Appearing in your first murder trial

Temporary Madness or Mere Delusion

Colleagues.

Thank you Tamzin Lee for your invitation to present at this conference; my only regret being that I was not able to attend the first two days. When we discussed the topic for this paper, I had not appreciated that many attendees would be experienced trial lawyers, so I apologise in advance if what I have to say is trite and unhelpful.

Criminal lawyers tend to talk about their cases within a moral framework that is distant from the experiences of ordinary people. In my case, when I first started my own practice twenty-nine years ago, the focus was on just getting the clients. It didn't matter much what they were charged with or who they were. I vainly took their retainer as an indication of my ability and capacity. I didn't know back then that I wasn't competing with many others as most of my clientele were seeking legal aid or pro bono assistance. Even then legal aid funding was grossly inadequate, but being a sole practitioner and with little life responsibilities, I could afford to do these cases. So, the murder cases that I took on, as a solicitor started from the very beginning, despite me having only minutes in practice as a criminal lawyer; these involved gaol killings, drug dealings gone wrong and curiously where women had killed their partners.

I've tried to remember each of these cases in preparing this paper, but thankfully I cannot remember them all, and I stopped counting when I reached twenty trials– including the now infamous backpacker murders – where there was someone killed and the issue being either whodunnit or the client did it because they had a reason to do so. And there was at least a dozen appeals.

From this experience I thought that I knew everything about murder cases.

So, in 1999, ten years into practice and at the age of 34, I decided to appear in my first murder trial as the advocate. I was still a solicitor which in Queensland means that I was not entitled to be robed. As a solicitor advocate, I had appeared in about a dozen jury trials, but this, as it were, was a huge step up. I thought I was ready.

I appeared at the committal hearing, in the days in which you could cross-examine at will, which took about three weeks. The case involved a knifing in a nightclub, the two victims being African American sailors, one died the other suffered a deep stab wound to the chest. The issues were intent and self defence. My client was a 23 year old Filipino man who was about 5 foot tall. His family are church going decent people, his brother a pastor at a local church. Jorai was already the black sheep in that family. The two Americans were at least six foot two and there were another thirty of them in the club at the time; all in their uniforms. The Crown case alleged that it was some sort of turf war. Jorai was arrested after making his way back into the club for some silly reason. He declined an interview.

I then sought out the thoughts of some barristers and they were mixed between lukewarm and stone cold. Trial advocacy was their turf, after all. One barrister however was surprisingly encouraging and when I have been asked by younger colleagues, I have adopted his view. He said to me that if you think you are ready, well you must be close. He had been a barrister by then for more than twenty years and viewed by many to be one of the better cross-examiners then at the Brisbane Bar. I didn't ask him the next question that I might have – when did *you* think that you were ready – for if I had done so, I would have ascertained that he had never done so – he had never appeared in a murder trial; and I think, even though he must now be in his fourth decade as a barrister, to my knowledge, he never has undertaken a murder trial by himself.

Looking back the two decades since I appeared in *R v Pangilinan*,[1] I would probably also say, from what I now know, that I must have been quite deluded to think I was ready. But at the same time, I would still encourage those contemplating doing so, not to hesitate if you believe that you are ready. I will speak about some matters that you might consider in making that assessment.

Firstly, self-assessment is so often laced with delusion; we all suffer from different levels of that. Lawyers are particularly afflicted by that trait.

I had seen some trials run by counsel well and others not so well. But that assessment is also so subjective; and unduly affected by the jury verdict. Badly run trials can still result in an acquittal and the best run defences, by the most eloquent advocates have failed. I had not then quite appreciated how tenuous verdicts can be, affected as they are by subjective and cognitive biases that most of us bring to bear on reaching any conclusion about human behaviour.

In my self-assessment I was also distracted by practicalities. I had run some trials for serious charges and had a working grasp of evidentiary and procedural framework in which trials are conducted. I had learned to cope with the fact that as a solicitor advocate, I would not be robed whereas the Crown prosecutor would be, and I always made sure that I had an instructing solicitor to be the conduit with the client and to balance the bar table. Those things should be a given. Also, to take the pressure off myself, I disclosed to the client that I had never appeared at a murder, and that there were several counsel around who would likely be available if he chose that alternative. He had seen me conduct the committal, and just said, I think you should do it; you know me and my mother think that you care. Again, hardly a valid assessment.

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[1] Jorai Panagalinan was convicted of murder and attempted murder at the trial in which I appeared. The Court of Appeal in *R v Pangilinan* [2001] 1 Qd R 56 upheld his appeal against these. My firm instructed Peter Callaghan to appear at the re-trial before he took silk. The jury again convicted him of murder. The Queensland Court of Appeal dismissed that appeal. The High Court refused his application for special leave. Jorai served 19 years in gaol before being released on parole in 2018.

I also made sure that the retainer and funding arrangements were such that you I was in a position to allocate all the necessary time to adequately prepare for the trial. At the time my senior clerk was Tom Pincus, who is now one of the leading junior barristers of the Brisbane Bar and he was all over the case. I felt that I had in place what I needed to run the case.

Second, there is no such thing as an easy murder trial, but there are obviously some which are more difficult than others. I thought I had carefully chosen one that involved issues that I was already accomplished at. As is sometimes said, a murder is much the same as an assault charge, with one less witness.

Third, I thought I had a viable case theory that was based in reality. On that issue, in retrospect, I was greatly mistaken. Whilst the evidentiary matrix at the committal showed that some of the sailors saw the sailors aggressively heading towards Jorai there was no evidence as to why this was the case or why Jorai, had a knife and pulled it out. So, when I say reality, I don't just mean the legal technical basis for the defence, rather one that a group of twelve people, whose only likely experience with killings is from television and film, would likely embrace.

Fourth, I wish I had taken a better look at all of the dynamics in making the decision that I was well positioned to argue their case. Accepting that, at least for counsel, there is notionally a cab rank rule. Upon reflection, having a brown skinned advocate (with a pony tail that went to the middle of my back) appearing for a brown skinned client was not something I turned my mind to at the time.

At the end of the Crown case, I told the judge that Jorai would not be giving evidence. Before I did that I had approached the Crown prosecutor who indicated that he accepted that self defence and provocation had been raised on the Crown case. The reason why my advice to the client about not giving evidence fell was that two weeks before the nightclub incident, he

had been arrested for wielding the same knife when he robbed a bottle shop for a bottle of rum.

The judge sent the jury out and chastised me. He said, don't think I'm going to leave self defence and provocation to the jury if they have heard from your client. When the prosecutor was asked his position, contrary to what he had told me, he wilted under the judicial gaze and sided with the judges view. The rest of the day and part of the next was spent in legal argument, but despite every reference to authority I could muster, his Honour maintained his view. A senior barrister that I consulted said that I should ignore what the judge said and I should still put the defences to the jury; and refer to the fact that the judge was likely to dish my defence. I was almost aphasic. But I valiantly trod on.

The jury convicted Jorai of murder but acquitted him of the attempted murder of the other; convicting him of the alternative charge of GBH with intent. The jury had focussed on the issue of intent. Self-defence was either not considered or accepted, as being borne out.

Whatever expectations I had were now coloured by the way in which the trial judge conducted the trial. On several occasions he chipped me in front of the jury for not being counsel. I lodged an appeal which had two grounds. The first argued that the trial judge erred in not leaving self defence and provocation to the jury; the second argued that the trial advocate, me, had been flagrantly incompetent in the conduct of the trial. I then approached a colleague at Minters and asked if they would take the appeal on. They did and brief a senior silk who is now on a Court of Appeal. I offered to provide an affidavit with a mea culpa but that was declined.

On the morning of the appeal, I was to be the first witness. Instead of the 10.15 start, I was asked to come at 11.00 with no explanation given. Once there the silk for Jorai smashed into my inexperience for about an hour, and then I was let go, tail between my legs. At lunch,

the silk who was appearing for the Crown called me and asked me if I had been told what happened before I entered the witness box. I hadn't. At the beginning of the hearing the President confronted Jorai's counsel about his decision to abandon Ground 1, and told him that the court wanted it restated and further asked whether he wanted an adjournment to prepare submissions. He said, he would box on the ground as to my incompetence and provide written submissions on that ground later.

Two months later the court upheld the appeal on ground 1. The judges added, kindly, that my conduct of the trial was forensically unexceptionable.

The retrial was conducted by a leading criminal barrister who I prevailed upon to do the trial on Legal Aid rates. Jorai was again convicted of murder but acquitted of GBH with intent, but convicted of GBH simpliciter. On his advice there was another appeal and an unsuccessful special leave application. Jorai was released on parole in 2018, after 19 years in custody.

I did not appear in another murder trial as a solicitor advocate; and since coming to Bar ten years ago have only appeared in three.

So what have learned from this experience.

First, murder trials are taxing and difficult. There is so much at stake.

Second, only you know whether or not you are ready; but that assessment should be based on a rational assessment of all of the dynamics.

Third, recognise there is a big difference between sitting the chair of the instructing solicitor and that of advocate/counsel. So, whilst experience in instructing whilst necessary is not always enough. The craft of cross-examination and address – whilst requiring extensive pre-planning and preparation – is literally only learned on your feet.

Finally, whilst passionate hard work is necessary in all trial work, there is special additional feature that attends a murder trial. You need to have the capacity to explain to a group of 12 strangers that either the forensic connection between your client is either flawed or misleading or in cases where identity is not in issue that in effect the act of taking another life should be excused or forgiven. Obviously, this challenge will be easier in some cases than others but it would be foolish to think that this is not a significant task. The art of persuasion in this sort of case has to mature, intelligent and simple. Cleverness is not enough. An awareness of the human condition, including all of our prejudices and limitations, something that came to me later than most is necessary.

The obvious question is whether I regret undertaking that first trial given everything that followed. It is only in recent years that I have acknowledged to myself that I probably was not equipped to give Jorai the best chance of acquittal. Prior to now I have used the fact that he was still convicted at the second trial as some indication that representation by a more experienced advocate essentially made no difference; but I don't think that is a complete answer.

Thank you.