

LAW REFORM COMMITTEE

Inquiry into County Court appeals

Melbourne — 14 February 2006

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Mr R. Stary, president; and

Mr B. Doogue, public officer, Criminal Defence Lawyers Association.

The CHAIR — I welcome to this inquiry into County Court appeals representatives from the Criminal Defence Lawyers Association: Mr Bill Doogue is the public officer and Mr Robert Stary is its president. As you are probably aware, this is a hearing under the Parliamentary Committees Act which means all the privileges of the Parliament extend to this hearing. It is subject to parliamentary privilege; it is being recorded by Hansard; it is a public hearing so the presumption is the evidence you give today will be on the public record unless there is any evidence you would like to give in camera in which case if you would request that, that would be appreciated. It is anticipated that within four weeks of this hearing subject to minor corrections to the transcript it will be put up on the web site for other people to peruse. We have to report to the Parliament around about the end of June in relation to this reference. We have received your written submission — thank you for that — and we would appreciate it if you could speak to it and then we would like the opportunity to engage in more informal discussion around the key issues raised in your submission.

Mr STARY — On behalf of the association we are grateful for the opportunity to make a presentation. I think what is clear is that there is some unanimity of view about retention of hearings de novo within the legal profession. From a personal perspective I have practised in the criminal justice area for 25 years and my view is that generally the system has worked reasonably well. I will not speak specifically — I am not going to recite the submission because you have that before you — but I think there are two things we see operating in practice. First is that the administration of criminal justice in the Magistrates Court is done in an expeditious way which is cost efficient and where there is basic fairness and equity and reasonable access to justice from defendants within the summary jurisdiction.

It is an important aspect of the administration of Magistrates Court or the summary jurisdiction — you will have the figures but there is something in the order of 90 000 cases determined in the Magistrates Court — that there is a safety net and that is through an appeal process. If I can use the example where a legal aid duty solicitor might appear for someone who is the subject of an arrest and they are taken before the court, if they think they can resolve the case the following day or the day of arrest minimising inconvenience to the prosecuting agencies and prospective prosecution witnesses and maximising the opportunity to get a just and expeditious outcome, then those cases are determined often then and there. I do not know what proportion of cases are determined in that fashion but there would be a reasonable number that are determined through the various duty solicitor schemes that now operate in every suburban and regional court.

If there was an amendment to the legislation that would narrow the grounds of appeal, then in terms of any practitioner discharging their professional obligations we suspect there will be an interruption to that process. We suspect that firstly if there is a process that is adopted that is an adaptation of what occurs for instance in the Supreme Court — that you have to identify error in sentence or error of law — then people will be much more guarded about the carriage of cases. Cases will not be resolved in the manner they are now resolved if they think they are going to be scrutinised in a way that is different from the de novo process that currently operates. In an environment where solicitors are more vulnerable and practitioners generally are more vulnerable in terms of prospective negligence claims or disciplinary action at any professional tribunal, they will opt for caution. I am absolutely certain about that.

The second thing that will occur if the de novo process is abolished is that then — to use my own practice as an example where we have the carriage of over 2000 cases a year — we will be much more discerning in terms of those cases we will opt to resolve summarily where we have an election to have the case heard indictably. If we do not think there is any safety net in terms of the de novo process, we will be more inclined to have those matters determined at trial. That will in a sense be a more protracted process and more costly. There will be committal proceedings necessarily and there will be a trial process. So for more serious indictable cases that are otherwise capable of being heard summarily we will be more inclined to take those matters to trial. Again

that will interrupt the current case-flow management practices that are in place which are working and are continually being refined and evolved.

If it is that de novo appeals are abolished, rather than taking the matter to the County Court on appeal if we can identify sentencing error or error of law, we will be more inclined to opt for the Supreme Court order-to-review process because if we are successful in that process we will be remitted back to the Magistrates Court for a re-determination of the case. We do not opt for that process now because if there is a hearing de novo process in place, it is much more cost efficient simply to go to the County Court even if we can identify error of law in either sentencing or the conduct or carriage of the case. We simply go to the County Court. We do not use the Supreme Court process because it takes more time and is less cost efficient. You would need to factor that into account. There would inevitably be in my view more cases that will be determined on order to review if there is error.

One thing the association is certainly keen on encouraging, promoting and participating in is law reform to improve the process, the administration of criminal justice, so we are not ostriches with our head in the sand saying the processes work well so therefore let us not tinker with them. We are actively involved in other various law reform committees whether they are the County Court users' group or the Magistrates Court users' group to improve the case management of cases. It needs to be well understood we are not averse to reform, but there is false economy in my view in terms of promoting the abolition of the hearing de novo process thinking it will minimise the number of cases in the County Court.

It would have a twofold effect. One is that it will ensure that those cases that are determined in the Magistrates Court are done so much more carefully and are likely to be conducted over a more protracted time with more requests for adjournments because of the change in the review mechanism which does not happen in de novo process — it is very rare there is some specific scrutiny of what occurs in the Magistrates Court. For instance it is rare that there is a transcript of proceedings of what occurred in the Magistrates Court particularly on sentence appeals, and most of the appeals are sentence appeals. As I said, it is likely to ensure there will be more cases determined indictably rather than summarily. That is the overview we have in terms of the risks we see are attendant upon changes in the de novo process.

Mr DOOGUE — I would just agree with Rob. I think there are four spots this has the potential for blowing out. The lists and clearly committals which are under pressure already — there are going to be a lot more committals. There is no way a change taking out the de novo process can avoid solicitors saying when they are confronted by an idiosyncratic magistrate that they are going to go into the committal process. It is clear that will happen and is something that is already being discussed as a possibility in light of this occurring.

The second place that will blow out as a consequence of that is the County Court list. At present you are looking at maybe up to a year to get a trial on once you have been committed to the County Court. All those matters extra that come into the list obviously place pressure on that list. The third inevitable blow-out is the Supreme Court as Rob has said because people will take a different route in terms of dealing these appeals. As an aside if you get rid of the hearing de novo and then the County Court are then remitting things back to the Magistrates Court to be re-hearings there is one thing that would have to be considered because if there was clearly an injustice you would not want it to be such that a person could not have the matter reheard. The final thing I would say of the four is in a situation where you no longer have a hearing de novo you are likely to have a lot more people in jail and consequentially the cost to the community is greater. Perhaps you have your fingers on the figures far more than I do, but it would seem housing people in jails awaiting appeals on law is not going to be beneficial for anyone.

Mr STARY — If I may just say something, Chair, to that submission. A case that is presented in the County Court on appeal often bears no semblance to the case that is presented in

the Magistrates Court. That is so particularly in cases where you are on the cusp of your client's receiving a term of imprisonment. In the Magistrates Court it is less likely for character witnesses to be called. It is less likely that there will be arguments as to law and the application of the various sentencing authorities. Those things are fleshed out much more in the County Court in an appeal process. There is a much more exhaustive examination of the case than in the Magistrates Court. A magistrate might be confronted with 60, 70 or 80 cases in a mention list, and you need to be able to cut the corners, and you need to be able to identify the relevant factors in a case. So, as I said, often a Magistrates Court hearing is completely different in its structure and its form to that of a County Court appeal. Because there is something in the order of 110 magistrates with 110 different views as to how a case should be determined, it is much more subject to the idiosyncratic views of the magistracy. With the greatest respect to the magistracy, there is perhaps a more consistent application of the law in the County Court, particularly with the experienced County Court judges who are more familiar with the various arguments as to sentence and application of the law.

Mr HILTON — But if magistrates are now legally qualified, this idiosyncrasy should surely be dampened to a significant extent.

Mr STARY — It is to a degree, particularly with the de facto recognition that there are specialist criminal judges in the County Court, and in the Magistrates Court for that matter. That is true, but you get differences of opinion and application of the law in different regions. For instance, if a particular region has a drug-addiction problem and there are residential house burglaries or various dishonesty offences, magistrates in that region will say, 'We need to protect the community. We need to take a particular view as to these sorts of offences'. We all know that there are sorts of flavours of the month from region to region. Some magistrates do not like drug trafficking cases in particular regions; some magistrates do not like residential burglaries; some magistrates do not like the sorts of gratuitous violence cases. The County Court brings about a much more consistent application of the law and sentencing principles.

The CHAIR — We will get into questions. Can I ask you first of all on the legal aid point — in your submission you indicate that if there are just error-based appeals, it will be too daunting for unrepresented people and therefore they will not proceed. I would have thought that in most instances those people would be receiving legal aid. Do you have statistics on people who want to go before the County Court on appeal who do not get legal aid and therefore do not proceed?

Mr DOOGUE — With all due respect, you only have to look at the Court of Appeal and see the process for appeal there to see that people will be unrepresented. Legal aid does not fund a section 5A(2) application for leave to appeal from the County Court to the Court of Appeal.

The CHAIR — I was talking about those from the Magistrates Court to the County Court. The evidence we have heard from Victoria Legal Aid is that basically it funds cases of merit.

Mr STARY — Subject to other eligibility criteria, which includes, for instance, if you are convicted whether you will receive a penalty of more than 200 hours on a community-based order. So it is not a right of appeal without qualification — eligibility without qualification, leaving aside the means test issue. So you might have someone, for instance, who has been convicted of motor vehicle theft, a relatively serious offence, and the consequences of conviction for a serious dishonesty offence might have implications for a person's future employability — if they are convicted in the Magistrates Court, and they receive a monetary penalty or a penalty of less than 200 hours on a community-based order, generally speaking there will be no right to or eligibility for legal aid on appeal. You might have an argument that that person has been wrongly convicted — let us use car theft because it is a common offence in the Magistrates Court. They may have been a passenger in a car. The argument might be as to their knowledge as to whether the motor vehicle was stolen. They have been picked up by a friend, for instance, and they will

have an argument that they had no knowledge at the time they entered the vehicle that it was stolen, and that is rejected by the magistrate. But the magistrate might say, 'I will give you the benefit of the doubt by imposing a lesser penalty', and that person will have no right or eligibility — —

Mr DOOGUE — I go back to the point that I was making, which was: if you replace a hearing de novo with an appeal based on law, the clear analogy you draw is that with the appeal process from the County Court to the Supreme Court legal aid does not fund the first step because it is necessary for somebody to read through all the documents relating to the matter, and they wait for the judges to make an assessment as to whether there is a case of value before they will grant funding to your client. In a situation where it is an appeal based on law, as a practitioner you will be getting hold of the tapes of the proceeding, you will be getting them transcribed, and you will not be waiting to find out if legal aid will give you funding — you will be forced to do that for a lot of clients, or, if they are private, they can have it done. Then once you have those, counsel will look at them and say what the chances of your appeal are. But it is not likely to happen on legal aid for people who have just come in off the street if they had a magistrate who overlooked something. A number of appeals may be late in a person's sentence when it is realised that the magistrate entering it has done it wrongly. They may not necessarily have the resources to pursue their appeal, because, as you have probably been told many times, with the appeal process to correct errors, if you do it within 14 days you can just go back before the magistrate, but beyond that period of time the only way to fix a problem with a sentence is by a hearing de novo, and that is an easy mechanism by which a number of the more clerical or administrative mistakes are fixed.

The CHAIR — So are you suggesting there is an up-front cost, in a sense, involved in actually getting the transcript transcribed before a decision can be made by legal aid as to whether or not the case would have merit on a question of law as distinct from a de nova — —

Mr STARY — Absolutely, yes.

Mr DOOGUE — Yes. Because even just to get the tape and transcribe it will be \$60, and the delay that occurs in the Court of Appeal, even on a sentence appeal, is currently 12 months — from the time you are in court to doing a sentence appeal, not an appeal against conviction. In terms of the quality of justice, at present there is a very fast appeal period. Really the Victorian justice system is very effective.

Mr STARY — You can get an in-custody de novo appeal on within 14 days. So it is a very efficient process.

The CHAIR — Within 14 days?

Mr STARY — Yes, but if, as you suggest, you have to have a more exhaustive examination of the material, there is absolutely no way that you will get a case on within 14 days, both in terms of personally getting the tapes from the Magistrates Court, which can take up to three months, and secondly, in terms of getting some determination by legal aid as to the merits.

The CHAIR — That is behind your contention that you will have more people in jail because you will have people who have been convicted, people who, if they are appealing on errors of law, would basically take longer and therefore they will languish in jail longer.

Mr STARY — That is one aspect. The second aspect is that when a person is arrested you will be much more disinclined to deal with the case then and there, because if you make a mistake or you do not adduce evidence or make appropriate submissions, you are at risk yourself if there is some inadequacy in the way the case is presented. So you will much less inclined to deal with an in-custody case immediately upon arrest.

Mr DOOGUE — The experienced magistrates and experienced practitioners know the tariff of what a crime is worth, and you can expect to get a penalty within a certain range generally. In a situation where you cannot rely on that appeal process, if it involves a young person, you will be quoting the whole line of cases on young offenders. You will do that because you would be embarrassed to have your matter appealed if you had said nothing, even though you know this is a good magistrate who is going to go within the tariffs.

Mr STARY — You expect when a lot of these things, as Bill suggested, go unsaid, there is a range of authorities that enunciate the principles for dealing with young offenders. If on appeal — not a de novo appeal but an appeal based on error — the appeal judge says, ‘Your counsel did not raise Robinson’s case’ or ‘Your counsel did not address the court on a particular issue’, they are the shortcuts we often take in the Magistrates Court that you would not take because, as I said, one is likely to be much more cautious in the conduct of cases, and those shortcuts will not be taken, particularly, as I said, because of professional negligence and other issues.

Mr DOOGUE — There is a culture in the law, as with most things — there seems to be a simplicity in the idea that if you change to having an appeal based on law, it may reduce numbers and it may cull out that which is unnecessary and unreasonable, but the reality is that people who are unreasonable will prolong their appeals anyway. You cannot really legislate to stop those people who cause problems anyway, unfortunately; I wish that you could. The imposition of that system across, say, from New South Wales to here — there is so much of a culture involved in the whole process that it does not lend itself to that sort of movement, in my opinion.

The CHAIR — In your submission you indicate that the magistrates are used to de novo appeals. You use a rather interesting phrase: ‘You may think I’m wrong, and if I am they will fix it up across the road’, and you cite that as evidence of their being comfortable with de novo appeals. What about the counterargument which says that you are basically undermining the independence and the legitimacy of the magistracy by continually allowing a fresh hearing of the same case before the County Court?

Mr STARY — Fortunately they are so small in number — the number of de novo appeals are comparatively small. If my statistics are correct and there are 90 000 cases or thereabouts determined in the summary stream, a very small percentage of those are subject to appeal. It is a fact that some magistrates when imposing a penalty will make a comment that you have other rights and entitlements to have the matter reconsidered.

The CHAIR — You also indicated that if this change were made, more serious indictable offences which would otherwise be heard summarily would go to trial at the County Court directly — —

Mr STARY — There is no question about that. Practitioners have a view — again, sorry to interrupt — that if statistically there is a 50 per cent acquittal rate in the County Court in jury trials, you might as well chance your arm through the indictable trial process than have the matter determined in the Magistrates Court, if there is no fallback position to the de novo appeal.

The CHAIR — Given the number of defendants who rely on legal aid, would that not be partly a function of the level of legal aid that might be available for County Court trials and therefore the extent to which anyone is willing to take it on based on that? The legal aid available for the Magistrates Court is obviously going to stretch further than it will at the County Court.

Mr STARY — It is a condition of every grant of assistance that if the case is capable of being determined summarily, it should be. So if at the time of making the application for legal aid the case can be determined in the Magistrates Court, it should be. You will simply delay making the application for legal aid, and so the person will then commence in the committal stream — unrepresented initially and then being subject to representation — and there is no County Court

judge who on what is called a section 360A application in the County Court will deny or refuse the granting of legal aid for an indictable matter.

Mr DOOGUE — You are starting to talk about a system whereby those people who have money take different options to those people who do not. The legal aid clients will often be told, ‘There is nothing you can do’, whereas another person who has money will be told, ‘You have the right to take this to a committal. It will be longer in the committal process, and the trial is going to be 12 months off. It will be longer and more expensive. Which do you want to do?’. It will be a fact that there will be a lot more committals and a lot more trials. If you think about it, even if that process goes on for 12 months and there is a sudden rush of people booking in more committals, the consequential cost and time of that will be vast. It will not just block up six months later in the Magistrates Court. It blocks up 18 months later in the County Court for the trials — 12 to 18 months later.

Mr STARY — It is inevitable that there will be cases elevated into the indictable stream if the de novo process is abolished.

Mr DOOGUE — Perhaps the clearest indication of that is that the magistrates themselves have a protocol that if you refuse jurisdiction — of course you are in front of a magistrate who you think will make an idiosyncratic decision and that it will then go off to the committal stream — if you then say, ‘No, I want to keep it in the Magistrates Court’, it has to go back in front of that same magistrate; the aim being to stop you trying to avoid certain magistrates in that process. That is currently the system as it stands. If the system were to be changed, clearly people would follow through and go to committal and then trial. The County Court judge in the end is not going to give you much, if anything, more, for a lot of the offences that are heard summarily, but you do not have that easy second chance of dealing with the matter if you think the decision is aberrant in some way.

The CHAIR — Just before we finish, do you want make any comments on the 1999 changes, briefly?

Mr STARY — In practice there are few judges who will disallow a person a right to abandon an appeal and ask them to discharge their onus to show exceptional circumstances. The reality is that most judges will say, ‘Now that you have had an opportunity to obtain further legal advice, or in the interests of justice, I now determine that you can abandon an appeal’. There are very few judges who apply that law in a vigorous way.

Mr DOOGUE — It does not really make sense to deny it, because if you do, you are in a position where you have to hear all the facts and the plea material for a person who no longer wants to continue with it. So pragmatic judges, which almost all are, will say the person wants to stop at this point.

The CHAIR — On the issue of the warning — the propensity or the possibility that the judge will increase the sentence without warning — you indicate that whilst it has had no marked effect, natural justice and fairness require the giving of warnings. In practice is that not something that their lawyer is now doing. I mean the lawyer will say, ‘This is the risk. If you go to the County Court — —

Mr STARY — When it is reinforced by a judge, which it often is, then you simply ask for the opportunity to take further instructions. Again, the reality is that very few judges will not allow you to then abandon. When the judge gives the warning it is true — again from our own experience — —

The CHAIR — Is that not the essence of legal advice — —

Mr STARY — No. Again, as a matter of reality, we will wait and see who the appeal judge is, and then if — well, this is the reality — we think the appeal judge is someone who has a particularly punitive approach, we will seek leave to abandon out of time, and, again, it is very rarely refused.

Mr DOOGUE — It is also a process that occurs most of the time in the Magistrates Court anyway, in that a magistrate, if they think they are going to imprison your client, will want you to address the issues pertinent to that. So as a matter of natural fairness, if you are thinking of locking somebody up and taking their liberty, but most — I do not want to use the word ‘decent’ — people with some eye to fairness will tell you, ‘I am going to lock your client up at this stage’. I think that is what is going to happen.

Mr HILTON — A previous witness advised that the time taken to hear these appeals in the County Court is usually the same length of time that it has taken in the Magistrates Court. I understood you to say that one of the benefits is that the County Court has greater time available to give more consideration to the issues. I am wondering how what you said stacks up against the previous evidence.

Mr STARY — If you examine any of the appeal lists, there are very rarely more than five or six cases in an appeal list.

Mr HILTON — I am talking about the length of time that each appeal takes, not whether a judge or a magistrate has 15 in a day, but whether he is spending 20 minutes or 15 minutes — —

Mr STARY — My experience is that more latitude is shown to an appellant, and it is more likely that witnesses, for instance, will be called in a plea mitigation. There is more likely to be an examination of the relevant sentencing law, so that is not my experience. My experience is that appeals generally take longer albeit the fact that you are often dealing with experienced practitioners as judges who might intervene and make some preliminary comment as to merit or otherwise.

The CHAIR — Thank you very much, and thank you for taking the time to give us your written submission and for expanding on it today. We appreciate it.

Mr STARY - Thank you.

Mr DOOGUE — Thank you.

Witnesses withdrew.