

The Voir Dire

A Practical Guide to Determining Admissibility

In the Local Court and Summary Trials

1. This paper is intended to be a brief reference to assist practitioners appearing in Local Courts, when faced with the need to challenge the admission of evidence in criminal hearings. Many, if not all, the principles herein have equal applicability to judge-alone trials, and indeed jury trials in the District and Supreme Court.

PART A – THE VOIR DIRE, SOME APPLICABLE LEGAL PRINCIPLES

What is a *Voir Dire*?

Where there are disputed or unestablished facts constituting a condition precedent to the admission of a particular piece of evidence, or evidence from a particular witness, the preliminary questions of fact and of the admissibility of the evidence are determined by the judge. The determination of such preliminary issues is known as the voir dire.¹

2. Voir Dires have been described in various ways. I prefer to think of them as “preliminary questions” or “preliminary hearings”². This helps me to think of what should be resolved in the trial as part of the adversarial process, and what, in truth, is the sort of preliminary matter that should be sorted out before the trial begins.
3. The Voir Dire is a useful mechanism whereby an accused can be made aware of what the actual evidence in a hearing against her will be, *before*, making decisions about what cross examination to conduct and what evidence to lead. For that reason alone, it is important to try to have the preliminary question/s identified, separated from the substantive hearing, and determined at the outset. This can be difficult, and I will try to suggest some approaches practitioners might take later in this paper.

¹ Halsbury’s Laws of Australia [195-175]

² On this point, I am in good company, but for the heading, s 189 Evidence Act refers not to *voir dire* but to “preliminary questions”

4. Accused persons have a right to know the evidence the State intends bringing against them on any given charge. A Voir Dire promotes the interests of justice by clarifying those parts of the contested evidence that will, and will not, be admitted as part of the pool of evidence from which the judge will determine the question of guilt. The voir dire can be applied to a wide variety of scenarios, not just to determine admissibility of a piece of evidence per se.

Power to Conduct a Voir Dire

5. The power to conduct a voir dire originates in the common law.³ The Evidence Act ("the Act") has not displaced the common law, at least in so far as the power to conduct a voir dire is concerned. As with other provisions of the Act, there are aspects of the conduct and procedure of voir dire that continue to be governed by principles derived from the common law.
6. The voir dire is clearly available in the Local Court, and in judge alone trials.⁴
7. Section 189 of the Act defines what may constitute a preliminary question. It does not set out when a voir dire should be conducted, or what might properly weigh in the exercise of a discretion whether to hold one. What the Act has done, however, is provide something of a definition as to what might appropriately be dealt with by way of a voir dire.⁵ It also mandates the procedure to be followed when determining certain preliminary questions. I will try to deal with each of the important aspects of s 189, and the common law, as may typically arise, in any given application to conduct a preliminary hearing.

No Right to a Voir Dire

8. It is important to note, at the outset, that there is no "right" of an accused person to have a voir dire conducted in order to determine a preliminary question.⁶ This has been a major hurdle facing practitioners who wish to determine a preliminary question in a Local Court hearing. It is up to the practitioner to convince the

³ *DPP v Zhang* [2007] NSWSC 308, [109]

⁴ *Zhang*, per Johnson J, at [111]; *DPP v Ridley* [2015] NSWSC 1478, at [39]-[41]

⁵ *Zhang* at [112]; *Haines v R* [2018] NSWCCA 269 at [277]-[279]; *R v Hawkins*(NSWCCA, 17/12/1992, unrep)

⁶ *R v Lee* (NSWCCA, 5 /5.1997, unrep) p2; *R v Lars aka Larsson* (1994) 73 ACrimR 91, (NSWCCA 30/6/1994) at [119]

judge/magistrate that it is appropriate to make the discretionary decision to conduct a voir dire.⁷

Voir Dire Available in Local Court

9. Many practitioners will have faced strong resistance from Magistrates when an application is made for a preliminary hearing. This ranges from the observation that “this is a busy list” and a VD might just be wasting time – “cant I just hear all the evidence and make my decisions about admissibility etc at the end” – to situations where the Magistrate doubts whether Voir Dires are meant to be conducted in the Local court, that is, the process “doesn’t exist” in local court hearings.
10. Taking the latter proposition first, there is no doubt that the voir dire is available in the Local Court. In *Ridley*, Adamson J looked beyond the common law to set out a statutory basis for concluding the voir dire was a procedure available in the Local Court.⁸ The first step was a reference to s 38 Criminal Procedure Act:

38 HEARING PROCEDURES TO BE AS FOR SUPREME COURT

In any proceedings for an offence (other than in the Supreme Court for an indictable offence), the procedures and practice for the examination and cross-examination of witnesses, and the right to address the court on the case in reply or otherwise, are, as far as practicable, to be conducted in accordance with Supreme Court procedure for the trial of an indictable offence.

Then Adamson J referred to s 202 Criminal Procedure Act:

Determination by court

202 DETERMINATION BY COURT

(1) The court must determine summary proceedings after hearing the accused person, prosecutor, witnesses and evidence in accordance with this Act.

⁷ *ibid*

⁸ *Ridley* at [40]. Note that in the Austlii version of this case, para [41] contains a typo, in that the published judgement at [41] refers to s 201 Criminal Procedure Act. Her Honour was clearly referring to s 202, which she had set out earlier in her judgement.

(2) The court may determine the matter by convicting the accused person or making an order as to the accused person, or by dismissing the matter.

(3) In the case of a matter heard in the absence of the accused person, the court may adjourn the proceedings to enable the accused person to appear or be brought before the court for sentencing.

11. In *Zhang*, Johnson J held:

Prior to the enactment of the Evidence Act there was ample authority for the proposition that a judge sitting without a jury or a magistrate could conduct a voir dire for the purpose of determining an objection to evidence at a criminal trial.

...

Section 189 Evidence Act provides for a voir dire to be held with respect to the admissibility of evidence, the use of evidence against a person or the competency or compellability of a witness. Section 189 is not confined to trial by jury. It extends to criminal and civil proceedings, whether heard by a judge or magistrate, sitting alone or with a jury.

..

The grant of a voir dire by a Court is a matter of discretion and not a right. A party seeking a voir dire must first satisfy the Judge or Magistrate that there are reasonable grounds for a voir dire, and counsel must identify the issues to which it is directed.⁹

12. Previous papers on this topic have also suggested that ss 4, 189 of the Act, taken together, provide a statutory power to hold a voir dire in the local court.¹⁰ Nothing in s 189 of the Act, or in any other provision that I am aware of, suggests that a Local Court *would not* have the power to conduct a voir dire. In particular, s 189(2), and

⁹ *Zhang* 109-112

¹⁰ See for eg *The Voir Dire: an Approach to Running one in the Local Court*, P Townsend & L Fernandez, October 2006, and *The Voir Dire, s 138, and 'Road Side ERISPs'*, M Dennis, 2014.

(4) would make no sense unless the voir dire was available in both summary and indictable jurisdictions.

13. Finally, the common law power for voir dire to be conducted in summary hearings, in NSW, goes back at least as far as *Dixon v McCarthy*.¹¹

14. Overcoming a Magistrate's resistance, or annoyance, at being asked to conduct this separate preliminary hearing is a more difficult question, and will be addressed in the second part of this paper.

15.

PART B – PRACTICAL MATTERS, AND PROCEDURE

What can qualify as a 'preliminary question'

16. Annexed to this paper is a copy of s 189 of the Act. This sets out *some*, but not all of the matters that relate to the conduct of a voir dire. As can be seen from subs (1), there is a very wide variety of matters that can be determined as 'preliminary questions'. A voir dire can be sought to determine, amongst other things:

- The admissibility of admissions made by an accused: Pt 3.4 Evidence Act; s 281 Crim Proc Act
- Competency of a witness – particularly with regard to their age and ability to give sworn evidence: s 13 Evidence Act
- Compellability of spouses and other family members: ss 18, 19
- Qualifications of expert witnesses, as well as their opinions: s 79 Evidence Act

17. The list of matters that can be dealt determined on a voir dire is not limited to the above. In the appropriate case, it is an important tool permitting an accused to isolate a particular piece of problematic evidence, and to have the Magistrate focus on issues relating to the admission of that evidence, or resolution of that issue, without it being simply 'part of the mix' of evidence that will ultimately determine whether the Crown has made its case.

¹¹ (1975) 1 NSWLR 617 pp 634-637, there is an earlier authority: *Ex parte Whitelock; re McKenzie* [1971] 2 NSWLR 534, but *Dixon* seems to be the case that is much more commonly referred to.

18. However, the first question for practitioners is whether a voir dire is needed at all. Can the issue be determined together with the substantive issues in the trial. Is it in truth a stand alone preliminary question? Often, on reflection, it will become clear that, from a practical point of view, it is better not to seek a voir dire at all.
19. The benefits of *not* conducting a voir dire include not running the risk of antagonising a Magistrate, not telegraphing the approach you are going to take in the hearing itself, saving time, and money, for your client. Further, if the issue is totally black and white, and you are sure it cannot be 'fixed', why not just raise the matter with the prosecutor before the trial?
20. To take an extreme example, what is the point of challenging the admissibility of identification, if your client has made clear admissions, and your case is really one of self-defence?
21. So, first up, I suggest giving close consideration as to whether one is needed at all.

How do I get a Voir Dire?

22. Ask for one. The precise formula of words is a matter for the individual practitioner. However, when the matter is called on for hearing, if you want a voir dire, it is important to let the Magistrate know.
23. Often Magistrates who have multiple matters for hearing on a given day run through the list to see who is ready, get an idea of how long a matter will take, the issues, priorities etc. This is a good opportunity, and it is good practice to let the Magistrate know that there will be a preliminary issue. Doing so alerts the Court, and may give you an opportunity to hand up the written material – statements, cases, submissions etc – that you will be relying on, so when your matter comes on, the Magistrate is already appraised of the issues and has an idea of the law you will be relying on.
24. Before embarking on identification of the issues and the material that the Magistrate ought to look at in this preliminary hearing, it is always prudent to make sure no Crown witnesses are present in Court. This is particularly so in cases where you seek to challenge the admissibility of an admission, and there may be police involved in the case present. It has always been my practice, when asking the court to conduct a voir dire, to ask the Court to make sure that no prosecution witnesses are present in court. This includes the OIC.

Persuading the Court a Voir Dire is Necessary.

25. As set out above, Magistrates commonly resist calls for a voir dire separate to the actual hearing. This flows from a desire not to waste time, and a belief that the Magistrate can readily isolate the evidence and determine the preliminary question at the end. Not only is this approach contrary to what I believe is the clear and correct approach that can be inferred from the words of s 189, but it is also a course fraught with danger. Much of the caselaw on the issue of voir dire stresses the need for particularity and precision when identifying the issue, and the evidence that will go to the resolution of that issue. This can only be muddled if left as 'part of the mix' of evidence in the hearing to be determined in one go at the end.
26. Furthermore, it can be very difficult to make appropriate tactical decisions until an accused knows whether the disputed evidence is in fact admitted against them in a case. That being so, there are a few things that a practitioner can do to make an application for a voir dire more persuasive.

The Voir Dire will Save Time, or at Least will not Waste Time

27. It is important to try to show the Magistrate that the conduct of this preliminary hearing will not result in an undue waste of time. Firstly, it is important to stress that, in the event that the Magistrate rules against the accused on the preliminary question, it will not be necessary for the evidence on the voir dire to be given again. That is:

"If your Honour rules against me on the question of [xxx] then I would of course consent to the evidence on the voir dire being tendered as evidence in the hearing. It will not have to be led again."

28. Secondly, if the determination of that discrete question is crucial to the Crown case, then the voir dire will save time, and the need for other witnesses to give evidence. Take for example a situation where there is a large body of evidence in a stealing case – owner of shop, value of goods, people walking by giving general descriptions, police arresting an accused etc – but the Crown case rests on a contested admission, say one which was not recorded. It can readily be seen that by conducting the voir dire, the Court could potentially save a lot of time, and stress for witnesses by coming to a decision about the admission first.

29. I have never considered the “wasting time” argument to have any real substance. As Hamill J recently held in *DPP v Nagler*¹²:

It would be unfair, at this distance, to be unduly critical of the conduct of the Magistrate. It is clear that the pressure of work on the day of the hearing, and I expect more generally in [that] local court, was intense, and probably unreasonably so. What is known from the record of the present proceedings is that there was another defended hearing in the list, that the defendant in that other matter was in custody, and that the defendant’s case proceeded beyond the luncheon adjournment. His Honour was also responsible for work safety issues of the court staff. It is not always possible, or appropriate, for courts to sit beyond 4pm although judicial officers at all levels frequently do so.

Even allowing for those things, these were criminal proceedings where the defendant faced penalties including imprisonment. He was entitled to a proper hearing. The complainants also had a legitimate interest in having their allegations heard. It must also be said that the time saved by the undue haste with which the matter proceeded was illusory. As it has transpired, the case has occupied a further day of court time in the Supreme Court, ... and more time in preparing this judgement. The matter will be remitted to the Local Court where it will have to be listed and then heard again from the beginning. A balance had to be struck and it is impossible to avoid the conclusion that the time pressure affected the proper conduct of these proceedings.

30. A properly prepared application for a voir dire will be able to show a magistrate how conducting the preliminary hearing will not result in the loss or waste of any court time. It should also remind the court that conducting this as a separate hearing is the proper procedure, regardless of the time pressures that might otherwise apply.

¹² [2018] NSWSC 416, at [41], [42]

Preparing the Voir Dire

Written material

31. Reducing your argument to *brief* written submissions, highlighting the principles you say show the challenged evidence is not admissible is always a good idea. A document one or two pages long, with the essence of your argument, perhaps in dot points, is going to assist the Magistrate with a 'road map' of your argument. It will also assist you to focus on the crucial or essential matters you need addressed. If you can hand this up so the Magistrate can read it before the hearing begins, so much the better.
32. I need to stress once again, brevity is key here.

Disclosure

33. You will need to consider what you are going to tell the Magistrate, and your opponent. Is there any utility in speaking to the prosecutor? In my view, if the issue is "black and white", then you have nothing to lose. For example, if an admission is simply not in admissible form – say an unsigned notebook entry and no offer of an ERISP – then approaching and raising it with the prosecutor is not likely to harm your client's interests.
34. On the other hand, there may well be issues that should not be telegraphed to the prosecution. Again in relation to admissions, if the actual challenge relates to the reliability of the admission, and therefore the focus will be on the circumstances surrounding the making of it, it is unlikely that any prosecutor will agree to not lead the contested admission. It would be rare for a prosecutor to concede that police conducted themselves in a manner that would contravene ss 84, 85 of the Act. What is more likely is that, knowing what is coming, the police witnesses will be prepared for cross-examination, making your task more difficult. Indeed, this consideration may lead you to a conclusion that you do not need a voir dire at all.
35. So, speaking with the prosecutor is a decision that can only be made on a case by case basis. However, the rule I apply is to consider whether the problem can be "fixed" with further evidence/explanation, or whether it is such a fundamental flaw in the investigative stages that cannot be 'explained away'. If you are in doubt, then do not raise anything with your opponent.

Identify the Issue/s

36. A single voir dire can be conducted to determine more than one preliminary question.¹³ What is important is that the advocate clearly identify the issue/s that the voir dire will address. A failure to do this, or do this with an appropriate level of precision will not only make your application less persuasive, it will lead to confusion as to what is in fact being considered

37. In *R v Hawkins*, the court held:

It is important that counsel seeking a voir dire identify the issues to which it is directed

In *Lars*, the CCA held:

Where it is sought to explore on the voir dire the admissibility of evidence, the accused must make application to the judge for such an examination, specify the issues to be explored, and show, to whatever extent the judge may reasonably require, that there is indeed a significant issue to be tried.¹⁴

38. So, identifying the issue for determination – preferably in those brief written subs referred to above – is not just a good idea, it really is mandatory.

39. Identifying the issue/s with precision will also include identification of the section/s of the Act that you say will need to be considered. If the issue is the admissibility of the admissions, what particular section/s apply? Are you going to be arguing that the admission is not reliable? Not voluntary? Or was the result of some inappropriate behaviour? Each of these requires the court to consider different tests, and may have different outcomes. By properly identifying the issues, and the applicable law, you further your client's interests, you gain the trust of the Magistrate, and what you have to say or are trying to achieve will be properly understood from the outset.

40. If you are challenging the admissibility of expert evidence, it is important to be able to tell the Magistrate why it is you say that evidence is not admissible. Has the expert gone beyond the scope of their expertise? Is this really a matter that should

¹³ Eg *Foster v R* (1993) 66 ACrimR 112

¹⁴ At [119], see also *Bin Sulaeman v R* [2013] NSWCCA 283 at [133]

be the subject of expert evidence? Is the Crown really trying to dress up an opinion in the garb of expert evidence?

41. Whatever the issue is, you will need to identify the precise basis of your objection. You should have whatever statute and caselaw you will rely on handy to provide to the Magistrate. Arguing the “vibe” of the thing is not likely to be particularly persuasive.
42. Getting this stuff ready at the beginning will also focus your submissions at the end of the evidence, as well as direct you clearly as to what you need to challenge in the voir dire, and whether you need to lead any evidence on the preliminary question.

Identify the Parts of the Crown Case you Object to

43. Whilst it may sound obvious, it is not enough merely to say, for example, “the accused would object to any evidence of an admission”. Furthermore, there is no point in challenging the evidence in one statement, if there is another witness who will attest to the same thing, and that evidence is not open to challenge, or worse still, the practitioner just neglected to include that other evidence within the scope of the voir dire.
44. What is needed is for practitioners to identify with particularity what pieces of evidence over which there is an objection. This goes hand in hand with the identification of the issues.

Invite the Crown to inform the Court the Basis of the Asserted Admissibility

45. Not every piece of evidence in a Crown brief will be admissible. It is for the Crown to establish relevance. Particularly when an objection is raised to a piece of evidence as a preliminary issue, the Crown is obliged to tell the court the purpose of the tender.¹⁵ Equally, the Magistrate is obliged to ascertain the basis of the tender.¹⁶ Often, a piece of evidence is potentially capable of use for more than one purpose. It is important to know how the prosecution seeks to use the challenged evidence.
46. Further, it may well be, having heard the prosecutor tell the court what they say the relevance of the material is, and how they will use it in the hearing, that you are

¹⁵ Eg *Ridley*[41]

¹⁶ *Ibid* at [44], [48]

content to seek to limit the use of that evidence under s 136. It may well then be that there is no need for a voir dire, since what you were worried about is not what the prosecutor wants the evidence for. Where a piece of evidence is capable of proving two different things, then it is advisable to enquire of the prosecution what basis they seek to tender that evidence.

47. For example, the prosecution may want to adduce evidence of things the accused is alleged to have said to a person at a party. Whilst the words may amount to an admission, and indeed this is what caused you to be worried about them in the first place, the only thing the prosecutor really wants is something that puts your client at that party at a particular time, or perhaps to use the words as part of the material from which to infer your client's state of intoxication. In those circumstances, you might easily be able to come to an agreement to limit the use of that evidence to that issue alone. This means the prosecution gets what they want, and you avoid the problem of an 'admission' being led against you. The Magistrate is happy because you have saved court time, and the hearing can proceed.

48. In any case, as Adamson J made clear in *Ridley*, once the accused has raised an objection to a piece of evidence, it is incumbent on the Court to ascertain how the prosecutor contends the evidence is admissible. I suggest, having raised the issue, and identified the particular piece of evidence, inviting the prosecutor to inform the Court of the basis upon which she says it is admissible. Then sit down.

Who Bears the Onus

49. It is for the party seeking to adduce the evidence to show how it is admissible. It is for that reason alone that a Magistrate needs to have the prosecutor identify the basis upon which evidence is said to be admissible. This remains so for the voir dire.

50. However, certain objections do place an evidentiary burden on the accused. Matters going to unfairness (s90) or voluntariness (s 84) will require the accused to establish an evidential basis for the objection. Assuming the Crown witnesses will not agree to the propositions you put, then you will need to prepare evidence on the voir dire. There will be other occasions where an accused will bear an onus, most obviously where the objection is taken under s 138 – it is then for the accused to prove unlawful/improper conduct actually took place.

Defence Evidence

51. If an accused is going to give evidence on the voir dire, it is important to always keep in mind the narrow issue being determined. Evidence on the voir dire is not an opportunity to run through the whole of the defence case, and the prosecution must not be permitted to cross-examine an accused at large. Any questioning of an accused on the voir dire should be limited to the actual issue requiring determination.
52. So, for example, if the reliability of an admission is challenged (s 85), then the court needs to consider whether the circumstances in which the admission was made are such that the truth of the statement might have been adversely affected. Whether the admission was *in fact made* or is *true* is irrelevant at this stage: eg *Rooke* (NSWCCA 2/9/97, unrep); *R v Esposito* (1998) 45 NSWLR 442 at 460. Therefore, it is impermissible for a prosecutor to cross examine an accused as to those things on the voir dire.
53. Furthermore, s 189(3) makes clear that *unless the accused herself raises it*, then the truth or otherwise of the admission is irrelevant. This is because the truth of the admission is a question of fact to be determined in the substantive hearing. It is something the jury would have to consider.
54. Keep in mind that an accused can lead evidence on a voir dire that asserts the impugned admission was untrue. However, if she does, then the prosecution will be permitted to xx and to lead evidence going to that issue as well.¹⁷
55. So, if your client is going to give evidence, it is essential that you are clear that this is not going to be the *whole* of his/her evidence. You must do what you can to make sure the client does not stray into territory where s/he asserts the admission was untrue.

Conclusion

56. The voir dire is a very useful tool in the arsenal of an advocate, if used properly. Applied sparingly, prepared in such a way as to be as quick, and to the point as possible will not only make your argument more persuasive, it will assist the Court to come to the resolution of issues in an efficient way. It does not hurt your client's

¹⁷See *R v Zhang* [2000] NSWSC 1099 at [51],[52]

interests, or indeed your reputation, if such preliminary questions are conducted in this way.

Ertunc Ozen SC

Public Defenders Chambers

Annexure A

EVIDENCE ACT 1995 - SECT 189

The voir dire

189 THE VOIR DIRE

(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 (10) 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.