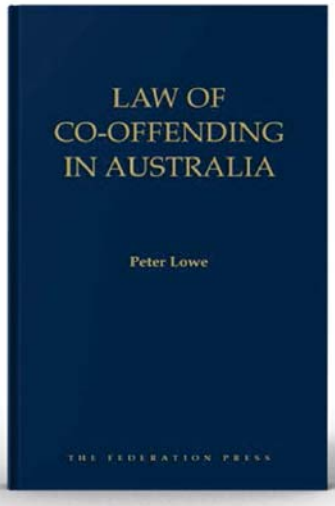
Law of Co-offending in Australia: Principles applicable to co-accused trials

by Peter Lowe (The Federation Press, 2022)



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> *Joint trials raise difficulties, some of which cannot be foreseen at the outset, in maintaining a balance of fairness in the scales, not only as between the prosecution and accused, but also as between accused persons.*

Generally there are strong reasons of principle and public policy why joint offences should be tried jointly: *Webb v The Queen* (1994) 181 CLR 41 at 88, 89, 56.

It has long been recognised that those who are charged with an offence allegedly committed jointly, such as the classic case of alleged robbers and a get-away driver, should generally be tried together. There are many ways in which joint criminal liability may arise; conspiracy, joint criminal enterprise, accessories are examples.

The reasons for a joint trial may be strengthened where each of two or more co-accused deploy a 'cut-throat' defence or the defence of one accused is that he or she was acting under the positive duress of the other. The fact that one accused desires to throw blame on another suggests the difficulty which could arise if separate trials are granted, enabling each accused to give evidence blaming the other without any denial or contradictor and potentially resulting in inconsistent verdicts. The interests of justice are not confined to the interests of the accused and acquittals in such circumstances may represent a miscarriage of justice. A joint trial seeks to avoid such outcomes.

But joint trials themselves raise difficulties, some of which cannot be foreseen at the outset, in maintaining a balance of fairness in the scales, not only as between the prosecution and accused, but also as between accused persons. The practical, procedural and legal aspects of trying two accused persons jointly give rise to some of the more challenging problems encountered in criminal law.

In the *Law of Co-offending in Australia*, Peter Lowe's starting point is the overriding concern that trial fairness is the foundation stone on which the Australian criminal justice process rests, from which he explores the special challenges when viewed through the lens of a trial of multiple accused.

The focus of the *Law of Co-offending* is how each Australian jurisdiction deals with issues affecting co-accused under common law and under statute. The book is purposed for practitioners of criminal law, prosecution and defence, as well as the judiciary.

Lowe steps through the practical application of rules of evidence and procedure, with all the particular considerations that arise in a joint trial of multiple accused. His professional balance, having himself both prosecuted and defended, is ideal for presentation of the issues. These include the ins and outs of forensic decisions such as whether and how to make an application for a separate trial. He deals with the various issues that commonly arise in any trial but which are made complex by the multiple accused. These include competence and compellability, admissibility of out of court statements of co-accused, reliance on admissions, voir dire procedures, and editing of a co-accused police interview at the instigation of an accused, to name only a few.

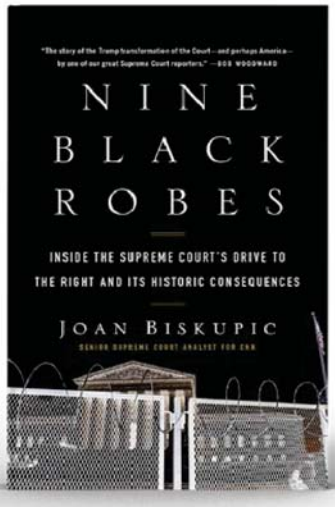
Lowe also devotes considerable energy to exploring particular trial applications in the context of a trial with multiple accused, including no case submissions, directed verdicts, changes of plea. Closing addresses, and the scope of permissible comment by one accused on the case of a co-accused, are two aspects where practitioners will benefit from Lowe's insights.

The book is a practical and comprehensive account of the law of co-offending. Throughout, Lowe navigates fine lines in the balance of interests when co-accused are jointly tried. It has day-to-day utility to practitioners in the various Australian jurisdictions, by identifying and explaining the rules, with accessible clarity, which apply in each place and the permutations on how they work.

Lowe notes that there is one issue which the reader should be aware may impact the book, which was the application for special leave filed by McNamara from the judgment of *Rogerson & McNamara v R* [2021] NSWCCA 160; 290 A Crim R 239. That application concerned the operation of s 135 of the *Evidence Act 1995* (NSW), common to the uniform evidence laws in Australia, in a joint trial of accused. Subsequent to the *Law of Co-offending in Australia* going to print, special leave was granted and the appeal was heard on 16 May 2023. Judgment in that case may give all the more reason for a second edition.

Nine Black Robes: Inside the Supreme Court's Drive to the Right and Its Historic Consequences

by Joan Biskupic (HarperCollins, 2023)



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The presidency of Donald J Trump may have only been for one term between 2017 and 2021, however, it was a consequential and confounding presidency. Almost since the start of the Trump presidency (and since its end), there has been a steady stream of books, articles, and podcasts about the impact of President Trump on American social and political life. So confounding was he that it necessitated self-help advice about navigating personal psychic pain and interpersonal conflict between friends and family[1] because of what he did as president.

Nine Black Robes: Inside the Supreme Court's Drive to the Right and Its Historic Consequences by Joan Biskupic adds to the rich body of literature about the Trump presidency by examining his impact on the US federal judiciary, and in particular, the US Supreme Court. Biskupic does so by first setting the scene of how Trump, and other actors, helped to shape the court through their appointment of ideologically aligned justices. Biskupic also takes the reader inside the court to detail the inner workings of the court and the relationships between the Justices during the Trump presidency.

The book benefits from Biskupic's long history as a Supreme Court analyst and journalist on the Supreme Court 'beat'. She is presently the full-time legal analyst for CNN and before that held positions as the editor-in-charge for Legal Affairs in Reuters and as a Supreme Court correspondent for the *Washington Post* and *USA Today*. She is also the author of several biographies of current and former justices of the Supreme Court on both 'sides' of the conservative-liberal ideological spectrum.

Although the book is an account of the court during the Trump presidency, it begins in the final year of the Obama presidency, with the death of Justice Scalia in 2016, and the highly controversial decision by Senator McConnell to not hold Senate confirmation hearings for President Obama's nominee for Justice Scalia's replacement – then Court of Appeal judge Merrick Garland (now the federal Attorney-General in the Biden administration). That 'most consequential decision' led the way to President Trump's appointment of three Supreme Court justices: Justice Neil Gorsuch (to replace Justice Scalia); Justice Brett Kavanaugh (to replace Justice Anthony Kennedy); and Justice Amy Coney Barrett (to replace Justice Ruth Bader-Ginsberg[2]).

Biskupic's deep experience as a Supreme Court reporter and analyst is evident in the extensive research and reporting she did for the book relying on the record of cases, archives including over 100 interviews with people in the court and its orbit 'including a majority of justices', as well as former law clerks, regular Supreme Court advocates and academics. In deploying those formidable contacts and skill, Biskupic has written a compelling group portrait of the Supreme Court, capturing the shifting dynamics of the court during the Trump presidency. In the process of doing so she has also described the role of other figures who assisted President Trump in his mission to remake the court, and in turn, the country. These include: White House counsel Don McGahn to whom President Trump delegated the selection of judicial nominees; Leonard Leo, the leader of the Federalist Society, a powerful non-government group of conservative members who worked closely with Don McGahn; and Senator Mitch McConnell, who as Senate majority leader controlled the nomination and confirmation process.

The book helps to explain the power of the presidency in judicial appointments. Most significantly, under Trump the court went from a finely balanced court between liberals and conservatives, with one justice (usually Justice Kennedy) tipping the balance in favour of one or the other side, to one with a conservative majority (five Justices) or supermajority (five plus the Chief Justice). In a more finely balanced Court, Chief Justice Roberts (himself a conservative justice) had acted as a moderating influence on the potential excesses of a conservative majority to preserve the ongoing institutional legitimacy of the court (most notably by 'saving' President Obama's Affordable Care Act in a 5-4 decision in which he joined the liberal justices). As the book details, the arrival of Justices Gorsuch, Kavanaugh and Coney Barrett, has significantly diluted Chief Justice Roberts' ability to moderate decisions. Those new appointments, together with Justices Clarence Thomas and Samuel Alito have created majorities in favour of preferred conservative outcomes independently of the Chief Justice (most notably in the June 2022 decision in *Dobbs v Jackson Women's Health Organisation* that overruled (the court's existing precedents in) *Roe v Wade* and *Planned Parenthood v Casey*).

The book contains numerous insights shared by the justices (unidentified), including the deliberations that took place in several cases. In this regard, the book contains original reporting. For instance, the book details the efforts of the Chief Justice to prevent *Roe* and *Casey* being overturned. His goal was to preserve the institutional legitimacy of the court by not overturning settled precedents that had been in place (in the case of *Roe*) for over 50 years and on which women relied in making important life decisions. Thus, he tried to 'privately lobby fellow conservatives' against overruling the existing precedents. He appeared to do so 'for weeks' despite the majority judgment in *Dobbs* having been produced in record time two months after oral argument in the matter, with all five of the justices who formed the eventual majority having joined that decision before the draft leaked, a majority that did not subsequently waver. The book is therefore not just a chronicle of how the court has behaved and developed with the arrival of each Trump appointee, but also a chronicle of how the role of the Chief Justice has waxed, and now waned, during the time he has been the court's notional leader.

Biskupic's conclusion is dire: the court's majority (Justices Thomas, Alito, Gorsuch, Kavanaugh, Coney Barrett) and even the supermajority (when Chief Justice Roberts joins) are 'laying waste to precedents and, indeed, offering no one confidence that [they are] done with [their] work'. The message of the book is clear. President Trump may no longer be in office, however, his influence on American law carries on and will continue to do so for the foreseeable future, despite public confidence and trust in the court having dropped significantly, most especially after the *Dobbs* decision.

The highly political manner with which the Supreme Court is treated – from its appointment process to discussions on how a justice 'votes' in a case, the characterisation of decisions as being conservative and liberal, the routine identification of judges as the appointee of a particular president in public commentary about judicial officers – (thankfully) has no Australian analogue. The reasons for why that is so await several doctoral theses.

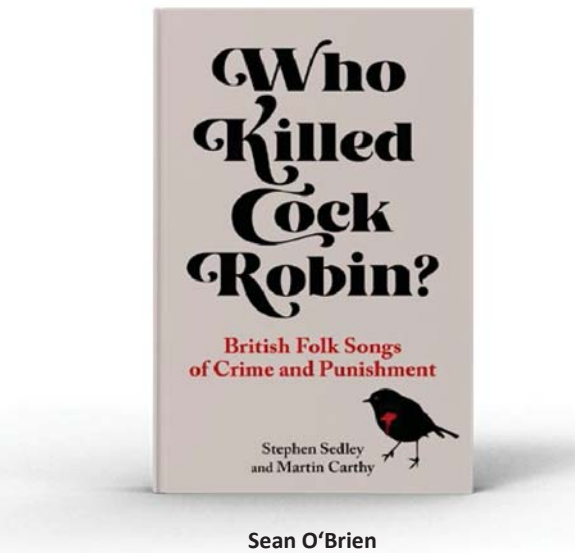
ENDNOTES

1 Amber Jamieson, 'How to cope with anxiety caused by Donald Trump: experts lend advice', *The Guardian*, 27 March 2016; Karen Attiah, 'Self-care tips for those who are terrified of Trump's presidency', *The Washington Post*, 12 November 2016; N'dea Yancey-Bragg 'How to navigate awkward political conversations at thanksgiving after a tense election', *USA Today*, 23 November 2020; Belinda Luscombe, 'Fighting With a Family Member Over Politics? Try These 4 Steps', *Time*, 19 February 2021.

2 The irony of replacing the liberal, pro rights, Justice Bader-Ginsberg with the conservative, anti-abortion Justice Coney Barrett echoed another appointment in US Supreme Court history when the first African American, liberal, Justice Thurgood Marshall, was replaced by the African American, conservative, Justice Clarence Thomas.

Who Killed Cock Robin? British Folk Songs of Crime and Punishment

By Stephen Sedley & Martin Carthy (Reaktion Books, 2021)



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This book takes the reader on a journey through the folk musical tradition of Britain as it intersects with the law from time to time. Chapters are arranged thematically according to the species of crime traversed in the songs. For example, 'Poaching', 'Homicide' and 'Arson'.

Co-author Sir Stephen Sedley is a former judge of the High Court of England and Court of Appeal. As a humorous aside 'Sedley's Laws of Documents'* (below) are sure to coax a knowing chuckle or two from counsel. Sedley provides a deft exposition of the historical legal context in the introduction to each chapter and a brief analysis of the particular law applicable to the conduct described in each song. Occasionally he proffers an argument for the defence or prosecution of a song's characters.

Sedley's co-author, Martin Carthy, is a renowned folk musician and musicologist. Carthy provides brief and informative notes on the provenance of each song, its traditional shape and melody. He has striven to collect the earliest recorded, most authentic versions, and has adorned them with musical notation.

A great pleasure alongside reading the book is listening to the tunes on your music streaming service, or on Youtube. Although the versions may differ, this brings the lyrics to life in way that reading them on the page simply cannot.

The following is a selection of links to Youtube videos for a few songs contained in the anthology:

- 'McCaffery'
- 'Lord Randall'
- 'Polly Vaughn'
- 'Famous Flower of Serving Men'
- 'The Flying Cloud'
- 'Hugh the Graeme'
- 'The Sheffield Apprentice'
- 'The Black Velvet Band'
- 'Maggie May'
- 'Tom's Gone to Hilo'

*Sedley's Laws of Documents:

1. Documents may be assembled in any order, provided it is not chronological, numerical or alphabetical;
2. Documents shall in no circumstances be paginated continuously;
3. No two copies of any bundle shall have the same pagination;
4. Every document shall carry at least 3 numbers in different places;
5. Any important documents shall be omitted;
6. At least 10 per cent of the documents shall appear more than once in the bundle;
7. As many photocopies as practicable shall be illegible, truncated or cropped;
8. Significant passages shall be marked with a highlighter which goes black when photocopied;
9. (a) At least 80 per cent of the documents shall be irrelevant. (b) Counsel shall refer in court to no more than 5 per cent of the documents, but these may include as many irrelevant ones as counsel or solicitor deems appropriate;
10. Only one side of any double-sided document shall be reproduced.
11. Transcriptions of manuscript documents and translations of foreign documents shall bear as little relation as reasonably practicable to the original;
12. Documents shall be held together, in the absolute discretion of the solicitor assembling them, by: a steel pin sharp enough to injure the reader; a staple too short to penetrate the full thickness of the bundle; tape binding so stitched that the bundle cannot be fully opened; or a ring or arch-binder, so damaged that the arcs do not meet.