



# Criminal Procedure (Amendment) (Scotland) Act 2004

2004 asp 5

## PART 2

### SOLEMN PROCEEDINGS GENERALLY

#### 11 Obstructive witnesses

After section 90 (death or illness of jurors) of the 1995 Act insert—

#### *“Obstructive witnesses*

##### **90A Apprehension of witnesses in proceedings on indictment**

- (1) In any proceedings on indictment, the court may, on the application of any of the parties, issue a warrant for the apprehension of a witness if subsection (2) or (3) below applies in relation to the witness.
- (2) This subsection applies if the witness, having been duly cited to any diet in the proceedings, deliberately and obstructively fails to appear at the diet.
- (3) This subsection applies if the court is satisfied by evidence on oath that the witness is being deliberately obstructive and is not likely to attend to give evidence at any diet in the proceedings without being compelled to do so.
- (4) For the purposes of subsection (2) above, a witness who, having been duly cited to any diet, fails to appear at the diet is to be presumed, in the absence of any evidence to the contrary, to have so failed deliberately and obstructively.
- (5) An application under subsection (1) above—
  - (a) may be made orally or in writing;
  - (b) if made in writing—
    - (i) shall be in such form as may be prescribed by Act of Adjournal, or as nearly as may be in such form; and

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- (ii) may be disposed of in court or in chambers after such inquiry or hearing (if any) as the court considers appropriate.
- (6) A warrant issued under this section shall be in such form as may be prescribed by Act of Adjournal or as nearly as may be in such form.
- (7) A warrant issued under this section in the form mentioned in subsection (6) above shall imply warrant to officers of law—
- (a) to search for and apprehend the witness in respect of whom it is issued;
  - (b) to bring the witness before the court;
  - (c) in the meantime, to detain the witness in a police station, police cell or other convenient place; and
  - (d) so far as is necessary for the execution of the warrant, to break open shut and lockfast places.
- (8) It shall not be competent, in any proceedings on indictment, for a court to issue a warrant for the apprehension of a witness otherwise than in accordance with this section.
- (9) A person apprehended under a warrant issued under this section shall wherever practicable be brought before the court not later than in the course of the first day on which—
- (a) in the case of a warrant issued by a single judge of the High Court, that Court;
  - (b) in any other case, the court,
- is sitting after he is taken into custody.
- (10) In this section and section 90B, “the court” means, except where the context requires otherwise—
- (a) where the witness is to give evidence in proceedings in the High Court, a single judge of that Court; or
  - (b) where the witness is to give evidence in proceedings on indictment in the sheriff court, any sheriff court with jurisdiction in relation to the proceedings.

### **90B Orders in respect of witnesses apprehended under section 90A**

- (1) Where a witness is brought before the court in pursuance of a warrant issued under section 90A of this Act, the court shall, after giving the parties and the witness an opportunity to be heard, make an order—
- (a) detaining the witness until the conclusion of the diet at which the witness is to give evidence;
  - (b) releasing the witness on bail; or
  - (c) liberating the witness.
- (2) The court may make an order under subsection (1)(a) or (b) above only if it is satisfied that—
- (a) the order is necessary with a view to securing that the witness appears at the diet at which the witness is to give evidence; and
  - (b) it is appropriate in all the circumstances to make the order.
- (3) Subsection (1) above is without prejudice to any power of the court to—

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- (a) make a finding of contempt of court in respect of any failure of a witness to appear at a diet to which he has been duly cited; and
  - (b) dispose of the case accordingly.
- (4) Where—
  - (a) an order under subsection (1)(a) above has been made in respect of a witness; and
  - (b) at, but before the conclusion of, the diet at which the witness is to give evidence, the court in which the diet is being held excuses the witness, that court, on excusing the witness, may recall the order under subsection (1)(a) above and liberate the witness.
- (5) On making an order under subsection (1)(b) above in respect of a witness, the court shall impose such conditions as it considers necessary with a view to securing that the witness appears at the diet at which he is to give evidence.
- (6) However, the court may not impose as such a condition a requirement that the witness or a cautioner on his behalf deposit a sum of money in court.
- (7) Where the court makes an order under subsection (1)(a) above in respect of a witness, the court shall, on the application of the witness—
  - (a) consider whether the imposition of a remote monitoring requirement would enable it to make an order under subsection (1)(b) above releasing the witness on bail subject to a movement restriction condition; and
  - (b) if so—
    - (i) make an order under subsection (1)(b) above releasing the witness on bail subject to such a condition (as well as such other conditions required to be imposed under subsection (5) above); and
    - (ii) in the order, impose, as a further condition under subsection (5) above, a remote monitoring requirement.
- (8) Subsections (7) to (19) of section 24A of this Act apply in relation to remote monitoring requirements imposed under subsection (7)(b)(ii) above and to the imposing of such requirements as they apply to remote monitoring requirements imposed under section 24A(1) or (2) of this Act and the imposing of such requirements, but with the following modifications—
  - (a) references to a remote monitoring requirement imposed under section 24A(1) or (2) of this Act shall be read as if they included references to a remote monitoring requirement imposed under subsection (7)(b)(ii) above;
  - (b) references to the accused shall be read as if they were references to the witness in respect of whom the order under subsection (1)(b) above is made.
- (9) The powers conferred and duties imposed by sections 24B to 24D of this Act are exercisable in relation to remote monitoring requirements imposed under subsection (7)(b)(ii) above as they are exercisable in relation to remote monitoring requirements imposed under subsection (1) or (2) of section 24A of this Act; and—
  - (a) references in those sections to remote monitoring requirements shall be read accordingly; and

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- (b) references to the imposition of any requirement as a further condition of bail shall be read as if they were references to the imposition of the requirement as a further condition under subsection (5) above.
- (10) Section 25 of this Act (which makes provision for an order granting bail to specify the conditions imposed on bail and the accused’s proper domicile of citation) shall apply in relation to an order under subsection (1)(b) above as it applies to an order granting bail, but with the following modifications—
- (a) references to the accused shall be read as if they were references to the witness in respect of whom the order under subsection (1)(b) above is made;
  - (b) references to the order granting bail shall be read as if they were references to the order under subsection (1)(b) above;
  - (c) subsection (3) shall be read as if for the words from “relating” to “offence” in the third place where it occurs there were substituted “at which the witness is to give evidence”.
- (11) In this section—
- (a) “a movement restriction condition” means, in relation to a witness released on bail under subsection (1)(b) above, a condition imposed under subsection (5) above restricting the witness’s movements, including such a condition requiring the witness to be, or not to be, in any place or description of place for, or during, any period or periods or at any time; and
  - (b) “a remote monitoring requirement” means, in relation to a movement restriction condition, a requirement that compliance with the condition be remotely monitored.

### **90C Breach of bail under section 90B(1)(b)**

- (1) A witness who, having been released on bail by virtue of an order under subsection (1)(b) of section 90B of this Act, fails without reasonable excuse—
- (a) to appear at any diet to which he has been cited; or
  - (b) to comply with any condition imposed under subsection (5) of that section,
- shall be guilty of an offence and liable on conviction on indictment to the penalties specified in subsection (2) below.
- (2) Those penalties are—
- (a) a fine; and
  - (b) imprisonment for a period not exceeding two years.
- (3) Subsection (4) below applies in proceedings against a witness for an offence under paragraph (b) of subsection (1) above where the condition referred to in that paragraph is—
- (a) a movement restriction condition (within the meaning of section 90B(11) of this Act) in respect of which a remote monitoring requirement has been imposed under section 90B(7)(b)(ii) of this Act; or
  - (b) a requirement imposed under section 24D(3)(b) (as extended by section 90B(9)) of this Act.

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- (4) In proceedings in which this subsection applies, evidence of—
- (a) in the case referred to in subsection (3)(a) above, the presence or absence of the witness at a particular place at a particular time; or
  - (b) in the case referred to in subsection (3)(b) above, any tampering with or damage to a device worn or carried by the witness for the purpose of remotely monitoring his whereabouts,
- may, subject to subsections (7) and (8) below, be given by the production of the document or documents referred to in subsection (5) below.
- (5) That document or those documents is or are a document or documents bearing to be—
- (a) a statement automatically produced by a device specified in regulations made under section 24D(4) (as extended by section 90B(9)) of this Act by which the witness's whereabouts were remotely monitored; and
  - (b) a certificate signed by a person nominated for the purpose of this paragraph by the Scottish Ministers that the statement relates to—
    - (i) in the case referred to in subsection (3)(a) above, the whereabouts of the witness at the dates and times shown in the statement; or
    - (ii) in the case referred to in subsection (3)(b) above, any tampering with or damage to the device.
- (6) The statement and certificate mentioned in subsection (5) above shall, when produced in the proceedings, be sufficient evidence of the facts set out in them.
- (7) Neither the statement nor the certificate mentioned in subsection (5) above shall be admissible in evidence unless a copy of both has been served on the witness prior to the trial.
- (8) Without prejudice to subsection (7) above, where it appears to the court that the witness has had insufficient notice of the statement or certificate, it may adjourn the trial or make an order which it thinks appropriate in the circumstances.
- (9) In subsections (7) and (8), “the trial” means the trial in the proceedings against the witness referred to in subsection (3) above.
- (10) Section 28 of this Act shall apply in respect of a witness who has been released on bail by virtue of an order under section 90B(1)(b) of this Act as it applies to an accused released on bail, but with the following modifications—
- (a) references to an accused shall be read as if they were references to the witness;
  - (b) in subsection (2), the reference to the court to which the accused's application for bail was first made shall be read as if it were a reference to the court which made the order under section 90B(1)(b) of this Act in respect of the witness; and
  - (c) in subsection (4)—
    - (i) references to the order granting bail and original order granting bail shall be read as if they were references to the order under section 90B(1)(b) and the original such order respectively;
    - (ii) paragraph (a) shall be read as if at the end there were inserted “and make an order under section 90B(1)(a) or (c) of this Act in respect of the witness”; and

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(iii) paragraph (c) shall be read as if for the words from “complies” to the end there were substituted “appears at the diet at which the witness is to give evidence”.

**90D Review of orders under section 90B(1)(a) or (b)**

- (1) Where a court has made an order under subsection (1)(a) of section 90B of this Act, the court may, on the application of the witness in respect of whom the order was made, on cause shown and after giving the parties and the witness an opportunity to be heard—
  - (a) recall the order; and
  - (b) make an order under subsection (1)(b) or (c) of that section in respect of the witness.
  
- (2) Where a court has made an order under subsection (1)(b) of section 90B of this Act, the court may, after giving the parties and the witness an opportunity to be heard—
  - (a) on the application of the witness in respect of whom the order was made and on cause shown—
    - (i) review the conditions imposed under subsection (5) of that section at the time the order was made; and
    - (ii) make a new order under subsection (1)(b) of that section and impose different conditions under subsection (5) of that section;
  - (b) on the application of the party who made the application under section 90A(1) of this Act in respect of the witness, review the order and the conditions imposed under subsection (5) of that section at the time the order was made, and
    - (i) recall the order and make an order under subsection (1)(a) of that section in respect of the witness; or
    - (ii) make a new order under subsection (1)(b) of that section and impose different conditions under subsection (5) of that section.
  
- (3) The court may not review an order by virtue of subsection (2)(b) above unless the party making the application puts before the court material information which was not available to it when it made the order which is the subject of the application.
  
- (4) An application under this section by a witness—
  - (a) where it relates to the first order made under section 90B(1)(a) or (b) of this Act in respect of the witness, shall not be made before the fifth day after that order is made;
  - (b) where it relates to any subsequent such order, shall not be made before the fifteenth day after the order is made.
  
- (5) On receipt of an application under subsection (2)(b) above the court shall—
  - (a) intimate the application to the witness in respect of whom the order which is the subject of the application was made;
  - (b) fix a diet for hearing the application and cite the witness to attend the diet; and

- (c) where it considers that the interests of justice so require, grant warrant to arrest the witness.
- (6) Nothing in this section shall affect any right of a person to appeal against an order under section 90B(1).

### **90E Appeals in respect of orders under section 90B(1)**

- (1) Any of the parties specified in subsection (2) below may appeal to the High Court against—
- (a) any order made under subsection (1)(a) or (c) of section 90B of this Act; or
  - (b) where an order is made under subsection (1)(b) of that section—
    - (i) the order;
    - (ii) any of the conditions imposed under subsection (5) of that section on the making of the order; or
    - (iii) both the order and any such conditions.
- (2) The parties referred to in subsection (1) above are—
- (a) the witness in respect of whom the order which is the subject of the appeal was made;
  - (b) the prosecutor; and
  - (c) the accused.
- (3) A party making an appeal under subsection (1) above shall intimate it to the other parties specified in subsection (2) above and, for that purpose, intimation to the Lord Advocate shall be sufficient intimation to the prosecutor.
- (4) An appeal under this section shall be disposed of by the High Court or any Lord Commissioner of Justiciary in court or in chambers after such inquiry and hearing of the parties as shall seem just.
- (5) Where the witness in respect of whom the order which is the subject of an appeal under this section was made is under 21 years of age, section 51 of this Act shall apply to the High Court or, as the case may be, the Lord Commissioner of Justiciary when disposing of the appeal as it applies to a court when remanding or committing a person of the witness's age for trial or sentence.”