NOTE

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PRELIMINARY HEARINGS IN SOUTH AUSTRALIA

REFLECTIONS ON READING *GOLDSMITH*

INTRODUCTION

WITH the *Justices Amendment Act* 1991 (SA) came fundamental changes to the conduct of committal proceedings in courts of summary jurisdiction in South Australia.[1] The South Australian Legislature has boldly taken steps to limit the cost incurred, lighten the judicial burden, and diminish the delay experienced in the processing of criminal matters through the courts that have accompanied lengthy committal proceedings in the past. Seemingly the Legislature has been careful in making these

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1 Act No 72 of 1991. The relevant proceeding is to be found in the Summary Procedure Act 1921 (SA). The relevant provisions came into operation on 6 July 1992. (The *Justices Amendment Act* 1991 (SA) amended the *Justices Act* 1921 (SA) and renamed it the *Summary Procedure Act* 1921 (SA) (s4 of the amending Act).)

changes to ensure that the time honoured purpose of the preliminary examination - that a defendant only be put upon their trial where the evidence warrants such trial - remains paramount.

Despite these changes, it remains the case in South Australia that where a defendant is charged with either a major indictable offence or a minor indictable offence, and, in relation to the latter has elected to be tried in a higher court as opposed to the Magistrates' Court, the prosecution must establish a prima facie case before any trial will commence.[2] The preliminary examination of the prosecution case takes place in the Magistrates' Court and, if the prosecution has made out a prima facie case against the defendant, results in the committal of the defendant to either the Supreme or District Court for trial. The decision as to which court to commit the defendant to will depend upon the type of offence with which they stand charged.[3] In the past, the defence was entitled to request that any prosecution witness relied upon in establishing a prima facie case attend the hearing and be made available for cross-examination. Through cross-examining the witnesses "up hill and down dale" defendants were able to ascertain the prosecution case in detail, elicit evidence that may prove of assistance to the defence, and test the evidence of the witness. This led to the committal proceeding becoming a long, drawn out affair.

Under the new regime brought in by the *Justices Amendment Act* 1991 (SA), the committal proceeding retains its basic skeletal structure. However resounding changes to its conduct have been instigated, and it is in this regard that the proceeding can be considered new.

The legislation governing the conduct of the hearing is to be found in Part V of the *Summary Procedure Act* 1921 (SA). The hearing is now known as a preliminary hearing; it is to be conducted "on the documents"; the oral

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2 Summary offences are dealt with by the Magistrates' Court solely. These matters do not undergo any preliminary examination, but proceed straight to trial where the defendant denies the charge lain. Should the defendant be charged with a minor indictable offence and elect to be tried in the Magistrates' Court, their case will likewise not be the subject of a preliminary examination but proceed directly to trial, assuming, of course, that the defendant denies their guilt; *Summary Procedure Act* 1921 (SA) ss103(3), 104(1) and 106. The essential difference between a trial in the Magistrates' Court and a trial in the higher courts is that a trial in the latter is conducted before a jury, unless the defendant further elects for trial by judge alone; *Juries Act* 1927 (SA) s7. If the defendant is committed for trial, the determination of which court they should be committed to will depend upon the type of offence they have committed; *Summary Procedure Act* 1921 (SA) s7.

3 *Summary Procedure Act* 1921 (SA) s19.

examination of witnesses is only to occur where special reasons exist; issues of credibility are not to be taken into consideration in determining evidential sufficiency; and the admissibility of evidence is an issue to be left to the court of trial unless it proves unarguable.

The Supreme Court of South Australia has had cause to comment on the new proceeding on only one occasion. That case, *Goldsmith v Newman,*[4] is the subject of this article, the intention of which is to analyse the operation of the preliminary hearing, as revealed in this decision.

GOLDSMITH V NEWMAN

The Facts

Kamahl Goldsmith, a minor, was committed for trial by a Judge of the Adelaide Children's Court on a charge of murder. The allegation was that he, in concert with his brother Wayne, beat the deceased so severely as to cause their death. On the night in question Kamahl was in bed with his girlfriend, Lena Varcoe, whilst his brother and the deceased were in another room in the house. An altercation broke out between Wayne Goldsmith and the deceased. At some stage Kamahl left the bedroom. The following morning the badly beaten body of the deceased was found on an adjoining allotment, where the evidence showed it had been dragged from the house.

The only evidence implicating Kamahl in the murder was that of Lena Varcoe who had given the police a statement in which she stated that he had confessed committing the crime to her. This was, in fact, Ms Varcoe's fourth statement, none of the preceding three making any mention of Kamahl's confession. Ms Varcoe explained her previous silence regarding Kamahl's confession on the basis of her fear of the accused.

Following the making of the statement, the Attorney General for South Australia granted Ms Varcoe immunity from prosecution for the offences of Accessory after the Fact and Misprision of Felony.

In accordance with s104 of the *Summary Procedure Act* 1921 (SA), the prosecution filed in Court and served upon the defendant that evidence which they proposed to rely upon at the preliminary hearing as tending to establish guilt. Prior to the hearing taking place, however, the solicitors for Kamahl Goldsmith had given notice of their client's desire to have

4 (1992) 168 LSJS 62.

certain witnesses attend the preliminary hearing for the purpose of their examination. In particular, the solicitors sought the examination of Ms Varcoe and those police officers who had been in contact with her leading up to her change of story and the grant of immunity. Consistent with this notice, an application was made at the preliminary hearing for the oral examination of Ms Varcoe and the police officers. This application was refused by the magistrate on the ground that there existed no "special reasons"[5] warranting the grant of leave to examine the witnesses. At the conclusion of the preliminary hearing, Kamahl was committed for trial.

On behalf of the defendant an application for the judicial review of the magistrate's decision was made to the Supreme Court, seeking the quashing of that decision, and further, that certain declarations be made regarding the procedure to be followed at a preliminary hearing.

Judgment

The Full Court of the Supreme Court of South Australia dismissed the defendant's application on the ground that it had not been shown that the learned Judge of the Children's Court had misdirected themself regarding the meaning of "special reasons" as contained in s106(2) of the *Summary Procedure Act* 1921 (SA). The Court indicated that there was some merit in the defendant's complaint, however, due to the nature of the relief sought by the defendant, the Court was prohibited from giving any further vent to their opinion. King CJ said:

> I think there is a good deal to be said for the proposition that the need to investigate the circumstances surrounding Lena Varcoe's change of story and the grant of immunity amounted to special reasons. I think that an exploration of those issues before trial would have facilitated the fair trial of the defendant and perhaps reduced the need for or length of a pre-trial hearing on the voir dire. There is no appeal, however, from the decision of the committing court. The question for this court is not whether the committing court's decision was erroneous, but whether the judge erred in law in his of the test ... It (his Honour's judgment) may or may not be the correct decision, but it is by no means so unreasonable or unintelligible that it could only have been

5 Within the meaning of s106(2) *Summary Procedure Act* 1921 (SA).

> arrived at on an erroneous understanding of the section [s106(2)].[6]

Some consolation is given to the defendant by this statement. It provides a firm indication that at the time of trial he should have been permitted the right to examine Lena Varcoe and the relevant police officers on the voir dire. Having disposed of the application for judicial review, the Supreme Court proceeded to analyse the new committal regime; to explore the meaning of "special reasons"; and to identify specifically that material to be disclosed by the prosecution prior to the conduct of a preliminary hearing.

THE PRELIMINARY HEARING REGIME

Changes to the Previous Regime

The Court observed that the purpose of the new proceeding was no different from that which preceded it, but made no further comment in this respect, except to refer to the case of *R v Harry; ex parte Eastway,*[7] in which the issue was dealt with in full. In that case King CJ said:[8]

> The question to be decided by the magistrate or judge at the conclusion of the preliminary examination is whether there is sufficient evidence to put the accused on his trial. Ensuring that the accused will not be put on trial without sufficient evidence to justify that course has been described by Gibbs ACJ and Mason J as the "principle purpose" of the preliminary examination; *Barton v The Queen.*[9] But it is not the only purpose. The examination also serves the purpose of acquainting the accused with the case which is to be made against him at trial and of affording him an opportunity to question witnesses with a view to eliciting evidence which may assist the defence at trial. When discussing the consequences to an accused of depriving him of committal proceedings, Gibbs ACJ and Mason J in *Barton*, pointed out that "in such a case the accused is denied (1) knowledge of what the Crown witnesses say on oath (2) the opportunity of cross-exaiming them." These

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6 *Goldsmith* at 69.
7 (1985) 39 SASR 203.
8 At 208-209.
9 (1980) 147 CLR 75 at 99.

purposes of a preliminary hearing were emphasised by Stephen J in the following passage:

> These factors may, and in the present case do, mean that loss by the accused of the chance of discharge by the committing magistrate is by no means the most serious detriment which absence of committal proceedings imposes upon an accused.
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> An accused also loses the opportunity of gaining relatively precise knowledge of the case against him and, as well, of hearing the Crown witnesses give evidence on oath and of testing that evidence by cross-examination. A court in exercise of its power to ensure a fair trial, can do much to reduce the deleterious effect of the first two of these losses by ensuring that the accused is furnished with particulars of the charge and proofs of evidence. But the loss of the opportunity to cross-examine Crown witnesses before the trial will be irremediable. How serious this will be to the accused will depend upon the nature of the offence charged and of the Crown's evidence. It is likely to be the most serious detriment which absence of prior committal proceedings imposes upon the accused.[10]

In *Goldsmith,* King CJ stated that these observations remained valid, save insofar as they have been the subject of inherent modification by the new regime. He proceeded to identify three such modifications made by the new legislative regime.[11]

Proof of Facts

Proof of facts by means of the production of witness statements without the oral examination or cross-examination of those witnesses was now the norm. Oral evidence may be accepted if, but only if, "special reasons" exist for permitting such evidence to be given.[12]

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10 *Barton* (1980) 147 CLR 75 at 105, per Stephen J.
11 *Goldsmith* at 67.
12 *Summary Procedure Act* 1921 (SA) s106(2).

Credibility

In considering the sufficiency of evidence the examining magistrate is prohibited from taking into account issues of credibility. The Court drew this conclusion from its interpretation of s107(1) of the *Summary Procedure Act* 1921 (SA). Section 107(1)(a) states that "evidence will be regarded as sufficient to put the defendant on trial for an offence if, in the opinion of the Court, the evidence, if accepted, would prove every element of the offence".

The use of the words "if accepted", it was held, indicate that the examining magistrate is only to consider whether or not there is a prima facie case on the face of the evidence tendered. King CJ makes it clear that in this regard the magistrates' power at committal has been significantly curtailed. No longer can they dismiss a charge on the grounds that "the evidence, although sufficient in law, is too weak or unsatisfactory, by reason of lack of credibility of prosecution witnesses, to justify putting the defendant on trial".[13]

Assumption of Admissibility

Section 107(1)(b) creates, for the purposes of a preliminary hearing what may be termed an assumption of admissibility. That is, all evidence tendered by the prosecution at a preliminary hearing as establishing guilt is to be assumed admissible unless the operation of such assumption would amount to an affront to the law of evidence. Issues of admissibility are in the main, therefore, left to the trial judge. Section 107(1)(b) reads as follows:

> [A]lthough the court may reject evidence if it is plainly inadmissible, the court will, if it appears that arguments of substance can be advanced for the admission of evidence, admit the evidence for the purpose of the preliminary examination, reserving any dispute as to its admissibility for determination by the court of trial.

One is perturbed by the prospect of an accused having to await trial before the admissibility of certain evidence is decided, where the earliest consideration of such issue may see the prosecution terminated and the consequent relief that that would bring to the accused realized. Surely it is not desirable to put an accused through the anxiety and despair that

13 *Goldsmith* at 67, per King CJ.

accompanies an accusation of criminality for any longer than is necessary? Would it not have been more in tune with the legislative intent regarding the new regime, to introduce a procedure whereby an accused is committed for trial subject to the questionable evidence being adjudged admissible? The issue of admissibility would be reserved to the trial judge for their consideration as soon as is practicable, but in any event within twenty-eight days, where the determination of the question of admissibility may prove fatal to the decision to commit. That is, if the evidence is sufficient to put the defendant upon their trial irrespective of whether certain evidence is rendered inadmissible, then the current procedure would be adhered to. However, if the decision to put the defendant upon their trial depends upon the admissibility of certain evidence, then the question of admissibility should be decided as soon as is practicable. Nevertheless, this is not the case, a magistrate may only reject evidence on the ground that it is inadmissible if it is plainly so, otherwise the issue of admissibility is reserved for trial.

If the modifications to committal proceedings identified by King CJ are considered in the light of the quotation taken from *R v Harry; ex parte Eastway*,[14] it would appear that in South Australia, a defendant who is charged with either a major indictable offence, or a minor indictable offence for which they have elected to be tried in a superior court, is prejudiced. They are denied the opportunity to examine witnesses orally for the prosecution with a view to

(1) obtaining precise knowledge of the prosecution case;

(2) eliciting evidence that may be of assistance to the defence case; and/or,

(c) testing the evidence of prosecution witnesses.

The first two of these disabilities can be overcome by the adequate disclosure of the prosecution case. This fact is recognised by Stephen J in the case of *Barton*,[15] and, indeed by Perry J in *Goldsmith* itself.[16] Such a solution has been adopted by the South Australian legislation. Perry J, in endorsing King CJ's judgment regarding the modifications brought to the

14 See pp108-109.
15 (1980) 147 CLR 75 at 99.
16 *Goldsmith* at 71, per Perry J.

preliminary hearing by the *Justices Amendment Act* 1991 (SA),[17] commented:

> It is apparent when the present amendments are viewed in the context of the legislative history which lies behind them that the erosion of the right to cross-examine witnesses at a preliminary examination has been balanced out by the enactment of provisions having the effect of enlarging the obligation of disclosure on the part of the prosecution.[18]

Section 104 of the *Summary Procedure Act* 1921 (SA) sets out in some detail the extent of the obligation upon the prosecution to make disclosure prior to the conduct of a preliminary hearing. It is not clear whether this obligation is cumulative upon those to which the prosecution is already subject, or seeks to replace those obligations and thereby be interpreted as a complete code governing the issue of disclosure in criminal proceedings pre-committal. These questions, the statutory scheme governing disclosure, and related comments made by the Full Court of the Supreme Court of South Australia in *Goldsmith* shall be returned to below.

Prejudice to the Defendant

In South Australia the position regarding the oral examination of witnesses at a preliminary hearing has altered significantly. Oral examination can only take place where the examining magistrate has granted the party leave to so examine, and this will only be granted where there exists "special reasons".[19] From this, two related questions arise for consideration. In the light of the opinion of Stephen J in *Barton,*[20] is the defendant prejudiced by having to establish that there are special reasons before being permitted to cross-examine prosecution witnesses at a preliminary hearing? The answer to this question depends upon that to the second - "What constitutes "special reasons"?"

"Special Reasons"

Sections 106(1) and (2) of the *Summary Procedure Act* 1921 (SA) are unequivocal in their requirements. A witness may not be called to give oral evidence at a preliminary hearing unless leave has been granted to do

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17 As contained in the *Summary Procedure Act* 1921 (SA).
18 *Goldsmith* at 71, per Perry J.
19 *Summary Procedure Act* 1921 (SA) ss106 (1) & (2).
20 See pp108-109.

so, and that leave will only be granted where special reasons for the production and examination of the witness exist. In determining whether special reasons exist the court to which application for leave is made must have regard to

(1) the need to ensure that the case for the prosecution is adequately disclosed;

(2) the need to ensure that the issues for trial are adequately defined;

(3) the court's need to ensure (subject to this Act) that the evidence is sufficient to put the defendant on trial; and

(4) the interests of justice.[21]

It is obvious that an innumerable variety of circumstances may amount to special reasons, making any attempt to define what it is that constitutes a special reason futile. Recognising this, the Chief Justice listed five circumstances which may amount to special reasons in an effort to provide magistrates with some semblance of a yardstick.

> (1) It may appear that there is sound reason to suppose that some degree of cross-examination will eliminate possible areas of contention and refine the matters really in dispute.
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> (2) Cross-examination may be desirable to establish important facts as to the foundation of a defence or to eliminate any possibility of a particular defence. For example, it may be important to ascertain from witnesses in advance of trial whether the defendant showed signs of intoxication or irrationality at relevant times.
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> (3) It may be necessary for a fair trial that the defence have a limited opportunity to explore, in advance of trial, key issues which may be relevant to possible defences such as bona fide claim of right or duress.
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> (4) In some cases some limited questioning of scientific witnesses may be necessary to explore possible

21 *Summary Procedure Act* 1921 (SA) s106(3).

> avenues of inquiry as to alternative hypotheses, or the need for further testing or analysis.
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> (5) There may be reason for dissatisfaction with the extent of prosecution disclosure by filing statements and documents pursuant to s104 or otherwise, and cross-examination may appear to be the best way to obtain such disclosure.[22]

What is more than apparent is that each application for leave to examine a witness orally at a preliminary hearing will have to be considered on an individual merits basis in the light of the objectives of the preliminary hearing. Nevertheless some direction can be gleaned from the modifications to committal proceedings that the new regime has brought in South Australia.

> Proof of facts by means of written statement is the norm and special reasons involve some facts or circumstances which require a departure from that norm having regard to one or more of the indicated criteria.[23] A desire for cross-examination for the purpose of affecting the credibility of a witness in the eyes of the court conducting the hearing, is not sufficient ... A desire to conduct an exploratory cross-examination without a definite object based on solid grounds, but in the hope of unearthing something which might assist the defence, is plainly not sufficient.[24]

Despite the fact that the powers of the examining magistrate in South Australia have been curtailed and, for that matter, that committal proceedings as a whole have been curtailed, there is no reason for magistrates to interpret the phrase "special reasons" narrowly. To do so would not be in the interests of justice, particularly as the magistrate is now charged with ensuring that the prosecution case is adequately disclosed and that the issues for trial are sufficiently defined. These new found responsibilities re-cast the role of the magistrate in a part more active than before. It is now no longer sufficient for a magistrate at a preliminary hearing to concern themself solely with the question as to whether the defendant should be put upon trial. Now the magistrate must also be satisfied that such trial will be fair, insofar as ss106(3)(a) & (b)

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22 *Goldsmith* at 68.
23 The criteria contained in s106(3) of the *Summary Procedure Act* 1921 (SA).
24 *Goldsmith* at 67-68.

indicate that at the conclusion of the preliminary hearing the defendant should be in a position to prepare their defence. It is this latter duty which, perhaps, should serve as an overall guide to magistrates in considering whether or not a special reason has been established; that is, will the oral examination of the requested witness serve to enable the defendant to prepare their defence where they would otherwise be inhibited were oral examination denied? If this is a corrrect interpretation of s106(3) of the *Summary Procedure Act* 1921 (SA), then the words of the Chief Justice, that "much will depend in some cases on the efforts made by the defence to obtain disclosure of information from the prosecution and the prosecution's response to such efforts", ring all too true. But that is to assume that the prosecution's discretion as to what evidence it will tender at committal proceedings remains untouched by the new regime.

Disclosure and the Preliminary Hearing

Section 104 (1) of the *Summary Procedure Act* 1921 (SA) governs the production of evidential material at a preliminary hearing. It states:

> Where a charge of an indictable offence is to proceed to a preliminary examination, the prosecutor must at least 14 days before the date appointed for the defendant's appearance to answer the charge -
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> (a) file in the Court in accordance with the rules -
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> (i) statements of witnesses for the prosecution on which the prosecutor relies as tending to establish the guilt of the defendant;
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> (ii) copies of any documents on which the prosecutor relies as tending to establish the guilt of the defendant;
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> (iii) a document describing any other evidentiary material on which the prosecutor relies as tending to establish the guilt of the defendant together with a statement of the significance that the material is alleged to have;
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> and

(iv) any other material relevant to the charge that is available to the prosecution;

and

(b) give personally or by post to the defendant or a legal practitioner representing the defendant copies of all documentary material filed under paragraph (a).

The material filed in accordance with s104(1)(a) is that which must subsequently be tendered at the preliminary examination by the prosecution under s106(1)(a), as proving every element of the offence against the accused.

In *Goldsmith*, it was alleged that the prosecution had failed to file and tender statements that must have been available to it, namely those related to Ms Varcoe's change of story and the subsequent grant of immunity. It was asserted, on behalf of the defendant, that this failure constituted a special reason, justifying the granting of leave to examine orally Ms Varcoe and the relevant police officers. Whether or not the assertion contained in this ground of appeal proved true is not disclosed, however it served to put on issue the obligation upon the prosecution to make disclosure pursuant to s104(1)(a). In relation to s104(1)(a), King CJ said:

> The first two paragraphs present no difficulty. The contents of the statements of witnesses and the documents upon which the prosecution relies as tending to establish guilt must be, at least arguably, legally admissible, see s107(1)(b), in proof of guilt of the defendant. Paragraph (iii) authorises the filing and tendering of documents the contents of which would not be legally admissible under the ordinary rules of evidence although the admissibility of the contents would have to be ruled upon if the objection were taken; see s106(1)(a). The intention appears to be to avoid unnecessary delays in a criminal case as a result of material relied upon by the prosecution, such as incomplete scientific tests or evidence of a witness who is not available to sign the statement at that stage, not at that time being available in a form which would be admissible under paragraphs (i) and (ii). The intention appears to be to enable such documents to go before the court on the

preliminary examination subject to objections as to admissibility.[25]

Extent of the Duty to Disclose

If at the conclusion of a preliminary examination a defendant is to be in a position where they can commence to prepare their defence, then must the prosecution file and tender all evidence upon which it will rely to establish guilt, whether such evidence be in an admissible form or not, or only so much as is required to establish a prima facie case?

Prior to the introduction of the new regime governing committal hearings, it was the law that in order to establish a prima facie case and have a defendant committed for trial, the prosecution need not tender before an examining magistrate its entire case, it was sufficient if the statements of all material witnesses were put in evidence.[26] In *Goldsmith*, the Court was not called upon to consider whether the new regime governing the committal of defendants for trial had altered this position. However in determining the nature of the material that need be disclosed by the prosecution pursuant to the obligation created by s104(1)(a)(iv), the Court implied that the newly created obligation is cumulative upon those obligations that have been born by the prosecution in the past. This would indicate that the Supreme Court's attitude to the regime for the production of evidence at a preliminary examination, as delineated in s104, is that it does not operate as an all encompassing code governing the disclosure of material prior to a defendant's trial. This is despite the fact that the language of s104 is sufficiently broad as to be capable of an all encompassing interpretation.

Support for the implied opinion of the Supreme Court is, prima facie, to be had in the wording of ss106(3)(a) & (b). It will be recalled that that section deals with the taking of evidence at a preliminary examination and the determination as to whether the oral examination of a witness should be permitted upon there being established special reasons. In determining whether special reasons exist, ss106(3)(a) & (b) require that the Court have regard to the need to ensure that the prosecution case is adequately disclosed and that the issues for trial are adequately defined. But these duties are to be discharged upon the evidence as filed and tendered by the prosecution. That is, the duties only arise where the defence apply for

25 *Goldsmith* at 65.

26 *Richardson v R* (1974) 131 CLR 116; *R v Harry; ex parte Eastway* (1985) 39 SASR 203; *Basha* (1988) 39 A Crim R 337.

leave to examine orally a witness whose statement the prosecution has tendered. They do not serve to arm the examining magistrate with the power to compel the prosecution to produce a witness who has made a statement not yet filed. But how can a magistrate ensure that the prosecution case has been adequately disclosed, or the issues for trial adequately defined without being seized of the entire prosecution case? And how can a defendant leave the magistrates' court in a position to prepare their defence for trial knowing that no surprises will be sprung upon them by the prosecution if the prosecution case is not disclosed in full at the preliminary examination?

If it were not the case that the new regime required the prosecution to disclose its entire case at a preliminary hearing, an examining magistrate could find themself in the position where, under s107, the evidence before them, if accepted, would prove every element of the offence, despite the fact that they suspected the prosecution case inadequately disclosed or the issues inadequately defined. The magistrate would then be compelled to commit the defendant for trial. To this extent, the obligation upon the prosecution to disclose its case at the preliminary hearing stage must be altered. The fact that the legislature has given the examining magistrate no power to compel disclosure on the part of the prosecution, and yet charges that magistrate with ensuring that the prosecution case be adequately disclosed and the issues adequately defined where an application to examine orally is made, would indicate that the prosecution must put its entire case before the court and not merely the material elements thereof. If this is not the case then surely the quest for expediency in processing criminal matters, which underpins the new regime, would be frustrated.

One finds support for this argument in the inclusion in s104 of a measure designed to deal with the disclosure of unused material. In addition to the material referred to in paragraphs (i), (ii) and (iii) of s104(1)(a), which is material upon which the prosecution relies in establishing guilt, paragraph (iv) requires that the prosecution file with the Court and serve upon the defendant "any other material relevant to the charge that is available to the prosecution". This latter material is obviously that upon which the prosecution does not seek to rely.[27] The fact that s104 caters for unused material in addition to used material is indicative of the fact that s104 is intended to be an all encompassing code governing the disclosure of material prior to a preliminary hearing. It is also supportive of the

27 *Goldsmith* at 66, per King CJ.

argument made above, namely that the entire prosecution case is to be filed and tendered and not merely that which is material.

In *Goldsmith*, it was held that the unused material, to be disclosed pursuant to s104(1)(iv), had to be relevant and admissible, and that it was for the prosecution to determine whether it was so.[28] This, the Court held, must be the case when one has regard to s107(1). That is, the Full Court limited the breadth of application of s104(1)(iv) to the immediate purpose of the preliminary hearing. One questions this limitation. It is clear from the remit accorded the examining magistrate by s106(3), that the preliminary hearing does look beyond committal to the preparation of the matter for trial. This subsection emphasises, in particular, that the defendant should be in a position to commence the preparation of their defence should they be committed at the conclusion of the hearing. That which is relevant to and admissible at a preliminary hearing does not equate to that which is relevant and admissible at trial. For instance, evidence going to the issue of credibility is not relevant to a preliminary hearing and therefore is not admissible, although it may be highly relevant to the trial and admissible. It could only assist in the administration of justice if such material were disclosed as soon as possible. If one permits s104 a broad interpretation, as advocated above, this would be so. In the light of the recent experiences in England regarding pre-trial disclosure, one also questions the propriety of permitting the prosecution to determine what is relevant to the defence - surely this should be a matter for the defence alone.[29]

It is suggested that pursuant to s104(1)(iv) all unused material, irrespective of its relevance or admissibility as perceived by the prosecution, is to be made available to the defence pre-committal. The use of the word "relevant" (a poor choice by the draftsperson due to its evidential meaning) in the sub-section indicates this to be the case. That is, in requiring "any other material relevant to the charge" to be filed with the court and served upon the defendant, the sub-section seeks to apply to all other material available that relates to the charge and not merely to all other material that is relevant to the proof of the offence. If the word

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28 King CJ and Duggan J held that what needs to be disclosed pursuant to s104(1)(a)(iv) need be relevant and admissible but does not include material relevant to a witness's credit nor evidence the truthfulness or reliability of which the prosecution distrusts (at 66). Perry J held that what should be disclosed pursuant to s104(1)(a)(iv) must be relevant and admissible and does not include material relevant to the credit of the witness, but beyond this the obligation to file and tender unused material should not be further read down (at 71-72).

29 *R v Ward* [1993] 1 WLR 619.

"relevant" in s104(1)(iv) was to carry its familiar evidential meaning, then surely, in the context of the section, it would have been used in describing the material and not the charge. What is relevant to the charge of an offence and what is relevant material to be placed before a court of law, are different things. One can see little value in the narrow interpretation given to s104(1)(iv) by the South Australian Supreme Court. Certainly it relieves the prosecution of what may be an onerous duty in certain cases, for example an allegation of fraud, and streamlines the preliminary hearing all the more, but ultimately it may serve to frustrate the legislature's attempt to have matters processed through the criminal justice system at a faster rate and possibly lead to miscarriages of justice. It appears further inconsistent with the new regime when one considers s106(3) and the duties cast upon the examining magistrate in determining whether or not special reasons exist. Obviously the preliminary hearing looks at the evidence with an eye gazing not just toward trial but also at the preparation for such trial. Nevertheless, the Supreme Court has perhaps viewed the duty to disclose unused material pre-committal, whilst hampered by blinkers.

SUMMARY

Without doubt the new preliminary hearing regime introduced into South Australia will serve to cure the criminal justice system of delay resulting from drawn out committal proceedings, whilst not detracting from its primary role, that being to ensure that only those against whom there is sufficient evidence stand trial. The loss sustained by defendants in not being permitted to cross-examine prosecution witnesses at large at committal has seemingly been compensated by enlarging the obligation to make disclosure that vests in the prosecution. Full and frank disclosure appears to be central to the success and fairness of the new regime. One wonders, therefore, whether the restricted interpretation given by the South Australian Supreme Court to the statutory obligation upon the prosecution to make disclosure may result in those time consuming enquiries and hearings made under, or in consequence, of the old committal system, merely being displaced to a later point in the criminal process.