Court Processes in Criminal Matters

CHAPTER CONTENTS

Introduction

The approach taken by a court in dealing with a criminal charge varies according to the seriousness of the charge (i.e. whether the offence is a summary offence or an indictable offence), and the position the defendant wishes to take for example whether a plea of guilty is ultimately to be entered or the charge is contested.

Any person may make a complaint about the commission of a criminal offence. This is usually done by notifying police, who then have the power to formally lay the complaint and commence the prosecution. This process is in place because criminal offences are said to be offences against the state and not merely offences against the individual victim.

Preliminary Procedure when Prosecuting a Criminal Offence

Resolving matters without going to court

A police officer may issue an infringement notice that requires a defendant to pay a fine, for example for liquor and public nuisance charges. A defendant who wishes to contest the fine may be able to send the charge to a court, but will not otherwise need to appear.

It is also possible for a defendant summoned to court to plead guilty online or in writing to some minor charges. Legal advice should always be sought before deciding to plead guilty.

Bringing the defendant before court

A defendant must be brought before a court before any proceedings can properly commence. This can be done in four ways:

- notice to appear
- complaint and summons
- arrest with a warrant
- arrest without a warrant having been issued.

Notice to appear

This is the most efficient way police can commence prosecutions where there are no perceived bail risks. For further information on the issuing of notices to appear see the *Arrest and Interrogation* chapter.

Complaint and summons

Complaint and summons were used by police prior to the advent of notices to appear. They are often used for traffic violations, taxation offences and breaches of local government provisions. A summons may be issued by a justice of the peace upon a complaint that a person is suspected of having committed an offence (s 53 *Justices Act 1886* (Qld) (Justices Act)). The summons will set out the nature of the offence, the date on which the matter will be heard and details of the court that will hear the charge (s 54 Justices Act).

A summons can be served on the defendant personally, but in respect of summary offences, it is more often delivered or sent by registered post to the last known place of business or residence of the defendant. In the case of traffic violations, these details can be obtained from licence or registration details kept by the Department of Transport and Main Roads. Proof of service of the summons is necessary should a defendant not appear as required (s 56 Justices Act).

Warrant

A warrant is similar to a complaint and summons, except that it also authorises the police to arrest the defendant. A court or a justice, on application by a police officer, may issue a warrant instead of a summons if satisfied that there are reasonable grounds for suspecting the person has committed an offence. If the offence is not an indictable offence, the application for a warrant must show that alternative methods to require appearance would be ineffective (s 371 *Police Powers and Responsibilities Act 2000* (Qld) (PPR Act)). Some relevant considerations would include the seriousness of the offence or a real concern that the defendant may abscond if they are issued with a summons or notice to appear perhaps based on the person's bail history.

Once a warrant is issued, the police have the power to arrest the defendant and are required to bring the person before a court as soon as reasonably practicable (s 393 PPR Act), namely on the same or the next court sitting day.

For further information about arrest without a warrant, see the *Arrest and Interrogation* chapter.

First Appearance Before a Court

A person charged with any type of offence, no matter how serious or trivial, appears for the first time before the Magistrates Court in the area where the offence is said to have been committed. Magistrates courts operate in Brisbane at major suburban locations, in all other Queensland cities and in some country towns. The court location and number is set out on the notice, summons or bail undertaking.

Legal representation

A defendant should preferably seek legal advice or representation before any court appearance.

Details of law firms that specialise in criminal matters can be obtained from the Queensland Law Society. If a defendant does not believe they can afford to pay for legal representation, Legal Aid Queensland or the Aboriginal & Torres Strait Islander Legal Service can be contacted to assess eligibility for government-funded legal representation. It should be noted, however, that assistance through Legal Aid Queensland is generally not available for summary proceedings in a Magistrates Court, other than in certain circumstances (e.g. if there is a risk of a jail term being imposed perhaps due to a person's previous convictions).

Proceedings in the Supreme and District courts are generally covered, subject to means-tested eligibility (for further information, see the Self-representation chapter).

In Brisbane and many major regional and suburban centres, a duty lawyer is available to provide free legal advice and representation to defendants on first appearance. Defendants who have not had the

opportunity to speak to a lawyer before the court appearance should get to court well in advance of the listed time to discuss the matter with the duty lawyer.

Legal representation is not compulsory. However, it is wise to obtain at least preliminary legal advice and if possible representation, particularly if the possible outcomes of the proceeding include the imposition of a term of imprisonment or a conviction being recorded, which might affect the defendant's future livelihood.

Layout of the court

The magistrate sits behind a large desk (the bench), which is usually on a raised platform at the front of the court. The magistrate is addressed as 'Your Honour'.

In front of the magistrate's bench is a long table (the bar table), at which the defence and prosecution are seated. Any person conducting the defence sits on the left and the prosecutor sits on the right (facing the magistrate). A uniformed police prosecutor usually conducts the prosecution for the first appearance, although there may also be representatives from the state or Commonwealth Directors of Public Prosecution or from other government agencies who may be prosecuting charges. Any person being spoken to by or speaking to the magistrate should stand at that point.

A defendant who has appeared in answer to a summons or notice to appear, or who has been granted bail (either by police or on a previous appearance before a court) sits at the left of the bar table, either alone or with a legal representative. Defendants who are in police custody remain in the dock. The dock is usually a panelled enclosure found along one of the courtroom walls. The witness box is often situated toward the centre of one of the courtroom walls. Proceedings are recorded using tape or digital recorders, which are operated by a clerk who sits directly in front of or to the side of the magistrate.

It is advisable to be respectful whilst in court by taking off any hat or sunglasses and turning mobile phones off. Eating or chewing gum is likewise not recommended. Sensible and non-provocative clothing should be worn.

Procedure before the court

At the first court appearance, the defendant will be informed of the charge and asked whether they accept the charge or wish to contest it. The police prosecutor will usually have a copy of the charge sheet, a police summary of the conduct alleged against the defendant (this document is called a QP9) and a copy of the defendant's criminal or traffic history, if there is one. These documents should be obtained from the police prosecutor and read before the defendant's name is called for the matter to proceed.

Summary and Indictable Offences

The process to be followed from this point depends upon what type of charge is before the court (see *Introduction to Criminal Law* for the various types of offences). The type of offence can be ascertained by reference to the legislation that creates it.

Regulatory and summary offences are determined and punished by a magistrate in a Magistrates Court (s 19 Justices Act).

Additionally, some indictable offences must be dealt with in a Magistrates Court unless the defendant elects to go to trial by jury (s 552B *Criminal Code Act 1899* (Qld) (Criminal Code)) or if the prosecution elects to proceed in this way (s 552A Criminal Code, ss 13, 118 *Drugs Misuse Act 1986* (Qld)).

For some offences, the election as to in which court the charges can be dealt with rests either with the prosecution or the defence, and for some offences it is mandatory that they be dealt with summarily in the Magistrates Court. It is not possible to give an easy answer to what can or cannot be dealt with in a Magistrates Court or what must be dealt with in a higher court. The provisions are quite complex, and it is wise to get legal advice on these issues.

Despite these elections, a discretion remains with the magistrate to determine that, due to the seriousness of the offence, a defendant may not be adequately punished on summary conviction and thus the matter should proceed as with other indictable offences (s 552D Criminal Code). Proceedings finally determined in the Magistrates Court are called summary proceedings.

Where the defendant has a choice as to jurisdiction, a number of considerations might apply:

- court expenses—to proceed on indictment will be much more costly, not least because there may be two hearings (a committal hearing in a Magistrates Court and trial in a District or Supreme Court). There is provision for costs to be met by the unsuccessful party at a summary hearing (s 158 Justices Act) but not for indictable proceedings. However, legal aid is less likely to be granted in the summary jurisdiction
- early resolution of the matter—to proceed on indictment will take much longer before the matter is ultimately resolved. However, a properly prepared case with the benefit of a preliminary hearing of the evidence has been recognised by the High Court as crucial to the defendant's right to a fair trial (*Barton v The Queen* (1980) 147 CLR 75 at 100). Again, the changes to how committal hearings are dealt with will have an impact on these decisions
- maximum penalties vary—maximum penalties prescribed in the summary jurisdiction are generally less than those open to the higher courts. However, whilst this is true, it is unlikely that a judge will impose a higher penalty than a magistrate on the same facts. Indeed, in respect of some offences, anecdotal evidence to the contrary exists
- consistency—there is anecdotal evidence that summary sentences are less likely to be consistent. Higher court proceedings are more readily published and accessible to the public. It should, however, be noted that greater resources are now available to judicial officers in relation to sentencing ranges through various databases which are able to be accessed.

The more serious indictable offences are ultimately heard before a judge and, if guilt is contested, also by a jury in the District or Supreme Court. Very serious indictable offences, such as murder, manslaughter and drug offences involving large quantities or a commercial element can be heard in the Supreme Court, District or Magistrates courts. Other indictable offences, for example robbery, rape or dangerous driving causing death, are heard in the District Court.

Defendant's Options at First Appearance Before a Court

The defendant at a first appearance has several options.

Enter no plea

A defendant may choose to seek an adjournment for legal advice or to obtain the QP9 and consider their position. If a magistrate grants the adjournment, the defendant will be required to return to the same court on the next date. A period of two to three weeks would generally be considered a suitable amount of time to obtain legal advice. A longer period may be granted in special circumstances but this cannot be presumed.

Every person charged with an offence is entitled to put the prosecution to proof. If a defendant wishes to see all of the evidence collated by police in respect of a charge, either to decide what plea should be entered or to determine the scope of culpability for an offence that is accepted, the matter may be set down for a hearing without a plea being entered so that a full brief of evidence can be compiled and provided by the prosecution (see further below). Particularly in respect of a serious offence, the defendant has the right to a preliminary committal hearing in the Magistrates Court before proceeding to trial or sentence in a superior court.

A guilty plea may be entered at any stage of the proceedings from the first appearance until a final determination of guilt or innocence. A formal plea is again asked of a defendant upon committal to a superior court. However, once a guilty plea is entered, it is very difficult to withdraw it.

Plead not guilty

If the charge is to be heard summarily, the matter will be adjourned for trial before a magistrate. This is called a summary hearing. A summary callover will be held two weeks after the matter is set down for a summary hearing, to enable the defence and prosecution to advise the result of case conferencing. Case conferencing is a formal negotiation process between the prosecution and defence aimed at the early resolution of proceedings. A full brief of evidence must be made available within five weeks of the summary callover, and at least two weeks before the summary trial. A brief of evidence will generally comprise signed written statements of all witnesses to be called and any exhibits referred to. Examples of common exhibits include photographs and tape recordings. If lawyers are engaged, a defendant need not appear at the review mention and need only appear at the summary hearing. If not legally represented, appearance at every mention and at the hearing is required.

If the charge is to proceed on indictment, the matter will be adjourned for a committal callover at which time the matter will either be set down for a committal mention or a full hand-up committal hearing date, by which time the brief of evidence should be provided to the defence within the time frame set by the Practice Direction No. 13 of 2010. At times, the prosecution will seek a further adjournment to complete the brief. It is also open to the defence to seek an adjournment if there has been insufficient time since the provision of the brief to peruse the materials. However, strict guidelines for the conduct of proceedings have been set by the courts, and it should never be assumed that such adjournments will be granted.

Once the evidence has been provided, a defendant may list the matter for a committal hearing. The defence is not permitted to cross-examine witnesses as of right. If a defendant or his lawyers wish to cross-examine a witness and the prosecution does not consent, then an application needs to be brought before a magistrate. A magistrate can only allow cross-examination if satisfied there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence. The process ensures that questions are put about issues of particular relevance that will be specified in the magistrate's orders (ss 83A(5AA), 110B Justices Act).

Once the police brief of evidence is received, a defendant may not wish to contest the charge, but instead consent to the matter going directly to a superior court. This is called consenting to a full hand-up committal for either trial or sentence on the charge.

Plead guilty

If the charge is to be heard summarily, the magistrate can hear the sentence immediately. Alternatively, if there is a basis for it, an adjourned sentence date or time can be sought. Usually the matter proceeds immediately.

If the charge is to proceed on indictment and must be heard in a higher court, and the defendant wishes to accept liability for the conduct without requiring police to produce all of the evidence they have, this can be indicated by advising the court that the defendant wishes to consent to the presentation of an ex officio indictment. The Crown (the name given to the Office of the Director of Public Prosecutions, whose lawyers prosecute indictable offences) has the power to present the charge directly in the District or Supreme court without antecedent committal proceedings in the Magistrates Court. A defendant who consents to this procedure saves the court, the investigative and prosecutorial agencies and therefore the public the more extensive costs of alternative proceedings. Upon sentence, the savings to the system and the timeliness of a plea of guilty entered at the first opportunity are factors that show acceptance of responsibility and a willingness to facilitate the course of justice (*Cameron v The Queen* (2002) 209 CLR 339) which may mitigate any penalty to be imposed (s 13 *Penalties and Sentences Act 1992* Qld) (Penalties and Sentences Act)).

Apply for bail

If a defendant has not already entered into a bail undertaking with police (i.e. they have appeared in answer to a summons or notice to appear or have been held in custody), an application for bail may be made at the first appearance (save for in respect of offences that carry life imprisonment such as murder, in which case only the Supreme Court has power to grant bail).

Bail on the defendant's signing of an undertaking to appear on the next court date is commonly granted in those circumstances. Sometimes conditions will be attached to the grant of bail, for example reporting to a police station on particular days or the provision of a surety or cash deposit. The undertaking to be signed is kept with the registry staff. A defendant must sign the undertaking at the registry before leaving the court (for further information see the Bail chapter).

Non-appearance at court

When a summons is issued to initiate court action, a defendant need not appear personally if a lawyer is instructed to appear instead. If there is no appearance at all on the defendant's behalf, the magistrate may proceed to hear the case ex parte (i.e. in the defendant's absence) (s 142 Justices Act).

If there is no appearance in response to the notice to appear, again a court can proceed ex parte or a warrant may be issued to have the defendant brought before the court (s 389 PPR Act). Similarly, if a person does not appear in accordance with a bail undertaking, then a warrant may be issued (ss 28, 28A Bail Act 1980 (Qld), s 367 PPR Act).

Summary Proceedings in the Magistrates Court

Once a defendant has indicated a plea of guilty, the prosecutor will read out the facts contained in the QP9 that support the charge. The prosecution will also inform the magistrate of any previous convictions of the defendant and raise any other matters it considers relevant in fixing the penalty. The magistrate will ask if the defendant agrees with the facts or would like to say anything before sentence is passed.

The defendant or their legal representative can challenge any allegation of fact if necessary. If the defendant disagrees with essential facts presented by the prosecutor, the magistrate may refuse to accept the plea of guilty and change it to a plea of not guilty. The matter will then be adjourned for summary hearing at a later time. If the facts in dispute are not essential to proof of the charge, the prosecutor may either accept the defendant's version or have the matter adjourned for a contested sentence so that evidence might be put before a court on the issues in dispute. Otherwise, if the facts are agreed, the sentence hearing proceeds.

Sentence submissions

The defendant has the opportunity to make submissions as to the sentence. Considerations relevant to the magistrate's sentencing discretion are listed in s 9 of the Penalties and Sentences Act. Submissions on these issues may include:

- an explanation of the circumstances that caused or led to the illegal behaviour
- features of mitigation that might exist to properly characterise the nature of the offence
- the defendant's personal history, family background, education, work record, marital situation, dependants, financial circumstances, any medical condition, prior good character (independent documentary evidence of these matters should be tendered if possible, including references from others or medical, psychological or psychiatric reports where relevant)
- explanation of any previous criminal convictions, particularly similar offences. Section 9(10) of the Penalties and Sentences Act particularly requires a court to treat a previous conviction as an aggravating factor, subject to other diminishing factors that are set out in the section
- expression or evidence of remorse
- details of any cooperation with police

- the plea entered, and if a guilty plea, whether it was at the earliest opportunity
- any time spent in police custody
- the impact the proceedings have already had upon the defendant
- the likely impact upon the defendant of any penalty which may be imposed.

Submissions as to penalty based upon the legislation creating the offence, other case authorities and sentences imposed in other similar cases might also be useful.

A magistrate has discretion to not record a conviction (s 12 Penalties and Sentences Act), taking into account the nature of the offence, the person's character and age and the impact a recorded conviction will have on the person's economic or social wellbeing or chances of finding employment. This issue should be raised with the magistrate, and materials and facts relevant to those matters should be pointed out. The effect of a non-recorded conviction is that a person is entitled to state that they have not been convicted of the offence (although the record remains with police and the courts, and there are some legislative and other incursions upon this entitlement).

In some cases, particularly if a community-based order of probation is being considered, the magistrate may order a pre-sentence report to be prepared by Queensland Corrective Services to help in deciding what sentence should be imposed. If so, the court might adjourn the sentence to allow time for preparation of this report. If the defendant is already under the supervision of a community correctional officer, that officer will usually prepare a report to assist.

When a sentence is being imposed, the defendant should stand.

Penalties

All penalties outlined in the Penalties and Sentences Act are available to a sentencing magistrate (see the Sentencing chapter). Fines are the most commonly imposed penalty in the Magistrates Court. The amount of a fine is to be determined by a magistrate taking into account the defendant's financial circumstances (s 48 Penalties and Sentences Act). Also, reasonable time to pay the fine can be sought and should normally be permitted. The collection of fines is now the responsibility of the State Penalties Enforcement Registry, and if there is a difficulty in paying a fine, that office should be contacted.

Murri Court

Sentence hearings for charges that can be dealt with summarily where the defendant is an Aboriginal or Torres Strait Islander person can be adjourned to the Murri Court.

The Murri Court aims to link defendants with support services that address the underlying contributors to their offending and ensuring that the magistrate is informed about the defendants' cultural and personal circumstances, efforts of rehabilitation and ongoing support needs at sentence.

The magistrate is assisted by the Murri Court panel, comprising members of the Aboriginal and/or Torres Strait Islander community nominated by community justice groups. The Murri Court panel sits with the Murri Court magistrate during all mentions and the sentence. The Murri Court assessment panel, comprising Indigenous Elders and a community justice group representative, is tasked with

assessing the defendants' suitability to participate in Murri Court (the entry report), including by identifying support services and reporting on the defendants' engagement with support services (sentence report). This panel reports to the Murri Court magistrate and Murri Court panel throughout the sentence process.

The proceedings, although formal, are adapted to provide for a process that is better understood by the defendant. The Murri Court panel will also be invited to explain to the defendant the impact of the offending on the community and their family, and to comment on where further steps could be taken by the defendant. Information in the sentence report, including on the defendant's progress and cultural and personal circumstances, must be taken into account by the Murri Court magistrate at the sentence.

Queensland Courts Referral

The Queensland Integrated Court Referrals (QICR) model seeks to integrate principles of therapeutic justice into the Magistrates Court when dealing with defendants for whom homelessness, mental illness, problematic substance use or impaired decision-making capacity contribute to their offending. The QICR aims to reduce long-term re-offending by referring eligible defendants to treatment or community support services.

Magistrates, in the normal conduct of the court and having regard to the provisions of the *Bail Act 1980* (Qld) (Bail Act), may grant bail under s 11(2) of the Bail Act and/or impose a condition including that the defendant participate in a rehabilitation, treatment or other intervention program (s 11(9)). A program may be attended through QICR while the defendant is on bail and subject to reporting, residential or other special conditions.

Service providers report on the defendant's attendance and engagement with the services to which they have been referred, and their progress in addressing factors contributing to their offending. These matters are then taken into account by the sentencing magistrate. Additionally, if the court considered a defendant may benefit from participating in the QIRC post sentence, they may make a probation order or recognizance order, in accordance with the Penalties and Sentences Act.

A defendant whose charges include a charge that can only proceed by way of indictment is not eligible to participate.

Summary Trials in the Magistrates Court

Particulars of the offence and evidence to be presented

To assist in the preparation of a defence, once a defendant has indicated a plea of not guilty, the defendant is entitled to full and detailed particulars of the alleged offence from the police prosecutor.

Often evidence of a course of events that occurred on a particular date or evidence in respect of more than one person charged with the same offence will be presented (or led). The prosecution is required, on request of any defendant, to stipulate which particular actions of the defendant are said to constitute the offence and, if necessary, the legal basis for guilt.

A defendant is also entitled to be informed of the evidence the police intend to call to support the charge (e.g. the witnesses they will call at the hearing).

Particulars and briefs of evidence can be obtained by writing to the police prosecutor well before the summary or committal callover date.

In principle, a defendant may seek to speak to a witness being relied upon by the prosecution prior to the hearing. In some cases it may be useful to do so to completely understand expert evidence. However, in practice such a right should be exercised with extreme caution by an unrepresented defendant. It is a serious offence for a defendant to retaliate against, interfere with or corrupt a witness or their evidence, or to prevent a witness from giving evidence (ss 119B, 126, 127, 130 Criminal Code). Any contact heightens the risk that such an allegation might be made. It should also be appreciated that any contact might later be the subject of evidence in the case. Additionally, bail conditions will sometimes stipulate that a defendant have no contact with prosecution witnesses. A witness may refuse to speak with a defendant, and in some cases it may be best to not engage on any issue that might reveal tactics or issues the defence sees as relevant before the evidence commences.

A defendant is not obliged to advise police who or what evidence might be called on their behalf before it is called.

Publicity

Court hearings for summary offences are usually open to the public. However, the public will be excluded in some situations. Examples include where the defendant is a child, a complainant is giving evidence concerning a sexual offence, the alleged offence is of a sexual nature committed on a child under the age of 17 years or a child under the age of 17 years is giving evidence (see the Sexual Offences chapter for more detail). The court has the power to exclude the public and conduct a closed court if it considers it to be in the best interests of justice (ss 70–71 Justices Act, pt 2 div 4 *Evidence Act 1977* (Qld)).

Adjournments

A magistrate has the power to adjourn any matter either before or during the hearing on application by either party. Once a case is set down for hearing, a further adjournment may be difficult to obtain unless there is a reasonable basis for it given the cost to the other party.

A prosecutor might apply for an adjournment where, for example, witnesses are unable to be located. If a defendant wishes to object to an adjournment on this basis, relevant issues for a court's consideration include whether or not the witness is necessary for the case, whether there has been some fault or neglect on behalf of the prosecution in ensuring the witness's availability or the certainty (or lack) of the witness's appearance at the adjourned date.

A defendant seeking an adjournment must have well-prepared arguments and a good basis such as illness, absence from the city for a good reason or the plan to call witnesses unable to attend court. In the case of illness, a court often requires the production of a medical certificate that specifically states that the defendant is unfit to attend court. To not unnecessarily prejudice the other party, it might also be worthwhile to give the prosecution notice (preferably in writing) of any intention to seek a further adjournment.

The decision by a magistrate on an application for adjournment is discretionary but qualified by the defendant's right to a fair trial. The fact that a refusal of an adjournment may lead to a miscarriage of justice is very important (*Thornberry v R* (1995) 69 ALJR 777; *Sali v SPC Ltd* (1993) 116 ALR 625).

The Prosecution Case in Summary Trials

The police prosecutor calls all witnesses the police wish to rely upon one after the other. No witnesses (other than the defendant) are allowed to hear any evidence in the case that comes before their evidence. They must wait in a separate witness room and also must not discuss any of the earlier evidence with anyone present.

The witness will sit in the witness box, take the oath (i.e. swear on a religious text such as the Bible) or make an affirmation to tell the truth. The witness will then proceed to give their version of the events in response to questions from the prosecutor (examination-in-chief). Defendants, especially those who are not legally represented, should take careful notes of the evidence given by the prosecution witnesses in order to question them later during cross-examination. If a witness is going too quickly to allow notes to be taken, the defendant may politely but firmly interrupt and ask the magistrate to ensure that the witness slows down.

Neither the prosecution nor the defence is permitted to ask their own witnesses leading questions. Leading questions are ones that suggest or lead the person questioned towards the answer sought by the questioner. An example of a leading question is:

> Q: Was it then that he threatened to bash your mother?
>
> A: Yes.

The question is objectionable because it leads the evidence being sought—the evidence is suggested to the witness that there was a threat to assault someone rather than the witness giving their own evidence of that threat.

The same information could be put before a court in a non-objectionable (i.e. non-leading) manner by asking the following series of short questions:

> Q: Did he say anything then?
>
> A: Yes.
>
> Q: What did he say?
>
> A: He said he would bash my mother.

To obtain evidence from a witness through the use of non-leading questions, the questioner needs to have a good knowledge of what the witness is likely to say in answer to their questions. This information can be obtained from reading any statements provided to police or if possible, drafting a statement of proof after a pre-trial interview to be signed by the witness. The witness should then be questioned, according to these statements in a manner designed to elicit the facts the court should know.

Cross-examination

When the prosecutor has finished questioning the witness, the defence may be entitled to ask the witness questions in cross-examination. It is permissible to ask leading questions during cross-examination. There is a rule of law that obliges a defendant who is giving or calling evidence of a fact to put that fact to any police or Crown witness who might be in a position to comment on it. Otherwise, a trier of fact (the magistrate or judge) may be entitled to infer that the defendant's evidence was made up in the witness box, and it will be of less weight. Therefore, this issue can be addressed by suggesting to a witness the crucial parts of the defendant's version of events.

Cross-examination should generally highlight positive prosecution evidence, weaken adverse prosecution evidence, elicit new advantageous evidence and highlight or bring into question the reliability or credibility (honesty) of a witness whose account is disputed. It is said that questions should only be asked in cross-examination when the answer is known, but this is only a rule of thumb. It would be worthwhile to consider the defence that is being run, note down what points are relevant to the defence regarding each witness before the hearing and generally keep to those points.

A common mistake of persons who represent themselves is to ask questions in the form of a lengthy statement that becomes difficult to respond to. Short questions that elicit a definite response are preferred.

Re-examination

When the defendant has finished cross-examining the witness, the prosecutor may re-examine the witness. The aim of re-examination is to enable the prosecutor to clarify any unclear aspects of the witness's testimony. The prosecution is not entitled to introduce new evidence, such as matters not discussed either in examination-in-chief or cross-examination.

No case to answer

When the prosecution case has closed, the defendant may submit to the magistrate that they have no case to answer. This is where the defendant argues that the magistrate should dismiss the charge on the basis that the prosecution has not supplied sufficient evidence in law to support the charge. The test to be applied is '… whether on the evidence as it stands [the defendant] could lawfully be convicted' (*May v O'Sullivan* (1955) 92 CLR 654 at 658). This is a question of law.

The magistrate will hear the submission and the prosecutor's reply. If a court accepts the submission, then the case is dismissed and the defendant is discharged from any existing obligation to appear in court in answer to that charge. If the no case to answer submission is rejected by a court, then the defence has the opportunity to present its case.

The Defence Case in Summary Trials

The defendant is not required to give or call evidence, because the onus in criminal matters is on the prosecution to prove the case beyond reasonable doubt. The onus is also on the prosecution to negative or disprove any defence that arises on the evidence. The defendant has a right to remain silent, and no negative inference should be drawn from that.

However, it remains a choice, and a defendant may wish to provide a contradictory account or raise a defence not otherwise open on the prosecution case. The decision whether to give or call evidence is not an easy one. For example, prior convictions of the defendant may become admissible if credit is in issue by a defendant giving evidence disputing the truth of the prosecution witnesses. The right to address the magistrate last at the close of the case is with the prosecution if a defendant gives or calls evidence. Otherwise, it remains with the defendant.

If calling evidence, each witness for the defence, including the defendant, will proceed by way of examination-in-chief (led by the defence), cross-examination (led by the prosecutor) and re-examination (led by the defence).

There are now statutory provisions modifying the common law position by deeming a defendant in certain circumstances to be in possession of things such as stolen goods or drugs. In such cases, where a matter is presumed against a defendant unless the contrary is proved, a reverse onus of proof may apply. When the onus of proof is on the prosecution, the standard of proof is beyond reasonable doubt. However, when the onus is on the defendant, it is a standard to prove on the balance of probabilities. All the defendant has to do is to prove that it is more likely than not that they did not know that, for example, the property was stolen or that the drugs were illicit drugs. In such cases, it becomes important that a defendant understands the importance of giving some evidence proving their innocence. There are a number of similar 'reversal of the onus of proof' provisions scattered throughout the legislation, and legal advice on such offences should be obtained before a matter proceeds to court.

Summing up

At the end of the evidence, both the prosecutor and the defendant (or the defendant's lawyer) have the opportunity to address the magistrate about the case. Generally, an outline of the evidence led which supports the defence position and an argument that the prosecution has not proved its case beyond a reasonable doubt (including by negating any defences raised) is necessary.

The verdict

Usually the verdict will be given promptly. However, if the trial was long or complicated, the magistrate may adjourn to consider the verdict or provide written reasons for judgment.

The magistrate must be satisfied beyond reasonable doubt that the defendant is guilty of the offence as charged. If the magistrate has a reasonable doubt about any of the essential elements of the charge, or if the magistrate is satisfied that a defence to the charge has been successfully made out, then the charge must be dismissed and the defendant discharged.

A discharged defendant has no further obligations to the court in respect of that charge and is free to leave the court. A defendant who is found guilty of the offence charged continues to be obligated to the court until the defendant has complied with any sentence order that might then be made. Sentence proceedings similar to that outlined above in respect of a guilty plea will follow a conviction.

Costs

Costs are generally not payable by an unsuccessful defendant when police lay the charge. However, if police call non-police witnesses (e.g. a doctor), the unsuccessful defendant may be ordered to pay the expenses for such witnesses. A defendant might also be required to pay the filing fee for any summons filed. Costs may be ordered in successful prosecutions by other statutory authorities, for example a workplace health and safety prosecution or a taxation offence prosecution.

When a charge is dismissed, the magistrate also has power to order such costs as seem just and reasonable against the complainant (usually the police). Section 158A of the Justices Act stipulates some of the relevant considerations to the exercise of the costs discretion.

Offender levy

A defendant who has been convicted of a charge will also be ordered to pay an offender levy, an annually indexed administrative charge introduced to pay for costs of law enforcement and administration.

Appeals from Summary Proceedings

Either the defendant or the complainant may appeal to the District Court against any final orders made by a magistrate at a summary hearing. However, in respect of indictable offences determined summarily, a complainant may only appeal against the magistrate's sentence or costs order and not following an acquittal (s 222 Justices Act).

An appeal to the District Court can be made against orders of conviction or sentence on many grounds. Grounds for appeal against conviction include an error of law, absence of jurisdiction, and in respect of indictable offences, that the magistrate erred in deciding the conviction or sentence summarily (s 114 *District Court of Queensland Act 1967* (Qld) (DCQ Act), s 552J Criminal Code).

An appeal will generally proceed by rehearing the original evidence given in the proceedings before the Magistrates Court. However, in special circumstances the District Court may grant leave for a party to adduce fresh, additional or substituted evidence on the appeal (s 223 Justices Act). Because an appellate court does not have the benefit of seeing witnesses give their evidence, there is a historical reluctance by appellate courts to overrule discretionary decisions that may be based upon the magistrate's assessment of the credibility of witnesses. An error on the part of the magistrate generally needs to be shown (*House v The King* (1936) 55 CLR 499).

An appeal against sentence must show that the original sentence imposed was excessive or inadequate in all the circumstances.

An appeal must be started within one month from the making of the order by filing a Notice of Appeal with the District Court registry. Once an appeal is filed, either the Magistrates Court or the District Court has jurisdiction to grant bail pending the appeal upon application. Bail pending appeal is generally only granted in exceptional circumstances. Grounds for release on appeal bail (in addition to addressing the usual bail risks) would include where the sentence is relatively short, and the whole or a substantial part of it would be served before the appeal could be heard. The decision of the District Court is not final with a further right of appeal to the Court of Appeal (s 118 DCQ Act).

Where the Attorney-General appeals against a sentence for an indictable offence dealt with summarily, the appeal is heard in the Court of Appeal. If the defendant has also appealed to the District Court, both appeals are heard before the Court of Appeal (s 669A Criminal Code).

Committal Proceedings in the Magistrates Court

Committal proceedings are conducted in the Magistrates Court in respect of indictable offences under s 104 of the Justices Act.

Section 114 of the Justices Act also provides for a process known as Registry Committal, where a court registrar can commit a defendant to trial or sentence where the defendant is legally represented and those legal representatives consent to that process.

In other respects, the benefits of a committal hearing for a defendant generally remain:

- The defendant is not placed on trial unless there is sufficient prima facie evidence such that a properly instructed jury could find the person guilty of the charge(s).
- The defendant and a court are provided with the opportunity to know the full nature of the evidence held by the prosecution to support a charge. There has been a codification and strengthening of the obligation of the prosecution to provide full and open disclosure of material evidence that the prosecution will use to support the charge. Provisions have been introduced to provide for that process to be managed by the Magistrates Court, including the provision of cost orders in limited cases where disclosure has not been made.
- The defendant can make a considered decision as to the appropriate plea to be entered.
- It is determined if a request should be made to the prosecution to cross-examine Crown witnesses on specific issues. If this is not consented to, an application to a magistrate for an order to do so can be made. Such an order will only be made if the magistrate is satisfied that there are substantial reasons why, in the interests of justice, the witness should be called to give oral evidence.
- The defendant can assess what evidence in reply should be collated for trial.
- Submissions can be more sensibly prepared as to the evidentiary issues at trial.
- The trial listing process will be better informed, particularly as to the likely duration and the issue(s) in contest at the trial.
- The basis for sentence will be determined if the defendant pleads guilty, so that a sentencing judge can be fully appraised of the nature of the case by reading the depositions from the committal. A contested sentence can also be prepared for if necessary.
- The Director of Public Prosecutions is permitted to more fully assess the prosecution case and determine whether the matter is, in fact, a proper one to bring to trial, notwithstanding that there may be a prima facie case. Also, matters relevant to public policy considerations can be considered.

Written statements are tendered of all witnesses. Statements may be tendered without the need for witnesses to provide full evidence, if the court is satisfied the defendant understands what the proceedings are about and knows their right to obtain legal representation or legal assistance, and that they have the right to apply to cross-examine witnesses.

Unless the case is conceded (and then only if the defendant is represented), the magistrate must determine sufficiency of the evidence for trial. Again this is a question of law, whether or not a jury, properly instructed as to the law, could convict the defendant.

There is a very long line of authority to support the proposition that indeed in determining whether the prosecution has adduced sufficient evidence to put a defendant on trial, a committing magistrate should have regard to the reliability of the evidence, not for the purpose of determining whether they personally are persuaded of guilt but for the purpose of determining whether any reasonable jury properly instructed could return a verdict of guilty upon it.

If a magistrate decides there is a case to answer, the defendant has the opportunity to give evidence and call witnesses. It is extremely rare for such evidence to be given or called at a committal hearing as the test for committal is not a high one, and it is not usually wise to disclose the defence case before the jury until the trial. If the defence calls evidence, the court will again consider whether there is a case to answer. If it decides that there is, the magistrate will commit the defendant for trial.

Once a defendant is formally committed for trial, they will then be called upon to either plead guilty, not guilty or to enter no plea. The defendant can either be kept in custody until the trial or be admitted to bail. A fresh bail application must be made to the magistrate after the formal committal for trial for a defendant to be released pending proceedings in a superior court.

Proceedings on Indictment in the Supreme or District Court

Preparation

After the committal hearing or the filing of an ex officio indictment, the defendant is directed to appear at the criminal sittings of the Supreme Court or District Court commencing on a particular date.

Meanwhile, the transcript of the committal hearing, if one is held, is prepared and a copy sent to the Office of the Director of Public Prosecutions (DPP) along with all witness statements tendered. The DPP will then provide a copy to the defence and will decide whether or not the case should proceed to trial and what the indictment (formal charge) should be. Defendants are able to make oral or written submissions to the director in this regard. Reference to the public interest criteria contained within the DPP's prosecution policy may be of relevance to that aim. If the decision is made not to proceed, the DPP may, instead of presenting an indictment, advise the court that they will not prosecute the matter by indicating nolle prosequi (no true bill).

Mention

Upon the presentation of the indictment, a defendant or their legal representatives will be called upon to advise the court of the course to be taken in respect of the indictment at a mention of the charge. If

represented, a defendant need not appear at a mention. If a plea of guilty is indicated, a future sentence date before a judge only will be set. If the charge is contested, a trial by jury will be set down.

Arraignment and plea

At the beginning of a trial or sentence proceeding, the accused person is placed in the dock, the indictment is read out by the judge's associate (who sits in front of the judge in the superior courts) and a plea is requested. If the accused pleads guilty, there is no need for a jury, and the judge considers penalty. If the accused pleads not guilty, a jury of 12 is empanelled.

Sentence proceedings

Sentence proceedings in the superior courts are more formal than those in the Magistrates Court, but the legal principles that apply are the same (see the Sentencing chapter).

Trial

Pre-trial application

An application for a direction or ruling by a trial judge can be made by either the defence or the prosecution either before the trial commences (pre-trial application (voir dire) (s 590AA Criminal Code) or at any point during the trial if an issue of law arises. Both proceedings are hearings convened before a court in the absence of the jury for the purpose of determining issues of law, for example whether certain evidence (often an alleged confession) is admissible in the proceedings or if the trial should be permitted to proceed either on the indictment as framed or at all.

Evidence can be heard at such a proceeding. Alternatively, arguments are often made on the basis of the evidence already led at a committal hearing. If the defence is asserting that an alleged confession was not given freely or is otherwise unreliable, relevant matters include the defendant's age, literacy and intelligence. It is also relevant to establish the length of time the defendant has spent in police custody and whether:

- access to a solicitor and legal advice was denied
- there was compliance or otherwise with the provisions of the PPR Act
- any assertions, promises or inducements were made by police.

A stay of the indictment may be sought on the basis of unfairness to the defendant due to, for example, delay or the unavailability of relevant evidence. Where there is more than one defendant or more than one charge, separate trials might be sought at a pre-trial hearing.

There is anecdotal evidence that such pre-trial applications have increased possibly as a result of the limited cross-examination of witnesses now allowed in the committal process.

Empanelling of the jury

An available jury list contains the names, addresses and occupations of the panel of people summoned as potential jurors. Potential jurors are randomly selected to come forward to take the oath or affirmation. During this process, both the defence and the Crown may challenge up to eight potential

jurors, without needing to explain the basis for the challenge. If a juror dies or is discharged after a trial begins and there is no reserve juror (these are often chosen in lengthy trials) a criminal trial can continue with not less than 10 jurors.

Nolle prosequi

Almost at any stage of the trial, particularly if the defence is successful on a voir dire (pre-trial application), the Crown prosecutor may enter a nolle prosequi (i.e. end the trial by deciding not to proceed further upon the indictment).

Evidence

Evidence is the information or statements given personally by witnesses or drawn from documents tendered to the court to establish facts.

Evidence must be relevant to the matter before the court for it to be admitted at a trial. The court will only allow evidence to be presented when it complies with complex established rules of evidence.

Hearsay evidence

The rule against hearsay provides that evidence must be an account of the first-hand experience of the witness giving it. Witnesses can only relate evidence they heard, saw, tasted or touched, not what someone has told them as truth of what was said. There are important exceptions to the rule against hearsay, and of particular importance is the confession or other admission made by the defendant against their personal interest. For example, police are able to give evidence of comments made by the defendant to them in an interview. The record of interview can take many forms (written, audio or video records of questions asked and replies given). For confessions to police to be admissible in evidence, they must have been made freely and voluntarily. All questioning of suspected offenders for indictable offences is required to be conducted electronically if practicable. The ss 414-441 of the PPR Act and the *Police Powers and Responsibilities Regulation 2012* (Qld) set out the requirements to provide fairness to persons being questioned.

Opinion evidence

The opinions of a witness are not generally admissible as evidence in legal proceedings. However, opinion evidence can be admissible where the person giving the opinion has expert knowledge of that area. For example, a psychiatrist may give an opinion as to the mental health of the accused person at the time of the alleged offence, but a lay person could not give such opinion evidence. They could only say what they heard or saw.

Nevertheless, lay people and police officers are often permitted to give evidence of their opinion regarding matters of everyday life. Examples include estimates of speed, age, distance and sobriety.

The Role and Responsibilities of the Jury

The trial proceeds before the jury in the same way as described above in relation to summary trials, although the existence of a jury to determine facts means that proceedings may progress more formally. In limited circumstances, criminal trials can be conducted before a judge without a jury either on the application of the prosecution (but only if the defendant consents) or on application of the defendant. A number of applications by defendants have been refused.

After the representatives for the Crown and defence have delivered their opening statements, witnesses give their evidence, and at the conclusion of the evidence, final addresses are made by the Crown and the defence. The judge will then explain to the jury the legal elements of the charge under consideration, outline the facts relevant to each element, give directions on the onus of proof and any legal considerations and explain all the possibilities open on the indictment. For example, on an indictment for murder, the accused may be found guilty of manslaughter instead.

The jury's responsibility is to consider the facts of the case and, bearing in mind the judge's directions on the law, decide whether any offence has been proved beyond reasonable doubt. The judge is entitled to assist the jury to understand the facts revealed by the evidence. However, the members of the jury alone bear responsibility to determine the facts of the matter.

If the jury reaches a verdict, it must be unanimous. If the jury cannot reach a unanimous verdict, then the judge discharges the jury and may order a new trial. There is now provision in Queensland for certain offences, including murder, that if the jury are unable to reach a verdict after a prescribed period of deliberation, a majority verdict of 11 out of 12 jurors (or if the jury consists of 11 jurors a majority of 10) may be given (s 59A *Jury Act 1995* (Qld)).

Appeals against Conviction

A person convicted of an offence on indictment may appeal to the Court of Appeal on any question of law pursuant to s 668D(1)(a) of the Criminal Code. An appeal against conviction must be lodged within one calendar month of the verdict's delivery (s 671(1) Criminal Code).

There are many grounds of appeal, including the unsafe and unsatisfactory nature of the verdict, an error in a trial judge's directions to the jury or rulings on a voir dire that may lead to a miscarriage of justice. If the appeal is allowed, then the Court of Appeal quashes the conviction and either orders a retrial (s 669 Criminal Code) or directs that a verdict of acquittal be entered (s 668E(2) Criminal Code).

A person sentenced for an offence on indictment may only appeal against the severity of the sentence imposed with leave of the Court of Appeal (s 668D(1)(c) Criminal Code) on the basis of the sentence being manifestly excessive or an error being made by the sentencing judge. An application for leave to appeal against sentence must be lodged within one calendar month of the sentence being imposed (s 671(1) Criminal Code). Whilst the Court of Appeal may either decrease or increase a sentence on appeal by a defendant (s 668E(3) Criminal Code), in practice, the court does not increase the sentence without first notifying a defendant in order to give an opportunity to withdraw the appeal.

The general settled law was that the Crown could not appeal against a not guilty verdict. Further, once a person was acquitted it was not possible to retry the person (the Rule against Double Jeopardy). However, ch 68 of the Criminal Code allows for the Director of Public Prosecutions to apply for a retrial in charges of murder where there is fresh and compelling evidence, or of offences punishable for life or 25 years or more if it meets the definition of a tainted acquittal.

The Attorney-General may also appeal to the Court of Appeal against any sentence for an indictable offence, whether dealt with on indictment or summarily (s 669A(1) Criminal Code), on the basis of its manifest inadequacy. A ruling staying an indictment can also be appealed by the Attorney-General (s

669A(1A) Criminal Code). Other matters of law may be referred to the court by the Attorney-General (ss 669(2), 669(2A) Criminal Code).

The Court of Appeal can extend the time in which to lodge an appeal against conviction or application for leave to appeal against sentence (s 671(3) Criminal Code). This usually only occurs where the potential appellant can show good reason for the delay, or that to deny the opportunity to appeal would result in an obvious miscarriage of justice.

Appeals are generally decided on the issues arising from the evidence at trial. However, the court may receive further evidence if necessary or expedient in the interests of justice (s 671B(1) Criminal Code).

No costs are awarded in criminal appeals (s 671F(1) Criminal Code). An incarcerated appellant may attend at the appeal if they wish, unless the issue involves a question of law alone (s 671D(1) Criminal Code).

An appeal from the Queensland Court of Appeal lies to the High Court of Australia. However, special leave to appeal to the High Court must be obtained from that court before such an appeal can be made.

A Governor's pardon

The Governor, as directed by cabinet, has the power to pardon any convicted person and may refer the whole or part of the case to the Court of Appeal for assistance in the exercise of this prerogative power (s 672A Criminal Code Act). This only occurs in the most exceptional circumstances.

Legal Notices

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