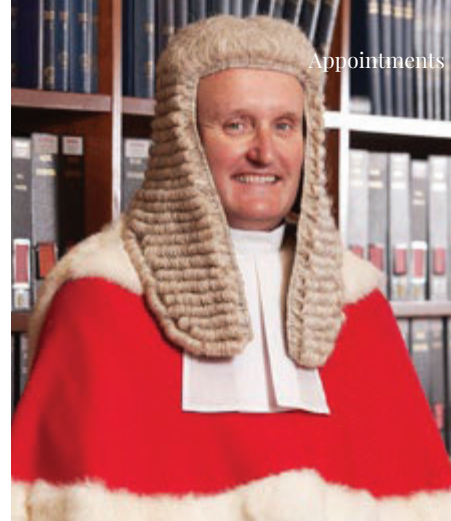


Retirement of the Hon Richard Button

from the Supreme Court of New South Wales



The Hon Justice Belinda Rigg
Supreme Court of New South Wales

His Honour was sworn in as judge of the Common Law Division of the Supreme Court of New South Wales on 12 June 2012. A farewell ceremony was held on 15 August 2024. Speeches on both occasions covered his Honour's life and many significant achievements prior to appointment to this court. Other than the basic milestones, I won't repeat those interests or accomplishments – with one exception.

His Honour was admitted as a solicitor in 1984 and by 1986 was working in criminal law at Legal Aid NSW. His Honour's passionate dedication to the criminal law in the four decades since is widely known. His Honour was called to the Bar in 1989 and was appointed as a Public Defender in 1991.

The one accomplishment prior to judicial life I will note is his Honour's 2007 article authored with Lloyd Babb SC, 'Some aspects of constructive murder in New South Wales'.¹ I mention this because it is reflective of his Honour's abiding interest in some of the most difficult aspects of criminal law, and the law of homicide in particular. This interest has shaped his contribution to the Court.

The article discussed the history of constructive murder. His Honour's desire to understand legal history is well known. The article went on to consider such issues as whether an act additional to the foundational offence is required, temporal limitations, and the content of 'malice' in the *Crimes Act 1900* (NSW). It considered how constructive murder combined with accessorial liability, intoxication, available defences and alternative conviction for manslaughter.

Now, 17 years later, his colleagues on the Supreme Court remember Justice Button as a wonderful source of knowledge of the criminal law, particularly with respect to the mental element of crimes. His Honour also had a focus on the jurisprudence of accessorial liability, about which he knew a great deal, and was willing to share

that knowledge at any time. He has been described as generous with his time, and his expertise was greatly appreciated by all.

His Honour was in his element in the Court of Criminal Appeal resolving curly aspects of homicide offending. In 2024, this required analysis of the concept of transferred malice – whether the mental element for murder is established even though someone other than the deceased was the intended target – and the application of such principle to participants other than the actual shooter, in *Fan v R* [2024] NSWCCA 114. In 2023, his Honour dealt with the requirement that an accessory before the fact know all physical and mental elements of the offence. His Honour found that this does not require proof of knowledge of the personal identity of an individual who is to be the perpetrator, in *Jaghir v R* [2023] NSWCCA 175. In 2020, his Honour considered the mental element for those sought to be inculpated by extended joint criminal enterprise, and the difficulty for juries in understanding this concept when sometimes explained correctly and accurately and sometimes not, in *Carbone v R* [2020] NSWCCA 318.

I could keep going back in time. Strength of knowledge in such areas was typical. In appellate decisions outside of homicide, deep knowledge of the criminal law's requirements regarding mental elements was also ever-present. In relation to sexual assault, his Honour has explained the difference between recklessness based on foresight of the possibility of absence of consent and non-advertent recklessness, noting the latter is not abolished by the introduction of the objective alternative of knowledge of absence of consent based on lack of reasonable grounds for belief in it: *Lee v R* [2023] NSWCCA 203. In *R v GAT* [2024] NSWCCA 32, his Honour determined when it can be inferred that a complainant had not consented to sexual intercourse despite the absence of direct evidence. In the same case, his Honour considered whether there was sufficient evidence of the accused's foresight of the possibility of lack of consent.

It is a shame I did not have the opportunity of sitting with his Honour on the Court of Criminal Appeal. I am informed that this was always rewarding because of the breadth of his erudition, together with his sense of fairness. I have been told that on those occasions when Button J was to write the first judgment, his colleagues looked forward in happy anticipation to one of his thoroughly enumerated drafts. His Honour was legendary for his use of ordinal adverbs, although his lists appear to have reached their pinnacle with 'eleventhly'.

I have known his Honour well since my appointment as a Public Defender in 2004. Since I joined this court, his Honour has been extremely generous with his time and knowledge. I understand well the sentiments conveyed by others.

His Honour presided over criminal matters in almost every courthouse in New South Wales where the Supreme Court sat. His Honour regarded jury trials and their direct engagement with the diversity of the community with deep satisfaction. His understanding of the consequences of each step in a criminal trial for the accused and family of victims only strengthened as a judge. Recognition of the investment of jurors in their task, and the significance to them and to the accused of the moment of returning a verdict, founded insistence on the immediate release of the accused from the dock after the delivery of a not-guilty verdict.

In sentencing homicide offenders, his Honour was most concerned with the importance of communication. This was for the offender and family of the deceased to understand why the sentence was to be imposed and so that the court understood deeply the loss of the victim's life.

His Honour's mastery of the criminal law, strong sense of fairness and justice, and ability to translate from Latin will all be greatly missed by his colleagues. BN

ENDNOTES

- 1 Lloyd Babb and Richard Button, 'Some aspects of constructive murder in New South Wales' (2007) 31 (4) *Criminal Law Journal* 234.