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The Mickelberg Saga and the Public Purse

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THE MICKELBERG SAGA AND THE PUBLIC PURSE

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THE CRIME

On 22 June 1982 three armed courier agents presented three valueless cheques to the Perth Mint. In return for these useless pieces of paper, the Mint parted with over $650,000 worth of fine gold bars.

Security and credit checking techniques at the Mint have since been "modified".

Each of the couriers delivered their bounty to a nearby office where they were received by a secretary who had been hired for the day specifically for that purpose.

A little later that same day, another unwitting temp who had been hired for the day, following instructions received over a CB radio, arrived at the "office", collected the heavy boxes of what he thought to be tools, took them in his car to Jandakot airport, a small airport outside Perth and left them on the ground outside a hanger.

Those gold bars were never seen again.

The cheques which had been used to defraud the Mint had been obtained from two sources. In April (7th) 1982, about ten weeks before the theft of the gold, a quantity of blank Western Australian Building Society cheques had been stolen from a building. Before the burglars left they destroyed the building by setting fire to it.

Five weeks later a quantity of blank Perth Building Society cheques were stolen from a building which was also destroyed by fire.

The three cheques which were presented to the Mint on 22 June 1982, came from those stolen cheques.

THE CHARGES

Three brothers Brian, Raymond and Peter Mickelberg were charged with

- a conspiracy to defraud the Director of the Perth Mint by inducing him to part with a quantity of gold without valid payment;
- two counts of burglary;
- two counts of arson; and
- three substantive counts relating to the fraudulent presentation of each of the three cheques.

Brian Mickelberg was convicted on some of the counts and later was successful on appeal. The other two, Raymond and Peter were convicted on all 8 counts and sentenced to lengthy periods of imprisonment at a trial which concluded in 1983.

There then began a long series of appeals which I regret to say have still not ended. For despite several visits to our Court of Criminal Appeal and indeed to the High Court, all of which were unsuccessful for the Mickelbergs, their most recent loss in the Court of Criminal Appeal earlier this year, has prompted the filing of another Application for Special Leave to appeal to the High Court.

In December 1986, Raymond was granted leave by the Court of Criminal Appeal to appeal against all of his convictions on the ground that he had discovered fresh evidence.

One month later (January 1987) Peter presented a Petition to his Excellency the Governor pursuant to s21 of the Criminal Code on the grounds that he too had discovered fresh evidence.

The then Attorney General referred the whole case to the Court of Criminal Appeal and by virtue of s21(a) of the Criminal Code the case was heard and determined as in the case of an appeal by a person convicted.

Both appellants contended in 1987 that the police had fabricated the case against them. Both contended that notes of interview taken on 26 July 1982 had been fabricated. Raymond further contended that the police had forged his fingerprint which had been found on the WABS cheque. Both appeals were dismissed.

After a trip to the High Court, Raymond's Application for Special Leave was refused and Peter's case was referred back to the Court of Criminal Appeal to consider two specific questions which were ultimately decided against the appellant.

Now one might normally have expected that one could rule a line under that case and move on.

However in November 1995, the then Attorney General referred the whole case involving both Raymond and Peter back to the Court of Criminal Appeal. It was again contended that fresh evidence had been found.

THE FRESH EVIDENCE

The evidence tendered by the appellants in so far as it related to experts was as follows.

The first was expert testimony relating to notes of evidence written by one of the interviewing officers (Lewandowski). This came about as a result of testing carried out by the appellants on the actual pages of the document that constituted the interview itself.

Messrs Robert Radley and David Baxendale, two British experts in the field of forensic examination of handwriting and documents, were brought to Perth by the appellants to say that through their examination of the Peter Mickelberg record of interview, using a technique known as ESDA, they believed that some of the document had been re-written.

The significance of this was that both police officers involved in the taking of the interview had said on oath, that it had not.

The ESDA technique highlights indented and electrostatic impressions resulting from the writing on a document while it is physically resting on top of other documents. The act of writing on the top document causes the indented and electrostatic impressions to be made on one or more of the documents underneath.

What Radley and Baxendale found was that the ESDA impressions found on page 4 of the interview did not match up with what was written on pages 1, 2 and 3 but rather appeared to have been impressions from a previous set of pages 1, 2 and 3.

The clear inference was that the existing pages 1, 2 and 3 were re-written pages, a conclusion which the Crown did not

challenge. Indeed we were willing to have the affidavits of the witnesses accepted as the evidence without the necessity of calling them from England to testify. The offer was declined.

Another area of the evidence where the appellants relied upon expert evidence concerned a fingerprint found on one of the WABS cheques. The fingerprint was referred to throughout as "the crime mark" and was identified as having being made by the right index finger of Raymond Mickelberg.

Now at trial, the defence attitude to this was that the appellant had been tricked into leaving his fingerprint on the cheque when it was shown to him by the investigating detectives. At least this was the scenario put to the jury by his counsel.

However Mickelberg himself wasn't quite happy with that version and told the jury that he had only picked up the cheque by its edges thus making it impossible for hi fingerprint to have apeared on the cheque where it did.

As it was claimed that the fingerprint was not put there by Raymond Mickelberg's natural finger, some explanation was sought to be given for the existence of this fingerprint on the cheque.

Now, as it happened, Raymond Mickelberg had developed some skills in the casting of hands and fingers in various rubber latex solutions. He says that he had many casts of his hands laying around his house and garage when the police came to arrest him in 1982. He further says that of all of the things that the police seized from his house pursuant to Search Warrants, the only thing he never got back from them were his cast hands.

What started off as an unspoken suggestion of an opportunity to forge later, with the passing of the years, evolved into a clear

accusation that the police had forged his fingerprint by the use of one of these cast hands.

That heralded the beginnings of a new Golden Age for all of those who could describe themselves as fingerprint experts throughout the world.

Experts from Scotland Yard, the FBI, Australian Police Forces State and Federal all descended on Perth to educate, instruct and confuse us.

But the issue to be determined and argued in the 1987 appeal was whether any artificial finger could ever reproduce a fingerprint with all of the subtleties and nuances that a genuine finger could produce.

It transpired that no expert was prepared to say on oath that the fingerprint was a forgery.

So in 1998 the appellants were still searching for an explanation for the existence of the fingerprint on the cheque. Knowing that once again they would be facing the cream of the world's experts in fingerprint science, they scoured the world to find probably the only living "expert" who had not been previously conculted in NSW, more precisely from a place called, believe it or not, "Thumb Creek".

And without in any way wishing to disparage the fine people of Thumb Creek or the place itself which I am sure is a veritable oasis, when I heard that our boys from Scotland Yard and the FBI and the Secret Service and the AFP were to be pitted against the fingerprint man from Thumb Creek, I confess that I had a little difficulty taking him seriously.

In any case this expert came along and said that not only was it a fairly simple process to transfer an undetectable forged fingerprint onto a cheque, but that he could see clear evidence on the cheque that someone had washed off an area of the cheque and implanted this fingerprint in that area.

He could also see tidemarks on the paper which showed the direction of flow of the bleach used to wash the cheque and he demonstrated this with charts and see-through overlays.

Now I know I'm not the most impartial observer but I had a very very close look at that chart, as did the three Appeal Court judges, as did our 6 or 7 experts, and I don't think that any single one of us could see even the beginnings of a drip much less a tide mark.

Now these were some of the issues which were *actually argued* in the appeal. However, as much preparatory work and expense was expended on grounds of appeal which were raised only to be abandoned once the case was referred back to court or after the Crown had obtained evidence which clearly negated the so called "fresh evidence".

This is notwithstanding the fact that it was the existence of this fresh evidence which formed the basis of their argument to have the case re-argued.

I want to just briefly cover two or three such areas.

CUSUM

The first of these areas relates to what is known as CUSUM or Cummulative Sum Analysis. This technique was applied to the Records of interview of both appellants.

The basic premise of this technique is that people use particular classes of words (eg nouns, words of two or three letters or words beginning with a vowel) in roughly consistent proportions of the words in each sentence and that different people often use such words in different proportions.

For example, 50% on average of the words of one person may be of two or three letters whilst the corresponding rate of use of such words for another person may be only 45%. The principle proponent of this theory, the Reverend Andrew Queen Morton from Scotland, would assert, as I understand him, that by graphing the proportion of habit words in each sentence of a text by the same author, a consistent result would be seen in the graphs.

If however part of the text contains a sequence of sentences where the habit words occur in much higher or lower proportions than the average for the rest of the text, then the CUSUM lines will diverge in the chart.

This is evidence, so the theory goes, that more than one author has contributed to the document. Morton then claimed that some of the words in the interview which were attributed to the Mickelberg's were not from them but from someone else, presumably the police.

Now this was something that was a little out of the range of common knowledge of most lawyers, so while not completely panicking but with a healthy degree of anxiety, we scoured the world for anyone who knew anything about this theory.

We found two such experts in England and engaged in very lengthy correspondence with them to try to gain a basic understanding of Morton's report.

Professor David Canter, Professor of Psychology at the University of Liverpool and Dr Richard Hardcastle, a forensic document examiner, and a Doctor of Philosophy in Physics, were enlisted to assist us in understanding and countering this novel evidence.

The point however is that huge amounts of public monies were spent in countering what turned out to be a scientific nonsense. After it was it was countered but also after the existence of the technique had been used as the principal claim to justify the referral of the case back to the courts, the appellants simply say we've changed our minds now thank you very much.

SCAN

The next missive from the Flat Earth Society arrived in the same post as a notification from the appellants that they intended to rely upon yet another scientific technique that had been developed overseas which could actually mathematically compute whether or not a person was telling the truth.

Fearing the demise of the jury system as we know it and the replacement of unanimous verdicts with battery operated calculators, we were informed that this newest revelation was called SCAN. Its principal proponent was a Mr Avinoam Sapir.

SCAN or Scientific Content Analysis, by breaking an individual's linguistic code, purported to be able to reveal what Sapir describes as

> *"the background information which generated the subject's vocabulary or dictionary. Or in other words, we would discover the full story that the subject didn't want to expose openly in the content of the story. However the subject's language exposed it."*

What he did was interview Raymond Mickelberg and from the results of that interview he was able he says, to determine whether Mickelberg was telling the truth when he claimed that his Record of Interview was fabricated.

To gain a little further insight into this extraordinary new investigative tool, I sought more information from a promotional leaflet relating to SCAN, and under the dual headings of a verse from Deuteronomy 13:13-15 and also the words, "WHAT IT CAN DO FOR YOU", the following information was supplied.

What is it?
It's a means by which you can understand what people are really saying (or writing), obtain information that otherwise would not be forthcoming, and detect deception.

How long has it been around?
Since Adam and Eve. But only very few, King Solomon for example, bothered with it. It has only been taught since 1978. Created some difficulties with the proposition that this was fresh evidence.

Who developed it?
Mr Avinoam Sapir BA Psychology, MA Criminology; of LSI (Laboratory for Scientific Interrogation) Phoenix Arizona, by using his skills as a polygraph examiner coupled with teachings from the Scriptures.

Who uses it?
Anyone who wants to know what people are really saying.

Will it work on people of other nationality?
Yes. Provided they are of this world. Cultural or language differences are perhaps an inconvenience but not a barrier.

Fortunately the experts we had engaged to deal with the CUSUM experience didn't find it too much of an intellectual jump to adequately dispose of this latest threat.

INK

Finally, during these efforts to counter the seemingly unending supply of experts being thrown at us, each of whom it seemed had theories which successively sought to outscore the other on the scale of bizarreness, we were then confronted with an allegation which if true, would certainly have supported the proposition that the investigating team of officers were all involved in an enormous conspiracy to frame these appellants.

It came about in this way.

As mentioned above, the appellants claimed that the police had introduced Mickelberg's fingerprint onto the cheque by fraudulent means. They claimed further that the police were assisted in doing this by reason of the fact that Raymond Mickelberg had been arrested and fingerprinted years earlier and that the West Australian Police still had his fingerprint on file.

Now the offence for which Ray Mickelberg had been arrested and convicted was relatively minor and the legislative provisions allowed for the dismissal of such an offence with a first offender. There was also provision for a person in those circumstances to request that his fingerprints be destroyed.

Raymond Mickelberg made such a request and the fact of the request for the destruction of his fingerprints was recorded in a police "New Offenders Register" in June 1976, six years before the alleged conspiracy to frame him for the Mint fraud.

Now the Mickelbergs claimed that no request to destroy the fingerprints was ever made and that the entry in the Registere must therefore be false.

They claimed that with testing they could prove its falsity and had the Register scientifically tested by experts in the USA. The claim was that the ink that had been used to record the entry in 1976 was not made until years later, so the entry must be fraudulent.

We then had the challenge of finding out exactly which ink this ink was, who manufactured it and when. These inquiries took us to the biggest ink libraries known to man, kept deep in the bowels of the building which housed the American Secret Service.

Here, real scientific detective work was undertaken to try to match the ink in the Register with any of the hundreds of thousands of different inks that had been manufactured all over the world.

We also found ourselves in the beautiful snow covered mountains of Mittenwald in Germany, in the laboratories of Mittenwald-Chemie who were, according to the appellants, the manufacturers of the suspect ink.

Next, by approaches made through diplomatic channels, we obtained assistance from the German equivalent of the FBI, the Bundeskriminalamt, from whom we learned far more information about Thin Layer Chromatography and High Performance Thin Layer Chromatography than should have been expected of any criminal lawyer.

There were many other such stories.

The preparation of the Crown's response in this case highlights just how much the public purse is under threat when appellants can raise all sorts of weird and wonderful claims in an effort to convince politicians that they have found "fresh evidence", only to then abandon them once they have obtained yet another day in court.