

Prosecutorial Ethics

Speech by **Lloyd Babb SC**

Director of Public Prosecutions (NSW)

Introduction

This paper will cover a range of topics on prosecutorial ethics. I will commence with a discussion of obligations of the prosecution when making submissions on sentence and then consider some issues of how “case theories” can stand in the way of a proper focus on the evidence and questions of why it is important as the prosecution to chart a course with thorough preparation and not lightly alter that course.

Submissions on Sentence:

***Barbaro & Zirilli v The Queen* [2014] HCA 2**

The High Court handed down a landmark decision on sentencing a week ago in the case of *Barbaro & Zirilli v The Queen* [2014] HCA 2 (a copy is attached), in which the High Court has overturned the Victorian Court of Appeal decision of *R v MacNeil-Brown* (2008) 20 VR 677.

Despite it being a Victorian case **it is essential reading for all criminal lawyers**. It is not very long – 25 pages, 13 being essential. I will need to carry out a more detailed evaluation of the case and intermediate appellate court considerations of the practical implications that consider it in the near future, but I would like to take some time to discuss my current thoughts on this case in the meantime.

By way of background, in *MacNeil-Brown*, three of five appeal judges had created an obligation on the Crown in Victoria to provide a numerical sentencing range if either "*the court requests such assistance*" or "*even though no such request has been made, the prosecutor perceives a significant risk that the court will fall into error regarding the applicable range unless such a*

submission is made". That obligation has now ceased to exist, but the impact of the decision extends well beyond Victoria and well beyond overturning *MacNeil-Brown*. It constrains the form and potentially the content of what the prosecution can say about what the sentencing outcome should be in a given case.

The facts in relation to Mr Barbaro involved 3 commercial quantity supply/attempted possessions of more than 16 million of MDMA tabs and 100 kg of cocaine. A plea agreement was reached. Before the applicants indicated their plea to CDPP, discussions and the prosecution indicated that the range was 32-27 for the head sentence and 24-28 for the non-parole period. Barbaro was in fact sentenced to a head sentence of life and a non-parole period of 30 years. There were slightly different facts in relation to Mr Zirilli. At the outset the judge indicated that did not seek and would not receive any submission from the prosecution about what the range of sentences was. An appeal on the ground that because of the sentencing judge's decision not to receive a range from the prosecution the sentence hearing was procedurally unfair and the sentencing judge failed to take into account a relevant consideration. The appeal was dismissed in the Victorian Court of Appeal. Special leave was granted by the High Court, the appeal was dismissed and the High Court determined that the practice required by *MacNeil-Brown* of the prosecution providing a submission about the bounds of the available range on sentence was overruled.

In *Barbaro*, French CJ, Hayne, Kiefel and Bell JJ (Gageler J dissenting on this point) held at [7]:

"The prosecution's statement of what are the bounds of the available range of sentences is a statement of opinion. Its expression advances no proposition of law or fact which a sentencing judge may properly take into account in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be imposed. That being so, the prosecution is not required, and should not be permitted, to make such a statement of bounds to a sentencing judge."

The majority also said at [39]:

"... the role and duty of the prosecution remains the duty ... to draw to the attention of the judge what are submitted to be the facts that should be found, the relevant principles that should be applied and what has been done in other (more or less) comparable cases."

It is neither the role nor the duty of the prosecution to proffer some statement of the specific result which counsel then appearing for the prosecution (or the Director of Public Prosecutions or the Office of Public Prosecutions) considers should be reached or a statement of the bounds within which that result should fall. ”

Barbaro potentially fundamentally affects how the NSW DPP approaches the conduct of sentence hearings, given that NSW Bar Rule 93 provides that:

A prosecutor may submit that a custodial or non-custodial sentence is appropriate and may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant decisions.

Further, my Prosecutorial Guideline 28 directly quotes from the Bar Rules and outlines how I expect prosecutors to comply.

The key thing that will need to be avoided is what is, or appears to be, a mere expression of opinion as to what a sentencing outcome should be. The scope of prosecution sentence submissions following *Barbaro* is that, beyond facts and comparative sentence information and the provision of comparable cases, the Crown must confine itself to addressing “*the relevant sentencing principles*” ([38]) or “*the relevant principles that should be applied*” ([39]). Those references must be taken to be a reference to both common law and statutory sentencing principles.

The relevant principle may be derived from what has been said by a prior intermediate appeal court, or the High Court (including such things as imprisonment being required for a particular offence other than in exceptional circumstances). A clear example of this would be reference to principles established in a guideline judgment such as *Henry* or *Juriscic/Whyte*.

It may also be necessary and appropriate to deal with such issues as the disposition or duration of a sentence in order to address statutory requirements, which are themselves sentencing principles set by parliament. For example, as to disposition, the fact that s 5(1) of the *Crimes (Sentencing Procedure) Act* provides that “A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate” may require submissions by reference to authorities and comparable cases as to whether the sentencing court should be so satisfied.

An example as to duration is that in the legislation providing for intensive corrections orders (ICOs) has a threshold issue of whether the offender is likely to get a sentence of imprisonment of no more than 2 years, which may then require submissions as to whether that is or should be likely.

An often cited passage on the obligations of the prosecution on sentence is *R v Tait* (1979) 46 FLR 386:

It remains true that the Crown is required to make its submissions as to sentence fairly and in an even-handed manner, and that the Crown does not, as an adversary, press the sentencing court for a heavy sentence. The Crown has a duty to the court to assist it in the task of passing sentence by an adequate presentation of the facts, by an appropriate reference to any special principles of sentencing which might reasonably be thought to be relevant to the case in hand, and by a fair testing of the defendant's case so far as it appears to require it. If the proposition that the Crown is not concerned with sentence was ever construed as absolving the Crown from this duty, it cannot be so construed when a Crown right of appeal against sentence is conferred. The Crown is under a duty to assist the court to avoid appealable error. The performance of that duty to the court ensures that the defendant knows the nature and extent of the case against him, and thus has a fair opportunity of meeting it.

Subject to the specific matters which I outline above, those obligations are ongoing.

I expect that the NSW Court of Criminal Appeal will consider *Barbaro and Zirilli* when it delivers judgment in the case of *Mitchell* which was argued last week. That was a case where the Crown Prosecutor declined to offer an opinion as to whether a sentence the judge indicated he was considering would be appealable. I subsequently directed a Crown Appeal and one of the issues on appeal was whether the residual discretion should be applied to dismiss the Crown Appeal because of the failure of the Crown to "properly assist".

This note is not a substitute for reading the case, but is designed to draw your attention to an important decision

Prosecutorial ethics and the conduct of a trial:

I started with sentencing only because there was such a significant and recent new decision. Let's get back to the conduct of the trial.

It is worthwhile to go back to basics because the role of prosecutor and defender can be extraordinary thankless and both are jobs of incredible responsibility. Too few resources, too many files, not enough time, the demands of the court, the demands of the other side, any number of things.

The case of *Boucher* from Canada which is the most often cited case. The court said:

The role of the prosecutor is not to obtain conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notation of winning or losing; his function is a matter of public duty than which in civil life one cannot be charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings.

In my view that quote quite summarises the importance and the significance of what prosecutors do. That case has been endorsed by the High Court and indeed many courts around the country.

It is the framework philosophy that guides the Regulatory Framework:

1. Bar rules
2. Advocacy rules of Revised Professional Conduct and Practice Rules of the Law Society
3. My Prosecution Guidelines
4. CW Prosecution Policy

When you read a number of the more recent cases and accepting that events can occur during the trial completely out of the prosecutor's control, we have all experienced that, so accepting that, nonetheless when we read some of the recent cases, one does wonder how it got to the situation that it did and the one that springs to mind is *Patel* in the High Court.

The allegation in *Patel*, a very high profile case, was manslaughter by criminal negligence. As it is obvious from the High Court judgement, particulars of the criminal negligence weren't provided to the Defence until shortly before the

trial. The Crown was running a case that the operations that were conducted negligently. After some period of time, a new set of particulars arrived which changed the allegation entirely. The Crown became that it was the decision to operate that was negligent, the operations themselves were fine.

Now that is a pretty big shift and during the course of the trial, numerous sets of particulars were provided, right up until the end of the Crown case. Now ultimately the High Court concluded that there had been a miscarriage of justice, amongst other things, the Crown had changed its case but it meant that a whole lot of evidence that was lead before the change of the Crown case was now before the jury that was hugely prejudicial.

Most cases are prepared and planned. Prosecutors need to think very carefully about changing a case prepared in that way.

Now what does preparation mean.

In my view, the starting point from the crown prospective are the elements of the offence. What is the evidence that establishes the elements, what's admissible and what inference is to be drawn from it. Now that is the first step in my view, and it is relevant at every stage of the proceedings.

So the first stage is the laying of the charge, one can't lay the charge unless you know what the crown case is, and what the evidence is. Now I expect that further evidence might be obtained over time and things might have to be reassessed.

However I am strongly of the view that it should be the prosecution that sanctions the charge that is to be prosecuted on indictment. Senior prosecutors need to determine the appropriate charge at that particular point in time. Overcharging and overreaching delays appropriate pleas and can lead to problematic trials.

There is a huge problems, you can appreciate, with charges that are wrong as time goes on because having charges that can't be proved do create false expectations not only to victims but in the media and alike. So it is relevant to the first stage, it is relevant to the question of accepting a plea. How can you work out if it is appropriate to accept a plea unless you actually know what the case is about and how you are going to prove it.

Knowing what the case is early also informs a prosecutors decisions about disclosure, it informs your decisions in relations to what witnesses are in fact

going to be called and what evidence is to be led and why the evidence is to be led.

It is not acceptable for a prosecutor, by the time of a hearing, to be unable to clearly articulate what the case is, how is going to be proved and if objection is taken to evidence a prosecutor should be able to say *“this is relevant and admissible because...”*

This would be assisted by early briefing and vertical representation. These are goals of mine. I think that front end resourcing can best occur if the prosecution sanction all charges that are to be prosecuted on indictment. If you would like to know more about the detail of what I propose then go to the Law Reform Commission website and look at my submission to them on the Early Guilty Pleas Reference.

Supporting the Crown Case with Evidence:

I don't like one facet of modern advocacy training as it applies to prosecutors.

Namely, the theory of a crown case. It seems to have sprung up in recent times in the criminal justice. I am assuming that it comes from the fact that if advocacy training ones told repeatedly what is the theory of your case and I am an advocacy teacher so I know that is what people are told. You don't want to have theory then try push the evidence into a theory as that is back to front. You need to look at what the evidence is and what inference can be drawn from that.