

## CROWN COURT (AMENDMENT) RULES (N.I.) 2006

1. The Crown Court (Amendment) Rules (NI) 2006 and the Criminal Appeal (Trial without jury ..... ) Rules (NI) 2006 came into force on the 8<sup>th</sup> January 2007.
2. They cover three areas –

<ul style="list-style-type: none"> <li>• Trial without a jury where there is a danger of jury tampering</li> </ul>	<ul style="list-style-type: none"> <li>• Sections 44 – 50 Criminal Justice Act 2003 – Came into force on 24 July 2006 by virtue of Criminal Justice Act 2003 (Commencement No. 13 and Transitional Provisions) Order 2006.</li> </ul>
<ul style="list-style-type: none"> <li>• Evidence by way of live link</li> </ul>	<ul style="list-style-type: none"> <li>• Article 80A of the PACE (NI) Order 1989, as inserted by Article 31 of the Criminal Justice (NI) Order 2003, and amended by Article 24 of the Criminal Justice (NI) Order 2005 – Came into force on 13 November 2006 by virtue of the Criminal Justice (2003 Order) (Commencement No. 3) Order (NI) 2006</li> </ul>
<ul style="list-style-type: none"> <li>• Trial by jury of sample counts</li> </ul>	<ul style="list-style-type: none"> <li>• Sections 17 – 21 and Schedule 1 Domestic Violence, Crime and Victims Act 2004 – Came into force on 8 January 2007 by virtue of Domestic Violence, Crime and Victims Act 2004 (Commencement No. 7 and Transitional Provisions) Order 2006. It applies to defendants committed for trial on or after 8 January 2007.</li> </ul>

3. Care should be taken when reading the CJA 2003, and the DVCVA 2004. These are UK acts which apply to NI, but given the different legal systems, the provisions have had to be modified for Northern Ireland, so read s.50 CJA and s.21 and Schedule 1 of the DVCVA first!

### ***JURY TAMPERING***

4. Section 44 of the CJA 2003 permits a judge of the Crown Court, on application from the Crown (not a Defendant or Co- Defendant), to order that a trial be conducted without a jury.
5. The current post-Diplock proposals are relevant. The NIO, in its recently published Consultation Paper – Replacement Arrangements for the Diplock Court System (August 2006), has proposed several changes to existing practice
  - The wording of paragraph 3.7 is unclear, but it appears that the defence will no longer have access to the names, addresses and occupations of potential jurors;
  - The right to peremptory challenge will be abolished (3.13);
  - Jurors will be balloted by number only (3.20);
  - In “more serious cases” the Court can direct that the jury be screened from the public;
  - Creation of a new offence of providing personal juror information without leave of the court (3.20).

The proposed new system for non- jury trial will create a presumption in favour of jury trial, with the DPP certifying non-jury trial based on a new two part statutory test -

- There is a risk of interference with, or perversion of the administration of justice;
- Certain circumstances would have to apply. The NIO have not attempted to bring forward a definitive list of circumstances at this stage, but the emphasis is the avoidance of jury intimidation or juries reaching perverse verdicts.

6. At paragraph 4.21 the NIO state: “In the future, it is intended that the arrangements of the 2003 Act and the system of non-jury trial that this consultation proposes will work in parallel. However the system proposed in this paper will take precedence over the 2003 Act.”
7. Under the 2003 Act, the judge must be satisfied that (1) there is evidence of a “real and present danger” that jury tampering would take place AND (2) notwithstanding any steps, including police protection, which might reasonably be taken, the likelihood that tampering would take place would be so substantial as to make it necessary in the interests of justice. Although police protection is the only example mentioned, it would include (the more obvious) transfer of the case to another Division.
8. Jury tampering is not defined in any way. A commentary from the United States may, or may not, be of assistance – “influencing a jury to make a decision in your favour by illegal means other than fair trial process involving presentation of evidence and court proceedings. It includes discussing the case with a juror out of the court, offering bribes, or warning of dire consequences.”
9. Section 44 (6) sets out three examples where there MAY be evidence of a real and present danger of jury tampering, although presumably the court may consider and find other examples –
  - a. In the case of a retrial, a previous jury has been discharged because jury tampering took place;
  - b. In the case of previous criminal proceedings, jury tampering had taken place;
  - c. Where there has been intimidation, or attempted intimidation of any potential witness.

Whilst the examples include a reference to witness intimidation, presumably straightforward cases of intimidation (e.g. of a victim in a domestic violence case) would not be enough, unless there was some indication in the background to the case that this would transfer to the jury/potential jury and that there was a risk of jury tampering.

10. Other examples (not listed) may include intimidation of witnesses in previous trials involving the same defendant, or defendants, and attempts to interfere with witnesses at the trial, short of intimidation (e.g. bribing them).
11. There is no mention of the standard of proof with regard to previous incidents, but presumably, as this is a Crown application, they would have to satisfy the Court, beyond a reasonable doubt that tampering had occurred, or that witnesses had been intimidated (see **Case [1991] Crim LR 192**). (It is a criminal offence to do an act intending to intimidate or harm (physically or financially), a witness or juror – Art. 47 of the CJ (NI) Order 1996.)
12. How will the court deal with the evidence in these applications? What if a juror, or potential juror, declined to give evidence due to fear? A police officer, or other, could give evidence of a contemporaneous state of mind, but not any alleged jury tampering (**Neill –v- North Antrim MC [1992] 1 WLR 1221**). Article 20(2)(c) of the Criminal Evidence (NI) Order 2004 may allow a statement to be admitted if the Crown are able to prove there is fear.
13. The application may occur in one of three situations –
  - At a first trial, and the Crown apply on the basis of the history of previous proceedings against the defendant(s);
  - At a retrial after a discharge of the previous jury because of jury tampering;
  - During a trial, if a judge uses his powers to discharge the jury because of tampering, he can then continue with the trial without a jury.
14. Section 46 sets out how a judge is to approach the question of jury tampering during a trial, in what would appear to supplement the common law powers. If the judge is minded to discharge a jury, he must inform the parties, state the potential grounds for a discharge, and afford them an opportunity to make representations.
15. Subject to the overriding interests of justice test, a judge can only discharge a jury and continue with the trial sitting alone, if satisfied that jury tampering has taken place and that to continue without a jury would be fair to the defendant(s). Therefore if a judge merely suspects that jury tampering has taken place, he can only discharge a jury, and order a retrial. He cannot proceed with the trial, sitting alone, unless he is sure tampering has taken place.

16. After a retrial has been ordered the judge can, at that stage, order that the retrial be conducted without a jury, or can leave the matter to the Crown to apply before the trial judge in the next trial.
17. A s.44 decision to order, or to refuse to order, a trial without a jury (i.e. before the trial commences) is subject to appeal. The decisions to discharge a jury, and continue the trial, and the decision of a trial judge to discharge a jury, and to order that the retrial be conducted without a jury (s. 46(3) and (5) orders), (but not a refusal to do so) are subject to appeal. Appeals can only be made with the leave of the judge, or the Court of Appeal, and the fast-track system (similar to the position with regard to prosecution appeals against decisions to terminate a trial) applies. Oral application must be made to the trial judge within 2 days of the ruling/order (Rule 44AA(8)). Pending the expiry of the time for appeal, and the determination of the Court of Appeal, the order does not take effect. The decision to terminate the trial, without further order, is not subject to appeal.
18. Where a trial is conducted without a jury, or continued without a jury, and results in a conviction, the judge must give a judgment which states the reasons for the conviction.

### ***LIVE LINK***

19. Article 80A of the PACE (NI) Order 1989, as inserted by Article 31 of the Criminal Justice (NI) Order 2003, and amended by Article 24 of the Criminal Justice (NI) Order 2005, now allows for the giving of evidence by live link, when a witness is outside the United Kingdom.
20. England and Wales have had a similar (but not identical) provision – s32 CJA 1988 (as amended) since November 1990, but only relating to proceedings for homicide or serious fraud.

### ***EXISTING LIVE LINK PROVISIONS***

21. The reception of evidence in this form is well established with regard to children. More recently, the Crown has been applying on behalf of adult

witnesses. The legislative framework for these special measures is contained in the Criminal Evidence (NI) Order 1999. Children under 17 at the time of hearing, or adult complainants of a sexual crime automatically are eligible for special measure directions. Other adult witnesses (if affected by mental disorder, physical disability or are in fear/distress about testifying) have to satisfy the court that the quality of their evidence would be diminished, before becoming eligible. Once a witness is eligible, live link is one of a number of special measures available, although it is compulsory in the case of a child witness.

### ***EXISTING ADMISSION OF HEARSAY PROVISIONS***

22. Article 20 (2)(c) of the Criminal Justice (Evidence) (NI) Order 2004 provides for the admission of a previous statement from a witness, if the court is satisfied that the person “is outside the United Kingdom and it is not reasonably practicable to secure his attendance”. The English Court of Appeal in **Castillo [1996] 1 Cr App R 438** considered that the court should consider three issues before granting permission –

- importance of the evidence
- expense and inconvenience
- weight to be given to reasons put forward for non-attendance

The ability to give evidence by live link could now be regarded as a further factor.

### ***ARTICLE 80A***

23. The relevant Rule is 44P. The application must be made within 28 days from the committal, with any party wishing to oppose the application lodging their notice within 14 days of receipt of application. In the absence of an objection, the Court can determine the application without hearing.

24. The Order does not attempt to give any guidance to the court as to how it should exercise its discretion. Article 80A (3) merely states – “Where the court gives leave, a witness (other than the accused) who is outside the United

Kingdom may give evidence through a live link in proceedings to which this article applies.

25. Certain guidance, is perhaps, given in Article 10 of the Criminal Justice (NI) Order 2004. This article is not yet in force. It will extend this facility to any witnesses, if the court is satisfied it is in the interests of the efficient or effective administration of justice for the person concerned to give evidence, taking into account the following circumstances –
  - availability of the witness
  - the need for the witness to attend in person
  - the importance of the evidence
  - the views of the witness
  - the suitability of the facilities at the place where the witness would give evidence
  - whether the direction might tend to inhibit effective testing of evidence.
26. It is suggested that this may also be a useful checklist when considering applications under Article 80A
27. Interestingly the requirements for a judge to warn a jury about weight of evidence, or prejudice to the accused are not present. In the event of a special measures direction – “the judge must give the jury ..... such warning (if any) as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused” (Article 20 Criminal Justice (Evidence) (NI) Order 1999) and in the event of any witness giving live link evidence – “the judge may give the jury ..... such direction as he thinks necessary to ensure that the jury gives the same weight to the evidence as if it had been given by the witness in the courtroom or other place where the proceedings are held.” (Article 13 of the Criminal Justice (NI) Order 2004) Despite this omission, it is suggested that some suitable direction is given.
28. There is no right of appeal pre-trial in respect of a live link ruling.
29. Evidence given under oath by live link shall be treated for the purposes of the Perjury (NI) Order 1979 as having been given in the proceedings.

30. Difficulties may arise with regard to the facilities available. Art. 80A emphasises the need to see and hear the witness. The Judge will need to ensure the oath can be administered properly, the witness is free from interference, the facilities are suitable etc. Rule 44P(9) allows the court to make it a condition of any order that the witness giving the evidence should be in the presence of a “specified person” who is able and willing to answer (under oath) any question the Court may put about the facilities.

### ***NON-JURY TRIALS FOR SAMPLE COUNTS***

31. Sections 17 – 21 and Schedule 1 Domestic Violence, Crime and Victims Act 2004 provides for a further type of non-jury trial. (Apart from the jury tampering cases and the Northern Ireland situation, the Criminal Justice Act 2003 made provision for non-jury trials in cases where the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the members of a jury hearing the trial that the interests of justice require that serious consideration should be given to the question of whether the trial should be conducted without a jury. This provision is not yet in force as Government attempts to pass positive resolutions in both Houses of Parliament have been unsuccessful. The Fraud (Trial without a Jury) Bill 2007 has passed through the House of Commons, and it is likely to become law with the Government applying the Parliament Act. It will commence 2 months after Royal Assent.)

32. The Solicitor-General when addressing Parliament on 27 October 2004, stated that the Government was bringing forward the legislation “to establish a two-stage procedure to provide in statute a replacement of the sample count procedure.” The need for the change was stated as threefold:

- The sentence will not necessarily be able to reflect the totality of the offending
- Victims could be denied the satisfaction of knowing that the defendant has been dealt with for the offence committed against them;
- Where there has been no conviction, the court has no power to award compensation.

33. The Court of Appeal **Canavan [1998] 1 Cr App R (S) 243** had ruled that an offender could only be sentenced for an offence proved against him (by admission or verdict) or which he has admitted and asked the court to take into consideration when passing sentence. Problems had been created with the passing of Section 1 (2) of the Criminal Justice Act 1991 (our Article 20(2) CJ(NI) Order 1996) – “The custodial sentence shall be (a)for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, *or the combination of the offence and one or more offences associated with it...*” (my emphasis). It was held that offences had to be proved or admitted. Lord Bingham LCJ stated that prosecuting authorities may wish to include more counts in some indictments, and that he thought that this need was not unduly burdensome or capable of rendering trials unmanageable.
34. These provisions only apply if the defendant in respect of each count is the same person. (This is the only attempt to define a sample count, or what is not a sample count. Rule 21 of the Crown Court Rules (NI) 1979 provides: “Charges for any offences may be joined in the same indictment if those charges are founded on the same facts or form or are a part of a series of offences of the same or a similar character.”)
35. The Crown can apply for a trial of some, but not all, of the charges in an indictment, should be heard by a judge sitting without a jury. The Rule is 44AB. The application must be made within 28 days of committal, with the defendant lodging any objection within 14 days of receipt. There must be a hearing of the application.
36. The court must be satisfied of three conditions-
- the number of counts is likely to mean that a trial by jury involving all of the counts would be impracticable
  - if an order were made, each count or group of counts which would accordingly be tried with a jury can be regarded as a sample of counts which could accordingly be tried without a jury
  - it is in the interests of justice for an order to be made.

37. The Crown must lodge a draft form of amended indictment (Form 3A), and when making the order the Court must specify the counts which may be subsequently tried without a jury (s. 17(8)). Essentially the new indictment must list the counts to be tried by the jury, and in a second part, list the counts related to the specific counts for the jury.
38. If the defendant is found guilty by a jury on a count which can be regarded as a sample of other counts, the other counts may be tried without a jury (s19(1)). A written judgement is required in the event of a conviction by a judge sitting alone.
39. The provisions do not apply to Diplock trials (s.21(2)).
40. The legislation is silent as to the position if the defendant is acquitted. The second trial cannot proceed with a judge sitting alone. Is a second jury trial feasible, in the event of an acquittal on the principal counts? It may be regarded as an abuse of process to proceed with a second trial.
41. Both the prosecution and the defence can appeal. Oral application for leave to appeal must be made to a judge (within 2 days of the order) (S. 18A(1) – inserted by Schedule of the Act for N.I. only). The order, or the refusal will not take effect during this period. If leave is granted, the appeal must be lodged within 7 days of the decision, and the decision will then not take effect until the appeal process is over.
42. Difficulties may arise in these cases –
- The Crown are unlikely to make too many applications, essentially severing the indictment.
  - In the jury trial, difficulties will arise in relation to the evidence concerning the other counts. Is it to be excluded? If admitted, what are the jury to be told?
  - The jury verdict of guilt is not binding on the judge. Presumably it may be admissible under the ‘bad character’ provisions.
  - A second trial will involve the victim having to give evidence again, and be subject to cross examination. Inevitably, there will be differences in evidence and emphasis.
  - There is a risk of a set of perverse verdicts, which would be difficult to explain. With a judge acquitting on the sample counts, you may not get an explanation.

44. Whether this legislation actually leads to a replacement of the sample count system as the Solicitor-General predicted remains to be seen. In the interim, we should follow the guidance of McCollum LJ in **R –v- RM (11 December 1998)** -

“1. It is important that where specified incidents can be identified they should be so identified in particular counts.

2. It is not necessary that detailed particulars are set out in the indictment but if the defence requires the examples to be particularised at the trial then this should be done in so far as it is possible to do so and failure to do so may result in a finding that conviction is unsafe.

3. Where it is impossible to identify the circumstances of particular incidents the jury should be directed that it must be satisfied that the offence alleged took place on at least one occasion, and in respect of each similar count that the offence took place on a further occasion.

4. A sufficient number of charges should be laid to reflect the extent of the criminal behaviour.

5. Different categories of offences should be reflected by different counts.

6. This court will rarely interfere when the jury has had a full opportunity to decide fairly the real issues between the parties and their decision is clear and consistent as between different counts.”