ADVOCACY IN THE DISTRICT COURT

Address to Queensland ODPP Conference
Roma Street Brisbane
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Judge J M Robertson

[1] I am honoured to speak to you this morning, although I have to say that my credentials to speak on advocacy are not as impressive as a number in this room, who have spent their whole professional careers as advocates in front of juries and people like me. As some of you are aware, I was the first solicitor appointed to the District Court in 1994, when I became the first resident Judge in Ipswich. People like Todd Fuller and Tim Ryan were responsible for much of the advocacy in my court on behalf of the Crown. I soon realised that as the Judge, you really did have the final say – not on the most important question – but basically on everything else, and I intend to refer to both of them today in roughly similar circumstances to the court room, where there is a limited right of reply, or in Tim's case, none because he is not here.

[2] To appreciate the role of the prosecutor in advocacy, it is necessary to understand the nature of the duty and role of the prosecutor in the trial process. It has been stated many times, and is contained in the Director's Guidelines. The prosecutor is often referred to as a "Minister of Justice", whatever that means. It is an expression that has been handed down through the ages, and was perhaps coined for the first time in this context by Theodore Roosevelt.

[3] In R v Gathercole [2016] QCA 336 at [49], the President of the Court of Appeal wrote:

> "[49] It is well established that in conducting an Australian criminal trial, which is both accusatorial and adversarial, the prosecutor has a duty not to obtain a conviction at any cost but to act as a minister of justice. The prosecutor's role is to place before the jury the evidence the prosecution considers credible and to make firm and fair submissions consistent with that evidence but without any consideration for winning or losing. The central principle is that the prosecution case must be presented with fairness to the accused. Unfairness may arise from the manner in which the prosecutor addresses the jury."

[4] It was interesting to review the various DPP Guidelines in the Australian states. The further one goes back in time, the more poetic are the descriptions of the role and duty of the prosecutor, and certainly in 1958 when, if not all, the vast majority of Crown prosecutors were male, the following was written by R R Kidston QC, former Senior Crown Prosecutor of New South Wales:

> "it behoves him – Neither to indict nor on trial to speak for conviction except upon credible evidence of guilt; nor to do even a little wrong for the sake of expediency or to pique any person or please any power; not to be either gullible or suspicious, intolerant or over-pliant: in the firm and abiding mind to do right to all manner of people, to seek justice with care, understanding and good countenance."

[5] A violinist and a small choir may have been useful props for a prosecutor attempting to achieve such lofty ambition. It is often said that the most effective prosecutor is the fair one, but fairness is not readily assimilated into an adversarial system in which the players are human beings, often possessed of considerable ego. It is well put in the New South Wales DPP Guidelines:

> "Nevertheless, there will be occasions when the prosecutor will be entitled firmly and vigorously to urge the prosecution view upon a particular issue and to test, and if necessary to attack, that advanced on behalf of an accused person or evidence adduced by the defence. Adversarial tactics may need to be employed in one trial that may be out of place in another. A criminal trial is an accusatorial, adversarial procedure and the prosecutor will seek by all proper means provided by that process to secure the conviction of the perpetrator of the crime charged."

[6] With those preliminary remarks in mind, I offer up my own, perhaps idiosyncratic, observations on advocacy techniques for you, as prosecutors. I only have a short time to go as a Judge, so I direct you not to quote this paper to me or to any other Judge as authority for anything.

The trial

(a) Challenges

[7] Advocacy starts with the jury empanelment. The prosecutors' challenges (referred to for historical reasons as standbys) should not be exercised for the same reasons as the defence. Having said that, I am convinced that the whole process, informed as it is by very little evidence, is a mixture of hocus pocus and prejudice. I leave aside information that may be available to the parties under the *Jury Act* that is not available to the Judge. There is no evidence to support the firmly held beliefs of

some that young people lack the life experience to be responsible jurors, or that older women are more likely than men to harshly judge a mature woman who is a complainant in a sexual matter. The standby should therefore be exercised sparingly. In my experience, the most competent counsel do just this, recognising that there is no provable forensic reason for exercising all eight challenges simply because the law says you can. The tone and timing of the challenge is important. Some counsel, predominantly on the defence side, do not seem to appreciate that shouting "challenge" at a juror, when that person has almost reached the bailiff, is both discourteous, and also potentially forensically disadvantageous, as the actual jury is likely to see the barrister as a wanker from the start.

(b) The impartiality speech

[8] Surprising as it may seem, this small event can involve advocacy. I have the practice of asking the prosecutor to give the panel a brief overview of the case at this point, so as to avoid the more frequently occurring situation where a juror suddenly realises that they know someone involved in the case when the name is read to them in context. In a recent trial involving multiple child complainants, I was very impressed by the prosecutor who showed the panel screen shots of the children from the pre-record; working on the intelligent premise that prospective jurors may more readily recognize a witness from a photo than from a name At this stage of the trial, it is easy to treat the speech as a mechanical exercise, but it is much better to connect with the jury as this is the time of first impression. In describing the occupations of witnesses, again, care should be taken. To describe a person's occupation as being "devoted to home duties", is likely to put everyone off. These are small issues, but important in my view.

(c) The prosecution opening

[9] A short, well-directed opening will be much more effective than a lengthy, discursive speech. From my own experience in writing judgments, it is the shorter ones that show much more decisive engagement with the real issues in a case. Mark Twain once said "I didn't have time to write you a short letter, so I wrote a long one instead."

[10] I am not a fan of the huge rhetorical flourish as the introduction to the prosecution opening speech. Generally, I don't think it is effective in any form of litigation, but

particularly so in jury trials. American jurisprudence contains a treasure trove on prosecutorial excesses which is not surprising given that the Land of the Free also produces Judges who carry and produce guns in Court, and in a number of famous cases use their weapon to threaten Counsel. There are a few times in my long judicial career when a Taser would have come in handy and not only for an unsuspecting member of the Court of Appeal walking down George Street! Crying is usually not called for. One of those American examples concerns a prosecutor who cried during closing argument, and this was a ground of appeal. One of his colleagues remarked;

> "He is an emotional guy and he teared up while talking about the last moments of the murder victim's life. The Court of Appeal found that prosecutorial crying was an improper appeal to passion and emotion, but it was a harmless error in this case. It seemed odd to me that crying would be deemed improper – I knew defence attorneys who cried in almost every closing argument!"

[11] At the start of a very lengthy Planning Appeal that I heard in Brisbane, one of my colleagues asked me who the lead counsel in the case were. When I told him, he advised me to "swallow a thesaurus."

[12] Sure enough, in the opening of what was a case about land use and economics, not some high profile criminal case, counsel for the appellant quoted from the "Charge of the Light Brigade." He said (with appropriate gravitas):

> "Half a league, half a league,
> Half a league onward,
> All in the
> Valley of Death rode the five hundred."

[13] Immediately, from the other side of the bar table, came the correction: "six hundred!" Thankfully, I was not asked to rule, as I was immediately thinking back to my Tennyson at school that it was "a thousand."

[14] It might work in the opening of a home invasion case involving bikies invading the clubhouse of other bikies, although of course in these enlightened times such a crime would be impossible.

[15] But seriously, I think rhetoric, particularly of the literary and poetic kind, has a very limited role to play in the opening. Also I do not think juries are impressed by

esoteric references to physics or pure mathematics where these disciplines have nothing to do with a case, and are more designed to show off the prosecutor's knowledge. The early research into juries conducted by Professor Warren Young and his colleagues in New Zealand in the late 1990's, clearly showed that at this point in the trial, the jurors want to know most of all what the real issues are in the case, and are unimpressed by show offs from either side of the bar table.

[16] Of course, there are always exceptions. When I was a young Judge, green and inexperienced, I always welcomed Todd Fuller quoting Shakespeare to me, and particularly if the jury was present:

> "A Daniel come to judgment
> Yea a Daniel
> O Wise young judge
> How I do honour thee."

He'd probably say now:

> "First, let's kill all the judges."

[17] The opening should be the model of brevity when it comes to the law. Tell a jury what has to be proved: one, two and three. Don't talk to them about the elements of the offence. It is frustrating and pointless when, immediately after I have given the jury basic opening directions about their role and the onus and standard of proof, the prosecutor does exactly the same thing.

[18] All of you have your own prepared notes which will guide the way in which you approach the case, particularly the features of the prosecution that are common to all prosecutions. However, it is always important to listen and to be prepared to modify your standard approach in accordance with the direction that the trial is taking. It is clear to the Judge and probably also the jury, when a prosecutor is simply "rolling the arm over" and not attending to the particular case.

[19] It is often of considerable assistance at this stage to provide the jury with materials, provided, of course, this is by agreement. In fraud cases, particularly lengthy, complex cases, a jury book of documentary exhibits is essential. Of course in Brisbane, now, there is facility for each jury to receive a USB stick and to view documents on computers in court and provided to them. In the regions we have no such luxury and often after rely on the prosecution to provide not only the Crown case but also the technology to understand the evidence.

[20] A copy of the charge or charges is essential, and describing the scene by reference to photographs and plans can be very helpful. PowerPoint can be a useful tool for this limited purpose, but I am not entirely convinced by PowerPoint openings or, indeed, closings. I know how much work goes into them, but the slides are likely to distract the jury; and I think everyone agrees that simply reading from the slide is the quickest way to disengage from the audience.

[21] As I have said, the jury at this point will want you to focus on the real issue or issues in the case. In most cases in the District Court this will be obvious. Do not however attempt to anticipate defences at this stage, as it can significantly disable your case before it starts. This has happened before me on a number of occasions, particularly in relation to s 24 of the *Criminal Code.*

[22] In one of the examples discussed in the New Zealand research, as a result of the prosecution opening in a case involving violence, it was not until the final addresses at the end of three weeks, that the jury realised that the critical issue in the case was intention and not the insanity of the defendant.

(d) Presenting the case

[23] Again, efficiency and preparation should be your guide. Prosecution witnesses, indeed all human beings, can be irritating. Being a witness is a difficult experience, especially for a lay witness. Showing irritation or even anger when a witness does not respond as expected is poor practice. Back in the dark days, when private counsel held commissions to prosecute and frequently appeared on both sides of the bar table, I had an experience which burned into my brain the importance of this point. The case involved three and a half days of s 93A tapes and pre-recorded evidence, including one and a half days of turgid cross-examination over which I presided. The two barristers involved were senior, and, to put it mildly, did not get on. Each irritated the other. Having sat through the pre-recording; I then heard all the evidence again with the jury at the trial. On day four, the prosecution called its first live witness – the mother of the complainant. She was angry and not very bright – a red light to take care. The prosecutor led her through her evidence late in the afternoon, becoming increasingly irritated and angry with her. Finally, he rebuked her for not paying attention to his questions, causing her to give some highly prejudicial evidence which had been excluded by agreement. The trial had to be done again and, yes, I was the trial judge once again.

[24] The presentation of a case has features of telling the prosecution story. Good advocacy will follow if you have a planned presenting of the case and you stick with it. Care must always be taken to not patronize the jury and to not in any way speak down to them. In my experience, when this happens, juries quickly pick up on it and they do not like it and will hold the offending barrister (or Judge) to account. This is again borne out by jury research. Although almost certainly exaggerating, a very senior barrister once told me that for every hour he spent in court, he spent two hours preparing. As a young, overconfident solicitor I quickly worked out in my head that this could only happen if he had about four hours sleep. I knew also that he had a real liking for the drink, so when did he fit that in?

[25] Re-examination, particularly of key witnesses, can be effective to clarify some confusions that may have arisen in cross-examination. However, re-examination is not compulsory. My experience is that the best prosecutors rarely re-examine. In recent times, it seems to happen much more frequently and for no apparent forensic reason. There is a danger (realised in cases in which I have been involved) that unfocused, unnecessary re-examination will detract from your case and strengthen your opponent's case.

(e) Cross-examination of the defendant

[26] In my experience, with most witnesses there are usually one or two areas that are amenable to effective testing by cross-examination. The long discursive, unfocused cross-examination is never effective with juries, in my experience. Experienced defence counsel will sit quietly if a prosecutor goes round and round asking repetitive questions, as they know that the jury will not be impressed. I had to stop a prosecutor once by saying, in effect, "You have now asked the same question at least six times, and you've got the same answer, move on," which led someone on the jury to say "Thank God for that!".

[27] Sometimes, of course (but rarely), a defendant will present you with a gold mine for a cross-examination. Tim Ryan prosecuted an armed robbery before me in Ipswich. The robbers had parked a stolen car in the Redbank Plains shopping centre carpark, and audaciously robbed a business owner in the centre in the daytime whilst armed with guns. There were many witnesses. The robbers were seen exiting the shopping centre and driving away in the stolen vehicle. Only one went to trial and he approached his defence in a novel way. Whilst on remand, he met a fellow who

was awaiting sentence for 11 armed robberies. Working on the premise that one more would make no difference to his future, this fellow was called by the defendant and proceeded to take responsibility for the Redbank Plains robbery. Unfortunately, he had not been well-briefed by the real robber, the defendant, probably because he was off his face on drugs at the time and could not recall much. The particulars of the robbery, including the behaviour of the robbers before and after the event, was meticulously established by Tim and not challenged by the defence. When the only defence witness was cross-examined, Tim carefully took him through each step, and you could see him trying to guess almost every answer – was it a shotgun or a handgun? Was it jewellery or money or a mixture of both? Who was wearing the balaclava and who had on the Humphrey bear mask? He got about half the answers right.

[28] By the time Tim got to the exit from the carpark, not only were the jury snickering, but so was the defendant. Tim asked our hero where the vehicle was parked. He didn't have a clue so Tim persisted and handed him a plan of the carpark which was huge and asked him to mark with a black highlighter exactly where the car was parked. This took the witness some time. There was uneasy silence in the court. When the plan was handed back to Tim, he simply held it up at the jury – the whole of the carpark had been coloured in black – tendered it, and sat down!

(f) The final address

[29] Much of what I have said earlier applies to the final address, which is perhaps the most important part of the case. Again, I have seen PowerPoint in presentations which hugely impressed me but, I suspect, not the jury very much, as their focus was on the prosecutor who was in different direction to the screen. At this stage there is more scope for rhetoric but again limited. I don't think humour works well with the jury either. If I have learned one thing about juries over my 46 years in the criminal law, it is how seriously they take their responsibilities. It is a serious business and very rarely does humour help and neither does sarcasm. There are many examples in the jurisprudence where prosecutors have gone too far, on rare occasions leading to a miscarriage of justice. In my 22 years as a judge, I can count on the fingers of my hands the number of truly perverse verdicts, and all of them are not guilty, and some came about because of an over-enthusiastic and arrogant prosecutor.

(e) Sentencing

[30] This is a critical role for you as prosecution advocates. With the legislative repeal of Barbaro you are again more able to assist the court when it comes to analysis of comparable authorities. Again, I think brevity is the most useful guide for effective advocacy in the sentencing process. A long detailed analysis of a decision may be called for if it is decisive, but that is rarely the case as no one case is alike. A technique that I appreciate harks back to the old days of the DPP Schedules. Instead of a schedule containing every CA decision on the topic, some prosecutors select the most relevant and present that in schedule form which can be a very useful tool. I think single Judge decisions are of limited value unless the offence is very unusual or only recently established.

[31] You should of course have a firm grasp on sentencing principles and be prepared to meet defence submissions that go to mitigation. The practice has improved, but in the past expert reports are handed up by the defence which are sometimes of little assistance, but the court hears nothing from the Crown side which is not helpful particularly where vexed issues such as "moral culpability" are involved. I have noticed a distinct improvement in this area, where the prosecutor will challenge the weight of opinions expressed often on the basis of a history taken only from the offender.

[32] I greatly appreciate receiving in advance schedules of fact, criminal histories etc as this greatly facilitates the sentencing hearing. Although only remotely related to the topic, I also appreciate being informed in court at the start of the hearing if victims' families are in court, who they are and where they are in the gallery. I sometimes speak to them in open court, but is simple courtesy to acknowledge their presence and be conscious of what you say in open court.

(e) Conclusion

[33] Advocacy is a very human process. It involves an expert communicating to lay people often complex facts and law. It is good to remind yourself frequently that you are privileged to have such a vital role and that humility and clarity will be what a jury appreciates most. I know it is difficult in these days of management speak and

cost cutting but it is essential if you are to prosper in your role as prosecutor. In the Victorian OPP guidelines there is quite a bit of the weasel wordplay that people like Don Watson deplore, but under the very weasel wordy heading "Advocacy Competency Framework" the basics are there although sadly described under "Vision and Values"! That is to act fairly and with integrity, respect others and strive for excellence. My professional life has largely been enriched by prosecutors who exhibit those features when they come before the Court. I would also add "listen carefully at all times".

[34] Years ago, I was in Judge Maguire's court awaiting my turn. The case before him involved unspeakable conduct with a fox terrier on the steps of a South Brisbane boarding house; near where Southbank now is. The barristers were both colourful characters. Leon Taeffe from the private bar was the prosecutor. He referred his Honour to a comparative involving a horse as the complainant, to which his Honour commented; "that is a much bigger enterprise". Leon thought he said; "that was a much bigger end to prise" and started to laugh which brought a firm rebuke from the Judge. Judges should listen also. Judge Maguire had not picked up that the defendant was very hard of hearing. His Honour proceeded to give one of his trademark sentencing remarks which included reference to all sorts of complex words such as "condign" and "egregious" and after about 30 minutes by which time he had imposed a modest fine, he asked the defendant if he understood. He was met with no response. Counsel reminded his Honour of the hearing problem so the whole judgment had to be repeated with the foxie's friend equipped with an ancient set of court hearing aids.

[35] It has been an honour to speak to you. I wish you all well in your work on behalf of the ODPP in Queensland.

John Robertson
25th January 2017