PREPARING A CLIENT FOR CROSS EXAMINATION

by Anthony Parker

1. This paper is a spin-off from one entitled "Life after the Dock Statement" which I prepared some time last year. In that work I put forward the idea that the abolition of the accused's right to make a dock statement was going to have very significant effects on the Defence's tactical approach to the jury trial. That idea was a pretty obvious one, as also is the concept that from the Defence point of view the conduct of a jury trial is now an exercise much closer to that of running a summary hearing than it was before.

2. Accordingly, this paper covers some of the same ground, although maybe in more detail, as did the previous one; and although what I am going to say is directed to the jury trial, much of it is as relevant to the conduct of summary matters.

3. The topic is not a very interesting one, and it is hard to say anything novel about it. I am going to try to leaven /spice /"rev" it up by referring to a few of the provisions of the new Evidence Act. This will be fascinating for all of us. Remember, though, that like everyone else I am speculating about what the Evidence Act 1995 might turn out to mean.

4. In this discussion we are concerned only peripherally with the (very difficult) decision whether to call our client or not. We assume at the outset that the judge /magistrate has already met our "no case" argument by snarling "Aw, get on with it Mr. Parker!", and /or that the foreperson has responded to the Prasad invitation with "Yes, we certainly do want to hear more"; the moment has arrived when we have to say, "I call the accused.".

5. We should not feel utter, abject terror at this stage. This is because our preparation of the accused to give evidence /face cross -examination has begun long before.

6. This preparation should begin as soon as the prosecution's case is known. Competent defence lawyers do not often commit their clients immediately or at first meeting to any definite, inflexible or formal account of the events relevant to the charges which the client is facing. The reasons for this are many, and they include the ideas that the client often does not know exactly what conduct of his is alleged to make up the offence, what conduct of other people is said to be relevant to it, and /or what matters within his knowledge are known to or able to be proved by the prosecution.

7. Accordingly, the first efforts of good defence lawyers are directed to answering the questions , What exactly is my client accused of having done? /What evidence is available to the prosecution? /What can the prosecution prove? /What other useful information can be got?. It follows that in the early

stages of a criminal case, the Defence should be concentrated on obtaining the maximum possible disclosure of the prosecution case, including the identity and the quality of their proposed witnesses.

8. That is obviously easier said than done. We all know that it is common enough to be routine that both the police and the prosecuting authorities will conceal the existence /evidence of witnesses who are relatives / unwilling /informers / accomplices / co -accuseds / criminals /otherwise unreliable until the latest possible moment. The limited methods by which it can be attempted, which would have to include subpoenas in the magistrates' courts, demands for particulars, and proper pressure for committal hearings, are not really what we are here to talk about.

9. One other thing needs to be said (before we get to the substance of what I am here to talk about). This is that the structure and the procedures of the Legal Aid Commission are not ideally suited to the demands of proper representation of accused persons in jury trials. I appreciate that God had His reasons for making the Commission in separate compartments, and that there are sound practical reasons for the idea that that as an accused person's case progresses through the hierarchy of the courts at different geographical locations, that he should be passed through the various compartments of the LAC. But the result of this is to make more difficult the Defence lawyer's central task, which can be shortly stated as identifying the issues in the case as early as possible and thereafter directing the preparation of the case at those

issues. The facts that committal hearings are virtually never undertaken, and that the sentence indication procedure (which has among its virtues that the Defence, and sometimes even the prosecution, has to look at the merits of a case at a comparatively early stage) is to be discarded, combine with the LAC's structures to make more difficult the commencement of preparation for a trial at a stage which is early enough.

10. Preparation of a defence case where the accused will be required to give evidence is an art significantly different from, and more difficult than, that involved in the presentation of a dock statement by means of which selected parts of the prosecution case are put in issue or facts advancing the defence case are put forward. In an ideal world, it begins at the moment when the client is first seen, and it begins in earnest as soon as the prosecution case is known.

11. It is essential that that stage, i.e. detailed knowledge of the prosecution case, is reached before the proceedings are set down for trial. The accused should then be interviewed in detail. His responses to and explanations of all of the important features of the prosecution case should be obtained and assessed. It should be assumed that the prosecutor will find at least the obvious lines of cross - examination, and the accused should be tested to see whether he can respond rationally and credibly. This is especially so where the prosecution can be expected to be able to prove some item of "real" evidence such as the accused's signature, fingerprints, blood or semen (which will

explain, incidentally, why I am using only the masculine personal pronoun), or letters or the like.

12. Such detailed instruction - taking, which is as much a part of the process of giving proper advice about whether the proceedings can or should be defended as it is part of preparing the client to give evidence, should always have been undertaken, even in the days of the dock statement. Where an accused has to give evidence, it should be assumed that even the most modest attempts at cross - examination will expose any obvious shortcomings in the defence case. An accused will have fewer places to hide, and the Defence advocate less chance to ignore/ gloss over/ obscure such problems. It follows that the days when cases were fixed for trial on the basis only of the accused's protestations of innocence are gone -- as also is the idea that counsel can obtain adequate instructions from the short conference in the cells on the morning of the trial.

13. The above is not intended to mean that Defence counsel must actually elicit in examination in chief every scrap of information about which the client can give evidence. Indeed, there will commonly be situations, such as where a particular piece of evidence is not known to the prosecutor, where it will be tactically wiser not to lead that evidence in chief. Of course, careful consideration needs to be given to the possible repercussions. In such cases it seems to me to be quite proper for the tactical decision to be explained to the

client, but in the context of his obligation to answer truthfully if asked about the matter.

14. It is equally proper, and I would argue an important part of our responsibility to ensure that our clients understand the court process and are at ease and able to give a fair account of themselves, that we tell the accused a few well known and simple rules to assist them in giving evidence. Once it is apparent that the accused may have to give evidence, I usually explain some or all of these propositions:-

(a) Once you get into that box, you are simply a witness like anyone else, to talk about facts etc that you know ;

(b) You should listen to the questions, and answer those questions only;

(c) If you don't understand a question, say so; do not guess about what the question may mean;

(d) Keep your answers short; if I want more information from you, I'll ask another question; make the prosecutor do the same;

(e) In cross - examination, if you can truthfully answer a question by saying yes /no /I don't know /I don't remember, say that and nothing more; don't give the prosecutor too much information;

(f) Don't get angry /don't get smart /don't try to score points against the prosecutor (remember what happened to Oscar Wilde);

(g) Don't try to argue your own case; you've hired a dog, so there's no need to do your own barking;

(h) Don't be concerned if you feel the prosecutor is not letting you explain; if necessary I can re-examine;

(i) Take your time /don't be rushed / you are entitled to consider the question before you answer it;

Concentrate.

15. Another thing which we owe to our clients and which should have the effect of assisting them in meeting the cross -examination which is to come is to try to ensure that our own examination in chief is no greater ordeal than they are going to endure from the prosecutor. We should present the accused's evidence in a rational and logical order, striving for clarity. We should tell the accused in advance of the order and the manner in which we will ask him to give the various parts of his evidence, and of the parts of his evidence on which we will spend more time or of which we will elicit more detail. Within ethical limits (remember James Mason in the movie "The Verdict"), there is no good reason why the accused should not be told the rationale for our decisions about the presentation of his case.

16. Where our client has any significant difficulty with the English language, we need to be astute to ensure that he has the assistance of an expert interpreter, both at our conferences and in court . In addition to the obvious reasons, many interpreters are experienced and presentable people, and the accused gains in presentation as a result; in South Australia, one of the

accredited interpreters of the Pitjantjatjara language is a woman so presentable, so obviously decent, so Christian and so just plain likeable that it is said that no jury has ever convicted her. It may be useful to note s.30 Evidence Act 1995, one of the effects of which is that where an accused has fairly adequate English but less than a native speaker's command, he is entitled to have the interpreter stand by and assist him as to part only of his evidence as necessary; in my opinion this has always been a perfectly proper procedure, but I understand that some judges have not been comfortable with the idea.

17. Once the cross -examination of our client has commenced, we should do what we can to give him protection. My own prejudice is that Defence advocates should not make objections simply to break up or distract attention from lines of cross -examination which show promise for our opponents, but minds may differ as to this. I am sure that we should not make objections purely for the purpose of telling our own witness how to answer; one reason is that this is usually a transparently slimy manoeuvre, since by the time the accused catches on the jury will have as well. In my opinion, we should not make objections (particularly before a jury) unless the point is sufficiently important and we are reasonably confident that the objection will succeed.

18. This does not mean that it will be rare that we will object. As a sweeping generalisation, prosecutors are not as experienced as cross - examiners as we are. We need to be vigilant to try to keep them in check. It is impossible to be exhaustive, but the areas in which excesses will occur would

have to include questions which are misleading or which misstate the evidence, which invite our clients to speculate, which "promote bare suspicion", or which are only a vehicle to put inadmissible material before the tribunal. (Examples: "Why did you tell the police that the car had been there all along?" / "You told the doctor that the accused had admitted it?"). We should make ourselves familiar with s.41 Evidence Act, 1995, which proscribes questions which are misleading, (as well as "unduly ..... offensive" ones, a provision which would no doubt have operated on the spectacularly offensive question I once heard posed by a police prosecutor to a defendant in Brewarrina Court: "Look, you were following the constable along like a mongrel dog, weren't you?"). The same section authorises the court to disallow "unduly ..... repetitive" questions, although it remains to be seen how stringently this provision will be enforced against cross -examiners on the prosecution side.

19. It may be worth noting that s.41 requires the court to take into account in deciding whether to disallow a question as improper "any relevant condition or characteristic of the witness, including age, personality and education" and "any mental, intellectual or physical disability to which the witness is or appears to be subject.". S.42 of the new Act, which gives the court power to disallow leading questions in cross -examination, may also be of some limited use in keeping some check on the prosecutor's treatment of obviously disadvantaged defendants.

20. Another aspect of the protection of the client who is to be cross - examined further illustrates the point that more detailed obtaining of instructions /preparation of witness is necessary where the accused is going to testify. Prosecutors love to press accused persons about details of their evidence by comparing them with propositions put /not put by Defence counsel to the prosecution witnesses. This can be embarassing, as when the prosecutor asked an accused at Port Augusta: "And where did Mr. Parker get such -and -such a detail?", and she replied: "I dunno. It wasn't from me". More importantly, such incidents damage the accused's case. They can be avoided, but only by having properly detailed instructions and by proper planning for the accused's cross -examination.

21. Few cross -examinations will fail to yield, in the prosecutor's view, some significant lie by the accused. Whether such material amounts to a lie, and if so amounts to or goes beyond being a matter affecting only the credit of the accused, and if so the use to which it can be put, are and will continue to be the source of constant argument: see Heyde (1990) 20 NSWLR 234 as an example of utterly peripheral statements being presented to the jury as indicative of guilt.

22. One last thing. In spite of the abolition of the dock statement, the accused in a criminal trial is still not a witness who can be compelled to give evidence. This is a critical distinction between his evidence and that of virtually every other witness, and the jury /tribunal is always entitled if it

thinks fit to take this into account in the accused's favour. Accordingly, we need to be constantly on our guard against efforts to present the accused's evidence as a pure matter of routine or to seek to devalue it by reference to such matters as the accused's high stake in the outcome of the case and /or his corresponding motive to lie.

23. All is not lost. Many accused people are good witnesses. The very best witnesses I have ever seen have been Aboriginal people when speaking English and telling the truth. The fact that an accused lacks formal education, does not speak nicely, is nervous or shy, lacks confidence, is unintelligent or has an imperfect command of English does not mean that he cannot give a good account of himself in evidence. Many an accused can present himself in court more impressively with the assistance of a measured and logical question -and -answer approach than he can achieve through a half - remembered and poorly -delivered dock statement. We all know as well through bitter experience the spectacle of the witness who is unimpressive in chief being transformed by an unwise cross -examination; logically we must be able to rely on the prosecutors to achieve this from time to time.

24. To the extent that accused people are able to reach the goal of giving a fair account of themselves in evidence, we should not leave this to their own resource and determination, but rather we should assist them by early and accurate identification of the issues, by detailed consideration and testing of their instructions, by realistic evaluation of the merits of their cases, by proper

planning for the presentation of their evidence, and by vigilance in seeking to protect them from excesses during cross -examination.