Paul Byrne SC – Leading Barrister in Criminal Law

Criminal Law Journal
Obituary
May 2009

The Hon. Michael Kirby AC CMG

NEW SOUTH WALES BAR ASSOCIATION

MEMORIAL OCCASION FOR THE LATE PAUL BYRNE SC

BANCO COURT

SUPREME COURT OF NEW SOUTH WALES

28 MAY 2009

PAUL BYRNE AND THE HIGH COURT

The Hon. Michael Kirby AC CMG*

AN ADVOCATE'S LIFE

We collect in this beautiful court room to remember Paul Byrne, a gifted barrister and accomplished legal scholar who died too young, and at the height of his powers.

I honour his widow, Karen, his sons Tom and Jack, his mother and other members of his extended family who have joined us for this occasion.

It is not usual to hold such a memorial for a barrister in this courtroom. Normally, the grand occasions of our profession, marked in this space, are reserved for judges, either on their coming into office or their departure from it, or to mark their passing. It is an indication of the very high regard and affection in which Paul Byrne was held by his discerning professional colleagues that such a large number of them have come together, at short notice, to remember him and to express their sorrow that he is no longer amongst us.

It is fitting that we should gather in this courtroom. It was here, at this Bar Table, that Paul Byrne demonstrated to the senior judges of the State, his mastery of the principles of criminal law and his forensic judgment in the presentation of appeals

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* Justice of the High Court of Australia (1996-2009)

and applications, normally on behalf of prisoners and other criminal accused. It was here when, sitting in the Court of Criminal Appeal of New South Wales, that I first saw him as a barrister and heard his skilful forensic abilities displayed. If I close my eyes, I can still see him, wig slightly awry, earnestly and with becoming understatement, presenting submissions of great power.

We are not here just because of the death of a very clever man and senior advocate. Our profession and this courtroom are often filled with extremely clever people. It takes more than cleverness to bring out the profession in large numbers to mark the death of an advocate.

Paul Byrne had that extra element. He was, quite simply, a lovely and a loving man. He lacked the sharpness of temperament that often goes with a top barrister. Yet, what he lacked in abrasive talent, he more than made up in subtlety and an outreach to the better part of human judgment. I never heard him overstate a case. He was a gifted persuader precisely because he left the flourishes to others. He went directly to his best points. Instinctively, he knew what they were and how judges would be troubled by them. This was his finest talent. I saw it displayed in this courtroom, when I sat in my crimson robes, looking down at the table I now occupy. I saw it in the High Court, dressed in sombre black. He had an advocacy of subtlety and understatement. It was a winning way.

Paul Byrne was born in October 1950 and died on 12 May 2009, just short of his sixtieth year. He was the product of public schools and displayed the best of their values: an ever-present instinct for democracy, egalitarianism and a distaste for pretence and vainglory.

From the Balmoral and Mosman Primary Schools and after a period at Artarmon Public School, he attended the famous North Sydney Boys' High School. That was the school of Sir Frank Kitto, a predecessor of mine in the High Court, and of Justice Athol Moffitt, my predecessor as President of the Court of Appeal of this State. It has produced many fine judges and advocates, including Justices Conti, Emmett and Buchanan of the Federal Court. Paul Byrne was one of that school's finest *alumni*.

At Sydney University, he took the degrees of Bachelor of Arts, Bachelor of Laws and Master of Laws. The last was awarded to him with first class honours and the University Medal. By those attainments, he demonstrated formally the intellect that was his hallmark and his great strength as a barrister.

For a time, Paul Byrne served as a member of the New South Wales Law Reform Commission. He gave back to the community in this way for the rich training in law, including criminal law, that he had received at university.

IN THE COURT OF CRIMINAL APPEAL

I urged that someone who had known him more closely than I should speak first on this occasion. But in the law, hierarchy is a potent force. Even on such an occasion as this. So those who knew better insisted that I, who now have no hierarchy, should go first. I do it gladly if it associates the highest court of our country with the tributes that will be paid to Paul Byrne. Before the High Court, he was to achieve, during my time, one of the largest practices of any barrister in the nation. This was simply because of his prominence in recent years within the ranks of senior counsel presenting applications for special leave and appeals in criminal contests in the most populous state of the country.

Yet before I saw Paul Byrne in the High Court, I saw him at this Bar Table. It was in *Domican v. The Queen*[1] that he appeared with Peter Hidden QC (as his Honour then was) to argue that Mr. Domican was entitled to a re-trial because of defects in the charge that the trial judge had given to the jury on the dangers of wrongful conviction on identity evidence. In *Davies & Cody v. The King*[2], the High Court had long before warned of those dangers. But the Crown case against Mr. Domican seemed to me, who was presiding in the appeal, so otherwise powerful that the defects of the identification evidence and direction could not sustain a submission that a miscarriage of justice had actually occurred. I am afraid that I led my two discerning judicial colleagues into error. Little did I know that, sitting at the Bar Table, was an advocate who had secured his first class honours and University Medal in the

1 *Domican v. R.[No.3]* (1990) 46 A Crim R 428.

2 *Davies & Cody v. The King* (1937) 57 CLR 170 at 182-183.

detailed study of identity evidence and the special needs for care in the instructions given to juries about it.

Paul Byrne and Peter Hidden took *Domican* to the High Court. There, with Justice Brennan alone dissenting[3], the High Court reversed the orders we had favoured in this place. The argument for Mr. Domican was impeccable. It had a searing logic, as I was later to acknowledge on many occasions in hearings in which identity evidence or other troublesome evidence was raised. Although, it was true, there was other powerful evidence against Mr. Domican, for all the court knew, the jury might have convicted the accused *solely* on the evidence as to his identity. On that footing, the imperfect trial directions could not stand. A re-trial was ordered.

It remains to be seen whether this reasoning will stand with the later explanations of the High Court of the proper way to approach the application of the 'proviso' in the *Criminal Appeal Act* of 1912[4]. That troublesome provision has continued to give rise to arguments in criminal appeals and doubtless will do so in the future. The fact remains that I was mildly castigated for having acknowledged the dangers of identification but having failed to give that acknowledgement proper effect. Paul Byrne helped to put me well and truly in my illogical place. Judges have different reactions to such admonishment. With Paul Byrne, one could not feel discomforted for long. I will not say that I enjoyed the correction. But he made one feel that it was good for the soul. I am here to make my expiation.

IN THE HIGH COURT

Paul Byrne quickly gathered around him not only a leading part in trial work and in cases in the Court of Criminal Appeal. He rapidly won a reputation in the High Court. He did so in the important decision in 1991 in *McKinney & Judge v. The Queen*[5]*.* After two decades of step-by-step attempts by the High Court to address the problems of unreliable confessions (or 'verbals'), he and Peter Hidden led the High Court to a resolute insistence upon reliable confirmation of confessions to authorities. In a stroke, this decision cured a serious defect in the administration of

3 *Domican v. The Queen* (1992) 173 CLR 555

4 *Weiss v. The Queen* (2005) 224 CLR 300.

5 (1991) 171 CLR 468.

criminal justice in Australia. Moreover, it diverted police and prosecution to the practice urged, long before, by so many law reform bodies, that confessional statements to authorities should be recorded and available for the decision-makers to see for themselves. This was a most important reform. It took fine advocacy to persuade the Court that it should intervene and not leave the matter entirely to Parliament. That was a correct decision. Paul Byrne's fingerprints were all over the submissions that led to its acceptance.

I came to the High Court in 1996. By this time Paul Byrne was appearing constantly as leading counsel at the central podium in applications and appeals. Just to list some of the cases in which he appeared is to identify a string of decisions concerned with important elements for the doctrine of criminal law and procedure in Australia. *BRS v. The Queen*[6] in 1997; *AB v. The Queen*[7] in 1999; *The Queen v. Olbrich*[8] also in 1999; *Crampton v. The Queen*[9] in 2001; *Grey v. The Queen*[10] in the same year. *Azzopardi*[11], *MFA*[12], *Dyers*[13], *Weininger*[14] and later *Antoun*[15], *Lavender*[16] and *Island Maritime Limited v. Filipowski*[17]. Each and every one of these appeals triggers memories of hard-fought battles, some won, some lost by Paul Byrne. All of these cases explore the interface of the power of the State in relation to the rights of the criminal accused. Very few advocates from the whispering side of the Bar had as large, repeated and successful a practice in the High Court as Paul Byrne did. The cases I have mentioned are only those recorded in the authorised reports. There were many other appearances. All of them were accomplished with his particularly engaging style of persuasion.

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6 (1997) 191 CLR 275.
7 (1999) 198 CLR 111. In this case he was led by Chester Porter QC.
8 (1999) 199 CLR 279.
9 (2000) 206 CLR 161.
10 (2001) 184 ALR 593.
11 (2001) 205 CLR 50.
12 (2002) 213 CLR 606.
13 (2002) 210 CLR 285.
14 (2003) 212 CLR 629.
15 (2006) 224 ALR 51.
16 (2005) 222 CLR 67.
17 (2006) 228 CLR 1.

WINNING WAYS AND UNDERSTATEMENT

A case, not yet mentioned, illustrates best my memories of Paul Byrne the advocate before the High Court of Australia. It is *Smith v. The Queen*[18], decided in 2001.

Mundarra Smith was indicted on a charge of robbing a bank. There was little evidence of his involvement, save for some imperfect video filmed photographs of the robbers and the oral testimony of two police officers who were allowed, at the trial, to say that they had previously dealt with Mr. Smith on a number of occasions and recognised the person depicted in the photographs as him.

As originally argued in this courtroom and before the High Court, Paul Byrne's submission attacked the admissibility of the oral evidence of the police officers on the footing that it amounted to opinion evidence, not a statement of fact. Moreover, as an opinion, it had failed to conform to the requirements for the reception of opinion evidence laid down in s.76 of the *Evidence Act* 1995 (NSW). The object was to keep the evidence excluded. The Crown accepted that, without that evidence, it would be difficult to sustain the link between the masked man depicted in the photographs and the prisoner whom the jury had found guilty.

At the beginning of Paul Byrne's submissions, he was beset with questions from the Court addressed to why the evidence of the police was not inadmissible for a completely different reason, not earlier argued. This was that the evidence was irrelevant and hence inadmissible in accordance with the fundamental rules of evidence law and s.55 of the Act.

My view was that the evidence of police officers who knew the accused was relevant, even perhaps too relevant, and so could afford the linkage required on that basis. I thought there was more in the opinion point. But as the argument unfolded, the Court grew more and more attracted to its own theory. This, as you know, sometimes happens. Paul Byrne's skill, looking at us with his thoughtful eyes, was to hold on to me whilst embracing enthusiastically the arguments that seemed to be carrying the day with my colleagues.

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[18] (2001) 206 CLR 650. Cf. *Evans v. The Queen* (2007) 82 ALJR 250 at 262 [55], 266-269 [80]-[103].

In the end, Paul Bryne won us all. It was triumph of differential persuasion. Not an easy challenge for an advocate to run inconsistent and even contradictory arguments. Only a specialist in forensic persuasion can do this with ease. Paul Byrne was such an expert. He won the appeal

I can still see him accepting my analysis and then, without a blush, turning to accept the analysis urged on him by Justice Hayne. I can still see him at the Bar Table advancing his understated contentions with that so attractive style. Some barristers earn the accolade 'the advocate's advocate'. To Paul Byrne, I would give the title of 'the judges' advocate'. He thought as judges do. His mind, like quicksilver, rushed to the submission that was sufficient to win the case. Yet his contentions were always grounded in legal principle and a scholar's knowledge of legal history and doctrine.

On this occasion, I feel that I can say for the High Court that Paul Byrne's death will deprive the Court of an advocate greatly respected and much admired. He was a lovely man. And that is why we have all come here to share our sorrow that he has died.

In his last weeks, Paul Byrne was very keen to attend my farewell at the High Court in February 2009. To the very last moment, I kept seats in the ceremony for him and for his lawyer son Jack. It was not to be. His illness, and doctors' orders, frustrated his wish to be there. But in a real sense, he is still present in the courtrooms where he argued so many important cases. His submissions helped to form the reasoned decisions. In our system of law, the judges are greatly dependent on the advocates. So he lives on in the law reports. He lives on in law reform and legal reviews[19]. But most of all, he lives on in the memories of his family and of us his friends[20].

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[19] See e.g. Paul Byrne, "Sentence Indication Hearings in New South Wales" (1995) 19 *Criminal Law Journal* 209.

[20] See also S. Norrish, Paul Byrne SC (1950-2009) NSW Bar Association *Bar News*, Winter 2009, 97-99.