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EVERY CASE, A MANAGED CASE:
USING THE CRIMINAL PROCEDURE RULES

SPEECH TO LONDON CPS

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Introduction

I am grateful to David Robinson, Deputy Chief Crown Prosecutor for London, for inviting me to talk to you this afternoon. Most of my contact with the CPS occurs in the court room listening to, and engaging with, your colleagues and with the defence about the particulars of individual cases, seeking, with my colleagues, to drive them forward to a just conclusion.

In one respect that arrangement is probably right in the interests of maintaining - and being seen to maintain - judicial independence. But it means also that there are few opportunities to consider the interests we share with you and with your defence colleagues, whose advocacy provides the material on which we base our decisions. Whether it's to acquit or convict after trial; or to sentence; or whether to grant bail or not.

So I am pleased to be able to offer now some thoughts about the use that we all make of one of the major pieces of criminal justice machinery for dealing with such matters; indeed the machinery to deal with the passage of every case through the criminal courts. I speak, of course, of the Criminal Procedure Rules[1].

I have split my plan for the next few minutes into four parts. First, I'd like to remind you briefly of the origin of, and context for, the Rules. Next, I'll explain a little of what the Rule Committee does. Third, I'll give a few examples of Rules and Rule changes that I feel are particularly relevant to the practical day to day business of the magistrates' courts. Finally, I'd like to mention some current personal case management preoccupations related to the Rules.

I hope then that we shall have some time for a broader discussion of the Rules from your perspective. Here, I should add the usual health warning: the opinions that I am about to express are entirely mine, and are from a magistrate's standpoint.

[1] The Criminal Procedure Rules 2012 SI 2012/1726

History

As you may know, the notion of criminal procedure rules came from Lord Justice Auld in his 2001 report on his Review of the Criminal Courts of England and Wales. He discovered that, although there were common features for summary proceedings and those on indictment, they were dealt with by different instruments, with one Act dating from 1795[2] and that there were different procedures between the magistrates' and the Crown courts. He concluded, unsurprisingly, that they needed improvement and modernisation.

He recommended that there should be a single procedural code[3] for a unified criminal court. The unified court came into being in 2005 with the creation of Her Majesty's Courts Service. Since 2010 that unification has embraced tribunals.

The Rules - statutory instruments - have a similar chronology. Their arrival resulted from a rule committee set up under section 69 of the Courts Act 2003 with the remit to make the Rules of procedure in the magistrates', the Crown Court and in the court of appeal *'...with a view to securing that – (a) the criminal justice system is accessible fair and efficient and (b) the rules are both simple and simply expressed.'* The approach for the Rules is based on the Civil Procedure Rules which pre-date them by seven years[4].

Membership

The committee is eighteen strong. Qualification for membership is set out in the Courts Act. The chairman is the Lord Chief Justice. Depending on whether members are judicial or non-judicial, they are either appointed by him with the concurrence of the Lord Chancellor, or they are appointed by the Lord Chancellor with the concurrence of the Lord Chief Justice. The first appointments were made in 2004 with the first rules coming into force in April 2005.

Members include the DPP; two court of appeal judges, one of whom - Rafferty LJ - is the current deputy chair; a high court judge; the Lord Chancellor's nominee; two circuit judges; a district judge (magistrates' court); a magistrate - currently that's me – a justices' clerk; two criminal barristers; two criminal solicitors; a chief constable; and two members from the voluntary sector with a direct interest in the criminal courts. And all that is glued together by a brilliant secretary. You will find committee details on the MoJ website.

Meetings

We consider and make Rules when we meet at Petty France on Fridays eight times a year. Our full meetings are normally preceded by meetings of the case management sub-group where, typically, we work on some of the detail. That includes items such as the Crown Court PCMH form and magistrates' court trial preparation forms, as well as numerous other forms that flow from particular rules.

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[2] Review of the Criminal Courts of England and Wales report, Rt. Hon. Lord Justice Auld October 2001, page 512

[3] Ibid. page 508.

[4] The first rules came into force in 1998 under the authority of the Civil Procedure Act, 1997.

From time to time we meet additionally to deal with specific topics, such as the material to be given to magistrates before trials, and currently to look at procedures for production orders and search warrants.

Before all meetings we receive from the secretariat comprehensive background papers; extracts from relevant legislation; and, of course, draft Rules to consider. I think that my hard drive blanches sometimes at the sheer volume of material. If it doesn't, I do! Between meetings there will generally be redrafting to consider, often involving extensive use of the track change/comment functions. Rules are very much children of the IT age!

For all our meetings we are very well supported, typically by officials from the Lord Chief Justice's office, MoJ, HMCTS and the Attorney General's office. But I must make particular mention of the contribution of the CPS. Not only via the DPP himself, but also other CPS staff who attend and who regularly garner views on the Rules from within the CPS.

Their collective expertise, together with our own experience, is invaluable in helping us to decide what will work, what should work, and what won't work. Meeting are focussed and highly collaborative. They are also very congenial. That atmosphere - and diversity of practical experience - contributes enormously to the Committee's ability to debate and to unpick some complex issues, such as clarity about reporting restrictions in the age of the tweet. Part 16 refers. Or enabling us to get to grips with contempt because our criminal law on that subject is scattered over numerous statutes, or is common law. Or because amendments to one act can appear in another where you least expect them, such as appeals and applications to the Crown Court about magistrates' bail[5] decisions.

As a passing observation I wonder sometimes how we can square the present position with one of Lord Bingham principles of the rule of law[6], that the law should be accessible without too much difficulty, but that is another matter!

Making Rules

Prompts for subjects about which to make Rules come from a number of sources. They include proposals from the secretariat, such as issues arising from new legislation -changes to youth remands under the LASPO Act are a recent example - high court or court of appeal judgments, and proposals from individual committee members.

Having made Rules, the Lord Chancellor then allows - or disallows them, although he has not done so yet! They are then submitted for Parliamentary approval (or disapproval; and again that has not happened.) They become law generally via a Rule amendment in April and a consolidation in October. As secondary legislation they interpret - that is to say, they explain the primary - and gather those interpretations in one place as practical procedural tools. But generally they cannot go beyond that.

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[5] Part 19, Bail and custody time limits; Senior Courts Act 1981, s81; Criminal Justice Act 2003, s16; Bail (Amendment) Act 1993, s1.

[6] The Rule of Law, Tom Bingham, pub. Allen Lane, 2010, Chapter 3, page 32, The Accessibility of the Law, '*...if you and I are liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is we must or must not do on pain of criminal penalty.*'

That's a summary of the history and background to the Rule Committee and the Rules. As I hope I have made clear, they are not about legal theory. They are a highway code – but with the full force of the law - setting out, in plain English for practitioners and the public , who must do what, how, where and when in our criminal courts.

The Rules

They are set out in Parts. There are just short of sixty of them at present and they deal with the eleven stages of the criminal court process. Since the CPS website replicates the Rules very effectively I may be in danger of offering you egg-sucking lessons on this point. But perhaps you will indulge me as I take you on a brief excursion through a few of them that may strike a chord with you. I'll start, appropriately perhaps, with Part 1 and the *overriding objective*[7].

In just about a page, its three short sections set out the fundamentals of the criminal justice process: *that criminal cases be dealt with justly; acquitting the innocent and convicting the guilty* – you will note the sequence of those two objectives –*dealing with the prosecution and defence fairly.* And so on, including reference to Article 6, taking into account the gravity and complexity of cases, and the needs of other cases.

Those principles - which are also the implicit headings for all the Rules that follow - pre-date my membership of the Committee and I am very proud to be associated with them. More than that, I am not overstating things when I say that, for me, the overriding objective is comparable in its potency to seven of the words of the oath that I took on appointment as a magistrate to *'...do right to all manner of people...'*

Special measures applications

Now, I'd like to mention some specifics. As regulars in the magistrates' courts you will be aware of the regrettable constancy of domestic violence cases. So you will be supremely familiar with the availability since 1999[8] of special measures, '*to assist a witness or defendant to give evidence.'* You will be equally familiar with the procedure for judicial consideration of special measures applications that is set out at Part 29.[9]

The starting point - Rule 29.3 - is that applications must be made in writing a soon as practicable after a not guilty plea. That arrangement was introduced to avoid the obligation, in operation previously, to require an application even before a plea had been entered. But that led to preparations for applications that may have become unnecessary because of a guilty plea. So a new arrangement - requiring applications for special measures (and hearsay and bad character) within 14-days of a not guilty plea - was introduced in the Rules for the magistrates' and Crown Courts in April 2010.

However, a short time later the CPS reported to the Committee that, in effect, a Rule amendment to deal with one problem - potentially needless appplications – had created another, unexpected, problem. Because further police inquiries do not start until a not guilty plea has been entered, it was taking more than 14 days to present the CPS with sufficient information on which to base applications for special measures, or to give notice of bad character or of hearsay evidence.

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[7] Part 1
[8] Youth Justice and Criminal Evidence Act, 1999, s19 et seq.
[9] Part 29, Rule 29.3 (a)

For whatever reasons, magistrates' courts were apparently not using their powers under Rule 29.5 - and the equivalent powers for bad character and hearsay - to extend the time limit beyond 14 days and for other easing of the application and notice process.

I express no view about the circumstances that caused magistrates' courts to refuse to extend the time limit and in such numbers that the CPS felt it necessary to raise the issue with the Committee. Indeed, a far as I am aware there was no evidence that refusals had breached the courts' duties under the overriding objective.

However, the Committee decided in April 2011 that the limit for magistrates' courts should be extended to 28 days. We were advised that that longer period would be sufficient and would not interfere with the six week target for first appearance to trial.

I supported the extension because it seemed to me that out-of-time refusals because of procedural delays, notwithstanding judicial justification, may have had the unintended effect of disadvantaging the very people - vulnerable witnesses- that Parliament had intended the Act to help. So 28 days became the new limit for magistrates' courts from October 2011. And I am sure that you will tell me how you feel that it is working.

Witness non-attendance

Next, the non-attendance of witnesses for magistrates' court trials[10]. This is also highly important because of the undesirable consequences of witness' absence. The Committee receives figures regularly about numerous aspects of court performance. There is much attention paid to cracked and ineffective trials.

It emerged in 2009 that, of the main reasons for trials cracking or being ineffective, prosecution witness non-attendance and overlisting alone were frustrating the progress of around a thousand cases a month. That was without taking into account late notice vacations.

That the parties principally are responsible for their witnesses is reflected in the general commitment within the overriding objective (to) *'...respecting the interests of witnesses...'* [11] and at Rule 3.9 which requires, *'each party (to) take every reasonable step to make sure his witnesses will attend when they are needed.'* [12]

But there was no explicit duty on the courts on this point. So with effect from October 2009 the Committee amended Rule 3.8,[13] which deals with case preparation. The addition of Rule 3.8(4)[14] now places a formal requirement on the court also to take action, rather than leaving responsibility with the parties only. The court now has a specific duty to do all it can to get witnesses to turn up when they are needed[15].

A typical example of the use to be made of Rule 3.8(4) would arise with, say, a domestic violence trial. Inquiries at the trial fixing hearing should identify whether, for example, a witness had children

[10] Criminal Procedure Rule Committee papers (09)7 and, (10)61 refer.
[11] Rule 1.1.(2)(d)
[12] Rule 3.9(2)(b)
[13] Part 3, Case management, Rule 3.8, Case preparation and progression.
[14] 3.8(4) (a) *in order to prepare for the trial, the court must take every reasonable step – (a) to encourage and to facilitate the attendance of witnesses when they are needed.*
[15] For detail see Nicholas Moss speech '*Criminal Procedure Rules and Witness Attendance for Magistrates' Courts Trials*' Magistrates' Association Council, London November 26th 2009, via Judiciary website.

to collect from school. If so, then the court ought probably not to fix the trial for the afternoon if it would clash, irretrievably, with that parental obligation.

A simple point, but one that can make the difference between a trial proceeding as intended and its being ineffective – and later cracking perhaps. Asking the prosecution if a witness summons may be necessary is another example, as is checking what contact the witness care team has made with the witness.

An addition to Rule 3.8(4)[16] will appear in the 2012 Amendment Rules, which come into force on April 1st. This change will require the court, once the witness *has* turned up, to do all it can to enable that person, and anyone else taking part in a trial, including the defendant, to do so.

It arose from reports to the Committee last October about problems faced by participants with a learning disability or a communication difficulty, but not so significant as to necessitate application for special measures. With this amendment I would expect, for example, the court to be alert at trial, as well as at the trial-fixing hearing for anyone - witness or defendant - who may need support, short of special measures, to enable that person to take part.

That may involve allowing extra trial time for a witness or a defendant to have breaks for health reasons; or reminding the parties about couching their questions suitably. The Rule is another provision that reminds the court of its duty of active engagement with cases at every stage to achieve efficiency and expedition, consistent with the overriding objective.

Prosecution closing speeches.

I'll give one more example. You'll know that Part 37[17] includes the detailed sequence to be followed for the conduct of magistrates' courts trials. Those of you who keep all editions of the Rules by your bedsides in case of insomnia will have noted an important amendment in the April 2010 edition. There had been a long-standing belief that the prosecution could not make a closing speech in a magistrates' court trial, in contrast with practice at the Crown Court. The Rules reflected that, dealing only with the prosecution's right at the close of a summary trial to address the court on relevant legal points.

However, in 2009 the CPS inspectorate recommended that closing speeches[18] in appropriate cases would improve advocacy and case presentation enabling, for example, issues arising in the witness box to be picked up. The entitlement to do so arises where defendants are represented, or where they introduce evidence other than their own, respectively under the Criminal Procedure Act, 1865 and the Criminal Evidence Act 1898.

After some debate, where concern arose that putting this entitlement in the Rule might elongate proceedings unnecessarily, the Committee agreed to include it as an amendment to Rule 37.3 (3)[19]. In supporting this change I felt that, in conjunction with a following defence closing address, it would be helpful as another mechanism for drawing together what can be disparate, not to say confusing

[16] 3.8(4) (b) *In order to prepare for the trial, the court must take every reasonable step -... (b) to facilitate the participation of any person, including the defendant.*
[17] Part 37, Trial and sentence in a magistrates' court
[18] CrimPRC(09)49
[19] Rule 37.3(3)(g)'*...the prosecutor may make final representations in support of the prosecution case where – (i) the defendant is represented by a legal representative, or (ii) whether represented or not, the defendant has introduced evidence other than his or her own...*'

evidential strands in, say, a section 4 public order or a section 39 common assault trial. In other words, a contribution to more efficient case management – and plainly in the interests of justice.

Of course, there are many, many more examples, such as the much larger scale rule provisions about bail, contempt and costs. But I'm content to leave you to compare and contrast – as exam papers say - the 2005 Rules with the current ones!

But great or small, the Rules reflect two important points about how the Committee works. They show that it moves rapidly, maintaining currency with developments in the law: a complete update of the Rules annually since 2010, with six-monthly amendments from the start. They show also that they are focussed firmly on the practical business of making the courts work better by expressing procedures in plain English and by locating them in a single source, with permanent and familiar numbering.

Improving case management

Every case a managed case

I have explained how the committee came about, what we do and how we do it, with examples of a few rules that, I hope, have struck a chord with you. I referred earlier to some personal preoccupations, and although I do not claim sole proprietorship of them I hope that these examples will resonate with you, too.

The CJSSS and *Stop Delaying Justice!* initiatives have been highly necessary and successful in speeding up the trial process. Here I refer also to timetabling[20] and the impact of *Drinkwater*.[21]

But most hearings in the magistrates' court are not contested, and as I mentioned earlier, the preamble to Part 3[22] makes plain that *every* case is managed, not just those where allegations are denied. So the need for active and effective case management - not to mention compliance with the overriding objective - is applicable to many more cases than those that follow not guilty pleas. Active and effective management are not only about speed and promptness, although they are essential. They are also about improvements to how magistrates' courts deal with other important matters.

Bail applications

I think there is scope for improvements to the structure of bail applications[23]. Where bail is opposed, the law is clear about the exceptions that may apply. But it would be helpful if both parties argued their points in synch with each other, identifying relevant exceptions in a clear sequence. To do so would not, in my view, interfere with the adversarial process.

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[20] 3.10 sets out a number of requirements for the conduct of a trial or an appeal, including at (b) that it '*…must consider setting a timetable…*'

[21] Drinkwater, R (on the application of) v Solihull Magistrates Court [2012] EWHC 765 (Admin) (27 March 2012). In this case multiple adjournments of a part-heard s39 trial culminated in the bench's refusal to grant a fourth adjournment, a decision to proceed in absence, and then to convict, only to have the conviction quashed by the Divisional Court. As part of its judgment the court commented on the trial court's not setting a timetable for the trial and managing it actively.

[22] 3.1 *This Part applies to the management of each case in a magistrates' court and in the Crown Court (including an appeal to the Crown Court) until the conclusion of that case.*

[23] See Part 19, Bail and custody time limits

To do otherwise seems, needlessly, to take up additional time understanding which argument applies to which exception even before a bench decides on the strength or weakness of each one, which is the purpose of an application in the first place.

In my view, where necessary, the court should, routinely, prompt the parties to approach their applications and responses in a more orderly sequence. Perhaps there is scope, too, for a Rule amendment to make the process clearer.

Victim personal statements

Next, take victim personal statements. As a component of open justice, VPSs are an important part of holding to account because they allow the court - and a defendant - to hear, in public, the consequences of his decision to offend. They help to paint a complete picture of an offence, thus assisting with sentencing and compensation. They may also bring conclusion for a victim.

In my experience, the availability of VPSs is highly variable, but I believe that if magistrates ask for them more as part of active case management that would underline the importance that we attach to them. In turn that should encourage the police to offer more victims the opportunity to make them. To reinforce the point an amendment from April introduces specific reference to such statements[24].

Sentencing reasons

Now, sentencing: as magistrates we explain the sentences that we pass and the consequences of non-compliance. But, I wonder how well we explain why we have passed them in the first place. I suggest that we need to improve how we satisfy Rule 37.10 (9) (b):[25] the duty of the court to explain the reasons for its sentence, so that in relation to their specific offence, offenders are told why the state has used its coercive powers against them.

This is also an important part of open justice and a means, thereby, of promoting community confidence in the system. It is also part of active case management, I suggest. A Rule amendment from April enables us to omit our reasons if no one is in court when sentence is passed, typically for motoring matters[26]. But it does not undermine the principle of open explanation when the parties, perhaps the public and, all too rarely in magistrates' courts, the media are present.[27]

Fine enforcement

I wonder about fines, too. In my experience, pressing for immediate payment on imposition can produce a credit or debit card, and sometimes even cash when one least expects it. Perhaps Purnell[28] may prompt another look at this territory with a view, again, to better compliance at the point of imposition through rigorous case management.

Trial preparation

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[24] 37.3(c)'*...including any statement of the effect of the offence on the victim, the victim's family or others.*'
[25] Amended Rule 37.10(9) '*When the court has taken into account all the evidence, information and any report available, the court must -...(b) when passing sentence, explain the reasons for deciding on that sentence, unless neither the defendant not any member so the public is present.*' The amendment introduces the 'no one present' provision, but it does not affect the long-standing reasons-giving requirement in other circumstances.
[26] See footnote 22 above.
[27] See also Part 5, forms and court records; Part 16, reporting, etc. restrictions.
[28] Purnell, R (on the application of) v South Western Magistrates' Court [2013] EWHC 64 (Admin) (23 January 2013).

I return to trials because, case for case, they take up most time. I want to mention a couple of points. Figures presented at Rule Committee meetings show that about two thirds of summary trials do not proceed[29] on the date originally planned because they are vacated, mostly at short notice. Or because they crack. Or because they are ineffective on the day.

So I wonder how much more the courts could do at the trial fixing stage to anticipate these outcomes. In some cases they are unforeseeable; and in others cracking because of a late guilty plea may be a positive outcome.

But in very many others frustrated progress is a negative outcome, particularly for alleged victims and witnesses. And I suggest that the position can be improved by magistrates' courts using the Rules to apply more vigorous, thorough and collaborative case management - leading to sufficient and clear directions - so that, for example, we achieve greater clarity about what it is in dispute; greater confidence about timely disclosure; greater certainty about witness attendance, what they will give evidence about and how long they are likely to take; and precision about other preparations that are necessary. The case management form, when completed comprehensively is a significant aid to this process.

Here I add that Rule 3.9 - *readiness for trial or appeal* - sets out clearly that '*...each party must comply with directions given by the court.*' It includes a duty on each party also to '*...make appropriate arrangement to present any written or other material....'* [30]A simple example of where the observance of that Rule would assist with efficient case management arises when the start of trials is delayed merely because equipment, such as a DVD player, has not been checked to see that it works and that it will actually play the evidential DVD[31].

The next edition of the case management form will include a space for a direction that equipment must be checked before the trial starts. Making a direction on that as well as on many other points may save countless wasted court hours.

Case progression officers

In parallel with tighter court room practice, I would like to see further emphasis on the crucial rôle of case progression officers[32] in progress chasing to ensure that the trial fixing court's directions have been complied with and alerting the court when they spot a problem.

Here Rule 1.2(1) (c)[33] is especially helpful. It requires anyone involved with a case, including CPOs, to notify the court if things that have not been done which will hinder progress. The CPOs' activities can make the difference between trials taking place as planned and their not doing so.

Day of trial timetabling

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[29] Source: HMCTS One Performance Truth, February 2013

[30] 3.9(2)(c)

[31] 3.9(2) '*In fulfilling his duty under rule 3.3, each party must...(c) make appropriate arrangements to present any written or other material.*'

[32] Rule 3.4(4) '*...A case progression officer must – (a) monitor compliance with directions...*'

[33] 1.2(1) (c) '*[Each participant, in the conduct of each case, must-] ...at once inform the court and all parties of any significant failure...to take any...direction of the court. A failure is significant if it might hinder the court in furthering the overriding objective.*'

Finally, I wonder, too, how many multi-day trials could satisfy completely the overriding objective of being dealt with justly, but could do so in a shorter time. Rule 3.10[34] gives the court scope for achieving that, where appropriate. The Rule requires the court to consider setting a timetable and also gives it the power to limit the duration of any stage of the hearing, including examination, cross-examination and re-examination. I shall be interested to hear your thoughts on the effectiveness of those powers.

Conclusion

In the last few minutes I have tried to give you the background and context for the Criminal Procedure Rules with some relevant examples. I shall not test your patience much longer beyond making some closing remarks - even though I am not represented!

For all the examples that I have given you, I have no doubt that you will have many others which you will regard as more important. But I hope that the ones that I have selected have shown you how the Rules are evolving constantly in response to need.
And how they are crafted to make the courts work better and to enable all court users - practitioners and public - to understand clearly and easily how the criminal courts work.

But we must all recognise that the ability of the Rules to ensure that all cases do proceed efficiently and effectively depends also on another component: whether they are about bail, or trials, or sentencing or any of the other matters that come before magistrates' courts we need to ensure that the parties have the right information at the right time; and that the court asks the right questions at the right time. Asking at the point that a problem has arisen, or when a piece of information is missing is often too late to repair the damage without further hold ups.

The efficient and effective management of every case that comes before a magistrates' court is at the heart of summary justice and the Rules are the mechanism for enabling that to happen. I hope that practitioners – advocates and the courts – will continue to familiarise themselves with the Rules, and all that they enable and demand, so that each of us satisfies the obligation to deal with criminal cases justly.

[34] Rule 3.10(b) and (d)