ALLOCATING CRIME FOR TRIAL IN SCOTLAND

SIR GERALD GORDON*

The principal features of Scots law in connection with the allocation of cases among the different courts for trial are simplicity, flexibility and the control exercised by the Crown. This means, amongst other things, that there is not much that one can say about the subject, and that much of what little one can say is neither precise, definitive nor permanent in its application. In order to explain the system it is necessary first to say something about the structure of the courts and the prosecution, and about the decision-making processes involved.

There are four levels of courts. At the bottom is the district court, which is the successor of the old burgh and justice of the peace courts, then comes the sheriff summary court, then the sheriff and jury court, and finally the High Court. The first two courts deal only with summary cases, *i.e.* cases decided by a single judge; the second deal with what are called solemn cases, *i.e.* cases on indictment, and they are tried in a court consisting of judge and jury, unless of course the accused pleads guilty. What follows about the powers and jurisdiction of the courts is subject to specific statutory exceptions, but there are not many of these.

Many, if not most, offences are still prosecuted at common law, the obvious exceptions being road traffic offences and drugs offences. All common law cases except murder and rape can be tried summarily or on indictment.[1]

---

* Sometime Professor of Scots Law at the University of Edinburgh and Temporary Judge of the High Court of Justiciary.

[1] Incest could formerly be prosecuted only in the High Court, but in terms of s. 4 of the Criminal Law Consolidation (Scotland) Act, 1995 it can now be prosecuted summarily if the Lord Advocate so directs in any particular case. Incest includes intercourse with a stepchild and intercourse by a person who is in the same household as, and in a position

Statutory offences are divided, as they are in England and Wales, into cases which are indictable and those which are not, but a summary statutory offence may be tried on an indictment which also includes indictable offences whether the latter are statutory or common law.[2] Whether or not indictable statutory offences can be tried by the sheriff depends on the wording of the statute in question, but as a general rule they can be so tried.[3]

I. The District Court

The powers available to a district court depend on whether the court is constituted by one or more lay justices or by a stipendiary magistrate. Glasgow district court is the only one which has stipendiary magistrates, and it also has courts presided over by a lay justice. Stipendiary magistrates have the same powers and jurisdiction as a sheriff sitting in the sheriff summary court.[4] What I am going to say about the district court applies to one consisting of a lay justice or justices.

The district court has power to impose sentences of up to sixty days' imprisonment or a fine of up to what is called 'level 4 on the standard scale'.[5]

The district court has jurisdiction to try most common law offences and almost any summary statutory offence. There are, however, a number of common law offences which

---

of trust or authority in relation to, a child under 16 under ss. 2 and 3. There is also a crime consisting of breach of duty by magistrates which can be prosecuted only in the High Court, but it has gone into desuetude.

[2] The Criminal Procedure (Scotland) Act, 1995, hereinafter referred to as 'the 1995 Act', s. 292(6). The maximum penalty remains the same as on summary conviction.

[3] The principal exceptions are treason, and contraventions of certain statutes such as the International Criminal Court (Scotland) Act, 2001.

[4] 1995 Act , s. 7(5).

[5] 1995 Act, s. 7(4), s. 7(8)(b)(iii). Level 4 is presently £2500: 1995 Act, s. 225.

are excluded from its jurisdiction. In addition to those offences which can be tried only in the High Court these are: (i) culpable homicide, robbery, wilful fire raising or attempted wilful fire raising; (ii) theft by housebreaking or housebreaking with intent to steal; (iii) theft or reset (Anglice: handling stolen property), fraud or embezzlement where the value of the property is an amount not exceeding level 4 on the standard scale; (iv) assault causing the fracture of a limb, assault with intent to ravish, assault to the danger of life and assault by stabbing, (v) uttering (Anglice: passing false documents) or banknote or coinage offences, incest and sexual offences.

The only significant statutory restriction on the power of the district court to try summary statutory offences relates to road traffic offences. It cannot try any offence involving obligatory endorsement other than offences which may be dealt with by fixed penalties.[6] It also has specific power to impose disqualification under the totting-up provisions.[7]

Despite these wide powers, however, the district court is in practice used only for minor offences, such as shoplifting, soliciting, minor breaches of the peace and minor road traffic offences.

II. The Sheriff Court

The sheriff court has been described as a court of universal jurisdiction: that is to say it has jurisdiction to try, either summarily or on indictment, any offence except one which is in the privative jurisdiction of the High Court.

The sheriff sitting as a summary court has power to impose sentences of imprisonment for up to three months or a fine of what is called 'the prescribed sum'.[8] In addition, he

---

[6] Road Traffic Offenders Act, 1988, s. 10.

[7] Road Traffic Offenders Act, 1988, s. 35 (6).

[8] 1995 Act, s. 5. The prescribed sum is presently £5,000: 1995 Act, s 225.

may impose up to six months' imprisonment where a person is convicted of a second or subsequent offence inferring dishonest appropriation of property or attempt thereat, or a second or subsequent offence inferring personal violence or attempt thereat.[9] He has also, of course, power to impose whatever penalty is provided by statute for a summary statutory offence, and so, for example, can impose up to six months' imprisonment for drink driving offences or driving while disqualified.

The sheriff when sitting with a jury has power to impose up to three years' imprisonment, or an unlimited fine.[10] His imprisonment powers are limited to three years even where he is dealing with a statutory offence which prescribes a longer period as the maximum sentence. Where, however, the sheriff thinks that three years would be an inadequate punishment, whether because of the nature of the offence or the record of the offender, and whether the offence is one at common law or under statute, he may remit the case to the High Court for sentence, in which case the High Court has the same powers as it would have had if the case had been taken there in the first instance.[11] I should make it clear that the sheriff has no such power to remit when he is sitting in the summary court.

There is provision in s. 13 of the Crime and Punishment (Scotland) Act, 1997 empowering the sheriff to impose up to six months' imprisonment when sitting summarily, but it has not yet been brought into force.

[9] 1995 Act, s. 5(3). There is provision in s. 13 of the Crime and Punishment (Scotland) Act, 1997 empowering the sheriff to impose up to twelve months' imprisonment in such cases, but it has not yet been brought into force.

[10] 1995 Act, s. 195. This was increased to five years by the Crime and Punishment (Scotland) Act, 1997. That provision, too, has not yet been brought into force, but there are rumours that it may be brought into force in the near future.

[11] 1995 Act, s. 195 (2).

III. The High Court

The High Court has jurisdiction to try any offence other than a statutory offence which can only be tried summarily and it can try such a summary offence when it appears on an indictment which includes other offences which are within its jurisdiction.[12] It can impose imprisonment for any period, up to and including life, or an unlimited fine, for any common law offence.

IV. The Prosecution

Subject to the privative jurisdiction of the High Court and any statutory limitations, the choice of court is entirely a matter for the prosecution, which is known collectively as 'the Crown'. An accused in Scotland has no right to insist either on a jury trial or on being tried summarily. It may, therefore, be helpful to provide a short outline of the prosecution process. Prosecutions in Scotland are, with rare and unimportant exceptions, carried out by the public prosecutor. The country is divided into districts corresponding to sheriff court districts in each of which there is a procurator fiscal, who may have any number of deputes, and who is responsible to the Lord Advocate as head of the prosecution system. Procurators fiscal and their deputes are full time professional prosecutors. The Lord Advocate is also responsible for what is known as Crown Office, where Crown counsel, as they are called, work. Crown Counsel are the Lord Advocate, the Solicitor General and a number of advocate deputes whose appointment is in the hands of the Lord Advocate. They are assisted by a number of persons appointed from the fiscal service, the senior of whom is known as the Crown Agent. The principal characteristic of the system is that a person cannot be tried on indictment except by authority of the Lord Advocate, which means that the decision to try him on indictment is made by a Law

---

[12] 1995 Act, s. 292(6).

Officer or by an advocate depute, *i.e.* by someone who is not a career prosecutor and who acts as a prosecutor only for a limited time.[13] Once upon a time advocate deputes spent only part of their time in Crown Office during their period as advocate deputes, but nowadays being an advocate depute is in practice a full time job.

The initial decision as to prosecution is made by the procurator fiscal (or one of his deputes), unless he has received instructions from Crown Office to report either the result of a particular investigation or a specified class of cases to Crown Office. The first decision which the fiscal has to make is whether to prosecute the case at all. He may decide to take no proceedings or he may decide to deal with the case by way of instructing the police to warn the accused. Where the alleged offence is triable in the district court he may also decide to deal with it by way of what is called a 'fiscal fine'. That is to say, he may offer the accused the opportunity of paying a fine of £25, £50, £75 or £100 in respect of offences which can be tried in the district court.[14] Where such an offer is accepted and the fine or the first instalment of the fine is paid, no prosecution will take place.[15]

If the fiscal decides to prosecute, it will be for him, again subject to any directions he may have received from Crown Office in relation to a particular case or a class of cases, to decide whether that prosecution should be summary or solemn. If it is to be summary, it is for him to say whether it should be taken in the district court or the sheriff court.

---

[13] There are currently proposals for a reform of the Crown Office structure which would leave decision-making in respect of cases other than those destined for the High Court to be made by the fiscal members of Crown Office, but they would be subject to the supervision of Crown Counsel: see Crown Office Paper on 'Modernising the Effective Prosecution of Serious Crime. Appointment and Role of Advocate Deputes: Proposals for Change' September 2002.

[14] 1995 Act, s 302; Criminal Procedure (Scotland) Act, 1995 Fixed Penalty Order, 1996.

[15] 1995 Act, s. 302 (6).

Such cases proceed on what is called a complaint, which is at the instance of the procurator fiscal. In most cases, therefore, Crown Office have no involvement at all. If the fiscal thinks that the case should proceed on indictment, he brings the accused before a sheriff on what is called a petition, in terms of which he asks the sheriff to commit the accused for trial.[16] Thereafter he prepares the case and submits what is called the precognition (Anglice: depositions) to Crown Office for the consideration of Crown counsel. That submission is accompanied by a recommendation as to whether the case should be dealt with by the sheriff or the High Court, or even dealt with summarily or not prosecuted at all. The case is then considered by Crown counsel and the final decision is theirs.

Sheriff and jury trials are conducted by fiscals, but the indictment runs in the name of the Lord Advocate and is signed by a fiscal by authority of the Lord Advocate.

V. Choice of Court

The main deciding factor in choosing which court a case should be tried in is what the prosecution regard as the appropriate penalty. The case will be sent to a court whose maximum powers are regarded as sufficient for the particular offence and accused. Choice of court will therefore sometimes be pre-determined, so to speak, by statutory maximum penalties. Whether or not a disqualified driver should be dealt with summarily or on indictment will usually depend on his record. But if he is to be tried on indictment, there is no point in bringing him before the High Court, since the maximum penalty for the offence is 12 months' imprisonment. Conversely, he cannot be tried in a lay district court, since they have no power to deal with him, but he

---

[16] This is a very simplified description of the process. There are many cases nowadays where the accused is allowed bail on his first appearance and is never formally committed for trial. In such cases it is open to the fiscal to 'reduce' the case to a summary complaint without requiring authority to do so from Crown Office.

could be tried summarily by either a stipendiary magistrate or a sheriff.

Within the very wide area, however, where there are no statutory restrictions, the choice of court becomes very much a matter of impression, sometimes assisted by policies laid down by Crown Office, or adopted by local fiscals. Some years ago the Procurator Fiscal in Glasgow considered taking drink driving charges before a stipendiary magistrate, but that did not in fact happen, or if it did, it stopped after a short time. I am informed, however, that run-of-the-mill drink driving prosecutions are now being taken before the stipendiary, presumably in order to relieve pressure on the sheriff court. I do not know if the same is true of cases of driving while disqualified or driving recklessly. There was also for a time a policy of taking breaches of the peace at football matches in the sheriff court. This was because football violence was causing public concern, and there was a public perception, which was never tested statistically, that sheriffs imposed heavier sentences than even stipendiary magistrates. To take cases in the sheriff court was seen as an indication that the authorities took them seriously. As these examples indicate, the choice among one of two, or sometimes more, competent courts can depend on a variety of factors, including perceived public attitudes and availability of resources, and the choice may vary from time to time.

At the other end of the scale there is a policy of taking robberies from retail premises in the High Court, on the view that people who work in such places are particularly vulnerable and deserve the degree of protection which it is believed is provided by a High Court prosecution. Generally speaking, such cases do attract a sentence of at least four years' imprisonment. It may be that if High Court judges were regularly to pass lower sentences than this, the Crown would relax their policy, or it may be that they would feel that to continue taking such cases in the High Court was still a worthwhile public relations exercise. That is unlikely, however, given the pressures on the High Court. But if the

sheriff's powers are increased to five years, most of such cases will almost certainly be tried in the sheriff court.

Again, there are, I understand, guidelines indicating the levels at which drugs offences should be dealt with summarily, or by a sheriff and a jury or in the High Court. Just what these are I have been unable to ascertain. Roughly speaking, however, one can say that simple possession is normally dealt with summarily by the sheriff, while dealing in large quantities, particularly of Class A drugs, will be dealt with in the High Court, and that 'dealing' includes acting as a courier. Just what is a large quantity has varied over the years and quantities which would have attracted a High Court prosecution some years ago may well now be taken in the sheriff court, particularly in the case of cannabis. On the other hand there was recently a case where the charge was one of dealing in small quantities of heroin, albeit over a period, by two accused who were found actually dividing the heroin into deals. They were prosecuted in the sheriff court, remitted to the High Court for sentence, and given sentences of four and five years. There is a case before me at the moment in the High Court where the accused was delivering £3,000 worth of heroin from one person to another. It remains to be seen whether it will attract a High Court sentence.

Child sexual abuse cases are normally taken in the High Court if they involve any sort of penetration, or a number of children, or the abuse has gone on over a long period. Lesser offences may be dealt with by the sheriff on indictment or even summarily.

Culpable homicide is not in practice prosecuted in the sheriff court. Attempted murder is usually taken in the High Court as, indeed, is assault to the danger of life. Assaults by stabbing will be dealt with on indictment where there is any significant injury.

And, of course, it has to be remembered that an offence which would be taken in, say the sheriff court, in the case of a first offender, may be taken in the High Court if the

offender has a bad record, and particularly if he has a previous analogous High Court coviction.

None of this is at all precise. In fact, it is somewhat reminiscent of the difficulty of describing an elephant, or the relationship between equity and the Chancellor's foot. Experience gives one a feel, albeit a very rough feel, so to speak, for what is a summary or a solemn case and, perhaps more particularly, what is a High Court case. But, as I have indicated, the boundaries change over time: when I started over forty years ago housebreakings involving more than £100 in value went on indictment. Nowadays, even allowing for inflation, the threshold is higher, and theft by housebreaking hardly ever gets into the High Court. Where the case is one of fraud or embezzlement the sums involved usually have to be very high before the case will get to the High Court. Having said that, I once dealt with a case of fraud by bogus workmen in the High Court, perhaps because there were a number of charges involved, perhaps because the victims were old ladies. There may also be questions of resources, of whether a case can be fitted into a suitable High Court sitting, of whether a High Court judge should be tied up for a long time in a complex fraud case.

VI. STATISTICS

Finally, just to give some idea of the scale involved, let me mention some rough statistics, rough partly because crimes are not listed according to the courts in which they were heard but by reference to bands of sentences. So all one can say is, for example, that at least *n* cases were heard in the High Court, since all cases involving sentences of four years or more would be High Court sentences, and only a very few of them would have been remits from the Sheriff Court, while there were probably a significant number of High Court cases in which the sentence, for one reason or another, was less than four years. The figures are for 1999, the latest I could find.

In that year 1,357 cases were taken in the High Court, some of which were remits for sentence from the sheriff court, but only 536 persons received sentences of four years or more, of whom 105 were convicted of what the statistics call serious assault, 119 of robbery, 33 of sexual assault and 28 of other sexual offences. At the other end of the scale 8,908 persons received sentences of three months or less, including 57 sexual offenders, 592 housebreakers and 1,294 shoplifters. 55% of all sentences were of three months or less, 27% of over three and less than six months, and only 3% were of four years or more.