Half Time Submissions

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INTRODUCTION

"That is the close of the prosecution case."

The above words can arouse a mix of reactions in the advocate. For instance, if the case has gone well and cross examination has been fruitful, we might be relieved that almost all of the hard work is over. Alternatively we might be experiencing trepidation with the prospects of relying, heaven forbid, on our defence case.

However it should realistically never be a time to relax, as the next decision can and often does determine the outcome of the case. The question that needs to be asked at the conclusion of any prosecution case, being in trial or hearing, is do we make a half-time submission?

Those of us working for the ALS encounter so many matters that either must conclude at the end of the crown case (where our client instructs not to give evidence or call evidence in defence); or should conclude at the end of the crown case (because the evidence is insufficient to exclude a reasonable doubt).

Accordingly it is important to be astute to the legal distinctions between the available half-time submissions and how they can apply to the evidence. It follows that a submission made at half time, even if unsuccessful, can be used as a means of persuasion in its own right. For instance, a Judge or Magistrate can be clearly placed on notice of weaknesses in the crown case which may ultimately assist them to comfortably find (or assist the jury in finding) a reasonable doubt.

Below is but a relatively short summary of the law pertaining to half-time submissions and some examples of how it might be applied.

PART 1 – NO PRIMA FACIE CASE/NO CASE TO ANSWER

When running a matter at trial or in the local Court, one of the most satisfying submissions to be made is the verdict by direction (no case to answer) or no prima facie case submission. This is because if you succeed you get to win on a brilliant legal point, or not so brilliantly by default due to the limits in the prosecution case. Either way you don't have to consider your own defence case, and don't have to address the tribunal of fact (Jury, Judge or Magistrate) as to which facts should be found and the conclusions to be drawn from such findings.

There are however some important points to remember in making such a submission, particularly in relation to how the Magistrate or Judge should assess the evidence presented in the Crown case and what inferences to be drawn from such.

Moreover, one should be sure that the submission is available by having a proper understanding of the law regarding the standard of proof, and the specific elements of the offence and how they relate, and thus can establish, the relevant charge.

The Law

The law in relation to a no prima facie case is well established and perhaps the starting point is as established in the High Court decision of *May v O'Sullivan* (1955) 92 CLR 654:

"When, at the close of the case for the prosecution, a submission is made that there is "no case to answer", the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law."[1]

Moreover the "question whether there is a case to answer, arising as it does at the end of the prosecution's evidence in chief, is simply the question of law whether the defendant could lawfully be convicted on the evidence as it stands, whether that is to say, there is with respect to every element of the offence some evidence, which, if accepted, would either prove the element directly or enable its existence to be inferred. That is a question to be carefully distinguished from the

[1] *May v O'Sullivan* (1955) 92 CLR 654, Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ at 657-658.

question of fact for ultimate decision, namely every element of the offence is established to the satisfaction of the tribunal of fact beyond reasonable doubt."[2]

Simply stated the test is whether there is evidence **capable** of proving each of the elements of the offence beyond reasonable doubt[3].

Being a question strictly of law, in a trial the no case to answer submission is made to the Judge in the absence of the jury, who is then obliged to give a ruling in accordance with the above authorities. Moreover the accused asks the trial judge to direct the jury to acquit on all or any of the counts in the indictment on the basis that there is no prima facie case, or no case to answer. If the submission succeeds then the jury must follow the Judge's legal direction and return a verdict of not guilty.

It should be noted however that a trial judge (or Magistrate sitting in a summary hearing) has no power to direct a jury to acquit the accused on the basis that, although there is a prima facie case, the evidence is such that it would be unsafe or unsatisfactory for the jury to convict the accused.[4] But there is another available submission to be made in such circumstances and is dealt with in Part 2 below.

The no prima facie submission essentially follows the same process in the local Court. For instance in *Director of Public Prosecutions (NSW) v Elskaf* [2012] NSWSC 2 Garling J helpfully summarised the authorities in the following way regarding how a no case submission when presented to a Magistrate is to be determined:

> [T]he determination of a no case submission is based upon all of the prosecution's evidence, if accepted, and
>
> (i) taken at its highest and strongest: *DPP v Lee* [2006] NSWSC 270 at [31]; *Wunderwald* at [28];
>
> (ii) even if it is tenous, inherently weak or vague: *Doney v R* (1990) 171 CLR 207 at 214-215;
>
> (iii) unless the evidence is inherently incredible: *Haw Tua Tua v Public Prosecutor* [1982] 1 AC 136 at 151; and

[2] *Zanetti v Hill* (1962) 108 CLR 433, Kitto J at 442; see also Attorney-General's Reference (No. 1 of 1983) (1983) 2 VR 410.
[3] *R v Briggs* (1987) 24 A Crim R 98.
[4] *Doney v R* (1990) 171 CLR 207 at 214.

(iv) unless the evidence is manifestly self-contradictory or the product of a disorderly mind: *R v Bilick* (1984) 36 SASR 321 at 337; *Cox* at 15; *Marsden* at [50].

A basic example

Assume you act for a woman named Mary who is charged with reckless wounding.

The allegation is that on 20/2/13 Mary recklessly wounded her partner in life, Michael, by throwing a schooner glass at his face at a gathering at their house.

The crown relies on the evidence of an eye witness to the assault, as well as the alleged victim Michael.

To succeed the Crown must prove the following:

1) Mary wounded Michael; and
2) The act was done recklessly

At the trial the Crown leads the following evidence:

i) The alleged victim Michael claims that Mary and he were arguing in the backyard immediately before he was struck to the face by what felt like glass. His evidence also involves his observation of Mary having held a schooner glass immediately before he was struck.
ii) Gary, an eyewitness to the assault, and a friend of both Mary and Michael, gives evidence that he was in the backyard when Mary and Michael were arguing, and that he saw Mary move her hand quickly in the direction of Michael who was standing about 2 metres away. He then saw Michael fall to the ground and noticed lots of blood spurting from his face. He cannot recall if Mary had a schooner glass in her hand at the time.
iii) Dr Elliot, an Emergency Registrar gave evidence at the trial in which he described having examined Michael shortly after the offence and treated him for a 6cm cut to the forehead, which penetrated the full layers of the skin (being epidermis and dermis), and required 10 sutures.

On the above evidence the crown case taken at its highest and strongest with inferences favourable to and consistent with the prosecution case support the following findings:

a) Mary had a schooner glass;
b) Mary threw her schooner glass in the direction of Michael;
c) Mary was not acting in self-defence nor was it an accident; and
d) The glass caused a wound to Michael's forehead.

Clearly the findings establish elements 1 and 2, and thus there is a case to answer.

However what if at the trial it was established that Dr Elliot's evidence consisted of treating Michael for a 6cm injury to the forehead that involved some superficial bleeding and penetration through the epidermis requiring the application of steri-strips?

It would seem that the case for the prosecution taken at its highest cannot establish wounding at law. Accordingly Mary could not lawfully be convicted on the evidence and the Judge could be invited to direct the jury to acquit Mary on the basis that there is no case to answer (assuming there is no backup offence of AOABH).

PART 2 – THE PRASAD DIRECTION

At the close of the crown case it might become clear that the evidence adduced to support the charge is tenuous or incoherent, notwithstanding having established each of the elements of the offence.

This may happen even in circumstances where the Crown case appeared to be relatively strong in the brief of evidence, but due to problems with witnesses (eg recalling evidence in the stressful environment of court, relying on memory, telling lies) or other forensic matters, it turns out that the reality is much different.

Again it is important to be able to recognise such an opportunity to draw the Court's attention to the quality of the crown case. Even if the submission is rejected, at least you have the bench thinking about whether the crown is able to prove the matter beyond reasonable doubt.

For instance, in a Judge alone trial or local Court hearing, the Judge or Magistrate will ultimately have to give reasons for the findings of guilt or otherwise. So why not get them thinking straight away about your belief in your case (or the weaknesses in the Crown case). Remember persuasion should not be left to the end of the case. Ian McClintock SC wrote a very helpful paper entitled "Addressing Juries" wherein he opined: "if you have left persuading the jury until the closing address – you've almost certainly lost".[5] Obviously this goes the same for a Judge or Magistrate sitting alone as the tribunal of fact and is salient advice.

So what does the law say about a significantly weak or tenuous crown case?

The Law

The "Prasad direction", which is not really a direction but an invitation, came about after the South Australian Supreme Court decision of *R v Prasad* (1979) 23 SASR 161; 2 A Crim R 45 which held that it is within the discretion of the judge to inform the jury of the right to bring in a verdict of not guilty at the close of the prosecution case if they are not satisfied that the evidence is sufficient to justify a conviction.[6]

The Court was careful however to distinguish this type of invitation from a directed verdict of not guilty (no prima facie case) as was discussed in Part 1 of this paper. In particular King CJ held that a Judge "may undoubtedly, if he sees fit, advise them *(the jury)* to stop the case and bring in a verdict of not guilty. But a verdict by direction is quite another matter. Where there is evidence which, if accepted, is capable in law of proving the charge, a direction to bring in a verdict of not guilty would be, in my view, a usurpation of the rights and function of the jury."[7]

Thus it can be seen that where the issue is about the quality of the evidence once it is established that there is at law a case to answer, the Judge has no place to direct the jury to acquit no matter how weak the evidence is. It remains that matters of law are for the judge and matters relating to whether evidence should be accepted and particular facts found, are entirely a matter for the jury.

[5] "Addressing Juries", Ian McClintock SC (2009) Public Defenders Criminal Law Conference.
[6] *R v Prasad* (1979) 2 A Crim R 45, King CJ at page 2.
[7] *R v Prasad* (1979) 2 A Crim R 45, King CJ at page 2.

It should be noted that the decision in *Prasad* was a 2:1 majority decision, and Mohr J who was in dissent relied on some English authorities (*Falconer-Atlee* (1973) 58 Cr App R 348 and *Mansfield* [1977] 1 WLR 1102) to find that the existence of a discretionary power to withdraw a case from the jury on the basis that the evidence, in the Judge's opinion, is so lacking in weight and reliability that no reasonable tribunal could safely convict on it, is one that "would seem to accord with good sense and the proper administration of justice."[8] Although His Honour was careful to point out that such cases would be few in number.

Despite this however, in New South Wales the Supreme Court has continued to apply the majority decision in *R v Prasad.*[9] Accordingly perhaps it is best to keep in mind the following principles when considering whether a "Prasad direction" is appropriate:

i) It is but an invitation and not a direction and thus the jury are not bound by it;
ii) The jury may ignore the judge's invitation and ask to hear more evidence;
iii) It is within the judge's discretion to inform the jury of the right to return a verdict of not guilty at the close of the crown case and accordingly he/she may refuse such an application; and
iv) Returning a verdict of not guilty on this basis is a matter of fact and not law, and thus can only be made by the tribunal of fact.

It should be noted however that while a jury is only "invited" by the judge to return a verdict of not guilty, it has been well established that juries listen carefully to, are guided by, and follow the advice of the trial judge.[10] Moreover if you can persuade the judge to give the invitation, then you will have the added persuasion of the Judge advising the jury of its right.

Furthermore while the "direction" should only be put simply and shortly, a judge may touch upon whatever feature of the evidence it is that has led him/her to give the direction, "usually some serious weakness in the Crown case that has emerged during its presentation."[11]

How does the process work however in the Local Court?

[8] *R v Prasad* (1979) 2 A Crim R 45, Mohr J at pages 11 and 12.
[9] See *R v Michael Anthony Ryan* (No 8) [2012] NSWSC 1161; *Seymour v Regina* [2006] NSWCCA 206; *R v Tantra* (No 1) [2010] NSWSC 394.
[10] *Gilbert v R* [2000] HCA 15.
[11] *R v Pahuja* (1987) 30 A Crim R 118 (CCA) per Cox J.

In *R v Prasad* King CJ said:

> I have no doubt that a tribunal, which is judge of both law and fact, may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal considers that the evidence is so lacking in weight and reliability that no reasonable tribunal could safely convict on it.[12]

Curiously the Local Court bench book is silent on the question of the application of *R v Prasad* in summary hearings. However there is really no question that the same test applies as it does in the higher Courts. Sometimes however it needs to be pointed out in clear terms what it is that you are inviting the Court to do.

For instance one could concede a prima facie case, but urge the Magistrate to dismiss the charge on the basis that the evidence lacks cogency and a conviction relied on such would be dangerous. Remember that where a trial judge rejects a no case submission it is still open to invite the Judge to give a Prasad direction (*Ayles v The Queen* (1993) 66 A Crim R 302 (SA CCA)).

However it may need to be stressed that this is not a "second limb" submission which addresses the Court on whether the evidence excludes a reasonable doubt, and must be made on the whole of the evidence (see Part 3). If the Magistrate considers your application to be a second limb submission, then you may be precluded from thereafter going into evidence.

Mary's Case and Prasad

Let's assume the same Crown case as above where Dr Elliot gives evidence about treating what is clearly a wound at law caused by broken glass.

However this time at the trial Michael's evidence is: "Me and the Mrs (Mary) had a barney but I didn't see her do anything with her hands before I was hit. I also can't remember her holding a glass in her hand before I was hit."

Gary the eyewitness gives evidence that: "I saw Mary and Michael arguing, it looked pretty heated, and I saw Mary raise her arm quickly in the direction of Michael just before he fell. But there were

[12] *R v Prasad* (1979) 2 A Crim R 45, King CJ at page 2.

also a lot of other drunk people drinking from schooner glasses standing next to Michael before he fell."

The prosecution case taken at its highest still supports an inference that Mary recklessly wounded Michael. However you will note that the case is now inherently flawed as the suggestion that Mary was the assaulter is weakened by reference to:

i) No actual evidence that Mary had a schooner glass in her hand;
ii) Michael not seeing Mary do anything with her hand (in conflict with Gary); and
iii) Evidence of others close by with schooner glasses capable of causing the injury.

Accordingly in these circumstances it would be open to the tribunal of fact to find that such evidence is insufficient to sustain a criminal conviction. And thus an application could be made to the Judge to inform the jury of the right and opportunity to stop the trial and find the defendant not guilty.

PART 3 – THE SECOND LIMB

In the local Court at the close of the prosecution case a Magistrate will invite you to indicate whether you will be calling any witnesses or tendering any further evidence. This is the time to be astute to the possibility of making what has become colloquially known as a "second limb submission."

The decision to make such a submission is often a brave one. Because if a prima facie case has clearly been established on the crown's evidence, one is precluded from thereafter calling any evidence should the submission be rejected (see why below). However for those of us working for the ALS, it is perhaps more often than not, a necessary decision as the prospects of going into a defence case can often only mean bringing undone all of the hard work done so far.

In reality all that a "second limb" submission means is that the case will conclude at the close of the Crown case and submissions pertaining to a reasonable doubt are to follow. This goes the same for a jury trial. It is a submission made by the advocate once it is decided that:

i) The crown has established a prima facie case;

ii) The evidence is not sufficiently lacking in cogency or reliability so as to warrant an invitation for the application of *R v Prasad*;

iii) There evidence is arguably incapable of excluding a reasonable doubt; and

iv) There is no need to go into evidence to support a finding of reasonable doubt.

The Law

The "second limb" as it were, comes from the test set out in a three page judgment of the High Court in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 relating to the burden and onus of proof on the prosecution in criminal proceedings.

The Court held the following at pargraph 7:

> When, at the close of the case for the prosecution, a submission is made that there is "no case to answer", the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there is a "case to answer" has no effect whatever on the onus of proof, which rests upon the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the **whole of the evidence before it**, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact.

More recently the New South Wales Supreme Court relied on *May v O'Sullivan* in holding that "[t]here is no necessary inconsistency between a Court deciding that the defendant has a case to answer, and then proceeding to hold, in the absence of any further evidence, that the case for the prosecution does not warrant a conviction."[13]

One then wonders how there can be a finding of a "case to answer" when the evidence does not warrant a conviction? So you can have a positive finding that there is a case to answer, however you need not answer the case to establish a reasonable doubt? Doesn't this suggest that there is no need to answer the case, and thus no case to answer?

[13] *Director of Public Prosecutions (NSW) v Elskaf* [2012] NSWSC 21.

Putting the troubling logic to one side, perhaps it is best to simply think of the test as set out in *May v O'Sullivan* as being upon a finding of a prima facie case, one can still be found not guilty because the evidence does not exclude a reasonable doubt.

Probably the most significant aspect of the "second limb" submission is the potential to forfeit one's right to call or rely on defence evidence. From time to time some Magistrates will take the view that making a second limb submission does not preclude you from calling your client. And naturally one may wish to take advantage of such a view.

However the test is whether on the **whole of the evidence before it**, which necessarily includes any defence evidence, the tribunal of fact is satisfied beyond reasonable doubt that the defendant is guilty. Accordingly this is why once a ruling on such a submission is made, the defence is thereafter precluded from calling any further evidence.

Moreover the local Court bench book states the following with respect to such matters:

"After a prima facie case is found, the defendant may argue, without calling evidence, that the evidence founding a prima facie case is insufficient to support a conviction. Before ruling on this submission it is wise to ensure that the defence does not intend to call evidence should the submission fail. If the defendant intends to call evidence, no ruling should be made on the *May v O'Sullivan* (1955) 92 CLR 654 submission and the case should be determined at the conclusion of all the evidence and submissions."[14]

So obviously one has to be careful in getting proper informed instructions (preferably signed) about whether the client potentially wants to forego his/her right to call evidence on the basis of a chance at acquittal at half time.

Mary and the second limb

Let's go back to the trial of Mary and the Reckless Wounding.

Now let's assume the evidence at the close of the Crown case is as follows:

[14] 2013 Local Court Bench Book – [10-000] Dismissal.

i) Dr Elliot still maintains his opinion regarding a cut through the full thickness of the skin (dermis and epidermis) caused by a glass being thrown at Michael.

ii) Michael now says, after a successful s 38 application by the Crown and cross-examination, that he agrees that he initially told police in his statement that Mary had a schooner glass in her hand just before he was struck. However he claims that he wasn't feeling himself at the time of making the statement, having been suffering some concussion from the assault, and maintains in evidence that he didn't see a glass in Mary's hand.

iii) Gary maintains that he saw Mary move her hand quickly in the direction of Michael just before he fell. However he thinks that Mary was holding a glass in her hand but cannot be certain of this. Importantly he tells the jury that there were a number of very drunk men holding schooner glasses standing beside Michael at the time that he fell.

Clearly there is a case to answer on this evidence.

However a Judge would unlikely exercise his/her discretion to inform the jury of its right to find that the evidence is insufficient to support a conviction. Particularly given the fact that there is now an issue of credit, a matter entirely for the jury to determine, when assessing Michael's evidence.

However the evidence is such that there may, notwithstanding above, be a reasonable doubt as to whether Mary committed the offence. Ultimately the jury could be invited to find that the Crown cannot exclude the possibility that one of the other men had caused the injury if they ultimately accept (or cannot reject) Michael's evidence about Mary not having a glass in her hand.

But remember that if the "second limb" submission is made, there are no second chances, and accordingly the case must stop there as the decision is to be made on all of the available evidence in the trial at its conclusion.

CONCLUSION

The half-time submission is a most important tool of persuasion available to the advocate. With a clear grasp of the legal distinctions between the available submissions, one is well placed to make the right decision to assist in winning matters at the close of the prosecution case.

Please email me on ben.bickford@alsnswact.org.au or phone on 0447620346 should you wish to discuss any of the matters raised in this paper.

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