WORKSHOP

PRESENTED BY THE HON CHIEF JUSTICE B F MARTIN

FOURTH CONFERENCE OF THE CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN TERRITORY IN BALI
28 JUNE - 2 JULY 1993

The facts detailed below come from the well known High Court decision in *Tuckiar v The King* (1934) 52 CLR 335.

The object of the workshop is to identify the differences in the criminal law, including practice and procedure, which operate today, and the effect which their proper application may have had if in force at the time of the killing of Constable McColl.

"The prisoner is a completely uncivilised aboriginal native belonging to a tribe frequenting Woodah Island, which lies near Groote Eylandt. On 1st August 1933, a police constable named McColl was killed there by the spear of a native, and the prisoner was brought to Darwin and charged with his murder. Some Japanese had been killed by natives a little time before, and McColl and three other constables were dispatched to enquire into the matter. They landed at Woodah Island with four trackers, and, after travelling on foot about twenty miles, they came to a deserted native camp on the edge of a thick jungle. They found the fires warm. They camped in the vicinity for lunch, posting the trackers round about. One of the trackers came in with information which enabled the party to surround a number of lubras, whom they handcuffed

together and brought back to camp. There the police questioned them. Later another report was brought that natives were landing in a canoe on a point near by and three of the constables and two trackers set off to intercept them. McColl and two trackers were left at the camp with the lubras, who were first unfettered. On the return of the constables, the two trackers were found at the camp, but neither McColl nor the lubras were there. Next morning McColl's dead body was found about four hundred yards away from the camp with a spear wound in his chest and a blood-stained spear lying a few paces from it. McColl's pistol showed that he had fired three times, his third shot having been a misfire. Apparently the two trackers, who were left with McColl in charge of the lubras and were afterwards found at the camp, had not remained there throughout the absence of the rest of the party, whom, probably, they had followed. At any rate neither of them was called as a witness, and it does not appear why or in what circumstances McColl left the camp. As the constables were returning to the camp, they spread in extended order. A spear was thrown at one of them and pierced his hat. He fired his pistol and the others came up to him. But they heard no shots which they attributed to McColl. According to the evidence of one of the trackers, called Paddy, who acted as interpreter at the trial, before the party separated, a native had come up from the jungle to within sixty feet of the camp and had then run away.

Some time after the death of Constable McColl, the prisoner

and some natives were induced to go in the boat of a trepanger to Darwin. There the prisoner was arrested and charged with the murder of McColl. To prove that it was he who killed McColl, the Crown relied upon two pieces of confessional evidence given by two natives who had been brought with him to Darwin. The first was an aboriginal, called Parriner, whose evidence was interpreted into pidgin English by Paddy. The effect of this evidence was that on Bickerton Island, which is a little to the south of Woodah Island, the prisoner told him that the policemen had come up to his camp and taken four lubras, three of whom were his, that he had been waiting in the jungle for some time for one of his lubras, that he had called and then come out of the jungle, had seen them at the camp, and had run back into the jungle, where he planted himself and sat quiet, that while hiding there, he saw a policeman go past, that he remained still and listened and heard a lubra speak, that he communicated with her by sign language, and told her he was near and would remain, that the policeman came close behind her, whereupon the prisoner signed to her to move aside and then threw his spear, that the policeman clutched the spear with one hand and with the other drawing his pistol fired it three times and then spoke no more, that he threw his spear lest the policeman should kill him, that when they saw the police they were all very frightened, including the lubras and picaninnies (sic). The other aboriginal who gave evidence of a confession was a mission boy called Harry. He said, in effect, that the owner of the boat in which they came to Darwin asked him to obtain

the prisoner's story. The story the prisoner told him was briefly that on coming back from fishing he had seen the boat in which the police had come to the island, that he had been chased by a black man, who saw him, and had hidden in the jungle, that people had run past him, that after some time he moved into the open, but, seeing nobody, he returned to the jungle, that then hearing the cry of a baby, he looked and saw a white man and a lubra stop, that the white man had sexual relations with the lubra, after which the lubra picked up the baby and both returned to the open space, that the prisoner then communicated by signs with the lubra, who was one of his three lubras, that the white man saw him, and thereupon he asked by signs for tobacco, that the white man then fired at him three times and reloaded, that the prisoner got behind a tree, the white man fired again and the prisoner threw his spear and hit him, that he then ran away and hid in the grass, but that later another white man came and seeing the handle of a spear sticking up fired, and that he thereupon threw the spear and hit the white man's hat.

At the trial at Darwin, the prisoner, who understood no English, was defended by counsel instructed by the Protector of Aborigines. At the conclusion of Parriner's evidence, the Judge asked counsel for the defence whether he had put before the prisoner the story told by the witness and talked it over with him. Counsel replied that he had not done so. The Judge then asked him whether he did not think it proper to discuss the evidence with the accused and see whether it was correct.

On counsel stating that he thought it desirable to take that course, the Judge arranged for him to take Paddy the interpreter and discuss the evidence with Tuckiar. The Court adjourned for half an hour to enable this to be done. On the Court resuming, Harry's evidence in chief was taken, but, before proceeding to cross-examine him, the prisoner's counsel said that he had a specially important matter which he desired to discuss with the Judge. He was in a predicament, the worst predicament that he had encountered in all his legal career. The jury retired, and the Judge, the Protector of Aborigines and counsel for the defence went into the Judge's Chambers. On their return, after some discussion of the reasons for the Crown's failure to call as witnesses other constables, trackers and the lubras, the jury were recalled and Harry's evidence was completed. Then the prosecutor obtained leave to recall a witness as to the good character of the deceased constable, McColl. ..... The witness said that the deceased was a very decent man, that he had never heard anything against his moral character, that he had been closely associated with him upon a patrol where there were half-caste girls and many native women, and there was nothing in his conduct, which could be censured in the least degree. No evidence was called for the defence. Before the Crown case was quite complete, the jury, who had heard much discussion of the Crown's failure to bring witnesses to Darwin, asked: "If we are satisfied that there is not enough evidence, what is our position?" The Judge reports that he understood them to mean, what was their position if they were satisfied that the

Crown had not brought before the Court all the evidence it might have brought. He replied: "You must think very carefully about that aspect of the matter and not allow yourselves to be swayed by the fact that you think the Crown has not done its duty. If you bring in a verdict of 'not guilty' it means that this man is freed and cannot be tried again, no matter what evidence may be discovered in the future, and that may mean a grave miscarriage of justice. Another aspect of the matter that troubles me is that evidence has been given about a man who is dead, and if the jury brings in a verdict of 'not guilty' it may be said that they believe that evidence, and it would be a serious slander on that man. It was the obvious duty of the Crown to bring all the evidence procurable and to have all these matters cleared up entirely, but you must not allow the fact that the Crown has failed in its duty to influence you to bring a verdict of 'not guilty' if there really is evidence of guilt before you on which you can rely. You should go and think about the matter quietly and carefully weigh all the evidence that has been given before you."

..... after telling the jury that a decision on any question of fact was entirely for them and they ought not to accept any view he indicated on a question of fact unless in their own independent judgment they agreed with it, the learned Judge proceeded to condemn the story which Harry said the prisoner told him, as an improbable concoction on the part of the prisoner, and, on the other hand, said that the only

conclusion from the facts which Parriner said the prisoner narrated to him was that that (sic) the homicide amounted to murder. We have also a report upon which we can rely for the two following passages in the summing up to which we attach importance:

(1) "I want you now, if you can, to put all that out of your minds, to look at the matter quietly and dispassionately, and without reference to any observations of that sort - to consider the evidence which has been put before you, and decide whether or not you can act upon that evidence. It may be that owing to the neglect or incompetence or worse of the people who had the preparation of this case for the Crown, a grave miscarriage of justice may occur and a serious slander may be affixed to the name of the dead man. But that is a matter you cannot take into consideration; it is a matter that should be inquired into elsewhere and not here. It is the duty of yourselves to consider only the evidence before you, and to endeavour if you can to avoid any miscarriage of justice. The other matter we cannot, unfortunately, deal with here; the responsibility for that must rest where it may ultimately be fixed."

(2) "You have before you two different stories, one of which sounds highly probable, and fits in with all the known facts, and the other is so utterly ridiculous as to be an obvious fabrication. What counsel for the defence asks

you to do is to take up the position that you will not believe either of these stories. Tuckiar has told two different stories to two different boys, and both of these stories have been told to you here in Court. Which one is true? For some reason Tuckiar has not gone into the box and told you which one is true, and that is a fact which you are entitled to take into consideration. You can draw from it any inference you like."