LJ 10/1531

OUR REFERENCE

YOUR REFERENCE

DATE

DIRECTOR'S CHAMBERS

DPP
NEW SOUTH WALES

RECEIVED
26 AUG 2010
LEGISLATIVE COUNCIL

25 August 2010

Ms C Cummins
Principal Council Officer
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Ms Cummins

Inquiry into judge alone trials under s. 132 of the *Criminal Procedure Act* 1986

I refer to your letter dated 17 August 2010 and set out below my responses to the questions taken on notice and additional questions on notice. I also enclose the corrected transcript.

Questions taken on notice

- Page 14: *The appeals question came up earlier from the Hon. John Ajaka. Do you know if this has become a problem in Queensland and Western Australia where they have changed the Acts to what is proposed here?*

The Queensland DPP has informed me that there is no interlocutory appeal available from a "no jury order" made under sections 614 and 590AA of the *Criminal Code*.

The Western Australia DPP has informed me that there is no interlocutory appeal available from an order for judge alone trial under section 118 of the *Criminal Procedure Act* 2004.

- Page 20: *In terms of judge alone and trial by jury, are there any statistics in regard to conviction rates as a comparison?*

As I indicated, there were statistics taken out in the ODPP in the early days after the judge alone provision came into force; however, that process ended many years ago. The records from that time were paper-based and I no longer have them. (They may well have been discarded at the time of the Head Office move last November.) The ODPP does not compile such statistics now. I was satisfied when I discontinued the collection that the statistics, when they were kept, did not show any outcomes that should give rise to any concerns or require further action.

175 Liverpool Street Sydney NSW 2000, Locked Bag A8 Sydney South NSW 1232, DX 11525 Sydney Downtown
Telephone: **(02) 9285 8888** Facsimile: (02) 9285 8601 TTY: (02) 9285 8646
www.odpp.nsw.gov.au

My recollection is that the conviction rate for judge alone trials was consistently slightly higher than that for jury trial; but that is not surprising, considering the nature of the cases and issues dealt with by judge alone and the circumstances in which judge alone trials take place.

Additional questions on notice

1. Your submission suggests that the District Court's experience in the prosecution of the Woon case may have provided the impetus for the proposed changes to the judge alone trial provisions.

a. What elements of the Woon case raised concerns over the existing judge alone provisions?

The concerns were the Chief Judge's, not mine, so I can only speculate. I assume that the Chief Judge was concerned about the additional time and cost involved in a trial by jury. I repeat, as stated in my letter to the Attorney General dated 26 November 2009, that the defence representative, when requesting trial by judge alone, indicated that the mental health of the accused (which would be better suited to assessment by a judge alone) was not an issue. The central issue to be determined, therefore, was the question of intent which the Crown regarded as appropriate for determination by a jury. I assume that the Chief Judge would have liked the power to direct trial by judge alone in order to save time and money. In the event, there were pleas of guilty, so no trial was required.

b. Do these issues warrant any amendments to the current judge alone provisions?

No.

2. Under the proposed model, if there is a risk of jury tampering the trial must proceed as judge alone. Several submissions, including your own, have raised concerns about this aspect of the proposed model.

a. How frequently does the problem of jury tampering arise?

In NSW it is virtually unheard of. I have not had one instance drawn to my attention in the almost 16 years that I have been DPP.

I did have one case of attempted jury tampering when I was at the private Bar, some time in the late 1980s, I think, or perhaps early 1990s. It is salutary to consider how that was dealt with. While court was sitting, two men came into the public gallery during an afternoon, stayed for a while and left just before the court adjourned for the day. They were casually dressed and one was tattooed. This was a trial of two men in a "bottom of the harbour" tax fraud that I was prosecuting on behalf of the Commonwealth, so they seemed somewhat out of place in the sparsely populated gallery. We discovered later that they followed a young male juror to a hotel on his way home and approached him there. They offered him money to vote "not guilty". He refused. The next morning he reported this to the forewoman of the jury, who reported it to a Sheriff's Officer. He separated the young man and the forewoman from the rest of the jurors (before they could be told anything) and informed the judge. Proceedings then occurred in closed court in the absence of the remainder of the jury. The young man and the forewoman were discharged

and the trial proceeded with ten jurors. A police investigation was conducted but I do not think that the offenders were ever positively identified. Both accused were eventually convicted. So there is no need, at least in cases like that and probably more generally, for trials to proceed before a judge alone.

b. What are the existing protocols for dealing with issues of jury tampering?
I am not aware of any formal protocols in existence. I suppose that the way in which such matters are dealt with depends very much on the individual circumstances - what form the tampering takes, what communications are made and to whom, what is the state of knowledge of any participant. In a worst case, the problem may be simply addressed by discharging one jury and empanelling another, with additional safety mechanisms put in place.

c. Do you feel that these existing protocols are sufficient to deal with any threats of jury tampering that may arise?
Yes, I am satisfied that existing measures are capable of dealing with any such problems.

d. What would be the impact of the jury tampering provision if the proposed model was enacted?
Negligible. Term of reference 6 applies, so it might depend on the interpretation of "risk". Does that mean "any risk" - in which case there could be significant disruption to the trial process - or is it intended to mean a "likely risk" or "probable risk" or some such, more reasonable, concept?

e. The submission from the NSW Public Defender suggests that it may be appropriate to amend the proposed model to permit 'a jury trial to continue as a trial by the judge alone without the accused's consent, where the jury is to be discharged because of jury tampering' (Submission 6, p 3). What do you think about this suggested amendment?
It is a sensible suggestion; but I still prefer to leave the present situation alone.

3. One of the arguments that is often raised in favour of judge alone trials is that a judge alone trial is likely to be completed more efficiently than a jury trial, resulting in time and cost savings for the judicial system.

a. What is your view on this argument and are you aware of any studies or other information that would enable us to understand the time and cost savings that may eventuate?
(To paraphrase a line from Hanns Johst's play, often misattributed: when I hear the word efficiency used with criminal justice, I release the safety on my Browning.)

By "efficient" I presume you mean fast and cheap. By those criteria, judge alone trials are usually more efficient. But I am more interested in the quality of criminal justice and in maintaining it at the highest level, given its rightful place in the government of our community. I prefer it to be effective and for it to be carried out professionally.

Time and cost savings are brought about because judges can cut corners and avoid technical requirements in place (for very good reasons) for jury trials. There is no need to ensure that another 12 people are kept abreast of what is happening in court.

I am not aware of studies on this aspect.

Chief Justice Spigelman has spoken and written about pantometry - the measurement of everything - and of its inappropriateness to justice. (His papers are on the Supreme Court website and he is reported on this subject in the Australian Law Journal.). Not everything that counts can be counted.

b. How should the tension between efficiency and justice be resolved in relation to judge alone trials?

There is no tension to be resolved because there is no contest between them. Justice trumps all.

4. The submission from Mr Peter Breen suggests that 'juries routinely throw out cases where the Crown presents unreliable witnesses but judges may be inclined not to reject witnesses who appear to be assisting in the administration of justice' (Submission 4, p 1). What are your views on this assertion?

It is arrant nonsense. First, Prosecution Guideline 26 "Witnesses" requires the prosecution not to call unreliable witnesses. Secondly, it is a slur on the competence and integrity of judges generally. Thirdly, the implication is that judges regard pro-prosecution witnesses, even unreliable ones, as "assisting in the administration of justice". That is just wrong.

5. The proposed model states that, when considering the interests of justice, the courts may refuse an application for a judge alone trial if the trial will require the application of objective community standards, such as reasonableness, negligence, indecency, obscenity or dangerousness (Item 8).

a. Is an 'interest of justice' test such as this used in other aspects of the criminal justice system?

Googling "interests of justice" brings up over 40 million references in 0.13 of a second. For example, it shows an International Criminal Court provision about declining to prosecute in the interests of justice and an English Legal Aid Commission reference to granting aid in the interests of justice. My Office uses a "general public interest" formula, but it could equally refer to the interests of justice. I suppose it could be said that the interests of justice are what are required to be served by the entire justice system at every step of the way.

b. The Queensland Law Society suggests that it is not necessary to 'define what issues will be considered in the interests of justice. The interests of justice is a broad and dynamic concept which is flexible enough to take account of a wide range of factors' (Submission 15, p 2). What is your view on this suggestion?

I agree.

6. Prosecution Guideline 24 states that 'dishonesty' is one of the community values that the DPP uses to assess if a trial should be heard by a jury. Your submission suggests that 'dishonesty' ahould be added to the factors that should be considered by the 'interests of justice' test.

a. What criteria does the DPP use to determine 'dishonesty'?

The *Crimes Act* 1900 defines 'dishonest' in section 4B: "dishonest means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people." Accordingly, it is necessary for the trier of fact to decide the standards of ordinary people. A jury of ordinary people is in the best position to determine what are the standards of ordinary people.

(The ODPP does not 'determine' dishonesty - it alleges it, according to the definition.)

b. What would be the benefits of including 'dishonesty' as one of the factors to be considered by the 'interests of justice' test?

See a. above. I rest my case...

7. Your submission notes that in applying the 'interests of justice' test, a judge will have to be informed of certain information about the case and the accused which may later 'be viewed by the Crown or the defence as inappropriate to be before the trial judge'.

a. Can you tell us more about the possible impact of such information being revealed?

Such information might include the accused's criminal history, prejudicial information about his or her disposition and conduct (eg that might presage disruptive conduct during a trial), personal information about the sensitivities of a victim/witness that might be relevant to his or her credit, prejudicial publicity about an accused person, etc. The point is that the previous disclosure to a judge of information that might not be admissible in the course of a trial, for the purpose of assisting a weighing of the interests of justice in proceeding with or without a jury, may operate on the judge's mind in an unacceptable way during the trial (however it proceeds). That risk is better avoided completely. Judges are human, too and constitute a jury of one in a judge alone trial.

b. How could this issue be overcome?

By leaving the decision with the Crown, acting in the general public interest.

8. Under the proposed model, the Crown is able to apply for a judge alone trial, a power that the Crown does not have under the existing model. What are your views on this aspect of the proposed model?

A better course is to give the Crown the right to elect under the existing model, without the need for the defence to consent.

9. Your submission suggests that when cases require the consideration of 'truly abhorrent' facts, such as sexual assaults against children, the consent of the accused to a judge alone trial should not be necessary. However, the submission from the NSW Public Defender suggests that where cases involve distressing evidence 'the right to trial by jury is the more deserving of retention' (Submission 6, p 4). Could you please elaborate on your concerns with regard to this issue?

"Truly abhorrent facts" are not the same as "distressing evidence". Courts and juries deal with distressing evidence daily and I agree with the Public Defenders on that point. My point, a different point, is that very occasionally, as in the Whitby case referred to in my submission, there comes along a case where people of ordinary fortitude would likely be greatly disturbed by exposure to the facts and that is an unfair burden to place on ordinary members of the community. Another example is the woman (now serving life imprisonment) who killed and skinned her husband and hung the skin on the back of the door, beheaded him and sliced some parts from his body, cooked them up and set them on the table for her children. Several burly policemen involved in that case never recovered. Such cases are not frequent, but a safety valve needs to be provided for them.

10. The proposed model states that if there are multiple accused and not all agree to a trial by judge alone, the trial must proceed before a jury, subject to the jury tampering provision. What are your views on this aspect of the proposed model?
I agree. That recognises that trial by jury is the preferred and should be the default option - and should be preserved.

Yours faithfully

N R Cowdery AM QC
Director of Public Prosecutions