

Summary trial – too summary?

Peter Hungerford-Welch argues that speed must not be achieved at the expense of the right of the accused to a fair trial.

*On 21 July 2006, the government published *Delivering Simple Speedy, Summary Justice (Department for Constitutional Affairs, 2006a)*, which set out plans to improve the speed and effectiveness of the Magistrates' court system. Lord Falconer, then Secretary of State for Constitutional Affairs and Lord Chancellor, wrote in the foreword that the government's vision was to deliver a criminal justice system that deals with cases 'fairly but as quickly as possible'. This article suggests that, whilst efficiency is in everyone's interests, according undue priority to haste may have an adverse effect on the fairness of the trial process.*

An aspect of speedy summary justice may be seen in a document issued in December 2009 by the then Senior Presiding Judge for England and Wales entitled *Essential Case Management: Applying the Criminal Procedure Rules* (Judiciary of England and Wales, 2009). This emphasises that 'unnecessary hearings should be avoided by dealing with as many aspects of the case as possible at the same time'. For example, the plea should be taken at the first hearing, or as soon as possible after the first hearing. The guidance goes on to point out that this obligation 'does not depend on the extent of advance information, service of evidence, disclosure of unused material, or the grant of legal aid'. I would argue that defence advocates may have to take a robust approach in resisting demands for a plea to be entered where, for example, the defence have insufficient information about the nature of the prosecution case and so it is not possible to give proper advice on plea. Moreover,

unrepresented defendants should not be pressurised into entering a plea without careful thought as to the consequences of pleading guilty.

Guidance

The guidance goes on to say that, where the accused pleads guilty, the court should, unless committing for sentence, pass sentence on the same day if at all possible; perhaps using a pre-sentence report prepared for earlier proceedings or a 'fast delivery' report prepared the same day. However, care needs to be taken here too, as it is important that the court is in possession of sufficient (and up-to-date) information both about the offence and about the offender to enable it to pass the most appropriate sentence.

The drive for speedy summary justice means that Magistrates' courts are expected to be increasingly reluctant to grant adjournments. For example, in *Balogun v DPP* [2010] EWHC 799 (Admin), the court reiterated that requests for adjournments should be submitted to 'rigorous scrutiny'. The delay caused by repeated adjournments, as well as adding to the cost to the taxpayer, can cause problems for the victim, the witnesses and the accused in the present case, not to mention those involved in other cases (the longer one case takes to progress through the system, the less court time can be devoted to other cases). However, the courts should be ready to grant

adjournments where there is a good reason why it would be unfair (to either side) for the trial to go ahead even though the parties are seeking an adjournment.

Issues

One of the themes of criminal procedure at the moment is the early identification of issues. The December 2009 guidance picks up this theme, saying that where the accused pleads not guilty, the parties must identify the disputed issues at the outset; if the parties do not supply this information to the court, the court must require them to do so. Such early identification of issues assumes preparation of the case well in advance of the trial. This is, of course, highly desirable; however, funding arrangements for publicly-funded criminal defence work (requiring solicitors to take on a high volume of cases in order to make a living) might be regarded as inimical to such early case preparation.

The guidance also says that the 'live' evidence at trial must be confined to the issues which have been identified. As a result, only witnesses 'who are really needed in relation to genuinely disputed, relevant issues should be required to attend', and as the trial itself begins, the court should begin by

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establishing what disputed issues the parties intend to explore and must 'ensure that "live" evidence, questions, and submissions are strictly directed to the relevant disputed issues'. This approach is reflected in the amended version

of rule 3.10 of the Criminal Procedure Rules, which came into effect in October 2010 and which provides that the court 'may limit the examination, cross-examination or re-examination of a witness, and the duration of any stage of the hearing'. It is likely that defence advocates will be called upon to justify lines of questioning to a greater extent than has previously been the case. Whilst fishing expeditions are best avoided,

some speculative questioning by the defence may well be necessary in order to probe properly the evidence being given by prosecution witnesses.

The prosecutor has to list all the witnesses whom the prosecution intend to call. For each witness, the defence have to indicate whether their evidence can be read to the court, and if not, what disputed issue makes it necessary for the witness to give evidence in person. The court then has to indicate whether or not the attendance of that witness is 'justified'. The form does not say what happens if the court takes the view that the attendance of the witness is not justified but that person is nonetheless called to testify because the defence do not consent to the statement of the witness being read under section 9 of the *Criminal Justice Act 1967*. Presumably, however, there could be ramifications in any costs order made against the defendant (under the *Prosecution of Offences Act 1985*, section 18) if he is found guilty. I would argue that that the defence should rarely be penalised for exercising their right to test the prosecution evidence through cross-examination.

Interventionist approach

This interventionist approach is supported by a new, five-page case management form (available from the Ministry of Justice website) to be completed by the parties in Magistrates' court cases to supply detailed information about the case. The form includes a series of very detailed questions to be answered by the defence, aimed at identifying what is agreed and what is in dispute. It should be borne in mind that, under the *Criminal Procedure and Investigations Act 1996*, section 6 (CPIA), defence statements (summarising the defence case) are not compulsory for summary trials. However, the detailed questions which have to be answered in this case management form effectively require the defence to provide much of the information that would be required in a defence statement, as set out in section 6A of the CPIA, effectively undermining the

exclusion of summary trial from the mandatory defence statement regime which applies in the Crown Court. Care must be taken when completing the form, as the contents can be used as evidence against the accused (as in *Firth v Epping Magistrates' Court* [2011] EWHC 388 (Admin), where an assertion in a case progression form that the accused was acting in self-defence was successfully relied upon by the prosecution as an admission that the accused was the assailant).

The form also contains a reminder of the fact that, whether or not the defendant supplies a defence statement, he must (under the CPIA, section 6C) give a notice indicating whether he intends to call defence witnesses and, if so, must identify them. This allows the Crown Prosecution Service to check whether any of the proposed defence witnesses have relevant previous convictions, but also (and more controversially) could enable the police to interview the proposed defence witnesses, with the concomitant risk of pressure being brought to bear on them not to testify or to change their story.

Speed

The desire for speed echoes the draft protocol on disclosure in Magistrates' courts, issued in May 2006 (Department for Constitutional Affairs, 2006b). Dealing with an earlier version of the Criminal Procedure Rules, Part 21 (defence entitlement to advance information about the prosecution case), para. 1.4 says that, where the material is served on the day of the hearing, 'defence advocates should, save in exceptional circumstances, expect to be ready to go through that material with the defendant and advise ... there and then without the need for an adjournment. If necessary, cases can be put back in the list to allow the defence sufficient time to consider any material provided'. Similarly, in para. 57 of the A-G's Guidelines on Disclosure, (defence entitlement to copies of the witness statements of the witnesses to be called by the Crown), para. 2.2 of the protocol says that, 'late provision of such evidence should not

automatically result in a trial being adjourned ... In the majority of cases, a competent advocate will be able to deal with the material then and there by the court allowing time before the trial commences, or even during the course of the trial'. It should be noted, however, that going through the material there and then may simply not be practicable in a case of any complexity or where the material is voluminous. In such cases, adjournments may be necessary.

In *Visvaratnam v Brent Magistrates Court* [2009] EWHC 3017 (Admin), Openshaw, J said that an 'improvement in timeliness and the achievement of a more effective and efficient system of criminal justice in the Magistrates' court will bring about great benefits to victims and to witnesses and huge savings in time and money'. This is clearly right: excessive delay is harmful to both sides of a criminal case. Not only do victims have to wait longer for justice, but also defendants have to wait longer for trials. However, speed must not be achieved at the expense of the right of the accused to a fair trial, including adequate time in which to prepare the defence case and the right to present that case fully. ■

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References

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