



.....

**Qualifying Test Paper:**

00483: District Judge (Magistrates' Courts) 2010  
Crime Paper

.....

**This paper should be left in the test room at the end of the test session. The contents of the test should not be discussed with or divulged to anyone.**

## **CANDIDATE BRIEF – PLEASE READ CAREFULLY BEFORE YOU START**

You have 90 minutes to complete the entire test. There are eight questions. You should answer **all** of them. You may answer the questions in any order. However, you must clearly indicate which question you are attempting. **Answers may be given in bullet points.**

This test has been set to assess:

- Intellectual Capacity – the ability quickly to absorb and analyse information
- Authority and Communication Skills – the ability to explain procedure and any decisions reached clearly and succinctly to all those involved

There is no need to recite the facts when answering the questions, unless you find it helpful to do so. In addressing the problems set you should deal with them only on the material that you have – deciding to adjourn for further information will not score marks.

Marks are available for:

- Coverage of key points – does your answer address the key points to which the question gives rise?
- Quality of conclusion – is your conclusion clear? Is it supported by and does it derive from your reasoning?

To obtain full marks you must cite specific sections of relevant statute, specific procedural rules and relevant guidance and case law in your answers.

### **Marking scheme**

Question	Coverage of key points	Quality of conclusion	Total Marks
1	7	4	11
2	4	4	8
3	7	2	9
4	7	2	9
5	3	2	5
6	6	2	8
7	8	None	8
8	20	2	22
Discretionary marks for good points not anticipated by the marking scheme			8
Total			88

**This paper should be left in the test room at the end of the test session. The contents of the test should not be discussed with or divulged to anyone.**

## TEST PAPER

On 15 May 2010 at 10:45 pm police receive an interrupted 999 call to attend 15 Mill Lane, Canterbury. They attend within two minutes and find Mrs Gibson in the kitchen with blood pouring from her nose. They also notice scratches to her arm and a red mark on the back of her leg. The kitchen table is on its side and there is a smashed phone on the floor. Mrs Gibson is crying and says that while eating a meal her husband suddenly became jealous and attacked her. He punched and kicked her repeatedly. When she phoned the police he snatched the phone and threw it to the floor. He continued hitting her until the police arrived.

The police hear a small child crying upstairs and on investigation find Mr Gibson on the landing. He is angry and distressed and says: "she started it." He is arrested and taken to a police station. In interview he says his wife attacked him for no reason. She is paranoid and believes he is having an affair. She is lying because she wants him locked up. She attacked him with a chair and there was a struggle during which he acted only in self defence.

Meanwhile Mrs Gibson makes a written statement to the police confirming the account she gave at the scene. Photographs are taken and a doctor confirms that she has a displaced nose, but that there will be no lasting injury. Mr Gibson is charged with assault by beating, contrary to section 39 Criminal Justice Act 1988. His reply to caution after charge was: "I'll kill myself."

The confirmed background facts are that he has five convictions in the past six years: two for theft, one for driving whilst disqualified, one for possession of an offensive weapon, and one for affray. There have been no previous reports of violence by him on his wife, and he is not on bail on any other matter.

**This paper should be left in the test room at the end of the test session. The contents of the test should not be discussed with or divulged to anyone.**

**Question 1 (11 marks)**

At the first hearing on 16 May 2010 the Crown Prosecution Service (CPS) oppose bail on grounds of likelihood of failure to surrender, and of further offences in view of his record. On the facts of this case can you refuse bail for the reasons given by the CPS? Explain your answer succinctly. List the grounds on which it might be legally possible to refuse bail on the facts given in this case.

**Question 2 (8 marks)**

The defence ask for an adjournment before entering a plea and fixing a date for trial so that they can obtain full statements from the Crown and take instructions. The CPS agrees. Do you grant the adjournment? Briefly justify your decision. What do you do next at this hearing?

**Question 3 (9 marks)**

Are the previous convictions potentially admissible at trial? Explain your answer with reference to the Criminal Justice Act 2003 and any case provided in the advance reading.

**Question 4 (9 marks)**

Today, one month before the date fixed for trial, the defence apply for a witness summons for Mrs Gibson's doctor (whose name they only discovered yesterday) to produce her medical records. They say this will support his defence that she is paranoid, volatile, and liable to behave irrationally.

- Should you issue the summons today? Explain your decision briefly.
- What is the relevant procedure before a witness summons can be issued in these circumstances? (Do not repeat any points you made in the answer to first bullet pointed question.)

Refer to the Criminal Procedure Rules (CPR) in your answer.

**Question 5 (5 marks)**

At a later hearing before the trial the defendant dispenses with his lawyer and tells you that he wishes to cross-examine his wife in person. You do not think this should happen. What, if anything, can you order and what (according to the CPR) "shall" you explain to him? (Do not deal with issues relating to compliance.)

---

**Question 6 (8 marks)**

On the day of trial, 29 October 2010, Mrs Gibson is nervous and asks to refresh her memory from the statement she made on 15 May. The defence lawyer says she should be asked first to give her evidence from memory. What is the legal position with reference to:

- the Criminal Procedure Rules
- the Criminal Justice Act 2003
- case law supplied with the advance reading?

**Question 7 (8 marks)**

Alternatively, on the day of trial Mrs Gibson fails to attend. The Crown says she is scared and applies for her statement to be read. The defence objects. Assuming any necessary notice has been given or waived, what must the Crown do and what are the statutory factors you consider when coming to your decision?

**Question 8 (22 marks)**

The defendant pleads guilty on the day of trial. Mrs Gibson has attended to give evidence and tells you that the relationship is over and she does not want to see him again. However she urges you not to punish him as he has learnt his lesson.

- Does this case pass the custody threshold? Answer in a couple of sentences making reference to the Guidelines for common assault.
- Follow the standard five-step process (as set out in the User Guide at the beginning of the Magistrates' Courts Sentencing Guidelines) to explain, in order, the key decisions involved in the sentencing process. Show the factors you consider at each step. Refer as appropriate to the Sentencing Guideline Council Guidelines on Domestic Violence and on Assault and Other Offences against the Person. Assume, for current purposes, that you decide to impose a 12-week prison sentence. Answer using bullet points.

**This paper should be left in the test room at the end of the test session. The contents of the test should not be discussed with or divulged to anyone.**



## **DISTRICT JUDGE (MAGISTRATES' COURTS) 2010 QUALIFYING CRIME TEST**

### **SUPPORTING MATERIAL**

- Sections 101, 106, 114, 116 and 139 of the Criminal Justice Act 2003
- The Criminal Procedure Rules Parts 1, 3.8, 28 and 31
- Essential Case Management – Applying the Criminal Procedure Rules issued by the Senior Presiding Judge in December 2009
- Recent Developments in the Magistrates' Court (reduced from the Judicial Studies Board papers prepared for the continuation courses for District Judges (Magistrates' Courts) 2009 and 2010.

## **Sections 101, 106, 114, 116 and 139 of the Criminal Justice Act 2003**

### **s. 101 Defendant's bad character**

(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—

- (a) all parties to the proceedings agree to the evidence being admissible,
- (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
- (c) it is important explanatory evidence,
- (d) it is relevant to an important matter in issue between the defendant and the prosecution,
- (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
- (f) it is evidence to correct a false impression given by the defendant, or
- (g) the defendant has made an attack on another person's character.

(2) Sections 102 to 106 contain provision supplementing subsection (1).

(3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

### **s. 106 Attack on another person's character**

(1) For the purposes of section 101(1)(g) a defendant makes an attack on another person's character if -

- (a) he adduces evidence attacking the other person's character,
- (b) he (or any legal representative appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999 (c 23) to cross-examine a witness in his interests) asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so, or
- (c) evidence is given of an imputation about the other person made by the defendant-

- (i) on being questioned under caution, before charge, about the offence with which he is charged, or
- (ii) on being charged with the offence or officially informed that he might be prosecuted for it.

(2) In subsection (1) "evidence attacking the other person's character" means evidence to the effect that the other person -

- (a) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one), or
- (b) has behaved, or is disposed to behave, in a reprehensible way;

and "imputation about the other person" means an assertion to that effect.

(3) Only prosecution evidence is admissible under section 101(1)(g).

#### **s. 114 Admissibility of hearsay evidence**

(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if -

- (a) any provision of this Chapter or any other statutory provision makes it admissible,
- (b) any rule of law preserved by section 118 makes it admissible,
- (c) all parties to the proceedings agree to it being admissible, or
- (d) the court is satisfied that it is in the interests of justice for it to be admissible.

(2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant) -

- (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
- (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
- (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
- (d) the circumstances in which the statement was made;
- (e) how reliable the maker of the statement appears to be;
- (f) how reliable the evidence of the making of the statement appears to be;
- (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

- (h) the amount of difficulty involved in challenging the statement;
- (i) the extent to which that difficulty would be likely to prejudice the party facing it.

(3) Nothing in this Chapter affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings.

#### **s. 116 Cases where a witness is unavailable**

(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if -

- (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,
- (b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and
- (c) any of the five conditions mentioned in subsection (2) is satisfied.

(2) The conditions are -

- (a) that the relevant person is dead;
- (b) that the relevant person is unfit to be a witness because of his bodily or mental condition;
- (c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;
- (d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken;
- (e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.

(3) For the purposes of subsection (2)(e) "fear" is to be widely construed and (for example) includes fear of the death or injury of another person or of financial loss.

(4) Leave may be given under subsection (2)(e) only if the court considers that the statement ought to be admitted in the interests of justice, having regard -

- (a) to the statement's contents,
- (b) to any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement if the relevant person does not give oral evidence),
- (c) in appropriate cases, to the fact that a direction under section 19 of the Youth Justice and Criminal Evidence Act 1999 (c 23) (special measures for the giving of evidence by fearful witnesses etc) could be made in relation to the relevant person, and

(d) to any other relevant circumstances.

(5) A condition set out in any paragraph of subsection (2) which is in fact satisfied is to be treated as not satisfied if it is shown that the circumstances described in that paragraph are caused -

(a) by the person in support of whose case it is sought to give the statement in evidence, or

(b) by a person acting on his behalf,

in order to prevent the relevant person giving oral evidence in the proceedings (whether at all or in connection with the subject matter of the statement).

### **s. 139 Use of documents to refresh memory**

(1) A person giving oral evidence in criminal proceedings about any matter may, at any stage in the course of doing so, refresh his memory of it from a document made or verified by him at an earlier time if—

(a) he states in his oral evidence that the document records his recollection of the matter at that earlier time, and

(b) his recollection of the matter is likely to have been significantly better at that time than it is at the time of his oral evidence.

(2) Where—

(a) a person giving oral evidence in criminal proceedings about any matter has previously given an oral account, of which a sound recording was made, and he states in that evidence that the account represented his recollection of the matter at that time,

(b) his recollection of the matter is likely to have been significantly better at the time of the previous account than it is at the time of his oral evidence, and

(c) a transcript has been made of the sound recording,

he may, at any stage in the course of giving his evidence, refresh his memory of the matter from that transcript.

## **The Criminal Procedure Rules Parts 1, 3.8, 28 and 31**

### **PART 1**

#### **The overriding objective**

**1.1.**—(1) The overriding objective of this new code is that criminal cases be dealt with justly.

(2) Dealing with a criminal case justly includes—

- (a) acquitting the innocent and convicting the guilty;
- (b) dealing with the prosecution and the defence fairly;
- (c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
- (d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
- (e) dealing with the case efficiently and expeditiously;
- (f) ensuring that appropriate information is available to the court when bail and sentence are considered; and
- (g) dealing with the case in ways that take into account—
  - (i) the gravity of the offence alleged,
  - (ii) the complexity of what is in issue,
  - (iii) the severity of the consequences for the defendant and others affected, and
  - (iv) the needs of other cases.

#### **The duty of the participants in a criminal case**

**1.2.**—(1) Each participant, in the conduct of each case, must—

- (a) prepare and conduct the case in accordance with the overriding objective;
- (b) comply with these Rules, practice directions and directions made by the court; and
- (c) at once inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by these Rules, any practice direction or any direction of the court. A failure is significant if it might hinder the court in furthering the overriding objective.

(2) Anyone involved in any way with a criminal case is a participant in its conduct for the purposes of this rule.

#### **The application by the court of the overriding objective**

**1.3.** The court must further the overriding objective in particular when—

- (a) exercising any power given to it by legislation (including these Rules);
- (b) applying any practice direction; or
- (c) interpreting any rule or practice direction.

## **PART 3.8**

### **Case preparation and progression**

#### Case preparation and progression

3.8 —(1) At every hearing, if a case cannot be concluded there and then the court must give directions so that it can be concluded at the next hearing or as soon as possible after that.

(2) At every hearing the court must, where relevant—

- (a) if the defendant is absent, decide whether to proceed nonetheless;
- (b) take the defendant's plea (unless already done) or if no plea can be taken then find out whether the defendant is likely to plead guilty or not guilty;
- (c) set, follow or revise a timetable for the progress of the case, which may include a timetable for any hearing including the trial or (in the Crown Court) the appeal;
- (d) in giving directions, ensure continuity in relation to the court and to the parties' representatives where that is appropriate and practicable; and
- (e) where a direction has not been complied with, find out why, identify who was responsible, and take appropriate action.

(3) In order to prepare for a trial in the Crown Court, the court must conduct a plea and case management hearing unless the circumstances make that unnecessary.

(4) In order to prepare for the trial, the court must take every reasonable step to encourage and to facilitate the attendance of witnesses when they are needed.

## **PART 28**

### WITNESS SUMMONSES, WARRANTS AND ORDERS

#### *Contents of this Part*

When this Part applies	rule 28.1
Issue etc. of summons, warrant or order with or without a hearing	rule 28.2
Application for summons, warrant or order: general rules	rule 28.3
Written application: form and service	rule 28.4
Application for summons to produce a document, etc.:	
special rules	rule 28.5
Application for summons to produce a document, etc.:	
court's assessment of relevance and confidentiality	rule 28.6

Application to withdraw a summons, warrant or order rule 28.7

Court's power to vary requirements under this Part rule 28.8

*[Note. A magistrates' court may require the attendance of a witness to give evidence or to produce in evidence a document or thing by a summons, or in some circumstances a warrant for the witness' arrest, under section 97 of the Magistrates' Courts Act 1980<sup>(1)</sup>. The Crown Court may do so under sections 2, 2D, 3 and 4 of the Criminal Procedure (Attendance of Witnesses) Act 1965<sup>(2)</sup>. Either court may order the production in evidence of a copy of an entry in a banker's book without the attendance of an officer of the bank, under sections 6 and 7 of the Bankers' Books Evidence Act 1879<sup>(3)</sup>.*

*See Part 3 for the court's general powers to consider an application and to give directions.]*

## **When this Part applies**

### **28.1**

(1) This Part applies in magistrates' courts and in the Crown Court where—

- (a) a party wants the court to issue a witness summons, warrant or order under—
  - (i) section 97 of the Magistrates' Courts Act 1980,
  - (ii) section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965, or
  - (iii) section 7 of the Bankers' Books Evidence Act 1879;
- (b) the court considers the issue of such a summons, warrant or order on its own initiative as if a party had applied; or
- (c) one of those listed in rule 28.7 wants the court to withdraw such a summons, warrant or order.

(2) A reference to a 'witness' in this Part is a reference to a person to whom such a summons, warrant or order is directed.

*[Note. See section 2D of the Criminal Procedure (Attendance of Witnesses) Act 1965 for the Crown Court's power to issue a witness summons on the court's own initiative.]*

---

<sup>(1)</sup> 1980 c. 43; section 97 was amended by sections 13 and 14 of, and paragraph 7 of Schedule 2 to, the Contempt of Court Act 1981 (c. 47), section 31 of, and paragraph 2 of Schedule 4 to, the Criminal Justice (International Co-operation) Act 1990 (c. 5), sections 17 and 65 of, and paragraph 6 of Schedule 3 and Part I of Schedule 4 to, the Criminal Justice Act 1991 (c. 53), section 51 of the Criminal Procedure and Investigations Act 1996 (c. 25) and section 169 of the Serious Organised Crime and Police Act 2005 (c. 15).

<sup>(2)</sup> 1965 c. 69; section 2 was substituted, together with sections 2 A to 2E, by section 66 of the Criminal Procedure and Investigations Act 1996 (c. 25) and amended by section 119 of, and paragraph 8 of Schedule 8 to, the Crime and Disorder Act 1998 (c. 37), section 109 of, and paragraph 126 of Schedule 8 to, the Courts Act 2003 (c. 39) and section 169 of the Serious Organised Crime and Police Act 2005 (c. 15). It is further amended by sections 41 and 332 of, and paragraph 42 of Schedule 3 and Part 4 of Schedule 37 to, the Criminal Justice Act 2003 (c. 44) for limited purposes; and for remaining purposes, with effect from a date to be appointed.

<sup>(3)</sup> 1879 c. 11; section 6 has been amended; none is relevant to these rules.

## **Issue etc. of summons, warrant or order with or without a hearing**

### **28.2**

(1) The court may issue or withdraw a witness summons, warrant or order with or without a hearing.

(2) A hearing under this Part must be in private unless the court otherwise directs.

*[Note. If rule 28.5 applies, a person served with an application for a witness summons will have an opportunity to make representations about whether there should be a hearing of that application before the witness summons is issued.]*

## **Application for summons, warrant or order: general rules**

### **28.3**

(1) A party who wants the court to issue a witness summons, warrant or order must apply as soon as practicable after becoming aware of the grounds for doing so.

(2) The party applying must—

(a) identify the proposed witness;

(b) explain—

(i) what evidence the proposed witness can give or produce,

(ii) why it is likely to be material evidence, and

(iii) why it would be in the interests of justice to issue a summons, order or warrant as appropriate.

(3) The application may be made orally unless—

(a) rule 28.5 applies; or

(b) the court otherwise directs.

*[Note. The court may issue a warrant for a witness' arrest if that witness fails to obey a witness summons directed to him: see section 97(3) of the Magistrates' Courts Act 1980 and section 4 of the Criminal Procedure (Attendance of Witnesses) Act 1965. Before a magistrates' court may issue a warrant under section 97(3) of the 1980 Act, the witness must first be paid or offered a reasonable amount for costs and expenses.]*

## **Written application: form and service**

### **28.4**

(1) An application in writing under rule 28.3 must be in the form set out in the Practice Direction, containing the same declaration of truth as a witness statement.

(2) The party applying must serve the application—

(a) in every case, on the court officer and as directed by the court; and

(b) as required by rule 28.5, if that rule applies.

*[Note. Declarations of truth in witness statements are required by section 9 of the Criminal Justice Act 1967<sup>(4)</sup> and section 5B of the Magistrates' Courts Act 1980<sup>(5)</sup>. Section 89 of the 1967 Act<sup>(6)</sup> makes it an offence to make a written statement under section 9 of that Act which the person making it knows to be false or does not believe to be true.]*

## **Application for summons to produce a document, etc.: special rules**

### **28.5**

(1) This rule applies to an application under rule 28.3 for a witness summons requiring the proposed witness—

- (a) to produce in evidence a document or thing; or
- (b) to give evidence about information apparently held in confidence,

that relates to another person.

(2) The application must be in writing in the form required by rule 28.4.

(3) The party applying must serve the application—

- (a) on the proposed witness, unless the court otherwise directs; and
- (b) on one or more of the following, if the court so directs—
  - (i) a person to whom the proposed evidence relates,
  - (ii) another party.

(4) The court must not issue a witness summons where this rule applies unless—

- (a) everyone served with the application has had at least 14 days in which to make representations, including representations about whether there should be a hearing of the application before the summons is issued; and
- (b) the court is satisfied that it has been able to take adequate account of the duties and rights, including rights of confidentiality, of the proposed witness and of any person to whom the proposed evidence relates.

(5) This rule does not apply to an application for an order to produce in evidence a copy of an entry in a banker's book.

*[Note. Under section 2A of the Criminal Procedure (Attendance of Witnesses) Act 1965<sup>(7)</sup>, a witness summons to produce a document or thing issued by the Crown Court may require the witness to produce it for inspection by the applicant before producing it in evidence.]*

---

<sup>(4)</sup> 1967 c. 80; section 9 was amended by section 56 of and paragraph 49 of Schedule 8 to, the Courts Act 1971 (c. 23), section 69 of the Criminal Procedure and Investigations Act 1996 (c. 25), section 168 of, and paragraph 6 of Schedule 9 to, the Criminal Justice and Public Order Act 1994 (c. 33) and regulation 9 of, and paragraph 4 of Schedule 5 to S.I. 2001/1090. It is amended by section 72 of, and paragraph 55 of Schedule 5 to, the Children and Young Persons Act 1969 (c. 54), section 65, and paragraph 1 of Schedule 4 to, the Courts Act 2003 (c. 39) and sections 41 and 332 of, and paragraph 43 of Schedule 3 and Part 4 of Schedule 37 to, the Criminal Justice Act 2003 (c. 44), with effect from a date to be appointed.

<sup>(5)</sup> 1980 c. 43; section 5B was inserted by section 47 of, and paragraph 3 of Schedule 1 to, the Criminal Procedure and Investigations Act 1996 (c. 25), and is amended by section 72(3) of, and paragraph 55 of Schedule 5 to, the Children and Young Persons Act 1969 (c. 54), with effect from a date to be appointed. It is repealed by sections 41 and 332 of, and paragraph 51(1) and (3) of Schedule 3 and Schedule 37 to, the Criminal Justice Act 2003 (c. 44), with effect from a date to be appointed.

<sup>(6)</sup> 1967 c. 80; section 89 was amended by section 154 of, and Schedule 9 to, the Magistrates' Courts Act 1980 (c. 43).

<sup>(7)</sup> 1965 c. 69; section 2A was substituted, together with sections 2, 2 B, 2D and 2E, for existing section 2 by section 66(1) and (2) of the Criminal Procedure and Investigations Act 1996 (c. 25).

## **Application for summons to produce a document, etc.: court's assessment of relevance and confidentiality**

### **28.6**

(1) This rule applies where a person served with an application for a witness summons requiring the proposed witness to produce in evidence a document or thing objects to its production on the ground that—

- (a) it is not likely to be material evidence; or
- (b) even if it is likely to be material evidence, the duties or rights, including rights of confidentiality, of the proposed witness or of any person to whom the document or thing relates, outweigh the reasons for issuing a summons.

(2) The court may require the proposed witness to make the document or thing available for the objection to be assessed.

(3) The court may invite—

- (a) the proposed witness or any representative of the proposed witness; or
- (b) a person to whom the document or thing relates or any representative of such a person,

to help the court assess the objection.

## **Application to withdraw a summons, warrant or order**

### **28.7**

(1) The court may withdraw a witness summons, warrant or order if one of the following applies for it to be withdrawn—

- (a) the party who applied for it, on the ground that it no longer is needed;
- (b) the witness, on the grounds that—
  - (i) he was not aware of any application for it, and
  - (ii) he cannot give or produce evidence likely to be material evidence, or
  - (iii) even if he can, his duties or rights, including rights of confidentiality, or those of any person to whom the evidence relates, outweigh the reasons for the issue of the summons, warrant or order; or
- (c) any person to whom the proposed evidence relates, on the grounds that—
  - (i) he was not aware of any application for it, and
  - (ii) that evidence is not likely to be material evidence, or
  - (iii) even if it is, his duties or rights, including rights of confidentiality, or those of the witness, outweigh the reasons for the issue of the summons, warrant or order.

(2) A person applying under the rule must—

- (a) apply in writing as soon as practicable after becoming aware of the grounds for doing so, explaining why he wants the summons, warrant or order to be withdrawn; and
- (b) serve the application on the court officer and as appropriate on—
  - (i) the witness,
  - (ii) the party who applied for the summons, warrant or order, and
  - (iii) any other person who he knows was served with the application for the summons, warrant or order.

(3) Rule 28.6 applies to an application under this rule that concerns a document or thing to be produced in evidence.

*[Note. See sections 2B, 2C and 2E of the Criminal Procedure (Attendance of Witnesses) Act 1965<sup>(8)</sup> for the Crown Court's powers to withdraw a witness summons, including the power to order costs.]*

## **Court's power to vary requirements under this Part**

### **28.8**

- (1) The court may—
- (a) shorten or extend (even after it has expired) a time limit under this Part; and
  - (b) where a rule or direction requires an application under this Part to be in writing, allow that application to be made orally instead.
- (2) Someone who wants the court to allow an application to be made orally under paragraph (1)(b) of this rule must—
- (a) give as much notice as the urgency of his application permits to those on whom he would otherwise have served an application in writing; and
  - (b) in doing so explain the reasons for the application and for wanting the court to consider it orally.

## **PART 31**

### **RESTRICTION ON CROSS-EXAMINATION BY A DEFENDANT ACTING IN PERSON**

#### **Contents of this Part**

Restrictions on cross-examination of witness	rule 31.1
Appointment of legal representative by the court	rule 31.2
Appointment arranged by the accused	rule 31.3
Prohibition on cross-examination of witness	rule 31.4

#### **Restrictions on cross-examination of witness**

### **31.1**

(1) This rule and rules 31.2 and 31.3 apply where an accused is prevented from cross-examining a witness in person by virtue of section 34, 35 or 36 of the Youth Justice and Criminal Evidence Act 1999<sup>(9)</sup>.

(2) The court shall explain to the accused as early in the proceedings as is reasonably practicable that he—

---

<sup>(8)</sup> 1965 c. 69; sections 2B, 2C and 2E were substituted with section 2 and 2A, for the existing section 2 by section 66(1) and (2) of the Criminal Procedure and Investigations Act 1996 (c. 25) and amended by section 109 of, and paragraph 126 of Schedule 8 to, the Courts Act 2003 (c. 39).

<sup>(9)</sup> 1999 c. 23; section 35 was amended by sections 139 and 140 of, and paragraph 41 of Schedule 6 and Schedule 7 to, the Sexual Offences Act 2003 (c. 42) and section 148 of, and paragraphs 35 and 36 of Schedule 26 to, the Criminal Justice and Immigration Act 2008 (c. 4).

- (a) is prevented from cross-examining a witness in person; and
- (b) should arrange for a legal representative to act for him for the purpose of cross-examining the witness.

(3) The accused shall notify the court officer within 7 days of the court giving its explanation, or within such other period as the court may in any particular case allow, of the action, if any, he has taken.

(4) Where he has arranged for a legal representative to act for him, the notification shall include details of the name and address of the representative.

(5) The notification shall be in writing.

(6) The court officer shall notify all other parties to the proceedings of the name and address of the person, if any, appointed to act for the accused.

(7) Where the court gives its explanation under paragraph (2) to the accused either within 7 days of the day set for the commencement of any hearing at which a witness in respect of whom a prohibition under section 34, 35 or 36 of the 1999 Act applies may be cross-examined or after such a hearing has commenced, the period of 7 days shall be reduced in accordance with any directions issued by the court.

(8) Where at the end of the period of 7 days or such other period as the court has allowed, the court has received no notification from the accused it may grant the accused an extension of time, whether on its own motion or on the application of the accused.

(9) Before granting an extension of time, the court may hold a hearing at which all parties to the proceedings may attend and be heard.

(10) Any extension of time shall be of such period as the court considers appropriate in the circumstances of the case.

(11) The decision of the court as to whether to grant the accused an extension of time shall be notified to all parties to the proceedings by the court officer.

### **Appointment of legal representative by the court**

#### **31.2**

(1) Where the court decides, in accordance with section 38(4) of the Youth Justice and Criminal Evidence Act 1999, to appoint a qualified legal representative, the court officer shall notify all parties to the proceedings of the name and address of the representative.

(2) An appointment made by the court under section 38(4) of the 1999 Act shall, except to such extent as the court may in any particular case determine, terminate at the conclusion of the cross-examination of the witness or witnesses in respect of whom a prohibition under section 34, 35 or 36 of the 1999 Act applies.

### **Appointment arranged by the accused**

#### **31.3**

(1) The accused may arrange for the qualified legal representative, appointed by the court under section 38(4) of the Youth Justice and Criminal Evidence Act 1999, to be appointed to act for him for the purpose of cross-examining any witness in respect of whom a prohibition under section 34, 35 or 36 of the 1999 Act applies.

(2) Where such an appointment is made—

- (a) both the accused and the qualified legal representative appointed shall notify the court of the appointment; and
- (b) the qualified legal representative shall, from the time of his appointment, act for the accused as though the arrangement had been made under section 38(2)(a) of the 1999 Act and shall cease to be the representative of the court under section 38(4).

(3) Where the court receives notification of the appointment either from the qualified legal representative or from the accused but not from both, the court shall investigate whether the appointment has been made, and if it concludes that the appointment has not been made, paragraph (2)(b) shall not apply.

(4) An accused may, notwithstanding an appointment by the court under section 38(4) of the 1999 Act, arrange for a legal representative to act for him for the purpose of cross-examining any witness in respect of whom a prohibition under section 34, 35 or 36 of the 1999 Act applies.

(5) Where the accused arranges for, or informs the court of his intention to arrange for, a legal representative to act for him, he shall notify the court, within such period as the court may allow, of the name and address of any person appointed to act for him.

(6) Where the court is notified within the time allowed that such an appointment has been made, any qualified legal representative appointed by the court in accordance with section 38(4) of the 1999 Act shall be discharged.

(7) The court officer shall, as soon as reasonably practicable after the court receives notification of an appointment under this rule or, where paragraph (3) applies, after the court is satisfied that the appointment has been made, notify all the parties to the proceedings—

- (a) that the appointment has been made;
- (b) where paragraph (4) applies, of the name and address of the person appointed; and
- (c) that the person appointed by the court under section 38(4) of the 1999 Act has been discharged or has ceased to act for the court.

## **Prohibition on cross-examination of witness**

### **31.4**

(1) An application by the prosecutor for the court to give a direction under section 36 of the Youth Justice and Criminal Evidence Act 1999 in relation to any witness must be sent to the court officer and at the same time a copy thereof must be sent by the applicant to every other party to the proceedings.

(2) In his application the prosecutor must state why, in his opinion—

- (a) the evidence given by the witness is likely to be diminished if cross-examination is undertaken by the accused in person;
- (b) the evidence would be improved if a direction were given under section 36(2) of the 1999 Act; and
- (c) it would not be contrary to the interests of justice to give such a direction.

(3) On receipt of the application the court officer must refer it—

- (a) if the trial has started, to the court of trial; or
- (b) if the trial has not started when the application is received—
  - (i) to the judge or court designated to conduct the trial, or
  - (ii) if no judge or court has been designated for that purpose, to such judge or court designated for the purposes of hearing that application.

(4) Where a copy of the application is received by a party to the proceedings more than 14 days before the date set for the trial to begin, that party may make observations in writing on the application to the court officer, but any such observations must be made within 14 days of the receipt of the application and be copied to the other parties to the proceedings.

(5) A party to whom an application is sent in accordance with paragraph (1) who wishes to oppose the application must give his reasons for doing so to the court officer and the other parties to the proceedings.

(6) Those reasons must be notified—

- (a) within 14 days of the date the application was served on him, if that date is more than 14 days before the date set for the trial to begin;
- (b) if the trial has begun, in accordance with any directions issued by the court; or

(c) if neither paragraph (6)(a) nor (b) applies, before the date set for the trial to begin.

(7) Where the application made in accordance with paragraph (1) is made before the date set for the trial to begin and—

(a) is not contested by any party to the proceedings, the court may determine the application without a hearing;

(b) is contested by a party to the proceedings, the court must direct a hearing of the application.

(8) Where the application is made after the trial has begun—

(a) the application may be made orally; and

(b) the court may give such directions as it considers appropriate to deal with the application.

(9) Where a hearing of the application is to take place, the court officer shall notify each party to the proceedings of the time and place of the hearing.

(10) A party notified in accordance with paragraph (9) may be present at the hearing and be heard.

(11) The court officer must, as soon as possible after the determination of an application made in accordance with paragraph (1), give notice of the decision and the reasons for it to all the parties to the proceedings.

(12) A person making an oral application under paragraph (8)(a) must—

(a) give reasons why the application was not made before the trial commenced; and

(b) provide the court with the information set out in paragraph (2).

**In the candidate's copy there is an Essential Case Management: Applying the Criminal Procedure Rules' but has been omitted in this version.**

**Recent Developments in the Magistrates' Court (reduced from the Judicial Studies Board papers prepared for the continuation courses for District Judges (Magistrates' Courts) 2009 and 2010.**

Bad character

*R v O* [2009] All ER (D) 34, [2009] EWCA 2235.

The 17 year old appellant appealed against his convictions for unlawful wounding and wounding with intent. The prosecution adduced evidence of his bad character, namely his conviction three months earlier for possession of a Stanley knife. The defence argued that this bad character evidence ought to have been excluded as a matter of fairness under section 103(3) CJA 2003. It was held that the judge had been right to admit it. There had been an attack on the character of the victims which consisted not only of allegations that each had started the violence, but that they had colluded in telling lies in court. The evidence had been admitted under section 101(1)(g). If admissible under (g) it was admissible before the jury for any purposes.

In a case of conflict of evidence about who had started the violence, the jury was entitled to know whether the defendant or the victims were more likely to have reached for a weapon and that the defendant had been convicted for carrying a Stanley knife only three months earlier. The judge could not be criticised for admitting the evidence under section 101(1) (g).

The defendant's previous conviction was plainly admissible, and even prior to the 2003 Act, the law had permitted previous convictions to go before the jury where there had been an attack on character. "In a case where the victims were accused of lying, the jury had to hear about the character of the person who had made the allegations. The judge had reminded the jury that it was for them to decide whether the previous conviction established a propensity to carry a bladed article."

The Court of Appeal observed that propensity is one example of gateway 101 (d). The gateway is more generally concerned with relevance to an important matter in issue between the defendant and the prosecution. The question of who started the violence and who picked up the weapon are important matters in issue between the appellant and the prosecution.

Bail for summary imprisonable offences

(schedule 12 Criminal Justice and Immigration Act 2008)

The defendant need not be granted bail if—

(a) it appears to the court that, having been previously granted bail in criminal proceedings, he has failed to surrender to custody in accordance with his obligations under the grant of bail; and

(b) the court believes, in view of that failure, that the defendant, if released on bail (whether subject to conditions or not) would fail to surrender to custody.

The defendant need not be granted bail if—

(a) it appears to the court that the defendant was on bail in criminal proceedings on the date of the offence; and

(b) the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would commit an offence while on bail.

The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not), would commit an offence while on bail by engaging in conduct that would, or would be likely to, cause:

(a) physical or mental injury to any person other than the defendant; or

(b) any person other than the defendant to fear physical or mental injury.

The defendant need not be granted bail if the court is satisfied that the defendant should be kept in custody for his own protection or, if he is a child or young person, for his own welfare.

The defendant need not be granted bail if he is in custody in pursuance of a sentence of a court or a sentence imposed by an officer under the Armed Forces Act 2006.

The defendant need not be granted bail if –

(a) having been released on bail in or in connection with the proceedings for the offence, he has been arrested in pursuance of section 7 of this Act; and

(b) the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would fail to surrender to custody, commit an offence while on bail or interfere with witnesses or otherwise obstruct the course of justice (whether in relation to himself or any other person).

### Hearsay

The decision of the Court of Appeal in *R. v Horncastle* [2009] EWCA (Crim) 964; [2009] All E.R. (D.) 211 has now been approved by the Supreme Court, *R. v Horncastle* [2009] UKSC 14.

The statutory regime in England and Wales relating to the admission of the evidence of an absent witness at a criminal trial does not breach article 6 of the European Convention on Human Rights. Convention jurisprudence does not require this regime to be disapplied in favour of a rule that convictions based solely or decisively on such evidence are incompatible with article 6. The Supreme Court pointed out that to introduce the “sole or decisive” rule into our procedure would create severe practical difficulties. It would often be impossible for an appeal court to decide whether a particular statement was the sole or decisive basis of conviction. Domestic law has adequate safeguards.

In *R v DT* [2009] EWCA Crim 1213 it was held that hearsay evidence should not be admitted under s.116 (witness in fear or cannot be found) unless the facts behind the application (such as the steps that have been taken to secure attendance) have been agreed or established by evidence. Similarly in *Nelson* [2009] EWCA Crim 1600, more should have been done to ascertain the witness’s reasons for refusing to testify before deciding to admit her statement “through fear”.

## Refreshing memory

Criminal Justice Act 2003: Section 139 (1) "A person giving oral evidence in criminal proceedings about any matter may, at any stage in the course of doing so, refresh his memory of it from a document made or verified by him at an earlier time if:

- a. He states in his oral evidence that the document records his recollection of the matter at that earlier time, and
- b. His recollection of the matter is likely to have been significantly better at that time than it is at the time of his oral evidence.

*R v Mangena* [2009] EWCA Crim 2535. At a Crown Court trial for fraudulent trading and money laundering, the judge made a blanket order allowing all the investor witnesses to refresh their memories from their police witness statements. On appeal it was argued that the judge ought not to have permitted the use of witness statements unless the witnesses had first been shown to stumble in their evidence by reference to a faulty memory. The appeal was dismissed. If a witness confirms in his oral evidence that he has made an earlier document which records his recollection of the matter and that his recollection of the matter is likely to have been significantly better at that time than it is at the time of his giving oral evidence, the latter condition under s.139 (1) (b) is a matter for the assessment of the judge, whatever the witnesses' own view of the matter may be. It is a matter for the discretion of the judge if the conditions in s.139 are met, one of which is the judge's view that the witness's recollection of the matter was likely to have been significantly better at the time of giving his witness statement than at the time of his oral evidence.

The procedure is not a matter of memory, but a question of what is in the interests of justice: "It will of course be a matter for the judge to consider where evidence can properly be given with the assistance of the witnesses' memory being refreshed by reference to an earlier statement and where on the substance of the evidence which that witness has come to give it would be in any event be preferable for the evidence to be given without reference to such a witness statement."

However "...it will be unusual for it not to be possible to use a statement as a memory refreshing aid by reference to the s.139 rule."

Remember also that under the Criminal Procedure Rules a witness is entitled to refresh his memory from a statement: "The objection that a witness cannot be allowed to refresh his memory because he has not stumbled is one that has been frequently made over the years, but it is thoroughly misconceived" (*Criminal Law Week*: Issue 7, 2010).

## Sentencing

Under s.125(1) of the Coroners and Justice Act 2009 courts "must follow" guidelines, including all SGC guidelines, not just "have regard to them". This applies to offences committed after 6 April 2010. There is an exception when it is not in the interests of justice to do so. The new Council must monitor and draw conclusions about the frequency and extent to which courts depart from the guidelines.

*Restraining orders.* As a result of the Domestic Violence, Crime and Victims Act 2004 restraining orders can now (from 30 September 2009) be made following conviction for any offence. Further the court has power to issue a restraining order following an acquittal for any offence where the court considers such an order to be necessary to protect and individual or individuals from future harassment. The court must ensure

that the terms of any restraining order are clear, precise and easily understood by the person subject to the order. The terms of any order must also be proportionate to the nature of the harassment. The order may be imposed for a specified period or until a further order is made. An application for a further order, or to vary or discharge the existing order, can be made by the prosecution, defendant or any person mentioned in the order. The usual right to appeal exists, including where an order is made upon acquittal.



SENIOR PRESIDING JUDGE  
FOR ENGLAND AND WALES

## ESSENTIAL CASE MANAGEMENT: APPLYING THE CRIMINAL PROCEDURE RULES<sup>1</sup>

### A) Generally

- The court<sup>2</sup> must further the Overriding Objective of the Rules by actively managing each case [*Crim PR 3.2(1)*].
- The parties must actively assist the court in this without being asked [*Crim PR 3.3(a)*]. But at every hearing, including at trial, it is the personal responsibility of the Magistrates or District Judge actively to manage the case [*Crim PR 3.2*].
- Unnecessary hearings should be avoided by dealing with as many aspects of the case as possible at the same time [*Crim PR 3.2(2)(f)*].

### B) The first hearing: taking the plea

At every hearing (however early):

- Unless it has been done already, the court must take the defendant's plea [*Crim PR 3.8(2)(b)*]. This obligation does not depend on the extent of advance information, service of evidence, disclosure of unused material, or the grant of legal aid.
- If the plea really cannot be taken<sup>3</sup>, or if the alleged offence is indictable only, the court must find out what the plea is likely to be [*Crim PR 3.8(2)(b)*].

### C) If the plea is 'guilty'

- The court should pass sentence on the same day, if at all possible (unless committing for sentence).
- If information about the defendant is needed from the Probation Service, it may be that a report prepared for earlier proceedings will be sufficient or a 'fast delivery' report (oral or written) may be prepared that day, depending on local arrangements.
- If a 'Newton' hearing is needed, the court, with the active assistance of the parties, must identify the disputed issue [*Crim PR 3.2(2)(a); 3.3(a)*] and if possible, determine it there and then or, if it really cannot be decided, give directions specifically relating to that disputed issue to ensure that the next hearing is the last.

---

<sup>1</sup> It is important to note that all participants in criminal cases, including Magistrates, District Judges, and Justices' Clerks must follow and apply the Criminal Procedure Rules. The Rules are not mere guidance. Compliance is compulsory. The word "must" in the Rules means **must**.

<sup>2</sup> The expression 'court' includes Magistrates, District Judges, and Justices' Clerks exercising judicial powers [*Crim PR 2.2(1)*].

<sup>3</sup> Exceptions to the rule requiring the plea to be taken are rare and must be strictly justified.

#### **D) If the plea is 'not guilty'**

The key to effective case management is the early identification by the court of the relevant disputed issues [Crim PR 3.2(2)(a)]. From the start, the parties must identify those issues and tell the court what they are [Crim PR 3.3(a)]. If the parties do not tell the court, the court must require them to do so.

- The relevant disputed issues must be explicitly identified and the case must be managed by the court to ensure that the 'live' evidence at trial is confined to those issues.
- The parties must complete the prescribed case progression form [Crim PR 3.11; Consolidated Practice Direction V.56.2] and the court must rigorously consider each entry on the form in order to comply with its duty actively to manage the case by making properly informed directions specific to each case.
- Only those witnesses who are really needed in relation to genuinely disputed, relevant issues should be required to attend. The court must take responsibility for this (and not simply leave it to the parties) in order to comply with the Overriding Objective of the Rules [Crim PR 1.1(2)(d), (e)].
- The court's directions must include a timetable for the progress of the case (which can include a timetable for the trial itself) [Crim PR 3.8(2)(c)].
- The time estimate for the trial should be made by considering, individually, how long each 'live' witness will take having regard to the relevant disputed issue(s).

#### **E) The parties' obligations to prepare for trial include:**

- Getting witnesses to court [Crim PR 3.9(2)(b)].
- Making arrangements for the efficient presentation of written evidence/other material [Crim PR 3.9(2)(c)].
- Promptly warning the court and other parties of any problems [Crim PR 3.9(2)(d)].

#### **F) At trial**

Before the trial begins, the court must establish, with the active assistance of the parties, what disputed issues they intend to explore [Crim PR 3.10(a)].

The court may require the parties to provide:

- A timed, 'batting order' of live witnesses [Crim PR 3.10(b)(i), (ii), (ix)].
- Details of any admissions/written evidence/other material to be adduced [Crim PR 3.10(b)(vi), (vii)].
- Warning of any point of law [Crim PR 3.10(b)(viii)].
- A timetable for the whole case [Crim PR 3.10(b)(ix)].

During the trial the court must ensure that the 'live' evidence, questions, and submissions are strictly directed to the relevant disputed issues.

#### **G) The Rules**

For a full version of the Rules, see:

[http://www.justice.gov.uk/criminal/procrules\\_fin/rulesmenu.htm](http://www.justice.gov.uk/criminal/procrules_fin/rulesmenu.htm)

**Lord Justice Leveson  
Senior Presiding Judge for England and Wales  
December 2009**