GOLDEN THREADS, GOLDEN SILENCES AND SILVER TONGUES THE RIGHT TO A FAIR TRIAL *R v IRELAND & ORS.* 17 DECEMBER 1678

England, and through it Australia, is uncommonly proud of its common law; in particular of its criminal law and the great tradition of ensuring procedural and actual fairness (justice?) to the accused man. The prime guarantee is said to be the duty of the prosecution to prove guilt beyond reasonable doubt (the *golden thread* of Viscount Sankey's speech in ***Woolmington***). Other checks and balances include the privilege against self-incrimination (incorporating the right to silence at interview and trial), the right to be represented and the right to trial by jury.

As a generalisation, most criminal defence lawyers would support these four principles; but by no means would all lawyers and judges do so. In the twentieth century, it has been suggested, the law may be falling behind the pace of social change; rules of trial procedure and of the criminal law may be a less effective and acceptable process than they ought to be because of, in particular, the silence rules. In England, the ***Criminal Justice and Public Order Act*** 1994 allows judicial adverse comment on the accused's silence on interview. It is not generally argued that the prosecution should no longer prove its case (although many examples of statutory watering down of this principle with an onus cast on the accused to satisfy some evidentiary burden may now found in the statutes).

I have had occasion recently to consider anew some of these *traditional* principles in the context of a 1678 trial at the Old Bailey. This was the prosecution of ***Ireland & Ors*** on a charge of treason, to wit a conspiracy to murder King Charles II (as part of the so called *Popish Plots*). A transcript of this trial, which I believe is an original document, was given to me some years ago. I was re-reading it and, not for the first time, was struck by the procedural and actual injustices of the trial and the marked prejudice and bias shown by the court and the prosecuting authorities. These sat incongruously with the references to a fair trial recorded on the transcript. The trial was characterised by the claims made on behalf of the Court and the prosecuting authorities that the accused were being given a *fair trial*. In this paper, I refer in summary form to the four important safeguards simply to introduce the disregard of them in the Kings Bench in 1678

The onus of proof

> *"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt ... if, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained".*
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> ***Woolmington v DPP*** [1935] AC 462, 481

Those of us familiar with the criminal law and/or ***Rumpole***, are acquainted with the *golden thread*. It is often referred to as *the presumption of innocence* but really has its expression in the words of Viscount Sankey in ***Woolmington's*** case. It is sometimes thought that the principle stated in ***Woolmington*** only emerged in 1935 at the time of that decision. Whilst it appears true that the law applied in English criminal cases prior thereto did rely upon a contrary proposition, which was stated in ***Foster's Crown Law*** (1762, p. 255), Viscount Sankey makes it clear that Sir Michael Foster cited no authority for his contrary proposition; that is, that at some particular time of a criminal case the burden of proof lies on the prisoner to prove his innocence. There was never a justification for such proposition.

One of the most famous of the earlier treatises on criminal law, according to Viscount Sankey, was the ***History of the Pleas of the Crown*** by Sir Matthew Hale (who died on Christmas Day 1675). His treatise on the subject was published posthumously by order of the House of Commons in 1680. Nothing in ***Hale*** suggests that the burden of providing his innocence lay on the prisoner.

The Right to Silence

> *"A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played. That is a fundamental rule of the common law which ... is applied in the administration of the criminal law in this country. An incident of that right of silence is that no adverse inference can be draw against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right of silence or to render it valueless."*
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> ***Petty v. R; Maiden v. R*** [1991] 173 CLR 95, 99

"That incident of the right of silence means that, in a criminal trial, it should not be suggested, either by evidence led by the Crown or questions asked or comments made by the trial judge or the crown prosecutor, that an accused's exercise of the right of silence may provide a basis for inferring a consciousness of guilt."

"The privilege (against self-incrimination) developed from the indignation caused by the practice in the court of Star Chamber, until its abolition in 1641, of compelling subjects called before it on no charge to answer questions on oath for the purpose of eliciting incriminating material against them. .. the privilege which emerged was a right to remain silent in the fact of accusations without being punished for silence or having the silence itself treated as itself evidencing guilt. If there were no other evidence against such a person the privilege protected him from being forced to make a case against himself.

R. v Bruce [1988] VR 579, 591

The right against self-incrimination was the cry of the social revolutionaries lead by the Parliament and puritan alliance (1649 - 1660) which when victorious, stamped it with permanency. The courts became sufficiently indulgent towards the right to cloth it with new glosses that widened its scope. In 1696 an Act of Parliament gave the defence a right to subpoena witnesses and offer their testimony under oath. However, the competency of an accused to testify under oath was not finally established in England until 1898. But the right against self-incrimination does not appear to have inhibited the judges in the late seventeenth century from vigorously and pointedly interrogating the accused in court.

The Right to Trial by Jury

Two principles of the criminal law have been noted. To these may be added the right to a jury trial. It is sometimes said that this right emerges from ***Magna Carta***. In this regard, Chapter 29 of the 1297 version of the charter reads:-

"No free man shall be taken or imprisoned or disseised of his freehold, liberties or free customs or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny or delay right or justice".

Sources of English Legal and Constitutional History (Edited by Evans and Jack, Butterworths [1984] 54)

The importance of the jury as an institution in modern times is confirmed by the remarks of Deane J in ***Kingswell v R*** (1985) 159 CLR 264, @ 301-302:-

> *The institution of trial by jury also serves the function of protecting both the administration of justice and the accused from the rash judgment and prejudices of the community itself. The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people. The random selection of a jury panel, the empanelment of a jury to try the particular case, the public anonymity of individual jurors, the ordinary confidentiality of the jury's deliberative processes, the jury's isolation (at least at the time of decision) from external influences and the insistence upon its function of determining the particular charge according to the evidence combine, for so long as they can be preserved or observed, to offer some assurance that the accused will not be judged by reference to sensational or self-righteous pre-trial publicity or the passions of the mob.*

The ***United States Constitution*** provides in Article III, section 2(3) for trial by jury as follows:-

> *The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.*

The Sixth Amendment to the ***Constitution***, adopted in 1791, provides:-

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence.*

In ***Patton v United States*** (1930) 281 US 276 @ 296-297, the Supreme Court considered the question of waiver of jury trial in a prosecution for a federal crime, and expressed its conclusion:-

> *The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as part of the structure of government, as distinguished from a right or privilege of the accused. On the*

> *contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court. Thus Blackstone, who held trial by jury both in civil and criminal cases in such esteem that he called it 'the glory of the English law', nevertheless looked upon it as a 'privilege', albeit 'the most transcendent privilege which any subject can enjoy'. [Book III, p. 397.] And Judge Story, writing at a time when the adoption of the Constitution was still in the memory of men then living, speaking of trial by jury in criminal cases said: 'When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our State constitutions as a fundamental right and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognised and confirmed it in the most solemn terms'. [Story on the Constitution, par. 1770.]*
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> *In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused.....*

The Court concluded its opinion:-

> *"Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant".*
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> (@ 312)

The right to jury trial is confirmed in Commonwealth jurisdictions by Section 80 of the ***Constitution*** (see the discussion in ***R v Cheatle*** (1992-3) 177 CLR 541 and in ***R v Brown (1985-86)*** 160 CLR 171).

The right to legal representation

The 1696 Act of Parliament referred to earlier also guaranteed the accused a copy of the indictment and the right to make his full defence, in treason trials at least, by *counsel learned in the law* (***State Trials*** (vi) 1189). The right of an accused person to have legal representation was considered by the High Court in ***McInnis v. R*** (1979) 143 CLR 575. In the course of his reasons, Barwick CJ said:-

> *"It is proper to observe that an accused does not have a right to be provided with counsel at public expense. He has, of course, a right to be represented by counsel at his own or someone else's expense. He has no absolute right to Legal Aid ... Nothing I say, nor what follows, can be taken to cast any doubt*

on my own belief that a defence conducted by a competent counsel has an advantage to an accused and that it is in the best interests of the administration of justice that an accused be so represented". (579)

Mason J (as he then was) noted his own agreement with what the Privy Council had said in the case of ***Galos Hired v R.*** [1944] AC 149 at 155, concerning *"the importance of persons accused of a serious crime having the advantage of counsel to assist them before the courts".* Nevertheless, *an accused in Australia did not have the right to present his case by counsel provided at public expense.* (581)

Murphy J expressed himself forcefully in a minority judgment. His speech commenced:-

"Every accused person has the right to a fair trial, a right which is not in the slightest diminished by the strength of the prosecution's evidence and includes the right to counsel in all serious cases. This right should not depend on whether an accused can afford counsel. Where the kind of trial a person receives depends upon the amount of money he or she has, there is no equal justice". (583)

Murphy J also referred to the English case of ***Galos Hired;*** *and continued:-*

"The importance of persons accused of a serious crime having the advantage of counsel to assist them before the courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel; see ***Holdsworth, History of Law****, Vol (ix), pg. 226 et seq".*

"The struggle was one to overcome judge-made rules which deprived all accused of treason or felony of the right to counsel. Parliament abrogated these judicial inventions (In 1696) and 1837 respectively) *and allowed the right. the right is an empty one, however, if courts force accused to trial unrepresented because counsel refuse or neglect to represent the accused (because of poverty, or other reasons)". (589)*

Murphy J earlier referred to the ***International Bill of Human Rights***, Article 14(3) of the ***International Covenant on Civil and Political Rights*** of which, provides: -

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To defend himself through person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of

> *this right; and to have legal assistance assigned to him, in any case where the interest of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." (588)*

Murphy J asserted that "the interests of justice" required the assistance of counsel at trials on *all* serious charges. He noted that Australia had signed the covenant on 12 December 1972 but had not then ratified it. Such *ratification* followed and was the subject of consideration in the now celebrated case of ***Dietrich*** (in which David Grace appeared to the applicant). The headnote summarises the judgment of the majority:-

> *The common law of Australia does not recognise the right of an accused to be provided with counsel at the public expense. However, the courts have power to stay criminal proceedings that will result in an unfair trial. The power to grant a stay extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence. In the absence of exceptional circumstances, a judge faced with an application for an adjournment or a stay be an indigent accused charged with a serious offence who, through no fault is unable to obtain legal representation, should adjourn, postpone or stay the trial until legal representation is available. If the application is refused and, by reason of the lack of representation, the trial is not fair, a conviction must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted with a fair trial.*
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> (1992) 177 CLR 292

The Popish Plot

We now have entrenched within the criminal justice system in Australia, at least, these four principles. It was not always so. Sir James Stephen (writing in the late nineteenth century) made the following observations about the seventeenth century criminal system:-

> *A study of the State Trials leads the reader to wonder that any judge should ever have thought it worth while to be openly cruel or unjust to prisoners. His position enabled him, as a rule, to secure whatever verdict he like, without taking a single irregular step, or speaking a single harsh word. The popular notion about the safeguards provided by trial by jury, if only "the good old laws of England" were observed, were I think, as fallacious as the popular conception of those imaginary good old laws. No system of procedure every devised will protect a man against a corrupt judge and false witnesses, any more than the best system of police will protect him against assassination. the safeguards which the experience of centuries has provided in our own days are, I think, sufficient to afford considerable protection to a man who has sense, spirit, and, above all, plenty of money; but I do not think it possible to prevent a good deal of injustice where these conditions fail. In the seventeenth century, rich and powerful men were as ill of as the most ignorant labourer or workman in our own day; indeed, they were much worse off, for the reasons already suggested.*
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> ***A History of the Criminal Law of England*** (Vol. 1, p 382-83)

This paragraph appears immediately before his consideration of the trials for the *Popish Plot*. Stephen characterised this period (the ten years 1678-1688, leading up to the Revolution) as the most important in English judicial history. In this period occurred not only the trials for the Popish Plot but also those connected with the Duke of Monmouth's rebellion (in which *bloody Judge Jefferys* obtained notoriety) and the trials which led to the Revolution itself (which included that of the seven bishops).

Stephen noted:-

> *The proceedings of the criminal courts have never before or since been of so much general importance, and for the first time we have reports of the cases which appear to have been thoroughly well taken by good shorthand writers. The result is that it is still possible to follow with minute accuracy every word of the proceedings. (383)*

It is necessary to remember that in England in the sixteenth and seventeenth centuries there was a great deal of religious dissension. There was great distrust, to say the least, between Protestants and Catholics. This extended, of course, to the monarchy. There were also other enormous social and political pressures of the time which contributed to the Revolution of 1688.

In this context, a man called Titus Oates emerged who told an improbable story, which Stephen summarises:-

> *The Catholics had for many years had a plan for introducing Popery into this country, and destroying Protestantism by force. The principle parties to this scheme were the Jesuits in Spain and France. They held a correspondence with Jesuits and others in England, Coleman being one of the chief correspondents. They also held "consults" at various places in order to concert measures for this purpose. One of these was held on the 24th April, 1678, at the "White Horse" tavern. It was there determined that Charles II. should be murdered by Pickering and Groves, or failing that, and failing also "four ruffians procured by Dr. "Fogarty," he was to be poisoned by Sir George Wakeman, the Queen's physician. A great army was also to be raised by some means, and introduced into England to massacre the Protestants; and a number of commissions, signed by "the "General of the Society of Jesus, Joannes Paulus d'Oliva, by "virtue of a brief from the Pope, by whom he was enabled," were brought over to England, and were distributed by Mr Langhorn, a barrister in the Temple, to a number of distinguished persons who, upon the success of the scheme, were to receive all the high offices of State. This scheme was known to a number of influential Catholics, who held "consults" on it in different parts of the country. (384)*

A number of trials took place between November 1678 and November 1680 which relied mainly upon the perjured evidence of this Oates. Most defendants were convicted and executed.

It is with the trial of ***Ireland and others*** with which we are concerned here. Ireland, who was a Jesuit priest, and Pickering and Grove (two of the servants in the Queen's chapel) were the persons said to have undertaken to murder Charles II. Also charged were Whitehead, who was the provincial of the Jesuits in England, and Fenwick, another Jesuit. They were discharged from the trial at the conclusion of the Crown case but **not** acquitted. They were to face trial again later on 13 June 1679 by which time the evidence against them had *improved.* They were probably in hindsight, robbed of the opportunity of outright acquittal by the *apparent* observance of principle in discharging them. They were, inevitably as it seemed, convicted and executed.

The evidence against Ireland, Pickering and Grove was that of Oates and Bedloe, wholly uncorroborated by any other witnesses whatever. They repeated what they had said before, fixing the prisoners with the scheme of murdering Charles. Bedloe swore that there was a meeting, at which Ireland was present, *at the end of August or beginning of September*, to discuss the assassination; but, suspecting that he was to be contradicted, he refused to pledge himself as to the time, beyond saying that it was in August. Ireland had probably heard that something to this effect had been stated at Coleman's trial, and had done what he could to provide witnesses to show that through the whole of August he was in Staffordshire. He did call one or two such witnesses, but he said that his imprisonment had been so short that he could send for no one; and on calling his first witness he observed, *It is a hundred to one if he be here, for I have not been permitted so much as to send a scrap of paper.* The three accused were convicted and executed.

The trial was a disgrace. The presiding Judge, Chief Justice William Scroggs, behaved abominably; Prosecuting Counsel, of whom there seemed to be a cricket team in numbers, were inflammatory; the accused defenceless. Considering the transcript of the trial in 1995, the reader will not be impressed by the safeguards of the trial by jury nor the application therein of the *good old laws of England.*

Three footnotes

(i) Oates had previously been convicted and imprisoned for perjury in 1674. He was tried again for perjury before Lord Chief Justice Jeffreys in 1685. His summing up to the jury concluded:-

> ... *there does not seem to be least doubt but that Oates is the blackist and most perjured villain that ever appeared upon the face of the earth* (***Stephen***, *390)*

They were strong words from the man who, as Recorder of London, had previously sentenced to death - as the result of Oates' perjury - at least eight of the 35 persons for whose deaths Oates' testimony was responsible. Oates lost the pension he was awarded in 1679 following his perjury conviction. He was pilloried, flogged and imprisoned. But when James II was deposed in 1688 he was released and re-granted a pension.

(ii) Lord Stafford was the last of those tried for the *Popish plot.* His trial before the House of Lords took five (5) days (Most of the trials were over in a day including that of Ireland & Ors). He was convicted by fifty five votes against thirty one, and

subsequently executed. What a remarkable scene that must have been when the peers voted on a man's lifeand this was only 300 years ago ! Did they divide on party lines?

(iii) The mode of execution for treason was rather fearsome.

Sir Thomas Smith in ***De Republica Anglorum*** (c. 1565, first published 1583) sets out orders regarding trials for treason (chapter 25):-

The same order touching trial by inquest by (xii) men is taken in treason, but the pain is more cruel. First to be hanged, taken down alive, his bowels taken out and burned before his face, then to be beheaded, and quartered, and those set up in diverse places.

(The Chapter continues, and provides that any person of the degree of baron or above charged with treason or any other capital crime is to be judged *by his peers and equals; that is, the yeomanie doth not go upon him but an inquest of the lords of the Parliament* ...).

Sources of English Legal and Constitutional History (supra, 192)

Sentence was pronounced, in ***Ireland's*** care, in even more explicit and grizzly terms.

> ***This Court doth therefore Award,*** *That you the Prisoners at the Bar, be conveyed from hence to the place from whence you came, and from thence that you be drawn to the place of Execution upon Hurdles, that there you be severally hanged by the Neck, that you be cut down alive, that your Privy Members be cut off, and your Bowels taken out, and burnt in your view, that Heads be severed from your Bodies, that your Bodies be divided into Quarters, and those Quarters be disposed at the Kings pleasure: And the God of infinite mercy be merciful to your Souls.*
>
> (Transcript, 83)

Some attempt was made to stay the execution, the King himself being reluctant to confirm it. However, the transcript records (@84):-

> *On Friday the 24th. day of January following, the Prisoners, William Ireland, and John Grove, were drawn from Newgate on a Hurdle, to the Common place of Execution, where they were Executed, according to the Sentence pronounced against them.*

Pickering, and his supporters, were a little more persuasive. He lasted until 25 May 1679.