The Banality of the Lengthy Criminal Trial

THE PRICE OF JUSTICE? LENGTHY CRIMINAL TRIALS IN AUSTRALIA by Janet Chan and Lynne Barnes, Sydney, Hawkins Press, 1995, 70pp, ISBN 1 87606 700 4

Why do people wishing to defend charges of indictable offences have to wait for anything up to two years before their trial can be heard? If you put that question to legal practitioners or judges, you will get a range of answers, which will usually include the assertion that one of the major reasons for the backlog in criminal cases awaiting trial is that practitioners and/or their clients *make* trials take too long. One suspects (although the attitudinal surveys conducted by Chan and Barnes did not test for age differences) that the older the practitioner or judge, the more likely it is that this assertion will be accompanied by two others. The first is that criminal trials used to be much leaner and meaner affairs, whilst the second is that the emergence of the "mega-trial" in the last decade or so is threatening to strangle the system unless drastic steps are taken to suppress it. Suggestions for such drastic steps have included the imposition of severe restrictions on the terms of legal aid, reversing the burden of proof, and the abolition of the rights to silence and trial by jury. Such radical suggestions are usually reserved for a select group of cases, variously described as those involving complex corporate crime, or complex fraud trials, or, more simply, "complex criminal trials". The suggested solutions to the problems of the mega-trial present many difficulties, not the least of them being the lack of any intellectually credible criterion for confining those solutions to such ill-defined groups or types of cases. Just what is it about complex corporate crime, complex fraud or, simply, complex criminal trials, which would justify stripping accused persons of valuable civil rights? It surely cannot be their mere complexity, else the prosecuting authorities would have an incentive to prefer the complex charge over the simpler alternative. Nor could the complexity of charges, or of the evidence offered to prove them, be taken as the occasion for diminishing the opportunity for giving them serious consideration and scrutiny, unless we were to accept the paradox of abandoning the need for proof beyond reasonable doubt in those very cases whose complexity makes such proof more difficult. Complexity certainly calls for adjustments to be made, but the price must never be a reduction in the concern which the current system has in avoiding wrongful convictions.

Janet Chan and Lynne Barnes have surveyed a large number of leading practitioners and judges for their thoughts as to the causes of the overly long trial, and for their solutions. Amongst the causes are the usual thoughts about the inexperience or greed of the practitioners (although it is interesting that only the judges seem to allocate blame fairly equally to prosecutors and defence lawyers), and amongst the solutions are the usual thoughts as to abolition or reduction of trial rights, together with the more trendy suggestions of introducing more training for counsel and judges. Solutions also include a more developed system of plea bargaining, a greater use of technology, and improved and even mutual pre-trial discovery rights with a view to narrowing and identifying the real issues in dispute. Like others before them, however, they conclude that there are no easy solutions, because underlying

the processes marked out as candidates for reform is a profoundly entrenched legal culture. It is a culture which they identify as one of the fundamentals of the adversarial system. Its overall hallmark is a strong rejection of the idea that the parties should co-operate with each other: "It is logical in an adversarial system for the defence not to make any concessions. The defence's reluctance to co-operate is in turn matched by the prosecution's lack of willingness to disclose." (p63) Whilst that may be seen as logical, it is not immutable. It is well over a century since civil litigation was characterised by such a strong tradition of mutual obstructionism, and yet no-one would suggest that civil litigation is no longer adversarial. Chan and Barnes also document accusations of weak judges as one one of the causes of the overly long trial, as well as judicial calls for more powers so that they need not be so passive. Once again, though, the parallel with civil litigation is instructive. The passive judge was until recently seen as one of the hallmarks of civil litigation, an indispensable feature of the adversarial system. However, readers familiar with the emergence of judicial case flow management techniques will know that it is a decade since Australia's major superior trial courts replaced the "cuckoo clock view of the [civil] judge's functions" (*John Fairfax & Sons Ltd v Foord* (1988) 12 NSWLR 706, at 712 per Mahoney JA.) with the interventionist judge who has assumed the primary responsibility for setting the pre-trial and trial timetables for civil cases.

One can accept, therefore, that there is a deeply entrenched culture of mutual obstructionism on the part of criminal law advocates which is in a symbiotic relationship with an equally entrenched culture of the non-interventionist criminal trial judge. At the same time, however, one need not accept this as an inevitable (and therefore inevitably enduring) feature of an adversarial system. Chan and Barnes do not deny the possibility of meaningful change, but because it would ultimately lead to long-term evolutionary cultural changes, they conclude that policy-makers and legal practitioners must come to some agreement about the criminal justice system's fundamental goals:

> A cultural change requires that the fundamental goals of the justice system be clearly defined, so that rule and procedural changes, technological assistance, education and training, as well as incentives and sanctions, can be directed towards these goals. In addition, these changes must be supported by appellate courts, consistent with resource decisions and closely monitored and evaluated. (p64)

If this means that we must *first* identify all our fundamental goals before trying out any changes, this reviewer respectfully disagrees. Incremental change stands much more chance of success than an attempt to secure a consensus statement of our fundamental goals in readiness for a self-conscious and full-scale attack on the adversarial culture. But that is a disagreement with the authors' general prescriptions for those inclined to reform the system, which is a minor part of this valuable work. Chan and Barnes have not set out to prescribe changes to the way we conduct criminal trials. Their two principal tasks were descriptive, not prescriptive. They were first, to conduct attitudinal surveys concerning the causes of overly long trials and suggestions for reform, and second, to identify and analyse long criminal trials to see how far they shared certain features. The ideas behind their second task were to develop an indicative list of symptoms exhibited by long criminal trials, and to compare that list against those generated by the attitudinal surveys.

The authors' first discovery was that despite governments and many practitioners having a strong sense of concern about the phenomenon of the lengthy

criminal trial, no-one had thought either to define "lengthy", or to maintain statistics recording the number of court sitting days each criminal trial has taken. The authors were driven to a number of sources simply to identify all Australian criminal trials taking at least 21 sitting days (their definition of a lengthy trial) in 1992 and 1993. Such sources included computerised court and prosecution management systems, hard copy court and prosecution files, associates' notebooks, interviews with practitioners, and the transcripts. Not unnaturally, the authors recommend improvements in statistical collections.

Their second discovery was equally surprising, namely, that in the period under review, fewer than 70 criminal trials went for more than 20 sitting days. This meant that lengthy criminal trials represented between one and eight per cent of all criminal trials, depending on the State or Territory concerned.

Perhaps most surprising of all was their list of factors most commonly associated with lengthy trials. There was no direct correlation between the length of trial and the use of interpreters, the number of charges or the number of persons charged. Factors commonly associated with lengthy trials included the number of prosecution witnesses, the inclusion of drug offences as the principal charges, and the extent to which the prosecution's case involved the use of secretly recorded telephone and other conversations. Suspicions over the quality and integrity of tape recordings, and similar suspicions regarding their transcription and (where applicable) translation apparently abound, and account for many a lengthy trial. The authors lacked the resources to rank the significance of each factor associated with a lengthy trial, or to compare those factors with a sample drawn from trials taking less than 20 days. But two points emerge very clearly. First, the lengthy trial is by no means the prerogative of persons charged with corporate or other white collar crime, let alone of the rich. Indeed, those paying for their own lawyers tended to have shorter trials. Second, legal complexity was not a major factor in most of the lengthy trials examined. These two points are of enormous significance, because they underline the futility of attempting to deal with the problem of overly long trials by measures specially tailored for certain types of offences. "The problem" is largely not the type of offence or offender, but the nature of the evidence. For example, dubious tape recordings, and dubious transcriptions and translations, might be part of a prosecution case involving drugs, fraud, homicide or incest. The criminal trial handles dubious evidence very inefficiently, because the culture of mutual obstructionism forces the postponement of the very expression, let alone testing, of those doubts until the trial is underway.

We return, then, to the twin cultures of mutual obstructionism and passive judges. If those are the problems, the solutions should not focus on particular types of trials, because they are problems which are part and parcel of *every* trial, short or long. Incremental reforms to the practices and rules of procedure and evidence must ultimately be available for all trials. A trial's undue length can then be seen as simply one manifestation of an overly combative culture whose other unwanted symptoms might be manifested in many trials, regardless of their length. Chan and Barnes are to be highly commended. They have done us an excellent service. To appropriate a phrase from another context, they have demonstrated the banality of the lengthy trial.

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