

**CRIMINAL LAWYERS' ASSOCIATION OF THE NORTHERN
TERRITORY**

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KEYNOTE ADDRESS

REMOTE JUSTICE

The Hon Justice Michael Kirby AC CMG*

GEOGRAPHICAL REMOTENESS

Tyranny of distance: The presence of lawyers from different parts of Australia in Bali, symbolises a changing feature of the world. It evidences, once again, the fact that Australia is no longer the helpless victim of the tyranny of distance. In an age of jet air travel, the Internet, cell phones and now nanotechnology, we are to some extent relieved of always being hostage to our geographical isolation.

The First Fleet took nine months to travel from England to Botany Bay¹. In the colonial days, responses to messages "home" would often require months. Governors and local officials in Australia, faced by

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¹ A Frost, *Arthur Phillip - His Voyaging* (OUP, Melbourne, 1987), 141 at 153ff.

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restless settlers might write to Whitehall for their instructions². But weeks and months and sometimes years might pass before instructions were received.

In such an environment, it is unsurprising that Australians conceived themselves as cut off, in their particular small communities, generally hugging the coast of a continental country. Crime was local. Courts and the legal profession were local. The divisions of Australia, later reflected in the States and Territories of the Commonwealth, merely formalised the arrangements that sprang up, out of geography, in the early days of British settlement.

The legal divisions remain. As well, the nation states are still in place in the world. Indeed, the international organisation of the United Nations, as its title indicates, depends on the nations for its effectiveness, however much the Charter might proclaim that it is based on the ideal "We the People of the United Nations"³. Nevertheless, the reality of the world today is that dealings often take place that are no respecters of borders. Crime, even of a traditional kind, is frequently transborder in character⁴. New international crimes proliferate. Some of

² For examples of such exchanges see *Yougarla v Western Australia* (2001) 207 CLR 344 at 381-389 [103]-[127].

³ Charter of the United Nations, Preamble, in H J Steiner and P Alston, *International Human Rights in Context - Law, Politics, Morals* (Clarendon, Oxford, 1996), 1148.

⁴ See eg *Lipohar v The Queen* (1999) 200 CLR 485 at 531-535 [111]-[123], 559-564 [186]-[200], 575 [235].

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them, in the form of terrorists' acts, have ramifications far from the scene of the crime. Sadly, Bali is associated in the minds of many Australians with shocking terrorist attacks of horrible ferocity affecting local people and also nationals of many lands, including our own. For many Australians, Bali too, is in the news because of front-page stories of charges and trials involving Australian nationals, arrested for alleged trans-border drug offences.

In this sense, law, even criminal law, is no longer universally local, in the way it substantially was when the Commonwealth of Australia was established. At that time, inter-jurisdictional travel was still comparatively slow, inconvenient and expensive. Motor vehicles had only just been invented. Aeroplanes were still to come. The Constitution was adopted in time to include the provision of a power to the Federal Parliament to make laws with respect to "postal, telegraphic, telephonic and other like services"⁵. But the big changes that altered the world, crime and our vision of ourselves, were to happen later in the century, spurred on by ever expanding technology.

Anyone in doubt about the internationalisation of crime, the proliferation of trans-border crime, and the likely growing impact of international human rights law on our handling of crime and punishment can read an earlier essay of mine "The Future of Criminal Law"⁶. It was

⁵ Constitution, s 51(v).

⁶ (1999) 23 *Criminal Law Journal* 263.

delivered in Bali at a previous conference of this Association in June 1999. The developments that have occurred since that paper was given have simply accelerated the trends that I mentioned on that occasion. The growth of trans-border phenomena has meant that, increasingly, the law must deal with them. Especially when it comes to the criminal law dealing with them, it is important that they be dealt with justly and according to basic principle. So much is the hypothesis expressed in international human rights law⁷. But it is also the hypothesis that lies deep in the doctrines of Australian law and in the expectations of Australians, as indeed of ordinary people in every land.

When, therefore, we talk of "remote justice" we may mean nothing more, in criminal matters, than bringing justice across great geographical distances. Not only is this still part of the reality of Australia, a continental country. It is also a phenomenon of the world in which Australia finds its place. A conference of Australian lawyers in Bali is a symbol of that world and of its interconnections.

Territorial remoteness: It is natural that Australians, in parts of the nation far from the seat of the High Court in Canberra, must sometimes feel themselves to be remote from that institution. Ever so occasionally, they may perceive the seat of government in Canberra, including the High Court, as remote from their concerns. Yet from the early years the

⁷ E.g. *International Covenant on Civil and Political Rights*, art 14.1.

High Court heard and decided appeals from all parts of the nation, including the Supreme Court of the Northern Territory.

Recently there was a commemoration at the Law Courts in Darwin of the decision of the High Court in *Tuckiar v The King*⁸. Present at the ceremony were families of Constable McColl and of Tuckiar (whose family name, in accordance with the local Aboriginal language, should more accurately be transcribed as "Dha'a'kiyarr". Interestingly, the case was dramatised in the form of a conference play at the 2001 conference of this Association in Bali. It was produced by Rex Wild QC, then Director of Public Prosecutions of the Northern Territory.

Tuckiar was a case in which the accused was described in the record, in the manner of those times, as "a completely uncivilised aboriginal native". He was charged with the murder of a police constable in the Northern Territory.

During the trial, the accused's lawyer interviewed his client, on the suggestion of the trial judge, to ascertain whether the accused agreed with evidence given by a prosecution witness alleging that he had confessed to the crime to that witness. In open court, the lawyer, having interviewed the accused, observed that he faced the worst predicament of his legal career. Feelings ran high in the Northern Territory about the

⁸ (1934) 52 CLR 335.

death of the police constable. The prosecutor sought to call obviously inadmissible evidence as to the good character of the deceased⁹. The evidence described the deceased's work on patrol, in areas where there had been many "half-caste girls and many native women", and suggested that there was nothing untoward in the deceased's conduct. No evidence was called for the defence.

The jury may have been members of the local community dependent on police constables such as the deceased. They may have been living in what then, far more than now, was a remote part of Australia. But they were still troubled by the failure of the prosecution to call witnesses to Darwin to prove the guilt of the accused. They sent a question to the judge and asked: "If we are satisfied that there is not enough evidence, what is our position?".

The trial judge gave the answer: "You must think very carefully about that aspect of the matter and not allow yourself 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". That direction was accurate enough; but it was hardly sufficient or fully balanced, given the

⁹ (1934) 52 CLR 335 at 341.

heavy onus borne by the prosecution to prove its case on a capital crime.

Having reminded the jury of the "obvious duty of the Crown to bring all the evidence procurable", the judge sent the jury back to continue their deliberations.

As a feature of the times, the High Court lamented that "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"¹⁰. The jury, perhaps unsurprisingly, in light of the judge's foregoing instructions, returned a verdict of guilty. Astonishingly, his lawyer then made a statement in open court: "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 [inculpating him] was the true one ... I think this fact clears Constable McColl [the police constable whose death by spearing occasioned the trial]".

¹⁰ (1934) 53 CLR 335 at 342.

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The trial judge proceeded to impose the sentence of death on the accused. As an instance of "remote justice" the trial was full of confusion, inappropriate conduct, error and above all injustice. But fortunately, an appeal lay to a remote court. A hearing before the Full High Court of Australia took place in Melbourne on 29 October 1934. A little more than a week later, the High Court handed down its unanimous decision that Tuckiar's conviction should be quashed.

It is a sign of the strength, and not the weakness, of the legal profession in the Northern Territory, that this instance of remote justice is still remembered and reflected upon. What might have been an embarrassing event for the administration of criminal justice, for fairness and due process in the trial of an illiterate accused, for a lawyer apparently overwhelmed by local sentiments adverse to his client, has become a source of instruction. Instead of burying the case as a troubling instance of remote injustice, it is remembered. It is still reflected upon, as an illustration that belatedly justice can be achieved through our institutions by invoking the mechanisms which they have in place to prevent miscarriages - even to an accused who may be hated and feared. Even to an accused who may be different - a member of some minority or unpopular group.

From far away in Melbourne, the High Court, remote from any passions that may have existed in Darwin, identified the errors and

"clear misdirections" of the "learned judge" which were "calculated gravely to prejudice the prisoner"¹¹. The judge had turned the prisoner's failure to give evidence into "a presumption of guilt". He had permitted evidence to be given of the deceased's constable's good character and moral tendencies which "clearly should have been disallowed". The High Court pointed to the fact that "the purpose of the trial was not to vindicate the deceased constable, but to enquire into the guilt of the living aboriginal"¹². It pointed out that no objection had been raised to this evidence and that, then, the errors of the accused's lawyer were compounded by his failure to press for acquittal or a conviction of manslaughter only and by his subsequent impermissible disclosure, in open court, of his privileged communication with his client¹³.

In a sense, the anxiety which the High Court judges obviously felt about the case is made clear by the exceptional order which the Court then made, not only quashing the conviction and judgment of the first trial but directing a verdict and judgment of acquittal¹⁴. This was an unusual disposition where the conviction at the first trial was set aside for errors in the conduct of that trial. Normally, the way such errors are corrected, and justice done, is by ordering a retrial, on the assumption

¹¹ (1934) 52 CLR 335 at 344.

¹² (1934) 52 CLR 335 at 345.

¹³ (1934) 52 CLR 335 at 346.

¹⁴ (1934) 52 CLR 335 at 347 per Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ; and at 355 per Starke J.

that it will be free of the earlier mistakes¹⁵. Not so with Tuckiar. The judges of the High Court quoted a report received from the trial judge who, to his credit, recognised that the "remote justice" of the trial of this accused has ended in a shambles¹⁶:

"If a new trial were granted and another jury were asked to choose [which story was correct] it would be practically impossible for them to put out of their minds the fact of the 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".

The High Court agreed and concluded unanimously that the "prisoner cannot justly be subjected to another trial at Darwin, and no other venue is practicable"¹⁷. He was therefore discharged.

No doubt some members of the remote Darwin community in November 1934 found the conclusion arrived at by the High Court Justices, at the end of the legal process, puzzling and unsatisfying. The family of Constable McColl could scarcely have been happy with the outcome. Those who upheld law and order at the time must have had a noisy field day. The High Court in Melbourne would doubtless have

¹⁵ *Dyers v The Queen* (2002) 210 CLR 285 at 297 [23], 314-315 [82]-[83]. C Corns, "The Discretion of a Court of Appeal to Order a New Trial or a Verdict of Acquittal" (2006) 30 *Criminal Law Journal* 343.

¹⁶ (1934) 52 CLR 335 at 347.

¹⁷ (1934) 52 CLR 335 at 347. See also at 355 per Starke J.

been castigated as "remote" and its "justice" unreal, impracticable, and insubstantial.

Yet looking back at that trial, from today's vantage point, we can see it as an instance of the vindication of our national and judicial institutions. Courts do not struggle to get a conviction at any cost. The process of the trial is important in itself. The judge must be impartial and removed from any local passions. He or she must hold the scale balanced fairly. The prosecutor must also be fair. The accused's counsel must be vigilant, competent and loyal to the client. Even in a remote place, these were the basic rules which the High Court insisted upon in *Tuckiar*. The Court was alert to the miscarriage of justice that had occurred. I suggest that recent decisions of the Court, including in *Fingleton v The Queen*¹⁸ and *Mallard v The Queen*¹⁹, continue this high tradition.

Within Australia, no matter how remote the place of the crime or the venue of the trial or distance from the local capital or Canberra, the theory of our Constitution is that the institutions will protect and repair injustice when the law permits and requires that course. This is an aspect of equal justice under law throughout the Commonwealth of Australia which is upheld by the courts of the integrated Judicature and,

¹⁸ (2005) 79 ALJR 1250; 216 ALR 474.

¹⁹ (2005) 224 CLR 125.

ultimately, as in *Tuckiar*, by the orders of the High Court. It may be that the establishment of independent courts, by and upon Chapter III of the Constitution of the Commonwealth, imports a basic implication of due process and fair trial, as a constitutional hypothesis applicable throughout the nation²⁰.

International justice: In my 1999 essay, I pointed out that international law and international institutions are now bringing concepts of justice to crime in ways that were unthinkable in earlier times.

The impact of the international law of human rights on our notions of criminal law and procedure is only just beginning to have effect in Australia. In most overseas jurisdictions, including those of English-speaking common law countries, this development has progressed much further because of the influence of local bills or charters of rights which state common themes with which judges and lawyers in criminal trials must be, or become, familiar. Anyone in doubt should examine the decisions of the English courts since the *Human Rights Act* 1998 (UK) came into force in 2000. In Australia, we are beginning to see the seeds of a similar development in the enactment in two jurisdictions of a local general law of human rights²¹.

²⁰ *Polyukhovich v The Queen* (1991) 172 CLR 501 at 609-610 per Deane J, 703-706 per Gaudron J; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 483-491 per Deane and Toohey JJ; 501-503 per Gaudron J.

²¹ *Human Rights Act* 2000 (ACT); *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

Even in advance of such direct application of international legal principles, so that they become part of Australian law, it is sometimes useful to have regard to international law on this subject in resolving a problem before our own courts. Although the *International Covenant on Civil and Political Rights*²² (ICCPR) has not been incorporated as part of Australian domestic law, it is sometimes useful to Australian judges and lawyers to have access to it in grappling with issues of basic principle.

The High Court has held that the Covenant cannot override clear statements of municipal law where these are settled by the Constitution, by binding statute or by a rule of the common law expressing accepted judicial authority²³. On the other hand, the law derived from such Australian sources is sometimes ambiguous or unclear. It is in such instances that, as *Mabo* teaches²⁴, it is permissible for Australian lawyers to look to international human rights law to clarify the requirements of the law and basic justice. In this sense, the appeal to international law may be another illustration of the contemporary workings of remote justice. Our country's legal system, operating far

²² ICCPR [1980] ATS 23. The relevant provisions came into force in respect of Australia on 13 November 1989. Australia has also signed the First Optional Covenant to the ICCPR.

²³ *Minister for Immigration and Multicultural Affairs v B* (2004) 29 CLR 365 at 424-426 [169]-[173]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 625 [179].

²⁴ *Mabo v Queensland [No 2]* [1992] 175 CLR 1 at 42.

from New York and Geneva, has been opened up to the influence of basic principles expressed in international treaties to which Australia is a party where such treaties state the universal rules of civilised nations.

A recent illustration of how this operates may be found in the decision of the High Court in *Nudd v The Queen*²⁵. That was a case where the accused complained that he did not have a fair trial because his legal representative had failed to understand, and had actually misstated before the jury, the content of the legal offence with which the accused was charged; had conducted the defence case on an incorrect appreciation of that offence; had omitted to secure detailed written instructions addressed to the correct view of the facts relevant to the offence; had failed to take instructions addressed to an accurate understanding of the law; and had introduced immaterial and prejudicial information in his closing address to the jury, based in part on such misunderstanding²⁶.

The evidence against the accused, sustaining the jury's finding of guilt of the crime charged, and thus his conviction, was extremely strong. But the misapprehension of the nature of the offence by trial counsel was also clear. How should the law react in such a case? Was the proper analysis one that focussed on whether the ultimate outcome of

²⁵ (2006) 80 ALJR 614.

²⁶ (2006) 80 ALJR 614 at 627-628 [54].

the trial was unsafe? Or was it first necessary to consider whether the accused had had a fair trial, without which it was inevitable that there had been a miscarriage of justice of some kind, without more²⁷.

In answering this question, it seemed to me proper to call on fundamental notions of justice expressed in international law. I thus referred to article 14.1 of the ICCPR. That provision states that:

"[i]n the determination of any criminal charge against him ... everyone shall be entitled to a fair ... hearing by a competent, independent and impartial tribunal established by law".

By art 14.3, it is provided:

"[i]n the determination of any criminal charges against him, everyone shall be entitled to minimum guarantees in full equality including:

- (b) [t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing".

The determinations of the Human Rights Committee of the United Nations, reached far away in New York and Geneva, had elaborated these provisions, explaining that they implied a guarantee of adequate, proper and effective legal representation²⁸. The more serious the case

²⁷ (2006) 80 ALJR 614 at 635-636 [101]-[108].

²⁸ *Vasilskis v Uruguay* (Case 80/80); *Kelly v Jamaica* (Case 253/87); *Campbell v Jamaica* (Case 618/97) in Joseph, Schulz and Castan, *The International Covenant on Civil and Political Rights* (2nd ed, 2005), 443.

and grave the potential punishment upon conviction, the greater is the obligation of the State party to ensure against incompetence in representation of an accused by providing the time and resources necessary to prepare an effective defence, so far as this is available.

In *Nudd*, I concluded that "because fundamental rights belong to individuals, their provision is not necessarily confined to cases where their deprivation actually results in adverse consequences that might not otherwise have occurred. Upholding fundamental rights, when applicable, will sometimes have a value in itself. This may be so "quite apart from the beneficial consequences of their observance for those immediately affected"²⁹. This view supported an approach which Justice McHugh had taken on a number of occasions, including in the decision of the High Court in *TKWJ v The Queen*³⁰.

It was by reference to the fundamental principles of international human rights law that I concluded in *Nudd*, alike with Justice McHugh in *TKWJ*, that where "the conduct of counsel has resulted in an unfair trial, that of itself constitutes a miscarriage of justice", without any need to prove more. In a sense, this approach was also evident in the reasoning of the judges of the High Court in *Tuckiar*. The trial in that case had

²⁹ *Nudd* (2006) 80 ALJR 614 at 634-635 [94].

³⁰ (2002) 212 CLR 124 at 148 [76].

involved so many errors that not only did that occasion an injustice. Effectively, it rendered a second, fair trial, impossible.

Notwithstanding my acceptance of this requirement of procedural fairness, as a precondition to criminal justice, I ultimately concluded in *Nudd* that the trial had not resulted in a miscarriage. By the application of the correct legal standard, the evidence was overwhelming. The theory of the facts which the accused propounded was considered an after-thought, belatedly derived following a jury question. Yet the outcome was for me not an easy or straight-forward one, having regard to the fundamental principles that I accepted³¹.

Australian lawyers and judges will become increasingly attuned, in years to come, to invoking and applying international legal principles in this way to assist us in our functions in Australian courts. At the moment, we are largely cut off from this source of help with basic human rights principles. But in the future, it will not be so. The value of such principles is that they take us back to the cardinal requirements of universal justice. Virtually without exception, they are requirements that are also reflected in the common law of Australia. Often they are also reflected, expressly or implicitly, in Australian legislation and even perhaps in the assumptions upon which the Australian Constitution was written.

³¹ See eg (2006) 80 ALJR 617 at 637 [110].

None of the other Justices of the High Court in *Nudd* referred to the international legal principles. For the moment, my voice on this subject tends to be a lone one in the High Court³². However, the tide of legal history is in favour of the use of these principles. As well, when one actually has a legal problem, which lies at the borderline, access to such universal principles, and to the jurisprudence that has gathered around them, is frequently of considerable practical help. After all, in many lands, working with constitutional or statutory human rights instruments largely expressed in common language, intelligent and highly experienced judges are grappling with such basic norms. We in Australia should not turn our back on this mode of reasoning. It helps bring the law back to basic concepts where these are relevant. Especially we should keep our minds open now that this approach has been accepted in jurisdictions where the law, including the criminal law, is so similar to our own, such as the United Kingdom, Canada, New Zealand and South Africa.

International tribunals and agencies: Further evidence of remote justice, as it is now practised, can be seen in the establishment in recent decades of international tribunals designed to end impunity for international criminals and to render accountable to international law and justice those who commit international crimes, such as crimes against humanity, genocide and crimes against the laws of war.

³² *Al-Kateb v Godwin* (2004) 219 CLR 562 at 625-630 [179]-[191]; cf 587-595 [52]-[72] per McHugh J.

The creation of the International Criminal Court³³ follows the earlier establishment of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. In addition to these organs, specialised criminal tribunals have been created in particular countries, such as Sierra Leone. In Cambodia, although an international tribunal has not been created as recommended by the United Nations, the United Nations is supporting the intended trial of remnants of the Khmer Rouge accused of genocide. It is doing so by the provision of international judges who will participate in the special Chamber within the judiciary of Cambodia, set up for this purpose. Dame Sylvia Cartwright, past judge and Governor-General of New Zealand, is serving as one of the international judges participating in this way.

I have not participated in any such tribunals. However, it was my privilege between 1993 and 1996 to serve in quite a different capacity as President of the Court of Appeal of Solomon Islands. That experience involved my sitting with judges from New Zealand, Papua-New Guinea, Australia and Solomon Islands in deciding appeals from the courts in that country. It was a rich experience. Many of the appeals concerned criminal cases. In several of them, Australian lawyers appeared. It

³³ Rome Statute of the International Criminal Court, A/Conf.183/9 of 17 July 1998. The statute entered into force on 1 July 2002. See "Internationalising the General Principles of Criminal Law" (2006) 30 Crim LJ 69.

stretches the mind of Australian lawyers to work in a jurisdiction other than one's own and to apply laws that are in some respects similar, and yet in others different, and to work with judges of similar but different backgrounds and with sensitivity to local traditions, some of which may not be written down.

At about the time I was serving in Solomon Islands, I also worked as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. Arriving in the country, devastated by war, invasion, revolution and murders, my task was to help rebuild institutions that Australians take for granted. The country, its culture, suffering and laws seemed remote to a lawyer raised and trained in the unbroken certainty of Australia's legal institutions.

Finding people who were literate, who could become magistrates to bring justice to Cambodia, was the first challenge. Teaching them about procedures, human rights treaties and the ways to grapple with difficult problems of daily practice was part of the challenge. The new judges wanted to know rudimentary things. Could they join political parties? Could they accept presents, said to be part of their culture? Could they telephone the Ministry of Justice if they were in doubt as to what to do? I urged the creation of an international tribunal to put the remaining Khmer Rouge leaders on trial. The Prime Minister, Hun Sen, told me that for peace in the country, they had to forget the unforgettable. Now, however, the special Chamber has been created in the Cambodian courts. Such gross crimes against all of humanity

should not go without trial and, if offences are proved, punishment and vindication of the law.

Bringing justice to remote parts of the world, plagued with past and present injustice, is no longer something Australians do as colonialists. Yet it is a task in which lawyers can be of help. Many Australian judges, or retired judges, serve in the courts of the Pacific and other regions. Many Australian lawyers now work overseas. Some are privileged to serve in remote places for United Nations and other agencies. Others, supported by AUSAID, contribute to infrastructure building for good governance in our region of the world. Even the judiciary of Indonesia, which was once a mystery to us, is now linked, to Australian courts through many projects. In 2006, for the first time, the High Court of Australia welcomed one of the law clerks of the Constitutional Court of Indonesia to work in the judges' chambers in Canberra. The Federal Court of Australia has taken a leading part in the conduct of seminars for Indonesian judges and court officials. In the professions of justice, we can learn from each other.

Technology bridging remoteness: One of the features of bringing justice in remote places that has proved of most interest to colleagues from Indonesia is the system of videolinks used by the High Court, copied I should say from the Supreme Court of another vast land: Canada. It is a system specially suited to a national court in a country of continental size such as Australia. But it is also suited to a great archipelago like Indonesia and also to a court, such as the European

Court of Human Rights which, from Galway in Ireland in the west to Vladivostok in the Russian Federation to the east, upholds the *European Convention on Human Rights*. This is a new means to grapple with the realities of remoteness in practical ways, and to use the new technology to bring justice to otherwise remote places.

When I was appointed to the High Court in 1996, I wondered how the hearing of applications for special leave by videolink would operate. My whole experience had been that of working in courtrooms with live advocates with the atmosphere and nuances of actual communication. Yet it is remarkable how, with instantaneous technology, the human mind adapts to communication through a videoscreen. The sight of lawyers and their clients in geographically remote places such as Darwin, Perth, Brisbane, Hobart and other cities far from Canberra is a reassurance that we can continue to bring justice to places distant from the main seat of the courts, and thus maintain the tradition commenced by Henry II when he sent the Royal Judges on circuit in England.

It is inevitable that the electronic technology that we see in videolinks will expand to aid the efficient access to justice of people everywhere. As the technology of videolink improves and becomes cheaper, it can be expected that it will be utilised for more than High Court special leave days and bail applications from prison in the Supreme Courts of the nation. The full implications of this answer to the problems of remote justice have not yet been explored. But we have to begin the odyssey.

INTELLECTUAL REMOTENESS

A different remoteness: So far, I have been concerned with the issues of geographical remoteness. They have special relevance for a vast country like Australia. But there is another form of remoteness that is just as relevant to the achievement of justice, including in criminal cases. I refer to intellectual remoteness.

Detachment in judicial decision-making is essential. It is an attribute of judicial impartiality. It means that the judge retains an open mind, listens to the evidence and argument, and decides issues on their merits without pre-judging them. But it does not mean that the judge is indifferent to injustice. It does not require the judge to be neutral to breaches of the law and departures from fundamental human rights. Values influence the way judges decide cases and lawyers fight them. They affect the ascertainment of relevant legal rules and the weight given to particular facts.

Remoteness in the face of demonstrated injustice is not a desirable stance for Australian lawyers to adopt. They must serve their clients and not bend in the winds of popular opinion, as seems to have occurred in Tuckiar. They must retain professionalism and detachment and not give way to unbridled emotion. They must not pursue what is simply a political agenda or partisan cause in the courts. But they should not be indifferent to the basic concerns of justice under law that

drive our legal system. There have been instances where this last kind of remoteness may have happened.

Another Aboriginal case: Consider a second case concerning an Aboriginal Australian sentenced to death. It may illustrate this point. I refer to the decision of the High Court in *Stuart v The Queen*³⁴. That was a case in which Rupert Max Stuart, described as "an aboriginal of the Arunta tribe, not quite of the full blood, aged about twenty-seven years"³⁵, was charged with the murder at Ceduna in South Australia of a young girl. For the conviction, the prosecution relied substantially on a confession typed out by police and signed by the accused in block letters. All that was added to connect him to the crime was a disputable opinion expressed by "the black trackers that the footprints on the beach [near the body] were his"³⁶.

An affidavit was tendered to the High Court, sworn by an expert in the Aranda language, T G H Strehlow, who was born and raised on the Hermannsburg Mission. This indicated that the accused was considerably handicapped when confined to the English language. The affidavit heavily suggested that the alleged confession demonstrated a use of the English language that was beyond the accused's command of

³⁴ (1959) 101 CLR 1.

³⁵ (1959) 101 CLR 1 at 4.

³⁶ (1959) 101 CLR 1 at 4.

English. This affidavit, which should have been a focal point of the trial, or the appeal to the Court of Criminal Appeal of South Australia, was only produced for the first time in the High Court. Consistent with authority³⁷, the High Court would not receive the affidavit. It declined, although the prisoner was facing execution for the crime.

In recent decisions in the High Court, I have expressed my view that the "appeal" to the High Court for which the Constitution provides, is not so strict as to forbid, exceptionally, the receipt of new or fresh evidence to prevent a miscarriage of justice³⁸. However, although Callinan J has stated a like opinion³⁹, a present majority of the High Court has set its face against such late, fresh or new evidence. To this extent, the rejection of Professor Strehlow's opinion was orthodox in the state of the law as understood when *Stuart* was before the High Court, as indeed since.

Nevertheless, there were other defects in the trial. The accused had asked to make a statement from the dock, as was then permitted in criminal trials in South Australia. He was unable, because of illiteracy, to read the statement prepared, based on his version. Following the prosecutor's objection, the trial judge would not allow a court officer to

³⁷ *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 109, 110.

³⁸ *Eastman v The Queen* (2000) 203 CLR 1 at 93 [277]-[278].

³⁹ (2000) 203 CLR 1 at 117-118 [356] per Callinan J.

read the statement for him. In consequence, the accused uttered only a few relatively inarticulate words to deny his guilt and to allege ill-treatment by the police in securing his "signed" confession.

The High Court observed that the course proposed to the judge for the accused, namely that a court officer read his dock statement, was a course that could have been adopted "with the consent of the Crown and, in the special circumstances of this case, one might perhaps have expected consent to be given"⁴⁰. But the failure to do so was not judged sufficient to warrant disturbance of the guilty verdict, although the result was that the accused was never able effectively to express his defence to the jury.

Another complaint in the case concerned the conduct of the prosecutor in pointing out that the accused might have given evidence. Such a statement appeared to be in breach of the prohibition then appearing in the *Evidence Act 1929 (SA)*⁴¹. Once again, whilst disagreeing with the reasons of the Court of Criminal Appeal, the High Court would not intervene.

Somewhat dramatically, the joint reasons of the High Court begin and end with the words: "Certain features of this case have caused us some anxiety"⁴². Yet, although the accused was under sentence of

⁴⁰ (1959) 101 CLR 1 at 8.

⁴¹ (1959) 101 CLR 1 at 8.

⁴² (1959) 101 CLR 1 at 3, 10.

death, the "anxiety" did not rise to the level of an order for a new trial at which the Strehlow evidence could indubitably have been tendered for the evaluation of a jury.

One can, of course, analyse the reasons of the High Court in *Stuart* with the touchstone of logic and fully sustain the conclusion arrived at. But many may feel that there was a strong contrast between the approach adopted in the *Stuart* application and that which was evident in *Tuckiar*. Such was the public anxiety about the dismissal of the application for leave to appeal in *Stuart* that a further appeal was funded to take the case to the Privy Council, also without success. There then followed a newspaper campaign; a Royal Commission; and commutation of the death penalty to life imprisonment. The story has been told in the film *Black and White*⁴³. The portrayal of the judges as persons remote from feelings of justice to the accused Stuart makes for powerful cinema. Courts must, of course, apply rules. Not every assertion of a miscarriage of justice is justified. Majority wisdom in the courts prevails. Purely technical slips in the conduct of a large modern trial are difficult to avoid. They may not always justify a retrial⁴⁴.

Nevertheless, where a case causes "a good deal of anxiety" to every participating justice of the High Court and where the highest

⁴³ cf M D Kirby, "The Stuart Case - A Story in Black and White" (2002) 23 *Adelaide Law Review* 195.

⁴⁴ *Weiss v The Queen* (2005) 224 CLR 300; cf *Weiss v The Queen [No 2]* (2006) 164 A Crim R 454.

sentence known to law has been imposed, any lawful benefit of the doubt should ordinarily be given to the accused. Cases of wrongful conviction do occur, as has now been acknowledged to have been the position in *Mallard*⁴⁵. That case made two journeys to the High Court before, eventually, the persistence of the prisoner's legal team won his release from prison and eventual vindication. I was a party to both applications. I joined in the dismissal of Mr Mallard's first request for special leave⁴⁶. The second application was brought nearly a decade later on new and different grounds. Human justice is fragile and imperfect. But judges and lawyers must never be remote to justice. They must remain open to the possibility that the system sometimes fails. They should beware lest they themselves become an instrument of injustice against which the courts, the profession and the community must always be vigilant.

Common purpose justice: In the aftermath of the Bali bombings, the venue for this Association's conference was shifted from Bali to Port Douglas in Queensland. I attended that conference where I was reminded of the English case of *Derek William Bentley*⁴⁷. It was a case concerned with derivative liability for murder.

⁴⁵ (2005) 224 CLR 125.

⁴⁶ *Mallard v The Queen* (1997) 191 CLR 646 (original application: Perth, 24 October 1997, per Toohey, McHugh and Kirby JJ).

⁴⁷ Tried before Goddard LCJ and a jury on 11 December 1952; appeal dismissed by the English Court of Criminal Appeal (Croom-Johnson, Ormerod and Pearson JJ, 13 January 1953; executed 28 January 1953. See *R v Bentley* [2001] 1 Cr App R 307.

The case of *Bentley* was a specially vivid one. The accused principal offender (Christopher Craig) who actually committed the acts that caused the death of the police officer in that case (P C Miles) could not be hanged because he was under-age. On the other hand, Derek Bentley, a companion of the primary offender, a man of low intellectual capacity who was over-age and a secondary participant in the crime, was convicted of murder. He was executed.

Under procedures now available in England, a *post mortem* review of the case was brought on a reference by the Criminal Cases Review Commission. The accused, Bentley, was posthumously acquitted. Of course, his life could not be restored. Was this outcome good enough? What lessons did the case teach for contemporary Australia and its laws? Especially what lessons did *Bentley* teach for derivative liability of co-offenders for very serious crimes, especially murder, that go beyond their actions and actual intentions of the accused?

The case played on my mind after the Port Douglas conference. It brought home to me the dangers that can attend some applications of the principle of accessorial liability and the felony murder rule. It suggested the departure which those rules of our criminal law can sometimes introduce from the general principle of criminal justice in Australia which holds that liability ordinarily depends on the coincidence

of criminal acts and the requisite criminal intent to commit the precise crime charged.

In the High Court, three cases have since presented a somewhat analogous issue to that arising in *Bentley*. They have not concerned the felony (or constructive) murder rule, as such⁴⁸. Instead, they have addressed the so-called extended common purpose liability of accused persons who are found to have agreed to be parties to a "foundational crime" which goes wrong in a way that was foreseen by them as a possibility. In such circumstances is it the common law of Australia that they are rendered equally liable for the more serious crime? Is this an excessive, disproportionate liability that effectively goes beyond the intention of the accused and punishes him or her severely for going along with bad company? In the realities of the involvement in crime of many young, weak-minded, gullible and intellectually impaired offenders, does this rule impose disproportionate criminal liability that the law should re-examine and re-evaluate?

In *McAuliffe v The Queen*⁴⁹, the High Court concluded that, at common law, a party was guilty of a crime which falls outside the scope of the common purpose shared with the principal offender if that party

⁴⁸ S Bronitt and B McSherry, *Principles of Criminal Law*, LBC, 2001, 496ff.

⁴⁹ (1995) 185 CLR 108. See comments (1996) 20 *Criminal Law Journal* 43 at 44-47.

contemplated, as a possibility, the commission of the offence by other parties in carrying out a joint criminal enterprise yet continued to participate in that enterprise with that knowledge.

The correctness and applicability of that principle was questioned by me in *Gillard v The Queen*⁵⁰. However, no objection to the principle was argued in *Gillard*. That case had therefore to be treated as a "missed opportunity"⁵¹ to review the current doctrine. Responding to observations of Hayne J in *Gillard*⁵², I expressed my opinion about the "special responsibilities for the health of legal doctrine in Australia" imposed on the High Court as the ultimate court of appeal for the nation⁵³:

"This Court is not a second level of a court of criminal appeal. ... [T]he Justices of this Court are not captives to the assumptions, concessions or agreements of parties. ... The Justices have their own responsibilities to the law, especially where the law appears unclear, uncertain or arguably unjust and in need of re-formulation.

There are, of course, judges who are uninquisitive and unconcerned about such matters. I am not one of them. Nor am I alone. During the hearing of the appeal, both Callinan J and I asked questions about relevant academic and professional writing about the law under consideration. This is not exceptional. It is normal for this and other final

⁵⁰ (2003) 219 CLR 1. See also *Deemal Hall v The Queen* (2006) 80 ALJR 1250.

⁵¹ (2003) 219 CLR 1 at 21 [53].

⁵² (2003) 219 CLR 1 at 36 [113] ff.

⁵³ (2003) 219 CLR 1 at 31 [89].

courts. As I then pointed out, in raising the point, we do not now require that such authors must be dead before their views are considered. Despite some rear guard resistance from formalists, the common law has made progress in this respect in recent decades. This Court is no exception. I decline to return to the dark ages. Others may do so as they please".

The references in *Gillard* to scholarly law reform and other criticisms of the ambit and justice of the doctrine of extended common purpose at common law⁵⁴ eventually prompted, in *Clayton v The Queen*⁵⁵, a formal application for reconsideration of the law as stated in *McAuliffe* and *Gillard*. The Full Court of the High Court by a majority comprising all of the Justices except myself, concluded that it had not been shown that the principles of extended common purpose liability led to any miscarriage of justice or occasioned injustice in the application of the law of homicide⁵⁶; that, in the development of the common law, it was not proper to consider any change to the law of extended common purpose⁵⁷; that the present rules did not render the trial of homicide in

⁵⁴ See eg G E Mueller, "The Mens Rea of Accomplice Liability", 61 *Southern Cross Law Review* 2169 at 2191 (1988); C Cato, "Foresight of Murder and Complicity in Unlawful Joint Enterprises Where Death Results" (1990) 2 *Bond L Rev* 182; S Bronitt, "Defending Giorgianni" (1993) 17 *Criminal Law Journal* 242; C M V Clarkson, "Complicity, *Powell* and Manslaughter" [1998] *Criminal LR* 556 at 558; S Gray, "'I Didn't Know, I Wasn't There': Common Purpose and the Liability of Accessories to Crime" (1999) 23 *Criminal Law Journal* 201.

⁵⁵ (2006) 231 ALR 500.

⁵⁶ (2006) 231 ALR 500 at 504 [15].

⁵⁷ (2006) 231 ALR 500 at 505 [18]-[19].

such cases too complex or over-complicated for jury decision⁵⁸; and that the application should therefore be refused. My own view was to the contrary.

The majority in *Clayton* explained and supported the present approach of the law, including in the following words⁵⁹:

"The applicants' contentions about 'unjust' results, or ... disconformity between legal and moral responsibility, proceeded ... from an unstated premise that the crime of murder should be confined to cases in which the accused intended the death of the victim. The allegation of injustice or disconformity ... fastened upon the fact that applying principles of extended common purpose could result in a person being found guilty of murder where that person did not agree or intend that death should result, but foresaw only the possibility that an assault with intent to kill or cause really serious injury might be made in the course of the joint enterprise. The applicants sought to compare this outcome with the case of a person assaulting another, knowing of the possibility, but not intending, that death or really serious injury might result. Such a person, the applicants submitted, would be guilty only of manslaughter.

A person who does not intend the death of the victim, but does intend to do really serious injury to the victim, will be guilty of murder if the victim dies. If a party to a joint criminal enterprise foresees the possibility that another might be assaulted with intention to kill or cause really serious injury to that person, and, despite that foresight, continues to participate in the venture, the criminal culpability lies in the continued participation in the joint

⁵⁸ (2006) 231 ALR 500 at 506 [24], 507 [29].

⁵⁹ (2006) 231 ALR 500 at 504-505 [16]-[17]

enterprise with the necessary foresight⁶⁰. That the participant does not wish or intend that the victim be killed is of no greater significance than the observation that the person committing the assault need not wish or intend *that* result, yet be guilty of the crime of murder."

My present purpose is not, of course, to reargue the issues in a different way or to add to what is written in the law reports. It is not to question the rule established by the High Court which Australian courts must faithfully obey and carry into effect. I have accepted and applied that rule⁶¹. It is, instead, to draw this line of authority to notice. It is to illustrate how different judges, including in a final court, respond to issues of law and justice that, in a sense, require them to have regard to past reasoned doctrine and, however difficult and remote the postulate may be, to try to understand the complaints of injustice and disproportionality that this doctrine is said to occasion to the often rather unlovely people who typically get caught up in its operation⁶².

In supporting my opinion that the common law, made by the judges, should be re-expressed by them, I cited the view of the doyen of criminal law in England, the late Professor Sir John Smith⁶³:

⁶⁰ *McAuliffe v The Queen* (1995) 183 CLR 108 at 118; *Gillard v The Queen* (2003) 219 CLR 1 at 36 [112].

⁶¹ *The Queen v Taufahema* [2006] HCA 11 at [112]-[121].

⁶² Some support for the maintenance of the present rule was provided by the report of the Law Commission of England & Wales, *Inchoate Liability for Assisting and Encouraging Crime* ((LawComm No 300), 2006, 13-16.

⁶³ (2006) 231 ALR 500 at 531 [122] citing *Smith* (1997) 465.

"It may be that the law is too harsh and, if so, it could be modified so as to require intention (or even purpose) on the part of the accessory that, in the event which has occurred, the principal should act as he did ... If it were to be decided that intention should be required, the jury would be told that they should not find D guilty of murder unless they were sure that D either *wanted* P to act as, and with the intention which, he did, or knew that it was not merely a "real possibility" but *virtually certain* that he would do so".

I suggested that this issue should not be left to Parliament for there could be no confidence, in the current age, that legislators would be interested in, or willing, to reform the criminal law in a way protective of its symmetry and of the position of those who become engaged in any way in crime. Sadly, such issues now are often determined at the level of the lowest common denominator, typically set by tabloid media and the pre-electoral auction.

Following the rejection by the High Court in *Clayton* of the invitation to re-examine the law on common purpose liability, so as to adopt criteria that would allow a greater capacity for juries to determine guilt, especially in homicide cases, according to principles more closely attuned to moral culpability, I accepted in *The Queen v Taufahema*⁶⁴ the requirement to apply the present law, although that law is not always clear as the circumstances of that case illustrated. *Taufahema* is itself an interesting illustration of the way in which common purpose liability

⁶⁴ [2007] HCA 11 at [112]-[121].

operates. It was also an illustration of a division in the High Court. The majority upheld a prosecution appeal. But Gleeson CJ, Callinan J and I concluded that even-handedness in the application of the long-standing rule restraining appellate disturbance based on trial decisions taken by trial counsel for tactical reasons, necessitated rejection of the prosecution appeal.

Injustice, and miscarriage of justice, whether remote or close at hand, invoke conclusions upon which experienced judges (and other decision-makers) can easily differ. Of its nature, justice is a disputable value. My view of what justice requires in a particular case is sometimes the same as, and sometimes different from, that of other judges. So it often is with all judges. That is the nature of judicial independence and impartiality.

Nevertheless, the arguments about reconsidering legal doctrine, and particularly the proper role of a final appellate court in doing so, illustrate a feature of the judicial role that is obviously important. It is that justice is never a remote thing. It is not a matter of words only or of case decisions only. It is not a formal postulate. It involves consideration of the operation of the law in practice. Criminal law, in particular, is usually intensely practical. This is where the law has a pointy end.

Where a prisoner is before the court whose liberty is at stake in the decision to be made, those facts concentrate the mind of the judge, or should do so. The judge must retain a sense of dispassion but must

remain curious, inquisitive and willing to look afresh, especially at issues of legal doctrine that arguably operate unjustly; introduce asymmetry into the law; complicate its provisions for jurors; and over-extend liability in a departure from the dual governing principles that normally oblige the marriage of criminal conduct and criminal intention.

CONCLUSIONS

The purpose of a meeting in a remote place is to encourage the participants to think beyond their comfort zone. Remote justice is something that Australian lawyers (and doubtless our legal colleagues in Indonesia) have had, from the start, to get used to.

Bringing the rule of law and thus the justice of the law, to remote geographical places is an important mission of civilisation. Its alternative is the rule of power, of guns, of corruption of nepotism or privilege. Lawyers are therefore fortunate to be actors in the endeavours, often imperfect, to bring justice according to law to remote places. Now they have new supports. Support may come from international human rights principles. It may come in the form of the new technology of travel, communications and the internet that bind us together. It may come from the sharing of wisdom and jurisprudence in countries other than those whose legal analysis we have borrowed in the past. It may come in conferences such as these.

Justice should not be remote, whether in the geographical or intellectual sense. It is our duty as lawyers to help bring justice according to law to people who face legal problems. Fortunately, in the field of criminal law, the decision of the High Court in *Dietrich v The Queen*⁶⁵ repaired the pre-existing, ramshackled "system" of dock briefs, assignments and problematic legal aid⁶⁶. The situation of prisoners who seek to appeal against their conviction or sentence is still imperfect. It varies in different parts of Australia⁶⁷. But *Dietrich* has at least ensured that in the most serious criminal trials, most persons who are accused and who cannot afford legal representation will be helped to come at justice because of that decision of the High Court. It was clearly an occasion when the Court was not remote from the substance of justice but gave it effect.

When cases come to court, it is inevitable, in criminal matters, that they will often have to be dealt with quickly and sometimes imperfectly. Judges, however long and wherever they serve, should not allow themselves to be remote from the realities of criminal law and sentencing as it operates in practice. The justice of the Commonwealth, possibly implied in the provisions of Ch III of the Constitution, means that our courts must truly engage with the arguments of the parties. They

⁶⁵ *Dietrich v The Queen* (1992) 177 CLR 292.

⁶⁶ See eg *Mclnnis v The Queen* (1979) 143 CLR 575.

⁶⁷ cf *Muir v The Queen* (2004) 78 ALJR 780 at 783-785 [20]-[28].

should not close their eyes to the risks of injustice. They should not shut their hearts to errors that cause them "a great deal of anxiety". And when we do not feel anxiety, although it is urged upon us, we must constantly ask ourselves: what if I am wrong? To say this is not to cast the justice of our legal system into the chaos of uncertainty. It is to subject the law and its rules to constant reality checks and to the scrutiny of fresh perceptions of suggested injustice which will necessarily change over successive generations.

The Criminal Lawyers' Association of the Northern Territory is aware of the importance of bringing justice to parts of Australia that are geographically remote. But all of us must be alert to the risk that justice is remote when it is most needed. It is against that risk that we strive in trials, and on appeals, to prevent miscarriages of justice and always to provide justice according to law - not remote but actual, equal, principled and real.

**CRIMINAL LAWYERS' ASSOCIATION OF THE NORTHERN
TERRITORY**

CONFERENCE, BALI, 2 JULY 2007

KEYNOTE ADDRESS

REMOTE JUSTICE

The Hon Justice Michael Kirby AC CMG