QUEENSLAND LAW SOCIETY
PLEAS OF GUILTY WORKSHOP

Monday, 15 May 2006 at 9.00 am
Law Society House

"Effective plea making from a Magistrate's perspective"

Judge Marshall Irwin
Chief Magistrate

Magistrates Courts are the courts of first instance in the judicial system[1], dealing with approximately 96 percent of people who are charged with criminal offences in Queensland. A large proportion of the court's time is taken up with sentencing. In discharging this responsibility, magistrates are entitled to expect the same respect and assistance as is received by the higher courts in the judicial structure.

The sentencing stage is at least as difficult and significant as any other part of the criminal justice process. To ignore this, whether as a prosecutor or as a defence counsel, is to fail as an advocate[2].

The prosecutor's role

The prosecutor has obligations different to those of defence counsel, owing duties both to the court and the public at large[3]. As is stated in a United States commentary on prosecutorial ethics:

> "The first, best and most efficient shield against injustice must not be in the persons of defence counsel, trial judges or the appellate court, but in the integrity of the prosecutor
> …. this notion lies at the heart of the criminal justice system."[4]

As stated by the Lord Chancellor of England on the introduction of the *Prosecution of Offences Bill* in 1988:

> "Prosecuting counsel is not an avenging angel; he is an instrument of justice."

Therefore the prosecutor must act fairly and impartially[5]. It is the duty of the prosecutor to make submissions on sentence to:

- Inform the court of all of the relevant circumstances of the case;
- Provide an appropriate level of assistance on the sentencing range;
- Identify relevant authorities and, legislation; and
- Protect the court from appellable error[6]

McPherson JA said in *R v Tricklebank ex parte Attorney-General* [1994] 1 Qd R 330 at 338:

> "The sentencing process cannot be expected to operate satisfactorily; in terms of either justice or efficiency, if arguments in support of adopting a particular sentencing option are not advanced at the hearing but are deferred until appeal."

This was emphasised by Keane JA in *R v Cay;* Exparte Attorney-General [2005] QCA 467, 14 December 2005 in which the appellant argued that the sentencing judge erred in exercising the discretion under section 12 of the *Penalties and Sentences Act 1992* to order that no conviction be recorded. The Crown Prosecutor had expressed no attitude on the issue. His Honour said at [12]:

> "Especially where the offence is by nature serious, the question whether or not to record a conviction should be addressed with considerable care, not only by the defence, but also by the Crown Prosecutor. It was unsatisfactory that in this case, no attitude was expressed by the Prosecutor. A substantial argument could have been mounted in support of the recording of convictions, respecting the community's fundamental interest in knowing the truth about an offender's background."

The *Director of Public Prosecutions Queensland – Director's Guidelines* dated on 18 November 2003 state at paragraph 42 (xi):

"…if a judge is lead into error by the prosecutor, justice may be denied to the community.

- Concessions for non-custodial orders should not be made unless it is a clear case.
- In determining the appropriate range, prosecutors should have regard to sentencing schedules, the appellate judgements of comparable cases, changes to maximum penalties and sentencing trends.
- The most recent authorities will offer the most accurate guide."[7]

These guidelines are addressed to Crown Prosecutors rather than to the Police Prosecutors who undertake the bulk of prosecutorial work in the Magistrates Court. However when I address Police Prosecutors I advise them to adopt the same approach. In particular I tell them:

- not to ask for a sentence which is not justified by the facts or antecedents of the offender;
- not to ask for a sentence which is clearly beyond range;
- not to ask for imprisonment if it is not warranted by the facts; and
- to refer to factors in mitigation as well as to factors in aggravation.

It is also important to follow paragraph 42(v) of the guidelines which provide that:

"The prosecution must ensure that any criminal history is current as at the date of sentence."[8]

The Defence Counsel's role

It has been said that it is the role of the defence advocate to obtain by legitimate means the punishment which to the client is the least undesirable of those which fall within the often broad range of sentencing options available to the court.[9]

Professionalism - Preparation and Precision

When I address lawyers on advocacy skills in the criminal jurisdiction I refer to the 3 *P's* of *punctuality, preparation and precision* which are expressed in a further *P* word, of being *professional.*

Preparation and *precision* are particularly important advocacy skills for practitioners who are seeking to most effectively represent their clients upon sentence in the Magistrates Court.

Preparation

In particular it is essential that advocates:

- are familiar with the legislation relevant to the case, including the sentencing guidelines in section 9 of the *Penalties and Sentences Act 1992* and section 150 of the *Juvenile Justice Act 1992*.

- bring an up to date copy of the legislation to court;
- are able to address the court about:

    - the maximum penalty for the relevant offence;
    - the maximum and minimum periods of driver licence disqualification, if applicable;
    - the sentencing range applicable in the circumstances of the case;
    - eligibility for community based orders;
    - issues related to breaches of suspended sentences of imprisonment and community based orders;
    - eligibility for post-prison community based release orders (which should again be known as *parole orders* from 1 July 2006);
    - the circumstances of previous convictions for like offences; and
    - the recording or non-recording of a conviction.

- are able to provide comparative sentences to the court;
- are able to provide a photocopy of relevant legislation and cases to the court;
- are able to verify their client's instructions, if requested to do so by the court; and
- ensure that any reference tendered in a criminal case demonstrates on its face that the author knows the purpose for which it is given.

The number of websites available, including that of the Queensland Parliamentary Counsel should make it a simple matter to access the most up-to-date reprint of the relevant legislation, and also any subsequent amendments, where necessary.

As a practitioner I found it a valuable starting point for the preparation of a case to not only make a list of the elements of the offence, but also to note the maximum penalty and the maximum and minimum period of any driver licence disqualification applicable.

I was therefore pleased to hear Hayne J of the High Court of Australia say in his address to a Queensland Bar Association Conference on 4 March 2006 that the essential starting point for the usually experienced advocates who appear before that court is the relevant statute. This illustrates my point that the same principles and quality of advocacy are to be expected at all levels of the judicial hierarchy. Therefore if you adopt best practice in the Magistrates Court, which is the court of first instance in that hierarchy, the benefits will remain with you when you appear as advocates in the higher courts.

In the Magistrates Court it is also important in the case of an indictable offence to confirm that it is one that can be dealt with summarily, and where an election is involved, as to which party is entitled to make the election.

Yet there are cases which come before the Magistrates Court in which the magistrates are referred to incorrect penalties (from

outdated copies of legislation) or asked to deal summarily with matters which can only be dealt with on indictment. In other cases inquiries by magistrates about maximum penalties and driver licence disqualification periods receive negative responses. This is because practitioners have not checked the legislation, and have left the issue entirely to the magistrate.

While there may be no need to assist the magistrate on these issues or on sentencing ranges (or to provide comparative sentences) for offences which regularly come before the court, eg. public nuisance offences, it is essential to be prepared to assist the magistrate where this is not the case, and to be ready to accurately provide assistance to the court when it is requested on such issues.

Magistrates cannot be expected to have an encyclopaedic knowledge of maximum penalties, driver licence disqualification periods, sentencing ranges and comparative sentences for the myriad of offences with which they are required to deal.[10] As is evidenced by the Appendices to the Queensland Magistrates Court 2004/2005 Annual Report, there are over 200 pieces of diverse legislation which can potentially come before the court, often in the course of busy callover lists where time is of the essence. The list of legislation within the Court's jurisdiction is continuing to grow. In addition a magistrate may not be familiar with particular legislation if he or she is newly appointed. There should not be too much reliance placed on the impossible proposition of magistrates knowing it all.

If it is intended to submit that an offender receive the benefit of a community based order such as probation, community service or an intensive correction order, steps should be taken, if possible, to have the offender assessed by a community corrections officer before the matter is mentioned to the court. This will ensure that court time is not lost while awaiting the assessment, and will be appreciated by magistrates.

In addition in the case of an indigenous client in a jurisdiction where a Murri Court operates[11], it is important to consider whether to apply for the matter to be heard in that court, and for steps to have the client interviewed by any Community Justice Group which operates in that jurisdiction in advance of the sentence being considered by the court.

Both prosecutors and defence counsel should draw the court's attention to whether the offender is pleading guilty to an offence which is in breach of a previously imposed suspended sentence of imprisonment or a community based order.

This is particularly important with a suspended sentence, because a Magistrates Court which convicts an offender of an offence for which imprisonment may be imposed and is satisfied that the offence was committed during the operational period of an order for a suspended sentence of imprisonment imposed by the court must deal with the offender for the suspended imprisonment. Where the suspended sentence of imprisonment was imposed by a higher court, the Magistrates Court must remand the person to appear before that court.

In my experience, magistrates are too frequently left to discover for themselves, from reading the criminal history that the offender is in breach of a suspended sentence of imprisonment, and then has to invite submissions from the prosecutor and defence counsel as to how it should deal with the offender. The court should not be left to do this for itself, because in a busy list there is a danger that this fact will be missed. This is another reason why the most up-to-date criminal history should be provided to the court.

Where the court is required to deal with the offender for the suspended imprisonment it is essential that the prosecutor and defence counsel direct their minds and submissions to the principle under section 147(2) of the *Penalties and Sentences Act* that it must order the offender to serve the whole of the suspended imprisonment unless it is of the opinion that it is unjust to do so, and the factors that the court is required to have regard to under section 147(3) when making this decision. A recent decision of the Court of Appeal which may assist you in this regard is *R v Hurst* [2006] QCA 102, 17 March 2006.

It is also important that there be positive assistance provided to the court where the issue of eligibility for post-prison community based release arises. Section 157(2) of the *Penalties and Sentences Act* vests discretion in a court to recommend eligibility for this after serving a specified part of a term of more than 2 years imprisonment. The Magistrates Court will particularly value that assistance in cases where it imposes another term of imprisonment on an offender who is already serving imprisonment

for the offences, with the result that the offender's period of imprisonment is more than 2 years. In this circumstance the court must:

- if a Magistrates Court last sentenced the offender to a term of imprisonment – make a recommendation for post-prison community based release relating to the period of imprisonment that the offender must serve; or
- if a court of higher jurisdiction last sentenced the offender, to a term of imprisonment – recommend a non-release period in relation to the fresh term of imprisonment imposed by the court.

This is a principle which can be easily overlooked in a busy court, and should be specifically drawn to the magistrate's attention rather than relying on the magistrate knowing it all.

As I have already noted it is anticipated that the *Penalties and Sentences Act* will be amended to replace the concept of post-prison community based release orders with parole release dates and parole eligibility dates. This will include the repeal of s157.

Instructions should be taken of facts surrounding previous offences of a like nature to the offence which is the subject of the sentence proceeding. These offences will be apparent from the defendant's criminal history. For example a defendant may be pleading guilty to assault occasioning bodily harm. If that defendant has a previous conviction for the same offence, it is relevant for the sentencing court to know the circumstances of that offence. If

these instructions are not taken prior to the plea of guilty being entered, time will be lost while the information is sought from the defendant in court, often with the response on the spur of the moment, that there is no recollection of the circumstances.

The issue of whether or not the court should record a conviction in the exercise of its discretion under section 12 of the *Penalties and Sentences Act* should be addressed as part of the submissions on sentence, and not left until after the penalty has been imposed.

These submissions should be made with reference to the circumstances, a court must have regard to under section 12(2). Although it is accepted that this discretion is at large and the considerations are not limited to the matters contained in this section.

In making such a submission, counsel must remember that it is insufficient to enliven the discretion not to record a conviction to simply demonstrate a possibility that a conviction may affect an offender's prospects of future employment: see *R v Le* [2003] QCA 256, 18 June 2003; *R v Bain* CA [1997] QCA 035, 14 March 1997. Although these decisions must now be read in light of the observation of Keane JA in *R v Cay* that it is not an essential requirement to exercise this discretion in favour of the offender to identify a specific employment opportunity or opportunities, he added that simply to point to a possible detriment on future employment prospects will usually be insufficient of itself, to order a positive exercise of the discretion to order that a conviction should not be recorded.

Notwithstanding this, Magistrates Courts continue to receive submissions in terms of the possible detriment on future employment prospects rather than providing the court with evidence that the recording of a conviction would have such an impact based on legislative requirements, employment criteria, or written confirmation from an employer or potential employer that this is the case.

If a submission is to be made that the court should approach the matter on the basis that the offender has a job to go to, has accommodation arranged, has undertaken a course of rehabilitation or has made restitution to the victim, every effort should be made to obtain written confirmation of this to be tendered to the court, or at least to confirm this by direct telephone contact with the person reputed to be able to support the fact that this is the case. Your submissions will have greater weight in these circumstances. Otherwise a court is entitled to be sceptical of a sudden positive turn around in the offender's fortunes.

Similarly when the defence is relying on medical, psychiatric or psychological factors in mitigation, some evidence of this should be produced rather than a simple assertion from the bar table to this effect. Any report on these issues which is tendered should be confined to the field of expertise of the author and not enter into the field of judicial determination by making direct comment of what sentence is appropriate.[12]

In Brisbane and Townsville you may be able to gain some assistance in this regard from the Mental Health Liaison Officer currently stationed at the arrest courts. I understand that such liaison officers will all soon be present at Southport, Maroochydore, Toowoomba, Beenleigh, Ipswich/Richlands and Sandgate/Caboolture.

In Brisbane you may also receive some assistance from the Homeless Persons Liaison Officer in the context of the Special Circumstances List pilot which operates each Thursday at the Arrest Courts. The eligibility criteria for inclusion in this list is Annexure "A." You will note that in addition to homelessness one of the criteria is that the defendant suffers from impaired decision making capability as a result of either mental health issues, intellectual disability or brain/neurological disorders.

A reference relied upon to support defence submissions will be given greater weight if it is expressly stated by the author that he or she knows that it is given for the purpose of a court proceeding and also the nature of that proceeding. For example such documents should be addressed to the presiding magistrate, rather than "To whom it may concern," which is sometimes unfortunately the case.

Each of these examples of diligent preparation requires no less than would be expected in a higher court.

Precision

In addressing the court on sentence identify the issues which are relevant to the court's determination and address them in a manner which is succinct and to the point. This will ensure that only meaningful and helpful material in mitigation is advanced to the court.[13] For example don't provide the court with your client's entire life and employment history, only those parts which are relevant to explain the offending behaviour. It is important to remember that the Magistrates Court is an extremely busy court with limited time to deal with each sentence.

The necessity of *going to the heart of the matter* was another point made by Hayne J in his address to the Bar Association Conference. And speaking at the Dame Ann Ebsworth Memorial Lecture in London, in February 2006, Kirby J said in relation to the mountains of information now available to courts that "a groan can sometimes be heard begging for the return of the days when one of the true skills of the advocate was discernment: the decision to cut away irrelevant or insignificant materials unlikely to help the decision-maker to come to the desired outcome." He added that the internet is of "enormous value" to an advocate when used selectively but that "It is not so valuable if it is used indiscriminately to generate masses of unread or ill considered material." He quoted former Chief Justice of the High Court, Sir Gerard Brennan, who said that "technology is but a tool for the well-trained analytical mind." From a practical point of view, as Hayne J also observed, it is important to remember that your bad points can infect your good points.

I have always found that it is good practice to advise the court at the outset, the sentencing option or options that you are seeking on behalf of your client. This will ensure that the court has an immediate understanding of the thrust of your submissions. It provides a foundation on which to structure your submissions in support of your contention and enables the court to focus on what you are trying to achieve. It would also ensure that you do limit your submissions to only those matters that are truly relevant to the court's determination.

It is important to be familiar with the sentencing guidelines in the *Penalties and Sentences Act* and the *Juvenile Justice Act* because these contain the principles which the court must have regard to in sentence. Submissions should recognise and be relevant to these guidelines. Although the court can be expected to appreciate the guideline to which your submission relates without it being necessary to designate the paragraph containing the particular principle to which the submission relates.

Always "know your court" so you address issues and provide the information which you know from experience is required by the particular judicial officer before whom you are making submissions.

Those cases in which it will be necessary to assist the magistrate as to sentencing options and ranges should be obvious to the prosecutor and defence counsel. In those cases there should be

positive submissions on these issues, supported by comparative sentences.

The court should not be left to ask counsel, “what do you suggest by way of sentence?” and should not simply receive the reply, “I’ll leave it to Your Honour.”

The court should also not be told, as occurred recently when it asked for comparative sentences that the Magistrates Court jurisdiction does not keep comparatives. The lawyer to whom this question was directed should have known that the magistrate was seeking advice about comparative sentences from higher courts. Again this is no less than would be expected by a higher court.

You are of course entitled to comment on the comparative sentences advanced by your opponent and to state why the comparative sentences on which you rely are more appropriate in the circumstances.

Whether as a prosecutor or a defence counsel, never make an argument on sentence that does not carry weight in your own mind, or make a submission for a sentence which is not consistent with a clearly established sentencing range. Concessions should be made where appropriate.

This is important in establishing and maintaining your credibility before magistrates. The court must feel confident in the submissions made to it. It is important to remember that you will

often be appearing before the same magistrate, and even if you are not, that magistrates share their experiences. If you establish a reputation for making unwarranted or over-the-top submissions, your submissions in future cases are likely to be given less weight by the judiciary. On the other hand you will find that magistrates will be more likely to accept your submissions in other cases once your credibility has been established. Therefore you will find that you get a much better result if the court can trust and rely on you.

Conclusion

The sentencing stage is at least as significant as any other part of the criminal justice process. A large proportion of the Magistrates Courts time is taken up with sentencing. In discharging this responsibility, magistrates are entitled to expect the same respect and assistance as is received by the higher courts in the judicial structure, including assistance as to sentencing options and ranges and comparative sentences. The principles of good advocacy are common to the Magistrates Courts and the higher courts. Good habits of advocacy adopted in the Magistrates Courts will stand you in good stead when appearing in higher courts.

Magistrates cannot be expected to have an encyclopaedic knowledge of these matters in relation to the myriad offences with which they are required to deal. There should not be too much reliance placed on the impossible proposition of magistrates knowing it all.

Advocates, whether prosecutors or defence counsel should carefully prepare their submissions on sentence with this in mind, and must provide succinct submissions directed to the issues which are relevant to the court's determination.

If you approach the sentencing stage of the criminal justice process in this manner you will assist the court in its difficult task and demonstrate your professionalism to the court. You will also establish your credibility with the court.

The Queensland magistracy looks forward to you appearing before us and addressing us on sentence in accordance with these principles. Those of you who are starting out in your profession can feel confident that Magistrates will be only to happy to answer your questions about how to enhance your making of effective pleas.

---

[1] The Hon. Justice J B Thomas, "Ethics of Magistrates" (1991) 6 5 A L J 387, 389
[2] C.S.J. Nyst, "Sentencing – The role of the Defence."
[3] M.J. Byrne, "Sentencing – The Crown's role."
[4] C.A. Corrigan, "Commentary on Prosecutorial Ethics," Hastings Constitutional Law Quarterly, 13(3) (Spring, 1987) 537.
[5] Director of Public Prosecutions Queensland – Director's Guidelines, 18 November 2003, Carter's Criminal Law of Queensland, 153053
[6] Ibid, paragraph 42, [147,200], 153080
[7] Ibid, [147,205.50], 153, 084.
[8] Ibid, [147, 205.20], 153, 081.
[9] C.S.J. Nyst, "Sentencing – The role of the Defence."
[10] M.J. Byrne – "Sentencing – The role of the Crown."
[11] Murri Courts currently operate from the Brisbane Magistrates Court, the Brisbane Childrens Court, Caboolture Childrens Court, Rockhampton, Townsville and Mount Isa. Rockhampton and Townsville also operate the Murri Courts in the adult and children's' jurisdictions.
[12] C.S.J. Nyst, "Sentencing – The role of the Defence."
[13] Ibid
14 http://www.lawyers weekly.com.au/articles/0C/0C03DB0C.asp