

Aboriginal Juvenile Justice in the Northern Territory: A Case Study

A 15-year-old Boy Sentenced to Seven Years in Darwin's Berrimah Prison

“Man Jailed for Raping 13-year-old Girl” was the headline of a Darwin ABC news report on 22 March, 2007. The brief account ended with the comment, “He was 15-years-old at the time.” There was no explanation for the reason why a nineteen-year-old Aboriginal youth stood before Chief Justice Brian Martin in the Darwin Supreme Court three-and-a-half years after the offence to be sentenced to seven years in Berrimah prison. And why was there no appeal or condemnation of this injustice? Eleven years on, when *all* youths in detention in the Territory are Aboriginal, the Kyle Horace case remains a topical reflection of the administration of juvenile justice in the Northern Territory. The causes are deep and have a long history.

The October 2016 issue of *Land Rights News*, pages 14-15, published an important article by Darwin lawyer, John B Lawrence SC, discussing the 1975 decision *R v Anunga Others* in the full court of the Northern Territory Supreme Court before Chief Justice Forster and Justices Muirhead and Ward. According to John Lawrence, the decision resulted in the *Anunga Guidelines*, designed “to remove or obviate some of the disadvantages from which Aboriginal people suffer in their dealings with police”. Lawrence says although the guidelines are not statutory laws, they are powerful, because non-compliance, without good reason, could and would render interviews inadmissible. Lawrence adds the guidelines have continuing relevance and application within the provisions of the *National Uniform Evidence Act*.

Lawrence claims the wording of the 1975 *Anunga* judgment reflect a society and a Court more sympathetic to Aboriginal people than exists in the Northern Territory today: In 1975 the judges wrote: “It may be thought by some that these guidelines are unduly paternal and therefore offensive to Aboriginal people. It may be thought by others that they are unduly favourable to Aboriginal people. The truth of the matter is that they are designed simply to remove or obviate some of the disadvantages from which Aboriginal people suffer in their dealings with police.”

John Lawrence believes that the *Anunga Guidelines* were “in many ways a continuum of an enlightened and progressive jurisprudence which the NT Supreme Court had developed over previous decades going back to Kriewaldt J in the 1950s”. As Lawrence notes, in 1954 Justice Kriewaldt commented, “In every case where I have been under duty to pass sentence on a native, irrespective of the charge, I have heard such evidence as has been available throwing light on the background and upbringing of the native.” The approach by Justice Kriewaldt remains topical in 2018 when every juvenile in detention in the NT is an Aboriginal child.

In addition, John Lawrence points out it was Justice Muirhead of the NT Supreme Court who was appointed to

head the Royal Commission into Aboriginal Deaths in Custody in 1989, and it was Muirhead who expanded the Terms of Reference to address the over-representation of Aboriginal people in jails.

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 short term inducements of our 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 discipline to set him on the right track..."

Perhaps this enlightened approach was taken a notch higher by Chief Justice Brian Martin in 2005 when he heard the case of a 55-year-old Aboriginal man charged with aggravated assault and sexual intercourse with a child. In a judgment which became notorious, the Chief Justice said he accepted that the man believed his actions were permitted under traditional law. However, he added, that under Territory law, both girls and women were entitled to say no, "even if it is the promised husband who is demanding sexual intercourse".

According to a lengthy report in the *Katherine Times*, August 17, 2005, page 5, Chief Justice Martin sentenced the Aboriginal offender to five months' jail for assaulting the girl with a boomerang and 19 months' jail for sexual intercourse with a child (to be served cumulatively), but suspended the sentence after one month on condition that the man be of good behaviour, provide a surety of \$250 and have no contact with the victim for two years. Chief Justice Martin said the case had been complicated and reflected a clash of laws, cultures and generations. The *Katherine Times* noted: "After the sentencing, Chief Justice Martin said he would request that copies of his remarks be sent to police, Aboriginal organisations and Community Government Councils to ensure all Aboriginal people understood the law."

The sentencing of the Aboriginal man to one month's jail for child rape was followed by a national outcry. In *The Australian*, May 24, 2006, page 1, the Chief Justice admitted he had made a mistake. He was quoted as saying, "I was wrong. I got the sentence wrong. The Court of Criminal Appeal said I was wrong. I have no problem with that." However, Judge Martin emphasised that courts across the nation take into consideration an Aboriginal person's belief in customary law. "It goes back to the offender's circumstances, their background, their culture – all of those things go to their make-up and reflect on their moral culpability," he told the newspaper.

Adding to the reactionary mood in keeping with the federal government's intervention into Aboriginal communities, 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 increasing the sentence to only three years, suspended after 18 months.

None of the above commentaries seem to have influenced the Darwin trial of an Aboriginal youth charged with the sexual assault of a 13.8-year-old white girl when the Aboriginal boy was 15.2 years of age. Kyle Horace was born of Aboriginal descent in Wyndham, Western Australia on 24th March, 1988. His grandfather was a champion international boxer and leader of the Oomboolgurri Community. His mother became an alcoholic and his step-father disowned him. His grandmother, Mavis Waddell, also originally from the Kimberley region of WA is a respected member of the Darwin community.

In November 2006, six months after Chief Justice Martin's baptism of fire, a tall and handsome 18-years-and-6-months-old Kyle Horace, stood in the dock before the chastened Chief Justice in the Darwin Supreme Court, charged with the sexual assault of a 13-year-8-month-old white girl more than 3½ years previously, in Darwin's northern suburbs on 5th May, 2003, when Kyle was 15.2 years of age.

After a trial by a non-Aboriginal jury, two days before Kyle's nineteenth birthday, on March 22, 2007, Chief Justice Brian Martin sentenced Kyle Horace to seven years' imprisonment commencing from the guilty date on 23rd November 2006. Kyle chose not to accept parole and served the full seven years in the Darwin Correctional Centre, better known as Berrimah Prison. His girlfriend, who he had known for almost five years, had given birth to their baby daughter on February 2nd, 2007, the month before Kyle was sentenced. On his release his daughter was almost seven years old.

For an in depth analysis of the evidence and the transcripts in Kyle's case, and the inconsistencies therein, see the essays on www.drilldayanthropologist.com

Cases reflecting the significance of the trial of an Aboriginal boy as an adult and his sentencing to seven years in an adult prison.

The following somewhat random sample of reported relevant cases, suggest defences that could have affected the sentencing of Kyle Horace (Defence Lawyer Alan Woodcock made no appeal).

1. *The Weekend Australian*, May 20-21, 2006, page 4, reported on a decision of the full bench of the High Court

in refusing to grant a man special leave to appeal against a three-year term or the rape of his 14-year-old promised bride. The three-year sentence had been imposed by the Northern Territory Court of Criminal Appeal, which had found the sentence of one month's jail imposed by Chief Justice Martin in August, 2005, to be “manifestly inadequate”. The sexual assault had occurred in June 2004. Judge Michael Kirby said that while Aboriginal customary law was important, this was not the case in which it should be explored. The newspaper reported that after the appeal the man had to serve 18 months after half of the three-year sentence was suspended. **Comment: The report confirms that the “public outcry” following Chief Justice Brian Martin's controversial sentencing of a man to one month's imprisonment for the rape of a child continued well into 2006. Kyle appeared before the Chief Justice in the Darwin Supreme Court on sexual assault charges in November 2006, unaware of the controversy into which he had been propelled. Obviously, customary law was not an issue in Kyle's case; however, being a case of an Aboriginal boy and a white girl, racial and cultural issues should have been central, but were not recognised as such in the courtroom.**

2. On 22 March, 2007, *ABC online*, headlined their report on Kyle's trial, “Man Jailed for Raping 13-year-old Girl.” The report 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.” **Comment: Perhaps it is not surprising that the ABC news described Kyle as “a man” when the judge had often used that description of the 19-year-old standing before him. However, as the news report adds in conclusion, “He was 15 at the time.” Strangely, the girl remains as a 13-year-old, almost four years on, while the boy was now “a man”. Unusually, the ABC report names the teenage male offender in this report that remains online today.**

3. “Innocent Perth Schoolboy Spends 11 Months in Jail: Our Justice Nightmare”, was the page one heading on April 1, 2007, in *The Sunday Times*. The story by Estelle Blackburn related the experience of a 16-year-old boy who had been locked up for almost a year awaiting trial. Blackburn reported, “Patrick Waring, then a 15-year-old Catholic college student, was dragged out of bed by police a year ago and arrested on nothing but the say-so of a lying 17-year-old girl who cried rape.” After his eleven months in jail, Patrick had been allowed home on strict conditions on the eve of his three-week trial. At the trial, defence counsel Tom Percy said the girl's evidence was riddled with inconsistencies. On April 8, the newspaper published a follow up story headed, “My 11 months of hell” and a reply from the Police Commissioner claiming “The president of the Children's Court ... remanded Mr Waring in custody. His decision to remand him in custody was due to other concerns and issues raised by the prosecution in opposing bail, including the seriousness of the charge, threats allegedly made during the attack

and the strength of the prosecution case.”

The Waring case was also reported in *The Subiaco Post*, May 8, 2010, page 1, as “Rape foul-up exposed to the world”, reporting on a documentary to be televised on SBS on June 9, 2010, titled “Every Family’s Nightmare”. The documentary was made by movie-maker Michael Muntz and co-produced by Prospero Productions. See also a four-page story, “Lost Innocence”, in *The Sunday Times Magazine*, May 16, 2010, pages 8-11. **Comment: In Patrick Waring’s case, the 15-year-old boy was held in custody for eleven months until the day before his trial. In contrast, after a complaint of sexual assault was made against Kyle Horace on May 5, 2003, the 15-year-old boy was released into the community where he lived for the next 3 years and six months without restraining conditions and without sexually reoffending. The delay was entirely due to police staffing issues. During his years of freedom, Kyle had developed a steady relationship with a girl who was respected member of the community. On 2nd February 2007, a month before the sentencing, their baby daughter was born. If the police thought Kyle was a violent rapist and a threat to the community, why was he not held in custody? Was his case ever brought before the Children’s Court, as in the Waring case?**

At the time of sentencing in March 2007, Chief Justice Brian Martin ordered that Kyle’s sentence 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 [on November 23rd, 2006].” The Chief Justice was astounded. He asked, “So that’s the only time he’s been in custody? He wasn’t in custody? Arrested?”

4. “Teen rapist sentenced to 10 years in prison” headed a story in *The NT News* on May 16, 2007. The report by Phoebe Stewart continued: “A 15-year-old boy who assaulted eight women and raped another was sentenced to 10 years in the Supreme Court last Tuesday. The boy pleaded guilty to 11 crimes in the Supreme Court last Tuesday. Chief Justice Brian Martin said 10 years was a “very severe sentence for a child” but it was “as lenient” as he could be given”. As a result of the sexual assaults in August the previous year, the boy was given a non-parole period of five years. **Comment: The brief report does not say whether the 14 or 15-year-old boy was Aboriginal, but it can be assumed he was. Neither does the report mention any defence given for his actions, which clearly showed an undiagnosed mental condition. In the Northern Territory it appears to be standard practice to try juveniles in an adult court system, with little consideration of their background, ignoring the recommended in *The Anungu Guidelines* and other precedents mentioned in the opening paragraphs of this essay. It is not surprising then that in June 2018 all juveniles in detention in the Northern Territory were Aboriginal.**

5. On April 23, 2010, the ABC News reported that tensions were high in Alice Springs over Chief Justice Brian

Martin's sentencing of four young white men for the bashing-related manslaughter of a local Aboriginal man, Mr Ryder. Many Aboriginal people feel that the men should have received longer than non-parole terms ranging from 12 months to four years. Justice Martin was reported as saying the manslaughter of Ryder was on “the lower end of the scale of seriousness”. He sentenced one man to four years’ jail, suspended after 12 months, another to five years and six months with a non-parole period of three years and six months while three others were each sentenced to six years with a non-parole period of four years. Judge Martin agreed the attacks were racially motivated. **Comment: The Ryder case exposed the racial tensions in the Northern Territory, and for many, the racial bias of Chief Justice Brian Martin. The writer maintains that the Kyle Horace case was also an example of racial inequalities in the court system, with the complainant described as a “naïve” white girl and the accused portrayed as violent predator, even referring back to his school records as an 11-year-old. However, more importantly, the clash of cultures that led to misunderstandings played a big factor, not adequately considered.**

6: *The Northern Territory News* Saturday Extra, 1st August, 2009 published on two pages Chief Justice Martin’s sentencing remarks to a young Aboriginal man convicted of sexually abusing an Aboriginal female cousin in the same community for a period of two years, while she was between the ages of 11 and 13 and he was between 21 and 24 years of age. The man was sentenced to four years’ imprisonment, suspended after having served 18 months. In this case, not surprisingly there was no question of consent. The Chief Justice said, “In view of your acceptance of responsibility and your lack of prior offending, and also in view of the support you have from your partner, I assess your prospects of rehabilitation as positive ... but I also assess that you will need help when you are released from jail... I point out that if you had not been a relatively young person of prior good character, the sentence would have been longer... I have decided that the sentence should be suspended after you have served 18 months.” **Comment: In this case, Chief Justice Martin took into account the accused's “young” age, although he was 24 at the time. Kyle was 15 in 2003. Kyle also had the full support of a loving grandmother who attended the trial. Kyle was also in a supportive relationship with a girl of his age who was carrying his child at the time of the trial. The judge also noted the accused in the 2009 case “had been bashed in the head...You got into fights at school rather than study. You commenced smoking ganja at the age of 13. You commenced drinking alcohol at the age of 15.” In comparison, on 12th March, 2007, Chief Justice Martin 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 11 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’s a first time for everything ... I’m not going to be sat here and treated like a mushroom.” It seemed the whole span of Kyle’s 18 years was to be taken into account.

7. “Youth, 16, put on sex register” reported *The West Australian*, February 6, 2009, page 11. “A 16-year-old will be registered as a sex offender for the next seven years after a 'five-second' consensual encounter in a school toilet with a girl he thought was 14...Mr Baker asked for the youth to be referred to the juvenile justice team so the sex convictions would be scrapped.” However, the Perth Children's Court Magistrate said her hands were tied and she did not have the power to prevent the youth who was 15 at the time being put on the sex offender register. Classification as a sex offender was automatic. **Comment: In the case of a youthful sex offence conviction, being placed on the sex offender register can be a crippling punishment, as Kyle Horace has found. His persistence in maintaining his innocence is seen as a lack of remorse and in jail he refused to attend group sessions with child sex offenders, with whom he was unfairly grouped. The gap between the law and reality was further shown when the Chief justice emphasized during the trial that sex with a girl under 16 was an offence, while in Kyle’s circle promiscuous sex between teenagers was common.**

8. In a case reported in *The NT News* on January 9, 2018, headed “Violent rape results in 'inadequate' sentence”, Justice Jenny Blokland sentenced a man to seven years with a non-parole period of four years for the brutal rape of a woman in Katherine which occurred in the early 1990s. She said the sentence was based on sentencing practices at the time of the offence. The accused had multiple convictions for assaulting women in the years since the rape. According to news reports, the judge stated, “It is appreciated that if the offending took place today the sentence being imposed would be inadequate.” **Comment: In the case of Kyle Horace, his sentence would have been significantly less if it had been based on the time of his offence at when he was aged 15, more than three years before the trial which had been delayed by police bungling.**

9. *The West Australian* reported on April 13, 2018, “A sex predator who violently raped a teenage girl more than fifteen years ago was jailed for three years yesterday. Adam Prow was 19 when he targeted the 14-year-old ... in December 2002.” Advances in forensic technology had led to the conviction of Prow who had previously been jailed for other sex attacks in the area about the same time. **Comment: Similarly, the offender's age at the time, 15 years previously, and the time passed since the offence seem to have affected the short length of sentence, despite the repeat offences and lack of remorse.**

10. *The West Australian* reported on February 17, 2018, “A violent sex predator who dragged a woman [up to 40 metres] from a Bunbury oval into bushes more than a decade ago was jailed for more than six years yesterday

over the 'heinous crime'." The newspaper reported that the 55-year-old-man was charged after a cold case review and will be eligible for parole after serving four years and four months. **Comment: The offender was over 40 years of age and his offence was exceedingly violent; however, like many similar cases, his sentence was less than that of a 15-year-old Aboriginal boy whose life circumstances were not considered.**

11. On June 8, 2018, *The West Australian* reported "a [17-year-old] teenager is due to face Kalgoorlie Children's Court ... over the alleged attack on a woman in her 70s ... He has been charged with aggravated sexual penetration, attempted sexual penetration, aggravated burglary, aggravated armed robbery and aggravated unlawful wounding." **Comment: The 17-year-old boy charged with a very violent rape appeared in the Children's Court. Kyle Horace was not given that opportunity, although he was 15 at the time he was charged. His friends told him he should have pleaded guilty in 2003 while he was 15. When police took Kyle into custody for sexual assault while he was waiting at a bus stop after leaving the two girls, Kyle answered, puzzled, "What sex assault?"**

12. On June 9, 2018, *The West Australian* reported on a case where a priest was cleared of allegations that he repeatedly engaged in sexual conduct with a young girl in 2011. Defence lawyer Linda Black said the girl changed her story between the time she spoke to police in 2015 and when she gave evidence in court earlier in 2018. "When people are telling the truth, no matter how many times they tell the story, the story doesn't change," the defence said. After deliberating for three hours, the jury found the priest not guilty of the offence and two other charges. **Comment: The jury appeared to believe the defence that if the complainant is telling the truth, their story doesn't change. In Kyle's case, all witnesses contradicted the complainant's version of events and her statement changed from the time of the complaint to the committal hearing and again after counselling before the trial three and a half years after the charges. Note: In other cases, statements made after counselling have been dismissed as unreliable and being unduly influenced. The girl in Kyle's case "remembered things" after counselling in the intervening years prior to the trial. These remembered things were admitted as evidence, such as "remembering" Kyle saying "This will be our little secret" which sounds like a statement from a counsellor's handbook.**

13. *The NT News* reported on June 7, 2018, Justice Graham sentenced a 30-year-old man to six years and nine months for the repeated rape of a girl aged between 10 and 11 years. The newspaper noted, "The court heard the rapes were compounded by the fact LW had been diagnosed with syphilis..." He would be eligible for parole after four years and nine months. Justice Graham said he accepted that LM "poses a risk to the community." **Comment: Again the sentence for a repeated rape of a 10-year-old child contrasts with the severity of a seven-year sentence given to an Aboriginal boy who was 15 at the time of a clumsy sexual encounter**

between two teenagers.

14. In the trial of a man accused of the anal rape of a woman, *The NT News* reported on June 5, 2018, “[Defence Lawyer] John Lawrence said the situation was a 'perfect recipe for confusion, misunderstanding, mistaken beliefs. Part of life as we interact with each other daily involves us saying things and doing things based on what we understand the other person is thinking or believing, that's how we interact, we're social animals, and that's easy sometimes, sometimes it's hard and sometimes we get it wrong.” **Comment: The racial dimension in Kyle's case at the very least led to “misunderstandings and mistaken beliefs” in a culture clash which was not considered in the trial. The contrasting way of life and sexual mores of a “coloured” street-wise Aboriginal boy in Darwin coming from a broken and alcoholic home and a “naive” white girl from an airforce service family was not considered, as recommended in precedents cited above.**

15. In *The Weekend Australian*, May 12-13, 2018, Angela Shanahan discusses the 2015 Luke Lazarus rape case, also aired on an ABC Four Corners program the same week. Shanahan writes: “[The case] has a lot of people talking about the subject of explicit consent in Australian law ... Originally Lazarus was found guilty and spent a year in jail. He appealed and a judge-only retrial was ordered in which he was found not guilty [of the rape of Ms Saxon Mullins].” Shanahan continues: “...the problem in this case was not whether the events the girl says happened took place. They certainly did. The problem was whether the young man realised the girl did not consent... The judge who reviewed the case agreed that Lazarus had reason to believe she did consent, no matter how she felt about it 'in her mind'.”

As Shanahan points out, “...expecting an explicit yes is too simplistic because it is too rational. It is not feasible in the real world, especially with young people, who are sexually exuberant... [the ability of young men to follow signals] can be almost non-existent in the throes of sexual passion. It is something they learn as they mature. Their behaviour is largely dependent to large degree on what signals they actually get. What makes all this worse for the legal profession is that modern mores basically allow pretty much anything, whenever, as the judge in Lazarus's retrial found, even though she tried to ignore it. Unfortunately, sex in the world of the young is no longer wrapped up in the frisson of romance because modern sexual mores won't allow that. Consent is not the only problem young people have to face, they have to face a world reduced to a sterile and loveless performance.” **Comment: When Kyle was picked up by police at the Anula bus stop the same night and told he was being taken in for sexual assault, he replied, “What sexual assault?” In his world of consensual promiscuity and “gang bangs” nothing unusual had occurred that day. The circumstances support his claim that what occurred was consensual.**

The forensic evidence did not support the charges of three counts of penetration for which he was

convicted,

16. In *The Weekend Australian*, December 24-25, 2016, page 18, Gerard Henderson reported on the December 7th sentencing of an 18-year-old who had pleaded guilty to planning to detonate two pressure-cooker bombs, along with seven steel pipe explosive in Melbourne. The offence, which carried a maximum penalty of life imprisonment, was considered by Justice Lasry “at the apex” of seriousness under commonwealth law. At the time of the sentence, the accused had already served 579 days pre-sentence detention in a youth justice centre. Henderson reported that Justice Lex Lasry recommended authorities avoid holding MHK in an adult prison. Henderson continues, “Sure, at the time of his crime, MHK was under 18 and, consequently, a juvenile ... However, it is not clear that a sentence of 5¼ years minimum, all of which may be served in the juvenile detention system, is much of a deterrent.” **Comment: A boy preparing to trigger a series of bombs in a city street was three years older than Kyle when Kyle was charged at 15 years of age, and yet the proven terrorist received a lesser sentence to be served in a juvenile detention system. Incidentally, in Kyle's case, to the judge's surprise at no time after the initial interview was Kyle detained until after the trial more than three years later. In other words, an alleged dangerous sex offender was allowed to live within the Darwin community without restriction until he was sentenced, and without reoffending. In the same period starting his own family, cruelly broken up by his seven-year sentence.**

Conclusion

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. Kyle Horace has done his time, but his future is limited by his unjust conviction, the psychological scars of his seven-year incarceration and his registration as a sex offender. The writer is a family friend, has visited Kyle in prison between 2006 and 2013 and remains in contact. Without hesitation I support Kyle in his future aspirations as a proud and innocent Aboriginal man.

Dr Bill Day

PO Box 425

MAYLANDS WA 6931

Mobile 0472 768 654