Splitting the Prosecution Case

Shaw v R (1952) 85 CLR 365

The Crown must call all its evidence in the Crown case and cannot split its case by calling evidence in reply where it could have anticipated the evidence to be called by the defence. The Crown should only be permitted to reopen its case in 'very special or exceptional circumstances'. This article seeks to assist legal practitioners appearing in the Local Court of NSW.

Very Special or Exceptional

The High Court adopted this phrase in the leading case of *Shaw v R.*[1] Dixon, McTiernan, Webb & Kitto stated at [13]:

> *It is probably enough to say that the occasion must be very special or exceptional to warrant a departure from the principle that the prosecution must offer all its proofs during the progress of the Crown case and before the prisoner is called upon for his defence.*

It follows that, in addition to proving every element of the offence, the prosecution must also anticipate what defences will be raised and lead evidence to rebut them. This is a very heavy burden for the prosecution. As such, the NSW Court of Criminal Appeal has been steadily eroding this principle and expanding the definition of 'very special or exceptional'.

Reopening the Crown Case

The CCA has held that the Crown may be permitted to reopen its case in order to supplement a deficiency in its case that was overlooked or is merely technical [2] provided it does not result in unfairness.[3] Examples of special or exceptional circumstances would be new evidence becoming available after the close of the Crown case or new issues arising in the Defence case.

In *Pham v R*, an interpreter translated telephone intercepts from Vietnamese into English and identified one of the voices as the co-accused. He identified the phone calls in which the co-accused participated by referring to his written statement. The Crown Prosecutor then forgot to tender the written statement. The trial judge permitted the Crown to reopen its case and tender the statement by relying on *Wasow* and *R v Chin*.[4] The court held at [35] – [36]:

> *The question is essentially one of fairness, based on the accused being entitled to know the case to be met. There could have been no doubt that Mr Tran and his counsel understood the intended extent of Mr Nguyen's evidence. It was not asserted that there was any step*

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[1] Shaw v R (1952) 85 CLR 365
[2] Wasow v R (1985) 18 A Crim R 348
[3] Pham v R (2008) 187 A Crim R 21 & Morris v R [2010] NSWCCA 152 at [26]
[4] (1985) 157 CLR 671 at 677 and 685

taken or not taken by the defence based on the limitation in the Crown case caused by the error. Rather, it was submitted that prejudice would be caused by the possibility or a potential for the jury placing disproportionate weight on the evidence lately produced. Counsel for Mr Tran cross-examined on the further evidence.

In all the circumstances, I do not see any error in the exercise of the discretion by the trial judge to remedy an oversight in a complex trial in a body of evidence that was clearly before the defence.

A case in which the Crown was not permitted to reopen its case is *Morris v R*.[5] There had been discussion between the trial judge and counsel of the need for the Crown to call some expert evidence but no expert witness was called before the close of the Crown case. After the defence case was closed the trial judge permitted the Crown to re-open its case, to adduce the expert evidence.

On appeal, McClellan CJ at CL relied on *Shaw v R* and held that the trial judge erred in permitting the Crown to reopen its case. His Honour held at [31] that the prosecutor should have realised the need for the Crown to call expert evidence. There was nothing "very special or exceptional" about either the evidence or the circumstances in which it became relevant.

Submissions

The test is 'very special or exceptional' circumstances. So, the submission would go like this:

The High Court held in Shaw that the prosecution must present all their evidence before the accused person is called upon to present his defence. The High Court held that the prosecution should only be allowed to reopen their case in, quote, very special or exceptional circumstances, unquote.

I submit that it was clearly foreseeable that the defendant would raise the defence of self-defence / duress / necessity / alibi. The prosecution should have anticipated this and led evidence in their own case to rebut this. In my submission, the present circumstances do not rise to the level of 'very special or exception'.

Allowing the prosecution to reopen their case is always unfair to the defendant as he may have conducted the defence differently had the evidence been presented to him beforehand. The evidence the prosecution now seeks to lead is not a mere technical matter. To allow the prosecutor to lead this proposed evidence would be especially unfair because . . . [different for each individual case].

If you have any interesting issues, I'm available everyday.

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[5] Morris v R [2010] NSWCCA 152