THE DENNING LECTURE 1994

"THE CRIMINAL JUSTICE SYSTEM: CURRENT PROBLEMS AND SOLUTIONS"

THE RIGHT HONOURABLE
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It is a great honour to be invited to give the Denning lecture, and for three reasons. First because it is sponsored by the Bar Association for Commerce, Finance and Industry whose influence continues to grow both in the Bar Council and in the wider world. Second because of the daunting distinction of my predecessors. But third and above all because it is the Denning lecture. I belong to what - it is alarming to ponder upon - is the dwindling cohort of practising advocates (albeit at present I only have one client) who have appeared in front of Lord Denning. He was a marvellous tribunal; an intellectual giant, but one who always gave every advocate a fair hearing, a fair crack of the whip.

One of Lord Denning's favourite sayings quoted to my predecessor Sam Silkin during the famous Gouriet case in the winter of 1977 has been one of my watch words as Attorney General. It is the quotation so apt to the requirement that the Government above all should be the first to obey the law, and comes from the 17th century philosopher Thomas Fuller. "Be ye never so high the law is above you". The other watch word to epitomise the role of the Attorney General is from the judicial oath, "without fear or favour, affection or ill will", which is crucial to the Attorney's involvement in our criminal justice system. And it is the achieving of the right balance in the criminal justice system to ensure that it is both fair and effective which is the subject of my lecture tonight.

Since the late 1970's we have been involved in an increasingly agonising reappraisal, spurred by the shock of miscarriages of justice revealed to the Guildford Four, Maguire, Birmingham Six, and West Midlands Regional Crime Squad cases. We have rightly worried to see our over formalised over rigid system - police note books compiled first separately and then together - statements whether true or false

artificially created - both then liable to be broken apart by the essentially very simple device of ESDA testing. I recall vividly Roy Amlot, then Senior Treasury Counsel at the Old Bailey, and a team of officials entering my room in the Law Courts one August afternoon in 1989 to disclose what was feared, rightly as it proved, to be the inherent unreliability of the way in which key confessions had been taken, recorded or perhaps fabricated in the Guildford Four case. As soon as the position could be properly established the matter was rightly hurried before the Court of Appeal for the convictions to be quashed.

Our goal is truth and justice. Yet somehow the system had become an over formalised game in which frustrated players were too often tempted to break the rules. If there is one message I wish to deliver it is that we should try to achieve a system which is rather less of a game and more a search after truth.

It is important however not to exaggerate the problem or to undervalue the very real advances we have made in the 18 years since the last Labour Government set up and the incoming Conservative administration implemented the findings of the Philips Royal Commission on Criminal Procedure. PACE, tape recording, advance disclosure, the Crown Prosecution Service, the Roskill Commission and the Serious Fraud Office, wider disclosure following the Guinness I and Judith Ward cases, the excellent and wonderfully prompt work of the Runciman Royal Commission which we have begun to implement are all significant advances. The Runciman Commission has held, rightly in my view, that our system is fundamentally sound. They do not recommend the adoption of a thorough going inquisitorial system and nor do I. But they do recognise the force of the criticisms which can be directed at a thorough going adversarial system which seems to turn a search for the truth into a contest played between opposing lawyers according to a set of rules which the jury does not necessarily accept or even understand.

At risk of complacency it is right I think to maintain some perspective by summarising quuckly what the Crown Prosecution

Service and the Serious Fraud Office, both so often the subject of unfair criticism, have achieved. The CPS last year prosecuted some 1,460,261 cases in the Magistrates Courts and 118,436 cases in the Crown Court with conviction rates of 97.7% and 90.1% respectively. Of the contested cases in the Crown Court the conviction rate was 56.7%.

The record of the SFO is also under estimated. For far too long the publicity generated by the failure, actual or perceived, of a few high profile cases has obscured its true record. How many people are aware of the following facts? In its 5½ years of existence the SFO has brought to a conclusion 130 major cases of which even the smallest are very large by ordinary standards. They involved 284 defendants. Of these, 181 have been convicted of one or more offences, a conviction rate of 63.7%. But more significant I think is the fact that in over 80% of those 130 cases at least one person has been convicted. And in cases where it is only one person it has almost invariably been the principal architect of the fraud.

The cornerstone of any prosecution is the preceding investigation. The prospects of a successful outcome may be heavily influenced by the thoroughness, professionalism and integrity of the investigators. Chief Officers and HM Inspectorate of Constabularies alike have recognised the need for a more systematic approach to management and supervision. Quite apart from the obvious benefits, that is a valuable protection to police officers who routinely face enormous pressures and are therefore sometimes tempted to what has in the past been called "noble cause corruption". ACPO has developed a Code of Ethics which commits every police officer to the assertion:

> 'I will act with fairness, carrying out my responsibilities with integrity and impartiality'.

I admire our police service. Its willingness to undertake healthy self-analysis is to me yet another reason for that admiration. Most policemen have a highly developed sense of right and wrong - which is why they joined the force in the first place - and would echo the

words of Sir Peter Imbert when he told his force firmly that society is not entitled to expect them to overcome the shortcomings of the system by taking short cuts. Better that the investigation fail altogether than that it seem to succeed by malpractice. The sort of conscientious professionalism to which our police service has pledged itself contributes just as much to a just and thorough investigation as any plethora of safeguards.

The next stage of the process is the decision whether to prosecute and in respect of what offences. Much attention has recently focused on statistics showing a significant proportion of cases instituted by the police being discontinued by the Crown Prosecution Service - about 13% at its highest. Clearly, that needs to be addressed. Statistics alone can tell us nothing about the quality or decision making either in the police service or the CPS. But one thing is certain. It is wasteful of the time and effort of all concerned to have such a high proportion of cases instituted only to be discontinued. The police and the CPS have to address the problem together because it is shared responsibility. Theirs is a partnership which is still in its infancy. One cannot move from the haphazard arrangements and practices which have characterised the 180 years since Jeremy Bentham was calling for the establishment of an independent prosecuting service to the time when this Government made it happen in 1985 and expect everybody in the system to adjust and adapt overnight.

We know from the survey conducted by the Crown Prosecution Service in November last that many cases have to be abondoned because the necessary evidence either is not available or has not been drawn together satisfactorily. The absence of accepted standards to guide the police as to what is the most appropriate charge in a given set of circumstances where a range of options may be open is also a fertile source of misunderstanding.

The solution to all this is closer liaison and working between the police service and the CPS than is currently the case. Professional independence is certainly not inconsistent with close liaison. The lines of communication from prosecutors to investigating officers must be

sufficiently short and effective that the officer on the case understands why decisions have been taken, and what is required of him when additional evidential requirements are identified. Only then can he explain to victims and witnesses how the case is proceeding. Keeping them properly informed is a modest price for public co-operation and support. The two services must understand each others needs more fully. We need to have in mind that one consequence of the use of full time professional advocates is that police officers have significantly less opportunity fully to understand the evidential requirements of the courts. The CPS must help the police by guiding them not only as to content and format of files being submitted but also the substance of the evidence needed. That is a matter for training. As to charging practice, I am pleased to say that the Crown Prosecution Service and the police service have embarked on a programme to develop guidance to help officers select the right charge at the outset of the case. Such guidance should be agreed between the two services. It should help the CPS deliver one of the objectives for which it was established, a greater consistency in prosecution decision making, whilst avoiding the raising of disappointed expectations. Such guidance directed towards the selection of the right charge from the outset, will complement the Code for Crown Prosecutors. As I said in the House of Commons on 14th December 1993, the Code is currently being revised so that it may be more easily understood by police officers and members of the public who are not lawyers. The public interest factors in favour of a prosecution are also to be brought out more clearly.

The courts also have a part to play if the Criminal Justice System is to enjoy the full and wholehearted support of the public. Every citizen has a duty to assist in the process of bringing wrongdoers to justice but we should not take their co-operation for granted. Witnesses in particular need to feel that the system has a proper regard for their interests. The Crown Prosecution Service has introduced, with the help of the judiciary, new arrangements for phasing the attendance of witnesses. There are also initiatives, particularly the issuing of Listing Guidelines in the Crown Court, and pilots of early plea and directions hearings, aimed at introducing greater consistency and certainty into the scheduling of cases. It is in this area that the legal

profession has perhaps the greatest role to play. One key to greater certainty in listing is the eradication of ineffective trials, which do so much to disrupt the efficient running of the courts. That can only come about if cases are prepared early, and accurate and early information is given on the likely plea and duration, and it is kept up to date. If that could happen I believe that the proportion of returned briefs would fall significantly. In addition, the Royal Commission has made helpful recommendations directed to the professions which the Bar Standards review Body, under Lord Alexander of Weedon, is examining. All these initiatives are steps in the right direction.

Too many cases today also fail because witnesses become reluctant - whether because of direct intimidation or a general feeling of being daunted by the occasion. Many of these problems are already being addressed by initiatives which form part of our Courts Charter. New court facilities are now designed to separate witnesses from the public and defendants, but much accommodation does remain unsatisfactory from this point of view. Unfortunately, it is often not possible to make such changes in older buildings. The CPS are anxious in the busiest courts to send Crown Prosecutors often handling up to 40 cases in a day, to court accompanied by an assistant to help administration and to attend and assist the witnesses and victims involved; though understandable pressures of funding do not immediately allow this. Those who give assistance to the police as informants must also be confident that their anonymity will be preserved. I shall be saying more about the problems of prosecution disclosure later.

I turn now to the trial process. The view of the Royal Commission on Criminal Justice to which I referred earlier should concentrate our minds on the need to prevent the adversarial element of our procedures - effective though it is in probing and testing the reliability of evidence - from so dominating the whole process that trials become competitions between advocates who are permitted to lose sight of the fundamental purpose. The trial must become more a search after truth. The crucial requirement is that the issues in a case be defined so far as practicable before the trial commences. It is

absurd, as happened in a major trial in the Midlands last year, that the prosecution and the jury had to wait 6 weeks into the trial itself before the true nature of the defence case was revealed. The jury must know where to concentrate its attention and have the evidence presented to it clearly and in the manner which most helps the decision-making process.

This need is most acute in commercial fraud and other complex cases such as those which have given rise to the spate of very long trials seen in recent years. At present the system of preparatory hearings and case statements established under the Criminal Justice Act 1987 seems often to have spawned long preparatory hearings without in many cases a corresponding benefit to the trial before the jury. I am told by judges and practitioners alike that there is substantial resistance within the legal profession to the submission of the defence case statement because they prefer for tactical reasons to keep their defence to themselves until the latest possible moment. In my view that will not do. The Fraud Trial Committee chaired by Lord Roskill recommended that juries should be replaced by judges and assessors because of the difficulties such cases present for juries. The Government then took the view that, rather than dispense with jury trial, it should seek to overcome the problems by introducing procedures which would ensure cases were manageable before juries. I still believe that it was right to maintain jury trial, though I recognise and continue to ponder carefully the huge pressure on even the most forceful of our judiciary, as well as on the jury, that these cases bring to bear. Under the present rules in the absence of goodwill by defence counsel it is often only by sheer determination intellectual dominace and force of personality that a judge can succeed in focusing the issues at the outset. Within the bounds of reason and propriety the defence must always do its best for its client. But an approach by the professions which concentrates unduly on technicalities and delay can only strengthen the case of those who are for trial by judge and assessors. I do not share that wish and am at present discussing with colleagues how the pretrial arrangements may be tightened to ensure that practice accords with what Parliament willed in 1987. One interesting possibility recently put to me is the establishment of a Rules Committee comprising

practitioners and judges so that more detailed arrangements may be set in place whereby the defence outlines its case in a manner conducive to proper management or proceedings. The Inter-departmental Working Group on Long Criminal Trials has received representations, in response to its Consultation Paper, supporting the proposition that there might be enhanced sanctions against practitioners who do not comply with judicial directions. I do not believe the present situation can be allowed to persist. It is unfair to judges and it is unfair to jurors.

The kind of highly structured arrangements established by the Criminal Justice Act 1987 for serious and complex fraud cases are clearly not necessary for the vast majority of cases before the Crown Court. But the Royal Commission did put forward more modest proposals for defence disclosure across the whole range of cases before the Crown Court pointing up the potential benefits to the quality of justice and efficiency. The Royal Commission pointed out that, although the obligations on the prosecution to disclose its case are extensive, the duty of the defence to reciprocate is very limited. Defendants may, without risking adverse comment, decline to co-operate in any way and at any stage of the criminal proceedings against them except where they are intending to call alibi or expert evidence. They need do no more than deny the offence and register a plea of not guilty. What the Royal Commission recommended was that the defence should be required to disclose sufficient for the prosecution to understand what the substance of the defence case would be. They envisaged standard forms being drawn up to cover the most common offences with the solicitor having to indicate nothing more specific than "accident", "self defence", "consent", or something such as "claim of right", or "abandoned goods". They recognised that more complex cases might require something a little more elaborate. When analysed, their proposals amount to straight forward common sense: we are talking about the stage of proceedings when the prosecution has fully outlined its case and the evidence upon which it is based. I believe it is hard to justify the present arrangement whereby a criminal trial may proceed until the end of the prosecution case - by which time the jury will have heard the majority of the evidence they

are to hear without knowing what the issue is which they have to decide. Under the aegis of the Lord Chancellor's Department we have piloted the use of plea and directions hearings in the Crown Court. All cases are committed to the Crown Court on a fixed date, where a plea is taken. If the plea is not guilty the judge goes through a questionnaire completed by the parties and gives directions as to the future handling of the case. The aim is to list cases going for trial for a fixed date after the plea and directions hearing. The pilots have demonstrated a significant reduction in late guilty pleas, down from 31% to 18% of all cases. We shall soon be considering recommendations from the Pre-Trial Issues National Steering Group for their use to be extended throughout England and Wales.

The Lord Chancellor's Deaprtment in its Annual Report for 1992/93 reported a 'cracked trail' rate of 32%. Those are cases which were prepared for trial but in the event no jury was sworn - usually because an acceptable plea was tendered. Such a high rate is indeed wasteful. The pilot schemes have shown what in-roads can be made into that. The incidence of alternative charges being added or accepted also fell sharply showing the benefits of earlier preparation by prosecution and defence.

The approach suggested by RCCJ would be very valuable in overcoming another major problem facing the criminal justice system today, the heavy and now all too often almost unmanageable burden on the Crown of prosecution disclosure. Proper disclosure in the criminal process is essential so that proceedings are both fair and seen to be fair. But the quest for transparency should not result in prosecution disclosure becoming over cumbersome. The defence must certainly have all relevant material necessary to ensure a fair trial. Prosecutors must be scrupulous in ensuring this. But both in Judith Ward and Guinness the duty to disclose was expressed by the courts in terms which have been construed so broadly that one must question how far they remain consistent with the interests of justice as a whole. In balancing what it is proper to require the prosecution to disclose it is essential that the court pays careful heed to protect the interests of society as a whole. There are two aspects to the problem. First the sheer

volume and logistical implications of the extent of disclosure which may now be required coupled with its cost both to the police and the prosecution agencies, and to the Legal Aid fund in order to pay the defence lawyers to examine it. Secondly, because of the sensitivity of some of the material which may be involved.

The investigation of a crime often moves in several different directions before there is a detection. It may be interrelated with other offences of a similar nature which ultimately turn out not to be connected. In one murder case involving a number of victims whose killings had occurred over a period of time and in different parts of the country compliance with a request for disgorgment of all documents having a bearing on the investigations would have generated so much material that printing out from the centralised computerised data base would have required non stop printing for one whole year. Prosecution counsel has been engaged full time for 7½ months. In a recent major fraud case the unused material occupied 300 document storage boxes. Supervision of the preliminary examination and photocopying what was required - a mere 135,000 pages - occupied a detective sergeant for 45 days and a clerk for 38 days. In a prosecution for rape the police were required to disclose the inquiry data base together with those of 7 other rape inquiries which had occurred in the county in the previous two years in order that the defence could trawl them with the hope of finding other suspects.

It is not just major cases which give rise to problems. Relatively simple cases such as shoplifting can result in substantial burdens on the police and the trader whose goods were stolen, where for example, a demand is made for the production of all closed circuit television recording relating to the store at about the material time. There may on occasion be a need for this to happen but such occurrences ought not to become routine.

These examples bear out my point: the defence lawyers must have what is reasonably necessary for the proper discharge of their duties to their clients but the present open ended obligation has become so burdensome as to threaten to crush the system it is meant to

sustain. I am confident that it has led to a substantial lengthening of trials by introducing quantities of irrelevant material, taking police manpower away from their proper role of detecting crime and may also compromise the privacy of those who co-operate with the police in criminal investigations beyond what is necessary and avoidable. That the burdens have also been felt by the judiciary is evidenced by the judgement of Mr Justice Jowitt in R v Melvin and Dingle and by the Court of Appeal in R v Keane. I particularly welcome the re-assertion of the responsibility of prosecuting counsel in appropriate circumstances to make proper judgements about materiality.

The other aspect of the problem relates to requests for the production of material which for one reason or another is sensitive. Intelligence based operations, sometimes in conjunction with surveillance and undercover work are increasingly important in the detection not only of terrorist crime but other serious crime. The law at present does not require the defence to state even the barest outline of its case in response to prosecution evidence adduced on committal. But the defence is permitted to probe and press for ever wider discovery not necessarily in the hope that it will produce some material of genuine importance and relevance to their case. Sometimes their best hope is that an over stringent order may put systems or individuals at risk and thus lead to the dropping of the case. If this happens without good reason it is itself a denial of justice. The reality is that it has happened in many serious cases up and down the country. The Court of Appeal has made it clear that such an approach is undesirable. The Home Secretary and I are both determined that this issue should be addressed. The proposals made by the Royal Commission for a two stage process of disclosure based on a primary obligation (to disclose material more directly associated with the investigation) and a secondary obligation linked to defined issues following proper disclosure of the nature of the defence, by then fully apprised of the Crown case. For my part the questions of prosecution disclosure and defence disclosure are inextricably linked. Justice requires that the courts have before them all relevant evidence. [High quality investigation at the outset and proper identification of the issues to trigger follow-up inquiries are the only sure means of

achieving that.]

Arising in part out of the question of disclosure is whether there should be a greater provision for interlocutory appeals in criminal proceedings. Some decisions made by magistrates are amenable to judicial review such as prosecution of the three Surrey Officers which was initially stayed by a stipendiary magistrate whose decision was overruled by the Divisional Court. But section 29 of the Supreme Court Act 1981 excludes from the ambit of judicial review matters relating to trial or indictment. The House of Lords has recently made it clear that the provision is to be widely interpreted and that the trial process is not to be interrupted for substantial periods whilst particular points are litigated in the appellate courts. I have no doubt that that is a sound general rule. There is already however one exception relating to serious and complex fraud cases where interlocutory appeals are permissible. There can be interlocutory appeal relating to questions as to the admissibility of evidence or any other question of law determined during the course of a preparatory hearing. That is also eminently sensible. It permits contentious issues on which the trial judge has ruled to be reconsidered by the Court of Appeal before the jury is sworn in and so avoid the risk of the trial proceeding on a false premise. There is, I believe, a need for a modest further extension of these arrangements. It occasionally happens that a case of substantial public importance is not tried at all because the trial judge either stays proceedings or makes a ruling with which the prosecution cannot comply and the proceedings therefore have to be abandoned. A recent example is the case of the West Midlands police officers involved in the Birmingham Six case whose trial was stayed because the judge considered that the publicity which had preceded the case precluded a fair trial. It would be wholly wrong for me or any Minister to comment on the merits of the particular decision. We must however recognise the degree of public concern occasioned by the fact that the trial did not go ahead and there is a strong case for saying that such decisions ought to be capable of review by an appellate court. Similar considerations apply in serious cases where inability by the Crown to comply with orders for disclosure relating to information such as the identities of informants and surveillance techniques force

abandonment. Once again, the public interest requires that the matter should be capable of being reviewed. Such an extension would not offend against the ordinary rule that the trial process should not be delayed pending interlocutory appeals because without that right of appeal there is no trial to be delayed. I would not be impressed by arguments that this modest proposal undermines the principle of finality. It is very much a question of balance: the defendant may appeal at the appropriate stage any ruling adverse to his interests. Depriving the prosecution of the opportunity to put a case before a jury can prove damaging to the public interest.

Much has been said and written since the Royal Commission reported about what is loosely described as plea bargaining. There is a growing awareness by practitioners that many cases can and should be resolved by sensible discussion without the need for elaborate and lengthy trials. I emphasise the word "properly". There is much myth and mystique about so called plea bargaining. The term is variously misused to describe a range of very different situations:

(i) The simplest is where the defendant is minded to place himself at the mercy of the court by pleading guilty and thus to benefit from the very proper discount on sentence for a timely plea. He understandably wishes to know how long or how much.

(ii) There is then the more complex situation where a defendant is minded to plead guilty to only some of the charges preferred or to alternative charges.

(iii) The more far reaching suggestions such as the Royal Commission idea for a form of sentence canvass. This would be a process by which a judge provides a defendant with an indication of the sentence or range of sentence which would be imposed on a guilty plea to one or more identified charges.

There is already before Parliament a provision which gives more explicit recognition to the appropriateness of defendants

receiving credit for an early guilty plea.

It frequently occurs that acceptance by the prosecution of a plea of guilty to only some charges accompanied by a modest sentence engenders suspicion of an improper deal. I have never known that to be the case but suspicion could be avoided by greater openness. I am therefore attracted to the concept of sentence canvas – one which has also been supported by the Seabrook Committee of the Bar Council. It is common sense that a man considering what is for him an extremely important decision should be entitled to know its likely consequences.

I can see no reason why the defence should not be able to discuss not only the question of acceptability of plea with the prosecution but also to canvass with both the prosecution and the judge the sentence which the court has in mind for a plea to a particular charge. And, subject to reporting restrictions, I believe it should be done in open court. Here again I believe the Royal Commission gives a steer in the right direction and their recommendations deserve serious consideration.

None of the Commission's recommendations go as far as the more sophisticated arrangements to be found in some jurisdictions, notably the USA, where charges and their disposal are negotiated by the prosecution and the defence, sometimes under the supervision of the court, in order to secure the co-operation of a major suspect and possibly his testimony. I do not rule out such innovations here but they need to be approached with caution. A different but more promising approach in the context of large fraud cases would be arrangements which permit a co-ordinated disposal of proceedings by prosecutors and regulators under the auspices of the court. With major fraud the public interest demands more than mere punishment. We should aim to divest fraudsters more effectively of their illgotten gains, drive them from our markets, and distribute their assets to those who have lost. It is an area which will need to be worked up in detail and I can think of no more appropriate body for whom to canvass the suggestion than the Bar Association for Commerce Finance and Industry.

CONCLUSION

All this brings me back to where I started. The vast majority of criminal justice systems are a mix of the adversarial and inquisitiorial. I believe our system is fundamentally sound but there is a need for some adjustment both as regards the balance between the interests of society (as manifested in the prosecution) and the defendant and also between the inquisitorial and adversarial elements. But above all else I believe that there is a need for all the players in the system, investigators, prosecutors, members of the legal professions and the judiciary to work closely together so to modify and develop our system on the lines which I have indicated that their efforts may be focused in individual cases not only on discharging their essential responsibilities within the overall rules but making the system operate effectively in the search for truth and thus for justice.

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