

ALLOCATING CRIME FOR TRIAL IN ENGLAND AND WALES

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I. GENERAL

A. BY OFFENCE TYPE

There are three types of offence:¹

(i) Summary only offences triable only in the Magistrates' Court.

(ii) Either way offences triable either in the Magistrates' Court or the Crown Court.

(iii) Indictable only offences triable only in the Crown Court.

1. Statutory offences

If the statute creating the offence only prescribes a maximum penalty on summary conviction and none on conviction on indictment, the offence is summary only. The maximum penalty for these offences will be six months or less. If different penalties are provided for conviction summarily (six months or less) and on indictment, the offence is triable either way. If the only penalty provided is on indictment, the offence is indictable only.

2. Common law offences

These are triable on indictment only unless listed in Schedule 1 to the Magistrates' Courts Act, 1980 Act. The few remaining common law offences are mostly serious and would be indictable only if created by statute (*e.g.* murder, manslaughter, false imprisonment, kidnapping).

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¹ Magistrates' Courts Act, 1980, ss. 17 to 25.

*B. Allocation of Either Way Offences.**1. By the Defendant*

The Defendant has an unfettered right to elect trial at the Crown Court. This continues despite the recommendations of several Royal Commissions and similar bodies (Auld L.J. being the latest so to recommend) that the right to elect be restricted in one way or another. The Government has rejected the recommendation that the decision as to summary trial or trial by jury be taken by the Magistrates' Court after hearing submissions from both prosecution and defence.

2. By the Magistrates' Court.

In deciding whether to accept jurisdiction in either way offences, the magistrates are required by section 19(3) of the 1980 Act, to have regard to:

- the nature of the case;
- whether the circumstances make the offence one of a serious character; and
- whether the punishment which a magistrates' court would have power to inflict for the offence would be adequate.

Their discretion is exercised in the context of the *Mode of Trial: Guidelines*² published in a Practice Note endorsed by the Lord Chief Justice. They are described as for guidance only and are to the effect that offences triable either way should be tried summarily unless the offence has one or more of the listed features and the magistrates regard their sentencing powers as inadequate.

Examples in sexual cases are set out below. One further example: the factors listed as aggravating a non-dwelling burglary are

1. Entry to a pharmacy or doctor's surgery.

² [1990] 1 W.L.R. 1439.

2. Fear is caused or violence done to anyone lawfully on the premises.
3. The offence has professional hallmarks.
4. Vandalism on a substantial scale.
5. The unrecovered property is of high value.

C. Allocation at the Crown Court

High Court judges, circuit judges and recorders (part-time judges) all sit in the Crown Court. Because of the enormous range of difficulty and gravity of those cases that are committed to the Crown Court, it is necessary to have some scheme governing the allocation of work between judges. Because of changing workload and business needs and changes in the way that some kinds of offences are regarded, an extremely complex system has developed. One of the objectives of Auld L.J.'s proposals is the simplification of this system.

1. Practice Direction (Crown Court: Business)

A series of Practice Directions, the latest in 2001,³ have classified offences at the Crown Court into four classes according to seriousness and specified which level of judge may try each class of offence: Class 1 (High Court judge unless released), 2 (High Court judge unless released) and 3 (all except recorders with less than 3 years experience) represent a more or less logical progression of seriousness. Unfortunately, within class 4 (triable by all) there is such an enormous range of offences (*e.g.* all drugs offences from possession of a gram of cannabis to importing ten tons of heroin, all robberies from one teenager robbing another of his pocket money to armed gangs robbing banks) that further refinement has been necessary.

Any High Court judge may try any case in the Crown Court. Circuit judges and recorders may not. Allocation of the most serious work in the Crown Court is restricted. To understand how this is done, it is necessary to know

³ [2001] 1 W.L.R. 1996.

something of the judicial hierarchy in England and Wales. England and Wales is divided for legal purposes into six circuits. Two High Court judges are assigned to each circuit as presiding judges of that circuit. A circuit judge is appointed as resident judge to each Crown Court. He or she has responsibility for that court.

The Practice Direction specifies some offences which have to be specifically released by the presiding judge to a circuit judge. For the operation of this in relation to rape, see below. The presiding judges may also issue directions for their circuits in relation to the allocation of Class 4 offences which have particular characteristics. Two examples from the present Practice Direction are cases where loaded firearms are used and cases where there is a risk of substantial racial feeling being excited by the trial.

2. Judicial Tickets

Over the past 15 to 20 years, the work of the courts has become increasingly specialised. That has led to a move away from the idea that all judges should be able to do all kinds of work within their jurisdiction. The English courts have dealt with this by authorising some circuit judges and, to a lesser extent, recorders to do work outside their normal jurisdiction or limiting certain kinds of specialised work to those authorised, and usually specially trained, to do it. These authorisations have come to be known colloquially as ‘tickets’.

In a criminal context, this applies to murder, normally tried by a High Court judge but releasable to one of a small number of circuit judges, rape and serious sexual offences (as to which see below) and serious fraud.

II. SEXUAL OFFENCES

A. By Offence Type

1. Summary Only

There are very few summary only sexual offences: loitering for the purposes of prostitution and indecent exposure are two.

2. Either Way

Indecent assault on a man or woman, unlawful sexual intercourse with a girl under 16, living off the earnings of prostitution, possessing or distributing indecent photographs of children (used to prosecute internet child pornography) and several less common offences.

3. Indictable Only

All the remaining serious offences: rape, buggery, incest, unlawful sexual intercourse with a girl under 13 and other less commonly occurring offences.

B. Allocation of Either Way Offences.

Under the *Mode of Trial Guidelines*, there are aggravating features suggesting committal to the Crown Court.

1. Indecent Assault

1. Substantial disparity in age and the assault is more than trivial.
2. Violence or threats of violence.
3. Relationship of trust or responsibility between defendant and victim.
4. Several similar offences and the assaults are more than merely trivial.
5. The victim is particularly vulnerable.
6. Serious nature of the assault.

2. Unlawful Sexual Intercourse with a Girl Under 16

1. Wide disparity of age.
2. Breach of position of trust.
3. The victim is particularly vulnerable.

C. Allocation at the Crown Court.

The fact that serious sexual offences require particularly sensitive handling and are particularly liable to attract public attention has led to the application with some care to these offences of the procedure of release by the presiding judges and to the ticketing of circuit judges to try rape and serious sexual offences.

1. Release

Under the *Practice Direction (Crown Court: Business)* all indictable-only sexual offences can only be tried by a circuit judge if released by a presiding judge of the circuit. Either way sexual offences do not require release. However, many of them are extremely serious, for example, long-term abuse within the family or have aggravating features, for example, indecent assaults by a doctor on his patients. In those cases, the resident judge may decide to refer the case to the presiding judge for a decision on who should try it.

Whichever route is taken, the procedure is the same. A summary of the case is prepared and sent to the presiding judge (by post or electronically) with the resident judge's comments and recommendations. The presiding judge will return the form with his decision: trial by High Court judge, by a named circuit judge or by any rape-ticketed judge as the case may be. The case will be listed in accordance with that direction.

2. Rape Tickets

The original idea (about 20 years ago) was that a limited number of selected circuit judges would try cases of rape and other serious sexual offences. The initial political spur was several extraordinarily crass comments by judges in such cases. However, the number of these cases⁴ and the need to expedite rather than delay their trial has forced the expansion of the authorisation of judges to try these cases so

⁴ There are over 4,500 convictions for indictable only and either way sexual offences each year (and a good number of acquittals).

that it can hardly now be described as a specialisation. About two-thirds of circuit judges who try crime are authorised. Of the third who are not authorised, a number will be recent appointments who have not yet had the opportunity to attend the qualifying course.

In one respect, the authorisation has been strengthened. The Judicial Studies Board now runs a Serious Sexual Offences Seminar twice a year. Attendance at that seminar is a pre-requisite to being authorised to try rape and other serious sexual offences.