SUPREME COURT OF QUEENSLAND

CITATION:	*Vasta v Clare* [2002] QSC 259
PARTIES:	**SALVATORE PAUL VASTA** (applicant) **v** **LEANNE JOY CLARE** (respondent)
FILE NO/S:	SC No 6969 of 2002
DIVISION:	Trial
PROCEEDING:	Application for Declarations
ORIGINATING COURT:	Trial Division
DELIVERED ON:	30 August 2002
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2002
JUDGE:	de Jersey CJ
ORDER:	**That the application be dismissed.**
CATHWORDS:	**DIRECTOR OF PUBLIC PROSECUTIONS – CROWN PROSECUTORS** – Application for declaratory relief – extent of Crown Prosector's independent discretion in conduct of sentencing – relationship between Director of Public Prosecutions and Crown Prosecutor – whether live issue for determination – *Director of Public Prosecutions Act* 1984.
COUNSEL:	AJ Morris QC for the applicant RV Hanson QC for the respondent
SOLICITORS:	Gilshenan and Luton Solicitors for the applicant Crown Solicitor for the respondent

[1] **de JERSEY CJ:** The applicant is a barrister who has for the last 12 years been employed in the Office of the Director of Public Prosecutions. He was appointed as a Crown Prosecutor in August 1996. These proceedings were provoked by disagreement between the applicant and the Director of Public Prosecutions, who is the respondent. It arose from the applicant's conduct of sentencing proceedings in respect of charges against a child of rape and torture.

[2] It was common ground on the hearing before me that the trend of Court of Appeal decisions would indicate that a period of actual incarceration should ordinarily be served in respect of such offending, even in the case of a juvenile offender. But the

applicant took the view that although a substantial term of imprisonment should be imposed, it should be fully suspended to assist the offender's rehabilitation. Accordingly, when the matter first came before the District Court, the applicant informed the Judge that he "would not be actively seeking custody". The Judge then adjourned the proceedings so that pre-sentence reports could be obtained. When the proceedings resumed, before another Judge, another prosecutor appeared, the applicant being elsewhere (on circuit). The approach of this prosecutor differed from that of the applicant, in that he submitted that actual custody should be imposed. The Judge on this occasion, aware of the applicant's contrary approach, adjourned the matter so that he could hear the applicant's reasoning. When the matter came on again, the applicant appeared, submitting for a sentence of five years' detention wholly suspended. The applicant drew the Judge's attention to Court of Appeal cases indicating that "juveniles who commit rape or torture are detained". In the result, the Judge sentenced the child to two years' detention.

[3] By a memorandum of 28 June 2002, the applicant explained to the respondent the reasons for his approach. The respondent responded by memorandum of 1 July 2002, effectively rejecting the basis offered by the applicant, and saying:

> "I am also troubled that after a conflicting submission was made by a fellow prosecutor, you returned to court to continue to advocate for immediate release without consulting with me."

The respondent sought a fuller explanation from the applicant. The applicant then provided a memorandum of 2 July 2002, and that led to the respondent's response of 10 July 2002 by which she directed that the applicant not appear for the Crown in any of the superior courts until further notice, with a review of the position on 28 September 2002. In the course of that memorandum, the respondent said:

> "…you actively sought the immediate release of the offender, putting your submissions substantially below the established range for sentence. In short, while appearing on my behalf, you made representations about policy of a highly controversial and substantial nature, without taking instruction from me, or even conferring with anyone else in this office.
>
> In your memorandum you state that it did not cross your mind that you should see me first. This shows an alarming lack of judgment in a prosecutor of your experience. Furthermore, your approach to sentence was not just a spontaneous outburst but a considered one, developed over two separate appearances.
>
> To make matters worse, you are unrepentant about it. You do not seem to realise that you might have overstepped the mark. Your defence is that the criticized submission was based on your genuine belief about the juvenile. It is not your bona fides, however, that I question. Rather it is the misapprehension that underpins it: that is that you are completely independent. You do not grasp the notion that as a crown prosecutor you must be instructed by me."

[4] The applicant seeks declarations to delineate the extent of his independence. The declarations sought are these:

> "Declarations as to whether, as a matter of law:

(a) It is or is not the case that the Applicant, as a Crown Prosecutor, when addressing submissions to a court with respect to sentence, is required by law to:
  (i) Exercise an independent judgement;
  (ii) Assist the court by addressing submissions as to the full range of sentencing options available in the circumstances of the particular case, including the maximum and minimum extremities of the appropriate range of sentencing options; and
  (iii) Make such submissions in good faith, based on the Crown Prosecutor's genuine belief as to what is appropriate in the circumstances.

(b) It is or is not the case that the Respondent, as Director of Public Prosecutions, has the legal power or authority to:
  (i) Direct a Crown Prosecutor to make sentencing submissions otherwise than in accordance with the principles set out in sub-paragraph (a) hereof; or
  (ii) Impose disciplinary sanctions or other administrative punishment in respect of a Crown Prosecutor who fails to give effect to a direction by the Respondent to make sentencing submissions otherwise than in accordance with the principles set out in sub-paragraph (a)."

[5] As I made clear at the hearing yesterday, the question of the applicant's capacities as a Crown Prosecutor does not arise here. I mention that expressly because the respondent touched on the matter in her memoranda. The only issue, if it arises, is the extent of a Crown Prosecutor's independence of the Director.

[6] It is convenient that I provide some brief observation on the relationship between the Director of Public Prosecutions and her prosecutors. The functions of the Director are set out in s 10 of the *Director of Public Prosecutions Act* 1984. The Director's fundamental responsibility is to conduct criminal proceedings on behalf of the Crown (sub-s 1(a)(i)). Significantly for the present case, the Director has power to determine which prosecutor should appear on her behalf in any particular matter. That is to be drawn from s 10(3), which provides:

> "In proceedings with which the director is concerned the director may appear in person or by counsel or solicitor, whether from within the director's own office or in private practice."

By s 11(1)(a) the director is authorised to "furnish guidelines in writing to crown prosecutors…with respect to prosecutions in respect of offences", but that power "does not authorise the director to furnish guidelines of a description referred to therein in relation to a particular case" (sub-s 1A), which implicitly recognizes a prosecutor's basic independence in the conduct of a case.

[7] A Crown Prosecutor is thus subject to guidelines furnished by the Director under s 11, and also, the constraints which ordinarily attend appearing as counsel, such as an overriding ethical obligation owed to the court and the administration of the law. The obligations of a prosecutor, representing the State, differ somewhat from those of private counsel, in respects discussed in *R v Hay and Lindsay* (1968) Qd R 459, 476. But in the end, it is undoubtedly nevertheless correct to say that the role of Crown Prosecutor is attended – should be attended – by a large measure of independent discretion. That independence, of political and executive interference,

and of the investigative agency, among other things, is critical to the integrity of the criminal justice system. *R v Puplett* (1968) QWN 16 provides an example of an established, particular situation in which a prosecutor acts as "an independent officer of the Crown", that is, in entering a nolle prosequi (cf. *R v Jell ex parte Attorney-General* (1991) 1 Qd R 48, 57). Another is in the presentation of indictments.

[8] That is not, however, to deny the Director the important role of endeavouring to secure consistency and predictability in the positions advanced by prosecutors in relation, for example, to sentencing levels – a matter of great public interest. Guidelines bearing on some aspects of the sentencing process have been published by the Director under s 11, and it would fall to a prosecutor to act consistently with them when applicable. But guidelines apart, it obviously falls to the Director, acting responsibly in the public interest, to seek to secure consistency of approach where desirable, by other persuasive means, such as through consultation with prosecutors in particular situations. Should a prosecutor refuse to accept the Director's advice on how to conduct a particular matter, where the Director reasonably perceives that the prosecutor's intended contrary approach is untenable, then the Director could remove the prosecutor from the case and designate another to conduct the case, acting under s 10(3).

[9] Blanket assertions of untrammelled independence in prosecutors may be unhelpful. Not only may they overlook the limitations arising out of relevant guidelines under s 10: they may also pay insufficient heed to the circumstance that a prosecutor acts on behalf of the Director, as may be drawn expressly from s 10(3) – so that the Director's reasonable instructions could hardly simply be ignored.

[10] In this case, the respondent did not become aware of the approach taken in court by the applicant until after the event. It is unfortunate that the applicant did not raise the question with her prior to the final hearing. Presumably had he done so, then if unable to persuade the applicant to her apparent point of view, which, importantly, was consistent with the approach taken in the Court of Appeal, the respondent could have removed the applicant from the case. It would obviously have been prudent for the applicant to have raised the issue with the respondent, at the latest when the difference between his approach, and that of the other prosecutor who appeared at the second hearing, became apparent.

[11] The particular objection taken by the applicant in his pursuit of this application centres on the respondent's statement in her memorandum of 10 July 2002:

> "You do not grasp the notion that as a crown prosecutor you must be instructed by me."

As put by Mr Morris QC who appeared for the applicant,

> "the issue of law sought to be determined concerns the respondent's pretended power (in her capacity as Director of Public Prosecutions) to "instruct" the applicant…as regards his submissions to a court, specifically with respect to sentencing issues, contrary to the applicant's "good faith" opinion as to the submissions which are appropriate in the circumstances of a particular case".

[12] Reading the respondent's statement in the context of the whole of the memorandum of 10 July 2002, I do not however consider that she should be taken to have been asserting a power of absolute control over the applicant, such that he should become

a mere mouthpiece for her. In one sense, because appearing on the Director's behalf (s 10(3)), a prosecutor should adhere to her reasonable instructions, though a Crown Prosecutor retains a substantial level of independence, as explained above. But the sense in which I believe the respondent was speaking, in this memorandum, of "instructing" the applicant, was through the imparting and sharing of views and information, not the mandating of a particular course from which the applicant must not under any circumstances diverge.

[13] The essential difficulty in this case was, as I see it, of a practical nature: simply enough, the difference of view was not ventilated within the Office at a sufficiently early stage. The problem is therefore seen ultimately to concern the internal administration of the Office of the Director of Public Prosecutions, a matter which is not justiciable.

[14] In these circumstances, it is not necessary or appropriate that I answer the questions raised in the application. The application is dismissed.

[15] As to costs, although my present inclination would be to make no order, they will be reserved, as requested by Mr Hanson QC who appeared for the respondent, so that the parties may make further submissions if desired. If the question of costs is to be agitated, written submissions should be furnished within seven days.