

**I**n writing this article I have drawn on my experience of criminal cases as a junior barrister and a Silk for 31 years in total, practising mainly on the Wales and Chester Circuit, as a Recorder for 16 years, and as a High Court Judge for the last 9 years. One of the greatest privileges at the Bar was to help with advocacy training for pupils and new tenants. These are some of the tips I picked up and passed on over the years as an advocate, and here are some of the whinges of a criminal judge. It is a highly personal selection of both.

## 5 Cross-examining the defendant

If you are prosecuting a jury trial, think carefully in advance about your first question in cross-examination. Often you will be able to put the defendant on the spot immediately, with a question he or she won't have expected and which spells doom by shutting off a line of retreat whether they answer yes or no. If circumstances permit, an evening or early morning 'thinking walk' will help you clear your head and help you focus on tactics!

# CRIMINAL ADVOCACY

MASTER ROBIN SPENCER

## In the Crown Court

### 1 Opening your case

When prosecuting a jury trial don't miss the opportunity to grab the jury's attention at the very start of your opening by setting out the case in a very few carefully crafted sentences. Too many openings (even by experienced counsel) begin by tediously referring the jury to the indictment. What a waste! You can take the jury to the indictment later.

### 2 Examination-in-chief

Examination-in-chief is a neglected art, partly because the evidence of key witnesses is often now presented in the form of their ABE interview. Unless the relevant evidence is not in dispute, you can't lead your own witness (prosecuting or defending) but you can guide the witness by thinking through the sequence of questions carefully. Don't follow the witness statement slavishly; it may be repetitive and confusing. Work out the correct chronological sequence, jot it down in the form of bullet points, then from that note ask short non-leading questions which help the witness tell his or her story naturally.

### 3 The Digital Case System

DCS has brought huge advantages but it generates its own problems. When you are speaking (whether to the jury, the witness or the judge) look up and speak up! Eye contact is essential. Don't look down at your laptop or ipad all the time. If necessary use a lectern, or devise a substitute by piling books or boxes!

4 Bearing in mind the confines of DCS, if you are going to cross-examine a witness on his statement to show inconsistencies, think through how you are going to do this. You will probably need to show the witness a paper copy of his statement; it wouldn't be appropriate for the statement to be shown on the big screen where the jury will see it as well. Make sure a paper copy is available. If necessary raise the logistics with the judge in advance before the witness comes into court.

## 6 Cross-examination generally

As the saying goes, 'Know your brief, and cross-examine from your head!' In other words, don't be bound by a script or over-detailed notes. Be prepared to go with the flow in order to press home any advantage, expected or unexpected.

7 Don't make speeches in formulating questions. Don't go on too long. You will ruin the effect of points well made if you go over the same ground again. Keep it brief and sit down once you have made your best points.

## 8 Leave the law to the judge

In your opening or closing speech don't lecture the jury on the law. Keep any law to the bare minimum. Don't tell them what you think the judge is going to say about the law in the summing up. Any detailed explanation of the law is rarely necessary. If it is, the judge will opt for a split summing up, giving the jury directions of law before counsel's speeches.

## 9 Reading statements to the jury

If you are reading to the jury as agreed evidence a section 9 statement which refers to things depicted in photos or plans in the jury bundle, tell the jury and invite them to have their bundle open at the relevant place. It is then so much easier to follow the evidence. This may seem obvious, but it is often overlooked.

## 10 No theatrics

If you are on the receiving end of an adverse ruling by the judge, perhaps on an issue of admissibility or a half-time submission, don't show dissent or sulk. The judge will not be impressed. It is unprofessional. It is even more important that you don't indulge in such theatrics in front of the jury. It doesn't go down well. Never do it.

## 11 Always be courteous

There is never any excuse for rudeness or discourtesy to the court staff. Their dedication, despite everything that austerity has thrown at them, is heroic. The most

important person in court is not the judge but the usher. Make the usher your friend.

## In the Court of Appeal (Criminal Division)

### 12 Sit in and watch beforehand

Sooner or later you will find yourself in the CACD. It is a very different ball game from the Crown Court. Before you make your first appearance in the CACD, take the time (if you can) to sit in court and watch the

Justice will tell you there is no need to introduce the background to the appeal: come straight to your best points. Be selective in the points you pursue. Don't flog an obviously dead horse.

17 Remember that, although the Court will have read the transcript of the prosecution opening and the judge's sentencing remarks (and, in a conviction appeal, the summing up), you will usually have the advantage of having been present at the hearing in the court below.

# DO'S & DON'TS

proceedings for a morning. The experience will be invaluable.

### 13 How did you get there?

You may be lucky enough to have been granted leave to appeal; or you may be appearing pro bono to renew an application for leave to appeal following refusal by the Single Judge. In that event the Court will be particularly grateful for your assistance, provided the application is not so hopeless that it is wasting the court's time. In that event you need to be prepared for the Court to direct that some of the time served (usually 28 or 56 days) should not count towards sentence. Be warned.

### 14 Composition of the Court

Usually there will be a court of three judges. The Presiding Lord Justice or Lady Justice sits in the middle. To the left of the LJ as you face the Bench there will be a High Court Judge. To the right of the LJ as you face the Bench there will be another High Court Judge, or often instead a very experienced senior Circuit Judge (such as the Resident Judge and Honorary Recorder of a City). It is always 'My Lord' or 'My Lady' whichever judge you are addressing. If necessary, write this down at the top of your notebook to remind yourself!

### 15 Questions from the Bench

One or more of the judges will probably ask you questions. Don't be alarmed. This is probably a good sign. Answer the question straightaway before continuing with your submission. It is a good idea to jot down (or note on your laptop or ipad) which judge is sitting where, because you may have to refer to one of the judges by name if there have been exchanges to which you need to return in order to answer or develop a point. In that event the formula is (for example): 'May I return to the point made by My Lord Mr Justice Snooks a few moments ago? I submit that ...'

### 16 Coming to the point

The judges will have read all the papers in the case very thoroughly in advance. The Presiding Lord or Lady

You may need to tell the Court some background which is not apparent. The Court does not automatically have access to the DCS.

### 18 Making an offer

In a sentence appeal, the Presiding LJ may well make you an 'offer' along the lines of: 'We have reached a provisional view that the sentence was too long, and that a sentence of 2 years rather than 3 years would have been appropriate. Can you do better than that?' If you think you can do better, don't be afraid to say so, having thanked the Court warmly for the indication. But don't push your luck.

### 19 Enumerating your points

It is good psychology to identify and enumerate your best points at the outset. If you do, in just a few words each, I can almost guarantee that you will have the attention of the Court, pens poised, and they will write down what you say. Don't waste that opportunity.

### 20 Not a re-run of mitigation or jury points

Beware of the temptation to address the CACD as if you are making a plea in mitigation or a speech to the jury. Your task is to demonstrate why the judge in the court below got it wrong in some way, not to have second bite at the same cherry.

### 21 Do your homework

It goes without saying that you need to know your case inside out, factually and legally. Do check in *Banks on Sentence* or *Criminal Law Week* whether there are relevant recent sentencing cases which may assist the Court. Sometimes we find we are having to do counsel's work ourselves!

### 22 Enjoy it!

Appearing in the CACD can be a very exhilarating experience, provided you have prepared thoroughly and have thought carefully about what the Court may ask you. Enjoy it, and good luck!