[HIGH COURT OF AUSTRALIA.]

TUCKIAR . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY.

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MELBOURNE, *Oct.* 29; *Nov.* 8.

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

Counsel—Criminal prosecution—Evidence of confession by accused—Interview between prisoner and counsel—Privilege—Duty of counsel.

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

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

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

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

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

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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

(1) (1893) 14 L.R. (N.S.W.) 150.
(2) (1887) 18 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. *Fieman* 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

(1) (1930) 47 C.L.R. 107.

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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 chose 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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brought by leave of this Court from any conviction, sentence, decree or order of the Supreme Court of the Territory. But, though this jurisdiction is conferred in unlimited terms, it should nevertheless be regulated by a consideration of circumstances and consequences that have reference to the administration of justice itself. Unless 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 administration 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 whith 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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" in the worst predicament that he had encountered in all his legal career."

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 Aboriginals for the Northern Territory informs us that " the conditions of interpreting the statements of aboriginals through other aboriginals, 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 aboriginals of a police party capturing their lubras, and apparently endeavouring to capture the aboriginals 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 aboriginals, however, and particularly to the prisoner, the conduct of the police party may well have appeared as an attack upon the lubras and themselves, and provoked or led to the attack upon the police in their own defence. A finding of not guilty, or of manslaughter, was quite open to the jury on the evidence. 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.

H. D. W.