

Chapter 10 (Crown Court Trial): Update

Note

Part 25 of the Criminal Procedure Rules now sets out some of the rules applicable to trial on indictment.

The Crown Court Bench Book has been replaced by *The Crown Court Compendium, Part I: Jury and Trial Management and Summing Up* (Judicial College, February 2017).

10.1 Pre-trial hearings

10.1.1 Early guilty plea hearing; preliminary hearing, plea and case management hearing

The Criminal Procedure Rules 2015 replaced the Plea and Case Management Hearing with the Plea and Trial Preparation Hearing.

Rule 3.13(1) provides that:

The Crown Court—

- (a) may, and in some cases must, conduct a preparatory hearing where rule 3.14 applies;
- (b) must conduct a plea and trial preparation hearing;
- (c) may conduct a further pre-trial case management hearing (and if necessary more than one such hearing) only where—
 - (i) the court anticipates a guilty plea,
 - (ii) it is necessary to conduct such a hearing in order to give directions for an effective trial, or
 - (iii) such a hearing is required to set ground rules for the conduct of the questioning of a witness or defendant.

Rules 3.13(2) goes on to provide that:

At the plea and trial preparation hearing the court must—

- (a) satisfy itself that there has been explained to the defendant, in terms the defendant can understand (with help, if necessary), that the defendant will receive credit for a guilty plea;
- (b) take the defendant's plea or if no plea can be taken then find out whether the defendant is likely to plead guilty or not guilty;
- (c) unless the defendant pleads guilty, satisfy itself that there has been explained to the defendant, in terms the defendant can understand (with help, if necessary), that at the trial—
 - (i) the defendant will have the right to give evidence after the court has heard the prosecution case,
 - (ii) if the defendant does not attend, the trial may take place in the defendant's absence,
 - (iii) if the trial takes place in the defendant's absence, the judge may inform the jury of the reason for that absence, and
 - (iv) where the defendant is released on bail, failure to attend court when required is an offence for which the defendant may be arrested and punished and bail may be withdrawn; and
- (d) give directions for an effective trial.

Rule 3.24(5) provides that where a magistrates' court sends the defendant for trial, the Crown Court must take the defendant's plea not less than 2 weeks after the date on which

the sending takes place (unless the parties otherwise agree) and not more than 16 weeks after that date, unless the court otherwise directs.

By virtue of para 3A.11 of *Practice Direction I*, if a case is sent to the Crown for trial (on the basis that the accused will not be pleading not guilty), a PTPH must be held within 28 days of sending. An indictment should be lodged at least 7 days in advance of the PTPH (para 3A.16). Additional case management hearings are discouraged (para 3A.21). Any case progression hearings should take place without courtroom hearings, using electronic communications (para 3A.24).

If a guilty plea is entered at the PTPH, sentence should be passed whenever possible. If a not guilty plea is entered at the PTPH, case management should take place in preparation for trial. This should be done using the Plea and Trial Preparation Hearing form, use of which is mandatory (see para.3A.3 of the *Practice Direction*): it should be completed by the parties and served on the court in advance of the hearing.

10.1.2 Preparatory hearings

In *R v Quillan* [2015] EWCA Crim 538, the Court of Appeal (at [7]-[8]) said:

One of the purposes of making an order for a preparatory hearing is to assist the judge's management of the trial. Deciding issues such as those which arise on this appeal in advance of the trial ... allows the trial to proceed uninterrupted, if that is the result of the determination of the legal issue. If there is an appeal, it allows this court to determine issues without the pressure of time created by the need to ensure that the jury which has spent weeks dealing with the case is not further inconvenienced. Even more importantly, if the decision is that the judge was right to stop the case, then no trial is required at all and enormous public expenditure is saved.

Criminal proceedings are burdensome for all involved, particularly witnesses, jurors and other members of the public who become embroiled in them. In addition such prosecutions are a very considerable burden on public finances; a misconceived prosecution is therefore a very serious matter. If counts in the indictment are misconceived in law it is essential that this is determined at the earliest stage...

The Court referred to *R v I* [2010] 1 WLR 1125 (where Hughes LJ had said at [21] that: 'Virtually the only reason for directing such a hearing nowadays is if the judge is going to have to give a ruling which ought to be the subject of an interlocutory appeal. Such rulings are few and far between and do not extend to most rulings of law') and continued (at [10]-[11]):

Whilst that is almost invariably the position, there may be special circumstances where a trial will be very long and very costly and where a ruling on a point of law in relation to the legal basis on which a count in the indictment is founded may determine whether or not a trial is required at all. In such a case such a point of law should be determined well before any trial starts. That is not the same thing as saying that it must be resolved in a preparatory hearing. There is a power in any case under s 40 of the 1996 Act to hold a pre-trial hearing and to decide any question of law relating to the case concerned. This procedure does not involve any of the technicalities which have caused some difficulty in relation to preparatory hearings and there is no interlocutory right of appeal (except where the prosecution treats any ruling as a terminating ruling).

A further benefit of the preparatory hearing procedure is that the prosecution is not required to undertake that a defendant is entitled to be acquitted if an appeal it brings against a ruling in a preparatory hearing fails. Cases of real complexity are crucially affected by the charges the prosecution chooses to prefer and the way in which it formulates its case. ... It is obviously of

benefit for such issues to be determined in advance of the trial so that, if it can be fairly done, the prosecution has an opportunity to reflect on any adverse ruling and to consider whether an amendment to the indictment should be sought.

10.3 Presence of defendant

Rule 25.2(1)(b) of the Criminal Procedure Rules provides that the court must not proceed if the defendant is absent, unless the court is satisfied both that the defendant has waived the right to attend, and that the trial will be fair despite the defendant's absence.

10.4 The jury

Rule 26.3 of the Criminal Procedure Rules requires the court officer to arrange for each juror to receive general information about jury service and about a juror's responsibilities. In particular, the juror must receive written notice of the prohibitions against research by a juror into the case; disclosure by a juror of any such research to another juror during the trial; conduct by a juror which suggests that that juror intends to try the case otherwise than on the evidence; and disclosure by a juror of the deliberations of the jury. The written notice must contain a warning that the penalty for breach of those prohibitions is imprisonment and/or a fine.

10.4.1 Who can serve on a jury?

In *Armstrong v UK* [2014] ECHR 1368, there were two police officers (one retired, one still serving) on the jury. The European Court of Human Rights rejected the claim that the trial had therefore been unfair. Firstly, the officers had alerted the court to the fact that they were police officers (one retired and one still serving) and enquiries were made to establish whether there was a real risk of bias. Secondly, 'the defence had every opportunity to object to the continued presence of the men on the jury but chose not to do so' (see [41] and [42]). Thirdly, this was 'not a case where a police officer who was personally acquainted with a police officer witness giving relevant evidence was a member of the jury' (see [43]). Finally, the defence case 'did not depend to any significant extent - if at all - upon a challenge to the evidence of the police officer witnesses' (at [44]).

Section 68 of the Criminal Justice and Courts Act 2015 amends the Juries Act 1974 so that the upper age limit for jury service is increased to 75.

10.4.3 Empanelling a jury

Rule 25.6(4) of the Criminal Procedure Rules states that:

The court must select the jury by drawing at random each juror's name from among those so summoned and

- (a) announcing each name so drawn; or
- (b) announcing an identifying number assigned by the court officer to that person, where the court is satisfied that that is necessary.

The ability to identify a juror by using a number, rather than their name, is relevant in cases where there is a fear of jury intimidation.

Rule 25.6(6) goes on to provide that the jury selected must comprise no fewer than 12 jurors and that it may, where the court expects the trial to last for more than 4 weeks, comprise as many as 14 jurors to begin with. Under rule 25.6(7), where the court selects a jury comprising more than 12 jurors, the court must explain to them that:

- (a) the purpose of selecting more than 12 jurors to begin with is to fill any vacancy or vacancies caused by the discharge of any of the first 12 before the prosecution evidence begins;
- (b) any such vacancy or vacancies will be filled by the extra jurors in order of their selection from the panel;
- (c) the court will discharge any extra juror or jurors remaining by no later than the beginning of the prosecution evidence; and
- (d) any juror who is discharged for that reason then will be available to be selected for service on another jury, during the period for which that juror has been summoned.

Rule 25.7(2) stipulates that, no later than the beginning of the prosecution evidence, if the jury then comprises more than 12 jurors, the court must discharge any in excess of 12 in reverse order of their selection from the panel.

The provision for having more than 12 jurors at the start of the trial is intended to prevent a trial from collapsing at its early stages because one or more jurors have to be discharged (for example, where it becomes apparent during the prosecution opening that one of the jurors is acquainted with a party to the case).

Under rule 25.6(9), the oath or affirmation taken by each juror is as follows:

I swear by Almighty God [or I do solemnly, sincerely and truly declare and affirm] that I will faithfully try the defendant and give a true verdict according to the evidence.

10.4.4 Challenges to jurors

10.4.4.1 Standing a juror by

Under rule 25.8(3), a prosecutor who exercises the prosecution right without giving reasons to prevent the court selecting an individual juror must announce the exercise of that right before the juror completes the oath or affirmation.

10.4.4.2 Challenging for cause

Rule 25.8(2) provides that a party who objects to the selection of an individual juror must tell the court of the objection after the juror's name or number is announced but before the juror completes the oath or affirmation, and must explain the objection.

10.5 Special Measures

In *R v Lubemba* [2014] EWCA Crim 2064 the Court of Appeal considered the methods which may be employed to facilitate vulnerable witnesses giving evidence. Hallett LJ quoted extensively from the judgement of the Court of Appeal *R v Barker* [2010] EWCA Crim 4 (whose approach was adopted in *R v Wills* [2011] EWCA Crim 1938, [2012] 1 Cr App R 2). Her Ladyship went on:

[42] The court is required to take every reasonable step to encourage and facilitate the attendance of vulnerable witnesses and their participation in the trial process ... [I]t is best practice to hold hearings in advance of the trial to ensure the smooth running of the trial, to give any special measures directions and to set the ground rules for the treatment of a

vulnerable witness. We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances. If there are any doubts on how to proceed, guidance should be sought from those who have the responsibility for looking after the witness and or an expert.

[43] ... The ground rules hearing should cover, amongst other matters, the general care of the witness, if, when and where the witness is to be shown their video interview, when, where and how the parties (and the judge if identified) intend to introduce themselves to the witness, the length of questioning and frequency of breaks and the nature of the questions to be asked. So as to avoid any unfortunate misunderstanding at trial, it would be an entirely reasonable step for a judge at the ground rules hearing to invite defence advocates to reduce their questions to writing in advance.

[44] ... The trial judge is responsible for controlling questioning and ensuring that vulnerable witnesses and defendants are enabled to give the best evidence they can. The judge has a duty to intervene, therefore, if an advocate's questioning is confusing or inappropriate.

[45] ... It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round. They cannot insist upon any supposed right "to put one's case" or previous inconsistent statements to a vulnerable witness. If there is a right to "put one's case" (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidation or distressing a witness ...

Rule 3.13(1)(c)(iii) of the Criminal Procedure Rules now provides that the Crown Court may hold a pre-trial case management hearing where 'such a hearing is required to set ground rules for the conduct of the questioning of a witness or defendant'. Rule 3.9(7) makes more detailed provision for 'ground rules' hearings, at which the court can give directions for the appropriate treatment and questioning of vulnerable witnesses and defendants:

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.

Trial on indictment: a summary of the procedure

Rule 25.9(2) of the Criminal Procedure Rules sets out the procedure to be followed where the defendant pleads not guilty. It provides that, in the following sequence:

- (a) where there is a jury, the court must: (i) inform the jurors of each offence charged in the indictment to which the defendant pleads not guilty, and (ii) explain to the jurors that it is their duty, after hearing the evidence, to decide whether the defendant is guilty or not guilty of each offence;
- (b) the prosecutor may summarise the prosecution case;
- (c) where there is a jury, to help the jurors to understand the case and resolve any issue in it the court may: (i) invite the defendant concisely to identify what is in issue, if necessary in terms approved by the court, (ii) if the defendant declines to do so, direct that the jurors be given a

- copy of any defence statement served under rule 15.4 (Defence disclosure), edited if necessary to exclude any reference to inappropriate matters or to matters evidence of which would not be admissible;
- (d) the prosecutor must introduce the evidence on which the prosecution case relies;
 - (e) ... at the end of the prosecution evidence, on the defendant's application or on its own initiative, the court: (i) may direct the jury (if there is one) to acquit on the ground that the prosecution evidence is insufficient for any reasonable court properly to convict, but (ii) must not do so unless the prosecutor has had an opportunity to make representations;
 - (f) ... at the end of the prosecution evidence, the court must ask whether the defendant intends to give evidence in person and, if the answer is 'no', then the court must satisfy itself that there has been explained to the defendant, in terms the defendant can understand (with help, if necessary): (i) the right to give evidence in person, and (ii) that if the defendant does not give evidence in person, or refuses to answer a question while giving evidence, the court may draw such inferences as seem proper;
 - (g) the defendant may summarise the defence case, if he or she intends to call at least one witness other than him or herself to give evidence in person about the facts of the case;
 - (h) in this order (or in a different order, if the court so directs) the defendant may: (i) give evidence in person, (ii) call another witness, or witnesses, to give evidence in person, and introduce any other evidence;
 - (i) a party may introduce further evidence if it is then admissible (for example, because it is in rebuttal of evidence already introduced);
 - (j) the prosecutor may make final representations, where (i) the defendant has a legal representative, (ii) the defendant has called at least one witness, other than the defendant him or herself, to give evidence in person about the facts of the case, or (iii) the court so permits; and
 - (k) the defendant may make final representations.

Criminal Practice Direction VI, para 25A, says that the prosecution opening speech should 'set out for the jury the principal issues in the trial, and the evidence which is to be introduced in support of the prosecution case', and that the purpose is 'to help the jury understand what the case concerns, not necessarily to present a detailed account of all the prosecution evidence due to be introduced'.

After the prosecution speech, the defence may (where appropriate) be called upon to clarify the issues in the case. *Criminal Practice Direction VI*, para 25A.2, states that the purpose is to 'provide the jury with focus as to the issues that they are likely to be called upon to decide, so that jurors will be alert to those issues from the outset and can evaluate the prosecution evidence that they hear accordingly'.

Criminal Practice Direction VI, para 25A.3, says that, at this point, the judge may give appropriate directions about the law (for example, as to what features of the prosecution evidence they should look out for in a case in which what is in issue is the identification of the defendant by an eye-witness).

Under rule 25.9(5), where there is more than one defendant, this procedure applies to each of them in the order in which their names appear in the indictment, or in an order directed by the court.

Rule 25.11(2) requires that, unless the court otherwise directs, a witness waiting to give evidence must not wait inside the courtroom, unless that witness is a party, or an expert witness.

Rule 25.11(4) sets out the process for eliciting evidence from the witness. It provides that, in the following sequence—

- (a) the party who calls a witness may ask questions in examination-in-chief;
- (b) if the witness gives evidence for the prosecution—

- (i) the defendant, if there is only one, may ask questions in cross-examination, or
- (ii) subject to the court's directions, each defendant, if there is more than one, may ask such questions, in the order their names appear in the indictment or as directed by the court;
- (c) if the witness gives evidence for a defendant—
 - (i) subject to the court's directions, each other defendant, if there is more than one, may ask questions in cross-examination, in the order their names appear in the indictment or as directed by the court, and
 - (ii) the prosecutor may ask such questions;
- (d) the party who called the witness may ask questions in re-examination arising out of any cross-examination.

Under rule 25.12, where the court permits a party to introduce in evidence the written statement of a witness, the court and the jury (if there is one) must read the statement; the gist of the statement must be summarised aloud; and, unless the court otherwise directs, if any member of the public (including any reporter) is present, each relevant part of the statement must be read or summarised aloud.

10.7 Submission of no case to answer

In *R v Vaid* [2015] EWCA Crim 298, Gross LJ (at [20]) noted that when considering (pursuant to *R v Galbraith*) whether the prosecution evidence, taken at its highest, is such that a jury properly directed could properly convict on it, “the question is whether a reasonable jury could, on one possible view of the evidence, reject all realistic possibilities consistent with innocence, not whether all reasonable juries would do so”.

In *R v Darnley* [2012] EWCA Crim 1148, Elias LJ (at [21]) said:

[T]he focus should be on the traditional question, namely whether there was evidence on which a jury, properly directed, could infer guilt. It is an easier test, not least because it focuses on what a reasonable jury could do rather than what it could not do. Reasonable juries may differ because the assessment of the facts is not simply a logical exercise and different views may reasonably be taken about the weight to be given to potentially relevant evidence. The judge must be alive to that when considering a half-time application. Of course, if the judge is satisfied that even on the view of the facts most favourable to the prosecution no reasonable jury could convict, then the case should be stopped.

In *R v Sardar*, [2016] EWCA Crim 1616, Sir Brian Leveson P (at [17]) cited the decision of the Supreme Court of South Australia, in *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1, where King CJ had said:

[I]t is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. ... Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence. ... He is concerned only with whether a reasonable jury could reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence.

I would re-state the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a

circumstantial case, that implies that even if all the evidence for the prosecution was accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilty beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence.

10.11 The judge's summing up

10.11.4 Such warnings as are appropriate

10.11.4.7 The defendant's good character

In *R v Hunter* [2015] EWCA Crim 631, the Court of Appeal reviewed extensively the case law on Vye directions. Hallett LJ (at [68]) said that:

- (a) The general rule is that a direction as to the relevance of good character to a defendant's credibility is to be given where a defendant has a good character and has testified or made pre-trial statements.
- (b) The general rule is that a direction as to the relevance of a good character to the likelihood of a defendant's having committed the offence charged is to be given where a defendant has a good character whether or not he has testified or made pre-trial answers or statements.
- (c) Where defendant A, of good character, is tried jointly with B who does not have a good character, a) and b) still apply.
- (d) There are exceptions to the general rule for example where a defendant has no previous convictions but has admitted other reprehensible conduct and the judge considers it would be an insult to common sense to give directions in accordance with Vye. The judge then has a residual discretion to decline to give a good character direction.
- (e) A jury must not be misled...

10.9 Closing speeches

In *R v Cojan* [2014] EWCA Crim 2512, the court referred to *R v Paul* [2013] EWCA Crim 978. Hallett LJ noted (at [12]) that the court in that case had considered that, despite any breach of a rule or 'convention' about the prosecution advocate not being entitled to make a closing speech, the verdicts were nonetheless safe on the basis that the strength of the evidence against the defendant. Her Ladyship went on to say (at [13]):

[W]e share the doubts of the court in *Paul* as to whether there is still any rule that prosecuting counsel may not make a closing speech where the accused is unrepresented ... In any event, we are not prepared to contemplate a rule, the effect of which would be to enable an accused deliberately to dispense with the services of his representatives so as to prevent prosecuting counsel making a closing speech in an appropriate case.

Hallett LJ went on to say (at [14]) that the court preferred:

to approach the matter as an issue of balance and fairness. It is the overriding duty of any trial judge to ensure that an accused has a fair trial. As part of that duty it would be incumbent upon a trial judge, faced with an unrepresented accused, to assess all the circumstances of the case and decide whether or not it would be fair to allow prosecuting counsel to make a speech.

10.11 The judge's summing up

Rule 25.14(2) requires the court to 'give the jury directions about the relevant law at any time at which to do so will assist jurors to evaluate the evidence'.

Such directions may be given at any stage of the trial, not just in the summing up. *Criminal Practice Direction VI*, para 26K.10 gives some examples of where an 'early direction' might be appropriate: before hearing identification evidence in a case where identification is in issue; before hearing evidence of bad character; before hearing hearsay evidence. The purpose of such an 'early direction' is to help the jury evaluate the evidence as they hear it.

Rule 25.14(3) goes on to set out the contents of the judge's summing up to the jury and subsequent stages of the trial. It provides that the court must:

- (a) summarise for the jury, to such extent as is necessary, the evidence relevant to the issues they must decide;
- (b) give the jury such questions, if any, as the court invites jurors to answer in coming to a verdict;
- (c) direct the jury to retire to consider its verdict;
- (d) if necessary, recall the jury to answer jurors' questions;
- (e) if appropriate, recall the jury to give directions for a verdict by a majority; and
- (f) recall the jury when it informs the court that it has reached a verdict.

The summary requires a 'summary of the nature of the evidence relating to each issue', and a 'balanced account of the points raised by the parties' (*Criminal Practice Direction VI*, para 26K.21).

The questions that may be put to the jury are sometimes known as a 'route to verdict'; it poses a series of questions the answers to which will lead the jury to their verdict. *Criminal Practice Direction VI*, para 26K.12, says that, unless the case is so straightforward that it would be superfluous to do so, the judge should provide a written route to verdict, which may be presented (on paper or digitally) in the form of 'text, bullet points, a flowchart or other graphic'.

Under rule 25.14(4), the court may give the jury directions, questions or other assistance in writing.

10.15 Returning a verdict

Rule 25.14(5) of the Criminal Procedure Rules provides that, when the court recalls the jury to deliver its verdict, the court must ask the foreman chosen by the jury, in respect of each count, whether the jury has reached a verdict on which all the jurors agree and, if so, whether that verdict is guilty or not guilty. If the jury has not reached a verdict and has been deliberating for at least 2 hours and if the court has given a majority verdict direction, then the jury (when they return to court after the majority verdict direction) should be asked whether at least 10 (of 11 or 12 jurors), or 9 (of 10 jurors), agreed on a verdict; if so, whether that verdict is guilty or not guilty; and if (and only if) such a verdict is guilty, how many jurors agreed to that verdict and how many disagreed.

10.17 Jury still unable to reach a verdict

10.17.1 The *Watson* direction

Further guidance on *Watson* directions was given in *R v Arthur* [2013] EWCA Crim 1852, where Pitchford LJ (at [43] – [44]) said:

[O]nce the jury is in retirement it is of the first importance that no individual juror should feel under any compulsion or pressure to conform with the views of the majority if to do so would compromise their conscience and, therefore, their oath. Furthermore, the jury as a whole, despite the heavy cost and inconvenience of a re-trial, should not feel under any pressure to

return a verdict if, conscientiously, they are not unanimous or cannot reach the required majority ... It is undesirable to give a *Watson* direction before or at the time of the majority verdict direction because its effect may be to undo the benefit of the majority verdict direction for which Parliament has provided. Exceptional circumstances may arise that will require the trial judge to deal with the exigencies of the moment but, in general, there is no occasion to make exhortations to the jury to arrive at a verdict. This is why the *Watson* direction is rarely given by trial judges and, when it is, only as a last resort following a prolonged retirement after the majority verdict direction has been given.

[I]f complaint is made about the trial judge's words of explanation, encouragement or exhortation the question for [the Court of Appeal] is whether the words used were appropriate in the circumstances or carried with them the risk that jurors would feel undue pressure to reach a verdict. If the effect of the judge's direction to the jury is to create a significant risk that the jury or individual jurors may have felt under pressure to compromise their oaths, the verdict is likely to be unsafe. No juror should feel required to compromise their oath in order to fall in with the majority and no jury should feel under pressure to reach a verdict if to do so would require any one of them to compromise their oath. The danger is that all jurors, particularly the minority, will feel pressure to return a verdict unanimously or by an acceptable majority at the expense of conscientious consideration of the evidence. The closer the jury is to unanimity or to an acceptable majority the greater is the pressure to which the minority may feel exposed.

In *R v M* [2014] EWCA Crim 2590, the Court of Appeal considered *R v Arthur*. Bean LJ (at [20]) summarised the effect thus:

there are cumulative tests which must be satisfied before a *Watson* direction can be given: (i) it requires exceptional circumstances, which is why it is rarely given; and even then (ii) it can only be given as a last resort where prolonged retirement following the giving of a majority direction.

10.17 Jury still unable to reach a verdict

10.17.2 Discharge of jury

In *R v Burton* [2015] EWCA Crim 1307, the Court of Appeal reiterated that 'the prosecution will not seek a third trial in the absence of special factors that would justify such a course' (per Treacy LJ at [24]). His Lordship went on to observe (at [36]):

the number of cases in which a third trial is permitted should be strictly limited in order to maintain public confidence in the criminal justice system and provide a degree of finality for a defendant. It is for that reason that the court must proceed with extreme caution. If a crime is truly one of extreme gravity and the evidence is cogent despite the problems experienced by previous juries then it may well be an affront to justice and more likely to undermine public confidence not to pursue the aims of convicting the guilty and deterring the most serious crimes.

Procedure where the defendant is convicted

Rule 25.16 of the Criminal Procedure Rules governs the procedure where the defendant pleads guilty or is found guilty. Rule 25.16(2) provides as follows:

The court may exercise its power—

- (a) if the defendant is an individual—
 - (i) to require a pre-sentence report,
 - (ii) to request a medical report,
 - (iii) to require a statement of the defendant's financial circumstances;
- (b) if the defendant is a corporation, to require such information as the court directs about the defendant's corporate structure and financial resources;

- (c) to adjourn sentence pending—
 - (i) receipt of any such report, statement or information,
 - (ii) the verdict in a related case.

Rule 25.16(3) sets out the role of the prosecutor at the sentencing hearing:

The prosecutor must—

- (a) summarise the prosecution case, if the sentencing court has not heard evidence;
- (b) identify in writing any offence that the prosecutor proposes should be taken into consideration in sentencing;
- (c) provide information relevant to sentence, including—
 - (i) any previous conviction of the defendant, and the circumstances where relevant,
 - (ii) any statement of the effect of the offence on the victim, the victim's family or others; and
- (d) identify any other matter relevant to sentence, including—
 - (i) the legislation applicable,
 - (ii) any sentencing guidelines, or guideline cases,
 - (iii) aggravating and mitigating features affecting the defendant's culpability and the harm which the offence caused, was intended to cause or might foreseeably have caused, and
 - (iv) the effect of such of the information listed in paragraph (2) as the court may need to take into account.

Under rule 25.16(6), before passing sentence, the court must give the defendant an opportunity to make representations and to introduce evidence relevant to sentence (and where the defendant is under 18, the court may give the defendant's parents, guardian or other supporting adult, if present, such an opportunity as well).

Rule 25.16(7)(a) provides that, when the court has taken into account all the evidence, information and any report available, the court must, as a general rule, pass sentence at the earliest opportunity. When passing sentence, by virtue of rule 25.16(7)(b), the court must:

- (i) explain the reasons,
- (ii) explain to the defendant its effect, the consequences of failing to comply with any order or pay any fine, and any power that the court has to vary or review the sentence, unless the defendant is absent or the defendant's ill-health or disorderly conduct makes such an explanation impracticable, and
- (iii) give any such explanation in terms the defendant, if present, can understand (with help, if necessary) ...

10.20 Variation of sentence

In *R v Warren* [2017] EWCA Crim 226, the Court of Appeal gave guidance on the operation of s 155 of the PCC(S)A 2000 (the 'slip rule'):

- (1) Where an error occurs in the factual basis of sentence it should be pointed out to the court as soon as possible and consideration should be given to correcting it at the earliest opportunity, preferably by revisiting sentence on the same day rather than a subsequent day.
- (2) A judge should not use the slip rule simply because there is a change of mind about the nature or length of the sentence but the slip rule is available where the judge is persuaded that he had made a material error in the sentencing process whether of fact or law. It is relevant in considering whether he had made a material error that that error might be corrected by the Court of Appeal on the Attorney General's application.
- (3) The sooner the slip rule is invoked in such a case the better. The passage of time from the first decision to its revision is a material consideration as to how the power should be exercised but there is a 56-day cut off in any event.

(4) A judge should not be unduly influenced by the prospect of a reference being made to change the sentence that he thought was right at the time by the mere threat of a review by the Attorney General. If the judge concludes that the sentence was not wrong in principle and was not unduly lenient, he should not change his mind simply because there is the possibility of a reference. The judge can then use the opportunity at the further sentencing hearing to give any further explanations for the original decision for the sentence.

(5) Sentencing and re-sentencing should take place in the presence of the appellant and administrative convenience should not be allowed to degrade that principle. But if for one reason or another the appellant cannot be brought to court in the 56 days there is a discretion to proceed in his absence so long as there is an advocate who can fully represent in the sense of who is properly instructed as to the relevant facts and is able to assist the court to make pertinent submissions on the facts and the law, as clearly this appellant's advocate was on the date of the re-sentence.

(6) [T]he appearance of justice and the impact of the change on a defendant where an error has not been induced by anything that he has said or done is a relevant consideration and in appropriate cases it can be reflected in a modest discount to the proposed revised sentence to reflect this fact. This is done in this case. We consider that modest discount was appropriate and sufficient.