

Speech to the 11th International Criminal Law Congress

Sydney, Saturday 11 October 2008

The Honourable Justice Ian G Harrison

Supreme Court of New South Wales

I had a fairly memorable introduction over 30 years ago to the practise of criminal law. As with most young counsel at the time, I was eager to do as much as I could in as many fields of advocacy as I could manage. Those of you who were at my swearing-in may recall my reference to judges many years ago all appearing to have some form of judicial Tourette's syndrome. Whenever I spoke they would shout obscenities at me. I could stop their unpleasant behaviour only by sitting down and remaining quiet. However, as a barrister there are limits to this as an effective response.

My first criminal case in the Supreme Court was before a certain judge who I shall refrain from identifying by name. He may be otherwise recognised in the course of what I am about to relate. This judge was renowned for dealing with matters in strictly logical groups of three propositions. For example, in *Mills v Sinfield* he said this: "I have mentioned three instances in the first of which there was no common purpose at all, in the second of which there was a common purpose but it was not criminal and in the third of which there was no prior agreement but the community of criminal purpose was proved by the circumstances of the crime itself".

I was making submissions to his Honour in the absence of the jury about some question of admissibility. I was beginning to think that this criminal caper was alright. His Honour then said to me: "Mr

Harrison, it appears to me that your arguments give rise to three propositions". Imagine how excited I became when this judge began to deal with my arguments adopting his usual and famous three-point technique. He continued: "Mr Harrison, I have listened to you for what seems like days and the experience has left me the poorer. First, you have wholly misunderstood the authorities on which you rely. Secondly, the jury don't like you so you may as well give up now. Thirdly, I don't like you either because you are nothing but a smart arse equity pooffer". He only stopped this when I sat down!

Even before my enthusiasm for the criminal law had been slightly blunted by this experience I had had an earlier encounter with a judge of the District Court who may still be remembered by some of you. I appeared for a man who had pleaded guilty to an offence involving some form of apparently illegal sexual conduct with another male. Judge Alistair Cameron-Smith was the sentencing judge. The matter took only about half a day. He came back after lunch to pass sentence. He commenced his remarks on sentence with the following words: "I can still remember the days when gay meant happy!" I'm sure his remarks on sentence also went on to draw some important comparison between Killara and Marrickville but I have not retained those details. I was not briefed to appear on the appeal.

My most pleasant experience as defence counsel was in a case tried in front of a jury by his Honour Judge Sinclair. His Honour's nickname was "Sinkers". Before my experience with his Honour I had always assumed that the moniker derived from his surname. It wasn't long before I learnt otherwise. Anyway, during the course of the trial I gained the very distinct impression that his Honour would have liked

to see the accused convicted – and that was just for starters! When the jury filed out to the jury room there was that usual feeling of temporary relief that comes with the anticipation that it may be possible to relax for just a little while as the jury considers its verdict. However, this didn't last long in this case. The jury must have quickly circled the table in the jury room a couple of times without sitting down because they walked straight back into court to acquit my punter. I realised that there are few feelings like it, especially when the judge almost chokes on the words he is then required to utter.

The theme of this congress is "criminal justice today and tomorrow". This has been just a small taste of yesterday from my perspective. My involvement with the criminal justice system effectively went into limbo shortly after those experiences until February last year when the pace once again picked up considerably. I will come back to that.

First of all however I should like to say how delighted I am to have been asked to speak this evening. My letter from the Director said, "We are honoured that you will be contributing to our *social* program". I think that may have been a subtle request not to reignite the mini controversy that followed my speech to the sentencing conference in Canberra earlier in the year. The Director actually asked me specifically to speak tonight on his current favourite topic. In fact he rarely speaks of anything else. As many of you will know that topic is "can embedded Crown Prosecutors as stakeholders achieve equitable outcomes from an holistic application to the unbundling of delictual legal disputes with an emphasis on value added multi-channelling, data-based functionality, core time analysis, benchmark inputs and process ownership going forward?" Anyway, our very own

DPP and congress convenor is an unmistakable identity in the New South Wales and Australian legal communities and I would like sincerely to thank the one and only Dennis Cowdroy for his invitation and congratulate him on his fine work as our DPP and in his other role as a Federal Court judge!

When I was appointed I thought that it might be prudent to do some research. Much had changed in 30 years. The first thing I did was to catch up on the lingo. So I googled a number of phrases like "Prasad direction". This managed to inform me that "at the lights near Mahendra's the cobbler be turning left into Basmati Boulevard. Go to the stop sign yes please and make a right . . ." During my speech in Canberra I was redundantly at pains to point out that my remarks came from a limited criminal law experience so that their validity would have to be tempered accordingly. The same applies to whatever I say this evening. The views I express are purely personal opinions and they are not intended to represent the views of anyone else or anything else.

The first thing I want to mention is our growing preoccupation – almost obsession – with imprisonment. I suspect that we are subject to a lot of overseas influences here but we really must look to ourselves for the root cause. We treat imprisonment of people almost as a kind of successful outcome when in fact it is to my mind in so many cases the ultimate manifestation of failure. One of the best examples of this can be seen in the way we are required to treat applicants for bail. There was a time when the prevailing presumption was in favour of bail. This seemed to me, as one of the uninitiated, to be inescapably logical and obvious having regard to the so far

undiluted presumption of innocence that applies to every accused person. With some well-understood and uncontroversial exceptions the deprivation of a suspect's liberty should only follow as the consequence of a conviction and not of mere accusation or suspicion. As we all know, amendments to the Bail Act have altered the common law presumption in favour of bail, now ranging from what amounts in many cases to no presumption either way, or what is sometimes referred to as a neutral presumption, up to a blanket presumption against bail in others. I hasten to observe that we have fortunately not yet reached the stage where any prescribed classes of offence attract a legislative abolition of the right to bail.

I have to say that I am also somewhat dismayed at some of the contests that emerge in the bail list every time I sit there. It seems to be a rare occasion that I encounter an application for bail in which the police case is not asserted by the Crown to be "strong". Similarly, fears are nearly *always* held for the safety of the alleged victim. Almost every applicant is considered to be a "flight risk" and the likelihood that witnesses will be approached or threatened is also usually high. I was even confronted the other day with opposition to the grant of bail to a 15-year old juvenile whose application was that he should go from a correctional facility *directly* to a residential drug and alcohol programme only if and when a place for him became available. Arguments *against* such a proposition almost left me speechless. This approach seems to me to flow from the scalp mentality. That is, if bail is successfully opposed, the Crown wins. If bail is granted, the Crown loses. This is not and should not become any measure of success. The sometimes patent annoyance, even anger, that some members of the police service appear to display

when bail is granted is also in my humble view inappropriate at best and unprofessional at worst.

Let me give you another example. A man charged with murder came before me on an application for bail last year. Bail was opposed. This man had no criminal record at all, and the case against him was wholly circumstantial. Argument before me centred on the strength of the Crown case, a highly relevant matter in such an application. Upon closer examination it emerged that the case was not strong as far as I could discern on the available material. There were other factors that clearly made the circumstances exceptional. However, when I granted bail there was a small explosion that apparently reverberated beyond the courtroom. The accused was subsequently put on his trial and the jury was directed to return a verdict of not guilty. This is not an isolated case.

Also last year I had an application for bail by a man charged with offences relating to possession of some rocket launchers. There still remained a presumption in favour of bail in his case. He had a wife and children, a steady job, no criminal history of any significance and was at risk of losing his home to a waiting mortgagee. An appropriate surety was offering substantial security. He had been in custody for about six months and had no prospect of a trial for another six months. I again had a lively discussion about the strength of the Crown case. I granted him bail. A jury subsequently acquitted him.

The point of these examples is that these alleged offenders would have spent time in custody for no good purpose if things had gone the same way. If they had been convicted there would have been no

detriment to the community if they had been imprisoned following their trial. It strikes me as an overwhelmingly one-sided debate in circumstances where there is no threat to the safety of witnesses or the community or the likelihood of a person absconding is low. However, what these not so subtle changes to the Bail Act have done is to put pressure upon the courts and the prosecuting authorities to opt for the "safe" course of refusing or opposing bail so that no newspaper can then say "I told you so" if a person re-offends or absconds. This is entirely cynical and emasculates the principles that should guide our thinking. As always, it is timely to remind ourselves whether or not the approach that we take would be different if the applicant for bail were our own son or daughter. It must be remembered also that "victims of crime" are not victims of *crime* in cases where there is an acquittal.

It is important to note that the standard of assistance that I have received from the profession in the bails list has been exceptional. The Crown papers are always very thoroughly and helpfully prepared. The Legal Aid and ALS lawyers are also fighting well above their weight, particularly when you consider the enormous workload and short timeframe to prepare that bedevils all their briefs. And while I am on the subject might I also say how impressed I am with the standard of the written submissions prepared by all sides in cases that come before the CCA. The amount of work that they represent is nothing short of remarkable.

I should however mention one all grounds appeal that came before the CCA when I was sitting. I did spend a good part of this appeal thinking that I must have been missing the point. An Indian man had

been convicted of murder. The victim had been his wife. The cause of death was not definitively determined. It was either poison, a self-administered overdose of prescription medication, or suffocation. The accused had been arrested following photo-identification of him using the victim's debit card at various ATMs until her account balance had been exhausted. The appeal centred upon the frailty of the identification and the absence of any known cause of death. The accused argued that any suspicious cause of death, for which he could have been responsible, had not been established. This was all very interesting but for one fairly significant fact. The victim had been found dead, bound and gagged and zipped up in a body bag locked inside their bedroom.

One thing that has attracted my attention is what appears to be the wholly unreasonable burden that is cast upon judges of the District Court when sentencing. A stranger could be forgiven for thinking that the whole sentencing calculus has become so confused and confusing that it is impossible to make any real sense of it at all. And yet the State's most important trial court has to cope with an endless workload of sentencing hearings, all to be delivered with an eye on the ever-expanding principles that must be applied.

I will not comment upon the populist sentiment that drove the introduction of standard non-parole periods. There seems to have been nothing more inclined to constrain the sentencing discretion than that innovation, itself a reaction to the idea that judges are too soft. It has led instead to many well-intentioned but genuine attempts by judges to produce a result that is fair in the particular circumstances of a case but which then attracts the attention of the

CCA with allegations of manifest inadequacy. There are to my mind respectable arguments for restricting Crown appeals on sentences to certain limited but specified categories. It is perhaps not without significance that *R v Wall* [2002] NSWCCA 42 is to be reported in the next volume of the New South Wales Law Reports. It is not always apparent to me in whose real interests such appeals are prosecuted?

The end result of all of this is a continuing assault upon the integrity of this sentencing tribunal with what must be a corresponding and dangerous potential to reduce morale. We rely upon the robustness of our judicial system and the judges within it but we stray into dangerous waters if we take it for granted that its tolerance for criticism is without limits. I know for a fact that the comparatively leisured pronouncements of the CCA do not in all cases sit well with many judges of the District Court having regard to the pressures under which they are required to work to produce the decisions that are so closely scrutinised. I think there is a perceived tendency to over-intellectualise the issues in many instances and that tinkering is far more dangerous than is generally recognised. I would favour the introduction of a leave list where appropriate appeals are sorted from the less worthy at an early stage.

One of the most eye opening characteristics of our criminal justice system is the number of hapless individuals who get caught up in it and who are convicted of crimes but who are hardly criminals in any accepted sense of the word. I had a man before me the other day with a criminal history that read like a small novel. It was over 40 pages long. It should have been in chapters. It read like the index to *Howie and Johnson* or the Criminal Trial Courts Bench Book. This

man was in custody for breaching an AVO taken out in favour of his mother. The man was schizophrenic and subject to a community treatment order. His mother was elderly and probably, if not certainly, also mentally ill. He was in gaol because he had knocked on her door at 5.00am. Even though his mother was said to be in need of protection from him, she kept him at her house until the police arrived and took him away. But they took him to prison until I gave him bail. His whole life had been wasted accumulating convictions directly related to his mental illness.

I have often said that people do not simply get up in the morning and spontaneously decide to follow a life of crime. I earnestly believe that only a small percentage of the people we incarcerate are evil or dangerous. Those that are should undoubtedly be in gaol. I also earnestly believe that for the most part we should have greater scope for flexibility in our dealings with accused and convicted persons. Unfortunately the legislative encroachments upon the sentencing discretion have either effectively eliminated or substantially emaciated many of the powers of the courts to adapt sentences to particular cases. Too often we are forced into a consideration of the so-called degree of criminality or seriousness of a particular piece of criminal conduct by reference to the maximum penalty for the offence. This is insidiously circular. I am fearful that a day will come when, for example, possession of certain quantities of illicit drugs that presently attract maximum sentences of life imprisonment will be decriminalised or significantly downgraded. My fear is not that the offences will be decriminalised but for what we will have done to the people we convicted and imprisoned in the meantime. We are a highly punitive,

retributive and unforgiving society. We are not the worst but we ought to be better.

Let me say something about juries. Heaven knows that everyone else has! Juries have become the flavour of the month. Should we retain them? Can we afford to do without them? Can we afford them at all? If juries had some commercial or mercantile equivalent they would have been discarded on economic criteria long ago.

My widest experience is with civil juries. As an advocate I did not like them even though I liked appearing before them. That may be because I have had to defend suits against unpopular but apparently revered and respected public institutions. I think civil juries are prone to make mistakes, often because of the complicated nature of the cases they hear. In any event, civil juries have been legislated into something approaching extinction in this State. The criminal jury is desperately holding on. Proponents of juries always emphasise that they "*usually* get it right". I am not so sure about that but even accepting that it is true for the sake of the argument, is *usually* often enough?

That question is particularly important in criminal trials. The old aphorism is that if you committed the crime you are better off with a jury and if you didn't commit the crime you are better off with a judge. In my experience the collective wisdom of intelligent jurors can sometimes be less than the sum of its parts. Jurors are not to be blamed for this. Moreover, can jurors now be realistically excluded from access to information that they are told that they should not have? To approach the matter upon the assumption that juries decide

cases by reference only to what they hear in court must in the third millennium be fast approaching a modern legal fiction. If it is, why do we perpetuate it? Why not openly defuse the whole debate by the simple and uncontroversial expedient of giving an *unqualified* right to every accused person to opt for trial by judge alone without the presently necessary consent of the DPP under s 132(3)? I see Dennis Cowdroy is moving uneasily in his seat!

If juries are to be retained it is presumably upon the basis that we are content to assume that they know what they are doing. Why then is it necessary to require the trial judge to sum up the facts as well as the law. There are jurisdictions where no judicial reference to the facts is made except in the context of explaining the applicable law. If what we know about individual attention spans is brought to account in the equation it seems unlikely that a judge's summing up will ever be a worthwhile exercise following addresses by opposing counsel. And yet we persist. This again adds unnecessarily to the steadily increasing workload of the trial judge.

Now that I have that off my chest, let me say what I really think! I know that some of you here tonight at this important congress come from jurisdictions where you have what we consider to be the unthinkable oxymoronic election of judges by popular vote. Many of you will have first hand experience with political interference in the judicial process. Each is as repugnant as the other. We are truly fortunate in this country not to have our institutions constantly trammelled by such insidious factors. My frustrations with some of the things I see are distinctly out of proportion to the worst excesses of some regimes and administrations. We can speak about these

things freely. In some countries the very defence of an accused person can put an advocate literally in mortal danger. The bravery and courage that it must take to practise this profession in such circumstances is not something about which most of us can express informed views. We can only imagine. We are all privileged to be able to mix, in an amiable gathering such as this, with those of you who have experienced these terrible things first hand. My complaints about bail must seem hollow to those who come from jurisdictions that barely even have courts.
