custody of the court at the appointed time;

and is accordingly unlawfully at large for any period.

(6A) The following, namely—

(a) the period for which the person is unlawfully at large; and

(b) such additional period (if any) as the appropriate court may direct, having regard to the disruption of the prosecution occasioned by—

(i) the person's escape or failure to surrender; and

(ii) the length of the period mentioned in paragraph (a) above, shall be disregarded, so far as the offence in question is concerned, for the purposes of the overall time limit which applies in his case in relation to the stage which the proceedings have reached at the time of the escape or, as the case may be, at the appointed time.

(6B) Any period during which proceedings for an offence are adjourned pending the determination of an appeal under Part 9 of the Criminal Justice Act 2003 shall be disregarded, so far as the offence is concerned, for the purposes of the overall time limit and the custody time limit which applies to the stage which the proceedings have reached when they are adjourned.

(7) Where a magistrates' court decides to extend, or further extend, a custody or overall time limit, or to give a direction under subsection (6A) above, the accused may appeal against the decision to the Crown Court.

(8) Where a magistrates' court refuses to extend, or further extend, a custody or overall time limit, or to give a direction under subsection (6A) above, the prosecution may appeal against the refusal to the Crown Court.

(9) An appeal under subsection (8) above may not be commenced after the expiry of the limit in question; but where such an appeal is commenced before the expiry of the limit the limit shall be deemed not to have expired before the determination or abandonment of the appeal.

(10) Where a person is convicted of an offence in any proceedings, the exercise, in relation to any preliminary stage of those proceedings, of the power conferred by subsection (3) above shall not be called into question in any appeal against that conviction.

(11) In this section—

'appropriate court' means—

(a) where the accused has been sent for trial or indicted for the offence, the Crown Court; and

(b) in any other case, the magistrates' court specified in the summons or warrant in question or, where the accused has already appeared or been brought before a magistrates' court, a magistrates' court for the same area;

'custody' includes local authority accommodation or youth detention accommodation to which a person is remanded under section 91 of the Legal Aid, Sentencing and Punish-ment of Offenders Act 2012, and references to a person being committed to custody shall be construed accordingly;

'custody of the Crown Court' includes custody to which a person is committed in pursuance of—

(a) section 43A of the Magistrates' Courts Act 1980 (magistrates' court dealing with a person brought before it following his arrest in pursuance of a warrant issued by the Crown Court); or

(b) section 52 of the Crime and Disorder Act 1998 (provisions supplementing section 51); 'custody of a magistrates' court' means custody to which a person is committed in pursuance of section 128 of the Magistrates' Courts Act 1980 (remand);

'custody time limit' means a time limit imposed by regulations made under subsection (1)(b) above or, where any such limit has been extended by a court under subsection (3) above, the limit as so extended;

'preliminary stage', in relation to any proceedings, does not include any stage after the start of the trial (within the meaning given by subsections (11A) and (11B) below);

'overall time limit' means a time limit imposed by regulations made under subsection (1)(a) above or, where any such limit has been extended by a court under subsection (3) above, the limit as so extended; and

'specified' means specified in the regulations.

(11ZA) For the purposes of this section, proceedings for an offence shall be taken to begin when the accused is charged with the offence or, as the case may be, an information is laid charging him with the offence.

(IIA) For the purposes of this section, the start of a trial on indictment shall be taken to occur at the time when a jury is sworn to consider the issue of guilt or fitness to plead or, if the court accepts a plea of guilty before the time when a jury is sworn, when that plea is accepted; but this is subject to section 8 of the Criminal Justice Act 1987 and section 30 of the Criminal Procedure and Investigations Act 1996 (preparatory hearings).

(11AA) The references in subsection (11A) above to the time when a jury is sworn include the time when that jury would be sworn but for the making of an order under Part 7 of the Criminal Justice Act 2003.

(IIB) For the purposes of this section, the start of a summary trial shall be taken to occur—

(a) when the court begins to hear evidence for the prosecution at the trial or to consider whether to exercise its power under section 37(3) of the Mental Health Act 1983 (power to make hospital order without convicting the accused), or

(b) if the court accepts a plea of guilty without proceeding as mentioned above, when that plea is accepted.

(12) For the purposes of the application of any custody time limit in relation to a person who is in the custody of a magistrates' court or the Crown Court—

(a) all periods during which he is in the custody of a magistrates' court in respect of the same offence shall be aggregated and treated as a single continuous period; and

(b) all periods during which he is in the custody of the Crown Court in respect of the same offence shall be aggregated and treated similarly.

(13) For the purposes of section 29(3) of the Senior Courts Act 1981 (High Court to have power to make prerogative orders in relation to jurisdiction of Crown Court in matters which do not relate to trial on indictment) the jurisdiction conferred on the Crown Court by this section shall be taken to be part of its jurisdiction in matters other than those relating to trial on indictment.

22B.— (1) This section applies where proceedings for an offence ('the original proceedings') are stayed by a court under section 22(4) or 22A(5) of this Act.

(2) If—

(a) in the case of proceedings conducted by the Director, the Director or a Chief Crown Prosecutor so directs;

(b) in the case of proceedings conducted by the Director of the Serious Fraud Office, the Commissioners of Inland Revenue or the Commissioners of Customs and Excise, that Director or those Commissioners so direct; or

(c) in the case of proceedings not conducted as mentioned in paragraph (a) or (b) above, a person designated for the purpose by the Secretary of State so directs, fresh proceedings for the offence may be instituted within a period of three months (or such longer period as the court may allow) after the date on which the original proceedings were stayed by the court.

(3) Fresh proceedings shall be instituted as follows—

(a) where the original proceedings were stayed by the Crown Court, by preferring a bill of indictment;

(b) where the original proceedings were stayed by a magistrates' court, by laying an informa-tion.

(4) Fresh proceedings may be instituted in accordance with subsections (2) and (3)(b) above notwithstanding anything in section 127(1) of the Magistrates' Courts Act 1980 (limitation of time).

(5) Where fresh proceedings are instituted, anything done in relation to the original proceedings shall be treated as done in relation to the fresh proceedings if the court so directs or it was done—

(a) by the prosecutor in compliance or purported compliance with section 3, 4 or 7A of the Criminal Procedure and Investigations Act 1996; or

(b) by the accused in compliance or purported compliance with section 5 or 6 of that Act.

(6) Where a person is convicted of an offence in fresh proceedings under this section, the institution of those proceedings shall not be called into question in any appeal against that conviction.

These sections are reproduced without Covid-19 related amendments.

PRE-TRIAL AND PLEA AND TRIAL PREPARATION HEARINGS

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D15.39

Since the introduction of the CrimPR, a considerably greater emphasis has been placed on case management (see D4 for a full discussion). At the forefront of this development is the court's active role in ensuring that, by the time a case reaches trial, all necessary preparation has been completed, and completed as efficiently and expeditiously as possible. 'Better Case Manage-ment' is a series of complementary initiatives, implementing Sir Brian Leveson's *Review of Efficiency in Criminal Proceedings,* and given effect under the umbrella of Crim PD I, paras. 3A.1 to 3A.28 (see Supplement, CPD.3A). The parties to proceedings are required to engage fully in court-led pre-trial case management, which is designed to identify those cases that will not go to trial at as early a stage as possible, and to ensure the efficient and expeditious dispatch of those that do. The two major Better Case Management hearings to give effect to these objectives are the early guilty plea scheme and the PTPH.

Use of Live Links and Telephone Facilities for Pre-trial Hearings

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D15.40

Crim PD I, paras. 3N.1 to 3N.17 (see Supplement, CPD.3N), address the use of live link and telephone technology for the conduct of pre-trial hearings. Crim PD I, para. 3N.1, makes clear that: 'Where it is lawful and in the interests of justice to do so, courts should exercise their statutory and other powers to conduct hearings by live link or telephone'. It is recognised that hearings that would in any event be public can properly be conducted via non-secure means such as Skype or Facetime (Crim PD I, para. 3N.4).

Courts are enjoined to direct the use of such facilities in the circumstances listed in CrimPR 3.2(4) and (5) (see Supplement, R3.2), and further guidance as to when such use is 'appropriate' is provided in Crim PD I, para. 3N.4 (and includes, wherever such facilities are available and can operate satisfactorily, their suitability for administrative hearings and where the satisfactory participation of the accused can be achieved). The parties are required to alert the court to any reason why such facilities should not be used (para. 3N.3, with further guidance at paras. 3N.5 to 3N.6). Itis emphasised at para. 3N.8 that there is no bar to the parties and the judge being in different locations for the purposes of a live link application for a 'virtual hearing' (see also D15.3). Further guidance on establishing and using live links is provided in the annex to Crim PD I.

Sections 57A to 57E of the CDA 1998 permit an accused who is in police or prison custody to appear at any preliminary hearing via a live link, including preparatory hearings, early guilty plea, and PTPH. The accused is thereby deemed to be present at the hearing. CrimPR 3.2(4) (see Supplement, R3.2) strongly encourages the use of live links where the technology is available and where the accused can participate effectively. Crim PD I, para. 3N.9, extends this facility, where appropriate, to those on bail. Factors that the court should consider include the importance of the accused understanding the proceedings.

The Coronavirus Act 2020, s. 54 and sch. 24, have made temporary modifications to the CDA 1998, ss. 57A to 57B and sch. 3A, to give the court power to direct 'live link' attendance at 'preliminary hearings'.

See also D15.96 for live links for witnesses.

Impact of Directions by the Magistrates' Court

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D15.41

The first stages of case management for cases reaching the Crown Court will already have been undertaken in the magistrates' court, giving effect to CrimPR Part 3 (see Supplement, R3.1 ***et seq.)*** and Crim PD I, paras 3A.1 to 3A.15 (see Supplement, CPD.3A).

The objective is for the court to identify those cases that will result in guilty pleas by asking the accused for an indication as to plea at the accused's first appearance (Crim PD I, para. 3A.1), and to make directions, governing the preparation of the case by the parties, to ensure that the matters set out have been addressed before the first hearing at the Crown Court.

The process at this stage is dependent on the initial details of the prosecution case, provided in accordance with CrimPR 8.2 (see Supplement, R8.2), and addresses the matters identified in r. 8.3 and Crim PD I, para. 3A.4. This information is intended to permit an accused to indicate plea, and for the court to proceed by the correct route from that indication. Where a not guilty plea is anticipated in relation to an accused on bail, more extensive information is required at this stage (Crim PD I, para. 3A.12).

Where a magistrates' court sends a case to the Crown Court for trial, the magistrates' court must set a date for a PTPH at the Crown Court (see D10.22) if a guilty plea has been indicated for an offence triable only on indictment (Crim PD I, para. 3A.10), or no guilty plea is indicated (para. 3A.11). The PTPH must be held within 28 days of sending (para. 3A.11). Paragraph 3A.16 states that an indictment should be lodged at least seven days in advance of the PTPH. Note the need to have the necessary consent for prosecution before the case is sent to the Crown Court (see *Welsh* [2015] EWCA Crim 906, [2016] 1 Cr App R 8 (113) and D2.18).

Parties will be expected to have communicated with each other by the time of any first hearing and must report to the court on that communication; parties are expected to continue thereafter to communicate with each other and with the court officer (Crim PD I, para. 3A.2).

Crim PD I, para. 3P.5, makes clear that the timetable for the obtaining and service of reports as to the mental health of the accused should be incorporated into the wider timetable for trial preparation rather than operating independently of it.

D15.42

Time for Service of Case Under the Crime and Disorder Act 1998 (Service of Prosecution Evidence) Regulations 2005 (SI 2005 No. 902: see D10.19), the period allowed for the service of the case is 50 days when the accused is in custody (8 days + 42 days) and 70 days when the accused is on bail (28 days + 42 days).

D15.43

Digital Case System Following a roll-out in February 2016, under the Digital Case System (DCS), new CPS cases sent to the Crown Court (save for limited categories) are paperless, with the evidential and administrative material accessed from an electronic file instead. This does not apply to other prosecution agencies.

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Preliminary Hearings Generally

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D15.44

Crim PD I, paras. 3A.16 to 3A.28 (see Supplement, CPD.3A), provide a comprehensive and detailed guide to the procedure to be adopted as regards case progression and preliminary hearings.

Where a deferred prosecution agreement is proposed (see D12.105) then, under the CCA 2013, sch. 17, para. 7, a preliminary hearing must occur at which the court will be invited to declare that it is 'likely to be in the interests of justice' that the prosecution and accused enter into a deferred prosecution agreement and that the proposed terms of the agreement are 'fair, reasonable and proportionate'.

Note the need to have the necessary consent for prosecution prior to any such hearing (see *Welsh* [2015] EWCA Crim 906, [2016] 1 Cr App R 8 (113) and D2.19).

Pre-trial Hearings

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D15.45

The CPIA 1996, ss. 39 to 43, and especially ss. 39 and 40, promote the efficient conduct of trials on indictment. They complement the rules for PTPH and preparatory hearings (see D15.47 and CrimPR 3.21; see Supplement, R3.21). Otherwise, such hearings occur where a guilty plea is anticipated, it is required for reasons of effective case management or to set ground rules for a vulnerable witness or defendant (r. 3.21(1)(c)).
Criminal Procedure and Investigations Act 1996, ss. 39 and 40

39. —(1) For the purposes of this Part a hearing is a pre-trial hearing if it relates to a trial on indictment and it takes place—

(a) after the accused has been sent for trial for the offence and

(b) before the start of the trial.

(2) For the purposes of this Part a hearing is also a pre-trial hearing if—

(a) it relates to a trial on indictment to be held in pursuance of a bill of indictment preferred under the authority of section 2(2)(b) or (ba) of the Administration of Justice (Miscellaneous Provisions) Act 1933 (bill preferred by direction of Court of Appeal or by direction or with consent of a judge), and

(b) it takes place after the bill of indictment has been preferred and before the start of the trial.

(3) For the purposes of this section the start of a trial on indictment occurs at the time when a jury is sworn to consider the issue of guilt or fitness to plead or, if the court accepts a plea of guilty before the time when a jury is sworn, when that plea is accepted; but this is subject to section 8 of the Criminal Justice Act 1987 and section 30 of this Act (preparatory hearings).

(4) The references in subsection (3) to the time when a jury is sworn include the time when that jury would be sworn but for the making of an order under Part 7 of the Criminal Justice Act 2003.

40. — (1) A judge may make at a pre-trial hearing a ruling as to—

(a) any question as to the admissibility of evidence;

(b) any other question of law relating to the case concerned.

(2) A ruling may be made under this section—

(a) on an application by a party to the case, or

(b) of the judge's own motion.

(3) Subject to subsection (4), a ruling made under this section has binding effect from the time it is made until the case against the accused or, if there is more than one, against each of them is disposed of; and the case against an accused is disposed of if—

(a) he is acquitted or convicted, or

(b) the prosecutor decides not to proceed with the case against him.

(4) A judge may discharge or vary (or further vary) a ruling made under this section if it appears to him that it is in the interests of justice to do so; and a judge may act under this subsection—

(a) on an application by a party to the case, or

(b) of the judge's own motion.

(5) No application may be made under subsection (4)(a) unless there has been a material change of circumstances since the ruling was made or, if a previous application has been made, since the application (or last application) was made.

(6) The judge referred to in subsection (4) need not be the judge who made the ruling or, if it has been varied, the judge (or any of the judges) who varied it.

(7) For the purposes of this section the prosecutor is any person acting as prosecutor, whether an individual or a body.

D15.46

Procedure Such hearings should normally be in public, and their outcome published if held in private (CrimPR3.21(3)).As these are pre-trial hearings, they can therefore be conducted by a judge who will not be the eventual trial judge. They differ from preparatory hearings in long or complex cases (see D15.52) in this respect. Restrictions on the reporting of pre-trial rulings are contained in the CPIA 1996, ss. 41 and 42. There are no exemptions in respect of the publication of formal details, such as the name, address and occupation of the accused (again, in contrast with the position in relation to preparatory hearings).

Plea and Trial Preparation Hearings

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D15.47

Save in cases where a preparatory hearing is required (discussed at D15.51), the major pre-trial Crown Court hearing will be the PTPH. The objective, expressed in Crim PD I, para. 3A.21 (see Supplement, CPD.3A), is that normally it should be the only pre-trial hearing. Its purpose, where an accused has indicated a guilty plea either in the magistrates' court at the time his case was sent or where such an indication has been given between that time and the PTPH, is for sentencing to occur (para. 3A.17). Otherwise, it is to ensure that all steps necessary for the proper preparation of a case for trial have been taken or are properly timetabled for future attention.

D15.48

Material for the Hearing The time allowed for the conduct of the PTPH must be sufficient for effective trial preparation, including the service of the prosecution case, the preferring of the indictment, the service of a defence statement and the making of any application to dismiss. The steps to be followed in relation to a PTPH are set out in detail in Crim PD I, paras. 3A.16 to 3A.20, and CrimPR 3.21 (see Supplement, R3.21).

CrimPR 3.21(2) requires the judge at the hearing to be satisfied of the following: (a) the defendant understands that credit will be given for a guilty plea; (b) what the defendant's plea is or is to be; (c) the defendant understands that if there is a trial, this can take place in the defendant's absence, and the consequences in relation to bail if the defendant were to fail to attend court.

Where an accused has been remanded in custody and sent to the Crown Court without the prior provision of initial details of the prosecution case, the material which is required for an accused on bail (para. 3A.12) has to be provided at least seven days in advance of the PTPH. Beyond that, the prosecution must have served sufficient evidence by the hearing 'to enable to court to case manage effectively without the need for a further case management hearing' (para. 3A.20), save in those cases to which para. 3A.21 applies (see D15.50). Moreover, Crim PD I, para. 3P7and 8, envisages a further case management hearing where it is necessary to set a timetable for obtaining evidence as to the mental health or capacity of an accused (see para. 3P7for the stages of that process).

D15.49

The Form The form to be used at a PTPH is that which appears in Crim PD, annex F, and is available via Criminal Procedure Rules: Forms - GOV.UK (www.gov.uk). The information required by the PTPH form must be available to the court at the PTPH, and it must have been discussed between the parties in advance. The prosecutor must provide details of the availability of likely prosecution witnesses so that a trial date can immediately be arranged if there is no guilty plea (Crim PD I, para. 3A.20).

The matters of case preparation that are addressed in the form are also addressed in other parts of this book. These include:

(a) orders in relation to witnesses, such as special measures (see D14.1) and witness sum-monses (see D15.92);

(b) orders as to disclosure (see D9 and D15.69, including guidance as to large-scale digital storage issues: see *R* [2015] EWCA Crim 1941, [2016] 1 WLR 1872, discussed at D15.62); and

(c) outstanding legal issues, including applications under the bad character and hearsay provisions of the CJA 2003 (see F13, F15 and F17).

In *Diedrick* [1997] 1 Cr App R 361, the appeal concerned the actions of the trial judge in questioning D about what he thought was a lie which D had told in the form submitted at what was then a plea and directions hearing. The Court of Appeal observed that what was said at the hearing was not expected to form part of the material for trial, and it would rarely be appropriate to refer to it. Where the trial judge was considering the use of such material, counsel should be allowed to address the judge first.

In *Newell* [2012] EWCA Crim 650, [2012] 1 WLR3142, the Court of Appeal made clear that matters recorded on the form on D's behalf should not then ordinarily be used as evidence against D through the exercise of the court's discretion under the PACE 1984, s. 78, even though it is prima facie admissible as an admission by an agent, which is an exception to the hearsay rule. That was predicated, however, on there having been compliance by D with the CrimPR, and with the 'cards on the table' approach to proactive case management now required (discussed at D4).

Valiati v DPP [2018] EWHC 2908 (Admin), [2019] 1 Cr App R 17 (216) upheld that approach. The content of the form was technically admissible, subject to the exercise of the PACE 1984, s. 78, but it was essential that the parties were open in their answers at a hearing such as a PTPH, and that no party ambushed another subsequent to such a pre-trial hearing, and such candour was more likely where the answers given were not liable to be admitted in evidence at a later stage.

D15.50

Subsequent Hearings Crim PD I, para. 3A.21 (see Supplement, CPD.3A), states that after the PTPH there will be no further case management hearing before the trial unless a condition listed in CrimPR 3.21(1)(c) is met and the court so directs, in order to further the overriding objective. Paragraph 3A.21 goes on to set out the types of cases in which it might be considered usual for a direction at the PTPH to include a direction for a further hearing. If a further case management hearing is directed, an accused held in custody will not usually be expected to attend in person, unless the court otherwise directs (para. 3A.22). Again, the provision for live links (see D15.40) will apply. Parties will be required to complete Effective Trial monitoring forms (para. 3A.25). If a party fails to comply with a case management direction, identified by case progression monitoring and the completion of monitoring forms, that party may be required to attend the court to explain the failure (para. 3A.23). Courts should maintain a record whenever a party to the proceedings has failed to comply with a direction made by the court (para. 3A.26). Non-compliance hearings may be conducted via live link or telephone (para. 3A.27).

As far as possible, case progression should be managed without a hearing in the courtroom, using electronic communication (para. 3A.24).

PREPARATORY HEARINGS

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D15.51

Preparatory hearings are a key pre-trial part of the criminal process in complex cases, the aims of which are very much in keeping with the case management ethos described above, namely the early identification of the issues and the tailoring of the trial process to those issues. Such hearings maybe held in long and complex cases (pursuant to the CPIA 1996: see D15.52) and in serious fraud cases (pursuant to the CJA 1987).

End of Document

Statutory Basis for a Preparatory Hearing

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D15.52

The CJA 1987 provides for special 'preparatory hearings' in serious cases of fraud. The relevant provisions are contained in ss. 7 to 11. Similarly, ss. 28 to 38 of the CPIA 1996 (see D15.63) contain provisions for preparatory hearings in other types of long or complex case. In each case, the statutory regime is supplemented by CrimPR 3.22 to 3.26 (see Supplement, R3.22 ***et seq***).

D15.53

Initiating a Preparatory Hearing Bys.7(1) of the CJA 1987, if it appears to a Crown Court judge that the evidence on an indictment 'reveals a case of fraud of such seriousness or complexity that substantial benefits are likely to accrue from a [preparatory] hearing', the judge may order such a hearing. See also *Quillan* [2015] EWCA Crim 538, [2015] 1 WLR 4673, discussed at D15.54, in which the Court observed that there might also be special circumstances where a trial would be very long and costly and where a ruling on a point of law might determine whether a trial was required at all. Under both the CJA 1987 and the CPIA 1996 (s. 29(1)), the decision to hold a preparatory hearing may be made by a Crown Court judge at any time before a jury is sworn, on the application of any of the parties or by the court of its own motion (s. 29(4)). The court's discretion should not be narrowly applied *(VJA* [2010] EWCA Crim 2742). CrimPR 3.22 to 3.26 (see Supplement, R3.22 ***et seq***.*)* lay down deadlines for the defence or prosecution to apply for a preparatory hearing and sets out the procedure for determining any such application. Rule 3.24 also covers the situation where a prosecutor seeks an order for a trial to be conducted with a judge sitting alone, within the terms of the CJA 2003, s. 43 or 44 (see D13.75 ***et seq***.*)*.

D15.54

Test for Holding a Hearing The purposes of the hearing are: (a) to identify the issues which are likely to be material to the verdict of the jury; (b) to assist their comprehension of those issues; (c) to expedite the proceedings before the jury; (d) to assist the judge's management of the trial; (e) to consider questions as to the severance or joinder of charges (CJA 1987, s. 7(1)(a) to (e); CPIA 1996, s. 29(2)).

A preparatory hearing can be held, within the scope of the CPIA 1996, only if the case appears to the judge to be complex, serious or likely to lead to a lengthy trial. Where there is no material upon which the judge can properly come to the conclusion that the case will be complex, serious or lengthy, there is no power to hold a preparatory hearing. In such a case, there will be no jurisdiction to entertain an interlocutory appeal under these provisions *(Ward* [2003] EWCA Crim 814, [2003] 2 Cr App R 20 (315)). The real test for holding such a hearing is whether an issue of importance to the conduct of the trial ought to be resolved, on appeal if necessary, at an early stage (see also *VJA* [2010] EWCA Crim 2742, where the Court of Appeal said that the purposes of a preparatory hearing should be interpreted broadly).

In *I* [2009] EWCA Crim 1793, [2010] 1 WLR 1125, the Court of Appeal essentially concluded that preparatory hearings were only of value where such an interlocutory appeal might be required. However, although that approach was endorsed to some extent in *R* [2015] EWCA Crim 1941, [2016] 1 WLR 1872, it was not followed in *R* [2013] EWCA Crim 708, [2014] 1 Cr App R 5 (33), where the Court of Appeal expressly rejected the possibility of interlocutory appeal as a reason to hold such a hearing, and it was qualified in *Quillan* [2015] EWCA Crim 538, [2015] 1 WLR 4673. In *Quillan,* the Court considered that there might also be special circumstances where a trial

would be very long and costly and where a ruling on a point of law in relation to the legal basis on which a count on the indictment was founded might determine whether a trial was required at all.

D15.55

Status of a Preparatory Hearing The preparatory hearing is in fact a stage of the trial itself and may be used in order to settle various issues without requiring the jury to attend (CJA 1987, s. 8; CPIA 1996, s. 30).

In *Southwark Crown Court, ex parte Commissioners for Customs and Excise* [1993] 1 WLR 764, the Divisional Court held that a change of judge after a preparatory hearing could only be accepted in exceptional circumstances. However, the Court of Appeal in *I* [2009] EWCA Crim 1793, [2010] 1 WLR 1125 made clear that it was sufficient that there was a compelling reason to change, rather than anything more exceptional.

It is possible for a judge to conduct separate preparatory hearings in respect of different accused who are charged in the same indictment (*Re Kanaris* [2003] UKHL 2, [2003] 1 WLR 443). Each accused is charged jointly and severally, and may thus be dealt with individually if the interests of justice so require.

Matters that May be Addressed during a Preparatory Hearing

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D15.56

The purpose of a preparatory hearing is set out in the CPIA 1996, s. 29(2), and may be summarised as:

(a) identifying material issues for the jury;

(b) assisting them to understand those issues;

(c) expediting proceedings before them;

(d) helping the judge to manage the trial; and

(e) considering questions as to the severance or joinder of charges.

The same purposes are identified in the CJA 1987, s. 7(1) (see D15.54). Any question as to the admissibility of evidence and any other question of law relating to the case may be determined at the preparatory hearing (CJA 1987, s. 9(3); CPIA 1996, s. 31(3)). According to *Re Gunawardena* [1990] 2 All ER 447, however, that power is in fact confined to questions related to the purposes of the preparatory hearing, as now outlined in the CJA 1987, s. 7(1)(a) to (e). See also CrimPR 3.23 and 3.24.

D15.57

Disclosure Among the powers available to the court at a preparatory hearing is the power to order the prosecutor and the defence to make disclosure in advance of the hearing (CPIA 1996, s. 31(4) to (7)), in addition to any disclosure already made as a result of the general duties on the parties (see D9).

Similarly, either before or at the preparatory hearing, the judge may, under the CJA 1987, s. 9(4) (and the CPIA 1996, s. 31(4)), order the prosecution to do any or all of the following:

(a) supply the court and the accused with a 'case statement' specifying (i) the principal facts of the prosecution case; (ii) the witnesses who will speak to those facts; (iii) any exhibits relevant thereto; (iv) any proposition of law on which the prosecution propose to rely; and (v) the relevance of the aforementioned to any of the counts in the indictment;

(b) prepare their evidence and other explanatory material in a form that appears to the judge to be likely to aid comprehension by the jury (and to supply it in that form to the court and the accused);

(c) give the court and the accused notice of matters which, in their view, ought to be agreed (including, where appropriate, the truth of the contents of relevant documents);

(d) amend the case statement in the light of objections from the defence.

Once an order to the prosecution to supply a case statement has been complied with, the judge may, under the CJA 1987, s. 9(5), and the CPIA 1996, s. 31(5), order the defence to do any or all of the following:

(a) give the court and the prosecution a written statement setting out in general terms the nature of the defence and indicating the principal matters on which they take issue with the prosecution;

(b) give the court and the prosecution notice of any objection they have to the prosecution case statement;

(c) inform the court and the prosecution of any point of law (including one of admissibility of evidence) which they wish to take and the authorities on which they will be relying; or

(d) give the court and the prosecution a notice stating the extent to which they are prepared to agree the documents and other matters which the prosecution have asked to have admitted, together with the reason for any refusal to agree.

Once the prosecution have received the defence case statement, they are entitled to make use of it by re-interviewing their own witnesses and asking them questions which arise from that statement. The judge has no power to forbid the prosecution from doing so or to prescribe the way in which they may carry out such re-interviews *(Nadir* [1993] 4 All ER 513).

In *H* [2007] UKHL 7, [2007] 2 AC 270, the House of Lords held that an order or ruling in relation to disclosure under the CPIA 1996, s. 8, did not fall within the purposes for which a preparatory hearing may be held, and therefore could not form the basis for an interlocutory appeal (see also D15.59). However, the requirement that the court is 'both entitled and obliged' robustly to case manage the disclosure process (per Sir Brian Leveson P in *R* [2015] EWCA Crim 1941, [2016] 1 WLR 1872 at [39]—[48]) makes orders as to disclosure an inevitable and important part of any such hearing.

Legal Rulings

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D15.58

The court may also make rulings as to any question of law relating to the case, including questions as to the admissibility of evidence (CPIA 1996, s. 31(3)), but its powers in this respect may be circumscribed by the principle in *Re Gunawardena* [1990] 2 All ER 447. In that case, it was held that the power to make binding rulings in a preparatory hearing in a serious fraud case was limited by implication to the purposes for which preparatory hearings may be ordered, as set out in s. 29(2) (see D15.56). Applying that decision, in *VJA* [2010] EWCA Crim 2742 it was emphasised that the court should only make rulings that would serve a useful trial purpose within the ambit of s. 29.

Applications of this principle include the following.

(a) **The indictment**: In *G* [2001] EWCA Crim 442, [2002] 1 WLR200, the trial judge at the preparatory hearing considered the management of the trial of three accused for conspiracy to cheat. He ruled that the indictment related only to one particular 'cell' of the alleged conspiracy, and therefore, only evidence which related to the narrower conspiracy would be admissible. It was held that the purpose of the ruling fell within s. 7(1)(a) since it was 'identifying issues which are likely to be material to the verdict of the jury'. Further, the judge's purpose was pro-active case management to ensure that the jury were not over-burdened. Moreover, applications relating to joint or separate trial are specifically identified in CrimPR 3.29 (see Supplement, R3.29) as a matter to be addressed at a pre-trial hearing, and preparatory hearings are not excluded from its ambit.

(b) In *van Hoogstraaten* [2003] EWCA Crim 3642, where the prosecution appealed against the ruling of the judge which was, in effect, to quash the indictment, by contrast, the Court of Appeal held that the ruling in question lay outside the scope of the CPIA 1996, s. 29(2), and it therefore had no jurisdiction to entertain an appeal.

(c) **Available defences**: In *Shayler* [2001] EWCA Crim 1977, [2001] 1 WLR2206, the Court of Appeal held that the judge at a preparatory hearing could rule on whether a particular defence (in this case, duress/necessity) was available to an accused as a matter of law. See also *S Ltd* [2009] EWCA Crim 85, [2009] 2 Cr App R 11 (171) as to the propriety of determining the availability of a defence at a preparatory hearing on the basis of the defence case statement.

(d) **Admissibility:** In *Claydon* [2001] EWCA Crim 1359, [2004] 1 WLR 1575, the Court of Appeal held that the purpose of 'expediting the proceedings before the jury' must include 'questions of evidence such as typically arise' under s. 78 of the PACE 1984. Following *Gunawardena,* however, the judge's rulings as to abuse of process would not be subject to appeal because they did not come within the listed purposes of a preparatory hearing, but any resolution of the anomaly 'must be left to a higher court'. An attempt at such a resolution came in *H* [2007] UKHL 7, [2007] 2 AC 270 (see (f) below).

(e) *R* (2000) *The Independent,* 10 April 2000, in which, similarly, the Court of Appeal held that it had jurisdiction to hear an appeal brought pursuant to s. 35, in respect of evidence sought to be excluded under the PACE 1984, s. 78.

(f) **Disclosure:** *HUKHL 7*, [2007] 2 AC 270, in which it was held that because an order as to disclosure, following an application under the CPIA 1996, s. 8, did not fall within the purposes of a preparatory hearing,

it could not form the subject of an appeal. However, there was nothing to prevent a judge dealing with a preparatory hearing from addressing issues of disclosure at the same time and, in effect, in parallel.

D15.59

Note, however, that in *H* considerable doubts were cast on the correctness of *Re Gunawardena, Claydon* and *van Hoogstraaten.* Applying that decision, in *VJA* [2010] EWCA Crim 2742 it was emphasised that the court should only make rulings relating specifically to the matters identified in s. 29.

However, CrimPR Part 3 addresses applications for a stay for abuse of process (r. 3.28) or the joinder or severance of the indictment (r. 3.29) as matters to be addressed before trial, and there is no suggestion in these rules that they do not operate within the ambit of a preparatory hearing, as they do in the context of other pre-trial hearings.

Where an order made pursuant to s. 29 is varied by the Court of Appeal following an interlocutory appeal (pursuant to s. 35) but the position is later altered by a subsequent decision of the Court of Appeal to the effect that its earlier decision was incorrect, the judge who originally made the order is entitled to vary it so as to accord with that second Court of Appeal decision *(Rowe* [2007] EWCA Crim 635, [2007] QB 975).

D15.60

Status of Rulings Made at a Preparatory Hearing Subject to the possibility of being varied on appeal to the Court of Appeal (see D15.64), an order or ruling made at the preparatory hearing will have effect at the trial unless it then appears to the judge, on application by a party, that the interests of justice require the order or ruling to be varied or discharged (CJA 1987, s. 9(10); CPIA 1996, s. 31(11)). See D15.59 and *Rowe* [2007] EWCA Crim 635, [2007] QB 975 as to the effect of Court of Appeal decisions on such rulings.

The sanction for a party departing at trial from his case as disclosed at the preparatory hearing and/or failing to comply with an order made at the hearing is that the judge may comment on the departure or failure and the jury may draw such inferences as appear to them proper (CJA 1987, s. 10(1); CPIA 1996, s. 34(2)). The judge may also give leave to comment to any of the other parties, but, in deciding whether such leave is appropriate, must have regard to the extent of the departure from the case as earlier disclosed and the justification for it (CJA 1987, s. 10(2); CPIA 1996, s. 34(2)). Save as allowed under the statutory regime, no mention maybe made to the jury of any information about the defence case disclosed at the preparatory hearing.

D15.61

Reporting Restrictions Restrictions on reporting preparatory hearings are contained in the CPIA 1996, s. 37, although certain formal details (e.g., the names, ages, home addresses and occupations of the accused and witnesses, and the offence(s) charged) may be published by virtue of s. 37(9). The court has power to lift the restrictions (s. 37(3)).

D15.62

The Fraud Protocol At such hearings, it is important to consider the aspirations behind the Protocol for the Control and Management of Heavy Fraud and other Complex Criminal Cases, the Crown Court disclosure in document-heavy cases initiative that forms part of Better Case Management and the guidance as to the disclosure process in large cases, especially large-scale digital disclosure exercises (*R* [2015] EWCA Crim 1941, [2016] 1 WLR 1872).

The Protocol seeks to achieve this, in conjunction with the CrimPR and Crim PD, by encouraging continuous case management by judges presiding over trials which may last more than eight weeks. The Protocol includes guidance covering the following areas.

(a) There should be initial consideration of the length of trial, requiring the prosecution team to justify the length of trial where it will exceed eight weeks (para. 1(iv)) and to notify the court and others where the case is likely to exceed that length (para. 1(v)). The trial judge is also expected to 'consider what steps

should be taken to reduce the length of the trial, while still ensuring that the prosecution has the opportunity of placing the full criminality before the court' (para. 3(vi)(b)).

(b) Early appointment of a trial judge is required where the case will last more than four weeks, who will then 'manage the case from cradle to grave' (para. 2). The judge will require a more detailed knowledge of the case than would normally be the case (para. 3(i)(b)).

(c) Case management issues are highlighted, including the matters that should be addressed at directions hearings (para. 3(iii)), with a short preliminary hearing followed by a full case management hearing attended by trial counsel. Prior to that hearing, both prosecution and defence will have identified their cases and at the preliminary hearing there should be 'a real dialogue between the judge and all advocates for the purpose of identifying the focus of the prosecution case, the common ground and the real issues in the case' (para. 3(iv)(b)).

(d) On disclosure, there should be a timetable for structured disclosure which prevents the defence solicitors spending 'a disproportionate amount of time and incur[ring] dispropor-tionate costs trawling through a morass of documents' (para. 4(iii)). In relation to the latter, this requirement is now addressed comprehensively in *R* [2015] EWCA Crim 1941, [2016] 1 WLR 1872.

In cases involving large-scale digital disclosure exercises, the essential guidance provided in *R* was:

(a) the prosecution is and must be in the driving seat at the stage of initial disclosure, and should produce a Disclosure Management Document identifying the overall disclosure strategy, selection of software tools and search terms and means of addressing potential privilege issues;

(b) there must be prompt and proactive dialogue between the parties, with defence statements playing a valuable role where there has been actual or purported initial disclosure, as to which the courts should not employ a counsel of perfection as to the nature and extent of initial disclosure;

(c) the process of disclosure has to be subject to robust case management, with the court prepared to give orders and directions even at the initial disclosure stage; the aim of this process being to drive the disclosure process efficiently to expeditious resolution of the case.

Selected Statutory Provisions Governing Preparatory Hearings

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D15.63
Criminal Procedure and Investigations Act 1996, ss. 29 to 32 and 34

29. —(1) Where it appears to a judge of the Crown Court that an indictment reveals a case of such complexity, a case of such seriousness or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing—

(a) before the time when the jury are sworn, and

(b) for any of the purposes mentioned in subsection (2),

he may order that such a hearing (in this Part referred to as a preparatory hearing) shall be held.

(IA) A judge of the Crown Court may also order that a preparatory hearing shall be held if an application to which section 45 of the Criminal Justice Act 2003 applies (application for trial without jury) is made.

(IB) An order that a preparatory hearing shall be held must be made by a judge of the Crown Court in every case which (whether or not it falls within subsection (1) or (1A)) is a case in which at least one of the offences charged by the indictment against at least one of the persons charged is a terrorism offence.

(IC) An order that a preparatory hearing shall be held must also be made by a judge of the Crown Court in every case which (whether or not it falls within subsection (1) or (1A)) is a case in which—

(a) at least one of the offences charged by the indictment against at least one of the persons charged is an offence carrying a maximum of at least 10 years' imprisonment; and

(b) it appears to the judge that evidence on the indictment reveals that conduct in respect of which that offence is charged had a terrorist connection.

(2) The purposes are those of—

(a) identifying issues which are likely to be material to the verdict of the jury;

(b) assisting their comprehension of any such issues;

(c) expediting the proceedings before the jury;

(d) assisting the judge's management of the trial;

(e) considering questions as to the severance or joinder of charges.

[**(2)** The purposes are those of—

(a) identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial,

(b) if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them,

(c) determining an application to which section 45 of the Criminal Justice Act 2003 applies,

(d) assisting the judge's management of the trial,

(e) considering questions as to the severance or joinder of charges.]

(3) In a case in which it appears to a judge of the Crown Court that evidence on an indictment reveals a case of fraud of such seriousness or complexity as is mentioned in section 7 of the Criminal Justice Act 1987 (preparatory hearings in cases of serious or complex fraud)—

(a) the judge may make an order for a preparatory hearing under this section only if he is required to do so by subsection (1B) or (1C);

(b) before making an order in pursuance of either of those subsections, he must determine whether to make an order for a preparatory hearing under that section; and

(c) he is not required by either of those subsections to make an order for a preparatory hearing under this section if he determines that an order should be made fora preparatory hearing under that section; and, in a case in which an order is made for a preparatory hearing under that section, requirements imposed by those subsections apply only if that order ceases to have effect.

(4) An order that a preparatory hearing shall be held may be made—

(a) on the application of the prosecutor,

(b) on the application of the accused or, if there is more than one, any of them, or

(c) of the judge's own motion.

(5) The reference in subsection (1)(a) to the time when the jury are sworn includes the time when the jury would be sworn but for the making of an order under Part 7 of the Criminal Justice Act 2003.

(6) In this section 'terrorism offence' means—

(a) an offence under section 11 or 12 of the Terrorism Act 2000 (offences relating to proscribed organisations);

(b) an offence under any of sections 15to 18 of that Act (offences relating to terrorist property);

(c) an offence under section 38B of that Act (failure to disclose information about acts of terrorism);

(d) an offence under section 54 of that Act (weapons training);

(e) an offence under any of sections 56 to 59 of that Act (directing terrorism, possessing things and collecting information for the purposes of terrorism and inciting terrorism outside the United Kingdom);

(f) an offence in respect of which there is jurisdiction by virtue of section 62 of that Act (extra-territorial jurisdiction in respect of certain offences committed outside the United Kingdom for the purposes of terrorism etc.);

(g) an offence under Part 1 of the Terrorism Act 2006 (miscellaneous terrorist related offences);

(h) conspiring or attempting to commit a terrorism offence;

(i) incitement to commit a terrorist offence.

(7) For the purposes of this section an offence carries a maximum of at least 10 years' imprison-ment if—

(a) it is punishable, on conviction on indictment, with imprisonment; and

(b) the maximum term of imprisonment that may be imposed on conviction on indictment of that offence is 10 years or more or is imprisonment for life.

(8) For the purposes of this section conduct has a terrorist connection if it is or takes place in the course of an act of terrorism or is for the purposes of terrorism.

(9) In subsection (8) 'terrorism' has the same meaning as in the Terrorism Act 2000 (see section 1 of that Act).

[Note: The version of s. 29(2) displayed in square brackets is in force only in respect of applications under the CJA 2003, s. 44 (jury tampering). Section 29(6)(i) is to be read as a reference to an offence under Part 2 of the SCA 2007: see SCA 2007, s. 63 and sch. 6, para. 29.]

30. If a judge orders a preparatory hearing—

(a) the trial shall start with that hearing, and

(b) arraignment shall take place at the start of that hearing, unless it has taken place before then.

31. —(1) At the preparatory hearing the judge may exercise any of the powers specified in this section.

(2) The judge may adjourn a preparatory hearing from time to time.

(3) He may make a ruling as to—

(a) any question as to the admissibility of evidence;

(b) any other question of law relating to the case;

(c) any question as to the severance or joinder of charges.

(4) He may order the prosecutor—

(a) to give the court and the accused or, if there is more than one, each of them a written statement (a case statement) of the matters falling within subsection (5);

(b) to prepare the prosecution evidence and any explanatory material in such a form as appears to the judge to be likely to aid comprehension by a jury and to give it in that form to the court and to the accused or, if there is more than one, to each of them;

(c) to give the court and the accused or, if there is more than one, each of them written notice of documents the truth of the contents of which ought in the prosecutor's view to be admitted and of any other matters which in his view ought to be agreed;

(d) to make any amendments of any case statement given in pursuance of an order under paragraph (a) that appear to the judge to be appropriate, having regard to objections made by the accused or, if there is more than one, by any of them.

(5) The matters referred to in subsection (4)(a) are—

(a) the principal facts of the case for the prosecution;

(b) the witnesses who will speak to those facts;

(c) any exhibits relevant to those facts;

(d) any proposition of law on which the prosecutor proposes to rely;

(e) the consequences in relation to any of the counts in the indictment that appear to the prosecutor to flow from the matters falling within paragraphs (a) to (d).

(6) Where a judge has ordered the prosecutor to give a case statement and the prosecutor has complied with the order, the judge may order the accused or, if there is more than one, each of them—

(b) to give the court and the prosecutor written notice of any objections that he has to the case statement;

(7) Where a judge has ordered the prosecutor to give notice under subsection (4)(c) and the prosecutor has complied with the order, the judge may order the accused or, if there is more than one, each of them to give the court and the prosecutor a written notice stating—

(a) the extent to which he agrees with the prosecutor as to documents and other matters to which the notice under subsection (4)(c) relates, and

(b) the reason for any disagreement.

(8) A judge making an order under subsection (6) or (7) shall warn the accused or, if there is more than one, each of them of the possible consequence under section 34 of not complying with it.

(9) If it appears to a judge that reasons given in pursuance of subsection (7) are inadequate, he shall so inform the person giving them and may require him to give further or better reasons.

(10) An order under this section may specify the time within which any specified requirement contained in it is to be complied with.

(11) An order or ruling made under this section shall have effect throughout the trial, unless it appears to the judge on application made to him that the interests of justice require him to vary or discharge it.

32. —(1) This section applies where—

(a) a judge orders a preparatory hearing, and

(b) he decides that any order which could be made under section 31(4) to (7) at the hearing should be made before the hearing.

(2) In such a case—

(a) he may make any such order before the hearing (or at the hearing), and

(b) section 31(4) to (11) shall apply accordingly.

34. —(1) Any party may depart from the case he disclosed in pursuance of a requirement imposed under section 31.

(2) Where—

(a) a party departs from the case he disclosed in pursuance of a requirement imposed under section 31, or

(b) a party fails to comply with such a requirement,

the judge or, with the leave of the judge, any other party may make such comment as appears to the judge or the other party (as the case may be) to be appropriate and the jury or, in the case of a trial without a jury, the judge may draw such inference as appears proper.

(3) In doing anything under subsection (2) or in do anything under it the judge shall have regard—

(a) to the extent of the departure or failure, and

(b) to whether there is any justification for it.

(4) Except as provided by this section, in the case of a trial with a jury no part—

(a) of a statement given under section 31(6)(a), or

(b) of any other information relating to the case for the accused or, if there is more than one, the case for any of them, which was given in pursuance of a requirement imposed under section 31, may be disclosed at a stage in the trial after the jury have been sworn without the consent of the accused concerned.

APPEALS FROM PREPARATORY HEARINGS

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D15.64

There are provisions for appealing from rulings made by the judge at a preparatory hearing to the Court of Appeal and, ultimately, the Supreme Court (see the CPIA 1996, ss. 35 and 36; CJA 1987, s. 9(11), and CrimPR Part 37). Leave to appeal is required from either the judge or the court (ibid.).

Where leave to appeal has been granted, the preparatory hearing may continue, but it cannot be concluded until the appeal has been determined or abandoned (s. 35(2); s. 9(13)). The Court of Appeal may confirm, reverse or vary the decision appealed against (s. 35(3); s. 9(14)).

The Court of Appeal only has jurisdiction to entertain appeals from orders that the Crown Court was entitled to make within a preparatory hearing (though the pool of orders which may be appealed has potentially been dramatically increased by *H* [2007] UKHL 7, [2007] 2 AC 270: see D15.58).

CrimPR Part 37 (see Supplement, R37.1 ***et seq.)*** contains the relevant procedural rules in relation to an appeal from a preparatory hearing to the Court of Appeal, and Part 43 (see Supplement, R43.1 ***et seq.)*** addresses appeals to the Supreme Court in this context.

End of Document

The Rules

Blackstone's Criminal Practice 2022 > PART D PROCEDURE > Section D15 Trial on Indictment: General Matters and Pre-trial Procedure > APPEALS FROM PREPARATORY HEARINGS

D15.65

Notice of Appeal An application for leave to the judge of the Crown Court who made the decision to be appealed should be made within two days of the relevant decision. Un-less the application for leave is made on the same occasion that the relevant decision is given, the appellant must give written notice of the application (and specify the grounds upon which it is made) to the Crown Court officer and all the parties affected by the decision (r. 37.4(1)).

Under r. 37.2(1) and (2), notice of appeal or an application to the Court of Appeal for leave to appeal must be served on the Registrar, the Crown Court officer and all parties to the preparatory hearing affected by the order or ruling to be appealed. It must be served no later than five days after either the date of the decision to be appealed or the determination or withdrawal of any application for leave has been made to the judge of the Crown Court.

By implication and in accordance with the rationale of the Court of Appeal in *PY* [2019] EWCA Crim 17, [2019] 1 Cr App R 22 (297) it would be possible for the prosecution to give notice of their intention to appeal by email.

If written notice of appeal was given to the Crown Court, a copy of it must accompany the notice or application for leave to appeal which is served on the Registrar (r. 37.3(2)(g)). The notice of appeal must (r. 37.3(2)):

(a) specify any question of law to which the appeal relates and include any facts which are necessary for the consideration of that point of law;

(b) summarise the arguments to be advanced before the Court of Appeal;

(c) list any authorities which are to be cited in argument; and

(d) if the judge of the Crown Court has given leave to appeal against his ruling, the notice must refer to that and must set out the grounds on which leave was granted.

The notice should be accompanied by any documents or other things which are necessary for the proper determination of the appeal or application as the case may be (r. 37.3(2)(v)).

D15.66

Response to a Notice of Appeal Pursuant to CrimPR 37.5, if the respondent wishes to oppose the appeal then, within five days of receipt of the notice, the respondent must serve written notice to that effect in the form set out in the Crim PD. The notice must be served on the Registrar and must state the date on which the appellant's notice was received, summarise the response to the arguments to be advanced by the appellant and set out any authorities the respondent proposes to rely on. Copies must also be served on the Crown Court officer, the appellant and any other parties directly affected by the decision (r. 37.5).

D15.67

Role of the Court The powers of a single judge of the Court of Appeal are set out in CrimPR 37.6 and may be exercised as though they were being exercised by the full court. Thus the single judge may give leave to appeal under the appropriate section, extend the time-limit for service of the notice of application and opposition, and give

leave for a person in custody to attend a hearing. Any application refused by a single judge can be renewed before the full Court under r. 37.7 by means of service of a written notice.

D15.68
Criminal Procedure and Investigations Act 1996, ss. 35 and 36

35. —(1) An appeal shall lie to the Court of Appeal from any ruling of a judge under section 31(3), from the refusal by a judge of an application to which section 45 of the Criminal Justice Act 2003 applies or from an order of a judge under section 43 or 44 of that Act which is made on the determination of such an application but only with the leave of the judge or of the Court of Appeal.

(2) The judge may continue a preparatory hearing notwithstanding that leave to appeal has been granted under subsection (1), but the preparatory hearing shall not be concluded until after the appeal has been determined or abandoned.

(3) On the termination of the hearing of an appeal, the Court of Appeal may confirm, reverse or vary the decision appealed against.

36....

(2) The judge may continue a preparatory hearing notwithstanding that leave to appeal has been granted under Part II of the Criminal Appeal Act 1968, but the preparatory hearing shall not be concluded until after the appeal has been determined or abandoned.

Section 9(11), (13) and (14) of the CJA 1987, which creates a right of appeal in serious and complex fraud cases, is in identical terms to the CPIA 1996, s. 35. It is possible to challenge the ruling of the Court of Appeal in such an interlocutory appeal by a further appeal to the Supreme Court.

PRE-TRIAL PROVISION OF INFORMATION: PROSECUTION OBLIGATIONS

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D15.69

Regardless of whether the trial is preceded by a preliminary or preparatory hearing, certain obligations rest upon the parties to disclose information about the evidence they intend to call or other material which is in their possession but which they do not intend to use at trial.

End of Document

Service of Evidence to Be Called

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D15.70

The defence at trial on indictment are entitled to know in advance of trial the evidence the prosecution intend to call. Most if not all the evidence will in fact have been disclosed by the statements or depositions. If the prosecution wish to call additional evidence, they are under a duty to serve notice of it.

In *Owens* [2006] EWCA Crim 2206, the Court of Appeal held that, even where a court had ordered that evidence would only be admissible if served before a certain date, it retained the discretion to vary that order to admit evidence served later.

Disclosure of Information Not Intended to Be Used as Evidence

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D15.71

The prosecution's duty to be fair to the defence extends to disclosing information which will not be part of their case and might even contradict their case, and of which the defence might otherwise be unaware. This obligation is now set out in the CPIA 1996, Part I (see D9 for details).

End of Document

Custody Record etc.

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D15.72

By PACE Code C, para. 2.4, the defence are entitled to a copy of the custody record which the custody officer is required to keep in respect of each person detained at a police station (see Supplement, PACE CODE C). Failure to supply a copy would be a breach of the Code and might lead to the exclusion of evidence through exercise of the court's discretion under the PACE 1984, s. 78 (see F2.9). Similarly, if the accused was stopped in the street and searched under the powers given to the police by the PACE 1984, s. 1, the defence are entitled to a copy of the record of search (see s. 2(9)).

PRE-TRIAL PROVISION OF INFORMATION: DEFENCE OBLIGATIONS

Blackstone's Criminal Practice 2022 > PART D PROCEDURE > Section D15 Trial on Indictment: General Matters and Pre-trial Procedure

D15.73

Historically, there was no general obligation on the defence to disclose the nature of their case, or the evidence they proposed to call before trial. The position altered radically with the implementation of the CPIA 1996, Part I (see D9 for details), which applies to alleged offences for which no criminal investigation began before 1 April 1997 (see D9.4) and is addressed in the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases, issued in December 2013 (see D9). In *R* [2015] EWCA Crim 1941, [2016] 1 WLR 1872 the importance of defence co-operation and engagement with the disclosure process from its initial stages was stressed (see D15.62).

Defence Statement

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D15.74

Under the CPIA 1996, s. 5, once the prosecution case has been served the defence are required to provide the court and prosecution with a defence statement, setting out in general terms the nature of the defence, and indicating the principal matters on which they take issue with the prosecution. The requirements are defined by s. 6A (see D9.30 and the Judicial Disclosure Protocol, para.17 (see Supplement, **A-G's Guidelines: Disclosure for Investigators, Prosecutors and Defence Practitioners**). Where a preparatory hearing is held in a case of serious fraud, the defence may similarly be ordered to supply a written statement setting out the nature of the defence (CJA 1987, s. 9(5)).

Expert Evidence

Blackstone's Criminal Practice 2022 > PART D PROCEDURE > Section D15 Trial on Indictment: General Matters and Pre-trial Procedure > PRE-TRIAL PROVISION OF INFORMATION: DEFENCE OBLIGATIONS

D15.75

By the PACE 1984, s. 81, rules may require any party to proceedings before the court to disclose to the other parties any expert evidence which the party proposes to adduce. CrimPR Part 19 and the robust provisions of Crim PD V, Part 19 (see Supplement, R19.1 ***et seq***. and CPD.19A ***et seq.***), contain the rules that apply under this power.

D15.76

Application The rules apply to both the prosecution and defence, but those relating to service have less relevance to the prosecution because prosecution expert evidence (like the ordinary prosecution evidence) will normally be disclosed by other means. For example, the statement that experts are required to make as to their understanding of the rules (CrimPR 19.4(j) and (k), and Crim PD V, para, 19B.1; see Supplement, R19.4 and CPD.19B**)** is not limited to experts instructed for the defence.

D15.77

Content of the Rules CrimPR 19.3 sets out the procedure for a party to seek to have a summary of an expert's conclusions admitted as a fact and the steps to be taken where a party seeks to have expert evidence admitted when it is not agreed. On request, a copy of the record of any 'examination, measurement, test, or experiment' on which the finding or opinion is based must be supplied or, if it is more practicable, reasonable opportunity to inspect such a record must be allowed; the duty also applies to anything on which the procedure was carried out (r. 19.3(3)(d)). Once expert opinion has been served, the court may direct a meeting of experts to discuss the issues and to prepare a statement of those matters on which they agree and disagree (r. 19.6(2), supplemented by Crim PD V, paras. 19C.1 to 19C.8). Alternatively, where several defendants give notice that they will seek to rely on expert opinion going to the same issue, the court may direct that only one expert should be instructed on their joint behalf (r. 19.7).

D15.78

Breaches of the Rules Failure to comply with the rules means that the expert evidence will be admissible at trial only with leave of the court or agreement of every other party (CrimPR 19.3(4)). The court retains the power to extend time-limits for compliance with these rules, even after their expiry (r. 19.9(1)). In *Ensor* [2009] EWCA Crim 2519, [2010] 1 Cr App R 18 (255), the Court of Appeal stressed that the CrimPR obliged the parties to give notice of their reliance on an expert, and to serve the report of that expert, at the earliest practicable moment; failure to do so entitled the trial judge to exclude that report (see also F11.46). (See also *Writtle v DPP* [2009] EWHC 236 (Admin) and D4).

PRE-TRIAL DISCLOSURE OF THIRD-PARTY MATERIAL

Blackstone's Criminal Practice 2022 > PART D PROCEDURE > Section D15 Trial on Indictment: General Matters and Pre-trial Procedure

D15.79

Another important area of pre-trial disclosure relates to material in the possession of third parties. This will include records held by health and education authorities, or financial institutions. Although applications for such material may commonly be made on behalf of the accused, under para. 51 of the A-G's Guidelines: Disclosure of information for criminal proceedings (set out at Supplement, **A-G's Guidelines: Disclosure for Investigators, Prosecu-tors and Defence Practitioners**), the prosecution is placed under an obligation to obtain material in the hands of third parties which might be relevant to the prosecution case. Such disclosure is addressed in the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases, issued in December 2013 (see D9).

In either event, the mechanism for securing disclosure of third-party material, unless it is volunteered, is through the issuing of a witness summons for the production of documents, pursuant to the Criminal Procedure (Attendance of Witnesses) Act 1965, s. 2A. These provisions are set out at D15.94, and this topic is addressed in more detail at D9.71.

The Criminal Procedure (Amendment) Rules 2021 (SI 2021 No. 40) amend CrimPR Part 3 to include at r. 3.3(2)(e) a requirement that parties alert the Crown Court to related family proceedings, and at r. 3.5(2)(i) the Court has the power to request information from those proceedings.

PRIVATE MEETING BETWEEN JUDGE AND COUNSEL

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D15.80

Before or during the trial, counsel may, with the judge's agreement, see the judge privately about the case. The basic principles are contained in Lord Parker CJ's observations in *Turner* [1970] 2 QB 321 at p. 324, modified in the light of the decision of the five-judge Court of Appeal in *Goodyear* [2005] EWCA Crim 888, [2005] 2 Cr App R 20 (281) (see also D12.61 and Crim PD VI, para. 26N.1: see Supplement, CPD.26N). The guidance is as follows.

(a) Freedom of access between counsel and judge is essential. This is because there may be matters calling for communication or discussion which cannot, in the interests of the client, be mentioned in open court.

(b) It is imperative that so far as possible justice be administered in open court. Counsel should therefore ask to see the judge only when it is felt to be really necessary. Equally, the judge should be careful to treat communications made out of court as private only when fairness to the accused so requires. In *Llewellyn* (1978) 67 Cr App R 149, the Court of Appeal criticised a trial judge who had asked counsel to come to see him so that they could discuss whether the trial should proceed on a single count for conspiracy or on two conspiracy counts as in the indictment or on charges of substantive offences. The issues should have been aired publicly and a full shorthand note taken which, *inter alia*, might assist the Court of Appeal should the judge's decision later be challenged on appeal.

(c) Any private discussion that does take place should be between the judge and both prosecuting and defence counsel, regardless of who asked for the meeting. If in court, the defence solicitor should also be allowed to attend if so wished.

(d) In *Goodyear,* Lord Woolf CJ made it clear (at [67]) that private meetings between judge and counsel should not act as a vehicle for plea bargaining.

D15.81

Recording the Meeting Where such a meeting occurs it is essential that a record is made. In *Smith (Terence Carl)* [1990] 1 All ER 634, Russell LJ put it this way (at p. 1314B—C):

> Of course, on the authority of the well known case of *Turner* [1970] 2 QB 321, in some circumstances it is permissible for counsel to see the judge in his room to ascertain his reaction to possible sentencing options open to him. But that should never occur, as has been said on almost innumerable occasions in this court, in the absence of a shorthand note-taker or, alternatively, in the absence of some recording device.

His lordship went on to quote with approval the words of Mustill LJ in *Harper-Taylor* (1988) 138 NLJ 80 at pp. 80—1, which encapsulate the problems posed by 'unnecessary visits to the judge's room':

> A first principle of criminal law is that justice is done in public, for all to see and hear. By this standard a meeting in the judge's room is anomalous: the essence, and indeed the purpose, being that neither the defendant nor the jury nor the public are there to hear what is going on. Undeniably, there are circumstances where the public must be excluded. Equally, the jury cannot always be kept in court throughout. The withdrawal of the proceedings into private, without even the defendant being there, is another matter. It is true, as this court stated in *Turner* [1970] 2 QB 321 at p. 326, that there must be freedom of access between counsel and

the judge when there are matters calling for communications or discussions of such a nature that counsel cannot in the interests of his client mention them in open court. Criminal trials are so various that a list of situations where an approach to the judge is permissible would only mislead; but it must be clear that communications should never take place unless there is no alternative.

Apart from the question of principle, seeing the judge in private creates risks of more than one kind, as the present case has shown. The need to solve an immediate practical problem may combine with the more relaxed atmosphere of the private room to blur the formal outlines of the trial. ... in particular, there is a risk that counsel and solicitors for the other parties may hear something said to the judge which they would rather not hear, putting them into a state of conflict between their duties to their clients, and their obligation to maintain the confidentiality of the private room.

The absence of the defendant is also a potential source of trouble. He has to learn what the judge has said at second hand, and may afterwards complain (rightly or not) that he was not given an accurate account. Equally, he cannot hear what his counsel has said to the judge, and hence cannot intervene to correct a misstatement or an excess of authority ...

PRESENCE OF THE ACCUSED AT TRIAL

The Principle

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D15.82

As a general principle, an accused should be present throughout the trial. The attendance of the accused at the Crown Court is secured by the magistrates remanding in custody or on bail when the case is sent for trial. If, having been bailed, the accused fails to attend on the day notified as the day of trial, a bench warrant may be issued forthwith for the accused's arrest under the BA 1976, s. 7 (see D7.98).

The accused must be present at the commencement of a trial on indictment in order to plead (see also *Hamou* [2019] EWCA Crim 281, [2019] 4 WLR 149 at D15.85). It is then the almost invariable practice for the accused to be present throughout the trial. The implication of this rule is that the accused must not only be physically present, but must have the proceedings interpreted if that is necessary *(Kunnath v The State* [1993] 4 All ER 30). CrimPR 25.2(1)(b) (see Supplement, R25.2) provides that the court must not proceed if the accused is absent, unless the court is satisfied that the accused has waived the right to attend and the trial will still be fair despite the accused's absence.

By extension, this also means that the judge ought not to deal with matters which constitute part of the trial proceedings in the absence of counsel for the defence. For example, in *Coolledge* [1996] Crim LR 748, an appeal was allowed because the judge inquired of a witness in chambers and in the absence of defence counsel as to the reason why he had failed to attend court to give evidence. The Court of Appeal held that counsel should not have been excluded since the procedure went beyond a mere inquiry, and affected the conduct of the trial itself, which was therefore tainted.

Exceptions to the Principle

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D15.83

Notwithstanding this general rule, the accused's presence may be dispensed with in exceptional circumstances (per Lord Reading CJ in *Lee Kun* [1916] 1 KB 337 at p. 341). The situations in which the court may be justified in proceeding without the accused are as follows.

(a) as a result of the misbehaviour of the accused (see D15.86);

(b) where his absence is voluntary;

(c) when the accused is too ill to attend;

(d) following the death of the accused.

Each of these circumstances and various related matters is considered below.

D15.84

Principles to be Considered In *Hayward* [2001] EWCA Crim 168, [2001] QB 862, the Court of Appeal considered the principles which the trial judge ought to apply when dealing with an absent defendant, and summarised them as follows.

(a) An accused has, in general, a right to be present at the trial and a right to be legally represented.

(b) Those rights can be waived, separately or together, wholly or in part, by the accused:

(i) they may be wholly waived if, knowing or having the means of knowledge as to when and where the trial is to take place, the accused is deliberately and voluntarily absent and/or withdraws instructions from legal representatives;

(ii) they may be waived in part if, being present and represented at the outset, the accused, during the course of the trial, behaves in such away as to obstruct the proper course of the proceedings and/or withdraws instructions from legal representatives.

(c) The trial judge has a discretion as to whether a trial should take place or continue in the absence of an accused and/or the accused's legal representatives. The judge is required to warn the defendant at the PTPH of the risk of the trial continuing in the defendant's absence (CrimPR 3.21(2); see Supplement, R3.21).

(d) That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the accused is unrepresented.

(e) In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular:

(i) the nature and circumstances of the accused's behaviour in being absent from the trial or disrupting its continuation, and, in particular, whether the behaviour was deliberate, voluntary and such as plainly waived the right to appear;

(ii) whether an adjournment might result in the accused being caught or attending voluntarily and/or not disrupting the proceedings;

(iii) the likely length of such an adjournment;

(iv) whether the accused, though absent, is, or wishes to be, legally represented at the trial or has waived the right to representation;

(v) the extent to which the absent accused's legal representatives are able to present the defence;

(vi) the extent of the disadvantage to the accused in not being able to give his or her account of events, having regard to the nature of the evidence;

(vii) the risk of the jury reaching an improper conclusion about the absence of the accused (but see (f) below);

(viii) the seriousness of the offence to the accused, victim and public;

(ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;

(x) the effect of delay on the memories of witnesses;

(xi) where there is more than one accused and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.

(f) If the judge decides that a trial should take place or continue in the absence of an unrepresented accused, the judge must ensure that the trial is as fair as the circumstances permit. In particular, reasonable steps must be taken, both during the giving of evidence and in the summing-up, to expose weaknesses in the prosecution case and to make such points on behalf of the accused as the evidence permits. In summing-up the judge must warn the jury that absence is not an admission of guilt and adds nothing to the prosecution case.

D15.85

The clear emphasis in *Hayward* was on the need for caution before proceeding to try a defendant in his absence. In view of the need to ensure compliance with the ECHR, Article 6, that caution is entirely proper. For the same reason, it is entirely proper that the focus in determining whether to proceed should be upon the accused's right to attend the trial and be represented at it.

The principles outlined by the Court of Appeal in *Hayward* were considered and commended by the House of Lords in *Jones (Anthony William)* [2002] UKHL 5, [2003] 1 AC 1. Lord Bingham endorsed the Court of Appeal's guidelines with two reservations:

(1) the seriousness of the offence should not be considered— the principles would be the same whether the offence was serious or minor; and

(2) even if the accused absconded voluntarily, it would generally be desirable that the accused should be represented. It was emphasised that it was a step to be taken with 'great caution and close regard to the overall fairness of the proceedings'. In *Amrouchi* [2007] EWCA Crim 3019, relying on those observations, Hughes LJ said it was a step that should only be taken when it was 'unavoidable'.

In *Lopez* [2013] EWCA Crim 1744, the Court of Appeal observed that the decision to proceed with a trial in the absence of an accused was one that had to be approached with the utmost care and that such a course should be adopted only in rare cases and only after consideration had been given to all relevant matters and in particular the fairness of the trial. Where D's defence involved the retraction of admissions made to the police in interview, his presence at his trial was of importance. In *R (Drinkwater) v Solihull Magistrates' Court* [2012] EWHC 765 (Admin),

the Administrative Court emphasised that expedition should not be a reason to continue a trial in the absence of the accused.

In a multi-handed case where one defendant was voluntarily absent, the impact of evidence relevant to that defendant being adduced in the trial of others had to be considered, and the possibility of severing the absent defendant to avoid prejudice to others considered *(Hamou* [2019] EWCA Crim 281, [2019] 4WLR 149).

Crim PD III, para. 14E.1, also addresses trials in the absence of the accused (see Supplement, CPD.14E). See also *Rebihi* [2012] EWCA Crim 2481, and the *Crown Court Compendium,* ch. 3-3, for the proper direction that should be given to the jury if the trial is to continue in the absence of the accused.

D15.86

Misbehaviour of the Accused If the accused behaves in an unruly fashion in the dock, e.g., by shouting out, or is apparently trying to intimidate jurors or witnesses, and thereby makes it impracticable for the hearing to continue, the judge may order that the accused be removed from court and that the trial proceed in the accused's absence (*Lee Kun* [1916] 1 KB 337).

In practice, the judge would warn the accused before taking the extreme step of barring from court, and it may be appropriate to permit a return to the dock at a later stage if the accused undertakes not to repeat the unruly behaviour. Unruly behaviour may also be deterred by the threat of holding the accused to be guilty of a contempt in the face of the court (see B14.89). An accused should not be handcuffed in the dock unless there is a real risk of violence or escape and there is no alternative to visible restraint *(Horden* [2009] EWCA Crim 388, [2009] 2 Cr App R 24 (406)).

Similarly, if the accused refuses to be brought into court from the cells, the trial judge is entitled to proceed without the accused where the right to be present has been unequivocally waived *(Smith (Henry Lee)* [2006] EWCA Crim2307). As is made clear at CrimPR25.2(1)(b), and was repeated in *Hussain* [2018] EWCA Crim 1785, the discretion to continue in the absence of the accused is to be approached with great caution and with close regard to the fairness of the proceedings. It may often be better to allow time to cool off, and to continue the trial in the accused's presence.

D15.87

Voluntary Absence of the Accused If the accused, having been present for the commence-ment of his trial, later goes voluntarily absent, either by escaping from custody or by failing to surrender having been bailed by the court for the period of an adjournment, the judge has a discretion to complete the trial in the accused's absence *(Jones (Robert Edward Wynyard) (No. 2)* [1972] 2 All ER 731). Should the accused be convicted, sentence may also be passed in the accused's absence *(Jones (No. 2)).* In *Simms* [2016] EWCA Crim 9, it was held that the same principle applied where D had voluntarily rendered himself incapable of participation in the trial through intoxication (or through a self-induced drug psychosis: *Ehi-Palmer* [2016] EWCA Crim 1844).

Whether to proceed in the accused's absence must, however, be a matter for the judge's discretion. In *Amrouchi* [2007] EWCA Crim 3019, the Court of Appeal identified questions relevant to the exercise of that discretion including whether (a) D had deliberately absented himself and (b) there were reasonable steps that could be taken to secure his attendance.

In *Hamou* [2019] EWCA Crim 281, [2019] 4 WLR 149, the Court of Appeal restated that a trial can proceed in the absence of an accused who has not been arraigned, however, the court was first required to be satisfied that the accused had waived the right to be arraigned. If the indictment had been amended after the accused had absconded, it could not necessarily be assumed that the accused had waived the right to be arraigned on that amended indictment, although this also depended on a fact-specific analysis.

The alternative is to discharge the jury from giving a verdict, thus allowing a retrial to take place before a different jury once the accused's presence has been secured. This exercise of discretion involved more than an assessment

of the adequacy of the evidence to explain the accused's absence, and required an assessment of fairness *(R (Rathor) v Southampton Magistrates' Court* [2018] EWHC 3278 (Admin)). Whether or not the court proceeds in the accused's absence, the judge may and almost certainly will issue a warrant for the accused's arrest under the BA 1976, s. 7 (see D7.98).

D15.88

Absent Defendant's Legal Representatives The position of defence legal representatives when a trial continues in the absence of an accused who has absconded was considered in *Shaw* [1980] 2 All ER 433. The accused's instructions are not deemed to have been withdrawn and counsel and solicitor are not therefore automatically required to withdraw from the case. Whether counsel should continue to act and to what extent are essentially matters for counsel having regard to the guidance given in the Code of Conduct of the Bar (per Kilner Brown J in *Shaw* at p. 1529G). Counsel can advance existing instructions and even fresh instructions provided by the offender after having absconded *(Pomfrett* [2009] EWCA Crim 1939, [2010] 2 Cr App R 28 (281)).

In *Kepple* [2007] EWCA Crim 1339, the Court of Appeal said that counsel was entitled to cross-examine witnesses in the continuation of the trial of an absent accused, providing he considered that he had sufficient instructions to do so, as long as he did not suggest what the absent accused's account would have been.

Where an accused absconds and is convicted in his or her absence, the limited circumstances in which legal representatives (assuming they have chosen not to withdraw) may give notice of appeal on the accused's behalf are dealt with at D26.14.

D15.89

Sickness of the Accused If the accused's absence from court is for reasons beyond the accused's control, the trial may *not* continue in his or her absence unless the accused consents (see, e.g., the dicta of Williams J in *Abrahams* (1895) 21 VLR 343, adopted by Roskill LJ in *Jones (Robert Edward Wynyard) (No. 2)* [1972] 2 All ER731) or if the case can be fully presented, including the accused's own written evidence, without unfairness (*Hamberger* [2017] EWCA Crim 273, [2017] 2 Cr App R 9 (81)).

The obvious and common example of involuntary absence is sickness. Thus, should the accused become ill during the course of the trial, the judge must either adjourn the case until the accused recovers or discharge the jury *(Howson* (1981) 74 Cr App R 172; *Kaur* [2013] EWCA Crim 590). If the court is not satisfied with the adequacy of the evidence of illness it should provide an opportunity for further evidence to be provided before continuing the trial in the accused's absence, and must always have regard to fairness (*R (Rathor) v Southampton Magistrates' Court* [2018] EWHC 3278 (Admin)). Possible exceptions to this proposition include:

(a) As mentioned in *Howson*, if there are several accused and one falls sick, the trial may continue in that accused's absence provided that the evidence and proceedings relate entirely to the cases against the co-accused and have no possible bearing on the absent accused's case.

(b) Where D's voluntary ingestion of drugs makes his participation in the trial impossible, the situation may well be otherwise *(Simms* [2016] EWCA Crim 9).

(c) Where D had a heart condition preventing his attendance but it was considered that his counsel were able to argue his case effectively and he was given the opportunity to give written evidence *(Hamberger).*

The decision in *Howson* also indicates that it is not enough for an accused to be physically present if too unwell to pay proper attention to the proceedings and give instructions to legal representatives. However, in *F* [2018] EWCA Crim 2693, the judge was found to have been correct to continue with the trial of an elderly hospitalised defendant by reference to factors such as the long delays in bringing the case to trial; the many adjournments which had already been granted; the interests of witnesses, including the complainant; and, crucially, whether the appel-lant's counsel was fully instructed and able to represent his interests without him being present.

D15.90

Death of the Accused Where the accused dies before the trial is completed, formal evidence of death should be given, and endorsed upon the indictment. This may, for example, be the evidence of the officer in the case that the officer has seen and identified the remains of the person named in the indictment. If such evidence is not available, other evidence such as a certified copy of the entry in the register of deaths will suffice. The endorsement of the indictment in such circumstances renders it of no legal effect. In such circumstances, the court has no discretion to take verdicts already reached but not delivered by the jury *(Turk* [2017] EWCA Crim 391, [2017] 2 Cr App R 2 (14)).

ATTENDANCE OF WITNESSES

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Securing the Attendance of Witnesses

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D15.91

In most cases, it is the responsibility of the police to secure the attendance of prosecution witnesses, and that of the defence solicitor to ensure that defence witnesses attend. The steps taken will depend on the sensitivity of the witness and whether there is a fixed date for trial, or whether the case is in a warned list in which case an accused, for example, would need to keep in daily contact with solicitors during the period in which the case might be called on.

D15.92

Compelling Attendance Where the prosecution or defence wish to secure the attendance of a witness but are not satisfied that the witness will attend voluntarily, they can apply for a witness summons. The procedure is set out in the Criminal Procedure (Attendance of Witnesses) Act 1965, ss. 2 to 3, which are set out at D15.94, and CrimPR 17.3 to 17.4 (see Supplement, R17.3 ***et seq****.).*

The same provisions are used to secure the production of documents, rather than the attendance of a witness, as evidence. The use of the provisions for this purpose is particularly pertinent to the disclosure of material in the possession of third parties, which is discussed at D15.79 and D9.72.

D15.93

Punishment for Failure to Attend A person who 'without just excuse' disobeys a witness order or summons requiring the person to attend court is guilty of contempt of the court that the person fails to attend (Criminal Procedure (Attendance of Witnesses) Act 1965, s. 3(1)). The person may be summarily punished as if having committed a contempt in the court's face (ibid.); it is desirable and appropriate for the judge who issued the warrant to deal in person with the witness *(Yusuf* [2003] EWCA Crim 1488, [2003] 2 Cr App R 32 (488)). The maximum penalty is three months' imprisonment (s. 3(2)). It was stressed in *Popat* [2008] EWCA Crim 1921 that it is disobedience of a summons which represents the contempt, and there is no requirement for an arrest warrant to have been issued in addition.

The existence of a 'just excuse' will not be lightly inferred. Witnesses are required to submit even to very substantial inconvenience in their business and private lives. Culpable forgetfulness can certainly never amount to a 'just excuse' *(Lennock* (1993) 97 Cr App R 228). However, the prosecution must prove beyond reasonable doubt that proper notification of the trial date was given *(Abdulaziz* [1989] Crim LR 717).

In *Wang* [2005] EWCA Crim 476, no witness summons had been issued at the time when D was warned that he might be needed at the Crown Court on a particular date. The Court of Appeal quashed his conviction. Nevertheless, the Court indicated that, if D had been warned that the prosecution would obtain a witness summons, and had gone to ground to evade it, a conviction under s. 3 of the 1965 Act, or at common law, might have been sustainable. This approach was approved in *Popat*.

In *R (H) v Wood Green Crown Court* [2006] EWHC 2683 (Admin), [2007] 1 WLR 1670, it was made clear that a witness may be remanded for as long as there is a real possibility that the witness may be required to give evidence, or further evidence, as the case may be.

D15.94

Criminal Procedure (Attendance of Witnesses) Act 1965, ss. 2 to 3

2. —(1) This section applies where the Crown Court is satisfied that—

(a) a person is likely to be able to give evidence likely to be material evidence, or produce any document or thing likely to be material evidence, for the purpose of any criminal proceedings before the Crown Court, and

(b) it is in the interests of justice to issue a summons under this section to secure the attendance of that person to give evidence or to produce the document or thing.

(2) In such a case the Crown Court shall, subject to the following provisions of this section, issue a summons (a witness summons) directed to the person concerned and requiring him to—

(a) attend before the Crown Court at the time and place stated in the summons, and

(b) give the evidence or produce the document or thing.

(3) A witness summons may only be issued under this section on an application; and the Crown Court may refuse to issue the summons if any requirement relating to the application is not fulfilled.

(4) Where a person has been sent for trial, for any offence to which the proceedings concerned relate, an application must be made as soon as is reasonably practicable after service on that person, in pursuance of regulations made under paragraph 1 of Schedule 3 to the Crime and Disorder Act 1998, of the documents relevant to that offence.

(5) [Repealed.]

(6) Where the proceedings concerned relate to an offence in relation to which a bill of indictment has been preferred under the authority of section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933 (bill preferred by direction of Court of Appeal, or by direction or with consent of judge) an application must be made as soon as is reasonably practicable after the bill was preferred.

(6A) Where the proceedings concerned relate to an offence that is the subject of a deferred prosecution agreement within the meaning of Schedule 17 to the Crime and Courts Act 2013, an application must be made as soon as reasonably practicable after the suspension of the proceedings is lifted under paragraph 2(3) of that Schedule.

(7) to (10) [Require compliance with the CrimPR and specify matters which may be covered by them.]

2A. A witness summons which is issued under section 2 above and which requires a person to produce a document or thing as mentioned in section 2(2) above may also require him to produce the document or thing—

(a) at a place stated in the summons, and

(b) at a time which is so stated and precedes that stated under section 2(2) above, for inspection by the person applying for the summons.

2B.— (1) If—

(a) a document or thing is produced in pursuance of a requirement imposed by a witness summons under section 2A above,

(b) the person applying for the summons concludes that a requirement imposed by the summons under section 2(2) above is no longer needed, and

(c) he accordingly applies to the Crown Court for a direction that the summons shall be of no further effect, the court may direct accordingly.

(2) and (3) [Require compliance with the CrimPR and specify matters which may be covered by them.]

2C.— (1) If a witness summons issued under section 2 above is directed to a person who—

(a) applies to the Crown Court,

(b) satisfies the court that he was not served with notice of the application to issue the summons and that he was neither present nor represented at the hearing of the application, and

(c) satisfies the court that he cannot give any evidence likely to be material evidence or, as the case may be, produce any document or thing likely to be material evidence, the court may direct that the summons shall be of no effect.

(2) For the purposes of subsection (1) above it is immaterial—

(a) whether or not Criminal Procedure Rules require the person to be served with notice of the application to issue the summons;

(b) whether or not Criminal Procedure Rules enable the person to be present or represented at the hearing of the application.

(3) In subsection (1)(b) above 'served' means—

(a) served in accordance with Criminal Procedure Rules, in a case where such rules require the person to be served with notice of the application to issue the summons;

(b) served in such way as appears reasonable to the court to which the application is made under this section, in any other case.

(4) The Crown Court may refuse to make a direction under this section if any requirement relating to the application under this section is not fulfilled.

(5) to (7) [Require compliance with the CrimPR and specify matters which may be covered by them.]

(8) Where a direction is made under this section that a witness summons shall be of no effect, the person on whose application the summons was issued may be ordered to pay the whole or any part of the costs of the application under this section.

(9) [Taxation and payment of costs.]

2D. For the purpose of any criminal proceedings before it, the Crown Court may of its own motion issue a summons (a witness summons) directed to a person and requiring him to—

(a) attend before the court at the time and place stated in the summons, and

(b) give evidence, or produce any document or thing specified in the summons.

2E. —(1) If a witness summons issued under section 2D above is directed to a person who—

(a) applies to the Crown Court, and

(b) satisfies the court that he cannot give any evidence likely to be material evidence or, as the case may be, produce any document or thing likely to be material evidence, the court may direct that the summons shall be of no effect.

(2) The Crown Court may refuse to make a direction under this section if any requirement relating to the application under this section is not fulfilled.

(3) and (4) [Require compliance with the CrimPR and specify matters which may be covered by them.]

3.—(1) Any person who without just excuse disobeys a witness summons requiring him to attend before any court shall be guilty of contempt of that court and may be punished summarily by that court as if his contempt had been committed in the face of the court.

(1A) Any person who without just excuse disobeys a requirement made by any court under section 2A above shall be guilty of contempt of that court and may be punished summarily by that court as if his contempt had been committed in the face of the court.

(2) No person shall by reason of any disobedience mentioned in subsection (1) or (1A) above be liable to imprisonment for a period exceeding three months.

The relevant rules are to be found in CrimPR Part 17 (see Supplement, R17.1 ***et seq.)***.

D15.95

Section 4 of the Act describes the powers available to ensure compliance with a witness summons.
Criminal Procedure (Attendance of Witnesses) Act 1965, s. 4

(1) If a judge of the Crown Court is satisfied by evidence on oath that a witness in respect of whom a witness summons is in force is unlikely to comply with the summons, the judge may issue a warrant to arrest the witness and bring him before the court before which he is required to attend: Provided that a warrant shall not be issued under this subsection unless the judge is satisfied by such evidence as aforesaid that the witness is likely to be able to give evidence likely to be material evidence or produce any document or thing likely to be material evidence in the proceedings.

(2) Where a witness who is required to attend before the Crown Court by virtue of a witness summons fails to attend in compliance with the summons, that court may—

(a) in any case, cause to be served on him a notice requiring him to attend the court forthwith or at such time as may be specified in the notice;

(b) if the court is satisfied that there are reasonable grounds for believing that he has failed to attend without just excuse, or if he has failed to comply with a notice under paragraph (a) above, issue a warrant to arrest him and bring him before the court.

(3) A witness brought before a court in pursuance of a warrant under this section may be remanded by that court in custody or on bail (with or without sureties) until such time as the court may appoint for receiving his evidence or dealing with him under section 3 of this Act; and where a witness attends a court in pursuance of a notice under this section the court may direct that the notice shall have effect as if it required him to attend at any later time appointed by the court for receiving his evidence or dealing with him as aforesaid.

Live Link

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D15.96

The use of a live link for the evidence of a witness is permitted by the YJCEA 1999, s. 24, the CJA 1988, s. 32, and the CJA 2003, s. 51.

In the context of the YJCEA 1999, references to live links are references to 'alive television link or other arrangements whereby a witness, whilst absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be heard and seen' by the judge, jury, justices, legal representatives, and interpreter for the accused (s. 24(8)). As to live links under the YJCEA 1999, see D14.44.

The procedure relating to live link directions other than in the context of 'special measures' is now set out in CrimPR 18.23 to 18.26 (see Supplement, R18.23 ***et seq***.). The application must be made using part B of the prescribed form. Under r. 18.23, the court may decide whether to give or discharge a direction at a hearing or without a hearing and in a party's absence if that party is the applicant or has had at least ten business days in which to make representations. Under r. 18.24, an applicant for a live link direction must identify the place from which the witness will give evidence and, if that place is in the UK, explain why it would be 'in the interests of the efficient or effective administration of justice for the witness to give evidence by live link'. If the applicant wants the witness to be accompanied by another person while giving evidence, that person must be named and the application must explain why it is appropriate for the witness to be accompanied. See also r. 18.10(f). The Coronavirus Act 2020 made temporary modifications to the rules relating to live links.

D15.97

Live Links for Overseas Witnesses The CJA 1988, s. 32, provides for the use of live links for witnesses who are overseas.
Criminal Justice Act 1988, s. 32

(1) A person other than the accused may give evidence through a live television link in proceedings to which subsection (1A) applies if—

(a) the witness is outside the United Kingdom;

(b) [repealed];

but the evidence may not be so given without the leave of the court.

(1A) This subsection applies—

(a) to trials on indictment, appeals to the criminal division of the Court of Appeal and hearings of references under section 9 of the Criminal Appeal Act 1995;

(b) to proceedings in youth courts, appeals to the Crown Court arising out of such proceedings and hearings of references under section 11 of the Criminal Appeal Act 1995 so arising.

Such links are now available at all trials in the Crown Court.

D15.98

Further Use of Live Links in the Interests of Justice The CJA 2003, s. 51, allows a court to permit witnesses, other than the accused, to give evidence through a 'live link' from another location in the UK, rather than just from overseas. This will usually be via a closed circuit television link, but is defined in such a way as to include any technology with a similar effect, such as video conferencing facilities or the internet.

The court may authorise the use of a live link only if:

(a) it is in the interests of the efficient or effective administration of justice for the witness to give evidence in this way (e.g., because the witness works in a different part of the country and can give evidence from the place of work via a live link); and

(b) notification has been received that the necessary facilities are available in the area where the criminal proceedings are to take place (the assumption is that the parties will ensure that there are facilities in the location from which the witness will give evidence).

Where a direction for a live link has been given, that means that the witness must give all his evidence in that way, so that cross-examination must also be conducted by live link. If it is in the interests of justice to do so, the court can rescind a direction for a live link.

Although the CJA 2003, s. 51, sought to increase the availability of live links, their availability remained under statutory control. Accordingly, it was not permissible for a court to permit a witness to give evidence by telephone where such a link was not available *(Hampson* [2012] EWCA Crim 1807, [2014] 1 Cr App R 4 (28)).

The use of live links for pre-trial hearings, as opposed to witness evidence at trial, is addressed in Crim PD I, paras. 3N.1 *et seq.* (see Supplement, CPD.3N) (see also D15.3 and D15.40).

CONTACT WITH WITNESSES, WITNESS COACHING AND FAMILIARISATION

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D15.99

An important aspect of the handling of witnesses is consideration of what contact it is appropriate for counsel, and others involved in either the prosecution or defence team, to have with them. This also involves consideration of the prohibition on witnesses being rehearsed by the party that is to call them, which potentially competes with the need to ensure that a witness is able to give his evidence in the best possible way, is not distracted by a lack of familiarity with his surroundings in court, and receives proper support from those responsible for his welfare through what can be a very stressful experience.

Contact between Counsel and Witnesses

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D15.100

Contact with witnesses was addressed in detail in the Code of Conduct. The Code has now been replaced by the BSB Handbook. Insofar as this addresses the issue, it may be summarised as follows:

(a) There is no longer a general rule preventing a barrister from having contact with any witness. Under the Written Standards that operated under the old Code, a barrister could have contact with a witness whom the barrister expected to call and examine in chief, with a view to introducing him or herself, explaining the court's procedure, and answering any questions about it which the witness might have. CPS guidance still indicates that a prosecuting barrister has a positive responsibility to ensure that a witness facing unfamiliar court procedures is put as much at ease as possible, particularly when that witness is nervous, vulnerable or apparently the victim of criminal conduct.

(b) Although the BSB Handbook provides only limited guidance, in a contested case in the Crown Court it is generally inappropriate for a barrister to *interview* any potential witness. Interviewing includes discussing the substance of the witness's evidence, or the evidence of other witnesses. The practice set out in the Code for Pre-Trial Witness Interviews (Written Standards, para. 6.3.2) remains useful (if not enforceable) guidance.

(c) To the extent that general disclosure obligations require (in the absence of any specific requirement in the BSB Handbook), where a barrister has interviewed a potential witness, that fact should be disclosed to all the other parties in the case before the witness is called.

(d) Counsel must not rehearse, practise or coach any witness, in relation either to the evidence itself or to the way in which to give it (BSB Handbook, rC9.4), as was made clear in *Momodou (Practice Note)* [2005] EWCA Crim 177, [2005] 1 WLR 3442, where the extent of permissible witness familiarisation was set out (see D15.103).

D15.101

Prosecution Counsel The proper handling of witnesses has become an important part of the role of the prosecutor, not least since the introduction of CPS Standards in this regard. Prosecuting counsel should not confer with any investigator witness unless the latter has a supervisory responsibility in the investigation (e.g., as officer in the case), and should not confer with or receive factual instructions directly from investigators on matters which may be in dispute.

D15.102

Defence Counsel The interlocking matters of conferences, counsel being attended at court by his professional client, and the seeing of witnesses are dealt with in various provisions of the Code of Conduct of the Bar, which may be summarised as follows:

(a) Provided that the interests of justice and of the lay client will not be prejudiced, counsel may agree with his professional client that attendance by the latter's representative may be dispensed with (BSB Handbook, rC17).

(b) Although, in general, counsel should not interview witnesses or discuss their evidence with them, there may be extraordinary circumstances in which departure from this principle is unavoidable. In *Fergus* (1994) 98 Cr App R 313 Steyn LJ stated (at p. 323) that, since defence solicitors had failed to see the alibi witnesses in order to ask why they had remembered the events of the day in question, counsel should have seen them himself.

Witness Familiarisation

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D15.103

In *Momodou (Practice Note)* [2005] EWCA Crim 177, [2005] 1 WLR 3442, the Court of Appeal made clear that, while familiarisation of witnesses with the court and procedure is legitimate, it must be carefully regulated. Judge LJ stated (at [61] and [62]):

> There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness. (See *[Richardson* [1971] 2 QB 484, *Arif* (1993) *The Times,* 17 June 1993, *Skinner* (1994) 99 Cr App R 212] and *Shaw* [2002] EWCA Crim3004.) The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be 'improved'. These dangers are present in one-to-one witness training. Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contami-nated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.
>
> This principle does not preclude pre-trial arrangements to familiarise witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out of court familiarisation techniques. The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness's own uncontaminated evidence. Equally, the principle does not prohibit training of expert and similar witnesses in, for example, the technique of giving comprehensive evidence of a specialist kind to a jury, both during evidence-in-chief and in cross-examination, and, another example, developing the ability to resist the inevitable pressure of going further in evidence than matters covered by the witnesses' specific expertise. The critical feature of training of this kind is that it should not be

arranged in the context of nor related to any forthcoming trial, and it can therefore have no impact whatever on it.

D15.104

Familiarisation by Outside Agency The Court of Appeal in *Momodou (Practice Note)* [2005] EWCA Crim 177, [2005] 1 WLR 3442, went on to give guidance (at [63]—[65]) as to the way in which any familiarisation process ought to be regulated, where it was by an outside agency rather than, as is routine, through the Witness Service. The guidance was as follows:

(a) The CPS should be consulted where prosecution witnesses were involved, and the proposed programme should be put in writing.

(b) Where the defence engaged in such a process, counsel's advice should be sought and the trial judge should be informed.

(c) The familiarisation process should be supervised by a barrister or solicitor, preferably by an organisation accredited for the purpose by the Bar Council and Law Society.

(d) None of those involved should have personal knowledge of the matters in issue, and the material used should not bear any similarity to the issues in the case. Nothing should be done to play on or trigger the witnesses' recollection of events.

(e) Any discussion of the criminal proceedings in question must be stopped and advice given about why it is not permissible.

(f) Careful records should be kept of the programme, those present and those responsible for the process. The records should be handed to the CPS and, in relation to defence witnesses, to the court.

(g) Barristers and solicitors were professionally obliged to see that this guidance was followed.