

## **Inconsistencies in the evidence against Kyle Horace: More reasons why he should not have been convicted.**

No form of sexual assault can be excused. Those who have experienced a forced violation of their person may receive a life sentence of psychological harm. The perpetrators may receive a lesser sentence. However, society's righteous indignation to defend the victim and punish the offender has often resulted in innocent people being accused and imprisoned. Inconsistencies in the case against Kyle Horace indicate that his conviction was unsound and a young man was wrongfully sentenced to seven years in the Darwin Correctional Centre.

The transcript of a rape trial is not pleasant reading. The complainant, witnesses and accused are forced to re-live the trauma of a life-changing event, in this case after they have grown from childhood to maturity. However, the frankness and personal nature of the evidence presented to the court is necessary for the jury to reach a verdict beyond reasonable doubt. Likewise, distressing evidence for all involved must be here re-examined if we are to question the verdict of the jury and the comments of the judge in Kyle's trial. The future of an innocent man depends upon it.

Kyle Horace had grown into a tall, impressive young man with a steady girlfriend expecting their first baby by the time he was tried in the Darwin Supreme Court on a charge of rape, fully three-and-a-half years after the alleged offence had occurred. Similarly, in Queensland, a young female high school student was summonsed to re-live a teenage sexual encounter before a judge and jury in Darwin, the city she had left with her parents three years before. In her evidence, the girl we shall name 'Sue' stated that the thought of returning caused her to waken in her bed screaming in vivid nightmares. In the suburbs of Darwin, Sue's younger friend, 'Anne' was also notified of her requirement to testify.

In 2006, these three young people were ordered to dredge from the depths of their minds their very different memories of an adolescent incident in a Darwin northern suburb that occurred one afternoon in May, 2003. Memories so different that they implied that someone was not telling the truth. Ironically, the long delay in bringing the matter to trial was excused in police evidence as being the result of an intervening emotional disturbance in the personal life of the Northern Territory police officer who was originally assigned to what had become a very cold case.

And so it was that a young couple's early sexual experience, differently remembered, resulted in a rape charge many years after the event. In those three years, and also on the day in question, Kyle had made no attempt to take any evasive action. Why should he? The police had not charged him until the committal hearing in February 2006, when he was first given \$500 bail. Neither had there ever been a restraining order or other surveillance. Whenever Kyle had been spoken to by the police for minor infringements over the years, an occasion not unusual for an Aboriginal teenager in Darwin, there had been no mention of sexual offences.

As he matured he had found a steady girl fiend who, by 2006, was pregnant with their future daughter. Then suddenly the young couple's future was threatened by a summons for Kyle to appear before a committal hearing in the Darwin Magistrates Court. Similarly, Sue's studies were disrupted as she was compelled to confront her suppressed fears of returning to Darwin and to give her version of what had happened in the school yard that afternoon so many years ago. At least she had been comforted by a therapist who assured her, 'It is not your fault.'<sup>1</sup>

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<sup>1</sup> At the trial Sue claims she remembered details six months before in 'flashbacks' more than three years after the event and after intensive counselling.

Both Sue and Kyle had been children under the law when their lives had intersected – two bored young teenagers in the dull northern suburbs who had missed all the excitement of Darwin’s annual May Day celebrations on a sparkling 2003 dry season day, now to be brought together again as adults before Chief Justice Brian Martin in 2006.

### **Further Analysis of the Evidence**

In the ensuing trial, Sue gave evidence under oath that a boy had forced himself upon her in the Anula Primary school yard while her best friend Anne waited nearby at the bus stop. Sue said she had taken the boy into the yard to give him directions to a street across the oval, but also accessible by walking around Yanyula Drive, the street they crossed to go into the school. **No street is visible** from behind the school buildings due to the dense fringing vegetation. The sexual fumbling common among sexually mature but under-age adolescents that occurred before Sue returned to the bus stop was now defined by the prosecutors as three counts of rape with a possible penalty of life imprisonment.

Sue was not the only one in the school yard to give evidence in the trial. At least two people had seen the couple and Anne had been with her all afternoon, except for those moments in the school yard. Although Kyle did not speak, his lawyer, Alan Woodcock, presented an alternative scenario, presumably after hearing Kyle’s story.

The transcripts show that all the eyewitnesses’ accounts **conflicted** with Sue’s version of events. Woodcock proposed that Sue had gone into the school yard with Kyle voluntarily and returned with him to the bus stop. This corresponded with what the school caretaker had seen, namely a dark boy and a white girl walking casually back to Yanyula Drive side-by-side, then moments later sitting on the fence talking. Another man walking past had seen the couple lying on the ground, and seconds later, after he had coughed, getting up and putting on their clothes with no time for the forced act of oral sex that Sue claims occurred as she got up from the ground. Woodcock suggested to Sue that this third act of penetration never occurred.

A clumsy sexual encounter in the school yard seen by the man walking to rugby training may have caused some minor bleeding from a sharp fingernail and penile intercourse may have been **attempted** unsuccessfully. However, the bruising was apparently done with **one action**. **The genital examination later found no semen on Sue’s person**. She claimed she ‘had never done it before’ but **an examination failed to prove** she was a virgin or even that her alleged virginity was broken. Distressing as this evidence may be to read, a genital examination using standard forensic procedures would have supported or otherwise **the reliability** of Sue’s testimony and the nature of the accusations. In contrast, **the internal physical examination by Dr Singh on the day of the alleged offence was shown to be seriously flawed** after a detailed analysis by the more experienced Dr Donald who was called for the defence.

Anne’s evidence conflicted with Sue’s story in almost every detail. Although younger and less mature, **Anne seemed to have been the more responsible of the two**. It was she who was concerned that her friend caught the bus home and who kept her eye on the time using her **mobile phone**. **She also knew the street names and locations from delivering pamphlets**. Remarkably for two young girls, the phone was apparently not used that afternoon - unfortunately the trial transcript indicates **the telephone records were not examined**. Were calls made? If calls were made, who was called and why? Anne says Kyle **introduced himself** and she saw **nothing remarkable** in the way the two walked off together. Her version of the meeting at the bus stop was **very different** to Sue’s account.

The details given about missed buses were inconsistent and can be checked against the timetables.<sup>2</sup> The behaviour of the two 'naïve' girls that afternoon, wandering aimlessly between bus stops, shops and a friend's house, meanwhile **repeatedly missing busses** indicates they were bored and seeking excitement.

If the girls were afraid, as Sue states, why was Anne not paying attention to the conversation between her friend and the boy she knew as Kyle, unless she felt the conversation was not her affair. Anne did tell the boy how to get to the street he wanted, but somehow Sue felt it necessary to take him into the school yard, away from her friend, although she claimed she was afraid of the boy. A map is included in this report to show that Yanyula Drive continues around the school and there was no need to go into the grounds, or go alone with a boy.

After Kyle and Sue had gone off together, Anne waited at the bus stop for some time before seeing the other two coming back together 'maybe a metre and a half' apart. Because they had missed another bus, Anne said she then asked Sue if she wanted to come back to her house. On the way back she asked what happened. She says that Sue kept answering, '**Nothing**.' When they got home she says **Sue didn't want to talk about it**; however, Anne told her mother and the police were soon called.

Certainly Anne describes Sue's changed behaviour as they *walked* back to the house. (Sue says that they *ran*). At the trial, apparently much weight was put upon Sue's expressions of distress after she came out of the school yard. Is changed behaviour after a youthful and hurried sexual encounter necessarily evidence of rape? There could be **many explanations for Sue's distress**, including most obviously the shock of her internal scratch and 'bruising'. Guilt, belated fear of parental discipline or possible pregnancy could equally have been worrying the young girl. Her later distress cannot be reliable evidence of Kyle's guilt. By the time her mother became emotionally involved, Sue was committed to the rape allegations.

The evidence of every witness was in conflict with the complainant's version of events, and suggested that whatever sexual activity occurred in the school yard it had been consensual. Woodcock suggested that Sue had answered the boy's request for sex with the statement, 'I've never done it before, but alright.' According to the police record of interview Kyle said that he only knew the age of the girl after being told by the police. In her dress and appearance Sue seemed more mature than her years, according to the step-father who saw Sue later that night. These points are relevant to the lesser offence of carnal knowledge by a boy only one-and-a-half years older.

Not only did all the other witnesses' statements disagree in important ways with Sue's statement, but the differences seriously undermined her reliability and truthfulness. Despite what Chief Justice Martin had heard during the trial, he related Sue's discredited statement in his sentencing remarks without variation or doubts.<sup>3</sup> **The only evidence of three counts of sexual penetration was the complainant's statement.** Certainly the jury must have had doubts, because they took eight hours to reach their verdict. Although there were some non-Europeans on the jury, there were no jurors of Aboriginal ancestry in the trial of a Black boy who had developed into manhood in the three-and-a-half intervening years, before being tried in an adult court for the rape of a 'naïve' white girl. Combined with a Chief Justice needing to repair his reputation after giving an Aboriginal elder a one month sentence for the anal rape of a girl under the age of consent, inevitably it was a racial trial. In Darwin, Kyle's guilt was decided long before he stood in the dock.

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<sup>2</sup> The Number 3 buses leaves the Casuarina terminus at 3.45, 4.50 and 5.55pm on public holidays

<sup>3</sup> [http://www.nt.gov.au/ntsc/doc/sentencing\\_remarks/2007/03/20070322horace.html](http://www.nt.gov.au/ntsc/doc/sentencing_remarks/2007/03/20070322horace.html)