JUDICIARY OF ENGLAND AND WALES

Keynote speech to the Criminal Bar Association Conference

25 November 2017

Lord Justice Singh

Introduction

1. It is a great pleasure to be invited to speak to the Criminal Bar Association Conference this year. I am looking forward to hearing other speakers and talking to as many of you as possible during the course of the morning.

2. Like many people in this room I was saddened last week to read the news of the passing of Jeremy Hutchinson at the age of 102. He was one of the greatest advocates at the criminal bar in the 20th Century. He was, of course, a founding member of the CBA. To mention just one of his many famous cases, he was junior counsel – led by Gerald Gardiner QC – in the *Penguin Books* case, which in many ways ushered in a new era: metaphorically as well as literally it marked the start of the 1960s. I never had the opportunity to see him in action myself but thankfully it is still possible to hear his beautiful voice. You can go to BBC i-Player and find his interview with Helena Kennedy three years ago in 2014, when he was only 99, in a series called "A Law Unto Themselves". Lord Hutchinson of Lullington QC, to give him his formal title, was, in the best traditions of the criminal bar, a fearless advocate. He was prepared to stand up not only to the state in the form of the prosecution but also to stand up to judges when that was necessary.

3. We are fortunate in this country to have an incorruptible judiciary. We are fortunate to have a fearless and independent criminal bar. We know that, even if we ourselves are never directly involved in the criminal justice system, if one of our fellow citizens is accused of a serious crime, they will have access to the best that the bar has to offer to defend them. We are also fortunate to have prosecutions conducted by advocates who must regard themselves as "ministers of justice." We need you at the criminal bar to make our system of criminal justice work and to work fairly and efficiently in the interests of all concerned, including the public interest.

Substantive criminal law

4. I intend to say very little about recent developments in substantive criminal law. We are going to hear later this morning from Dr Findlay Stark about that topic. I would briefly mention just two cases from this year which have struck me as being of particular interest.

5. The first is the judgment of the Supreme Court in *Ivey v Genting Casinos Ltd* [2017] 3 WLR 1212, in which it was said that the second limb of the *Ghosh* direction on dishonesty was wrong. Of course that case was a civil case, not a criminal case; the relevant passage was *obiter*; and so the issue awaits authoritative resolution in the criminal context by the Court of Appeal. However, the Divisional Court has very recently observed that, given the terms of the unanimous views of the Supreme Court, "it is difficult to imagine the Court of Appeal preferring *Ghosh* to *Ivey* in the future." See *DPP v Patterson* [2017] EWHC 2820 (Admin) (2 November 2017, Sir Brian Leveson PQBD), at para. 16.

6. *Ghosh* [1982] QB 1053 was decided by the Court of Appeal when I was studying criminal law at university. In practice I don't think there were many cases in which the second limb of the direction in fact had to be given, because it usually sufficed to direct the jury that dishonesty is an ordinary word of the English language, whose meaning would be well known to them. I do remember one case I tried as a Recorder in which I did have to give the second limb of the direction.

7. The other case I would mention is the decision of the Court of Appeal in *Rose* [2017] EWCA Crim 1168 (31 July 2017), which concerned gross negligence manslaughter. I remember the case because at one time I was going to be the trial judge and I had to case manage it in its preliminary stages. The defendant was an optometrist. She was convicted of the manslaughter of a boy whom she had seen for an eye examination and who later died. The Court of Appeal quashed the conviction on the ground that a submission of no case to answer should have been accepted by the trial judge. The Court clarified the basis for criminal liability in such cases. In particular the Court emphasised that the risk of death must be both serious and obvious; and that, in assessing the reasonable foreseeability of serious and obvious risk of death, it is not appropriate to take into account what the defendant would have known but for his or her breach of duty.

The Jury

8. As we all know juries are a fundamental feature of our system for trying serious criminal cases. In my experience juries take their task very seriously and value the responsibility and trust which are vested in them. I want to

touch on three points in the jury system when just occasionally something can go wrong.

9. The first is that it is important that the panel of jurors in waiting should properly understand the significance of what is being said to them when they are asked, for example, to mention immediately if they know the name of a person connected to the case. I remember a murder case I tried at Luton in 2014 in which a juror did recognise the name of a witness but said nothing at the time because he really wanted to serve on the jury in what he thought would be a very interesting case. Later he mentioned this to other jurors. Although fortunately this was before the case had got very far, and in particular witnesses did not have to be recalled to give evidence, he was arrested by the police and his case referred to the Attorney General.

10. The second point is this. The introductory remarks by the trial judge to the jury should mention right from the start of the trial that they should not talk about the case even to other members of the jury except when they are all together. This does not always happen and, if it does not, counsel for the parties should remind the judge of the need for this. Earlier this year I was a member of the Court of Appeal which considered a case where, unfortunately, the trial judge had not done this, although it was her usual practice to do so; and counsel did not notice the omission: see *Agera and Lansana* [2017] EWCA Crim 740 (9 June 2017), para. 16. In the end this did not affect the outcome of the appeal although some members of the jury had spoken about the case when they went out for a drink, but it is worth remembering that counsel have a responsibility in this regard as does the judge.

11. The third point relates to the use of IT by members of the public in a jury trial. These days a smartphone can do so many things that were undreamt of even a

few years ago; and can do so almost instantaneously. When I tried a murder case at Lewes in 2013, there was a submission of no case to answer on behalf of one of the two defendants at half time. I rejected that submission. Of course all of that happened, as it must, in the absence of the jury. Very shortly afterwards my ruling was circulated on social media by someone who had been in the public gallery. Thankfully it was possible to have this material removed quite quickly and no one suggested that any member of the jury had seen it. One cannot emphasise enough the warning that the judge now gives to jurors at the start of a trial not to research the case on the internet, including the possibility of a contempt of court and penal sanctions being imposed. But one cannot guarantee that there will never be problems when the use of smartphones is so quick and easy.

Directions to the Jury

12. I want to turn to a different topic: directions given by the trial judge to a jury. The fundamental purpose of a summing up is to help the jury in its task. Everything that we do as judges should be directed to achieving that purpose. In recent years it has become common practice to provide directions of law to the jury in writing, after discussion with counsel. Often those directions will be accompanied by a route to verdict, certainly in the more complicated cases.

13. Since the new Criminal Procedure Rules and Practice Direction came into effect in April of last year, trial judges have been encouraged to consider giving a "split summing up". This seems to me to be something which can have great value depending on the nature of the case being tried. Often it will be helpful to have the basic directions of law given by the judge to the jury before closing speeches by the advocates. I would suggest that the route to

verdict, if there is one, should also be given to the jury before closing speeches. All of this is helpful not least because it enables the advocates to tailor their closing speeches to what the real issues in the trial are and they can assist the jury by going through the issues which the jury will have in a document and which they can readily follow.

14. In an appropriate case it can also be helpful for the defence to make a short speech after the prosecution have opened the case, so that the jury can understand what the issues at the trial are going to be before they start hearing the evidence.

15. I would even urge, in the appropriate case, the giving of written directions on the law, including the burden and standard of proof, at the outset of the trial, before the evidence is heard by the jury. This is what happened in a murder trial which I tried at Lewes in the spring of last year. The reason why that was particularly helpful to the jury in that case was that it was possible to identify right at the start of the trial what the main issue in the case was going to be. That issue was diminished responsibility, as counsel for the defence explained in a short speech. Furthermore, it was possible to explain to the jury before they heard the evidence how they should approach that evidence. Of course the burden of proof shifts to the defendant in a case where he or she relies on diminished responsibility. And the standard of proof is different for a defendant compared to the normal criminal standard of proof which lies on the prosecution.

16. And there will be cases which fall somewhere in the middle of the spectrum. For example, before identification evidence is going to be heard by the jury, it will often now be appropriate for the judge to give the standard direction on identification evidence just before that stage is reached. Similarly, the

standard direction on expert evidence should be given just before the jury are about to hear from the first expert witness in the trial.

The Evidence of Children

17. In recent years we have all become more attuned to the needs of children in our criminal courts. I myself have conducted trials where the principal witnesses of fact were very young children, at least one I remember as young as five. This will often be true in sex offence cases but it can be true in other cases too, such as homicide.

18. I remember one such case, which I tried at the Central Criminal Court last year, in which the main witnesses for the prosecution in a manslaughter case were the brother and sister of the young child who had been killed by their father. They clearly found it very difficult to give evidence in the normal way, even from a video suite, and so it was decided that leading counsel for both sides should go the video suite and ask their questions from there, with the intermediary also present, while the jury and others could watch the evidence being given from the courtroom.

19. More generally the advocates' tool kit has been of enormous help in this context. In my experience, advocates have become much better at understanding the different way in which cross-examination should be conducted of young children.

20. ABE interviews are something we are now well used to dealing with in a criminal trial. I think it fair to say that the quality of those interviews can still be variable. Many people feel that the early parts of the interviews could

perhaps be more closely edited to focus on what is really going to be required in a Crown Court trial.

21. One interesting development, which has been piloted as you know in a number of courts around the country, including Kingston, is the use of section 28 to record the cross-examination of a child witness. While this is still work in progress, it seems to me that one of its beneficial consequences can be that if, for some reason, a trial becomes ineffective, at least the evidence of the child witness will already be in existence in recorded form and, even if there has to be a second trial, that child will not have to come back to court to go through the process of cross-examination for a second time.

Equality and Diversity

22. The Chair of the CBA, Angela Rafferty QC, has made it clear that one of her priorities this year is equality and diversity, including social mobility. This is a subject in which I have long taken an interest. At one time I was Chair of the Bar Council's Race Relations Committee, which later became one of its Equality and Diversity Committees. Like Angela, I think this topic has as much to with the need for greater social mobility at the Bar as with other strands of diversity, such as gender and race. This is an important issue for the judiciary too. It is a great honour to serve the public as a judge and the country deserves the best judges, from all backgrounds.

23. Although there is no room for complacency I have always been a "glass half full" person. For example, in the last year there have been four women appointed as Resident Judges at Crown Courts in London, including one person of Asian origin.[1] Another woman of Asian origin has been appointed a

[1] HHJ Deborah Taylor (Southwark); HHJ Usha Karu (Inner London); HHJ Rosa Dean (Harrow); and HHJ Alice Robinson (Croydon).

senior circuit judge to sit at the Old Bailey.[2] These are all steps in the right direction and I hope help to provide inspiration to others, some of whom will be in this room today. If you are not a Recorder already, I would encourage you all to think about applying to become one as perhaps the first rung on the judicial ladder.

Concluding Remarks

24. All that remains for me to say is to thank you again for the work that you do in our criminal courts. I wish you well and hope that you enjoy the rest of this Conference.

25. Let me end as I began with the late great Jeremy Hutchinson. In the book Jeremy Hutchinson's Case Histories by Thomas Grant (2015), in the post-script written by Jeremy Hutchinson himself, he said:

> "No one becomes a criminal barrister to make large sums of money. A criminal practice has always been the least well paid and of the lowest status at the Bar. Yet in my opinion the rewards are of the greatest. You practise in circumstances that seriously affect your fellow human beings in their personal and everyday lives. Your clients are of every kind, privileged or deprived, bewildered and weak, or street-wise and strong. ... You are privileged in your work; privileged because, first, it falls to you to uphold at all times the principles of justice and the rule of law, and, second, unreservedly to uphold the interests of your client whose case becomes yours. You share for a short time the intimate life of a person *in extremis* and stripped bare whose reputation, livelihood or liberty have been placed in your hands."

[2] HHJ Anuja Dhir QC.