

**57.21 Evidence Co-defendant's trial**

*R v Marsh and Cato* 2018 EWCA Crim 986 para 6 and 44 A judge should not make findings of fact based on evidence called in a trial conducted without the defendant present or represented which run counter to the mitigation or a basis of plea without informing the defence of their intention to do so, so that the defence can make submissions.

**57.28 Basis of plea Basic principles**

*R v Marsh and Cato* 2018 EWCA Crim 986 The defence served a basis of plea and the prosecution counsel said they took no issue with it and 'it wasn't contrary to their evidence'. The prosecution counsel then opened the case contrary to the basis of plea and the Judge departed from it too. The defence appealed. Held. We don't understand how it could be said the basis of plea wasn't contrary to the evidence. Had the prosecution not been prosecuting 18 defendants they would have sorted it out. The basis of plea was not signed by the advocates, as it should have been if agreed, so the Judge was free to ignore it. The prosecution made their case crystal clear in their opening. In our view, the defence had sufficient notice of the case that they had to meet. This ground of the appeal is dismissed.

Note: This seems contrary to the basic principles of sentencing. Defendants should not receive extra imprisonment because agreed documents are not signed. It is important that parties should be able to rely on what the prosecution say. A basis of plea should be checked in the same way whether there is one or 18 defendants. The excuse given that counsel didn't have time is no real excuse. Once the opening had been given, the Judge or the defence should have intervened. The fact that the defence knew when the opening was given what the case was is not the crucial issue. What was important is that the defence were denied an opportunity to have a *Newton* hearing (as the time for having one had passed) because they trusted what the prosecution said. If a judge wants to depart from an agreed basis of plea, the defence should be told, see 57.56. If the prosecution are: a) told what the defence case is, b) the difference between the accounts is significant, c) the prosecution don't ask for a *Newton* hearing, and d) the judge does not raise the issue, the defendant is entitled to be sentenced on his or her version of the facts, see 57.57. Ed.