

CRIMINAL PROCEDURE RULE COMMITTEE

MEETING ON FRIDAY 11th DECEMBER, 2020 at 1.30 p.m.

MEETING CONVENED BY VIDEO CONFERENCE

MINUTES

Present

Committee members

Lord Justice Fulford (chairman of the meeting)
Lord Justice Haddon-Cave
Mr Justice William Davis
HH Judge Picton
HH Judge Edmunds QC
District Judge (Magistrates' Courts) Snow
Louise Bryant
Sue Gadd
The Director of Public Prosecutions, Max Hill QC
Alison Pople QC
Paul Jarvis
Shade Abiodun
Edmund Smyth
Assistant Commissioner Nick Ephgrave
David Kenyon
Jodie Blackstock

Also attending

Mrs Justice McGowan
Professor David Ormerod QC, University College, London
Professor Cheryl Thomas QC, University College, London
Hanna van den Berg, Lord Chief Justice's Office
Alyson Sprawson, Senior Presiding Judge's Office
Richard Sampson, Chief Magistrate's Office
Siân Jones, JC Service
David Barnes, JC Service
Sophie Marlow, Attorney General's Office
Nigel Gibbs, Crown Prosecution Service
Helen Measures, HM Courts and Tribunals Service
Richard Chown, Ministry of Justice
Laura Pankhurst, Ministry of Justice
Caroline Graham, Ministry of Justice
Robert Pryke, Criminal Appeal Office
Sarah Hannah, Criminal Appeal Office
Cathy Dilks, Criminal Cases Review Commission
Jonathan Solly (Committee secretariat)

Apologies are offered to anyone taking part whose name was missed.

1. Welcome, apologies for absence and announcements

Chairing the meeting, Lord Justice Fulford welcomed Committee members and all those who usually attended, thanking all for their participation by video conference in the difficult circumstances of the public health emergency. He welcomed in particular Helen Measures, Deputy Director (Crime), HM Courts and Tribunals Service, attending to speak about criminal courts recovery at agenda item 4; Mrs Justice McGowan, attending to speak about her review of the Criminal Practice Directions at agenda item 5; and Professor Cheryl Thomas QC, attending for the discussion of her recently published article on jury research at agenda item 6.

The chairman drew attention to the interview with Louise Bryant published in 'Magistrate' magazine and recently circulated by email. He exhorted members to keep in mind, and to try to exemplify, her description of Committee decision making as an activity that proceeded by consensus, after sometimes lively debate.

He reported apologies for absence from, among those who usually attended the Committee's meetings, the Chief Magistrate; Matthew Gould; and Julie Clouder.

2. Draft minutes of the meeting held on 6th November, 2020

The minutes were adopted.

The chairman reported that a reply to the letter discussed at item 11 of that agenda had been sent. There were no other matters arising.

3. Criminal Procedure (Amendment) Rules 2021: signature of the statutory instrument

**CrimPRC(20)71
CrimPRC(20)71 Supplement**

The chairman drew attention to the amendments identified in the supplementary paper.

Each member attending indicated assent to the instrument (namely, Lord Justice Fulford, Lord Justice Haddon-Cave, Mr Justice William Davis, His Honour Judge Picton, His Honour Judge Edmunds QC, District Judge (Magistrates' Courts) Snow, Mrs Bryant JP, Ms Gadd, the Director of Public Prosecutions, Ms Pople QC, Mr Jarvis, Ms Abiodun, Mr Smyth, Assistant Commissioner Ephgrave, Mr Kenyon and Ms Blackstock). Those absent had separately indicated their assent (the Lord Chief Justice, and Ms Case and Ms Hewer).

4. Criminal courts recovery

CrimPRC(20)72

The chairman introduced Helen Measures and invited her to describe the action taken, and being taken, by HM Courts and Tribunals Service in response to the coronavirus public health emergency.

Helen Measures described the impact on HMCTS of the sudden imposition of the first set of emergency restrictions in March and the work that had been required, immediately and in the subsequent weeks and months, to make court buildings safe and to promulgate guidance. A working group on the restoration of jury trials had been established in which representatives of all agencies and others involved participated and which had overseen a steady increase in the number of such trials undertaken; though the steady recovery of magistrates' courts had led to an increase in the number of outstanding Crown Court cases. Gradually more court rooms had been opened and more court staff recruited. A consultation on the possibility of extending court operating hours was under way. Modifications to some court buildings had been made to allow the conduct of trials of multiple co-defendants. The implementation of arrangements enabling section 28 of the Youth Justice and Criminal Evidence Act 1999 (pre-trial video recording of cross-

examination) had been completed despite the emergency. Court performance was closely monitored and it now could be seen that magistrates' court disposals outstripped receipts but Crown Court disposals were presently 3% lower than before the emergency and receipts had increased. What had been achieved was attributable to the hard work of the judiciary and of court staff, all of whom continued to work hard.

The chairman recorded the Committee's thanks for this account. He invited questions and observations.

Mrs Justice McGowan expressed gratitude to HMCTS staff, who had worked wonders despite unprecedentedly difficult circumstances.

The Director of Public Prosecutions endorsed the judge's comments and thanked everyone working in the criminal justice service, every one of whom had made enormous efforts. He asked whether statements suggesting that full recovery for the Crown Court might not be achieved until March 2023 were correct. Helen Measures confirmed that that was so, depending upon the rate of future receipts and the availability of resources. Crown Court recovery still had a long way to go, and although the gap between receipts and disposals at last was diminishing the projected recruitment of more police officers, and the consequent prosecution of more offences, would increase the strain on the system. It was not correct to say that cases were being listed in 2023, but it was correct that recovery to pre-emergency levels was not expected until then.

Ms Blackstock asked how technology had been used and with what effect on trials. She referred to a report of a case in which a defendant had participated by live video link but had turned off the video so that he could not be seen by the court. Helen Measures explained that the use of video conferencing had hugely increased, and paid tribute to the efforts of the staff who had established arrangements for that; though the decision as to whether its use was or was not appropriate in any given case was one for the court. HMCTS was awaiting the results of research into the effectiveness of live video links. She would make enquiries into the circumstances reported by Ms Blackstock and would correspond with her.

The chairman observed that without video links the work of the Court of Appeal, criminal division, would have become impossible.

Assistance Commissioner Ephgrave added to others' his gratitude for the work that had been undertaken by all participants. However, he drew attention to the fact that serious cases now were being listed for trial into 2022, which imposed very significant strains on witnesses and witness care units. His impression was that the mix of outstanding cases had changed. Helen Measures agreed and shared the concern. The implementation of section 28 pre-trial cross-examination was intended to help relieve the concerns about witnesses. The outstanding case mix had been affected by the capacity of courts more easily to deal with straightforward cases only at the outset. Now, however, more complex trials could be listed, and efforts were being made as far as possible not to delay cases that were hard to try.

HH Judge Edmunds QC agreed that it was right to praise the efforts of court staff and others. He asked whether 2023 as the expected date for recovery was a national average, with some areas unlikely to recover fully by then. He observed that at his own court in Isleworth and at other London Crown Court centres the only reason why cases were not being listed into 2023 was because judges and listing staff did not wish to give trial dates so far ahead, not because the trial date would not fall in that year if they were to do otherwise. Already the courts were working at their maximum practical capacity, having regard to the number of cells and court staff available and allowing for limited public access and other restrictions. Even so, they were making no impression on the number of

outstanding bail cases, and a large number of new custody cases had begun to arrive. A realistic assessment was needed urgently of when the current restrictions might be eased, so that listing could proceed accordingly. In the judge's view, more temporary courts, with adequate staff and cells, were needed in the London area. Helen Measures explained that in order to facilitate listing ahead information was needed about judicial sitting allocations for next year, the courtrooms available, and staffing available: none of which was yet known for sure. She confirmed that the modelling for the 2023 forecast had been applied to each region and that each region's results could be made available.

Lod Justice Haddon-Cave also endorsed others' expressions of gratitude to court staff, whose efforts he described as heroic. The effort now required compared with running a marathon and would have to be sustained throughout next year at least, lest what already had been achieved by the efforts of many should be lost. Helen Measures thanked the judge and confirmed that efforts to restore the courts would not diminish.

Mr Kenyon, too, expressed his thanks. He endorsed what Assistance Commissioner Ephgrave had said about the significant burden on witnesses and witness care units. He urged the prioritisation of cases involving vulnerable witnesses to avoid the loss of strong cases by witness attrition. Helen Measures observed that listing was ultimately a matter for judges but agreed that witness attrition was a concern. Mr Kenyon commented that this strengthened the case for ever greater communication between judges and all others, including those responsible for witness care.

Drawing discussion to a conclusion, the chairman recorded the Committee's thanks to Helen Measures for her description of the continuing court recovery work and for taking part in the meeting. While the Committee could make no decisions directly affecting matters discussed, her account would inform the Committee's deliberations and contribute to its work.

5. Criminal Practice Directions review

CrimPRC(20)73
CrimPRC(20)44

The chairman introduced the material for the Committee, thanked Mrs Justice McGowan for joining the meeting, and invited her to describe the review.

Mrs Justice McGowan explained that those conducting the review hoped to realise the Lord Chief Justice's aspirations for more succinct and useful directions. The work progressed, she expected much to be achieved during the Christmas vacation, and she hoped to be able to submit revised draft directions to the Committee for consideration by Easter with a view to their promulgation next summer. She invited written questions or observations, to be sent to her or to Hanna van den Berg.

6. Recently published jury research

CrimPRC(20)74

The chairman introduced Professor Thomas QC and the material for the Committee. He observed that Professor Thomas' research would amply justify a much longer discussion than time today would allow. He thanked her for agreeing to take part in this meeting and invited her to identify anything in particular that she thought the Committee should do or should consider.

Professor Thomas QC reminded members that her recently published article, in an edition of the *Criminal Law Review* marking the 350th anniversary of *Bushell's Case*, was a summary only of findings due to be published next year, findings which had been announced by Sir Brian Leveson in the course of a lecture during 2019 and knowledge of which thus had been public since then. The article had been drawn to the Committee's

attention because of its members' participation in the creation of the juror information notice which was the subject of part of the research.

The Director of Public Prosecutions added his thanks to those of the chairman. He asked whether Professor Thomas would agree that it was important to maintain training and information for jurors, and that judges' directions to jurors were hugely important. He noted the differing jury conviction rates for different victim age groups. He wondered whether the Committee should revisit its recent discussion of clearing the public gallery during the trial of sexual offences to allow complainants more freedom to express themselves uninhibitedly. The recently published report referenced by the Committee paper suggested truly radical changes to current trial procedure, including to the admissibility of sexual history evidence and to jury trial itself.

In reply, Professor Thomas QC emphasised that (i) her detailed research due to be published next year would include a close analysis of jury verdicts from 2006 to 2019 which would help to provide the context for the research findings, and (ii) in no way should her research be seen as arguing that changes are needed in the way judges currently direct juries in this area; only on two specific topics (stranger vs acquaintance rape, and emotion when giving evidence) did the research show enough juror uncertainty to warrant the current Stage 2 study of whether, and if so what, additional guidance might be helpful to jurors.

Assistance Commissioner Ephgrave observed that although not yet fully reported Professor Thomas' research helped to counter the negative effects of other public comments on the victims of sexual offending. He thought it essential to ensure that the message that juries could be trusted to be fair was heard.

HH Judge Edmunds QC reported having attended a recent meeting of the London victim board at which it had been apparent that many looked forward enthusiastically to the wider publication of Professor Thomas' research.

Mr Kenyon endorsed those observations. The issues arising from the trial of sexual offending had become increasingly politicised, in his view unhelpfully to the victims of that offending. Professor Thomas' research supported a more measured and helpful response.

Drawing discussion to a conclusion, the chairman repeated the Committee's thanks to Professor Thomas QC.

7. Case management group report

Mr Justice William Davis reported that the group had:

- 1) endorsed proposed guidance for promulgation with two new magistrates' courts Preparation for Effective Trial forms, when those were introduced. The judge explained that the case management group had worked on a proposed revision of the current PET form throughout 2019 but the final pilot had been interrupted by the public health emergency and the introduction of the new form delayed. In the meantime, HM Courts and Tribunals Service had commissioned the preparation of some very helpful guidance for unrepresented and other defendants.
- 2) endorsed a revised form of application for an extension of pre-charge bail, subject to consultation with the Council of HM District Judges (Magistrates' Courts) and with representatives of the National Police Chiefs' Council. The judge explained that the group had received a report that some 45% of applications received were incorrect. It was hoped that a simpler and clearer form would significantly reduce that error rate.

- 3) approved in principle a proposal for clear and simple national guidance to identify the appropriate initial destinations for sendings for trial, committals for sentence and appeals from magistrates' courts to the Crown Court, which destinations in some cases might not be the Crown Court centre the most proximate to the magistrates' court at which the material decision had been made, and invited the preparation of such guidance; and
- 4) in response to Law Commission recommendations, received and discussed a working group's initial conclusions on potential amendments to forms of application for search warrants. Three issues of principle had been identified on which the Committee's views would be sought at its next meeting. The judge recorded the group's gratitude to those police officers who had participated in the working group.

Assistant Commissioner Ephgrave offered to assist with the proposed consultation on the revised pre-charge bail extension application form. He reported that the National Police Chiefs' Council had consulted its members on the Law Commission's recommendations for search warrants and that he would arrange for the secretary to be sent the results, for information.

8. Criminal Practice Directions IX Appeals: duties of fresh representatives

CrimPRC(20)75

The chairman explained that the draft practice direction amendments now imposed a duty on fresh representatives in appeals to the Court of Appeal to obtain objective evidence of events at trial only when necessary, not routinely in every case.

The Committee approved the proposed amendments.

9. Part 19 Expert evidence: distinguishing expert evidence and evidence of fact

CrimPRC(20)76

The chairman introduced the note for the Committee, observing that the Forensic Science Regulator had raised an interesting point concerning evidence about telephone cell site analysis which suggested that the Part 19 rules should apply more widely than now. The Lord Chief Justice and he disagreed. In the view of each, it was the responsibility of the judge to ensure that witnesses kept within the scope of their competence and did not give opinion evidence where that was not what they had been called to do.

Lord Justice Haddon-Cave agreed. He considered the suggestion misconceived. It must be left to the judge to rule on the admissibility of such evidence.

HH Judge Edmunds QC also agreed. He thought that it would be over-engineered to make provision for such circumstances, observing that doctors frequently gave both factual and expert evidence.

Professor Ormerod QC observed that he had not understood the Regulator's suggestion to be directed to the trial judge's responsibility for controlling admissibility but intended only to ensure that an expert who gave factual evidence, about the distribution of bloodstains, for example, did not also give expert opinion evidence, for example about the significance of that distribution, without first complying with the relevant rules.

The chairman still doubted that any rule amendment was required. Mr Justice William Davis agreed, observing that the cases cited by the Regulator themselves exemplified the control of evidence by trial judges.

Nigel Gibbs reminded the Committee that between 2011 and 2013 it had considered extending the scope of the expert evidence rules to cover evidence of mixed fact and opinion but had rejected the proposal as unduly complex.

The chairman directed that a reply be sent accordingly to Dr Tully CBE, the Forensic Science Regulator, to inform her of the Committee's decision and to explain.

10. Website publication of the Criminal Procedure Rules and other material **CrimPRC(20)77**

The chairman drew attention to the information given in the Committee paper and invited members to alert the secretary to any difficulty encountered in using the new website.

11. Any other business

The chairman invited preliminary views on a suggestion by the Chief Magistrate that provision for magistrates' courts should be made corresponding with CrimPR 3.31 and CrimPD VII C.1 – 8, about *Goodyear* sentencing indications in the Crown Court.

Richard Sampson explained that the Chief Magistrate recently had ruled in a youth court case that the court had jurisdiction to give such indications (though she had declined to give an indication in that case). He understood her to have in mind that something between the indication available in allocation proceedings and a full *Goodyear* indication might be appropriate, especially in a youth court, and having regard to the case of *R (M) v West London Youth Court*.

Siân Jones observed that clearly there was a power for magistrates' courts to give such indications. Mr Justice William Davis agreed but cautioned that exercise of the power would require very careful thought about the context for its use and about the potential consequences of giving such an indication. Ms Gadd drew attention to the case law warning magistrates against saying anything when adjourning for sentence after conviction while a report or other information was obtained which might allow an inference to be drawn about their sentencing disposition.

The chairman directed that a paper with draft rules should be submitted to the next meeting for discussion.

Drawing the meeting to a conclusion, the chairman expressed his gratitude to members for their forbearance and persistence in meeting by video conference during what had been an extraordinary year. He hoped that it would be possible soon to resume meetings as before. He wished members an enjoyable Christmas holiday.

12. Dates of next meetings: Friday 5th February, 2021, and Friday 19th March, 2021

The meeting closed at 2.55 pm.