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THE EVIDENTIARY BRAY

1. Introduction

Decisions of fact are a source of constant difficulty to the common law judge. There are four reasons for this. First, the rules of evidence are complex and in many areas yet to be judicially settled.[1] Secondly, by nature many of the rules of evidence can only be stated in general terms and as a result are not easy to apply to particular fact situations. The rule allowing evidence of similar facts is the best illustration of this.[2] Thirdly, in some situations, because of the inherent difficulties of definition, the law leaves the ultimate admissibility of information to the judges' discretion *e.g.* improperly obtained evidence in criminal cases and statutory cross-examination of the accused. Finally, even where it is clear which information is to be considered by the trier of fact the ultimate decision of fact is inherently difficult, for the process of proof, whereby facts in issue are discovered or inferred from the information received, is left by the law to "common sense". This recognises that there is yet no definitive analysis of proof and difficult cases must be left to individual conscience.[3]

Whereas many judges are prepared to cope with difficult factual decisions with a bluff pragmatism Dr. Bray constantly refused to decide cases except by strict logic and analysis. His decisions are all marked with an intellectualism which is characteristic of his life and admired by all. However, mere analysis and logic cannot in themselves decide cases and must always be the tools for the application of principles.[4] As has been pointed out, in the real world of fact finding many particular rules are of uncertain application yet Dr. Bray held strong views upon the principles to be applied in deciding factual issues. As a result he found himself often criticised as academic and often the dissenting member of a Full Bench.[5] Yet, it will be submitted, his principles are not controversial nor other than those reflected in the common law tradition. Centrally, he always emphasized the importance and freedom of the individual, insisting that the State only interfere with the individual in a manner consistent with

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1. *E.g.*, it is uncertain whether the hearsay rule applies to implied assertions; it has yet to be determined to what extent courts can judicially notice regulations and proclamations; it is unclear whether an accused can be cross-examined about charges which are relevant to the issue.
2. A recent example is *The Queen* v. *Pfitzner* (1976) 15 S.A.S.R. 171, to be discussed later in this article, where Bray C.J. disagreed with the majority on the application of the rule. But there are other examples of evidential rules which are difficult to apply. Judges must warn juries where the testimony of victims of assaults or of identifying witnesses is suspect, but the law does not definite precisely when such testimony is suspect nor precisely what warning should be given. Again the warning may not be necessary where there is other corroborative evidence, but which evidence is capable of providing that corroboration will 'depend on the circumstances'. Some of these difficulties are adverted to in this article.
3. For discussion of the problems inherent in proof see Cohen, *The Probable and the Provable* (1977); Eggleston, *Proof, Probability and Evidence* (1978) and Ligertwood, "The Uncertainty of Proof", (1976) *3 M.U.L.R.* 367.
4. *Cf.* Dworkin, "Hard Cases", Ch. 4 *Taking Rights Seriously* (1977).
5. His more important dissenting judgments in criminal cases involving evidential points will be analysed in this article.

common law notions of fairness and natural justice, and only in situations where grounds for interference are certainly established. It is in the criminal court that such ideas assume prominence and his influence was most felt in the criminal field.

It is impractical to analyse all reported cases where Dr. Bray reached decisions of fact, and it is proposed to concentrate upon those cases which best illustrate the logical and liberal principles characteristic of the former Chief Justice. The influence of these principles can be seen in four areas and this article will be divided accordingly. In the first place, they determined his approach to judicial discretions, in particular the discretion to exclude improperly obtained evidence. Secondly, they produced his cautious approach to suspect testimony and led him to analyse precisely the common law requirements for corroboration of such testimony. Thirdly, they resulted in his insistence that the common law procedural requirements of proof be strictly followed. Finally, they created in him a reluctance to convict wherever there existed a risk of injustice.

It is illuminating to read together the important decisions of the former Chief Justice. His meticulously logical approach, applied with characteristic consistency, led him to find in arguments flaws which other of his colleagues appeared unable or unwilling to expose. Furthermore his intensely liberal attitude made him reluctant to convict whenever a flaw, no matter how slight, appeared in the arguments for guilt. On the other hand, when his colleagues did recognise flaws they were willing to evaluate them and to dismiss those they considered of dubious weight. The Chief Justice was always reluctant to make this evaluation. This difference in approach produced many dissents from the Chief Justice and this article will seek to show why he disagreed with his colleagues in particular cases. It is submitted that the key to the Chief Justice's approach was his reluctance to dismiss hypotheses of innocence which were theoretically open on the facts but which many "practical" men would dismiss as remote. The Chief Justice refused to tolerate even remote risks where the liberty of the individual was at stake. Which approach one prefers depends upon where one balances the interests of the individual against the interests of society as a whole. In the long run, arguably to the good of society as a whole, the practical approach produces for the most part correct decisions, tolerating the occasional conviction of the innocent in pursuit of his aim. The former Chef Justice's approach sough to ensure that no nnocent person was found guilty, sacrificing the overall result to this end. This was his interpretation of the common law presumption of innocence as embodied in the standard of proof beyond reasonable doubt.

These remarks apply most directly to the cases discussed in sections *(2)* and *(4)* of the next part of this article. These deal with corroboration and proof beyond reasonable doubt respectively. In sections *(1)* and *(3)*, which deal with his approach to the discretion to exclude improperly obtained evidence and his insistence upon the common law requirements of procedural fairness, the former Chief Justice's liberalism is used to formulate particular rules of evidence.

2. *Those Areas of the Law of Evidence in which Dr. Bray was most influential*

(1) The discretion to exclude improperly obtained evidence.

Although the common law has for long been committed to the principle that law enforcement officers should act legally and fairly in obtaining

evidence against suspected persons,[6] judges have been reluctant to apply this principle to exclude probative information at an accused's trial. There is, and has been for a number of years, an undoubted discretion to exclude evidence improperly obtained[7] but judges in the past interpreted narrowly the grounds upon which this discretion could be exercised. Essentially information would only be excluded where it could be said to operate unfairly against an accused at his trial, and judges felt information could only operate unfairly if it was misleading or obtained in cricumstances of trickery.[8] As a result information was generally admitted even if wrongfully obtained, and the principle that law enforcement officers should act legally and fairly could only be applied in civil actions, rarely brought by aggrieved criminals. Blatant misconduct appeared to be condoned by the criminal courts.

This narrow approach has recently been overruled by the High Court in *Bunning* v. *Cross*,[9] but over the ten years prior to this decision the South Australian Supreme Court, led by its Chief Justice, had itself evolved the wider discretion. Furthermore, the Court had developed rules of fairness to be followed by investigating policemen. Much of this work has gone unnoticed in the rest of Australia, where there may be even more reason to be protected from police impropriety than in South Australia.

The groundwork for this wider approach was begun by Dr. Bray in 1969 in *The Queen* v. *Wright*[10] where the Full Court was asked whether an accused, testifying on the voir dire in support of a submission that his confession to the police should be excluded, can be asked whether his confession is true and, if he can be asked and compelled to answer, whether an admission on the voir dire can be admitted before the jury where the previous confession is held inadmissible. Having decided that only in limited circumstances is the truth of a confession sufficiently relevant to be revealed at the voir dire, and that generally what is said at the voir dire should be admissible before the jury, the Chief Justice held that, nevertheless, there is a discretion to prevent the jury hearing what has been testified at the voir

6. Cases on false imprisonment and unlawful search and seizure illustrate this commitment, but give only civil remedies.
7. The High Court recognized the discretion explicitly in *The King* v. *Lee* (1950) 82 C.L.R. 133 where it decided that wrongfully obtained confessions could be excluded in exercise of the discretion. In *Karuma* v. *The Queen* [1955] A.C. 197 the Privy Council recognised a similar discretion to exclude improperly obtained real evidence (that is objects and articles, rather than confessional statements, which are themselves circumstanial evidence of the accused's guilt, *e.g.* prohibited or stolen articles, blood samples, photographs, finger prints, the results of breath-alyser tests, *etc.*). Recently Wells J. has suggested each discretion is exercised on different grounds. See n.9 *infra.*
8. *Ibid.*
9. (1978) 19 A.L.R. 641. This decision has been followed by the Full Court of South Australia in *The Queen* v. *Barker* (1978) 19 S.A.S.R. 448 and *The Queen* v. *Lavery (No. 2)* (1979) 20 S.A.S.R. 430, but in both decisions Wells J. expressed doubt about whether the wider discretion extended beyond real evidence to confessional evidence. He feels that the narrower traditional test of fairness to the accused still applies to confessional evidence so that a confession cannot be excluded on grounds of public interest. King C.J., Mitchell J., White J., and Walters J., it is submitted, clearly accept that the wider *Bunning* v. *Cross* approach applies to confessional evidence. The recent Full Court decision of *The Queen* v. *Austin* (1979) 83 L.S.J.S. 163 expressly rejects Wells J.'s view.
10. [1969] S.A.S.R. 256. This decision, and the conclusion of Dr. Bray, was recently overruled in *Wong Kam-ming* v. *The Queen* [1979] 2 W.L.R. 81, where the Privy Council took the matter a step further and held truth is not relevant to the voir dire enquiry and when evidence is excluded after a voir dire hearing nothing said at that hearing should be disclosed to the jury.

dire, and as a rule that discretion should be exercised to exclude from the jury any admission made by the accused at the voir dire where the judge has decided that a previous confession to the police should be excluded. The Chief Justice reached this conclusion because he considered the principal reason for excluding confessions, whether on the ground of involuntariness or in exercise of the residual discretion, is to discourage improper police practices, and to allow proof of an admission on the voir dire when it has been decided that the previous confession is inadmissible would subvert this policy. This policy he clearly articulates in the following passages:

> "I stress the policy behind the common law rules relating to the exclusion of confessions not shown to be voluntary: that policy is designed generally to repress improper police practices; it is not based on any presumption that any particular confession is untrue."[11]

> "But in deciding whether to exercise [the discretion] or not the judge, in my view, should always bear prominently in mind the steady policy of the law in viewing with disapprobation excessive zeal or improper techniques in the interrogation of the accused and should consider the effect of his decision on the promotion of that policy. This, of course, is not the only, and not necessarily the determining, factor which will guide his discretion."[12]

In the next year in *The Queen* v. *Ireland*[13] the Chief Justice was provided with another opportunity to present his view of the exclusionary discretion. Part of the information tendered against the accused consisted of photographs taken of the accused's hands showing scratches. These photographs were taken after the accused had been told (wrongly) that he was obliged to submit to the camera. The Chief Justice remarked:

> "I do not suggest that Detective Bator acted otherwise than in good faith; but in my view if the police not only make of an accused person a demand with which he is not bound to comply, but in addition give him to understand that compliance is legally necessary, and he complies believing that he has to comply, then this Court should discourage such conduct in the most effective way, namely, by rejecting the evidence"[14]

On this occasion Zelling J. agreed with the Chief Justice's approach and when the matter went to the High Court Barwick C.J. confirmed the existence of a discretion to exclude improperly obtained evidence on wider grounds:

> "Whenever . . . unlawfulness or unfairness appears the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment.

11. *Id.*, 264.
12. *Id.*, 266.
13. [1970] S.A.S.R. 416.
14. *Id.*, 423.

> Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."[15]

Having been given the imprimatur of the High Court Dr. Bray expressed in a number of subsequent cases his strong view upon how the exclusionary discretion ought to be approached. In *The Queen* v. *Collins*[16] the defence alleged that incriminating statements were made after the accused had handed the police a letter, drafted by his solicitor, in the following terms:

> "My name is Terry Collins . . . I have been advised by my solicitor Paul Anderson of my legal right not to answer any questions. I do not wish to answer any questions until my solicitor is present to advise me."

The trial judge, having been asked on the voir dire to exclude the confessional statements in exercise of his discretion, refused to find that the letter, which had undoubtedly been written by the solicitor, had been produced and, there being prosecution testimony to support such a finding, the Full Court felt unable to interfere. But Dr. Bray went on to consider what the result would have been if the letter had been handed to the police, or if the accused had otherwise intimated his refusal to answer:

> ". . . if that was the true position the evidence should have been rejected. There is no longer room for argument or doubt about this proposition. If the appellant's version of the relevant matter had been accepted, the confession should have been excluded."[17]

In a number of previous cases[18] it had been held that it is improper for the police to continue questioning after the suspect has intimated that he does not wish to answer questions and Barwick C.J. in *Ireland* agreed that such impropriety should be a factor relevant to the exercise of the exclusionary discretion.[19] Dr. Bray places much more emphasis upon the impropriety than this.

Very shortly after *Collins'* case Dr. Bray was faced with another case, *The Queen* v. *Stafford,*[20] where the accused alleged that the police had continued to question him after he had handed them a similar letter, drafted by his solicitor, indicating his refusal to answer questions. Again the trial judge had refused to believe that the letter, proved by the solicitor to have been written, had been produced, and accepted the contradictory testimony of the police. The Chief Justice's enquiring mind led him to the following comment:

> "I have been very disturbed about these findings. I refer to my remarks in *Reg.* v. *Collins* . . . There, as in this case, the accused claimed to have produced a document prepared by a solicitor . . . There, too, the police denied the story and the denial was accepted by the learned judge, despite his acceptance of some evidence tending to support the accused's story. I found the conclusions of the learned judge surprising. I find the conclusions of the learned judge in this

15. (1970) 44 A.L.J.R. 263, 269.
16. (1976) 12 S.A.S.R. 501.
17. *Id.*, 507.
18. *The Queen* v. *Evans* [1962] S.A.S.R. 303; *Harris* v. *Samuels* (1973) 5 S.A.S.R. 439, 452, 464-465.
19. (1970) 44 A.L.J.R. 263, 267.
20. (1976) 13 S.A.S.R. 392.

> case even more surprising. It is difficult to believe that when a man and his mistress are supplied with legal letters of protection, if I may so describe them, and are interviewed by the police on the same day at the same place she should produce hers and he should not and should not even claim the protection verbally if by any chance he happened not to have the document on him . . . It is striking that the courts should twice within a few weeks be confronted with a situation where the accused person alleges that he has claimed this protection and has produced documents of the type in question here and the police have denied the claim and the production. Any such denial should, in my view, be severely scrutinized. It is strange that a man should pay for a shield and throw it away as soon as battle is joined."[21]

But Dr. Bray felt unable to disturb the trial judge's finding and concluded with a final passing shot:

> ". . . I do not think we can interfere. It must be presumed that amongst those who have reason to think that they may come under the attention of the police there are some so generously disposed towards the legal profession that they are prepared to pay for advice and for the preparation of a passport of immunity from questioning without apparently any intention of following the advice or producing the passport."[22]

However, there were further reasons for excluding Stafford's confession in exercise of the discretion. The circumstances under which he was taken to the police station and interrogated involved significant improprieties. The police suspected Stafford had been involved in the taking of a number of electrical items and found him present at premises where some of the stolen items were situated. He denied any knowledge of the items or their theft and was thereupon removed in handcuffs to a police station where, after a lengthy wait, he was interrogated. As a result he signed a confession and was then taken by the police before a Justice and formally charged with taking electrical goods. The following extracts from the Chief Justice's judgment indicate his view of these circumstances and their legal effect:

> "On Detective Howard's evidence given in isolation I think the confession had to be excluded. He admitted in cross-examination that he did not tell the appellant that he was being arrested or why he was being arrested, but that he was in fact arresting him by conduct. I think the courts should attach to this sort of conduct emphatic disapproval and emphatic sanctions."[23]

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21. *Id.*, 398-399.
22. *Id.*, 399 (In 1978 in *The Queen* v. *Poulter* (1978) 19 S.A.S.R. 370 Dr. Bray was confronted with yet another case where a trial judge refused to believe that the accused produced a letter of protection. He reluctantly accepted the finding, adding (*id.*, 373):
    > "I cannot forbear, however, repeating comments I have made on earlier occasions that it must be regarded as an odd quirk of human nature that when a person who is accused or suspects that he is going to be accused of a serious crime takes careful precautions in advance to establish that he intends to exercise his legal right to refuse to answer questions by the police, he should nevertheless freely volunteer such answers in the relaxed and intimate atmosphere of the detective's office").
23. *Id.*, 401.

> ". . . what the police did was to make an arrest and, in my view, an unlawful arrest, which they were not entitled to employ for the purpose of interrogating the appellant . . . Having chosen to act in this illegal way, in my view they must abide the consequence of their choice."[24]

> "I think that a conviction obtained by the aid of a confession made after the arbitrary and unlawful acts of the police in the present case is a conviction obtained at too high a price."[25]

With this decision there followed over the next few years a spate of cases where defence counsel sought exclusion of evidence on the basis of police impropriety and many of the objections succeeded, for by this stage the Chief Justice had convinced a number of his colleagues that they ought to exercise some control over police investigation. In *Walker* v. *Marklew*[26] the Full Court ruled inadmissible the confession of a juvenile Aborigine, emphasizing that it had been obtained in breach of police standing orders and rules laid down in a circular from the Commissioner. The Chief Justice was a member of the Court but the main judgment was given by King J. who, in words closely following those of the Chief Justice, remarked in conclusion:

> "It is important therefore that the police officers and the public be reminded of the importance of the rules which the Courts have developed for the protection of citizens who are under suspicion of crime and that police officers be reminded of the necessity of complying with them."[27]

In *The Queen* v. *Ajax and Davey*[28] White A.J. explained, during argument to exclude the confessions of two Aborigines obtained in breach of the Commissioner's circular, that

> ". . . the purpose is to see that the guidelines are carried out and if people do not carry out the guidelines you do not accept the evidence and the consequence will be one day that the guidelines will be followed."[29]

Mitchell J. has long held the same view as the Chief Justice, remarking in *The Queen* v. *Dodd, Milera and Bingapore*:

> "In my view the Courts should set their faces firmly against the admission of evidence illegally obtained."[30]

In *The Queen* v. *Eyres, Eastway, Clarke and Osenkowski*[31] Walters J. was faced with a situation where the N.S.W. police had detained a suspect for some 26 hours solely for the purpose of interrogation. This he held unlawful, ill-advised and imprudent and paraphrased the words in Dr. Bray in concluding

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24. *Ibid.*
25. *Id.*, 402.
26. (1976) 14 S.A.S.R. 463.
27. *Id.*, 485.
28. (1977) 17 S.A.S.R. 88.
29. Transcript, 63.
30. Unreported decision of 25 October, 1974 referred to by Dr. Bray in *The Queen* v. *Stafford* (1976) 13 S.A.S.R. 392, 402. Mitchell J. recently endorsed her view in *The Queen* v. *Killick* (1979) 82 L.S.J.S. 148.
31. (1977) 16 S.A.S.R. 226.

> "that to allow the Crown to present to the jury evidence of confessional statements which are alleged, on the prosecution case, to have been made by the accused on the third day of his detention and which were obtained after what I find to be "the arbitrary and unlawful acts of the police in this case"—and I regret that I feel constrained to use that expression—might well result in "a conviction [being] obtained at too high a price." "[32]

These decisions illustrate clearly Dr. Bray's concern for the liberty of the individual and his insistence that South Australian courts uphold this liberty by discouraging police impropriety. This is no new principle to the common law and Dr. Bray's contribution was one of emphasis rather than anything else. He recognized that in the modern world where the State's influence has increased and its resources for enforcing its will have become technologically overwhelming, the common law must achieve its stated principles by modifying specific rules. This he not only did himself but also successfully persuaded other of his colleagues to do. The High Court has now clearly recognised the need for a wide discretion to discourage police impropriety[33] and Dr. Bray's wider approach has been vindicated. However, it is doubtful whether other judges place as much emphasis upon impropriety as Dr. Bray did and it is doubtful whether other judges will be as insistent upon such strict adherence by the police to investigative rules. There is a suggestion in the latest Full Court decision on this topic, *The Queen* v. *Lavery (No. 2)*[34] that the Court is now more willing to tolerate impropriety "in the interests of justice". In that case a confession was obtained consequent upon an unlawful arrest by Queensland police, but it was held admissible as the police were unaware of the illegality, the illegality had no obvious effect on the reliability of the confession, and the crime for which the accused was suspected, armed robbery, is a very serious matter. The new Chief Justice, Mr. Justice King, who was the trial judge, concluded that these factors persuaded him "against exercising my discretion in a way which would have deprived the jury of the assistance of the very cogent and convincing police evidence of the confession".[35] The Full Court, Walters, Wells and White JJ., agreed, the last emphasizing;

> "It is in the public interest, as well as in the interest of a particular accused, that each accused should enjoy the benefit of a fair trial. It is part of the quality of life which we have inherited and endeavour to maintain, if not improve. But the concept of a fair trial also carries with it an element of fairness to the prosecution representing the community. The dual aspect of the concept of fairness is sometimes overlooked."[36]

A similar attitude is found in the recent Full Court decision of *The Queen* v. *Austin*[37] where the impropriety was held insignificant when viewed against the seriousness of the crime in question.

There are, therefore, already signs of a movement away from Dr. Bray's liberal position and a re-emphasis of the interests of society as a whole.

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32. *Id.*, 232.
33. In *The Queen* v. *Ireland* (1970) 44 A.L.J.R. 263 and *Bunning* v. *Cross* (1978) 19 A.L.R. 641.
34. (1979) 20 S.A.S.R. 430.
35. (1978) 19 S.A.S.R. 515, 519.
36. (1979) 20 S.A.S.R. 430, 469.
37. (1979) 83 L.S.J.S. 163.

The logical result of this is to undermine the very reason given by the High Court for the wide discretion, *i.e.* the protection of the individual from executive impropriety, and to return to the view that the accused can only complain of impropriety where it results in unreliable evidence being tendered against him. But the High Court itself left open this option by failing to stipulate which considerations should receive priority in the exercise of the discretion, and it is open to judges to emphasize the seriousness of the offence so that all improprieties, other than those producing unreliable evidence, can be disregarded. There are signs of this emphasis in South Australia and the attitudes of the former Chief Justice may well be forgotten.

(2) Corroboration

With his concern for the protection of the individual it is not surprising that Dr. Bray expressed strong views upon the need for juries to be warned of the danger of acting upon suspect testimony. Two judgments of the Full Court, led by the Chief Justice, *The Queen* v. *Goode*[38] and *The Queen* v. *Harris*[39], emphasize the inherent weaknesses in testimony of identification where the suspect is previously unknown to the witness. In both cases the Full Court quashed convictions where the trial judge had failed adequately to warn juries and decided that the need to warn is not obviated by the mere presence of other implicating evidence, adding that although there may be cases where other evidence is so strong that a warning is unnecessary "a judge can never go wrong in giving one where the circumstances of the identification would call for it if there was no additional evidence."[40] It is not surprising that Dr. Bray was a party to this Full Court decision which comes so close to saying a warning is necessary in all cases involving identication of previously unknown suspects and yet expressly denies the existence of such a general rule, leaving the appropriate direction to the circumstances of each case.[41] The result has been that in practice trial judges tread warily in cases involving testimony of identification.

Dr. Bray also expressed views upon the controversial aspects of rules requiring corroboration of the testimony of accomplices, notably in his dissenting judgment in *The Queen* v. *Rigney*.[42] This case is also of interest as in illustration of Dr. Bray's tendency to disagree with his colleagues on questions of fact, for, whereas he was prepared to conclude that two witnesses to a homosexual assault were accomplices, the majority could find nothing to involve them in the crime. The incident involved five men, the appellant Michael Rigney, the victim, Gollan, Carter and Raymond Rigney, who had been drinking at a hotel. The appellant, the victim and Gollan left to drink at a nearby river bank, where the victim was forced to submit to a sexual assault by the appellant. While this assault was going on Gollan returned to the hotel and brought Carter and Raymond Rigney back to the river bank. As they arrived they saw the appellant sexually assaulting the victim. When the appeallant had finished Gollan said, "Whose

38. [1970] S.A.S.R. 69.
39. (1971) 1 S.A.S.R. 447.
40. *Id.*, 452. For an endorsement of this comment by Dr. Bray see *The Queen* v. *Harm* (1975) 13 S.A.S.R. 84, 95.
41. In *The Queen* v. *Harm* (1975) 13 S.A.S.R. 84 the Full Court, including the Chief Justice, refused to interfere where an inadequate warning had been given but there was plenty of corroborative evidence and identity was not really in issue.
42. (1975) 12 S.A.S.R. 30.

turn now?" and the victim alleged that first Raymond Rigney and then Gollan assaulted him. The appellant, Gollan and Raymond Rigney were jointly tried on separate counts of sexual assault. Only Raymond Rigney was acquitted. On appeal the appellant contended that the trial judge had not directed the jury that there was evidence that Carter and Raymond Rigney, both of who testified at the trial, were accomplices to the appellant's assault and had not warned the jury appropriately. The majority held that there was no evidence that Carter and Raymond Rigney participated in the assault by the appellant. Jacobs J. concluded:

> "Having read and re-read the evidence in this case, I can find no basis upon which any reasonable jury could regard Raymond Rigney or Carter as accomplices of the appellant . . . While it may be permissible to speculate that the ultimate arrival at the pepper tree of all the persons concerned was no mere accident, or that there was some pre-arrangement, albeit not fully disclosed by the evidence, to meet there, it would be the merest guesswork to suppose, in the absence of any evidence upon the topic, that they all—that is to say all except [the victim]—went there for the purpose of behaving as some of them in fact did, rather than, as [the victim] says, for the purpose of drinking. Moreover, the appellant had not only committed his alleged offence, but he had almost completed it, before Raymond Rigney and Carter arrived. Their mere presence as spectators, and even an inferred intention to encourage the conduct, is not sufficient to make them accomplices in the absence of any evidence of actual encouragement."[43]

But the Chief Justice pointed to the following information in holding that there was evidence from which a reasonable jury could infer that Carter and Raymond Rigney had participated in the assault by the appellant:

> "The evidence of [the victim] as to the initial conversation at the pepper tree, particularly Gollan's participation in it, the various queries as to whose turn it was, the evidence of [the victim] that there were discussions of some kind after the appellant got off him, the evidence of Carter that there was some talk of going down to the pepper tree, his further evidence that when he, Gollan and Raymond got down there and saw the appellant on top of [the victim] "we were just joking and laughing and carrying on and looked over", could, I think, afford ground for an inference that the appellant and Gollan had agreed to have intercourse with [the victim], that the appellant began, that Gollan went back to the hotel and collected Raymond and Carter, that they were told what was going on, that Gollan and Raymond decided to participate and Carter at least to help by giving approval to the whole proceeding. That could make Carter and Rigney *particeps criminis* in the crime allegedly committed by the appellant, which was still in progress when they got there. They would at least be aiding and abetting him to continue with it."[44]

It is difficult to comment upon these differing conclusions without at least a copy of the transcript. Dr. Bray's hypothesis is logically open on the facts

43. *Id.*, 56.
44. *Id.*, 39-40.

as gleaned from the judgments and this is sufficient for him to leave the matter to the jury. He concluded by quoting a dictum of Murray C.J. in *The King* v. *Webbe and Brown*:

> "It is impossible to say as a matter of law that a witness is not an accomplice unless there is no evidence to justify that conclusion. If there is evidence, the question must go to the jury."[45]

But the majority demanded more than a logical hypothesis that the witnesses were jointly involved. A hypothesis must achieve some degree of probability before it can be left to the jury and the majority was not willing to find that degree upon the evidence. Dr. Bray, typically, required much less before deciding a point in favour of the accused, for if the hypothesis was open he could see no reason why the trial judge should not leave it to the jury and give the appropriate warning. To some this approach is impractical and academic, to others it is justified as giving complete protection to the individual by insisting that trial judges leave no stone unturned.

Having decided that there was evidence of the witnesses' involvement in the assault by the appellant Dr. Bray still had several interesting decisions to make, on none of which was there a previous South Australian authority.

The trial judge had rightly pointed out that the testimony of the victim of a sexual assault generally requires a warning, but could that testimony be corroborated by testimony which might itself also require a warning about corroboration? Dr. Bray accepted the House of Lords decisions in *D.P.P.* v. *Hester*[46] and *D.P.P.* v. *Kilbourne*[47] that there is no rule against mutual corroboration and such testimony may be corroborative. But he hastily added that it did not mean

> ". . . that there are not some situations in which for various reasons the evidence of one witness cannot be regarded as corroborative of another witness deposing to the same or similar events. It is only the blanket rule which has been condemned."[48]

Secondly, as the Chief Justice thought there was some evidence that the victim may have consented to the intercourse he considered the victim potentially an accomplice, and asked whether the testimony of one accomplice can corroborate that of another. He emphatically declared it can not, rejecting suggestions in *D.P.P.* v. *Kilbourne*[49] by Lord Reid that there was no blanket rule in this area either:

> "I can only say, with respect, that if it is not a universal rule I cannot think at the moment of any justifiable exceptions and I will regard it as a universal rule until I am told by higher authority what the exceptions are"[50]

and clearly implied that the jury should have been left to consider whether the victim had been an accomplice.

The Chief Justice reluctantly accepted the narrow definition of accomplice found in *Davies v. D.P.P.*[51] viz. *particeps criminis,* but still had

45. (1926) S.A.S.R. 108, 111.
46. [1972] 3 All E.R. 1056.
47. [1973] 1 All E.R. 440.
48. (1975) 12 S.A.S.R. 30, 36.
49. [1973] 1 All E.R. 440, 456.
50. (1975) 12 S.A.S.R. 30, 37.
51. [1954] A.C. 378.

to consider whether Raymond Rigney, whose implicating testimony was given when he gave evidence on oath in his own defence, was an accomplice within *Davies'* case. On this point he preferred the Victorian decisions of *The Queen* v. *Teitler*[52] and *The Queen* v. *Anthony*[53] which hold a *particeps criminis* an accomplice whether testifying for the prosecution or the defence. But he acutely added:

> "Lest I should be misunderstood, I hasten to say that of course the necessity of the warning only applies when the accomplice's evidence implicates the accused. In a case like *Anthony's* case above where the accomplice co-accused gave evidence exculpating the accused, but evidence which, if the jury rejected the exculpatory part of it and accepted another part of it, could be damaging to the accused, there was no doubt no necessity for a positive rule of law demanding a warning, for in such a case the motive of self-preservation at the expense of the accused is lacking."[54]

This was not, however, the situation in the case before him.

As a result of these decisions of law the Chief Justice held that the issue of whether Carter and Raymond Rigney were accomplices should have been left to the jury and his view was that the conviction had to be quashed as the jury had not been specifically warned of the weakness of the testimony of witnesses whom it could have concluded were accomplices.

The decision has been analysed in some detail as it is a telling example of Dr. Bray's attitudes in the Court of Criminal Appeal. He always gave the accused the benefit of the doubt on the facts and had an easy way of dealing with controversial aspects of law, interpreting the law to give maximum protection to the accused. In the result his judgment in *The Queen* v. *Rigney* is the leading South Australian authority on the definition of accomplices.

Dr. Bray also expressed strong views on the requirement of a warning where testimony is given by the victim of a sexual assault. In *The Queen* v. *Byczko (No. 1)*[55] the victim testified that the accused had intercourse with her without her consent. The trial judge warned the jury of convicting the accused on the uncorroborated testimony of the girl, but failed to explain what the law meant by corroboration. One point argued by the Crown was that following *Kelleher* v. *The Queen*[56] the warning was required only as a matter of prudence and did not have to be given in the instant case as there was other evidence capable of constituting corroboration. Dr. Bray agreed that *Kelleher* stood for the proposition that failure to warn did not automatically vitiate a conviction for sexual assault but thought "that all the learned judges of the High Court . . . thought it desirable that the usual warning should be given in some form" and added "Their Honours' remarks, it seems to me, were addressed rather to courts of criminal appeal than to trial judges."[57]

In the case before him a warning had been given and he held that in those circumstances it was incumbent upon the trial judge to explain what he meant when he used the word corroboration:

52. [1959] V.R. 321.
53. [1962] V.R. 440.
54. (1975) 12 S.A.S.R. 30, 39.
55. (1977) 16 S.A.S.R. 506.
56. (1974) 131 C.L.R. 534.
57. (1977) 16 S.A.S.R. 506, 510.

> "In particular, I think the jury should be told that in order to be corroborative the evidence must be such as tends to show not only that the crime was committed but that the accused committed it, and that nothing consistent with both the case for the prosecution and the case for the accused can amount to corroboration."[58]

However, Dr. Bray did not decide that the failure to explain was decisive but held that what was fatal in the case before him was the direction that "[I]n my opinion as a matter of law they add up to corroboration of her story sufficiently to render a warning not necessary," which wrongly took the question of whether the evidence did amount to corroboration out of the jury's hands:

> "[The trial judge] may take the risk of saying nothing about corroboration at all, and perhaps, if he does so, the direction will pass unscathed through the appellate court. But if he is going to raise it, I cannot think that he can tell the jury that they must accept his decision on something which it is clearly for them to decide as a matter of fact."[59]

The other members of the court, Hogarth and King JJ. agreed with the Chief Jusice's conclusions in this case.

Having expressed his views on the need for the jury to be warned about acting upon the uncorroborated testimony of identifying witnesses, accomplices and the victims of sexual assaults, it remained for the Chief Justice to explain what evidence is capable of providing that corroboration, and the opportunity presented itself not long before he retired in the cases of *The Queen* v. *Lindsay*[60] and *The Queen* v. *Stephenson*[61]. The Chief Justice's views on this topic are a unique illustration of his liberal spirit.

In *Lindsay* the accused was charged with having raped a young girl in one of some "old privies" ("I refuse to dignify them by the name of toilets"[62]) in a South Australian country town. The girl testified that the accused, having "chatted her up" at the swimming pool, followed her into the street where he grabbed her by the arm and dragged her off to the privies where he had sexual intercourse with her. His story was that he had followed her into the street and did take hold of her arm when asking her to accompany him, but alleged that she willingly went with him to the privy where he interfered with her digitally only. As the victim of a sexual assault the girl's evidence required corroboration and to confirm her account (that she went unwillingly) the trial judge directed the jury that it could have regard, first, to the accused's admission that he held her by the arm and, secondly, to the testimony of a witness who saw the accused and the girl talking animatedly in the street and confirmed that the accused had hold of the girl by the arm. Dr. Bray agreed that the witness's testimony could be interpreted by the jury to corroborate the victim's version that . . . she went unwillingly[63] but refused to agree that the accused's mere

58. *Id.*, 511.
59. *Id.*, 513-514.
60. (1978) 18 S.A.S.R. 103.
61. (1978) 18 S.A.S.R. 381.
62. (1978) 18 S.A.S.R. 103, 104.
63. The witness described some of what happened in the following cross-examination:
Q.: And the girl did not appear to be pulling away from him?
A.: No, just arguing.
Q.: But there was no pulling away?

admission that he took hold of her by the arm was capable of constituting corroboration, on the ground that evidence consistent with both the case for the prosecution and the case for the defence cannot generally amount to corroboration. The Chief Justice's view appears in the following passage:

> "It is complained in effect that the accused ought not to be allowed to exclude items of evidence from the category of potentially corroborative matter by narrowing the area of debate. If such an item would be corroborative if everything were in issue, it ought not, it is suggested, to lose that character because it relates solely to something which is admitted. It seems to me that this criticism mistakes the purpose of corroboration.
>
> There is a contest between the story of the witness to be corroborated and the story of the accused. The jury must choose between them with due regard to the onus of proof and the presumption of innocence. If they are to choose in favour of the witness because of the alleged corroborative evidence, that evidence must relate to something asserted by him and denied by the accused. If it only relates to something which is common to both stories it cannot provide any touchstone of the credibility of the witness in the disputed area.
>
> It is complained that if this is right it can never be known until the defence has been given whether any particular item of evidence is corroborative or not. So be it. Corroboration is not a test of admissibility. The necessity to decide whether or not any particular item of evidence is potentially corroborative only arises at the stage of the summing up . . . The corroboration must, as it seems to me, be something tending to confirm the evidence of the witness in the disputed area and not outside it. In this sense I think the accused can by admissions narrow the area of debate and deprive an item of evidence of the potentially corroborative character which it would have borne without the admission. Of course the story of the accused may be so incredible or so contradictory as to justify rejection and conviction despite the warning. That is another matter."[64]

In the case before him the holding of the girl by the arm was not in dispute, so that evidence of the touching, whether from an admission by the accused or from an independent witness, could take the matter no further. The accused's admission was therefore incapable of corroborating the girl's story that she was dragged off. On the other hand the testimony

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63. *Cont.*
A.: No.
Q.: By her. And there was similarly no pulling by him on her arm?
A.: Yeah, he was—well he just got hold of her.
Q.: He just had hold of her?
A.: Yeah.
Q.: But he was not dragging her?
A.: No.
Q.: Away. And she was not pulling back?
A.: Not at that time, no.
Q.: Or at any time that you saw them?
A.: Towards the end she started, not really pulling away, but just sort of as if she wanted to go somewhere . . .
More of the cross-examination is quoted by Dr. Bray in (1978) 18 S.A.S.R. 103, 104-105.

64. (1978) 18 S.A.S.R. 103, 108.

of the independent witness could be interpreted as established more than a mere holding, and therefore the Chief Justice was willing to let that testimony go to the jury as potentially corroborative.

The majority, Zelling and Wells JJ., disagreed with the Chief Justice's view of the admission:

> "We think the true test is that no evidence which is common to the case of the Crown and the case of the accused can amount to corrobation unless either the evidence itself bears a different character when viewed in relation to the Crown case from what it bears in relation to the case of the accused or unless the inferences which can be drawn from such evidence, if the jury are constrained to draw them, support the evidence of the prosecutrix in a material particular. Certainly an accused person cannot, by a timely admission of facts which could otherwise amount to corroboration, deprive them of that quality by making an admission."[65]

In *The Queen* v. *Stephenson*[66] the Chief Justice explained the reason for his view. The accused was charged with attempted rape, the prosecutrix alleging that she was held down by one of the accused's friends while he attempted to have intercourse with her, but he was unable to achieve an erection. In his statement to the police the accused admitted, *inter alia,* that the victim "was just lying there. Bob was still holding her arms", and in his unsworn statement to the jury the accused explained that the boys had been engaged in a bit of horse-play with the girl, and she was playing along.

The Chief Justice held that this admission to the police could not corroborate the girl's allegation that she did not consent:

> "There may, as I said in *Lindsay's* case, perhaps be cases where an admission of some circumstances by the accused is so inconsistent with his denial of guilt as to be potentially corroborative. But, in my view, this is not such a case . .. I view with apprehension any whittling away of the rule [that evidence consistent with both the case for the prosecution and the case for the defence cannot amount to corroboration]. If that happens there is a danger that bizarre or unconventional behaviour or circumstances, which are neverthless, on the accused's story at least, entirely innocent, may be thrown into the scales against him with disproportionate emphasis by being categorized as potentially corroborative. On this reasoning it would in the last century have been regarded as potentially corroborative if the accused admitted a secret assignation with a girl in a secluded area, even though for a non-amorous purpose."[67]

Again the majority, Walters and King JJ., disagreed with the Chief Justice's decision on the facts. King J. agreed that in most cases independent evidence confirming a common fact cannot be regarded as corroborative, but felt that in some it may be open to the jury to infer that the independent evidence is more consistent with the witness's account than the accused's, and held that the situation before him was such a case. But King J. did not dissect the evidence as precisely as the Chief Justice. The latter agreed

65. *Id.,* 122.
66. (1978) 18 S.A.S.R. 381.
67. *Id.*, 385-386.

that other parts of the accused's statement to the police, in which he described struggling, could be corroborative, but objected to the trial judge's direction that the admission of a mere holding could be corroborative. King J. refused to take that direction alone and based his decision on the conclusion that the trial judge had directed that the admission of both the struggling and the holding could be corroborative, and with this he agreed. On the other hand Dr. Bray held that technically there had been a misdirection, although he did dismiss the appeal on this point on the ground that there had been no substantial miscarriage of justice, it being unlikely that the jury had acted on the admission of a mere holding.

There is much to be said for the Chief Justice's view of corroborative evidence. Everyone would agree that it is essential that corroborative evidence confirm the witness's testimony independently of that testimony. That, as it stands, is now settled law. But one can easily accept that statement and yet fail to see that there is a contradiction of it in allowing evidence agreed on by both prosecution witness and accused as corroboration of the story of the former. This contradiction becomes more evident if we follow out the reasoning. Where the corroborative evidence confirms a common fact it can only be corroborative if the jury accepts the witness's explanation and rejects the accused's. Therefore before the evidence can be corroborative the witness's account must be believed. This being necessary, the corroborative evidence does not confirm the witness's testimony independently. To put it another way, the evidence cannot be corroborative until the accused's account is rejected as untruthful, but the basis for rejecting the accused's account is the acceptance of the witness's account, the very evidence that needs to be corroborated in the first place. Walters J. comes close to endorsing this approach in *Stephenson's* case:

> ". . . if the jury chose to believe only that portion of the appellant's statement in which he admitted that Schaaf was holding the prosecutrix's arm while he was attempting to penetrate her, and if they chose, perhaps influenced by the appellant's answers to the police, to disbelieve him when he said that "she was laughing and appeared [to him] to be playful", then that portion of the statement which the jury saw fit to accept, taken in conjunction with the impugned passage from the record of interview, could in my opinion, be treated as potentially corroborative of the prosecutrix's evidence."[68]

It is highly doubtful whether Walters J. would have regarded the admissions as implicating the accused in a rape if he had not had before him the prosecutrix's testimony. Without that testimony the accused's account is colourless. To use that testimony is to undermine the essential rule that corroborative evidence must gather its implicative force independently of the testimony of the witness to be corroborated.

The Chief Justice never failed to keep that basic principle sharp and clear, and free of contradiction. In doing so he thought it necessary to emphasize that failure to keep it sharp and clear could admit the danger of convicting individuals because of their unconventional behaviour.

(3) Common law procedural requirements of proof

Common law adversary principles demand that parties present their dispute before an independent judge who is directed to hearken to the

68. *Id.*, 394.

evidence and not himself engage in the investigation of the quarrel. Furthermore, each party must be given the opportunity to comment upon the arguments and information presented by his opponent. These principles received emphasis during the time Dr. Bray held the position of Chief Justice, for he believed whole-heartedly in them.

A simple example of this belief is *Denver* v. *Cosgrove*[69] where the defendant to a speeding charge asked the Justices to take a view of the scene of the crime. They refused, saying they knew well the stretch of road involved. Dr. Bray upheld an appeal commenting:

> ". . . the Justices were not, in my view, except by consent, entitled to take their knowledge of the particular area into account in assessing the evidence before them. It is one thing for a view to occur in the presence of the parties, each of whom can point out matters relied on by the other side. It is another thing for the court to use its peculiar knowledge of a particular locality for the purpose of drawing inferences, the bases of which might be unknown to the parties and therefore not capable of being properly contested by them. All views and inspection should be in the presence of both sides. A court can take judicial notice of the general geographical features of a locality which can be taken to be well known to all residents, but not, in my opinion, of the particular features of a small section of road as to which it is not reasonable to assume such general knowledge . . ."[70]

He expressed a similar opinion in *Pope* v. *Ewendt*[71] where the prosecutor appealed against the dismissal of a speeding charge on the ground that following a view the Justices had purported to take judicial notice of the distance between a sign and a crossing. The Chief Justice criticized the Justices for their private view and held that judicial notice could not be taken of such a particular distance. However, he dismissed the appeal on the ground that the prosecutor had made no objection when the Justices, in open court, had reported the view and had made it clear that the information gathered from the view would be utilized by them. This failure to object could be taken as a waiver of the prosecutor's right to attend the view. One suspects that the Chief Justice would have been more reluctant to find a waiver by a defendant in similar circumstances where the view had contributed to the defendant's conviction!

The Chief Justice was always reluctant to allow the Court to act upon information gathered by itself. In *Cavanett* v. *Chambers*,[72] an appeal from a Special Magistrate against a conviction for driving under the influence and driving without due care and attention, the Special Magistrate had, on his own initiative, consulted two medical text-books in reaching a finding that because the accused had a blood alcohol reading of .20% he must have been incapable of exercising effective control. This was held improper by the Chief Justice. There was no such notorious agreement amongst medical experts for the court to take judicial notice of such a proposition,[73]

69. (1972) 3 S.A.S.R. 130.
70. *Id.*, 133.
71. (1977) 17 S.A.S.R. 45.
72. [1968] S.A.S.R. 97.
73. Id., 100: " . . . it is conceivable, though I doubt it, that in the course of time . . . knowledge of the effect of blood alcohol may become so notorious and trite, and so generally accepted as reliable as to pass into the ordinary common stock of knowledge: . . . But that time is not yet."

nor could s.64 of the Evidence Act, 1929-1979 (S.A.) be interpreted to allow the court to consult such books on its own initiative. That section provides:

> "All courts may, in matters of public history, literature, science or art, refer, for the purposes of evidence, to such published books, calendars, maps, or charts as such courts consider to be of authority on the subjects to which they respectively relate: Provided nothing herein contained shall be deemed to require any such court to accept or act upon any such evidence when tendered, unless it thinks fit."

The Chief Justice held that this section can only apply where the book is either tendered by a party or the parties otherwise consent to the court consulting a particular work:

> ". . . if the court decides to inform itself by reference to medical text books or reports not in evidence the attention of the contending parties or their counsel should be called to it and they should be heard upon the subject. To do otherwise, it seems to me, is to commit an obvious breach of a fundamental rule governing the administration of justice . . . [B]ut I am prepared to go further . . . and to hold that, except by consent of all parties, which was clearly absent in this case, s.64 could not have been properly invoked in the exercise of a sound discretion . . .
>
> The proper way of eliciting material of the kind contained in the extracts from [the text-books referred to] is for these extracts to be put to an expert witness. His comments on them can then be made the subject of cross-examination or re-examination, as the case may be, or other experts may be called in rebuttal."[74]

Thus, not only does the Chief Justice endorse the principle that parties should be able to comment on all evidence presented but he also emphasizes the principle of party presentation, which insists that the parties present all the evidence, except where they expressly consent to judicial investigation.

A similar view is found in the Chief Justice's judgment in *Freeman* v. *Griffiths*.[75] This was a personal injuries action where the state of daylight at the time of the accident was in issue, and on appeal it was argued that the judge should, on his own initiative, have consulted the Government Gazette to determine the official time of sunset on the day in question. The Gazette embodies an almanac published in accordance with the provisions of the Proof of Sunrise and Sunset Act, 1923 (S.A.), s.3 of which provides that the published almanac is *prima facie* evidence of the times of sunrise and sunset. It was argued that judicial notice should have been taken of the time specified in the Gazette or at least the Gazette should have been referred to pursuant to s.64 of the Evidence Act. Dr. Bray disagreed and held that as neither party had tendered the Gazette in question the Court "could not be expected to go out and hunt for it of its own motion. Indeed if it did so, its decision would be very likely to be reversed".[76] This conclusion certainly accords with the Chief Justice's interpretation of s.64 of the Evidence Act in *Cavanett* v. *Chambers*,[77]

74. *Id.*, 101-102.
75. (1976) 13 S.A.S.R. 494.
76. *Id.*, 498.
77. [1968] S.A.S.R. 97.

but the Chief Justice was confronted with authorities of his own, notably *Stokes* v. *Samuels*,[78] and *The Queen* v. *Harm*,[79] which suggest that judicial notice can be taken of proclamations, regulations and the like published in the Government Gazette. Dr. Bray referred to a distinction he had drawn in *Harm's* case between "a proclamation or regulation laying down some general rule of conduct and an executive notice specifying particular individuals or persons to whom certain legal consequences apply"[80] and held:

> "The specification of the particular time of a particular event on a particular day to my mind resembles the specification of a particular individual for the purpose of this rule. It would be unreasonable, indeed almost absurd, to expect a court to be judicially aware of every such specification without proof. Those who rely on it should prove it by the tender of the relevant Gazette."[81]

This conclusion is difficult to follow for it is arguable that the times of sunrise and sunset affect all individuals alike. However, the distinction drawn in the rule applied by Dr. Bray does show that the Chief Justice did have developed views upon when matters of law, statutes, proclamations, regulations and the like, could fall outside the usual adversary procedure of proof and be judicially noticed, and it is submitted that these views are rooted in his liberal philosophy. Where rules affect all individuals alike the courts can be deemed to know them. When rules affect only particular individuals they must be strictly proved, tendered by a party and subjected to comment by an opponent.

In other areas the Chief Justice insisted upon strict adversary proof. In *Price* v. *Bevan*[82] he was asked to determine the appropriate procedure for finding a witness hostile upon the basis of his previous inconsistent statements. On the witness making an adverse statement, the prosecutor (who had called the witness) was allowed to call a policeman to testify that he had had conversations with the witness on two earlier occasions and had taken notes of these conversations. These notes were then handed to the Magistrate who, after pointing out parts of the inconsistency to the witness and getting no adequate explanation, declared the witness hostile upon the basis of the notes. He refused to allow defence counsel to cross-examine the witness before declaring him hostile. The Chief Justice held this procedure most improper, and laid down a very strict procedure to be followed on declaring hostility on the basis of previous inconsistent statements. First, each previous contradictory statement must be put to the witness by the party calling him to give him the opportunity to accept or explain his previous statement. Authority for this procedure is contained in s.27 of the Evidence Act[83] (which also applies after hostility has been

78. (1973) 5 S.A.S.R. 8.
79. (1975) 13 S.A.S.R. 84.
80. *Id.*, 99.
81. (1976) 13 S.A.S.R. 494, 498, 499.
82. (1974) 8 S.A.S.R. 81.
83. This section, which has equivalents in all other States, provides:
"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but if the judge is of opinion that the witness is adverse, the party may—
(a) contradict the witness by other evidence;
or
(b) by leave of the judge prove that the witness has made, at any other time, a statement inconsistent with his present testimony: Provided that, before

declared and the witness's previous statements are being proved in open court). Secondly, if the witness denies a particular statement then, and only then, can it be proved by calling a witness to that statement. And the previous statement is proved in the ordinary way, in this case by the policeman testifying orally to the conversations, using his notes to refresh his memory, perhaps, but not by tendering the notes. Thirdly, opposing counsel should be able to cross-examine the witness before he is declared hostile, to give him an opportunity to explain any previous inconsistent statement. Dr. Bray could find no authority on this topic but thought it "an elementary principle of justice".[84] These elementary principles of justice, the adversary requirements of proof, are emphasized throughout the Chief Justice's judgment in this case, now the leading South Australian decision on the subject.

A final case illustrating Dr. Bray's concern for procedural fairness is *The Queen* v. *Pfitzner*.[85] The accused was charged with selling, on 10 April, 1976 at Walkerville, a quantity of Indian Hemp. The only evidence of this offence was his admission to the police when interviewed on 12 April, 1976 that he had sold three pounds of what he variously described as dope, grass and marijuana for $1,000 on the previous Saturday night, April 10, in a side street near the Buckingham Arms Hotel, Walkerville. At the trial the accused alleged that the police had forced him to make this confession but, on the trial judge ruling the confession technically admissible,[86] he called witnesses to his movements on that night to prove he could not have sold the substance on that night as alleged. His sister proved that he already had in his possession a large sum of money on the Saturday afternoon and a witness testified that the accused had been with him from about 7.30 on Saturday night until after midnight. As the Chief Justice put it:

> "It is apparent that the appellant was doing his best to meet a case of a sale on the night of Saturday, April 10th. He did not attempt, and, in my view, could not have been expected to attempt to meet a case of a sale on some other day, such as Friday, 9th April, or Sunday, 11th April."[87]

The trial judge directed the jury that if it was satisfied that the accused did sell the substance as alleged it did not matter that it was unsure about exactly when the sale took place—"Because you see, the date—the statement of the date—is to give the accused reasonable particularity of the offence with which he is charged. It is not, in my view, in this case essential or material."[88] Dr. Bray held that this amounted to a misdirection:

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83. *Cont.*
> giving such last-mentioned proof, the circumstances of the supposed statement sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made the statement."

84. (1974) 8 S.A.S.R. 81, 92.
85. (1975) 15 S.A.S.R. 171.
86. *Id.*, 176 Bray C.J. comments on this finding:
> "I cannot say to what conclusion I would have come on this evidence. It leaves me with great disquiet. But I cannot see my way clear to holding that the learned judge was wrong. There was evidence on which he could have come to his conclusions. They were not necessarily conflicting or contradictory. It would be contrary to all the principles on which courts of of appeal act for us to interfere".

87. *Id.*, 184.
88. *Id.*, 185.

> "Whether the date alleged in an information is vital to the charge must depend on the circumstances. So long as it is clear that the controversy turns on the events of a certain occasion it may not matter if the date of that occasion is misstated if the occasion itself is clearly identified and both partes have directed their cases towards it, *cf. Page* v. *Butcher* [1957] S.A.S.R. 165. But obviously if a man is charged with committing an offence on Saturday and comes prepared with an alibi for Saturday, he cannot be convicted of committing the offence on Friday or Sunday, unless, perhaps, the information is amended and the trial adjourned to enable him to meet the new case . . . I think that a very real prejudice would have been caused to the appellant if the jury had been left with the impression that it did not matter whether the sale took place on the Saturday or on some other day, particularly some earlier day."[89]

He therefore emphasizes that the accused must be given the opportunity to meet an allegation of a specific offence, and in the case before him, the date was necessary to isolate the offence. Then, with his accustomed penchant for the innocent hypothesis, he concludes:

> "I would point out in addition that if indeed a man is terrorised by the police into making a false confession, he may well choose to relate it to a time for which he thinks he can produce an alibi."[90]

The majority did not agree that the trial judge had misdirected the jury on this matter. The Crown had charged the accused with the offence he had admitted in his confession and as a result the real issue, of which the accused had fair notice, was whether his confession was true or not. While the jury might doubt the date mentioned in the confession it might yet accept that the offence had been committed in the vicinity of that date and when looked at as a whole this was the direction given by the trial judge in his summing up. Wells J. concluded:

> "Given the purview of the issue, the exact date was, with respect to the case to be met by the accused, immaterial; only its bearing on the truth of the confession was, in my opinion, of any real importance."[91]

Whether one agrees with Dr. Bray's approach or not his decision on the point is yet another example of his concern for procedural fairness and his insistence that appellate courts always have due regard to the circumstances from the point of view of the possibly (indeed, to be assumed) innocent individual.

(4) Conviction beyond reasonable doubt

The Chief Justice's strict attitude towards proof in criminal cases has already been seen in his approach to corroboration. He, like other judges, insisted that juries be carefully warned of acting on unreliable testimony in the absence of corroboration, but *The Queen* v. *Rigney*[92] shows that he was more ready than his colleagues to find testimony technically in need

89. *Id.*, 185-186.
90. *Id.*, 186.
91. *Id.*, 195.
92. (1975) 12 S.A.S.R. 30.

of corroboration and *The Queen* v. *Lindsay*[93] and *The Queen* v. *Stephenson*[94] show that he was less willing than they to find evidence technically capable of amounting to corroboration.

This strict attitude is illustrated in other Full Court decisions where Dr. Bray found himself in dissent. For example, in *The Queen* v. *Pfitzner*[95] the Chief Justice, as well as dissenting on the point already discussed, disagreed with the majority on another significant point. It was assumed by all that, before the jury could act upon the accused's admission that he sold Indian Hemp, it was necessary to prove that he could recognise such a substance. Dr. Bray made this assumption although he commented:

> "I am beginning to think that marijuana or Indian Hemp or pot or grass is becoming, by those or any other names, so familiar an object in the contemporary scene that a general knowledge of it may be taken for granted. We do not require a witness who has admitted smoking a cigarette or drinking a glass of beer to prove his familiarity with tobacco or alcohol before accepting his admission at its face value."[96]

To prove his knowledge of Indian Hemp on 10 April the prosecution proved that in 1972 the accused had been charged and convicted of cultivating and possessing Indian Hemp, and that on 29 July, 1976 he pleaded guilty to a charge of possessing Indian Hemp for sale on the 12 April, 1976, two days after the date of the alleged sale in question. The majority, Sangster and Wells JJ., held the convictions and evidence explaining their circumstances admissible to prove a continuing knowledge of Indian Hemp. Bray C.J., extremely concerned about the prejudicial effect of the disclosure of a conviction for an identical offence merely two days after the incident in question,[97] held that although the 1972 convictions were admissible, the 1976 one was not, as it did not prove the accused's ability to identify Indian Hemp on 10 April. He gave two reasons. First, if the confession on 12 April could not be acted upon without proof of knowledge he did not see how logically a later admission on 29 July could take the matter any further:

> "If the admission to the detectives that the relevant substance was Indian Hemp was sufficient to prove that it was, then the evidence of the 1976 conviction was unnecessary. If that admission was not so sufficient, neither was the other admission, though made in court to a judge instead of to the detectives in the City Watchhouse."[98]

The sheer logic of this argument is overwhelming. Secondly, he held that even if the conviction proved knowledge on 12 April this was not proof of knowledge on 10 April. The Chief Justice rejected an argument of restrospective recognition, viz. "On 12 April I could recognize Indian Hemp and hence on 12 April I knew that what I sold on 10 April was Indian Hemp, even if I could not recognize it on 10 April," pointing out that the argument assumes he paid sufficient attention to what he was selling on 10 April to be able to identify it in the light of later knowledge. He then concluded:

93. (1978) 18 S.A.S.R. 103.
94. (1978) 18 S.A.S.R. 381.
95. (1976) 15 S.A.S.R. 171.
96. *Id.*, 178.
97. *Id.*, 177.
98. *Id.*, 179.

> "Of course, this whole enquiry savours of extreme unreality, but since this line of reasoning was relied on as the justification for placing highly prejudicial matter before the jury I think it should be held rigorously to its own logic."[99]

All the judges in *Pfitzner* agreed that evidence of other convictions should not be admitted unless its probative value outweighs its prejudicial effect. But whereas the majority was prepared to decide this balance in favour of the Crown the Chief Justice was not, regarding the 1976 conviction as so prejudicial that it could only be admitted if it conclusively showed knowledge on 10 April, and, as he demonstrated with unerring logic, it could not conclusively prove that. It is interesting to compare this approach with that of Wells J. who, in relation to the 1976 conviction, concluded:

> "In my opinion the plea of guilty coupled with the inaction referred to (failure to appeal), was manifestly "worth considering" when faced with the question whether the accused made a full and free judicial confession of his guilt on each occasion, and fully understood the implications of doing so."[100]

Again in this context it is not necessary (indeed it is probably impossible) to decide which approach is correct. What is important is the Chief Justice's refusal to find an accused guilty beyond reasonable doubt where the jury may have placed more emphasis upon evidence than it deserved. In this case the conviction relating to 12 April may have been taken not only to prove knowledge but as a justification for finding the accused guilty on 10 April, and the Chief Justice, with the innocent accused in mind, refused to tolerate such a risk.

In *The Queen* v. *Garrett*[101] the Chief Justice demonstrated a similar attitude. On the accused's trial for rape where consent was in issue, the prosecution sought to prove that previously the prosecutrix had brought a charge of rape against the accused, on which occasion the accused had been acquitted. All members of the Full Court, including Dr. Bray, held this evidence admissible as relevant to the issue of consent, but the Chief Justice dissented on the ground that the trial judge had not directed the jury that it was bound to accept the acquittal of the previous charge. The trial judge directed the jury "to draw no inference either for or against the accused . . . from the fact of that prosecution and its outcome."[102] The Chief Justice held that the principle of *res judicata* meant that earlier decisions could not be called into question in later decisions and the trial judge's direction left the previous conviction as a neutral fact "whereas in my view he should have treated the acquittal as giving rise to a definite, indeed an unchallengeable, inference in the accused's favour."[103] As the jury's verdict had been by a majority and it had agonized over its decision for five and a quarter hours the Chief Justice was not prepared to say that with the proper direction the jury would have reached the same verdict. The majority, Zelling and Walters JJ., considered the trial judge's direction on the whole sufficient. Zelling J. concluded the issue thus:

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99. *Ibid.*
100. *Id.*, 198.
101. (1977) S.A.S.R. 501 (reversed on appeal to the High Court (1977) 18 A.L.R. 237).
102. *Id.*, 511.
103. *Ibid.*

> "It would no doubt have been better if this point had been referred to explicitly, but nothing in the summing up casts the slightest doubt on the fact that the accused had a verdict of acquittal in his favour, and I cannot think that the jury could have been in any possible misapprehension as to their duty or that any miscarriage of justice has occurred."[104]

Bray C.J. refused to skate over the risks involved in this way. On appeal to the High Court it was held that the disclosure of the previous rape was too prejudicial and should not have been permitted. Only the fact that the prosecutrix had informed against the accused and had willingly testified against him at a former trial should have been disclosed, and a new trial was ordered. This is a rare example of the High Court taking an even more liberal view of the facts than Dr. Bray.

In *The Queen* v. *Weldon*[105] the Chief Justice again found himself the dissenting member of a Full Court, because again he could not convince himself that the accused had not been prejudiced by the conduct of the trial. The accused was charged with stealing a welder and a mask from his employer and, on being interviewed by the police and later at his trial, he explained that he had just borrowed the items to do a job of his own and intended to return them. It was therefore important for the prosecution to establish what opportunities the accused had had to return the items prior to his interview with the police, which took place five days after the taking. At his trial the accused explained that he was waiting until he was again working night shift so he could return the goods unseen. To test the credibility of this defence it was necessary to know which shifts the accused had worked between taking the goods and being interviewed by the police but the prosecution had failed to establish this as part of its case, although it had called witnesses who could have proved which shifts the accused had worked. The defence case closed on a Friday afternoon and the trial was adjourned to the following Tuesday, when the prosecution successfully sought leave to reopen its case and recall one of its witnesses to prove the accused's shifts during the relevant period. This witness established that the accused had been on one night shift since the taking and therefore had already had an opportunity to return the goods unseen. On appeal it was argued that the prosecution should not have been given leave to reopen. The Chief Justice agreed:

> "I have come to the conclusion, after analysing and considering the evidence as indicated above, and contrary to my original opinion that [the] relevance [of the shift times] was reasonably foreseeable and, whether it was or not, that the point would have been covered if the Crown case had been fully and strictly proved."[106]

He was much influenced by the fact that the Crown had called two witnesses who were asked some questions about the shift times but the point was never clarified and at the close of the prosecution case the testimony of these witnesses was contradictory on the point. The Chief Justice was slow to tolerate such sloppy prosecution. He was also influenced in upholding the appeal by the risk that, because the evidence in rebuttal was given alone, after a weekend break, and was emphasized in the trial judge's summing up, the jury may have unduly magnified a perhaps unimportant point:

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104. *Id.*, 524.
105. (1977) 16 S.A.S.R. 421.
106. *Id.*, 428.

> "The jury might have regarded the issue of day shift or night shift on Friday the 30th as the touchstone by which to decide the case. In fact, as I have said, it seems to me to have been comparatively unimportant. The mere fact that the goods were not returned on the first day available after the appellant had, according to him, ceased to use them for the purpose for which he had borrowed them seems to me to be of comparatively little weight in deciding what was his intention when he took them. I think the appellant was improperly prejudiced by the admission of the evidence."[107]

Bright and Zelling JJ. disagreed, holding that the difference between night and day shifts was not a material matter before the close of the prosecution case. Furthermore, it was not reasonably obvious to the Crown during its case that the opportunity to return the goods was significantly better during a night shift than a day shift. In these circumstances it was reasonable and in the interests of justice to allow the Crown to reopen. Nor did they regard the matter as of such unimportance as to justify overruling the trial judge's discretion to allow the Crown to reopen its case.

This decision illustrates clearly the difference in approach between the Chief Justice and other members of the court. He always looked at cases from the joint of view of the accused, and if the trial created any doubts about his guilt he would interfere. Furthermore, he insisted, because the result of a trial has serious consequences for the individual, that the prosecution strictly proves its case. On the other hand other members of the court tended to look at cases from a more general point of view. On the facts is there a real risk that an innocent man has been convicted? If the risk is a mere hypothetical possibility the decision should stand. The Chief Justice was reluctant to evaluate risks as mere hypothetical possibilities and demanded strict proof.

The foregoing decisions show the Chief Justice's concern with evidence which is prejudicial in the sense that it may be given more (or less) probative value than it deserves by the trier of fact. *Smith* v. *Samuels*[108] illustrates the Chief Justice's reluctance to convict where the evidence leaves open an hypothesis of innocence. The accused was charged that, he, being a suspected person, was in a public place with intent to commit an offence triable on information in the Supreme Court. Two police officers had seen the accused and two other men, late at night, walking through a shopping centre. They followed them, saw them look into a window of a shop and then walk to a darkened area behind the shop. They emerged a few moments later, walked to the car park, got into their car and drove off. The police followed and stopped the car, finding a pair of bolt cutters under the front seat. At his trial the accused explained that he went to the shop to look at some rifles on sale there, that he walked behind the shop to urinate, and that the bolt cutters were in the car (which did not belong to the accused) as the men had been on a shooting expedition and in the past, when shooting with his father, the accused had had trouble when wire became entangled with the car and the bolt cutters had been taken along in case this happened again. There were problems with this defence; in his statement to the police the accused had said all three men had gone behind the shop to urinate; the bolt cutters were hidden under

107. *Id.*, 429-430.
108. (1976) 12 S.A.S.R. 573.

the seat of the car and the accused said he merely put them on the floor of the car, and the accused had not taken his rifles with him. Furthermore, the accused called neither his father, nor the two other men, to confirm his story. The final point proved decisive in the mind of the Special Magistrate:

> "If one proposes to give a different explanation to that given when first questioned it seems to me that one should, if such evidence is available, and there was no suggestion here that it was not, call evidence to verify the changed account but this was not done."[109]

On appeal it was argued that the Special Magistrate had been wrong to draw inferences adverse to the accused from his failure to call corroborating witnesses, and that the decision to convict was against the weight of evidence. Only the Chief Justice accepted these arguments. Defence counsel had been given no opportunity by the Special Magistrate to explain why the witnesses had not been called and Dr. Bray considered this decisive. He felt there could be no presumption of availability, as appeared to have been applied by the Magistrate and that the availability upon which the adverse inference depends could only be found after the defendant has had an opportunity to explain. In the case before him Dr. Bray felt that there was a perfectly reasonable explanation for not calling the accused's companions, for they had also been charged and were awaiting trial. Although strictly compellable Dr. Bray concluded:

> "But humanly speaking I do not think that an unfavourable inference should be drawn by a failure to call those who are about to be tried for a criminal offence and whose evidence might imperil them on their own subsequent trial."[110]

Having excluded this important adverse inference the Chief Justice held this entitled the appellate court to re-examine the evidence itself, and felt the evidence, although justifying suspicion, could not support a finding of a present intention to commit a crime. He adverted to the distinction "between reconnoitering to see if a particular felony is feasible and the formation of an actual intention to commit a particular felony in the future when possible or when conditions are favourable,"[111] and decided:

> "If we are at liberty to examine the evidence for ourselves, as in the view I have taken we are, I would say that it is not proper to hold on that evidence that the existence of the latter rather than the former state of things was proved beyond reasonable doubt."[112]

The majority, Mitchell and Zelling JJ., dismissed the argument that no adverse inference could be drawn from the failure to call the witnesses:

> ". . . we do not agree that it was incumbent upon the learned Special Magistrate to enquire why the other two occupants of the car were not called. Any counsel and particularly any experienced counsel such as Mr Waye knows perfectly well that if he chooses not to call available witnesses, that may well be taken into account by the tribunal of fact in coming to its conclusion. Indeed it would be

109. *Id.*, 580.
110. *Id.*, 581.
111. *Id.*, 583.
112. *Ibid.*

> unwise and undesirable to place an onus upon a Magistrate to ask counsel such a question. Counsel may have very good reasons for not wishing to call the witness but may have equally good reasons for not desiring to inform the Court what those reasons are. In the present case he probably would not have wished to inform the Court that the two companions of the defendant were alleged to fall within the category of suspected persons. The position remains as the Magistrate found it to be. Counsel chose not to call the witnesses and he must take the consequences of not calling them . . ."[113]

Having decided this the majority held that there was sufficient evidence to justify the Magistrate's finding and in these circumstances there was no ground for an appellate court to substitute its view of the evidence.

This is another case where it appears that the Chief Justice dissented because essentially he was not certain whether the trier of fact had properly canvassed all the hypotheses consistent with innocence. He was reluctant to draw an adverse inference from the accused's failure to call corroborative testimony. As far as he was concerned there were innocent explanations for this and none of these had been adequately canvassed by the Special Magistrate. The risks in convicting were for him too great.

3. *Conclusion*

It is no coincidence that Dr. Bray found need for his principles in the realm of fact-finding for, as was pointed out at the beginning of this article, and as has been illustrated by many of the cases discussed, fact-finding is inherently difficult and leaves much to be decided by principle rather than rule. Nor was the former Chief Justice wanting in the principles to guide him in reaching difficult decisions, for he came to the Bench not only equipped with a logical intellect but armed with a liberal philosophy. But the philosophy was in no sense radical, being based firmly upon the common law's presumption of innocence and its insistence upon proof beyond reasonable doubt in criminal cases. All common law judges adhere to liberalism, but that is not the end of the matter for there is no definitive version of such a philosophy and the common law rules, the crystallization of the principles of liberalism, are themselves far from definitive. In this state of affairs judges necessarily differ in drawing the line between the interests of the individual and those of society as a whole. And whereas, under the guise of pragmatism, many judges emphasize the "interests of justice" at the expense of the individual, Dr. Bray steadfastly maintained that the State could only interfere with the individual lawfully and in clear cases. The difference is one of emphasis and is difficult to describe in general terms. But it is submitted that the decisions of the former Chief Justice discussed in this article show clearly how his approach frequently differed from that of his colleagues. In the long run he believed that emphasis of individual liberty is for the good of society as a whole.

By this emphasis Dr. Bray contributed significantly to the law of evidence in the fields of improperly obtained evidence, corroboration, and procedural fairness. But his contribution lay in his interpretation of the rules rather than in their reformulation. For example, all would agree that in Australia improperly obtained evidence can be excluded on grounds of public policy. In interpreting this rule Dr. Bray placed much more weight upon the fact

113. *Id.*, 587.

of illegality than upon the nature of the offence involved. On the other hand his colleagues appear recently to have placed the emphasis the other way. Given the presently open-textured formulation of the exclusionary discretion both interpretations are equally within the rule. Similarly, while all agree that corroborative evidence should be independent, Dr. Bray felt that to rely upon the inherent improbability of the accused's explanation of admitted facts except in the most extreme cases would undermine this rule, whereas his colleagues appear not to have such doubts. In both examples the differences lie in the interpretation of the rules rather than in their formulation.

In these circumstances one must be sceptical about how enduring will be the former Chief Justice's influence in the area of fact-finding. Already there are signs that the Supreme Court will take a less liberal approach to the exercise of the discretion to exclude improperly obtained evidence, and Dr. Bray's view of which evidence is capable of constituting corroboration has never had widespread acceptance. On the other hand his decisions enforcing the common law adversary principles of party presentation of evidence are less controversial.

Dr. Bray's views were probably most immediately felt in his approach to particular decisions of fact and in his interpretation of proof beyond reasonable doubt. Certainly in this field his contribution depended upon his being present on the bench so as to be able to apply his liberal philosophy to concrete cases. In this field he most clearly displayed his powers of analysis, his humanity and his concern for the individual.

This concern is inherent in the man. He is a singular man who understands society's intolerance of unorthodox views and habits, but who has always championed the right of the individual to live his own life. In a speech to the boys of his old school he reminisced of his times at the school and concluded:

> "The pressures to conformity were great. I resisted them as silently and unobtrusively as I could and the lessons I learnt in so doing have enabled me to resist them with much less trouble ever since. I hasten to add that I am not recommending non-conformity for its own sake. If you can conform happily no doubt you would be foolish not to do so. Some people can't."[114]

These people Dr. Bray always sought to protect.

114. *St. Peter's College Magazine*, December 1978, 13.