

Archbold Review

Cases in Brief

Conspiracy—nature of conspiracy—single conspiracy involving three layers of a drug supply chain—whether all those charged capable of being members of single conspiracy—nature of evidence

JOHNSON AND OTHERS [2020] EWCA Crim 482; 1 April 2020

The appellants were convicted of a conspiracy between themselves and with others to supply class A controlled drugs at a trial at which W, who was at the centre of the conspiracy and had become an assisting offender (Serious Organised Crime and Police Act 2005, ch.2), gave evidence for the prosecution. The prosecution case was that J and A were wholesale suppliers of drugs to W, who in turn supplied the drugs to B, M and C, for onward supply to other suppliers and thence eventually to end-users. S, who was in the supplied-to group, had pleaded guilty before trial, which was relied on as evidence that a conspiracy existed. The appellants contended that the judge should have allowed submissions of no case to answer.

(1) The court summarised some of the principles in relation to the charging of conspiracies: (a) it was of the essence of a conspiracy that there must be an agreement to which the defendant was a party and that each defendant charged with the offence must be proved to have shared a common purpose and design, rather than similar or parallel purposes and designs (see e.g. *Shillam* [2013] EWCA Crim 160, [2013] Crim L.R. 592, at [19]-[20]); (b) it was possible for the evidence to show the existence of a conspiracy of narrower scope and involving fewer people than the prosecution originally alleged, in which case it was not intrinsically wrong for the jury to return guilty verdicts accordingly: *Shillam* at [20]; (c) chain and wheel conspiracies were different in structure. In a chain conspiracy, A agreed with B, B with C and C with D. In a wheel conspiracy, A at the hub recruited B, C and D. In each it was necessary that the defendants be shown to be a party to the common design and aware that they were part of a common design to which they were attaching themselves; (d) the need to show a common design and an awareness of the common design highlighted the danger to the prosecution of charging a single conspiracy

rather than what may be a series of substantive offences or different conspiracies, when the offending involves a group of people over a substantial period. Such offending may, on a proper analysis, be the result of a series of transactions or agreements, and a single conspiracy may be impossible to prove (*Mehtab* [2015] EWCA Crim 1665).

(2) The evidence against A and J included that W's evidence was that once a supply chain was established, drugs would be supplied on credit, the money flowing back up the chain after the final sale to end-users: such evidence was capable of supporting the contention that A and J were party to the wider agreement involving W's onward supply, such supply being a precondition of payment. There was in addition evidence of contacts of various kinds between A and J and those below W in the supply chain. There was also evidence of W's contacts with those below B and M in the supply chain, such as to provide evidence from which the jury could conclude that B and M were involved with a conspiracy with W to supply drugs onwards, not simply receiving drugs from W without any involvement by him thereafter. The length of time W had been supplying them was such that the jury could properly conclude that they had an appreciation of the scale of the operation.

(3) By contrast, W supplied C because he knew C had a network of suppliers below him, and he was a cash buyer. There was no evidence of other contacts between C and A and J. Whilst it may have been open to the jury to conclude that W and C were parties to an agreement which involved C's onward supply of drugs, there was insufficient evidence to go to the jury that C was party to the larger conspiracy.

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Evidence—intermediary—approach of the courts—nature of determination by the judge—general matters

THOMAS [2020] EWCA Crim 117; 29 January 2020

(1) The experience of the courts was reflected in Criminal Practice Direction 3F.12, 13 and 16, which gave detailed consideration to the appointment of intermediaries. There would be cases when the needs of the defendant and the circumstances of the trial would be such that an intermediary would be required for the entire trial, whilst in others, notwithstanding a defendant's difficulties, a fair trial could be secured without the appointment of an intermediary for any stage of the proceedings, or only for a particular part, such as his or her evidence. The Practice Direction observed that the appointment of an intermediary for the defendant's evidence would be rare, and exceptionally rare in the case of a whole trial order. Intermediaries were not to be appointed on a "just-in-case" basis or because a report by an intermediary, psychologist or psychiatrist had failed to provide the judge with a proper analysis of a vulnerable defendant's needs. Any difficulty experienced by the defendant must be considered in the context of the actual proceedings which he or she faced. Intermediaries should only be appointed when there were compelling reasons to do so, it being clear that all other adaptations of the trial process would not sufficiently meet the defendant's needs to ensure effective participation in the trial.

(2) It followed that applications for intermediaries should be addressed carefully, with sensitivity and caution to ensure the defendant's effective participation. The recommendation by one or more experts that an intermediary should be appointed was not determinative of the issue. It was a question for the judge to resolve. The guidance given in *Cox* [2012] EWCA Crim 549, [2012] 2 Cr.App.R 6 [29] and [30] was important in this respect.

(3) As general matters, first, practitioners should be alert to the possibility that a defendant may have comprehension or communication difficulties and they should assess whether to request a ground rules hearing to address them. Secondly, in cases where there were substantive comprehension or communication difficulties, intermediaries could, in the right case, provide useful assistance to counsel in advance of or during the trial, in obtaining the defendant's instructions.

In addition to *Cox*, the court considered *Grant Murray* [2017] EWCA Crim 1228, [2018] Crim. L.R. 71; *Biddle* [2019] EWCA Crim 86, [2019] 2 Cr.App.R 2; and *Rashid Yahya* [2017] EWCA Crim 2, [2017] 1 Cr.App.R 25.

Food safety—EU Food Safety Regulations (No 178/2002) Art. 14—EU Food Information Regulations (No 1169/2011) Art.24(1)—deeming provision—whether rebuttable or irrebuttable presumption—strict construction of penal statutes—application

R (TESCO STORES LIMITED) v BIRMINGHAM MAGISTRATES' COURT [2020] EWHC 799 (Admin); 4 April 2020

The question in the substantive hearing of the application for judicial review of a preliminary ruling in the magistrates' court allowed to proceed at a previous hearing (see [2019] EWHC 3755 (Admin), [2019] 3 Archbold Review 2) was whether it was a criminal offence for a shop to offer food for sale, or otherwise place it on the market, after its

labelled "use by" date. EU Food Safety Regulations (No 178/2002) Art.14 prohibited placing food on the market if it were "unsafe", and breaching those Regulations was an offence in England by virtue of the Food Safety and Hygiene (England) Regulations 2013 Reg.19 and Sch.1. The issue in T's case depended on the construction of the provision to the effect that highly perishable foods should carry a "use by" date and that "[a]fter the 'use by' date a food shall be deemed to be unsafe ..." in the EU Food Information Regulations (No 1169/2011) Art.24(1). T contended that the deeming provision in Art.24(1) was rebuttable (and that it would seek to rebut it at trial); the interested party, the prosecutor Birmingham City Council, contended that it was an irrebuttable presumption, a rule of law.

(1) The court considered the domestic and Commonwealth authorities on deeming: *Credit Foncier Franco-Canadien v Bennett* [1963] 43 WWR 545, [1963] BCJ 16 (British Columbia); *International Bottling Company Limited v Collector of Customs* [1995] 2 NZLR 579 (New Zealand); *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478, [2002] 1 W.L.R 997; *Anderton v Clwyd County Council (No 2)* [2002] EWCA Civ 933, [2002] 1 W.L.R 3174; *R (Spath Holme Limited) v Secretary of State for the Environment* [2001] 2 AC 349; and *Inland Revenue Commissioners v Metrolands (Property Finance) Limited* [1981] 1 W.L.R 637. While "deemed" may, depending on the context, connote a rebuttable presumption, its use in Art.24(1) unambiguously created an irrebuttable presumption. The authorities relied on by T showed that "deemed" often connoted an irrebuttable presumption, and that conclusion in T's case was supported by a purposive approach: the purpose of the European food law scheme was to deliver a high level of protection to consumers, based on the precautionary principle and risk assessment practices (the relevant "purpose" being not, as counsel for T myopically argued, the internal structuring of the relevant legislation). In line with the aims of European food law, the deeming provision in Art.24 was definitional in the sense that it was purposively designed to include, within the scope of "unsafe", food which was labelled with a "use by" date that had expired because, on the basis of its generic characteristics and usual treatment, such food was considered to afford an undue risk to human health if consumed. The fact that in a particular case a highly perishable food did not adversely affect human health if eaten after the "use by" date was not to the point. European food law required the prospective evaluation of risk: as a matter of precaution, it considered that, where foods were highly perishable, the risk to human health was such that after a particular date they should not be used.

(2) The tenet of construction that provisions that imposed criminal penalties be construed strictly in favour of an accused (see *Hughes* [2013] UKSC 56, [2013] 1 W.L.R 2461, [27], [quoting Lord Hoffman *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131 E]) did not assist T. On any view, the meaning of reg.19 of the 2013 Regulations was clear beyond any doubt – it made a breach of Art.14 of the Food Safety Regulation a criminal offence – and for that purpose it was clear (by reason of Art.24) that food beyond its "use by" date was unsafe.

[*Comment: while the particular context of the criminal law of food marketing may be of somewhat limited interest, the court engaged in a substantial discussion of the proper construction of deeming provisions.*]

Explosives—Explosive Substances Act 1883 s.4(1)—“lawful object”—nature of requirement—whether included experimentation and self-education

COPELAND [2020] UKSC 8; 11 March 2020

(1) The structure of the Explosive Substances Act 1883 s.4(1) was clear. If, under limb (1), the prosecution proved circumstances such as to give rise to reasonable suspicion that the making or possession/control of an explosive substance was not for a lawful object, that gave rise to a specific onus on the accused under limb (2) to identify the specific object or purpose for which he or she made the substance or had it in possession/control. The burden of proof at the limb (2) stage was on the accused, and the standard of proof was the balance of probabilities.

(2) The object or purpose identified by the accused under limb (2) had to be “lawful” in the usual sense of that term in English law, namely that the object in question was not an object or purpose which was made unlawful by the common law statute. It must be the sole object. The fact that the making or possession of the substance might involve the commission of regulatory offences did not prevent an accused who sought to make out a defence under limb (2) from relying on an object at a more general level which was lawful: *Fegan* (1984) 78 Cr.App.R 189 (CCA, NI); *Attorney General’s Reference (No 2 of 1983)* [1984] QB 456.

(3) If an accused did identify a specific object which was lawful in the requisite sense, the prosecution might seek to show that it was not, in fact, his or her object, or not the sole object and that it included an unlawful element. It would also be open to the prosecution to seek to show that pursuit of the object specified, although it might be lawful in a general sense, would involve such obvious risk to other people or their property from use of the explosive substance that the inference should be drawn that the object of the accused was mixed, and not wholly lawful. If the accused knew that the proposed use of the explosive substance in his or her possession would injure others or cause damage to their property or was reckless regarding such a risk, the ostensibly lawful object would be tainted by the unlawfulness inherent in the pursuit of that object.

(4) *Riding* [2009] EWCA Crim 892, in which it was said that mere curiosity could not be a lawful object in the making of a pipe bomb, was correct on its facts, as there was no need for R to use an explosive substance to satisfy his curiosity as to whether he could successfully construct a pipe bomb. He could have used an inert substance. It was not part of R’s case that he had made it in order to see if he could make it explode. This statement was wrongly taken to have wider significance in C’s case by the judge at first instance and the Court of Appeal ([2019] EWCA 36 (Crim)) to reject the proposition that curiosity or experimentation was capable of being a lawful object. Experimentation and self-education, including to satisfy one’s curiosity in relation to the subject of investigation, were lawful objects, in the general sense required. Just as “self-defence” was a lawful object in *Fegan* and the *Attorney General’s Reference*, but whether a particular use of the weapons involved constituted self-defence would depend on the circumstances in which they were used, so experimentation and self-education was a lawful object, but an actual explosion was capable of being unlawful, depending on the facts. The judgment, delivered by Lord Sales, was agreed with by Lords Reed and Carnwath. Lords Lloyd-Jones and Hamblen dissented.

Voyeurism—secret filming of consensual sexual intercourse—whether circumstances such as to create reasonable expectation of privacy

RICHARDS [2020] EWCA Crim 95; 28 January 2020

R filmed himself having sexual intercourse with two women who said they did not consent to the filming. He was convicted under the Sexual Offences Act 2003 s.67(3) (recording another without consent doing a private act with the intention that someone would look at the recording for the purpose of sexual gratification). R’s intention to view for sexual gratification was accepted, and there was a clear issue for the jury as to consent. The only element in issue on appeal from a preparatory ruling was whether he had recorded a private act as provided for in s.68 (“a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy”). R argued that the relevant place was the women’s bedrooms, which could not provide them with privacy from R, who was present with their consent and participated in the activity that was filmed. The court dismissed the appeal. Applying the approach in *Bassett* [2008] EWCA Crim 1174, [2009] 1 W.L.R. 1032, whether a person was doing a private act in a place which, in the circumstances, would reasonably be expected to provide privacy would depend inevitably on the context. The expectation of privacy may vary depending on the precise relationship between the person observed and his or her observer (see the commentary on *Bassett* by David Selfe, (2009) 193 Criminal Lawyer 2). In assessing the importance of the particular circumstances, Crown counsel provided a telling example: if a patient removed his or her clothes in a doctor’s surgery for an examination, there would be two participants. The patient would reasonably expect that his or her body, revealed for the examination, would be viewed only once, during the consultation. But a jury could conclude that there was a reasonable expectation of privacy against the secret filming of that examination to enable the doctor to view it afterwards for his or her sexual gratification. This persuasively illustrated how a participant to an activity could be guilty of a s.67(3) offence if he or she secretly recorded what was otherwise a lawful event in which they participated. Section 67(3) protected against the recording of another person doing a private act, and was not limited to protecting the privacy of a complainant from secret filming by someone who was not present during the private act in question.

SENTENCING CASE

Surcharge Orders

ABBOTT [2020] EWCA Crim 516, 26 March 2020

The three conjoined appeals raised issues of principle relating to the calculation of surcharge orders pursuant to s.161A of the Criminal Justice Act 2003. Three questions were considered:

- (i) If a sentencing court is dealing with more than one offence and the disposals are the same (i.e. a fine or a period of imprisonment), is the amount of the surcharge calculated by reference to the total sentence imposed (i.e. aggregating the individual fines/total imprisonment) or is the amount of the surcharge calculated by

- reference to the highest of the individual sentences imposed?
- (ii) If there is a mixed disposal (i.e. a fine and a period of imprisonment), how is the surcharge calculated?
 - (iii) If the sentencing court is dealing with the activation of a suspended sentence, or breach of a community order, would any further sentence attract another surcharge, and how would the surcharge be calculated in relation to other new offences?

The court answered the questions as follows:

- (i) The amount of the surcharge should be calculated by reference to the total sentence imposed (i.e. the total period of imprisonment, or the total amount of any fine). In reaching this conclusion, the Court (at [60]) noted that the Sentencing Council guidance on calculating the appropriate surcharge adopts a different approach. At [61]-[66] it said this guidance is inconsistent with the decision in *Phelan-Sykes* [2015] EWCA Crim 1094, which accurately reflects the language in the applicable statutory framework and also removes any anomalies that may stem from how the overall prison sentence imposed for a number of offences is structured.
- (ii) If there is a mixed disposal (e.g. a fine and a period of imprisonment), the surcharge applicable to each should be calculated. The higher value is the amount of the surcharge. This conclusion followed from the conclusion reached in respect of point (i) above. In a case involving a fine and a period of imprisonment, the

surcharge is the higher of the amount corresponding to the aggregate fine and the amount corresponding to the aggregate period of imprisonment. The same principles apply to any other available combination of orders, and apply whether there is a mixed disposal in relation to a single offence, or different disposals in relation to different offences.

- (iii) Where a surcharge has already been imposed, no further surcharge should be imposed on any future occasion. Where the court activates any suspended sentence of imprisonment, or acts upon breach of a community or other order, and at the same time sentences an offender for new offences, the surcharge should be calculated only by reference to the new offences. The duty to impose a surcharge is discharged when the court first sentences the offender. Section 161A contains no duty or power to order an offender to pay a second surcharge and the provision is not engaged for a second time when the court “deals with” an offender on a second or subsequent occasion. At [83]-[85] the Court also emphasised that when calculating the applicable surcharge the sentencing court must be careful to ensure that the correct charging regime applies, that offences taken into consideration should be ignored when considering the offences dealt with for the purpose of imposing a surcharge and that the form of words to be used when imposing the surcharge in the Crown Court should be: “The surcharge provisions apply to this case and the order can be drawn up accordingly”.

Feature

The Coronavirus Act 2020 and its impact in the Crown Court

By HHJ Lana Wood¹

Extension of powers to hold remote hearings using video and audio technology

One of the Government’s stated purposes in introducing the Coronavirus Bill was to ensure that proceedings could be conducted in whole or in part by video or telephone in more circumstances than had previously been permitted, to avoid the risk of the spread of the disease through public congregation in public places.² The extension of the court’s powers to direct live link attendance at hearings has been affected by modifications to, principally, the Crime and Disorder Act 1998 and the Criminal Justice Act 2003. Eligibility for attendance by live link is extended to those on bail. The circumstances in which a live link direction can be made in respect of witnesses are extended. Other participants, including the judge, legal representatives, and others assisting the court may now attend by live link. The arrange-

ments enable the use of fully video and video-enabled courts so that some hearings can be conducted with all parties at remote locations.

The scheme of the legislation

Section 53 and Sch.23 of the Coronavirus Act 2020 make temporary modifications to the Criminal Justice Act 2003, the Criminal Appeal Act 1968 and the Criminal Justice Act 1988. Section 54 and Sch.24 make temporary modifications to the Crime and Disorder Act 1998, the Police and Criminal Evidence Act 1984, the Prosecution of Offences Act 1985 and the Serious Organised Crime and Police Act 2005. Section 55 and Sch.25 make temporary modifications to the Courts Act 2003 and the Tribunals, Courts and Enforcement Act 2007. These provisions all came into force on 25 March 2020³ and will expire at the end of the period of two years beginning with that date.⁴

¹ The opinions expressed in this article are my personal opinions only, at this stage of my study of the modifications effected by the Coronavirus Act 2020. They may not be correct, and should not be taken as indicating that I have made my mind up on any future hearing: I am certainly open to being persuaded that any view I have expressed here is wrong.

² See the Government’s impact assessment Coronavirus Bill: summary of impacts.

³ Coronavirus Act 2020, s.87(1).

⁴ Coronavirus Act 2020, s.89(1).

The principal modifications applicable in the Crown Court

Provision for remote hearing of preliminary hearings and sentencing hearings is made by modifications to ss.57A-G and the insertion of a new Sch.3A to the Crime and Disorder Act 1998 (CDA 1998). Provision for remote hearing of eligible criminal proceedings is made by modifications to ss.51-56 and insertion of a new Sch.3A to the Criminal Justice Act 2003 (CJA 2003). Provision in relation to public participation in remote hearings and offences of recording or transmitting those hearings is made by insertion of new ss. 85A-D of the Courts Act 2003 (CA 2003).

Key concepts

Preliminary hearing is defined by s.57A(3) CDA 1998 as:

a hearing in the proceedings held before the start of the trial (within the meaning of subsection (11A) or (11B) of s.22 of the Prosecution of Offences Act 1985) including, in the case of proceedings in the Crown Court, a preparatory hearing held under s.7 of the Criminal Justice Act 1987 ... or s.29 of the Criminal Procedure and Investigations Act 1996 ...

Sentencing hearing is defined in s.57A(3) CDA 1998 as:

any hearing following conviction which is held for the purpose of (a) proceedings (in a magistrates' court) relating to committal to the Crown Court for sentencing; or (b) sentencing the offender or determining how the court should deal with him in respect of the offence (including reviewing, amending or revoking such a sentence or determination); or (c) determining (i) how the offender has complied with a sentence given in respect of the offence, or (ii) how the offender should be dealt with in respect of compliance with such a sentence; and here "sentence" includes any way in which a court has determined that the offender should be dealt with in respect of the offence.

Eligible criminal proceedings – a key term – are defined in s.51(2) CJA 2003 by list. The list includes following types of proceedings in the Crown Court: a criminal appeal to the Crown Court and any proceedings that are preliminary or incidental to such an appeal; a trial on indictment or any other trial in the Crown Court for an offence; proceedings under s.4A or 5 of the Criminal Procedure (Insanity) Act 1964⁵; proceedings under Pt.3 of the Mental Health Act 1983; proceedings under s.81(1)(g) of the Senior Courts Act 1981 or s.16 of CJA 2003 in respect of a person who has been remanded by a magistrates' court on adjourning a case under s.11 of the Powers of the Criminal Courts (Sentencing) Act 2000⁶; a hearing before the Crown Court which is held after the defendant has entered a plea of guilty; a hearing under s.155 of the Powers of Criminal Courts (Sentencing) Act 2000⁷; and any hearing following conviction held for the purpose of making a decision about bail in respect of the person convicted.

It should be noted that there is no overlap between preliminary hearings, sentencing hearings and eligible criminal proceedings: hearings to which Pt.3A of CDA 1998 applies

⁵ Respectively, a determination by a jury whether the accused did the act or made the omission charged against him, and exercise of the court's powers to deal with persons not guilty by reason of insanity or unfit to plead.

⁶ Respectively, a bail application to the Crown Court, and an appeal to the Crown Court against a magistrates' court decision, by a person who has been remanded for medical examination and report following a magistrates' court finding that he did the act or made the omission charged.

⁷ Power to vary or rescind a Crown Court sentence.

(i.e. preliminary hearings and sentencing hearings as defined by s.57A(1) of that Act) are not eligible criminal proceedings. Hearings at which the court makes an order under s.37, and/or 41, or s.45A of the Mental Health Act 1983, for instance, although they are proceedings under Pt.3 of the Mental Health Act 1983, appear also to fall within the definition of sentencing hearing,⁸ and therefore appear not to be eligible criminal proceedings.

A **live video link**,⁹ in relation to a person (P) taking part in a hearing, is a live television link or other arrangement which (a) enables P to see and hear all other persons taking part in the hearing who are not in the same location as P, and (b) enables all other persons taking part in the hearing who are not in the same location as P to see and hear P.

A hearing is **conducted wholly as a video hearing**¹⁰ if directions have been given, whether under ss.57B, 57E or 57F CDA 1998, under s.51 CJA 2003, or under any other power, for all of the persons taking part in the hearing to do so through a live video link, and all of those persons take part in the hearing in accordance with those directions.

A **live audio link**¹¹, in relation to a person (P) taking part in a hearing, is a live telephone link or other arrangement which (a) enables P to hear all other persons taking part in the hearing who are not in the same location as P, and (b) enables all other persons taking part in the hearing who are not in the same location as P to hear P.

A hearing is **conducted wholly as an audio hearing**¹² if directions have been given under ss.57B, 57E or 57F CDA 1998 or under s.51 CJA 2003 for all of the persons taking part in the hearing to do so through a live audio link, and all of those persons take part in the hearing in accordance with those directions.

Power to order attendance at preliminary hearings through live link

Section 57B CDA 1998 gives the court power to give a direction for any participant in a preliminary hearing to participate through a live link.

CDA 1998 Sch.3A Pt. 1 contains prohibitions and limitations on the use of live links in preliminary hearings. The following limitations apply to all preliminary hearings:

- (1) The accused may not take part in a preliminary hearing through a live audio link for the purpose of giving evidence.
- (2) A person (other than the accused) may not take part in a preliminary hearing through a live audio link for the purpose of giving evidence unless—
 - (a) there are no suitable arrangements by means of which that person could give evidence through a live video link, and
 - (b) the parties agree to that person giving evidence through a live audio link.

⁸ "a hearing following conviction which is held for the purpose of ... sentencing the offender or determining how the court should deal with him in respect of the offence".

⁹ Defined by s.57A(7) CDA 1998, and (in identical terms) by s.56(2D) CJA 2003.

¹⁰ Defined by s. 57A(8) CDA 1998, and (in equivalent terms) by s.56(2E) CJA 2003.

¹¹ Defined by s.57A(5) CDA 1998, and (in identical terms) by s.56(2B) CJA 2003.

¹² Defined by s.57A(6) CDA 1998, and (in equivalent terms) by s.56(2C) CJA 2003.

Specific limitations and prohibitions apply to particular types of hearings: disputed bail hearings,¹³ hearings to determine fitness to plead,¹⁴ and hearings to accept a guilty plea.¹⁵

Power to order attendance at sentencing hearings through live link

Section 57E CDA 1998 gives the court power to give a direction for any participant in a sentencing hearing to participate through a live link.

However, CDA 1998 Sch.3A Pt. 2, para.9 contains prohibitions and limitations on the use of live links in sentencing hearings. The following limitations apply to sentencing hearings:

- (1) The offender may not take part in a sentencing hearing through a live audio link.
- (2) A person (other than the offender) may not take part in a sentencing hearing through a live audio link unless—
 - (a) that person's participation through the live audio link is only for the purpose of giving evidence at the hearing,
 - (b) there are no suitable arrangements by means of which that person could give evidence through a live video link, and
 - (c) the parties agree to that person giving evidence through a live audio link.

Power to order attendance at eligible criminal proceedings through live link

Section 51 CJA 2003 gives the court power to give a direction for any participant in eligible criminal proceedings to participate by audio or video link. Provisions which the draftsman described as prohibitions and limitations on that power are to be found both within s.51 itself, and in Sch.3A. Section 51(1B) provides that no direction may be given for any member of a jury to take part in eligible criminal proceedings through an audio or video link.

The structure of Sch.3A to the CJA 2003 differs from the structure of Sch.3A to the CDA 1998: the first two paragraphs of the schedule describe proceedings which are permitted, respectively, to be heard as wholly audio proceedings, and as wholly video proceedings. There are in effect therefore three categories of eligible criminal proceedings:

13 CDA 1998 Sch.3A para.3: para.3(2): D may not participate in a preliminary hearing at which the court is deciding whether to grant or continue bail, if the making of the decision is disputed (including where the court is minded to refuse or revoke bail of its own motion) through a live audio link; para.3(3) (a): a person other than D may not take part in the hearing through a live audio link unless that person's participation is only for the purpose of giving evidence; para.3(3) (b) and (c): a person other than D may not take part in a preliminary hearing through a live audio link for the purpose of giving evidence unless (a) there are no suitable arrangements by means of which that person could give evidence through a live video link, and (b) the parties agree to that person giving evidence through a live audio link.

14 CDA 1998 Sch.3A para.5: para.5(2): a hearing under s.4 CP(D)A 1964 may not be conducted wholly as a video hearing; para. 5(3): D may not participate in a hearing under s.4 of the CP(D)A 1964 through a live audio link; para.5(4): a person other than D may not take part in the hearing through a live audio link unless that person's participation is only for the purpose of giving evidence at the hearing; para.5(4) (b) and (c): a person other than D may not take part in a hearing under s.4 of the CP(D)A 1964 through a live audio link for the purpose of giving evidence unless (a) there are no suitable arrangements by means of which that person could give evidence through a live video link, and (b) the parties agree to that person giving evidence through a live audio link.

15 CDA 1998 s.57B(9) (a): if any person takes part in a preliminary hearing – other than for the purpose of giving evidence – through a live audio link, the court may not accept a guilty plea. CDA Sch.3A para.6: para.6(2): D may not participate a hearing at which he is expected to plead guilty through a live audio link; para.6(3): A person other than D may not take part in a preliminary hearing through a live audio link for the purpose of giving evidence unless (a) there are no suitable arrangements by means of which that person could give evidence through a live video link, and (b) the parties agree to that person giving evidence through a live audio link.

those which fall within Sch.3A, para.1,¹⁶ those which fall within Sch.3A, para.2,¹⁷ and those which fall within neither. Sch.3A para.3 contains restrictions on the use of audio links in proceedings which fall within para.1

- (2) The defendant may not take part in the proceedings through a live audio link for the purpose of giving evidence.
- (3) A person (other than the defendant) may not take part in the proceedings through a live audio link for the purpose of giving evidence unless—
 - (a) there are no suitable arrangements by means of which that person could give evidence through a live video link, and
 - (b) the parties agree to that person giving evidence through a live audio link.

Paragraph 4 contains additional restrictions on the use of audio links in eligible criminal proceedings which do not fall within para.1:

- (2) The defendant may not take part in the proceedings through a live audio link.
- (3) A person (other than the defendant) may not take part in the proceedings through a live audio link unless—
 - (a) that person's participation through the live audio link is only for the purpose of giving evidence in the proceedings,
 - (b) there are no suitable arrangements by means of which that person could give evidence through a live video link, and
 - (c) the parties agree to that person giving evidence through a live audio link.

In the case of proceedings under s.4A or 5 of the Criminal Procedure (Insanity) Act 1964, it is for the person appointed by the court to put the case for the defence (if such a representative has been appointed), rather than for the defendant, to agree or withhold agreement to a witness giving evidence through an audio link.¹⁸

Contempt of court

Restrictions apply when the court is dealing with a person for contempt of court committed at both preliminary hearings which involve an audio link element, and at eligible criminal proceedings which involve an audio link element. If any person takes part in a preliminary hearing or in eligible criminal proceedings – other than for the purpose of giving evidence – through a live audio link, the court may not deal with a person for contempt of court, including enquiring into conduct and imposing punishment, at that hearing.¹⁹

16 As relevant to the Crown Court: proceedings preliminary or incidental to a criminal appeal to the Crown Court (para.1, Condition A); a hearing following conviction held for the purpose of making a decision about whether to impose or vary conditions of bail in respect of the person convicted (para.1, Condition E); a hearing following conviction held for the purpose of deciding whether to grant or continue bail in respect of the person convicted (including where the court is minded to refuse or revoke bail of its own motion), and either (i) the Bail Act 1976, s.4, does not apply to the person, or (ii) the making of the decision is not disputed (para.1, Condition F).

17 As relevant to the Crown Court: an appeal to the Crown Court which is an appeal only against sentence (para.2, Condition A(a)); an appeal to the Crown Court arising out of a summary trial which is an appeal arising out of a summary trial which was itself conducted wholly as video proceedings, and which the parties agree may be conducted wholly as video proceedings (para.2, Condition A(b)); proceedings preliminary or incidental to any criminal appeal to the Crown Court (para.2, Condition A(c)); a hearing under PCC(S)A 2000, s.155 (Condition H); a hearing following conviction held for the purpose of making a decision about bail in respect of the person convicted (Condition F).

18 CJA 2003 Sch.3A para.4(5).

19 CDA 1998 s.57B(9) and CJA 2003 s.51(12), respectively.

Table showing permissible directions for attendance at Crown Court hearings

Coronavirus Act 2020: permissible directions for attendance at hearings in the Crown Court	Attendance by audio link	Attendance by video link	Minimum physical attendance in court	D's minimum level of attendance
<i>A participant at a hearing can only attend by live link if the Court has made a live link direction under the Act in respect of his attendance at that hearing</i>				
Preliminary hearings as defined in s.57A(3) CDA 1998				
PTPH – not guilty plea to be entered	Yes ^{1,2}	Yes ¹	None	Audio ²
PTPH – guilty plea to be entered	No ¹	Yes ¹	None	Video
Hearing to determine fitness to plead under s.4 CP(D)A 1964	No ¹	Yes ¹	One participant	Video
CTL extensions (unless a contested bail application will be heard at the same hearing)	Yes ^{1,2}	Yes ¹	None	Audio ²
Bail applications – uncontested	Yes ^{1,2}	Yes ¹	None	Audio ²
Bail applications – contested	No ¹	Yes ¹	None	Video
General pre-trial hearings (e.g. mention, FCMH, PTR)	Yes ^{1,2}	Yes ¹	None	Audio ²
Sentencing hearings as defined in s.57A(3) CDA 1998				
Sentence, orders under ss.37/45A MHA, reviews and breaches	No ¹	Yes ¹	None	Video
Newton hearings (if classified as a sentencing hearing)	No ¹	Yes ¹	None	Video
Eligible criminal proceedings as defined in s.51 CJA 2003				
Trial	No ¹	Yes ¹	Jury	Video
Hearings under section 4A or 5 CP(D)A 1964	No ¹	Yes ¹	Jury	Video
Proceedings under Part 3 MHA 1983, other than sentencing hearings (e.g. ss.35 & 36 remands, s.38 interim hospital orders)	No ¹	Yes ¹	One participant	Video
Proceedings under s.81(1)(g) SCA 1981 or s.16 CJA 2003 in respect of D who has been remanded by Mags on adjourning a case under s.11 PCC(S)A 2000	No ¹	Yes ¹	One participant	Video
Post-conviction bail hearing: s.4 BA 1976 does not apply; uncontested; or to consider imposing or varying conditions only	Yes ^{1,2}	Yes ¹	None	Audio ²
Post-conviction bail hearing: s.4 BA 1976 applies and application is contested	No ¹	Yes ¹	None	Video
Hearing under s.155 PCC(S)A 2000	No ¹	Yes ¹	None	Video
Hearing held after plea of guilty (e.g. vacate plea, POCA)	No ¹	Yes ¹	One participant	Video
Criminal appeal to Crown Court: preliminary or incidental proceedings	Yes ^{1,2}	Yes ¹	None	Audio ²
Appeal against sentence	No ¹	Yes ¹	None	Video
Appeal against conviction: summary trial was held by video and parties agree to appeal being conducted wholly as video proceedings	No ¹	Yes ¹	None	Video
Appeal against conviction: summary trial not held by video, or summary trial held by video but parties do not agree to video appeal	No ¹	Yes ¹	One participant	Video
Contempt of court arising during a preliminary hearing or eligible criminal hearing attended by live link				
Dealing with contempt, including enquiring into conduct and imposing punishment at the hearing at which the alleged contempt was committed. For the purposes of the final column, D is the alleged contemnor.	No ^{1,3}	Yes ¹	Determined by nature of hearing at which alleged contempt was committed	D = alleged contemnor-Video

¹ A direction for a witness other than D to give evidence by an audio link may be made but only if (1) there are no other suitable arrangements by means of which that person could give evidence through a live video link and (2) the parties agree to that person giving evidence through a live audio link. In the case of a hearing under s. 4A or 5 CP(D)A, it is for D's appointed advocate to agree or withhold agreement.

² Note that D cannot give evidence by audio.

³ CDA 1998, s.57B(9) and Sch 3A, para 4, and CJA 2003, s.51(12) contain prohibitions on dealing with a person for contempt of court (including enquiring into conduct and imposing punishment) at any preliminary hearing or any eligible criminal proceedings if any person takes part in the hearing – other than for the purpose of giving evidence – through an audio link.

This table is the work of HHJ Lana Wood, HHJ Jonathan Cooper and HHJ Silas Reid.

Procedure for making, varying or rescinding directions

Temporary amendments to the Criminal Procedure Rules effected by The Criminal Procedure (Amendment No.2) Coronavirus Rules 2020 set out the procedure for making applications and for giving directions.²⁰ The duties of the court²¹ are extended to include a duty to give live link directions where a power to do so exists. Part 18 sets out the procedure for making an application and for determining an application. The application may be determined on application or of the court's own motion, with or without a hearing,²² but the parties, and, in an appropriate case, the Youth Offending Team, must be given the opportunity to make representations before a decision is made.²³ CrimPR 18.4(3) requires the court to announce the reasons for a decision to not to give a live link direction, and for a decision to rescind a live link direction in respect of a sentencing hearing. A helpful summary of the court's powers has been added to the notes to CrimPR 18.

In deciding whether to give a direction the court must consider all the circumstances of the case, including in particular:

- (a) in the case of a direction relating to a witness:
 - (i) the importance of the witness's evidence to the hearing;
 - (ii) whether a direction might tend to inhibit any party from effectively testing the witness's evidence;
- (b) in the case of a direction relating to any participant in the hearing:
 - (i) the availability of the person;
 - (ii) the need for the person to attend in person;
 - (iii) the views of the person;
 - (iv) the suitability of the facilities at the place where the person would take part in the hearing in accordance with the direction;
 - (v) whether the person will be able to take part in the hearing effectively if he or she takes part in accordance with the direction.

A direction may not be given unless the court is satisfied that it is in the interests of justice for the person concerned to take part in the preliminary hearing, sentencing hearing or eligible criminal proceedings (as applicable) in accordance with the direction through a live audio link or through a live video link.

Decisions as to whether to make directions will have to be made by the court on a case-by-case, participant-by-participant basis. The potential scope of the directions is wide: a direction may apply to several or all of the persons participating in a particular hearing including the judge, lay justices, legal representatives, defendants, witnesses, expert witnesses, interpreters, intermediaries, probation officers, and any other person appointed by the court to assist in the proceedings, and may be made in relation to a person outside England and Wales. (But as previously mentioned, no such order can be made in respect of a juror.)

²⁰ CrimPR 18.23, 18.24 and 18.26.

²¹ CrimPR 3.

²² CJA 2003 s.51(3), (4C) and (4G), and CDA 1998 s.51B(3A), (3D), (3G) and s.51E(2), (4C) and (6B).

²³ CJA 2003 s.51(4), (4C) and (4F), and CDA 1998 s.51B(3), (3D), (3F), and s.51E(4), (4C) and (6A).

Once given, a direction may be varied or rescinded.²⁴ The same considerations apply on a decision to vary as on a decision to give a direction. A direction may not be rescinded unless the court is satisfied that it is in the interests of justice for the direction to be rescinded. An opportunity to make representations must be afforded to the same people as in relation to a decision to make a direction. A decision to revoke a live link direction does not affect the court's power to give a further live link direction in relation to the proceedings.

Enabling the public to see and hear the proceedings

Section 85A of the Courts Act 2003 gives the court powers to direct that the proceedings are to be broadcast (in the manner specified in the direction) for the purpose of enabling members of the public to see and hear, (or hear, as appropriate), the proceedings, and to direct that a recording of the proceedings is to be made in the manner specified in the direction for the purpose of enabling the court to keep an audio-visual record, (or an audio record, as appropriate), of the proceedings. CrimPR r.18.4(5) requires the court to announce the reasons for a decision not to direct broadcast and/or recording. Sections 85B and 85C create offences in relation to recording or transmitting broadcasts or transmissions.

The limitations of the legislation

The Coronavirus Act was drafted and enacted at great speed. There are a number of obvious respects in which the modifications enacted fall short of Parliament's stated aim in introducing the legislation. Those shortcomings arise primarily because the modifications have been drafted by reference to particular types of hearing. Hearings which are not permitted by the legislation to be heard by audio or video link (i.e. hearings which are not preliminary hearings, sentencing hearings or eligible criminal proceedings, as defined) cannot be heard remotely and will continue to require physical attendance at court. It is not clear where certain types of hearings and proceedings which form part of the daily workload of the Crown Court fit into the scheme of the legislation: for instance, *Newton* hearings, applications for restraining orders on acquittal, and Criminal Behaviour Order applications, amongst others. Had the court been granted a general power to direct live link attendance at all hearings, perhaps subject to particular principled exclusions, the provisions would have enabled the court to deal remotely with hearings which appear to have been overlooked in the current legislation; and the resulting scheme would have been much easier to understand.

The modifications seem to produce some bizarre and probably unintended results. The power to give directions for some or all participants taking part in eligible criminal proceedings to appear by a live audio link or a live video link is subject to the prohibitions and limitations on the use of live links contained in CJA 2003 Sch.3A. The introductory words for CJA 2003 Sch.3A paras 1 and 2 are similar:

1(1) Eligible criminal proceedings may be conducted wholly as audio proceedings only if the proceedings meet one of the following conditions.

2(1) Eligible criminal proceedings may be conducted wholly as video proceedings only if the proceedings meet one of the following conditions.

²⁴ CrimPR 18.25 sets out the procedure for an application to vary or rescind.

Hearings which fall within the “eligible criminal proceedings” definition, but which are not hearings mentioned in either CJA 2003 Schedule 3A para.1 or 2, appear to require at least one participant to be physically present at court, to ensure that the prohibition on such hearings being conducted wholly as video hearings is not breached. There appears to be no reason of principle for this requirement.

The court is not permitted to direct that an interpreter for a witness who himself has been directed to appear by audio link should attend by audio link, if the hearing is one which requires the attendance of all participants – other than a witness in respect of whom a direction for audio attendance has been made – by video link. An interpreter is a participant in the hearing, and does not fall within the witness exception.

There are a number of uncertainties resulting from inclusion of particular types of proceedings as eligible criminal proceedings by specific description, when those proceedings would, had they not been included in the list, have appeared to fall within the definition of sentencing hearings. For instance, it is difficult to see what types of proceedings if any might fall within the category of a hearing under s.155 PCC(S)A 2000 (eligible criminal proceedings), but not be encompassed by the definition of a sentencing hearing.²⁵ It appears that the inclusion of proceedings under s.155 PCC(S)A 2000 in the list of eligible criminal proceedings is redundant: if the hearing is a hearing to which Pt.3A of CDA 1998 applies, it is excluded from the category of eligible criminal proceedings. Perhaps this ambiguity matters little: both CJA 2003 and CDA 1998 permit such a hearing to be conducted wholly as video proceedings, and the provisions in relation to the attendance of witnesses by an audio link are identical.

The difficulty is more acute in relation to Pt.3 of the Mental Health Act 1983: the view has been expressed above that where a hearing is concerned with sentencing the defendant or determining how the court should deal with him in respect of an offence, it is a sentencing hearing. Assuming that to be correct, hearings at which the court is considering making orders under s.37, s.41 and s.45A MHA 1983 (sentencing hearings) can be conducted wholly as video proceedings. Hearings at which the court is considering making orders for remand under ss.35 and 36 (for report and treatment respectively), interim hospital orders under s.38, and appeals to the Crown Court under s.45 against hospital or guardianship order made in the magistrates’ court, on the other hand (eligible criminal proceedings), cannot be conducted wholly as video proceedings, and will require the physical presence in court of at least one participant. There appears to be no principled reason for these distinctions: indeed the hearings in respect of which the safeguard of a physical attendance at court is required interfere to a lesser degree with the liberty of the defendant than those which may be heard by video link.

The types of permissible direction which may be made can depend on the stage reached in the proceedings, and also on whether the defendant has been convicted on a plea, or after trial. To take the example of a defendant who has been arrested on a warrant and produced at court: if the warrant has been executed before trial, the hearing will be a preliminary hearing. If no bail application is made, or if the defendant does not object to the refusal of bail, directions for all participants to attend by audio link can be given; if the hearing includes a disputed bail application, directions for all participants to attend

by video link can be given (and a witness may attend by audio link if the two conditions are satisfied). If the warrant has been executed after conviction on a plea of guilty the hearing falls within s.51(2)(f), eligible criminal proceedings, but does not fall within any of the categories set out in Sch.3A para.1 or 2. Directions for attendance by live video link can be given, but the hearing cannot be conducted wholly as video proceedings, so one participant, at least, will have to be physically present at court. In a final scenario, if the warrant has been executed after conviction following a verdict of guilty at trial, there is no power to give any live link directions: all participants will have to be present at court.

The change in the definition of “live link” creates potential technical difficulties with multi-handed cases. The unmodified definition²⁶ referred to the person attending by live link being able to see and hear, and to be seen and heard by the court during a hearing. The modified legislation refers to the person taking part in the hearing being seen and heard by “all other persons taking part in the hearing”. The modified definition appears to require all participants who appear through video to be able to see and hear all other participants at all times. Skype for Business, the remote hearing software currently being employed by HMCTS for video hearings, permits only a limited number of video images to appear simultaneously. It does not have a gallery-type view, as Zoom for instance does. Only a certain number of participants are on screen (the last few ones to speak) and the remaining participants are reduced to icons at the bottom of the screen. Although they can see the images of those in the top row, no-one can see their images.

As soon as a party to the meeting speaks, their video image will appear, but it is not clear whether this satisfies the statutory definition. It is clearly arguable that someone who is not speaking at a particular moment continues to be taking part in a hearing. To take the example of the judge: a judge who is not speaking, but listening to advocates’ submissions would appear to be taking part in the hearing. If this suggestion is correct, the number of participants who could attend a multi-handed hearing by Skype would be limited to the number of people who can be seen in the top row.

What else is on the horizon?

Mental Health Act modifications

Section 10 and Sch.8 of the Coronavirus Act 2020 make temporary modifications to certain requirements under the Mental Health Act 1983: of principal note is the relaxation of the requirement for two doctors’ reports: once these provisions are brought into force, the court will be able to dispense with the requirement for a second doctor’s report when making orders under ss.36(1), 37(1), 38(1), 45A(3) and 51(5) if it is satisfied that complying with the requirement applying to that provision for the evidence of two registered medical practitioners is impractical or would involve undesirable delay.

These further modifications are not yet in force: they will come into force on such day as the Minister by regulations appoints.

Further amendments to the Act

There is some suggestion that Parliament may look again at the Act and pass further legislation to cure some of the internal inconsistencies and *lacunae* identified.

²⁵ “sentencing the offender or determining how the court should deal with him in respect of the offence (including reviewing, amending or revoking such a sentence or determination”.

²⁶ S.57A CDA 1998, as unmodified.

Worked example: bail applications

Section 57B CDA 1998 gives the court power to give a direction for a person to take part in a preliminary hearing through a live audio or video link. “Preliminary hearing” is widely defined: pre-trial bail applications fall within this definition. New Sch.3A to the Crime and Disorder Act 1998 contains prohibitions and limitations on the use of live links. Paragraph 2 contains provisions which apply to all preliminary hearings. Paragraph 3 contains provisions in relation to disputed bail hearings.

The effect of the provisions is:

Uncontested Bail applications may be listed for fully attended hearing, fully video hearing, partial video hearing (i.e. some participants attend court physically and some attend by video link), fully audio hearing or partial audio hearing (i.e. some participants either attend court physically, or attend by video link and the rest by audio link). A defendant who attends may attend any such hearing by audio or video link, but may not give evidence through an audio link. Witnesses may appear by audio link **only if** there are no suitable arrangements for them to appear by video **and** the parties agree to them attending through an audio link.

Contested bail applications may be listed for fully attended hearing, fully video hearing or partial video hearing (i.e. some participants attend court physically and some attend by video link). Witnesses may appear through an audio link, but **only if** there are no suitable arrangements for them to appear by video **and** the parties agree to them attending through an audio link. All other participants must appear by video.

The rules remain the same for both an uncontested and a contested bail application if the defendant does not attend.

The Court of Appeal, Criminal Division and the virtual public gallery

The amendments to the Criminal Justice Act 2003 s.51 allowing for virtual hearings explained above by HHJ Wood include appeals to the Court of Appeal, Criminal Division.¹ There are also minor amendments to the Criminal Appeal Act 1968. The right of appellants to be present is abrogated (although appearance by video link from prison has been general for some time in any event). Other amendments allow not only a single judge, but also the registrar, to give the relevant direction for a virtual hearing (s.31(1)(a), s.31A(2A)). The court has announced in its Emergency Business Plan that it will continue sitting, but will concentrate on urgent cases, and that, where possible, it will hear cases remotely.² No constitution of the Court of Appeal, Criminal Division sat over Easter (from 9 to 23 April), but before that, a reduced number of constitutions were sitting in March and early April, and latterly some sat virtually.

The HMCTS guidance on telephone and video hearings³ has a section entitled “open justice”, which emphasises the importance of open justice and sets out various methods to facilitate it. It seems clear that some, at least, virtual hearings in various courts are being made available to journalists. It is less clear to what extent the courts are succeeding in providing a virtual public gallery.

In an attempt to see in practice how it might work, I approached the Criminal Appeal Office⁴. Initially, I was told that a person with “an interest” in a case could *apply* to join a virtual hearing. Subsequently it appeared that I could apply, to the presiding Lord Justice, as a member of the public, although the notice appearing on the daily list since the Easter break only refers to “interested parties”. I did so, and in due course, was given a telephone number to call with a conference PIN, and listened to three sentence appeals on 7 April. While, as a member of the public, I had only audio, the participants were all present via video links. I could be heard, at least initially – the clerk asked who had joined, and heard my answer. I do not know if I was muted during the hearing. Even with only audio, the proceedings were clear and well organised. One of the counsel appearing, Edmund Fowler, told me later that he was unaware of the presence of “the public”.

I suspect I was the first member of the public to ask to sit in a virtual public gallery in the Court of Appeal, Criminal Division. The suggestion that I was “applying” cannot be strictly correct. If proceedings are in open court, then the public, subject to space and conduct, are entitled to attend. This is, however, probably a result of the approach adopted by cautious officials rather than a policy.

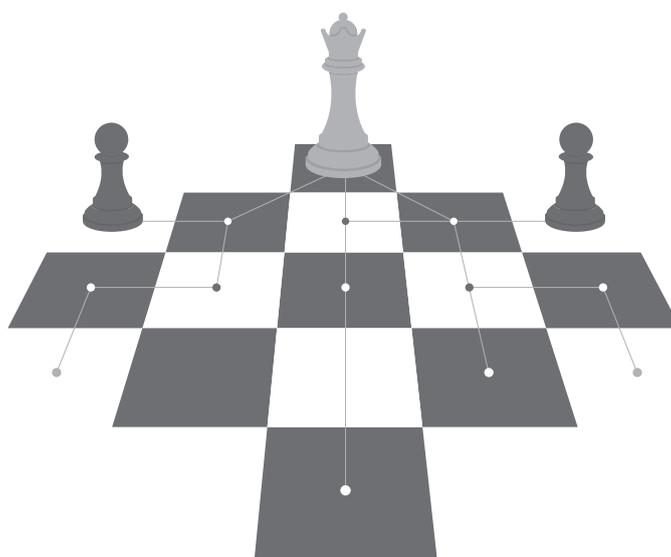
We are aware that some Crown Court centres have provided feeds from a virtual hearing to a physical room in a court building, but we would be interested to hear from practitioners if they have had any other experiences of remote public observation of virtual hearings in the Crown Court.

RP

⁴ Emails should be addressed to: criminalappealoffice.courtclerks@hmcts.x.gsi.gov.uk.

¹ s.51(2)(d), as amended by Coronavirus Act 2020, sch. 23, para 2.
² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880317/RCI_Ops_update_Court_of_Appeal_Criminal_-_Emergency_Business_Plan_21_April_2020.pdf, Unhelpfully, this document is published every day carrying that day's date, so it is not clear when it was first published.
³ <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak#open-justice>.

All things considered.



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