APPROACH TO THE PREPARATION OF THE CASE FOR THE PROSECUTION BEFORE THE CIRCUIT COURT AND THE RESIDENT MAGISTRATE'S COURT

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General Observations:

Because of the difference in process, pleading, procedure and practice, it will be convenient to deal with the preparation of cases in the Circuit Courts separately from the Summary Courts. Nevertheless, there are certain general and fundamental principles common to both. This is so because, inter alia, the standard and burden of proof and the rules of evidence are in general the same for both jurisdictions.

According to the draft 'Uniform Crime Charging Standards in the State of California':

> "Prosecution of the guilty is designed to serve four basic goals:
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> 1. The protection of society from individuals who pose a danger to the persons or property of other individuals;
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> 2. The deterrence of other individuals from posing a similar danger in the future;
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> 3. The rehabilitation of guilty individuals so that they can become law abiding members of a free society and thus permit other individuals more secure enjoyment of their freedom;
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> 4. The punishment of guilty individuals for failing to fulfil their responsibility to obey the laws on which the preservation of an orderly and free society rests."

In pursuit thereof a prosecutor in drafting his information or indictment and in presenting his case must concern himself primarily with the following:

(1) Is there evidence that an offence has been committed?

(2) Is the evidence admissible and sufficiently probative to prove the essential elements constituting the particular offence(s) contemplated?

(3) Is there sufficient evidence to establish the identity of the accused as perpetrator or particeps crimimis?

(4) If culpability depends on complicity, is there evidence to prove a common design?

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(5) Does the evidence in its totality present a prima facie case (taking into consideration any special evidential requirement, whether of law or practice, e.g. corroboration of an accomplice's testimony or of a complainant in a sexual case, etc.)?

(6) Selecting the more appropriate charges and avoiding unnecessary alternatives and multiplicity of charges.

1. Evaluating the Evidence - Some important considerations

(i) The admissibility of any statement given by the accused. In that regard, the circumstances should be investigated to establish voluntariness and so determine its admissibility.

(ii) Statement of person who took accused into custody or arrested him and the attendant circumstances.

(iii) Scientific evidence, whether in deposition or certificate, should be carefully considered for its effect whether probative of guilt or exculpatory.

(iv) Whether or not there is any evidence to challenge or give the lie to an exculpatory statement by the accused.

(v) Corroboration. Consider whether corroboration is

(a) essential, or

(b) desirable.

Re (a) - If it is essential, e.g. the unsworn evidence in the case of a child of tender years and if such corroboration is non-existent or unattainable then prompt steps should be taken to put an end to the proceedings by offering no evidence or the entry of a Nolle Prosequi. Re

Re (b) - Notwithstanding the absence of corroboration, is the uncorroborated evidence credible and cogent?

2. Proof of the Essential Elements Constituting the Offence

The prudent course is to enumerate and categorise the essential elements of an offence and for each category ask the pertinent question - is there any evidence to prove this? In that regard, you are entitled to

include reasonable inference.

Interviewing Prospective Witnesses

Unlike the American system where the District Attorney or his assistant is virtually part of the investigating team, in the British/ Jamaican syatem, the Prosecuting Cfficer is an advisory associate rather than an active participant in the investigatory process.

The American system, whilst it often produces a more finished and thorough investigation, has this disadvantage: the District Attorney, being himself so closely concerned with the investigations, in the evaluating of the evidence is unable to give the matter a truely objective assessment and the desire to prove himself right is often sufficiently strong to cause him to strive for a conviction rather than to seek a decision that is but just and fair.

Accordingly, in our system witnesses are not interviewed as a rule. However, just as a visit to a locus is often helpful in presenting the case, an interview before trial is sometimes necessary and useful Thus it may be helpful to interview, e.g.

(i) a child- to observe his demeanour and assess his intelligence and to ascertain his appreciating the necessity to speak the truth and whether or not he understands the nature and obligation of an oath;

(ii) an accomplice - to learn if he is still willing to give evidence for the Prosecution despite the delicacy of his position;

(iii) expert witness - for elucidation or further opinion on matters within his competence.

Witnesses to the facts ought not to be interviewed together to avoid the risk of one influencing the other.

If a witness expresses a desire to refresh his memory from his statement he should be allowed to do so but the modern view is that his so doing should be made known to the defence before he is called.

See R. v. Webb (1975) Cr. L.R., p. 159.

Circuit Court

Unless the Department of Public Prosecutions advises on

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for the Circuit Court comes to the Director of Public Prosecutions after committal by the Clerk of the Courts transmitting the Deposition and committal proceedings. In committals from the country parishes for the country Circuits the Clerk of the Courts provides the necessary copies of the Depositions for the use of the Presiding Judge and for Counsel on both sides. In committal for the Home Circuit the Depositions are copied in the typing pool of the Registry and then returned to the Department for Indictment to be preferred. In the more spacious days before Independence Resident Magistrates and Clerks of the Courts were inclined to be more considerate and if the Circuit was too near committals would be deferred until the Circuit opened, then the committal would be for the next ensuing Circuit. A committal for a Circuit in session is bad in Law.

Generally, the Indictment is preferred on the basis of the evidence contained in the committal proceedings.

The Indictment is not limited to, nor must it necessarily include the charge on which the Preliminary Examination was ordered

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and held, but may include such counts as are disclosed by the evidence or statements (Section 43 Justice of the Peace Jurisdiction Act) but the addition of fresh counts ought not to be unfair to the accused. R. v. Nesbeth (1972) 55 C.A.R. p. 490.

Because of the power conferred on the Director of Public Prosecutions to present Voluntary Bills (section 2 of Criminal Justice Administration Act) even if the information upon which the Preliminary Examination was ordered is defective, the Indictment would still be valid. R. v. Archie Sam Chin (1961) 3 W.I.Reports p. 156 - for the English position (see R. v. Shakeshaft (1960) Cr. L.R. p. 207).

In recent years Preliminary Examinations are either made a trial run by defence Counsel in which case there are pages and pages of crossexamination (most of it fishing) or go to the other extreme and are so terse as to be unable to present a clear and comprehensive picture. In that regard, important witnesses are frequently not called or, if called, important details are omitted from their Depositions.

Accordingly, Crown Counsel more often than not in important cases has to seek from the Police statements additional data and

information to enable him to draft the proper charges. In rare cases further investigation is often necessary. Of course, where fresh evidence is to be introduced this necessitates the serving on the defence Notice of additional evidence.

In the event that one of the accused was wrongly discharged at Preliminary Examination, it is open to the Director of Public Prosecutions to present a Voluntary Bill under provisions of section 2 of the Criminal Justice Administration Act. However, the prudent course is to apply to a Judge for his consent to a Voluntary Bill rather than the D.P.P. presenting an indictment on his own volition for two reasons:

(i) So doing removes any suggestion or atmosphere of arbitrariness.

(ii) Since D.P.P. has no power to issue process compelling appearance, enlisting the Judges aid in presenting the Voluntary Bill automatically ensures his assistance in the issue of the necessary process.

Witnesses at the back of the Indictment

Counsel should be careful not to include on the back of the Indictment witnesses he does not intend to call. Where the witness is included at the back of the Indictment, although the Prosecution has a discretion whether or not to call the witness, this discretion must be exercised in a manner calculated to further the interests of Justice and at the same time fair to the defence. Accordingly, failure to call a witness whose name is on the back of the Indictment unless there is clearly good cause for so doing may open the prosecution to uncomplimentary criticism and the Judge may "invite" the Prosecution to call the witness. R. v. Oliva (1965) 49 C.A.R. p. 298.

The Court, however, will not usually interfere with the exercise of the discretion unless it can be shown that the prosecutor was influenced by some "oblique motive". Adel Mohammed el Dabbel v. Attorney General for Palestine (1944) A.C. 156.

However, if the witness is not on the back of the Indictment the duty of the prosecution is to make the witness available to the defence - no duty to supply defence with a copy of the statement of such witness.

Witness who are dead or so ill as to be unable to attend or who are absent from the Island or insane.

In section 34 of the Justices of the Peace Jurisdiction Act, there are provisions for the reading of the Depositions of the witnesses who are unable to attend from the reasons set out above. Evidence to establish that the witness falls within one of these categories should be obtained and tendered as a basis for the reading of the Depositions. Appropriate notices of intention to adduce this evidence should be served on the defence. In a recent Judgment of the Court of Appeal an appeal was allowed on the basis that the Deposition of a dead witness was improperly admitted. The Judgment failed to deal with the distinction between a dead witness and an absent one and gave no helpful interpretation to the proviso to section 34 or to distinguish R. v. Linley (1957) C.L.R. p. 123 which was concerned with a witness absent through illness.

Resident Magistrates Courts

Indictments

Many serious offences are triable on indictment in the Resident Magistrates Court. Section 268.

The procedure is by way of a Voluntary Bill presented upon an Order for indictment made by the Resident Magistrate - section 272.

In making the Order, the Resident Magistrate is not limited to the charge in the information but may direct the presentation of an indictment for "any offence disclosed in the information or for any other offence or offences", but the information must charge an indictable offence. R. v. David Griffiths R.M. Cr. Appeal 178/70.

Before making an Order the Magistrate shall make the "necessary enquiry" to ground the making of the Order. Although the Magistrate is thereby empowered to examine exhibits and even documents prejudicial to the defence (R. v. Juror (1933) J.L.R. p. 24 at p. 34) yet there is no duty on him to do so, and the proper and usual practice is for the Counsel or the Clerk of the Courts to open to the facts and to ask for an Order for indictment containing such counts as may be founded on the adducible evidence and in keeping with the established principles of pleading and practice.

To effectively accomplish this the Clerk of the Courts or

Counsel must critically examine the statements and exhibits and prepare a draft indictment. He should be careful to see

(i) that the Resident Magistrate signs the Order for Indictment (R. v. Joscelyn Williams et al (1958) 7 J.L.R. p. 129;

(ii) that this is done before the draft Indictment is signed by him.

Failure to observe these requirements, and in sequence, will result in the trial being mulity. R.v. Monica Stewart (1971) 17 W.I.R. p. 381.

As the same Resident Magistrate who made the Order has to try the case, it is imprudent to have the Order signed on a remand or mention date since Resident Magistrates may quickly pass up on promotion, pass out on retirement, pass on in transfer or pass by. See Rex v. David Ebanks (1944) 4 J.L.R. p. 158.

In drafting an Indictment in the Resident Magistrates Court, there are the same principles as regards duplicity joinder of persons and joinder of counts as in the Circuit Court. Duplicity is matter of form and not evidence - R. v. Greenfell et al (1973) 1 W.L.R. p. 1151. On the question of amendment it may be argued that the powers of the Resident Magistrate may even be wider than those of a Judge of the Circuit Court. *(Section 278 Judicature (Resident Magistrates) Act as interpreted in R. v. Egbert Wilson (1953) 6 J.L.R. p. 269. However, the current trend is to relax the technicalities in criminal pleadings and to permit relevant amendments including the addition of fresh counts. See R. v. Radly & Others (1974) 58 C.A.R. p. 394.

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*Section 278

At any stage of a trial for an indictable offence before sentence, the Court shall amend or alter the indictment so far as appears necessary from the evidence or otherwise, and may direct the trial to be adjourned or recommenced from any point, if such direction appears proper in the interest either or the prosecution of of the accused person.

Summary Jurisdiction

The Summary Courts are

(1) Resident Magistrate, exercising Special Statutory Jurisdiction;

(2)(a) Petty Sessions Court presided over by Resident Magistrate,

(b) Petty Sessions Court presided over by two Justices of the Peace in respect of offences over which Jurisdiction is specifically conferred by any Law. (Interpretation Act).

The Resident Magistrate may preside in (1), 2(a) and also 2(b) by virtue of section 63 of the Judicature (Resident Magistrates) Act.

Because of important procedural and substantive differences in (1)and (2), including the procedure on appeal - offences under (1) and (2) even if they arise out of the same transaction and against the same person cannot be tried together; a fortiori if one offence is indictbale and the other summary. Such a joint trial would be a mullity.

Accordingly, if the charges can be confined to one Jurisdiction this may save a multiplicity of trials.

Drafting Information

After evaluating the evidence care should be taken to see that the information reflects the offence. In general, summary offences are statutory breaches and a good working rule is that the wording of the information should follow as closely as possible the words of the Statue at the same time taking care to avoid duplicity.

When the original information is defective and it is necessary to present new charges the prudent course is to try the new and valid information first before disposing of the old to avoid having to argue against the decision in R. v. Benson 4 W.I.R. p. 128: where the withdrawal of the information after a plea of not guilty was held to be a dismissal, but the correctness of this decision is doubtful since a trial does not begin until evidence is heard. To hold that there was a dismissal on the merits when the trial had not commenced seems illogical. See R. v. Crashe (1957) 2 Q.B. p. 591,(1957) 2 A.E.R. p. 772.

Some Prudent Pre-trial Measures

(a) Process

In every case before trial begins, the returns of all relevant process should be checked for proper service. In the absence of a party, no further action can be taken on defective process. Further it saves time and embarrassment if the prosecution knows before the case is brought on whether or not the requisite services of process have been effected.

(b) Exhibits

The existence of the exhibits should be ascertained. Except where a statute or other rule of Law renders a documentary exhibit admissible for the facts therein asserted, every exhibit has to have a living witness whose oral testimony is the vehicle which carries it into evidence. In criminal case an exhibit cannot be tendered and admitted "by consent".

Care should be taken to see that such evidence identifies the exhibits and renders it relevant and exposes its probative value.

(c) Gazette and other Documentary exhibits which are rendered admissible by some act for facilitating proof.

These documents should be to hand so that they can be tendered as early as is convenient. Although the Court would in general permit the reopening of the prosecution's case to admit such a document yet if the document is not a more formality but to prove an essential element in the offence such permission ought not to be granted after the close of the defence. See Palastanga & Solomon (1962) C.L.R. p. 334, but in the C.M. Criminal Appeal No. 40 of 1975 - R. v. Wesley Lyn Cook - B. Merchandise Control Order the Court of Appeal allowed the appeal where after the close of the defence and submissions by defence Counsel the Judge reopened the case to put in the Gazette to prove the article was controlled and the price at which it was controlled. The price inspectors in evidence having omitted to say what was the controlled price of the article.. Apparently, the Court was of the view that this was unfair and unjust to the defendant.

PART II

PRESENTATION OF CASES IN THE RESIDENT MAGISTRATE COURTS

Indictments

Although there is no statutory provision as to addresses, the prosecuting officer should open to the facts for the following reasons:

(1) As a basis for the application for an order for an indictment in the terms of the draft indictment.

(2) To inform the defence of the nature of the Crown's case.

(3) Because this is implicit in the provisions of sections 272 and 273 of the Resident Magistrates Jurisdiction Act.

In summary offences there is no obligation to open, but in an important or involved case the defence may ask for particulars and if the request is reasonable the Court may direct that such be furnished.

Presenting the Evidence

The Prosecuting Officer should before calling his witness be mindful of the peculiar position of trial on indictments in the Resident Magistrate's Court, namely that once a Resident Magistrate has made an order the case must be tried by him whereas in summary cases, even after a plea is taken the trial does not commence until evidence is heard and therefore the justices taking pleas need not be the same who try the case.

In presenting the case, the style is the man; there are no hard and fast rules as to the order in which the Prosecution calls its witnesses. However, embrrassment and inconvenience may be avoided and comprehension enhanced if the case is presented as close to the sequence of events as can conveniently be done. Thus endeavours should be made to have an exhibit tendered at the earliest instead of having it marked for 'identity'. The problem is made more difficult by certain Resident Magistrates who are reluctant to admit in evidence any document until it has been completely covered by oral testimony. This approach is unnecessary since the evidential worth of the document cannot be any higher nor more probative at any stage than its cover by oral testimony unless some law facilitates proof by declaring that it may be admitted for the truth of matters therein contained. So that if at the end the

prosecution has not sufficiently covered the document the Resident Magistrate may as the Americans put it "strike it from the record" and consider the case without that evidence.

If the document is merely marked for identity the defence may decline to cross examine on it on the basis that to do so would then put it in evidence. This may be of vital importance where the document is essential to a system whereby many different persons acting within a defined scope contribute to the making of the document. In this regard, I commend for your information and guidance the judgment of the Court of Appeal in R. v. Wong - R.M.C. No. 59 of 1973 - dealing with documents of this nature.

Notwithstanding the absence of hard and fast rules, certain approaches are commendable:

(i) In involved cases of fraud where the fraudulent person takes advantage of a particular system and uses false or falsified documents, it is important at the very outset to establish the system of accounts or business dealing and to select for so doing the witness who is the most competent in terms of position and knowledge.

(ii) In cases of offences against the person and property it is usually convenient to call the complainant first.

(iii) Although in tendering admissions and confessions in the Resident Magistrate's Court there is no jury to be sent out and therefore in the strict sense of the phrase there is no "trial with a trial" yet because admissions and confessions though relevant are only admissible if voluntary the prosecution's obligation is the same - namely to prove beyond reasonable doubt that the statement is voluntary. Equally the Resident Magistrate has the unavoidable duty to decide as a matter of Law whether or not the statement is voluntary and admissible and ought to be admitted. It is therefore necessary to lay the foundation for its admissibility and the better practice is before embarking on this exercise to advise the Court and if the defendant is represented to give his Attorney a copy of the statement (if written) or inform him (if oral)

of the words allegedly used by the defendant.

This will define the nature of the challenge to admissibility (if challenge is being made).

Closing the Crown's Case

Before closing the Crown's case care should be taken to see that all the essential elements of the offence are proved. Although the Court should not in general make excuse for or tolerate carelessness in the prosecuting Officer, yet a strong and important case should not be summarily dismissed for an omission to prove a formality or some relevant fact that from the/conduct of the defence was not only not challenged but the defence proceeded on the basis that that fact had been proved or existed. Thus the case should be reopened to prove the parish in which the offence occurred or the value of the goods stolen, or the owner of such goods. In R. v. Kenneth Codner 6 J.L.R. p. 339, the Court went very far indeed in re-opening the Crown's case.

In that regard, a distinction should be drawn between re-opening a case to cure an evidential omission and cases where rebutting evidence is called to meet an issue arising ex improviso. R. v. Milliken (1969) 53 Cr. Appeal Report p. 330.

At the close of the Crown's case, the Court will rule whether or not there is a case to answer.

The submission - no case to answer - is usually based on one or other or both of the following grounds:

(i) That some essential element constituting the offence has not been proved; and/or

(ii) the case for the Crown has been so discredited or the evidence so unconvincing that a reasonable tribunal would be unlikely to convict on that evidence. Practice Note of Divisional Court (1962) 1 A.E.R. 448.

A Prosecuting Officer if called upon to reply to submissions for which for one good reason or another he is not prepared to answer then and there should not hesitate to ask for an adjournment to examine the authorities and to research the point. R. v. Madden (1975) C.L.R. p.583.

If the defence intends to call witnesses other than the defendant, he may open his case. The presenting of evidence other than the defendant's (even documentary evidence) gives the Prosecution a

right to reply. If the defence calls witness to the facts then in general the defendant (whether on oath or statement from the dock) goes first. R. v. Smith (1968) 52 Criminal Appeal Report p. 224.

The procedure for Petty Sessional Proceedings is set out in the Justices of the Peace Jurisdiction Act, section 13 - neither side is entitled to an address upon the facts as distinct from submissions on the law. The Court, however, may permit or invite addresses.

Change of Plea

After a trial has commenced, if the prisoner exoresses a desire to change his plea then he should be re-arraigned and the plea should come form his own lips. Here as always the plea must be unconditional and unambiguous. At this state a formal verdict in keeping with the plea must be entered. R. v. Hancock 23 C.A.R. p. 16.

Plea Bargaining

The directions in R. v. Turner (1970) 54 C.A.R. p. 352 provide a useful guide and are appended.

Where the indictment contains two counts in descending order of gravity then a plea of guilty to the lesser offence even if not accepted by the Prosecution at the time, may still be accepted even after an unfavourable verdict, provided that issue estoppel does not arise (R. v. Hogan (1974) 2 A.E.R. p. 142).

On the other hand, where there is only one count upon which a plea to a lesser offence may be made because the greater include the lesser, e.g. a plea to common assault on an indictment for Wounding, then if such a plea is not accepted and upon trial a verdict of acquittal is entered that would be an end to the matter in that no judgment could then be entered on the rejected plea. R. v. Hazeltine (1967) 2 Q.B. p. 857; (1967) 2 A.E.R. p. 671. See also R. v. Kelly (1965) 49 C.A.R. p. 352.

Multiple Trials

Where a defendant is charged with several offences or sets of offences in which there are common questions of law and fact but these offences cannot either validly or conveniently be tried together then if there is a conviction on one set the prudent course would be to adjourn the others until proceedings on appeal are concluded or abandoned or the right to appeal extinguished by effluxion of time.

If on the other hand there is an acquittal on the merits, the proceedings in the other cases ought to be summarily terminated in the defendants favour.

In either case it is a matter in the discretion of the Court.

Alternative Counts

Where the counts on the possible verdicts are or may be in a descending order of gravity then verdicts should be taken down the line until a conviction is obtained or the issues are exhausted. On the other hand where the Counts are true alternatives like Larceny and Receiving then a conviction should only be entered on the count to which the evidence more strongly points, i.e. regard must be had to the realities of the matter R. v. Dawson (1960) 44 C.A.R. p. 87 and judgment deferred (or the jury discharged) on the other count. R. v. Seymour (1954) 38 C.A.R. p. 68, R. v. Roma (1956) C.L.R. p. 46.

Conclusion

This brief note is designed to help in certain situations that are likely to occur but there can be so many permutations in sequences and resultant consequences from any given set of factors and circumstances that in the end the quality of a prosecuting officer's performance will depend upon his own ingenuity and intelligence. To that end, he should strive to enhance his inherent ability by studious research and industrious application.

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