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The Right Honourable Lady Justice Rafferty

Chair of the judicial college and Lord Justice of Appeal of England and Wales

Criminal Law Review Conference

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I'm pleased to be at a conference organised by the journal which was and is meat and drink to the criminal practitioner I used to be and the judge sitting in crime I am. That familiar red cover heralded the comforting and the challenging, and was worth its weight in platinum. It still is. Thank you for inviting me.

There will emerge a theme running through what I want to suggest this morning and I begin by underlining the importance and the usefulness of the Criminal Procedure Rules, which by statute must be "*simple and simply expressed*" [1]

Let me first emphasise what the Criminal Procedure Rule Committee brings to the wider criminal justice system.

Here's what it isn't: it is not a group of people picking over finnicky points which in the real world are of little import. It is the product of meticulous and in-depth analysis which can stand among the best. What emerges is a comprehensive procedural code.

The inherent strength of the Rules derives from membership of the Committee. It is deliberately widely drawn, spanning the whole of the criminal justice system, the aim (and I can tell you with complete confidence the result) being frank, detailed debates. Nothing escapes its anxious scrutiny. No lacuna goes unfilled. No passing dignitary escapes its diligent questioning. No invited guest sits passively more than once. All stages of the system have a voice and all voices sound equally.

[1] *(s.69(4)(b) Courts Act 2003 as amended by Constitutional Reform Act 2005)*

Creation of the Rules via the committee makes it quicker to amend and revise procedure where there have been unintended consequences or where local practices have developed – and would have been better left undeveloped. This method is significantly more lithe than using primary legislation. It means that procedural rules are operationally viable before problems arise where no rule is in place, and/or because the rule which is in place is no longer apt. This level of vigilance protects against unwelcome outcomes which could have included public expense whilst a decision is reviewed and most importantly injustice which might have prevailed.

The statutory authority under which the Rules are created means they are secondary legislation and must be treated as such. Another descriptor might be that they must be respected as such. They are not an optional extra. Individuals within the profession have been known publicly and wrongly to suggest deficiencies in the worked outcomes of the committee. This attracts a warmly phrased invitation to attend the next meeting where dialogue is best described as free-flowing. Numerous judgments of the CACD act as epistles to advocates in all levels of court urging them to apply and follow the Rules.

Lord Thomas CJ in March 2015 when issuing an update to the Criminal Practice Direction said:

> "*As this court will make clear in a series of judgments, no advocate in the criminal courts should consider himself/herself competent to practise unless they have with them, both in this court and in the courts below, a copy of the Criminal Procedure Rules and Practice Directions, which are printed together. This court will not hesitate to take the toughest line with those who fail to have either in this court or in the Crown Court the Criminal Procedure Rules at their fingertips. No practitioner would wander into the civil courts without a knowledge of the White Book. The same is to be expected of the criminal courts.*"

My judgment in *R v James and R v Selby* [2] highlights both the mechanism of Court of Appeal Criminal Division judgments being used to refer issues to the Committee where a case imports a practical difficulty the rules can resolve, and it makes the point that advocates

[2] *R v James and R v Selby*

need to know and apply them. Addressing Grounds which are rambling, unfocused, and, to coin a phrase, all over the place, I said:

> "*It is essential that this increasing difficulty in the Court of Appeal (Criminal Division) should be controlled.... The court might, if Grounds are inexcusably prolix and not consolidated after a warning shot by the Registrar refuse an application on the basis that no Ground was identifiable...One area in which urgent intervention might assist lies in the powers of the Criminal Procedure Rule Committee. The practitioner should have the adjurations of the Rules at the fingertips.*"

The Lord Chief Justice issues criminal Practice Directions under statutory authority[3] These complement and provide discursive substance to the framework of the Rules, as well as guidance on a wealth of other topics, some of which we'll consider shortly.

Rules Practice Directions and forms have all contributed to new improved national procedure. We might highlight direct lodgement - appeals no longer lodged at the Crown Court where proceedings originated but directly at the CACD.
Another example is the committee's complex work after a request from Sir Peter Thornton, Chief Coroner as then he was, who dealt with the inquest into the suicide in custody of Sarah Reed. Miss Reed was on remand awaiting a report into her fitness to plead. The report had been requested but it was not clear to whom it was addressed. The result was several wasted adjournments. The chronicle was so stressful for her that she took her own life.

The inquest was referred to the Senior Presiding Judge who referred what had happened to the Committee. A working group comprising Committee members, mental health professionals, and practitioners from the mental health services did an enormous amount of work. Those efforts founded the creation of new rules and Criminal Practice Directions and forms so that the ordering of reports and their purpose, addressed to the correct person, should when followed make needless adjournments a thing of the past and certainly no longer a recurring problem. Their work should also ensure that a report bites on the issues with which the court needs help and offers it as succinctly as possible. It always struck me as desperately sad that it took a life snuffed out to put right what had been no more than an accident of accretion. Layer added to layer with all the right intentions but .....

Vulnerable witness and sex cases.

[3] *s.74 Courts Act 2003 as amended by Constitutional Reform Act 2005 schedule 2.*

There is now a volume of guidance and training for criminal practitioners, whose quotidian diet includes dealing with vulnerable people. The most recent iteration of the Criminal Practice Directions includes a good deal of help on how to deal with vulnerable defendants.

The court can use its inherent powers and direct provision of an intermediary for a defendant [4] but before, if it does, it gets there it will aim to adapt the trial process to a defendant's needs[5] in the hope of providing effective help. It will think for example about a support worker or another capable adult being with the defendant[6].

Inherent powers have plasticity. An intermediary could be appointed solely to help a defendant giving evidence, a time of the 'most pressing need' (*OP* 2014) or for the entire trial. So one could. But the court will rarely take either course. Even less often, as the current Criminal Practice Direction reads at 3F.13, will an intermediary be appointed for the whole trial – "extremely rare" is the language - and that is supported by the judgment in *Rashid*.[7]

Since the Youth Justice and Criminal Evidence Act 1999, the prevailing wisdom is that orthodox procedures of the adversarial trial must be adapted to the needs of child and of other vulnerable witnesses, including those with physical and mental disabilities[8] Advocates must adapt to the witness, not the other way round[9]:

Under s.28 of that Act witnesses if under 16 at the hearing, or suffering a mental disorder or significantly impaired intelligence and social functioning, or a physical disability or disorder, and if the result is a diminished quality of evidence are eligible for the by now familiar opportunity to have their cross-examination recorded before the trial.

I have a particular interest in how S28 is fulfilling its aim. The entire scheme was my idea, and I wrote that section of the Pigot Report which set it out. That was in 1989. After quite some years – let's assume allowing time for reflection - both parts of my notion are now in play.

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[4] *C v Sevenoaks Youth Court [2009] EWHC 3088 (Admin)*
[5] *R v Cox [2012] EWCA Crim 549*
[6] *CrimPR 3.9(3)(b); R v Cox; R (OP) v Ministry of Justice [2014] EWHC 1944 (Admin); R v Rashid [2017] EWCA Crim 2;*
[7] *R v Rashid* [2017] *EWCA Crim 2.*
[8] Blackstone D14
[9] *Lubemba* [2015] 1 WLR 1579

The pilot [Leeds, Liverpool and Kingston] demonstrated real benefit as a consequence. By now it's pretty clear that the discipline of that other breakthrough, the Ground Rules Hearing, strips out from cross-examination a chunky amount of stress, time and any consequences of advocates' perhaps unnecessarily traditional style. In the pilot courts where judiciary and local advocates have honed their skills in conducting effective Ground Rules Hearings to nail down the questions for the witness it is not uncommon for the subsequent cross-examination to take but 10 minutes.

Despite some technological glitches s.28 is set to feature across the jurisdiction. The senior judiciary has always recognised its value (to take one example, the guilty plea rate has gone up for sexual offences against young children where consent is no defence) but we are realists. For success, technology must support the system and cope with the demands. We have long recognized that s.28 will be difficult to get right in London particularly. Advocates here operate over a much wider geographical area. A s.28 cross examination hearing at 09.30 at Snaresbrook will make it difficult to reach a trial at Isleworth at 10.30. That's why most of London is left towards the end of the extended programme, so a system can be tested to destruction in areas where the fixed point geography challenges are fewer.

That's not to say advocates in the South East can skim the principles set out in *Lubemba* and *Hampson*[10] and articulated in s18E and the annex to the Criminal Practice Direction. The annex sets out principles established in Court of Appeal Criminal Division case law and is to my mind compulsory reading for the practitioner in this area. Don't bridle, judges have to learn too. There has been a huge training programme for judges in dealing with vulnerable witnesses and help for the profession in general includes the Inns of Court College of Advocacy's recently published **20 Principles of Questioning**[11] .

I want to pull together some general questions on what the vigilant among you might have spotted is a motif running through what I've said. I aim to plant comments and leave you to think.

Arguably the most elegant sentence in the English language: *With this ring, I thee wed*; 6 words. The Lord's Prayer: 66 words. The Gettysburg Address; 286 words. Declaration of Independence,1322 words. EU compliant regulations on the sale of cabbage 26,911 words.

[10] *Hampson* [2018] EWCA 2452 Crim
[11] https://www.icca.ac.uk/images/download/advocacy-and-the-vulnerable/20-principles-of-questioning.pdf

We've looked together at the stormclouds gathering over Grounds of Appeal which are too long, rambling, waffling, warbling, all four, and/or which otherwise disappoint. What's the best control mechanism? Is it tough Criminal Procedure Rule vocabulary? Is it a Court of Appeal Criminal Division judgment or three, from the top, reiterating disapprobation? Is it a Criminal Practice Direction in firm tones? All the above?

Why, in 2019 more or less, are some of us wedded to archaic syntax and particularly to the passive voice? "*It is thought*". "*It is arguable*" "*It is suggested*" are favourites. Well it certainly is suggested, at least by me, that this has reached the end of its natural life.

Preparing this speech I walked randomly to a set of papers on my table offering this example

The offender faced a four count indictment as follows: (list)
The offender faced trial before the judge and jury between 10th September and 18th September. He was acquitted of Count 1 on the indictment and convicted of counts 2 to 3. As count three was an alternative to Count Four no verdict was sought on Count 4. 56 words.

Now, if he were tried in a Crown Court, call me old-fashioned but isn't that bound to be before a judge and jury? And don't all Counts sit on an indictment? Here's an alternative:

On a four count indictment: (list) he was tried between 10th and 18th September. He was acquitted of Count 1 and convicted of counts 2 and 3. No verdict was sought on Count 4. **34 words**

The indictment reflected an incident that took place outside Something College Something Street Somewhere. On 24 November 2016 the offender was responsible for stabbing two victims John Smith aged 17 at the time of the offence (date of birth first of January 1999) and Jane Brown aged 18 at the time of the offence (date of birth first of January 1998). The offender and the two victims were students at Somewhere College. The first victim had been in an on off relationship with a young woman XY in the weeks preceding the incident reflected in the indictment. The offender had been spending time with her. ***106 words***

Outside Something College, Somewhere on 24 November 2016 the offender stabbed John Smith,17, born first of January 1999 and Jane Brown, 18 born first of January1998. The three were students at Somewhere College. JS's on off relationship with a young woman XY lasted some weeks before the incident. The offender had spent time with her. **55 words**

That's 162 words reduced to 89, a chopping of nearly 50%, and if I may say so immodestly the meaning is clearer in the second versions. In a skeleton argument I can read about the learned judge up to sixty times. Speaking entirely for myself life will still hold meaning for me if I am referred to as the judge not the learned judge. Similarly, the author's respect for the judge's efforts below doesn't need to be repeated fifteen times let alone made more profound when it becomes "with the greatest respect".

As chairman of the Judicial College I taught a residential seminar in which I took the group through two sets of sentencing remarks one anonymised to protect the judge. We timed me delivering each one and of course I had the page count. The first, over 22 pages – that's 22 - took 34 minutes – that's 34 – for two men in the dock to find out they were getting five years and seven years respectively for a straightforward GBH. In the second it took Mr Justice Irwin as then he was sentencing the murderer of the little lad Rhys Jones in Liverpool eight minutes of pure gold to say everything necessary. Whoever originally said "I had to write a long letter because I didn't have time to write a short", Oscar Wilde, Benjamin Franklin, who knows who cares, you might think he was spot on.

The reader, in circumstances you and I know well, does in my opinion better when confronted with fewer words. The advocate's points stand out better. The effort for the judge reading is reduced, and, bear in mind, you want the judge on your side.

These are my views and some suggestions I invite you to take away and bat about. Don't feel obliged to agree. But if you're going to reject economy of expression, when next we meet tell me why.

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