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Rule 25.9(2)(c): Defence Statements and 'openings'

By Marie Spenwyn

In a recent webinar we discussed this topic of delivery of defence openings / summary of issues and how defence statements can be framed to support a defence opening.
This article is a summary of the key provisions discussed.

Traditionally in England and Wales the defence may give an opening address at the start of the defence case, but only where evidence is to be called other than from the accused person. In many cases this means that the issues are not identified clearly until a late stage and in long cases there can be an advantage to the prosecution to dominate the trial issues.

Rule 25.9, taken together with the overriding objective, now allows for a fair and concise rehearsal of the issues raised in the defence statement or alternatively for the jury to be given the defence statement. The practice is for judges to ask defence counsel to give a short summary of the issues in the defence case after the prosecution opening, usually in serious and/or complex/ lengthy cases. In more than one trial this has been expressed as "a couple of sentences to identify the issues" and defence counsel have complied with that request.

However, Rule 25.9 allows for more than that and our experience is that a summary of issues may need to run into several paragraphs. Judges have the power to 'red pen' defence openings on the issues in a way that is not done with prosecution openings – an imbalance that may need to remedied by arguing for a longer opening. This can be achieved, not by a 'couple of sentences" on the hoof but by drafting a defence opening and serving on the court and all parties. It is worth thinking this through at the time a defence statement is drafted so that what is said later is clear from what the client has endorsed.

Early Identification Of Issues

An invitation to set out the issues in the defence case at an early stage of a trial is different from the option of a defence opening at close of Prosecution case which is provided for in the Criminal Procedure Rules (CPR) at 25.9 (2)(g):
"the defendant may summarise the defence case, if he or she intends to call at least one witness other than him or herself to give evidence in person about the facts of the case…"

CPR 25.9 (2) (c) provides as follows:

25.9—

1. *This rule applies where—*
    a. *the defendant pleads not guilty; or*
    b. *the defendant declines to enter a plea and the court treats that as a not guilty plea.*
2. *In the following sequence—*
    a. *where there is a jury, the court must—*
        i. *inform the jurors of each offence charged in the indictment to which the defendant pleads not guilty, and*
        ii. *explain to the jurors that it is their duty, after hearing the evidence, to decide whether the defendant is guilty or not guilty of each offence;*
    b. *the prosecutor may summarise the prosecution case, concisely outlining the facts and the matters likely to be in dispute;*
    c. *where there is a jury, to help the jurors to understand the case and resolve any issue in it the court may—*
        i. *invite the defendant concisely to identify what is in issue, if necessary in terms approved by the court, and*
        ii. *if the defendant declines to do so, direct that the jurors be given a copy of any defence statement served under rule 15.4 (Defence disclosure), edited if necessary to exclude any reference to inappropriate matters or to matters evidence of which would not be admissible;*

Not all practitioners are aware of the power for a jury to be provided by the Judge with a copy of a defence statement that has been available before the CPR provision set out above. In the Criminal Procedure and Investigations Act 1996 (as amended) at 6E:

Disclosure by accused: further provisions

(4)The judge in a trial before a judge and jury—
(a) may direct that the jury be given a copy of any defence statement, and

(b) if he does so, may direct that it be edited so as not to include references to matters evidence of which would be inadmissible.

(5) A direction under subsection (4)—

(a) may be made either of the judge's own motion or on the application of any party;

(b) may be made only if the judge is of the opinion that seeing a copy of the defence statement would help the jury to understand the case or to resolve any issue in the case.

(6)The reference in subsection (4) to a defence statement is a reference—

(a)where the accused has given only an initial defence statement (that is, a defence statement given under section 5 or 6), to that statement;

(b)where he has given both an initial defence statement and an updated defence statement (that is, a defence statement given under section 6B), to the updated defence statement;

(c)where he has given both an initial defence statement and a statement of the kind mentioned in section 6B(4), to the initial defence statement.

In the case of R v Connor [2019] EWCA Crim 96, amongst other grounds of appeal, complaint was made about the CPR provision allowing for jury to be shown a Defence Statement (DS), on basis that the defendant had not been advised of the power under CPR (which was not then in force). The Court of Appeal made the point that CPIA 6E already provided for this.

At paragraph 29:

The next ground of appeal is raised by Connor and concerns the judge's ruling that the defence statements should go before the jury. On behalf of Connor, the argument was advanced that the judge should not have acted pursuant to Rule 25.9(2)(c) because it was not in force at the time that the defence statements were served. This argument is without merit. There was no commencement provision for the rule limiting its application to defence statements drafted after it came into effect. In any event, a trial judge has a discretion to direct that the jury be given a copy of the defence statement where he or she is of the opinion that seeing it would help the jury to understand the case or resolve an issue in the case ever since section 6E was added to the Criminal Procedure and Investigations Act 1996 by an amendment which came into force in 2005 so that this is not a new discretion. What is new in Rule 25.9(2)(c) is the ability of the judge to offer defence counsel the opportunity to outline the issues to the jury after the prosecution opening.

It is therefore important for practitioners to advise a defendant when preparing a DS of the following:

- the general importance of agreeing the DS as to the contents pertaining to the defence – as to which they could face later questioning if they give evidence.
- that Crown can apply to place all or part of a DS before a jury depending on the answers given in questioning.
- That the Judge has the power to place the defence statement in full or in part before the jury under CPIA 6E though now more likely under CPR 25.9(2)(c) (if the opening of the issues is non-compliant or the invitation to open is declined).

In *Conor* the court did comment on what was 'new' arising from the CPR - "the ability of the Judge to offer defence counsel the opportunity to outline the issues to the jury after the prosecution opening" i.e. at an earlier stage in case".

There were specific provisions on this topic in the Criminal Practice Directions prior to the recent re-issue effective from May 2023. The provisions are reproduced below as they do provide some context to what was envisioned by 'identification of issues' but with the warning that the detail is no longer part of the practice directions.

Criminal Practice Direction VI (Trial) 25A: Identification for the jury of the issues in the case, paras 25A.2–25A.6 -

NOW REMOVED

25A.2 CrimPR 25.9(2)(c) provides for a defendant, or his or her advocate, to set out the issues in the defendant's own terms (subject to superintendence by the court), immediately after the prosecution opening. Any such identification of issues at this stage is not to be treated as a substitute for or extension of the summary of the defence case which can be given later, under CrimPR 25.9(2)(g). Its purpose is to provide the jury with focus as to the issues that they are likely to be called upon to decide, so that jurors will be alert to those issues from the outset and can evaluate the prosecution evidence that they hear accordingly. For that purpose, the defendant is not confined to what is included in the defence statement (though any divergence from the defence statement will expose the defendant to adverse comment or inference), and for the defendant to take the

opportunity at this stage to identify the issues may assist even if all he or she wishes to announce is that the prosecution is being put to proof.

25A.3 To identify the issues for the jury at this stage also provides an opportunity for the judge to give appropriate directions about the law; for example, as to what features of the prosecution evidence they should look out for in a case in which what is in issue is the identification of the defendant by an eye-witness. Giving such directions at the outset is another means by which the jury can be helped to focus on the significant features of the evidence, in the interests of a fair and effective trial.

25A.4 A defendant is not entitled to identify issues at this stage by addressing the jury unless the court invites him or her to do so. Given the advantages described above, usually the court should extend such an invitation but there may be circumstances in which, in the court's judg- ment, it furthers the overriding objective not to do so. Potential reasons for denying the defendant the opportunity at this stage to address the jury about the issues include (i) that the case is such that the issues are apparent; (ii) that the prosecutor has given a fair, accurate and comprehensive account of the issues in opening, rendering repetition superfluous; and (iii) where the defendant is not represented, that there is a risk of the defendant, at this early stage, inflicting injustice on him or herself by making assertions to the jury to such an extent, or in such a manner, as is unfairly detrimental to his or her subsequent standing.

25A.5 Whether or not there is to be a defence identification of issues, and, if there is, in what manner and in what terms it is to be presented to the jury, are questions that must be resolved in the absence of the jury and that should be addressed at the opening of the trial.

25A.6 Even if invited to identify the issues by addressing the jury, the defendant is not obliged to accept the invitation. However, where the court decides that it is important for the jury to be made aware of what the defendant has declared to be in issue in the defence statement then the court may require the jury to be supplied with copies of the defence statement, edited at the court's direction if necessary, in accordance with section 6E(4) of the CPIA 1996.

The Crown Court Compendium Part I provides some guidance on the topic of early identification of the issues [at 3-1A]. It is of note that there is a specific reference to the fact that there is no right of the defence to give such an opening and the invitation is at the discretion of the trial Judge. The guidance also gives an example of inviting the defence to provide a 'short list of bullet points in writing in advance so that the limited scope of the exercise is clear to all parties'. In one recent case, negotiation with the trial judge by email led to a 9 paragraph opening which started as 9, was reduced to 4 and then the judge agreed 9 with further amendment and explanation. It was an example of how a practice of "a couple of sentences" can restrict the defence. Knowing of Rule 25.9 can allow the defence greater opportunity to express the defence case, should it be appropriate to do so. Whether yours is a case where all issues need to be handed over at the start will be a matter of professional judgment.

The compendium goes on to deal with legal directions that can be provided at an early stage of the trial – as such we draw attention to this power in this context as this may impact on a decision to accept the invitation to open the issues and/or the extent of what is said:

1. CPR 25.14— (1) This rule applies where there is a jury.

   (2) The court must give the jury directions about the relevant law at any time at which to do so will assist jurors to evaluate the evidence.

CPD 8.5 Jury Directions and Written Material Early provision of directions:

> **8.5.1** The Court is required to provide directions about the relevant law at any time that will assist the jury to evaluate the evidence. The judge may provide directions prior to any evidence being called, prior to the evidence to which the direction relates or shortly thereafter.

Practical Impact

The powers available to the court mean that practitioners should keep in mind how matters are set out in DS with a view to:

i) adapting the content to a defence opening statement of issues

and

ii) taking account of the risk of a Judge allowing an edited version to go to jury via CPR or CPIA 6E

It is important to make sure the client is advised of the court's power when agreeing a DS and this is a further reason why a signed DS is important. It may be prudent in some cases to consider an additional (to be retained separately) endorsement to the extent that the client has been so advised.

In our view it may be the CPIA could still be used to allow the DS to go to the jury, even if the invitation is accepted, where the court takes the view that the identification of the issues does not go far enough or is inaccurate. As such a discussion with the Judge about the content – which may require in some cases written submissions - is a useful one.

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