Re-examination

Re-examination is the third and final possible stage of questioning (apart from questions from the judge). It is limited to questions to clarify issues raised in cross-examination and to explain any inconsistencies in the witness's evidence in chief and cross-examination. Questions about issues raised only in examination in chief should therefore not be asked. Where the cross-examiner has accused the witness of fabricating his evidence in chief, the party calling the witness may be allowed to prove that the witness made a previous out of court statement which is consistent with his evidence today. (See p.84.)

It appears the judge has residual discretion about questions so as to ensure that the jury is not misled as to the existence of some fact or the terms of any previous statement by the witness: **Ali (Hawar Hussein) [2003] EWCA 3214**. The discretion does not permit the re-examiner to reinstate the evidence of a witness merely where inconsistencies are shown up by cross-examination. This would affect the finality rule and falls some way short of the test of whether the jury would otherwise be misled.

Figure 15 on p.71 summarises the previous section of work and represents in tabular form what we saw above at p.54 in relation to proceedings in the Crown Court.

Special Measures Directions for Defendants and Vulnerable and Intimidated Witnesses

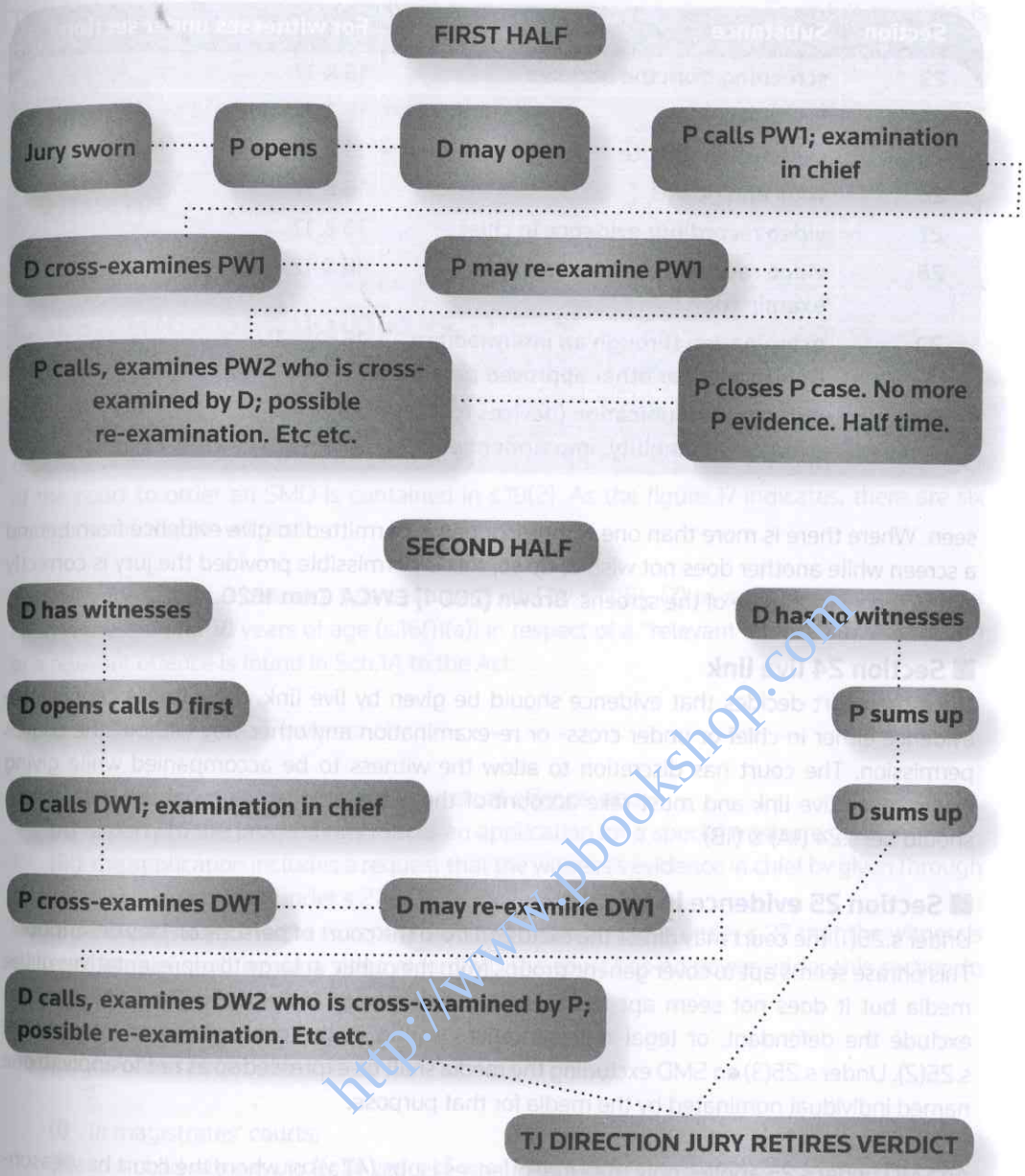
Witness Anonymity Orders (p.59) as well as the restrictions on questions in cross-examination (p.62) are species of Special Measures to protect witnesses. In addition, Part II (sections 16–33) of the YJCEA creates a statutory scheme of special measures directions (SMD) for the protection of vulnerable or intimidated ("eligible") witnesses, especially children, and also for defendants. The measures modify standard procedures for giving evidence in criminal proceedings.

SMD for Eligible Witnesses Other Than the Defendant

Section 23 screening from the accused

This is designed to prevent the witness from seeing the defendant but the screen must not prevent the judge, jury, justices, interpreter or legal representatives from seeing and being

FIGURE 15 Summary table



Sections 27 & 28 video recordings of evidence in chief, cross- and re-examination

These measures can apply to any eligible witness whatever their age. Their full meaning is dealt with in Chapter 3 p.108.

Section 32 provides that in trials on indictment where an SMD has been given the judge "must give the jury such warning (if any) as he considers necessary to ensure that the fact that" an SMD was given does not prejudice the accused. This badly drafted section appears to be both mandatory ("must") and discretionary ("if any").

Categories of Eligible Witness

This Part of the Act is structured as follows. Sections 16 and 17 define an "eligible witness". Such a witness can be the beneficiary of an SMD. In general terms, a witness will benefit from an SMD where, without it, there would be a diminution in the quality of his evidence. The special measures themselves are to be found between ss. 23 and 30 as shown in figure 16. The power of the court to order an SMD is contained in s.19(2). As the figure 17 indicates, there are six categories of eligible witness.

Eligibility for a special measure has been extended by s.17(5)–(7) to any witness other than a child witness under 18 years of age (s.16(1)(a)) in respect of a "relevant offence". The definition of a relevant offence is found in Sch.1A to the Act.

Under s.22A (see Figure 17) where:

(i) a witness is the complainant to a sexual offence; and
(ii) a party to the proceedings makes an application for a special measure; and
(iii) the application includes a request that the witness's evidence in chief by given through a video recording under s.27

the court *must* (subject to the exceptions below) make an order under s.27 that the witness's evidence in chief shall be via a video recording. The court has no power under this section to raise the issue of an SMD of its own motion.

Section 22A does not apply:

(i) in magistrates' courts;
(ii) to a child witness under 18 years of age (s.16(1)(a));
(iii) if the court decides either that such a measure would not be in the interests of justice (s.27(2); or
(iv) if the court considers that use of the video would not maximise the quality of the evidence (s.22A(9)).

called to give evidence. In these circumstances the defendant has two options. First he might seek exclusion under the reliability conditions contained in subs.(7) where the burden of proof would be on him. Alternatively he might rely on his right fair trial under art.6 of the ECHR or seek exclusion of prosecution evidence under PACE s.78(1).

Section 117(2)(b) & (c): "supplied" and personal knowledge

Although the relevant person need not be identified by name it must be shown that he had, or it may reasonably be supposed he had, personal knowledge of the "matters dealt with" in the document. This will not be a problem where the person who supplied the information is the same as the person creating the document as contemplated by s.117(3). It involves accepting that a person might be said to supply information to himself notwithstanding that in **Derodra [2000] 1 Cr.App.R.41** Buxton L.J. in said it was "inapt to refer to a person as supplying information to himself".

Can the document prove itself?

The question is whether the requirements of s.117(2) (knowledge, supply, intermediaries, profession) can be inferred from the documents themselves or whether, as with s.116(2) absence or fear must be proved by separate evidence. The answer is found in **Foxley [1995] 2 Cr.App.R.523**. The defendant was convicted of corruption by having shown favouritism in the placing of contracts with foreign companies in exchange for money paid into a Swiss bank account by the companies concerned. The judge admitted company records and accounts which had been supplied by the companies to their own prosecuting authorities and forwarded to the English authorities. They were many years old. No oral evidence was called in support of the documents. Roch L.J. asked:

> is direct oral evidence required either from the officer of the appropriate authority in the foreign country that he has seized the documents in accordance with the laws of his country or from an officer of the company that these were indeed documents from his company created in the course of business containing information supplied by a person who had or may reasonably be supposed to have had personal knowledge of the matters dealt with? In our judgment such direct evidence is not essential, although it will often be desirable . . . The court may, as Parliament clearly intended, draw inferences from the documents themselves and from the method or route by which the documents have been produced before the court.

It may, nevertheless, be questioned whether the closing words of in s.117(2)(b) were complied with. (Professor Smith ([1995] Crim.L.R.637) argued that the case has nothing to do with hearsay—the documents were not indicative that payment had been made but of the payments themselves.)

Multiple Hearsay

You will recall the illustration at p.117 in which we distinguished direct from hearsay evidence and then first hand from multiple hearsay. You may wish to refresh your memory now. T's evidence would be multiple hearsay because T heard the history of events from M who was told them by S to whom they happened. When we analysed that situation, we said the difference between first hand and multiple hearsay was significant. We will now see why.

Section 121 is headed "Additional requirement for admissibility of multiple hearsay" and reads as follows.

> (1) A hearsay statement is not admissible to prove the fact that an earlier hearsay statement was made unless—
>
> (a) either of the statements is admissible under section 117, 119 or 120,
> (b) all parties to the proceedings so agree, or
> (c) the court is satisfied that the value of the evidence in question, taking into account how reliable the statements appear to be, is so high that the interests of justice require the later statement to be admissible for that purpose.
>
> (2) In this section "hearsay statement" means a statement, not made in oral evidence, that is relied on as evidence of a matter stated in it.

Subsection (1) creates an exclusionary rule in relation to multiple hearsay with exceptions (a)—(c) in subs.1. Unless the exceptions apply, one hearsay statement cannot be proved by another. This section reinforces what we saw at p.136 above which is that s.116 is, in principle, limited to first hand hearsay.

Capability to Make a Statement: Section 123

A hearsay statement is inadmissible if made, supplied or created by a person who (subs.3) is incapable of "understanding questions put about the matters stated and giving answers which can be understood". This is virtually the same test as that used in the Youth Justice and Criminal Evidence Act 1999 s.53 to determine competence as a witness and under s.54 to determine "intelligible testimony" capability (see Chapter 3 p.98).

Credit of the Maker of the Statement: Section 124

In Chapter 2 p.66 we saw that in principle a witness's answers in cross-examination on matters of credit are final and he cannot be impeached by contrary evidence. We noted exceptions such as previous inconsistent statements, bias and convictions and, when they apply, evidence to the contrary is admissible. Such contrary evidence is admissible where

the witness does not give evidence: s.124(2)(a). In addition the court can (s.124(2)(b)) permit evidence to be given on an issue which would otherwise be collateral—in other words leave may be given to infringe the finality rule in collateral issues.

By way of illustration if the cross-examiner is permitted to ask a witness about some disreputable conduct falling short of a conviction, in normal cases the witness's answer would be final. Under s.124(2) the court has discretion to allow evidence of such conduct to be given where the relevant person does not give evidence.

Stopping a Case where the Evidence is Unconvincing: s.125

Section 125(1) creates a catch-all power in respect of any offence where

- after the close of the prosecution case;
- the case is based wholly or partly on a statement not made in oral evidence in the proceedings; and
- the evidence is important in the case; and
- is so unconvincing that a conviction would be unsafe.

In principle the section can apply to evidence admitted under the hearsay provisions of the Act including ss.114, 116 and 117. As we have seen, however, each of those sections carries at least one subsection enabling the court to exclude evidence otherwise admissible under it. It follows that the exact relationship of s.125 to the other sections is a matter of speculation as its relationship to s.78(1) of PACE 1984.

The court can direct either an acquittal or a re-trial but the defendant cannot be convicted of another possible offence such as common assault instead of an offence under s.47 of the Offences Against the Person Act 1861.

Discretion to Exclude Evidence: Section 126

The section applies only where the evidence consists of a statement not made in the proceedings and where the court is satisfied—judged by the issue of "waste of time"—that the case for admitting it is substantially outweighed by the case for excluding it. The court's power to exclude evidence under s.78(1) of PACE or at common law are expressly preserved by s.126(2). In **C & K [2006] EWCA Crim 197** Pill L.J. referred [22] to s.126 as giving "the court a general discretion to exclude evidence in criminal proceedings" but this is obviously wrong given its wording. It applies narrowly to "waste of time". It seems his Lordship read only the section headnote.

Overall Considerations with Regard to Exclusion of Hearsay Evidence

The CJA 1988 mandated the court to consider the interests of justice before admitting hearsay. There is no similar provision in the CJA 2003 though there are some specific provisions such as those in ss.116(4) and 117(7).

Given the fair trial requirement of art.6 and the power to exclude under s.78(1) of PACE what issues are likely to arise when the judge decides whether to admit hearsay evidence? As Waller L.J. observed in **Sellick [2005] EWCA Crim 651** whether art.6 has been infringed is "very fact sensitive". In practice the following are factors are most likely to affect admissibility of hearsay evidence.

Article 6(3)(d)

Everyone charged with a criminal offence has the following minimum rights;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

This right is sometimes known as the right to confront one's accuser. **Dennis ([2010] Crim.L.R.255** (260–269)) identifies four different meanings of "confrontation". They are the right to:

- public trial;
- face-to-face confrontation;
- cross-examination;
- know the identity of the accuser.

Suppose that instead of calling a witness to give oral evidence of what he heard or saw, etc. the prosecution relies on that person's out-of-court statement—in other words, the prosecution is seeking to rely on hearsay evidence. Assuming the admissibility conditions are satisfied, to what extent does art.6(3)(d) give the defendant a right to confront witnesses against him? The documentary evidence may be that of an identified or unidentified (i.e. anonymous) witness. Do not confuse the situation under discussion now with that where the documentary evidence comes from an unidentified (anonymised) witness—the situation we encountered in Chapter 2 p.59 under the provisions of the Coroners and Justice Act 2009. In that situation the witness is not identified but does give oral evidence.

In **Unterpertinger v Austria (1986) 13 EHRR 175** the ECtHR said admitting written statements is not per se inconsistent with art.6—it is the *use* made of them which is critical. One reason for calling anonymised documentary evidence is that the State wishes to protect the identity of agents engaged in undercover operations. In cases brought against the Netherlands