MISCARRIAGES OF JUSTICE AND EXTRACURIAL INQUIRIES: A JUDICIAL VIEW FROM THE NORTHERN TERRITORY

I know of nowhere in the world where there is a judicial system in which miscarriages of justice never occur. Recent history in Australia and the United Kingdom vividly illustrates the serious imperfections of what are generally regarded as reasonably good judicial systems. The justices of the High Court of Australia have perhaps been less detached from the general community than their United Kingdom counterparts and, for that reason I suspect, there has been less judicial gullibility here in relation to confessional evidence than there. The recent case of *McKinney*[1] illustrates the point. Nevertheless, miscarriages of justice occur in Australia all too frequently.

According to some great principle I think I heard if miscarriages of justice *can* occur they *will* occur. Clearly enough a better legal system will admit of fewer miscarriages, and, while a perfect system will never be devised, we must constantly strive to make our own system progressively less prone to miscarriages of justice. But, for present purposes it is enough for us to acknowledge that in our own judicial system miscarriages of justice will sometime occur. Miscarriages of justice are the fish that slip through the forensic net. If more than a very few are slipping through it is time to get a new net. But human fish are too valuable, and so long as any slip through the net there must be a way of recovering them. Hence the necessity for extracurial procedures to save the person. I use the word "extracurial" here to mean outside of the ordinary court processes. I do not use it to mean processes in which judges do not play an active role.

I have been away from New South Wales for some 10 years living in the Northern Territory where the *Sydney Morning Herald* costs about $8 a copy — too much for me — so I am unaware of how many fish have been slipping through the net in New South Wales. Of course I know there have been some. In the Northern Territory there was a case concerning a Mr and Mrs Chamberlain. At all material times there has been in the Northern Territory a provision in substantially the same terms as Section 26 of the *Criminal Appeal Act* (NSW) enabling the Supreme Court to quash convictions: namely, section 431 of the *Criminal Code* (NT). However, section 431, like section 26, requires the court to deal with the matter as if it were an appeal, and I take that to carry the consequence that there are evidentiary rules, such as those concerning fresh evidence, that might prevent a complete and unfettered inquiry. It is possible, although I was not privy to the decision makers' reasons, that the reason why Chamberlain was not referred to the Court of Criminal Appeal was because it was not clear that the evidence that the court would be asked to consider would be admissible as fresh evidence in the sense in which that expression has become a term of art in the law of appeals.

There was no provision in the Northern Territory like section 475 of the *Crimes Act* (NSW) supplying a regular path to an inquiry into guilt following conviction distinct from the appeal process. The lack of this kind of provision caused great trauma to the social fabric of the Northern Territory from which it will take some time to recover.

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1 *McKinney v The Queen, Judge v The Queen* (1991) 171 CLR 468.

The Chamberlain case demonstrated vividly the need for a regular mechanism for instituting inquiry. As I see it, whatever other qualities an extracurial system of review of convictions should have, there are three requirements that are highly desirable if not essential. They are:

1 That it can be activated by regular process,

2 That it can lead by a regular path, in an appropriate case, to judgment of acquittal, and

3 That it is a truly inquisitorial procedure unfettered by the rules of evidence. I do not mean that it should not be presided over by a person who happens to be a judge. Indeed, in general a judge or magistrate would be the most appropriate person to conduct such an inquiry.

The Northern Territory had no regular process by which an extracurial inquiry could be sought through the court. Some sections of the Government seemed to have come to regard the case as a contest between Lindy Chamberlain and itself. Therefore, until the political pressures became uncontainable, the Government refused any worthwhile inquiry.

When the vessel was about to explode, Justice Trevor Morling was appointed a Royal Commissioner to inquire. He was assisted by Chester Porter QC. A great deal of evidence was taken. The "Morling Report"[2] led to a pardon. But the Chamberlains, who protested their innocence, said, as any intelligent person might: "We have done nothing to be pardoned for — justice demands that we be acquitted."

Again the Government found itself in a quandary. I believe by then that there was probably no reluctance on their part to act to allow an acquittal to occur. But, what is relevant for present purposes, is that there was no mechanism to achieve an acquittal even where an acquittal was warranted.

The pronouncing of a verdict of acquittal is a judicial act which, as far as I know, cannot be done by the executive without doing violence to the separation of powers between executive and judiciary. The Northern Territory government saw and recognised the problem. To solve it, it incorporated in the *Criminal Code* a new section 433a. The section was, in its terms, of general application, but the occasion of its enactment was the Chamberlain case. Omitting surplus language, it is as follows:

433a Reference by Attorney General of certain convictions

(1) where ... a person has been convicted ... and the prerogative of mercy has been extended to the person in respect of that conviction, ... the Attorney General may, at the request of the convicted person, if the Attorney General is satisfied that it is expedient in the interests of justice so to do, refer the case to the Court [of Criminal Appeal] to enable the Court to consider whether the conviction should be quashed and a judgment and verdict of acquittal entered.

2 Morling, T, *Report of the Royal Commission of Inquiry into Chamberlain Convictions*, Darwin, Government Printer, 1987.

There might be room for vigorous debate on the question whether the reference to the Court of Criminal Appeal should be in the discretion of the Attorney General. I, for one, would give that discretion to the court itself. Otherwise I expect the section is so far unexceptionable

(2) ...

(3) In considering a case referred to it ... The Court shall hear argument by the Attorney General or by counsel on (his) behalf and, if the Court considers it necessary to enable it to reach a conclusion on the question before it, may hear argument—

(a) by the convicted person or by counsel on the convicted person's behalf; or

(b) by any counsel appointed by the Attorney General to present such argument as might have been presented by the convicted person if the convicted person had appeared.

(4) In considering a case referred to it under subsection (1), but subject to subsection (5), the Court has (the powers it would have on an appeal).

(5) (On a reference the Court is not bound by the rules of evidence but may inform itself as it thinks fit.)

(6) ...the Court may—

(a) receive in evidence—

(i) a transcript of evidence taken, and the exhibits produced, in a proceeding before a court of, or in an inquiry by a commission of inquiry ... , or

(ii) a report of a commission of inquiry ..., and draw such conclusions of fact from the evidence and exhibits or report as it thinks fit; or adopt, as it thinks fit, the finding, decision, judgment, or reasons for the finding, decision or judgment, of a court or commission of inquiry referred to in paragraph (a) that are relevant to the court's consideration.

In fact, the Attorney General, following the Morling Inquiry, referred the *Chamberlain* case to the Court of Criminal Appeal. I was one of the judges of that Court. On the basis of the unassailable Morling report we quashed the Chamberlains' convictions and entered verdicts of acquittal.

The *Chamberlain* case shows that there must be a regular mechanism for bringing the matter to the notice of the Supreme Court. It is not enough to be able to petition the executive. If a case has (or has taken on) political overtones, the judgment of the executive may be clouded by bias. The mechanism must be regular in the sense that it can be brought into operation without having to invoke irregular and extraordinary processes. As far as it goes, since the 1992 amendment, section 475 serves that purpose, although it remains possible for a person, ignorant of section 475, to petition the governor who is not obliged to inform the Supreme Court or to direct an inquiry. I suggest that, if section 475 is to be preserved as appropriate, all approaches to the executive for review should either result in an inquiry being ordered under section 475 or at least they should result in the Supreme Court being informed of the approach. After all, many of these cases are not of the ancient type where a petitioner was truly seeking mercy. The modern petitioner is often seeking justice, not mercy. That is not to say that the traditional role of the governor

as to the prerogative of mercy should be watered down in any way. The co-existence of two roads is not inconsistent.

That the regular mechanism should have the effect of alerting the Supreme Court is not inappropriate, because (although in another sense) the traditional mark of a Superior Court was that it had the oversight of inferior tribunals by the prerogative writs to ensure, amongst other things, that they acted justly. Here it is not a matter of inferior tribunals, but it is certainly about ensuring that injustice is not knowingly permitted to stand within the society for which the Supreme Court exists. I regard this as a not inappropriate development of the idea that lay behind the old more limited prerogative writ remedies.

At the same time such extracurial examinations should not become a routine way of having someone second guess the jury or the appellate courts. The Supreme Court itself has shown that in dealing with matters under section 475 it can prevent that from happening. Justice Hunt, now CJ at CL, expressed the view in Rendell [3]: that "Since the Court of Criminal Appeal was created to deal with matters of fresh evidence, the section [ie 475] should not be used as an additional avenue of appeal; nor is it appropriate that recourse should be had to it simply because the evidence does not pass the tests as to when a new trial will be granted by that Court". His Honour cited *Harris*[4] and *Gallagher*.[5]

The journey embarked upon when the Supreme Court decides to order an examination under section 475 should reasonably be able in an appropriate case to lead to a verdict of acquittal and not a mere pardon. If the section 475 route is to be retained I would recommend a provision in substance similar to section 433a of the *Criminal Code* of the Northern Territory to enable a court, in a proper case, to receive in evidence itself the evidence before an inquiry and, in a suitable case, the findings of the inquiry, and to quash a conviction.

If the better vehicle were thought to be section 26 of the *Criminal Appeal Act*, there should, I respectfully suggest, also be a provision similar in effect to section 433a of the *Criminal Code* (NT) expressly empowering the Court of Criminal Appeal to admit into evidence before it the inquiry material I have referred to. Whatever else may be said about the present legislation, it is obscurely worded. If those provisions are to be amended or replaced, let the new provisions be such that a reasonably intelligent person reading them can understand them.

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3 (1987) 32 A Crim R 243 at 248.

4 (unreported CCA 13 December 1985).

5 (1986) 160 CLR 392 at 399.