FITNESS TO PLEAD :

AVOIDING THE ISSUE

The definitive statement on whether an accused person is "fit" to plead was formulated by Justice Smith in the Victorian case of PRESSER [1958] VR 45 at 48;

> "He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any".

Justice Smith's formulation from the fifties has been consistently considered and approved by the High Court since then. Most recently it was considered by the High Court in KESAVARAJAH 1994 74 A Crim R 100, at 110. Also NGATAYI v R 1980 147 CLR 1.

In the Northern Territory the question is covered by Section 357 of the Criminal Code.

357. WANT OF UNDERSTANDING OF ACCUSED PERSON

(1) If, when the accused person is called upon to plead to the indictment or during the trial, it appears to be uncertain, for any reason, whether he is capable of understanding the proceedings at the trial so as to be able to make a proper response, the court shall inquire into the question of whether he is capable or not.

(2) If the court finds that he is capable of understanding the proceedings the trial is to proceed as in other cases.

(3) If the court finds that he is not so capable it is to say whether he is so found by it for the reason that he is in a state of abnormality of mind or for some other reason that it shall specify and the finding is to be recorded; and the court may order the accused person to be discharged or may order him to be kept in custody in such place and in such manner as the court thinks fit, or admit him to bail, until he can be dealt with according to law.

(4) A person so found to be incapable of understanding the proceedings at the trial may be again indicted and tried for the offence.

APPLICATION

Although there is no ruling on this it would seem that Section 357 only applies to proceedings in the Supreme Court on indictment;

> **" called upon to plead to the indictment or during the trial ..." 357(1).**
> **"Trial" itself is defined in the Code at Section 2 as; "includes a proceeding upon a plea of guilty".**
> **"Judicial proceeding" is defined in the Code at Section 2; "means any proceeding had or taken in or before a Court, tribunal or person in which evidence may be given on oath".**

Neither "court", "proceeding" or "tribunal" are defined. The argument that trial applies to Magistrates Court matters by virtue of the above definitions is probably unsustainable on its own. Combined with the wording of 357(4);

> **"(4). A person so found to be incapable of understanding the proceedings at the trial may be again indicted and tried for the offence."**

confirms that the provision only applies to indictable cases in the Supreme Court. A person cannot be tried on indictment for a summary offence, whatever the reason.

There is no equivalent provision to be found in the Justices Act. The Mental Health Act says nothing on the concept. It is arguable that a

Magistrate, sitting in his judicial function hearing a criminal charge, may have inherent power to apply the common law principles from PRESSER, if and when such a question arises. However without statutory authority this is unlikely. It would certainly be open to address the question by stating a case to the Supreme Court pursuant to Section 162 of the Justices Act. Another means, again procedurally involved, would be by taking an action in the nature of Certiorari pursuant to the Supreme Court Rules.

At a committal hearing no plea is required. Because of this it is arguable that this partly administrative function can proceed despite a defendant's unfitness to plead. Upon committal for trial the Supreme Court could then address the question (refer PIOCH v LAUDER (1976) 27 F.L.R. 79 and Ward Kelly's SUMMARY JUSTICE [8110]). Although those authority's support such a position it seems to fly in the face of reasonable standards if an accused person could have his committal without being fit to plead and therefore comply with all the tests in PRESSER. Such requirements/entitlements are surely as necessary at committal as they are at trial?

PROCEDURE

The question of fitness to plead is one which is to be decided by a Judge alone; THE QUEEN v BRADLEY (No.1) 1986 85 FLR 102. In this respect the Northern Territory differs from all other Australian States and England which involve empanelling a Jury specifically to hear that issue. This non-requirement of a Jury lends weight to the argument that this question can be addressed by a Magistrate.

The question can be raised by either the prosecution, the defence or the Judge; KESAVARAJAH (at p110). If the Crown is aware of credible evidence

casting doubt on the ability of an Accused to understand a trial proceeding it is incumbent on the Crown to inform the Court before a plea is taken; R v P 1NTLR 157.

Where the question arises it must be determined before any issue relating to guilt or otherwise, or to the admissibility of any evidence; R v P (Supra). That is, it is a threshold issue; it is asked and answered before arraignment.

The onus of proof is on the party raising the issue and the standard of proof is, if the Crown raises it, proof beyond reasonable doubt and if the defence raises it, proof on the balance of probabilities; R v P (supra) and DONAVON [1990] WAR 112.

WANT OF UNDERSTANDING: IT'S MEANING

The law is the law and as far as the standards required on this question they are, in any man's language, high. As Dixon J so perceptively observed in "SINCLAIR v THE KING" 1946 (73 CLR) 316 at 334;

> **"It does not seem to have been noticed by the text writers how high a degree of intelligence this test might demand if it were literally applied".**

Justice Dixon is then referring to the English decision of PRITCHARD (1836) 7 CAR and P. 303 which formed to a large extent the basis of Justice Smith's formulation in PRESSER. Justice Smith himself appreciated the point when he said the test needs to be applied "in a reasonable and common sense fashion". [1958 VR at 48].

What is important is that the incapacity, the lack of understanding is not restricted or caused solely by mental disability or incapacity. A charged citizen's inability to understand the criminal proceedings that flow can be caused by any good reason.

FITNESS TO PLEAD AND THE ABORIGINAL DEFENDANT

The Northern Territory criminal lists are constituted by a very large proportion of Aboriginal people. The figures vary from Court to Court. The likes of Port Keats and Yuendemu and other Bush Courts would be virtually 100% Aboriginal. The Supreme Court somewhat less. As an indicator of the proportion of their involvement in the system 81% of sentenced prisoners held in Territory jails in 1994 were Aboriginal; likewise 83% of persons sentenced to imprisonment in 1994 were Aboriginal *. Those numbers consist of Aboriginal people, defendants, with differing levels of "assimilation" (to use a term!). They range from urbanised part Aboriginal defendants who enter the criminal justice system as integrated as any mainstream citizen, to a larger number of defendants from out bush who have English as very much a second, third or fourth language as well as regarding Australian values, institutions and procedures as alien. There are a large number of Aboriginal defendants brought to court who simply do not pass this threshold question. Aboriginal defendants in the Territory have very rarely taken the point.

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* NT Department of Correctional Services Annual Report; 1994.

That paucity is evidenced by the fact that the two cases, BRADLEY and R v P which have addressed this issue were concerned with non-Aboriginal accused who both suffered from physical mental incapacity. BRADLEY suffered from frontal lobe damage caused by him turning the gun on himself after killing his son and daughter while P was retarded due to anoxia at birth. The point was taken in W.A. by an Aboriginal defendant in the late 70's and ended up in the High Court case of NGATAYI v THE QUEEN 147 CLR at Page 1. In that case a traditional bush Aboriginal man from North West Western Australia was charged with Murder. Upon his Arraignment the issue as to his fitness to plead was raised by his counsel. The argument went that he could not understand that his drunkenness might be a defence on the element of intent. He wanted to plead guilty because he had done the stabbing and that, in his view, there could be "no amelioration" (Counsel's term) of his guilt because of it. He was therefore unfit to plead. The argument was rejected and after a 2 day trial in which the accused gave evidence he was convicted of murder and sentenced to death. That was appealed and the appeal was dismissed. Application for leave to appeal was dismissed by Chief Justice Barwick. It was granted by four other Judges. Leave to appeal was granted with the appeal being refused by the majority, (Gibson J, Mason J and Wilson J) with Justice Murphy, in dissent, granting the application and allowing the appeal.

As to what can cause incapacity the joint judgement of Gibbs, Mason and Wilson was unequivocal.

> **At page 7; "the incapacity to which Section 631 refers may arise "for any reason". It need not be due to any physical and mental condition. For example, if the Prisoner can't speak English, and no interpreter can be found who can translate the proceedings into his tongue, the section would seem to apply".**

Section 631 is very much the equivalent of the Territory's Section 357 *. Specifically the Court rejected the argument that the accused need understand the concepts of law which were applicable to the charge. They partly relied in their rejection on the fact that he was represented by counsel.

> **At Page 9; "if the accused is able to understand the evidence, and to instruct his counsel as to the facts of the case, no unfairness or injustice would generally be occasioned by the fact that the accused does not know, and cannot understand, the law. With the assistance of counsel he will usually be able to make a proper defence".**

And on the facts of that case the Court made the following point:

> **"the fact that the Applicant could not understand the law under which he was tried, (as to intent) did not mean that he was not able to make a proper defence with the assistance of counsel".**

It should be pointed out that at all times in the trial proceedings an interpreter was used. His lack of understanding to the charge, the nature of the proceeding, the effect of evidence etc were not argued at any stage in the application and appeals.

Statistically it would seem that the very large numbers of Aboriginal defendants who are "processed" through the Court systems here in Darwi at Yuendemu, Groote Eylandt and the like do not "want of any understanding". The test in PRESSER as approved by the High Court is apparently complied with.

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* Refer also - Section 393 Crimes Act (Victoria);
Section 293 Criminal Law Consolidation Act 1935;
Section 613 Criminal Code (Queensland);
Sections 26 and 27 Criminal Code (Tasmania) and of the Western Australian Criminal Code.
Section 20B - 20BH Crimes Act (Commonwealth)

For any practitioner who has been involved in the sausage factory of the "process" it is clear that such a proposition is arrant nonsense. According to the High Court such defendants;

> **" require the ability (1) to understand the nature of the charge; (2) to plead to the charge and to exercise the right of challenge; (3) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged; (4) to follow the course of the proceedings; (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and (6) to make a defence or answer the charge."**
>
> **(KESAVARAJAH at p110)**

Far from enjoying that level of comprehension which the law requires, large numbers of Aboriginal people proceed through the system via the Police, the lock up, the Legal Aid Lawyer and the Bench with a very small portion of that required understanding.

The question begs; how many young men from Umbakumba, Groote Eylandt are able to understand the charges, follow the course of their proceeding, understand the effect of the prosecution evidence and instruct their lawyer adequately on what their defence is? Likewise from Maningrida, Port Keats, Hermansburgg?

Let it not be said that the continued entry, process, exit and re-entry through the system with all its parts, including Aboriginal Legal Aid, has educated the players to the extent that they comply with **PRESSER**. Not only does familiarity breed contempt, in the process that presently exists it, if anything, compounds misunderstanding. Previous dealings experienced with a want of understanding merely increase that very misunderstanding.

INTERPRETERS

The use of effective interpreters in the system looms as an obvious solution to the fact that large numbers of charged Aboriginal people are unfit to plead.

That obvious solution has been known to the players in the system for decades. There are no shortage of official Reports, Inquiries, Recommendations, Statements from the Bench etc on this point *. They come and go, appear and disappear, while the process grinds on continually. There is the occasional proceeding where one, or all, or some of the parties have managed to produce an interpreter and the case proceeds with their assistance. This is usually a more serious case in the Supreme Court. Subject to the interpreter being effective and appropriate (and there are instances where some are just not) the threshold question is invariably answered in the positive. Justice Smith's criteria is usually fulfilled. Of course the Trial is harder for most of the lawyers involved, its longer and of course it costs more money.

The reality is quite obvious. To comply with Section 357 via the use of appropriate interpreters in both the Magistrates and Supreme Courts would cost a fortune. From the training of interpreters in the large number of Aboriginal languages used to appropriate levels through to the large delaying effect on processing of the criminal lists would cost the government very large amounts of money.

The performance of the players in the criminal justice system to date does not lend to confidence in the establishment of an effective interpreter service. This goes for all players involved.

There is evident, across the board, a lack of will on the part of the participants (being of course the only beneficiaries) of the criminal justice system. The defendants who are the subject of this issue are not effectively consulted on it.

The question is do we want charged persons to understand the charge and their trial? Its not can we afford it. It maybe some solace to the powers that be that the alternative to ignoring this fundamental question is probably more costly. If Aboriginal people across the Territory were to take the point that through language difficulties they were unfit to plead then it would be sugar in the petrol tank of the criminal justice system which would grind to a rapid and very costly crawl.

CONCLUSION

The legal concept of fitness to plead exists in the Northern Territory. That concept in Section 357 of the Code and as outlined 35 years ago by Smith J in PRESSER is as much law as any other law. It forms a threshold question in the criminal justice system which, if raised, requires a positive answer before a prosecution continues.

It is procedurally difficult to address it in the Magistrates court but it is still there. If it applies to a defendant charged with murder, it should also apply to a defendant charged with unlawful use of a motor vehicle. The question does not require a jury in the Territory and is one for a Judge (BRAY(1)Supra) and it should also be one for a Magistrate. It is proposed to lift the Magistrate's sentencing ceiling to 5 years very soon.

Magistrates shall continue to deal with (was the term "processed" used earlier?) the vast majority of criminal cases. No self respecting criminal justice system would want to operate with defendants in the dark, lacking the fundamental understanding of the charges faced and the trial process ahead.

The criminal justice system is like any other government funded body. The imperatives of cost effectiveness loom further to the fore daily. Cost cutting, case management, Callovers upon Callovers predominate with a vi to increase efficiency and save money (the order of those 2 aims is very debatable). There is and should continue to be conflict between corner cutting and the rule of law. The latter must prevail.

The question of an accused citizen's ability to properly understand the criminal charges he faces and the procedures which fall from it as well as hire and instruct a lawyer to present to the court his defence(s) in relation to it is are surely as fundamental a right as that person's right to have representation in the first place. The High Court in DEITRICH v THE QUEEN (1992) 177 CLR 292 wax lyrical on the "fundamental importance of an accused person receiving a fair trial. In no uncertain terms the High Court declared their willingness to tailor prescriptions to ensure that an accused person receives a fair trial. In doing so they quoted the examples from the cases of BARTON v THE QUEEN (1980) 147 CLR 75 and McKINNEY v THE QUEEN (1991) 171 CLR 468.

Because Deitrich was not granted an adjournment to obtain legal representation his conviction for importing heroin was quashed and a retrial ordered.

If fitness to plead points were taken by appropriate Aboriginal defendants, either in the Magistrates Courts or the Supreme Court and they were rejected and convictions followed what would the present High Court say about such a question? One could anticipate with confidence that the High Court would require compliance with the law on a defendant's fitness without which a fair trial could not be held. The need for interpreters to be used across the field in the NT Criminal Justice system is probably more in need than the need for legal representation for Mr Dietrich.

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