Crime in Australia – change and continuity

A twenty-year perspective

By The Hon Justice M. D. Kirby AC, CMG.

Justice Michael Kirby, one of Australia's most respected members of the judiciary, gave this address to the First National Symposium of Crime in Australia, convened by the Australian Institute of Criminology

Exactly 20 years ago, crime in Australia was the focus of every waking hour of my life. I was newly in office as the first Chairman of the Australian Law Reform Commission.

The Whitlam Government had decided to establish a single, national law-enforcement agency to be known by the engaging title of the Australia Police. The Government desired to introduce legislation to regulate this new national police service during the fateful Budget sittings of the federal parliament which ended abruptly on November 11, 1975. Accordingly, the Federal Attorney-General, Kep Enderby QC, assigned to the Commission the task of producing a report upon the system of criminal investigation which would be observed by the new force and the procedures for investigating and determining justly and effectively complaints against its members.

We were required to report to the Government by August, 1975. The commission, still acquiring premises and staff, assembled a remarkable team of consultants and official assistants. Not that the commissioners, themselves, were lacking in talent. They included F.G. Brennan QC (now Chief Justice of Australia), John Cain (later Premier of Victoria), Professor Alex Castles (of the Adelaide Law School), G. J. Evans (later federal Attorney-General and now Minister for Foreign Affairs and Trade) and Professor Gordon Hawkins (who taught me, and many of us, criminology long before this institute was founded).

Our work was divided into two projects. The report, *Complaints Against Police* (ALRC 1975a), proposed a system which has basically become the model throughout Australia and elsewhere. It involved reaffirmation of the police commissioner's primary powers, the provision of access to the ombudsman and a facility for a tribunal hearing in certain cases. The report, *Criminal Investigation* (ALRC 1975b), covered the gamut of legal regulation of investigations by police. It dealt with arrests, custodial investigation, the right to silence, release and bail, search and entrapment, the special problems of various minority groups and the sanctions necessary to enforce the rules laid down.

I wrote the first draft of the *Complaints* report. Gareth Evans, in a bravura performance, wrote within 15 weeks what is still a truly brilliant text on the basic laws of criminal investigation. Sadly, despite two parliamentary efforts and notwithstanding Gareth Evans' unique later position in Government, the *Criminal Investigation* report has never been translated into

national law. But, in the way of these things, it has certainly influenced the development of common law in Australia. It has also been picked up in various statutory provisions.

Returning to Canberra for this symposium, which is designed to look to the future, you will forgive me if I cast a hurried glance at the past. Vivid in my memory are the remarkable sessions in which the commissioners and the consultants – and then alone – sought to hammer out a modern law of criminal investigation for Australia. I trust that you can imagine the sparks which occasionally flew as Gareth Evans, a brilliant young academic, was forced to justify his propositions to Gerard Brennan who had trod the boards of the criminal courts for years and never exhibited an instinctive knowledge of the principles of criminal law and procedure with which the new reformers had to come to grips.

An interesting feature of the work of the commission, specially referred to in the statute under which we laboured 20 years ago, was the command by parliament to bring Australian law and practice into conformity with the standards laid down in the International Covenant on Civil and Political Rights. At that time, Australia had not yet ratified the covenant, still less the First Optional Protocol which Senator Evans was later to procure. The Attorney-General's reference to the commission required it to:

> Provide for human rights and civil liberties and the need to maintain a proper balance between protection for individual rights and liberties on the one hand and the community's need for practical and effective law enforcement on the other.
>
> (ALRC 1975a, p. v).

Finding that balance is still the controversial and elusive task of all who are involved in the criminal justice system. As I shall demonstrate, the controversy has not diminished at all in the 20 years since that energetic team gathered at University House, Canberra, and worked upon the first proposals for a national criminal procedure statute.

As I glance at the program of this symposium, I can see many of the same themes as were the subject of our attention 20 years ago. The problem of policing multicultural Australia was then already apparent. The commission examined the special problems of non-English speaking accused and made recommendations to achieve a more relevant and just legal regime which took into account their linguistic and other disadvantages. The particular disadvantages of Aboriginal Australians, when accused of criminal offences, cried out for particular protections to prevent wrongful convictions and injustice. Here, too, the commission made special recommendations, many of which have become part of our judge-made law. Some of the special problems of juvenile justice were addressed in the needs of children, faced with a criminal accusation, to have the reality and not simply the theory of proper protection.

Yet some of the subjects tackled at this symposium demonstrate the shifts which have occurred in public perceptions of what is crime and what steps a community may properly take to protect itself from those who wilfully challenge its peace and sense of order. Thus, although one obviously projected task for the new national police service was to be organised crime, there was little attention to the special needs of tackling that very modern challenge to the peace of society. Nor did child abuse and family violence figure large in the discussions of 1975 despite the great reforms to family law then being achieved. Even in the decade during which I have served in the NSW Court of Criminal Appeal, I have noticed a remarkable increase in cases of family abuse against children, particularly of incest-type offences involving fathers and stepfathers. The previous unwillingness to mention offences of this kind has been replaced by new procedures of policing and changed community attitudes that now bring many such cases to the courts. Similarly with violence against women, where once such violence was accepted by some of its victims, as their lot in life against which the criminal justice system gave scant protection, now women, in increasing numbers, will not tolerate violence. Rightly, they look to the courts and to the criminal law to offer them protection and redress.

Clearly, it was intended that the Australia Police would busy itself in the cases of fraud against government and consumer crime. The latter had been brought within federal regulation by such measures as the *Trade Practices Act 1974*. But we gave precious little thought to these growing areas of federal policing and responsibility. I am afraid we simply assumed that the general rules of criminal investigation would apply to them all.

Redefining Crime

It is, therefore, as well, at intervals of a decade or so, to reflect upon the purposes of the criminal law and of the procedures which are so intertwined with that law's operation and which affect its definition. Violent crime, with physical cruelty by one person to another, will always hold its place in any society's lexicon of crime. So will

robbery, theft, fraud and other forms of cheating designed to separate one person from that person's property. But other activities are not so certain of their place.

It is exactly 100 years ago that Oscar Wilde had his unfortunate encounter with the criminal law. On May 25, 1895 he was found guilty, on a second trial, of homosexual offences in private involving adult males. He was sentenced to two years hard labour. The only good that came of it was that he wrote the hauntingly beautiful *Ballad of Reading Gaol* and completed *De Profundis*. But Wilde, the human being, was destroyed and driven into exile. Nowadays, most of us look with pain and discomfort at the way in which the great power of the state was brought to bear upon Oscar Wilde for acts which most, if not all, intelligent observers would now regard as outside the proper realm of criminal law enforcement. Protecting minors is a proper role of the state. Preventing unwilling infliction of violence, injury and loss is a proper role of the state. Protecting the community from gross indecencies in public, before unwilling observers, is part of the function of the state, derived from the sovereigns role as keeper of the peace. But intruding into the bedrooms of adults is now considered to be an excess of state power. Yet let me remind you that 20 years ago, in most parts of Australia, the criminal law in this regard had not changed since Oscar Wilde's day. Even today, the Tasmanian Criminal Code remains resolutely unreformed. True, it may not be enforced. Since the passage of federal legislation it may not even be enforceable. But the crimes remain on the books 40 years after Wolfenden.

I do not imagine that, 20 years from now, our generation will be honoured as having such enlightenment that a like review of our collection of crimes will be seen, with the wisdom of future times, to have required no reform. For example, there are many who question the current approach of the criminal law to the use of recreational drugs of addiction and drugs having damaging physical and psychological effects on their users. Many observers are now challenging the prohibition model. They call for a different strategy of harm minimisation. In some parts of Australia reform has already been introduced in respect of the possession of small quantities of cannabis. In most other jurisdictions minor offences of this kind – like nude bathing with discretion – are not always prosecuted. In this Territory [the ACT], a more radical measure is now under contemplation to consider the feasibility of a controlled provision of heroin, under legal warrant, to established addicts.

I predict that, in 20 years, many of our drug laws will have been radically changed. There will be an increasing emphasis upon looking at adult drug use as an issue of public health rather than one of law and order. Self-evidently, this change would have enormous implications for crime in Australia as it stands today. The public investment in policing and investigating drug offences, the cost in court time, the toll of corruption and the price in terms of civil liberties – as the network of telephonic interception and exceptional powers attests – all show the urgent need to rethink this form of state intrusion into the personal conduct of adults. Whenever I hear of a big police drug "bust" – or see in my court a criminal apprehended with huge quantities of prohibited drugs– I ask the question that every intelligent person must ask: Who are the apparently law-abiding citizens: plumbers and merchant bankers, therapists and greengrocers, who are using these drugs? The law falls upon them, and on those who supply their market, with intermittent effect but ferocious energy. The potential for official corruption and for ever-expanding powers of law enforcement not to say the fundamental principle involved are increasingly directing the attention of the question of an alternative strategy.

In matters of acute pleasure-seeking , whether in sexual conduct or drug use, pornography, prostitution or gambling, the criminal law is only ever partially successful. Our recent experience should teach us the wisdom of limiting the function of the state and its criminal law in such matters to the state's proper province. I suggest this is protecting citizens, their corporations and community from unconsensual wrongs deliberately inflicted; protecting, the young and otherwise vulnerable; and upholding, public peace from affront causing disturbance.

Crime is in a constant state of redefinition. It reflects, with a time delay, the changing values of society and its changing, needs. Twenty years ago, before the scourge of HIV/AIDS, there were no specific offences relevant to the wilful infection of others. Twenty years ago, in most parts of Australia, attempting suicide was a crime. Now,we are told, voluntary euthanasia is probably a human right. Reflection on these changes makes it important to meet in an outlook symposium such as this. It turns our attention to the age-old questions: What is crime? How should it be proved?

The Accusatory Trial

One of the subject matters of the 1975 report on *Criminal Investigation* which caused the sharpest debates,within the commission concerned

the measures which should be adapted to enforce the rules which the commission proposed. The provision of an effective disciplinary code and a truly independent procedure for handling complaints against police was comparatively uncontroversial. Similarly, the introduction of reforms to facilitate civil action against the state, as representing police, were also agreed and carried into force by statute. But the question of the exclusion of evidence obtained in breach of the proposed code raised fundamental questions concerning the purpose and methodology of the criminal trial. If evidence was reliable, should it not always be admitted? If it was excluded, would that not deprive the decision-maker of the truth and require that a thing so serious as a criminal charge be decided on part only of the facts?

In the United States of America, the Supreme Court had laid down a strict rule for the exclusion of evidence unlawfully obtained. It did so both to discourage the misuse of power and, as it was sometimes put, to keep the temples of justice protected from the corroding influence of evidence, however reliable, which was improperly obtained by the agents of the state.

In the end, the Law Reform Commission favoured a statutory improvement of what was then the Australian common-law position. It saw its reform as a solution "occupying the middle ground between the Kuruma decision and the United States 'extremes'". Although its statutory formulation was not enacted by parliament, it largely has been brought about by judicial decisions (see, for example, *Sunning v. Cross* (1978) 141 CLR 54; *Cleland v. The Queen* (1982) 152 CLR 1; *Pollard v. The Queen* (1991) 171 CLR 177). Indeed, when the new "rule of practice" was adopted in *McKinney and Judge v. The Queen (1991)* 171 CLR 468, the position arguably tilted even further in favour of the accused than the commission had proposed.

The debates about the nature and purpose of the criminal trial are just as energetic today as they were when we were working on the commission's report. Indeed, in some ways, they seem to be hotting up. Because of the inexorable intermingling, of criminal law and criminal procedure, it is important that this symposium should take these debates into account. They are relevant to the way in which the state exercises its power against those accused of offending against the community, protected by the state.

In the United States, some of the more apparently offensive results of the exclusionary rule have led to a movement which hopes, by legislation, to overcome or modify it. This is known as the "truth school". Amongst its staunchest adherents are Justice Stephen Breyer, President Clinton's second appointee to the Supreme Court. Its intellectual forbears include the late Judge Henry Friendly of the Second Circuit Court of Appeals in New York and Professor Akhil Reed Amar, of the Yale Law School. Amar is no encrusted conservative. He took part in the presidential campaign of Robert Kennedy and George McGovern. His is the intellect behind a Bill recently examined by the Judiciary Committee of the United States Senate, sponsored by Senator Orrin Hatch of Utah. It purports to end the exclusionary rule altogether. But it also contains provisions to allow victims of illegal searches to sue for damages and to have other remedies. Amar considers that this is a better way to go because, in his opinion, United States judges are increasingly finding "unacceptable" official behaviour to be "appropriate" in order to evade the harsh application of the exclusionary rule:

> Brennan has a sportsman's model of criminal procedure, and it's said that since defendants tend to be poor and black we want to even out the odds a little and let them try to exclude evidence ... But a lot of feminists have pointed out in recent years that the victims of also tend to be poor and black, and often women. Excluding evidence does not help the victims – it hurts them. So if police violate someone's rights then maybe the person should sue the police in a civil law suit ...
>
> (Toobin 1995, p.46).

The now famous Judge Lance Ito, presiding at the O. J. Simpson trial (possibly, after the trial of Jesus Christ, the most internationally, recognised trial of all time) is reported to be a member of the truth school. He is, after all, a former prosecutor. He must have felt the sting on many occasions of the exclusion of evidence which would have clinched the prosecution case (Toobin 1995, p. 46). A question arose during the Simpson trial as to whether the prosecution should be allowed to introduce evidence of O. J. Simpson's history of domestic violence against his deceased wife. The defence objected, contending that it was unduly inflammatory and essentially irrelevant to the murder trial. Judge Ito allowed some only of the evidence to be proved. According to Professor Amar:

> ... It would have been wrong – it would have violated commonsense – to deprive the jury of the history of this relationship before the murders
>
> (Toobin 1595, p. 46)

The Simpson case daily illustrates to millions the importance of criminal procedure for effective enforcement of the criminal law. Feminist and minority scholars have commented on the

impediment which evidentiary rules and criminal procedure have sometimes presented, particularly to the successful prosecution of offences against women and disadvantaged minorities.

In Australia, two recent events have enlivened this debate. One is the publication of Evan Whitton's book *Trial by Voodoo* (1994). This is a book by an experienced and distinguished journalist who takes to task the mode of trial which we have accepted for the proof of criminal accusations. Drawing upon decades of observing criminal trials and royal commissions, Mr Whitton is clearly unimpressed by many of our legal rules. Amongst his special targets are the right to silence, the accusatory and adversarial trial system, the hearsay rule and the limitation on the proof of similar facts. He does not much like the judicial discretion to exclude unduly prejudicial evidence. Generally speaking, he thinks that a better way of dealing with corruption allegations would be to take them from the general criminal courts and to put them into special tribunals:

> Given the effect of corruption on democracy, in my view charges laid as a result of corruption inquiries should be heard by special tribunals which hear the same evidence as the inquiry. A shorter and cheaper way would be simply to empanel a jury with the commissioner. If that increased the velocity of a move to the European criminal justice system, so much the better
>
> (Whitton 1994).

The second event was the publication by the High Court of its judgment in *Ridgeway v. The Queen* (1995) 129 ALR 41 (HC) 98. There, the court by majority (Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ, McHugh J dissenting) upheld an appeal and entered an acquittal in a case where the accused had been convicted of obtaining prohibited imported drugs which had been imported into Australia in contravention of the Customs Act 1901 (Cth). In fact, the drugs (140.4 grams of heroin) were imported into this country pursuant to a scheme originally devised by the accused. But, as the evidence showed, they were actually imported in a "controlled importation" by police officers acting in co-operation with the police in Malaysia and Singapore.

The High Court of Australia unanimously rejected a defence of entrapment which Mr Ridgeway had propounded. But the majority set aside his conviction upon the ground that the illegal importation of heroin, which was one of the essential ingredients of the offence charged, had actually been carried out by police officers in clear contravention of the legislative provisions creating the very offence of which the appellant was convicted. To the plea that this was the only way that the propounded offence could have been committed in a "controlled" situation, Mason CJ, Deane and Dawson JJ said:

> Such an argument must ... be addressed to the Legislature and not to the Courts. If it be desired that those responsible for the investigation of crime should be freed from the restraints of some provisions of the criminal law, a legislative regime should be in introduced exempting them from those requirements. In the absence of such a legislative regime, the courts have no choice but to their face firmly against grave criminality on part of anyone, regardless of whether he or she, be government officer or ordinary citizen. To do otherwise would be to undermine the rule of law itself
>
> (Ridgeway v. The Queen (1995) 129 ALR 41 (HC) 58).

To like effect was the judgment of Brennan J:

> This result is manifestly unsatisfactory from the viewpoint of law enforcement. As a technique of law enforcement, the so-called 'controlled' importation ... may be an acceptable technique for the detection and breaking up of drug rings but, if that be so, the law-enforcement agencies must address their concerns to the parliament. So long as the unqualified terms of [the Act] reveal the parliament's intention to prohibit all persons, including the law-enforcement agencies from importing heroin, it is not for the courts to encourage the executive branch of government to sanction a deliberate course of contravention. The executive branch of government cannot dispense its officers from the binding effect of the laws prescribed by the parliament. If law-enforcement agencies apply for an amendment of the laws to permit the employment of detection methods such as those used in this case it will before the parliament to consider whether control should be legislatively prescribed. The parliament might impose conditions upon the employment of those methods. The parliament might place responsibilities for authorising the importation of prohibited imports for detection purposes upon specified officers who will be liable if they fail to exercise supervision over the operations of the law-enforcement agencies. It is manifest that there will be anomalies, if not corruption, in the conduct of such operations in the absence of adequate supervision. But provisions of that kind cannot be prescribed by the courts; they are appropriate matters for consideration by the parliament.
>
> (Ridgeway v. The Queen (1995) 129 ALR 41 (HC) 67f).

In his dissent, McHugh J appealed to what he saw as commonsense:

> It seems likely that the members of the Australian Police Force [sic]who facilitated the importation of heroin into Australia have committed offences against the Customs Act. But they acted with the best of motives. Moreover, it seems clear that they thought they were acting lawfully in accordance with ministerial agreement. In those circumstances I would find it unsurprising that, in the exercise of his discretion, the Director of Public Prosecutions would not prosecute the police officers involved. ... As a result of his own plan ... the appellant without reasonable excuse had possession of heroin which had been imported into Australia in contravention of the Customs Act That constituted the offence for which he was convicted. He had even obtained that heroin from the person whom he had asked to import it. The fact that unlawful conduct of Australian Federal Police officers may have assisted that person to carry out the appellant's instructions does not mean that they have created the offence for which he was convicted. Possession of the heroin without lawful excuse was the essence of the offence. The appellant's possession of the heroin was the result of his own initiatives, formed without any inducement from the police officers.
>
> (Ridgeway v. The Queen (1995) 129 ALR 41 (HC) 57).

Ridgeway is the type of case that causes Mr Whitton to reach for his bottle of vitriol. And he is not alone.

Behind the majority and minority opinions in *Ridgeway* lies an important difference about the basic purpose of a criminal trial which it is appropriate for us to reflect upon. In requiring the weighing up of the public interests involved, the majority made it clear that the question of unfairness to a particular accused was only of peripheral importance in deciding whether evidence of an illegally procured offence should be excluded on public policy grounds:

> The critical question was whether in all the circumstances of the case, the considerations of public policy favouring exclusion of the evidence of the appellant's offence, namely the public interest in maintaining the integrity of the courts and of ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement, outweighed the obvious public interest in the conviction and punishment of the appellant ...
>
> (Ridgeway v. The Queen (1995) 129 ALR 41 (HC) 57).

Here, I believe, is the essence of the difference between the thesis advanced by Mr Whitton's book and the thesis which our courts have traditionally upheld. This is often expressed in terms of the multiples of guilty accused who must go free in order that no innocent person should ever be convicted of a crime. But Mr Ridgeway's "innocence" was purely technical. Therefore, there was a further and more fundamental principle which was at stake here. It was that the great power of the state in the prosecution of criminal offences must, in the defence of the freedom of all, be kept under strict check. In a sense, the courts are saying that it is more important that such a check should be enforced even than that an offender, (including one such as Mr Ridgeway), should be convicted.

Professor Charles Nesson in the Harvard Law Review explained:

> Our belief in the legitimacy of the legal system is a function of the extent to which we feel it reflects our values, and to a considerable extent our values are influenced by the effect the legal system has upon us. The judicial system is in conversation with society, a conversation whose volume and intensity depends on the system's ability to generate acceptable verdicts. ... One who is absolutely committed to the process of ascertaining and testing the truth, and who would thus shun any concessions of the search for truth to the production of acceptable verdicts, may find that he does so at the expense of other important values. He may discover that extremes in the pursuit of truth can impair the system's capacity to generate acceptable verdicts and thus undercut its ability to project the norms embodied in the substantive law. The discomforting thought that our quest for truth must not weaken our drive towards acceptable verdicts undermines the comfortable position that our drive towards acceptable verdicts should not compromise our quest for the truth.

However, with respect to Mr Whitton, the European systems of inquisitorial trial which he so clearly prefers, are by no means perfect. I see this on my visits to the courts in Cambodia for the United Nations. Inherited from the French colonial tradition, the prosecutor sits not at the Bar table but in a special bench closer to the judge and not much lower than the judicial bench. The geography of the courtroom is highly symbolic. The prosecutor is in a closer relationship to the career judge – indeed they are, in a sense, members of a like career service. Under prompting of the European Commission and Court of Human

rights, established civil law countries such as France and Italy are now modifying their penal procedure to approximate more closely to that of common-law trial, with its more tender attention to the rights of the accused. Foremost amongst these common-law rights is the right to silence and not to be forced to incriminate one's self. Self-accusation is a modern form of torture. It can be extracted by procedural means just as effectively as by the barbarities of the Star Chamber. The important stand which our criminal justice system has taken, until now, is that the search of the criminal trial is not, as such, for the truth. It is not, as such, to determine between guilt and innocence. It is instead, statutory exceptions apart, to consider whether the state has proved its case against the accused beyond reasonable doubt.

Those who become impatient with the rules which our criminal justice system has established have their reasons of course. They must be listened to with care, especially if they have the experience in our courts as Mr Whitton does. Outsiders often see error more quickly because they are without preconceptions. But we who know what the criminal justice system is really about must try to explain its ultimate justification. It is to strike the balance between individual rights and criminal law enforcement in a way that keeps the great power of the state and its agencies under check. That check protects the innocent as much as the guilty. It sets the standard for human rights observance. It protects the rule of law.

Doubtless refinements and reforms in criminal procedure can be adopted which remove or minimise results which seem to offend commonsense. This is what the High Court said in *Ridgeway*. Controlled importations may indeed be needed. But they require legislative sanction. It is essential that the naive view that the criminal trial has one purpose alone, namely to ascertain the truth, should be answered. Our accusatory criminal procedure has, it is true, weaknesses and faults. But its great strength is that it has defended us from the oppressive state. Other countries, with civilisations older than ours, have not been so fortunate. The controls imposed by the mode of trial are an ingredient in our liberties. They lie at the very core of our system of criminal justice. That core should not be readily surrendered to inquisitions, special tribunals, enforced self-incrimination, the reversed onus, obligatory pre-trial discovery and the many other means that might secure the truth. They may do so at too high a price. That is why in criminal law and procedure there must be continuity and respect for fundamentals as well as vigilant attention to reform.

I hope that this 20-year reflection will encourage the participants in this symposium to remember the importance of criminal procedure to the substantive criminal law. The lesson of our legal system is always to remember procedure. And nowhere more than in the criminal law. In the lively reflection on crime in Australia which it is the purpose of this symposium to offer, my advice is this – remember procedure. In procedure may be found many of our liberties.

Neither concern for victims of crime, nor anxiety that the right to silence is sometimes used by the guilty is enough to alter the fundamental rule that the state must prove its accusation and do so very clearly. Neither the rejection of some probative evidence nor the occasional controversial exercise of a judicial discretion to exclude relevant evidence warrant a change in the very nature of our criminal trial. For that mode of trial has much important work to do for our society. And the need for it increases, and does not diminish, as the power of the state is enhanced by its modern organisation and enlarged by new technology.

Those who would erode the accusatory trial need to be reminded in each new decade and generation that it is the centrepiece of something which, in a way, defines the very nature of our society living under the law. It is part of our civilisation. In truth, it is constitutional in its character. I, for one, would defend it from further erosion. Yet drip by well-meaning drip, it is eroded by legislators and sometimes by judges – in the name of truth or efficiency or public policy. The time has come to cry halt.

References

Australian Law Reform Commission 1975a, Complaints (Australian Federal Police) Act 1981 (Cth), AGPS Canberra.

———— 1975 b. Defence Force (Discipline) Act 1984 (Cth), AGPS, Canberra.

Toobin, J. 1995, "Ito and the Truth School" in *New Yorker*, 27 March, pp. 42-5.

Whitton, E. 1994, *Trial by Voodoo*, Random House, Sydney.

Nesson, C. 1985, "The evidence or the event? On judicial proof and the acceptability of verdicts", *Harvard Law Review*, no. 1357, p. 1391f.

This article first appeared in Criminology Australia - the Australian Institute of Criminology quarterly journal, Spring 1995..