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2 Introductory words at commencement of trial incorporating 18(1) Empanelling a jury

{Bench Book pp. 9 – 10 and 377 – 381}

Before swearing in the jury (*Bench Book pp. 377 – 379*)

There should be a consultation with the advocates as to the questions, if any, it may be appropriate to ask potential jurors. The topics which may need to be addressed include:

- in cases that may run beyond the length of the jurors' summons, the availability of the jurors to sit for the anticipated length of the trial.
- whether potential jurors know the defendant, potential witnesses or others involved in the case.
- whether potential jurors are so familiar with any locations that feature in the case that they may have, or come to have, access to information not in evidence (e.g. by working in or being a regular at a public house at which the incident occurred).
- in cases where there has been any significant local or national publicity, whether any questions should be asked of potential jurors.

Swearing in the jury (*Bench Book pp. 379 -381*)

Problems rarely arise but if they do they are so case specific that it is impractical to address them in this Companion. Reference should be made to Chapter 18 of the Bench Book.

Introductory words (*Bench Book pp. 9 – 10*)

After the jury has been sworn and the defendant has been put in charge the judge will want to give directions to the jury on a number of matters including those set out below. It is for the judge to decide the order and style in which this is done. Such remarks should be tailored to the particular case which the jury is to try.

- The time estimate of the trial and normal sitting hours should be explained. If the defendant or any witness is a child or has difficulties or needs of which the jury will learn, such that the sitting hours have to be adjusted, an explanation should be given at this stage.
- The jury should be reminded that they have taken an oath or affirmation to try the case upon the **evidence**, which is what they will all hear together in court, and told that it is the essence of the jury system that their verdicts will be based upon their common experience of the evidence and the discussions that they will have about that evidence in their deliberations at the conclusion of the case.

For this reason, the following points cannot be stressed too strongly and should be accompanied with a warning that ignoring them may well (as they have already been informed in their jury instructions) amount to a contempt of court which is an offence punishable with imprisonment:

- ◊ Until the case has been completed, jurors must not discuss any aspect of it with **anyone at all** outside their own number or allow anyone to talk to them about it, whether directly, by telephone, through internet facilities such as Facebook or Twitter or in any other way. And, even after they have returned their verdicts, whilst they may then talk about the case with others, they must be careful only to speak about what happened in the court room; they must never in any circumstances disclose anything of their discussions or deliberations.
 - ◊ They may discuss aspects of the case among themselves but should only do so when they are all together, not in ones or twos, and they must be sure that no one else is present. They should not reach any concluded views about the case until they have heard all the evidence, the advocates' submissions and the summing up.
 - ◊ They must not carry out any enquiries or research into any aspect of the case themselves, for example by visiting places mentioned or looking up any information on the internet. They should only work on the case when they are at court.
 - ◊ They must take no account of any media reports about the case.
- The jurors should also be told that not only are they responsible, personally and together as a jury, for the verdict but also for all that they do whilst they are at court. For this reason:
 - ◊ should anyone try to approach them to talk about the case they should have nothing to do with it but report it immediately to an usher or the court clerk, preferably in the form of a note, so that the judge can deal with it there and then.
 - ◊ should they have any problems amongst themselves they should report it immediately in the same way so that the judge can help them. It should be explained that unless they report any such problems at the time that they arise, it may well not be possible to put things right.

These points can be made with an assurance that such things are uncommon but that it is better for the jury to know how to act if such things were to occur.

- If there is an interpreter for the defendant, identify the fact and in terms agreed with the advocates, explain the interpreter's role (e.g. translating everything into a foreign language or assisting a defendant who has some English with technical or difficult language).
- If there are to be witnesses using special measures or interpreters it is desirable to give an explanation of what is to happen and why at this stage.
- Smoking arrangements (at those courts where provision is made) should be explained.

A full list of matters such as those outlined above appears at pp. 9 - 10 of the Bench Book.

7(1) Visual identification

{Bench Book pp. 107 – 112}

Where the prosecution case depends on visual identification evidence (which may include a situation in which the defendant admits presence but denies that he was the person who acted as is alleged by the identification witness) a Turnbull direction must be given.

Directions

- The following warnings must be given:
 - ◊ of the need for caution to avoid the risk of injustice;
 - ◊ that a witness who is convinced in his own mind may be wrong;
 - ◊ that a convincing witness may be wrong;
 - ◊ that more than one witness may be wrong (*see over);
 - ◊ that a witness/witnesses who purport/s to recognise the defendant, even when they know the defendant well, may be wrong.
- The jury should be directed to put caution into practice by carefully examining the surrounding circumstances of the evidence of identification, in particular:
 - ◊ the duration of the period during which the witness had the person he says was the defendant under observation; in particular for how long was the witness able to see the person's face;
 - ◊ the distance between the witness and the person observed;
 - ◊ the light/lighting;
 - ◊ whether there was any interference with the observation (such as either a physical obstruction or other things going on at the same time);
 - ◊ whether the witness had ever seen the person whom he says he was observing before and if so in what circumstances (i.e. whether the witness had any reason to be able to recognise the defendant);
 - ◊ the length of time between the original observation (usually at the time of the incident) and the identification by the witness of the defendant to the police (often at an identification procedure);
 - ◊ whether there is any significant difference between the description the witness gave to the police and the appearance of the defendant.
- Any weaknesses in the identification evidence must be identified, for example those arising from:
 - ◊ one or more of the circumstances set out above;
 - ◊ the fact that an incident was unexpected/fast-moving/shocking or involved a (large) number of people so that the identifying witness was not observing a single person;
 - ◊ anything said or done at the identification procedure including any breach of Code D.

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- Evidence which is capable and, if applicable, evidence which is not capable of supporting the identification must be identified.
 - ◊ * Where more than one witness gives evidence of identification the jury should be told that they must consider the quality of each witness' evidence of identification separately and must have regard to the possibility that more than one person may be mistaken. However, as long as the jury are alive to this risk, they are entitled to use one witness' evidence of identification, if they are sure that that witness is honest and independent, as some support for evidence of identification given by an/other witness/es.
 - ◊ The jury may also use evidence of description, if they are sure that it comes from a witness who is honest and independent, as support for evidence of identification given by an/other witness/es.

 - Particular care is needed if the defendant's case involves an alibi: see 16(1).

14(3/vi) Hearsay – statement of complaint [s.120 (4), (7) and (8)]

{Bench Book pp. 228 - 230}

Directions

- It should be explained to the jury that the statement (or part of it) was put into evidence because the witness said that, to the best of his belief, he made the statement and it is true and that the jury are entitled to hear evidence about a complaint which a person made before the proceedings began.
- The jury must be directed about the following matters:
 - ◊ the complaint itself falls to be judged as part of the evidence of the complainant witness;
 - ◊ evidence of a witness' complaint is evidence about what that witness has said on another occasion: it originates from the complainant witness and so does not provide independent support for that witness' evidence;
 - ◊ the context in which the complaint was made;
 - ◊ the length of time which elapsed between the subject matter of the complaint (the event/s complained of) and the making of the complaint;
 - ◊ any explanation for any delay in making the complaint;
 - ◊ the consistency/inconsistency of the complaint with the witness' evidence (and sometimes any other complaint made by the same witness). Points of consistency and/or inconsistency should be specified. The jury are entitled to consider this/these when they are deciding whether or not the witness is accurate, reliable and truthful.
- If it has been suggested that a complaint has been made up, evidence of a complaint made to another person nearer the time of the alleged event may be used as evidence to rebut that suggestion and the jury should be so directed.

14(3/A) Distress

Evidence of complaint is sometimes coupled with evidence of distress: it is most commonly, but not invariably, encountered in conjunction with a complaint, whether that be at or about the time of the events alleged, in a recorded interview or when giving evidence. It is unusual for a complainant to have shown distress but not to have made any complaint at the same time but this may occur.

Directions

In giving a direction about distress the jury should be told that because distress is behaviour shown by the complainant, before they can rely on such evidence as consistent with or supporting the complainant's account they must be sure that the distress was:

- genuine; and
- not caused by something unconnected with the matter complained of.

In order to resolve these matters the jury should be directed to:

- look at all the circumstances in which the complainant's distress was observed by the witness/es who describe it; and
- consider the significance, if any, of time that has elapsed between the event/s about which the complainant makes complaint and the time of apparent distress. This may be linked to a direction about any delay in making the complaint itself.

Although it is a matter for the jury to decide, some situations are more compelling than others and it is not in every case that the jury must be warned to exercise caution about such evidence: e.g. evidence that a complainant ran along a street moments after an alleged event and banged on the nearest front door whilst screaming hysterically may be more compelling than evidence that a complainant was tearful whilst giving an account at a police station a month after the alleged event.

Care must also be taken not to give a "circular" direction: i.e. a direction which has the effect of directing the jury that they may only use distress in support of the complainant's evidence if they are sure that the complainant's evidence is true!