OPINION

Re: Part 13A of the Crimes Act 1900 (NSW)

Ex parte: Geoffrey Walter Edelsten, querist

On 27th July 1990 the querist was convicted before Sharpe J and a jury of one count each of soliciting one Flannery to assault one Evans and of perverting the course of justice by obtaining an adjournment of Flannery's trial fixed for 31/1/84 by certifying that Flannery was unfit for trial. The two counts were tried together and it was a central feature of the Crown case that a police sergeant, one Duff, a patient of querist, was also a friend of some standing.

I am asked to advise whether querist's case warrants a further application for an inquiry by a justice of the peace pursuant to s.475 of the Crimes Act 1900 (NSW) for, as will appear, there has already been one such application, which was unsuccessful. This fact is obviously a factor to be considered but it is not fatal. In *Rendell* (1987) 32A.Crim.R.243 Hunt J ordered an inquiry in such a situation under s.475, which has now been repealed and replaced by elaborate provisions for the review of convictions, part 13A of the Crimes Act, which was proclaimed on 12th November, 1993. Part 13A provides for applications of two sorts, a petition to the Governor for a review of a conviction or the exercise of the pardoning power (Division 2) and an application to the Supreme Court for an inquiry into a conviction

(Division 3). In both cases the application may be refused if the matter is the same as has previously been dealt with under the repealed provisions and special facts or circumstances do not justify further action.

Querist's case has always been that Flannery was no more than a patient whom the police (Duff and McNamara) who are also patients had sent to him; that he first saw Flannery on Thursday 26/1/84 having no knowledge of the latter's criminal background and gave him laser treatment for the removal of a tattoo that day and again on Saturday 28/1/84. Late on Saturday he had him admitted to hospital with apparent septicaemia. He says that at the request of Flannery's solicitor he gave a certificate that Flannery was unfit for trial on 31/1/84 and expressed the opinion that he would be in hospital for at least the coming week. Sharpe J directed the jury that they would acquit if the Crown case consisted solely of the evidence concerning his hospitalisation. On the other hand if it were the case that querist was aware that Duff and McNamara did not want Flannery to face trial on 31/1/84 when he gave him what is obviously elective treatment, he became "one of the conspirators". No complaint can be made of this direction and it is the heart of the case.

Querist made an unsworn statement to the jury in which he said that he first met Flannery on 26/1/84 having spoken to him by telephone one to two weeks earlier about the removal of a tattoo and that he knew nothing of his criminal history until 31/1/84, after he had given the certificate; that he had no knowledge that Flannery was to be tried on 31/1/84 until that day or the day before. He also told the jury that when Flannery learned on 31/1/84 that querist had given the certificate he told

querist he was glad his trial had been adjourned as he did not want to face a certain judge and that he regarded the treatment and the certificate as a favour. He denied guilt of the murder for which he was to be tried but told querist he was a man who killed and bashed for money. To displace this innocent explanation of the treatment given by querist to Flannery, the Crown relied on two telephone conversations over querist's mobile telephone which had been recorded and transcribed fortuitously by one Beaver (an enthusiastic amateur) who had no connection with either querist or the police, without querist's knowledge. The first was on 3/3/84, a month or so after the certificate was given. Acts of harassment had started on 1/3/84 and pornographic material had arrived the next day. The tape refers to "some homicide squad detectives, two pretty heavy guys" (obviously Duff and McNamara), one of whom was a patient at his Georges Hall surgery. It also reports querist as saying, "I rang a guy who I helped out recently who's a hit man and I said 'I want this guy found and got off my back' and he said 'if he could find him he would, but (he said) I'll get in touch with these two detectives who are friends in the homicide squad.'" Querist goes on to say that the two were patients at Georges Hall and that they came to see him and reassured him that they would "get the guy before he (did) anything". Querist told the jury he had had no idea of the relations between Flannery, Duff and McNamara prior to 3/3/84. He said he was stunned to learn of it but rang Duff at Wollongong and Duff called on him later in the day and said he was glad querist had given Flannery the certificate as he felt Flannery was not guilty. On the same occasion Duff said it was he who had referred Flannery to querist for tattoo removal.

The second tape was on 15/4/84, and it must be remembered that this was nearly three months after the first visit of Flannery to querist's surgery and at a time when the relevant facts of the police relationship with Flannery and Flannery's background were certainly known to querist. On this tape he says to his then fiancee that he had helped someone (obviously Flannery), a professional killer, who had just been a patient, whom the police introduced to him a few months ago; that the police needed a favour, he was on a murder charge, and they wanted him not to face a particular judge. So when he knew he had to go in front of this particular judge, he "had to be out of action for a few days". This passage obviously enough could be a simple statement of the facts as known to querist on 15/4/84 or a potted version of the facts as known to him when he started Flannery's treatment on 26/1/84. Naturally the Crown contended for the latter.

Unless one accepts the Crown's version of the meaning of the ambiguous statement of 15/4/84, the only inconsistency between either of the tapes and the unsworn statement to the jury is that querist in the latter corrected the statement that the two detectives came to see him on 3/3/84, to one (Duff).

The notion that the tapes somehow give the lie to querist's statement to the jury that he first met Flannery on 26/1/84 seems quite unsustainable, yet Sharpe J appears to be so directing the jury at page 20, although his Honour may have been continuing his reference to the Crown's submissions, which is how Finlay J understood it in subsequent proceedings. However, even if the word "introduced" on the tape of 15/4/84 be taken as necessarily meaning a personal introduction, it

does not mean that Flannery was personally known to querist before 26/1/84 - the period from that date to 15/4/84 being close to three months and the statement on the tape "a few months ago". The point is of critical importance for Sharpe J ultimately directed the jury that if querist "knew nothing of Flannery's background or was not associated with Duff et cetera prior to the date of the medical certificate" he should be acquitted of count two. The phrase "associated with" must obviously mean more than knowing him as a patient and presumably referred to the Crown allegation that querist was a party to Duff's and McNamara's plan. I therefore set out the relevant parts of both telephone conversations:

Edelsten and receptionist 3/3/84, p3.

"R What else are they what are they going to do about it, nothing?
Dr E Oh well I don't know, I've just had some homicide squad ah squad detectives two pretty heavy guys that ah both have killed men in the last few weeks ah and the police you know that hostage drama at.
R Yeah.
Dr E Home Homebush?
R Yeah.
Dr E The guy that killed him, he's a patient of mine at Georges Hall. Ah, oh, quite a few of them are actually and ah, I rang a guy who I helped out recently, who's a hit-man and I said I want this guy found and got off my back and ah, he said, oh, ah, if he could find him he would, but he said I'll get in touch with these two detectives who are friends, ah, in the homicide squad and they both happen to be patients of mine at George's Hall and ah, I do their pilots' medicals. And ah, they both came over to see me and reassured me that ah, they'll get the guy before he does anything."

Edelsten and Leanne 15/4/84 p.3(foot)-p4.7

(After conversation which seems obviously to refer to Flannery)

"Dr E Yeah, I helped him and, em he just said he doesn't drop his price for anybody and that's it. He said 'I'm a professional - it's my livelihood.'

L Beats people up ..? Is that all he does?

Dr E He kills people.

L Does he!

Dr E Yeah. Nice young fella.

L Yeah.

Dr E But, um, I think he's a professional killer.

L Has he got a nice house?

Dr E Pardon?

L Has he got a nice house?

Dr E I don't know, I've never been to his house... He was just a patient and the police introduced me to him.

L When?

Dr E Oh, a few months ago.

L Over this guy?

Dr E No, no. No ... they needed a favour. He was on a murder charge and they wanted him not to face ..

L Who did he kill?

Dr E Pardon. I can't hear you.

L Who did he kill?

Dr E A standover man. Someone who was standing over a restaurant owner, trying to extort money from him and um.

L You're kidding?

Dr E He was hired to come up from Melbourne and kill him.

L Oh, that's all right ... (laughs) What and the coppers wanted to let him go?

Dr E No, the coppers just didn't want, you know, he got a good chance of beating the rap ... but if he had faced a particular judge ... the judge has got a reputation of er, er, accepting evidence blindly and putting people away - and he felt that he's got a better chance if he got in front of another judge, so when he knew that he had to go in front of this particular judge he had to be out of action for a few days .. to miss that judge to get onto another judge's list. And

> as it happened, they got it adjourned for a year."

Count two, as Sharpe J recognised, ultimately depended on whether the conversation of 15/4/84 was an account of the events as querist knew them on that date, including what Flannery had told him on 31/1/84, or a statement of what the police told querist before he treated Flannery.

To go back to count one, the critical phrase "got off my back" is obviously equivocal. It could mean anything from "dissuaded by whatever means" (from persuasion to bringing in the police) to "rendered incapable by any means, including death". In other words it was a classic case of the proper inference to be drawn from the proven facts. The Crown selected assault but this hypothesis has no more to support it than any of the others. The facts however do not suggest that on 3/3/84 Flannery understood himself to be sought for murder or mayhem. He advised querist to put the matter into the hands of Duff and McNamara and the evidence clearly is that querist did so. Moreover Flannery's professional proclivities were likely to make him a person of some standing in the underworld and thus one who might have some success in his enquiries. It was common ground that no harm in fact came to Evans. Now it is true that the Crown did not have to prove an agreement to assault, still less an actual assault. The question however is whether the alternative meaning of "assaulted in order to dissuade" was open to the jury beyond reasonable doubt.

Indeed his Honour would seem to have been conscious of this for his direction on count one was that the basic question for the jury was whether the words "get him off my back" were "an attempt to induce or incite Flannery to use persuasion, assault, et cetera, to stop that harassment". This seems to have been a serious misdirection for it is possible that the jury believed that if the words in question were an attempt to induce Flannery to use persuasion or something else other than assault, count one was satisfied. However no objection was taken and no application for redirection was made and the point was not taken on appeal. As to count two, the words used on the tape are wholly equivocal as to when querist got the incriminating information. This was the critical question, for the learned judge directed the jury to acquit if querist did not have the requisite knowledge before he signed the certificate. Of course other evidence might have tipped the scales but before examining this possibility I should shortly state the subsequent history of this matter.

Querist was convicted on both counts and sentenced to six months on each, to be served cumulatively. He has always protested his innocence and an appeal was taken to the Court of Criminal Appeal which was dismissed on 11/10/90. However, none of the grounds argued before that Court go to the factual weakness of the Crown case but to questions of law such as the illegality of Beaver's interception of the conversations and the elements of the offences charged. Obviously, the appeal did not raise the question whether the verdict and conviction were unsafe or unsatisfactory, which would have required of the Court of Criminal Appeal an independent examination of the evidence. See the line of cases running from

Ratten (1974) 131 CLR 510, 515-16 per Barwick CJ to *Knight* (1992) 175 CLR 495, to which I shall return.

Of course, having appealed against his conviction querist has exhausted his right to appeal: *Grierson* (1938) 60 CLR 431; *Stubbs* (1970) 71 SR NSW 76 CCA. However he applied to Mr Dowd QC, then Attorney-General, for an inquiry under s.475 of the Crimes Act 1900. This was refused on 18/3/91. He then applied to Gleeson CJ on 5/6/91 submitting new evidence. Doubtless in response to this application, the question was considered by Finlay J, who on 10/7/91 declined to order an inquiry.

The material relied on before Finlay J consisted of statements from convicted criminals (Keane, Alexander and Rogers), from Professor Crank and from Mrs Hall. Keane had been friendly with Flannery and claimed to have visited him in the Bigge Street hospital, Liverpool, in late January 1984, when Flannery said to him "I think the doctor is getting on to me. I will have to use the old gunpowder trick"; and when asked what it was, Flannery replied: "Gunpowder in cigarette paper causes the pulse (or) temperature to go up." Professor Crank's evidence was that the ingestion of gunpowder affects the ionic balance in the blood and will raise blood pressure and possibly bring on vomiting and diarrhoea. Keane also says that Flannery spoke of an incident in about March 1984 when Flannery told him of the doctor ringing him because someone was giving him a hard time, saying, "I told him to ring the police". Alexander and Rogers really deposed to learning of Keane's conversation and make no direct contribution.

Mrs Hall had been querist's receptionist at Georges Hall surgery. She recalled Flannery telephoning to enquire about tattoo removals and coming in a few days later to see querist, saying that a policeman friend had told him that the doctor did tattoo removals. She says he waited and that when querist was free she heard him explaining the procedure and the possibility of infection and telling Flannery to go away and think about what he had said. She says that querist removed a tattoo from Flannery's arm that afternoon (a Thursday). She also recalls Flannery attending again on the Saturday.

Mrs Hall also told of an occasion in March 1984 when querist asked for Flannery's patient card and then telephoned Flannery saying, "Do you know anything about who is harassing me and why? Why are people doing this?" She says that shortly after he asked for Duff's patient card (which had the telephone number among the details). The evidence of Keane, Professor Crank and Mrs Hall was capable of corroborating querist's account of the conversation with Flannery on 3/3/84 when, in response to his saying, "get him off my back", Flannery suggested he get on to the police, and he did so, indicating that there was no thought of soliciting assault, and that the culprit was not even identified. The evidence of Keane further indicates a possible source of the symptoms that led to Flannery's hospitalisation and strongly suggests that querist was being used.

However Finlay J said that Mrs Hall's evidence against the background of the evidence given at the trial would not give rise to a doubt as to guilt so as to initiate

an inquiry. As to the evidence of Keane, his Honour referred to the submission that it would have induced reasonable doubts in the minds of the jury as to whether querist was party to a plot and would have convinced them that Flannery and the police had fooled him and the court and said - "These assertions are not correct. The evidence ... would have been inadmissible at the trial". After considering the decided cases on s.475 his Honour declined to direct an inquiry, saying that the new material quite failed to cause him "unease" or "a sense of disquiet".

On 2/12/91 querist made a further application to the Attorney-General, then Mr Collins QC, submitting additional evidence from one Vandimeer who said that he had in fact taken gunpowder to Flannery in hospital in January 1984, from Mrs Flannery, who insisted that her husband had in fact been ill and spoke of swelling under the armpit (an indication of septicaemia), nausea and high temperature on the Saturday, and from one O'Brien, who also deposed to Flannery speaking to him in December 1983 or January 1984 about the "old gunpowder trick" to get him into hospital. This must have been rejected, and a further application, details of which I do not have, was rejected by Mr Hannaford on 6/4/93.

The essential feature of the Crown case on count two was that the treatment of Flannery and his admission to hospital were corrupt acts by querist with a view to Flannery's being unfit for trial on 31/1/84. Evidence that Flannery had in mind the ingestion of gunpowder to produce the requisite symptoms, supported by evidence that he received a quantity in hospital, would give weight to the hypothesis that the perversion of justice was the work of Flannery who used gunpowder to produce a

situation which called for his hospitalisation. The evidence of Keane would, if it matters, be admissible at a retrial as going to Flannery's state of mind: *Walton* (166 CLR 283). I say, if it matters, because proceedings under s.475 are not directed to retrial. The evidence of Vandimeer would be admissible as direct evidence supporting the gunpowder trick hypothesis even if Flannery did not consider it necessary to use it while in hospital. The evidence of Mrs Hall corroborates querist's evidence, that Flannery was introduced by the police but in circumstances quite innocent so far as querist is concerned and it conveys no suggestion that querist was, for example, expecting Flannery, or that the tattoo procedure had already been agreed - quite the contrary. The evidence of Mrs Flannery corroborates the medical record which shows that on admission Flannery had an infected right forearm, very sore and swollen, and was vomiting and feeling nauseous on admission.

So far as count one is concerned, the Crown case required an adverse inference to be drawn from the tapes. So far as count two is concerned, the Crown case again required an adverse inference to be drawn from the tapes. Now if the tapes are wholly equivocal as to when querist became aware of the facts he so lightheartedly recounted with what some might regard as misplaced joviality - and, in my opinion, they are - it is a classic case for the application of the principle which governs cases of circumstantial evidence, recently examined by the High Court in *Knight*, supra. That case concerned proof of the state of mind of a prisoner standing trial for attempted murder when the relevant shot was fired. The majority (Mason CJ, Dawson and Toohy JJ, at pp 502-3 say: "The state of mind of the appellant was

necessarily a matter of inference from other facts found by the jury. In those circumstances, the reasoning process which must be employed if the onus of proof beyond reasonable doubt is to remain upon the prosecution is well recognised. As Dixon J said in *Martin v. Osborne* 1936 (55 CLR 367, 375):

> 'If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation.'"

And at p.503 they cite a further passage from the same judgment of Dixon J:

> "This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed."

The fact proved is querist's awareness of a situation which involved the state of mind of Flannery and of the police in late January 1984 and prior to his certificate. The fact to be proved is that he became aware of the situation prior to the giving of the certificate. Without more, no such conclusion could rationally be drawn.

Is there more? The learned judge in summing up told the jury that Duff had more than a casual acquaintance with querist and went on, "We are not to know what the basis of that friendship was. We do not know why people in our community sometimes try to cultivate senior police officers, but it happens."

Nothing briefed to me shows that there was a friendship at all. The last sentence is plainly a suggestion that querist was at least likely to be one of the people in the community who improperly cultivate senior police officers. If there is no basis for that it is a highly prejudicial slur by the presiding judge. It did not end there. The

learned judge went on to refer to the Crown's assertion that there had been demonstrated "just how that sort of association can sometimes lead to criminal activity". The learned judge proceeds to remind the jury that Duff, although not officially involved in the harassment complaint, went to Castle Hill police station because obviously he was concerned "as a friend of the accused that everything was being done that could be done to locate Evans". The suggestion, whether it emanates from the Crown or not, seems to have been that it was corrupt or improper for Duff to have interested himself in the matter of the harassment by Evans, if Evans it was. For my part I cannot see how that can be suggested, but of course Duff and McNamara had an interest of their own in ensuring that querist whom, on his account of things, they had duped, did not become frustrated and try to say too much. It is possible that querist said something in his evidence to the Medical Board which might lend some colour to these directions to the jury and if so I should be told. I return to the legal aspect of the summing up.

The summing up was, with respect, quite unsatisfactory for a case which was essentially circumstantial. One would have expected a direction in conformity with, say, *Peacock* (1911) 13 CLR 619, an indication of the critical fact or facts to be proved by inference from the facts proved and an indication of the competing hypotheses. Instead there was no reference to principle until the summing up was almost completed, when the jury is given a final and perfunctory direction in the following language:

> "There is a further direction of law I have to give you and that is that if there are two competing theories, one of which is consistent with the accused's

> innocence, then you must give him the benefit of the doubt. That does not mean to say that just because you have heard some explanation or two other explanations you have to weigh the effect of those explanations. Is it a valid theory? Is it one that is plausible in all the circumstances? Because it is all the evidence that you have to consider before you in deciding whether you find one way or the other."

The more usual direction is that referred to in *Knight* at p.205, namely, that the jury should only find by inference an element of the offence charged if there are no other inference or inferences which are favourable to the defendant reasonably open on the facts. However as in *Knight* so here, the question is whether the jury, acting reasonably, could have rejected as a rational inference the possibility that querist had no guilty knowledge when he treated Flannery on 26/1/84 and admitted him to hospital on 28/1/84.

I turn now to the question of possible relief. The new Part 13A of the Crimes Act replaces not only s.475 of that Act but also s.56(a) of the Criminal Appeal Act 1912. It applies to past convictions: s.12 of the amending Act (No. 64 of 1993) unless a matter was pending under s.475 or s.12(a) as the case may be. It would seem that querist has no matter, which is undefined, so pending. Division 2 provides for a petition to be made to the Governor for a review or the exercise of the pardoning power: s.474B, whereupon the Governor may direct an inquiry, the Minister may refer the whole case to the Court of Criminal Appeal to be dealt with as an appeal, or the Minister may request the opinion of the Court of Criminal Appeal on any point: s.474C(1). However before any action is taken under s.474C(1) there must be a doubt or question as to the convicted person's guilt: s.474C(2) and if the same

matter has been dealt with under s.475 the petition need not be dealt with unless the Minister is satisfied that special facts or circumstances justify the taking of further action: s.474C(3).

B

Division 3 provides for an application for an inquiry to the Supreme Court: s.474D(1). An inquiry may be directed only if there is a doubt or question as to guilt, as to any mitigating circumstances in the case or any part of the evidence: s.474E(2). There is the same discretion as under s.474C(3) if the same matter has been dealt with under s.475.

The distinction between the two procedures is that the petition under Division 2 can get the case straight to the Court of Criminal Appeal under s.474C(1)(b). In querist's situation this has much to recommend it. The relevant material has been collected and put before the Chief Justice, Finlay J, and a succession of Attorneys-General. There seems to be no need for further inquiry which may be time-consuming and costly. The only witnesses who have not been submitted to cross-examination are Professor Crank, Mrs Hall, Vandimeer and O'Brien. No doubt the Court of Criminal Appeal could order their cross-examination. Such a course would have the advantage of providing finality for both querist and the Crown.

Finally, the question must be asked what the special facts and circumstances are that justify the taking of further action. I would summarise them as follows:

(1) Querist faced the jury as a professional man well known to be offside with his profession and a man with a flamboyant lifestyle. Such men tend to receive little sympathy from judge or jury and it is essential to a fair trial that in such cases it be conducted strictly according to law.

(2) The trial was marred by errors of law in that -

(i) the act required to be proved as the act solicited was not confined to assault;

(ii) the direction in relation to circumstantial evidence was not adequate;

(iii) the jury was invited to draw inferences of guilt from ambiguous words without a warning that they could only do so if those inferences were the only rational inferences which could be drawn.

(3) It was not open to the jury to draw inferences of guilt from the telephone conversations of 3/3/84 and 15/4/84.

(4) There was no friendship between querist and Duff and no evidence of any relationship other than that of a medical practitioner and patient. The summing up of the learned judge when he told the jury that Duff had more than a casual relationship with querist was in error.

(5) The only review at judicial level of the new evidence has been that of Finlay J, who, with respect, misconceived his function. The evidence of Keane, if believed, would have shed new light on the case. Any one who thought it capable of belief would have felt the requisite "unease" or "sense of disquiet": *Varley* 1987 (8 NSW LR 30, 35, 48). In rejecting it out of hand his Honour was really requiring doubt as to querist's guilt to be shown to his own satisfaction which is, with respect, erroneous: *Varley* at 48. As to Mrs Hall there is no indication that his Honour recognised the

significance of her evidence, namely, (a) that to all appearances Flannery came in the ordinary way to the surgery (although she was surprised that police had recommended it); and (b) that the critical approach by querist to Flannery on 3/3/84 was immediately followed by querist calling for Duff's card and putting the matter in his hands. His Honour's suggestion that her evidence should have been available at the trial overlooks the fact that evidence need not be fresh evidence for the purpose of the doubt required by s.475 and now ss474C(2) and 474E(2) See e.g. *Varley* at p.45.

(5) Querist has long since served his sentences. This however is no impediment. Section 475, the precursor of the present legislation, was designed to enable a man to clear his name: *White* 1906 (4 CLR 152, 165) per O'Connor J. This is of especial importance to querist who is not being permitted to practise his profession while the convictions stand.

In conclusion I am of the opinion that there are good grounds for a petition for a review of querist's convictions or the exercise of the Governor's pardoning power, under s.474B of the Crimes Act 1900, to the end that His Excellency may be pleased to exercise the pardoning power or alternatively the Honourable the Minister may refer the whole case to the Court of Criminal Appeal to be dealt with as an appeal.

Peter David Connolly QC,
Former Queensland Supreme Court Justice 1993

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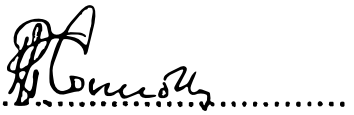

P.D. Connolly
Chambers
26 October, 1995