

THE SIGNIFICANT AND KEY ROLE OF THE PROSECUTOR IN UPHOLDING THE RULE OF LAW

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Cet article est la version complète de l'allocution donnée par l'auteur, Haut Magistrat néo-zélandais, lors de la Pacific Prosecutor Conference qui s'est tenue en juillet 2009 à Brisbane (Australie). Fort d'une expérience de plus de quarante ans du monde judiciaire du Pacifique Sud, il souligne en acteur et observateur avisé, le rôle fondamental que joue le Parquet dans le respect des règles de droit dans cette région du monde.

This is the text of the address by Justice Baragwanath to the Pacific Prosecutors Conference that was held in Brisbane on 7 July 2009. It reflects on and provides insights into the role of prosecutors in the contemporary justice system.

I PRELUDE

In *Memoires de Guerre* De Gaulle identified two basic human needs: dignity and security.¹ You are concerned with each of those. Across the globe economic pressures have seen public confidence in major institutions plummet. Many members of the public have suffered heavily at the hands of others. In this climate of concern the pressures on prosecution agencies to deliver weigh heavily. The linked themes of the

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1 *L'Appel 1940-1942* (Plon 1954) 679. See now *Attorney-General's Reference No 3 of 1999; Application by the British Broadcasting Corporation to set aside or vary a Reporting Restriction Order* [2009] UKHL 34 17 June 2009, [18] per Lord Hope of Craighead, emphasising the importance of "human autonomy and dignity". The case concerns name suppression, as to which see also *R v B* [2009] 1 NZLR 293 (CA).

rule of law and the role in it of prosecutors are of even greater topical interest than the regular diet of crime which sells newspapers and television programmes.

Reporting on the recent Pacific Judges Conference in Tahiti, attended by Justice McMurdo, President of the Court of Appeal of Queensland, and other judges from seventeen states, I noted:

Accounts by successive judges from small states ... placed in sobering perspective the overarching theme of the rule of law...Chief Justice Black of the Federal Court of Australia addressed the constant challenge of slippage from adequate rule of law standards.

The rule of law and prosecutors' part in it matter. It is a privilege to be invited to address you on your professional role. I do so in the acute awareness that mine is necessarily an idiosyncratic, because personal, standpoint. The Honourable Attorney-General of Samoa² was reported on Friday³ to have observed in a related context⁴ that each state will examine its institutions according to its own culture, history and requirements. Discussion at the recent South Pacific Judge's Conference in Tahiti, with indigenous and French judges as well as those of Australia, the USA and New Zealand, underlined that point. What follows is this not a lecture as to how others should handle these matters but an attempt to offer particular experience which may provide a basis for comparison with your own.

II THE INSTITUTIONAL CONTEXT

Settled institutions rarely come under close examination, except as a response to systemic failure.⁵ The criminal law is an institution where such examination occurs

2 The Attorney-General of Samoa is Aumua Ming Leung Wai.

3 At the 17th annual conference of the Australia and New Zealand International Law Association.

4 That of the establishment of human rights commissions.

5 The Erebus case in New Zealand is a prime example, where it took the deaths of 257 people in an air disaster and a decade of controversy over the terms of a Royal Commissioner's report to bring international acceptance of the phenomenon of systems failure. The International Civil Aviation Organisation reported: "The Erebus Report was, probably, ten years ahead of its time. After all, Chernobyl, Bhopal, Clapham Junction, Kings Cross and other major high technology systems catastrophes had yet to happen. They need not have happened. In retrospect, if the Aviation community – and the safety community at large – had grasped the message from Antarctica and applied its prevention lessons, Chernobyl,

rarely and, as a rule, only after grave miscarriage.⁶ Questioning its component elements tends to be viewed with disfavour; attempts at reform often encounter resistance and adverse reaction.

To a degree such response is understandable. Confidence in our criminal law and institutions is closely associated with respect for the rule of law which is our ultimate safeguard against anarchy.⁷ So challenges to it must be carefully considered. But when at the New Zealand Law Commission we undertook a root and branch examination of the criminal jury system, including interviewing jurors, we found that long-held assumptions can prove ill-founded.⁸ Yes, the institution proved fundamentally sound. But those of us with long criminal experience were disturbed to

Clapham Junction, Kings Cross and certainly the Dryden report would not have existed." (Human Factors Digest No 10 Circular 247-AN/148).

6 In the notorious Dreyfus affair in France a distinguished Jewish army officer was court-martialled and sent to prison in exile. It prompted Zola's famous "J'Accuse!" and the ultimate vindication of the officer and discrediting of deep-seated army institutional practices. Recently in France, as a result of the Outreau scandal, a decision has been made to abandon the institution of juge d'instruction. There a young judge ordered the arrest of some 18 people alleged to have been involved in large-scale sex offending. After three years in custody, during which there was a suicide and great distress, all were acquitted except four of whom three admitted making false accusations. Both the judge and the institution have come under sustained attack. It should be noted that respected French opinion has called the affair "médiatisé": "media-driven". The latest *Courrier International* (June 16-24 2009) has recounted the heavy financial pressure on the print media internationally. Whether that has contributed to mediatisation of the matter is outside the scope of this paper.

7 The most lucid account is More's in Robert Bolt's "A Man for all Seasons":

William Roper: So, now you give the Devil the benefit of law!

Sir Thomas More: Yes! What would you do? Cut a great road through the law to get after the Devil?

William Roper: Yes, I'd cut down every law in England to do that!

Sir Thomas More: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!

8 NZLC R69 Juries in Criminal Trials (2001).

learn how unthinking we had been. The basic lesson was that judges must place themselves on the jurors' bench: consider what information we would need if we came cold to an unfamiliar task, what aids we would require if we had to make factual findings, how twelve people should be assisted to manage their relationship and role. The result was to treat jurors as the judges they are: for the presiding judge to provide at the outset a handout setting out their roles with the major rules of onus and standard of proof and the elements of the crime; giving them the transcript; providing them with flow-charts setting out the issues and the options available; and constantly striving to find ways to help them perform their task.

III PERSPECTIVE

I have emphasised the theme of reform of our institutions and practices because the first and last task of the prosecutor and everything between is as a minister of justice, whose task is to optimise the fairness and effectiveness of our criminal process and, by ensuring justice, enhancing public confidence in the rule of law. That requires constant vigilance, imagination and courage.

In what follows I by no means downplay the role of the defence. They are crucial contributors to a fair trial; without a powerful defence the adversary system risks failure. The state of the art internationally is to ensure that the accused is represented by able and experienced counsel who will test the case their client faces and advance their own with ability and courage. I focus on the prosecutor because that is our topic.⁹

I start with my own experience. I joined the Auckland Crown Solicitor's office at 19 and, apart from some study elsewhere, remained with the firm as a partner until at 36 I left to go to the separate bar. Defending clients for the first time was a revelation. I found that as a prosecutor I had committed the very kind of thoughtlessness of which, as a judge, I became aware after the Juries Report was completed. Last minute amendments of the indictment look very different from the other side of the net. What I have seen since, as a trial judge, as a law commissioner, as a member of Courts of

9 For other accounts see Nicholas Cowdery QC *The Duties of the Prosecutor* address to Industrial Law Committee, Federal Litigation section, Law Council of Australia 12 November 2007 which contains standard guidelines and statements from the UN, New South Wales and Canada and Spigelman CJ *Opening Address to the Australian Association of Crown Prosecutors Conference* 5 July 2007.

Appeal in Samoa and New Zealand, and more recently as an amateur of international criminal law,¹⁰ has confirmed that the prosecutor is the player in the court process most able to promote or damage the institution of justice.

Your role is more critical than that of the judge, because you influence what comes before the court; a judge can only respond to what counsel provide. Our errors are made in the face of the court and can be corrected on appeal. Gross defence error can be corrected by the same process.¹¹ But unfairness or slackness on the part of the prosecution may go unseen and result in irremediable miscarriage.

This Conference, which takes all of us into a different environment, provides the opportunity to take stock. It was said of the Scottish philosopher, David Hume who, like his English counterpart Jeremy Bentham, loathed cant:¹²

Hume swept away all that was pretentious and sanctimonious from the Scottish intellectual scene.

Hume identified the tension that underlies the two elements of the judicial oath:

To do *right* to all manner of people after *the laws and usages* [of the particular state]

He contrasted the conflicting yet complementary principles:

Liberty, which preserves individuals; and *authority* which preserves society.

Uncontrolled liberty will destroy society; yet, as Hume discerned, even in the freest society:

A great sacrifice of liberty

has to be made to authority which

must be acknowledged essential to its very existence.

The key question is, of course, how much of a sacrifice. And that is largely determined by how you and the judges perform our functions.

10 The tide of crimes against humanity washes as far as New Zealand (cases involving art 1F of the Refugee Convention, the most recent being *X v Refugee Status Appeals Authority* CA 109/2008 (judgment pending)).

11 *R v Sungsuwan* [2006] 1 NZLR 730 (SC).

12 Arthur Herman *The Scottish Enlightenment* (2003) 195.

To equip ourselves for that task requires that we be more than lawyers. I mention the example of another Scot, Henry Home, later Lord Kames, who turned the Advocates Library at the Court of Session into

a major respository for books not only on law but also on philosophy, history, geography and foreign travel.

It became the seedbed of the Scottish enlightenment¹³ and of almost all our social sciences.¹⁴

Responding to Kames' example, to see the prosecutor in context I go back to the opinion of a master of your profession from two thousand years ago, in an age before liberation of slaves and of women. This is how the Roman advocate Cicero put it. I invite you to consider how much of this is a relic of the past and how much remains true:¹⁵

[J]ustice fulfils all three prerequisites for gaining glory: goodwill, because it seeks to benefit the greatest number; good faith, for the same reason; and admiration, because it despises and ignores those things which fire most men with greed, and possesses them...

The man who wishes to win true glory must discharge the obligations of justice... There are several types of them which call for eloquence, and in our state many young men have won praise by speaking before juries... [T]he greatest admiration is reserved for speeches in lawsuits. These are of two kinds, speeches for the prosecution and speeches for the defence. Of the two, speeches for the defence are the more praiseworthy, but quite often speeches for the prosecution win approval... But speeches for the prosecution should not often be undertaken and only ever for the good of the state.

The focus on the male and on self-promotion is of course outdated. And nowadays mere eloquence tends to be viewed sceptically by judges and juries. Certainly the need for the Crown (which I will use as short for prosecution) case to be advanced professionally and effectively is as important now as ever before. But modern tribunals – judge and jury – place a premium on fairness, as many young zealots have found when they lose an unloseable case.

13 Fortuitously discussed in this morning's *Australian* 13.

14 Herman, 87.

15 *On Obligations* (Oxford World's Classics) 68-71.

One point however is constant: it remains true that prosecution must be undertaken only for the good of the state. That can be a very big ask.

As a prosecutor you are an officer of state with great powers and a massive responsibility. It starts well before the case begins.

IV ACCEPTANCE AND REJECTION OF THE BRIEF

Some of you will be members of offices of Attorneys-General or Crown Solicitors; perhaps members of a fused legal profession or the independent bar. All of you will have responsibilities for others, perhaps family members; you will have friends and colleagues whose respect and affection you value; you may have tribal or other allegiances. All of you will have career plans and ambitions. Yet you may suddenly find that you are called upon to make a decision with major consequences for your personal comfort. Conflicts of interest are not the problem: all of us encounter them and must decide whether they require us to decline the case. Hart are about publish a text by my brother judge, Justice Hammond of the Court of Appeal of New Zealand, on the subject of judicial recusal; the principles for counsel are much the same.

As to accepting instructions, the classic dilemma for a prosecutor was that of John Cooke who originated the right to silence and the duty to act free of charge for the poor. Applying the cab rank rule, which he also invented, he accepted the first brief to prosecute a head of state for waging war on his own people, the trial of Charles I which was the predecessor of the prosecutions of Pinochet, Milosevic and the rest. Eleven years later he was executed by burning.¹⁶

As to rejecting a brief, the Australian Federal Cabinet declined the Attorney-General, Robert Ellicott QC, access to Cabinet papers which he considered essential to his decision whether to take over the private prosecution of the former Prime Minister, Gough Whitlam for conspiracy. He resigned his office in protest against the Cabinet's interference with the exercise of his independent discretion, citing an opinion of the former English Attorney-General, Sir Hartley Shawcross QC.¹⁷

¹⁶ Geoffrey Robertson *The Tyrannicide Brief* (Vintage 2006).

¹⁷ *Reshaping the Criminal Law* (Stevens & Sons 1978) 376.

V THE PRIVATE PROSECUTOR

In New Zealand a private prosecutor received leave from the Chief Justice to bring a manslaughter charge against a police officer in *Wallace v Abbott*.¹⁸ The Law Commission has recommended retention of private prosecutions in recognition of their important constitutional and theoretical place within our system.¹⁹ In New Zealand the Law Officers can file a *nolle prosequi* of improperly commenced private prosecutions: see *Mafart v TVNZ Ltd*.²⁰

In England Sir Richard Buxton, until recently a Lord Justice of Appeal, has written on the role of the private prosecutor.²¹ He recorded that attempts to abolish the private prosecution have traditionally been met with claims that the institution is a valuable safeguard against inertia or misbehaviour by the official prosecuting authorities. While that approach has been viewed sceptically by Lord Bingham of Cornhill in *Jones v Whalley*,²² Sir Richard considers that in England also the institution is here to stay. He refers to the debate in England whether such proceedings must be conducted by counsel, which ensures that the rules of etiquette and conduct are maintained.

VI THE GENERAL OBLIGATION OF CROWN COUNSEL²³

The current Rules of Conduct of New Zealand practitioners are typical:²⁴

Duties of prosecution lawyer

13.12 A prosecuting lawyer must act fairly and impartially at all times and in doing this must—

18 *Wallace v Abbott* [2003] NZAR 42 (HC).

19 New Zealand Law Commission Criminal Prosecution (NZLC R66 2000, available at www.lawcom.govt.nz) para 255.

20 *Mafart v TVNZ Ltd* [2006] 3 NZLR 534 (CA and SC).

21 "The Private Prosecutor as a Minister of Justice" [2009] Crim LR 427.

22 *Jones v Whalley* [2007] 1 AC 63 (HL) [9].

23 For a recent overview of the decision whether to prosecute see now *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45 30 July 2009.

24 Lawyers and Conveyancers Act 2006 (Rules of Conduct and Client Care for Lawyers).

- (a) comply with all obligations concerning disclosure to the defence of evidence material to the prosecution and the defence; and
- (b) present the prosecution case fully and fairly and with professional detachment; and
- (c) avoid unduly emotive language and inflaming bias or prejudice against an accused person; and
- (d) act in accordance with any ethical obligations that apply specifically to prosecutors acting for the Crown.

At a constitutional level it is the role of the Law Officers (Attorney-General and Solicitor-General) to accept ultimate responsibility for prosecution policies and decisions.²⁵ But at a practical level each prosecutor is ultimately responsible for the delivery of justice in a particular case, as is the trial judge. The weight of that responsibility is not always appreciated. Today's *Australian* contains an account of the case in which the Corruption and Crime Commissioner said that the actions of the prosecutor played a pivotal role in Mallard's wrongful conviction for murder.²⁶ In an exemplary paper delivered last November by Simon Mount of the Auckland Crown Solicitor's partnership, it was reported that since the Criminal Cases Review Tribunal was established eight years ago in Scotland 32 miscarriages resulted in overturning of convictions. In New Zealand, with a similar population and no statutory tribunal our equivalent number was one. Unless we are 32 times as virtuous as the Scots, which those who know New Zealanders may think improbable, the report is sobering. One response would be to act on the advice of Sir Thomas Thorp, former Crown Solicitor, Judge of the High Court and chairman of the Parole Board, and establish a similar tribunal.²⁷ But until that happens, there is an additional weight on our shoulders, as prosecutors, trial judges and members of appellate courts, to have those statistics in mind when exercising our respective functions.

That precept applies to all prosecutors, including the very newest. I have not forgotten the case, reported as *Keepa v Inspector of Fisheries* [1965] NZLR 322,

25 New Zealand Law Commission, above n 19, para 16.

26 7 July 2009, p 6.

27 Review of Firearms Control in New Zealand (GP Print Wellington 1997).

which was my first appearance for the Crown in the High Court. I thought I had prepared adequately to meet the appeal by Māori of the 90 Mile Beach at the top of New Zealand against conviction for taking rock oysters without a permit. They alleged customary rights, pointing to a section in the Fisheries Act that said "Nothing in this Act shall affect Māori fishing rights". But in a 1914 decision two judges had held that the section has no effect.²⁸ I cited it to the judge and the appeal was dismissed. Many years later I found myself appearing in the Court of Appeal arguing the same point, in relation to the same beach and the descendants of the original shellfish.²⁹ Much had happened in between. I was now acting for the Māori; we had discovered the principles that later came to be applied in *Mabo* and the fact that the 1914 case depended upon the decision in *Wi Parata*, probably the most excoriated judgment in New Zealand legal history.³⁰ This time the Māori succeeded. But because of my failure a quarter of a century before to research the point properly I had, for the Crown, presented an argument that was unprincipled and wrong. And convictions had resulted.

Perhaps as a result, in *Solicitor-General v Miss Alice* I decided to spell out for others the obligations of the Crown in litigation which had taken me so long to learn.³¹

[42] It is the constitutional role of the state, represented by the Crown, to safeguard and promote the interests of its citizens. It has no other justification...

[43] The commentators are unanimous in characterising the duty of the law officers, the Attorney-General and the Solicitor-General as being to act in the public interest in the administration of justice. In *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001), para 25.8.2, Professor Joseph notes that "[the] Attorney-General is obliged to act always in the public interest". Paul East QC says "[the] Attorney-General represents the public interest in the administration of justice and can, where appropriate

28 *Waipapakura v Hempton* (1914) 33 NZLR 1065 (SC).

29 *Te Runguna o Muriwhenua* [1990] 2 NZLR 641 (CA).

30 *Wi Parata v The Bishop of Wellington* (1877) 3 NZLR 72 (SC). It described the Treaty of Waitangi as a nullity.

31 *Solicitor-General v Miss Alice* [2007] 2 NZLR 783 (HC).

take legal action to see that the law is observed and justice done" ("The Role of the Attorney-General" in Joseph (ed), *Essays on the Constitution*, p 186).

[44] That obligation must equally lie upon other elements of the Crown involved in the administration of justice. In *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at p 342 Griffith CJ stated:

"I am sometimes inclined to think that in some parts ... of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken."

That dictum was cited by the Full Federal Court of Australia in *SCI Operations Pty Ltd v Commonwealth of Australia* (1996) 139 ALR 595 at p to support the proposition that:

". . . it is well established that the Crown must act, and be seen to act, as a model litigant."

[45] Likewise, in England in *Sebel Products Ltd v Commissioners of Customs and Excise* [1949] 1 Ch 409 at p 413, Vaisey J stated:

"... the defendants being an emanation of the Crown, which is the source and fountain of justice, are in my opinion bound to maintain the highest standards of probity and fair dealing, comparable to those which the courts, which derive their authority from the same source and fountain, impose on the officers under their control ..."

[46] Similarly, in Canada, Estey J in giving the decision of the majority of the Supreme Court in *Skogman v R* [1984] 2 SCR 93 at p 109 cited with approval the dictum of Schroeder JA in *City of Toronto v Polai* (1969) 8 DLR (3d) 689 at p 697:

"The Attorney-General is in a different position from the ordinary litigant, for he represents the public interest in the community at large . . ."

[47] In *Tweed v Parades Commission for Northern Ireland* [2007] 2 All ER 273 at para [31], in the analogous sphere of disclosure in judicial review, Lord Bingham of Cornhill has recently stated:

"[There is an] obligation resting on a public authority to make candid disclosure to the Court of its decision making process, laying before it the relevant facts and the reason behind the decision challenged ..."

[48] The theme overall is that the Crown as Executive must be an exemplar of high standards of conduct in litigation before the Courts.

In an important recent refugee judgment *SH (Afghanistan) v Secretary of State for the Home Office*³² Sedley LJ has stated:

Where counsel appears for the Home Office (and I have no doubt that what I am saying applies to solicitors as well), an independent obligation to justice may very well call for the advocate to draw the tribunal's attention to matters helpful to the appellant, to which by oversight or worse the appellant or the appellant's advocate has failed to draw attention.

These principles apply with stronger force to prosecution counsel in criminal cases; the accused is entitled to a fair trial and whatever the reason for failure to meet that standard the trial will miscarry if that occurs.³³ So if the defence are not up to it, the prosecution, as well as the judge, must pitch in to help.

VII CONDUCT PRE-TRIAL

It cannot be over-emphasised that the duty of fairness begins pre-trial (indeed it never ends; even after verdict new material helpful to the defence must be disclosed). The first obligation is of disclosure. My first murder trial concerned the death of a young man at Mission Bay in Auckland. His fiancée had been beside him when he was stabbed and when the police arrived was unsurprisingly distraught. In her distress she gave the police an account that was exculpatory of the accused, whom she had identified in two subsequent statements. I was puzzled: material information must not be withheld from the defence; yet in my view the initial statement was nonsensical. I consulted the senior partner, Bob Meredith who looked at me in surprise and said "the facts are for the jury, not for you; of course you must pass it over".

His approach was formalised a good deal later when in the *Chief Ombudsman* case Sir Robin Cooke P devised out of the new Official Information Act a regime of

32 *SH (Afghanistan) v Secretary of State for the Home Office* [2007] EWCA Civ 1197 cited by Matthew Groves "The Surrogacy Principle and Motherhood Statements" in *Administrative Law in a Changing State; essays in honour of Mark Aronson* ed Linda Pearson, Carol Harlow and Michael Taggart (Hart 2008) 82.

33 *Sungsuwan*, above n 11.

criminal discovery.³⁴ The point is that each of them, from very different backgrounds, saw the principle in the same way: Crown counsel must not withhold from the defence, and therefore from the court, any material that may be of relevance, whatever counsel's personal views. The principle applies equally to judges. A similar lesson was given by Lord Bingham in the Privy Council in *Bain v R (NZ)*.³⁵

115 ...the real thrust of the Crown's case on appeal is to emphasise the strength of the many facts pointing clearly towards David's guilt. This, as is evident from the quotations given above of passages in the judgment of the third Court of Appeal, is the essential basis upon which the court dismissed the appeal. The Board does not consider it necessary to review these points in detail, for three reasons. First, the issue of guilt is one for a properly informed and directed jury, not for an appellate court. Secondly, the issue is not whether there is or was evidence on which a jury could reasonably convict but whether there is or was evidence on which it might reasonably decline to do so. And, thirdly, a fair trial ordinarily requires that the jury hears the evidence it ought to hear before returning its verdict, and should not act on evidence which is, or may be, false or misleading. Even a guilty defendant is entitled to such a trial.³⁶

A further pre-trial function of real importance is the selection of a proper charge or charges and to respond appropriately to any defence proposal to negotiate a plea. The topics require greater analysis than my time permits. In New Zealand the Solicitor-General has issued guidelines.³⁷ They include the following:

7.1 Circumstances can change, or new facts come to light, which make it necessary to reconsider the appropriateness of the charges originally laid.

7.2 If after a review against the relevant criteria, it is clear that a charge should not be pursued, it should be discontinued at the first opportunity. The mode of discontinuance will depend on the court before which the charge is pending and the stage the proceedings have reached. Similarly, if it is plain that a charge should be amended, that should be done at the first opportunity.

34 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA).

35 *Bain v R (NZ)* [2007] UKPC 33.

36 Following his recent retrial Bain was acquitted.

37 They are reproduced in Philip C Stenning *The Modern Prosecution Process in New Zealand* (Victoria University Press, 2008) 296.

7.3 If a charge is not to be proceeded with because a witness declines to give evidence and there are acceptable reasons why he or she should not be forced to do so, it will generally be preferable to ask the Court to dismiss the charge for want of prosecution. That course should be followed, rather than seeking a stay from the Solicitor-General, to ensure that the reasons for the discontinuance are publicly stated.

7.4 Arrangements between the prosecutor and the accused person as to the laying or proceeding with charges to which the accused is prepared to enter a plea of guilty can be consistent with the requirements of justice, subject to constraints which must be clearly understood and followed by prosecutors.

7.5 Those constraints are:

- (a) no such arrangement is to be initiated by the prosecutor.
- (b) no proposal to come to such an arrangement is to be entertained by a prosecutor unless:
 - (i) there is a proper evidential base for the charges to be laid or proceeded with and, conversely, there is not evidence which would clearly support a more serious charge.
 - (ii) the charges to be proceeded with fairly represent the criminal conduct of the accused and provide a proper basis for the Court to assess an appropriate sentence.
 - (iii) the accused clearly admits guilt of those charges which are to be proceeded with.
- (c) the prosecutor must not agree to promote or support any particular sentencing option. In every case the informant or the Solicitor-General will reserve the possibility of an appeal against sentence if the sentence imposed is considered manifestly inadequate or wrong in principle.
- (d) a prosecutor must not lay charges or retain them after it is clear that they should not be proceeded with for the purpose of promoting or assisting discussions about such an arrangement.

...

7.6 In addition to the matters outlined above a decision to enter into such an arrangement should be based upon the following considerations:

- (a) whether the accused is willing to co-operate in the investigation or prosecution of others or the extent to which the accused has already done so;
- (b) whether the sentence that is likely to be imposed if the charges are pursued as proposed would be appropriate for the criminal conduct involved;
- (c) the desirability of prompt and certain despatch of the case;
- (d) the strength of the prosecution case;
- (e) in cases where there has been a financial loss, whether the accused has made restitution or arrangements for restitution;
- (f) the need to avoid delay in the despatch of other pending cases.

In England the topic of charge negotiation or "plea bargaining" has recently been considered in depth by a full Court of Appeal in *R v Goodyear*,³⁸ where procedures for giving sentence indications, previously regarded as unlawful, are set out in detail. The Court stated the following as to the role of the prosecution:

69 As the request for an indication comes from the defence, the prosecution is obliged to react, rather than initiate the process. This presented no problem in the days before *R v Turner* [1970] 2 QB 321, when the common understanding, universally applied, was that the prosecution did not, indeed was obliged not to involve itself in or appeal against a sentencing decision. None of that continues to apply.

70 We must expressly identify a number of specific matters for which the advocate for the prosecution is responsible.

- (a) If there is no final agreement about the plea to the indictment, or the basis of plea, and the defence nevertheless proceeds to seek an indication, which the judge appears minded to give, prosecuting counsel should remind him of this guidance, that normally speaking an indication of sentence should not be given until the basis of the plea has been agreed, or the judge has concluded that he can properly deal with the case without the need for a *Newton* hearing (*R v Newton* (1982) 77 Cr App R 13).
- (b) If an indication is sought, the prosecution should normally inquire whether the judge is in possession of or has had access to all the evidence relied on by the

38 *R v Goodyear* [2005] 1 WLR 2532.

prosecution, including any personal impact statement from the victim of the crime, as well as any information of relevant previous convictions recorded against the defendant.

- (c) If the process has been properly followed, it should not normally be necessary for counsel for the prosecution, before the judge gives any indication, to do more than, first, draw the judge's attention to any minimum or mandatory statutory sentencing requirements, and where he would be expected to offer the judge assistance with relevant guideline cases, or the views of the Sentencing Guidelines Council, to invite the judge to allow him to do so, and second, where it applies, to remind the judge that the position of the Attorney General to refer any eventual sentencing decision as unduly lenient is not affected.
- (d) In any event, counsel should not say anything which may create the impression that the sentence indication has the support or approval of the Crown.

In New Zealand legislation to deal with this important topic is in preparation.

VIII OBLIGATIONS AT TRIAL

A criminal case matters to all involved: the accused, the victim, the community. In the common law adversary process the prosecutor is the advocate for the Crown, charged with putting its case clearly and well before the court and testing that of the defence.³⁹ That is both important and obvious. What is less easy is to decide just how that should be done in the instant case.

It is trite, because true, that in any legal judgment context is all. What is appropriate for the Crown where the defence is represented by an experienced leader,

³⁹ Justice Kirby in *Evans v The Queen* (2007) 235 CLR 521 gave at para 68 the following summary of the principles to be adhered to by prosecutors:

In a number of recent cases, this Court, the Court of Criminal Appeal itself, as well as other courts of high authority have found it necessary to remind prosecutors in criminal proceedings about the legal and professional rules governing their conduct in representing a special public litigant bearing, on behalf of the community, a "greater personal responsibility" to contribute to "the seriousness and the justness of judicial proceedings" of this kind. Australian courts should not accept any decline in those standards. In proper cases, evidence of serious lapses in standards by prosecutors, if uncorrected at trial, should result in appellate orders requiring a new trial that will conform to the fundamental standards of fairness postulated for the administration of criminal justice in Australia.

who to get to the heart may agree to shortcuts at which less experienced counsel might jib, may well be overbearing and unfair to a litigant in person. What matters is where fairness and proportionality point.

Of course Crown counsel must be masters of the rules of evidence and procedure, themselves major pointers to justice, developed from others' experience. But their role does not stop with opening, leading evidence, cross-examining and closing.

While it is the judge's role to exclude inadmissible evidence, that role should be as long stop where counsel have missed a point. Theirs is the primary function – to run the case. Judicial intervention is undesirable in criminal cases, especially before a jury. The judge, like the jury, should be and be seen to be above the fray. Whereas occasional rulings are inevitable, and usually in the absence of the jury, an intervening judge can give the appearance of tilting the scales. The problem is especially acute with accused who are poorly represented, whether by counsel or by themselves. The judge is faced with a dilemma: to intervene and appear to take sides; or not to, and risk injustice.

While defence counsel too are officers of the court and bound to comply with the rules, including those of etiquette and conduct, Crown counsel are in a sense ancillary judges; their freedom from defence counsel's heavy burden of representing the accused gives them greater capacity to contribute to the just and efficient running of the trial.

But they must first attend to their own responsibilities. Two recent Australasian judgments underline the point. In *Evans v The Queen*⁴⁰ the prosecutor required the accused facing charges of armed robbery, when under cross-examination, to put on a baseball cap found at the scene and a balaclava and overalls found at the accused's home and also sunglasses, so that the jury could compare his appearance with that of the offender as photographed by security cameras. The Crown was held to have acted wrongly, by Gummow and Hayne JJ because the evidence was not relevant and by Kirby J because the evidence was more prejudicial than probative. Kirby J acquitted the prosecutor of misconduct. But he upheld the appellant's argument that the course adopted was improper:

40 *Evans v The Queen*, above n 39.

109 There have been cases where witnesses have been requested to engage in in-court demonstrations by revealing a particular part of the body, otherwise clothed; providing a sample of handwriting; wearing a hat or where they have otherwise been tested on some idiosyncratic spoken or written reproduction of particular words. However, never in my experience has conduct in which the accused person has been asked to engage come close to the serious prejudice to which the appellant was subjected by the questioning by the prosecutor and the demonstration that she led him to perform in his trial.

110 When cases come before this Court, we must look beyond the instant case. We must examine what has happened recently against the standard of what will occur if, condoned, it becomes a general rule. In *Livermore v The Queen*, the Court of Criminal Appeal in New South Wales addressed what it saw as repeated instances of Crown Prosecutors making extravagant and improper submissions in closing which, the Court said, caused it to "[think] that [its] repeated condemnation ... appears to have fallen on deaf ears". In *Livermore*, the conduct of concern was the content of the prosecutor's closing address to the jury. Here, there is no complaint of such a kind. Indeed (as I have shown) the prosecutor in her closing observations attempted to assist the trial judge to provide directions to the jury on identification and resemblance evidence that were legally accurate and protective of the appellant.

111 Nonetheless, where, as here, such a prejudicial course of demonstration and questioning has been allowed at trial and excused by the Court of Criminal Appeal, it falls to this Court to insist on a return to basic standards of fairness in prosecution practice and in the conduct of such trials. That means ensuring that serious potential prejudice to an accused person, by obliging him to dress in court in the presence of the jury as a villain, should not be allowed. It should be disallowed in the clearest of terms. We should not avoid such condemnation by taking a pathway around it, deploying reasoning never previously hinted at.

112 If in trials of persons for armed robbery (now commonly captured by surveillance cameras on film and in still photographs) the accused could be required by prosecuting counsel to dress up like the offender and to present before the jury in the varying garments of criminal disguises, the trial of the accused would be gravely compromised. When the issue comes to this Court we should tackle it directly and say so clearly. [footnotes omitted]

I suspect that a further element of the majority's approach was on the basis of infringement of the dignity of the accused, now the basic human right, which

underlies the reluctance with which judges now permit accused to be manacled in court.⁴¹

In *R v Stewart* the Supreme Court of New Zealand has just delivered judgment setting aside a conviction on the grounds of unfairness by the prosecutor, whose address included the passages:⁴²

What did you make of the psychiatrist that the accused hired just before the trial and paid to try and get a defence to these charges? What did you make of Dr Davis' psycho babble? At the end of the day the doctor agreed that it was ultimately for you to make the decision about deceit or fraud, that's not for a doctor to make. You may well think that Dr Davis was a malingerer's dream who seemed to be able to come up with an explanation for everything the accused did as being consistent with Chronic Pain Disorder. Do you think he came across as an independent and impartial expert or was he someone who was firmly in the accused's camp bending things around to suit the accused.

...

You may well think at the end of the day Dr Davis' evidence seemed to say that everything was explainable by Chronic Pain Disorder. Is this just another one of those myriad of modern disorders let loose on the world by the medical profession which means that no one's responsible for any of their own actions anymore?

...

Who's got the motive to lie? Burt White [the appellant's brother-in-law] has got no reason to lie. I suggest to you, the neighbours have got no reason to lie. It's the accused who's got the reason to lie, he's got motive to lie, he's got the motive to go along and hire a psychiatrist and try to get himself off his ... out of this trouble. He's the one on trial, he's the one with the most to lose, him and his family. That's why they've got the motive to lie at this trial, those witnesses have got no motive to lie.

41 Since the cap contained a hair with DNA matching that of the accused, and of a type expected to be found in fewer than one in ten billion in the general population, the High Court applied the proviso.

42 *R v Stewart* [2009] NZSC 53.

The Supreme Court rehearsed the well known duties of the prosecutor which, in this company, can be consigned to an appendix. But unhappily that is not an isolated case. In *R v Musa* my colleagues were constrained to allow a new trial on rather similar grounds.⁴³

Lest this appear as a sermon to others I would recount that the final Crown address which was challenged in *R v Thomas (No 2)*,⁴⁴ while delivered by my leader, had been prepared by me.⁴⁵ It survived that challenge. Whether it meets the standards just discussed is for others to decide.

43 *R v Musa* [2008] NZCA 290.

44 *R v Thomas (No 2)* [1974] 1 NZLR 658 (CA).

45 Mr Morris read to this Court the relevant passage from his address to the jury which, he explained, had been prepared and typed before delivery. The passage is as follows:

"We fortunately do not know how long elapsed between the time Jeanette realised her husband was dying and her own death or just what happened in between. We do know that at some stage she received a violent blow, consistent with being from the butt of a rifle, to her face, and that when she was finally shot she was lying on the floor. We also know that a long hearth mat and cushion were at some stage burned by the murderer and also that the room was heavily bloodstained. Whether the burning of these items was, like the use of the two saucepans, with a view to concealing the blood or whether it was done to conceal other marks traceable to the killer or his treatment of Jeanette we do not know. The murderer was impelled by some overwhelming motive and that motive may have been more than merely to destroy Harvey, perhaps out of jealousy, and silence the only other witness. The evidence is equally consistent with a desire to get to Jeanette even if this entailed first killing her husband and later Jeanette herself. Whether the murderer was impelled by a combination of these motives only he can say, but there is nothing to suggest any alternative."

Mr Ryan accepted this as a correct record of what the Crown Prosecutor had said. He submitted that it was emotive and that it suggested ([1974] 1 NZLR 658 page 660) that Jeanette may have been sexually assaulted before she was killed. Even though Mr Morris, very fairly, was willing to accept that his words could carry that implication we do not think, having regard to all the evidence including that showing the appellant's strong affection at an earlier stage for Jeanette and his current misfortunes as compared with the Crewes, that it can be said that this passage exceeded the bounds of propriety. It is to be remembered that, in making his final address, the Crown Prosecutor was obliged to deal with the question of motive and he had to anticipate that in his address Mr Ryan would urge the jury that the appellant had no motive to kill.

IX CONCLUSION

A century ago Roscoe Pound delivered a lecture "The Causes of Public Dissatisfaction with the Administration of Justice".⁴⁶ Their causes include the dilemma that criminal processes may be too harsh or too soft; the reality that responses to crime are understandably made in angst, without awareness of the constitutional and human imperatives that have rid us of capital punishment and must continue to inform a just regime. Wisdom, maturity, sensitivity, energy, and balance are rare individually and more so in combination. Yet these, as well as the experience that only time and the example of others can provide and the vision that is needed to bring about necessary change, are the critical qualifications for an officer of justice. You are under examination in every decision you make and each piece of conduct that is made, or not made. Your performance, in your position of authority, is an example good or bad to others both near and far.

My forty years exposure to the New Zealand experience and to shorter periods elsewhere has seen, by and large, admirable performance by prosecutors. Experience of attitudes in Samoa, Tonga, the Cook Islands, Australia and New Zealand, and encounters with a number of you and other prosecutors in other common law and civil law jurisdictions in Europe and the Pacific, have borne out the fact of our common concern for the rule of law. That you have taken the trouble to come to this important conference, to learn and to share ideas, is further evidence that the systems in our part of this troubled world are in good heart.

⁴⁶ Roscoe Pound "The Causes of Public Dissatisfaction with the Administration of Justice" (1906) 29 ABA Rep 395, Cited by Spigelman CJ (n 9 supra). Available on internet.

APPENDIX
STEWART v R

[19] The duties of a prosecutor are well-established and should be well-known to all who undertake that role in this country. Among these duties, as the Court of Appeal said in *R v Roulston* [1976] 2 NZLR 644 in a dictum equally applicable to an attack on defence witnesses, is that (at p 654 per Woodhouse J):

... it has always been recognised that prosecuting counsel must never strain for a conviction, still less adopt tactics that involve an appeal to prejudice or amount to an intemperate or emotional attack on the accused. Such conduct is entirely inappropriate and a basic misconception of the function of any barrister who assumes the responsibility of speaking for the community at the trial of an accused person.

[20] To like effect, Tipping J observed when delivering the more recent judgment of the Court of Appeal in *R v Hodges* (CA 535/02, 19 August 2003, Tipping, Hammond and Paterson JJ); followed in *R v O* [2007] NZCA 87 (CA 342/06, 21 March 2007, Hammond, Chambers and Arnold JJ) and *R v Henderson* [2007] NZCA 524 (CA 153/07, 20 November 2007, Wilson, Panckhurst and Venning JJ):

[20] [Counsel representing the Crown in a criminal trial] is entitled, indeed expected, to be firm, even forceful. Counsel is not entitled to be emotive or inflammatory. The Crown should lay the facts dispassionately before the jury and present the case for the guilty of the accused clearly and analytically ... [Crown counsel] are entitled to contend forcefully but fairly for a verdict of guilty; but they must not strive for such a verdict at all costs.

[21] The words of the Supreme Court of Canada in *R v Cook* [1997] 1 SCR 1113 apply with equal force to New Zealand prosecutors (at para [21] per L'Heureux-Dubé J):

... while it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence, it is well recognized that the adversarial process is an important part of our judicial system and an accepted tool in our search for the truth Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability. Indeed, this is a critical element of this country's criminal law mechanism. In this sense, within the boundaries outlined above, the Crown must be allowed to perform the

function with which it has been entrusted; discretion in pursuing justice remains an important part of that function. [Underlining in original].

[22] After referring in *R v Mallory* (2007) 217 CCC (3d) 266 to this passage from *Cook*, the Ontario Court of Appeal helpfully analysed the obligations of prosecutors in opening and closing their case:

[338] It is well established that the opening address is not the appropriate forum for argument, invective, or opinion. The Crown should use the opening address to introduce the parties, explain the process, and provide a general overview of the evidence that the Crown anticipates calling in support of its case. Simply put, "the Crown's opening address should be impartial and fair, a brief outline of the evidence that the Crown intends to call". At the opening of the trial the rules constraining the Crown "should apply with even more vigour" than at the closing when by then the jurors have heard and seen all about the case.

[339] With respect to closing addresses, the Crown is afforded greater latitude. While Crown counsel must at all times conduct themselves with dignity and fairness, they are entitled to advance their position forcefully when making closing submissions. In *R v Daly* (1992) 57 OAC 70 at 76 (CA) this court observed:

A closing address is an exercise in advocacy. It is the culmination of a hard fought adversarial proceeding. Crown counsel, like any other advocate, is entitled to advance his or her position forcefully and effectively. Juries expect that both counsel will present their positions in that manner and no doubt expect and accept a degree of rhetorical passion in that presentation.

[340] The closing address is the proper forum for argument and the Crown is certainly entitled to argue its case forcefully. The Crown should not, however, engage in inflammatory rhetoric, demeaning commentary or sarcasm, or legally impermissible submissions that effectively undermine a requisite degree of fairness.

[341] In a protracted and hard fought trial such as this, one with months of pre-trial proceedings and allegations of abuse of process, it may be difficult for the Crown to resist rhetorical excess. But resist it must, even when provoked by what Crown counsel perceives to be obstructive and truculent behaviour by the defence.

