# CHAPTER 6 - SOLEMN PROCEDURE

This Chapter does not attempt to fully set out the entire law and procedure in solemn procedure. Rather, guidance is contained in respect of a number of areas where practical guidance is required by Procurators Fiscal. For a more comprehensive statement of law and procedure in solemn matters Procurators Fiscal should consult Chapters 12 to 18 of Renton and Brown 6th Edition.

## 6.01 JUDICIAL EXAMINATION

Procurators Fiscal are encouraged to refer to Renton and Brown 6th edition 12:10 to 12:31 for a current statement of the law in relation to judicial examination.

Section 10 of the Criminal Justice (Scotland) Act 1995 amended section 20A of the 1975 Act, the provision dealing with judicial examination procedure. The amended section now forms section 36 of the Criminal Procedure (Scotland) Act 1995.

The principal effect of the amendment is to allow the prosecutor, in addition to asking questions of an accused at judicial examination designed to elicit any "denial, explanation, justification or comment" about the charges he faces etc, to ask questions designed to elicit any "admission" (section 36(1)). The purpose of the questioning must be to determine, inter alia, whether the accused's account discloses a defence. The provision no longer requires this to be a specific category of defence (section 36(2)(a)).

The amendment also imposes a duty on the prosecutor to investigate, within reason, any ostensible defence disclosed at judicial examination and provides that the sheriff shall make the accused aware of this at the start of the examination (section 36(6)(b), (10) and (11)).

It should be noted that the principles to which the prosecutor should have regard in framing his questions, now contained in section 36(5), remain unchanged, namely:

(a) the question should not be designed to challenge the truth of anything said by the accused;

(b) there should be no reiteration of a question which the accused has refused to answer at the examination; and

(c) there should be no leading questions.

**Section 36(1)**

The effect of the amendment to this section is intended, less to change the law on judicial examination than to clarify it. The Thomson Committee, whose recommendations formed the original basis of section 20A of the 1975 Act, saw one of the objectives of judicial examination procedure as being to enable the prosecutor to question accused about the charges they faced, so that they could admit or deny or offer any explanation, justification or comment in their defence. The reference to "admission" was omitted from the original Act and Lord McCluskey, in debate on the 1995 Act in the House of Lords, indicated that in his view this was an initial misdrafting of the provision.

Contrary to some opinion, therefore, the change does not increase the questioning power of the prosecutor, but clarifies the legal position somewhat. While the original provision did not exclude asking questions designed to establish whether an accused

admitted any of the averments, that has been the way it has been interpreted in practice.

Given that the new provision allows questioning designed to elicit "admission, denial, explanation, justification or comment" it appears that Procurators Fiscal can now be much more straightforward and direct in their questioning. Instead of asking, eg, "Do you deny stabbing ?", they can ask "Did you stab X?", "Do you know AB?", "Where you in X Street?", "Where were you?", "Who were you with?", etc. Procurators Fiscal should have regard to this when conducting judicial examinations.

**SERVICE OF JUDICIAL EXAMINATION TRANSCRIPTS**

Section 37(6) of the 1995 Act places an obligation on the Procurator Fiscal to serve the transcript of Judicial Examination within 14 days of the date of the examination.

Procurators Fiscal must ensure that they have appropriate systems in place to ensure that service is effected in an appropriate way and that, if there is a failure to serve, alternative arrangements can be made within the statutory time limit.

In the event that it does not prove possible to serve the transcript within the statutory time limit there is provision in Section 37(9) of the Act to apply for an extension of the time limit although the extension has to be granted by the High Court.

Where the circumstances require it the Procurator Fiscal should prepare a report for Crown Counsel outlining the circumstances and providing detailed information in relation to the appropriate dates. A draft application should also be prepared and the papers sent for Crown Counsel's consideration. In the event that Crown Counsel approve the application, then the application should be lodged with the Sheriff Clerk who will transmit the papers to the High Court where the High Court Judge will consider the application. In the event that the application is successful the Procurator Fiscal will be informed by Crown Office together with details of the new date within which the service must be effected.

There should be no additional delay in submitting a report to Crown Counsel since the Court may take into account such additional period as providing a justification for refusing the application to extend the time limit and it is therefore not appropriate for these matters only to be addressed with submission of the Precognition.

**DUTY TO INVESTIGATE OSTENSIBLE DEFENCE**

**Section 36(10) and (11)**

As regards the duty imposed on prosecutors to investigate any ostensible defence disclosed by the accused, this gives statutory force to what good practice already dictates.

The duty imposed by section 35(10) requires the prosecutor to "secure the investigation, to such an extent as is reasonably practicable of any ostensible defence disclosed during the course of the examination". Given that the section relates to examination "(whether the first or a further examination)" and that, if a first examination, the accused may emit a declaration, it would appear that the duty pertains also to a defence which may be disclosed during the course of a declaration.

Procurators Fiscal should ensure, therefore, that, where a defence is indicated in the course of a declaration or judicial examination, it is immediately investigated "to such an extent as it

reasonably practicable" (section 36(10)) and subject to the proviso that the duty imposed does not apply "as respects any ostensible defence which is not reasonably capable of being investigated" (section 36(11)). If the Police are instructed to carry out any such investigation, such instruction should be given in writing.

**CROWN OFFICE RESEARCH**

In 1994, Crown Office commissioned research on the use of judicial examination procedure. The research was on a small scale, involving a study of 303 High Court and 35 Sheriff and Jury examination transcripts, interviews with 9 Procurator Fiscal Deputes in 6 offices and with 4 Advocate Deputes. Its objectives were:

1. to analyse the use made of judicial examination by Procurators Fiscal in different offices and to examine the policies affecting that use in a sample of local offices;

2. to examine the effectiveness of judicial examination in eliciting a defence or other evidentially useful information; and

3. to explore the extent to which judicial examination transcripts are used at trial and their value as perceived by Procurators Fiscal and Advocate Deputes.

In relation to the first objective, the researchers found that use of the procedure by Procurators Fiscal in the 6 offices varied. Three offices made little use of the procedure - in effect only conducting judicial examinations in murder cases. The other offices held judicial examinations in all cases likely to go to the High Court and also in selected Sheriff and Jury cases. Even in these offices, however, use of the procedure was diminishing because of its perceived redundancy and also the resources involved in conducting judicial examinations compared with increased overall workloads.

In relation to the second objective, it was found that, in general, defences or other evidentially useful information were elicited in only a small percentage of cases.

As regards the third objective, the researchers found that Procurators Fiscal varied in the use they made of judicial examination transcripts in those cases where they were available. Advocate Deputes, on the other hand, made very little use of them at all, although they favoured holding judicial examinations in all High Court cases.

Procurators Fiscal and Advocate Deputes were agreed that the value evidentially of transcripts was limited.

**EFFECT OF NEW PROVISIONS**

The Lord Advocate is interested in assessing the impact of the provisions on judicial examination procedure and is therefore keen to encourage its use in appropriate cases with a view to monitoring its impact.

Procurators Fiscal are therefore instructed to give greater consideration when marking petition cases, to conducting judicial examinations.

Procurators Fiscal are reminded that consideration should be given to holding judicial examinations in cases where:

(1) the circumstances disclosed in the report indicate that a particular line of defence is likely to be adopted;

(2) the report discloses extra judicial admissions, particularly when these

have not been tape recorded; and

(3) in the view of the Procurator Fiscal, it is appropriate to give the accused the opportunity of stating his position in relation to a charge or charges.

## 6.02 FIRST DIETS IN THE SHERIFF COURT

Section 66 of the Criminal Procedure (Scotland) Act 1995 provides that where a case is to be tried in the Sheriff Court, a notice shall be served on the accused with the indictment calling upon him to appear in answer to the indictment at both a first and trial diet. Section 71 of the 1995 Act provides that at the first diet the court shall, so far as is reasonably practicable, ascertain whether the case is likely to proceed to trial and, in particular:

(a) the state of preparation of the prosecutor and of the accused with respect to their cases; and

(b) the extent to which the prosecutor and the accused have complied with the duty under section 257(1) of the Act (duty to seek agreement of evidence).

As with intermediate diets in summary proceedings, the court is empowered to ask the prosecutor and the accused any question in connection with any matter which it is required to ascertain. Accordingly, the first diet in Sheriff and Jury proceedings essentially serves the same purpose as an intermediate diet in summary proceedings. In addition, if a party has, not less than 2 days before the first diet, given notice to the court and to the other parties, the first diet may also be used by a part to:

(a) raise a matter relating to the competency or relevancy of the indictment;

(b) object to the validity of the citation;

(c) submit a plea in bar of trial;

(d) apply for separation or conjunction of charges or trials;

(e) challenge a special capacity;

(f) apply to the court to determine that the record of proceedings at judicial examination or part of the record should not be read to the jury;

(g) identify documents the truth of the contents of which ought to be admitted or any other matter which in the view of the party ought to be agreed; or suggest that there is some other point which could in the opinion of the party be resolved with advantage before the trial.

## 6.03 PRELIMINARY DIETS

Procurators Fiscal are encouraged to refer to Renton and Brown 6th edition at 17/08 to 17.28 to find an up to date summary of the law in relation to preliminary diets.

By virtue of section 66 of the Criminal Procedure (Scotland) Act 1995, a notice has to be served on the accused with the indictment calling upon him to appear in answer to the indictment at a trial diet in the High Court. There is no first diet in High Court proceedings. However, a party may apply to the High Court to hold a preliminary diet to determine any of the matters detailed in section 72 of the 1995 Act. These are the same matters which may be considered at a first diet in sheriff and jury proceedings on notice being given by one of the parties.

At a preliminary diet the court has to dispose of the matter specified in the notice

by which application was made for the preliminary diet. In addition, however, by virtue of section 73 of the 1995 Act, whatever the reason which prompted one of the parties to request that a preliminary diet be held, the court must also ascertain whether the case is likely to proceed to trial and enquire into the state of preparation of the parties and whether the parties have complied with the duty to seek agreement of evidence. In other words, although there need not be a preliminary diet in High Court proceedings, when there is such a diet it will be used by the court in exactly the same way as an intermediate or first diet to enquire into the state of preparedness of the parties.

## PROCEDURE AT FIRST OR PRELIMINARY DIET

Where the court concludes that the case is unlikely to proceed to trial the court is obliged to postpone the trial diet, and may fix a further first or preliminary diet. Alternatively, the court may adjourn the first or preliminary diet.

The accused is obliged to attend the first diet and, if he fails to do so the court may grant a warrant to apprehend him. Both the first and preliminary diet may proceed notwithstanding the absence of the accused.

## DUTY TO SEEK AGREEMENT OF EVIDENCE

Section 257 of the 1995 Act applies to both summary and solemn proceedings. It imposes a duty on the prosecutor and the accused (if he is legally represented) to identify any facts:

(a) which he would, apart from the section, be seeking to prove;

(b) which he considers unlikely to be disputed by the other party (or by any of the other parties); and

(c) in proof of which he does not wish to lead oral evidence.

Having identified these facts, the prosecutor and the accused must take all reasonable steps to secure the agreement of the other party to these facts. At the same time, the other party is under a duty to take all reasonable steps to reach agreement.

By virtue of sub-section (3) the duty applies:

(a) in relation to proceedings on indictment, from the date of service of the indictment until the swearing of the jury, or the date on which the accused intimates in writing to the Crown Agent that he intends to plead guilty and desires to have his case disposed of at once; and

(b) in relation to summary proceedings, from the date on which the accused pleads not guilty until the swearing of the first witness or, where the accused tenders a plea of guilty at any time before the first witness is sworn, the date when he does so.

At the intermediate diet in summary proceedings, or at the first or preliminary diet in solemn proceedings, the court is obliged to ascertain the extent to which the prosecutor and the accused have complied with these duties. Accordingly, it is to be anticipated that the court will ask the prosecutor whether he has identified any facts which he considers unlikely to be disputed by the other party, and whether he has taken any steps to secure the agreement of the other party.

## IDENTIFICATION OF FACTS UNLIKELY TO BE DISPUTED

The duty is to identify facts which are unlikely to be disputed by the other part, not to identify facts which should not be disputed by the other party. The fact that evidence would appear to be uncontroversial is certainly the starting point but it is considered that the Procurator Fiscal is entitled to have regard to the whole circumstances of the case, including his knowledge of the accused (or of his legal representative) in assessing whether the facts are or are not likely to be disputed by the other party. It should also be noted that the prosecutor (and the other parties) retain an absolute right to lead oral evidence if that is his wish. Sub-section (1)(c) was inserted with the specific intention of ensuring that a party wishing to lead evidence could not be prevented from doing so simply because the other party intimated to the court hat he was willing to agree the evidence. There will be occasions, especially with jury trials, where it is important to lead oral evidence even although such evidence could be agreed.

In view of the terms of section 257 of the 1995 Act, it is essential that the Procurator Fiscal identify evidence which is unlikely to be disputed by the other party and which he would wish to have agreed. Although the duty does not arise until the indictment is served or the accused has pled not guilty, the identification of facts can be done at any stage in the proceedings, for example, at the marking stage, following the pleading diet, or when preparing for the intermediate, first, preliminary or trial diet. To avoid duplication of effort, it is recommended that the identification of facts should be carried out at the same time as instructions are given to cite witnesses. Where there is an intermediate or first/preliminary diet, the Procurator Fiscal should identify these facts before that diet. There is nothing in section 257 which would prevent the prosecutor from waiting until immediately before the trial diet before complying with the duty. However, as the court, at such a diet, will wish to ascertain the extent to which the prosecutor has complied with the duty, it would be appropriate to do so before the diet.

The facts which are identified under section 257 of the 1995 Act should be noted on the case papers. This may be either a note of the witnesses whose evidence should be agreed, or of specified facts. **In summary cases the facts should be noted on the intermediate diet check list. In solemn cases, the precognition should contain a draft statement of the facts which the Procurator Fiscal has identified as being capable of agreement, and the statement of facts should be served on the accused along with the service copy of the indictment**.

## SECURING THE AGREEMENT OF THE OTHER PARTIES

Once the facts have been identified under section 257 of the 1995 Act, the prosecutor is under a duty to take all reasonable steps to secure the agreement of the other parties to them. It is to be anticipated that the court, at the intermediate or first diet, will wish to know what steps the Procurator Fiscal has taken to secure agreement. Although, as with the identification of the facts, there is no requirement that the reasonable steps should have been taken before the intermediate or first diet, the fact that the court is obliged to ascertain what steps have been taken, will lead inevitably to an expectation that steps will have been taken before the intermediate or first diet. It is considered that summary and solemn procedures require different approaches.

The first step which could be taken to secure agreement would be for the Procurator Fiscal to write to the other party

with a note of the evidence which he considered unlikely to be disputed and in respect of which he wished to reach agreement. At the same time, the Procurator Fiscal could provide the other party with a draft of a minute of admission or agreement (section 256 of the 1995 Act). While that may be the expectation of the court, such an approach has considerable resource implications, and a balanced judgement is required. It is to be anticipated that in many cases the approach to the other party will not result in the evidence being agreed, even although the evidence is uncontroversial and ought not to be disputed. Accordingly, in summary cases if a letter or draft minute has not been sent to the defence prior to the intermediate diet, it is considered that the duty under section 257 will be discharged if the Procurator Fiscal is in a position to respond to the court's enquiry by indicating that he has identified specific facts which could be agreed and that he is in a position to discuss these facts with the defence. However, this is not considered an appropriate approach in sheriff and jury proceedings, where steps should be taken before the first diet to seek the agreement of uncontroversial evidence. This could be done by providing the defence with a draft minute of agreement but the suggested course of action is to serve a statement of facts on the accused along with the service copy indictment (see below). The use of a statement of facts will also be appropriate in summary cases where the uncontroversial evidence is lengthy or complex.

In both summary and solemn cases, it would be appropriate, in the letter accompanying the list of witnesses, to remind the other parties of the duty placed on all parties by section 257 of the 1995 Act.

**6.04 PRELIMINARY DIETS - NON-CONTENTIOUS EVIDENCE**

Section 72 of the Criminal Procedure (Scotland) Act 1995 allows the court to order a preliminary diet in solemn proceedings on the application of a party to proceedings who is of the opinion that there are documents the truth of the contents of which ought in his view to be admitted, or that there is any other matter which in his view ought to be agreed (section 72(1)(c)).

It is envisaged that this provision will be of most value in cases of fraud, but it may be of use in any case where there is significant formal or apparently non-contentious evidence, in particular from witnesses who will require to travel some distance.

For the trial judge to play an informed role in the process he will require to be able to consider the evidence in question and to know that efforts have already been made to secure agreement.

In the sheriff court the normal approach should be for the Procurator Fiscal to draft a joint minute of admissions and/or agreement and forward it to the defence for consideration, as soon as possible after service of the indictment, ensuring that the relevant productions are copied to or available for examination by the defence at that time. In some cases it may be possible to draft a joint minute prior to indictment.

The application should wherever possible narrate that the documents or other matter proposed to be admitted are as set forth in an annexed draft joint minute of admissions and/or agreement and should (if need be by use of a further annex) refer to the specific production numbers. Where it has been thought appropriate to summarise the nature and effect of evidence in a letter to the defence agents covering the draft joint minute, or even to enclose copy witness statements, copies of these documents

should also be referred to in and annexed to the application. The relevant productions should be lodged in time for consideration by the judge prior to the preliminary diet (and should be available in court at the preliminary diet).

At the preliminary diet the court has to dispose of the matter specified in the notice by which application was made for the preliminary diet. In addition, however, by virtue of section 73 of the 1995 Act, whatever the reason which prompted one of the parties to request that a preliminary diet be held, the court must also ascertain whether the case is likely to proceed to trial or enquire into the state of preparation of the parties and whether the parties have complied with the duty to seek agreement of evidence. In other words although there need not be a preliminary diet in High Court proceedings, when there is such a diet it will be used by the court in exactly the same way as an intermediate or first diet to enquire into the state of preparedness of the parties.

## 6.05 STATEMENTS OF FACT

### (a) UNCONTROVERSIAL AND ROUTINE EVIDENCE - STATEMENTS OF FACT

Section 258 of the 1995 Act allows a party to prepare and sign a statement specifying facts (or facts set out in a document annexed to the statement) which the party considers are unlikely to be disputed by the other party to the proceedings. If such a statement is served on the other parties, and they do not serve a counter-notice challenging any of the facts specified or referred to in the statement, then the facts in the statement will be deemed to have been conclusively proved.

The relationship between this provision and the requirement, in section 257 of the 1995 Act, to take all reasonable steps to secure the agreement of evidence which is unlikely to be disputed, falls to be considered. As the service of a statement is not a procedure which leads to evidence being **agreed**, it cannot be said that the service of a statement is a reasonable step which should have been taken to secure the agreement of evidence. On the other hand, the fact that a statement has been served would presumably make it **unreasonable** to expect that steps should have been taken to secure agreement of the facts specified in the statement.

The service of a statement on the other parties is therefore a step which, if taken, would allow the Procurator Fiscal to maintain that he had complied with his duty under section 257 of the Act. It would not be reasonable, however, to require the Procurator Fiscal to routinely serve statements of fact on the other parties (but see guidance above at 6.3 in relation to sheriff and jury cases where, as a matter of policy, it is considered that statements of fact should be served with the indictment).

### (b) STATEMENTS OF FACT: PROCEDURE

Section 258 of the 1995 Act provides that a party to criminal proceedings may prepare and sign a statement specifying facts which that party seeks to prove and considers unlikely to be disputed by the other parties. A copy of the statement may then be served on the other parties. The statement may either specify the facts or refer to facts set out in a document annexed to the statement. Such a document might be either a witness statement or a documentary production. As the statement will be read to the jury in solemn proceedings, every effort must be made to make the statement intelligible and easy to follow. If the statement is served not less than 14 days before the trial diet, and not challenged in a notice served not more

than 7 days after service of the statement, then the facts specified or referred to in the statement are deemed to have been conclusively proved. Service of the statement may be effected by any of the methods by which a complaint or indictment may be served (Rule of the Act of Adjournal (Criminal Procedure Rules 1995)). These provisions do not prevent a party from leading evidence of circumstances relevant to, or other evidence in explanation of, facts specified or referred to in the statement. If, in the course of the trial, evidence emerges which has the effect of putting in doubt something contained in the statement, the court may direct that the presumption shall not apply. Where such a direction is made the trial will be adjourned unless all the parties otherwise agree.

## SECTION 76 PROCEDURE

### 6.06 REPORT TO CROWN OFFICE

Upon receipt of a letter in terms of Section 76 of the Criminal Procedure (Scotland) Act 1995 in respect of a case which has not previously been reported to Crown Office, the Procurator Fiscal will forward it to Crown Office immediately.

6.

### PURPOSE OF SECTION 76 REPORT

In compiling a Section 76 report it should be kept in mind that the purpose of the report is twofold:

1. to provide Crown Counsel with all the information required including a clear statement as to the sufficiency of evidence for them to give the instructions upon it; and

2. to provide the Procurator Fiscal or the Advocate Depute with all the information he will require to place before the court at the Section 76 diet. It should not be necessary for him to refer to any document other than the report when presenting the case in court (apart from the indictment and the copy list of previous convictions).

### 6.08 RESTRICTED OR CONDITIONAL TERMS OF SECTION 76 LETTER

Where a Section 76 letter is tendered and its terms are so restricted or conditional that the Procurator Fiscal is of the opinion that it will be refused by Crown Counsel there is no need for the matter to be reported immediately but the letter should accompany the proceedings when the case is reported by precognition and the circumstances should be referred to briefly in the history of the case included in the precognition.

### 6.09 SECTION 76 LETTER SUBMITTED AFTER PROCEEDINGS INSTRUCTED

If the case has already been reported to Crown Office and a Section 76 letter is received the following procedure should be noted:

When Sheriff and Jury proceedings have already been instructed but an indictment not yet served and a Section 76 letter is tendered in respect of all charges, Section 76 proceedings may be taken forthwith without reporting. Where a High Court indictment has not yet been served the plea should be reported forthwith to Crown Office. Where a Section 76 letter is not exhaustive of all the charges the case should be re-reported for Crown Counsel's instructions. Where an indictment has already been served it will not be necessary to serve a Section 76 indictment but the accused must be served with a notice to appear at a diet of the court in which the trial would have taken place, not less than four clear days after the date of

the notice. While the Appeal Court held in McKnight v HMA 1991 SCCR 751 that an induciae may be waived if no objection is taken in Section 76 cases, it made it clear that it is unwise to accept such a waiver because of the short induciae. The notice will be in the style of Form 10 I-B of the appendix to the Act of Adjournal (Criminal Procedure Rules) 1996. If an indictment has already been served, the Procurator Fiscal should, in appropriate cases, take steps to ensure that once the plea is tendered the witnesses are cancelled and the Sheriff Clerk is notified immediately so that jurors can, if appropriate, be countermanded. It will be a matter of judgement in each case whether these steps can be taken before the plea is recorded.

**SERVICE OF SECTION 76 INDICTMENT**

If no trial diet has yet been fixed and no indictment served, an indictment served on an accused who wishes to plead guilty under the Section 76 procedure need not contain a list of witnesses or productions. The accused in such circumstances, may be served with an indictment and a notice to appear after four clear days either at the High Court or the Sheriff Court accompanied by a notice in terms of Form 10.1-A of the Act of Adjournal (Criminal Procedure Rules) 1996. Where a Section 76 indictment is taken in the Sheriff Court, the Sheriff still retains the power to remit the case to the High Court for sentencing in terms of Section 195 of the 1995 Act.

## 6.10 SECTION 76 LETTER – CASE ALREADY INDICTED AT HIGH COURT

Where, however, the case has already been indicted for trial in the High Court, whether in Edinburgh or on circuit, the Section 76 diet will meantime always take place at the High Court in Edinburgh, notwithstanding the terms of any notice already served on the accused under Section 66 of the 1995 Act. If the case has already been indicted for trial in the Sheriff Court the Section 76 diet will take place in that court, with the Sheriff able to remit the case if he thinks fit.

## 6.11 DESERTION PRO LOCO ET TEMPORE

Section 76(3) makes provision for cases where an accused has submitted a Section 76 letter but when he appears at the diet he either pleads not guilty or pleads guilty only in part and the prosecutor does not accept such a restricted plea. In such cases the diet should be deserted pro loco et tempore and the case will be re-indicted later under normal procedure if no full indictment has been served or if the trial diet has been cancelled. If it is intended to proceed to trial on a full indictment which has been served it will be a matter of practicality whether the trial diet can proceed or whether a postponement should be moved for under Section 76(3). Where the diet is postponed under Section 76(3) the period of postponement does not count towards any time limit. Where it is not appropriate to invoke Section 76(3) the Procurator Fiscal should always consider whether it is necessary to seek an extension of the period of 12 months under Section 65. Such a motion should be made orally at the Section 76 diet. The Procurator Fiscal should also consider and report immediately to Crown Office on the need to extend the 80 and 110 day periods.

## 6.12 POSTPONEMENT OF TRIAL DIET

Where an indictment has already been served and a trial diet fixed and there are other accused named on that indictment who have not intimated their intention to plead guilty under the Section 76 procedure, if the plea of a co-accused tendered at the Section 76 diet is not

accepted the court may not exercise its power of postponement of the trial diet as provided in Section 76(3) since the other accused will not be present at the Section 76 diet.

The exercise by the court of the power of postponement of the trial diet in terms of Section 76(3) will only be competent where all the accused named in the indictment which has been set down for trial have been given intimation in terms of Section 76(1) and are present at the diet constituted under the provisions of that section.

**6.13**

If any application is to be made to a court to exercise its powers of postponement in terms of Section 76(3), that application must be made orally at the Section 76 diet. There is no right of appeal open to an accused where the court postpones the trial diet in terms of Section 76(3) even where the procedure is being governed by a time limit.

**6.14**

The order of the court postponing a trial diet under Section 76(3) and fixing a new trial diet will be endorsed on the record copy indictment by the Clerk of Court, authenticated by the signature of the presiding judge and entered in the record of proceedings. The order will have effect, in relation to the new trial diet, of a warrant for citation issued under Section 66 of the 1975 Act by the Sheriff Clerk or the Clerk of Justiciary as the case may be.

**6.15**

Where the trial is postponed at the Section 76 diet, there will be no calling of the case on the date fixed for the original trial diet.

**6.16**

An accused who pleads guilty under the Section 76 procedure may be called as a witness by virtue of Section 266 of the 1980 Act against any other co-accused named in the original indictment who proceed to trial.

**6.17**

In Section 76 cases where medical evidence is to be led in respect of an accused who appears to be suffering from a mental disorder or a physical condition which would affect sentence, the names of the doctors should be shown on a list of witnesses appended to the indictment.

Where there is any prospect that the court may make an order under Section 58 and/or Section 59 of the 1975 Act, arrangements should be made to have the doctor(s) present in court to give oral evidence as to the offender's mental condition.

**6.18 APPLICATIONS FOR EXTENSION OF 110 DAY PERIOD**

Procurators Fiscal should be aware that in terms of section 65(5) and (7) of the Criminal Procedure (Scotland) Act 1995 applications to extend the periods of 80 and 110 days in any solemn case may only be granted by a single Judge of the High Court. Difficulties have arisen in a number of sheriff and jury cases. Procurators Fiscal must have the terms of section 65 in mind and they should note, in particular, that a sheriff cannot competently consider or grant an application for extension of custody time limits.

In cases which have been indicted for trial and in which the defence make a successful motion to adjourn or postpone

the trial diet, whether at the first diet or at the hearing of an application for postponement, or at the trial diet, it may not in consequence be possible to commence the trial within the 110 day period. In these circumstances the Procurator Fiscal should obtain from the defence, in writing, their agreement to an extension, or at least have the matter canvassed before the sheriff when the motion is made to adjourn or postpone the trial diet. A report should be submitted immediately to Crown Office, giving full details of the procedural history of the case and, where it is not possible for any reason to adjourn or postpone the trial to another sitting or diet, details of the next available sheriff and jury sitting to which the case can be properly indicted, or at which the case can be brought to trial in terms of section 81 of the 1995 Act.

In determining the date of any sitting to which a case is to be re-indicted or brought to trial under section 81 Procurators Fiscal must consider the basis of the defence motion and have the defence make clear their position in court as regards the period which they desire. There is, of course, no point in adjourning the case to a date which is itself prior to the expected resolution of the difficulty which has provided the motion to adjourn.

The High Court does not look favourably on protracted extensions of the 110 day period and re-indictment should be regarded as a last resort in these cases. Procurators Fiscal must always have in mind the fundamental protection afforded by the period of 110 days and that any extension which is sought should be for the minimum necessary period. In reporting the circumstances to Crown Counsel Procurators Fiscal should highlight any reasons why the case could not have been adjourned or postponed to an earlier sitting, if one was available, or why section 81 procedure could not have been invoked, since this information will require to be put before the High Court.

Applications for extension will normally require to be dealt with very urgently and it will normally be desirable to ensure that the accused is present at any hearing on the application to extend the 80 and 110 day periods. Procurators Fiscal should therefore transmit by fax, in the first instance, a copy of a report to the High Court Unit at Crown Office so that the relevant application can be prepared and lodged with Justiciary Office at the earliest opportunity, with a view to obtaining an early date for the hearing. It may, in exceptional cases, be impossible to arrange for the attendance of the accused prior to expiry of the 110 days, where, for example, the difficulty arises on the 109th or 110th day. In these circumstances it may be possible to make an application for an interim extension to the date of a full hearing and that may also be necessary, retrospectively, in cases where the 80 day period has expired, but the High Court has disapproved of extension of the 110 days in the absence of the accused and every effort must therefore be made to deal urgently with any question of extension of custody periods.

It may also be necessary to make an application to extend the custody periods in cases where the accused has been remanded in custody for a pervious trial diet, but liberated after spending some period in custody and thereafter arrested after failing to appear at the trial diet. Procurators Fiscal should ensure that they have appropriate arrangements in place to ensure that they are informed immediately on the apprehension of a person in this category and, if the custody periods have started to run again, the new time limits should be calculated immediately so that any necessary application for extension of the 80 and 110 days can be made without any delay.

Procurators Fiscal should, however, normally proceed by means of a separate petition warrant in terms of the breach of bail provisions where this is possible. Where the accused has been released on bail and has failed to attend, the Procurator Fiscal should obtain a warrant in respect of the principal indictment and thereafter commence separate proceedings in respect of the contravention of section 27(7) of the 1995 Act by way of petition warrant

Any case of difficulty or uncertainty or urgency in relation to these matters should be brought to the immediate attention of the Head of the High Court Unit.

## 6.19 EXECUTION OF WARRANTS FOR APPREHENSION FOLLOWING THE FAILURE OF PERSONS TO APPEAR

In the application to the European Commission of Human Rights by Francis Dougan against the United Kingdom (Dougan v UK, application No 21437/93), on 11 January 1995, the Commission concluded that there had been a violation of the applicant's right, contained in Article 6.1 of the European Convention on Human Rights, to a "... hearing within a reasonable time ..." in the following circumstances.

> Dougan was charged with attempted murder but failed to appear for trial at the High Court in 1981. A warrant was granted for his arrest. The warrant was not sent to the police for execution. Instead the police were instructed by the Procurator Fiscal to arrest the applicant, without warrant, under Section 3(7) of the Bail etc (Scotland) Act 1980. The warrant was not issued to the police until 1984. In the event the applicant was not arrested until 1992 and the proceedings were concluded in 1993.

Following the issue of the Commission's report, the Government has given an undertaking to the Committee of Ministers of the Council of Europe that it is now and will continue to be the invariable practice in Scotland, that when an accused person fails to appear for trial at the High Court in Scotland, a warrant for his arrest is immediately passed to the police for execution.

Although the undertaking refers to High Court proceedings, the principle of not delaying in taking steps to bring the accused before the court applies also in relation to sheriff and jury proceedings and summary proceedings. It requires to be recognised that a wider range of options is available in the sheriff and district court (such as arranged appearance or surrender to warrant).

Before issuing a warrant for arrest following failure to appear at court in solemn proceedings, Procurators Fiscal must have regard to any period spent on remand prior to the granting of the warrant and to the effect this will have on observance of the time limits contained in section 65(4) of the Criminal Procedure (Scotland) Act 1995, in respect both of service of the indictment and commencement of the trial. Where the period already served on remand will prevent compliance with the time limits, Procurators Fiscal should obtain a fresh petition warrant for the apprehension of the accused under section 3(1)(a) of the Bail etc (Scotland) Act 1980 or section 27(1)(a) of the Criminal Procedure (Scotland) Act 1995, as appropriate, and forward that, to the police for execution. In any event, the number of days in custody should be calculated and recorded before the issue of any warrant.

Reliance should not ordinarily be placed on

the arrest provisions of section 28(1) of the Criminal Procedure (Scotland) Act 1995. There may, however, be exceptional circumstances where the accused person comes to the attention of the police unexpectedly, at a stage where it is not feasible to execute the failure to appear warrant and before there has been time to obtain a warrant under section 27 of the 1995 Act. In these circumstances, it will be appropriate for the accused to be arrested under section 28(1) of the 1995 Act.

In any solemn case where the non-appearance warrant is issued to the police for execution, the police must be instructed to notify the Procurator Fiscal forthwith of the arrest on such notification by name steps must be taken to ensure that appropriate action is taken for re-indictment of the case and, where necessary, for extensions of time limits to be sought.

Procurators Fiscal should ensure that the police conduct regular enquiries in an attempt to locate persons for whom warrants have been issued following non-appearance, particularly in solemn proceedings. It is important that the nature and extent of these enquiries should be recorded by them. Generally, Procurators Fiscal must review warrants regularly and request a progress report from the police. This will assist in ensuring that the police undertake the necessary periodic enquiries and also that a written record of it will be maintained.

## 6.20 REFERENCES TO THE EUROPEAN COURT

A lower court is entitled to seek a preliminary ruling from the European Court of Justice if the lower court considers that a decision on the question raised before it is necessary to enable the court to give judgement (Wither v Cowie 1991 SLT 401 at 405F). Procedure in this regard is governed by paragraphs 31.1 to 31.7 of the Act of Adjournal (Criminal Procedure Rules) 1996. Where a party wishes to raise a question on solemn proceedings his notice of intention to do so must be given to the court and to the other parties not later than 14 days after service of the indictment (31.2(1)). The court thereafter will reserve consideration of the question to the trial diet and after hearing parties may determine the question or may decide that a preliminary rule from the European Court of Justice may be sought. If the court determines the question the accused will then be called on to plead to the indictment if appropriate.

In all cases in which notice of a question of European Law is received the Procurator Fiscal should immediately contact Crown Office in order that the situation may be considered and instructions given about dealing with the question at the later diet. Reference should be made to the Appeals Unit in the first instance.

## 6.21

## COMMENT BY PROSECUTOR ON ACCUSED'S FAILURE TO GIVE EVIDENCE

Section 32 Criminal Justice (Scotland) Act 1995 has removed the prohibition against the prosecutor commenting on an accused's failure to give evidence. It should be noted, however, that neither the prosecutor nor defence may comment on the failure of the spouse of an accused to give evidence (section 264 of the 1995 Act). This section examines the consequence of that change and makes suggestions as to the appropriate approach which prosecutors should take when commenting on an accused's failure to give evidence.

The 1995 Act did not make any change to the position prior to trial, for example, at judicial examination or in answering

questions put by the police. It is already settled that an accused who gives evidence of something which could have been stated by him at his judicial examination in answer to a question competently put to him opens himself to the possibility of comment by the prosecutor, judge of a co-accused.

**THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995**

It is a basic principle that an accused cannot be compelled to incriminate himself. Accordingly, an accused cannot be compelled to give evidence. An accused is, however, a competent witness for the defence at every stage of the case (section 266 of the Criminal Procedure (Scotland) Act 1995).

Sections 141(1)(b) and 246(1)(b) of the Criminal Procedure (Scotland) Act 1975 prohibited the prosecutor from commenting on the failure of the accused to give evidence at his trial. Such comment was not necessarily fatal to a subsequent conviction where it did not influence the result of the case, for example, where the judge had given clear directions to the jury to disregard the prosecutor's comment (Upton v HMA 1986 SLT 594).

**COMMENTS BY THE COURT**

While the 1975 Act expressly prohibited the prosecutor from commenting on an accused's failure to give evidence, it did not prohibit the judge from commenting. It is settled law that the trial judge is entitled, in appropriate circumstances, to comment on the failure of the accused to give evidence and to draw that failure to the attention of the jury. The burden of proving that the accused committed the crime libelled against him rests upon the prosecutor throughout the trial. Although the burden of proof is on the prosecution, cases may occur in which the proved facts raise a presumption that the accused has committed the offence libelled, and in which, if he fails to put forward an explanation sufficient to create in the minds of the jury (or judge in summary cases) a reasonable doubt as to his guilt, they will be entitled to draw an inference of guilt against him.

There are several reported cases in which the jury had been instructed that the absence of an innocent explanation by the accused entitled them to draw a stronger inference of guilt from the prosecution evidence. It has been held, however, that any judicial comment should be restrained and a judge should not try to impress his own views on matters of fact on the jury. In Sutherland v HMA 1994 SCCR 81 the Lord Justice General stated "Any such comment must be carefully considered, lest a jury should receive the erroneous implication that they are entitled to treat the fact that the accused had not entered the witness box as a piece of evidence which supports the case made by the prosecution. But it is recognised ... that where there are facts relevant to the issue of guilt which in their entirety are within the knowledge of an accused alone, such comment is both competent and proper, provided always that it is made with restraint".

It has also been held that any comment by the judge should not be reiterated or re-emphasised. In Scott (AT) v HMA 1946 JC at page 98 Lord Moncrieff states "... such comment, if made by the judge, should, at most, be incidental comment and should in no case be reiterated and emphasised".

It has also been accepted that the judge must be careful to ensure that the jury is not led to believe that silence is evidence against the accused, i.e. that silence provides corroboration. The judge should avoid giving the jury the impression that they are entitled to treat the fact that the accused has not entered the witness box as additional corroboration, or worse, as an

additional piece of evidence which can be added to a body of evidence which would otherwise have been insufficient to satisfy the jury that guilt had been established beyond reasonable doubt.

**SECTION 32 CRIMINAL JUSTICE (SCOTLAND) ACT 1995**

The Thomson Committee on Criminal Procedure in their second report (1975, Cmnd 6218) recommended that the prosecutor as well as the judge should be allowed to comment on the fact that the accused had failed to give evidence to counter the prima facie case against him. This recommendation has now been implemented by section 32 of the 1995 Act which has repealed sections 141(1)(b) and 346(1)(b) of the 1975 Act.

The accused is still entitled to remain silent and the judge or jury is still entitled to draw from his silence such inferences as appear proper. All that has changed is that the prosecutor may now comment on the accused's failure to give evidence. Where the prosecutor exercises his right to comment, it is to be anticipated that the judge in his charge to the jury will be obliged to address the issue of what inferences can properly be drawn from the accused's failure to give evidence.

**6.22 EXERCISE OF THE RIGHT TO COMMENT**

The existing case law on the judge's right to comment is relevant to a consideration of the circumstances and way in which it would be appropriate for the prosecutor to comment.
During the passage of the Criminal Justice (Scotland) Bill, the then Lord Advocate, Lord Rodger of Earlsferry described the use which would be made of the freedom to comment:

> "the prosecutor will comment only with restraint because of course he must have regard to the fact that as the law has been laid down it is only with restraint that this can be said to a jury and it is only in special circumstances that it can be said. If he goes further than that, if he says something which goes beyond that, it will be the judge's duty to correct what the prosecutor has said and to give the proper direction to the jury. If he should fail to do so, or, in certain circumstances, if the appeal court thought that what was said by the prosecutor was so outrageous, then presumably the matter could be the basis for a ground of appeal. Where the law itself only allows comments with restraint, and only for inferences to be drawn in narrow circumstances, it would be a foolish prosecutor indeed who went further than that."

-

**6.23 NOTIFICATION TO VICTIMS OF RELEASE OF PRISONERS**

In the White Paper on Crime and Punishment the Government announced its intention of introducing a Scheme to notify victims of violent crime of the release of their assailants from custodial sentences.

A Scheme has now been devised and will operate on a pilot basis for an initial period of one year, commencing **1 April 1997**.
The Scheme will apply to victims of crimes that involve a violent of sexual element, including crimes of harassment, where the offender is sentenced at the High Court to a term of imprisonment/detention of 4 years or more.

The Scheme will involve 2 core stages. The first stage is the identification of eligible

victims and the provision for the first stage. The Scottish Prison Service has undertaken to accept responsibility for the second.

As regards identifying appropriate victims, Procurators Fiscal are entitled to use discretion in individual cases. There may be considerations which mean that otherwise eligible victims should not be included within the Notification Scheme, for example, if there is reason to believe that notification might lead to the commission of a further offence because an offender may be at risk from a victim. In addition, there maybe cases where it is appropriate to provide notification to persons who are not victims but who are, for example, relatives of deceased victims or of victims who are incapacitated, child victims, victims with learning difficulties or other vulnerable victims.

In practice, therefore, after a sentence of 4 years or more has been imposed on an accused person at the High Court, an assessment will require to be made of whether the victim should be given the option of opting in to the Scheme. Only exceptionally should the victim not be given that option and the reason for a decision not to give the victim the option must be recorded.

If a decision is made that the victim should be included, a letter should be sent to him/her immediately after the sentence has been passed. The letter explains the Scheme and how to access it. It also gives the victim the option of changing his/her mind about receiving notification and provides information about what to do if there is a change of address before notification is received.

Appeals

In addition to the above, it will also be necessary to write to the victim where the accused is granted interim liberation.

Although the Procurator Fiscal has no locus to be heard on interim liberation applications, he is best placed to assume responsibility for informing appropriate victims where applications are successful and that this should be done at the earliest opportunity after a hearing.

In an effort to establish procedures for ensuring that Procurators Fiscal are made aware as soon as possible of the granting of interim liberation applications in the sheriff court, Scottish Courts Service have agreed to ensure that Sheriff Clerks copy bail orders in all such cases to the Procurator Fiscal without delay (whether or not the Procurator Fiscal was present in court when the application was heard).

In relation to High Court matters, and appeals against refusal of interim liberation, the trainee in the Appeals Section at Crown Office has responsibility to notify offices of the outcome and it has been emphasised that this be done as soon as possible by telephone on the day of the hearing and followed up by a letter.

Procurators Fiscal should ensure that procedures suitable for their office are in place for information about the granting of interim liberation applications, whether at the first instance or on appeal, to be communicated to relevant victims without delay.

Where interim liberation is granted to a prisoner in a case where the victim has been given the opportunity to opt in to the Notification Scheme, a further letter should be sent to the victim advising of the interim liberation release.

Commencement of Scheme

As indicated above, the Scheme applies to cases in which sentences of 4 years or more are passed on or after **1 April 1997**.

Letters must therefore be sent to appropriate victims in each qualifying case after that date.