The movie no judge can afford to miss*

*by Justice M D Kirby

This article first featured in *The Age* newspaper in August. It is reprinted here with permission from *The Age* and High Court judge and the author of this article, Justice Michael Kirby.

Recently, the Australian movie *Black and White* had its world premiere in Sydney. It will be in a cinema near you towards the end of this year. Every Australian judge and magistrate should see it.

It should also be of interest to many other citizens. The film tells the story of Max Stuart, a near full-blood Aborigine who was convicted of the murder of a nine-year-old girl at Ceduna, South Australia, in December, 1958.

The only real evidence against him was a typed confession, signed after he was interrogated by six police. Stuart later said the confession was forced out of him.

The film tells of the trial, the appeals to the High Court and Privy Council, a royal commission and the eventual commutation of the death penalty imposed on Stuart after the jury found him guilty.

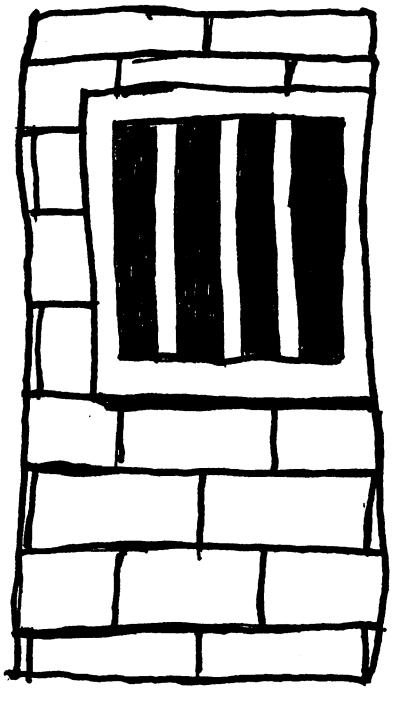
In its day, the Stuart case was a great controversy. The High Court refused to receive evidence from an expert in the Aranda language, Professor Ted Strehlow.

He had said that Stuart's alleged confession was incompatible with his poor command of the English language.

The court said that, generally, it would not receive fresh evidence on appeal. Yet despite dismissing Stuart's legal points, the High Court judges confessed that "certain features of this case have caused us some anxiety". They nonetheless confirmed the death sentence, and the Privy Council in London refused to intervene.

The resulting public concern was picked up by an ambitious young newspaper proprietor in Adelaide, Rupert Murdoch. As a result, a royal commission was appointed.

Astonishingly, the presiding commissioner, Sir Mellis Napier, had,



as chief justice, confirmed Stuart's conviction on appeal.

A second commissioner was the trial judge (Sir Geoffrey Reed). Viewed with today's eyes, this was a flawed process of review.

Unsurprisingly, the commission's report did not quieten the concerns about Stuart's conviction. Yet he served a long prison sentence before being released on parole - this only after the chairman of the parole board (Sir Roderic Chamberlain) was required to stand aside. He had been the Crown prosecutor at Stuart's trial.

The film shows that the Australian legal system 40 years ago had a lot of safeguards built into it, although they did not always work well.

More importantly, a comparison with our legal system today shows that many things have improved to repair the defects highlighted in the trial of Stuart.

The laws and practices of Australia today are less discriminatory against Aborigines. The Aboriginal Legal Service has been established. The follow-up to the Royal Commission on Aboriginal Deaths in Custody appears to have reduced the incidence of those tragic fatalities. But Aboriginal imprisonment is still disproportionately high.

We still have a long way to go.

However, overt prejudice, never far from the surface in Stuart's trial, is now less common in the legal scene. A prisoner such as Stuart, facing such a serious charge, would today undoubtedly be entitled, if without means (as Stuart was), to proper and effective legal aid.

This is a consequence of the rule laid down by the High Court in Dietrich's case in 1992. The somewhat peremptory way in which the courts of 1959 dealt with Stuart's complaint about the circumstances in which the confession was taken from him would today have had to run the gauntlet of the High Court's rulings in McKinney's case in 1991.

The court there laid down the rule that wherever police evidence of a confession made in custody is disputed and its making is not reliably corroborated (as by sound or video recording), the judge should warn the jury of the danger of convicting on the basis of that confessional evidence alone.

Although Strehlow's evidence would not have been available in the High Court even today, it seems unlikely to me that the court now would adopt the same kind of formalistic approach as it did in 1959.

Further, the highly partisan approach of the prosecutor at the trial, and even in the High Court, would, I suspect, today have attracted more than a verbal rebuke.

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Courts in Australia have also developed principles to protect litigants from incompetent counsel. I do not say that those principles would necessarily have applied in Stuart's case. But where a person is denied a fair trial because of seriously flawed legal representation, the courts do not now wash their hands.

There are also advances in technology. Such advances affect the way in which confessional statements are recorded. But they now extend to DNA and other scientific evidence to reduce the risks of wrongful convictions.

In Stuart's case, hairs had been found under the victim's fingernails. Samples were taken of Stuart's hair. But in 1958 and 1959, such scientific tests were in their infancy.

Today, they would probably have proved determinative. The fundamental lesson that judges and magistrates should draw from watching *Black and White* is that formalism is not enough.

A devotion to justice is imperative.

I regard it as a sobering discovery to learn from Black and White that the real saviour of Stuart's life was not the Australian court system. It was the chance decision of a young media personality who shared the "good deal of anxiety" about the case which the courts, given the full chance to do so, either did not see or would not, or could not, act upon.

No system of human justice is perfect.

The improvements we have made in the past 40 years by no means removed the possibility of miscarriages of justice or wrongful convictions.

To the very end, no one really knows for certain whether Stuart was guilty or innocent. But the conduct of his prosecution, trial and appeals were not a shining moment in Australian legal history.

It is therefore right that his case should be portrayed and his story retold to a national and international audience. It is a good and brave country, with strong institutions, that learns from past errors and adopts reforms to avoid their repetition. ①

The LSNT Annual General Meeting: a short report

As well as electing a new Council (see pages 10 to 12), the 2002 Annual General Meeting of the Law Society of the NT addressed four other important issues. They are briefly outlined here.

Proposed amendment to the Constitution re: nominations
This motion, moved by the President Ian Morris, required that all nominations for election of the Society's Council had to be received by the Secretariat seven days prior to the date set for the AGM.

If no nomination was received for a Council position, the amendment allows for nominations to be called from the floor of the meeting and seconded verbally by a member at any time prior to the closure of nominations by the Chair.

The motion was carried and is now pending approval from the Attorney-General.

Proposed amendments to the By-laws
These were based on the disciplinary processes of the Society. Consideration of these proposed amendments were adjourned to a Special General Meeting to be held on a date to be advised.

Proposed Adoption of the Barristers' Conduct Rules
The meeting considered adding the Barristers' Conduct Rules to the Law Society's Rules of Professional Conduct and Practice. The Barristers' Conduct Rules would only apply to barristers.

The meeting endorsed the adoption on proviso that a consultation process in accordance with the Act be undertaken before they were set down in the Law Society's regulations.

Proposed amendment re: dealings with the Law Society
A rule was endorsed to require practitioners under investigation for a complaint to be courteous and co-operative in their dealings with the Society. ①