

Chapter 9 (Indictments): Update

The provisions in the Criminal Procedure Rules governing the content of indictments are now set out in Part 10 of the Criminal Procedure Rules.

10.2.

- (1) The indictment on which the defendant is arraigned ... must be in writing and must contain, in a paragraph called a 'count'—
 - (a) a statement of the offence charged that—
 - (i) describes the offence in ordinary language, and
 - (ii) identifies any legislation that creates it; and
 - (b) such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant.
- (2) More than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission.

...

- (4) An indictment may contain—
 - (a) any count charging substantially the same offence as one for which the defendant was sent for trial;
 - (b) any count contained in a draft indictment served with the permission of a High Court judge or at the direction of the Court of Appeal; and
 - (c) any other count charging an offence that the Crown Court can try and which is based on the prosecution evidence that has been served.
- (5) For the purposes of section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933—
 - (a) a draft indictment constitutes a bill of indictment;
 - (b) the draft, or bill, is preferred before the Crown Court and becomes the indictment—
 - (i) where rule 10.3 applies (Draft indictment generated electronically on sending for trial), immediately before the first count (or the only count, if there is only one) is read to or placed before the defendant to take the defendant's plea under rule 3.24(1)(c),
 - (ii) when the prosecutor serves the draft indictment on the Crown Court officer, where rule 10.4 (Draft indictment served by the prosecutor after sending for trial), rule 10.5 (Draft indictment served by the prosecutor with a High Court judge's permission), rule 10.7 (Draft indictment served by the prosecutor on re-instituting proceedings) or rule 10.8 (Draft indictment served by the prosecutor at the direction of the Court of Appeal) applies,
 - (iii) when the Crown Court approves the proposed indictment, where rule 10.6 applies (Draft indictment approved by the Crown Court with deferred prosecution agreement).

...

- (7) Unless the Crown Court otherwise directs, the court officer must—
 - (a) endorse any paper copy of the indictment made for the court with—
 - (i) a note to identify it as a copy of the indictment, and
 - (ii) the date on which the draft indictment became the indictment under paragraph (5); and
 - (b) ... serve a copy of the indictment on all parties.

9.2 Drafting the indictment

The Criminal Procedure Rules formerly required the indictment to be signed by the officer of the Crown Court. However, the current version of the Rules does not contain this requirement.

Rule 10.3 makes provision for the draft indictment to be generated electronically when the defendant is sent to the Crown Court for trial. Otherwise, under rule 10.4, the prosecutor must serve a draft indictment on the Crown Court not more than 28 days after serving under copies of the documents containing the evidence on which the prosecution case relies.

9.3 Time limit

The 28-day time limit for serving the indictment (where it is not generated electronically on sending for trial) is now in rule 10.4 of the Criminal Procedure Rules.

9.4 Form of indictment

The rules governing the content of the indictment are unaltered but are now to be found in rule 10.2 of the Criminal Procedure Rules.

In *R v Clarke* [2015] EWCA Crim 350, Lord Thomas CJ (at [18]) said that, under what is now rule 10.2(1), the ‘sole question is whether the particulars make clear what the prosecutor alleges against the defendant’.

9.7 Joinder of counts

The rules governing joinder of counts in an indictment have been amended to remove the requirement that they must be founded on the same facts or form (part of) a series of offences of the same or a similar character. However, rule 3.21(4) of the Criminal Procedure Rules now provides:

Where the same indictment charges more than one offence, the court—

- (a) must exercise its power to order separate trials of those offences unless the offences to be tried together—
 - (i) are founded on the same facts, or
 - (ii) form or are part of a series of offences of the same or a similar character;
- (b) may exercise its power to order separate trials of those offences if of the opinion that—
 - (i) the defendant otherwise may be prejudiced or embarrassed in his or her defence, or
 - (ii) for any other reason it is desirable that the defendant should be tried separately for any one or more of those offences.

In *R v Williams* [2017] EWCA Crim 281, Lord Thomas CJ (at [22]) said that “when considering whether offences are of the same or a similar character, the court is not concerned with the legal characterisation or exact similarity. The court takes into account the wider characteristics of the offence”.

It should be noted that the change to the Criminal Procedure Rules overrules the effect of *R v Newland* [1988] QB 402, where it was held that the power to ‘sever’ the indictment (i.e. order separate trials) applies only where the counts are correctly joined, and so the court had either to delete the counts which were improperly joined (as in *Newland*) or stay the existing indictment and allow the prosecution to serve fresh indictments (as in *R v Follett* [1989] QB 338). Rule 3.21 now *requires* the court to order separate trials if the counts are improperly joined.

In *R v Nelson* [2016] EWCA Crim 1517, it was held that, in appropriate cases, a defendant might properly be convicted of two offences arising out of the same conduct or incident. Where the full extent of the criminal activity was capable of being covered by either of two

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separate offences, the two counts should not remain for consideration by the jury. However, in this case, the separate counts were appropriate: the two charges were not true alternatives and nor were they mutually exclusive; they did not overlap in terms of their ingredients; and the maximum sentences for the two counts were different, reflecting their quite different natures.

9.7.4 Joinder of summary offences under s 40 of the Criminal Justice Act 1988

In *R v Lewis* [2013] EWCA Crim 2596; [2014] 1 Cr App R 25, the defendant was sent to the Crown Court for trial on a charge of attempted theft. Two charges of common assault, which were founded on the same facts as the attempted theft, were joined in the indictment pursuant to s 40 of the Criminal Justice Act 1988. The prosecution subsequently offered no evidence on the attempted theft (and so the defendant stood acquitted of that offence). The defendant was then tried for the two summary offences, and found guilty by the jury. On appeal, McCombe LJ, at [15], said:

Section 40 is relevant to the stage at which an indictment is drawn up. Once the indictment is preferred, it remains the indictment before the court. The loss of one charge by reason of an acquittal, either by a jury verdict at the conclusion of the trial, or on earlier judicial direction, or on the entry of a formal verdict on the offering of no evidence on that charge at whatever stage, does not remove the count from the indictment. It remains in the indictment on which the defendant is charged and tried.

It followed that the Crown Court retained jurisdiction to try the summary offences, even though the either-way offence was no longer before the court.

Lewis was followed in *R v Taylor* [2014] EWCA Crim 2411.