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CRIMINAL LAW JOURNAL

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So many distinguished Australian lawyers participate in the development of criminal law that it has not been the general custom of this journal to note the death of significant contributors.

In 42 years, only four detailed obituaries have been published. The first was for Dr Des O'Connor.[1] However, he had been the general editor of the journal for the first twelve volumes. The idea of creating such a publication was substantially his. He was a law teacher. However, he served for some time as a special magistrate in the ACT. The second obituary was for Mr Paul Byrne SC.[2] He had been a much admired and influential barrister who argued many influential criminal cases in the appellate courts. A lecture series has since been established in his name focussed on criminal law. The third obituary was in honour of John Harber Phillips AC, past Chief Justice of Victoria and holder of many other high offices. He initiated the *Phillips' Briefs* in this journal, contributing them right up to the time of his death.[3] The record of his life[4] shows that he

* Chair of the Editorial Board of the *Criminal Law Journal*; Editor-in-Chief of the *The Laws of Australia*; One time Justice of the High Court of Australia.
[1] (2008) 32 *CrimLJ* 140-141.
[2] (2009) 33 *CrimLJ* 227.
[3] See "Losing One's Cool" (2009) 33 *CrimLJ* 55.
[4] (2009) 33 *CrimLJ* 288.

wrote on criminal law doctrine but also found time for books on intriguing places, advocates and puzzles. A tribute to his skills as a writer is the continuance of the *Phillips' Brief*, well after his passing. The fourth obituary was written for Mr Fiori Rinaldi AM, the founding and long-time editor of the *Australian Criminal Reports*.[5] Three of the four obituaries were offered by the present writer. All of those honoured have had links to this Journal. All of them had contributed articles that were published in these pages. Each was, in a sense, part of the 'family' of the *Criminal Law Journal*.

Sir Laurence Street did not contribute an article to this journal, although he did contribute innovative articles to the *Australian Law Journal* (ALJ). Most of his articles were on the issue of Federal Court encroachment into what he saw as state court territory.[6] Alternatively, they were on mediation issues, following his judicial retirement. The closest he came to contributing reflections on an aspect of criminal procedure was in an article published in the ALJ on "Regulatory/Criminal Proceedings: Appraisal Conference".[7] This was an essay of fewer than three pages written immediately after his retirement as Chief Justice of New South Wales. It was his attempt to bring into the field of criminal law, which he had dominated in his home state for one and a half decades, lessons that he had begun to draw from his increasing interest in alternative dispute resolution (ADR). There too, he was to dominate the field although, as he explained in the ALJ, he preferred to describe ADR procedures as "additional dispute resolution". He was keen to get practitioners thinking about the practicability and utility of evolving new procedures to fill a place

[5] (2015) 39 *CrimLJ* 167.
[6] See e.g. *The Consequences of a Dual System of State and Federal Courts* (1978) 52 ALJ 434; "Towards an Australian Judicial System" (1982) 56 *ALJ* 8;
[7] "Mediation and the Judicial Institutions" (1997) 71 *ALJ* 765.

in the criminal justice system that they had come to play in the civil justice system.

To say the least, Sir Laurence Street was extremely critical in his ALJ article about aspects of criminal procedure. His criticism was sparked by a then recent prosecution of a leading Melbourne barrister, Mr Neil Forsyth QC for "an alleged conspiracy to defraud the Commonwealth taxation laws resulting from a raid on [Forsyth's] chambers and the seizing of his client-related files".[8] It was that case, and the pressure that it imposed on a barrister with whom the former Chief Justice could empathise, that led him to describe the criminal justice system as a "travesty". He estimated that the injustice that he identified could have been averted if both parties, at an early stage and before the battlelines were publicly drawn, had been assisted to form a dispassionate, objective appraisal of the whole matter through the medium of a professionally structured appraisal conference, chaired by a mutually acceptable consultant.[9]

One gets a feeling from reading Sir Laurence Street's ALJ article that he was very critical of the prosecuting authorities in that case and that he would have had many criticisms, suggestions and ideas for criminal law reform up his sleeve, had he been induced earlier and more often to contribute his thoughts to these pages. Hopefully, succeeding judges may be encouraged by reading this obituary, either during their judicial service or after it, to draw on their judicial experience so as to help improve the doctrine and procedures of criminal law in Australia. At least to the extent

[8] (1998) 72 *ALJ* 860.
[9] *Ibid* at 862.

that such proposed improvement is consistent with applicable legislation and the fundamental principles of our accusatorial criminal justice system.

Laurence Street was born on 3 July 1926 to the privileged life of a grandson of [Sir] Philip Whistler Street, a judge and later Chief Justice of the Supreme Court of New South Wales and Lieutenant Governor of the State. His father [Sir] Kenneth Street, son of Sir Philip, was appointed to the Supreme Court of New South Wales in 1931 and in 1950 became, like his father, Chief Justice and Lieutenant Governor.[10]

After school, Laurence Street served as an ordinary seaman in the Royal Australian Navy for which he enlisted in wartime. He served in the Pacific War and was demobilised in 1947. He undertook legal studies at the University of Sydney. After graduation with honours, he quickly achieved fame as a barrister, mixing enormous charm with hard work, legal talent and imagination. His father had been a dour but entirely reliable chief justice. Occasionally, and increasingly as he grew older, Laurence Street evidenced the values and interests of his mother, Jessie Street. She had been a reformer, a feminist and was greatly interested in human rights. She participated in the delegation to the United Nations General Assembly session that adopted the *Universal Declaration of Human Rights* of December 1948. In later years, as a judge, Laurence Street displayed empathy for anti-discrimination laws and equality that sometimes surprised his more conservative admirers. In his last published judgment he held boldly that, in certain circumstances a transsexual was not a "male person" for the purpose of the *Crimes Act* 1900 s 81A.[11] In his judicial life

[10] Details are collected in the Obituary by Acting Justice A.R. Emmett (2018) 92 *ALJ* 565-568.
[11] See *Regina v Lee Harris*, (1988) 17 NSWLR 158. See also *Sibuse Pty Ltd v Shaw* (1988) NSWJB 74 (CA) and *Lisafa Holdings Pty Ltd v Commissioner of Police and Ors* (1988) NSWJB 167 (CCA).

it sometimes appeared to knowledgeable observers that he was engaged in an intellectual struggle between the orthodoxy that had been taught to him by his father and the liberalism that he had learned at his mother's knee.

Street's primary expertise at the Bar, and as a QC, (appointed 1963) was in the fields of bankruptcy, company and commercial law. It was no surprise that in 1965 he was appointed to the Supreme Court of New South Wales and assigned to the Equity Division. He soon won accolades presiding in the "venue of choice" for large commercial disputes in Australia. His efficiency and brilliance in mastering complex commercial cases, and his capacity to move straight to the provision of *ex tempore* reasons for what proved generally unassailable judgments[12] indicated the star qualities of his temperament and talent. It was therefore equally unsurprising, in 1974, on the resignation of Chief Justice Sir John Kerr to become Governor-General of Australia, that Street succeeded to the office so vacated. For the first time in the Commonwealth of Nations the office of Chief Justice of a jurisdiction was held successively by three generations of the same family.

Tensions soon broke out between Chief Justice Street and judges of the newly created Federal Court of Australia, established in 1976. Street was fiercely defensive of his judicial prerogatives and desperately keen to defend the premium role his court had won in civil commercial litigation. Ultimately, it would be for the legal profession and the market to make the critical decisions on choice of venue. In any case, by this time, Street CJ had a new legal focus and challenge.

[12] (2018) 92 *ALJ* 565 at 566.

The practice of most Australian Supreme Courts, back to early colonial times, had been for the chief justice to preside in criminal appeals, when the court was sitting *in banc.* Without an extensive background in criminal trials or appeals, Laurence Street was soon presiding in the busiest court of criminal appeal (CCA) in the nation. He sought to bring to his new work the same talents that he had deployed in the Company List and generally in the Equity Division of the Supreme Court.

The Honourable Michael McHugh AC QC, a judicial colleague on the Court of Appeal of New South Wales and later as a Justice of the High Court of Australia, remembers an instance of that skill in 1977 in *R v Gilmore*.[13] This was a seminal case on the use of spectrograph analysis of voice on a tape recorder and comparison with the voice of the accused. The trial judge had rejected the evidence of an expert on the ground that the evidence was not from a recognised field for expert knowledge. The Court of Criminal Appeal (Street CJ, Lee and Ash JJ) held that the evidence was admissible. It allowed the appeal and ordered a new trial. Michael McHugh, who argued the case for the appellant recalls Street CJ's "extraordinary capacity to grasp new and extensive and complex material and render a lucid *ex tempore* judgment at the conclusion of the argument. None of the counsel who had appeared at the trial had referred to the many US cases on the subject. There were no Anglo-Australian authorities on the subject. [Argument] took the Court through the numerous US cases and the academic literature on the subject as well as the evidence. The appeal was heard in the days before written

[13] *R v Gilmore* [1977] 2 NSWLR 935.

submissions were required. So [Street CJ] had no forewarning of the argument. Yet he quickly comprehended all the material and gave judgment at the end of the argument. It was an extraordinary performance, as can be seen by reading his judgment."

It was in the CCA that the present writer came to work with Street CJ when appointed President of the Court of Appeal of New South Wales in 1984. At first, relations were somewhat distant. It was still comparatively recently that the separate Court of Appeal had been created in New South Wales in 1965. That step involved the supersession of long-time, experienced trial judges.[14] Moreover, although the *Criminal Appeal Act* 1912 (NSW) provided neutrality for the appointment of judges of the Supreme Court to the CCA, Street CJ, at first, withheld invitations to the Judges of Appeal. Whilst this practice was probably welcomed at the time by some trial judges of the Common Law Division, it was contested and criticised by the Judges of the Court of Appeal. Eventually Street CJ relented. The invitations to participate (and thus commonly to preside) began to flow. He was too good a lawyer to do otherwise. The desirability of mixing specialist and non-specialist lawyers in the same appellate court was eventually understood, for that had been the path that Street CJ had himself earlier taken.

To sit with Street CJ in the CCA was a special experience for serving judges. None of those who shared that privilege will forget it. He worked with herculean energy. Generally, he tried to dispose of all the cases with *ex tempore* reasons, immediately following argument and a short adjournment for brief judicial discussion. On a typical day, in the

[14] M.D. Kirby, "Judicial Supersession: The Controversial Establishment of the New South Wales Court of Appeal" (2008) 30 *Sydney Law Review* 177.

experience of the writer, he would work relentlessly through the list, often including three substantial appeals against conviction together with two or two appeals against sentence. Commonly, he would offer to pronounce the first reasons in the court in every case. It was an offer that most judges, mesmerised by his abilities and eloquence, would gladly accept.

During this time, Street CJ introduced a practice, by cooperation with the Crown Prosecutors appearing in the CCA. To the prosecution written submissions would be annexed a "Part A" with a succinct, footnoted and substantially uncontentious summary of the facts of the offence; the course of the prosecution; and the issues in the appeal. Street CJ would read this onto the record and then proceed, seemingly without interruption and with the utmost felicity, to provide the reasons for the disposing of the appeal and reaching the orders that he favoured. He was not a harsh judge; but he was not a 'softie' either. In the writer's experience, only Samuels JA, in the NSW Court of Appeal, could rival Sir Laurence Street in proceeding directly and swiftly to the provision of highly persuasive reasons for judgment that mixed legal skill with verbal elegance.

I am indebted to the Hon. Rod Howie QC for a note on the criminal cases of Street CJ, from his era in the 1970s and 80s, that continue to be used regularly in the courts today. Because of his continuing contributions to the *Handbook* on standard judicial directions in NSW and advice when sought by the general editor of the *Australian Criminal Reports*, Mr Howie is in a good position to survey that field. He includes *R v Todd*[15] and Street CJ's remarks on the effects of delay on the sentence proper to a case. Those remarks were expressly approved by the High Court of Australia in

[15] [1982] 2 NSWLR 517.

Mill v The Queen.[16] The exposition by Street CJ is regarded as a classic to this day and is constantly applied in decisions of the NSWCCA.[17]

Another case deals with the issue of whether a judge may sum up to the jury on a basis for possible conviction, although it was not relied upon by the Crown. Street CJ's opinion on this issue has been cited in many cases, most recently in *Sieders v The Queen*.[18]

On the liability of an accessory before the fact, the law laid down by Street CJ in *R v Johns*[19] was approved by the High Court of Australia in *Johns v The Queen.*[20] At least in New South Wales courts it is ordinarily the reasons of Street CJ that are used to introduce any discussion on joint criminal liability. His reasons in *Johns* can now be read together with the long discussion by the High Court of Australia of the issues in *Miller v The Queen*.[21] In that last mentioned decision, the High Court held fast against the criticisms of joint criminal liability as "over criminalising" the liability of a secondary offender and rejected the recent decision of the Supreme Court of the United Kingdom and the Privy Council in *R v Jogee*.[22] When the High Court of Australia rejected the English authority in *Jogee,* it cited the statement of Street CJ about the criminal liability assumed by the secondary party.[23] Only Gaegler J in *Miller* took up the challenge that had succeed in *Jogee*.[24] The resulting authority of the High Court has been the subject of comment in this journal. Whatever else may be said about the resulting law and principle in Australia, (and much will be said) it

[16] (1988) 166 CLR 59.
[17] See e.g. *R. v Elchielch* [2016] NSWCCA 225 at [56].
[18] [2008] NSWCCA [187].
[19] [1978] 1 NSWLR 282.
[20] (1980) 143 CLR 108 at 130-131.
[21] (2017) 90 ALJR 918; (2016) 289 CLR 380.
[22] *McAuliffe v The Queen* (1995) 183 CLR 108; *Clayton v The Queen* (2006) 81 ALJR 439 at [98] per Kirby J.
[23] [2016] 2 WLR 681 at [87].
[24] *R v Johns* [1978] 1 NSWLR 282 (CCA) at 290.

cannot be laid at the door of Street CJ. He merely stated the earlier understanding of the law in England.[25] In the CCA, he was a faithful centurion, acting under orders from the High Court. He did not enjoy the same powers of review and reconceptualization as belonged to the Justices of the High Court of Australia.

Inevitably, as a judge working normally in the CCA, Street CJ's legal imagination was kept under firm control. To some extent this was because of the ever present facility of special leave to appeal from his judgments to the High Court. But to some extent it was also the product of his judicial methodology. This greatly favoured the provision of immediate decisions. That technique tended to put a dampener on extended reflection, consideration of academic and other criticism of the law and conceptual analysis.[26]

When Street CJ was eventually set free from the judicial harness in 1988, we get an idea of where his creative imagination took him. We can see it in the article on criminal practice that he immediately wrote for the ALJ. And then he turned to the practice of ADR. In ADR, he was greatly successful. Today, in civil cases of any size ADR as an additional element in litigation is now the norm. The intrusion of ADR into criminal process is still largely a challenge for the future.

[25] (2016) 90 ALJR 918 at 924 [19].

[26] Mirko Bagaric, "The High Court on Crime in 2016: Outcomes and Jurisprudence" (2017) 41 *CrimLJ* 7 at 8 and 11 where "strong academic criticism of the breadth of this doctrine and the holding in *Jogee*" are quoted to the effect that 'joint criminal enterprise was flawed and should be abolished'. See also S. Odgers, "Editorial: The High Court, The Common Law and Conceptions of Justice" (2016) 40 *CrimLJ* 243; S. Odgers, "Editorial: McAuliffe Revisited Again" (2016) 40 *CrimLJ* 55; and Sarah Putney, "Case and Comment: *R v Jogee*" (2016) 40 *CrimLJ* 110.

Sir Laurence Street died in Sydney on 21 June 2018. His State Funeral took place at the Sydney Opera House on 5 July 2018. It was almost entirely devoid of religion. Amongst the praise for his judicial work, reference was made to his specially creative role in the establishment, in 1964, of the Australian Naval Reserve Legal Panel of which he was the first head. Two of his children, Judges Sylvia Emmett and Alexander Street are today serving members of that panel. Theya re serving federal judges.[27] Following his death many obituaries have been written of "Lorenzo the Magnificent".[28] This one adds reference for a most important field of the law which he came to influence profoundly through the talents he had basically derived from his father and grandfather. Yet the lingering question remains of what might have been if his dazzling career had taken him to the High Court of Australia, where the reformist insights derived from his mother might have had larger opportunities of expression.

Sir Laurence Street was survived by his widow, Lady Penny Street and by his first wife, Susan. There were four children to the first marriage and a daughter (Jessie) to the second. The second Jessie Street is a lawyer.

[27] See Obituary by Acting Justice Arthur Emmett: (2018) 92 ALJ 565.
[28] Ibid at 565.