

**CRIMINAL LAWYERS ASSOCIATION
OF THE NORTHERN TERRITORY**

Presents

THE RUPERT MAXWELL STUART CASE

A Shining Moment in Australian Legal History?

REGINA

V

STUART

SOUTH AUSTRALIA, APRIL 1959

***Tenth Biennial Conference
Bali
2-8 July 2005***



*Photo of Rupert Maxwell Stuart from the front cover of the book **The Stuart Case** written by K.S. Inglis*

Introduction

This is the sixth play-reading (play) presented to the biennial CLANT Conference. It, and these notes, have been written in collaboration by Rex Wild and Caroline Heske both of the Northern Territory Office of the Director of Public Prosecutions. The former of those expresses his gratitude to the latter (who will not be in Bali at the Conference) for her initial interest in the project and then her research and very substantial written contributions to the final production (both of this paper and the play) Caroline is a real playwright and has been produced. There is a note of those productions at the end of the paper.

Some stimulus is usually required before the topic for the play is selected. It came, actually prior to the last Conference, with a suggestion by Russell Goldflam. He is the principal solicitor of the Northern Territory Legal Aid Commission's Alice Springs Office. Russell knows Max Stuart, still living in the Alice Springs area, and thought the subject worthy of consideration by the CLANT delegates. At that time it had been again in the news with the release in the previous year (2002) of *Black and White*, a film based directly on the story of the trial and the legal mish-mash which followed. Russell can thank himself for being cast as Max Stuart in the play itself.

The Story

Rupert Max Stuart is an aboriginal man with some white ancestry. He was born in 1931 in Alice Springs. He was raised by the Aranda (Arrernte) people of Central Australia. Stuart was a wandering labourer and was never fully initiated into Aboriginal traditions. He left Central Australia and joined Jimmy Sharman's boxing troupe, with which he travelled round Queensland and the Northern Territory. He drove cattle in Western Australia. He then joined Norman Gieseman's Funland Carnival, which eventually travelled to Ceduna on its way to Port Augusta. It was at Ceduna that the events which were to lead to his conviction for murder occurred.

Late in April, 1959, Stuart was found guilty of the rape and murder of nine year old Mary Hattam. The murder had occurred a few days before Christmas 1958, in a beach cave near the small South Australian town of Ceduna, population 900. Discovery of the crime led to immediate outrage and a great deal of pressure to find the perpetrator.

The police arrested Stuart. Stuart had been seen in the area of Ceduna Beach, and two aboriginal trackers who had assisted police had indicated that tracks at the scene of the crime had been made by an educated black man from the north. Stuart could speak English but not well. He was offered no interpreter, support, or legal advice. He was made to strip and interrogated by six police officers. He denied the allegations.

Stuart was told that police had two black trackers who would be able to identify the murderer's tracks left at the scene. He then apparently confessed. The confession was typed, read back to Stuart, and he signed it. It became the primary piece of evidence against him. Stuart maintained that the confession had been beaten out of him by police.

When the prosecution case at trial closed, Stuart could do one of three things. He could remain silent; he could go into the witness box and give evidence on oath in reply to questions; or he could make an unsworn statement from the dock.

The common law has always provided that the prosecution cannot bring against an accused person evidence of bad character—including previous convictions—which would merely prejudice a jury against him in general without helping to prove the particular charge before them. An exception to this principle has long been recognised: if an accused person calls witnesses to his good character, the evidence can be countered by evidence of his bad character. But in the late nineteenth century, legislation in South Australia as in other common law jurisdictions went further; it provided that where the defence involved imputations on the character of a witness for the prosecution, prosecuting counsel was entitled to cross-examine a defendant-witness in an attempt to destroy *his* good character.

There was a very substantial argument about this at the trial. Counsel sought to have Stuart's prepared statement read for him by the clerk of courts. The prosecution opposed this course, and the judge refused the application. The jury were deprived, correctly it might be thought in the circumstances, of the full text of Stuart's response to the charge of murder. At this distance it is easy to be critical of the strategy adopted by Stuart's Counsel. (Perhaps this is a matter for discussion over morning tea?)

The jury retired at 2.20pm on Friday 24 April. They returned an hour and a quarter later with their verdict. He was, of course, found guilty.

The criminal law of South Australia gave Mr Justice Reed no alternative other than to sentence Stuart to death. It would have been different if Stuart's trial had occurred in Queensland, where capital punishment was abolished in 1922, or in New South Wales, where it was abolished in 1955 for everything except treason and piracy. In Tasmania, where the Labor government was against hanging, the sentence of death would have been pronounced but commuted. But Stuart happened to be tried in a state where the politicians in power believed earnestly in the need for capital punishment. Stuart was to hang at the Adelaide Gaol (by an anonymous executioner) on the twenty-eighth day after his conviction, unless he appealed or the government saw grounds for commutation.

Max Stuart was granted a stay of execution as his case was appealed, first to the Full Court of the Supreme Court, then the High Court, and then the Privy Council. Defence sought to call linguistic expert, T.G.H. Strehlow, in order to say that the confession could not have been dictated by a man with Stuart's poor English. After examining the confession, he said:

*I read through it slowly and with growing amazement. In my ten years of varied experience of evidence given by aboriginals, part-aboriginals, police officers, and white residents in the Northern Territory, I had never seen a document even faintly resembling the one I was now looking at. Far from bearing any resemblance to any statement ever made by an aboriginal or illiterate part-aboriginal person within my own experience, this succinct and purposeful transcript, in point of its contents and the arrangement of its subject matter, began to reveal itself as a document which could have been composed only by some person who was well versed in legal procedure and in the practice of giving court evidence. ... In plain Australian my immediate reaction upon reading the Police Confession was—'Rupert Stuart just does not talk like that.'*¹

Both Australian courts refused to allow the new evidence and found there were no grounds for appeal. Stuart's death sentence was eventually commuted, despite the inflexible operation of the judicial system, due to public outcry and parliamentary decree.

The Judges on the Court of Criminal Appeal in the Supreme Court during the appeal were Sir Mellis Napier CJ and Mayo and Abbott JJ. The following exchange occurred between one of the judges and Counsel appearing on behalf of Stuart.

Abbott J: You are saying that six police officers perjured themselves?

O'Sullivan: Yes

Abbott J: For no reason?

O'Sullivan: For a very good reason—their jobs and careers would have been at stake.

Mayo J: Their jobs and careers would have been at stake if they had done it. And their liberty too I should think.

O'Sullivan: We know it is done.

Abbott J: I have heard it done with one or two, but not a group of policemen. (Ingليس, 38)

There was a great deal of interest created in the case.

The application for leave to appeal was heard by the High Court in June. Leave was not given. In the course of its judgment the Court had this to say.

Certain features of this case have caused us some anxiety, but we are of the opinion that it would not be in accordance with the principles governing the exercise of our jurisdiction ... to grant this application. ... Counsel for the applicant did not think fit to raise any question of his understanding of English at the proper time, which was, of course, on the arraignment, and neither Mr Strehlow's affidavit nor any evidence

¹ Ingليس (see later footnote for full reference), 45.

to a similar effect was put before the Court of Criminal Appeal. ... It is to be observed that the objection to the police evidence appears to have been based throughout on alleged extortion by violence and threats rather than on any ability of the applicant to understand questions put to him. Having regard to all the circumstances, we do not think that a ground for granting special leave is disclosed by Mr Strehlow's affidavit.²

At the High Court, the Crown Solicitor had observed that when Stuart entered South Australia he came under the guardianship of the state's Protector. In the *Advertiser*, Duguid (president of Aborigines Advancement League, medical practitioner from Scotland) rebuked the Aborigines Department for not having its welfare officer present when Stuart was interrogated. This welfare officer, Duguid wrote, was stationed at Ceduna so that he would be on hand to assist aborigines on the West Coast when in trouble.³

Prosecutor Roderic Chamberlain (later Sir Roderic) received a great deal of bile from the press. This might explain a comment made by Sydney journalist Evan Whitton in the *Sydney Morning Herald* many years later.

But if getting Stuart into prison and keeping him there were routine perversions of justice, getting him out was quite surreal. He was forgotten until 1968, when an elderly Englishwoman, Isabel Roads, known as Miss Penny, began to visit him, but the dreaded Chamberlain became chairman of the parole board in 1970 and made it plain that he would not release Stuart.⁴

Following the High Court's refusal for leave to appeal Stuart's solicitors decided to petition the Privy Council. In the meantime the Executive Council had resolved not to commute the sentence but a respite was granted to 20 July and later extended to 4 August 1955. O'Sullivan appeared before the judicial committee of the Privy Council and on 28 July it dismissed the petition but suggested the examination of new evidence. On 30 July Sir Thomas Playford, the Premier of South Australia, announced a Royal Commission and respites of the death sentence were thereafter regularly made. The Royal Commission commenced its work on 21 August. On 5 October 1955 Counsel for the Crown before the Royal Commission, Roderic Chamberlain QC, announced that the death sentence had been commuted. The Commission concluded its work on 26 October and on 3 December its report was presented to the Parliament with findings that the verdict of guilt was wholly justified. Stuart then began the life sentence in Yatala.

We have not dwelt on the Royal Commission and its processes here. It might well justify a dramatic performance in its own right. One intriguing aspect of it was that the Commissioners were Chief Justice Napier (who had presided at the Appeal), Sir Geoffrey Reed J (who had presided at the trial) and Ross J. This encouraged the cartoon which we reproduce here for your amusement. (Tom was Sir Thomas Playford, South Australian Premier).

² (1959) 101 CLR 1, Inglis, 48

³ Inglis, 57

⁴ SMH, 7 June 2002



PUBLIC: "Billme! Tom's not calling in the same does again, is he?"

—News, Adelaide, July 31, 1959

Stuart's first application for parole in February 1972 was refused. Rather astonishingly it appears that Sir Roderic Chamberlain sat on the Parole Board. In April 1973 he indicated he would not sit on future considerations of parole and Stuart was paroled to Santa Theresa in October 1973. His behaviour between then and 1983, during which time he was paroled on five occasions, was unimpressive and he returned to Yatala on each occasion. His final parole was on 3 July 1984. He then began work as a field officer with the Central Land Council, became an elected delegate and executive member of the Central Land Council in 1989 and its elected Chairman in July 1998. As the Chairman it fell to him, on 30 March 2000, to welcome Queen Elizabeth II to Alice Springs. He continues to live in Central Australia.

In 1993 a docudrama *Broken English* was shown on SBS and ABC and in 2002 the feature film *Black and White* was released. This starred Robert Carlyle as lawyer O'Sullivan, Charles Dance as Roderic Chamberlain QC and David Ngoombujarra as Max Stuart. Max is shown at the end of the film in an excerpt taken from *Broken English*. You will hear at the end of the play what he had to say, nearly 40 years after the event, of his involvement in the Mary Hattam murder.

He was interviewed by Penelope DeBelle of the *Sydney Morning Herald* on 19 August 2002 and this is what she wrote.

The Max Stuart of today is an official and an elder who welcomed the Queen to Alice Springs two years ago and presented her with a painting of the dreaming of his land, the Yeperenye, or giant caterpillar." After the royal commission, Stuart's sentence was commuted to life. In 1974 he was released, but still in the grip of drink he was in and out of jail until 1984.

His wife died almost 20 years ago and he lives alone in a caravan on a property just out of Alice Springs, dividing his time between there and land he owns near Kings Canyon, four hours away. He makes the trip alone in a beaten-up old car whose tyres need air.

Despite his well-paid job as head of the Central Land Council, a job given to him by Pat Dodson....

If he had the money, he says, maybe millions of dollars or a nugget of gold from the MacDonnell Ranges up there, he would re-open the old case so justice could be done. 'I don't want a pardon first,' he said, 'I just want the case to start again and talk about a pardon after, yeah.

I always wanted to be involved in nothing, you know, just a stockman and drover's boy,' Stuart says. That changed, partly because of his time in prison. 'I learned bush laws and whatever when I was inside the prison, how to respect people, how to speak to people when you're spoken to. I used to be a bad fellow before that.

Because when I was in the condemned cell I was a non-believer, he says. So when people around the world started praying for me, I didn't hear them talking but it comes in my mind. The day before I got hung they were all there. Whichever way the wind blows, I didn't give a damn.

I'm only living on a borrowed life anyway,' he chuckles. 'You got to go one day.



The events of the Stuart case have
now been dramatised in
Black and White
a major feature film starring
Robert Carlyle, Charles Dance,
Kerry Fox and David Ngoombujarra.



J. D. O'Sullivan



Helen Devaney



R. M. Stuart with Detective Jones



Detective Sergeant Paul Turner



Prosecutor Chamberlain



Sergeant W. Low



Above: Police Station Ceduna, SA
Below: Trackers

The Characters

The reader has already been introduced to Rupert Max Stuart. There were a number of civilian witnesses at the trial. Not all of them will be portrayed in the play. We have included Peter Jacobsen (aged 8). He was a friend of Mary and Peter Hattam and with them on the day that Mary died. Dennis Blackham was a taxi driver who drove Max Stuart to Thevenard Hotel near Ceduna on the day of the murder.

There were three *expert* witnesses (although it will be left somewhat to the observer of the play to assess the level of their expertise).

- Dr Kathleen Thompson – had been working at the Bush Church Aid Society's base for a few months, having graduated from the University of Melbourne three years earlier. She performed a post-mortem examination on Mary Hattam the day after her death.
- Sonny Jim – an aboriginal tracker who usually did farm work. Once, briefly, he became a film actor, for an English company making *Robbery Under Arms*. He turned up for the committal in the uniform of a lance-corporal at the Royal Military College at Duntroon.
- Harry Scott – aged 65 was Sonny Jim's uncle, had spent his life at Koonibba, the Lutheran mission beyond Ceduna until 1957, when he took a job on the Thevenard wharf.

There were a number of police officers and they can be very briefly described as follows.

- Detective-Sergeant Paul Turner – from CIB in Adelaide, flown in to investigate this matter. President of the Police Association.
- Constable Richard Jones – from CIB in Adelaide, flown in to investigate this matter.
- Sergeant William Low – from CIB in Adelaide, flown in to investigate this matter, fingerprint expert and photographer
- Senior Constable Frank Whitrod – from Port Lincoln, drove to Ceduna to investigate
- Constable John Fairweather – from Port Lincoln, drove to Ceduna w/Whitrod to investigate
- Sergeant Walker – local Ceduna police
- Constable Green – local Ceduna police
- Constable Herde – local Ceduna police

The lawyers were as follows.

- John David O'Sullivan – Defence lawyer assigned to Stuart. He often appeared in criminal cases and was a leading member of the Democratic Labor Party. At the federal election in late 1958, O'Sullivan was the party's campaign director in South Australia and had his name at the top of its ticket for the Senate.
- Helen Devaney – O'Sullivan's partner in his legal firm. She was his junior or instructor at the trial. [The respective juniors Scarfe and Devaney do not seem to have taken many, if any, witnesses at trial.]
- Roderic Chamberlain, Q.C. – a tall, lean man of 57, played superbly in the movie *Black and White* by Charles Dance. He was South Australia's Crown Solicitor. He was later knighted and wrote his own book about the Stuart affair (bearing title of that name and published in 1973).

Some of the Issues for Consideration

This case is a disturbing illustration of a legal system which could not cope with the reality of its colonial frontier. The court viewed all proposed measures to assist Stuart to understand his rights, the case against him, or to convey his story in English as *special measures*; exceptions, which could not be countenanced.

The evidence admitted, seen from afar, was far from reliable, and much of it was highly prejudicial with little probative value. Considerations of a fair trial seemed to have given way to a determined attempt to preserve faith in police and the rule of law. But such faith can only be justified if those whose job it is to uphold the law rigorously scrutinise their own actions and those of their peers. Justice must not become a crusade.

Justice Michael Kirby wrote a film critique of *Black and White* which was published in the *Canberra Times* on 1 August 2002. He said this.

The fundamental lesson that judges and magistrates should draw from watching Black and White is that formalism is not enough. A devotion to justice is imperative. I regard it as a sobering discovery to learn from Black and White that the real saviour of Max Stuart's life was not the Australian court system. It was the chance decision of a young media personality who shared the 'good deal of anxiety' about the case which the courts either did not see or would not, or could not, act upon.

No system of human justice is perfect. The improvements we have made in the past 40 years by no means removed the possibility of miscarriages of justice or wrongful convictions. To the very end, no-one really knows for certain whether Max Stuart was guilty or innocent. But the conduct of his prosecution, trial and appeals were not a shining moment in Australian legal history."

Lawyers looking today at the trial would note the absence of anything like an attempt to comply with the *Anunga* Rules.⁵

The Play Reading:

This play has been adopted from the original trial transcript for *Regina v Stuart*. The transcript has been abbreviated and various witnesses have been deleted altogether. They would advance the narrative little although no doubt necessary to an orderly presentation of the prosecution case. The original wording has been used wherever possible but this is subject to the following note. The court-approved transcript does not faithfully record, in every instance, the question asked and answer given. Rather, it is generally a compilation of the question **and** answer. It has been necessary to winkle out the original question. As a result some answers may appear longer than you would expect at trial. We plead *dramatic licence!*

Acknowledgements

One of the essential pieces of material for a legal play reading is the original court transcript. We have been fortunate in, once again, having access to that material. In this case it was obtained for us by Liesl Chapman of the South Australian Office of the Director of Public Prosecutions and we express our gratitude to her. Russell Goldflam has already been acknowledged as the proposer of the topic and he also lent his (borrowed, as it turned out) copy of the book by K S Inglis *The Stuart Case* so that we could build on the original proposal. I also thank my executive assistant Trish Smith for managing to marry two separate manuscripts in both this paper and the play and produce a result which is, at least, worthy we hope of your consideration.

We thank again on your behalf the delegates who have been pressed into service, volunteered their participation or forced their way in as members of the cast (a full list of the *Dramatis Personae* and the players appears at the end of this document). We hope the play provides some diversion while confirming, once again, the need to fight for and safe guard the right to a fair trial.

We should also acknowledge the assistance provided by Ken Inglis' book *The Stuart Case* to which we have referred regularly. Those wanting more information about the case and its aftermath would do well to obtain a copy.⁶

⁵ *R v Anunga* (1976) 11 ALR 412

⁶ K.S. Inglis *The Stuart Case* [Black Inc, 2nd Ed., 2002]

We leave the last words in the play itself to Max Stuart. You will have to wait to the end to hear those enigmatic words. In the meantime, we give the final word here to Russell Goldflam.

The last time I saw Mr Stuart was when he presided over the celebrations for the 30th Anniversary of the Formation of the Central Land Council last year (2004). As I was walking home across the Todd River that night he was chanting traditional Arrernte songs over the PA, a very forceful (and lyrical) reminder of his status as a boss for this part of the country.

*Rex Wild & Caroline Heske
ODPP Chambers
Darwin NT, June 2005*

Previous Plays

| | | | |
|------|--------------------|---|---|
| 1995 | The Popish Plots | - | Golden threads, golden silences and silver tongues: The right to a fair trial. |
| 1997 | Ned Kelly | - | The benefit of Counsel. |
| 1999 | Tuckiar | - | A fair trial: interpreters and the right to a defence and the right to understand |
| 2001 | Eureka Trials | - | The resilience of the jury system: serving the community. |
| 2003 | Bentley & Craig | - | A Matter of Profound Regret: Derek William Bentley's Birthright to a fair trial. |
| 2005 | The Rupert Maxwell | - | A Shining moment in Australian Legal Stuart Case History |

Plays written by Caroline Heske

Nonsense on Paper (2001) and *Relic* (2002) were produced by Psychic Cat Productions in Melbourne, and an adaptation of *Obernewytn* by Isobelle Carmody was produced by Corrugated Iron Youth Arts in Darwin in 2004.

DRAMATIS PERSONAE – and – PLAYERS

The Trial Judge

Justice Sir William Reed *Tom Pauling*

Prosecuting Counsel

Roderic Chamberlain *David Grace*

E B Scarfe *Beth Wild*

Defence counsel

John D O'Sullivan *Jon Tippet*

Helen Devaney *Suzan Cox*

Witnesses

| | |
|--------------------------------------|--------------------------|
| <i>Peter Jacobsen (aged 8)</i> | <i>Ruth Brebner</i> |
| <i>Dr Kathleen Thompson</i> | <i>Jenny Blokland</i> |
| <i>Denis Blackman</i> | <i>Stewart O'Connell</i> |
| <i>Sonny Jim</i> | <i>Dean Mildren</i> |
| <i>Harry Scott</i> | <i>Peter Thomas</i> |
| <i>PC Howard Herde</i> | <i>Jack Karczewski</i> |
| <i>PC Richard Jones</i> | <i>Tom Berkley</i> |
| <i>Det Sgt Paul Turner</i> | <i>Glen Dooley</i> |
| <i>Sen Con Frank Whitrod</i> | <i>Mark Johnson</i> |
| <i>Sgt William Low</i> | <i>Martin Fisher</i> |
| <i>John May JP</i> | <i>Austin Asche</i> |

The Accused

Rupert Maxwell Stuart *Russell Goldflam*

Clerk of Arraignment *Jodi Mather*

Foreman of the Jury *David Robertson*

Narrator *Rex Wild*

The play reading has been adapted from the original transcript of the trial by Caroline Heske and Rex Wild.