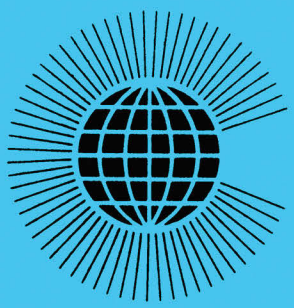
Delay in the Administration of Criminal Justice

Commonwealth Developments and Experience



Commonwealth Secretariat

Delay in the Administration of Criminal Justice

Commonwealth Developments and Experience

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PREFACE

This study was undertaken at the request of the Commonwealth Secretariat. I would like to thank the staff of the Legal Division for their invaluable help in tracking down materials and for their enthusiastic support of this project. Individual Commonwealth countries also provided information and assistance, for which I am very grateful. Finally, Professor John Ll. J. Edwards of the Faculty of Law, University of Toronto furnished me with sound advice, which is sincerely appreciated.

I have endeavoured to state the law as at November 1, 1979, although more recent developments are occasionally noted.

J.A.C.

INTRODUCTION

> [The] Law Ministers expressed their grave concern about increasing delays in the administration of justice - a problem faced by almost all Commonwealth jurisdictions. They agreed that it was one which called for positive and urgent action; and pledged themselves to providing remedies which in no way jeopardised the quality of justice and which respected the fundamental rights of all persons under the law.
>
> Surveying the problem and the varied responses to it by countries in widely different parts of the Commonwealth, [the] Law Ministers were left with a heightened perception of the value of comparative approaches to solutions. They requested the Commonwealth Secretariat to assist them in their determination to meet this challenge, by both collating information on a Commonwealth-wide basis and arranging appropriate studies.

These statements are drawn from the Communique issued at the meetings of the Commonwealth Law Ministers in Winnipeg in 1977; this report is a direct result of the concern expressed there about delay and the call for information on how different Commonwealth jurisdictions have been approaching this problem. In the following pages the phenomenon of delay, its causes and consequences will be examined, with the bulk of the report being devoted to detailing the various ameliorative measures which have been pursued and, where the information is available, the effectiveness of these developments.

Writing exhaustively about the developments and experience of one country in dealing with trial delays would be an imposing enough task because this is an area in which remedial action is being taken almost daily with a wide variety of measures being pursued. I could not hope therefore to conduct a totally comprehensive review of all developments throughout the Commonwealth. It was not possible to catalogue every relevant measure in every jurisdiction; rather, selected examples are given. Some of the examples that appear are used because they represent a general development which has been taken up in several countries; others are used for their innovative value. Wherever possible, similar

provisions in other jurisdictions will be footnoted.

In surveying the countries of the Commonwealth it became quite obvious that the extent of delay in each country varies quite considerably. For some jurisdictions, usually the smaller developing nations, the problem has not yet surfaced, whereas in the industrialised nations it is an issue of great concern. Even in those countries where excessive delays have not yet emerged, it is very likely that they will at some point in the future, given the basic similarities of their legal systems to others prevailing in the Commonwealth. For these jurisdictions, the usefulness of this report will not be in providing information about possible methods of dealing with a worrisome situation, but in pointing out possible avenues of prevention. They are thus in an enviable position, for prevention is usually more palatable than the cure.

One final introductory note: delay is a problem in both criminal and civil cases, but this report is confined to examining development in eradicating delay in criminal proceedings. Although a consideration of civil procedure will be excluded, one important point should be made at the outset concerning the interplay between civil and criminal jurisdiction. Delay in criminal cases is treated as a very serious problem, and quite rightly so, for in many cases the very liberty of a citizen is at stake. It is of overwhelming importance that his fate should be decided within a reasonable time from the initial laying of the charges. Because of this vital consideration, the hearing of criminal cases is generally given priority against civil cases. This further delays the adjudication of the civil caseload of the courts which already suffers from its own indigenous delays. Significant progress cannot hope to be achieved in eliminating delays in civil proceedings until the hearing of criminal cases is expedited.

Before turning to an examination of Commonwealth developments and experience in dealing with trial delay, two preliminary concerns should be addressed in order to place such responses in a meaningful context. Firstly, why is delay in the criminal justice system a cause for concern, and secondly, what causes such delays?

PART ONE

DELAY IN THE ADMINISTRATION OF CRIMINAL JUSTICE

I. The Consequences of Delay

Elucidating the effects which delay has on the criminal justice system is not as enlightening an exercise as it should be. There is an assumption that delay is an unmitigated evil that must be eliminated, but far too little effort has been devoted to actually documenting delay's consequences. As a result, literature in this area tends to be speculative or intuitive rather than empirically based. It is assumed, for example, that unnecessary delays cause undue suffering to those detained in custody pending trial and that pressures to dispose of cases quickly result in procedural corners being cut. These are serious allegations. It is beyond the scope of this report to establish scientifically whether delay does produce such consequences; instead, it must proceed on the basis that the effects discussed in the literature are a probable consequence of delays. In any event, so serious are these purported effects for the very principles on which criminal justice is based that the mere probability that these consequences are produced by delays in processing cases through the system should be sufficient to galvanise remedial action.

Delay is perceived to affect the very quality of justice dispensed by the courts. Justice in this sense refers not to substantive or "ideal" justice but to procedural justice or justice according to law.[1]

> If a procedural system is to be fair and just, it must give each of the participants to a dispute the opportunity to sustain his position. It must not create conditions which add to any essential inequality of position between the parties but rather must assure that such inequality will be minimized as much as human ingenuity can do so.[2]

The rules of criminal procedure are not perfect in that they are not guaranteed to produce the correct result in each instance, that is, the conviction of the guilty and the acquittal of the innocent. They represent what is thought to be the most acceptable compromise between the rights of an accused person and interests of society which will produce a just and fair result in most cases. Procedural justice then is the just disposition of cases according to the legal rules currently in effect in a society.

The timing of the administration of justice is critical to a fair hearing and a just outcome. "Justice delayed is justice denied" and "justice is sweetest when it is freshest"[3] are currently being recited so often that they are on the verge of becoming trite and meaningless. It

is important that they do not. Once accused, a person has the right to be notified of the charge against him, to be brought as quickly as possible before a tribunal to hear the case against him, to be heard in his own defence and to a decision by an unbiased judge on the merits. In other words, the rules of natural justice apply.[4] Delaying the steps of this process has the effect of keeping an accused person under prolonged suspicion of guilt, unable to clear himself of the charges being made against him. In addition, it is possible that an extended period before trial may affect the quality of the evidence and the thoroughness of the eventual hearing. The longer it takes for a criminal charge to be determined, the less certain it becomes that a just and fair outcome will result.

On the other hand, justice will rarely result if the criminal process is too speedy. The audi alterem partem rule insists that notice of a criminal charge must be adequate in its terms, so that the accused knows the essence of the case he has to meet and can prepare his answer properly; and sufficient time must be given for representations to be made.[5] Time is needed for the emotions aroused by a criminal act to subside, thus enabling the accused to get an unbiased hearing; to allow both sides to prepare their case and to enable the court to come to a reasoned decision based on its knowledge of the facts, the law and the circumstances of the particular case. Caution is needed to ensure that an emphasis on dispatch does not mean that the meaningful formalities of the law are turned into hasty ceremonial symbols of a society's impatience with crime and its progeny. It is not delay per se which is objectionable, but excessive delay.

(i) Delay and the defendant

At the outset it must be stated that, for the defendant, the impact of delay may not always be negative. Arguably an accused may benefit from delays in two significant ways: by the postponement of the unpleasant consequences which follow an unfavourable outcome and by the improved chances of a better outcome because of the passage of time. This leads to manipulation of the system which demeans the administration of justice. Nevertheless, even in this respect, the effects of delay upon defendants vary considerably according to their pre-trial custody status. For the defendant awaiting trial in custody, any benefits of delay may be outweighed by very clear costs.

Conviction and punishment after a fair trial, while never pleasant, can generally be called just; punishment before conviction or after acquittal

is never just. Delays in the administration of justice unfortunately increase the probability of these situations occurring.

The effects of a criminal charge do not commence with conviction; being under suspicion has its own stigma. The presumption of innocence exists in the courtroom by placing the onus of proof on the prosecution, but among society at large, it would be fair to say that being charged with a criminal offence often gives rise to a presumption of guilty which in many cases is not dispelled even on acquittal. There is a natural human tendency to think "he wouldn't be in that position if there were not some truth in the allegation". On being charged, even if he is not kept in custody, the accused may face suspension from employment, disruptions in his social relationships and suffer emotional anguish. The longer he has to wait for trial, the more severe these effects become; and they may be perceived as punishment of a kind, experienced before the trial itself:

> ...[W]ithout a trial, or threat of a trial, there can be no justice, only unproved accusations hanging over a defendant's head.[6]

The consequences of a lengthy delay before trial are undeniably severe for an accused who has to wait in custody; for that custody, whether it amounts to mere deprivation of liberty or something more, is punishment before conviction of someone who may never be convicted.[7] There is almost universal recognition of the impropriety of punishing someone who is only accused of a crime, but in certain circumstances, the interests of society override such reservations. A recent study of bail procedures in Western Australia found that the period spent in custody awaiting trial in the District Court or Supreme Court (which period according to a survey carried out at one prison appeared to be at least 62 days and in one case as much as 155 days) was likely to be disruptive to a defendant's life, his family, his employment and might place him at a disadvantage at his subsequent trial.[8] Courts are often reluctant to imprison a person where such a sentence would mean loss of employment; for the pre-trial detainee who has already lost his job, this barrier to a prison term does not exist. Prior loss of employment may therefore be an unfavourable factor affecting the severity of sentence. These punitive consequences of arrest and protracted detention are augmented by the generally poor conditions in detention facilities.

It is the exception rather than the rule for there to be special, separate facilities for holding pre-trial detainees. Usually, people remanded in custody spend the period before trial in a local jail or its

equivalent alongside those serving short prison sentences. At its inception in England, the detention of untried prisoners was the primary function of the jail. Now it has to serve two often conflicting and possibly irreconcilable functions, achieving success in neither.

A survey of Canadian detention facilities in the late 1960s found that they varied considerably from province to province. Some have a separate jail system for those awaiting trial whereas in others the same institution serves both functions. Overall, many of the provincial institutions used to house those awaiting trial were old and poorly equipped. Sanitation and living conditions were primitive; segregation difficult to maintain, and the security provisions, designed to meet the requirements of the most difficult inmates, had to apply to all.[9] A more recent Australian study referred to the deplorable accommodation given to persons awaiting trial and detained in a pre-trial detention centre and to those in rural areas who continue to be held in police prisons and lock-ups.[10] In addition, there is generally little in the way of programmes and activities for the transient pre-trial prison population; the regime for them is one of depressing monotony.

Although public safety demands that some accused persons must be confined before trial, the effects of pre-trial punishment should be minimised. Although they often share the same facilities, the conditions of incarceration applicable to convicted prisoners and those merely accused of crime should attempt to differentiate between them. There should be parity, not between convicted and unconvicted prisoners, but between those released on bail and those remanded in custody. Regardless of whether arrested persons are detained for their risk of non-appearance or pre-trial recidivism, the only distinction between those detained and those on bail, for the purposes of treatment, is the presence or absence of a necessity for custody.[12] Acknowledging this reasoning, most jurisdictions make some concessions to the untried prisoner. It is generally provided that he be exempted from the work and treatment programmes of the institution;[12] that access to legal counsel be facilitated[13] and restrictions on mail and visits are relaxed.[14]

There are indications, however, that this differentiation between convicted and unconvicted prisoners may be more theoretical than real, given that many of these privileges are within the discretion of the prison superintendent or relevant government minister. One of the more recent studies of pre-trial detention found that while prison rules do distinguish the unconvicted from the sentenced prisoner in theory, this means very little in practice. Many of the special privileges attributed to the unconvicted

can only be implemented given financial resources and outside contacts which most prisoners do not have. Indeed, the unconvicted can find themselves worse off than the sentenced prisoners if the general provision of facilities is seen as unnecessary in view of the detainee's theoretical rights.[15] The sheer weight of numbers often makes it impossible for prison personnel to administer these privileges to which untried prisoners are entitled.

Excessive delay exacerbates an already severe situation by placing additional burdens and pressures on detention facilities. The longer the period before trial and the more people who are detained, the less likely it is that there will be acceptable conditions in these holding centres. Time and weight of numbers also strains the order and security of these institutions, increasing the risk that an accused will be subjected to prison disciplinary measures. Although he may be entitled to a measure of mitigation of the pains of imprisonment, he is not exempted from the disciplinary regime of the institution.[16]

The amount of punishment suffered before trial is clearly not insignificant. It would be so even if trials were dispatched with reasonable speed, which makes any protraction of the period of detention indefensible. The Law Commission of India in its 78th Report stated that the problem of pre-trial prisoners in jails has assumed magnitude in India and in other jurisdictions. In response to this finding it underlined the basic need to reduce delays in processing cases, but more specifically recommended that cases in which the accused is incarcerated prior to trial should be given preference (in most jurisdictions this unwritten rule is adhered to) and that there should be a presumption in favour of bail.[17] One commentator on African law has suggested that delay itself should be a factor which should be taken into account at the bail hearing: how long will the accused be required to stay on remand if refused bail? When is the case going to be heard? If the case is set for hearing in seven days' time there is obviously less necessity for bail to be awarded than if it is set for hearing in 70 days' time.[18]

The liberalisation of bail laws has been a fairly widespread response to the exacerbation of pre-trial detention by excessive delays.[19] The aim of such reforms has been to reduce the numbers of those detained before trial by legislating a presumption in favour of bail for a defendant. Canadian bail legislation has gone a step further by providing a method for expediting the trial of an accused who has been detained in custody pending trial because bail was refused. Except in relation to murder and the other serious criminal offences, the case of a person detained pending trial and

whose trial has not commenced must now be considered by a judge immediately after the accused has been detained for 90 days, where he is charged with an indictable offence, and within 30 days for a summary offence.[20] If the judge is not satisfied that the continued detention of the accused is justified, he must order that he be released, either upon giving an undertaking or upon entering into a recognizance. Whether or not he makes an order for the release of the accused, he may give such directions as he thinks necessary for getting the case to trial.

In Sri Lanka, where an accused is remanded in custody pending trial in the District Court or the High Court he shall, if not brought to trial within 45 days, be entitled to be admitted to bail, unless good cause has been shown to the contrary, or unless the trial was postponed at the request of the accused.[21]

A more radical approach to the problem was found to be necessary in Nigeria. Early in 1975 a Decree was enacted in that country which empowered the Chief Justice of each state to go to any prison and order the immediate release of any person found in that prison who had been detained for any period longer than he would have served had he been convicted of the offence for which he was arrested in the first place. This measure has proved very popular and the Decree has been invoked on several occasions.[22]

In a few other Commonwealth jurisdictions, measures exist on a continuing basis which prevent an accused being detained for too long pending a hearing. Fairly typical of protection based on the law of habeas corpus is section 608 of the Western Australian Criminal Code[23] which provides an accused with a "right to be heard". A person committed for trial for an indictable offence can, under this rule, make application in open court at any time during the first sittings of the Court held after his committal to be brought to his trial. If an indictment is not presented against him at some time during those sittings, the Court may, upon a motion made on his behalf on the last day of the sittings, admit him to bail. In fact, the Court is required to do so unless it appears on oath that some material evidence for the Crown could not be produced at those sittings. Further, any person committed as aforesaid who has made such application to be brought to trial and is not brought to trial at the second sittings, is entitled to be discharged.

Sierra Leone instituted a similar provision in 1965 which stipulated that where an accused person has been committed for trial, and for three consecutive sessions his case has not been disposed of, he could, on the last day of the third session, apply to the High Court for the case to be

dismissed for lack of trial unless the prosecution could give good cause why the case had not been tried. Unfortunately, this provision has been found to be ineffective because the courts tend to accept the prosecution's reasons for the delay, and find it difficult to release accused persons when such applications are made.[24]

In Scotland, what is commonly known as the "110 day rule" has been in existence since the early 18th century. This rule sets up various time limits by which certain stages of the proceedings must be completed: a defendant detained in custody pending trial who has not been served with an indictment within 60 days of committal, is entitled to give notice to the Lord Advocate, who is in charge of all criminal prosecutions, that if he is not served with an indictment within 14 days, the prosecutor will be called upon in court to show cause why he should not be released from prison.[25] But, more importantly:

> Where the accused has been incarcerated for 80 days, and an indictment is served upon him, and he is detained in custody after the expiry of that period of 80 days, then, unless he is brought to trial within 110 days of the date of his being committed till liberated in due course of law, he shall be forthwith set at liberty and declared for ever free from all question or process for the crime with which he was charged.[26] (Emphasis added)

The extension of bail provisions and the discharge of remanded prisoners from custody are sound measures to restrict the deleterious impact of delay; but the fact remains that there are a core of accused persons who are not going to be affected by such provisions and who will remain in custody until trial. Delays will continue to affect these defendants adversely. In recognition of this, some jurisdictions allow the trial judge to take account of any period spent in custody prior to trial in determining the sentence. In South Australia this is merely the practice of the courts;[27] in Canada, the Criminal Code gives the judge a discretionary power to take this period into account.[28] Such sentencing practices will, of course, only benefit those detained in custody who are subsequently sentenced to a term of imprisonment. Not only are non-custodial sentences often imposed, but, not infrequently, an accused is acquitted after being detained prior to trial.[29] "Set-off" provisions do not provide these people with any benefit.[30]

Punishment before trial may not be the only injustice suffered by those remanded in custody. They may face considerable difficulties in adequately preparing their defence: they are unable to obtain statements,

seek evidence or interview witnesses, and access to legal advisors depends on the cooperation of the prison authorities.[31] They can do little to further their own defence and must depend on others to act in their best interests. Faced with such obstacles, the accused may give up his defence, valid or not, and plead guilty to expedite the process and get on with the task of serving his sentence. Friedland, in his Toronto study Detention Before Trial, found a significant number of persons who pleaded guilty after one or more remands. Although it is not the only possible explanation for this change in plea, the accused may have desired to have the case disposed of to avoid further remands and delays.[32] A more recent New Zealand study has confirmed that this pattern exists.[33] The vast majority of those who change their plea may indeed be guilty, but the possibility exists that those who have a valid defence or who are innocent may also react to the demoralising effects of prolonged detention in this way.

Over the past two decades, several studies have purported to show that pre-trial detention has adverse effects on the outcome of a trial.[34] The report of the Bail Review Committee of the New South Wales Parliament indicated that people who have been held in custody between arrest and trial are:

(a) more likely to plead guilty;
(b) more likely to be convicted if they plead not guilty; and
(c) more likely to be sentenced to a term of imprisonment if convicted.[35]

The apparent correlation between pre-trial status and sentence may, however, be a result of the fact that the justice or magistrate, in granting bail, takes into consideration very similar factors to those which will be taken into account in the sentencing decision. Because other factors, such as the accused's offence history and general demeanour at the court hearing, may have an effect on the sentence decision, there can be no strict correspondence between custody status and trial outcome.

Detention before trial has inherent disadvantages for the accused; excessive trial delay exacerbates them. If the time before trial cannot be reduced to acceptable lengths, the right to bail may have to be extended further in order to reduce the number of accused persons who can be detained. This may have unfortunate consequences of its own in terms of increases in crime committed by defendants while on bail.[36]

(ii) Delay and the preservation of the evidence

In order to discharge the onus of proof, the prosecution in a criminal case must collect and preserve the evidence necessary to prove the facts

alleged beyond a reasonable doubt. Likewise, the defence must accumulate evidence to refute the charges unless it is felt that there is no case to answer. For the most part, that evidence will consist of the oral testimony of witnesses; their accounts of the facts as they remember them. In view of the fragility of the human memory, it is essential that trial should follow within a reasonable period of the occurrence in question.[37] The longer the period before trial, the more likely it is that the witnesses' testimony will become less reliable. An accused could be wrongly convicted on unreliable evidence which would be manifestly unjust, but it could equally well work in his favour and assure his acquittal. Knowledge of this possibility may actually encourage the defendant or his counsel to delay the trial in the hope that the evidence will deteriorate.[38] As the period of time before trial expands, the likelihood increases of the individual becoming a "dropout" somewhere along the line. The slippage in the system is quite large and the most important reasons for the slippage are probably the fading of the evidence and the growing reluctance of witnesses to keep returning to court.

Criminal cases are rarely heard on the original trial date. Witnesses are forced to return to court again and again without ever testifying as the case is repeatedly postponed and often finally disposed of without a trial if the accused lodges a late plea of guilty. Witnesses who were actually the victims of the crimes at issue may find little solace or justice in this treatment. When a case is repeatedly postponed witnesses often give up and do not return for the next scheduled appearance. This may force the prosecutor to drop the charge because of a lack of evidence or to agree to reduce the charge or give some other consideration in return for a guilty plea. Once again, knowledgeable defendants, usually those who have been in court on several previous occasions, may try to take advantage of the system's delays and turn them to their advantage by out-waiting the witnesses. Recent Canadian studies have found that multiple adjournments were the major factor militating against witness cooperation.[39] Witnesses lose earnings and time with each trip to court, and it is unreasonable to expect that citizens will automatically keep subjecting themselves to personal loss and inconvenience in the name of justice.[40]

Fairness to victims and witnesses demands that they be subjected to a minimum of intrusions and interruptions of their daily routine. Justice is not purely a property of defendants; due consideration must also be given to the other participants in the criminal justice system, though, it must be emphasized, not by eroding the rights of the accused.

(iii) Delay and case disposition

The criminal courts of many jurisdictions are under extreme pressure due to mounting backlogs and ever-increasing caseloads. In the absence of any immediate effective solution to this problem, the courts and their personnel have come to depend to an increasing extent on the guilty plea to keep cases moving through the criminal justice system.[41] Guilty pleas are an established part of the administration of justice; they take significantly less time to process as there is no time-consuming fact finding or jury deliberation. In contrasting guilty pleas with confessions, the Lord Chief Justice of England had this to say:

> We are never squeamish, never have been squeamish about allowing a man to convict himself if he wants to. Every day when we sit as judges in the first instance at a criminal trial, the first thing that is put to the prisoner when he comes up into the dock is "Are you guilty or not guilty". If he says guilty, which is simply a confession of guilt, we do not say "Be quiet, do not say that, it is the wrong thing to do". On the contrary, we say, very well, and the Judge heaves a sigh of relief because that is one case out of his calendar and he can get on with something else. We are not in the least troubled about convicting a man on a voluntary confession, provided it is voluntary...."[42]

Currently, the focus is on plea negotiation as the key method for encouraging and facilitating guilty pleas.[43] This is not to say the plea negotiation is purely a product of delay. An extensive body of American literature has shown that plea bargaining has been in existence, in one form or another for many, many years, and that although the exact causes behind bargaining have not been isolated, caseload pressures are not the culprit. They are merely a convenient whipping boy.[44] However, the argument that case pressures can be removed and plea negotiation remain does not mean that case pressure is without any effect on the bargaining processes. When case volume increases and resources remain constant, changes in the negotiation process may become manifest;[45] the prosecutor may abandon the marginal case which he might have pursued earlier; he may offer to reduce more charges and recommend lighter sentences, or he may simply demand more severe sentences after trial.[46]

The ethics and practice of plea negotiation have been the subject of a heated and continuing debate, but the concern here is whether this manifestation of delay-induced pressures is adversely affecting the administration of justice. Guilty pleas are obnoxious if they are not completely voluntary and made in the full knowledge of all the facts and their

legal implications.[47] The differential legal position of confessions and guilty pleas is curious, though not quite in the way Lord Widgery saw it: a confession, surrounded by various protections, requires knowledge of a factual situation; the guilty plea, however, implies a sophisticated knowledge of law in relation to the facts, which a defendant, even one guided by his counsel, often does not have. If the inducement is substantial, an accused faced with weeks or months until trial, may give up a valid defence, or plead guilty when his guilt is questionable. The longer the delay, the more attractive the guilty plea becomes.[48]

> Where years are likely to pass before the trial of charges there is a temptation for both the prosecution and the accused to endeavour to find some way out, and sometimes the easiest, but not the most equitable, way out is by bargaining as to plea.[49]

There is also the possibility that an innocent defendant may plead guilty because of a fear that he will be sentenced more harshly if he is convicted after trial. It must be acknowledged that because of the emotional potential of this problem, it is very easy to overstate. The truth is, that it is just not known how common such a situation is. The possibility exists that the percentage of innocent persons pleading guilty is no greater than the percentage of innocent persons found to be guilty through the adversary system.[50] Neither the trial nor plea bargaining are perfectly accurate procedures, but because the latter is largely hidden from the public eye, it is understandable that unease is felt about its consequences.

A connected concern is that plea bargaining may also be producing injustice by treating guilty defendants too leniently, by allowing court-wise defendants to manipulate the system and by penalising those ignorant of the plea bargaining system who plead guilty without any concomitant "reward" or who legitimately pursue their right to trial and are subsequently found guilty. Differential access to plea bargaining is unfair in its own way.

How can the accuracy and voluntariness of guilty pleas be established? At the moment, it goes little beyond asking the accused if the plea is voluntary, which is not very reliable. This is especially so for guilty pleas that are not the result of an agreement between defence and prosecution but of an implicit or tacit bargain in the form of a reasonable expectation of sentencing leniency on the part of the offender and an established practice by the court of showing differential leniency to defendants who

plead guilty in contrast to those who demand trial. The inducement in these circumstances is much more metaphysical and the lack of voluntariness even more difficult to discern. Newman, an American commentator, has proposed that there be a more detailed examination by the court into the factual basis for guilty pleas.[51] While an examination of the evidence to establish the guilty plea would meet a great many of the reservations against plea negotiations, the guilty plea process would become more elaborate, perhaps little different from a full trial and hence would no longer fulfil its present function as a speedy processing mechanism.

Guilty pleas are quick precisely because they allow the system to be circumvented. The hearings which follow them are not hearings in the true sense of the word: a cursory establishment of the defendant's knowledge and the voluntariness of the plea; pleas in mitigation by the defence; in some jurisdictions a speaking to sentence by the prosecution and the actual sentence. The judge may adjourn the case to give consideration to the sentence, but the hearing of the case is truly summary. After waiting, often for a considerable period of time, for his case to come up before the court, especially if the guilty plea has not been lodged at his initial appearance, the defendant's case is given hasty consideration. It has been observed that the same objectives of conviction by trial are applicable to the guilty plea process, and the same basic concerns, such as the accuracy and fairness of the procedures, arise in both systems. Even the problem of the speed of justice occurs in both systems, but with reversed concerns: delay in the trial system and quick justice with guilty pleas.[52] The co-existence of these systems can result in the evils of both - a long wait until trial culminating in summary disposal, particularly in the lower courts where the vast proportion of cases are disposed of by guilty pleas - neither of which are designed to increase the probability of justice according to law. A study of guilty pleas in the lower courts of Victoria produced some interesting results: it was found that although between 1971-1976 the percentage of persons pleading guilty dropped substantially from 75.4 per cent to 61.8 percent, the acquittal rate remained fairly steady. As the authors of this report comment, one might have expected that as fewer and fewer persons pleaded guilty and chose instead to go to trial, the acquittal rate would have decreased markedly, which did not in fact happen. As there was no significant change in the substantive criminal law during the period under review, it would appear that statistically, a significant number of persons who previously had pleaded guilty in the past would have been acquitted if they had gone to trial.[53]

> It is essential for the proper administration of justice that the courts shall be able to try cases within a reasonable time from the date of the facts from which they arise. It is equally important that the courts shall not feel under pressure to get through trials quickly owing to the backlog of cases.[54]

Caseload pressures may well result in speedy processing becoming the ends of the system rather than the doing of justice.

(iv) Delay and the aims of the criminal justice system

Excessive delay dislocates the ends and the means of the administration of justice. After numerous delays waiting for a case to be heard, the trial becomes the end of the criminal justice system and the punishment of the offender is divorced from the original criminal act. The unpleasant consequences of a prolonged period before trial becomes the punishment for guilty and innocent alike and the legal penalty, when it is finally imposed, seems more like the gratuitous infliction of harm.

> It is then, of the greatest importance that the punishment should succeed the crime as immediately as possible, if we intend that, in the rude minds of the multitude, the seducing picture of the advantage arising from crime should instantly awaken the attendant idea of punishment. Delaying the punishment serves only to separate these two ideas and thus affects the minds of the spectators rather as being a terrible sight than the horror of which should contribute to heighten the idea of punishment.[55]

Although ideas of general deterrence may not be widely espoused these days, the preservation of the connection between criminal act and punishment is necessary. No matter which theory is the cornerstone of punishment, each is at least partly dependent for its success upon getting to the offender without undue delay. Whether the emphasis is on protecting society, discouraging the offender or others from committing criminal acts or rehabilitating the offender, delays may reduce any efficacy they might have.[56]

Even if the present systems of criminal law and procedure in the Commonwealth were to be administered with near perfect timing, some measure of injustice and unfairness would still exist. Although the evidence is far from conclusive, it would appear that excessive delay in processing cases aggravates the imperfections of our present systems, such as imprisonment before trial, and creates anomalies of its own, not least of which is

the stress on speedy hearings. Delays may prove injurious to the defendant, to the interests of society and even to the criminal justice system itself in that if citizens lose their respect for the system there is a danger they will take the law into their own hands. Incontrovertible proof is not necessary for it to be acknowledged that delay in the criminal justice process is a real cause for concern.

Footnotes

[1]Sir Carleton Kemp Allen, Aspects of Justice (London, 1958), p. 65.

[2]A.S. Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure", (1959-60), 69 Yale Law Journal 1149 at p. 1192.

[3]Lord Bacon quoted in Kenny's Outlines of Criminal Law, (17th ed.) (London, 1958), para. 745.

[4]S.A. de Smith, Judicial Review of Administrative Action (London, 1968), pp. 135-36.

[5]Id. at pp. 171-89. For an interesting discussion of the embodiment of the right to adequate time and facilities for the preparation of a defence in the Nigerian Constitution and case-law on the subject see C.O. Olawoye, "The Problem of Delay in the Administration of Criminal Justice" in Second West African Conference on Comparative Criminology, Criminal Law and the Law Courts (Lagos, 1973), pp. 107-118.

[6]Lewis Katz et al., Justice is the Crime: Pretrial Delay in Felony Cases (Cleveland and London, 1972), pp. 59-60.

[7]C. Beccaria, (An Essay on Crimes and Punishments (1819) (Stanford, 1953)) emphasized the point that deprivation of liberty, being a punishment, ought to be inflicted before conviction for as short a time as possible (p. 75).

[8]Law Reform Commission of Western Australia, Working Paper (Project No. 64), Review of Bail Procedures (1978). See note in (1978), 4 Commonwealth Law Bulletin p. 342. See also Law Commission of India 78th Report, Congestion of Undertrial Prisoners in Jails, (1979).

[9]Canada, Report of the Canadian Committee on Corrections, Toward Unity: Criminal Justice and Corrections (Ottawa, 1969), pp. 101 and 288.

[10]South Australia, Criminal Law and Penal Methods Reform Committee, Third Report, Court Procedure and Evidence (Adelaide, 1975), p. 61.

[11]Note: "Constitutional Limitations on the Conditions of Pre-Trial Detention", (1970), 79 Yale Law Journal 941 at p. 943.

[12]For example, The (English) Prison Rules 1964 S.I. No. 388, as amended.

[13]Id. rule 37.

[14]Id. rule 34(1).

[15]R.D. King and R. Morgan, A Taste of Prison (London, 1976).

[16]The English Prison Rules, supra footnote 12, rules 50 and 51 provide that the special privileges accorded the unconvicted prisoner may be forfeited for an offence against discipline.

[17]"Congestion of prisoners on remand in jails", (1979), 5 Commonwealth Law Bulletin 785.

[18]D. Brown, Criminal Procedure in Uganda and Kenya, (2nd ed.) (London, 1970), p. 53.

[19]For example, the Canadian Bail Reform Act, R.S.C. 1970, c.2 (2d Supp.); the English Bail Act, 1976; the Victorian Bail Act, 1977; and the Bail etc. (Scotland) Act, 1980.

[20]Bail Reform Act, R.S.C. 1970, c.2 (2d Supp.) which came into operation in 1972 and which now forms Part XIV of the Canadian Criminal Code, R.S.C. 1970, c. C-34 section 459.

[21]Sri Lanka, The Administration of Justice Law, No. 44 of 1973, sections 181(2) and 192(2).

[22]"Delays in the Administration of Justice" in Selected Memoranda prepared for the 1977 Meeting of the Commonwealth Law Ministers, Winnipeg (London, 1977), p. 27.

[23]As reprinted, July 1974.

[24]"Delays in the Administration of Justice", supra footnote 22 at p. 28.

[25]Criminal Procedure (Scotland) Act, 1975, section 101(1).

[26]Id. section 101(3). This deadline may be waived by the judge in the event of the illness of the accused, judge or juror; the absence or illness of any necessary witness, or "any other sufficient cause" for which the prosecutor is not responsible - section 101(5).

[27]South Australia, Criminal Law and Penal Methods Reform Committee, supra footnote 10 at p. 61.

[28]Subsection 649(2.1) Canadian Criminal Code, supra footnote 20; inserted by R.S.C. 1970, c.2 (2d Supp), originally proclaimed in force January 3, 1972.

[29]New Zealand, Department of Justice, Study of Preliminary Hearing Procedure Before Committal for Trial (Wellington, 1978). This study found that in the New Zealand courts there was an 8.3 per cent acquittal rate among those detained in custody.

[30]The Law Reform Commission of Western Australia issued a Working Paper (Project No. 43) in 1977 which examined the issue of compensation for persons detained in custody who are ultimately acquitted; how other countries approach the problem and what approach should be taken in Western Australia. See note at (1977), 3 Commonwealth Law Bulletin 253.

[31]For a full discussion of the consequences of custody see S. Armstrong and E. Neumann, "Bail in New South Wales", (1976), University of New South Wales Law Journal 298 and M.L. Friedland, Detention Before Trial (Toronto, 1965).

[32]M.L. Friedland, id. at p. 89.

[33]New Zealand, Department of Justice, supra footnote 29 at p. 12.

[34]For example, M.L. Friedland, supra footnote 31; M. King, Bail or Custody (London, 1973); Home Office Research Unit, Time Spent Awaiting Trial (London, 1960), and P. Koza and A.N. Doob, "The Relationship of Pre-Trial Custody to the Outcome of the Trial", (1974-75), 17 Criminal Law Quarterly 391.

[35]Parliament of New South Wales, Report of the Bail Review Committee (1976), p. 48.

[36]T.W. Church et al., Pretrial Delay: A Review and Bibliography (Williamsburg, 1978), p. 11.

[37]Glanville Williams, "Proposals to Expedite Criminal Trials", [1959] Criminal Law Review 82 at pp. 82-85. In the Canadian case of Attorney-General for Saskatchewan v. McDougall [1972] 2 Western Weekly Reports 66 at p. 70, Batten, D.C.J. refused to allow an appeal by way of trial de novo on the grounds that the accused had had the charge hanging over his head for several months and because the memories of the witnesses had of necessity deteriorated to an appreciable extent, particularly in regard to the police witnesses who had had to deal with many other cases in the intervening period. See also F. Nwadialo, The Criminal Procedure of the Southern States of Nigeria (Benin City, 1976), p. 8.

[38]U.N.S.D.R.I., Delay in the Administration of Justice (India) (Rome, 1978), p. 1.

[39]J.L. Wilkins, The Prosecutor and the Courts (Toronto, 1979) and R.G. Hann, Project Omega: Provincial Criminal Court Administration (Edmonton) Report (Edmonton, 1977).

[40]For a graphic description of the hardships witnesses are often faced with see Bangladesh Ministry of Law and Parliamentary Affairs, The Report of the Law Committee 1976 (Dacca, 1978), pp. 8-10.

[41]For example, in England and Wales in 1977 85 percent of defendants in Magistrates' Courts pleaded guilty of all charges for which they were tried; at Crown Court the corresponding proportion was 50 percent - Great Britain Home Office, Criminal Statistics England and Wales 1977 (Cmnd. 7289) para. 4.4. An Australian survey shows similar results: guilty plea rates vary from approximately 50 per cent in the highest courts to between 60-75 per cent in the middle level courts and in excess of 80 per cent at the lowest and busiest level of the court hierarchy - P.A. Sallman, "Criminal Justice: A Systems Approach", (1978), 11 Australia and New Zealand Journal of Criminology 195 at p. 200.

[42]Rt. Hon. Lord Widgery, "The Balance of the Criminal Law Trial", [1972] New Zealand Law Journal 478 at p. 481.

[43]It is somewhat ironic that plea bargaining may be eroding the time advantage of guilty pleas as defendants hold out until the last moment before pleading guilty in the hope of getting a better "deal", and as defendants become aware of the existence of these negotiations, more defendants come to expect bargaining to take place whereas in the past a straightforward plea of guilty might have been entered - G.A. Ferguson and D.W. Roberts, "Plea Bargaining: Directions for Canadian Reform", (1974), 52 Canadian Bar Review 497 at pp. 552-53.

[44]L. Friedman, "Plea Bargaining in Historical Perspective", (1979) 13 Law and Society Review 247; M.M. Feeley, "Perspectives on Plea Bargaining", (1979), 13 Law and Society Review 199 and P.F. Nardulli, "The Caseload Controversy and the Study of Criminal Courts", (1979), 70 Journal of Criminal Law and Criminology 89.

[45]A recent English study indicated that between 1965-74 when the work-load of the Crown Court more than doubled, the ability of the system to cope with this increase was achieved only by an emergency court building programme and the appointment of many more judges. Thus, from 1972-75 the number of circuit judges increased by 27 per cent, Recorders by 45 per cent, courtrooms in use by 26 per cent and Crown Court sitting days by 16 per cent - J. Baldwin and M. McConville, "Conviction By Consent: A Study of Plea Bargaining and Inducements to Plead Guilty in England", (1978), 7 Anglo-American Law Review 271 at pp. 276-77. In times of increasing economic restraint it is improbable that such expansion can continue which may have an impact on the guilty plea process.

[46]M. Heumann, "A Note on Plea Bargaining and Case Pressure", (1975), 9 Law and Society Review 515 at p. 527.

[47]The Kenya Court of Criminal Appeal stressed this in Adan Inshair Hassan v. Republic (1974), 18 Journal of African Law 124. The Court went on to restate the appropriate procedure to be followed before a plea of guilty can be accepted: magistrates must explain to the accused person all the essential ingredients of the offence charged and should record what the accused person has said as nearly as possible in his own words.

[48]South Australia Criminal Law and Penal Methods Reform Committee, supra footnote 10 at p. 119.

[49]Id.

[50]United States. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts (Washington, D.C., 1967), p. 10.

[51]D.J. Newman, Conviction: The Determination of Guilty or Innocence Without Trial (Toronto, 1966), pp. 20-21.

[52]Id.

[53]J. Willis and P. Sallman, "Criminal Statistics in the Victorian Higher Courts: A First Glimpse of the Possibilities", (1977), 51 Law Institute Journal 498, 510 at pp. 507-508.

[54]JUSTICE Society, Pre-Trial Criminal Procedure: Police Powers and the Prosecution Process (London, 1979), para. 77.

[55]C. Beccaria, supra footnote 38 at p. 1 and L. Katz et al., supra footnote 6 at p. 56.

II The Causes of Delay

Restrictions on the prolonged questioning of suspects and detention without being formally charged have prevented real delays occurring between arrest and first appearance in court; but serious delay is occurring where summons are issued instead of arrests being made and between first appearance in court and final disposition of the case, either at first instance or on appeal. To an increasing extent, total trial time can be measured in months or years rather than in weeks.

It is axiomatic that before solutions can be proposed, evaluated, or their implications examined, the causes of a problem must be isolated. Governments and court administrators have been finding effective solutions elusive and this is perhaps because the causes of delay are often difficult to determine with any accuracy. Some factors, such as increasing caseloads can be measured fairly precisely by counting the number of people or cases appearing before the courts each year; but others, such as the decreasing use of discretionary screening by police and prosecutors, tend to defy empirical evaluation, forcing the observer to rely on more impressionistic evidence. Solutions based on the latter are generally more tenuous, experimental and time-consuming. In either event, the answers are not materialising overnight.

One initial word of caution must be sounded: there can be no strict correlation between cause and solution. The extensive provision of legal aid to defendants may have the effect of slowing down the criminal justice process but that does not mean that legal aid should necessarily be restricted or abolished. Excessive use of adjournments may be a major cause of delay but it is unlikely that the courts could function fairly without them. In reaching for the answers to the delay problem we must go beyond the elementary causal relationship. There must be an intervening evaluation stage where the benefits of the "cause" are weighed against the possible harm they may be producing. Through this process it may be decided that legal aid and adjournments have intrinsic worth and should, therefore, be retained. The solutions must be directed not at abolishing such causes, but at curbing their worst excesses, and in such a way that participants in the criminal justice system are not deprived of their benefits. We cannot have a totally efficient system. The very nature of the criminal justice process is "inefficient" because it is, and must remain, deliberate.[1] Intelligent choices must be made in order to retain that delay which is necessary while eliminating that which is excessive.

In this chapter the causes which will be discussed in detail are those found outside the courts and those located in the nature and number of the cases appearing before the courts. There are, in addition to these, a good many factors at work within the criminal court system and its procedures which decelerate the processing of cases. For example, there is too much unnecessary business conducted in the courtroom where formal rules and procedures must be adhered to, rather than having as many peripheral matters cleared away through discussion and disclosure between counsel in advance of a court appearance. Strict adherence to the viva voce evidence rule, even where a party does not contest a piece of evidence against him also has an impact as the hearing of oral evidence is exceptionally time-consuming. Jury trial is notorious for the ways in which it lengthens criminal proceedings. In addition, administrative techniques presently used in the courts are no longer equal to the task of dealing with spiralling caseloads. Physical resources are strained and man-power limited. The scheduling of large numbers of cases with correspondingly large numbers of legal representatives involved is precarious, easily crippled by adjournments sought by counsel on both sides when commitments conflict or a case is not prepared. A fuller description of this class of causes will be given more usefully in Part Two where they are immediately followed by a discussion of the measures taken to meet these conditions. The causes of delay discussed here are generally broader both in terms of their origins and their implications and solutions.

Common law jurisdictions, ranging from the very small to the very large, from the developing countries to the industrialised nations, are experiencing vast increases in caseloads. For example, in Britain, the total number of persons tried for indictable offences has nearly doubled since 1963, and the number committed for trial in the Crown Court has nearly tripled. In the magistrates' courts the workload in respect of minor criminal cases has also increased from 1.2 million cases in 1965 to 1.6 million in 1975.[2] An investigation of the workload of the criminal court in certain areas of India found that it had almost doubled from 1966 to 1973.[3] What is producing these increases?

(i) An increasing Crime Rate

The most obvious explanation for the increase in the courts' caseloads is an increase in the amount of detected crime in society. There is certainly widespread belief in the "rising crime rate":

> It is a view which has broad public acceptance and is taken seriously to signify real and growing threats to life, property and important social values. The response to the threat has seemed to enjoy almost as much consensus as the belief itself - a 'strengthening' of the law, an increase in the forces of order, and a search for ever effective means of crime prevention and repression. In the United States this was dignified into a 'war against crime' while in other societies more modest schemes have sufficed, such as expanding the police force, building more prisons and hiring more social workers.[4]

There can be little argument that there has been an increase in the absolute number of offences due to population growth which has brought about a concomitant increase in the number of criminal cases in the courts. There is more crime simply because there are more people. But alongside increases in the rate of population growth have been escalations in the crime rate, that is, the amount of crime per capita which takes into account fluctuations in population size. A study in New Zealand has disclosed that over the past 15 years there has been a great increase, not only in the absolute number of prosecutions, but in the rate of prosecutions in proportion to the population. From 1960-1975 the number of charges in respect of which a person was arrested increased by 200 per cent and the rate per 1000 of population rose from 8.64 to 20. The number of traffic prosecutions increased by 219 per cent and the rate increased from 34.87 to 85.75 per 1000 of population.[5]

One possible explanation for this increase in the crime rate in many countries is that there have been occurring fundamental changes in the social and economic structure. This is particularly true in the developing nations which are undergoing accelerated social development. If, as is widely believed, crime is associated with increased social mobility, population densities, family instability and urban growth, it is little wonder that crime rates are increasing where these phenomena are occurring.[6] Dense populations, increasing commerce and industrialisation and an emphasis on material possessions all make crime easier to commit and more difficult to prevent or detect.

Factors such as urbanisation and increased opportunities to commit certain offences have produced a measure increased criminal activity. But it is debatable whether this increase in the criminal propensities of a population would account for more than a proportion of the increased workload of the courts. An extensive body of literature now exists which illustrates the fallibility of criminal statistics in giving an accurate

picture of criminal activity in society.[7] From these caveats it is clear that the type of crime, the reporting and recording of crime and police practices have all to be taken into account when analyzing any apparent increase in the crime rate.

As the figures given above for New Zealand show, there has been a massive increase in traffic offences coming before the courts in that country. In Fiji, traditional crime is increasing by about 25 per cent a year, while traffic offences increase by about 55 per cent.[8] McDonald, in her study of British crime figures, found that the "rising crime rate" turned out to apply not to crimes of violence, as is popularly thought, but to trivial infractions. From 1950-1966 neither total indictable convictions nor charges were found to have increased significantly, whereas summary convictions were increasing significantly at the rate of 5.5 per cent per annum and reported parking offences at the rate of 5.2 per cent per annum.[9] A similar situation exists in Canada: the Canadian Committe on Corrections found that an increase in summary offences accounted for 98 percent of the 25-fold increase in the crime rate between 1901-1965. Traffic offences in turn were responsible for 90 per cent of the increase in summary convictions.[10] These figures do not necessarily indicate more perverse driving practices on the part of the population, but rather an increase in the number of drivers and motor vehicles on the road. McDonald found that the rate of registered motor vehicles in Britain accounted for 97 per cent of the variance in traffic violations and 62 per cent of the variance in reported traffic offences.[11]

Some of the apparent increase in the crime rates may be due to an increased readiness on the part of the public, or to increased efficiency on the part of the police in detecting some sorts of crime.[12] Considerably more crime occurs than is ever discovered. Thus, an increase in police discovery and clearance rates could produce a "crime wave" even although the level of actual criminal activity remains stable. The growth of the crime rate, therefore, may be more a reflection of the level and type of policing in existence at any particular time than of actual criminality.

It is evident that police enforcement policies can have a significant impact upon the workload of the criminal courts. More sophisticated investigation techniques can also have this effect; in the Canadian province of Ontario it was found that dramatic increases in charging had occurred in the offence of "driving while disqualified or while one's licence has been suspended or cancelled". The increases were nearly five-fold over the period 1970-76, after which the trend appeared to be stabilising. It was

thought that this increase could be explained as being a result of a sophisticated computerized system which patrolmen have access to through their radio systems, allowing them to obtain, very rapidly, accurate suspension data from the Canadian Police Information Centre.[13]

The relative size of police forces to population may also affect the number of people being brought into the criminal courts. It follows fairly logically that if there is more police manpower there will be more policing, more investigation, more charges and consequently more criminal cases in the courts because of the untapped source of 'hidden' crime. This seems paradoxical to those people who think of the police as preventing crime and who conclude that an increase in the number of policemen will result in a corresponding decrease in crime. More police generally means more crime and more work for the courts.

Increasing crime rates are contributing to the caseload crisis, but the typical response to the "crime wave" - more policing - is only exacerbating the situation. What we are witnessing is not in fact an increase in crime as much as an increase in the processing of crime and this is the real source of our difficulties.[14] We must respond accordingly.

(ii) "The Law Explosion"[15]

Increased enforcement of the law provides more cases for the courts to process; in addition, an increase in the number of court cases can also be attributed to the introduction of new legislation.[16] It seems that basic practical considerations have been ignored in expanding the ambit of the criminal law:[17] in the past few decades many new areas have become subject to laws and regulations which has led to an increase in the number of potential offences, and consequently, to an increase in prosecutions. As indicated above, summary offences have accounted for the major proportion of the increase in the crime rate, and traffic offences are the main source of this increase. In terms of numbers, the motorist is the typical criminal of today.[18]

> We have for many years now been experiencing an inflation of the criminal law. Legislatures are active in continually creating a vast mass of crimes by outlawing a wide variety of conduct on pain of a criminal sanction. This habit of legislatures regularly to prescribe the criminal sanctions for control of any behaviour has indeed led to a "crisis of overcriminalization."[19]

This increased use of the criminal law is seen by some to be a result of the emergence of heterogeneous and complex societies: as society grows

more interdependent, relationships between people who are otherwise strangers become common and more complex, and more reliance is placed upon abstract and formal rules to govern these relationships. This is particularly so in relation to motorists and to consumers and producers of goods and services. As more strangers rely increasingly upon formal rules to regulate their relationships, and as there are more formal regulations to be followed, there is a continual increase in the number of potential cases for the court system, both in absolute numbers and per capita.[20] We have societies that are far more complex and vastly more demanding on law and legal institutions than they were previously.

For the most part, this expansion of the criminal law has not created crimes in the traditional sense, but rather regulatory offences, particularly offences of strict liability. A study commissioned by the Law Reform Commission of Canada used a sampling survey to estimate the number of offences of strict liability that exist in Canada. It concluded that there are at least 20,407 offences of strict liability under federal law and at least 17,560 under provincial law in the average province. The researchers did not even attempt to quantify the vast number of municipal offences and therefore the survey underestimates the total number of strict liability offences.[21] Thus, in any given province, an individual is regulated by laws containing an average of 41,582 offences of which 37,967 (91%) are offences of strict liability; and in any given year in the whole of Canada there are likely to be nearly 1,350,000 convictions for strict liability offences. The number of prosecutions will be considerably larger.[22] Traditional criminal cases comprise only one-twelth of total case volume.

Although it is minor criminal cases that make up the bulk of the caseload of criminal courts, their impact cannot be dismissed lightly. Generally, the basic structure of a trial for a contested parking ticket is the same as the structure of a trial for a more serious offence, and because the minor cases often attract as much paperwork as serious ones, these minor offences are among the chief culprits clogging the criminal courts. In terms of workload and administrative burden, traffic and parking offences are infinitely more important to the administration of justice than serious criminal cases.

> Like all else, law comes at a price - especially criminal law. This we forget when some new social problem makes us say "there ought to be a law against it". As though having a law against it were always a perfect solution.[23]

A perfect solution it is not. In fact it may be creating more problems in terms of delay than it is solving.

(iii) Geographical isolation

In many Commonwealth countries there exists alongside the growing case-load problem the difficulty of providing prompt access to the courts. Where the population is concentrated in large urban areas there is little problem of getting physical access to the courts either to set a case in motion or to defend oneself against a criminal charge. Courts will either have a permanent base in urban centres or operate there for most of the year. The case may take some time to be processed through the system, but actually introducing a case into the system is fairly straightforward. This contrasts markedly with the situation outside urban areas where a small population is scattered over a vast geographical area. In Botswana, for example a population of approximately 710,000 is spread over 220,000 square miles. The volume of business in any town or settlement may not be enough to justify a permanent criminal court; and where a court travels on circuit, business will have to be accumulated for its relatively infrequent visits.[24] In addition, these isolated areas are often inaccessible during certain seasons of the year.

The New Zealand Royal Commission on the Courts which reported in 1978 pointed out that court structure must be appropriate to the conditions prevailing in each jurisdiction. The basic factors that restrict and shape any attempt to restructure the administration of justice in New Zealand, for example, are geographic configuration and the small and scattered nature of the population. These factors produce a conflict between a centralised system making the best use of judicial and other legal talents, including specialised knowledge and skills, as well as buildings and administrative staff, and the need to show the face of justice throughout the country to meet the needs of a local community quickly and with the minimum inconvenience to residents. The spread of population results in significant variations in court workloads in New Zealand. It needs to be recognised that a solution to the problem of delay for urban centres may be inappropriate elsewhere.[25]

(iv) Police and prosecutorial discretion

Police and public prosecutors (where they exist) in common law countries generally have the discretionary power not to proceed with a case if they see fit. Different considerations can affect the decision to prosecute: whether the offence is minor or serious; whether the suspect has a criminal record and whether there is a strong case to be made against him. Effective screening to prevent unnecessary prosecutions and weak cases appearing in court would provide some measure of relief for courts

sagging under a heavy burden of cases. But there are indications that in one major Commonwealth jurisdiction at least, cases pressure may be having the opposite effect. Emphasis on police productivity coupled with an increasing criticism of the widespread exercise of discretion by police officers may be having the effect of passing on a larger caseload to the prosecutor's office. Unfortunately, in Canada, prosecutors do not appear to be increasing their screening of cases to prevent the weak or unnecessary charges reaching the courts.

The screening of cases by a prosecutor would require review of the cases prior to the scheduled court date if one has been set and a decision made then whether to drop the case or to proceed. It seems to be coming increasingly common that, unless the case is a serious one, the prosecutor's first contact with a case will occur on the date of the court appearance and not before.[26] This is a little late in the day for effective screening. That prosecutors have time to screen serious cases is ironic because the decision not to proceed is least likely to be exercised in relation to those offences.

The absence of effective screening is confirmed by prosecutors themselves:

> With nearly every prosecutor going into court five days a week, forty-eight weeks a year and spending most of the day in court, he can only deal with what is in court; there is no time to deal with the question of what should be in court. If there is no experienced Crown prosecutor available to scrutinize the evidence and the resulting charges early in the history of a case to determine if the charges are warranted, then the case is submerged in an ever-increasing docket, surfacing months later as a preliminary inquiry or trial with the Crown relying almost entirely on the police to have done the right thing at the beginning. In such circumstances, the role of Crown Counsel is merely that of an expediter, part of a machine for prosecution... The most important of his talents and powers, the exercise of Crown discretion, is excluded from the process. Being unable to screen, he is unable to prevent the system from breaking down from the bulk of the chaff.[27]

For systems, such as that prevailing in England, where the police perform many of the functions of the prosecutor, this must also be a concern. They too are susceptible to giving the cases which come before them the minimum necessary attention in the face of increasing case-files which must be processed.[28] If this source of caseload pressure has not yet manifested itself in a jurisdiction, preventive action should be taken to

ensure that it does not.

The sheer volume of cases coming before the courts is contributing to delays in disposing of the caseload. There are other factors, however, connected with the cases themselves which determine the speed with which they and other cases in the system are handled: the widespread use of legal aid and the complexity of the cases being brought into court.

(v) Legal Aid

In the criminal law sphere, increasing caseloads can hardly be attributed to the widespread institution of legal aid: people are not more willing to be charged, nor are they charged simply because legal aid is available.[29] Legal aid, therefore, does not cause delay by bringing more cases into court, at least into courts of first instance. Rather, legal aid affects the amount of time it takes for each case to be disposed of, due to a variety of factors.[30]

The granting of an individual's right to legal aid in each particular case adds another stage to the already cumbersome trial process. Time is needed for an accused person to apply for legal aid and for administrators to consider his claim. Legal aid introduces a peripheral administration, giving rise to a potential for delay, but such delay can be seen as being necessary. Undue delay may arise not from the administration of the system, but from abuse of it by defendants.

In Ontario, which has one of the most extensive legal aid plans in the world, the Ministry of the Attorney General has observed that accused persons do not always make prompt applications for assistance, even though the courts generally allow a three week adjournment for this purpose. Information which the legal aid administration requires before issuing an entitlement to legal aid is not always speedily provided, thus necessitating a further adjournment to permit completion of the application.[31] This has also been the experience in the English Magistrates' Courts.[32]

Concern is also being expressed that counsel who participate in legal aid plans are causing delays through abuse, for example, by encouraging, or at least not discouraging full defence of a "hopeless" case or election to a higher court and jury trial, because of the economic advantages which will accrue.[33] There seems to be a general feeling that cases in which there would have been a guilty plea some years ago are nowadays likely to be defended because the defendant has nothing to lose financially and his counsel has everything to gain. But this apparent increase could be the

result of people no longer pleading guilty merely because they lack legal representation.[34] Measuring the impact of legal aid in this way to verify such suspicions has not been successful because neither legal aid schemes nor the courts have structured their affairs with a view to this particular exercise.

(vi) Case complexity

As we seen above, a vast proportion of the caseload of the criminal courts is made up of relatively straightforward minor cases, but the courts are also faced with a growing number of complex cases which consume an inordinate amount of court time in addition to needing considerable pre-trial preparation.[35] Case complexity is a very important factor affecting the length of a trial and, the more time any individual trial takes to complete, the less time there is available to hear other case.[36]

A case against a defendant which contains multiple charges will take longer to hear than one where a single charge is sought to be proved. According to recent statistics for the criminal courts in England, about 70 percent of those defendants dealt with at magistrates' courts in 1977 were charged with one offence only; at the Crown Court the corresponding figure was about 40 per cent. Defendants charged with five or more offences comprised two per cent of the total defendants dealt with in the lower courts and 13 per cent of those dealt with at Crown Court, which is quite a significant proportion of potentially complex cases.[37]

One of the areas which has been subject to increasing criminalisation over the past few decades is the world of business. In most jurisdictions there is now close regulation through the criminal law of monopolies, industrial safety, taxation, fiduciary relationships and environmental protection. This, combined with specialised law enforcement has led to more of these cases, generically described as white-collar crime, appearing in court.[38] White-collar crime is generally technical, complex and well-hidden, taking place over months, if not years. To the untrained eye these operations are often indistinguishable from legitimate business practice and proof that they are indeed illegal is difficult to find. Long and sophisticated investigations are necessary, inevitably followed by time-consuming and complicated trials. These cases are among the most difficult and time-consuming to try, often generating some of the most complex questions of law for consideration along with tortuous fact situations, and promising a high probability of an appeal if there should be a conviction.[39] Another

characteristic of white-collar prosecutions is the mass of documentary material that is often sought to be admitted in evidence by both sides. This can give rise to lengthy voir dires which will consider the admissibility of such evidence.

The increasing use of the conspiracy charge is also producing more complex cases, particularly in Britain and Canada. An indictment for conspiracy, standing alone or in conjunction with a substantive offence,

> permits a vague definition of the offence; broader standards of the admissibility of evidence apply; it may provide the solution to prosecutorial problems as to situs and jurisdiction....[40]

The English Law Commission issued a report on the law of conspiracy in 1976 which concluded that the inclusion of a conspiracy count adds to the length and complexity of trials, and, in particular, complicates the task of summing up to a jury. Proof of conspiracy can be a difficult, time-consuming operation often depending on evidence obtained through electronic eavesdropping devices, which in turn tends to produce the complications of a voir dire or 'trial within a trial'. The summing up by defence and prosecution and the charge to the jury can take days and the jury may have to return repeatedly for directions. In a conspiracy case which came before the English Court of Appeal in 1975, prosecuting counsel's opening speech lasted two-and-a-half days; the hearing of the evidence took 48 days; the closing speeches 10 days and the summing-up six days. The jury deliberated for two-and-a-half days before delivering its verdict.[42]

> What we want to do is to invite the attention of both judges and counsel to the need to keep trials as short as is consistent with the proper administration of justice. Trials as long and as complicated as this one are a burden upon judges, jurors and accused which they should not be asked to bear.[43]

The English Criminal Law Amendment Act, 1977, replaced the common law offence of conspiracy with a more restricted statutory offence of conspiracy. In addition, the Court of Appeal has issued a practice direction, the effect of which is to require prosecuting counsel to justify any joinder of a count of conspiracy and a substantive charge. Unless the interests of justice demand it, the prosecutor must choose between them, simplifying such cases considerably.[44] In this way, some limited moves are being made to remedy the situation in which needlessly complex cases are brought into court.

In conclusion: the criminal justice systems of the Commonwealth are not growing as fast as either the populations they serve; the extent to which the criminal law is used to regulate behaviour or the amount of crime that is processed through the courts. The finite resources of the courts are having to cope as best they can in dealing with a seemingly infinite stream of cases, both petty and complex. From this rather unequal struggle delays of considerable magnitude have resulted. Long-term solutions to the problem of delay will depend, in part, at least, on this shortfall being reduced, even if it cannot be eliminated.

Footnotes

[1]A.W. Mewett, "Inefficiency in the Courtroom", (1975), 18 Criminal Law Quarterly 1.

[2]"Delays in the Administration of Justice" in Selected Memoranda prepared for the 1977 Meetings of the Commonwealth Law Ministers, Winnipeg (London, 1977), p. 16.

[3]In 1966 there were 647,000 cases for trial; in 1973 there were 1,147,318 - U.N.S.D.R.I., Delay in the Administration of Criminal Justice (India) (Rome, 1978), p. 28.

[4]L. McDonald, The Sociology of Law and Order (Montreal, 1976), p. 13.

[5]New Zealand, Report of the Department of Justice 1977/78 (Wellington, 1978), p. 5. See also Canada Committee on Corrections, Report of the Canadian Committee on Corrections (Ottawa, 1969), p. 23, which disclosed that the Canadian crime rate underwent a 25-fold growth from 1901 to 1965.

[6]W. Clifford, An Introduction to African Criminology (Nairobi, 1974), pp. vii-ix and S. Arcand and Y. Brillon, "Comparative Criminology: Africa", (1973), 6 Acta Criminologica 199 at p. 201.

[7]See, for example, P.J. Giffen, "Official Rates of Crime and Delinquency" in W.T. McGrath (ed.), Crime and Its Treatment in Canada 2d ed, (Toronto, 1976) and N. Walker, Crimes, courts and figures: An introduction to criminal statistics (Harmondsworth, Middlesex, 1971).

[8]C.H.S. Jayewardene, "Crime and Justice in Fiji", (1977), 5 Crime et/and Justice 240 at p. 242.

[9]L. McDonald, supra footnote 4 at p. 218. The English Magistrates' Courts now process more than two million traffic offences a year (2,216,111 in 1976); this is in addition to those motorists dealt with by way of a caution or fixed penalty notice - Great Britain, Home Office, Offences Relating to Motor Vehicles 1976 (London, 1977).

[10]Canadian Committee on Corrections, supra footnote 5 at p. 23. In 1973, traffic offences (excluding parking) accounted for almost 75 per cent of all summary convictions in Canada - Statistics Canada Justice Statistics Division, Statistics of Criminal and other offences 1973 (Ottawa, 1978).

[11]Supra footnote 4 at p. 224.

[12]N. Walker, supra footnote 7 at p. 25.

[13]Ontario Provincial Secretariat for Justice, Justice Statistics Ontario 1978 (Toronto, 1978).

[14]A. Nixon, "Criminal Law", [1978] New Zealand Law Journal 435 at p. 436.

[15]The American Assembly, Columbia University, The Courts, the Public and the Law Explosion, (H.W. Jones ed.) (Englewood Cliffs, N.J., 1965).

[16]A.A. Adeyemi, "The Criminal Law as a Selection Instrument for the Administration of Justice", in Second West African Conference in Comparative

Criminology, Criminal Law and the Law Courts (Lagos, 1973), pp. 1-38 at p. 19.

[17]N. Cameron, "Some Consequences of an Overextended Criminal Law", in R.S. Clark (ed.), Essays on Criminal Law in New Zealand (Wellington, 1971), pp. 147-69 at pp. 149-50.

[18]Id. at p. 154.

[19]A. Rabie, "The Need for Decriminalization", (1977), 10 The Comparative and International Law Journal of Southern Africa 200. The latter phrase in the quotation comes from S.H. Kadish, "The Crisis of Overcriminalization", (1968), 7 American Criminal Law Quarterly 17.

[20]N. Cameron, supra footnote 17 and W.G. Skogan, "Traffic and the Courts: Social Change and Organizational Response", in H. Jacob (ed.), The Potential for Reform of Criminal Justice (Beverley Hills, 1974), pp. 131-72 at p. 131.

[21]Law Reform Commission of Canada, Working Paper No. 2, Criminal Law: Strict Liability (Ottawa, 1974), p. 2.

[22]P.J. Fitzgerald and T. Elton, "The Size of the Problem", in Law Reform Commission of Canada, Studies in Strict Liability (Ottawa, 1974), p. 55.

[23]Law Reform Commission of Canada, Working Paper No. 10, Limits of the Criminal Law: Obscenity: a test case (Ottawa, 1975).

[24]See, for example, U. Baxi, "Access, Development and Distributive Justice: Access Problems of the "Rural" Population", (1976), 18 Journal of Law Indian Law Institute 375.

[25]New Zealand Royal Commission on the Courts, Report (Wellington, 1978), p. 245.

[26]Alberta Board of Review Provincial Courts, Administration of Justice in the Courts of Alberta (Edmonton, 1975) and C. Brookbank, "Aspects of Court Reform", in J.L. Wilkins, The Prosecution and the Courts (Toronto, 1979), pp. 88-167 at p. 105.

[27]J.P. Rickaby, "The Crown Attorney's Perspective", Crown's Newsletter, December 1975, p. 15. See also K.L. Chasse, "Diversion and the Prosecutor", Crown's Newsletter, July/August 1976, p. 1.

[28]The English Court of Appeal has recently issued a Practice Direction with the aim of discouraging unnecessary criminal prosecutions - "Practice Direction (Crown Court: Costs of Prosecution)", [1980] 1 Weekly Law Reports 697. Previous practice required the court to have regard to the principle that an order would normally be made for prosecution costs in the Crown Court to be paid out of central funds, unless the proceedings had been instituted or presented without reasonable cause. It became the practice to assume that such an order had been made unless the Court ordered to the contrary. As a result of this new Direction, this practice will no longer prevail. An application for costs must be made by the prosecution in each case - "This will serve to remind the court that where proceedings have been instituted or continued when they should not have been, the court has a discretion not to order the costs of the prosecution to be borne by central funds."

[29]It is possible, however, that the availability of legal aid may be causing more appeals to be lodged for it is thought that legally aided appellants have practically nothing to lose by appealing - F. Rinaldi, "Penalising the Appellant in Appeals by Convicted Persons", (1976), 50 Australian Law Journal 9.

[30]D. Biles and B. Swanton, "The Future of Criminal Justice in Australia", in D. Biles (ed.), Crime and Justice in Australia (Canberra, 1977), pp. 167-87 at p. 180; and New Zealand Royal Commission on the Courts, supra footnote 25 at p. 195.

[31]Ontario Ministry of the Attorney General, Annual Report 1975-76 (Toronto, 1978), p. 30.

[32]"Delays in Magistrates' Courts", (1977), 141 Justice of the Peace 485 at p. 486.

[33]See, for example, the evidence given by the English Lord Chief Justice, Lord Widgery, to the Royal Commission on Legal Services noted at (1978), 4 Commonwealth Law Bulletin pp. 180-181.

[34]J.L. Wilkins, Legal Aid in the Criminal Courts (Toronto, 1975), p. 125.

[35]J. Law, "The Thomson Report", 1976 Scots Law Times (News) 89.

[36]Even in relatively simple cases the average time taken to dispose of cases has increased in recent years because of the necessity of obtaining such things as probation and pre-sentence reports - Scottish Home and Health Department, The Sheriff Court (Edinburgh, 1969), Cmnd. 3248 para. 30.

[37]Great Britain Home Office, Criminal Statistics England and Wales 1977 (Cmnd. 7289), para. 4.4.

[38]"The Quality of Justice", (1978), 128 New Law Journal 298.

[39]H. Edelhertz, The Nature, Impact and Prosecution of White-Collar Crime (Washington, D.C., 1970), pp. 39-40.

[40]R. v. Cotroni; Papalia v. The Queen, [1979] 7 Criminal Reports (3d) 185 (Supreme Court of Canada) per Dickson J. at p. 189.

[41]Great Britain The Law Commission, Report on Conspiracy and Criminal Law Reform No. 76 (London, 1976).

[42]R. v. Turner, (1975), 61 Criminal Appeal Reports 67.

[43]Id., per Lawton L.J. at p. 76.

[44]Practice Direction [1977] 1 Weekly Law Reports 537; [1977] 2 All England Law Reports 540..

PART TWO

DEALING WITH DELAY

The preceding discussion of the causes and effects of delays in the criminal justice system will at least have given some indication of the nature and size of the problem we are currently being confronted with and what the consequences are likely to be if we fail to act to eradicate or prevent this retardation of justice. Just as there is no simple cause of delay, there is no simple, nor single, solution. Combative measures can be pursued on various levels: those which will regulate the intake of the courts and those which will speed up a case's progress through the system.

Commonwealth developments to deal with the problem of delays have been located on three planes: those reforms which aim to speed up the traditional court processes; those which create new procedures and tribunals for dealing with special types of cases and those which aim to keep certain cases out of the court system altogether. On all these levels a basic problem has had to be confronted: the balancing of efficiency in the workings of the system against the rights of the accused and the conveniences of the major participants. As might be expected, measures which fit into the first class given above have proved to be the most popular. The common law jurisdictions favour adherence to the principles and practices of their historical tradition as far as possible, simply because, despite its defects, it also has significant merits, notably in terms of protecting the rights of the accused. In modifying the existing trial process, there are generally two main objects in view:

> The first is to increase the efficiency of criminal procedure as a means of convicting the guilty, while preserving all proper safeguards against the danger of convicting the innocent. The second is to simplify the law and procedure by getting rid of unnecessary complications and by abolishing or modifying rules which...."Have ceased to be appropriate in modern conditions."[1]

With such underlying purposes in mind, along with an awareness of such factors as the time wasted in court on peripheral matters, on detailed proof of formal issues and on frivolous appeals, reforms have evolved. In general terms they endeavour to keep unnecessary matters out of court; to cut down on the amount of oral evidence; to restrict access to jury trial and streamline the jury trial process; to facilitate disposal by guilty pleas; to speed up the appellate process and to reorganise court systems so that they function more efficiently. It is to a more detailed examination of these measures that we now turn.

III Preliminary Procedure

Where an accused person and his counsel go into court with little more in their possession than the facts contained in an indictment or summons, it is to be expected that a substantial amount of court time will be taken up not with actual adjudication but with the drawing out of information and issues from the prosecution's case. In the absence of any depth of knowledge about the strength of the case against him, the defendant will be unlikely to plead guilty at first appearance, and if the option is available, he may elect to have a preliminary inquiry in order to discover more of the nature of the case against him. If either party is ignorant of the details of a case before appearing in court, court appearances will be characterised by surprise and a confusion of the issues which will have to be clarified before the trial proper can proceed. To some, this teasing out of the points of contention and the evidence available to support them is fundamental to the adversary process, but this is debatable at the very least. In the words of Mr Justice Traynor, former Chief Justice of the California Supreme Court:

> The plea for the adversary system is that it elicits a reasonable approximation of the truth. The reasoning is that with each side on its mettle to present its own case and to challenge its opponent's, the relevant unprivileged evidence in the main emerges in the ensuing clash. Such reasoning is hardly realistic unless the evidence is accessible in advance to the adversaries so that each can prepare accordingly in the light of such evidence.[2]

Such measure of discovery between defence and prosecution can help lay down the basic groundwork in a case from which point a traditional hearing according to adversarial principles can commence and be concluded, hopefully with expedition. Those in favour of disclosure of one form or another are not advocating that adversary proceedings should be eliminated, merely that they should be restricted to the real points at issue. Pre-trial proceedings can clear away unimportant, formal or undisputed matters, promoting a speedier disposition of the case in hand and freeing more court time for the hearing of other cases.

There are three general types of pre-trial proceedings: discovery between counsel; a pre-trial hearing, usually before a judge and a preliminary inquiry or committal proceedings, the first being the most informal and the latter having been part of common law procedure since the 16th century. Innovations in relation to disclosure have concentrated on

encouraging discovery and pre-trial conferences; committal proceedings are perceived to have become too cumbersome and time-consuming a procedure for the clearing away of preliminary matters. Consideration of preliminary inquiries will be reserved for a separate section.

Closer cooperation between prosecution and defence in a criminal trial to determine which issues are in contention could reduce the length of preliminary inquiries, where they still exist, and of the actual trial.[3] If a fact is not disputed by the defence, witnesses will not be required to attend the proceedings and be heard and other evidence need not be introduced. More significantly, if the defendant acknowledges the strength of the prosecution's case by pleading guilty, a trial will be totally unnecessary.[4] Thus, discovery seeks to promote agreement between the parties as to certain of the facts at issue to eliminate the necessity of proof. The pre-trial conference on the other hand, which generally takes place with a judge present, while still a relatively informal procedure, tends to deal with those legal and procedural matters which cannot because of their very nature be agreed to, requiring instead a judicial decision. Included in this list are such matters as special pleas, res judicata and issue estoppel, severance of trial, venue, joinder of counts, alternative charges, amending of defective indictments, fitness to stand trial, issues of admissibility of evidence, statutory vires and the jurisdiction of the trial court.[5] These are basic matters which often disrupt and prolong trials, particularly jury trials, where the jury must retire until such issues have been decided. This represents a considerable waste of the jurors' time.

One Commonwealth jurisdiction which has had a longstanding practice of encouraging a much wider measure of disclosure than has existed in most others is Scotland. Scottish practice is to provide the defence with a list of the Crown's witnesses, whom they are entitled to precognose or examine.[6] This is not discovery in the sense in which it is generally used because this practice does not actually disclose the prosecution's evidence; it merely provides the defendant with the means of obtaining it by his own efforts. At one time it might have been difficult for the accused to take advantage of his right to take precognitions because of lack of facilities and finance; but since the introduction of legal aid, such obstacles have been largely removed.[7] There is no guarantee, of course, that even if the defence does precognose a Crown witness that they will receive the same information, not because of any deliberate deception on the witness' part, but purely because of differences in elucidating information. Nevertheless,

a report on criminal procedure issued in 1975 rejected proposals that Scottish practice should conform to the wider idea of discovery by providing that Crown precognitions should be made available to the defence.[8]

In one sense the Scottish discovery procedure is quite narrow and restricted. It does, however, have a much wider potential in terms of supplying the accused and his counsel with information about the case, but the onus is on the defence to make the most of it. A discovery scheme cast in this mould might counter some of the criticisms which aver that discovery is a one way operation.[9] Owing to the protection afforded the accused against self-incrimination, the direction of discovery tends to be from prosecution to defence, although, as we shall see later, some inroads are being made to turn the tide in relation to certain aspects of the defence. Objections to simply handing over the prosecution's evidence might be eliminated if such a modified scheme were to be introduced. Experience in Scotland with discovery is useful from another point of view: when rights to discovery are mooted fears are often expressed that allowing the accused access to police and prosecutorial information would unduly aid the criminal and help him escape his just desserts. More particularly, there is a feeling among police and prosecutors that interference with Crown witnesses is a real threat if their identity is revealed to the accused prior to court proceedings.[10] Longstanding Scottish experience has not found witness intimidation following release of the list of witnesses to be a significant problem.[11]

In other common law jurisdictions there has been no tradition of co-operation and discovery between the parties prior to trial. Now that delay is of such significant proportions, however, several countries have set up experimental schemes or enacted legislation to encourage a clearing away of preliminary matters before the case goes into court.

The English Criminal Law Amendment Act, 1977,[12] contains in section 48 a provision, still to be put into operation, which would enable rules to be made,

> (1)(a) for requiring the prosecutor to do such things as may be prescribed for the purpose of securing that the accused or a person representing him is furnished with, or can obtain, advance information concerning all, or any prescribed class of, the facts and matters of which the prosecutor proposes to adduce evidence; and
>
> (b) for requiring a magistrates' court, if satisfied that any requirement imposed by virtue of paragraph (a) above has not been complied with, to adjourn the proceedings pending compliance with that requirement unless the court is satisfied that the conduct of the case for the accused

will not be substantially prejudiced by non-compliance with the requirement;

The section also provides that such rules may apply to all cases or only to certain classes of cases and may bestow an absolute right to such information or one which would be exercisable at the option of the defence. In addition, failure by the prosecutor to comply with such rules would not constitute a ground of appeal against sentence.[13] This procedure will extend only to cases heard in the magistrates' courts. For the more serious and complex cases heard in the higher courts, an experimental scheme of pretrial hearings has been put into operation in the Central Criminal Court (the Old Bailey) in London.

Experimental court practice rules for the Central Criminal Court introduced on October 1, 1974 inaugurated a "summons for directions" procedure - a step in the proceedings between committal and trial at which counsel on both sides appear before a judge for the purpose of eliciting the live issues in the case, settling various preliminary matters before trial starts, thus avoiding undue wastage of time.[14] The procedure is set in motion by an application from either side once the case has been scheduled for a hearing, and the pre-trial procedure is normally held not earlier than 14 days before the date fixed for trial. The hearing, at which the defendant is entitled to attend, may be in the judge's chambers, although any orders will be made in open court. At the hearing, counsel are expected to be able to inform the court as to pleas; the necessary attendance of prosecution witnesses; any notices of further evidence and any additional witnesses who may be called, together with a written summary of the evidence they are expected to give if their statements are not available for service; any admissions of fact or exhibits under section 10 of the Criminal Justice Act, 1967; the probable length of trial; any issues relating to the mental or medical condition of the defendant or of a witness; any point of law or question relating to the admissibility of evidence that may arise; the designations of witnesses the prosecution does not intend to call and any alibi not already disclosed in accordance with the provisions of section 11 of the Criminal Justice Act, 1967.

This experimental procedure is intended primarily for long and complex cases. In the first six months of operation it was used in approximately 20 cases and was successful in reducing considerably the length of subsequent trials.[15] As the James Committee on the Redistribution of Criminal Cases between the Crown Court and the Magistrates' Courts pointed out, a procedure like this one is apt for long cases, but for short uncomplicated

cases it would be unnecessary and would also involve time, trouble and expense that would outweigh any small advantage which might accrue. It was concluded by the Committee that the procedure could not usefully be introduced as one of general application unless there were to be a concomitant provision enabling it to be waived if both parties and the court agreed that it was unnecessary in a particular case. It would seem more sensible to provide that the court should have the power to invoke the procedure in those cases in which it thought it appropriate.[16] If care is not taken over the range of application of schemes such as this one we may create more problems instead of solutions. Application to too narrow a range of cases will result in a negligible impact on the eradication of delay; use in every case will produce a process more unwieldy and time-consuming than the one it replaces.

Experience in South Australia provides a good example of another dilemma surrounding preliminary procedures, that is, should disclosure be a formal or an informal process? In summary proceedings in that State, if the prosecution fails or refuses to supply adequate particulars, the defendant may apply to the court for an order for further and better particulars, which in itself takes up more court time, and it is the duty of the court in an appropriate case to make such an order.[17] There is, however, no way in which a defendant or his counsel can, as of right, inspect before the hearing of the charge any documentary or tangible evidence which the prosecution may intend to tender at the hearing. As a matter of practice, police prosecutors do frequently permit defence counsel to inspect such items prior to trial which can result in the saving of considerable time and can permit advice as to plea to be given to the accused at an early time.[18] Discovery, however, rests solely on the good relationship between the prosecuting officer and defence counsel.

> Because of the variables involved, therefore, informal contacts and professional courtesies are not effective modes of discovery that can be relied upon. Invariably, the dispensation of these courtesies will be uneven and haphazard due to the nature of a rule of practice as opposed to a rule of law requiring disclosure of the evidence, and to the extent this is true, the fair application of the law is not achieved.[19]

In Canada, however, informality in disclosure between Crown counsel and defence seems to be favoured. The de jure situation as regards the defendant's right to discovery is that after he has been committed for trial he is entitled to inspect the indictment, his own statements, the evidence

and the exhibits, if any.[20] But he may not, as of right, demand production of the statements made by Crown witnesses since these do not constitute evidence within the statutory definition, though the trial judge has the discretion to order the prosecution to do so.[21] As in South Australia, discovery through inter-personal cooperation evolved to remedy this rather restrictive situation. Unfortunately, it would appear that in many cases this had militated against the success of more formal discovery procedures which would be available to all defendants, not just to those whose counsel have "good connections". For example, a disclosure project was begun in British Columbia in 1977 and the preliminary indications on its operation were that counsel felt that they were getting material prior to the project anyway. It was not giving them anything they were not getting previously, therefore admissions as a result of disclosure so as to save time in court were unlikely to result, the Crown being put to strict proof with the same frequency as previously.[22] The failure of a six month long project in Edmonton, Alberta was more unequivocal. This project initially covered such offences as breaking and entering, possession of stolen goods, thefts, fraud and false pretences, all over $200, assault, bodily harm and uttering. The procedure was that after arraignment for preliminary inquiry (committal) the accused was given the option of participating in a "Disclosure Court". If he took up this option the case was adjourned for two weeks to allow counsel to meet for discussions and then the case would appear before the Disclosure Court to find if the preliminary inquiry could be curtailed if there was to be a guilty plea or if the points at issue could be reduced. The results were disappointing. After a six week trial it became obvious that defence counsel did not appear interested in using the disclosure procedure; but of the small sample that did use disclosure, its advantages became evident. Over 50 percent of the witnesses who would have been required for the preliminary inquiry did not have to be called and there were instances of charges being withdrawn, stays of proceedings being entered, and defence counsel agreeing to a shortened preliminary inquiry. After this initial period, the programme was expanded to cover all offences for which a defendant could elect trial in higher court to get more participation and the defence Bar were canvassed to obtain more interest. Participation, unfortunately, remained poor. The rationale given for this was that historically there has been full disclosure on an informal basis and also there was not a large problem with case backlog in the Edmonton criminal courts and therefore there was no sense of urgency. Overall, very few preliminary inquiries were waived, a few were reduced in size but there

was no significant saving in time. It was concluded after six months that the project had been given a fair trial; that there did not appear to be any need for a formalised or legislated disclosure mechanism in the system and if there was to be legislation, then each province should be given the choice to opt into the system.[23]

More favourable results have been obtained in schemes launched in Quebec and Ontario. In Montreal, a system which could be labelled "communication in lieu of preliminary inquiry" is used: there is disclosure sufficient to give defence counsel all they need to prepare the defence. This includes a summary of the statements of witnesses, but not their names or addresses. The quid pro quo is that the defence waives the right to a preliminary inquiry under section 476 of the Canadian Criminal Code.[24] In 1976 this discovery project avoided the appearance of 35,000 witnesses who would otherwise have been summoned needlessly.[25]

In Ontario, a dual system operates: a discovery procedure followed by a pre-trial conference. In 1977 the Attorney General of Ontario issued a set of "Guidelines on Disclosure in Criminal Cases" designed to reduce the length of preliminary hearings by providing informal disclosure to defence counsel at an early stage in order to permit him to decide which witnesses are really necessary at a preliminary hearing and which ones can be dispensed with in favour of a written synopsis of their anticipated testimony along with other specified types of written disclosure.[26] After the preliminary inquiry has been held, the "Practice Direction Concerning Supreme Court Criminal Trials" issued by the Chief Justice of the High Court comes into operation.[27] Crown attorneys and defence counsel are invited to meet prior to trial to complete a Pre-trial Conference Report with a view to narrowing the issues. Where necessary, a judge may be present. In both instances, participation is purely voluntary. This scheme covers the whole of Ontario except Ottawa. There, a more formal scheme was found to be necessary. It is possible that this pattern may recur in other parts of the country and indeed, in other Commonwealth jurisdictions where there is currently a reliance on informal discovery procedures.

The public prosecutors' office in Ottawa had been committed for some time to a policy of liberal disclosure of prosecution evidence. Between 1960 and 1970, as a matter of practice, defence counsel were generally well informed of the case against their client before election as to mode of trial or plea. In 1972, however, a number of factors developed that altered significantly the ability of the Crown's office to meet counsel, make disclosure and discuss disposition. These factors we are already familiar with:

an increase in caseload; increasing complexity of cases; the impact of legal aid on the pursuance of legal remedies, etc. The informal discovery system in effect broke down. This led in 1976 to the establishment of "judicially supervised disclosure", also known as "pro-forma preliminary hearings".[28] The procedure is strictly voluntary and must have the consent of both prosecution and defence. In essence it is a cross between discovery and a pre-trial conference: disclosure is supervised by a regularly instituted Disclosure Court. All parties are called into court, defence, prosecution, investigating police officer and judge. The Crown Attorney then advises the Court; the defence counsel and investigating officer can retire from the courtroom, meet, and disclosure between them proceed. If defence counsel is not satisfied that he has had full disclosure, he may confer with Crown counsel, and, if no resolution is made, their respective positions may be stated to the Court and the presiding judge may, with inquiries, help resolve the issue. If defence counsel is satisfied with the disclosure, he so states for the record and his client is then arraigned in the usual way. The accused may then waive the preliminary inquiry, demand a preliminary inquiry on the evidence of certain named witnesses only, or require a full inquiry in the usual manner.[29] Between June 29th and November 30th, 1976, the Pro-Forma Court system obviated the necessity of subpoenaing 2,141 witnesses. In 87 per cent of all the cases the court dealt with, the attendance of one or more witnesses was waived by defence counsel. Of some 1,547 cases dealt with by the Disclosure Court, slightly over one third of them were finally disposed of by guilty plea, or by a plea of guilty to lesser charges or by withdrawal by the Crown.[30]

Thus far, "discovery" and "disclsoure" have referred more or less exclusively to the handing over of details of the prosecution's case to the defence. Pre-trial discovery is virtually a "one-way" affair. Reciprocal disclosure would appear to go against a basic principle of the common law that the onus of proof is on the Crown to prove its case beyond a reasonable doubt. The defendant is not expected to aid in his own conviction. Nevertheless, there are instances in some Commonwealth jurisdictions where the accused is under a legal duty to disclose some aspects of his defence.

The English Criminal Law Revision Committee, in a report issued in 1966, contrasted the position of defence and prosecution in relation to disclosure. The introduction of evidence at the very last minute, that is, during the course of a trial, often took the prosecution by surprise and

would occasion a demand for an adjournment to allow the prosecution time to reflect and prepare to meet this new aspect of the case. This was thought to be particularly harsh in relation to the defence of alibi. The Committee recommended that provision should be made placing the defendant under a duty to make prior disclosure of an intention to put forward an alibi defence.[31] This was enacted in section 11 of the Criminal Justice Act, 1967:

> (1) On a trial on indictment the defendant shall not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi.
> ...
> (8) "the prescribed period" means the period of seven days from the end of the proceedings before the examining justices.

This provision has been replicated, with minor variations, in other Commonwealth jurisdictions. To give a few examples:

(i) the New Zealand Crimes Amendment Act, 1973,[32] requires notice of an alibi to be given within 14 days of committal for trial;

(ii) the Tasmanian Criminal Code Act 1973 inserts section 368A into the Criminal Code which requires an alibi notice within 7 days of committal or within 7 days of having received notice of such requirement;

(iii) the Crimes and Other Acts (Amendment) Act, 1974, of New South Wales[33] provides that the "prescribed period" for giving an alibi notice is within 10 days of committal;

(iv) in Queensland, the Criminal Code and the Justices Amendment Act, 1975, provides a 14 day "prescribed period";[34]

(v) in Victoria, the requirement is a much more general one. The Crimes Act, 1976 inserts section 59(6A) into the Magistrates (Summary Proceedings) Act which provides that at any time after the accused person has been cautioned and before he has been discharged or committed for trial, the justice may, and, if he has been requested to do so by or on behalf of the informant, shall say to the accused person words to the effect that he will not be permitted to give evidence at trial of an alibi defence unless he has previously given notice of particulars of the alibi and of the witnesses in support of such alibi;

(vi) the Criminal Procedure Code (Amendment) Act, 1976 of Singapore[35] provides that in any summary trial notice of an alibi defence must be given within 14 days of "the end of the proceedings before the Magistrate on the occasion that the accused is charged in court for the first time with the offence in respect of which he is raising the defence of an alibi".

As a result of a Practice Note of the English Court of Appeal, Criminal Division, the alibi notice is no longer being used solely to prevent the prosecution being taken by surprise at trial but also to estimate the amount of time required to hear a case in which an alibi is put forward. The Note requests that the prosecution should send a copy of any notice of alibi to the court of trial as soon as it is given to them in order to enable the clerk of court to make more reliable estimates of the length of criminal trials.[36]

Other jurisdictions have not been so narrow in their requirements of disclosure by the defence. The Criminal Procedure (Scotland) Act, 1975[37] provides:

> s.82-(1) It shall not be competent for the accused to state any special defence unless a plea of special defence shall be tendered and recorded at the first diet, or unless cause be shown to the satisfaction of the court for a special defence not having been lodged till a later day, which must in any case not be less than two clear days before the second diet.[38]

There is no authoritative list of what constitutes a special defence, but it is generally thought to include alibi, insanity, incrimination, self defence and automatism.[39]

In Canada, a more extensive duty of disclosure is placed on defendants in criminal bankruptcy and security fraud prosecutions. Cases in these categories are often complex and involved and the successful prosecution of them is an arduous and time-consuming job. Accordingly, fuller discovery of the defendant's case is permitted.

To facilitate the prosecution of fraudulent bankrupts, the Canadian Bankruptcy Act[40] permits the examination of the bankrupt and other persons in aid of pending criminal procedures. Section 133(1) of the Act confers the right upon a trustee in bankruptcy without an order to examine the bankrupt, any person reasonably thought to have knowledge of the bankrupt, or any person who is or has been an agent, clerk, servant, director or employee of the bankrupt, respecting the bankrupt, his dealings or property. The section also provides that the trustee may order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power, relating in all or part to the bankrupt, his dealings or property. Thus, this section confers a most unusual power of obtaining discovery in criminal matters. Where the trustee believes that a criminal offence has been committed, he can examine the bankrupt and others and obtain their evidence on oath before laying an information,

although the examination can equally well take place after criminal proceedings have been commenced.[41] In a "section 133(1) examination" it is customary for a witness to claim the protection afforded by the Canadian and provincial Evidence Acts in respect of questions which may prejudice him, and this protects the witness from having his answers used against him in subsequent criminal proceedings. Nevertheless, the carrying out of the examinations enables the investigator to obtain necessary information which would otherwise be unavailable to him. One commentator has observed that, in practice, the right of examination has proved to be a most useful tool in fraudulent bankruptcy prosecutions and has not been unduly oppressive to those being examined.[42]

Similar powers of investigation have been given to provincial securities commissions under provincial legislation. These commissions share responsibility with the police for the investigation of alleged securities offences such as fraud and "wash trading" and have certain powers designed to assist in the conduct of such investigations, in addition to those designed to facilitate day-to-day regulatory activities. There is no restriction stating that powers designed for purposes other than investigations may not be used in the conduct of investigations. Information obtained by the commissions in the performance of other responsibilities frequently leads to the initiation of an investigation and such information is also frequently used in the course of investigations initiated on the basis of information obtained in other ways. As a result, the commissions are able to conduct extensive inquiries and hearings prior to the initiation of criminal proceedings. Again, the witness may claim the protection of the Evidence Acts so that his testimony cannot be used directly against him, but these inquiries are nonetheless a valuable source of information which help expedite otherwise lengthy prosecutions.[43]

To summarize: developments in the area of pre-trial disclosure and discovery have been premised on the sensible notion that by having a freer exchange of information out of court, superfluous considerations will be excluded from the hearing of criminal cases and trials will be expedited. The adversary system does not demand that the participants must go into court "blind" or without having previously resolved technical, time-consuming, procedural issues. The actual administration of justice must, however, be done in open court.

Many cases appearing in the criminal courts are relatively straightforward. If more information is needed in addition to that provided as a

matter of course, counsel should be able to rely on ad hoc discussions. But for those cases which raise complex legal and procedural issues, involve large numbers of witnesses and allege tortuous fact situations, a more structured system may be advantageous. Nonetheless, it must not become so rigid that it consumes more time than it serves. The use of the preliminary inquiry or committal proceedings for discovery purposes provides a ready-made example of the dangers of over-formalisation. The current trend is toward the dismantling of this time-consuming process. Unless care is exercised, we may be replacing one procedural albatross with another.

Footnotes

[1]Great Britain. Criminal Law Revision Committee, Report no. 9, Evidence: Written statements, formal admissions and notices of alibi (London, 1966, Cmnd. 3145), para. 5.

[2]"Ground Lost and Found in Criminal Discovery", (1964), 39 New York University Law Review 228.

[3]M.W. Doyle, "Criminal Discovery in New Zealand", (1976-77) 7 New Zealand Universities Law Review 23 at p. 39.

[4]For a full discussion of the advantages of extended discovery see Scotland, Committee on Criminal Procedure in Scotland (The Thomson Committee), Criminal Procedure in Scotland (second report) (Edinburgh, 1975), Cmnd. 6218, para. 30.06.

[5]Law Reform Commission of Canada, Report on Criminal Procedure - Part I: Miscellaneous Amendments (Ottawa, 1978), p. 4.

[6]Thomson Committee, supra footnote 4 at para. 17.10. This practice is given statutory form in section 70 of the Criminal Procedure (Scotland) Act, 1975, c. 21, a consolidating statute: "The accused shall be served with a full copy of the indictment and of the list of the names and addresses of the witnesses to be adduced by the prosecution." A precognition is not the witness' own statement, but a narrative of what the witness stated.

[7]G.H. Gordon, "Institution of Criminal Proceedings in Scotland", (1968), 19 Northern Ireland Legal Quarterly 249 at p. 267.

[8]Thomson Committee, supra footnote 4 at paras. 17.10-17.12.

[9]M.W. Doyle, supra footnote 3 at p. 23.

[10]Id.

[11]Thomson Committee, supra footnote 4 at Chapter 17.

[12]c.45, section 48(1).

[13]Criminal Law Amendment Act, 1977, section 48(3).

[14]Central Criminal Court: Practice Rules in Archbold's Pleading, Evidence and Practice in Criminal Cases, (39th ed., 1976), para. 361b. For discussion of this scheme see C. Hampson, Criminal Procedure (London, 1977), p. 150 and Great Britain, Home Office, Report of the Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts (the James Committee) (London, 1975), Cmnd. 6323, paras. 266-68.

[15]Id. at para. 267.

[16]Id. at para 268.

[17]Lafitte v. Samuels, [1972] South Australia State Reports 1.

[18]South Australia. Criminal Law and Penal Methods Reform Committee, Third Report, Court Procedure and Evidence (Adelaide, 1975), p. 67. In cases tried on indictment, discovery is obtained through the preliminary inquiry although there has been some limited use of experimental disclosure schemes - see pp. 113-14. In one scheme, defence counsel solicits further information from the prosecution on the basis of which admissions are made and objections taken to the admission of evidence etc. A memorandum is then prepared, signed by counsel and handed to the judge.

[19]M.W. Doyle, supra footnote 3 at p. 25.

[20]Canadian Criminal Code R.S.C. 1970, c. C-34, section 531.

[21]Patterson v. The Queen, (1970), 2 Canadian Criminal Cases (2d) 227 (Supreme Court of Canada).

[22]"Pre-Trial Disclosure and Discovery Practices" (1977) 59 Uniform Law Conference of Canada Proceedings 57.

[23]R.A. Cawsey, "Pilot Project in Edmonton" in Law Reform Commission of Canada, Preparing for Trial (Ottawa, 1977), pp. 211-16 and "Pre-Trial Disclosure and Discovery Practices", supra footnote 22 at pp. 57-58. At the time this latter survey was conducted Saskatchewan, Manitoba and Nova Scotia had no discovery projects, preferring instead to rely on their informal systems which depend on the goodwill of counsel.

[24]"Pre-Trial Disclosure and Discovery Practices", supra footnote 22 at p. 58.

[25]Law Reform Commission of Canada, supra footnote 5 at p. 3.

[26]Crown's Newsletter, February 1977, p. 1. See appendix for full text of guidelines.

[27]Crown's Newsletter, February 1977, p. 8. See appendix for outline of Pre-trial conference report.

[28]"Pro-forma Disclosure in Ottawa-Carleton" in Law Reform Commission of Canada, supra footnote 23 at pp. 257-58.

[29]Id. See also "Summary of the Ottawa Pro-forma Procedure", Crowns's Newsletter, February 1977, p. 31 and L.M. Shore, "Comments on the Ottawa Pre-Trial Discovery Procedure", (1976) Criminal Lawyers Association Newsletter vol. 2(4), p. 44.

[30]Law Reform Commission of Canada, supra footnote 5 at p. 3. The possible impact of extended discovery in inducing guilty pleas will be discussed in more detail below.

[31]Great Britain, Criminal Law Revision Committee, supra footnote 1 at paras. 31-33.

[32]1973, No. 118, section 11.

[33]Act No. 50, 1974 (N.S.W.), section 8 inserting section 405A into the New South Wales Crimes Act, 1900.

[34]No. 27 of 1975, section 22, inserting section 590A into the Queensland Criminal Code.

[35]No. 10 of 1976, section 11.

[36][1969] 1 All E.R. 1042 per Lord Parker C.J.

[37]c. 21.

[38]An identical provision appeared in the Criminal Procedure (Scotland) Act, 1887, section 36. Section 339 of the 1975 Act provides that a defendant must give notice of an intention to introduce an alibi defence in summary proceedings.

[39]Thomson Committee, supra footnote 4 at para. 37.01 See R.C. Savage, "Criminal Procedure: The Effect of Procedure upon Justice" in R.S. Clark (ed.), Essays on Criminal Law in New Zealand (Wellington, 1971), pp. 94-112 at pp. 109-110 for arguments in support of a wider duty of disclosure being put on the defendant.

[40]R.S.C., 1970, c. B-3.

[41]L.W. Houlden, "Discovery in Criminal Prosecutions in Bankruptcy Matters", (1972), 50 Canadian Bar Review 486 at p. 487.

[42]Id. at p. 495.

[43]J.C. Baillie, "Discovery-Type Procedures in Security Fraud Prosecutions", (1972), 50 Canadian Bar Review 496.

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 recogniton 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 harrassment 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 Bangladesh[33] 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.

[15] c.80.

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

[17] Antigua, 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.

[18] New 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.

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

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

[22] I.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.

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

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

[25] Victoria 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.

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

[27] Id. section 51.

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

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

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

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

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

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

[34]Sri 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.

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

[36]Under 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.

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

V The Guilty Pleas and Plea Bargaining

The hearing of the oral evidence of witnesses and cross-examination is a time-consuming process not only in committal proceedings, but also, naturally, at the trial of a criminal case. At trial, the prosecution may produce additional witnesses; witnesses for the defence will also be heard whereas they are generally absent from committal and both sides may conduct vigorous and lengthy cross-examinations. In the following chapter there will be an examination of the inroads that have been made into the viva voce evidence rule; the present section, however, is concerned with the elimination of the need for proof by means of a straightforward or negotiated guilty plea.

The inherent advantages of the disposal of cases by guilty pleas were outlined in Chapter II: where a plea of guilty is tendered and accepted, the hearing is expedited due to there being little or no fact finding or arguments on points of law or procedure and no jury deliberations. In a summary cause disposed of by guilty plea the accused appears before the court, satisfies the judge that his plea is voluntary and that he is aware of his legal right to have the case against him proved beyond a reasonable doubt, and then he is sentenced. Many of these advantages, however, may be lost in relation to indictable offences where the plea is not taken until the conclusion of committal proceedings. Traditionally, whether or not the accused intended to challenge the case alleged, the preliminary inquiry still took place with the hearing of prosecution witnesses and a decision by the judge as to whether or not a prima facie case existed. This did provide a measure of protection against an accused pleading guilty, for whatever reason, where the prosecution's case was too weak to support the facts. The argument can be made that this safeguard should remain, given that the existence of plea bargaining may produce involuntary or coerced pleas of guilt. This is one possible mechanism for assuring that in the circumstances of a particular case there is at least prima facie evidence to justify a guilty plea. Nevertheless, throughout the Commonwealth the screening function of preliminary inquiries is on the decline whereas discovery is on the increase. One of the perceived advantages of discovery is that it encourages guilty pleas in those cases where the prosecution's evidence is strong.[1] Current practice therefore promotes guilty pleas while neglecting in the same measure to provide safeguards against potential abuse.

In those jurisdictions where written statements may now be tendered in committal proceedings, committal is expedited for the defendant who intends to plead guilty:[2] the hearing is either waived on the basis that all

evidence is in written form, or the magistrate makes a decision as to the viability of the case on the basis of the written statements. Little or no court time is used. Some countries have gone further by allowing a plea of guilty to be lodged in advance of or at the preliminary hearing which in many cases will not only save the time of the judiciary and the court, but also of the prosecution in preparing and lodging written statements in the statutory form. Where full committal proceedings are still the norm, the savings in time by allowing guilty pleas to be lodged at this earlier stage are even more substantial.

As far back as 1943, the South Australian Parliament enacted an amendment to the Justices Act providing that where a defendant appeared before a special magistrate, or two or more justices on a preliminary inquiry charged with a "minor indictable offence",[3] the defendant at any stage of the proceedings, whether any statement had been taken from witnesses or not, could plead guilty to the offence or any of the offences charged against him. Thereafter, the court was to treat and dispose of the case summarily.[4] This provision is still in operation.

A new procedure was introduced in Uganda in 1962[5] which enabled certain magistrates to convict a person on his own plea of guilt on a charge of manslaughter or rape, or of an attempt to commit such offence or of aiding, abetting or inciting the commission of it. Unlike the South Australian procedure, this covered a more serious class of offences. In view of this, minor procedural protections were also enacted. In the case of manslaughter, the consent of the Director of Public Prosecutions was necessary before such a conviction could be made, and in any case, if the magistrate considered that the interests of justice demanded it, the accused could be provided with legal advice before being called upon to plead.[6] The provision of legal aid, however, was purely within the discretion of the magistrate, and given the seriousness of the charges involved and the sentences that could be imposed (the defendant was to be sent to the High Court to be sentenced) reservations as to the fairness of such a procedure were expressed.[7] Uganda has since reversed its position on this issue and preliminary proceedings are now mandatory for all offences not triable by a magistrates' court, notwithstanding that the accused intends to plead guilty to the charge.[8]

Other jurisdictions which have passed legislation in this area have restricted the right to plead guilty in serious cases in some respects in order to provide appropriate protections for the defendant. In New Zealand, the Summary Proceedings Amendment Act, 1976, permits a plea of guilty to be received before or during a preliminary hearing but only where

the defendant is legally represented.[9] In New South Wales such a plea may only be tendered where a person is charged with an indictable offence not punishable by life imprisonment,[10] and the decision to accept the plea is within the discretion of the justice.[11]

When a guilty plea is not lodged timeously, its advantages are substantially reduced. A not guilty plea which, near the date set for trial, or even on the actual day of trial, is changed to a plea of guilty results in all the time-consuming work of making arrangements for convening the trial having been wasted, including the time of witnesses, who will have been put to considerable inconvenience.[12] In addition, court schedules will be upset: where a guilty plea is received at short notice, the ensuing hearing will be much shorter than anticipated, but it is unlikely that other cases can be called on for hearing at such short notice. The court will remain empty while cases pile up outside the door.

Defendants often delay tendering a guilty plea until they have been able to assess the strength of the prosecution's case. If this information is not forthcoming at the outset, the decision is retarded. Hopefully, those developments providing or encouraging early or extensive discovery will help to counter this difficulty. The accused may also withhold his plea of guilty to give himself time to prepare a favourable picture of himself to present to the judge at sentencing. By pleading not guilty initially, he provides himself with a breathing space in which he can, for example, get a steady job, make restitution, obtain good character references and so on. These factors may be taken into account by the judge and the ultimate result, the sentence, may be more favourable to the accused.[13] It is also conceivable that in the light of more widespread knowledge of the existence of plea negotiation, an accused and his counsel will "hold out" in the hope of securing a more favourable "bargain".

A measure designed to avoid the problems of late pleas tested in Scotland was the requirement that an accused person who has pleaded not guilty should renew his plea four days before the date fixed for the trial. It was thought that while this necessitated another brief appearance in court, this might at least have the effect of preventing the unnecessary attendance of witnesses on the day of trial. This was tried extensively in the courts in Glasgow but was a complete failure.[14] An alternative procedure which has been suggested is that use should be made of continuations (remands, adjournments) without plea rather than pleas of not guilty which result in the fixing of trials which are eventually withdrawn.[15] Alternative

measures which have been considered in Scotland at least involve the invoking of sanctions against a defendant where there is a late change of plea or where a case proceeds on a plea of not guilty but the court is of the opinion that the defence was of no substance. It was concluded, however, that if the first of these measures were introduced it would result in more cases going to trial in order to avoid the sanctions; and the second proposal could be interpreted as putting a premium on pleas of guilty, offending against the principle that an accused is entitled to require the Crown to prove its allegation and would also involve a reciprocal right to expenses against the Crown in the event of an acquittal.[16] Encouraging guilty pleas and the timely lodging of such must be more subtle than coercive and must represent the actual wishes of the accused.

There has existed in Scotland since 1887 a procedure very favourable to an accused who does tender an early guilty plea: it is known as "section 31 procedure".[17] This provides that in solemn procedure (roughly equivalent to trial on indictment) an accused person who desires to have his case disposed of quickly and intends to plead guilty is entitled to give written notice to this effect, through his solicitor, to the office of the Crown prosecutor. This notice is given by letter, and the present law requires that it be signed by the accused's solicitor. An indictment in short form (it will not include a list of witnesses or productions) is thereafter served on the accused along with notice to appear in the lower court at an early date. Sentence may be imposed by the sheriff in appropriate cases; in others he remits the case to the High Court for sentence.[18] At the present time this expedited procedure is only available where the accused is legally represented. The Thomson Committee on the Criminal Procedure of Scotland recommended that this restriction be lifted and the indications are that this recommendation will be implemented.[19] As a noted commentator on Scots law has observed, this procedure does offer subtle inducements for the accused detained in custody to plead guilty: the length of any pre-trial detention is curtailed considerably and the possibility exists that in a limited number of cases the sheriff will not remit the case to the High Court in circumstances where the Crown might be expected to fix a trial in that court. This could result in a lighter sentence for the accused.[20]

The invitation, offer and acceptance of inducements to plead guilty through what are commonly known as plea negotiations probably exist in some form or another in most Commonwealth jurisdictions even though they may not be officially recognized.[21] In South Australia, for example, an accused may bargain with the Crown to accept a plea of guilty to one charge and

withdraw others or to accept a plea to a lesser crime than that charged. But the bargain cannot include as a term the fact that the prosecutor will make a plea for any particular sentence to be passed.[22] In Canada on the other hand, the practice of the prosecutor "speaking to sentence" as part of an agreement with the accused seems to be quite widely accepted.[23] A practice exists in Jamaican Resident Magistrates' Courts whereby a clerk of court may accept a plea of guilty to the lesser of two offences;[24] in Kenya, although the process of plea bargaining has not been statutorily formalised, in practice there exists an informal process whereby a plea to a lesser offence may be accepted, or less frequently, charges withdrawn in return for a guilty plea.[25]

The ethical concerns surrounding plea bargaining are not the real issue here, rather the point to be examined is the extent to which it has been recognised as a legitimate practice having a function to play in expediting the hearing of criminal cases.

> Above-board acceptance of plea bargaining as part of the criminal justice process will ease the pressure of court congestion. Acceptance requires the earnest efforts of the bar and bench, and perhaps of the parliament and the public, to set realistic guidelines for the case of the participants in the criminal process. Attorneys and judges must have certain knowledge of which forms of plea bargaining are acceptable and which are not. Perhaps the development of different forms of plea bargaining is required to suit local conditions. The crucial decisions must be whether the judiciary will be an active participant in the process. It is crucial because judicial integrity is at stake. The "cherished image" of the impartial arbiter in the battle between the Crown and the accused may be tarnished when the judge descends into the ruck.[26]

The authority for accepting a lesser plea already exists in the legislation of many Commonwealth countries.[27] Some of these provisions are quite general, stating little beyond the fact that a lesser plea may be accepted. In England, for example, section 6(1)(b) of the Criminal Law Act, 1967, provides that where a defendant is arraigned on an indictment for any offence, and can lawfully be convicted on such indictment of some other offence not charged in such indictment, he may plead not guilty to the offence charged but guilty of such other offence, although it is always in the discretion of the judge to refuse to allow a plea to a lesser offence. What exactly are the lesser offences for each charge are not specified. In contrast, some other jurisdictions specifically enumerate the lesser included offences which may be accepted for each offence. In Tasmania,

Chapter XXXIX of the Criminal Code Act 1924-77 sets out the powers of conviction upon particular indictments. A general provision enables the accused to plead guilty to "any other crime of which he might be convicted upon such indictment".[28] The Act further provides that upon an indictment for murder, for example, an accused may be convicted of manslaughter; concealment of birth; causing the death of child before birth or infanticide.[29] Upon an indictment for stealing; obtaining property by a false pretence; cheating or receiving stolen property, the accused may be convicted of any of such crimes respectively.[30]

Where the lesser included offences are specified a measure of guidance is provided for the party charged with the responsibility of accepting or rejecting a plea of guilty to a lesser offence. Additionally, in some jurisdictions, judicial consent is required before such a plea can be accepted;[31] in others it is the prosecutor's consent that is necessary.[32] The recognition of plea bargaining contained in legislative measures such as these is at most implicit and very little guidance is given to those involved in plea bargaining. Fortunately, the legitimacy or otherwise of plea bargaining practices has been addressed more explicitly in a small number of key judicial decisions which have had a notable impact on the practice of plea negotiation.

In R v. Turner,[33] a case which in itself had little to do with plea bargaining, the English Court of Appeal took the opportunity to make some general observations and guidelines on the subject:

(1) counsel must be free to advise a plea of guilty if he thinks that that is in his client's best interests, and to advise it strongly. He is entitled to point out that such a plea showing an element of remorse is a mitigating factor which may reduce sentence. He must emphasize that his client must not plead guilty unless he has committed "the acts constituting the offence charged";

(2) the accused must have complete freedom to choose his plea:

(3) there must be free access between counsel and judge, but any discussion must be between the judge and counsel on both sides. Lord Parker C.J. thought that the discussion should be in private in case counsel might want to discuss some mitigating factors like illness, which should not be made known to the accused, or might wish to discuss whether it would be proper to accept a plea to a lesser offence;

(4) the judge may say that whatever the accused pleads, the sentence will or will not be of a particular kind, such as probation or imprisonment. He should never indicate that the sentence will be severer if the accused goes

to trial. This would amount to undue pressure on the accused, depriving him of a free choice;

(5) defence counsel should disclose to his client any discussion which has taken place with the judge on sentence.

> The Turner decision alleviated the former discrepancies in practice, especially among a minority of over-zealous barristers (and on occasion, judges) who sought to expedite justice by encouraging a guilty plea without due consideration of the case in question. The guidelines in Turner expressed in cogent lucidity the mode of conduct to be observed both in approach and substance, to plea bargaining.[34]

In the Bahamas, due to the fact that section 142 of the Criminal Procedure Code provides that the practice of the Supreme Court in its criminal jurisdiction shall be assimilated, as far as circumstances permit, to the practice of the High Court of Justice in England, plea bargaining is officially recognised and acceptable since it was sanctioned in Turner.[35]

In contrast, a negative relationship between the Turner decision and the practice of plea bargaining has been put forward in the Australian state of Victoria.[36] Since the early 1970s the county courts in Victoria have experienced a marked decline in guilty pleas from 75.4 per cent in June 1971 to 61.8 per cent in December 1976, with more people exercising their right to trial by jury. It is felt that changes in plea bargaining practices in Victoria in the early part of the decade may well have contributed to the decline in guilty pleas. Despite the qualified approval given to plea negotiation in Turner, the case created a certain amount of controversy and criticism in legal circles in Australia. It is argued that the Victorian judges, especially county court judges, decided that they would discourage the practice, which would explain to some degree, the declining number of guilty pleas over the period studied. Failure of defendants to get some idea of the possible penalty could result in decisions to go to trial.[37] This trend was compounded by the Australian case of Bruce v. The Queen[38] which unilaterally condemned the practice of plea bargaining and is seen as having had a deterrent effect on the practice of plea bargaining.[39] Thus, court decisions have had a significant impact on the use of guilty pleas to expedite the hearing of criminal cases.

A novel situation in relation to plea bargaining exists in Ontario. There, in 1972, the government became involved in promoting and regulating plea negotiations by issuing guidelines to the Crown Attorneys who prosecute criminal cases in the courts and whose consent is a necessary prerequisite

for a plea to a lesser offence to be accepted in court.[40] These have no statutory force, of course, but their persuasive value is considerable.[41] It is worth setting out the nine principles in full:

(1) The proper administration of justice is the paramount consideration in all plea discussions, and, as with all the duties of the Crown Attorney, due regard must be had for the rights of the accused, the protection of the public and the interest of the victim in accepting the plea of guilty to a lesser or included offence.

(2) The Crown Attorney should do nothing to compel a plea of guilty to a lesser number of charges or a lesser or included offence.

(3) The Crown Attorney should indict only on those charges on which he intends to proceed to trial or, in trials in the Provincial Court (i.e. the lower court), the Crown Attorney should, with leave of the court, withdraw those charges on which he does not intend to proceed to trial.

(4) The Crown Attorney should not consent to the acceptance of a plea of guilty to an offence which has not been committed.

(5) The Crown Attorney should not consent to the acceptance of a plea of guilty to a charge that cannot be prosecuted because it is barred at law.

(6) In all discussions with defence counsel, the Crown Attorney must maintain his freedom to do his duty as he sees fit. Nothing should be said or done to fetter the freedom of the Crown Attorney and the defence counsel.

(7) The Crown Attorney may state to defence counsel the view he may give if asked by the presiding judge to comment on the matter of sentence. The Crown Attorney should not agree to a specific sentence. He may draw the attention of the presiding judge to any mitigating or aggravating circumstances that may appear to him to be relevant and may make submissions concerning the appropriate form and range of sentence. However, he should take the clear position that the matter of sentence is strictly for the judge and that any statement that is made cannot bind the Attorney General in the exercise of his discretion whether to appeal against a sentence or not.

(8) The Crown Attorney always should consider himself as agent of the Attorney General and, as such, responsible for the proper administration of justice.

(9) Apart from exceptional circumstances neither the Crown Attorney nor the defence counsel, either alone or together, should discuss with the judge matters bearing on the exercise of the judge's discretion, in the judge's chambers or any place other than in open court. Where attendance in the judge's chambers is dictated by the circumstances, the Crown Attorney should always request that a court reporter be present to take down the full discussion

which should form part of the record of the case. All representations to the judge on which he is to base the exercise of his discretion concerning a plea of guilty should be made in open court.[42]

Other jurisdictions which have a public prosecution service might consider similar guidelines with appropriate modifications according to the desired format of plea bargaining. For those countries which have a system of private prosecutions, guidelines addressed to prosecuting counsel may not be as effective. More general statements such as the one contained in Turner may have to suffice, although some thought should be given to providing some form of guidelines to police prosecuting counsel where they exist.

The guilty plea process and its encouragement through plea negotiation is a useful way to expedite certain criminal cases, but extreme care must be taken not to pursue this end with a total disregard for the means involved. The ultimate decision to plead guilty must be that of the accused. Recognising and regularising the plea bargaining process could make it a fairer one with more limited possibilities of abuse. Of the different methods which have been reviewed here it would appear to the author that the type of system prevailing in Scotland - a legal rule providing a right to an expedited hearing and other peripheral benefits available to all serious offenders - is a most appropriate one. The procedure is on a formal rather than an ad hoc basis, the latter being susceptible to wide variations in practice; it is available to a wide class of offenders as a group whereas pressure to plead guilty is more keenly felt when a procedure proceeds on an individual basis, and the "inducement" is a similar one for all accused.

Perhaps the most useful long-term measure we can pursue in this area is to scale down our expectations of the guilty plea process and plea bargaining. It must be realised that it can only relieve the problems of the criminal courts to a limited extent and that other ameliorative measures must be sought.

Footnotes

[1]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, Comparative Criminal Procedure (New York, 1969), pp. 55-84 at p. 59.

[2]T.F. O'Brien, "Committals for Trial", (1973), 47 Law Institute Journal 33.

[3]The Justices Act Amendment Act, 1956, No. 57 changed the wording to "an offence cognizable by a special magistrate or justices under section 120", but the scope of this provision remains substantially the same.

[4]Justices Act, 1921-78, section 106a, inserted by Justices Act Amendment Act, 1943.

[5]Ordinance No. 17 of 1962, inserting section 216A into the Uganda Criminal Procedure Code.

[6]H.F. Morris and J.S. Read, Uganda: The Development of its Laws and Constitution (London, 1966), pp. 265-66.

[7]B. Slattery, "Drafting Criminal Charges", (1974), 7 East African Law Review 275.

[8]Uganda, Magistrates' Courts Act, 1970, No. 13, as amended by Decree No. 17 of 1971.

[9]No. 169, 1976, section 15, inserting a new section 153A.

[10]This exclusion of the more serious offences also extends into the arena of the trial: some countries do not allow guilty pleas to be tendered at the trial of these offences. For example, Lesotho's Criminal Procedure and Evidence Proclamation (No. 59 of 1938) section 235(1) as inserted by section 4 of the Criminal Procedure and Evidence (Amendment) Order (No. 2 of 1939) provides that guilty pleas will not be received where the charge is one of murder. In Canada it is the practice not to allow guilty pleas where the offence entails mandatory life imprisonment.

[11]New South Wales, Justices Acts, 1902-1978, section 51A, inserted by Act No. 16, 1955, section 7(1)(a).

[12]A survey of pleas in the county courts of Victoria found that 42 per cent of cases listed as trials turned into pleas of guilty - J. Willis and P. Sallman, "Criminal Statistics in the Victorian Higher Courts: A First Glimpse of the Possibilities", (1977), 51 Law Institute Journal 498, 570 at p. 504.

[13]W.T. Westling, "Plea Bargaining: A Forecast for the Future", (1976), 7 Sydney Law Review 424 at p. 425.

[14]Scotland, Committee on Criminal Procedure in Scotland (the Thomson Committee), Criminal Procedure in Scotland (second report) (Edinburgh, 1975), Cmnd. 6218, para. 20.04.

[15]"Response of the Council of the Law Society of Scotland to the Questions submitted by the Committee on Criminal Procedure under the

Chairmanship of Lord Thomson", (1972), Journal of the Law Society of Scotland 7 at p. 11.

[16]Id. at p. 11 and Thomson Committee, supra footnote 14 at paras. 20.05-20.06.

[17]Section 31 of the Criminal Procedure (Scotland) Act, 1887, now section 102 of the Criminal Procedure (Scotland) Act, 1975, c.21.

[18]R.W. Renton and H.H. Brown, Criminal Procedure According to the Law of Scotland, (4th ed. by G.H. Gordon) (Edinburgh, 1972), paras. 8.01-8.02.

[19]Criminal Justice (Scotland) Bill, 1979, section 21. This Bill fell when a general election was called in the spring of 1979.

[20]G.H. Gordon, "Plea Bargaining", 1970, Scots Law Times (News) 153. In other jurisdictions a much more restricted scheduling advantage is given to those cases where there is a guilty plea in that on any given court day these cases will be disposed of before the contested cases - see, for example, Great Britain, Home Office Circular No. 97/1978, (1978), 128 New Law Journal 756 at p. 757.

[21]See, for example, P.A. Sallman, "Criminal Justice: a Systems Approach", (1978), 11 Australia and New Zealand Journal of Criminology 195, where the author discusses the recent Australian decision in Bruce v. The Queen, (unreported, High Court of Australia, May 21, 1976). In that case, the practice of plea bargaining was condemned out of hand and Sallman observes that this creates a wide divergence between official recognition of the position and the reality of what is a daily fact of life in and out of Australian courts.

[22]South Australia, Criminal Law and Penal Methods Reform Committee, Third Report, Court Procedure and Evidence (Adelaide, 1975), pp. 117-118.

[23]For example, R. v. MacArthur, (1978), 15 Newfoundland and Prince Edward Island Reports 72 (P.E.I. Court of Appeal) at p. 74: "It cannot be stated that there is anything wrong in Crown counsel making a submission to the court as to the sentencing of the accused."
In Attorney-General of Canada v. Roy, (1972), 18 Criminal Reports New Series 89 (Quebec Court of Queen's Bench), however, it is stressed that the judge is not bound by the suggestions of the Crown in this respect.

[24]Correspondence to author from Jamaican government n.d.

[25]Correspondence from Attorney General's Chambers Nairobi, dated March 5, 1979.

[26]W.T. Westling, supra footnote 13 at pp. 430-31.

[27]In Scotland there is also authority for accepting a plea of guilty to one of a number of charges contained in an indictment - Criminal Procedure (Scotland) Act, 1975, section 61(1).

[28]Section 355(1)(a) of the Tasmanian Criminal Code Act, 1924-77.

[29]Id. section 333.

[30]Id. section 338.

[31]England, Criminal Law Act, 1967, section 6(1)(b). This requirement is probably more common in those jurisdictions which, like England, do not have a professional prosecuting service.

[32]Canadian Criminal Code, R.S.C., 1970, c. C-34 section 534(4); Sri Lanka, The Administration of Justice Law, No. 44 of 1973, section 204; New South Wales, Crimes Act, 1900-1977, section 394A and Queensland, Criminal Code Act, 1899-1978, section 598.

[33][1970] 2 All E.R. 281; [1970] 2 W.L.R. 1093. For commentary see G.H. Gordon, supra footnote 20.

[34]R.D. Seifman, "The Plea Bargaining Process: Trial By Error?", (1977), 127 New Law Journal 551 at p. 552.

[35]Correspondence from the Legal Department, Nassau, Bahamas, dated 9th May, 1979.

[36]J. Willis and P. Sallman, supra footnote 12.

[37]Id. at p. 504.

[38]Supra footnote 21.

[39]J. Willis and P. Sallman, supra footnote 12 at p. 504. See also P. Sallman, "The Guilty Plea as an Element in Sentencing", (1980), 54 Law Institute Journal, 105, 185.

[40]Ontario, Ministry of the Attorney General, Memorandum to all Crown Attorneys, "Principles Applicable to Plea Discussions", originally issued May 25, 1972.

[41]E.C. Gerhart, "Plea Negotiations", Crown's Newsletter, January 1979, p. 2.

[42]In a more recent affirmation of these principles it was stressed that expediency in reducing workload is not acceptable as a reason for accepting a plea to a lesser offence or lesser number of offences, and that the reasons for accepting a plea to a lesser offence or lesser number of offences should be stated in open court - D.R. Stuart, "Annual Survey of Canadian Law: Part 3 Criminal Law and Procedure", (1977), 9 Ottawa Law Review 568 at p. 645.

VI Expediting the Hearing of the Evidence

(i) The Formal Admission of Undisputed Facts in Criminal Trials[1]

Although an accused may admit his guilt *in toto* thereby waiving his right to have the case against him proved beyond a reasonable doubt, in many common law jurisdictions he is not allowed to admit certain of the facts alleged by the prosecution, which would obviate the need to introduce evidence to prove those particular facts. In consequence, court time is often wasted on proving facts which the defence or the prosecution do not dispute. As far as the accused is concerned, the rule is based on the principle that once a plea of not guilty is entered, it is incumbent on the prosecution to prove every fact and circumstance constituting the offence(s) charged, there being no mid-point between a plea of guilty which admits the truth of everything charged and a plea of not guilty which puts everything in issue.[2] Perhaps this is related to the sensitivity with which confessions are treated by the criminal law. Be that as it may, provided sufficient safeguards for accused persons are laid down, there would seem to be no cogent reason for not allowing formal admissions in criminal proceedings. If a party is willing that something should be treated as proved, it seems unnecessary that the other party should have the burden of proving it. Moreover, since a person can admit the whole case against him by pleading guilty, it seems illogical that he should not be allowed to admit part of it.[3] It must be stressed that allowing the formal admissions of undisputed facts (and sometimes documents) generally only permits admissions to be made of facts of which oral evidence may be given. It does not enlarge the scope of legally admissible evidence, but merely provides an alternative and convenient machinery for placing legally admissible evidence before the court.

In a number of Commonwealth jurisdictions the rule requiring proof of all facts has been modified over the years by statute, under which facts not in dispute may be admitted by the accused, and in some instances, also by the prosecution. Canada, New Zealand and Queensland have provisions which are very widely framed, placing few restrictions on how undisputed facts are to be admitted in court. Section 582 of the Canadian Criminal Code[4] provides:

> Where an accused is on trial for an indictable offence he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.

Section 369 of the New Zealand Crimes Act, 1961,[5] provides:

> Any accused person on his trial, or his counsel or solicitor, may admit any fact alleged against the accused so as to dispense with proof thereof.

Section 644 of the Queensland Criminal Code, 1899, as amended reads as follows:

> An accused person may (by himself or counsel) admit on the trial any fact alleged against him, and such admission is sufficient proof of the fact without other evidence. In this section the term "trial" also includes, and is hereby declared to have always included, proceedings before justices dealing summarily with an indictable offence.

Thus, although the kind of proceeding may affect whether a formal admission will be accepted, the method by which such evidence should be tendered, orally or in writing, is not specified and it would appear that if he is legally represented, the accused need not be present when the admission is made, but he need not be legally represented.

By contrast, other jurisdictions have made the presence of the defendant in court, whether or not he is legally represented, a necessary prerequisite for the acceptance of formal admissions. In Tasmania and Western Australia the wording of the relevant provisions is identical:

> An accused person, either personally or by his counsel or solicitor, in his presence, may admit on his trial any fact alleged or sought to be proved against him, and such admission shall be sufficient proof of the fact without other evidence.

Section 34 of the South Australian Evidence Act, 1929, as amended, provides:

> A person may admit on his trial any fact alleged or sought to be proved against him, and such admission shall be sufficient proof of the fact without other evidence: Provided that the admission shall be made by the accused either personally or by his counsel or solicitor in his presence, or, in the case of a body corporate, by its counsel or solicitor.

The relevant provisions of Botswana, Lesotho and Swaziland are identical. Section 269 of the Botswana Criminal Procedure and Evidence Act (reproducing an amendment made in 1939) provides:

> (1) In any criminal proceedings, the accused or his representative in his presence may admit any fact relevant to the issue, and any such admission shall be sufficient evidence of that fact.
> (2) An admission made by an accused or his representative in his presence at a preparatory examination, which the magistrate thereat noted on the record, may be proved at the subsequent trial of the accused by the production, by any

> person, of the documents purporting to constitute that record.[7]

The provisions in this class are very liberal as to type of proceedings where formal admissions of fact may be made but place a restriction on how it is to be received, i.e. the accused must be present in court.

There is a slightly different safeguard built into the legislation of the Australian state of Victoria. Section 149A of the Evidence Act, 1958, as amended, reads as follows:

> Subject to the express provisions of any Act but notwithstanding any rule of law or procedure or any practice to the contrary the accused person in any criminal proceedings may make admission of any fact or matter that is relevant in the proceedings and any person acting judicially may accept the admission as sufficient evidence of that fact or matter without further proof unless he is of the opinion that it would be contrary to the interests of justice so to do having regard to all the circumstances of the case. (Emphasis added)

In the remaining jurisdictions where undisputed facts may be admitted, protection for the accused is provided in terms of a requirement that he must be legally represented. In New South Wales, section 404 of the Crimes Act, 1900, as amended provides:

> Every accused person on his trial may, if so advised by counsel, make any admissions as to matters of fact, whatever the crime charged, or give any consent which might lawfully be given in a civil case.

"Matters of fact" has been interpreted to include matters of fact which are not within the personal knowledge of the accused and conclusions as to matters of fact. Also, admissions made under this section make it unnecessary for the Crown to call evidence to prove the matters admitted, and accordingly, the Crown ought not to call such evidence if it would be likely to prejudice the accused unless such evidence goes not only to prove the matters admitted but also to prove other matters in issue.[8]

Scottish procedure in relation to formal admissions requires that they be set down in writing in the form of "minutes of agreement and admission".[9] This procedure covers both undisputed facts and documents although it may only be used where the accused has legal assistance in his defence. This is essentially a pre-trial procedure rather than one used in court; thus, a recent review of Scottish procedure concluded that more use of these minutes might be made if the pre-trial preparation period were

extended somewhat, to allow drawing up and adjustment of the documents.[10]

In Uganda, the clearing away of undisputed matters also forms part of the pre-trial preparation: admissions are made during that period rather than in court during the trial. After committal, and an arraignment the first thing the High Court Judge is required to do is to ascertain what facts are agreed and draw up a memorandum of the admitted facts. The memorandum must be read over and explained to the accused and signed by him and his counsel. This procedure can only occur if the accused is legally represented. Any fact or document agreed or admitted in a memorandum filed under this section shall be deemed to have been duly proved for the purpose of subsequent proceedings, although the court may require proof of such matters if it is of the opinion that the interests of justice demands it.[11]

Since 1970 Bermuda, Hong Kong, Malawi, Singapore and the Seychelles have enacted legislation which is identical for all practical purposes to section 10 of the English Criminal Justice Act, 1967.[12] The English provisions are in the following terms:

> (1) Subject to the provisions of this section, any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecutor or defendant, and the admission by any party of any such fact under this section shall as against that party be conclusive evidence in those proceedings of the fact admitted.
>
> (2) An admission under this section -
> (a) may be made before or at the proceedings;
> (b) if made otherwise than in court, shall be in writing;
> (c) if made in writing by an individual, shall purport to be signed by the person making it and, if so made by a body corporate, shall purport to be signed by a director or manager, or the secretary or clerk, or some other similar officer of the body corporate;
> (d) if made on behalf of a defendant who is an individual, must be approved by his counsel or solicitor (whether at the time it was made or subsequently) before or at the proceedings in question.
>
> (3) An admission under this section for the purpose of proceedings relating to any matter shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter (including any appeal or re-trial).
>
> (4) An admission under this section may with the leave of the court be withdrawn in the proceedings for the purpose of which it is made or any subsequent proceedings relating to the same matter.

(ii) Modification of other rules of evidence

In common law jurisdictions the general rule is that all facts which have to be proved at a criminal trial must be proved by oral evidence given at the actual trial. Hearing evidence viva voce is thought to be the best method of assessing the credibility of witnesses. As we have already seen, the extreme orality of criminal trials has a decelerating effect. It would be advantageous, therefore, if evidence which was unlikely to be disputed could be given by means of a written statement of the witness who would otherwise give evidence orally. As the English Criminal Law Revision Committee pointed out in 1966, provided an accused does not wish to question the person who can give the evidence, there is no real reason why that person's evidence should notbe given by means of a written statement. In relation to crucial evidence it is probably easier for judge and jury to follow and assess its value when they see and hear the witness. This is less likely to be the case where the evidence is purely technical. The Committee felt that juries in particular would be less likely to be wearied and distracted from the major issues if formal or uncontroversial evidence was read out rather than given by a succession of witnesses.[13] Documentary evidence can be as cogent as oral evidence and it is often easier for the court to follow and can be absorbed much more quickly and thus speed the trial.[14]

In light of this, several Commonwealth countries have acted to change the character of the criminal trial from one of extreme orality to a combination of oral and documentary evidence by allowing the undisputed evidence of witnesses to be admitted in the form of a written statement or permitting documentary evidence to be received without formal proof.

One of the earliest provisions to this effect was the Criminal Law Amendment Act, 1892 of Queensland,[15] section 4 of which reads:

> When a person charged with an indictable offence other than treason, wilful murder or murder, or any of the crimes defined in the second paragraph of section 81 and in section 82 of "The Criminal Code" is committed for trial, the Justice or Justices by whom he is committed shall, when the depositions of the witnesses are read over to him, ask him after the reading of the deposition of each witness whose evidence is in the opinion of the Justice or Justices of a formal character, whether he wishes that witness to be produced at his trial or whether he will be content that the deposition as taken and read to him shall be produced and admitted as evidence at the trial together with the exhibits (if any) annexed.

This marked a break away from English practice, which, although allowing the deposition to be used to neutralise a witness' testimony where leave has been given to treat the witness as hostile, did not allow it to be used as evidence in the subsequent trial. In India the deposition of a medical witness, taken and attested by a magistrate in the presence of the accused, may be given in evidence at the trial.[16] This is also permitted in Singapore with the rider that the court must be satisfied "that grave inconvenience would otherwise be caused".[17]

The English Criminal Justice Act, 1967, provides that written statements are to be admissible in committal proceedings subject to certain conditions. This relaxation of the viva voce evidence rule was also extended to "criminal proceedings", again subject to certain qualifications, and the legislatures of Singapore, Western Australia, Seychelles and Malawi subsequently enacted broadly similar procedures.[18] Section 9 of the Criminal Justice Act enables the written evidence of a witness to be admitted to the same extent as oral evidence in all criminal trials, subject to the right of the party against whom it is tendered and of the court to require that the witness should give evidence orally. A similar amendment to the Criminal Procedure Code of Bangladesh permits evidence of a formal character to be given by affidavit, subject to the power of the court on its own motion or on application made by the prosecution or defence to summon and examine witnesses.[19]

A slightly different provision exists in Tasmania. There, section 113A of the Evidence Act, 1910, as amended, provides:[20]

> In any criminal proceeding the judge may -
> (a) if he sees fit; and
> (b) if the parties to the proceeding consent thereto, receive as evidence without formal proof thereof -
> (c) exhibits; and
> (d) affidavits and statutory declarations.

The Indian Criminal Procedure Code likewise allows the evidence of any person whose evidence is of a formal character to be given by affidavit, "subject to all just exceptions".[21] In relation to documents it is provided in section 294 of the Code that:

> (1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

> (2) The list of documents shall be in such form as may be prescribed by the State Government.
>
> (3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed: Provided that the Court may, in its discretion, require such signature to be proved.

In South Australia the admission of the undisputed evidence of witnesses occurs on an informal, ad hoc basis. It is felt, however, that it is not done as frequently as it might be if there were a statutory provision similar to that contained in section 9 of the English Criminal Justice Act. A committee studying evidence and procedure in South Australia recently recommended that such a measure be enacted to encourage the use of written statements, thereby saving the time of the courts and of prospective witnesses and also saving expense.[22]

Technical and scientific evidence is often the most difficult to convey with clarity orally and in many cases, such evidence is not challenged by either party. If it is to be challenged, then the attendance of that witness is imperative, but otherwise, a written report would likely be more satisfactory both for those assessing the evidence and the witness - the expert witness - who is, as a result, not tied up in court and is free to continue with his work. Provisions relating specifically to the expert witness and the reception of his evidence have been enacted in several Commonwealth jurisdictions.

In Jamaica, section 33 of the Food and Drug Act provides that:

> (1) Subject to subsection (2), the certificate of an inspector or analyst stating that he has examined or analysed an article or sample for the purpose of this Act and stating the result of his examination or analysis shall be admissible in evidence in a prosecution for a contravention of this Act and shall be prima facie proof of the statements contained in the certificate but the party against whom it is produced may require the attendance of the inspector or analyst for the purpose of cross examining him.
>
> (2) A certificate under subsection (1) shall not be admissible in evidence unless the party intending to produce it has before the trial given to the party against whom it is intended to produce it reasonable notice of such intention and a copy of the certificate.[23]

In a similar vein, section 27 of the Dangerous Drugs Act reads:

> In any proceedings against any person for an offence against this Act the production of a certificate signed by a Government Chemist or any Analyst designated under the provisions of section 17 of the Food and Drugs Act, shall be sufficient evidence of all the facts therein stated, unless the person charged requires that the Government Chemist or any Analyst be summoned as a witness, when in such case the Court shall cause him to attend and give evidence in the same way as any other witness.

Documentary evidence of this type is also admissible in India,[24] Seychelles,[25] Solomon Islands,[26] and Singapore.[27] In St. Lucia a recent amendment to the dangerous drugs legislation makes it permissible for an analyst's report to be received in evidence as prima facie evidence of any statement contained therein in any summary proceedings under the Act. Moreover, if in any such proceedings a "designated officer" is required to attend and give evidence as to the subject matter of his report, the party requiring his attendance will be required to pay a sum of money into court as costs.[28]

The regulation of driving speeds and driver-alcohol consumption has resulted in a great deal of evidence of measurement and blood, breath and urine analysis being heard in court. In Britain a certificate relating to the taking and analysis of specimens of blood and urine is accepted as proof of the matter contained therein unless challenged by the accused;[29] and in New South Wales, certificates relating to breath analysis are similarly admissible in evidence.[30] Also in New South Wales, a provision is in operation to the effect that at any inquest or where a person is charged before a justice or justices with an indictable offence, it shall not be necessary, unless there is judicial direction to the contrary, for any person who makes a scientific examination of any article or body to give evidence of the result of the examination. Rather, a certificate containing a statement that he made the examination, his qualifications and his conclusions shall be prima facie evidence of the contents of the certificate. There is a proviso, however, that where the certificate is tendered by the prosecutor, the justice or justices shall not dispose of the case summarily without the consent of the accused.[31] A similar measure relating to medical reports exists in the Canadian province of Ontario, although it requires the leave of the court and notice to be given to all other parties to the case. In addition, where a legally qualified medical practitioner has been required to give evidence viva voce and the court is of the opinion that the evidence could have been produced as effectively by way of a medical report, the court may order the party that required the doctor's attendance to pay as

costs such sum as it considers appropriate.[32]

Expert evidence is, of course, not always merely a statement of the results of tests and analyses. Such results may often be subject to differing interpretations and it is the expert's opinion, his conclusions, which form the crucial part of his evidence. In order to avoid having cases drawn out by the hearing of a multiplicity of expert witnesses giving repetitive opinion evidence, the Canadian Evidence Act provides that where the prosecutor or defence intend to examine as witnesses at a trial, professional or other experts entitled according to law and practice to give opinion evidence, not more than five of such witnesses may be called upon by either side without the leave of the court.[33]

The reception of expert evidence in documentary form is also permissible in a few jurisdictions. This is not as common as formal scientific and technical evidence because it is much more likely to be challenged or disputed. Section 180 of the Malawi Criminal Procedure and Evidence Code reads as follows:

> (1) Whenever any facts ascertained by any examination, including the examination of any person or body, or by any process requiring any skill in pathology, bacteriology, biology, chemistry, physics, botany, astronomy or geography and the opinions thereon of any person having that skill are or may become relevant to the issue in any criminal proceedings, a document purporting to be a report of such facts and opinions, by any person qualified to carry out such examination or process (in this section referred to as an "expert") who has carried out any such examination or process shall .... on its mere production by any party to those proceedings, be admissible in evidence therein to prove those facts and opinions if one of the conditions specified in subsection (3) is satisfied ...
>
> (3) The conditions referred to in subsection (1) are -
> (a) that the other parties to the proceedings consent; or
> (b) that the party proposing to tender the report has served on the other parties a copy of the report and, by endorsement on the report or otherwise, notice of his intention to tender it in evidence and none of the other parties has, within 7 days from such service, served on the party so proposing a notice objecting to the report being tendered in evidence under this section.[34]

The 1976 amendments to sections 12 and 13 of the Evidence Act of British Columbia, effective as of July 15, 1976, provide that a statement in writing setting out the opinion of an expert is admissible in evidence if a copy of the written statement is furnished to every party to the proceeding

who is adverse in interest at least 14 days before the statement is given in evidence.[35] The opposite party may require that the expert be produced for cross-examination. Before this amendment, these sections applied to medical evidence only, but they now extend to all expert evidence.

Another area in which the written word may be more explicit and expeditious in terms of the hearing of evidence is that of the conduct of a business. Not only is such evidence often minutely detailed, making it difficult to grasp through oral presentation, but, where the business operation is a large one, the person(s) who recorded the matters when they occurred may have difficulty in recalling them with exactitude, and it may even be difficult to produce such person in court.

The English Criminal Evidence Act, 1965, makes admissible as evidence in criminal cases certain commercial records which, until the decision of the House of Lords in Myers v. Director of Public Prosecutions[36] had been generally thought to be properly admissible. In that case, it was held that manufacturers' records of cylinder block numbers were inadmissible to confirm the identification of stolen cars as this evidence was hearsay which could not be brought within any established exception to the rule against the admission of such evidence. The Act provides that where in any criminal proceedings direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall be admissible as evidence of that fact in certain circumstances. The first is that the document must form part of a record relating to a trade or business and have been compiled in the course of that trade or business from information supplied, directly or indirectly, by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the documents. In addition, the person who supplied that information must be dead, "beyond the seas", unfit to give evidence due to a physical or mental condition, or cannot with reasonable diligence be identified or found, or, finally, cannot be expected (having regard to the time which has elapsed since he supplied the information) to have any recollection of the matters dealt with in the information he supplied.[37] In this section "document" includes any device by means of which information is recorded or stored.

Similar measures have subsequently been enacted in other Commonwealth countries. Legislation in Tasmania[38] and South Australia[39] contain a proviso that the enactment does not require a judge to admit such a writing in evidence if it appears that the interests of justice would not be served thereby. In Victoria it is provided that the court may at any stage of the

proceeding, if, having regard to all the circumstances of the case, it is satisfied that undue delay or expense would otherwise be caused, order that such a statement shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence, notwithstanding that the maker of the statement or the person who supplied the information is available, but is not called as a witness.[40]

Technological advances are now providing us with instant information and total, accurate recall, and there is a dawning realisation of the advantages such information may have in accelerating court proceedings. A 1979 amendment to the Evidence Act of South Australia provides that computer output is admissible in criminal proceedings.[41] It is not restricted to business "documents". Even more innovative has been an experiment in the courts of British Columbia with video-taping. Suspected impaired drivers are asked to perform physical sobriety tests and their performance is recorded on videotape. The tape is made available for viewing by the charged driver and his counsel prior to a court appearance and the prosecution will submit the tape in evidence. British Columbia is the only Canadian province to allow the use of videotapes as evidence. This experiment has had a profound effect on the disposition of "drinking driving" cases. The video-taping is credited with a 25 per cent drop in impaired driving charges and a 40 per cent decrease in "not guilty" pleas in the town of Vernon where the experiment is being conducted. This data implies that the prosecution on seeing the tapes will drop unjustified charges which they would previously have proceeded with; and the defendant, upon seeing incontrovertible proof of his own performance, will not challenge the evidence and plead guilty. It has been estimated that in its first year of operation, the "Vernon experiment" saved approximately $41,000 in court costs.[42]

Oral evidence in criminal proceedings is thus being displaced to a limited extent, mainly by the reception of undisputed documentary evidence. As other methods of recording and reproducing events and facts become more reliable, fallible human recollection may be able to be dispensed with in an increasing number of instances, although the right of the defendant to challenge and cross-examine witnesses must be preserved.

The hearing of evidence is not its only time-consuming aspect; the hearing of arguments and judicial decisions on the admissibility of evidence also consumes a substantial amount of time in a number of hearings. If a defendant makes a "confession" to the police and subsequently alleges it was

not made voluntarily, a voir dire will have to be held to determine whether it was in fact a voluntary statement and consequently, admissible in evidence at trial. Hearsay evidence, to which it is thought inexperienced jurors might attach too much weight, is generally excluded under the "best evidence" rule. The English Criminal Law Revision Committee in its 11th report set out five reasons for excluding certain types of evidence: because it would be too prejudicial to the accused; because it is too unreliable; because of the way in which it was obtained; because its reception might confuse the issue or for over-riding reasons of policy not related to its value.[43]

The desirability of drastically altering the rules regulating the admissibility of evidence has been vigorously debated for some years, particularly in the United Kingdom and the United States. In Britain the discussion has centred around the Eleventh Report of the Criminal Law Revision Committee which recommended that fairly substantial changes be made to the laws of evidence in that country.

> Since the object of a criminal trial should be to find out if the accused is guilty, it follows that ideally all evidence should be admissible which is relevant in the sense that it tends to render probable the existence or non-existence of any fact on which the question of guilt or innocence depends. This is the only possible meaning of relevance for the purpose of any reasonable discussion of the law of criminal evidence. It also follows that ideally every person who can give relevant evidence should be a compellable witness ....[S]trict and formal rules of evidence, however illogically they may have worked in some cases, may have been necessary in order to give accused persons at least some protection, however inadequate, against injustice. But with changed conditions they may no longer serve a useful purpose but on the contrary have become a hindrance rather than a help to justice. There has also been a good deal of feeling in the committee and elsewhere that the law of evidence should now be less tender to criminals generally.[44]

The Committee recommended, inter alia, that the suspect's "right of silence" when interrogated by the police should be restricted. It was proposed that if the accused failed to mention a fact at the interrogation stage which he later relies on, the court may draw the proper inferences.[45] The Committee favoured the abolition of the accused's right to make an unsworn statement; and, although it was not proposed to make the accused a compellable witness, it was recommended that if he refused to give evidence on his own behalf, this could be taken into account. Substantial changes in the requirements for corroboration were also proposed along with substantial

inroads into the rule against hearsay. These recommendations and others provoked a heated debate and, as a result, the Eleventh Report remains unimplemented. Radical changes in the law of evidence have, however, been implemented in two other Commonwealth countries.

The overriding principle on which the Criminal Procedure and Evidence Code of Malawi is based is "that substantial justice should be done without due regard for technicality". To this end, the accused has been made a compellable witness; appeals on evidentiary grounds have been restricted and the rules regarding confessions relaxed. If an accused refuses or neglects to be sworn, give evidence, answer any question lawfully put to him or produce any document or thing which he is required to produce, such refusal or neglect may be commented upon by the prosecution and may be taken into account by the court in reaching its decision.[46] It is also provided in section 240 of the Code that the improper admission or rejection of evidence is not of itself a ground for granting a new trial or reversing a decision on appeal if it appears to the appeal court that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision or that if the rejected evidence had been received, it ought not to have varied the decision.

Section 176 of the Code reads:

> (1) Evidence of a confession by the accused shall, if otherwise relevant and admissible, be admitted by the court notwithstanding any objection to such admission upon any one or more of the following grounds (however expressed) that such confession was not made by the accused or, if made by him, was not freely and voluntarily made and without his having been unduly influenced thereto.
>
> (3) Evidence of a confession admitted under subsection (1) may be taken into account by a court, or a jury, as the case may be, if such court or jury is satisfied beyond reasonable doubt that the confession was made by the accused and that its contents are materially true. If it is not so satisfied, the court or the jury shall give no weight whatsoever to such evidence. It shall be the duty of the judge in summing up the case specifically to direct the jury as to the weight to be given to any such confession.

Under this confession rule, the alleged confession in its full details is put before the court during the prosecution's case, but its weight is not determined until the conclusion of the case. As one commentator has pointed out, it is perhaps difficult to expect jurors to give "no weight whatsoever" when they are directed to do so after the completion of the case.[47]

The reforms introduced into the law of evidence of Singapore by

the Criminal Procedure Code (Amendment) Act, 1976 and the Evidence (Amendment) Act, 1976, were "borrowed" from the proposals of the English Criminal Law Revision Committee. The right to silence and the right of the accused person to make an unsworn statement from the dock are removed;[48] silence on the part of a person suspected of having committed an offence when being questioned can be used against him[49] and a wider class of hearsay evidence is made admissible.[50] When these changes were proposed they were met with criticisms similar to those which were voiced in England,[51] but in this instance, these criticisms were overridden and the proposals implemented.

Experience to date in restructuring the admissibility of evidence suggests that extreme caution must be exercised to ensure that efficiency and expediency do not trample the interests of the accused underfoot. There must be a delicate balancing of the extent to which changed circumstances enable certain out-of-date protections to be removed and any reforms of the laws of evidence.

Footnotes

[1]In this section I have relied heavily on a memorandum prepared by the Commonwealth Secretariat for the meeting of Commonwealth Law Ministers, Winnipeg, August, 1977.

[2]Id. para. 1.

[3]Great Britain, Criminal Law Revision Committee, Report no. 9, Evidence: Written statements, formal admissions and notices of alibi (London, 1966), Cmnd. 3145, para. 22.

[4]R.S.C., 1970, c. C-34. It is proposed that section 582 be amended to provide that the section applies to all proceedings and that the Crown be able to make admissions - Uniform Law Conference of Canada, Proceedings (1978) p. 55.

[5]These provisions have been made applicable to summary proceedings by the Summary Proceedings Act, 1957, as amended by the Summary Proceedings Amendment Act, 1961.

[6]Tasmania Evidence Act, 1910, section 109; Western Australia Evidence Act, (1977 reprint), section 32.

[7]The corresponding reference for Lesotho is section 269 of the Criminal Procedure and Evidence Proclamation, No. 58 of 1938, as amended; and for Swaziland, section 272 of the Criminal Procedure Act, No. 67 of 1938.

[8]R. v. Longford, (1970), 17 F.L.R. 37; (1971), Australian Digest 117.

[9]Summary Jurisdiction (Scotland) Act, 1954, section 36 and Criminal Procedure (Scotland) Act, 1975, section 150.

[10]Scotland, Committee on Criminal Procedure in Scotland (Thomson Committee), Criminal Procedure in Scotland (second report) (Edinburgh, 1975), Cmnd. 6218, para. 36.04.

[11]Uganda, Trial on Indictments Decree, No. 26 of 1971, section 64.

[12]Bermuda Evidence Act, 1905, section 28B, inserted by the Criminal Justice Act, (No. 271 of 1970); Hong Kong Criminal Procedure Ordinance, cap. 221, section 65C, inserted by Act No. 5 of 1971; Malawi Criminal Procedure and Evidence Code (cap. 8.01), section 183; Singapore Criminal Procedure Code, cap. 113, section 371B, inserted by Act No. 12 of 1972 and Seychelles Criminal Procedure Code, section 127B.

[13]Great Britain, Criminal Law Revision Committee, supra footnote 3 at paras. 7-9.

[14]A. Samuels, "Written Statements - Documenting Evidence in Criminal Cases", (1978), 142 Justice of the Peace 632.

[15]56 Vic. No. 3, as amended, section 4.

[16]Indian Code of Criminal Procedure, 1973, section 291.

[17]Singapore, Criminal Procedure Code (Edition of 1970), cap. 113, as amended, section 364.

[18]Singapore, id. at section 371A; Western Australia Justices Act, (1977 reprint), section 69; Seychelles Criminal Procedure Code, section 127A and Malawi Criminal Procedure and Evidence Code, section 175.

[19]Bangladesh Law Reforms Ordinance, 1978, (No. XLIX of 1978), see note at (1979), 5 Commonwealth Law Bulletin 616.

[20]Inserted by the Tasmanian Criminal Code Act, 1975.

[21]Indian Criminal Procedure Code, 1973, section 296.

[22]South Australia Criminal Law and Penal Methods Reform Committee (Third Report), Court Procedure and Evidence (Adelaide, 1975), p. 153.

[23]From memorandum prepared by the Jamaican government for the author. A similar provision exists in section 42 of the Food and Drugs (Scotland) Act, 1956.

[24]Indian Criminal Procedure Code, 1973, section 293. This provision covers the evidence of any chemical examiner, the Chief Inspector of Explosives, the Director of the Fingerprint Bureau, the Government Serologist and the directors of two named scientific institutes.

[25]Seychelles Criminal Procedure Code, section 127A.

[26]Letter from the Attorney General of the Solomon Islands dated February 5, 1979. The legislation covers reports by a surveyor, a geologist, an analyst or a medical practitioner.

[27]Singapore Criminal Procedure Code, (Edition of 1970, as amended), cap. 113, section 366. The reports of chemists, pathologists, bacteriologists, botanists, a government appointed document examiner and an inspector of weights and measures are covered by this provision.

[28]St. Lucia Dangerous Drugs (Amendment)(No. 2) Act, (No. 1 of 1979). See note at (1979) 5 Commonwealth Law Bulletin 620.

[29]Great Britain, Road Traffic Act, 1972, section 10.

[30]New South Wales Motor Traffic Act, 1909, as amended, section 4E(12) (a) & (b) and Crimes Act, 1900, as amended, section 414A(2) & (3).

[31]New South Wales Crimes Act, 1900, as amended, section 414A(1).

[32]The Evidence Act of Ontario, R.S.O. 1970, c.
section

[33]Canada Evidence Act R.S.C., 1970, c. E-10, section 7.

[34]Malawi Criminal Procedure and Evidence Code, cap. 8.01, section 180.

[35]Evidence Act, 1960, R.S.B.C. c.34, section 12 as amended by 1976 c.33, section 86. For commentary see D.B. Kirkham, "Experts' Statements Pursuant to the B.C. Evidence Act", (1978), 36 Advocate 29.

[36][1965] A.C. 1001; [1964] 2 All.E.R. 881.

[37]England Criminal Evidence Act, 1965, c. 20, section 1. See also Canada Evidence Act, supra footnote 33 at section 30 and Trinidad and Tobago Evidence (Amendment) Act, 1978, (No. 36 of 1978).

[38]Tasmania Evidence Act, 1910, as amended, section 40A.

[39]South Australia Evidence Act 1929, as amended, section 45(a).

[40]Victoria Evidence (Documents) Act, 1971, section 55(7).

[41]Evidence Act Amendment Act, 1979, (No. 9).

[42]"Credit goes to T.V. for D.W.I. drop", The Journal, September 1, 1979, p. 2 and The National, September 1979, p. 35.

[43]Great Britain Criminal Law Revision Committee, Eleventh Report: Evidence (London, 197), Cmnd. 4991, paras. 14-19. See also Scottish Law Commission, Research Paper on the Law of Evidence of Scotland (April 1979).

[44]Id. at paras. 14 and 21.

[45]Many of the constitutions of Commonwealth countries include, in provisions "to secure protection of the law", the following - "No person who is tried for a criminal offence shall be compelled to give evidence at his trial." Provisions in this precise form of wording occur, for example, in section 18(7) of the Barbados Constitution (Schedule to the Barbados Independence Order 1966 S.I. No. 1455); section 10(7) of the Solomon Island Constitution (Schedule to the Solomon Islands Independence Order, 1978 S.1. No. 783 and article 20(7) of the Bahamas Constitution (Schedule to the Bahamas Independence Order 1973 S.1. No. 1080). It is arguable that this provision exists it would be unconstitutional for a statute to provide that any inferences against the accused can be drawn.

[46]Malawi Criminal Procedure and Evidence Code, supra footnote 34 at section 256.

[47]V.G. Davidson, "Reforms in Evidence and Criminal Procedure - The Malawi Experiment Considered", (1968) 4 East African Law Journal 31 at p. 34.

[48]Criminal Procedure Code (Amendment) Act, 1976, section 5, (section 121 of the Code).

[49]Id. section 6, (section 122).

[50]Id, section 23, (section 371 B-J).

[51]For example, H. Singh, "Reforms in the Law of Evidence: Some Observations", (1975), 17 Malayan Law Journal 160.

VII Jury Trial

Until relatively recently in the history of the common law, an accused's right to trial by jury was virtually unassailable. Jury trial was the normal method of dealing with all those offences which make up the central core of the criminal law, including those of a fairly trivial nature. Summary trial was limited to minor assaults, offences against the Vagrancy Acts and Game laws and infringements of the small amount of regulatory legislation of the time. In England, by the mid-19th century, there had been a decline in the severity of punishments along with a reform of magisterial law. For example, justices were required to sit in public except when conducting committal proceedings, and this made possible a gradual extension of the scope of summary jurisdiction. Minor indictable offences were made amenable to summary conviction if the accused consented and in return, magistrates could only impose lesser penalties.[1]

Summary trial, as its name suggests, is a shorter procedure than jury trial: there are no addresses to the jury by counsel or summing up by the judge; the requirements for the recording of the proceedings are generally much less strict[2] and there are, of course, no jury deliberations. Trial on indictment is a more expensive process in terms of both time and money. Aspects of trial on indictment, such as the expenses of the jury[3] and the cost of shorthand writers and recording equipment have no counterpart in the lower courts. In addition, jury trial takes longer than the summary trial, even for a case of similar gravity and complexity.[4] Nonetheless, the right to judgement by one's peers, especially where the liberty of an individual is at stake, is seen as being an important and central part of the administration of justice in many Commonwealth countries.[5] If this right does not flow from Magna Carta, at least its existence supports and gives effect to the ideal contained in the Charter.[6] The belief in the superiority of jury trial seems to be based on two grounds: firstly, that the traditional jury, selected virtually at random, brings a more impartial mind to bear on the issues than can magistrates and judges who inevitably become "case-hardened" and may be too ready to accept the prosecution's case; secondly, jury trial has other distinctive features such as being presided over by a professional judge and representation of both parties by counsel, the pace of the hearing is slower and once the trial has started it proceeds to a conclusion without interruption. This results in the issues being brought out more clearly and examined more thoroughly than is possible in a busy magistrates' court with a crowded list.[7]

Whatever the intrinsic worth of jury trial may be, its corresponding disadvantages mean that a widespread right to jury trial is no longer attainable in today's overcrowded criminal courts. Delays produced as a result of trial by jury are being tackled in three ways: by restricting jury trial to a very limited number of offences; by reforming jury trial practices and procedures and lastly, by abolishing jury trial altogether.

Those offences for which there is an absolute right to jury trial are being gradually reduced throughout the Commonwealth. In the Seychelles, for example, only murder and other offences carrying the death penalty carry a right to trial by jury. The vast majority of indictable offences may be tried on indictment or summarily; either the accused or the prosecution has the choice of which mode of trial to pursue. By making more offences amenable to summary trial it is generally hoped that more defendants will consent (where they have that option) to a hearing before a magistrate, the quid pro quo being the narrower range of sentences that lower court judges can impose. But before considering in detail offences triable either way, the option of totally withdrawing the right to jury trial for some minor indictable offences must be examined.

This solution has an obvious advantage over the situation where the defendant or prosecutor is given a choice as to the mode of trial: the number of jury trials for this class of offences is not merely reduced, but completely eliminated. In the past, the number of offences triable exclusively in a court of summary jurisdiction has been very limited, usually only involving those offences for which extremely minor penalties may be imposed. For example, in New Zealand, section 66 of the Summary Proceedings Act, 1957, as amended, preserves the right of a person charged with an offence punishable by imprisonment for more than a three month period to be tried by jury. Recent English experience has shown that increasing the number of offences for which jury trial is no longer available may not be a viable response in some jurisdictions.

In 1973 a Committee was set up in England under the chairmanship of Lord Justice James to examine the allocation of business between the different levels of the criminal courts. The immediate stimulus for the setting up of this Committee was the need to alleviate the pressures on the Crown Court which had been building steadily since the Court's inception in 1971, and to reduce delays in the disposal of Crown Court business. Interestingly, the point has been made that at this stage, the Crown Court had become a victim of its own success: the efforts which had been made by the new court

administration to make proceedings on indictment more efficient had been fairly successful in some areas with the result that proceedings in the Crown Court had become a more attractive proposition than they had been under the system which existed prior to 1971, and more defendants were therefore exercising their option to have their case heard in this forum. This underscores a point which has been made before: developments to deal with delays cannot be enacted without due consideration of their possible consequences. They will not be operating in a vacuum and may have an impact on other parts of the system and on the future operation of the courts.

The James Committee considered various methods of making justice more expeditious, and, based upon its recommendations, the English Criminal Law Amendment Bill, 1976, provided, inter alia, that certain cases of theft and related offences of dishonesty, where the value of the money or property involved did not exceed twenty pounds were to be tried exclusively by the Magistrates' Courts.[9] Cases of criminal damage other than arson, where the value of the damage did not exceed one hundred pounds were also proposed to be transferred to the lower courts. This meant that the right to elect trial by jury was to be abolished in those cases. The Committee had felt that it was confronted with the issue of providing expensive justice to trivial cases at the price of delaying justice to the serious cases which appropriately deserve expensive justice, and its members concluded that society should not pay that price. This is how the Committee viewed the conflicting claims and how they resolved them:

> In the last analysis, society has to choose between two conflicting aims. On the one hand is the existing right of the citizen to be tried by a judge and jury on any charge of theft or criminal damage, however small the amount involved. On the other is the right, especially important defending a serious charge, to be heard as soon as possible. These two requirements have to be met with resources which are finite and cannot be expanded without limit. At present, defendants on serious charges are suffering the injustice of long-delayed trial, while the time of the Crown Court is partly occupied with minor cases of low monetary value.[10]

Although the Government accepted this position and embodied it in the original Bill, the proposal met with vehement opposition from the public, the press, professional bodies and Parliament.[11] The opponents of the proposal rejected it because it was founded, as Lord Edmund-Davies stated in the debates in the House of Lords, "frankly and expressly, on the basis of expediency".[12] To them, the right of anyone charged with theft to a jury

trial, however small the amount involved, cannot be overridden by the right of a defendant on a serious charge to be tried as speedily as possible.

Eventually, after prolonged debate in the House of Lords, the Government withdrew this clause from the Bill, and replaced it with one much narrower in scope. Those offences which were triable either way which are now only triable summarily are offences under section 1 of the Criminal Damage Act, 1971, (excluding arson) and aiding, abetting, counselling or procuring, or attempting or inciting another to commit such an offence where the value of the property does not exceed two hundred pounds.[13] The restriction on the right to jury trial could not be extended beyond this, at least, for the time being. It is interesting to note the later remarks of Lord Hailsham:

> We began this Bill in an atmosphere of almost excited controversy....I can remember the speeches ....of those who thought that the rule of Magna Carta and trial by jury was being brought to an end...because of the Government's then intention to implement the James Committee on the subject of small thefts. I admit...that I was among those who advised the Government to give in on that point. I think I was right to do so; all the heat has been removed from the Bill by that very wise concession, because public opinion is not ready for that kind of amendment. However, I now want to say, in the cool of the evening, that I think the James Committee and the Government's original intentions were perfectly right. We shall come to them in the end.[14]

Certainly, the right to jury trial has been more severely restricted in some other Commonwealth jurisdictions. Canadian society has long accepted the monetary criterion for determining the forum for trying theft which was so vigorously rejected in England. Section 483 of the Canadian Criminal Code reads as follows:

> The jurisdiction of a magistrate to try an accused is absolute and does not depend upon the consent of the accused where the accused is charged in an information
> (a) with
> (i) theft, other than theft of cattle,
> (ii) obtaining money or property by false pretences,
> (iii) unlawfully having in his possession any property or thing knowing that all or part of the property or thing or the proceeds was obtained by or derived directly or indirectly from the commission in Canada of an offence punishable by indictment, or
> (iv) having, by deceit, falsehood or other fraudulent means, defrauded the public or any person, whether ascertained or not, of any property, money or valuable security,

> where the subject-matter of the offence is not a testamentary instrument and where the alleged value thereof does not exceed two hundred dollars;

This then is a limited class of indictable offences for which there is no right to jury trial; for the most serious criminal offences, which include murder and treason, the defendant has an absolute right to jury trial in Canada. One exception to this rule exists in the province of Alberta where an accused, charged with an indictable offence may, with his consent, be tried by a judge of the superior court of criminal jurisdiction without a jury.[15] It appears that this option is frequently exercised.[16] Outside of these categories there exists a large class of indictable offences for which an accused may elect his mode of trial. In this class of offences are included rape, bribery, criminal negligence and manslaughter. This category of offences may be tried, at the option of the accused, by judge and jury, by a single judge or by a magistrate, unless the Attorney General requires trial in a superior court. This option of trial by a single judge rather than by judge and jury is not widely available in other jurisdictions.[17]

The right to jury trial as it exists in Canada is notable in another respect. Although, in other countries, the consent of the accused, with the concurrence of the justice, is a necessary prerequisite for the summary hearing of those offences which may be tried on indictment or summarily, this is not the case in Canada, nor in Scotland. Thus, in these two jurisdictions, there is no right to jury trial where the accused is charged with an offence that is triable either way. The choice as to mode of trial is that of the prosecutor and not of the defendant. Concern has been voiced in England as to the possible consequences where the choice as to mode of trial is not that of the defendant; in particular, whether there is more likelihood of an appeal because the accused feels that he has been unfairly dealt with.[18] This fear would not appear to have been realised in Canada or Scotland.

In Scotland the procurator fiscal (i.e. the prosecutor) makes the first decision whether the case should be proceeded with at the summary level or be sent on petition to a sheriff sitting with a jury or to the High Court of Justiciary. If the case is to go on petition, the procurator fiscal then makes his investigation of the incident and sends the resulting materials to the Crown Office. At this stage, the original decision is reviewed by senior officials and confirmed or sent back for summary trial.[19]

> We are most anxious...that there should not be introduced into the Scottish criminal system a right on the part of the accused to opt for jury trial. While in general we do not think that persons accused of crimes against property or crimes of violence would opt for jury trial,

> persons accused of driving offences might do so in the hope of finding a sympathetic jury, and delays in disposing of criminal business. In any event, we think that jury trial in Scotland, as a matter of right, is unnecessary. In summary cases in the sheriff court, as in solemn, the Scottish system of prosecution is based on direction by the Lord Advocate, a corps of professional prosecutors, the need for corroboration of evidence and the trial of cases by professional judges, and legal aid availability. It may be that in England the jury is thought to offset any shortcomings of prosecution by the police, lack of corroboration of evidence, and the trial of cases by lay magistrates.[20]

Recent experience in South Australia may tell us more about the extent to which defendants, given a choice as to mode of trial, will elect trial by jury. In that state, the power of courts of summary jurisdiction to hear minor indictable offences was first given by the Minor Offences Procedure Act, 1869, and the consent of the accused was required. A 1931 amendment to that statute removed the necessity of consent. It was for the court to decide, after it had heard all the evidence of the prosecution, whether it would dispose of the case summarily. Since November 30, 1972, however, a person accused of a minor indictable offence may elect to be tried either by a special magistrate or by a jury. Notwithstanding that the accused consents to be tried summarily, the court may still commit him for trial.[21] From December 1972 to November 1974, 72 persons charged with minor indictable offences elected to be tried in the Central District Criminal Court before a judge and jury rather than be tried by a special magistrate, and approximately 10 such persons elected to be tried by jury in the Northern and Southern Criminal Courts. The South Australia Criminal Law and Penal Methods Reform Committee was informed that soon after the amending legislation came into operation about 16 persons each month elected to be tried by juries for minor indictable offences but that this number gradually decreased to about three or four per month. A record of the number of minor indictable offences tried summarily in magistrates' courts could not be obtained, but it seemed likely to the Committee that by far the greater number of persons charged with these minor offences elected to be tried by magistrate rather than by a jury.[22]

Although the South Australian experience was very positive, it is fairly clear that the quality of summary justice must be maintained, or even upgraded, to avoid an increase in the number of elections for jury trial in those jurisdictions where the choice is the defendant's. In other words, one valid and desirable method of encouraging defendants to consent to summary trial in cases for which that mode of trial is appropriate, is by

making summary trial more attractive. This is particularly so given that it seems that when indictable offences have become triable summarily at the option of the accused there is a tendency, in England at least, for the number of prosecutions to go up markedly. This carries with it the suggestion that prosecutions were not previously being brought when they could have been or else some more minor charge was being used because of the delays involved.[23] Given the increasing extent to which offences are being made triable either way, it is a factor which must be borne in mind.

At present, the main attractions of summary trial are that it is usually quicker and carries a liability to a lighter sentence. As the James Committee pointed out, expedition in the disposal of cases should be an integral feature of summary trial and it is essential that cases should come on quickly for hearing in magistrates' courts.[24] Unfortunately, the combination of an increasing number of petty traffic cases and the extension of the jurisdiction of the lower courts is making such expedition difficult to achieve, and this is putting pressure on the courts to process cases even more quickly. One criticism brought against the English Magistrates' Courts is that their business is conducted too hurriedly without adequate consideration being given to the cases.[25] It goes without saying that a defendant who is dissatisfied with the quality and thoroughness of his hearing before the magistrates is more likely to lodge an appeal and may, in future exercise his right to jury trial.

Lesser penalties are often provided for the summary conviction of indictable offences. In Canada, for example, every one convicted of an offence punishable on summary conviction is liable to a fine of not more than $500 or to imprisonment for not longer than six months, or both, except where otherwise expressly provided by law.[26] Under section 169(4) of the Seychelles Criminal Procedure Code, no sentence of imprisonment exceeding three months or a fine of more than 250 rupees can be imposed upon the summary conviction for an indictable offence. In some other countries, however, there is a trend away from such lenient penalties. In New Zealand, for instance, the maximum penalty on summary conviction for an indictable offence is three years' imprisonment or a fine not exceeding $1,000, or both.[27] A 1978 amendment to the Summary Jurisdiction (Procedure) Act of Guyana extended the criminal jurisdiction of magistrates to allow them to try certain indictable offences summarily, and provides that "the court may sentence (the accused) to any punishment or punishments to which the High Court could have sentenced him if he were convicted of such offence in the High Court",[28] although sentences in excess of three years' imprisonment or

a fine of $4,000 cannot be imposed. In such instances, the penalties are obviously not as attractive.

We saw earlier that expediting committal proceedings while lessening the burden of the lower courts, may produce an increased workload for the trial courts; similarly, by redistributing offences between higher and lower courts and making summary trial more attractive, the caseload problem may simply be being transferred from one court level to another. The problem itself has not been eradicated, it has simply disappeared from one court, only to reappear at a later date in another. Redistribution by itself is clearly not enough.

Apart from reallocating criminal cases between various court levels and restricting access to jury trials, attempts have been made throughout the Commonwealth to streamline the jury trial process per se. Factors which are perceived to slow down the jury trial process are the assembling of the jury; the requirement of unanimity and the hearing of complex cases.

"Jury engineering" is a phenomenon, if not a science, which is widely known and used in the United States, but which, fortunately, is much rarer in Commonwealth jurisdictions. In the United States it generally entails a detailed questioning of each individual prospective juror to elict details of his background and possible prejudices. This consumes a large pool of jurors and a substantial amount of time. In England, two steps have been taken to discourage any emulation of this practice in the English criminal courts. In 1973 the Lord Chief Justice issued a Practice Direction:

> A jury consists of twelve individuals chosen at random from the appropriate panel. A juror should be excused if he is personally concerned in the facts of a particular case, or closely connected with a party to the proceedings or with a prospective witness. He may also be excused at the discretion of the judge on grounds of personal hardship or conscientious objection to jury service. It is contrary to established practice for jurors to be excused on more general grounds such as race, religion or political beliefs or occupation.

Then, in 1977, the number of peremptory challenges of jurors given in section 12(1) of the Juries Act, 1974, was reduced from seven to three,[30] which severely curtails an opportunity for "jury engineering".[31] In Canada, the number of peremptory challenges accorded an accused under the Criminal Code varies with the severity of the punishment for the offence charged.

An accused charged with high treason or first degree murder has 20 peremptory challenges; if the offence is one punishable with more than five years' imprisonment the accused has 12 challenges and for an offence liable to less than five years' imprisonment, there are four peremptory challenges available.[32]

Traditionally, unanimity in jury decisions is required; that is, all the jurors must be convinced beyond a reasonable doubt of the accused's guilt and convict, or all be convicted of his innocence and acquit. A "hung" jury would result in the dismissal of the jury and a re-trial. In the event of this occurring, not only are there essentially two full-blown trials, which are time-consuming in themselves, but the initial jury deliberation is usually a lengthy process.[33] A New Zealand study concluded that the incidence of disagreements between jurors was not sufficient to justify the abrogation of the established principle of unanimity.[34] In contrast, a study of the County courts in Victoria found that the figures show a reasonably steady but significant number of hung juries each year, amounting to 183 cases in seven years. It was suggested that the introduction of majority verdicts might diminish the number of hung juries, although the possibility existed that many juries which are "hung" under the unanimity system are so badly in disagreement that the majority system would still not produce a verdict.[35]

In Nigeria, trial by jury takes place only in Lagos State. Provision is made for the acceptance of majority verdicts although the requirement of a unanimous verdict is retained for capital offences. For a non-capital offence, the verdict must be unanimous if it is given within two hours after the jury began to consider its verdict. If it is given more than two hours after deliberations began, it may be a majority verdict provided the jury (of eight in non-capital offences) are agreed in proportion of 7:1 or 6:2. On a trial of a capital offence, if on the expiration of two hours after deliberations began, not less than one out of 12 jurors agree that the accused person is not guilty of the capital offence with which he is charged but guilty of a lesser offence, the judge may accept such a majority verdict.[36]

The Juries Act of South Australia provides that in non-capital cases a majority verdict of 10:2 shall be taken as the verdict of all the jurors where they have remained in deliberation at least four hours. In capital offences, the jury may be discharged if they are unable to reach a unanimous verdict after four hours although a majority verdict of manslaughter is competent.[37]

Majority verdicts were introduced in England by section 13 of the Criminal Justice Act, 1967:

> (1) Subject to subsections (3) and (4), the verdict of a jury in proceedings in the Crown Court or the High Court need not be unanimous if -
>
> (a) in a case where there are not less than 11 jurors, 10 of them agree on the verdict; and
>
> (b) in a case where there are 10 jurors, 9 of them agree on the verdict.
>
> (3) The Crown Court shall not accept a verdict of guilty by virtue of subsection (1) above unless the foreman of the jury has stated in open court the number of jurors who respectively agreed to and dissented from the verdict.
>
> (4) No court shall accept a verdict by virtue of subsection (1) above unless it appears to the court that the jury have had such period of time for deliberation as the court thinks reasonable having regard to the nature and the complexity of the case, and the Crown Court shall in any event not accept such a verdict unless it appears to the court that the jury have had at least two hours for deliberation.

This formula has a little more flexibility than the sliding scale used in Nigeria and South Australia; it takes into account the very important factor of case complexity. In terms of the use made of majority verdicts, in England, it appears that at least in 1968 and 1969, just under 10 per cent of trials were decided by majority verdicts.[38]

Complex, technical cases do present difficulties for the jury trial process. It has been suggested that trial by ordinary jury may be outmoded in relation to what is known as commercial prosecution. The evidence is complex, involving a large number of documents, books of account and financial records - evidence which "is largely beyond the understanding of the common jury".[39] The use of special juries have been put forward from time to time as a method of overcoming this problem. The special jury would consist of persons whose education or training in a particular field would enable them to follow the evidence in certain cases much more closely than the ordinary juror.[40] As a solution, however, this remains largely untested.

In a number of Commonwealth jurisdictions, attempts to redistribute offences among criminal courts and to streamline the jury process have been abandoned or rejected in favour of total abolition of jury trial. The right to trial by jury no longer exists in India;[41] in the East African nations;[42] in Nigeria, except Lagos State; in Bangladesh;[43] in Singapore;[44] in Fiji[45]

or in the Solomon Islands.[46] In these countries, indictable offences are heard by judges sitting with or without assessors. Thus, to a great extent, trial by jury no longer exists in the Commonwealth. Unfortunately, it has not been possible to gauge the extent to which this has expedited criminal proceedings.

Footnotes

[1]For a more detailed discussion see D.A. Thomas, "The Allocation of Cases to Jury Trial" in N. Walker and A. Pearson (eds.), The British Jury System (Cambridge, 1975), pp. 67-81, and South Australia, Criminal Law and Penal Methods Reform Committee, Third Report, Court Procedure and Evidence (Adelaide, 1975), p. 6.

[2]For example, section 169 of the Seychelles Criminal Procedure Code provides that a magistrate hearing a minor indictable offence summarily does not have to record the evidence in detail, merely noting certain specified particulars.

[3]A survey of South Australia found that in the six months ending June 30, 1974, over $67,000 was paid in jury fees - South Australia Criminal Law and Penal Methods Reform Committee, supra footnote 1 at p. 88.

[4]Great Britain, Home Office, Report of the Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts (London, 1975), Cmnd. 6323, para. 25. See also J. Daniels, "Trial By Jury: Sacred Cow or Alien Transplant?", (1974), 6 Review of Ghana Law 106 at pp. 114-15.

[5]Indeed, in some jurisdictions, the right to trial by jury is entrenched in the Constitution. For example, Article 20(2)(9) of the Bahamas Constitution reads: "(2) every person who is charged with a criminal offence...(g) shall, when charged on information in the Supreme Court, have the right to trial by jury."

[6]New Zealand, Royal Commission on the Courts, Report (Wellington, 1978), paras. 142-43.

[7]Great Britain, Report of the Interdepartmental Committee etc., supra footnote 4 at para. 36.

[8]I.R. Scott and C.T. Latham, "A Comment on the Report of the James Committee", [1976] Criminal Law Review 159 at p. 162.

[9]Clause 23 of the original version of the Bill. According to one estimation, this twenty pound limit in theft and property cases should have removed 5,000 cases each year from the Crown Court - "The Criminal Law Bill", [1977] Criminal Law Review 65 at p. 68.

[10]Great Britain, Report of the Interdepartmental Committee etc., supra footnote 4 at para. 87.

[11]For a detailed discussion of this reaction see S. Shetreet, "The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts", (1979), 13 University of British Columbia Law Review 52, and E. Griew, The Criminal Law Act, 1977 (London, 1978).

[12]378 Parl. Deb. H.L. (1976) 5th Ser. 848.

[13]Criminal Law Amendment Act, 1977, c. 45 section 23.

[14]382 Parl. Deb. H.L. (1977) 5th Ser. 74.

[15]Canadian Criminal Code R.S.C., 1970, c. C-34, section 430.

[16]Saskatchewan, Office of the Attorney General, Study of the Organization of the Courts in Saskatchewan, (No. 2), (1974), p. 46.

[17]The Minister of Justice and Attorney General of New Zealand has recently published a paper - "A New Court Structure for New Zealand" - outlining the Governments response to the Report of the Royal Commission on the Courts. It contains a proposal that every person charged with an indictable offence will continue to be entitled to be tried by a jury, but the Crimes Act will be amended to permit an accused to elect trial before a High Court judge alone, save in very serious cases.

[18]I.R. Scott and C.T. Latham, supra footnote 7 at pp. 166-67.

[19]J.G. Wilson, "Pre-trial Criminal Procedure in Scotland: A Comparative Study", (1965), 82 South African Law Journal 69, 192.

[20]Scottish Home and Health Department, The Sheriff Court (Edinburgh, 1967), Cmnd. 3248, para. 227.

[21]South Australia Justices Act Amendment Act, 1972, (No. 2), section 13.

[22]South Australia Criminal Law and Penal Methods Reform Committee, supra footnote 1 at pp. 92-93.

[23]JUSTICE Society, Annual Members' Conference, 1974, The Future of Trial by Jury, p. 2.

[24]Great Britain, Report of the Interdepartmental Committee etc., supra footnote 4 at para. 70.

[25]Id. at para. 253. See also Papua New Guinea, Law Reform Commission, Indictable Offences Triable Summarily, Joint Working Paper No. 1, (1977), p. 4.

[26]Canadian Criminal Code, supra footnote 14 at section 722(1).

[27]New Zealand Summary Proceedings Act, 1957, as amended, section 7.

[28]Guyana Administration of Justice Act, 1978, (Act No. 21 of 1978), section 4.

[29]Practice Direction (Jurors), [1973] 1 W.L.R. 134.

[30]England Criminal Law Act, 1977, section 43.

[31]Two recent decisions of the Court of Appeal have addressed the issue of jury vetting: in R. v. Sheffield Crown Court, ex parte Brownlow [1980] 2 W.L.R. 892, the Court expressed serious doubts whether there should be any jury vetting at all, either by the prosecution or the defence. It has since held, however, that some degree of scrutiny is necessary if disqualified persons are to be excluded from juries - R. v. Mason, The Times, June 4, 1980.

[32]Canadian Criminal Code, supra footnote 14 at section 562.

[33]For example, section 56 of the New South Wales Jury Act, 1977, provides that where the jury have retired for more than six hours, the court may discharge them if it seems unlikely that they will agree. This would seem to be an attempt to curtail the length of inconclusive jury deliberations.

[34]New Zealand, Royal Commission on the Courts, supra footnote 5 at para. 219.

[35]J. Willis and P. Sallman, "Criminal Statistics in the Victorian Higher Courts: A First Glimpse of the Possibilities", (1977), 51 Law Institute Journal 498, 570 at p. 516. For arguments supporting the majority verdict, see A.K.P.Kludze, "The Jury and the Burden of Proof", (1977), 14 University of Ghana Law Journal 55.

[36]F. Nwadialo, The Criminal Procedure of the Southern States of Nigeria (Benin City, 1976), pp. 206-7.

[37]South Australia Juries Act, 1927, as amended, section 57.

[38]JUSTICE Society, supra footnote 21 at p. 4.

[39]Report by P.D. Connelly, Q.C. to the Parliament of Queensland into the affairs of Queensland Syndication Management Pty. Ltd. and others, (1973), para. 114. See also "Juries 'not competent'", (1979), 5 Commonwealth Law Bulletin 938.

[40]South Australia Criminal Law and Penal Methods Committee, supra footnote 1 at p. 101 and Scotland, Committee on Criminal Procedure in Scotland (Thomson Committee), Criminal Procedure in Scotland (second report) (Edinburgh, 1975), Cmnd. 6218, paras. 51.34-51.37.

[41]Trial by jury was abolished by the Code of Criminal Procedure, 1973, which repealed the Code of Criminal Procedure, 1898.

[42]D. Brown, "Reform of the Administration of Justice", (1966), 2 East African Law Journal 248 at p. 249.

[43]M. Cheong, "Jury Trial: the Singapore Experience", (1973), 11 University of Western Australia Law Review 120.

[44]C.H.S. Jayewardene, "Crime and Justice in Fiji", (1977), 5 Crime et/and Justice 240 at p. 242.

[45]Correspondence from Attorney General's Chambers, Honiara dated February 5, 1979.

VIII Speeding Up the Appellate Process

> Appeals illustrate, as nothing else could that speed of disposal of court business and the requirements of justice may point in opposite directions. An appeal always involves delay yet rights of appeal are generally regarded as desirable in principle.[1]

Originally, the common law of England recognised no right of appeal proper in criminal matters. One exception was the writ of error which lay to set aside a conviction where there was an error on the face of the record. This remedy, however, was so limited in its application that it was rarely used. From early times the practice arose whereby a judge who had a difficult case would stay the execution of sentence and refer the matter for discussion at an informal meeting of judges. If they were of the opinion that an accused had been improperly convicted, they would recommend a pardon, otherwise the sentence was executed. This informal gathering was eventually erected into a court for Crown Cases Reserved in 1848 which was composed of all the judges. Their power was only to determine any questions of law that arose upon the trial of an accused at either assizes or quarter sessions, and not questions of fact or sentence. In addition, only the prisoner and not the Crown could appeal and even then, it was not a matter of right. That right was eventually promulgated in the English Criminal Appeal Act, 1907, which created the Criminal Court of Appeal.[2] Similar measures were enacted throughout the Commonwealth as it came to be realised that rights of appeal were fundamental to the proper administration of criminal justice. Generally there now exists an absolute right of appeal on a question of law, with a more restricted right on mixed questions of fact and law, on questions of fact and against sentence.

There are three purposes behind the appellate review of criminal convictions: firstly, to see that justice is done in a particular case, that is, to ensure that the defendant had a fair trial and that no prejudicial error was committed; to provide a judicial mechanism for the on-going development of the criminal law, both substantive and procedural, in the common law manner; and lastly, to ensure the uniform and even-handed administration of criminal justice throughout a particular jurisdiction.[3] The right of appeal is thus an important procedural safeguard.

Courts of appellate jurisdiction have not been immune to the ills afflicting the courts of first instance; they too are facing ever-increasing caseloads and mounting backlogs. Increasing volume carries a constant dual threat: that the judicial machinery will break down from overload and that efforts to keep the mass moving so as to avoid a breakdown will erode the

quality of adjudication. In order to avoid either eventuality, attempts are being made throughout the Commonwealth to streamline the appellate process.

There are certain unavoidable delays in getting a case ready for appeal: counsel must often be allotted the appellant under legal aid; the legal representative or the appellant must draw up the grounds for appeal and the transcript of the trial must be prepared.[4] There is a limit to the extent to which the time available for these preparations can be curtailed.

Because the right of appeal is seen as being so fundamental to the proper administration of justice, speeding up the appellate process by curtailing that right has not been a widespread solution. In India, however, the Criminal Procedure Code of 1973 provides that there is no right of appeal in petty cases:

> s. 376 - Notwithstanding anything contained in section 374, there shall be no appeal by a convicted person in any of the following cases, namely:-
>
> (a) where a High Court passes only a sentence of imprisonment for a term not exceeding six months or of fine not exceeding one thousand rupees, or of both such imprisonment or fine;
>
> (b) where a Court of Session or a Metropolitan Magistrate passes only a sentence of imprisonment for a term not exceeding three months or of fine not exceeding two hundred rupees, or both such imprisonment or fine;
>
> (c) where a Magistrate of the first class passes only a sentence of fine not exceeding one hundred rupees; or
>
> (d) where, in a case tried summarily, a Magistrate empowered to act under section 260 passes only a sentence of fine not exceeding two hundred rupees.[5]

In addition, there is in India, no appeal where an accused pleaded guilty if he was convicted in the High Court or in the Metropolitan Magistrates' Court except as to the extent or legality of sentence.[6] The Malawi Criminal Procedure and Evidence Code similarly provides that there shall be no appeal from a plea of guilty where the accused has been convicted by a subordinate court, except as to the extent and legality of sentence imposed.[7]

A more general trend in the reform of appellate procedures is that of replacing multiple rights of appeal with a single right of appeal with a revision or second appeal only on some substantial question of law. Provision for too many successive appeals and revisions has the effect of delaying the final disposal of cases.[8] In Tanzania, for example, before the court system was simplified, there existed a number of courts, and often a

party was allowed three or four appeals. Taking a case up to the Central Court of Appeal might involve as many as seven appeals. This was both time-consuming and expensive.[9]

The administration of justice in Sri Lanka underwent radical reform in the early 1970s, one result being the vesting of all appellate authority in a single court - the Supreme Court.[10] This means that there will be only one appeal in criminal proceedings, rather than the two which were available prior to 1971. This departure was inspired by the necessity to eliminate the massive recurrent backlog of appeal cases that accumulated owing to the multiple appeal system and the excessive workload of the courts. The original jurisdiction of the Supreme Court has largely been removed in order to conserve sufficient judicial time for the speedy disposal of appeals. To reinforce this goal of the adequate judicial consideration of appeals, it has also been provided that appeals from decisions of Magistrates' Courts shall be heard by at least two judges and appeals from the District Courts and High Court by at least three judges.[11]

Attempts have also been made to modernise certain appellate procedures which are no longer relevant to modern conditions, a prime example being the abolition of the appeal de novo. In this instance, Canadian experience will be examined. Until 1976, an appeal from summary conviction was by way of a trial de novo. This was essentially a new trial before an appeal court in which the accused stood in exactly the same position procedurally as he stood after the entry of his plea before the summary conviction court. If he had pleaded not guilty at trial, the Crown on appeal was required to present its evidence and prove its case beyond a reasonable doubt. In 1976,[12] sweeping changes were introduced which effectively abolished trial de novo, substituting an appeal on the record of the proceedings in the lower court. In a news release issued by the Minister of Justice at the time the amendment was proposed, it was explained:

> The de novo or new trial appeal procedure from summary conviction cases was formulated when most of these cases were heard by lay magistrates. It was thought essential to permit the dissatisfied party the opportunity of having the case heard by a legally trained trial judge. This justification no longer exists since there is a broad availability of trained magistrates. The procedure is unnecessarily time-consuming and a serious inconvenience for the witnesses.[13]

On the whole, Commonwealth jurisdictions provide a right of appeal to a superior court with a further rehearing only in very exceptional cases.[14] It is unlikely that the right of appeal can be restricted further in order to expedite the final disposal of criminal cases. The type of measures that are being adopted are those which restrict the scope of appellate review; those which deter groundless appeals and those which streamline the administration and processing of appellate cases.

If an appeal court is willing to alter a trial judgement on grounds of a minor nature, it is more than likely that more people will lodge an appeal in the hope of having their conviction overturned or their sentence reduced. As one commentator has pointed out, a reduction in the number of appeals, and hopefully, a concomitant speeding up of the hearing of the remainder, might be achieved if the scope of appellate review is limited.[15] This can be done in several ways: firstly, the appellate court should only review factual determinations to ascertain whether they are reasonably supported by the evidence; secondly, the court should consider issues which were not raised in the trial court only to prevent manifest injustice or to determine jurisdictional questions, and the court should not disturb a trial court judgement unless there was a denial of substantial justice or a serious departure from established procedure.[16]

While an absolute right of appeal on a question of law is usually provided in common law jurisdictions, leave to appeal must be sought where the grounds of appeal rest on questions of fact or fact and law or if the appeal is against sentence.[17] Groundless appeals are discouraged by the necessity of obtaining leave to appeal whenever the point is not one of law alone. This requirement was written into the original legislation creating the English Court of Criminal Appeal in 1907 and was subsequently adopted by other Commonwealth countries. Even in 1907 obtaining leave was seen as a "seive" which "would hold back the hopeless cases".[18] By coupling the necessity of obtaining leave with the authority of a single judge to grant or deny leave in the name of the court, the Act erected a screening mechanism from the outset. Under the "single judge system" applications for leave to appeal are referred to a single judge rather than the full court of three judges and he has the power to refuse or grant such leave. If he refuses, however, the applicant is at liberty to renew his application to the full court.[19] A similar provision exists in the Supreme Court and the Federal Court of Appeal in Nigeria: a single judge of those respective courts is empowered to exercise any power vested in the court other than the final determination of a cause or matter. In criminal cases, if a judge of the

court refuses an application for the exercise of any such power, the applicant is entitled to have his application determined by the full court.[20] In Canada, if the single judge refuses leave to appeal, the accused may appeal for leave to the full court by filing a notice of application for leave within seven days of the single judge's refusal.[21] By utilising the single judge procedure, the appeal court is freed of the task of dealing with a percentage of really hopeless cases, since, if the single judge thinks that some arguable point is involved he will grant leave.

As to the effectiveness of this system as a screening mechanism: in the English Court of Appeal in 1970 there were 8,280 applications for leave to appeal; 3975 of these were abandoned; in 3363 cases leave was refused and leave granted in 942. In 1973, there were 6171 applications, 1541 abandonments, 3516 refusals and 1114 cases leave to appeal was granted. The percentage of cases screened out by the single judge refusing to grant leave to appeal rose from 41 per cent in 1970 to 57 per cent in 1973.[22] This is impressive evidence of the procedure as a screening device. One can readily imagine the additional judge time that would have been required if all applications for leave had been brought before the full court. Of course, if every unsuccessful applicant were in fact to renew his application, the single judge procedure would lose its point and become simply a time-consuming interim step. Yet, in practice, only a minority of would-be appellants renew their applications. In 1970 in England one-sixth of all applications refused by a single judge were renewed; the reaminder were abandoned.[23] A former Lord Chief Justice of the Court of Appeal has expressed the opinion that the percentages of abandonments are considerably greater than was previously the case due to a change in procedure: formerly the prisoner was merely told by the prison governor that his application was refused. Nowadays he gets a copy of a form showing that on a certain date his application was considered by the judge signing the form and that the judge had refused the application for the reasons stated on the form.[24]

An alternative to the leave to appeal procedure is provided in some Commonwealth jurisdictions in the form of a certificate granted by the trial judge. The Criminal Law Consolidation Act, 1935, of South Australia, as amended, provides an absolute right of appeal on a question of law; a right of appeal on questions of fact or fact and law on the certificate of the trial judge; a right of appeal with leave of the Full Court of Appeal on other grounds, including sentence, unless the sentence is fixed by law.[25] In Queensland, a person convicted on indictment may appeal with leave of the appeal court or the certificate of the judge of the court of trial on

questions of fact, or mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal.[26] A similar provision in the Canadian Criminal Code provides a right of appeal on grounds of fact or fact and law with leave of the Court of Appeal or a judge thereof or upon the certificate of the trial judge that the case is a proper case for appeal.[27] In these instances, it is clear that the trial judge is to some extent playing the role of the "single judge", although, having supervised the trial at first instance, his objectivity may be slightly coloured. In the Canadian context it has been observed that the certificate of the trial judge as an alternative to the leave of the Court of Appeal should not be granted by the trial judge as a matter of course; he should be satisfied that there is a reasonable doubt that the verdict is correct and his certificate should contain a statement to the effect. This provision will only apply where there has been a trial by jury rather than trial by judge alone, otherwise the certificate would obviously be inconsistent with his finding as to the guilt of the accused beyond a reasonable doubt.[28]

An interesting measure designed to reduce the scope of criminal appeals was enacted in the Criminal Appeal Rules, 1979, of South Australia. They provide that the Full Court will not allow a ground of appeal that relates to a direction or any omission to direct upon a question of fact alone, or upon a question of mixed law and fact or that relates to a decision as to the admission or rejection of evidence given by a judge presiding at the trial, unless express objection was taken or express submissions were made with respect thereto by the applicant to the presiding judge.[29]

Where the single judge or certificate procedure does not exist to screen cases and for the screening of appeals on questions of law there is often a procedure for the summary dismissal of what are known as "frivolous" appeals. In England, the percentage of criminal appeals falling into this category is estimated as ranging between 60 and 90 percent.[30] The English Criminal Appeal Act, 1968, section 20 provides:

> If it appears to the registrar of criminal appeals of the Court of Appeal... that a notice of an appeal which involves a question of law alone does not show any substantial ground of appeal, he may refer the appeal to the Court for summary determination; and where the case is so referred the Court may, if they consider that the appeal is frivolous or vexatious, and can be determined without adjourning it for a full hearing, dismiss the appeal summarily, without calling on anyone to attend the hearing or to appear for the Crown thereon.

Substantially similar provisions exist in Canada,[31] Queensland,[32] Scotland,[33] South Australia,[34] Tasmania,[35] Malawi,[36] India[37] and Kenya.[38]

The requirement that the prospective appellant must seek leave to appeal where the ground of his appeal is not purely a matter of law and the summary dismissal of groundless appeals are aimed at preventing the appellate courts being swamped under a mass of "hopeless" appeals, and in so doing, expedite the appellate process for those cases worthy of consideration.

Courts of appeal, in making their decisions, will generally rely more or less exclusively on the transcripts of the trial. The hearing of new evidence is the exception rather than the rule in many jurisdictions,[39] although one observer attributes a measure of the delays experienced in the English setting to the great opportunities which exist in the Court of Appeal to submit new evidence on any issue, if it is in writing. Presenting the testimony of live witnesses, however, requires the leave of the court. Application for leave is typically accompanied by an affidavit giving the substance of what the witness will say. On sentence appeals the court has an easy-going attitude and will listen to virtually anything the appellant wants to offer; but on conviction appeals, the evidence is supposed to be limited to that which is admissible under the ordinary rules of evidence in trial court.[40] Thus, the more evidence an appeal court has to consider over and above the trial transcript, the more time is consumed, particularly if a single judge must hear multiple applications for leave to introduce new evidence. While all steps must be taken to secure justice for the appellant, restraint must be exercised to avoid transforming an appeal hearing into what is essentially a completely new trial.

As a rule, appellate courts will not alter the decision of the trial court unless there are substantial grounds for so doing. As a result, even where an appellant is technically in the right, his appeal may be dismissed if 'no substantial miscarriage of justice has actually occurred', and if no reasonable trier of fact would or could have given any other verdict than that which in fact was given, and no substantial injustice has been done. This rider covers the kind of situation where, for example, a fact has been elicited by an improper leading question, but the fact was of no relevance to the outcome of the trial.

Fairly typical of such saving provisions is section 353(1) of the South Australian Criminal Law Consolidation Act, 1935, as amended. It reads as follows:

> The Full Court on such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported, having regard to the evidence, or that the judgement of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
> Provided that the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.[41]

It is hoped that a prospective appellant having been informed of this policy and the relative merit of his own case by counsel will not pursue an appeal where the error is a marginal one which the appeal court is unlikely to correct.

The importance of timely and forthright legal advice cannot be underestimated in reducing appellate court caseload and expediting hearings on appeal. Most jurisdictions have a time limit for the lodging of appeals, although provision is usually made for cases being received out of time in special cases.[42] If the convicted person has not yet received advice from counsel as to the merits of his appeal then this period is near expiry, he is likely to proceed with his case, however weak it might actually be. New machinery was promulgated in England in 1974 to avoid such an unsatisfactory state of affairs. The essence of the new procedure is reliance on a pamphlet "Preparation for Proceedings in the Court of Appeal, Criminal Division" issued by the Registrar of Criminal Appeals. Under this, counsel's brief contains instructions to advise or assist on questions of grounds of appeal: counsel should state at the end of a case either that in his view there are grounds or that there are no grounds or that he needs further time for consideration. If either grounds or provisional grounds are thought to exist, counsel should either draft them or state that they will follow within 14 days. This is handed to his instructing solicitor before he leaves the court, together with his written view which must be signed by him. If counsel cannot advise at the court, he must send written advice within 14 days. The timetable is such that the client gets clear advice within the 28 day period allowed for filing an application for leave to appeal.[43] If, in counsel's view there is no ground for an appeal it is to be hoped that his client will act accordingly and refrain from lodging a notice of leave to appeal.

Other measures of deterrence exist to discourage convicted persons from lodging frivolous appeals. Those countries in which the court of appeal has the power to increase sentence on appeal have a ready-made deterrence mechanism. This power to increase sentence on appeal exists in Scotland,[44] Uganda,[45] Tasmania,[46] South Australia[47] and India.[48] When the English Court of Criminal Appeal was established in 1907 it had the power to increase sentences, but this was removed by the Criminal Appeal Act, 1966. During the debate on this Bill, several politicians argued that if this change were made, the Court would be swamped by appeals. Many people now feel that this prediction has been fulfilled and some have suggested that the power to increase sentence be restored.[49] One study of the deterrent effect of the power to increase sentence on appeal concluded, however, that although there has been a large increase in the number of appeals in England, it is not possible to say with any degree of certainty that frivolous appeals have contributed disproportionately to the increase.

> The safe conclusion seems to be that there is little evidence for supposing either that the abrogation of the power to increase sentence caused an increase in appeals or that the restoration of the situation as it was before 1966 would lead to a reduction in their number.[50]

Unless an appellant is released on bail pending his appeal, he will spend the interim period in custody. Thus, whether this period will ultimately count towards his sentence is of great significance to him, particularly given the length of time it may take for his appeal to be finally decided. In Uganda there exists what is called the "six weeks rule":[51] the first six weeks spent in custody pending the determination of an appeal is not counted as part of his sentence, unless the appeal court directs otherwise. By contrast, the Scottish rule provides that the time during which an appellant, after admission to bail, is at large pending the determination of his appeal shall not be reckoned as part of any term of imprisonment under his sentence, but for the appellant in custody, this interim period shall be reckoned as part of any term of imprisonment imposed, subject to any direction from the Court to the contrary.[52]

Before 1966, English law provided that if an application for leave to appeal were refused, the defendant automatically lost credit for time served up to a maximum of 42 days, unless the court directed otherwise. The Criminal Appeal Act, 1966, abolished this automatic loss of time, providing instead that in cases of unsuccessful applications for leave to appeal, the full court or single judge might direct in its discretion, that

part or all of the time served pending the appeal not count towards the sentence. In other words, the time served now counts unless the appellate court directs otherwise. In the years immediately following that change in the law, the Court of Appeal, Criminal Division, seldom exercised its discretion to direct that time not count.[53] However, in 1970 the Lord Chief Justice read a Practice Note pointing out the strain on the court and the appellate process of having so many unarguable applications. In view of this continued escalation in applications and of the fact that legal aid on appeals was widely available, it was announced that in future the Court would not be reluctant, in connection with unarguable applications, to direct that the time served not count towards the ultimate sentence.[54] Further,

> [W]here an application devoid of merit has been refused by the single judge and a direction for loss of time has been made, the full court, on renewal of the application, may direct that additional time shall be lost if, once again, it thinks it right so to exercise its discretion in all the circumstances of the case. The object is to enable prompt attention to be given to meritorious cases by deterring the unmeritorious which stand in their way.[55]

Immediately after this policy was announced, the volume of case filings in the Court of Appeal fell dramatically. Within three or four weeks, filings had dropped from nearly 1,000 a month to approximately 500 monthly. The total caseload for 1970 ended up roughly on a level with that of 1966, substantially lower than that of the three intervening years.[56] There has not been, however, any wholesale deprivation of time by the Court. From May to December, 1970, directions for time not to count were entered in 547 of the 2,693 applications refused by the single judge - a ratio of approximately one in five. The aggregate time directed to be lost was 12,895 days, an average of 23 days lost in each case in which the direction was made. On the data available, it would appear that although these directions are made selectively, the deterrent effect is strong.[57]

More recent developments, however, indicate that the effectiveness of this provision has waned somewhat. The Lord Chief Justice has seen fit to issue a further Practice Note directed at discouraging the lodging of hopeless appeals:[58]

> In order to accelerate the hearing of those appeals in which there is some merit, single judges will, from 15th April 1980, give special consideration to the giving of a direction for loss of time, whenever an application for leave to appeal is refused. It may be expected that such a direction will normally be made unless the grounds are not

> only settled and signed by counsel, but also supported by the written opinion of counsel. Advice on appeal is, of course, often available to prisoners under the legal aid scheme. Counsel should not settle grounds, or support them with written advice, unless he considers that the proposed appeal is properly arguable. It would, therefore, clearly not be appropriate to penalise the prisoner in such a case, even if the single judge considered that the appeal was quite hopeless.
>
> It is also necessary to stress that, if an application is refused by the single judge as being wholly devoid of merit, the full court has power, in the event of renewal, both to order loss of time, if the single judge has not done so, and to increase the amount of time ordered to be lost if the single judge has already made a direction, whether or not grounds have been settled and signed by counsel. It may be expected that this power too will, as from 15th April 1980, normally be exercised.

The Australian situation is fairly straightforward: under recent legislation enacted in Victoria, no appellant will run the risk of losing custody credit;[59] Tasmanian appellants are allowed full credit "unless the court otherwise orders";[60] the remaining States operate under provisions which reproduce subsection 14(3) of the English Criminal Appeal Act, 1907, that is, time served pending an appeal shall not count, unless direction is given to the contrary. This section rests the reason for forfeiture of appeal time on the basis that the offender is being "specially treated as an appellant" while in custody. An appellant who wishes to avoid possible forfeiture can request that the prison authorities treat him as an ordinary prisoner rather than accord him the "special treatment" provided by the prison regulations.[61]

An interesting practice occurs in Ontario: in that province appeals by those convicted and sentenced to a period of imprisonment are sometimes heard in a court room within the prison itself. This saves the manpower and cost involved in the transportation of prisoners to the court. Also, it has had the effect of reducing the number of such appeals, which, as one commentator has observed, are often motivated by the desire to take a trip to town and have a day out of prison.[62]

The hearing of a case on appeal involves a great deal of administrative work, and delays also occur in this part of the process. Before an application for an appeal to leave can be considered, the papers in the case must be obtained from the trial court and in most cases a transcript must be made from the shorthand notes or recording of the trial.[63] In Ontario

it has been found that the main cause of delay with appeals is the time required for transcription of the evidence of trial proceedings.[64] In order to expedite appeals and eliminate unnecessary costs, a Practice Direction was issued limiting the contents of transcripts:

> All court reporters are being instructed as follows:
> 'that hereafter, unless otherwise ordered by a judge of the Court of Appeal and notwithstanding other instructions from counsel, they are to omit from all transcripts of evidence for criminal or civil appeals:
> (a) all proceedings on the challenge of the array or of jurors for cause;
> (b) any opening address of the trial judge;
> (c) the opening and closing address of counsel;
> (d) all proceedings in the absence of the jury and all argument, in the absence of the jury, and where there is no jury, excepting objections to a charge and the trial judge's ruling thereon together with any reasons for his ruling;
> (e) all objections to the admissibility of evidence excepting only a notation that an objection was made together with any ruling of the trial judge including any reasons for his ruling.'
> In supplement to that instruction counsel are required to avoid ordering the transcription of any and all evidence that is not essential to an appeal ....In all cases counsel are also required to agree as to undisputed facts rather than having evidence to prove them transcribed. Failure of counsel in these respects...may invoke the sanctions of the Court.[65]

In England, it is the Registrar of Criminal Appeals who decides, on the basis of the grounds of appeal stated in the application, what portions of the trial proceedings are to be transcribed, and he notifies the "shorthand writer" accordingly. Only as much of the transcript is ordered as is essential to enable the court to pass on the grounds asserted in the application.[66]

The Registrar is in charge of a sophisticated piece of administrative machinery - the Criminal Appeal Office - designed to expedite the preparation and processing of appeals. One American commentator has expressed the view that this is perhaps the key to the Court of Appeal's ability to cope with its large caseload.[67] The role of the Registrar's office is best described as total management of the case from the initiation of appellate proceedings by the defendant to the point where actions by a judge of the court is to be taken.

After filing the application for leave to appeal, the defendant or his counsel need do nothing more to perfect the appeal. The Registrar takes

entire charge of the matter at that point. His office is responsible for the presentation to the judges of the case in a satisfactory format within an acceptable time. This includes obtaining and assembling the record and putting it before the court. The entire criminal appeals process is facilitated by the use of a number of printed forms; little or nothing is left to be devised ad hoc by anyone. Often these forms can be employed simply by checking the appropriate blanks. This makes each step quicker and easier for the staff, judges, lawyers and particular for any unrepresented defendants. They also provide some safeguard against a defendant overlooking a matter which would be in his interest and make the contents of a case file easier to grasp since there is a relatively high degree of uniformity and succinctness of information.[68]

A new system of monitoring the progress of appeals was introduced into the Ontario Court of Appeal in 1978: a colour-coding scheme has provided a mechanism whereby appeals can be isolated where the rules have not been complied with or where there appear to be unjustifiable delays. Before this system was operational, in order to put the Court on a current basis, all appeals which were over a year old and had not been proceeded with were dealt with by five special purge courts. The Court intends to continue monitoring appeals with the goal that almost every appeal will be heard within six months of the judgement appealed from,[69] a worthy objective.

This section on appellate procedure has served to illustrate that modernising and streamlining the rules of criminal evidence and procedure is only one method of eradicating the worst delays in the criminal justice system; administrative efficiency in the court organisation is also necessary if the processing of cases is to be expedited. It is to the issue of courts administration in a more general context that we now turn.

Footnotes

[1]Great Britain, Scottish Home and Health Department, The Sheriff Court (Edinburgh, 1967), Cmnd. 3248, para. 66.

[2]R.E. Salhany, Canadian Criminal Procedure (Toronto, 1978), pp. 306-307.

[3]D.J. Meador, Criminal Appeals: English Practices and American Reforms (Charlottesville, 1973), p. 7.

[4]Lord Parker of Waddington "The Criminal Division of the Court of Appeal", (1970), 12 Criminal Law Quarterly 307 at p. 317.

[5]Indian Criminal Procedure Code, 1973, section 376.

[6]Id. section 375,

[7]Malawi Criminal Procedure and Evidence Code, Cap 8:01, section 348.

[8]H.R. Khanna, "Some Reflections on Criminal Justice", (1975), 17 Journal of Indian Law Institute 505 at p. 509.

[9]"Report on Judges' and Magistrates' Conferences, Nov. 1967-March 1968", (1968) 1 Eastern Africa Law Review 167 at pp. 168-69.

[10]Sri Lanka Administration of Justice Law, No. 44 of 1973, effective January 1, 1974. For commentary see L.J.M. Cooray, "Administration of Justice in Sri Lanka", (1976), 7 Hong Kong Law Journal 67.

[11]L.J.M. Cooray, id. at p. 80.

[12]Criminal Law Amendment Act, 1975-75-76, c. 93, sections 89-95.

[13]R.E. Salhany, supra footnote 2 at p. 341.

[14]For example, in England, an appeal lies to the House of Lords from any decision of a Divisional Court of the Queen's Bench Division in a criminal cause or matter, at the instance of the defendant or the prosecutor, but only with the leave of that court or of the House of Lords itself. Leave will not be granted unless the Divisional Court certifies that a point of law of general public importance is involved, and it appears to that court or to the House of Lords, as the case may be, that the point is one which ought to be considered by the House.

[15]S. Shetreet, "Remedies for Court Congestion and Delay: The Models and the Recent Trend", (1978-79), 17 University of Western Ontario Law Review 35 at p. 54.

[16]Id.

[17]For example, Criminal Procedure (Scotland) Act, 1975, c. 21, section 228 and Tasmania Criminal Code Act, 1924, as amended, section 401.

[18]Great Britain, Report of the Interdepartmental Committee on the Court of Criminal Appeal (London, 1966), Cmnd. 2755, p. 25.

[19]"The Lord Chief Justice on Criminal Appeals", (1969) 46 Law Guardian 11, at pp. 13-14.

[20]Nigeria Supreme Court Act, 1960, section 2 and the Federal Court of Appeal Decree, 1976, section 10. For further discussion of these provisions see A.O. Obilade, The Nigerian Legal System (1979), pp. 171-81.

[21]Canadian Criminal Code R.S.C. 1970, c. C-34, section 603(3).

[22]For a full breakdown of the Court of Appeal caseload see R.M. Jackson, The Machinery of Justice in England (1977), p. 207.

[23]D.J. Meador, supra footnote 3 at pp. 45-46.

[24]Lord Parker of Waddington, supra footnote 19 at pp. 13-14.

[25]Section 352.

[26]Queensland The Criminal Code Act, 1899, as amended, section 668D(6).

[27]Canadian Criminal Code, supra footnote 21 at section 603.

[28]R.E. Salhany, supra footnote 2 at p. 310.

[29]The Criminal Appeal Rules, 1979. See Australian Legal Monthly Digest 1979, para. 640.

[30]D.J. Meador, supra footnote 3 at p. 11. The former Lord Chief Justice put the figure at 75 per cent - Practice Note [1970] 1 All E.R. 1119.

[31]Canadian Criminal Code, supra footnote 21 at section 612.

[32]Queensland The Criminal Code Act, 1899, as amended, section 671H(2). This provision applies to leave to appeal against a conviction or against sentence.

[33]Criminal Procedure (Scotland) Act, 1975, section 256. Here, the decision as to the summary determination is purely that of the court.

[34]South Australia Criminal Law Consolidation Act, 1935, as amended, section 365.

[35]Tasmania Criminal Code Act, 1924, as amended, section 416(2).

[36]Malawi Criminal Procedure and Evidence Code, cap. 8:01. section 351.

[37]Indian Criminal Procedure Code, 1973, section 384.

[38]Kenya Criminal Procedure Code, sections 352 and 352A.

[39]For example, Canada - see R.E. Salhany, supra footnote 3 at p. 328.

[40]D.J. Meador, supra footnote 3 at pp. 73 and 133.

[41]See also Canadian Criminal Code, supra footnote 21 section 613(1)(b)(iii); Tasmania Criminal Code Act, 1924, as amended, section 402 and Uganda Criminal Procedure Code, section 331(1).

[42]For example, in England notice of leave to appeal must be served within 28 days; in Queensland the period is 14 days and in Malawi, 10 days.

[43]R.M. Jackson, supra footnote 22 at pp. 208-209.

[44]Criminal Procedure (Scotland) Act, 1975, section 254(4).

[45]Uganda Criminal Procedure Code, section 333.

[46]Tasmania Criminal Code Act, 1924, as amended, section 402.

[47]South Australia Criminal Law Consolidation Act, 1935, as amended, section 353(4). The courts of South Australia have in effect abrogated this power, the Full Court announcing that an appeal court should not act sua sponte to increase sentences but should only so act in suitable cases where there has been a cross-appeal by the Crown - Fischer v. Chambers (1972) 4 S.A.S.R. 105 at p. 114.

[48]Indian Criminal Procedure Code, 1973, section 386.

[49]S. White, "Deterrence and Criminal Appeals: the effect of the Criminal Appeal Act, 1966", (1975), 38 Modern Law Review 369.

[50]Id. at p. 392.

[51]Uganda Criminal Procedure Code, section 333(3).

[52]Criminal Procedure (Scotland) Act, 1975, section 268.

[53]D.J. Meador, supra footnote 3 at p. 63.

[54]Lord Parker C.J. Practice Note [1970] 1 All E.R. 1119.

[55]Id. at p. 1120.

[56]D.J. Meador, supra footnote 3 at pp. 64-65.

[57]Id. at p. 65.

[58][1980] 1 All E.R. 555.

[59]Victoria, Act No. 8701, assented to May 1975, amending the Social Welfare Act, 1970, by introducing section 202A.

[60]Tasmania Criminal Code Act, 1924, as amended, section 415(4) and Prison Regulation 98.

[61]For a typical provision to this effect see Queensland Prisons Act, 1958, as amended, section 26(2). For a more detailed discussion of the Australian situation see F. Rinaldi, Essays in Australian Penology (Canberra, 1976) and "Penalising the Appellant in Appeals by Convicted Persons", 50 Australian Law Journal 9.

[62]S. Shetreet, supra footnote 15 at p. 41.

[63]New Zealand Royal Commission on the Courts, Report (Wellington, 1978), para. 220.

[64]W. Howland et al., "Reports on the Administration of Justice in Ontario on the Opening of the Courts for 1979", (1979), 13 Law Society of Upper Canada Gazette 3 at p. 9.

[65]Supreme Court of Ontario, Revised Practice Direction (1977) Criminal Lawyers' Association Newsletter 11.

[66]D.J. Meador, supra footnote 3 at p. 30.

[67]Id. at p. 28.

[68]Id. at pp. 28-40.and D.R. Thompson and H.W. Wollaston, The Court of Appeal, Criminal Division (London, 1969), pp. 101-104.

[69]W. Howland et al., supra footnote 63 at p. 9. In Nigeria, an administrative directive has been promulgated which requires all appeals to be heard within three months of the trial judgement - Correspondence from the Solicitor General's Division, Lagos, dated January 22, 1979.

IX Courts Administration

Running a criminal court in the days of small caseloads presented relatively few difficulties. The judge, on his own or with the aid of a clerk of court, could arrange a rough schedule according to which cases could be heard; both sides would appear in court on the allocated day and the case would proceed. Nowadays, the picture is substantially different: in urban centres, several courts and judges are operating at the same time; lawyers may have prior commitments in other courts and have to seek an adjournment in any other cases in which they are scheduled to appear; heavy workloads may prevent counsel from being prepared to proceed with a case on the scheduled date, forcing them to seek an adjournment. These adjournments will leave the courts empty on one day and create a bottleneck on another, and overall will create serious delays in the disposal of cases. To enable the courts to cope with increasing caseloads and the problems they generate, more sophisticated administration and scheduling of cases is required.

Gradually it is being realised in common law jurisdictions throughout the world that the problems relating to court administration, in both the judicial and non-judicial aspects, must be tackled seriously and comprehensively. The practice of court administration techniques is, however, still very much in its infancy. As a result, what follows here is merely a brief review of the limited action that has been taken.

In those Commonwealth countries which are turning towards court administration as a partial solution to the problem of delay, the trend is towards fixing responsibility for such administration firmly and clearly in the hands of a particular official or in the hands of a designated authority [1] rather than leaving it to individual judges who have more than enough to do hearing cases and preparing their decisions, and who, arguably, do not have the necessary administrative skills which the orderly functioning of the court system now requires.

In 1969 the Report of the English Royal Commission on Assizes and Quarter Sessions (the Beeching Report) stated that key administrative officers ought to exercise "firm managerial control over all matters affecting the smooth running of the courts other than those which have a direct bearing upon the discharge of judicial functions".[2] It was suggested that an officer, a "Courts Administrator", should be in charge at each court centre. The idea was that he would be responsible for the administration of the courts at the centre to which he was assigned and that he would be responsible to the Circuit Administrator, thus ensuring uniformity throughout each circuit.[3] These recommendations having been implemented with minor modifications, such

court administrators have been appointed. One of their main functions is to act as a co-ordinator to enable the Chief Clerks at individual court centres to co-operate with one another in creating a system by which the resources of judge power, available court staff and accomodation facilities can be deployed in a manner which will enable court business to be disposed of efficiently.[4]

In proposing such a scheme, the Beeching Commission appreciated that the concentration of administrative power in the hands of full-time non-judicial officers would result in these officers making decisions of a quasi-judicial nature, and as a result, recommended that on constitutional grounds, "a visible and effective safeguarding of the position of the judges serving on the Circuits" should be provided.[5] That safeguard is provided by the Presiding Judge system: the Lord Chief Justice appoints High Court judges to serve as Presiding Judges, two for each circuit, except the South-East which has three, one of whom is the Lord Chief Justice himself. On each circuit, the twin heads of the administrative system are the Circuit Administrator and the Presiding Judge present on the circuit. The Presiding Judges can exert considerable control over the judicial performance by seeing that the judges working on the circuit are assigned to cases commensurate with their special experience and ability. By maintaining close contact with the Circuit Administrator the Presiding Judge can advise on intended administrative action and anticipate problems which administrative decisions may cause judges.

After this system had been in operation for four years, one observer concluded that a strong unified court service staffed with competent personnel had been established in England and Wales, although it was still grappling for control of the court system and serious problems affecting the efficient running of the system persisted.[6]

The Circuit Administrators are directly responsible to the Lord Chancellor's Department within which a Court Business Branch has been established. The Lord Chancellor has an authority which is difficult to define: he is the head of the judges, a member of the Cabinet and he sits on the Woolsack, He serves as a high-level link between the executive branch of government and the judiciary, and, because his is a non-political office, he symbolizes the maintenance of the independence of the judiciary. He has ultimate control over the court administrators, and thus judicial independence from extraneous interference is preserved. In Canada the lack of a judicial officer with an equivalent status is proving to be a major stumbling block in developing an acceptable system of courts administration.

By 1975 all provinces of Canada had established, in some form, offices of Courts Administration, specially designed to gather and analyse information about the outputs of the system as well as improvements in courts administration.[7] The most impressive efforts at promoting such an approach to the problems which the courts are facing have been those of the Ontario Law Reform Commission. Its proposals were based on the following argument:

> Ontario should adopt a "systems" approach to courts administration, based on sound management principles consonant with the administration of justice and not on the traditional judicial model which focusses on the judicial hierarchy and structures authority and lines of communication accordingly. The courts must be regarded as an assembly of interdependent parts forming a complex but unitary whole.[8]

Ontario attempted to put this ideal into practice in an experimental scheme called the "Central West Project".[9] A Project Management Team made up of personnel with shared expertise in all areas of courts administration developed a case-flow management system for the lower courts in a small area of the province. This system involved the complete rescheduling of all the business of the criminal courts, the changing of the time of the commencement of various courts, the re-allocation of duties between Provincial judges and justices of the peace, a change in the procedure for setting trial dates, a change in the intake procedure for scheduling first appearances of cases not previously dealt with, a change in adjournment procedures, a change in the number and location of various court sittings, the development of a new system for streaming certain types of cases into different courts, and the allocation of specific blocks of judicial time for the disposition of certain types of cases.[10]

The attempt to introduce the case-flow management system failed because in Canada the overall authority for courts administration is divided between the judiciary and the Ministry of the Attorney-General. The Attorney General, being a political figure, does not have that independent, unifying role which the Lord Chancellor in England has. The Project Management Team of the Attorney General's Ministry did not have the authority to execute their caseflow system because the execution of every single administrative decision made by Ministry personnel depends entirely upon the decisions of individual judges made in individual cases, thus, the scheme failed. Above all, efficient and effective courts administration depends on central decision-making, co-operation and comprehensiveness.

In Ontario, as a result of the "Central West" experience it has been concluded, quite correctly, that the only way to achieve any unified

managerial control over case-flow is to place over-all control in the hands of a central authority with the ability to develop and apply case-flow management standards upon individual courts. Neither the constitution nor the public would permit this authority to be wielded by the Attorney General as this would be a fundamental breach of the independence of the judiciary. Effective management controls over individual courts and upon the court system as a whole can only be imposed where ultimate authority is vested in a judicial office. Thus, it has been proposed that ultimate authority and responsibility be conferred upon a Judicial Council composed of the senior judiciary.[11] Given the limited amount of time that judges have at their disposal for such functions and their own limitations as administrators on a grand scale, the effectiveness of this proposal remains to be seen.

Establishing a mutually acceptable definition of the respective roles of the executive and the judiciary in courts administration has not yet been achieved in Canada. Consequently, the executive feels constrained in implementing comprehensive plans for re-organising the courts. This jurisdictional question would appear to be impeding the speedy development of solutions to the problem of administering courts in Canada.[12]

The Courts Administration Act, 1975,[13] established the office of Director of Court Administration in the Australian state of Victoria. The other stated aim of the Act is "to make provision for the more efficient disposal of business dealt with by the Courts of Victoria". This, however, will not be done directly through the Director of Court Administration as his statutory role is an advisory rather than an executive one, Section 4 of the Act provides:

> The functions of the Director shall be -
> (a) to advise the Attorney-General with respect to any action which he considers would lead to -
> (i) the more convenient, economic and efficient disposal of the business of the courts; or
> (ii) the avoidance of delay in bringing civil and criminal actions to trial;
> (b) to confer from time to time with the Chief Justice of the Supreme Court, the Chief Judge of the County Court and the Chief Stipendiary Magistrate in relation to the matters referred to in paragraph (a);
> (c) to confer with the Chief Commissioner of Police, the Director General of Social Welfare, the Crown Solicitor and the Prosecutors for the Queen with respect to matters affecting criminal trials and appeals; and

(d) to confer with members of the legal profession and all other persons concerned with the matters referred to in paragraph (a) in relation to those matters.

As one observer has noted, it may seem that the Victorian Director of Court Administration is a shadow of his English counterpart, but in his advisory and consultative roles, he will be able to make recommendations which should have a lasting impact on the performance of the court system in Victoria.[14]

Thus, even among the narrow range of examples we have at our disposal, it is fairly clear to see that the precise format of the development of courts administration has varied quite widely. We turn now to the kind of developments and results which this emphasis on courts administration is producing.

A recent Home Office Circular reported that in some English criminal courts an improved system of listing cases is producing significant savings of time and money.[15] While the practice of magistrates' courts varies quite widely in this respect, these courts generally have adopted, with considerable success, a system whereby, on any particular day, any cases in which the court has become aware that there will be an application for a remand or adjournment are dealt with first and the lists of other cases are arranged in such a way that guilty pleas are dealt with before contested cases. Additionally, in some of the busier courts, a system has been successfully introduced whereby the court list is specifically divided into segments called at different times - for example, if charges and remands are dealt with first and the court sits at 10.30 a.m., summons cases are not called until 11.00 a.m. This kind of measure is of great benefit to defendant and counsel as well as witnesses, as they need no longer turn up at the beginning of the court day and perhaps have to wait a substantial period of time until their case is called. The time set for the hearing of a particular case is much more specific than previously.

In 1974, the Lord Chief Justice of England issued a Practice Note which set up an experimental listing procedure in the Divisional Court of Queen's Bench called the "Expedited Hearing List" to cover applications for prerogative orders and appeals by case stated to the Divisional Court.

> The main purpose will be to secure the early disposal of short and simple cases, particularly those which involve sentences of imprisonment, disqualification for driving or possession of property. A characteristic of such cases will be that counsel can be adequately instructed at comparatively short notice.

> Where leave is given to move for a prerogative order, the court may direct that the motion be entered in the 'Expedited Hearing List'. If such a direction is given, the court will nominate the week, normally two clear weeks ahead, in which the motion will be heard. The applicants should at once inform the respondents of the court's directions, should supply them with copies of the papers used in the application for leave, and agree with them where possible the date or dates convenient to all parties, being a day or days in the nominated week. If informed of a convenient date, the head clerk will take it into account in fixing the date of the hearing.[16]

As yet, there is no indication as to how useful this experiment has been.

One of the most recent English innovations in court management is the introduction of computer technology into this arena. Computers programmed to facilitate a comprehensive management system are being introduced in a number of summary courts. The scheme is still at an early stage but the court in Nottingham is now more or less ready to put the system into operation. The general theory underlying the new system is that it will bring together all the court business in a single system with ready recovery and also enable individual cases to be isolated and the full history of the case from the issue of the summons to the payment of the fine to be extracted as a running document. The ultimate advantage of such a record is that the whole pattern of the court's work can be quite readily examined, predictions as to staff requirements can be made and the costing of the whole judicial process can be undertaken accurately. One special merit of such a comprehensive system is the facility that it provides for the management of court business in an orderly and predictable way. Data can be incorporated in the system relating to such matters as the availability of witnesses - whether, for example, police officers will be on leave on given dates - predictions as to the time that the case will run on a hearing day and if the system is interconnected with police records, then the prior criminal history of the accused can be available on a terminal inside the court. With all the information that it is possible to include in computer programmes, it will obviously be readily adapted to the preparation of court lists and this should remove some of the continuing problems that summary courts have with allocating work to the various magistrates and also ensuring that the parties in a case have a fairly firm date and time on which the case will be heard.[17]

Due to the division of responsibility for courts administration in Canada which was discussed above, the initiative in developing more

expeditious methods of processing cases through the courts has come mainly from the judiciary. There has been a substantial re-adjustment in the schedule of the courts and the manner in which cases are assigned. In Ontario, the Chief Justice has implemented the rationalisation of court calendars, working with the senior judge in each judicial district to achieve a more efficient processing of charges before the courts and to facilitate the setting of trial dates. Many court sittings which ordinarily deal with a general list of cases have now been sub-divided with certain days being devoted to first appearances, pleas of guilty and short trials, while others are dedicated to the trial of general Criminal Code offences, narcotics offences and the more serious driving offences. This has resulted in a better use of judicial time and physical facilities. Additionally, in many instances, the period of time from the date of the offence to the final disposition of the matter has been shortened.[18]

This kind of specialisation has also been experimented with in the lower courts of Zambia. In response to the large volume of criminal business, the magistracy specialised its own functions to a considerable degree. In the larger cities, the Senior Resident Magistrate, assisted by a Resident Magistrate or Magistrate Class 1, handles the taking of all pleas and disposes of all cases where a guilty plea is entered. This helps ensure a compliance with the exacting standards of unequivocality and voluntariness which exist in Zambia. Where a not guilty plea is entered the case is assigned to a magistrate after consulting a general diary in which is kept a record of all the cases pending before magistrates in the district; the more serious cases usually being assigned to the more senior magistrates. Outside of the major cities, however, this form of specialisation does not prevail because the volume of cases does not warrant it.[19]

A rather interesting project was set up in a provincial court in Metropolitan Toronto which established that a 90 day disposition period for most criminal offences is feasible if operating under the ideal conditions of a fixed caseload with the same judge, Crown attorney and court clerk assigned to the same court. This fixed team approach reduced adjournments caused by defence counsel "shopping" for a lenient judge or an amenable Crown Attorney and those adjournments caused when a new prosecutor is assigned to a case at short notice. The success of this scheme is attributed to the fact that the judge has fairly extensive control over a particular section of the caseload. It is not known yet how far this particular project can be successfully extended.[20]

Another effective mechanism for combating delay has been operating in the county courts in one judicial district in Ontario. This is the "criminal assignment court" which sits one afternoon a week to assign trial dates, usually for about a month from the assignment court hearing. The defence counsel in a case will receive a notice from the Crown Attorney's office, which is primarily responsible for the scheduling of criminal cases, stating that the case will come up at the assignment court on a particular day. Counsel may then get in touch with the Crown Attorney's office and agree upon a trial date acceptable to both sides. If there is such agreement he need not appear at the assignment court, otherwise, he must appear. The Assignment Court, presided over by a judge assisted by a Trial Co-ordinator, arranges trial dates and hears requests for adjournments. When called, most cases are ready to proceed and the major problem is finding a mutually agreeable trial date. Each week approximately 80 per cent of the cases on the list are assigned trial dates. In the remaining cases an adjournment to the next assignment court is usually sought. The judge demands an adequate reason before an adjournment will be granted, otherwise a trial date is set. A court-wide policy against the granting of adjournments on the day of trial once a trial date has been set by the assignment court has been a key factor in the efficient operation of this system.[21]

Developments and experiments such as these illustrate the potential which efficient court management has for tackling unnecessary delays in the processing of criminal cases through the courts, although, once more, care must be exercised to ensure that efficiency rather than justice does not become the ends of the system.

Footnotes

[1]I.R. Scott, "Court Administration", (1970), 50 Australian Law Journal 30.

[2]Great Britain, Royal Commission on Assizes and Quarter Sessions, Report (London, 1969), Cmnd. 4153, para.

[3]Id. at para. 124.

[4]I.R. Scott, The Crown Court (London, 1972), p. 42.

[5]Beeching Report, supra footnote 2 at para.

[6]I.R. Scott, supra footnote 1 at p. 34.

[7]M. Debicki, "Courts" in D. Bellamy et al., The Provincial Political Systems (Toronto, 1976), pp. 368-80 at p. 372.

[8]Ontario Law Reform Commission, Report on Administration of Ontario Courts (Toronto, 1973), Vol. 1, p. 381.

[9]The experimental scheme is described in detail in Ontario, Ministry of the Attorney General, White Paper on Courts Administration (Toronto, 1976).

[10]Id. at p. 8.

[11]Id. at p. 15.

[12]G.D. Watson, "The Judge and Court Administration" in A.M. Linden (ed.), The Canadian Judiciary (Downsview, 1976), at p. 168.

[13]No. 8752 of 1975.

[14]I.R. Scott, supra footnote 1 at p. 36.

[15]Home Office Circular No. 97/1978, (1978), 128 New Law Journal 756.

[16]Lord Widgery C.J., Practice Note, [1974] 3 All E.R. 528.

[17]"Computer Court Management", (1979), 3 Criminal Law Journal 48. See also Ontario, Ministry of the Attorney General, Annual Report 1974-75 p. 43. The computerised scheduling of court hearings and caseloads is attributed with saving $180,000 a year in the court system. The computer system in operation in Ontario also has a "back filing" technique which allocates parking offences and re-issued summonses to the earliest possible court dates which have become open through the payment of fines or the re-adjustment of schedules.

[18]Ontario, Ministry of the Attorney General, supra footnote 17 at p. 28.

[19]F.O. Spalding et al., "One Nation, One Judiciary: The Lower Courts of Zambia", (1970), 2 Zambia Law Journal 1 at p. 136.

[20]W. Howland et al., "Reports on the Administration of Justice in

Ontario on the Opening of the Courts for 1979", (1979), 13 Law Society of Upper Canada Gazette 3 at pp. 7-8. See also "An experiment in speeding up court process", (1980), 6 Commonwealth Law Bulletin 322.

[21]Ontario Law Reform Commission, supra footnote 8 at p. 293. In 1979, the Chief Justice of Ontario issued a Notice respecting trial dates and adjournments in the provincial courts. It provides that once a trial date has been fixed, adjournments will be granted only in exceptional circumstances. Default by counsel may give rise to disciplinary proceedings.

PART THREE

THE USE OF ALTERNATIVE PROCEDURES AND SPECIALISED COURTS

From the previous section it can be seen that a great deal of activity is currently taking place in Commonwealth jurisdictions to modify the rules of evidence and procedure and to modernise court practices in order to expedite the hearing of cases in the criminal courts. These measures are being applied to those offences for which it is felt that a traditional court hearing is essential. Developments on another plane, however, proceed on the basis that some types of criminal cases may not require a full court hearing or may benefit from having a specialised hearing with procedures relevant to the features of a particular class of cases. It is to an examination of such measures that we now turn.

X Dispensing with the Presence of the Defendant at a Court Hearing

For the more serious criminal offences, the presence of the defendant in court, with or without counsel, is seen as being a necessary prerequisite for the proper administration of justice. "Justice" cannot be done in his absence; he must be given the opportunity to participate in the proceedings. By contrast, with very minor offences, where the penalties are concomitantly small, the presence of the accused at the hearing is not seen as being so essential. Often defendants in such cases do not bother to show up in court, and if the accused's appearance is necessary, the court must adjourn the hearing and issue a summons to compel his appearance. To deal with situations such as these, some jurisdictions allow the court to proceed with an ex parte hearing in some circumstances.

In Western Australia, for example, an ex parte hearing may be held if the defendant does not appear at a hearing set for a "simple" offence. Where this occurs and the complaint is a simple offence against the Road Traffic Act, 1974, or other prescribed Act, the justices may receive affidavits of evidence in support of the matter alleged in the complaint rather than demand the physical presence of witnesses.[1] As a protection for the accused, the justices have a residual jurisdiction to set aside decisions given in default of the appearance of any party.[2]

Upon proof that the summons was served a reasonable time before the time appointed for the defendant's appearance, justices in South Australia may proceed ex parte to the hearing of the complaint and "to adjudicate thereon as fully and effectually, to all intents and purposes, as if the defendant had personally appeared before it in obedience to the summons".[3]

Amendments to the Justices Act of New South Wales enacted in 1973, provide that an information may be dealt with in the absence of the defendant in certain cases:[4]

> Where -
> (a) an information for an offence punishable summarily before a justice or justices has been laid under this Division by a member of the police force or a public officer;
> (b) a summons for the appearance of the defendant to answer to the information has been served on the defendant in any manner provided by law for the service of such summons on that defendant in relation to that offence; and
> (c) the defendant does not appear at the time and place fixed for the hearing of the information,
> the court before which the information comes for hearing may, if it is satisfied that the facts as alleged in or annexed to the summons constitute such an offence and that reasonably sufficient

> particulars thereof are set out or annexed to the summons, thereupon make an order imposing on the defendant a penalty to be paid within such time as is specified in the order, being a penalty of an amount of the pecuniary penalty that might have been imposed had the defendant been convicted of the offence.

In other words, a penalty is imposed, but there is in law no conviction, which is a significant protection for the accused who is proceeded against in his absence. Provisions such as these prevent the delays which occur while the presence of the accused is secured and are a boon to court scheduling as the court diary is not disrupted by adjournments and the subsequent re-scheduling of cases.

Other jurisdictions, rather than waiting for a defendant to fail to make an appearance, dispense in advance with his attendance in court. In Nigeria, for example, under section 100 of the Criminal Procedure Law of Lagos States, where a magistrate issues a summons in respect of an offence punishable by a fine not exceeding $100 or by imprisonment for a term not exceeding six months, or both, he may, on the application of the accused, if he sees sufficient reason to do so, dispense with the personal attendance of the accused provided that he pleads guilty in writing or pleads guilty through counsel.[5] This type of procedure is commonly known as "mail order justice" or pleading guilty by mail.

For offences which are only triable summarily and which are not to be heard in juvenile court, a procedure was introduced by the English Magistrates' Court Act, 1957, whereby the accused may plead guilty without being present in court. The procedure does not apply to an offence for which the accused is liable to be sentenced to be imprisoned for a term exceeding three months. Whenever a summons is issued requiring an accused to appear to answer an information charging an offence covered by this procedure, the prosecution must serve on the accused:

(i) a concise statement of the facts which will be placed before the court if the accused pleads guilty without appearing;

(ii) a notice stating the effect of doing so, in terms of the penalty which may be imposed and

(iii) a form for the accused to send to the clerk of court expressing his intention of doing so and containing, if he wishes, a submission with a view to the mitigation of sentence.

When the accused uses this procedure, the clerk informs the prosecution and the court proceeds to hear and dispose of the case in the usual way. The prosecuting counsel need not attend the hearing as the accused has admitted

the facts which are stated in court and on which his conviction will be based. If, upon hearing these facts, the court intends to disqualify the accused from driving or sentence him to imprisonment, it must adjourn the case and secure his presence in court.[6] Most defendants under this procedure do plead guilty by post and the statements are read out in court without any witnesses attending. This saves a great deal of the time of the police and other participants at the cost of additional typing and office work.

For minor traffic offences, an accused may plead guilty by post in Kenya.[7] In Zambia, section 99 of the Criminal Procedure Code provides that whenever a summons is issued in respect of any offence other than a felony, a magistrate may, if he sees reason to do so, and shall when the offence with which the accused is charged is punishable only by fine and/or imprisonment not exceeding three months, dispense with the personal attendance of the accused if he pleads guilty in writing or appears by an advocate. The corresponding provision in Malawi is more or less identical to this with the proviso that no magistrate may impose a sentence of imprisonment without the option of a fine except in the presence of the accused.[8] Such provisions are designed to save the time of the courts, defendants, prosecutors and to save expense. The safeguard against the infliction of a term of imprisonment or the disqualification from holding or obtaining a driving licence without notice to the defendant in addition to the original notice is a very desirable one.[9]

In Scotland, the appearance of an accused in summary proceedings is dispensed with not merely where he pleads guilty, but also in relation to his first appearance in court where he intends to plead not guilty.[10] Accused persons are summoned to attend the first calling of their case in a summary court by a citation issued by the procurator fiscal. This citation requires the accused to attend personally but the fiscal may inform him that he may intimate his plea in his absence by letter to the court and plead on his behalf. If the accused intends to plead guilty in his absence he is asked to add any explanation which he wishes to put before the court and the court may then dispose of the case in his absence or alternatively, if the sheriff thinks fit, continue the case and require the accused to attend court at a later date with a view to pronouncing sentence in his presence. If the accused intends to plead not guilty, he is not required to attend personally at the first calling as the court will appoint a diet for the trial of the case at a later date. If the procurator fiscal required the personal appearance in every case of this kind it would place an increased

burden on the already overburdened summary courts and could only result in further delays.[11]

In those jurisdictions where written pleas of guilty may be tendered, failure of the accused to tender such a plea or to appear in court on the scheduled date will result in the adjournment of the case while the court takes steps to secure the defendant's appearance before the court. In other jurisdictions, however, the procedure is a little different: unless the accused positively elects to appear in court, the case will be disposed of in his absence as if he had entered a plea of guilty.

New Zealand introduced a summary procedure for minor offences in the Summary Proceedings Amendment Act, 1973.[12] The Act defines "minor offences" as those that do not carry a liability to imprisonment or to a fine in excess of $500. Where a charge of this kind is laid, the prosecutor, instead of filing an information, proceeds on the basis of a "notice of prosecution in the prescribed form" in which the offence alleged and the relevant circumstances are set out, together with a full statement of the accused's rights. When the defendant receives his notice, he is able to decide whether he agrees with the facts as set out or whether he wishes to contest the matter. If he chooses to plead guilty he may do so by letter and avoid the necessity for appearing in court. He may also write to the court setting out any factors he wishes to be taken into account in mitigation of the offence. The Act further provides:

> If the defendant pleads guilty...or if, in any case, the defendant does not, by the date specified in the notice...give written advice to the Registrar...a Magistrate may, on the basis of the summary of facts contained in the notice...deal with the defendant as if he had appeared before a Court and pleaded guilty.

Only when he pleads not guilty are witnesses required to attend to give evidence in court. This step in the procedure represents a major improvement so far as traffic officers in particular are concerned. With an ordinary summons or where a fixed penalty procedure was in operation, when a defendant took no steps in relation to the summons he received, the officer who had detected the offence was required to attend court and give what was known as formal proof, that is, evidence on oath of the circumstances of the offence. In most Magistrates' Courts, this meant that on traffic court days a procession of traffic officers might have to line up to give their purely formal evidence when they could have been more usefully performing their

ordinary traffic enforcement duties.[13]

One perhaps unfortunate side effect of the introduction of this minor offences scheme is that it has subsumed the fixed penalty system existing in New Zealand. In 1968 an "infringement fee" procedure was established under the Transport Act, 1962. Scales of fees were attached to certain traffic offences and offending motorists would be issued with a notice setting out particulars of the offence and the amount of the prescribed infringement fee. If the motorist paid the penalty, the case never went into court. Since January 1, 1975, when the new minor offence procedure came into operation, all minor offences, including those which were dealt with by standard fines, are dealt with under the new procedure. Thus, cases which were previously disposed of without recourse to a magistrate are now appearing in court. As a result, the amount of time required of magistrates or justices of the peace and court staff is greatly increased. Far from saving the time of the court, an already difficult situation is exacerbated.[14]

As to the general use of the minor offence procedure: in Auckland, justices of the peace dispose of an average of 4000 cases "on the papers" each month; in approximately 400 cases a not guilty plea is entered or there are appearances for pleas in mitigation of penalty.[15]

A similar system exists in Queensland under the Decentralisation of Magistrates' Court Act, 1965, as amended. A summons for a minor offence to which this Act applies will contain a note to the effect that if the defendant does not admit the offence alleged, he is requested to inform the court to that effect at least seven days before the scheduled date of the hearing. If he does so inform the court, he is not required to appear on the scheduled date, the court must instead set up another appearance. If the defendant does not inform the court that he intends to plead not guilty, he is liable to be convicted. In these circumstances the hearing will be conducted in the absence of both the complainant and the defendant and shall be deemed to be a hearing of the matter of the complaint by a Magistrates' Court ex parte under section 142(1)(a) of the Justices Act, 1886, as amended. As a measure of protection for the accused, the magistrate must adjourn the hearing and arrange for his attendance if he intends to imprison the defendant, suspend or cancel a licence or disqualify him from holding one.[16]

One of the major impediments to the prompt and efficient disposal of business in the lower criminal courts is the sheer volume of work of a relatively minor nature which has to be dealt with. By allowing cases to

be disposed of in the absence of defendant, prosecution and witnesses, that is, purely "on the papers", at the option of the accused, the processing of such cases is speeded up. It is, however, most important that the offender retains the right to have the charge against him determined in court in the ordinary way and that the information given to him make his options very clear.

Footnotes

[1]Western Australia Justices Act (reprinted 1977), section 135.

[2]Id, at section 136A.

[3]South Australia Justices Act, 1921-36, as amended, section 62(b).

[4]New South Wales Justices (Amendment) Act, 1973, (Act No. 11, 1973), inserting section 75B(2) into the original legislation.

[5]A.O. Obilade, The Nigerian Legal System (1979), p. 247.

[6]English Magistrates' Courts Act, 1957, c. 29, section 1. For commentary see C. Hampton, Criminal Procedure (2d ed.) (1977), p. 310 and R.M. Jackson, The Machinery of Justice in England (1977), p. 227.

[7]Correspondence from the Attorney-General's Chambers, Nairobi, dated March 5, 1979.

[8]Malawi Criminal Procedure and Evidence Code, cap. 8:01, section 93.

[9]South Australia Criminal Law and Penal Methods Reform Committee (Third Report), Court Procedure and Evidence (Adelaide, 1975), pp. 65-66.

[10]Criminal Procedure (Scotland) Act, 1975, section 334.

[11]Scotland, Committee on Criminal Procedure in Scotland (Thomson Committee), Criminal Procedure in Scotland (second report) (Edinburgh, 1975), para. 14.15.

[12]See section 20A of the New Zealand Summary Proceedings Act, 1957, as amended.

[13]New Zealand, Royal Commission on the Courts, Report (Wellington, 1978), para. 434.

[14]Id. para. 444.

[15]New Zealand Department of Justice, Report of the Department of Justice 1975-76, (Wellington, 1978), p. 7.

[16]A substantially similar provision exists in Victoria under the Magistrates' (Summary Proceedings) Act, 1975, (No. 8731), and in Western Australia under the Justices Act Amendment Act, 1979.

XI Fixed Penalty Notices

Dispensing with the attendance of the defendant at a summary hearing does result in some saving of time, but the case must still go before a magistrate for his consideration. The paperwork involved can be quite considerable and, because the defendant is at most given an indication of the upper and lower limits of the possible penalty, he may wish to defend the case. Fixed penalty procedures, as the name implies, carry a fixed monetary penalty which the defendant is informed of in the summons, and unless he decides to challenge the charge or fails to pay the fine, the case is dealt with administratively and does not appear before a magistrate or justice of the peace. It is used largely for minor motoring offences.

In 1940, when a proposal was being aired in New South Wales to allow minor traffic offenders to plead guilty and pay a predetermined fine by mail, considerable protest was heard:

> Under the proposed new system the accused's contact with the majesty of the law will apparently be confined to a policeman and a pillar box. There are the following further objections to the proposed new system:-
> (1) In these cases it will diminish or do away altogether with...the publicity properly associated with the administration of justice and judicial discretion in the assessment of punishment according to the facts of a particular case.
> (2) It is calculated to encourage the belief that an offence against the law is something to be bought off with a cheque rather than something to be punished.
> (3) The convenience of sending a fine by post may tend to encourage pleas of guilty in cases where the accused person believes that he has a good defence but is not prepared to spend a day in court in order to establish it.[1]

If petty traffic offences, such as failing to stop at a stop sign or illegal parking, were viewed in the same light as other criminal offences, these arguments might have some merit, but in general, they are not seen in this light. In view of the large scale upon which contraventions of traffic laws are committed and tolerated by the public, it is doubtful whether such traffic violations, in situations which are not obviously dangerous, can ever evoke a great deal of public disapprobation, unlike more traditional crimes.[2] And, as the appropriateness of the criminal sanction and the forum in which it is imposed are, to a large extent, in direct proportion to the degree of public disapproval evoked by the contravention, the handling of these traffic offences is becoming an administrative rather than a criminal

justice process.

In India, the Motor Vehicles Act, 1939, provides a procedure for certain traffic offences whereby the accused can plead guilty by post and remit a specified fine. It applies in the case of persons other than professional drivers for some offences of a minor nature, and the ticket issued by the policeman should contain the amounts of fine for the various categories of traffic offences in respect of different types of vehicles. In other Commonwealth jurisdictions, the introduction of fixed penalty schemes has been a more recent development, although their use is now being rapidly expanded as the advantages over time-consuming court proceedings become apparent.[3]

One of the real advantages of the fine system to offending motorists is that because it is an administrative process, if the penalty is paid, a conviction for the offence is usually avoided, although "demerit points" may be incurred. The British Road Traffic Regulation Act, 1967,[4] provides in subsection 80(2):

> Where a constable finds a person on any occasion and has reason to believe that on that occasion he is committing or has committed an offence to which this section applies, he may give him the prescribed notice in writing offering the opportunity of the discharge of any liability to conviction of that offence by payment of a fixed penalty under this section; and no person shall then be liable to be convicted of that offence if the fixed penalty is paid in accordance with this section before the expiration of the 21 days following the date of the notice or such longer period (if any) as may be specified therein or before the date on which proceedings are begun, whichever event last occurs.

Fixed penalty notices issued under section 80 of this Act are limited to certain offences concerned with lights, parking and waiting, non-payment of charges at street-parking places, failure to conform to prescribed routes and non-display of a current vehicle licence. The particular offences dealt with in this manner do, however, vary from area to area. According to the latest figures available, approximately three million of these notices are being issued each year in England and Wales. Unfortunately, the penalties are being paid only in a little over half the cases.[5] Where the motorist does fail to pay the fixed penalty the offence then requires to be followed up by the police and reported for prosecution in the usual way, which entails a considerable amount of work. So much so that by 1974 the fixed penalty system in England was in danger of breaking down, particularly

in London. As a result provisions for vehicle owner liability were enacted in sections 1-5 of the Road Traffic Act, 1974.[6] These provide that in respect of certain fixed penalty offences,

> (a) for the purposes of the institution of proceedings in respect of the alleged offence against any person as being the owner of the vehicle at the relevant time, and
> (b) in any proceedings in respect of the alleged offence brought against any person as being the owner of the vehicle at the relevant time,
>
> it shall be conclusively presumed (notwithstanding that that person may not be an individual) that he was the driver of the vehicle at that time and, accordingly, that acts or omissions of the driver of the vehicle at that time were his acts or omissions.[7]

It is hoped that this will plug the loophole whereby vehicle owners challenge charges on the basis that they were not driving the car at the particular time alleged and thus encourage the payment of more fixed penalties. It is perhaps a little early to assess the effectiveness of these provisions, but after initial teething troubles caused primarily by overly-complex statutory forms, the system seems to be working quite well.[8]

There also exists in Britain a system of "mitigated penalties", that is, certain authorities have the power to offer the accused the chance to pay a mitigated, or reduced, penalty, in default of payment of which prosecution then ensues. For example, by virtue of section 3 of the Vehicles (Excise) Act, 1971, the Secretary of State for Transport may, in his discretion, permit the owner of a motor vehicle who has failed to take out a current road fund licence to pay a mitigated penalty. In exercising his discretion, the Secretary of State will take into account whether there has been a deliberate fraud. This power was used extensively when local authorities were the licensing authority (in 1970, 400,000 car owners were found without current licences and more than 88,000 were offered the opportunity of paying a mitigated penalty[9]). It is not known to what extent they are used by the Secretary of State now that the department has taken over from the local authorities. The power is, however, a useful one. The economic cost of prosecution must be several times greater than the cost of writing a letter demanding payment of a mitigated penalty in default of prosecution.[10]

Fixed penalty systems exist under various names. Western Australia has a "traffic infringement notice" procedure[11] as does Tasmania.[12] The procedure in New South Wales is set out in the Motor Traffic Act, 1909,

as amended, in section 18. Under this section, if the offender does not pay the fixed penalty and does not appear at the time and place fixed for the hearing of the information, the court may use an ex parte procedure and make an order imposing a penalty on the defendant. Legislation was enacted in 1974 in Bermuda[13] and in 1978 in Trinidad and Tobago[14] setting up fixed penalty systems. The Canadian province of Alberta instituted a "violation ticket" procedure in the Summary Convictions Act, 1978,[15] which offers an interesting incentive for offenders to pay fixed penalties for a certain class of offences. Summary proceedings for provincial offences, which are generally of a minor, regulatory nature and criminal offences coming under federal jurisdiction, may be commenced by laying a complaint and issuing a summons by means of a violation ticket. This will specify details of the offence and the courses of action to be followed by the alleged offender. Section 22 of the Act provides:

> (1) Where authorized by the regulations or a municipal by-law, a defendant may make a voluntary payment in respect of a summons by
>
> (a) signing the plea of guilty in the appropriate place on the summons, and
>
> (b) delivering the summons together with
>
> (i) an amount equal to the penalty specified in the regulations for the offence, if the defendant is charged with an offence under an enactment to which Part 3 does not apply,
>
> (ii) an amount equal to one half of the penalty specified in the regulations for the offence, if the defendant is charged with an offence under an enactment to which Part 3 applies, or
>
> (iii) an amount equal to the penalty specified in the relevant by-law for the offence, if the defendant is charged with an offence under a municipal by-law,
>
> to the place stated on the summons within the time period prescribed by the regulations.

Thus, for those offences coming within Part 3 of the Act which are basically provincial traffic offences, if the defendant chooses to pay the "fixed" penalty, he need only pay half the specified sum.

Although the time of judges, defendants, prosecutors and witnesses is saved by using fixed penalty schemes, they can involve a significant amount of administration and paper work, particularly if the penalty notice is issued in the form of a regular summons. To avoid this, most jurisdictions have combined fixed penalties with a ticket procedure. For example, Ontario has what is called a "Uniform Traffic Ticket" which enables a motorist to be served on the spot with a summons setting out the exact charge rather than

waiting weeks for a mailed summons or personal service by a police officer. This system has proved very successful and was extended in 1972, by means of the Summary Conviction Ticket, to the full range of provincial offences. This has saved police and clerical manpower by cutting through the normal mass of paper generated by any minor charge.[16]

Neither should it be ignored that the receipt of fixed penalties in itself creates work for the staff of the court into which they are paid.[17] And, as we have seen, non-payment of penalties generates work for the police, prosecutors and the courts. A few jurisdictions are attempting to mitigate these problems by instituting "demerit point" schemes. This alternative levies non-financial penalties for traffic violations, each offence being weighted by a specific number of points. If, within a given period a driver accumulates more than the allowed number of points, his licence is suspended. In 1968, such a system was introduced in British Columbia.[18] The purpose of the new system was explained by the then Attorney-General, the Hon. L.R. Peterson as follows:

> In today's affluent society, a small fine has not proven a deterrent to bad driving... For the great mass of motorists, the few dollars they have to pay as a fine does not have any meaning. But everyone values the privilege of driving, and the object of our program is to increase safety on our provincial highways through driver licence control.[19]

The demerit point scheme provides that for the commission of traffic offences other than non-moving offences and very serious offences such as dangerous driving or criminal negligence, the offender is provided with a Traffic Violation Report and instead of having to pay a fine, has points assessed against his driver's licence. The alleged violation can be disputed within one week of the issue of the Violation Report, upon payment of a deposit of ten dollars.[20] The matter is then heard before a Provincial Court judge with all the normal rules of evidence etc., applying, the only difference being that no fine is assessed if the violation is established. The judge simply forwards the Traffic Violation Report, with his findings noted thereon, to the Superintendent of Motor Vehicles, where it is added to the driving record of the individual involved. Where the violation is not challenged by the offender, the appropriate number of demerit points for the offence involved are levied against his record by the Superintendent of Motor Vehicles. When a person accumulates six points the Superintendent will issue a written warning that a further offence might lead to suspension of a driver's licence, though no further action is taken at that time. When

nine points have been accumulated, the driver is given the opportunity to show just cause why his driver's licence should not be suspended. He may request a hearing which will include a review of his driving record. On the basis of this record and the hearing, the Superintendent of Motor Vehicles will decide whether the licence should be suspended or whether the driver should be placed on probation. Depending on the nature and number of offences committed, suspensions may be for periods varying from one month to three years. The number of highway traffic related court appearances between 1968 and 1975 dropped dramatically and consequently, the congestion in the lower courts of British Columbia had been lessened considerably.[21] More recently, however, British Columbia introduced a compulsory insurance scheme in which the premium varied as the square of the number of points awarded against a driver. Within one month of the introduction of this measure, the number of traffic violations contested in Provincial Court increased by 200 per cent, effectively destroying one of the major benefits envisaged for the Traffic Violation Report system.[22] It remains to be seen whether this trend can be reversed.

Substantially similar demerit point systems also exist in Queensland,[23] Tasmania[24] and Singapore.[25] One apparent disadvantage in dealing with traffic offences in this way is that the large sums previously recovered from fines no longer find their way into the consolidated fund or the public coffers. When the total cost of collecting these monies is taken into account, however, along with the wider implications of an almost impossible yet still increasing strain on the court system, the loss of revenue may be a small price to pay for the results achieved.[26]

Footnotes

[1]"Mail Order Justice", (1940), 14 Australian Law Journal 2.

[2]A.J. Middleton, "Separation of Administrative Measures from the Criminal Sanction", (1977), Crime et/and Justice 139 and B. Swanton, "Australian Police Forces" in D. Biles (ed.), Crime and Justice in Australia (Canberra, 1977), pp. 35-59 at p. 48.

[3]See for example S. Hagan and N. Osborough, "The Parking Motorist and the Road Traffic Act (Northern Ireland)", (1967), 18 Northern Ireland Legal Quarterly 177 at p. 198.

[4]c.76.

[5]Great Britain Home Office, Offences Relating to Motor Vehicles, 1976 (H.M.S.O., 1977), paras. 2.9 and 2.10. In 1972, 2,562,123 notices were issued and the penalty was paid in 1,651,765 cases; in 1976, 2,902,695 notices were issued and 1,634,623 were paid.

[6]For a more detailed discussion see P. Halnan, "Diversion and Decriminalisation of Road Traffic Offences", [1978] Criminal Law Review 456.

[7]Road Traffic Act, 1974, c. 50, section 80.

[8]P. Halnan, supra footnote 6 at p. 458.

[9]A.F. Wilcox, The Decision to Prosecute (London, 1972), pp. 103-104.

[10]P. Halnan, supra footnote 6 at p. 457. The Commissioners of Customs and Excise also make good use of similar powers to impose penalties on those who attempt to evade the payment of duty on articles they bring into the country - A.F. Wilcox, supra footnote 9.

[11]Western Australia Road Traffic Act, 1974, section 102 as amended by the Road Traffic Amendment Act, 1978.

[12]Tasmania Traffic Act, 1925, as amended by Act No. 50 of 1971.

[13]Bermuda, The Traffic Offences Procedure Act, 1974, (No. 53).

[14]Trinidad and Tobago Motor Vehicles and Road Traffic (Enforcement and Administration) Act, 1978, (No. 18).

[15]Statutes of Alberta, 1978, c. 33. Assented to May 16, 1978.

[16]"The Challenge of the Minor Offence" in Ontario, Ministry of the Attorney General, Annual Report 1975/76 (Toronto, 1978), pp. 44-47 at p. 44.

[17]J. Law, "The Grant Report", 1967, Scots Law Times (news) 233, 241 at p. 236.

[18]British Columbia Motor Vehicle Act, 1960 Revised Statutes of British Columbia c. 253, as amended, section 126A.

[19]Press release issued by the British Columbia Motor Vehicle Branch, September 23, 1968. For further discussion of this provision see J. Atrens, "Section 126A of the British Columbia Motor Vehicle Act", (1969), 19 University of Toronto Law Journal 431.

[20]The deposit will be refunded if the person appears at the hearing, but where he fails to appear, it will be forfeited as a penalty.

[21]Alberta Board of Review Provincial Courts, Administration of Justice in the Courts of Alberta (Edmonton, 1975), p. 51.

[22]Id. at p. 111.

[23]Queensland Traffic Act 1949, as amended.

[24]Tasmania Traffic Act, 1925, as amended, Part IVA.

[25]Singapore Road Traffic Act, 1974.

[26]New Zealand Royal Commission on the Courts, Report (Wellington, 1978), para. 445.

XII Special Sittings of the Courts

Another method of expediting normal court business which has been experimented with to a limited extent in the Commonwealth is that of having special sittings of the lower courts usually to deal with minor traffic offences. These sittings are generally 'special' in terms of time - the courts convene outside of regular court hours - but they may also be 'special' in terms of location. In Nigeria, for example, Mobile Court Edicts have set up peripatetic courts to try traffic offences throughout the states of the Federation.[1]

Besides offering the opportunity to speed up the processing of these minor cases and those which are heard during regular court hours, this development also reflects a trend towards increasing the accessibility of the courts to the public.[2] Thus, evening court sittings allow defendants and witnesses to appear without having to take time off work. They also make full use of the available physical resources of the criminal justice system, although, it must be noted, they do demand an increase in court and judicial personnel.

A pilot scheme of three night courts was set up in New South Wales in 1976 to handle traffic cases. The scheme was designed to provide traffic offenders with better opportunities to challenge their cases in court, as it was felt many people were convicted by default or without the benefit of a plea in mitigation simply because they could not afford to absent themselves from their employment.[3] A subsequent survey of the operation of these night courts was of the opinion that this experiment had not been as successful as anticipated, although specific reasons were not given.[4]

In Metropolitan Toronto, when a person receives a summons to appear in a specific day court he is given the option to apply for a night court, but this will be for reasons of his convenience only as it will not bring the case on for a hearing any sooner than scheduled. At present, the date allotted for the day court appearance will probably be several months in the future. If the defendant applies to have the case transferred to the night court, all the documents relating to his case are kept in a file until the day court hearing date. Following that date, the case is assigned to a night court date, usually one month in the future.[5]

Evening courts have on occasion been held in Scotland in exceptional cases, for example, when large numbers of accused persons have been held in custody. In some of the more distant courts, sittings are not infrequently held in the evening to fit in with local travelling arrangements.[6]

One of the more successful experiments with night courts is located in Tasmania. There plea courts have recently been introduced on a trial basis in two large county courts. These plea courts commence at 5 p.m. before justices of the peace and are provided for those cases where the first appearance is merely for the tendering of a plea. Defendants are not arbitrarily summonsed to appear at a night court but are given the choice of appearing before a day court if that would be more convenient. The purpose of the night court is to make it possible for defendants to avoid the loss of salary or wages by having to appear for plea only during the daytime and this is proving to be quite a successful project.[7]

In Malawi, the innovation has not been with night courts, but with weekend sittings. The Criminal Procedure and Evidence Code provides:

> Where the presiding judge or magistrate is of the opinion that, for the purpose of avoiding delay, expense or inconvenience which in the circumstances of the case would be unreasonable, a court should be held on a Sunday, such court may so be held and no finding, sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered only by reason of the fact that the same was made or passed on a Sunday.

Overall, special court sittings have not been used very widely as a method of expediting cases. Perhaps this can be attributed to extra demands this places on court personnel.

Footnotes

[1] [1976] Bulletin of Legal Developments 206.

[2] New Zealand Department of Justice, Report of the Department of Justice 1974/75 (Wellington, 1977), p. 7 and D. Biles and B. Swanton, "The Future of Criminal Justice in Australia" in D. Biles (ed.) Crime and Justice in Australia pp. 167-187 at p. 179.

[3] Sydney Daily Telegraph, June 15, 1976.

[4] New Zealand, Royal Commission on the Courts, Report (Wellington, 1978), para. 860.

[5] Ontario Law Reform Commission, Report on Administration of Ontario Courts (Toronto, 1973), Part II, p. 62.

[6] Scottish Home and Health Department, The Sheriff Court (Edinburgh, 1967), Cmnd. 3248, para. 512.

[7] New Zealand Royal Commission on the Courts, supra footnote 4.

[8] Cap. 8:01, section 71(2).

XIII Special Courts and Tribunals

A step beyond having special sittings of the courts to deal with certain classes of cases is the creation of totally separate courts or tribunals for hearing them. It is suggested from time to time that traffic offences, with which the lower courts are deluged, should be wholly removed from criminal courts and be dealt with by a completely separate system of traffic courts. Apart from relieving the criminal courts of a huge burden, two main advantages are said to flow from such reform. The first is that a specialist court would show greater expertise in traffic law; the second is that it would remove from the traffic offender the stigma of being dealt with in a criminal court.[1]

Although traffic courts per se have not been established, in some of the larger cities in Zambia there has been a specialisation in the handling of traffic offences. In Lusaka and Kitwe, for example, one magistrate has been assigned to deal almost exclusively with traffic offences. In Ndola, however, no one magistrate is permanently assigned to traffic cases; instead, magistrates take turns hearing such cases on a monthly basis, presumably because no magistrate is interested in hearing the sometimes wearisome and repetitive traffic offences all the time. Nonetheless, it has been found that the Lusaka-Kitwe system does have its advantages in that magistrates assigned to hear traffic cases develop expertise in the technical nature of such offences and in the complexities of the Road Traffic Ordinance.[2]

In Jamaica the Traffic Court Act established a Traffic Court with jurisdiction to hear and determine:

(1) offences under, and contraventions of, the Road Traffic Act and any regulations made thereunder;

(2) offences against the Main Roads Act;

(3) offences against the Parochial Roads Act and

(4) offences triable summarily which are committed in the course of a transaction giving rise to a charge for an offence or contravention mentioned in (1), (2) or (3).[3]

One of the most innovative schemes to deal with traffic offences is that being experimented with in Ontario. In June 1974 in North York, Toronto, a pilot project was initiated in which informal proceedings for dealing with minor traffic offences replaced formal proceedings in the Provincial Court (Criminal Division). Under this project, a traffic tribunal, operated by the department of highways was created.[4] The tribunal concept was seen as having five main objectives:

(1) To remove all provincial traffic offences from the criminal court milieu.

It was felt that by hearing all traffic offences at a separate traffic tribunal, a less formal approach might be adopted which would encourage a better understanding by the offender of the consequences of his infraction.

(2) To implement a driver training programme as part of the tribunal structure in a way that it becomes an integral part of the sentencing process.

(3) To introduce formally a plea of guilty with an explanation on a drop-in basis. Quite often an offender will feel that although he has committed an offence, there are mitigating circumstances surrounding the commission of the offence which he wishes to bring to the attention of the court. Under the usual traffic system, more often than not, this offender will appear in court and enter a plea of not guilty, thus necessitating a full trial. By offering the offender a plea of guilty with an explanation, which can be exercised by him dropping in at the tribunal at a time convenient to him, it was anticipated that a significant number of offenders would exercise this option and thus reduce the volume of trials and the cost of requiring a trial. It was also expected that if a significant number of offenders avail themselves of this plea, the ever-increasing amount of time spent by police officers in court would be reduced appreciably.

(4) To increase the number of daily sessions for pleas of not guilty to five. Monday to Thursday the sessions are as follows:

9.00	a.m. -	10.30
10.30	-	12.00 noon
1.30	p.m. -	3.00
3.00	-	4.30
7.00	-	8.30

There is no evening session on Friday. The reasons for increasing the number of sessions was to make full use of available facilities; decrease the amount of time spent by police witnesses waiting for cases to come up and to bring the tribunal's business hours within the usual business hours of the community.

(5) To introduce new techniques and new methods of administering minor traffic offences. For example, there is no prosecutor in the minor traffic hearing room and there is no court reporter, the hearing being recorded on in-built sound recording devices.

As to how the system actually proceeds: on being served with a traffic ticket, the offender also receives a notice advising him that in addition to paying the fine out of court if he wishes to plead guilty, or appearing in court to plead not guilty, he may appear at the Tribunal on a "drop-in" basis to enter a plea of guilty with an explanation in cases where he feels

he did commit the offence but that there were mitigating circumstances surrounding the commission of the offence. The hearing is conducted informally in pleasant surroundings in a building not connected with the Provincial Courts and is presided over by a hearing officer who is a justice of the peace. He advises the offender of the legal consequences of a plea of guilty with an explanation and if the offender lodges such a plea, a discussion of the explanation follows. It should be noted that the investigating police officer is not present for pleas of guilty with an explanation. If the hearing officer is satisfied that the offender committed an offence he then registers a conviction. Following conviction, the hearing officer keys the offender's driver's licence number into the visual display screen computer terminal seated beside him. In a matter of seconds, a summary of the offenders's driving record appears on both the hearing officer's screen and a screen located directly in front of the offender. A discussion of the offender's driving history then follows and if the hearing officer is of the opinion that the offender could benefit from driver training, he recommends it to the offender, pointing out that he will take the offender's attendance at the course into consideration when sentencing him. Such courses are held in the same building and instructors are available at all times. Sentence is then imposed taking into account the offender's explanation and his participation or otherwise in a driver's improvement program.

If a defendant wishes to plead not guilty, he simply appears at a hearing room on the date set out in his ticket. Again, there is no prosecutor present except when accident charges are heard. The defendant is entitled to cross-examine the police officer, but only the justice of the peace may ask questions of the offender. If the accused is found to have committed the offence, the record review system, discussion and offer of the driver improvement course are the same as in the event of a plea of guilty with an explanation.

From the outset, the North York Traffic Tribunal was subjected to careful monitoring and analysis. A public reaction study was implemented with a control study at an ordinary traffic court. From the results of this independent study, it would appear that the tribunal has resulted in a vastly improved public opinion of the administration of justice in North York. It is, of course, impossible to measure empirically the benefits which accrue when increased public respect for the judicial system is achieved. Although traffic court is the lowest level of the province's judicial system, it is the only level with which the average citizen becomes personally involved with the administration of justice. Increased public confidence and respect

for justice as it is dispensed at this level permeates the public's opinion of the entire judicial system.

A study of police officers who appeared before the Tribunal showed that their views were similar to the public opinion survey. In addition, there were indications that police officers are spending less time in court which results in substantial cost savings. Of the accused who choose to come to court, more are electing not to have a trial and instead are taking advantage of the opportunity to plead guilty with an explanation. This is not only resulting in savings of time and money, but is also encouraging drivers to come to the Tribunal to discuss and improve their driving abilities.

A comparison of the time within which offences were processed at the Tribunal and at other control locations indicated that the tribunal system has reduced the backlog in hearing cases quite significantly. The disposition date has levelled off at approximately 41-45 days after the date of the offence as compared with 60-65 days and as much as 100 days in regular court.[5]

The success of this project has resulted not only in the expansion of the traffic tribunal concept to other parts of the province of Ontario, but to a much wider category of offences. As of April 1, 1980, all provincial offences which carry a liability to fines of less than $300, comprising predominantly of minor traffic and liquor offences, have been removed from the aegis of the criminal courts and are now heard by a provincial offences tribunal,[6] run along roughly the same lines as the traffic tribunal. Under the new procedure the present rights to a full trial or to pay a preset fine without attending court continue to exist, but, in addition:

(i) defendants are able to drop in at the tribunal office at their convenience, without prior arrangement, to plead guilty before a justice of the peace and seek time to pay the fine or offer an explanation in mitigation of the set penalty which the justice could reduce;

(ii) defendants who wish to put forward a legal defence but do not wish to appear or be represented at a trial are able to deliver to the court a written defence. This is reviewed by the justice; if it discloses any legal ground of defence a trial is held without the defendant having to appear. At his trial the court considers the case against the defendant in light of the written explanation, perhaps questioning the Crown's witnesses to clear up points raised in the written submission. Thus, the defendant has his defence raised without having to attend or be represented, provided that a conviction could have been entered without a trial being held if the written explanation did not raise a reasonable defence to the charge. This

procedure will probably prove to be the most controversial aspect of the scheme. As one commentator has observed, the question remains whether the "write-in" not guilty submission will be an adequate protection if the defendant disputes the charge but does not want to miss work to attend a hearing. It raises the question whether a justice of the peace can maintain his role as an impartial judge while questioning Crown witnesses in the light of the defendant's submissions.[7]

(iii) defendants who wish to appear or be represented at a trial have an absolute right to do so. They are obliged to tell the court office that a trial should be scheduled; in return their trial will often be scheduled for a fixed time of day. With both sides being aware in advance of the fixed trial date and time, it is hoped that adjournments should rarely be necessary. Once a person has pleaded not guilty and elected to appear at his trial, a trial of the issues is held even if he does not appear.[8]

The entire provincial offences procedure is based on the underlying assumption that considerations of efficiency outweigh the desirability of the personal appearance by the defendant in minor offences, particularly where he chooses that option.[9] And by removing these petty offences from the criminal court system into a more informal and flexible process it would appear that a significant step is being taken towards the eventual decriminalization of such behaviour.

Although traffic offences have been a popular target for special courts, specialised hearings have been instituted for other classes of criminal behaviour in some Commonwealth jurisdictions.

A proviso to section 11(1) of the Indian Criminal Procedure Code, 1973, as amended, states:

> [T]he State Government may, after consultation with the High Court, establish, for any local area, one or more Special Courts of Judicial Magistrates of the first class or of the second class to try any particular case or particular class of cases, and where any such Special Court is established, no other court or Magistrate in the local area shall have jurisdiction to try any case or class of cases for the trial of which such Special Court of Judicial Magistrate has been established.

A substantially similar provision also exists in Sri Lanka.[10] General provisions like these are quite useful as they provide the criminal justice system with a measure of flexibility to deal with situations where the courts are inundated with a particular type of offence at certain periods. For

example, a police strike might spark off a wave of looting and a special court could be set up to deal with the charges subsequently laid.

A more specific Special Courts Act was enacted in India in 1979.[11] This makes provision for the speedy trial of certain offences committed during the operation of the Proclamation of Emergency dates June 25, 1975. The Act provides that if the Government is of the opinion that there is prima facie evidence of the commission of an offence alleged to have been committed by a person who held high public or political office in India, and that, in accordance with the guidelines contained in the Preamble to the Act, the offence ought to be dealt with under the Act, the Government shall make a declaration to that effect in respect of every such case. On such declaration being made, a prosecution in respect of the offence shall be instituted only in a Special Court designated by the Government. In the trial of such cases the Special Court is required to follow the procedure prescribed by the Criminal Procedure Code for the trial of warrant cases before a magistrate.

To combat the phenomenal rise in the incidence of armed robbery following the end of the civil war in Nigeria, the Federal Military Government passed the Robbery and Firearms (Special Provisions) Decree, 1970, which applies throughout the Federation.[12] Under the Decree, as amended, the Military Governor of a State has the power to constitute a tribunal or tribunals for the trial of the offences of robbery, attempted robbery and illegal possession of firearms. Such a tribunal consists of a High Court Judge as chairman, a senior member of the armed forces and a senior police officer. The tribunal can impose the death sentence in the case of robbery where the offender was armed with any firearms or offensive weapon or was in company with any person so armed, or where he, at or immediately before or immediately after the time of the robbery wounded any person. If no weapon was used or no wounds inflicted, the robbery is punishable by a term of imprisonment of not less than 21 years, with comparable penalties for attempts, illegal possession of firearms, etc. By Amendment Decree (No. 2) of 1974, the Attorney General of the Federation is empowered to make rules as to the procedure to be adopted in the prosecution of such offences. It would appear that no such rules have so far been made, thus, the procedure which is used is substantially the same as that followed in a High Court summary trial.[13]

Also in Nigeria, a Federal Revenue Court was established in 1973 as a Federal High Court of Justice.[14] The Court consists of a President and such number of other judges (four being the minimum) as the Head of the

Federal Military Government may prescribe by order. It is to operate in at least four Judicial Divisions altogether covering the entire country, the area of each Division being determined by the President of the Court. A single judge, duly appointed, constitutes the court.

The court has both civil and criminal jurisdiction in those cases -

> (a) relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party;
> (b) connected with or pertaining to -
> (i) the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation,
> (ii) customs and excise duties,
> (iii) banking, foreign exchange, currency or other fiscal measures;
> (c) arising from -
> (i) the operation of the Companies Decree, 1968, or any other enactment regulating the operation of companies incorporated (under said Decree),
> (ii) any enactment relating to copyright, patents, designs, trade marks and merchandise marks;
> (d) of Admiralty jurisdiction.[15]

The Supreme Court of Nigeria had the opportunity in 1973 to explain the rationale behind the creation of this special court:[16]

> [T]he true object and purpose of the Federal Revenue Court Decree as can be gathered from the four corners of it, is the more expeditious dispatch of revenue cases, particularly those relating to personal income tax, company tax, customs and excise duties, illegal currency deals, exchange control measures and the like which the State High Courts were supposed to have been too tardy to dispose of especially in recent years.

Section 32 of the Federal Revenue Court Decree, 1973, expressly provides that in general the Criminal Procedure Act is to apply substantially to criminal proceedings in the Court, but all criminal cases before the Court are to be tried summarily.[17] Provision is also made for the establishment of Currency Offences Tribunals in Nigeria.[18]

In response to an increase in offences involving firearms, Jamaica established a Gun Court in 1974 to speed up the trials of these offences, to protect witnesses from intimidation and to impose harsh penalties for offenders found guilty of gun related offences.[19] Although the legislation ran into some constitutional difficulties which culminated in a Privy Council decision,[20] amending legislation of 1976 has resolved those difficulties. All offences involving a firearm must, therefore, be heard in

the Gun Court.

The Gun Court Act requires that where any person charged with a firearm offence appears before the Gun Court, the hearing before that Court of the offence shall be commenced within seven days of the date of his first appearance before the Gun Court on that charge, but that no objection to any proceedings shall be taken or allowed on the ground that any hearing was not so commenced. In early 1976 it took, on average, three weeks from the time of arrest to bring a Gun Court case to trial. That period compared favourably with an average three or four month period between arrest and trial in the Circuit Court sitting in Kingston. The time between arrest and the bringing of Gun Court cases to trial shows, however, an alarming tendency to increase. In July 1976 it was taking about two months; by February 1977 the time lag between arrest and trial was 10 weeks. It seems clear then that while cases are brought to trial in the Gun Court over a shorter period than obtains in the Circuit Court, trials in the Gun Court cannot now be accurately described as speedy.[21]

Preliminary hearings were abolished in relation to Gun Court offences, as this was one way in which it was felt that trial would be speeded up, but it was replaced by providing to the accused, at a specified time before trial, a detailed police statement so that he would know the evidence which would be led against him. This requires from the police a greater amount of sophistication in their collection of statements than beforehand. Thus, a measure which was meant to speed up the trials in some respects also inhibits the trial coming on expeditiously because of the time it takes for the police to collect statements sufficiently detailed so as to provide the accused with adequate information of the case against him. Jury trials were also abolished in matters which came before the Gun Court as a time saving measure. Other difficulties in the way of speedy trial in the Gun Court are the lack of adequate courtroom facilities; civilian witnesses are sometimes reluctant to come forward and give evidence, and although all accused appearing before the Court are entitled to legal aid, there are difficulties in finding counsel and agreement of trial dates also creates delays. Having resolved the constitutional difficulties surrounding the Court, the Jamaican government is now devoting its attentions to eradicating some of these obstacles to speedy trial.[22]

The creation of special courts and tribunals is thus another method of relieving the congestion in the criminal courts, while at the same time providing more expeditious disposal of the cases which have been isolated in

this way. It is nonetheless a rather expensive solution as it entails the setting up and staffing of an entirely new piece of adjudicative machinery. One factor which should perhaps be investigated before money is spent on the creation of new specialised courts is whether the same amount of money spent on expanding and renovating the established criminal courts might not produce the same kind of benefits and to a wider category of cases.

In many of the developing Commonwealth nations there already exists a structure of special courts which could perhaps be put to fuller use, thereby speeding up the administration of justice. These tribunals are the customary courts where village elders or tribal leaders dispense justice according to local law and custom.

Botswana is one country which has turned to a development of its customary courts as a method of resolving the problem of delays caused by having a small population scattered over a wide geographical area. For example, the Botswana Customary Courts (Amendment) Act, 1976, increased the criminal jurisdiction of the customary courts to the imposition of sentences up to four years or a fine up to Pula 4,000 in cases infringing the Stock Theft Act. As a result of this and other extending legislation, a backlog of small offences has been cleared. Some of the cases which had piled up in the bigger centres were dealt with almost immediately.[23] In recent years similar proposals to extend the jurisdiction of customary courts in Ghana have been aired. The Ghanaian Chief Justice asked in 1973 that the jurisdiction of the Judicial Committee of the House of the Chiefs be extended to include cases which, by reason of the experience and the proximity of the parties to the chief and elders, could be more speedily dealt with than in ordinary courts.[24]

At the end of the colonial period in Papua New Guinea, the coalition government did not attempt to abolish the common law courts, rather, it decided to add another set of courts which would apply customary law in customary fashion, operating parallel to the common law courts. The Village Courts Act, 1973,[25] came into operation in 1974 with the following mandate:

> The primary function of a Village Court is to ensure peace and harmony in the area for which it is established by mediating in and endeavouring to obtain just and amicable settlements of disputes.[26]

Although the Village Courts have jurisdiction over people of all ranks and nationalities (and have exercised it) they were intended to serve Papua New Guineans primarily. Thus, the first courts were set up in rural

areas, though a few have been inaugurated more recently in urban centres as well. The Village Court Secretariat was empowered to establish courts area by area, whenever local people show sufficient interest in having one. By the end of 1976 there were 252 Village Courts operating in 30 areas throughout Papua New Guinea, staffed by 1185 magistrates and serving a population of 544,632.[27] Although there are jurisdictional limits on Village Courts in both civil and criminal matters, they apply only when the magistrate has failed to achieve a settlement through mediation and must adjudicate.

In general, the Courts are supposed to apply customary law, both in substance and procedure. This results in no distinction being made between civil and criminal cases; the court is free to order a fine, performance of community work, payment of compensation or any combination of these. The courts are not restricted by common law rules of evidence and procedure and may work flexibly, in the style of a village meeting, mediating, rather than adjudicating in order to achieve the peaceful settlement of a dispute. The available evidence suggests that village people are making frequent use of the Village Courts rather than having recourse to the District Courts.[28] Partly on the basis of the Papua New Guinea experience with Village Courts, the government of Western Samoa in proposing to confer judicial authority on village councils in the areas of both custom and minor criminal offences.[29]

Bangladesh enacted the Village Courts Ordinance in 1976[30] which provides for the constitution of small causes courts at the village level for the trial of cases involving offences or rights and liabilities of a minor nature. The stated object of the law is to make justice available right at the door of the people living away from urban centres at nominal or no expense. The procedure followed in these courts is very simple so that hearings are generally quick and inexpensive. Thus, unless a case warrants trial before courts with a higher jurisdiction because it involves major offences or rights and liabilities, litigants living in villages need not travel to courts situated in cities, there to be kept waiting for months before judgement, even in a petty case, is delivered. One hoped for side effect of this measure is that courts of higher jurisdiction will be releived of much of their burden and will be able to dispose of the more serious cases more expeditiously.

In the Northern Territory of Australia the administration of criminal justice has been described as "a continual battle between man and geography".[31]

> What is needed is a system which guarantees minimal remand time for persons awaiting trial, minimal travel by defendants and witnesses to

> court, minimal delay so that punishment can seem to be responsive to a particular act and a maximum amount of court time to consider each case.[32]

The Government of the Northern Territory announced that it hoped to fulfill these requirements by introducing a system of village courts using aboriginal justices of the peace to dispense tribal justice to this end, two pilot projects were recently initiated whereby aboriginals are acting as advisers to stipendiary magistrates, who are specialising in appreciating the needs of the aboriginal communities.[33]

An interesting situation has transpired in Nigeria which may well provide useful information for those countries considering setting up or expanding the jurisdiction of customary courts. Recent developments in respect of customary courts in Nigeria reveal two opposing trends: the move towards abolition and the retention and improvement of customary courts. In the early 1970s three states abolished the customary courts, transferring their jurisdictions to the magistrates' courts. As to the extent to which this change will accelerate the legal processes, one commentator has observed that prior to the abolition of the customary courts, the magistrates' courts were notorious for the congestion that existed. The transfer of the functions of the customary courts has added further pressure on these courts which in all probability can only be relieved by a significant increase in the number of magistrates.[34] A different picture is seen in the nine Northern States of the Federation where a reforming activity has been set in motion with a view to improving the customary courts. This exercise proceeds on the assumption that customary courts have not yet outlived their usefulness.

> With the two trends poised against each other only time will enable us to decide which is the better approach to a rather difficult problem.[35]

Footnotes

[1]P. Halnan, "Diversion and Decriminalisation of Road Traffic Offences", [1978] Criminal Law Review 456 at p. 459.

[2]F.O. Spalding et al., "One Nation, One Judiciary: The Lower Courts of Zambia", (1970), 2 Zambia Law Journal 1 at p. 138.

[3]Memorandum from the Jamaican government to the author, n.d.

[4]Ontario Ministry of the Attorney General, Annual Report 1976/77 (Toronto, 1979), pp. 46-52.

[5]Id. See also Alberta Board of Review Provincial Courts, The Administration of Justice in the Courts of Alberta (Edmonton, 1975), p. 50 for commentary.

[6]The Provincial Offences Act, 1979 S.O. c.4.

[7]S. Shetreet, "The Limits of Expeditious Justice". Background Paper prepared for the Conference on Expeditious Justice, Edmonton, Alberta, October 19-21, 1978, pp. 35-36.

[8]Ontario, Ministry of the Attorney General, Provincial Offences Procedure: An Analysis and Explanation of Legislative Proposals (Toronto, 1978).

[9]S. Shetreet, supra footnote 7.

[10]Sri Lanka, The Administration of Justice Law, No. 44 of 1973, section 46.

[11](No. 22 of 1979). See note at (1979), 5 Commonwealth Law Bulletin 615.

[12]This was later amended by the Robbery and Firearms (Special Provisions) (Amendment) Decrees of 1971 and 1974.

[13]F. Nwadialo, The Criminal Procedure of the Southern States of Nigeria (Benin City, 1976), p. 27.

[14]Nigeria, Federal Revenue Court Decree, 1973, (No. 13 of 1973).

[15]Id. at section 7(1)(2). Uganda has a similar court set up under the Economic Crimes Tribunal Decree, 1975, as amended. It covers offences such as the stealing of foreign exchange, stealing by persons in public service and stealing by directors or officers of corporations and companies.

[16]Jammal Steel Structures Ltd. v. African Continental Bank Ltd. [1973] All N.L.R. (Pt. 2) 208 at p. 222.

[17]Federal Revenue Court Decree, 1973, section 32(2). For a full discussion of this Decree see A.O. Obilade, The Nigerian Legal System (1979), pp. 185-188.

[18]Nigeria Counterfeit Currency (Special Provisions) Decree, 1974.

[19]Jamaica, The Gun Court Act, 1974, (No. 8 of 1974) as amended by Act No. 1 of 1976. For commentary see "The Gun Court" in Selected Memoranda prepared for the 1977 Meeting of the Commonwealth Law Ministers, Winnipeg (London, 1977), p. 23 and R.H. Hickling, "The Jamaican Gun Court Act", (1974), 16 Malaya Law Review 248.

[20]Hinds and others v. The Queen; D.P.P. v. Trevor Jackson

[21]"The Gun Court", supra footnote 19 at p. 580.

[22]Id.

[23]"Delays in the Administration of Justice" in Selected Memoranda etc., supra footnote 19 at p. 23.

[24][1974] Bulletin of Legal Developments 4.

[25]No. 12 of 1974. For commentary see B.M. Narokobi, "Adaptation of Western Law in Papua New Guinea", (1977) 5 Melanesian Law Journal 52.

[26]Village Courts Act, 1973, section 19.

[27]A. Paliwala et al., "Economic Development and the Changing Legal System of Papua New Guinea", (1978) 16 African Law Studies 3 at p. 52.

[28]Id. at p. 53.

[29]"Western Samoa Proposal to confer Judicial Authority on Village Councils" in Selected Memoranda etc. supra footnote 19 at p. 30.

[30]Ordinance LXI of 1976.

[31]R.L. Misner, "Administration of Justice on Aboriginal Settlements", (1974), 7 Sydney Law Review 257 at p. 258.

[32]Id. at p. 259.

[33]"Aboriginals Involvement in the Administration of Justice", (1979), 5 Commonwealth Law Bulletin 1359.

[34]E.I. Nwogugu, "Abolition of Customary Courts - The Nigerian Experiment", (1976) 20 Journal of African Law 1 at p. 12.

[35]Id. at p. 15.

PART FOUR

KEEPING CASES OUT OF COURT

> The danger has already been mentioned that the judicial system will founder under the sheer weight of matters coming before it. Good administration and management and improved procedures can do much to mitigate this danger but are unlikely to remove it. The question is whether the courts should be reserved for matters that are of some importance to the well being of society. This is an area which calls for examination. There is a real prospect of any criminal justice system being debased and depreciated by over use.[1]

The ambit of the criminal law has been a continuous historical extension from the one initial offence of parricide; but this extension has now reached unprecedented proportions and this in turn is having its effects on the courts. The question that is now being generally canvassed is: can certain types of behaviour be de-regulated? Is the criminal law an appropriate instrument for dealing with many of the problems which have been brought under its aegis? The response in some jurisdictions has been a qualified "yes". Relieving the burden on the courts by keeping cases out of that forum has been achieved by three methods: decriminalisation, depenalisation or diversion and conciliation.

XIV Decriminalisation

"Decriminalisation" will be used here in its most limited sense, that is, the legislative process of making acts lawful that were previously sanctioned by the criminal law.[2] After repeal of the crime, the behaviour in question is left free of legal control and apparently also of any other organised social reaction.[3] This contrasts with depenalisation, discussed in the following chapter along with diversion, where the criminal sanction is abandoned, but the conduct in question is then controlled by means of some other legal sanction.

Decriminalisation, being the most radical alternative of the three is also the least widely used.[4] Where it has been used to a significant extent is in the area of victimless crimes particularly those relating to sexual conduct. The laws against homosexuality, prostitution and abortion have been quite widely relaxed. The English Sexual Offences Act, 1967, provides in section 1 that it no longer shall be an offence for a man to commit buggery or gross indecency with another man provided that:

(i) the act is done in private;

(ii) the parties consent and

(iii) the parties have attained the age of 21.

In Canada, similar amendments to the Criminal Code were enacted in 1968-69 which decriminalised homosexual acts and sodomy between consenting adults over the age of 21 in private.[5] The law relating to sexual offences in the Australian Capital Territory was amended by the Law Reform (Sexual Behaviour) Ordinance, 1976.[6] The ordinance provides a general legalisation of all acts of a sexual nature done in private and with the consent of the other party; consent is by definition absent in the case of close relatives and people under the age of 16.

The act of prostitution, in itself, was never a crime at common law. There were peripheral offences such as keeping a common bawdy house or living off the earnings of prostitution. The English Vagrancy Act of 1824 made it an offence punishable with one month's hard labour if a "common prostitute was wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner". This was replaced by the Street Offences Act, 1959, which made it an offence punishable by fine for a "common prostitute to loiter or solicit in a street or public place for the purpose of prostitution".

The Canadian Criminal Code had also sought to control prostitution by the vagrancy laws. A "common prostitute" found in a public place and unable to give a good account of herself was guilty of a form of vagrancy.

This was repealed by section 195.1 of the Code which now makes it a minor offence for "every person who solicits any person in a public place for the purpose of prostitution".[7] Thus, the scope of the criminal law in regulating sexual conduct has been restricted.

Vagrancy itself is another area where a limited amount of decriminalisation has been taking place. In 1972, the offence of vagrancy where no moral turpitude is involved was removed from the Canadian Criminal Code.[8] Prior to this amendment the situation was as follows:

> s.175 - (1) Every one commits vagrancy who
> (a) not having any apparent means of support is found wandering abroad or trespassing and does not, when required, justify his presence in the place where he is found;
> (b) begs from door to door or in a public place;
> (c) being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself;
> (d) supports himself in whole or in part by gaming or crime and has no lawful profession or calling by which to maintain himself; or
> (e) having at any time been convicted of an offence under a provision mentioned in paragraph 689(1)(a) or (b), is found loitering or wandering in or near a school ground, playground, public park or bathing area.
>
> (2) Every one who commits vagrancy is guilty of an offence punishable on summary conviction.
>
> (3) No person who is aged or infirm shall be convicted of an offence under paragraph (1)(a).

The 1972 amendment repealed paragraphs (1)(a), (b) and (c) and subsection (3).

In Uganda, the Vagrants Act was repealed in 1977, eliminating the offence of vagrancy. In its place is a comprehensive scheme for the resettlement of vagrants on "community farm settlements".[9]

Vagrancy is a criminal offence in all parts of Australia other than the Northern Territory, where it was abolished in 1973. In 1974 the Territory also repealed the offence of public drunkenness, replacing it with police powers of "apprehension" of certain persons found drunk in public. Other Australian states are looking at the possibility of removing the intervention of the criminal justice process in this area.[10]

In England a working party examined vagrancy and street offences with a view to determining what role (if any) remained for the criminal law in this area, issuing its report in 1974.[11]

> We have asked ourselves whether the criminal law should wholly cease to concern itself with those who sleep rough; and, in doing so, we have been fully conscious of the views of those criminologists who believe that society should

> show itself to be more tolerant of deviant behaviour, and should seek ways of 'decriminalising' it. There is some force in the argument that sleeping out, as such, is a harmless activity which may, if the person sleeping out looks unkempt and unprepossessing, raise irrational fears and prejudices; and that it is not the business of the criminal law to frustrate the choice of his way of life, still less to visit penal sanctions on those who are driven to it by homelessness, social inadequacy, mental illness and other misfortune.[12]

While the Working Party did agree that the role of the criminal law in controlling vagrancy should be circumscribed, it felt it could not endorse a wholesale withdrawal.[13] This attitude was endorsed by the Tasmanian Law Reform Commission which felt that it cannot be seriously maintained that the answer to the problem is simply to leave vagrants alone, except perhaps in a minimal number of cases. Rather, something must be done for most of these people, for example, an escort to a voluntary shelter, simply for their own protection.[14]

Currently another offence is being canvassed for decriminalisation: simple possession of marijuana. Legislative implementation of such a proposal was on the calendar of the Parliament of Canada before the Government fell in the May, 1979, general election.[15] In Jamaica the Joint Parliamentary Select Committee of the House of Representatives and the Senate was set up in 1977 with the following terms of reference:

> To consider the criminality, legislation, uses and abuses and possible medicinal properties of ganga (marijuana) and make appropriate recommendations.

The Joint Committee presented its interim report in which, although it did not recommend the legalisation of marijuana, it expressed the view that there was a substantial case for decriminalising the personal use of the drug. No legislation has, however, been enacted to implement this recommendation.

It is fair to say that decriminalisation as a method of keeping cases out of the criminal courts is, at the present time, producing more proposals than concrete action, though it is to be hoped that these proposals will reach fruition eventually. Nonetheless, the extent to which the catalogue of offending can be pruned is very much dependent on the attitude of public opinion towards these "victimless" offences.[16] The main difficulty in treating these offences differently is that moral discourse has now become almost totally associated with criminal law provisions and solutions. There is, therefore, a strong resistance to decriminalisation because

"legalising" is equated with approval. It must also be realised that if decriminalisation is pursued only within the narrow confines of victimless crimes of morality, the impact on the courts will be a very limited one simply because such offences do not make up a very significant proportion of the criminal caseload. Such crimes are difficult to detect and prove in court which results in relatively few prosecutions being brought. Decriminalising vagrancy offences has slightly more impact as vagrants, once they have appeared in court, tend to get trapped in a "revolving door" coming back into court repeatedly for minor misconduct.

Only if decriminalisation is pursued on a wider basis will it really affect the operation of the courts. In New Zealand, for example, a set of figures was compiled by the Department of Justice dealing with offences which might be handled outside the criminal justice system using 1976 as the model year. It was estimated that 60.23 per cent of the total prosecutions related to offences which could be removed from the court system though, it must be emphasized "decriminalisation" was being used in a wider sense here and thus included depenalisation. The "unnecessary" prosecutions covered certain traffic offences, drunkenness and vagrancy, breach of maintenance orders, sale of liquor offences and failure to pay certain fees such as television licence fees, fishing licence fees and library fees, which, it was felt, could be handled quite effectively by administrative measures.[17]

Footnotes

[1]"Problems in the Administration of Justice", Memorandum prepared by the Government of New Zealand in Selected Memoranda prepared for the 1977 Meeting of the Commonwealth Law Ministers, Winnipeg (London, 1977), pp. 505-508.

[2]E.A. Fattah, "New Trends in the Criminal Justice System" in D. Morrison (ed.), New Directions in the Criminal Justice Process: A Report of an Advanced Seminar in Criminology (Vancouver, 1973), pp. 2-31 at p. 4.

[3]A. Rabie, "The Need for Decriminalisation", (1977), 10 Comparative and International Law Journal of Southern Africa 200 at p. 201.

[4]For an examination of the political implications of pursuing the path of decriminalisation, see D. Brown, "Criminal Justice Reform: a critique. An Examination of Decriminalisation" in D. Chappell and P. Wilson (eds.), The Australian Criminal Justice System, (2d ed.) (Toronto, 1977).

[5]Canadian Criminal Code, R.S.C. 1970, c. C-34, section 158.

[6]No. 55 of 1976.

[7]Criminal Code Amendment Act, 1972, c. 13, section 15.

[8]Id. at section 12(1).

[9]Uganda, Decree No. 5 of 1977.

[10]For an overview of the Australian position see Tasmania, Law Reform Commission, Report on Decriminalisation of Drunkenness and Vagrancy (Tasmania, 1977).

[11]Great Britain, Working Party on Vagrancy and Street Offences, Working Paper (London, 1974).

[12]Id. at para. 30.

[13]The Working Party's proposals have as yet not received any legislative attention.

[14]Tasmania. Law Reform Commission, supra footnote 10 at p. 6.

[15]Canada, House of Commons Debates, March 22, 1979.

[16]New Zealand, Report of the Department of Justice 1976/77 (Wellington, 1977), p. 5.

[17]New Zealand Royal Commission on the Courts, Report (Wellington, 1978), para. 199.

XV Depenalisation and Diversion

Depenalisation is a close relation of decriminalisation in that the criminal behaviour is no longer handled by the criminal justice system, instead another agency steps in to take over the responsibility. We have seen, for example, that in the Canadian province of Ontario, minor offences are now mainly an administrative concern; they are being weaned away from the criminal courts. Another prime example of depenalisation is the replacement of the criminal justice model with the medical model in dealing with alcohol and drug-related offences.

The English Criminal Justice Act, 1972,[1] provides in section 34:

> (1) In any case in which a constable has power to arrest a person under any of the provisions mentioned in subsection (3) of this section the constable may, if he thinks fit, take him to any place approved for the purposes of this section by the Secretary of State as a medical treatment centre for alocholics, and while a person is being so taken he shall be deemed to be in lawful custody.
> (2) A person shall not by virtue of this section be liable to be detained in any such centre as aforesaid to which he has been taken, but the exercise in this case of the power conferred by this section shall not preclude his being charged with any offence.

The offences covered by this section are being drunk and disorderly, being drunk and incapable, and being drunk and disorderly in a public place. Making attendance at the treatment centre voluntary avoids the "due process" complications which have affected other legislation, that is, the defendant is not being deprived of his liberty without a fair hearing. Nonetheless, the provision is not without its coercive aspects, as subsection (2) carries with it the heavy implication that failure to cooperate on this voluntary basis will result in regular criminal charges being laid.

This section was not proclaimed in force until 1976,[2] and even then it was to have practical effect only in those areas where medical treatment centres for alcoholics ("detoxification centres") had been approved for the purposes of section 34 by the Secretary of State for Social Services. A Home Office Circular, issued upon the proclamation of section 34, stated that Chief Constables would be advised individually of any intention to approve an establishment as a detoxification centre in their area. In practice, since the cooperation of the police is necessary in order to enable a detoxification centre to function - the referral of alcoholics to these centres is purely within the discretionary power of the police officer - the representations of the police were likely to be taken into account in any

discussions which preceded the setting up and approval of a centre. In addition, the circular expressed the hope that experimental detoxification centres, coupled with other facilities for the long-term care and treatment of alcoholics, would have the effect of reducing the number of their court appearances and convictions for drunkenness offences.[3]

The first centre for males was opened in May, 1976 in the West Yorkshire Police Area. In the first six months of operation there were 462 admissions involving 197 offenders. Altogether, 4,257 males were convicted of alcohol-related offences in this area in 1976, compared with 4,318 in 1975. If both convictions and admissions to the detoxification centre are combined, however, the 1976 total for that area was nine per cent higher than the 1975 total.[4] This pattern is also evident in the figures for 1978: the centre dealt with 347 persons in 1978, slightly fewer than in 1977. This fall was not associated with a reduction in the number of offences of drunkenness in the area; the total number of findings of guilt and admissions to the centre was 5,553 in 1978, six per cent more than in 1977.[5] This may mean that the police, rather than using the detoxification centre where they might normally have charged the alcoholic, were using it where formerly they would not have laid charges, merely issuing a caution, On the whole though, police cautions are used only in a tiny proportion of drunkenness cases - approximately 0.5 per cent. The second centre, for both sexes, was opened in the Greater Manchester Area in October, 1977. This centre dealt with 286 persons in 1978, the number of admissions being 432. In contrast with the results from the original centre, the number of findings of guilt for offences of drunkenness in the area in the first year of operation fell by 11 per cent from 8,119 in 1977 to 7,192 in 1978, while the total findings of guilt and admissions to a detoxification centre fell by seven per cent from 8,156 in 1977 to 7,624 in 1978.[6]

Ontario has also initiated a programme to channel alcoholics into medical treatment facilities rather than the criminal courts. An experimental unit operated in Toronto by the Addiction Research Foundation proved that expensive medical staffing in detoxification centres was unnecessary because physical complications were rare. Consequently, other units set up in Toronto and those planned for other areas are manned by non-medical staffs. Although they are not a part of the criminal justice system, such units depend on some arrangement for rescuing homeless drunks from the streets. As a result, Ontario, like Britain, has continued to depend on the police. The Liquor Control Act of Ontario[7] has been amended to empower police officers to escort public inebriates to a detoxification centre in lieu of laying a criminal

charge. It is a mixed system in the sense that the police, at their discretion or because beds are sometimes available, may use the criminal justice system for some inebriates and the detoxification centre for others.[8]

The objection to detoxification centres in the absence of more long term treatment and care-taking facilities is that they tend to become revolving doors, just like the courts, but rotating even more rapidly. The prescribed stay is only a few days and experience in Ontario has shown that many men leave after a few hours. The health protection of the longer jail term is lost, and the motivation of the police to operate what essentially becomes a "taxi service" may be weakened.[9]

The Criminal Law and Penal Methods Reform Committee of South Australia recommended that the offence of public drunkenness be abolished and that "sobering up" units be established wherever practicable and that police cells be designated as sobering up units elsewhere.[10] This recommendation was enacted in amendments made to the Alcohol and Drug Addicts (Treatment) Act, 1961, in 1976 and 1978.[11] As the title of the statute implies, these provisions apply to drug addicts as well as alocholics. The procedure followed in South Australia is that where a police officer or other "authorised person" has reasonable grounds to believe that a person is under the influence of a drug (which includes alcohol) in a public place, and, as a result, is unable to take proper care of himself, he shall, using any reasonable force, either,

(a) take him home,

(b) take him to a sobering up centre or

(c) take him to a police station.

The addict may be kept at the police station for a maximum period of four hours after which he must either be released or transferred to a sobering up centre. A person admitted to a sobering up centre shall be discharged as soon as he has recovered from the effects of the drug. In any case he cannot be detained longer than 18 hours from the time of apprehension unless, before the expiry of the 18 hours, a medical practitioner has certified that further detention is necessary for full recovery. A drug-dependent person can be detained for a maximum period of 102 hours if, within the initial 30 hours, the superintendent of the institution has satisfied a court of summary jurisdiction that such further detention is necessary. Once more, the maximum sobering up period is quite short - a little over four days - but longer detention without giving the addict the chance to challenge his detention would probably be perceived as a fundamental breach of a person's civil liberties.

Tasmania has had a similar piece of legislation in operation since 1968: the Alcohol and Drug Dependency Act,[12] provides that if a police officer finds in a public place someone apparently suffering from alcohol or drug dependency who is in immediate need of care and control he may remove him to a "place of safety" for medical, social welfare and treatment arrangements to be made.[13] The dependent person may be detained in a place of safety such as a hospital, treatment centre or police station for a maximum period of 72 hours.[14]

The above provisions appear to provide an effective means of dealing with persons who are alcohol or drug dependent, without recourse to the courts. But the Tasmanian Law Reform Commission, in its study of the decriminalisation of drunkenness and vagrancy, was told that these provisions have been little used. The main reason for this seems to be that police officers are understandably hesitant about presuming to say whether or not a person is alcohol or drug dependent. There is, in addition, a body of opinion opposed to the use of this system on the grounds that it does not give the person concerned any rights to have his case determined by the courts.[15]

A number of other Commonwealth jurisdictions have chosen to try and provide longer term care and protection without the necessity of imposing a prison term on the alcoholic or drug addict. This does necessitate a court appearance to satisfy due process requirements, but the judge in such proceedings is sitting in a quasi-civil capacity much like the judge in hearings for civil commitment under mental health legislation.

The Alcoholism and Drug Addiction Act, 1966, of New Zealand provides:[16]

> s. 9(1) On the application in the prescribed form of a relative (as defined in this section) of any person, or on the application in the prescribed form of a member of the Police or of any other reputable person, that the person to whom the application relates is an alcoholic, any Magistrate may if he thinks fit issue his summons to the alleged alcoholic to show cause why an order should not be made requiring him to be detained for treatment for alcoholism in an institution.
>
> (2) On the hearing of the application the Magistrate shall not make an order under subsection (7) of this section unless two medical practitioners either give evidence to the effect that they believe the alleged alcoholic to be an alcoholic within the meaning of this Act and that the making of an order for his detention and treatment as such is expedient in his own interest or in that of his relatives.

> (7) Subject to subsection (6) of this section, on the hearing of the application, the alleged alcoholic then being present before him, the Magistrate may, if he thinks fit, and if he is satisfied of the truth of the application, and that the managers or the superintendent of an institution, as the case may require, are willing to receive the alcoholic into the institution, make an order requiring the alcoholic to be detained for treatment for alcoholism in that institution.

The maximum period of detention that can be ordered under this provision is two years,[17] which is substantially more than the few days allowed in the jurisdictions examined above. An "alcoholic" under the New Zealand statute is defined as "a person whose persistent and excessive indulgence in alcoholic liquor is causing or is likely to cause serious injury to his health or is a source of harm, suffering, or serious annoyance to others or renders him incapable of properly managing himself or his affairs".[18] Thus, a police officer or relative does not have to wait until an alcohol-related criminal act is committed before setting this process in motion as he generally does under the detoxification centre schemes, although criminal behaviour while intoxicated would be prima facie evidence that the alleged alcoholic is a "source of harm...or serious annoyance". Under section 23 of this Act, any person ordered to be detained in a treatment institution has a right of appeal under the Summary Proceedings Act, 1957, in the same manner as if he had been sentenced to detention within the meaning of that Act.

Victoria also has a more long-term treatment alternative for alcoholics and drug addicts. The Alcoholics and Drug-dependent Persons Act, 1968, provides that, upon a complaint by a police officer, relative or business partner that a person is an addict, a judge or magistrate may order that person to attend an assessment centre for seven days.[19] In contrast to the system in New Zealand, after this period of assessment, the decision as to whether the alcoholic or addict should be committed to a treatment centre for an unspecified period of time is made, not by a member of the judiciary, but by the medical practitioners and the medical officer in charge of the assessment centre.[20] The person so committed is however provided with a right of appeal against such committal "as if the order of the medical officer committing such person to a treatment centre were an order made by a judge or magistrate...in the course of some duly appointed sitting of the court."[21]

In March 1973, the Vagrancy (Insufficient Means) Bill was read in the Victorian Legislative Council. This Bill had as a central proposal the

idea that a person arrested under the Vagrancy Act, 1966, would have a choice of being dealt with by the criminal courts or under the provisions of the Alcoholics and Drug-dependent Persons Act, 1968. In addition to alcoholics and addicts, the Bill also embraced people "in need of medical, psychiatric, or nursing treatment or care, or persons otherwise in need of care and protection". The Bill did not provide a right of appeal, which, to some would seem to be a breach of fundamental rights.[22] In any event, the Victorian Statute Law Revision Committee recommended that the Bill not proceed.[23]

> The recommendation seems to have been premised basically upon a perceived overlap between the provisions of the Bill and the 1968 Act. Whatever the reasons, there is obviously a mood developing in favour of such pieces of legislation. There is undoubtedly good will and the best interests of all at work. While we need to guard against is precipitously falling into a therapeutic model of criminal justice without taking into account the fundamental tenets of fairness, human rights, legal rights and the overall humanitarian and administrative concept of accountability to the individual who is subjected to the process.[24]

To summarise: depenalisation endeavours through deregulation to substitute administrative and social welfare measures in place of the criminal justice system in dealing with certain classes of offences or offenders. Similarly, diversion also attempts to use alternative measures to the criminal justice system in dealing with offenders; but it does so on a more informal basis. Diversion depends more on police and prosecutorial discretion than on legislation. It is more in the nature of being selective law enforcement rather than trying to apply to a class of offenders as a whole.

Screening cases out of the criminal courts through selective law enforcement is certainly not a new concept. In most legal systems, whether the decision to prosecute is in the hands of the police or of a public prosecuting service, a discretion whether or not to proceed with a case exists. In exercising that discretion the police officer or prosecutor will take into account such factors as the seriousness of the offence, the criminal history of the offender and the strength of the case against him. In this way, weak cases and unnecessary prosecutions may be kept out of our overworked courts.

In some jurisdictions the discretion to prosecute is placed on a

more formal basis through the mechanism of police cautions or warnings. This decision may be taken at one of two levels: the officer on patrol may decide, on his own initiative, not to report the offender but to end the matter there and then with a firm word of warning. Since such warnings are informal and off the record, little is known of the extent to which they are used, although in the case of minor offences it is thought that their use must be considerable.[25] Even those countries which do not formally recognise cautioning will have this ad hoc process in operation. In Canada, for example, a few provinces employ a warning or caution and in cases where cautioning does occur, it is primarily a discretionary decision by an individual police officer which is informal, unrecorded and not subject to review.[26] When an offence is reported, in those jurisdictions which formally recognise cautioning, a senior police officer or the public prosecutor may still decide to take no further action, or to issue a formal caution as an alternative to proceedings in court. In Scotland, which has a system of public prosecution, police discretion is exercised in cases referred to the procurator fiscal and the police may warn some offenders on their own initiative. Others are warned by the police at the request of the procurator fiscal, or by the fiscal himself.[27] In England and Wales, which have no public prosecuting service, the system is one of police cautions.

The decision not to prosecute most resembles an embryonic form of diversion when it reaches the stage of a formal caution.[28] In England, if the formal caution is for an indictable offence, the offender will most probably be asked to attend a police station where, if the offence is admitted and the complainant does not insist on a prosecution, he will be given a verbal caution by a senior police officer in uniform. Otherwise, the caution will be sent in the form of a letter from the chief constable. In either event, it will consist of a sharp reminder of the seriousness and consequences of offending, threatening prosecution for any further law breaking.[29]

A study of cautioning in England and Wales in the late 1960s found that cautioning was used most commonly in relation to juvenile offenders; the majority of adult offenders cautioned had admitted to minor theft or to receiving stolen property. These two groups accounted for more than three-quarters of the cases in which the police administered a caution. The only other numerically large groups were sexual offenders and those who admitted to breaking and entering offences.[30] More recent studies have supported these findings.[31] In 1977 there were approximately 115,000 offenders cautioned for indictable offences in England and Wales, and 34,000 for non-indictable offences, excluding motoring offences for which cautioning is

not used. Between 1969 and 1977 the number of persons cautioned for indictable offences increased by 132 per cent, but the cautioning rate for adults has remained between four and five per cent since 1960.[32] This represents a substantial saving in court time.

Thus, exercising the discretion not to prosecute and issuing formal and informal cautions to offenders is one way to screen suitable cases out of the criminal justice system. The decision not to prosecute, however, is mainly a negative one. Nothing positive happens apart from the decision not to proceed or the issuing of a caution. Diversion, on the other hand, which is a development of police and prosecutorial screening, has a marked positive component. Diversion may be defined as the halting or suspending, prior to a court appearance, of formal criminal proceedings against a person on the condition or assumption that he will do something in return.[33] This definition serves to emphasize those characteristics of diversion which distinguish it from the everyday processes of police and prosecutorial screening. Unlike screening, diversion involves imposing some obligation on the divertee to do something, generally something intended to have rehabilitative value. Diversion then is not merely a measure born of the realisation that the criminal law is overutilised, but is also fostered by a recognition that the current range and application of dispositional alternatives in the criminal process treats too many persons either too harshly or too ineffectively.[34]

The concept of diversion originated in the United States. Within the Commonwealth, the initiative has been taken by Canada following the publication of the federal Law Reform Commission's Working Paper No. 7 on Diversion in 1975. The following discussion will concentrate more or less exclusively on developments and experience within that jurisdiction.

The Law Reform Commission of Canada saw diversion as a useful compromise between adjudication and decriminalisation: it represents an approach which recognises that problems exist and cannot just be defined away and seeks solutions which maximise conciliation and problem settlement.[35] The full force of the criminal process can thus be restricted to offences which raise serious public concerns.

> Underlying diversion is an attitude of restraint in the use of the criminal law. This is only natural for restraint in the use of criminal law is demanded in the name of justice. It is unjust and unreasonable to inflict upon a wrong-doer more harm than necessary. Accordingly, as an incident is investigated by police and passed along the criminal process an onus should rest upon officials to show why the case should proceed

further.[36]

If the dispute can be settled satisfactorily, adequate restitution be made, community work be performed or medical treatment and social services be forthcoming, officials should make use of these options if this would be in the best interests of the accused and the community. The Commission itself acknowledged that diversion programmes, if they are to be successful, will require the expenditure of large sums of money in new areas, although hopefully, it will reduce the demand for services in other parts of the criminal justice system. Increased demands will be placed on the community for services including probation, child welfare, family counselling, manpower training, special education of different kinds, and medical or health services. It noted, for example, that probation services and counselling through drug and alcohol addiction agencies were already overloaded in some communities.[37]

The Law Reform Commission's project also had a research component, testing the theses underlying diversion in one area of Toronto.[38] It was known as the East York Project and its object was to see how difficult it was to divert people away from the criminal justice system by finding alternatives available to people in the community. In particular, would it be possible to develop some form of mediation or arbitration that could be used systematically? The project was operated in an existing police district in which police officers were instructed by the Attorney General and his deputy, supported by the police chief, that they did not have to, if they did not wish, lay criminal charges in any case (regardless of seriousness) if, in their judgement, the public interest would be better served by an alternative. One caveat was added: that if it was a crime in which there was a specific victim, both victim and offender had to agree to the alternative way of handling the situation. If the police officer, offender and victim agreed to seek a settlement, a project worker was called in to work out a settlement and this resulted in no criminal charges being laid. The project officials provided a mediation service and referral to relevant outside agencies.

Compared to an adjacent police district, cases referred to court were reduced by one-third in the experimental area. The system appeared to have advantages lost in the adversary system as presentation in court occurs only after a long process involving a great deal of hurt which by necessity is neglected, the purpose of the court hearing being to deal with the substantive issue at stake. Before trial there is a six to eight month period and during that time the offender may develop a self-concept of his innocence while the victim is absolutely convinced that the accused is guilty.

In such a win-lose situation, the end result is bound to make someone dissatisfied.[39] The crime rate in the area also dropped slightly, although this was possibly only a reflection of a country-wide trend. The project was deemed to have been successful.

Although the practice of diversion has still to receive formal recognition, informal schemes have been set up across the country. One further example will be examined.[40] Believing that the community has the ability and responsibility to deal with many of its own offenders, a segment of the community in Victoria, British Columbia, has set up a community diversion centre which operates basically as follows.[41] A police officer, satisfied that a law has been broken and that evidence exists to warrant laying a charge, uses his discretion to divert the accused rather than charge him. He contacts a diversion worker who comes immediately to the police station. With the accused, the police officer and the accused's parents (where the accused is a juvenile) all present, the diversion worker describes the nature of the diversion programme and the accused is given the opportunity to choose either to be charged and seek acquittal in the courts or to accept diversion, which is, in effect, an admission of guilt. The diversion worker endeavours to ensure that the accused understands what the charge would be against him and what evidence the police have. His legal rights to counsel and trial and the real possibility of acquittal are clearly set out. The worker then makes sure that the accused understands the requirements of the diversion programme.

A second source of referrals comes from the prosecutor. When a charge reaches his desk, the prosecutor has the prerogative to direct less serious cases to alternative programmes. If he considers that a particular case can best be handled by the community, he will contact the diversion centre. A diversion worker will interview the accused, and if the case is suitable and the accused willing, the prosecutor will inform the court clerk, the charging officer and the victim and the diversion will go forward.

Should the person choose the programme but fail to appear as required, his case is returned to the police or prosecutor who may then proceed with the charge. If he begins the programme but does not complete it, or completes it unsatisfactorily, neither the police nor the prosecutor will pursue the matter further. Thus, the accused is not subjected to double jeopardy by having a criminal charge hanging over him indefinitely. Nevertheless, a report will be made to the police or prosecutor, and this presumably might affect his future chances of being offered the diversion alternative.

The elements of the diversion programme are:

(1) to make restitution of stolen goods or money;

(2) to meet the victim in person, whenever possible, in order to apologise for the wrong done;

(3) to attend meetings with a diversion worker in order to work out the reconciliation contract and account for its fulfilment and also to enable the worker to assess the basic needs of the divertee and to begin them;

(4) to perform a period of voluntary community service and

(5) to attend a workshop of three to four hours which helps the divertee to examine his situation and the causes and consequences of his offence. The function of law in society is explored and he is helped to understand his responsibility for his own actions.[42]

In 1978, when the programme had been operating for two and a half years staffed by five full-time and three part-time workers, an evaluation was conducted. In that period it had dealt with 607 accused people. Initial expense had been high both because of start-up costs and because, until the programme came to be known, there were few referrals. However, the costs dropped rapidly, while the budget remained constant, as referrals rose from 65 in the first year to 210 in the second and to 311 in the first half of the third. There was no formal follow-up done on divertees, but from monitoring court lists, the staff was left with the impression that well below five per cent of their clients have been charged with a subsequent offence.

The offences dealt with through the diversion programme were usually first offences, minor, and property-related, with a heavy emphasis on shop-lifting. Other offences which might be considered appropriate, such as alcohol-related assault and impaired driving were seldom referred because of the low official and community tolerance for them. On the other hand, the policy of the diversion programme itself was against accepting drug addicts and alcoholics for whom Victoria contains no adequate treatment resources.[43]

Overall, the project found that diversion had the following advantages:

- the offender could be dealt with immediately without long court delays;
- flexibility and wider discretion could be exercised in choosing remedial action. In other words, the sanction could be more directly related to the offence;
- the offender could be dealt with in terms of community values;
- the opportunity for the offender and the victim to meet tended to alleviate bitterness and to focus feelings so that they could be dealt with;

- the offender remained in the community instead of being removed from it and
- the programme provided a much-needed non-adversarial process to relieve the burden on the courts.[44]

It must also be noted, however, that a number of negative factors also appeared, in that it was shown that the possibility existed that the legal rights of the accused to seek acquittal in the courts might not be safeguarded during the referral process. In addition, people might be referred to the programme simply because it is there, when ordinarily they would be warned by the police and sent home, or their cases would simply be dropped by the prosecutor.[45]

Those findings echo concerns which have been expressed in the literature and which, to a great extent, were pointed out by the Law Reform Commission itself.[46] Proceedings in open court do have inherent advantages in that accused persons can be represented and the safeguards of judicial procedure will be observed and kept under open scrutiny. Courts are able to exercise judicial control over improper practices, their decisions can be enforced, follow-up enquiries can be ordered, records will be maintained and the vital check of appeal proceedings provided.[47] Extreme caution needs to be exercised to ensure that informal diversionary proceedings, conducted in private, without legal advice, do not leave the accused too exposed to the coercive aspects of diversion.[48]

The Canadian courts have had a limited opportunity to examine a few of the more troublesome aspects of diversion. In R. v. Jones[49] the accused was charged with possession of marijuana and shoplifting. On that occasion she was judged a suitable candidate for diversion but failed to comply with all the terms of the agreement. Subsequently, she was apprehended on an unrelated charge, but on the grounds that she had failed to comply with the agreement, the Crown Attorney restored the original charge to the list. Mr. Justice Anderson of the British Columbia Court of Appeal held that the diversion process in this particular instance was an abuse of process because it gave the prosecutor the power to hold the threat of criminal proceedings over an accused in order to induce him to enter into and carry out what is, in effect, a sentence of probation.

> While it can be argued that the discretionary program is voluntary in the sense that the accused was not compelled to agree to the "diversion" conditions fixed by the prosecutor, it seems to me that one cannot avoid the fact that there was coercion in a very real sense.[50]

This decision carries with it the implication that "default" sanctions have

no place in diversion agreements.

In another British Columbia case, R. v. Drew,[51] a sentence was appealed on the grounds that the provincial court judge had taken into account in passing sentence the fact that the accused had previously been charged with shoplifting and had entered into a diversion agreement which had been successfully completed. The trial judge had stated that, had it not been for the diversion, he could have granted the accused a discharge on condition that he enter into a probation order for six months. Instead, his sentence was suspended and he was placed on probation for 12 months. The Court of Appeal allowed his appeal:

> I do not think that it would be appropriate for the court to interfere with the decision not to proceed with the shoplifting charge by assuming that there is something akin to a conviction. The Crown's election not to proceed resulted in the appellant doing community service and entering into certain conditions. He has completed his side of the bargain. I presume that he is not now liable to prosecution. A purpose of diversion is to avoid court proceedings and a conviction. That purpose should not be defeated by our treating the allegation as a conviction.[52]

We must also prove to ourselves that we have not become so wedded to formal, state-sanctioned processes and to authoritative decisions that a development such as diversion, noted for its flexibility and informality, is in danger of leading to an extension rather than a contraction of the criminal justice system.

Footnotes

[1]c. 71.

[2]Great Britain, Criminal Justice Act, 1972, (Commencement No. 5) Order, 1976, bringing the section into force on April 1, 1976.

[3]Great Britain, Home Office Circular 111/1976, "Criminal Justice Act 1972, section 34: Medical Treatment Centres for Alcoholics", (1976), 126 New Law Journal 811.

[4]Great Britain, Home Office, Offences of Drunkenness 1976 England and Wales (London, 1977), Cmnd. 6952. See also "Detoxification", (1977), 127 New Law Journal 975.

[5]"Offences of drunkenness", (1980), 6 Commonwealth Law Bulletin 334.

[6]Id.

[7]1970, R.S.O. c. 249 as amended by 1971 S.O. c. 88, section 1.

[8]P.J. Giffen, "The Criminal Courts and the Control of Addiction" in M.L. Friedland (ed.), Courts and Trials (Toronto, 1975), p. 110.

[9]Id.

[10]See brief summary in Tasmania Law Reform Commission, Report on Decriminalisation of Drunkenness and Vagrancy (Tasmania, 1977), p. 5.

[11]South Australia, Alcohol and Drug Addicts (Treatment) Act Amendment Act, No. 96 of 1976 and No. 97 of 1978.

[12]No. 61 of 1968.

[13]Id. section 58.

[14]Id. section 60.

[15]Tasmania, Law Reform Commission, supra footnote 8 at p. 7.

[16]No. 97 of 1966, section 9.

[17]Id. sections 10 and 11.

[18]Id. section 2.

[19]No. 772 of 1968, section 11.

[20]Id. section 12(1). A scheme operating in British Columbia reverses these two stages: a physician may order temporary detention for observation and treatment up to a maximum of 12 hours. Thereafter a confirming order of a magistrate must be sought to enable the alcoholic to be ordered to attend at or be detained in a treatment institution for an indeterminate term not exceeding 12 months - Summary Convictions Act, 1960, R.S.B.C. c. 373, as amended, section 64A.

[21]Id. section 12(2).

[22]P.A. Sallman, "Accountability in criminal justice administration" in P. Wilson and D. Chappell (eds.), The Australian Criminal Justice System (Toronto, 1977) pp. 492-505 at p. 503.

[23]Victoria, Report from the Statute Law Revision Committee upon the proposals contained in the Vagrancy (Insufficient Means) Bill, 1974 and upon section 5 of the Vagrancy Act, 1966, (1974). A brief commentary on this report is to be found in Tasmania, Law Reform Commission, supra footnote 8 at p. 5.

[24]P.A. Sallman, supra footnote 20 at p. 503.

[25]D. Steer, Police Cautions - A Study in the Exercise of Police Discretion (London, 1970), p. 5.

[26]Saskatchewan Law Reform Commission, Working Paper on Provincial Offences: Tentative Recommendations for Reform (Saskatoon, 1977), pp. 96-97.

[27]D. Steer, supra footnote 23.

[28]NACRO, Diversion from the Criminal Justice System in an English Context (London, 1975), p. 6.

[29]See J.A. Ditchfield, Police Cautioning in England and Wales Home Office Research Study No. 37 (1976).

[30]F.H. McClintock and N.H. Avison, Crime in England and Wales (London, 1968), p. 160.

[31]D. Steer, supra footnote 23, and M. Hough, "Police Cautioning", Great Britain Home Office Research Bulletin no. 4, 1977.

[32]Great Britain Home Office, Criminal Statistics England and Wales 1977 (London, 1978), Cmnd. 7289, para. 5.5.

[33]NACRO, supra footnote 26 at p. 10 and N. Cameron, "Diversion: Recent proposals in criminal justice", (1976), 8 Victoria University of Wellington Law Review 220. "Diversion" is capable of a much wider definition encompassing, for example, alternatives to imprisonment, but for our present purposes, the definition given is the most relevant.

[34]NACRO, supra footnote 26 at p. 41.

[35]Canada Law Reform Commission, Working Paper No. 7, Diversion (Ottawa, 1975), p. 1.

[36]Id. at p. 3.

[37]Id. at p. 22.

[38]Canada Law Reform Commission, East York Community Law Reform Project. Studies on Diversion (Ottawa, 1975).

[39]Id. at pp. 97-98.

[40]For a brief description of other schemes in operation see Saskatchewan Law Reform Commission, supra footnote 24 at pp. 15-20 and

P.A.R. Johnston, "Another Viewpoint on Diversion", (1977), Crime et/and Justice 292.

[41]J. Aubuchon, "Model for Community Diversion", (1978), 20 Canadian Journal of Criminology 296.

[42]Id. at pp. 296-98.

[43]Id. at p. 298.

[44]Id.

[45]Id. at p. 299.

[46]For example, the Commission took particular care to point out that if restraint were not exercised in the diversion process as well as in the criminal justice process, diversion programmes would have the opposite effect to that which was intended - supra footnote 33 at p. 24.

[47]A.F. Wilcox, The Decision to Prosecute (London, 1972), p. 111.

[48]D. Biles and B. Swanton, "The Future of Criminal Justice in Australia" in D. Biles (ed.), Crime and Justice in Australia (Canberra, 1977), pp. 167-187 at p. 180; N. Cameron, supra footnote 31 at p. 221 and K.L. Chasse, "Diversion and the Prosecutor" Crown's Newsletter, July/August 1976, p. 1.

[49][1978] 3 W.W.R. 271 (British Columbia Court of Appeal).

[50]Id. at p. 283.

[51][1979] 7 Criminal Reports (3d) S-21 (British Columbia Court of Appeal).

[52]Per Seaton J.A., Lambert J.A. concurring at p. S-24.

XVI Conciliation

"Diversion", besides being an updated version of the long-standing practice of police and prosecutorial screening, also represents a formalisation of conciliation and mediation processes which exist in some Commonwealth countries as a means of avoiding court hearings. As we have seen, a general practice in diversion schemes is that where there is an identifiable victim, the diversion agency may mediate between the offender and the victim to promote a reconciliation, often by way of some form of restitution to the victim. Mediation not only has the cathartic effect of enabling the disputing parties to sort out their own grievances, but it also helps to reduce the workload of the criminal courts.[1]

The use of conciliation and arbitration before any formal court proceedings are undertaken has been promoted and expanded in several Commonwealth jurisdictions. In Tanzania it is a long-established practice that the less serious cases go through an arbitration process before reaching the courts. The process covers such offences as minor assaults, assaults within the family group and petty thefts where the parties are in some way related.[2] It has been found that this does reduce the flow of cases going to court and should therefore be encouraged, but it is feared that any attempt to institutionalise these informal arbitration proceedings would serve only to create another layer of courts. Villagers would still seek informal settlement before moving on to arbitration proceedings, as the essence of the present system of arbitration is its absolute informality. The parties are not restricted in regard to their choice of persons as assessors. Neither are they restricted as to the manner in which the reference is to be made, and the arbitrators themselves are not confined as to the methods which they can use to settle the matter. Often, they do not act as arbitrators at all, but merely as mediators, bringing parties together and persuading them to accept what appears to be a reasonable solution. Seldom do they arrive at a conclusion which they impose on the parties, which is the normal function of an arbitrator.[3]

The desire to place more emphasis on achieving compromises between disputing parties while ensuring that no guilty party benefits from his wrongdoing resulted in a measure of institutionalisation of the mediation process in Papua New Guinea.[4] Unofficial dispute settlement still takes place: it is made up of moots and meetings of family heads and does not occur in any uniform prescribed way, instead adjusting its membership and procedure according to the importance of the case and/or of the litigants. But this has now been supplemented by a more formal Village Court system

that was brought into existence by the central government.[5] These courts were introduced in Papua New Guinea to give emphasis to the idea of mediation and compromise, and to encourage popular participation in dispute settlement. As we saw earlier, the Village Courts have proved to be quite successful in this task.[6]

After independence, India established a quasi-judicial mechanism called the "nyaya panchayat" which was to be set up at the village level throughout the country. Previously, the panchayat had been an organ of village government, thus, providing these bodies with adjudicatory powers marked a historic break with the panchayat system as it had existed prior to independence.[7] It has been characterised by one commentator as "experimentation in legal access for village populations".[8]

One of the objects of the establishment of the nyaya panchayats was that many of the small disputes or petty offences which often disturb the peace and harmony of village life should, in the interest of the village community, be disposed of expeditiously and cheaply by a local tribunal of the villager's own choice.[9] An emphasis on the amicable settlement of disputes is an important aspect of nyaya panchayat ideology. Accordingly, conciliation is often emphasized over adjudication in some state legislation. In Bihar and Kerala, for example, it is obligatory on the nyaya panchayat to first resort to conciliation in all matters, including criminal cases, whereas in Rajasthan conciliation is permissible though not obligatory.[10]

> In many legal systems, both modern and developing, both Eastern and Western, concern is mounting over increasing delays in the courts and over the rising costs of litigation both to the litigant and to the State. This concern has focused attention on inexpensive and expeditious alternatives to court-room adjudication. Attention has focused on arbitration and conciliation as viable alternatives. Of recent experiments with such devices, none has been as ambitious and comprehensive as Ceylon's Conciliation Board's scheme.[11]

The Conciliation Boards Act of Ceylon[12] (now Sri Lanka) was passed in 1958 with the object of putting an end to wasteful litigation by promoting the amicable settlement of disputes, civil and criminal. It was meant essentially for village areas and the arbitrators were therefore men of the village. This represented a continuation of a 2500 year old tradition of settling disputes within the local community by conciliation through the Gansabha or village tribunal. It was envisaged that every citizen troubled by a civil dispute or minor criminal act would come before a Conciliation

Board composed of leading citizens of his community. The Board was to enquire into the matter and attempt to get the parties to resolve the problem amicably. No man should proceed to court without first attempting to settle his dispute before a Board; no court should entertain an action except where proceedings before the Board had failed to effect a settlement. The provisions of the Act were extended to urban areas after 1963 when the Minister of Justice was given wider powers to constitute the Panel of Conciliation.[13]

In each area a "panel of conciliators" is to consist of not less than twelve persons who are chosen usually on the basis of their social standing in the community and education. Practising lawyers were named to some of the earlier panels, but present policy is to exclude them. Conciliation boards which hear the cases consist of three or more members of the panel who are appointed by the chairman of the panel.

The power of a Conciliation Board is solely to bring the parties together and, on the basis of a confrontation in an informal setting, encourage them to arrive at a mutually acceptable settlement of their differences. The Board has the power to summon any person to attend its meetings to give evidence and to produce documentary or real evidence. Failure to obey such summons brings liability to punishment by fine in the Magistrates' Court. The Board may accept evidence without regard to the Evidence Ordinance except that it must allow a witness all privileges he would be entitled to in giving evidence before a court of law. Moreover, the Board has no punitive powers and they are not adjudicative bodies. They have no power to make determinations, enter judgements or compel action of any person except insofar as is necessary to gather evidence in the course of an inquiry. The Board simply encourages the disputants to agree upon a settlement although it often suggests what it views as a just and reasonable settlement. If a settlement is not possible, a certificate is issued to the complainant stating that inquiry has been made by the Board and that a settlement has not been achieved. Armed with this certificate, the complainant may proceed to court.[14]

As to their use and effectiveness: the first Board was constituted in February 1959, but at the end of 1965 only 75 Boards had been established. After 1965 the number of Boards increased steadily so that by July 1, 1970 there were 324 in operation, although they were not distributed evenly throughout the country. Statistics kept by the Ministry of Justice reveal that up to 1969, 29,441 disputes were referred to Conciliation Boards, and of these, 13,710 (or nearly 50 per cent) were settled. These figures are taken as an indication of the good results flowing from the implementation of the Act.[15] The institution of the Conciliation Boards has also had an impact

on the workload of the criminal courts. One evaluation of the operation of the conciliation system during the 1960s found that those areas which have a high concentration of Conciliation Boards in operation experienced on an average an increase of only three per cent in the business of the Magistrates' Courts whereas in those areas with a low concentration of Boards, the Courts' business increased dramatically by 31 per cent.[16]

> Quantitiatively, the Conciliation Boards have had a demonstrable impact on the Island's courts, an impact which has not been fully appreciated by lawyers and judges alike. Qualitatively, the Boards' impact is more difficult to assess. Have the Boards contributed to basic changes in the "quality of justice" of Ceylon's legal system? The "justice" dispensed by the Boards is quicker, cheaper and, from the parties' perspective, more understandable and more equitable than the justice dispensed by the regular courts. More understandable and equitable because the entire scheme is founded on the consent of the parties to a settlement - a settlement based not on technical rules of law only vaguely comprehensible to the average citizen, but rather one based on common sense notions of what is fair and equitable in the facts of the case. Settlements generally give to each party a part of what he sought; each can walk away from the Board satisfied that he has been vindicated at least in part - a resolution seldom realised in a court with its winner-take-all procedure. The Conciliation Boards settle disputes without reference to law. In attempting to label this trend as desirable or undesirable, we confront a rhetorical question better left for the scholars of jurisprudence. Is the purpose of a legal system to resolve disputes in an orderly fashion, or is its purpose to resolve disputes in an orderly fashion according to given substantive rules? In other words, is the important factor that the dispute has been resolved, or is it more important how (in terms of substantive rules) the dispute has been resolved?[17]

Conciliation Boards have also been set up in Bangladesh under the Conciliation of Disputes (Municipal Areas) Ordinance.[18] Criminal cases which must be dealt with by a Conciliation Board are those relating to offences under the Penal Code and the Cattle-trespass Act specified in the Schedule of the Ordinance (generally property offences where the value of the property does not exceed 5,000 taka). The Board, however, has no jurisdiction where an accused has been previously convicted of a cognizable offence.

When a dispute to which the Ordinance applies arises, either party may apply to a commissioner of a Pairashava for the constitution of a

Conciliation Board for the resolution of the case. The Board consists of a Chairman and four members, two being nominated by each of the parties. It has no power to pass a sentence of imprisonment or fine but, in criminal cases, it may order the payment of compensation not exceeding 5,000 taka. The decrees of a Board are enforceable as if they were tax debts, and the decisions of a Board are final and not appealable if the Board has reached its decision unanimously or by a majority of 4 to 1. In other cases, a party may appeal to the Subdivisional Magistrate.

In Britain, a few fairly recent Acts of Parliament have provided some scope for conciliation as a better means of securing compliance with the law than proceedings in court. In the sensitive area of race relations, the Race Relations Board has been successful, more often than not, in settling disputes without recourse to the courts. In much the same way, local housing authorities have preferred to seek a reconciliation between landlord and tenant where there has been a breach of the Rent Acts. Under this legislation, it is a criminal offence to "harass" the occupier of rented premises. Before taking proceedings in court, the local authority normally tries to restrain the landlord by explaining the law and warning him that he is liable to a fine or six months' imprisonment on summary conviction. In a large number of cases, these efforts at conciliation prove successful.[19]

A number of African nations have enacted provisions which place an onus on the court to promote conciliation and the amicable settlement of a case. Section 156 of the Ugandan Magistrates' Courts Act, 1970, reads as follows:[20]

> In criminal cases, a magistrates' court may promote reconciliation, and encourage and facilitate the settlement in an amicable way, of proceedings for assault, or for any other offence of a personal or private nature, not amounting to felony and not aggravated in degree, in terms of payment of compensation or other terms approved by such court, and may, thereupon, order the proceedings to be stayed.

Substantially similar provisions exist in the Southern States of Nigeria;[21] Malawi;[22] Seychelles;[23] Kenya[24] and Zambia.[25] Although these cases do go to court, informal and flexible negotiations may expedite a settlement which will prove satisfactory to both sides.

Thus, where a victim of a crime exists, be it a crime against his person or his property, perhaps it should not be rather automatically assumed that adjudication on the adversary model is the best way of resolving the problem, particularly where a prior relationship exists between offender and victim. There are at least three possible alternatives:

(1) the handling of the situation by the community or a section thereof. For the most part, this method would probably be most appropriate for small, closeknit communities;
(2) the use of a conciliation board of some description or a diversion agency. This, of course, does carry an inherent drawback in that it necessitates the setting up of a quasi-judicial structure which will entail considerable expense and may not in the end result in any overall saving in time. The parties to the dispute may, however, be more satisfied with the outcome; and
(3) the use of existing police, prosecutorial and judicial manpower in promoting informal dispute settlement. To a remarkable extent, the police fulfil this function already. For prosecutors and judges, a significant redefinition of their roles would be required. Hence, in deciding to adopt informal case settlement, a jurisdiction can choose a model most suited to the level of social development within the jurisdiction and the resources available for such a scheme.

Measures designed to keep cases out of the courts do have the potential to expedite the hearing of criminal cases by reducing the workload of the courts. The inherent difficulty with such solutions (decriminalisation excepted) is that the number of cases is not actually being reduced; there is merely a reallocation of the cases to bodies outside the formal criminal justice system. The creation of alcoholic treatment centres and conciliation boards, for example, is an expensive proposition, though not without its merits in that these bodies allow the cases left in the system to be processed more quickly. The cases in the new system are handled more expeditiously and in addition, this may be a more appropriate response to the behaviour concerned. There is the further danger, however, that having invested money in providing these new agencies and relieving the criminal courts, the work of these bodies will subsequently expand to meet the resources available. In other words, criminal justice officials will not be as restrained in channelling people into the system if the delay and caseload situation improves. Having enacted measures such as those reviewed above, vigilance must be maintained, otherwise the caseload crisis will simply recur.

Footnotes

[1]A. Paliwala et al., "National Goals and Law Reform", (1976) 4 Melanesian Law Journal 259 at p. 263.

[2]In Western Samoa, reconciliation is also carried out according to traditional practices for minor offences within the family, more as an apology than a reconciliation although acceptance of the apology leads to reconciliation. This procedure generally applies even to the most serious crime in the land. It is normally made before the accused is charged or before the trial but in no way overtly affects the administration of justice, that is, it does not result in suspension of criminal proceedings - correspondence from the Office of the Attorney General, Western Samoa dated January 12, 1979.

[3]"Report on Judges' and Magistrates' Conferences November 1967 - March 1968", (1968), 1 East African Law Review 167 at p. 168.

[4]A. Paliwala et al., supra footnote 1.

[5]Papua New Guinea, Village Courts Act, 1973, as amended. For commentary see B.D. Ross, "A Review of the Judiciary in Papua New Guinea", (1977), 5 Melanesian Law Journal 5 at p. 7.

[6]See ante, Chapter XIV, footnote 25 and accompanying text.

[7]U. Baxi, "Access, Development and Distributive Justice: Access Problems of the "Rural" Population", (1976), 18 Journal of the Indian Law Institute 375 at p. 406.

[8]Id. at p. 411.

[9]K.N. Chandrase Kharan Pillai, "Criminal Jurisdiction of Nyaya Panchayats", (1977), 19 Journal of the Indian Law Institute 438 at p. 456.

[10]U. Baxi, supra footnote 7 at p. 416.

[11]R.K.W. Goonesekere and B. Metzger, "The Conciliation Boards Act: Entering the Second Decade", (1971), 2 Journal of Ceylon Law 35 at pp. 35-36.

[12]No. 10 of 1958.

[13]Conciliation Boards (Amendment) Act, No. 12 of 1963.

[14]R.K.W. Goonesekere and B. Metzger, supra footnote 11 at pp. 48-60.

[15]R.K.W. Goonesekere, "Conciliation Boards", (1970), 1 Journal of Ceylon Law 143 at pp. 143-44.

[16]R.K.W. Gooneskers and B. Metzger, supra footnote 11 at p. 88.

[17]Id. at pp. 90-91. For an examination of the continuing role of Conciliation Boards in Sri Lanka's newly restructured criminal justice system see L.J.M. Cooray, "Administration of Justice in Sri Lanka", (1976) 6 Hong Kong Law Journal 67 at pp. 80-81.

[18]No. V of 1979. See note at (1979), 5 Commonwealth Law Bulletin 614.

[19]A.F. Wilcox, The Decision to Prosecute (London, 1972), pp. 109-110.

[20]For commentary on this provision see D. Brown, Criminal Procedure in Uganda and Kenya, (2d ed.), (London, 1970), p. 169 and H.F. Morris and J.S. Read, Uganda: The Development of its Laws and Constitution (London, 1966), p. 271.

[21]F. Nwadialo, The Criminal Procedure of the Southern States of Nigeria (Benin City, 1976), p. 1.

[22]Malawi Criminal Procedure and Evidence Code, cap. 8:01, section 161.

[23]Seychelles Criminal Procedure Code, cap. 45, section 165.

[24]Kenya Criminal Procedure Code, section 176.

[25]Zambia Criminal Procedure Code, cap. 160, section 8.

Conclusions

The stated object of this report was to enable Commonwealth jurisdictions to benefit from the experience of others in dealing with delays in the trial process. On the basis of the materials presented here, it is fair to say that a great deal of effort has been devoted to tackling what appears to be a problem of great magnitude and widespread implications. The diversity of response offers a rich source that every Commonwealth country can consult in drawing up a plan of action. Equally important, it also provides a valuable index of possible pitfalls.

It is now apparent, for example, that procedures which may save time at one stage of the criminal justice process may produce serious delays at the other; that informal time-saving mechanisms can become rigid and formalised and consequently of little benefit; that utilising modern technology and administrative techniques in the court system can be very useful, but that many charges, such as those aimed at streamlining jury trials, at decriminalisation or at diverting people from the system, will affect only a very small proportion of criminal cases. While it may not appear to be very systematic, each part and procedure of the criminal justice system is inextricably linked, and this must be constantly borne in mind in drawing up reforms. A controlled intake is just as important as efficient processing mechanisms. An unrestrained flood of cases can sabotage the most innovative procedures. In fact, speedier processing and increased resources may make criminal prosecution a more viable and attractive proposition in cases which previously might have been kept out of the system, thus making it even more imperative that controls be maintained on the numbers and types of cases that come into the criminal justice system.

These are not the only concerns, or even the most important ones, that must be addressed by any Commonwealth jurisdiction which is considering instituting changes to deal with delays in the administration of justice. There are a number of basic issues which, although touched on in the body of the text, are not dealt with at length. Nevertheless, they cannot be ignored in the hope that they will disappear. In contrast to the rather technical problems raised in the preceding paragraph, these issues are of a more jurisprudential nature, and logically, should be addressed before reforms are instituted. Unfortunately, this is rarely, if ever, the case. Instead, policy-makers pursue the path of expediency, leaving others to ponder the future of the philosophical underpinnings of the common law system of criminal justice.

An all-pervasive atmosphere of crisis is prompting numerous changes in how we process criminal cases; but what we have is a classic case of being so concerned with pruning individual trees that the basic state of the forest is being neglected. For example, throughout the common law world there is a dearth of adequate research on the operations of the criminal justice system. The overriding concern, both now and in the past, is on getting the work done rather than on analyzing how it is done. This makes it difficult to say with any degree of certainty whether delays are indeed any worse than they have been in the past, and if they are, what the causes are. There is little hard evidence that the criminal courts used to function more efficiently. It is possible that while they were perhaps once able to process cases more expeditiously, this was because there was a distressing lack of concern for the interests of the accused.

Given the existence of this deficiency, we lack an adequate basis for grounding reforms. Such research would take a significant amount of time and effort. Unfortunately, the widespread feeling of crisis makes us reluctant to wait for this information, before deciding on a plan of action. Hence, we proceed in a piecemeal fashion on a trial-and-error basis, adhering faithfully to the principle of incrementalism. Further, having instituted this plethora of changes, it is often difficult to see just how much impact they are having, in the absence of adequate evaluation of the criminal justice system. New procedures and administrative measures are often introduced without there also being an in-built evaluation of their operation. General methods of measurement may show that processing time has been reduced, but in the absence of controls and follow-up studies, it is possible that other factors are responsible for this result.

Rationality, not desperation, should be the guiding principle. This demands not only careful observation and analysis of the way the system operates, but also a thoroughgoing examination of the broader implications of both the problem and its possible solutions. What needs to be considered, for example, is whether the use of the criminal law as a regulatory tool has got out of hand. Can the criminal justice process, as presently constituted, ever cope satisfactorily with the kind of caseload it is currently being presented with? In other words, what should the criminal law legitimately be used for? Should the criminal justice process be adjusted to accommodate the changing nature of its caseload? If using this process is perceived to be the best way of handling such behaviour, then the answer should be in the affirmative. Otherwise, due consideration should be given to finding alternative methods of dealing with non-traditional crimes, leaving the

criminal courts to deal with what has long been accepted to be the criminal law's business. Regardless of whether the ambit of the criminal law is circumscribed or not, there should also be a reassessment of modern-day expectations of the criminal justice system. Perhaps many of our current difficulties stem from the fact that our expectations are unrealistic. Technology, automation and assembly-line production have conditioned us to expect instant gratification. Instant justice, however, is neither desirable nor feasible; justice cannot be stamped out of plastic moulds.

Of course, justice itself is not a static immutable quality. What a fair trial should consist of should also be the subject of careful consideration. Have circumstances so altered that fundamental changes in trial procedures are necessitated? Can the widespread right to counsel and legal aid justify more summary forms of trial and less restrictive rules of evidence, for example? The answer should depend on whether such changes measure up to reformulated standards of fairness or whether they are simply the product of expediency.

This brings us back to a major theme threading through the body of this study; the tension between expediency and fairness. Elevation of the former to a motivating force behind system change would tend to support the proposition that the mere accomplishment of adjudication is enough. But is it? Should we not endeavour to keep alive the worthy ideal that the manner of adjudication is of paramount importance. Progress can still be made in making the criminal justice system more efficient, for it is far from being perfect in design or in its administration. Nevertheless, efficiency must not be pursued oblivious of fairness and justice:

> [D]ue process today is threatened by the inefficiencies which afflict courts all across the country. Unless antiquated, wasteful, and cumbersome procedures are replaced by those more rational and expeditious, the courts may find themselves unable to afford deliberative, due process adjudication to any litigants. The machinery may simply grind down under the overload, while public respect for legal institutions erodes correspondingly. The legal order is not powerless to deal with this threat. The whole point of introducing more efficient and better structured...processes is to make it possible for the courts to have time for reflection and study and hence sound judgement on contested issues of substance, in the face of unprecedented caseloads. Efficiency is a means, not the end. Properly understood, it is a rubric for new ways in court procedures of eliminating steps which serve no purpose, of eliminating long

> lapses of time where nothing happens....of relieving judges of chores which do not require judicial attention, and so on, all to the end of making it possible for the indispensable process of judgement to function on an informed basis and within some acceptable period of time. Thus, viewed in proper perspective, efficiency and expedition are the handmaidens of due process.[1]

A blind concern with eliminating delays cannot be tolerated because it is likely to produce an over-emphasis on haste, which is perhaps the greater of the two evils. Delays in the administration of justice did not manifest themselves overnight and it would be doing them, and the participants in the criminal justice system, an injustice if overnight solutions were to be attempted.

Footnotes

[1]D.J. Meador, Criminal Appeals: English Practices and American Reforms (Charlottesville, 1973), p. 163.

APPENDIX

Ontario Attorney General's Guidelines on Disclosure in Criminal Cases

The Guidelines are in effect only in relation to prosecutions to which the following Criminal Code sections apply:

47(1)(2)(a)(b), 75, 76.1, 76.2, 78(a), 79(2)(a), 144, 146(1), 203, 218(1), 219, 221(1), 222, 223, 230, 232, 247(1), 251(1), 303 and 304.

These sections constitute all offences under the Criminal Code where the maximum penalty is life imprisonment except the offence of breaking and entering a dwelling house.

The Guidelines are:

1. Where Crown Counsel is of the belief that a plea of not guilty may be entered, he will make himself available to defence counsel by proposing in writing to defence counsel, prior to the date on which the matter is set to proceed, that defence counsel meet with him prior to the date on which the matter is set to proceed to review the evidence that the Crown expects is available and to discuss the nature and scope of the written disclosure that can be available in the case in the manner described in paragraphs 2(b) and (c) below.

2. (a) When such a meeting takes place, Crown Counsel, after reviewing the evidence that the Crown expects is available and discussing the nature and scope of the written disclosure that can be available in the manner described in paragraphs 2(b) and (c) below, will ask defence counsel to undertake to the Crown what the accused's election is going to be.

   (b) If the accused proposes to elect trial in Provincial Court, Crown Counsel will agree to provide him with the written disclosure described in paragraph 3 below within a reasonable period of time prior to trial.

   (c) If the accused proposes to elect trial in County or Supreme Court, or if the offence is in the absolute jurisdiction of the Supreme Court, Crown Counsel will endeavour to reach agreement with defence counsel as to the number of witnesses that must be called at the preliminary hearing. If agreement is reached on the limitation of witnesses, Crown Counsel will, in order to ensure committal for trial, ask defence counsel to undertake that he will, after the calling of the agreed number of witnesses at the preliminary hearing, either:

      (i) consent to a committal for trial pursuant to s.476 of the Criminal Code,

   or (ii) admit, for the purpose of the preliminary hearing, such facts as are disclosed in the written disclosure as, in the opinion of Crown Counsel, are necessary for the purpose of the preliminary hearing,

or (iii) agree to the filing of the synopsis of the expected evidence of such witnesses who have not testified at the preliminary hearing as, in the opinion of Crown Counsel, are necessary for the purposes of the preliminary hearing.

If such an undertaking is made by defence counsel, Crown Counsel will undertake to provide the written disclosure described in paragraphs 3(a) to (e) below after the agreed number of witnesses are called at the preliminary hearing.

(d) If

(i) defence counsel refuses to participate in a disclosure discussion after being afforded a reasonable opportunity to do so,

or (ii) a disclosure discussion is held but defence counsel refuses to give an undertaking regarding his client's election,

Crown counsel shall apply, pursuant to paragraph 6 below, for exemption from adherence to these guidelines.

(e) If a disclosure discussion is held but:

(i) agreement is not reached on the total number of witnesses to be called at the preliminary hearing,

or (ii) defence counsel refuses to give an undertaking pursuant to paragraph 2(c) to ensure a committal for trial,

Crown counsel will conduct a preliminary hearing in the ordinary way and will, after committal for trial, provide written disclosure pursuant to paragraphs 3(b), (c) and (d) below;

(f) If defence counsel participates in a disclosure discussion and agreement is reached as to the total number of witnesses to be called at the preliminary hearing and as to the manner of ensuring committal for trial pursuant to paragraph 2(c) above, but defence counsel subsequently, after the calling of the agreed number of Crown witnesses at the preliminary hearing, seeks to be relieved of his undertaking pursuant to paragraph 2(c) above, Crown Counsel will continue the preliminary hearing in the ordinary way, after an adjournment if necessary, and will, after committal for trial, provide written disclosure pursuant to paragraphs 3(b), (c) and (d).

(g) In a case involving more than one accused, where either paragraph 2(d)(i) or 2(d)(ii) or 2(e)(i) or 2(e)(ii) or 2(f) becomes applicable to one or more of those accused, Crown Counsel shall comply with these guidelines with respect to the remaining accused unless Crown Counsel applies for and receives an exemption from adherence to these guidelines pursuant to paragraph 6 below with respect to those remaining accused. If no such application for exemption is made or granted, Crown Counsel is entitled to seek an undertaking from counsel for the remaining accused, that any information provided to them by the Crown pursuant to these guidelines not be passed on by them to the other accused or counsel for the other accused.

3. Written disclosure should include the following:

(a) A synopsis of the evidence of each witness who is not examined at the preliminary hearing by either the Crown or the defence and whom the Crown proposes to call at trial as part of the Crown's case-in-chief.

No such synopsis need be provided in respect of any witness whom the Crown proposes to call at trial in reply only.

No synopsis that is provided need necessarily refer to any evidence of the witness that the Crown does not propose to elicit as part of the Crown's case-in-chief because such evidence would be relevant in reply only.

Each synopsis will be prepared on a form which will bear the following caution:

> "This synopsis is provided to defence counsel as part of a programme designed to give to the accused disclosure of the Crown's case. It may not have been possible for Crown Counsel to interview this witness prior to the delivery of this document to defence counsel and, accordingly, the synopsis may be incomplete. Should other material matters come to the attention of Crown Counsel, he will provide to defence counsel a synopsis of such additional matters orally or in writing if feasible prior to the calling of this witness at trial. The Crown will consider such additional matters as part of the original synopsis."

(b) A copy of any written statement and a report of any oral statement made by the accused to a person in authority which the Crown intends to tender at trial as part of the Crown's case-in-chief, together with any other written statement or report of any oral statement or part thereof made by the accused to a person in authority which, on its face, relates to the proof or disproof of the elements of the offence, within the custody or control of the prosecution.

(c) A copy of any prior criminal record of the accused in the custody or control of the prosecution.

(d) Copies of photographs and documentary evidence capable of reproduction which the Crown proposes adducing at trial and copies of all expert's reports which on their face relate to the proof or disproof of the elements of the offence and which are in the custody or control of the prosecution.

(e) The names and addresses of all witnesses whom the Crown, at the time of the delivery of items (a) to (d) above, proposes to call as part of the Crown's case-in-chief at trial, unless, in the opinion of Crown Counsel, there is reason to anticipate that the witness may be intimidated or otherwise improperly influenced.

4. Crown Counsel will further agree to provide such further materials within categories (a) to (e) in paragraph 3 above as may come into the possession of the Crown prior to the calling, at the trial, of the witness to whom the material relates except in cases to which paragraphs 2(e) and (f) above apply in which event the further material referred to therein shall be limited to categories (b), (c) and (d) in paragraph 3.

5. Crown Counsel shall in his discretion determine how these guidelines can best be followed in a case when an accused is unrepresented.

6. The Attorney General has directed that these guidelines be followed in every prosecution involving the section numbers of the Criminal Code referred to above unless Crown Counsel in charge of the prosecution is exempted from adherence to the guidelines or any part thereof by the Regional Crown Attorney.

OUTLINE FOR PRE-TRIAL CONFERENCE REPORT, ISSUED BY THE HIGH COURT OF ONTARIO

NOTE: THE POSITIONS HEREIN ARE TENTATIVE, ALL AGREEMENTS ARE WITHOUT PREJUDICE AND PURELY FOR THE ASSISTANCE OF THE COURT IN THE RESOLUTION OF TRIAL PROBLEMS. IF ANY CHANGE BECOMES NECESSARY COUNSEL WILL ENDEAVOUR TO ADVISE EACH OTHER AND THE COURT PROMPTLY.

_____
Date

REGINA v. _____

Counsel for Crown:

Counsel for Accused;

Indictment reads as follows:

1.

2.

3.

4.

COUNSEL FOR THE CROWN STATES THAT HE HAS MADE AND WILL MAKE DISCLOSURE OF THE CROWN'S CASE AS FOLLOWS:

(check one) _____ Pursuant to the Attorney General's guidelines;

_____ (Where guidelines are not applicable) By responding to all reasonable requests to make known to the defence all relevant factual matters.

1. SUMMARY OF BACKGROUND FACTS:

2. PRELIMINARY MATTERS:

(a) Will there be any preliminary matters raised by the prosecution? If so, what?

(b) Will there by any preliminary matters raised by the defence?

Motion to quash	___Yes	___No
Application for separate trial	___Yes	___No
Application for change of venue	___Yes	___No
Challenge for cause	___Yes	___No
Others (please specify)		

(c) Is there any issue as to the competency of the accused to stand trial? ___Yes ___No

Will it be raised by the defence? ___Yes ___No

Will it be raised by the Crown? ___Yes ___No

3. WILL THE ISSUE OF INSANITY UNDER s.16 OF THE CRIMINAL CODE BE RAISED AT THE TRIAL?

By the Crown? ___Yes ___No

By the Defence? ___Yes ___No

4. THEORY OF THE PROSECUTION:

5. THE DEFENCE:

6. WILL ANY OF THE FOLLOWING SPECIFIC DEFENCES BE RAISED?

(a) drunkenness ___Yes ___No

(b) provocation ___Yes ___No

(c) alibi ___Yes ___No

(d) lack of intent ___Yes ___No

(e) self-defence ___Yes ___No

(f) automatism ___Yes ___No

(g) accident ___Yes ___No

7. WILL EXPERT EVIDENCE BE CALLED BY THE DEFENCE?

8. FACTUAL ADMISSIONS COUNSEL ARE PREPARED TO MAKE PURSUANT TO s.582 OF THE CRIMINAL CODE:

9. DOES THE DEFENCE ADMIT CONTINUITY OF EXHIBITS?

10. OTHER LEGAL ISSUES LIKELY TO ARISE AT TRIAL:

(a)

(b)

Do counsel anticipate there will be a voir dire and if so, on what issues?

11. HAS A DATE BEEN SET FOR TRIAL?

ESTIMATED LENGTH OF TRIAL:

12. REMARKS:

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