

THE VOIR DIRE:

AN APPROACH TO RUNNING ONE IN THE LOCAL COURT

Paul Townsend and Lester Fernandez
October 2006

Introduction

What is it?

A voir dire is the forum for legal argument on an application to have evidence excluded by the judicial officer in a trial, or to test the competency of a witness, or test whether a witness is to be declared unfavourable. It is the process for getting the challenged evidence before the judicial officer so that the application can rationally be assessed and decided. It is also the process for getting before the judicial officer evidence of facts upon which the application relies.

It is often called a “trial within the trial”. Literally, it means, in French, “to see to say”. This has always puzzled me. A learned text book (Jill Hunter & Kathryn Cronin, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary*, Butterworths, 1995, p 471) claims that it is a corruption of the French *vrai dire*, which means “to speak truthfully” – which may explain why it is conducted in the absence of the jury.

Does it exist in the Local Court?

Yes it does, despite what some magistrates might tell you. There are stories of magistrates responding to a request for a voir dire by saying something like, “This is not the District Court”; or, “There is no such thing in this jurisdiction”. Quite commonly the magistrate will say, “What we will do is hear all the evidence, and then I will make my decision on your application to exclude some of it at the end.” I will confess right away that the past I have in agreed to such a procedure.

The *Evidence Act* sets out the law on the voir dire at Section 189. It is worth a good close look:

The voir dire **189**

(1) If the determination of a question whether:

- *(a) evidence should be admitted (whether in the exercise of a discretion or not), or*
- *(b) evidence can be used against a person, or*
- *(c) a witness is competent or compellable,*

depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.

(2) *If there is a jury, a preliminary question whether:*

- (a) *particular evidence is evidence of an admission, or evidence to which [section 138](#) (Discretion to exclude improperly or illegally obtained evidence) applies, or*
- (b) *evidence of an admission, or evidence to which [section 138](#) applies, should be admitted,*

is to be heard and determined in the jury's absence.

(3) *In the hearing of a preliminary question about whether a defendant's admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the defendant.*

(4) *If there is a jury, the jury is not to be present at a hearing to decide any other preliminary question unless the court so orders.*

(5) *Without limiting the matters that the court may take into account in deciding whether to make such an order, it is to take into account:*

- (a) *whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the defendant, and*
- (b) *whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question, and*
- (c) *whether the evidence to be adduced in the course of that hearing would be admitted if adduced at another stage of the hearing (other than in another hearing to decide a preliminary question or, in a criminal proceeding, a hearing in relation to sentencing).*

(6) [Section 128\(8\)](#) *does not apply to a hearing to decide a preliminary question.*

(7) *In the application of [Chapter 3](#) to a hearing to determine a preliminary question, the facts in issue are taken to include the fact to which the hearing relates.*

(8) *If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced in the proceeding of evidence given by a witness at the hearing unless:*

- (a) *it is inconsistent with other evidence given by the witness in the proceeding, or*
- (b) *the witness has died.*

The first thing you will notice about Section 189 is that it does **not** say: “This applies only to the District Court” or “This never applies in the Local Court” or “This only applies in the Local Court at the absolute discretion of the magistrate”.

The second thing you will notice about Section 189 is that it assumes there may not be a jury. In other words, the section does not only apply if there is a jury sitting as the tribunal of fact. It presumes the possibility of other kinds of tribunals of fact.

So yes, it applies to the Local Court – see section 4 of the *Evidence Act 1995*.

However...

An accused has no “right” to a voir dire hearing. Here is the authority for that proposition, and it contains a useful tip:

“It is of the utmost importance that practitioners and judges always remember that the grant of a voir dire hearing is a matter of discretion not of right, and that a party who seeks a voir dire hearing must first satisfy the judge that there is reasonable ground for departing from the ordinary procedure of the trial to that extent. It is important that counsel seeking a voir dire identify the issues to which it is directed...” - per Badgery Parker J, McInernay J agreeing, *R v Hawkins*, unreported CCANSW 17 December 1992 (BC9202721).

How do you get one up and running?

Ask. Say something to the magistrate like, “There is some evidence in the police case that I object to. The question of its admissibility should be decided on the voir dire.” Or, even, be bold: “We will need a voir dire on some of the evidence in the police case that I say is inadmissible.”

If the magistrate responds with the assertion that the voir dire does not exist in the Local Court, or some variation of that theme, you might gently take them to sections 4 and 189 of the Evidence Act, in order, you might tell them, to assist them not to fall into error.

If the magistrate responds by suggesting that, in order to save precious court time, the court will hear the evidence in the summary trial and then make the decision, you might suggest that the proper way to proceed would be to hear the evidence on the voir dire and, if the magistrate rules against you and admits the evidence, you would consent to the evidence on the voir dire being tendered as the evidence in the summary trial. It seems to me that this procedure has the same effect, but is the correct approach.

What happens next?

You tell the magistrate briefly what is the evidence that is challenged, and what issues you will raise in your argument to have the evidence excluded. This is really important, and, as noted in *Hawkins* referred to above, the issues have to be clearly identified before the voir dire starts. The only evidence to be called in the voir dire, then, is evidence that is relevant to the identified issues.

The challenged evidence is then led by the prosecutor. Depending on the nature of the challenge, and depending on what facts, if any, you need to establish, you may or

may not cross-examine the witnesses called. And you may or may not call evidence yourself in your case on the voir dire.

Calling evidence on the voir dire

If your application to exclude the challenged evidence depends upon the magistrate finding particular facts, and those facts will not be admitted by the witnesses in the prosecution case in evidence-in-chief or cross-examination, then you almost certainly will have to call evidence in your case.

It is useful to bear in mind that the only evidence that is relevant in the voir dire is evidence that is relevant to the issues you have identified. This protects your client somewhat at least from cross-examination at large on the voir dire. Cross-examination of your client, or any witness called by you, is strictly restricted to the issues on the voir dire.

If the evidence you are trying to exclude is evidence of an admission by your client, it is also useful to note carefully section 189 (3).

The onus and standard of proof

Generally, the prosecution has the onus of proving the facts asserted by the evidence in the voir dire. The only exception to this is where your challenge is framed in terms of the discretion to exclude unlawfully or improperly obtained evidence pursuant to section 138 *Evidence Act*. In that application, you bear the onus of proving the unlawful or improper conduct that grounds the application.

It is very important to note section 142 *Evidence Act*, which establishes the standard of proof on questions of admissibility: it is **on the balance of probabilities**. This applies to both sides, defence and prosecution.

Addresses

As it is your application to exclude the evidence, you address the court first. You should also, if necessary, have a right to reply to the arguments put up by the prosecutor in answer to your argument.

What follows is a suggested approach to preparing a voir dire.

An Approach

There are a number of tactical decisions that have to be made. A guideline or checklist (signpost? sounding board? measuring stick?) might be:

Voir Dire

One: The Argument

- What are the issues?
- What is the law on these issues?
- What is the argument I want to make at the end?

Two: The Facts

In order to make the argument:

- What facts must be proved?
- Who must prove those facts?
- To what standard must those facts be proved?

Three: The Evidence

What witnesses will give the evidence of those facts?

What questions am I going to ask to elicit that evidence

- In chief?
- In cross-examination?