Preparation for Trial: The Vincent Way

By Rowan Skinner

The obligation of an advocate briefed to defend in a criminal trial under the Victorian Bar Rules is quite distinct from that of an instructing solicitor. Under the Rules, the defence advocate is obliged to protect the client from being convicted except by a competent tribunal and upon admissible evidence. The Rules do not prohibit defence counsel from advising a client in strong terms that he is unlikely to escape conviction. The solicitor acting for the same accused has the responsibility under the Professional Conduct and Practice Rules 2005 to advise the client charged about any law, procedure or practice which in substance holds out the prospect of some advantage if the client pleads guilty or authorizes other steps towards reducing the issues, time, cost or distress involved in the proceedings. Generally the solicitor's obligation is to advance and protect the client's interests.

The role and responsibility of counsel and solicitor retained by an accused in a criminal trial intersect. Their responsibility is to give serious and careful consideration to whether the charge is defensible. It may be that after careful consideration of the allegations and the instructions concerning those allegations that it would be bad advocacy to proceed with a contested trial. If the prospects of success has no reality then it would be irresponsible to do so. These statement seem self-evident but they are not necessarily.

This article explores the method of approach to trial preparation, which is apposite to prosecuting as it is to defence, although it is written primarily for the defence lawyer's perspective. It was an approach adopted by the now retired Supreme Court judge Frank Vincent and it gives an example of the approach taken to one specific case in which he appeared. The philosophy outlined is one endorsed by him.

The facts

A migrant woman takes her six-year-old child home from school. It is 3:15 p.m. on an ordinary sunny afternoon. She crosses a public park about 15 m from a sign which was attached to on a post erected in that park. She is shot in the head and immediately slumps to the ground dead. There is no apparent reason for it. There are no family problems, her husband is an ordinary working man with no enemies. She is obviously an ordinary decent woman. Considerable publicity follows and there is some propaganda in the media to the effect that a sniper was responsible[1]. There is therefore considerable potential for prejudice.

The possibility of a sniper is given credibility by a report that in housing commission flats some distance away from where the incident occurred, that there had been a sniper firing at school children. Police find a gun in the backyard of a home immediately adjacent to the park. Cartridge cases are found in the vicinity; and bullet holes are observed in fences and signs around the park area. The gun is a rifle fitted with telescopic sights; the distance from the fence of the house from which the rifle was obviously fired to the park where the woman was hit is about 150 metres and the victim is about 15 metres away from the nearest signpost.

A young man, 19 years of age, is charged with murder, after an interview with police. He admits in the interview that, yes, he had shot the woman, but that he did it accidentally. He said he had taken the magazine from the gun and that he sighted the weapon over the back fence on a sign, which was considerably to the left of the woman. Having accidentally discharged the rifle, he ran away, horrified and terrified. He tells police that he is certain that he only fired the gun once. When asked to explain the fact that the woman had been shot twice, he cannot.

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[1] 'Preparation of a Criminal Trial' Frank Vincent Q.C.

The defence team were immediately presented with the difficulty of the young man's instructions, which were that he had told the police a deliberate lie about firing the gun only once. The accused said that he had been advised by one of his mates that if the police knew that he had deliberately fired the gun at all, he was likely to get convicted, so it would be better for him to tell police that it was an accidental discharge and he didn't intend to fire the gun. This lie could have had the affect of working very badly against the young man. Today, a prosecutor might suggest to the jury that the lie was an implied admission by him, said out of the knowledge that the truth would convict him.

Mr Vincent summed up his young client thus: inarticulate; unemployed; very little knowledge of firearms; in his spare time he used to hang around local wrecking yards, catch lifts with tow truck drivers who would let him operate their radio; or he would work on a broken down motorcar. The telescopic sight had been fixed on the rifle by the young man, but it hadn't been done properly and he hadn't tested it at all. The young man claimed that he had been firing the gun over the back fence at various signs and that he simply did not see the deceased woman.

The approach

How does one go about preparing a defence where the facts point so strongly in favour of the prosecution? Where does one start? Did the young man's version have any inherent credibility from the perspective of an ordinary listener?

The task of preparation, has two basic objectives: the first must be to clarify and define what are likely to be the real issues in the trial; the second must be to determine a method of approach to those issues.

A significant part of the role of defence counsel is to determine the strength of the Crown case and the way in which it is likely to be formulated against one's client. The credibility and accuracy of witnesses has to be assessed, the extent to which the version given by the

client is compatible with the objective evidence, allied to the explanation given by other participants in the drama. Finally, consideration has to be given to the ultimate acceptability to a jury of the version given by the client. It may, for example, be quite clear that the Crown case is going to be made out against the individual and that the defence which he desires to raise has no merit. A good advocate will appreciate this and give consideration to a plea of guilty and submissions in mitigation of penalty.

The most obvious place to start is with the definition of the offence itself. One must look at the legal form of the charge and what the elements of the offence are that must be established. The client will provide his story which will be taken into consideration. Usually however, one will find that many of the elements of the offence can be put to one side because there is no real issue about them. Arguing every single point which arises in proceedings is likely to be insulting to the courts, witnesses and juries, and that a good advocate should not waste his client's and the communities' money in this way. The preferable course is to consider the specific questions which have to be determined and apply oneself in relation to those questions. In order to achieve a critical analysis of the defence case, the barrister's role is not separated from the solicitor's role. Prior to trial those roles are so closely merged that there is no point in differentiating them. Each is concerned with the same analysis of the situation. However, the solicitor has the significant practical problem of converting the questions into realistic investigations.

The ultimate goal of the defence team is to sit down and think where one would want to finish up at the end of the case. A total philosophy for the defence should be developed which will be used throughout the trial to be incorporated in the address. For this purpose, the address should be written before the trial. His Honour says that there should be almost nothing that occurs during the course of the trial which one did not expect to happen. When preparing cross-examination one ought to know realistically what one expects from and what part it plays in the whole scenario. One should have no right to expect that any miracles are going to occur during cross-examination. Cross examination

is conducted only for a very specific purpose, which is as a logical outcome of the initial preparation of the final address.

One must keep in mind when preparing for trial, that whatever is raised on behalf of the client is going to be analysed by others and subjected to the critical faculties of judges and prosecutors. Then of course there is the jury of 12 who should never be regarded as fools or gullible or less intelligent than oneself, either counsel or the solicitor. To that end, the personal credit of counsel will support the client's credit, or not. Everything counsel does must be consistent with the seriousness of the situation as counsel should assume that one's behaviour is being observed by jurors from the point one leaves chambers to cross the road until the court room.

The ultimate question is whether it is possible on the material before the advocate to present *an actual defence*. Is it possible that the instructions provided by the client would be given some credibility when presented before a jury?

There must be an appreciation of the difference between a 'defence' and a story. A story is an explanation, an answer, or denial which more or less fits the facts. However, a defence on the facts is a psychologically viable alternative explanation which when someone thinks about it gives rise to a reasonable doubt.

Preparation for trial

It seemed distinctly possible that Mr Vincent's young client had been firing a dangerous and misaligned weapon at signs in the nearby park when the death occurred.

The questions he asked were, did the general version given by him marry with the first observations made about the young man, that is, that he was an inarticulate young man who would hang around with tow-truck drivers and whose instructions were that he was

firing at various signs and didn't see the deceased. It was important to establish what he was actually saying and did he have any inherent credibility from the ordinary listener?

The young man's legal advisers thought that he may have; that he may have been stupid to enough to have fired a gun on which he had placed a telescopic sight across a park. The real question was would he necessarily have seen the deceased?

There were a number of activities which were undertaken:

First, the instructing solicitor arranged for the whole area to be independently photographed and from a wide range of positions. The police photographs provided at committal would frequently suit the prosecution perspective and thus omit a number of salient features. In this case, the salient features were marks on fences and posts at which the accused had been firing needed to be recorded at the very earliest opportunity.

Second, in order to assist the defence of accidental shooting, it was important to establish if possible that the gun had been fired at other times. In order to do so, the accused man's legal representative would need to establish that the period during which the shots had been fired and the number of shots. This had to be considered in the early stages of preparation. If too much time passes, there is the distinct possibility that people may not remember significant detail.

The result of this investigation by the solicitor was that a number of people who lived nearby recalled hearing shots on other occasions. One of these neighbours had become so annoyed that he had reported the matter to local police and identified the area from where the shots had come. This man gave evidence at the trial that he determined that the firing position was from one of two backyards on the other side of the park. It turned out that one of these was behind the house in which the accused lived.

Thirdly, it was necessary to examine the weapon. A forensic decision had to be made as to whether this examination was conducted prior to the inquest. In this case, the telescopic sight had been removed by police before the alignment was checked. This meant that there was no evidence as to the actual alignment of the firearm when the incident occurred. It appeared that police had approached the case on the basis that they were dealing with a sniper, not a young fool. There was little forensic investigation done; police seemed to have viewed the case as 'clear cut', given that the woman had been shot in the open on a clear day at a range of 150 yards.

Aerial photos were taken of the park; a cartographer fully mapped the area so that calculations could be made; meteorologists were secured to detail the wind direction and velocity at the relevant place and time. They then attended the scene to calculate the range of wind velocities and directions at the relevant time and place.

A firearms expert examined the telescopic sight. It transpired that it was a cheap model with a limited arc of vision, some looseness in the lenses resulting in the possibility of a measurable deviation. They examined the posts at which the accused had been firing. Characteristics of the gun were examined to see which way the bullets would throw when fired. Drawings were prepared which indicated the pattern of shots and the various quadrants in which shots would land. Other drawings were superimposed relating the field of vision to the arc of fire. The result was that there was a calculation made that there was only a 5% chance that the deceased woman had been in the field of vision at the time the rifle was discharged.

The result of these investigations could assist the defence contention, that the accused was not a killer, but an immature young man. It was best that this evidence emerged from the crown case. To achieve this, the defence could rely upon the record of interview, which showed the tone of voice and attitude of the accused, and the witnesses who attested to the gun having been fired on other occasions, which tended to support that position.

Calling the client

A sensible decision has to be made as to whether the client is called. Some senior advocates today might consider that the high point of the defence case at the conclusion of the crown case. The decision however might depend on the strength of the crown case, but also on a number of other factors.

The client would have to be properly prepared so that he understood the nature and extent of the case against him. He must know the legal elements of the charge. He has a right to know the issues which he is going to have to cope with and to be psychologically prepared to fight for himself in the witness box.

The trial process is very stressful. The solicitor and counsel should determine whether the client is capable of coping with the stress. Owing to fear, anxiety, intellect or social disadvantage, some people are unable to cope and even innocent people can look shifty or guilty under cross examination. These sort of characteristics must be given due consideration in any proper preparation process.

Conclusion

Mr Vincent's approach could be described as 'a wholistic one' to case preparation. Of course one might not have a choice, but preparation of a defence should not begin a week prior to the trial, but immediately on receipt of instructions. An advocate's preparation should involve his solicitor. Each must clarify and define what are likely to be the real issues in the proceedings and attempt to determine a method of approach to those issues which involves an understanding of the human situation with which one is endeavouring to deal. Each must ensure that the defence *fits* the incontrovertible facts and the evidence given by the witnesses so that it becomes psychologically viable. Everything done in the course of preparation of the defence is geared towards the final address and so the final

address is the natural culmination of what went on in preparation. Finally, every one of the people involved in the case, regardless of how badly they have apparently behaved, should be treated by advocates with professional dignity and without appearing judgmental. Respect for everyone involved in the proceedings ultimately goes to counsel's credit and therefore the clients.

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