ARTICLES

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BLACK AND WHITE LESSONS FOR THE AUSTRALIAN JUDICIARY

ABSTRACT

Using the 'celluloid metaphor' of the new Australian film *Black and White*, the author describes the features of the case of Rupert Max Stuart that reached the High Court in 1959. He outlines the imperfections of the legal process and acknowledges that the prisoner's life was ultimately saved not by the legal system or the judicial process but by a dedicated group of journalists and other citizens who shared the High Court's expressed 'anxiety' about the case but were more determined to give effect to that 'anxiety'. The author describes improvements in the criminal justice system since 1959. These include legal protections for indigenous people; the requirements of legal representation as expressed in *Dietrich*; the rigorous rule for confessions to police adopted in *McKinney*; the stricter rules governing criminal appeals; the larger insistence on prosecutorial impartiality; the enforcement of requirements for competence of lawyers; and the advent of DNA and other scientific

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* Justice of the High Court of Australia. This article is based on a lecture given at the Law School, The University of Adelaide, 12 August 2002.

evidence to reduce the risks of miscarriages of justice. The author suggests that the Stuart affair illustrates how cleverness is not enough in the law. There must also be a commitment to justice.

I CAUSE CÉLÈBRE

It seems that everyone who lived in South Australia in the late 1950s and 1960s was touched by the Stuart affair.[1] Most have a story to tell. For South Australians, it was the great scandal. But the exact nature of the scandal depended upon individual points of view and these were sharply divided.

With time, most scandals fade away. Memories are dimmed. The original actors leave the stage or die. Yet the Stuart case lives on in memory. Now, the memories have been rekindled by an Australian film that vividly portrays the crime and its consequences. The film, *Black and White*, had its world première at the opening night of the 49th Sydney Film Festival in 2002. By the time this essay is published, *Black and White* will be distributed to cinemas throughout Australia and overseas. It portrays the Australian judicial system at work 40 years ago. Not all of the images are flattering. Yet not all of them are savage and critical. We see portrayed a legal and judicial system with strengths, but also with very human faults.

At the world première, the director of the film, Craig Lahiff, the producers Helen Leake and Nick Powell and several of the actors took their bows. Most of the audience were non-lawyers for whom this was a kind of mystery thriller. But for a lawyer watching the film, the important question that it posed was not whether the accused was guilty of murder. Crucial though that question is, it is simply the puzzle at the centre of the mystery of what happened. For the lawyer, the importance of the Stuart case is that it displays a legal system of decades ago that was put to the test in the trial of an illiterate Aboriginal Australian and was revealed as seriously deficient in important respects. Equally intriguing are the lessons that the film suggests concerning the improvements that have occurred in the administration of justice in the intervening years and the need to maintain the momentum of such improvement.

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1 The story of the case, the trial, appeals, campaign, Royal Commission and later events is told in K S Inglis, *The Stuart Case*, (2nd ed, 2002).

Forty years ago, I was just commencing my legal career. My work as a solicitor was mainly on the civil side. However, as a result of activities that I began as a law student, I became associated with the local Council for Civil Liberties (CCL). Here, I was brought face to face with the realities of criminal justice as they existed in Australian law at that time.

For the most part, the honorary work for the CCL did not involve people accused of serious crimes. The majority of the cases concerned conscientious objectors to the Vietnam call-up; defending protesters in the public demonstrations that were common in Australia in the 1960s and combating the intransigence of authorities who invariably refused permission for public processions and marches. The CCL defended people alleging police misconduct. It ventured forth with Aboriginals and students seeking to 'liberate' the remaining places to which indigenous Australians were commonly denied access. It was in this area, at the lower end of the hierarchy of criminal offences, that I first became acquainted with the realities of criminal law and practice.

One case in which the CCL engaged me concerned a suggested denial of natural justice to a young invalid pensioner suffering from the consequences of encephalitis. Following a minor confrontation he had been brought before a magistrate in the Court of Petty Sessions in Paddington. The accused's name was Glenn Corbishley. The exchanges between Mr Corbishley and the magistrate, as recorded in the transcript, revealed apparent departures from the duty to accord a party procedural fairness. The Corbishley case became an object lesson for me in the way the criminal law sometimes operated, when disadvantaged people became caught in its web.

Mr Corbishley challenged his conviction in the Court of Appeal of New South Wales, seeking judicial review on natural justice grounds. Justice J D Holmes, in memorable words, said of the proceedings:[2]

> The picture is one which shows how the poor, sick and friendless are still oppressed by the machinery of justice in ways which need a Fielding or a Dickens to describe in words or a Hogarth to portray pictorially. What happened that day to the applicant was only the beginning of the terrors which were to confront him before the proceedings before this stipendiary magistrate were completed.

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2 *Ex parte Corbishley; Re Locke* [1967] 2 NSWR 547, 549.

The decision of the Court of Appeal had an unsettling denouement. Its sequel was the hearing of a merits appeal in the District Court in which the judge confirmed the conviction and replaced the magistrate's bond with a term of imprisonment. This outcome, so apparently offensive to a just conclusion of the substance of a case, taught me an important lesson. The law operates in categories, solving immediate problems, sometimes without attention to the overall justice of the case. One can win a battle but lose the war. Sometimes, both battle and war are lost for want of adequate legal representation.[3]

The Stuart case, and the Royal Commission that followed it, concerned much more serious crimes. But it also involved a disadvantaged litigant. The controversy about it hit the headlines in the Sydney of my youth. Then, like other notorious cases, it passed from memory. Now, *Black and White* has revived the memory. The film is a celluloid metaphor for the need to improve the criminal justice system, especially for the disadvantaged and vulnerable. Every judge, lawyer and law student should see *Black and White* and reflect on its lessons. The film contains important instruction. For those of us who have a temporary responsibility for the administration of criminal justice, formalism is not enough. Law itself is not enough. Cleverness in lawyers and judges is not enough. Of those who judge, and those who practise law, something more — something quite intangible — is required.

I want to demonstrate these propositions by reference to the story of Max Stuart that *Black and White* recounts. From a consideration of that story, and the defects it discloses in Australia's criminal justice system 40 years ago, I want to ask whether the defects have been removed. Or whether there remains room for improvement.

II MURDER IN CEDUNA

The basic facts that lay behind the criminal proceedings against Rupert Max Stuart are simple. On 20 December 1958, near Ceduna in South Australia, a young girl, Mary Olive Hattam, aged nine, was raped and murdered in a cave by the seashore. Her body was found that night by a party of local people searching for her. The crime revealed in the cave was horrifying. There was nothing to identify the

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3 In later years, in the Court of Appeal of New South Wales, a rule was laid down obliging a judge in such a case to warn of the possible increase in sentence so that an appellant can seek leave to withdraw the appeal: *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282.

person who had committed the offence except some footprints in the sand near the cave. These were traced on the following morning by Aboriginal trackers who pointed to footsteps in the sand from the cave to a pool of water and thence back to a roadway above the beach.[4]

Max Stuart was an Aboriginal of the Aranda or Arrernte (formerly 'Arunta') tribe, described as 'not quite of the full blood'.[5] He had come to Ceduna on the day before the murder. He arrived with a travelling road show by which he was employed. Two days after the crime, at about ten o'clock at night, a party of six police officers went to where Max Stuart was living. The police took him to the Ceduna Police Station where he was questioned for some time. According to the police, at first he denied all implication in the crime. But eventually, they alleged, he admitted his guilt and described the circumstances of the murder. A confession was typed out. It was signed by Max Stuart in block letters. The accused was then charged with murder and locked up. The substance of the case against him was that confession. All that was added to connect him to the crime was an opinion, expressed by the trackers, that the footprints on the beach were the same as Stuart's.

III THE TRIAL AND APPEALS

Max Stuart had no money to engage a lawyer. He applied to the Law Society of South Australia for legal aid. He was assigned a young legal practitioner, David O'Sullivan, and his business partner, Helen Devaney. O'Sullivan was not a Queen's Counsel. Normally, senior counsel would be assigned to a murder case. None, it seems, were available. On 21 January 1959, Stuart was committed for trial by Mr L K Gordon SM, sitting in Ceduna. He was arraigned in the Supreme Court of South Australia before Mr Justice (Sir Geoffrey) Reed. His trial began before an all-male jury. It lasted five days. On 24 April 1959, the jury returned a verdict of guilty. In accordance with the law at that time, Max Stuart was sentenced to death. In South Australia, under the Playford Government, the ultimate sentence was not a formality; it was commonly carried out.

Things moved quickly in those days. On 4 May 1959, notice of appeal to the Court of Criminal Appeal of South Australia was given. On 6 May 1959, the appeal was heard before a court comprising the Chief Justice of South Australia,

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4 *Stuart v The Queen* (1959) 101 CLR 1, 3 ('*Stuart*').

5 Ibid.

Sir Mellis Napier, and Justices Mayo and Abbott. At the conclusion of the hearing, the court dismissed the appeal. It confirmed the death penalty.[6]

It was in these circumstances that, in Melbourne, on 1 and 2 June 1959, Max Stuart's application for special leave to appeal against his conviction came before the High Court of Australia. Presiding was the Chief Justice of Australia, Sir Owen Dixon. The other Justices participating were Justices McTiernan, Fullagar, Taylor and Windeyer. Two weeks later, at the Brisbane sittings on 19 June 1959, the Court delivered a unanimous written judgment. It is recorded in the 101st volume of the *Commonwealth Law Reports*.[7] It covers eight pages. It dismissed the application.

Counsel appearing for the Crown throughout the proceedings was Mr Roderic Chamberlain QC, the Crown Solicitor for South Australia. Mr O'Sullivan and Miss Devaney appeared throughout for the prisoner.

IV THE HIGH COURT APPEAL

Three main points were argued in the High Court. The first was that the Court should receive expert evidence to the effect that the language used in the typed confession, said by police to have been the exact words of Max Stuart, was incompatible with that of a person whose total fluency was only in the Aranda Aboriginal language and whose knowledge of the English language was imperfect. The opinion, in the form of an affidavit by Mr Ted Strehlow, an expert in the Aranda language, was that the confession 'could not have been dictated by a totally illiterate aboriginal'.

The second point was a complaint that the trial judge had refused to permit an officer of the court, at the request of the accused, to read to the jury the written statement that he was himself unable to read because of illiteracy.

The third objection concerned a comment by the prosecutor at the trial that the accused had a right to give evidence on oath but that he would then be subject to cross-examination. Mr O'Sullivan objected that this statement before the jury contravened the provisions of the *Evidence Act* of South Australia that 'the failure

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6 *Stuart* [1959] SASR 133.
7 *Stuart* (1959) 101 CLR 1.

of any person charged with an offence … to give evidence shall not be made the subject of any comment by the prosecution'.[8]

One by one, these objections were rejected by the High Court.

The first objection provides my only personal link with the Stuart case. My original appointment to judicial office was in December 1974. At that time many of the *dramatis personae* who took part in the case were still alive. I met a number of them on journeys to Adelaide in my capacity as Chairman of the Australian Law Reform Commission.

One such encounter was dramatic and tragic. The linguistics expert in the Aranda language, by this time Professor T G H Strehlow, was an important figure for explaining the customary laws of the Aboriginal people. He had grown up with Aboriginal people on the Hermansburg Mission in Central Australia. He spoke their language fluently. When the Australian Law Reform Commission was asked in 1977 to examine Aboriginal customary laws, we naturally looked to Professor Strehlow for guidance.[9] At one stage we spoke briefly about the Stuart case. Strehlow revealed his profound disappointment in the Australian judiciary, especially the High Court. On a visit to Adelaide, I agreed to open an exhibition of Strehlow's photographs and artefacts. It was when he called on me in his old room at the University of Adelaide shortly before the opening ceremony, that he suffered a heart attack. Ted Strehlow died in my arms.[10]

It was Professor Strehlow who provided the Stuart team with the opinion, analysing the language of the confessional statement and deposing that it could not have been dictated by Max Stuart, as the police claimed. The language used included the somewhat stilted legal-police language of those days. People and objects were described as 'situated' in a stated place, a word from Norman French that few ordinary Australians (still less illiterate Aboriginals) would use.

Unfortunately, as the High Court noted, 'counsel for the applicant did not think fit to raise any questions of this understanding of English at the proper time which was, of course, on the arraignment'. The High Court pointed out that 'neither Mr Strehlow's affidavit nor any evidence to similar effect was put before the

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8 *Evidence Act* 1929 (SA), s 18(ii).

9 See the Commission's report *The Recognition of Aboriginal Customary Laws* (ALRC 31, 2 Vols, 1986). There is a comment on the *Stuart* case at 445, par 603.

10 The circumstances are described in M D Kirby, 'T G H Strehlow and Aboriginal Customary Laws' (1981) 7 *Adelaide Law Review* 172, 176–7.

Court of Criminal Appeal'. The High Court said that 'generally speaking', it was confined on appeal to the material that was before the court appealed from.[11] A fine distinction was drawn by the Court between Max Stuart's complaint at the trial that the confession was extracted through violence and threats rather than unreliable because of his inability to understand the questions put to him by police. The Court, therefore, dismissed the first argument.

The second argument related to the request that the statement from the dock be read for Stuart by a court officer. As the High Court noted, that facility was regularly available to prisoners in South Australia.[12] Unfortunately, the Crown Prosecutor had objected to it being done in this trial. This objection was upheld as one upon which the Crown was entitled to insist. The judge had told Mr O'Sullivan that he could prompt the accused. The High Court describes what then happened:[13]

> [T]he prisoner's statement consisted of what may be described as a few, and relatively inarticulate, words which denied his guilt and alleged ill-treatment on the part of the police officers who had interrogated him. It was as follows:-
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> 'I cannot read or write. Never been to school. I did not see the little girl. I did not kill her. Police hit me. Choked me. Make me say these words. They say I killed her. That is what I want to say.'
>
> (His counsel then spoke to him). 'That is what I want to say. Someone to read this out for me.'

The High Court agreed with the Court of Criminal Appeal that Max Stuart had no enforceable legal right to have the statement read before the jury. The Court observed that 'at the same time it could, of course, have been done with the consent of the Crown, and in the special circumstances of this case, one might perhaps have expected consent to be given ....' But the judges concluded: '[N]o legal right of the applicant was denied ... and we do not think that any ground which would justify the intervention of this court can be found therein.' So the second ground also failed.

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11 *Stuart* (1959) 101 CLR 1, 4–5 citing *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 109, 110.

12 Ibid 7.

13 Ibid.

As to the third ground, which concerned the side comment by Mr Chamberlain that the prisoner had not been denied an opportunity of putting his version of the facts before the jury, the High Court accepted that this had been said by Mr Chamberlain to prevent the jury being misled into thinking that the applicant had suffered an injustice. There was no shorthand note or recording of exactly what Mr Chamberlain had said to the jury. But, on either version, it was clear that he had told them that Max Stuart had a right to give evidence on oath, then being subject to cross-examination.

The High Court disagreed with the legal analysis of the Court of Criminal Appeal, excusing this comment.[14] This meant, in effect, that a legal error had occurred, involving a breach of the *Evidence Act*. On the face of things, it was a serious breach. But, in effect, the High Court upheld Max Stuart's conviction on the basis of the 'proviso'. It did so by describing the occasion of the comment as involving 'altogether exceptional circumstances' and noting that the judge was not forbidden from instructing the jury as to the accused's right not to give evidence and that he had done so in clear and lawful terms.[15] The High Court agreed that it was not every instruction by a judge that could erase a forbidden comment by the prosecution. It acknowledged that 'in any ordinary case the lawful and unlawful comment must be presumed to have been cumulative in effect'.

V 'A CAUSE OF ANXIETY'

In the last paragraph of the High Court's reasons the Justices returned to, and repeated, a statement they had made in the first paragraph of their decision. It was that 'certain features of this case have caused us some anxiety'.[16] At the time, such words were very unusual indeed. Mr Chamberlain, later Sir Roderic, was to complain that these words 'more than anything else, led to all the turmoil that was to follow'.[17] Nevertheless, the proffered 'anxiety' was not sufficient to result in an order quashing the conviction, the sentence of death and ordering a retrial. A parting shot in the High Court's reasons was targeted at Mr Chamberlain. Whilst the case stood for judgment, he sent a communication on behalf of the Crown to the Registrar of the High Court enclosing material said to bear on the prisoner's capacity to understand the English language. In their reasons, the Justices rebuked Mr Chamberlain: 'This communication we have entirely ignored and we do not

14 Ibid, 9.
15 Ibid, 10.
16 Ibid, 3, 10.
17 Sir Roderic Chamberlain, *The Stuart Affair*, (Rigby, 1973), 38.

think it ought to have been made'. Sir Roderic Chamberlain later observed, in his book on the case, that he had been 'obliged to accept the rebuke' although he 'never understood why the High Court should have felt obliged to "ignore" information with direct bearing upon the credibility' of the Strehlow affidavit.[18]

VI SEQUEL AND COMMUTATION

Three events then followed in quick succession. First, Rohan Rivett, the editor-in-chief of the Adelaide *News*, backed by an ambitious, young newspaper proprietor, Rupert Murdoch, took up the cause of Max Stuart. There was widespread media and public agitation about the 'good deal of anxiety' to which the High Court had referred. An application was made for special leave to appeal to the Privy Council. This was rejected as, later, would be the application to the Privy Council involving the last man hanged in Australia, Ronald Ryan.[19] To the very end of its involvement in Australian cases, the Privy Council did not wish to be concerned in such minor, local controversies. But then, in response to the media and public agitation, the Premier, Thomas Playford, established a Royal Commission to enquire into the conviction.

The Royal Commission was constituted of three judges, two of whom, remarkably, had been involved judicially in Max Stuart's case. Sir Mellis Napier (who had presided in the Court of Criminal Appeal) and Sir Geoffrey Reed (the trial judge). The third Royal Commissioner was Mr Justice Ross, who was the same age as Reed but junior to him in seniority of service.[20] Viewed with today's eyes, and even allowing for the small number of judges in South Australia at the time, the composition of the Royal Commission was astonishing. The Royal Commission reported that there was no reason to warrant disturbance of Stuart's conviction. In the meantime, Mr Playford communicated the recommendation to the Governor that the death penalty be commuted to imprisonment for life. Max Stuart's life was spared. He is still alive. The film ends with an enigmatic statement made by him in Central Australia. He is now an old man.

What is the relevance of this case, decided so long ago, for us, the judicial officers, lawyers and law students of Australia, working in a new century?

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18 Ibid.

19 M Richard, *The Hanged Man: The Life and Death of Ronald Ryan* (2002) reviewed M D Kirby (2002) 26 *Criminal Law Journal* 114.

20 K S Inglis, *The Stuart Case* (MUP, 1961), 96.

VII A CRITICAL EYE ON THE STUART STORY

Some scenes in the film *Black and White* appear unrealistic to trained legal eyes. The modest ivy-covered building in Little Bourke Street that housed the High Court in Melbourne in 1959 was obviously considered insufficiently grand for worldwide conceptions of a nation's Supreme Court. Another more monumental building (apparently a Masonic temple) was chosen, boasting Doric columns of much grandeur. Alas, this building did not come supplied with a proper bench — few buildings other than courthouses have them. In the result, the High Court, as portrayed, was constituted of only three, not five, judges and two of them had to make do without a table: a bizarre notion for any working judge.

At various points in the dialogue, in various courts, the advocates are heard to express their personal opinions. Whilst this error has indeed crept into advocacy in recent years, it is most unlikely that it would have been tolerated 40 years ago. If it had occurred, it would have been sternly rebuked, for the feelings and opinions of lawyers are irrelevant, save as they express the submissions of their clients. Mr Chamberlain is sometimes portrayed as too evil; Mr O'Sullivan as too good. The truth was probably that Chamberlain was a highly committed and able prosecutor, sometimes lacking detachment, who viewed his opponent as incompetent and Stuart as guilty of heinous crimes. Certainly, Mr O'Sullivan did make slips in the proper representation of his client. They told heavily against Max Stuart, especially by the time the case reached the High Court and the Privy Council.

Yet have we, in the Australian judiciary, made progress since the Stuart case? Would such a case have been dealt with in a similar way today? Do the standards of Australian courts 40 years ago reflect the standards that we apply to contemporary criminal proceedings?

VIII NEW EVIDENCE IN APPEALS

One thing has certainly not changed. The High Court has continued to set its face against the reception of fresh evidence, even crucial evidence, in the disposition of appeals before it. It was so held in *Mickelberg v The Queen*.[21] That was the case about the Mickelberg brothers in Perth, recently again in the news.[22] Before the High Court they had sought to tender new evidence that had not been available to

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21 (1989) 167 CLR 259.

22 *West Australian,* 12 June 2002 ('The Mickelberg Verdict Looks Unsafe').

them earlier. The High Court rejected the evidence. It held that it could not receive it. This rule was recently reaffirmed in *Eastman v The Queen ('Eastman')*.[23] The foundation for the rule appears to be an interpretation of the word 'appeal' in s 73 of the Constitution. That word has been given a strict meaning, as involving an appeal on the record, that is, a narrow, legal appeal permitting no fresh evidence to be received whatever its weight and importance and however reasonable the failure to secure and call it at the trial or on the earlier appeal.

In *Eastman* I dissented from this opinion, believing it to be inconsistent with the proper reading of the Constitution. The notion of 'appeal' was relatively new at the time when the Constitution was written. It is now a normal feature of the work of the courts. Appeals provide protection against legal and factual errors and against serious miscarriages of justice.[24]

My view has not so far prevailed. If anything, the High Court's position has firmed up. The most that the High Court said in the *Stuart Case* in 1959 was that the Court was, 'generally speaking', confined on appeal to material that was before the court appealed from. Now, in *Eastman*, this is said to be an unyielding rule — always applicable. The rule means that where new evidence, such as that of Professor Strehlow or the exculpating lay evidence of Max Stuart's employer, turns up after a trial and hearing before the Court of Criminal Appeal are concluded, whatever the reason and however justifiable the delay, the High Court, even in a regular appeal to it still underway, can do nothing. Justice in such cases, is truly blind. The only relief available is from the Executive Government or the media — not from the Australian judiciary.

IX IMPROVEMENTS IN CRIMINAL JUSTICE

Despite this rule, other beneficial changes have certainly been introduced. Many of them follow rulings of the High Court itself, given in times since 1959, and seemingly more sensitive to justice.

First, we now live in a country whose laws and practices are less discriminatory against, and dismissive towards, our indigenous peoples. Most Australians realise

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23 (2000) 203 CLR 1.

24 *Eastman* (2000) 203 CLR 1, 76–93; cf *Gipp v The Queen* (1998) 194 CLR 106, 150–155; cf *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)(* (1999) 73 ALJR 306, 322–5.

the importance of ensuring true equality in the legal system for Aboriginals. The greatest advance in this direction came with the belated recognition of Aboriginal land rights in *Mabo v Queensland [No 2]*.[25] However, quite apart from that decision of the High Court, judges had earlier laid down explicit rules to govern the questioning of Aboriginal suspects.[26] Such principles were adopted out of recognition of the cultural forces that tend to result in Aboriginal concurrence in questions put to them in an interrogatory setting.

The Aboriginal Legal Service has been established. The Australian Law Reform Commission made particular proposals for interrogation of Aboriginal suspects. Some of these still await implementation.[27] In the Northern Territory, mandatory sentencing, which fell so heavily upon Aboriginal offenders, has been repealed.[28] The follow up to the Royal Commission into Aboriginal Deaths in Custody appears to have reduced the incidence of those tragic fatalities. But Aboriginal imprisonment in Australia is still disproportionately high. We still have a long way to go. Yet overt prejudice, never far from the surface in Max Stuart's trial, is now, I believe, much less common in the legal scene. I hope it is.

Secondly, a prisoner such as Max Stuart, facing such a serious charge, would undoubtedly now be entitled, if indigent (as Max Stuart was), to proper and effective legal aid through an Aboriginal Legal Service. In such a trial, he would not be obliged to turn to young, courageous but inexperienced lawyers such as Mr O'Sullivan and Miss Devaney or to benevolent, voluntary bodies such as the Poor Persons' Committee of the Law Society or CCL. Moreover, he would have access to professional representation in the trial, effectively as a legal right. This is the consequence of the rule laid down by the High Court in *R v Dietrich*[29] — a notable decision that, in effect, endorsed Justice Murphy's dissenting opinion against the old attitude stated only 13 years earlier in *R v McInnis*.[30]

Thirdly, the somewhat peremptory way in which the courts of 1959 dealt with Max Stuart's complaint about the circumstances in which the confession was taken from him by six policemen would today have been obliged to run the

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25 (1992) 175 CLR 1.

26 *R v Anunga* (1976) 11 ALR 412.

27 *Criminal Investigation* (ALRC 2, Interim, 1975), para 382; *Aboriginal Customary Laws* (ALRC 31) (Vol 1), Ch 22 (para 573), 1986.

28 *Sentencing Act* 1995 (NT) ss 78A, 79B, since repealed; N Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24 *Criminal Law Journal* 164.

29 *Dietrich v The Queen* (1992) 177 CLR 292, 311–2, 337, 362, 374.

30 (1979) 143 CLR 575.

gauntlet of the High Court's rulings in *McKinney v The Queen*.[31] Forty years ago, the allegation of an improper extraction of a confession from accused prisoners by police and other officials was regarded by some judges and magistrates as an affront to the integrity of Crown officers. Something of the flavour of those naive days is brought out in the film. There is shock and indignation at the fact that the allegations are even made. There is resistance on the part of judicial office-holders to the very possibility that they could be true.

Such attitudes were also reflected in the High Court in Stuart's case. Yet, in the wake of repeated complaints and numerous official inquiries, the High Court took, one by one, its gradual steps towards a more rigorous principle. Those steps can be traced through such decisions as *Driscoll v The Queen*,[32] *Stephens v The Queen*,[33] *Carr v The Queen*[34] and *Duke v The Queen*.[35] Eventually, in *McKinney,* the High Court laid down the rule that wherever police evidence of a confessional statement, allegedly made by an accused whilst in police custody, is disputed and its making is not reliably corroborated (as by sound or video recording) the judge should, as a rule of practice, warn the jury of the danger of convicting on the basis of that confessional evidence alone. Had such a warning been given to the jury in Max Stuart's case, in firm judicial language as intended, it might have alerted the jury to the real possibility that his claim, that the confession had been extracted from him by violence, might have been true.

Fourthly, although Professor Strehlow's evidence would not have been available in the High Court today to undermine the reliability of the alleged confession by Max Stuart, it seems unlikely to me that the Court would now adopt such a formalistic approach to the conduct of the Crown at the trial in objecting to the reading of the dock statement for an illiterate Aboriginal and in making impermissible observations about the accused's failure to give sworn evidence. Dock statements have now all but disappeared in Australia. That issue does not, therefore, now arise. One of the reasons that caused some lawyers to support the retention of the facility of an unsworn statement before the jury was just such an accused as Max Stuart — illiterate, inarticulate, susceptible to cultural norms favouring agreement and discouraging contest.

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31 (1991) 171 CLR 468.

32 (1977) 137 CLR 517, 523, 541.

33 (1985) 156 CLR 664, 669–70. See also *Bromley v The Queen* (1986) 161 CLR 315, 324–5.

34 (1988) 165 CLR 314.

35 (1989) 63 ALJR 140, 142, 148.

That issue apart, the highly partisan approach of the prosecutor at the trial, and even in the High Court would, I suspect, today have attracted more than a verbal rebuke and an expression of anxiety. It is one of the great traditions of our legal system, which we must be at pains to preserve, that the prosecutor is not a persecutor. The prosecutor's task is to place all relevant evidence before the court.[36] The criminal trial is not strictly an adversarial proceeding. Statute apart, it is an accusatorial proceeding in which the prosecutor must prove the elements in the offence of the accused and do so beyond reasonable doubt. The accused, normally, need prove nothing.[37]

Today, once the conduct of Mr Chamberlain QC at the trial was placed before an appellate court, including the High Court, and especially in relation to a disadvantaged, illiterate person whose first language was not English, it seems impossible to think that an apparently deliberate breach of the *Evidence Act* would just be brushed aside as immaterial to the circumstances. Of the Crown and its prosecutors, very high standards of integrity, detachment and fairness are expected. Where today such prosecutors act unfairly or inadequately, and the result is a miscarriage of justice, a retrial would normally be ordered.[38]

Fifthly, there were undeniable and serious defects in the conduct of Max Stuart's case by his lawyers. His representatives certainly had courage and determination — two sterling qualities in advocates. But they made serious tactical and legal mistakes. In effect, these cost their client his appeal to the High Court and the Privy Council. They could have cost him his life.

In the intervening 40 years, in keeping with greater realism, courts in Australia have developed principles to protect litigants from incompetent counsel.[39] I do not say that those principles would necessarily have applied to Mr O'Sullivan and Miss Devaney. It is easy to be wise after legal events — a privilege that specially belongs to appellate judges. But today, where a person is denied a fair trial

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36 *Grey v The Queen* (2001) 75 ALJR 1708, 1717; cf *Giannarelli v The Queen* (1983) 154 CLR 212; M Hinton, 'Unused Material and the Prosecutor's Duty of Disclosure' (2001) 25 *Criminal Law Journal* 121.

37 *Liberato v The Queen* (1985) 159 CLR 507, 515, 519; *RPS v The Queen* (2000) 199 CLR 620, 630–3; *KRM v The Queen* (2001) 206 CLR 221, 254 [97], 256 [104]; *R v Whittingham* (1988) 49 SASR 67, 71.

38 Ibid.

39 *R v Birks* (1990) 19 NSWLR 677; cf *Conway v The Queen* (2002) 76 ALJR 358, 379–80; *Crampton v The Queen* (2000) 75 ALJR 133; *Rowe v Australian United Steam Navigation Co* (1909) 9 CLR 1, 24.

because of incompetent legal representation, the courts do not wash their hands; neither should they. This is another advance of the past 40 years.

Sixthly, in so far as the established infraction by Mr Chamberlain of the prohibition on comment about the accused's right to give evidence on oath and the breach of the *Evidence Act* attracted a conclusion that it could be overlooked by reason of all of the circumstances, it is proper to say (as a number of High Court judges have lately observed),[40] that the application of the 'proviso' to condone established legal defects in a trial is less common now than previously it was. This suggests, as is my own impression, that the right to a legally accurate trial is more vigorously enforced today than it was in Australia 40 years ago. Perhaps this fact demonstrates, in turn, our perception of the truth that it is a miscarriage of justice, without more, if a material legal error affects the conduct of a criminal trial.

There is also evidence of a growing involvement of the High Court in criminal appeals, when compared to the days of Max Stuart's proceedings.[41] This fact also suggests a contemporary turning away from the notion that, somehow, criminal law (and its companion activity, sentencing) are beneath the dignity of the highest court in the land. A miscarriage of justice must never be beneath the dignity of anyone involved in the judiciary — least of all of a judicial officer who, on behalf of the Australian people, has the power to remove a proved error occasioning an apparent injustice.

Seventhly, we should not overlook the advances in technology that have come to the aid of the criminal justice system in the past 40 years. Some such advances affect the way in which confessional statements are recorded to avoid later disputes over alleged official impropriety. However, as recent highly publicised cases demonstrate, biological evidence is now playing an increasing role to secure safe and reliable convictions and, where relevant, to exclude the inculpation of the innocent. DNA and other scientific evidence involve their own problems, dangers and risks of injustice. But there is no doubt that, used properly, such evidence can be extremely powerful. Sometimes it can exculpate an accused who was, like

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40 *Gilbert v The Queen* (2000) 201 CLR 414, 438 [86]; *Doggett v The Queen* (2001) 75 ALJR 1290, 1313–4 [153]; *Festa v The Queen* (2001)76 ALJR 291, 325; cf *Whittaker* (1993) 68 A Crim R 476, 484.

41 M D Kirby, 'Turbulent Years of Change in Australia's Criminal Law' (2001) 25 *Criminal Law Journal* 181; M D Kirby, 'The Mysterious Word "Sentences" in s 73 of the Constitution' (2002) 76 ALJ 97; M D Kirby, 'Why Has The High Court Become More Involved in Criminal Appeals?' (2002) 23 *Australian Bar Review* 4.

Max Stuart, previously convicted on disputed oral testimony.[42] In Max Stuart's case, hairs had been found under the victim's fingernails.[43] Samples were taken of Stuart's hair. However, in 1958 and 1959, such scientific tests were rudimentary. Today, they would probably have proved determinative.

X FORMALISM IS NOT ENOUGH

The film *Black and White* gives a mixed message about the Australian legal system 40 years ago. On the one hand, it does reveal its steady devotion to proper procedures and to appellate review, then, through three levels of the judicial hierarchy followed by a Royal Commission. On the other hand, it portrays the chief actors in the drama as highly formalistic and basically unconcerned (or not too much concerned) about the risk that they might themselves be the instruments of a miscarriage of justice. I have known lawyers of that kind. We all have. It would be a stereotype to say that such attitudes can be traced to upbringing, social class and education. Personality and character are the key to such attitudes. When lawyers forget the mission of justice which is our professional calling, and when we celebrate law devoid of justice, we run the risk that we ourselves sanction serious wrongs and become part of the problem.

We have not reached judicial nirvana in Australia in 2002. Even today, in the High Court of Australia, there is no guarantee that a prisoner seeking special leave to appeal will have legal representation or even an oral hearing. In some States of the Commonwealth, such as Western Australia and Queensland, prisoners are routinely brought from prison to the court when they have been refused legal aid. At least then they have the chance to state their arguments for themselves, equally with others who can do through counsel. That is what happened when Justice Gaudron and I were sitting in Perth and heard the successful application of the prisoner in *Cameron v The Queen*.[44] In other States (such as New South Wales) the prisoner is not ordinarily given that facility. In South Australia the Court must normally send a request that the prisoner's application to appear be facilitated.

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42 *R v Button* [2001] QCA 133 [Williams JA]; noted (2001) 26 *Alternative Law Journal* 97.

43 R Chamberlain, above n 17, 8.

44 (2002) 76 ALJR 382. In colonial times in India, a great Indian judge, Mahmood J, held that a prisoner was not 'heard' in the proceeding unless he was brought to court: *Queen Empress v Pohpi & Ors* 1 LR 13 All 171 (FB); J S Venna, 'Recent Judicial Trends in Enforcement of Freedom – The Indian Experience' (2001) 27 *Commonwealth Law Bulletin* 571, 572.

This means, effectively, that in some parts of Australia the refusal of legal aid (a decision made within the Executive Government and depending, in part, on its allocations of funds) decides whether an oral hearing takes place or not. There are obvious defects in such arrangements.[45] So we should not think that we have cured all the failings of the judicial and legal system of Australia since the bad old days when Max Stuart was tried, convicted and sentenced to death.

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. It needs to be hard-nosed and practical. It needs to be renewed every day. We, who are part of the organs of the state, must be on our guard lest we ever lose entirely our empathy and understanding for the accused who come before the courts. Lest we think that all accused must be guilty because otherwise they would not be charged. Lest we assume that accused down-and-outs are guilty because, like Max Stuart, they have a black face or belong to some other minority whom we do not really know, understand or care for.

It is 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 not our Constitution. It was not the learned judges or the barristers. It was not even the professor of linguistics. To a very large extent, it was the chance decision of an exceptional editor-in-chief of the Adelaide *News,* Rohan Rivett, endorsed at the outset by the new chief proprietor of the *News,* the young Rupert Murdoch, to support Max Stuart's cause, that saved his life. They and others (a number of them journalists) shared the 'good deal of anxiety' about the case that the courts, given the full chance and power to do so, either did not see or would not, or could not, act upon.[46]

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45 Cf *Cameron v The Queen* (2002) 76 ALJR 382, 400 [96]–[98].

46 Credit must also be given to Father Tom Dixon, who championed Max Stuart throughout, and who first approached Rohan Rivett to take up the Stuart cause. Journalists who played significant parts then included Tom Farrell and Jack Clarke. In addition, the later involvement of journalists Don Hogg, Jenni Brown, Pam Graham and Noela Whitton and an Englishwoman, Isabel Roads, who visited Max Stuart in prison and pressed for his release even after Mr Justice Chamberlain (as he had become) took up duties in 1970 as chairman of the parole board which initially declined parole. Max Stuart was eventually released on parole: E Whitton, 'When Justice Miscarried At The Governor's Pleasure', *Sydney Morning Herald,* 7 June 2002, 12. He later became chairman of the Central Land Council of the Aboriginal people: K Inglis, *The Stuart Case*, 388.

No system of human justice is perfect. The improvements we have made in the past 40 years by no means remove 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, do not represent a shining moment in Australian legal history. It is therefore right that his case should be portrayed and his story re-told to a national and international audience. It is a good and brave country, with strong institutions, that reflects on the errors of the past and adopts reforms to ensure that they will not be repeated.

XI FORTY YEARS LONG

As I left the cinema after viewing *Black and White* at its première, the words of the *Venite*[47] in the service of Morning Prayer in the *Book of Common Prayer* kept returning to my mind:

> Today if ye will hear his voice, harden not your hearts: as in the provocation, and as in the day of temptation in the wilderness … Forty years long was I grieved with this generation, and said: It is a people that do err in their hearts, for they have not known my ways.

Many of the lawyers, and most of the judges, portrayed in *Black and White* had allowed long years in the law to harden their hearts. Forty years later we, the judges, lawyers and law students of contemporary Australia, must always be willing to hear the voice of justice. Form is not sufficient. Our function in the law is the substance of justice according to law. We can be reminded of that function by texts and case books and by our daily work. But now we can be reminded of it by a timely Australian film.

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47 Psalm 95.