



Précis Paper

Practical Issues in Criminal Trials

I am pleased to present Richard Thomas of the Canberra Bar in discussion with Stephen Walmsley SC, who for many years was a District Court judge in New South Wales. Richard edits Benchmark Weekly Criminal which has been very well received by the profession.

This discussion is particularly interesting for those practitioners who are not before the court on criminal matters on a daily basis. It addresses some of the numerous and fascinating issues that are still alive when there is trial by jury.

Discussion Includes

- Practical matters that arose in the criminal proceedings that led to *Conway v R* [2002] HCA 2; 209 CLR 203.
- The principle that a new trial can be refused after an error of law at trial has been found, where there has been no miscarriage of justice.
- The directions trial judges should make
- Jury problems that can arise, and how and when they should be raised with the trial judge.
- Character directions and their importance at all levels of trial, whether before a jury or a magistrate.
- Cross examination of witnesses who have already been convicted and sentenced regarding the alleged offence.
- Fitness for trial, including raising the fitness issue at a late stage of the trial.

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Practical Issues in Criminal Trials

1. In this edition of BenchTV, Richard Thomas (Barrister) and Stephen Walmsley SC (Barrister) discuss the murder trial of John Conway and Kathy McFie which was ultimately appealed to the High Court in *Conway v R* [2002] HCA 2. The purpose of their discussion is to provide an example of some of the practical issues that can arise in criminal trials.
2. Mr Thomas acted for the co-accused, McFie, at trial and in the Full Federal Court. Mr Walmsley SC is a retired judge and former barrister.

Material Facts

3. Conway was a police officer, who was married with a child aged 7 at the time of the trial. The marriage had been beset with problems and there were allegations of violence. In family law proceedings, Conway's wife was granted custody of the child. Conway and McFie, the co-accused, were conducting an extra-marital affair and they planned to murder Conway's wife. They engaged the services of contract killers, Steer and Williams (hereafter 'the contractors'), agreeing to compensate them with the sum of \$15,000 for the murder. Steer and Williams murdered the wife by administering her with an overdose of heroin.
4. Significantly, Conway and McFie were approached by the police at an early stage in the investigations and they denied that they were in a relationship. This lie was later used to undermine their credibility at trial.
5. Eventually, the contract killers were caught by the police and agreed to cooperate with their investigation into Conway and McFie. Steer and Williams agreed to wear listening devices in a recorded conversation with Conway and McFie and soon after, they are arrested and charged with murder.

Prior to the Trial

6. Upon being charged, Conway and McFie were formally committed although interestingly, McFie was granted bail. It is very rare for a murder accused to be granted bail but the circumstances would have indicated that she was not a danger to the community and that there was no threat of her leaving the jurisdiction.
7. It was determined that the trial was to be a joint trial of both of the co-accused, Conway and McFie. Mr Thomas, who had only recently been briefed in the matter, became concerned that Conway might allege that McFie was solely responsible. This was a difficult tactical issue

because Mr Thomas was not given instructions to consult with counsel for Conway, which might have been a means to conduct a more effective defence.

8. Mr Thomas explains that his approach to defending McFie was to suggest she was not responsible for the crime but was influenced or manipulated by Conway.

The Evidence at Trial

9. The most damning piece of evidence against the co-accused was the confessional evidence provided by the contract killer's recording. Mr Thomas notes that the significance of the evidence was tempered by it being unclear whether McFie was there the whole time or there at all.
10. On top of the recording, the Crown emphasised that the pair had a strong motive to engage the contractors given it was a means of removing an inconvenient spouse so they could remain together. For Conway, it also meant retaining custody of his child. Furthermore, there was the evidence of the contractors who pointed their fingers at the co-accused. In totality, the evidence was quite overwhelming against the co-accused.
11. Less significantly, there was also evidence that went towards the character of McFie. The Crown alleged she was disreputable on the basis of being an adulterer and also because it emerged she had tried to befriend the deceased and had made a series of secret recordings of their conversations. Mr Thomas recounts that her instructions to him were that she had made them in order to understand the relationship between Conway and his wife. The Crown suggested that it was duplicitous conduct designed to obtain evidence to discredit the deceased as a mother.

The Hearing

12. As regards the evidence of the contractors, it was necessary that the Crown Prosecutor disclose in his opening address that they had plead guilty to murder and had received reduced sentences in exchange for cooperating with the Police and providing evidence against the co-accused. Mr Thomas recounts that both he and counsel for Conway made much of this quid pro quo at trial and strongly emphasised the clear reliability concerns with the contractors' evidence. Mr Walmsley suggested that one means of creating reasonable doubt in the minds of the jury would have been to find a relationship between the contractors and the deceased. However, there was none.
13. When it came time for Mr Thomas to cross-examine Conway, a significant event was that a letter written by Conway to McFie was put to Conway. Mr Thomas characterizes the letter as

almost amounting to an admission by Conway that he was entirely responsible and that he would do everything he could to protect McFie. Mr Thomas considers that he did make some headway in trying to show that McFie was not responsible but it was ultimately not enough.

14. Another tactical question was whether to allow McFie to be cross-examined by counsel for Conway. Mr Thomas decided that it was necessary for the jury to get the story from the horse's mouth and McFie was cross-examined. Mr Thomas also decided that he would keep his objections to a minimum during her cross-examination so as not to appear to be shielding her. During the cross-examination, counsel for Conway put it to her that she was entirely responsible for the murder. Mr Thomas recalls that McFie was completely shocked by the allegation notwithstanding that he had warned her of the possibility. Such was the shock that the trial judge felt the need to intervene because she seemed to be on the verge of physically collapsing. At the time, counsel for Conway did not object to the judge intervening however, he later contended that the judge should disqualify himself because the jury would have apprehended that he was biased. This was rejected by his Honour. The intervention was eventually a ground of appeal before the High Court but was similarly dismissed.
15. In response to McFie's episode, Mr Thomas made an application to the judge that McFie was unable to continue with the trial due to her mental state. The judge adjourned the trial for the purpose of McFie consulting a psychologist. On the medical reports being provided to his Honour, he decided that there was insufficient evidence to suggest she was unfit to be tried. Mr Walmsley notes that the relevant test was whether her understanding was sufficient to instruct her lawyers, which she clearly could. Although she was plainly very stressed, this would not be unusual for people in her position and the trial continued.
16. Another issue that arose at trial concerned the possibility that a person who had previously been in a relationship with McFie had been in contact with a juror. When this suspicion was brought to the attention of Mr Thomas, he immediately raised it with the judge in the absence of the jury. The judge then examined the jury to try and determine whether any were aware of this occurring and as a result, his Honour was satisfied that nothing prejudicial had occurred. Mr Walmsley notes that matters affecting the jury are common problems in trials and he strongly emphasises vigilance in this regard given the importance of the jury in the criminal justice system.

Judicial Directions

17. An aspect of the trial that was particularly important were the directions the judge made to the jury prior to their deliberations so as to assist them with the complex issues raised in the trial. Directions were made in relation to how to deal with evidence given by the co-accused, the relevance of character evidence and also how to approach evidence said to demonstrate

a consciousness of guilt. Mr Thomas notes that the direction on the character evidence was very brief as compared to the current directions mandated by the Benchbooks. However, the most contentious direction surrounded the evidence of the contractors. His Honour directed that it was unsafe to convict the co-accused solely on the basis of the contractors' evidence. He then identified 18 pieces of evidence which he considered were capable of providing corroboration. Conway appealed this direction all the way to the High Court. Although, the High Court agreed that 4 out of the 18 items identified were not capable of providing corroboration, it was found that this error did not cause a miscarriage of justice. The High Court found that the evidence remained overwhelmingly against Conway and stressed that an error of law is not sufficient for a retrial.

Significance

18. Ultimately, both McFie and Conway were duly convicted of murder although McFie was sentenced slightly more leniently, with a non-parole period of 12 years compared to Conway's 18 years.
19. The proceedings are interesting, notwithstanding generating no new law, because they illustrate many of the common difficulties that arise during serious criminal trials. Issues with the jury, when to raise concerns with the judge, tactics in relation to co-accused, character evidence, fitness issues and directions in relation to corroboration are things that counsel and solicitor advocates need to be constantly aware of.

BIOGRAPHY

Richard Thomas

Barrister, Silk Chambers - Canberra

Richard Thomas was admitted as a Solicitor in 1990 and called to the Bar in 1978. He has contributed to many law reports including Australian and New Zealand Insurance Law Reports, Medical Law International and Lexis Nexis. In addition, he has written various books and legal articles as well as being the Editor of Benchmark Criminal Weekly Review. Aside from the law, Richard is actively involved in equestrian activities.

Stephen Walmsley SC

Stephen Walmsley SC was called to the Bar in 1981, appointed Senior Counsel in 1997, and served as a District Court Judge from 2001 to 2013. He practised in the ACT and NSW and served on several committees of the ACT and NSW Bar councils.

BIBLIOGRAPHY

Focus Case

Conway v R [2002] HCA 2; (2002) 209 CLR 203

Judgment Link

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2002/2.html?stem=0&synonyms=0&query=conway%20209%20CLR%20203>

Legislation

Evidence Act 1995 (Cth)

Other

Criminal Trial Courts Bench Book - <https://www.judcom.nsw.gov.au/criminal/>