CRIMINAL APPEALS AMENDMENT BILL 2021

Committee

Resumed from 14 June. The Deputy Chair of Committees (Hon Peter Foster) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 4: Part 3A inserted —

Progress was reported after the clause had been partly considered.

Hon MATTHEW SWINBOURN: Last night, when we were dealing with this matter in committee, Hon Nick Goiran was pursuing a line of questioning regarding self-represented offenders, and particular reference was made to their exclusion under proposed section 35D(1)(b). I would like to pick up on that point and make a number of points about those provisions.

I had confirmed that a self-represented offender would not fall within the definition in proposed section 35D(1)(b) as no lawyer would be representing the offender. The reason for this policy is that a self-represented person has full control of their case and makes all decisions themselves, whereas this may not be the case for a person who is being represented by a lawyer. The provision is designed to protect offenders from lawyers' incompetent or negligent failure to tender evidence, for which no fault lies with the offender. Plainly, if the offender were self-representing, the fault would lie with them.

If we compare the wording in proposed section 35D(1)(b)(i) to that in the definition of "new evidence" in proposed section 35D(2), we will note that they are the same. Proposed section 35D(1)(b) essentially takes a very specific situation that would have been regarded as new evidence and deeming the situation to be fresh evidence so that it has a lower evidentiary hurdle. This does not mean that the self-represented offender is disadvantaged by the provision, for two reasons. Firstly, the provision itself is an exception to the definition of new and fresh evidence. It is more accurate to say that the provision works to the advantage of an offender who had an incompetent lawyer, which is not something that would happen often, I am sure. It also bears mentioning that it is unlikely that an offender would be unrepresented on a matter that proceeded on the indictment. Nevertheless, it is possible.

Secondly, the fact that an offender was self-represented would be taken into account when considering whether the evidence is fresh evidence in the first place. Latitude would likely be extended to an accused in determining what evidence, by reasonable diligence in their own interest, they could have been able to produce at trial. This is because an accused will often be disadvantaged in intellectual terms or in terms of financial and legal resources in the conduct of the case. Where a self-represented offender wants to utilise evidence to support an appeal that was not tendered and with reasonable diligence could have been tendered, that would be new evidence under proposed section 35D(2). This is one of the safeguards to avoid victim re-traumatisation, as an offender is expected to present available evidence in their defence at their trial.

The requirement for the exercise of reasonable diligence reflects the principle that there must be an end to litigation and recognises that the pursuit of perfect justice can come at too high a price if it prolongs litigation, with its attendant costs, inconvenience and uncertainty. But it also prevents parties who have gone to trial underprepared being rewarded for their lack of diligence with a second chance before another jury, since a trial is not a dress rehearsal for a second trial or for a rehearing in an appellate court with additional evidence. Whether reasonable diligence was exercised is a matter for the court to determine in the circumstances of the particular case. If the appellant in such a situation cannot overcome the innocence test, the offender could still approach the Attorney General of the day for the exercise of the royal prerogative. However, and without wanting to pre-empt any such decision, the chances of a successful petition in those circumstances would not be promising.

Hon NICK GOIRAN: Thanks, parliamentary secretary. That is a good, comprehensive explanation for the distinction in proposed section 35D(1)(b) and proposed section 35D(2). The parliamentary secretary is simply indicating that the reason we are elevating one scenario into the category of fresh evidence, which would otherwise need to meet the new-evidence test, is that it has the extra element of incompetence or negligence by the offender's lawyer.

As I indicated yesterday evening, when we almost managed to complete our scrutiny of this matter, I have very few remaining questions with respect to clause 4. The only other matter that I will have questions on, after this clause, is clause 6, and, as the parliamentary secretary is aware, my questions there are quite brief.

Having dealt with the scenario with respect to section 35D, the parliamentary secretary will be aware that we are now inserting at 35D a statutory definition of "fresh, new and compelling evidence". The concepts of fresh evidence and new evidence are not new. Indeed, from time to time they are referred to in our own common law. To what extent are we changing the ordinary interpretation of "fresh evidence" or "new evidence"? To what extent are we amending it by this statutory definition?

Hon MATTHEW SWINBOURN: As an aside, it was a little amusing to me when the member said that the concepts of fresh evidence and new evidence were not new, because of the peculiar nature of this language. The member is in fact correct. They are in themselves not new concepts because they are reflected in the common law and courts have dealt with them, if we can now call these concepts of fresh and new evidence as "first appeals" rather than second or subsequent appeals. I will explain that. That is just a little side point.

I have explained the special types of evidence relating to lawyer incompetence. This is not part of the common law, as that would ordinarily be regarded as new evidence. Outside of this exception, the definition of "fresh evidence" at proposed section 35D(1)(a) is that evidence is considered fresh —

> if, despite the exercise of reasonable diligence, the evidence was not and could not have been tendered at the trial of the offence or any previous appeal;

This definition conforms with that developed under the common law in Western Australia and aligns with that used in similar legislation in South Australia, Tasmania and Victoria. The recent Western Australian Supreme Court of Appeal case of Houghton v the State of Western Australia [No 2] [2022] [WASCA] 7 provides a useful definition of "fresh evidence" at paragraph 195 of the judgement —

> Fresh evidence is evidence that either did not exist as at the date of the trial or could not, with reasonable diligence, have been obtained or discovered for use at the trial.

The member will see that the definitions are almost entirely the same. The definitions do not vary, other than the exclusion of lawyer incompetence and negligence, which does not form part of the common law of fresh evidence. On the definition of "new evidence" in the bill versus the common law definition, the definition of "new evidence" at proposed section 35D(2) is that evidence is considered new —

> … if the evidence was not tendered at the trial of the offence or any previous appeal but, with the exercise of reasonable diligence, could have been tendered at the trial of the offence or any previous appeal.

This definition conforms with that developed under common law in Western Australia.

Again, in the recent WA Court of Appeal case of Houghton v the State of Western Australia, a useful definition of "new evidence" at common law was provided at paragraph 195. In that judgement at paragraph 195—I am sorry, Deputy Chair, can you ask the chamber to quieten down? I am having trouble concentrating.

The DEPUTY CHAIR (Hon Jackie Jarvis): I again remind members that Hansard reporters are not in the chamber and if the parliamentary secretary cannot hear himself, the Hansard reporters will not be able to hear either.

Hon MATTHEW SWINBOURN: Thank you, deputy chair.

The definition provided by the WA Court of Appeal at paragraph 195 was that new evidence is evidence that could, with reasonable diligence, have been obtained or discovered for use at the trial. As the member can see, the court's very recent definition of that conforms with the definition provided in the bill. I note, however, as I mentioned in my answer to one of the member's questions yesterday, that the bill adopts a different test that the offender must satisfy to be successful in an appeal on the basis of new evidence. As stated in Houghton v the State of Western Australia at paragraph 196, the common law provides —

> An appellate court will not allow an appeal against conviction, on the basis of new as distinct from fresh evidence, unless the new evidence establishes that the appellant is innocent or the new evidence raises such a doubt that the court is satisfied that the appellant should not have been convicted.

The test in the bill again creates a higher bar than the common law principles for initial appeals based on new evidence, as the bill asks only whether the offender is innocent and not also whether the offender should not have been convicted. It emphasises that second or subsequent appeals, particularly those based on new evidence, are not to be allowed lightly. Does that make sense to the member?

Hon NICK GOIRAN: Yes, it does. I thank the parliamentary secretary for reciting the common law definitions of fresh and new evidence. I note that the most recent judgement that the parliamentary secretary referred to from 2022 simply recites the definitions, from what I can see, going back as far as Beamish v The Queen in 2005. The series of cases since then have continued to repeat that common law definition. It is important for there to be an appreciation for the distinction between that definition at common law and what will now be enshrined by this bill. In either case, will it be necessary for the court to make any finding of fact about whether reasonable diligence was exercised in order to then admit the fresh or new evidence?

Hon MATTHEW SWINBOURN: The answer is yes, that would need to be considered as a finding of fact. If the member has further follow-up questions, we can probably explore that further.

Hon NICK GOIRAN: Will having made a finding of fact that there was an absence of reasonable diligence, and that one of the reasons that reasonable diligence was not exercised was that evidence was not tendered, eliminate the prospect of that evidence being tendered?

Hon MATTHEW SWINBOURN: No. If it falls within the definition of "new evidence", it can be tendered. It depends. If it does not satisfy that first test, it is possible that it could satisfy the second test in those circumstances.

Hon NICK GOIRAN: In other words, a finding of fact by the court is necessary on whether reasonable diligence has been exercised, because if reasonable diligence has not been exercised, is the only way in which that evidence might be able to be entered or considered by the court via the new evidence pathway?

Hon MATTHEW SWINBOURN: The member is correct, but the point we would like to make about the court determining a matter like this when an appellant pleads their case on the basis of fresh evidence and, in the alternative, new evidence, is that the court would consider the matter in its entirety. Obviously, if an appellant pleaded only fresh evidence and could not satisfy the reasonable diligence test, leave probably would not be granted or, on the determination of the merit of the matter, it would be dismissed. But, as I say, a good lawyer representing a person in those circumstances would plead in the alternative, so long as there was a factual basis for doing so, to ensure that they were not going to get knocked out at that stage for failure to satisfy the reasonable diligence test.

Hon NICK GOIRAN: Therefore, for evidence to be accepted by the court under this scheme as fresh evidence, does the appellant have to demonstrate, or obtain a finding of fact, that reasonable diligence was exercised?

Hon MATTHEW SWINBOURN: I do not quite remember the member's question, but I get the thrust of it. Clause 35D(1)(a) deals with fresh evidence. It states —

> if, despite the exercise of reasonable diligence, the evidence was not and could not have been tendered at the trial of the offence or any previous appeal …

There would be some circumstances in which no amount of diligence could result in the evidence being tendered at trial—for example, a change in the state of the law with respect to a certain thing. I suppose that is covered off in the "could not" rather than the "was not" in relation to that because of the impossibility of that. There may be some circumstances in which a person has proceeded with the case without any diligence, for example, but a change in the law meant that they could not have possibly presented the evidence at that time even if they were as diligent as anybody could possibly be—if the member can catch my drift on that one.

There is that sort of notion. But that is obviously something that, because of a change in either the law or what is accepted in evidence—which, as I say, some people might have argued for at a different stage, but until it is accepted or adopted by either the courts of a change in Parliament—no amount of diligence is going to change.

Hon NICK GOIRAN: I ask the parliamentary secretary to consider page 3, line 21, of the bill and the use of the word "and". I am trying to test here whether we are satisfied that it should indeed read "and" or the word should read "or".

At the moment, this first, new statutory definition of "fresh evidence"—putting aside the second definition of fresh evidence involving the negligence of the lawyer—refers to evidence that was not and could not have been tendered at the trial of the offence. I compare that with the common law definition that the parliamentary secretary kindly read out earlier. There it says that fresh evidence is evidence that either did not exist as at the date of the trial or could not with reasonable diligence have been obtained or discovered for use at the trial.

Are we satisfied that we want to be what I would describe here as narrowing further the definition of fresh evidence in contrast to the common law definition by making it a mandatory component that one must demonstrate that the evidence not only was not tendered at the trial, but also could not have been tendered at trial? And if we are satisfied that that is in fact the intention of the government, to narrow that definition in contrast to the well-established common law definition, then I take it that we can move on. I just want to make sure that we are very clear that we are deliberately using the word "and" here and not "or".

Hon MATTHEW SWINBOURN: The first thing to say at the outset is that the advice I am receiving at the table is that the "or" in the common law definition does not do the same work as the "and" in the statutory definition. To be very clear, the overall effect of the definition in the new bill is the same overall effect as the common law definition. This is on the parliamentary record of debates. If there is argument at a later date, reference can be made to this.

Hon Nick Goiran interjected.

Hon MATTHEW SWINBOURN: That is the intention, yes. To break that down a little further, the definition states that the evidence was not, as a matter of fact, tendered at either the trial or a subsequent appeal and—the conjunctive—could not have been tendered. Without exhausting the circumstances in which it could not have been tendered, the most obvious are that the evidence did not exist at the time of the trial or, even with the exercise of reasonable diligence,

people were not aware of the existence of the evidence, which could have been due to misconduct on the part of the prosecutors or the police because it was not presented or because it just never came forth, or anything of that kind, or that as a matter of either case law or statutory law, it was not permitted to be entered into evidence because those things were excluded after the law changed and it happened at a later date. I hope that clarifies that matter.

Hon NICK GOIRAN: That was very helpful. It is important that we get this right. I take it that the government's position, which it has asked Parliament to agree to and get on the record, is that the common law definition of fresh evidence has been recited many times in Western Australian judgements. That definition comes in two parts. The first part is that the evidence did not exist as at the date of the trial and the second is that it could not, with reasonable diligence, have been obtained or discovered for use at the trial. The government is saying, in asking Parliament to agree on the record here, that the first of those scenarios would be considered to be a subset of the second; that is, if evidence did not exist at the date of the trial, it follows that it could not have been obtained previous to the trial. For that reason, the government and parliamentary counsel have chosen to use the words on page 3 at lines 18 to 23, and the very express intention of the Parliament is that both those scenarios are captured here: firstly, the scenario that evidence that did not exist as at the date of the trial—we say that is captured by this definition—and, secondly, that evidence could not, with reasonable diligence, have been obtained or discovered for use at the trial. It is important to get that clear on the record.

Hon MATTHEW SWINBOURN: Thank you, member; that is correct.

Clause put and passed.

Clause 5 put and passed.

Clause 6: Act amended —

Hon NICK GOIRAN: This is the only further clause I wish to examine. This is the start of division 1, within part 3 of the bill. It informs us that the bill will amend the Bail Act 1982. I know that the Attorney General yesterday made an announcement about proposed reforms to the Bail Act. It is not for us in this place to consider matters that are currently on foot in the other place, so I do not want to ventilate that issue, but I would like some clarification or confirmation from the government on whether the reforms announced by the Attorney General yesterday will have any impact on any provision of this bill. If they will not, we can move on; if they will, to what extent will they create any transitional issues?

Hon MATTHEW SWINBOURN: The short answer is no; they will not have any impact. By way of elaboration, the current Bail Act provisions will continue to apply in the same way as they do for appeals under part 3 of the Criminal Appeals Act 2004. For completeness, I draw the attention of the member to the provisions in the Bail Act in clause 4A of part C of schedule 1, which states —

> In deciding whether or not to grant bail to an accused who is in custody waiting for the disposal of appeal proceedings, the judicial officer shall consider whether there are exceptional reasons why the accused should not be kept in custody, and shall only grant bail to the accused if satisfied that —
>
> (a) exceptional reasons exist; and
>
> (b) it is proper to do so having regard to the provisions of clauses 1 and 3 or, in the case of a child, clauses 2 and 3.

The next clause of the schedule, clause 5, states that clause 4A does not apply to appeals under part 2 of the Criminal Appeals Act 2004—that is, appeals from courts of summary jurisdiction. The proposed amendments do not apply.

Clause put and passed.

Clauses 7 to 14 put and passed.

Title put and passed.

Report

Bill reported, without amendment, and the report adopted.

Third Reading

Bill read a third time, on motion by **Hon Matthew Swinbourn (Parliamentary Secretary)** and passed.