

## Amended Guidelines Issued by the Lord Advocate

### Police and the Media

1. The law in Scotland relating to Contempt of Court is governed by the Contempt of Court Act 1981 which came into force on 27 August 1981 (hereafter referred to as the Act). Although the Guidelines are given principally from the point of view of that Act, other considerations such as defamation and the effect of giving out information on the development of an enquiry have been kept in mind.

2. Publication of information prejudicial to an accused will be treated as contempt under the rule of strict liability only when criminal proceedings are "active" as defined in the Act.

Proceedings are "active" on arrest (which will include any arrest under section 1 of the Criminal Justice (Scotland) Act 2016 from the 25<sup>th</sup> January 2018 onwards), the granting of a warrant for arrest, the service of an indictment or complaint, or the grant of a warrant to cite.

The Act embodies in statutory form the law of Scotland as defined in the previous common law, and in particular, the case of **Hall v Associated Newspapers Ltd & Others** 1978 SLT 241. The effect of the strict liability rule is that proceedings for contempt may be taken whether or not the publisher intended to impede or prejudice the criminal proceedings. However the strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings will be seriously impede or prejudiced.

3. One other effect of the strict liability rule is that contempt proceedings may be taken even where the publisher was unaware that proceedings were "active". There is however a defence of innocent publication and distribution available to a publisher but only where he has taken all reasonable care and the onus of establishing it lies on the accused. As a result, information regarding whether proceedings are "active" should be given to the media on request.

4. Prior to proceedings becoming "active" publication of information with the intention of prejudicing the proceedings may render the publisher liable to prosecution for attempting to pervert the course of justice. The charge of attempting to pervert the course of justice could also be brought against the person who gave the prejudicial information to the press for publication. In such a case the prosecution would have to

prove criminal intent and this may be contrasted with the position under the strict liability rule.

5. In cases either of contempt of court or attempt to pervert the course of justice, the fact that the source of the offending material was the police will not be allowed as an excuse or mitigating factor. Where the offending or prejudicial information has emanated from police sources, the court may even take the view that it would be improper to allow conviction of the accused who has suffered prejudice therefrom.

6. In the course of delivering the Opinion in the case of Hall the Lord Justice General said: -

"It is a matter for consideration whether after an individual has been arrested and has been charged with a crime it is desirable for the police to be disseminating information relating to the crime or to the individual concerned."

Similarly, in the course of delivering the Opinion in a case involving the Glasgow Herald Newspaper (High Court of Justiciary, 24 October 1979) the Lord Justice General said: -

"Before leaving this case we think it desirable to mention that we were informed by Counsel for the Respondents that the offending material which, on publication, constituted the admitted contempt of court was mainly derived from a Press Association release which was, in turn, derived from information supplied by Police sources South of the Border. We have had occasion before to question the wisdom of the provision of such information by the Police to the Press at least at any time after a person to whom it relates has been arrested on criminal charges."<sup>7</sup> In respect of untried individuals, in 2017 the Appeal Court considered the dicta in the case of *HM Advocate v Caledonian Newspapers Limited* (High Court of Justiciary, 9 February 1995) in which the court stated that if the Lord Advocate were to authorise the publication of a photograph of an untried individual then this would reduce the risk of a finding of contempt. The court did not state that the strict liability rule could be eluded by obtaining the consent of the Lord Advocate to publish a photograph. It simply stated that in practice, it may reduce the risk of a finding of contempt. Contempt of court is an offence which is within the province of the court itself to take effective action to vindicate its authority and preserve the due and impartial administration of justice. Any allegation of contempt of court must be referred to the court for the court to deal with. On this basis, it is not for COPFS to sanction the

release of photographs of untried individuals. The media should instead seek independent legal advice on the release of photographs in order to avoid committing contempt of court. Details of whether proceedings are “active” can be obtained by the media from the police or from COPFS Media Relations.

7. The police can be under considerable pressure from the media to make statements during the course of an investigation, and it is suggested that the under noted guidelines be followed:

a) Where a crime has been discovered and someone has been arrested.

In this type of case the media should in the first place be told no more than the bare minimum, for example, "The body of Mrs A B was found at (locus) on (time and date). A man has been arrested in connection with this death and a report will be submitted to the Procurator Fiscal". The name of the deceased should only be given after the next-of-kin have been informed. Before any statement which goes beyond the above is made to the media its content must be approved by Office of the Deputy Crown Agent for Serious Casework at Crown Office

The proceedings are "active" because someone has been arrested. The media may approach the police stating that they wish to publish and asking if proceedings are active. They should be advised that they are. The media may also ask for the identity of the person arrested for their information (whether or not for publication) in order to ensure that what they publish does not prejudice that person. It is considered unlikely that there could be any substantial risk of the course of justice being seriously impeded or prejudiced in the event that the media published the name of the person arrested. Accordingly if the media ask for a name, it should be given unless there is an operational reason for not doing so, e.g. fear that accomplices may destroy evidence if it becomes known that a certain person has been arrested. It should be stated, if a name is given, that the reason for doing so is that they may ensure that they comply with the 1981 Act. Where the name of the arrested person is given, no further details of the charge should be given other than what is suggested above.

In all cases the police should note the information requested and information given.

b) Where a crime has been discovered and the police have evidence which identifies the culprit as being a known person

An example of what might be said in this case is, "The dead body of Mrs A B was found at (locus) on (time and date). The death is being treated as criminal but so far there has been no arrest. A report will be submitted to the Procurator Fiscal". If you wish to add something like "Intensive investigation is proceeding" there could be no objection to that. In a case of this nature where it is believed that the media are aware of the identity of the person against whom the police have evidence, a warrant for his apprehension should be sought with the utmost expedition and the media informed that it is anticipated that a warrant will be granted (without naming the person in respect of whom the warrant is sought) before they will be ready to publish. If for any reason a warrant is not granted as anticipated, the media may be so informed.

After the warrant has been obtained, the media should be advised that proceedings are active. If the media also ask for the identity of the person named in the warrant the information should be given unless as in (a) above there is an operational reason for not doing so. No details of the charge(s) contained in the warrant should be given. If for any reason the police wish the identity or photograph of a person named in a warrant to be published (e.g. because of suspected danger to the public) the Office of the Deputy Crown Agent for Serious Casework at Crown Office must be consulted before any such step is taken.

c) Where a crime has been discovered and the culprit is unknown

This is the most difficult type of case. The police may want the help of the media but at the same time they should not unnecessarily disclose important evidence to them. There would appear to be no need to state, for example, that a dead woman's hands were tied behind her back by her tights (the knowledge of this fact by an accused might be vital in showing that his confession is credible unless he could claim to have read it in a newspaper). On the other hand there may be a need to describe her companion when she left a public house in the hope that a member of the public will come forward with evidence of identification. While publicity may lead to the discovery of fresh information, the likelihood of its doing so must be carefully weighed against the possibility of prejudice in later legal proceedings. Because of this

possibility also persons who are likely to be witnesses in the case should be discouraged from talking to the media. Such conversation may well affect the witness's account or recollection in vital aspects

d) Where an incident has been the subject of police investigation

This occurs frequently in the case of sudden death, which the police are obliged to investigate and report to the Procurator Fiscal. A brief statement may be given to the media at a certain point. If a police officer judges it wise to add something like "There would appear to be no suspicious circumstances", there would be no objection to that.

8. Increasingly private individuals and businesses choose to release images and CCTV footage of incidents via social media. Media organisations may choose to publish this. The COPFS guidance sets out the advice that is given to media organisations about this. They are advised that where they obtain footage from sources other than the police or Procurator Fiscal they must carefully consider their obligations under the Contempt of Court Act 1981 and the impact of publication on future criminal proceedings.

9. Criminal proceedings are "concluded" as defined under the Act. The term "concluded" includes circumstances where an individual has been sentenced, acquitted, and any other verdict, finding, order or decision which puts an end to proceedings. Proceedings will become active again if a written intimation of appeal is lodged and, before any statement is made in such circumstances, the Office of the Deputy Crown Agent for Serious Casework at Crown Office should be consulted to ascertain whether an appeal has been lodged.

10. In all matters and at all stages of an investigation police officers should not hesitate to contact the Office of the Deputy Crown Agent for Serious Casework at Crown Office in cases where they wish guidance.