

Chapter 8 (Sending cases to the Crown Court for trial): Update

8.2 Section 51 of the Crime and Disorder Act 1998

8.2.4 Procedure after the case has been sent to the Crown Court

The procedure to be followed in now to be found in Part 120 of the Criminal Procedure Rules (see Chapter 9).

8.4 Voluntary Bills of Indictment

Rule 10.9 of the Criminal Procedures now applies 'where a prosecutor wants a High Court judge's permission to serve a draft indictment' (in other words, seeks a 'voluntary bill of indictment'). The prosecutor has to serve a written application on the court and (unless the judge otherwise directs) on the proposed defendant; if the prosecutor asks for a hearing, the application must explain why a hearing is needed (r. 10.9(2)).

The application must attach (i) the proposed indictment, (ii) copies of the documents containing the evidence on which the prosecutor relies, including any written witness statements and documentary exhibits; (iii) a copy of any indictment on which the defendant already has been arraigned, and (iv) if not contained in such an indictment, a list of any offence(s) for which the defendant already has been sent for trial (r. 10.9(3)(a)). The application must also include (i) 'a concise statement of the circumstances in which, and the reasons why, the application is made', and (ii) a concise summary of the evidence contained in the documents which accompany the application, relating that evidence to each count in the proposed indictment (r. 10.9(3)(b)). Unless the application is made on behalf of the DPP or the Director of the SFO, the application must also contain a statement that, to the best of the prosecutor's knowledge, information and belief, (i) the evidence on which the prosecutor relies will be available at the trial, and (ii) the allegations contained in the application are substantially true (r. 10.9(3)(c)).

Under r. 10.9(4), a proposed defendant served with an application who wants to make representations to the judge must serve written representations on the court and on the prosecutor, as soon as practicable. If the proposed defendant asks for a hearing, he must explain why a hearing is needed.

Rule 10.9(5) provides that the judge may determine the application without a hearing, or at a hearing (in public or in private), and may do so with or without receiving the oral evidence of any proposed witness.

Criminal Practice Direction II, para 10B.4, says that this is an 'exceptional procedure', which should be used only where 'good reason to depart from the normal procedure is clearly shown and only where the interests of justice, rather than considerations of administrative convenience, require it'. Paragraph 10B.6 goes on to say that the judge may invite oral submissions from either party, or accede to a request for an opportunity to make oral submissions, if the judge considers it necessary or desirable to receive oral submissions in order to make a sound and fair decision on the application'. Any oral submissions that are permitted should be heard in open court unless the judge otherwise directs.

In *Serious Fraud Office v Evans* [2014] EWHC 3803 (QB), the prosecution sought a voluntary bill of indictment following the dismissal (under the Crime and Disorder Act 1998, schedule 3, paragraph 2) of the charge which has been sent to the Crown Court for trial. Fulford LJ said (at [85]) that:

Granting a voluntary bill of indictment is an exceptional course, and it will only be issued following a successful application to dismiss if i) the court has made a basic and substantive error of law that is clear or obvious; or ii) new evidence has become available that the prosecution could not put before the court at the time of the dismissal hearing which (along with any existing evidence) provides the prosecution with a sustainable factual basis for the charge; or iii) there was a serious procedural irregularity ... [T]his is not an exhaustive list because there will be other exceptional situations when it may be appropriate to grant a voluntary bill, for instance if the charges against the accused were dismissed on the basis of a technicality, particularly if it was one that the prosecution reasonably failed to anticipate.

His Lordship noted that, in *R v Muse* [2007] EWHC 2924, Openshaw J had held that it was wrong in principle for the prosecution to be able to get round a decision that it did not like by inviting another judge to take a different view of the same material that had been before the judge who had dismissed the charge(s). However, his Lordship had also suggested that there was no inflexible rule that a voluntary bill of indictment could never be granted to correct a mistaken decision of the prosecution or to reflect a change of mind by the prosecuting authority, albeit the power to do so should be used sparingly, in truly exceptional cases.

In *Evans*, Fulford LJ (at [86]) also said:

In my view whether or not a voluntary bill is granted under this heading will depend on the nature and the extent of the prosecution's changed position, the reasons that have led to the new approach and the implications for the proceedings as a whole. Therefore, the court will need to consider carefully the prosecution's suggested justification against the background of the relevant procedural history. Furthermore, it is to be emphasised although the accused will always be prejudiced by the prosecution's application to revive dismissed criminal proceedings, his position will necessarily require careful consideration.