Supreme Court

Cap. 117.

COURT OF APPEAL (PRACTICE DIRECTION)

At the sitting of the Court on July 29, 1988 the Chief Justice handed down the following Practice Direction with respect to Evidence by Written Statements – Disclosure of Information to Defence – Unused Material – Guidelines for Disclosure: This Practice Direction is intended to be applicable when the system of paper committals becomes operative. It is expected that the associated legislation will be brought into operation on October 1, 1988.

PART I

1. Where the prosecution proposes to tender written statements in evidence under Section 25B of the *Magistrates Jurisdiction and Procedure Act* or Section 20B of the *Evidence Act* it will frequently be not only proper, but also necessary for the orderly presentation of the evidence, for certain statements to be edited. This will occur either because a witness has made more than one statement whose contents should conveniently be reduced into a single, comprehensive statement or where a statement contains inadmissible, prejudicial or irrelevant material. Editing of statements should in all circumstances be done by a Crown prosecutor (or by a legal representative, if any, of the prosecutor if the case is not being conducted by the Crown) and not by a police officer.

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2. *Composite Statements*

A composite statement giving the combined effect of two or more earlier statements or settled by a person referred to in paragraph 1 above must be prepared in compliance with the requirements of section 25B of the *Magistrates Jurisdiction and Procedure Act* or Section 20B of the *Evidence Act* as appropriate and must then be signed by the witness.

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3. *Editing Single Statements*

(1) By marking copies of the statement in a way which indicates the passages on which the prosecution will not rely. This merely indicates that the prosecution will not seek to adduce the evidence so marked. The original signed statement to be tendered to the Court is not marked in any way. The marking on the copy statement is done by lightly striking out the passages to be edited so that what appears beneath can still be read, or by bracketing, or by a contribution of both. It is not permissible to produce a photocopy with the deleted material obliterated, since this would be contrary to the requirement that the defence and the Court should be served with copies of the signed original statement. Whenever the striking out/bracketing method is used, it will assist if the following words appear at the foot of the frontispiece or index to any bundle of copy statements to be tendered: "The prosecution does not propose to adduce evidence of those passages of the attached copy statements which have been struck out and/or bracketed. (Nor will it seek to do so at the trial unless a Notice of Further Evidence is served)."

(2) By obtaining a fresh statement, signed by the witness, which omits the offending material, applying the procedure in paragraph 2 above.

4. In most cases where a single statement is to be edited, the striking out/bracketing method will be the more appropriate, but the taking of a fresh statement is preferable in the following circumstances.

(a) When a police (or other investigating) officer's statement contains details of interviews with more suspects than are eventually charged, a fresh statement should be prepared and signed omitting all details of interviews with those not charged except, insofar as it is relevant, for the bald fact that a certain named person was interviewed at a particular time, date and place.

(b) When a suspect is interviewed about more offences than are eventually made the subject of committal charges, a fresh statement should be prepared and signed omitting all questions and answers about the uncharged offences unless either they might appropriately be taken into consideration or evidence about those offences is admissible upon the

charges preferred, such as evidence of system. It may however be desirable to replace the omitted questions and answers with a phrase such as:

"After referring to some other matters, I then said....." so as to make it clear that part of the interview has been omitted.

(c) A fresh statement should normally be prepared and signed if the only part of the original on which the prosecution are relying is only a small proportion of the whole although it remains desirable to use the alternative method if there is reason to believe that the defence might themselves wish to rely, in mitigation or for any other purpose, on at least some of those parts which the prosecution do not propose to adduce.

(d) When the passages contain material which the prosecution is entitled to withhold from disclosure to the defence.

5. Prosecutors should also be aware that, where statements are to be tendered under Section 20B of the *Evidence Act* in the course of summary proceedings, there will be a greater need to prepare fresh statements excluding inadmissible or prejudicial material rather than using the striking out or bracketing method.

6. None of the above principles applies, in respect of committal proceedings, to documents which are exhibited (including statements under caution and signed contemporaneous notes). Nor do they apply to oral statements of a defendant which are recorded in the witness statements of interviewing police officers, except in the circumstances referred to in paragraph 4*(b)* above. All this material should remain in its original state in the committal bundles, any editing being left to prosecuting counsel at the Trial Court (after discussion with defence counsel and, if appropriate, the trial judge).

7. Whenever a fresh statement is taken from a witness, a copy of the earlier, unedited statement(s) of that witness will be given to the defence in accordance with the guidelines contained in Part II unless there are grounds under paragraph 13 of the guidelines for withholding such disclosure.

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PART II

8. For the purposes of these guidelines the term "unused material" is used to include the following:

(1) all witness statements and documents which are not included in the committal bundles served on the defence;

(2) the statements of any witnesses who are to be called to give evidence at committal and (if not in the bundle) any documents referred to therein;

(3) the unedited version(s) of any edited statements or composite statement included in the committal bundles.

9. In all cases which are due to be committed for trial, all unused material should normally (i.e. subject to the discretionary exceptions mentioned in para. 13) be made available to the defence Attorney-at-law if it has some bearing on the offence(s) charged and the surrounding circumstances of the case.

10. *(a)* If it will not delay the committal, disclosure should be made as soon as possible before the date fixed. This is particularly important (and might even justify delay) if the material might have some influence on the course of the committal proceedings or the charges on which the magistrate might decide to commit.

(b) If however it would or might cause delay and is unlikely to influence the committal, it should be done at or as soon as possible after committal.

11. If the unused material does not exceed 50 pages, disclosure should be by way of provision of a copy, either by post, by hand or via the police.

12. If the unused material exceeds 50 pages or is unsuitable for copying, the defence Attorney-at-law should be given an opportunity to inspect it at a convenient police station or, alternatively, at the Attorney-at-law's office, having first taken care to remove any material of the type mentioned in para. 13. If, having inspected it, the Attorney-at-law wishes to have a copy of any part of the material, this request should be complied with.

13. There is a discretion not to make disclosure in the following circumstances.

(1) There are grounds for fearing that disclosing a statement might lead to an attempt being made to persuade a witness to make a statement retracting his original one, to change his story, not to appear at court or otherwise to intimidate him.

(2) The statement (e.g. from a relative or close friend of the accused) is believed to be wholly or partially untrue and might be of use in cross-examination if the witness should be called by the defence.

(3) The statement is favourable to the prosecution and believed to be substantially true but there.are grounds for fearing that the witness, due to feelings of loyalty or fear, might give the defence Attorney-at-law a quite different, and false, story favourable to the defendant. If called as a defence witness on the basis of this second account, the statement to the police can be of use in cross-examination.

(4) The statement is quite neutral or negative and there is no reason to doubt its truthfulness, e.g. "I saw nothing of the fight" or "He was not at home that afternoon". There are however grounds to believe that the witness might change his story and give evidence for the defence, e.g. purporting to give an account of the fight, or an alibi. Here again, the statement can properly be withheld for use in cross-examination.

(Note: in cases (1) to (4) the name and address of the witness should normally be supplied.)

(5) The statement is, to a greater or lesser extent, "sensitive" and for this reason it is not in the public interest to disclose it. Examples of statements containing sensitive material are as follows:

(a) it deals with matters of national security; or it is by, or discloses the identity of, a member of the security services who would be of no further use to those services once his identity became known;

(b) it is by, or discloses the identity of, an informant and there are reasons for fearing that disclosure of his identity would put him or his family in danger;

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(c) it is by or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity became known;

(d) it contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he was a suspect; or it discloses some unusual form of surveillance or method of detecting crime;

(e) it is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served on the supplier, e.g. a bank official;

(f) it relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matter prejudicial to him;

(g) it contains details of private delicacy to the maker and/or might create risk of domestic strife.

14. In deciding whether or not statements containing sensitive material should be disclosed, a balance should be struck between the degree of sensitivity and the extent to which the information might assist the defence. If, to take one extreme, the information is or may be true and would go some way towards establishing the innocence of the accused (to cast some significant doubt on his guilt or on some material part of the evidence on which the Crown is relying) there must be either full disclosure or, if the sensitivity is too great to permit this, recourse to the alternative steps set out in para. 19. If, to take the other extreme, the material supports the case for the prosecution or is neutral or for other reasons is clearly of no use to the defence, there is a discretion to withhold not merely the statement containing the sensitive material but also the name and address of the maker.

15. Any doubt whether the balance is in favour of, or against, disclosure should always be resolved in favour of disclosure.

16. No unused material which might be said to come within the discretionary exceptions in para. 6 should be disclosed to the defence until:

(a) the investigating officer has been asked whether he has any objections, and

(b) it has been the subject of advice by the Director of Public Prosecutions.

17. In all cases the Director of Public Prosecutions should be fully informed of what unused material has already been disclosed.

18. If the sensitive material relates to the identity of an informant, attention should be paid to the following passages from the judgments of.

(a) Pollock CB in A–G v Briant (1846) 15 M & W 169 at 185, 153 ER 808 at 814–815:

> ".....the rule clearly established and acted on is this, that, in public prosecution, a witness cannot be asked such questions as will disclose the informer, if he be a third person. This has been a settled rule for fifty years, and although it may seem hard in a particular case, private mischief must give way to public convenience.....and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer...."

(b) Lord Esher MR in Marks v Beyfus (1880) 25 QBD 494 at 498:

> "....if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail."

19. If it is decided that there is a duty of disclosure but the information is too sensitive to permit the statement or document to be handed over in full, it will become necessary to consider whether it would be safe to make some limited form of disclosure by means which would satisfy the legitimate interests of the defence. These means may be many and various but the following are given by way of example.

(1) If the only sensitive part of a statement is the name and address of the maker, a copy can be supplied with these details, and any identifying particulars in the text, blanked out. This

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would be coupled with an undertaking to try to make the witness available for interview, if requested, and subsequently, if so desired, to arrange for his attendance at court.

(2) Sometimes a witness might be adequately protected if the address given was his place of work rather than his home address. This is in fact already quite a common practice with witnesses such as bank officials.

(3) A fresh statement can be prepared and signed, omitting the sensitive part. If this is not practicable, the sensitive part can be blanked out.

(4) Disclosure of all or part of a sensitive statement or document may be possible on a counsel-to-counsel basis, although it must be recognised that counsel for the defence cannot give any guarantee of total confidentiality as he may feel bound to make use of the material if he regards it as his clear and unavoidable duty to do so in the proper preparation and presentation of his case.

20. An unrepresented accused should be provided with a copy of all unused material which would normally have been served on his Attorney-at-law if he were represented. Special consideration, however, would have to be given to sensitive material and it might sometimes be desirable for counsel, if in doubt, to consult the trial judge.

21. If, either before or during a trial, it becomes apparent that there is a clear duty to disclose some unused material but it is so sensitive that it would not be in the public interest to do so, it will probably be necessary to offer no, or no further, evidence. Should such a situation arise or seem likely to arise then, if time permits the Director of Public Prosecutions should be consulted.

22. The practice outlined above should be adopted with immediate effect in relation to all cases so far as is practicable, that is to say, immediately after the associated legislation is brought into operation.