Letter

A Reply on 'Gay Killings'

In the July 1997 issue of this journal there was published an article by Stephen Tomsen and Allen George entitled 'The Criminal Justice Response to Gay Killings: Research Findings'. The article studied a number of cases in which it was considered that a gay person had been killed in circumstances where homophobia was a factor in the killing itself, and also in the courtroom handling of the prosecution which followed.

At page 66 of the article there is discussion of a case of *R v Bonner* (NSW Supreme Court, 19th of May 1995) in which an accused man was acquitted outright of the murder of a gay deceased. The representation of that decision in the article is very misleading. It is in the following terms:

> This courtroom approach [one involving reference to the sexual history of the victim] could play on the existing homophobia of individual jurors or their ignorance of gay culture and lifestyles. It may also rely on the limited and stereotyped understanding of homosexuality that has been made available through the popular media. This was the case in the *Bonner* trial, which resulted in a full acquittal. Defence counsel repeatedly emphasised the heterosexuality, youth and good looks of the accused, and asked the jury to understand the motivations of the deceased through their own recollections of media accounts of the actions of participants in the Sydney Gay and Lesbian Mardi Gras parade.

I appeared as counsel for the defence in that case, which was conducted before a jury of twelve. Mr Justice Dowd presided. As it happens, a transcript was kept of both the prosecution and defence addresses in the *Bonner* case, and a rereading of it confirms my clear recollection that I took great pains to avoid attempting to play on the supposed homophobia of the jury in my address to the jury. There was good reason for this, quite apart from the distastefulness of assuming that twelve Sydney jurors would automatically have the retarded caste of mind of a 1930s jury in deepest Alabama: namely, one of the jurors was dressed and outfitted so as to indicate that he was homosexual, and well out of the closet. It would have been a foolish advocate who sought to persuade such a person that a wink of the eye is justification for producing a knife and stabbing someone. Indeed, I put this to the jury:

> What we say — what the defence says is that the provocation element in this case is not really there. What is there is Steven Bonner being physically manhandled by a much larger man who has made a threat to him of, in effect, male rape and this is following certain conversations and so on. It is only if you take a view of the facts where you totally reject what Steven says and think, it must have been just conversation, it must have been just conversation where the other fellow, the poor deceased Tom, said something like 'Gee, you are an attractive lad, I would like to get into bed with you', and Steven had jumped up, got the knife and stabbed him and killed him.
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> Now if that were the fact, if that were the fact — if you find that beyond any reasonable doubt — that those are the facts, then naturally you would reject the proposition that an ordinary person would do that. *I would not stand here and seek to persuade you — I would not be so foolish as to seek to persuade you — that an ordinary person is entitled, just because they got an offensive verbal sexual proposition, to kill the other person. That is just not acceptable, that is not provocation which in our society would be regarded as acceptable* [emphasis added].

In the defence address there was no snide reference to homosexuality, no 'wink, wink, nudge, nudge' style of suggestion that homosexuals are hateful people who deserve what they get. The reference to the Mardi Gras which I made was perfectly straightforward and would require almost wilful blindness to characterise it as homophobic:

> Years ago when the subject of homosexual behaviour was still — to use the vernacular — in the closet, many people in the community may have been uncertain about male sexuality and may have been totally ignorant of what it meant to be a homosexual person. But we now live in a time where people are more educated about these matters and for many years you have seen in Sydney each year and the gay mardi gras is seen by hundreds of thousands of people, the pilots of which you see on television and as jurors you bring into the jury box your knowledge of these matters and indeed you are aware of that phenomenon and anyone who has ever seen the gay mardi gras would be in no doubt what the conduct of the participants says in terms of the attitude of gay men towards homosexuality.
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> In particular I submit it would be a matter of which you are well aware that male homosexuality is not always lust — doubtless it does involve genuine love and affection between people just as love between men and women does but it also involves lust, ravishing, sexual intercourse and it involves just as powerful a sexual component as does sexuality between men and women. You may reject my analysis of those facts but I submit to you that that is a real phenomenon.

Is this homophobic? I suggest not.

I summarised the facts to the jury in the following way:

> Firstly, Tom in fact had a homosexual inclination and had made a sexual approach on another occasion. Secondly, in this instance, Tom indicated that he was going to have sex with Steven willy-nilly, whether he wanted it or not. Thirdly, Tom grabbed Steven and that was an assault. He says he did not give him any permission to assault him or touch him, and have any sexual contact with him.
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> Fourthly, Steven indicated clearly to Tom he did not want to participate. What other explanation can there be for the row or racket that Miss Hughes says she heard? Clearly there was none. It almost certainly was exactly what Steven says. He politely told him to fuck off.
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> Fifthly, Tom was over 18 stone in weight and Steven was of slight build.
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> Sixthly, Tom had Steven pinned against the bench to prevent him from moving.
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> Seventhly, apart from Steven's belief that Tom intended to rape him, Steven, reasonably you may think, feared injury from being wrestled down the concrete stairs. He grabbed the knife from a nearby position on the spur of the moment.

These were the essential facts, but furthermore the accused was a person of good character. I was able to put this to the jury:

> ... it was the defence option to raise Steven's background. You do not need to fear that there is in this young man's history, background or character, some dark secret which you might perhaps think is relevant. He does not have convictions for assaulting people, carrying concealed weapons, bashing up homosexuals at Green Park, or causing trouble in Oxford Street. He does have, as he through his legal advisers has voluntarily revealed, a few teenage convictions for minor and unrelated matters, which you might well think are totally unrelated and do not deprive him of being, for the purposes of this case, a person of good character.

Apart from the background of the young man, it is obvious that I was speaking to a jury which gave every indication that it well knew what I meant when I referred to bashings in Green Park, and causing trouble in Oxford Street, and would not have condoned any such things.

After the defence speech, His Honour Mr Justice Dowd summed up the facts and the law to the jury. He did so in a fashion which properly reflected the prosecution and defence cases; nothing in his summing-up condoned in the slightest degree violence against homosexuals. It was a fair and correct summing-up. Furthermore, it is well known that His Honour Mr Justice Dowd was for a substantial time Attorney-General for New South Wales; and it is well known that his political leanings were towards social tolerance. It would have been astonishing if he had permitted a trial in a case such as the *Bonner* matter to be conducted so as to give an improper advantage to a defence based on intolerance. He did not do so and the trial was not conducted on any such basis.

The defence put forward, which the jury accepted, self defence, exactly as if it were a case involving heterosexual contact:

> If you reversed the sexual role, imagine if this was not Steven Bonner but a young woman of the same age who goes home with a man, a man for whom she has no sexual feelings at all except he has previously made a pass [at] her. He is 18 stone in weight and she is a young woman of slim build and suddenly the man leaps at her, indicating his desire to have sex with her then and there and she does not want to. She does not give him permission to and she is pinned against the table or the desk or the bench and there is a knife nearby and in the course of being pushed down she grabs the knife and pushes it at the man.
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> Would you hesitate thirty seconds in acquitting that woman? I would respectfully submit you would not take thirty seconds, and that is the case here.

The jury did acquit, and it is unfair to the jury, unfair to Steven Bonner and unfair to those involved in the conduct of the trial to suggest that the outcome reflects homophobia. There are cases where the responses of angry and ignorant young men, carrying with them a cultural baggage of hatred of 'poofters', and 'queers', impels them to brutality against homosexuals; this was not such a case and for the authors so to characterise it is not only unfair but academically unsound and politically counterproductive.

G D Woods QC

Barrister