Continuity Evidence in Criminal Cases
A somewhat defence perspective

Introduction

When I think of continuity evidence (also known as chain of custody evidence) I actually think of questions. Do I tell the prosecution if it is in issue? Does continuity have to be proved from hand to hand? Should I object to evidence around continuity or do I leave that to submissions? Will the prosecution be able to adjourn/reopen their case if I don't object?

This paper seeks to offer some guidance in relation to answering these questions in a criminal case context.

What is Continuity?

Continuity, as the name suggests, involves the movements of something from one place to another. Basically it is the question whether the thing at point A is the same thing at point B.

This can involve questions about the integrity of the evidence (i.e. has the exhibit been contaminated; which may be intentional or unintentional) as well as more generalised questions of relevance. Other issues can involve the standard of proof and evidentiary questions over things such as opinions, labelling and hearsay.

A common example, where continuity can arise, is with drugs or DNA.

An example is where drugs are found in the execution of a search warrant. The search warrant will normally be filmed. It can be expected that the item will be filmed in situ and then placed into an exhibit bag with a unique identifying number. A description of the item may also be added to the bag. The bag will be sealed in a drug exhibit bag with an exhibit log normally being contemporaneously filled in. The item will then be transported back to the police station and entered into the exhibit book and then onto the exhibit safe.

At some stage the exhibit will be signed out of the exhibit safe and transported to the drug lab (DAL) by a police officer. A receipt will be given for the item at DAL. DAL will assign the exhibit a unique identifying number(s). The exhibit will then be stored and given to an analyst. The analyst will test the material and either that person or another person will interpret the results and produce a certificate that can be used in court.

Does Continuity evidence have to be proven beyond reasonable doubt?

The answer is not always yes.

Calling the evidence "chain of custody" evidence, ironically offers a clue to why this might not be so.

In R v McNair unreported, Supreme Court of Victoria Court of Appeal, 8 May 1997, the Victorian Court of Appeal doubted a direction, given in a DNA case, that continuity in the circumstances of that case, had to be proved beyond reasonable doubt. They did so with reference to Shepherd v The Queen 1990 HCA 56; (1990) 170 CLR 573.

It appears the question will come down to whether continuity is classified as an indispensible link in a chain or part of a strand in a cable.

I would suggest in the average drug case, continuity would have to be proved beyond reasonable doubt. This is because generally the only significant evidence proving an element of the offence, i.e. that the drug is a prohibited drug, is the drug certificate.

However some DNA cases may be different. DNA evidence often goes to the issue of identity. If there is other evidence going to this issue then the evidence might be seen as more of a strand in a cable. Basically the more pieces of evidence going to an element of the offence the more likely that continuity will not have to be proved beyond reasonable doubt[1].

Does continuity have to be proven hand to hand?

No, but in any individual case, to overcome the standard of proof, it might be. A classic statement of principle comes from Barron v Valdmanis (unreported NSW Supreme Court 2 May 1978)

> In a criminal prosecution where it is necessary to establish that material found in the accused's possession is identical with material subsequently analysed, there are, as was pointed out by Brereton J in Young v Commissioner for Railways (1962) NSWSR 647 at 651, two ways of doing so. The first is to trace it from hand to hand and to this end it is usually necessary to call every person who had it in custody from the point of origin to the end of its journey. The second method is to identify that which was found in the possession of a person charged by its physical characteristics with that which was analysed; per Justice Meares [2].

In *Barron* police found "green vegetable material" in two bags in the boot of the Accused's car. The bags were taken to Central Police Station and handed to a station sergeant whose name was unknown by the time of the hearing. The bags were taken to DAL approximately 3 months later. The Accused's

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[1] Over compartmentalisation of evidence has been viewed with disapproval (i.e. R v Davidson

[2] It might be noted that Brerton J in *Young* without deciding actually expressed *some* doubt whether the second method he espoused could be applied in criminal cases.

conviction of possession of cannabis at first instance was overturned on appeal. His Honour Justice Meares noted a complete hiatus in what happened to the bags from the time they got to Central Police Station until the time they got to DAL. There was no evidence that the vegetable material was identical with what was analysed and so the appeal was allowed.

Ultimately the question is whether the prosecution can displace the standard of proof on admissible evidence. A circumstantial case might prove continuity even if the item cannot be traced hand to hand. However it might also depend on how you run your case. If you specifically put continuity in issue then in certain circumstances, the courts may sometimes insist that more strict proof is required (to be discussed below re s137 exclusion).

In R v Reynolds (unreported NSWCCA 25 August 1992) a police officer in a “chain” was unable to give evidence due to a major depressive episode.

> Obviously, the absence of the testimony of [the officer] created a potential problem for the Crown in establishing the continuity of possession of the substances allegedly found on the appellant, and its integrity so that it was not mixed with any substances concerned with any other offender. However it was a matter for the jury to consider whether or not the substance which the Crown claimed to have found in the possession of the appellant when he was arrested was the same substance as was subsequently analysed. Cf Bergin and Burr Unreported CCA (NSW) 22 June 1984

In R v Pavlovic NSWCCA unreported 15 October 1990 an “off white” substance (cocaine) was found at a search of a flat. The substance was wrapped in pages that were said to come from a pornographic magazine found at the premises. At trial it could be conclusively shown that the magazine tendered in evidence could not have been the source of the pages in which the substance was wrapped. The CCA held that the continuity of the drug was a matter for the jury[3].

In Anglim and Cooke v Thomas (1974) VR 364 bottles containing various liquids were transported to the drug lab in a sealed labelled bag and signed in by a technician. There was no evidence about how the bag came to be in the possession of the analyst who prepared the drug certificate. The certificate noted the details of the sealed bag and the officer who had delivered it. The Magistrate’s decision convicting the Accused was upheld.

A word of warning, cases such as the NSW CA decision in Young v Commissioner for Railways, cited in *Barron*, turned at least in part on the best evidence rule; which obviously lends itself to a hand by hand approach. *Young* went on appeal to the High Court and while the ultimate orders of the

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[3] Who obviously took careful note of the magazine.

CCA were upheld, none of the judgments in the High Court endorsed the CCA majority reasoning[4].

The state of the prosecution evidence in *Barron* was shoddy. There was no mention of the bags being sealed, and there was a complete absence of what happened to them at the police station.

More modern cases show more inclination to leave continuity to the jury. In R v Stafford [2009] QCA 407 at [126] the Queensland Court of Appeal sated that it was not sufficient to demonstrate the absence of what might be later thought to be a desirable procedure. It was also insufficient to merely speculate that any such absence of procedure might render the results of scientific analysis "liable" to contamination.

Is continuity a question of law or fact?

As seen from the above continuity is normally a question of fact. Only if the decision is such that no tribunal acting reasonably could have come to it having regard to the evidence will it be a question of law; Anglim and Cooke v Thomas (1974) VR 364 at 368. *Barron* was such a case.

This means that different tribunals of fact can come to different conclusions on the same facts.

This is well illustrated by the decision of Eames J in DPP v Spencer [1999] VSC 301. In that case Mr Spenser's house was searched and "green vegetable matter" was found in his house, as well as in his car.

Ultimately a successfully submission was made that the failure of the prosecution to call the witness who couriered the "material" to the drug lab combined with the lack of proof that the material was the same, was fatal.

Justice Eames in dismissing the Crown appeal found that while there was evidence capable of satisfying the lower court Magistrate of continuity beyond reasonable doubt the Magistrate was not bound to have so found; at [33] and [68]. i.e. Either decision was open.

The case of Koushappis v The State of WA [2007] WASCA 26; (2007) 168 A Crim R 51, is a most extreme case illustrating this principle. A warning to defence lawyers, it isn't pretty.

Mr Koushappis was charged with drug offences. Amongst other things a plastic container was found during a search of premises, which was tied to him. The contents of the container, which on the video was at least 5 bags (one being empty), were placed into a drug exhibit bag numbered W0025272.

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[4] (1962) 107 CLR 27, See discussion below

The container and its lid were themselves placed into an ordinary plastic bag [5].

A police officer gave evidence that on return to the police station he took a series of photographs of the plastic bags found in the container. He photographed three plastic bags with nothing in them, three with a white powder substance, three which contained a brown powder substance, and one which had a number of purple tablets. The WACCA noted that the items shown in the photographs were "obviously removed" from W0025272; although no witness was asked anything about this; at [65].

There was also no evidence about how the drugs got to the drug laboratory. At trial three drug lab certificates were produced; each in relation to a different substance. These certificates recorded three sets of drug exhibit bags, numbered sequentially; none of which mentioned W0025272. Two of the certificates had reference to D131853 and one to D131854; all of which had the label Koushappis. The "D" references were said to be police reference number tied to the search.

The OIC gave evidence that he had secured the exhibits and saw that they were properly sent off to the lab but there was no evidence about how this had been done; he simply wasn't asked.

What was said to be the plastic container and four empty plastic bags was received by another laboratory and swabbed for DNA.

The CCA observed that the prosecution had conducted their case on the understanding that continuity was not in issue; although the Court did note in final submissions counsel for the accused had attacked continuity.

The trial judge had directed the jury that they had to be satisfied of continuity beyond reasonable doubt. The jury convicted. In dismissing the accused's appeal the Court had this to say:

> Whilst the safe custody of critical exhibits such as these ought to be readily proved by clear and specific evidence rather than being left to inference, having regard to the way the case was conducted on both sides, the evidence here was such in my view, as to allow the jury to be satisfied beyond reasonable doubt that the drugs that were analysed…. were in fact those seized by police from the appellant's house"; at [85].

The WA CCA indicated that it was possible to infer that each time the contents of a drug bag were opened what is found in them would be resealed into a different drug bag. The CCA held that W0025272 must have been opened to be photographed and that "usual practice" would have seen the

[5] Although the exhibit officer in his statement noted that 4 plastic bags were placed in an exhibit bag W005272. i.e. he dropped a "2".

exhibits placed into other numbered bags; hence the sequential numbering of the bags delivered to the drug laboratory (although the Court acknowledged there was no evidence of this). The "necessary inference" for the lack of the empty bags being recorded in the drug certificates was that they were sent, with the plastic container, to the other lab for DNA testing see [78]-[79].

Koushappis is a high point for continuity as a question of fact.

Another interesting aspect of the decision is that one of the certificates gave a total weight of powder from three bags and the average content of certain substances. The CCA rejected a submission that the powder could have been mixed up before analysis. The WA CCA stated that "had the contents of the bags been mixed and then analysed, it would not have been possible for the analyst to talk of "average" percentages. The certificate

> [h]ad to be understood as indicating that each of the three bags contained methylamphetamine and the other substances identified, and that the average percentages were as stated. It could not mean anything else; at [92][6]

Ultimately Koushappis illustrates the principle that the way you run your case can have very important consequences; although it is, with most cases in this area, a decision on its own facts. For instance the evidence of continuity in *Spencer* was a lot stronger but continuity was rejected in that case.

One gets a distinct impression from Koushappis that a perceived lack of defence "fairness" in not putting the matter into issue until final submissions played a big part in the decision.

Does continuity have to be put in issue?

Ultimately I think the answer has to be assessed on a case by case basis with the fundamental starting point being the standard and onus of proof.

A useful quote, albeit in a different context, comes from Azzopardi v The Queen (2001) 205 CLR 50 at [34]

> The fundamental proposition from which consideration of the present matters must begin is that a criminal trial is an accusatorial process, in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt. It is, therefore, clear beyond doubt that the fact that an accused does not give evidence at trial is not of itself evidence against the accused. … it cannot fill in any gaps in the

[6] What of the possibility that the substances were assumed to be the same and mixed before analysis? If the substances were separately analysed before mixture why didn't the certificate simply say this? Apparently the use of the word "average" must make this impossible.

> prosecution case; it cannot be used as a make-weight in considering whether the prosecution has proved the accusation beyond reasonable doubt. Further, because the process is accusatorial and it is the prosecution that always bears the burden of proving the accusation made, as a general rule an accused cannot be expected to give evidence at trial. In this respect, a criminal trial differs radically from a civil proceeding.

The starting point must be the same in continuity cases i.e. in an accusatorial process it is not for the defence to fill in the gaps of the prosecution case.

In *Spencer* Justice Eames noted in the circumstances of that matter that the accused was entitled to the full weight of the presumption of innocence [at 57] and that “[a] criminal prosecution is not one which imposes on defence counsel an obligation to warn the prosecutor as to the deficiencies in the prosecution case”; at [76].

In *Spencer* defence took no objection to the tender of any material, nor did they suggest, at any stage in the evidence, that there was a deficiency in continuity.

However since *Spenser* there has been somewhat of a trend, at least among some judges, to a greater expectation in relation to defence disclosure. This somewhat reflects statutory changes. For example under Division 3 in Part 3 of the Criminal Procedure Act introduced in 2010, which applies to trials in the District and Supreme Courts, the Court may order pre-trial disclosure (s141) including s143(h) where the accused proposes to raise “any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor”.

The judgment of Maxwell P in R v Clark [2005] VSCA 294; (2005) 158 A Crim R 278 provides an example of this. Maxwell P had this to say

> I accept the submission of senior counsel for the Crown that modern criminal trial practice is quite deliberately directed at identifying, before trial commences, matters of law or evidence which will be in issue at the trial. As counsel said, no longer is “trial by ambush” acceptable. In my view, if the defence has any intention of challenging the factual foundations of Sergeant Bellion’s opinion, there was ample opportunity for this to be raised, either at a pre-trial directions hearing or at the commencement of the trial.

Clark was a case concerning a motor vehicle accident where an expert gave an opinion about the speed of a vehicle based partly on measurements taken by another person. The defence did not object to the evidence at trial but did so on appeal.

The other judges in *Clark* did not explicitly endorse the Presidents comments. *Clark* does however stand for a proposition that failing to object can have serious consequences against the recalcitrant party.

If you can object why wouldn't you?

For tactical reasons.

In continuity cases there may be a number of objections that can be taken to the evidence including relevance, hearsay, opinion, and s137 of the Evidence Act.

As we all know tactics can backfire. A tactical reason in terms of continuity evidence is in order not to alert your opponent to a problem in the evidence so to restrict their opportunity to fix it. However by not objecting to otherwise inadmissible evidenced you might be taken to have waived objection[7].

The danger in not objecting is that if you leave continuity to final submissions the tribunal of fact may simply find against you; and in doing so take into account somewhat elusive ideas of the "fairness" of your conduct; i.e. *Koushappis*. Unless this decision is entirely unreasonable, good luck on appeal if you have to establish an error.

However, in addition to the burden and onus of proof, if you choose not to object the following might assist.

A criticism in failing to object may be unwarranted. For instance an advocate can hardly be criticised for failing to object to evidence, which is admissible. In fact they could be criticised if they did.

Evidence is relevant if it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings; s55 Evidence Act.

Just because something at point A is not the same thing at point B may not make the evidence irrelevant. For instance a person is arrested and found with "green vegetable material" thought to be cannabis in a resealable bag. This is sent off to DAL to be examined. Say the material is not the same because it has been intentionally swapped by a dishonest police officer. While the material is not the same at point B it may still be relevant (for instance to the credibility of a witness who is said to have swapped it).

To be relevant it only has to rationally affect the probability that it is the same thing at both points. This is not a high test. This should not be confused with a

[7] i.e. R v Clark above at [54], [61]; although the position of "waiver" in criminal trials is not without its difficulties, see R v Gonzales [2007] NSWCCA 321 (2007) 178 A Crim R 232.

question of ultimate relevance; which is entirely appropriate for final submissions i.e. the weight that can ultimately be given to the evidence.

By ultimate relevance I mean a finding whether an element of an offence is actually made out. For instance in a murder case the defence might ultimately submit that certain evidence does not bear the interpretation placed on it by the Prosecution, such as motive and opportunity, simply because the accused is in fact not guilty. This is not an admissibility argument.

Apart from relevance what are some of the other objections that can be taken to Continuity Evidence?

Hearsay and Labels

The High Court decision in *Commissioner of Railways v Young* concerned the admissibility of a label.

In that case the respondent was a widow whose husband had been killed running for a train at Town Hall station. The allegation was that he was drunk and tried to board a moving train falling into the gap (mind the gap).

The case came down to the admissibility of the analysis of a sealed jar with a label written on it "Blood taken from the body of Robert Patterson Young on September 22 September 1956". The majority of the NSW CCA rejected the tender of the evidence. The somewhat misleading headnote indicates that this was on the basis of the best evidence rule as the jar itself was not produced; although the judgment of Brereton J is more explicable on the failure of the applicant to lay the proper ground work for the existence of the label (i.e. in the case direct oral evidence was not ultimately led as to what was written on the jar from the person who wrote it).

In the High Court Justices Dixon and Menzies would have allowed the appeal on the basis that the representation on the label was hearsay if tendered for the truth of the representation but was relevant for a non-hearsay purpose of identifying the jar. Kitto J dismissed the appeal saying that this was a false issue. Taylor and Windeyer JJ decided the matter on the basis that, while the label could be used for the purposes of identification, insufficient groundwork had been laid.

The groundwork aspect in *Young* is a very relevant aspect of the decision. It is certainly arguable that a label is not original evidence of anything (calling it circumstantial evidence or otherwise) unless there is evidence establishing how it came into existence i.e. *Young*[8]. Before a document is admitted in

[8] Facilitation of proof provisions in the Evidence Act such as 183, may not change this; see *Ocean Marine Mutual Insurance v Jetopay Pty Ltd* (2000) 120 FCR 146 at [20] – [22].

evidence, there must be an evidentiary basis for holding what it purports to be[9].

It might be noted that section 70 of the Evidence Act provides that the hearsay rule does not apply to a tag or label attached to, or writing placed on, an object in the course of a business for the purposes of describing the identity, nature or weight of the object, or its contents. In this regard it is clear that a government laboratory would be a business for the purposes of the Act as would the police; see Evidence Act Dictionary Part 2 Clause 1(1)(b). Just exactly how this section changes, if at all, the position in *Young* is not exactly clear[10]; it might be argued that it simply allows the label in combination with s60 to be used as evidence of the truth of the representation [11] and does not affect the need to lay the ground work for the label (i.e. including its authenticity).

If you don't object to a label, a similar argument as set out above in relation to relevance objections can also be used to explain a "failure" to object. In *Spencer* Eames J rejected a criticism that the defence had "failed" to object to exhibits with labels attached to them. This was for the very reason that the labels were potentially relevant for the non-hearsay purpose of identification; at [48]. His Honour noted s70 of the Evidence Act[12].

The importance of labelling in terms of identification has clearly been accepted in numerous cases i.e. *Anglim and Cooke v Thomas*, *Dimitriou v Samuels* (1975) 10 SASR 331[13].

Hearsay, Opinion and s137 Exclusion

A leading decision in this area is R v Sing [2002] NSWCCA 20; (2002) 54 NSWLR 31.

Sing has not been discussed until now because the impact of that decision has been somewhat affected by the subsequent decision of the NSWCCA in R v Sharwood [2006] NSWCCA 157. In fact *Sing* might nowadays be seen as more a case in relation to prosecution duties of fairness in calling witnesses and/or the application of the "basis" rule for expert evidence rather than a continuity case per se[14].

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[9] See National Australia Bank LTD V Rusu [1999] NSWSC 539 at [17].

[10] In *Spenser* Eames J thought s70 was introduced to overcome the decision in *Young*; at [49]

[11] Although in appropriate circumstances s136 could be used to limit the evidence to its non-hearsay purpose or s137 used to exclude it.

[12] Which at that point did not apply in Victoria,

[13] It might be noted that in *Young* Menzies J observed, at 552, that the label of the jar, even if it had been admitted would not conclusively prove continuity, but at most would establish that the blood analysed was *probably* that taken at the autopsy. However this view has not been adopted.

[14] The application of the basis rule is now not entirely clear after the decision of the High Court in Dasreef Pty Ltd v Hawchar [2011] HCA 21.

Mr Sing was charged with aggravated break and enter and commit sexual assault. The Victim was confronted in her home with a knife allegedly by the Accused. Swabs taken from the complainant were later matched to blood taken from the Accused.

At trial the Accused's representative objected to evidence from the forensic biologists who were called by the Crown. It appears this was on notice; but this point is not entirely clear.

An objection was taken to continuity based on hearsay. Essentially other persons, not called had carried out some of the actual testing. There were three bases for the decision to allow the appeal. Firstly the representations of the experts who gave opinions were irrelevant unless the basis for those representations were proved; see [32]. Secondly even if s60 of the Evidence Act technically made their opinions admissible (for the truth of the representations) they should have been excluded; and finally the refusal of the Crown to call relevant and material witnesses also raised exclusion under s135 and 137;

> There is an obligation on the prosecution to call available witnesses of events alleged to constitute the offence and of essential parts of the prosecution case, at least unless there is some justification for not doing so: see for example R v Kneebone [1999] NSWCCA 279; (1999) 47 NSWLR 450. I think this does extend to witnesses such as those in this case dealing with important links in the prosecution case. Particularly since DNA evidence can be so compelling, I do not think the matter of the correct carrying out of testing procedures should normally be proved, over objection, merely by evidence of the existence of the procedures and the giving of instructions, and otherwise left to inference. If for any reason the persons who actually did the work are unavailable, there may be justification for such a course. But there is no suggestion of that here; at [35]

In *Sharwood* the appellant stood trial on five counts of aggravated indecent assault, contrary to s61M(1). DAL certificates had been served pursuant to s177 of the *Evidence Act*. The CCA noted that no notice was given by the appellant before the commencement of the trial that objection would be taken to the certificates. Formal objection to the analysts' certificates was made on day six of the trial.

The CCA was not persuaded that the objection was taken to the scientific processes used by the analysts to produce the results. The CCA found that the objection related to the continuity of the custody of the exhibits, in the context of the exhibits being possibly contaminated while being processed in the laboratory. The CCA found that this fact distinguished the case from *Sing*; at [32].

The CCA noted that by leaving it as a jury matter defence counsel was able to

submit with force to the jury that there was a significant gap in the Crown's case in relation to the DNA evidence; at [31].

The CCA declined to find that the "basis" rule had been breached. It was said that the basis of the analysts opinion was clearly identified, i.e. the results of tests carried out by the nominated analysts, who except for one, had been available to give evidence (although were not called). The results of those tests was not challenged insofar as they were correctly carried out. The only question was whether the exhibits had become contaminated whilst in the laboratory. The Court noted that s70 of the *Evidence Act* enabled the concluding analyst to give evidence as to the articles provided to her within the laboratory by reference to the labels and identification upon them; at [33].

However once contamination was raised it is hard to distinguish *Sing* on the more general *Kneebone* point that the Crown could have called additional witnesses going to the issue of contamination[15].

<u>Can the Prosecution adjourn a matter or reopen their case to cure continuity?</u>

Adjournment

S184 of the Criminal Procedure Act is relevant to summary proceedings where the evidence has not been served in the brief. Factors such as the seriousness of the offence are relevant; i.e. normally the more serious the offence the more likely an adjournment will be granted; see DPP v West [2000] NSWCA 103; (2000) 48 NSWLR 647.

Reopening

A seminal Australian authority in relation to reopening of a Crown case is Shaw v. The Queen [1952] HCA 18; (1952) 85 CLR 365. In that case Dixon, McTiernan, Webb and Kitto JJ. said at pp 379-380 :

> "Clearly the principle is that the prosecution must present its case completely before the prisoner's answer is made. There are issues the proof of which do not lie upon the prosecution and in such cases it may have a rebutting case, as when the defence is insanity. When the prisoner seeks to prove good character evidence may be allowed in reply. But the prosecution may not split its case on any issue. . . . It seems to us unsafe to adopt a rigid formula in view of the almost infinite variety of difficulties that may arise at a criminal trial. It is probably enough to say that the occasion must be very special or exceptional to warrant a departure from the principle that the prosecution must offer all its proofs during the progress of the Crown case and before the prisoner is called upon for his defence . . . Further . . . the English cases make it plain enough that generally speaking an occasion will not suffice for

[15] Although the conduct of the defence may have played a part in the actual decision in this case.

> allowing an exceptional course if it ought reasonably to have been foreseen. Again, it may be pointed out that even an unexpected occasion may be of such a nature that it would have been covered, had the Crown case been fully and strictly proved."

In R v Chin [1985] HCA 35; (1985) 157 CLR 671 it was said:

> The general principle is that the prosecution must present its case completely before the accused is called upon for his defence. ... Also, it has been held that evidence may be given in reply to prove some purely formal matter the proof of which was overlooked in chief; at [12] per Gibbs CJ and Wilson J.

See also R v Killick [1981] HCA 63; (1981) 147 CLR 565. R v Soma [2003] HCA 13; (2003) 212 CLR 299.

In Cosgriff v Bateman (unreported Victorian Supreme Court 22 October 1990) Justice Southwell upheld an appeal in relation to a drug conviction. No continuity evidence was led in relation to drugs found in a car and the drug certificate produced in the matter. His Honour found that in the absence of satisfactory evidence linking the drugs the court below should not have been satisfied beyond reasonable doubt that the drugs were the same[16]. The judge held however that the Magistrate should have allowed the Prosecution to reopen their case if the Magistrate had not otherwise convicted, and so returned the matter to the court below; at page [8].

However in *Spencer* the Magistrate refused the Crown application to reopen the case. Eames J regarded the overlooking of continuity as not merely technical; at [77]. He also thought that nothing the defence had done had misled the prosecutor and commented that a "criminal prosecution is not one which imposes on defence counsel an obligation to warn the prosecutor as to deficiencies in the prosecution case; at [76]. Eames J also took into account delays that had occurred in the matter and found that the Magistrates discretion not to reopen the case was one, which was open; at [80].

Conclusion

Practitioners can face difficult tactical considerations when running continuity cases. Error on appeal can be very difficult to establish if the tribunal of fact finds against you.

Fundamentally the prosecution have the onus to prove continuity. The "chain" does not necessarily have to be proved hand to hand, it can be proved by inference.

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[16] The Magistrate had used facilitation of proof provisions in relation to drug certificates to find continuity however it was held that the provisions only facilitated proof of the analysis and *not* of the chain.

In certain circumstances a “failure” to object might be seen as a waiver of the evidence. Judicial attitudes can sometimes differ on the tactics used; although there is nothing unfair in simply not pointing out gaps in the prosecution case.

Telling the prosecution about the issue, in the higher courts, can be required by the Criminal Procedure Act. Stricter proof may be required in cases where the issue is disclosed, in the sense that the prosecution may be obliged to call all available witnesses on the issue.

In terms of contamination, on appeal, it is not sufficient to demonstrate the absence of what might be later thought to be a desirable procedure. It also is insufficient to merely speculate that any such absence of procedure might render the results of analysis ”liable” to contamination.

Benjamin Pierce
Barrister
Ada Evans Chambers
Email: bpierce@adaevanschambers.com
Ph: (02) 92836230
Facsimile 02 92836231
Mobile 0408225300

Note I am more than happy to be contacted and take comments and answer any questions about this paper.