

Chapter 1 (Preliminaries): Update

1.7 Alternatives to prosecution

1.7.1 Cautions

1.7.1.1 Adults: 'simple cautions'

Even though 'simple' cautions for adults are non-statutory, their scope is now restricted by statute. Section 17 of the Criminal Justice and Courts Act 2015 provides that, where a person aged 18 or over admits committing an indictable-only offence, the police must not administer a caution unless an officer of the rank of superintendent or above considers that there are exceptional circumstances relating to the person or the offence, and the DPP (in practice, this will be a Crown Prosecutor) consents.

If the offence is an either-way offence specified by statutory instrument (see the Criminal Justice and Courts Act 2015 (Simple Cautions) (Specification of Either-Way Offences) Order 2015 (SI 2015/790), the police must not give a caution unless an officer of the rank of inspector or above considers that there are exceptional circumstances relating to the person or the offence (but the DPP's consent is not required).

If the offence is a summary offence (or an either-way offence not specified by statutory instrument), the police must not administer a caution if, within the period of two years before the commission of the present offence, the person has been convicted of, or cautioned for, a similar offence (unless an officer of the rank of inspector or above considers that there are there are exceptional circumstances relating to the person, the offence admitted or the previous offence).

1.7.1.3 Youth offenders: cautions

Section 41 of the Criminal Justice and Courts Act 2015 amends s 66ZA of the Crime and Disorder Act 1998 to require a youth caution to be given in the presence of an appropriate adult where the offender is under the age of 18 (thus including 17 year olds).

1.2.2 Searching premises

1.2.2.1 Entry with a warrant

In *R (on the application of AB) v Huddersfield Magistrates' Court* [2014] EWHC 1089 (Admin), Stuart-Smith LJ (at [13]) said:

The parties' submissions referred us to a generous selection of the cases over the past few years where the courts have considered the legality of warrants. Most need not be individually cited in this judgment. However, it should by now be clearly appreciated by all who make or decide applications for the issuing of warrants that there is no part of the process that should be regarded as a formality. Each application must be carefully and precisely formulated so as to satisfy both the statutory requirements and the duty of full and frank disclosure; and a decision to issue may only be taken after that level of critical scrutiny that is required when the court is asked to sanction a substantial invasion of fundamental rights. The flow of the authorities tends towards requiring increasing rigour and precision at all stages of the process and nothing we say in this judgment should be taken or interpreted as going against that flow.

1.8 The overriding objective

1.8.1 Case management powers and duties

Rules 3.2(1) of the Criminal Procedure Rules requires the court to further the overriding objective by actively managing the case. Rule 3.2(2) defines 'active case management' as including:

- (a) the early identification of the real issues;
- (b) the early identification of the needs of witnesses;
- (c) achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case;
- (d) monitoring the progress of the case and compliance with directions;
- (e) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way;
- (f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings;
- (g) encouraging the participants to co-operate in the progression of the case; and
- (h) making use of technology.

Rule 3.2(4) and (5) create a presumption that, where facilities are available, live links or telephones should be used for pre-trial case management hearings.

Rule 3.3 sets out the duty on each party to actively assist the court in fulfilling its duty under rule 3.2. Rule 3.3(2) says that this includes:

- (a) at the beginning of the case, communication between the prosecutor and the defendant at the first available opportunity and in any event no later than the beginning of the day of the first hearing;
- (b) after that, communication between the parties and with the court officer until the conclusion of the case;
- (c) by such communication establishing, among other things—
 - (i) whether the defendant is likely to plead guilty or not guilty,
 - (ii) what is agreed and what is likely to be disputed,
 - (iii) what information, or other material, is required by one party of another, and why, and
 - (iv) what is to be done, by whom, and when (without or if necessary with a direction);
- (d) reporting on that communication to the court—
 - (i) at the first hearing, and
 - (ii) after that, as directed by the court ...

The provisions relating to case preparation and progression are now set out in rule 3.9 of the Criminal Procedure Rules, which provides as follows:

- (1) At every hearing, if a case cannot be concluded there and then the court must give directions so that it can be concluded at the next hearing or as soon as possible after that.
- (2) At every hearing the court must, where relevant—
 - (a) if the defendant is absent, decide whether to proceed nonetheless;
 - (b) take the defendant's plea (unless already done) or if no plea can be taken then find out whether the defendant is likely to plead guilty or not guilty;
 - (c) set, follow or revise a timetable for the progress of the case, which may include a timetable for any hearing including the trial or (in the Crown Court) the appeal;
 - (d) in giving directions, ensure continuity in relation to the court and to the parties' representatives where that is appropriate and practicable; and
 - (e) where a direction has not been complied with, find out why, identify who was responsible, and take appropriate action.

- (3) 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; and
 - (b) to facilitate the participation of any person, including the defendant.
- ...
- (6) Facilitating the participation of any person includes giving directions for the appropriate treatment and questioning of a witness or the defendant, especially where the court directs that such questioning is to be conducted through an intermediary
- (7) Where directions for appropriate treatment and questioning are required, the court must
 - (a) invite representations by the parties and by any intermediary; and
 - (b) set ground rules for the conduct of the questioning, which rules may include—
 - (i) a direction relieving a party of any duty to put that party's case to a witness or a defendant in its entirety,
 - (ii) directions about the manner of questioning,
 - (iii) directions about the duration of questioning,
 - (iv) if necessary, directions about the questions that may or may not be asked,
 - (v) where there is more than one defendant, the allocation among them of the topics about which a witness may be asked, and
 - (vi) directions about the use of models, plans, body maps or similar aids to help communicate a question or an answer.

Rule 3.10(2) provides that, as part of their trial preparation, each party must:

- (a) comply with directions given by the court;
- (b) take every reasonable step to make sure that party's witnesses will attend when they are needed;
- (c) make appropriate arrangements to present any written or other material; and
- (d) promptly inform the court and the other parties of anything that may—
 - (i) affect the date or duration of the trial or appeal, or
 - (ii) significantly affect the progress of the case in any other way.

Rule 3.11 sets out the court's powers and duties with regard to the conduct of a trial or an appeal. The court:

- (a) must establish, with the active assistance of the parties, what are the disputed issues;
- (b) must consider setting a timetable that—
 - (i) takes account of those issues and of any timetable proposed by a party, and
 - (ii) may limit the duration of any stage of the hearing;
- (c) may require a party to identify—
 - (i) which witnesses that party wants to give evidence in person,
 - (ii) the order in which that party wants those witnesses to give their evidence,
 - (iii) whether that party requires an order compelling the attendance of a witness,
 - (iv) what arrangements are desirable to facilitate the giving of evidence by a witness,
 - (v) what arrangements are desirable to facilitate the participation of any other person, including the defendant,
 - (vi) what written evidence that party intends to introduce,
 - (vii) what other material, if any, that person intends to make available to the court in the presentation of the case, and
 - (viii) whether that party intends to raise any point of law that could affect the conduct of the trial or appeal; and
- (d) may limit—
 - (i) the examination, cross-examination or re-examination of a witness, and
 - (ii) the duration of any stage of the hearing.

R (Hassani) v West London Magistrates' Court [2017] EWHC 1270 (Admin) concerned the taking of what were regarded as unmeritorious points in a drink-driving case. Echoing the oft-cited words of Auld LJ in *R v Gleeson* [2003] EWCA Crim 3357 (at [36]), Irwin LJ says (at [9]):

The criminal law is not a game to be played in the hope of a lucky outcome, a game to be played as long and in as involved a fashion as the paying client is able or prepared to afford.

He goes on (at [10]) to say that the Criminal Procedure Rules “are there to be employed actively so as to preclude game-playing and ensure that the courts only have to address real issues with some substance”, adding (at [11]):

Time wasting, extension of hearings and taking hopeless points in the hope of wearing down an opponent or the court are neither proper nor legitimate ways in which to conduct a case, for a party or for a party's lawyers. Courts must be aware of such behaviour and employ firm case management to prevent it.

Attention is drawn (at [12]) to effect on the defence of the duty to co-operate in the achievement of the overriding objective:

If the defence are going to suggest that some document or some piece of service is missing, they must do so early. If they do not, then it is open to the court to find that the point was raised late, and any direction then sought to produce a document or to apply for an adjournment may properly be refused.