HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CRIMINAL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Instructions to candidates for the practical assessment

Introduction

The practical assessment is focused on a criminal trial before a judge and jury in the Court of First Instance.

Mycroft is charged with one count of dishonestly using a computer contrary to section 161(1)(c) of the Crimes Ordinance (Cap. 200) and one count of dealing with property known or believed to represent proceeds of an indictable offence contrary to section 25(1) of the Organized and Serious Crimes Ordinance (Cap. 455). Digby is charged with one count of dealing with property known or believed to represent proceeds of an indictable offence contrary to section 25(1) of the Organized and Serious Crimes Ordinance (Cap. 455). He is also charged with one count of offering Ludovico an advantage contrary to section 9(2)(a) of the Prevention of Bribery Ordinance (Cap. 201). Ludovico is charged with one count of accepting an advantage contrary to section 9(1)(a) of the Prevention of Bribery Ordinance (Cap. 201).

The indictment can be found in the attached 'Bundle of Evidential Material'.

In order to complete the practical assessment, candidates will be required to do the following:

1. To make or oppose an application for severance of trial in the case of Ludovico; **and**

2. to participate in a mini-trial.

The material upon which the practical assessment will be conducted

All the material upon which the assessment will be conducted is contained in,

1. the evidential material presented in the written assessment paper (attached at Annexure A); and

2. the 'Bundle of Evidential Material' (attached at Annexure B).

Your role as solicitor-advocate

When you receive these instructions, you will at the same time be advised whether you will appear as counsel for the prosecution or counsel for the defendant.

As prosecuting counsel, of course, you will rarely, if ever, have sight of the proof of evidence taken from a defendant by his legal representatives. For the purposes of this practical assessment, however, the defence materials are made available to you. This is because there is a limited time within which the required exercise (including examination-in-chief and cross-examination) is to be conducted. Accordingly, it is to be assumed that all witnesses, both for the prosecution and the defence, have given evidence in accordance with their statements except where in examination-in-chief they have diverged from or contradicted those statements. Should there be any such divergence or contradiction, for the purposes of the practical assessment, it is to be taken that they have arisen in the course of the witness's testimony. In cross-examination, therefore, it will be put to the witness that one part of his or her testimony has been contradicted by another part.

Dress

You will be expected to dress appropriately, that is, a solicitor would dress when appearing in open court in the High Court: you should therefore wear a gown and bands.

Getting to the heart of the matter

It is important to note that, with each candidate being given only a limited time span to complete each allocated exercise, it is important to adhere strictly to the following guidelines:

- Addresses to the court or to the jury must be structured and succinct, getting to the heart of the matter without delay.

- It is to be assumed that the court or jury have a very good understanding of the background facts and accordingly, while arguments must of course be put into a proper factual context, there is no need for long, time-consuming recitations of the background facts.

- Remember, in addressing the jury it is not the role of a solicitor-advocate to instruct them on the law. That is the function of the judge.

Analysis and structure

Candidates are expected to demonstrate a structured and analytical approach in all of the exercises required of them. The Examining Panels are required to pay special attention to whether or not a structured approach has been clearly evidenced, that is, a presentation which demonstrates that it is based on careful analysis and a choice of approach best suited in the limited time available to advancing the case that is advocated.

BEFORE the Interim Application

You must prepare a skeleton argument in relation to the application supporting the position of the party you are representing. You have been advised separately which party this is.

The Skeleton should be typed. It should not exceed 4 pages (A4, one-sided, 12 font, single spaced).

You may refer to the attached authorities as you think appropriate. You do not need to attach them to the skeleton argument.

Please note that for the purpose of this assessment, your argument must be limited to the authorities which are attached.

You must email your skeleton argument in MS Word format to the Secretariat of the Higher Rights Assessment Board at info@hrab.org.hk by **no later than 3 p.m. of the Wednesday prior to the day of the assessment**.

Upon receipt, the Secretariat will ensure that the party opposing you in the interim application is given a copy of your skeleton argument. The members of your Examining Panel will also receive copies so that they can be considered before the assessment itself takes place. You will therefore understand that, if you submit your skeleton argument late, it may not be marked and will place you at real risk of failing the assessment.

THE CONDUCT of the Interim Application

The application for severance is made by defence counsel for Ludovico and opposed by prosecuting counsel prior to commencement of trial proceedings. For the purpose of this application, you can consider the witness statements of Betty, DPC9898 and Ludovico's defence notes.

THE CONDUCT of the mini-trial

(1) Witnesses

Only one prosecution witness and either the accused or the defence witness will attend the mini-trial. You will be advised of the identity of the witnesses by the Secretariat on the day of the assessment itself when you arrive and register.

You must therefore be prepared *in a structured and analytical manner* to examine and cross-examine all relevant witnesses.

(2) Prosecution witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the prosecution:

1. Betty
2. DPC9898

(3) Defence witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Defence:

1. Mycroft
2. Digby
3. Ludovico

DURING the mini-trial

You can assume:

1. The witnesses will appear at the trial in the order listed above; and

2. For the purposes of the mini-trial, it is to be assumed that the evidence of all witnesses, other than those called, is to be, and has been, fully in accordance with their statements.

Opening Speech

If you are allocated the role of prosecuting counsel, you will be expected to make a brief opening speech to the jury. It will last a maximum of 5 minutes.

If you are allocated the role of defence counsel, you will be expected to make a brief speech to the jury at the opening of the defence case. It will last a maximum of 5 minutes.

Conduct of the examination-in-chief/cross-examination

If you are allocated the role of prosecuting counsel, you will be expected to conduct an examination-in-chief of one prosecution witness. It will last a maximum of 10 minutes. If you are allocated the role of defence counsel, you will be expected to conduct a cross-examination of that witness. It will last a maximum of 15 minutes.

If you are allocated the role of defence counsel, you will be expected to conduct an examination-in-chief of either the accused or the defence witness. It will last a maximum of 10 minutes. If you are allocated the role of prosecuting counsel, you will be expected to conduct a cross-examination of that witness. It will last a maximum of 15 minutes.

Interventions/Objections

You are also required to

- deal with any interventions/objections made by the advocate representing the opposing party;

- take any objections, as you think appropriate, to the questioning of witnesses by the advocate representing the opposing party; and

- deal with any judicial interventions/questions as and when they arise.

Case law

The following authorities that the candidates may find useful for the interim application.

Extracts of *Archbold Hong Kong 2021*, 1-161 onwards

below), can be charged together in one count, although they may each be charged in separate counts or indictments: 2 Hale 173; *R v Atkinson* (1706) 1 Salk 382; *Young v R* (1798) 3 Term Rep 98; and see the speech of Lord Diplock in *DPP v Merriman* [1973] AC 584 at p 606, HL; *R v Lee Shek-ching* [1987] HKLR 31; *R v Chau Wai-keung & Yu Sun-wah* [1993] HKLY 268. A charge against two or more defendants in a single count is joint and several. If, therefore, in the case of any particular defendant, the evidence at the trial proves that he was guilty of the offence but was acting on his own and not in concert with any other, he can nevertheless be convicted on the count as laid: *DPP v Merriman*, above.

(4) Joinder of persons separately committed for trial

1–160 As to the power to amend a charge contained in an indictment preferred in accordance with the voluntary bill procedure so as to add the name of a defendant who has been separately committed for trial on the same charge, see *R v Ismail* 92 Cr App R 92, CA.

(5) Separate trials of counts lawfully joined and of defendants jointly charged

The power to order severance

Criminal Procedure Ordinance (Cap 221), s 23(3)

1–161 23.—(3) Where, before trial or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable todirect that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.

The fact that charges are lawfully joined in one indictment, or that defendants are jointly charged, does not necessarily mean that it will be proper to try those charges or defendants together. The court may order a separate trial of any count or counts in an indictment where, before trial or at any stage of a trial, the court is of the opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or where for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment. This includes the power to order separate trials of defendants who are jointly charged in one count because such a charge is joint and several and therefore alleges separate offences against the defendants: see *DPP v Merriman* [1973] AC 584, HL and *HKSAR v Lin Siu Lun* (CACC 10/2006, [2008] HKEC 212). In any event, the authorities show that the courts have a power to order separate trials against defendants who are jointly charged in one count and that the principles upon which the court acts in such cases are the same as those upon which it acts in respect of separate trials of separate counts: see, for example, *R v Gibbins and Proctor* 13 Cr App R 134, CCA; *R v Bywaters* 17 Cr App R 66, CCA; *R v Grondkowski and Malinowski* [1946] KB 369, 31 Cr App R 116, CCA; *R v Wilson* [1958] Crim L R 475, CCA and *R v Tam Shing-choi* (CACC 768/95, [1997] HKLY 418). For particular considerations in respect of separate trials as between defendants, see §§1–177 and 4–77 *et seq*, below.

1–162 Section 23(5) gives the court a specific power to discharge the jury if an order for separate trials is made pursuant to section 23 during the course of a trial. It also provides, *inter alia*, that the procedure on the separate trial of a severed count shall be the same in all respects as if the count had been found in a separate indictment.

1–163 It is to be noted that an order for separate trials may be made "before trial, or at any stage of a trial". This provision would appear to permit a judge to postpone a decision on severance if necessary, or to change his original ruling if the course which the trial takes justifies such a change (see the authorities cited, §§1–161 *et seq*, above). It will also sometimes happen that the necessity to make an application for separate trials will not arise until part way through a trial. In some cases it will be of assistance to have

a ruling on questions of severance in advance of the trial date. See §§2–61 *et seq*, below, as to pre-trial reviews generally. In *R v Wright* 90 Cr App R 325, CA, an application for severance had been refused by one judge at a pre-trial review. The different trial judge refused to reconsider the question, regarding the matter as concluded by the decision of the first judge. The Court of Appeal held that the decision of the first judge did not bind the second, although the latter was not obliged to hear the same point argued again if nothing material had changed. It is submitted that a judge should also entertain a fresh application for severance if some matter which is clearly material to the issue was not put before the first judge, even though there has been no actual change of circumstances.

The general approach to severance

1–164 The discretion given to a trial judge to order separate trials is a wide one, but like all discretions it must be exercised judicially: *R v Gibbins and Proctor*, above. The Court of Appeal will not readily interfere with the exercise of that discretion unless it can be shown to have been exercised other than on the basis of the usual and proper principles: *R v Blackstock* 70 Cr App R 34, CA; *R v Wells* 92 Cr App R 24, CA; *R v Dixon* 92 Cr App R 43, CA; *R v Cannan* 92 Cr App R 16, CA; *R v Wong Wing-yuet* (Cr App 611/95). The application of the general principles will depend to a great extent on the individual facts of particular cases. In *Ludlow v Metropolitan Police Commissioner* [1971] AC 29, HL (§1–153, above), the "discretion aspect" of the problem was considered by Lord Pearson.

> "The judge has no duty to direct separate trials under section 5(3) [ie section 23(3)] unless in his opinion there is some special feature of the case which would make a joint trial of the several counts prejudicial or embarrassing to the accused and separate trials are required in the interests of justice. In some cases the offences charged may be too numerous and complicated (*R v King* [1897] 1 QB 214; *R v Bailey* (1924) 18 Cr App R 42) or too difficult to disentangle (*R v Norman* [1915] 1 KB 341) so that a joint trial of all the counts is likely to cause confusion and the defence may be embarrassed or prejudiced. In other cases objection may be taken to the inclusion of a count on the ground that it is of a scandalous nature and likely to arouse in the minds of the jury hostile feelings against the accused: see *R v Southern* (1930) 22 Cr App R 6, at p 9; *R v Muir* (1938) 26 Cr App R 164" [at p 41].

1–165 (See §1–182, below, as to severance of long and unduly complicated cases, and see §§1–167 *et seq*, below, in relation to severance of charges alleging sexual misconduct.)

The mere fact that evidence is admissible on one count and inadmissible on another is not in itself a ground for ordering the counts to be tried separately; but where it would be difficult in the course of a summing up to distinguish the evidence relating to the respective counts, and there is, therefore, a risk that the jury when considering one count may be unable to disregard the evidence relating to another count, there is a ground for ordering separate trials: *R v Sims* [1946] KB 531; 31 Cr App R 158, CCA.

In *R v Blackstock*, above, when dismissing an appeal against the refusal of the trial judge to order separate trials of pairs of robbery and firearm charges, where the evidence on one pair of charges was not admissible on the other, the Court of Appeal said:

> "Every trial judge is familiar with the requirement, where more counts than one of a similar kind are joined in an indictment, of adding a warning to the jury that they must not add all the counts together and convict because there is more than one count in the indictment, or use the evidence on one count as evidence on the other. They should consider each count separately in the light of the evidence upon that particular count against the accused person, but no other. Juries have shown themselves well able over the years to follow such a direction and apply it" [at p 37].

1–166 This decision was followed in *R v McClinchey* 78 Cr App R 282, CA (refusal of trial judge not to sever count of dishonest handling of photographic equipment from counts of burglary and handling of credit card stolen in the burglary, upheld), where an argument based on dicta in *Boardman* (cited at §1–173, below), to the effect that the judge should have exercised his discretion in favour of severance in respect of the evidentially unrelated counts, was held to be ill-founded. It was said that the dicta

in *Boardman*, a case concerning allegations of sexual misconduct, cannot be taken as casting doubt on the principles expressed in *Ludlow* (§1–153, above) and should not be regarded as being intended to apply beyond circumstances such as those then before the House of Lords. See also *R v Mariou* [1992] Crim L R 511, CA; *R v Dixon* 92 Cr App R 43, CA, and *R v Cannan* 92 Cr App R 16, CA (§§1–169 *et seq*, below) in this regard. Sexual mis-conduct cases may, therefore, merit separate consideration: see §§1–167 *et seq*, below. In *R v Wells*, above, the Court of Appeal found no reason to interfere with the exercise by the trial judge of his discretion (refusal to sever two groups of charges arising from two separate drugs raids at appellant's premises) on the particular facts of the case (prejudice and complexity had been relied upon), but indicated that each case depends on its own facts and that other considerations might have applied if the charges had amounted to an allegation that the appellant was a "drugs baron".

Ordinarily, if offences are properly joined, a defendant does not have the right to have the indictment severed merely because he might wish to give evidence in respect of one count and not another; while the right of a defendant not to give evidence must be recognised, and weight may be given to his desires, it should be borne in mind that he could change his mind about giving evidence and applications to sever might be made for tactical reasons; it is a matter for the discretion of the trial judge: *R v Phillips* (DM) 86 Cr App R 18, CA.

For guidance on the practice to be followed in a case where the question of the admissibility of "similar fact" evidence may affect the decision as to severance, see §§1–173 *et seq*, below.

As to the practice of severing a count of conspiracy from related substantive counts, see §§36–58 *et seq*, below.

The approach to severance in cases alleging sexual misconduct

1–167 The scandalous nature of one or more of the offences alleged was mentioned by Lord Pearson in *Ludlow* (§1–153, above) as a factor that might justify the ordering of separate trials for counts that are properly joined. In *R v Sims* [1946] KB 531; 31 Cr App R 158, CCA, Lord Goddard CJ said,

> "... in such a case as the present [allegations of homosexual misconduct], however, it is asking too much to expect any jury when considering one charge to disregard the evidence on the others, and if such evidence is inadmissible, the prejudice created by it would be too great for any direction to overcome" [at pp 536, 164].

1–168 Dicta to similar effect are to be found in the speeches in *DPP v Boardman* [1975] AC 421, HL:

> "When in a case of this sort, the prosecution wishes to adduce 'similar facts' evidence which the defence says is inadmissible, the question ... ought, if possible, to be decided in the absence of the jury at the outset of the trial and if ... the evidence is inadmissible and the accused is being charged in the same indictment with offences against other men the charges relating to the different persons ought to be tried separately. If they are tried together the judge will, of course, have to tell the jury that in considering whether the accused is guilty of the offence alleged against him by A, they must put out of mind the fact which they know that B and C are making similar allegations against him. But, as the Court of Criminal Appeal said in *Sims*, it is asking too much of any jury to tell them to perform mental gymnastics of that sort. If the charges are tried together it is inevitable that the jurors will be influenced, consciously or unconsciously, by the fact that the accused is being charged not with a single offence against one person but with three separate offences against three persons. It is said ... that to order separate trials in all these cases would be highly inconvenient. If and so far as this is true it is a reason for doubting the wisdom of the general rule [of exclusion]. But so long as there is that general rule, the courts ought to strive to give effect to it loyally and not, while paying lip service to it, in effect let in the inadmissible evidence by trying all the charges together" [per Lord Cross at p 459].

1–169 In many cases the considerations mentioned by Lord Cross in *Boardman* proved to be determinative in the exercise of the discretion as to whether separate trials should be ordered in cases of allegations concerning sexual misconduct. In this regard, see

also *R v Novac* 65 Cr App R 107, CA; *R v Wilmot* 89 Cr App R 341, CA, and *R v Brooks* 92 Cr App R 36, CA.

However, in a number of subsequent cases, the Court of Appeal upheld the refusal of trial judges to order separate trials of charges of sexual offences, purporting to apply to the individual facts of each case the general principles stated in such decisions as *Ludlow*, *Blackstock*, and *McGlinchey* (cited §1–153, above), although those decisions themselves suggest that particular considerations may apply in cases of a scandalous or sexual nature: see *R v Dixon* 92 Cr App R 43, and *R v Cannan* 92 Cr App R 16, CA. In *Cannan*, the court did acknowledge that in sexual cases, trial judges may well often order separate trials in the exercise of their discretion, but said that decisions based on individual facts should not be erected into binding authorities. Trenchant academic criticism of the way in which the discretion as to the ordering of separate trials was exercised on the facts of *Dixon* and *Cannan* is to be found in the commentaries at [1990] Crim L R 335 and 869.

1–170 What was, nevertheless, clear was that no problem as to the exercise of the discretion as to severance would arise in a case where the evidence on each count would be admissible on the other; in such a case there would be no point in ordering separate trials. It is therefore important when dealing with an application to order separate trials of two charges to ascertain whether the evidence on each charge is admissible on the other. (For practical guidance as to the procedure that should be followed in this regard, see §§1–173 *et seq*, above.) In *DPP v P* [1991] 2 AC 447, HL, the two certified questions were:

> "(1) where a father or step-father is charged with sexually abusing a young daughter of the family, is evidence that he has also similarly abused other young children of the family admissible (assuming there to be no collusion) in support of such charge in the absence of any other 'striking similarities'; and (2) where a defendant is charged with sexual offences against more than one child or young person, is it necessary in the absence of 'striking similarities' for the charges to be tried separately?"

1–171 In the course of a speech with which the rest of their Lordships agreed, Lord Mackay LC set out the test to be applied in answering the first certified question: see §13–5, below. His Lordship went on to say that the answer to the second certified question is "no", provided that there is a relationship between the offences of the kind described in his answer to the first certified question. Unfortunately, his Lordship did not say in terms whether or not charges of the type under consideration may properly be tried together in the absence of a relationship of this kind.

1–172 In the subsequent decisions of *R v Tickner* [1992] Crim L R 44, and *R v Smith* [1992] Crim L R 445, the Court of Appeal again rejected, on the basis of the individual facts, appeals based on the refusal of trial judges to order separate trials of sexual charges in which the evidence on the various charges had not been mutually admissible, but in neither case does the court appear to have addressed the implications of the answer to the second certified question in *DPP v P*, above. However, in *R v Christou (G)* [1997] AC 117, HL, the answer to the second certified question was prayed in aid in support of a contention that in cases of sexual abuse of children where the evidence of one child is not admissible in support of allegations by another child, the judge's discretion should always be exercised in favour of severance. In a speech with which the rest of their Lordships agreed, Lord Taylor CJ, having reviewed the authorities, concluded that the relevant principles had been correctly explained in *R v Cannan*, above. The appropriateness of separate trials will depend on the particular facts of each case. Judges will often consider it right to order separate trials but to hold that either generally or in respect of any particular class of case the judge must so order would be to fetter the discretion given by statute. The relevant factors will vary from case to case, but the essential criterion is the achievement of a fair resolution of the issues. That requires fairness to the accused but also to the prosecution and those involved in it. Some, but by no means an exhaustive list, of the factors which may need to be considered are: how discrete or inter-related are the factors giving rise to the counts; the impact of ordering two or more trials on the defendant and his family, on the victims and their families and on press publicity; and importantly, whether directions the judge can give to the jury will suffice to secure a fair trial if the counts

are tried together. In relation to that last factor, his Lordship stated that jury trials are conducted on the basis that the judge's directions of law are to be applied faithfully and experience shows that juries, where counts are jointly tried, do follow the judge's directions and consider the counts separ-ately. See also *R v C, The Times*, 4 February 1993, CA, §1–156, above.

Procedural guidance where "similar fact" evidence may be admissible

1–173 In *Boardman* (§1–168, above), Lord Cross said that issues as to severance and similar fact evidence ought, if possible, to be decided at the outset of the trial. The resolution of these issues may well affect the approach adopted by counsel on both sides to various matters during the course of the trial. However, in *R v Scarrott* [1978] QB 1016, 65 Cr App R 125, CA, Scarman LJ offered guidance to trial judges as to how to approach the issues of severance and admissibility in two stages. "The first phase is before arraignment when a defendant submits that the indictment should be severed ... the next phase is when the judge's ruling is sought as to the admissibility of the similar fact evidence." At the time the judge rules upon the question of severance "he is taking no final decision as to the admissibility of evidence." Scarman LJ thereafter explains that if the application for severance is rejected and a multi-count indictment has to be tried, it does not follow that the evidence given will be admissible on all counts contained in the indictment. Similarly, if an application for severance is upheld, it is still open to the Crown, at the appropriate moment, to adduce evidence relating to the other (and now put aside) counts as similar fact evidence on the count(s) being tried; it will then be for the judge to rule, in accordance with the laws of evidence whether the evidence is admissible or not.

1–174 Where a judge has ruled at the outset of a trial that evidence of a previous offence is admissible on a "similar fact" basis, but the evidence given during the trial destroys the basis for that ruling, the correct course (assuming that the jury have been made aware of the previous offence) is to discharge the jury: *R v Naylor* [1998] Crim L R 662, CA. A similar course should be considered where an application for separate trials has been refused on a "similar facts" basis, which is subsequently undermined. In *R v Wells* 92 Cr App R 24, CA, which was not a case of sexual misconduct, the trial judge had deferred a ruling on the "similar fact" point until the end of all the evidence. Giving the judgment of the Court of Appeal, Hodgson J said that the trial judge then had three choices:

> "first, at that stage, to discharge the jury, if he decided that the evidence on the first batch [of counts] was not admissible on the second batch and that a firm direction could not remove the prejudice; second, to allow the trial to proceed, but give the usual direction on separate consideration; or, third, to direct the jury that the evidence on the first batch of counts was admissible as probative of the second batch and, logically, vice versa" [at p 29].

1–175 See also *R v Dixon* 92 Cr App R 43, CA, for a further example of a trial judge declining to give a definitive ruling on a "similar fact" issue when ruling on an application for separate trials.

1–176 The procedural guidance given in *Boardman* and *Scarrott* was considered in *R v Wilmot* 89 Cr App R 341, CA, where the defendant was charged with a series of rapes. At the outset of the trial, the judge ruled in favour of severance and against the suggested admissibility of evidence in relation to one offence in proof of another. After the complainant in the first trial had been cross-examined and the issue in the case had become apparent, counsel for the prosecution invited the judge to reconsider his ruling. This the judge did. In the light of what the issue now appeared to be and, having regard also to the fact that in the intervening two days, two of the total of five alleged victims had been traced by the police and were then, therefore, available to give evidence, the judge revised his earlier ruling. The solution adopted was not simply to admit the evidence of the other offences on the first trial but to discharge the jury on the first trial and order a new trial with the counts being tried together. This, in effect, achieved the best of both worlds at a small price, namely two or three wasted court days: this was

inevitable on the basis of the material put before the trial judge on the original application. The Court of Appeal entirely approved of the course taken. See also §13–26, below, as to contamination of, or collusion between, complainants.

Severance as between defendants

1–177 The general principles (§1–164, above) apply when questions arise as to separate trials as between different defendants, whether jointly charged or charged with different offences in the same indictment. See also §§4–81 *et seq*, below. However, certain issues commonly arise in such cases.

In *R v Moghal* 65 Cr App R 56, CA (an appeal based on the fact that separate trials had taken place), it was said that it is only in exceptional cases that separate trials should be ordered for two or more defendants who are jointly charged with participation in one offence. Similarly, it was said in *R v Lake* (1977) 64 Cr App R 172 at p 175, CA, that it has been accepted for a long time in English practice that there are powerful public reasons why joint offences should be tried jointly; the importance is not merely the saving of time and money; it also affects the desirability that the same verdict and the same treatment shall be returned against all those concerned in the same offence; if joint offences were widely to be tried as separate offences, all sorts of inconsistencies might arise; accordingly, it is accepted practice that a joint offence can properly be tried jointly, even though this will involve inadmissible evidence being given before the jury and the possible prejudice which may result from that; the practice requires that the trial judge should warn the jury that such evidence is not admissible as against a particular defendant or defendants. The court recognised that there could be exceptions to the general practice and that the application of general principles will be affected by the facts of individual cases. Observations to similar effect were made in *R v Josephs and Christie* 65 Cr App R 253 at p 255, CA.

In the majority of cases it is in the public interest that defendants who are jointly indicted should be tried together: *R v Hoggins* 51 Cr App R 444, CA. However, in long or complicated cases it may be desirable to order separate trials: see §1–182, below.

In *R v Pieterson and Holloway* [1995] 2 Cr App R 11, CA, the trial judge had refused to abort the trial part way through and order separate trials where one of two defendants claimed to be prejudiced by the fact that the joint trial prevented him from calling as a witness his co-defendant, who had not given evidence in his own defence-appeal dismissed. In *R v Eriemo* [1995] 2 Cr App R 206, CA, it was said, *obiter*, that a defence of duress by a co-accused would not in itself be a sufficient justification for separate trials and that the interests of justice in such cases may well dictate that defendants be tried together so that the whole truth may be put before the jury.

1–178 There is no rule of law that separate trials should be ordered where an essential part of one defendant's defence amounts to an attack on a co-defendant, but the matter is one which the judge should take into account in deciding whether to order separate trials or not: *R v Grondkowski and Malinowski* [1946] KB 369, 13 Cr App R 164, CCA. See also *R v Miller* 36 Cr App R 169, Assizes (Devlin J) (observations on desirability of trying co-conspirators together). Where the trial is before a judge or magistrate alone, the professional ability to ignore prejudicial matters, which ability may be lacking in a jury, will be taken into account, see *R v Tam Shing-choi* (Cr App 768/95).

1–179 In *R v Hoggins*, above, two defendants who were charged with murder sought to blame each other. They were convicted and appealed on the ground that the trial judge should have ordered separate trials in view of the consideration introduced by *Murdoch v Taylor* [1965] AC 574, HL (§8–145, below), that the court had no discretion to limit the cross-examination of a defendant who had given evidence against a co-defendant. Held, dismissing the appeal, this was only one factor to be taken into consideration, and that it must be weighed against the interests of the defendant seeking to cross-examine and of the public in the proper administration of justice. Likewise, the likelihood of one defendant being exposed to cross-examination as to his criminal record on behalf of another defendant is just one matter to be

considered; the interests of witnesses who would have to give evidence about, for example, sexual matters, should also be taken into account in an assessment of the requirements of the interests of justice when separate trials are sought: *R v Edwards and Lake (deceased)* [1998] Crim L R 756, CA. However, where a co-defendant was entitled to cross-examine the appellant on the contents of an interview which had been ruled inadmissible for prosecution purposes, and where counsel for the co-defendant made it clear that she intended so to cross-examine, the prejudice was such as to justify a departure from the general practice of trying co-conspirators together and, in those circumstances, the judge should have granted separate trials: *R v O'Boyle* 92 Cr App R 202, CA.

1–180 Although there is no firm rule, it will often be appropriate to order separate trials where an indictment contains a count that A assaulted B, together with a count that C assaulted A. If a joint trial was to take place in such a case and either defendant gave evidence in his own defence, counsel for the Crown could cross-examine him to bring out evidence against the other defendant, rather than adduce such evidence by examination-in-chief. This situation would be prejudicial to a defendant against whom such evidence was adduced and is to be distinguished from the situation that arises where defendants are jointly charged with the same offence and run cut-throat defences, which enables counsel for the Crown to cross-examine each about the other. In the latter situation, the prejudice would arise from the nature of the respective defences. In the first situation, the avoidance of unusual prejudice will normally outweigh the convenience of not having to call the same witnesses at two separate trials: *R v Johnson (A)* [1995] 2 Cr App R 1, CA. The prejudice to co-defendants from incriminating remarks made in interview can sometimes be mitigated by suitable editing. In *R v Silcott* [1987] Crim L R 765, CCC, Hodgson J ordered that any reference to a co-defendant in an interview be substituted with a reference to a letter of the alphabet (see also *R v Mathias* [1989] Crim L R 64, Crown Court (HHJ Pearlman)). Such a course should not be adopted if it would involve the exclusion of evidence that is exculpatory of the maker of the statement that is edited: *R v Gunewardene* [1951] 2 KB 600, 35 Cr App R 80, CCA; *R v Pearce*, 69 Cr App R 365, CA; *Lobban v R* [1995] 2 Cr App R 573, PC. In *HKSAR v Lin Siu Lun* [2008] HKEC 212, CA, it was held that a count of conspiracy to do grievous bodily harm should have been severed from a count of murder where the first defendant was charged with murder, but not conspiracy, and his co-defendants charged with conspiracy had given interviews containing statements which were highly prejudicial to the first defendant.

1–181 In *R v Pervez and Khan* [1983] Crim L R 108, CA, the court said that the question of severance should be raised and determined before consideration of questions of admissibility of alleged confession statements made by defendants. The court must have overlooked the fact that whether the trial of defendants should be severed may well depend upon the admissibility of one or more confession statements. Indeed, the fact that an alleged confession by A was highly prejudicial to B might be B's only ground for asking for a separate trial. If A's statement was held inadmissible, the ground for B's application would disappear.

As to the question whether separate trials are appropriate in a case where not all of the defendants are of good character, but those who are of good character are entitled to a full direction in that regard, see *R v Vye, R v Wise, R v Stephenson* 97 Cr App R 134, CA, §§4–228 *et seq*, below.

For a discussion of the cases on the power to order separate trials under s 5 of the Indictments Act 1915, see the Commentary to *R v Miah* [2012] Crim LR 67.

See §4–39, below, as to the effect of a change of plea by a co-defendant in certain circumstances.

Unduly long and complicated cases

1–182 The desirability of trying joint offenders together, or of trying counts together which are properly joined in one indictment according to the rules, may often be outweighed by the difficulties which may arise from the jury having to deal with a number of issues or a great volume of evidence or both. In *R v Novac* 65 Cr App R 107 at p 118,

the Court of Appeal said that nothing short of absolute necessity could justify the imposition of the burdens of a very long trial. The court added that, in a jury trial, brevity and simplicity are the hand-maidens of justice; length and complexity its enemies. See further *R v Thorne* 66 Cr App R 6, CA; *R v Cohen*, and *R v Kellard* (§1–85, above), and see §36–58, below.

On some occasions, little if any extra court time is likely to be taken up by separate trials, even of defendants charged with the same offence. The evidence common to all defendants, which alone has to be repeated, may not be disputed and may often be admitted. Moreover, an acquittal on the first trial may lead to the prosecution offering no evidence on a subsequent trial. A conviction may lead to a plea of guilty in a subsequent trial. Considerable public expense is saved by reducing the number of solicitors and counsel attending each day.

I. OBJECTIONS TO INDICTMENT

(1) General

1–183 There are many matters which may result in objection being taken to an indictment. Such objection may be taken because of some defect in the indictment itself; or because of some defect in the procedure followed in the preferment of that indictment or the pursuit of it. For example, an indictment will be open to objection in the following situations:

(1) if it has been preferred otherwise than in accordance with the provisions of section 24A of the Criminal Procedure Ordinance (Cap 221) or section 83E *ibid*;

(2) if it is drafted otherwise than in accordance with the Indictment Rules (see §§1–97 *et seq*, above), eg if it is insufficiently, or incorrectly, particularised (see §§1–97 *et seq*, above), if it charges more than one offence in one count (see §§1–123 *et seq*, above), or if it contains counts that cannot properly be joined in the same indictment (see §§1–146 *et seq*, above);

(3) if it has not been preferred within the time required by section 14 of the Criminal Procedure Ordinance (Cap 221) (see §§1–193 *et seq*, below);

(4) if it has not been signed, as required by section 17 of the Criminal Procedure Ordinance (Cap 221);

(5) if the time limits for the beginning of trials have not been complied with (see §4–1, below);

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(6) if it charges an offence that is not known to law (see §1–205);

(7) if it charges an offence that is not triable on indictment;

(8) if it charges an offence in respect of which any necessary consents to the institution or continuation of the prosecution have not been obtained (see §§1–198 and 1–225 *et seq*, below) in respect of which any necessary notification of a decision to bring proceedings has not been given;

(9) if it charges an offence in respect of which any relevant limitation period had expired before the commencement of the prosecution (see §§1–187 *et seq*, below);

(10) if it would amount to an abuse of process to permit the prosecution to pursue it (see §§4–43 *et seq*, below);

(11) if it charges the defendant with an offence for which he has already been convicted or acquitted or pardoned; see *HKSAR v Yeung Chun-pong* (DCCC 438/2005, [2005] HKEC 1361) where the prior disposal was in another jurisdiction;

(12) if it charges a person who is immune from prosecution or whose acts at the relevant time are not susceptible to the jurisdiction or who, by reason of age, was incapable in law of committing an offence at the relevant time (see §§1–65 *et seq*, above);

(13) if it charges a person, who has been extradited from abroad, with an offence that was not covered by the extradition proceedings (see §§1–78 *et seq*, above).

The above list was referred to, with apparent approval, in *R v Central Criminal Court and Nadir, Ex p Director of Serious Fraud Office* 96 Cr App R 248 at p 252, DC.