

## THE CHIEF JUSTICE AND MR JUSTICE MURPHY: LEADERSHIP IN A TIME OF CRISIS<sup>1</sup>

THE HON JUSTICE ROSLYN ATKINSON<sup>2</sup>

Thank you for inviting me to speak tonight about our former Chief Justice and Emmanuel old boy, Sir Harry Gibbs.

Much has been written about Sir Harry's judicial career but most have concentrated on his judicial writings. What I want to speak about tonight is a less well known side of his career and character: the qualities of leadership that Sir Harry showed during the very difficult period for the High Court which followed the publication of articles in the *National Times* at the end of November 1983<sup>3</sup> and in the *The Age* newspaper on 2 February 1984<sup>4</sup> and ended with the death of Mr Justice Lionel Murphy on 21 October 1986.

I observed part of that period as an Associate at the Court during 1986 and cannot of course reveal any confidences reposed in me during that time; but most of the material is in the public record. The advantage my experience of working at the Court gives me is that I am able to rely on those matters in the public record that I know to be true and to reject those that I know to be false. Now more than 20 years later it is possible to revisit the events without the partisanship which engulfed people at the time. I will do this not by trying to draw any conclusions about the rights and wrongs of Mr Justice Murphy's behaviour but rather looking at the leadership shown by Sir Harry Gibbs during this desperately difficult time.

Let me first give a picture of the dramatis personae of this tale. The Chief Justice, Sir Harry Gibbs, tall, spare, intellectual, introverted, precise, courteous, conservative, a lawyer's lawyer; Mr Justice Lionel Keith Murphy: ebullient, extroverted, social and political reformer and at least prior to his appointment to the High Court, a politician's politician. Yet until the controversy which swelled around the High Court between 1984 and 1986 both men apparently enjoyed a reasonably respectful and even occasionally convivial relationship.

Sir Harry Gibbs was appointed a Justice of the High Court of Australia on 4 August 1970.<sup>5</sup> At that time he joined Chief Justice Barwick and McTiernan, Menzies, Windeyer, Owen and Walsh JJ.<sup>6</sup> It was not long before Sir Harry was the most senior puisne Judge.<sup>7</sup> Windeyer and Owen JJ left the court in 1972, the former by retirement and the latter by death.<sup>8</sup> Walsh and Menzies JJ died in 1973 and 1974 respectively and McTiernan J retired in 1976 after 46 years on the court, at the age

---

<sup>1</sup> Delivered at the Sir Harry Gibbs Law Dinner at Emmanuel College, The University of Queensland 16 May 2008.

<sup>2</sup> Supreme Court of Queensland.

<sup>3</sup> Marian Wilkinson, 'Big Shots Bugged', *National Times*, 25 November – 1 December 1983, 3-5.

<sup>4</sup> Lindsay Murdoch and David Wilson, 'Secret Tapes of Judge, Lawyer', *The Age* (Melbourne), 2 February 1984, 1, 5.

<sup>5</sup> (1970) 119 CLR iii.

<sup>6</sup> High Court of Australia, *Former Members of the High Court* (2008) <[http://www.hcourt.gov.au/justices\\_02.html](http://www.hcourt.gov.au/justices_02.html)> at May 1, 2008; Joan Priest, *Sir Harry Gibbs – without fear or favour* (1995), 59-60.

<sup>7</sup> Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 302.

<sup>8</sup> High Court of Australia, above n 6.

of 84. By the time Chief Justice Barwick retired in 1981 as a result of his failing eyesight caused by diabetes,<sup>9</sup> Sir Harry was the most senior Judge.<sup>10</sup>

Sir Garfield Barwick had become the Chief Justice of the High Court from federal politics.<sup>11</sup> Before he retired he was joined on the High Court bench by another politician, the Honourable Lionel Keith Murphy.<sup>12</sup> Murphy was elected a senator at the 1961 Federal election taking up his Senate seat in 1962. He remained a backbencher until he was elected Leader of the Opposition in the Senate in 1967.<sup>13</sup> After the election of the Whitlam government on 2 December 1972, he became leader of the government in the Senate, Attorney-General and Minister for Customs and Excise, positions he held until his resignation from the Senate on 10 February 1975 when he was appointed to the High Court to replace Sir Douglas Menzies.<sup>14</sup> Meanwhile Sir Harry became the Chief Justice on 12 February 1981.<sup>15</sup>

The *National Times* newspaper edition published on 25 November 1983 broke a story that in February 1980, Federal and New South Wales Police had begun a crime intelligence operation against a Sydney solicitor reputed to be a 'Mr Fix It' for organised crime in Australia.<sup>16</sup> The police, it was reported, bugged the solicitor's telephone from February until May 1980 as a result of information that the solicitor had 'fixed' the outcome of a court case involving an international drug trafficker. The article revealed that the solicitor's conversations had included conversations with a former New South Wales Magistrate and a Judge as well as others. It said that their conversations indicated amongst other things that the solicitor and senior public officials were involved in fixing judicial proceedings and providing prostitutes for a senior Judge.

On 2 February 1984, the *Age* newspaper in Melbourne published a story on its front page entitled 'Secret Tapes of judge, lawyer' by Lindsay Murdoch and David Wilson with the subheading 'Sydney solicitor's phone was tapped' and under the general heading of 'Network of Influence.'<sup>17</sup> The article went further than the allegations first raised by the *National Times*. It published what purported to be excerpts from transcripts of telephone conversations which had been illegally taped by the New South Wales police. It reported that the unnamed Judge was unwittingly taped during telephone calls to the solicitor's home and office in 1979 and 1980. The article reported that they talked about judicial appointments, politicians and personal matters. Amongst the serious allegations against the Judge was a conversation in which it was said that he promised to ask a prominent New South Wales government figure to help secure a highly paid public service job for a man connected with the solicitor. The Judge rang back to say that the job had been lined up. He told the solicitor after speaking to the government figure, 'He'll give it to him.' The newspaper reported that the senior New South Wales public servant who got his job some time after the Judge promised to ask a New South Wales government figure to secure it still held the position. In another telephone conversation later reported to be

<sup>9</sup> Blackshield, Coper and Williams, above n 7, 58.

<sup>10</sup> Ibid 302.

<sup>11</sup> Ibid 57.

<sup>12</sup> Jenny Hocking, *Lionel Murphy – a political biography* (1997) 224.

<sup>13</sup> Enid Campbell and H P Lee, *The Australian Judiciary* (2001) 77.

<sup>14</sup> Blackshield, Coper and Williams, above n 7, 485; Campbell and Lee, above n 13, 77.

<sup>15</sup> Blackshield, Coper and Williams, above n 7, 302.

<sup>16</sup> Wilkinson, above n 3, 3.

<sup>17</sup> Murdoch and Wilson, above n 4, 5.

with crime figure, Abe Saffron,<sup>18</sup> the solicitor referred to the Judge as ‘the trump.’ The transcript also reveals that the solicitor said he would ‘arrange girls’ for the Judge.<sup>19</sup>

The following month, on 6 March 1984, the Judge was named in the Queensland Parliament by Don Lane MP as being Mr Justice Lionel Murphy of the High Court of Australia.<sup>20</sup> The solicitor was Morgan Ryan.<sup>21</sup>

Two Senate Inquiries were conducted into the allegations against Mr Justice Murphy. The first commenced on 28 March 1984 and the second on 6 September 1984.<sup>22</sup> The inquiries heard evidence from the Chief Magistrate of New South Wales, Mr CR (Clarrie) Briese and New South Wales District Court Judge Flannery about what they alleged were Mr Justice Murphy’s improper attempts to influence them in respect of criminal charges faced by Morgan Ryan. The first Senate committee, consisting of Labor Senators, Michael Tate (the Chair), Nick Bolkus and Rosemary Crowley, Liberal senators, Austin Lewis and Peter Durack, and Democrat Senator Don Chipp, was split along party lines.<sup>23</sup>

The second committee was also split. Its report was tabled on 31 October 1984. A majority, however, found that, on the balance of probabilities, Mr Justice Murphy could have been guilty of behaviour serious enough to warrant his removal from the High Court of Australia. That committee consisted of Senators Michael Tate, Nick Bolkus, Austin Lewis and Janine Haines.<sup>24</sup> They were assisted by two former Judges, Mr John Wickham from Western Australia, and Mr Xavier Connor from the ACT.<sup>25</sup> Mr Connor observed: ‘In four years as a bench clerk to Victorian magistrates, in 23 years at the Victorian Bar, in 10 years on the Supreme Court of the ACT and in six years on the Federal Court of Australia I have not encountered anything comparable [with Murphy’s behaviour]. It would be unfortunate if Parliament or the public were to gain the impression that it was expected or normal judicial behaviour.’<sup>26</sup>

Ian Temby QC, the Commonwealth Director of Public Prosecutions (DPP), announced on 14 December 1984 that Mr Justice Murphy would be charged with attempting to pervert the course of justice.<sup>27</sup> Informations charging Mr Justice Murphy with two offences of attempting to pervert the course of justice relating to the hearing of criminal proceedings involving Morgan Ryan were laid in the Local Court of New South Wales in Sydney on 30 January 1985. Morgan Ryan had been charged with conspiracy in 1981, was committed for trial in March 1982 and was

---

<sup>18</sup> David Marr and Wendy Bacon, ‘The Judge who Would Not Take the Oath’, *National Times*, 2-8 May 1986, 10.

<sup>19</sup> Murdoch and Wilson, above n 4, 1.

<sup>20</sup> ‘How the Murphy Case Unfolds’ *Sydney Morning Herald* (Sydney), 29 April 1986, 4; *Hansard of the Queensland Parliament*, 6 March 1984, 1791.

<sup>21</sup> Jennifer Falvey, ‘Murphy Takes his Case Straight to the Jury’, *The Australian* (Sydney), 22 April 1986, 1.

<sup>22</sup> Parliamentary Commission of Inquiry Bill 1986 (Digest of Bill 86/98), 19 August 1986.

<sup>23</sup> Errol Simper, ‘How Lionel Murphy Went to War’, *The Australian* (Sydney), 29 April 1986, 10.

<sup>24</sup> Parliamentary Commission of Inquiry Bill, above n 22, 2.

<sup>25</sup> Errol Simper, above n 23, 10.

<sup>26</sup> For a detailed analysis of the Senate Inquiries see: Harry Evans, ‘Australian Senate: Inquiries Into the Conduct of a Judge’ (1985) 66(3) *The Parliamentarian* 115.

<sup>27</sup> *Sydney Morning Herald*, above n 20.

later found guilty and sentenced.<sup>28</sup> His conviction was overturned on appeal<sup>29</sup> and a fresh trial was expected to take place in 1985.

This is the only time a Judge of the High Court of Australia has ever faced criminal charges. Mr Justice Murphy continued to sit during February 1985 but did not sit from the beginning of March 1985, leaving the court to dispose of the whole of its business with six judges rather than the usual complement of seven.<sup>30</sup>

Mr Justice Murphy was committed for trial on both charges on 26 April 1985.<sup>31</sup> The *Sydney Morning Herald* published the full text of the written statement made by Mr Justice Murphy to the committal. It commenced, 'I am completely innocent. I am angry at these false charges. I did not attempt to pervert the course of justice. To do so would be a betrayal of what I have fought for all my life.' He observed that throughout history judicial officers of all levels have talked to one another about developments in the law and about cases in which they, or others, are engaged. He said, 'they do so in the sure knowledge that the judicial officer dealing with the case will act in accordance with his, or her, judicial oath or affirmation. Judges and Magistrates throughout Australia are, in my belief not frail. They will not deviate from their duty because of interchange with other judicial officers whoever they are.'<sup>32</sup>

Mr Justice Murphy referred to the fact that at the start of Ryan's trial on Monday 11 July 1983, Ryan's solicitor, Mr Miles, made an application to quash the indictment by referring to a speech on the state of the Australian Judicature made at the Australian Legal Convention by Sir Harry Gibbs in his role as Chief Justice on 8 July 1983.<sup>33</sup> In that speech the Chief Justice reportedly criticised the practice of prosecutors charging conspiracy where they could have directly charged a substantive offence. This was the effect, Mr Justice Murphy said, of *Hoar's* case.<sup>34</sup> Mr Miles handed up to Judge Flannery the *Sydney Morning Herald* report of that speech. Mr Miles also referred to a number of cases including *Hoar's* case. Mr Justice Murphy continued: 'Yet until these proceedings Judge Flannery said nothing about the reference by Mr Miles to the Chief Justice's speech. Judge Flannery has given everyone the impression that Mr Miles had referred out of the blue to *Hoar's* case which I had mentioned to Judge Flannery on the night of July 9. This has left the impression of an extraordinary coincidence explicable only by collusion between myself and Mr Miles. The facts about the Chief Justice's speech and Mr Miles' reference to it explode the coincidence, but this vital evidence did not come out prior to these committal proceedings.'<sup>35</sup> The effect of the publication of the statement by Mr Justice Murphy was of course to bring the Chief Justice, Sir Harry Gibbs, into the controversy.

<sup>28</sup> Justice J B Thomas, *Judicial Ethics in Australia* (2<sup>nd</sup> ed, 1997), 181; Bill Goff, 'Move by Temby in Murphy Case', *Canberra Times* (Canberra), 31 January 1985.

<sup>29</sup> *R v Ryan* (1984) 55 ALR 408.

<sup>30</sup> Enid Campbell, 'Suspension of Judges from Office' (1999) 18 *Australian Bar Review* 63, 70.

<sup>31</sup> *Sydney Morning Herald*, above n 20.

<sup>32</sup> *Sydney Morning Herald*, 27 April 1985, 9.

<sup>33</sup> Sir Harry Gibbs, 'The State of the Australian Judicature' (1983) 4 (12) *The Legal Reporter* 4.

<sup>34</sup> *The Queen v Hoar* (1981) 148 CLR 32.

<sup>35</sup> *Sydney Morning Herald*, above n 32.

In the address on the State of Australian Judicature given at the Australian Legal Convention on 8 July 1983 in Brisbane,<sup>36</sup> Sir Harry had commented on, amongst other things, criminal procedure. He said two questions arose in relation to that area. The first was undue delays between the time of arrest and the time of trial and the second whether the trial process itself needed to be made more efficient. With regard to the second question, he referred to the increasing number of long and complex trials. He made a number of suggestions with regard to how that could be improved by devising a new system of interlocutory procedure in an endeavour to find a way to define the issues, and to obtain admissions of matters which are not really in contest by the defence. He also said that there have been cases in which the prosecution itself was not without responsibility for the length and complexities of the trial. He observed, 'It seems to be common for the prosecution to charge conspiracy to commit an offence even though the evidence shows a substantive offence was committed. My court has on a number of occasions recently had to reiterate what was recognised over 15 years ago by the House of Lords in *Verrier v Director of Public Prosecutions* [1967] 2 AC 195, that it is the general rule that where there is an effective and sufficient charge of a substantive offence, it is undesirable to add, or for that matter to substitute, a charge of conspiracy, as that will tend to prolong and complicate the trial. There are, however, exceptions to that rule and all too often prosecutors consider that the case falls within them.'<sup>37</sup>

Sir Harry's address was reported on page 3 of the *Sydney Morning Herald* of 9 July 1983.<sup>38</sup> Towards the end of the article he was quoted as saying, 'It seems common for the prosecution to charge conspiracy to commit an offence even though the evidence shows that a substantive offence was committed.'<sup>39</sup> *Hoar's case*<sup>40</sup> was not referred to by name by Sir Harry in his State of the Judicature address nor was it referred to in the *Sydney Morning Herald*<sup>41</sup> however it was presumably one of the cases to which the Chief Justice referred. The case concerned conviction of two persons, Hoar and Nobel, on a charge of conspiracy with others to commit an offence against the law of the Northern Territory (the *Fisheries Act 1965*), contrary to s 53(1) of the *Criminal Law and Procedure Act 1978* (NT). Hoar was also convicted on two substantive offences. The conspiracy of which they were convicted was a conspiracy to fish for barramundi during a prohibited period and at a prohibited place.

In the majority judgment, Gibbs CJ, Mason, Aickin and Brennan JJ observed at 38: 'Generally speaking, it is undesirable that conspiracy should be charged when a substantive offence has been committed and there is a sufficient and effective charge that this offence has been committed. As Lord Pearson observed in *Verrier v Director of Public Prosecutions* [1967] 2 AC 195 at 223-224, the addition of a charge of conspiracy in the same indictment will tend to prolong and complicate the trial.' Murphy J went further. His Honour said at 41: 'The over zealous use of conspiracy charges proves embarrassing and costly not only to the accused but ultimately to prosecuting authorities and the courts. It brings the administration of criminal justice into disrepute. This is happening in Australia. History shows that the

---

<sup>36</sup> Gibbs, above n 33.

<sup>37</sup> Ibid.

<sup>38</sup> John Slee 'The Temptation to Scrap Juries', *Sydney Morning Herald* (Sydney), 9 July 1983, 3.

<sup>39</sup> Ibid.

<sup>40</sup> *The Queen v Hoar*, above n 34.

<sup>41</sup> Slee, above n 38.

administration of justice will be well served if courts keep a tight reign on the spawning of conspiracy charges.’

As well as releasing to the press the statement he made at the committal, Lionel Murphy also took legal steps to try to overturn the decision of the Magistrate to commit him for trial. The application for judicial review was heard by Toohey J in the Federal Court and dismissed on 29 May 1985.<sup>42</sup>

The trial before Justice Cantor and a jury commenced on 5 June 1985.<sup>43</sup> Counsel for the prosecution was Ian Callinan QC and for the defence, Tom Hughes QC. Lionel Murphy faced two counts of attempting to pervert the course of justice, one in relation to Judge Flannery and one in relation to Mr Briese. He was convicted on 5 July 1985 on one count on the indictment and acquitted on the other. The count on which he was convicted was that between 1 December 1981 and 29 January 1982 ‘at Sydney in the State of New South Wales and elsewhere whilst a Justice of the High Court of Australia he did attempt to pervert the course of justice in relation to the judicial power of the Commonwealth in that he did attempt to influence Clarence Raymond Briese, Chairman of the bench of Stipendiary Magistrates in the said State to cause Kevin Jones, a Stipendiary Magistrate in the said State, to act otherwise than in accordance with his duty in respect to the hearing of committal proceedings against one Morgan John Ryan of charges of conspiracy under s 67(b) and s 86(1)(d) respectively of the *Crimes Act 1914* (Cth) then being heard by the said Kevin Jones.’<sup>44</sup>

The alleged facts of that offence were that there had been a series of conversations between Mr Justice Murphy and Mr Briese. In one of those conversations, Mr Justice Murphy was alleged to have phoned Mr Briese and said ‘I have got a matter that I want to talk to you about, but not on the phone.’<sup>45</sup> Mr Justice Murphy and his wife then visited Mr Briese’s home for dinner on 6 January 1982 and Murphy is alleged to have said to Briese of the Morgan Ryan case, ‘I will tell you of another wrong case of conspiracy and that is the Morgan Ryan case.’<sup>46</sup> Murphy professed knowledge of the case and said that he was disturbed by it. Briese said he would make some enquiries and see what the situation was. The two men met at a function and Mr Briese told Mr Justice Murphy that he had spoken to Mr Jones who was the Magistrate hearing the committal and that Mr Briese’s guess was that Jones would commit Morgan Ryan for trial. Murphy was alleged to have replied ‘The little fellow will be shattered.’<sup>47</sup> Subsequently Mr Justice Murphy rang Mr Briese and told him he had been speaking to the Attorney-General from New South Wales and that the Attorney-General was going ahead for legislation for the independence of Magistrates. Mr Justice Murphy is then alleged to have said to Mr Briese ‘And now what about my little mate?’<sup>48</sup> He was acquitted of the second count on the indictment relating to Judge Flannery.

Only a month after the conviction of his judicial colleague, Sir Harry, as Chief Justice of the High Court of Australia, was due to give the next biennial State of the

---

<sup>42</sup> *Murphy v Director of Public Prosecutions* (1985) 60 ALR 299.

<sup>43</sup> *Sydney Morning Herald*, above n 20; details provided in *R v Murphy* (1985) 4 NSWLR 42, 45.

<sup>44</sup> These details are found in: *R v Murphy* (1985) 158 CLR 596, 597.

<sup>45</sup> *Sydney Morning Herald*, above n 20, *R v Murphy*, above n 43, 47.

<sup>46</sup> *R v Murphy*, above n 43, 68.

<sup>47</sup> Edited text of Justice Cantor’s judgment reported in: *Sydney Morning Herald* (Sydney), 4 September 1985, 7.

<sup>48</sup> *Sydney Morning Herald*, above n 20, *R v Murphy*, above n 43, 68.

Australian Judicature address at the Australian Legal Convention in Melbourne. Sir Harry referred to the controversy:

Any remarks on the state of the courts in Australia would paint too bright a picture if they did not include some reference to two disturbing series of events, both without precedent in Australia, which have occurred since this address was last delivered.

The first concerned evidence inflicted on Family Court judges and their families:

The second matter which has caused sadness to those concerned with the state of the courts in Australia is the fact that three judicial officers, one a member of the High Court, have been charged with offences concerning the administration of justice. Two have been convicted, but have appeals, or similar procedures, pending, and one is awaiting trial. These matters are all sub judice and I can say no more about them. But there is one thing that I do wish to say. I am sure that no one who knows anything about the working of the law in Australia has any doubt about the complete integrity of the judicial system as a whole, and notwithstanding the tendency of some Australians to denigrate those who hold high office, I shall be very surprised if the majority of ordinary citizens hold any different opinion.<sup>49</sup>

On Murphy's application, Cantor J reserved 21 questions for the consideration of the Full Court of the High Court under s 72 of the *Judiciary Act*.<sup>50</sup> In the Supreme Court Murphy moved to arrest judgment on the ground that on its proper construction, s 43 of the *Crimes Act* was incapable of applying to the facts alleged in the indictment and, alternatively if it could be so applied, it was beyond the legislative power of the Commonwealth.<sup>51</sup> On the application for the Attorney-General for the State of New South Wales, 'that part of the cause pending in the criminal division of the Supreme Court of New South Wales which raises the question whether s 43 of the *Crimes Act 1914* applies in respect of committal proceedings with respect to indictable offences against the laws of the Commonwealth conducted by a Magistrate appointed under the *Justices Act 1902* (NSW), and if so, whether in relation to such committal proceedings s 43 of the *Crimes Act*, and s 68 of the *Judiciary Act* are valid laws of the Commonwealth, and whether, prior to its repeal, s 85E of the *Crimes Act 1914* was a valid law of the Commonwealth', was removed into the High Court under s 40 of the *Judiciary Act*.<sup>52</sup>

The questions reserved by Cantor J and those removed were heard together by the High Court in *R v Murphy* (1985) 158 CLR 596 on 12 to 14 August 1985. On 20 August the remaining six members of the High Court handed down a unanimous joint judgment. Their Honours held that an attempt to pervert the course of committal proceedings in relation to an alleged offence against a law of the Commonwealth is an attempt to pervert the course of justice in relation to the judicial power of the Commonwealth within the meaning of s 43 and that in relation to such committal proceedings, s 43 of the *Crimes Act*, and s 68 (2) of the *Judiciary Act* are valid laws of the Commonwealth, and s 85E of the *Crimes Act* was, prior to its repeal, a valid law of the Commonwealth. The questions reserved under s 72 of

---

<sup>49</sup> (1985) ALJ 522, 522.

<sup>50</sup> *R v Murphy*, above n 43, 45; *R v Murphy*, above n 44, 597.

<sup>51</sup> *R v Murphy*, above n 43, 45.

<sup>52</sup> *R v Murphy*, above n 44, 598.

the *Judiciary Act* were remitted for hearing to the Full Court of the Supreme Court of New South Wales.<sup>53</sup>

On 3 September 1985, Lionel Murphy was sentenced to 18 months imprisonment.<sup>54</sup> Justice Cantor was reported as saying during his sentencing that Murphy's attempt to pervert the course of justice had done a 'terrible injury' to the administration of justice and had adversely affected the integrity and standing of every Judge in Australia. The sentence had to demonstrate the intolerance of the judiciary for such conduct.<sup>55</sup> His Honour continued 'even so, I feel it will take some time for the judiciary and its members to live down this episode and to be restored in the position in the public mind they formerly held as men of unquestioned impartiality and integrity.'<sup>56</sup> Mr Justice Murphy immediately announced that he had no intention of retiring. He was granted bail pending appeal.<sup>57</sup>

On 28 November 1985, the Court of Appeal and Court of Criminal Appeal of NSW, sitting jointly, quashed the conviction and sentence.<sup>58</sup> The court held, *inter alia*, that the trial judge had misdirected the jury on the use that could be made by them of evidence of good character and on the standard of proof with regard to motive. However they said that there was evidence upon which a jury properly instructed could convict and so ordered a new trial.<sup>59</sup>

Mr Justice Murphy was retried before Hunt J and a jury on 14 April 1986. On the retrial, he did not give sworn evidence as he had during the first trial but rather made an unsworn statement from the well of the court room on which he could not be cross-examined.<sup>60</sup> He was acquitted on 28 April 1986.<sup>61</sup> However questions remained, particularly as to the proper conduct of a judge.

The night of his acquittal many of the High Court Judges (and their Associates) were in Melbourne at an oration to celebrate the centenary of the Judge who is usually considered the greatest High Court Judge, the former Chief Justice, Sir Owen Dixon. The oration given by the then Governor-General, Sir Ninian Stephen, who co-incidentally gave the Sir Harry Gibbs lecture in 2007, was entitled 'Sir Owen Dixon – a celebration: an oration to commemorate the centenary of the birth of the late Sir Owen Dixon, distinguished juror and statesman.'

The High Court quite properly maintained a media silence however that did little to quell the media speculation. David Marr in the *National Times* of 25 April-1 May 1986, before the verdict was returned, observed that:

The jury is sitting to decide only whether Murphy is guilty of a particular charge: attempting to pervert the course of justice. And their verdict cannot directly bear on the great issue that lies behind this case, one which is tied neither to this trial nor the criminal law: the proper conduct of judges.

<sup>53</sup> Ibid 620.

<sup>54</sup> Jenny Cooke, 'Murphy: 18 months But Will Not Resign', *Sydney Morning Herald* (Sydney), 4 September 1985, 1.

<sup>55</sup> Edited text of Justice Cantor's judgment, above n 47, 7.

<sup>56</sup> Cooke, above n 54, 1.

<sup>57</sup> Ibid.

<sup>58</sup> *R v Murphy*, above n 43, 54-55, 59-60. The judgment date of 28<sup>th</sup> November 1985 is taken from a copy of the judgment as handed down, however the Law report states the date as 18 November, 1985.

<sup>59</sup> Ibid 70.

<sup>60</sup> Above n 21, 1.

<sup>61</sup> Thomas, above n 28, 185.



He referred to statements made by Murphy during the trial suggesting it was appropriate for him to approach the Chief Judge of a lower court, Chief Judge Staunton, to get an early trial for a friend who was a solicitor.

Of that approach to Staunton, Murphy this week told the jury: 'To my mind this was perfectly proper, all it would mean was that he would be dealt with according to law as soon as possible.'

The second matter was the appropriateness of Murphy's commenting to the Chief Magistrate about the strength of the case against his friend when that matter was being heard in the Magistrates Court. Marr concluded,

When the hullabaloo about the verdict dies down, this issue will still have to be faced.<sup>62</sup>

In the *Sydney Morning Herald* of 29 April 1986 the editorial said, 'The acquittal of Justice Murphy at his retrial clears the way for him to resume his place on the High Court. Many people expect him to be back at work when Court resumes next week. That should close an unhappy chapter in Australian history in which an intolerable strain was placed on not only the lives of Justice Murphy and many others, but also the institution of the judiciary itself.' But the *Sydney Morning Herald* also had an article in which Verge Blunden, the High Court Reporter, under the headline 'Uncomfortable seats on the High Court' opined 'Justice Murphy is likely to resume his place on the seven member High Court Bench in the sittings beginning next Tuesday. But this could not be confirmed last night because the Chief Justice, Sir Harry Gibbs, had placed a news blackout around the Bench. It is known there has been deep anxiety on the Bench about events of the past two years, and there must be a question mark over when and if the court will return to normal operation. It is reasonable to assume that some of the other judges may not feel comfortable sitting with Justice Murphy, although none of them will comment publicly on the matter.'<sup>63</sup> In the *Financial Review* of the same day the headline of an article by David Solomon and Gary West said, 'Justice Murphy expected back on High Court Bench in fortnight.'<sup>64</sup> On 30 April, Verge Blunden referred to the fact that Sir Harry had remained silent about the future of Mr Justice Murphy, and speculated that there was a strong likelihood that Justice Murphy would return to the bench for the May sittings.<sup>65</sup>

Other allegations about inappropriate behaviour by Mr Justice Murphy surfaced in the media. Murphy was publicly criticised for not giving evidence on oath or calling evidence of good character at his second trial.<sup>66</sup> In addition, David Marr and Wendy Bacon in the *National Times*<sup>67</sup> referred to a recommendation

---

<sup>62</sup> David Marr, 'Murphy's Final Plea', *National Times*, 25 April 25 – 1 May 1986, 3.

<sup>63</sup> Verge Blunden, 'Uncomfortable seats on the High Court', *Sydney Morning Herald* (Sydney), 29 April 1986, 4.

<sup>64</sup> David Solomon and Gary West, 'Justice Murphy Expected Back on High Court Bench in Fortnight', *Financial Review* (Melbourne), 29 April 1986, 3.

<sup>65</sup> Verge Blunden, 'Sir Harry's Silence Hints at an Early Return for Murphy', *Sydney Morning Herald* (Sydney), 30 April 1986.

<sup>66</sup> David Marr and Wendy Bacon, 'The Judge who Would Not Take the Oath' *National Times*, 2-8 May 1986, 10.

<sup>67</sup> David Marr and Wendy Bacon, 'Temby Rejects Advice to Charge Murphy Again', *National Times*, 2-8 May 1986, 5. See also: Brian Toohey and Wendy Bacon,

reportedly made by Ian Callinan QC to Ian Temby, the DPP, to prosecute Lionel Murphy and Morgan Ryan for conspiracy and attempted bribery in regard to what

was known as the Greek conspiracy case and alleged medifraud by a client of Ryan's. The recommendation was not accepted.

The Report of the Stewart Royal Commission was tabled in Parliament.<sup>68</sup> Its brief had been to determine whether what had become known as the *Age* tapes were genuine. A second secret volume of the report, the first volume of which authenticated the *Age* tapes, was said to contain further allegations against Murphy.<sup>69</sup>

Untrue stories began to circulate and be published suggesting that one or more of the High Court Judges would refuse to sit with Mr Justice Murphy, or that Sir Harry was involved in an attempt to have the Governor-General persuade Mr Justice Murphy to resign, or that the judges would conduct some sort of inquiry into Mr Justice Murphy's behaviour.<sup>70</sup> No doubt aware of the damage such false allegations could do to the institution of the High Court, Sir Harry took the extremely unusual step of issuing a public statement about the Judges' meeting held on 5 May 1986.<sup>71</sup>

Yesterday there was a meeting of the Justices of this Court, including Mr Justice Murphy. In some way a misunderstanding of the intentions of the Justices has arisen. The Justices do not intend to conduct any inquiry or to make any finding as to the conduct of Mr Justice Murphy in order to resolve any controversy as to his Honour's judicial status, rights or duties. They did not agree to do so yesterday.

The function of the Court is to decide cases in open court and not to conduct private inquiries. The Court has no function to perform as to its own composition, though its members, of course, have an abiding concern with the preservation of public confidence in it. It was that concern which led the meeting of the Justices yesterday to consider what, if any, part it was appropriate for them as individuals to play. In the course of the discussion in that regard Mr Justice Murphy sought an opportunity to see the relevant material in the confidential volume of Mr Justice Stewart's Report and to make a public response to it. He volunteered in the meantime not to sit. The other members of the Court agreed to postpone further discussion until Mr Justice Murphy has made such response as he wishes to make.<sup>72</sup>

The Chief Justice meanwhile, as Joan Priest notes in her biography of him, continued his heavy schedule of duties unabated. 'He showed poise and courage in

---

'Questions Lionel Murphy Should Answer', *National Times*, 9-15 May 1986, 8; 'Murphy Met Abe Saffron: New Claim', *The Australian* (Sydney), 3 June 1986.

<sup>68</sup> New South Wales and Victoria, Royal Commission of Inquiry into Alleged Telephone Interceptions (1986) 155/1986.

<sup>69</sup> Thomas, above n 28, 185.

<sup>70</sup> Peter Bowers, 'Gov-Gen Acts on Murphy' *Sydney Morning Herald* (Sydney), 7 May 1986, 1, 4-5; David Solomon, 'High Court Judges Try Hard Not to Sit in Judgment of Murphy' *Australian Financial Review* (Melbourne), 7 May 1986, 6; Gregory Hywood, 'Judges Must Decide – Hawke' *Australian Financial Review* (Melbourne), 7 May 1986, 1, 4; David Solomon, 'Threat of Strike Action in High Court Staggered Government' *Australian Financial Review* (Melbourne), 8 May 1986, 8; Geoff Kitney, 'Murphy: The Agony Could Go On for Months' *National Times*, 9-15 May 1986, 3.

<sup>71</sup> Mike Steketee, 'Statement From Judges Caught Govt by Surprise', *Sydney Morning Herald* (Sydney), 7 May, 1986, 1, 4.

<sup>72</sup> Priest, above n 6, 110; Campbell, above n 30, 71.

the heat of the media attention.<sup>73</sup> His primary concern was with the dignity and independence of the High Court and its judges.

The Federal government set up a Parliamentary Commission of Inquiry<sup>74</sup> to inquire and advise the Parliament whether any conduct of Mr Justice Murphy had been such as to amount in its opinion to proved misbehaviour within the meaning of s 72 of the Constitution.<sup>75</sup> Its members were three retired judges, the Hon Sir George Lush, the Hon Sir Richard Blackburn, OBE and the Honourable Andrew Wells QC. It was required to conduct its hearings in private unless special circumstances required a public hearing and to report by 30 September 1986.<sup>76</sup>

Mr Justice Murphy applied to the High Court for an interlocutory injunction to prevent the Commission from sitting on the grounds that the Act was invalid; or, assuming it to be valid, it did not authorise investigations of the kind proposed to be made; and that Mr Wells was disqualified from taking part in the inquiry.<sup>77</sup> The application was heard in Brisbane on 26 June 1986 and the decision handed down the following day. The injunction was refused as the court held that the balance of convenience required that the Commission's investigations should proceed.

The first two questions were set down for further hearing on 6 and 7 August 1986 but the court immediately decided that Mr Wells was not disqualified from sitting. The remarks which had been alleged to disqualify him were reported in the *Adelaide Advertiser* on 24 February 1984 soon after the 'Age tapes' had been published. On the previous day the Chairman of the Australian Law Reform Commission Mr Justice Michael Kirby had been reported as saying that the discussion between the solicitor and the Judge about the appointment of a contact to a high position in the New South Wales public service and the agreement of the Judge to lobby the senior politician who would make the appointment was the sort of thing that 'goes on all the time in judicial circles.'<sup>78</sup> He was reported as saying 'the intervention of judges in public service appointments was part of the netherworld of the legal arena and explained that it was a practice inherited from Britain.'<sup>79</sup> Mr Justice Wells, as his Honour then was, of the South Australian Supreme Court was reported to have said in a court case on the following day that the implication of the article not only imputed corruption to the judges but implied that they were from time to time willing to act in flagrant defiance of constitutional principles governing the separation of powers. He said that no judge of his acquaintance would ever dream of doing such a thing.<sup>80</sup>

In rejecting the proposition that Mr Wells would be unable to bring an impartial and unprejudiced mind to the inquiry, the High Court said,<sup>81</sup> 'The remarks made by Mr Wells were made long before the inquiry was set up and were not made in reference to the plaintiff or his conduct but to rebut the assertions attributed by the writer of the article in the newspaper to Mr Justice Kirby. We, of course, do not know whether Mr Justice Kirby did make remarks to that effect. However, in our experience, it would not be right to say that judges commonly intervene to influence

---

<sup>73</sup> Priest, above n 6, 110.

<sup>74</sup> *Parliamentary Commission Inquiry Act 1986* (Cth).

<sup>75</sup> *Ibid* s 5.

<sup>76</sup> *Ibid* s 7; *Murphy v Lush* (1986) 60 ALJR 523, 523-4.

<sup>77</sup> *Murphy v Lush*, above n 76.

<sup>78</sup> Mark Brauer, 'Murky Waters Clouding Bottom Issue', *Adelaide Advertiser* (Adelaide), 23 February 1984, 7.

<sup>79</sup> *Ibid*.

<sup>80</sup> *Murphy v Lush*, above n 76, 525; 'Judicial 'Job Meddling' Claims Rejected', *Adelaide Advertiser* (Adelaide), 24 February 1984, 9.

<sup>81</sup> *Murphy v Lush*, above n 76, 525.

the making of public service appointments or that there is a practice inherited from Britain whereby judges descend into some shady netherworld of dubious behaviour. The remarks of Mr Wells amount to no more than a denial that judges, to his knowledge, engaged in conduct of the kind allegedly described by Mr Justice Kirby, conduct of a kind which Mr Wells regarded, understandably, as contrary to accepted standards of judicial behaviour. It would be preposterous to hold that the expression by a judge of generally held views as to the standards of judicial propriety should be thought to disqualify him from acting in a judicial capacity.<sup>82</sup>

The next sittings commenced on Tuesday 29 July 1986. The workload was heavy and unrelenting. Several important decisions were handed down in that week<sup>83</sup> and two important cases argued.<sup>84</sup> Mr Justice Murphy did not sit while the Parliamentary Commission of Inquiry carried out its investigations into his behaviour.

However, Justice Murphy was informed that he was terminally ill. He decided to return to the High Court to sit. The inquiry process had not reached a conclusion and Sir Harry told Mr Justice Murphy that it was 'undesirable' for him to sit. Murphy disagreed and exercised his constitutional right to sit.<sup>85</sup> Mr Justice Murphy withdrew his challenge to the validity of the Commission.<sup>86</sup>

This was undoubtedly a most difficult time for Sir Harry. He was firmly of the view that Lionel Murphy should not sit. He wrote to Mr Justice Murphy firmly expressing that view. He did not purport to speak on behalf of all of the judges but wrote on 31 July 1986 as Chief Justice in the following terms, which I reproduce in full:

Dear Lionel,

I repeat that I am sincerely sorry to hear the news about your health.

As you know, I think it undesirable that you should sit, and in the interests of the Court, as well as in your own interest, I do not propose to list you to sit. However, if you do decide to take your seat on the bench I request you to let me know (or to ask your staff to let my staff know) beforehand on what cases during this sittings you would wish to sit and I shall then make the necessary arrangements.

<sup>82</sup> The article published in the *Adelaide Advertiser* on 24 February 1984, after reporting Mr Justice Wells' remarks, went on to clarify its report on the previous day about Mr Justice Kirby's statement: 'In Sydney last night Mr Justice Kirby said it was common practice for governments to consult a number of people, including judges, about statutory appointments. His remarks had not been intended to imply that this practice was unique to judges or that it was corrupt. 'I have been contacted at times when I have had some knowledge of the qualities of someone, and in those circumstances I feel I was doing my duty.'

<sup>83</sup> *Carlton and United Breweries Ltd v Castlemaine Tooheys Ltd* [1986] HCA 38; (1986) 161 CLR 543; *Re JRL; Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342 on 30 July. On 31 July 1986 the court handed down its decisions in: *Minster for Aboriginal Affairs v Peko – Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 and *Re F; Ex parte F* [1986] HCA 41; (1986) 161 CLR 376. On 1 August the court handed down its decision in *Commercial Radio Coffs Harbour v Fuller* [1986] HCA 42; (1986) 161 CLR 47.

<sup>84</sup> On 29 and 30 July 1986: *State Bank of NSW v Commonwealth Saving Banks of Australia* [1986] HCA 62; (1986) 161 CLR 639 was argued. On 30 and 31 July, *Attorney-General (NT) v Maurice* [1986] HCA 80; (1986) 161 CLR 475 was argued.

<sup>85</sup> Hocking above n 12, 311; Priest, above n 6, 111-113.

<sup>86</sup> Christobel Botten, 'Decision is Seen as Right and Proper' *The Age* (Melbourne), 2 August 1986, 4.

I would propose to make a news release in the following terms:

Mr Justice Murphy has informed me that he is gravely ill. He has also stated that he intends to exercise what he has described as his constitutional right to sit on the Court, notwithstanding that the Parliamentary Commission of Inquiry has not yet made its report. It is essential that the integrity and reputation of any Justice of this Court be seen to be beyond question. That being so, I regard it as most undesirable that Mr Justice Murphy should sit while matters into which the Commission is inquiring remain unresolved, and before the Commission has made its report. Nevertheless, in the circumstances to which I have referred, I do not regard it as appropriate to do more than express that view.

I would not propose to say anything in court, but would make the release on the day when you first sit. I would hope that if you wish to say anything you would follow a similar procedure. In framing my draft news release in the way that I have done I have assumed that your own statement, if any, would be similarly uncontroversial and that I would not need to reply to it. I would appreciate it if you supplied me in advance with a copy of any statement you proposed to make. In your own interests, particularly to avoid any possibility of harassment by the media, I would suggest that our statements be not released until after you have gone into Court.

Mr Justice Murphy replied in equally firm tones:

Dear Bill,

I refer to your letter of 31 July 1986.

I find it extraordinary that you propose to make a news release, especially one in the terms set out in your letter. Although you describe it as uncontroversial, it would inevitably provoke an intense public controversy involving you, me and the Court.

If you do so, this would be the second time within weeks that such a controversy has been provoked. In May, the Government through 2 Ministers informed me that you had said that if I resumed sitting, the Court would or might go on strike. I now know that most members of the Court had not even contemplated such a course. However I have not heard any public denial by you, although the matter has been widely reported.

Your statement questions whether I have a constitutional right to sit on the Court. The plain constitutional position is that the Justices when appointed to the Court have a constitutional right to sit until death, resignation or removal under s 72 (on the grounds only of proved misbehaviour or incapacity). It is not for the Chief Justice or any Justice to decide whether it is undesirable for any other Justice to sit on the Court. It is improper for one Judge to publicly express an opinion on the desirability of another to continue as a Justice or to exercise his functions as a Justice. This is at the foundation of the independence of the judiciary.

It has been part of Australia's judicial history that a number of appointments to the High Court have been attacked, and the integrity and reputation of the appointees have been questioned in and out of Parliament, and occasionally by resolutions of Bar Councils. If your contention is correct, it would follow because the Justice's integrity and reputation had been questioned he should not continue as a Judge of the Court. Nothing could be more calculated to undermine the independence of the judiciary. It would encourage the promotion of campaigns against Judges and not only those newly-appointed.

For a Chief Justice to state that if there is a question about a Justice's reputation or integrity, or if there is an inquiry into a Judge's conduct, he should not continue as a Justice, undermines the independence of every federal judge. Significantly, you made no such suggestion when the 2 Senate inquiries were in progress, the second of which included Parliamentary Commissioners. During both of those inquiries I sat and decided cases.

You refer to the undesirability of sitting before the Commission makes its report. As I informed all members of the Court my advice is that there is no reasonable prospect of the Commission reporting by the due date of 30 September. Even if any extension were granted I am advised that the probability is that the Commission would not report before the end of this year.

I wish to avoid any public controversy with you, as this will inevitably encourage others who will be only too anxious to feed on such a controversy. But if you issue the news release I will answer along the lines of this letter, or release the letter. My present intention is that I will not make any statement from the bench or issue any statement before sitting. A copy of the statement which I intend to issue in any event is enclosed.

As you suggested, my staff informed yours of the cases in which I propose to sit.

Yours sincerely,  
Lionel.<sup>87</sup>

The Chief Justice released the news release he had proposed<sup>88</sup> and Mr Justice Murphy released both his letter to the Chief Justice and a press statement in the following terms:

On Tuesday 29 July, I resumed the full exercise of my constitutional and statutory functions as a Justice of the High Court of Australia. I so informed the Court at its statutory meeting on the Tuesday. I have already commenced sitting.

My medical advice is that I have an advanced state of cancer – in its secondary stages – that there is no cure and no treatment. The advice is that in the absence of a remission I shall not live very long. At the moment I am not in any pain and I feel quite well. My medical advice is that I am able to resume sitting on the Court. I have chosen to spend what portion I can of the limited time available in doing as much judicial duty as I usefully can.

I will bear in my mind the interests of the litigants.

A practical embarrassment to my resuming sitting was the case which I had in the Court concerning the validity of the Parliamentary Commission of Inquiry. That embarrassment was removed when I discontinued the case last Monday.

Between 15 and 30 July, I received from those assisting the Parliamentary Commission of Inquiry a number of purported allegations. In my view they are either untrue or do not constitute misbehaviour. I have already been cleared of many of them by the unanimous decision of the first Senate Committee. In all the circumstances, I do not propose to attend any further proceedings of the Commission.

---

<sup>87</sup> Priest, above n 6, 111-113.

<sup>88</sup> 'The Exchange that Shook the High Court' *Sydney Morning Herald* (Sydney), 2 August, 4.

I thank the many people who have expressed their support for me by letters, telegrams and personally in the streets, and elsewhere.

Despite the medical advice, I have not given up hope.<sup>89</sup>

The Federal Government supported Mr Justice Murphy's right to sit and moved to close down the inquiry. But there was vigorous political opposition. Despite the repetition by Mr Justice Murphy of the false proposition about the potential for the Court to go 'on strike', the Chief Justice, wisely in my view, did not respond. He stayed out of the political controversy to preserve the court. It left the rebuke unanswered but his restraint kept the court out of further political turmoil. Tom Hughes QC who as Attorney-General had recommended the appointment of Sir Harry to the High Court and who as counsel appeared for Mr Justice Murphy, in an address given in 2006, said of this period:

The public position adopted by Sir Harry demonstrated the determination of a mild-mannered man to act as he thought right in agonising circumstances under which a lesser person would have taken a softer option.<sup>90</sup>

Justice Michael Kirby, also speaking in 2006, said that 'His well known sense of calm was often called upon to help steer the nation's highest court through those difficult years.'<sup>91</sup>

On 1 August 1986, the court heard argument in *Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd* [1986] HCA 72; (1986) 162 CLR 395. 1 August 1986 was also the date on which a criminal matter had been set down for the hearing of a special leave application. The quite unremarkable case was *King v The Queen* [1986] HCA 59; (1986) 161 CLR 423. Mr Justice Murphy sat on that case and the next in the sittings: *Miller v TCN Channel Nine Pty Ltd* [1986] HCA 60; (1986) 161 CLR 556 which was heard on 5 and 6 August 1986. On 5 August, the Commission of Inquiry decided it would not take any further evidence and adjourned till 19 August, the date when Parliament was expected to resume.<sup>92</sup>

On 19 August 1986, the Commission of Inquiry published detailed 'Rulings on Meaning of 'Misbehaviour' re the Honourable Mr Justice LK Murphy.'<sup>93</sup> The Commission expressed the clear view that misbehaviour is not limited to misconduct in office, incapacity, conviction of a crime or criminal conduct. Mr Wells QC said at p 45:

The word 'misbehaviour' must be held to extend to conduct of the judge in or beyond the execution of his judicial office, that represents so serious a departure from standards of proper behaviour by such a judge that it must be found to have destroyed public confidence that he will continue to do his duty under and pursuant to the Constitution.

<sup>89</sup> Ibid.

<sup>90</sup> Hon Tom Hughes, AO, QC, 'Sir Harry Gibbs: An Advocate's Perspective' (Speech delivered in *Upholding the Australian Constitution*, Proceedings of the Eighteenth Conference of The Samuel Griffith Society 18 (2006), 6.

<sup>91</sup> Hon Justice Michael Kirby, AC, CMG, 'Sir Harry Gibbs remembered' (Speech delivered in *Upholding the Australian Constitution*, the Proceedings of the Eighteenth Conference of The Samuel Griffith Society 18 (2006), 1.

<sup>92</sup> Parliamentary Commission of Inquiry, 'Special Report of Parliamentary Commission of Inquiry' *Australia Parliamentary Papers 1986*, Parliamentary Paper No. 443/1986, (1986) 36, 1.

<sup>93</sup> Ibid.

The Commission of Inquiry had before it 14 specific allegations which fell within that category. However on 20 August 1986, the Commonwealth Parliament passed the *Parliamentary Commission of Inquiry (Repeal) Act* which effectively prevented forever access to any document containing material relating to the conduct of the Honourable Lionel Keith Murphy.<sup>94</sup> The allegations against Mr Justice Murphy have by necessity remained unresolved and, unless the Act is ever repealed or amended, will remain so in perpetuity.

The views expressed in the Commission of Inquiry were adopted by the Parliamentary Judges' Commission of Inquiry which was conducted in Queensland into the behaviour of Mr Justice Vasta and Judge Pratt, which were presided over by Sir Harry in 1988 and 1989.<sup>95</sup>

In *King v The Queen*<sup>96</sup> special leave to appeal was refused. The majority judgment was given by Justice Dawson with whom Gibbs CJ, Wilson and Brennan JJ agreed. Mason, Deane and Murphy JJ would have granted special leave to appeal and allowed the appeal. The two leading judgments were given by Dawson and Deane JJ; but Murphy J, whilst agreeing with Deane J, gave brief reasons of his own. The three principles referred to by Mr Justice Murphy were that it is the right of every accused person to know, with particularity, the case which the prosecution wishes to prove at trial;<sup>97</sup> the duty of a prosecutor is to present the case against the accused fairly and honestly and not to use any tactical manoeuvre legally available in order to secure a conviction;<sup>98</sup> and that a new trial is not the inevitable result of a successful appeal against conviction: it may be appropriate to enter a judgment of acquittal.<sup>99</sup>

*Miller v TCN*<sup>100</sup> was a case on s 92 of the *Constitution*. As it transpired, it was the last case decided by the High Court before it completely refashioned its view of s 92 in a case heard the following year in *Cole v Whitfield*<sup>101</sup>. *Miller v TCN* served only to demonstrate the uncertainty of the tests of whether or not s 92 of the *Constitution* was breached. On the four propositions in which findings were made, Gibbs CJ, Mason, Murphy, Brennan, Deane and Dawson JJ agreed on one, with Wilson J dissenting; Mason, Murphy, Brennan and Deane JJ agreed on the second, with Gibbs CJ, Wilson and Dawson JJ dissenting; on the third Gibbs CJ, Mason, Wilson and Dawson JJ agreed, with Murphy and Brennan JJ dissenting; and on the fourth Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ agreed, with Murphy J dissenting. Murphy J's famous dissent in *Buck v Bavone* (1976) 135 CLR 110 at 132 was not taken up by the rest of the court.

The judgments in both cases were handed down on 21 October 1986. In neither were the judgments of Justice Murphy decisive in terms of the result reached; but in them he made important statements of principle with regard to both criminal and constitutional law.

The judgments were handed down in circumstances of extreme urgency. The court received word that Mr Justice Murphy was near death. If he died before the

<sup>94</sup> *Parliamentary Commission of Inquiry (Repeal) Act 1986* (Cth) s 6.

<sup>95</sup> See in particular Queensland: *First Report of the Parliamentary Judges Commission of Inquiry*, before Rt Honourable Sir Harry Talbot Gibbs (Presiding Member), Hon Sir George Hermann Lush and Hon Michael Manifold Helsham, 1989, 9-10.

<sup>96</sup> (1986) 161 CLR 423.

<sup>97</sup> *Ibid* 425.

<sup>98</sup> *Ibid* 426.

<sup>99</sup> *Ibid* 426-427.

<sup>100</sup> (1986) 161 CLR 556.

<sup>101</sup> (1988) 165 CLR 360.



judgments were handed down, the reasons written by Mr Justice Murphy would have had to have been destroyed. Knowing that his judgments could not be published after his death, the Chief Justice immediately listed the matters for the judgments to be delivered without the publication of pamphlet copies which were normally produced but which would have held up the publication of the judgments for forty-eight hours. Justice Murphy died within an hour of the publication of the judgments. It was Sir Harry who was responsible for these last judgments of Mr Justice Murphy being published.<sup>102</sup>

All of the High Court judges including the Chief Justice attended his State Funeral in Sydney on 27 October 1986.<sup>103</sup> The Chief Justice's last official duty with regard to Mr Justice Murphy was to preside over a ceremonial sitting for the Court to pay tribute to their colleague. In a generous speech, about Mr Justice Murphy's many achievements Sir Harry said rather less fulsomely of his contribution as a judge: 'It cannot be denied – and he would not have wished to deny – that he was at times the subject of controversy and that his judicial method was one which did not command universal assent. However, the value of the contribution made by any judge to the law and the extent of his influence upon it cannot well be assessed by his contemporaries; judgment on those questions must be left to history.'<sup>104</sup>

The Chief Justice continued to sit in court for only a matter of weeks; the last case he heard was, rather aptly, *Queensland v The Commonwealth*.<sup>105</sup> Sir Harry was the sole dissident in favour of the State.

#### CONCLUSION

The Chief Justice's leadership during this crisis can be seen from his behaviour throughout:

1. The judicial work of the court continued unabated.
2. The Chief Justice refused to allow the Court to be drawn into the political controversy.
3. Each judicial decision of the Court regarding their colleague was expressed unanimously in a joint agreement.
4. The Chief Justice never wavered in expressing judicially what was expected of a judge's behaviour.
5. When Murphy chose to sit again against the expressed wishes of the Chief Justice, he was treated equally and with courtesy and dignity.
6. Sir Harry behaved in a careful, courteous, imperturbable and quite correct way throughout what was undoubtedly the most difficult episode in the High Court's history.

It is an important part of his legacy that Sir Harry's leadership guided the court through this terrible crisis without any lasting damage to its standing or reputation. It is appropriate to end with Sir Harry's own observations. During his speech at the sittings to mark his retirement on 5 February 1987, he said:

---

<sup>102</sup> Kirby, above n 91, 3.

<sup>103</sup> Jenny Cooke and Michael Laurence, "Comrades Gather in Praise of Murphy", *Sydney Morning Herald* (Sydney) 28 October 1986, 2.

<sup>104</sup> (1986) 160 CLR vii.

<sup>105</sup> (1987) 162 CLR 74.

I think it will always be true to say that the work of a Chief Justice of this Court is somewhat burdensome and during recent years the Court has faced unprecedented difficulties. Nevertheless I have derived much satisfaction from serving as Chief Justice of the Court. I have enjoyed the friendship of my fellow justices and have had the loyal support of the staff of the Court.

My endeavour has been to maintain the high standards which were set by my eminent predecessors and which have, I think, earned respect for the Court not only in Australia but also elsewhere.<sup>106</sup>

In that task he undoubtedly succeeded.

---

<sup>106</sup> (1987) 162 CLR viii.