

PROPOSED PROCEDURES TO SIMPLIFY THE PRESENTATION OF COMPLEX COMMERCIAL CRIMINAL CASES

A paper by the Government of Hong Kong

General

The substance of this paper was prepared by the Attorney General's Chambers in Hong Kong for presentation, along with other papers, to a Select Committee of the Hong Kong Legislative Council. The paper was prepared before the publication of the report of the Fraud Trials Committee chaired by The Right Honourable The Lord Roskill, P.C. but not supplied to that Committee. It is interesting to compare the paper and the Roskill Report in respect of the area they both cover.

2. The Select Committee was established after debates in the public forum and the Legislative Council over the Trial of Commercial Crimes Bill 1985 which proposed, for complex commercial criminal cases, a mode of trial by a High Court judge and three commercial adjudicators similar to that proposed in the Roskill Report. This paper does not deal with the mode of trial for these cases which was argued separately. The Select Committee was told by the Attorney General's Chambers that the more effective was the procedure for simplifying the issues, the less need there was for an expert tribunal to try the case.

3. Parts of the original paper dealing with entirely local issues have been removed from this version.

4. The Commercial Crime Unit of Attorney-General's Chambers in Hong Kong has a great deal of experience in the prosecution of complex commercial criminal cases; perhaps more than the prosecution authorities of any other Commonwealth jurisdiction. This situation is, we hope, because the Hong Kong authorities have a greater determination to prosecute these difficult cases, rather than that our businessmen are more dishonest than most. With our experience, we can, perhaps better than most people, understand the reluctance of many jurisdictions to press these prosecutions with enthusiasm when one is faced with the problem mentioned in this paper. The task is daunting logistically and the temptation to direct scarce resources to needs which may produce quicker and more visible results is difficult to resist. But criminal conduct of the kind concerned is a rot and, if unchecked, particularly in a community like Hong Kong which depends for its survival on the health of its business and financial sectors, is pernicious.

5. As a basis for these proposals, it may be helpful to attempt to set out some principles of general application.

6. Any system of criminal justice should, with as great certainty as possible, ensure that the guilty are detected, tried and sentenced and the innocent are acquitted.

7. A system of criminal justice should be as speedy, efficient and inexpensive as is consistent with the attainment of real and substantial justice.

8. The right of society to be protected from the effects of crime, being the sum of individual rights of all the people in that society, should be treated with respect and concern. These rights are too important to be the subject of 'games' played by lawyers.

9. Procedures which have no merit, other than an aura of historical responsibility, should be abolished and replaced by procedures which are direct, straight-forward and efficient.

10. When a society is faced with great changes, it can expect its system of criminal justice to be examined with an objective eye and, even if it is only its appearance that is unimpressive, it risks the danger of the good being discarded with the bad, resulting in the substitution of a different system which may be unacceptable.

11. The 'right to silence' as a constituent of our criminal justice system should be properly understood and not used as some kind of slogan or banner under which to fight changes to the system. The 'right to silence' means no more than the right of an accused person not to be obliged to incriminate himself. In the context of a trial, an accused person is not obliged to say anything but if he exercises that right in the face of sufficient and credible evidence, he runs the risk of that evidence being accepted.

Background

12. Although the proposals regarding the mode of trial in selected complex commercial crime matters is debated, there is general agreement amongst commentators and legal practitioners that there is room for improvement both in the investigation and presentation of these cases.

13. It is clear that the current method of presentation of these cases is cumbersome, time wasting and does not necessarily achieve just results. The issues may be blurred even up to time that the jury are asked to consider their verdict and the job of the jury is made more difficult by the way in which the case is presented. It often occurs that the defence probe a witness's testimony without any specific allegations being put to the witness and at the conclusion of the evidence it remains unclear whether that witness's evidence and other evidence relating to the issue is disputed. Furthermore, the defence as they are presently entitled, often use the complexity of the case to advantage by putting the prosecution to strict proof on matters that are not in dispute thereby creating confusion and extending the cost and time of the trial.

14. Before we deal with the problems in detail and propose some solutions which in our view would assist in presentation of these cases let us first deal with what actually occurs under our system at the present time.

The current situation in Hong Kong

15. Large scale commercial fraud is investigated by two agencies namely Commercial Crime Bureau (CCB) of the Royal Hong Kong Police or the Independent Commission Against Corruption (ICAC). The reason that ICAC become involved is that many large commercial frauds have as their basis corruption on a gigantic scale. The most recent examples of this type of corruption/fraud are seen in the large amounts of money and other advantages flowing to senior bank officials to induce them to make large loans, not with ordinary commercial criteria in mind, but rather their own individual benefit. The main point that we should emphasize in this paper is that these large commercial frauds cannot be viewed in the same light as other crimes with which the criminal law deals. The usual investigatory techniques cannot be successfully applied to this type of crime. Some of the distinguishing features are as follows:

- (a) There is rarely an identifiable victim. The victim of this type of crime is remote from the criminal conduct. In many cases it is shareholders and

creditors who suffer and they are not directly involved in the running of the company. Therefore often there is no complainant in the traditional sense. There may be a liquidator, there may be the Commissioner for Banking or the Commissioner of Securities or the press calling for an inquiry, but rarely in a large collapse do the investigators find people pushing down the door with specific allegations of fraud. Often small investors or creditors complain vocally however they are unable to assist the investigator other than to complain that they have lost money. They are unaware of how the money has been lost or what circumstances precipitated a particular collapse. Very often all the investigator has is his own suspicion that there is criminality involved in the collapse.

- (b) Added to the above mentioned problem the investigator is generally faced with reluctant witnesses. There are firstly the large bankers and creditors who generally have made the commercial decision to cut and accept their losses. They are not keen to have their affair or their conduct examined although in most cases their co-operation as witnesses is sought and is of utmost importance. Then there are those, who have an interest of their own to serve and will only co-operate as a last resort. For example, professionals who fear possible civil repercussions and others who fear some form of non criminal action if they co-operate, or people who have been peripherally involved or assisted in the fraud who fear possible prosecution. Finally those who worked closely with the main fraudster and therefore are sympathetic and faithful to him are also reluctant if not positively hostile to the investigation.

The investigator is therefore faced with a mountain of documentation, a smell of criminal conduct and enormous pressure to produce quick results.

- (c) The fraudster is often influential, wealthy and usually intelligent and has had and continues to have the best professional advice that money can buy. Sometimes the professional advice has gone far beyond just professional assistance (that is involvement or a personal friendship with the person being investigated) and of course this makes the investigator's task more difficult. Although there is a veneer of cooperation, rarely is that forthcoming and the investigator is therefore operating in a hostile environment.
- (d) At a very early stage, the investigator is assisted by professional accountants and lawyers who hopefully will conduct the prosecution, however, the material seized from searches must be examined and analysed in order to determine if criminality exists and if it does its nature and who was involved. In Hong Kong because one is dealing with a wealthy commercial community witnesses leave the jurisdiction without any requirement to return, there is no method of taking evidence before they depart, documents disappear before investigators become aware of their existence and generally the investigation is hamstrung from the outset.

16. Faced with the situation described the investigator and his advisors work through the case. They are generally at a disadvantage because powers of search and seizure are restrictive. The opponent has time to avoid search and seizure and others can hold the investigator off for some time until there is general consensus as to how to treat the search warrants. The defendants have sufficient notice of any search and can therefore dispose of anything incriminating. Professional offices and banks create problems of their own. Generally one does not wish to in any way disrupt the ordinary business or professionals or bankers but unless they are prepared to co-operate it is difficult to obtain documents quickly.

17. Although the ICAC have extensive powers of investigation the police do not have similar powers. Often in the case of large scale commercial fraud corruption of senior executives is part of the fraud. We have difficulty in justifying a distinction between the powers given to ICAC and those needed by CCB to adequately investigate large scale fraud. Section 50(7) of the Police Force Ordinance (Cap.232) empowers a magistrate to issue a search warrant upon an application on oath by any person. The scope of such a warrant is very wide, however, there are times when it is necessary for the investigators to secure documents without any delay and it is our experience that documents are often missing or destroyed by the time the investigator is able to move. In special circumstances where it appears to the Commissioner of Police or certain delegated officers that because of the urgency of the matter a warrant should issue we recommend that he have power to issue the warrant. We refer specifically to Section 17 of the Prevention of Bribery Ordinance (Cap. 201) which gives special power to the ICAC. Such powers should be given to the police.

18. Section 14 of the POB Ordinance (Cap. 201) empowers the Commissioner to require a suspected person to furnish information about assets, liabilities, income and expenditure. Powers of a broadly similar nature relevant to the investigation of commercial crime should be given to the Commissioner of Police. Similarly we recommend that provisions be enacted similar to those in Section 14A of the POB Ordinance regarding restrictions on the disposal of assets.

19. One of the major problems in the investigation of commercial crime in Hong Kong is the disappearance not only of suspects but of people who could assist. Furthermore, potentially reluctant witnesses often leave without notice therefore making the task of the investigator and prosecutor extremely difficult. In many cases suspects are arrested and have to be charged long before the investigation is sufficiently advanced and therefore the prosecutor is forced to make decisions long before he has sufficient evidence to make the most informed analysis of the case. Section 17A of the POB Ordinance (Cap. 201) provides that a court may order a person subject to an investigation to surrender any travel document in his possession. Such an order can operate for 6 months and for a further 3 months if a magistrate is satisfied that an investigation could not reasonably have been completed within the 6 month period. We recommend similar provisions be enacted to grant the Commissioner of Police similar powers in cases of commercial crime.

20. In respect of witnesses there should exist a power to obtain evidence at an early stage. In cases where a potential witness refuses to make a statement to the police or alternatively where that witness is considered to be hostile to the investigation we recommend that the Attorney General be empowered to apply to a magistrate to have that person examined on oath. Section 83 of the Criminal Procedure Act 1955 (Zimbabwe) provides that:

"A magistrate may at any time upon the request of the public prosecutor require the attendance before him for examination by the public prosecutor of any person who is likely to give material evidence as to any alleged offence whether or not it be known or suspected who the person is by whom the offence has been committed."

We recommend a similar provision be enacted in Hong Kong.

21. As to the availability of witnesses, if it appears to a magistrate that a potential witness is an essential witness in a prosecution he should have power to order that the witness not to leave Hong Kong or at the very least that the person deposit some security to ensure his attendance at any time in the future when required.

22. Eventually after an extensive enquiry the prosecution is in a position to lay charges. Often it has been necessary to grant immunities, and often witness statements are far from complete because of the reluctance already described. Charges are preferred and the defendants are presented to a court. There is no guarantee that those witnesses from whom

statements have been taken will attend at the hearing. Currently, there is no method of ensuring a witness's attendance at court other than by way of witness summons. A magistrate cannot issue such summons requiring a witness to attend in the High Court other than after a preliminary enquiry. Furthermore a witness is free to leave the jurisdiction even after service of a summons upon him and once out of the jurisdiction there is no way of ensuring his attendance. Section 37 of the Criminal Procedure Ordinance (Cap. 221) empowers a court to issue an arrest warrant in the case of a witness where it can be satisfied on oath that the witness is unlikely to comply with the summons. In practice it is almost impossible to obtain that evidence until after the witness has left. We recommend that magistrates be empowered upon application by the prosecution to ensure a witness remains within the jurisdiction. Again, if a witness is to leave and there is doubt that he will return a magistrate should be empowered to order him to deposit security to ensure his future attendance.

The Law

23. The Theft Ordinance (Cap. 210) creates numerous offences. In our view the Ordinance does not adequately provide protection in the case of a great many large scale frauds. The prosecution is often required to find substantive offences to fit circumstances which do not adequately illustrate the criminal conduct. These attempts are artificial and unsatisfactory. In many cases the prosecution, if it is to present the total picture and an accurate account of the criminal conduct must charge conspiracy to defraud. The use of conspiracy has been criticized by the Courts and there is a view that the prosecution should if possible charge substantive offences. Many commentators have suggested a general offence of fraud. New South Wales has such legislation, the DPP of UK recommends it in strong terms and Hong Kong would benefit enormously if such an offence were created. The DPP in the UK on the 7 August 1984 recommended the creation of an offence of fraud where a person dishonestly acts in a manner which prejudices or takes the risk of prejudicing another's rights knowing that he has no right to do so. He recommends that it not be restricted to a risk of possible injury resulting in economic loss.

24. If a person dishonestly acts in a manner and prejudices the rights of others this should be an offence and lawyers ought not have to spend hours attempting to fit the conduct into an offence which had its origins many years ago when large scale commercial fraud as we know it today was unknown. Furthermore the defence should not be able to put forward a multitude of technical objections in a situation where their client has clearly offended however he is attempting to avoid the charge on technical grounds. We recommend the introduction of a general offence of fraud. An offence of fraud is common in countries the legal systems of which are based on Roman Law, such as Scotland. A statutory provision creating such an offence might read as follows -

" Any person who by an deception (whether or not such deception was the sole or main inducement) dishonestly causes actual or potential prejudice to another commits an offence and is liable to imprisonment for 14 years".

Procedure after charge

25. In due course the defence are served with a copy of the charges, copies of all statements upon which the prosecution intends to rely, copies of exhibits and an exhibit list (Section 80B Magistrates Ordinance (Cap. 227)).

From this material the defence are required to decide whether they require a committal hearing or whether the matter should be automatically committed to the High Court. The position is unsatisfactory for a variety of reasons:

- (a) The material served is generally voluminous. Therefore even though theoretically the defence has the prosecution case, for counsel to properly understand the case an enormous amount of work is required and the defence may never really understand the case until the Crown opens. Even then if the Crown opening is general the essential issues may not become obvious until towards the end of the case (if ever).
- (b) Defence Counsel may not look at the case until very late in the piece. This can be due to pressure of work; or if legal aid is involved the failure to properly compensate them for committal and pre-trial work.

26. Therefore based usually on inadequate preparation and the difficulties described, the defence are required to elect whether to have a preliminary enquiry. However if they elect, the case, (unless dismissed by the Magistrate), is then transferred to the High Court. We do not wish to deal with the advantages and disadvantages of committals here as this is the subject of a separate paper.

27. The defence up to this time have not given nor are they required to give any indication of their plea or their defence. Even up to the date of trial the Crown is often uncertain as to plea. Certainly the issues in dispute are rarely known at this stage. The Crown prepares its case on the basis that all will be in dispute. The defence takes the attitude that it is for the Crown to prove its case. Therefore a great deal of time, effort and money goes into establishing matters which in due time are undisputed. An inordinate amount of time is spent ensuring documents which are not the subject of dispute and properly proved.

28. Furthermore, the trial judge is kept in the dark. Although he has all documents, statements and depositions it is usually unclear to him what the issues are in the case. There is now provision for a form of pre-trial conference. On the 30th November 1984 the Chief Justice issued a practice direction (APPENDIX 1) dealing with the subject of pre-trial procedure. Although the practice direction is detailed and provides a framework within which the prosecution and defence can work there are practical difficulties in applying it. Firstly, there is no compulsion upon the parties to comply. Our experience has been that because defence counsel often receive the brief at a late stage no meaningful agreement can be reached prior to trial. Secondly, the Judge who conducts the pre-trial review is not necessarily the trial Judge. Therefore in a complex commercial crime case the advantage of having the trial Judge involved at an early stage may be lost. It is important that the judge who conducts the pre-trial review be familiar with the case. Unless that person is the trial judge it seems to us to be a waste of judicial time to have one judge read into the case for pre-trial purposes and another to come to it at a later stage for trial. Thirdly, the Judge cannot apply any sanction if the pre-trial procedure does not work. It is difficult for the defence to cooperate if they do not have, in advance, the prosecution's statement of case. Fourthly unless there is some method of ensuring that counsel briefed for trial cooperate in the procedure there is still doubt at trial as to what matters are agreed. Counsel at trial are not necessarily bound by earlier admissions made and the Crown may still be in a position at the last moment when it is unsure about agreed matters.

29. The experience in our general prosecutions section has been that it is difficult in practice to implement the procedures and we consider that the procedure does not go far enough to ensure smooth running of a complex commercial trial. One of the major difficulties is that counsel do not consider their case until a very late stage and usually meaningful discussions only take place just prior to the commencement of the trial. This is not satisfactory in complex commercial cases. It is our view that unless there is full disclosure between the prosecution and the defence then it is unlikely that the issues can be isolated sufficiently to ensure that the trial is significantly shortened and that the case can be presented in its simplest form to the jury. The present pre-trial procedure depends basically on the goodwill of counsel, and in our view that is unsatisfactory.

30. Furthermore, counsel dealing with the case at its early stage may not later act at trial, therefore one is never sure that what appears to be agreed one day will be agreed at trial. In legally aided cases counsel are not properly remunerated for pre-trial work and unless there is a fundamental change in approach the system cannot work in a satisfactory manner. We therefore recommend that the solicitors and counsel be adequately remunerated for work done prior to trial and in particular preparation for pre-trial conferences.

31. Generally what occurs is that on the morning of the trial the Judge is asked to adjourn for a day or more whilst counsel try to sort out agreed facts. The present system is therefore a piecemeal approach which although of some use does not in any meaningful way solve the problem. The Judge is in due course informed and after a jury has been empanelled and after preliminary legal argument the Crown opens its case. We suspect that it is during the opening that the Judge and defence discover how the Crown is presenting its case.

32. The trial proceeds with an opening speech from the prosecutor. More often than not the Judge and defence counsel do not have a copy. They do not know how the prosecution will present its case. The jury are never provided with the opening speech. They are required to listen and absorb complex commercial concepts without any assistance other than the prosecutor's opening speech. In our opinion it is virtually impossible for them to absorb the detail. It is often difficult for the Judge at first blush to understand the case and the defence is in much the same position. It therefore follows that in this adversarial situation the defence is reluctant to agree evidence and exhibits and the Judge is reluctant to push the defence to make concessions. It is only as the trial proceeds that the real issues start to become evident. Often witnesses are called whose evidence is not in dispute or where the defence wish to elicit a fact which the Crown may have conceded if placed on notice. Experts from each side are kept away from one another, therefore cross-examination of them can be length only to find out that the area of disagreement falls within a narrow compass. Very technical evidence is received viva voce from witnesses whose evidence can be most confusing unless carefully explained.

33. The defence then present their case. Until that stage it may not have been made clear what the defence case really is, nor may it ever become clear. Defence experts can be called without notice to the prosecution. The whole case is presented in an adversarial atmosphere with various tactics and techniques used, not necessarily to assist in making the issues clear. In fact some have described the whole procedure as a "game lawyers play" where tactics, advocacy and confusion take pride of place over clarity and a search for the truth. At the conclusion of this length procedure the Judge has the daunting task of summing up the case to the jury. The jury is expected to listen and absorb complex directions which can take several hours or even days. At the end of it all they are required to announce a verdict on this mammoth presentation.

34. Most commentators agree that there is need for improvement of the system. There are varying opinions, but the great majority consider there is a need to introduce extensive pre-trial procedures in an attempt to isolate the issues, simplify the case and shorten the trial. We recommend that extensive pre-trial procedures be introduced in complex commercial crime cases.

35. The question that one immediately asks is should there be compulsion upon the parties to cooperate in such a procedure and how far should the defence be forced to reveal its hand? How will a court ensure compliance? What are the sanctions for non compliance?

Does a non compulsory system work?

36. It is our considered view that a system which relies on the goodwill of the parties will not work. In a system which is designed to put the prosecution to proof and which does not require the defence to show any part of its hand, the defence is in an extremely difficult position when asked to voluntarily cooperate. At all time they must have their client's interest in mind and it is often the case that in order to secure an acquittal they require the Crown to prove every part of its case. This approach is not necessarily in the interests of the smooth administration of justice or in getting to the ultimate truth but it is in the interest of the defendant. Furthermore, unless there is a basic change in the attitude of the profession and the legal aid office to payment for preparatory work one cannot expect counsel to spend many hours preparing for a pre-trial review. There must also be a basic change in the approach of the judiciary so that the trial judge is brought into the picture earlier and he is the one to decide pre-trial matters and play an active role.

37. The experience to date has been that a voluntary form of pre-trial procedure has not proved to be satisfactory for a number of reasons: Firstly in cases which are legally aided, counsel is not remunerated sufficiently for work done prior to trial. For the system to work adequately a considerable amount of work must be performed by counsel before trial if agreement is to be reached. Secondly the present attitude of the defence has been that they will only agree matters when they are clearly satisfied that the prosecution can prove the matters sought to be agreed. This approach cannot be criticized because there is no requirement upon the defence to make any admission even though their instructions may be that the matters sought to be agreed are not in dispute. There needs therefore, to be a fundamental change in approach so that the defence are required to positively assert their object rather than take a passive approach and say in effect to the Crown "you prove it".

38. It is therefore recommended that legislation be enacted that upon the application of the Crown or the defence a structured pre-trial procedure be followed.

The pre-trial procedure

39. A number of jurisdictions have approached pre-trial procedures in different ways.

(a) United Kingdom

The United Kingdom has no form of pre-trial review which is either compulsory or effective. The present system of pre-trial review depends basically upon the goodwill of counsel involved in the case and there is no specific provision that the trial judge be involved in the pre-trial review. The Roskill Committee have received numerous submissions, a great many of which advocate extensive pre-trial review procedures. The present situation in Hong Kong is unsatisfactory.

(b) Scotland

There is no form of pre-trial review in Scotland nor is there any formal discovery of documents. There is however a judicial examination procedure which enables the prosecutor to put questions to the accused shortly after he has been charged and in the presence of a sheriff. The purpose of such examinations is to elicit from the accused on account of the matters averred in the charge or of any alleged confession. He is informed that prior to trial the defence is required to give notice of certain specified defences and failure to give notice can result in the Court refusing to allow those defences to be raised. The defence must provide a list of their witnesses at least ten days prior to trial. This allows the prosecution time to interview any defence witnesses if it so desires.

(c) Ireland

There is no pre-trial review.

(d) Australia

In Victoria there are pre-trial criminal procedure rules (APPENDIX 2) which provide that an accused person or the Director of Public Prosecutions may make application to a judge for directions with respect to the preparation for trial, readiness of trial or conduct of trial of a criminal case in any case where it is necessary for the fair and expeditious conduct of the trial. At the hearing of the application the judge may ask such questions of the parties and give such directions with respect to the preparation for trial, readiness of trial or conduct of trial as the judge thinks proper having regard to all circumstances. The accused is present throughout the hearing.

The effect therefore of these rules is that there is no sanction upon a defendant if he does not comply with the rules and there is certainly no procedure by which a defendant can be compelled to cooperate with the pre-trial review procedure. We have already made our views clear that in a voluntary system unless the judge participates in a very forceful way the pre-trial review can serve little useful purpose.

South Australia also has rules which relate to pre-trial conferences. Other States of Australia do not have any procedure.

(e) New Zealand

New Zealand has no procedure.

(f) Canada

The Canadian experience in relation to pre-trial reviews is that in some Provinces pre-trial reviews do take place, however it appears there is no formal procedure by which these pre-trial conferences are held. Again the situation is that the onus is upon the Crown and the defence to cooperate. It seems that these pre-trial review procedures in Canadian Provinces are designed basically to ensure the Crown has provided the defence with a great deal of material, but there is no requirement upon the defence to make admissions or to agree or to discover documents.

(g) United States

We have not looked in detail at the various States of the United States of America however we have investigated the position in New York and in Illinois. There are extensive rules in New York and in Illinois dealing with pre-trial discovery and pre-trial procedures.

40. We recommend that legislation be enacted in Hong Kong dealing with pre-trial procedures and discovery. The legislation should contain the following provisions:

(i) Whether committal proceedings are retained or not there be provision that within seven days of filing of the document either party can apply to a judge for an order requiring a pre-trial conference. Provision should also exist which enables the court upon its own motion and upon hearing counsel to review a pre-trial conference.

(ii) Upon the application being granted we recommend that if by that stage the trial judge has not been appointed the Chief Justice thereupon appoint the trial judge

who from that moment on shall have conduct of the pre-trial proceeding. The parties, upon the order being made, would be required to attend before the judge. Again we suggest that it be desirable that counsel who would be involved in the case would be involved in the pre-trial procedure and therefore the court should allocate time which would be convenient to counsel's other commitments.

(iii) Upon attending before the pre-trial judge he would make orders requiring the Crown to file and serve upon the defence within a period specified by him the following documents:

- (a) A statement of the Crown case. This statement should be in the form of an outline of the Crown opening and should specify broadly what evidence the Crown relies upon and its relevance to the Crown case. The statement should contain the Crown's submission on the law applicable to the charges. (The purpose of providing this document to the defence is so that at a very early stage they can see exactly how the Crown case is to be presented).
- (b) All statements of witnesses upon whom the Crown intends to rely. this should include any written and the substance of any oral statements.
- (c) Reports or statements of experts, including physical and mental examinations and scientific tests which resulted both in positive and negative results.
- (d) Any books, papers, documents, photographs or tangible objects which the prosecution intends to use in the hearing in support of its case.
- (e) Any charts or other aids upon which Crown would rely.
- (f) A list of previous convictions of the defendant any any witnesses upon whom the Crown intends to rely.
- (g) Statements of witnesses who may assist the defence.

(iv) Provision should be made that this discovery be on a continuous basis and the Crown be responsible to ensure that any material matter is discovered to the defence as soon as practicable after it becomes known to the prosecutor.

(v) Any claim of Crown privilege or claim of confidentiality due to public policy should be referred to the judge who should have a discretion as to whether the material should be discovered.

(vi) The matters which need not be discovered are:

- (a) Any documents relating to legal research any records, correspondence, reports or memoranda to the extent that they contain opinion, theories, conclusions of legal and investigative personnel.
- (b) Any details which might lead to the identification of an informant.
- (c) Any matters which are matters of security.

If there be debate or disagreement about material which ought to be discovered the trial judge should be the final arbiter.

(vii) After the Crown has served its documents pursuant to the order the defence would be required to serve on the prosecution and file with the court the following:

- (a) A statement from defence as to the defence or defences upon which it intends to rely.
- (b) A statement from the defence as to which witness statements are:
 - (i) agreed
 - (ii) required for pre-trial evidence
 - (iii) required for evidence at trial

When we refer to evidence required for pre-trial evidence we recommend that there be provision that prior to trial upon the application of either the defence or the prosecution, witnesses whose statements have been served and would be relied upon can be called before the judge some time before the trial. The deposition is taken and can be tendered at the trial. If either party objects to pre-trial evidence being given the judge shall have a discretion not to order such pre-trial evidence and the witness would then be called at trial. We recommend this procedure because it is our view that on many occasions there are witnesses who are required to attend at trial whose evidence could normally be agreed. However, the defence may wish to ask questions to obtain some detail or additional evidence, when in fact there is no dispute about that witness's evidence. We realise that where a witness's credit is in issue then it is essential that witness be seen and his evidence heard by the jury however we feel that there are many witnesses in large commercial cases whose evidence is not in dispute but nevertheless the defence wish to cross-examine. It may be in many of those cases the defence would be content with cross-examining that witness in the absence of the jury and then have the witness's evidence read to the jury and for it to be explained to the jury that the witness's evidence was given prior to the trial. In circumstances where witnesses are going overseas or leaving the Territory this procedure would be extremely valuable.

- (c) Documents - The defence would be required to indicate which documents are disputed and the basis for the objection. In the absence of objection from the defence the documents become admissible without formal proof thereof. The signatures and handwriting appearing thereon are presumed to be prima facie evidence of the fact that the person whose name or writing appears on the document in fact signed or wrote on it. If a stamp or writing on the document indicates that it has been received then that is prima facie evidence of the fact of the document was so received.

Photostat or photograph copies of documents would be admissible unless there is objection. The objection should be ruled upon by the trial judge taking into account the relevance of the document and its evidential value. All these objections could be heard during the pre-trial proceeding.

- (d) The defence to supply names and addresses of any witnesses they intend to call plus statements and memoranda of oral statements relating to those witnesses.

- (e) The defence to produce all books, papers, tangible or intangible objects, etc. which they intend to use in the trial as evidence or for the purposes of cross-examination.
 - (f) The defence to supply all reports or statements of experts. Experts from either side should be encouraged to confer in the presence of solicitors or counsel to see if a great deal of complex evidence can be agreed.
- (viii) Once the parties have had the opportunity to examine each other's documents and each other's case then further pre-trial conferences would be held to ascertain what agreed facts could be put to the jury and how they would be presented.
- (ix) It is essential if this system of pre-trial is to work that the trial judge who will in due course conduct the trial be a party to the pre-trial proceeding and that he play an active role in the pre-trial proceeding to ensure that parties thereto co-operate.
- (x) We suggest the pre-trial conferences be held in court and that the defendant be present throughout the pre-trial conference. The hearings should be in private and not be the subject of press reporting.
- (xi) If a defendant refuses to cooperate in the pre-trial proceeding then his failure to cooperate can be a matter of comment at trial by the trial judge. Furthermore, if his failure to cooperate is due to counsel or solicitors or both not being prepared then the sanction of costs thrown away should be applied. If the matter is legally aided the trial judge should have discretion to order that solicitors and/or counsel should not be remunerated for certain days which he considers were wasted by failure of the defence to agree matters not in dispute. The trial judge should have wide powers to make any order he considers to be just.
- (xii) It is our view that if a system of proper pre-trial procedure was implemented with a view to obtaining substantial agreement on matters which should not be matters of dispute then the length of trial could be reduced by up to 50%

Plea bargaining

41. In *R v Turner* (1980) 2QB 321 the Court of Appeal gave the following directions on plea bargaining.

- (a) Counsel must be completely free to do what is his duty, that is to give the accused the best advice he can and if it need be in strong terms. This may often include advice that a plea of guilty shows an element of remorse which is a mitigating fact enabling a court to give a lesser sentence.
- (b) The accused having considered counsel's advice must have a complete freedom of choice whether to plead guilty or not guilty.
- (c) There must be freedom of access between counsel and judge. Any discussion, however, must be between the judge and both counsel. If a solicitor representing the accused is in court, he should be allowed to attend the discussions if he so desires.
- (d) The judge, should, subject to one exception never indicate the sentence which he has in mind to impose. A statement that on a plea of guilty he would impose one sentence and on conviction following a plea of not guilty he would

impose a severer sentence should never be made. In the case of *R v Cain* (1976) Cr L R 464 the Court qualified the above mentioned observation in that it stated that it was trite to say that a plea of guilty would generally attract a somewhat lighter sentence than a plea of not guilty after a full-dress contest on the issue. Everybody knew that it was so, and there was no doubt about it. Any accused person who did not know about it should know it. The sooner he knew the better. What would be condemned in *R v Turner* was a more precise offer or suggestion on the part of the judge in which the actual penalty was more closely defined. The judge [in such circumstances] would in a sense be inviting the accused to bargain with him and that was something which should be condemned.

42. Furthermore in *Turner* the court held that where any discussion on sentence had taken place between the judge and counsel for the defence it should be disclosed to the accused. In *Cain's* case what statement was qualified in the following way. It was not uncommon for a defence counsel who did not know the judge well and who is not quite familiar with the tariff of sentencing to wish to get some guidance from the judge as to what sentence he had in mind so that he might accordingly advise his client. One of the advantages that flowed from the close relationship between judge and barrister was that the barrister in that situation could go to the judge and ask him for guidance. If the judge felt disposed to give it to him, counsel would then have a reliable idea of what sort of sentences his client faced and could advise him properly. But the whole point would be destroyed if he disclosed what the judge told him. The confidentiality in their relationship would be broken. In a practice direction issued subsequently to *Turner* and *Cain's* case (1976) Cr. Law Review 561 the court directed that the directions in *Turner* and *Cain* should be followed. However where there was inconsistency the decision of *Cain* should prevail.

43. The decisions in *Turner* and *Cain* and the observations of the Court of Appeal in England must be read in the light of the Hong Kong decision in *CHEUNG Ping-kei v. The Queen* No. 1342 of 1983. The effect of the decision is that where counsel see the judge in Chambers the Court of Appeal in Hong Kong has indicated that it is preferable if not required that counsel communicate those communications to his client. The court of Appeal in England in *Cain's* case clearly thought it proper that counsel not communicate to his client communications with the judge in a case where counsel is attempting to find out from the judge his views as to the tariff in a particular case.

44. In cases of complex commercial crime where there may be a multiplicity of counts it is our view that counsel should be free to bargain as to plea. In practice considerations of sentence are vitally important when plea bargaining takes place. It is our view that it should be permissible for counsel to discuss sentence with the judge within the guidelines laid down in *Turner* and *Cain's* case. We would go further and suggest that it would be proper for a judge to indicate in clear and direct terms his views about the case and his views about sentence. We consider that any cases of complex commercial crime would result in pleas if the judge and counsel were free to discuss their views of the case and that these views be expressed on occasions "off the record". This particularly applies where the judge has been involved in pre-trial discussions and has a fuller understanding both of the Crown and the defence case. We accept that a defendant ought not to be intimidated into pleading guilty by promises of a light sentence. However, in cases of commercial fraud defendants are usually represented. They receive the best advice available and one can assume their counsel will advise them so that they do not feel intimidated. There should be freedom between counsel and the judge to discuss both plea and sentence.

45. Perhaps the protection that could be afforded to an accused person is that where a possible plea has been discussed in Chambers and an accused person is arraigned or re-arraigned, before the plea is taken the judge should explain to him that he should not be intimidated or influenced in his plea by the fact that there have been discussions about sentence prior to the plea being taken.

Indictment

46. It should be open for the judge during the pre-trial hearing to suggest to the prosecution that they amend the indictment in order to simplify the case. There should be freedom of discussion between the prosecution, the defence and the trial judge as to the form of the indictment. At the end of the day it is a matter for the Attorney General to file the indictment and he decides what form it should take. However it is our view that the judge should be free to discuss with counsel his views about the indictment in an attempt to simplify the case and make the issues simpler for the jury.

The Judge

47. In our view it is highly desirable that there should be a panel of judges appointed to try matters of complex commercial crime. These cases are not simple cases and those judges who are appointed to such a panel should be specialists in this area. It is a matter of course for the Chief Justice to determine which cases are matters of complex commercial crime and when it would be appropriate to appoint a specialist judge. We suggest that the judges who are appointed as special commercial judges should undertake some form of training, in particular it would be desirable for them to meet with senior members of the commercial community and to discuss various business practices in certain specified areas. For example it would be desirable for judges to meet with senior bankers and learn from them certain basic matters relating to banking practice. Equally judges should spend some time with the accountancy profession to discuss certain basic accountancy matters such as the way in which accountants approach an audit, how standards evolve, what guidelines accountants use in their approach to certain accounting problems. We could give examples in other areas however once judges were assigned, we consider that the communication between them and people in commerce who have specialist knowledge could be fostered.

The jury and presentation of the case

48. The method of presentation of the criminal case whereby a number of jurors who have no knowledge of the case are confronted with an opening speech, the evidence, closing speeches, and a summing up without any recourse to material other than exhibits is totally unsatisfactory in a difficult commercial crime case. We are of the view that the jury should be provided with as much material as possible to assist them. We are particularly aware of the problem of providing them with too much material, however as a minimum we would suggest that before a jury commence to hear evidence they be provided with firstly a glossary of terms and the explanation of those terms. For example, in a case where banking practice and letters of credit are being discussed by many witnesses a jury should be provided with a written glossary of terms which describe in layman's language the type of documentation and the type of expressions that will be used by the witnesses. The glossary should be the subject of agreement between counsel. If counsel cannot agree the judge should make a final decision as to how the terms should be explained to the jury. They should be provided with the written opening statement of the Crown and they should be given the opportunity of having the evidence of witnesses available for them to pursue when they finally deliberate upon their verdict. This would of course mean that in a complex commercial crime case the evidence is taken verbatim as it proceeds. They should be provided with the defence opening speech and both the Crown and defence closing speeches. Speeches should be kept to a reasonable length so that the jury can absorb them. This could be done as a result of the discussion between the judge and the counsel as to which are the real issues in the case and a concentration by judge and counsel upon those issues. It seems unnecessary for counsel to have to go over in detail matters which are essentially agreed. A simple statement from counsel as to agreed matters could be made and incorporated in the losing address of Crown counsel. Counsel could then concentrate their comments on the matters in issue.

49. The jury should be provided with a copy of the summing up. At the end of the summing up it is our view that the judge should not leave the matter to the jury at large however he should ask certain specific questions for the jury to answer. The questions should be formulated as a result of discussions between counsel and the judge with the judge of course making the final decision. The jury would then be given an opportunity to direct their minds to certain key questions the answers to which would result in a general verdict either of guilty or not guilty. During their deliberation the jury should be free to have access to all material presented to them at trial including evidence of witnesses. In lengthy cases the evidence of a number of witnesses has been given some considerable time prior to the jury being asked to consider their verdict and it seems unfair to require the jury to make their own notes or alternatively to try to recall in detail evidence given by witnesses over a period of weeks.

50. Prior to summing up the judge should indicate to counsel how he intends to direct the jury on the law applicable to the case. He should invite counsel to make any submissions upon the proposed direction. Furthermore, we recommend that it should be the duty of counsel to intimate their objection to any matter in the proposed summing up to which counsel disagree. The Court of Appeal should only in the most exceptional cases allow Counsel to be heard on a matter where no objection or protest was made to the Trial Judge.

Summary of recommendations

51. That powers of search and seizure contained in Section 17 of the Prevention of Bribery Ordinance (Cap. 201) be given to the Commissioner of Police to be used specifically in commercial crime cases (Para.17).

52. That similar powers to those contained in Section 14 of the Prevention of Bribery Ordinance (Cap. 201) relating to disclosure of assets be given to the Commissioner of Police to be used in the investigation of commercial crime (Para. 18).

53. That a provision similar to that contained in Section 17A of the Prevention of Bribery Ordinance (Cap.201) relating to surrender of travel documents be enacted empowering the Commissioner of Police to apply to a magistrate for an order that a suspect surrender his travel documents (Para. 19).

54. That there be provision for examination of witnesses who refuse to make a statement or alternatively who are hostile to the prosecution (Para. 20).

55. That there be provisions to secure the attendance of witnesses (Paras. 21 and 22).

56. That there be a general offence of fraud (Paras. 23 and 24).

57. That solicitors and counsel in legally aided cases receive adequate remuneration for preparation for pre-trial conferences (Para. 30).

58. That legislation be enacted providing for extensive pre-trial procedures and discovery in cases of large scale commercial fraud (Paras. 34, 38 and 40).

59. That within seven days of filing of an indictment either party be at liberty to apply for a pre-trial conference or that court upon its own motion be empowered to order a pre-trial conferences (Para. 40(i)).

60. That the Trial Judge be the judge who conducts the pre-trial conferences (Para. 40(ii)).

61. That the Crown be required to file and serve upon the defence various specified documents (Para. 40(iii)).
62. That discovering be on a continuous basis up to trial (Para. 40(iv)).
63. Claims of Crown privilege or confidentiality be referred to the judge (Para. 40(v)).
64. That certain specified matters not be subject to discovery (Para. 40(vi)).
65. That the defence be required to file and serve upon the Crown various specified documents (Para. 40(vii)).
66. That there be provision for the taking of evidence prior to trial (Para. 40(vii)(b)).
67. That the defence be required to make discovery (Para. 40(vii)(c)).
68. That the defence supply to the prosecution names addresses and statements of defence witnesses (Para. 40(vii)(d)).
69. That pre-trial conferences be held privately in the presence of the defendant (Para. 40(x)).
70. That failure by the defendant or his legal advisors to cooperate in the pre-trial procedure be subject to sanctions (Para. 40(xi)).
71. The plea bargaining be permitted (Para. 44).
72. That the judge be free to discuss his views about the form of indictment (Para. 46).
73. That there be a panel of judges appointed to try complex commercial crime cases. That those judges receive advice from the commercial community as to commercial practice (Para. 47).
74. That the jury be provided with:
 - (1) a glossary of terms;
 - (2) a copy of the opening speeches;
 - (3) a statement of matters agreed;
 - (4) a copy of the summing up;
 - (5) a series of specific questions;
 - (6) opportunity to read the evidence of witnesses; (Paras. 48 and 49).
75. That the trial judge consult with counsel prior to delivery the summing up and hear counsel on the proposed directions of law that he intends to give (Para. 50).
76. That subject to exceptional cases the defence be prohibited from raising matters on appeal where no issue was taken at the trial (Para. 50).

PRACTICE DIRECTION

Pre-trial procedures in the High Court

This direction is issued by the Chief Justice for the guidance of practitioners in proceedings in the High Court in the exercise of its criminal jurisdiction.

It will come into effect from 1 January, 1985.

Pre-trial procedure

1. The Attorney-General may serve on the accused or his solicitor, a notice to admit such facts as may be specified therein relating to -

- (a) the chain of evidence for exhibits;
- (b) that the offence was committed, if this is not to be contested by the accused;
- (c) the admission of documentary exhibits;
- (d) any other matter which may be specified in such notice.

A copy will be served on the Registrar. Such notice will be served after the filing of the indictment and where practicable not less than 28 days before the date fixed for trial.

2. The solicitor for the accused is expected to obtain his client's instructions in the matter and, within 14 days after the notice to admit facts is served, to serve on the Attorney-General a notice in reply stating which facts are admitted. Any admissions should comply with the provisions of section 65C of the Criminal Procedure Ordinance which include the right to seek the leave of the court to withdraw any such admission. A copy of the notice in reply should be served on the Registrar.

3. The Attorney-General may serve notice on the accused or his solicitor that he intends to tender the written statement of any witness, pursuant to section 65B of the Criminal Procedure Ordinance, without calling that witness to give oral evidence. Such notice will, where practicable, be served after the filing of the indictment and not less than 7 days before the date fixed for trial. A copy of the notice will be sent to the Registrar not later than 7 days prior to the date fixed for trial. If objection is made to a statement being tendered in evidence the solicitor for the accused is expected to let the Attorney-General and the Registrar know of this as soon as possible.

4. Not less than 4 days before the date fixed for trial (unless counsel for the Crown and the Defence agree to a later date and shall so inform the judge), a judge who shall if practicable be the judge who is to try the case, may, if he considers it desirable to do so, require counsel for the Crown and the Defence to attend a meeting in his Chambers, presided over by him.

5. At such meeting, counsel will be expected to inform the judge of the following matters -

- (a) of the pleas to be tendered at trial;
- (b) whether any additional evidence is to be called by the Crown and the substance thereof;
- (c) whether or not the facts included in the Attorney General's Notice to Admit Facts are to be admitted; or, if no such notice was served, what facts, if any, are to be admitted and in what form that admission is to be put to the jury;
- (d) which of the prosecution witnesses named on the back of the indictment is available, which of them the Crown intends to call, and which of them defence counsel wishes to be made available;
- (e) whether any statements are to be tendered pursuant to section 65B of the Criminal Procedure Ordinance;
- (f) whether objection is to be taken to the admissibility of any of the Crown evidence, and how long the hearing of such objection is likely to take;
- (g) if any expert testimony is to be called;
- (h) of the order in which prosecution witnesses are likely to be called;
- (i) of the names and addresses of witnesses from whom statements have been taken by the prosecution but who are not going to be called;
- (j) of any alibi not already disclosed;
- (k) of his estimate of the probable length of the trial and of any other significant matter which might affect this;
- (l) whether or not it is intended to make any submission as to:
 - (i) the severance of the accused or of any count of the indictment;
 - (ii) the quashing of the indictment;
 - (iii) the provision of further and better particulars of any count in the indictment; or
 - (iv) any other matter which should be determined in the absence of the jury before the accused pleads to the indictment.
- (m) of any point of law which may arise in the trial, and of any authority in which either party intends to rely as far as can be envisaged at that stage; and
- (n) of any other significant matter which might affect the proper and convenient trial of the case.

6. At such meeting the judge will give such directions as appear to him necessary to secure the proper and efficient trial of the case.

7. The accused shall be present at such a meeting unless the accused or his solicitor informs the judge that he does not wish to attend.

General

8. If possible on the day fixed for the trial any preliminary issue of law will be heard and determined before the jury is empanelled.

9. Any practitioner who, in relation to any particular case, experiences difficulty in complying with this direction should, as soon as possible, contact the Registrar.

Dated this 30 day of November, 1984.

Chief Justice
Supreme Court
Hong Kong

STATUTORY RULES 1984

No. 331

Supreme Court Act 1958 Interpretation of Legislation Act 1984

Supreme Court (pre-trial Criminal Procedure) Rules 1984

IN PURSUANCE of the powers conferred by the Supreme Court Act 1958 and section 50 of the Interpretation of Legislation Act 1984 and all other powers thereunto enabling the Judges of the Supreme Court hereby make the following Rules:

1. These Rules may be cited as the Supreme Court (Pre-Trial Criminal Procedure) Rules 1984.
2. These Rules shall come into operation on 3 September 1984.
3. In the Table preceding Chapter 1 of the Rules of the Supreme Court after the expression Chapter VIII - Industrial Property Rules Orders 1-7 there shall be inserted the expression Chapter IX - Pre-Trial Criminal Procedure Rules: Orders 1-2.
4. There shall be added to the Rules of the Supreme Court as Chapter IX thereof the following Chapter.

CHAPTER IX

PRE-TRIAL CRIMINAL PROCEDURE RULES

Order 1 - Interpretation

1. In this Chapter unless the contrary intention appears -

"Accused person" means a person in respect of whom a presentment for an indictable offence has been made at the Supreme Court.

"Criminal case" means a case entered in the List.

"List" means the Criminal List of cases in the Supreme Court compiled by the Criminal Trial Listing Directorate.

"Pre-trial hearing" means the hearing of an application under Rule 2 of the Order 2.

Order 2 - Pre-Trial Hearings'

1. (1) A Judge nominated by the Chief Justice shall be in charge of the List in this Chapter any reference to the Judge shall be read and construed as a reference to the Judge for the time being in charge of the list.

- (2) The powers of the Judge with relation to a case entered in the List may be exercised by some other Judge if the judge requests him so to do or if in special circumstances that Judge thinks fit to exercise them.
2. (1) An accused person or the Director of Public Prosecutions or the Criminal Trial Listing Directorate may make application to the Judge for directions with respect to the preparation for trial, readiness for trial or conduct of the trial of a criminal case in any case where it is necessary for the fair and expeditious conduct of the trial.
 - (2) An application under this Rule shall be made by notice in the form numbered 1 in the Schedule filed with the Prothonotary and -
 - (a) in the case of an application by an accused person served on the Director of Public Prosecutions and the Criminal Trial Listing Directorate;
 - (b) in the case of an application by the Director of Public Prosecutions, served on the Criminal Trial Listing Directorate and the accused person; and
 - (c) in the case of an application by the Criminal Trial Listing Directorate, served on the Director of Public Prosecutions and the accused person.
 - (3) Where an application is made under this Rule the Prothonotary shall cause notice of the hearing of the application in the form numbered 2 in the Schedule to be served on the accused person, the Director of Public Prosecutions and the Criminal Trial Listing Directorate.
 - (4) An application or notice under this Rule may be served -
 - (a) in the case of service on the Criminal Trial Listing Directorate - by posting it to the Director of the Criminal Trial Listing Directorate or by delivering it to the Director;
 - (b) in the case of service on the Director of Public Prosecutions - by posting it to the Director of Public Prosecutions or by delivering it to the Director; and
 - (c) in the case of service on the accused - by posting it by certified mail to the address shown on the accused's recognizance of bail or to such other address as has been notified to the Prothonotary to be the correct address of the accused or to such other address as the judge directs or if the accused is not on bail, to the Director General of Corrections under direction that it be forthwith provided to the accused.
3. (1) Where on the hearing of an application under Rule 2 the Judge is satisfied that it is necessary for the fair and expeditious conduct of the trial of the relevant criminal case, the Judge may -
 - (a) ask such questions of the parties; and
 - (b) give such directions with respect to the preparation for trial - as the Judge thinks proper having regard to all the circumstances.
 - (2) Questions asked of the parties in accordance with sub-rule (1) may include the questions set out in Form 1 in the Schedule.

- (3) An application under Rule 2 shall be heard in Court.
 - (4) The accused person shall be present at the hearing of an application under Rule 2.
 - (5) Nothing said by an accused person at a pre-trial hearing and no failure by an accused person to answer a question at a pre-trial hearing, shall be used in any subsequent trial or made the subject of any comment at the trial.
- 4.
- (1) All proceedings on the hearing of an application under Rule 2 shall be recorded and transcribed in any manner authorised by Part VI of the Evidence Act 1958.
 - (2) The Prothonotary shall cause all records and transcripts of proceedings on the bearing of an application under Rule 2 to be filed in court.

SCHEDULE

Form 1

Application for pre-trial hearing

Application is hereby made under Rule 2 of Order 2 of the Supreme Court (Pre-Trial Criminal Procedure) Rules for directions with respect to the preparation for trial readiness for trial or conduct of the trial of.....

The reasons for which this application is made are as follows:

(Set out in detail and in simple language the reasons that make an application desirable).

IMPORTANT NOTICE TO THE PARTIES

Please read the information set out on the back of this form.

Dated this day of 19

As the case may be

.....

Director of Public Prosecutions

.....

Solicitor for the Accused

.....

Officer of the Criminal Trial

Listing Directorate

To:

And to:

INFORMATION FOR THE PARTIES

1. You will be notified by the Prothonotary of the Supreme Court of the date and time for the pre-trial hearing.

2. At a pre-trial hearing the Judge may ask the following questions and counsel (or the accused if he is unrepresented) will be expected to be able to inform the Court in relation to the following:

1. Has the presentment been filed?
2. Has a copy of the presentment been received by the accused or his representatives?
3. Is any amendment of the presentment likely to be sought by the prosecution?
4. Are further particulars of the presentment likely to be sought by the accused?
5. Is there to be any application to sever the presentment and if so, what is the application likely to be?
6. Is there to be an application for a separate trial by any and which accused?
7. Does the accused presently intend to plead Guilty or Not Guilty to any and which count(s) in the presentment?
8. Is there any possibility of a change of plea?
9. Is it intended there will be a conference between counsel for the Director of Public Prosecutions and counsel for the accused?
10. Does the prosecution propose to call any additional evidence?
11. Has the prosecution notified the accused and/or his representatives of any additional evidence and if it intends to do so when is it proposed to furnish a proof of evidence?
12. What is the probable length of the trial?
 - (a) Prosecution estimate.
 - (b) Accused estimate.
13. Is any point of law or of admissibility of evidence likely to be raised before the trial commences? If yes, of what duration are the matters to be raised likely to take?
14. Does the accused or the prosecution intend to raise a special issue? e.g. unfitness to plead, change of venue.
15. Does the accused intend to raise a special plea? e.g. Lack of jurisdiction: autrefois convict, autrefois acquit etc.
16. Does the accused intend to rely upon an alibi not yet disclosed in conformity with the Crimes Act?

17. Do the parties anticipate any problems as to the availability of witnesses? If yes, give details.
18.
 - (a) What admissions of fact are sought by the prosecutor?
 - (b) Is the accused prepared to make the admissions sought or any of them?
 - (c) What admissions of fact are sought by the accused?
 - (d) Is the prosecution prepared to make the admissions sought or any of them?
19. Does any difficulty arise about photographs or plans and formal proof of them?
20. Is any order sought for the inspection of prosecution exhibits or other evidentiary material in the possession of the prosecution as to which a question may arise in the course of the trial?
21. Is any order sought for the preservation or detention of any document or thing relating to the trial?
22. Is any order sought for the production before the court of any document tape recording or thing relating to the trial?
23. Does any party propose to deliver the other party a notice to admit in respect of anything not covered by question No. 18?
24. What arrangements have been made for Counsel to hear any tape recordings in the custody of the prosecution and to be provided with any transcript thereof?
25. Does any party intend to apply for a view, and if so, where and at what stage of the trial?
26. Will an interpreter be required during the trial?
27. Are there any other significant matters which might effect the proper convenient trial of the issues?

Form 2

In the Supreme Court
of Victoria
Between

The Queen
and
A.B.

NOTICE OF PRE-TRIAL HEARING

Take notice that on the day of 19
at o'clock in the morning/afternoon* at the Law Courts, Melbourne, the Judge in charge
of the Criminal List of cases in the Supreme Court will hear an application by (name of
applicant) for directions with respect to the preparation for trial, readiness for trial or
conduct of the trial of this case.

Dated the day of 19

.....

To:

And to:

*Delete whichever is inapplicable

Dated this 9 day of August 1984.

JOHN McI. YOUNG, C.J.
KEVIN ANDERSON, J.
PETER MURPHY, J.
B.L. MURRAY, J.
R.K. FULLAGAR, J.
R.E. MCGARVIE, J.
NORMAN M. O'BRYAN, J.
ROBERT BROOKING, J.
I. GRAY, J.
BARRY BEACH, J.
J.A. GOBBO, J.
ALEC SOUTHWELL, J.
R.C. TADGELL, J.
ALASTAIR NICHOLSON, J.
G. HAMPEL, J.
W.F. ORMISTON, J.
H. NATHAN, J.