

REFLECTIONS ON Tuckiar v the King 1934 52 CLR

This is Part 1 in a series. Part 2 will be in the July 2000 edition of *Balance*.

Playing the part of Fitzgerald took me on an odyssey to discover just how and why he betrayed his client. This article attempts to set out the historical background and relevant facts. Part 2 will outline how Fitzgerald failed his client and most importantly why. Like a lot of Australian history the answers suggested are not too pretty.

Of course Tuckiar provides the still accepted law on counsel's duties and responsibilities to his/her client. By glaringly failing Mr Fitzgerald wrote the law so to speak. And of course by playing his part I was most curious to try and work out just how and why he did what he did and failed where he failed.

Context:

The historical setting is, as always, vitally important to gauge just what was going down. Some of the political forces and conflicts at play then were "strikingly similar" to the present day. *White v Black*; *North v South* and *The Executive v The Judiciary* were all then important conflicts that impacted on how the justice system generally dealt with the situation and how the individual players therein did what they did and why. In *Tuckiar v The King* Mr Fitzgerald is very much at the centre of the Ratio Decidendi and so in trying to work out why he did what he did, and thus so abrogate his duties as counsel, requires placing Tuckiar's trial in context.

Historical Background:

The events leading to the trial occurred in the Northern Territory in 1932- 1934. These were volatile times nationally and indeed internationally.

Australia, like the rest of the Western world, was dominated by one thing: the depression. Huge unemployment.

Poverty. Concomitant with that the severe polarisation of political forces. Federally Australia was ruled by the recently formed United Australia Party led by the ex-Labour Minister "honest Joe" Lyons; a coalition of moderate and right which had taken over from Scullen's previous self destructed Federal Labour Government. It was a time of economical and political turmoil. There were riots in the streets in the largest cities: secret armies of both left and right were forming in the wings. West Australia had voted for secession.

Internationally that great institution Democracy had elected, by the majority of voters in Germany, Adolf Hitler and his Nazi party. He was shortly to be invited by President Hindenburg to take over and, via the Reichstag fire, he did just that! Once again majorities are shown to be more than capable of clamouring and voting for some of the vilest of things but lets not allow the mandatory sentencing debate to get in the way of Australia in the 30s.

Phar Lap had been done away with by the envious Americans and: "There's two teams out there and one of them is playing cricket" was stirring up the masses even more. Australia was definitely questioning the type of relationship it would/should have with "The Old Dart". Sir Isaac Isaacs had amidst controversy recently been appointed as the first Australian born Governor General. So politics on a national scale were quite different to those today. Not so Northern Territory and Federal relations.

While the constabulary down South were busy putting down hunger and political riots there colleagues up North were engaging in punitive missions against Aborigines. Prior to the Caloden Bay and Woodeye Island killings, in 1928 a Commission of Inquiry had exonerated a



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police "party" (?) for their acknowledged killing of 31 Aborigines at Coniston as a reprisal for the murder of a white man, Fred Brooks. Missionary and Aboriginal evidence since suggests it was probably between 70 and 100 Aboriginal men, women and children killed. In the 20's and 30's there were smaller but similar incidents in Arnhem Land and the Kimberley with police patrols "investigating" matters and shooting Aborigines indiscriminately. In a real sense there existed a "Phoney War" between white authorities, whether they be police or civilian settlers, and the Aborigines of the North.

Although exonerated over Coniston the NT police and authorities generally were put on notice about their treatment of Aborigines, both nationally and internationally.

This then was a factor not dissimilar to the Northern Territory's present situation with mandatory sentencing. The backdrop of North versus a watchful South was very much the case in the Tuckiar trial.

Facts

On 17 September 1932 at Caloden Bay East Arnhem Land a group of Aborigines speared dead five Japanese trepangers. It was generally understood the reason was perceived abuse of Aboriginal women by the Japanese. Similar killings of Japanese trepangers, similarly motivated, had occurred in the past.

When this came to light, in view of the Coniston Inquiry revelations, there was lobbying and monitoring by Christian and other benevolent bodies concerning any subsequent police

action. One might say an instance of Southern do gooders "butting in"!

In November 1932 the police sent a party to investigate and found nothing. Next Dry Season (June 1933) another police patrol by horse and boat went in search. It was on this trip that Constable McColl was killed at Woodeye Island.

Prior to this expedition in March 1933 two typical post depression drifters, Fagan and Traynor were sailing East along the top end of East Arnhem Land. Sometime in March they were killed at Woodeye Island by Tuckiar and another Aboriginal man, Mirera. The killers came upon Fagan and Traynor who had abducted and sexually abused Tuckiar's wife. They killed both white men on their boat.

Meanwhile on 1 August 1933 on Woodah Island the police party seized four Aboriginal women for questioning. The women were secured. Some Aboriginal males were spotted and the bulk of the party gave chase leaving Constable McColl to guard the women. He took off with the women and got lost. One of the women was again Tuckiar's wife. Tuckiar came upon them and speared Constable McColl to death and released his wife and the other women. Constable McColl managed to fire two shots from his pistol and one misfired. His hand was still on the revolver when the party rediscovered him the next day. He was buried there in a shallow grave. The police then headed back without any defendants and one less member.

Once the news hit Darwin of a policeman slain there was a predictable outcry for vengeance. The predictable "baying" was once again spotted by the Southern do gooders as well as The English Anti-Slavery Society members and they again lobbied the Federal Government to prevent the Northerners sending out a punitive mission to "teach the blacks a lesson".

Reverend Dyer from the Anglican mission at Oenpelli received instructions to prevent any punitive mission by bringing the relevant suspects in peacefully. This he achieved with the assistance of Fred Grey, a local trepanger. Fifteen Aboriginal men, including Tuckiar,

were brought by boat, landing at Darwin in April 1934. Upon arrival the police arrested them all and remanded them in custody at Fannie Bay gaol. This led to further tension between the mission movement and the local authorities as Reverend Dyer and Mr Egan had basically assured the Aboriginal men that if they went to Darwin to talk with the big white boss they would be able to return to their country within a month. They also warned them that if they didn't go with them they would either be shot or taken back by the police and people would be injured.

News of their arrival and incarceration again hit down South and the spotlight from the do gooders over the Aboriginals consequential treatment at law was well and truly switched on.

It was during this time that Constable McColl's remains, as retrieved from his shallow grave on Woodah Island, were buried in Darwin amid predictable brouhaha. The trial judge Wells J, who had never even met the deceased, was one of the chief mourners present.

There were three separate murder trials. Three Aboriginal men were charged with the murder of the five Japanese. Tuckiar and Mirera were charged with the murder of Traynor and Fagan. Tuckiar alone was charged with the murder of Constable McColl. All defendants were ultimately committed after separate coronial and committal hearings in May 1934. They remained in custody the entire period until the trial. And so in August 1934 Darwin Supreme Court heard three separate murder trials on three consecutive days.

THE HAT TRICK

Trial one; R v Meu, Natjelme and Nerkaya. 1 August. Coram: Wells J.; John Harris, Crown Prosecutor and Defence Counsel WJP Fitzgerald.

The particulars of this murder were that the three accused and others set upon the victims on a beach at Caledon Bay. The evidence was in the main confessions from the three accused plus two Aboriginal eye witnesses.

Judge Wells was recently appointed (May 1934). He had already drawn himself to the attention of the federal authorities up to that point having already passed death sentences on eight earlier convicted

murderers and making various intemperate remarks from the bench vis a vis Aboriginals. This week was to be no exception.

Trial one was over in one day with the jury deliberating for 15 minutes. All three were found guilty. During the plea in mitigation which urged against the death penalty and for a small term of imprisonment Justice Wells displayed some of his true colours:

The people killed are subjects of a friendly nation. They were engaged in a lawful occupation and were murdered...If we were not able or willing to afford proper protection to their nationals they should be allowed to take the matter of protecting them into their own hands.

All said notwithstanding Arnhem Land was an Aboriginal Reserve and none of the Japanese trepangers had permits to be there. During this dialogue between the Chief Protector of Aboriginals Dr Cooke and The Bench, Justice Wells then said:

Possibly the best and kindest thing to do to them is to hang them. But it is difficult to decide what to do with them.

In the end they were all sentenced to twenty years imprisonment to be released after four years if certain conditions could be met.

Trial two; R v Tuckiar and Mirera. 2 August. Coram: Wells J, Harris and Fitzgerald.

Again this lasted only one day. Again the particulars were similar in that it was alleged Tuckiar and Mirera killed both the drifters having discovered them interfering with their respective wives. The evidence in the main consisted of confessions made by both accused to different Aboriginal witnesses who were called. On this occasion both accused were found not guilty.

Trial three. Another day another trial. 3 August. The famous (infamous) trial of R v Tuckiar. Coram: Wells J, Harris and Fitzgerald.

Particulars of this murder were that on the 1 September 1933 at Woodah Island Tuckiar speared Constable McColl to death.

Next month will conclude the tale showing how Fitzgerald failed in his duties to his client and suggest why he so did.