(N O T F O R P U B L I C A T I O N)

EARLY REFLECTIONS UPON THE COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA

> "And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye? Or how wilt thou say to thy brother, let me pull out the mote out of thine eye; and, behold, a beam is in thine own eye?" (Matt. c7, vv3&4)

The Court of Criminal Appeal of the Northern Territory (I shall refer to it as 'the Court') came into being on 1 March 1986 as the result of the Administrator proclaiming sections 406 to 431 of the **Criminal Code Act 1983** to come into operation on that date.

A paper of this kind is of little value unless it is utterly frank. If I offend any of my brethren or others by what I say, I beg their tolerance. I ask them to understand that my hope is that discussion may ensue to the benefit of the administration of criminal justice in the Northern Territory. I ask them also to understand that insofar as they may see my remarks as attacking them, they are equally an attack upon myself. The Court is new. If it is not functioning as well as it might, there is still time to improve its performance. But

that desirable result will not be achieved unless such deficiencies as there may be become known. You may very justly disagree with what I say. Any of my brethren who react violently towards me may successfully raise provocation.

For those who may not know, I should mention that until the establishment of the Court, appeals from single judges lay directly to a full bench of the Federal Court. The creation of the Court of Criminal Appeal is a part of the preparation of the Northern Territory for Statehood.

In my opinion the system of appeals to the Federal Court was unsatisfactory for a number of reasons. It would be churlish, however, not to acknowledge the debt owed by the Northern Territory to the judges of the Federal Court who sat on appeals there from time to time. So keen were they to come to the Northern Territory that, by the time each had his turn, it was a long time before any judge returned. In the result there was no discernible pattern or policy in the Federal Court's judgments. Most of the Federal Court judges came from the more 'respectable' end of legal practice, so that few of them had extensive experience in criminal practice. Although their theoretical knowledge was more than adequate, they lacked the 'feel' of a judge working in the criminal jurisdiction that no amount of case reading can give. So it was with great expectations that the Northern Territory got a Court of Criminal Appeal.

The Court starts-off unfettered by precedent except by decisions of the High Court. Within the strict limits of the law it will be open to the Court to establish its own character and policy as have the criminal appeal courts of the States. Who would not recognize the lengthy thesis-like judgments of South Australia, or the more peremptory judgments of New South Wales bearing the dominating stamp of 'Street' upon them?

The Court came into being shortly after the commencement of the Criminal Code. The purpose of that monumental piece of legislation remains obscure, unless it was to immortalise a particular law-giver: however I fear the name of Everingham is destined to perish before that of Hammurabi. Mr Everingham succeeded in dragging the Northern Territory screaming out of the vital mainstream of the common law, only to leave it floundering in a backwater. No longer would the development of the common law in South Australia, Victoria and New South Wales serve the Northern Territory. The Criminal Code was a sorry happening.

But, what is worse, not satisfied with giving us a Code, the law-giver gave us a bad one. I wrote to Mr Everingham when he asked for my opinion about the draft Code; I said it would represent a leap forward to 1899. He was quite unmoved. Some of the novel provisions of the Code, I am told, are the brainchild of a Queensland barrister. It is not so much the difficulty of guessing the intentions underlying those provisions that causes the trouble, rather it is the inept way in which they are

expressed. Section 154, to which I shall refer later, is a prime example: a section used more than any other and yet already productive of dispute, at times heated: see **Baumer**, below. Most persons similarly circumstanced would have drawn the Code differently.

A major task of the Court will be to construe and apply the Criminal Code. For the reasons I have hinted at, it is far from easy. Bearing a superficial resemblance to the Queensland Code, in reality it is very different. Consequently, there is no body of law to turn to, except the general law of statutory interpretation. The task of summing-up to juries is especially difficult. Complex provisions provide what have come to be known as objective as well as subjective tests for the existence of the mental elements of a crime or of a defence. The fact that the task may present the judge with difficulty is neither here not there, but when explaining the law is, of necessity, so complicated that the judge is embarrassed putting it to the jury, then the law is in danger of falling into greater disrepute. Some charges, if made strictly in accordance with the Code are guaranteed to glaze the eyes of the most intelligent juror. So, in the years to come, I believe the Court will have a great deal of its time taken up in the wasteful exercise of examining the adequacy of charges to juries brought about by the pointless complications of the Code. So far there have been no such appeals.

What has the Court done in the 18 months of its existence? I will confine myself to appeals against sentence. (There has been only one appeal against conviction: **Lewis v R.**, 17 July 1987. It was successful. I understand the Crown to be seeking special leave to appeal to the High Court. The case is not of particular interest to this gathering.) Since its inception the Court has heard 6 appeals against sentence. They are:

R v Yates	11 December 1986
Baumer v R	3 July 1987
Sullivan and Anor v R	7 July 1987
R v Ireland	25 August 1987
R v Allison	11 September 1987
R v Hogon	16 September 1987

Of these 6 appeals, 4 of them were appeals by the Crown. The Attorney-General appeals as of right against sentence: section 414 of the Criminal Code. There are more Crown appeals against sentence awaiting hearing.

Yates confirmed that the Court would follow **R v Tait & Bartley** (1979) 24 ALR 473 as correctly stating the approach to an appeal against sentence, and, in particular, Crown appeals against sentence. Yates had pleaded guilty to possession of cannabis for the purpose of supply. The maximum penalty in the circumstances was 7 years imprisonment. He was sentenced to

a term of 12 months and the judge ordered that he be released after serving 3 months upon entering a recognizance to be of good behaviour for 2 years. The Crown said the sentence was manifestly inadequate. The passage from **R v Tait and Bartley**, 24 ALR 473 at 476, quoted in **Yates** contains references to High Court authorities in support. It is becoming a classical reference so I quote it here:

> "An Appellate Court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error (see generally, Skinner v R (1913) 16 C.L.R.336 at 339-40; R v. Withers (1925) 25 S.R. (N.S.W.) 382 at 394; Whittaker v R (1928) 41 C.L.R. 230 at 249; Griffiths v R (1977) 15 ALR 1 at 15-17).
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> Although an error affecting the sentence must appear before the Appellate Court will intervene in an appeal either by the Crown or by a defendant, a Crown appeal raises considerations which are not present in an appeal by a defendant seeking a reduction in his sentence. Crown appeals have been described as cutting across 'time honoured concepts of criminal administration' (per Barwick C.J., Peel v R (1971) 125 C.L.R. 447 at 452; [1972] A.L.R. 231 at 233). A Crown appeal puts in jeopardy 'the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal' (per Isaacs J., Whittaker v R., supra at 248). The freedom beyond the sentence imposed is, for the second time, in jeopardy on a Crown appeal against sentence. It was first in jeopardy before the sentencing court."

The other judge and myself agreed with the Chief Justice's reasons. May I, however, use a comment in some additional remarks of the other judge to illustrate a tendency of judges to

elevate almost to the status of a rule of law, with what I believe is less than due regard for the consequences of doing so, some relatively trivial matter of practice. His Honour pointed out that 13 testimonials of good character had been received by the trial judge in evidence but that none of the authors had indicated that they knew the purpose for which the references were to be used. His Honour said that no point had been taken by the Crown on that score at the appeal. He noted that the references 'clearly influenced the sentencing judge's approach'. But his Honour went on to say, 'I think it undesirable references in this form should be presented to the Court if it is intended to make a serious submission upon the offender's good character. Hopefully, these remarks may serve as a warning in the future that little, if any, weight will attach to evidence of this kind unless given with a clear indication that the author knows the purpose for which it is sought.' I respectfully disagree. The weight to be given is matter for the sentencing judge.

Written testimonials are strictly inadmissible. However, long-standing practice is that the Crown generally consents to their use. They vary very greatly in kind. Sometimes they are testimonials that the prisoner has accumulated during his lifetime; sometimes they are recently obtained. Of the latter class, they are sometimes expressed in terms that show the author to be aware of the prisoner's crime; others are not so worded. An experienced judge almost instinctively evaluates them having regard to these factors. He rarely makes express mention

of the nature of the references in his remarks on sentence. That is not to say that he will fall into the crass error imputed by the judge. No **a priori** measure of the weight of evidence as 'little, if any' can be determined by an appeal court. There are too many possibilities. If the sentencing judge was fit to be appointed to the bench, he is capable of evaluating character references having regard to many relevant factors including knowledge on the part of the referee of the purpose for which it was to be used.

I have spent some time on this point because it illustrates what I regard as the tendency of some of us to descend to the trivial. The Court must not lose sight of the fact that barristers will hang on remarks made by judges of the Court. They will tend to treat every comment as if it were part of the **ratio decidendi**. Unless the judges are prepared to see their general remarks given truly universal application they should resist the temptation to make them. This vice is not peculiar to the Court. The highest courts have often offended, finding they must later qualify or retract. The temptation is one felt by an intelligent person to justify the particular by reference to the general. It was observed in **de Smith's Judicial Review of Administrative Action** (Fourth Edition) in an entirely different context, 'When one comes across a judicial formulation of general legal principle it is not infrequently misleading because the court has in mind only a limited range of contexts in which the problem arises.': p233. That comment

applies equally to many generally expressed comments of judges in criminal appeals whether they be legal principles or counsels of good practice. It remains that a judge, especially one sitting on appeal, ought to avoid any generalisation wider than the case requires, and, equally importantly, he should distinguish principles of law on the one hand from admonitions for better practice on the other. If the judges do not advert to the distinction, it is certain that most barristers will not. Perhaps I can add that judges ought not to assume that an elementary matter concerning the weight to be given to evidence has escaped the sentencing judge just because he did not make special reference to it. Sentencing judges are under no obligation to refer to every matter that acted upon their minds in the process of reaching a decision. The disease that seems to infect many Australian judges, verbosity, has reached epidemic proportions in recent years. It became virulent in South Australia and spread to other places. It has certainly reached the Northern Territory. Can I ever survive saying that the High Court has not escaped it? I am receiving treatment for it myself but it is hard to cure.

I would turn now to the most controversial decision of the court: **Baumer**. If there is a decision that does not do the Court credit, it is this one. Before I begin to criticize the judgments, I must put all minds at rest by affirming that so long as **Baumer** remains I must and do regard it as stating the applicable law. It is worth emphasising that a serious

discussion of the operation of a court would be a vanity unless the participants are prepared to be completely frank.

O'Leary CJ posed what he called the 'principal question': the construction to be given to sub-section (4) of s.154 of the Code, and, in particular, how that sub-section is to be taken into account in sentencing a person for an offence under the section. Why that should have been the principal question, or even an important one, is not clear to me.

Before referring further to what his Honour said, to help those who have not troubled to read the judgments or even the relevant parts of the Code, I set out in full section 154:

> '154. DANGEROUS ACTS OR OMISSIONS
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> (1) Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any member of it in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years.
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> (2) If he thereby causes grievous harm to any person he is liable to imprisonment for 7 years.
>
> (3) If he thereby causes death to any person he is liable to imprisonment for 10 years.
>
> (4) If at the time of doing or making such act or omission he us under the influence of an intoxicating substance he is liable to further imprisonment for 4 years.

Baumer was charged with doing a dangerous act whilst under the influence of alcohol, namely, driving a motor vehicle and colliding with another motor vehicle and thereby causing grievous harm to a person. The sentencing judge imposed a head sentence of 8 years imprisonment, he made an order prohibiting the appellant from obtaining or holding a driver's licence for a period of 20 years. His Honour fixed a non-parole period of 4 years. Baumer claimed that the sentence was manifestly excessive, that the trial judge had given too much weight to the appellant's previous convictions and that the period of disqualification was excessive. The appeal was dismissed by a majority.

The Chief justice noted the conflicting views of Maurice J and Muirhead AJ. He said that subsection (4) represents a deliberate and radical departure by the legislature from the previous legislation dealing with offences of the kind covered by the section including driving offences. He said that by virtue of the section the fact that the offender was under the influence of an intoxicating substance at the time of the offence must be taken into account as an aggravating circumstance rendering the offender liable to a specific further substantial penalty in addition to any other penalty to which he is liable under the section. Muirhead AJ was of the opinion that the court must consider subsection (4) as a separate exercise. I would have fallen into the error of regarding that approach to the section as incorrect had I been sitting on the appeal. So now is a

convenient time to speak in defence of the errors I would have fallen into.

I cannot see why the particular procedure adopted for determining a proper sentence should have affected to a significant extent the magnitude of the sentence. Is there necessarily a difference between a sentence, determined for particular facts proportioned to a simple maximum of 11 years, and a sentence for the same facts proportioned to a maximum of 7 years plus some part of 4 years? In the circumstances does the subject matter admit of such an order of precision?

Asche J, as he then was, made no reference at all to a particular way of construing section 154. There is nothing to indicate that he followed the procedure said to be correct by the majority. His Honour arrived at the sentence he did because he thought it was appropriate with reference to the facts and the provisions of section 154. Did he notionally fix a sentence by reference to a 7 year maximum and then add a further term by reference to the 4 years prescribed by sub-section (4)? Who knows? I do not believe the magnitude of the sentence turned on such a legalistic distinction.

The grounds of appeal did not suggest that the sentencing judge applied section 154 incorrectly. The appellant complained that the sentence was manifestly excessive. He complained that the judge erred in law by giving too much weight

to his previous convictions. The period of disqualification was said to be excessive.

The resolution of the question how one should approach the application of section 154 could not determine the questions raised by the grounds of appeal. The appellant had pleaded guilty to a charge of conduct traditionally described as culpable driving causing grievous harm. The facts were bad. On any view of it, the sentence had to be high on the range. The vital question to be answered was 'what is the range?' Was it up to 11 years? Was it up to 7 years with the distinct addition to the sentence of some part of a further 4 years? Or was the range, as the dissenting judge said, to be ascertained by reference to sentencing practice for culpable driving offences or their equivalent throughout Australia?

I venture to repeat that the significance of the choice between the 11 year range and the 7 year plus 4 year range is insignificant. If either of those prescribed maxima provided the criterion for determining a proper sentence, the sentence passed by the sentencing judge could not be regarded as manifestly excessive. But, if the dissenter was correct, I would agree with him that the sentence was manifestly excessive. I think the preoccupation of the court with the niceties of sub-section (4) was unfortunate because it distracted the judicial reasoning from a more useful course. In allowing themselves to be distracted by a nice analysis of the section, insufficient attention was given

to the real issue what was the criterion against which the sentence ought to have been determined. There may well be a case where that nice question would have to be determined; where the distinction would determine an appeal. But this was not one of them. The sentencing judge had not here adverted to the distinction and opted for one or the other. If Maurice J was correct in his choice of criterion, there could be no question but that the sentence was manifestly excessive. If Maurice J was right, the nice instruction about how to apply sub-section (4) was idle.

I believe that the courts should never lose sight of the fact that, except in the case of common law misdemeanours, it is the Parliament that determines how serious a class of crimes is. It is beyond authority for a judge to ignore that standard and to import one of his own. This is so no matter how worthy his arguments might be; no matter how reasonable or compelling. If the Parliament has unambiguously expressed its intention by statute concerning the gravity of a class of offences, the judges are by law bound to give effect to that intention in appropriate cases. I can see no basis for categorizing that expressed maximum as 'marginal'. The fact that driving offences are only one sub-class of many comprehended by the section cannot, in my opinion, affect the principle. All offences under the section constitute a definite class. It is true that one cannot always confidently regard the expressed maxima in statutes as expressing the Parliament's intention. Some of those statutes are ancient.

Some of them, whilst having been amended in many other respects in the course of the years, have been left alone in respect of penalties despite the fact that the courts have been imposing sentences bearing little relation to the maxima. In such cases it might be argued with justification that the Parliament, by standing by, has evinced an intention that the courts should go on as they have been. There are other imaginable situations in which one might reasonably say the prescribed penalties do not truly express a legislative intent. But, such a conclusion could never be reached in relation to a statute recently passed and prescribing penalties that are unique and specific. The penalties expressed in the Code must be taken by the judges to be a true reflection of the seriousness of the offences for which they are prescribed. No appeal to what is going on in other places can prevail over the Northern Territory Parliament's expression of intention. I believe that this is a matter of principle. The expressed legislative criterion of seriousness must prevail over the disagreement of judges no matter how much more reasonable and proper the latter may be.

In summary, I think **Baumer** not one of the happy products of the Court. I do not think the construction of section 154, and especially the manner of operation of sub-section (4) called to be decided. And, with respect to the minority, I believe that in his very understandable expressions of indignation, he overlooked an opportunity to be coldly critical which would have been to great effect.

What can I say about **Sullivan** except that the Court was clearly correct and that I was wrong. Sullivan and Rigby pleaded guilty before me to 2 counts of unlawful entry at night with intent to steal and to one count of stealing. I sentenced them to 3 years imprisonment on each count to be served concurrently. I declined to fix non-parole period. Both offenders were in their late 30s and had known each other since their days at Westbrook Boys Home in Queensland. They were chronic drug users. Each had a long criminal record dating back to boyhood. Shortly before the offences they had been working as prawn fishermen in the Gulf of Carpentaria. The three offences arose out of one transaction. They had been drinking together at the Stella Maris Club, located near the waterfront in Darwin catering for seamen. Sullivan had some casual employment there as a doorman during daylight hours. All of the money they had earned on their recent work in the Gulf had been spent in a succession of binges. On the night of the crimes, they engaged in a drinking session at Stella Maris. They decided to return after closing to steal grog for their own use. They arrived back after midnight. Sullivan removed some metal louvres with a tyre lever and gained entry. He passed out bottles of spirits and cartons of beer to Rigby. They took the can containing donations for the club Christmas party. The loot was put into a plastic garbage bin. Needing a car to carry it, they went by taxi to a friends place, borrowed a car and returned to the club. They then forced an entry upstairs. They levered off a padlock and broke into a storeroom with a shovel. They took more alcohol and

some tobacco. They also took money from a till. They put all the stolen property into the car and drove away. The total value of goods stolen was about $2,100.00. Little of it was recovered. Some of the spirits had been sold, some given away and some consumed by them. It was this Steinbeckesque picture that so distracted me that I fell into the error of declining to specify a non-parole period. I regard what the court said about the fixing of non-parole periods as sufficiently important to commend its reading to anyone concerned with the matter of parole periods. If the relevant passage were not so long I would have reproduced it in this paper. I content myself with reproducing the concluding paragraphs:

> " In our opinion, the success of the parole system in the Northern Territory makes it desirable in the interests of society that parole remain an option whenever possible. In Sullivan's case, we think it appropriate to fix a non-parole period of 15 months. To mark the significant differences in their respective criminal records over recent years, in Rigby's case we think 18 months an appropriate period. Neither appellant should assume that when he has served that portion of his sentence he will automatically be released on parole, that is not how the system works here.
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> The Court thinks it worthwhile pointing out that if no parole period is fixed, both men will almost certainly be released unconditionally after two years. With what we propose, the Parole Board may release Sullivan on appropriate conditions after 15 months and Rigby, 18 months. If this course commends itself to the Board, then it may require both men subject themselves to suitable supervision as a condition of their release for the balance of their 3 year head sentences. Those sentences will not be discharged until they have gone the full 3 years without offending again. The desirability of keeping this option open, in our judgment, is clear.
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> We give each of the appellants leave to appeal. The appeals against failure to specify a non-parole

> period are upheld and the Court fixes the periods already mentioned. Otherwise the appeals are dismissed and the sentences are confirmed."

Since this is my paper, I propose to indulge myself a little by referring to my own reasons in **Hogon**. I believe it is time the Crown moved away from the pcsition that the only two sentencing options are severity in the public interest and leniency in the interest of the offender. In some cases they may be a correct description of the options. I expressed my own opinion of the question in **Hogon** which I take the liberty of reproducing here:

> 'It is an oversimplification to see the judge's role in every case as seeking a nice mean between severity, presumed to be in the public interest, on the one hand, and leniency, presumed to be in the interest only of the offender, on the other. I am sure that the true public interest is not validly expressed in such simple terms. The public interest may in an appropriate case be promoted, not by severity but by leniency.
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> In the last analysis the function of the court in administering justice according to the criminal law is to serve the public interest. It is the public interest that requires that criminals be punished, that weight be given to the deterrence of the offender and of others. It is the public interest that requires a sentence to be appropriately proportional to the offence. In the end there is no other interest that can prevail over the true public interest. It is in the public interest that a sentence be a just one. I cite no authority for these propositions because they seem to me to be axiomatic.
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> But, as the High Court has reminded us in connexion with at least two other legal topics that occur to me here, namely, those of illegally obtained evidence and public interest immunity, the public interest is not simple but complex. The public has an interest in the promotion of certain traditionally accepted ideals which frequently cannot be <u>fully</u> realized simultaneously in the same subject matter. Strict justice will usually be inconsistent with a full measure of mercy in a given case: a prudent judge will seek a mean that avoids

> excessive violence to either ideal. A sentence providing an effective measure of deterrence may extinguish a newly kindled fire of reform in an offender. Where should the prudent judgment settle? The question often arises in one's mind whether a sentence, designed to provide an ample measure of deterrence, is so sure to have that effect that a different sentence, that would provide a real chance for the rehabilitation of the offender, should be rejected merely because it would not have a deterrent effect?
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> The public interest is not always best served by treating general deterrence as paramount. Where, upon a fair consideration of the evidence in a case, a judge concludes that by not requiring the offender to go to gaol there is sufficient probability that he will become a useful, law-abiding member of society, the public interest may be better served by not sending him to gaol. If the criminal process by its proper procedures can make a real contribution towards the formation of a good member of society, it should, I believe, do so. The chance of that happy result must be a real one based on the evidence. His Honour said: " . . . if the accused can continue the progress which he has done in the last year he will not only cease to be a menace to the community but he will become a useful member of that community and be in a position to repay to the community some of the damage which he has previously done."
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> The gravity of the offence is obviously a major factor. Some crimes are inherently so grave that no likelihood of reform could lead to the conclusion that the public interest would be better by a non-prison sentence.'

I would welcome debate on this question. There is room for differences of opinion. This is an area in which the Court can make a useful contribution. It will only do so however if it adopts a cooperative approach to matters: that is, only if the judges are praepared to act as a group. But, in support of my postion in **Hogon**, I would quote the wisdom of Muirhead J, sitting with Bowen CJ and Evatt J, as a member of the Federal Court in **R v Davey** (1980) 50 FLR 57 at 65 where his Honour said:

> "The purpose of the criminal law is to bring wrongdoers to justice of the protection of the community. First and foremost, it is the protection of the community a sentencing judge must bear in mind (**R v Cuthbert** per Herron CJ (1967) 86 WN (Pt 1) (NSW) at 274. There are occasions when a judge determines he can olnly extend that protection by severe punishment; there are other situations when he will reach the view that probation, suspension of sentence or community work orders are appropriate, not because they will be less unpleasant for the prisoner, but because they may be productive of reformation which offers the greatest protection to society."

This leads me to the next point I would make. It is inimical to the achievement of anything worthwhile for one or more of the judges of the Court to adopt an isolationist or even, in cases of disagreement, a confrontationist attitude to other judges. An appellate court will, in my inexperienced opinion, achieve its full potential only if the judges confer and argue about what the decision of the Court should be. In that way the dialectic of the sharing and testing of ideas will operate to produce the best possible judgements. The other way, that is, for each judge to go skulking off to his chambers and to produce a judgment with little or no consultation with his brethren, will certainly produce a result. But, often one in which the ascertainment of the **ratio decidendi** of the Court's decision may be difficult if not impossible, and where, in any event, there is found little of inspiration for the legal profession. One cannot help reflecting on the fact that so many memorable High Court judgments have been joint or partly joint efforts: obviously the results of thoughtful exchange between the

judges. Again, at the risk of courting a horrible fate, the worst performances of the High Court, also memorable, have been manifest in cases where there have been five or more unrelated judgments with few common ideas in any of them, causing nightmares for barristers trying to advise clients what the law is. I hope therefore that we of the Court will learn the art of judicial cooperation which is, after all, no more than a special application of dialectics, superior to mere logic in that it has superadded the cross-fertilisation of minds: a sort of intellectual hybrid vigour. I must not be thought to be saying that, having tried through difficult debate to reach a common position and having failed, a judge ought to surrender his opinion to one with which he disagrees. That would be intolerable. But, I believe that judges should at least go through the pain and toil of such debate before they slink off to their own funk holes to do their own thing.

There is a matter I am somewhat loathe to mention for fear it will create the false impression that I regard the standard of advocacy before the Court to have been poor. The fact is that it has been high, especially when undertaken by members of the bar. There was one occasion, however, when an appeal brought by a convicted person was conducted with such monumental incompetence that the case had to be adjourned with an urgent request by the Court that counsel be briefed in order to avoid the real possibility of a miscarriage of justice. The case was quite difficult as to the law, and the person appearing for

the appellant was in total and, almost certainly, incorrigible ignorance of even most elementary matters such as what were the elements of the offence in respect of which the appeal was brought. The point of mentioning this is that the performance of the Court is significantly affected by the quality of the advocates who practise there. Those who appear before the Court are not mere ornaments (although some are quite handsome), they are there to assist the Court, and the quality of their assistance is reflected in the quality of judgments. I am grateful that the quality of the assistance provided by the NT Bar is excellent.

Whilst on the subject of advocacy, may I make some suggestions that may or may not meet with acceptence. There has been a tendency, diminishing in recent experience, for counsel to put on his list of authorities for the Court every case ever decided in any jurisdiction in every part of the English speaking world bearing any connexion with the case to be heard. One's Associate tells one that Mr X has a team of workmen with hand trucks carrying loads of books into the court-room in preparation for the case. One enters the court-room at the appointed time to see Mr X's opponent, Mr Y, armed only with 'Criminal Law' by Howard. An uneven match, you might think? Not at all! All of Mr X's cases have been considered and epitomised in a recent judgment of the High Court; a case that is discussed by Howard. Please be sensible in the use of authority. If the High Court has truly dealt with the question, nothing more is required. The

High Court binds the Court. Of course it is a different matter if you are not really trying to assist the Court, but rather, hoping to fill your clients with awe of your vast learning, or your opponent with terror. In either of the latter cases, send a message to the judges not to be disturbed by the vast wall of books, that they are there for tactical effect only. But, if Mr Y thinks that a two line summary of the effect of a lengthy High Court judgment in a popular students text book is a substitue for the full report, he is wrong. There is nothing more irritating than to have a string of cases and their effect read out from a text book. It is as if to say to the judge, 'I'm a bit tired, I'll leave it to you to dig the cases out and read them.'

Another thing to avoid when arguing appeals is the use of dramatic advocacy and repetition. If persuasion failed in the court below, it is too late at the appeal stage for a another try. The arguments upon which a party would rely should be put with all appropriate force to the trial judge. Submissions before the Court should be characterised by logic and calm: at that stage you are attempting to point to one or more errors of law. Unless the trial judge has made an error your appeal will fail: it is too late for emotive persuasion. Therefore, if you believe the primary judge should impose a sentence within a certain range, inform him of the range. Specify your sources. In other words, do your homework at the trial stage and give the trial judge the benefit of it. The Court may not be impressed by a great deal of work done especially for the appeal if the judge

below was given little help. The worst thing is positively to lead the trial judge up the garden path. Remember, judges bear some similarities to human beings, and a judge sitting on appeal, hearing about all the idiotic things his brother below has done, may think to himself, 'Hell! This could be happening to me! I would not have known about these esoteric principles counsel is now so eloquently expounding! Yah Boo to him!'

The Crown now has a full right of appeal against sentence under the Criminal Code of the NT. In my opinion this right imposes on the Crown the same duty as rests upon an accused to give all available assistance to the trial judge on the matter of sentence. In **R v Ireland**, a Crown appeal against sentence, I had occasion to say:

> "The respondent may have been fortunate that the same submissions as are now put by the appellant were not put to the sentencing judge. His Honour may have been persuaded to deal with the respondent more severely. They contrast markedly with the submissions put to the sentencing judge. There, the Crown said little to create a realization of the gravity it now contends for. The crown appeals against sentence as of right. This was not always so. There is no reason excusing the Crown from putting fully to the sentencing judge such matters as are relevant to the sentence. The contrary tradition existed when there was no right of appeal by the Crown. If it is necessary to refer to cases and other material in order adequately to assist the sentencing judge, the Crown, like any other party to litigation, ought to make such reference."

Finally may I implore the Crown to think twice, if not more often, before exercising its right of appeal against sentence under the Criminal Code. The Crown's exercise of this right should be a true rarity. In the Northern Territory it is a commonplace. I can

hear Mr Karczewski saying, "Well Judge, if you'd give sensible decisions we wouldn't have to appeal so much."

Judges Chambers

Supreme Court

Darwin

J.A. NADER

17/10/1987.