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THE ROLE OF A JUDGE IN A CRIMINAL TRIAL

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I have assumed that my function on this occasion is to describe Australian law and practice, and to concern myself with the ordinary case, that is, a criminal trial by jury, in which both the prosecution and the accused are represented by counsel. In Australia, some criminal trials, even for serious offences, take place before a judge sitting without a jury. This usually requires the agreement of the parties. However, most trials for serious criminal offences are before a judge and a jury of 12. In most Australian States, majority verdicts are possible, but for federal offences there is a constitutional requirement of unanimity. A trial involving a self-represented accused raises special considerations, and imposes particular responsibilities on the trial judge. Presiding at a jury trial of a self-represented accused is perhaps the most difficult of judicial tasks. However, it raises issues that are outside the scope of this address. Australia has an extensive system of legal aid in criminal

cases, and most people charged with indictable offences are represented by counsel.

Criminal justice in Australia is administered in accordance with the system that is sometimes described as accusatorial, or adversarial. A trial is structured as a contest between the executive government and a citizen. Almost all prosecutions are instituted by an official prosecuting authority. In most Australian jurisdictions, there is a Director of Public Prosecutions, whose office is part of the executive government, but whose role is separate from that of the police. In our system, unlike that of many countries in the civil law tradition, the judiciary plays no part in the investigation of crimes, the decision to lay charges, the gathering of evidence, or the selection of witnesses. A criminal trial is presided over by a judge who has taken no part in the development of the prosecution case and who is meant to be conspicuously independent of the parties, and neutral in his or her function. The primary responsibility of the judge is to ensure a fair trial according to law.

That what is going on is a trial, and not an investigation or a commission of inquiry, was stressed by Barwick CJ in the High Court of Australia in *Ratten v The Queen*[1]:

> "It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law. Upon the evidence

> and under the judge's directions, the jury is to decide whether the accused is guilty or not."

The view has been taken in Australia that, save in exceptional circumstances, a trial judge has no power to call a witness without the consent of the parties, or to direct the prosecution to call a witness[2]. There are two reasons for that. First, the neutrality of the trial judge could be compromised if he or she were to intervene in decisions as to what evidence to present. Secondly, having taken no part in the investigation, a trial judge ordinarily has no way of knowing the possible implications of calling a particular witness. A judge may have no way of knowing, for example, what possible unfair prejudice to a party might result. Normally a judge does not know, and cannot find out, what is in counsel's brief. Inappropriate judicial intrusion into forensic decisions by counsel is apt to have unpredictable consequences.

Because of the delay, inconvenience and possible prejudice involved in constantly interrupting proceedings once a jury has been empanelled, in most Australian jurisdictions statutes or rules of court provide for pre-trial hearings at which rulings are made on contentious issues of procedure or evidence. These rulings are interlocutory, and may be changed. Sometimes, although exceptionally and by leave, they may be appealed before trial. The object is to avoid surprise, and to minimise the need to send juries out of court while procedural or evidentiary points are argued. In some cases, decisions made at these pre-trial hearings have a major effect on the conduct of the trial. Reasons for the rulings are normally given. Erroneous rulings may later

form the basis of grounds of appeal if there is a conviction at trial. As a general rule, however, appeal courts are reluctant to delay or interrupt trials to consider interlocutory rulings, which may be changed, or which may turn out to be immaterial. Even if a Court of Criminal Appeal takes on an interlocutory ruling, the High Court of Australia has made it clear that, save in the most exceptional circumstances, it will not grant special leave for a further appeal.

At the commencement of the trial, when the accused is arraigned, the trial judge will empanel the jury. In Australia, unlike the United States, challenges for cause, although possible, are relatively uncommon. There are also a limited number of peremptory challenges.

After the jury is empanelled, and before the prosecutor's opening address, it is common for the trial judge to give the jury some preliminary advice and instruction. This may include identifying the respective counsel and their roles, summarising the charge and the plea of not guilty, and explaining the respective responsibilities of the judge and the jury. Since jurors usually are required to select a foreperson, it is sometimes thought desirable to explain that his or her only role is to act as a spokesperson for the jury in communicating with the judge. Jurors sometimes, unless corrected, assume that the foreperson has some kind of greater authority. Especially where there has been pre-trial media publicity, a judge may think it prudent to warn the members of the jury that their duty is to decide the case only on the evidence they hear in court. In these days of internet access to information, that may be

important. It is common to warn jurors against making their own enquiries about the case. Some trial judges take the opportunity to tell jurors about the onus and standard of proof although that, of course, is a matter to which they will return in the final summing-up.

The prosecutor will then open the prosecution case to the jury. In some jurisdictions, this may be followed by an opening address by counsel for the accused. This can have an important effect in limiting the issues; although defence counsel do not always regard that as an advantage.

Where there are multiple charges, or multiple accused, the trial judge's preliminary statement to the jury may include an explanation of any legal consequences that will bear upon their task.

The characteristic function of the judge is to preside, to direct the trial procedure and rule on any arguments as to admissibility of evidence, to resolve any other legal issues that arise in the course of the trial, and to sum-up to the jury at the conclusion of the trial, giving them such instruction on the law as is necessary to enable them to deliver a verdict according to law. The function of the jury is to attend to the evidence, to decide the issues of fact relevant to the outcome, and to deliver a verdict in accordance with their view of the facts and in accordance with the directions they have received from the judge.

When arguments on points of procedure or evidence arise during the course of the trial, and the trial judge is called upon to make rulings, there is a degree of flexibility of practice in relation to such matters as to whether to permit argument to take place in front of the jury, what length of argument to permit, and how, and when, to explain rulings. I have already referred to pre-trial hearings that are designed to deal with some of these problems. During a trial, common sense and fairness will dictate the answers to most questions as to how to deal with these matters. Obviously, it is desirable to minimise the need to exclude the jurors from the courtroom. However, the trial proceeds in public and in open court, and if there is a risk that something that may be said in argument will cause embarrassment or prejudice, or may even lead to an application to discharge the jury, then it may be necessary to exclude the jury during argument. In former years, it was common for trial judges to rule on objections to evidence without hearing extended argument from counsel, and to give reasons for their rulings at the end of the trial. This meant that the flow of evidence was interrupted as little as possible. The modern tendency, especially if issues raised are likely to be important, is to hear argument and give reasons as rulings are made, although the length of argument may be curtailed, and the reasons may be brief. The trial judge's assessment of the difficulty and importance of particular issues will dictate the way in which these matters are handled.

Controlling witnesses and counsel is one of the trial judge's responsibilities - a responsibility which varies in difficulty from case to case. There is room for difference in judicial style. As advocates, we

have all seen some judges who were models of firmness, tact and fairness; and some judges who were not. It is important, however, that everybody in court should understand that one of the judge's duties is to preside, and that the judge has the ultimate power and responsibility of ensuring that there is a fair trial. Undisciplined conduct by counsel, witnesses or parties should attract a firm judicial response. Beyond that; it is not possible state rules that will apply to all cases. The judge must be, and be seen to be, in charge of the proceedings.

For some reason, perhaps because of undisciplined conduct of the kind mentioned above, or perhaps because of circumstances which involve no fault on anyone's part, there may be an application for the jury to be discharged. Circumstances leading to such an application may include the seeing or hearing by the jury of inadmissible matter where the danger of unfair prejudice cannot be cured by a warning or direction. Where a prejudicial event occurs, and the trial judge has a discretion to discharge, key considerations will be the seriousness of the occurrence, the stage of the trial at which it has occurred, and the likely effectiveness of a warning or direction to overcome its impact[3]. In some cases, it might be desirable to give a warning at the time of the occurrence, rather than to wait until summing-up.

At the conclusion of the evidence, which may or may not include evidence from the accused, counsel will address (the order of addresses varies between jurisdictions) and the judge will sum up to the jury.

Before any of that happens, however, two things may occur. First, defence counsel may apply, usually at the end of the prosecution case, for a directed verdict of acquittal. In the past, there has been some difference of opinion as to the extent of the trial judge's power in this regard. Everybody agrees that it is a trial judge's duty to direct a verdict of acquittal if there is no evidence on which a jury could lawfully convict[4]. Whether there is evidence that could warrant a conviction is a question of law[5], and therefore a question for the trial judge. It is ordinarily resolved by reference to evidence which supports a conviction without regard to any evidence favouring the accused, because it is for the jury to determine what parts of the evidence are to be accepted and what parts are to be rejected.

The area of previous doubt concerned the question whether a trial judge may direct a verdict on the basis of considerations related to the quality of the evidence and, in particular, whether a trial judge has the power to direct a jury to acquit when the judge assesses the evidence to be such that a verdict of guilty based on it would or should be quashed by a Court of Criminal Appeal on the ground that it was unsafe or unsatisfactory, or to use more modern terminology, unreasonable. In Australia, that question has been decided in the negative. The High Court has held that if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury, and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury. The judge has no power to direct the jury to enter a verdict of not guilty on the ground that, in the judge's view, a verdict of

guilty would be unsafe or unsatisfactory[6]. That conclusion was based upon the respective functions of judge and jury at a criminal trial, and a proper regard for the constitutional role of the jury as the triers of fact. It is true that a Court of Criminal Appeal in Australia is given a statutory power to set aside a jury's verdict as unreasonable, but it is not the proper role of the trial judge to seek to exercise a corresponding power in anticipation of a jury verdict. The High Court said[7]: "The power of a court of criminal appeal to set aside a verdict on the ground that it is unsafe or unsatisfactory, like other appellate powers, is supervisory in nature. Its application to the fact-finding function of a jury does not involve an interference with the traditional division of functions between judge and jury in a criminal trial." On the other hand, a trial judge has a discretionary power to inform a jury of their right to conclude that the evidence which they have heard is insufficient to justify a conviction, and to bring in a verdict of not guilty without hearing more[8]. If this is done, it is usually at the end of the prosecution case.

Secondly, it is common, and prudent, for the judge, before the addresses of counsel, and in the absence of the jury, to raise with counsel any legal issues which may affect what is to be said in the summing-up. It is important, for the orderly conduct of the trial, for counsel, before they address, to have a clear and common understanding of the way in which the case will ultimately be left to the jury. That, of course, may be influenced by the line of argument adopted in address, but it will also be influenced by the trial judge's view of the

law to be applied. If there are disputes about that, it is desirable to have them sorted out before addresses.

In the summing-up, there will be certain matters of law upon which it will always be necessary for a jury to be directed. These include the onus and standard of proof, the obligation of the jury to decide the case on the evidence and in accordance with the judge's instructions, and the legal elements of the offences charged against the accused and of any defence raised.

The extent to which a trial judge should explain the law affecting the charges and any defences may be a matter for judgment. Two principles are clear. First, the trial judge should not set out to tell the jury any more about the law than they need to know in order to find a verdict. At a murder trial, the judge does not set out to deliver a lecture on the law of homicide. The object is to explain to the jury the issues that arise for their decision in the particular case. Secondly, the jury are not concerned with abstract legal principles, but with the relationship of legal principles to the evidence and the issues which have emerged at trial.

In *Alford v Magee*[9], in a passage that has been cited many times since, the High Court said:

> "[T]he late Sir Leo Cussen [a former Chief Justice of Victoria] insisted always most strongly that it was of little use to explain the law to the jury in general terms and then leave it to them to apply the law to the case before them. He held that the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case. He held that the only law which it was necessary for

> them to know was so much as must guide them to a decision on the real issue or issues in the case, and that the judge was charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are."

It is this aspect of the function of a trial judge that is most likely to lead to appealable error. Judges generally have little difficulty in stating the general principles of law, or the statutory provisions that govern a case, although there are areas of the law which are notorious exceptions. It is normally in relating those principles, or statutory provisions, to the facts, so that the jury may understand the issues that arise for their judgment as the triers of fact, that problems arise.

One difficulty that may confront a trial judge is that of deciding when to leave to a jury the possibility of an alternative verdict. To a large extent this is governed by statute, but a particular problem arises in the case of homicide where, on a charge of murder, manslaughter is, on the facts, a viable alternative result. Counsel for the accused might well, as a matter of tactics, seek to avoid this alternative. It will often better suit the defence for the jury to see the case as murder or nothing. The law in Australia is that, if there is evidence to support an alternative verdict of manslaughter, the judge must leave that issue to the jury notwithstanding that it has not been raised by either party[10].

It is the practice in Australia for trial judges, not only to explain how the prosecution seeks to make out its case, and the nature of the defence, and thereby to crystallise the issues for decision, but also to

remind the jury of the principal features of the evidence and to summarise the arguments of counsel. I understand that in many parts of the United States the latter part of this exercise would be regarded as at least risky and inadvisable, and as almost certain to lead to accusations of unfairness. I suspect also that judges in some Australian jurisdictions may do this at much greater length than would be usual in other parts of the common law world. It is both a cause and an effect of the increasing length of trials. At a short trial, there may be little need to remind a jury of evidence and arguments. At the other extreme, at the end of a conspiracy trial that has lasted several months, the jury may need reminding of much of the evidence. Trial judges are not forbidden to indicate their own views of the evidence or the issues, but they do so at the risk of accusations of unfairness and of inappropriate and unbalanced intrusion into matters that are for the jury. In Australia, judges usually tell juries that, if the judge appears to them to have an opinion on the facts, it is their duty to disregard that opinion unless it coincides with their own independently formed view. So long as it is made clear that the power, and sole responsibility, of deciding all issues of fact rests with the jury, fair and suitably balanced commentary on the evidence is not inappropriate, and in some cases may be unavoidable.

Although it is for the jury, not the judge, to weigh the evidence, decide what to accept and what to reject, or to doubt, and the weight to be given to it, appellate courts have identified certain circumstances in which it is the duty of trial judges to warn juries of matters which, in the experience of courts, require some caution on their part. Again, to some

extent this is now governed by statute, and some of the judicial warnings that were given in the past, especially in cases of sexual complaints, are no longer appropriate. Identification evidence is sometimes of a kind that, in the experience of courts, should be approached with caution, because honest witnesses, convinced of the accuracy of their observations, can so easily be mistaken[11]. The evidence of accomplices attracts a warning of possible unreliability because of an accomplice's incentive to tailor an account of the facts in order to minimise his or her own complicity[12]. Where there has been a long delay before prosecution, the accused's ability to mount a defence may be affected and it may be necessary to ensure that this is appreciated by the jury[13]. The rationale behind the need for such warnings includes the risk that certain dangers are not necessarily obvious to lay jurors. This is not intended as a comprehensive account of the circumstances that call for a warning or of the nature of the warning required. That is a topic that could justify a paper of its own.

It may be useful to note one aspect of criminal trial practice in Australia which is, I think, different from practice in a number of other common law jurisdictions. Australian judges have had a longstanding unwillingness to attempt to explain to juries the meaning of the expression "beyond reasonable doubt", to the point of declining to give an explanation even when it is asked for[14]. Elaboration or paraphrase of that expression is regarded in Australia as an invitation to trouble. Why we have taken such a strong, and, I think, fairly distinctive, line on this point puzzles some of our overseas friends; but it has become an

entrenched part of our legal culture. One of the first lessons any criminal trial judge is taught is not to be drawn into an exegesis of "beyond reasonable doubt".

A general comment should be made in conclusion. Directions to juries are made for the purpose of enabling them to perform their constitutional function, and to return a just verdict on the issues and evidence in the trial. They are not ritualistic incantations. They are not primarily intended to preserve the reputation or dignity of the trial judge by disarming counsel in a possible future appeal. They are meant to be fair, relevant and informative. In the Australian tradition, the criminal law is meant to be administered by juries. If it is so complex that it is impossible to explain to a lay person, then there is something wrong with the law. Yet law reform itself is a complex task, and altering one principle of law may have consequences for other principles such that limited changes, of the kind that are within the power of appellate courts, may merely solve one problem and create another. One contribution that appellate courts can make usefully to the work of trial judges is to avoid subjecting them to pressure for inappropriate inflexibility. The capacity of trial judges to tailor their directions to the circumstances of individual cases is important to their power to conduct fair trials. Guidance from appellate courts as to directions, instructions and warnings is valuable, but it should not override the need to relate the law to the justice of the particular case.

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[*] Chief Justice of Australia.

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[1] (1974) 131 CLR 510 at 517.

[2] *Richardson v The Queen* (1974) 131 CLR 116 at 122; *Whitehorn v The Queen* (1983) 152 CLR 657 at 682.

[3] *Crofts v The Queen* (1996) 186 CLR 427 at 440.

[4] *Plomp v The Queen* (1963) 110 CLR 234.

[5] *May v O'Sullivan* (1955) 92 CLR 654; *R v R* (1989) 18 NSWLR 74 at 84.

[6] *Doney v The Queen* (1990) 171 CLR 207.

[7] (1990) 171 CLR 207 at 215.

[8] *R v Prasad* (1979) 23 SASR 161 at 163.

[9] (1952) 85 CLR 437 at 466.

[10] *Gilbert v The Queen* (2000) 201 CLR 414; *Gillard v The Queen* (2003) 219 CLR 1.

[11] See, for example, *Domican v The Queen* (1992) 173 CLR 555.

[12] *Davies v Director of Public Prosecutions* [1954] AC 378.

[13] *Longman v The Queen* (1989) 168 CLR 79.

[14] *Green v The Queen* (1971) 126 CLR 28, *R v Flesch* (1987) 7 NSWLR 554.