## "TO TRAVEL HOPEFULLY IS NOT FAR BETTER THAN TO ARRIVE AT A VERDICT PROPERLY."[1] *R.* v. *McKenna and others.*[2]

The renitence of the pillar of criminal justice — the inviolability of trial juries — was recently reaffirmed by the Court of Criminal Appeal in *R.* v. *McKenna.*

In most systems which owe their vitality to the common law, trial by jury has come to assume a cloak of uncritical veneration which serves also to obscure many of

23. Recent examples of this practice are the adoption in *R.* v. *Jones* [1959] 1 W.L.R. 190; [1959] 1 All E.R. 411 by Lord Parker of Lord Sorn's interpretation of s.5(1)(*a*) of the Homicide Act 1957 in *H.M. Advocate* v. *Graham* [1958] S.L.T. 167, 169. For criticism of *Jones* see my note in *University of Malaya Law Review* Vol. 1, pp. 154-156. For a more advantageous 'borrowing' see the adaptation of the Scottish doctrine of diminished responsibility embodied in s.2 of the Homicide Act.

24. Podola was hanged. The Home Secretary did not reprieve him, possibly feeling that his one trump card had been played and lost when he invoked s.19(a) of the 1907 Act.

25. The Bill was laid before Parliament on 8th March, 1960. Its first clause would enable the defendant or prosecutor in any criminal case to appeal to the House of Lords from the Divisional Court of the Queen's Bench Division and from the Court of Criminal Appeal without the Attorney-General's fiat.

    On the second reading in the Lords on 24th March, 1960 (reported in *The Times* newspaper 25th March, 1960) the Lord Chancellor criticised the existing machinery for final appeal as anomalous due to the Attorney-General's overlapping functions. For he is a member of the executive, he might have appeared for the prosecution in the criminal appeal (as he, in fact, did in *Podola*) and is called upon to act in a quasi-judicial capacity when deciding on whether to grant the fiat.

1. With apologies to R. L. Stevenson and Mr. Justice Stable.
2. [1960] 2 W.L.R. 306 *The Times* newspaper, 16th January 1960, Court of Criminal Appeal before Cassels, Donovan and Ashworth JJ.

its real demerits. On one side of the world the jury's perpetuation is eloquently urged[3] and on the other its impending dethronement deplored. [4]

The reaction to Mr. Justice Stable's threat to keep a Nottingham jury together all night if they could not come to a quick verdict before his train left for London must therefore be viewed in a predominantly emotional context; for his words set editorial pens wagging with indignation and the apostles of Blackstone thumbing urgently through the *Commentaries* to reinvest their faith and search out precedents for such irreligious treatment of English juries.[5]

Volume iv would reveal to them the round denunciation by Sir Thomas Smith,[6] Sir Matthew Hale[7] and Blackstone himself of the practice "heretobefore in use, of fining, imprisoning, or otherwise punishing jurors.....for finding their verdict contrary to the direction of the judge" as being "arbitrary, unconstitutional and illegal." [8] They should also be reassured to learn (from other sources [9]) that instances of unabashed jury oppression like the disposal of trials at a single sitting[10] and the withholding from jurors of meat, drink and warmth to expedite a verdict, crept out with the first half of the last century, and that the physical exploitation of the jury and defence in *Lord Cochrane's* case[11] was but an isolated evil in an otherwise respectable era.

In *McKenna* the accused brothers and their associate Busby were convicted on counts in indictment charging Busby with larceny and taking and driving away a vehicle without the owner's consent, and the McKennas with being accessories after the fact for receiving, comforting, harbouring, assisting and maintaining him.

After sitting late on Monday and Tuesday, November the 24th and 25th last year, the court was delivered of Mr. Justice Stable's summing up on the Wednesday morning. Towards the end of his charge at about midday, the learned Judge informed the jury of his desire to catch a train for London which left Nottingham at about 1 p.m. If they could not reach a verdict before then he was prepared to break off his summing up and renew it when he returned to Nottingham at 11.45 a.m. the next day.

After consulting his fellow jurors, the foreman informed his Lordship that they would require a longer period for deliberation than his proposition would accommodate. Instead of adopting his proposed course the Judge then stated, "I will catch the later train and I will now run through the indictment again." After this, the jury retired and two hours later (at 2.30 p.m.) returned to ask the Judge's guidance on two matters.

3. *viz.* The unanimous approval of those members of the Bench in the *Minutes of Evidence* before The Royal Commission on Capital Punishment (1949-1953). See also the *Report* (Cmd. 8932).

4. *viz.* Mr. Justice Buttrose as reported in *The Straits Times* newspaper, Singapore, 20th April, 1960.

5. Blackstone has described juries as "the glory of the English law." (iii. *Commentaries* at p. 379) and as "this admirable criterion of truth, and most important guardian both of public and private liberty....." (iv. *Commentaries* at p. 407).

6. Commonwealth 1. 3 c. 1.

7. 2 *P.C.* at p. 313.

8. iv. *Commentaries* at p. 354. For a striking example of jury oppression see *R.* v. *Bushell* (1670) 6 *State Trials* 999. At p. 1002 we read: "The prisoner, being a juryman; among others charged at the Sessions Court of the Old Bailey to try the issue between the king, and Penn, and Mead, upon an indictment, for assembling unlawfully and tumultuously, did 'contra plenum et manifestam evidentiam,' openly given in court, acquit the prisoners indicted, in contempt of the king, etc." See also the earlier trial of Throckmorton for treason in 1554. (1 *State Trials* 869).

9. Especially from the survey by Professor Glanville Williams in *The Proof of Guilt* at p. 11 *et seq.*

10. Though after 1794 the Court was empowered to adjourn in cases of felony.

11. In 1814: After the case had been running for fifteen hours the defence was called upon to open its case at midnight. At 3 a.m. the court was adjourned until 10 a.m. when a refreshed prosecution made its reply. See on this case Glanville Williams *"The Proof of Guilt"* at p. 11.

Having received this, they again retired and after a further fifteen minutes were recalled by his Lordship.

Mr. Justice Stable then delivered what the Court of Criminal Appeal 'regretfully' described as his 'threat' and 'ultimatum' to the jury. His words are taken from the transcript of the proceedings:

" I have disorganised my travel arrangements out of consideration for you pretty considerably already. I am not going to disorganise them any further. In ten minutes I shall leave this building and if, by that time, you have not arrived at a conclusion in this case you will have to be kept all night and we will resume this matter at quarter to twelve tomorrow. I do not know, and I am not entitled to ask — and I shall not ask — why in a case which does not involve any study of figures or documents you should require all this time to talk about the matter. May I suggest to you that you go back to your room, that you use your common sense, and do not worry yourselves with legal quibbles. That is what you are brought here for: to use your common sense, bring a bit in from outside. There it is, members of the jury."[12]

Faced with the alternative of being "kept all night" (without intimation as to the nature of the court's hospitality and possibly ignorant of the normal provision of hotel accommodation) the jury[13] retired again and reappeared in court six minutes later with verdicts of guilty on all the counts indicated above.

The Court of Criminal Appeal allowed the appeals and quashed the convictions against the three men. The judgment of the Court was read by Mr. Justice Cassels and it emphasised in appropriately expressive language the necessity for the complete independence of the jury in reaching a verdict.

" It is a cardinal principle of our criminal law that in considering their verdict, concerning, as it does, the liberty of the subject, a jury shall deliberate in complete freedom, uninfluenced by any promise, unintimidated by any threat. They still stand between the Crown and the subject, and they are still one of the main defences of personal liberty. To say to such a tribunal in the course of its deliberations that it must reach a conclusion within ten minutes or else undergo hours of personal inconvenience and discomfort, is a disservice to the cause of justice." [14]

Of the trial Judge's unconcealed irritation at the jury's slowness in reaching a verdict on what to him might have appeared a straightforward issue the court said: "To experience [irritation] is understandable; to express it in the form of such a threat to the jury as was uttered here is insupportable."

The prosecution asserted that notwithstanding the irregularity, the evidence against the three appellants was so cogent that they should be brought within the proviso to section 4(1) of the Criminal Appeal Act, 1907 (accommodating cases where the miscarriage of justice is not 'substantial', even though the court is of the opinion that the ground of appeal is good).[16] The court was unable to agree to this course

12. [1960] 2 W.L.R. at p. 310. In an earlier case *R.* v. *Hartleigh* (1908) 1 Cr. App. Rep. 17 the Court of Criminal Appeal refused an application on ostensibly similar facts. The jury was unable to reach a verdict so the Chairman recalled a witness and informed the jury that they would be locked up for two hours. Agreement was reached within that time. The Court could see no substantial irregularity in such a procedure and discerned no coercion to the jury's agreement.

    *McKenna* is possibly distinguishable from *Hartleigh* on the *degree* of the judge's interference rather than on the principle which seems to be the same in both cases.

13. Which incidentally included two women members.

14. [1960] 2 W.L.R. at pp. 311-312.

15. [1960] 2 W.L.R. at p. 312.

16. For the test in such cases *Stirland* v. *Director of Public Prosecutions* [1944] A.C. 315; [1944] 2 All E.R. 13 and *cf. R.* v. *Leckey* [1944] K.B. 80; [1943] 2 All E.R. 665.

in view of the jury's difficulty in arriving at a verdict prior to Mr. Justice Stable's intervention. An alternative prosecution contention that a new trial should be ordered was not sustained on the ground that the trial was not in fact a nullity.[17]

In quashing the convictions the Court announced its regret at having to discharge three men whom "any jury would have been amply justified" in finding guilty of "an extremely serious, well-planned crime." Its avowed justification for so doing was expressed in words which constitute an assurance of the continuing integrity of trial by jury in criminal cases:

" Plain though many juries may have thought this case, the principle at stake is more important than the case itself." [18]

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17. For an example where an order *venire de novo* was made, see *R.* v. *Cronin* [1940] 1 All E.R. 618; 27 Cr. App. Rep. 179, and for where it was refused, see *R.* v. *Neal* [1949] 2 K.B. 590; 65 T.L.R. 557; [1949] 2 All E.R. 438; 33 Crim. App. Rep. 189.

18. [1960] 2 W.L.R. at p. 313.