# THE MAGISTRATES' ASSOCIATION

## JUDICIAL POLICY AND PRACTICE COMMITTEE

### Cases sent to Crown Court

**Background**

In a recent interview with *The Times*, Lord Justice Leveson, Chairman of the Sentencing Council, expressed concern about 18,000–20,000 cases a year sent unnecessarily to the Crown Court because the eventual sentence was a fine, discharge, community penalty or custodial sentence within magistrates' powers.

In November 2009 at the Magistrates' Association AGM, the then Lord Chancellor, Jack Straw, made similar remarks, also mentioning 6,000 cases a year where the defendant elected Crown Court trial. It was not clear from Lord Justice Leveson's comments whether he was including or excluding those 6,000 cases.

When Jack Straw was making his comments at the Association's AGM, he said he was not persuaded to increase magistrates' powers, because there was the opportunity to reduce Crown Court caseload and increase magistrates' court caseload without doing so.

It is believed that the Ministry of Justice is concerned that any increase in magistrates' powers would lead to an increase in the prison population, something it wishes to avoid given the current historically high numbers, current overcrowding and the cost of adding more capacity.

It is however incontrovertible from the most recent sentencing statistics (2010, Q1) that the Crown Court is sentencing more indictable, including either way, offences and the magistrates' courts are sentencing fewer. In that quarter, compared to a year earlier, the number of persons sentenced fell by 1.0 per cent to 79,300. This comprised a 4.4 per cent fall at magistrates' courts (to 56,100) together with a 6.2 per cent rise in the number of people sentenced at the Crown Court (to 23,200). Converting that back into numbers, magistrates' courts sentenced 2,600 fewer cases and the Crown Courts sentenced 1,350 more cases than in the same quarter a year earlier. It is particularly noteworthy that the number of persons sentenced in the Crown Court in the first quarter of this year was the highest in any quarter since 1998 and is a rise of 600 on the previous highest recorded figure of 22,600 in the last quarter of 2009.

Obviously the average custodial sentence from the Crown Court is much longer than that from the magistrates' court. At any one time, approximately 94% of the prison population has been sent by the Crown Court.

**Discussion**

It will have been relatively easy to obtain statistics for the numbers of cases sentenced at the Crown Court within magistrates' powers, but far less easy to establish why the cases were there in the first place. However, see the results of a limited survey below.

While Lord Justice Leveson was still Senior Presiding Judge in 2009, he had raised the same concerns at a judges' meeting. The matter was discussed at the Thames Valley AJF in December 2009. The Thames Valley judges reported back to him that they did not feel this was a concern, except for the number of cases where defendants, prompted by their solicitors were opting for Crown Court trial because of the more favourable legal aid provisions available to them at the time.

There are several offences where the sentencing range extends from non-custodial to Crown Court sentences; these include:

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| Criminal damage | Breach of ASBO | ABH |
| Possession of bladed weapon | Burglary | Various drugs offences |
| Fraud | Handling | Theft |
| Threat to kill | Dangerous Driving | |

The Magistrates' Court Sentencing Guidelines (MCSG) has clear categories of seriousness within each offence and state when such cases should be committed to the Crown Court for sentencing. There is no evidence whatsoever that magistrates are disregarding their guidelines. Furthermore it is hard to imagine that magistrates, who are assisted by qualified legal advisers, could regularly and systematically misinterpret these very specific guidelines and send anything like 20,000 unnecessary cases a year to the Crown Court.

In fact the Lord Chief Justice, Lord Judge, wrote a letter published in the *Magistrate* magazine in November 2009 and included this endorsement of magistrates' work '*What is remarkable is that given the, literally, hundreds of thousands of cases heard before magistrates up and down the country every year, so few give rise to any suggestion of error*'.

In some cases the MCSG will not be as clear cut in specifying that the case should go to the crown court. With theft in breach of trust there is a middle category of three where the theft is between £2000 and £20000, or where there was a high degree of trust and the value was below £2000. There the starting point is 18 weeks custody and the range is from high community sentence to the Crown Court. The starting point is so little below the limit of magistrates' powers that if the Crown suggests some aggravating factors, it will be almost inevitable that the magistrates will commit for trial because their guideline instructs them to *assume for the purpose of mode of trial that the prosecution version of the facts is correct*. This guideline always causes magistrates to err on the side of committing to the Crown Court. It does not require magistrates to speculate that the case might be more serious than the Crown says, but it does require them to take note of every potential aggravating factor which the Crown mentions when mode of trial is decided.

One possible explanation of 'avoidable' cases being sent to Crown Court is that the Crown Court has greater powers to deal with breach of community sentences. Another possible way of avoiding referral to Crown Court may be by allowing a one-third discount for a prompt guilty plea on a custodial sentence which would otherwise have been for nine months, so that it becomes six months, which is within the powers of the magistrates' court.

Limited survey, data

The following data on mode of trial decisions was collected in a group of 8 courts in the South East of England on a single day in the first quarter of 2010:

- 103 decisions were recorded
- In 96 of these cases the Court accepted the proposal made by the CPS about the appropriate trial location, 55 for summary trial and 41 for Crown Court
- In 3 cases the court directed jury trial, although the CPS asked for summary trial
- In 4 cases the court directed summary trial when jury trial was requested by the CPS
- However, in cases where summary trial was offered, 66% of defendants elected jury trial

**Recommendations**

The Magistrates' Association contends that no significant reduction in Crown Court cases can occur merely by telling magistrates that there is a problem. What is required is a positive strategy that allows magistrates to hear all appropriate cases in their courts. Accordingly, the Association sets out below five recommendations for action.

- **The Magistrates' Association recommends that the government should increase magistrates' powers to 12 months maximum custody**

For offences such as dangerous driving (maximum sentence on indictment 2 years) and possession of a bladed weapon (maximum on indictment 4 years) it would bring cases of medium seriousness, particularly if there was a guilty plea, within magistrates' powers.

Even for theft, where the maximum on indictment is 7 years, an increase in magistrates' powers would cover all but the biggest thefts. If prison is increasingly used only for dangerous and violent offenders, purely economic crimes such as theft have to be very major before they attract more than 12 months custody.

The Magistrates' Association also points out that, at any one time, only about 6% of the prison population has been sentenced to custody in magistrates' courts. The Association believes that the fear that there would be an increase in the prison population if magistrates were to be given greater powers is unfounded.

No *primary* legislation is required to implement this change. It requires a statutory instrument to implement Section 154 of the Criminal Justice Act 2003. The Magistrates' Association does not recommend that this should happen unnoticed by Parliament, however. It recommends the government should give a full briefing to the Justice Select Committee but it need not take a long time to implement.

- **The Magistrates' Association recommends that the Practice Direction and legislation which require the bench to take the prosecution case at its most serious when deciding mode of trial should be amended**

The Practice Direction (Criminal Consolidated) at V.51 .3 states '*the court should assume for the purpose of deciding mode of trial that the prosecution version of the facts is correct*'. Moreover Section 19(3) of the Magistrates' Court Act 1980 obliges the court to consider '*whether the punishment which a Magistrates' Court would have power to inflict for it would be adequate*' in making its decision. Together, this guidance and legislation pushes courts towards taking the prosecution case at its most serious. It may be that this could be addressed by revised guidance but the legal advice that we have been given is that the legislation would have to be amended.

- **The Magistrates' Association recommends that the current restrictions which apply to committing for sentence after trial should be reviewed**

This would allay possible concern by a bench that, by retaining jurisdiction, it may run the risk of being unable to impose an adequate sentence if a guilty verdict is reached. The guidance in the introduction to the MCSG could also be usefully addressed. This presently states that:

*When dealing with an either way offence for which there is no plea or an indication of a not guilty plea, these guidelines will be relevant to the mode of trial decision and should be consulted at this stage. This is important because, in some cases, the ability to commit an offender to the Crown Court for sentence after trial may be limited.*

Perhaps consideration might be given to a suggestion that the prosecution be given the right to make representations post verdict if it was felt that the magistrates sentencing powers were then not sufficient.

- **The Magistrates' Association recommends that the government should examine the right of defendants to elect jury trial for all either way offences**

It should be emphasised that the Association fully supports the right of jury trial at Crown Court for the most serious offences. However, it could be argued that the extra cost and delay of a jury trial is not justified for some low level and low value offences such as minor theft. The government is intending to confirm the right to jury trial in forthcoming proposed legislation so this recommendation might seem to contradict government policy. However the objective can be achieved by making certain offences summary only below a certain value and theft below £5,000 could be a summary only offence. (Criminal damage below £5000 is already a summary only offence so there is an exact parallel here).

Alternatively, mode of trial could be made a purely judicial decision based on offence seriousness. Under such a system the defence would still have the right to make representations and have a right of appeal.

A further suggestion could be to give Crown Court judges the power to order that the defence legal aid costs should be paid at the magistrates' court rates — where the magistrates' court had accepted jurisdiction but the defendant had elected jury trial.

It should be noted in this context that the Association's policy is that all trials in magistrates' courts should be heard by a panel of three, which may which may be three magistrates or a DJ(MC) sitting with two magistrate colleagues.

- **The Magistrates' Association recommends that each of the definitive guidelines issued by the Sentencing Guidelines Council (and now the responsibility of the Sentencing Council) should be reviewed and amended as appropriate — since it is clear that the guidelines are being followed when mode of trial decisions are made**

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