Bar Notes

Conduct of Counsel as a Ground of Appeal

The duties of counsel to ask particular questions or questions on a particular topic are the subject of the recent judgment of the Court of Criminal Appeal in *R v De Keyser* (unrep. 20 July, 1987). The Court made it clear that, in circumstances where counsel's conduct of the trial is the ground of appeal, the question to be decided is whether the conduct resulted in a miscarriage of justice: "it is not the conduct of counsel which is under consideration, it is the question whether that conduct has in any way resulted in a miscarriage of justice. I stress 'in any way'" (per Lee J at pp.23-24).

The Court said that where a witness has been cross examined generally on his evidence and where the aspects of the evidence material to the question of guilt have been enquired into, it would be rare for the Court to perceive a miscarriage merely because another counsel, who did not bear the responsibility of the trial, contends that the cross examination should have been more extensive.

The judgement of the trial counsel "on the importance of inconsistencies in testimony is one which he must exercise against the overall impression which he seeks to leave with the jury in regard to the witness' evidence." Hence the Court commented that counsel may, very properly, refrain from cross-examining on inconsistencies and they emphasized that it is never the length of cross examination "which is the hallmark of an effective cross examination."

This position of cross examination must be contrasted with the calling of a witness. The latter was discussed by the English Court of Appeal in *R v. Irwin* (1987) 1 WLR 902. In this case the barrister decided not to call two alibi witnesses. He did not tell his client of this decision. It was held that such a situation did amount to a material irregularity and the appeal was allowed. The Court said "The question . . . is not whether counsel was right in thinking the witness should not be called but whether he was entitled to bind his client by his decision". The Court noted that there may be cases where it is not vital to consult the client about the calling of an alibi witness at the time the witness is to be called. Such a situation may arise where there has already been thorough discussion. Nevertheless the Court held in this case clear, and preferably written, instructions were required before the witnesses were not called. All barristers should be aware of the desirability of written instructions in such circumstances.

Frequently where the conduct of trial counsel is attacked counsel is requested to provide an affidavit explaining his conduct. Such a procedure seems inconsistent with the comment that it is not counsel's conduct which is under consideration. It is generally, at very least, undesirable for trial counsel to be required to give evidence either by affidavit or orally in such situations.□

B. Donovan

Unreported Judgments

In **Roberts-Petroleum v. Kenny Limited** [1983] 2 A.C. 192, the House of Lords said that it would, in future, adopt the practice of declining to allow transcripts of unreported judgments of the Court of Appeal (Civil Division) to be cited on the hearing of appeals to the House unless leave was given to do so. That leave was only to be granted on counsel giving an assurance that the transcripts contained a statement of some principle of law, relevant to an issue on the appeal to the House that was binding on the Court of Appeal and of which the substance, as distinct from the mere choice of phraseology, was not to be found in any judgment of that Court that had appeared in one of the generalised or specialised series of reports.

The wake from this case is just hitting Australia.

In September 1986 the Victorian Supreme Court issued a practice note prohibiting the citing of unreported judgments in that Court on substantially the same basis as had the House of Lords, as well as requiring notice that an unreported judgment would be relied upon to be given to the Court and all other parties.

On 22 May 1987 the Chief Judge of the Family Court, Justice Evatt, issued a direction prohibiting the use of unreported judgments in that Court, that direction being in substantially the same terms as that issued by the Victorian Supreme Court.

The Bar Association has written to the Chief Judge requesting that that direction be reconsidered. It supports the proposition that while one should give notice to one's opponents if one intends to cite unreported authority nevertheless it should not be necessary for leave to be obtained before such authority can be cited.

The Council's view is that relevant authority should be cited and that irrelevant authority should not be cited but that the question whether or not an authority is reported ought not to be a consideration. The only difference between a reported case and an unreported case (apart from ease of access) is that the law reporters have determined that an unreported case is not worthy of being reported. The danger of rules restricting the citing of unreported authority is that it places in the hands of the law reporting authorities significant power as to the course taken by the law. For this reason the Bar Council has consistently opposed the introduction into New South Wales of the Victorian rule.□

Domain Parking Station

The Town Clerk has informed the Registrar that the Council has had discussion with representatives of the Police Force. The Police have introduced special hoodlum police patrols of the area around the Domain Parking Station from 6 pm to 2.30 am daily. In addition the area will be patrolled by Police Dogs and Handlers from 6 pm to 2.30 am on Thursday, Friday and Saturday evenings and, occasionally by Police Mounted patrols. In addition, the Council has engaged Sydney Night Patrol Inquiry Services to conduct periodical patrols of the moving footway tunnel.□