

Law and Justice Address

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Virginia Bell

It is an honour to be invited to make the Law and Justice Foundation's annual Justice Address, if a little surprising. I'm an after dinner speaker. The essence of after-dinner speaking is being inconsequential, which I've never had a problem with. Previous speakers have included two former Chief Justices of the High Court, who it must be said, had advantages over me: they were in the habit of thinking in big picture terms, whereas I'm at the coal face level of the hierarchy. Moreover, they were *former judges* when they delivered the Justice Address. The only thing the public asks of serving judges is that they express no views on any topic of controversy and generally contrive to be dull. In the past I believe judges were allowed to have an interest in military history but I think nowadays that may be politically incorrect.

Much of my career has been involved with the criminal law and, within the constraints of being a serving judge, I thought I would speak about criminal justice since it is the area of the work of the courts, which is the most controversial and frequently misunderstood.

A recent report by the *Bureau of Crime Statistics and Research* contains the results of a survey designed to measure the level of public confidence in criminal justice (*Crime and Justice Bulletin*, No 118, August 2008). Respondents expressed high levels of confidence that the system respects the rights of accused persons and treats them fairly. On the other hand there was a low level of confidence that the system addressed the needs of victims of crime. The survey did not ask the respondents whether they thought that respecting the rights of accused persons and treating them fairly were desirable goals. Given the low level of confidence on other measures, it may be that some of the respondents who expressed confidence in these

measures, considered that it was a reflection of a bias against the interests of victims of crimes: A common enough view, which assumes that the one can be set off against the other.

Respect for the rights and fair treatment of those accused of crime are central to our system of criminal justice and on an occasion such as to-night's dinner it's worth reflecting how fortunate we are that is so.

Five years before the apology offered by the Commonwealth Parliament to Aboriginal Australians a reconciliation ceremony took place in the Supreme Court building in Darwin, in which the Yolgnu people of east Arnhem land thanked the High Court for a decision which remains a landmark in our criminal law: *R v Tuckiar* [1934] HCA 49; (1934) 52 CLR 335. Tuckiar, the name by which the appellant was known, is a corruption of his name, Dhakiyarr Wirrpanda. He was a Yolgnu man convicted of the murder of a white policeman named Albert McColl. The story is a tragic one in a number of respects but the judgment stands as a moment in our history of which we can all be proud. It speaks to the value which we as a community place on fairness. Many lawyers here tonight will be familiar with *Tuckiar's* case, but some of you may not be, so bear with me while I sketch some of the history.

In 1933 a small party of police were despatched to Woodah Island in the Gulf of Carpentaria to investigate the murder of several Japanese fishermen. Constable McColl was one of the party. The police came upon a group of Aboriginal women whom they took into custody, handcuffing them together, and taking them back to their camp so as to interrogate them. A group of Aboriginal men were observed setting off in a boat and the main body of the police party headed off in pursuit; leaving Constable McColl to superintend the Aboriginal women. On their return the police found that Constable McColl and the women were missing. His body was found the next day not far from the

camp. His pistol was lying nearby. Three shots had been fired from it, the third a misfire. He had been speared through the heart.

Tuckiar and another Yolgnu man named Parriner and some others were persuaded by a white fisherman with whom they were on good terms to go to Darwin to sort the matter out. Three of the aboriginal women whom the police had seized were said to have been "Tuckiar's women". He was charged with the murder of Constable McColl. The only evidence against him presented at his trial was of confessions which he was alleged to have made. One was to Parriner and the other to an Aboriginal boy named Harry. Tuckiar spoke no English and the evidence was given through an interpreter who relayed it to the court in pidgin. Tuckiar was alleged to have told Parriner that he had hidden in the bushes and given a signal to the woman handcuffed to Constable McColl to move away and that when she did so he had speared him. Harry's evidence was that Tuckiar said he had seen Constable McColl having sexual intercourse with his wife and that, after this, McColl had seen Tuckiar and fired at him. It was against this background that Tuckiar had thrown the spear.

The Protector of Aborigines arranged for counsel to appear for Tuckiar. Unfortunately both the trial judge and Tuckiar's counsel appeared more concerned to protect Constable McColl's reputation than to ensure that Tuckiar had a fair trial. Evidence was led to show that Constable McColl was a man of good moral character who had been known to behave with decorum including when he was in the company of half-caste girls.

At the conclusion of Parriner's evidence, the judge asked counsel in front of the jury whether he had obtained instructions from Tuckiar about what Parriner had to say. Counsel said that he had not. The judge adjourned the trial so that counsel could speak with Tuckiar. On the resumption of the trial, counsel asked if he could speak with the judge in chambers because he had

been placed in the most difficult predicament of his life. There followed a further adjournment during which counsel and the Protector of Aborigines conferred with the judge in chambers. The trial resumed. No evidence was called on Tuckiar's behalf.

The jury was troubled by the lack of evidence and they sent a note asking, "if we are satisfied that there is not enough evidence, what is our position?" The judge answered their question, saying among other things, that they should not be swayed if they thought the Crown had not done its duty, he reminded them that if they brought in a verdict of not guilty Tuckiar would be freed and could not be tried again no matter what evidence may be discovered in the future.

In his summing up the judge told the jury, "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". He went on to comment that Tuckiar had not given evidence and that the jury could draw any inference that they cared to draw from that circumstance.

Tuckiar was convicted and sentenced to death.

After the jury returned their verdict, Tuckiar's counsel informed the Court that he had spoken with Tuckiar, with the assistance of the interpreter, putting to him that he had told two different stories and asking him which was true. Tuckiar had said that the true account was the one he had told Parriner.

Tuckiar appealed to the High Court. The case was heard by five justices. The history of the trial was set out in the joint reasons (Gavin Duffy CJ, Dixon, Evatt and McTiernan JJ) and their honours observed that for more than one reason the verdict could not stand. The trial judge's comment on Tuckiar's failure to give evidence was a clear misdirection. Moreover, the jury had

witnessed the spectacle of Tuckiar's counsel retiring, at the judge's suggestion, to discuss the evidence of the principal witness against him and that after this counsel had asked to see the judge because he had been placed in "[t]he worst predicament" of his career. The judge's direction that the jury could draw such inference as they liked from Tuckiar's silence was in the circumstances an invitation to presume his guilt. Their Honours said that it had been wrong to admit the evidence of Constable McColl's good character because, "the purpose of the trial was not to vindicate the deceased constable, but to inquire into the guilt of the living Aboriginal" (at 345). They were trenchantly critical of counsel. It was not clear why he had perceived himself to be in a predicament; he had a plain duty to press such rational considerations as the evidence fairly gave rise to in favour of a complete acquittal or a conviction for the lesser offence of manslaughter (at 346):

Whether he be in fact guilty or not, a prisoner is, in point of law, entitled to an acquittal from any charge which the evidence fails to establish that he committed, and it is not incumbent on his counsel by abandoning his defence to deprive him of the benefit of such rational arguments as fairly arise on the proofs submitted.

Justice Starke wrote separately. He pointed out that the judge had directed the jury that if they accepted Parriner's account it was a case of deliberate murder. His Honour considered that this overlooked the effect on Tuckiar of what he had seen happen (at 352):

It was, no doubt, necessary for the police to capture and handcuff the lubras if they were to achieve the object of their expedition, but the rules of English law cannot be cited in support of their action. To uncivilized aboriginals, however, and particularly to the prisoner, the conduct of the police

party may well have appeared as an attack upon the lubras and themselves, and provoked or led to the attack upon the police in their own defence. A finding of not guilty, or of manslaughter, was quite open to the jury on the evidence.

All of the justices were agreed not only that the appeal must be allowed and Tuckiar's conviction set aside, but on the consequential order. In the ordinary course one would have expected the Court to order a new trial. However, the publicity given to the statement made by Tuckiar's counsel had been widespread throughout the Northern Territory and in the extraordinary circumstances of the case it was considered that it would not be possible to afford Tuckiar a fair trial. The Court directed that a verdict and judgment of acquittal be entered. Justice Starke expressed his expectation that the Commonwealth authorities would ensure Tuckiar's safe return to his country.

The language of the judgments is the language of another era, which to our ears may sound prejudiced and condescending. The Yolgnu people are described as "uncivilized Aboriginals". The women are referred to as "lubras" and their children as "picaninnies". The judges who decided the case were all white, they all happened to be men and they all led lives of relative privilege. There is no reason to think that they did not share the prejudices that were common to privileged professional men of their time. But what counted was their intelligence and fidelity to the principles of the common law. The judgment was handed down on 8 November 1934: In that year Hitler assumed the office of Fuhrer of the German people and German judges were applying the Nazi regime's eugenics laws; the Department of Justice in the United States was offering a \$25,000 reward for the capture of John Dillinger *dead or alive*; and in Australia the High Court entered a verdict of acquittal in the case of an Aboriginal man who had speared to death a white policeman, because the court that tried him had not given him what the law demanded, which was, a fair trial according to law.

There is, as many of you would know, a grim postscript to Tuckiar's story. After his release from Fannie Bay Goal, Tuckiar disappeared. His fate is unknown. The probability is that he was murdered by those who did not agree with the verdict. While the habits of the lynch mob had not died in some quarters of our society in 1934, it is worth noting that the High Court's decision was not greeted with storms of protest. The unfairness of aspects of Tuckiar's trial had been reported and there was a groundswell of public concern about his conviction and the imposition of the death penalty. The organised labour movement and the church had been active in petitioning the Commonwealth Government for clemency. Among the petitions was one from the Ipswich Railway Workshop Workers, who presented it to the Prime Minister, Joe Lyons. The *Sydney Morning Herald* (11 August 1934) reported that the Prime Minister had responded:

You may be assured that the Cabinet will approach the matter with very great sympathy. On the general question of control of Aborigines, I feel that some more permanent and satisfactory method should be evolved. My personal view is that these unfortunate people deserve some consideration. They were the owners of the country before we came.

The *Sydney Morning Herald* and *The Age* gave extensive, fair, coverage to the decision of the High Court quoting large sections from the judgment. The quality of the legal reporting in the newspapers of record at that time is impressive and in marked contrast with the coverage of important decisions of the Court today.

Those for whom the court is required to ensure a fair trial will often be individuals who are accused of heinous offences or who, for other reasons, are the subject of public odium. It is a mark of our civilisation that courts are

insistent on the fair treatment of the accused even if the content of a fair trial seems to some commentators to be a costly and unnecessary luxury.

So it is encouraging to see that the respondents to the Bureau's survey rated the courts favourably on what I will broadly describe as the fair trial measures. The low level of confidence in the ability of the criminal justice system to meet the needs of victims of crime is a cause of concern to those of us involved in the administration of justice. I hope that at least to some extent the responses on this measure reflect a popular understanding of how things were, more than how they are. I say this because over the course of my professional life I have seen a number of changes, which I believe have made the experience of court less of an ordeal for complainants and for the families of victims. We have come a long way from the days that I recall when the complainant in a sexual case was left sitting by herself in the draughty corridors of the Darlinghurst complex as she waited to give evidence.

The use of closed circuit television as a means of taking the evidence of complainants, to say nothing of the provision of waiting facilities designed to prevent the complainant from rubbing shoulders with the friends and family of the accused, are measures which relieve some of the stress of being a witness in a criminal case. Equally important is the support that the Witness Assistance Service of the DPP provides to complainants. Having a person present who is familiar with the court process and who is able to provide support and information is a very practical way of helping complainants and family members to deal with the trial process.

The law now requires the court to disallow questions put to a witness in cross-examination that are intimidating, offensive or humiliating: s 275A of the *Criminal Procedure Act* 1986 (NSW). More recently, provisions were introduced into the *Criminal Procedure Act* to provide a mechanism to deal with sensitive evidence: ss 281A – 281F. Sensitive evidence includes, for

example, certain types of photographs, images of alleged victims of sexual offences, and the like.

All of these are sensible measures which do not detract in any degree from the court's ability to provide a fair trial to the accused.

There remains a widespread belief in the community that complainants in a sexual assault trial can expect to be asked intrusive questions about their sexual history and reputation. The law does not allow it and has not allowed it for years: s 293 of the *Criminal Procedure Act* and before that s 409B of the *Crimes Act 1900*. But the experience of complainants dating back nearly a generation, who were subjected + to their sexual history being paraded for public view, lives in our collective memory. I hope that with time the public perception of the system's treatment of the victims of crime will reflect what I believe is a more positive picture.

I am conscious that tonight is an occasion to celebrate the work of the individual nominees and the organisations for whom they work for the contributions that they have all made to improving the quality of and access to justice in our society. I would like to pay my respects to all of you and get off my soap box and let everyone enjoy the night.
