REFLECTIONS ON THE MURPHY TRIALS

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I INTRODUCTION

It is a great privilege to have been asked to contribute to this special edition of the Journal containing essays in honour of the Honourable Ian Callinan AC QC.[1] In this instance I shall concentrate on but one matter in his extensive practice at the Bar, but a significant matter that went for some time, had a variety of manifestations and encompassed a multitude of interests and conflicts: that is, his role as the prosecutor of the late Justice Lionel Murphy of the High Court of Australia.

It is also a great burden to assume. Where to begin? What 'spin' (if any) to put on this chapter of Australia's legal history in the space available? How much of the lengthy and at times legally technical proceedings themselves should be included? How to show enough of the play of the unique Callinan attributes? How to keep myself out of it, matters of significance having now faded from the ageing memory (even assisted by the few scraps of paper that survive) and because throughout the proceedings against Murphy at all levels I was Ian's principal junior. It was a rare (for the time) pairing of Queensland and NSW counsel – the 'dingo fence' for lawyers was still in place at the Tweed in those days.

At the time of his retirement from the High Court last year Ian described the case as 'agonising' – for himself, the court and Murphy – 'It was a very unhappy time for everybody' he said and so it was. Little could we know when we accepted the briefs just how agonising it was to become and how important it was to have a leader of the quality of Callinan to guide the case to its conclusion.

When the case ended Ian commented that someone should write a book about it. I agreed – there is still a book there. I expected that he would do it, but he went off into novels and plays and High Court judgments instead. Did he expect me to do it? If so, this essay will have to serve as a very poor second best. I am not a regular contributor to law journals and I do not employ the academic style. I do not have the time or the space to address all aspects of the proceedings (even if the reader were interested), so not every event or procedural step (by any means) will be recorded and much more occurred than is referred to in what follows; but this may give the reader some flavour of the events.

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1 When first mentioned names, titles and postnominals are given; thereafter only surnames, or forenames in some cases, are used. No disrespect is intended thereby.

II IAN DAVID FRANCIS CALLINAN

At the beginning of 1985 I knew no more about Ian than that he was President of the Queensland Bar Association. I had been in junior practice at the Bar in Sydney for ten years (after some time in practice in Papua New Guinea). I had been briefed in the associated case of Judge John Foord QC before Christmas 1984 (led by Andrew Kirkham QC of the Victorian Bar, later its Chairman) and was briefed in the Murphy matter in January 1985. The Commonwealth Director of Public Prosecutions at the time, Ian Temby QC, then needed leading counsel for probably the most challenging prosecution that he would mount. He obviously knew a great deal more about Ian than I did – he clearly knew of his long and broad experience at the Bar, of his depth of legal knowledge, of his qualities of leadership and inspiration, of his professional fearlessness, of his keen appreciation for the application of principle in all circumstances and of his unfailing, old fashioned courtesy at all times and in all conditions. I was yet to learn of all that.

The late Sir Alec Guinness used to say that he knew when he had the character of a role that he was to play properly interpreted when he had the walk right. Even barristers who are recreational playwrights do not need to think about that and Ian's walk does betray his character. For a large man it is a deceptively hesitant, almost delicate, step. But it puts the whole into a rolling motion, building a momentum that has an inexorability about it. The irresistible force rolls aside or over most objects, even if they were thought to be immovable or unsurmountable. And the disarming feature is that Ian's relentlessness is accompanied by the most polite, genteel words, tones, expressions and solicitude, without noise or fuss and even at times with an air of distraction. He seems to use words almost regretfully, as if acknowledging their force but wanting to hold that back in his mouth. It is exceedingly rare to hear him swear. And he remembers. (One can only sympathise with the batsmen he confronted in his cricketing days.)

Ian brings that rolling approach to conversation, to negotiation, in court to examination and cross-examination and to addresses. It is an approach that was translated to the bench with a leavening of humour, scepticism, concern and above all independence of mind.

III LIONEL KEITH MURPHY

Lionel Murphy had been admitted to the Bar in NSW in 1947. He rapidly grew his practice and took silk in 1958. In 1961 he was elected to the Federal Parliament, taking his seat in the Senate in 1962. Late in 1972 he was appointed Attorney-General and Minister for Customs.

On 10 February 1975 he was appointed a Justice of the High Court of Australia.

IV CHARGES AND ALLEGATIONS

Following hearings by a Senate Select Committee on Allegations Concerning a Judge in September and October 1984 and its report on 31 October 1984, on 14 December 1984 Lionel Keith Murphy was charged with two charges under section 43 of the *Crimes Act 1914* (Cth). As later amended at the committal proceedings, the charges were:

> That between the 1st day of December, 1981 and about the 29th day of January, 1982 at Sydney in the State of New South Wales and elsewhere Lionel Keith Murphy whilst a Justice of the High Court of Australia 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 of the State of New South Wales to cause Kevin Jones, a Stipendiary Magistrate of the said State to act otherwise than in accordance with his duty in respect of the hearing of committal proceedings against one Morgan John Ryan on charges of forgery and conspiracy under s 67(b) and s 86(1)(d) respectively of the Crimes Act 1914 then being heard by the said Kevin Jones; and
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> That between the 1st day of July, 1983 and the 9th day of July, 1983 at Sydney in the State of New South Wales and elsewhere Lionel Keith Murphy whilst a Justice of the High Court of Australia did attempt to pervert the course of justice in relation to the judicial power of the Commonwealth in that he did attempt to cause Paul Francis Flannery, a Judge of the District Court of the State of New South Wales, to act otherwise than in accordance with his duty with respect to the trial of the count of conspiracy under s 86(1)(d) of the Crimes Act 1914 against one Morgan John Ryan which commenced before his Honour and a jury on 11th July, 1983.

Shortly put, Morgan Ryan, a Sydney solicitor, had been charged with the indictable offences of forgery and conspiracy to commit a Commonwealth offence in relation to immigration matters. He was a friend of Murphy, having first met him in about 1950. It was alleged that Murphy, in speaking about the Ryan case to NSW Chief Magistrate Clarence Briese at a dinner party at Briese's house and later, had attempted to have some influence brought to bear upon the committing Magistrate, Kevin Jones, in Ryan's favour. It was alleged that in a later telephone call to Briese, Murphy had uttered the now famous words: 'And now, what about my little mate?'

Later, after Ryan had been committed for trial on the conspiracy charge alone, it was alleged that Murphy, at a dinner party at his home, had sought to bring similar influence directly to bear upon District Court Judge Paul

Flannery QC who was listed to hear the Ryan trial which eventually commenced on 11 July 1983.

Ryan was in fact convicted on 2 August 1983 and sentenced on 5 August 1983.

V 'AGE TAPES'

On 21 February 1984 Temby was appointed a Special Prosecutor to institute proceedings (if appropriate) in relation to any Commonwealth offences arising out of the 'Age tapes'. They were in fact transcripts apparently of recordings of intercepted telephone conversations published by the Age newspaper in Melbourne and provided to the Commonwealth Attorney-General by representatives of the Age on 1 and 2 February 1984. Temby reported on 20 July 1984. Justice Donald Stewart (as Royal Commissioner) then inquired into the Age tapes (in which I had a role as junior counsel assisting) and he reported (secretly) in December 1984.

It was suggested that Murphy had been recorded in this material in 1979 and 1980 and that one person with whom he had spoken was Ryan.

The Senate Select Committee on the Conduct of a Judge had been established on 28 March 1984 and was superseded by the Senate Select Committee on Allegations Concerning a Judge which carried on its proceedings from 6 September 1984.

Murphy stood aside from the High Court from 31 October 1984, the date the Committee presented its report.

VI MURPHY COMMITTAL PROCEEDINGS

Much preparatory work was done for the committal hearing (as might be imagined). Conferences were held in Sydney and Brisbane involving Callinan, myself, members of our instructing team and investigators and witnesses. In an early Advice emphasis was placed (unsurprisingly) on obtaining evidence of the nature of the association between Murphy and Ryan. The Age tapes became and remained a matter of interest.

The charges were listed for committal hearing before the Local Court at Sydney on 4 March 1985. There was a bit of early jostling with dates when Ian Barker QC, then heading the Murphy team instructed by Sir Clarrie Harders, Graham Kelly and Peter Perry, became ill and an adjournment was requested. Callinan was briefed to prosecute the trial of Brian Maher in Brisbane from 18 March. The Murphy matter was listed for mention on 27 February. A further complicating factor was that, as noted above, I was also briefed as junior counsel in the proceedings against Judge Foord and that had already been listed for committal hearing from 10 April 1985 (it was later adjourned). In the result the Murphy committal was set for 25 March 1985.

Magistrate Arthur Riedel presided in a courtroom in the refurbished Mark Foys department store, the Downing Centre. Murphy was represented by Alec Shand QC and Linton Morris QC. The witnesses called by the prosecution were AFP Chief Inspector David Lewington, Ryan, Justice James McClelland, Graeme Henson (now Chief Magistrate of NSW but then Clerk of the Local Court), Briese, Brian Roach, Chief Judge James Staunton of the District Court, Judge Flannery and Darcy Leo, retired Magistrate. Kevin Jones had died before the proceedings commenced. Extensive written submissions were made by both sides.

On 16 April 1985 Mr Riedel decided, after lengthy argument, that the evidence in relation to both the Briese and Flannery charges was capable of satisfying a jury of guilt. That was the first leg of the test to be satisfied for committal. On 26 April 1985 the second leg was addressed and Murphy was committed that day for trial on both charges. Bail was dispensed with.

On the latter date Murphy had made a statement in which he said, inter alia:

> Your Worship, I am completely innocent. I am angry at these false charges. I did not attempt to pervert the course of justice … However, should the case go to a jury, I will present my account of the facts in evidence to the jury. I will dispute the versions given by the main witnesses for the prosecution.

Shand had then addressed at length, not calling any evidence. A flavour for Callinan's advocacy style can be gathered from the opening of his address in response:

> Could we say this first: that despite all the protestations to the contrary by my learned friend, his submissions largely amounted to no more than a rehearsing of the old argument [on the first leg of the test] and the facts and the law. Now to that extent we don't deem it necessary to descend into the same detail with respect to facts as does our learned friend. We'd also submit to your Worship that you've really been invited, although again the protestations are to the contrary, to retract your findings [on the first leg of the test] …

He also made references to 'the utter bankruptcy of the defence' and 'ludicrous examples' employed by it: 'such as have been able to be pointed to are really, with the greatest of respect, quite ridiculous'.

VII A LITTLE GLASS OF WHITE WINE

It seems that Ian has usually been fond of a light relaxing drink at the end of the day. His invitation to 'a little glass of white wine' usually saw the liberation of French champagne from its lair to assist in reflection on the

day's events – a very enjoyable and civilised custom, I must say, in keeping with Ian's general approach to life.

We had several during these proceedings (no doubt at least one after the committal order) and to a frugal junior barrister they were always a welcome luxury. We also dined once at Milano's Restaurant in Brisbane – scene of an encounter between Murphy and Judge Flannery that was to become the subject of evidence in the first trial. I suppose you could call it a view by counsel.

VIII REVIEW OF THE COMMITTAL

On 13 May 1985 Murphy brought an application to the Federal Court for review of the decisions to commit him for trial under section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The grounds were that the decisions involved an error of law, there was no evidence or other material to justify the making of the decisions and the decisions were otherwise contrary to law.

Once again extensive written submissions were made. The application did not succeed.

IX FIRST TRIAL

The indictment signed by Temby and dated 5 June 1985 (the date of commencement of the trial) contained two counts in the terms stated above.

At the trial in the Supreme Court at Sydney before the late Justice Cantor, Callinan led me with Peter Clark (from Melbourne originally), then Senior Deputy Commonwealth DPP. Shand QC, Morris QC and Dermot Ryan (now of Senior Counsel) appeared for Murphy who pleaded not guilty to both counts.

The trial was held in the Old Banco Court in St James Road, a rather small but historic Victorian era court room with fine timberwork and an elevated gallery. The court was well filled by participants and observers throughout the trial and the media laid siege to the place for weeks.

On the first day, 5 June 1985, during the jury empanelling process, a number of applications were made for people to be excused. In the presence of the whole panel one woman, having been sworn to give evidence on her application and having been asked why she wanted to be excused, rounded on Murphy, pointing at him with her arm extended and saying in a loud voice: 'I hate him. The moment I saw him I knew he was fully guilty. He should be castrated and sent to hell.' Murphy seemingly involuntarily crossed his legs where he sat.

Shand submitted (in the absence of the panel) that the jury panel be discharged and another made available. He submitted 'that your Honour

could not be satisfied in the light of that violent outburst that this trial could proceed without the real possibility of prejudice'.

The Crown did not oppose the application, Callinan submitting: 'I am bound to concede that it was an exceedingly strong statement; really in our experience on this side of the Bar table of an unprecedented kind'.

A non-publication order was made of the statements given by the jury panellist and that panel was discharged. A fresh one was brought in and a jury struck without further incident. The Crown opened from 12 noon.

The witnesses called by the Crown at the trial were Robert Jones, Ryan, Leo, Henson, Briese, Roach, McClelland, Staunton, Judge Flannery and Gloria Briese. The Crown closed its case at 12 noon on 13 June 1985. Lengthy arguments followed on an application for directed verdicts on both counts.

On 19 June 1985 Justice Cantor refused the application by the defence for verdicts by direction. Murphy then gave notice of his desire to reserve questions of law arising from that refusal for consideration by the High Court pursuant to section 72 of the *Judiciary Act 1903* (Cth).

The defence opened its case at 12:30 pm on 19 June. Murphy was called to give evidence that afternoon and continued on to 21 June. Callinan opened his cross-examination by having Murphy accept that he was knowledgeable of the counsel available to him in Australia and that it was important that his representative should accurately and fully put his (the accused's) contrary assertions to witnesses. Then he demonstrated how that had not occurred with Staunton, but that he (Murphy) had not intervened. It was an interesting beginning.

At one point in the cross-examination, after an excursion into Mrs Murphy's hydroponic garden and discussion of that with Briese, Callinan became irritated: 'Look, I am not asking you about other lawyers, observing others, and I think you understand the question. You heard your own counsel tell the witnesses to respond directly. Please respond directly to my questions.' That was about as aggressive as he appeared in the trial, although there were many occasions when he sought to confine Murphy to succinct answers to his questions.

A meeting between Murphy and Judge Flannery at a function at Milano's Restaurant in Brisbane was ventilated. Callinan: 'And I don't say this in any critical way, I don't suggest this, but you had quite a lot to drink that night?' Murphy: 'Yes. Let me say this, Mr Callinan, we were certainly not inebriated if that is what you are suggesting'.

Concerning the famous phrase allegedly said to Briese in this case and the subject of some obviously close attention in the course of the trial – the reference to 'my little mate' – the following passage of cross-examination occurred.

> Q Do you say categorically that you did not use the words 'My little mate'?
> A Yes.
> Q Has that always been your recollection?

A Yes.
Q Quite categorically you did not use those words?
A Yes.
Q Emphatically, you did not use the words 'My little mate'?
A Yes.
Q Your recollection on that has never wavered?
A No.
Q Do you deny that you never used those words?[sic]
A I deny that I did use those words.
Q Do you deny that you did use those words on that occasion?
A Yes.

Murphy concluded his evidence on 24 June 1985.

Other witnesses testified from 25 June 1985 including a short reprise by Murphy. Jesse Troutman (a Commonwealth driver), Rhonda Shields (Murphy's personal secretary) and Michael Kirby were called.

Callinan's cross-examination of Justice Kirby (then President of the NSW Court of Appeal) has been commented upon from time to time. At the time of his retirement last year Callinan said that Kirby (then a fellow member of the High Court) reminded him of the experience still 'in a very pleasant way. He's a very genial man and we laugh about it.'

Kirby was asked about his first federal appointment to the Arbitration and Conciliation Commission as a junior barrister after seven years' practice. Murphy had been Attorney General at the time (but Kirby explained that it was a recommendation by the Minister for Labour to the Executive Council).

Q Judge please do not misunderstand the question I am about to put to you but an appointment of that kind after seven years would be unusual, after seven years' practice at the Bar?
A I was not the youngest person appointed but it would be unusual. I had, of course, hesitation in accepting it, but I did and then soon after that I was appointed to be the full time Chairman of the Law Reform Commission, an office I held for nearly ten years.

Murphy had invited him to that position. It was established that Murphy and Kirby were friends and that Kirby had been a guest at his residence (but not vice versa). They had corresponded, telephoned and occasionally dined out together.

The final question and answer were:

Q At the moment I am asking you about his friends. You would not doubt that he was a man who would be very loyal indeed to his friends?
A Yes, I think loyalty is one of his qualities.

Mrs Ingrid Murphy gave evidence, followed by William Murphy, Angela Bowne, Justin O'Byrne, Elizabeth Evatt and Francis Dawson. Each was economically and skilfully cross-examined by Callinan. The case for the accused closed on 26 June. Addresses followed.

The summing-up began on the 19th day of the trial on 2 July 1985 and the jury retired at 11:28 am on 4 July. Verdicts were given at 9:28 pm on Friday 5 July 1985.

That night will forever be etched in the minds of those present. It was the night of the annual Bench and Bar Dinner, not far along Phillip Street in the subterranean dining room of the NSW Bar Association. The participants in the trial, of course, were on hand at the court in rather spartan Victorian era accommodation and without the appurtenances of a formal dinner. As it became known that the jury would return, people materialised from everywhere, including in formal attire from the Bench and Bar Dinner, and the court was jam-packed. The atmosphere was intense and as I waited at the Bar table for the court to convene in a moment of panic I thought I might well faint from the tension in the air. (Fortunately that diversion did not occur.) Among the observers in the upper gallery was then NSW Solicitor General Mary Gaudron QC who, with very buoyant Murphy family and friends, had prepared for a celebration party at Murphy's home in anticipation of an acquittal.

Murphy was convicted on the Briese count and acquitted on the Flannery count.

At the Bench and Bar Dinner, Roddy Meagher QC shouted champagne for his table.

X JURY REACTION

After much public comment on the result, at 11:33 am on 11 July 1985 a man identifying himself as the foreman of the jury telephoned John Laws on his widely broadcast radio program. He purported to speak for a few of the jurors. He said: 'I do not think anybody who has commented has any idea of the month out of our life, the anguish, the heartache and the misery we went through to do what was required of us … we all agree we were looking at a good man who answered a call for help.' He referred to comments that the jury had got it wrong and said: 'That's very hard on the jury'. He urged people to be quiet about the matter until the appeal was heard.

The man spoke of the terrible law that makes a person guilty if there is but a risk of improper influence. He said that the law was there for good reason, to prevent manipulation of the judicial system by powerful people, but it was not right that a person who always helped his fellows should be caught up in it. The jury had been scarred by having to convict in such circumstances.

He said that while the law is a good one, the way it was interpreted and applied in this instance was not a good thing. The jury had deliberated for 21 hours, asking the judge for three further directions.

The man rang back the next day at 10:57 am, very critical of comments that Temby had made the day before following his first appearance on the Laws program, including concerning possible contempt of court proceedings for his speaking out.

On 15 July 1985 Murphy's solicitors received a letter dated 10 July 1985 apparently from one of the jurors who stated that most believed Murphy to be not guilty of attempting to influence judicial officers or of trying to gain an advantage for Ryan. It was said that after the judge's directions on the possibility of risk they had no option but to convict.

In the letter criticism was made of Shand for not making any 'loophole' clear in his final address; but it was also said that Callinan should not gloat – 'he did not convince us'.

XI HIGH COURT

As noted above, before verdicts were given (and indeed, before the defence case began) Murphy had applied pursuant to section 72 of the *Judiciary Act 1903* (Cth) for the trial judge to reserve 15 (later 21) questions of law for determination by the High Court. In response to the application the Crown submitted, inter alia, that the trial judge should proceed to sentence and execution should then be respited. There was no objection to release on bail in the meantime. The matter was argued on 19 July 1985 when submissions were made upon questions of law to be reserved. Murphy was remanded for sentence and bail was continued.

When called up for sentence on 19 July 1985 and asked if he had anything to say, Murphy said:

> Yes I have. I am innocent of this charge. I intend to pursue every avenue that is open to me to establish my innocence. I have great faith in the jury system, even with its imperfections, but it is the best system that has been devised for criminal justice.
>
> It is my belief that had the jury been properly directed by your Honour they would have acquitted me. I am confirmed in that belief by the statements that have been volunteered by various jurors. The questions which have been reserved contain no complaint about the jury. They claim that your Honour excluded evidence which was favourable to me and seriously misdirected the jury about the law.
>
> I am hopeful that the Appeal Court will direct a new trial. I am confident that my innocence will be established.

Justice Cantor expressed the view that the remarks of jurors should never have been made, being 'precipitated or prompted by the wide media coverage given to ill-informed, irresponsible and in some cases obviously politically motivated criticisms of the jury's verdict by persons some of whom hold important positions in the community. One might have expected more responsible behaviour' and they were 'wholly irrelevant'.

A motion in arrest of judgment was also made on the ground that section 43 of the *Crimes Act 1914* (Cth) was incapable of application to the facts alleged in the Briese count, alternatively that the section was invalid as beyond the legislative power of the Commonwealth. The section 43 and another question concerning section 68 of the *Judiciary Act 1903* (Cth) were removed into the High Court. The High Court was also invited to consider the validity of the former section 85E of the *Crimes Act 1914* (Cth), the conspiracy offence provision.

The hearing took place in Canberra on 12-14 August 1985. Sir Maurice Byers QC led Tom Hughes QC and Dermot Ryan for Murphy. Peter Lyons and I were juniors to Callinan (Peter having been brought in from Ian's Brisbane chambers – and later also to be President of the Queensland Bar Association, departing in controversial circumstances last year). The High Court, constituted by the other six Justices (*R v Murphy* (1985) 158 CLR 596), on 14 August (with reasons given on 20 August) made findings that section 43 did apply to the circumstances of this case, that sections 43 and 68 were valid laws of the Commonwealth and that, prior to its repeal, section 85E was also a valid law of the Commonwealth. It remitted the reserved questions of law back to the Full Court of the Supreme Court of NSW (being the Court of Appeal).

On 23 August 1985 the motion in arrest of judgment was dismissed.

XII SENTENCE

On 3 September 1985 Justice Cantor embarked 'upon the performance of the distasteful duty of passing sentence upon the prisoner'. He sentenced Murphy to imprisonment for 18 months. It was ordered that upon the expiration of a period of ten months Murphy might enter into a recognisance to be of good behaviour for the balance of the sentence. He directed that execution of the sentence be respited until the referred questions of law had been considered and decided. Murphy was admitted to bail without security on conditions.

XIII COURT OF APPEAL AND COURT OF CRIMINAL APPEAL

Application was made on 12 September 1985 for an appeal against conviction to the Court of Criminal Appeal on 19 grounds.

The Court of Appeal sat as a five Judge bench (Street CJ, Hope, Glass, Samuels and Priestley JJ) to deal with the questions of law, followed

immediately by the Court of Criminal Appeal similarly constituted to hear the appeal against conviction. Tom Hughes QC with Desmond Andersen and Dermot Ryan appeared for Murphy. Peter Lyons remained as a second junior for the Crown in the appeal.

The case is reported at (1985) 4 NSWLR 42. The hearing occurred on 5-8 November 1985. The Court then addressed 21 questions (answering 12) and on 28 November 1985 allowed the appeal, set aside the verdict and conviction and ordered a new trial.

Further publicity of the kind admonished by Justice Cantor in July then occurred. On 29 November 1985 the Daily Telegraph carried a story in which the then NSW Premier and Federal President of the ALP, Neville Wran QC, was quoted as saying: 'I was very satisfied with the Court of Appeal decision – I agree that there was a clear miscarriage of justice. The sooner the final step in what's been a very, very prolonged and sad affair is taken the better. I have a very deep conviction that Justice Murphy is innocent of any wrongdoing … He's a unique individual who is admired and loved by hundreds of thousands of Australians. I think most Australians, once the matter is finally disposed of, will be anxious to restore him to the dignity and status to which he is entitled.'

In a 'doorstop' interview with the media Wran had been asked: 'So you're convinced he'll be found innocent after this re-trial?' to which he had replied: 'I have a very deep conviction that Mr Justice Murphy is innocent of any wrongdoing'. Asked: 'So you'd expect a different verdict from a new trial?' he said: 'Oh yes'.

For those published remarks the Court of Appeal convicted Wran of contempt of court. He was fined $25,000 and the publisher of the Daily Telegraph was fined $200,000. They were both ordered to pay the costs of the Director of Public Prosecutions.

On 5 December 1985 the Sydney Morning Herald reported that Temby had decided that there should be a retrial, but that an indictment would not be presented until there was reason to expect that there could be a fair hearing (following the publicity given to the matter). Temby was quoted as saying: 'I am satisfied that cannot be earlier than three months from now. The situation will be reviewed then. I again entreat supposed experts, public figures, the press and all others to refrain from saying anything concerning the strength of the case against Mr Justice Murphy, or indeed anything which might render a fair retrial more difficult.'

The Australian newspaper reported that day that a storm of controversy had erupted over that decision. Politicians fumed. Like all storms it passed and the politicians found other things to fume about.

XIV SECOND TRIAL

Prior to a jury being empanelled in the second trial before Justice David Hunt, on 17 March 1986 the President of the Senate sought to appear (by

Theo Simos QC and Peter Biscoe) as *amicus curiae* to make submissions relating to the law of parliamentary privilege and to submit that the presiding judge should of his own motion disallow any questions that may be in breach. Concern was expressed about any use of evidence given at the Senate Select Committee inquiries in 1984.

On 2 April 1986 there were pre-trial arguments about the supply of particulars and other matters.

On 8 April 1986 Justice Hunt gave reasons for various decisions in relation to the Senate, having the effect of 'business as usual' – see (1986) 5 NSWLR 18.

On 10 April 1986 various subpoenas were returned and access orders made.

Callinan, Clark and I again appeared for the Crown in the second trial which commenced on 14 April 1986. Murphy was represented by Ian Barker QC with Desmond Andersen and Dermot Ryan. In preliminary remarks to the jury Justice Hunt referred to the fact that this was a re-trial. He said:

> It would of course be quite unreal for anyone to expect that you would not be aware that Mr Justice Murphy, the accused here, has already been tried once on this charge and that a new trial was ordered because of some errors of law made by the trial judge at that first trial.
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> There was considerable publicity given to the matter last year and you would have to be a hermit if you had not heard something about the case. In case you have by any chance forgotten, your memory would have been jogged quite strongly by the reports in this morning's newspapers.
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> This trial for which you have been selected is the new trial of that charge and you must decide whether the Crown has proved the accused guilty of that charge by reference only to the evidence which is led at this trial. Neither the fact that there has been an earlier trial nor the result of that earlier trial upon this charge is relevant or has anything to do with your decision as to whether the accused is guilty of that charge.
>
> Normally a jury is not even made aware of the fact that there has been an earlier trial but it is impossible to believe that you would not know something about it and it is for that reason that I give you this specific warning, that you must put out of your minds everything that you have heard or read about the earlier trial, you must put it right out of your minds. [His Honour then repeated the warning, referred also to publicity about the Senate inquiry, directed them on that and then continued.]

> Unfortunately, the problem does not finish there. At various times, but particularly late last year, a number of possibly well-meaning but nevertheless definitely misguided people have publicly expressed their views about the issues which were decided by the jury at the first trial and about the issues which you have to decide at this trial. That was, to say the least of it, a regrettable departure by people who should have known better, from what should have been said about these matters and, even more unfortunately, what they had to say was given considerable publicity.
>
> You must also put that publicity right out of your minds in this case.

At the beginning of his opening address Callinan opened the batting with his usual understated humility and helpfulness in that characteristically quiet manner:

> Ladies and gentlemen, I hope you will not become impatient with me if I tell you a little more about the course of the trial because, as I would understand it, some of you would not have any experience of the legal process and in particular of the criminal process but it may be helpful, I hope it will, if I can explain further some aspects of the matter to you.

And on he went in his unfussed manner.

The second trial proceeded with evidence from Ryan, Henson, Briese, Mrs Briese, Jennifer Briese, McClelland, Leo, Don Thomas, Staunton and Halpin. The Crown case closed on 21 April 1986.

Barker QC then said simply: 'I do not wish to open, your Honour. The accused will make a statement to the jury.' Murphy then made a dock statement. It was a famous one. In part he said:

> Ladies and gentlemen, the law gives the right to everyone accused of an offence the right to speak directly to the jury without examination or cross-examination and I've chosen to do this, and to speak to you directly as my judges …
>
> Now, judges and magistrates at all levels – lawyers, all talk about developments in the law and the cases before the courts. We all do so in the knowledge that the judge or magistrate dealing with the case will deal with it in accordance with his or her duty. They will not deviate from their judicial duty because of interchange with others, whoever they are …
>
> All the time I knew him, Mr Briese had held himself out to me to be a person of the utmost integrity. I had no reason to think otherwise. It never entered my head that he was a person who would allow

> himself to be used to influence another Magistrate to pervert the course of justice, or to in any way act contrary to his duty. I had no indication that he would do anything wrong.
>
> I, at no time whatever, had any intention to pervert the course of justice and I made no attempt to do so. I have told you the truth, and I ask you to find me not guilty.

The defence then called only Murphy's secretary, Rhonda Shields, to give evidence of social arrangements made between the Murphys and the Brieses.

Callinan addressed for the Crown on 22 April 1986 and the defence followed.

On 23 April 1986 Barker QC unsuccessfully made an application for the discharge of the jury on the basis of statements in the Crown's address. The defence address concluded and the summing up commenced after lunch on that day.

The jury retired at 10:30 am on 28 April 1986 and at 2:15 pm returned with a verdict of not guilty.

In The National Times after the verdict, David Marr (in the early days of his journalistic career) wrote a piece in which he described portions of Callinan's final address to the jury: 'The unfussed mood in this trial ended with Murphy's unsworn statement to the jury and Callinan's address for the prosecution. Callinan attacked Murphy for giving insufficient details in the statement and for raising against Briese matters which Briese was never faced with by counsel, matters Briese was therefore never given a chance to answer, to be re-examined on, to call evidence on if necessary.' The unfussed mood continued to the end.

XV FLANNERY MEMORIAL DOLLAR

District Court Judge Paul Flannery QC was a principal witness for the Crown on the second charge, as noted above. Towards the end of the Crown case in the Murphy retrial (on the Briese charge, only) Ian and I discussed, as a large range of material useful for cross-examination was being assembled, whether or not Murphy would give sworn evidence the second time around. The alternatives were to stand mute or (at that time) to make an unsworn statement from the dock (as it was called).

Ian immediately and unhesitatingly asserted that Murphy would make a dock statement. I regarded that as completely unsupportable – indeed, outrageous to even suggest that a Justice of the High Court would resort to the course then maintained for the ignorant, ill-educated or otherwise inadequate accused to safely lay before a jury a version of events for it to consider in its deliberations, a version untested by cross-examination. And after all, Murphy had said at the time of committal that he would give evidence and at the first trial he had.

In a rash move I offered a bet to Ian that Murphy would give evidence. Ian accepted. The wager was for the princely sum of one dollar.

Of course I lost the bet when Murphy began his dock statement. The wager became known as the 'Flannery Memorial Dollar' to recognise Judge Flannery and the torment he had suffered to ensure that whatever he said in evidence was the truth, the whole truth and nothing but the truth. (A reading of the transcript of his evidence will show how seriously and literally he took his oath.) I had a dollar coin mounted as a trophy, suitably inscribed, and solemnly presented it to Ian on an appropriate occasion. I saw it much later on a bookshelf in his chambers at the High Court in Canberra.

XVI PARLIAMENTARY COMMISSION OF INQUIRY

The secret report of the Stewart Royal Commission had been presented and a former Australian Federal Police Officer made allegations following the second trial. On 5 May 1986 Murphy advised that he would voluntarily refrain from sitting on the High Court and he did so for a time.

On 8 May 1986 the Parliamentary Commission of Inquiry Bill (Cth) was introduced into Parliament by the Attorney-General, Lionel Bowen MP. Its purpose was 'to establish a Parliamentary Commission of Inquiry to investigate the behaviour of Mr Justice Lionel Murphy'. When the Act came into force three retired judges (Lush from Victoria, Blackburn from the ACT and Wells from South Australia) were appointed members of the Commission. Its task was to consider, in private, specific allegations and determine if Murphy's conduct could amount to proved misbehaviour (thereby grounding dismissal from office). It could have regard also to previous inquiries but generally was not to look at matters dealt with in the criminal trials.

Evidence had to be legally admissible and Murphy was not to be required to give evidence unless the Commission believed it had evidence of misbehaviour.

The Commission was given powers to summon (and if necessary arrest) witnesses, issue search warrants and deal with offences committed against it (eg giving false or misleading evidence). A body of material, initially chiefly arising from our preparations for the thwarted cross-examination of Murphy in the second trial (for which the Crown had been much better prepared), was provided to the Commission.

In the absence of any adverse findings, the material produced to and by the Commission was to be embargoed from publication for 30 years (ie until 2016, as it happened). Then Prime Minister Hawke wanted it to be locked away in perpetuity, but the Senate determined otherwise.

XVII LATER APPEARANCE BEFORE MURPHY

Almost immediately after the verdict in the second trial and Murphy's triumphant appearance on the steps of the court we were informed, for the first time, that he was ill with cancer. We were shocked. The disease progressed fairly rapidly (although Murphy tried various remedies, some of them experimental, apparently) but after a period of voluntary withdrawal Murphy returned to sit on the High Court for as long as he could. He died on 21 October 1986.

In the second half of 1986 I had occasion to appear in the High Court in Canberra before a bench of which he was a member. I was not looking forward to the prospect, but I must record that in the face of obvious and serious physical difficulties, not to mention what must have been playing on his mind, his Honour was a model of courtesy and propriety on the few occasions when he engaged with me in argument.

XVIII ANOTHER CONNECTION WITH QUEENSLAND

It was through my work with Ian Callinan and his associations in Queensland, I am sure, that later (in 1991, having taken silk in 1987) I was offered the brief to prosecute the late Sir Joh Bjelke-Petersen. I hoped I had learned well from past experience.

But Joh's jury is another story …