NORTH QUEENSLAND LAW ASSOCIATION CONFERENCE

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TOWNSVILLE

"MAGISTRATES COURT ADVOCACY"

Judge Marshall Irwin
Chief Magistrate

Magistrates Courts are the courts of the first instance in the judicial structure throughout Australia[1]. The Queensland Magistrates Court is often referred to as "The Peoples Court". This is because it is the court that the majority of people who come before Queensland Courts will have contact with. Approximately 96% of people who are charged with criminal offences come before it. Therefore it is the court where most of the community form their impression of the Queensland criminal justice system.

For these reasons many regard it as the most important court in the judicial structure. It is the court where young practitioners are likely to *cut their teeth* forensically, just as I did over a quarter of a century ago together with many others who are now judges or senior counsel. It is also a court in which practitioners are likely to continue to appear. And Magistrates are entitled to the same respect and assistance from advocates as is received by the other courts in the judicial structure.

For young practitioners it is a good court in which to learn and to hone skills in court craft and etiquette, and other practical advocacy skills while addressing a wide range of legal issues. These learning experiences will include observing and listening to opponents and magistrates, seeking feedback from colleagues and magistrates with a view to enhancing advocacy skills and also learning from mistakes. In my view the only true mistake is the one which is not learnt from. Magistrates are aware that young practitioners will be appearing before them and will be tolerant of those who do their honest best to apply the practical principles which I will outline to you.

Advocacy in the Magistrates Court involves applying the *3 P's* of:

- Punctuality;
- Preparation; and
- Precision.

These principles can be expressed in one further *P* word, of being *professional*. They are essential to the effective representation of clients in the Magistrates Court and also the foundation of advocacy in the other courts in the judicial structure.

Punctuality

An important aspect of showing the Magistrates Court the same respect as the other courts in the judicial structure is being ready to start on time.

The Magistrates Court generally commences earlier than the higher courts. In some parts of the state the court commences as early as 8:30am. The Arrest Courts generally commence at 9:00am. This is because of the large

volume of matters which are dealt with daily by the court. In some arrest courts, such as Brisbane and Southport there will often be in excess of one hundred matters listed each day. The expeditious and orderly discharge of the jurisdictions of the Magistrates Court therefore requires that courts start early and on time. Both the Bench and legal practitioners will be less likely to make mistakes when fresh at the outset of the day than if matters are still being dealt with at 5:00pm.

If you are required to take instructions from a client who is in custody at the court it is important to arrive to take instructions before the time appointed for court to commence so that you are able to appear before the court at that time.

Magistrates appreciate that there will be circumstances beyond the control of advocates which will make it difficult to start on time, eg a client or a witness who should be the subject of a conference arrives late. In these circumstances it is still essential to appear before the court at the appointed time to mention the matter and explain the difficulty. It is important to afford the magistrate the courtesy of making his or her own decision as to whether to stand the matter down until later in the day. The magistrate is likely to be less frustrated and more receptive to submissions if he or she is informed as to what is happening. Early notice of any difficulty will enable the work for the day to be restructured so that time is not lost in completing the court list, in the interests of all persons appearing before the court, including other advocates.

If it becomes apparent before the day on which a matter is listed for hearing that there is a difficulty with the case which may require an adjournment it is important for the legal representative for the parties to contact the court and

arrange for it to be mentioned at the earliest available opportunity, and not to wait until the morning that the matter is listed to ask for an adjournment on this basis. Providing this courtesy to the court will enable another matter to be listed in the place of the case. As a result court time and the time of the fellow practitioners will not be lost. Again the court is likely to be more receptive to an adjournment request make in advance of the hearing date.

However it would be wrong to assume that the court will always grant an adjournment, even where the parties have reached an agreement to this effect. Magistrates do not appreciate being confronted with unilateral statements by the parties that a case is to be adjourned. As part of regulating the proceedings of the court, magistrates like to make their own decision on these issues. Therefore it is important to place proper reasons before the court in support of an adjournment submission and be prepared to support it with evidence. For example if the reason for seeking the adjournment is that the client is incapacitated through illness a medical report or certificate should be provided. If this is not possible the advocate should at least contact the medical practitioner so that the magistrate can be satisfied there is verification of this.

The court may not necessarily consider it a proper reason for an adjournment that a particular barrister who has been briefed is unavailable because it may consider that there is many other competent counsel who can be briefed, particularly in larger cities.

If it is necessary for you to apply for an adjournment on the morning that a matter is mentioned in an arrest court or call over court, upon arrival the advocate should advise the court clerk of this fact and of his/her identity and every effort will be made to mention the matter early in the

proceedings. Whenever possible the court will first deal with adjournments in which legal representatives appear. It will also give priority to sentences where the defendant is legally represented.

However it can only do this if the advocates are punctual and make themselves known to the clerk before the proceedings start. If advocates approach the court in this matter, they will find that magistrates appreciate that they will have other matters to attend to whether in another court or in their chambers or offices, and will do their best to meet their convenience by mentioning the matters as early as possible.

Announcing your appearance

Advocates should announce their appearance in each matter in which they appear in the Magistrates Court. It is important to speak clearly and to spell their name. Counsel should also clearly advise the name of their instructing firm.

Appearance slips are not provided in the Magistrates Court as this would generally be impractical because of the volume of matters handled. It is important that the names of advocates be accurately recorded on the court file by the magistrate and in any transcript which is later made of the proceedings. This is the case whether you the advocate is well known to the magistrate or not. It is also a matter of courtesy to the court. Therefore I can probably add another *P* word to the list of advocacy attributes – *"politeness".* In other words civility is important both towards opponents and the court.

Addressing the court

Since 12 November 2004 Queensland magistrates have been addressed as “Your Honour”. This is in consequence of a Practice Direction No 9 of 2004 that was issued at this time.

This Practice Direction reflects that with the passing of the *Magistrates Act* 1991 Queensland magistrates emerged from the public sector to be independent judicial officers in the full sense of the word. This position was enhanced in mid 2000 when the title “stipendiary” was dropped and they became simply magistrates.

It also created uniformity in the mode of address of all Queensland judicial officers and thereby removing the confusion which resulted in judges of the higher courts being referred to as “Your Worship” and magistrates being referred to as “Your Honour”. Although I suspect that no magistrate will object to occasionally being referred to as “Your Majesty” as is sometimes the case by self represented litigants.

This mode of address is also in keeping with that used in the case of Federal Magistrates.

Preparation

Professionalism in the presentation of a case to the court requires that practitioners prepare carefully and are in a position to provide assistance to the court. 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 & Sentences 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 post-prison community based release orders (which will 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;

- Refer to the cases by their proper citation;

- 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;

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

As both a practitioner and a magistrate I have found a valuable starting point for the preparation of a case or a judgement is to make a list of the elements of the offence and to note the maximum penalty and to note the minimum and maximum period of any driver licence disqualification. 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 structure. Therefore the adoption of best practice in the Magistrates Court will remain when appearing as an advocate in other 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.

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. However, it is also important not to pretend to know the answer by making a guess at it.

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 another 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 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 section 157.

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* [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; Ex parte Attorney-General* [2005] QCA467, 14 December 2005 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 support 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.

I have previously given an example of a situation in which it is necessary that to be able to verify a client's instructions in relation to incapacity to attend at court as required due to a medical condition.

Other examples of this, which may arise on a sentence or on a bail application in a criminal proceeding are submissions that the court should approach the matter on the basis that a client 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 which can 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. Submissions to this effect will possess 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.[2]

In Townsville some assistance in this regard maybe available from the Mental Health Liaison Officer currently stationed at the arrest courts.

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 by a judge.
Further, in any case in which *costs* are sought it is important that at the conclusion of the proceeding advocates are in a position to:

- present a Schedule of Costs what are sought to the magistrate.

Precision

In presenting a case it is essential to identify the issues in question and address them in a manner that is succinct and to the point.

Do not waste time asking repetitive questions or pursuing irrelevant issues. Similarly ensure that submissions at the conclusion of the evidence are precisely directed to the issues in dispute.

Remember in a Magistrates Court advocates are not addressing a jury. Therefore don't waste time in addressing issues about the onus or standard of proof which the magistrate can be expected to know other than in exceptional cases, eg. where there is a reverse onus provision. More will be achieved by going to the central issue and direct submissions on fact and law to it. Advocates should be as concise as they properly can. A magistrate may have to hear a number of trials on a given day, and will not appreciate submissions which waste his or her time.

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 bad points can infect good points.

Therefore it is essential when making submissions for advocates to order their thoughts and present them in a logical manner, and in addition organise the papers and documents which are to be tendered.

By adopting this approach to sentence it will ensure that only meaningful and helpful material in mitigation is advanced to the court.[3] For example don’t provide the court with a client’s entire life and employment history, only those parts which are relevant to explain the offending behaviour. Again it is important to remember that the Magistrates Court is an extremely busy court with limited time to deal with each sentence. Aim submissions on sentence directly at the result which it is sought to achieve. I have always found that it is good practice to advise the court at the outset, of the sentencing option or options that are sought on behalf of a client. This will ensure that the court has an immediate understanding of the thrust of the submissions. It provides a foundation on which to structure the submissions in support of contention to be made and allows the court to

focus on what the advocate is trying to achieve. It would also ensure that the submissions are directed only to 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 a submission relates without it being necessary to designate the paragraph containing the particular principle to which the submission relates.

Always "know your court" so as to address issues and provide the information which from experience are known to be required by the particular judicial officer to whom submissions are being made.

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.

An advoacate should never make an argument to the court on law or fact that does not carry weight in his/her own mind, or make a submission in a criminal case for a sentence which is not consistent with a clearly established sentencing range. And be prepared to make concessions where appropriate. This is important for young practitioners in establishing their credibility before magistrates and maintaining it when they become more senior.

The court must feel confident in the submissions made to it. It is important for advocates to remember that they will often be appearing before the same magistrate, and even if this is not the case, that magistrates share their experiences. If advocates establish a reputation for making unwarranted or over the top submissions, their future submissions are likely to be given less weight by the judiciary. On the other hand they will find that their credibility will be established by making sound and supportable submissions, and magistrates are more likely to accept their submissions in other cases.

Prosecutorial presentation

While these principles hold true for criminal and civil maters and for defence counsel and prosecutors in criminal proceedings, it is important for any advocate who appears as a prosecutor to remember that he/she has obligations different to those of defence counsel, owing duties both to the court and the public at large[4]. 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." [5]

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[6].

The prosecutor has a large responsibility which includes:

- determining what evidence to place before the court; and

- determining what witnesses to call.

The prosecutor must ensure that all relevant and admissible evidence is placed before the court. This is because the prosecutor represents society as a whole, and is not the representative of the officer who brings the charge or even of the victim.

The role of the prosecutor is to assist the court to get the truth and not to obtain a conviction at all costs. He or she must be prepared to make a submission in an appropriate case that there there is insufficient evidence to warrant a conviction. And he or she must accept the court's rulings and not to be seen to disagree with them, either by body language or by tone of voice, no matter how disappointed in the result. This last piece of advice holds true for all practitioners whatever their role in the proceedings.

On sentence 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[7].

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* 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) states:

> "…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."[8]

Further prosecutors should:

- 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 provides that:

> "The prosecution must ensure that any criminal history is current as at the date of sentence."[9]

Conclusion

The Queensland Magistrates Court is the people's court and as such is a very important component in the judicial structure of the state. It is the court in which advocates are likely to spend much of their time as young practitioners and in which they are likely to continue to appear as they become more senior.

It is the court where most members of the community will form their perceptions of the criminal justice system. It is the aim of the court to maintain standards, and to ensure that it acts effectively and efficiently so that the many people who have contact with it perceive the Queensland justice system as fair and equitable.

The advocates who appear before the court are integral to achieving this. It is therefore essential that they are professional in your dealings with the court by observing the *3 P's* of being punctual, prepared and precise.
Magistrates are entitled to expect the same respect and assistance as is received by the other courts in the judicial structure, including assistance as to sentencing options and ranges and comparative sentences. The principles of good advocacy are common to all courts. Good habits of advocacy adopted in the Magistrates Courts will stand you in good stead when appearing in the other courts in the judicial structure.

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[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] Ibid
[4] M.J Byrne, "Sentencing – The Crown's role."
[5] C.A Corrigan, "Commentary on Prosecutorial Ethics", Hastings Constitutional Law Quarterly 13(3) (Spring, 1986) 537
[6] Director of Public Prosecutions Queensland – Director's Guidelines, 18 November 2003, Carter's Criminal Law of Queensland, paragraph 1(147,000) 153053
[7] Ibid, paragraph 42, [147,200], 153080
[8] Ibid, [147,205.50], 153, 084.
[9] Ibid, [147, 205.20], 153, 081