

NO JUSTICE FOR KYLE HORACE !

Accused at 15; charged at 17; tried as an adult at 18; sentenced in 2007 to 7 years imprisonment for a crime he swears he did not commit.

On March 22nd, 2007, in the Darwin Supreme Court, the Northern Territory Chief Justice Brian Martin sentenced Kyle Horace to seven years imprisonment commencing from 23rd November 2006. Kyle will serve a minimum of five years in the Darwin Correctional Centre, better known as Berrimah Prison, before being eligible for parole. Kyle was born of Aboriginal descent in Wyndham, Western Australia on 24th March, 1988. In late 2006, as a well-built adult he stood in the dock before an all-white Darwin jury,¹ charged with the rape of a 13.8-year-old white girl more than 3½ years previously, in May, 2003. He was tried as an adult, although when the alleged offence was committed Kyle was legally still a child of 15 years and two months. The police did not even move to charge Kyle until August 2005, two-and-a-half-years after the supposedly violent sexual offence that he vows he did not commit. However, the courts interpreted Kyle's protestation of his innocence as a 'lack of remorse.'

The Northern Territory Chief Justice Brian Martin appears to be sympathetic to Aboriginal people. In an extremely rare event in 2005 his Supreme Court sat outdoors in full regalia in a remote Aboriginal community to hear the case of a 55-year-old Aboriginal man charged with the sexual assault and bashing of a 14-year-old girl, who was said to be the man's promised wife. Chief Justice Martin described the case as 'extremely difficult' because the offences were condoned under tribal law (*Katherine Times*, August 17th, 2005, page 5). More recently, on the day before sentencing Kyle Horace, Chief Justice Martin was photographed in the Supreme Court foyer with tribal markings painted on his face as he participated with Yolngu dancers in the launch of a new dispute resolution service (www.mawul.com *Northern Territory News*, March 22nd, 2007, page 3).

By the time that Kyle Horace was called to the dock, the Northern Territory Supreme Court had created a storm and was being closely watched by the national media. On May 24th, 2006, Chief Justice Martin had admitted he made a mistake in sentencing the Aboriginal elder to one month's jail (*The Australian*, May 24th, 2006, page 1). Although Judge Martin defended his lenient sentence, it had been increased after a public outcry and several appeals (*Weekend Australian* May 20th-21st, 2006, page 4). The federal Minister for Indigenous Affairs, Mal Brough, commented that not only was Chief Justice Martin's decision wrong, but the appeal judges had also failed the sexual assault victim by

¹The jury included some members of Non-European descent but none from the Darwin Aboriginal community.

increasing the sentence to only three years, suspended after 18 months. However, Kyle Horace was unaware of the controversy caused by the Chief Justice's sentencing.

By 2006 Kyle had other preoccupations. His loving partner, a respected Darwin girl who he has known for almost five years, gave birth to their baby daughter on February 2nd, 2007, the month before Kyle was sentenced. That afternoon in 2003 when an immature teenager had clumsily experienced sexual intercourse with a girl in an empty school yard would have remained a distant adolescent regret if it had not been for a surprise visit by police to his grandmother's Rapid Creek home in August 2005 to charge Kyle with three counts of rape. Apparently the police officer investigating the original complaint that was made on Monday May 5th, 2003, had been suffering from 'depression after a marriage break-up,' and the preparation of charges against Kyle had been deferred – deferred for 2½ years! Meanwhile, between May 2003 and the trial in late 2006 Kyle had committed some minor offences for which he had served a total of 56 hours of community service. There were no sexual offences recorded in this time.

The court heard that on the afternoon of Darwin's May Day public holiday, Monday May 5th, 2003, Kyle met two teenage girls waiting at a Darwin northern suburbs bus stop. One of the girls stated that her friend gave Kyle two dollars, the other girl said she did not. The judge noted in sentencing that there were several inconsistencies in the accounts given by the two girls, but these were 'of no significance.' Kyle was said to have then asked the girls directions to a particular street. The judge noted in his sentencing:

In an effort to get rid of you, the victim agreed to point you in the direction of the street. For that purpose, the victim walked with you into the grounds of the Anula Primary School where she pointed in the general direction of the street.

Despite the claim that the girls were frightened of Kyle, the other girl waited at the bus stop until her friend returned, after the offences were supposed to have occurred. Kyle says he walked back to the bus stop with the girl. The school caretaker says he saw Kyle and the girl walking back together, apparently in conversation and later sitting on the fence talking. Kyle then walked to his aunt's house where she offered to drive him home to his grandmother's house. He declined the offer and said that he would catch a bus from Anula. He was apprehended by the police waiting at the Anula shops bus stop. Hardly the behaviour of a 15-year-old boy who was supposedly guilty of a violent rape moments earlier!

That night Kyle's step-father received a telephone call from his mother-in-law, Kyle's grandmother, to say that Kyle was in the police lock-up. The man is the father of the youngest of Kyle's half-brothers

and has a particularly close relationship with his step-son. At the police station, the man asked Kyle, 'Did you rape this girl?' to which Kyle replied, 'I did not rape any girl.' (Kyle has always admitted that they had attempted to have sexual intercourse in the school yard). While he was at the police station, Kyle's step-father glanced over at the young girl being hugged by her tearful parents. He says that the girl looked across at Kyle with a grin on her face. The step-father says, 'It must be said, the girl that I saw looked like a 20-year-old-hooker.'² Even from his prison cell, Kyle still expresses his concern for the girl who he says has lied to the court, and asks, 'Why did she lie?' The girl's father works for the Australian Army and has since been transferred with his family to another state, away from the Northern Territory, so the answer to Kyle's question may never be known.

Kyle did not give evidence in his defence. For reasons he cannot disclose, the defence lawyer, Alan Woodcock, advised Kyle against it. In the dock, Kyle was judged by a jury devoid of Aboriginal representation in a town like Darwin where there had been recent alarmist publicity about the antisocial behaviour of gangs of 'coloured youths.' In court, the jury faced a grown man who was alleged to have raped an innocent white girl from a respectable family. In contrast to the tall brown-skinned man in the dock, the prosecution painted a picture of the complainant as a naïve school girl. In his judgment, the judge said:

She was obviously a friendly child from a good family who lived a relatively sheltered life. This was not a young girl who had knocked around or, in the words of the prosecutor to the jury, was looking for some action. This was a young girl who liked reading, drawing, writing and going to the movies. She did not have a boyfriend - she was, very obviously, extremely naïve.

At the time of their meeting Kyle was barely fifteen and shared similar interests, as would have been obvious if he had been tried in the Children's Court, three years earlier.

The more Kyle pleads his innocence, the more it is said that he does not accept responsibility for his actions. As the Chief Justice said, 'You continue to maintain that the sexual acts were consensual.' But how was it that a supposedly violent rapist had been allowed to freely roam the streets of Darwin for two-and-a-half of his undoubtedly disturbed adolescence years, before being charged? And then another year before his trial. In contrast, a 15-year-old boy in Perth, Western Australia, in 2006-7 was detained for eleven months after being charged with the rape of a 17-year-old-girl. The WA Director of Public Prosecutions had opposed bail. *The Sunday Times* reported (April 1st, 2007, page 1): '[the boy] was dragged out of bed by police a year ago and arrested on nothing but the say-so of a lying 17-

² Alan Woodcock, the defence lawyer, rang to say that he is offended by this description, saying to the writer, 'She was only a young girl!' However, the writer stands by a description by someone who was present at the police station on the evening in question, rather than an opinion of someone who saw the complainant only during the trial, many years later. The stepfather was not called as a witness.

year-old girl who cried rape.’ (See also page 8, ‘He’s lost his youth’; Also *The Sunday Times* April 8th, page 8, ‘My 11 months of hell’; ‘DPP response,’ pages 66-67; ‘Why police laid charge,’ page 63). In June 2010, SBS television broadcast a documentary of the Waring case. Patrick Waring was quoted in the media: ‘The amount of damage that this whole ordeal has done to not just me but to my family, the fact that my parents are going to have to sell their house, the fact that my dad and my mum have given up so much just to be able to prove that someone was lying in the first place, this sort of thing can destroy people’ (*Subiaco Post*, May 8, 2010, p.5).

At one point during his years of growing up in Darwin, Kyle was banned from the Casuarina Shopping Centre and later, when he returned, charged with trespassing in breach of a bond. Hardly a major crime! Not mentioned was the fact that Kyle was given a hiding at the back of the Centre by two security guards. Other minor stealing and loitering charges were not surprising for a boy who spent his early boyhood in an alcoholic and unstable shifting environment. At the age of eleven, Kyle was told by his mother’s partner, the man who Kyle thought was his father that Kyle was not to call him ‘Dad’ anymore. Kyle has never known his biological father.

Fortunately, Kyle eventually returned to Darwin where he could be under the care of his sober and loving grandmother, a respected member of the Darwin community. She is actually Kyle’s grandfather’s half-sister. Kyle’s grandfather was the well known boxer and Aboriginal activist, Norman Horace, who fought internationally as ‘Kid Langford.’³ Under the guidance of his grandmother during his teenage years, Kyle has participated in treatment programs for children of alcoholics and for his own alcohol and drug abuse. Testimony was given at the trial that he responded positively.

When Kyle’s grandmother entered the court to give her evidence she was not even aware that it was to be a Supreme Court with the all the intimidating paraphernalia of wigs and gowns and an all-white jury sitting in judgment. The police had raided her home several times over the years at all hours, once at 2am, and disrespectfully called the anxious elderly woman, ‘Nana.’ The whole experience has been extremely stressful for her and will continue to affect her health as long as her grandson is in Darwin prison.

Kyle’s defence was provided by NAAJA, the body that has replaced the North Australian Aboriginal Legal Aid Service. Otherwise the lawyer did not seem to view the case as a racial matter. Perhaps he was influenced by his background as a prosecutor. However, the trial of a boy of Aboriginal descent on a charge of the rape of a white girl aged 13 years and eight months should not have been heard in

³ See ‘The Oombulgurri Story,’ page 100.

Darwin before a jury without any representative of Aboriginal descent. Equally, a boy who allegedly offends should not be tried as a man in an adult court. This is a double prejudice against the accused. Also the Chief Justice had something to prove after the public reprimand he received following his judgement in the previous sexual assault case. Kyle and his grandmother were caught up in something they did not understand, and still cannot understand.

The Chief Justice said on March 22nd:

The sentence in total would have been longer if you had been a mature adult or if you had previously offended in a significant manner. I have no power to suspend part of the sentence... the Criminal Code has directed the Court to impose a non-parole period of not less than 70 percent of [the total period of imprisonment of seven years]. This is a reflection of the community's concern about these types of crimes and the need to protect the public. I fix a non-parole period of five years...

By February 2008 Kyle had served 14 months of his sentence in Berrimah Prison. Kyle looks forward to the visits by his partner and their baby daughter to see 'daddy.' Kyle realises it may take more than five years to campaign for justice in his case. By this time he would have served his sentence. He is prepared to do his 'time', get an education while in prison and look forward to a new life on the outside. However, this time scale does not allow for Divine Intervention. Kyle's defenders can only present the facts as they are recorded and 'leave the results to God' in the belief that justice will be done, and deserves to be done for an innocent boy (the accused) and a misguided young girl (the complainant) caught up in the Northern Territory legal system.