LEGAL HISTORY

The Testimony of Aborgines in Law Courts in the Northern Territory *by George Dickenson from his book Kadaitcha, extracted in South Pacific, Sept-Oct 1958*

The customary warning addressed to an Aboriginal witness by the Clerk of the Court in proceedings before a court in the Northern Territory is as follows: "You talk true fella what you bin see longa your own eye."

The *Evidence Ordinance* (No 2) 1939, provides that "in all proceedings in the administration of Justice, whether of a civil or a criminal nature, in which the testimony of any Aborigine is required, the court having jurisdiction in the matter to which the testimony relates, may receive the testimony without administering any form of oath, and without any formality, except that the court shall, before receiving the testimony, cause it to be explained to the Aborigine that he is required to tell what he knows about the matter to which his testimony is related."

The court before which it is offered may receive it by means of the interpretation of any other Aborigine, without administering to him any oath duly to interpret the testimony.

The same Ordinance (s9A(5)) directs that the effect of any such unsworn testimony shall be according to the weight and credibility which, in the opinion of the court or of the jury under the direction of the court (as the tribunal may be before which such evidence is offered) ought to be attached thereto as evidence given without the sanction of an oath.

The value of such evidence was discussed by the Judge of the Northern Territory, Mr Justice Kriewaldt, in the case of R v Byers in 1953. In that case the Judge said, among other things, that after reflecting, at some length on the native evidence, he found himself "in this state of mind that I could not be satisfied beyond reasonable doubt on the evidence alone that any illegal branding of catttle had taken place at Coolibah Station although that evidence suffices to persuade me that it was very probably true that this had been the case. On the native evidence alone, beyond reasonable doubt, that the defendant had been present at any illegal branding, it is sufficient to make me think quite likely that the defendant was present. The only part of the native evidence which I would be inclined to reject is that the branding took place at the Coolibah homestead yard. No circumstances were disclosed which would render it likely that the VRD cattle would have been branded at that yard and not at some yard nearer to where they were mustered. In effect, therefore, the native evidence regarded from the aspect of being evidence of similar acts only, would not persuade me beyond reasonable doubt that a defence of mistake or accident, if that defence had been raised by the accused, was available to him, but, in fact, no such defence was raised. In thus expressing the effect on my mind of the native evidence I have not overlooked the warning I have mentioned regarding the evidence of accomplices. In the circumstances of this case, and to the extent that I am discharging the functions of a jury, I have, despite that warning, accepted the evidence of the native witnesses but only to the extent that I have indicated."

The question of the weight that a jury should give to the unsworn evidence of Aborigines was considered by Mr Justice Kriewaldt in the case of R v Tiger and Captain, 1953.

The Judge in his summing up to the Jury in this case said: "...Gentlemen, when you are considering the weight that you should give to the evidence of these four young men, there are two things to which want to draw your attention. Originally no one was allowed to give evidence unless he was sworn on the Bible -- to be more exact, unless he was sworn on the Four Gospels, and meant a Jew, for instance, or a Chimaman could not give evidence at all in a court of law. Certainly no Aborigine in the early states of the Commonwealth was allowed to give evidence because he could not take the oath. Well, the law was altered long ago, long before there was a Northern Territory, and since then an Aborigine is allowed to give evidence in a court of law without being sworn.

"Because he is not sworn it is for the jury to say how much weight his evidence is to have. If you thought, having watched them in the witness box, that these four natives were arrant liars and that their word could not be relied upon, then you should reject their evidence. But if you think because they were sworn on the bible they have told a pack of lies then you should reject their evidence. On the other hand, if you think that today, in this court room, they told you what in fact happened then you are entitled to act upon their evidence and you should do so. It s for you to say what value their evidence has. I do point out, however, that their evidence is not on oath and for that reaon alone, if you think it is proper to do so, you may place less reliance on their evidence than if it had been given on oath..."

The evidence given by native witnesses varies. In Papua New Guinea I have noticed a tendency to accept Counsel's questions as a statement of fact. In the Northern Territory the Aboriginal witness appears to reduce the quantity of evidence, and there is sometimes a variation between his evidence in the Supreme Court and his evidence at the preliminary hearing before the lower court. This is accounted for by the system of investigation.

The Aboriginal witness makes his first statement, usually to a police officer. He is then examined, cross-examined and re-examined in the magistrate's court. Then follows the trial in the Supreme Court, with further exami-

nation, cross-examination and re-examination. At this stage the Aboriginal witness believes that his story should now be well known to the whiteman and, therefore, an abridgement is sufficient.

Aboriginal witnesses are of various types. One of the best Aboriginal witnesses came from Yirkalla (sic). He was a mission-taught Aborigine and his name was Dundawoi.

At one stage of his examination the Judge asked him "You tell me what happened?"

Dundawoi: "After that Mungiri bin begin with me and Dawurbu. After that, Mungiri and Urubulu fight."

Judge: "How they fight?"

Dundwoi: "With woomera. Urubulu dropped the woomera and picked up a tomahawk axe. All right; this woomera he drop him. Then he drop axe. After that, he killim (hit) with fish spear. Then he drop axe. After that, he killim (hit) Mugiri in the left arm. It fall out. After that, he go this way behind him and killim (hit) on the back of the right side. Him not fall out. Mungiri pullem out himself. After that, I bin chase Urubulu. I bin sorry with Mungiri. I hit him with my finger (hand) in the ribs (chest) and face. After that, Mungiri pulled out the fish spear. Mungiri went behind Urubulu and killim (hit) right on the back. He pull him out and drop the spear. He run away and stay round the corner."

Judge: "That Urubulu died?"

Dundawoi: "Yes, he stay down that was finish."

The Australian Aborigine has not always made the best contacts in his association with white men, and his character as a witness, I feel, depends on this association. The mission boy and the Aborigine who has worked on the big cattle stations are not likely to give their evidence in the same way, and one can only weight their evidence in the light of a particular background.

The question of voluntariness of a statement made by an Aborigine arises in the court of the Northern Territory with great frequency. The usual police warning runs in this form of pidgin: "I want you to savvy that big trouble might come up alonga you about that old man Tiger. You bin talk that you bin finish him. That old man finish now. Suppose um you talk along me all that trouble. I bin put him alldown paper talk and I bin talk big boss alonga Darwin (ie the Judge) longa that court all about that trouble. Suppose em you don't want to talk. All right, you no more got to talk if you don't want to. You savvy that?"

Policeman: "He said 'Savvy'."

Policeman: "I said: 'You want to talk along me about that trouble.' He said: 'I bin tellim you true, fella. I said: 'You savvy you don't have to tellin me if you don't want to.' He said: 'I savvy'."

Mr Justice Kriewaldt has said with regard to confessional statements made by native Aborigines: "...In my opinion, where the only objection taken to the statements is that the accused is a native and that his statement was obtained without an official of the Welfare Branch having been present, the statement should be admitted in evidence as a voluntary statement. There is no rule of either substantive or adjective law which excludes as evidence confessional statements made by an Aboriginal in the absence of an official of the Welfare Branch. In the absence of any suggestion that the statement was made otherwise than in the exercise of a free choice to speak or remain silent, the statement should prima facie be admitted.

"It thus becomes necessary to decide whether as a matter of discretion I should exclude the statement for the reason advanced by counsel. In some circumstances the absence of an official of the Welfare Branch might be sufficient reason. If, for example, a native had little or no contact with white people, it might well be thought that his statement to a police officer in answer to questions was not voluntary but was made in the belief that such questions must be answered..."

The Aborigine, unlike the European, does not carry a burden of hopes and fears and his evidence is, on occasions, factual and detached. The effort of the average European to embellish, explain and colour his evidence occupies the attention of courts of Justice for many weary hours.

The evidence of Aborigine Ben Jubulla in R v Willie, Activity and Peter before Mr Justice Kriewaldt in 1955 at Alice Springs Supreme Court is a very good example of a logical statement by an Aboriginal witness. Aborigine Ben Jubulla gave evidence of tracking a kadaitcha party:

Mr Odlum (Crown Prosecutor): "You remember that time you went to Mulga Hole Creek with Constable Knight?"

Ben Jubulla: "Yes, I remember that creek. Go in there Thursday night. Went to Mulga Creek and see that kadaitcha track. I track em along find kadaitcha feathers. Go through snaky gum all along, right along up the hill, all along by the hill, on top of the hill, all along by the hill, on top of the hill, follow along. Find this blood on top of the hill, follow along blood. Find blood again. See this Activity track. Follow along see Left Hand Jack track with blood. Follow alone see Peter track. Go along across Amelia Creek, down at Mulgo Hole, down the hill now. Down the big hill, follow along top of the hill. Follow along the hill, track all along the hill, down the hill follow along. Find the blood. Have to come back. Go along that Amelia Creek again. Friday morning went down again. They take their kadaitcha boot off. No bin see track then."

However, most lawyers agree as to the ineffectiveness of some Aboriginal evidence. One of the best examples of this ineffectiveness is to be found in the case of R v Tuckiar, before Mr Justice Wells in 1934 at Darwin.

During the trial in the Supreme Court the Judge invited anyone present in court to give evidence and the Rev Mr Dyer, a missionary, gave evidence in which he said that he had had a conference at Woodah Island with one Parraner and all the elders of the tribe. Tuckiar was present. "Parraner told us a different story from the two told here in court. I have that story but I do not know what I can do about it."

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