



**CRIMINAL LAWYERS ASSOCIATION
OF THE NORTHERN TERRITORY**

**SEVENTH BIENNIAL CONFERENCE
BALI 27 JUNE - 2 JULY 1999**

TUCKIAR'S TRIAL



*A Fair Trial -
Interpreters and the Right to a Defence
and the Right to Understand*



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INTRODUCTION

This performance, actually a play reading, of the trial (together with the background and aftermath) of *Tuckiar* is extensively based on materials provided by His Honour Justice Mildren of the Supreme Court of the Northern Territory, with whom I have collaborated in preparing it for the conference, and on Ted Egan's book *Justice All Their Own*.

Justice Mildren, of course, requires no introduction to Territorians; nor does Ted Egan. Ted describes himself as a *singer, songwriter, author and professional vagabond*. He is an MA in History and the presenter of television series and is a former Northern Territory Patrol Officer and himself at one time, as a result of that, a *Protector of Aborigines*. He is a member of the National Reconciliation Council, speaks two Aboriginal languages and he is attuned to Aboriginal issues.

Ted's book is described in its flyleaf as:

The product of forty years' research, this account of the killings, the protests and the subsequent trials in Darwin in 1934 (and) presents a thorough analysis of the motives and behaviour of the various participants. It shows the disturbing and distressing consequences of the imposition of the British system of justice on people accustomed to their own predictable, consistent legal system, which itself is the product of a complex culture developed over thousands of years.

I have long been interested in *Tuckiar's* case;¹ in fact, ever since we were referred to the High Court decision as part of our Ethics lectures at University. To those readers who have forgotten their Ethics (?), I am attaching a copy of the head note from the report: (1934-35) 52 CLR 335.

When deciding to present Tuckiar's story as my contribution to this year's conference, I was delighted to find Ted's book which had been published in 1996. It brings to life the period of the thirties in the Territory and the clash of cultures. When I wrote to him, requesting permission to use his material for the play, Ted very graciously consented and wrote that he was *honoured that you wish to use my material in conjunction with your production in Bali.*

I was also pleased when discussing the project very informally with Justice Mildren (actually over drinks with our wives immediately at the conclusion of the 1997 conference) to discover our mutual interest in Tuckiar. Dean is, of course, a well-known student of Territory legal history. He has a lot of original material in relation to *Tuckiar's* trial which he has generously made available. He is very much responsible for the format we have adopted this year which finds the play presented in five acts with some scene changes. I repeat that it is a play reading rather than a play so a great deal of *in character* depth should not be expected.

THE STORY

Most of you will be familiar with the principle for which *Tuckiar's* case is usually cited. It is to do with professional ethics and is the case most cited in relation to the obligation of defence counsel to keep his client's instructions confidential and to provide an adequate defence in all the circumstances of the case. This latter principle appears in the head note in the following terms:

Counsel had a plain duty, both to his client and to the Court, to press such rational considerations as the evidence fairly gave rise to in favour of complete acquittal or conviction of manslaughter only.

The judgment of the High Court, which does give a fair description of the events which occurred prior to the trial, does not, however, provide the *climate* of the time. The killing of Constable McColl, which was the subject of the murder with which Tuckiar was charged, followed the killing of Japanese trepang fishermen at Woodah Island in September 1932. A police party had been despatched to Caledon Bay at the beginning of November 1932 but did not succeed in *apprehending any of the offenders*. A further expedition was to be organised *immediately after the wet season*. In fact the police

¹ Of course, I am not an *island* in this regard. I know the Northern Territory Women's Lawyers Association did a reading of *Tuckiar* last year. I have also been advised since starting this project that Chief Justice Martin also made a presentation on *Tuckiar's* case at this very conference some years ago (before my time!).

patrol which left Darwin to investigate the killing of the Japanese at Caledon Bay did not leave until June 1933. The patrol included Constable Ted Morey (as its leader), and two Darwin-based Constables, Jack Mahony and Vic Hall. The latter was the only one of the group to give evidence at the subsequent trial. Constable Albert Stewart McColl, who was stationed at Roper Bar, joined the party along with Aboriginal trackers from that station. The trackers were Tommy, Paddy (also known as Big Pat who also gave evidence at the trial), Lock and Dick. The police patrol travelled overland and arrived at the end of July on Woodah Island which lies near Groote Eylandt. On 1 August 1933 McColl was killed by spearing.

The patrol, having landed at Woodah Island, travelled on foot about 20 miles. They came to a deserted native camp where they found the fires warm. They posted trackers and information enabled the party to surround a number of *lubras* whom they handcuffed together and brought back to camp. One of them was Tuckiar's wife. There the police questioned them. Later another report of a sighting of natives in a canoe was received 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 unfettered. On the return of the constables the two trackers were at the camp but neither McColl nor the lubras were there. Next morning his body was found about 400 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 he had fired three times, his third shot having been a mis-fire. Apparently the two trackers left with McColl in charge of the lubras (and afterwards returned to the camp) had not remained there throughout the absence of the rest of the party. Neither of them gave evidence and it is not known why and in what circumstances McColl left the camp. As the other constables were returning to the camp a spear was thrown at one of them which pierced his hat. He fired his pistol but no shots were heard which were attributed to McColl.

Following the death of the police constable there was a considerable outcry. The Administrator of the Territory, Colonel Weddell, wrote to the Department of the Interior at the end of August 1933 and claimed *Strong demonstrative force imperative, as natives numerous, hostile and cunning, many murders by them during the last 16 years remain unpunished.*

Following substantial negotiations at all levels, it was decided not to send the *demonstrative force* regarded as *imperative* by the Administrator. Instead a party was arranged by the Christian Missionary Society with a view to travelling to the region and providing a mechanism for settling the differences. In effect, to cause *peace to break out*. The Missionaries, in fact, travelled to Groote Eylandt and in due course persuaded Tuckiar and others to travel to Darwin to explain their part in the whole affair. They induced Tuckiar and the other *natives* to travel in the boat of a trepanger to Darwin with promises of safe conduct and quick return. One of the leaders of the Missionary team was Reverend Alf Dyer who was an Anglican Minister and previously the Superintendent at Oenpelli and at Groote Eylandt. Once Tuckiar arrived in Darwin he was arrested and charged with the murder of McColl. He was going to spend most of the rest of his known life in Fannie Bay gaol.

It plays no part in the Tuckiar case in the High Court, as we know it, but it is important to understand that feelings were running high in Darwin and the Northern Territory during this period. The bodies of two unidentified men were also found on Woodah Island. These were two men who were almost certainly killed in March 1933. Their death was not known until many months later and in fact after the killing of McColl. It was therefore no part of the police patrol to investigate the killing of these two men who were thought to have been Traynor and Fagan. They were also trepang fishermen. In light of what was to occur during the trial of Tuckiar for the murder of McColl, it is important to note that these two white men were in fact killed by Tuckiar and two other Aboriginal men whilst they were on their boat at Woodah Island and this killing had followed those white men sexually interfering with Tuckiar's wife on board that boat.

Of course the police patrol that arrived in July 1933 was there to investigate the killings of the Japanese at Caledon Bay in September 1932. When Morey and his party landed at Woodah Island in August 1933, the Yolngu probably surmised that the police were there to investigate the killings of Traynor and Fagan. As Ted Egan says, *How ironic that one of the women captured by the police was Djapparri*, whose husband Tuckiar had already killed two white men who had previously abducted her.

In any event, once having established the death of these other two men by discovering their bodies, and Tuckiar having been taken back to Darwin, he was also charged with their murder. The significance of this is that the trial for that murder took place on Thursday 2 August 1934 in the Supreme Court in Darwin. The trial judge was Justice Wells, the prosecutor was John Harris and defence counsel was William Fitzgerald. That trial was concluded within a day and Tuckiar and the other accused were all acquitted. Five of the twelve white man jury which participated in that trial were also to be included in the jury on the very next day when the trial of Tuckiar for the murder of McColl would proceed. William McMillan, who had served on the first jury, was to be foreman of the Friday team. The trial commenced at 9.30 am on Friday 3 August 1934 and was concluded by 10.50 pm when, following a verdict of guilty, the matter was adjourned until Monday 6 August. The trial had lots of twists and turns but I will leave those to be aired during the play.

The plea on sentence, the death penalty not then being mandatory, was heard on Monday morning and in due course sentence of death pronounced.

As we know, application was made for leave to appeal directly to the High Court. This was heard on 29 October 1934 (things got on a little more quickly in those days) and judgment was given on 8 November 1934, less than two weeks later. I have noticed that Fullagar KC and Dethridge appeared for the appellant. Wilfred Fullagar was later a judge of the High Court himself and Dethridge became a County Court judge in Victoria. The report notes that *Reynolds* appeared for the Crown. I can only assume that this was Ted Reynolds who later became a very prominent Silk at the Melbourne Bar and was regarded for many years as the leader of the Bar. He was an acting Supreme Court judge, I think, in the early fifties but was never confirmed.

The majority judgment of the court was delivered by Gavan Duffy CJ on behalf of himself and Dixon, Evatt and McTiernan JJ. A separate judgment was delivered by Justice Starke, but to the same general effect.

For those readers who are interested in learning more about Tuckiar and this period of Northern Territory history, then a good starting point is the judgment of the High Court in *Tuckiar* and Ted Egan's book.

THE PLAYERS

We have claimed some dramatic licence in identifying our *players*. All of the witnesses and jurymen were, in fact, males. In the play I presented at the last conference I did not use all of the actual witnesses. *Ned Kelly's* trial concluded in two days; *Tuckiar's* in one! The witnesses you will hear are all of those that were called. The players (and I thank each of them for their participation) will be:

Mr Justice Thomas Wells, Trial Judge	Tom Pauling
John Harris, Prosecutor/Acting Crown Law Officer	David Grace
William Fitzgerald, Barrister & Solicitor, Defence Counsel	Jon Tippett
Harry Partridge, Solicitor for the Accused	Nicole Spicer
Lt Colonel Robert Weddell, NT Administrator	George Georgiou
Harold Nelson MP	Rex Wild
John Nichols, Court Orderly/Associate.....	Melanie Little
Unidentified Aboriginal Interpreter.....	Glen Dooley
William McMillan, Foreman of the Jury	Charlie Rozencwajg
Arnold Orton, Jurymen	Julie Wager
Tuckiar (<i>Dhakiyara Wirrpanda</i>), the Accused	Peter Tiffin
Warder	David Bamber
Joseph Aloysius Carrodus, Acting NT Administrator.....	Richard Refshaug
Chief Justice Gavan Duffy.....	Stephen Odgers
Wilfred Fullagar KC	Austin Asche
E R Reynolds	Jenny Blokland
Justice Starke	Stephen Apps
High Court Orderly	Suzanne Oliver
Unidentified policeman	David Dalrymple

Witnesses

Victor Charles Hall, Mounted Constable Tom Berkley
Paddy (Big Pat), Police Tracker Richard Coates
Parriner, Woodah Island Aboriginal Dean Mildren
Harry, Aboriginal Mission Boy Alasdair McGregor
Dr Cecil Cook, Protector of Aborigines Therese Austin
Reverend Alf Dyer, Anglican Minister Elizabeth Morris
Narrator Rex Wild

SYNOPSIS

- Act I** An introduction
- Scene I** The funeral of McColl at Gardens' Cemetery, Darwin on 22 April 1934. The eulogy is read by Harold Nelson MP and Administrator Weddell makes some inflammatory remarks.
- Scene II** Tuckiar meets Fitzgerald and Partridge with an unidentified Aboriginal interpreter at Fannie Bay gaol.
- Act II** The trial at Darwin, 3 August 1934
- Scene I** The opening of the trial and calling of witnesses Hall, Paddy and Parriner. The judge then suggests to Fitzgerald that he obtain some further instructions about Parriner's evidence.
- Scene II** Fitzgerald then has an adjournment for half an hour, with Paddy and Parriner to discuss the evidence with Tuckiar and obtain his instructions.
- Scene III** On resumption, Harry gives evidence and then Fitzgerald informs the judge that he has a matter to discuss and that he is *in a predicament*. The jury then retires.
- Scene IV** Fitzgerald and Dr Cook then meet with the judge in Chambers.
- Scene V** Harry is cross-examined by the defence. The trial continues with a discussion between the prosecutor and judge as to absence of witnesses. The prosecutor obtains further instructions and proceeds with the trial, and recalls Hall to give character evidence. Final addresses and the like, questions from the jury (with more evidence from Hall) and verdict follows.
- Act III** The Sentencing, Darwin, 6 August 1934
- Scene I** The sentencing process. Fitzgerald calls the Chief Protector of Aborigines Cook and Reverend Dyer. Sentence of death is passed.

Act IV The High Court, Melbourne

Scene I The High Court; Wilfred Fullagar KC appeared for the appellant and E R Reynolds for the Crown. They make submissions to the High Court in Melbourne on 29 October 1934.

Scene II The court gives judgment via Gavan Duffy CJ and Starke J on 8 November 1934. The conviction is quashed and a verdict of acquittal is entered.

Act V Fannie Bay gaol.

Scene I Tuckiar is released from Fannie Bay gaol on 10 November 1934 and departs Darwin never to be seen again.

REX WILD
Director's Chambers
Darwin

[HIGH COURT OF AUSTRALIA.]

TUCKIAR APPELLANT ;

AND

THE KING RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
THE NORTHERN TERRITORY.*Counsel—Criminal prosecution—Evidence of confession by accused—Interview between
prisoner and counsel—Privilege—Duty of counsel.**Criminal Law—Evidence—Comment by Judge on prisoner's failure to give evidence
—Act No. 245 (S.A.), sec. 1.*

Sec. 1 of Act No. 245 (S.A.), which is in force in the Northern Territory, enables a person accused of an offence to give evidence on his own behalf but it provides that no presumption of guilt shall be made from the fact of such person's electing not to give evidence.

An accused, who was a completely uncivilized aboriginal native, was charged with the murder of a police constable in the Northern Territory. During the trial counsel for the accused interviewed his client at the suggestion of the Judge to ascertain whether the accused agreed with evidence given by a witness for the Crown of a confession alleged to have been made by the accused to the witness. After interviewing the accused, his counsel in open Court said that he was in the worst predicament that he had encountered in all his legal career. During his summing up to the jury the trial Judge commented on the failure of the accused to give evidence. The accused was found guilty of murder.

Held, by the whole Court, that the conviction should be quashed; by *Gavan Duffy C.J., Dixon, Evatt and McTiernan JJ.*, that the Judge's comment alone was sufficient to render the conviction bad; by *Starke J.*, that the actual charge given to the jury in the circumstances of the case denied the substance of fair trial to the accused.

Per Gavan Duffy C.J., Dixon, Evatt and McTiernan JJ.: Counsel had a plain duty, both to his client and to the Court, to press such rational considerations as the evidence fairly gave rise to in favour of complete acquittal or conviction of manslaughter only.

After the prisoner was convicted his counsel made a public statement in Court to the effect that the accused admitted that the evidence called by the Crown of a confession made by the accused to a witness was correct.

Held, by the whole Court, that counsel should not have divulged the information thus acquired.

H. C. OF A.

1934.

MELBOURNE,

Oct. 29 ;

Nov. 8.

Gavan Duffy
C.J., Starke,
Dixon, Evatt
and McTiernan
JJ.

H. C. OF A.
1934.TUCKIAR
v.
THE KING.

APPEAL from the Supreme Court of the Northern Territory.

This was an appeal by leave from a conviction of murder before the Supreme Court of the Northern Territory, and from the sentence of death pronounced by the Court.