Living within the Law

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The University of Newcastle Law School has paid me a profound honour in inviting me to deliver the 2005 Sir Ninian Stephen Lecture. Unlike my predecessors at this lectern, I am neither a distinguished justice of a superior court or an eminent academic. I have, for 28 years, been a public servant, a foot soldier in our legal system, working at the coalface of the most fascinating jurisdiction of all, the criminal courts.

The distinguished Australian after whom this lecture series is named achieved a vast array of honours and offices in a splendid life of service to this country and to the international community. Knight of the Garter, Knight of the Order of Australia, Knight Grand Cross of the Order of Saint Michael and Saint George, Knight Grand Cross of the Royal Victorian Order, Knight Commander of the Order of the British Empire, Governor-General, Member of the Privy Council, Justice of the High Court of Australia, Justice of the Supreme Court of Victoria, Australian Ambassador for the Environment,

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President of the Constitutional Centenary Foundation, Senior Judge of the International Criminal Tribunal for the former Yugoslavia, Judge of the International Court of Justice and Chair of a United Nations Commission to address war crimes in Cambodia.

Compared to the audience of the inaugural of these lectures, delivered by Sir Ninian himself on this very day in 1993, you have been cruelly short-changed.

But I do wish to encourage you to walk in the great footsteps of Sir Ninian in your approach to your lives in the law. When the Honourable Justice Michael Kirby AC CMG delivered this lecture in 1997, he referred to three characteristics which Sir Ninian has deployed throughout his devoted service to the citizens of Australia. Justice Kirby urged his audience to strive to emulate Sir Ninian in a call to honesty and balance and proportion. I wish to echo His Honour's call, particularly from the perspective of the criminal law, and to remind you that you already possess these qualities in abundance.

The danger is that the life and logic of the law can sometimes erode these qualities and we must be on our guard to ensure that our senses of honesty and balance and proportion remain immune and intact as we develop powerful reasoning skills which render one capable of justifying almost anything.

For my undergraduate degree I attended a Law School which was then much younger than yours. In fact I was in the very first intake of the Faculty of Law at what is now the University of Technology, Sydney, but which was then the New South Wales Institute of Technology. It was 1977. My workmates in the Attorney General's Department were full of derision: 'You're doing Law at tech?' But I was very fortunate that it had come into being.

Just after I completed the Higher School Certificate, an event occurred the detail of which I am not confident to give you as my recollection of it and that of my parents has, in the intervening years, diverged. So I shall simply say that it came

to pass that I found myself no longer living at home. Of course the word HECS at that time still had no other meaning than an evil spell or curse. But as a matter of survival I had to work. I started work as a legal clerk in the New South Wales Public Service on the same day as I started law at the Institute of Technology.

It was exclusively a part-time course in those days and the then Dean, Professor Geoffrey Bartholomew, had reservations about the staying power of the 6 out of the initial 150 starters who were school-leavers. The average age of the first intake was 34. I was the youngest and one of only 15 women. The spectre of all those worldly looking people was intimidating and their talk of other degrees undertaken (but, as I came to discover, uncompleted for the most part) meant that when the Dean made his prescient prediction that only 10% of us would finish the degree within 6 years, I was concerned that I would not be one of them. But I didn't realise then how much I would come to thrive on Chiko Rolls and schooners of New.

Alcohol was a particular temptation to the law student of the day, in a way which I am sure is no longer the case. I have always regarded Sir Ninian Stephen's judgment in the leading Australian authority on the criminal defence of intoxication as being to blame. In *R v O'Connor* Sir Ninian said:

> My subsequent references to intoxication are to be understood as restricted to the consequences of the voluntary taking of alcohol ... to a degree sufficient to deny the existence of the mental element necessary for the commission of the offence in question ... relatively mild states of intoxication, which do no more than suppress inhibitions, are excluded.[1]

One can always find licence, within the law, to justify one's position. But justification does not necessarily lead to justice.

Full-time work and part-time study of a discipline as rigorous as Law is very difficult. Social life tends to be rushed, forced

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[1] (1980) 146 CLR 64, 95.

and shared with the other people with whom you have your study regime in common. No one else is awake.

As a part-time student one misses the culture and camaraderie of campus life. Of course in the 1970s our lectures were conducted in the Anthony Horderns Building, in George Street, Sydney, a condemned shopping emporium in which we endured sweltering heat, torrential water leaks, fire drills which must have been organised by the publican of the Century Hotel next door and ancient elevators which broke down and trapped you for hours, particularly if you had been to the Century Hotel next door. So there wasn't a campus to have a campus life in.

I also missed being part of a network of lawyers of my own age who had studied together. There were none of the employment or mentoring opportunities which are offered to schools of undergraduates who are all young and yet to embark upon their working lives.

I was however powerfully motivated by our old Dean's gloomy imprecation. I was determined to meet the challenge. I was going to finish. As it happened I completed the degree in the same time it would have taken full-time. I felt in a desperate hurry to achieve. I was ambitious at work and I progressed through the ranks, success in law studies obviously contributing greatly. One of the reasons I was in a hurry was because I harboured a vague fear in my sub-conscious that were I to become a mother at some time in the future, I wouldn't be able to do anything else. Life as I knew it would end. Well, it didn't. But it made doing degrees part-time while working look like a bit of a bludge.

A life in the law is all about meeting challenges. Meeting challenges can mean the difference between a professional life which is mediocre and mundane and one which is exciting, which makes unique contributions to the development of our law and which leaves you with that exquisite, natural high which comes from having pushed yourself and succeeded.

Opportunities in your professional life will open up to you repeatedly. And the more opportunities you pursue, and the more enthusiastically you embrace them, the more they will present themselves. Opportunities will invariably mean work, time, perhaps taking certain risks. Just doing nothing or saying 'no' will often be the easier or more attractive option.

Opportunities will sometimes be terrifying. The mere thought of making an appearance in a court was once a paralysing thought. There's only one thing for it. Become a barrister.

But if there's anything worse than the fear that you might make a fool of yourself in court, it's the fear you might do it in front of the whole of Australia. Live television. Something that I first did because I had formed the habit which I urge upon you: embrace every opportunity.

It was 1989 and I was the solicitor in charge of the Child Sexual Assault Unit in the Office of the Director of Public Prosecutions. The Attorney General of the day wanted someone to be interviewed on Good Morning Australia to defend the position that the government was then taking, that we didn't need closed-circuit television in courts for the taking of evidence from child complainants in sexual assault cases because we had other, better, means of preparing and protecting the children for and through their court experiences. No one from his Department wanted to do it and the hard word was put on me. I wanted to run away. But that was the soft option. The session went well.

The importance of this was not for the body of knowledge it contributed to the world or for its memorability. It was significant for me because it conquered a fear, it met a challenge and it contributed to the confidence which I had in myself.

As opportunities beget opportunities I was the obvious departmental choice a year later (in more propitious times for the State's finances) to participate enthusiastically in the launch of closed-circuit television for children's evidence. There are always higher mountains to conquer. An appearance

on Geoffrey Robertson's Hypothetical in 2001 ramped up the fear factor considerably.

Receiving a brief in a particular criminal trial can also be daunting on occasion. I certainly recall a rising apprehension upon receipt of the brief to prosecute Ms Diane Fingleton, then Chief Magistrate of Queensland, over an email she sent to another magistrate. It was nothing at all to do with the merits of the case as I was not yet acquainted with them. It was because of the obvious polarisation of views that the criminal prosecution of the occupant of such an office would produce.

Ms Fingleton's appeal is still to be determined by the High Court and it would be inappropriate to comment on the matter but it stands as an example not only of the challenges one must face in a life in the law but also the operation of the "cab-rank" principle which forms part of the New South Wales Barristers' Rules. The cab-rank principle requires a barrister to (with certain exceptions) accept a brief from a solicitor in his or her field of practice if the brief is within his or her capacity, skill and experience. The purpose of the cab-rank principle is to ensure that no-one appearing before a court is denied representation, whatever the crime and however unpopular the views or conduct in issue. The Crown, representing the community, is entitled to representation just as an accused person is so entitled.

When our latest Oscar winner Cate Blanchett was asked, before the awards, how she felt when offered the role of Katharine Hepburn in The Aviator, she said: 'because it terrifies you is not the reason not to do it – it's the reason to do it'. Her words remained with me because I read them on the day I was asked to deliver this lecture!

I have been a Crown Prosecutor since 1990. The title has harsh and odious connotations to some people and certainly its role is frequently misunderstood. I represent the Crown, in other words the community, in criminal trials in the Supreme and District Courts. I don't prosecute drink drivers or shoplifters or people found in possession of marijuana. These types of

cases are prosecuted by the Police. The trials in which I am briefed are those involving people accused of murder, assaults causing serious injuries, sexual assaults on children and adults and armed robberies. They are trials involving crimes where there is usually a victim or victims. The victims have families who are also victims.

This is particularly so in cases of homicide but is also manifestly the case when someone has been seriously injured or traumatised by a crime. For some victims the anguish continues in a justice system which can give the impression that it is increasingly focused on the rights of the accused person to the complete exclusion of the rights of the victims, many of whom, on any view of the evidence, have been victims of someone's crime and have found themselves bound up in the criminal justice system through absolutely no fault of their own.

The Crown Prosecutor is not the representative of the victim. The DPP Prosecution Guidelines prescribe that: '[a] prosecutor represents the community and not any individual or sectional interest. A prosecutor acts independently, yet in the general public interest'.[2] The Guidelines describe the prosecutor's role as 'to assist the court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness'.[3]

As practising barristers, Crown Prosecutors are also bound by the New South Wales Barristers' Rules. There are additional rules for prosecutors which do not apply to barristers not so acting, including: '[a] barrister shall not press the prosecution's case for conviction beyond a full and firm presentation of that case'.[4] Conversely, defence counsel have a private duty in

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2 Office of the Director of Public Prosecutions for New South Wales, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* (2007) Guideline 2.

3 Ibid.

4 *The New South Wales Barristers' Rules* (2008) r 63.

that they must seek to advance and protect the interests of their clients to the best of their skill and diligence.[5]

The DPP Guidelines also oblige Crown Prosecutors to have regard to the New South Wales Charter of Victims Rights, which is incorporated as an Appendix to the Guidelines. The first and foremost of these rights is: '[a] victim should be treated with courtesy, compassion and respect for the victim's rights and dignity'.[6]

While New South Wales, which started off as a gaol house, has now reached the civilised position of achieving a myriad of protections for the rights of the accused person, the course of some cases through the criminal justice system may leave you to ponder when the undoubtedly innocent (as opposed to the merely presumed innocent), the victims, will have their liberty restored.

May I bring you up to date on the plight of Ms C, the victim of gang rape, in Bankstown in August, 2000, by 14 men. Ms C was sexually assaulted 25 times in four locations over six hours and was subjected to the gratuitous degradation of being hosed down in a dark, deserted industrial estate on a winter's night.

These crimes, and the other gang rapes committed by various combinations of 14 offenders, were very thoroughly investigated by a large police task force which included specialist detectives and analysts with skills in a variety of areas.

Had these crimes taken place 20 years ago, the briefs would have consisted of the statement of the complainant, the statement of a doctor, possibly the statement of someone to whom the complaint had been made and the statement of a police officer

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5 Ibid, r 16.

6 Office of the Director of Public Prosecutions for New South Wales, above n 2, Appendix D.

saying that the accused did not wish to be interviewed. The investigators usually had no training in taking statements from complainants and there was little effort made to locate evidence which may have had a bearing on proof of the case.

Things were very different by 2000. The Crown case in the trial involving Ms C included covert physical and electronic surveillance, telephone intercepts, mobile telephone records giving precise locations of accused persons at relevant times and telephone records establishing association between suspects. The evidence gathered in the course of these technical areas of investigation is valuable because it can support the evidence of the complainant that a particular person nominated or identified by her was the person responsible for the sexual assault.

Better and more thorough investigations can, however, have the unexpected effect of increasing the complexity of the trials. In respect of each additional area of evidence there may be argument about whether it is fair to admit it, whether it has been illegally or improperly obtained and whether its probative value outweighs the danger of unfair prejudice to the accused. In joint trials, an area of contention will be whether a particular piece of evidence is admissible against only one, or more than one, of the accused, and what can be done to ensure that no prejudice flows to those against whom it is not admissible.

Obviously these trials are now longer and more difficult. Where more evidence is tendered and trial judgments as to admissibility made, more avenues of appeal inevitably arise. From a complainant's perspective, it must seem ironic when a successful appeal arises from an area of evidence which would not have existed in a sexual assault case which had been less thoroughly investigated.

In the case of Ms C, four accused were tried together, BS, MS, MC and MG. (Three others pleaded guilty, one, TS, was tried separately, and I shall return to him shortly, and several others, it is believed, remain at large). One of the four accused tried together, MC, maintained he had sexual intercourse with Ms

C, in the company of other men, on the day in question, but that it had been consensual. His car and the locations described by him were consistent with Ms C's account.

She claimed that the man in the passenger seat next to MC had a ponytail and had raped her too. She identified MG from a photoboard as 'the passenger in the red car'. MG and MC were close friends. There were phone calls between their mobile phone services, from relevant locations, on the day of and shortly before, the rapes. MG, whom police surveillance showed in the passenger seat of MC's red car, wearing a ponytail, on several occasions in the weeks after the rapes, denied any involvement in the offences.

The admission, and use made, of one piece of evidence was to have a disastrous effect for the unfortunate complainant, whom, on any view of the evidence, had been subjected to an unspeakable ordeal.

The police arrested MC and interviewed him about several of the Bankstown rapes. A telephone intercept warrant had been obtained and his mobile phone was being monitored. During the interview, MC was given a break and left the police station to obtain some lunch. He telephoned MG and his calls were intercepted and recorded. He is heard to say:

> 'G..., they've f...ed me brother. They know your name, I've seen Bil's name, everyone's name. They know everything bro'.

MG replies:

> 'So what's gunna happen?'

MC says:

> 'I'm at the cop shop'.

They then made arrangements to meet urgently at the library nearby.

The trial judge ruled that this evidence was admissible to show consciousness of guilt on the part of MC but that it could not be used for this purpose against MG. Nevertheless the evidence was available to show 'close association' or 'deep interest in what MC was talking about' or 'an association between two people having an interest in the matter which is the subject of the trial'.

All four accused were found guilty by the jury. All four appealed, each on numerous grounds. Of the seven grounds in MG's appeal he was successful in establishing that the trial judge had erred in allowing telephone intercept evidence against him and erred in his directions about that evidence. The Court of Criminal Appeal held that MG had not, in the phone call, adopted MC's inculpatory statements or otherwise implicated himself and further, that the judge should have directed the jury, with emphasis, that this was the case and warned them against using the call as indicating MG's consciousness of guilt.

The original trial was held in 2002. The retrial commenced on 23 August 2004 when several issues were raised by the defence which had not been the subject of any concern in the previous trial or appeal.

A psychiatrist was called by the defence to challenge the accuracy of the complainant's recollection. This necessitated the complainant being examined by a psychiatrist called by the Crown, whose opinion was that there was nothing to suggest that her accounts would be inaccurate. The trial judge ruled that the evidence of the psychiatrists as to the reliability of her recollection would be admissible, thereby, it could be thought, taking the emphasis from the credibility of the complainant and casting it upon the relative charisma of the two doctors, who will of course have to be called at the two opposite ends of the trial. The last word, in terms of evidence, will go to the defence psychiatrist who has not examined the complainant either at the time she was raped or at any time since, who will say that in his opinion she should not be believed in relation to her identification of the accused.

The second new defence application raised, for the first time, at retrial, concerned the notes of the counsellor who had spoken to the complainant at the hospital to which she was taken soon after she was assaulted. The hospital counsellor, who accompanied the complainant during the medical examination arranged by investigating police, followed up with several brief phone calls to the complainant in the weeks that followed. The defence sought access to the notes and the Department of Health briefed counsel to oppose the access on the basis that as they were records of 'a sexual assault communication', they were privileged under the relevant provisions of the *Criminal Procedure Act 1986* (NSW).[7] After argument, the trial judge permitted the release, to the defence, of some of the material which he ruled may have been relevant to the timing of her recollection of the many events she had related to the police.

I understand from Ms C's father that Ms C will not now attend any medical practitioner or other health worker for any reason whatsoever, fearful that her private medical records will be subpoenaed and come into the hands of the accused.

The third new defence application raised for the first time in 2004 concerned the photograph of the accused used by police in the photoboard. The photo was not used for the photoboard identification process until several weeks later, after the accused's legal representative had advised the police that the accused would not take part in an identification parade. On 20 October 2004 the trial judge ruled that he would not permit the photograph (and therefore the identification process which used it), to be admitted in the trial. He ruled that the accused, in standing still while the photograph was taken, was making an admission or representation and therefore should have been cautioned before it was taken and told of any purpose for which it may be used in the future.

The judge ruled that the photograph was unfair pursuant to s 90 of the *Evidence Act 1995* (NSW), improperly obtained

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[7] See generally Ch 6, Pt 5 *Criminal Procedure Act 1986* (NSW).

pursuant to ss 138 and 139 of the same Act and that the photographing should have been videotaped (as an interview is) pursuant to s 281 of the *Criminal Procedure Act 1986* (NSW). The Crown had submitted that posing for the photograph did not constitute an admission and that the accused was merely supplying a particular of identification. Interestingly the judge said that if the police had merely extracted a still photo of the accused from the video of the search of the premises and used that, there would have been no problem. For my part I must say that as the accused was wearing a peaked cap with a large jacket hood over the top throughout the search, it may not have provided a very useful image.

As the identification evidence (which had not been found to be deficient in the earlier appeal to the Court of Criminal Appeal) is the lynchpin of the Crown case, the decision has been appealed against by the Crown and the Court of Criminal Appeal is yet to deliver its judgment. This issue is of even greater importance because of the fact that the same photograph was used to identify the accused in a separate earlier trial concerning the gang rape of two other young women taken from Chatswood and assaulted in a Greenacre Park. Even though the accused's appeal against conviction in that matter was not successful, one can envisage that he may re-open that matter on the strength of the ruling about the photograph in the other case if the Crown appeal in this case fails. So MG's matter limps on.

Earlier I mentioned TS, also alleged to have been part of the gang who assaulted Ms C in August 2000. When the trials came on in 2002, TS sought and was granted a separate trial because his part in the matter concerned only the first phase of the incident. The Crown had opposed the separate trial, anticipating that publicity about the trial of the first four would make it difficult for TS to receive a fair trial in the future. Nonetheless he was tried later, separately from the other four, and convicted. There was no identification issue for him because he is recorded on railway station surveillance video with Ms C and others who pleaded guilty (not that the jury was told that they had so pleaded, of course). The evidence

against him included a letter in his handwriting, bearing his fingerprints and torn from a diary found in his home, located in the possession of one of his co-accused, MS. The letter told of having sent two people to the home of Ms C, mentioning her surname, to threaten her that if she didn't drop the charges she'd be bashed. It also said that they would have to get their story straight so they would not 'f... up' in court.

TS appealed against his conviction. He was granted a retrial on the basis that his trial was not fair because it had been held too soon after the conviction of his co-offenders. His retrial was to have been heard early last year but an adjournment was granted because it was held to be too close to publicity given to the appeals in the matters of his co-accused, also held then. TS's retrial has been adjourned until May 2005 so that his counsel may have the opportunity to consider whether any of the new points raised for MG may also be applicable to TS.

Each additional trial about the same events yields slight variations in accounts, particularly of complex events involving numerous individuals, cars, locations and offences. This leads to lengthier cross-examinations, particularly for the complainant.

In this series of cases, Ms C may be able to look forward to the completion of her ordeal of giving witness to these events by the fifth anniversary of their occurrence. The appeals, of course, will go on a lot longer.

Our criminal trials in New South Wales are conducted under the adversary system. Unlike the inquisitorial system of the European model, the object of which is to ascertain the truth, the adversarial system is an enquiry into whether the prosecutor has discharged the burden of proof beyond reasonable doubt.

Sir Daryl Dawson in a judgment of the High Court said:

> A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted, and the judge's role in that system is to hold the balance between the contending

> parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. When a party's case is deficient, the ordinary consequence is that it does not succeed. If the prosecution does succeed at trial when it ought not to and there is a miscarriage of justice as a result, that is a matter to be corrected on appeal.[8]

His Honour said nothing about the fact that if the prosecution does not succeed at trial when it ought to have, there is no appeal. Nor does he address the fact that many criminal appeals result in orders for retrials due to very minor matters which seem most unlikely to have made any difference to the verdict of the jury, the tribunal of fact, which does, after all, have the advantage of seeing the witnesses give their evidence in person. Then the witnesses, including the victims themselves, and the accused, have to endure the whole ordeal again, except that it is longer, because there is cross-examination on any variation in even the most irrelevant detail if it varies even slightly from the way it was described in the first trial.

If justice, in the criminal jurisdiction, means that the innocent are acquitted and the guilty are convicted, the adversarial system may seem routinely to achieve the former but rather often to fail with the latter.

Its methods often seem, to observers, incompatible with justice. Helen Garner, in her latest book, *Joe Cinque's Consolation* said:

> One of the props of the adversarial system, I began to see, is a curious charade that memory is a clear, coherent narrative, a stable and unchanging source of information, so that any deviation from a witness's original version of an event can be manhandled to look like unreliability, or the intent to deceive. Thus I saw how a Crown witness of what seemed to be transparent sincerity and desire to do right ... could go to water under the sustained onslaught of a defence cross-examination.[9]

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[8] *Whitehorn v The Queen* (1983) 152 CLR 657, 682.

[9] Helen Garner, *Joe Cinque's Consolation – A True Story of Death, Grief and the Law* (2004) 159.

The most fundamental aphorism of our criminal law is that it is better that 100 guilty men go free than one innocent man stands convicted. In this I believe whole-heartedly. Wrongful conviction is truly a prosecutor's worst nightmare. The good news is that there has never been a time when it has been less likely to occur in this State.

Modern prosecutors are now constantly on their guard to ensure that no piece of evidence is of a type which may lead to the risk of wrongful conviction. Recent international conferences of prosecutors have focussed on ensuring the probity of certain areas of evidence which have traditionally been thought to be potentially unreliable. The Director of Public Prosecutions last month exhorted all prosecutors in this State to acquaint themselves with a recent report of the Canadian Department of Justice proffering guidelines for prosecutors to avoid wrongful convictions.[10] It was gratifying to note that the safeguards suggested are already in use in New South Wales and have been for some time.

In the area of identification parades and identification from collections of photographs, for example, the Canadian report recommends that a witness be advised that the actual perpetrator may not be in the line-up or photograph array so as to avoid psychological pressure that a witness may feel to nominate someone.[11] This has been routine police practice in New South Wales for a number of years, with the warnings to witnesses given in a standard form of words and the process videotaped.

The Canadian Report recommends that to guard against false evidence being given of confessions, interviews of suspects by police should be videotaped.[12] Well of course in New South

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[10] FPT Heads of Prosecutions Committee Working Group, *Report on the Prevention of Miscarriages of Justice* (2004).

[11] Ibid 53.

[12] Ibid 71-3.

Wales, the admissibility of confessions to police has depended upon their having been taped now for many years.[13]

In a murder trial which I prosecuted some years ago, the accused was said by witnesses who were nearby to the killing, which occurred in a caravan park, to have been repeating the words: 'I had to kill him'. The police who attended the scene were not permitted to give that evidence. It was given instead by some children who had been in the caravan park wagging school.

The criminal law now has a patchwork of detailed controls on confessional evidence and evidence which is found to have been illegally or improperly obtained, that has developed and been applied ever more rigorously, over many years. These developments have been made in the spirit of the duty of courts to maintain public confidence in the administration of justice. It has often been said by the High Court in decisions disallowing a portion or class of evidence in a criminal case that it is contrary to the public interest to allow public confidence to be eroded by a concern that the court's processes may lend themselves to oppression and injustice.[14] Perhaps it is time for us to consider whether public confidence in the courts is now being eroded by the perception that the pendulum has swung rather too far in the direction of the protection of the rights of the accused person.

Should we question whether 'fairness' equates increasingly, in the courts, to a decision in favour of the defence and against the community, which has a legitimate right to having criminal activity duly recorded, punished and the offender rehabilitated in his own interests and those of his fellow citizens?

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[13] See s 281 *Criminal Procedure Act 1986* (NSW).

[14] See, for example, *Jago v District Court (NSW)* (1989) 168 CLR 23, 29-30 (Mason CJ), citing *Moevao v Department of Labour* [1980] 1 NZLR 464, 481 (Richardson J).

What must not be lost in the rhetoric of the criminal law, and our zeal to afford every possible protection to accused persons, is the fact that every time a guilty person is acquitted the law, in a sense, has failed the community it exists to serve. Just to utter this unassailable proposition is almost a heresy because it involves looking behind that stalwart of the criminal law that one is innocent until proven guilty. This legal act of faith is in danger of becoming a legal fiction.

There seems to be a fashion, among some in the criminal justice system, for a kind of misplaced altruism that it is somehow a noble thing to assist a criminal to evade conviction. I was recently walking past some defence barristers at Darlinghurst Court and they were waiting for the return of a jury. I knew nothing of the case but could surmise, from the location, that it was a murder trial and it was obvious that the gentlemen were representing co-accused. Wishing to greet them with a pleasantry, I said to them: 'may justice be done'. 'Oh, we don't want that!' was the mirthful reply.

But what good does it do a person, in 2005, to get away with a serious crime? There is no remorse, no introspection, no rehabilitation. For some, there may be a feeling of relief and a determination never to find oneself in the same predicament again. What though of the rest, whose respect for the criminal law is now even lower, having seen it fail and who are emboldened by having defeated it? Obviously the community is in danger from these people. If they offend again, isn't someone accountable, apart from themselves?

Fear of oppression by the state in criminal proceedings has an honourable and perfectly explicable history. Its genesis is a backlash against barbaric practices which have been gradually ameliorated over hundreds of years – trial by ordeal, burning at the stake, capital and corporal punishment. There were no second chances. Now there are. No Court, and no prosecutor, wants to see an offender with any chance of leading a law-abiding life in the future being crushed by an onerous penalty which will leave him or her with no hope for the future.

Even the era of the sharp rebuke from the Bench seems to have ended with the retirement of the Honourable Justice (Roddy) Meagher a year ago. In his judgment in an appeal against the severity of a sentence he said:

> The crucial fact in this case is that the appellant, in company with other little thugs, was engaged in the group-terrorising of innocent shopkeepers in the Parramatta area. The way they did it, by demanding protection money and enforcing such demands by violence, is reminiscent of the behaviour of the Nazi thugs in Berlin ... or of Mafia groups in ... Sicily. If civilised democracy is to survive in this country, such behaviour must be suppressed. The first step to do so is to impose very heavy prison sentences on those who glory in it. ...
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> In the present case, a magistrate, recreant to her duty, imposed a ridiculously light sentence on one of these thugs. Then (Judge X) imposed on another of them a sentence which was only slightly less ridiculous. Then (Judge X) sentenced (the appellant) to sentences which totalled 2 years 6 months with a non-parole period of 1 year 6 months. Now, if you please, he appeals to this Court on the ground that the sentence is too severe, whereas there should have been a Crown appeal on the ground that the sentence was too lenient.[15]

His Honour was in the minority and the appeal was allowed.

The most honourable, the most honest thing ever seen in a criminal court is a plea of guilty. Its effect is magnified when the offence is a very serious one and the victims, or their survivors, are present. Justice is done and seen to be done. The guilty plea soaks up the anger like a sponge.

Last month I presented an Indictment in the Supreme Court against a man for the murder of an 81 year old lady in her home in Katoomba. There was no forensic evidence left behind except for one thing. Under the fingernails of the deceased was a DNA profile which was not her own.

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[15] *R v Wong* [2003] NSWCCA 247, [2]-[3].

The DNA located was the same profile as that recovered from a housebreaking in the same area three months earlier. So the local police, who were investigating the matter, surmised that the person responsible for the killing was probably a local burglar who had not expected to find anyone at home on the afternoon he entered the deceased's home. The police knew over a dozen local burglars and compiled a list of 'persons of interest'.

Over the next few weeks, as these people were brought, individually, to the police station having been arrested on warrants or for minor crime, the police arranged to have the area cleaned before their arrival and collect their cigarette butts. Several people were eliminated from suspicion for the killing. A Mr White[16] was arrested for an outstanding warrant and his cigarette butt was collected. DNA was isolated from the butt and its profile was identical to that found under the deceased lady's fingernails. Mr White was then arrested for the murder, a buccal swab taken from him pursuant to the *Crimes (Forensic Procedures) Act 2000* (NSW) and this also matched that taken from the deceased.

In the circumstances of this case, there was no doubt that White had been responsible for the killing. DNA evidence, at the level of discrimination which modern science now provides, is devastatingly probative. In circumstances like these, it provides proof not beyond reasonable doubt, but beyond any shadow of a doubt. Just as importantly, the six people whose DNA was different were proven innocent without the least inconvenience.

But when White was asked how he pleaded on the first day of the trial, he said: 'not guilty'. There followed a voir dire hearing during which the defence submitted that the police had tried to defeat the *Crimes (Forensic Procedures) Act 2000* (NSW) by covertly taking the DNA of the 'persons of interest'. It was argued that the forensic sample taken from White under

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[16] [2005] NSWSC 60 refers.

that Act was inadmissible because it was only sought because of the cigarette butt sample, which was obtained illegally. All of the police involved were called and cross-examined about their conduct in the matter. The Crown argued that the accused was not a suspect at the time his cigarette was discarded as there was nothing then that gave grounds for any reasonable suspicion sufficient to arrest him for the murder. Furthermore it would be traumatic for the persons of interest, all innocent of murder with the possible exception of one, to be brought in and subjected to a forensic procedure on suspicion of murder. Justice and commonsense prevailed and the trial judge ruled that the DNA evidence was admissible.

After this ruling, to the great relief of the deceased's seven children, White pleaded guilty. His attempt at achieving acquittal on what might be seen to be a technicality, rather than a weakness in the evidence against him, had failed, but at least he was able to see this at a relatively early stage and then face up to his crime.

White will be rewarded for the remorse inherent in his plea, for saving the bereaved the trauma and the State the cost of the trial, in a substantially discounted sentence. He will receive help toward his rehabilitation and with his drug addiction, which is no doubt the cause of his criminal activity. He faced up to his responsibilities and, with the uttering of one word, 'guilty', the victim's family's sense of outrage and grievance was dissipated. His very fine counsel will perform an honourable role in bringing these matters, and the subjective factors attracting a more lenient penalty, to the attention of the sentencing judge.

The investigating and prosecuting authorities of this State have endured decades of refinement and have assumed stringent controls to ensure absolute transparency, full disclosure and, at every level, fairness towards accused persons. Yet I am informed that in some law schools the teaching of criminal law revolves around the supposed epidemic of the conviction of the innocent. This is very old-fashioned teaching.

What I wish to challenge you to do, in your practice of the criminal law, is to bring your sense, your humanity and your conscience with you. Justice isn't achieved by ambush, trickery, dragging proceedings out in a war of attrition with witnesses. It's achieved by honesty, balance and proportion. As lawyers, you have a power. Be good with it.