Disclosure of the Prosecution Case before Trial

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A great part of the criminal law and the law governing procedure and evidence in England and Australia has developed in the last 150 years. Committal proceedings as we now know them appear to have their origin in Lord Jervis' Act (the Indictable Offences Act 1848 England; (*see R v. Kent, ex parte McIntosh* (1970) 17 FLR 65 at 75).

Section 94 of the *Magistrates Court Ordinance* 1930 (ACT) provides that after all evidence has been called at committal proceedings if a properly qualified person, that is a magistrate 'is of opinion, having regard to all the evidence before . . . (the court) . . ., that a jury would not convict the defendant of an indictable offence' the person charged shall be discharged. If he is not of that opinion, the person accused shall be committed for trial.

This section comes at the end of a series of sections of the Ordinance dealing with the procedure by which a magistrate hears evidence presented by an informant and sometimes on behalf of the person charged. There are two stages at which the magistrate makes a decision. The first stage is at the end of the prosecution case. A decision must be made as to whether there is some evidence which could prove the essential facts which must be made out before the offence alleged would be established. At that stage, the quality of the evidence, its credibility and the existence of other evidence of an exculpatory nature need not be considered. The question only is, 'has some evidence been presented which would prove each ingredient required to constitute the crime?' If there is no evidence which would establish an element, or elements, of the offence charged, the proceedings end with the defendant's discharge. If this question is answered in the affirmative the magistrate proceeds to the next stage.

Whether or not the person charged gives evidence the presiding magistrate must next consider whether or not he is of the opinion described in s.94. At that stage, as is pointed out in *Saffron v. Director of Public Prosecutions* (1989) 16 NSWLR 397 Samuels JA at 403 and Priestly JA at 412, the magistrate must make his own examination of the evidence. He must consider such factors as inconsistencies, alleged bias of witnesses, opportunities to observe of witnesses, the possibilities of innocent explanation and the many other factors which a jury could properly take into account.

Obviously s. 94 does not involve a magistrate in forming an opinion about guilt or innocence, he or she has to determine only whether, taking all the necessary circumstances into account, he is of the opinion that a jury would not convict unless he can form that view he must send the accused person on for trial.

Although the present formulation under s.94 is relatively new, (October 1987), for practical purposes the same procedure for committal proceedings had been followed by magistrates in NSW and the ACT for many years.

In 1969 in Canberra, committal proceedings were commenced for rape against four persons. In January 1970 before any proceedings were heard, the Attorney-General filed an 'ex officio' information in the Supreme Court charging the same offences. This was a procedure allowed by s.53 of the *Supreme Court Act* which had never before been used and resulted in *R v. Kent, ex parte McIntosh* (1970) 17 FLR 65.

In that case Fox J mentioned that the committal proceeding 'can be and often is of advantage both to the Crown and the accused'. He said

> This is apart from the fact that an independent tribunal in the form of a magistrate has to be satisfied that there is a case to go for trial before he (the accused) is committed (p. 77).

Fox J in that judgment mentioned that there had been discussions as to whether some alternative form of procedure should be adopted (p. 77). In the end, having upheld the validity of the Attorney's action in proceeding without committal proceedings, he subsequently discharged the accused without trial and committal proceedings were held.

In the High Court in *Barton v. R* (1980) 147 CLR 75 the absence of committal proceedings was again the subject of consideration. In the joint decision of Gibbs ACJ, and Mason J there appears the following:

> . . . committal proceedings constitute an important element in the protection which the criminal process gives to an accused person (at 99).

In the judgment of Stephen J

> Committal proceedings are an important part of the protection ordinarily afforded to an accused in the criminal process and for the accused to be deprived of them necessarily puts a court upon enquiry.

and

> . . . the loss of the opportunity to cross-examine crown witnesses (at committal) will be irremediable (p. 105).

However, in the *Barton* case Murphy J said:

> the desirability of committal proceedings in modern times is doubtful at least in certain kinds of cases (p. 108).

and Wilson J suggested that in some cases to proceed without committal proceedings might be

> the only decision consistent with the sensible and efficient administration of justice (p. 114).

The Abolition of Committal Proceedings

Since 1980 the question of the abolition of committal proceedings has been constantly considered. It has been suggested both by Sir Harry Gibbs (Australian Criminal Lawyers Conference, Broadbeach, July 1988) and by Sir Ronald Wilson (24th Australian Legal Convention, Perth, 1987) that the creation of independent Directors of Public Prosecution has added a factor which might enable an independent examination of a case to be undertaken and could make the traditional committal proceedings unnecessary.

In addition, there is evidence that committal proceedings have been abused by individual defendants who have used the proceedings to unduly prolong the criminal justice process. We must accept that this happens but there is plenty of room for dispute about the extent of the problem. If committal proceedings are being abused, used as a means of delay or harassment of witnesses, it does not follow that they should be abolished.

One must applaud efforts to prevent any improper use by accused of the criminal justice system but one does not need to take part of the system away because it is the subject of abuse.

Over the last few years the issue of the utility of committal proceedings in their current form has been raised again and again and variations to the existing system suggested.

Reforms needed in the System

Certainly there are some long overdue reforms about which, those genuinely concerned with the protection of the individual's rights, would not seriously quibble.

- A professional witness such as a police officer should not have to exhaust his memory before being entitled to refer to a statement. The need for anything apart from an identification of the statement under our current legislation should be questioned. (As soon as that is done one turns towards the so-called 'paper committal').

- Non-contentious evidence must be admissible by mere tender of a statement. (Again an acknowledgment of the 'paper committal').

- The tribunal conducting the preliminary enquiry must be in a position to prevent cross-examinations which are designed to delay proceedings.

The opportunity for a person accused to cross-examine witnesses at the committal stage should not be lost entirely.

The suggestion that the filtering process should be performed by the independent Director of Public Prosecutions instead of a magistrate seems to me to create a quite invidious position for the DPP. In many instances the DPP has decided that a prosecution should be launched and conducts the prosecution at committal, in some cases, of course, the accused is discharged at that stage.

The decision as to whether there is enough material to prosecute is a different one from whether an accused should be put on trial. It seems to me that it would be preferable if the two decisions were taken by different persons.

There is another reason to be cautious about the proposal that the DPP make the decisions. The discretion reposing in a prosecutor once a trial is in the offing has been emphasised by the High Court in *Richardson v. The Queen* (1974) 131 CLR 116 where (at 119) the personal judgment of the prosecutor as to which witnesses to call, is mentioned. In *R v. Apostilides* (1984) 154 CLR 563 at 575 the High Court referred to the prosecutor's role in forming this decision as 'a lonely one'.

The proposal would involve the DPP making a decision as to which witnesses to rely on and then a further decision as to whether at a trial, a jury would acquit. The decision on the first point could have a substantial bearing on a decision on the second point.

There is another practical difficulty: in most cases the statements are either those of police officers or those prepared by police officers. Unless an officer of the DPP actually cross-examines for himself, he would have to accept what is set out in the statements. An accused person, however, is usually in a position to instruct his lawyer as to the accuracy of many parts of the case against him and crucial matters affecting the decision as to whether there should be a trial can be exposed, if the person accused plays a part.

The interests of justice support the continuation of a procedure under which a judicial officer determines whether or not an accused person should go to trial. Where an accused person has access to proper legal advice I support a streamlining of the procedure, so as to avoid delay but there are two aspects of any procedure which should be drawn to attention.

Firstly, it is very important that at an early stage the accused have the opportunity of knowing at least as much as the investigating police know about the alleged crime. This may be rather more than the prosecuting authorities know. At present the committal procedures enable the person charged to issue summonses for production returnable at committal proceedings. The extent of the power of the magistrate to order production and inspection of documents so produced has been the subject of two decisions of the ACT Supreme Court: *Ex parte McGregor* 61 ACTR 7 and *Ex parte Pullen* 78 ACTR 25.

Suggested new procedures overcome the difficulty faced in relation to the statements of witnesses whose evidence the prosecution intends to call. However, it may well be that an accused wants to pursue matters which have been disclosed to investigating officers which they rightly or wrongly do not wish to follow up or the significance of which has been altogether missed.

It must be appreciated that there are limits to the extent to which the investigating police must disclose information, for example, the identity of informers, security matters the subject of a public interest privilege claim (*see Alister v. The Queen* 154 CLR 404) but unless, at a stage prior to trial, these matters are sorted out by a suitably qualified tribunal, there is enormous scope for trials to be lengthened and sometimes aborted because a presiding judge is left to determine for the first time whether the accused should have access to additional material and the opportunity to call evidence arising from that material.

Secondly, as we move more and more toward the use of paper committals there must be some protection for an accused person from the unexpected. At present in New South Wales, statements prepared for committal include paragraphs designed to indicate that the maker of the statement has told the truth, and appreciates that the statement is to be evidence. However, there is no way of limiting the witness in the witness box in a trial, to what is in the statement. An accused person may see no harm in not cross-examining a witness whose statement will be used at the preliminary enquiry and then at the trial, find that the witness adds to that material very damaging testimony, perhaps utterly unexpected by the accused.

A few simple questions in cross-examination, along the lines 'That was all you saw?' asked at committal, tend to protect an accused person from this sort of surprise.

The statement of the witness could include an additional sentence such as 'What is set out above contains all relevant material which I am able to provide', but where the statement was not obtained by a trained lawyer, such a procedure could be unfair to the potential witness and to the prosecution.

If one is to shorten and streamline committals so as to avoid the need to call oral evidence and subject witnesses to cross-examination, there must be some protection for an accused if, at a hearing, relevant additional prejudicial evidence is disclosed. Some solutions come to mind, the extra material might be inadmissible, or a judge could allow cross-examination in the absence of the jury and then determine whether the trial should proceed.

Conclusion

When reformers come to deal with criminal procedure, it must be remembered that some people charged with a criminal offence will be innocent. While proceedings in the nature of our current committal proceedings remain, an innocent accused has an opportunity of being discharged. Even if not discharged, the accused, having learned about the case against him, can carry out such preparation as is needed to assist his case at a trial or sometimes to persuade the prosecuting authorities not to proceed.

The value of a pre-trial examination has been recognised again and again, the continuation of such a procedure with appropriate improvements is an important safeguard.