

Opas on Ryan

Dear Gerry,

MY attention has been drawn to an article by Julian Burnside on Ronald Ryan.

As I vehemently disagree with his assertion that Ryan was guilty, I have written a response which you may be able to publish in *Bar News*. I believe I am in a better position than anyone else to discuss the case as most of those involved are now gathered unto their fathers. I am probably clinging to life with a somewhat slippery grip so I seek to make a last plea for someone who did not deserve to die.

If it is too long to print, at least do me a favour and make it available in the Bar Library for anyone who might want to do some research into capital punishment.

Regards

Phil Opas

The article by Phil Opas is not too long to print. We are delighted to print it, not only because of its content but also because we are fed up with having to say "We Were Wrong". It is much more satisfying to say "Julian Burnside was wrong".

The Editors

THE INNOCENCE OF RONALD RYAN

Julian Burnside's article asserts that the verdict of guilty was correct but the sentence was inappropriate. As most of the principal actors in this drama are now dead, and in the natural order of things I must soon join them, please allow me to put another view as my last attempt to put the record straight.

I will go to my grave firmly of the opinion that Ronald Ryan did not commit murder. I refuse to believe that at any time he told anyone that he did. When all hope of a reprieve had gone and he had decided that he might as well declare his guilt (if that was the fact) there are two people whom I believe he would have told and they were Father Brosnan and me. Father Brosnan and I have formed a lifelong friendship since the hanging, and Father has told me that Ryan never made any admission of guilt to him.

Father Brosnan did not hear his final confession which enabled Ryan to die in a state of grace.

Ryan always vehemently denied to me that he fired the shot that killed the warder, Hodson. The last time I saw him

was the day before I left for London to seek leave to appeal from the Privy Council. I told him frankly that I did not expect to succeed on mere questions of law, although I was heartened by the action of Sir John Barry who had rung me a few days before to tell me that he had presided at a hearing of the Court of Appeal which had come to a decision diametrically opposed to that reached by the three justices who had heard Ryan's appeal. He told me his decision might help me and asked me to see his associate and obtain a copy of the unanimous decision, hot off the typewriter.

One of the legal points decided against Ryan turned on the time when the felony of escaping from prison ended. The trial judge, Justice Starke, followed an old New South Wales case which held that the felony of escaping continued right up to recapture — in Ryan's case nineteen days later. Therefore if the shooting took place outside the gaol (which it did) the Crown did not have to prove intent and the felony murder rule applied. Therefore manslaughter was not a possible verdict and the judge refused to leave it to the jury.

My contention, and that of Jack Lazarus for Walker, was that the escape was complete when the two prisoners escaped from the prison and were outside the control and custody of those in charge. Therefore the felony/murder rule did not apply because the murder was not in the course of the felony of escape, and intent was an essential ingredient of the charge which had to be proved beyond reasonable doubt by the prosecution. Thus manslaughter had to be considered by the jury even though the defence was that Ryan had never fired a shot.

Justice Barry in a different case agreed with our contention and refused to follow the case relied on by Justice Starke. We therefore had at the appellate level six justices evenly divided on whether the felony/murder rule applied in the circumstances of Ryan and Walker.

I informed Ryan that I would do my utmost to stress before the Privy Council the serious difference of opinion between six senior justices of this State, and that this was a worthy case to require their adjudication. Nevertheless I told him that I would probably fail as the Privy Council rarely intervened in criminal matters. I said that we were largely playing for time to create a groundswell of public opinion that would prevent the government from carrying out its declared intention of executing him.

Ryan replied, "We've all got to go some time, but I don't want to go this way for something I didn't do." Then he smiled and added, "You know, mate, we're playing time on. If you don't kick a goal soon, we're going to lose this match." We shook hands and that is the last time I saw him.

One of the last things Ryan did was to write me a letter that I never received. Perhaps it may turn up at Sotheby's some day. He showed it to Father Brosnan, and I am indebted to him for informing me of the contents. It expressed deep gratitude for the efforts I had made on his behalf, and went on to ask that I attend the hanging as he wanted to look on the face of a friend as his last vision on earth.

I did not attend the hanging.

Apart from any question of Ryan admitting guilt, I am of opinion that not only did he not fire a shot, but that he could not have fired the shot that killed the warder. I rely on facts that could neither lie nor be mistaken. The bullet that killed Hodson was never recovered. It passed right through the body. It was never proven that the M1 carbine held by Ryan ever fired a shot while in his possession.

During the war I served for nearly six years on active service in the RAAF and was proficient in weaponry, although that did not include the M1 carbine which was not then used by our forces. My instructor, Allan Douglas, the Public Solicitor, served with the AIF and ended the war as a lieutenant colonel also proficient in weaponry. At the time of the trial I was an active reservist in the RAAF and I arranged for Douglas and me to spend about three hours at the butts at Laverton under instruction from a senior armaments officer. Between us we fired about six hundred rounds from an M1 carbine. We observed and measured muzzle velocity, penetrability, range and general characteristics of the weapon using the same smokeless cartridges that according to the evidence were loaded in the magazine of the weapon which Ryan took from the tower at Pentridge. I believe that by the time of the trial I knew more about the M1 carbine than did the ballistics expert called by the prosecution. In fairness to him, he knew a lot more about a large variety of weapons but Douglas and I were concentrated on one only.

We confirmed that unlike the Lee Enfield .303 rifle familiar to infantrymen which had two distinct pressures, the M1 carbine was fired immediately by a comparatively light pressure on the trigger and continued firing until the finger was removed. It had no recoil so that it did not jerk back the shoulder of the firer. As

smokeless cartridges were used, no smoke was emitted from the barrel. Therefore witnesses who spoke of seeing Ryan's shoulder jerk back and seeing smoke from the barrel were drawing on imagination.

The evidence was unchallenged that when Ryan took the carbine it was loaded with eight rounds. Seven were positively accounted for. If the eighth could also be accounted for then Ryan could not have killed Hodson.

The vital witness on this aspect was the warder in the tower at Pentridge from which Ryan seized the carbine. He was Helmut Lange. In the witness box he described how Ryan's first action was to activate the bolt on the carbine but according to Lange he did this while the safety catch was on. The result had to be, as he agreed, to eject a live cartridge. Lange said that he did not find that cartridge, but that did not affect the position that every cartridge in the magazine had been accounted for without Ryan firing a shot.

The evidence that the carbine had fired a shot was most unsatisfactory and inconclusive. While on the run for nineteen days, Ryan and Walker drove a car to Sydney by an indirect route that took them via the Riverina and Hay during a hot summer period with no rain. The carbine was in the boot of the car. The ballistics expert examined the carbine when it was retrieved and gave evidence that it appeared to him that it had not been cleaned since it was last fired. Under cross-examination he said that he did not take any sample from the barrel to test for residue from gunpowder or cordite. He agreed that it was inevitable that the barrel would be dusty while being carried through a drought stricken rural area. The most he could say was that the barrel appeared dirty but he could not say what caused the dirt. He could not say that the weapon had been in fact fired since it was last cleaned.

A few years after Ryan was hanged I received a phone call from a man with a strong German accent. I cannot be more precise about the date as I did not note it. He refused to give his name but he said that Helmut Lange had been a friend of his. Lange came from East Prussia and they were both members of the Austrian Club in Brunswick Street, Fitzroy, where they often met for a drink and a chat in their native language. He said Lange told him that he had been on duty in the tower when Ryan seized the weapon from the rack. The first thing that Ryan did was to work the bolt on the carbine. Ryan did not seem to know much about the gun because the safety catch was on and this resulted

in bullets (plural) being thrown out on the floor.

Lange picked up the bullets (plural) and later on made a written report which he handed to his superior. At that time an inquiry was being conducted in the prison to see whether any warders had helped the prisoners to escape. About two weeks later while Ryan and Walker were still being hunted, Lange was called before his superior and asked to make another report omitting all reference to finding any bullet. Lange refused at first but he was threatened with being charged with conspiring with the prisoners to help the escape. Because he wanted to keep his job he made another report as asked.

After the hanging Lange became very worried about the false evidence he had given. In 1969 he was informed that he had been awarded a commendation for bravery for his actions during the escape and he was ordered to go to Government House to receive the award. He believed this was a pay-back for giving false evidence and he refused to go. Eventually he was presented with the award at Pentridge by the Governor of the Gaol.

On 12 April 1969 while on duty in the tower at Pentridge he committed suicide by shooting himself.

I took no action on this phone call and I have no means to verify the statements. I suggested to the caller that he convey this information to the police. For some reason he was clearly afraid of the police and hung up. However, this only confirmed what I have always believed, namely that Lange lied in the witness box. The ejection of the round made it impossible for Ryan to have committed murder.

Confirmation is further obtained from what I contend is evidence that cannot lie. Before the trial I attended three autopsies and borrowed a skeleton from the Anatomy School at Melbourne University to understand fully the course that the bullet took through the body of the deceased. I obtained from the pathologist under cross-examination that he measured meticulously the diameter of the wounds of entry and exit. They were identical, showing without question that the bullet had not been deflected in its path. Had there been any deviation the wound of exit would have been larger than the wound of entry, as bits of bone and other material would have enlarged the wound of exit.

In the result there was no contest that the bullet entered between the first and second rib on the right side and came out between the second and third rib on the left side, one inch lower than it went in. As

they were both standing on level ground, it was impossible for Ryan being 5 foot 8 inches high to shoot in a downward trajectory to cause the wounds on Hodson (6 foot 1 inch).

I was at pains to get from every eye witness who gave evidence that when shot Hodson was running upright so as to present his full height as a target. Murray commented to the jury that Hodson might well have been bending over. The evidence was all one way. Hodson was running upright as one would expect from a heavily built man who had just had Christmas dinner and was keeping his eyes on the man he was pursuing.

All independent eye witnesses deposed to hearing only one shot. A warder, Paterson, a very excitable Scot, gave evidence that at the relevant time he came out of the main gate at Pentridge armed with an identical M1 carbine to that taken by Ryan. He stood on top of the low stone wall surrounding the garden in front of the gaol and took aim at Ryan. He took a first pressure on the carbine (which as stated above would instantly fire it) but saw a woman in the way so he pulled the gun up and taking a second pressure fired harmlessly into the air.

Taking aim at Ryan he would only have to miss him by about half a degree and he would hit Hodson in the very way that in fact he was struck. By standing on the low wall he would have the necessary height to fire in a downward trajectory.

Paterson had made three conflicting statements. In the first he said he heard only one shot. In the other two he said he heard two shots. If he did, he was the only witness who heard them. From memory I think there were fourteen, not eleven, in a position to see and hear what took place. If Ryan had fired a shot, somebody other than Paterson should have heard it. I wouldn't have hanged a dog on Paterson's evidence.

Ryan was the unfortunate victim of the Premier's determination to have a hanging. After the appeal to the High Court was dismissed, a petition to the Privy Council seeking leave to appeal was filed. That was the signal for the Premier to set a date for execution before that petition could be heard. I drew a statement of claim in a writ seeking an injunction to restrain the hanging until the final outcome of the Privy Council petition.

I failed both before the judge of first instance, Menhennitt J. and the Full Court to obtain the injunction on the ground of lack of jurisdiction. Nevertheless the Full Court said that it was unthinkable that a

man should be executed before he had exhausted his ultimate right of appeal.

Reluctantly the Premier deferred the execution. He then directed the Public Solicitor to withdraw my brief as the government was not going to fund the petition. I consulted the Ethics Committee of the Bar Council to seek approval to make a public appeal for a solicitor prepared to brief me as I was prepared to pay my travel and other expenses and appear without fee. The Committee said that this would be touting for business and was unethical. I argued that a man's life was at stake and I could not see how I would be touting when no payment was involved.

I defied the ruling and on radio sought an instructor. As one might expect I was inundated with offers. I accepted the first application, being from an old friend Ralph Freadman. Two Labor party stalwarts Val Doube and Barry Jones (who was then completing articles with Norris Coates and Hearle) headed an Anti Hanging Committee and offered me a return fare to London but could not fund my junior, Brian Bourke. I accepted the offer and as luck would have it, Alleyne Kiddle was in

London completing a Master's degree and she agreed to take a junior brief at a fee of two-thirds of nothing.

As readers would know, theoretically an appeal to the Privy Council is a vestigial remnant of an appeal to the sovereign in person. The Council gives an opinion always ending with "and we shall so humbly advise Her Majesty". The actual decision is simply a few lines published in the Government Gazette announcing that the appeal has been allowed or dismissed.

Theoretically it is possible but extremely unlikely that Her Majesty may give a decision contrary to the advice of the Judicial Committee. Sir Henry Bolte took no chance of that occurring. Ryan was hanged on 3 February 1967. The decision of Her Majesty in Council to refuse leave to appeal was gazetted on 10 February.

My involvement did not end there. I was called on to show cause before the Bar Council why I should not be struck off the Roll for flouting the direction of the Ethics Committee. I decided to ignore the proceeding and make no answer. I was ultimately persuaded by many colleagues that I had to fight and allow my choice

from many volunteers to represent me. I agreed reluctantly but only on condition that personally I would take no part.

Dick McGarvie with Ivor Greenwood as his junior appeared for me. The job of prosecuting me fell to the junior silk who happened to be Ninian Stephen. He was a friend of mine, and I hope he still is. I was present in body but not in mind. What happened is a blank except that at the end I was unanimously acquitted. The Chairman Louis Voumard remarked, "What the Bar needs is more Phil Opases not one less."

I have no regrets about my conduct. I don't think I would act differently in the same circumstances today. I will always be troubled by the feeling that Ryan should have been acquitted and that I must have been inadequate for the task of defending him. At least so long as capital punishment is kept off the statute books, no member of the Bar will have to visit the occupant of the condemned cell and discuss with him or her the chance of living or dying. It is a heavy burden when in the last analysis it may all depend on you.

Philip Opas

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