Siberia Calling

Notwithstanding the funereal depiction of my likeness on the cover of the last edition of Bar News, suggestions of my demise have been greatly exaggerated. Perhaps in part to dispel them, our learned editor has invited me to contribute again.

Juries

The acquittal in London of the sons of Robert Maxwell and others after a long and complex trial and a long retirement by the jury prompted predictable responses by some calling for:

- the abolition of jury trial for such offences; and
- the abolition of the Serious Fraud Office for failing to secure convictions.

I had the experience of visiting the trial in progress last year and of talking frankly and at length with lawyers on both sides, some of whom are friends (of mine, that is: not necessarily of each other). I saw how the jury was treated and the facilities and procedures that were in place to ensure that they understood and were able to assimilate the evidence, the issues and the arguments. The trial judge was particularly astute in facilitating the whole trial process.

There were six computers for the jury (one between two) and they were regularly and apparently satisfactorily used to view documents and refer to exhibits as the trial progressed (as all participants could via their own terminals).

The demand that juries be abolished in such proceedings seems to me to flow from a number of false or unverifiable premises:

1. that the critic knows the mind/s of the jury;
2. that literate and apparently normal jurors are unable to understand evidence presented largely in documentary form and to appreciate issues and assess the strength of arguments arising out of and based upon such material;
3. that advocates and judges are unable to satisfactorily explain ideas and events proved by such evidence that might be outside of the jury's daily experience;
4. that judges (perhaps assisted by expert assessors) are the only people who can - or should - make decisions based upon such evidence and that the community therefore should be excluded from doing so;
5. that if a jury's decision does not accord with the critic's opinion the jury must have been wrong.

One message, however, is strongly reinforced by such cases: there is a heavy burden on all advocates to know the evidence, identify the issues and argue their cases in a way that will be understood by the tribunal (whether it be a jury or a judge). That process will be facilitated by early attention to the task.

As to the second demand: while the SFO may have its difficulties, what possible basis can be provided for its abolition by an acquittal reached after a lengthy jury retirement? Or are we to assume that every person charged must be guilty and that acquittals only occur through prosecutorial incompetence?

Majority Verdicts

One improvement to trial by jury might be to allow majority verdicts of 11:1.

My Office prosecutes in about 1,000 District Court trials each year. In about 6% of them the jury fails to agree. It is not possible to know how the voting has gone in such cases, but there is anecdotal evidence of the one member holding out (either way) and apparently against the weight of evidence and reason.

A juror in a recent trial which ended in a disagreement (11:1) and discharge wrote to the trial judge to explain what had happened. The letter described an extraordinary performance by the one dissentient, revealing irrationality, extreme and unreasonable bias and two days of futile discussion. The juror was apparently incapable of reasoning on the basis of the evidence presented and constantly referred to extraneous events.

Recently I received a letter from a former solicitor in a foreign country who served on a Sydney jury. It was stated that one member was receiving psychiatric treatment and was severely overborne by the trial process.

The juror constructed an artificial and totally unrealistic theory of the facts as proven. After a four-week trial it was only the ability of another juror to demonstrate to the inventive one that logic should prevail that prevented a hung jury.

Another correspondent has written that it is precisely because juries are representative of the community that they are dangerous. For example, what would a foreigner think of the chances of a representative jury in Mississippi or Tennessee doing justice in a fair and rational manner?

The NSW Parliamentary Library is publishing a briefing paper on majority jury verdicts in criminal trials, canvassing the main issues and arguments. There needs to be action taken, however, to obtain data on the jury split in hung trials.

A jury is a random selection of 12 members of the community (subject to certain qualifications). There is no magic in the number 12. If 12 are able to acquit or convict, why not 11? Especially if they can test the strength of their conclusions against those of a dissentient?

Defence Openings

I would like to see a requirement introduced that the defence make an opening statement or address immediately after the Crown opening in trials.

Until such an arrangement can be formalised I have instructed prosecutors not to object to any application made by the defence to make such a statement. By way of assistance to the judge in deciding whether or not to permit it, they may submit that an address in the true character of an opening of the defence case, which serves to identify the issues to be determined, might be of great assistance to the Crown, the Court and the jury.

It should be noted, however, that in cases where an unsworn statement may still be able to be made s. 405 of the *Crimes Act* needs to be considered. It may prevent a defence opening where no evidence is to be called and if an opening is made it may prevent the making of an unsworn statement.

Judge Alone Trials

Whatever the attractions of juries, many accused elect for trial by judge alone. As I noted in the December issue, guidelines for consenting to such elections have been published and copies are available from the Bar Association and my Office. The power to give consent has been delegated to all Crown Prosecutors and other lawyers prosecuting in trials.

Recently a decision not to consent to an election by an accused for a trial by judge alone was challenged in the Supreme Court. It was held that the decision was not reviewable; and that in any event the decision in that case was proper.

Recent figures indicate that Statewide in the District Court judge alone trials are occurring in about 15% of cases. They are more common in child sexual assault cases and less common in white collar crime. While the conviction rate in jury trials is about 50%, in judge alone trials it is about 60%.

(In Japan, where there are no juries, it is 99.998%!)

Summary Prosecutions

You have have heard or read that the Royal Commission into the New South Wales Police Service recently gave its approval to my Office conducting a pilot scheme prosecuting summary offences in the Local Court in place of police prosecutors.

The details are now being decided and such a pilot will begin soon.

The Commissioner also invited submissions from any interested persons or bodies on the subject of my taking over the conduct of summary prosecutions Statewide. I have suggested that the Bar Association may be interested in making one.

In my view this is a development that is well overdue and should be pursued with vigour and dispatch. ❑

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