SOME INCIDENTS OF JURY TRIALS IN CRIME

By The Hon. SIR CHARLES LOWE
of the Supreme Court of Victoria

DURING the month of May last I presided in the Criminal Court at Melbourne. I was called on to give a ruling in one case which has led me on reflection to think that there are some incidents of jury trials in the criminal jurisdiction which are not as fully known as they should be and that information in regard to them is either not to be found in the books or at least is not readily accessible. It is for this reason that I have been prompted to write this article.

In order to understand the point raised and the ruling given, let me recall that the ordinary course by which a case reaches the Criminal Court is a preliminary hearing before a Justice of the Peace or a Magistrate in which depositions are taken and the accused committed for trial. The procedure is set out in s. 40 and the following sections of the Justices Act 1928. In homicide cases where there has been an inquest on the death of the deceased, the committal is generally from the Coroner's Court.[1] In passing it may be noted that the procedure in England is different and as set out in Halsbury[2] it does not accord with the Victoria procedure. But although there is usually a preliminary examination, it is not necessarily so. The Attorney-General may file a presentment against any person without any preliminary investigation[3] and the prosecutors for the Crown may exercise this power in the name of the Attorney-General.[4] Where the Attorney-General presents without there having been a preliminary hearing notice is given to the accused to attend for trial on a named date, and on this notice he must attend to stand his trial. In Victoria the charge is brought before the Criminal Court in nearly all cases by 'presentment', the warrant for this mode of proceeding being found in s. 385 of the Crimes Act 1928. The very rare procedure of summoning a grand jury and, if it finds a true bill, further proceeding by way of indictment can be seen in s. 388 of the Crimes Act 1928 and *R. v. McInnes and others.*[5]

Let us next assume that the accused is before the Court on a presentment, that he has been arraigned, and upon arraignment has

[1] See ss. 15 & 16 Coroners Act 1928.
[2] Halsbury (2nd edn.) vol. 9 p. 126, sub-s. 163.
[3] *R. v. Cameron and Cracknell* (1896-7) 22 V.L.R. 481, 484.
[4] S. 387 Crimes Act 1928. [5] [1940] V.L.R. 416.

pleaded not guilty. The trial jury of twelve is then impanelled and the accused is put in charge of the jury. Unless for some reason the trial miscarries (about which I shall say something later), the accused is entitled to have the verdict of the jury. Even if the accused gives evidence on oath and admits doing the acts which constitute the crime, the judge cannot direct a verdict of guilty.[6] In *R. v. Farnborough*[7] Lord Russell of Killowen C.J. says that the jury may consider the matter too trivial to justify a conviction and not convict.[8] Nor is the case any different where the accused, having pleaded not guilty on arraignment, afterwards and during the course of the trial withdraws that plea and substitutes a plea of guilty. It is still for the jury into whose charge he has been given to decide the matter. If the judge discharges the jury and sentences the accused the conviction and sentence will be set aside.[9]

I must now turn to a different matter. It might be supposed that since we have the Juries Act 1928 all the law with relation to juries is to be found in it, but such a supposition would be a mistake. Where, however, the terms of that Act are mandatory, the Act must be obeyed.[10] The matter in point on the ruling I gave was the discharge of the jury. S. 78 of the Act deals only with a special case of inability to agree and even so it is merely permissive. There are many cases where a jury, not able to agree within six hours, have been detained for a substantially longer period without affecting the validity of the verdict. Indeed it may be said that the common law as to juries still exists where it has not been expressly or impliedly repealed. There are many and recent instances of the discharge by the trial judge of a jury and the order of a retrial where for example a juror has been approached by a party or on his behalf. At Geelong recently a jury was discharged when it was discovered that a missing Crown witness had passed unchallenged and was sitting on the jury impanelled to try the case in which he was to have been a witness. Whether or not a jury should be discharged is generally a matter of discretion in the trial judge i.e. discretion judicially exercised—and his discretion will not be lightly interfered with.

I am now in a position to refer more particularly to the ruling which has prompted this article.

The accused, A, after an inquest on the death of the victim was

[6] *R. v. Nicholas* [1921] V.L.R. 602. [7] [1895] 2 Q.B. 484, 486.

[8] The case of *R. v. Brown and Brian*, [1949] V.L.R. 177, should also be considered on this point.

[9] *R. v. Hancock* (1931) 171 L.T. Jo. 354, Halsbury (2nd edn.) vol. 9 p. 155 sub-s. 213, *R. v. Heyes* [1951] 1 K.B. 29.

[10] *R. v. Abrahams and Bull* [1948] V.L.R. 51.

presented for trial on a charge of murder. In a statement to the police he admitted the stabbing which caused the death and demonstrated the manner of it. He gave evidence on oath in which he alleged *inter alia* that it was his father who had done the stabbing and that his (A's) statement to the police was false and was made to protect his father. The jury acquitted A of murder but found him guilty of manslaughter. On appeal from this conviction the Court of Criminal Appeal thought there was further material evidence available which had not been called and which, if believed, tended to support his story that it was his father who did the stabbing. The Court of Criminal Appeal therefore quashed the conviction and ordered a new trial of A, but only on a charge of manslaughter. It was the retrial on a presentment of manslaughter which came before me. After the trial had proceeded for a full day, and at the beginning of the second day, the Crown Prosecutor applied for the discharge of the jury. The Attorney-General, he said, had intended to present both A and his father for the crime of manslaughter, but on attempting to serve a notice of trial on A's father he could not be found before the retrial commenced. He had, however, now been found. If the retrial went to verdict the accused might be acquitted because the jury thought the father did the stabbing. If the father were then presented another jury might find him not guilty on the ground that the jury thought the son did the stabbing. This, he said, would be making a travesty of justice. He asked for the discharge of the jury so that a new presentment against both father and son might be filed.

The application was refused. Assuming the consequences to ensue which the Crown Prosecutor suggested (though to be sure one could only guess at the jury's reasons), the Crown had not, in this case, as it might have done, applied for an adjournment to enable both to be presented together but had elected to proceed on a single presentment against A. A had been given in the charge of the present jury. No misconduct or irregularity had occurred which would warrant the discharge of the jury and A was entitled to the verdict of that jury. As a matter of interest it may be added that the jury convicted A of manslaughter as the previous jury had done.

One may speculate what the Crown would have done if the application had been granted and the jury discharged. The proceedings in the Court of Criminal Appeal only concerned A. Would the Crown have proceeded against A's father for murder and, if so, could they have presented him jointly with A, who could no longer be tried for murder but only manslaughter? Moreover would the

order of the Court of Criminal Appeal for the retrial of A for manslaughter be obeyed by trying A jointly with A's father? These latter questions were not argued and I refrain from pursuing them further.

Now let me refer to certain aspects of the common law in relation to juries. I will not elaborate the position as to peremptory challenges which the accused has. The law can be sufficiently ascertained from the Juries Act. Nor is there any difficulty in finding the law which governs challenges for cause or the practice of the Crown in standing aside. In particular I refer to the right of the trial judge. The case of *Mansell v. The Queen*[11] is of great authority. In it will be found the opinions of very eminent judges that if the judge sees that a juror who is called is deaf, blind or incapable by reason of mental or physical infirmities to serve or has conscientious scruples against finding a verdict of guilty he may direct him to stand aside. In *R. v. Burns*[12] the Full Court held that the trial judge has power to direct a juror to stand aside who is not in a fit state to discharge his duty. The Court said that 'Every Court of Justice has an inherent power – a duty as well as a power – to take care that the machinery of justice is not abused in such a manner as to prevent justice being done or allow a scandal to take place.'[13] In *R. v. Longland* Sir Samuel Griffith, then Chief Justice of Queensland, thought that he had power to discharge a jury on discovering that one of the jurors would not convict whatever the evidence was. In my own experience I have been told that a juror would not convict no matter how strong the evidence of guilt was. Having such matters in my mind I had in 1951 to preside at a second retrial of John Bryan Kerr on a charge of murder. The jury panel in our Courts are sworn in batches of twelve and as each batch of twelve stood up preparatory to the tender of the oath I read the following statement:

> 'Gentlemen: The jury to be impanelled today will have to try a charge of murder made against the accused person by the Crown. The oath now about to be tendered to you requires each and all of you to give a true verdict according to the evidence. If there is any one of you who is not willing to take that oath, or who is not willing to find a verdict according to the evidence – that is to say – not willing to find the accused guilty if he thinks the evidence shows him to be guilty and not willing to acquit him if the evidence does not satisfy him that the accused is guilty, he should not take this oath but should ask to be excused. If there is any

[11] (1858) 8 El. and Bl. 54.
[12] (1883) 9 V.L.R. (L.) 191.
[13] (1896) 7 Q.L.J. 56.

one of you who is not prepared to find according to the evidence, will he please sit down.'

Several jurors sat down and later each repeated on oath his objection, when I was dealing with excuses. The accused was convicted and the making of this statement to the jury was one of the grounds of appeal from the conviction. Counsel for the prisoner on the appeal said he found himself unable to support the ground. The Full Court said the making of the statement by the judge was not only not improper but was desirable.[14] Since *Kerr's* case the reading of such a statement to the jury in murder cases is routine practice. At the present sittings on a trial for murder no fewer than four jurors sat down and were afterwards excused.

Somewhat analogous is the practice of most judges in civil jury cases to inquire whether any of the jurors called are related to or in close business association with any of the parties and if so to have another juror selected.

Since this article does not purport to be an exhaustive exposition of the subject and since I have dealt with the particular occasion of the article, and such related matters as are necessary to understand what was done, this is an appropriate place to end.

[14] [1951] V.L.R. 239, 240.