# 11. Defended hearings

## 11.1 Magistrate's notes

A suggestion is to note each element of the charge on a separate piece of paper. As evidence is given, note it as it relates to each of these elements. This method can provide a helpful framework for your decision.

A starting point is the list of common offences in chapter 19. You may peruse the elements of the offence which are the subject of the charge before you, and note the evidence presented to satisfy each of the elements.

## 11.2 Hearing outline and procedure

### 11.2.1 Appearance/ non-appearance of parties

#### Only the defendant appears: s 150 CPA

If the complainant has had notice of the time and place appointed for hearing, and does not appear, either in person or by his or her counsel, dismiss the charge unless you think it proper to adjourn the hearing to another date.
You may:

- release the defendant on bail,
- remand him or her in custody, or
- post such security for his or her appearance as you think fit.

#### Only the complainant appears: s 151 CPA

Where the defendant was summoned, and the offence charged is punishable with a term of imprisonment for a term not exceeding six months and/or a fine not exceeding $200, you may, upon proof of service, proceed with the hearing in the absence of the defendant.

If the offence charged amounts to a felony and you are satisfied that the defendant has failed to obey the summons or breached his or her bail conditions, you may order a warrant for his or her arrest and adjourn the hearing. See the chapter on "Bail".

In a summons case, if there is no proof that the summons has been served at a reasonable time before the hearing, then adjourn for a reasonable time to allow the prosecution to serve, or to prove service.

If a defendant has been arrested and bailed by Police, check the Police bail form to ensure that the defendant signed the bail form and was bailed to the appropriate date before continuing.

#### Appearance of both parties: s 152 CPA

If, at the time appointed for hearing the case, both the complainant and the defendant appear, proceed to hear the case.

#### Non-appearance of parties after adjournment: s 155 CPA

If the defendant does not appear before the court after an adjournment, you may, unless the defendant is charged with a felony, proceed with the hearing. If the defendant is charged with a felony, issue a warrant of apprehension.

If the complainant does not appear, you may dismiss the charge, with or without costs.

### 11.2.2 Part-heard applications

At times there will be applications, first by the prosecution and subsequently by the defence, to have the case heard then adjourned because all the evidence needed for the case is not available on the date of hearing. It is advisable for you to hear the application in full and ask for the other party to respond before ruling.

Some counsel may deliberately make this application in order to prolong or delay matters. Remember that the discretion to grant or not to grant the adjournment rests with you.

Usually hearing dates are fixed by the court, in consultation with the parties and well in advance. Therefore, unless there are compelling reasons, you should grant adjournments on part-heard applications sparingly.

### 11.2.3 Admission of facts

A defendant, or his or her counsel, may admit any fact or any element of the offence and that admission will constitute sufficient proof of the fact or element: s 147 CPA.

Every admission is to be in writing and signed by:

- the defendant or his or her counsel, and
- the Magistrate.

### 11.2.4 Plea of guilty to other offence

Where a person is charged with any offence and can be lawfully be convicted on that charge, of some other offence not included in the charge, he or she may plead not guilty of the offence charged, but guilty of some other offence: s 194 CPA.

## 11.3 Unrepresented defendant at trial

The following outline applies where the defendant is unrepresented. With necessary modifications, however, it also applies when the defendant is represented.

Take care to fully advise the defendant of the procedure to be followed and to accurately record the advice given to the defendant. The following steps should be followed:

- Inform the defendant that proceedings are going to be conducted in English: s 35(1) DCA.
- Confirm the defendant's plea and ensure this is recorded on the Evidence Sheet.

- Ask the witnesses to leave the court room.
- Ask the defendant whether he or she prefers to have the proceedings interpreted and arrange for an interpreter for him or her: s 35(2) DCA.
- Provide the defendant with a brief explanation of:
  - the procedure to be followed,
  - the right to cross-examine,
  - the right to give and call evidence, and
  - the obligation to put his or her case to any witness.
- After each witness has given evidence, excuse the witness from further attendance and warn the witness not to discuss the evidence with other witnesses who have yet to give evidence.
- If there are several unrepresented defendants, have them identify themselves to you at the outset.
- If you ask any questions of a witness after re-examination has concluded, you should ask the prosecutor and the defendant if there are any further matters raised by your questions, which they wish to put to the witness.

Without overdoing it, you are expected to help the defendant from time to time during the hearing. After the prosecution case is concluded, you make a finding whether there is a case to answer.

Next, you may address the defendant on his or her options in the following manner:

> "You have three options:
> (1) You have the right to give evidence yourself by giving evidence on oath, in the witness box. If you do, you may be cross-examined by the prosecutor. It is entirely a matter for you to decide. You also have the right to call witnesses to give evidence on your behalf. Again, if they give evidence, they may be cross-examined by the prosecutor. You are not obliged to call witnesses - it is entirely a matter for you to decide. Do you understand this?
> (2) You have the right to make a statement from the witness box and will not be cross-examined by the prosecutor.
> (3) You have the right to remain silent and since you have heard what the prosecution have said against you it is again up to you whether you wish to exercise this right".

You must ensure that the defendant fully understands the choices open to him or her before electing the one that he or she prefers. Once the defendant has indicated his or her preference, record it on the Evidence Sheet.

You may then ask the defendant to give you his or her version of the events. It may be helpful to lead the defendant through the preliminary matters to help provide confidence for him or her to give their own account of the crucial event.

If reference to damaging evidence given by the prosecution is omitted, draw attention to it and enquire if the defendant wishes to comment on it.

After the defendant has been cross examined, ask:

> "Is there any further evidence you wish to give arising out of the questions just put to you by the prosecutor?"

A defendant may not make an unsworn statement, but may make submissions on the law at any time.

After hearing all submissions on the law and the evidence, then either deliver your judgment or fix a date to deliver it.

## 11.4 No case to answer

The following applies whether the defendant is represented or not. Remember that the standard of proof required at this preliminary stage is one of a "prima-facie" case.

At the close of the prosecution case, if there is a submission that there is no case to answer, you should give the prosecution the opportunity to reply.

A convenient test is found in *Practice Note* [1962] 1 All ER 448:

> "A submission that there is no case to answer may properly be made and upheld: when there has been no evidence to prove an essential element in the alleged offence, when the evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it … if a submission is made that there is no case to answer the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it there is a case to answer".

If you decide that there is a case to answer announce:

> "I find that there is a case to answer".

Sometimes brief reasons are appropriate. Care should be taken to ensure that the defendant does not feel that the case is already decided against him or her.

If you find that there is no case to answer, you should give a ruling detailing why, dismiss the information and acquit the defendant: s 201(a) CPA.

## 11.5 Evidential matters

### 11.5.1 Warning to a witness against self-incrimination

You will need to be constantly vigilant about self-incriminatory statements by a witness. If a question is asked, the answer to which could be self-incriminatory, you should:

- warn the witness to pause before answering the question,

- explain that any evidence the witness gives in court that is self-incriminating could be used to prosecute them for a crime,
- explain that the witness may refuse to answer the question.

In most cases, it would be wise to stand the witness down to see a lawyer to explain the consequences.

### 11.5.2 Identification

There is a need for caution in considering evidence of identity.

It is notorious that honest and genuine witnesses sometimes make mistakes. A convincing witness may nonetheless be a mistaken witness.

In summary hearings, you must bear in mind the need for caution before convicting a defendant in reliance on the correctness of identification evidence and, in particular, the possibility that the witness may be mistaken. See *R v Turnbull & Others* [1976] 3 All ER 549.

You should state and record this.

### 11.5.3 Evidence of defendant and spouse in criminal cases

The defendant and his or her spouse (married) are competent but not compellable witnesses for and against each other. See the chapter on Evidence.

If the spouse of the defendant refuses to give evidence, then there is little you can do.

### 11.5.4 Defendants charged jointly

Nothing that a defendant says in a statement to the police or anyone else which incriminates a co-defendant can be evidence against the co-defendant, unless the co-defendant expressly or impliedly accepts what has been said.

### 11.5.5 Corroboration

Where corroboration is required as a matter of practice, you must look for it in the prosecution evidence. Where you are unable to find corroboration in the evidence but you were nevertheless satisfied beyond reasonable doubt of the defendant's guilt, you must warn yourself of the danger of convicting on the evidence. You may then convict. You must endorse on your judgment that you have warned yourself of the danger.

### 11.5.6 Lies

If it is established that the defendant has lied, as opposed to making a genuine error, the fact that the defendant has lied goes to credibility.

A lie does not necessarily mean the defendant is guilty, as a lie can be told for a number of reasons and not always to avoid guilt.

Consider the remaining evidence to ascertain if the prosecution has proved its case.

Only consider a deliberate lie as part of the prosecution case if the lie was clearly stated when an innocent explanation could have been expected to be given.

## 11.6 Amending the charge

### 11.6.1 General

The court has wide powers to alter any charge by substituting a lesser, or indeed a more serious, charge. You may alter the substance or the form of the charge either by way of:

- amendment,
- substitution, or
- the addition of a new charge.

The amendment can be made at any time during the hearing before the close of the case for the prosecution.

If any amendment is made to the charge, the amended charge must be put to the defendant, as he or she is required to plead to the amended charge.

The defendant may also demand that the witnesses be recalled to give fresh evidence and be cross-examined. The prosecution will have the right to re-examination.

### 11.6.2 Procedure

The proposed amendment must be stated with clarity. Explain the difference in the essential ingredients of the former charge and the amended charge to the defendant who is unrepresented. After you have received an application from the prosecution to amend, the following procedure is suggested:

- Ask counsel for the defence or the defendant (if unrepresented): "Do you consent to this application to amend or do you oppose it?"
- If the amendment is not opposed and the defendant is represented, the amendment would ordinarily be granted.
- Hear defence submissions.
- Give the prosecution opportunity to reply.
- Decide whether to grant the application or not.
- Then amend the Evidence Sheet as appropriate and endorse and sign it: "Amended as above during the hearing" or "Amended in Court - defendant present".
- Have your reasons recorded or note them briefly.
- Announce that the amended charge replaces the original charge.

- Put the amended charge to the defendant and take a plea. It is necessary to endorse the Evidence Sheet that the amended charge has been read to the defendant.
- Ensure that everything said in connection with the amendment is recorded.

### 11.6.3 Procedure if prosecution amends the

s 191A CPA

The prosecution may apply to the court to amend an information at any time before the close of the prosecution's case. Such an application may be made orally or in writing and must state the particulars of the proposed amendment.

In considering the application to amend, you may:

- grant the application,
- dismiss the application,
- where you grant the application you may adjourn the proceedings for such time as you deem appropriate for the accused person to prepare his or her defence, or
- make such orders as you deem necessary.

Where you order for an information to be amended:

- the amended information should be read to the accused person, and
- the accused person should plead to the amended information.

The accused person or his or her legal representative may apply for an adjournment to allow the accused person to prepare his or her defence.

If there is no adjournment, ask the parties:

> "Are there any further questions you wish to put to any witness who has already given evidence?"

If so, then the witness or witnesses must be recalled and the hearing continued on the amended or substituted charge.

Where the original or amended information contains more than one count, on an application by the prosecution or accused person, you may order that any count be tried separately if you deem that:

- an accused person may be prejudiced because he or she is charged with more than one count in such information, or
- a trial with another accused person will prejudice the fair trial of the accused person.

Where an order for a separate trial is made, the procedure is the same as if the count had been set out in a separate information.

## 11.7 Exhibits

### 11.7.1 Production

Though it is the clerk's function to mark the exhibits, you may have to intervene to ensure that each exhibit (especially with a set of photos) is:

- distinctively marked, and
- recorded in your notes in the Evidence Sheet in a manner that leaves no doubt what the exhibit mark refers to.

Generally, prosecution exhibits are numbered 1, 2, 3, etc. and defence exhibits are letters A, B, C, etc. An exhibit produced by a prosecution witness in cross examination is a defence exhibit.

### 11.7.2 Marking of exhibits by witness

Often parties pass exhibits, such as plans and photos, to witnesses quite indiscriminately and invite them to mark some point, eg: the impact point in a collision. If such a situation occurs, care must be exercised to ensure clarity.

Ensure that the witness marks all photos (or plans, or maps) with, ideally, a differently coloured pen and your notes should clearly describe it.

If, however, by marking a plan or photograph, it is possible that a later witness may be influenced by such marking, it may be preferable to have a copy of the exhibit marked and produced as a separate exhibit with the original being kept in an unmarked state.

## 11.8 Application for change of plea

A defendant may change his or her plea from "not guilty" to "guilty" on application.

Credible grounds for such application must be provided.

The right of the defendant to change or her plea exists until sentence.

Note that there is no special right given to the defendant to apply for a change of election. It is suggested that, if a change by virtue of an amendment reduces a felony to a non-electable offence, then it follows that trial would be conducted summarily. On the other hand, if the amendment changes the nature of the charge to an electable offence, then an election should be put to the defendant before a plea is taken on the amended charge.

## 11.9 Withdrawal of complaint

The prosecutor may withdraw a complaint, with the consent of the court, before a final order is passed: s 153 CPA.

Where the withdrawal is made after the defence case, acquit the defendant.
Where the withdrawal is made before the defence case, you may:

- acquit the defendant, or
- discharge the defendant.

An order of discharge is not a bar to subsequent proceedings on account of the same facts.

## 11.10 Order of acquittal bar to further procedure

An order of acquittal shall without other proof, be a bar to any subsequent information or complaint for the same matter against the same defendant: see s 94 CPA.