ISBN 0 9505247 8 6

A REPORT BY JUSTICE

The Truth and the Courts

Written Evidence to the Royal Commission on Criminal Procedure (Part II)

95a Chancery Lane, London WC2A 1DT
01-405 6018

A REPORT BY JUSTICE

The Truth and the Courts

Written Evidence to the Royal Commission on Criminal Procedure (Part II)

LONDON
JUSTICE
FEBRUARY 1980

This Report has been prepared and published under the auspices of the JUSTICE Educational and Research Trust

ISBN 0 9505247 8 6

Printed in Great Britain by E & E Plumridge Limited of Linton, Cambridge, England

JUSTICE

British Section of the International Commission of Jurists

The following members of JUSTICE working parties took part in the preparation of our Evidence:

Bramwell Bartlett
Richard Beddington
Patrick Bucknell
Anthony Burton
Christopher Critchlow
Stuart Elgrod
Jeremy Fordham
Andrew Geddes
Robert Hardy
Christopher Hordern, Q.C.
David Howard
Richard Jenkins
Alan Levy
Gavin McKenzie
Barry Press
Alec Samuels, J.P.
Tom Sargant
Stephen Solley
Peter Weitzman, Q.C.

This Report has been endorsed and approved for publication by the Council of JUSTICE

CONTENTS

	page
Introduction	1
Pleas of Guilty and Changes of Plea	4
Mutual Disclosure	11
Evidence of Identification	19
Evidence and Statements of Co-Accused	25
Court Witnesses	29

INTRODUCTION

1 This is Part II of the evidence submitted by JUSTICE to the Royal Commission on Criminal Procedure. The first part, published in June of last year under the title *Pre-Trial Criminal Procedure*, covered police powers of arrest, detention and interrogation, the admissibility of verbal statements and the question of whether prosecutions should be initiated and carried through by the police or by some independent prosecuting agency.

2 In respect of powers of detention and interrogation, our most important recommendation is that alleged verbal admissions should not be admitted in evidence at the trial unless they have been authenticated by a magistrate, or by a solicitor or by a system of tape-recording. The object of this recommendation was threefold, viz:

(a) to prevent the fabrication or embroidery of suspects' statements,

(b) to eliminate the temptation for the police to hold a suspect overlong in custody and to bring improper pressures to bear on him in the hope of obtaining some kind of admission,

(c) to cut out the immense amount of time now wasted at trials by arguments as to the admissibility and genuiness of statements adduced in evidence.

We took the view that anything less than a statutory exclusion of unauthenticated statements would bring about no real improvement in the present unsatisfactory situation.

3 It is however an integral part of our proposals that

(a) The police should be allowed adequate time for questioning suspects;

(b) Any refusal to answer questions would be recorded and reported to the court of trial;

(c) The accused would lose his present right to make an unsworn statement from the dock.

4 As regards the power to prosecute, we have recommended, as we had done in 1970, that decisions to prosecute in other than minor cases should be taken out of the hands of the police and entrusted to independent regional prosecuting agencies under the general supervision and control of a Department of Public Prosecutions. Our reasons for making this recommendation were again threefold, viz:

(a) At present, the whole process of the investigation, the interviewing of suspects and potential witnesses, the gathering and testing of scientific evidence and the selection and presentation of all the prosecution's evidence is in the hands of the police and their prosecuting agents. Even where prosecution solicitors and

counsel are consulted, the police are legally their clients and can bring pressure to bear on them to secure that their wishes are carried out.

(b) In consequence of the above, a case may be brought to trial without the conduct of the investigation, or the selection and presentation of the evidence, having been at any time subject to independent scrutiny or control.

(c) The power of the police to initiate or not to initiate prosecutions gives them undesirable opportunities to bargain with suspects and leaves the door wide-open for corruption.

5 The outstanding characteristic of an English criminal trial is that it is not an objective enquiry into truth based on all the available evidence, but a contest between the prosecution and the defence to prove to the satisfaction of the jury on the evidence put before it that the prisoner in the dock has committed the offence of which he is accused. The contest is governed by rules and the Court acts only as referee. A trial judge may not openly take sides but may intervene by way of question or reproof and decides all matters relating to the admissibility of evidence.

6 Over the years an elaborate system of rules has been devised to safeguard the accused from unfair practices on the part of the prosecution and from the admission of unreliable evidence. On balance these rules can be said to favour the accused, but their observance depends to a considerable extent on the integrity and fair-mindedness of everyone engaged in various stages of the process and on the way in which the trial judge uses his discretion and sums up the evidence to the jury.

7 Furthermore, the calling of witnesses and the production of scientific evidence lies within the discretion of counsel for the prosecution and the defence. The Court has a residual power to call witnesses whom neither side wants to call, but the use of this power is rare and has been frowned upon by the Court of Appeal. On the defence side the accused is at no stage of the investigation or the trial under any legal obligation to answer questions or to go into the witness box. He can remain silent throughout the whole process and leave the prosecution to prove its case against him.

8 The result of all this is that there are trials in which the facts put before the jury are like the tip of an iceberg in relation to other important material which is available but not disclosed, and it is not difficult for the innocent to be convicted and the guilty to be acquitted. An unjustified acquittal means that a criminal may remain at large and that the police are frustrated and tempted to bend the rules. The conviction and imprisonment of an innocent man is something which we should seek to avoid at all costs and which is made even more serious by the difficulty of establishing innocence, either on appeal or by a petition to the Home Secretary, once the jury has pronounced its verdict. This difficulty is virtually insurmountable when the miscarriage of justice has been

brought about by police malpractice or by the failure of the defence to call evidence that was available. The case recounted in paragraph 77 below provides an example of this.

9 Over the years the main purpose of the reforms proposed by JUSTICE committees has been to ensure that, within the framework of the accusatorial system, all the available and relevant evidence of the crime and the accused's connection with it is brought to the knowledge of the jury and presented in its most reliable form. The recommendations referred to above are designed with this purpose in mind. The recommendations in this second part of our evidence deal with the preparations for trial and some aspects of the trial itself.

PLEAS OF GUILTY AND CHANGES OF PLEA

10 Both in a Magistrates' Court and in a Crown Court a defendant may apply to the Court to change his plea. A change from not guilty to guilty is normally accepted. It presents no problems and no injustice need arise from the procedure, provided the change is not the result of improper pressure and the possible consequences are fully understood by the defendant.

11 In a Magistrates' Court a defendant who has pleaded guilty may ask to change his plea (or the Court may invite him to change it) at any time before sentence has been passed. If he is committed to the Crown Court for sentence he may ask to change his plea at any time before sentence is passed by that Court. On an application for change the Court dealing with the defendant has a discretion to allow the change if justice requires that it should be permitted.

12 However, if a defendant wishes *after sentence has been passed* to change his plea from guilty to not guilty, he can do so only if he appeals to the Crown Court and shows that his original guilty plea should not have been accepted because it was "equivocal" i.e. although he said "guilty" when the charge was put to him, he also put forward facts inconsistent with that plea.
Thus Archbold, 39th Edition, para. 1367b states:
"If a plea of guilty tendered in a Magistrates' Court was an unequivocal plea (i.e., a plea which could not be described as a "guilty but" plea), then, once sentence has been passed by the magistrates... and the conviction is complete, it is too late for any court to entertain an application for a change of plea. However the Crown Court does have the right to enquire into the position of whether or not the plea entered before the Magistrates' Court was an equivocal plea."
If a change of plea is allowed the case is remitted back to the Magistrates' Court to be tried.

13 The scope for change of plea on the ground of equivocality is however very limited and decided cases show that, after sentence has been passed, leave to change pleas of guilty have been refused in cases where:

(a) the defendant was not legally represented,
(b) he pleaded under a misapprehension as to the law or the facts,
(c) he pleaded on the mistaken or negligent advice of his solicitor or counsel.

We take the view that this is too restrictive and can result in injustice.

14 Similarly, there is a right of appeal to the Court of Appeal after a plea of guilty in the Crown Court, but it will entertain such an application only if it is satisfied that:

(a) the appellant did not appreciate the nature of the charge or did not intend to admit that he was guilty of it, or
(b) he was subjected to improper pressure by his counsel, or, when pleading, had lost his power to make a voluntary and deliberate choice, or
(c) there was unlawful plea-bargaining, or
(d) on the known and admitted facts he could not have committed the offence or be guilty in law of the offence charged.

The onus of proof effectively lies on the appellant, and the allowing of such appeals is extremely rare. In respect of (a), the appellant has to prove a state of mind. In respect of (b) and (c) the evidence of defending counsel is bound to be given greater weight. In respect of (d) the procedure of the Court of Appeal is not geared to the investigation and ascertainment of fact. If the Court of Appeal does allow the appeal, it will send the case back to the Crown Court for a new trial.

15 The virtual finality of a guilty plea, particularly if it has been upheld on appeal, is increased by the refusal of the Home Office to go behind it, even if substantial new evidence pointing to innocence comes to light. It will normally do so only for technical reasons, for example when a road sign is subsequently found to have been incorrectly sited.

16 Although we accept that the majority of pleas made in both the Crown Court and in Magistrates' Courts are correct, we know from our own experience and from the evidence in the files of JUSTICE that there are a significant number of cases in which persons have pleaded guilty because of inadequate knowledge or understanding, and should not have been allowed to do so. By the very nature of the problem, not many cases come to light in which it is later established that the accused was not guilty. But we are seriously concerned about the injustices which can arise when incorrect pleas of guilty are made and accepted. The dangers are not so great in the Crown Court, primarily because of the greater availability of legal aid and of the longer time for preparation and appraisal of the merits of the case. But in Magistrates' Courts the dangers are very real and ever present.

Reasons for Incorrect Pleas

17 There is good reason to believe that wrong pleas of guilty are sometimes induced by ignorance of the law on the part of suspected persons. Very few of them understand that the prosecution must prove all the constituent elements of the offence of which perhaps the most important is the concept of *mens rea*. When a police officer asks a question like, "Did you do it?", or "Did you take it?", the answer may well be "yes", but the suspect may not have had any dishonest intention. Such an admission would not constitute guilt but it might well lay the foundation

NOTE: Much of the argument in this section of our evidence and some of our recommendations are based on an unpublished study of the problems of pleas of guilty made by our Criminal Justice Committee in 1972.

for a subsequent unjustified plea of guilty.

18 This is particularly important when one is dealing with juvenile defendants. If, in accordance with the Judges' Rules, a parent or social worker is present, as is frequently the case, those persons may not have sufficient knowledge of the law and suggest to the juvenile that he plead guilty.

Source of Pressure

19 There are many factors which help to create pressure on an accused person to plead guilty, even though he may know or believe that he is innocent.

(a) It is natural for the police to hope that there will be a guilty plea and to advise the defendant to enter one. It saves them the time and trouble of collecting evidence and presenting it in court. They may be content to have caught and brought to court the man they think is the offender and therefore willing to make things easier for him if he pleads guilty.

(b) Courts are known to be likely to pass a lighter sentence after a plea of guilty than after a contested trial. Such a plea may indicate genuine contrition, save prosecution witnesses, especially women and children in sex cases, from the ordeal of cross-examination, save the time of the Court and generally be in the public interest.

(c) A judge or magistrate may not give more than the norm for pleading not guilty, but he may give less than the norm for pleading guilty. For this reason, when the evidence against an accused appears likely to secure a conviction, counsel may sometimes point out to a client the potential advantages of pleading guilty even though he may have protested his innocence.

(d) Some prosecuting authorities are inclined to bring alternative charges relating to the same offence, e.g., reckless driving and careless driving, in the hope that the defendant will plead guilty to the lesser charge rather than run the risk of being found guilty of the greater. Unlike juries, magistrates cannot convict of a lesser offence unless it is specifically charged.

(e) A person charged with a minor offence, especially a motoring offence, may well take the view rightly or wrongly, that the Court is likely to accept police evidence whatever he says and that it is not worth spending time and money to contest the charge.

(f) A person of good character and standing, when faced with a charge of indecency or dishonesty, or assault, may well be tempted to try to avoid publicity by pleading guilty in a Magistrates' Court.

(g) An accused person may be unable to put forward a true and valid defence without disclosing matters, not necessarily criminal, which he wants to keep hidden either in his own interests or those of relatives or friends.

(h) Occasionally he may deliberately decide to take the blame in order to shield a relative or friend, or do so because of intimidation by his more powerful criminal associates.

(i) A plea of not guilty in a Magistrates' Court inevitably results in the case being adjourned for anything up to six months. If the defendant fears he may be refused bail or does not want the charge hanging over his head indefinitely, he may plead guilty so that the matter can be dealt with there and then, particularly if he has been advised that he is not likely to be given a custodial sentence.

20 Apart from the pressures already referred to, the pressure of being in custody makes a decision as to plea difficult to reach objectively. The desire to be released frequently overrides any consideration of the effect of being convicted. In a Magistrates' Court, there are frequent cases of persons who have been arrested the previous night, kept in custody for one reason or another and then required to plead before having full knowledge of the facts. For example, through an excess of alcohol a defendant may have no memory of the incident and plead guilty unequivocally on the basis of the information which has been given to him by the police. Inevitably the questions of whether to exercise the right to elect trial by jury and what plea to make are taken on that first hearing. We know of one Magistrates' Court in Inner London which has a stated policy of not granting legal aid to anyone on their first appearance on a shop-lifting charge but still requires the defendant to make his election and to plead. Duty Solicitor schemes do mitigate the problem but pressures on Duty Solicitors (who, for example, in Inner London are only permitted to see defendants in custody) mean that they do not provide the necessary cover to ensure that all persons make the correct plea. In any event, some of the pressures will result in legal representatives not receiving accurate information upon which to advise. Further evidence may come to light subsequently to prove innocence. But there is no way in which that evidence can be raised at a later stage and the plea changed, save in the limited circumstances referred to above.

21 The question of plea-bargaining is also relevant and there is evidence to suggest that, despite the guidelines laid down by the Court of Appeal in R v Turner,[1] pressure is still being placed on defendants to plead guilty to lesser charges even though they may protest their innocence. The findings by John Baldwin and Michael McConville recently published by Martin Robertson in the Law and Society series, show that there is need for further research in this field and that the number of cases may be greater than is generally supposed.

22 If, as we believe, there are many more cases of defendants unjustifiably pleading guilty than is generally recognised, then existing

[1] [1970] 2 Q.B. 321.

provisions for allowing them to change their pleas, or to have them subsequently annulled, are quite inadequate, as is the manner in which they are invoked. If any one of the pressures or considerations we have listed has caused an innocent or partly innocent defendant to plead guilty, his plea may well be regarded as unequivocal and he will have no effective right later to challenge the recorded verdict.

23 *We therefore recommend that a person who has pleaded guilty, should be allowed to change his plea* provided he can show (the burden of proof being on him) that there are reasonable grounds for believing that he had a valid defence and can satisfy the Court that he pleaded in ignorance or because of some misunderstanding or by reason of some circumstance (e.g. the fear that he might be remanded in custody) which in truth vitiated his free decision or judgment. The Court should have an overriding power to order a trial when circumstances indicate that it would be just to do so.

24 We further recommend that, in considering petitions based on new evidence after pleas of guilty, the Home Office should have regard to the considerations outlined in the preceding paragraphs.

Prevention of Unjustified Pleas of Guilty

25 We take the view however that it is more important to prevent unjustified pleas of guilty to be tendered and accepted than to provide means of remedying them after the event, and to this end we have a number of further proposals to make.

26 A frequent cause of injustice lies in the failure to make proper use of the procedure and safeguards in some Magistrates' Courts when pleas of guilty are tendered. The charge is put to the defendant. After he has pleaded, the facts of the case are outlined by the prosecution and the defendant is invited to comment on them. If he accepts the facts without comment then the police officer is asked if anything is known. The defendant is then asked to mitigate and the Court proceeds to consider the question of an appropriate sentence or of reports which may need to be obtained.

27 If, on the other hand, he decides to put his version of events, it may emerge that he may not have committed a criminal offence or that he has a possible defence. The kind of case we have in mind is one where the defendant says he did not know the goods were stolen, or he had a legitimate use for the offensive weapon, or he did not intend permanently to deprive the owner of the article found in his possession. In such cases it is the duty of the Court to advise the defendant to withdraw his plea and try the case as a plea of not guilty, or, more desirably, to adjourn the case, grant legal aid and arrange for the case to be tried by another bench. A bench with an experienced clerk, or a stipendiary magistrate, will immediately spot these cases and not allow them to proceed on a guilty plea. But an inexperienced lay bench with an

inexperienced clerk may miss them, or the defendant may fail to mention the vital point.

28 It would appear that, for the above reasons, there may not always be sufficient consideration of the facts before a plea of guilty is accepted and the case finally disposed of, and that the courts are not always alert to the possibility of a plea of guilty being incorrect.

29 The unpublished report of the JUSTICE Committee on *Pleas of Guilty* made a number of detailed proposals designed to remedy the defects we have described, and they were elaborated in a later published report entitled *The Unrepresented Defendant in Magistrates' Courts*, and in the JUSTICE Evidence to the James Committee. In principle they would provide that:

(a) all charges and summaries should contain sufficient particulars to indicate in clear language what are the essential elements of the charge, and the facts on which the prosecution will rely. This is already done in the majority of Road Traffic cases.

(b) whenever it is practicable, the defendant or his solicitor should be provided with the statements made by prosecution witnesses in time for them to be studied before the defendant is required to make his plea.

(c) in all cases the prosecution should state its case briefly in open court after the charge has been put and before the defendant is asked to plead or make his election.

(d) when the defendant is not represented, it should be the duty of the Court to satisfy itself that the defendant understands the nature and extent of the charge and is aware of any defence to it.

(e) the defendant should be told that he must make his own free choice, and, after a plea of guilty, he should be specifically asked a question along the following lines:
"Are you pleading guilty entirely of your own choice and not because of any pressure to do so?"
If there is the slightest doubt, a plea of not guilty should be entered.

Exploration of Facts after a Plea of Guilty

30 There are cases in which a defendant rightly pleads guilty to an offence but wants to challenge the police version of events in respect of the part he is alleged to have played or the remarks he is alleged to have made when arrested. He or his defence lawyer may be taken unawares by matters of which he has no prior knowledge and be unable to cross-examine the police officer to any effect. If a plea of guilty has been indicated in advance, then the arresting officer may not be available in court for questioning. Our present system does not provide for a proper judicial investigation into the part played by the defendant and his

degree of guilt, such as takes place in jurisdictions in which initial pleas of guilt are not accepted, and the Court too often has to depend on the unsworn evidence of police officers. This criticism applies to Crown Courts as much as it does to Magistrates' Courts.

We therefore recommend that if, after a plea of guilty, there is any dispute or doubt about the part played by the defendant, then the matter should be properly resolved and if necessary both the defendant and the prosecuting police officer should be examined on oath.

MUTUAL DISCLOSURE

Introductory

31 We have assumed that the objects to be achieved by any changes in procedure in this area are twofold:

(i) to ensure that, as far as possible, the course of justice is not hindered by the failure of the prosecution or the defence to appreciate in time the nature of the issues which eventually fall to be decided and the evidence which is relevant to them, and

(ii) to avoid unnecessary expenditure of time, energy and expense in preparation or at trial on matters which are either irrelevant or not really in dispute.

32 However, these objects must not be achieved by means which invade the defendant's fundamental right to require the prosecution to prove its case against him and they must be seen against a background of the difficulties which at present usually confront the defence in preparing a case for trial.

33 The prosecution has far greater resources available to find and produce evidence at court and, while it is right for society to provide its law enforcement agencies with the maximum resources to fulfil its criminal detection and prosecution functions, it is also right, in order to ensure public confidence in the administration of justice, that by the time a matter comes to trial the defence has had sufficient opportunity to locate and produce all the evidence relevant to the defence case.

34 The preparation of the defence in England and Wales is undertaken by a relatively small number of solicitors in private practice who undertake criminal work, aided by independent experts. The funds for the payment of these agencies is primarily provided by the Government under the legal aid system but no administrative support is granted and there is no guarantee, for example, that the costs of expert witnesses will be reimbursed to the defence solicitor. (See para. 50)

35 The prosecution, on the other hand, has at its disposal a comprehensive range of experts in government service. The resources of the prosecution in finding witnesses and getting them to court are far greater than those of defence solicitors who at present are finding this particular aspect of preparing a case perhaps the most difficult of all.

36 The prosecution sometimes refuses or ignores requests by defence solicitors to make available certain information which it is desirable in the interests of justice that the defence should have. We have in mind such matters as:

(i) notes and records made at the police station in respect of a particular defendant, including antecedent forms, and
(ii) the identity of police officers present at given times.

In relation to other evidence, such as documentary exhibits, there is sometimes unnecessary delay in producing them.

Disclosure by Prosecution

37 In theory the prosecution evidence should be available to the defence in good time before the committal proceedings, or in good time for summary proceedings. In fact this is often not the case.

(i) In many cases the prosecution fails to serve notice of its evidence until the day of the committal. The defendant is thus faced with the choice of delaying the committal and so the subsequent trial by obtaining a remand or of proceeding without prior knowledge of the evidence.
(ii) The prosecution frequently exercises the right to serve additional evidence. It is by no means unusual for such evidence to arrive in the course of the trial itself.

38 The prosecution will, in certain circumstances, have the right to give evidence in rebuttal. The circumstances in which individual judges will exercise their discretion to permit the giving of such rebuttal evidence may vary very widely.

39 Even where the prosecution has disclosed the whole of the evidence on which it proposes to rely, it does not follow that the nature of the prosecution case can be seen by the defendant with sufficient clarity to enable him properly to prepare his defence. In most simple cases, for instance in almost all burglary cases, the issues will no doubt be clear. At the other end of the scale in a conspiracy to defraud it may be very difficult for the defendant to know how the case will be put against him. Even in theft, the prosecution's case may be by no means clear from the evidence, for instance where the theft arises out of a general deficiency, which is not at all uncommon.

40 It almost invariably happens that the prosecution in the course of its inquiries collects evidence, particularly in the form of witness statements, on which it does not propose to rely. There may be various reasons for such decisions. Sometimes they are tactical and even where the decision is based on what the prosecution regard as fair it may appear in a very different light to the defence. The present position with regard to the defence's right to see such statements is uncertain and unsatisfactory. We can see no reason why the defence should not have a statutory right to see all statements taken by the police subject only to an overriding power, which should be exercised by a judge, to exclude the right in the case of specific witness statements where it can truly be shown that disclosure would be contrary to the public interest.

Disclosure by the Defence

41 At present defendants are under no obligation (save for the provisions relating to notice of an *alibi*) to disclose any part of the evidence which they may give, or the nature of any defence upon which they may rely. This is inherent in the defendant's right to reserve his defence until he is put upon his trial, which JUSTICE regards as a fundamental feature of our system of criminal justice. However, we recognize that in practice the exercise of this right can result in the prosecution being obliged to call evidence or bring witnesses to court to prove matters which turn out not to be in issue at all or to achieve a technical advantage, with the result that time is wasted and much unnecessary expense incurred. Also, although in general the prosecution has the fullest foreknowledge of the evidence the defence is likely to put forward, there are occasions when the nature of the defence developed at the trial is such as to take the prosecution by surprise, and on some such occasions the prosecution is, as a result, unable to rebut a defence which, with prior notice, it could in fact have rebutted. The problem is how to avoid the waste of time and expense and injustice to the prosecution without undue invasion of the fundamental rights of defendants.

42 There are at present procedures available which can be used to alleviate some of these defects in the operation of the system, but which in practice achieve little. The underlying reason for the failure of these procedures is the fact that for various reasons attention is not directed to the crystallization of the issues at an early enough stage.

43 Thus, although careful use of the conditional witness order should eliminate the attendance of unnecessary witnesses, and could often indicate to the prosecution with fair accuracy the matters which are not in dispute, in fact opportunities to make such use of the procedure do not readily present themselves. At committal the defence is not yet apprised of all the matters necessary for a proper decision, and the present system often fails to provide a subsequent occasion, in good time before the trial, for the decision to be taken. Every criminal practitioner is familiar with the resulting wasteful situation in which witnesses are brought to court only to be sent home again because their oral testimony is found no longer to be necessary.

44 Again, although it is now possible for either side to make admissions of fact and thereby eliminate the calling of witnesses or to limit the scope of their evidence, this procedure is very little used, and when it is used it is generally only in the course of the trial.

45 In some court areas there is provision for the regular holding of a pre-trial review in complicated cases. In other areas, the practice is not followed and certain courts appear to be opposed to it. When such reviews are held they are generally not as effective as they should be.

46 In some courts cases are listed for plea only, when there is no clear

indication that the plea will be guilty. This practice sometimes affords an opportunity for clarification of the issues on a counsel-to-counsel basis, but for various reasons it is often impossible to achieve this result.

47 Because it is imperative to preserve the right of the defendant to require the prosecution to prove its case, we reject any general proposition that the defendant should be obliged to specify the nature of his defence or to disclose his evidence or his attitude to the evidence of the prosecution.

48 We think, however, that an exception can and should be made to this general rule (as it already is in relation to the defence of *alibi*) for the specific defences of insanity, automatism and diminished responsibility. The fact that these defences must depend wholly or in large part upon expert evidence makes it appropriate to require notice of them to be given.

49 Similarly, we think that there can be no objection to a requirement that a defendant disclose in good time before trial the opinion evidence of any independent expert whom he proposed to call (but not what that expert has been told by or on behalf of the defendant).

50 As a corollary to this the prosecution should be required to afford the defendant's expert all reasonable facilities to enable him to inform himself of relevant matters, and provision should be made for the payment of realistic fees to experts in legal aid cases. At present such facilities are often not, or not readily, available; and the fees paid upon legal aid often fall far short of the expert's perfectly reasonable charges, so that either the defendant is denied proper expert assistance or his solicitors are left to cover the shortfall out of their own pockets.

51 In its evidence to the Devlin Committee, JUSTICE recommended that the "Notice of Alibi" procedure should be extended to include provision for a "Notice of Disputed Identification" to cover those cases in which identity is in issue but an alibi notice is not appropriate. It was proposed that such notice should be given by an accused person on his first appearance in court on a summary charge, or within 7 days of receipt of a summons, or in terms similar to the alibi notice procedure in indictment cases. We endorse this recommendation.

52 Although we do not think it would be desirable, or indeed generally practicable, to require defendants to give notice of the factual nature of their defence (save in the special cases mentioned in paras. 48 and 51 above), the narrowing of the issues which can be achieved by proper admissions is likely to delimit the area of dispute: for example, admissions may show that self-defence is an issue, though not necessarily the only one, whereas identity is not.

53 It should also be possible for notice to be given of any unusual points of law which are to be raised and of any authorities to be relied upon. In practice some advance notice of such matters is often given on a

counsel-to-counsel basis. However it seems desirable to afford some more regulated opportunity for the giving of such notice.

Procedural Recommendations

54 The various preparatory steps we have been discussing could best be promoted by the regular use of a pre-trial procedure akin to the Summons for Directions which takes place in civil actions in the High Court. It would by no means be necessary for the summons to be heard in court in all, or even, perhaps, in the majority of cases, but by its timing it would concentrate attention on the taking of the appropriate steps preparatory to trial early enough to limit, if not prevent, the defects in the present operation of the system we have described. The procedure should be set up and enforced by Crown Court Rules. We attach a 'pro forma', at present in use in one court area, which we feel would help to concentrate the minds of both prosecution and defence at the pre-trial evidence stage, thus saving time and expense at trial.

55 Thus, where the defendant is going to plead guilty he would be directed (but not, of course, required) to notify his intention in good time before the date fixed or proposed for the summons. The summons would then become unnecessary and the case would be listed for plea and sentence.

56 In general the parties would be directed to give notice of the relevant matters in good time before the hearing of the summons, including agreement to the reading of witness statements (edited by agreement where appropriate); the admissions sought by either side; and any special legal issues to be raised. Where the parties are able to agree the procedure need go no further than an exchange of letters but in other and in more complicated cases there would be a hearing at which suitable directions could be given. Such directions would deal with the precise propositions of fact to be admitted or not admitted, notice of any special defences which are to be raised (See para. 48 above), provision for the employment of and the disclosure of reports by expert witnesses on behalf of the defence and such matters. In suitable cases the judge would direct the prosecution to make clear the nature of the case against the defendant by means of particulars or, where appropriate, by furnishing a brief précis of the proposed opening speech.

57 The most important matter to be dealt with, which it should be the duty of the prosecution to prepare for the consideration of the defence in every case where a plea of guilty has not been notified, will be the admissions of fact to be sought by the prosecution.

58 Other matters which we think could properly be dealt with at the pre-trial review are:

(i) The disclosure of all witness statements taken by the police (original as well as composite statements) if required by the defence and subject to the prosecution's entitlement to refuse

to supply copies of such statements on the grounds that it would be contrary to public policy to do so. If the defence does not accept the validity of such objection, the judge at the pre-trial review should rule thereon. In other words, we adopt the legislative proposals put forward by the JUSTICE Committee on Evidence in 1965 (*Availability of Prosecution Evidence to the Defence*).

(ii) Previous convictions, if any, of all prosecution witnesses.

(iii) Similarly with the other matters referred to in para. 37 above.

59 It would be important to establish that the hearing of the summons did not necessarily exhaust the procedure. In suitable cases it could be adjourned. In any event there would be liberty to apply or renew the summons, and the further exchange of information between the parties should be encouraged.

Notification of alibi witnesses

60 We do not consider that the present period of seven days within which, under the Criminal Justice Act, 1967, the defence has to provide the prosecution with the names and addresses of proposed alibi witnesses is at all realistic, and in practice the period is rarely kept to. It is often not until the committal proceedings themselves that the defence is made aware of the relevant dates and times. In our own view a longer period is required to enable the defence to trace and interview likely alibi witnesses. The prosecution would be sufficiently protected by a requirement that notice be given at (or before) the pre-trial review or within a period specified at the review by the judge.

61 At present it is common for the police to interview and take statements from alibi witnesses with whose names and addresses they have been supplied without notice to the defence and so without the defence having an opportunity to be present. This practice is, in fact, contrary to the instructions given to the police by the Home Office, which are not sufficiently known, and in our view it gives rise to the possibility of abuse. In relation to this, we think it worth while to set out the history of this matter

62 Advance notice of a defence of alibi was proposed in a Memorandum "Advance Notice of Special Defences" submitted to the Criminal Law Review Committee by JUSTICE early in 1966, and was introduced in the Criminal Justice Act, 1967. The JUSTICE proposals were however more restricted than the provisions which were ultimately enacted. Their purpose was to allow the police to check criminal records and the truth of the alibi before the trial. Only 72 hours' notice was to be required and it was to be laid down that the police should not be allowed to interview alibi witnesses notified under the Act except in the presence of the accused's solicitor, unless this requirement was waived by him.

63 When the 1967 Bill was introduced, it required notice to be given within 7 days after the committal proceedings and contained no restrictions on the interviewing of witnesses. During the Committee stage of the Bill an amendment was introduced requiring the police to give notice of intention to interview and an opportunity to the defence solicitor to be present. This was not accepted by the Government but the Law Officers gave an undertaking that instructions to this effect would be issued to the police. These should have had the same effect as our proposed rule, but as with all directives that are not given statutory force, this one came to be widely ignored and in a number of cases brought to our notice the police have interviewed alibi witnesses and have either persuaded them not to give evidence, or have taken statements from them which did not fully support the accused's story and called them as prosecution witnesses. There are times when it may be advantageous for defence counsel to be able to cross-examine an alibi witness but it is confusing for juries when a defence witness is called for the prosecution.

64 Enquiries subsequently revealed that the majority of judges, counsel and solicitors were quite unaware of the undertaking given and the instructions issued and in 1977, after an exchange of three letters between our Chairman and the Home Secretary, he finally agreed to recirculate the instructions which by then were 10 years old and had never been renewed. We then asked, but without response, that the judiciary and the legal profession should also be notified and recent enquiries have shown that many practicing solicitors and counsel are still unaware of the requirement. *Because of this we recommend that it should be widely publicized and given statutory force.*

65 It should also be clearly established that the defence is entitled to approach and seek an interview with any prosecution witness but, both to prevent any abuse of this right and to protect the defendant's advisers from the risk of suspicion or accusation of such abuse, the defence should be required to give a similar notice to the prosecution.

66 No doubt the proposed procedures would mean that solicitors would have to spend more time on cases in the early stages and that barristers would be called in sooner. But we are satisfied that they would produce a considerable saving of:

(i) court time (which is under such pressure);

(ii) unnecessary attendances by witnesses; and

(iii) police time (the wastage of which is not always appreciated);

and also, which in our view is of overriding importance, would lead to a greater likelihood of arriving at a just verdict.

RECOMMENDED FORM FOR PRE–TRIAL REVIEW

67

(1) Counsel will be expected to be able to inform the Court:–

(a) of the pleas to be tendered on trial;

(b) of the prosecution witnesses required at trial as shown on the committal documents and any notices of further evidence then delivered and of the availability of such witnesses;

(c) of any additional witnesses who may be called by the prosecution and the evidence that they are expected to give; if the statements of these witnesses are not then available for service a summary of the evidence that they are expected to give shall be supplied in writing;

(d) of facts which can be and are admitted and which can be reduced in writing in accordance with Section 10(2)(b) of the Criminal Justice Act 1967, within such time as may be agreed at the hearing and of the witnesses whose attendance will not be required at trial;

(e) of the probable length of the trial;

(f) of exhibits and schedules which are and can be admitted;

(g) of issues, if any, then envisaged as to the mental or medical condition of any defendant or witness;

(h) of any point of law which may arise on trial, any question as to the admissibility of evidence which then appears on the face of the papers and of any authority on which either party intends to rely as far as can possibly be envisaged at that stage;

(i) of any names and addresses of witnesses from whom statements have been taken by the prosecution but who are not going to be called and, in appropriate cases, disclosure of the contents of those statements;

(j) of any alibi not then disclosed in conformity with the Criminal Justice Act 1967;

(k) of the order and pagination of the papers to be used by the prosecution at the trial and of the order in which the witnesses for the prosecution will be called;

(l) of any other significant matter which might affect the proper and convenient trial of the case.

(2) The Judge who is to try the case may hear and rule upon any application by any party relating to the severance of any count or any defendant and to amend or provide further and better particulars of any count in the indictment. The Judge may order particulars relating to any count to be delivered within such time as he may direct.

(3) The Judge may make such order or orders as lie within his powers as appear to him to be necessary to secure the proper and efficient trial of the case.

(4) Subject to the provisions of Sections 9 and 10 of the Criminal Justice Act 1967, admissions made may be used at the trial.

EVIDENCE OF IDENTIFICATION

68 JUSTICE is profoundly disappointed by the combined reactions of the Attorney-General, the Home Office and the Court of Appeal to the recommendations of the Devlin Committee. The directives issued by the Attorney-General may have resulted in fewer unjustifiable charges being brought. The new Home Office instructions about identification parades should have eliminated some of the more obvious irregularities, and the Court of Appeal's directives in R. v. Turnbull[1] have alerted judges to their duties and provided defence counsel with ammunition with which to challenge doubtful evidence of identification more effectively.

69 The danger and causes of mistaken identification have however not been eliminated to the extent they could have been if the more important recommendations of the Devlin Committee had been given statutory force. No penalties have been attached to the non-observance of any of the new safeguards. Everything is still left to the discretion of the judiciary. More especially, the Court of Appeal has considerably weakened the requirement of corroboration recommended by the Devlin Committee. We therefore welcome the opportunity of pressing on the attention of your Commission the need for the statutory safeguards set out in our evidence to the Devlin Committee, many of which were endorsed in its report. If these are not introduced, we fear that the present state of vigilance will revert to one of indifference as has happened after the two previous identification scares. Indeed there are already some signs that this is happening.

70 The most important of these safeguards was the requirement that evidence of identification should be corroborated by evidence of another kind. In making this recommendation we relied on the findings of the Committee of Enquiry into the case of Adolf Beck, which, although Beck had been identified by a large number of witnesses, said, "Evidence as to identity based on personal impression is, unless supported by other facts, an unsafe basis for the verdict of a jury". We added a qualification to our recommendation to the effect that, if it was thought to be too drastic and liable to prevent convictions in clear-cut cases, the prosecution should be allowed to submit to the judge in the absence of the jury that the identification was of such a reliable nature that it should be allowed to go to the jury without corroboration but with an appropriate warning. We further recommended that in such cases the way in which the trial judge had used his discretion should be appealable.

71 The Devlin Committee did not go quite as far as this. It accepted the JUSTICE view that in normal cases evidence of identification should be supported by evidence of another kind, but proposed that if the trial

[1] [1976] 3 W.L.R. 445

judge, after carefully reviewing all the circumstances of the evidence, found himself unable to point to any exceptional circumstances or to any substantial supporting evidence, he should have to direct the jury that it was unsafe for them to convict. But what is far more important, the report of the Devlin Committee, in para 4.83, sets out detailed recommendations which it would like to be given statutory form.

72 The Court of Appeal has not supported this forthright approach and appears to have advised the Home Secretary that, in its opinion, no new legislation was required. Instead, in its judgment in the cases of R. v. Turnbull and others, the Court set out a series of guidelines for trial judges. These were designed to implement the spirit of the Devlin Committee's recommendations, except that its concept of "exceptional circumstances" is rejected and replaced by emphasis on the quality of the identification evidence.

73 In our view, these guidelines are quite inadequate because there is no statutory obligation on trial judges to follow them, or penalties of exclusion attached to irregularities in the obtaining and presentation of identification evidence by the prosecution. The judgment merely says that a failure to follow the guidelines is "likely to result" in a conviction being quashed and would do so if, in the court's judgment on all the evidence, the verdict was either unsafe or unsatisfactory. In our experience, the court rarely regards a verdict as unsafe and unsatisfactory when there is evidence on which a jury was entitled to convict and even more rarely probes beneath surface appearances.

74 This leaves the door open for trial judges to use the guidelines as they think fit and there is evidence that they are not doing so with sufficient strictness. For example, we have a number of cases in which trial judges, after giving a satisfactory general warning and reading out the Turnbull catalogue of circumstances to be considered, have completely failed to apply the warning to the specific aspects of the evidence which required it, and counsel has advised that this would not provide valid grounds of appeal.

75 Considerable uncertainty has arisen over the dividing line between identification and recognition. The Devlin Committee took the view, with which we could agree, that recognition of the accused after he had been seen in favourable circumstances by someone who knew him well (i.e. an employer or near relative) could qualify for the description of exceptional circumstances. The Turnbull judgment appeared to accept this and went on to point out that a recognition could be mistaken and also requires an appropriate warning. There are indications however from cases recently brought to our notice that this guideline is not being observed and that casual encounters or sightings are being invoked by the courts to justify non-observance of the Turnbull guidelines. We cite two examples.

76 (a) Two youths attacked and robbed a butcher of his day's takings and ran off. They were seen by two girl shop-assistants who described their clothes and the colour of their hair. One of the girls said that one of the robbers turned round for a few seconds when he was 30 yards away and she caught a glimpse of his face. Two weeks later she saw a youth named Stephen Cookson passing her shop, decided he was one of the robbers and alerted the butcher who gave chase and detained him. She then told the police for the first time that she and her friend recognized Cookson because on one or two occasions in the past he had been in their shop.

(b) The trial judge put it to the jury that this was a case of recognition rather than identification and gave a quite inadequate warning. There were serious discrepancies in the evidence of the girls and of other eyewitnesses. A man who had chased the robbers said that the one alleged to be Cookson did not turn round. Cookson had a substantial alibi which was "muddied" by statements which the police took from the alibi witnesses. The trial judge failed to give the warning about alibi evidence laid down in the Turnbull guidelines. Leave to appeal was granted on grounds drafted by JUSTICE, but the conviction was upheld.

77 (a) Eric Abbott was found guilty of taking part in the hijacking of a lorry at a lay-by near Sevenoaks in the early hours of a Sunday morning. His conviction was based on "recognition" by two men who with good reason could be regarded as accomplices. One was the lorry driver who had made an unexplained telephone call prior to the hijacking and was treated extraordinarily well by the hijackers. The other was the owner of the flat to which the driver was taken before he was eventually released. In neither case was an accomplices' warning given. The only other evidence was an ambiguous and disputed reply made by Abbott while he was being questioned.

(b) According to the driver, the man whom he identified as Eric Abbott had a full beard and round face with no special distinguishing features, but according to at least six independent witnesses he had been clean shaven on the night of the hijacking and he had a conspicuously flattened boxer's nose. He and his brother were arrested on suspicion on the Wednesday after the hijacking and "by chance" encountered the driver in the corridor of Sevenoaks Police Station. The driver told the police that he thought he recognized Abbott as the man he had described as having a full beard despite the fact that he was then clean shaven. There were in fact strong indications that he had indicated the brother, who was released after his alibi had been checked.

(c) Abbott was then put on an identification parade and was picked out by the driver. This evidence was allowed to be given without any adverse comment by the judge, despite the fact that the driver was clearly picking out a man he had already seen in the police station. The owner of the flat, who had met Abbott once or twice in a public house, made a statement two weeks after the hijacking in which he said he recognized him as one of the men who came to his flat. This was the beard situation in reverse, and he admitted at the trial that there was a confusing likeness between Abbott, his brother and a nephew.

(d) Among the statements served at the committal proceedings was one from a police officer in the Flying Squad who said that on the Monday after the hijacking he had seen Abbott in a street near his home and that he had a full beard. It later became clear to the prosecution that there was evidence to the contrary and a notice of additional evidence was served in exactly the same terms but giving the sighting as on the Monday before the hijacking. Abbott's counsel advised him that, if he challenged the honesty of this evidence, he ran the risk of having his character put in and that, as the issue was whether or not he had a beard on the night of the hijacking, it would do no harm to admit that he had one on the previous Monday. He proceeded to make the admission against Abbott's wishes, and this turned out to be a disastrous blunder. Six alibi witnesses went into the witness box and testified that they had been drinking with him until late on the Saturday night and that he was clean shaven. They were then asked when they had last seen him with a beard and they all said that they could not remember. When the trial judge summed up he effectively destroyed their credibility by reminding the jury six times that it was admitted that he had a full beard on the previous Monday.

(e) These same witnesses all said that they had been drinking with Abbott until the public house closed at 11 p.m., and had stood talking on the pavement until 12.30 p.m. when, because he had so much to drink, one of them took him home in a minicab. The judge's general comment on their evidence was that, although it was relevant to the issue of the beard, it did not help him over the hijacking because he could still have got to Sevenoaks by 6 a.m. This comment was in direct contradiction to the evidence of one of the hijackers who pleaded guilty to driving away the lorry but not to the actual hijacking. This man told the jury that Abbott had nothing to do with the hijacking, that the third man was called Harry, and that all the men involved had been in the area between the Surrey Docks and Sevenoaks from 10.30 p.m. onwards.

(f) Abbott was found guilty and given five years imprisonment.

Two counsel advised him that he had no grounds for appeal and his wife eventually sought the help of JUSTICE. Extensive grounds of appeal were prepared and submitted. They included valid criticisms of the identification proceedings and the way in which the judge had dealt with them, a number of serious misdirections, and a full explanation of how the mistaken admission came to be made. The Single Judge refused leave to appeal and counsel who had helped in drafting the grounds readily offered to take the application to the Full Court. In the meantime, Abbott's wife and brother had provided a statement to the effect that the Inspector who had given evidence about the beard had told them that he might well have been mistaken, and the prosecuting solicitor had confirmed in a letter that the two prosecution witnesses had convictions for dishonesty.

(g) It was feared that the admission would be a difficult obstacle to overcome but, as it was plain for all to see that there had been a miscarriage of justice, it was hoped that the Court would allow all the other matters to outweigh it. This hope was not realized. The Court brushed aside all the matters in Abbott's favour and ruled that the admission constituted binding evidence in law and could not be withdrawn. The jury were consequently entitled to doubt the credibility of the alibi witnesses and to convict.

78 We believe that these two cases show conclusively that the recommendations of the Devlin Committee and of the Turnbull guidelines are not being observed either in the letter or the spirit, and that the judiciary cannot always be relied upon to ensure that they are enforced.

79 This lack of judicial concern makes it even more imperative that the rules governing pre-trial identification procedures should be enforced by statute to the extent that the evidence should be inadmissible if they are not observed, unless the circumstances are proved by the prosecution to have been such as not to have caused any risk of injustice or prejudice to the defence. Our recommendations were set out in full in our evidence to the Devlin Committee and we mention here only those which we consider to be most important.

(a) No identification parade should be held without a solicitor being present and any refusal to go on a parade should be authenticated by a solicitor. It should not be enough for the police to say that the suspect refused to go on parade or that he did not ask for a solicitor, or that the solicitor could not get there in time.

(b) A solicitor should also have the statutory right to watch over the preparation for a parade in order to ensure that the witnesses are given no opportunity of seeing the suspect before he goes on the parade or of learning where he is standing.

(c) Evidence of identification by confrontation should not be

allowed unless there has been a clear refusal to go on a parade and the suspect has had an opportunity to obtain the advice of a solicitor.

(d) All witnesses should be required to provide and sign descriptions of the person or persons they had seen, and these should be made available to the defence whether or not it is intended to call them.

80 We made a number of further recommendations which we think should be implemented.

(a) In order to prevent disputes over situations which Lord Parker described as "sticking out like sore thumbs", all identification parades should be photographed. The Devlin Committee supported this recommendation and we do not regard the police objections to it as sufficiently valid to justify the rejection of such a valuable safeguard. We are at present dealing with a case involving a sentence of eighteen years' imprisonment in which the parade was witnessed by an inexperienced solicitor who failed to object to the fact that the suspect was in rough working clothes and had spent the night in the cells, whereas all the other persons on the parade were neatly dressed.

(b) In view of the strict procedures and care required in the holding and carrying out of identification parades, we are of the view that "afterthoughts" are inherently suspect and should therefore be entirely inadmissible.

EVIDENCE AND STATEMENTS OF CO-ACCUSED

81 Two defendants are frequently alleged to have been involved in the same crime and jointly tried. This is a sensible and just course, because the whole matter can be investigated in one trial and the respective responsibilities of the defendants apportioned. But it must be nonetheless recognized that the rules of evidence are such that an accused is very vulnerable vis-a-vis a co-accused. One defendant may well seek to reduce or escape his liability by shifting the blame wholly or partly upon the other, and the other may retaliate. Police and prosecution not unnaturally seek to exploit the temptation of a defendant to cast the blame upon the other, with the result that each defendant may produce evidence damaging to the other, the defence of both defendants is undermined, the two defences are inconsistent and damaged and unattractive and both defendants go down in the confusion. Greater protection is needed for a defendant who is subject to direct or indirect attack by a co-defendant.

Statements from the Dock and Unsworn Statements

82 The Eleventh Report of the Criminal Law Revision Committee, 1972, paras. 102-106, clause 4(2) recommended that statements from the dock should be abolished and the same recommendation was made in the JUSTICE memorandum, *The Interrogation of Suspects*, 1976, and repeated in Part I of our evidence to the Royal Commission. Although it commands widespread support, it has been lost sight of because of the controversy over proposals relating to the right of silence. In a joint trial, a statement from the dock can be especially undesirable because the maker of it is protected from cross-examination. It can thus be used by A to make a damaging attack on his co-accused B, who has no proper protection because he is unable to cross-examine A or to put his bad character to him.

83 In the case of R. v. George[1], A and B were jointly charged with murder, and after B had closed his case A made an unsworn statement from the dock saying that it was B who was responsible for the killing and not himself (A). The judge refused to allow B to call rebutting evidence on the ground that what A had said was not evidence against B anyway. B appealed against the conviction but the Court of Appeal upheld the judge's decision, saying that the problem presented by a statement from the dock was exactly the same as that which arose when a co-accused had made a damaging statement (in his absence)

[1] (1979) 68 Cr. App. R. 210; [1979[Crim. L. R. 172 C.A.

not in court. What was required was a clear direction that the statement from the dock was not evidence against B, and this had been given. It then became clear that such a statement which implicated a co-accused should be put before a jury as being wholly ineffective to weigh in the scales against the co-accused.

84 Whether a damaging statement is made outside or inside court, to tell the jury that evidence before them is evidence for one purpose but not for another, or that evidence is admissible against A but not against B, may be logically consistent but in practice it is absurd. Once the damaging evidence is in, the jury will find it virtually impossible to compartmentalize their minds so as to take it into account for one purpose but not for another. Human beings just do not work like that. It is submitted that it just will not do to say to the jury that A's unsworn statement that co-accused B was the murderer is "wholly ineffective to weigh in the scales against B" – R. v. George – because the drama of the statement cannot be so readily dissipated, especially as the statement is to be considered when the jury are deliberating upon the guilt or otherwise of A, the maker of the statement. The rule has been described by Professor Sir Rupert Cross as gibberish[2] and by Learned Hand J. as a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else"[3]. "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell... . The naive assumption that prejudicial effects can be overcome by instructions to the jury... all practising lawyers know to be unmitigated fiction."[4] If at any stage before the jury retires A makes any damaging statement or gives any damaging evidence against his co-accused B then B should have the automatic right to lead rebutting evidence and to reply. If damaging evidence is evidence against one defendant but not another then a separate trial should be ordered if there is any reason for thinking that B might be prejudiced by the continuance of the joint trial.

Use of Co-Accused's Statement in Interrogation

85 Rule V of the Judges' Rules permits a police officer to put into the hands of a person charged with an offence, or who is aware that he is about to be charged with an offence, a written statement by a co-accused. He may not read it to him or invite any reply or comment, and if the person charged wishes then to make a statement or starts to reply, he must be cautioned. In the course of an interrogation a person may be told about statements made by another accused (or by independent witnesses) which implicate him. Whether written or unwritten, such a statement of another person is hearsay except to the extent that its truth is admitted by the accused. It may also become admissible to explain the defendant's reactions to it, e.g. he might faint or react violently or say something that is only explicable if the court hears the statement. Thus the contents of a statement are only admissible against a co-accused insofar as he admitted them and the courts should be more wary than they sometimes are of allowing juries to hear assertions that are not clearly admitted.

[2] [1973] Crim. L. R. 329, 332, 334, 338-339.

[3] Cited in Bruton v. U.S. 1968 391 US 123, Nash v. U.S. 54 FZd 1006, 1007.

[4] Bruton v. U.S. suora.

Propensity to Violence

86 If in a joint murder trial A says that he is non-violent, and therefore it must have been B who did the killing, B is entitled in reply to adduce evidence that A's mistress made a statement indicating that A was in fact violent, because such evidence is relevant and probative going to an issue.[5] But if A had simply alleged that B did the killing, and had not gone on to assert that he (A) was non-violent, then it appears that the statement of the mistress would not have been admissible, because it went only to propensity.[6] The rule has a certain superficial logic, but it would be better to permit the judge in his discretion to admit evidence of propensity by way of rebuttal to B when B is a co-accused subject to direct or indirect attack from A.

Sentencing of Co-accused

87 There used to be a custom that, when a co-accused had pleaded guilty and was to be called as a prosecution witness, he would be sentenced before the trial to avoid the danger of his evidence being influenced by the hope of obtaining a more lenient sentence. There is no longer any fixed rule and judges often prefer to wait and hear the whole story before passing sentence. Natural justice, in our view, demands that a co-accused should be sentenced at the outset whether he proposes to give evidence for the prosecution or the defence. In the latter case, the accused may otherwise be reluctant to give evidence for fear of incurring a longer sentence than he might have done if he had remained silent. It might also be oppressive for someone who has pleaded guilty to have to wait until the end of a lengthy trial to learn his fate. Judges should therefore postpone the sentencing of a potential witness only in very exceptional circumstances. If there is no prospect of his being called then there can be no objection to his sentencing being postponed, unless the trial is going to be a lengthy one.

[5] R. v. Bracewell (1979) 68 Cr. App. R. 44.

[6] R. v. Bracewell, supra, following Lowery v. R. [1974[A.C. 85, 102; (1973) 58 Cr. App. R. 35, 52.

88 **Conclusions and Recommendations**

(1) The danger that a defendant may, in the course of an unsworn statement from the dock, make damaging allegations against a co-defendant constitutes an additional reason for abolishing the right to make such statements.

(2) There should be full opportunity on the usual principles for a defendant to rebut and reply to allegations made by his co-defendant (including allegations in an unsworn statement from the dock if this right is retained).

(3) Statements (or parts thereof) made outside court by a defendant should be excluded or edited if the prejudicial effect against a co-defendant exceeds the probative effect against the maker.

(4) Such exclusion or editing should not prevent such statements being used in cross-examination of the maker when he gives evidence. At this stage a co-defendant would have the usual means to attack the maker including putting his character and previous convictions to him.

(5) The courts should be more wary than they sometimes are of allowing juries to hear assertions that have not been already admitted.

(6) Where a defendant makes allegations against his co-defendant the latter should have the right, subject to the discretion of the judge, to adduce evidence of the former's propensity to the type of offence before the court.

(7) Where the defendants cannot fairly be tried together, separate trials should be ordered.

(8) Co-accused who may be required to give evidence for the prosecution or the defence should be sentenced at the beginning of the trial.

COURT WITNESSES

89 In an English trial, the calling of witnesses lies within the discretion of counsel for the prosecution and the defence. The Court has a residual power to call witnesses whom neither side wants to call, but the use of this power is rare and has been frowned upon by the Court of Appeal. This can result in the jury being deprived of the evidence of an important witness which could be vital to a true determination of the issues it is asked to try.

90 A memorandum by our Committee on Evidence published in 1965 called attention to this unsatisfactory position in the following terms:

(1) In criminal cases the defence in particular may be forced to call a witness because his evidence on a particular matter is vital, although by reason of his general character and perhaps his evidence on other matters, his association with the defence taints it. Such a situation may arise even where all the parties including the prosecution desire the Court to call the witness, but it is not prepared to do so. This point is reinforced by the fact that the prosecution is not bound to call every witness named on the back of the indictment, though it is usual to tender them for cross-examination if the defence wishes it. The prosecution is under no sort of obligation to tender a person whose evidence may be to some extent favourable to the defence, but whose name is not on the back of the indictment. Here again, the limitations upon the right of a party to cross-examine his own witness may inhibit or prejudice both prosecution and defence.

(2) The rules regarding the cross-examination of court witnesses are vague and uncertain, and unduly limit the rights of the parties to conduct their cases effectively.

(3) More use of court witnesses will obviate much of the manoeuvring which frequently occurs. It will go some way towards meeting the criticism that the English legal system tends to resemble a game between contestants with the judge acting as an umpire, rather than a real search for the truth. It is desirable that every witness who can throw light on the issues should be brought before the Court, and that if need be the accuracy and reliability of his evidence should be thoroughly probed.

91 In the light of the above our Committee made the following recommendations:

(1) The Court should be able to call a witness on the application of a party or partner to the proceedings even if any other party

objects thereto.

(2) The Court should be able to call a witness of its own volition.

(3) When a witness is called by the Court the following rules should apply:

(a) All parties should have the right to cross-examine witnesses generally.

(b) If the witness is called upon the application of the party only, that party should cross-examine the witness first:

(c) otherwise the order of cross-examination should be determined by the Court.

92 We wish to reaffirm these recommendations and to urge that full use be made of the Court's power.

JUSTICE PUBLICATIONS

	Non-Members	Members
Published by Stevens & Sons		
Privacy and the Law	80p	55p
Administration under Law (1971)	75p	50p
Litigants in Person (1971)	£1.00	70p
The Unrepresented Defendant in Magistrates' Courts (1971)	£1.00	70p
The Judiciary (1972)	90p	70p
Compensation for Compulsory Acquisition and Remedies for Planning Restrictions (1973)	£1.00	70p
False Witness (1973)	£1.25	85p
No Fault on the Roads (1974)	£1.00	75p
Parental Rights and Duties and Custody Suits (1975)	£1.50	£1.00
Published by Charles Knight & Co.		
Complaints against Lawyers (1970)	50p	35p
Published by Barry Rose Publishers		
Going Abroad (1974)	£1.00	70p
*Boards of Visitors (1975)	£1.50	£1.25
Published by JUSTICE		
The Redistribution of Criminal Business (1974)	25p	20p
Compensation for Accidents at Work (1975)	25p	20p
The Citizen and the Public Agencies (1976)	£2.00	£1.60
Our Fettered Ombudsman (1977)	£1.50	£1.00
Lawyers and the Legal System (1977)	£1.50	£1.00
Plutonium and Liberty (1978)	75p	60p
CLAF, Proposals for a Contingency Legal Aid Fund (1978)	75p	60p
Freedom of Information (1978)	75p	60p
Pre-Trial Criminal Procedure (1979)	£1.50	£1.00

The following reports are out of print. It has become impracticable to maintain stocks and quote fixed prices for photostat copies, but quotations will be provided on request.

Contempt of Court (1959)
Legal Penalities and the Need for Revaluation (1959)
Preliminary Investigation of Criminal Offences (1960)
The Citizen and the Administration (1961)
Compensation for Victims of Crimes of Violence (1962)
Matrimonial Cases and Magistrates' Courts (1963)
Criminal Appeals (1964)
The Law and the Press (1965)
Trial of Motor Accident Cases (1966)
Home Office Reviews of Criminal Convictions (1968)

*Report of Joint Committee with Howard League and N.A.C.R.O.

The Citizen and his Council – Ombudsmen for Local Government ? (1969)
The Prosecution Process in England and Wales (1970)
Home-made Wills (1971)
Living it Down (1972)
Insider Trading (1972)
Evidence of Identity (1974)
Going to Law (1974)
Bankruptcy (1975)

Duplicated Reports and Memoranda

Report of Joint Working Party on Bail	25p
Evidence to the Morris Committee on Jury Service	25p
Evidence to the Widgery Committee on Legal Aid in Criminal Cases	25p
Reports on Planning Enquiries and Appeals	40p
Rights of Minority Shareholders in Small Companies	25p
Complaints against the Police	25p
Eleventh Report of Criminal Law Revision Committee	40p
A Companies Commission	25p
The David Anderson Case	75p
Powers and Duties of Trustees	35p
Report of Data Protection Committee	30p
Select Committee on Parliamentary Commissioner	30p
Transcript of JUSTICE Conference on–	
"Eleventh Report of Criminal Law Revision Committee" (1973)	£1.00
"Children and the Law" (1975)	£1.00
"The Rights of Prisoners" (1979)	£1.50

Memoranda by Committee on Evidence

1.	Judgements and Convictions as Evidence	15p
2.	Crown Privilege	15p
3.	Court Witnesses	15p
4.	Character in Criminal Cases	15p
5.	Impeaching One's Own Witness	15p
7.	Redraft of Evidence Act, 1938	15p
8.	Spouses' Privilege	15p
9.	Availability of Prosecution Evidence to the Defence	20p
10.	Discovery in aid of the Evidence Act	15p
11.	Advance Notice of Special Defences	15p
12.	The Interrogation of Suspects	25p
13.	Confessions to Persons other than Police Officers	15p
14.	The Accused as a Witness	15p
15.	Admission of Accused's Record	15p
16.	Hearsay in Criminal Cases	15p

JUSTICE

British Section of the International Commission of Jurists

JUSTICE is an all-party association of lawyers concerned, in the words of its constitution, 'to uphold and strengthen the principles of the Rule of Law in the territories for which the British Parliament is directly or ultimately responsible: in particular, to assist in the administration of justice and in the preservation of the fundamental liberties of the individual'. It is also concerned to assist the International Commission of Jurists in its efforts to promote observance of the Rule of Law throughout the world.

JUSTICE was founded in the Spring of 1957 following a joint effort of leading lawyers of the three political parties to secure fair trials for those accused of treason in Hungary and South Africa. From this co-operation arose the will to found a permanent organisation. A preamble to the constitution lays down that there must be a fair representation of the three political parties on the governing Council, which is composed of barristers, solicitors and teachers of law.

In the twenty-one years of its existence, JUSTICE has become the focal point of public concern for the fair administration of justice and the reform of out-of-date and unjust laws and procedures. It has published authoritative reports on a wide variety of subjects, the majority of which are listed at the end of this report. Many of them have been followed by legislation or other government action. In Commonwealth countries, JUSTICE has played an active part in the effort to safeguard human rights in multi-racial communities, both before and after independence.

Membership of JUSTICE is open to both lawyers and non-lawyers and enquiries should be addressed to the Secretary at 95a Chancery Lane, London, W.C.2. Tel: 01–405 6018.