THE REGAINING OF INNOCENCE

BY DR NORMAN H YOUNG

AFTERWORD

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The Hon Justice Michael Kirby CMG*

Probably no other trial in Australia's history - with the possible exception of that of Ned Kelly - has attracted so much attention as the trial of Lindy Chamberlain. The chronicle of events recounted in this book explains why the case attracted so much attention. It had all the ingredients to make that course virtually inevitable. The disappearance of a baby from a tent near Ayers Rock, a brooding monument of nature in the middle of the Australian desert. A young mother and her Pastor husband suffer a terrible bereavement. A Coroner finds that the baby was taken by a dingo: a fearsome fate which enlivens the anxiety of every parent. The moves of officialdom to have that finding quashed. The committal of the parents for trial. A trial held in remote Darwin under the spotlight of unprecedented media coverage. The jury's verdict of guilty. The long trail to challenge the jury's verdict in the courts, ending finally in a narrow decision of the highest Court of Australia to refuse to intervene. The organisation of a citizens movement to challenge the findings. Calls for a Royal Commission. The

release of the mother. The report of the Royal Commissioner that new evidence renders the convictions unsafe. The subsequent application which secures the quashing of the convictions of the parents. A great deal of pain and heartburn on the road to the right conclusion.

The case raises many points of importance to lawyers. The decision in the High Court lays down stringent requirements both for trial judges and appellate courts reviewing a challenged conviction for a criminal offence. Particularly stringent are the requirements where the conviction is based upon circumstantial evidence. Even where the evidence is sufficient in law to sustain a conviction, an appellate court must not allow the conviction to stand if it considers that it is unsafe or unreliable for any reason.[1] But although these principles were established in Mrs Chamberlain's case they were of no avail to her in the courts. At the end of the ordinary legal road, Mrs Chamberlain's conviction was upheld. It took extraordinary, extracurial steps to be taken to rescue her from prison, to secure the Royal Commission and to provide amending legislation to permit the quashing of the conviction.

There will be some who will see the eventual outcome as a vindication of the system of criminal justice in Australia. The Guardian in England, in a film critique of the cinema version of the Chamberlain case, declared: "One comes away from the film feeling that a society with such a

capacity for self-criticism must possess a good deal of inner strength". After all, this is a story which, upon one view, ended happily ever after. But did it? Would the original Coroner's finding have been challenged and set aside, but for a feeling in some official quarters that it impuned the integrity of some governmental officials? Would there have been an indictment and trial in such a case at all but for the tremendous media coverage and the "beat-up" of the story provided by the media, reaching as it did into the Coroner's very courtroom? Would Mrs Chamberlain and her husband have been convicted if there had been no such media coverage intruding every night into the living rooms from which the jury would ultimately be drawn? Did the fact that the Chamberlains belonged to a minority religion or came from a different part of Australia in any way influence the jury's or the community's opinion as to their guilt? Would there have been quite the same energy put into fighting their case through three levels of the courts of Australia but for the support they had from the institutional Church which stood behind them? How would an ordinary unsupported citizen have gone in such straits? Would the exceptional steps of the Royal Commission, the amending legislation and the compensation have been provided if the Chamberlains had stood alone? Or would a lonely Mrs Chamberlain still be sitting in a Darwin prison as I write this?

Behind these questions lies what is perhaps the most significant issue of all. Are there other Chamberlains in the

prisons of our country who are there because the system of justice broke down?

No system of human justice is perfect. The system we have inherited in Australia has many strengths. Jury trial helps to avoid the oppressive tyranny of government officials. The prosecutor must prove the case beyond reasonable doubt. The rules of evidence and procedure stand in protection of the accused. The accused may remain silent. It is for the Crown to prove that the accused is guilty; not for the accused to prove that he or she is innocent. These are the rules on paper. In the books. In practice, things do not always work out so well. Juries can be prejudiced. The atmosphere of the courtroom can be poisoned. Expert testimony can be placed before the jury and inadequately understood or tested because most, or all, of the experts belong to the prosecution. In practice if the accused stands silent or looks different or is from a minority, he or she may suffer unfairly at the hands of fellow citizens in the jury box.

In the end the dust will settle upon the Chamberlain case, as it does upon all human events. Even the great triumphs of Ramses II are now partly buried under the sand of the Egyptian desert. So the dust of the Australian desert will eventually envelop even the Chamberlain story. The media will seize upon other headlines. Different human interest stories will grasp the community's attention. The courts of law will grind remorsely on.

If we learn one thing only from the Chamberlain case it should be this. The good citizens who were confronted with the travails of the Chamberlains - and who experienced for the first time a lingering doubt about the justice of our legal system - should direct that concern beyond the Chamberlains. They should exhibit a similar concern for every victim or potential victim of a miscarriage of justice. We should all be vigilant: judges, jurors and citizens generally. No system is proof against the occasional mistake. But from the story told in this book we should rededicate ourselves to the improvement of our legal system. If this is one of the outcomes of the sad case of Lindy, Michael and Azaria Chamberlain, the pain, tears, energy and intellectual endeavour recounted in these pages will not have been offered entirely in vain.

Court of Appeal

Sydney

1 June 1989

* President of the Court of Appeal of New South Wales. Former Chairman of the Australian Law Reform Commission. Commissioner of the International Commission of Jurists. Personal views.

1. Chamberlain v The Queen (No 2) (1984) 153 Commonwealth Law Reports 521. See also Morris v The Queen (1987) 163 Commonwealth Law Reports 454 and Carr v The Queen (1988) 62 Australian Law Journal Reports 568.