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Denigration of the Criminal Justice System
A reflection of the 1970s New Zealand courts through an
analysis of the Arthur Allan Thomas trials

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II Abstract

This paper is a critique of New Zealand's criminal justice system as it existed in the 1970s. Through an analysis of the Arthur Allan Thomas trials, in which the courts failed to produce a just result, it will demonstrate how the system was crippled by three of its major components; the prosecution, the judiciary and the jury. While acknowledging the prominent roles played by the defence and the police in the Thomas case, they will not be the focus of this paper. After setting out the chronology of appeals and proceedings that lead up to Thomas' royal pardon, this paper will go on to explain why the criminal justice system was ineffective. It will do so by unravelling the systematic bias and unethical practice that occurred within the prosecution and the judiciary. Lastly, it will illustrate the adverse effect such practices had on the impartiality of jurors.

Keywords: Arthur Allan Thomas, New Zealand criminal justice system, 1970s

III Introduction

The New Zealand criminal justice system operates on various protection mechanisms intended to prevent unjust outcomes. These include the New Zealand Bill of Rights Act 1990, the Criminal Disclosure Act 2008, the onus of proof on the prosecution and rules regulating lawyers' conduct.¹ During the 1970s, these safeguards either did not exist in their current form or were not always complied with. This paper critiques the state of the criminal justice system during that period by exposing the flaws within three major components of the court system. It will do so through an analysis of the Arthur Allan Thomas trials.

The prosecution of Arthur Allan Thomas is one of the most controversial cases in New Zealand's contemporary legal history. The case triggered a significant shift in the country's perception of the criminal justice system. When the 1980 Commission of Inquiry revealed a critical piece of evidence was planted by the police,² public confidence in law enforcement diminish dramatically. The police played a key role in securing a conviction

¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008; and "Solicitor-General's Prosecution Guidelines 2013" (28 June 2013) Crown Law Office <http://www.crownlaw.govt.nz/artman/docs/cat_index_13.asp>.

² *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe* (PD Hasselberg, Government Printer, Wellington, 1980) at [350].

and police corruption is the aspect of the case most vividly remembered today. However, Thomas' ten year struggle for justice also resulted from deficiencies within the prosecution, the judiciary and the jury. The failure of the courts to produce a just result was also subject to widespread criticism. This paper focuses on the conduct of these three components of the adversarial court system during the Thomas trials. For the purposes of this paper the actions of the defence will not be analysed.

The available sources reveal that during the course of the two Supreme Court trials, the prosecution appeared to show a greater interest in obtaining a conviction than producing a just result. It manipulated evidence and used unethical tactics to ensure the preservation of a guilty verdict. The judges were allegedly pro-prosecution and stubbornly stood beside their verdict in spite of the evidence. Furthermore, there was a real likelihood the influence of the judiciary and the prosecution deprived Thomas of the right to an impartial jury. Regrettably, there are few sources available in defence of the system. This may be due to the fear of attracting strong public backlash or because the system was largely indefensible.

IV Setting the Scene

On 17 June 1970, Harvey and Jeannette Crewe were murdered in their Pukekawa farmhouse.³ Their bodies were later discovered in the Waikato River, both with a .22 bullet to the head.⁴ Having examined a modest collection of 64 rifles against the recovered bullet fragments, the Department of Scientific and Industrial Research (DSIR) concluded only two rifles could not be excluded as having shot the fatal bullets; one of which belonged to local farmer Arthur Allan Thomas.⁵ Adding to this his affection for Jeannette in the past, Thomas became the prime suspect in the police investigation. The discovery of a cartridge case (exhibit 350) in an allegedly unsearched flowerbed on the Crewe farm marked the tipping point of the case against Thomas. The DSIR established that exhibit 350 belonged to his rifle and it was this piece of planted evidence that led to Thomas' arrest in November 1970.⁶

³ *Report of the Royal Commission*, above n 2, at [436].

⁴ At [54].

⁵ "Crown Case in Crewe Murder Trial" *The New Zealand Herald* (Auckland, 16 February 1971) at 5.

⁶ David Yallop *Beyond Reasonable Doubt?* (Hodder and Stoughton, Auckland, 1978) at 76.

The first trial ended on 2 March 1971 with a guilty verdict on both counts; Thomas was sentenced to life imprisonment for the murder of Harvey and Jeannette Crewe.⁷ An appeal against the conviction was dismissed.⁸ In response to several petitions, the case was reviewed by former Supreme Court judge Sir George McGregor. In February 1972, McGregor produced a report advising against a new trial.⁹ The ‘Arthur Allan Thomas Retrial Committee’ was tenacious in its efforts to have Thomas acquitted. In August 1972, it was successful in its application to have the case referred to the Court of Appeal,¹⁰ and on 26 February 1973 the Court ordered a second trial.¹¹

The second trial began on 26 March and the jury delivered its verdict on 16 April 1973. Yet again, Thomas was found guilty of double murder.¹² An outcry erupted in the public gallery with some individuals banging on windows and others chanting in anger. A furious crowd could still be found screaming outside the Supreme Court an hour after the conviction.¹³ It was evident that a cynicism towards the criminal justice system was developing in New Zealand.

On 11 July 1973, the case came before the Court of Appeal on grounds of unfair conduct by the prosecutor.¹⁴ For reasons discussed later, this appeal was dismissed. In 1974, two questions were referred to the Court of Appeal relating to new evidence on exhibit 350.¹⁵ This too was dismissed and an application to the Privy Council in 1978 appealing this decision was refused.¹⁶ Defence counsel contended that the Court of Appeal erred in law in its interpretation of the onus of proof, but the Privy Council advised that it had no jurisdiction to entertain the appeal.¹⁷ The main focus of this paper will be on the 1971 and 1973 Supreme Court (now the High Court) trials.

⁷ “Thomas Sentenced To Life Imprisonment For Farm Murders” *The New Zealand Herald* (Auckland, 3 March 1971) at 4.

⁸ *Report of the Royal Commission*, above n 2, at [23].

⁹ At [24].

¹⁰ Yallop, above n 6, at 207.

¹¹ *Report of the Royal Commission*, above n 2, at [24].

¹² “Jury Find Thomas Guilty of Crewe Murders” *The New Zealand Herald* (Auckland, 17 April 1973) at 3.

¹³ Gabriel David “Mass Hysteria Erupts when Guilty Verdict Delivered” *The Evening Post* (Wellington, 17 April 1973) at 11.

¹⁴ *R v Thomas (No 2)* [1974] 1 NZLR 658 (CA).

¹⁵ *Report of the Royal Commission*, above n 2, at [27].

¹⁶ *R v Thomas* [1978] 2 NZLR 1 (PC).

¹⁷ At 8.

It was apparent to a large portion of the country that the case against Thomas was flawed.¹⁸ Yet, after exhausting what seemed like every avenue of the criminal justice system, Thomas was still no closer to an acquittal. Prime Minister Robert Muldoon was one of many with reservations about the outcome, feeling the prosecution had not proven Thomas' guilt to the mandatory standard. In his opinion, both juries were not presented with sufficient evidence to find Thomas guilty beyond reasonable doubt.¹⁹

Following the publication of David Yallop's book in 1978, Muldoon took the matter to cabinet recommending an independent inquiry into the case. The product was a report by Robert Adams-Smith QC which contained serious criticisms of the evidence used against Thomas and raised doubts about the satisfaction of the standard of proof.²⁰ Consequently, on 17 December 1979, acting on the recommendation of Minister of Justice Jim McLay, the Governor-General exercised his royal prerogative. Thomas was granted a free pardon pursuant to s 407 of the Crimes Act 1961, leading to his release that year.²¹

In 1980 a Royal Commission of Inquiry (the Commission) was established to inquire into the circumstances of the two convictions and to determine the quantum of Thomas' compensation.²² This body utilised an inquisitorial process as opposed to the adversarial system used by the New Zealand courts.²³ It was not until then a wrongful conviction was finally recognised.

V The Prosecution

Appearing for the Crown in both trials were two highly competent prosecutors, David Morris and David Baragwanath.²⁴ As for Thomas, he had the robust representation of accomplished defence lawyers Paul Temm QC in 1971,²⁵ and Kevin Ryan in 1973.²⁶ The presence of equally proficient counsel arguing for either side ought to produce a just result. However, reality demonstrated that this may only represent the baseline of what is required

¹⁸ See "Angry Crowd Reaction to Verdict Scares Jury" *The New Zealand Herald* (Auckland, 17 April 1973) at 1; and "They Believe in Thomas's Innocence" *The Evening Post* (Wellington, 29 August 1973) at 8.

¹⁹ Robert Muldoon *My Way* (Reed, Wellington, 1981) at 144.

²⁰ At 145.

²¹ *Report of the Royal Commission*, above n 2, at [29].

²² Barry Gustafson *His Way: A Biography of Robert Muldoon* (Auckland University Press, Auckland, 2000) at 291.

²³ *Report of the Royal Commission*, above n 2, at [486].

²⁴ "Crown Case in Crewe Murder Trial", above n 5, at 5.

²⁵ At 5.

²⁶ "Isolation Order For Jury in Thomas Trial" *The New Zealand Herald* (Auckland, 27 March 1973) at 3.

to establish true equality of arms. In a number of aspects, the prosecution had secured noticeable advantages over the defence.

A The Desire for Conviction

It is a well-established principle of legal practice that prosecutors are first and foremost officers of the court or “ministers of justice”.²⁷ Rather than solely acting in the interests of a particular party, prosecutors owe a wider duty to assist the court in ascertaining the truth and securing justice. The notion that prosecutors must not “struggle for a conviction” emerged in the early 19th century, and was authoritatively reaffirmed in *R v Puddick*.²⁸ The New Zealand Court of Appeal in its 1973 decision referred to this case with approval.²⁹ However, the Court added that prosecutors must be as firm as the circumstances necessitate to present a fair and complete case.³⁰

The principle can now be found in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and the Solicitor General’s Prosecution Guidelines 2013. These two documents state that prosecutors shall perform their obligations impartially. They must avoid arousing prejudice or bias against the defendant, and present their case dispassionately and without inflammatory language.³¹ The guidelines also endorse the Court of Appeal’s 1973 position, permitting prosecutors to act as strong advocates prosecuting their case “forcefully in a firm and vigorous manner.”³²

In spite of the prosecutor’s role as an impartial officer of the court, by the arrival of the second trial a strong desire for conviction was allegedly shared by both the police and the prosecution.³³ Since the first trial, the circumstances had changed dramatically. *Sunday News* columnist Odette Leather observed that “[t]he trial of Arthur Thomas has ended, but in its stead a strange new trial has begun. The defendant in this instance is ‘the system’.”³⁴ By 1973 the entire criminal justice system had been vilified. This included the judge, the police, and prosecutors Morris and Baragwanath. The integrity of those constituting the

²⁷ David Plater “The development of the Role of the Prosecuting Lawyer in the Criminal Process: ‘Partisan Persecutor’ to ‘Minister of Justice’” (2006) ANZLH E-Journal 1 at 3.

²⁸ At 11.

²⁹ *R v Thomas No. 2*, above n 14, at 659.

³⁰ At 659.

³¹ Lawyers and conveyancers Act (lawyers: conduct and client care) rules 2008 (SR 2008/214), above n 1, r13.12; and “Solicitor-General’s Prosecution Guidelines”, above n 1, at 19.3.

³² At 19.3.

³³ Kevin Ryan *Justice: Without Fear or Favour* (Hodder Moa Beckett, Auckland, 1997) at 135.

³⁴ Yallop, above n 6, at 202.

system was under “extraordinary attack.”³⁵ As a result, the desire for conviction was supposedly “very deep” and “very personal.”³⁶ Such a desire can be perceived through the prosecution’s close collaboration with the police,³⁷ excessive collation of juror-related information,³⁸ heavy angling of evidence during cross-examination,³⁹ the wrongful use of the subpoena,⁴⁰ and its part in destroying important exhibits in 1973.⁴¹ Muldoon acknowledged this desire, but was sympathetic to those striving for a conviction:⁴²

There is no doubt that, once they decided that Thomas was the murderer, the police used every trick in the book to have him convicted, and they were successful. This is not a criticism of the police. They have a tough job in getting convictions of people who are undoubtedly guilty and they constantly face defence lawyers who also use every trick in the book. In the Thomas case, the police were so keen to get a conviction that they actually used a mobile command post stationed outside the Supreme Court...

B Preferential treatment

The difference in treatment received by counsel gave the prosecution an edge. Kevin Ryan, representing Thomas in the second trial, recalled the marked lack of courtesy and deliberate denigration of defence counsel and defence witnesses by the Department of Justice and certain police officers.⁴³ While the prosecutors were perceived as comrades of the Department, the defence was demonised. Preferential treatment was not limited to mere niceties. The relationship between the prosecution and the police could be construed as a partnership while there was little incentive for the police to aid the defence. As a result, there was a major disparity in the resources available to both sides.⁴⁴

The prosecution had at its disposal the entire police force to facilitate the process of analysing and gathering evidence. Throughout the second trial, a police caravan was parked outside the Supreme Court in which officers monitored the case as it progressed.⁴⁵

³⁵ Yallop, above n 6, at 217.

³⁶ Ryan, above n 33, at 135.

³⁷ “Verdict in Thomas Trial Expected Today After Summing up by Judge” *The New Zealand Herald* (Auckland, 16 April 1973) at 3.

³⁸ *Report of the Royal Commission*, above n 2, at [463].

³⁹ Pat Booth *The Fate of Arthur Thomas: Trial By Ambush* (South Pacific Press, Auckland, 1975) at 99.

⁴⁰ Yallop, above n 6, at 116.

⁴¹ *Report of the Royal Commission*, above n 2, at [402].

⁴² Muldoon, above n 19, at 144.

⁴³ Ryan, above n 33, at 135.

⁴⁴ At 135.

⁴⁵ Yallop, above n 6, at 222.

Detective Inspector Bruce Hutton revealed that its purpose was to assist the prosecution by carefully scrutinising the evidence and the arguments made by the defence. Officers were swiftly dispatched to acquire evidence detrimental to Thomas' case.⁴⁶

On the other hand, the defence was not so well-equipped. During his opening address, Ryan noted that the defence "did not have the money nor the means nor the power to be able to do the same preparation".⁴⁷ He went on to say, "I do not think that when a person challenges the State, as happened in this particular case, that they start off equal."⁴⁸ This was not a comment on the skills of counsel or the cost of specialist fees, but the unfair level of assistance the prosecution received from the police department: "when you are in this Court you can't chase around looking for witnesses. You can't have a caravan placed by the Court and plugged in, like the police."⁴⁹

C Unethical Tactics

Competition is inherent in an adversarial system. The system relies on a degree of rivalry between counsel to ensure all possibilities are presented and meticulously analysed. In a wide sense, in advocating for their respective parties, counsel are essentially cooperating to ascertain the truth. However, the practical reality of an adversarial system is that the result is not determined by who can present the best case based on the evidence, but rather which lawyer is better at employing tactics. The danger of using tactics in court is that they may serve the function of shrouding the truth rather than exposing it.⁵⁰

The subpoena, a device used to compel witnesses to give evidence in court, was used as a pre-trial tactic. The prosecution abused the power of subpoena by using it for a different purpose, that is, to prevent defence counsel from interviewing certain witnesses before the trial.⁵¹ Peter Thomas, Thomas' cousin, had been living with Thomas and his wife. He was an important witness for the defence as he insisted the accused had never left the farm the night the Crewes were murdered. Temm was prevented from interviewing him before the first trial as Peter Thomas had been subpoenaed by the Crown. Subpoenas were also served on Bruce Roddick and other key witnesses, though the prosecution never intended

⁴⁶ Yallop, above n 6, at 223.

⁴⁷ "Verdict in Thomas Trial Expected Today After Summing up by Judge", above n 37, at 3.

⁴⁸ At 3.

⁴⁹ At 3.

⁵⁰ R J Gerber "Victory v Truth: The Adversary System and its Ethics" (1987) 19 Ariz St LJ 3 at 4.

⁵¹ Yallop, above n 6, at 116.

to call on them.⁵² This hindered the defence's ability to gather evidence and properly prepare its case for trial. Other tactics employed by the prosecution included the selective presentation of facts and the suppression of evidence. By withholding material that was of value to the defence, the prosecution was able to construct a set of facts most favourable to the Crown case. This is discussed below.

D The Prosecution and the Evidence

There are four major issues pertaining to the way the prosecution handled evidence prior to, during, and after the trials. More specifically, its selective presentation of facts, lack of disclosure, skewing of evidence, and destruction of evidence.

1 The Selective Presentation of Facts

The efficacy of the adversarial system is contingent on the jury making an informed decision; this must involve hearing all the evidence. A major criticism of the prosecution was its selective presentation of facts. For example, Morris relied on Thomas' retention of an old letter from Jeannette as proof of Thomas' continuing obsession and "passion"⁵³ for her.⁵⁴ The prosecution chose not to reveal that Thomas had produced this letter to the police of his own volition and also kept a number of letters written to him by other woman around the same time.⁵⁵ In breach of disclosure obligations, these letters were withheld during the first and second trial.⁵⁶

The considerable body of evidence *for* Thomas' innocence was not heard by either of the juries.⁵⁷ This is because the defence was deprived of the opportunity to present its case fully. The lack of appreciation given to the rules on disclosure and the disparity in resources made it difficult for Temm and Ryan to strike back. The police in aid of the prosecution deliberately suppressed any evidence favourable to the defence.

One witness relayed to the police that she heard gun shots coming from the Crewe farm on the 17 June, at a time that suggested the Crewes were murdered before Thomas and his family had gone to bed.⁵⁸ This was dismissed by the police along with evidence indicating

⁵² Yallop, above n 6, at 116.

⁵³ "Women Witness at Murder Trial Says Thomas Had 'Passion' For Jeanette Crewe" *The New Zealand Herald* (Auckland, 29 March 1973) at 3.

⁵⁴ Booth, above n 39, at 168.

⁵⁵ At 104.

⁵⁶ At 168.

⁵⁷ At 17.

⁵⁸ *Report of the Royal Commission*, above n 2, at [417].

a potential “clean up” that took place on the Crewe farm; sparks and emissions were seen coming from the farm two days after the murder at a time when the Thomas’ were out of town.⁵⁹ This evidence supported the defence case as it indicated someone else may have been responsible for the deaths of the Crewes. However, the defence was not informed. In fairness, though the conduct of the police was in aid of the prosecution, there is no evidence suggesting Morris was aware of these matters.⁶⁰

2 *The Disclosure of Evidence*

Under s 13 of the Criminal Disclosure Act 2008, the prosecution has a continuing obligation to fully disclose any information with a material bearing on the defendant’s case. This information, which includes the names and addresses of material witnesses interviewed by the prosecution,⁶¹ should be given to the defence as soon as reasonably practicable.⁶² A comprehensive regime on the discovery of documents did not exist in New Zealand at the time of the two trials. This is not to say there were no rules on disclosure at all. The Police General Instruction C143 stated:⁶³

“When Police decide not to call a person as a witness for the Prosecution, the Defence should be advised of the name and address of the person so that, if desired, the person can be called as a witness for the Defence. This instruction, however, applies only to a person who is able to give material evidence (particularly when favourable to accused), and not a person who because he is unable to give any material evidence is not being called.”

When the first trial took place in 1971, Halsbury’s Laws of England contained a basic statement of law which was accepted by the Commission as applicable in New Zealand at the time:⁶⁴

“When the Prosecution have taken a statement from a person who can give material evidence, but decided not to call him, they must make him available as a witness for the Defence, but need not supply the Defence with a copy of the statement they have taken.”

⁵⁹ *Report of the Royal Commission*, above n 2, at [433].

⁶⁰ At [412] and [434].

⁶¹ Criminal Disclosure Act 2008, s 13(3).

⁶² Section 13(1).

⁶³ *Report of the Royal Commission*, above n 2, at [412].

⁶⁴ Viscount Simonds (ed) *Halsbury’s Laws of England* (3rd ed, Butterworths, London, 1952 to 1964) vol 10 at [765] as cited in *Report of the Royal Commission*, above n 2, at [414].

This was further clarified in 1975 in the case of *R v Mason*. Moller J held that where the police have interviewed a person with evidence on a material subject, “whether the prosecution considers him creditworthy or not, it must make his name and address available to the defence.”⁶⁵

Had these requirements for disclosure been strictly followed or existed in their current statutory form, the police and prosecution would not have been able to get away with selectively presenting evidence. Full disclosure would have ensured any information withheld by the prosecution and the police could be provided to the jury by defence counsel; allowing jurors to deliver an informed verdict and thus ensuring Thomas’ rights to a fair trial.

3 The Skewing of Evidence

Closely connected with its selective use of facts was the way the prosecution heavily angled the evidence in utter disregard for the truth during cross-examination. This is the nature of circumstantial evidence; its flexibility allows for broad interpretation. Morris claimed that when Thomas and Jeannette both resided in Maramarua, Thomas had pestered her to the point she abandoned her teaching course and travelled to Wanganui to get away from him.⁶⁶ This supported allegations of Thomas’ enduring passion.⁶⁷ The truth was that Jeannette had never been a permanent member of staff at Maramarua School and there was no course for her to complete. Upon inquiry the headmaster revealed that “no one had ever sought this information.”⁶⁸ Jeannette had real incentives to move to Wanganui as her best friend resided there and she was also offered a permanent teaching position,⁶⁹ but it was not in the interests of the prosecution to acquire this information.

Exhibit 350 was the critical piece of evidence buttressing the Crown’s case. There was no doubt that the cartridge was fired from Thomas’ rifle;⁷⁰ thus, it placed him directly on the Crewe farm with a loaded weapon. However, Dr Jim Sprott, expert witness for the defence, made a discovery that endangered the narrative created by the prosecution. Dr Sprott revealed that there were small, but noticeable incongruences between the lettering on the base of exhibit 350, and the lettering on cartridges capable of containing one of the

⁶⁵ *R v Mason* [1975] 2 NZLR 289 (SC) at 292.

⁶⁶ Booth, above n 39, at 98.

⁶⁷ “Women Witness at Murder Trial Says Thomas Had ‘Passion’ For Jeanette Crewe”, above n 53, at 3.

⁶⁸ Booth, above n 39, at 99.

⁶⁹ At 100.

⁷⁰ Yallop, above n 6, at 76.

pattern 8 bullets retrieved from the bodies.⁷¹ This inconsistency strongly suggested that the cartridge case connecting Thomas to the murders had been planted.

Morris attempted to discredit this discovery using expert witnesses to confuse the jury rather than to provide reliable empirical evidence. Dr Donald Nelson, lead scientist for the prosecution, allegedly gave false evidence that the two cartridges were identical.⁷² In October 1973, Inspector Hutton and Dr Nelson attempted to pressure George Leighton, who was responsible for engraving the head stamps for the ICI, into swearing a false affidavit.⁷³ Leighton refused to sign it as the affidavit incorrectly stated that the ICI head stamps he produced were identical with no differences in the lettering of each batch. The Commission found that the differences in the categories of cartridge cases could be discerned by the naked eye,⁷⁴ and was satisfied beyond reasonable doubt that exhibit 350 contained a pattern 18 or 19 bullet, not a pattern 8 bullet.⁷⁵ The Commission stipulated that there is a fundamental obligation on expert witnesses acting for the Crown to “tell the whole truth in the interests of justice”, regardless of whether the evidence assists the Crown or the defence.⁷⁶ Critical of the draft affidavit prepared for Leighton by Dr Nelson, the Commission stated:⁷⁷

“This incident is indicative of a tendency on the part of Dr Nelson, manifested in other areas in far more serious ways, to shape the evidence to fit his own theories rather than to shape, and if necessary abandon his own theories in the light of the evidence.”

4 *The Destruction of Evidence*

After the second trial, Morris advised Inspector Hutton to dispose of the exhibits, including exhibit 350.⁷⁸ The police disposed of them on the Whitford tip on 27 July 1973.⁷⁹ As a result, in 1975, when the case was referred back to the Court of Appeal, the Court was

⁷¹ Booth, above 39, at 154.

⁷² Peter Williams QC, *The Dwarf who Moved and Other Remarkable Tales from a Life in the Law* (Harper Collins, Auckland, 2014) at 177.

⁷³ At 176.

⁷⁴ *Report of the Royal Commission*, above n 2, at [99].

⁷⁵ At [97].

⁷⁶ At [160].

⁷⁷ At [120].

⁷⁸ Yallop, above n 6, at 280.

⁷⁹ At 280.

deprived of the opportunity to physically examine the cartridge case. Fortunately, there remained a series of photographs on which counsel could rely.⁸⁰

The Commission deemed the disposal of the evidence to be “an improper action designed to prevent any further investigation of exhibit 350.”⁸¹ Before the result of the appeal in 1973 was determined, in an interview with Morris, Booth informed him that Thomas and his supporters intended to continue the fight for Thomas’ freedom.⁸² The exhibits were valuable to the defence and their existence was a threat to the prosecution’s case.⁸³ Although it was normal practice to dispose of exhibits after an appeal, the Commission considered that “enough had been said, seen and done” to make it clear to the prosecution that the exhibits continued to be of use and should have been returned to Thomas or defence counsel.⁸⁴

The Court of Appeal dismissed the 1975 appeal, finding that the defence had not excluded a reasonable possibility that exhibit 350 contained a pattern 8 bullet.⁸⁵ Peter Williams QC was critical of the decision, contending that the Court misinterpreted the onus of proof.⁸⁶ Minister of Justice Dr Martyn Finlay shared this sentiment, stating that:⁸⁷

“...the burden of proof was not in accordance with my understanding of the law. I felt that they had put the burden of proof on Thomas rather than the Crown. I was astounded by the decision.”

As the following section illustrates, this was not the extent of anomalous decision-making by the judiciary.

VI The Judiciary

The judiciary is supposed to be independent and strictly impartial.⁸⁸ Under an adversarial system the function of a judge at a jury trial is to act as a neutral referee overseeing court proceedings.⁸⁹ A review of the 1970s criminal justice system as reflected through the

⁸⁰ *Report of the Royal Commission*, above n 2, at [63].

⁸¹ At [402].

⁸² At [363].

⁸³ At [364].

⁸⁴ At [364].

⁸⁵ At [29].

⁸⁶ Williams, above n 71, at 178.

⁸⁷ Yallop, above n 6, at 289.

⁸⁸ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 21.3.1.

⁸⁹ At 8.2.3.

Thomas trials, requires an analysis of the judiciary and its purported bias towards the prosecution.

A Partial Judges

Defence counsel strongly believed the system was hampered by judge-partiality. Peter Williams QC has stated that on many occasions throughout his career, he had “sensed a favourable bias of judges towards the prosecution”.⁹⁰ In describing Henry J, who presided over the first trial, Temm revealed that “amongst members of the Auckland Bar Association he had a reputation for being a prosecutors’ judge.”⁹¹

Drawing from experience, Ryan observed that a judge could not be taken to have acted impartially simply because remarks appeared fair in print. For example the use of emphasis, tone of voice or facial expression can have the opposite effect on the jury to what has been written down.⁹² Ryan alleged that Perry J’s conduct conveyed to the jury that Thomas was most likely guilty and his Honour continually treated the defence unfairly.⁹³

B Perry J

Ryan recalled that in the course of cross-examining Inspector Hutton, Perry J interjected and accused Ryan of improper practice. The matter was resolved in private and his Honour concluded that Ryan was not in breach. However, Perry J did not remit this to the jury when they returned to court; no effort was made to restore the defence’s credibility and integrity which had been publicly undermined.⁹⁴ On the other hand, when Morris suggested Thomas had sexually assaulted Jeannette, no comment was made by Perry J though the accusation had no evidential support.⁹⁵

C Henry J’s Summing-up

Henry J’s summing-up of the 1971 trial provoked accusations of judicial bias as his Honour appeared to overtly support the prosecution’s case. Yallop opined that Henry J’s summing-up better served as a closing speech for the prosecution as it ensured “only one

⁹⁰ Williams, above n 71, at 183.

⁹¹ Yallop, above n 6, at 114.

⁹² Ryan, above n 33, at 135.

⁹³ At 147.

⁹⁴ At 148.

⁹⁵ At 147 – 148.

possible verdict could be reached” and was inherently “favourable to the Crown’s point of view.”⁹⁶ For example, his Honour stated:⁹⁷

Mr Temm claimed first of all that the evidence did not prove that the axle was attached to Harvey Crewe’s body. Well, there was a *very strong submission to you from the Crown* that there were very good reasons for you to come to a conclusion that it was.

In addition, Temm considered that Henry J only barely satisfied the duty to present both sides as he gave special attention to the prosecution’s case, and hardly any to the defence.⁹⁸ Henry J reiterated all the important points raised by Morris, methodically reviewing the prosecution’s evidence. In comparison, the attention given to the case for the defence was inadequate. Henry J summarised the defence’s case in only five lines and simply asked the jury to remember the defence’s evidence.⁹⁹

The emphasis Henry J placed on the case against Thomas, relative to the lack of attention given to the defence case, implied that his Honour believed Thomas used his rifle to murder Harvey and Jeannette Crewe.¹⁰⁰ In addition, it indicated that his Honour considered the wire and axle found on the bodies had originated from Thomas’ farm.¹⁰¹ Ted Smith, a Pukekawa farmer sitting in the public gallery was shocked by how Henry J distorted and slanted the evidence towards a guilty verdict.¹⁰² The summing-up also inferred that any possibility exhibit 350 was planted was simply untenable:¹⁰³

...that would entail a visit to his farm and the search for and the finding of a spent shell to be planted by somebody whom we do not know anything at all, and again, the shell will not involve the accused unless the bullets found in the heads of Jeannette and Harvey Crewe were No. 8, the same as his, and had the same rifling marks as would be made by his rifle. How would an unknown person know that his (accused’s) rifle and spent ammunition from his farm would give that result?

⁹⁶ Yallop, above n 6, at 189.

⁹⁷ At 337 (Appendix 5: Transcript of Mr Justice Henry’s Summing-up to the First Trial Jury) (emphasis added).

⁹⁸ Booth, above n 39, at 71.

⁹⁹ Yallop, above n 6, at 194 – 196.

¹⁰⁰ See 332 – 335 (Appendix 5: Transcript of Mr Justice Henry’s Summing-up).

¹⁰¹ See 336 – 337.

¹⁰² At 191.

¹⁰³ At 335 (Appendix 5: Transcript of Mr Justice Henry’s Summing-up).

His Honour qualified this statement with “*please do not think I am suggesting it, but you may well think that any suggestion of the planting of a shell has little or no merit or validity.*”¹⁰⁴ Henry J included many of these escape clauses to ensure his Honour appeared impartial to the jury. The Court of Appeal in *Waara v R* restated the longstanding idea that judges are not barred from expressing a view on the facts, provided the jury is directed that it is not worth any particular weight.¹⁰⁵ However, given the countless times Henry J expressed one-sided views and would sometimes weigh counsels’ arguments in favour of the prosecution,¹⁰⁶ any of the qualifying clauses were likely inadequate to mitigate the influential effect of the strong inferences made by an authoritative figure of the court. Though perhaps unintentional, Henry J’s summing-up likely had the effect of conveying to the jury how to decide the case under the guise of neutrality.

In June 1971 Temm appealed on grounds that Henry J failed to put the defence case adequately and the summing-up as a whole was partial and unfair.¹⁰⁷ The Court of Appeal held there was no substance in the complaint and it was “trite law” that a judge need not address every contention advanced.¹⁰⁸ This was reaffirmed in *Ibbetson v R* where the Court stipulated that judges do not need to devote equal amounts of time to the respective cases.¹⁰⁹ However, there was and still is a requirement to ensure the summing-up is neutral and balanced in the sense of fairly and adequately imparting the salient points of each side.¹¹⁰ In the context of the excessive emphasis placed on the Crown’s case combined with the numerous suggestions made by Henry J, the summing-up had the effect of advocating the prosecution’s case and fell short of fairly representing the arguments in a neutral and balanced manner.

An appeal against the second jury verdict brought by Ryan in July 1973 on grounds of unfair conduct by the prosecutor was also dismissed.¹¹¹ The dismissal of this appeal is also anomalous when one considers the Court of Appeal’s reasoning below.

¹⁰⁴ Yallop, above n 6, at 335 (Appendix 5: Transcript of Mr Justice Henry’s Summing-up). (emphasis added).

¹⁰⁵ *Waara v R* [2010] NZCA] 517 at [59].

¹⁰⁶ See Yallop, above n 6, at 337 (Appendix 5: Transcript of Mr Justice Henry’s Summing-up).

¹⁰⁷ “Pukekawa Murder Conviction Appeal Fails” *The New Zealand Herald* (Auckland, 19 June 1971) at 8.

¹⁰⁸ At 8.

¹⁰⁹ *Ibbetson v R* [2011] NZCA 228 at [30].

¹¹⁰ *Waara v R*, above n 104, at [59]; and *R v Raymond* [1956] NZLR 527 (CA) at 531.

¹¹¹ *R v Thomas No. 2*, above n 14, at 659.

D The Court of Appeal: 11 July 1973

The appeal against the second verdict was on the basis of “unfair conduct by the crown prosecutor”.¹¹² Ryan referred to statements made by Morris in his final address to the jury. One of Ryan’s arguments related to the prosecution’s suggestion that Thomas sexually assaulted Jeannette before killing her.¹¹³ This suggestion was purposely emotive, and unsupported by evidence heard by the jury during trial. In spite of this, the Court of Appeal held the prosecution did not exceed the bounds of propriety. The Court acknowledged that prosecutors must not struggle for a conviction; however, they qualified this with the notion that prosecutors are entitled to be as firm as the circumstances warrant in the interests of presenting a case “fairly and completely”.¹¹⁴

The Court considered the inference made by Morris was warranted by the circumstances; Thomas’ past affection for Jeannette and his precarious financial position relative to the Crewes’ wealth were supposedly bases upon which Morris was entitled to suggest sexual assault.¹¹⁵ However, in view of the emotionally charged nature and seriousness of a sexual violation allegation, one would expect strong evidence would be required to support such an inference rather than factors that simply make it a mere possibility. Especially considering the potential effect it could have on the jury in coming to a verdict.

Stranger yet, the Court sympathised with the prosecution’s interest in crafting a response to the question of motive. It appreciated that Morris would have anticipated Ryan would urge there was no motive to kill.¹¹⁶ Essentially, the Court gave the prosecution licence to fabricate a motive though none could be conclusively established. It seems more in step with the obligation to “present the case fairly and completely”¹¹⁷ to have Morris convey to the jury that no reasonable motive could be identified.

E Judicial Response to Criticism

It is conceivable that the Courts’ reluctance to allow an appeal in 1973 was attributed to the desire to protect the justice system from denigration. In fact, one of the functions of the

¹¹² *R v Thomas No. 2*, above n 14, at 658.

¹¹³ Yallop, above n 6, at 341 – 342 (Appendix 6: Final Speech of Crown Solicitor David Morris to Second Trial Jury).

¹¹⁴ *R v Thomas* (no 2), above n 14, at 659.

¹¹⁵ At 660.

¹¹⁶ At 660.

¹¹⁷ At 659.

judiciary is to maintain public confidence in the courts.¹¹⁸ If the authority of the courts is lowered in the eyes of the public, litigants would be deterred from bringing cases. In 2004, the New Zealand High Court in *Solicitor-General v Smith* reasoned that the courts can only effectively uphold the rule of law if they command the authority and respect of the public.¹¹⁹ However, laws against scandalising the court can only be justified when authority and respect is due; that is, if the judiciary is carrying out its function as an impartial and independent arbiter of justice. During the Thomas case, many judges blindly defended a corrupt system at the expense of an innocent man's freedom.

Exposed to widespread public criticism, members of the judiciary were impelled to speak out in defence of the criminal justice system. Sir Alfred North, former president of the Court of Appeal who heard the appeal against the first trial verdict in 1971, criticised the campaign for Thomas' release as causing "incalculable harm" to the system.¹²⁰ He further claimed that the system would "break down" if it could be subject to continued allegations of unfairness.¹²¹ Wild CJ, one of five judges in the 1975 Court of Appeal hearing, also considered Thomas a threat to the system. He made a public statement that if Thomas was granted a new trial after two guilty verdicts, the system would be brought into disrepute.¹²²

Booth alleged that the administration refused to examine matters submitted by himself and Dr Sprott. Rather than objectively considering whether his submissions had merit, the system would immediately cast them aside.¹²³ Peter Williams QC identified that this perception of Thomas as a danger to the stability of the criminal justice system made it particularly difficult to attain an acquittal.¹²⁴ The view seemed to be that any success accruing to Thomas would erode the public's confidence in the courts; thus any attack on the system was rigorously repelled.

At this point, it should be apparent that the close relationships that existed between various pillars of the criminal justice system reinforced the system's flaws. The police worked closely with the prosecution as they shared a common interest in the conviction of the accused and protecting themselves from disrepute. The same goes for the judiciary which

¹¹⁸ "Guidelines for Judicial Conduct" (March 2013) Courts of New Zealand at [10] <<https://www.courtsofnz.govt.nz/business/guidelines/guidelines-for-judicial-conduct>>.

¹¹⁹ *Solicitor-General v Smith* [2004] NZFLR 728 at [17].

¹²⁰ Keith Hunter *The Case of the Missing Bloodstain* (Hunter Productions, Auckland, 2012) at 131.

¹²¹ At 131.

¹²² Williams, above n 71, at 178.

¹²³ Booth, above n 39, at 169 – 170.

¹²⁴ Hunter, above n 119, at 131.

appeared to be pro-prosecution and had a vested interest in ensuring public confidence in the administration of justice. The deficiencies of the system were self-sustaining as the pillars did not act as checks and balances upon one another; the desire to preserve public confidence rendered the appeal system virtually useless and without an impartial judiciary the defendant was vulnerable. The result was that when the system failed Thomas, there were no internal mechanisms available to remedy the situation or provide a deterrent to unseemly conduct. In reaction to public pressure,¹²⁵ justice had to be restored through the involvement of Parliament and the Executive under the procedures of an inquisitorial system.

VII The Jury

The Jury is a crucial component of the criminal justice system. While judges deal with the legal matters, members of the jury serve a fact finding function.¹²⁶ The jurors in the Thomas trials did not have vested interests in ensuring one particular outcome; therefore, they should have been completely neutral and able to act as a safeguard in the system. Despite this, shortcomings emerged nonetheless. This section will examine the efficacy of the jury system by reviewing its operation in the Thomas case.

A The Efficacy of the Jury System

In an unrelated case, Wild CJ stated that jury verdicts deserve the confidence of the public.¹²⁷ In defence of the system, his Honour stated that the jury represents the whole of the community. In addition, the defence is given the power to challenge the composition of the jury to ensure impartiality, the jury hears all the evidence and a unanimous verdict safeguards a person from wrongful conviction. However, as the Thomas case revealed, this was not necessarily the case.

1 Ability to hear all the Evidence

As noted earlier, due to the selective use of facts and the way evidence was heavily angled by the prosecution, both juries were unable to hear all the evidence. Contrary to Wild CJ's assertion, the two juries did not have in front of them all the evidence; an uninformed verdict does not deserve the confidence of the community.

¹²⁵ See Yallop, above n 6, at 294 (An Open Letter to The Prime Minister of New Zealand); and Muldoon, above n 19, at 145.

¹²⁶ Law Commission *Juries in Criminal Trials Part One* (NZLC PP32, 1998) at 62.

¹²⁷ "System 'Loaded – Against Accused'" *NZ Truth* (Wellington, 8 May 1973) at 30.

2 *The Jury Deliberations*

The notion that the requirement of unanimity acts as a safeguard against erroneous verdicts is swiftly discredited upon examining the jury deliberation of the second trial. The safeguard was futile as three of the jurors who were opposed to a guilty verdict were quickly persuaded to change their minds.¹²⁸ It was revealed that the jury did not engage in careful deliberation and had come to a decision within a few minutes. The jurors simply decided to loiter in the jury room until they were satisfied they had taken longer than the first jury to return to the courtroom.¹²⁹

B Advantages of the Prosecution in Relation to the Jury

The defence was yet again at a disadvantage, only this time it was due to the influence the Crown exerted over the jury. The prosecution had the upper hand in vetting the jury list, the sequestration of jurors fuelled the development of a crown-jury relationship, and members of the jury were possibly not impartial.

1 Vetting Jury Lists

The jury system strives to ensure that the courts are provided with a panel that is both impartial and representative of the ordinary New Zealand citizen. However, because of three advantages the prosecution had in relation to the jury list, there was a real possibility that the Crown could shape the composition of the jury. While the defence and the prosecution both had the right to receive a copy of the list of potential jurors prior to the ballot, this vetting right was not equal.

Firstly, the custom was that the jury list would be made available to both sides three working days prior to the trial. However, it was not until less than two working days before the second trial that the court registrar allowed Ryan to access a copy of the list.¹³⁰ This treatment of the defence team by members of the Department of Justice was allegedly not unusual.¹³¹ It was later unveiled that the prosecution had obtained an unpurged list six weeks prior to the second trial and a copy of the jury list 16 days before the trial.¹³² This meant the Crown had ample time to analyse the jury list and decide which persons to

¹²⁸ Yallop, above n 6, at 273.

¹²⁹ At 273.

¹³⁰ *Report of the Royal Commission*, above n 2, at [454].

¹³¹ Ryan, above n 33, at 136.

¹³² *Report of the Royal Commission*, above n 2, at [453].

object to while the defence had a significantly shorter amount of time to look through the 90 names.¹³³

Secondly, there was a disparity in resources. Unlike the prosecution, the defence did not have the entire police force on its side to facilitate the vetting process. The injustice was not limited to the fact the prosecution had access to more labour, but it also rested in the extent of information gathered. Williams noted that the defence was merely given the name, address and occupation of each juror, while the Crown abused its access to police facilities. Police officers were instructed to compile profiles for each potential juror containing extensive information. This included whether they were pro-police and anything that would cause them to be sympathetic towards Thomas.¹³⁴ The Commission took the view that the thoroughness of the police checks were “excessive, improper and calculated to prejudice the fairness of the subsequent trial.”¹³⁵ This feeds into the final advantage of the prosecution.

Wild CJ was perhaps over optimistic in his belief the defence’s power to challenge jury selection was adequate to prevent jury partiality. Section 363 of the Crimes Act 1961 gave the Crown an unlimited right to stand jurors aside while Ryan only had six peremptory challenges pursuant to s 122 of the Juries Act 1908. The Commission recognised the significant problem posed by s 363.¹³⁶ The excessive collation of information was considered prejudicial because under s 363 it was possible for the Crown to stand aside jurors until those favourable to the prosecution were called. Effectively, this meant that the Crown could select a partial jury. In fact, prior to the second Thomas trial, eight members of the jury had been noted as “strongly pro-police.”¹³⁷

Few protection mechanisms existed to guard against such an outcome and the ones that were available were of little use. Section 362 of the Crimes Act allowed parties to challenge the selection on grounds of partiality, fraud and wilful misconduct; however, this provision seldom assisted in the provision of an impartial jury.¹³⁸ Section 363 allowed counsel to challenge the selection of jurors on the ground that they were not indifferent between the Crown and the accused. This right of challenge was not often used as a sound

¹³³ Yallop, above n 6, at 220.

¹³⁴ “System ‘Loaded – Against Accused’”, above n 126, at 30.

¹³⁵ *Report of the Royal Commission*, above n 2, at [463].

¹³⁶ At [463] and [469].

¹³⁷ Ryan, above n 33, at 151.

¹³⁸ “System ‘Loaded – Against Accused’”, above n 126, at 30.

basis for the objection was difficult to satisfy without prior intimate knowledge about the juror.¹³⁹ The Commission opined that:¹⁴⁰

“The right of the Crown Prosecutor to stand aside an unlimited number of jurors is in our view an anachronism which invites abuse; the Crown should have the same number of peremptory challenges as the Defence.”

Section 363 was repealed in 1982 by the Juries Act 1981.¹⁴¹

2 *Crown-jury Relations*

The inequities were not limited to the Crown’s broad powers over the jury selection process; they extended to the relationship the jury had with counsel. A noticeable Crown-jury relationship emerged during the second trial. There were two reasons for the development of a close relationship between the prosecution and the jury. Firstly, the Crown created or was given opportunities to have greater interaction with the jurors outside of court. Secondly, especially at the time, there was an innate tendency for laypeople to trust the Crown and its witnesses which included the police. In short, the jury’s predilection for the prosecution was driven by external as well as internal forces.

(a) *External Forces*

Taking an abnormal route, Henry and Perry JJ both decided that sequestration was necessary to preserve a fair trial. Throughout both trials the respective juries were kept in isolation at the Auckland Station Hotel.¹⁴² It is possible that the judges’ orders were made with good intentions; the sequestration of jurors is a legitimate means of insulating jurors from influences likely to prejudice a fair trial. Sequestration was considered by the New Zealand Court of Appeal in 1995 in the case of *Gisborne Herald v Solicitor-General*. The Court recognised the “sequestration of jurors for the duration of trials has not been a practice in New Zealand” and that it would “add to the pressures on jurors and affect their ordinary lives.”¹⁴³

¹³⁹ “System ‘Loaded – Against Accused’”, above n 126, at 30.

¹⁴⁰ *Report of the Royal Commission*, above n 2, at [469].

¹⁴¹ Juries Act 1981, s 37(1).

¹⁴² “Crown Case in Crewe Murder Trial”, above n 5, at 5; and “Isolation Order For Jury in Thomas Trial”, above n 26, at 3.

¹⁴³ *Gisborne Herald v Solicitor-General* [1995] 2 HRNZ 142 at 156.

Sequestering jurors was indeed very rare in the 1970s.¹⁴⁴ While the defence objected to sequestration, the prosecution approved of the directive and even booked rooms at the hotel in advance.¹⁴⁵ Studies have shown that keeping juries in isolation increases the risk of jurors developing feelings of resentment towards the accused.¹⁴⁶ As a result, there is a real likelihood for jurors to identify with the prosecution.¹⁴⁷ To make matters worse, the presence of police officers at the hotel meant the jurors were vulnerable to their influences. They would spend many hours in the company of the police who served as their escorts and carers.¹⁴⁸ There is a real risk that this association subconsciously influences jurors;¹⁴⁹ Ryan believed that, in coming to a verdict, the second trial jury was influenced by feelings of friendship.¹⁵⁰

The Crown also actively tried to win the allegiance of the jurors. During the second trial there was a lunch gathering for the jury, the prosecutors and Crown witness Inspector Hutton at the Tuakau hotel. The defence was not invited.¹⁵¹ The police also allegedly took jurors out on a fishing expedition the weekend before the delivery of the verdict, and according to hotel staff they hosted various parties for the jurors at the Station Hotel.¹⁵² It is difficult to see how the jury's verdict would not in some way be influenced by its relationship with those constituting the prosecution team.

(b) Internal Forces

Another factor weighing against Thomas, was the inclination for laypeople at the time to place their trust in the police. Williams wrote that some jurors subconsciously harboured a desire to placate authority; such a desire is most likely residual from what is taught during early childhood.¹⁵³ Ryan observed that New Zealand juries usually had faith in the integrity of the police force.¹⁵⁴ Given that the police were always in close proximity to the jurors and possessed extensive information about each one of them, it is possible that the

¹⁴⁴ "Isolation Order For Jury in Thomas Trial", above n 26, at 3.

¹⁴⁵ Yallop, above n 6, at 113.

¹⁴⁶ James P Levine "The impact of sequestration on juries" (1996) 79 *Judicature* 266 at 269.

¹⁴⁷ At 270.

¹⁴⁸ Ryan, above n 33, at 137.

¹⁴⁹ Levine, above n 145, at 270.

¹⁵⁰ Ryan, above n 33, at 163.

¹⁵¹ At 137.

¹⁵² Ian Wishart *Arthur Allan Thomas: The Inside Story* (Howling at the Moon Publishing, Auckland, 2010) at 182 – 184.

¹⁵³ "System 'Loaded – Against Accused'", above n 126, at 30.

¹⁵⁴ Ryan, above n 33, at 158.

desire to placate the police was also attributed to fear of police retribution. Either way, the public displayed an over-readiness to accept the testimony of police officers.¹⁵⁵

Police witnesses were given the benefit of the doubt, and this made it particularly easy for the prosecution to portray Thomas as a liar when he challenged police evidence during cross-examination. Antipathy towards the police in New Zealand society did not largely arise until after the Thomas trials. The case marked the beginning of a shift in the public's perception of law enforcement, but widespread mistrust did not manifest until the display of police brutality during events tied to the 1981 Springbok Tour.¹⁵⁶ At the time of the second trial, while there were many who believed in Thomas' innocence, there was still a large portion of the public who found allegations of police impropriety simply unfathomable.¹⁵⁷

3 *A partial Jury*

Many factors are indicative of a partial jury. The most prominent of which is where a member of the jury has personal connection with a party or a witness.¹⁵⁸ Bob Rock was the foreman of the second jury and was personally acquainted with one of the Crown witnesses. Rock was in the navy with Detective Sergeant Hughes, who gave evidence in the second trial; they had known each other for years.¹⁵⁹

The court registrar considered this was not prejudicial to Thomas' right to a fair trial and dismissed it without alerting the defence to this information.¹⁶⁰ This was problematic as Ryan was not given the opportunity to dispute the foreman's continued participation in deliberations. The Commission was critical of this omission and considered that it was enough on its own to justify describing the second trial as a miscarriage of justice.¹⁶¹ The administration made no attempt to investigate the nature and extent to which Rock was affected by his relationship with the witness. As the person chairing the jury, there was also a possibility that he could influence other jurors. The existence of a partial jury is inherently unfair and not representative of the whole community.¹⁶² Henry J agreed that

¹⁵⁵ Ryan, above n 33, at 163.

¹⁵⁶ Martin O'Connor "Baton use stops protest" *The Dominion Post* (Wellington, 30 July 1981) at 1.

¹⁵⁷ Wishart, above n 151, at 183.

¹⁵⁸ Law Commission, above n 125, at 62.

¹⁵⁹ Yallop above n 6, at 220 – 221.

¹⁶⁰ At 221.

¹⁶¹ *Report of the Royal Commission*, above n 2, at [466].

¹⁶² At [466].

the jury should have been dismissed in the second trial and a re-trial should have been ordered.¹⁶³

VIII Conclusion

The Arthur Allan Thomas case saw public trust in New Zealand's criminal justice system diminish dramatically. The conduct of actors within the courts inhibited the fair administration justice and as a result exposed themselves to profound derision. For example, the trials revealed the prosecution's total lack of regard for its duty to the courts. The struggle for a conviction was discernible from the way the prosecution employed unfair tactics, attempted to fabricate evidence about exhibit 350 and destroyed exhibits while cognisant of their value to the defence. To make matters worse the prosecution was supported by the police force with whom they shared a common interest: the preservation of their reputations which had been undermined by the extensive litigation. The defence did not have this resource advantage. By breaching disclosure rules, the prosecution and the police successfully presented a set of facts tailored to the detriment of the defendant. Justice was ostensibly not a priority for the prosecution and the police.

The case also unveiled the potential for members of the judiciary to, in some cases, unfairly favour the prosecution. In particular, Henry J's summing-up to the first jury attracted great controversy. Even accounting for the distressingly wide discretion afforded to judges in this aspect of the trial,¹⁶⁴ the summing-up fell short of constituting a fair and adequate representation of the respective cases. The 1973 Court of Appeal decision also indicated a tendency to favour the prosecution as the Court openly sympathised with the prosecution's desire to fabricate a motive. The judiciary's devotion to defending and maintaining the verdict was also disconcerting as it rendered the appeals process virtually useless. Instead of addressing the deficiencies in the system Wild CJ and Sir Alfred North were critical of Thomas' supporters and adamantly defended the system.

The jury, supposedly composed of neutral laypeople, ought to have guarded against the potential for the prosecution and judiciary's interests to affect the outcome; however, the jury was not immune to the Crown's influences. As a result of the prosecution's control over jury selection, the relationship between the jury foreman and a Crown witness, and the development of favourable crown-jury relations during the second trial, the resulting

¹⁶³ Yallop, above n 6, at 221.

¹⁶⁴ *Ibbetson v R* [2011] NZCA 228 at [30].

jury was not impartial. It did not represent the values of the whole community. In addition, the prosecution's selective presentation of facts prevented the jury from making an informed decision. The remaining safeguard yet to be exhausted existed outside of the criminal justice system. Had it not been for the intervention of the Executive, Thomas would not have been freed in 1979.

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