

# CURRENT ISSUES

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## When is Plea Bargaining Justified?

“Plea bargaining” comes in two varieties. The first involves the participation of the trial judge in the process of sentencing. Usually, counsel for the accused and the prosecutor indicate through the judge’s associate that they wish to attend the judge in chambers. The purpose of such judicial intervention is to obtain an indication from the judge as to the sentence he or she would impose on the assumption that both parties were agreeable to accept a plea of “guilty” to some lesser charge than appears on the indictment.<sup>1</sup> The other form of “plea bargaining” involves a “bargain” struck between the prosecutor and counsel for the defence, and will be dealt with in detail below.

It is submitted that any practice involving the trial judge in sentencing is to be avoided, not only because it gives rise to the perception that sentences can be “negotiated”, but the legal process must be seen in public, and anything seen to be done behind closed doors must weaken public confidence in the administration of justice. Furthermore, it inhibits the judge from handing down a more severe sentence when all the relevant facts are disclosed prior to sentencing. Were he or she to hand down a more severe sentence than indicated in chambers, the accused would justifiably feel aggrieved. It is the responsibility of the accused’s counsel to advise the client as to the likely sentence, a responsibility which cannot be transferred to the Court.

Again, this form of “plea bargaining” gives rise to the perception that an accused can achieve a lesser sentence on a plea of “guilty” than one who defends the charge by pleading “not guilty”. This aspect “overlaps” to some extent the other aspect of “plea bargaining”, where a plea of “guilty” is agreed upon between the Crown and the defence, the “consideration” for the bargain being that the Crown agrees to the withholding of some aggravating factors from the judge when outlining the background of the crime when the accused comes up for sentencing.

It is therefore not untimely to restate the warning uttered by the Full High Court (Brennan, Deane and Gallop JJ) in *R v Tait*,<sup>2</sup> where their Honours noted:

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<sup>1</sup> See for example *R v Bruce* (unreported, Victoria Court of Criminal Appeal, 19 December 1975). The practice was emphatically condemned by the Full High Court on the failed special leave application (unreported No 42 of 1976); see also the discussion of the case in *R v Marshall* [1981] VR 725.

<sup>2</sup> (1979) 24 ALR 473.

In order that a court may accede to an application that it sit in camera, it must appear either that there is a statutory provision which enables it to do so, or that the case falls within one of the ‘strictly defined exceptions’ (as Lord Blanesburgh described them in *McPherson v McPherson*<sup>3</sup> to the rule that the proceedings of courts should be conducted ‘publicly and in open view’ (*Scott v Scott*)<sup>4</sup>. Apart from statute, a court has no discretion as to whether it sits in public or in private. That rule is clearly established as it is essential to the preservation of confidence in the judicial system. ... The practice by which a judge in chambers exercises the jurisdiction of his court, which Dixon J described as a ‘well-understood mode of exercising the judicial authority belonging to a judge in virtue of his office as a judge of the Supreme Court’ (*Medical Board of Victoria v Meyer*)<sup>5</sup> is not a practice which authorizes a judge sentencing a prisoner to receive in chambers information which is calculated to affect the sentence. If his court cannot be closed without statutory warrant, a fortiori he cannot hear submissions in his private chambers.<sup>6</sup>

It follows that the view expressed in *R v Turner*,<sup>7</sup> approving “freedom of access between counsel and judge”, can no longer find support in this country.

The second aspect of “plea bargaining” involves an agreement that in exchange for a plea of “guilty”, the parties will withhold relevant and provable facts of aggravation when addressing the court on sentencing.

There has been much adverse publicity about the seemingly lenient sentences handed down some time ago by Judge Latham of the New South Wales District Court in the case involving three youths charged with pack rape, sentences which the Crown subsequently appealed on the grounds that they were manifestly too lenient. It is the Crown’s conduct of these trials which has led to a review of plea bargaining for inclusion in the Journal’s *Current Issues*.

There can hardly be a barrister practising in “crime” who has not, at some time or other, been involved in some form of “plea bargaining”, ie offering a plea of “guilty” as a trade-off to a lesser charge. Sometimes the prosecutor approaches the defence, at other times the defence sounds out the Crown to see whether a “deal” can be arranged. The practice is well known and not uncommon. However, there is - or ought to be - “consideration” for the bargain to the extent that the defence abandons a mitigating, or even potentially absolving factor which might otherwise be open to the accused, such as - in the case of crimes of violence - self-defence, provocation, or diminished responsibility. The list is by no means exhaustive. For maximum impact, if a plea bargain is contemplated, it should be explored after an accused has been committed to stand trial. Once it is known that the court is asked to deal with a plea rather than a full trial, this should expedite the hearing, thus shortening the period in remand centres if the accused is not bailed.

The benefit to the accused in receiving a lighter sentence is, arguably, offset by the benefits to the community, if only because it reduces the need to build ever more prisons.

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<sup>3</sup> [1936] AC 177, 200.

<sup>4</sup> [1913] AC 417, 441.

<sup>5</sup> [1937] 58 CLR 62, 97.

<sup>6</sup> *Ibid* 403-405

<sup>7</sup> [1970] 2 QB 321, 326.

Our criminal jurisprudence has always accepted a system which allows an accused, charged with, say, murder, to agree to plead “guilty” to manslaughter in exchange for a reduced sentence. Australian courts have followed for many decades the early English precedents which permit the substitution of manslaughter for murder where, for example, a husband kills his wife’s lover (or his wife) when surprising the pair in *flagrante delicto*. Further defences which may substitute guilty of manslaughter rather than murder include self-defence, “mercy killing”, diminished responsibility, and - more recently - “provocation” in cases of alleged unwanted homosexual advances.

It is well established that plea bargaining constitutes a legitimate and generally accepted legal tactic. However, what constitutes “mitigating circumstances” demands not only that there is an arguable defence in support of the lower charge, but, more importantly, when the case comes before the judge for sentencing, **all relevant and provable facts must be given to the court to enable the judge to hand down the appropriate sentence.**

It is submitted that the crime of rape can never be the subject of “plea bargaining”. Rape is rape and there is nothing in between. The woman involved (the prosecutrix) will be advised by her counsel, usually a public prosecutor instructed by the Director of Public Prosecutions (“the Crown”) that the accused may rely on “consent”, or else may allege that her own conduct led him/them reasonably to believe that she consented to sexual intercourse. If the prosecutrix did not report the offence at the first opportunity, the defence will rely on the absence of “fresh complaint”. However, while murder may be reduced to manslaughter, rape is uniquely rape. Either it is rape or nothing. Hence, unlike other crimes of violence, mitigating defences such as provocation, lack of intent, or a mistaken belief in the woman’s consent are not available in cases of rape. The crime is by itself sufficiently horrendous to deprive it of “mitigating circumstances”.

It follows that the collusive bargain between Crown and Defence, agreeing to withhold some aggravating facts from the court in the case of the three youths who pleaded “guilty” to rape before Judge Latham, resulting in lighter sentences, is indefensible. There are no “mitigating circumstances” in men old enough to appreciate the heinousness of their crime, and the submission by counsel for one of the youths to claim that his client did not know that rape was unlawful under Australian law beggars belief.

If, as is widely reported in the case, the two girls involved were not consulted - let alone concurred - with the Crown’s agreement that some of the more aggravating facts would be withheld from the judge in return for a plea of “guilty”, this is nothing less than a corruption of the legal process. Indeed, it is submitted that it constitutes an attempt to pervert the course of justice, denying the court knowledge of the true circumstances in which the plea was made. If this in fact occurred in the Sydney rape cases - as is generally reported and has never been denied - New South Wales lacks the statutory backup which would make such conduct illegal; *cf The Criminal Law Offences Act Q 1990*.

As early as 1908, a Canadian appellate judge (MacLaren JA) noted: “*The end does not justify the means. Even the most desirable end cannot justify the employment of corrupt means. The fountain of justice should be kept pure and not be corrupted at its source*”,<sup>8</sup>

<sup>8</sup> *R v Silverman* (1908) 14 CCC 79.

a citation which, in a different context, was quoted with approval by Dawson J of the High Court of Australia in *Meissner v The Queen*.<sup>9</sup>

In the result, the “sanitised” version Judge Latham was given on this occasion will inevitably leave the already traumatised women with a question mark against their reputation, whilst the convicted youths can continue to claim that they were innocent of the crime. A *plea* of “guilty” - unlike a *verdict* of “guilty” by a judge or jury - does not constitute irrebuttable evidence of guilt. For example, if any of the youths are not Australian citizens, their plea of “guilty” to this crime and their sentences of imprisonment for in excess of twelve months would not, *of itself*, be sufficient to support their deportation if the Minister of Immigration and Multicultural Affairs decided to deport them and that decision were to be appealed to the Administrative Appeals Tribunal (AAT).

These very circumstances arose some years ago, when the Minister ordered the deportation of a non-citizen who had pleaded “guilty” to two charges of indecent dealing with a child under twelve years, and was sentenced to twelve months imprisonment. At the relevant time, the girl was four years of age. The man appealed the deportation order to the AAT.<sup>10</sup>

The sequence of events in the case is interesting. At the committal proceedings, the accused pleaded “not guilty”. The four-year old gave evidence, notwithstanding that in law, she was an incompetent witness; see “special witness” Division 4 of the *Evidence Act* (Qld). She was not cross-examined. When the matter came to trial, the applicant initially pleaded “not guilty”, only changing his plea to “guilty” after the jury had been empanelled.

In his evidence before the Tribunal, the applicant swore that he merely tickled the four-year old and “blowing raspberries”. He claimed that he had been persuaded by his counsel to change his plea, being advised that any cross-examination of a young child about an alleged penetration of her vagina would be very traumatic experience for her. For good measure, counsel told his client that the Crown would rely on a video cassette of the girl being interviewed by counsellors in which she provided a graphic account of sexual molestation, adding that if the jury were to return a verdict of “guilty”, the judge would take a poor view of the defence’s tactics and impose a heavy sentence of imprisonment. If, on the other hand he were to plead “guilty”, counsel assured him that the judge would take that into account and impose a significantly lighter sentence. The advice was prophetic - the accused was sentenced to a mere twelve months imprisonment and released after eight months.

It is therefore interesting to reflect on the legal effects of a plea of “guilty”. For example, does the conviction or the facts found by a judge create an issue estoppel or *res judicata* in administrative proceedings? The answer is “No”. This became the central issue in the hearing of the above case. Counsel for the Minister assumed that, having been found guilty of a serious offence and sentenced to twelve months imprisonment, the applicant’s appeal was limited to a plea in mitigation, and hence did not call evidence in support of the conviction. Counsel for the Minister was to be in for a surprise.

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<sup>9</sup> (1995) 130 ALR 547.

<sup>10</sup> *Gaudin and Minister for Immigration and Multicultural Affairs* No. Q1999/637.

The prosecutrix not being called as a witness, the video cassette was held to be inadmissible. This resulted in the Tribunal noting that any allegations of sexual molestation had at no stage been challenged in cross-examination. For good measure, in her statement to the police, which was made an exhibit (the Tribunal is not bound by the rules of evidence), the girl claimed that during the whole period that she was sexually molested, the accused “*walked in and out of the bedroom checking on his wife in the kitchen*”. This wording persuaded the Tribunal that the four year old’s statement had been “contaminated”, resulting in the rest of the girl’s statement being viewed with some scepticism.

The applicant had no prior convictions. For good measure, there was considerable evidence of good character and steady employment. The applicant’s evidence being uncontradicted, the Tribunal applied the civil standard of proof and allowed the appeal.. There was no further appeal

In the circumstances, was counsel’s advice to his client to change his plea to “guilty”? improper? Is it ever proper for counsel to persuade a client to plead “guilty” when he or she maintains his or her innocence? The answer is a hesitant “yes”. In the instant case, if counsel was persuaded that his client would be an unimpressive witness, and that a four-year old girl, if cross-examined about intimate sexual conduct, would in all probability become hysterical, and hence invoke the jury’s sympathy, making a “guilty” verdict more likely, the advice was, arguably, justified. For good measure, “indecent dealing” has been widely interpreted by the courts.<sup>11</sup>

Returning to the Sydney rape cases, did counsel for the three youths have the same latitude in acting as he/they did? Here the answer is more difficult. Once counsel was satisfied that the Crown had overwhelming evidence of guilt, making an acquittal unlikely, the duty to the clients was to minimise their sentences. At this point, counsel faces an ethical dilemma: Is it proper to “horse trade” a plea of “guilty” by obtaining the prosecution’s agreement to withholding aggravating facts from the court when addressing the judge on sentencing? Here, it is submitted, the answer would seem to be “no”. The Crown’s agreement to such a bargain is difficult to defend, coming close to a conspiracy to withhold critical evidence from the court, and thus to pervert the course of justice. Counsel for the accused has thus entered into a collusive bargain which, on one view, comes close to making him/them *particeps criminis*.

It is submitted with little hesitation that in sentencing an accused who pleads “guilty” to an offence, the trial judge must be informed of all the facts surrounding the offence, both those which are mitigating and those which render the offence more serious, not a sanitised version in order to reduce the appropriate punishment. Courts are the sole instrument of justice in a civilised society. For officers of the court to consent to withhold from a judge information relevant to appropriate punishment is calculated to bring the law - and the legal profession - into disrespect, as well as going well beyond the duties to the court counsel has sworn to uphold.

Having achieved by deception what it set out to achieve, ie a more lenient sentence, the Crown’s appeal against sentence thus sits oddly with its own conduct. However, in

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<sup>11</sup> See, eg, Macrossan SPJ in *R v Cook* [1927] St R Qd 348, 349.

*Malvaso*,<sup>12</sup> a case involving an appeal from the Court of Criminal Appeal of South Australia,<sup>13</sup> the High Court held that the silence of the Crown Prosecutor was a matter appropriate to be taken into account in deciding whether leave should be given to the Attorney-General to appeal against a sentence imposed upon the convicted person. Reference to *Malvaso* was made by the Court of Criminal Appeal in *R v Rahme* (NSW),<sup>14</sup> where their Honours noted that: “*The High Court pointed out that a ‘plea bargaining’ agreement could not bind the Attorney-General nor restrain him from seeking leave to appeal. Nor could any ‘agreement’ bind the court.*”

Finally, and with the utmost respect, even Judge Latham, at first instance, cannot totally escape criticism. One must wonder what persuaded her Honour to pronounce - gratuitously on the sanitised facts given to the court - that this horrendous crime “was not racially motivated” when all the evidence to the contrary had been deliberately suppressed. *Obiter dicta* have a habit of haunting judges who pronounce them. This case proved to be no exception.

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<sup>12</sup> (1989) 168 CLR 227, 233.

<sup>13</sup> (1989) SASR 503.

<sup>14</sup> *R v Rahme* (1991) 53 ACrimR 8, 11 (Kirby P, Lee CJ and Smart J).