

# To be Not or not to be Not

By Russell Goldflam\*

Once upon a time, words were charms. Open Sesame. Abracadabra. A plague on you. By and large though these days, words have lost their charm. But not so one, which still has the power to curse, or bless. Guilty. And of course, its partner in crime: Not Guilty.

To utter either of these is not just to express oneself, or communicate with another, the common or garden things words these days do. Pronounce these particular words, in their anointed place and at their appointed time, and something happens. Not magic, but nonetheless something solemn, momentous and powerful.

In Alice Springs recently, a man has pleaded Not Guilty, and now the foreman of the jury, in his anointed place, at his appointed time, is delivering verdict. There are three charges. On the first count, the foreman pronounces Not Guilty. On the second count he pronounces Not Guilty. But on the third and final count, there's a problem: he mispronounces. There's a sort of a cough, or an occluded catarrhal grunt or perhaps a word (which some later say was 'Not' and others later say was not) followed, more distinctly, by the word 'Guilty'. He sits down.

The judge thereupon thanks the jury for their service, and discharges them. They go home, for the time being at least.

The judge then asks Mr Crown if there is any reason why he should not now discharge the accused, the ritual inquiry following a jury acquittal. Mr Crown, clearly discombobulated, says 'sorry, I misheard the last verdict', the judge says 'there were three findings of Not Guilty', and Mr Crown says, problematically, as it subsequently transpires, 'no problem'.

The man in the dock looks in turn concerned, confused, and very, very relieved. He goes home too, at least for the time being.

Later in the day, when counsel re-assemble to listen to the audiotape record of what the foreman had said, one thing, and only one thing, becomes clear: there is a problem,

after all. They play the tape, and they play the tape again. And the fatal Not is not there. The lawyers scurry off to consult their law books.

The next morning the man's lawyer says he agrees with the judge. He thought he heard the foreman say Not Guilty. The tape, he argues, is unreliable.

Unsurprisingly, Mr Crown disagrees. He argues that the jury should be reconvened. Only they will know for sure what they had actually instructed their foreman to say on their unanimous behalf.

But 'tis the week before Christmas and all routes south are chockers with townfolk on the annual rellie run. At least some of the jurors would by now have left the jurisdiction, no doubt gnashing their teeth at the disruption to their holiday plans caused by that damned trial. There's a more fundamental problem though: having said the word, having entered its verdict, the deed is done. Having dissolved, the jury is, as the judge duly finds, functus. Like that parrot of ill-repute, it has ceased to be. Its constituent parts have returned anonymously to the community from which they were drawn.

Even having regard to the evidence of Mr Crown's ears and the gap in the tape, various cogent considerations which it is not now necessary to repeat lead the judge to safely conclude that the verdict had in any case actually been Not Guilty.<sup>1</sup>

Walking back from court with Mr Crown, engrossed in conversation about this little bit of unprecedented legal history we had just witnessed, we suddenly see, right in front of us, Mr Foreman, blithely crossing the street. Professional ethics and the *Juries Act*, which discourage the interrogation of former foremen,

deter us from running over, grabbing him by the collar, admonishing him about the importance of clear enunciation, and asking 'what the functus did you actually say in there?'

By the following morning His Honour's judgment call has apparently been vindicated. In a small town like Alice, word always gets around after a trial, notwithstanding the *Juries Act*. I hear no less than three independent stories of jurors having told so-and-so who had passed it on to such-and-such that it had been Not Guilty all along.<sup>2</sup> The judge, having discharged his final judicial function for the year – adjudicating the Best Decorated Christmas Desk competition at the Alice Springs courthouse – goes home.

Talking of professional ethics, a colleague asks me, what if I'd been the man's lawyer, and had thought I'd heard the foreman say Guilty, what would I have done? I would like to think, I say, that I would have had the sense to keep my mouth shut, and go home.

## Endnotes

- 1 See R v MRS (Unreported decision SCC No 20202977 of Riley J delivered on 17/12/2003 at Alice Springs); accessed at [http://www.nt.gov.au/ntsc/doc/sentencing\\_remarks/2003/12/mrs\\_031218.htm](http://www.nt.gov.au/ntsc/doc/sentencing_remarks/2003/12/mrs_031218.htm)
- 2 Subsequently, Mr Crown told me that he'd been reliably informed that it had been Guilty all along. So the matter would not appear to be laid to rest, beyond all conceivable doubt, after all.

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