[Legal Briefing]

[Criminal Justice]

Pre-trial disclosure after the Criminal Justice Act 2003

Simon Parsons asks: are the new rules an attack on the principle of equality of arms?

The Criminal Justice Act (CJA) 2003 represents a seismic change in the criminal justice process. The CJA consists of 339 sections and 38 schedules; these make extensive changes to the law of procedure, evidence and sentencing. The Act is the result of the White Paper *Justice for All* in which the government stated that they intended to rebalance the criminal justice process in favour of victims in order to achieve the goal of "strong, safe communities"[1] This article will consider the changes made by the CJA to pre-trial disclosure. It will also consider to whether these changes undermine the fundamental principle that in adversarial criminal proceedings there must be "equality of arms" between the prosecution and the defendant.[2]

Equality of arms

[1] Cm. 5563 (2003) p 26.

[2]In *Edwards* v *United Kingdom* (1992) 15 EHRR 417, the European Court of Human Rights (EctHR) held that disclosure by the prosecution was a crucial precondition of a fair trial. In *Rowe and Davis* v *United Kingdom* (2000) 30 EHRR 1 the ECtHR found a violation of Article 6(1) (the right to a fair trial) where the prosecution failed to place relevant documents before the trial judge or to invite him to rule on disclosure.

The general rule is that the prosecution has the legal burden of proving beyond reasonable doubt that the accused has committed the *actus reus* of an offence with the required *mens rea*[3]; in other words, the magistrate or jury must be sure that the prosecution has proved its case. To discharge this burden, the prosecution has the evidential burden of adducing *prima facie* evidence of the accused's guilt: evidence, in other words, on which a court or jury could properly be sure that a question of fact is proved, but are not bound to find that this is so[4]. To compensate for the power of the state the principle of equality of arms requires not only that the prosecution discharge the burden of proof[5] but also that the prosecution and the defence have equal access to relevant evidence and an equal right to present and contest evidence. This means that the prosecution must give detailed disclosure of evidence for and against the accused. This is reflected in the right of disclosure contained in Article 6 (3) (a) of the European Convention of Human Rights which states that when a person is charged with a criminal offence he or she has the right 'to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him'[6]

Pre-trial disclosure by the prosecution

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[3] *Woolmington* v *DPP* [1935] AC 462, HL.

[4] The CPS standard of a "realistic prospect of conviction" is at the higher end of the *prima facie* range. A realistic prospect of conviction is an objective test. It means that a jury or a bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. See the Code for Crown Prosecutors sections 5.2 and 5.3.

[5] There are many statutory offences with reverse burdens of proof which put the legal burden of proof upon the accused a practice that is generally to be deplored.

[6] This is supported by Article 6 (3) (b) which gives a right 'to have adequate time and facilities for the preparation of his defence'.

The purpose of pre-trial disclosure by the prosecution is to disclose the *prima facie* evidence which the prosecution intends to use to prove beyond reasonable doubt the facts in issue of the offence charged. There are difficulties, however, if the prosecution fails disclose *unused* evidence. The original section 3(1)(a) of the Criminal Procedure and Investigations (CPIA) Act 1996 required primary disclosure by the prosecution of unused evidence "which in the prosecutor's opinion might undermine the case for the prosecution against the accused". Secondary disclosure by the prosecution of unused evidence would occur after disclosure of evidence by the defence where the unused prosecution evidence "might be reasonably expected to assist the accused's defence as disclosed by the defence statement".[7]

Amendments made by the CJA to the CPIA came into force on the 4th April 2005.[8] One consequence is that the distinction between primary and secondary prosecution disclosure has now disappeared as the CPIA now requires the prosecution to disclose unused evidence which "might reasonably be considered capable of undermining the case for the prosecution *or of assisting the case for the accused*".[9] This is to be welcomed, as it will mean that the disclosure of unused evidence assisting the defence will no longer be dependent on the defence disclosing a particular defence in its statement. It therefore supports the principle of equality of arms. To be effective, however, it requires the prosecution to accept there is a duty to support the defence as well as the prosecution case. This in turn will depend on the police drawing up complete schedules of evidence.

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[7] CPIA section 7(2) (a). The CJA repeals this section.

[8] For a more detailed examination see Mike Redmayne 'Criminal Justice Act 2003: (1) Disclosure and Its Discontents' [2004] Crim L.R.441.

[9] CJA section 32 amending CPIA section 3 (1) (a).

However, the CJA makes no change to the CPIA in one respect, holding that it is sufficient that the prosecution ‘purports’ to comply with its duty to disclose (section 5 (1) (b) CPIA), which would seem to exclude judicial scrutiny of prosecution disclosure prior to disclosure by the defence. This would appear to be a breach of the equality of arms principle and a violation of Article 6(3) (a) in that it prevents the accused challenging, at this stage of proceedings, what he or she may think is inadequate prosecution disclosure of unused evidence.[10] It may well be that section 5 (1) (b) will be interpreted to allow judicial scrutiny of disclosure by the prosecution prior to disclosure by the defence but if not that section may be subject to a declaration of incompatibility with Article 6 (3) (a).[11]

Pre-trial disclosure by the defence

Prior to the CPIA there was no obligation on the defence to disclose its case on the facts in issue until the trial itself. However, since the 1996 Act came into force a statement setting out the case for the defence case must be disclosed prior to trial in the Crown Court [12]and may be disclosed in the magistrates' court.[13] The problem has been that the defence disclosure has not given enough detail. In many cases the defence statement just amounted to a bare denial.[14] The CJA makes changes to defence disclosure to deal with this. The details of the nature of the defence still must be disclosed but in addition there has to be disclosure of any particular defences upon

[10] CPIA section 8 allows for judicial scrutiny of prosecution disclosure but only *after* defence disclosure.
[11] Human Rights Act 1998 section 3 and section 4.
[12] CPIA section 5.
[13] CPIA section 6.
[14] J Plotnikoff and R Wolfson ‘A Fair Balance? Evaluation of the Operation of the Disclosure Law’ Home Office 2001.

which the defendant intends to rely. Also any disputed factual matters and explanations as to why they are disputed must be disclosed, as must any points of law which are to be taken. If the defence statement discloses an alibi then the name and address of any witness who supports the alibi must also be given.[15] This requirement for increased disclosure is reinforced by the fact that any failure to disclose will be deemed to be the fault of the defendant and not his lawyer, unless the contrary is proved.[16] If the defence fails to provide a defence statement or to disclose disputed matters of fact the prosecutor can comment upon these failures during the trial without requesting leave. These changes increase the possibility of an adverse inference by the jury that the defendant has something to hide.[17] The purpose of these changes is to 'rebalance' the criminal justice process in favour of victims and witnesses by obligating the defendant to provide fuller disclosure before the trial. It has been suggested that any requirement of defence disclosure represents an attack on the defendant's privilege against self-incrimination.[18] However, some defence disclosure can be justified in that it will reveal evidence for and against the facts in issue and thus supports the rules of evidence applied in the court. The real question is whether these changes go too far. Requiring the defendant to disclose in too much detail areas in dispute with the prosecution undermines the principle of equality of arms. It is a necessary advantage for defendants them to have the benefit of surprise when cross-examining prosecution witnesses (necessary, because they are taking on the power and resources of the state): this advantage may be lost if the law obliges them to make too detailed disclosure.

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[15] Section 33 CJA inserting a new section 6A into the CPIA.
[16] Section 36 CJA inserting a new section 6E into the CPIA
[17] CJA section 39 amending CPIA section 11
[18] No 8 at 450.

It may be that the opportunity to draw adverse inferences will be limited to a few, rare cases where, for instance, the defendant has failed to disclose a duress defence. However, giving the prosecution the name and address of an alibi witness might have damning consequences for the defence: for instance, where the police then interview that witness and bring about a change of mind. To forestall any injustice that might occur as a result of this, the CPIA now provides for a Code of Practice which requires, inter alia, that the defence will be notified of any proposed interview and the defence lawyer will have the right to be present at it.[19] But if there is a change of mind this will assist the prosecution in the discharge of its burden of proof although Redmayne suggests that the fact the burden is on the prosecution does not prevent it using defence evidence to discharge it by, for example, an alibi address in fact revealing the defendant had time to reach the scene of the crime and commit the crime.[20] Redmayne also suggests that the rebalancing is in fact symbolic because possible adverse comments from the failure to disclose a point of law or the failure to disclose the name and address of a witness will require the leave of the judge[21] but that leave will rarely be granted.[22] However there may be a change of culture to enforce the greater defence disclosure vigorously because when the Government signals change this influences practitioners in the criminal justice process. An example of this influence is the greater sentencing powers given to sentencers in the 1990s; this led to more people being sent to prison. So much so, in fact, that magistrates had to be shown a video of the then Home Secretary David Blunkett stating in Parliament that he did *not* want first time burglars to go to prison.[23]

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[19] Section 39 CJA inserting a new section 21A into the CPIA.
[20] No 8 at 451.
[21] Section 11 CPIA.
[22] No 8 at 447.
[23] *The Legal Executive* (2005) January at 2.

Conclusion.

While the end of the distinction between primary and secondary prosecution disclosure is to be welcomed, the changes in the law of disclosure also require defendants to give greater disclosure. In addition, the changes have not altered the fact that prosecution disclosure cannot be subject to judicial scrutiny prior to defence disclosure. It should also be noted that the CJA disclosure provisions are not the only provisions affecting the criminal trial, as the bad character provisions[24] will allow for greater admittance of previous convictions in trials, and there is the possibility that more hearsay will be admitted as well, since section 114 (1) (d) of the CJA allows its admission where it is in the interests of justice to do so[25]. The result of these changes could be an escalation of the criminal justice process with more defendants being convicted with many of them going to prison. We must hope that the Court of Appeal will interpret these provisions in a conservative way so that there is not a large increase in the number of defendants being convicted and sent to prison.[26]

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[24] Sections 98 -113 CJA.

[25] This may be violation of the right to effective challenge contained in Article 6 (3) (d).

[26] In *Hanson* [2005] EWCA Crim 824 the Court of Appeal has made it clear that despite the change to the law of bad character made by the CJA the approach of the courts should be that a defendant's bad character should not be admitted as a matter of routine.