

**BOOK REVIEW****“THE JUDGE’S CHARGE IN CRIMINAL TRIALS”**

(Thomson Round Hall, 2008)

Genevieve Coonan and Brian Foley

**THE HONORABLE MR. JUSTICE NIAL FENNELLY\***

The very title of this impressive work, as much as the fact of its appearance, testifies to the enduring and intense importance of jury trial in Ireland. Lord Justice Auld in his 2001 *Review of the Criminal Courts of England and Wales* described jury trial as the “practical and public manifestation of the citizen’s involvement in the administration of criminal justice”,<sup>1</sup> and a “powerful contributor to public confidence in [that] system”.<sup>2</sup> At the same time, official statistics show consistently that some 90% of convictions on indictment result from a plea of guilty. So, most do not get to the jury.

The two young barrister authors disclose in their Preface an aspiration to fill a gap at the issue desk of the Law Library. They have regularly witnessed the *doyens* (unnamed, but one can guess) of the criminal bar “taking out Charleton, McGrath and Walsh in one swoop”.<sup>3</sup> The perceived gap relates to the absence of any work dealing with “the most important time in a criminal trial”.<sup>4</sup> This work will fill it, and will add a kilo or so to the weight to be borne by the *doyens*.

I wonder, however, if the authors are right to perceive an increasing amount of appeals to the Court of Criminal Appeal grounded on alleged defects in the summing up. In September 2008, the Law Reform Commission of the State of Victoria

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\* Judge of the Supreme Court of Ireland.

<sup>1</sup> *Review of the Criminal Courts of England and Wales*, Chapter 1 available at <http://www.criminal-courts-review.org.uk/ccr-01.htm>.

<sup>2</sup> *Review of the Criminal Courts of England and Wales* (precious note).

<sup>3</sup> Coonan and Foley, *The Judge’s Charge in Criminal Trials* (Dublin: Thomson Reuters, 2008), ix.

<sup>4</sup> Coonan and Foley (previous note), ix.

published, almost contemporaneously with the work under review, a Consultation Paper on Jury Directions identifying concern about the rate of appeals in that state, whose population is about five million to our four:

Between 2000 and 2007 there were 538 appeals to the Court of Appeal from conviction at trial. Of these appeals 298, or 55%, contained claims that the trial judge had made an error when giving directions to the jury. In 160, or 30%, of these cases, the appeal was allowed and a retrial ordered. Commentary from the Court of Appeal also suggests that over half of the appeals resulting in retrials succeeded on points of law not taken at trial. A common complaint in many cases is that appeals on the grounds of jury directions relate to technical points rather than to substantive errors that would have had any effect on the verdict of the jury.<sup>5</sup>

There is limited comparable research for this jurisdiction. There is a very useful 2005 article in this Journal by Professor Paul McCutcheon, "A Review of the Jurisprudence of the Court of Criminal Appeal 2002-2004: Principles and General Themes".<sup>6</sup> This study shows that there were 130 convictions or conviction-and-sentence appeals in the period studied; 48 or 37% of appeals were allowed: 24 or less than 10 per annum, on grounds related to the charge. On the other hand, the *Report from the Working Group on the Jurisdiction of the Courts*, reporting in 2003, found that the total percentage of appeals allowed in full in the period 1998-2001 was 21%.<sup>7</sup>

It is a constant theme of the Victorian Report that the number of matters which a judge has to cover have increased relentlessly, both in number and complexity. The number of mandatory warnings has resulted from a combination of judicial

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<sup>5</sup> *Jury Directions* (Victorian Law Reform Commission, Consultation Paper No. 6), p.10.

<sup>6</sup> McCutcheon and Hanlon, "A Review of the Jurisprudence of the Court of Criminal Appeal 2002-2004: Principles and General Themes" (2005) 5(1) J.S.I.J. 213.

<sup>7</sup> *The Criminal Jurisdiction of the Courts* (Courts Service Working Group, Dublin, 2003).

and legislative intervention. These, as here, reflect developments over time both in the law and in social conditions.

To cite one example, which the authors explain, the rash of long-delayed prosecutions for sexual offences against children has prompted the need for the judge's charge to take account of special dangers to the fairness of a trial. Two convictions have been quashed for failure in that regard in the *People (DPP) v. C.C.*<sup>8</sup> and the *People (DPP) v. E.C.*<sup>9</sup>

The Court of Criminal Appeal and the Supreme Court have laid special emphasis on the role of counsel in assisting the judge. One writer refers to the practice of making requisitions in terms which suggest that it is confined to Ireland (North and South):

In Ireland ... there is a practice whereby counsel may "requisition" the judge after the summing-up: when the jury has retired the judge invites representations from counsel for both sides who may take issue with both the legal and factual content of the judge's address to the jury ...<sup>10</sup>

There is a striking difference between Irish and English practice. The English tendency is to encourage the trial judge to consult counsel before charge. In *R v. Cocks*, the Court of Appeal suggested that it was not for the judge "to seek further assistance after he has sent the jury out to consider their verdict". In the same case, James L.J. further suggested that "defending counsel owes a duty to his client and it is not his duty to correct the judge if a judge has gone wrong".<sup>11</sup>

It would be a brave defence counsel who would adopt that attitude in our courts. The Court of Criminal Appeal and the Supreme Court place particular emphasis on the need for counsel to have raised, by way of requisition at the trial, any complaint about the charge that is intended to agitate on appeal. In *People (DPP) v. Cronin (No. 2)*, Kearns J, speaking for a majority of the Supreme Court said that "some error or oversight of substance,

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<sup>8</sup> [2006] 4 I.R. 287.

<sup>9</sup> [2007] 1 I.R. 749.

<sup>10</sup> Doran, "The Necessarily Expanding Role of the Criminal Trial Judge" in Doran and Jackson (eds.), *The Judicial Role in Criminal Proceedings* (Oxford: Hart Publishing, 2000), p. 16.

<sup>11</sup> *R v. Cocks* (1976) Cr. App. R. 79

sufficient to ground an apprehension that a real injustice has occurred, must be demonstrated before the court should allow a point not taken at trial to be argued on appeal".<sup>12</sup> This requirement highlights the responsibility both of the prosecution and the defence. The High Court of Australia adopted a very different approach in the case of *Pemble v. The Queen*.<sup>13</sup> The result is that in a wide range of circumstances, the trial judge is obliged to give directions on matters which have never been raised in the course of the trial. Kirby J explained in a later case that:

The judge's duty transcends that of counsel. The judge represents the whole community and the law. And that is what *Pemble* holds.<sup>14</sup>

The jury is drawn from the citizenry at large, and is designated by the Constitution as the exclusive arbiter of guilt or innocence in criminal trials other than for minor offences. It is patently necessary that they must receive appropriate rulings on the applicable law and guidance on the facts, including treatment of the evidence. It is astounding, therefore, to find that, as recently as the early twentieth century, the Court of Appeal in England was able to conclude that the failure to sum up at all might not be fatal to a conviction. The trial judge had stopped cross-examination and asked the jury whether they would like him to sum up or "is the evidence sufficient for you".<sup>15</sup>

I cannot help thinking that the authors have treated this decision with a deference which it scarcely deserves. The proposition appears to be supported by a dictum of Avory J that whether a non-direction amounts "to a misdirection ... in any particular case depends on the facts of the case".<sup>16</sup> It calls to mind the scene in the film *A Man for All Seasons*, where the jury trying Thomas More are invited (unhistorically, I believe) to render a

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<sup>12</sup> *People (DPP) v. Cronin* [2006] IESC 9.

<sup>13</sup> *Pemble v. The Queen* (1971) 124 C.L.R. 107.

<sup>14</sup> *CTM v. The Queen* (2008) 24 A.L.R. 1, 23, per Kirby J.

<sup>15</sup> *R. v. Newman* (1913) 9 Cr. App. R. 134.

<sup>16</sup> *R. v. Finch* (1917) 12 Cr. App. R. 77.

verdict without retiring. It is beyond imagining that a trial judge in this jurisdiction would dispense with the charge.

The task of the judge in charging a jury is an onerous one, and becoming more so. He is obliged to give directions on the law in the following principal areas:

- Basic principles concerning criminal liability: the presumption of innocence, the burden of proof and the standard of proof: the notion of proof beyond reasonable doubt is subtle and difficult;
- The component elements of the offence with which the accused stands charged;
- Special defences such as self-defence and provocation; difficult new areas of the law on insanity and diminished responsibility;
- Special directions concerning a range of evidential matters, such as identification (the *Casey*<sup>17</sup> warning), the requirement of and meaning of corroboration (accomplice evidence, sexual offences, confessions); the legislature has intervened in some of these areas, the courts in others.

I find it difficult to fault the authors' coverage of all of these matters and much more. Different types of evidence are treated separately and authoritatively: confessions, identification, DNA, and evidence of bad character.

As a judge who has not had to undertake the burden of charging a jury, I can only sympathise with the trial judge who has to perform this burdensome task. So far as the law is concerned, the trial judge is entitled to expect assistance from counsel, especially prosecution counsel. This should lighten the load to some degree. I apprehend that the hardest part is the summary of the evidence, which must be clear, balanced, fair and, crucially, helpful to the jury. Lord Hailsham set a high standard for the charge in *R v. Lawrence*:

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<sup>17</sup> *People (Att-Gen) v. Casey (No.2)* [1963] I.R. 33.

It has been said before but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's notebook.<sup>18</sup>

I sometimes fear that the search for absolute fairness has a tendency to sterilise the charge, and empty it of real meaning or practical utility. The anodyne line-by-line repetition of the evidence, without comment of any kind, is unlikely to be helpful to a jury. In the United States, the judge's directions are on the law alone; New South Wales gives specific power to dispense with a summary of the evidence. One can sympathise with the occasional plaintive cry that the charge "does not have to be, in order to be balanced, a desiccated dissertation by a schoolman".<sup>19</sup> The Court of Criminal Appeal (McCarthy J.) did not object to the judge expressing "clear views of his own" where he had given "a most painstaking and accurate charge to the jury".<sup>20</sup> It observed (per McGuinness J.) that "a number of trial judges deliberately refrain from making any comment, however mild, on the evidence before the court ...".<sup>21</sup> The Court restated that "comment is permissible if it is made in the course of a fair and balanced charge".<sup>22</sup>

As the authors point out, striking the balance is not easy. Who would wish to return to the jury management practiced by judges within living memory? One wonders with Hamlet whether "conscience", in the form of the looming presence of the Court of

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<sup>18</sup> *R v. Lawrence* [1982] A.C. 510, 519.

<sup>19</sup> *R v. Butler* [1999] Crim. L.R. 595.

<sup>20</sup> *People (DPP) v. Doran* Judgments of the Court of Criminal Appeal 1984-1989 page 129.

<sup>21</sup> *People (D.P.P.) v. D.O'S* Court of Criminal Appeal, 27 May 2004, McGuinness J. (Murphy, Abbott, McGuinness JJ.).

<sup>22</sup> *People (D.P.P.) v. D.O'S* (previous note).

Criminal Appeal, runs the risk of making “cowards” of trial judges.

The authors are thorough, systematic and practical. They cite useful authority: where Irish authority is lacking, they refer to English, Canadian, Australian and occasionally American cases. This is very much a practitioner’s guide and *vade-mecum*. It should also be of immense value to judges. It is destined to become the standard work of reference.