

Committal Proceedings in the Australian Capital Territory

Terry Higgins
Convenor, Criminal Law Committee
Law Society of the
Australian Capital Territory

If a person is charged with having committed an indictable offence in the Australian Capital Territory, that person may be summoned before the Magistrate's Court 'to answer the information and to be further dealt with according to law' (ss.26 and 89 *Magistrates Court Act 1930*).

The procedure 'according to law', the committal proceeding, is dealt with by Part VI of that Act. It is called 'the preliminary examination' (s. 90). Section 90 also provides a procedure for the informant to serve the accused with statements of witnesses and copies of documents and photographs of exhibits relevant to the matter. Section 90AA provides that the written statement, if in the manner and form provided, shall be admissible in evidence. The accused may render the statement inadmissible by requiring the person who made it to attend to give evidence. That requirement may be imposed by leave otherwise or by the court of its own motion.

Section 90A deals with pleas of guilty tendered in committal proceedings. If s.477 *Crimes Act 1900* applies to the offence then the court may either deal with the matter summarily, with the consent of the accused, or refer the matter to the Supreme Court for sentence.

Assuming no plea of guilty, the matter proceeds to the conclusion of the Crown evidence. At that point, the court is to consider whether it is of the opinion that 'having regard to all the evidence before it, the evidence is capable of satisfying a jury beyond reasonable doubt that the accused person has committed an indictable offence' (s.91 (b) *Magistrates Court Act*).

The accused person is then charged with the offence. It is, however, provided that (s.92 (1)) 'sub-section (1) does not apply in relation to a person charged with an indictable offence if the court has decided to dispose of the case summarily, pursuant to a law in force in the Territory'.

It would seem that if the court has, at or before this time already decided to proceed in accordance with s.477 *Crimes Act 1900*, the court has no power to lay a charge of its own motion. It could, of course, allow an amendment to the then existing charges in that category of cases to which s.28 (*Magistrates Court Act 1930*) applies.

Section 92A (*Magistrates Court Act 1930*) allows the court, even after having heard and determined the matter summarily, to commit the defendant to the Supreme Court for sentence if that is considered desirable by reason of 'the character and antecedents' of the accused.

It is not clear whether the Supreme Court could proceed under s.556A of the *Crimes Act 1900*, in such a case.

If s.477 *Crimes Act 1900* has not been applied, the examining magistrate proceeds under s.94 (*Magistrates Court Act 1930*), at the conclusion of all the evidence, to apply the same test to it, as is set out in s.91 (b) (*Magistrates Court Act 1930*). There does not seem to be any prohibition upon a magistrate determining, even at that stage, to apply s.477 *Crimes Act*. If he does not, however, then the defendant will either be discharged, in which case, s.97 (*Magistrates Court Act*) permits an order for costs to be made in favour of the defendant, or the defendant then becomes the accused and is committed for trial. If the latter, then the accused may be admitted to bail.

Importance of Committal Proceedings

The process of commitment for trial traditionally was capable of being exercised either by a grand jury or by ex-officio indictment. The grand jury was established in 1166 (assize of Clarendon) to encourage and receive accusations of crime. The *Australian Courts Act 1828* provided for presentment by the Attorney-General of indictments. The jurisdiction of justices to present persons to the Attorney for trial after preliminary examination remained. Grand juries had existed in Australia prior to 1828, but played no part in presenting indictments. They were never instituted for that purpose and only the preliminary examination by magistrate (or coroner) with the Attorney-General finding a true bill or the ex-officio information existed as a means of presenting an accused for trial.

In practice, there is, as the Criminal Bar Association's submission of 16 November 1988 notes, great utility in ensuring that only those cases where there is serious issue to be tried between the Crown and accused will be presented. The test in s.91 (b), (*Magistrates Court Act*) expresses that question appropriately. Gibbs and Mason JJ noted in *Barton* (1981) 55 ALJR 31, 36 that, although the Attorney-General has power to lay an information ex officio, abuse of that power might threaten a fair trial. That power may be controlled so as to avoid that result, for example discharge of the accused and a stay of proceedings. It would be unfair, it was noted, to introduce at trial, material evidence not previously placed before the examining magistrate.

Lord Devlin described committal proceedings as an essential safeguard against wanton or misconceived prosecutions.

It is sometimes contended that this purpose may be served by full disclosure of the prosecution brief. Their Honours in *Barton* at page 38 point out that this is a useful supplement but no substitute of knowing:

- what the witnesses will say when sworn;
- what the witnesses will say upon cross-examination;
- what effect upon the decision to prosecute the evidence open to the accused to call will have to an impartial observer; and
- what an independent authority considers as to the existence or not of a prima facie case.

They concluded '... a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair'.

Stephen J. noted that the most serious detriment and loss to an accused by denying a committal proceeding was the loss of the right to cross-examine. That loss may be illusory or very serious depending on the nature of the case. However, Wilson and Murphy JJ were not convinced of the indispensability of committals.

It is certainly true that it is no necessary part of a committal that each witness must be called to give oral evidence. The 'paper committal' under which the evidence is presented by way of a formal proof of evidence does no injustice to an accused provided:

- (i) the statement is limited to admissible evidence; and
- (ii) the witness is, on proper notice, available to an accused to cross-examine.

The right to an independent appraisal of the evidence so adduced would be the subject of question only if (i) it was exercised inappropriately or (ii) the prosecutor's view was invariably correct, or so close to that very little difference was made.

Neither condition exists in my experience. There is a right of review of a decision to commit in the case of Australian Capital Territory or Federal Offences. The Attorney-General can present an ex-officio information if an incorrect decision not to commit is made. In Federal matters, there is currently a right in the prosecution to seek review under the *Administrative Decisions (Judicial Review) Act 1977*.

For the Crown, an advantage of committals is the need to present for public, or at least, judicial scrutiny, its case. Often a case, strong enough when viewed from one point only, is shown conclusively to be weak when exposed to the light of objective scrutiny. Cross-examination, in most cases, is an integral part of that scrutiny. That process enables the Crown to confront the weaknesses of its own case and gives it the opportunity to consider whether those weaknesses can be eliminated.

Prosecutions are frequently altered radically from the original perception as a result of committal proceedings. At best, a complete discharge may follow, at worst, the issues are better defined, the more expeditiously to be disposed of at trial.

Method of Conduct of Committal Proceedings

It does not follow that the traditional method of conducting a committal by viva voce evidence is essential to safeguard the fairness of any subsequent trial. In New South Wales, s.106 of the *Justices Act* provides an alternative system for the receipt of written statements in lieu of oral evidence at committal. This procedure is, as has been noted, available under s.90AA, (*Magistrates Court Act*).

It seems, therefore, that in relation, at least, to indictable offences, considerable time will be saved with no unfairness to an accused if:

- (i) by an appropriate time before the committal hearing, the accused, personally or by his counsel is provided with a copy of all proofs of evidence;
- (ii) there should also be provided copies of all material in the possession of the prosecution which it is fair to disclose to the accused (for example prior statements of witnesses, statements of relevant witnesses it is not proposed to call but whom the accused might wish to call);
- (iii) where it is not practicable to provide copies of, or photographs of, exhibits, inspection should be permitted; and
- (iv) that only those witnesses required by the accused to attend for cross-examination should be required to attend in person.

Advantages of Retention of Committals

If committals are retained, allowing for the 'streamlining' of procedures above-mentioned, they do have the advantage:

- (i) of avoiding the unfairness referred to in *Barton's* case;
- (ii) of enabling the trial to be conducted with greater efficiency, particularly if, coupled therewith, pre-trial interlocutory hearings are available to deal with objections to indictments, separate trials, voir dire rulings on disputed evidence such as confessions; and
- (iii) of encouraging the choice of summary trial and earlier pleas of guilty by accused persons (see for example s.477 *Crimes Act 1900* (NSW) and s.4J *Crimes Act 1914* (Cwlth)).

For the reasons outlined above, I would strongly support the retention of the committal process.

References

Submissions to Joint Parliamentary Committee on the National Crime Authority from: Criminal Bar Association of Victoria. Submission 16.11.88; Law Council of Australia. Submission 22.2.89.