

## CHAPTER 7

### ASPECTS OF THE TRIAL PROCESS

[7-1] This chapter focuses on matters of procedure likely to arise in anticipation of and during criminal trials. Topics to be addressed include:

- (1) guilty plea before and during trial;
- (2) the admission of written statements as evidence at trial, in the absence of the witness;
- (3) admissions of fact before or during trial;
- (4) alibi evidence;
- (5) the pre-trial review of cases;
- (6) the prosecution's duty of disclosure; and
- (7) special procedures for taking the evidence of vulnerable witnesses.

#### 1. GUILTY PLEA BEFORE AND DURING TRIAL

[7-2] If the defendant pleads guilty, a trial will be unnecessary. Generally speaking, a defendant who pleads guilty to the offence shall be entitled to a sentencing discount.<sup>1</sup> However, the historical practice that the one-third discount would be given to the defendant pleading guilty before trial has now been qualified by the case of *HKSAR v Ngo Van Nam*.<sup>2</sup> Generally speaking, the full one-third discount should only be given to a defendant who pleads guilty at the earliest opportunity. If a defendant pleads guilty at a later stage of the proceedings, the sentencing discount available should be less than one-third and could even be less than 20 per cent. The guidelines set out in *Ngo Van Nam* will be discussed in greater detail in **Chapter 9**.

[7-3] When a defendant pleads guilty, the brief facts or a summary of the prosecution's case, prepared by the police or the prosecutor, will be read out to him in court. If he agrees that the brief facts accurately reflect his actions, he acknowledges them and the court will sentence him on the basis that all the facts acknowledged are true.

[7-4] If the defendant wishes to plead guilty but does not agree that the facts, as summarised by the prosecution, accurately reflect his actions, he may plead

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1 *HKSAR v Ngo Van Nam* [2016] 5 HKC 231, [2016] 5 HKLRD 1.

2 *Ibid.*

guilty but dispute the brief facts. For example, an accused may wish to plead guilty to a charge of assault but may dispute the number of times or the way in which the prosecution alleged he struck the victim. Such a dispute may be worth the accused pursuing, where it has the potential to significantly affect the sentence imposed.<sup>3</sup> A plea of guilty may still be entered but the gravity of the criminality may be challenged by utilising the procedure known as a *Newton* inquiry.<sup>4</sup> Where the accused has advised his counsel that he disputes a matter alleged in the brief facts, counsel for the accused should first approach the prosecution to determine whether the facts may be altered to the satisfaction of both the prosecution and the defence. If no agreement can be reached, it may be necessary to conduct a *Newton* inquiry to determine the disputed fact.<sup>5</sup> However, a court need not hold a *Newton* inquiry if the accused makes an implausible assertion,<sup>6</sup> or if the fact in dispute would make no real difference to sentencing.<sup>7</sup> Further, if the defence and prosecution have agreed on a set of facts which the court does not accept, the court may question the accused and satisfy itself as to the facts.<sup>8</sup>

[7-5] In the course of the *Newton* inquiry, the prosecution may call witnesses to give evidence on the facts in dispute and the defence may test the evidence in cross-examination. The defence may also call witnesses and such witnesses will be subject to cross-examination from the prosecution. The magistrate or judge must then determine which version of events to accept. The prosecution bears the onus and standard of proof.<sup>9</sup> If no evidence is called and the judge or magistrate finds there is still substantial conflict between the parties after hearing submissions from both counsel, he should give the defendant the benefit of the doubt.<sup>10</sup>

[7-6] If the dispute is so serious as to go to a denial of an element of the offence, then the accused cannot be said to have entered a true plea of guilty and a not guilty plea should be entered.

## 2. SECTION 65B: EVIDENCE BY WRITTEN STATEMENT

[7-7] In the event that a trial is necessary because of the defendant's not guilty plea, the prosecution (and the defendant if he wishes to) will have to adduce evidence relevant to the facts or issues in dispute at trial. Instead of calling the relevant witnesses to testify in court, it is possible to have the witnesses' written statements be admitted as part of the party's evidence by virtue of section 65B of the Criminal Procedure Ordinance (Cap 221) (CPO), which provides that:

- (1) In any criminal proceedings, other than committal proceedings, a written statement by any person shall, subject to the conditions contained in subsection (2),

3 See, for example, *HKSAR v Ting Chiu and Anor* [2003] 3 HKLRD 378, [2003] HKCU 966.

4 As developed from the case of *R v Newton* (1982) 4 Cr App R (S) 388.

5 *R v Tolera* [1999] 1 Cr App R (S) 25, 29.

6 *HKSAR v Yau Wai Man & Anor* [2010] 3 HKC 503, [20].

7 *R v Kam Chun Pang* (unreported, CACC 504/1991, 14 July 1992).

8 *R v Myers* [1996] 1 Cr App R (S) 187, 188–189.

9 *R v Kerrigan* (1993) 14 Cr App R (S) 179, 181.

10 *R v Hiroyuki Sato* [1994] 1 HKCLR 119, [1994] HKCU 223.

be admissible as evidence to the like extent as oral evidence to the like effect by that person.

- (2) A statement may be tendered in evidence under subsection (1) if —
- (a) the statement purports to be signed by the person who made it;
  - (b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief;
  - (c) before the hearing at which the statement is tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings; and
  - (d) none of the other parties or their solicitors, within 14 days from the service of the copy of the statement, serves a notice on the party so proposing objecting to the statement being tendered in evidence under this section.

Provided that paragraphs (c) and (d) shall not apply if the parties agree before or during the hearing that the statement shall be so tendered.

**[7-8]** This section allows written statements to be tendered as evidence, as if the statement maker had given that evidence *viva voce* in the course of the trial. The statement must usually be served on the other parties to the proceedings at least 14 days before the trial commences to allow any objection to the absence of the witness to be made. If no objection is made within 14 days, the parties served with the statement will be deemed to have agreed that the witness need not appear to give oral evidence at trial. If all the parties agree that no objection will be made to the absence of the witness, a statement may be tendered to the court without any advance service.

**[7-9]** If the statement has been made by a person under 21 years of age, the statement should state his age.<sup>11</sup> If the statement has been made by a person who could not read it, the statement should be read to that person before he signs it and it should be accompanied by a declaration to this effect by the person who read the statement.<sup>12</sup> The statement should also be accompanied by a court certified translation if it is in a language other than English or Chinese.<sup>13</sup>

**[7-10]** The prosecution is most likely to use this procedure when a witness has become unavailable to give evidence at trial and the defence is unlikely to wish to cross-examine him. It is more unusual for the defence to utilise the provision.

**[7-11]** The procedure for tendering the statement requires that the statement be read into evidence by the party seeking to tender it. According to section 65B(4)(b) of CPO, the court may require the witness to attend for examination despite any agreement between the parties to allow the evidence to be given by a written statement. The party who has tendered the statement may also call the witness to give some of his evidence *viva voce*. This may be practical where the witness is

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11 CPO s 65B(3)(a).

12 CPO s 65B(3)(b).

13 CPO s 65B(3)(c).

providing expert evidence, much of which is tendered as a written statement, but counsel is of the view that evidence needs to be led on some specific points.

[7-12] It is important to note that where the statement of an expert witness has been tendered by agreement under section 65B of CPO, the parties are deemed to have also agreed on the expert status of the witness.<sup>14</sup> If a party is served with a statement under section 65B of CPO and does not agree that the witness is an expert, he should object to the statement's admission into evidence, thus requiring the witness to attend the hearing to establish his expertise.

[7-13] It should also be noted that where a party does not object to a statement tendered under section 65B of CPO, he is not estopped from calling evidence from other witnesses to contradict the statement. By failing to object to the statement under section 65B(2)(d), a party only gives up his right to cross-examine the maker of the statement, he does not lose the right to contradict the evidence contained in the statement.

[7-14] A statement may only be tendered to the court under section 65B of CPO where it is admissible under the common law and statutory rules of evidence. Documents may be produced as exhibits to the section 65B statements.

[7-15] Practice Direction 9.3, entitled *Criminal Proceedings in the Court of First Instance*,<sup>15</sup> provides details of the procedure to be adopted when the Secretary for Justice has served notice on the accused or his solicitor that he intends to tender the written statement of a witness, pursuant to section 65B of CPO.<sup>16</sup> According to the Practice Direction, the notice informing the defence that the prosecution intends to tender the written statement of a witness under section 65B of CPO should be served on the accused or his solicitor within 21 days after lodging of the paginated committal bundle, or such time as the court may direct.<sup>17</sup> Where the defence wishes to object to the statement being tendered in evidence, the solicitor for the accused is expected to let the Secretary for Justice and the Registrar know of this objection within 21 days after the notice is served (or such time as allowed by the court).<sup>18</sup>

[7-16] Practice Direction 9.4, entitled *Criminal Proceedings in the District Court*,<sup>19</sup> provides that where a written statement is proposed to be tendered in evidence in a District Court trial, in terms of section 65B of CPO, the statement should be served by the party proposing to tender it, before any pre-trial review.<sup>20</sup> The Practice Direction goes on to provide that the statement need not be served on

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14 *HKSAR v Wong Ching Yin & Anor* [1999] 3 HKC 480, 487G–488B.

15 Practice Direction 9.3 is included in this book in **Appendix 4.7**.

16 Practice Direction 9.3, [5.3.7].

17 *Ibid.*, [5.3.7(1)].

18 *Ibid.*, [5.3.7(2)].

19 Practice Direction 9.4 is included in this book in **Appendix 4.8**.

20 *Ibid.*, [16].