

IV Curtailing Committal Proceedings

Committal proceedings or preliminary inquiries occur between an accused's first appearance in court charged with an indictable offence and the actual trial of the case against him, and can often represent a full scale dress rehearsal of at least the prosecution's case. The time taken to dispose of serious criminal charges could be curtailed if this repetition were eliminated.

The preliminary inquiry was initially a forum for judicial interrogation. In 1554 justices of the peace were empowered to examine the accused and those that brought him to trial concerning the facts and circumstances of the case.¹ When this legislation was enacted, the purpose was evidently to obtain a confession from the defendant if at all possible. Gradually the practice changed and the interrogation of the accused was not permitted, the purpose of such inquiry being to ascertain if there was a prima facie case to be made against the accused. By Bentham's day some magistrates were making a habit of nullifying the inquiry so far as the accused was concerned by informing him that he was not bound to answer. This was given statutory recognition in an Act of 1848 which provided that the primary function of the justices in this respect was to hear the witnesses against the accused, and having done so they should warn the accused that he was not bound to say anything, though he was invited to do so. If the proceedings raised a "strong or probable presumption of guilt" in the minds of the magistrates they were to commit or bail him for trial.² The magisterial inquiry thus became a judicial proceeding.³

The stated purpose of committal proceedings thus became that of acting as a screening mechanism. The lower tribunal in considering the evidence is to screen out groundless or speculative prosecutions, saving the time of the trial court and protecting an innocent person from the harassment of an unnecessary trial.⁴ But it is generally felt that this screening process has become a perfunctory one with a great deal of reliance being placed on the prosecution's assessment of the case, with the result that all but the very feeblest of cases tend to be committed for trial.

In the absence of any other method of securing details of the prosecution's case, committal proceedings have come to be used as a means of obtaining discovery. It is arguable that this has become its most important function and one for which it may not be best suited. Through hearing the evidence which the prosecution puts forward to establish a prima facie case, the accused will know in some measure what case he has to

meet and will be cognisant of most of the evidence supporting it. He then has the opportunity of deciding how to plead in the light of this evidence and of seeking to obtain the evidence needed to answer the prosecution's case.⁵ But, as we have seen, a court hearing is not necessary for adequate discovery.

There are other advantages to committal proceedings: to the prosecution it has some advantage in that it enables it to test out its case in court. It may be that there is also some advantage in having the evidence of key witnesses formally recorded which can then be used at trial in the event that they are unable to attend.⁶ Generally, it enables witnesses to give their evidence while the matter is still relatively fresh in their minds.⁷ Committal proceedings, however, are not the only method, nor necessarily the best method of securing such advantages. In addition, preliminary inquiries possess inherent disadvantages: what is essentially a pre-hearing of the prosecution's evidence is time-consuming to witnesses, police officers, counsel and the court. Witnesses must present themselves at court to give evidence at least twice, with the result that they are often reluctant to involve themselves in legal proceedings.⁷ In serious or sensational cases there is often a great deal of publicity, and possibly in consequence, some unfairness to the accused although statutory restrictions on media coverage of preliminary hearings exist in many jurisdictions. The necessity of recording the evidence given in preliminary examinations also contributes to slow down the process. The time-honoured method of recording evidence was to have a clerk attached to the Magistrates' court to take longhand notes which was a tedious and time-wasting process. In recent times there has been increasing use made of shorthand writers and this has expedited hearings somewhat, but nevertheless they have continued to contribute heavily to the problems of overcrowding and delay in the lower courts.⁸

Scotland has, since modern times, not had a system of committal procedures. The decision whether or not to proceed with a case is the task of the public prosecutor, not of a lower court judge, and is based on the statements of evidence to be given by witnesses for the Crown. The defendant's first appearance in court is generally for the purpose of applying for bail. The second appearance is the occasion for committal for trial or "full committal" to be granted. The practice is for the sheriff (the lower court judge) to grant the motion of prosecuting counsel without hearing or seeing any evidence. He proceeds on the understanding that the prosecutor

would not make the motion unless there was a prima facie case. In some cases the prosecutor may be in a position to move for full committal at the first hearing in which case the second appearance does not take place.⁹ This system of committal based on the judgement of the public prosecutor after consideration of the written evidence of witnesses would appear to work well. In any event, a recent examination of Scottish criminal procedure was opposed to re-adopting the practice that the sheriff be obliged to consider the evidence and satisfy himself that there is a prima facie case to answer basically because of the deleterious effects this would have on his ability to handle his workload.¹⁰

Scottish committal procedure contains the nucleus of more recent developments in this area in other Commonwealth jurisdictions. The vast proportion of time taken up by preliminary inquiries is consumed by the hearing and recording of oral evidence. Committal proceedings on the basis of the written statements of witnesses would eliminate these time-consuming processes while retaining the screening function of the inquiry. This has been one direction of reform. Alternatively, the preliminary inquiry can be wholly abolished having instead a unilateral decision of the prosecutor or the judge, or it can be bypassed by consent of the parties.

The English Criminal Justice Act, 1967, is commonly perceived to have led the way in the reform of committal procedures and it has certainly been used as a role model in other countries. But aside from Scotland, two other jurisdictions were forerunners in curtailing pre-trial proceedings.

In 1959 an attempt was made in Uganda to streamline the taking of depositions at the preliminary inquiry by reading out the statements made to police and asking each witness to confirm that the statement was correct.¹¹ This procedure was found to work satisfactorily where short, formal evidence was submitted, but it did not work well for key witnesses whose evidence required close, detailed examination. It was also found that the standards of English used by police officers was sometimes of too low a quality to be acceptable in a court of law. Examining magistrates found occasions when the process was longer and more difficult than taking the deposition straight from the witness.¹²

In Ghana, a major divergence from the traditional committal procedure was introduced in the Criminal Procedure Code, 1960, which came into force in 1961. By section 182 of the Code the prosecution is required to furnish the court and the accused with a "summary of evidence which shall comprise a list of the witnesses who the prosecution propose to call at the trial and a summary of the evidence to be given by each witness." If the

magistrate is satisfied on a reading of this summary of the evidence that a case against the accused exists, he may then proceed to commit the accused for trial, giving the accused an opportunity to make a statement before so doing.¹³

Recognizing that committal proceedings had become a vehicle for discovery, most Commonwealth governments in making amendments have sought to provide alternative means of disclosure which would make the preliminary inquiry less attractive and therefore less likely to be resorted to, if indeed it is retained in some modified form.¹⁴ As noted above, English legislation has provided a useful model. Section 2 of the English Criminal Justice Act, 1967,¹⁵ provides that in committal proceedings a written statement is admissible as evidence to the like extent as oral evidence to the like effect by that person as long as certain conditions are satisfied:

- (1) the statement must be in the prescribed form and purport to be signed by the person who made it;
- (2) it must contain a declaration by the maker to the effect that it is true to the best of his knowledge and belief, and that he made it knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything he knew to be false or did not believe to be true;
- (3) before that statement is tendered in evidence, a copy of it must be given by or on behalf of the party proposing to tender it, to each of the other parties to the proceedings, and where given by or on behalf of the prosecutor, the defendant must be given notice of the right to object to it being tendered in evidence;
- (4) it can only be tendered in evidence if none of the parties to the proceedings object, before it is tendered, to it being so tendered;
- (5) if the statement is made by a person under the age of 21 the statement must give his age;
- (6) if it is made by a person who cannot read, it must be read to him before he signs it, and the statement must be accompanied by a declaration to that effect by the person who read it to him and
- (7) if the statement refers to another document as an exhibit, the copies given to the other parties must be accompanied by copies of the other document, or by such information as will enable the parties to whom it is given to inspect the document, or a copy of it.

Notwithstanding that a statement may be admissible in this manner the justices may, of their own motion or on the application of any party to the proceedings, require the maker of the statement to attend before them

to give oral evidence.

The tendering of evidence in committal proceedings by written statements allows the process to be completed often in a few minutes. At the same time, however, the need for preparing the written statements in the proper form has added to the burden of the prosecution.¹⁶

The net result of this and other provisions of the 1967 Act is that committal proceedings in England may now take the following forms:

- (a) a full oral hearing, where the accused may seek to challenge all or some of the items of the prosecution's evidence in the hope of having the charge dismissed;
- (b) curtailed committal proceedings where the accused agrees to accept some or all of the evidence in the form of written statements and
- (c) committal without consideration of the evidence as provided by section 1 of the Criminal Justice Act, 1967.

A "section 1 committal" as it is called, may take place if all the evidence before the court consists of written statements and the defendant or defendants are all legally represented.¹⁷ No precise figures are available as to how often this expedited procedure is used, but one survey suggested that in some areas of England and Wales over 90 per cent of all committals for trial were made on the papers alone.¹⁸ This, however, may not be as desirable a result as it seems. The James Committee on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts received evidence that "section 1 committals" were resulting in cases going to trial which ought not to have been committed.¹⁹

It is clear that a price has been paid for the introduction of streamlined committal procedures; cases fail because indictments are inaccurately drawn and witnesses, not having been tested, sometimes do not come up to proof. Further, too many cases are committed for trial, not only without any consideration of the evidence by the justices, but also without any consideration of the evidence by anyone.²⁰

The Committee also referred to the growing concern caused by the number of cases in which defendants are acquitted in the Crown Court by the direction of the judge.²¹ Such figures as are available suggest that approximately 30 per cent of acquittals in the court are by direction, although these are marked regional variations. Although it does not necessarily follow from the fact that an acquittal is directed that the accused ought not to have been committed for trial, the figure of 30 per cent does suggest that a significant number of very weak cases are not being filtered out with the result that unnecessary expense is incurred

and Crown Court time wasted.²² It was suggested by the James Committee that misuse of "section 1 committal" could be avoided if, before a person was committed for trial, counsel for both sides were required to sign a certificate to the effect that they had examined the witnesses' statements and were satisfied that the case was suitable for committal for trial without consideration of the evidence by the court. There has been no formal implementation of this recommendation and there is no indication that any other Commonwealth nation has enacted a similar proviso.

Allowing evidence to be tendered by written statement is a measure which has been quite widely adopted in other Commonwealth countries: in South Australia, where the statement of a witness for the prosecution has been reduced to writing and verified by a declaration it may be received in evidence at a preliminary inquiry providing the defence has received a copy.²³ According to Tasmanian procedure, the defendant may choose that he does not require depositions to be taken before justices; that although he does not dispute that an order for committal be made, he requires the depositions of one or more witnesses to be taken or that he requires a full preliminary inquiry.²⁴ In Victoria, evidence by written statements is not permitted where the charge is one of treason, murder, attempted murder or conspiracy to murder.²⁵ The written statements and documentary evidence must be delivered to the accused at least 14 days before the preliminary examination is to be taken; and unless he receives notice from the accused to the contrary, the informant need not produce the witnesses at the examination. Thus, unless the defendant takes positive action, the committal proceedings will be heard on the basis of written statements.²⁶ In addition, the accused may elect, in writing, to stand trial by jury without a preliminary hearing being conducted at any time after receiving copies of the written statements of witnesses.²⁷ The procedure in New Zealand is very similar to that in England - an accused may be committed for trial on the basis of written statements - but this option is only available if the defendant is legally represented.²⁸ This provision came into force May 1, 1977 and an early evaluation in 1978 revealed that it had not at that time been completely accepted by the police or practitioners with the result that the obvious objectives which it was designed to meet were not being achieved. Nevertheless, from the limited use which had been made of it, there was no indication that it was defective in any way and therefore would hopefully reach its potential in due course.²⁹ Preliminary proceedings may also proceed on written statements in Hong Kong,³⁰ the Solomon Islands,³¹ and Cyprus.³²

Several other jurisdictions have gone further and abolished committal proceedings altogether. The accused has no option to demand that the lower court perform a screening function. The Law Reforms Ordinance 1978 of Bangladesh³³ substitutes formal discovery for commitment proceedings. The accused is sent to trial to the higher court after he has received copies of the statements of witnesses who will be called against him, copies of his own statements and other information regarding the prosecution's case. In Sri Lanka the decision to proceed with a case by the Director of Public Prosecutions on the basis of police reports which contain a full account of all the circumstances; copies of the statements of all witnesses; a report of any proceedings before any judicial officer and such other information, documents or productions as may be relevant or as may be required by the Director of Public Prosecutions.³⁴

In Nigeria the preliminary inquiry has been replaced by proofs of evidence in several states; for example, by the Criminal Procedure (Miscellaneous Provisions) Edict, 1974 of the East Central State.³⁵ Subsection 9(2) provides that proofs of evidence must consist of:

- (a) a statement of the charge;
- (b) a statement that the accused elected to be tried by the High Court, where he has a right of election;
- (c) the name, address and statement of any material witness whom the prosecution intends to call;
- (d) the name, address and statement of any material witness whom the prosecution does not intend to call, provided that the submission of the names does not prevent the prosecution from calling such witness at the trial if he desires to do so;
- (e) the copy of any report, if available, made by a doctor about the state of mind of an accused person in custody;
- (f) records of convictions, if any, affecting the credibility of any witnesses for the prosecution;
- (g) statements of the accused person;
- (h) an inventory of all exhibits to be produced at trial and
- (i) any other statement or document which the prosecution may consider relevant to the case.

The preliminary inquiry was also abolished in India in a major restructuring of the Criminal Procedure Code in 1973.³⁶

Regardless of whether committal procedures are abolished or merely curtailed, the net result is that the discovery requirements of the pre-trial period are accorded a new pre-eminence and this is to be applauded. Hopefully it will produce the kind of advantages discussed in the previous chapter. The withering away of the screening function of preliminary examinations may have its drawbacks nonetheless. When the "safety net" of the screening mechanism is removed, more cases get through to trial in the higher court; exactly how many more will depend on how active a mechanism it was previously. Undoubtedly these new procedures save the time and effort of witnesses, the judiciary and the lower courts, but the trial of the cases may consume more time in the higher courts. Committal for trial requires some form of quality control mechanism, whether it be a magistrate or a prosecutor, to make sure that as far as possible, weak cases and doubtful evidence do not reach the trial court. Otherwise, the bottle-neck problem created by committal proceedings will merely be transferred from one court to another.³⁷

Footnotes

¹ 1 & 2 Phil. and M. c. 13, (1554), and 2 & 3 Phil. and M. c. 10, (1555).

² Sir John Jervis' Act, 11 & 12 Vict., c. 42, (1848).

³ T. Plucknett, A Concise History of the Common Law, (3rd ed.) (London, 1940), p. 383 and G. Williams, The Proof of Guilt, (3rd ed.) (London, 1963), pp. 44-45.

⁴ India, Ministry of Home Affairs, Research Division, Seminar on Criminal Law and Contemporary Social Changes (New Delhi, 1969), p. 116 and I. Potas, "The Criminal Courts" in D. Biles (ed.), Crime and Justice in Australia (Canberra, 1977), pp. 60-80 at p. 65.

⁵ E.F. Frohlich, "Committal Procedures in England and Australia", (1975), 49 Australian Law Journal 561.

⁶ R.S. Savage, "Criminal Procedure: The Effect of Procedure upon Justice", in R.S. Clark (ed.), Essays in Criminal Law in New Zealand (Wellington, 1971), pp. 94-112 at p. 107.

⁷ J. Ll. J. Edwards, G.O.W. Mueller and G. Williams, "Preliminary Investigation by Magistrates in Great Britain and Canada", in G.O.W. Mueller and F. Le Poole-Griffiths (eds.), Comparative Criminal Procedure (New York, 1969), pp. 55-84 at p. 58.

⁸ T.F. O'Brien, "Committals for Trial", (1973), 47 Law Institute Journal 33. One of the most recent examples of reform in this area is the Maltese Electro-magnetic Recording of Proceedings Act, 1980. This Act empowers the courts to order that their proceedings be recorded by electro-magnetic means.

⁹ Scotland, Committee on Criminal Procedure in Scotland (Thomson Committee), Criminal Procedure in Scotland (second report) (Edinburgh, 1975), Cmnd. 6218, para. 10.01.

¹⁰ Id. at paras. 10.01 and 10.07.

¹¹ Uganda Criminal Procedure Code, section 222A.

¹² D. Brown, "Reform of the Administration of Justice", (1966), 2 East African Law Journal 248 at p. 249. Interestingly, after totally abolishing the preliminary inquiry in 1967 (Uganda Criminal Procedure (Summary of Evidence) Act, 1967) Uganda reinstituted them by Decree No. 17 of 1971. See now section 171 of the Magistrates' Courts Act, 1970, as amended.

¹³ A.N.E. Amissah, "The Machinery of Criminal Justice in Ghana", (1964), 1 University of Ghana Law Journal 80 at p. 85 and S.G. Davies, "Ghana: The Criminal Procedure Code, 1960", (1962), 11 International and Comparative Law Quarterly 588 at p. 592.

¹⁴ C.f. the position in Canada where there is provision in section 476 of the Criminal Code for a preliminary inquiry to be waived with the consent of the accused and the prosecutor, but there is no corresponding provision which would provide the defence with alternative means of discovery.

¹⁵c.80.

¹⁶E.F. Frohlich, supra footnote 5 at p. 563.

¹⁷Antigua, although suffering greatly from delays, is opposed to the elimination of preliminary inquiries in that country until legal aid can be made available to defendants as of right. It is felt that on a reading of statements without legal advice it might appear that a prima facie case had been made out, whereas in fact most of what it contains is inadmissible. Preliminary hearings thus provide a necessary legal safeguard. See "Delays in the Administration of Justice", in Selected Memoranda prepared for the 1977 Meeting of the Commonwealth Law Ministers, Winnipeg (London, 1977), p. 33.

¹⁸New Zealand, Department of Justice, Study of Preliminary Hearing Before Committal for Trial (Wellington, 1978), p. 1. See also R.C. Savage, supra footnote 6 at p. 108.

¹⁹(1975), Cmnd. 6323, para. 232.

²⁰I.R. Scott and C.T. Latham, "A Comment on the Report of the James Committee", [1976] Criminal Law Review 159 at p. 171.

²¹James Committee, supra footnote 18 at para. 240.

²²I.R. Scott and C.T. Latham, supra footnote 19 at p. 171. See also JUSTICE Society, Annual Members' Conference, 1974, The Future of Trial by Jury (1974), p. 11.

²³South Australia Justices Act, 1921-75, section 106.

²⁴Tasmania Justices Act, 1959, section 56A as amended by Act No. 108 of 1974.

²⁵Victoria Magistrates (Summary Proceedings) Act, 1975, section 45(2) In a similar vein, in the Seychelles committal proceedings are restricted to offences which carry the death penalty and murder cases, and to such cases as the Attorney General specifically orders - Criminal Procedure Code, cap. 45, section 188.

²⁶Victoria Magistrates (Summary Proceedings) Act, 1975, supra footnote 25 at section 45(6)-(9).

²⁷Id. section 51.

²⁸New Zealand Summary Proceedings Act, 1957, section 160A, inserted by the Summary Proceedings Amendment Act, 1976, No. 169.

²⁹Correspondence to the author from the New Zealand Department of Justice dated February 7, 1979.

³⁰Hong Kong Magistrates (Amendment) Ordinance No. 70 of 1978, in force on October 1, 1978. See (1978), 8 Hong Kong Law Journal 371, for commentary.

³¹Correspondence from Attorney General of the Solomon Islands dated February 5, 1979.

³²Cyprus Criminal Procedure (Temporary Provisions) Law, 1974 (No. 42 of 1974).

³³No. XLIX of 1978. See note in (1979), 5 Commonwealth Law Bulletin 616.

³⁴Sri Lanka, The Administration of Justice Law, No. 44 of 1973, sections 77-81. The Law Reform Commission of Papua New Guinea has come down in favour of adopting a system similar to this - Papua New Guinea, Law Reform Commission, Working Paper No. 13, Committal Proceedings. See note at (1979), 5 Commonwealth Law Bulletin 789.

³⁵No. 19 of 1974. See also the Criminal Justice (Miscellaneous Provisions) Edict 1973, of the South Eastern State, section 2.

³⁶Under the new Criminal Procedure Code, the Sessions judge will himself, at the first hearing, decide whether there is a prima facie case, and if not, will discharge the accused - see sections 207-209.

³⁷It is ironic that paring down committal procedures makes them and the ensuing trial by jury more attractive, and therefore more heavily utilised.