REPORT OF THE CRIMINAL LAW REFORM COMMITTEE

PRELIMINARY HEARINGS OF INDICTABLE OFFENCES

PRESENTED TO THE MINISTER OF JUSTICE
SEPTEMBER 1972

REPORT OF THE CRIMINAL LAW REFORM COMMITTEE ON PRELIMINARY HEARINGS OF INDICTABLE OFFENCES

Introduction

1. The present procedure for preliminary hearings of indictable offences is placed before the Committee because many people concerned in them feel that some of the time involved is unnecessary. Members of the public attending as witnesses may wait for lengthy periods outside the Courtroom, and then give formal evidence without a single question being asked of them in cross-examination. This is frustrating and irritating to busy people. They ask themselves why they should have to waste so much of their time waiting around outside the Courtroom, only to give brief evidence which attracted no interest from the defence. If at the same time, absence from work or business has meant financial loss their irritation is the more understandable, and frequently more obvious. We learn from police sources that witnesses quite often say that they will not help in future if their assistance means that they will again lose time and money.

2. The Court's time is also important, and Magistrates may be occupied in a preliminary hearing for days, even weeks on occasion, while the presence of police officers at Court giving evidence, and their absence from normal duty, detracts from the operational efficiency of the police.

3. But at the same time it must be emphasised that the importance of a preliminary hearing in our process of criminal justice is very great, not only to protect a citizen against an accusation which is insufficiently supported to justify his standing trial before Judge and jury, but also, and perhaps more importantly, to provide the accused and his advisers with full information of the case against him. These two aspects are of such fundamental importance, that any alteration to our present system of preliminary hearings would be unsatisfactory if either factor was in any way undermined.

4. It is worth emphasising that what the Committee is considering is not the actual trial of an accused person. It is simply the preliminary hearing, at which the presence of witnesses may be less necessary than will be their presence at the trial itself.

5. The Committee has given this matter very long and careful consideration. It has been helped in its deliberations by the composition of its membership. The Solicitor-General participates as chairman, it has among its number a lawyer who is also a senior officer of police with very wide experience as a police prosecutor, and other members are very experienced counsel who have appeared for prosecution or defence in a wide variety of criminal trials.

6. It may be of some importance to say that the proposals now advanced have the Committee's unanimous approval and the recommendations are made accordingly.

General Background

7. Our present procedure calls for a hearing in the Magistrate's Court presided over either by a Magistrate or by Justices of the Peace. At this preliminary hearing each prosecution witness, whose evidence is to be placed before the Supreme Court at the subsequent trial, is required to attend and give his evidence in the ordinary way. What he says is taken down on a typewriter, read over to him afterwards and then signed by him and the presiding Magistrate or Justices.

8. At the end of the preliminary hearing the defence is invited to call evidence, but almost invariably the defence reserves its case and calls no evidence whatever.

9. At this point in the hearing, it is open to the defence to make submissions to the Court that the evidence placed before it is insufficient to justify committing the accused for trial. To make such an application is a valuable right, and it is of fundamental importance that it be not diminished in any way.

10. The time involved in preliminary hearings may vary from an hour in some cases, up to a fortnight or more in others. Frequently the hearings occupy the best part of a day, and it is not at all uncommon to find that the procedure involves a second or third day.

11. In many cases a number of witnesses attending are giving formal evidence only, and the defence right to cross-examine is rarely exercised against them. The defence does cross-examine other witnesses from time to time, but the practice seems to vary in different parts of the country. The defence usually asks few or no questions, mainly because it is often uncertain where the prosecution case is leading. There are occasions however, and such are in the experience of several members of the Committee, when there has been lengthy cross-examination of witnesses at the preliminary hearing, generally as a prelude to a motion to discharge the defendant without committal, and sometimes for the purpose of exploring avenues that might merit attention in the Supreme Court but which, if they prove unprofitable at the preliminary hearing, can be ignored at the subsequent trial. This right of cross-examination is also important, and again must be carefully preserved.

12. In the great majority of preliminary hearings, it is usual for the defence to allow the witnesses to give their evidence without cross-examining any of them. A few examples may serve to illustrate the Committee's point:

(a) In charges of burglary, it is usual for a property owner to be called for the purpose of deposing that the premises in question were secured by him at one point in time, and subsequently found by him to have been forcibly entered.

(b) In cases involving motor vehicles, it is not uncommon for a vehicle inspector from the Ministry of Transport to be required to attend to depose as to the result of an examination made of the vehicle.

(c) In cases of death a pathologist is called to depose as to results of his post-mortem.

(d) Where exhibits have been passed from one hand to another it is necessary to call each person who has handled them to depose as to how they came into his possession and how they left it.

(e) Sometimes surveyors are required to prepare scale plans and they also are required to attend to produce their plans.

(f) Photographs are often produced and it is technically necessary at the preliminary hearing for the photographer to be called to describe what is obvious in the photographs he has prepared for the purposes of the prosecution.

13. There are a number of charges which cannot be dealt with in a summary way - rape, abortion, wounding with intent etc. In such cases our present provisions require a full preliminary hearing even when the accused intends to plead guilty. Such a plea presupposes that there is sufficient evidence to justify committal, and in these cases we cannot see much justification for requiring all witnesses to attend the Court.

14. It seems to the Committee a pity that some way has not been found to preserve the benefits of the present system, and at the same time to save inconvenience to the public, the Courts, the legal profession and the police, by devising a scheme that will enable a preliminary hearing to be conducted adequately, with proper regard for all necessary safeguards, and yet occupy much less time. In particular, if members of the public can be spared the necessity of leaving their places of business or employment to come to the Court to give formal evidence that is not contested, this advantage alone would, in the opinion of the Committee, merit a change.

15. To enable it to reach its conclusions, the Committee instructed its secretary to make enquiries of other jurisdictions, and received a great deal of information from overseas that helped it materially in its deliberations.

Other Jurisdictions

16. Enquiries have been made in Great Britain, Australia and elsewhere which disclose that the practice corresponding to our preliminary hearing varies widely. In Scotland there is no preliminary hearing at all, while in other jurisdictions it can be an elaborate process.

17. Great difficulty has been experienced in the United Kingdom during the last decade because of the volume of criminal work, and because the procedure there involved a record being taken by sometimes inexpert typists, and frequently it seems, by a writer recording the evidence in longhand. As a result, the Criminal Justice Act 1967 was passed and came into force on January 1st 1968. This Act made provision for witnesses to give their evidence in the form of a written statement, properly authenticated, which, with the consent of the defence, could be

tendered to the Court at the preliminary hearing without the witness attending. The Act covered a number of procedural matters, but the main points concerning preliminary hearings were contained in the first two Sections. There was a further provision completely prohibiting publication of any of the evidence given at preliminary hearings, except where the accused wanted a report to be published. We have been supplied with information of the way that the procedure instituted under this Act has worked out in practice, and some defects have been pointed out to us, although it seems to have been remarkably satisfactory.

18. The Committee sees much merit in adopting, in general principle anyway, the general procedure in Ss. 1 and 2 of the Criminal Justice Act 1967, with some modifications that the passage of time has shown to be desirable.

19. The Committee does not advocate a radical departure from such an important part of the criminal process. It makes its suggestions confident that they can effect an important change for the better.

20. Overseas experience shows that the Criminal Justice Act 1967 is widely used in Great Britain. We are told by the Law Society that although no statistics are available from throughout the United Kingdom, figures for the City of Birmingham indicate that in over 3000 cases last year, including grave charges, witnesses were called in only 3% of those hearings. The Chief Constable of the West Yorkshire Constabulary informs us that well over 90% of all committals for trial in his district were dealt with on the papers alone, and there is other information to similar effect.

COMMITTEE'S PROPOSALS

21. The present procedure laid down under Part V of the Summary Proceedings Act 1957 should be retained.

22. In addition opportunity should be available for the evidence of witnesses to be tendered to the Court in writing without the need for such witnesses to be present. This alternative should only be permitted if both prosecution and defence have no objection.

There are occasions when the prosecution wants a particular witness to give evidence, either because it wishes to establish the witness's credibility, or because it wishes to have the witness, an accomplice perhaps, depose on oath as to matters he has disclosed to the police earlier. It is sometimes also helpful for the prosecution to give a young complainant in a sexual case the experience of giving evidence before the trial. The defence on the other hand, will often want to assess the credibility of prosecution witnesses which cannot be done where the evidence is recorded in writing and the witnesses are unseen. In such circumstances it is necessary that both sides should have the opportunity of insisting that witnesses appear, and for that reason the Committee proposes the alternative only when there is no objection by any party to the case.

23. It is possible for this procedure to be adopted for some witnesses, and it may, in a proper case be adopted for all persons giving evidence on behalf of the prosecution.

24. If all the evidence should be put forward in writing without witnesses attending the Court, then where the defence makes no objection to an order for committal, we suggest that the Court make a formal order of committal without consideration of the material contained in the written documents. This we describe as "committal on the papers", but to ensure that there is proper protection for every accused, in our opinion it should only be permitted where the accused is represented by counsel or a solicitor. If an accused is not legally represented, then the Committee thinks it important that examination of the prosecution evidence should be made by someone other

than the police officer conducting the enquiry, and in such circumstances it sees a need for the presiding Magistrate to examine the material and to reach a conclusion in the ordinary way as to whether there is sufficient evidence to commit the accused for trial. But where counsel or a solicitor is acting the defendant's own legal advisers will have made such examination already.

25. The Committee suggests that the alternative it proposes can be achieved legislatively, by adding new sections to Part V of the Summary Proceedings Act 1957. These sections would be closely patterned on the relevant parts of the Criminal Justice Act 1967 (UK), with some amendments to meet local conditions.

26. The proposed legislation should include the following provisions:

a. Where all parties to a prosecution agree, the evidence of any witness may be tendered in writing at a preliminary hearing without that witness coming to the Court. A copy of the statement must be made available to the other parties before the hearing, and must be signed by the witness who will make a formal declaration in that statement that he believes the statement to be true. A witness who wilfully makes a statement knowing it to be false should be liable to prosecution for an offence punishable by imprisonment.

b. If it is agreed that all witnesses at a preliminary hearing have their evidence put forward in writing and if the accused person is represented by a solicitor or counsel, and if that counsel or solicitor consents to the accused person being committed for trial without any hearing at all, the Magistrate shall commit the accused without further enquiry.

c. In any case where the Magistrate thinks fit, he may require any witness to attend the Court

and give evidence, whether the accused's legal adviser has consented to a committal or not. He should then consider the evidence, whether written or oral, and decide whether the accused should be committed for trial.

d. Where the accused's legal adviser does not consent to a committal the Magistrate must consider the evidence, whether written or oral, hear any submissions either party wishes to make, and then decide whether the accused should be committed for trial.

e. If the accused is not legally represented, the Magistrate must consider the evidence, whether written or oral, hear any submissions either party wishes to make, and then decide whether the accused should be committed for trial.

f. All written statements tendered under the proposed amendment will be treated as if they are depositions, and may be used at the trial to the same extent and in the same way that depositions may now be used.

27. If the Committee's recommendation is adopted, the future procedure for preliminary hearings will take one of the following forms:

(i) The case will be conducted in exactly the same way as is done now, with witnesses being called, their evidence being recorded, and a judicial decision being made at the end of the evidence after hearing submissions put forward by either side.

(ii) The evidence will be tendered to the Court in written statements, and unless the solicitor or counsel representing the accused consents to committal, the Magistrate will consider the evidence contained in such statements together with any submissions that are made to him, and again decide whether to commit the accused for trial.

(iii)The evidence put before the Magistrate by the prosecution will comprise both written statements from witnesses tendered by consent, and evidence

given by witnesses summoned before him in the usual way, and unless the solicitor or counsel representing the accused consents to committal, the Magistrate will again decide whether to commit the accused for trial.

Committals where the accused pleads guilty

28. Mention has already been made of a number of crimes which cannot be dealt with by a Magistrate. These include murder and attempted murder, manslaughter, infanticide, rape and attempted rape, abortion and wounding with intent to injure.

29. In these cases depositions now have to be taken at a formal preliminary hearing. It seems unnecessary to have a full hearing when the accused who is legally represented does not challenge the case against him and wishes to plead guilty.

30. The Committee proposes a further amendment to the Summary Proceedings Act 1957, to enable the accused who is legally represented, if he wishes, to plead guilty in the lower Court without a preliminary hearing. A summary of the case can be read to the Judge when the accused appears in the Supreme Court for sentence, and submissions can be made in the ordinary way.

31. If an accused wishes to hear all the evidence before deciding how to plead, the usual practice can be followed. But if he and his solicitor have access to written statements as proposed, this may be unnecessary.

32. This amendment will mean that where the accused admits his guilt witnesses need not leave their ordinary affairs, the time of the Courts will be saved, and there will not be any disadvantage to the accused. It will also mean that complainants will not have to go through the experience of saying publicly all that befell them at the hands of the accused. In sexual cases, especially when the complainant is a young person, this is an important aspect, and the Committee

believes that this change would be justified on that ground alone, quite apart from the convenience to the public, the Courts and the Police.

News Reports of Evidence at Preliminary Hearings

33. As has already been mentioned, the Criminal Justice Act 1967 (UK) expressly provided that none of the evidence given at a preliminary hearing was to be published unless the accused requested it. The Committee does not propose that this provision in the English Act be adopted. The general view of the Committee is that it would be better to reconsider this matter when the proposal it makes concerning the procedure for the preliminary hearings has been in operation for a time, and the effect of the changes can be assessed, and with other aspects of procedure, may need to be reviewed. The press will still be able to report any evidence given in Court as it can now, any submissions made by prosecution or defence, and the decision made by the Court together with the reasons for that decision. If an accused is committed for trial that fact can be reported, but if there is a submission by the defence that there is no case to answer, and the Court upholds that submission, the evidence will no doubt be canvassed in the course of the argument, which the press will be able to report in such detail as it thinks fit. In result, then, the press will continue to be able to do what it has been able to do in the past which is to report all that actually takes place in Court. This will ensure that the public will be kept aware of the way in which the new system is functioning.

SUMMARY

The Committee recommends:

1. That the present system for conducting preliminary hearings of indictable offences be retained.

2. That legislative provision be made to enable the evidence of witnesses to be given in written form, where both parties consent to that being done.

3. That where the accused is represented by counsel or a solicitor, and the defence consents to an order that the accused be committed for trial, the Court shall commit the accused without making further enquiry, unless the Magistrate wishes to hear evidence from a particular witness or witnesses.

4. That where the accused is represented by counsel or a solicitor, and wishes to plead guilty to a charge which cannot be dealt with by a Magistrate, there should be power for the Magistrate to accept such a plea without having to hear all the evidence.

For and on behalf of the Committee

Barwick

Chairman

MEMBERS:

Mr R.C. Savage Q.C. (Chairman)

Associate Professor B.J. Brown
Professor I.D. Campbell
Chief Superintendent G.A. Dallow
Mr W.V. Gazley
Mr P.G.S. Penlington
Mr K.L. Sandford
Mr P.B. Temm Q.C.
Mr D.A.S. Ward
Ms P.M. Webb

Mr C. Anastasiou (Secretary)