On Common Law Riots in New South Wales 1985-1992

Billy Purves, Crown Prosecutor, has had first hand experience with recent trials involving charges of riot. He discusses the history of the charge and the effect of its replacement by Part 3A of the Crimes Act.

On 6th April this year the Court of Criminal Appeal quashed the convictions of Arthur Murray and Albert "Sonny" Bates on charges of riot. That was the final chapter in the Brewarrina riot of 1987 which followed the funeral of a young man who had died in police custody a week earlier. A total of 17 Aboriginal people had been committed for trial on riot charges.

The CCA judgment in *Murray & Bates* not only closed the chapter on that particular riot, it also closed the book on the offence of common law riot in NSW.

The insertion in the *Crimes Act* of Part 3A dealing with "Offences Relating to Public Order" will have a significant impact on the conduct of any future riot trials.

The author of this article, now a Crown Prosecutor, appeared for several accused in each of the four series of trials which occupied so much of the District Court calendar at Penrith and Bathurst between 1987 and 1991. His appearance for 15 clients in 10 separate trials gave him an unusual insight into the phenomenon of riotous assembly - and the legal problems involved with subsequent trials.

The four riots were:

1. The Mt Panorama "Bikies Riot" in Bathurst in April 1985: More than 100 people, mostly young men, were arrested and charged with riot and sundry related offences. About 35 went to trial for riot, between 1987 and November 1988, at Penrith.
2. The Bourke Bowling Club Riot in August 1985: Ten young Aboriginal men stood trial in Bathurst in August 1989.
3. The Bourke Post Office Riot in August 1986: Nine young Aboriginal men stood trial in Bathurst in August/September 1990.
4. The Brewarrina Hotel Riot of August 1987: Seventeen Aboriginals were committed for trial. Nine men stood trial on riot in Bathurst. Another three pleaded guilty to lesser offences. The charges against the remaining five are not expected to proceed.

The author here reflects on riots, the trials, evidentiary problems, the changes in the law and associated matters.

When the jury returned its verdict of not guilty for my client Guy Gibbs on 6 May 1991, I had a double reason to sigh with relief. Apart from the obvious satisfaction of the verdict, I was aware that this was certainly the last common law trial for riot in NSW: no longer would I have the physical and mental baggage of some 30 cases defining or illustrating some element of riot.

A file of cases had been compiled for me in June 1987 by Angela Avouris of the NSW Legal Aid Commission when she instructed me in the trials of two young men, Peter Andersen and Colin McPhail - each of them now commemorated in the surprisingly short list of Australian cases saying anything about riot.

For what strikes one immediately about the cases pre-1987 is the absence of Australian authorities. Two Victorian cases in the file were relevant only to sentencing: *Aitken and Ors* (1980) 3 A Crim R 14 and *R v McCormack and Ors* (1981) VR 104. There were a couple of cases on the NSW statutory summary offence of unlawful assembly - both cases incidentally in which the appellants were allegedly expressing determination to "get the scabs" in industrial disputes: *Munday v Gill and Ors* (1930) 44 CLR 38 and *R v O'Sullivan* (1948) WN (NSW) 155.

The English cases pre-1987 were the only relevant authorities on what constituted a riot. They also disclosed a great deal of the social and political history of England between 1839 and 1980.

Any barrister in Australia researching the law on riot in 1990 might have found cases on:

- 19th century bare-knuckle prize fights: *R v Coney* (1882) 8 QBD 534 and *R v Billingham* 2 C & P 234.
- An election riot in the village of Great Marlow where a mob supporting the losing candidate (no party affiliations mentioned) wrecked 90 buildings, including the Crown Hotel, headquarters of the successful candidate, Colonel Williams: *Drake v Footitt* (1881) 7 OBD 201.
- A mob attending a theatre for the purpose of interrupting the performance, their noise rendering the actors inaudible. No physical violence and no damage to property - nonetheless it was a riot: *Clifford v Brandon (*1809) 2 Camp 358.
- A crowd ransacking a grocer's shop and dwelling, then setting it on fire: *R v Howell* (1839) St Tr NS Vol 3 1087.
- A street corner gang in "a low neighbourhood" in London knocking down part of a brick wall by running at it with their hands extended: *Field & Ors v Receiver of Metropolitan Police* (1907) 2 KB 853 - the seminal case of modern common law riot.
- Students assaulting guests at a social function at Cambridge University: *R v Caird & Ors* (1970) 54 Cr App R 499.

Perhaps the most poignant case in the whole file was that of *R v Joseph Rayner Stephens* (1839) St Tr NS Vol 3 1189. Mr Stephens was an outspoken Methodist minister who had described the Bishop of London as "an episcopal devourer of widows' houses". But he was on trial in 1839 for his part in "a great riot, rout, disturbance, tumult and tumultuous assembly".

In fact, he had addressed what Australians would regard as a rather rowdy demonstration, calling for better wages and working conditions, reform of the Poor Law, universal suffrage and a secret ballot at parliamentary elections. He urged the torchlight rally of 3,000 to fight for their rights. When he asked if they were armed, several shots were fired in the air. The crowd, led by a band, then marched through the town of Hyde and eventually dispersed peacefully.

No-one was injured and no property was damaged. Two of the Crown witnesses were local mill-owners whose factories

had been the targets of previous complaints by the accused.

All part of what historians call the rich tapestry of English life. Mr Stephens conducted his own defence. The Attorney-General, later Lord Campbell, the Lord Chancellor, led a team of *five* prosecuting attorneys.

Needless to say, he was convicted, and sentenced to imprisonment in the House of Correction at Knutsford for the term of 18 calendar months.

Until recently, these cases were the authorities that counsel in NSW relied on in riot trials.

The recent additions to the NSW *Crimes Act* will certainly make life simpler for the practitioner in criminal law. Section 93B is a distillation of centuries of legal argument and refinement. However, the draftsman ought not to feel flattered by this assessment - Section 93B is a virtual carbon-copy of the *English Public Order Act* 1986 Section 1. Section 93B sets out the five elements of the offence which deal succinctly with the main questions that have arisen in the common law:

(1) Where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his or her own personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot and liable to penal servitude for 10 years.
(2) It is immaterial whether or not the 12 or more persons use or threaten unlawful violence simultaneously.
(3) The common purpose may be inferred from conduct.
(4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.
(5) Riot may be committed in private as well as public places.

The most obvious change is that riot now requires a minimum of 12 participants compared with the smaller common law riot of three persons.

The CCA in *Murray & Bates* quashed the convictions on riot because the accused had been indicted with one other accused - and that person had been acquitted. In effect, the CCA held that it was legally impossible to have a common law riot of two people.

The maximum penalty is set at 10 years, compared with the previous possible maximum of life imprisonment. (S93B[1]).

Sub-section 5 resolves the question that arose in *Kamara v DPP* (1973) 57 Cr App 880. A group of students from Sierra Leone resident in Britain occupied their country's High Commission building in London in a demonstration. They were charged with unlawful assembly, not riot (although a toy pistol was used to frighten the occupants into submission). The House of Lords found, with almost brutal brevity, that it was not necessary to show that fear was engendered beyond the bounds of the building.

Sub-section 4 appears to resolve a more complex point: can there be a riot if there is no-one actually present to be put in a state of "fear for his or her own personal safety"? The common law had provided no certain answer.

In *Kamara v DPP* at 889 Lord Hailsham said:

"I consider that the public peace is in question when either an affray or a riot or unlawful assembly takes place in the presence of *innocent third parties*" (emphasis added).

In the same year, in *Taylor v DPP* (1973) 57 Cr AppR 915 at 928 Lord Reid of Drem discussed this point without having to decide it in a case of "affray". He concluded:

> "But I am much more doubtful about suggestions in some cases that no-one but the combatants need be present at all, or even within earshot ... that it is enough that, if *someone had been present*, he would have been terrified" (emphasis added).

The author shares his fellow-Scot's doubt about the legal situation. It may all, however, be a purely hypothetical concern.

If the Reverend Mr Stephens had led his torchlight procession around the Yorkshire Moors in the depth of winter, letting off their flintlocks and frightening a few sheep, could that have constituted a riot? Under Section 93B(1)-(4) it certainly could, but the courtroom reality is that witnesses must testify to the facts constituting the elements of riot; and if the only persons present are the alleged rioters?

Certainly, in all the reported cases this has *not* emerged as a real problem. And in the four riots in NSW between 1985 and 1987 there was no shortage of witnesses to testify to their fear and terror.

On the contrary, police officers sometimes seemed to be vying to find the most emotive terms to describe their feelings. A former soldier in the Australian Army said Mt Panorama had been more frightening than anything he had experienced in Vietnam: even the Vietcong with Kalishnikov assault rifles, grenades and mortars had not inspired the terror that a bunch of drunken Australian bikies armed with bottles, sticks and stones could instil.

Perhaps it is not surprising therefore that there has not been any real issue in the four NSW cases about the occurrence of a riot per se. Most accused, through their counsel, have conceded that there was a riot in progress at the relevant time. The principal issues on which juries were asked to find a reasonable doubt were identification, alibi and fabrication of evidence.

Before examining some of the issues that arose in the cases of the 45 - accused of whom I have personal knowledge - it might be of value to bear in mind the low conviction rate in these cases. In the 17 cases from Mt Panorama of which I had some personal acquaintance, only *three* resulted in eventual conviction. (Two others were convicted at first instance but had their convictions overturned on appeal and were acquitted on re-trials).

Of the 28 on trial in the three "race riots" only five were eventually convicted of riot. (Several were convicted of an alternative count of unlawful assembly, a much less serious offence than riot).

In all the Mt Panorama cases and most of the "race riot" cases the key Crown witnesses were police officers. At least two and as many as six officers testified that they had seen the individual accused throwing a stone, stick, bottle, Molotov cocktail or all four missiles at them or other officers. No police officer to my knowledge ever admitted even the possibility that he might be mistaken. Yet of the 45 accused I have mentioned,

only 8 were convicted of riot.

The Mt Panorama Riot

This riot is in a different category from the other three NSW riots for these reasons:

- Its size and duration. Over a period of at least four hours, several hundred people, mostly young men, attacked a police station surrounded by a high wire fence and protected by about 100 police officers.
- The other three matters involved only 20 to 50 "rioters" and as few as 10 police, they were much briefer, estimates varying from 15 to 45 minutes.
- The other three could fairly be described as "race riots". All the accused were of Aboriginal descent. In each of those riots the principal activity was a violent physical conflict with police officers, none of them Aboriginal.
- There was also damage in these three riots to property owned or patronised by "whites"- the Bourke Bowling Club and the Brewarrina Hotel in particular.
- In the "race riots" the Aboriginal participants were predominantly young men, not only known to each other, but often related.
- Most of the police in these riots knew at least some of the Aborigines, frequently through prior arrests or having seen them in court.
- Most of the young men put on trial after the Mt Panorama riot were of prior good character. Others had had only minor brushes with the law prior to April 1985 and raised their "good character" at their trials.
- Very, very few of the 36 Aborigines committed for trial in the "race riots" was able to put character in issue. I remember only one - and he was convicted. Nearly all had been convicted more than once; the offences ranged from petty thefts, through "street offences" to quite serious assaults. Some men aged about 30 had police records covering two or three pages.

There had been clashes between campers and police at Mt Panorama before the 1985 Easter races. Because of this, staff from what is now the Charles Sturt University at Bathurst were present during the riot - armed only with pens, notebooks and tape-recorders. They are better qualified than a mere lawyer to explain why a large number of young Australians should embark on a prolonged and, at times, ferocious attack on the compound and the officers guarding it.

IDENTIFICATION

This was the most contentious legal issue to arise in the four riots, especially the Mt Panorama one. It will continue to be. The *Crimes Act* will not affect that aspect of the law.

What the Mt Panorama cases did bring to light was a practice instituted by the police, which in the author's opinion is wide open to abuse and may well have led to the conviction of innocent persons.

During the riot, police arrested many suspects after charging in groups at the crowd and grabbing "offenders". Others were arrested at camp sites on the mountain during the next day by police who claimed to recognise those arrested as offenders from the previous night's disturbance.

All of those arrested were marched to the compound and photographed - a standard procedure for all persons charged with serious offences. But these photographs were different. The standard photograph is a black and white shot, showing head and shoulders of the offender, usually against a marked wall-chart showing the height of the person. Usually there is a full-face and a profile shot.

Previous disturbances at Mt Panorama had created problems for the police. Suspects had apparently swapped clothes after their arrest and photography, creating difficulties for the arresting police who were also the witnesses to the alleged offences.

To counter this, the police photographed all those arrested standing with the arresting officer(s) - most of the photographs showed a suspect standing between two police. These were coloured, Polaroid photographs, thus linking an individual arrested with the arresting officers.

The photographer in most cases took an extra photograph - the same suspect in the same company. That second photograph was then handed to the senior of the arresting officers. Alarm bells would immediately start ringing in the minds of criminal trial lawyers.

What prevents that officer from showing that coloured photograph on its own to any number of police present during the riot? How great is the temptation for police who may have been assaulted over a prolonged period by someone who *looks* like the man in the photograph? It should not come as any great surprise that police officers did show the photographs to other officers not present at the arrest; and those other officers did "identify" the person in the photograph as an offender.

At the trials police officers backed away from suggestions that they had been *shown* the photographs; some claimed they had seen the particular photograph as one of a group of photographs at a police station; or, in one case, that he had just happened to see the photograph on another officer's bed in passing.

Fortunately for the accused, the police had not foreseen the legal and factual problems when making their pre-trial statements. The phrase "Sergeant Bloggs *showed* me the photograph" left little room for verbal manoeuvre in the courtroom, although valiant efforts were made to explain the phrase.

The police photographer concerned testified that he had taken a *second* photograph in *every* arrest. But at the subsequent trials in which I was involved no second photographs were produced - despite the issue of subpoenas. All had apparently evaporated or self-destroyed. Most police officers simply denied getting a second photograph - flatly contradicting the police photographer. The Court of Criminal Appeal, however, saw nothing inherently wrong in the procedure: see *McPhail & Tivey* (1989) 36 A Crim R 390.

Mr McPhail had been identified in court by at least three officers who admitted having seen the photograph, but denied having been shown it in isolation. He was granted a re-trial on another ground. At his re-trial, with the same Crown witnesses

giving the same evidence, and the same defence counsel conducting a virtual carbon-copy of the first trial, the jury retired for only 25 minutes and acquitted him. Such is the glorious uncertainty of life at the Bar.

It is the author's submission that when police officers are the victims, the witnesses, the arresting officers and the investigating agents, then special precautions are needed: first to limit or remove the temptations and opportunities to exaggerate or fabricate evidence; second to protect the accused against over-zealous police and their compliant colleagues.

IDENTIFICATION PARADES

There seems to be a widening gap between the pronouncements of superior courts and the practices of the NSW police. The High Court believes that a properly conducted identification parade "provides the most reliable method of identification": *Alexander v the Queen* (1981) 45 CLR 395 at 400. The NSW Court of Criminal Appeal in *R v Moussa* (unreported 5 July 1984) said:-

> "... It has been said many times in courts of the highest authority that the absence of an identification parade and the substitution of identification through some other method, for example by photograph, in a court or in a police station may result in so weakening the identification evidence as to lead to a case being withdrawn from a jury." (Approved in *R v De-Cressac* (1985) 1 NSWLR 381 at 385).

The fact is that identification parades are very rarely held in NSW.

In the many trials I have appeared in over the past 10 years when identification was an issue I can recall only one where a parade was held. A rugby league team from Green Valley was alleged to have wrecked a service station near Newcastle on an end-of-season outing. Police tried to hold a series of identification parades, using off-duty police and local rugby league players to make up the numbers. The service station proprietors nominated *some* of the Green Valley Hornets, and quite a few of the locals, as their attackers. Anecdotal evidence from police officers suggests that this is not an uncommon occurrence.

No identification parades were attempted after the Mt Panorama riots, although significant numbers of young men of similar appearance were in custody at Bathurst police station and, theoretically at least, available for such parades.

In the space of those few years from 1987 to 1991, this State saw more riot trials than in the previous 50 years. Future historians may wonder what caused this surge of civil unrest. Were these mass confrontations between police and young men a social phenomenon that flared up, never to be repeated? Time will tell.

But at least any counsel in future trials will be spared the burden of those English 19th century cases defining riot. ❑

Judicial Embellishment

Writing judgments can, on occasions, be even more mind-numbing than chamber work. Not suprising then that judges occasionally seek to enliven their work with literary and other allusions. Here are a few samples. (Contributions to this column will be gratefully received.)

Proprietors of Strata Plan 20754 v Hawkesbury City Council & Anor
Kirby P
Mahoney JA
Priestley JA

Kirby P: "On the facts disclosed in these proceedings Franz Kafka would have found a rich seam of raw material with which to enliven his writings about modern government. Fully explored, the facts could, of course, present a different complexion from that which emerged from the uncontested material presented to the Court. Behind the facts which the parties chose to litigate, may lie explanations and justifications of their conduct which did not emerge at the trial. Doubtless Kafka's officials had their own private excuses for their conduct. "

Macleay Pty Ltd t/as Wobbies World v Anne Moore (Victorian Supreme Court)

Brooking J: "When Dante reached the gate of hell the first thing he saw was an inscription which ended with the words, "All hope abandon, ye who enter here." Dante read the notice with care and, turning to Virgil, his guide, exclaimed, "Master, these words import hard meaning".

When Anne Moore arrived at the gate of Wobbies World, an amusement park in Nanawading, and passed through the turnstile, she must have come within inches of a sign which, while not as alarming as the one Dante encountered, was not in encouraging terms -

'PERSONAL INJURY OR PROPERTY LOSS OR DAMAGE IS YOUR RESPONSIBILITY
Your entry is your acceptance of these conditions.'

Unlike the inscription over the gate of hell, the characters of which were "in colour dim", the sign at the amusement park was in bright red lettering, and, instead of being "over a portal's lofty arch", it was at eye level, just to the right of the turnstile facing those who were about to click their way through into Wobbies World. "

TTS Pty Ltd v Griffiths (Supreme Court of the Northern Territory of Australia Asche CJ, 20 December 1991)

"I note that in one part of the transcript he is reported as inspecting "trains" but I take that as a misprint for "cranes" since the opportunity to inspect the former in the Territory would be somewhat limited; the Commonwealth Government having apparently taken the view that it should not be stampeded into honouring express contractual obligations undertaken a mere eighty or so years ago to construct a railway line from Darwin to the South Australian border " ❑