BOOK REVIEWS

Beyond Reasonable Doubt, G. HAWKINS, B.A. (Wales) (Criminol.); Associate Professor of Criminology, Institute of Criminology, University of Sydney. (Australian Broadcasting Commission, Sydney, 1977), pp. 5-132. Cloth recommended retail price $6.95 (ISBN: 0 642 97204 4); Paperback recommended retail price $2.50 (ISBN: 0 642 97466 7).

The public analysis of a notable criminal trial is a well tried formula for arousing interest in any theory remotely connected with the subject which the analyst wishes to propound. If Professor Gordon Hawkins' book falls into this category then there is some difficulty in determining the theory for which the book is an intended vehicle and a temptation to treat it as no more than commercial sensationalism unsuitable (if not unworthy) of review in this publication. Such treatment may not be too unfair in light of the influence of television script writers on the finished product. This influence would be obvious even without the author's acknowledgement of his indebtedness to their work. Nevertheless, even if the book were no more than an attempt using the sensational to make the layman alive to and critical of the efficiency of the criminal justice system, then it warrants consideration by lawyers, if for no other reason than to discover whether the methodology for involving laymen in this sort of critical analysis might usefully be applied elsewhere.

The single advantage of this 132 page work is the brevity of the manuscript, something which might be construed as so vexing to the publisher as to require the use of such expansionary devices as exceptionally large typeface, huge chapter headings and commencement of the text at page 5. Less critical observers would say these features make the contents of the book more appealing, direct and easily assimilated by the reader.

If the latter object is intended then it is belied by the language—not that this is obtuse—far from it. Nevertheless, the whole subject suffers in transmutation from the stimulating and persuasive (if not convincing) presentation of the coloured screen to the printed word. Those who saw the television series will no doubt be struck by the greater effectiveness of the pictorial diagrammatic representation showing the juxtaposition of the various persons and the trajectories of bullets fired in the *Ryan* case—designed to establish that the accused could not have fired the fatal shot—as opposed to the several pages of text in the book (page 35 ff.) attempting the same result. There seems to be no reason why the latter could not have been leavened if not enlivened by the addition of such material and perhaps photographs. That it was not, reinforces another valuable lesson about the invidious persuasiveness of television. At least the printed word grants a better opportunity for crictical analysis of the author's arguments. (One wonders why the purchasers of the cloth edition of the work should be more shabbily treated than

those of the paperback version which has eight photographs between pages 64 and 65.)

The text of the book includes a substantial introduction of 13 pages which, more than the text, reveals the real motive of the author in discussing the four cases which follow. This appears to be a desire to examine those cases, questioning in respect of each if the case against the accused man was proved beyond reasonable doubt. More broadly, to determine if the right described by Sir Rupert Cross as "what must surely be the citizen's most fundamental right, the right not to be convicted of a crime until he has been proved guilty of it beyond reasonable doubt" has been abridged. With Professor Hawkins' right to examine the cases one can have no quarrel for as he rightly points out (page 5): "[J]ustice is not subverted by the recognition of the possibility of miscarriages. Indeed it can only be preserved as long as we are prepared to maintain a constant and dispassionate acknowledgment of that possibility". Nevertheless, it is a pity when an author puts such sensational examples of the possibility of miscarriage before an audience (many of whom may have grave difficulty in grasping such fundamental concepts as are related to the duty and the role of a trial advocate in daring to defend a "guilty" man) that the author does not express the fundamental right of the citizen in more accurate terms. The right is a right not to be convicted of a crime until proven guilty of it beyond reasonable doubt *to the satisfaction of the tribunal trying the issue of fact*, usually as in these cases a jury. If such an inaccurate expression of the citizen's fundamental rights is not subversive of justice as a jurisprudential concept in the round, it may well be so in relation to the particular system under discussion, particularly when it is aimed at so large a pool of potential jurors as both the television programme has reached and the book will reach. It is perhaps more subversive when coupled with such fatuous if not contradictory justifications of the activity as are contained in the remark "the study of past miscarriages may lessen the chance of error in the future" (page 5) in the climate of a discussion of four cases in respect of which jurors found the accused guilty (in one case twice) and Courts of Appeal ultimately confirmed those verdicts.

It is not just the lawyers' point of view which makes it important for a lay audience to be enabled to understand the real legal precept in respect of which change is sought; that audience should not be allowed to be deceived into attacking something which does not represent the real position. For lay people may not have sufficient appreciation of the differences in the discipline of the criminologist and the practising criminal lawyer to do otherwise than treat the utterances of the former as highly authoritative, particularly from so eminent an author. Moreover, the author's remark may be designed to lay the groundwork for acceptance of the theory, later pressed by the author in his discussions of the *Van Beelen* case, for specially qualified jurors in cases involving complex and technical or scientific evidence. Such a proposition is at least arguable but the danger that this remark in its initial context in the book may be misconstrued as propounding so radical a change as training jurors, has far more serious implications. These are not

altogether alleviated by the author's disclaimer in the final acknowledgements (pages 131-132) that "neither he nor anyone else save the author can be held responsible for such errors, infelicities and omissions as, despite their efforts, still remain".

Perhaps it is at least a subconscious acknowledgement of the recalcitrance of such tribunals that leads Professor Hawkins to make the attack on the Appeal Courts which follows in the introduction after his treatment of the concept of reasonable doubt, the presumption of innocence and the jury system.

Again, the treatment of the concept of reasonable doubt is introduced with the bland and fallacious proposition which proceeds from the correct presumption that if the accused in the four cases subsequently discussed were wrongly convicted (legally entitled to a verdict of not guilty) this does not necessarily mean that they are innocent. So much is true but to go on and suggest in passing, as the author does, that a Scottish jury might have brought in a verdict of "not proven" in such a context adds nothing to the argument on the correctness or otherwise of the conviction and suggests that juries operating in systems of law where there is no provision for a middle ground verdict are more likely to resolve any reasonable doubts, which may exist as to whether the Crown has proved its case, by convicting the accused rather than acquitting him. Apart from the reference to a conversation with the late Professor Peter Brett, which was designed to highlight the true position of the individual opinion of outside observers on the question of guilt or innocence as opposed to the questions of the correctness of the conviction according to law (a difficult distinction to the layman) so juxtapositioned with an assertion that two of the accused were wrongly convicted as to detract from the point, the remainder of the author's treatment of this concept seems adequate and well reinforced by the language of at least one eminent jurist.

The treatment by the author of the presumption of innocence under that heading although inadequate in failing to explain that concept dealing as it does with the social rationale for the rule that the prosecution must prove its case beyond reasonable doubt, nevertheless explains succinctly, worthy ideas relating to the obvious consequences of adopting a different standard of proof, before mounting the claim that the four cases discussed are not of a kind where only fanciful or unreasonable doubts could be entertained on the accused's behalf.

Under the heading "The jury system" the author begins with a number of observations on the value of the jury as a tribunal for determining guilt beyond reasonable doubt, which tend to raise a feeling of disquiet, while at the same time exonerating the jury from blame for any erroneous conclusions which they may reach. Again, the author gives reign to at least one dangerous fallacy in saying that "[f]ortunately under our system of justice such beliefs of [police officers] are not regarded as the sole criterion of guilt or innocence" (page 11). Such beliefs are, of course, no criteria at all and it is difficult enough for defence counsel to try and eradicate that dangerous and widely held misconception from the minds of jurymen in any particular

case, without having it fostered in a book of this sort.

It is difficult to dispell the misgivings which lawyers may suspect are engendered in the minds of jurors who may inadvertently learn that they are not hearing all the available evidence on a particular topic. Thus, to tell potential jurors that the withholding of evidence in the particular cases under discussion might have resulted in different verdicts without exploring the reasons for such evidence being excluded or mentioning the fact that even when seemingly admissible evidence is excluded it is often so excluded as much at the behest of the defence (in the belief that exclusion is in the best interests of the accused) as at the instigation of the prosecution, is unnecessarily suggestive of prosecutorial dishonesty and misleading if not belittling of the role of counsel. The author finishes this section of the introduction with a balanced assessment of the pros and cons of a system in which juries would be struck from panels with specialist expertise in difficult, complex scientific or technical trials, before proceeding to an examination of the criminal appeals system. He concludes by supporting the contention that many of the errors which remain uncorrected by our appeal courts would be remedied if a criminal appeal was conducted on the same basis as the trial, namely, that the appellant he considered innocent until the conclusion of the appeal process. The author quotes Dr Desmond O'Connor (page 17): "The appeal procedure ought to be seen as part of the general complex of the trial of guilt and as such the position of the accused should not be altered merely because there has been this intervention of a jury finding". If this is an argument for the abolition or downgrading of so inconsequential a thing as "mere juries" then it ought to be more fully explained and justified.

The author concludes his introduction by justifying his choice of four cases guaranteeing "an audience" on the grounds that serious cases, with serious consequences to the accused, warrant special concern; require particularly dispassionate consideration; would be cases where the administrators of the system would have taken special pains to safeguard the prisoner's rights (which in some unexplained way enhances the value of the criticism) and because a vast amount of material is available from which to reconstruct the cases in detail. Frankly these reasons remain singularly unconvincing to one who believes that it is dangerous in the extreme to foster the notion that the quality of justice is strained by either the seriousness of the offence or the consequences of conviction or that "books . . . press reports, magazine articles etc." (page 18) ought to be relied upon (along with trial and appeal transcripts) to reconstruct in detail the cases as the basis of any account, let alone form the foundation of an analysis of this sort.

A critique or discussion of the author's analysis of the four cases of *Ryan, Ratten, Van Beelen* and *McLeod-Lindsay* requires some familiarity with the trial transcripts which the author mentions, or at very least, partial acceptance of the author's interpretation of them. The fact that controversy rages amongst those who have such familiarity with the cases highlights the need to avoid arguing with the author about either his interpretations of the material or the conclusions which he

draws. To so baldly dismiss the text of the book in this way would be wrong, as this portion of the work is not just a bare description of the cases, highlighting the circumstances which the author claims makes the final verdicts suspect. Besides doing this he makes excellent use of this section of the book to exemplify the concepts propounded in the introduction and to re-identify and connect those concepts with examples from the cases under discussion and (perhaps more unfortunately) to introduce several more criticisms of the system and the climate in which it operates. Thus, the weight of forensic evidence used in the *Van Beelen* case is used to develop the argument favouring technically qualified jurors and the *Ryan* case is explored against the background of the enormous difficulties created for the defence by the unthinking use of sensational pre-trial publicity.

Finally, it ought to be said that the text of this part of the book is laced with (at least to the lawyer) thought provoking opinions which, whether it is agreed are supported by the material on which the text is based or not, deserve more than a moment's reflection. So the *Ratten* case is used as a vehicle to mention the problems created by counsel seeking to preserve their right of last address to the jury at the expense of calling evidence; as is the *Van Beelen* case to explore (on highly speculative evidence) the possible effects on jurors of knowledge that the accused has prior convictions, the effect of monetary cost weighting the decision of an Appeal Court against the granting of an appeal and the issue of prosecutorial discretion to disclose to the defence, evidence peculiarly within the knowledge of the Crown. Regrettably, it is as difficult to be sympathetic to the author's conclusions on these issues as it is to be with his introductory remarks.

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Federal Jurisdiction in Australia, by Z. COWEN, A.K., G.C.M.G., K. St J., Q.C., Governor-General of Australia and L. ZINES, LL.B. (Syd.), LL.M. (Harv.), Robert Garran Professor of Law, the Australian National University. (Oxford University Press, Melbourne, 1978, 2nd edition), pp. i-xix, 1-233 with Table of Cases and Index. Cloth recommended retail price $19.95 (ISBN: 0 19 5500547).

In 1959 Professor Zelman Cowen (as he then was) said in the introduction to the first edition of *Federal Jurisdiction in Australia* that if his book failed to persuade those responsible for the ordering of jurisdiction, then "its most satisfying achievement would be its own relegation to the shelves of legal history".[1] The first edition has an important place in the shelves of Australian legal history, not due to any deficiency in its power of persuasion, but because its scholarship and masterful appraisal of one of the most difficult areas of constitutional law rightly placed it there. The second edition—twenty years

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[1] Z. Cowen, *Federal Jurisdiction in Australia* (1959) xv.