JUDGES' RISE, JURIES' FALL

In Australia, although it accounts for less than 1% of the total finalisation of criminal charges, trial by jury is nevertheless regarded as representing the paradigm of the criminal justice system. Its use in the most serious criminal cases is unlikely to be challenged; whenever a proposal is made to limit the availability of jury trial a predictable howl of protest from the Bar, civil liberties groups and similar quarters goes up. The jury's supposed record of defying State tyranny, its service as the community's voice of reason and commonsense, the deference usually shown to its verdicts and its random participatory nature as both a duty and a prize of citizenship are called in defence.

In the popular view, the image of the jury trial is one where the truth is revealed by the trial process and presented to the jury in an ultimately unmistakeable way. The "Rumpole" model of criminal trial has the protagonist defence counsel irritated by the unhelpful interruptions of the trial judge but ultimately and eloquently placing his client's fate in the jury's safe hands, the trial judge being irrelevant and impotent by that point.

Yet over the last thirty years the jury trial in Australia has undergone a dramatic shift so that much of the power and pre-eminence of the jury has been taken from it and given to the Judges. This has been accomplished with virtually no criticism or even examination. The rise of the Judges' power at the expense of the jury's has been achieved mainly by the Judges themselves, although lately (but again without substantial debate or even appreciation of what is resulting) the process has been given the legislative imprimatur.

It is not the purpose of this paper to do much more than draw some attention to the way in which this has been achieved, rather than the reasons for it. It is hard to

escape the conclusion however that at the heart of this judicially instigated shift in power lies a rather elitist view that Judges know better not only than jurors, but also better than juries (i.e. the combined knowledge and wisdom of 12). Juries appear to be regarded as dangerous if dim-witted creatures, liable to wreak injustice unless firmly restrained by the judicial hand.

The means by which Judges have come to occupy if not the central role at least a more powerful role in today's jury trial are broadly three-fold: the bestowal of discretions in place of rules, the giving of judicial warnings and imprecations, and the availability of the substitution of Judges' verdicts for juries'.

A brief examination of these developments follows:

The Rules of Evidence Displaced by Discretions

In the first Australian edition of Cross on Evidence (1970, Butterworths) a small section was entitled *"Judicial Discretion"* - it covered under five pages in total – it commenced *"There is an increasing recognition of a wide field of judicial discretion in relation to the admissibility of evidence"*. The author said such discretion enabled the disallowance of admissible evidence if admissibility would operate *"unfairly"* against the defendant. However, of 29 cases footnoted in this section, only five were Australian.

By the 6th Australian edition of Cross on Evidence (2000) the references to judicial discretion had grown significantly and as well as occupying a discrete section were dotted throughout the work. The discrete section which had its origin as *"Judicial Discretion"* described above was now entitled *"Discretion to Exclude Evidence"*. The section was footnoted, *"This has become a much more prominent issue in recent times and reflects a fundamental shift away from rigid exclusionary rules"*.

The section now commences, *"If the judge is not to dictate the decision on an issue by withdrawing it from the trial or by directing a verdict, the next most powerful way in which the judge can affect its decision is by overriding the rules governing the admission of evidence relevant to that issue"*.

In Australia the various judicially recognised discretions to exclude evidence in criminal proceedings include inter alia:

(i) A general discretion to reject evidence which is otherwise admissible but whose probative value is (in the judge's view) too slight compared to its prejudicial effect – a value judgment which assumes the jury to be easily swayed or inflamed and not to be credited with rationality.

(ii) In the case of a confession, if there are circumstances which in the trial judge's view render it *"unfair"* to be used against the accused – clearly a value judgment or series of them so imprecise as for it to be judicially acknowledged that *"Fairness is an indefinable concept which depends upon all the circumstances of each particular case"*. (per Fitzgerald J, *Seymour v A-G* (C'wth) (1982)[1]). Nevertheless, it is apparently too volatile a concept to be entrusted to a jury, despite its nominal role as the community's voice.

(iii) In the case of any evidence, "real", confessional or otherwise, where the evidence has been obtained unfairly or illegally, and the trial judge considering *"broader questions of high public policy, unfairness to the accused being only one fact which, if present, will play its part in the whole process of consideration"* (*Cleland v R* (1982)[2]). In other words, neither Parliament nor the jury need concern itself with drawing the acceptable boundaries of the State's behaviour, the trial judge will do that.

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[1] 53 ALR 513 at 527
[2] 151 CLR 1 at 34

Almost inevitably before any of the judicial discretions are activated facts will have to be found if they are not agreed. To do that, witnesses and evidence are tested on the voire dire. Often question of credit, plausibility and reliability arise; a state of satisfaction as to what really happened needs to arise in the judge's mind. This is supposed to be the jury's province – the facts. But because the judicial discretion can so vitally affect the course of a trial it is often the case that the crucial fact finding is carried out at the voire dire stage, a stage at which of course the jury is completely excluded.

The trial judge's fact finding and the trial judge's personal values are thereby often of considerably more importance to the result of a jury trial than those of the jury itself.

A clear illustration of how the (judicial) encouragement of the use of judicial discretion has the effect of enhancing the trial judge's role at the expense of the jury's was given by the case of *Ridgeway v The Queen* (1995)[3]. The Australian Federal Police and Australian Customs Service had arranged for the importation of heroin from Malaysia in an operation described as a "controlled operation". Ridgeway was convicted of being in possession of a prohibited import namely the heroin so "imported". The importation of the heroin by the law enforcement officers was itself illegal.

The High Court considered if a substantive defence of "entrapment" would be recognised. As the High Court acknowledged (at p 29) in considering the United States' position, *"As a general rule, the question of entrapment is 'one for the jury, rather than the court'."*

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[3] 184 CLR 19

The High Court concluded such a defence was not available in this country thus excluding the jury from consideration of the question. A clear majority of the Court further held in the particular case that the trial judge's discretion ought to have been activated to exclude *"the evidence of the accused's guilt"*, i.e. not just a particular piece of evidence which might or might not be fatal to the prosecution case, but there should have been exercised *"a more general discretion to exclude any evidence of guilt in a case where the actual commission of the offence was procured by unlawful conduct on the part of law enforcement officers for the purpose of obtaining a conviction."* (p 32).

Lest there be any risk of a jury actually dealing with the matter in a way inconsistent with the judge's view, then the Court also added that the appropriate remedy where evidence was excluded on the grounds of public policy was not just its exclusion from the trial, but a permanent stay of the proceedings themselves. In other words, a trial judge would decide the primary facts and apply his or her notion of public policy to them to decide if a prosecution should proceed – an exercise quite beyond the Executive decision to prosecute and one lacking legislative authority.

In the Uniform Evidence Act adopted with minor variations in the Commonwealth jurisdiction, the Territories, New South Wales and recently Tasmania, judicial discretion is statutorily recognised and, arguably, given even greater reign than the judges themselves had. There are enacted very wide provisions (ss 135-139) containing a general discretion (available in criminal, and now civil, cases) to refuse admission where the probative value of the evidence is substantially outweighed by any of the dangers that it might be unfairly prejudicial to a party, be misleading or confusing or cause or result in an undue waste of time. The Court is also empowered to limit the use of evidence. In criminal cases the court **must** refuse to admit prosecution evidence if its probative value is outweighed by the danger of unfair prejudice to the defendant. Evidence illegally or "improperly" obtained is to be excluded unless the "desirability" of admitting it outweighs the "undesirability" of doing so.

The true effect of rules of evidence being displaced in favour of discretions is (or should be) obvious: if the Judge's function is to apply rules then he or she truly acts (as they still tend to describe themselves in introductory comments to juries) as an "umpire". Where there is a right of appeal for both sides their rulings are amenable to correction, so biases, idiosyncratic value judgments and straight out favouritism of one side expressed in rulings at least in theory if not always in practice are not capable of consistently dictating the outcomes of entire cases. The exercise of a judicial discretion is less amenable to correction, and hence its availability increases the personal power of the trial judge to influence if not dictate the result of a trial in a final way.

There may have been somewhere in the lengthy Australian Law Reform Commission reports which preceded the Uniform Evidence Acts some recognition that the enactment and enhancement of judicial discretion would enhance the Judges' role and power at the expense of the role and power of the jury. If there was, it did not translate to any public debate of which I am aware.

Judicial Warnings and the Rise of the Judges' Summing-Up

The traditional distinction of the roles of judge and jury in a criminal trial stresses that the judge is to direct the jury on the law but the jury are the "sole judges on the facts". Model summings-up stress this separation of functions.

However, in modern times Australian courts have developed a body of law which places an obligation on the trial judge to warn the jury of the "dangers" of acting on certain evidence or to otherwise give strong direction to the jury on how it is to regard certain kinds of evidence, or how to go about its task. This obligation is apparently not seen either as creating a tension with the separation of roles, nor of being at odds with the body of cases in which the possibility that the jury would be

"overawed" by a judge expressing his views on the facts too strongly or in an unbalanced way (e.g. *Broadhurst v R* [1964][4]) results in the verdict being set aside.

The High Court of Australia has developed a requirement to warn far beyond the traditional "warnings" required such as the danger of convicting on the uncorroborated evidence of an accomplice.

In *Bromley v R* (1986)[5] evidence against the accused had been given by a schizophrenic witness. The High Court held that where it "appears" (i.e. to the trial judge – or should have so appeared) that a witness whose evidence is important has some characteristic which may affect his capacity to give reliable evidence the jury should be given an appropriately tailored warning of the danger of convicting unless there was confirmation of that witness's evidence.

In *McKinney v R* (1991)[6] the High Court held that where there was evidence of a confession to police from a person involuntarily held in police custody, and the making of the confession was disputed and not "reliably corroborated" (i.e. not by the Police) there **must** be a warning given pointing to the danger involved in convicting on the basis of that evidence.

In *Longman v R* (1989)[7] the High Court held (notwithstanding the statutory abolition of the requirement of corroboration of a complainant of sexual crime) that the uncorroborated evidence of a complainant of sexual crimes a long time ago ought to attract a judicial warning pointing out the danger of convicting in light of the loss by delay of the defendant's means of testing the allegations.

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[4] AC 441 at 464
[5] 161 CLR 315
[6] 171 CLR 488
[7] 168 CLR 79

The dangers of identification evidence require a warning – like the other warnings now required this must be given even if there had been a full canvassing in counsel's addresses of the dangers and deficiencies in such evidence; what the jury has to have is a warning by the judge which adds *"the weight of his authority to the need for caution"* (*Festa v The Queen* (2001)[8]).

The occasions upon which a warning might be held to have been required are many and varied, and have increased significantly in the last 20 or so years. The consequence of there being a failure to warn when the occasion is identified (by an appeal court) to have arisen is that a verdict will almost invariably be set aside as unsafe and unsatisfactory. This will occur whether or not the "danger" was fully argued to the jury by counsel – the jury will still apparently be presumed to be insufficiently aware of the "danger" without the judge pointing it out from on high.

The effect has been that appeals are routinely conducted with a complete focus on what the trial judge did or did not say **as to the facts** – not the law – for these warnings go to what the jury as fact finder is to do.

Reasonable verdicts clearly open on the evidence are thus liable to being set aside because it is assumed that without the benefit of (what should have been) the trial judge's view about how certain witnesses or factual matrixes should be viewed and dealt with, the jury's verdict has insufficient quality to stand. The judicial view of the facts is thus elevated in importance above that of the jury's.

Judges' Reasonable Doubt Trumps Jury's

The appellant in *M v R* (1994)[9] had been convicted on two counts of indecent assault on his daughter, on her uncorroborated evidence which in some aspects was a

[8] 208 CLR 593 at 604
[9] 181 CLR 487

variance with that of other witnesses at the trial. The appellant had denied the allegations at interview and on oath at trial. The appeal was on the ground that the convictions were *"unsafe and unsatisfactory"* – a common statutory basis of appeal. In the High Court a majority of four to three upheld the appeal, and held the test for an appeal court on such a ground is whether the appeal court itself thinks it was open to the jury to be satisfied beyond reasonable doubt of the guilt of the accused. It is only when a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by an appeal court that the court may conclude that no miscarriage of justice occurred. Further, the majority said that where the evidence lacks *"credibility"* for reasons which are not explained by the manner in which it was given, *"a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced"*.

To my mind somewhat unconvincingly the majority declared that in setting aside a jury verdict *"the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open for the jury to be satisfied beyond reasonable doubt that the accused was guilty"*.

Expressed that way, the test seems more objective and reliable than it is. However, the fact is that in *M v R* (supra) four members of the High Court believed the verdict was unsafe and unsatisfactory; three did not. (The jury had been unanimous.)

Since *M v R* the Courts of Criminal Appeal of each State has repeatedly had to entertain appeals from jury verdicts which amount to little more than re-hearings (from the transcript) of the trial complete with the oratorical flourishes once condemned as "jury tricks" to try to inculcate a reasonable doubt in the appeal court. Watching or participating in these appeals causes one to reflect on what Brennan J of the High Court said in refusing Lindy Chamberlain's application for

bail, (1983)[10], *"To grant bail in such a case is to whittle away the finality of the jury's finding and to treat the verdict as merely a step in the process of appeal. The central feature in the administration of criminal justice is the jury, and it is a mistake to regard the effect of its verdict as contingent upon confirmation by an appellate court".*

It is open to serious question whether these sentiments can be stated as confidently today. However, this was said only 20 years ago. If within that time the position of judges vis-à-vis juries has changed as fundamentally as this paper suggests, it is all the more remarkable for having been a bloodless, even noiseless, coup.

It has also been achieved with little or no argument or even observation. If the supposedly robust and representative nature of the jury has its supporters, they have not been heard. Whether the quality of justice has been enhanced has escaped any rigorous independent attention, presumably because the nature and extent of the shift in the balance of power has itself escaped any wide appreciation or comment.

A Need to Restore Balance

The judge-driven rise of the judges has occurred in areas operating only in the accused's favour – there is only an exclusionary discretion, not an inclusionary discretion; the "warnings" relate only to the dangers of conviction or acceptance of prosecution evidence; the double hurdle of overcoming a jury's doubt followed by an appeal court's goes only one way. This of itself should suggest that mechanisms to restore balance need to be put into place legislatively. These would, at the least, involve prosecution appeals against acquittal. Without the prospect of such appeals the power concentrated in the trial judge's hands to effectively dictate an acquittal by the discretionary exclusion of evidence, or by the stay of the proceedings on the basis of the anticipated exclusion of evidence of guilt, is at present virtually

[10] 46 ALR 608 at 61

unreviewable. The community has a legitimate interest that the guilty be convicted, but that interest has been completely ignored in the developments referred to in this paper.

I would go further. If it is to be the case that a reasonable doubt that an appeal court has is one a jury should have had, should it not also be the case that the exercise of a discretion in a particular way (or even the finding of particular facts) that an appeal court would have exercised or found ought to be the way a trial judge should have ruled or found? A discretion is so ethereal that its successful challenge is inordinately difficult even where a right of appeal exists. The ability to give effect to an appeal court's view of how the discretion ought to have been exercised, if at all, goes some way to effectively supervising, controlling and homogenising the use of the powers the judges have given themselves.

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