Chapter 11

Summary hearing - dealing with evidence

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Introduction

1. The establishment of facts in a civilian criminal court is governed by the law of evidence which is a large and complex branch of the law, the detail of which lies beyond the scope of this chapter. This chapter deals with evidence as it applies to summary hearings conducted by a CO or subordinate commander. The intention is to provide those involved in the administration of Service discipline at unit level with the ability to recognise and deal with the most common issues that may arise where the officer hearing the charge is attempting to establish the facts of a case and to recognise when it will be necessary to seek staff legal advice.

2. The summary hearing is not a court. It is an inquisitorial process in which the CO endeavours to discover facts by actively searching for evidence and questioning the witnesses. No rules of evidence apply as such, but the principles ensure both best practice and fairness to the accused.

Best evidence rule

3. As a fundamental principle, the officer hearing the charge should always seek to ensure that the best evidence available is used at summary hearing. For example, the officer hearing the charge should try to ensure that any document relating to a case is the original rather than a copy. Similarly, where there is an exhibit, such as the alleged stolen property (where this has been recovered) in a case of theft, the officer hearing the charge should seek to have the property physically produced at the summary hearing to assist, for example, in establishing whether it has any obviously identifiable features. This ensures fairness to the accused, which is another fundamental principle of the summary hearing process. This does not mean that if the evidence provided to the officer hearing the charge is not the best, it cannot be used; but if it is not the best, it may affect the weight the officer hearing the charge attaches to it.

4. Where in any doubt as to what amounts to best evidence, the officer hearing the charge should seek staff legal advice to determine how best to deal with evidential issues that arise at summary hearing.

The meaning and purpose of evidence

5. **Proving the facts**. If an accused denies a charge, all the elements of the offence in question are put in issue. The officer hearing the charge must be satisfied that all aspects of the charge are proved to the requisite standard (i.e. beyond all reasonable doubt) before he can find a case proved.

How evidence is introduced

6. Evidence is introduced (with a view to proving a charge) in one of three ways:

   a. By witness evidence;

   b. By documentary evidence; or

c. By the production of real evidence.

7. For the procedure concerning how evidence should be introduced at a summary hearing, see Chapter 9 (Summary hearing and activation of suspended sentences of Service detention). The officer hearing the charge should, in whatever form the evidence is presented, ensure that it is relevant and admissible (see paragraphs 23 to 30 below).

8. **Witness Evidence.** Witness evidence is simply an account by an individual and takes one of two forms:

a. **Oral.** Oral evidence is spoken evidence given by a witness at summary hearing; or

b. **Written.** Written evidence is a statement made by a witness that is read out at summary hearing.

9. **Documentary evidence**. Documentary evidence is any evidence contained in a document and produced for consideration by the officer hearing the charge. Documents include, for example: orders, maps, plans, drawings and photographs. There are rules relating to the origin and relevance of documents which the officer hearing the charge should seek to apply both as best practice and because the Summary Appeal Court will require documentary evidence to be produced in a form that will make the evidence legally admissible. For the purposes of the summary hearing, having established the relevance of the document to the charge, the officer hearing the charge should then, as a matter of best practice, ensure where possible that either the original document or where appropriate, a certified true copy of the document is produced.

10. In most cases the document(s) will need to be produced, for example, simply to confirm that a standing order existed and exactly what it stated, see section 13 of Chapter 7 (Non-criminal conduct (disciplinary) offences). In relation to an offence of failing to attend for a duty, for example, a copy of the relevant order with the accused's name on it may need to be produced, see section 15 of Chapter 7 (Non-criminal conduct (disciplinary) offences).

11. The officer hearing the charge may seek staff legal advice where he intends to use a document in order to help directly to prove an offence from the contents of the document itself (e.g. a letter purportedly written by the accused confessing to a theft) and in any case of doubt concerning documentary evidence.

12. **Real evidence**. Evidence in the form of an object is called real evidence. Little evidential weight can be attached by the officer hearing the charge to such evidence in the absence of some accompanying evidence (which could be in statement form) identifying the object in question, if possible stating how it came to be before the CO and explaining its connection with or significance in relation to the case. Real evidence can include weapons, or objects found in the possession of the accused.

13. **Circumstantial evidence**. Circumstantial evidence is not a separate source of evidence, but rather a classification into which any type of evidence may fall. This is evidence of one or more facts (such as motive or opportunity) from which other facts may then be inferred or deduced – hence such evidence is sometimes referred to as indirect evidence.

Case study – how evidence is introduced

A theft has taken place from a locker in Service accommodation and the accused is stopped by the Service Police ten minutes after the offence, in a car, half a mile down the only road leading to the accommodation. In the boot of the car are found a crow bar, gloves and a mobile phone allegedly taken from the accommodation. The following evidence might be considered:

a. **Witness evidence**. There may be a witness who can give evidence that he saw the accused in the accommodation at the time of the alleged theft.

b. **Real evidence**. The mobile phone could be offered in evidence to help prove both it was the item taken, (if it is identified by the owner) and that it was the accused who took it.

c. **Circumstantial evidence**. The crow bar itself is real evidence, but its possession by the accused, without further explanation, amounts to evidence of circumstances which make it more probable that the accused was connected with the theft – i.e. the crow bar is circumstantial evidence. The accused's presence a short distance from the crime scene – if this is stated in the witness evidence of the Service policeman who apprehended him may also amount to circumstantial evidence.

14. The case study above shows that many facts often involve proof by more than one of the methods of presenting evidence. Real evidence may be combined with witness evidence to make the fact in issue intelligible, such as production of the mobile phone with a statement on oath by the Service policeman that it was found in the possession of the accused.

Burden and standard of proof

15. 'Burden of proof' describes who is obliged to prove facts. The burden of proof usually lies on the prosecution in criminal trials. However, for summary hearings there is no 'prosecutor'. Therefore the burden lies upon the officer hearing the charge to call sufficient evidence to establish that there is a charge to answer and, if the defence calls evidence to refute the charge, to rebut any defence. 'Standard of proof' describes the degree to which the proof must be established. These two concepts are discussed further in paragraphs 16 – 18 and 19 below.

16. **Burden of proof.** The accused does not have to prove his innocence or disprove the charge against him. If an accused raises sufficient evidence to suggest that he may have a defence, then the officer hearing the charge must consider this evidence. What is sufficient will vary and in some cases it might be enough for the accused merely to rely upon evidence from any other source (including the officer hearing the charge's witnesses) which suggest he might not have committed the offence. This is a complicated area of the law where there are statutory exceptions (see paragraph 17 below) to the general rule that the burden of proof rests with the officer hearing the charge.

17. **Burden of proof - statutory exceptions.** A number of statutes provide for a specific defence to the offence outlined in that statute. In such cases, it is for the accused to provide some evidence in support of such a defence. For example, in a case of possession of an

offensive weapon, having lawful authority or a reasonable excuse for possessing the weapon are defences to the charge. The accused must be able to provide some evidence on which the officer hearing the charge could find that the possession of the weapon was justified on grounds of lawful authority or reasonable excuse. If he does so, the officer hearing the charge must satisfy himself that the accused's possession of the weapon was not justified (i.e. that the accused did not have such lawful authority or reasonable excuse), before he can find the charge proved.

18. **Burden of proof - defences.** In relation to certain defences that exist in law such as self-defence, for defences generally see Chapter 12 (Defences, mitigation and criminal responsibility), there is also a burden of proof placed on the accused (if raising such a defence) to provide some evidence in support of such a defence. For example, an accused facing an assault charge and wishing to claim self-defence, will need to provide some evidence from himself, other witnesses or CCTV evidence, that he was attacked or thought he was going to be attacked by the other person. It is then for the officer hearing the charge to decide whether he is satisfied beyond reasonable doubt (see paragraph 19 below on standard of proof), that the accused was not acting in self-defence when he struck the other person.

19. **Standard of proof.** Every allegation at a summary hearing must be established 'beyond reasonable doubt'. In other words, the officer hearing the charge must not find the charge proved unless satisfied beyond reasonable doubt, based on the evidence presented to him, that the offence was committed by the accused. The officer hearing the charge has a duty to have regard to all the evidence produced at summary hearing, both for and against the accused. However, he may draw reasonable inferences from the facts, although if any such inference is against the accused, the officer hearing the charge must be sure that it is the only inference which can properly be drawn. If there is any reasonable doubt as to whether the charge has been proved against an accused, the charge must be dismissed.

20. **Staff legal advice**. In any circumstances where the officer hearing the charge thinks that an exception to the general rule in paragraph 16 might be encountered, he should seek staff legal advice.

Proof of facts without evidence

21. **Presumptions.** Certain matters are presumed and therefore the officer hearing the charge can accept the existence of the fact forming that presumption in the absence of any evidence to the contrary. The most likely examples which may be encountered are as follows:

a. **Presumption of innocence of the accused.** The law presumes that an accused is innocent of the offence with which he is charged until the charge is proven against him. It is this presumption that makes it unnecessary for the accused to establish his innocence.

b. **Presumption of guilty knowledge.** Where a person is charged with theft, evidence is presented that the accused was found in possession of the property soon after it had been stolen and if the accused offered no explanation as to how the property came to be in his possession, the officer hearing the charge may infer guilty knowledge on the part of the accused and presume that he was a thief. The same inference may be made by the officer hearing the charge if the explanation provided by the accused is considered to be unreasonable.

c. **Presumption of intention.** As a general rule, proof that a person knew that his actions were likely to have certain consequences, when considered together with

all the other evidence, is evidence from which the officer hearing the charge can properly infer that the person intended those consequences when he carried out his actions.

22. **Judicial notice.** These are matters that the officer hearing the charge can assume are the case without needing evidence produced to prove them. Such matters form the background to the issues of fact that the officer hearing the charge is considering and mean that he must not ignore common sense and his knowledge of human nature and the ways of the world. Accordingly, the officer hearing the charge should also take judicial notice of matters within his general Service knowledge. Therefore, evidence does not need to be given on such things as the relative rank of officers, general duties and obligations of different members of the Services or as to any matters which any officer or Service person may reasonably be expected to know. However, matters within general Service knowledge do not extend to specialist or professional knowledge and it is necessary to rely upon the evidence of experts who are qualified by reason of their specialist knowledge (see sub-paragraph 25b below). For example, in the case of a disputed negligent discharge, it would be necessary for the officer hearing the charge to have evidence produced to him from an ammunition technician. If the officer hearing the charge is in any doubt as to whether to take judicial notice of a particular fact, that fact should be proved at summary hearing in the ordinary way.

Relevance of evidence

23. **Relevance.** As a matter of principle, evidence received and considered by the officer hearing the charge should be relevant and so far as is possible, be admissible. Although, as a general principle, evidence which is relevant is therefore admissible, there are a number of exceptions that are discussed at paragraphs 26 to 30 below. Accordingly, relevance and admissibility, whilst intrinsically linked, are distinct concepts and need to be considered separately.

24. **General rule as to relevance.** In principle, nothing should be admitted in evidence that does not tend immediately to prove or disprove the charge. For example, on a charge of contravening standing orders by having no car insurance, evidence that the accused's car had defective lights would not be relevant. However, if the charge was one of contravening standing orders by driving a vehicle with defective lights, the evidence clearly would be relevant.

25. **Opinion evidence.** Generally speaking, witnesses must testify as to particular facts which they have seen, heard or otherwise observed, but are not allowed to state their opinion on those facts. Witness opinion as to facts in issue is considered irrelevant since it is for the officer hearing the charge to draw any necessary inferences from proved facts. For example, a witness cannot, on a charge of contravening standing orders by negligent or careless driving, state whether the accused drove 'negligently' or 'carelessly'. He must only give a factual description of the driving, for example, that the car was being driven on the wrong side of the road. It is then for the officer hearing the charge to decide whether the manner in which the accused drove was negligent *etc,* having regard to all the circumstances of the case. There are, however, exceptions to this rule:

a. **Drunkenness.** Unfitness through alcohol (drunkenness) under section 20 of the Act is an exception where a witness may state whether in his opinion the accused was drunk and should also qualify his reasons for holding such an opinion, for example, because the accused's eyes were glazed, he was unsteady on his feet or he smelled of alcohol. Where a medically qualified witness (such as a doctor) has examined a Service person for the purpose of ascertaining his condition he may be called in the same way as any other witness (as may a Duty Officer) to describe what

he saw when the Service person was brought before him and state whether in his opinion the Service person was drunk.

b. **Expert evidence.** Expert evidence is also an exception where a person with specialist knowledge in a particular field may be called to give his opinion on any point within the range of his specialist knowledge. Therefore, an expert can give opinion on matters irrespective of whether he was an eyewitness to those matters and may also refer to information from textbooks, reports etc., as well as detailing experiments he has carried out to test or verify his opinion. Examples of expert evidence would be as follows:

(1) In respect of a charge of assault occasioning actual bodily harm, a doctor may state that in his opinion an injury is consistent or not consistent with that person being struck with a weapon.

(2) Any Service person can give an opinion on a point which is within his specialist Service knowledge, provided such knowledge is not of the kind which would be expected to be generally known in a Service environment. For example, an ammunition technician could provide his opinion on the cause of a negligent discharge.

Admissibility of evidence

26. **Admissibility.** Evidence should, so far as is possible, be admissible, see paragraphs 23 and 24 above. Admissibility is a complicated area of the law but the following principles should be followed as a matter of best practice.

27. **Best evidence rule.** See paragraph 3 above.

28. **The rule against hearsay.** The legal rule against hearsay forbids a witness from relating what somebody else told him if tendered as evidence to prove the truth of what was said. For example, (A) cannot be called as a witness merely to state what (B) told him. Rather, (B) must be called to tell the officer hearing the charge himself what he knows about the facts in dispute. Likewise, (A) is not permitted to be called as a witness merely to present a letter (which contains something with reference to the facts in dispute) written to him by (B), since this would amount to written hearsay. Instead (B), as author of the statements in the letter, must be called to give oral evidence of the letter's contents. Hearsay should not be produced at summary hearings for the following reasons:

a. As the evidence is second-hand evidence, it is not possible to test the reliability of the evidence. In particular, the fact that the evidence consists of repetition of what a third party has written/said carries an obvious risk of distortion or inaccuracy akin to 'Chinese whispers'.

b. The credibility of the person making the statement cannot be tested since they are not a party to the summary hearing proceedings and so cannot be questioned on oath.

29. **Admissions.** Where an accused has admitted certain matters in relation to an offence, the CO should satisfy himself that any admission not made in an interview under caution was not made under pressure (that the accused was under no pressure to make an admission). Where an admission or a confession is made, the CO should exercise care in using that evidence.

30. **Staff legal advice.** Hearsay is a complex area of the law of evidence and it is important that the officer hearing the charge thinks carefully about seeking staff legal advice if he considers that it may be an issue or he should consider carefully referring the charge to the DSP for Court Martial (CM) trial.

Weight of evidence

31. When the evidence is produced at a summary hearing in accordance with the principles above, it is still a matter for the officer hearing the charge to consider what weight the evidence should carry in proving the fact(s) to which it relates.

32. **Assessing the value of oral evidence.** Allowance should always be given by the officer hearing the charge for the inability of some Service personnel to express themselves clearly, particularly in what may be an unfamiliar and daunting environment. Nonetheless, it is for the officer hearing the charge to decide upon the credibility of a witness based upon the evidence he provides (the weight of which may, to some degree, be assessed by the way in which such evidence is delivered by the witness).

33. **Identification.** Whenever a case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, it is important that special care is taken in weighing up such identification evidence. This is because it is quite possible for an honest witness to make a mistaken identification; a mistaken witness can also be a convincing one and even a number of apparently convincing witnesses can all be mistaken. The officer hearing the charge should examine closely the circumstances in which identification by a witness takes place, such as the following:

a. How long did the witness have the accused under observation?

b. At what distance?

c. In what light?

d. Was the observation impeded in any way?

e. Had the witness ever seen the accused before?

f. If so, how often?

g. If only occasionally, had the witness any special reason for remembering the accused?

h. How long elapsed between the original observation and the subsequent identification?

i. Are there any discrepancies between the description of the accused first given by the witness and the accused's actual appearance?

If the identification evidence is poor, the officer hearing the charge should find the offence not proved unless there is sufficiently compelling other evidence to support the allegation against the accused.

34. **Staff legal advice.** Whenever an issue regarding identification arises either prior to or during a summary hearing, the officer hearing the charge is strongly advised to adjourn the proceedings and seek staff legal advice. In most cases, the potential evidential issues

surrounding identification will be sufficient to justify referral of the charge to the DSP for CM trial.

Attendance and compellability of witnesses

35. **Civilian witnesses at summary hearing.** During a summary hearing, only Service personnel can be compelled to attend by virtue of an order to do so; any civilian witness, regardless of the potential value of their evidence, cannot be made to attend the hearing if they do not wish to do so. Consequently, if a civilian witness refuses to attend a summary hearing and the evidence they could offer is relevant to the charge, the officer hearing the charge should consider referring the charge to the DSP for CM trial, since at such proceedings UK civilians can be compelled to attend.

36. **The accused.** An accused, unless he wishes to give evidence, cannot be compelled to give any evidence. At a summary hearing, the officer hearing the charge has a duty to inform the accused that he has a right to give evidence if he so wishes.

37. **Evidence from an accomplice.** Where this issue arises it would normally be appropriate to seek staff legal advice and it may also justify the officer hearing the charge referring the charge to the DSP.

38. **Spouse as a witness.** Where this issue arises staff legal advice should be sought.

39. **Children.** Where this issue arises staff legal advice should be sought.

40. **Witnesses who can neither hear nor speak.** Such witnesses can still be called to give evidence. Evidence by a deaf witness can be received either in writing or through sign language using an interpreter if necessary and will be treated as oral evidence.

41. **Religious belief (or absence thereof).** Religious persuasion has no bearing on whether that witness can give evidence. However, the form of oath or affirmation required to be given by the witness will have to be tailored so as to be applicable to his beliefs and thereby binding on his conscience.

Privilege of witnesses

42. Privilege refers to the right of a witness, when giving evidence, to refuse to answer certain types of questions or to refuse to produce certain types of document when required to do so on the grounds of some special interest recognised by law. The most common examples are as follows:

a. **Self-incrimination.** No witness (other than the accused when giving evidence at his request and in relation to the offence with which he is charged) can be compelled to answer a question if the answer would tend to expose that witness to any criminal charge, penalty or forfeiture or to any relevant Service punishment. In other words, every witness has a privilege against self-incrimination.

b. **Client-lawyer privilege.** A legal adviser (subject to the exception outlined below) is prohibited from disclosing any communication made between him and the accused in his capacity as legal adviser. In addition, a witness should not be questioned during the summary hearing about any such communications. Only if the witness himself (as the ‘client’ in the client-lawyer relationship) freely volunteers authority for any disclosure, can such privilege be waived.

c. **Medical officer-patient privilege.** When a doctor (or other health care professional, (e.g. a nurse or physiotherapist) is fulfilling a role as a witness at a summary hearing, he is under a legal duty not to disclose information obtained in his professional capacity[1] about his patient's medical condition unless his patient consents to such disclosure. In the absence of such consent, as a matter of policy, such information can be disclosed to the officer hearing the charge if it is in the public interest to do so[2], e.g. where the patient is a potential danger to others. Where such an issue arises staff legal advice should be sought.

d. **Communications with chaplains.** Communications made to a member of the clergy in his professional capacity are, strictly speaking, not privileged if the padre has to be a witness at a summary hearing. However, although not formally recognised as such, the civilian courts have respected confidentiality in communications between a member of the clergy and an individual. Chaplains should not as a matter of policy, ordinarily therefore be required to give evidence at summary hearing as to something told to them in their professional capacity[3]. Where such an issue arises staff legal advice should be sought.

Use of evidence from Service and other inquiries

43. Evidence given to a Service inquiry panel cannot be used in a summary hearing (see paragraph 44) unless the accused asks for this evidence to be used because it assists his case at summary hearing. More guidance on Service inquiries is also set out in JSP 832 (Service Inquiries). However, evidence from non-statutory inquiries such as local/unit inquiries and SCIT inquiries may generally, potentially be used at summary hearing, whether adverse to the accused or not (this would include evidence of inconsistency between a statement made at a non-statutory inquiry and at summary hearing). In such cases the officer hearing the charge should be cautious in so doing and should seek staff legal advice. In the case of other evidence not taken on oath, as no rules of evidence as such pertain to summary hearing, such evidence can be used, but again the officer hearing the charge should be cautious in so doing and should seek staff legal advice.

44. **Admissibility.** Other than perjury[4], evidence given by any person to a Service inquiry panel is not admissible against a person at a summary hearing or in proceedings before a civilian court or Service court[5]. Evidential limitations also apply where evidence has been gained before a Board of Inquiry convened under the SDAs or QRRN and staff legal advice may be sought.

45. Staff legal advice should be sought where an accused may wish to rely on evidence given by a person to a Service inquiry panel because the evidence in nearly all cases is excluded.

46. **Exhibits provided to a Service inquiry panel.** Evidence may also be admitted at a summary hearing or in proceedings before a civilian court or Service court if the evidence in question existed independently of the Service inquiry. For example, a log book produced to a Service inquiry as an exhibit may be, subject to other rules on admissibility, produced in evidence against an accused in subsequent disciplinary proceedings.

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[1] But not for example where he had been asked to give his opinion as to whether an accused was drunk.
[2] See DGPL 76/03 – Confidentiality and the Protection of Patient Information written by the Army Medical Directorate which has tri-Service application.
[3] See Protocol E of Armed Forces Chaplaincy Policy Board/MFWG/03 dated 21 Oct 05 – Chaplaincy Protocol for the Armed Forces, which has tri-Service application.
[4] Sections 2 or 5, the Perjury Act 1911.
[5] The Armed Forces (Service Inquiries) Regulations 2008/1651 regulation 12.

Use of evidence from drug and alcohol testing

47. Testing can be carried out in relation to post incident drug and alcohol testing and compulsory drug testing in specific circumstances on Service personnel and relevant civilians[6]. The results of such tests are not admissible[7] as evidence in disciplinary proceedings for a Service offence. Also see JSP 835 (Alcohol and Substance Misuse and Testing).

[6] Sections 305 to 308 of the Act.
[7] Section 308(3) of the Act.