

The case of the Darwin juvenile sentenced to 7 years for “the rape that wasn’t.”

By Dr William B Day

On 27<sup>th</sup> May, 2010, Chief Justice Brian Martin of the Northern Territory announced to the media “in words laced with anguish and despair” that he intended to resign at the age of sixty-two. “You reach a point where you say enough is enough,” the Chief Justice lamented. “We can put people in jail but that in itself has proved to be an ineffective way of rehabilitating people.” According to the judge, the courts are “right at the tail end of all the experiences of the life of the offender. Being at the tail end we can’t cure them – that’s the problem,” he said. Justice Martin’s retirement also comes as tensions remain high in Alice Springs over his sentencing of four young white men for the bashing-related manslaughter of a local Aboriginal man, Mr Ryder. Many Aboriginal people feel that the offenders should have received longer than non-parole terms ranging from 12 months to four years.

Announcing his retirement, Justice Martin admitted that he made a mistake in 2005 when he sentenced a 55-year-old Aboriginal elder to one month’s jail for the rape of his 14-year-old promised bride. “I got the balance wrong,” he said. “I remember thinking of all the factors – the impact of the victim and the families – then trying to balance out the other side of the coin, which was an Aboriginal man who didn’t realise it was wrong in the wider law.” Commenting on a successful appeal against the sentence the Minister for Indigenous Affairs at the time, Mal Brough, said that not only was Chief Justice’s decision wrong, but the appeal judges had also failed the sexual assault victim by increasing the sentence to only three years, suspended after 18 months.

Meanwhile, a young Aboriginal man named Kyle Horace incarcerated in Darwin’s overcrowded Berrimah prison read the press reports in his dimly lit cell. After been sentenced by the Chief Justice to seven years for a crime he claims he did not commit, Kyle finds no reassurance in the judge’s remarks that at times he “got the balance wrong” in his sentencing. Nor does Kyle concern himself about the “demoralising” toll taken on judges by “sentencing people to solutions that they don’t think are going to work.” For young men like Kyle it is not the judge but the prisoners who suffer “right at the tail end” of the legal system - in Kyle’s case contemplating how life might have been if justice had been rightfully served in the beginning. Behind bars, daily mulling over his innocence, Kyle has little sympathy for the “psychological toll” on the judge who sentenced him.

On 22<sup>nd</sup> March, 2007, the judge had pronounced those fateful words, “You have been found guilty by a jury of three crimes of unlawful intercourse without consent. In other words, you have been found guilty of three crimes of rape.” In prison, Kyle pondered over the Chief Justice’s most

recently reported comments that “there was no such thing as ‘rape’ in Northern Territory law.” In the media, the judge had clarified his remarks by saying, “A child in the law can give consent. When there is consent, the child gives consent but the community recognises that the child is too young to give an informed consent, too young to understand the implications, so the community has said even if a child consents there is still an offence.” The Chief Justice added, “If the community wants to call people who have sexual intercourse with children [who are aged] under 16 ‘rapists’, then the community can do so ... It’s a question of terminology.”

Amongst Kyle’s teenage Darwin friends in 2003, promiscuous sex was common. Were all his friends under the age of consent committing a crime, or was his mistake as an Aboriginal boy to become sexually involved with a white girl? And if there is “no such thing as rape”, why did the Chief Justice describe the offence as such? Unbeknown to Kyle, his misfortune was to appear in the Supreme Court immediately after Chief Justice Martin had been “at the tail end” of severe criticism in the media for the light sentence given to the Aboriginal elder. 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. Was Kyle offered as a scapegoat, a sacrificial lamb in the inherently racist justice system, to satisfy the reputation of a judge and the public demand for harsher penalties, despite the fact that he was a 15-year-old boy when the offence occurred and the evidence strongly suggests the complainant had lied?

Reading the Chief Justice’s remarks, Kyle remembered the media report of his sentencing under the heading, “Man Jailed for Raping 13-year-old Girl.” The report had continued:

An 18-year-old Darwin man will spend at least five years in prison after raping a 13-year-old girl in May 2003. Kyle Horace was found guilty by a Northern Territory Supreme Court of three counts of unlawful sexual intercourse without consent. In sentencing today, the court heard Horace raped the girl in the grounds of a Darwin primary school after he approached her asking for directions. He was 15 years old at the time.

Kyle wondered why the news report described him as a man of 18 while the girl remained 13, almost four years after the events. Neither was it of any consolation for Kyle to read the Chief Justice’s remarks that the media is free to describe consensual under-age sex as “rape” if they choose to do so.

If Kyle was considered to be a violent offender, why was he freed without restraint from May, 2003, before eventually being charged in August, 2005, and given \$500 bail until his trial in November, 2006? Were not these years of good behaviour worth considering? Instead, his protestations of innocence were described as a lack of remorse. In sentencing Kyle, the Chief Justice had said: “You continue to maintain that your sexual acts were consensual. You have not indicated any sign of remorse. I agree with the probation officer that this state of mind is a significant risk factor in connection with possible re-offending.”

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 fully three-and-a-half years after the alleged rape 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 “Alison” stated that the thought of returning caused her to waken in her bed in fear. In the suburbs of Darwin, Alison’s younger friend, “Beverley” was also notified of her requirement to testify.

In late 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 that were so different they implied that someone was not telling the truth. Ironically, the long delay in bringing the matter to trial was excused by the prosecution as being the result of an intervening emotional disturbance in the personal life of the Northern Territory police officer who had been assigned to what had become a very cold case. The following descriptions of the events of that fateful meeting are reconstructed from the transcript of the trial documenting accounts differently remembered.

### **The meeting at the bus stop**

The first Monday in May is a public holiday in Darwin, when human rights are proclaimed in the annual May Day Parade and a festival on Mindil Beach celebrates the beginning of the Dry Season and the end of the long and humid monsoon, better known as “The Wet”. The crisp cooler weather under blue skies is a welcome change from the steamy months from October to April when deadly box jellyfish make swimming hazardous. Despite the holiday activities taking place in the inner suburbs, Monday May 5<sup>th</sup>, 2003, had been a boring day for two adolescent girls waiting for a bus and an Aboriginal boy walking to visit his aunt in the quiet streets of the northern suburbs. It was to become a day that changed the lives of the three teenagers forever.

Alison, the older of the two girls, usually lived with her parents and her 15-year-old brother and 16-year-old sister at the Darwin RAAF base in Winnellie where her serviceman father was based. She was born in September, 1989, making her age 13 years and 8 months in May, 2003. This long weekend she was staying at her best friend Beverley's home in Enterprise Street, Anula. Beverley was four months younger than Alison. On the Sunday night the two girls baby-sat at a neighbour's house and then spent some of the Monday swimming in the pool at Beverley's home. Because Alison was due home by 6 pm, Beverley says the girls walked down to the bus stop on Springhill Road "at about quarter to four" to catch the bus. Beverley had her mobile phone to check the time. Remarkably for two young girls, the phone was apparently not used that afternoon - unfortunately the trial transcript indicates the telephone records were not examined.

Although it had been a quiet day in the suburbs, there was increasing activity in the school grounds within sight of the bus stop where the two girls were waiting. Every Monday at 5.30 p.m. the Brothers rugby league team held their training on the school oval and the players began to arrive as usual that afternoon. Tae Kwan Do practice was also due to begin at 5.30 p.m. in the school assembly area and children were playing in the school sandpit. In addition, the school caretaker had spent the whole day on the school grounds where he shared a caravan with his partner.

Meanwhile, after returning from walking to the nearby shops and missing at least one bus, the two girls waiting at the bus stop were approached by Kyle Horace. He was born in Wyndham, Western Australia on 24<sup>th</sup> March, 1988, and was living in the nearby suburb of Rapid Creek with his 75-year-old grandmother, Mavis Waddell, a respected member of the Darwin community. Mavis was born on the Forrest River Mission and is actually Kyle's grandfather's sister. Kyle's grandfather was the well known boxer and Aboriginal activist, Norman Horace, who won the New South Wales lightweight championship and the 1969 Australian junior lightweight championship and fought internationally as "Kid Langford."

After the meeting at the bus stop, described very differently by the two girls, 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." Beverley had been delivering pamphlets in the district and told Kyle how to get to the street he wanted. Although all streets can be reached from Yanyula Drive which continues in a crescent around the school, somehow Alison felt it necessary to take Kyle into the school yard, away from her friend, although she claimed she was afraid of the boy.

### **The incident in the school yard**

Alison said that after they had passed the school buildings she pointed out the street across the oval but the boy wasn't interested; he stood in front of her and grabbed her arm. However, a site inspection reveals that no street is visible through the trees growing between the school buildings and the oval, and the avenue of trees around the oval. In her recorded statement, Alison said the boy was behind her and then walked in front of her and grabbed her right forearm. Later she claimed in her evidence that she was walking behind the boy when he turned around on the pathway and faced her before grabbing her by the arm.

In her statement Alison said, "He started undoing my shorts and I told him to piss off but he didn't stop." She was asked at the trial if her voice was loud enough for someone else who was nearby to hear. Alison said, "It was loud enough for him to hear ...my body wasn't re-acting ... It was in a more panicky tone, but I couldn't quite yell." At this point Alison added in 2006 that she heard footsteps and the boy let her go. She said she then started running off, back towards the bus stop.

A rugby player cutting through the school grounds on his way to training was surprised to see a "young lad and a girl having sexual intercourse" near some bushes in the school grounds. After a glance, the witness walked on, giving a loud cough as he passed. When he looked back he saw the boy getting up and the girl sitting on the ground "pulling some clothing on." He glanced back after "5 to 10 seconds" and saw the boy move from about a metre away from the girl to "across the road [in the school] to wash his hands" at the taps, with no time for the forced act of oral sex that Alison claims occurred as they stood up. The witness was asked if he "felt the need to go over and do anything." He replied that he did not think there was anything "untoward" in what he saw, apart from it being wrong to be having sex in that location. The only action the rugby player took was to continue down the path to his rugby training.

The school caretaker says he left his caravan on the school grounds at about 5 p.m. to do a check. At that time the Tae Kwon Do group was setting up in the assembly area. The caretaker saw what looked like, from the back, a boy and a girl of high school age walking side-by-side away from him and around the school buildings out of his sight. He watched them walking for perhaps less than a minute. The couple were moving their heads towards each other, as though talking. From the caretaker's description, the boy fitted the description of Kyle Horace and was wearing the same clothing. The caretaker returned to his caravan to tell his partner he was going to check around the back of the school to Yanyula Drive. When he reached the front of the school the caretaker very briefly saw the same boy, of Aboriginal appearance, and a white girl. They were now sitting

together on the front rail of the school boundary facing toward the road apparently talking, although he could not hear them. The caretaker thought he first saw the couple at about 5 p.m. and the next time at about 5.15 to 5.20 p.m.

### **The police are called**

Alison had left her backpack with her girlfriend at the bus stop when she walked off with the boy. Beverley says she lost sight of them when they turned right into Yanyula Drive. She estimated that she waited for about half an hour to forty-five minutes at the bus stop, checking the time on her mobile telephone. After waiting for so long, Beverley walked down to Yanyula Drive to see where the couple had gone and saw them walking back along Yanyula Drive towards where Beverley was waiting in Springhill Road. After seeing that her friend was returning with the boy, Beverley walked back to the bus stop. While she had been waiting, she says that another bus had passed. She says Alison came back to the bus stop with the boy and the boy walked away. Beverley then asked Alison if she wanted to come back to her house. As the girls walked back to the house (not *ran* as Alison claims) Beverley asked what had happened. Alison kept answering, “Nothing”. When the two friends went into Beverley’s bedroom Beverley again asked what had happened. Alison said she did not want to call the police but her friend “ended up getting her to call her mother and then we called the police.” The defence lawyer asked Beverley, “Did she say she didn’t want to tell her mother?” Beverley replied, “She just said she didn’t want anyone to know about it.” Alison told the jury, “I was still crying, so [my mother] asked me what was wrong and all I said was I had been raped and she screamed on the other end [of the telephone].”

The call was noted as being received at the police station at 5.43 p.m. Meanwhile, Kyle had walked to his aunt’s house where she offered to drive him home. Kyle declined the offer and said that he would catch a bus from Anula. He was apprehended by the police at 6.05 p.m. waiting at the Anula shops bus stop, not far from the school. 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 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 had a particularly close relationship with his step-son. 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.” This remark particularly offended Kyle’s defence lawyer, Alan Woodcock, who rang the author of this article and threatened legal action. However, unlike most of those involved in the trial the stepfather

was present on the night and was able to make his own assessment of the complainant. A six-page statement from the girl was taken by the police at about 11 p.m. that same night.

### **The trial**

By the time of the trial in November 2006, 3½ years had passed since May, 2003, and witnesses' memories had begun to fade. There was even some variance with evidence given at the trial and at the committal hearing in February 2006. Mr Woodcock claimed there were ten things that came to light in evidence given to the trial that were not in the complainant's original statement. The Chief Justice replied, "And saying therefore they should have doubt about her reliability?" Instead Chief Justice Brian Martin instructed the jury, "the pieces [of the story] do not have to fit together like a puzzle." In Kyle's view the judge was advising the jury that they should not question the complainant's version of events, despite the discrepancies that were obvious to all at the trial. In his sentencing remarks, the judge noted, "the differences in their recollections are of no significance."

After more than three years, one would think that the statements given to police in 2003 would be more reliable than later memories. The complainant had received counselling and some of her memories had "come back" even more recently. In 2006 she remembered things in "nightmares" that she felt were caused by the thought of having to return to Darwin from Queensland where her father now served. In her nightmares, Alison remembered things she did not include in her original statement. In 2006 Alison explained her forgetfulness because she was "traumatised and under pressure." She added, "I've been trying to block it out but it just comes back." For example, she now remembers the boy having one hand up her top and on her breasts while his other hand was in her pants. In November 2006 when the complainant was asked why she hadn't mentioned this before she said, "I've been having nightmares lately with flashbacks, and it brought it back to me." After three years she remembered for the first time the boy telling her after the alleged assault, "this will be our little secret" (an unlikely comment for Kyle to have made).

The two girls gave their evidence in a closed court setting. Alison was always referred to as being just 13, although she had been almost 13 years and eight months. At the time, Kyle was less than 15 years and two months of age. Although Kyle was a solid boy in 2003, weighing 60 kilograms and 170 centimetres in height, by 2006 he was standing in the dock as an almost fully grown 18-year-old man, in contrast to a girl portrayed as a naïve and traumatised child. Several times the accused was referred to as a "man." For example, in questioning Beverley, Mr Woodcock asked, "Do you remember the second time that the man you now know as Kyle came back and talked to Alison?" After the verdict of guilty the Chief Justice observed, "This is a young man who is aged 18. He is staring down the barrel of a long sentence of imprisonment." Perhaps more tellingly, Kyle was

black and she was white. However, the defence lawyer apparently did not view the trial as a racial issue.

At the trial Mr Woodcock for the defence called Dr Terrence Donald of the Royal Adelaide Women and Children's Hospital to comment on the evidence of Dr Gurmeet Rajinder Singh, the on-call medical officer at the Sexual Assault Referral Centre (SARC) in Darwin. Dr Donald has been a forensic paediatrician since 1978. He had studied Dr Singh's notes, the transcript of her evidence and the record on a DVD disk of the medical examination made on 5 May 2003. According to Dr Donald, the scratch that was observed was probably more likely caused by a fingernail. He added, "Dr Singh saw the haematoma [i.e. bruise] but clearly she didn't get a chance to look [beyond] for any sign of injury." Dr Donald told the court that in a situation like this he would re-examine a 13-year-old after two days, "Because by then things have settled down." He also questioned the value of statistics on sexual injuries when applied to individual cases. He said, "You get situations where there's a lot of force and no injury and situations where there doesn't seem to be much force at all and there's quite significant injury."

The senior Darwin police forensic biologist detected no semen on either the swab or the smear contained in the Sexual Assault Kit taken from the victim. The forensic officer said that the SARC doctors also took swabs of the girl's left and right breasts. No DNA was recovered from these swabs although the girl claimed Kyle had placed his hands on her breasts. DNA identical to Alison's was later recovered from Kyle's underpants, but there could be many explanations for this.

The Chief Justice made it clear that any sexual penetration of the girl, being under the age of sixteen, was unlawful. He stated emphatically, "I propose to say to the jury there's no suggestion that this was anything other than – in this situation – unlawful." However, according to the committal hearing, during the police interview Kyle was asked, "So you happen to know how old she is?"

Kyle replied, "Mm, yeah now I do."

The police asked, "How do you know?"

Kyle answered, "Because I got told by youse."

Before sentencing Kyle in March, 2007, the Chief Justice insisted on the inclusion of information from Kyle's primary school records. The judge noted, "Here's a young man who on the face of this material has had difficulty in relationships at school with other students..." He asked Mr Woodcock, "Do you have a problem with any of that?"

Woodcock replied that that he did, “Because this occurred when this person was aged eleven at primary school. The remoteness in time is such that it is completely irrelevant.” Woodcock added, “It’s not the usual process in the sentencing. I’ve never seen it done before... we’re not sitting in continental Europe - this is not a free ranging inquiry.” To which the Chief Justice replied, “Well, Mr Woodcock there is a first time for everything ... I’m not going to be sat here and treated like a mushroom.” It seemed the whole life span of Kyle’s 18 years was to be taken into account.

### **The verdict**

On 22<sup>nd</sup> November, 2006, after the summing up, the jury retired at 12.45pm. At 6.16 p.m. the jury returned for four minutes then retired again until 8.24 p.m. After almost eight hours consideration the Foreman pronounced that the jury had found the accused guilty of all charges. Firstly, sexual intercourse, namely digital vaginal penetration without consent. Secondly, sexual intercourse, namely penile vaginal penetration without consent. Thirdly, sexual intercourse, namely fellatio without consent. However, the transcripts suggest there was little evidence for the latter two of these three charges and the question of consent had been ruled upon by the judge.

After the Chief Justice ordered the sentence to be back-dated to when Kyle was first taken into custody he asked, “Can someone tell me when that was please?” The prosecutor answered, ‘that was the day of the conclusion of the trial...’

In surprise, the Chief Justice replied, ‘So that’s the only time he’s been in custody? He wasn’t in custody? Arrested?’

The judge was then advised that Kyle had not been in custody until the day of the guilty verdict in November, 2006.

In summary, there were no jurors of Aboriginal ancestry in the trial of an Aboriginal 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 “naive” 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 and bashing 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.

### **Postscript**

Once a month, Kyle’s grandmother catches the bus to visit her grandson in the prison, 15 kilometres from Darwin on the Stuart Highway. Kyle also looks forward to visits from his partner of five years and their little daughter born on 2<sup>nd</sup> February, 2007. In March 2009, Kyle’s 21<sup>st</sup> birthday passed unrecognised in Berrimah Prison. His hopes were recently raised by a visit from Katrina Jackson, a second year law student from the University of Chicago, where Barak Obama taught for twelve

years. In November, 2010, he will have completed his fourth year of internment. Typically, Kyle is determined to serve the full seven year sentence so as to be free of restrictive conditions on his release. He believes that his chances of parole are not bright as long as he insists on his innocence. His mates advise him that he should have pleaded guilty when he was 15, but he was never given that choice. After years of judicial inaction, Kyle and his family presumed the matter was closed. In the words of the Chief Justice, “Enough is enough!” It is time for a judicial enquiry into the jailing of an Aboriginal juvenile for seven years for “The rape that wasn’t.”