CRIMINAL PRACTICE DIRECTIONS 2015 DIVISION III

CUSTODY AND BAIL

Contents of this Division

CrimPR Part 14 Bail and custody time limits
CPD III Custody and bail 14A: BAIL BEFORE SENDING FOR TRIAL

14A.1 Before the Crown Court can deal with an application under CrimPR 14.8 by a defendant after a magistrates' court has withheld bail, it must be satisfied that the magistrates' court has issued a certificate, under section 5(6A) of the Bail Act 1976, that it heard full argument on the application for bail before it refused the application. The certificate of full argument is produced by the magistrates' court's computer system, Libra, as part of the GENORD (General Form of Order). Two hard copies are produced, one for the defence and one for the prosecution. (Some magistrates' courts may also produce a manual certificate which will usually be available from the justices' legal adviser at the conclusion of the hearing; the GENORD may not be produced until the following day.) Under CrimPR 14.4(4), the magistrates' court officer will provide the defendant with a certificate that the court heard full argument. However, it is the responsibility of the defence, as the applicant in the Crown Court, to ensure that a copy of the certificate of full argument is provided to the Crown Court as part of the application (CrimPR 14.8(3)(e)). The applicant's solicitors should attach a copy of the certificate to the bail application form. If the certificate is not enclosed with the application form, it will be difficult to avoid some delay in listing.

Venue

14A.2 Applications should be made to the court to which the defendant will be, or would have been, sent for trial. In the event of an application in a purely summary case, it should be made to the Crown Court centre which normally receives Class 3 work. The

hearing will be listed as a chambers matter, unless a judge has directed otherwise.

CPD III Custody and bail 14B: BAIL: FAILURE TO SURRENDER AND TRIALS IN ABSENCE

14B.1 The failure of defendants to comply with the terms of their bail by not surrendering, or not doing so at the appointed time, undermines the administration of justice and disrupts proceedings. The resulting delays impact on victims, witnesses and other court users and also waste costs. A defendant's failure to surrender affects not only the case with which he or she is concerned, but also the court's ability to administer justice more generally, by damaging the confidence of victims, witnesses and the public in the effectiveness of the court system and the judiciary. It is, therefore, most important that defendants who are granted bail appreciate the significance of the obligation to surrender to custody in accordance with the terms of their bail and that courts take appropriate action, if they fail to do so.

14B.2 A defendant who will be unable for medical reasons to attend court in accordance with his or her bail must obtain a certificate from his or her general practitioner or another appropriate medical practitioner such as the doctor with care of the defendant at a hospital. This should be obtained in advance of the hearing and conveyed to the court through the defendant's legal representative. In order to minimise the disruption to the court and to others, particularly witnesses if the case is listed for trial, the defendant should notify the court through his legal representative as soon as his inability to attend court becomes known.

14B.3 Guidance has been produced by the British Medical Association and the Crown Prosecution Service on the roles and responsibilities of medical practitioners when issuing medical certificates in criminal proceedings: link. Judges and magistrates should seek to ensure that this guidance is followed. However, it is a matter for each individual court to decide whether, in any particular case, the issued certificate should be accepted. Without a medical certificate or if an unsatisfactory certificate is provided, the court is likely to consider that the defendant has failed to surrender to bail.

14B.4 If a defendant fails to surrender to his or her bail there are at least four courses of action for the courts to consider taking:-

(a) imposing penalties for the failure to surrender;
(b) revoking bail or imposing more stringent conditions;
(c) conducting trials in the absence of the defendant; and

(d) ordering that some or all of any sums of money lodged with the court as a security or pledged by a surety as a condition on the grant of bail be forfeit.

The relevant sentencing guideline is the Definitive Guideline Fail to Surrender to Bail. Under section 125(1) of the Coroners and Justice Act 2009, for offences committed on or after 6 April 2010, the court must follow the relevant guideline unless it would be contrary to the interests of justice to do so. The guideline can be obtained from the Sentencing Council's website: http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm

CPD III Custody and bail 14C: PENALTIES FOR FAILURE TO SURRENDER

Initiating Proceedings – Bail granted by a police officer

14C.1 When a person has been granted bail by a police officer to attend court and subsequently fails to surrender to custody, the decision whether to initiate proceedings for a section 6(1) or section 6(2) offence will be for the police / prosecutor and proceedings are commenced in the usual way.

14C.2 The offence in this form is a summary offence although section 6(10) to (14) of the Bail Act 1976, inserted by section 15(3) of the Criminal Justice Act 2003, disapplies section 127 of the Magistrates' Courts Act 1980 and provides for alternative time limits for the commencement of proceedings. The offence should be dealt with on the first appearance after arrest, unless an adjournment is necessary, as it will be relevant in considering whether to grant bail again.

Initiating Proceedings – Bail granted by a court

14C.3 Where a person has been granted bail by a court and subsequently fails to surrender to custody, on arrest that person should normally be brought as soon as appropriate before the court at which the proceedings in respect of which bail was granted are to be heard. (There is no requirement to lay an information within the time limit for a Bail Act offence where bail was granted by the court).

14C.4 Given that bail was granted by a court, it is more appropriate that the court itself should initiate the proceedings by its own motion although the prosecutor may invite the court to take proceedings, if the prosecutor considers proceedings are appropriate.

Timing of disposal

14C.5 Courts should not, without good reason, adjourn the disposal of a section 6(1) or section 6(2) Bail Act 1976 offence (failure to surrender) until the conclusion of the proceedings in respect of which bail was granted but should deal with defendants as soon as is practicable. In deciding what is practicable, the court must take

into account when the proceedings in respect of which bail was granted are expected to conclude, the seriousness of the offence for which the defendant is already being prosecuted, the type of penalty that might be imposed for the Bail Act offence and the original offence, as well as any other relevant circumstances.

14C.6 If the Bail Act offence is adjourned alongside the substantive proceedings, then it is still necessary to consider imposing a separate penalty at the trial. In addition, bail should usually be revoked in the meantime. Trial in the absence of the defendant is not a penalty for the Bail Act offence and a separate penalty may be imposed for the Bail Act offence.

Conduct of Proceedings

14C.7 Proceedings under section 6 of the Bail Act 1976 may be conducted either as a summary offence or as a criminal contempt of court. Where proceedings are commenced by the police or prosecutor, the prosecutor will conduct the proceedings and, if the matter is contested, call the evidence. Where the court initiates proceedings, with or without an invitation from the prosecutor, the court may expect the assistance of the prosecutor, such as in cross-examining the defendant, if required.

14C.8 The burden of proof is on the defendant to prove that he had reasonable cause for his failure to surrender to custody (section 6(3) of the Bail Act 1976).

Sentencing for a Bail Act offence

14C.9 A defendant who commits an offence under section 6(1) or section 6(2) of the Bail Act 1976 commits an offence that stands apart from the proceedings in respect of which bail was granted. The seriousness of the offence can be reflected by an appropriate and generally separate penalty being imposed for the Bail Act offence.

14C.10 As noted above, there is a sentencing guideline on sentencing offenders for Bail Act offences and this must be followed unless it would be contrary to the interests of justice to do so. Where the appropriate penalty is a custodial sentence, consecutive sentences should be imposed unless there are circumstances that make this inappropriate.

CPD III Custody and bail 14D: RELATIONSHIP BETWEEN THE BAIL ACT OFFENCE AND FURTHER REMANDS ON BAIL OR IN CUSTODY

14D.1 The court at which the defendant is produced should, where practicable and legally permissible, arrange to have all outstanding cases brought before it (including those from different courts) for the purpose of progressing matters and dealing with the question of bail. This is likely to be practicable in the magistrates' court where cases can easily be transferred from one magistrates' court

to another. Practice is likely to vary in the Crown Court. If the defendant appears before a different court, for example because he is charged with offences committed in another area, and it is not practicable for all matters to be concluded by that court then the defendant may be remanded on bail or in custody, if appropriate, to appear before the first court for the outstanding offences to be dealt with.

14D.2 When a defendant has been convicted of a Bail Act offence, the court should review the remand status of the defendant, including the conditions of that bail, in respect of all outstanding proceedings against the defendant.

14D.3 Failure by the defendant to surrender or a conviction for failing to surrender to bail in connection with the main proceedings will be significant factors weighing against the re-granting of bail.

14D.4 Whether or not an immediate custodial sentence has been imposed for the Bail Act offence, the court may, having reviewed the defendant's remand status, also remand the defendant in custody in the main proceedings.

CPD III Custody and bail 14E: TRIALS IN ABSENCE

14E.1 A defendant has a right, in general, to be present and to be represented at his trial. However, a defendant may choose not to exercise those rights, such as by voluntarily absenting himself and failing to instruct his lawyers adequately so that they can represent him.

14E.2 The court has a discretion as to whether a trial should take place or continue in the defendant's absence and must exercise its discretion with due regard for the interests of justice. The overriding concern must be to ensure that such a trial is as fair as circumstances permit and leads to a just outcome. If the defendant's absence is due to involuntary illness or incapacity it would very rarely, if ever, be right to exercise the discretion in favour of commencing or continuing the trial.

Trials on Indictment

14E.3 Proceeding in the absence of a defendant is a step which ought normally to be taken only if it is unavoidable. The court must exercise its discretion as to whether a trial should take place or continue in the defendant's absence with the utmost care and caution. Due regard should be had to the judgment of Lord Bingham in *R v Jones* [2002] UKHL 5, [2003] 1 A.C. 1, [2002] 2 Cr. App. R. 9. Circumstances to be taken into account before proceeding include:

i) the conduct of the defendant,

ii) the disadvantage to the defendant,

iii) the public interest, taking account of the inconvenience and hardship to witnesses, and especially to any complainant, of a delay; if the witnesses have attended court and are ready to give evidence, that will weigh in favour of continuing with the trial,
iv) the effect of any delay,
v) whether the attendance of the defendant could be secured at a later hearing, and
vii) the likely outcome if the defendant is found guilty.

Even if the defendant is voluntarily absent, it is still generally desirable that he or she is represented.

Trials in the Magistrates' Courts

14E.4 Section 11 of the Magistrates' Courts Act 1980 applies. If either party is absent, the court should follow the procedure at CrimPR 24.12. Subject to the provisions of the statute, the principles outlined above are applicable. Benches and legal advisers will note that the presumption at rule 24.12(3)(a) does not apply if the defendant is under 18 years of age.

CPD III Custody and bail 14F: FORFEITURE OF MONIES LODGED AS SECURITY OR PLEDGED BY A SURETY/ESTREATMENT OF RECOGNIZANCES

14F.1 A surety undertakes to forfeit a sum of money if the defendant fails to surrender as required. Considerable care must be taken to explain that obligation and the consequences before a surety is taken. This system, in one form or another, has great antiquity. It is immensely valuable. A court concerned that a defendant will fail to surrender will not normally know that defendant personally, nor indeed much about him. When members of the community who do know the defendant say they trust him to surrender and are prepared to stake their own money on that trust, that can have a powerful influence on the decision of the court as to whether or not to grant bail. There are two important side-effects. The first is that the surety will keep an eye on the defendant, and report to the authorities if there is a concern that he will abscond. In those circumstances, the surety can withdraw. The second is that a defendant will be deterred from absconding by the knowledge that if he does so then his family or friends who provided the surety will lose their money. In the experience of the courts, it is comparatively rare for a defendant to fail to surrender when meaningful sureties are in place.

14F.2 Any surety should have the opportunity to make representations to the defendant to surrender himself, in accordance with their obligations.

14F.3 The court should not wait or adjourn a decision on estreatment of sureties or securities until such time, if any, that the bailed

defendant appears before the court. It is possible that any defendant who apparently absconds may have a defence of reasonable cause to the allegation of failure to surrender. If that happens, then any surety or security estreated would be returned. The reason for proceeding is that the defendant may never surrender, or may not surrender for many years. The court should still consider the sureties' obligations if that happens. Moreover, the longer the matter is delayed the more probable it is that the personal circumstances of the sureties will change.

14F.4 The court should follow the procedure at CrimPR 14.15. Before the court makes a decision, it should give the sureties the opportunity to make representations, either in person, through counsel or by statement.

14F.5 The court has discretion to forfeit the whole sum, part only of the sum, or to remit the sum. The starting point is that the surety is forfeited in full. It would be unfortunate if this valuable method of allowing a defendant to remain at liberty were undermined. Courts would have less confidence in the efficacy of sureties. It is also important to note that a defendant who absconds without in any way forewarning his sureties does not thereby release them from any or all of their responsibilities. Even if a surety does his best, he remains liable for the full amount, except at the discretion of the court. However, all factors should be taken into account and the following are noted for guidance only:

i) The presence or absence of culpability is a factor, but is not in itself a reason to reduce or set aside the obligations entered into by the surety.
ii) The means of a surety, and in particular changed means, are relevant.
iii) The court should forfeit no more than is necessary, in public policy, to maintain the integrity and confidence of the system of taking sureties.

CPD III Custody and bail 14G: BAIL DURING TRIAL

14G.1 The following should be read subject to the Bail Act 1976.

14G.2 Once a trial has begun the further grant of bail, whether during the short adjournment or overnight, is in the discretion of the trial judge or trial Bench. It may be a proper exercise of this discretion to refuse bail during the short adjournment if the accused cannot otherwise be segregated from witnesses and jurors.

14G.3 An accused who was on bail while on remand should not be refused bail during the trial unless, in the opinion of the court, there are positive reasons to justify this refusal. Such reasons might include:

(a) that a point has been reached where there is a real danger that the accused will abscond, either because the case is going badly for him, or for any other reason;
(b) that there is a real danger that he may interfere with witnesses, jurors or co-defendants.

14G.4 Once the jury has returned a guilty verdict or a finding of guilt has been made, a further renewal of bail should be decided in the light of the gravity of the offence, any friction between co-defendants and the likely sentence to be passed in all the circumstances of the case.

CPD III Custody and bail 14H: CROWN COURT JUDGE'S CERTIFICATON OF FITNESS TO APPEAL AND APPLICATIONS TO THE CROWN COURT FOR BAIL PENDING APPEAL

14H.1 The trial or sentencing judge may grant a certificate of fitness for appeal (see, for example, sections 1(2)(b) and 11(1A) of the Criminal Appeal Act 1968); the judge in the Crown Court should only certify cases in exceptional circumstances. The Crown Court judge should use the Criminal Appeal Office Form C (Crown Court Judge's Certificate of fitness for appeal) which is available to court staff on the HMCTS intranet.

14H.2 The judge may well think it right to encourage the defendant's advocate to submit to the court, and serve on the prosecutor, before the hearing of the application, a draft of the grounds of appeal which he will ask the judge to certify on Form C.

14H.3 The first question for the judge is then whether there exists a particular and cogent ground of appeal. If there is no such ground, there can be no certificate; and if there is no certificate there can be no bail. A judge should not grant a certificate with regard to sentence merely in the light of mitigation to which he has, in his opinion, given due weight, nor in regard to conviction on a ground where he considers the chance of a successful appeal is not substantial. The judge should bear in mind that, where a certificate is refused, application may be made to the Court of Appeal for leave to appeal and for bail; it is expected that certificates will only be granted in exceptional circumstances.

14H.4 Defence advocates should note that the effect of a grant of a certificate is to remove the need for leave to appeal to be granted by the Court of Appeal. It does not in itself commence the appeal. The completed Form C will be sent by the Crown Court to the Criminal Appeal Office; it is not copied to the parties. The procedures in CrimPR Part 39 should be followed.

14H.5 Bail pending appeal to the Court of Appeal (Criminal Division) may be granted by the trial or sentencing judge if they have certified the case as fit for appeal (see sections 81(1)(f) and 81(1B) of the Senior Courts Act 1981). Bail can only be granted in the Crown Court within 28 days of the conviction or sentence which is to be the subject of the appeal and may not be granted if an application for bail has already been made to the Court of Appeal. The procedure for bail to be granted by a judge of the Crown Court pending an appeal is governed by CrimPR Part 14. The Crown Court judge should use the Criminal Appeal Office Form BC (Crown Court Judge's Order granting bail) which is available to court staff on the HMCTS intranet.

14H.6 The length of the period which might elapse before the hearing of any appeal is not relevant to the grant of a certificate; but, if the judge does decide to grant a certificate, it may be one factor in the decision whether or not to grant bail. If bail is granted, the judge should consider imposing a condition of residence in line with the practice in the Court of Appeal (Criminal Division).