

TUCKIAR v THE KING (1934) 52 CLR 335: Dhakiyarr Wirrpanda (circa 1900-1934?)

CHRONOLOGY

Sources and Abbreviations

1. **Report of High Court proceedings.** The most authoritative account of the trial of Tuckiar for the alleged murder of Police Constable Albert Steward McColl, and (for lawyers) the definitive assessment of the breach of Tuckiar's entitlement to legal professional privilege by his Defence Counsel at the trial (W J P Fitzgerald), is that contained in High Court of Australia's authorised report of the proceedings in that Court: *Tuckiar v The King* (1934) 52 CLR 335 (Volume 52 of the *Commonwealth Law Reports*, commencing at page 335).

The date 1934 in that citation reflects the fact that the judgment (or decision) of the High Court was published on 8 November 1934. The name of the case as reported (*Tuckiar v The King*) reflects the fact that Tuckiar, as “Appellant”, appealed to the Court to set aside his conviction for murder (in the Supreme Court of the Northern Territory) and the “Respondent” was The “King” (or the “Crown”), the nominal representative of the government responsible for prosecution of the case against the “Accused” person, Tuckiar, described in the CLR report as the “prisoner”.

The CLR Report of proceedings in the High Court occupies 21 pages, numbered “335” to “355” inclusive. On pages 335-336 is a lawyer's summary of the significant facts as found by the Court and the Court's essential statements of law based upon those facts. It is what is known as the “headnote” of the case report. It was prepared by one of the Court's authorised law reporters, H Dallas Wiseman (a barrister, whose initials “HDW” appear at the end of the Report, on page 355). Immediately after the headnote, on page 336, is a short description of the procedural character of the proceedings in the High Court. They were an appeal by leave (that is, by a grant of permission by the High Court) from a conviction of murder before the Supreme Court of the Northern Territory, and from the

sentence of death pronounced by [that] Court”. The names of the High Court judges who sat on the case are summarised at the beginning of the headnote, on page 335, immediately under two dates and a reference to “Melbourne”. The reference to Melbourne indicates that the Court’s hearing was conducted in Melbourne. The first date (29 October 1934) indicates that the hearing took place during the course of that day. The second date (8 November 1934) is the date upon which the Court published its Judgment. That is confirmed by the marginal reference to that date on page 338, after the abbreviated Latin expression “*cur.adv.vult.*”. In its full form that Latin expression is “*curia advisari vult*”. It means that “the court (“*curia*”) wished (“*vult*”) to be advised (“*advisari*”). Its significance is that it indicates that, after hearing evidence and arguments in the appeal on 29 October 1934, the Court “reserved judgment” until 8 November 1934 so that it could think about the case and prepare “Reasons for Judgment” to be published (as it happened on 8 November 1934) in support of any orders it might make to dispose of Tuckiar’s appeal.

The orders in fact made by the Court are summarised at the end of the Report on page 355: “*Conviction quashed and prisoner discharged*”. Although all five judges who heard the case were unanimous in their support of those orders, four of the judges (Chief Justice Gavin Duffy and Justices Dixon, Evatt and McTiernan) delivered joint Reasons for Judgment (reproduced at pages 338-347 inclusive) and Justice Starke delivered his own, separate Reasons for Judgment (reproduced at pages 347-355 inclusive). Each set of Reasons concludes with a more expansive statement of the orders made by the Court. At page 347, for example, the joint judgment concludes with a statement that the judges who wrote, or lent their names to preparation of, those Reasons intended that Tuckiar’s appeal be allowed; that the conviction of him by the Northern Territory Supreme Court jury be quashed (or set aside); that the judgment of the Supreme Court based upon the jury’s verdict of guilty also be quashed; and that a verdict and judgment of acquittal, in favour of Tuckiar, be entered in the records of the Supreme Court.

The barristers who appeared at the hearing in the High Court, and their respective arguments, are set out on pages 336-338. Counsel for Tuckiar (whose

submissions are at pages 336-337) were Messrs Fullagher KC and Detheridge. Counsel for the Respondent Crown was Mr Reynolds. The initials “KC” stand for “King’s Counsel”, an indication that Fullagher was a “senior counsel” and that Australia’s Head of State at that time (the British monarch) was a King rather than a Queen. Fullagher held his commission (appointment) as a senior counsel from the King. In those days, had a Queen been reigning, he would have been described as “Fullagher QC”, adapting his title to that of a “Queen’s Counsel”. In more recent days, Australian States and Territories have appointed (instead of Queen’s Counsel) “Senior Counsel” who are indicated by the initials “S.C.”. As it happens, (Sir) Wilfred Kelsham Fullagher himself became a judge of the High Court on 8 February 1950 and remained in that office until his death on 9 July 1961.

The clearest statement of the Court’s findings of fact about the death of Constable McColl is set out in the joint Reasons for Judgment at pages 339-341 (commencing in the fourth line on page 339 with a reference to Tuckiar as “the prisoner” and concluding on the eleventh line of page 341 with a reference to “the white man’s hat”). The clearest statement of the Court’s findings of fact about what was (or not) said and done at Tuckiar’s trial is set out in the joint Reasons at pages 341-344, commencing with the twelfth line on page 341 (“At the trial at Darwin...”) and concluding with the twenty-fourth line on page 344 (with the expression “Judge pronounced sentence of death”). The majority of the High Court judges analysed these facts in what is set out in the remainder of the joint judgment (at pages 344-347). Their critical observations about the conduct of Defence Counsel at the trial and his failure to uphold Tuckiar’s entitlement to legal professional privilege appear on pages 346-347 (commencing on the sixth line of page 346 (“It would...”) and concluding on the fifth line of page 347 (“...strict observance”), supplemented by an extract (on page 347) of a report of the trial made to the High Court by the trial judge (Mr Justice Thomas Alexander Wells).

The High Court’s judgment is authoritative as far as it goes. However, any reader of it must understand its limitations. The language it uses (when, for example, Tuckiar is described on page 339 as “a completely uncivilised

Aboriginal native”) reflects the language of the time, 1934. The facts as found by the Court might not, by others, be regarded as beyond dispute; the Court’s search for the truth was limited by the evidence before it and its limited purpose in describing the facts sufficiently to determine whether or not Tuckiar’s appeal should, according to law, be allowed. Others (such as social historians) might unearth other facts or attribute a different significance to facts generally known. Finally, it must be understood that the Court’s role ended with the making of its orders for Tuckiar to be “discharged” (that is, to be released). It was not to know, and the report of its proceedings is silent, about the tragic disappearance of Tuckiar after his release from prison. Tuckiar’s story as it appears in the *Commonwealth Law Reports* is necessarily incomplete.

2. **Secondary Sources.** Of the many references to Tuckiar’s Case in secondary sources, one of the better short works is Jack Waterford’s entry, “Tuckiar v The King” in *The Oxford Companion to the High Court of Australia* (Melbourne, 2001), edited by Professors Blackshield, Coper and Williams. Waterford’s entry (on pages 687-688) is faithful to the *Commonwealth Law Reports* report of the High Court’s Reasons for Judgment, and it directs attention to the question of legal professional privilege as a central consideration in assessing the professional obligations of an advocate. An entry on “Aboriginal Peoples”, at pages 446-452, in the same book was written by the High Court’s own Justice John Toohey. It ventures the view that *Tuckiar v The King* (1934) 52 CLR 335 was the first reported decision of the Court in which an Aboriginal person was a party to proceedings. Quite apart from that significant fact it was, and is, an important case about the duties of a trial advocate.

Of the longer secondary sources on Tuckiar’s Case, one of the best is Ted Egan’s book, *Justice All Their Own: The Caledon Bay and Woodah Island Killings, 1932-1933* (Melbourne, 1996). The author is now the Administrator of the Northern Territory, the equivalent of a Governor of an Australian State. The research for his book was conducted over several decades, when he was himself actively involved in Aboriginal communities, as a public servant and as a friend. He interviewed many of the participants in the events he describes. He also publishes extracts of basic primary sources so as to make them available to the

public without the distortion of historical perspectives that accompany presentation of present-day opinions as historical facts. He does, certainly, present opinions congenial to the current day, but their character as opinions is transparent, and they do not stand between a reader and his or her personal assessments of original sources.

The main entries of relevance in *The Australian Dictionary of Biography* are those for Tuckiar, listed under his Aboriginal name, “Dhakiyarr Wirrpanda” (Supplementary Volume, 2005) and Thomas Alexander Wells (16 ADB 52). The *Australian Dictionary of Biography* can be accessed electronically via the website, www.adb.online.anu.edu.au

For an account, and explanation, of a ceremony of reconciliation between the descendants of Tuckiar and McColl, in the precincts of the Supreme Court of the Northern Territory and in the presence of the Chief Justice of Australia (Gleeson CJ), see the speech of a descendant of McColl in the NSW Legislative Council: NSW *Hansard* Article No. 60 of 2 December 2003 (accessible, as a speech on “Aboriginal Reconciliation”, on the website of Charlie Lynn MLC, www.charlielynn.com)

Some of the dates attributed to events in Tuckiar’s story differ as between different sources. In this Chronology, preference is given to dates recorded in the High Court’s Reasons for Judgment ((1934) 52 CLR 335) and in Ted Egan’s book.

Date

Event

1932

17 Sept Five Japanese fisherman working with Aboriginal crews to harvest trepang off the coast of Arnhem Land (an Aboriginal reserve in the Northern Territory of Australia, east of Darwin, the capital of the Northern Territory) were killed at Caledon Bay by Aborigines. The relationship between the Japanese and the Aboriginal community had suddenly deteriorated for reasons not fully known but, perhaps, resulting from conduct of the Japanese interpreted by the community as a deep

insult: Egan, *Justice All Their Own*, pages 14-17 and 20. Three Aboriginals (Mau, Natjelma and Narkaya) were subsequently charged with the murder of one of the Japanese. After a preliminary hearing in the Darwin Police Court (the evidence at which is summarised in Egan at pages 86-93), they were committed for trial in the Supreme Court of the Northern Territory. The trial was conducted by Mr Justice T A Wells ("Wells J") and a jury. It was held on 1 August 1934. The jury found the Accused guilty: Egan, page 94. The judge sentenced them to imprisonment for 20 years, with a recommendation that they might be released for good behaviour after 4 years: Egan, page 98.

1933

March Two Australian of Caucasian descent (William Fagan from Tasmania, and Frank Traynor from Sydney in NSW) were killed by Aborigines at Woodah Island (near Groote Eylandt) on the east coast of Arnhem Land while sailing in that region: Egan, pages 55-57. The men appear to have been killed by Aboriginal men (including Tuckiar and Mirera) because they had sexually violated Aboriginal women, one of whom was a wife of Tuckiar (Djaparri Wirrpanda): Egan, page 56. Tuckiar and Mirera were subsequently charged with the murder of one of the men: Egan, page 85. After a preliminary hearing in the Darwin Police Court on 26 July 1934 (the evidence at which is summarised in Egan at pages 103-104), the Accused were committed for trial to the Northern Territory Supreme Court. The trial was conducted by Wells J and a jury on 2 August 1934: Egan page 105. The evidence at the trial is summarised in Egan at pages 105-113. The Accused were acquitted: Egan, page 113.

1 Aug Police Constable Albert Stewart McColl (a member of a police expedition sent from Darwin to investigate the Japanese deaths) was killed by the spear of an Aboriginal on Woodah Island when he was left as the only policeman, with two Aboriginal trackers, to guard Aboriginal women taken into custody for questioning: 52 CLR 339 and 348-349. One of the women held by McColl was a wife of Tuckiar, Djaparri. She had been sexually used by Traynor and Fagan in the incident that had led to their

deaths in March 1933, as is recorded in the ADB entry on “Dhakiyarr Wirrpanda”. Tuckiar was protective of her, and may have believed either that she would be abused by the policeman (who was not in uniform) or that the police expedition was seeking retribution for the deaths of Traynor and Fagan. It is generally accepted that he was the person who killed McColl. In January 1934 he admitted to the members of a Missionary “Peace Expedition” that he had killed McColl because the policeman had captured his woman: Egan, page 64. At a coronial hearing into the death of McColl in Darwin on 16 April 1934 he was committed to the Northern Territory Supreme Court for trial on a charge of murder: Egan, pages 80, 85 and 115. The trial was conducted by Wells J and a jury on 3 August 1934: Egan, pages 113 and 115. The verdict of the jury was “Guilty”. On 6 August 1934 the judge sentenced Tuckiar to death: Egan, pages 145, 147 and 148-152. It was from that conviction, and sentence, that Tuckiar appealed to the High Court.

21 Aug Constable Ted More, the leader of the police expedition, delivered a formal report on McColl’s death to the Superintendent of Police in Darwin. It is reproduced in Egan at pages 24-30. It became a foundation for findings of fact by the High Court in Tuckiar’s Case: Egan, page 179.

1934

8 April The Missionary “Peace Expedition”, led by Reverend A J Dyer brought Tuckiar and his co-accused to Darwin, as it happened, to stand trial: Egan, page 72. The Aboriginals came voluntarily and, it seems, without any full appreciation of the processes to which they were to be subjected. Against the wishes of Dyer, the 5 men accused of murder (regarded by the authorities as self-confessed killers) were arrested and imprisoned pending trial: Egan, page 72. Dyer seems to have regarded the deaths (and, in particular, the death of McColl) as “justifiable homicide” (Egan, page 161) because the Accused had acted in defence of themselves and their women (“self-defence” being a complete defence to a charge of murder).

- 9 April McColl's body arrived in Darwin for burial, retrieved from Woodah Island by a second police expedition: Egan, page 73.
- 10 April The Accused were brought before Darwin Police Court for preliminary hearings which, after adjournment, resulted in all 5 men being committed for trial in the Supreme Court of the Northern Territory: Egan, pages 85-86 and 102-103.
- 16 April At the conclusion of a coronial inquiry into the death of McColl, Tuckiar was formally committed for his murder: Egan, page 80.
- 22 April McColl was buried in Darwin in a large, public funeral, with Wells J present in his capacity as a private citizen: Egan, page 81.
- 1 Aug The trial of Mau, Natjelma and Narkaya for the murder of Tanaka, one of the Japanese killed at Caledon Bay on 17 September 1933. The presiding judge was Wells J. John Harris, Acting Crown Law Officer, appeared for the Crown (the Prosecution). William Joseph Pious Fitzgerald appeared for the Defence: Egan, page 93. The Accused were convicted by the jury (Egan, page 94) and sentenced by the Judge to 20 years' imprisonment, with a recommendation that they might be released after 4 years with good behaviour (Egan, page 98).
- 2 Aug Trial of Tuckiar and Mirera for the murder of "a certain person whose name is unknown" (being one of Traynor or Fagan), killed at Woodah Island in or about March 1933. The presiding judge was Wells J. The Crown Prosecutor was John Harris. Counsel for the Defence was W J P Fitzgerald: Egan, page 105. In summing up the case to the jury at the end of the trial, Wells J doubted that the Crown had adduced sufficient evidence to support a conviction; even if confessions of the Accused were relied upon, it seemed to him that the Accused had acted in self-defence. The jury returned a verdict of "Not Guilty". Mirera was released by order of the Judge. Tuckiar remained in custody to stand trial, the following day, for the murder of McColl: Egan, pages 112-113.

3 Aug

Trial of Tuckiar for the murder of Constable McColl at Woodah Island on 1 August 1933. Wells J presided. John Harris appeared as Crown Prosecutor. W J P Fitzgerald appeared as Tuckiar's Defence Counsel: Egan, page 115. The course of the trial is described in the Reasons for Judgment of the High Court at 52 CLR 341-344 and 349-355. As Starke J noted, the only evidence before the jury connecting Tuckiar with the death of McColl were two (not completely consistent) confessions attributed to him by Aboriginal witnesses. One witness was an Aboriginal named "Parriner" and the other an Aboriginal called "Harry": 52 CLR 349. The most damning of Tuckiar was Parriner's evidence of a confession summarised at 52 CLR 340. It characterised Tuckiar as the assailant, even though he was said to have attacked McColl to release Aboriginals in McColl's custody. Harry's evidence (summarised at 52 CLR 340-341) was more sympathetic to Tuckiar; it characterised McColl as the assailant and, so, presented Tuckiar with a stronger foundation for a defence of self-defence. Two statements to the Court by Fitzgerald after having conferred with Tuckiar about Parriner's evidence were highly prejudicial to Tuckiar. The first statement, to the effect that "[he, Fitzgerald] was in a predicament, the worst predicament that he had encountered in all his legal career", was made to the Judge in the presence of the jury; it implied that Tuckiar had made a confession of guilt: 52 CLR 341, 346, 354. The second statement, after the jury had delivered a verdict of guilty, was an explicit assertion that Tuckiar had confessed to Fitzgerald that the story said to have been told to Parriner was true, and the story said to have been told to Harry was a lie. It so prejudiced the public mind against Tuckiar that the High Court, on appeal, felt that Tuckiar had to be given an acquittal because no re-trial could possibly be fair: 52 CLR 343-344, 346-347 and 354-355. Perhaps taking a cue from the Judge, Tuckiar's counsel appears to have been preoccupied (incorrectly, as the High Court found) by an anxiety to protect the posthumous reputation of McColl. The trial finished, after a marathon session, at about 11.00 p.m.: Egan, pages 144-145. Perhaps Fitzgerald's judgement was affected by exhaustion, but the High Court held that his conduct was inexcusable.

- 6 Aug After hearing evidence and submissions on sentence, Wells J sentenced Tuckiar to death: Egan, pages 248-152.
- 10 Aug Proceedings were commenced in the High Court of Australia in Tuckiar's name by the Government official known as "Chief Protector of Aborigines" with assistance from Tuckiar's Defence Counsel, Fitzgerald: Egan, page 155. Fitzgerald did not appear as counsel for Tuckiar in the High Court.
- 30 Aug A judge of the High Court (Starke J) granted Tuckiar "leave" (that is, permission) to appeal against his conviction and sentence: Egan, pages 163-164. Leave to appeal was only granted in important cases. This was clearly an important case. In explaining his decision to permit an appeal to be brought, the Judge published Reasons for Judgment which included the following statement: "There is one observation I would like to make. I rather regret that Counsel for the defence [Fitzgerald] made any public statement of what the prisoner [Tuckiar] had said to him at any time. That is very prejudicial to the prisoner. One would have thought that the procedure would be if the prisoner made confessions to Counsel, the duty of Counsel, unless he is seriously embarrassed, is not to make public those statements, but to do his best on the evidence. I am surprised that Counsel disclosed that information.": Egan, page 164.
- 1 Oct At the invitation of the High Court, and in the absence of a full transcript of the proceedings in the Supreme Court, Wells J delivered to the High Court a written report on the proceedings. Extracts from it are reproduced in Egan at pages 164-176.
- 29 Oct The High Court heard Tuckiar's appeal in Melbourne. The arguments of counsel are summarised at 52 CLR 336-338. The High Court reserved its judgment.
- 8 Nov The High Court delivered judgment in Tuckiar's Case: allowing his appeal, quashing (setting aside) his conviction and sentence, and substituting an order that he be acquitted of McColl's murder: 52 CLR 555 (and 347).

9 Nov In accordance with the High Court's orders, Tuckiar was released from prison in Darwin only to disappear (presumed murdered by a party or parties unknown): Egan, pages 188, 190 and 191-192.

2003

June 28 Descendants of Tuckiar and McColl joined together in a ceremony of reconciliation marked by the unveiling of a monument in the grounds of the Supreme Court of the Northern Territory, witnessed by the Chief Justice of Australia: NSW *Hansard* Article No. 60 of 2 December 2003, accessible as a speech on Aboriginal Reconciliation on the website www.charlielynn.com

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