"Dealing with absent and unfavourable witnesses in the Local Court"

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INTRODUCTION

Advocacy books are a useful resource for preparing defended hearings. This is because they provide some advice for cross-examining prosecution witnesses. However, in a significant number of cases, the main prosecution witness does not attend. And if he or she does, the only person cross-examining the witness is the prosecutor. The advice from the advocacy books is largely irrelevant.

The purpose of this paper is to provide lawyers with some guidance when encountering these cases. There are a number of papers that discuss the ethical challenges for lawyers in these situations. The focus of this paper is law and legal procedure.

The intended audience of the paper is junior solicitors working for the ALS in local courts.

The paper is in two parts. Part 1 deals with absent witnesses. Part 2 deals with unfavourable witnesses.

PART 1: Absent witnesses

When a prosecution witness fails to attend a hearing, a prosecutor may do the following:

1) request that the hearing be adjourned to another date to allow the witness to attend.

2) apply for a warrant for the arrest of the witness

3) proceed by tendering the statement of the absent witness

I will now discuss the legal principles and procedure concerning these three processes.

1) Adjournments

Legal Principles

Prosecutors nearly always seek an adjournment when one of their witnesses fails to attend a hearing. This is especially so when they cannot establish a prima facie case without the missing witness. A magistrate has the power to adjourn a matter on the day of hearing.[1] This decision is wholly within the discretion of the magistrate.[2] Therefore an

[1] Criminal Procedure Act 1986 NSW – s 40 (1); Local Courts Act 1982 – s 54
[2] *R v Callaghan* [1966] VR 17 cited in Howie & Johnson *Annotated Criminal Legislation* NSW, Butterworths 2007.

appellate court will only interfere with such a decision if the Magistrate has erred in exercising that discretion or not exercised his/her discretion at all.[3]

The magistrate's decision involves weighing up the accused's right to hear charges without delay against the prosecution's right to present its case.[4] Magistrates may also have regard to efficient case management (however this is subordinate to the aforementioned considerations).[5] Factors relevant to this decision include:[6]

- Whether the application is opposed[7]
- The reason why the prosecution cannot proceed[8]
- The likelihood of the witness attending on the next occasion
- The effect of refusing the adjournment on the prosecution case[9]
- The gravity of the charge[10]
- Whether the accused is in custody[11]
- Age of the matter[12]
- Cost to the defendant (including whether the defendant received prior notification of the application[13])

One case on this issue is *DPP v Gursel Ozakca & Anor* [2006] NSWSC 1425. This was a crown appeal against a magistrate's refusal to grant an adjournment. It was a domestic violence matter. The complainant failed to attend. Without the complainant's evidence, a prima facie case could not be established and the charges were dismissed.

The complainant had gone to Turkey to visit her father, who was suffering from a heart condition. The illness was unexpected and it was impossible for her to return by the hearing date. Rothman J held that due to these exceptional circumstances, and because the adjournment application was never opposed, the accused right to a speedy trial did not outweigh the prosecutor's right to properly present its case. The magistrate's order was quashed and the matter was remitted to the local court for hearing. Rothman J said "it is an essential aspect of the discretion that I exercise in quashing the orders that the accused is not, and was not, in custody."[14]

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[3] In *DPP v Gursel Ozakca & Anor* [2006] NSWSC 1425 it was held that the failure to grant an adjournment meant the prosecutor was denied natural justice. This meant that the magistrate had "constructively failed" to exercise his jurisdiction.
[4] *Ozarkca* above at [19].
[5] *Queensland v JL Holdings Pty Limited* [1997] HCA 1; (1997) 189 CLR 146 at 154, per Dawson, Gaudron and McHugh JJ.
[6] This is not an exhaustive list.
[7] *Ozarkca* at [26].
[8] A medical emergency would be a good reason.
[9] *Smith v Attard* (NSWSC, Studdert J, 8 November 1993, unreported) at 5.
[10] *Smith v Attard* (NSWSC, Studdert J, 8 November 1993, unreported) at 5.
[11] *Ozarkca* at [30].
[12] *Smith v Attard* (NSWSC, Studdert J, 8 November 1993, unreported) at 5.
[13] *Ozarkca* [26].
[14] *Ozarkca* [30].

It is very important to emphasise that the decision in *Ozarkca* was dictated by the presence of exceptional circumstances.

Procedure

Magistrates will usually determine applications by hearing submissions from the bar table. Some magistrates might insist on oral evidence from the informant to explain why the prosecution are not ready to proceed. On these occasions, defence lawyers will have an opportunity to cross-examine the informant. But bear in mind that highlighting tardy police work may lead a magistrate to reason "why should the complainant miss out on his/her day in court just because the police never even told him/her the court date."

The police fact sheet will normally be tendered on the adjournment application to enable the magistrate to assess the gravity of the charge.

Defence lawyers will normally be instructed by their clients to oppose the application, however, this may not impress the magistrate if the prosecutor has presented truly exceptional circumstances. Addressing the bullet points above will assist in opposing applications. If important factors are unknown, such as the reason for the witness's absence, it may be worth pointing out that the prosecutor is the applicant and it is for them to convince the court that an adjournment is appropriate.

If the adjournment is granted because of a witness' non-attendance, it would seem a magistrate should hear any fresh bail application.[15]

2) Warrants

If the prosecutor is successful in obtaining an adjournment, they may also request a warrant to ensure the attendance of a witness. Some magistrates will consider the issue of a warrant before determining the adjournment application (these magistrates would argue that unless there's a warrant there is no point adjourning the matter.)

Magistrates have the power to issue a warrant for the arrest of an absent witness.[16] However, a magistrate can only do this if:

- a subpoena was issued for the witness's attendance; and
- all requirements (see below) for subpoenas were complied with; and
- the witness has not complied with the subpoena; and
- no just or reasonable excuse has been offered for the failure to comply[17]

[15] s 22A of the Bail Act 1978 NSW should not preclude an application in these circumstances.
[16] Criminal Procedure Act NSW 1986 s 229
[17] Note that this criterion is less onerous on the prosecutor than section 194 of the Evidence Act – which requires the party seeking the warrant to actually prove that the non-attendance is without excuse. It appears section 194 of the Evidence Act has been abrogated by Criminal Procedure Act s229. This means

Requirements for subpoenas include:

- they must be signed and dated by a Registrar[18]
- they must be served within a reasonable time and at least 5 days before the hearing[19] unless a Registrar has permitted the subpoena to be served later.[20]

The police may serve a witness with a subpoena by:[21]

- handing it to the witness
- sending it by post, fax or email to the witness' business address/business email address
- putting it down in the witness' presence if the witness is refusing to accept it (after telling them the nature of the notice)

Unlike civilians, the police do not appear to have a statutory requirement to pay conduct money when subpoenaing witnesses.[22]

When warrants are issued, hearings are normally adjourned for mention to fix a new hearing date. The mention date is normally a week or two after the original hearing date. This allows the police to execute the warrant. The witness is normally granted bail – usually with a bail condition to attend the new hearing date.

The court often invites a defence lawyer to make submissions opposing the warrant. If the adjournment application has already been granted it is difficult to see how a defence lawyer has standing on this issue (i.e. why should the defendant care if the witness is arrested or not before the next hearing date?). Notwithstanding that, if the foundation for a warrant has not been established, lawyers should draw this to the court's attention.

If the warrant is considered before the adjournment has been granted, defence lawyers should be entitled to address the court. This is because the decision to issue a warrant would undoubtedly affect the decision to adjourn the matter (i.e. a magistrate is unlikely to issue a warrant and then refuse the adjournment.) Defence lawyers in this situation can use their arguments against an adjournment (e.g. my client is in custody so the matter should proceed) to oppose the warrant.

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s194 no longer applies to criminal proceedings in the local court – see Criminal Procedure Act NSW s231(4).

[18] Criminal Procedure Act 1986 NSW s 222(2); Local Courts (Criminal and Applications Procedure) Rule 2003 – Reg 44

[19] Criminal Procedure Act s 223(1)

[20] Criminal Procedure Act s 223(2)

[21] Criminal Procedure Act s 223(3); Local Courts (Criminal and Applications Procedure) Rule 2003 – Reg 44

[22] Criminal Procedure Act 1986 NSW s 224

3) Tendering the witness statement: s65 of the Evidence Act

If a witness is absent and an adjournment application is refused, prosecutors have two choices:

1) proceed without the absent witness's evidence (which often means no prima facie case can be established)

2) proceed by tendering the statement of the absent witness

The second course of action does not occur regularly. It is especially rare (and arguably futile) for prosecutors to attempt this when the absent witness is the only prosecution witness.

As a general rule, courts do not admit witness statements. This is because allegations contained in the statements are hearsay (if you're asserting that those allegations are true). This is because they are made out of court – rather than under oath. Thus, a witness's statement is inadmissible if no exception to the hearsay rule applies.

Prosecutors in this situation will have to rely on Section 65 of the Evidence Act (exception to the hearsay rule - maker unavailable) to have the statement admitted. Section 66 will not assist the prosecutor because that provision requires that the witness (the maker of the statement) is available to give evidence.

A magistrate will have to consider a number of distinct questions before allowing the statement to be admitted. These include:

a) Is the witness really unavailable? (mere absence is not sufficient)
b) Was the statement made in trustworthy circumstances? (Section 65(2))
c) Did the prosecutor give the defence notice that they would try this? (Section 67)
d) Should I allow the evidence even though I have a discretion to reject it? (s 137)

If, after considering the above questions, the evidence is allowed, the magistrate will still have to ask:

e) Can I safely convict on this evidence given it was never tested by cross-examination? (section 165)

The five points above each present significant hurdles for the prosecutor. The magistrate will have to determine these questions in a step-by-step process. Defence lawyers may oppose the tender of the statement at any of the stages (a) – (d) above. It is preferable, however, to focus your objection on your strongest point rather arguing at each step along the way.

I will discuss each of these five steps below.

a) Is the witness unavailable?

Difference between available and unavailable witnesses

Before a witness statement can be admitted, a prosecutor must establish that the witness is unavailable.[23] Mere absence is not sufficient.

A witness may be defined as available or unavailable. These terms are legal definitions. They are not synonymous with presence and absence.

The Evidence Act suggests all witnesses are either available or unavailable to give evidence.[24]

In my opinion it is unhelpful to think of witnesses as simply available or unavailable. I prefer to put witnesses into four categories. These are:

1. **Present AND available**

    - this is a typical witness who attends court and gives evidence under oath
    - any hearsay evidence given by this witness will be governed by section 66

2. **Present AND unavailable**

    - this is a witness who attends court but refuses to take an oath
    - here section 65 will be relevant, however, I will deal with this situation in part 2 of the paper which deals with unfavourable witnesses (rather than absent witnesses)

3. **Absent AND unavailable**

    - this is a witness who has not attended court and has been legally defined as unavailable
    - here section 65 will assist the prosecutor (provided certain conditions are met – discussed later)

4. **Absent and <u>NOT</u> unavailable (simply not there)**

    - this is a witness who has not attended court, however, the court has refused to define the witness as unavailable
    - therefore the prosecutor cannot use section 65 to admit the statement
    - also, the prosecutor cannot use section 66 because the witness is not available (despite the fact that the witness is not unavailable!)

[23] I note the actual legislation uses the term "not available." However, for simplicity, I will use the term "unavailable."
[24] Evidence Act NSW 1995 – Dictionary Part 2, Clause 4 (2).

Thus, prosecutors will have to convince the court that the witness falls into category 3 (above) rather than category 4. I will now discuss how they can do this.

Establishing Unavailability

A witness will be considered unavailable if:[25]

(a) they are dead, or
(b) they are not competent to give evidence, or
(c) it would be unlawful for them to give evidence about a fact, or
(d) a provision of the Evidence Act prohibits the evidence being given, or
(e) the police have taken all reasonable steps to find the witness or to secure his or her attendance, but without success, or
(f) the police have taken all reasonable steps to compel the person to give the evidence, but without success.

Local court practitioners are most likely to encounter subsection (e). I will therefore concentrate on this subsection. Subsection (f) arises when the witness is present and unavailable. I will deal with subsection (f) in part 2 of the paper.

To demonstrate all reasonable steps have been taken, the prosecutor will usually call oral evidence from the informant. The informant will usually describe the steps he or she has taken to secure the witness's attendance. Examples of steps taken include:

- issuing/serving of a subpoena
- imposing a bail condition requiring the witness to attend (this would only occur following the execution of a warrant)
- providing conduct money
- contacting (or attempting to contact) the witness before the hearing date, including giving them advanced notice of the date
- efforts to locate the witness on the hearing date
- conversations with the witness' family/friends in attempt to locate the witness
- conversations with the witness on the hearing date (police officers often give evidence of being told to "f*** off" or other expletives by the witness at their front door)

Defence lawyers will then be given an opportunity to cross-examine the informant. Cross-examination is an excellent opportunity to highlight those reasonable steps NOT taken by the police. Examples may include a failure to ask family members where the witness is or the failure to actively offer conduct money etc.

Some restraint will be necessary. The police's failure to take a step will only be worth highlighting if the magistrate will consider it a 'reasonable step.' It's not a good sign if

[25] Evidence Act NSW 1995 – Dictionary Part 2, Clause 4 (1).

the magistrate says "oh we can't expect the police to chase every rabbit down every hole."

What does 'all reasonable steps' mean?

Reasonable minds will to differ on this issue. Every case will be considered individually. At the very minimum, the court would expect the witness to be subpoenaed. This might not be required if the witness has signed a bail undertaking to attend court on the hearing date (as is common after the issue of a warrant). Some effort to make contact with the witness would also be expected. As would inquiries with the witness's family.

The court would expect the police to offer conduct money to a witness traveling to court.[26] The fact that a witness did not request conduct money is unlikely to excuse an officer who neglected to offer.[27]

The mere fact that a witness is now living interstate or overseas would not excuse the police from taking the aforementioned steps.[28]

However, if a witness's whereabouts in a foreign country is unknown, then the police would not be expected to make inquiries within that country.[29]

Courts in small country towns might expect the police to search the whole town for the witness on the morning of the hearing. Such an expectation would be less likely in the city.

Common sense will dictate. If in doubt, point out the informant's omission.

The hearsay rule has a long history and courts should be slow to take exception to this rule.

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[26] Note that there does not appear to be any statutory obligation for the police to offer conduct money – see Criminal Procedure Act s 224. Nonetheless, it would be expected as a reasonable step to secure the witness's attendance.

[27] *Catterpillar Inc v John Deere Ltd* (No 2) (2000) at [18] This was a civil matter where the plaintiff asserted a witness was unavailable because he was a citizen (and lived in) the United States. The plaintiff had written a letter to the witness requesting his attendance. There was no response. The court held the witness was not unavailable for a variety of reasons – including the fact that no offer were made to meet all expenses. The court rejected the plaintiff's argument that the witness could have raised this [18].

[28] *R v Kazzi; Williams and Murchie* [2003] NSWCCA 241 at [12].

[29] In *Kazzi* (above) the witness was in India but nothing else was known. The police were not expected to search for him in India. I think the decision would have been different if the police had contact details of the witness or his family and they failed to pursue them.

b) Was the statement made in trustworthy circumstances: Section 65(2)

Once a witness is declared unavailable, the court will only allow the statement if it was made in circumstances that suggest it would be safe to do so. This includes if the statement was:

> (a) made under a duty
> (b) made shortly after the event AND in circumstances that make it unlikely that the statement is a fabrication, or
> (c) made in circumstances that make it highly probable that the statement is reliable, or
> (d) made against the interests of the person who made the statement at the time it was made.

The prosecutor must establish one of the above criteria before the evidence will be admitted.

Section 65(2)(a): Made under a duty

I will not discuss section 65(2)(a) because it rarely arises. It may assist the prosecution of corporate crime.

Section 65(2)(b) Made shortly after the event AND in circumstances that make it highly unlikely that the statement is a fabrication

Prosecutors are more likely to rely on section 65(2)(b).

There are conflicting interpretations of the phrases "shortly after the event" and "circumstances that make it highly unlikely that the statement is a fabrication." For a proper discussion of these authorities, I recommend reading Odgers pp225-230.[30]

It has been argued that this section is primarily focused on the witness's opportunity to fabricate. Not on the witness's ability to remember. If this view is correct, a statement would only have been made "shortly after," if it were made immediately (minutes) after.

Consider the example of a complainant that reports an assault 24 hours after the event. S/he would have had an opportunity to concoct. But is unlikely to have forgotten the details of what happened.

Lawyers will be assisted by their common sense. If police officers arrive at a fight scene minutes after an altercation and they obtain a statement from the alleged victim in their notebook, there is a good chance this will satisfy section 65(2)(b). If a complainant waits

[30] Odgers, S *Uniform Evidence Law*, (7th Ed.) (Lawbook co. 2006)

a day or two to make the statement, there is enough authority to at least make the objection.[31]

Section 65(2)(c): made in circumstances that make it highly probable that the statement is reliable

Prosecutors also use section 65(2)(c). It is often used in addition to, or as an alternative to, section 65(2)(b).

In applying this provision, the court should consider the circumstances surrounding the making of the statement rather than the circumstances of the offence.

In the following examples, the court ***might not*** accept that the statement was made in circumstances that make it highly probable that the statement is reliable:

- if the witness is drunk at the time of making the statement
- if the witness received a head injury just before making the statement
- if the witness had taken heavy doses of medication before making the statement
- if the complainant had limited English speaking skills and was not accompanied by an accredited interpreter at the time of making the statement[32]

Odgers argues that the court must find circumstances that increase the probability of reliability, rather than simply pointing to a lack of circumstances suggesting unreliability.[33]

Some authority suggests it is permissible to consider what the maker of the statement has said on previous occasions. It may, therefore, be relevant to draw the court's attention to any retraction statements made by the witness in relation to the matter or other matters.[34]

Section 65(2)(d) against the interests[35] of the person who made the statement at the time it was made

This arises in cases involving co-offenders.[36] The policy behind this provision is that someone is likely to be telling the truth if they're incriminating themselves. Its application can be explained by using a simple example:

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[31] See the cases *Williams v The Queen* [2000] FCA 1868 (20 December 2000) and *Harris v R* [2005] NSWCCA 432.

[32] See *R v Richard Harry Morton* [2008] NSWDC 107 per Phegan J at [34]. In this case, the French-speaking complainant was accompanied by a bi-lingual friend. However, the fact that the police did not enlist an accredited interpreter influenced the court's decision to hold the circumstances were not highly probable to be reliable.

[33] Although he does point to contrary authority – see Odgers, S *Uniform Evidence Law*, (7th Ed.) (Lawbook co. 2006) p 231.

[34] See discussion by Odgers, S *Uniform Evidence Law*, (7th Ed.) (Lawbook co. 2006) p 229.

[35] See Evidence Act s 65(7) for the definition of against interests.

[36] An important case concerning this section is *R v Suteski* [2002] NSWCCA 509.

> A and B commit a break and enter together. A is arrested and interviewed by police. A makes full admissions to his role in the offence. He nominates B as his 'partner in crime.' A pleads guilty and is sentenced. B is charged and pleads not guilty. At B's hearing, the prosecutor calls A to give evidence. A has decided he no longer wants to 'dob' his mate in. He does not attend court. After hearing evidence from the informant the court declares B unavailable. The prosecutor will attempt to use A's ERISP as evidence by using section 65(2)(d). When A was implicating B he was also implicating himself. Therefore A's statement (ERISP) was against his own interests at the time of making the statement.

The provision has been criticized.[37] One problem is that on occasions, an offender may minimize his/her own role, while exaggerating the role of his/her co-accused. The statement will still be deemed to be made against the interests of the maker of the statement.

Another problem is that the phrase "against the interests" is interpreted objectively rather than subjectively.[38] Therefore a statement will be considered against the interests of the maker, even if the maker didn't realize they were inculpating themselves. Consider the juvenile offender who says:

> I swear I didn't do nothing wrong man. I just stood at the door and kept a look out while Rob and Chris went into the store with knives and robbed everyone.

This representation would be against the interests of the maker.

In these situations, defence lawyers may need to focus their arguments on section 137 of the Evidence Act.[39]

A change to the wording of section 65(2)(d) has been proposed.[40] This would allow a previous statement if it was "made against the interests of the person who made it at the time it was made ***and*** in circumstances that make it likely that the representation is reliable."

Finally, if co-offenders are both pleading not guilty it may be ill-advisable to have separate hearings because of this provision.

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[37] See, for example, submissions referred to in the 2005 ALRC report 102 at http://www.austlii.edu.au/au/other/alrc/publications/reports/102/

[38] One of the arguments made during Suteski's special leave application to the HCA was that a subjective test is more appropriate. The HCA did not specifically rule on this particular argument but refused leave on the basis that there was an insufficient prospect of success. See footnote below for one of Gleeson CJ's explicit comments.

[39] Gleeson CJ commented during Suteski's special leave application "If the ultimate safeguard is the discretion [s137] then you do not need to torture the language of section 65." Suteski v The Queen [2003] HCATrans 493 (2 December 2003)

[40] The Evidence (Ammendment Act) 2007 (NSW) was passed in October 2007. It was assented to in November 2007. The commencement date has not yet been set.

Section 65(2) Procedure

Before tendering the statement, the prosecutor may first need to call evidence on a *voir dire* to establish the section 65(2) criteria. Prosecutors will often call the police officer who took the statement from the witness. They might also call evidence from a doctor who treated an alleged assault victim moments before a statement was taken. Defence lawyers may cross-examine these witnesses to highlight that the section 65 criteria is not satisfied. The defence may also adduce evidence on the *voir dire*. For instance, someone who witnessed a complainant make a retraction statement may give useful testimony.[41]

c) Notice Provisions: s 67

The prosecutor must give "reasonable notice"[42] before using section 65 to tender a statement.[43] The court may, however, dispense with notice requirements.[44] The court would be reluctant to do this if it prejudiced the defendant.[45]

A common cause of prejudice may emanate from local court listing advice forms. Consider this example:

> An alleged domestic violence victim complains she was assaulted. She gives a notebook statement to a police officer when she is drunk. At the time a hearing date is fixed, the defence lawyer indicates that s/he only requires the complainant for cross-examination. The complainant does not attend the hearing. She is declared unavailable. Despite not giving notice, the prosecutor attempts to admit the notebook statement pursuant to section 65(2)(c) – asserting that the statement was made in reliable circumstances. The defence lawyer objects, arguing to the contrary. The defence may need to cross-examine the police officer who took the statement, however the police officer has legitimately not attended the hearing.

In the above example, lack of notice may have caused the defendant unfairness. Hence the magistrate may enforce the notice requirements. Notwithstanding that, the magistrate may grant the prosecution an adjournment.

d) Discretionary Exclusion

The court must refuse to admit the absent witness's statement if its probative value is outweighed by the danger of unfair prejudice to the defendant.

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[41] E.g. a Justice of the Peace who witnessed a retraction statement being made and signed.
[42] "Reasonable notice" is not defined.
[43] Evidence Act NSW – Section 67(1).
[44] Evidence Act s 67(4)
[45] *Tsang Chi Ming v Uvanna Pty Ltd (t/a North West Immigration Services)* 1996 140 ALR 273 at 282 per Hill J, quoted in Odgers, S *Uniform Evidence Law,* (7th Ed.) (Lawbook co. 2006) at p 243. Also section 192 of the Evidence Act will assist.

When an absent witness' statement is admitted, the defendant has no opportunity to cross-examine the witness. That is, the defendant is unable to test the truth of that statement.

This should be stressed when making arguments pursuant to section 137.

e) Consequences of allowing the evidence

If the magistrate allows the statement, it is admitted for the truth of its contents. That is, if X writes in a statement to police "I was bashed by Y" then the statement is evidence that X did in fact bash Y. It is not just evidence that X told the police that he was bashed by Y.

Nonetheless, magistrates should exercise caution in placing significant weight on the written statements of absent witnesses.[46] The reason for this is expressed by Odgers:[47]

> *(a) The potential compounding of weakness of perception, memory, narration skills and sincerity when evidence of the fact is given second hand.*
>
> *(b) The statement to the witness not be testable by cross-examination.*
>
> *(c) The statement made to the witness not being made in a court environment and thus potentially more susceptible to pressures which might result in a false account.*
>
> *(d) The statement made to the witness not being made on oath or affirmation in the solemn context of proceedings in court.*

If the prosecution case relies solely on the evidence of one witness, the magistrate must scrutinize the witness's evidence with great care when assessing its reliability.[48]

For some of the above reasons it seems that only in the most exceptional circumstances could a defendant be convicted beyond reasonable doubt when the sole witness is absent.

[46] See section 165 of the Evidence Act
[47] This was quoted verbatim in R v **TJF** [2001] NSWCCA 127 at [55].
[48] Often known as the Murray direction. Odgers, S *Uniform Evidence Law*, (7th Ed.) (Lawbook co. 2006) p 748.

4. What if my client is absent?

Finally, before turning to part two, it is worth discussing those cases where the defendant is also absent.

If an accused person is not present at his/her hearing the magistrate may convict the accused based on the allegations in the police fact sheet.[49]

However, if a legal representative is present on behalf of the accused, the magistrate is precluded from simply relying on the police fact sheet.[50] The prosecutor will need to prove the case by calling witnesses to give oral evidence. If the prosecution witness(es) are absent, there may be no prima facie case.[51]

Even if an accused is represented, they may still be liable to a charge of failing to appear in accordance with their bail undertaking.[52]

Lawyers should be **very hesitant** to represent absent clients.[53] Cases where there is **definitely** no evidence capable of satisfying the charge may be one appropriate situation.

[49] See Criminal Procedure Act s 196 and 199

[50] A magistrate cannot rely on s 196 in this situation. This argument arose in *Albert Barker v Elaine Jacob & Anor* (NSWSC, unreported 27/03/2000, Hulme J) in relation to similar provisions of the repealed Justices Act. Hulme J confirmed the proposition that a person did appear if absent but legally represented.

[51] Provided, of course, that none of the aforementioned processes are carried out: adjournments, section 65 applications etc.

[52] Bail Act 1978 NSW Section 51(1).

[53] One reason is that an accused can only have his/her conviction annulled if the order is made in his/her absence: Crimes (Appeal and Review Act) 2001 NSW - Section 4. Hence, a legal representative's presence will preclude any application for annulment. This is despite the fact that the accused may have a satisfactory explanation for not attending. And s/he may have had an increased chance at being acquitted if attending a new hearing (following conviction and annulment) where s/he could give evidence. The other problem with representing absent clients is that instructions cannot be obtained if unexpected evidence arises during the hearing.

PART 2: UNFAVOURABLE WITNESSES

Introduction

If a prosecution witness attends court, the prosecutor will call the witness to give evidence. The prosecutor will attempt to adduce evidence from the witness that supports the prosecution case ("favourable evidence"). The prosecutor may employ three methods to adduce such evidence. These are:

1) adducing the evidence orally by asking **non-leading** questions (examination-in-chief). If that fails they will try:

2) adducing the evidence orally by asking **leading** questions (cross-examination: s38). If that fails they will try:

3) tendering a written statement made by the witness

The weight that a magistrate gives a witness's evidence will be significantly influenced by the method employed to elicit it. For instance:

- method 1 produces evidence that is sworn and forthcoming
- method 2 produces evidence that is sworn but less than forthcoming
- method 3 only produces unsworn evidence

It will be very important to highlight this to a magistrate during a closing argument.

I will discuss the application of these three methods by using a case study. The case study assumes the following facts:

> John and Michelle are married. John is charged with punching Michelle in the face once (common assault.) Michelle made a statement at the police station the day after the alleged assault. The statement says "John punched me in the face once." Constable Smith took the statement from Michelle and witnessed her signature. John pleads not guilty. His instructions are "Michelle and I had an argument but I never touched her." There are no other witnesses mentioned in the brief – just statements from Michelle and Constable Smith. At the hearing the prosecutor calls Michelle to give evidence.

1st Method: Examination in Chief

As mentioned, prosecutors must always attempt to elicit evidence by asking non-leading questions.[54] Once they have elicited all the relevant favourable evidence they will sit down and allow the defence to cross-examine.

[54] Evidence Act NSW 1995 s 37.

Sometimes, however, favourable evidence is not immediately forthcoming. The extent to which they must continue asking non-leading questions will depend on the circumstances.

For instance, consider the above case study about John and Michelle. Consider two scenarios:

Scenario A

The prosecutor will call Michelle to give evidence. The prosecutor will ask Michelle what happened. Assume Michelle says:

> "John and I had an argument – but nothing else happened." **(Scenario A)**

The prosecutor will (depending on the magistrate) be expected to ask some further open-ended questions such as "did anything else happen?" etc. However if Michelle fails to mention the assault, non-leading questions will soon cease. The prosecutor will seek leave to cross-examine the witness. (I.e. the prosecutor will resort to method 2 – discussed shortly).

Scenario B

Now consider a different situation. Assume that during examination-in-chief, Michelle repeatedly tells the court:

> "I simply cannot remember what happened that day." (**Scenario B)**

Again, the prosecutor has no evidence to establish an assault. However, before resorting to cross-examination, the prosecutor may attempt to refresh the witness's memory in court.[55] This would involve handing the document to Michelle and allowing her to read it to herself.[56]

A prosecutor must seek leave to do this. Leave will only be granted if:[57]

- the witness acknowledges that s/he made a statement to the police
- the statement was made when the offence was fresh in his/her memory[58]
- the witness acknowledges that at the time of making the statement – the witness found it to be accurate.

[55] Evidence Act NSW 1995 s 32
[56] With the leave of the court, the witness may read it aloud – however this rarely happens: see Evidence Act s 32 (3).
[57] Evidence Act NSW 1995 s 32
[58] This term has been interpreted differently. For a proper commentary see Odgers, S *Uniform Evidence Law*, (7th Ed.) (Lawbook co. 2006) at p96.

After allowing the witness to read the statement, the prosecutor will re-commence questioning of the witness (still using non-leading questions). If Michelle's memory is suddenly revived and she tells the court "John punched me," the prosecutor will be satisfied. The prosecutor will not need to cross-examine Michelle.

However, Michelle may simply say "I've read what it says there but I can't remember what happened."[59] If this occurs, the prosecutor will have resort to cross-examination to establish a prima facie case.[60]

2nd Method: Cross Examination (Evidence Act s 38)

Prosecutors will only be allowed to cross-examine their own witness if the court grants leave under section 38 of the Evidence Act.

Section 38(1) allows the prosecutor to cross-examine the witness about:

(a) evidence that is not favourable
(b) a matter that the witness would be expected to know about but is not making a genuine attempt to answer questions on the matter
(c) a prior inconsistent statement

Assume an application is brought pursuant to section 38(1)(c) – a prior inconsistent statement. In deciding whether or not to grant leave, the magistrate is likely to have regard to the following issues:

1) has the witness made a prior statement?[61]
2) is the prior statement inconsistent with the witness's testimony?
3) did the prosecutor give notice of the s 38 application?
4) would granting leave cause the accused unfairness?
5) if leave to cross-examine is granted should the ambit of cross-examination be limited?
6) if leave to cross-examine is granted should the witness be granted a certificate for protection against self-incrimination?

[59] Most witnesses see a copy of their statement before going into the courtroom. Hence, section 32 is unlikely to affect witnesses in many cases. If the witness is determined to not assist the prosecutor, the section 32 process is unlikely to have any impact on the hearing. An example where it would be effective is where a busy doctor can't remember dealing with a particular patient until s/he is allowed to refresh his/her memory from a report s/he prepared after a consultation.

[60] There does not appear to be any obligation on the prosecutor to attempt to refresh the witness's memory in court before turning to method 2. However, some magistrates may require it before they grant leave to cross-examine under s 38(1)(a) or (b).

[61] This was a problem for the crown in R v Yi [1998] NSWSC 39 where the crown was unable to assert who the interpreter was when the statement was made.

1. Has the witness made a prior statement?

This must be established by the prosecutor (on a *voir dire*).[62] If the witness denies that s/he made a prior statement s/he might be 'stood down' and asked to wait outside the courtroom. The prosecutor will then call a police officer to testify (on the *voir dire*) that s/he saw the witness read and sign the statement. This testimony is likely to satisfy a magistrate that the witness did in fact make the prior statement.[63]

2. Is the prior statement inconsistent with the witness's testimony?

If there is any dispute the statement will be tendered (on the *voir dire* only) and the magistrate will determine the issue.

3. Did the prosecutor give notice of the s 38 application at the earliest available opportunity?[64]

The prosecutor would usually submit that the earliest opportunity was after the witness's evidence in chief – ("I didn't know the witness would recant from the earlier statement.")[65]

Lack of notice would only dissuade a magistrate from granting leave if it caused unfairness.[66]

4. Would granting leave cause the accused unfairness in this case: s 192?

The magistrate must consider this issue.[67] Often, in my view, unfairness will not transpire in these matters until prosecutors use the third method - tendering the statement (discussed later).[68]

It's worth keeping in mind that even if leave is granted, the defence will still have an opportunity to cross-examine.[69]

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[62] R v Yi [1998] NSWSC 39

[63] Of course, in some cases the defence may wish to challenge this by cross-examining the officer or calling defence witnesses on the *voir dire.* Sometimes the relevant officer will not be available and an adjournment may be required. Strictly speaking, the defence may not be able to concede the witness made a statement.

[64] The magistrate may have regard to this in considering whether to grant leave: s 38(6)(a)

[65] Sometimes prosecutors call witnesses as part of their prosecutorial duty to present all the material facts – even when the original statement does not support their case. In these cases, the prosecutor would have an earlier opportunity to notify the defendant of his/her intention to cross-examine.

[66] If it did, an adjournment may be a more appropriate remedy than to refuse leave.

[67] Evidence Act s 192 (2). Section 192 also requires the magistrate to consider other matters, however, subsection 2 is usually the most contentious.

[68] In a trial, there is the potential that a jury will erroneously have regard to the contents of the prosecutor's leading questions, even when the witness is refusing to agree with such questions. However, a jury may be instructed that questions are not evidence – answers are.

[69] But be aware of Evidence Act s 42 which can preclude the defence from asking leading questions during cross-examination in certain circumstances.

5. If leave to cross-examine is granted should the ambit of cross-examination be limited?

Defence lawyers may ask the magistrate to limit the ambit of cross-examination.

If leave is granted pursuant to section 38(1)(c), the prosecutor is only permitted to cross-examine about a prior inconsistent statement, rather than cross-examination at large.

Of course, the prosecutor may also seek leave to cross-examine on the matters in section 38(1)(a) and (b). However, matters that are relevant only to the witness's credibility should be covered.[70]

In some cases, it may be worth defining the ambit before cross-examination commences. An appropriate case may be where a witness has given evidence on a whole variety of issues and only parts of the evidence are inconsistent with the prior statement.

6. If leave to cross-examine is granted should the witness be granted a certificate for protection against self-incrimination: s 128?

This may in fact influence a magistrate's decision on whether or not to grant leave.[71] Granting a certificate may be necessary for ensuring a fair hearing. Consider this example. A witness makes a false complaint to police. When giving evidence in court, the witness says "I can't remember what happened." This may be a convenient answer to avoid admitting lies to the court.

The accused may be denied a fair hearing because the witness was unwilling to admit his/her earlier lies to the court. The accused may receive a fairer hearing if the witness is assured that s/he won't be prosecuted for these lies.

Section 128 of the Evidence Act allows the magistrate to issue a certificate to protect the witness against self-incrimination (the effect being they can't be prosecuted based on the in-court admissions.) However, it provides no protection against perjury.[72] If the magistrate is thinking about refusing the certificate for this reason, one defence submission would be:

> "I won't be suggesting this witness is lying in court (committing perjury) I will be suggesting that this witness lied when first speaking to the police (which is a criminal offence), hence the need for a certificate."

Nothing in the act empowers a defence lawyer to request a certificate on behalf of the witness. Nonetheless, because the issue of a certificate may promote fairness, it may be necessary to raise the issue.

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[70] Credibility encompasses both honesty and reliability. In personal violence matters involving only one prosecution witness, the entire prosecution case is likely to depend on an assessment of the witness's credibility.

[71] It may be relevant to the magistrate's consideration of Evidence Act s 192(2).

[72] Evidence Act s 128 (7)

Note on Section 38 (1) and (b)

Before considering the effect of granting leave to cross-examine, it's worth pointing out that the above considerations were based on an application pursuant to section 38(1)(c).

The relevant considerations would vary slightly if leave were sought under section 38(1)(a) or (b). As mentioned, prosecutors may make applications pursuant to more than one subsection.

Section 38(1)(a) is the appropriate section for the prosecutor to use when the magistrate genuinely accepts the witness cannot remember what happened. That is, the ***evidence*** is unfavourable.[73]

Section 38(1)(b) is the appropriate section when the witness is failing to give evidence on matters the witness would be expected to know about. That is, the ***witness*** is unfavourable.[74]

The effect of granting leave to cross-examine

Once leave is granted, the prosecutor will cross-examine the witness. The witness is likely to be confronted with the prior statement (but it won't be tendered yet.)

The rest of the hearing will be influenced by the witness's answers during cross-examination. It is very important to listen carefully to the evidence. Remember: **questions are not evidence** – only answers to questions are.

It is worth considering the particular effect of some common responses. For this, I will refer back to the case study of John and Michelle. Once again, assume Michelle has given evidence in chief. Assume the same two alternative scenarios mentioned earlier:

> In scenario A she says: "John and I had an argument – but nothing else happened."
> In scenario B she says: "I simply cannot remember what happened that day."

Now assume the prosecutor cross-examines Michelle. Consider the effect of cross-examination in these two scenarios and how the status of the evidence is affected:

Response 1: A prima facie case is established

> Scenario A she says: "Actually John did punch me in the face."
> Scenario B she says: "Oh that's right. Now I remember. John punched me in the face."

If Michelle gives these responses, the prosecutor has established a prima facie case. There will be no need to use method 3 – tendering the statement.

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[73] This analysis is taken from *Unfavourable Witnesses* "Criminal Trial Courts Bench Book" at www.judcom.nsw.gov.au at p 2. The case of R v Lozano (unrep, 10/6/97, NSWCCA) is referred to.
[74] Ibid.

Response 2: A (weak) prima facie case is established

> Scenario A: "Yes I admit that's what I told the police but that's not what actually happened"
> Scenario B: "Yes I do remember telling the police that John punched me. But I don't remember him actually doing it."

This evidence will establish a (weak) prima facie case that John assaulted Michelle. That is:

- Michelle's sworn evidence is now: "I told the police that John punched me."
- The hearsay rule says that would not be admissible to prove: John did in fact punch Michelle.
- However, Michelle's oral evidence is relevant to her credibility[75](because she is conceding that her evidence in chief is different to what she's said in the past.)
- Therefore her sworn evidence is relevant for a non-hearsay (credibility) purpose.
- The tribunal of fact is entitled to use this as evidence that John did in fact punch Michelle (for a hearsay purpose).[76]

Thus, the prosecutor has prima facie evidence that John punched Michelle. The prosecutor will only use method 3 (tendering the earlier statement) if it can further the prosecution case. Tendering her earlier written statement will simply demonstrate she told the police "John punched me." She's already given sworn evidence of that. Hence, the statement should not be tendered. (I.e. method 3 is not required.)

Exception: if the earlier statement was a video recorded interview, this may assist the magistrate in determining the veracity of the earlier statement, as the magistrate could observe the delivery of her allegations. This could therefore be legitimately tendered.

Response 3: No prima facie case is established

> Scenario A: "I did make a statement to police but I never said what you just read out – I must have been verballed."
> Scenario B: "I remember telling the police something – I'm not sure what. But I can't remember if he actually assaulted me."

If this is her evidence, there is still no prima facie case and the prosecutor must resort to method 3.

Response 4: No prima facie case is established

> Scenario A: "I don't care what you say – I never went to the police station to make a statement"; or

[75] The credibility rule will not preclude this evidence: see s 103, s 106(c).
[76] Evidence Act s 60. However, if the court immediately asks that the evidence be limited for its credibility purpose (s 136) – there may still be no prima facie case.

> Scenario B: "I do not remember telling the police anything. I do not remember what happened."

If this is her evidence, there is still no prima facie case and the prosecutor must resort to method 3.

The need to comply with the rule in Browne v Dunn

Before turning to method 3 (tender of statements), it is worth making two points about the rule in *Browne v Dunn*:

1) The prosecutor must comply with the rule in *Browne v Dunn* if s/he intends to contradict his/her own witness at a later point.

2) Of course, the defence lawyer will also have to comply with the rule in *Brown v Dunn.* In the examples (3) and (4) above, however, it would have been unnecessary to suggest to the witness she was not assaulted by John.

For commentary on the consequences of breaching the rule: see Odgers, S *Uniform Evidence Law*, (7th Ed.) (Lawbook co. 2006) pp136-141.

3rd Method: tendering a written statement made by the witness

The above discussion demonstrates that a prosecutor will only need to resort to method 3 if:

1) the witness still denies (or can't remember) **having made** a statement to police; or

2) the witness admits the statement was made but denies that it **accurately records** what she told the police (or she can't verify that it's an accurate record because she can't remember what she told police)

1. Proving the witness made a statement to police

This will be done by having an officer testify that s/he saw the witness read and sign the statement.[77]

[77] This may have already taken place during the officer's evidence-in-chief. It also may have happened during the *voir dire* (when the foundation was laid for the section 38 application). If the latter occurred, the prosecutor and defence lawyer may be able to import that evidence from the *voir dire* into the hearing by consent.

2. Proving what was said in the statement

This is best explained by referring to our case study. Assume Michelle said the following during cross-examination:

> Scenario A: "I did make a statement to police but I didn't say what you've just read out. The cop must have verballed me"; or
> Scenario B: "I did make a statement but I just can't remember if that's what I said to the police"

The prosecutor now wishes to prove that Michelle's earlier statement did in fact say "John punched me." And more importantly, the prosecutor wants to prove John assaulted Michelle.

There appears to be three mechanisms for proving Michelle said "John punched me" in her earlier statement. They are:

a) tendering the written statement of the witness: Evidence Act s 102, 103, 60
b) tendering the written statement of the witness: Evidence Act s 66
c) adducing oral evidence from the police officer (regarding his/her conversation with the witness)

The first (a) is the easiest and most common vehicle of proof. The overall difference in using the second two methods is so remote that I will not discuss them for present purposes.

a) Tendering the written statement of the witness: Evidence Act s 102, 103, 60

The prosecutor may attempt to admit the earlier written statement. The statement is relevant. This is because it will affect Michelle's credibility (i.e. if she's found to have changed her story then her credibility will be impugned).[78] The credibility rule is unlikely to preclude its admission.[79]

The statement is unlikely to be defined as hearsay evidence.[80] This is because the prosecutor will submit:

- The statement is not tendered to prove that **John punched Michelle**.
- The statement is tendered to prove **Michelle told the police "John punched me."**

Thus, the statement is likely to be admitted. However, once the statement is admitted for a non hearsay purpose (credibility) it may be used for a hearsay purpose (i.e. to prove

[78] See Evidence Act s 55(2)(a)
[79] See both ss 103 and 106(c) and also the case of *Adam v R* [2001] HCA 57; 207 CLR 96; 183 ALR 625.
[80] See Evidence Act s 59

John punched Michelle.)[81] Hence, there will be a prima facie case that John punched Michelle.

The defence may ask the court to limit the use of the evidence.[82] That is, limit it to evidence that Michelle told the police "John punched me." The defence could argue that was the prosecutor's original intention.

The defence could further argue that if Michelle's sworn evidence is still "I don't remember what happened" the tender of the statement would cause real prejudice. This is because the defence would be unable to test the details of the earlier version.[83]

Similar arguments may be made pursuant to section 137 which allows discretionary **exclusion** of the evidence.

If the evidence is excluded or limited to its credibility use, there will still be no prima facie case that John assaulted Michelle.

If the evidence is allowed, there is still no sworn evidence from Michelle that she was punched by John. There is also no sworn evidence from Michelle that she told the police "John punched me." There is simply unsworn evidence of both propositions. This is very weak evidence.

Considering closing arguments

The above discussion demonstrates the different ways a prosecutor can establish (or fail to establish) a prima facie case. While there are many different methods of obtaining prima facie evidence, the method used in any given hearing should not be ignored.

It is the role of a defence lawyer to point out the shortcomings in the evidence and why the magistrate may have reservations about accepting it.

In the case of John and Michelle consider the two possible extremes:

1. Sworn evidence from Michelle that she was punched by John, given forthrightly by Michelle in response to non-leading questions. Or;

2. Unsworn evidence that Michelle told the police "John punched me" (even though she has given sworn evidence in court that "John never punched me".)

In both of the above examples, a prima facie case may have been established, but the magistrate will be treating the evidence very differently.

[81] See Evidence Act s 60
[82] Section 136 of the Evidence Act gives the court a discretion to do this.
[83] A similar argument was made in R v GAC (unrep, 1/4/97, NSWCCA) in a slightly different context.

The second example, above, would be an appropriate case for the magistrate to give him/herself a *Prasad* direction.

Whether a defendant gives evidence is a matter for each defendant and his/her lawyer. If a defendant gives sworn evidence consistent with innocence that will be a further consideration for the magistrate.

Conclusion

If anybody wishes to discuss any of these issues further please do not hesitate to contact me:

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