

Centenary of the Court of Criminal Appeal Dinner

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A Matter of Fact: The Origins of the Court of Criminal Appeal

The Hon Justice Peter McClellan AM*
Chief Judge at Common Law
Supreme Court of NSW

Chief Justice, Attorney, former Chief Justices, colleagues, former colleagues, ladies and gentlemen.

Wilhelm Meyer, aka Thomas Smith, was born in Lincolnshire in 1839. He was an enterprising soul. During his life he claimed to have studied medicine in Vienna. He did at one time practise as a doctor in Adelaide. He also claimed to have been the surgeon-general to the King of Hawaii as well as the owner of a coffee plantation in Honolulu.¹

With this level of apparent achievement in conventional society it is surprising that Meyer came to be a significant figure in the criminal history of England and, indirectly, New South Wales. By the 1870s, Meyer had taken to a life of crime on the streets of London. Posing as a

* I express my gratitude to Christopher Beshara, the Common Law Researcher, who was responsible for the research for, and first draft of, this paper.

¹ "Report of the case of William Thomas, alias John Smith, contained in the *Times* newspaper, of 16th Sept., 1904", reproduced in Eric R Watson, *Adolf Beck (1877–1904)* (William Hodge & Company, 1924) 224–5.

nobleman by the name of “Lord Willoughby”, he successfully tricked at least 17 women into parting with their jewellery. His modus operandi was simple. He would pretend to mistake a woman on the street for one “Lady Everton” or some other fictitious dame, and then engage her in conversation. He would promise to show her the French Riviera on his yacht, or perhaps take her as his mistress. But first, she needed jewels and a wardrobe fit for the occasion. At Meyer’s request, the woman would hand over her ring, in the belief that “Lord Willoughby” would have it examined for size by a jeweller and return with more resplendent pieces. Suffice to say, he never came back. Meyer must have had a way with words because the historical record does not paint a flattering picture of him: short, rotund, double-chinned.

As you might expect, Meyer eventually saw the inside of a prison cell. In 1877, he was convicted and sentenced to five years imprisonment. Specific deterrence proved totally ineffective and he left prison unreformed. He very quickly reprised his alter ego and set about defrauding more women of their jewels and other belongings.

In December 1895, a well-dressed Norwegian man named Adolf Beck was walking down Victoria Street when one of Meyer’s many victims identified him as the charlatan who had made off with her jewels.

Although Beck denied the accusation, he was arrested and charged. His life took a further and more significant turn for the worse when a number of other women identified him as the culprit. As if things were not bad enough, the judge who presided over Beck's trial had prosecuted Meyer when he was at the Bar. His Lordship was convinced that the man now before him was the culprit. The judge refused to allow the defence to call evidence to show that Beck could not have been the guilty party because he was in Peru when a number of the crimes took place. On the sworn evidence of a number of victims, Beck was convicted of Meyer's crimes and sentenced to seven years imprisonment. Only when it was discovered from prison records that Meyer was circumcised, whereas Beck was not, did doubts begin to surface about Beck's guilt. Although the Home Office brought this anomaly to the trial judge's attention, his Lordship was unmoved. Beck continued to languish in prison for crimes he did not commit, until he was released on parole in 1901.

His sorry tale did not end there. In 1904, Beck was again arrested, and after trial convicted, on the evidence of another woman who mistook him for Meyer. This time, however, Beck's accuser was not certain in her identification. The trial judge was troubled by the guilty verdict and chose to delay sentencing. In a rare stroke of luck for Beck, the case was

solved a few days later when the police arrested “Lord Willoughby”, who had continued all the while to sweet-talk women into handing over their jewels. Beck was finally pardoned and given £5,000 for his troubles. But he was shattered and his life ruined.²

There is another person of historical significance to the origins of the Court of Criminal Appeal. His story is also one of unmitigated misery. George Edalji was a solicitor from Birmingham of Indian and Persian descent. In 1903, a number of animals were inexplicably slaughtered near his father’s residence. An anonymous letter sent to the police claimed that George was seen disembowelling a horse. George was convicted after trial and sentenced to seven years imprisonment. Those who have studied the matter conclude that it should have been obvious to anyone who cared to look at the evidence that George could not have been guilty. Not only did his father, an Anglican clergyman, supply George with an alibi, but the mistreatment of animals did not abate while he was in gaol awaiting trial.³

Both Beck’s case and the misfortune of George attracted significant publicity. They were cited by those who urged reform of the criminal

² Beck lived out his final years in “poor circumstances” before succumbing to bronchitis and pneumonia in a Middlesex hospital in 1909: *The Times* (London), 8 December 1909, 11.

³ Rosemary Pattenden, *English Criminal Appeals 1844–1994* (Clarendon Press, 1996) 30.

justice system because of the unreliability of some jury verdicts. In 1906, the reformers were encouraged by two articles published in the *Daily Telegraph* by Sir Arthur Conan Doyle, in which he sought to prove George's innocence.⁴ It would be fair to say that the case did not require the deductive genius of Sherlock Holmes.

There were others, but it was the fate of Beck and Edalji which provided the impetus for the English *Criminal Appeal Act* of 1907. Before the Act, the English criminal justice system did not provide for appeals on questions of fact. An appeal on a question of law was confined and could only be pursued with the leave of the trial judge. It may come as no surprise that leave was rarely granted. English judges were notorious for strong-arming juries into returning the verdicts the judge wanted.⁵ It was thought, overoptimistically, that the Crown prerogative of mercy would be adequate to deal with the occasional wrongful conviction.⁶

The movement for reform was taken up by the newspapers, and not just the tabloids. The perceived dysfunction of the criminal justice system is reflected in a letter to the editor published in *The Times* in February 1907, which read: "No one in his senses can approve of the course of

⁴ *Daily Telegraph* (London), 11–12 January 1907.

⁵ Pattenden, above n 3, 16.

⁶ *Ibid* 19–20.

things, now becoming almost normal, in which the main features are conviction, agitation by friends, investigation by a distinguished amateur, a 'boom' in the popular Press, [and] a departmental committee of the Home Office".⁷

The English experience was repeated in New South Wales. Moss Morris Friedman was a banker who was convicted in 1902 of receiving stolen goods. Friedman had no complaint about the efficiency of the justice system. He was tried on a Wednesday, convicted and sentenced on the Thursday, and released on the Friday of the same week. Friedman was convicted solely on the evidence of a boy who claimed that Friedman had purchased stolen goods, worth £200, at a price of £80. Before passing sentence, the trial judge remarked that he himself would not have found Friedman guilty. Within 24 hours of conviction, counsel for Friedman presented a petition for clemency to the Minister for Justice, Bernhard Wise, who sought a report from the trial judge. The trial judge reported back immediately and Wise recommended that Friedman be released. In a move that raised eyebrows, Friedman was actually

⁷ Herbert Stephen, "Criminal Appeal", *The Times* (London), 14 February 1907, 11. Though initially opposed by the English judiciary, the Court of Criminal Appeal proved a success. *The Times* concluded two years after its establishment that "even with ... imperfections in procedure, the formation of the Court has been justified": "The Working of the Court of Criminal Appeal", *The Times* (London), 2 February 1909, 9. An editorial published the next month was also positive: "There is no sign that juries are losing their sense of responsibility by reason of the knowledge that they no longer always speak the last word. There is no likelihood that almost all prisoners will appeal, as was at one time feared ... The Act has not proved unworkable, as was predicted": "The Court of Criminal Appeal", *The Times* (London), 12 March 1909, 9.

released a day before the Premier, John See, approved Wise's recommendation for clemency. A rumour was aired in Parliament that the wheels of justice were greased by the Minister's unpaid debt to Friedman, although this was never substantiated.⁸

William Arthur Holman is a figure well known to students of the Labor Party, although perhaps not with great affection.⁹ He had an acutely personal interest in the workings of the criminal justice system. Before his election to Parliament, Holman was the proprietor of the *Daily Post*, a unionist newspaper established in 1895 to give "temperate expression to the industrial and political aspirations of the workers". The paper was set up as a company of individual shareholders. The directors decided against calling for payment on the shares until the paper had proved its viability. That never happened, and the paper was forced into liquidation. Holman and his colleagues were charged with, and ultimately convicted of, having conspired to defraud one of the shareholders of his investment in the newspaper. Holman denied that he had acted dishonestly. At the conclusion of the trial, his counsel sought permission

⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 October 1902, 3054 (Joseph Carruthers MLA), 3063 (John See MLA, Premier). See also J C L Fitzpatrick, "Correspondence: The Friedman Case", *Windsor and Richmond Gazette* (NSW), 2 December 1902, 16.

⁹ On Holman's role in the labour movement, see H V Evatt, *Australian Labour Leader: The Story of W A Holman and the Labour Movement* (Angus and Robertson, 3rd ed, 1945). Holman remains a controversial figure in Labor circles. He broke ranks with the Labor Party in 1916 over conscription, which he supported, and formed the conservative Nationalist Party of Australia with his one-time political rival Sir Charles Gregory Wade.

for Holman and the co-accused to address the jury from the dock. The trial judge refused the request, although the point was reserved for the Full Court's consideration.

Holman was sentenced to two years imprisonment. He spent two months in prison before the Full Court decided that he ought to have been allowed to address the jury and quashed his conviction.¹⁰ Holman's brief stay in prison was devastating. Dr Evatt's biography of Holman recounts that he "underwent unspeakable indignity and mortification".¹¹ Fortunately Holman's ordeal was not in vain. He did as others suffering a similar fate have done. He decided to study law. He passed the Bar exams and was admitted to practise despite the Bar Council's opposition.¹² In 1912, he pioneered the *Criminal Appeal Act* as Attorney-General in James McGowen's Labor Government, and later served as Premier himself. According to Evatt, Holman "derived great satisfaction from the passing of his Criminal Appeal Bill".¹³

¹⁰ *R v Smith and Ors* (1896) 17 NSWLR 104. The Bench considered the appeal point to be a technical one. Darley CJ, with whom Stephen and Cohen JJ agreed, said at 107: "I am strongly of the opinion that the Legislature should ... repeal s 470 of the *Criminal Law Amendment Act* so far as it allows prisoners to make statements. Now that a prisoner may give evidence on oath, the necessity for allowing him to make a mere statement no longer exists, and the power is, in my experience, one which is often grossly abused".

¹¹ Evatt, above n 9, 87–8.

¹² *Ibid* 156–62.

¹³ *Ibid* 297.

The New South Wales Act followed the English Act. It provided a mechanism by which convicted persons could appeal on a question of fact. This was recognised as a concession to the fallibility of the jury system, which the Beck and Edalji cases, among others, had exposed. Offenders were also given a right to seek leave to appeal against the severity of their sentences.

Until the Act was passed, an appeal against conviction could only be brought on a question of law. The right was severely limited before 1849, when an appeal on a question of law could be referred to the Full Bench of the Supreme Court only by the trial judge. There was no appeal as of right, save for the theoretical possibility that a convicted person could lodge a writ to have the conviction quashed for an error of law on the face of the record.¹⁴ The so-called “writ of error” rarely succeeded.¹⁵

¹⁴ Ibid 253.

¹⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 July 1911, 1292 (William Arthur Holman MLA, Attorney-General). As to the writ of error provisions, see *Criminal Law Amendment Act 1883* (NSW) s 427 (rep); *Crimes Act 1900* (NSW) s 471 (rep). Sometimes the effect of quashing a conviction for legal error could be ameliorated by the award of a *venire de novo*, which would allow the Crown to bring fresh proceedings on the same charge, but only where the original trial was attended by fundamental error: *Winsor v The Queen* [1866] 1 QB 390. See, for example, *R v Mitchell* (1904) 4 SR (NSW) 317, where the jury found the defendant guilty of stealing and receiving the same goods. The proper approach in cases where a jury is satisfied of the defendant’s guilt of either larceny or receiving but is unable to decide which is the correct count is to bring in a special verdict, whereupon the offender will be sentenced for whichever of the two offences carries a lesser punishment: *Crimes Act 1900* (NSW) s 121. The jury failed to do so. The defendant lodged a writ of error and the Court quashed the conviction. Rather than leave it at that, the Court granted a *venire de novo* permitting the Crown to bring fresh proceedings. See also *R v Pratt* (1904) 4 SR (NSW) 573, 575; *R v Atkinson* (1907) 7 SR (NSW) 713. In other ways as well the Attorney-General had perhaps overstated the extent of the problem posed by writs of error. Section 471(2) of the *Crimes Act* conferred on the Supreme Court the power to amend a conviction infected with error, as occurred in *R v Jackson* (1906) 6 SR (NSW) 283, where a prisoner was convicted of manslaughter and erroneously sentenced to six years imprisonment rather than six years penal servitude, and the Court corrected the sentence.

The appeals procedure was somewhat improved in 1849, when the State adopted the English procedure of “stating a case” on a question of law.¹⁶ However, there was still no means by which a convicted person could challenge his conviction on the ground that the jury had reasoned to the wrong factual conclusion.¹⁷ The only remedy for prisoners who complained that the jury was in error was to petition the Governor.¹⁸ Furthermore, it was not possible for offenders to appeal against the severity of their sentences. Only the Executive could reduce excessive sentences in the exercise of the prerogative of mercy.¹⁹

The Beck case was extensively discussed when the Criminal Appeal Bill came up for debate in the New South Wales Legislative Assembly in July 1911. The Attorney-General said that he was troubled by the fact that the miscarriage of justice in Beck’s case had come to light only because the actual perpetrator continued to offend while the wrongfully

¹⁶ *Reserved Criminal Cases Act 1849* (NSW) ss 1–3 (rep). The substance of the “case stated” provisions was carried over into the *Criminal Law Amendment Act 1883* (NSW) ss 422–426 (rep) and the *Crimes Act 1900* (NSW) s 470 (rep).

¹⁷ Section 23 of the *Criminal Appeal Act 1912* (NSW) abolishes the writ of error.

¹⁸ *Criminal Law Amendment Act 1883* (NSW) s 383 (rep); *Crimes Act 1900* (NSW) s 475 (rep).

¹⁹ G D Woods, *A History of Criminal Law in New South Wales* (Federation Press, 2002) explains at 285–86 that prior to the Act, “in New South Wales there had never been any appeal to a higher court against the severity of criminal sentences – or indeed, except on error of law, against criminal convictions. Instead, there was a regular flow of petitions to the Governor and parliamentary representatives against convictions and sentences seeking the exercise of the prerogative of mercy”.

convicted man was behind bars.²⁰ Mr Holman endorsed the remarks of the former English Attorney-General, Sir Henry James, who in 1883 identified “the obvious probability that juries, however desirous of doing their duty justly ... sometimes ... made grievous mistakes in their verdicts”.²¹ Analogies were also drawn with the position in civil cases, where appeals were available on fresh evidence grounds as early as the mid-seventeenth century.²² The Attorney-General quoted Lord Loreburn, the then Chancellor, who in 1907 posed the question: “If men are liable to go wrong in their judgments in civil cases, why are they not under similar liability in criminal cases?”²³

Questions were raised as to how the *Criminal Appeal Act* would operate in practice. Some politicians feared that the Court would be inundated with unmeritorious appeals. One member of the Opposition wondered whether every drunkard in the State who was convicted of misbehaviour – of whom the Hansard records there were about 20,000 every year – would appeal against their convictions.²⁴ The Attorney-General sought to allay these fears by reciting the English experience. He noted that in

²⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 July 1911, 1298, 1301 (Mr Holman MLA, Attorney-General).

²¹ Quoted in New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 July 1911, 1297 (Mr Holman MLA, Attorney-General).

²² Pattenden, above n 3, 6.

²³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 July 1911, 1297 (Mr Holman MLA, Attorney-General).

²⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 July 1911, 1316 (Mr Wade MLA).

1909, only six per cent of the 10,000 or so convictions recorded that year went on appeal to the English Court of Criminal Appeal.²⁵ This led one Member of the House to interject that the Attorney-General would find criminals to be “more enterprising in New South Wales!”²⁶

The government originally envisaged that both District and Supreme Court judges would sit on the Court of Criminal Appeal.²⁷ The rationale was that District Court judges would bring their worldliness, trial experience and fact-finding skills to the task of deciding criminal appeals, which would now raise questions of fact as well as law.²⁸ It was also suggested that District Court judges were best acquainted with the sentencing range that was considered appropriate for particular offences.²⁹

There was unease about the prospect of District Court judges overruling their Supreme Court counterparts. One Member of the Legislative Council described the possibility of decisions rendered by a majority of District Court judges as introducing “an element of ‘topsy-turveydom’ into

²⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 July 1911, 1304 (Mr Holman MLA, Attorney-General).

²⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 July 1911, 1304 (Daniel Levy MLA).

²⁷ Criminal Appeal Bill 1912 (NSW) cl 3.

²⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 July 1911, 1766 (Mr Holman MLA, Attorney-General).

²⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 July 1911, 1769 (Mr Holman MLA, Attorney-General).

the administration of justice which would not make for harmony of working”.³⁰ Sir Charles Gregory Wade, the Member for Gordon, went a step further by predicting judicial revolution. He warned that the judges of the District Court would end up “laying down the law for the whole state and governing the Supreme Court”.³¹ Historionics aside, there was a legitimate concern that the Court of Criminal Appeal would be divested of its constitutional status as a Supreme Court if District Court judges were to sit alongside Supreme Court judges. Ultimately the clause providing for the appointment of District Court judges was abandoned.³²

As you know, the New South Wales Act confers a power on the Court to order a new trial whenever an appeal against conviction is successful.³³ Alluding to the English Act, which did not provide for a new trial,³⁴ the Attorney-General said that the power was necessary “in order to avoid the remedying of one wrong by committing another”.³⁵ The English position left judges in the invidious position of having to let the guilty go

³⁰ New South Wales, *Parliamentary Debates*, Legislative Council, 7 December 1911, 2430 (Mr Carruthers MLC).

³¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 July 1911, 1767 (Mr Wade MLA).

³² Following amendments introduced in 2008, the Chief Justice may direct the Chief Judges of the District Court and the Land and Environment Court to sit on the Court of Criminal Appeal, provided the Chief Judge concerned consents to sitting on the Court: *Criminal Appeal Act 1912* (NSW) s 3(1A).

³³ *Criminal Appeal Act 1912* (NSW) s 8.

³⁴ Pattenden, above n 3, 190–3. Pattenden notes that the Court of Criminal Appeal had inherited from the Court for Crown Cases Reserved a residual power to grant a *venire de novo*, a writ vacating the verdict and ordering fresh proceedings. However, such a writ was available only when the conviction was vitiated by fundamental error (as when, in *R v Hancock* (1931) 23 Cr App R 16, an accused confessed his guilt at trial but the jury were not asked to formally enter a verdict).

³⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 July 1911, 1307 (Mr Holman MLA, Attorney-General).

free whenever their convictions were tainted by legal error. It was not always possible to dismiss the appeal by applying the proviso. Time and again in their judgments, English judges hinted at the need for greater flexibility in the *Criminal Appeal Act*.³⁶

The problem in England came into sharp relief in 1911, when an appellant who was convicted of murder and sentenced to death had his conviction quashed for legal error. The Crown had a strong circumstantial case. However, the police statements of the Crown's star witness were not shown to the defence. That did not stop the trial judge, who was obviously convinced of the appellant's guilt. In summing up, he decided to leave no room for doubt. The judge told the jury that the witness had mentioned several matters in his statement taken on the day of the murder, including that the appellant had confessed and that the witness had seen the appellant dispose of the murder weapon. The judge also told the jury that, according to the witness' statement, the appellant had said things about the manner of the victim's death that only the murderer could have known. It was later discovered that the witness had not mentioned any of these incriminating matters in his statement.³⁷ Justice Darling delivered the judgment of the appellate

³⁶ See, for example, *R v Stone* (1910) 6 Cr App R 89, 95; *R v Winkworth* (1910) 6 Cr App R 179, 181; *R v Rufino* (1911) 7 Cr App R 47, 49.

³⁷ *R v Ellsom* (1911) 7 Cr App R 4.

court, which included a scathing criticism of the absence of any statutory power to order a new trial.³⁸ However, it was not until 1964 that the English Court's plea for the power to order a retrial would be answered.³⁹

In New South Wales, the *Criminal Appeal Act* was given a lukewarm reception by the press. Reflecting the nationalistic sympathies of the day, the *Sydney Morning Herald* criticised the Attorney-General for his "unquestioning obedience to [the English] model".⁴⁰ The newspaper noted that unlike in England, "the way of appeal [was] not closed or tortuous" in New South Wales, where offenders had long enjoyed a right of appeal on questions of law.⁴¹ But what really incensed the press was Holman's proposal to have Supreme Court judges make recommendations as to whether the Crown should exercise its prerogative of mercy in capital cases. The *Herald* wrote: "The Government must still perform its duties, whether it contains overworked politicians or not, and there should be no back doors provided for shifty folk in office".⁴²

³⁸ *R v Ellsom* (1911) 7 Cr App R 4, 8.

³⁹ It was not until the re-enactment of the English *Criminal Appeal Act* in 1964 that the Court of Criminal Appeal was given the power to order a retrial where an appeal had succeeded on fresh evidence grounds. The Criminal Division of the Court of Appeal for England and Wales, which superseded the English Court of Criminal Appeal in 1966, was given from its inception a general power to order a new trial.

⁴⁰ "Law Reform", *Sydney Morning Herald* (Sydney), 13 July 1911, 8.

⁴¹ "Ministerial Responsibility", *Sydney Morning Herald* (Sydney), 28 November 1911, 8.

⁴² *Ibid.*

In 1924 the Act was amended to incorporate s 5D, which gave the Attorney-General the power to appeal against sentence. It was part of a package of legislation designed to address public concern about an apparent upswing in crime in New South Wales, which prompted the Nationalist Party government to expand police powers and dramatically enlarge the summary jurisdiction of the lower courts. Not everyone approved of these measures. Sir Edward McTiernan, who served for a time as the Member for the Western Suburbs (a seat clearly in need of redistribution) was critical. In parliamentary debate, he said, with just a touch of irony: “After considering the speech made by the Minister on the second reading of the bill, and the provisions of the measure itself, one comes to the conclusion that it is not a social reformer’s bill”.⁴³

In its early years, the Court of Criminal Appeal attempted to remain faithful to the words of the section. It was of the view that it had an “unfettered discretion” to vary an offender’s sentence which it considered to be inadequate.⁴⁴ The High Court was of the same view. In *Whittaker v The King*,⁴⁵ a jury convicted a man of the manslaughter of his wife. The trial judge imposed a sentence of 12 months penal servitude with hard

⁴³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 July 1924, 670 (Edward McTiernan MLA).

⁴⁴ See, for example, *R v Gosper* (1928) WN (NSW) 165, 166; *R v Geddes* (1936) 36 SR (NSW) 554, 555.

⁴⁵ [1928] HCA 28; (1928) 41 CLR 230.

labour. The Attorney-General appealed against the sentence to the Court of Criminal Appeal. The appeal was presided over by Sir Philip Street, the first of the three Streets to serve as Chief Justice. The Court allowed the appeal and re-sentenced the offender to five years imprisonment.⁴⁶ The High Court refused the offender's application for leave to appeal. Knox CJ and Powers J said that the "true view" of s 5D of the *Criminal Appeal Act* is that "unlimited judicial discretion [to vary the sentence] is thereby conferred on the Court of Criminal Appeal".⁴⁷ Sir Kenneth Street, who succeeded Sir Frederick Jordan as Chief Justice, adhered to this view. His Honour said in a 1956 case: "this court is given a free and unfettered discretion, if it thinks that the sentence needs to be increased, to impose such sentence as in its view is appropriate to the offence concerned".⁴⁸

It was only in the 1970s that the High Court retreated from this position. Barwick CJ cautioned that Crown appeals against sentence should be "a rarity, brought only to establish some matter of principle".⁴⁹ However, Sir

⁴⁶ *R v Whittaker* (1928) 28 SR (NSW) 411.

⁴⁷ [1928] HCA 28; (1928) 41 CLR 230, 235 (Knox CJ and Powers J). See also *R v Geddes* (1936) 36 SR (NSW) 554, where the Court of Criminal Appeal re-sentenced an offender who was given a 12-month sentence for manslaughter to a sentence of three years imprisonment. Chief Justice Sir Frederick Jordan, who delivered judgment on behalf of the Court, acknowledged that sentencing is not an entirely objective enterprise, but one in which the "only golden rule is that there is no golden rule" (at 555). Again the High Court refused special leave to appeal: *R v Geddes* (1936) 36 SR (NSW) 680 (note).

⁴⁸ *R v Herring* (1956) 73 WN (NSW) 206, 206 (Street CJ).

⁴⁹ *Griffiths v The Queen* [1977] HCA 44; (1977) 137 CLR 293, 310 (Barwick CJ). The High Court was probably concerned to bring the principles regulating Crown appeals against sentence into line with its

Laurence Street continued the family tradition and voiced strong opposition to the High Court's discouragement of Crown appeals, remarking in 1983: "It would ... be wrong for courts to adopt a posture of discouraging the bringing of Crown appeals whether by direct statements to this effect or by reluctance to entertain them fairly and properly".⁵⁰

The cases that come before the Court can reflect the worst of human nature. In 2002, the late Justice of Appeal Roderick Meagher, well known for his robust approach to criminal law, presided over an appeal by Mark Valera, who had been sentenced to life imprisonment for two counts of murder.⁵¹ The facts were truly gruesome. Meagher JA said in his judgment: "Using language as restrained as possible, I find the circumstances of each murder disgusting".⁵² His Honour dismantled the appellant's arguments in short order and concluded by remarking that "one might be tempted to suggest that the circumstances of the present case call for a punishment a good deal more severe than mere life imprisonment".⁵³ Wood CJ at CL and Bell J agreed with Meagher JA's

1936 decision in *House v The King* [1936] HCA 40; (1936) 55 CLR 499, where Dixon, Evatt and McTiernan JJ emphasised at 505 that a reviewing court should interfere with a trial judge's discretion only in cases where the judge "acts upon a wrong principle, ... allows extraneous or irrelevant matters to guide or affect him, ... mistakes the facts, ... [or] does not take into account some material consideration".

⁵⁰ *R v Holder and Johnston* [1983] 3 NSWLR 245, 255 (Street CJ).

⁵¹ *R v Valera* [2002] NSWCCA 50.

⁵² *R v Valera* [2002] NSWCCA 50, [2] (Meagher JA).

⁵³ *R v Valera* [2002] NSWCCA 50, [9] (Meagher JA).

reasons, but added that they “would resist the temptation to consider whether the case might have called for any more severe punishment than that imposed”.⁵⁴

The Court of Criminal Appeal has been a pioneer of equal opportunity in the judicial system. As was mentioned this morning, the Court sat the first all-female Bench in the common law world in 1999, when Beazley JA and Simpson and Bell JJ sat together. However, you may not know the whole story, which Simpson J has authorised me to tell. Although Handley JA was originally rostered to preside over the Court, Spigelman CJ sensed the opportunity to make history and authorised a last-minute change to the roster. The three women judges sat together on the Court amid considerable publicity. As it happens, on the night before this historic sitting, Sydney suffered a major hailstorm which resulted in widespread property damage along the State’s east coast. The next morning, Simpson J sent the Chief Justice an email in which she jokingly inquired, with reference to Genesis 6:5 and 7:11: “Did we receive last night an expression of opinion from above at the enormity of the unnatural and wicked event you have ordained to take place today?” Little did her Honour know that the “expression of opinion from above”

⁵⁴ *R v Valera* [2002] NSWCCA 50, [11] (Wood CJ at CL), [16] (Bell J).

was indeed received by the Chief Justice, whose residence in Darling Point had been badly damaged the night before.

Many of the cases that come before the Court are accompanied by considerable controversy. One that should be mentioned is Tim Anderson's 1991 appeal against his conviction in what became known as the "Hilton Bombing Case". Anderson was convicted of being an accessory to the murder of two garbage men and a police officer, who were killed when a bomb exploded outside the Hilton Hotel in Sydney. The intended target was allegedly the Prime Minister of India, who was then at the Hotel. The Crown case was that one Evan Pederick placed the bomb in a garbage bin at Anderson's behest. Anderson and Pederick were members of Ananda Marga, a religious movement based in India and under surveillance at the time by ASIO. The group was campaigning for the release of its "divine" leader from an Indian prison. According to the Crown case, Anderson and Pederick hoped that by assassinating the Indian Prime Minister, momentum would build for their leader's release.

In his judgment, Gleeson CJ, with typical understatement, remarked: "A consideration of some of the features of the assassination proposal might be thought to lead to a conclusion that this was not a very realistic

expectation, but the Crown argued that the persons involved in the plot were not very realistic people”.⁵⁵ The Chief Justice described Pederick as “a witness who said that on a particular occasion he stood in George Street in Sydney and tried to blow up the Prime Minister of India, the Prime Minister of Australia, and a number of other people besides, and, when his attempt was unsuccessful, attributed its failure to the supernatural intervention of his guru”. The Chief Justice added: “He seems to have been a person whose reasoning processes were somewhat unorthodox”.⁵⁶

This occasion should not pass without mention of guideline judgments for sentencing. At a time when grid sentencing was in serious contemplation, Spigelman CJ visited England to look at the practice of superior courts giving guidance to first-instance judges on matters of sentencing principle and the appropriate range of sentences for particular crimes.⁵⁷ In the first guideline judgment issued by the Court of Criminal Appeal, the Chief Justice stressed that inconsistency in sentencing tends to erode public confidence in the administration of justice. His Honour’s intention was not to deny judicial discretion, but to make its exercise more likely to lead to outcomes that align with

⁵⁵ *R v Anderson* (1991) 53 A Crim R 421, 452 (Gleeson CJ).

⁵⁶ *R v Anderson* (1991) 53 A Crim R 421, 452 (Gleeson CJ).

⁵⁷ Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 32.

community standards.⁵⁸ The High Court was not as enthusiastic as the Court of Criminal Appeal, and in 2001 questioned, among other matters, whether the Court had the power to issue guideline judgments on its own motion.⁵⁹ The State Parliament supported the Chief Justice's vision, amending the *Criminal Appeal Act* to give the Court this power.⁶⁰

Guideline judgments now play a significant role in the sentencing of many offenders.

As I have mentioned, the primary reason why Parliament created a Court of Criminal Appeal was to allow an appellate court to review a jury's factual findings and where appropriate overturn its verdict.

However, the Court was slow to embrace this role. The language of s 6 was imported directly from the English Act. As you know, it provides that the Court of Criminal Appeal "shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence".

Two approaches have competed for acceptance. The first requires the Court to consider only whether there is sufficient evidence to support the conviction under review, without regard to the Court's preferred view of the facts or the reliability of the evidence. Chief Justices Sir William

⁵⁸ *R v Jurisic* (1998) 45 NSWLR 209, 220–1 (Spigelman CJ).

⁵⁹ *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584, [84] (Gaudron, Gummow and Hayne JJ).

⁶⁰ Schedule 5 to the *Criminal Legislation Amendment Act 2001* (NSW).

Cullen, Sir Philip Street and Sir Frederick Jordan thought this approach to be correct.⁶¹ The High Court was initially of the same view. Knox CJ and Gavan Duffy and Starke JJ said in respect of a 1928 appeal that raised an unreasonable verdict ground: “It is of the highest importance that the grave responsibility which rests on jurors ... should be thoroughly understood and always maintained”.⁶²

The High Court has decisively moved from this approach towards a position that is less deferential to the jury as the tribunal of fact. The appeal court is now required to “make an independent assessment of the evidence, both as to its sufficiency and its quality”.⁶³ It is assumed that “[i]n most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced”.⁶⁴ The High Court

⁶¹ *R v Dent* (1912) 12 SR (NSW) 544, 550 (Cullen CJ); *R v Mansfield* (1916) 16 SR (NSW) 187, 193–4 (Cullen CJ), 198 (Ferguson J); *R v McCall* (1920) 20 SR (NSW) 467, 470 (Cullen CJ, Gordon and Wade JJ agreeing) (special leave refused in *McCall v The King* (1920) 28 CLR 608 (note)); *R v Thomas* (1928) 28 SR (NSW) 490, 491 (Street CJ); *R v Cable* (1947) 47 SR (NSW) 183, 184–5 (Jordan CJ); *R v Crooks* (1944) 44 SR (NSW) 390, 393 (Jordan CJ, Davidson and Halse Rogers JJ agreeing). See also *R v Sharah* (1932) 32 SR (NSW) 444, 446–7 (James J, Davidson and Halse Rogers JJ agreeing) quoting *R v Perfect* (1917) 12 Cr App R 273 (“Unless we, sitting in this Court, are prepared to say that, when a judge differs from a jury on a finding of fact, we ought to conclude that the verdict is unreasonable, or that there has been a miscarriage of justice, we cannot quash this conviction ... In these circumstances it seems to us that we must accept the decision of the jury on the facts, and that we are not in a position to quash this conviction, unless we substitute ourselves as a tribunal of fact ...”).

⁶² *Ross v The Queen* [1922] HCA 4; (1922) 30 CLR 246, 255–6. Their Honours were applying s 594 of the *Crimes Act 1915* (Vic), since repealed, which was materially identical in relevant respects to s 6 of the *Criminal Appeal Act 1912* (NSW).

⁶³ *Morris v The Queen* [1987] HCA 50; (1987) 163 CLR 454, 472–3 (Deane, Toohey and Gaudron JJ). See generally *Whitehorn v The Queen* [1983] HCA 42; (1983) 152 CLR 657, 686; *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487, 492 (Mason CJ, Deane, Dawson and Toohey JJ); *MFA v The Queen* [2002] HCA 53; (2002) 213 CLR 606, [56]; *SKA v The Queen* [2011] HCA 13; (2011) 243 CLR 400, [11]–[14] (French CJ, Gummow and Kiefel JJ).

⁶⁴ *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487, 494 (Mason CJ, Deane, Dawson and Toohey JJ).

has attempted to reconcile this approach with the previous authorities by explaining that where a reasonable doubt experienced by a criminal appeal court can be resolved by the jury's advantage in seeing and hearing the evidence, the jury's verdict of guilty may be allowed to stand.⁶⁵ However, each judge of the Court must consider whether he or she is persuaded of the appellant's guilt to the criminal standard of proof.⁶⁶

The Court can at times be the source of humour. Some of you will know of one particular occasion when Gleeson CJ and Meagher JA sat together. Early in the proceedings, Meagher JA whispered in the Chief Justice's ear: "You only have to look at him to know he is guilty". The Chief Justice is said to have responded: "They haven't brought the prisoner up yet. That is the sheriff's officer you're looking at". I have not checked the story with Murray Gleeson for fear that the truth might ruin a good yarn.

⁶⁵ *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487, 494 (Mason CJ, Deane, Dawson and Toohey JJ).

⁶⁶ See also *Chamberlain v The Queen (No 2)* [1984] HCA 7; (1984) 153 CLR 521, where Mason CJ and Gibbs J said at 534: "To say that the Court of Criminal Appeal thinks that it was unsafe or dangerous to convict, is another way of saying that the Court of Criminal Appeal thinks that a reasonable jury should have entertained such a doubt". This approach is reflected in the painstaking analysis of the sufficiency and quality of the evidence in the recent appeals brought by Gordon Wood and Jeffrey Gilham: *Wood v The Queen* [2012] NSWCCA 21, [49]–[388] (McClellan CJ at CL, Latham and Rothman JJ agreeing); *Gilham v R* [2012] NSWCCA 131, [465]–[543] (McClellan CJ at CL, Fullerton and Garling JJ).

Apart from an array of controversial cases, there are other issues in the history of the Court which we could talk about tonight, but time does not allow. For those of you who may be interested, I will discuss these issues in a paper that expands on these remarks.

If William Holman were alive today, I believe that he would look upon his creation with pride. A cynic might say that his enthusiasm for the Court derived from his own unhappy experience with the criminal justice system. If that is true, the *Daily Post* affair was a blessing in disguise. The future Attorney-General's experience was nothing if not educational. It brought home to Holman that wrongful convictions, inappropriate sentences and inadequate opportunities for appellate review can cause serious injustice to individuals and have a corrosive effect on public confidence in the justice system. The Court of Criminal Appeal was established by Parliament to address these issues. It has been entrusted with the responsibility of articulating the common law and construing the statutes which define the criminal law in this State. Within the parameters set by Parliament, the Court has the responsibility of giving guidance with respect to the sentences which are appropriate for particular offences and offenders. Notwithstanding the occasional flesh wound it has suffered at the hands of the High Court, none except a disgruntled appellant would suggest that the Court has not made a

profound and enduring contribution to the criminal justice system in this State. That it has done so is a testament to the skills, experience and dedication of successive Chief Justices and the judges who have served with them on the Court.