Anzela Legal Studies Teachers' Conference
Undumbi Room Parliament House
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The Hon Catherine Holmes
Chief Justice

In order to speak to you today, I asked for some indication of what was on the Legal Studies curriculum so as to get some idea of where our mutual interests might lie. There were three topics identified; one was the attributes of a fair trial. Now that is something I can get worked up about. I could probably get excited about the other topics too, but there is a limit to how much time I have. You can think about what is needed for a fair trial at a macro or micro level; the macro being the social context you need for fair trials to take place and the micro being the particular conditions in which a given trial must take place to be fair. I will touch on aspects of both.

When I speak to you about this, our perspectives are no doubt a little different. You will be thinking about how anything I might say might be of any use in your teaching 16 and 17 year olds the course components, while I am thinking about what I wish that every Australian understood about the legal system by the time they reached adulthood and hoping that you might get some of it across to your students. Still, I think there is enough cross-over there for us to get by.

It is not an overstatement to say that the availability of a fair trial is critical in a democracy; and it is not just that trials should be fair, but that people should perceive them to be fair. As a society we agree that we will allow ourselves to be governed by certain institutions; the Parliament will make our laws, the executive will run the government, the courts will administer justice. It only works if there is general agreement that we accept their respective roles and accept the outcomes.

That is why educating people about our institutions, including the judicial system, is so important. You do not have to go very far on the internet to find a multitude of websites which will tell you that the justice system is rigged, the judges are corrupt, that the law is stacked in favour of the Catholics, the UN world conspiracy, the banks, the paedophiles:

tick whatever box you like. To put it simply, if people understand how things work, both in the larger institutional sense and in the smaller sense of the mechanics of how a trial works they are far less likely to fall for this kind of claptrap, and our democracy is the more secure for it. That is why your role in education is so important.

You are probably familiar with the article of the International Covenant on Civil and Political Rights which sets out the general principle of a fair trial: that in the determination of criminal charge every defendant is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

I want to focus to begin with on the independent and impartial tribunal aspects. I saw somewhere that Justice Daubney had spoken to this conference last year on the topic of judicial independence. I will not cover the same ground; my concern is that the existence and value of that independence is not generally understood. It disturbs me that most members of the community do not appear to have any concept of the three arms of government, one of which is the judiciary; that they often think judges are and should behave like public servants. That, of course would be inimical to the prospect of a fair trial, when so much of what the courts do in the civil sphere involves actions by individuals against the government, and all of what occurs in the criminal sphere, on which I will focus, involves the Crown.

Worse, occasionally you will see an accusing reference to judges as “unelected”, as though that were a bad thing. I strongly recommend to you an American website of the Brennan Centre for Justice at New York University. It focuses on democracy and justice but a major preoccupation is the effect of special interest spending in judicial elections. About 87% of US state judges face some form of election for their position. It seems to me axiomatic that you cannot have the appearance of a fair trial or perhaps even the actuality of a fair trial when donors to judges’ election campaigns are parties; as has happened in the United States.

Staying with the broader theme of institutional confidence, another thing which is damaging to community acceptance of the judiciary as independent and trials as fair is constant attack by the media and sometimes, more concerningly, by politicians on not just the outcomes of cases but the judges themselves. President Trump has made an art form of it in the United States but our own politicians are not free of the tendency. They are abetted by some sections of the press. And the way in which cases are reported frequently

lacks detail and nuance — and sometimes the critical facts. Let's face it, uninformed outrage is marvellous clickbait. If you can teach your students to evaluate what they read in the press about court cases with a critical eye, and ideally to go further to see if they can find more information so that they can form their own assessment, you will be doing the public a great service.

What is critical to fairness is that each case is judged on its merits and that the judge's rulings are made independently and according to law not according to what the executive or even the majority of the public would like to see happen. In the broader sense, democracy requires that the rights of the minority, and that includes deeply unattractive defendants standing trial on horrifying charges, are not trampled by public indignation, or what passes for it in the media. And quite apart from the democratic principle at stake, a rigorous approach demanding that evidence be properly obtained and the standard of proof beyond reasonable doubt be strictly observed actually makes for more reliable outcomes.

Occasionally I see on the television angry people demanding that someone be held accountable or expressing anger at an acquittal. Sometimes you feel there is a risk that people lose sight of the value of not just holding someone accountable but holding the right person accountable; because if near enough is good enough, the result is that not only is there the appalling result that the wrong person pays for the crime but the person who should be doing so is still at large. And proper and effective policing is devalued if we are happy just to have the least appealing suspect convicted or if we are content with shortcuts to the result.

Now coming down from those very broad concerns to the more particular. The Covenant sets out in detail the features necessary to a fair trial: the presumption of innocence; protection against self-incrimination; information as to the charge; the opportunity to prepare a defence and have legal representation of the person's choosing; the ability to be present at trial and defend him or herself, cross-examine the prosecution witnesses and calling his own; an interpreter if needed; and trial without undue delay. I quote this because it is a handy checklist, not because it is of great significance: these things are part of our common law and in some instances take statutory form.

They are the basics. I would actually go back a bit further. The essentials for a fair trial in a given case begin before anyone stands up in court. Inherent in the concept of a fair trial is

that the case is fairly investigated, and that police over-reach is prevented. That may mean unpopular rulings excluding evidence, leading to media indignation which may well feature the words “got off on a technicality”.

And also on the pre-trial front, publicity is of concern as capable of poisoning the prospects of a fair trial.

I have spoken about the importance of judicial independence in securing a fair trial, but this concerns the actual decision makers in the criminal trial. Because fairness also requires something that is increasingly difficult to attain, a jury whose minds have not been affected by publicity. Most of our conventional media outlets, to give them their due, are pretty good about respecting the need to avoid adverse publicity once someone has actually been charged. But up to that point they can be a little sensationalist. And lately there has been a phenomenon that concerns me, a refusal to recognise that it might actually be in everyone’s interests in securing a fair trial if investigative reports which give details of a lurid event are not made public before the people concerned come to trial.

Even more problematic is the pernicious effect of the internet, where random theories abound. That becomes more acute when you get to trial. You cannot police what jury members look at during a trial and there is a very human desire to know a little more about something than everybody else; to seek more information than is given in the court room. A couple of times I have been fool enough to Google myself. As a mild-mannered law-abiding citizen I have been startled at the crimes a couple of conspiracy sites ascribe to me. Truth and the internet are not close acquaintances. Sometimes plausibility and the internet are not close acquaintances. But the prospect that jurors will be tempted to trawl the internet for accurate or invented details of the accused or the alleged crime is a big concern, one which can plainly have a grave impact on a trial’s fairness. Our best protection seems to be other jurors; people who have done it cannot resist sharing their knowledge, and their fellow jurors follow the directions they are given at the beginning on the trial and report it to the trial judge. But for the juror discreet enough to look and not tell, I do not know what the solution is. I think it would be fair to say that access to internet coverage of defendants and alleged crimes is one of the greatest contemporary challenges to achieving trial fairness.

A trial without undue delay is one of the Covenant’s requirements. Obviously, delay has an effect on both the accused and the victim or the victim’s family. The accused person may

spend time on remand which he or she will never be able to recover even if acquitted. And there are consequences for the fairness of the trial itself. Evidence may be lost, witnesses' memories fade. Canada has been experiencing a good deal of controversy about trial delays. Last year, in *R v Jordan*, [2016] 1 SCR 631, the Supreme Court of Canada stayed drug charges because of a delay of four years to get them to trial. The accused had been arrested after into an investigation into what the judgment called a "dial-a-dope" operation. It is not a term I am familiar with, but apparently it refers to street level dealing. The court expressly recognised the right to be tried within a reasonable time, referring to the maxim "justice delayed is justice denied". And by a majority of five to four it took the drastic step of prescribing time periods for what amounted to unreasonable delay, 18 months from charge to the end of trial in what I take to be the equivalent to our District Court cases and 30 months for Superior Courts. Unless the Crown could show exceptional circumstances in the form of the cases complexity or unexpected events like witness illness, the charges would be stayed.

The judges in the minority, which included the Chief Justice, agreed that a stay of the charges should be granted in that case, but disagreed with the proposed time limits, warning that there would be unfortunate consequences.

That warning seems to have been soundly based. There were hundreds of stay applications across the country and there was outrage when a man charged with killing his wife had his charges stayed because of a five year delay. Last week in *R v Cody*, the Supreme Court reserved it decision on another drug trafficker case involving delay. It is thought that the court might clarify its earlier decision but it is unlikely to reverse it.

The court in *Jordan* blamed delay on a culture of complacency in the criminal justice system, combined with the increasing complexity of trial processes. Other sources suggest that a failure to make timely judicial appointments has been an ongoing problem in Canada. We have done fairly well by comparison; we have tried hard to streamline our processes, and vacancies on the bench are filled pretty promptly. I feel all the better for reading about Canada because our own statistics are not too bad. In the Supreme Court which obviously deals with the most serious criminal matters, only 12% have waited more than 12 months from the presentation of the indictment to be resolved and 2.4% have waited more than two years. But of those many will not involve delay in going to trial but the setting aside of the verdict on appeal and the ordering of the retrial. But having said that, we face a seemingly inexorable upwards trajectory in criminal filings. They have doubled over the last three financial years. Inevitably our timeliness in disposing of matters

will deteriorate, and I fear what that means for the fairness of trials as well as for the number of defendants on remand.

Of course, it is a requirement of a fair trial that the accused be accorded procedural fairness. If it is found on appeal that there has been a failure in the trial procedure so fundamental that the appellant has been denied a fair trial, the jury's verdict will be set aside, no matter how overwhelming the evidence. If it involves the kind of departure from essential requirements that the High Court is described as going to "the root of the proceedings" the proviso in the Criminal Code which allows the Court of Appeal to uphold a verdict despite irregularity if it is satisfied there has been no substantial miscarriage of justice cannot apply.

But what constitutes procedural fairness may change according to the circumstances. So for example one of the Convention requirements is a person be present for his trial. Our Criminal Code modifies that in s 617: the trial must take place in the accused person's presence unless he conducts himself so as to make the continuation of the proceedings impracticable. Then the court can direct the trial to proceed in his absence as happened in the Whisky Au Go Go case, of *R v Stuart & Finch* [1974] Qd R 297, where Stuart deliberately swallowed metal objects so that he had to be hospitalised in order to delay the trial. It has commonly been the case in other jurisdictions which do not have an equivalent provision that where an accused absconds the requirement for him to be present is not regarded as indispensable.

The right to representation also cannot be regarded as an absolute. There are many cases where an accused has sacked his lawyers or behaved so impossibly that they cannot continue to appear so that he is left representing himself, and usually doing a very bad job, but unsurprisingly that is not regarded as necessarily unfair.

And it is not just depending on the circumstances that what constitutes a fair trial may alter. The concept has been fluid over time. It was not until the end of the 19th Century that an accused person could give evidence in his or her own defence. So if you are a fan of 19th Century literature, in George Eliot's *Adam Bede,* for example*,* you will notice that poor sad Hetty Sorrel, charged with the murder of her baby, did not get to explain herself. The trials and the carrying out of the sentences were remarkably quick. And as Justices Hayne and Bell pointed out in *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [100] the presumption of innocence was not perceived as the fundamental principle it is accepted as

today until 1935, with the decision in *Woolmington v Director of Public Prosecutions*. That is the case of which Rumpole was so fond; it talks about the golden thread: the onus on the prosecution to prove the prisoner's guilt.

So is it the case that we keep adding to the requirements for a fair trial? Well, not entirely. The rule against double jeopardy used to be considered a feature of a fair trial; that you would not be re-tried for an offence of which you had been acquitted. That has changed in most states including our own. But to date the new provisions of the Criminal Code which permit the court to allow a person to be re-tried for murder if there is fresh and compelling evidence or on any offence carry a penalty of 25 years or more if the acquittal was tainted for example involving perjury or corruption of witnesses have not been invoked.[1] My point is though, we can change our ideas of what is fair.

Still, I do not think you'll have any trouble identifying some basic requirements of fairness for your students. What I hope very much is that you will convince them that fairness matters. And that it matters much more than whether they like the beneficiaries of it.

[1] Sections 678B and 678C of the Criminal Code.