

(1896) 17 NSWLR (Law) 157

In re MEAGHER.

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Attorney—Misconduct—Striking off the rolls.

June 1.

The C.J.
Stephen J.
and
Owen J.

M., an attorney, defended D. for attempt to murder. D. was convicted, and subsequently M., being employed by his partner to ascertain whether D. was guilty, saw D., who then confessed his guilt to him. M., however, concealed this from his partner, who was a member of Parliament, and thereby induced him to take steps to have a Royal Commission appointed to enquire into the question of D.'s guilt or innocence. M. attended the Commission, and took precautions in one instance to prevent the truth appearing, and was the cause of a maladministration of justice, and having been employed by a committee formed for the defence of D. upon the hearing by the Commission, he persistently deceived them by asserting his belief in the innocence of D. The Court ordered M.'s name to be struck off the rolls.

THE Court called upon R. D. Meagher, an attorney, to answer certain matters appearing in the special case stated by Cohen, J., in the case of R. v. Dean and Meagher (see ante, p. 132), and in other documents which were legally admitted at the trial at Darlinghurst of the said case, and to shew cause why he should not be struck off the rolls. The Court furnished Meagher with the particulars of the charges made against him. These were as follows:—

"The respondent being employed to go to Darlinghurst to ascertain whether or not Dean was guilty of the crime for which he had been convicted, ascertained from Dean that he was in fact guilty; nevertheless he led his partner to believe that Dean was innocent, and thereby induced his partner, being a member of the Legislative Assembly, to take such steps as would cause a Royal Commission to be appointed to enquire into the question of Dean's guilt or innocence.

"That he allowed the Commission to be appointed, and in order to excite the population in Dean's favour, attended a public meeting at the Town Hall, where he asserted his belief in Dean's innocence.

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"That he attended before the Commission, took precautions in one instance to prevent the truth appearing, and was the cause of a maladministration of justice—the pardon of Dean and his discharge from custody.

"After this, in order further to deceive the public, he attended a meeting of Dean's supporters, at which he stated he believed Dean to be the victim of a foul conspiracy.

"That being employed by the Dean Defence Committee as their solicitor he persistently deceived them by asserting his belief in the innocence of Dean. He informed Sir Julian Salomons that he was aware of the fact of Dean's guilt, and Sir Julian Salomons having made a statement in writing to this effect disclosing the statement made to him, respondent denied that he had made any such statement and imputed to Sir Julian Salomons that he was acting under an hallucination.

"Ultimately he made a declaration admitting his guilt."

The respondent filed an affidavit in which he expressed his dissatisfaction with the conduct of the Judge at the original trial of Dean when he was charged with attempting to poison his wife, and stated that comments had appeared in the press unfavourable to the attitude of the Judge, that it was the public who agitated for the Royal Commission, that although Dean had made a confession to him, it was to him as his solicitor, and that he thought it would have been a breach of professional confidence if he had made known such confession.

Barton, Q.C., and Gannon, for the respondent. The respondent formed a genuine opinion that Dean had not a fair trial. If therefore that opinion was bona fide, and he acted from a sense of duty, the Court should not deal hardly with him. Dean's confession was made to him as his solicitor, and if he took the view that he was bound to respect his client's confidence and withhold this knowledge from the public and from his partner, although in so doing he committed an error of judgment, the Court will not strike him off the rolls for that. He did not act from a wicked and malicious motive, but from what in his opinion was a sense of the duty which he owed to his client. Although his conduct may have been blameworthy, it is not an offence for which the Court should impose the severest penalty.

THE CHIEF JUSTICE. In this matter, which has been argued by Mr. *Barton*, the Court called upon the respondent, a solicitor of the Court, to shew cause why he should not be struck off the rolls. Before I pronounce the decision of the Court, it will be as well to state the facts of the case as they appear to us.

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It appears that during the course of last year Dean was placed upon his trial for administering poison to his wife with intent to kill her. And the respondent was retained to act as his solicitor. Accordingly the trial took place, and the result was that Dean was found guilty, the jury recommending him to mercy. Immediately after the trial the respondent was of opinion that certain proceedings at the trial had taken place which ought not to have taken place, and that Dean was prejudiced to some extent by those proceedings. It appears that Mr. Crick, his senior partner, wanted to ascertain whether it would be wise, both in the interests of Dean and also of the firm, to take any steps for the purpose of establishing that Dean had not had a fair trial, and that an innocent man had been found guilty. There had been some discussion in the press with reference to the trial, and Mr. Crick requested the respondent to go and see Dean in Darlinghurst and find out from him whether he was guilty or not. Previous to this Mr. Crick and the respondent had some discussion about the case, and the respondent stated—I have no doubt honestly—that he believed in Dean's innocence; however, Mr. Crick, as I said before, requested him to go to Darlinghurst and ascertain, if he could, whether Dean was guilty or not. That appears at page 4 of the special case, as follows:—"On Tuesday morning, 9th April, the *Daily Telegraph* contained a leading article on the conduct of the trial, and Crick said that he thereupon determined to bring the matter before Parliament, he being then a member of the Legislative Assembly of this colony. On that morning he said to Meagher: 'I have thought this matter over, and am determined to bring it before the Assembly, but before doing so I am anxious to know whether it is safe, in Dean's interest, to reopen it; if we reopen it, and succeed in proving Dean absolutely guilty, it will not reflect much credit on us as professional men. Has Dean told you anything with regard to his guilt?' Meagher said, 'Dean has all along protested his

1896. innocence.' Crick said, 'Did you ask him whether he was guilty
In re or innocent?' Meagher said, 'There was no necessity, on account
MEAGHER. of the man's continued protestations of being innocent, and the
The C.J. whole thing was a mystery to Dean.' Crick said, 'What ground
have you for coming to the conclusion that the verdict of the
jury is wrong, outside the action of the Judge?' Meagher said,
'That both Mrs. Seymour and Mrs. Dean had sworn that up to
the time of this charge about the lemon syrup or chops they never
had any suspicion that Dean was trying to poison Mrs. Dean, and
he knew for a fact from Detective Keating that six weeks before
then they heard Keating was trying to make out a case of
poisoning against Dean.' Crick said, 'Was that fact before the
jury?' Meagher said, 'No; I was told it in confidence, and
would not break it.' Crick said, 'There is no such thing as
confidence where human life is concerned, and you had a right
to bring it out. Suppose Keating denies this?' Meagher said,
'I can be corroborated by two reporters.' Crick sent for the
reporters; one came and corroborated Meagher in every particular,
and, according to Crick's recollection, told Crick that the other
reporter could do the same. On the same day Crick said further
to Meagher, 'This is not only a matter for ourselves, but Dean
has to be considered, and if this matter is reopened it will be re-
opened on all sides; it will be for the Crown to give evidence
against Dean as well as for evidence to be brought in Dean's
favour, and I don't want to be made a laughing-stock of. I want
to be assured that the man is innocent.'"

Thereupon the respondent went to Darlinghurst, and in an
interview which he then had Dean confessed his guilt. In other
words, Dean confessed he was guilty of one of the most atrocious
crimes a man can commit—an attempt to murder his wife by
administering poison to her—and with that knowledge the
respondent returned to his partner, and what took place then
appears in the special case:—"Crick swore that either on the
same or the next day Meagher came to him and said, 'He (Dean)
told me to tell you to go on, he has nothing to fear, he
never bought poison or handled it, and he defies the Govern-
ment and all the police force to prove he ever handled the
poison.'"

Now here there was not merely a *suppressio veri*, but a deliberate false statement to Mr. Crick, who was thereupon deceived by it, that Dean still protested his innocence. This took place on the 9th April, and on the 17th April Mr. Crick, in the Legislative Assembly, relying on the solemn assurance made by the respondent as to Dean's innocence, requested that a Royal Commission should be appointed. As far as we know this was the first time that a Royal Commission was mentioned, and the position was then this, that the respondent knew that this man was guilty of this atrocious crime. Now it may be that, the respondent having gone to Darlington to see Dean, Dean may have treated the respondent as his professional adviser, and that at that time the relation of client and solicitor did exist. Certainly it is hardly likely that Dean would have made a confession to any one but the person whom he believed to be his professional adviser. And it may be that the respondent was not bound to disclose the information which he had received. If he is to be punished in this case, he is not to be punished for withholding that confession, but there is no reason why he should not have disclosed it to his partner. There would have been no breach of professional confidence in disclosing it to his own partner, and if he had we can readily imagine that Mr. Crick would have said—"From this moment forward we must remain quiescent in the matter. We now have the knowledge that this man is an atrocious criminal who has been properly convicted, and we must take no steps which may be the means of frustrating the ends of justice." The respondent, instead of disclosing what had taken place, on the contrary deceived his partner, which led to Mr. Crick making certain representations in the Legislative Assembly that a Royal Commission should be appointed. After this a meeting took place in the Town Hall in reference to Dean. Both Mr. Crick and the respondent were present at the meeting, which was called for the purpose of exciting the public mind and forcing the Government to appoint a tribunal to enquire into Dean's case. At that meeting Mr. Crick spoke, but we do not know what he said.

Then respondent was called upon to speak, and what he then said appears at p. 7 of the special case:—"Mr. Meagher on rising

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received quite an ovation. He was not present, he at once explained, in his professional capacity as defender of Dean, but merely as a private citizen to raise his voice on behalf of truth." He then knew that Dean was guilty. He does not appear to have said in so many words that Dean was innocent, but he said, "he was there as a private citizen to raise his voice on behalf of truth, and he would speak the truth, whatever the result might be." He then continued: "That magnificent gathering arose from no mere sentiment, no maudlin sympathy with criminal classes; but was the expression of public feeling which extended from Broken Hill to the seaboard. This demonstration was made because the whole country believed that the conviction of George Dean was a miscarriage of justice, and a positive menace to the liberty of every citizen in the community. He reviewed the facts, dealt with the recommendation to mercy, and its ready acceptance by the Executive, and said that facts had since come to light which justified a rehearing of the case without delay." What does that mean? It must mean that facts had since come to light which established Dean's innocence. That was a speech delivered by him at the Town Hall in which he excited the public mind to believe in Dean's innocence at a time when he had a full knowledge of the facts of the case. Then a Royal Commission was appointed, and there is no doubt that the respondent acted for Dean, being retained by the North Shore Defence Committee, and what took place then appears at p. 11 of the special case: "Mr. Goddard and two other members of the committee waited on Mr. Pilcher at his chambers, and shortly after they had been speaking together, Meagher came in. Mr. Pilcher desired to be posted up in the case, and said it was different to an ordinary Court case, as he had no brief, and he asked Meagher, and also the members of the committee, whether they felt satisfied that Dean was innocent. Speaking for the committee, Mr. Goddard stated, 'We said that we could produce evidence to prove it.' Meagher said, 'Dean has been submitted to very severe tests, and none of them have shaken my confidence in Dean's innocence.' This was shortly after the appointment of the Commission. The members of the committee then left, leaving Meagher with Mr. Pilcher. He, Mr. Goddard, was in attendance

at the Commission when Smith the chemist was examined. Mr. Pilcher and Meagher were there. Mr. Goddard several times suggested questions to Meagher to be asked of the witnesses. Meagher would look over them, and, if he approved, hand them to Mr. Pilcher. While Smith was giving evidence Mr. Goddard suggested in writing that he should be asked whether he sold or supplied poison to Dean. Meagher tore the paper up. Mr. Goddard afterwards asked Meagher why he did not put the question, and Meagher said, 'Lawyers don't like putting these direct questions.' Meagher said, 'This man might say he had given or sold the poison to Dean.' Mr. Goddard said, 'In that event there is an end of the case; we are not a committee to get Dean off by hook or by crook, but to try and satisfy ourselves whether Dean was guilty or not guilty.' Mr. Goddard seems to have taken a proper view of his duty in the matter, but the solicitor upon whom he was relying was deceiving him all through, just as he had deceived his partner.

After the Royal Commission had made its report the committee still remained in existence, and it would appear that some reports got about with reference to Dean having made a confession. In point of fact the respondent at this time had imparted his knowledge of Dean's guilt to Sir Julian Salomons. And Mr. Goddard had an interview with respondent, which was as follows: "Mr. Goddard said to Meagher, 'A rumour has reached my ears that you have stated that Dean has confessed his guilt to you.' Meagher said, 'I don't know how that arose; I have been seeing Sir Julian Salomons in reference to an action I propose to take against the *Daily Telegraph*. Sir Julian was very excited on that occasion, and strongly asserted his belief in Dean's guilt. In a jocular sort of way I said, 'Suppose he should turn out to be guilty after all?' Goddard said to Meagher, 'Did Dean make any confession to you?' Meagher said, 'No, and if Sir Julian says I did I will go on the housetops and give it the lie direct.' Mr. Goddard said, 'Do you still believe in Dean's innocence?' Meagher said, 'Yes; I have sometimes had my suspicions of guilt, but I am satisfied he is an innocent man.'" Well, now it is said that the respondent was forced into this course because he did not disclose to Mr. Crick that which he knew. It may be that is

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1896. so, and I think the initial fault in this case was not communicating
In re to his partner the knowledge he had obtained. If he had done
MEAGHER. so the probability is that there would have been quiescence on
The C.J. their part, and in that event probably there would have been no
Royal Commission, justice would not have been frustrated, and
Dean would not have been released.

Ultimately circumstances arose which induced the respondent to confess that all through the proceedings which took place after the trial he had known of Dean's guilt. Now what can the respondent's motive have been? He did not do this for money, because it appears that he never received a penny in the matter. Nor could it have been for sympathy for a man who had committed such a horrible crime. I greatly fear that this young man—a young man, too, of marked ability—was carried away by a feeling of self-glorification. I cannot imagine any other motive.

Well, he made a declaration, which is in these words:—"I am determined to endure mental torture no longer, nor to stifle the voice of truth. Being of opinion that Dean was not guilty, and that his trial was an unfair one, I decided to use my utmost endeavours to secure his release. I became aware after his conviction, while in the condemned cell, of his guilt, and coming from Darlinghurst in the tram I was torn asunder as to whether I should upset the verdict or let things remain as they were. I knew the man who had been my best friend in life, Mr. Crick, would never aid in Parliament or otherwise a movement for the reopening of the case if he knew Dean was guilty. I concealed the terrible fact from him and everyone else, including Mr. Pilcher and the members of the Defence Committee, and as there is a 'destiny which shapes our ends, rough hew them how we will,' Sir Julian Salomons did become from me the repository of the secret, which is substantially given by him in his statement read in the Legislative Council. I regret that he did my partner an injustice in referring to his knowledge of the matter. I did, some time after Dean's release, and after I had spoken to Sir Julian Salomons, deny to Mr. Crick that there was any foundation for rumours he referred to in connection with an alleged confession, and it was only yesterday I made to him a full confession, which I now in pain and sorrow make to the public. I have contradicted

Sir Julian Salomons in the Legislative Assembly, as I deluded myself that in loyalty to Dean on a breach of confidence I was justified in fighting with any weapons. When I found my error of judgment had forced me into falsehood to cover up my indiscretion and to shield Dean, I was prepared for the sacrifice, but when I found that my action was to engulf innocent people and place them in a felon's dock, as I see by the papers this morning other 'prominent men to be arrested,' I determined that unless I extricated the innocent I would be guilty of flagrant moral cowardice."

Did the respondent consider what he was doing in procuring the release of Dean? Did he not see that by so doing he was charging Dean's wife and her mother with a crime equally atrocious as that committed by Dean—a foul conspiracy to bring about the conviction and execution of Dean. His whole conduct had been to bring upon the innocent contumely, which now, thank God, rests upon Dean. His declaration continues:—"And although I have committed a great error of judgment, which, in its terrible consequences, has almost unhinged my intellect, and brought dire tribulation on those dear to me, I still have a sense of justice, and only wish I could put back the universe again to the day I made my first error. I find in view of the arrest of an innocent person I can no longer keep this terrible silence."

What would he have done if the mother and daughter had been arrested on a charge of conspiracy? Then the declaration continues:—"I am young, my judgment is still clear, and I now have a serenity of conscience I have not had for months that I am doing the right thing. This awful lesson of my life I will endeavour to atone for in another clime. My resignation of my seat in Parliament accompanies this declaration, and I am deeply sensible of the injury I have done to the indulgence and hospitality shewn to me in public and private life in my native land. I trust, with my young life—yet under 30 years of age—I may, in some other portion of the globe, lead the life of truth, and use my humble faculties in the small sphere I shall move in for the promotion of the happiness and winning the esteem of those I come in contact with in a strange country, and that in the land I love my acts may, in days to come, be forgiven and forgotten."

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It would appear from that, that he was himself of opinion that he could not remain upon the rolls of this Court any more than he could remain a member of the Legislative Assembly, and it would certainly be a strange thing under the circumstances if he were not removed from the rolls. The question for the consideration of the Court is this: Is a solicitor who has been guilty of the conduct I have described, a fit person to remain on the rolls?

Where a solicitor is suspended, that is generally done as a punishment, and he may be subsequently restored to the rolls. But where a solicitor is struck off the rolls, it is because he is not a fit person to be accredited to the public as being worthy to remain on the rolls. He is not struck off the rolls as a punishment. That is the test which has been applied for many years. So far back as the year 1778 Lord *Mansfield* in the case of *Ex parte Brounsall* (1) said, "This application is not in the nature of a second trial or a new punishment, but the question is, whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free of all suspicion." His Lordship, wishing to give a solemn judgment, mentioned the matter to all the Judges, who were of opinion that the solicitor should be struck off the rolls, and said "it is on this principle, that he is an unfit person to practice as an attorney. It is not by way of punishment, but the Court on such cases exercises a discretion whether a man whom they have formerly admitted is a proper person to be continued on the roll or not." Then there is the case of *R. v. Southerton* (2), in which an attorney had been found guilty of sending a letter threatening to put a prosecution in motion for the purpose of obtaining money to stay the prosecution, and in which judgment had been arrested. At the end of the case Lord *Ellenborough*, C.J., said "that enough appeared to the Court to satisfy them that the defendant was a very improper person to remain as an attorney on the rolls of the Court, and therefore he desired the Master to enquire and report whether the defendant was still upon the roll of attorneys of this Court"; and the report continues, "and the Master having certified to the Court in the affirmative on a subsequent day, a rule was made on the defendant to shew cause why he should not

(1) 2 Cowp. 829.

(2) 6 East 126; 8 R.R. 428.

be struck off, which the defendant yielded to, and his name was accordingly struck off the roll, his counsel admitting that he could not resist it." Again in the case of *Stephens v. Hill* (1), *Alderson*, B., says, "the question in this case is whether the attorney has so misconducted himself in his character of an attorney as to be an unfit person to remain upon the roll If persons are to be accredited by the Court, it is our duty to watch over and control their conduct, and when a man behaves in such a way as this person has done, he ought to be no longer accredited." In 1893 a similar principle was laid down by *Lopes*, L.J., in *In re Weare* (2), in which he says, "to my mind the question which the Court in cases like this ought always to put to itself is this, is the Court, having regard to the circumstances brought before it, any longer justified in holding out the solicitor in question as a fit and proper person to be entrusted with the important duties and grave responsibilities which belong to a solicitor?" Then there was the case of *In re Salwey* (3), in our own Court, in which the Court followed the principles laid down in the English cases. In that case the attorney had been twice tried and twice acquitted, but it appearing from the judgment of the Chief Judge in Equity and of the Full Court in the case of *The Union Bank v. Fisher* (4), that Salwey was guilty of fraudulent conduct, the Court ordered his name to be struck off the rolls. In that case, in delivering the judgment of the Court, I relied upon a passage in the judgment of *Cockburn*, C.J., in the case of *Re Hill* (5), where he says, "I should add there is one consideration I omitted, and which I think is entitled to great weight. It is that put to us in the course of the discussion, namely, that if these facts had been brought to our knowledge upon the application of this gentleman's admission, we might have refused to admit him, and I think the fact of his having been admitted does not alter his position; having been admitted, we must deal with him as if he were now applying for admission." That brings me to this position. A young man who desires to become an attorney has to be introduced to the Judges, and after

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(1) 10 M. & W. 28.

(3) 15 N.S.W.L.R. 147.

(2) [1893] 2 Q.B. 439.

(4) 14 N.S.W.L.R. Eq. 1 & 241.

(5) L.R. 3 Q.B. 543.

1896. satisfying them by means of testimonials that he is honourable and truthful, and a man in whom they can place complete reliance, he enters into his articles. After he has served his time and passed the necessary examinations, he has to give notice that he intends to apply to be admitted as a solicitor, and the Court requires from his master a certificate shewing that he has borne a good character. After the Court is satisfied as to his character, he is admitted, and he thereupon takes an oath that he will "truly and honestly demean himself in the practice of an attorney according to the best of his knowledge and ability." After he has taken that oath he is allowed to practice his profession. Now I ask anyone whether it is possible to suppose a case where a clerk had been employed by his master, just as the respondent was in this case by his partner, to go up to Darlinghurst and ascertain whether a prisoner, the client of his master, was guilty or not, and having found out that he was guilty, he concealed that from his master, and led him to assume that the prisoner was innocent; is it, I say, possible to suppose that those facts coming to light on an application for the clerk's admission, any Court would admit him? Under the circumstances which appear to the Court, it is therefore impossible that the respondent should remain upon the rolls. I know that in striking the respondent's name off the rolls, it means professional ruin to him, and therefore the Court discharges this duty with the utmost pain; but at the same time it is a duty which the Court owes to the public, and no matter how much pain it may cause, it is a duty from which the Court must not shrink.

STEPHEN, J., and OWEN, J., concurred.

Respondent struck off the rolls.

Attorney for the respondent: *R. H. Levien.*

Tuckiar v The King(1934) 52 CLR 335

[HIGH COURT OF AUSTRALIA.]

TUCKIAR APPELLANT;

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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.*H. C. OF A.
1934.*Criminal Law—Evidence—Comment by Judge on prisoner's failure to give evidence
—Act No. 245 (S.A.), sec. 1.*

MELBOURNE,

Oct. 29;

Nov. 8.

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.

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

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.

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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.

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.

The facts are fully set out in the judgments hereunder.

Fullagar K.C. and Dethridge, for the appellant. The *Supreme Court Ordinance* (N.T.), No. 12 of 1918, enables the High Court to grant leave, and gives the High Court the fullest jurisdiction in the matter, empowering it to make any order it thinks just (*Porter v. The King; Ex parte Yee* (1)). The *South Australian Criminal Law Consolidation Act 1876* is the relevant criminal code. Secs. 5 and 6, as modified by ordinance No. 10 of 1934, apply to convictions of aboriginal natives.

[DIXON J. referred to Act No. 245 (S.A.), sec. 1, which enables the accused to give evidence on oath.]

The South Australian ordinance, No. 3 of 1848, enables an uncivilized person, including an uncivilized aboriginal native, to give evidence otherwise than on oath. This provision is in force in the Northern Territory by virtue of sec. 7 of the *Northern Territory Acceptance Act 1910*. Sec. 13 of the *Northern Territory Acceptance Act 1910* gives power to the Commonwealth to make ordinances for the government of the Northern Territory. The evidence of the character of McColl was wrongly admitted and the jury were wrongly directed thereon. The evidence was insufficient to support a conviction. The evidence of the witness Parriner was never properly analyzed at the trial, and was put to the jury in a way that was quite misleading. In the circumstances of this case the trial Judge should never have commented on the failure of the accused to give evidence. The Judge's comments on the evidence were, in the circumstances, far too strong and he ought

(1) (1926) 37 C.L.R. 432.

to have directed the jury with great caution. The trial Judge did not adequately direct the jury as to the nature of the charge and the onus of proof. He did not properly direct the jury as to the failure of the Crown to call certain witnesses. There is fresh evidence now available, which could not reasonably have been discovered before the trial, which is a prior inconsistent statement made by Parriner. The trial Judge was wrong in suggesting that counsel for the accused should interview the accused and ascertain whether he agreed with the evidence given by Parriner, and, particularly in view of the statement made by counsel for the accused in Court after his interview with the prisoner, he should not have commented on the failure of the accused to give evidence. The detention of the lubras was continuing all the time, and the possibility of this constituting provocation should have been put to the jury (*R. v. Kops* (1)). The fact that objection to evidence in a criminal trial is not taken will not render the evidence admissible (*R. v. Gibson* (2)).

[STARKE J. referred to *R. v. Cowpe and Richardson* (3).]

The evidence which was adduced shows that the whole story was not brought out. In the case of an aboriginal native there should be proof of more than the mere throwing of a spear and the fact that a man was killed. Parriner's evidence amounts to no more than a statement that the accused threw the spear. There are obvious gaps in Parriner's evidence. Parriner had made previous inconsistent statements as to the accused's alleged confessions. The conviction should be quashed and no new trial should be ordered, as it would, in the circumstances, be impossible to obtain a fair trial.

Reynolds, for the Crown. The materials before the Court show that the jury gave very close consideration to the matters put to them. Both the trial Judge and the jury had some knowledge of the mentality of aboriginals. The final consideration is: Has there been a miscarriage of justice? (*Ross v. The King* (4)). The evidence as to McColl's character was admissible as tending to show the improbability of the story told by the accused. If it is not admissible it has not led to any miscarriage of justice. The jury could accept

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(1) (1893) 14 L.R. (N.S.W.) 150.
(2) (1887) 13 Q.B.D. 537.

(3) (1892) 13 L.R. (N.S.W.) 265.
(4) (1922) 30 C.L.R. 246, at p. 251.

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the whole of one statement or part of each statement made by the accused to Parriner and Harry. The evidence of provocation does not indicate that the attack was provoked by anything that the accused saw at the time. In spite of the irregularities the accused had a fair trial. Although Act No. 245 of South Australia is in force in the Northern Territory, there was no substantial miscarriage of justice and the evidence justified the conviction and sentence imposed. The comments of the Judge were not too strong and he did in fact leave to the jury the stories told by the accused to Parriner and Harry. There was adequate direction on the distinction between murder and manslaughter. It is difficult to believe that the fresh evidence was not available had the accused's counsel desired to call it. The witness, Dyer, could have been interviewed before trial and in fact Dyer was in Court when Parriner gave his evidence and could then have intimated that Parriner had told him a different story earlier. The evidence shows that there was deliberation and collusion between the accused and the lubra at the time when the accused threw the spear at the deceased.

Fullagar K.C., in reply.

Cur. adv. vult.

Nov. 8.

The following written judgments were delivered :—

GAVAN DUFFY C.J., DIXON, EVATT AND McTIERNAN JJ. This is an appeal by leave from a conviction of murder before the Supreme Court of the Northern Territory, and from the Court's sentence, which was death. The appeal is given by sec. 21 of the *Supreme Court Ordinance* 1911-1934-(inserted by No. 12 of 1918 and No. 10 of 1922), which confers general jurisdiction upon this Court to hear appeals by leave from any conviction, sentence, judgment, decree, or order of the Supreme Court of the Northern Territory, including any order or direction made by the Judge of the Northern Territory whether in Chambers or in Court, and including also any refusal of such Judge to make any order. The validity of the ordinance has been upheld (*Porter v. The King*; *Ex parte Yee* (1)). The

(1) (1926) 37 C.L.R. 432.

ordinance is expressed more widely than sec. 73 of the Constitution, and the Court is not confined to examining the correctness of the judgment pronounced on the verdict of the jury (cf. *Pieman v. Balas* (1)) but has jurisdiction to set aside the verdict. The prisoner is a completely uncivilised aboriginal native belonging to a tribe frequenting Woodah Island, which lies near Groote Eylandt. On 1st August 1933, a police constable named McColl was killed there by the spear of a native, and the prisoner was brought to Darwin and charged with his murder. Some Japanese had been killed by natives a little time before, and McColl and three other constables were dispatched to enquire into the matter. They landed at Woodah Island with four trackers, and, after travelling on foot about twenty miles, they came to a deserted native camp on the edge of a thick jungle. They found the fires warm. They camped in the vicinity for lunch, posting the trackers round about. One of the trackers came in with information which enabled the party to surround a number of lubras, whom they handcuffed together and brought back to camp. There the police questioned them. Later another report was brought that natives were landing in a canoe on a point near by 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 first unfettered. On the return of the constables, the two trackers were found at the camp, but neither McColl nor the lubras were there. Next morning McColl's dead body was found about four hundred 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 that he had fired three times, his third shot having been a misfire. Apparently the two trackers, who were left with McColl in charge of the lubras and were afterwards found at the camp, had not remained there throughout the absence of the rest of the party, whom, probably, they had followed. At any rate neither of them was called as a witness, and it does not appear why or in what circumstances McColl left the camp. As the constables were returning to the camp, they spread in extended order. A spear was thrown at one of them and pierced his hat. He fired his pistol and the

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others came up to him. But they heard no shots which they attributed to McColl. According to the evidence of one of the trackers, called Paddy, who acted as interpreter at the trial, before the party separated, a native had come up from the jungle to within sixty feet of the camp and had then run away.

Some time after the death of Constable McColl, the prisoner and some natives were induced to go in the boat of a trepanger to Darwin. There the prisoner was arrested and charged with the murder of McColl. To prove that it was he who killed McColl, the Crown relied upon two pieces of confessional evidence given by two natives who had been brought with him to Darwin. The first was an aboriginal, called Parriner, whose evidence was interpreted into pidgin English by Paddy. The effect of this evidence was that on Bickerton Island, which is a little to the south of Woodah Island, the prisoner told him that the policemen had come up to his camp and taken four lubras, three of whom were his, that he had been waiting in the jungle for some time for one of his lubras, that he had called and then come out of the jungle, had seen them at the camp, and had run back into the jungle, where he planted himself and sat quiet, that while hiding there, he saw a policeman go past, that he remained still and listened and heard a lubra speak, that he communicated with her by sign language, and told her he was near and would remain, that the policeman came close behind her, whereupon the prisoner signed to her to move aside and then threw his spear, that the policeman clutched the spear with one hand and with the other drawing his pistol fired it three times and then spoke no more, that he threw his spear lest the policeman should kill him, that when they saw the police they were all very frightened, including the lubras and picaninnies. The other aboriginal who gave evidence of a confession was a mission boy called Harry. He said, in effect, that the owner of the boat in which they came to Darwin asked him to obtain the prisoner's story. The story the prisoner told him was briefly that on coming back from fishing he had seen the boat in which the police had come to the island, that he had been chased by a black man, who saw him, and had hidden in the jungle, that people had run past him, that after some time he moved into the open, but, seeing nobody, he returned to the jungle, that then hearing the cry of a

baby, he looked and saw a white man and a lubra stop, that the white man had sexual relations with the lubra, after which the lubra picked up the baby and both returned to the open space, that the prisoner then communicated by signs with the lubra, who was one of his three lubras, that the white man saw him, and thereupon he asked by signs for tobacco, that the white man then fired at him three times and reloaded, that the prisoner got behind a tree, the white man fired again and the prisoner threw his spear and hit him, that he then ran away and hid in the grass, but that later another white man came and seeing the handle of a spear sticking up fired, and that he thereupon threw the spear and hit the white man's hat.

At the trial at Darwin, the prisoner, who understood no English, was defended by counsel instructed by the Protector of Aborigines. At the conclusion of Parriner's evidence, the Judge asked counsel for the defence whether he had put before the prisoner the story told by the witness and talked it over with him. Counsel replied that he had not done so. The Judge then asked him whether he did not think it proper to discuss the evidence with the accused and see whether it was correct. On counsel stating that he thought it desirable to take that course, the Judge arranged for him to take Paddy the interpreter and discuss the evidence with Tuckiar. The Court adjourned for half an hour to enable this to be done. On the Court resuming, Harry's evidence in chief was taken, but, before proceeding to cross-examine him, the prisoner's counsel said that he had a specially important matter which he desired to discuss with the Judge. He was in a predicament, the worst predicament that he had encountered in all his legal career. The jury retired, and the Judge, the Protector of Aborigines and counsel for the defence went into the Judge's Chambers. On their return, after some discussion of the reasons for the Crown's failure to call as witnesses other constables, trackers and the lubras, the jury were recalled and Harry's evidence was completed. Then the prosecutor obtained leave to recall a witness as to the good character of the deceased constable, McColl. This evidence was, of course, quite inadmissible, but no objection was taken to it. The witness said that the deceased was a very decent man, that he had never heard anything against his moral character, that he had been closely associated with him upon

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a patrol where there were half-caste girls and many native women, and there was nothing in his conduct, which could be censured in the least degree. No evidence was called for the defence. Before the Crown case was quite complete, the jury, who had heard much discussion of the Crown's failure to bring witnesses to Darwin, asked: "If we are satisfied that there is not enough evidence, what is our position?" The Judge reports that he understood them to mean, what was their position if they were satisfied that the Crown had not brought before the Court all the evidence it might have brought. He replied:—"You must think very carefully about that aspect of the matter and not allow yourselves to be swayed by the fact that you think the Crown has not done its duty. If you bring in a verdict of 'not guilty' it means that this man is freed and cannot be tried again, no matter what evidence may be discovered in the future, and that may mean a grave miscarriage of justice. Another aspect of the matter that troubles me is that evidence has been given about a man who is dead, and if the jury brings in a verdict of 'not guilty' it may be said that they believe that evidence, and it would be a serious slander on that man. It was the obvious duty of the Crown to bring all the evidence procurable and to have all these matters cleared up entirely, but you must not allow the fact that the Crown has failed in its duty to influence you to bring a verdict of 'not guilty' if there really is evidence of guilt before you on which you can rely. You should go and think about the matter quietly and carefully weigh all the evidence that has been given before you."

Unfortunately a verbatim report of the full summing up was not made and we do not know what direction was given in respect of very important matters, particularly in relation to manslaughter, provocation, and self-defence. But it does appear that, after telling the jury that a decision on any question of fact was entirely for them and they ought not to accept any view he indicated on a question of fact unless in their own independent judgment they agreed with it, the learned Judge proceeded to condemn the story which Harry said the prisoner told him, as an improbable concoction on the part of the prisoner, and, on the other hand, said that the only conclusion from the facts which Parriner said the prisoner narrated to him was that that the homicide amounted to murder.

We have also a report upon which we can rely for the two following passages in the summing up to which we attach importance:—

(1) "I want you now, if you can, to put all that out of your minds, to look at the matter quietly and dispassionately, and without reference to any observations of that sort—to consider the evidence which has been put before you, and decide whether or not you can act upon that evidence. It may be that owing to the neglect or incompetence or worse of the people who had the preparation of this case for the Crown, a grave miscarriage of justice may occur and a serious slander may be affixed to the name of the dead man. But that is a matter you cannot take into consideration; it is a matter that should be inquired into elsewhere and not here. It is the duty of yourselves to consider only the evidence before you, and to endeavour if you can to avoid any miscarriage of justice. The other matter we cannot, unfortunately, deal with here; the responsibility for that must rest where it may ultimately be fixed."

(2) "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. What counsel for the defence asks you to do is to take up the position that you will not believe either of these stories. Tuckiar has told two different stories to two different boys, and both of these stories have been told to you here in Court. Which one is true? For some reason Tuckiar has not gone into the box and told you which one is true, and that is a fact which you are entitled to take into consideration. You can draw from it any inference you like."

Upon the jury's finding a verdict of guilty, the Judge postponed pronouncing sentence, which, in the case of an aboriginal, is not necessarily death. The prisoner's counsel then made the following statement:—"I have a matter which I desire to mention before the Court rises. I would like to state publicly that I had an interview with the convicted prisoner Tuckiar in the presence of an interpreter. I pointed out to him that he had told these two different stories and that one could not be true. I asked him to tell the interpreter which was the true story. He told him that the first story told to Parriner was the true one. I asked him why he told the other story. He told me that he was too much worried so he told a different

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story and that story was a lie. I think this fact clears Constable McColl. As an advocate I did not deem it advisable to put the accused in the box." The learned Judge said:—"I am glad you mentioned it, not only in fairness to McColl but also because it proves that the boy Harry was telling the truth in the witness box. I had a serious doubt whether the boy Harry was telling the truth, but it now appears that he was."

When the Court resumed his Honor added:—"It did not occur to me at the time, but I think I should have stated publicly that immediately that confession had been made to you, you and Dr. Cook (the Protector of Aborigines) consulted me about the matter and asked my opinion as to the proper course for you, as counsel, to take, and I then told you that if your client had been a white man and had made a confession of guilt to you I thought your proper course would have been to withdraw from the case; but as your client was an aboriginal, and there might be some remnant of doubt as to whether his confession to you was any more reliable than any other confession he had made, the better course would be for you to continue to appear for him, because if you had retired from the case it would have left it open to ignorant, malicious and irresponsible persons to say that this aboriginal had been abandoned and left without any proper defence."

After hearing some evidence upon the subject of punishment, the learned Judge pronounced sentence of death.

We think that this narrative of the proceedings shows that for more than one reason the conviction cannot stand.

In the first place, we think the observations made by the learned Judge upon the failure of the prisoner to give evidence amounted to a clear misdirection and one which in the circumstances was calculated gravely to prejudice the prisoner. Sec. 1 of Act No. 245 of South Australia, which enables persons accused of offences to give evidence on their own behalf and is in force in the Northern Territory, contains a proviso that no presumption of guilt shall be made from the fact of such person electing not to give evidence. In the present case, the jury witnessed the spectacle of the prisoner's counsel, at the suggestion of the Judge, retiring to discuss with the prisoner the evidence of the principal witness against him and see

whether it was correct, and of his saying after doing so, that he wished to discuss with the Judge a specially important matter, which put him in the worst predicament that he had encountered in his legal career. Afterwards, the Judge, who had to their knowledge heard counsel's communication, directed them that for some reason the prisoner had not gone into the witness box and told them which of the stories was true and that they were entitled to take that fact into consideration and draw any inference from it they liked. He thus authorized them to make a presumption of guilt from the prisoner's failure to give evidence and the circumstances which had occurred before them were likely to reinforce the presumption with a well-founded surmise of what the Judge had been told by the prisoner's counsel.

In the next place, although the evidence of McColl's good character and moral tendencies was not objected to, it clearly should have been disallowed. The purpose of the trial was not to vindicate the deceased constable, but to inquire into the guilt of the living aboriginal. Before he could be found guilty it was necessary that by admissible evidence the jury should be finally satisfied to the exclusion of reasonable doubt that he had killed Constable McColl in circumstances which amounted to murder. By leading evidence that the prisoner told a story that he killed the deceased in circumstances supporting a plea of self-defence and involving a reflection upon the moral conduct of the dead man, the prosecution could not make relevant the latter's reputation and moral tendencies. The prisoner should not have been exposed to the danger of the jury's regarding the matter as a dilemma between an imputation on the dead and the conviction of the aboriginal. That danger is likely to have been much increased by the manner in which the Judge expressed himself when the jury asked what was their position if they were satisfied that the evidence was not sufficient and afterwards in his summing up in the first passage therefrom which we have set out. Notwithstanding the direction which accompanied them, the observations as to the slander upon a dead man and the possibility of a miscarriage of justice by the escape of a guilty man were calculated to do anything but fix the jury's attention on the necessity of being satisfied beyond reasonable doubt of the guilt of the accused. No doubt, his Honor

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was in the best position to interpret the jury's question, but it cannot be certain that it did not mean what the foreman's words appear literally to imply, namely, what were they to do if the evidence appeared to them to fall short of establishing guilt? If they did mean this, the answer and subsequent treatment of the matter must have had a still greater tendency to prejudice the prisoner. It would be difficult for anyone in the position of the learned Judge to receive the communication made to him by counsel for the prisoner and yet retain the same view of the dangers involved in the weakness of the Crown evidence. This may, perhaps, explain his Honor's evident anxiety that the jury should not under-estimate the force of the evidence the Crown did adduce. Indeed counsel seems to have taken a course calculated to transfer to the Judge the embarrassment which he appears so much to have felt. Why he should have conceived himself to have been in so great a predicament, it is not easy for those experienced in advocacy to understand. He 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. No doubt he was satisfied that through Paddy he obtained the uncoloured product of his client's mind, although misgiving on this point would have been pardonable; but, even if the result was that the correctness of Parriner's version was conceded, it was by no means a hopeless contention of fact that the homicide should be found to amount only to manslaughter. Whether he be in fact guilty or not, a prisoner is, in point of law, entitled to 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. The subsequent action of the prisoner's counsel in openly disclosing the privileged communication of his client and acknowledging the correctness of the more serious testimony against him is wholly indefensible. It was his paramount duty to respect the privilege attaching to the communication made to him as counsel, a duty the obligation of which was by no means weakened by the character of his client, or the moment at which he chose to make the disclosure. No doubt he was actuated by a desire to remove

any imputation on Constable McColl. But he was not entitled to divulge what he had learnt from the prisoner as his counsel. Our system of administering justice necessarily imposes upon those who practice advocacy duties which have no analogies, and the system cannot dispense with their strict observance.

In the present case, what occurred is productive of much difficulty. We have reached the conclusion, as we have already stated, that the verdict found against the prisoner must be set aside. Ordinarily the question would next arise whether a new trial should be had. But upon this question we are confronted with the following statements made by the learned trial Judge in his report—"After the verdict, counsel—for reasons that may have been good—made a public statement of this fact which has been published in the local press and otherwise broadcasted throughout the whole area from which jurymen are drawn. If a new trial were granted and another jury were asked to choose between Parriner's story, Harry's story, and some third story which might possibly be put before them it would be practically impossible for them to put out of their minds the fact of this confession by the accused to his own counsel, which would certainly be known to most, if not all, of them. . . . Counsel for the defence . . . after verdict made, entirely of his own motion, a public statement which would make a new trial almost certainly a futility."

In face of this opinion, the correctness of which we cannot doubt, we think the prisoner cannot justly be subjected to another trial at Darwin, and no other venue is practicable.

We therefore allow the appeal and quash the conviction and judgment and direct that a verdict and judgment of acquittal be entered.

STARKE J. This is an appeal brought, by leave of this Court, by an aboriginal of Australia who was convicted of murder and sentenced to death by the Supreme Court of the Northern Territory. The organization of the Northern Territory is set forth in the *Northern Territory Acceptance Acts* 1910-1919 and the *Northern Territory (Administration) Acts* 1910-1933. Under the *Supreme Court Ordinance* 1911-1934, sec. 21, made pursuant to these Acts, an appeal may be

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1934. or order of the Supreme Court of the Territory. But, though this
TUCKER jurisdiction is conferred in unlimited terms, it should nevertheless
v. Be regulated by a consideration of circumstances and consequences
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Starke J. some substantial and grave injustice has been done in the particular
case, this Court should be slow to intervene; mere irregularities in
the course of a trial do not warrant its interference in the adminis-
tration of criminal justice. In my opinion, the present case is
exceptional, and warrants the intervention of this Court.

The appellant belongs to a tribe of uncivilized aboriginals, who inhabit what is known as the Gulf country, in the far north of Australia. He neither understands nor speaks English. A Japanese had been killed by the aboriginals in Caledon Bay. In August of 1933, a police party was despatched to investigate this and other incidents. It consisted of Constables Morey, Hall, Mahoney and McColl, and some aboriginal police boys, who were used as interpreters and trackers. The party landed at Woodah Island in the Gulf of Carpentaria, and tried to get into contact with the natives. It marched about twenty miles, and found an aboriginal camp, recently deserted. Later, the party surrounded a number of lubras, or aboriginal women, whom they handcuffed and brought to the camp, and questioned, through the police boys, as to the killing of the Japanese in Caledon Bay. Two or three of these lubras belonged to the prisoner and may be described as his wives. Later again, the party saw a number of aboriginals on a rocky point which ran out into the sea, and a canoe load of aboriginals at the end of the point just disembarking. Leaving Constable McColl and two trackers with the lubras, the rest of the party ran across the neck of the point to intercept the aboriginals, but lost sight of them, and they escaped. The party then spread out in extended order, and went back through the scrub towards the camp where McColl had been left with the lubras. During these operations, the hat of Constable Mahoney was slashed by a spear across the puggaree, through the felt, and the police fired some revolver shots. Upon the party reaching the camp, McColl was not there, nor were the lubras, but the two police boys were still there. Search was made for McColl, and next morning

he was found dead, in a comparatively clear place not more than a quarter of a mile away from the camp. He had been speared through the chest, and a spear was found a few paces away, stained with blood. McColl's revolver was found lying beside him. There were six cartridges in it: three had been fired, but one had been a misfire. He was buried nearby. All the aboriginals, men and lubras, were, according to the evidence, wild, excited and frightened, but it is sworn that the lubras calmed down when told what the police wanted, and that their handcuffs were removed before the police attempted to intercept the aboriginals on the point already mentioned.

About the end of 1933, a missionary party went to Caledon Bay to investigate the killing of Constable McColl. They met more than a hundred aboriginals on Woodah Island, including the prisoner Tuckiar and another aboriginal called Parriner. The expedition recovered the body of Constable McColl and arranged with the aboriginals that several of them, including the prisoner and one Marara, should proceed to Port Darwin, the administrative headquarters of the Northern Territory, some hundreds of miles away, and explain their actions, and, if necessary, "take the consequences." The prisoner voluntarily proceeded to Port Darwin, and was there arrested and charged with the murder of Constable McColl.

The only evidence connecting him with the killing of Constable McColl was a statement made by him to the aboriginal called Parriner and another to an aboriginal called Harry. Parriner was an uncivilized aboriginal, but Harry appears to have been a mission boy. Neither was able to speak or understand English. They were not sworn, but their statements were taken pursuant to the ordinances of South Australia, 1848 No. 3 and 1849 No. 4, which are in force in the Territory. And these statements were rendered into "pidgin" English by a police boy, who was also a witness in the case.

It is manifest that the trial of the prisoner was attended with grave difficulties, and indeed was almost impossible. He lived under the protection of the law in force in Australia, but had no conception of its standards. Yet by that law he had to be tried. He understood little or nothing of the proceedings or of their consequences to him, and had the misfortune to place the counsel assigned to him

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According to the uncivilized aboriginal Parriner, the prisoner made to him (as expressed in the "pidgin" English of the interpreter) the following statement:—"Tuckiar bin talk 'Policeman been come up there and grab four fella lubra. I no more bin savvy that alonga my eye. I bin sit down alonga jungle and I bin wait for that fella lubra good while. Sun bin up there' (indicating overhead). Tuckiar bin talk that way alonga me. He bin talk 'I bin sing out from jungle. I bin sing out again. I bin leavem that jungle and I bin walk, bin come up outside. I bin look and I bin see policeman sit down, and I bin come up more close. I bin look from long way, and then I bin come up close, and I bin see lubra all sit down one mob. I bin look and I bin see them fella move, and I bin run away and go into jungle and plant myself, and sit down quiet.' Then Tuckiar bin say 'I bin see somebody go past, I bin see policeman go past.' Tuckiar bin tell me that himself, that he bin see policeman go past. Then him bin talk 'I bin sit down little bit longer. I bin sit down quiet and listen. Then lubra bin sing out little bit outside, lubra bin sing out alonga mouth.' Then Tuckiar bin talk that him bin gettem stick and talk alonga stick, and that lubra bin sing out again from scrub inside, and that Tuckiar bin talk alonga stick and bin sit down quiet. Tuckiar bin talk that policeman bin come up behind lubra, and lubra bin sing out and that Tuckiar bin talk alonga stick 'I no more long way, I sit down quiet.' Then Tuckiar bin talk that lubra bin come close up alonga him and he bin look and see lubra and policeman come up close behind. Then Tuckiar bin talk that he bin talk to lubra alonga finger, no more bin talk alonga mouth, 'You bin give me room.' Then Tuckiar bin talk that he bin hookem up woomera alonga spear, that lubra bin go back behind and policeman come up, and that Tuckiar bin chuckem spear. Tuckiar bin talk all this. Then Tuckiar bin talk that policeman grabem spear one hand, and bin get 'em revolver and bin shoot three shots. Tuckiar bin talk that policeman no bin talk anything. Then Tuckiar bin talk that he bin run away and get behind jungle and go right in." *Cross-examination.*—To Mr. Fitzgerald: "Tuckiar bin tell me him big fella frightened when him bin see policeman; him say everybody, black

fella lubras and piccaninnies, big fella frightened, and Tuckiar too. Tuckiar bin tell him bin have three fella lubra and policeman bin grab them three fella lubra. Tuckiar bin talk alonga me that him big fella frightened. Him bin talk alonga me 'I bin kill 'em that man.' Tuckiar bin talk 'I chuck spear alonga him before he kill me.' Tuckiar bin talk him bin see policeman first." *Re-examination.*—To Mr. *Harris*: "Tuckiar bin tell me that he and that fella lubra bin talk alonga stick, and that he bin tell that fella lubra bring up that one fella man, and that then him bin talk alonga stick 'You bin give me room,' and then him bin chuckem spear." Harry, the other aboriginal, said that the prisoner had made a statement to him to the effect that he saw Constable McColl having connection with one of his lubras, and that McColl fired at him, whereupon he speared the constable. The learned trial Judge, in his charge to the jury, said that Parriner's account was highly probable, and "involved all the essential elements of murder" and that the statement made to Harry was "so utterly ridiculous as to be an obvious fabrication."

In my opinion, the charge, in the circumstances of the case, denied the prisoner the substance of a fair trial. The Judge reports to this Court that he gave to the jury a careful explanation of what constituted the crime of murder and how the story told by Parriner involved all the essentials of murder. He also reports that the jury were informed that they were entitled to bring in a verdict of manslaughter, which he defined, and that the question of what amounted to provocation in law was dealt with, although counsel for the defence had not raised the question in his address to the jury. But we do not really know what the charge was upon either topic. The report of the learned Judge does not supply it, nor do the notes of the charge made by counsel for the prisoner supply the defect, though they make it clear that he did follow or record the charge in reference thereto. It is clear to me, however, that the case against the prisoner was too forcibly stated, and that aspects of the case all important to the prisoner were overlooked, or, at all events, not presented with sufficient force. It was not right in this case to inform the jury that they should accept the statement of the aboriginal Parriner, and treat that of the aboriginal Harry as a fabrication. Nor was it right to inform the jury that if they believed Parriner

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the prisoner was guilty of "deliberate murder—no argument about it." The Chief Protector of Aborigines for the Northern Territory informs us that "the conditions of interpreting the statements of aborigines through other aborigines, especially during the formal proceedings of a Court, make it difficult and almost impossible to get more than an approximation to the truth." Yet the learned Judge in his charge to the jury passes by these difficulties and dangers. But, worse still, he wholly fails to suggest for the consideration of the jury the possible effect upon uncivilised aborigines of a police party capturing their lubras, and apparently endeavouring to capture the aborigines as well. 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 aborigines, 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. Yet the learned Judge is silent upon this important aspect of the case, and practically invites the jury to find a verdict of guilty. Again, in my opinion, it was not right to tell the jury that the prisoner's statement to the aboriginal Harry was "so utterly ridiculous as to be an obvious fabrication." The truth of and the weight to be attached to the statement were essentially matters for the jury and not for the Judge. The conviction of the prisoner for murder, in such circumstances as these, ought not to be sustained.

It was also contended that the conviction of the prisoner should be quashed because of the wrongful reception of evidence, and because the learned Judge commented on the fact that the prisoner had not gone into the witness box and informed the jury whether his statement to Parriner or that to Harry were true.

Both of these objections appear to me of minor importance, and hardly sufficient in themselves to warrant the intervention of this Court. It will be remembered that the prisoner said to Harry that he saw McColl having connection with one of his lubras. But it cannot be too clearly understood that there was no evidence whatever

of the fact other than the statement of the prisoner related by Harry and translated into "pidgin" English by the police boy. It is improbable that any jury, or any person, would place any reliance upon such a statement unless it were corroborated. The learned Judge, however, admitted evidence to prove that Constable McColl was an officer of undoubted character and reputation. The evidence was inadmissible according to English law. But was any substantial miscarriage of justice thereby occasioned? The learned Judge, in his charge to the jury, reflected upon the preparation of the Crown case, and upon the fact that persons had not been called as witnesses who should have been called. He added that a grave miscarriage of justice might thus occur and a serious slander be affixed to the name of a dead man, meaning McColl. But he informed the jury that was a matter they could not take into consideration. Further, the Judge asserted his own opinion that the prisoner's statement to Harry was, upon its face, a fabrication. It is difficult to conclude that the evidence called in support of the character and reputation of Constable McColl had any serious bearing upon the trial, or caused any miscarriage of justice.

The comment of the learned Judge which is objected to was as follows:—"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. What counsel for the defence asks you to do is to take up the position that you will not believe either of these stories. Tuckiar has told two different stories to two different boys, and both of these stories have been told to you here in Court. Which one is true? For some reason, Tuckiar has not gone into the box and told you which one is true, and that is a fact which you are entitled to take into consideration. You can draw from it any inference you like." An Act of South Australia (1882 No. 245), which was in force in the Territory, enabled accused persons if they so desired to be sworn and give evidence as a witness: "Provided that no presumption of guilt shall be made from the fact of such person electing not to give evidence." It is said that the comment of the learned Judge was in contravention of this proviso. The comment should not have been made in the form adopted. The prosecution had put in

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evidence two statements alleged to have been made by the accused. They differed as to the circumstances under which Constable McColl was speared. It would have been legitimate to call attention to these differences, and to any circumstances that made the one statement more probable than the other, and to add that it was for the jury to consider whether either could be relied upon, and which, if either, was true. The Judge, however, took it upon himself to say that the statement to Harry was an obvious fabrication, and this course was calculated to influence the jury strongly against the prisoner, and to prevent a fair and calm consideration of the matters that the jury should have considered. But I doubt whether the comment that Tuckiar had not gone into the box and told the jury which story was true, and that they could draw any inference they liked, added much to the impropriety, or in itself caused a miscarriage of justice. It was obvious that the two statements differed in circumstance, and that the prisoner had offered no explanation of the difference, in the witness box or otherwise.

The trial of the prisoner seriously miscarried, but the reasons for this conclusion go deeper, to my mind, than the irregularities just referred to. Indeed, the latter do not seem to have been the subject of any objection on the part of counsel who appeared for the prisoner. But the conduct of the case by counsel is not above criticism. It was a grave mistake to announce, in open Court, after he had consulted with the prisoner at the suggestion of the Judge, that "he was in a predicament, the worst predicament that he had encountered in all his legal career." And it was a grave breach of the confidence reposed in him by the prisoner to make the following public announcement after the prisoner had been convicted and before he was sentenced:—"I have a matter which I desire to mention before the Court rises. I would like to state publicly that I had an interview to-day with the convicted prisoner, Tuckiar, in the presence of an interpreter. I pointed out to him that he had told these two different stories and that one could not be true. I asked him to tell the interpreter which was the true story. He told him that the first story, told to Parriner, was the true one. I asked him why he told the other story. He told me he was too much worried so he told a different story and that story was a lie. I think this fact clears

Constable McColl. As an advocate I did not deem it advisable to put the accused in the box." The Judge remarked:—"I am glad you mentioned it, not only in fairness to McColl, but also to prove that the boy Harry was also telling the truth. I had no doubt that Harry was telling the truth and apparently he was." Comment is needless. The learned Judge reports that, "if a new trial were granted, and another jury were asked to choose between Parriner's story, Harry's story, and some third story which might possibly be put before them, it would be practically impossible for them to put out of their minds the fact of this confession by the accused to his own counsel." I entirely agree. A new trial under conditions fair to the accused is now impossible.

The result is that the prisoner's conviction should be quashed, and his discharge ordered.

Conviction quashed and prisoner discharged.

Solicitor for the appellant, *D. A. Tregent*, agent for *W. J. P. Fitzgerald*, Northern Territory.

Solicitor for the Crown, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

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