27 December 2017

Dear Kyle

How are you? Did you have a good Christmas? It was good to see you looking so well in September last when I was in Darwin for Rob's wedding. Sorry we didn't have a chance to talk much. I was hoping you would like to go to Canberra for the Aboriginal Embassy meeting. I think I could have raised the money to send someone from Darwin for that special occasion, and I would have made an appeal on Facebook if you were prepared to go, but you messaged that you would not go by yourself, and by then it was too late. Since that time the Embassy people have been occupying an unused cafe in old parliament house. Latest news is that the bathrooms have been locked by the authorities. These toilets and bathrooms have always been available to the embassy campers in the past.

You also mentioned that you would like to come to Perth. Are you still interested? A few months ago was instrumental in a friend getting a two-bedroom unit in Tenth Avenue Maylands, in the same street where I live. He is of Aboriginal descent, about 40 years of age, ex-army (served in East Timor, and driving a water truck for FMG on a Pilbara iron ore mine, 2 weeks on and one week off - or "2 and 1", as they say. He pays $210 a week but he is only home on his "swing" for one week and also goes over east to see is daughter sometimes (he comes from Brisbane area and his ex has remarried, so there are child custody issues). Being away so much, it is obvious that he isn't get getting good value for his rent. I can ask him if he would like a reliable flatmate prepared to pay about $110 a week. Matt (his name) is also a member of AA, six years sober and goes to an AA meeting almost every day while in Perth, so it goes without saying that his flat is <u>strictly</u> smoke-free, drug-free, alcohol-free accommodation at all times. If you would agree to those conditions, I think you two would get on OK. However, Matt's is a second floor unit and he might allow smoking on the veranda, not sure.

I can hear you saying, "There goes Bill with another of his plans that never come to anything. Raise the hopes and lets you down again." I can see why you would think that. But you have to admit you are not exactly co-operative because of your negative attitude to everything. I haven't discussed this idea with Matt yet. I was waiting for him to settle in to the flat. I thought considering your knowledge of the 12 Step Program, if you were prepared to live in a dry and clean unit, it might work. Maylands is a great place to live. It is only five stations on the train to the city and the shops and train station are nearby. Finally, there is the problem of the fare south – we can arrange a one-way ticket for you I am sure.

Now on other matters….

Dear Kyle

Enclosed is a report about a trial in England where police failed to examine the mobile telephone records on the claimant's phone. This was a point I made, that the girls in your case were carrying a mobile and yet I could see no reference in the transcripts to the calls or messages they might have made that afternoon. Also the other point relevant in the UK case was the effect of cuts to funding on police investigations, resulting in delays and short cuts. In your case, the police officer took stress leave, resulting in long delays in a hearing while you grew to adulthood.

Also enclosed is a 2016 report of another case where the accused was 18 when he came before the judge. Up to the trial he had served 1 year and 214 days in detention in a youth justice centre, so presumably he was about 16 when the crime was committed, and was correctly treated as a child. (The report says that in mid-2015 the accused was aged 17, but these numbers don't add up. If he had been in detention for almost two years he must have been younger than that). Also the report notes that at the time of his crime the accused "was under 18 and, consequently, a juvenile." Even though he was found guilty of serious terrorism offences and sentenced to more than 5 years, the report says his time may be served in the juvenile detention system, unlike in your case, where you went straight into Berrimah adult prison.

In the above case, and many others, the accused was correctly treated as a juvenile due to the fact of his age at the time of the offence, and this was taken into account in the sentencing. Also in most cases of serious changes, the accused is kept in remand or at least released on strict conditions. Remember how Chief Justice Martin was so surprised to hear that you had been living freely in the general community right up to the time of the trial in Darwin? Your good behaviour over that three-year period from charges to trial did not seem to have been taken into account when sentencing you.

There is also a report of a case in WA headed "Teen faces child sex charges" (September 23, 2017). This is another case where the accused was 19 at the time of the trial, two years after the offences against a 14-year-old girl. The offences are nothing like your case, but the reporting is interesting, with the heading calling the accused a teenager and the story referring to him as a man (in your case you were always referred to as a man, although the charges relate to you as a 15-year-old boy).

I also enclose articles by Dan Box, the journalist who exposed the injustice of the mandatory sentencing of Zak Grieve. Dan Box mentions other journalists who helped, like Amos Aikman, Matt Cunningham and others at the

ABC. Another possible contact is Paul Toohey who is a journalist who spoke to me years ago about your case but nothing came of it. I suppose the interesting thing about the Grieve case, is the power of the media to expose injustice.

Perhaps more useful to your defence is the enclosed the report by the QC/SC John Lawrence published in Land Rights News, October 2016. John Lawrence has been on TV a lot lately due to the Don Dale inquiry into youth detention. I believe that your experience of the miscarriage of justice resulting in serving seven years in an NT prison should have been heard by the Royal Commissioners.

John Lawrence writes about the "Amunga Guidelines" , which were established by the late Chief Justice Forster and Justices Muirhead and Ward in 1975. According to the Court, the guidelines were designed to "remove or obviate some of the disadvantages for which Aboriginal people suffer in their dealings with police." The guidelines mainly referred to the way police interviews were conducted. However, they come after various rulings by Justice Kriewaldt in the 1950s. For example, Justice Kriewaldt took into account "the background and upbringing" of the Aboriginal accused and always sought to hear evidence in court "or by using any material available ... where tribal law of custom might possibly be relevant."

Now it is well-known that Chief Justice Brian Martin followed Justice Kriewaldt's precedents in his sentencing, and indeed the consideration of tribal law in a case just prior to your case had resulted in a media storm when the Chief Justice sentenced an elder to 4 months for the anal rape of a 14-year-old girl. Whether the court heard expert evidence on the matter is not known, but it seems unlikely the offence could be excused under tribal custom.

What consideration was made of your Aboriginality? We know the prevalent attitude in north Australia is that Aborigines are full-bloods, even though this distinction was removed in 1964. Did the judge feel that the precedents set in trials of Aboriginal people even applied in your case? In my opinion yours was a racial trial and, having known your grandfather as an activist for land rights and a community leader at Oombulgurri, I am more aware than most of your connections to your culture. I am also very aware of the urban subculture of "coloured kids" in Darwin where you found a sense of belonging. It appears that neither the court or the white jury understood this culture gap.

Lawrence gives other examples of judgements that allow for an Aboriginal interpretation of events, such as when Muirhead in 1982 found that the court should inform itself of "the significance of words, gestures and situations" which may explain the situation.in which the alleged offences occurred. Judge Muirhead was also appointed

head of the Royal Commission onto Aboriginal Deaths in Custody which sat from 1989 to 1991. Sadly, your case proves that little heed was taken of the recommendations in Muirhead's final report.

According to John Lawrence, in 1977 Justice Muirhead said:

> "In dealing with Aboriginal children one must not overlook the tremendous social problems they face. They are growing up in an environment of confusion. They see many of their people beset with the problems of alcohol, they sense conflict and dilemma when they find the strict but community based cultural traditions of their people, their customs and philosophies set in competition with the more tempting sort term inducements of out society.
>
> In short the young Aboriginal is a child who requires tremendous care and attention, much thought, much consideration. Seldom is anything solved by putting him in prison. If he becomes an offender he requires much by the way of support and perhaps much by way of discipline to set him on the right track."

In the case of Kyle Horace, what consideration was taken of his Aboriginal background? By contrast, despite objections by his defence lawyer, Alan Woodcock, the Chief Justice quoted Kyle's poor school records as a character reference. There seems not to have been any awareness by the judge or the defence that Kyle's was a racial trial. A handsome Aboriginal boy, albeit of an urban street subculture, meeting with a white girl from an airforce family with very different cultural understandings of sexual mores, or expected ways of behaviour. Was expert opinion heard to explain these cultural differences to a jury?

As John Lawrence discusses, according to past rulings and precedents of the NT Courts, evidence of cultural differences should have been required in court, to put the charges against Kyle in context. We know that Chief Justice Martin was well-aware of the rulings of Muirhead and others, as well as the "Anunga Rules" and the precedents set by Justice Kriewaldt. Was Martin inhibited by the media outcry against him just prior to sitting in judgement on Kyle's case? Did the media attack on his misinterpretation of customary law influence Martin in sentencing Kyle? To emphasise the need to consider Kyle's experience of Aboriginality, the jury empanelled in Kyle's case was almost solely white, and certainly did not represent Kyle's peers, or his Aboriginality. Considering the racial divide in Northern Australia, it would be doubtful, without expert guidance, that any of the jury would have an understanding of the racial nature of the charges. For example, a previous NT Attorney General in Darwin, John Elferink, expressed a common view in the administering of youth justice. Elferink said: "These are strapping young lads, but my goodness gracious me we will crack down on them and we will control them."

Another issue crucial to the case of Kyle Horace, was that in the three years that passed before the Supreme Court trial, the complainant had received counselling. After counselling the girl began to recall things she had not included in the statement ot police in May 2003. Judgements in courts have recently disallowed statements made by witnesses who have received counselling. Similarly witness's memories recalled years later, and following counselling, should not have been admitted as evidence, particularly when not supported by the forensic evidence, as was allowed in Kyle's case. Accusations added three years later after counselling, such as that the accused said “This will be our little secret” not only do not reflect the language of the accused but come straight form a counsellor's text book.

As I have explained in previous documentation of the Horace case, available on the internet under www.drbilldayanthropologist.com, the evidence of every witness contradicted the evidence of the complainant, and yet this damning evidence was excused by Martin in saying “the pieces do not have to fit together like a jigsaw.”

Following my self-publication of comments on the trial, the appointed defence lawyer, Alan Woodcock, spoke to me from Darwin in an abusive telephone call. Woodcock was offended because I had quoted an eye-witness (who was never called) saying “She looked like a twenty-year old hooker.” Alan Woodcock, who is now himself a judge on the NT court, seemed more concerned for the reputation of the complainant rather than for his client serving seven years in Berrimah prison, and why, for inexplicable reasons, there was no appeal against Chief Justice Martin's sentence. My reply to Woodcock was “Unlike you and me, the witness was there on the night.” On August 19, 2010, the editor of The National Indigenous Times, Stephen Hagan publicised a four-page article on Kyle Horace's trial. In 2017 Dr Stephen Hagan of Batchelor College published a book on racism in the judiciary system. The book can be ordered online. The sad case of Kyle Horace is a prime example.

Yours sincerely

Dr William B Day
Mobile: 0472768654