R v Kina – A Miscarriage of Justice: The Importance of Leading Probative Evidence at Trial

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I INTRODUCTION

R v Kina[1] was a 1993 Queensland Court of Appeal ('QCA') decision that quashed the conviction of Robyn Bella Kina ('Robyn') for murder of her abusive de facto partner Anthony David Black ('Tony'). Robyn had endured violent beatings, various physical abuse and years of anal rape by Tony. In 1988 Robyn was sentenced to life imprisonment with hard labour. Her conviction was quashed after five years in jail, because of 'exceptional difficulties of communication between her legal representatives and the appellant'.[2] These 'exceptional difficulties' subsisted throughout the preparation for trial, and the trial itself. These 'exceptional difficulties' of communication between Robyn, an Indigenous woman, and her legal representatives prevented Robyn from testifying at her short half day murder trial. Available affidavits and evidence in support of the defence of provocation were ignored or not relied on. Robyn's statement to her own legal counsel, documenting her history of abuse at the hands of Tony, was overlooked by the same counsel and not admitted into the brief of evidence at her trial.

The 1993 QCA case was a referral of the whole case by the Attorney-General under the *Criminal Code Act 1899* (Qld) ('*the code*') s 672A. It reads like a Greek tragedy. There appears little judgement passed on the incompetence of Robyn's legal representation, with focus instead on the miscarriage due to Robyn's 'unusual and difficult circumstances'.[3] This author asserts the circumstances were not unusual, and only made difficult by Robyn's own legal representatives who missed and ignored multiple opportunities to present evidence probative of the defence of provocation. The legal system swirling around this perpetually abused Indigenous woman failed so manifestly that the miscarriage of justice is still referred outside of Australia 30 years later. This essay revisits the case looking at the evidential aspects that could have been raised at the trial. At the appeal new evidence was treated as fresh evidence, not new evidence that was reasonably available at the time of the trial. This essay also provides a keyhole peek at the legal system's interaction with Indigenous Australians, before revealing the sad fact that 30 years after Robyn's conviction was quashed, cases like *R v Kina* still happen in Australia today.

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[1] *R v Kina* [1993] QCA 480 ('*Kina*').
[2] Ibid page 40.
[3] Ibid page 39.

II DISCUSSION AND CRITICAL ANALYSIS:

A *Evidence that Convicted*

Robyn's legal representatives proceeded to trial on the simplest of bases, and one which hung upon a single golden thread: whether the Crown could satisfy its onus as to the requisite intent.[4] Nothing else. This was despite the fact that the evidence of intent heavily favoured the prosecution case. Together with a dead body, a previous arrest for stabbing her sister Agnes,[5] and the admission of stabbing by Robyn,[6] the prosecution's evidence included witnesses that corroborated Robyn's statement 'I am going to stab you, you bastard'.[7] This statement of intention is an exception to the hearsay rule, and so was readily admissible.[8] Additionally, even if not an exception to hearsay, another view is that

> [I]t is original evidence. It is because the making of the statement has independent evidentiary value in proving the author's intentions, those intentions being a fact in issue or a fact relevant to a fact in issue, that the witness's testimony does not infringe the hearsay rule. It is original evidence rather than an exception to the hearsay rule.[9]

The legal representatives decided themselves against Robyn being put on the stand to give evidence. The legal representatives did not encourage Robyn to give evidence[10], and did not dissuade her from not giving evidence,[11] because they thought it would work against her if she went on the stand.[12]. The poverty of this approach was made clear by McPherson J.A when he said that Robyn giving evidence 'might possibly have made her case better, but could scarcely have made it worse'.[13] No explanations were given by Robyn's legal team at the time as to why they did not call or give evidence. They appear to have simply formed the view based on these 'exceptional difficulties in communication'.[14] So the first question is: What evidence could the legal team have adduced that would have derailed the steam train heading towards a miscarriage of justice?

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[4] *Kina* pages 28-29; *Woolmington v Director of Public Prosecutions* [1935] AC 162
[5] *Kina* page 11-12.
[6] *Kina* page 50.
[7] *Kina* pages 43-44.
[8] *Kamleh v R* (2005) 213 ALR 97, which upheld *Walton v The Queen* (1989) 166 CLR 283
[9] *Walton v R* (1989) 166 CLR 283 at 288-289 (Mason CJ).
[10] *Kina* page 27.
[11] *Kina* page 28 at [26].
[12] *Kina* page 34.
[13] *Kina* page 46 (McPherson J.A).
[14] Kina page 40.

B *Fresh and New Evidence, Probative Evidence, Incompetent Representation*

The evidence indicating a miscarriage was 'inescapable',[15] and could squarely have supported s 304 of *the code* defence of provocation, or at least diminished the prosecution's reliance on intent. If Robyn had taken the stand crucial evidence of Tony's threat to anally rape Robyn's niece Enid[16] would have shed light on her "heat of passion caused by sudden provocation"[17] at the time of the stabbing, and had significant probative[18] value towards a defence of provocation.

Then there is other evidence such as Robyn's statement taken by her legal representative, but overlooked by the same legal representative and not included in the brief of evidence at trial.[19] There was a report by Dr Orth[20] who examined Robyn immediately after her arrest documenting multiple physical injuries consistent with domestic violence. Robyn had endured a long violent history at the hands of Tony, including persistent anal rape which she found shameful and disgusting. Dr Orth's report was not sought by Robyn's legal team until months after a failed appeal against the conviction in November 1988.[21] But wait, there's more.

Mr David Berry, a social worker, made comprehensive reports at the request of Robyn. David gradually learned of her predicament after spending many hours with Robyn who was in jail awaiting trial. He submitted these reports to the Public Defender's Office, and made numerous attempts to follow up but never received a reply. Robyn later told David that her legal team 'wished that he would not interfere with proceedings'.[22] There is also the fact that Robyn's legal team did not cross examine many deponents.[23] Meanwhile the prosecution submitted that Robyn's evidence should not be accepted because of the differing accounts and that the evidence 'became more favourable to her cause'.[24]

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[15] *Kina* page 49 (The President and Davies J.A).
[16] *Kina* pages 16, 22, 32-36 with the court further noting at page 18 that there was also completely independent evidence available from others to confirm this threat.
[17] *Criminal Code Act 1899* (Qld) s 304(1).
[18] Australian Law Reform Commission, '*The definition of substantial probative value*' (webpage 17 August 2010) <https://www.alrc.gov.au/publication/uniform-evidence-law-alrc-report-102/12-the-credibility-rule-and-its-exceptions/the-definition-of-substantial-probative-value/>.
[19] *Kina* page 27.
[20] *Taylor v R* (1978) 22 ALR 599 with regards how expert opinion is to be treated by a jury. Note the court in *Kina* chose to exclude evidence from Ms C.A. Miller based on a lack of investigation of her qualifications, and relevance to the case: *Kina* page 36.
[21] *Kina* page 18.
[22] *Kina* page 31.
[23] *Kina* page 37.
[24] *Kina* page 40.

At the appeal the QCA was put in the position of accepting all this evidence as fresh evidence. McPherson J.A stated 'it must be conceded the evidence was available at the trial, and in that sense the evidence was not "fresh"'.[25] New evidence is different to fresh evidence. Fresh evidence did not exist at the time of the trial, or could not have been found with reasonable diligence and has surfaced at a later date. The evidence that brought about the quashing of Robyn's conviction, and subsequent pardon, was actually new evidence that was available at the time of Robyn's trial and could have been discovered at the time with reasonable diligence.[26] The test is whether a jury acting reasonably, with that evidence, would have acquitted.[27] The summary of the appellant and QCA judges is that regardless of being fresh evidence, or new evidence, the evidence was of such probative value that the conviction be quashed.[28]

Before discussing the issue of 'exceptional communication difficulties' this author would like to discuss the judge's role in ensuring a fair trial. *R v Apostilides*[29] is authority that it is possible for a judge, in exceptional circumstances, to call witnesses. In that case, two witnesses spent hours with a woman and a man until just minutes before the woman was raped by the man at her home. The witnesses were not called by the prosecution. It was held by the High Court when dismissing leave to appeal that a judge cannot compel the Crown to call witnesses, but this does not prevent the judge from calling witnesses.[30]

One wonders why the judge did not exercise this discretion for Robyn. *Apostilides* had been decided only months before Robyn's case, and this author offers that a Queensland lower court should have been minded, in the circumstances, to exercise the discretion. Before the trial judge was an Indigenous woman being fast tracked to imprisonment for life with hard labour after just a half day trial. Did the judge compound already serious fetters on exculpatory evidence available but not adduced? Robyn was being tried for a serious offence, and deserved competent representation. In *Nudd v R* [2006] HCA 9 issues of serious incompetence were discussed. While it is clear that an accused is not to be afforded a Rolls Royce defence,[31] neither should they receive an incompetent one. It is interesting for

[25] *Kina* page 53.
[26] *Ratten v R* (1974) 131 CLR 510, 516-517.
[27] *Gallagher v R* (1986) 160 CLR 392, 399, 402, 42; *Kina* page 43 (McPherson J.A).
[28] *Kina* page 5 as plead by the petitioner; page 53 (McPherson J.A); page 42 (The President and Davies J.A).
[29] *R v Apostilides* (1984) 154 CLR 563.
[30] Ibid at 570.
[31] *Nudd v R* [2006] HCA 9; Frances Regan, 'Rolls Royce or Run Down 1970s Kingswood?' (1997) 22, 5 *Alternative Law Journal* 225 <http://www5.austlii.edu.au/au/journals/AltLawJl/1997/91.pdf>.

this author that s *668E* of *the code*[32] was always available to any competent authority to overturn this decision, instead of waiting five years for the petitioner to stumble across a willing ear. Where was a review of this decision? Why did this short, sharp trial not raise any red flags?

C *Exceptional Communication Difficulties Leading to Miscarriage of Justice.*

That Robyn suffered the disability of 'exceptional difficulties of communication between her legal representatives and the appellant'[33] is obvious. But why were there such difficulties to communicate with a raped and abused Aboriginal woman? This case was heard in 1988. The principles underlying the Anunga Rules[34] were laid down by Forster J in 1975 as guidance for police officers. These were not out of reach or beyond comprehension to a couple of lawyers and a judge in Queensland.[35] On any reading of the facts Robyn's legal representation failed to engage with Robyn, and were woefully unresponsive to opportunities to adduce evidence probative of the defence of provocation, and lack of intent.

What is interesting about the appeal judgement is the observation of Robyn's 'complex factors'[36] which presented these exceptional difficulties to communication with her legal representatives. At page 40 of the judgement the three complex identified characteristics are listed: Robyn's Aboriginality; the battered woman syndrome; and the shameful (to her) nature of the persistent violence and anal sex. This author questions whether those factors are really complex factors, as to be something so unique that lawyer – client communication is so fatally fettered.

By way of argument this author notes the bar has been set very high for similar fact evidence before similar facts are held admissible.[37] Similar facts must be truly unique.[38] In the 1995 High Court decision of *Phillips v R* a teenage boy who violently raped five teenage girls with a very similar pattern of circumstances was observed to exhibit an 'entirely unremarkable' set of circumstances.[39] Yet here a raped and beaten Aboriginal woman presents her legal

[32] *Criminal Code Act 1899* (Qld) ('*the code*') s 668E Determination of appeal in ordinary cases.
[33] See above n 2.
[34] *R v Anunga* (1974) 11 ALR 412, 414-415.
[35] See above n 33. The rules for interrogating an accused include using an interpreter for complete and mutual understanding; the presence of a 'prisoner's friend' in whom the accused has confidence; and formulating questions that are not in the nature of cross examination, with a focus on manner and tone of voice used.
[36] *Kina* page 40.
[37] *Phillips v The Queen* [2006] HCA 4 [56]-[58].
[38] *Phillips v The Queen* [2006] HCA 4 which confirmed *Pfennig v R* (1995) 127 ALR 99.
[39] See above n 33.

representatives with such a disability of 'complex factors' that 'exceptional difficulties' in communication are insurmountable. How can a teenage boy's almost methodical 16 month program of rape be unremarkable circumstances, and yet a perpetually beaten and raped Indigenous woman be exceptional circumstances.

Robyn's legal team were woefully inadequate in their ability to communicate and represent, and with disastrous results. Yet, they barely received a puff of admonishment. It seems the QCA reasoning focused away from the legal representation, and towards finding an exceptional foundation about Robyn upon which to quash the conviction. However, these exceptional difficulties of communication linger within the Australian Court system.

D *Communication difficulties a Subsisting Problem*

The problem of countering subsisting communication problems between an Indigenous person and the legal system remains of paramount importance. The wider issue of abuse by intimate partners is never far from the news,[40] and a core issue relevant to this essay was summarised by a New Zealand Law Commission report in 2016. The report said '[p]ut simply, if the judge or the jury does not understand the social context of the homicide and the realities of the defendant's situation, the actions of the defendant cannot be accurately assessed'.[41] (Shortly after this statement *R v Kina* is footnoted).[42] While there have been attempts at improving cultural competence within the judiciary,[43] problems still remain.

One recent example is that of Indigenous man Gene Gibson who in 2017 had his 2014 conviction[44] quashed[45] after being wrongfully convicted of murder. Gene received a $1.3m ex-gratia payment.[46] The primary reason his conviction was quashed: communication

[40] ABC News (Australia), '*Ladies who stab: Are we failing abused women who kill*?' (webpage 29 September 2019) <https://mobile.abc.net.au/news/2019-09-28/ladies-who-stab-abused-woman-who-kill/11553582>; ABC News (Australia), '*Australia is turning a blind eye to violence against Indigenous women, but we will not stay silent — our lives matter*' (webpage 6 October 2019) <https://www.abc.net.au/news/2019-10-06/jody-gore-release-domestic-violence-indigenous-aboriginal-women/11570042>.
[41] New Zealand Law Commission, '*Understanding Family Violence: Reforming the Criminal Law relating to Homicide*' (Report 139, May 2016) 36 [2.54]
[42] New Zealand Law Commission, '*Understanding Family Violence: Reforming the Criminal Law relating to Homicide*' (Report 139, May 2016) 36 footnote 169.
[43] Cavanagh, V and Marchetti, E, (2016) 'Judicial indigenous cross-cultural training: What is available, how good is it and can it be improved?' 19(2) *Australian Indigenous Law Review* 45.
[44] *State of Western Australia v Gibson* [2014] WASC 240.
[45] *Gibson* v *State of Western Australia v* [2017] WASCA 141.
[46] ABC News, '*Gene Gibson gets $1.3m payment after wrongful conviction over Josh Warneke's Broome death*' (webpage 18 April 2018) <https://www.abc.net.au/news/2018-04-18/gene-gibson-gets-payment-after-josh-warneke-wrongful-conviction/9671792>.

issues. Gene did not understand English very well, and neither did he understand the legal processes around him. He gave short 'yes' and 'no' to answers, and nods of the head.[47] Note here the phenomenon known as gratuitous concurrence, which relevantly refers to an Aboriginal tendency to say yes to the proposition of a question regardless of whether the question is understood.[48] While the Anunga rules were considered in the 2014 case, which held his confessions were inadmissible, it did not prevent Mr Gibson languishing in custody awaiting his trial. This author observes some of the Anunga Rules now appear quite dated, and some have been subsumed by legislation.[49] However, the principles and thrust of the Anunga Rules should fundamentally remain as important as ever.

III CONCLUSION

Whatever the landscape, wherever the state based jurisdiction in Australia, the fact that mere communication difficulties continue to see Indigenous Australians locked up, and prevented from adducing evidence potentially probative of their innocence at trial is a national shame. Ongoing cultural competence training for the judiciary, practicing lawyers[50] and within law school curricula[51] appears an ongoing imperative. Determining why this issue stubbornly persists for over 200 years is a question for another essay.

END.

2190 words

[47] *Gibson* v *State of Western Australia v* [2017] WASCA 141 [128] and generally through the judgement.
[48] Dr Diana Eades, 'Judicial understandings of Aboriginality and language use' (2016) 12(4) *Judicial Review* 471, 476.
[49] *Police Powers and Responsibilities Act* 2000 s 420 'Questioning of Aboriginal people and Torres Strait Islanders'.
[50] Cavanagh, V and Marchetti, E, (2016) 'Judicial indigenous cross-cultural training: What is available, how good is it and can it be improved?' 19(2) *Australian Indigenous Law Review* 45.
[51] Ibid 46.