# A lesson for prosecutors

By Peter Hastings QC

In some states of the USA prosecutors in the offices of county district attorneys participate in the thrill of the chase for suspects by working closely with investigators prior to arrest, even to the point of attending crime scenes. That has never been the practice in Australia where the necessity of the appearance of independence and objectivity has meant that any pre-arrest legal advice is given usually by advisors within the investigating agency, and prosecutors normally require a brief of evidence setting out most of the admissible evidence before advising investigators upon the commencement of proceedings. To the extent that there was beginning to develop a departure from that practice, the findings of formal inquiries in recent times into the circumstances of two well-publicised failures of prosecutions in different cities on opposite sides of the country are such that the departure should be short-lived.

In reviewing completely unrelated circumstances which took place over a decade apart, both revealed common deficiencies in the way in which the decision to prosecute was made without the availability to the prosecutor of a brief containing the available evidence set out in admissible form. The investigation headed by former NSW Justice John Dunford QC by the West Australian Corruption and Crime Commission into the conviction of Andrew Mallard for murder[1], and the inquiry by former NSW Justice John Clarke QC into the case of Dr Mohamed Haneef after he was charged in Brisbane with a counter-terrorism offence[2], consistently demonstrated that the miscarriages of justice had their origins in the circumstances in which the decision to prosecute was based upon case summaries and oral presentations provided by the investigating police.

### Andrew Mallard

The circumstances of the prosecution of Andrew Mallard resulted in one of the most appalling injustices in the history of criminal justice in Australia. Mallard was convicted of the murder of a woman found deceased in a jewellery shop at Mosman Park, a suburb of Perth. He spent almost 12 years in prison until the High Court set aside the conviction on 15 November 2005 and ordered a new trial.[3] Eventually the proceedings against him were dropped.

At the time of the offence Mallard was an eccentric character who had been diagnosed as suffering from a hyper-manic phase of bipolar mood disorder during his various periods in psychiatric hospitals. He manifested all the signs of suffering from cannabis induced psychotic episodes. At the time he had no permanent place of abode but stayed with acquaintances by paying rent in the form of cannabis. As it turned out, probably the only positive outcome of his lengthy incarceration was the fact that he emerged 12 years later as someone who, when reverting to his normal state, was reasonably erudite, objective and intelligent, an otherwise unlikely outcome in view of his lifestyle prior to his arrest.

Apart from his bizarre behaviour at the time, he also suffered from the distinction of being very tall. He had been spotted in the area in which the offence was committed on the same day and early in the investigation he was nominated to the investigating police as a possible person of interest. On the day following the murder, as a result of an unrelated episode of manic behaviour, he was arrested and charged with impersonating a police officer and was remanded for psychiatric assessment in hospital. He was there spoken to by police investigating the murder but denied any involvement.

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After his discharge he was questioned again but became hysterical and ended up biting one of the detectives on the leg. He was duly charged with that unseemly conduct, and upon his release an undercover officer was assigned to befriend him. The officer, playing the role of a fellow homeless person, duly spent the next three days in his company on the streets, according to some suggestions, plying him with alcohol and cannabis, and it may be assumed, discussing the murder with him in the hope that he may confess. He did not. The undercover operation was terminated and Mallard was arrested and questioned again during which he made a series of erratic and sometimes inaccurate statements about the circumstances of the murder. Much of what

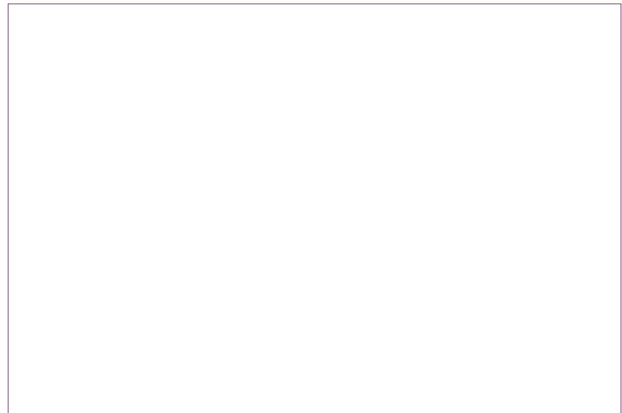
he said about it was in the third person. In large part it was clearly a hypothesis, and given the time spent with the undercover officer, presumably based on facts which had been supplied to him. Importantly, he drew a sketch of the wrench which he said was used in the murder. Subsequent tests with a similar wrench did not produce the same pattern as the injuries sustained by the deceased (a result which infamously was never revealed to his defence).

The investigating police then met with the director of public prosecutions to seek his advice as to whether there was sufficient evidence to charge Mallard with the murder. No statements or other records were produced, although the video of his interview was played during the meeting. No notes seemed to have been taken of the meeting. The director gave advice that there was sufficient evidence but that it would be a difficult case. There is no suggestion that in so doing the director acted improperly. After the meeting police went to the hospital where Mallard was being treated and charged him with the murder.

The investigation by the CCC revealed that what occurred thereafter in bringing about his conviction, was a catalogue of misconduct, as the police and prosecution struggled to secure the conviction against him. An initial appeal to the Court of Criminal Appeal[4] and an application for special leave to the High Court[5] were both unsuccessful. Fortunately for Mallard a number of people believed him to be innocent and continued to campaign on his behalf. Notwithstanding the emergence of fresh evidence, a further appeal to the Court of Criminal Appeal failed[6] and it was not until the matter finally came to the High Court again that the conviction was overturned, largely upon the ground that there had been a failure to disclose relevant material to the defence.

Even then, it was only when a cold case review was conducted that evidence was discovered which identified the probable offender as a convicted murderer who committed suicide in custody after being named on television as the new suspect.

It cannot be said with certainty that if the decision to prosecute had been made upon a brief of evidence, it would have been different, but the requirement for the provision of a brief setting out the then available evidence in written form, would have gone a long way to preventing the inaccurate versions of the evidence later provided to the prosecution, and would certainly have curtailed the opportunities that were taken subsequently to compensate for the deficiencies in the prosecution case by altering statements and misrepresenting the prosecution evidence before the brief was finally submitted at the trial.



Dr Mohamed Haneef leaving Australia on 28 July 2007. Photo: Newspix

### Dr Mohamed Haneef

The circumstances surrounding the regrettable charging of Dr Mohamed Haneef in Brisbane with a counter-terrorism offence arising from unfounded allegations of connections with earlier terrorism incidents in London and Glasgow, display a striking similarity in relation to exposing the perils of advice to prosecute being given without the benefit of the provision of a formal brief of evidence.

The Australian Federal Police and the Commonwealth director of public prosecutions had established a close working relationship during major counter-terrorism investigations and the AFP would approach the CDPP for advice in the course of an investigation and brief the CDPP on the status of an investigation. The AFP had almost immediately been receiving information concerning a connection between Dr Haneef and persons involved in the acts of terrorism, and eventually began to communicate with the CDPP concerning the evidence available. On the day that the decision to prosecute was made the prosecutor was provided with a 48 page briefing paper to read, and some supporting material. After a number of meetings with investigators, and with ASIO officers silently lurking in the background, during the day, the prosecutor advised that he thought there was enough evidence to

charge Dr Haneef, adopting in his mind, the reasonable grounds 'arrest test'. He then provided a short note to that effect and drafted an appropriate charge.

The following morning Dr Haneef was then taken to the City Watchhouse and charged. Despite the fact that inaccurate information provided by police was later conveyed to a magistrate, the magistrate granted bail. To that extent the harm from the erroneous advice was benign compared with the consequences for Andrew Mallard.

However, Dr Haneef was then held in custody as a result of the ministerial cancellation of his visa until the Federal court overturned that decision and he was released.

The Inquiry Into the Case of Dr Mohamed Haneef[6] concluded that the advice of the prosecutor was wrong. That was hardly surprising. He was misinformed as to important facts and was not provided with a transcript of a conversation between Dr Haneef and arresting officers at Brisbane airport or with a transcript of his first interview, both of which contained no admissions and exculpatory material. Nor was he told at any of the meetings with investigators of the views of senior members of the investigating team that they thought that the evidence was insufficient to warrant the institution of proceedings. There is little doubt that if the decision to prosecute had been based upon consideration of a fully documented brief of evidence, the decision would have been different.

Subsequently the CDPP amended its guidelines to make it clear that no advice on the sufficiency of evidence can be provided by a Commonwealth prosecutor other than in accordance with the prosecution policy, that is on the reasonable prospects of conviction test. The guidelines do not go further to identify the circumstances in which the advice is to be given, although in practice the only basis upon which the advice can be given is by reference to admissible evidence. What seems to have occurred is that there is now a disinclination on the part of the CDPP to provide any pre-arrest advice without the provision of a full brief of evidence.

The situation is dealt with in a little more detail in the Guidelines of the NSW Director of Public Prosecutions in which Guideline 14 stipulates that advice may be given to police as to the sufficiency of evidence 'only on receipt of sufficient material in admissible form'. It would seem that such advice is rarely given by the ODPP and police rely upon the Legal Services Section for pre-arrest assistance.

The significance of the message from the inquiries should not be missed. Earlier police royal commissions have revealed the perils of comfortable relationships between prosecutors and investigators, and the overriding duty of the prosecutor to be independent and objective is best maintained when the dealings between them are kept at arms-length, notwithstanding any inconvenience that may follow and the lack of excitement from being denied the opportunity to be part of the investigation.

### Endnotes

1. *Report on the Inquiry into Alleged Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs Pamela Lawrence, the Prosecution and Appeals of Andrew Mallard and other Related Matters*, Corruption and Crime Commission 7 October 2008.
2. *Report of the Inquiry into the Case of Dr Mohamed Haneef*, The Hon. John Clarke QC, November 2008.
3. *Mallard v R* (2005) 224 CLR 125.
4. *Mallard v R* WASCA 11/9/96.
5. *Mallard v R* HCA 24/10/97.
6. *Mallard v R* [2003] WASCA 85.