

Not re. topic  
Traffic  
Police  
3 separately  
+ well used  
presentations  
magistrate  
by Warren Donald Sr  
(Alice Springs  
Magistrates  
Court)

## LAWYERS - A POLICEMAN'S/LAWYER'S/MAGISTRATE'S PERSPECTIVE

Anything that removes lawyers from the criminal process must be a good thing.

There are three essential components to a good criminal justice system

- an offender, an investigator and a suitably stern court.

The community is well and truly tired of those who make a living, often on the public purse, by twisting words, misrepresenting the facts, and coming up with a view of a occurrences that a weak misguided court will often accept.

It is the police officer who is on the ground. He is dealing face to face with society's vermin. He knows when a person is guilty. It is almost a matter of instinct.

From this perspective, removal of sentencing and other discretions is a step in the right direction. Although stated in extreme terms that encapsulates the view of some police. In my time as an N.T. Police Officer I was able to observe among some a disdain for many of the protections that were then present within the legal process.

It was known, for instance, that certain officers would be willing to take 'shortcuts' or worse in preparing a matter for

prosecution. These officers did not see anything wrong in this. It was justified in their minds on the basis that they knew the offender was guilty and the steps taken by them ensured that justice, as they perceived it, prevailed.

*Indeed by police  
self or as  
best witness  
how*

This was not a phenomenon restricted to the Northern Territory.

In the course of my time as a police officer I worked with police in other states and whose attitudes were often more extreme. That it is recognised as a country-wide phenomenon is shown by yet another tale told by Gillespie Jones:

"A year or so ago I was standing on the steps of the ACT Supreme Court which overlooks the police station on which there are flagpoles. I was talking to a solicitor friend, Brian Morris, when a constable approached us. Brian said "Why aren't the flags flying at half mast over the police station?". The policeman said, "Why should they be? Who died?. Brian said, "Your patron saint, Agatha Christie. More fiction has come out of that police station than even she could dream up".

The old days of non-audio recorded records of interview and admissions will be recalled by most. There are, of course, stories which can be told by all as can stories relating to the manipulation of evidence. With acknowledgment to audley Gillespie-Jones, a former colleague from Canberra, the following illustrates the point:

"There was a very famous detective in Sydney, whose name I shall not mention. He would order any criminal who came from interstate, to return immediately. If the criminal protested, this famous detective would say to him, "I will plant a pistol on you and charge you with a felon in possession of a pistol and I'll have you put away for two years'. Now, some of these interstate criminals were wanted in their own state so could not return; and this famous detective would carry out his threat. One such criminal from Victoria enlisted the services of Phil Roach, a highly-experienced lawyer in the criminal field. The famous detective went into the witness-box and his evidence went something like this: "I searched the luggage of the defendant and I found this pistol in it. I produce the prior convictions of the defendant. I tender the pistol." The pistol was then marked Exhibit 'A' and the Magistrate said to Phil, "Mr Roach, would you care to examine the pistol?". "No", said Phil, "I have seen this very pistol produced by this same witness on twenty-seven prior occasions. The last time he produced this pistol, I examined it and nicked an edge in the top of the rifling with a small file. If Your Worship puts his little finger in the bore, he will feel the sharpness." The case was dismissed.

Whilst I acknowledge that the standards of all police forces have improved, more protective mechanisms are in place and police officers generally act in a more professional manner, I find it difficult to accept that similar attitudes <sup>could</sup> ~~do~~ not currently exist ~~amongst a minority of police officers.~~

*eg. Estman - Munnis - rights*

There is an ever present temptation for those investigators with close contact with victims of crime to too closely identify with the victim's position. There are still opportunities for police to "guild the lily" or take shortcuts. Most police resist such temptation but where they do not it is only the continued efforts expended by dedicated and professional advocates that protects those who would otherwise be at their mercy.

*loss of objectivity + fallacy of youth demonstrated by - Kuhlman + grade by date*

In my second life as a Lawyer I appeared mainly in defence of those who, more often than not were in my belief inappropriately charged.

Fortunately I practised primarily in a jurisdiction where the sentencing and other discretions present in the common law had been largely left to continue. They were not the subject of interference by the legislature.

Then, on occasion, it was possible to witness the attitude of police referred to earlier, but in reverse. How often do those of us who practice come up against an opposing lawyer who seems

intent on running a case regardless of cost or merits. How often do we suspect that a matter is being taken to hearing not for the interest of the client but for the sake of his representative's ego or billings? I'm sure all of us have experienced situations in which we would acknowledge the interest of all would be better served if lawyers were not involved.

"Shortly after the war, a barrister, Ted Ellis, was appearing before His Honour, Mr Justice 'Jack' Barry, in a divorce case and phrasing his words rather loosely when addressing the Judge, said, 'And knowing Your Honour's experience in adultery ...', when the Judge interrupted, 'I could commit you for that, Mr Ellis'. To which Ted replied, 'I mean, when Your Honour was at the Bar'.

Gratton Gunson (later Judge, who had Supreme Court practice, was cross-examining a rather rough-looking witness in the County Court, before the disagreeable Judge, and asked him, 'Where were you when the fracas (which he, in the ordinary way, pronounced frackar) broke out?'. By the look on the witness's face, Gratton realized that he didn't know the meaning of the word 'fracas'. So, he said 'Where were you when the melee, the fight, started?' The Judge said, 'What did you say at first?' Gratton replied, 'Frackar'. The Judge said, 'Spell it'. Gratton spelt it. The Judge said, 'Ah,

frackass'. Gratton, 'I apologize, Your Honour, I forgot I was appearing in the County Court.'

Perhaps the system would be better served by removing all lawyers from the system except ourselves.

Sitting in a court with a client's fate resting squarely on one's shoulders certainly does change the perspective of a former policeman.

No longer is punishment a question solely of retribution and deterrence. No longer are matters starkly black or white. The client is seen in a more human light. He now has good character, a family to support and good prospects. Rehabilitation is now the only consideration. What possible purpose can be served by sending him to gaol? Why should he suffer a conviction? He needs his licence for work.

Mandatory imprisonment? Never! The judges and magistrates are too tough already. Whatever happened to "imprisonment is a punishment of last resort"? Why is it that those deciding sentence cannot see the real issues?.

In my second life thoughts it is the narrow minded, the politicians on a re-election law and order platform and right wing police who are attempting to push an unjustified harsh viewpoint on the judiciary.

Why is it that prosecutors always seem to be appointed to the bench?

Sure there is the odd exception when for some unexplained reason those sitting in judgement see the light (could it be that he/she is just distracted at that point?) In general, however, the bench is tough and unreasonable enough. The game is already on an uneven playing field. There is absolutely no need to tilt it further by removing the few discretions left.

And so to the third life....

Hang on! what am I doing here? It is now me! The buck stops here.

The good and bad in all submissions can now be seen in each submission. The interests of the community v. the individual - certainly nothing is so black or white now.

In quiet moments of contemplation and honest reflection some of those 'ridiculous' and 'outrageous' decisions of judges and magistrates before whom I have appeared become more understandable. Although some amusing stories remind of our own experiences:

"Sir Charles Lowe was a Judge of whom Sir Robert Menzies once said 'I never thought a man who looked so wise could be so wise.' A young and nervous juror, wishing to be excused service, was asked by Sir Charles, 'Why do you wish to evade your duty?' 'Because', the juror said, 'my wife is about to conceive'. A startled barrister sprang up and said 'I'm sure what the juror is trying to say, Your Honour, is that his wife is about to have a baby'. 'In either event, the husband's presence is desirable', said the Judge. 'He will be excused'. On that day, another juror desiring to be excused, when asked his name, replied, in a foreign accent, 'Peach'. Sir Charles asked, 'How do you spell it?' The Juror, "PEITSZCH". Sir Charles, 'Now, for my edification, would you please spell 'Apricot?.

"There was a Judge who was a great egoist. In fact, when he came into the court, the tipstaff who, of course, preceded him, used to call out in a loud voice not 'All stand' but 'Kneel'. Now, this Judge sat with the Archbishop and several prelates on an ecclesiastical appeal court. A clergyman, who had been defrocked, appealed to this court. When he came before the court, he took objection to the Court's jurisdiction. He said he had only one judge and that was God. Whereupon, the Judge turned to his colleagues, the Archbishop and the prelates, and said, 'In that case, Ill sit alone'.



One of the first realisations to strike home to me in this my third life is the importance of lawyers! Those who preside over the Supreme Court will have seldom experienced the additional problems of dealing with an unrepresented defendant. The need to explain procedures and the need to extract mitigating factors is a slow excruciating process, something akin to the task of a colonial dentist.

And what of an unrepresented criminal defendant? - Double the hearing time. There is a need to guide and assist he that is inexperienced in the law and who is plainly in terror of uttering a few words in such alien surroundings. At the same time he must be restrained from venting months of worry and frustration on the first unfortunate witness that appears for cross-examination. Brown v. Dunn? Forget it. Try explaining that to a fridge mechanic in court for the first time and in full flight imitating Rumpole in cross-examination.

"Ross Sterland, SM, relates a story about an Aborigine who was defending himself on a charge of exceeding thirty-five miles per hour at Cowra, in New South Wales. He was adamant that at no time did he exceed thirty-five mph, and that he had only travelled a short distance before the motor-cycle policeman stopped him and asked him his reason for exceeding the speed limit. The Aborigine further stated that he was watching his speedometer closely, as

he had seen the motor-cycle policeman following him in his rear-vision mirror. At the end of the Prosecutor's cross-examination, Ross Sterland asked one question: 'What gear were you in?' The Aborigine replied, 'The usual - thongs, jeans and a T-shirt'."

What could be worse?

Easy! A small claims hearing with each party unrepresented. Double hearing time - not likely - triple it. Each of the problems mentioned earlier can be multiplied by two.

A clear and unambiguous finding can be made that it is not only the client who benefits from competent representation but the presiding magistrate, the court, and the community.

The adversarial system is now appreciated by me in all its glory. Only when each argument is being tested by competent counsel is there an opportunity for the real issues to be aired.

And what of discretion? There is an argument that the courts have brought the removal of some discretions down on their own heads. There is always a danger that the courts will be perceived to be out of touch with the community whose interests they protect. There are cases in the Northern Territory where my personal belief is that that perception is accurate .

The difficulty that I have, however, with the removal of such discretion is the unfairness brought down upon the heads of many.

As indicated above, we are all subject to a perception based upon our role or position in relation to a matter. It is the judge or magistrate who is able to sit back objectively and balance each submission. It is he or she who is in the better position to consider each factor dispassionately in each case.

Two examples of the unfairness generated by removal of discretion will suffice. Each of these examples are from recent times in Alice Springs.

First, the removal of discretion on disqualification of licence.

Take two defendants. The first is a hard working family man who has recently established his own business. He is the sole breadwinner for his family. He has no prior convictions. He is caught driving with a blood alcohol concentration of .09%. He must lose his licence for six months. In this case because of his loss of licence his business ceased, his family was without financial support and the family had to leave Alice springs.

The second defendant does not support his family, lives on the dole and has a reading of .149%. Same disqualification and it does not mean a thing to him. Obviously a disproportionate sentence in the first defendant's case.

A recent matter that came before me involved a young man in his mid 20's. He was well qualified and had devoted his short professional life to the care of disabled children. There were glowing references speaking of his voluntary activities in relation to such children. He is without prior conviction. One night whilst intoxicated and arguing with his wife he threw a rock and smashed the windscreen of a car. Minimum penalty - <sup>Weeks</sup> 2 ~~months~~ in prison! How can that be justified and yet there appears to be <sup>no</sup> discretion left to the sentencer.

From this policeman, this lawyer, and this magistrate I ask those who legislate to think again.