

# CRIMINAL LAW UPDATE



**1 JULY 2020**

## Lawful Judgment of Your Peers

*The threat to trial by jury during and after the pandemic*

*Rejecting the jury's verdict, the Judge declared it unacceptable. But the foreman insisted: "We have no other verdict to give."*

*And so the Judge imprisoned the jury for the night, "without meat, drink, fire, and tobacco". He told them to change their verdict, or "starve".*

*As the jurors were taken away that night, one of the defendants shouted to the jury: "mind your privilege, give not away your right," and a juror replied: "Nor will we ever do it."*

*For two days and two nights, the jurors were repeatedly told to change their verdict, but they refused. Having declared their unchanged verdict for the final time, the jurors were fined and imprisoned.*

*This was overturned on appeal, with the court finding no cause for such a sentence; the judge had no right to intervene, as the jury alone decides the verdict.<sup>1</sup>*

This 17<sup>th</sup> century jury recognised the importance of their role, a role which has developed over the centuries. Whilst very different from the jury we have today, a

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<sup>1</sup> Robert and Marilyn Aitken, 'Bushell's Case' [2010] 36(2) Litigation 49-53.

'jury of [your] peers' has its roots in the Magna Carta, and has come to represent the gold-standard of justice. Jury trials have survived political revolutions, global recessions, and two world wars; changing and evolving, but continually protecting our rights. And they achieve that because of the same 'privilege' these jurors fought for; a judge may want to convict, but only the jury can decide who is guilty.

## The threat to jury trials

In recent weeks, the right to a jury trial has been threatened for a large number of serious 'either way' offences. These offences can currently be heard in a Magistrates' Court, or by a jury in the Crown Court. The defendant has the right – always – to choose a Crown Court trial for these offences. This is an important right. Being found 'guilty' of any of these offences would be life-changing. Defendants can lose their jobs, their families, and their freedom. They deserve to know that they will be tried under the fairest system available.

The reason given for restricting such an important right at this time seems, at face value, a valid one. We are in the middle of a global crisis which makes the practicalities of bringing 12 random members of the public (plus advocates, witnesses, judges, etc.) into one room rather difficult. On this basis, the government refers to the backlog of cases that needs to be worked through, subtly suggesting that the backlog was caused by the suspension of jury trials in March of this year.

This is not correct. Jury trials have been building into a backlog for years; the Western Circuit produced a report showing the shocking situation only this year.<sup>2</sup> This backlog was caused – not by the pandemic – but by chronic underfunding. Hundreds of court buildings were sold off.<sup>3</sup> Of the courts we still have, many are not allowed to use court rooms that are available, restricted by the number of 'sitting days' (days on which a court can have a judge in it to hear cases), which have similarly been slashed. With not enough courts, not enough cases were heard, and so the backlog grew. Whilst courts did close their doors in March this year, this has only caused a tiny percentage of the backlog we face today.

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<sup>2</sup> Kate Brunner *et al*, 'This Doesn't Look Like Justice: The consequences of closed courtrooms on the Western Circuit and beyond', <https://www.criminalbar.com/wp-content/uploads/2020/01/Western-Circuit-Sitting-Days.pdf>

<sup>3</sup> Over 200 courts have been sold off since 2011. Owen Bowcott, 'Ministry of Justice to close 86 courts in England and Wales', Published 11<sup>th</sup> February 2016, <https://www.theguardian.com/law/2016/feb/11/ministry-of-justice-close-86-courts-england-wales>.

The government has chosen this moment, a moment of global crisis, to tackle a backlog it has caused, and a backlog it has known about for years. They suggest the way to clear the backlog is a massive, untested upheaval of the justice system, in removing the right to a jury trial from members of the public who have been accused of 'either-way' offences.<sup>4</sup>

You could be forgiven for questioning the government's timing on this matter. The leader of the Western Circuit, Kate Brunner QC, notes that jury trials are expensive, and so coronavirus is now being used as 'an excuse to get rid of the right to a jury'.<sup>5</sup> The savings caused by abandoning so many jury trials means that there is a real concern that, once gone, the right to a jury trial for these offences will not be returned. Diplock trials in Northern Ireland were meant to be a temporary measure, but have been repeatedly extended since 2007. It may be simply too tempting to continue to save money in this way. To solve a problem caused by chronic underfunding, the government would be able to save yet more money.

### Why does this matter?

Jury trials are important for two reasons: they allow the general public to play a part in the justice system, and they consistently achieve the fairest results.

The first is obvious: we are all bound by the same laws, and so we are all responsible to each other. If you are accused of breaking those laws, it is the public – 12 people like you – who reach a verdict. Placing the law in the hands of the people ensures that the public play an important role in their own justice system, seeing it at

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<sup>4</sup> This article has not considered the practicalities of what is being suggested, but it is worth noting that there is a chronic shortage of magistrates for the Magistrates' Courts themselves, and so it is not clear where the government proposes finding enough magistrates to sit in both the Crown and Magistrates' Courts.<sup>4</sup> Particularly given the backlog that the Magistrates' Courts are already facing. ('Criminal Court Statistics (quarterly): July to September 2019 tables', Published 13 December 2019, and Jemma Slingo, 'Magistrates' court backlog reaches 484,000', Published 26 June 2020, <https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-july-to-september-2019>; <https://www.lawgazette.co.uk/news/magistrates-court-backlog-reaches-484000/5104780.article>) In addition, it is possible that, without the option of jury trials, many defendants will choose to remain in the Magistrates' Court, further increasing the backlog there, and potentially leading to more appeals to the Crown Court. This 'quick fix' to the Crown Court backlog, then, could cause extra work for both the Magistrates' and Crown Courts.

<sup>5</sup> Chris Matthews, 'Government using COVID-19 to get rid of jury trials, says head barrister for Cornwall and Devon', Published 24 June 2020, <https://www.cornwalllive.com/news/government-using-covid-19-rid-4260447>.

work, and making the decisions themselves. This role remains something that the public themselves continue to value.<sup>6</sup>

The second reason for jury trials is arguably the most important; juries are the fairest system we have. Unlike legal professionals (judges) and a few select volunteers (magistrates), jurors are 12 random members of the public, bringing their own experiences and their own voices to the final, important decision of guilt.

Diversity is key to this fairness. When deciding criminal cases, psychologists believe that the decision-maker has to listen to all of the evidence, and fit the information provided into a 'story' which makes sense to them. To form these stories, the decision-maker refers to their own understanding of the world, and how things tend to happen.<sup>7</sup> Their own experiences, then, are what the jury uses to decide which story best explains the evidence, and so which verdict is appropriate. This is why the Court of Appeal encourages jurors to examine the evidence using their 'own experience... and general knowledge of the way things work in the real world', stating this real-world experience is 'an essential strength of the [jury] system'.<sup>8</sup>

### Diversity and avoiding bias

A mixture of experiences gives the defendant the best chance of being understood; a young, black juror who has been repeatedly stopped by the police is more likely to understand the experiences of a young, black defendant who says he has been targeted by the police, than a middle-aged, white individual who has never been spoken to by the police. Similarly, a young juror is more likely to understand the likelihood of going home with someone on their first date than an older individual who has not been 'dating' for some time. We all have different experiences to bring to the jury pool, to try to understand the story produced by the evidence.

Unlike juries, the suggested bench of one judge and two magistrates cannot produce the same mixture of experiences. The vast majority of judges and magistrates are over 40 years old, (the majority are over 60), and these individuals are, if not well-off,

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<sup>6</sup> Professor Michael Zander QC describes the public's confidence in the jury system. Law Commission, *Juror Misconduct and Internet Publications Report* (Law Com No 340, 2013), para 4.43.

<sup>7</sup> Penny Darbyshire, 'What can we learn from published jury research? Findings for the Criminal Courts Review 2001' [2001] Crim.L.R. 970-979 (972-3).

<sup>8</sup> *R v Thompson* [2010] EWCA Crim 1623.

at least financially comfortable.<sup>9</sup> Much of this is for obvious reasons; judges have reached the heights of their profession and are on a salary. Magistrates are volunteers, and so have the financial security to be able to give up their time for free. Despite our best efforts, we have not, as a nation, recruited a diverse pool of magistrates.

The impact of this loss of experience on a verdict can be huge. Cultural differences affect how evidence is viewed. For example, it is generally felt in Western society that it is polite to make eye-contact. Refusing to make eye-contact is considered rude, and indicative of lying. Many judges and magistrates may feel a defendant is more likely to be guilty, then, if they refuse to make eye-contact with the judge, barristers, or others in the court. They may not know that in some Afro-Caribbean cultures, it can actually be a sign of respect to avoid making eye-contact.<sup>10</sup> By reducing the range of experiences to those of a judge and two magistrates, the risk that a defendant is convicted based on cultural misunderstandings rockets.

A range of voices is important to counteract a variety of unconscious influences which affect every decision. One study showed that men are significantly more likely to consider an overweight female defendant guilty than a thin one.<sup>11</sup> Women showed no such bias. If a male judge were to sit with just one male magistrate, the lone female magistrate would be unable to counter-act the possibility of this unconscious bias. With 12 random members of the public asked to reach a unanimous verdict (or even, eventually, a majority of 9 or 10), it is likely that there would be enough women to prevent such an unfair influence from overwhelming the decision.

The diversity of jurors' experiences explains why repeated surveys of real jury cases have found that jury verdicts effectively filter out prejudices. The Lammy Review found that jury trials are the only element of our entire justice system that is free from bias.<sup>12</sup> When decisions are made by a variety of 12 members of the public, bias is filtered by those different experiences feeding into the jury's verdict. Studies show

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<sup>9</sup> The Lord Chief Justice of England and Wales and the Senior President of Tribunals, 'Judicial Diversity Statistics 2019', Published 11 July 2019, <https://www.judiciary.uk/wp-content/uploads/2019/07/Judicial-Diversity-Statistics-2019.pdf>.

<sup>10</sup> Editorial, 'Seeing is Believing' (1999) *N.L.J.*, 549.

<sup>11</sup> *ibid.*

<sup>12</sup> David Lammy, *The Lammy Review: An independent review into the treatment of, and outcomes for Black, Asian and Minority Ethnic individuals in the criminal justice system* (Final Report, September 2017), <https://www.gov.uk/government/publications/lammy-review-final-report>.

that Black, Asian, and Minority Ethnic (BAME) defendants are no more likely to be convicted than white defendants in jury trials,<sup>13</sup> and even when BAME defendants face an all-white jury, there is no evidence of discrimination.<sup>14</sup> This is in stark contrast to the review's findings in regards to sentencing judges, or Magistrates' Court verdicts, which found that both magistrates and judges exhibit a startling bias towards BAME individuals.<sup>15</sup> Juries, instead, were declared 'a success story of our justice system', because their decisions are not undermined by these apparent prejudices.<sup>16</sup>

### Alternative ways to deal with the backlog

The backlog is nothing new – the criminal Bar were calling for the funding to allow more courts to deal with more cases long before the pandemic started.<sup>17</sup>

Clearly the pandemic has made things more difficult, but that is not a reason to undermine justice. Since the pandemic closed the courts, barristers have been advocating for Nightingale courts; large courts that are properly ventilated, in which socially-distanced trials can take place. Whilst not all of our remaining courts (after the others were sold off) are able to accommodate such trials, other options are available. Theatres and lecture halls stand empty across the country. Renting these to enable the large-number of socially distanced trials that we need would be a very good start.

If necessary – after a proper search for Nightingale courts – juries can be reduced in size. Juries of seven have sat in times of national crisis, and it may be that a similar reduction will better enable social distancing. But it remains the case that seven random members of the British public is still a fairer option than a bench of three (one judge, two magistrates), with the diversity issues that they face.

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<sup>13</sup> Cheryl Thomas, 'Ethnicity and the fairness of jury trials in England and Wales 2006-2014' [2017] Crim.L.R. 860-876 (861).

<sup>14</sup> (n12) 195.

<sup>15</sup> (n12) As an example, the report notes that judges sentencing offenders were 240% more likely to give a prison sentence to BAME offenders than their white counterparts. The Magistrates' Court exhibit worrying results for BAME women, which it was difficult to account for because of a lack of data about which defendants plead guilty and which are found guilty by the magistrates.

<sup>16</sup> (n12) 31.

<sup>17</sup> (n2).

## Conclusion

During the middle of a pandemic, and in the midst of the *Black Lives Matter* movement, the suggestion that jury trials be severely restricted in this way is alarming. For huge numbers of defendants, the criminal justice system's ability to deliver justice would be seriously undermined. BAME individuals in particular have been shown to suffer without the diversity of voices that we find in our jury system. Now is not the time to deny these people justice as a 'quick fix' for the backlog.

There is a backlog. It was not caused by the pandemic, but fixing it now is more difficult than it would have been last year. That cannot be denied. Despite that, this is not a reason to deny justice for the thousands of people who have the right to a trial by jury. A 17<sup>th</sup> century jury would not give away their right to decide the fate of their defendants. We too must mind our privilege, and not give away our right.

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