Judicial reflections on the defence case — An update

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There continues to be much diversity of judicial opinion in Australia about the permissibility of negative judicial comments on the defence case. It is surprisingly infrequent even for one state to consider the law of other states. While there is a traditional position allowing judicial comments as long as they do not overawe the jury, are otherwise fair and error-free and clearly stated to be comments not directions, it has come increasingly under attack. In England the view has developed very recently that comments on the defence case should assist the jury as fact finder by drawing their attention to something they might otherwise overlook — by reason of their inexperience, for example. That thought may also be found in a few Australian cases and is proposed as the leading principle here: for judicial comments should solve a problem. On the other hand, the jury should not be told that judicial experience buttresses judicial comments as they might then give them too much weight.

Introduction

In 2005, I published in this journal an analysis of the law surrounding negative judicial commentary on the defence case during the summing-up.[1] Although Grove J in the NSW Court of Criminal Appeal was generous enough to refer to my analysis shortly afterwards as 'useful',[2] since then the issue of judicial reflections on the defence has continued to be the subject of various different opinions across Australia. Often it seems that each jurisdiction does not know what is happening next door. Recently, the stage has shifted from Adelaide to Melbourne and Sydney. The culmination of a dispute within the Supreme Court of South Australia along with my experience there during those troubles prompted my earlier article; now, in South Australia matters have settled down and there seems to be an agreed position, but trouble has erupted in Victoria, having indeed followed me here, and there have also been distinct rumblings in Sydney also.

There is a second reason for returning to the topic. Recently the Court of Appeal for England and Wales has adopted a position not far from that which I advocated in my earlier piece — although this is just coincidence, and no claim of any causal relationship between those two facts would be plausible. The English development is unknown in Australia west of the Nullarbor, and indeed the Victorian Court of Appeal has cited earlier English case law with no apparent awareness of later developments there. In brief, the idea is that judicial comments on the defence should be most readily made when they will

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1 G Taylor, 'Judicial Reflections on the Defence Case in the Summing-Up' (2005) 26 *Aust Bar Rev* 70.

2 *Taleb v R* [2006] NSWCCA 119; BC200602300 at [8].

assist the jury by enabling them to see a point which they might otherwise miss owing to their lack of experience. Judicial reflections on the defence case should not be a solution looking for a problem, but should contribute something to the trial, and they are most likely to do that when a jury might overlook a point or be taken in by a meretricious argument: it is one of the greatest strengths of the jury system that jurors bring minds unhardened by years of experience in determining criminal guilt to the trial, but a hardened mind can on occasion have something valuable to tell neophytes. To this point, on the other hand, the Victorian cases provide the important corrective that a reference to *judicial* experience as the source of such comments may lead the jury to place too great a weight upon the value of the comments.

The competing views

The traditional position

The most widespread view is, in essence, that the trial judge may comment negatively on the defence to the jury, as long as it is made clear that: any such comments are indeed clearly commentary on the facts and not directions of law by which the jury would be bound; there is no danger of the jury's being overawed by the comments and concluding that a verdict of not guilty would be 'fatuous or disrespectful';[3] and, of course, there are no errors of fact or misstatements of the defence[4] and the trial as a whole and the summing-up in particular remain fair overall (for example, by not raising an allegation which the accused had no opportunity to respond to). Extreme care must also be exercised to ensure balance if the jury reports a deadlock after some deliberation, given that a one-sided direction might clearly be used by the jury members in favour of conviction as a means of procuring a surrender by the others.[5]

Outside that particular situation, the travails of the 1990s in South Australia have culminated in the complete triumph there of the view that I have just summarised — 'the traditional position', as it is regularly called in South Australia in accordance with the words of Cox J at the height of the battle in 1997.[6] For example, in *R v MacBeth*[7] Doyle CJ (with whom the other two judges agreed) clearly thought that the wiser course for the trial judge might well have been to say nothing to contradict the defence's accusation that the complainant's distress during evidence had been scripted. The trial judge had pointed out to the jury that the distress appeared during re-examination, and that there was no guarantee that re-examination would even take place, making any idea that it had been scripted hard to support — a comment that would also pass muster if the test were whether the comment might inform the jury of something they might otherwise not realise. Doyle CJ held that, while

3 *R v Hulse* (1971) 1 SASR 327 at 335.
4 *Azzopardi v R* (2001) 205 CLR 50; 179 ALR 349; [2001] HCA 25; BC200102009 at [52].
5 *Gassy v R* (2008) 236 CLR 293; 245 ALR 613; [2008] HCA 18; BC200803348 at [30], [51], [92]-[101]; Taylor, above n 1, at 79.
6 *R v D* (1997) 68 SASR 571 at 579; BC9703801.
7 [2008] SASC 71; BC200801450 at [77]–[88]. See also *R v Duryea* (2008) 103 SASR 70; 192 A Crim R 286; [2008] SASC 363; BC200811426 at [31]-[37]; *R v Paplia* [2014] SASCFC 18; BC201401218 at [25]ff; *R v C* [2015] SASCFC 143; BC201509498 at [57]ff.

'[i]t may be that these days judges are less inclined to express a view about the facts or about an issue than they were in the past', the traditional view was nevertheless 'soundly based'.[8]

Doyle CJ repeated these views in *R v Bachra*,[9] although White J, who agreed with the Chief Justice's reasons, again thought that judicial 'restraint when commenting on the submissions of counsel concerning factual matters'[10] might be the better course. Tasmania has also adopted 'the traditional view' in the one case I can find from there.[11]

That the usual qualifications expressed at the start of this section are by no means empty is shown by *R v Allen*,[12] a case of causing death by dangerous driving.[13] The judge's statements on the key issue of whether the accused's driving showed the necessary lack of care for a conviction on that charge effectively withdrew the issue from the jury and amounted to a direction that the required lack of care had existed.[14] The accused's appeal was therefore allowed and a new trial ordered. Nevertheless it is apparent that the traditional view leaves great leeway to the trial judge to make comments on the accused's case, even those which may mention matters that would be obvious to twelve people of reasonable intelligence. And *Allen* certainly was an extreme case: the judge had said frankly to the jury — and this is not quoting him out of context — that the appellant's driving had 'created a risk which I say is out of the ordinary, and consequently you should convict him of this charge of driving in a manner dangerous to the public'.

Queensland, too, has tended to follow the traditional view; little attention is paid to s 620 (1) of its Criminal Code, which expressly permits the judge to make observations upon the evidence.[15] There, case law also vividly demonstrates that the traditional view is not a free licence to the judge and can lead to the allowing of an accused's appeal if the directions do not pay due regard to the conditions which the traditional position imposes upon judicial comments on the defence (in brief: not overawing the jury, fair and error-free and clearly stated to be comments not directions). In *R v Durham*[16] the judge used very intemperate language in describing the accused, a priest, and those who had given evidence for the defence, postulating a conspiracy to cover up the truth. A case of child sexual abuse is the last case in which a jury could be enlightened by such remarks, and the accused's appeal was rightly allowed. In *R v Fullgrabe*,[17] the evidence was significantly misstated by the judge in

8 *R v MacBeth*, ibid, at [78].
9 (2010) 108 SASR 204 at 206ff; [2010] SASCFC 42; BC201007725.
10 Ibid, at SASR 216.
11 *Carr v R* (2002) 11 Tas R 362; [2002] TASSC 60; BC200205059 at [85]. See also below n 15.
12 (2003) 39 MVR 407; 142 A Crim R 467; [2003] SASC 309; BC200305781 (*Allen*).
13 The death was, regrettably, that of a well-known lecturer in law at the University of Adelaide, who at the time was a colleague of the present contributor — the author of *Introduction to Tort*, 2nd ed, Lawbook, 1996.
14 *Allen* (2003) 39 MVR 407; 142 A Crim R 467; [2003] SASC 309; BC200305781 at [22]-[23], [62]-[67].
15 Section 371(j) of the Tasmanian Code contains a comparable provision. On Western Australia, see below n 57.
16 (2000) 110 A Crim R 92; [2000] QCA 88; BC200001066.
17 (2002) 133 A Crim R 453; [2002] QCA 366; BC200205496.

providing a comment in a far less fraught case, and the same result ensued. A similar fate would have overtaken the convictions in *R v SBA*[18] had the judge not corrected remarks based on a view of the facts that had not even been put to the accused; on an application for special leave to appeal which failed only by majority, the High Court of Australia characterised the remarks as 'several statements that were wrong and should not have been made'.[19]

Finally, an appeal was allowed in *R v Knight*,[20] a case in which the court reaffirmed the traditional position, which it had 'long adopted',[21] but again allowed the appeal because the trial judge made remarks on the alleged tendency towards gratuitous concurrence on the part of Aboriginal people giving evidence. This track record shows that a trial judge in Queensland would indeed be well-advised to reflect on the advice of the majority of the High Court of Australia in *RPS v R*[22] that 'perhaps more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel'.

New South Wales and Victoria

It is in our two largest states that unease about judicial reflections on the defence case has borne most fruit recently.

Victorian case law too has known of instances in which appeals have had to be allowed because the trial judge's comments have introduced a new factual hypothesis which the accused was not able to comment upon,[23] the trial judge shifted the burden of the prosecution case to facets of the evidence which the Crown had deliberately chosen not to emphasise[24] or the trial judge made it insufficiently clear that comments were not directions of law that must be heeded.[25] However, Victoria's separateness from the general stream of cases begins with *R v Mong*.[26] The charge was trafficking in heroin and the accused was the proprietor of the restaurant in which the heroin was handed over. The accused conceded that he knew that the package in which it was contained was at his restaurant; the issue was whether he knew that it contained heroin.

In summing-up, the judge asked the jury to consider whether a heroin dealer would:

> take that amount of heroin [697 g in weight, of which 520 g was pure heroin] to a restaurant he may never have heard of and leave it with someone, again he may never have met, without telling him what was in the parcel and ask that person to

18 (2007) 172 A Crim R 23; [2007] QCA 169; BC200703922.
19 *SBA v R* [2008] HCATrans 77 (*SBA*).
20 [2010] QCA 372; BC201010241.
21 Ibid, at [267].
22 (2000) 199 CLR 620; 168 ALR 729; [2000] HCA 3; BC200000084 at [42] (*RPS*).
23 *R v Green* (2002) 4 VR 471; 128 A Crim R 513; [2002] VSCA 34; BC20021761.
24 *R v Lao* (2002) 5 VR 129; 137 A Crim R 20; [2002] VSCA 157; BC200205918.
25 *CMG v R* [2011] VSCA 416; BC201109535 at [12]–[14], [18] (*CMG*). Contrast *KRI* v *R* [2012] VSCA 186; BC201205960 at [91]ff, [101], [108]ff (*KRI*) along with the dissenting view at [123], [131], [135]–[137], [150]; *AC v R* (2014) 42 VR 278 at 289; [2014] VSCA 71; BC201402610 (*AC*).
26 (2002) 5 VR 565; 136 A Crim R 502; [2002] VSCA 203; BC200207580 (*Mong*).

give it to a man that he, the supplier, for all we know had never met, if that man came in for dinner that day, there being no other details or instructions given to the man in the restaurant or to be passed on to the man who came to dinner. The supplier, in other words, would be taking the chance that the diner would somehow or other pay him sometime or other a sum of money which would be what he, the supplier, expects to get for the supply of the heroin, but which he has never told the man at the restaurant or the diner is the amount that he wants.

Test it further by looking at that evidence from the point of view of a supplier of heroin. Ask yourselves what would a supplier of heroin be likely to require before he would supply that amount of heroin. Would that supplier require that there be a previous arrangement made between the supplier and the purchaser as to the willingness of the supplier to supply that amount of heroin to him, would he require that there be an agreed time and place for the handing over of the heroin, that there be a place in which the heroin would be held in the possession of the supplier or under his watchful eye so that no harm could come to this block of heroin?

Would the supplier require that the heroin be provided not to a stranger but to someone that he knew well or somebody he could trust, would he require the quantity and the price of the heroin to have been agreed in advance, and as the heroin was not apparently to be paid for on the spot when it was handed over but was to be sold on to others, would he require that there would have been an agreement as to the price that was to be paid to him, the supplier, and any deductions that ought to be made by way of commission so that he, the supplier, would know that he is going to get what he wants to get for this? Would he require that there be arrangements in place about the time and place and circumstances under which he, the supplier, would be paid when this heroin is sold on and so on?

Ask yourselves whether that is the sort of scenario in which you would expect heroin of this quantity and amount to be changed over or handed over or whatever you like. In that way you can test the evidence of a witness against what I call the known facts and your own common sense and experience, whatever your own common sense and experience tell you about the probabilities of life in the real world. In the light of that, if you do that analysis, does it seem likely or probable to you or in accordance with your experience and common sense that the evidence of Mr Tang [which was consistent with the defence case that the accused did not know what was in the package] is truthful and reliable, and that is the decision that you have to make in the light of the analysis that you make.[27]

Referring to the warning of the majority in *RPS*[28] just quoted but to none of the usual cases in which the judge's capacity to comment on the defence evidence under the 'traditional position' is affirmed, the Court of Appeal for Victoria held that 'his Honour's analysis was devastating', 'went too far' and had left the evidence in question 'in tatters' and had caused the trial to miscarry.[29] It may be that this was an extreme case; worse comments could, however, be imagined, and it is remarkable that there was no consideration of the 'traditional position' authorities allowing judicial comment within limits. If the test advocated here were adopted, it might be more generous to the trial judge: the principal question would be whether these remarks assisted the jury by drawing their attention to matters they might otherwise overlook. An edited version of these comments would do just that, given that the accumulated judicial experience with the customs of drug dealers is unlikely to be shared

27 Ibid, at [22].
28 (2000) 199 CLR 620; 168 ALR 729; [2000] HCA 3; BC200000084.
29 *Mong* (2002) 5 VR 565; 136 A Crim R 502; [2002] VSCA 203; BC200207580 at [29].

by the average jury, and it is probable that the trial judge had just such thoughts in his mind as he made the remarks quoted to the jury. Nevertheless, they clearly go on too long and adopt too much of an advocate's tone, at least when read in the report of the decision.

It was, however, in the recent case of *Hermanus v R*,[30] a historical sexual case involving several allegations affecting a child of early primary-school age, that views in the Court of Appeal for Victoria began to diverge. Nevertheless, there is clearly an appreciation on both sides of the fence of views on the other: giving the lead judgment for the majority, Osborn JA referred to 'some misgivings as to aspects of her Honour's directions',[31] while Priest JA in dissent would have allowed the appeal '[n]ot without some reluctance'.[32]

The divergence of opinion had arisen because of the trial judge's directions on possible explanations for delay in the complaint. This is a question which is affected by statute, and the statute has recently changed; s 52(4) of the Jury Directions Act 2015 (Vic) now states that, if there is evidence of delay in complaining on the part of the complainant:

> the trial judge must inform the jury that experience shows that —
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> (a) people may react differently to sexual offences and there is no typical, proper or normal response to a sexual offence; and
> (b) some people may complain immediately to the first person they see, while others may not complain for some time and others may never make a complaint; and
> (c) delay in making a complaint in respect of a sexual offence is a common occurrence.[33]

In the summing-up in question, however, the judge had gone even further and referred, for example, to recent publicity about historical sexual cases involving family members, schoolteachers, members of the clergy and so on and to the fact that the jury 'may think that it takes a lot of courage to [complain], and a lot of emotional strength to follow it through'.[34]

In the majority dismissing the accused's appeal, Osborn JA cited the abovementioned note of caution from *RPS*, but the decision was, with one exception, otherwise an unremarkable application of existing principles. There was one noticeable addition, namely a discussion of the English case of *R v MM*.[35] As will be shown below, this case does not represent the final word in England and Wales, but it was apparently the most recent one which his Honour, or his associates, were familiar with. That case approved a judicial comment to the effect that, 'with common sense and knowledge of the world', a jury should consider that a child might hesitate to complain because, for

30 [2015] VSCA 304; BC201511229 (*Hermanus*).
31 Ibid, at [7].
32 Ibid, at [129].
33 Reference should also be made to n 3 to s 51, which preserves the ability of the Judge and the defence (as well as the Crown) to suggest that a particular complainant's credibility may be affected by delay.
34 *Hermanus* [2015] VSCA 304; BC201511229 at [137].
35 [2007] All ER (D) 196 (Jun); [2007] EWCA Crim 1558 (*MM*). The case had, however, been mentioned briefly in *KRI* [2012] VSCA 186; BC201205960 at [95], [137] n 74; *AC* (2014) 42 VR 278; [2014] VSCA 71; BC201402610 at [78]ff.

example, the consequences of doing so could be 'unpredictable and sometimes calamitous',[36] and those latter words appeared virtually unchanged in the trial judge's direction in the case at hand in Victoria. Osborn JA also denied that the comments in the case at hand involved 'unduly emotive language. A judge is entitled to make comments in strong language provided that they are relevant and are not unbalanced'.[37] The second majority judge, McLeish JA, in effect endorsed those last comments[38] and otherwise provided an orthodox defence of the judge's comments, although his Honour was less enthusiastic about *MM*.[39]

In dissent, Priest JA rejected the law laid down in *MM*, 'a somewhat obscure case [. . .] which clearly turned on its own facts': it was 'wrongly decided'[40] and 'should emphatically be disapproved'; particular disapproval was reserved for the word 'calamitous' 'and other fraught language'.[41] His Honour, without referring to the standard authorities on the point — although they can hardly have been unknown to a distinguished former member of the criminal Bar, and they had been referred to in the majority judgments anyway — made a plea for greater restraint in judicial summings-up, particularly in cases of this sort:

> Reading the judge's comments as a whole — although other members of the court may not share my view — my strong impression is that they were couched in language more befitting an advocate's address to a jury than a judge's charge. True it is that they were prefaced by a direction that they were mere comments which could be accepted or rejected, but, coming from the judge, they would have assumed a deal of legitimacy and weight in the eyes of the jury. Moreover, the comments were in part expressed in seemingly emotive language supporting emotive content. It might be acknowledged that any discussion of the sexual abuse of children is likely to provoke strong emotional reactions in ordinary people. So much merely seeks to emphasise, however, the need for restraint when making any comment on the subject. Hence it was, to say the very least, unfortunate that the judge saw fit tacitly to link the applicant's case with well-publicised cases of sexual offending against children at the hands of family members, teachers, clergy and others having authority over them, and the disclosure of such childhood abuse in adulthood. Furthermore, to speak of a 'trigger or a need . . . to disclose or to speak out', which is 'no easy thing to do', and which the jury might think 'takes a lot of courage . . . and emotional strength to follow through', could only have been understood by the jury as a direct reference to the central issue arising in the case, and as a direct endorsement of the prosecution's arguments concerning delay made in the course of the prosecutor's final address . . .
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> The judge's very direct comments, all of which favoured the prosecution case, and many of which were couched in emotionally charged language on a subject with inherently emotive themes, made by a judge whose office the jury might be expected to respect, would have had a powerful effect upon the jury. The comments were not balanced by any comments favourable to the defence case. In my view, not only did they have the potential unfairly to skew the jury's consideration of the case in favour

36 *MM*, ibid, at [14].
37 Ibid, at [58].
38 Ibid, at [173].
39 Ibid, at [175].
40 Ibid, at [142].
41 Ibid, at [148].

> of the prosecution, but indeed I think it probable that the comments would have lived up to their potential, and in fact have compromised a dispassionate assessment by the jury of the case against the applicant. The judge's comments led to the charge being gravely unbalanced. They have occasioned a substantial miscarriage of justice.[42]

One thought that this prompts is that it is true that the summing-up as a whole should be balanced, but the traditional position does not require individual comments on the facts to be balanced by equal and opposite comments favourable to the defence — as long as it is clear that the remarks are a comment which the jury may reject, the jury is not overawed, there are no misstatements of fact and no other unfairness such as raising an allegation which the accused should have had an opportunity to respond to. This judgment, which elides those two issues of balance in the comments and in the summing-up, is nevertheless a plea for greater restraint in judicial comments, particularly in emotive cases, and appears to be an attempt to move the law away from the hallowed traditional position.

In New South Wales, also, there has been some considerable judicial dissension and a marked movement away from the traditional position. This may have started as long ago as 2000, although the disagreement in *R v Sinanovic*[43] between Hulme J, on the one hand, and Wood CJ at CL and James J on the other is more easily explicable as based on a factual matter — the fact that the accused was unrepresented being the primary one — and there was no hesitation expressed, on either side, about the applicable law (namely, the traditional position). However, in *R v Heron*[44] Priestley JA, with the agreement of the other two members of the court (Foster AJA and Simpson J), thought that 'as a matter of rationality it seems difficult to dispute'[45] the view that, if the judge's opinion should not govern or influence the jury (two quite different things), it should not be expressed at all.

In *R v RTB*,[46] a unanimous court allowed an appeal in a case in which two judicial comments had been made. One was that the lack of evidence by the complainant about a particular count might simply be due to her forgetfulness rather than going to her credibility, as the accused had argued. The other was to the effect that her statement that the accused had penetrated her 'lots of times' might refer not to separate incidents, but to multiple penetrations during the one incident. The court held that '[i]n neither case was there any necessity for the trial Judge to say anything to the jury'[47] — the traditional position knew nothing of 'necessity' as a criterion for judicial comments upon the defence case. Their Honours (Spigelman CJ, Wood CJ at CL and Kirby J), in allowing the appeal, stated further that '[s]uch matters of speculation, whilst perhaps appropriate for counsel, should not receive the added weight of the intervention of the judicial officer'.[48] And in *Taleb v R*,[49] Grove J. identified

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42 *Hermanus* [2015] VSCA 304; BC201511229 at [139]ff.
43 [2000] NSWCCA 396; BC200007663.
44 [2000] NSWCCA 312; BC200004837.
45 Ibid, at [80].
46 [2002] NSWCCA 104; BC200201374.
47 Ibid, at [55].
48 Ibid, at [60].
49 [2006] NSWCCA 119; BC200602300.

a 'trend [. . .] that judges will be required to exercise greater restraint in comment'.[50]

However, this impression was largely based on the analysis of Simpson J in the same case, and her Honour's analysis was itself somewhat imbalanced in its survey of the case law in general and the South Australian dispute of the late 1990s in particular.[51] As was noted in the civil case of *Channel Seven Sydney Pty Ltd v Mohammed*,[52] her Honour had referred only to the initial South Australian case in which change was proposed and not to the later ones in which the 'traditional position' had been reasserted and confirmed. Hulme J repeated this point perhaps more forcefully than was strictly necessary in *Chen v R*:

> It is not immediately obvious that Simpson J.'s remarks can be reconciled with the authorities to which I have referred. So far as the first aspect of the submission is concerned, unless the judge is an abject idiot, when listening to the evidence he cannot fail in almost all cases to form at least some view as to the guilt of an accused. Furthermore, in virtually all cases there is a distinct possibility that the judge will, after the jury's verdict, have to sentence the person being tried. While the verdict itself will determine a number of issues, in many cases it can't be assumed that it will determine all, and that the judge will have no decisions to make as to the circumstances of the offence. He would be remiss in his duty if he refused to countenance forming some views while the evidence was progressing.[53]

Of course, the question is not whether the judge should form views, but whether they should be expressed to the jury.

A functional view

I suggest that the principal reason for this confusion and conflict among the authorities is that there is insufficient, or even no consideration in much of the case law of what function a judge's comments on the defence case to the jury are actually meant to serve — what the problem is that is being attacked within the framework of the jury's being the sole fact finder. Now, it is certainly a strength of the system of trial by jury that it avoids either the perception or the reality of 'case hardening'. A jury consists of lay people who have not heard the same old defences again and again and should therefore be able to treat each case as the unique event that it is rather than looking at it through the prism of many previous and largely unsuccessful attempts to run similar defences. However, that advantage comes with the equal and opposite disadvantage that the jury might not recognise that there is possibly a lack of merit in a particular defence argument, or at least that things are not as simple as they might seem. An example that springs to mind, based on *R v Webb*,[54] is that the failure of the complainant to give a connected and/or consistent account of the events may be due not to any lack of truthfulness, but rather to the trauma of the events themselves and the consequent difficulty in recalling and relating them. Statutes now add a further example: the fact that delay in

50 Ibid, at [7].
51 Ibid, at [73]–[85].
52 (2008) 70 NSWLR 669; [2008] NSWCA 21; BC20081248 at [52].
53 [2010] NSWCCA 224; BC201007709 at [60].
54 (1997) 68 SASR 545; BC9702336.

reporting sexual crimes is not abnormal or an indicator of lack of credibility, however much difficulty it may add to the task of a defendant.

Judicial reflections on the defence case will be most valuable and most easily justified when they attack this problem and indicate to the jury a point which they might otherwise overlook or underestimate the significance of. It is certainly true that the Crown can do this also, but the authority of the judicial office may need to be lent to such a point; and in most jurisdictions nowadays, the Crown's address always precedes that of the defence anyway, which means that the point may not be apparent to the judge until it is too late for the Crown to respond. Adopting this as the primary condition for judicial reflections on the defence means that judges' comments will be 'helpful in understanding the possibilities in the present case', in the words of Osborn JA in the majority in *Hermanus*.[55] As the Court of Appeal for New South Wales said in *Mohammed*,[56] 'Part of ensuring a fair trial is assisting the jury to assess the facts and come to conclusions, and no doubt comment on the facts can properly assist'.

This is a view which informs a recent judgment of the Court of Appeal for Western Australia. While Western Australia has also seen cases which simply apply the 'traditional position',[57] in *Bowles v Western Australia*[58] a most experienced former prosecutor, Hall J, with the concurrence of the rest of the court, said:

> [T]here may be witnesses who will require the trial judge to elaborate further in their directions. This will be because it may not be readily apparent to the jury that factors which would be otherwise useful in assessing the credibility of a witness may be less reliable for a particular witness due to some disability or significant characteristic of the witness. There may be a danger that a jury drawn from the dominant culture will unthinkingly assess a witness based upon their own unconscious assumptions in regard to levels of understanding, educational background and appropriate responses. In those circumstances, it may be necessary for a judge to suggest to a jury that they may need to use care in respect of a particular witness in applying these assumptions.
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> . . .
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> In my view, there was a proper basis for the trial judge to give directions to the jury in regard to the complainant's evidence. There was, of course, an available explanation for the inconsistent answers given at the first interview; the complainant said that she had not told the truth on this occasion because she was scared. As to the cross-examination, a great deal of it was in leading form. There is nothing in itself unusual about this. However, with some Aboriginal witnesses and indeed child witnesses, the desire to be compliant with the questioner may reduce the reliability of answers to such questions. Indeed, as defence counsel pointed out, there were indications that the complainant was 'suggestible'. Of course, he was doing so in

55 *Hermanus* [2015] VSCA 304; BC201511229 at [48].

56 (2008) 70 NSWLR 669; [2008] NSWCA 21; BC200801248 at [49].

57 *Perombelom v Western Australia* [2006] WASCA 168; BC200606631 at [14]; *Smith v R* (2008) 37 WAR 297; 67 ACSR 15; [2008] WASCA 128; BC200804494 at [150]-[169], [271]-[304]. Western Australia also enjoys, as a Griffith Code jurisdiction, a provision which expressly permits the judge to 'make any observations about the evidence that the Judge thinks necessary in the interests of justice': Criminal Procedure Act 2004 (WA) s 112. For comparable provisions in other states, see above n 15.

58 [2011] WASCA 191; BC201107385 at [52], [61].

> regard to the second interview. Nonetheless, the point was well made and the jury might not have readily appreciated the difference in the form of the questions put in the second police interview as compared to the cross-examination.

This is merely an instance of a circumstance under which judicial comment may be valuable; there are plenty of witnesses from the 'dominant culture' also whose evidence might be more reliably assessed by a jury if there is some judicial comment on a supposed weakness in it — such as its allegedly inconsistent account of traumatic and frightening events.

In England, this point has also started to appear in judgments — after the case of *MM*,[59] which has been the subject of so much discussion in Victoria. Thus, in *R v JD*[60] the court approved judicial comment 'particularly in areas where there is a danger of a jury coming to an unjustified conclusion without an appropriate warning [. . .] to ensure fairness to the complainant'.[61] In that case, however, the court gave a useful warning by holding that the judge should have set out more fully the accused's contentions about the significance of delay in order to ensure fairness to him, while at the same time holding that the conviction was not unsafe and the appeal should therefore be dismissed.[62] The words just quoted were repeated and quoted with approval 2 years later by a differently constituted Bench of the Court of Appeal for England and Wales in *Miller v R.*[63] In that case the court added that such comments should be put to counsel before the jury hears them[64] — a very sensible practice. In the following year, with the court again differently constituted, *GJB v R*[65] approved both *JD* and *Miller* and added the important reminder not only that the defence case should be clearly put, but also that such comments must not assume the guilt of the accused but be made clearly conditional on the truth of the allegations.

Thus the insight has begun to emerge in England that the judge's adverse comments on the defence case should serve a purpose — the purpose being to inform the jury of a consideration that they, as neophytes, might otherwise miss but which is apparent to the Judge on the basis of greater experience of criminal trials. Victorian case law adds, however, an important qualification: the jury should not be told that a judicial comment on the facts that is adverse

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59 [2007] All ER (D) 196 (Jun); [2007] EWCA Crim 1558. In that case, too, however, the point is foreshadowed, with the court stating at [16] that:

> in our judgment the jury did need some assistance as to the reasons why it might be that it might take time for girls to make allegations of this nature. The jury would have been very well aware that allegations are of course sometimes made up. They would have been very well aware that that was the decision that they had to make in this case. They might not have been so aware of why it is that early complaint is not made in respect of these allegations and the Judge was, in our view, entitled to give the measured comment that he did.

60 [2008] EWCA Crim 2557.

61 Ibid, at [11].

62 When s 2 (1) of the Criminal Appeal Act 1968 (UK) was amended by the Criminal Appeal Act 1995 (UK), the tripartite grounds for allowing a criminal appeal still usually found in Australian legislation (eg, Criminal Law Consolidation Act 1935 (SA) s 353 (1)) were replaced by a single ground — namely, that the conviction was unsafe.

63 [2010] EWCA Crim 1578 at [24].

64 Ibid, at [26].

65 [2011] EWCA Crim 867 at [26].

to the defence is based on judicial experience, for otherwise the jury might give too much weight to it or even mistake it for a direction of law.[66] 'The proper course is to express such a comment in terms which make it clear that the comment is directed to identifying reasonable possibilities as a matter of general human experience rather than judicial experience.'[67] The statute law of Victoria recognises this too: s 52 (4) of the Jury Directions Act 2015 states that the possible reasons for delay and its common occurrence must be the subject of a direction to the jury with the preface that experience has shown them to exist — the statute wisely does not say judicial experience.

Conclusion

Clearly there is something to be said for both positions which have predominated in Australian case law to date. The traditional position, as well as being sanctioned by decades of practice, pays respect both to judicial experience and to the fact that juries are not cyphers. On the other hand, the question asked in the NSW case of *Heron*[68] is a valid one: if judges' comments can freely be ignored by the jury, why make them at all?

It is suggested here that the answer to this question lies in asking ourselves what judicial comments adverse to the accused are meant to achieve. It cannot be merely an opportunity for the judge to display superior advocacy skills to those of the Crown prosecutor, let alone to sound off about the accused's misdeeds or to shift the focus of the Crown case. Judicial comments on the defence case should serve a purpose. It is strange indeed that so many decisions are handed down without considering at all, even in a single sentence, what purposes judicial criticism of the defence is supposed to serve.

Cases are too various, and judicial comments too disparate, to admit of a formulaic approach to the admissibility of judicial reflections on the defence case. But when the issue is raised, the first and principal question that is asked should be: did this judicial comment assist the jury by drawing their attention to something which, as neophytes, they might otherwise have overlooked? Or is there some other serious purpose which the adverse comments served and which might otherwise not be adequately pursued?

66 This is not a new point: see Taylor, above n 1, at 86ff. Cases from Victoria making this point, apart from that to be referred to in the text, include *KRI* [2012] VSCA 186; BC201205960 at [101], [131]; *Hermanus* [2015] VSCA 304; BC201511229 at [31]–[34].

67 *AC* (2014) 42 VR 278; [2014] VSCA 71; BC201402610 at [78].

68 *R v Heron* [2000] NSWCCA 312; BC200004837.