



Life on the bench in PNG

By Justice Graham Ellis



Kokoda District Court House. Photo: Sandra Jackson / Fairfaxphotos

After appearing in a case in Port Moresby in 1985, I found myself travelling there over the next few years to assist with seminars to train local lawyers. In 1989, when a judge who had been stabbed a few months before decided not to renew his contract, I was approached by the chief justice to fill that vacancy. Upon arrival in January 1990, at a time when the law and order situation was so serious that 9pm to 6am curfews were imposed in major towns, I found I was based in Rabaul, with responsibility for the New Guinea Islands region. As a result, I spent the first three weeks in the month sitting as a judge of the National Court (the senior trial court) in either Manus, Kavieng, Rabaul, Kimbe or Buka in the Bougainville region. The last week in the month was normally spent in Port Moresby, sitting as one of three (or sometimes five) judges of the Supreme Court (the senior appellate court).

Sitting in the Bougainville region during what became known as the Bougainville crisis involved a number of challenging tasks, including deciding cases involving some members of the armed forces while other members of the armed forces were 'test-firing' their weapons into the ground behind me to give me a hint how to decide the case.

August 1991 saw the eradication of criminal list backlogs from the entire New Guinea Islands region. A system was implemented in Rabaul whereby anyone committed for trial by the District Court would appear in the National Court the following Monday. If the case involved a plea, it was finalised straightaway. If the matter was proceeding to trial, a trial date was allocated and the trial was conducted within the following

month. It was a surprise to find that, under such a system, the law and order problem virtually disappeared and Rabaul at that time became the only major town which did not have a 9pm to 6am curfew.

Dealing with criminal gangs led to some interesting moments although some light relief was provided when a gang leader charged with one count of wilful murder, four counts of armed robbery and six counts of pack rape was given a life sentence for rape. Not realising I had imposed the first ever life sentence for rape in the history of PNG, I found the national newspaper's weekend edition had a prominent headline 'First life sentence for rapist' and, not having a photograph of the accused, they put my photo underneath the headline!

...members of the armed forces were 'test-firing' their weapons into the ground behind me to give me a hint how to decide the case.

September 1991 brought its share of excitement when I was appointed to chair a Leadership Tribunal when the then deputy prime minister was charged with 86 charges of corruption. To cut a long story short, the outcome was that the positions of deputy prime minister and governor-general both became vacant.

Late in 2008, following two years of negotiations between governments, I found myself back in PNG working in the

Office of Solicitor General. There were three problems I was requested to address: the standard of the local lawyers in the office, corrupt settlements (which a commission of inquiry revealed to have involved hundreds of millions of Kina over the previous three to five years) and a backlog of about 10,000 cases involving claims against the state. When I arrived, in November 2008, the solicitor general and his deputy had been terminated based on their involvement with what was said to have been a corrupt settlement. In February 2009, when they were re-appointed, I found myself instructed to work from home and by June I was flying home to Australia as the attorney-general did not want me there any more. I should add that in May this year that corrupt settlement was approved for payment and, shortly after that, the prime minister recently demanded and received the resignation of the attorney-general who approved that settlement. However, my return to Australia was short-lived.

In September 2009 the chief justice of Papua New Guinea (please pronounce it Pa-pua and not Pap-ua), Sir Salamo Injia, asked me to return to the bench almost 20 years after I was first sworn in. The position in PNG is that a newly appointed judge is sworn in by the governor-general and the welcome ceremony is conducted later. On 26 February 2010, five months after I arrived, I was officially welcomed. It was interesting to listen to the welcome speech of the attorney-general who caused me to be sent home eight months before.

Upon arrival in September 2009 I was sent to places where there were backlogs: Wewak in October, Kavieng in November and Porgera in December. The current position is that there are about 20 judges. Only three of us are non-citizens and the other two have worked in PNG for many years. About half the judges are based in provincial locations. Judges would prefer to serve in Waigani, the government centre in Port Moresby. No-one wanted to serve in Enga Province which had attracted a reputation as being the 'wild west' of PNG. When the chief justice indicated he was thinking of sending me to Enga I beat him to it by volunteering to go there.

Accordingly, since February this year I have been based in Wabag. Getting to Wabag involves a one hour flight from Port Moresby to Mount Hagen then driving, with a police escort vehicle, for two to three hours west along a deteriorating road to Wabag. Since there are limited places to shop in Wabag, it is necessary to make the occasional shopping trip to Mount Hagen on Saturday mornings. An added difficulty is that the power blackouts are frequent and sometimes lengthy. At home, blackouts means the food in the refrigerator is likely to spoil. At work, blackouts mean that the recording equipment will not work so I have to revert to the system which applied



Ellis J (left) with Kariko J, Sawong J, Kawi J

when I was here 20 years ago and write everything by hand so that a transcript can be typed in the event of an appeal.

There should be about 20 staff at the National Court in Wabag. There are about 15. About 10 of them are security guards. In the registry there are two people doing the work of five. The current court building replaced a building that was burnt down. Wherever I go in Wabag I am supposed to be accompanied by a police escort vehicle. For the first two months I thought the police escort vehicle was a covert operation but then I found out that the police escort vehicle was off the road, being repaired! It transpired that, instead of the message being the resident judge is important because he has a police escort and that Wabag is dangerous because the resident judge needs a police escort, the message became that the resident judge is not scared of the criminals and he does not need a police escort because Wabag is now safe.

A police mobile squad, the local equivalent of a SWAT team, is based in Wabag. Sometimes we call them in to 'keep the peace' while a dangerous criminal is being tried. Other times their appearance without notice, patrolling in their blue camouflage uniform and carrying assault rifles outside the court, suggests a dangerous criminal is being tried. In addition to the court security staff, the mobile squad and my police escort, I have two security guards at home.

The judge based in Wabag, the capital of Enga Province, also looks after the Porgera circuit. I can clearly recall reading an article in the SMH's *Weekend Magazine* a year or two ago about Porgera and feeling sorry for the poor judge who had to sort that mess out. Little did I realise that would be me! Porgera,

now a gold-mining town, is a three hour drive west of Wabag. In both locations, the criminal list is dominated by murder charges with an occasional aggravated rape. That reflects that the law and order situation had become so difficult that the police were concentrating on murder to the exclusion of other offences. You do not want me to give examples of the kind of conduct revealed by the evidence in murder trials. Perhaps it is sufficient to indicate that there was one accused who had seven charges pending: five charges of wilful murder, one charge of attempted and one charge of wilful damage arising from when he shot at the local police station with his M16.

The accused is usually charged with either wilful murder (killing with intent to kill), murder (killing with intention to cause grievous bodily harm or killing in the course of committing another crime) and manslaughter (unintentional killing). The maximum penalty for manslaughter and murder is life imprisonment: for wilful murder it is the death penalty. There have been a number of people sentenced to death since the death penalty was re-introduced in 1991. However, that penalty has yet to be carried out and after close to 20 years it must be questioned whether it ever will be.

Civil cases vary. There are a lot of claims for damages arising from police raids (police officers go into a village, burn houses, shoot pigs and destroy crops)...

There is a guideline Supreme Court judgment for sentencing in cases of manslaughter, murder and wilful murder which gives four categories for each offence. The suggested starting point for a category 1 manslaughter case is imprisonment for between 8 and 12 years. Easily the most common kind of case in that category would be what is known locally as a 'spleen death': a husband kicks his wife, she has an enlarged spleen due to malaria, her spleen is ruptured and she bleeds to death. At the other end of the scale is category four wilful murder. You can guess what the suggested penalty is for such a case. I almost had such a case recently. At close to midnight I found a Supreme Court case which suggested that the offender fell within category 3, not category 4. The next day, when I announced the sentence of life imprisonment, the offender dropped to his knees and said a quick prayer then said 'Thank you' to me before departing for the cells.

Reducing backlogs means list a criminal trial every day. I have

had two weeks with a wilful murder trial every day. As there are no juries in PNG, it is necessary to conduct the trial, reach a verdict and, if the verdict is guilty, consider what sentence should be imposed. Having done this job before, albeit 20 years ago, I am usually able to deliver a same day oral judgment or, since I do my own typing, a next day written judgment. The normal sittings hours are 9.30 to 12 noon, with no morning tea adjournment, and 1.30pm to 4.00pm, with no afternoon tea adjournment. I use the time between 9.00am and 9.30am and between 1.00pm and 1.30pm to hear pleas of guilty and to deliver judgments. As a result, I tend to average up to two cases per day, given the occasional case where the prosecution does not proceed, such as a rape case where the complainant has since married the accused!

Government office hours in PNG are 7.45am to 4.06pm (please don't ask me why 4.06pm). My day usually starts at 6.00am with admin work between 7.30am and 9.00am. I usually go home shortly after 4.00pm (so my driver can take my housekeeper home) and then start typing up my summary of the day's evidence in order to be able to finalise the judgments ready for delivery the next morning. The day usually ends between 10.00pm and midnight, depending on such things as whether there is a blackout. There is not a vacant moment in any day for those three weeks of National Court sittings.

At the completion of those three weeks, there is 6.00am start for a drive to Mount Hagen to catch a plane to Port Moresby. That hour on the plane is my R&R. Upon arrival in Port Moresby I collect my appeal books for 'Supreme Court week'. My record was to have sat on 10 Supreme Court appeals in five days last November but, when I was sent to Kokopo recently, there were 21 appeals listed over four days. When stacked on the floor, the appeal books came just above my knee. They were delivered at 6.00pm Sunday night and the cases started at 9.30 the next morning. I managed to sit on 20 of those 21 appeals. Only one of those appeals did not proceed and I was pleased to be able to deliver an oral judgment in each of the remaining 19 appeals, thereby keeping my record of no reserved judgments intact.

When I arrived in Wabag, there were 202 cases in the civil list and I had only been given three weeks in April for civil sittings. The question was how to address that backlog. I decided to 'shake the list and see what falls out' by giving the prosecutor and the defence lawyer a day off to prepare for criminal matters and conducting a call-over of the entire civil list on one day: 17 February 2010. That revealed about 20 matters which had either been settled or were discontinued. A 'Summary Determination List' on 19 March removed another



'Those who say they are innocent, please raise your hand'. Eighty-three men in a cell built for 40. Photo: Graham Ellis

20 or so. More than 40 cases were heard and finalised in April. As there are 40 pending appeals from the District Court, they have been listed for between 9.00am and 9.30am and 1.00pm to 1.30pm in June, two in the morning and two in the afternoon, so as not to interrupt the flow of criminal cases. Hence, the good news is that by 30 June only about 80 of the 202 civil cases will remain. The bad news is that 30 or so cases have been commenced this year so the list will only be down to about 110 by the end of June when I take three weeks' break. Since 30 of those 110 cases arise from motor vehicle accidents, and half of the plaintiffs are passengers from the same bus accident, those matters have been listed for a week in August. Thus, by 31 August the list should be back down to a more acceptable 80 cases.

Civil cases vary. There are a lot of claims for damages arising from police raids (police officers go into a village, burn houses, shoot pigs and destroy crops), a number of claims by owners or former owners of customary land and a variety of other disputes.

So far as the criminal list backlogs are concerned, as a result

of three weeks spent in Porgera in May, there are no cases pending in Porgera with the result that anyone committed to stand trial in the National Court from now on will have his or her case heard the next time a judge is in town. In Wabag, the criminal list backlog should be eliminated by the end of June. The position then will be that anyone who is committed for trial by a magistrate in the District Court will appear in the National Court on the first Tuesday in the following month. If the case is a plea it will be finalised straightaway, otherwise it will be allocated a trial date at that first call-over and the trial will be held within the next four months.

As was the case when I was based in Rabaul, the elimination of criminal list backlogs in Wabag and Porgera has had a favourable effect on the law and order situation. People no longer bring their bush knives into town, there have been no fights in Wabag town this year and no drunken people on the streets of Wabag. Accordingly, the work here is rewarding despite being demanding, difficult and not without danger.

In contrast to the heat of Port Moresby, Wabag is a much cooler climate, being more than 2,000 metres above seal level, and

Porgera is close to 3,000 metres above sea level. The biggest contrast, however, is when I return to Australia, normally every fourth weekend, to remind my wonderful wife and adorable son what I look like. Living and working in a developing country makes me appreciate many things Australians take for granted. Happily, there is a direct flight from Port Moresby to Sydney so I can leave Port Moresby at 2.00pm on Friday and be back by 1.00pm Monday.

The first thing I noticed in the women's section was a remandee, who was obviously suffering from a mental disability, chopping firewood with an axe. Checking the court files revealed that she was awaiting trial for murdering her husband with ...

The workload is the mental equivalent of running a marathon since, in addition to the trial and appeal workloads, I have two additional tasks. First, my judicial administration duties. Judges in PNG are expected to contribute to what is known as judicial administration. Not long after I arrived, the chief justice appointed me to chair the Ethics Committee. Our primary task is to prepare a Code of Conduct. Recently, I have been given the task of establishing and chairing an Audit Committee.

Secondly, I should not overlook what might be called my human rights duties. The PNG Constitution has, since Independence in 1975, contained extensive human rights provisions. For example, section 37(17) provides that: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' More importantly, section 57 provides that those human rights (called basic rights) shall be protected by the Supreme Court or the National Court either 'on its own initiative' or on application by any person who has an interest in the protection and enforcement of those rights.

Add to that the requirement for prison visits and you have a recipe for excitement. One of the reasons I was assigned to Enga is that there is no prison in Enga Province! I was given the task of correcting that situation on the understanding that I would only be required to achieve miracles immediately and the impossibilities may take a little longer.

My approach in PNG has always been to inspect where remandees and convicted persons will be held before either denying bail or sentencing anyone to imprisonment in that locality. For that reason, I went to inspect the prison in Baisu,

near Mount Hagen, where the prisoners from Enga Province are housed. At Baisu, prisoners are a three or four hour drive by truck from Wabag and seven or eight hours from Porgera. That makes it difficult for families to visit them and for their lawyer to meet with remandees to prepare their defence.

The first thing I noticed in the women's section was a remandee, who was obviously suffering from a mental disability, chopping firewood with an axe. Checking the court files revealed that she was awaiting trial for murdering her husband with ...! I conducted a fitness hearing as soon as possible. The decision became easier when the remandee said she wanted to be released so she could live with her husband. She has now been moved from prison to a suitable hospital environment.

However, the greatest surprise was when I found 83 remandees housed in a cell built for 40. When I asked them to assume their sleeping positions they could not lie down without someone's head being on someone else's legs. There was only one toilet for those 83 men and it did not flush. There was a drum of water near the Asian-style, hole in the ground toilet with a metre long piece of hose nearby. It was used to suck water from the drum to flush the toilet and, when not used, it was left on the toilet floor. It did not take long to decide whether those conditions breached the requirement to treat those remandees 'with humanity and with respect for the inherent dignity of the human person'. I was able to take photos and publish a 20 page next working day judgment which hit the front page of the national newspapers for a number of days. Rather than exercise my Constitutional powers to order certain people to do certain things, I chose to do no more than request a number of things. Not surprisingly, the relevant people responded better to requests than to orders, with one notable exception.

That judgment also outlined the situation in the police cells in Wabag which had been condemned by the Department of Health more than a year earlier. Additionally, I was able to point out that there was, in Enga Province at Mukurumanda, a prison with no prisoners! Housing for the guards had been completed but not the cell blocks. Luckily, I noticed a nearby building which was suitable for housing as many as 80 prisoners.

As a result, by the end of the calendar month there was an interim remand facility established and operational at Mukurumanda and a Steering Committee established to fast track the completion of that prison facility in Enga Province. Regrettably, the Police commissioner did not respond to my requests. Rather than get upset, make orders and threaten to have him arrested (which another judge was already doing at the time), I spoke with the court staff and we began cleaning

the police cells. Since our cleaner at the court is Seventh Day Adventist, we could not do it on Saturday, so we began to clean the police cells every second Sunday. Ten members of the court staff and two police officers assisted me. Consistent with the proposition that cleanliness is next to Godliness, cell cleaners were able to go to church on Sunday morning and clean the police cells on Sunday afternoon.

You would not believe the shock wave that went through the country when it transpired that a Supreme Court judge was cleaning toilets. There followed a rush of activity to not only fix up the police cells straightaway but also construct new police cells as soon as possible. I should add that the dozen people who joined me in the cell-cleaning exercise may have been influenced by the fact that everyone who assisted has had their name placed in a barrel and, when the new police cells are completed, some lucky person will win a pig.

You need to know that pigs are highly valued in Enga Province and are often seen as a measure of wealth and status. On one occasion I was having difficulty understanding the evidence in a murder case arising from an argument over a pig until I realised that the pig was sleeping inside the house. He (or she) was, to use a local term, a 'house pig'. On another occasion, in Kavieng, when the evidence involved a number of references to Ramone, I asked whether Ramone was going to be called to give evidence only to find that Ramone was not the name of a person: it was the name of a bus!

Another memory from Kavieng was when I thought I would reduce the backlog by conducting a joint trial for six people each charged with the murder of a man believed to be engaged in sorcery. When the prosecutor indicated that there were another six people charged with the same murder, I found myself running a murder trial with twelve accused. Since they would not all fit in the dock, and as there were two rows of seating for the public in the back of the court, I decided the front row would be for the accused and the back row for the spectators. In order to rearrange the seating I said: 'anyone who is involved in the death of (name), please raise your hand'. I have yet to tell the prosecutor, who was facing me, that there were thirteen hands raised!

I have appreciated letters and e-mails from colleagues at the bench and bar. However, please excuse any delay in replying. A letter from a judge took three weeks to arrive because it was sent to Port Moresby. (It would have been longer if it had been sent to Wabag.) I was not able to reply to an e-mail from a silk for a number of days due to electricity blackouts followed by the telephone lines being out. My new found skills include walking around the house in the dark and keeping food where the ants can't find it. Other challenges include feeding a party

of seven on circuit to Porgera when their travelling allowance cheques have not arrived before we leave Wabag, a task made more difficult by the fact that there is no bank in Porgera!

For those who may be tempted by a gruelling workload I should disclose the remuneration package. I am told there is a pay rise on the way but I have yet to see it. When I arrived, the salary was around K140,000 (\$A56,000) per annum. Deducting a third for tax gives about \$A38,000 per annum. There is an additional annual amount equivalent to \$A12,000 for security but I can assure you that is fully expended. Hence, many juniors at the Sydney Bar would earn my annual salary in two weeks, there would be silks who earn that amount in a week and I suspect David Jackson QC would earn that in a day of special leave applications in the High Court. I'm not complaining at having put off my retirement in order to help restore law and order in a remote part of PNG. I don't just get to talk about the rule of law: I get to do something about it. The only 'minus' is living away from my family. I am indeed fortunate to have their support for my work here. You may be assured that it does the reputation of the NSW Bar no harm to have one of its members serving here.

On one occasion I was having difficulty understanding the evidence in a murder case arising from an argument over a pig until I realised that the pig was sleeping inside the house. He (or she) was, to use a local term, a 'house pig'.

While there is no doubt that there are people in PNG who engage in criminal and corrupt conduct, they represent perhaps only one per cent of the population although they attract 99 per cent of the publicity in Australia. The vast majority of the people of PNG are delightful people and their support for my work is most encouraging. I am pleased to be able to count many of them as my friends. However, to use the oft-quoted tourist promotion slogan from a number of years ago, it is true to say: 'PNG – land of the unexpected'!