REPORT OF THE CRIMINAL
LAW REFORM COMMITTEE

THE POWER TO DISCHARGE BEFORE ARRAIGNMENT

Presented to the Minister of Justice
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REPORT

of

THE CRIMINAL LAW REFORM COMMITTEE

THE POWER TO DISCHARGE BEFORE ARRAIGNMENT

Under section 347 of the Crimes Act 1961 a Judge is empowered to discharge an accused person before arraignment and such a discharge is deemed to be an acquittal. The relevant subsections of s.347 are as follows:

> "(1) Where any person is committed for trial, the Judge may in his discretion, after perusal of the depositions, direct that no indictment shall be presented, or, if an indictment has been presented, direct that the accused shall not be arraigned thereon; and in either case direct that the accused be discharged.
>
> (4) A discharge under this section shall be deemed to be an acquittal."

The Committee has been asked to consider the question whether section 347 should be amended to the effect that a discharge should not operate as an acquittal.

The Committee commenced its task by examining the history of the power to discharge before arraignment.

Until the Crimes Act 1961 came into force indictable cases coming before the Supreme Court in New Zealand commenced by way of a "Bill of Indictment" which was laid by a Crown Solicitor after the committal of the accused

for trial in the Magistrate's Court. The Bill of Indictment was considered by the Grand Jury, a former institution in our law which had its origin in the Assizes of Clarendon of 1166.

The function of the Grand Jury after being sworn and receiving a charge from the presiding Judge, was to examine in private on oath such of the prosecution witnesses as they might see fit and inquire merely whether or not there was a prima facie case against the accused. If the Grand Jury concluded that there was a prima facie case against the accused, the Foreman used to endorse on the Bill of Indictment the words "True Bill" and thereafter the document became known as an "Indictment". It was upon this "Indictment" that the accused was subsequently arraigned and required to plead. If, on the other hand, the Grand Jury concluded that there was no prima facie case against the accused, the Foreman endorsed the Bill of Indictment "No Bill" and the Judge ordered the release of the accused.

The Committee noted that the Grand Jury did not have the power to acquit the accused and, thus, the effect of a "No Bill" was not an acquittal and it was neither deemed to be an acquittal nor declared to have the effect of an acquittal. If the prosecution saw fit, it could prefer a further Bill of Indictment for the consideration of a Grand Jury. From the decision of the Grand Jury there was no right of appeal.

The Grand Jury was abolished in England in 1933. In New Zealand, the Grand Jury was abolished by the enactment of section 345 of the Crimes Act 1961 of a different procedure.

Although the Grand Jury did not have power to acquit the accused and the finding of a "No Bill" did not amount to an acquittal, a Judge was given, prior to the abolition of the Grand Jury, a power to discharge before arraignment.

Permitting a Judge to discharge without conviction is in fact a qualification of the fundamental principle that no one, not even the Crown itself, "has the power of dispensing with the laws or the execution of the laws". Lord Denning M.R. has recently described the process as "mitigating the rigour of the law" as when there has been a technical breach of the law in which it would be unjust to inflict any punishment whatever. (Refer Buckoke and Others v. Greater London Council [1971] 2 All E.R. 254 at page 258 (C.A.)).

The Report of the Criminal Code Commission in 1878 discussed the power to discharge without conviction before arraignment. The Report referred to the discharge without conviction of persons "who have committed acts which though amounting in law to crimes, do not under the circumstances involve any moral turpitude" and to the discharge of persons who have committed "acts causing harm so slight that no person of ordinary sense and temper would complain of such harm". The Commissioners also referred to a provision in the Criminal Justice Act (Imperial) 1855 which enabled Justices to dismiss charges of larceny "if they are of opinion that there are circumstances in the case which render it inexpedient to inflict any punishment". As well there was recognition by the Commissioners of the same principle in relation to assaults "so trifling as not merely to merit any punishment".

Section 17 of the Criminal Code Act 1893 provided that where a Court on a perusal of the depositions considered first that the offence charged deserved no more than a nominal punishment and secondly that it was unnecessary that a conviction should be obtained, it was empowered to direct that no bill be preferred, or if a bill had been found before the Grand Jury, direct that the accused be not arraigned thereon. Such a discharge was declared to have "all the effect of an acquittal of the accused in respect of the offence for which he was committed for trial".

Section 37 of the Crimes Act 1908 was in the same form as Section 17 of the 1893 Act. Section 37 of the 1908 Act gave way to section 42(3) of the Criminal Justice Act 1954. The requirement enjoining the Court to consider "that the offence charged deserves no more than a nominal punishment and that it is unnecessary that a conviction should be obtained" was dropped with the passing of the Criminal Justice Act 1954. Such a discharge under the Criminal Justice Act 1954 was declared to "have all the effect of an acquittal".

Finally to complete the narrative of the provisions relating to discharge before arraignment prior to the Crimes Act 1961, by virtue of section 10 of the Criminal Justice Amendment Act 1960 the discharge before arraignment was "deemed to be an acquittal" instead of having "all the effect of an acquittal".

Thus the power to discharge before arraignment under section 347(1) now coalesces first the power to find a "No Bill", which did not operate as an acquittal, formerly vested in the Grand Jury, and secondly the power to discharge before arraignment as contained in the various

statutory provisions referred to above which did operate as an acquittal.

The Committee has noted the reported cases decided on the exercise of the power to discharge before arraignment prior to the passing of the Criminal Justice Act 1954. The reported cases show that some Judges, at least, have regarded themselves as free to exercise a general supervisory jurisdiction over both the committing Justices or Magistrates and the Grand Jury itself notwithstanding the two considerations which the Court was required to take into account. In R. v. Homiston (1909) 38 N.Z.L.R. 1021 the Judge discharged the accused as there was no evidence to support the charge and it would have been unfair, so the Judge held, to the accused to have put him on his trial. The two specific matters set out in section 37 of the Crimes Act 1908 were not referred to. In R. v. Cleary [1940] G.L.R. 437 the Grand Jury did not follow the presiding Judge's direction and the Judge, Mr Justice Ostler, therefore cured the matter himself by discharging the accused being satisfied that the depositions did not disclose any evidence of the offence with which that accused was charged in the Indictment.

Since 1st January, 1955, when the Criminal Justice Act 1954 came into force, Judges, in exercising the power to discharge before arraignment, have been untrammelled by any particular statutory considerations as were previously prescribed by the legislature.

In R. v. Myers [1963] N.Z.L.R. 321 Wilson J. noted that a Judge is given a complete discretion and that no guidance is given by section 347 as to the basis upon which the discretion should be exercised. The learned

Judge then said:

> "To some extent the power conferred on a Judge by this subsection appears to be similar to the former power of the Grand Jury to return a No Bill. Thus, if after reading the depositions, the Judge is satisfied that it is unlikely that any jury, properly directed, would convict, or, a fortiori, that it would be wrong for a jury to convict the accused, it appears that the discretion may properly be exercised. In these circumstances, however, the Judge must bear in mind the facts that a competent Court, which has had the advantage of seeing and hearing the witnesses, has committed the accused for trial, and that (unlike the Grand Jury) the Judge himself has not had that advantage. The occasions for the exercise of this discretion must, therefore, be rare. Nevertheless, it must be assumed that these factors were appreciated by the Legislature when the power was conferred and, accordingly, if the Judge, bearing in mind the disadvantages which I have mentioned, is still satisfied that it would be wrong to require the accused to stand his trial, he should not hesitate to exercise his discretion in the accused's favour."

In R. v. Leary (unreported Supreme Court, Auckland Judgement 1972), McMullin J. said:

> "Nonetheless, it is a section in which a Judge, exercising the general oversight formerly exercised by a Grand Jury, can take into account not merely the technicalities of the law but also its purpose and the principles of punishment."

Without attempting in any way to catalogue exhaustively the grounds upon which a Judge would exercise his discretion to discharge an accused before arraignment under section 347(1), it seemed to the Committee that the power would be exercised if the Judge concluded:

(a) That there was no prima facie case to go to a jury; or

(b) That it was unlikely that any jury properly directed would convict; or

(c) That the depositions did not disclose any evidence of the offence with which the accused was charged in the indictment and that it would not be fair to put the accused upon his trial; or

(d) That the evidence only disclosed a technical or trifling breach of the law which would only deserve a nominal punishment, or which would not deserve any punishment at all, and that it was unnecessary that a conviction should be obtained; or

(e) That the offence alleged against the accused caused harm so slight that no person of ordinary sensibility would complain of such harm.

The Committee then addressed itself to the principal reasons which might justify an amendment as to the effect of the discharge:

(1) At present an accused can be discharged by a Judge on a perusal of the depositions and without hearing counsel when further evidence might, unbeknown to the Judge, already be in the hands of the Crown Prosecutor or might ultimately be available to him before the trial which would repair some of the deficiencies then present in the prosecution's case as it appears in the depositions. In effect, the Crown is precluded by the discharge from repairing its case.

(2) The discharge of the accused before arraignment is a final determination of the prosecution and it does not permit the prosecution to proceed further.

(3) There is no right of appeal available to either the Crown or the defence from a decision given before arraignment under section 347(1) of the Crimes Act 1961. In other words, if the Crown is aggrieved that a Judge has discharged the accused, or alternatively if the accused is aggrieved that a Judge has not discharged him under section 347(1) no appeal lies to the Court of Appeal at the suit of either party to the prosecution.

(4) The prosecution case is normally taken in the Magistrate's Court by a Police Officer, who is not legally trained and qualified, and the committal is ordered, in many cases, by two Justices of the Peace who are similarly not legally trained and qualified.

(5) Depositions are rarely taken with the same care, or as extensively, as evidence is adduced at the subsequent hearing in the Supreme Court. It is therefore argued that it is unjust to the prosecution and against the public interest to acquit the accused by means of a discharge before arraignment on evidence which has been, possibly, inadequately and even carelessly adduced in the Magistrate's Court at the preliminary hearing.

(6) A discharge at the preliminary hearing is not final in its nature and does not amount to a dismissal of the charge and the accused has not therefore been in peril at any time up until arraignment. (Refer R. v. Pepper [1963] N.Z.L.R. 424 and R. v. Johnston [1959] N.Z.L.R. 271.)

(7) Prior to the abolition of the Grand Jury the finding of a "No Bill" did not lead to an acquittal. The coalescing of the power of the Grand Jury to find a "No Bill" and the power of the Judge to discharge amounting to an acquittal has placed an accused person in a more favourable position than he was in previously.

(8) If the full rigour of the law is to be mitigated, then this decision should be left until after the trial is concluded by verdict. At that stage the Judge would then have all the circumstances of the offence before him and would be in a better position to decide the issue.

The Committee asked itself - Should the law be left as as it stands, at present, so that a discharge under section 347 (1) operates as an acquittal in all cases? Alternatively, should the section be amended by the introduction of an alternative power to release the accused, such an order being similar in effect to the finding of a "No Bill" by a Grand Jury and not operating as an acquittal. Alternatively, should the provision that a discharge before arraignment operates as an acquittal be abolished completely?

The Committee having examined the principal reasons which might support an amendment, has reached the following conclusions:

(1) A discharge under section 347(1) should continue to operate as an acquittal in all cases provided that the Judge is required to hear both counsel for the prosecution and counsel for the defence (or, of course the accused himself if he is not represented), before giving a decision as to whether to discharge before arraignment. The Committee accepts the criticism of the present law that it is wrong for a Judge to be able to exercise the power to discharge before arraignment merely on a reading of the depositions and without hearing counsel for either the prosecution or the defence. The Committee is therefore of the opinion that section 347(1) should be amended to the effect that a Judge of his own motion should be empowered to call upon the parties to argue the question of a discharge; and that either the prosecution or the defence should be able to apply to the Court for a discharge. In either case the Committee considers that the Judge should give both the prosecution and the defence an opportunity to be heard before he exercises his power to discharge and give his decision in public if there is to be a discharge.

(2) The Committee accepts the criticism that as the law stands at present if a discharge is ordered without hearing the parties, the

prosecution is precluded from being able to repair its case which might have been poorly presented in the Magistrate's Court at the time of the preliminary hearing. If the majority of prosecutions in New Zealand were conducted by legally trained prosecutors at the stage of the preliminary hearing, then the Committee's view might have been different. The Committee is of the opinion that all the material upon which the prosecution proposes to rely at the trial, either in the form of the depositions already taken or in the form of proofs of evidence of further witnesses yet to be called at the trial, should be before the Judge when he is called upon to hear and decide an application to discharge the accused before arraignment.

(3) The Committee considered whether or not there ought to be a right of appeal at the suit of the accused if his application for a discharge failed or at the suit of the Crown if the Judge ordered that the accused be discharged. The Committee does not favour a right of appeal being available to either the prosecution or the defence. In examining this aspect of the matter the Committee noted that the matters which can now be made the subject of appeal before trial relate to the procedure and conduct of the trial which is about to take place. It was felt that if a right of appeal was available to the accused against the refusal to grant a discharge before arraignment, it could encourage delays and it could even be prejudicial to the accused. As an alternative the Committee considered whether or

not there ought to be a right of appeal available to the accused limited to an error on a question of law. It was felt that such a right of appeal might be a backdoor method of permitting a general appeal. The accused would not be prejudiced if the Judge erroneously, as a matter of law, decided against granting a discharge before arraignment. The point would inevitably arise again during the trial and if there was a conviction the legal point could then be taken on appeal after conviction.

(4) The Committee gave consideration to the question of whether or not a Judge should be required to give reasons if he discharged an accused before arraignment. The Committee does not recommend any such statutory requirement as it believes that in the ordinary course of events, a Judge would give reasons if he was required by Statute to hear the parties before reaching his decision to discharge.

(5) The Committee recognises that the accused is not in peril up until the time when he is arraigned. Nevertheless, it is of the opinion that if a discharge before arraignment operates as an acquittal, then the presence of such a discretionary power in the Crimes Act will act as a restraining influence on the Police and other prosecuting bodies and will be a protection against illfounded and illconducted prosecutions. The Committee does not favour an accused person having a Damocletian sword hanging over his head which would be the situation if a discharge before arraignment did not operate as an acquittal. The accused

is entitled to know whether or not he is free of the charge which has been preferred against him. If he is free of the charge, then he should stand in the position of an acquitted person. If he is not, then he should stand his trial.

(6) The Committee considered but rejected the proposal that the Crimes Act be amended to include a power of release which would not operate as an acquittal, as well as a power to discharge which would operate as an acquittal. The Committee takes the view that the law was altered by the abolition of the Grand Jury and the coalescing of the Grand Jury's powers with the Judge's powers. The Committee does not favour the reintroduction of a provision which would be less favourable to accused persons.

(7) A discharge before arraignment operating as an acquittal can be justified on economic grounds. If there is no prima facie case against the accused and the deficiencies of the Crown case cannot be repaired, then the proceedings should be at an end at this point so that the state and the accused are saved the expense of a trial which must clearly result in an acquittal if further proceedings are brought.

(8) The Committee unhesitatingly accepts that a Judge should be entrusted with a discretion to mitigate the full rigour of the law. The Committee further considers that where a Judge exercises his discretion in favour of an accused person prior to arraignment, the order which he makes should operate as an acquittal and not

merely a release with the prospect of further proceedings. The discretion is exercised rarely but when it is it should be exercised with finality.

Recommendations

The Committee recommends:

1. That section 347 of the Crimes Act 1961 should be amended to the effect -

   (a) that a Judge of his own motion be empowered to discharge before arraignement but in such a case he shall, before so doing, give both the prosecution and the defence an opportunity to be heard; and

   (b) that either the prosecution or the defence be able to apply to the Court for a discharge before arraignment; and

   (c) that where there is to be a discharge, the decision be given in open Court.

2. That a discharge before arraignment under section 347(1) of the Crimes Act 1961 should operate as an acquittal in all cases.

For and on behalf of the Committee

Barrack

Chairman

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