From a Nagging Doubt

What follows is a very brief look at some of the many issues that arose in the investigation of the murder of Assistant Commissioner Colin Winchester and the subsequent trials of David Eastman. Time does not permit a review of all the significant issues that arose in the 30 years since the murder, or even a detailed elaboration of those mentioned below.

Introduction

10 January 1989.

It's a warm summers evening in Canberra.

At approximately 9.15 pm, Assistant Commissioner Colin Winchester, drives his white, unmarked, police car into his neighbour's driveway. He would do this as a favour to the elderly widow who lives there.

As he is getting out of his car, a shooter approaches him from behind. Winchester doesn't see him. The shooter fires twice, most likely from a Ruger 10/22 rifle, once owned by Louis Klarenbeek.

The first shot hits Winchester in the back of the head. The second, to his right temple.

Is this the infamous "double tap," well known to those with an interest in professional killings? Or is it just the work of an extremely lucky amateur?

Whatever it is, this was the execution murder of the ACT's most senior police officer, and the most senior police officer in Australia ever to have been murdered.

Thus began one of Australia's most controversial murder investigations - resulting in two of Australia's most complex and difficult murder trials.

A rather eccentric, disgruntled, ex- public servant by the name of David Eastman would be charged with the murder, and in 1995, after a six month trial, he would be convicted of that crime.

It would be 19 years and two months before he is finally released on bail, following an Inquiry by Brian Martin AJ and the quashing of his conviction by the Full Court of the Supreme Court of the ACT.

What was it about this case that so captured the imagination of many Australians?

No doubt the murder of the ACT's top cop was, itself, a most newsworthy event.

Perhaps it was the newspaper headlines the day after the murder alleging that this was a Mafia execution.

Perhaps it was to do with the rumours that other police may have been involved in the killing.

Perhaps a combination of many factors – including that this strange man by the name of David Eastman might be responsible.

David Eastman was an object of much curiosity.

The son of a one-time barrister and foreign diplomat, the dux of Canberra Grammar, he was notorious in the Canberran community. An early whistleblower, a well-known stirrer.

A man who, in a fit of pique, once threw a water jug at a magistrate. This is why all water jugs in ACT courts are now made of plastic.

I remember when Eastman was charged with the murder. I was just starting out at the Bar, never once thinking that one day our fates would be entwined.

I recall the photos of this odd man with the odd hat, parading with a plastic toy firearm out front of the Court house. His choice of head-wear would become a point of difference between us during the re-trial. It was, surprisingly, one of the few arguments we had.

As you might well expect, a police investigation commenced in which no expense or resource was spared.

A team of ACT detectives was assembled under the command of Superintendent, later Commander, Ric Ninness, a hard-nosed, old style policeman. He had been a member of the ACT police for many years and was part of the old guard, unhappy with its merger with the Commonwealth police, to become the AFP. To the old guard, the Commonwealth police were not 'real' police.

The wisdom of having police who were so closely connected to Colin Winchester investigate the murder might well be questioned. It was not just one of their own that was murdered, but their well-respected and popular boss. Emotions were very high on the night of the murder and remained so up to the time of Eastman's conviction in 1995. On being asked to move away from the crime scene by a junior crime scene investigator, an emotional Ninness would respond "fuck off constable," and remain there, right next to Winchester's dead body.

<u>Mafia Involvement</u>

Early media reports suggested that the killing of Winchester was a "mafia hit".

To understand why that was so it is necessary to know a little about Operation Seville.

Between 1980 and late 1982, Colin Winchester was the man behind a major police operation targeting the Calabrian Mafia.

The genesis of this operation was a very colourful, duplicitous, Walter Mitty like character, who used the code name "You Know Who", or YKW.

In 1980, YKW approached Sgt Lockwood of ACT police, and later A/C Winchester, with an offer to infiltrate and provide information about this highly secretive organization, L'Onerata. His motives are not entirely clear. I doubt very much that he was acting as a good Samaritan.

His offer included a boast the he could help solve the 1977 murder of anti-drugs campaigner, Donald Mackay.

From YKW's offer of assistance began Operation Seville. It was the first of its kind and of doubtful legality.

To paraphrase Martin AJ:

Seville was "a joint AFP/NSW police operation. … The police permitted two plantations of Cannabis to be grown near Bungendore, in NSW, in order to gain intelligence about the syndicate through the informant, YKW. … YKW was responsible for the organized crime syndicate believing that Winchester was corrupt and protecting their interests. It appears that the organization held that belief until late 1988. Eleven of the participants in the plantations, known as the

Bungendore Eleven, were belatedly arrested and a prosecution was instigated by the National Crime Authority. Their committal hearing commenced in February 1989, approximately 6 weeks after Winchester's murder. The police investigation into Winchester's death proceeded upon the basis that members of the crime syndicate possessed a possible motive for the murder by way of 'pay back' for the arrests and prosecution of the eleven."

The committal of the Bungendore 11 collapsed when the prosecution's star witness, YKW, refused to give evidence.

As an aside, by a strange, and completely fortuitous coincidence, YKW's assistance in Operation Seville did in fact help to solve the murder of Donald Mackay. Perhaps that's a story for another day.

Investigation into David Eastman.

Mr Eastman became a suspect within days of the Winchester murder, as a result of information provided to the police by his GP.

Mr Eastman saw his doctor on the 6 January 1989, four days before the murder, and said, allegedly, of Winchester, "*I should shoot the bastard.*" He is also alleged to have said - "*the police should be taught a lesson*."

The words "*I should shoot the bastard*" were excluded at the re-trial on the basis that the doctor could not be certain that they were in fact said.

Following the murder of Winchester, the doctor contacted Superintendent Ninness and told him of his consultation with Eastman and what had been said.

Police also learned that Mr Eastman had met with A/C Winchester and Neil Brown QC, the then shadow A-G, some three weeks earlier. Mr Brown told police investigators what transpired during that meeting, at the end of which, Mr Eastman refused to shake hands with Mr Winchester.

The third reason Eastman came under suspicion was that on the 11 January 1989, the very day after the murder, police went to speak to him about his meeting with Winchester, and asked him about his movements "*last night*".

During that conversation, Eastman was vague and evasive. He stated he had been out driving, possibly buying some take away food. He could not recall where he went or whether he stopped to eat.

The prosecution relied heavily on this evidence at the re-trial.

They argued, first, Mr Eastman had the opportunity to kill Winchester.

Secondly, it was implausible that this highly intelligent man could not remember what he had done the night before. They submitted he lied because he knew that the truth would implicate him. It was an 'implied admission' of his guilt.

You may have noticed that the police were not specific with times when they asked Eastman what he did "*last night*."

Evidence was led in the re-trial that Eastman had gone to a massage parlor, the "Touch of Class," on the night of the murder, at about 11 pm.

Was that why he was being coy when police asked what he did "*last night*"?

He didn't tell police about the visit to the brothel. However, what he did say was that he was out – "*possibly between 8 and 10 pm*." That is, it was Mr Eastman who nominated the time period he was out driving.

Winchester was shot at 9.15 pm. The times Eastman volunteered, far from providing an alibi, provided him with ample opportunity to kill Winchester, <u>had he done so</u>.

We asked the jury, rhetorically, would this highly intelligent man not have planned for himself an alibi, if he was guilty of what was an otherwise meticulously planned murder?

Would he have volunteered to police that he had been out driving at the very time the murder was committed, knowing that he was under no obligation to speak to police?

In any event, Mr Eastman was now under suspicion and much police attention focused on him over the years, right up to his trial in 1995. Whether it was too focused on him, and not others, has been a topic of much debate.

Mr Eastman, complained, with some justification, that he was being constantly harassed by police, particularly Superintendent Ninness, and by covert surveillance officers, most of whom Eastman had no difficulty identifying.

Charged with Murder

Mr Eastman was eventually charged with the murder on 24 December 1992, at the conclusion of the re-opened coronial inquest.

The initial inquest had delivered an open finding.

Police gathered more evidence, and the inquest was re-opened. The further evidence came from three sources.

First, Raymond Webb who gave evidence that he saw Eastman walk into the home of Louis Klarenbeek, the gun seller, on the 31 December 1988.

The Klarenbeek Ruger 10/22, very likely to have been the murder weapon, was sold by Mr Klarenbeek on the 1 January 1989 to a man who inspected it the day before.

Mr Klarenbeek at all times denied having sold the gun to Mr Eastman.

Secondly, evidence was led from Mrs Klarenbeek, that her husband, now deceased, had told her he lied to police when he said he didn't recognize anyone as the purchaser of the weapon when police showed him photos. Mr Eastman's picture was on a photo-board shown to Klarenbeek in late January '89.

The third piece of evidence was from Robert Barnes, a forensic scientist from Victoria – his evidence linked Eastman's car to the crime scene through gun-shot residue analysis.

As a result of this further evidence, on the 24 December 1992, the coroner, Chief Magistrate Ron Cahill, charged Eastman with the murder of Colin Winchester.

<u>Trial 1</u>

The first trial commenced on 16 May 1995.

It was a monumental disaster for Mr Eastman.

He repeatedly sacked his legal representatives, engaged in abusive exchanges with the trial judge, and refused to cross-examine key witnesses when he was representing himself.

Throughout that trial Eastman made, to use the words of the Full Court of the Federal Court, "vile, foul-mouthed, vituperative comments addressed to the" trial judge and prosecutors.

"You wouldn't know the law from a Bull's foot," he would tell the judge.

"You are a silly … nasty old man as well."

"You're a corrupt shit."

The 'C word' was also directed at the trial judge, Carruthers AJ, who, it must be said, showed remarkable forbearance.

On 3 November 1995, after three days of deliberation, the jury found Mr Eastman guilty of murder.

He was sentenced to life imprisonment.

A reading of the trial transcript shows that Eastman was pre-occupied with police harassment rather than the charge of murder itself. If his lawyers did not advance his complaints of harassment, in the way he wanted them advanced, they were inevitably sacked and not spared Eastman's vituperative attacks.

Appeals and Inquiries

Following his conviction there were a number of unsuccessful appeals all the away to the High Court, and two Inquiries. One looked into the issue of his fitness to plead, but it was the Martin Inquiry that finally bore fruit.

Martin Inquiry

On 3 Sept 2012, Marshall J, of the Federal Court, granted an application for an Inquiry into Eastman's conviction.

In 2014 Martin AJ delivered a 447-page report. Of the trial, Martin AJ said:

" *… there were flaws … and the applicant did not receive a fair trial. The verdict was reached in circumstances where significant material was not disclosed by the prosecution; critical evidence was seriously flawed; evidence of a threat to kill was not properly tested; and the jury was left with the impression that the applicant's complaints about police conduct were utterly bereft of any foundation*."

Martin AJ was most critical of the evidence of forensic scientist, Robert Barnes. HH said:

"*Applying these principles and, in particular, the words of the joint judgment in Mallard, because of the 'over-arching importance' of Mr Barnes' evidence, and the weight the prosecution placed upon his reliability, I am unable to say that*

had full disclosure been made and the material been made available to the applicant so that he could cross-examine on it, the applicant would inevitably have been convicted. He has lost thereby a fair chance of acquittal." [1819]

His Honour continued:

"*The failures to disclose relevant information were inadvertent, but they had the effect of seriously undermining the capacity of the defence to attack a 'central plank' in the prosecution case. Further, the absence of disclosure prevented the jury from being made aware of evidence strongly demonstrative of Mr Barnes' lack of independence and objectivity*." [1819]

Barnes' evidence was that the gun shot residue found at the crime scene, in the form of partially burnt propellant, and that found in Mr Eastman's car, were indistinguishable and, in all probability, came from the same manufactured batch of PMC, the brand of ammunition used in the murder of Mr Winchester.

If accepted, that evidence provided a "significant link" between the Crime Scene and Eastman. (MI p 88)

The Prosecutor, Michael Adams QC, later Adams J of the NSW Supreme Court, argued in closing:

"*It would be 'completely unreasonable not to accept that PMC .22 propellant can be distinguished from all other ammunition*

propellants for the reasons and in the circumstances given by Mr Barnes' … 'The only reasonable conclusion on the whole of the scientific evidence before you which, I have said, is all one way and completely un-contradicted is that PMC propellant is unique'. The applicant had PMC in his boot. The applicant had PMC propellant … in his car. The applicant had substantial residues of PMC propellant in his car which was the type of ammunition used in the murder." (MI 103)

PMC propellant, it would emerge at the Inquiry, is not unique.

The Martin Inquiry found that it could not be said that the gun shot residue found in Eastman's car was PMC propellant, or that it was indistinguishable from that found at the crime scene. At its highest, the gun shot residue found in Mr Eastman's car was <u>consistent</u> with PMC propellant and consistent also with propellant from 35 other brands of ammunition, including '<u>Winchester Wildcat'</u>, a brand of ammunition which, according to the evidence, Eastman had used when test firing a gun he had purchased in early 1988.

Not surprisingly, Barnes, was not called on the re-trial and 'Agreed Facts' stating that the "*… partially burnt particles found in Mr Eastman's car … could have been produced by any of the 36 types of .22 ammunition…",* which were listed.

In the end, the GSR evidence that played such a prominent part in his conviction, was a "non-event" in the second trial.

There were also issues with Barnes' qualifications to give the evidence he gave, as well as his objectivity.

In a recorded conversation with one of the police investigators, Barnes said;

" … as we've discussed I'm going to work, you know I'm working with you. As far as I'm concerned … I'm a Crown witness, a Police witness." [MI 400]

Barnes clearly lacked independence and was biased in favour of the prosecution. He was also facing disciplinary charges in Victoria, of which the AFP were aware.

Barnes was resistant to his work being reviewed by other experts; other prosecution experts felt he was being used as an expert in too many areas; that he was too emotionally involved in the crime scene; and there were questions about a database that he and his assistant created.

None of these matters were disclosed to the defence.

The Full Court said in *Eastman v DPP* (ACT) (No.2) [2014] ACTSCFC 2, at [107]:

"Martin AJ found that the way in which the prosecution led expert evidence at the trial minimised the chances of the overseas experts straying into criticisms of Mr Barnes or

expressing the concerns that they had about his evidence and expertise. He also found that Mr Barnes gave his evidence in a way that was designed to convey the impression that he was a careful and conservative expert who had used methods that were well accepted in the scientific community … The jury was not told that profiling of GSR and propellant was a "novel concept" or that Mr Barnes was "working on the boundaries of forensic science as it existed at that time."

So, once again, we see a conviction based on very dubious scientific evidence. I wonder whether, given the High Court decision in *IMM*,[1] where the trial judge is effectively denied the ability to exclude evidence which is unreliable or lacking in credibility, we might see more such convictions.

Whilst the Full Court quashed Mr Eastman's conviction, it did not follow Martin AJ's recommendation that Eastman should not be re-tried. Martin AJ was of the view that -

"the *passing of so many years, coupled with the death of numerous witnesses and publicity prejudicial to the applicant, mean that a further trial would be unfair both to the prosecution and to the applicant. A retrial would not be in the best interests of the community*."

The DPP again presented Eastman for trial. He sought a stay of the proceeding but that was refused at first instance and on appeal.

[1] *IMM v R* (2016) 257 CLR 300

Re-Trial

On the 4 June 2018, a panel of 500 potential jurors gathered at the Albert Hall. The old Supreme Court was too small to accommodate a panel of such a size.

Murugan Thangaraj SC, from the NSW Bar, led Michelle Campbell, also from the NSW Bar and Keegan Lee, an advocate with the ACT DPP.

I led barristers Michael Stanton and Lucy Line, both of the Victorian Bar.

The judge was Kellam AJ, formerly of the Victorian County Court, the Victorian Supreme Court and the Victorian Court of Appeal.

Surprisingly, 192 of the 500 potential jurors did not seek to be excused from the trial, estimated to run for 6 months.

On the 5 June, a jury was struck.

By the time of openings on the 18 June, we had already spent some 40 days on pre-trial issues and his Honour had delivered some 35 rulings. More rulings were delivered in the course of the trial.

The more significant rulings related to the exclusion of Eastman's evidence from his first trial; the admission into

evidence of Listening Device recordings said to contain admissions; Public Interest Immunity claims and Legal Professional Privilege.

The central issue at trial was the identity of the killer. "*Who killed Colin Winchester?*"

By the time the jury delivered its verdict on 22 November 2018, they had heard from approximately 129 witnesses, had read to them 41 section 67 hearsay statements, as well as numerous other documents and agreed facts. They had listened to about 15 days of closing addresses and to a five-day charge. Despite all of that, they appeared to remain gripped by this murder "whodunit," from beginning to end.

The case against David Eastman

The prosecution case was that Winchester was murdered because he refused to intervene in an assault charge brought against Eastman.

That charge arose out of a fight between Mr Eastman and his neighbour, over a parking space, of all things. Following the fight, Eastman went to the police to make a complaint of assault. Instead, it was he who ended up being charged.

Mr Eastman considered that his being charged was the doing of Sgt Coutts, an officer with whom he had many run-ins over the years.

Eastman complained about this injustice to police command; to the Ombudsman; numerous lawyers and politicians, all to no avail. Finally, he managed to get the shadow AG, Neil Brown QC, to arrange a meeting with A/C Winchester.

The three met on 16 December 1988. Winchester said he would look into the matter but that ultimately it was a decision for the DPP. It was, at times, a heated meeting. At its conclusion, Eastman refused to shake Mr Winchester's hand, saying he *wouldn't do so until the matter had been investigated properly*.

The prosecution theory went further. A conviction on the assault charge would preclude, or at least make it very difficult, for Eastman to regain employment in the Public Service, something he was desperate to do. There was ample evidence of that desperation.

His campaign to be returned to work had been on-going for at least 10 years, and hard fought.

The assault charge was listed for hearing on the 12 January 89. The prosecution case was that Eastman had to act before then. He focussed his anger and attention, they said, on Colin Winchester who, in the mind of Eastman, was the head of the corrupt ACT police; the man who refused to have Eastman's complaint investigated properly; who refused to withdraw the charge and, worst of all, backed his own officers.

This might all seem a little far-fetched but Mr Eastman had been making threats to kill someone, even Mr Winchester, if the various injustices done to him were not remedied.

To Lesley Vick, assistant to Senator Janine Haynes, Eastman said he "*would have to kill somebody so people could see the injustice that had been done to him*."

To his German pen friend, Irene Finke, he wrote in December 1987, after the assault charge had been laid – "*now I want to kill the neighbour, his friends and the bastard police as well*."

To Mr and Mrs Bewley, when complaining about his treatment by the Commissioner for Superannuation, he allegedly said "*I just feel sometimes I could get a gun and kill someone*".

Dennis Barbara, Eastman's one time solicitor, told police, that in late November, early December of 1988, Eastman had allegedly said "*I'll kill Winchester and get the Ombudsman too*".

To his GP, on 6 December 1989, he allegedly said "*the police need to be taught a lesson*".

There were a number of other violent threats said to have been made by Eastman admitted into evidence. In the end, I think they probably helped the defence because they showed that Eastman was a man given to making many threats, but not to carrying them out.

In answer to the suggested motive, the defence relied on the fact that on the 22 December 1988 Mr Eastman received the good and long awaited news that he had finally been deemed fit to return to work in the Public Service.

The evidence showed that he was overjoyed by that news and that he was optimistic about his prospects for employment. He expressed that optimism to his friends. He was not concerned that the assault charge would impact on his ability to return to the public service because, as he told his doctor on the 6 January, his lawyer was going to adjourn his case so that representations could be made to the DPP. And, even <u>if</u> convicted in the Magistrates Court, there were avenues of appeal of which he was well familiar. He was a persistent fighter. According to one long suffering senior bureaucrat, "the most persistent individual" he had ever come across in 30 years of service. Killing Winchester made no sense. It would not make the assault charge go away.

The prosecution case against Eastman relied on 20 key points. Time does not permit an elaboration of those points but they include:

- Motive, as just discussed,
- Implied admissions by reason of his lies to police concerning his whereabouts on the evening of the murder,
- Purported admissions picked up on the listening devices,
- An alleged sighting of his car on the 8 January 1989 parked outside the Winchester house,

- Eastman's interest in purchasing a firearm throughout 1988,
- Eastman being seen entering the Klarenbeek residence on the day the murder weapon was sold (Webb's evidence),
- Alleged sightings of Eastman and his car in the vicinity of the Klarenbeek's home at the relevant time, and
- The alternative hypothesis floated by the defence was not a reasonable hypothesis.

Reasonable Alternative Hypothesis

The first thing I should say about running the alternative hypothesis is that we were careful to avoid creating the impression that our defence rested solely on an acceptance of it. We did not want to be seen to be putting all of our eggs in that particular basket. If we did, and the jury rejected it, then the path to conviction would have been relatively straight forward.

So, the principal focus remained on putting the prosecution to its proof that it was Eastman who shot Winchester.

The Alternative Hypothesis was introduced in closing by reminding the jury of Mr Ninness' evidence that Winchester would have made a lot of enemies during his 27 years in the force, and that there were others with reason to kill him, particularly those involved in Operation Seville.

Those involved in the Bungendore plantations had lost millions of dollars in profits and now faced the prospect of losing their liberty.

A man by the name of "B" was closely related to some of the Bungendore 11 accused. He was called by the prosecution at our request.

He was the son of the one time reputed head of the Calabrian Mafia in Canberra, who himself was subsequently murdered in a mafia execution.

B had been convicted of various crimes involving cannabis and other drugs. He owned and drove V8 cars. A V8 was heard by several of Winchester's neighbours at the time the shots were fired. B claimed an alibi but that was never properly investigated by police.

A telephone conversation was intercepted. In it, B was complaining that police had executed a search warrant on his home and "the *bad thing* is they found a similar bullet". Police denied finding such a bullet, but B's choice of words was interesting.

There was other evidence strongly supportive of this alternative hypothesis but that evidence remains suppressed on public interest immunity grounds.

It was, we submitted, a reasonable possibility, not excluded by the evidence, that Colin Winchester was killed by B.

LD Recordings

Listening devices were in place at Eastman's unit from September 1989 to January 1993.

Eastman was aware, by mid-December '89, of the existence of those devices.

The prosecution relied on 3 recordings as constituting admissions.

They are each of Eastman talking to himself, in whispered tones.

Professor Peter French, an expert linguist and phonetician, briefed by the prosecution, prepared transcripts of those recordings. His level of confidence in some of the words which follow varied, and there are also some words in between that were unintelligible. The following are snippets of the more, allegedly, incriminating:

TAB 3 – 3.6.90

"They worked very hard to prove … ("*They made me want to kill you*")

"Had to kill him sitting down."

"He was the first man I ever killed and he … "

TAB 5 – 22.6.90

"Shot. But why did, ("*he/they/ I")* do it."

Looked like I'd have a name - "*if /when*" I killed … I don't give a bugger. I just wanted it straightened."

TAB 1 – 29.7.90

"And even when you called the first ("*night and I missed you*"). That was a very frustrating night (and) … had to come back again the next night to ("*kill the*") … bugger. And then (*all of a sudden, you're dead*)"

"Finally, on the second night you succeeded. It was like trying to shoot (*miracles*). It required about 50 takes before you … what you wanted. I mean the only thing you didn't do you didn't provide me with a bag full of stones."

And "You solicited the behaviour which you now have the hypocrisy to come and complain about. … To this court. The charge is a fraud your worship."

The recordings were of very poor quality.

The defence relied on Dr Helen Fraser, an expert phonetician and linguist from NSW. She reviewed Professor French's transcripts and considered that, in large part, they were too unreliable for the purpose for which they were to be used, that is, as an 'aid memoir'.

Dr Fraser was also greatly concerned about the danger of "priming" when listening to unintelligible recordings with the "aid" of an unreliable transcript.

"Priming" is the process where, in the case of a transcript being provided to a jury, the transcript impacts on what the listener is hearing through the power of suggestion.

In this case, the prosecution told the jury what they believed was on the recordings in their opening address. The jury then got to hear a lot about the allegations in the course of the trial. They then received Professor French's transcripts. So, by the time the jury got to listen to the recordings, they were, we submitted, well and truly primed.

There were other problems with the recordings.

What was Eastman talking about? There was no context.

There was no second speaker who might have helped to put Eastman's words in to context.

Were the words reflective of what was going on in Mr Eastman's head? Was he articulating some only of the internal monologue.

Take the expression, from TAB 3, "Had to kill him sitting down." Who had to kill him sitting down? I, you, they, he or she?

Bear in mind, also, that by the time of these recordings, Mr Eastman was already a suspect and the coronial inquest was well underway. Was he talking about what was being alleged against him? Was he rehearsing what he would say in court? We knew, from other recordings, that he often rehearsed what he was going to say in Court. Was he talking about what he had read in the press?

Did the unintelligible words put a different meaning on those preceding or succeeding words?

We emphasised the importance of context and the danger in ascribing meaning to whatever words could be heard without context.

TAB 1 was the recording that included the words "bag of stones."

At both trials, the prosecution argued that Eastman was referring to the biblical story of David and Goliath. Eastman the David who killed the giant, Colin Winchester. This, they argued, was an 'admission'.

The jury might well have accepted that in the context of a trial where David Eastman, on the prosecution case, killed the head of the ACT police.

However, we were able to provide some independent context. Two days before that recording, Eastman had been to Court charged with criminal damage, constituted by

throwing stones at police who were conducting surveillance on him. One stone smashed the windscreen of their unmarked police car.

This is what TAB 001 was about, not some biblical story.

Remember – "You solicited the behaviour which you now have the hypocrisy to come and complain about … The charge is a fraud your worship."

This nicely demonstrated the importance of context.

What I think was of most interest to the jury, who were out for 7 days deliberating, was the evidence of Raymond Webb. The man who claimed he saw Eastman walking in to Klarenbeek's house on the weekend the murder weapon was sold. It was the transcript of his evidence only that they requested during their deliberations.

In 1989 Webb made two statements to the police. In one he said he did not see anyone at the Klarenbeek house when he went there to inspect guns that were for sale. In the other, he made no mention of having seen anyone.

At the first coronial inquest, under oath, he said that those statements were true and correct.

In November 1992, three years later, he made a further statement saying he did see someone at the Klarenbeeks, and that person was David Eastman.

So, if true, he had lied on oath to the coroner. Never a good start for a witness. At the second trial he said he lied under oath, claiming he was too scared to tell the truth.

He was cross examined as to that, as well as his opportunity to make a reliable identification, if indeed he did see anyone. An analysis of his evidence showed that he really only had about a second, possibly two, to make the identification - of a stranger.

There was just something odd about his evidence.

He also happened to be a member of the AFP fishing club; was friends with AFP officers; and he knew Colin Winchester's brother.

There was sufficient for the jury to have a doubt about his evidence.

We relied heavily on Mr Klarenbeek. He made statements and gave evidence to the coroner from his hospital bed. He said it was not Mr Eastman who had bought the gun. He did not identify Eastman on the 3 occasions that police tried to have him identify Eastman. He, in fact, gave a description of the purchaser on the 28 January 1989, which he repeated almost word for word 6 days later. It did not fit Eastman.

AND it was only through Klarenbeek's assistance and co-operation that police were able to identify the murder weapon. He went, voluntarily, to an old quarry where he had

fired the Ruger, to search for some of his used cartridge cases. He found some and handed them to the police. Their markings matched the markings on the cartridge cases found at the crime scene. This is how the murder weapon came to be identified. The weapon itself has never been found. So why would he lie about the purchaser?

The prosecution submitted that Klarenbeek lied to the police and Coroner. We submitted only one man lied to the police and the coroner – and that was Webb, the person whom the Crown relied on for the identification.

With respect to the statements and coroner's court evidence of Klarenbeek's wife – she too being deceased by the time of the re-trial – they were riddled with ambiguities that were never tested in cross-examination.

Time does not permit an elaboration of those ambiguities and, indeed, all of the issues in the trial, but there were many. The above barely scratches the surface.

Challenges

There were many challenges in running this trial over and above the vast volume of material that had to be absorbed– somewhere in excess of 70 folders landed in my chambers when I first accepted the brief.

It is no secret that Mr Eastman could be a very difficult client. It is reported publicly that he suffered from a paranoid personality disorder.

On Eastman's past form, I fully expected to join an elite club of barristers to have been sacked by him. I am now a member of an even smaller club never to have suffered that fate.

While Mr Eastman and I had our moments, over all, we got along quite well.

Eastman is highly intelligent, extremely articulate, at times quite charming, at other times given to fits of rage, which would settle as quickly as they occurred. I soon learned that the best way to deal with him was to listen without interruption and to always give him a straight answer, good news or not.

By the time the trial started with a jury we seemed to have won his confidence and he was prepared to leave to us the forensic decisions that needed to be made.

His behaviour throughout the re-trial was exemplary. No vituperative outbursts, no throwing of water jugs.

The evidence against Eastman was largely circumstantial and the combined effect of that evidence did make it a strong case. The prosecution relied upon what they said was "a

remarkable series of coincidences" all pointing to Mr Eastman's guilt. Each had to be met, and they were.

Another challenge was the unsolicited advice from those who believed that they knew what really happened to Mr Winchester, and how we should run the defence.

In the end, judgment calls had to be made, and those judgments were based solely on some 18 months of preparation and many, many discussion with my juniors, instructors, and Mr Eastman himself.

Final Observations

Mr Eastman spent over 19 years in gaol for a crime of which he maintained he was not guilty.

Again, it would seem, just like in the cases of *Chamberlain*, *Mallard* and *Splatt*, unreliable scientific evidence played a big part in his conviction in 1995.

And like the Chamberlains, Eastman did not fit, he was unconventional and odd. Something lapped up by the media.

It remains for all involved in the criminal justice system (judges, prosecutors and defence lawyers) to do what they can to ensure that such injustices never again occur. The system is brought into disrepute and innocent people made to pay a horrible price.

In his report to the Full Court, Martin AJ added:

"I am fairly certain that the applicant is guilty of the murder of the deceased, but a nagging doubt remains."

It is a great credit to the jury in the re-trial, and to the jury system generally, that despite all the prejudicial publicity that was generated over many years, for five months the jury listened carefully and patiently to the evidence, they weighed it intellectually and dispassionately, and like Martin AJ, they too had a doubt - a reasonable doubt.

Eastman is now 73. The last 30 years of his life wasted. He is now a free man.

An injustice has been remedied.

But the question of who killed Colin Winchester remains, tragically, unresolved.

I suspect it always will.