

THE CRIMINAL JURY TRIAL SYSTEM

The recent acquittal in the High Court of three serving or former police officers charged with historical sexual offending has provoked much public discussion, even protest. Some have questioned the fairness of the jury trial process in this country. In this article I do not propose to discuss that case – as Chief Judge of the High Court it is not my role to do that – but rather I wish to explain some of the features of the jury trial system, in the hope it may assist a better understanding of how the system works.

The right to a fair trial is at the heart of the criminal justice system and is enacted in our Bill of Rights legislation. To that end, there are 3 fundamental principles underpinning the system we adopted from the British and which has operated in the common law world for centuries. A fair trial requires, first, the recognition of three separate interests – those of the victim, the accused and the wider community. No one of these interests may dominate to the exclusion of any of the others.

The second principle is that justice is to be administered according to law. Amongst other things, that means a trial must be conducted in accordance with the rules of evidence and procedure, as laid down by Parliament or developed by case law. An accused is entitled to be judged solely on the basis of the evidence. Gossip and innuendo are not evidence. Evidence is information that is admissible if it is deemed to be relevant and if the assistance it can provide in determining an issue outweighs any unfairly prejudicial effect.

Thirdly, an accused person is presumed to be innocent, until the prosecution proves the contrary. To find a person guilty of a crime requires proof beyond reasonable doubt: in other words, a jury must be sure of guilt before it may convict. We can see why that must be so. An accused - if convicted - faces significant penalty, which may include a serious loss of liberty and sometimes for a very long period of time. Finally, an accused person cannot be compelled to give evidence but may choose to do so.

In the past few weeks debate has arisen from the recent acquittals in the High Court as to whether the previous convictions of an accused person ought to be placed before a jury for the purpose of deciding guilt or innocence. The rule of evidence that normally applies is that prior convictions cannot be taken into account in deciding guilt or innocence. This is because the mere fact an accused person has committed a crime on one occasion does not mean he or she has done so on another. In what is known as “propensity reasoning”, it is dangerous to assume that a person has committed an offence they are charged with simply because they have committed a similar type of offence in the past. Guilt must be decided on the totality of the evidence.

To take a simple example, if an older person accused of burglary had a previous conviction for burglary committed many years previously as a teenager, would it assist the jury to know this fact in deciding guilt or would it unduly influence them, when many of the factors of the later offence could be significantly different? Introducing the fact of the previous conviction could be regarded as an unreliable indicator of guilt and merely prejudicial to the accused, possibly influencing the jury to attach too much weight to the previous conviction.

Ultimately, whether evidence of previous convictions is put before a jury must depend on the circumstances. Case law has developed principles (now included in the Evidence Act 2006) to define when such evidence may be allowed.

There are two important exceptions to the usual rule excluding evidence of past convictions. The first is that Judges have a discretion to allow the prosecution to introduce evidence of past convictions where there is a distinctive pattern of conduct or such a striking similarity between the earlier conduct and the matter before the Court as to make it more likely that the offender committed the later offence as well. To qualify under this exception, the conduct on the earlier occasion must be beyond the merely commonplace for the crime in question. An example is where the alleged offender has in the past adopted a distinctive or unique “signature” in carrying out similar crimes. This exception has been part of the law for many years and although resorted to more frequently these days is still regarded as an exception to the usual rule because of the dangers of “propensity reasoning” - a jury assuming guilt on the basis of past conduct or previous offences.

In deciding whether to admit previous convictions, Judges and prosecutors must also consider the extent of evidence which is relevant in respect of the previous conviction. The mere fact there has been a previous conviction on a similar crime would not be of much help to a jury without some knowledge of the circumstances. That could require the complainant in the earlier case to give evidence again, which might well present practical difficulties. The Judge would need to consider whether the further evidence would amount to a total or partial “re-run” of the earlier case and an unnecessary distraction to the jury, or whether it would be of real assistance in determining guilt. It is for the prosecutor to decide whether to ask the Judge for permission to introduce evidence of this kind.

The second main exception to the usual rule is where an accused attacks the good character of the complainant or a prosecution witness. In that situation, Judges have a discretion to allow the accused to be questioned about past convictions, if the accused chooses to give evidence.

As well as the debate about prior convictions, some have argued it is unfair to allow extensive cross-examination of a complainant and have their credibility attacked by the accused’s lawyer. This process is an unavoidable feature of the adversarial system of justice, which means that any complainant or prosecution witness in any type of trial is exposed to questioning by the accused’s lawyer. It is widely regarded as the most effective method devised for testing evidence. It applies also to the accused, who if they choose to give evidence or to call evidence may be subjected to the same questioning by the prosecution.

In cases of alleged sexual offending, the law nevertheless recognises there are special concerns. The matters at issue are deeply personal for the complainant and, almost invariably, complainants find giving evidence before a Judge and jury a difficult experience. The law has been extensively developed by Parliament to assist complainants in sexual cases: a complainant’s name or identity must not be published unless he or she chooses; the complainant is not usually required to give evidence at depositions but only once at trial; a screen may be placed between the complainant

and the accused; the courtroom is usually cleared of all members of the public except for a small number of designated persons; a support person is permitted to be present; and, in the case of child complainants, the evidence is normally given on videotape with any questioning over closed-circuit television so the child does not have to be in the courtroom.

There are also very strict rules about questioning a complainant in a sexual case about their sexual experience with others or about their general reputation in sexual matters. New Zealand legislation prohibits questioning of this kind, with only very narrowly defined exceptions. Judges are cautious in granting permission for this kind of questioning and take care to ensure complainants are not badgered or unfairly questioned.

Despite all these safeguards, some disquiet clearly exists in the community about some of these issues. Now that the recent trials are over, it is right there should be informed and vigorous debate. The Law Commission is to grapple with some of these difficult and complex questions. The Judges will provide any assistance they can to the Commission, to ensure public confidence is maintained in the criminal justice system. It is vital for the whole community that criminal trials are conducted fairly and take into account the different and competing interests involved.

Hon Justice Tony Randerson
Chief High Court Judge