

**THE CASE FOR A
NATIONAL COURT
FOR INDICTABLE CRIME**

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For many years I have commented on certain anomalies in the distribution of criminal business in the courts of Ireland. Delays in the listing of cases in the Central Criminal Court have now prompted the Minister for Justice, Equality and Law Reform to have the jurisdiction of the courts examined with a view to tackling the delay problem. A working group is also undertaking a more fundamental examination of jurisdictions.

I understand that the Circuit Criminal Court in Dublin can give a trial date within weeks. In the Central Criminal Court it takes about 16 months and rising to get a trial. If the case has to be adjourned it takes a further 16 months to get it back on the rails. While there is a “no adjournment” rule that cannot be absolute. Essential witnesses get heart attacks, accused persons periodically self-mutilate to postpone their trials and victims have to sit their Leaving Certificate and so forth.

As the judge having charge of the list in the Central Criminal Court I regularly receive letters from the families of victims and the relatives of persons allegedly murdered. There is great distress occasioned by the delay for families seeking closure. The alleged attacker is likely to be on bail and frequently lives near the alleged victim involving daily contact. What causes particular distress is when the case is adjourned by either the prosecution or defence occasioning a further 16 months delay without notice to or consultation

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with the victims or relatives of a deceased. I am constantly struck by the frequency with which defence counsel come into court on the eve of a trial seeking an adjournment where it is obvious that there is another side by way of victims or relatives whose interests have in no fashion been taken account of. Such applications are refused.

It should be remembered that the 16 months delay in the Central exists in spite of a high level of pleas of guilty. For some years there has been in existence a special discount in sentence for those who deliver their plea at the earliest opportunity leaving their trial date available for the disposal of another accused. This system has to date ensured a high level of pleas of guilty and early sentencing of those who plead. It has also meant that all of the cases listed for trial are “fighters”, the pleas having been shaken out of the tree at an early stage.

If these pleas were one day to cease to be forthcoming the effect would be to either double the delays or double the number of High Court judges devoted exclusively to crime. A majority (or as near as makes no difference) of those who contest their guilt in rape cases secure acquittals. Interest groups should note that these acquittals come from on average evenly sexually mixed juries. I can generally profile those cases in which there will be an acquittal but that is a matter to be dealt with in another paper. It may be that those done “bang to rights” have pleaded leaving as fighters those cases with a fight in them. Nevertheless it should be appreciated that the present balance could be adversely altered at any time by an appreciation of the rate at which sexually balanced juries are acquitting or by a harsher sentencing regime. Many will find the concept unpalatable but the reality is that while resources are limited the administration of criminal justice depends in part on the co-operation of the rapist and child molester.

Until 1981 the Central Criminal Court being the criminal division of the High Court had exclusive jurisdiction in relation to:

- treason;
- piracy;
- genocide;
- murder; and
- certain offences under the Offences Against the State Act

All other indictable crime was returned for trial to the Circuit Criminal Court but each side both prosecution and defence had the right of transfer to the Central. The prosecution could thereby transfer to the High Court a serious fraud or a case giving rise to public concern.

The transfer system was misused by accused persons for the purpose of delaying their trials. In my time at the junior criminal bar the tactics frequently directed by petty criminals were:

- elect for trial by judge and jury; and
- call for “open depositions”. The term “open depositions” had no legal standing but was invariably used by the defendant calling the shots.
- when the trial date was reached in the Circuit Court transfer to the Central.

The judges rarely insisted on the seven days notice which was required for a transfer as of right. The effect of this was that a trial for the theft of a chocolate bar not infrequently went all the way up the High Court.

To deal with the problem the executive overreacted. It completely abolished the right to transfer leaving the Central Criminal Court with jurisdiction to try only the five matters set out above in which it had always hitherto enjoyed an exclusive jurisdiction. At a later stage as a result of Rape Crisis Centre lobbying an exclusive jurisdiction was added in rape and aggravated sexual assault.

There has never in the history of the state been a prosecution for treason, piracy or genocide. There has been

one prosecution in the Central under the Offences Against the State Act. This was in respect of alleged intimidation of a clerk in the Chief State Solicitor's office over a bail motion and resulted in an acquittal. The reality is that the Central has jurisdiction to try only cases of murder and rape.

People have regrettably been murdering and raping each other for centuries so that they are very settled crimes. There is no doubt an emotional need in the body politic that they be tried by the highest rank of first instance judge but no such requirement is justified by their complexity. As a judge of the High Court while I *must* try a case which might have come into being because a young man didn't have the good manners and sense to see a girl home after some inappropriate sex I *cannot* try a billion pound fraud not because it is above my jurisdiction but because it is beneath it. That case must be tried in the Circuit Court and depending on the place of arrest perhaps in a remote part of the country. I am sure there are inexhaustible categories of cases which would merit the attention of the High Court but cannot at present have it. I would suggest as prime candidates serious fraud, international money laundering, drugs dealing and importation, internet crime, perjury bribery and corruption and crimes committed in the context of holding government or other high office.

Exclusive jurisdiction in rape was conferred on the Central as a badge of the heinousness of the crime. The position in the hierarchy of the crimes just listed seems to me to be giving them a certificate that they are not too bad at all, at all.

Though it has the power to do so the Central Criminal Court has never sat outside Dublin. The exclusive jurisdiction in rape is now putting an excessive burden on the jurors of Dublin. There are now up to six juries being sworn every Monday most of them for rape trials. It is no easy matter empanelling a jury. Prosecution and defence exercise their challenges to the full, many jurors are available only for limited periods of time and many volunteer that they couldn't

give an impartial verdict in a sex case. As a result of regularly coming close to running out of jurors it has now been found necessary to summon 500 jurors every Monday. This is of course additional to the requirements of the Dublin Circuit Criminal Court and the civil side of the High Court.

Another feature of the present regime is that due principally to the increasing length of contested cases to severed indictments and to separate trials. I have repeatedly to tell the parties on Mondays that I have no judge available for them. This will result in 16 months delay. It is my understanding that at the same time there may be judges in the Dublin Circuit Criminal Court who have no trials to take up and are free. There are of course Chinese walls between our jurisdictions and I cannot avail of their services.

Where lies the solution?

The most simplistic solution and one which would have wide support would be to send rape back to the Circuit Court. The first effect of this would be to disperse rape around the country back to local courts. The unique overview of sexual crime as it is available to the judge in charge of the Central Criminal Court list would be lost. This would result in a serious diminution of the understanding of what is happening in Ireland today. Such a diminution is already happening by reason of the policies in the media to cut back in their reporting of this area. Anyone who thinks the courts are merely mopping up the sexual crime of decades ago is seriously deluded.

More seriously merely to offload rape would not deal with the problem of appropriate cases being denied access to the High Court.

Nor would it be a solution to say that fraud, money laundering or other specified crimes should be transferred to the Central. Whether a crime should be tried at the highest level or at a lesser one should depend not merely on the textbook description of the crime but on its totality including

the manner of its commission, its value, the effect on its victim and the antecedents of the accused.

What needs to be considered is the establishment of a permanent national court for indictable crime whose judges would be drawn from the ranks of both the High Court and the Circuit Court.

Any such consideration must start with a look at the Crown Court in England and Wales. This was created in 1971 to replace courts of assize and quarter sessions. It is a unified national criminal court in continuous session and while the trappings of the Old Bailey are retained no doubt in the interests of the tourist trade the English Central Criminal Court is by statutory definition the Crown Court when it is sitting within the city of London. That the Crown Court model is unsuitable for total adoption in Ireland can be simply illustrated by stating that the judges range from lay magistrates at one end of the scale to the Lord Mayor and Aldermen of the City of London at the other. For the most part they are High Court judges, Circuit judges and recorders.

Another aspect of its composition can be rejected straight away as unsuited to Ireland. Circuit judges may try murder, rape and child sexual abuse cases if they are individually approved for that purpose by the presiding judge and the Lord Chief Justice. This is known colloquially as the Circuit judge having his “murder ticket” or “rape ticket” as the case maybe. I do not believe that it would be in line with our constitutional scheme of things for one judge to be licensed to hear a case which could not be heard by a judge of co-ordinate jurisdiction for want of that license. This is not to say that cases could not be directed towards experienced Judges in a more subtle or less structured fashion.

Crimes in England and Wales are assigned to five classes:

- In class one are all capital cases, treason, murder, genocide and Official Secrets Act offences.
- In class two are manslaughter, infanticide, child destruction, abortion, rape, sexual intercourse or incest with a girl under 13, sedition, Geneva Convention offences, mutiny and piracy. It is interesting to note that piracy appears to rate a slightly lower position in the hierarchy in England than here.
- In class three are all other offences triable only on indictment.
- In class four are wounding or causing grievous bodily harm with intent, robbery or assault with intent to rob and conspiracy.
- Class five comprises all offences which are triable either summarily or on indictment.

Cases in class one must be tried by a High Court judge. A murder may be released by the presiding judge to a Circuit judge who has his murder ticket.

Cases in class two must be tried by a High Court judge unless a particular case is released by the presiding judge to a Circuit judge. A case of rape or serious sexual assault of a child in any class may be released only to a Circuit judge or recorder who has his rape ticket.

Class three cases may be tried by a High Court judge or in accordance with general or particular directions given by the presiding judge before a Circuit Court judge or a recorder.

Cases in class four may be tried before a High Court judge, a Circuit judge or a recorder but shall not be listed before a High Court judge without his consent or that of the presiding judge.

Presiding judges may issue directions as to when it is appropriate to reserve a case to a High Court judge and as to the allocation of work between Circuit judges and recorders.

In such directions specific provision shall be made for cases in the following categories:

- cases where death or serious risk to life, or the infliction of grave injury are involved, including motoring cases arising from reckless driving and/or excess alcohol;
- cases where loaded firearms are alleged to have been used;
- cases of arson or criminal damage with intent to endanger life;
- cases of defrauding government departments or local authorities or public bodies of amounts in excess of £25,000;
- offences under the Forgery and Counterfeiting Act 1981 where the amount of money or the value of goods exceeds £10,000;
- offences involving violence to a police officer which result in the officer being unfit for duty for more than 28 days;
- any offence involving loss to any person or body of a sum in excess of £100,000;
- cases where there is a risk of substantial political or racial feeling being excited by the offence or the trial;
- cases which have given rise to widespread concern;
- cases of robbery or assault with intent to rob where gross violence was used, or serious injury was caused, or where the accused was armed with a dangerous weapon for the purpose of the robbery, or where the theft was intended to be from a bank, a building society or a post office;
- cases involving the manufacture or distribution of substantial quantities of drugs;

- cases the trial of which is likely to last more than 10 days;
- cases involving the trial of more than five defendants;
- cases in which the accused holds a senior public office, or is a member of a profession or other person carrying a special duty or responsibility to the public, including a police officer when acting as such; and
- cases where a difficult issue of law is likely to be involved, or a prosecution for the offence is rare or novel.

As I indicated already the Crown Court model is not suited to total adoption in this jurisdiction but deserves to be looked at. It seems to me that there is a need for greater flexibility in relation to the trial of indictable crime particularly of the more serious kind and of cases which give rise to public concern. This could perhaps best be met by enacting a new jurisdiction in which judges of various levels would sit in the one unified criminal court and have cases assigned for hearing at their respective levels by recognised and established criteria.

Policy considerations in relation to such a change are of course a matter for the executive and the Oireachtas and the detail is a matter for parliamentary counsel to draft.

I would make two observations from my experience of having charge of the list in the Central Criminal Court as follows:

1. It is essential that there should be a permanent presiding judge and deputy presiding judge for the purpose of consistency and discipline in relation to the administration of the list. I still remember how the list was decimated for a full year ahead during my absence for 2 weeks hearing personal injuries cases in the country.

2. Judges assigned to sit in the Court must do so for a reasonable period preferably for a year at a time but certainly

not less than for a full term. At present judges come to sit in the Central for shorter periods and it is happening on a weekly basis that a case is called as going on, having an expected duration of two to three weeks but the only judge free is moving on to some other duty in a weeks time. In such a situation the case has to be adjourned and the further 16 months delay comes yet again into play. A change in the practice of the Central having one permanent full-time judge and a series of short-term visiting 'bed-and-breakfast' judges is a reform which could usefully be made immediately.