LEGAL}{ EAGLES CLE

Continuing Legal Education for Criminal Lawyers

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"THREE LIARS AND A TRICK"

THE ART OF MAKING OPENING AND CLOSING ADDRESSES FOR THE ACCUSED IN JURY TRIALS

OPENING ADDRESSES:

An exercise in civil disobedience pressed by the fervent desire to protect an innocent accused from the cruellest excesses of a trial.

THE RULE:

Criminal Procedure Act, (NSW) 1986, s159:

"(1) An accused person or his or her Australian legal practitioner may address the jury immediately after the opening address of the prosecutor.

(2) Any such opening address is to be limited generally to an address on:

(a) the matters disclosed in the prosecutor's opening address, including those that are in dispute and those that are not in dispute, and

(b) the matters to be raised by the accused person.

(3) If the accused person intends to give evidence or to call any witness in support of the defence, the accused person or his or her Australian legal practitioner is entitled to open the case for the defence before calling evidence, whether or not an address has been made to the jury".

The note in Butterworths practice says that this provision was previously contained in s405 Crimes Act, (NSW) 1900. This is not the full picture. I only searched back to January 1975, which was four years before I started practice. In those days, s405 referred to the ability of the accused to make an unsworn statement to the jury at the close of the Crown case[1], but did not refer to a Defence opening address after the prosecution opening at all, only an

[1] Called "the Dock Statement".

opening address before the Defence case commenced. The Dock statement was abolished in 1995. From then on the provision read:

"405 ***Address to jury by accused***

(1) Every accused person on his trial, whether defended by counsel or not, may, after the prosecutor addressed the jury or has declined to address the jury, personally or by his counsel, address the jury.

(2) Where the accused intends to give evidence or to call any witness or witnesses in support or the defence the accused or his counsel shall be entitled to open the case for the defence before calling his evidence.

(3) Where, in the closing address by or on behalf of the accused, relevant facts are asserted which are not supported by any evidence that is before the jury, the Court may grant leave to counsel for the Crown to make a supplementary address to the jury replying to any such assertion.

The word "opening" does not appear. The first time a provision resembling the present provision appeared in s405 of the Crimes Act was in January 1998. That provision was as follows:

"405 (1) ***Opening address on trial issues***

The accused or the accused's counsel may address the jury immediately after the opening address of the prosecutor. Any such opening address is to be limited generally to an address on all or any of the matters disclosed in the opening address of the prosecutor that are or are not in dispute and the matters to be raised by the accused."

Section 159 has been commented on in *R –v- MM [2004]NSWCCA 81*[2]*.* In that case, a bench of the CCA comprising Levine J., Howie J. and Smart AJ heard an appeal from a trial before Judge Black QC in the District Court at trial from 21/08/2002 to 3/09/2002.[3] The trial was on a late complaint (approximately 20 year delay) on 9 counts including indecent assault of a male and two counts of the abominable[4] crime of Buggery. The appeal was against the conviction by the jury on 8 of the 9 counts and an application for leave to appeal against sentence. The grounds of the appeal were: Inadequate Longman direction; HH failed to tell the jury of the use the jury could put of the delay in complaint in assessing the complainant's credibility; the Crown Prosecutor addressed the jury inappropriately; [Fourth ground abandoned]; HH failed to give specific warnings about the evidence of two Crown witnesses; Verdicts are unreasonable.

Levine J. gave the principal judgment with which Howie J agreed and Smart AJ dissented. Howie J. added remarks on two of the grounds of appeal.

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[2] This appeal was after the second trial of MM on the Indictment, so it should be referred to as R –v- MM #2

[3] I remember Black QC was a fair and skilful UK silk who came to Australia late in life. I briefed him shortly after he started at the NSW Bar.

[4] More correctly I think it should be the "abdominal" crime of buggery.

The reason I am going into this case in detail is that there is disagreement on the NSW bench about the weight to be given to the remarks of Howie J. on the meaning to be given to s159. Some hand out a copy of the most pointed remarks of Howie J. to the Defence counsel at the start of the trial and indicate that this is the course to be followed in their court. King DCJ is one who follows this course. Others actively dismiss Howie J's remarks as 'obiter' and reject the Crown's entreaties to remind me of them. Jefferies DCJ follows this course.[5]

The issue is in that appeal because the Defence included in their appeal the complaint that the Crown was inappropriate in his final address to the jury. There was strong reason for that ground of appeal. What the Crown said in his closing address to the jury was:

"Perhaps over the past 20 years we've come to understand amongst other things how important an uncorrupted youth is to our ability to live as healthy adults. But this trial is an example of how enlightened a community we have become. As a community we have confronted the reality of the exploitation of children by those in positions of trust, and we no longer hide from that reality. It is no longer acceptable to take the view that because the abuse took place many years ago that it's not worth pursuing, or that it didn't happen at all. We've come to recognise that the sexual exploitation of children occurs in cities and towns. It occurs in the most respectable quarters of our community. It occurs in places we would expect a child would be safe. Our churches, family homes and our schools. Sometimes the offending continues for quite some time. People around the place don't see what they don't expect to see. But more often than not in cases such as this there are no witnesses, because sexual offences, by their very nature, invariably occur in private, away from prying eyes.".

Levine J. commented: 'They are unfortunate, unnecessary and uncalled for.'[6]

Levine J. also said that he agrees with Howie J's remarks in his separate judgment that:

"… the Prosecutor's address, where he purports to deal with anticipated directions of law , constituted a serious transgression and one which could have derogated from the authority of the learned trial judge in charging the jury on those very matters of law."[7]

However, he prefaced that comment with the remark:

"Otherwise, whilst reiterating my view that the remarks of the Crown Prosecutor were unfortunate, even if there may be some basis for saying they were provoked by an opening remark some days before by defence counsel, it is apparent that sight was lost of the limitations upon defence counsel's opening address."[8]

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[5] I comment that Howie J. (now a disgraced former SCJ) was a hopeless trial advocate at the Bar and Clive Jefferies had a distinguished career as a solicitor advocate (Criminal Attorney) prior to his elevation to the Bench. Judge Jefferies enjoys good advocacy in his court.

[6] *R –v- MM* [2004] NSWCCA 81 at para 47;

[7] *R –v- MM* [2004] NSWCCA 81 at para 50;

[8] *R –v- MM* [2004] NSWCCA 81 at para 50;

I think the clue to the resolution of this matter lies in Levine's comment:

"It may well be … that an experienced trial judge such as the present judge … might have taken the view that a forensic stance by one counsel had been successfully dealt with and appropriately dealt with by the forensic stance of opposing counsel and the matter should be allowed to rest."[9]

Nevertheless, Howie J. quoted the second reading speech for the introduction of s405 in 1997 in Hansard. This makes it clear that the parliamentary intention was to allow the option to the Defence at the earliest stage to tell the jury the issues in the case only. In Hansard, the then Minister for Police, who delivered the Second Reading speech, described the address as "the new address". I think in law that is the proper description of it.

Howie J. added[10]: "The present is a good example of how defence counsel's address far exceeded the legitimate bounds of an opening under s159 and almost caused the trial to miscarry." AND

"… the defence opening address in the present case was inappropriate and that the trial judge should have either intervened during it or taken steps after it to disabuse the jury of the false issues raised by the address."[11]

The offending passage in Defence Counsel's opening to the jury was:

"Reference has been made by the learned Crown to the fact that these matters are very old, 19 or 20 years ago. In many respects we are stepping back in time, not only in relation to the events that occurred, but to the law that existed then. You have heard the term buggery used. They referred to them as an abominable crime of buggery you might think that represented the sort of morality that existed then even in relation to this offence. It is not referred to in that term any more. So looking back the time [sic] as events that occurred, but looking back in time in relation at the law that was applied then and that has a number of effects and I would ask you to keep that in the forefront of your mind when you are considering the evidence, because you have to asses this evidence to that degree of your being satisfied beyond reasonable doubt".

However, Levine J. and Howie J. saved their most cutting criticisms for the Crown:

Levine J.[12]: "… the Crown Prosecutor's closing address where he purports to deal with anticipated directions of law, constituted a serious transgression and one which could have derogated from the authority of the learned trial judge in charging the jury on those very matters of law. None of these regrettable incidents in my view constitute a miscarriage."

Howie J.: Referring to the inappropriate remarks by Defence counsel in his opening, said

[9] R –v- MM [2004] NSWCCA 81 at para 49;

[10] At paragraph 140;

[11] At paragraph 150;

[12] At paragraph 50;

143 They resulted in the comments made by the Crown Prosecutor which have in part been set out in the judgment of the Presiding Judge and which gave rise to this ground of appeal. With respect, I agree that they were inappropriate and, in my view, to a very marked degree. But these were not the limits of the Crown Prosecutor's transgressions during his address. (underlining added)

144 The Prosecutor addressed the jury at some length about the warnings to be given by the trial judge about the effect of delay. This in my opinion had no place in the Crown Prosecutor's address, especially where, as here, the Crown sought to explain to the jury why those warnings were required and how the jury were to use them. The Crown was at pains to point out to the jury that the trial judge was not going to indicate his personal opinion about the evidence of the complainant, nor was he going to invite the jury to acquit the accused, but rather that these warnings were always given in criminal trials and were in effect "just common sense".

145 In my opinion it is no business of the Crown to seek to explain the reasons for the giving of directions or warnings by the trial judge or what they mean or how the jury is to use them. This is a matter for the trial judge: not the Crown Prosecutor. Counsel should understand that their principal function is to address on the facts and not to anticipate directions and warnings to be given by the trial judge and to put a gloss on them to assist the case they are presenting to the jury. In particular, the Crown should not use the consequences of delay in an attempt to explain or excuse the unreliability of the complainant as was done in ***DGB*** and to some extent in the present case.

146 The Crown must recognise, as the jury is required to do, that the defence has been prejudiced by the delay because of the inability to test the complainant, because of the vagueness and inconsistency in accounts where these occur, and because of the inability to carry out those investigations that might have raised a doubt about the truth of the complainant's account. There is no point in the Crown addressing the jury on some basis other than that which the law accepts is the consequence of long delay, and it is dangerous for the Crown to do so. The law not only binds the judge and the jury, but also the Crown Prosecutor in the submissions and arguments that can be put to the jury.

147 This does not mean that the Crown cannot seek by legitimate means to persuade the jury to accept the account of the complainant notwithstanding the delay and consequential dangers involved in doing so. It can of course counter what it anticipates will be any specific matter of prejudice which the defence will raise, by a reference to the evidence in the particular case. But it cannot attempt to attack or undermine the basic principles upon which such trials are conducted and which are manifest in the Longman warning.

It is fair to conclude that R –v- MM#2 is a cautionary tale for the Crown more so than for Defence counsel and the remarks of Howie J. certainly were obiter.

Finally, there is a word in s159 which has not been referred to by Howie J. in his obiter remarks which deserves attention: "generally". "*Any such opening address is to be limited generally to an address on:*

(a) the matters disclosed in the prosecutor's opening address, including those that are in dispute and those that are not in dispute, and

(b) the matters to be raised by the accused person.".

The word is not "strictly" or "solely" or exclusively", so there is room for some rhetorical flourishes and in my opinion Defence counsel should not be deterred at all by the Bench form making an interesting and valuable opening to a Jury.

I had a victory in a kiddie sex case recently. An 11yo daughter of long separated parents wrote a note to her mother saying that when she was five years old her father had licked her on the vagina. The case result was hinged on two matters – my opening to the jury AND an inadvertent confession by the Complainant at the end of Cross-Examination that she had fabricated her story.

In my opening to the jury I said:

"You have heard the accused plead not guilty, but there's more than that. The accused denies this emphatically, completely, wholly, totally and you will see that sometimes children of separated parents want to end access by saying the most appalling things.

At the end of the cross-examination of the complainant, I concluded with these questions:

Q. And your stepfather, A. H., took that note to police that day, didn't he?

A. I'm not sure what day he took it to them.

Q. He took it on - all right, I'll tell you. He took it on Sunday 4 March--

A. Okay.

Q. --the day you gave it to your mother.

A. Okay.

Q. And then, on Wednesday 7 March you did your interview with police that has been played to the court --

A. Yep.

Q. --and it worked, didn't it?

A. Yep.

Q. You have never had to see your father since then?

A. No.

I said "Thank you" and sat down. The Jury promptly returned from a Prasad Direction with a verdict of Not Guilty.

The opening address by Defence can be a valuable predictor of the course of the trial.

Please find an Attachment at the end of this paper. It is the transcript of a recent opening of mine to a Jury in a drug trial. The verdict was "Not Guilty". It is possibly worth a read.

CLOSING ADDRESSES

There are many rules for the Crown in the closing address and few for the Defence. Some of the Crown's rules are:

- Should avoid intemperate language or appealing to the jury's emotions[13];
- Should never mislead the jury as to the content of any of the oral evidence given in the trial;
- Should not express personal opinions or otherwise enter into the fray as a contestant;[14]
- Should not criticize Crown witnesses as being in a "conspiracy of silence" if that has not been put to them by the Crown in their evidence;[15]
- Should not ask the jury to make inferences about matters that were not in evidence;[16]
- Should not criticize the manner in which Defence counsel cross-examined the complainant;[17]
- Should not criticize a witness called in its case where the Crown failed to make an application under s38 (Unfavourable witness);[18]
- Should not attempt to confine the warnings yet to be given by a trial judge in the Judge's instructions to the jury;[19]
- Should not address the jury as to the warnings to be given to the jury in sexual assault cases;[20]
- Should never raise the impermissible question: "Why would the complainant lie?"
- Should never suggest that if the complainant wanted to lie then he could have made it easier for himself by telling better lies;[21]

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[13] *Whitehorn –v- R (1983) 152 CLR 657 at 663-4;*

[14] *R –v- Callaghan [1994] 2 Qd R 300;*

[15] *R –v- Teasdale [2004] NSWCCA 91;*

[16] *R –v- Rugari [2001] NSWCCA 64;*

[17] *R –v- Rugari [2001] NSWCCA 64;*

[18] *Kanaan –v- R [2006] NSWCCA 109;*

[19] *R –V- MM [2006] NSWCCA 81;*

[20] *R –V- MM [2006] NSWCCA 81;*

- Should never display to the jury any diagram or drawing which was not in evidence in the trial (which was a reason why I had a jury discharged after the Crown address);

- Should never introduce the Crown's personal views into the address by saying: "What I find difficult to believe is …" or "What I think is …";[22]

Most of these strictures do not affect the Defence counsel's address. However, the Crown may be given leave to make a supplementary address where Defence counsel has asserted relevant facts which are not supported by the Evidence. This opportunity does not extend to the times when the Defence counsel has put arguments that are fallacious, illogical, extravagant or dishonest. Those are matters for the jury to determine.

There has been a recent decision in this area. See *Greggo –v- R [2013] NSWCCA 7 (01/02/2013).* In that appeal, the Court rejected a complaint about the Crown's closing address because "experienced" trial counsel had not objected to the Crown's remarks after the address.

The judgment of Justice Johnson, with whom the remainder of the Court (Hoeben & Button JJ) agreed, contained the following:

> 220. During the Crown trial advocate's closing address to the jury, reference was made to the significant factual dispute between the Appellant and the Complainant regarding the nature of their relationship. The Appellant submits that the remarks were highly prejudicial.
> 221. The relevant portion of the Crown's closing address is as follows (emphasis added):
>
> *"The Crown says that <u>there's been a lot of evidence led before you or sought to be led before you that has very little weight that amounts to a scurrilous attack upon the complainant's credibility and character</u>. The Crown says what you have to accept as a foundation for it is that the complainant declared to* [Ms Reynolds]*, before the day that they went to the disco, that she was romantically interested in the accused. The Complainant denied that and* [Ms Reynolds] *also did too. It's just the accused that asserts it."*
>
> 222. Two aspects of the above passage fall for consideration by this Court:
>
> (a) the Crown trial advocate's description of the evidence of the Appellant regarding the nature of his relationship with the Complainant as a *"scurrilous attack"* upon the Complainant's character and credit; and
>
> (b) the Crown trial advocate's submission to the jury that the Appellant's evidence on the matter had *"very little weight"*.

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[21] *KNP –v- R [2006] NSWCCA 213;*

[22] *KNP –v- R [2006] NSWCCA 213;*

223. The Crown submits that no complaint was made by the Appellant's experienced trial counsel concerning this comment, and that this indicates the lack of impact of the words at trial.
224. Comments of Crown Prosecutors during their closing address have been the subject of judicial consideration on numerous occasions: see *McCullough v The Queen* [1982] Tas R 43; 6 A Crim R 274; *R v Kennedy* [2000] NSWCCA 487; 118 A Crim R34; *R v Rugari* [2001] NSWCCA 64; 122 A Crim R 1; *R v Liristis* [2004] NSWCCA 287; 146 A Crim R 547; *R v Attallah* [2005] NSWCCA 277; *Livermore v R* [2006] NSWCCA 334; 67 NSWLR 659; *KNP v R* [2006] NSWCCA 213; 67 NSWLR 227; *Soames v R* [2012] NSWCCA 188.
225. The Court in *Livermore v R*[23] reviewed the relevant authorities and stated (at 667 [31]) that there are five features of a Crown address that have consistently been held to justify the intervention of this Court:

"(i) A submission to the jury based upon material which is not in evidence.

(ii) Intemperate or inflammatory comments, tending to arouse prejudice or emotion in the jury.

(iii) Comments which belittle or ridicule any part of an accused's case.

(iv) Impugning the credit of a Crown witness, where the witness was not afforded the opportunity of responding to an attack upon credit.

(v) Conveying to the jury the Crown Prosecutor's personal opinions."

226. It is submitted for the Appellant that the trial had been conducted upon the basis of a strong challenge to the credibility and reliability of the Complainant. The Appellant had given evidence, which was in conflict with that of the Complainant in critical respects. It was submitted that an emotive and excessive submission had been made by the Crown that a *"scurrilous attack"* had been made upon the Complainant's *"credibility and character"*. It was submitted that the challenge to the evidence of the Complainant was forensically legitimate, and that the Crown submission was unfair and should not have been made. It was submitted that it had a tendency to deflect the jury so as to give rise to a miscarriage of justice.
227. Submissions are sometimes made by the Crown, during closing address, to pre-empt submissions expected to come in the closing address of the defence: see *R v Attallah* at [109]; *Livermore v R* at [40].
228. What the Crown trial advocate did in the present case may be described as a form of pre-emptive attack on what was anticipated by the Crown to be a key aspect of the Appellant's closing address. It ought be noted in this regard that much of the cross-examination of the Complainant was devoted to the nature of her relationship with the Appellant and the assertion that she had expressed romantic interest in him.
229. It was submitted on behalf of the Appellant before this Court that the evidence given by him concerning the nature of his relationship with the Complainant, and the cross-examination of the Complainant on that topic, did not amount to an attack on the Complainant's character. Instead, it was submitted, it constituted legitimate cross-examination of the Complainant based on instructions. The Appellant submitted that

[23] *Livermore –v- R [2006] NSWCCA 334*

the Crown's comment to the jury suggested that his trial counsel had done something improper in adducing this evidence.

230. The Appellant's trial counsel was entitled to test the evidence of the Complainant, especially with respect to the nature of her relationship with the Appellant. Counsel was required to put his instructions to her, that she had romantic feelings for the Appellant.

231. The word *"scurrilous"* is defined by the Macquarie Dictionary as meaning *"grossly or indecently abusive"*. During the course of oral submissions in this Court, the Crown did not seek to defend the use of that term. Instead, it was submitted that the term was perhaps used by the Crown trial advocate in a more colloquial sense.

232. It was submitted by the Crown that the remarks by the Crown trial advocate were a legitimate, albeit strongly worded, criticism of the evidence of the Appellant.

233. In my view, the Crown trial advocate should not have used the words under challenge. It was inflammatory to assert that a *"scurrilous attack"* had occurred.

234. However, to the extent that the Appellant submits that these words constituted a strong (adverse) comment directed to the Appellant's trial counsel (and thus the Appellant), it is noteworthy that trial counsel made no complaint about them, and did not seek a correction or withdrawal from the trial Judge.

235. The absence of complaint from the trial counsel indicates that no prejudice to the Appellant was perceived in the atmosphere of the trial.

236. Further, it should be kept in mind that Ms Reynolds supported the Complainant, and not the Appellant, on the issue of whether the Complainant had expressed any romantic interest in the Appellant. This was an important aspect of the trial, and the Crown was entitled to remind the jury of this, using appropriate forceful language. However, the language selected was inappropriate and should not have been used.

237. That said, it has not been demonstrated that the Crown trial advocate's closing address gave rise to a miscarriage of justice.

In Livermore's case there had been an application to discharge the Jury, which had not been successful. The CCA in that case did not express that the application to discharge was a necessary pre-condition to the CCA upholding the ground of appeal. The decision of the CCA in *Greggo* is a dire warning to Defence counsel that they must OBJECT every time there is a fault in the Crown closing address. The only appropriate application is for discharge of the jury.

THE DEFENCE CLOSING ADDRESS

Counsel should not read a prepared address. Reading takes all the passion and most of the interest in the audience away from the address. It is imperative to have notes, but they must be Spartan. Put them on the lectern, glance at them occasionally and talk to the panel. Look at each face for a second or two then move on to another face.

Every quote from the transcript must be preceded by the transcript reference. This not only allows the Bench and the Crown to check the quote, it gives the impression that you are guaranteeing that the quotation is accurate.

I usually say words to this effect: "You have been told that this address is not evidence. You are judges and you are bound by your oath to be fair to the Accused. An important part of being fair to him is that you listen carefully to his side of the case. When you are told this

address is not evidence, that does not mean it might be untrue. I am doing my utmost to ensure that everything I tell you in this address is completely accurate. If I slip up and say something which is not completely accurate, the Crown or His Honour will tell me later and I will have to carefully re-state what I said to you, so I am doing my best to ensure that this is completely accurate."

Especially in the longer addresses, I always throw in the following:

"I have to ask you to be patient with me because there is a lot of material I must get through. I have to do my job thoroughly and properly."

"In case you're wondering, I'm about half-way through."

When I am reading from the transcript to remind the jury how evasive the complainant was in cross-examination I say:

Remember how evasive she was in cross-examination! I asked her this question: (Read it out)

She answered: (Non-Answer to the question)

Next question: (Read that out)

She answered: (Non-answer to the question)

I said: "Look at that! She's walking like a crab! Hang on a sec. You know when you're walking on a beach. You take a step towards a crab. It either goes that way (dramatic gesture with my left arm pointing with my left index finger across my chest to the right side on my body) or that way (opposite gesture with my right arm pointing to my left side). And now look at this: [next question and non-answer] Look! She's still walking like a crab! (At about this point, some if not most of the jurors will laugh, most of the rest will smile, which is what you want. I am of the view that if they laugh at the complainant's evidence they will never forget you in the jury room.) Not guilty verdict.

I have had great success with that routine.

Figure out your own routine, but don't try it unless you are prepared to let go of your formality and some of your reservations. This is theatre and the moment is there for you to grasp! Sometimes, when you refer to His/Her Honour, or the accused, wave your arm hand out, open and facing up in their general direction. Theatre keeps the jury interested.

I sometimes try to throw in a colourful characterisation:

(In a "cut dick" case where the injured male complainant was obviously untruthful and became horribly evasive in cross-examination) "You know, ladies and gentlemen, getting a straight answer to a straight question out of that chap was like pulling teeth on a mallee bull." His Honour used that in his summing up: "Mr Brassil gave you his opinion that getting a straight answer to a straight question out of that chap was like pulling teeth on a mallee bull.

Well, (pause) that is a country expression, ladies and gentlemen (pause) and I've been to the country (pause) and let me tell you that is a very difficult thing indeed." Not Guilty verdict

Beyond Reasonable Doubt

I usually tell juries, after mentioning "Proof beyond reasonable doubt":

I am not permitted to tell you what I think those words mean. They are ordinary English words and you know what they mean. Beyond Reasonable Doubt. You have to decide this case consistently with your oath as judges of the facts, giving full meaning to each of those words – Beyond Reasonable Doubt.

THE BLUNDERBUSS

"You have to decide what weight – that is a lawyers term – you are to weigh (gesticulating to show weighing between left and right hands) and judge. You have to decide what weight you give to the evidence of each witness in the Crown case and you have to apply your ordinary commonsense in making decisions about that. But in making that decision, what weight to give, I am suggesting to you that you make that decision using your ordinary common sense, just **as you would in your own life**. Ask this question to your self – "Would you give her a job?" Let's say you have just retired and you have all your superannuation in a bank account. Would you hire her to invest that money on your behalf and then rely on her report each Friday to tell you how much you have got to spend next week? Would you really hire her. Would you trust her."

When in a case at Campbelltown DC I had a jury foreman who never looked at me, always faced away. The Crown case was entirely dependent on the evidence of an undercover copper whose credit I had severely shaken. He was a cunning liar and full of self confidence, especially when shown he had done the wrong thing. His confidence was never rattled by his breaches of procedure. On the other hand, my guy was an illiterate Vietnamese sewer who, still in his thirties, lived at home with his parents. He was not strong in the witness box. He was a soft target for the Crown and one juror (possibly 19yo female) had sneered at me during cross-examination of my guy by the Crown. The Campbelltown jury had no Asian faces or any brown or black skin. I never saw the face of the foreman until just after I said: "I want you to answer this question: Would you give him a job! Would you allow him access to your personal computer and rely on his promise to only access drives A, B and C but not D or E drives on your computer because they contained your personal matters? Would you give him a job! The foreman's head turned to me at the start of the second sentence and he watched me intently from that moment on. Not guilty.

THREE LIARS AND A TRICK

A late complaint by a 16 year old female (17 years at trial) of sexual misbehaviour by her step-father, supported but badly by her mother and her grandmother. Her evidence in chief was very strong in chief, but in cross was very unsatisfactory, she was contradicted by her mother and her mother contradicted her grandmother. She admitted she had been caught

out lying by her step-father on many occasions. Of course that was against her interest. Her mother said that was not true, her daughter did not tell lies (so obviously untrue, I told the jury I was sorry for the mother when she said that … I did not say why I said I was sorry for her). Her mother agreed the grandmother really hated the Accused. Grandmother denied any ill feeling towards the Accused. I finished my address as follows:

"I was lying awake in bed the night before last thinking about this address and I thought of a great summary of the Crown case for you. You've had three liars and a trick. Three liars and a trick. I'll tell you what the trick was.

Remember when I finished cross examining grandma[24] then the Crown gets the chance to ask her questions about the matters that arose in cross examination. It's called re-examination and there are rules for Re-examination.

He cannot ask about fresh matters, that is, matters that did not arise in cross-examination unless he gets my agreement or permission from Her Honour -- but he did not get either of them, and he is not allowed to ask leading questions. Remember he asked: "Just one thing, madam, you can't read or write in Cantonese that's right isn't it? And she replied straight away through the interpreter "That's right I've not been to school, not one day in my life."

What you supposed to do with that information? You know and I know that there are many more languages in China than just Cantonese. Why didn't he mention any of the other languages ... and … what does this mean? Does it mean that she might be able to read or write in some other Chinese language? Who knows? … Let's just presume that it was a bad question, badly asked and badly answered and she can't read or write in any Chinese language. What are you supposed to do with that information? Are you supposed to forgive her for being so untruthful to you in the witness box because she can't read or write in any Chinese language? That can't be right.... So, what are you supposed to do with that information? Are you supposed to feel sorry for her because at the age of 67 she can't read or write? Her Honour will tell you in a few minutes that **under no circumstances are you to decide any matter in this trial because you might feel sorry for a witness**. So, what do you supposed to do with this information? …(pause) … It's just a trick, ladies and gentlemen. It's just a trick. You've had three liars and a trick. … Three liars and a trick. I know what you are going to do with this Crown case, ladies and gentlemen. You've had three liars and a trick. Those are the submissions for the accused.

Richard Nixon[25] rose to his feet and was unable to complete a sentence:

Well, your Honour, I wanted to say, … what I was going to point out was ... the Crown's submission is that …"

Her Honour: "Exactly, Mr Crown. Exactly."

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[24] I actually didn't call her 'grandma' to the jury, I used her correct name.

[25] Of course this is the nickname I gave him after the trial. Former President of the USA, Richard Milhouse Nixon, a Republican, had the nickname "Tricky Dicky". The Watergate break-in and secret recording of the Democrat election convention was one of his tricks.

Not guilty.

Bibliography:

I acknowledge assistance gained from:

"Uniform Evidence Law" , 9th Edition by S. Odgers S.C.

Butterworths "Criminal Practice & Procedure"

ATTACHMENT

An example of an opening to a jury in a Drug trial.

"BRASSIL: Ladies and gentlemen, first of all, my name is Brassil. That's an ancient Irish name, but you wouldn't know it as an Irish name, and I'm a barrister. This chap here is sitting in front of me at the bar table, this chap sitting in the middle is doing his first weeks at the bar and as part of his training he's required to go to a senior barrister and ask can he sit on a criminal trial, and that's what he's doing. Please do not think for a second that the accused is rich, he's got two barristers, do not go there, do not guess those things, please. I know this young man's father, I went to university with him, so just relax about that.

Secondly, you have heard the Crown's opening to you, and I'm going to correct a few things that, in my opinion, she actually got wrong, but I'm not going to tell you the entire story because that's not my function right now. My function now is to speak generally to you about what the trial is going to involve, and I'm going to save the most important bits for when I open the defence case, when I talk to you about what the defence case will be, and what I say to you at the end, I'm keeping my powder dry, but for important reasons I want to say this to you. You are judges. You are judges of the facts, as his Honour has told you, and that's a most important and powerful thing for citizens in our democracy here to do to play your part to make sure that justice is properly done in criminal trials and to ensure that this man, who is a citizen as well, gets a fair trial.

He has a Vietnamese interpreter because his natural language is Vietnamese. He came here when he had fully learnt Vietnamese language and of course he has learned a lot of English, but to guarantee that he understands every single word that I say to him, that he needs to say to me, that the Crown says to you, that the witnesses say to this Court, to guarantee that he understands every word perfectly, we provide him with a qualified interpreter. Please don't be distracted by that fact. It's just he doesn't have enough English for all of us to be completely confident that he understands every word that's said. That's being fair.

So we are emphasising fairness in the conduct of these proceedings to the accused. Please be guided by that. Now, another thing. His Honour is the judge in this trial for the purposes of the law and the administration of this criminal case. You aren't here when his Honour enters the room, but when his Honour enters the room, we all stand as a mark of respect to the judge presiding over this trial. But when you walk in, the accused stands. He stands because I've told him to, not because he knows to for any other reason. Either the interpreter or I or my solicitor will give him a nudge if he forgets to remind him, because he is required to stand because you are his judges. That's why he stands.

You have that little unspoken ceremony. It's not in any Act of parliament that I've ever noticed, but the accused stands as a mark of respect for you, his judges. We are all equal citizens in this democracy of ours, but he stands because you are his judges appointed in the process you've been through today for the purposes of his trial. So please don't add any extra into this matter because you see something that doesn't quite make sense. If I've forgotten to tell you something, please through your foreperson ask his Honour about it if you have any concerns, but you are here to focus on the evidence. You've heard the Crown tell you what the evidence will be from the Crown's perspective.

Of course it's all the way you say things. Things - persuasion of people, its in the way you say things. The Crown, early in her address to you, spoke about the evidence. She said Ms Vuong had telephone conversations with Mr Pham. You don't know who Mr Pham is, but it's definitely not this man. His name is Than Long Ly. Pham is not him. When you hear mention of Mr Dang, that is not this man. This man is Than Long Ly. I know they're Vietnamese names and sometimes they're a little bit hard to hang onto, but if you could possibly rethink the Crown address to you, she didn't say, "Vuong tells Ly." She said, "Vuong told Pham." She didn't say, "Ly told Pham." She said, "Pham told Vuong." There still hasn't been a mention of Mr Ly, who is the accused in this trial.

The Crown told you that Ms Vuong and the undercover police officer were in the hotel room and she said, "Waiting for the accused and Mr Dang to arrive in the room." Hello. No, I say that's not what - in my submission, you will see later it's not what they were doing, because the moment this man walked into the room, Ms Vuong says, "You - I told her that it would be you. What's him?" Or some words to that effect. Then he's out of the room. The Crown told you 30 seconds. I haven't yet got a stopwatch out, but I will. It's less than 30 seconds he's in the room. No-one mentions this accused's name ever before he walks into that room.

This man steps out of the total blackness of unknown into the glaring light of a surveillance camera for less than 30 seconds and that's it. Says nothing, carries nothing, orders nobody. The Crown told you about his mobile phone. The Crown told you that - can I suggest to you that the Crown is mistaken about the evidence in this matter, because the Crown told you that Mr Ly and his solicitor approached Mr Dang in gaol. No. No. We agree that Mr Ly approached Mr Dang in gaol to say some words to the effect that, "You need to say that phone was yours." That's a very critical matter. You will see that Mr Dang signed the statement saying the phone was his.

Why the devil would he have signed that? That's taking evidence that's in someone else's case and tipping it on his own head. He did that for a powerful and important reason, and you will see. You will have evidence of his powerful and important reason for tipping all that evidence on himself. The Crown says he did it. But it was a lie, and I say why did he do it? That's going to be a major issue in this trial as to why that man did that. What is the character of that man? You, as the judges of fact, will receive this evidence and weigh it, consider it and decide this case in accordance with the evidence.

This case is going to open up in a way that the Crown has not told you about because I haven't told her. I'm not required to. This accused is innocent until proven guilty. He is innocent every second until and unless on the possibility that you might find the case proved against him beyond a reasonable doubt. Until that moment, he is guaranteed to be innocent. You will hear that he's 33 years old. You'll hear that he has a nil criminal record. You'll hear that he has a young son and a wife, though not technically married, but who cares anyway. This is not a Court about morals or tradition. He has a wife and a child and a nil criminal record, and he's innocent until proven guilty.

We say to each other in our ordinary talk, we say, "Give him the benefit of the doubt." Ladies and gentlemen, give him the benefit of the doubt. Wait until you've heard all of the evidence before you make a decision. There is not, in this trial, please, one moment where

you say to yourself - before you've heard all the evidence and the addresses at the end, there is not a moment where you can properly say, "All right, that's it. I've heard enough. I've made up my mind." That is not how judges decide cases. You have to be patient. His Honour said to you, "Relax." So please, relax, be patient and wait. I ask that you give this man the fair trial that he deserves to get.

Sometimes, in your own lives, you will have made a mistake, gone to a place and then thought, "Oh my god, what's going on here," and you get out of there. It might be for men - and I can only talk about my life experience - a public toilet where when you see what's going on, you just get out of there. But you went in there. You can't be blamed for going in there unless you know what's going on inside. The Crown have to prove, beyond a reasonable doubt, that he knew what was going on inside that room.

It's not a matter of guessing. It's a matter of the Crown asserting that they can prove and then they produce evidence which proves his involvement in this awful business, and I say to you ladies and gentlemen: wait. Be patient with me, I have a job to do. I will do it thoroughly to the best of my ability. I won't tolerate errors. I won't tolerate anything happening in this courtroom that I think I can properly and appropriately object to, and at the end I propose to put to you the defence case, which in my respectful submission will leave you with a very reasonable doubt about what the Crown alleges has gone on here.

The Crown[26] said to you that the accused was there to make sure the transaction happens. Pure conjecture. There's no interview, there's no statement, there's no telephone tap, there's nothing to support that statement to you, except a presumption that he actually is guilty. I say, that statement of the Crown's can't stand, because it's a wish list. It's a wish, it's not a fact. The Crown's opening to you is not evidence. What the witnesses say to you in this trial is evidence, please be guided by the evidence in the trial to determine what the fact is in this trial. You'll hear more from me later, ladies and gentlemen. Thank you.

[26] At the end of this trial I gave the Crown a nickname: Aunty Arsenic. (Seems like a kindly older lady, but actually is quite poisonous).