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PROSECUTING FRAUD AND CORRUPTION

Introduction

I was formerly a detective working at various stations on the Northern Beaches in Sydney and came to investigate fraud matters that the Fraud Squad did not want to take on. I had little competition from fellow detectives because by and large police run a mile from the investigation of allegations of fraud. In fact it is often the case that complainants will be told that their matter is more appropriately pursued civilly, even when little or no investigation has been undertaken.

After admission I ran fraud units for a couple of national insurance companies before starting as a prosecutor about seventeen years ago. Since then I have become the central point of contact for fraud prosecutions in the various jurisdictions within which I have worked. In NT I work closely with the Fraud Squad from the point of first receipt of complaint developing a strategy for investigation and providing ongoing advice about evidentiary requirements.

In 2013 allegations surfaced about rorting of the government Pensioner & Carer Concession Scheme. That scheme is run by NT Dept of Health and provides benefits for eligible senior citizens such as travel discounts, concessions on car registration, electricity rates, optometry services and other costs. The rationale of the scheme is that it provides an incentive for seniors to remain in the NT rather than to retire down south.

I want to use that investigation and prosecution as a means of demonstrating some of the difficulties that arise in working in this area. I am going to use some illustrations from our famous local rag, the NT News to add some entertainment to the presentation. You might all

be familiar with this Murdoch publication for such headlines as these (couple of front pages). In fact if you watch the breakfast show on the ABC they will invariably leave the NT News until last and facetiously ask what the NT News has got for today.

The Investigation

Information first came to police attention from whistle blower sources. In a nutshell the allegation was that various travel agents were rorting the PCCS. When raised with the relevant Department there was a distinct lack of enthusiasm for investigation. There were reminders of obligations under Treasurer's guidelines for public servants to report suspected thefts of public revenue to police. Eventually an independent report was commissioned rather than referral to police much to my objection.

After six month delay and $100k plus was spent on a consultant we ended up with a report that basically analysed the Department's database and identified the companies which had the highest number of claims against the scheme. Information that quite readily could have been generated through simple intelligence analysis.

There had been some media attention on the allegations so police actually got the go ahead to investigate the allegations. In consultation with me we selected one agency because they were high on the list of utilisers of the scheme but also because the company had a very simple structure and we were cognisant of the obligation to prove criminal conduct on the part of a particular individual or individuals.

Like all good fraud investigation strategies, the investigators started by looking from the outside in. Collecting all the objective information. Interviewing persons starting with those likely to have no involvement and slowly working towards those that were suspected as principals.

The modus operandi of the suspected fraud was pretty easily identified. Travel agents were suspected of obtaining quotes for fully flexible fares, submitting the quotes in support for reimbursement under the scheme and booking the pensioners on cheap flights, invariably red eye non-refundable with no meals or other fringe benefits.

At some point the investigators decided it was time to start interviewing the pensioners. The first such pensioner seemed like an innocent enough subject. A 70 odd year old

Portuguese/Timorese woman. A time for interview was arranged. Police attended with recording device and relevant documentation at hand. The pensioner had a friend with her, her daughter. Before the interview even commenced proper, the interview friend had disclosed her identity, the proprietor of the travel agency police were investigating. If it wasn't already the case, the cat was out of the bag at this early point in the investigation.

Police continued to gather information. From the Department about the contractual arrangement with the travel agent and material submitted in support of each claim for concession payment. From the ticketing consolidator and airlines about actual cost of flights booked. From pensioners about the circumstances of travel arrangements made. Investigations were conducted about 117 transactions in total. At some point the police met with me to discuss the execution of a search warrant at the travel agency business premises. I suggested it would be a complete waste of time as the suspect was well aware of our investigations and had no doubt destroyed all relevant material. Police insisted on going through the motions. What a fortuitous decision that was.

I gave an advice on the evidence to hand. Police were to use that advice to justify to their senior management that a warrant should be obtained. Bizarrely my conclusion that there was a prima facie case was challenged from somewhere higher up in the police hierarchy. A review of my advice was sought. My Director refused the request, backing me as the resident fraud expert. I have since provided a statement commenting that although my advice to police is often challenged, that has never been the case when I have recommended a prosecution.

Investigating police obtained a warrant from a Supreme Court judge. Another first, they were directed not to execute it by their superiors. A fair degree of frustration dominated our conversations at this point. The Commissioner of Police went on an interstate trip. The investigators sought permission from a senior officer in, lets say, an unconventional area to execute the warrant. They got the green light and on 14 November 2014 turned up at the office of Latitude Travel with warrant in hand.

I was proven wrong. Damning electronic records, mobile telephone communications and Viber communications were discovered. The senior investigator analysed the information and took it not to his senior officers but to the office for Public Interest Disclosures. Within days the Commissioner of Police had resigned. He is now before the court having been

charged with one count of attempting to pervert the course of justice. During the course of the trial of Kamitsis the accused admitted to an agreed fact that she had an intimate relationship with the former Commissioner of Police.

The warrant was executed on a Friday. I vividly recall sitting on my balcony reading the paper on the Saturday morning. I had just got back from Alice Springs late the evening before and hadn't caught up on the news. This was the front page of the NT News. My first text to one of the investigators was WTF. I am sure police engage in certain conduct just to infuriate prosecutors. Why would they be delivering a forty something year old businesswoman of apparent good character to the rear of a caged truck in handcuffs and in full view of the media? Kamitsis' lawyer was to tell me afterwards that this was the biggest sticking point in any negotiations. His client was furious about the embarrassment that resulted from her treatment. She was determined to prove her innocence.

The Prosecution

The laying of charges started the clock ticking. There had been no referral of the brief for advice as to whether charges should be laid and what they should be. There was one count of obtain benefit by deception before the court for between dates alleging $127k plus fraud. One count despite the fact that there was no provision allowing the rolling up of fraud charges in NT.

The practice directions required service of a brief within six weeks of indication the matter was being contested and a committal mention date eight weeks hence.

A thirty four volume brief of evidence arrived which was deficient in many respects. Defence should never assume that investigators necessarily have a good handle on what is required to prove complex offending. In my experience generally they do not. I became involved in a process of stalling to try and get the brief into shape. That resulted in the following headline for which I received commentary from around the country.

We decided the most manageable way to prosecute the matter was to identify the strongest twenty examples and prosecute them on a representative basis. Even twenty counts resulted in a jury pack that was six volumes in size.

Prosecution of representative counts was a decision based on manageability but also on an expectation that any conviction could be led at subsequent trials. That raises the interesting question of the interpretation of s91 of the Uniform Evidence Act.

Cross discusses the position at common law at [5180] – [5235]. At [5200] he makes the following comments:-

> Although the rule under discussion operates to exclude evidence of judicial findings in previous civil cases,[1] it is the exclusion of previous convictions and, to a lesser extent, acquittals of the parties in subsequent cases that has drawn the greatest criticism. It is difficult to escape the apparent inconsistency of a judicial system which will deprive an accused person of liberty upon the say-so of a jury but not permit this fact to be placed before a subsequent tribunal charged with the task of determining the same issue upon a lesser standard of proof. The consequence of such a rule may be that a convicted arsonist may establish a claim against an insurer arising out of the same blaze upon which the conviction is founded.
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> The justification of this anomalous rule is that the verdict of the criminal jury is nothing more than its opinion based on facts which it did not witness. It is also said that in the subsequent civil case it is likely that the party relying upon the conviction, and the civil tribunal itself, will tend to place undue weight upon this evidence to the exclusion of other evidence which the convicted person might seek to adduce. It is submitted that, in the case of a previous conviction, these justifications are illusory if one accepts the proposition that a convicted person is guilty of the offence of which that person has been convicted and at the trial had the opportunity and, indeed, the incentive to present to the court every matter which favoured the defence case. Furthermore, as is seen at [29105] , the modern tendency is to admit opinion evidence as a matter of convenience, even as to ultimate issues, reserving the right of the court to make up its own mind upon the whole of the evidence. Finally, the common law exception referred to in [5190] above makes it clear that in certain cases the court will act upon the determination of a non-judicial tribunal.

And at [5120] he discusses the position at common law with respect to criminal cases:-

> Although there is very little authority on the point, it seems that the principle applies to criminal cases.[1] As between the Crown and the accused, the previous conviction estops the accused from denying guilt of the offence, but the conviction of a third party is generally inadmissible as evidence of the facts on which it was based.[1A] Thus, at the trial of a handler, the conviction of a thief is inadmissible as evidence that the goods received were stolen.[2] The

> conviction of one co-offender is inadmissible against another.[3] On the other hand there is a long established rule that, upon the trial of a person on a charge of having been an accessory to the commission of a felony, proof of the conviction of the alleged principal offender is admissible, and constitutes prima facie evidence that the felony was committed by that offender.[4] But the rule does not make admissible against the accessory evidence which is otherwise not admissible against the accessory.[5]
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> New Zealand Courts have recognised the possibility, based on United States authority, that convictions for crimes of violence committed by a person killed by the accused are admissible where self-defence was an issue.[6]
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> It follows that where similar fact evidence is admissible, the relevant facts can be proved by a conviction, evidencing the material facts underpinning the elements of the offence alleged, irrespective of whether the conviction took place after a trial or on a guilty plea.[7] But mere proof of a prior conviction will often lack the detail which makes similar fact evidence sufficiently probative to be admissible.[8]

In *Bennett v Western Australia* (2012) 223 A Crim R 419 the Western Australian Court of Criminal Appeal admitted the facts upon which a criminal conviction was based under their *Evidence Act* but noted at [54] that there was no provision such as s91 or s92 of the *Uniform Evidence Act* proscribing the admission of such evidence in WA.

It is a matter of conjecture whether the effect of s91 of the *UEA* is to prevent the admissibility of prior convictions for the purposes of proving the facts of such convictions. That could cause some significant difficulties for prosecutors seeking to rely on such convictions as tendency or coincidence evidence. For fraud matters it is pretty much impossible to produce a digestable case to a jury which contains more than about twenty allegations. I don't envisage abandoning this strategy any time soon.

Defence adopted the sensible strategy of pushing the matter on at the fastest possible rate to catch the prosecution out. There was no challenge to evidence at committal, the only comment being that the prosecution would be put to proof on everything including the accuracy of the atomic clock. The defence solicitor Peter Maley was banned from having any discussions with me (slide of defence).

After committal commenced the agony of deciding the wording of counts on the indictment. Publicity about the failed prosecution of Federal Labor minister Craig Thompson rang in my ears. In that case the majority of charges were dismissed on appeal because they alleged theft

by Thompson from the bank. On appeal to a single judge it was held that the complainant should have been particularised as the Health Services Union. The DPP did not appeal the decision.

I had prosecuted a matter in the ACT in the early 2000s called Martiniello with a similar outcome. It involved the theft of money from Australia Post using the BPay system. Martiniello discovered an anomaly in the electronic system that permitted the transfer of funds from a bank account with insufficient funds to a credit card using BPay. Bpay reversed the funds transferred from the bank account but did not recover the credit into the credit card account. Martiniello proceeded to transfer $250000 into his credit card account from various bank accounts over the next 12 months and use the money for gambling purposes.

After consultations with Commonwealth DPP, an advice from Richard Maidment QC and discussions within my office we proceeded on a state charge of stealing from CUSCAL which was the organisation that facilitated the transfers and had the credit in electronic format immediately prior to transfer to the credit card account.

Martiniello was convicted at first instance but acquitted on appeal on the basis that the charges should have particularised theft from Australia Post and therefore should have been prosecuted under Commonwealth law in accordance with s109 of the Constitution. I had left ACT DPP by the time of appeal but certainly gave advice that I believed the decision was wrong and that it should be appealed to the High Court. That never occurred. The court reports are littered with examples of fraud prosecutions that have failed because of error in charging. I did not want Kamitsis to be another example.

We indicted for twenty counts of obtain benefit by deception particularising the deception as contained in the invoice that had been forwarded to Department of Health. The invoice represented that the cost of the flights were as stated whereas the maker of the representation did not believe that to be true when the invoice was submitted. The amount particularised was the difference between the invoiced amounts and the actual cost of the flights. There were complications with commissions that the contract permitted so we erred on the side of caution in particularising the amount of the benefits obtained. We also relied on a provision of the NT Criminal Code which permits the finding of guilt on a lesser amount effectively removing the common law obligation to prove at least the amount that is particularised in an allegation of dishonesty. There were three counts where the amount alleged to have been

obtained by deception was the total amount invoiced because the evidence inferred that in each instance no trip had been taken.

We laid seventeen counts in the alternative alleging theft from the pensioner of the difference between was obtained as a consequence of submission of the invoice and what was spent on the pensioner. The basis for laying these charges was that what the travel agent had received was held on trust for the pensioner and to direct any part of it to another purpose was to steal that part from the pensioner. No alternative counts were laid in relation to the three counts for which it was alleged no travel was taken.

A major problem for the prosecution was proving that it was the accused that was responsible for the false representations. This was something the police had not paid too much attention to in the investigation. They do not really get the concept of excluding all hypotheses consistent with innocence and tend to conceive such issue along the lines of, 'Its her business and she is getting the benefit so it must have been her.'

Technology and a bit of luck came to the rescue. Our computer forensics expert was able to demonstrate that invoices had been generated on a particular computer attached to the server at the business. He could show communications either side of the generation of the invoice that were clearly attributable to the accused.

We discovered email communications between the ticketing consolidator and the accused personally which inferred that it was the accused that had booked the flights that were actually taken by the pensioner. In many instances the actual flights had been booked before the invoice had been submitted to Dept of Health which was powerful evidence of intention to deceive.

The accounting records were a valuable source of information. When used them as contemporaneous notes admissible as exceptions to the hearsay rule because they constituted admissions against interest. We utilised an expert in the accounting system Cross Check Travel to interpret the material. He was able to say that the relevant records had the accused's login attached and that the records revealed disbursement of funds received in a manner consistent with the interests of the accused personally.

Other evidence that pointed to the accused as the person who had misrepresented in the invoice included her signature as witness on applications for concession completed by pensioners which accompanied invoices, evidence from pensioners that it was the accused

who they had personally dealt with at Latitude Travel and evidence of a former staff member that it was the accused who took charge of all pensioner concession claims.

Pre-trial

Defence basically sat on their hands throughout the lead-up to the trial. They insisted on and got an early trial date. We went to trial within twelve months of the arrest. They also used every opportunity to generate as much publicity as possible to keep the maximum pressure on the prosecution. They regularly complained about late service of evidence which was a fair point given the most compelling material largely came after committal.

A further five volumes of material was generated after committal and it largely formed the material that was relied upon at trial. Initially police had obtained recorded statements from a large number of administrative staff at the Dept of Health which tended to be free narrative statements of complaint about management of the department, lack of resources and lack of direction. After committal I instructed the taking of a statement from a representative purely for the purposes of producing all business records that were needed for the prosecution. That witness was the sole witness to be called from the Dept of Health.

A major pre-trial issue was an interpretation of the contract that formed the basis of the relationship between travel agents and the Dept of Health. The Crown position was that it obligated the travel agent to nominate in an invoice the actual cost of the flights booked. Defence argued that the contract permitted the travel agent to invoice for 'travel services' rather than actual cost.

As is often the case in such matters, the whole case turned on the interpretation of a couple of words in a couple of clauses. The contracts were poorly drafted and did not even identify the parties correctly. But that was not the focus of attention. The question was whether the contract established an obligation to specify the actual cost and then at trial to prove that the accused knew that she was obliged to invoice for the actual cost of the trip.

The defence of course did not initiate the pre-trial ruling. They were happy to leave it in abeyance and raise it during the trial to disrupt the flow of the Crown case. We didn't let that happen.

We had some fortune in that the presiding judge, Dean Mildren, was a former commercial litigator and had great experience in contract interpretation. He ruled in our favour. The matter proceeded to trial largely on the basis of a challenge to the Crown's ability to prove that it was the accused that was responsible for any representations and that if it was her she had been dishonest in the making of such misrepresentations.

The Trial

Six volumes of material were collected in jury packs for presentation to the jury. Use was made of s50 of the UEA to provide summary material in relation to information contained in a range of documents. Perhaps the most effective pieces of evidence were the spreadsheets that police prepared summarising the information contained in accounting records. An example of the spreadsheets is annexed to this paper.

During the course of the trial defence capitulated on their threat to make the Crown prove the accuracy of the atomic clock. They made some 127 admissions and only three witnesses were called. In effect the defence conceded that it was Kamitsis that had submitted the inflated invoices, received the proceeds and distributed the proceeds but that she had not acted dishonestly in submitting the inflated invoices or using the monies paid by PCCU to her for the benefit of the pensioners.

At the close of the Crown case defence made submissions for all counts to be dismissed on the basis that no criminal offending was evidenced. The basis for the application was that there was no evidence that the accused was under any obligation to deal with the payment in any particular way. They relied particularly on the High Court decision of *Stevens v R* (1978) 139 CLR 315.

Stevens v R is authority for the proposition that where property is received in accordance with the terms of a contract, it will only constitute fraudulent misappropriation if the conversion is contrary to an express or implied term of the contract which establishes a fiduciary duty to use the payment other than for his own use.

Upon analysis of the contract Mildren J held that it established no fiduciary relationship between the accused and PCCU. In fact the contract specifically provides that no fiduciary relationship is created. The Crown argued that the fiduciary relationship with respect to the

stealing charges was as between the accused and the pensioners on whose behalf the accused had received the money. Mildren J rejected that argument and dismissed the seventeen counts of theft. He held that *Stevens* had no application to the twenty obtain benefit by deception charges.

The defence did not go into evidence. The Crown closing address went for two days as, because only three witnesses were called and they gave very little oral testimony, all the jury had was a large collection of documents. I had to take them through the documents to demonstrate how it was that the contents of those documents proved each of the counts on the indictment.

Defence launched into a ferocious attack upon me in their closing address. Schadenfreude was the term that Tippett used to describe me. The prosecution was launched for political reasons and his client was the victim of a witch hunt instigated by powerful forces. Of the three pages of written submissions that I filed following the defence closing, most was read to the jury after Mildren J confirmed with defence that he had gone a little over the top.

The accused was convicted on the representative counts, pleaded guilty to all outstanding matters including allegations of corruption relating to the Chief of Staff of a government minister and her husband paid $127,000 into court in mitigation. She was sentenced to three and a half years imprisonment suspended after 18 months.

Consequences of Kamitsis Conviction

Within a week of conviction Flight Centre Ltd entered into negotiations with NT Government and subsequently paid $2.2 million in settlement of the civil dispute relating to claims on the PCCS. Investigations are ongoing in relation to criminal activity of individuals operating under the Flight Centre banner.

Four other individuals from a variety of travel agencies across the Territory have pleaded guilty to rolled up fraud charges ranging from $6,000 to $65,000. A further person has agreed to enter a plea of guilty at first appearance in early October.

Other than Flight Centre there is only one outstanding investigation in relation to travel agent fraud on the PCCS.

Paul Mossman former Chief of Staff to Minister Bess Price is to face a trial on three charges of corruptly receiving benefits from Kamitsis for the performance of his duties.

Former police commissioner John McRoberts is charged with one count of attempting to pervert the course of justice in relation to his alleged interference in the Kamitsis investigation. I expect to be a witness at that trial.

ANNEXURE 1

Counts 9 & 10
Jeanette Carter