CRIMINAL APPEAL AMENDMENT (JURY VERDICTS) BILL

Bill introduced and read a first time.

Second Reading

Mr ANDREW TINK (Epping) [10.02 a.m.]: I move:

That this bill be now read a second time.

The purpose of the bill is to amend the Criminal Appeal Act with respect to appeals against jury verdicts to provide that the courts apply a tighter test when deciding whether there has been a miscarriage of justice due to prejudicial material relating to the case being published or broadcast. At present the court has the discretion to form its own opinion as to whether the publicity is so prejudicial—by way of judicial notice almost—that the jury should be discharged, or that the verdict given by the jury is unsafe requiring the matter to be retried. The bill seeks to limit the circumstances in which a court can take such action. It requires the court to be satisfied that the material influenced an opinion or conclusion formed by the jury or a member of the jury and that there has been a miscarriage of justice.

The bill provides that the court may examine a juror on oath to determine whether that juror read, saw or heard alleged prejudicial material and then to decide whether such material influenced the jury. Under this bill the court must be satisfied about those two matters. In other words, if the bill becomes law, there must be evidence of influence arising out of the reading of material that influenced a juror or jurors in their verdict and the mere opinion of the court is not sufficient to warrant a retrial. The bill arises from a decision dated 4 March 2004 in the New South Wales Court of Criminal Appeal in *Regina v Tayyab Sheikh*. The President of the Court of Criminal Appeal, Justice Mason, the Chief Judge at Common Law, Justice Wood, and Justice Sully were the three judges to hear the appeal. Page 3 of their judgment states:

These grounds argue that the sensational and widespread publicity during the critical period [the start of Sheikh's trial and the return of verdicts in the first trial] caused the miscarriage of justice and rendered this Court's earlier decision for a separate trial worthless. It is argued that Sheikh's position was worse than if he had been tried jointly.

Justice Mason and Justice Wood, based on their own assessment, decided that the verdict should not stand in light of the widespread publicity. In coming to that opinion they quoted Justice McHugh of the High Court in *Gilbert v The Queen*, who followed the important test upon which more weight should be placed. Paragraph (21) of the judgment in the Sheikh case stated:

The criminal justice system proceeds on what McHugh J described as *"the assumption that criminal juries act on the evidence and in accordance with the*

directions of the trial judge." … Merely because a jury gains access to inadmissible material does not mean that the trial miscarries even if that material is damaging in some way to the accused.

Justice McHugh is one of the most respected judges in the nation and he applied the proper test. I believe the courts should apply this test more widely in deciding whether publicity is prejudicial. The judgment continued:

In the case of sensational media publicity that gives a jury access to damaging inadmissible material there may be cases where the jury's capacity to ignore the material is put into serious doubt. The courts have used various remedies including adjournment and express directions to the jury to exclude from their minds anything heard or perceived outside the courtroom. In some instances none of these remedies will be fully or sufficiently effective.

In this instance, the court found that to be the case for many reasons. The appeal was based on a number of grounds and the Court of Criminal Appeal found that it was not safe for the verdict to stand. The majority judgment, which goes to the heart of this bill, is as follows:

Appellate courts give broad deference to the decisions of trial judges faced with applications for discharge and/or adjournment. But there is undoubted jurisdiction under s6 of the **Criminal Appeal Act**—

and this bill amends that Act—

to set aside a conviction in an extreme case if the trial has miscarried because of the atmosphere of external hostility in which it was conducted.

In their majority judgment Justice Mason and Justice Wood said:

In our view, this was such a case.

Two affidavits have been placed before the Court giving details of media coverage of the earlier trial and its outcome. They span the period 7-14 June 2002 and include transcripts of radio broadcasts of leading Sydney radio and televisions stations. These broadcasts and telecasts provided extensive and graphic reportage of the earlier trial and strongly expressed commentary about the conduct, character and deserts of the accused/convicted men.

They then detailed some of those comments, which I will not repeat here. In the event, the court found that it was unsafe for the matters to stand, and it took a decision to substitute its own decision, in effect, to send the matter back for a retrial. The minority judge, Justice Sully—in my opinion he is a highly respected judge—took another course. We need to make that course the majority position by legislation, which is what this bill does. Justice Sully again quoted Justice McHugh and applied the test differently. In the judgment he said:

122 It follows that the appellant's present argument must be that he lost that

fair chance of acquittal because the refusal to discharge the jury entailed that the assessment of the competing cases was made by jurors whose fairness and objectivity had been subverted by the media coverage of which the appellant now complains.

123 There are in my opinion two flaws to this argument.

124 **First**: there being no submission that the verdicts cannot be supported …

125 **Secondly**: the argument does not give due weight to his Honour's instructions to the jury.

The second point raises a key issue. Justice Sully has confidence, as do I, that a properly instructed jury, instructed in plain English with a plain English direction, can and should be allowed to consider these matters and can and should be given the benefit of the doubt unless there is specific evidence to the contrary, as the bill provides for, to deliver a verdict when, despite media publicity, it has been properly directed to ignore that publicity. The second point raised by Justice Sully in paragraph 125 is the key. He then sets out at great length over a couple of pages the direction that the trial judge gave to the jury in this case, which in his view was sufficient to deal with the very strong publicity that had been given to the case.

Anyone who is interested in this whole issue should read and give close attention to the direction given to the jury. The decision in that case persuaded me to introduce this bill. However, decisions by even higher judges in New South Wales—that can only be the Chief Justice—are starting to head in a different direction. A case in the New South Wales Court of Appeal—*John Fairfax Publications v District Court*—has a judgment date of 15 September 2004. It is a judgment of the Chief Justice, Justice Handley, and Justice Campbell—again, that is an exceptionally strong bench. The Chief Justice, as he does, delivered the judgment which, in addition to dealing with the matter, set out some broader principles. I have a lot of time for the way the Chief Justice delivers his judgments and deals with the wider issues. His judgment is an important one. At paragraph 17 he said:

The principle of open justice and the principle of a fair trial each inform and energise many areas of the law …

That is the point, and it is the balance we seek in these matters—that is, the openness of justice. It means that people, one way or another, will discuss controversial trials. There is a public demand for it. We live in a democracy. Some might say that the demand is insatiable but it is strong. If we are part of a democratic system, whether we swear an oath to the Parliament, an oath as a judge, an oath as a juror or anything else, we must accept that an open and robust media is a fact of life. To think that it is anything else is simply denying reality. We must make the system work in the context of an open, robust and democratic society in which the media are becoming more central to things every day.

I understand that the Chief Justice, by referring to open justice, is acknowledging that point. But he then talks about the equally important principle of a fair trial. That is the balancing point. It is important, but never easy, to weigh up those two principles. As the law stands at the moment with the case I referred to previously, one would say that the balance in favour of a fair trial is for the Court of Criminal Appeal to intervene if it forms the view that a jury's verdict is unsafe to stand in the face of strong publicity. That balance needs to change, and there must be actual evidence of a problem with a juror or jurors being influenced by publicity to swing the outcome of the matter, so to speak, away from the idea of open justice in the broader sense to the idea that a fair trial has been compromised. In this important judgment the Chief Justice, if I read him correctly—it is a civil matter, not a criminal matter—is starting to make a more robust case for juries being given more latitude to have their way despite strong publicity. In paragraph 59 of the judgment the Chief Justice said:

It is conceivable that media publicity may create a situation in which an accused will not be able to have a fair trial within a reasonable period or at all. In that circumstance an anticipatory non-publication order may be needed to ensure fairness to the prosecution. However—

this point is important—

that exceptional case is so unlikely that it cannot form the basis of an implication of a power on a test of necessity.

… If a truly exceptional case ever arises it can be handled by the exercise of the protective inherent jurisdiction of the Supreme Court.

The Chief Justice is trying to narrow down significantly the ambit of the suggestion that, without specific evidence that a jury has been influenced, it is open to a court simply to step in and say, "We have decided that it is too unsafe to stand." The judgment continues in fairly strong terms. At paragraph 103 the Chief Justice said:

There are now a significant number of cases in which the issue has arisen as to whether or not an accused was able to have a fair trial in the light of substantial media publicity, indeed publicity much more sensational and sustained than anything that occurred here. Those cases have decisively rejected the previous tendency to regard jurors as exceptionally fragile and prone to prejudice. Trial judges of considerable experience have asserted, again and again, that jurors approach their task in accordance with the oath they take, that they listen to the directions that they are given and implement them. In particular that they listen to the direction that they are to determine guilt only on the evidence before them.

Although the words were not uttered for that purpose, I take that as strong support for the idea behind this bill—that jurors are more robust than a lot of people give them credit for. It has been argued that there is no need for this bill. The decision of the Court of Criminal Appeal in *Regina v Sheikh*, which

is a strong precedent, stands in the way of the application of this type of rule. I think—and I am certain that the public thinks—it ought to be applied. That is the reason this bill is before the House. Anybody interested in criminal law should read the speech made by Justice Dunford at the Criminal Law Conference on 27 July. It contains excellent and thought-provoking material, not that everybody would necessarily agree with every part of it. The Government, to its credit, has already acted on parts of it, but there is more to be done. In relation to juries, Justice Dunford said:

Unfortunately there are a number of persons in the legal profession who seem to regard jurors in much the same way as politicians regard voters—

I am not saying that I necessarily agree with Mr Justice Dunford on that precise point—

that is, as absolute idiots, who need to be spoon fed any information, are incapable of rational thought and can be easily swayed by irrelevant matters and information. I disagree. Jurors are our fellow citizens, our neighbours, the persons with whom we do business and so on, and they are not lawyers.

He goes on to state:

I know some lawyers believe that juries can be swayed by emotion and red herrings, but after almost 18 years on the bench I remain, as I say, a supporter of the jury system, and over that time there are only a handful of cases where I have personally disagreed with the jury's decision, and even in those cases, I have been able to see a reasonable and logical reason why a jury has come to a different conclusion.

He goes on to talk about the importance of having juries in corporate fraud cases and said that he would not support the abolition of juries in retrials of sexual assault cases. After a bill such as this is passed I hope there is less room for retrials on some sexual assault cases. If there is evidence that a juror has been influenced by media attention the Court of Appeal can move. Despite that little jibe at politicians, the main point that the judge makes is important. I strongly agree that juries are robust. After a long career on the bench and elsewhere the judge certainly formed that view. Michael Chesterman, emeritus Professor from the University of New South Wales, delivered a paper at the nineteenth annual conference of the Australian Institute of Judicial Administration in September 2001. The web site of the Law and Justice Foundation of New South Wales contains this interesting information about Chesterman's study:

The study reaches the conclusion that NSW criminal juries have a relatively successful record on resistant to publicity.

It also states:

In the opinion of the researchers, these findings suggest that NSW juries achieve a relatively satisfactory level of resistance to publicity.

The summary conclusion states in part:

Most of the juries discharged conscientiously their duty to scrutinize the evidence carefully and, if necessary, at length.

After the conclusion of an extensive study, emeritus Professor Chesterman had this to say on page 5 of his report:

Our interviews provided grounds for believing that counsel engaged in the case and, to a lesser extent, the trial judges tended to over-estimate the level of recall of these matters.

He was referring to pre-trial publicity. He went on to talk about the Internet, which has already been dealt with by Parliament. At page 7 he said:

Secondly, in the 38 of our trials which were attended by specific publicity—

that is, the number of trials considered in the study—

very few of the 167 respondent jurors considered that this publicity might have influenced them. Only 4% gave a positive answer to this question, with a further 13% not responding to it. Similarly the jurors did not believe that their fellow-jurors were influenced …

He refers to one juror who was obviously interviewed for the purpose of the study and continues:

One juror linked the preceding assertion (inaccuracy of reporting) with this one (lack of susceptibility to media influence):—

> "I don't know how stupid they think jurors are. When something wrong was reported, we didn't read it and go, 'Oh, was I asleep for that?' We knew we heard everything, so the papers didn't influence us."

That important point reflects the widespread view in the community that people are able to deal with these matters. They are subjected to reasonable direction to put things out of their minds for the purpose of coming to a decision. On page 19 Professor Chesterman's concluding comments are as follows:

Overall, the picture of jurors' reactions to media publicity emerging from our research was, as we viewed it, a relatively optimistic one. In particular, they appeared less likely to encounter or remember pre-trial publicity, and less vulnerable to bias in the reporting of trials, than is often supposed by judges and legal practitioners.

The report does not state that everything was 100 per cent satisfactory, but nobody could say that in respect to any part of the administration of justice in

this State, given that at the end of the day it depends on human nature, whether one is a judge, a juror, a witness or a lawyer. There will always be room for error and improvement. However, overwhelmingly Mr Chesterman's report heads in the direction of giving jurors more credit for disregarding media publicity. If that statement is contested I refer honourable members to the web site of the Law and Justice Foundation, which reaches exactly the same general conclusion. On the other side of the coin I refer to a presentation in May 2004 by the Chairman of the Press Council, Professor McKinnon. He talked about the case I referred to this morning—the basis for the need for this bill—and said:

At the heart of the Appeals Court judgment was the assertion that

> appellate courts have a power to set aside a conviction in an extreme case if the trial has miscarried because of the atmosphere of external hostility in which it was conducted. Justices Mason and Wood find this such a case …

The majority judgment said that the directions given to the jury in the trial did not remove the prejudice from extensive media comment to a degree that enabled the majority to be confident the trial was not compromised.

He went on to quote some of the references in the judgment and said:

Media comment was evidently the demon. But is saying "would have lingered heavily" more than simply an assertion?

He referred to Justice Hunt and said:

David Hunt put the mind-set of judges very clearly in saying:

> Even judges who are trained to ignore extraneous prejudicial material have to exercise great care in doing so. For jurors, who have no such training, it is obvious that there will be cases where extraneous material is so overwhelming that they could not be expected to disregard it, and such a trial will inevitably be compromised … This is not an assertion of distrust in juries, merely a commonsense recognition that in some cases a jury will be unable to ignore such extraneous material.

In response to that Mr McKinnon said:

Jurors can't, but judges can! Is this touch of arrogance well founded?

Setting aside arrogance—I do not want to talk about that—I say that whatever judges can do, jurors can do in their area of responsibility, provided they are properly instructed. I agree with Mr McKinnon, Justice Sully and the Chief Justice that jurors should be trusted. It is important that the House pass this bill because the law on this

issue needs to be improved. As it currently stands, unless and until there is a major change to the legislation it will be necessary to send cases back for retrial.

Paul Sheehan, who writes robustly in the *Sydney Morning Herald* about these matters, wrote an article on 29 November in which he set out the overall cost of sending matters back for retrial. He referred particularly to the cost to victims and the public concern that victims do not want to give their evidence again. We must avoid that situation at all costs, and the way to avoid it is to try to ensure that victims do not have to give evidence a second time. We must study the circumstances where victims have had to give evidence a second time, and ask whether the system can be improved to prevent such situations occurring. Steps can be taken through publicity to change the requirement for victims to give evidence again. That issue is covered by the bill. If passed, the bill would prevent victims in some cases from having to face the trauma of giving evidence a second time. That provision is of critical public importance.

A very senior Court of Appeal bench has laid down the law in Sheikh's case, and I do not believe that matter will be reconsidered in the near future. We are not able to confidently tell our constituents or the public of New South Wales that in cases of a major crime a court will not intervene to impose its own view that a jury will not be allowed to proceed to a verdict or that the verdict will stand. We cannot be confident that that is the law as it currently stands. In fact, I believe it is not.

We cannot wait for the possibility that the courts may change the law in this regard. I say "possibility" because the Chief Justice is heading in that direction, but a change is not inevitable and there is certainly no timeline. The public would expect the Parliament to deal with a matter of such public importance robustly. We should head in the same direction followed by the Chief Justice, being the principal representative of the courts, in his view on the concept of a fair trial, and Professor McKinnon, who is the primary proponent of the concept of the importance of an open trial.

Yesterday the Attorney General referred to comments I made about the Director of Public Prosecutions. The last comment I made about the Director of Public Prosecutions was very positive. It related to his support for majority verdicts, which I also support. I would like to make a second positive comment about the Director of Public Prosecutions relating to the matter now before the House. On *Stateline* on 8 March 2004, in answer to a question from Quentin Dempster, "Director, where do you stand on jury influence by the media? Are jurors so stupid or easily led that fair trials are now virtually impossible in New South Wales because of sensational media coverage in criminal cases?", Mr Cowdrey replied, "No, I don't think that proposition is correct. I think that juries are quite robust and intelligent and they are not given the credit."

Pursuant to sessional orders business interrupted.

Debate resumed from 9 December 2004.

Mr ANDREW TINK (Epping) [10.00 a.m.]: When debate concluded on the last occasion I was quoting my old friend the Director of Public Prosecutions. Contrary to what some people may think, there are many occasions on which I agree with him and strongly support his point of view. This is one such occasion. The Director of Public

Prosecutions said, "I think that juries are quite robust and intelligent and they are not given the credit." I agree with him on that point. This bill gives jurors the credit for having in general a high degree of commonsense that allows them to differentiate between what they see, read and hear in the media, and what they see and hear, and on occasions read, during the course of a trial.

I believe jurors can distinguish between what is in the media and what is before them in a trial, with the one proviso that they are properly instructed by the judge. In my view it is axiomatic that once a jury has been selected and empanelled, the onus is very much on the judge and the system to ensure that jurors are properly directed. If for some reason jurors with an honest intention misunderstand what is required of them, then, so far as I am concerned, by definition something is wrong with the system that instructs them. That may not be the fault of the judge; it may be the constraints of the law of this State under which the judge has to work. Nevertheless, it is the system that is at fault if a juror, acting honestly and with goodwill—and, overwhelmingly, in my opinion they do just that—does something wrong.

So far as directions to be given to juries are concerned, we need to ensure that they are capable of being understood by ordinary people of good commonsense. I have mentioned in the past a program that was run in the Supreme Court of Queensland. Every judge, when conducting a trial, has bench books that provide directions for the jury, from which the judge reads out. In the Queensland example, the Chief Justice of the Supreme Court arranged for all directions contained in the bench books to be crafted in plain English. I could not imagine a more important project than that and it has been of great benefit in Queensland. What needs to be done in this State is a complete revision of all bench books in every jurisdiction in which a jury is likely to be empanelled.

All instructions that the judges are required to give to juries should be rendered into plain English so that ordinary people of commonsense can understand them, free of legalese, special terms and so forth which may be intelligible only to lawyers. That is a key component in ensuring that the decision making process is accessible to ordinary people. The bill is designed to get around the decision that the Court of Criminal Appeal [CCA] reached in one particular case, and therefore one assumes potentially in many other cases, that the CCA can, of its own opinion only, decide that the media has been so overwhelming in one prejudicial direction that it is unsafe for a jury verdict to stand because the inference is that the jury must have been affected by what was in the media report.

I simply do not accept that proposition. I do not believe that, in the absence of evidence, judges should be able to impose that opinion on jurors. There must be evidence, objectively measured, of some failing, impropriety or influence on a juror by a media report before the Court of Criminal Appeal can step in and say, " This decision of the jury is unsound. Go back and start again." Since this bill was last before the House we have had the example of a complainant refusing to give evidence again at a retrial in a very serious rape case. And who could blame her?

As a result, the Parliament is legislating to allow the use of transcript evidence in lieu of the complainant giving evidence again. But it is most unsatisfactory that, through no fault of the complainant—whose views were clearly understandable—a retrial

cannot occur in that case. The more serious the offence and the charge, the more difficult and complex the business of retrying the matter from start to finish. That is why we must have rules in place that keep retrials to a minimum, while ensuring that justice is done. I do not believe that the idea of requiring actual evidence of influence on a jury by the media cuts across the principle of delivering justice in a particular case. On the contrary, the idea that judges can impose their opinions about whether juries can be influenced by the media—free from any evidence that that is the case—is wrong in this day and age.

The idea that jurors can be quarantined from the media is equally wrong, as is the belief that the media can be censored in some way. A judge recently considered putting a block on the Internet to prevent jurors accessing media press clippings of past events. It is not possible to take that approach. Given the openness of the community these days and the wide interest in court proceedings, it is not desirable that past reports of events should be blocked in the future. As a matter of principle, that is not a good policy. But even if it were, it would be dangerous for Parliament to introduce a law that is impossible to enforce. There is nothing worse than the Parliament passing a law that is not possible to carry out. I do not think the technical arrangements for blocking the Internet are such that one could be 100 per cent certain of preventing juries access to every relevant press clipping. If we make the rule and it is breached, the case must be retried. I think that is putting the cart before the horse. It is the wrong approach.

The right approach is to accept that we have open and informed media, particularly with regard to matters of public record. We must accept that fact in the twenty-first century and devote our efforts to ensuring that juries receive proper instructions. Rather than judges fashioning orders or Parliament passing laws to block access to information in the public domain, effort must be made to instruct juries to take account of the evidence before them in court and not what might be in their minds as a consequence of what they have read, heard or seen on television.

There is another regrettable development—which I do not claim represents more than a tiny proportion of the bench; certainly, to my knowledge, no-one on the bench in the Court of Criminal Appeal. This week we had another case of a judge, who apparently suffers a medical condition, being asleep on the bench. I think that is deeply troubling to ordinary people of commonsense. It is expected that a judge in a serious criminal trial will pay full attention to everything that is said and done in court. Ordinary people understand that an inattentive judge—in the case I have mentioned it appears that the judge was asleep for up to 45 minutes—opens the door to the taking of appeal points that will result in a retrial. An unfortunate headline appeared in the *Daily Telegraph* on 2 March 2005—it is unfortunate not because it appeared but because it is a fair reflection of what many people think about the judiciary these days. It identified three judges, whom it labelled "Drunk, Drowsy, Depressed", and then continued, "And that's just the judges."

I do not mean to turn this into a jihad on the judiciary: I make it clear that such behaviour is not representative of the overwhelming number of people who sit on the bench. However, I think these issues are fairly raised. They are of the utmost importance to people. When such issues are put in the public domain in this manner many more people who may serve on juries ask: Who are the judges—some of whom

have a range of difficulties—to say that in their opinion, and their opinion alone, we cannot possibly be trusted to put out of our minds what is in the media and to focus solely on the evidence put before us in court? There is a rising tide of resistance in the public mind to judges imposing on juries their opinions outside of matters of law—legal matters are obviously totally different—and claiming that all that has been said and done in the media prevents juries from considering objectively the evidence before the court. People are starting to resist strongly judicial opinions of that type. Such opinions are not helpful to the partnership between the judiciary and juries in serious criminal trials.

I conclude where I ended my previous contribution. In proposing this bill to Parliament I believe the Director of Public Prosecutions, Mr Cowdery, is spot on. We must give juries credit for being robust and intelligent. The onus is on Parliament to craft rules that make it clear to jurors what their responsibilities are. The onus is on the judiciary to ensure that those rules and the law that develops around them are explained to jurors in such a way that honest, reasonable, conscientious jurors of ordinary ability understand exactly what they have to do, what they have to consider and what they have to put out of their minds. That is where we must focus our attention. It is important to give juries the benefit of the doubt regarding media comment and that a jury's verdict be overturned only if there is actual evidence of inappropriate media influence on jurors. The Court of Criminal Appeal should step in only in that circumstance. I commend the bill to the House.