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Judgment in black and white; A new film about a '50s murder case should be required viewing for all Australian judges and magistrates

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Recently the Australian movie *Black and White* had its world premiere in Sydney. It will be in the 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 Aboriginal 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.

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 none the less 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 Max Stuart.

The laws and practices of Australia are less discriminatory against Aborigines. The Aboriginal Legal Service has been established. The follow-up to the Royal Commission into Aboriginal Deaths in Custody appears to have reduced the incidence of those tragic fatalities.

But Aboriginal imprisonment in Australia is still disproportionately high. We still have a long way to go. However, overt prejudice, never far from the surface in Max Stuart's trial, is now less common in the legal scene.

A prisoner such as Max 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 would now adopt such a formalistic approach as it did in 1961. 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.

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 Max 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 Max 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 Max 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 either did not see or would not, or could not, act upon.

The conduct of his prosecution was not a shining moment in Australian legal history.

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 Max 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.

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