

2552

BOOK REVIEW

Australian Bar Review

Red Silk: The Life of Elliott Johnston QC
By Penelope Debelles

The Hon. Michael Kirby AC CMG

AUSTRALIAN BAR REVIEW

BOOK REVIEW

PENELOPE DEBELLE

RED SILK: THE LIFE OF ELLIOTT JOHNSTON QC

Wakefield Press, Adelaide, 2011;

ISBN 978 1 86254 956 2 (Pbk);

212 pages incl. Foreword, Preface, Chronology and Index (6pp).

RRP\$AUD

Elliott Johnston QC was a long-time member of the Australian Communist Party and a committed believer in Marxist ideals.

This unusual phenomenon calls to mind the Duke of Edinburgh's reported retort to Gareth Evans when he declared the *Australia Acts* of 1986 our independence statutes: 'Big deal!', said the Duke. Yet to be one of South Australia's leading barristers, ultimately appointed as Queen's Counsel and eventually a judge of the State Supreme Court, this combination of achievements with communist beliefs was a big deal in the minds of some, perhaps many, as Elliott Johnston was in his prime.

His biographer, Penelope Debelle, a journalist, sets for herself the puzzle as to how a leading lawyer whose task it was to help apply the law could possibly reconcile that life-long function with revolutionary ideals which called for the overthrow of the capital state and the substitution of a 'dictatorship of the proletariat'.

The book opens (as is common in biographies today) with a fast forward insight into a visit that Elliott Johnston made to Communist China in 1955. He went there, during a comparatively benign period in the history

of Chairman Mao's regime, to study one of the first, and seemingly most successful, attempts to build a workers' paradise. He returned to Adelaide by way of the then Soviet Union. However, he suffered, as a consequence, the cancellation of his Australian passport by Immigration Minister Harold Holt, for daring to travel to a communist country. The visits to Beijing and Moscow reinforced Elliott Johnston's belief that he had seen tomorrow's world. The workers' state was still embryonic. However, something had to be done to replace the shocking defects of capitalism that Johnston had witnessed in Australia when growing up during the Depression years.

For Elliott Johnston, communism promised hope for the future and basically he stuck with his ideals and admiration for the competitor regimes, through thick and thin, over 70 years. That is not to say that he had many illusions about the merciless wrongdoing of Stalin and Mao. He simply believed that Australian communism would, and could, be different. He expected the Marxist ideal to be attained here through democratic elections. His way of acting out his political philosophy was to make his large talents as a lawyer available to the poor and the vulnerable: communists, prisoners, workers, a defrauded family member and an unpopular immigrant. He became a lawyer for the disadvantaged.

Elliott Johnston was born in 1918. He attended Unley High School in Adelaide (later the school of Prime Minister Julia Gillard). He was smart and ambitious and won an Elder bursary that won for him a place at Prince Alfred College, a Methodist institution from which he clearly derived strong Wesleyan (but not religious) values, dedicated to making the world a better place. His own forebears had been Presbyterian and

his father was a cashier who retained his job in the 1930s when many others were being retrenched. The young Elliott had been born blind in his left eye. Yet this only made him more determined to succeed in his studies and in sport. He did so, duly winning a further bursary to the University of Adelaide to permit him to study law.

Whilst at the University, he fell in with brilliant colleagues, including Finn Crisp and Max Harris. With the former, he helped establish the National Union of Australian University Students (NUAUS). For decades, this became the nurturing ground of Australia's political and legal leaders.

The radicalism of his youth soon attracted the irritation of university leaders. Sir Douglas Mawson, Professor of Geology at the University of Adelaide and a notable Antarctic explorer, took a strong dislike to Johnston. He sought, unsuccessfully, to defeat his attempt to become President of the Adelaide Students' Representative Council. Later, when war came, the Vice-Chancellor of the University stood firm, insisting over Johnston's protests that the student newspaper would be censored for the duration of the conflict. Despite winning many academic awards and prizes, Johnston narrowly missed out on the Rhodes Scholarship. Already, his values did not fit comfortably with those of the electors for that prestigious award, meeting at Government House. His legal career was interrupted by war service in New Guinea and the Pacific Islands. He combined his military duties with marriage to Elizabeth Teesdale-Smith and membership of the Communist Party of Australia (CPA) which he joined in 1941. Elizabeth came from a well-off family. She too had attended a Methodist college and shared her husband's political sympathies. Eventually, she was to return to university to secure her own law degree and they became both personal

and business partners. In co-operating with the writer of this biography, Elliott Johnston insisted that Elizabeth's role in his life should be fully acknowledged. And so it is.

For a time, the CPA saw the bright young lawyer in Adelaide as one of its stars of the future. He was recruited as a full-time organiser with the Party, a position he accepted. Just as dutifully, he was later to obey the Party's direction that he would be of greater help to the revolution by becoming a top lawyer. Which is what he proceeded to do.

The central part of the biography is the story of Elliott Johnston's legal practice. It was certainly wide and diverse, including compensation cases and criminal and public law matters. It was Johnston who conceived the argument later litigated in the High Court in *Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447: a case that affected the practice of banks securing mortgages from parents to support the debts of their children. Because banks were traditionally seen by communists as the worst citadels of capitalism, the victory in *Amadio's Case* would have been particularly sweet for Elliott Johnston.

Try as she might, it was difficult for the author to make the parade of individual cases in which Elliott Johnston appeared as counsel to look singular and fascinating. More detail would have been needed and there was no space for that. Although some of his early cases involved capital offences, which Johnston felt ill-equipped to defend, the impression gained is that his years of practice at the Bar were like most of their kind. Each day merged into the next. But the hero's cases were only relevant to the main themes of the biography as they demonstrated the fine qualities of Johnston that fitted him to be a leader of the legal

profession. He was a stickler for accuracy and observance of proper procedures. He was invariably courteous and polite in and out of court. He was highly industrious and gained notable forensic skills in many fields of law. He was good at lateral thinking. He was not afraid of silence in court and, like many good advocates, he would take time, on his feet, to think through his strategies. He was not specially motivated by money. He was a strong supporter of women in the legal profession. All this meant that he won the love and respect of many lawyers and towards the women whom he mentored, he was occasionally, but harmlessly, flirtatious.

So far the biography is not particularly distinctive. But three public events combined to make Elliott Johnston's life in the law unusual. The first was the controversy that welled up in 1969 when his name went forward for the first time from Chief Justice John Bray to the Coalition Government of Steele Hall for appointment as Queen's Counsel. Because this appointment would involve the issue to him of a formal commission in the name of the Queen, it required the approval of government. Conventionally, however, that approach had been a formality. Johnston had many professional admirers. But he also had political critics, who could not see that he would exhibit sufficient loyalty to the Crown and to governmental institutions to warrant appointment as a silk.

Premier Hall offered to appoint all of the Chief Justice's nominees save for Johnston. In response, Bray withdrew the entire list. To their credit, counsel who then missed out refused to accept individual appointments except on the nomination of the Chief Justice. When the Hall Government was replaced in June 1970 by a Labor government headed

by Don Dunstan, the commission to Johnston was quickly approved (although not, it seems, unanimously) by the new State Cabinet. It was announced by Attorney-General Chris Sumner.

Asked at the time whether there was not an inconsistency between taking the commission and membership of the Communist Party, Johnston denied that there was any tension. So far as he was concerned, he was a member of an Australian political party which decided its own policies and owed no allegiance or obedience to anyone but itself and its members. Unlike Ted Laurie in Melbourne, Johnston refused to resign from the Communist Party prior to receiving appointment as a silk. He regarded that as an unprincipled step and as selling out his conscience for personal professional legal gain. In the end, his approach was vindicated. His elevation to the office of senior counsel saw the range and significance of his cases grow, together with an ever-expanding band of admiring legal practitioners who valued his forensic talents.

The second event of importance was Johnston's appointment in 1983, at the age of 65, as a judge of the Supreme Court of South Australia: the first avowed communist elevated to such a position in Australia. As Dame Roma Mitchell who, as Acting Chief Justice of the State, welcomed him to his judicial office, observed: "The controversy about his appointment [as Queen's Counsel] had melted away by the time he became a judge". In short, "He had proved himself as a barrister beyond reproach". And that was enough to convince virtually everyone that he would impartially fulfil his duties as a judge. Which is what he proceeded to do.

Johnston agonised over resigning from the CPA when he became a judge. However, eventually, he did this for the duration of his judicial years in conformity with the strong apolitical convention of the Australian judiciary. When, after only five years of judicial service, he retired from the judiciary at the age of 70, he quickly rejoined the Communist Party. He had kept his personal integrity but also and obeyed the conventions to the extent that he regarded them as relevant.

The third important public event in his life followed quickly after his retirement as a judge. He was appointed by the Hawke federal government as one of the five Royal Commissioners into Aboriginal deaths in custody. The enquiry examined 99 cases of Aboriginal prison deaths. A year later, Johnston accepted a commission as Chairman of the Commission when Justice James Muirhead resigned for reasons of health. The report of the Commission did not accept that the many deaths of Aboriginal accused in custody evidenced instances of murder or manslaughter. Still the report did conclude that the shocking levels of prison deaths grew out of the grossly disproportionate rate at which Aboriginal people were being imprisoned in Australia; the loss of their land and the destruction of their economy and culture; and the common exposure of the indigenous people to the ignominy of racist attitudes and policies that had to change. A year after the delivery of the report of the Royal Commission, the High Court of Australia delivered its important judgment in *Mabo v Queensland [No.2]* (1992) 175 CLR 1. The Court there upheld the claim to recognition of 'native title', reversing many precedents that had previously refused that step. Elliott Johnston's report was one of several legal developments at the time that contributed to the changing the national *Zeitgeist*.

In the years since the Royal Commission report, Elliott Johnston has been honoured in many ways by appointments not unusual for a senior and respected advocate and retired judge. A high civil honour in the Order of Australia, honorary degrees and professorial appointments show that his life's work and empathy for the underdog have been valued and respected, particularly in South Australia where he has become a living legend. His wife, Elizabeth, died in 2002 and a lengthy chapter of this book is dedicated to her part in his life as a comrade, best friend and wife. Clearly she fought for social and political change quite as vigorously as he had done. In the words of the author, "their left wing missionary zeal burned on into their old age". Correctly, the biographer poses the question not how did they stay true to their beliefs but "how they survived the sheer tedium of years of Communist Party meetings, fund raising and conferences".

This is an aspect of Elliott Johnston's life that remains a puzzle, notwithstanding the thorough reportage of the events that make up his career. Occasionally, there are intriguing glimpses of the personalities of the colleagues in the CPA with whom Johnston had to deal: Laurie Aarons, Lance Sharkey, Ted Hill and J.B. Miles. Miles, for example, travelled to Adelaide to sort out the divorce of party officials who astonishingly obeyed his instruction for the greater good of the movement. How any political organisation could hold such power over its members (and especially a member as intelligent as Elliott Johnston clearly was) remains a puzzle. So murderous were the communist regimes overseas that even formal association with them, by the mid-1950s, would have been difficult for most lawyers. Somehow, Elliott Johnston and Elizabeth could look beyond the defects and see the great ideals that had drawn them to the cause in their early youth.

In the end, the conclusion seems to be that Johnston embraced communism and the CPA as a kind of spiritual cause. Like many in the Christian church, he saw the wrongs that came to light as the fault of individual actors, not of the organisation or its ideals. And at their heart, the ideals for which Johnston stood throughout his life were not all that different from those of the Methodists whose bursaries set him on the high road to legal fame and fortune at school and university. His causes were: concern for Aboriginals; support for the poor; redemption and defence of prisoners; public controls over banks and governments; respect for women's rights; non-discrimination and dignity for all minorities. It is unsurprising that, in his recent years, Elliott Johnston is portrayed as condemning the sale by successive governments of public assets; the demolition of the Australian system of industrial arbitration; and the Northern Territory Intervention, undertaken in the last days of John Howard's government.

Farewelling Johnston from the Supreme Court of South Australia 15 years ago, Attorney-General Sumner remarked on his long life as a man who sought to act on the principles to which he adhered:

“Although you have had to fight for unpopular causes in your professional and political life, you have been secure in your personal value system and have never given way to the attractions of an off-hand, detached, uncaring cynicism which seems to afflict many people as they leave the idealism of youth behind. For you, your ideals remain as important now as they always have been”.

The book opens with a marvellous foreword by the Hon. Mary Gaudron who declares that the biographer was lucky to have a subject who lived in interesting times and always remained interesting in his own right. She, too, appreciated what it was to be “a first”, especially in the law

“which remains an essentially conservative profession”. She offers praise of Chief Justice Bray (although she mistakenly bestows a knighthood) and of the legal profession of South Australia that produced Roma Mitchell, Elliott Johnston and other stand out lawyers. She observes:

“I have always found the South Australian legal profession to be open-minded, progressive and tolerant. I suspect Elliott’s professional life might have been more difficult and more controversial in any other State”.

Even South Australia was not all that tolerant in the law until the 1970s and 1980s, by which time the communist bogeyman had lost much of its power to frighten and alarm. By then, many of the revealed values of the hero of this book were not so different from those of countless other lawyers and citizens. And for his own part, Johnston was praising the virtues of judicial independence, institutional apoliticism and professional comity in language not all that different from the judges and lawyers for whom communism was an anathema.

This is an excellent story on the life of a fine man and lawyer. The book is illustrated by 16 pages of family and professional photographs that give glimpses of the life and times of Australia’s ‘Red Silk’. Yet to the end of the book one thirsts for a deeper understanding of what elements in his nature or experience first initiated Elliott Johnston’s radical inclinations. And what kept them going in the face of so many discouragements and disappointments.
