CRIMINAL LAW, JOINDER OF OFFENCES

Grievance

MS M.M. QUIRK (Girrawheen) [9.35 am]: My grievance is directed to the Attorney General and relates to the operation of the criminal law in the context of joinder of offences in sexual cases and, in particular, those involving child abuse in a familial setting.

It is contended that the operation of the current law leads to instances of injustice and unfairly makes a distinction between sexual cases and other instances of serial or multiple offences. Joinder of criminal offences is governed by section 585 of the Western Australian Criminal Code and, in summary, provides that joinder of offences is permitted where they form or are part of a series of offences of the same or similar character, are alleged to be constituted by the same act or omissions, or are alleged to be constituted by a series of acts done or omitted to be done in the prosecution of a single purpose.

In the final report of the Western Australian Law Reform Commission titled “Review of the Criminal and Civil Justice System in Western Australia” in 1999, it canvassed this issue extensively and outlined the competing arguments. It said that the provision of section 585 of the Criminal Code is quite rightly directed towards ensuring that the accused receives a fair trial. The Law Reform Commission said that it stems from the fundamental principle that the evidence of the commission of offences other than the offence charged is generally inadmissible against the defendant at a criminal trial. Further to that, it is contended that allowing evidence of other offences may unjustly erode the presumption of innocence, which underlies all criminal trials. On the other hand, it is argued that joinder of multiple charges against the same defendant in one indictment reduces costs to the State, saves time and conserves judicial resources. It also noted that it can work to the advantage of the defendant in terms of reduced cost and time and there is the additional potential benefit, in the event that the defendant is convicted, that he or she can receive concurrent sentences. Trauma to witnesses, which is of particular relevance in the area of child sexual abuse, is also reduced and the judge and jury can also be given a more complete picture of the alleged pattern of offending.

In practice, factors militating against joinder are regarded as particularly compelling where multiple offences of a sexual nature are involved, as it is generally held that this would create an impermissible level of prejudice to the defendant. More significantly, as a result of the High Court decision in Hoch v The Queen (1988) CLR 292, an additional factor was considered relevant.

I digress briefly to recount the facts of the case of Hoch because it starkly raises the kinds of issues that confront us in this context. The accused was a student teacher and was employed part time as a recreation officer at a home for young boys in Brisbane. His duties included planning and carrying out activities for those boys. Allegations were made by three boys who resided at the home that the defendant had sexually molested each of them. The defendant was charged on the same indictment with three counts of indecent dealing with a boy under 14 years of age. He was convicted at trial and placed on a recognisance. Ultimately he applied for special leave to the High Court, contending that each count should be heard separately. The High Court held that if evidence of sexual offences that would otherwise be admissible could have been the result of concoction by the witnesses, the charges should be tried separately. Given this outcome, the Legislatures of both Victoria and Queensland have legislated to abolish the effect of the Hoch case and this particular finding in relation to collusion or concoction. It is my view that we should do the same in this State and legislate a provision similar to that in the Queensland Criminal Code section 579A (1AA).

In September 1999, the Western Australian Law Reform Commission put out a final report titled “Review of the Criminal and Civil Justice System in Western Australia”. Recommendation 272 stated -

In considering potential prejudice, embarrassment or other reason for ordering separate trials under provisions relating to joinder of alleged offences of a sexual nature, the court should not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion.

As the law stands in this State, it is a perfectly legitimate defence strategy to argue for separate trials in serial sexual offending by one individual against different victims. However, that does not make it acceptable to the community. In cases where an offender is the father and the victims are siblings and collectively their testimony is part of the res gestae, the outcome produced by the Hoch decision is extremely unfortunate and acts as a further disincentive for victims to come forward. In addition to its recommendation to follow the Queensland Criminal Code, the Law Reform Commission has also recommended that in considering joinder of counts, judges should have the assistance of criteria enshrined in the Criminal Code to help in that process.

The Law Reform Commission recommended those criteria, which I will not canvass at length now, but which included things like delay as a result of ordering separate trials; inconvenience to witnesses; whether there is a
risk of prejudice to the accused that cannot be overcome by direction to the jury; the cost of ordering separate trials; and issues such as security and witness arrangements.

The Law Reform Commission also believed there may be circumstances in which the issue of prejudice to the accused was so finely poised that a judge alone should preside at the trial. This may also be appropriate in all cases of a sexual nature and for long and complex trials.

It is accepted that this is a difficult issue. In my respectful view it is the principal duty of the Attorney General to ensure that citizens of this State charged with offences have access to a fair trial. Nevertheless, if our judicial system falls into disrepute because of its adherence to esoteric rules that produce silly and absurd outcomes of almost Dickensian proportions and which unduly distress the most innocent in our society, it is incumbent on the Attorney General to act decisively and with expedition.

As Mr Justice Jones said in Attorney General’s reference No 1[1979] WAR 45, 51 -

...the requirement to have a fair trial comprehends not only fairness to the accused but also fairness to the prosecution. ie to the State, the community. The community has a legitimate and vital interest to see the law upheld and guilty persons convicted.

MR J.A. McGINTY (Fremantle - Attorney General) [9.43 am]: I thank the member for Girrawheen for her learned dissertation on the law as it relates to the joinder of offences in the one indictment, and proposals for law reform in that area. As she rightly pointed out, section 585 of the Criminal Code contains the general rule that only one charge against one accused is to be contained in each indictment. Certain circumstances are still listed in section 585 to provide that more than one charge against an accused can be listed in the one indictment when the offences constitute a series of offences of a similar character, when the offences comprise the same acts or when the acts are done in the prosecution of the same purpose.

The proviso, again contained in section 585, is whether joinder will result in prejudice to the accused that cannot be overcome by direction from the court. As the member has rightly indicated, the High Court has made a number of rulings in sexual cases, the first of which was in the case of Sutton v Queen which was that, in sexual cases, it is almost impossible for prejudice against the accused to be overcome by a direction from the court. In the second case, Hoch v Queen, the one referred to by the member for Girrawheen, a High Court decision held that evidence is not admissible against one accused in two separate charges on the basis of similar fact evidence when it is possible that the two victims have colluded or concocted their evidence. Those two pieces of law have application in Western Australia because, unlike some other States such as Queensland, which is also a code State, we have not moved to reform the law to overcome those decisions in Hoch v Sutton.

In its final report, “Review of the Criminal and Civil Justice System in Western Australia” of September 1999, the Law Reform Commission recommended, first, that the effect of the decision in Sutton be overcome and that the Parliament - that is, we - legislate to give judges a discretion to consider whether prejudice can be overcome by a direction in those sexual cases to which the member for Girrawheen referred. We are talking here about cases of incest, paedophilia and rape in a general sense although not confined to those. In the case of the Sutton decision, the Law Reform Commission recommended that the judge be allowed a discretion to determine whether a direction could overcome the prejudice that would otherwise flow to the accused. In the case of Sutton v Hoch, the Law Reform Commission recommended that Parliament legislate to provide that when a judge is considering whether to hold separate trials, the judge cannot have regard to the possibility that the similarity between the evidence of the two victims or the complainants was concocted or colluded. Those two recommendations for reform of the law will have particular relevance in cases of sexual assault.

The Law Reform Commission rationale in this matter is contained in chapter 26 of the final report on joinder where it reads -

Joinder of multiple charges against the same defendant in one indictment reduces State costs. . .

In the light of our justice system, that is a worthwhile benefit but it must be weighed against whether the accused would be prejudiced. It certainly seems that it would benefit the State with regard to the cost to the justice system in prosecuting these cases. Secondly, the Law Reform Commission identified that if two or more complaints of a sexual assault with similar evidence proceeded together rather than being heard separately, it would clearly save the court time. Thirdly, it would conserve judicial resources. The Law Reform Commission then observes -

It also can work to the advantage of the defendant in terms of reduced cost and time.

That might be a view that the Law Reform Commission has, but I doubt whether too many defendants who opt for separate trials would see that as a great benefit to themselves. The Law Reform Commission goes on to say -

There is the additional potential benefit of concurrent sentences if the defendant is convicted.
That is of real benefit to the defendant.

The most compelling argument in favour of relaxing the law regarding joinder of offences is this observation by the Law Reform Commission -

Trauma to witnesses may be reduced and decision-makers can be given a more complete picture of the alleged offending.

The reference to “trauma to witnesses” is clearly reference to the fact that the victims of sexual assault may be required to give evidence on more than one occasion about essentially the same acts. That is something we should avoid at all costs by placing the interests of the victims first. Of all the arguments advanced by the commission for law reform in this area that is the most compelling. The Law Reform Commission concludes -

Given the potential benefits of joinder, it may seem curious that joinder of charges is generally restricted in Western Australia.

They are observations with which I agree. The Labor Party has indicated its intention to move to adopt and implement the vast bulk of the recommendations from the Law Reform Commission’s 1999 report.