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Tips, tricks and pitfalls for Local Court Practitioners

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Introduction

It is trite to observe that the Local Court of NSW is, by far, the busiest criminal jurisdiction of all NSW Courts. According to the Bureau of Statistic, in 2018 the NSW Local Court finalised 128,932 criminal cases. By comparison, the higher jurisdictions combined finalised a comparatively modest 4897 criminal cases in the same year. It is not surprising then that most criminal law practitioners spend the vast majority of their time in the Local Court. What is more surprising is the lack of seminars and literature designed to assist practitioners who appear in this jurisdiction navigate the manifold issues which can arise in Local Court matters.

Those who regularly appear in the Local Court know that it is a very different beast to the higher jurisdictions. While the substantive law is the same in all jurisdictions, the practice and procedure in the Local Court, as well as the practical realities of the resource constraints that all parties to Local Court criminal proceedings are typically faced with, mean that there are certain issues which arise uniquely in the context of Local Court proceedings. This paper seeks to provide Local Court practitioners with (hopefully) helpful, practical guidance to assist in dealing with some of these issues and offer suggestions as to how to more effectively run defended matters in this jurisdiction. To that end, a deliberate effort has been made to keep case references to a minimum in favour practical, pithy advice about matters which arise in the daily practice of the criminal law in the Local Court.

1. Ethical Conflicts– Beware the friendly "victim"

In recent years, there has been a proliferation of prosecutions for domestic violence offences in circumstances where the alleged victim (herein called the complainant) does not wish their partner (or in some cases child) charged with a criminal offence and/or does not want the protection of an AVO. This has in turn created an ethical minefield of dilemmas for practitioners advising clients in these situations.

Three dilemmas in particular arise regularly. First, what does one do when the complainant wishes to communicate directly with the practitioner representing the accused? Second, what to say to a client about the likelihood of the proceedings being dismissed in the event that the complainant does not attend the hearing? And third, what advice to give where the complainant is the client, seeking advice about how to retract a statement containing false allegations.

Before discussing these individual dilemmas, it is convenient to set out the various ethical principles which often are often engaged where there is contact between a practitioner and a complainant.

First, there is the requirement that the practitioner avoids conflicts of interest between their duties to a current and a former client. This is reflected in clause 10 of the Solicitor's Conduct Rules which reads as follows:

10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by Rule 10.2.

10.2 A solicitor or law practice who or which is in possession of information which is confidential to a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:

10.2.1 the former client has given informed written consent to the solicitor or law practice so acting, or

10.2.2 an effective information barrier has been established.

While a comprehensive dissertation on the nature and content of this duty is beyond the scope of this paper, it is important to note that a person may still be a client of a law firm even though they have not entered into a costs agreement with it. For example, if a complainant calls a law firm and describes their problem for the purpose of obtaining legal advice, the firm thereby acquires a duty of confidentiality to that caller, even if no retainer results from that discussion.

Next, there is a solicitor's duty not to influence a witness. This duty is enshrined in clause 24 of the Solicitor's Conduct Rules. More importantly, it must be borne firmly in mind that any attempt to influence a witness may constitute one or more of a number of public justice offences created by Part 7 of the *Crimes Act* 1900.

Additionally, there is Solicitor's Conduct Rule 27 which prohibits a solicitor from appearing as an advocate in a matter if he/she is likely to become a material witness in the proceedings.

Lastly (for present purposes), is the duty of every practitioner to act in the best interests of their clients at all times, subject only to the requirements of the law and the practitioner's duty to the Court.

The Law Society of NSW has produced a guideline for practitioner's regarding communication with complainants in domestic violence matters. While the guideline is not binding and, in the writer's view, not exhaustive, it is none the less a very useful resource. The guideline is available on the law society web site and the writer highly recommends that practitioners familiarise themselves with it.

There is one other important practical matter to bear in mind regarding communicating with complainant s in DV matters. Whenever a complainant contacts a defence lawyer, the very act of making that contact gives rise to a suspicion that she (or, less likely he) may be prone to changing their attitude towards the accused and their version of relevant events. After all, in almost all cases it is the complainant who contacts police and gives them a version of events which discloses an offence. It the same person is now seeking to bring about a cessation of the proceedings commenced as a result of their contact with police, it is wise to be alive to the

possibility that they may yet change their minds again. This has a number of important implications discussed further below.

Practitioners are faced with the prospect of communicating directly with the complainant of a criminal offence in a number of ways. Below is a discussion of three common scenarios involving direct contact with a complainant.

Scenario 1.

You are sitting in your office working on something, your secretary rings you to ask if you are able to speak to a prospective new client about a domestic violence matter. You, always keen to secure new instructions, interrupt whatever you were working on and take the call. Not long into the conversation you find out that they are actually speaking to the complainant who wants desperately to 'drop the charges'. What .do you do? There are a number of potential alternative approaches to consider.

One, conservative, approach might be to have your reception staff trained to screen calls so that a call from a complainant is never put through to you in the first place. You could ensure that you reception staff ask every new enquiry whether they are the complainant in the offence and, if they are, inform them that you can not speak with an complainant and they must get the accused him or herself to call. The advantage of this approach is that is avoids the complications that can arise when a solicitor talks to a complainant. However, it is an approach which lack an understanding of the business imperatives of a legal practice as well as the "human factor" for the person making the enquiry.

The reality of modern consumer behaviour is that most potential client enquiries who are told that they solicitor will not speak to them will not arrange for the accused to call back, rather they will simply dial the next law firm in their google search and the only thing that will be achieved is that the firm will lose a potential client. Further, this approach fails to recognise that the caller is a human being, with human emotions. They are likely highly anxious and distressed at the prospect of their loved one being charged with a criminal offence and are probably blaming themselves for their partner's predicament. So, is there a better way to handle a situation of this kind?

The writer suggests that there is an alternative which is consistent with the professional obligations of a legal practitioner while at the same time being less "stand-offish" towards the caller. That is for the practitioner to take the call and have a very brief discussion with the caller. This approach runs the risk of conflicting oneself out of acting for the accused, however, this risk is often more theoretical than real.

While it is true that once a practitioner speaks with a complainant , that person becomes a "former client" for the purposes of rule 10 (assuming that the conversation does not result in a formal retainer), that does not automatically mean that the practitioner cannot subsequently act for the accused. It is to be noted that there is no absolute prohibition against acting for an accused once one has received confidential information from the complainant in the matter. Such a prohibition only

arises where there is a conflict of interest between the two clients and, even then, rule 10.2.1 allows for the possibility of the former client giving consent for the practitioner to act for the other party. In the situation with which we are presently concerned, there is often no such conflict. Both the complainant and the accused want the same outcome, and both are likely to consent to the disclosure of their confidential information to the other for the purpose of achieving it.

That is not to say that taking a call from a complainant is a simple matter. This approach is not for the fain hearted as it requires great care to protect the practitioner from falling foul of the law and the solicitor's conduct rules. While it is not possible to provide a comprehensive prescription for how to handle the scenario presently under discussion, the writer has the following suggestions for those practitioners who elect to take the less conservative approach of speaking with the complainant:

1. Make a very comprehensive file note of your conversation.

2. If possible, ask your secretary to joint you in your office, put the caller on loudspeaker to have a witness to the conversation.

3. Keep the conversation to a minimum, try to persuade the caller of the need to speak with the accused directly as early in the conversation as possible.

4. If at all possible, avoid discussing the events surrounding the charge with the caller.

5. Advise the caller of the conflict of interest rules that govern solicitors and that both they and the accused will need to sign a consent for you at act for the accused.

6. NEVER say anything to the complainant to suggest that they should not turn up to court to give evidence at the hearing of the matter.

7. Confirm your discussion with the caller in writing to them.

Scenario 2.

You have arranged an initial conference wit a client charged with a DV offence. When you come out to the waiting room to greet them, you realise they are accompanied by their partner- who is the complainant. What do you do?

Thankfully, the answer in a circumstance of this kind is relatively straight forward. Quite apart from the intricacies of communication with complainant s generally, there

is Solicitor's Conduct Rule 25. This rule, with some exceptions which are not presently relevant, prohibits practitioners conferencing two witnesses together. The writer suggests that the only appropriate course of action in a situation where the complainant turns up at a conference with the accused is to politely explain the import of rule 25 and ask the complainant to wait in the reception area or go home.

Scenario 3.

You act for the accused in a DV matter. The complainant has made a statement to police inculpating your client in an assault upon her (or, less frequently-him). Your client tells you that the complainant now wants to retract her allegations. What do you do?

A number of options present themselves for consideration. You could:

a. Tell the client that you can not do anything about that as you can not communicate with the victim at all.

b. Tell the client that she should go to police and tell them that she wishes to make a retraction statement.

c. Tell your client that she should obtain her own independent legal advice about making a retraction statement and the consequences of it.

d. Obtain a statement from the complainant yourself or have one taken by someone else in your firm.

This is a tricky and potentially very controversial topic. As will be seen below, the writer advocates for option d, albeit with significant safeguards. It should be made clear at the outset that in this regard, the writer iv very much Robinson Crusoe. Most commentators would probably advise against this course. However, for the reasons set out below, it the writer's contention that this is not only a permissible approach but, arguably, often the only approach consistent with the solicitor's duty to their client.

As is often the case in the law, an analysis of this scenario must begin with fundamental principles. The fundamental obligation of every legal practitioner is to act in the best interests of their client. When acting for an accused person, that duty encompasses the duty to marshal all available exculpatory evidence. In the case of perishable evidence (that is to say, evidence which may disappear if not secured promptly) it must include the duty to take all reasonable steps to secure the evidence before it perishes. It seems to the writer that a complainant who expresses a wish to retract her allegations falls squarely into the category of exculpatory evidence which is potentially highly perishable, noting what was said above about the potential of such a witness being prone to changing her version of events.

If once accepts the above analysis, simply refusing to do anything at all to secure a retraction statement while it is being offered (option a above) is clearly inconsistent with the practitioner's duties to their client. Arguably, one could adopt option b, and suggest that the complainant approach the police to provide her retraction statement. The difficulty with this option is twofold.

First, practical experience shows that police are very reluctant to take retraction statements and not infrequently simply expressly refuse to do so. This is despite the current official NSW Police code of practice on DV matters requiring police to always investigate when a complainant claims to have fabricated their original allegation (see p.50-51 of the Code of Practice for the NSW Police Response to Domestic and Family Violence).

A further difficulty with this approach is that a police officer who is taking a retraction statement needs to treat the person making the retraction as a suspect, given that they may be about to confess to having made a false complaint to police. Anecdotal evidence suggests that police sometimes tell a person in that position that if they give a retraction statement they may (or sometimes that they will) be charged with a criminal offence themselves and/or give the person a caution about their right to silence before taking the statement. Both approaches usually result in the complainant not proceeding with the retraction statement. In this way, encouraging a complainant to provide a retraction statement to police often results in a loss of that evidence for ever.

Encouraging the complainant to obtain independent legal advice (option c) is also a course fraught with danger. Apart from the expense involved, which many clients cannot afford, most practitioners who advice complainant s who wish to retract their allegations give advice that if she were to retract her initial statement, she would thereby be admitting having made a false complaint to police and expose herself to being charged. While that advice is erroneous (see below), it nonetheless usually results in the complainant sticking to her original allegations.

Regrettably, uncomfortable as it is for the practitioner involved, in the final analysis the only course which is consistent with the practitioner's duty to their client is to arrange for the retraction statement to be taken in-house either by the practitioner or, preferably, another solicitor in the firm. While this is an approach which many practitioners would instinctively recoil from and one which must be approached very delicately, done correctly, there is little to fear from it.

There are a number of safeguards that can, and in the writer's view should, be put in place to protect the practitioner taking the retraction statement from allegations of any impropriety:

1. The arrangements for the complainant to come in and provide a retraction statement should be in writing, via email, so that there is no dispute as to what was (and what was not) said.

2. Before the complainant comes in, she should be informed (not advised, as she is not the practitioner's client) of the following:

a. That she is under no obligation to provide a statement or speak with the practitioner;

b. That the practitioner acts for the accused, and in the interests of the accused;

c. That the practitioner can not therefore provide her with legal advice;

d. That if she decides to meet with the practitioner to provide a statement, the meeting will be audio recorded (or, if preferred video recorded);

e. That she is entitled to seek independent legal advice before deciding whether or not to meet with the practitioner;

f. That the practitioner intends to invite the OIC to be present during the meeting.

3. The practitioner should insist that the complainant confirms, by return email that she has read and understood the information provided in point 2 above;

4. As would be obvious by now, the writer strongly suggests that the entire meeting in which the complainant provides a retraction statement be recorded so there is no room for argument as to what transpired during it;

5. As already indicated, the retraction statement should not be taken by the practitioner who will be appearing as advocate in the proceedings;

6. The complainant should be encouraged to attend the practitioner's office without the accused so as to minimise any suggestion that she was coerced by him into giving the statement;

7. Before the conference is arranged, the OIC should be advised of the practitioner's intention to meet with the complainant and invited to be in attendance if they so wish;

8. During the conference itself, the practitioner should be very careful to adopt an inquisitorial rather than adversarial style of questioning. The questions ought to be open and non-leading. In other words, the style of questioning should resemble examination in chief rather than cross examination.

The second dilemma presented by the reluctant complainant is what, if anything, to say to a client about the possibility that the complainant will not attend court to give evidence. Local Court practitioners are well aware that quite frequently complainants do not attend at hearings to give evidence and that this usually results in the dismissal of the charges. The dilemma is what can a practitioner legitimately say to a client on this topic without encouraging him in turn seek to persuade, or worse still coerce, the complainant to not attend court to give evidence.

It goes without saying that seeking to encourage, persuade or coerce any witness, including a complainant, not attend Court to give evidence is a serious criminal offence contrary to section 325 of the *Crimes Act* and attracts a maximum penalty of 5 years imprisonment. It is taken for granted that no cognitively intact practitioner would ever seek to engage in such conduct. However, practitioners must also be very cautious that they do not inadvertently become accessories before the fact to such an offence by counselling their clients (explicitly or implicitly) to commit such an offence.

On the other hand, ignoring the reality that complainants in DV are not infrequently a 'no show' at hearings is also not an acceptable approach. Given the frequency with which DV complainants fail to attend Court, a practitioner can not properly advise their client of the potential outcomes of the proceedings without adverting to this possibility. Further, an inevitable consequence of the presumption of innocence which forms the bedrock of the criminal justice system is that an accused is entitled to plead not guilty to an offence for no better reason than a hope that the wheels will somehow fall of the prosecution case- including as a result of a non-attendance of a key witness. How than does one balance those conflicts?

It is suggested that in advising an accused person, especially in a DV matter, it is legitimate, and arguably necessary, for the practitioner to advise their client of the potential that if a plea of not guilty is entered the case could be won by default if the complainant chooses not to attend court to give evidence. However, it is very strongly suggested that this advice should be followed by very clear advice about the offence in s325 of the *Crimes Act* and a firm admonition, in strong terms, that neither the client nor anyone else can in any way seek to suggest to the complainant, whether explicitly or implicitly, that she ought not attend court to give evidence.

The last topic related to reluctant complainants is the question of what is the proper advice to give when one is acting for a complainant who seeks advice on how to stop criminal proceedings commenced as a result of a false complaint made by her to police. As mentioned in passing above, the writer is of the view that the advice given by most practitioners in this circumstance is erroneous.

The advice most commonly dispensed in these circumstances seems to be that if the complainant were to give evidence to the court which contradicts her statement, she could be charged with a criminal offence of making a false complaint to police. As a result, most complainants who seek independent advice regarding the possibility of retracting their allegations ultimately do not do so.

There are two problems with the advice described above. First, it ignores the fact that perjury is also a criminal offence. Hence, if a practitioner is instructed by the complainant that her original statement to police was untrue, it would be most inappropriate, and in fact criminal, to encourage that complainant to stick with her original statement in her evidence in court. Such advice is tantamount to being an accessory before the fact to perjury.

Fortuitously, there is a solution to this conundrum. It lies in s128 of the *Evidence Act*. That section provides for a mechanist by which a person who is concerned that they may incriminate themselves by the evidence they give can obtain a certificate which protects them against the evidence they give being used against them in other proceedings. Hence, a complainant who has made false allegations in a statement to police simply has to invoke the s128 procedure before giving substantive evidence of the relevant events and she is protected from that evidence being used to prosecute her for having made the false allegations in the first place.

There are two notes of causation which need to be borne in mind in the scenario. First, careful attention must be paid to the procedure of invoking s128. The procedure is simple, and it is not proposed to go into it here, however the practitioner giving advice on s128 should of course make sure that they review the section and advise their client carefully of the required steps.

Second, a s128 certificate only provides protection in respect of evidence given in court, no such protection is available for out of court statements. This means that, regrettably, a complainant in this circumstance should be advised that the matter must proceed to hearing and she can not give a retraction statement to police and, in fact, she should not make an admission to having lied to police to anyone, including the accused (although often that ship has long sailed by the time the complainant is seeking legal advice) . This can become tricky because the complainant will usually want to stop the proceedings before they get to a hearing and will want to tell the accused that she has lied to police but has now fixed the problem.

2. Keeping out admissions.

Most Local Court practitioners are alive to the need to carefully consider the admissibility of any admission made by an accused and are attuned to various circumstances in which the admissibility of such an admission can be challenged. A failure to caution the accused is one such circumstance, admissions not made voluntarily is another. This section of the paper seeks to bring to the forefront a less often utilised provision of the Evidence Act which, in the right circumstances, can be used to challenge the admissibility of admissions to good effect. That provision is s85, it reads as follows:

85 CRIMINAL PROCEEDINGS: RELIABILITY OF ADMISSIONS BY DEFENDANTS

(1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:
(a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence, or

(b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

Note : *Subsection (1) was inserted as a response to the decision of the High Court of Australia in Kelly v The Queen(2004) 218 CLR 216 .*

(2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

(3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:
(a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject, and

(b) if the admission was made in response to questioning:
(i) the nature of the questions and the manner in which they were put, and

(ii) the nature of any threat, promise or other inducement made to the person questioned.

This provision can sometimes be deployed quite powerfully. This is because the language of the section makes it clear that once the defence establishes the preconditions that the statement sought to be excluded is an admission and that is was made in the circumstances described in s85(1), it bares only an evidentiary onus to raise the issue of whether the circumstances of the making of the admission are such that the truth of it was not adversely effected. Thereafter, the burden shifts to the prosecution to establish, on balance (not beyond a reasonable doubt) that the admission was made in circumstances where the truth of it was not likely to be adversely affected. The best way to demonstrate the possible use of this section is with an example based on a recent matter the writer had. Some of the details have been changed to protect confidentiality and distil the s85 point from other issues in the case, however the relevant facts are real.

The writer recently had a matter wherein the accused was charged with DUI, one count of possessing goods suspected of being stolen or unlawfully obtained and possession of a prohibited drug- being ice. The offences were detected as a result of the accused's erratic manner of driving. He was driving along a street near the CBD at an exceedingly slow speed and stopping in the middle of the road for no apparent reason. Police pulled him over for an RBT, which was negative. However, police made observation of his behaviour consistent with affectation by an illicit substance, including that he was rambling incoherently.

He was subjected to a road-side sobriety test which he unsurprisingly failed. Police then obtained from him a sample of his blood under clause 15 of schedule 3 of the *Road Transport Act* 2013. Subsequent analysis of the sample showed high levels of methylamphetamine in his system. To support the charge of DUI, police obtained an expert opinion from a pharmacologist who, again unsurprisingly, opined that that the accused was well under the influence that his judgment was severely affected.

The drug and "goods in custody" charge arose out of a search of the accused's wallet which revealed that he had a small quantity of ICE and a credit card issued in a name other than the accused and not known by him.

The DUI and possession charges were pleas of guilty. The more concerning charge for the accused was the goods in custody charge as it may have impacted on his employment given that it is an offence involving dishonest conduct. His instructions were that the card was found by him in a night club that night and he was simply being a good Samaritan and taking it home so that he could call the bank the following morning to have it cancelled. The problem was when he was questioned by police at the scene, he made admissions inconsistent with his present instructions. If his defence was to have any chance of success, it was imperative to have those admissions excluded.

The course adopted was unusual. Probably to the surprise of the prosecution, the defence served on the prosecution its (the prosecutions) own pharmacological report along with representations to withdraw the goods in custody charge on the basis that the admissions at the scene were likely to be excluded under s85 based on the prosecutions own ample evidence that the accused was heavily effected by drugs at the time of making the admission. The representations were initially refused but the charge was than withdrawn on the day of the hearing.

3. Tendency

Tendency evidence can be a powerful rhetorical tool. It is most commonly used by the prosecution in sexual assault trials. It very rare for tendency evidence to be tendered in Local Court proceedings and almost unheard of for defence to adduce such evidence. In this section, the writer seeks to persuade practitioners to pay more careful attention to how tendency evidence can be useful to the defence.

The law of tendency is a complicated beast. Much jurisprudence is devoted to dealing with the question of the circumstances under which tendency evidence is admissible, including some important recent decisions from the Hight Court. However, this paper will not concern itself with seeking to explore this topic. Partly because it is too wide a topic to do justice in the space available, partly because of a determination to keep this paper as practical, and hence free from elaborate legal analysis as possible, but mostly because the law of tendency is almost certain to be fundamentally reformed in the very near future as a result of the recommendations made by the child abuse royal commission. This than is not the best time to embark

upon a comprehensive analysis of a law which is likely to look very different in the near future.

Tendency evidence is presently greatly underutilised by the defence. A view seems to have developed that tendency is something only useful to the prosecution. In the writer's view, that is not so. Tendency evidence can be deployed by the defence in many cases, even in the Local Court.

It can be especially useful in domestic violence cases. Consider a case wherein a female complainant makes an allegation that her partner has assaulted her, and there is evidence of injuries to her supporting her version of events. The accused agrees that there was a physical altercation and that he caused the injuries but says that they were inflicted in self-defence. His version is that his partner often becomes violent when she is drunk and that on the evening of the alleged offence, she once again came home drunk, started an argument and then attacked him physically, prompting him to defend himself. A struggle ensues during which the complainant received injuries.

In a case such as this, it is very useful to establish that the complainant indeed has a tendency to be violent towards her partner when intoxicated. There may well be witnesses available who observed previous incidents between the couple which can bear out the existence of the asserted tendency. Such evidence can be quite powerful and should be adduced at the hearing if at all possible.

It should be acknowledged that leading tendency evidence of this kind may irritate some Magistrates, who are under enormous pressure to get through cases quickly and are therefore keen to confine the hearing to the facts of what had occurred on the night in question. The writer's suggestion is that the possibility of irritating the bench in this way ought not dissuade the practitioner from adducing the evidence because if the matter ends up in the District Court on appeal, the approach of the Judge may well be very different.

4. Reverse complaint evidence

Reverse complaint evidence is another category of evidence greatly underused in Local Court proceedings despite its potentially significant probative value. Some practitioners may not even have heard of reverse complaint evidence.

Complaint evidence is common-place in the District Court and increasingly so in the Local Court. It is evidence that the complainant had complained to some other person or persons (sometimes to police) about the alleged offence. Complaint evidence is, on its face, hearsay. It is evidence of an out of court statement made by the complainant to another person. This notwithstanding, it is admissible under s66 of the *Evidence Act*. Section 66 creates exception to the hearsay rule which allows for admission of hearsay statements as long as:

a. The maker of that statement has been or it to be called to give evidence and;

b. The occurrence of the asserted fact is fresh in the mind of the maker at the time the statement is made.

A common example of complaint evidence in the Local Court are “000” call recordings made by a complainant at the time of reporting the offence.

Reverse complaint evidence is also admissible under the s66 exception. It can be led by defence where the accused is giving evidence in the defence case and in his evidence is advancing an alternative version of the relevant events, that is, an exculpatory version different to that contended for by the prosecution see *R v Crisologo (1998) 99 A crim R 178.*

Essentially, reverse complaint evidence is evidence by a witness other than the accused to the effect that the accused discussed the incident giving rise to the charges with him or her prior to being arrested and provided a version consistent with the version the accused is presenting to the court. To illustrate by way of example, take a matter concerning an allegation of a common assault, where the defence version is that there was an argument between the complainant and the accused and it was the complainant who struck the accused and then said “I’m going to get you in trouble with the police”. Reverse complaint evidence would be evidence from the accused’s friend that the same day as the alleged offence the accused spoke to this friend and told him that the complainant assaulted him and then threatened to report him (the accused) to the police.

5. Costs

In the criminal jurisdiction, application for costs are far and few between. When they are made, they are generally made under the provisions of the *Criminal Procedure Act* 1986. Succeeding in an application for costs under this act is no easy task. Without going into the minutia of relevant provisions, generally, the applicant must demonstrate some kind of improper or unreasonable conduct on the part of the prosecution. There is however another act which allows the Local Court exercising its criminal jurisdiction to make an order for costs, and the test for the making of an order is different and often much less difficult to reach.

The legislation in question is the *Costs in Criminal Cases* Act 1967. This act allows an accused person who has been found not guilty or where charges have been withdrawn to apply to the court to issue a certificate as to costs. That certificate is than submitted to the Attorney Generals department who determine the quantum of costs to be paid pursuant to the certificate.

Significantly, the test for the granting of the certificate (set out in s3) is that :

> *“in the opinion of the Court or Judge or Magistrate granting the certificate:*

(a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings, and

(b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances."

Generally, this test is easier to meet than that under the *Criminal Procedure Act* because it does not require any unreasonableness on the part of the prosecution. It casts the focus firmly on the hypothetical issue of whether the evidence as it actually unfolded in the hearing would have been sufficient to justify the laying of the charges if it had been known to the prosecution at the time of the charges being laid.

A very helpful authority on the principles governing the application of the *Costs In Criminal Cases Act* is *Mordaunt v Director of Public Prosecutions & Anor* [20007] NSWCA 121. At paragraph 36 of that decision McColl JA distils out from the authorities dealing wit the application of this act, in point form, 17 principles. It is lengthy, but well worth reproducing in its entirety.

36 The following principles can be extracted from the authorities dealing with applications for a s 2 certificate:

(a) The CCC Act is reforming legislation with a beneficial purpose designed to confer valuable privileges upon persons who succeed in criminal prosecutions; its provisions should not be narrowly construed so as to defeat the achievement of its general purposes: Nadilo v Director of Public Prosecutions (1995) 35 NSWLR 738 at 743 per Kirby P; see also Allerton v Director of Public Prosecutions (1991) 24 NSWLR 550 (at 559-560) per Kirby P, Meagher JA, Handley JA;

(b) The judicial officer dealing with an application for a certificate need not be the trial judge: R v Manley [2000] NSWCCA 196; (2000) 49 NSWLR 203 (at [61]) per Simpson J (Wood CJ at CL agreeing); Solomons v District Court of New South Wales per McHugh J (at [47], footnote 42); however it is "always preferable for such an application to be made to the judicial officer determining the original proceedings on its merits, or to the Court of Criminal Appeal that hears and allows an appeal": Manley, per Wood CJ at CL (at [4]), per Sully J (at [49]);

(c) The "institution of proceedings" in s 3 refers to the time of arrest or charge not to some later stage such as committal for trial or the finding of a bill: Allerton (at 558);

(d) The applicant for a s 2 certificate bears the onus of showing it was not reasonable to institute the proceedings; it is not for the Crown to establish, nor for the Court to conclude, that the institution of the proceedings, was, or would have been in the relevant circumstances, reasonable: Manley (at [15]) per Wood CJ at CL; R v Johnston [2000] NSWCCA 197 (heard concurrently with Manley) (at [17], [29]) per Simpson J (Wood CJ at CL agreeing);

(e) The task of the court dealing with an application under the CCC Act is to ask the hypothetical question, whether, if the prosecution had evidence of all the relevant facts immediately before the proceedings were instituted it would not have been reasonable to institute the proceedings: Allerton (at 559 – 560); the judicial officer considering an application must find what, within the Act, were "all the relevant facts" and assume the prosecution to have been "in possession of evidence of" all of them and must then determine whether, if the prosecution had been in possession of those facts before the proceedings were instituted, "it would not have been reasonable to institute [them]; an applicant for a certificate must succeed on both the "facts issue" and the "reasonableness issue": Treasurer in & for the State of New South Wales v Wade & Dukes (Court of Appeal, 16 June 1994, unreported, BC9402561) per Mahoney JA (with whom Handley and Powell JJA agreed); Ramskogler (at 134 – 135) per Kirby P;

(f) The hypothetical question is addressed to evidence of all of the relevant facts, whether discovered before arrest or before committal (if any); after committal and before trial; during the trial; or afterwards admitted under s 3A of the CCC Act; all of the relevant facts proved, whenever they became known to the prosecution and whether or not in evidence at the trial, must then be considered by the decision-maker: Allerton (at 559 – 560); Manley per Wood CJ at CL (at [9]); the relevant facts include those relevant to the offences charged and the threshold question posed by s 3(1)(a); other facts will also be relevant and admissible going, amongst other things, to the question posed by s 3(1)(b) and to the ultimate question whether, assuming that the court is of the opinion required to be specified, it should exercise its discretion under s 2: Gwozdecky v Director of Public Prosecutions (1992) 65 A Crim R 160 (at 164 – 165) per Sheller J (with whom Mahoney JA and Hope AJA agreed);

(g) Courts should not attempt to prescribe an exhaustive test of what constitutes unreasonableness for the institution of the proceedings within the meaning of s 3(1)(a): Fejsa v R (1995) 82 A Crim R 253 at 255; Manley per Wood CJ at CL (at [13] – [14], however the factors set out in (h) – (n) have been identified as germane;

(h) The reasonableness of a decision to institute proceedings is not based upon the test that prosecution agencies throughout Australia use as the discretionary test for continuing to prosecute, namely whether there is any reasonable prospect of conviction, nor is it governed by the test in s 41(6) of the Justices Act 1902 [prior to its repeal] applied by magistrates, namely whether no reasonable jury would be likely to convict; the test cannot be a test of reasonable suspicion which might justify an arrest and it cannot be the test which determines whether the prosecution is malicious: R v McFarlane (Blanch J, 12 August 1994, unreported); app. Manley per Wood CJ at CL (at [12]), per Sully J (at [42]); Regina v Hatfield [2001] NSWSC 334; (2001) 126 A Crim R 169 per Simpson J; and adopted by Blanch AJ (with whom Spigelman CJ and Simpson J agreed) in Regina v Ahmad [2002] NSWCCA 282;

(i) The fact a prosecution may be launched where there is evidence to establish a prima facie case does not mean it is reasonable to launch a prosecution; there may be cases where there is contradictory evidence and where it is reasonable to expect a prosecutor to make some evaluation of that evidence: McFarlane; app. Manley per Wood CJ at CL (at [12]);

(k) The fact that a court concluded the evidence was insufficient to warrant a conviction is not necessarily indicative of unreasonableness: R v Williams; ex parte Williams [1970] 1 NSWR 81 (at 83) per Sugarman P (with whom O'Brien J agreed; cf Manning JA (at 85));

(l) The fact that a court enters a judgment of acquittal in favour of an accused does not mean that it was not reasonable to have prosecuted; sometimes that course is followed rather than to order a new trial if (for example) the accused has already served most of the sentence imposed upon him or her: Fejsa (at 255); cited with approval in Hatfield (at [9]) per Simpson J;

(m) Section 3 calls for an objective analysis of the whole of the relevant evidence, and particularly the extent to which there is any contradiction of expert evidence concerning central facts necessary to establish guilt, or inherent weakness in the prosecution case; matters of judgment concerning credibility, demeanour and the like are likely to fall on the other side of the line of unreasonableness, being matters quintessentially within the realm of the ultimate fact finder, whether it be Judge or Jury: Manley per Wood CJ at CL (at [14]); Johnston (at [26] [29]) per Simpson J (with whom Wood CJ at CL and Sully J agreed); it is not sufficient to establish the issue of unreasonableness in favour of an applicant for a certificate that, in the end, the question for the jury depended upon word against word; in a majority of

such cases, it would be quite reasonable for the prosecution to allow those matters to be decided by the jury; it would be different where the word upon which the Crown case depended had been demonstrated to be one which was very substantially lacking in credit: R v Dunne (Hunt J, 17 May 1990, unreported);

(n) The mere fact that the Court of Criminal Appeal allows an appeal and enters a verdict of acquittal upon the "unsafe and unsatisfactory" ground, is not necessarily a touchstone for an exercise of the discretion in favour of the applicant: Manley per Wood CJ at CL (at [15]);

(o) In considering an application for a certificate it is relevant to have regard both to the information in the possession of the prosecuting authorities, and the conduct of the defendant, bearing in mind the essentially adversarial nature of a criminal prosecution and the tactical decisions that are legitimately a part of the process: Manley per Simpson J (at [76]) (Wood CJ at CL agreeing);

(p) Section 3(1)(b) recognises that tactical considerations and decisions are legitimate in the defence of criminal charges, and the potential value to an accused person of retaining the element of surprise in the confrontation of prosecution witnesses, or the presentation of the defence case; it will primarily be directed to omissions, for example cases in which defence material has been, for tactical or strategic or other reasons, withheld from the prosecution; it is also wide enough to encompass positive acts such as the (probably more unusual) case where the defence has deliberately in some way misled the prosecution; it is not in every case where defence evidence has been deliberately withheld from the prosecution that a court will consider that the omission to supply the material to the prosecution was not reasonable in the circumstances: Johnston (at [18]); see also Hatfield (at [12]).

(q) Delay in foreshadowing and making the application may be relevant to the exercise of the discretion whether to grant a certificate: Manley, per Wood CJ at CL (at [6]), Sully J (at [49]), Simpson J (at [80]); Johnston, [2000] per Sully J (at [10]);

(r) Before a certificate is granted, the judge must have formed an opinion specifying the matters in s 3(1)(a) and (b), and must also exercise the residual discretion, contemplated by s 2, to grant a certificate: Ramskogler (at 140) per

Handley JA; (at 142) per Sheller JA; cf Solomons v District Court of New South Wales (at [50]) per McHugh J."

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