51st Police Prosecutor's Training Course

Thursday, 9th September 2004

by Judge Marshall Irwin, Chief Magistrate

Good morning and thank you for the opportunity to speak to you.

I probably should tell you a little bit about my background if you are not aware of it. I spent a considerable amount of time as a Crown Prosecutor during the course of my career. I have also worked as a General Counsel for the Criminal Justice Commission and I have worked with the National Crime Authority in a number of positions. I do have a background in prosecutions and law enforcement and in addition to that I have also appeared at the other end of the bar table looking at it from both perspectives. I hope with that in mind and also given the last 12 months of experience that I have had as a magistrate sitting throughout the state, in court 1, in indigenous communities and other jurisdictions, that I can give an overview and the expectation that the magistracy has of police prosecutors as they appear before us.

I would like to start by referring to a passage from a United States commentary on prosecutorial ethics.

> "The first, best and most effective shield against injustice must be found not in the persons of defence counsel, trial judge or the appellate courts, but in the integrity of the prosecutor …. this notion lies at the very heart of the criminal justice system ".

This is particularly important in respect of people like yourselves who will be police prosecutors because it will be you who are responsible for the great

bulk of prosecution work in the Magistrates Court. The Magistrates Court is simply the court of first instance in the judicial system. It is the court where the greatest majority of the public will have contact whether they come before it a complainants or witnesses or defendants.

Approximately 95% of all criminal matters are dealt with in the Magistrates Court and the defendants you will be appearing against will frequently be self represented. This is an increasing trend before all the courts. Even the Court of Appeal and Higher Courts these days have about 1/3 of the people appearing before them as unrepresented litigants. The proportion is considerably higher in the Magistrates Court as I am sure you know.

Many of these people that you will be dealing with whether they are witness or defendants will be stressed and trauma affected. So in short - the court where you will be prosecuting is the court where most lay members of the public will have their first and often their only experience of the judicial system. Therefore it is the court where the general public will form their perception of the criminal justice system. Their impression of the court system and in particular whether it is a just system will depend greatly upon their perception, not only about the way in which the magistrate conducts the court, but also on their perception as to how police prosecutors perform their duties.

As you know in the Magistrates Court you may be prosecuting summary trials, you may be appearing on sentences and you may be prosecuting committal proceedings. Sometimes they will be committal proceedings which are full hand-ups, other times there will be some witnesses to be cross-examined, sometimes evidence will be given in full and depending on the seriousness of the charge you may be appearing against the best defence counsel in the state.

You may be appearing in the Childrens Court or the Drug Court pilot program. As you may be aware we have Drug Court pilot programs being conducted in Southport, Beenleigh, Ipswich, Cairns and Townsville. Those courts operate somewhat differently from the courts that we are most used to. They operate

as a team and there are team meetings. If you are a prosecutor attached to one of those courts you will be involved as part of the team with the magistrate, Legal Aid practitioners and Corrective Services personnel in helping develop sentencing strategies to assist drug dependant offenders, often people who are recidivist offenders.

You might also appear in the Murri Courts, special courts we operate in some parts of Queensland to deal with indigenous offenders. These courts were created to try and provide a less threatening environment for indigenous offenders and also impose culturally appropriate sentences, with the aid of community justice groups or community elders, who sit on the bench with us. If you go into those courts you will normally find, particularly in Brisbane that the magistrate sits with an elder at the bench in front of the magistrate's bench, so that they sit on the same level as the offender. The police prosector in that court appears in civilian clothing rather than in police uniform and there is more direct conversation between the bench and the defendant than is found in a normal court. In addition an elder can ask the defendant questions and the defendant can have, to assist them, a family member or somebody who they feel comfortable with, who can also address the court. There are a number of variations that operate around the state. Murri courts operate in Brisbane on a weekly basis, Rockhampton, Mount Isa and most recently in the Childrens Court.

As you travel around the state to perform your duties you will find that no one-size fits all solution to how Magistrates Courts operate. You will find for example that if you prosecute in indigenous communities in the Gulf and on the Cape York peninsular or the Torres Strait Islands that the way courts operate in those areas has to be different to the way they operate in the city.

The police prosecutor has a large responsibility. These responsibilities include:

- Determining what evidence to place before the court
- Determining what witnesses to call

- A myriad of other complex decisions.

As such the police prosecutor wields enormous power. The unethical or unprofessional use of that power has the potential to undermine the rule of law. It also has the potential of affecting the credibility of the prosecutor and also that of the police service.

Your credibility in a courtroom is as important as the credibility of the defence counsel. You will find that you get much better results from courts that trust you and feel that they can rely upon you than courts that have reason to doubt that credibility. The court must feel confident in the submissions that are being made to it. On the other hand an ethical and professional and disciplined approach to the discharge of your powers will not only enhance the rule of law but also your professionalism as a prosecutor and the reputation of the Queensland police service.

The essential first step is for the prosecutor to look beyond being a mere representative of the police officer who brings the charge or the victim. If there is one thing that I would like you to take away from this morning in addition to what I hope are some practical suggestions that I will make later it is that you must look beyond being a representative of the charging police officer or even the victim. Albeit you must be sympathetic to the victim and you must make the victim feel as if they have had their day in court and that their interests have been properly represented, you must consider yourself as representing society as a whole. You are in court as an officer of the criminal justice system. Therefore you must keep your professional distance in the way in which you prosecute the case and you must keep your objectivity and be even handed. At the end of the day you are in the court to assist the court to get to the truth and not to obtain a conviction at all costs.

Your duty to the court is to act in an honest and impartial manner. This involves placing before the court in an understandable and logical way all relevant and admissible evidence, taking care not to exclude any properly admissible evidence which may be of assistance to the defence. If in the

course of a summary trial the prosecutor failed to call a relevant witness this could constitute a miscarriage of justice and could lead to a new trial. Similarly withholding documentary evidence in your possession or power which could assist the defence could also lead to this result. There is also an obligation at a committal proceeding for you to place all relevant and admissible evidence before the court. This is consistent with the recent amendments to the Criminal Code which have placed much more extensive statutory obligation of disclosure on police prosecutors and the police service in general. Indeed you may find if you disclose the information which is the basis of your case at an early stage that it will lead to an early resolution of the case, particularly if the defence appreciate the strength of the case against them.

Not only must you as a police prosecutor without fear or favour ensure that all relevant and admissible evidence is elicited during a summary trial or during committal proceedings but you also must be prepared to make a submission to a magistrate in an appropriate case that there is insufficient evidence to warrant the conviction or committal of the defendant if this is the case. The Prosecutor must not pursue any argument of law or fact that does not carry weight in his/her own mind. What I am saying is, it is important to make concessions.

You will often be appearing before the same magistrates, maybe less so in Brisbane than other parts of the state. Even in Brisbane if you are prosecuting for any length of time you are likely to consistently come before the same magistrates, and you will get on so much better and your arguments will carry so much more weight if you are prepared to make concessions in appropriate cases and you do not put up submissions in support of propositions which are really not available on the evidence or on the law.

This objective attitude is inconsistent with the “win at all cost” approach, but not trying ones hardest and best. You must remember as prosecutors it is not a question of wining or losing, it is putting up the case to the best of your ability. The fact is that in criminal trials, as you know, the concept of “beyond reasonable doubt” applies. In the majority of cases by far, the overwhelming

majority of cases, you must prove your case to the satisfaction of the court "beyond reasonable doubt". Because of that standard you cannot always expect that you will attain a conviction. If you do not attain a conviction it is important that you do treat the court with respect. It is important that you accept the rulings of the court and not be seen to disagree with them, either by body language or by tone of voice, no matter how disappointed you might get.

In preparing to speak to you today I asked for some views from experienced magistrates, people who have been on the court for longer than I have, about "dos and don'ts" that I could talk to you about as a matter of practical examples. The concept that I have just mentioned is one of the points that came through, so obviously magistrates do experience prosecutors from time-to-time who do make it quite obvious that they don't respect the courts decision because they are disappointed in it. I would urge you not to behave in that way because you cannot always win. The standard of proof is such that you cannot always win and you will not do yourself any good in the long run in courts if you behave in that manner. Having said that, there are a number of excellent prosecutors that I see in the courts before me who are prepared to make concessions, who are prepared to take it on the chin when the evidence does not go their way or the decision goes against them because they can appreciate that there are in fact difficulties with the prosecution case.

This is what is involved in due process. A police prosecutor who does act in accordance with due process which respects the rights of the individual is likely to establish his/her credibility with the court and the legal profession.

I would like to give you some practical pointers which I hope will assist you in presenting cases before the courts. As I have said in giving these to you I have also consulted with other magistrates so I could get a cross section of views.

First, I would like to stress are what I call the three P's. I might indicate to you that I say this not only to you but I say it to legal practitioners who I address,

including the people who appear at the defence end of the bar table. The P's to me are punctuality, precision and professionalism and probably as part of professionalism I could add another P, that is to be prepared.

I have already spoken to some extent about a professional approach to prosecuting so I will say something about punctuality. This is something that applies more to the other end of the bar table than it does to yourself. I generally find that police prosecutors know what time that they have to be in court and they are there. It is important to remember that the Magistrates Courts as I said before is the first port of call, the court of first instance in the judicial system. It is entitled to be treated with the same respect as the Supreme or District Courts. This includes being ready to start on time, whether that time is in some courts at 8:30 am or in other courts 9 o'clock or 9:30 am. That will probably be less of an issue to you because of the times you are starting your shifts. It is probably a bit harder for legal practitioners who are used to starting court at 10 o'clock in the District and Supreme Court. As you would appreciate there are reasons why the Magistrates Court starts early. In many cases it is because of the large bulk of work that has to be got through during the day. We are also a lot fresher at the beginning of the day and less likely to make mistakes than if we start late and proceedings drag on until 5 o'clock or even later. This is particularly the case in the big callover courts like court 1 in Brisbane and some of the other arrest and callover courts around the state where hundreds of matters can be transacted on a particular day.

I say this because I did find when I arrived in one particular court in Brisbane, and this has nothing to do with police prosecutors, that a court that was due to start at 9:30 am was lucky to start somewhere between 9.45 and 10 o'clock in the morning. It seemed that practitioners had the attitude that they started court when it suited them. That has changed as I now adjourn the matters in that court to 9 o'clock and allow half an hour to prepare so that we start at 9.30 am.

Having said that I appreciate that there are things that happen which make it difficult to start on time - maybe the defendant turns up late or a witness you need to have a conference with is late. There can be many acceptable reasons for why court cannot start on time. I do ask, whether the case can start on time or not, that you are there with the representative of the other side and in a position to tell the court at 9 o'clock, if that is the time the court starts or 9:30 am or even 8:30 am, as to how the day is going to unfold. If it is obvious that you cannot start until 10 o'clock and there is a good reason for it, mention the matter at 9 o'clock to make sure the court understands what is happening. The court will be a lot less frustrated and will be much more comfortable about what is occurring provided that it knows what it going on. It is also possible that some other arrangement can be made to restructure the day so that time lost at the beginning of the day can be picked up by having a shorter lunch or what ever else it might be.

The important thing is to let the court know what is going on. That is the case even if you end up prosecuting in some of the indigenous circuits. There are real issues in indigenous circuits about people being at court on time when their case is due to start and magistrates who go to these areas appreciate that and they know they have to be a lot more flexible in the way in which they conduct courts in Cape York and the Gulf communities than would be the case, say in Brisbane or some of the major metropolitan or provincial centres. Even in those situations the court would like to have somebody appearing at the time the court is due to start to tell it what is happening for the day. I would like you to bear that in mind.

An aspect of professionalism is to prepare your case with care, although I and all other magistrates appreciate that you normally don't have the benefit of getting the brief a long time in advance of attending before the court to prosecute the case.

When you get into court it is important to announce your appearance clearly and to spell your name. Not every magistrate will be immediately familiar with you particularly when you are starting in new areas and particularly when you

are going through a number of different courts in a jurisdiction such as Brisbane. Speak clearly, don't mumble and don't speak "50 to the dozen" as one magistrate put it to me before I came here this morning, particularly when you are giving facts from a QP9 on sentence. I have to say that I experienced that recently in a court and I found it extremely frustrating that somebody put their head down into the QP9. I understood they probably had not seen the QP9 before they started to read it, but down went the head into the QP9. It was read quickly and indistinctly. Time was lost rather than gained by racing through the QP9 because I had to keep going back and asking what had been said because it was simply impossible to keep up and take notes about relevant matters. So I would ask you to bear that in mind when you are appearing in the courts.

It is also important to be familiar with legislation you are prosecuting under and in particular the maximum penalties under that legislation. There is a lot of legislation that magistrates deal with everyday where they will be immediately familiar with the maximum penalty, for example the Vagrants, Gaming and other Offences Act and the Traffic Legislation. There are other pieces of legislation that none of us come across on a regular basis and in those circumstances you might find a magistrate asking you "what is the maximum penalty for this offence" and you really need to be in a position to able to tell the court that so no mistakes are made.

There was a case recently in which when that question was asked, the prosecutor who must have had an old copy of the legislation told the magistrate the penalty was $14,000.00 when the maximum penalty was $75,000. You might say that magistrates are supposed to know the law or the magistrate could have stood down and checked it up himself. However this is not always possible in a busy court when you are trying to transact and move a considerable amount of business through the court in an efficient manner. Magistrates as is the case with any other judicial officer, are entitled to expect when they ask a question they can be given an accurate answer and they can rely upon it because there is not always the time to stand down and look up

pieces of legislation which they may not have on the bench with them at the time that they are dealing with the sentence.

I always had the approach as a prosecutor myself that the very first thing I did when I look at a piece of legislation, particularly if I was going to be dealing with a sentence was to look at the maximum penalty and highlight it so that I would tell the court. It is also important to make inquiries as to whether or not the legislation has been amended recently. I am sure that is what happened to the prosecutor in that particular case - he went to court with an old copy of the legislation. But with electronic aids these days it is not difficult to find through various statutory websites including the one that is provided by the Queensland Parliamentary Counsel, the most up to date copy of the Act.

Also while taking about being prepared I would like you to be prepared to make submissions on sentence including specifying a range of penalties, especially if you are invited to do so by a court. Once again you will find that there are many offences particularly street offences, public nuisance and drink driving offences that come up all the time and magistrates will be well aware of the range which is appropriate in those cases. You might have a magistrate who has recently been appointed who is not aware of the range and at that stage he/she will be seeking to obtain considerable assistance from the prosecution as to what the appropriate range of penalties are for certain offences. Also if a magistrate is moving into a new jurisdiction it may be the penalties in a regional area differ slightly from the range of penalties that apply in Brisbane. I tend to travel the state and sit in various courts. I was greatly helped recently by a prosecutor in Mt Isa who obviously knew I would not have any idea of what the local range of sentences was and very helpfully told me, every time she made a submission on sentence, “the range that we apply here is between this and this”. I found that to be extremely helpful.

There will be of course cases that are a bit unusual. These are the cases where magistrates will be particularly looking for assistance on sentence. It would be useful if you have some comparative sentences available if you have time to prepare them to help the court - some decisions of previous

courts on either principal or sentence in similar facts situations. In particular in those cases, where whether or not the person might be imprisoned is a borderline issue, it would be valuable for the magistrate to have some submissions on sentence.

The prosecution is in fact obliged when required by the court to assist in this way. So don't be shy about that. Try to identify the cases that are a bit out of the ordinary where the magistrate might want help and do a bit of research about them if you have a chance before you go into court, and certainly assist the magistrate if the magistrate makes any requests of you about what the range of sentences might be.

Consistently with what I said before about making objective submissions if you are making submission on sentence or if you are asked to make a submission on sentence, don't ask for a sentence which is not justified by the facts or and antecedents of the offender and don't ask for a sentence which is clearly beyond range. In particular don't ask for imprisonment if it is not warranted by the facts. Again, your credibility will grow with the magistrate if he/she appreciates that you don't make unwarranted over the top submissions on matters like this. You are more likely to have your submissions accepted in other cases once that credibility has been established.

It is also important to refer to factors in mitigation as well. A number of prosecutors who appear before me in Brisbane certainly do that and it is extremely helpful. Again it does a lot to establish your credibility with the court.

You will probably be aware as a result of the amendments to the Criminal Code earlier this year, section 590 AH provides that the prosecution must disclose a copy of the accused's criminal history which is in its possession. It is important for defence counsel conducting trials to have an accurate understanding of what their clients criminal history is, whether they have a criminal history at all, or if so, how serious it is, so that they can properly

decide how to run their case and whether, if they cross-examine a Crown witness about his/her criminal history, their client will be at risk in being cross-examined as to his/her criminal history.

The prosecution in my view also has a duty to inform the defence of any previous convictions it is aware of for any other prosecution witnesses. You don't loose anything in my experience by being fair. Your credibility grows and you find that you win more cases than you loose. Although as I said it is not really a question of winning or losing when you appear in court.

If you are referring to legal decisions the court would like you to refer to them by their proper citation. It appears from what I have been told by one of our magistrates that he has had the experience that someone just cited the page in the police prosecutions manual. That is not very helpful to magistrates because we don't have the police prosecutions manual in front of us when we are dealing with matters. So if for example you are citing an authority from the Queensland Reports it might be R v Smith (1998) 1 Qld Reports 283 or something to that effect. If it is an unreported decision that you are relying upon it can be referred to by the name and number of that decision. If you do have an unreported decision it would be helpful if you have a photocopy to hand that up to the bench so that there is a copy of the case before the magistrate. Of course if the case has been reported there is always the opportunity for the magistrate to be able to get a copy of that decision. Even in those circumstances if it is a case that you think is important to support your argument it would assist to provide a photocopy of that to the magistrate. That is what happens in the Higher Courts including the Court of Appeal. Even though many of the cases referred to have been reported in law reports the Court of Appeal always asks you to bring photocopies of those cases so that they have got them immediately before them when they are considering the arguments made to the court. This is something that is helpful and appreciated by the court.

Another of our magistrates suggested to me that if you are prosecuting in Court 1 and somebody pleads guilty to a Commonwealth offence the best

approach would be to remand it to the court that is set aside for Commonwealth matters. This is because you probably won't deal with Commonwealth offences very regularly. The magistrate who is appearing in court 1 also probably doesn't deal with Commonwealth offences everyday of the week. We do have a specialist court set aside to deal with Commonwealth matters with a magistrate who does that regularly for a period of 12 months to 2 years. It is more efficient and also conducive to a just outcome if the matter is adjourned to court 11 at 9.30 am on Fridays in the current building. It will be a different number court when we move to our new premises on George Street. These are premises that will make everybody feel better about coming to work and appearing in the courts and hopefully will remove a lot of tension and trauma that is associated with appearing in what is really a building of a by-gone era where the facilities and the colours and the lack of interview rooms or places to get away from other people in the building I am sure only add to the trauma and tension of the day. My suggestion to you is if you do have a Commonwealth matter it would be better if you suggest that it be remanded to the Commonwealth court which sits every Friday at 9.30 am.

I would like to say something about trials. Firstly if you are questioning witnesses refer to them as Mr or Ms or Sargent or Constable or whatever the appropriate title is and don't call them by their Christian name. This is also a suggestion, made to me by magistrates who have come across people who have done so.

Undoubtedly you have had it drummed into you during this course not to ask leading questions in evidence in evidence-in-chief. We all have a tendency to do it particularly if the witness is not giving us the answer we want. At the end of the day answers given to leading questions on vital matters don't carry much weight with the court. Obviously you can ask leading questions on those matters that are formal. Sometimes the defence will agree to leading witnesses through matters that are not contested because that saves a lot of time. When it comes to vital issues it is important not to ask leading questions. Your case will be all the better if the witness volunteers the answer without the

answer being put into his/her mouth. In a similar vein if you are not getting the answers that you want don't keep repeating the question. Courts do not appreciate the same question being asked over and over and eventually a rebuke will come from the bench.

I would also urge you to be tolerant of self represented litigants. As I have said the incidence of self representation is steadily increasing in all Australian courts and in particular in the Magistrates Courts. That situation is unlikely to change. Limitations on the availability of Legal Aid, substantially contributes to this problem and relief in that area seems unlikely.

Ultimately it is a fundamental right for a party to be self represented particularly if they have no other choice. I know that they can be frustrating, particularly those self represented litigants who are blinded by an intractable commitment to the rightness of their case and lack any objective view. It has to be remembered that these are people who are not familiar with the legal system. As a result of that the magistrate has to take even more care than usual to ensure that such persons have a fair opportunity during their day in court and that may involve spending some time explaining to them their rights and how the system operates. You might find that frustrating, particularly if you have a difficult self represented person to appear against. Ultimately like everybody else in the court they are entitled to be treated with respect and again intolerance towards them will not impress the court.

When you make submission at the end of trials, try to identify the issue which is in question don't make submissions by rote because there is a standard set of submissions you make in every case. Try to identify the issue and go to that and direct your submissions to that. You will find for example that the magistrates know what the standard of proof is. You are not addressing a jury. You are addressing a lawyer who knows these things. Don't spend a lot of time going over those issues because magistrates will feel that is just wasting time, particularly if there are a number of trials to be dealt with in the one day. You will achieve so much more if you go to the central issue and address your submissions on facts and law to that. Be as concise as you properly can. It

may become apparent before the hearing that a matter cannot proceed, perhaps because you have found that a witness has become ill or is unavailable because of other commitments which have come up. If you get that information let the defence know as early as possible and have the matter mentioned before the court at the earliest possible opportunity. The courts appreciate that. So if it is quite apparent that a matter can't proceed make an earlier application to have it adjourned to another date. Sometimes these matters can be adjourned on papers. But in other cases the matter will have to be mentioned in one of the courts. This means that the courts not wasting time that might otherwise be wasted if the matter falls over at the last moment. This prevents losing time which could have been used for another case.

However don't assume that the court will always grant an adjournment. The court doesn't like it when prosecutors and defence counsel turn up before the court on the morning the matter is listed for hearing and unilaterally tell the court that they have agreed between themselves that the matter is to be adjourned. The court might have another view about that. Ultimately it is up to the court to regulate its own procedures and you will find that magistrates like to make their own decisions about these things. That is why it is very important, as I said, if there is a reason for an adjournment that the matter gets brought to the attention of the court at the earliest possible opportunity and not on the morning the matter is supposed to proceed. From time-to-time you will be approached by the defence counsel who wants a matter put off because clearly they are double booked and they want to be able to deal with both matters. They will understandably hope that you agree to that so that they can earn both of their fees. The courts attitude is that there are a lot other people who are competent to do these cases in Brisbane and they should be briefed instead. Try not coming to the court with unilateral agreement on adjournments, remembering it is the court that makes the final decision.

It is also the court which has to make the final decision whether prisoners who appear in court should be handcuffed. This is an issue that crops up from time-to-time, particularly in Brisbane. You should work on the basis that magistrates are not going to take any silly risks with people who are really

escape risks. However as you are probably aware your directions from Deputy Commissioner Condor are that people should not be brought in to court in handcuffs unless the matter has been raised with the magistrate in advance of that and the magistrate has made a decision as to whether or not the person can be brought into court in handcuffs.

It is all a matter of recognising that it is the court that controls its own procedure and it is the court that makes rulings about these matters. You will find that if you say to the magistrate that a person has a record of escaping from custody or some other reasonable argument as to why a person might be a danger if not in handcuffs, that magistrate will accept it. We just want to have the opportunity to make our own decisions about these things and not have them taken out of our hands.

Also don't be over familiar with court staff. I know if you are appearing in courts regularly particularly in regional areas that you would get to know the staff very well. I say that to you again because one of the magistrates suggested I raise this with you. So again that magistrate has seen it as an issue. It is all an issue of perception. There is supposed to be a separation between the court as a judicial arm and the police service as part of the executive and it can create the wrong perception if the defendant comes to court and sees there is a too familiar a relationship in the court between the prosecutor and the court staff. Much of what happens in court is about perceptions. This is something you have to appreciate all the time.

In conclusion, as police prosecutors you are responsible for the great bulk of prosecution work in the magistrates court and as I said you wield enormous power in that regard. Your role goes to the very heart of the public trust on which the system of justice depends. It is essential for you to look beyond being a mere representative of the police officer or the victim of the offence and consider yourself as a representative of the community and a person who is an officer of justice who is there to assist the court in getting to the truth.

This will not only enhance the rule of law but also the professionalism of yourselves as police prosecutors. It will also enhance the reputation of the police service.

I wish you well in your future career as police prosecutors. It is a very important role, it is an integral role to the efficient and fair operation of the Magistrates Court and it is important that experienced people of commonsense are prepared to take on this role in the court. I look forward to seeing some of you appearing in courts I preside in over the coming months and perhaps the coming years, perhaps in various parts of Queensland. I know that you will all be prepared, professional and punctual and precise and wish you all the best for your future careers.

Thank your again for the opportunity to talk to you this morning.

Judge MP Irwin
Chief Magistrate