JUSTICE

The Redistribution of Criminal Business

Memorandum of Evidence
to
Lord Justice James' Committee

CHAIRMAN OF COMMITTEE
LEWIS HAWSER, Q.C.

LONDON
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British Section of the International Commission of Jurists

This Memorandum of Evidence was prepared by the JUSTICE Standing Committee on Criminal Justice. Its members are:

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THE REDISTRIBUTION OF CRIMINAL BUSINESS

INTRODUCTION

1. The terms of reference of Lord Justice James' Committee are:-
"to consider within the framework of the court structure what should be the distribution of criminal business between the Crown Court and Magistrates Courts; and what changes in law and practice are desirable to that end".

These give no indication of the reasons for the appointment of the Committee. It is however clear from statements made by the Lord Chancellor that its primary purpose is to consider ways and means of reducing the congestion of business in the Crown Court and the consequent delays in bringing cases to trial. It is also clear that the two most obvious and effective means of bringing about a re-allocation of work in favour of magistrates' courts are to remove the right to trial by jury in certain classes of cases and to widen the range of offences triable summarily with the consent of the accused.

2. For our part, although we accept that there have been and in some cases will be delays in bringing cases to trial (some of which could have been tried quite satisfactorily in magistrates' courts), we do not accept that congestion is a sufficiently serious and/or intractable problem to justify any curtailment of existing rights to trial by jury. We think that there are other ways of dealing with the problem. Any proposals of a drastic nature will throw an intolerable burden on many magistrates' courts, involving a deterioration in the quality of magisterial justice and creating bottlenecks far worse than any which may exist in the Crown Court at present.

CONGESTION

3. Our information indicates that the only area of substantial congestion and serious delays is that of the Inner London Crown Court. So far as we have been able to ascertain, there is no problem in the provinces, or at the Central Criminal Court, or in Middlesex. Indeed as far as the Central Criminal Court is concerned, cases are generally coming up for trial very speedily and the Court is also dealing with many cases that have been originally committed for trial to Inner London. Two factors should materially mitigate the Inner London problem: first a number of additional courts will be opened in the near future; secondly there appears to be a real prospect of a diminution in the crime wave. The recent drop is, we hope, a harbinger of this. We further understand that Inner London hopes to reduce the length of its untried list by calling on for trial a number of older cases in which it is thought that the key witnesses may now be dead or untraceable. It seems therefore that, even if there is no further drop in the crime wave, there is a reasonably good prospect that the administrative problems could be overcome.

4. Despite what appears to be a very technical and complex pattern described in the Consultation Note, we think that the present division of business between juries and magistrates is broadly satisfactory and acceptable, reflecting as it does the distinction between serious and minor offences, or between offences carrying serious and minor social consequences.

5. In any event we are strongly of the opinion that the right to elect for trial by jury is so fundamental in cases which (regardless of the prospect of imprisonment) involve honesty and reputation, that it should not be cut down unless it is clearly established that serious injustice and hardship are being caused by congestion, that there is no real prospect of the position being remedied in the reasonably near future, and that no other means are available. In our view, these conditions are not fulfilled. The Consultation Note broaches fears of what might happen if every defendant elected to go for trial, but the abuse of any social machinery will lead to its breakdown.

6. All this however does not mean that we should be content to rely on administrative measures or to regard the continued expansion of courts and court services with indifference. On the contrary we think that a number of administrative and legal reforms would substantially reduce the number of cases which go for trial without any important curtailment of existing rights. These are:-

(1) greater discrimination on the part of the prosecution in the framing of charges;
(2) a requirement that the prosecution supply the defence in advance with copies of witnesses' statements;
(3) the appointment of duty solicitors;
(4) the proper supervision of the working of the system of criminal legal aid;
(5) widening the range of offences that are triable summarily; and
(6) with limited exceptions making all moving traffic offences triable only in magistrates' courts.

FACTORS LEADING TO ELECTION FOR TRIAL

7. Before we go on to consider those remedies which involve a reclassification of offences we think it useful to discuss some of the factors which lead defendants or their solicitors to elect for trial by jury in cases which might be regarded as more suitable for trial in magistrates' courts. Some of them are not capable of being proved or depend on human motives and attitudes which cannot be regulated by law. They nevertheless form part of the overall picture of the problem under consideration.

8. One often hears arguments that the guilty are more likely to be acquitted by a jury than by magistrates, or that the innocent are more likely to be convicted by magistrates than by a jury, or that magistrates convict the innocent and juries acquit the guilty. Such arguments are profitless, being based upon unproved and largely unprovable premises. The conviction of the innocent is unjust to the accused; the acquittal of the guilty is harmful to society. We should all be committed to the ascertainment of the truth by means of just procedures which have the confidence of the accused and the public as a whole.

9. The merits of the present system of trial by jury, and the attraction of exercising the right to elect, are many and obvious, e.g.:

(i) The defence knows the case to be met because statements or depositions have been supplied. An old style committal may be called for, in order to judge the strength of prosecution witnesses. Publicity for those committal proceedings may be thought desirable. In consequence there is a better opportunity for preparing the defence adequately.
(ii) It is easier to obtain the services of a lawyer and an experienced advocate for a jury trial.
(iii) Legally qualified judges are better suited to determine difficult legal issues, e.g. admissibility of evidence, especially where a co-defendant makes a statement incriminating another co-defendant; or the meaning of dishonesty or deception; or what constitutes corroboration.
(iv) More time is available and there is no pressure to get through the day's list.
(v) The jury is a good tribunal – conscientious and careful; very seldom producing wholly indefensible verdicts and often showing a remarkable capacity to discriminate between different defendants and between different counts. It represents a good random cross section of the public and will do so even more after 1st April. Its members may be inexperienced in trials but they have experience of life and are not case hardened. A jury has a freshness of approach to the whole matter. In a larger group there is a better chance that prejudices will sort themselves out, or at least be subjected to a process of give and take which makes them relatively ineffective.
(vi) It is generally thought that the chances of acquittal in certain types of cases are better before a jury than before magistrates. It is however by no means certain that this would prove to be the case if a meaningful statistical comparison could be carried out.
(vii) Provided his trial has been fairly conducted, the ordinary man is more likely to accept the result and to feel that justice has been done to him if the verdict is one of his fellow citizens rather than that of a Bench of magistrates or of a stipendiary

magistrate. This particularly applies in cases where an accused's intentions and motives are in issue rather than facts.

10. The disadvantages of trial before magistrates, or disadvantages as perceived by the accused and his advisers, are largely of a converse nature:

(i) Magistrates, especially lay magistrates, cannot easily sit for more than one day a week and consequently cannot hear long cases.
(ii) Complicated or difficult issues of law may be effectively beyond the capacity of laymen unless they are guided by a highly experienced clerk, which is not always possible. In passing, we mention that there is a pressing need for more properly qualified clerks.
(iii) The same tribunal has to decide issues both of fact and of admissibility of evidence.
(iv) A postponement of a trial is not always so easy to obtain from magistrates and the defence may not have sufficient time to prepare.
(v) The defence may feel that it is highly undesirable to conduct an "impromptu" or "blind" defence, especially against experienced police officer witnesses for the prosecution.
(vi) Magistrates can become case hardened (especially stipendiaries) and under the pressure of disposing quickly of a large number of cases they may not perceive the inadequate prosecution case or the genuine defence. Furthermore, the accused often looks upon the magistracy as "them", an elite, or a part of the establishment, and not as ordinary men and women.

AVAILABILITY OF PROSECUTION EVIDENCE

11. The experience of a number of members of our Committee, in particular of the solicitor members, is that quite often the defence opts for trial by jury because it does not know in advance what the prosecution evidence against a client is going to be, and is not therefore equipped to meet it. No solicitor – let alone an unrepresented defendant – wants to undertake an impromptu defence. Some prosecuting authorities do help the defence by making statements available, but others refuse. The police are often reluctant through fear that a false defence will be concocted if time is given. This is plainly a short-sighted policy. The defence has only to elect for trial with a Section 1 committal and all the witness statements are promptly handed over. The refusal to supply statements thus acts as a powerful incentive to elect for trial.

12. We therefore recommend that the prosecution should be required to serve, at the request of the defendant or his solicitors, the statements of all witnesses they propose to call as soon as is practicable. We have set out in an Appendix the principles on which we think that this new provision might operate. We can further see no reason why statements of

witnesses favourable to the defence whom the prosecution does not propose to call should not also be supplied, as we have recommended for trials in the Crown Court. We are quite certain that this very simple administrative reform would lead to more of the less serious cases being tried in magistrates' courts, where the penalties imposed are likely to be less severe than in the Crown Court.

RESPONSIBILITY OF SOLICITORS

13. It has been suggested that some solicitors encourage their clients to elect for trial in legally-aided cases for the sole reasons that they personally will have less work to do while the fees they can claim are higher. We have no means of ascertaining whether, and to what extent, this is widespread. If it is, the introduction of the duty solicitor would go some way towards reducing the practice. It would help to distribute the work more evenly and to ensure that those solicitors who undertake criminal cases were experienced in the work. An earlier Committee of JUSTICE has already recommended the setting-up of a Special Advisory Committee to keep the working of criminal legal aid under close review, and this would act as a check on firms which abuse the legal aid system.

THE DUTY SOLICITOR

14. We should also like to stress the beneficial role which the duty solicitor can play in sorting out cases, advising defendants and assisting the court in the early stages of a case. A plea of guilty when the evidence justifies it and the accused has no defence can save a great deal of time and unnecessary remands. Advice when the accused first appears in court may prevent him from asking to go for trial when it is clearly to his disadvantage to do so. We do not think it necessary to expand on this theme as your Committee will no doubt have the benefit of accounts of the workings of the experimental schemes in Bristol, Cardiff, Manchester and elsewhere.

RESPONSIBILITY OF THE PROSECUTION

15. Under present law and practice not all unnecessary trials in the Crown Court are due to unjustified election by the defence. The prosecution is quite often to blame through its choice of the offence to be charged, i.e. through charging an indictable offence when a summary offence would be adequate, or charging an offence which can only be tried by a jury if the prosecution consents. Another device is to add a charge of conspiracy to a minor offence when there are two or more defendants. A member of our Committee has experience of such a case – in which a minor theft from a builder's yard has resulted in a long and expensive trial at the Old Bailey.

INTERMEDIATE CASES

16. It has been suggested that magistrates should decide in the "hybrid" or "intermediate" cases whether or not the accused should have trial by jury. We have considered this suggestion and do not find it acceptable for a number of reasons:

(i) The function of magistrates is to hear and determine the cases which come before them, and not to select which accused persons they will try. Although it is proper for magistrates to be able to refuse to hear an indictable case because of its potential seriousness, it would, in our view, be wrong for them to be given power to bring cases within their jurisdiction.
(ii) A large proportion of trials would be preceded by a "trial before a trial" to determine the mode of trial. Refusal by magistrates of jury trial could lead to an appeal, and further complication delay and expense.
(iii) The "allocation" bench could not constitute the "trial" bench.
(iv) Magistrates feel themselves to be a good tribunal, and as a matter of amour propre would be extremely reluctant to renounce jurisdiction.
(v) It would be necessary for legal aid to be granted on a much greater scale, since an unrepresented defendant could hardly be expected to argue effectively the way in which magistrates should exercise their discretion.
(vi) Our answers to the tentative criteria proposed in para. 13 of the consultation note will be apparent from what we have said above. It would be impossible to promulgate and apply satisfactory and workable criteria for "keeping" a case or "passing it up" to the Crown Court. Parliament in creating a criminal offence should say whether an offence shall be triable only by magistrates or only by jury or shall fall into a clearly defined intermediate or hybrid category where the accused shall have the right of election. Criteria to guide Parliament in laying down general principles are very desirable, but once those principles are evolved they should be capable of application to individual cases without the exercise of further discretion.

CHANGES IN THE LAW

17. It is quite possible that, if the recommendations and suggestions mentioned above were to be implemented, any serious overloading of the Crown Courts could be avoided. We nevertheless feel that there are some changes in the law which would improve the situation without impairing any fundamental rights. Offences involving dishonesty, violence of any gravity, sexual impropriety and drugs are, and should remain, on fundamental principle, triable by jury at the election of the accused. Dishonesty

is dishonesty whether the accused be rich or poor, important or unimportant, well known or obscure, young or old and whether the sum alleged is £1,000 or £1. Seriousness or triviality and the consequences of a conviction cannot be assessed by judges and magistrates but only by the accused himself. Justice is no respecter of persons.

WIDENING THE RANGE OF CASES TRIABLE SUMMARILY

18. Our main recommendation is that a number of offences which at present are triable only on indictment should be made capable of being tried summarily if the accused consents. We suggest that these could include:-

1. Burglary in a dwelling house where key or force used.	S.9. Theft Act 1968
2. Burglary in a dwelling house with intent to commit an offence not included in the First Schedule.	–do–
3. Dishonestly handling goods stolen abroad.	S.22 Theft Act 1968
4. Bigamy.	S.57 Offences Against the Person Act 1861
5. Perjury – judicial proceedings	S.1. Perjury Act 1911
– non judicial proceedings	S.2. –do–
– false declarations to obtain registration	S.6. –do–
6. Forgery – valuable security (now limited to £100)	S.2(2)(a) Forgery Act 1913
– demanding property on forged document (now limited to £100)	S.7(a)
– document to title to goods	S.2(2)(a) –do–
7. Sexual Offences – Intercourse with girl aged 13-16	S.6. Sexual Offences Act 1956
– Buggery between consenting males aged over 21 in public	S.12. –do–
– Similar offence on Merchant Ship	S.12 –do–
– Buggery when one person aged 18-21	S.12 –do–

MOTORING OFFENCES

19. Our consideration of the question of jury trial in certain motoring offences was overtaken by the Road Traffic Bill which was then on its way through Parliament. Its provisions must obvsiouly have the effect of reducing the number of cases which go for trial. Our provisional view was that, with the exception of some cases of dangerous driving, e.g. causing death or second offences, all moving traffic offences should be triable only in magistrates' courts. The Bill, however, raises very difficult and complex issues and, at this point, we do not think it sensible for us to attempt to make any firm proposals.

WIDENING OF THE RIGHT TO ELECT FOR TRIAL

20. Whilst the re-allocation of work between the Crown Court and Magistrates' Courts is under consideration, we think it right to call attention to the category of offences which at present can only go for trial if the prosecution consents. In the main these are serious offences. Examples are:-

(i) Fraudulent evasion of fares on public transport.
(ii) All drug offences.
(iii) Assault upon police officers in the execution of their duty. The present right of election by the prosecution (Magistrates' Courts Act 1952 s.25 and Police Act 1964 s.51) is contrary to principle and should be abolished.
(iv) Living on immoral earnings.

In our view defendants should be given the right of election in these cases.

APPENDIX

1. In paragraph 12 of our Memorandum of Evidence we recommend that the prosecution should be required, at the request of the defendant or his solicitor, to serve the statements of all witnesses it proposes to call as soon as is practicable. This procedure is of course already permissible under Sections 2 and 9 of the Criminal Justice Act 1967, but in our view it should be made a statutory obligation in all cases except those of a simple and minor character (e.g. drunkenness and loitering) where there are only one or two witnesses and neither party is asking for an adjournment or remand.

2. The procedure adopted by a member of our Committee who is a Chief Prosecuting Solicitor is to advise the Defence of his intention to call only one prosecution witness, usually the officer in the case who was not necessarily an eye-witness but who had recorded factual matters relating to the alleged offences and had taken any statements from the defendant, and to serve the statements of all other witnesses. On receipt of these statements the defence is of course at liberty to ask for any of the witnesses to appear in court.

3. To achieve the purpose of this procedure, and for it to operate efficiently and fairly, it is necessary for there to be a remand of two or three weeks for all the witnesses' statements to be properly taken, checked and prepared.

4. It is further most desirable that the prosecution be legally represented, as the statements need to be vetted for admissibility and it is desirable that whoever is in charge of the prosecution should be aware of all the relevant factors in the case.

5. It is also essential that, save in the simplest cases, the defendant be represented. A Duty Solicitor could obviously play a useful role in discussing with the prosecution on a defendant's first appearance in court, and prior to the granting of legal aid, the fairest and most economical way of presenting the evidence.

6. Some cases are unsuitable for the use of this procedure, and the prosecuting solicitor then usually arranges a conference with the defence representatives, outlines his case and shows them exhibits.

7. A number of significant and beneficial results have been found to accrue:-

(a) It has been found that, in motoring cases, defendants are usually prepared to allow the statements of prosecution witnesses which have been served to be read out in court, with much saving of time, expense and inconvenience.
(b) It has been found possible to include a larger number of all types of cases in the day's list. Experience has shown that the serving of statements often confines the area of dispute to the interpretation of statements and to the essentials of the case.

(c) There has been a significant reduction in the number of defendants electing to go for trial, without any additional burden of time being put on the magistrates' courts.

8. Somewhat contrary to expectation, the procedure has not measurably increased the number of pleas of guilty.

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