SOUTH AUSTRALIA

REPORT

OF THE

Royal Commission in regard to Rupert Max Stuart

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REPORT OF THE ROYAL COMMISSION IN REGARD TO RUPERT MAX STUART

To His Excellency Air Vice-Marshal Sir Robert Allingham George, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Knight Commander of the Royal Victorian Order, Knight Commander of the Most Excellent Order of the British Empire, Companion of the Most Honourable Order of the Bath, and upon whom has been conferred the decoration of the Military Cross, Governor in and over the State of South Australia and its Dependencies in the Commonwealth of Australia.

MAY IT PLEASE YOUR EXCELLENCY.

By a Commission under Your Excellency's hand dated 30th July, 1959, we were appointed a Royal Commission to enquire into and report to Executive Council upon:—

(1) The facts purporting to be disclosed in certain statutory declarations purporting to be made by Norman George Gieseman, Edna Gieseman and Betty Hopes all of Burpengarry in the State of Queensland, relative to the movements, actions and intentions of Rupert Max Stuart now a prisoner in Her Majesty's Gaol at Adelaide.

(2) The movements of the said Rupert Max Stuart during Saturday, the 20th day of December, 1958.

(3) The reasons why the said statements were not made or furnished to the Supreme Court of South Australia or to an appropriate authority before the dates when they were respectively made and furnished.

(4) The circumstances in which the said declarations were obtained and made.

1. We opened our sittings at Adelaide on the 10th August, 1959. Mr. J. F. Brazel, Q.C., and Mr. C. J. Legoe appeared as counsel to assist the Commission. Mr. J. R. Kearnan with Mr. E. B. Scarfe appeared for the Attorney-General and Mr. C. Villeneuve Smith with Miss H. Devaney appeared as counsel for Rupert Max Stuart. Mr. Smith informed the Commission that he appeared for Stuart, subject to an application being made, at a later stage, for Mr. J. W. Shand, Q.C. (of the New South Wales bar) to appear as leading counsel for Stuart. He also stated that (subject to Mr. Shand's overall conduct of the case) his instructions were to intimate that Stuart desired to give evidence through an interpreter.

2. On the 17th August, 1959, Mr. J. W. Shand, Q.C., made application for leave to appear as counsel for Rupert Max Stuart. It appeared to us that the right of audience, contemplated by section 13 of the Royal Commissions Act 1917, is limited to practitioners of the Supreme Court of South Australia. But, holding that some discretion must be reserved to us in this matter, we accepted Mr. Shand's appearance in order that he might assist us in our enquiry into the truth of the matters referred to us. Also on the 17th August, 1959, Mr. R. R. St.C. Chamberlain, Q.C., appeared as leading counsel for the Attorney-General.

3. The examination of witnesses commenced on the 17th August, 1959, and continued until the 20th August, 1959.

4. During the afternoon of 20th August, 1959, Mr. Shand, Q.C., claimed that the Chairman of the Commission had stopped his cross-examination of a witness, Alexander Adam Phin, and asked for an adjournment until the following day for the purpose of considering his position. We granted the adjournment asked for by Mr. Shand, but he was informed that he was at liberty to continue his cross-examination of the witness, and that we should sit on as long as it suited him.

5. When the sitting commenced on 21st August, 1959, Mr. Shand, Q.C., read the following statement:—

> "My instructing solicitors and myself consider after yesterday that we are not being given, nor will be given, a thorough investigation in this matter. We consider that our continued association with this Commission will in no way help Stuart and will in fact handicap him. We think the particulars (*sic*) have established that this Commission is unable properly to consider the problems before it and we therefore withdraw."

He and his juniors then withdrew from the Commission.

In our view there was no valid reason for this action. All that need be said about the reasons given for it is that, throughout the hearing up to that time, we had given Mr. Shand, Q.C., a full and unrestricted opportunity to cross-examine each witness brought before the Commission, and that he had no ground for believing that there would not be a thorough investigation of the matter by the Commission. As the withdrawal of counsel left Stuart without representation, we adjourned the proceedings with a view to some suitable arrangement being made for counsel to represent him.

6. Shortly after this, the Government of South Australia intimated that it would be prepared to provide the necessary fees for the employment of counsel but the attempt to provide for Stuart's representation proved abortive for the reason that, acting upon the advice of his solicitors, he declined to appoint new counsel.

7. On the 31st August, 1959, when we sat again we were informed by Stuart's solicitor (Mr. J. D. O'Sullivan) that Stuart did not wish to be represented further by counsel at the Commission nor did he wish to attend to give evidence or to proffer any witnesses. At this sitting our attention was drawn to notice of a motion given in Parliament, which referred to our Commission, and on that account we deemed it desirable to adjourn our sittings.

8. We again sat on the 4th September, 1959, when we requested Mr. O'Sullivan, as Stuart's solicitor, to obtain specific instructions from his client and to inform us whether Stuart desired to be present or to employ anyone to watch the proceedings on his behalf. We resumed the taking of evidence on this date.

9. On the 7th September, 1959, Mr. O'Sullivan handed to us a statement signed by Stuart in which he informed us that, following upon advice received from his counsel, Mr. J. W. Shand, Q.C., he did not propose to be represented before us or to give evidence himself, call witnesses, be present at the proceedings or in any other way be associated with the Commission.

10. We therefore continued our proceedings without representation on behalf of Stuart and completed the hearing of evidence then available to us on the 8th September, 1959.

11. On the 9th September, 1959, Mr. Brazel, Q.C., informed us that he had received a communication on the previous evening, that Mr. Shand, Q.C., had advised Stuart, to give evidence without the assistance of counsel, but there had been a further change in the position that morning, and it was possible that new solicitors might be instructed on behalf of Stuart. In these circumstances we deemed it advisable to adjourn our proceedings until the 11th September, 1959.

12. When we resumed on that day, Mr. C. Villeneuve Smith sought leave on behalf of Mr. J. L. Travers, Q.C., to appear for Stuart, subject to arrangements suitable to Mr. Travers being made for an adjournment to enable him to consider his brief, having regard to his commitments in another matter in the criminal jurisdiction. At this stage we decided to adjourn our enquiry until 16th September, 1959, but we intimated that we should then expect to be informed whether Stuart would or would not give evidence.

13. On the 16th September, 1959, Mr. Travers, Q.C., withdrew his application and Mr. J. E. Starke, Q.C. (of the Victorian bar) sought and was granted leave to appear with Mr. C. Villeneuve Smith for Stuart. He applied for an adjournment for three weeks after the 18th September, 1959, from which date he intimated he would devote his full time to the matter. We agreed to an adjournment until the 5th October, 1959.

14. When we resumed on that day, Mr. Starke, Q.C., sought leave for Miss H. Devaney to appear with him as well as Mr. C. Villeneuve Smith. He also requested a further adjournment until the 13th October, 1959, when he undertook to be prepared to proceed. He also applied for the right of free, full and unfettered cross-examination of a number of witnesses specified in a communication addressed to us, and submitted that he should not be called upon to decide whether he would or would not call Stuart to give evidence, until the cross-examination of all these witnesses had been completed. At this sitting we were informed by Mr. Chamberlain, Q.C., that Cabinet had decided to recommend to Your Excellency in Council to commute the sentence of death. He also submitted that Mr. Starke should be called upon to decide forthwith whether he would call Stuart, and that Stuart should give evidence at this stage, if at all. After deliberation we ruled that, if Stuart was to be called, it should be at this stage, but we accepted Mr. Starke's assurance that he could not proceed before the 13th October, 1959. Mr. Starke then obtained a short adjournment to consider his position, after which he informed us that Stuart would give evidence on the 13th October, 1959.

15. On the 13th October, 1959, we continued the hearing of evidence which concluded on the 21st October, 1959. In all, forty-five witnesses gave evidence before us. Counsel addressed us on the 22nd, the 23rd and the 26th October, 1959.

16. Having regard to the way in which this case has been confused and overlaid by misunderstanding and misrepresentation, not only throughout Australia, but even on the other side of the world, we feel obliged to begin by setting out, in some detail, the facts and circumstances leading up to this enquiry. But, in order to avoid unnecessary interruptions to the narrative, we have adopted the device of relegating the text of documents, and other matters, to appendices where they can be annotated and studied at leisure.

THE OUTLINE

17. On the afternoon of Saturday, 20th December, 1958, a little girl, Mary Hattam, aged 9 years, was raped and murdered on a lonely beach, between the townships of Ceduna and Thevenard, on the far West Coast of South Australia.

On the night of Monday, 22nd December, 1958, Rupert Max Stuart (from time to time referred to as 'the petitioner') was arrested and charged with the crime. He was tried in Adelaide at the April Sessions of the Supreme Court, and on the 24th April, 1959, he was convicted by the verdict of the jury. As the law of South Australia requires he was sentenced to death.

In due course he appealed to the Court of Criminal Appeal (the Full Court of the Supreme Court). His appeal was dismissed on the 6th May, 1959. An application for Special Leave to appeal to the High Court of Australia was refused on the 19th June, 1959, and a further Petition, for Special Leave to appeal to the Queen in Council, was rejected by the Judicial Committee of the Privy Council on 28th July, 1959.

18. According to the undisputed evidence at the trial, the child had been playing on the beach with her brother, aged 10, and another little boy; but, at some time, probably after 2.30 p.m., the boys had gone off on an errand of their own, leaving the girl by herself. The boys had been away for, perhaps, half an hour. When they returned to the beach, Mary was not there. A fisherman, who had landed on the beach at about 3.45 p.m. on that afternoon, testified that he had seen no one on the beach as he came in and landed. None of these times can be fixed with any pretension to accuracy, and, in the circumstances, it has been accepted that the crime must have been committed between the hours of 2 and 4 p.m.

19. When the child failed to come home, the police were informed and a search was instituted; but it was not until after midnight that the body was discovered. It was lying in a little cave in the face of a low limestone cliff a few feet above tide level. There was no doubt with respect to the manner of the unfortunate child's death. Her skull had been fractured in two places. The injuries had, apparently, been inflicted by repeated blows from a stone that was lying nearby. She might have lived for some time after receiving the injuries, but, whether before or after receiving them, she had been brutally violated.

FOOTPRINTS

20. A clue—and the only clue to the identity of the murderer—was provided by tracks or footprints in the sand, leading from the cave to a pool nearby and returning to the cave, and, thence, along the beach to a roadway leading into the township of Ceduna. Black trackers, called in by the police, reported that these tracks had been made by the bare feet of an 'educated native', meaning, thereby, a native who had lived with white men and acquired some of their ways; but the trackers also professed to be able to say that the tracks were those of an 'Aranda man', that is, a native of the Aranda (or Arunta) tribe from Central Australia.

THE PETITIONER

21. The petitioner answers to that description. He is about 27 years of age, and a native of the Aranda tribe, although not quite of the full blood. He had arrived in Ceduna from West Australia, on Friday, 19th December, 1958, as an employee in a travelling show or 'fun fair' which had camped in the 'park lands' on the eastern edge of the town. The show was owned and managed by one Gieseman.

22. According to the evidence at the trial, it appeared that, on the morning of Saturday, 20th December, the petitioner had been drinking in Ceduna, but at about 2 p.m. he had hired a taxi to take him to Thevenard, which is two miles or more from Ceduna. He had returned to Ceduna and the fun fair, presumably, on foot.

In the evening he had been drinking again, and, at about 9.30 p.m., he had been arrested and lodged in a cell in the Ceduna police station. He had remained there until the following morning. On his release he had returned to the Gieseman Show which was then packing up to move on to Whyalla; but he had been dismissed from his employment. He had, thereupon, sought and obtained employment by the Wheat Board on the Wheat Stacks at Thevenard.

THE ARREST

23. As the case against the petitioner was presented at the trial, it depended upon admissions in his answers to questions put to him by the police, and a signed confession said to have been dictated by him. In view of criticism which has been levelled at the police, we think that it is necessary to say something about the circumstances in which the investigation was proceeding.

24. The neighbourhood—which includes the two towns of Ceduna and Thevenard—has a population of about 1,200. Westward it is 700 miles or more—across the Great Australian Bight and the Nullarbor Plain—from the Goldfields of West Australia. To the north there is nothing but salt bush and the dead heart of Australia. The nearest sizeable towns are Whyalla and Port Lincoln. Whyalla is near the head of Spencers Gulf and about 250 miles to the east, Port Lincoln, at the mouth of the Gulf, is about the same distance to the south-east. Adelaide is about as far again across the two Gulfs. All these distances are by air. By any practicable surface route they would of course be greater.

25. The local police force consisted of a sergeant in charge with a constable at Ceduna and another constable stationed at Thevenard. For the purposes of the investigation three officers, Det. Sgt. Turner and Const. Jones (of the homicide squad) and Sgt. Lowe (photographer and finger print expert) had

been sent by air from Adelaide, and two, Det. Whitrod and Const. Fairweather, from Port Lincoln. They had reached Ceduna at about 9 a.m. on the Sunday morning, and the rest of that day and the whole of Monday had been occupied in, more or less, routine enquiries, but, on Monday evening, the suggestion came from Whyalla, that it might be advisable to question Rupert Max Stuart who had been dismissed from the Gieseman Show and left behind at Ceduna.

26. It was well on in the evening when the message came through, and it was nearly 10 p.m. before the suspect could be located, as working for the Wheat Board and living in quarters on its premises. On that, a party consisting of a local constable and the five officers from Adelaide and Port Lincoln set out to find the petitioner, and to bring him to the Ceduna police station for questioning. He was not in the tent in which he had been sleeping, but was discovered—as the police thought—hiding nearby.

27. Having regard to the rough limestone of the cave in which the act had been done, it seemed to the police that the criminal might well be marked by abrasions, particularly on the knees, and, before questioning the petitioner, the police procured him to pull up his pants, and finding that—as they testified—he had a number of scratches on his left knee, and some on his right, they proceeded to take him to the police station for questioning.

28. At the police station he was cautioned, and when asked, "Do you understand that?" he said "Yes". It was then put to him that the little girl had been raped and murdered "at the bottom of the cliff on the beach . . . a few hundred yards from the Wheat Board" (*i.e.* from where the petitioner had been 'picked up'). He was asked "Do you know anything about it?", and said "No, I never did it". He was asked to strip, and, when he did so, it appeared to the police that he had various small scratches on his back and shoulder blades. He was asked about his employment with the travelling show, and whether he had been given the 'sack' for being missing from his work on the Saturday. He said, "Yes. I got on the booze". When asked what he had done on the Saturday, he gave an account of drinking with some half-castes on the beach near the jetty. He was asked, "Are you sure you were with these chaps all day?" He said "Yes I was . . ." When told that the police had reason to believe that he had been in Thevenard on that afternoon, he said "Yes. I will tell you the truth". He then spoke of taking a taxi to Thevenard and of meeting a man who had given him the remains of a bottle of wine, and of walking back along the road to Ceduna. First, he said that he had followed the road all the way. Then, when it was suggested to him that it would be natural to take a short cut across the beach, he said "Yes. I did walk along the beach for a little while." When asked if he had done so in bare feet, he said "No, I had my boots on." He was asked "Did you see a little girl on the beach?" and said "No. I never saw any girl."

INTERROGATION

29. Then followed the questions that brought the confession. The detective said "Can you track?" and the petitioner said, "Yes. I have done plenty of that". He was then told of the tracks on the beach, and that the black trackers had said that, if they saw tracks, made by the same man, they would know him, and he was asked "Do you think that's right?" He said "Yes. They would know them". Then the detective said "We are going to let them have a look at some of your tracks. What do you think they will say?", which brought the answer "I will tell you the truth. I saw the little girl murdered; but I did not do it". When asked what he had seen, he gave a circumstantial account of a white man, who had had a car on the top of the cliff, and had pulled out a gun, and ordered the petitioner to pick up the little girl and carry her into the cave. When he was told that the blood splashed about in the cave showed that the girl must have been raped and murdered there, he said "I must have done it but I don't remember doing it". When the detective said ". . . I think you can remember what you did", the petitioner said "I might as well tell you what I did. I did do it. I was pretty full or I wouldn't have done it."

30. According to the evidence the questioning proceeded:

> Q. "What happened when you came down onto the beach?" A. "I will tell you the truth. I saw the little girl playing in a pool of water. There was no-one else around. I called out to her to come and see the little birdies in the cave. I had just found them. She came over to the cave and crawled in to it. I went in behind her. She asked me where the birdies were and I told her they had gone now. I then punched her on the side of the head and she went out to it and then I rooted her." Q. "How was she dressed?" A. "She had a white coat on and red bathers". Q. "Did you take her bathers off?" A. "Yes I pulled them off. It was hard to root her". Q. "What did you do then?" A. "I killed her". Q. "Why did you kill her?" A. "So she could not tell anyone what I had done". Q. "How did you kill her?" A. "I bashed her head in with a rock". Q. "How many times did you hit her with the rock?" A. "About 6 I think". Q. "What clothes were you wearing?" A. "That shirt and those trousers and these boots", (*i.e.* the boots he was wearing at the time). Q. "Did you take your trousers off before you raped the child?" A. "Yes I took off all my clothes and my boots". Q. "When did you do that?" A. "After I knocked her out and before I rooted her". Q. "Why did you take your clothes off?" A. "So they wouldn't get blood on them". Q. "What did you do then". A. "I went down to a pool of water and washed all the blood off". Q. "Why did

you do that?'' A. ''So no-one would see it on me''. Q. ''What did you do then?'' A. ''I walked out of the water and went back near the place where I had killed the little girl and put on my clothes. I walked along the beach and put my boots on later when I got near the road''. Q. ''How drunk were you at the time when you first saw the little girl?'' A. ''I was pretty full.'' Q. ''Could you walk straight, or were you staggering around?'' A. ''I could walk straight, I wasn't that full''. Q. ''Then you can remember clearly what you did?'' A. ''Yes, I can remember everything but I would not have done it if I had not had wine. It must have been that what made me do it.''

WRITTEN CONFESSION

31. The evidence is that, at this point, the detective asked Stuart ''Do you wish to make a statement about this matter'' and Stuart said 'Yes'. He was cautioned again, and, in reply to the question 'Do you want to write the statement?', he said, 'I can't write much. I can only sign my name.' He was asked 'Do you want us to type the statement for you?' and said 'Yes'. On that Det. Whitrod typed the statement which is set out in full in Appendix I. After that the statement was read over to, and signed by, the petitioner in block capitals, 'ROPERT MAX STUART', and then he was asked to walk through a patch of sand that had been spread in the station yard for the purpose. On inspection the black-trackers professed to recognize the footprints as those of the man on the beach.

32. The petitioner was then arrested and charged with the murder. On the following morning he was shown a piece of rock, and asked whether it was the stone with which he had killed the little girl. He said ''It looks like it''. The bathers that had been picked up near her body were likewise produced, and, when he was asked whether they were those that he had taken from her, he said, 'They are the same colour they look like it.'

PRELIMINARY EXAMINATION

33. At the preliminary examination before the Magistrate (Mr. Gordon S.M.) first at Ceduna and later in Adelaide, the petitioner was represented by Mr. J. D. O'Sullivan. When the witnesses tendered by the prosecution had been examined and cross-examined, the record continues as follows:

''H.H. intimates in his opinion the evidence is sufficient to put the defendant on his trial for the offence charged.

Defendant does not wish to give evidence or call evidence. H.H. warns defendant in terms of S.110 of Justices Act. Defendant says

'I reserve my defence'

Defendant committed for trial . . .''

COURSE OF THE TRIAL

34. At the trial the petitioner was defended by Mr. O'Sullivan and Miss Devaney. He was arraigned in the ordinary way and pleaded Not Guilty. In cross-examining the police witnesses, counsel for the defence put a number of questions, suggesting that the confessions had been obtained by threats and violence, but this was strenuously denied by each and every of the six officers who had been present at the interrogation. By way of defence Mr. O'Sullivan tendered a document signed by the petitioner, and applied to have it read to the jury as an 'unsworn statement' by the defendant.

35. The trial judge ruled that this could not be permitted without the consent of the prosecutor, but he offered to allow Mr. O'Sullivan to assist the petitioner to give his statement by prompting him on any topic, by asking him things and assisting him, as far as possible, to cover everything that he desired to put to the jury. That offer was rejected and the petitioner made his unsworn statement as follows:

''I cannot read or write. Never been to school. I did not see the little girl. I did not kill her. Police hit me. Choke me. Make me said these words. They say I kill her. That is what I want to say.''

On Mr. O'Sullivan speaking to the petitioner he held out the document already referred to and added:

''That is what I want to say. Someone to read this out for me.''

36. The following colloquy ensued:

''His Honour: Do you want to say anything about the evidence the police officers gave as to what happened at the police station?

Defendant: No.

Mr. O'Sullivan: I do not ask for any further questions to be put to him. I prefer that Your Honour did not suggest anything further to him''.

37. In directing the jury the trial judge treated the confession as the crux of the case, and stressed the burden on the prosecution of proving that it was freely and voluntarily made. We have extracted the passages in question and they will be found in Appendix II. It is necessary to bear in mind that it was on this evidence and on this direction that the jury returned their verdict of Guilty.

That is to say that, at the trial, there was no hint of any alibi, nor any hint that the petitioner was in any way embarrassed by his inability to understand the evidence as it was being given, or to instruct his counsel, or that he was incapable of dictating the written confession. In his summing up, the trial judge (without any objection from the defence) treated it as an admitted fact that Stuart had gone to Thevenard in Blackham's taxi, as Blackham testified, at about 2 p.m. In these circumstances the defence rested upon nothing but the suggestion that the confession had been obtained by threats and violence. It follows that the verdict of the jury, rejecting that defence, meant that the jury had no hesitation in believing the testimony of the police. No criticism has at any time been directed against the summing up of the trial judge which Mr. Shand, Q.C., before this Commission described as "very thorough and very fair".

APPEAL TO THE FULL COURT

38. On the appeal to the (S.A.) Court of Criminal Appeal the petitioner took five objections to the trial and the verdict. Three can be ignored as objections over-ruled by the three courts of appeal, and having no bearing upon the subject of this enquiry.

The other grounds of appeal taken before the Full Court were (1) the refusal of the trial judge to permit the written statement to be read to the jury, and (2) that the verdict could not be supported on the evidence.

Dealing with the first of these objections, the Full Court held that the trial judge was right in refusing to allow the document to be read. The judge had gone as far as he properly could—in fact he had given the defence more than it was entitled to—by offering to allow counsel to assist the petitioner to make his unsworn statement by prompting him and drawing out his version of the facts.

39. Dealing with the objection that the verdict was unreasonable, the Full Court pointed out that the jury is the constitutional tribunal for weighing and assessing the value of the testimony, and that the appeal to a Court of Criminal Appeal is not by way of rehearing. It "is a limited appeal which precludes the court from reviewing the evidence and making its own assessment thereof" (*Aladesuru v. The Queen* (1956) A.C. 49, 54-5).

The conclusion of the Full Court was expressed as follows:

> "We have not seen the witnesses, but we must assume that the jury who did see them were satisfied that this evidence was given in good faith, and, if that is so, it seems to us that the verdict was a necessary conclusion upon the evidence."

THE APPEAL TO THE HIGH COURT OF AUSTRALIA

40. On the application for Special Leave to appeal to the High Court of Australia the objections which had been taken before the Full Court were argued and rejected, but the considered judgment of the High Court begins by saying:

> "Certain features of this case have caused us some anxiety . . ."

The reference, as we understand it, is to an affidavit filed in the High Court in support of the petitioner's application. The deponent, Mr. T. G. H. Strehlow, is, admittedly, an authority upon the 'Aranda' or 'Arunta' language, and, in his affidavit, he deposed that he had known the petitioner since he was a small child, and that, from his past knowledge of the petitioner, and a conversation with him in pidgin English at the Adelaide Gaol, he (the deponent) was able to say that the petitioner's knowledge of English was inadequate. This affidavit was, no doubt, the prime cause of the publicity accorded to this case, and the terms in which it is couched should be compared with the evidence which we have heard. For that purpose the relevant paragraphs are set out in Appendix III 1.

41. The new ground of appeal (based on Mr. Strehlow's affidavit) was rejected by the High Court as follows:—

> "Counsel for the applicant did not think fit to raise the question of his understanding of English at the proper time, which was, of course, on the arraignment, and neither Mr. Strehlow's affidavit nor any evidence to a similar effect was put before the Court of Criminal Appeal. Generally speaking this Court is confined on appeal to the material which was before the court appealed from . . . But in any case it is entirely consistent with this affidavit that the applicant was fully capable of understanding and answering questions put to him and of describing intelligibly simple acts and events. It is to be observed that the objection to the police evidence appears to have been based throughout on alleged extortion by violence and threats rather than on any inability of the applicant to understand questions put to him. Having regard to all the circumstances, we do not think that a ground for granting special leave is disclosed by Mr. Strehlow's affidavit."

42. Although the affidavit disclosed no ground of appeal, which could be considered by the High Court at the stage which the case had then reached, it did, admittedly, disclose grounds for 'anxiety' or, more especially, for further investigation on the part of the proper authorities. This was, apparently, undertaken in so far as a document was proffered to the High Court, in the form of a deposition taken by a court of summary jurisdiction, sitting at Alice Springs, Northern Territory. According to its purport this is the evidence given by Stuart when conducting his own defence upon a charge of a petty offence. The High Court declined to look at it; but it has now been put in evidence as Exhibit 31 (Appendix IV 1).

APPEAL TO HER MAJESTY IN COUNCIL

43. When the petition for Special Leave to appeal came before the Judicial Committee of the Privy Council on 28th July, 1959, yet another ground of appeal was submitted in the form of 'fresh evidence' in support of an alibi, which had not up to that time been suggested, namely, that, on the afternoon in question from before 2 p.m. until 4 p.m., Stuart had been working at the Gieseman show in charge of 'the darts'. On the suggestion that statutory declarations to that effect were on their way from Queensland, Mr. O'Sullivan for the petitioner sought an adjournment of the application to allow the fact to be verified. The application for special leave was rejected, without calling upon the respondent. In the course of the hearing their Lordships indicated their views upon the various points taken by counsel for the petitioner as hereinafter appears.

44. On the complaint that the trial judge should have allowed the petitioner to put in the written statement, it was pointed out that nothing like that would have been allowed in England, and (according to the shorthand note) Viscount Simonds is reported as saying that the course proposed by the trial judge was "a most merciful way of treating the case". The discussion closed as follows:

"Lord Radcliffe: . . . the judge addressing you said:

> 'I said formerly that you would be allowed to prompt the defendant on any topic: to ask him things and assist him as far as possible in order to allow him to make his statement. In other words assist him to cover everything that he desires to put to the jury. I do not want any misunderstanding about that. Now how do you desire the statement to be given.'

"Viscount Simonds: Then follows your answer to that.

> 'I want him to stand up and say what he wishes to say, and I am prepared to leave it at that.'

"Mr. O'Sullivan: I had no choice.

"Viscount Simonds: In the face of that I think that the complaint you now make is wholly unjustified."

45. On the subject of the police evidence Viscount Simonds is reported as saying to Mr. O'Sullivan:

> "You are not entitled upon any of the material before us to suggest that the evidence of the police was in any way corrupt or in any way wrong. It was accepted by the jury, and the courts, through which this case has proceeded, have seen no cause to doubt it."

46. The application for adjournment was refused as follows:

> "Counsel for the petitioner has urged that the hearing of this petition should be adjourned in order that certain further matters which have recently come to his notice may be examined; but it is clear that these matters could not affect their Lordships' decision and humble advice to Her Majesty, however relevant they may be for consideration by the Executive Authority in South Australia."

COURSE OF EVENTS LEADING TO INQUIRY

THE WHYALLA INQUIRY

47. When Stuart was dismissed on Sunday, 21st December, the Gieseman Show was packing up to leave for Whyalla. It left Ceduna on that morning, and arrived in Whyalla on the following day. On that evening (Monday, 22nd December) Detective Phin (who has since retired from the police force) called upon Gieseman to make the customary check, which is routine police practice in the case of any circus or travelling show. Ascertaining from Gieseman that the show had been in Ceduna on the previous Saturday, the detective referred to the murder, and asked Gieseman whether he thought that any of his people could have been in it, or know anything about it. This was followed by an inquiry whether any of them had been away from the show on that day. To which Gieseman replied that 'the only lads who had been away from the show on that day' had been Allan Moir and Max Stuart. For further information about Stuart, and his movements on the Saturday, Phin was referred to Moir. When he had questioned Moir, Phin reported to his Inspector and, in the result, a telephone message was sent to the police at Ceduna, leading to the arrest of the petitioner.

48. At 10 a.m. on the following morning the lad, Allan Moir, aged 15½, called at the Police Station, where Det. Phin took his statement in writing. This was dictated to a typist, and read over to, and signed by, Moir. According to this statement Stuart and Moir had left the show shortly after 8 a.m. on the Saturday morning. They had been drinking with some half-castes in a little cave near the Ceduna jetty, but Moir had left the others at about 9.45 a.m., and had returned to the Show ground at about 10 a.m. The statement continues—

> "During the day at about 1 p.m. I went up to the town to get some boot polish, and I saw Stuart drunk in front of the picture hall with some other male darkies. Stuart gave me two shillings to get him some boot polish in the store next to the picture show. I did so, and gave him a tin of boot polish and three pence change. I then returned home to the showgrounds.

At about 5.30 p.m. I went up to the jetty fishing . . . when I returned to the showgrounds at about 6 p.m., Stuart was there but he had sobered up in the meantime . . . Between 6 p.m. and 8 p.m. Stuart worked at the sideshow. He was working at a dart board, and at about 8 p.m. we went up the street to get something to eat . . .''

MOVEMENTS OF GIESEMAN SHOW

49. On the morning (23rd December, 1958) that this statement was taken from Moir, Stuart had been brought before a Justice of the Peace in Ceduna, and remanded in custody to Adelaide. The evidence is that the Gieseman show carried on at Whyalla until after Christmas, and then moved on to Moonta Bay, where it remained until the 26th January, 1959.

It appears that, on the Appeal to the Privy Council, Mr. O'Sullivan told their Lordships that he had first seen Stuart on 17th or 18th January, when—according to him—the show had gone on to Queensland, a distance of 2,000 or 3,000 miles. But the fact is that the show was still at Moonta Bay (about 120 miles from Adelaide) when the preliminary examination of the charge against Stuart was opened at Ceduna on 21st January. The examination was continued on 22nd January, and adjourned to Adelaide where it was completed on 28th and 29th January, but, by that time, namely, after 26th January, the Gieseman Show was on its way to Newcastle, N.S.W. It was not until about April that it moved on to Queensland.

THE STATUTORY DECLARATIONS

50. The statutory declarations (referred to in the Commission) were obtained by a Roman Catholic priest, Father Dixon. He had spent some time in the Northern Territory and had acquired some knowledge of the Aranda or Arunta language. At the request of the regular chaplain, he had visited Stuart in the Adelaide Gaol. The first visit was early in May, 1959 (p. 559) *i.e.* shortly after the petitioner's appeal had been dismissed by the Full Court. After that, Father Dixon had visited the petitioner regularly two or three times a week. According to his account of his conversations with the petitioner, it was impossible to rely upon the petitioner's ability to fix the time of day and, in particular, the time when he had returned from Thevenard to Ceduna, and it seemed to the witness that the members of the Gieseman troupe might have been able to give evidence upon that subject.

51. Accordingly, on or about 25th July, 1959, when he gathered that the appeal to the Privy Council was unlikely to succeed, Father Dixon got in touch with a newspaper that had been giving publicity to the case. In the result an arrangement was made by which the paper financed and assisted the Reverend Father to go to Queensland, for the purpose of seeing these people and ascertaining whether they were prepared to come forward and testify to an alibi for the petitioner. On 27th July, 1959, Father Dixon got in touch with Gieseman at Atherton in Queensland and obtained the three statutory declarations, made by him, by his wife, and by an employee, Betty Hopes. According to these declarations, Stuart had returned to the show shortly before 2 p.m., on the day in question, and had been working on ''the darts'' until 4 p.m.

52. On 7th August another declaration to the like effect was obtained from William McNeish. This declarant had been with the Gieseman show in Ceduna, but in August, 1959, he was in Collinsville, Q., as the manager for Gieseman of a second show of the same sort. We have been left to surmise as to the circumstances in which this declaration was made. According to McNeish (when testifying to the fact on 20th August) it had been obtained from him by two men whose names he was unable to remember when he was giving his evidence. It is clearly apparent, on his account of the matter, first, that the question put to him was, where was Stuart between 2 and 4 p.m. on the day in question, and secondly, that he knew, when making the declaration, what the Gieseman's had said upon that subject. It would appear further, that the declaration was obtained from McNeish by two journalists who obtained a declaration from Allan Moir immediately afterwards.

53. In addition to the statement obtained from him in Whyalla, Allan Moir appears to have given three or, perhaps, four different accounts of the events of Saturday, 20th December. In addition to his sworn evidence we have the Whyalla statement, two statutory declarations (made at Collinsville, Q., on 30th July and 7th August respectively) and a reference in his evidence to a telephone conversation with a journalist speaking from Sydney. The various accounts are irreconcileable, but, in his evidence, Moir testified that what he had told Phin in Whyalla was the truth, so far as he could remember it when giving the statement, and, for what his evidence is worth, his memory at that time would, no doubt, be better than in July and August, 1959.

THE PETITIONS TO THE GOVERNOR IN COUNCIL

54. The first petition for commutation of the sentence was presented by the petitioner on 1st July, 1959, that is to say, after the judgment of the High Court, and before the application to the Privy Council. The ground urged was the petitioner's inability to speak English, and, in an attempt to explain away the document to which we have already referred (Ex. 31: App. IV Pt. 1: See note thereto) it gives an account of that document, which was clearly disproved in the course of our inquiry.

On 29th July (the day after the rejection of his Petition to the Privy Council) the petitioner presented a second petition enclosing copies of the declarations obtained from the Giesemans and Miss Hopes. This petition referred to the observation of the Judicial Committee as to consideration by the Executive Authority in South Australia, and prayed for commutation of the sentence. On the same day the intention of the Executive to appoint Commissioners to conduct the present inquiry was announced by the Hon. the Premier.

On the 30th July a third petition was presented, praying for a reference to the Full Court of the Supreme Court of South Australia, in the manner authorized by Section 369 (*a*) of the Criminal Law Consolidation Act 1935-56. This section provides for the reference being treated as an appeal to the Full Court.

55. On this survey there was, certainly, a case calling for an investigation into the material that had not been put before the jury, but it is difficult to see why any heat or excitement should have been injected into the agitation for further inquiry or rehearing.

It would seem that the source and origin of this heat was an element of exaggeration and extravagance, even of misrepresentation, in the presentation of the appeals to the High Court and to the Privy Council (for which see App. III), but, for the present purpose, it is sufficient to say that it was, and is, a perversion of the truth to describe Stuart as 'unable to speak English', or as being "denied any opportunity of giving his version of the facts to the jury' or to suggest that the trial was a mis-trial, or was not a fair trial on the defence that was submitted to the jury.

A CORRECTION

56. In this connection there are two points that should be cleared up. In arguing before the High Court, and in the Privy Council, Mr. O'Sullivan endeavoured to make the point that he had been hampered by the difficulty of communicating with his client, and by his inability to find an interpreter speaking Arunta. In the Privy Council he stressed the lack of funds, which had prevented him from finding the Giesemans and obtaining their evidence at the trial.

57. In view of what has been published in the Press, we think that it is right to correct an obvious misapprehension upon these subjects. As any legal practitioner should know, there is no substance in either of these complaints. The counsel assigned to defend the petitioner were charged with the duty of ascertaining whether he had any defence to the charge and of submitting it to the jury at the trial. We experienced no difficulty, whatever, in taking the petitioner's evidence without the aid of an interpreter. But, be that as it may, if counsel were unable to obtain their client's instructions without the assistance of an interpreter, it was their bounden duty to bring the fact to the notice of the Court. In that event the Court would not have entered upon the trial, until an interpreter had been provided.

58. Much the same answer must be given to the complaint of the lack of funds to find and bring the witnesses to prove the alibi that has now been set up. All that the defence had to do was to use the means provided by our system of administering criminal justice. It is true that the petitioner could not be expected to set up his alibi until the time—the period for which it was required—had been ascertained, but that was made apparent by the evidence given on the first day of the preliminary examination, if it was not known to Mr. O'Sullivan prior to that.

59. We agree with Mr. Starke that the evidence at the preliminary examination left the time of death somewhat indefinite, but the evidence of the fisherman, Jorgensen, made it fairly clear that the child had disappeared before 4 p.m., and that her body must have been lying in the cave since that time, or before then. If there was any truth in the alibi—if the petitioner had in fact returned to the show before 2 p.m. and had been given his lunch, and had worked on the darts until 4 p.m.—it was a simple matter for the defence to ensure the presence of the witnesses at the trial. All that was necessary was for the petitioner to say where he was at that time, and to apply to have the Giesemans called as witnesses. The show was still at Moonta Bay, and there would have been no difficulty whatever in securing the attendance of the Giesemans or, if necessary, the whole troupe. As a matter of fact, all that was necessary was for the petitioner to suggest that he had returned to the show at or about the usual lunch time. If he had said that, before or when he was committed for trial, it would have been incumbent upon the prosecution to make the necessary inquiries, and to disprove the suggestion if they could.

THE INQUIRY

SCOPE OF THE INQUIRY

60. Our Commission specifies four questions upon which we are required to report, but, for the purpose of reporting upon the movements of the petitioner, during Saturday, 20th December, 1958, we have found it necessary to take into consideration the circumstances in which the written confession was obtained from the petitioner. For that reason, and, further, having regard to the undertaking given by the Hon. the Premier (''Hansard'' 4th August, 1959), to 'see that every matter connected with this case' should be 'sifted to the ground', we have felt obliged to direct our attention to the question whether, in view of the evidence that we have heard, there is any substantial reason for apprehending that justice has miscarried.

61. For this purpose the petitioner has called evidence directed to three different topics, that is to say, (1) to the alibi, (2) to his ability to understand and speak English, and (3) to his suggestion that the confession was extorted by threats or actual violence. It should, however, be pointed out that none of this evidence would satisfy the conditions upon which a court of appeal would receive fresh evidence. For a fuller discussion of the well established practice on this subject, and its bearing upon this inquiry, we may refer to the authorities mentioned in Appendix VI, but, for the present purpose it is sufficient to say that, if an accused person elects not to give evidence, or abstains from calling evidence that he could have called, he is not—in the ordinary course of things—entitled to another trial or to complain that justice has miscarried.

62. It follows that by enabling the petitioner to re-open the case, first, by setting up the alibi, that he had made no attempt to set up at the trial, and secondly, by giving the testimony which he deliberately elected not to give when he was before the jury, the Executive has conceded something which the practice of the courts would not allow in the ordinary course of things. The reason for granting that concession is, of course, the suggestion that the petitioner is an illiterate aboriginal native—incapable of following the course of the evidence, incapable of more than the few halting and almost inarticulate words in which he addressed the jury, and quite incapable of understanding the questions put to him by the police, or of dictating or assenting to the written confession which was given in evidence.

63. In these circumstances, the question that must necessarily stand at the threshold of the inquiry is whether the petitioner was, in truth, incapable of making a proper defence to the jury. If he was really as incapable as he was held out to be—at the trial and in the various courts of appeal—he is, no doubt, deserving of sympathy and, what is more (if Mr. Strehlow's affidavit is accepted) the authenticity of the confession must of necessity be subject to grave doubt. But, on the other hand, if the truth is that he was quite capable of following the evidence as it was given, and of understanding and answering questions put to him in English, it is difficult to see any excuse for his rejecting the offer of the trial judge to allow his counsel to assist and prompt him to give his version of the facts. And in this connection we cannot overlook what occurred (see para. 36) when the trial judge put a question to the petitioner, and was politely but firmly reminded that he had no right to ask it.

Knowing what we now know, namely, that the petitioner was quite capable of giving evidence without the assistance of an interpreter, and that he was not without previous experience of criminal proceedings, we find it difficult to resist the conclusion that the attitude adopted by the defence was designed to play upon the sympathy of the jury, and that the trial judge was discouraged from asking questions, lest the true measure of the petitioner's understanding and command of the English language should be disclosed to the jury.

MR. STREHLOW'S AFFIDAVIT

64. Until a comparatively late stage in our inquiry, we were left to understand that the petitioner's evidence would have to be taken—in whole or at any rate in part—through an interpreter. This is, of course, what anyone would think on reading the documents in Appendix III, and the petition to the Judicial Committee and, still more so, on reading a long memorandum addressed by Mr. Strehlow to the Hon. the Chief Secretary, in which the writer includes a dissertation on pidgin English, giving the equivalents for various expressions used in the confession, including amongst others, "we were talking (us fella bin talk)": "I must have stopped (me bin stoppem, mussa be)": "she was standing ('im bin stand)".

65. We would not be understood as imputing to Mr. Strehlow any intention to mislead the High Court; but we think that there are two respects in which the affidavit filed in the High Court was definitely misleading. In the first place the reference to "a long conversation in Arunta and in pidgin English" would convey the impression that Stuart speaks 'pidgin', as that expression is generally understood, but Mr. Strehlow's evidence (p. 831) was as follows:—

"Q. You tell us that what this man (Stuart) was speaking in (when giving his evidence) was pidgin English?

A. No. It is what I would call Northern Territory English.

Q. Was it anything but perfectly good English?

A. I think if you took it down phonetically you would still find some of these things".

* * * * * * * * * * * * * *

"Q. Do you mean to tell me you regard that man as inadequate in the way of English?

A. I would say he has not full fluency of expression because all fluency of expression means that he should, in the same way as an uneducated man, at least, understand the common synonyms as well. He does not know words like 'accident'. I think somebody used that word yesterday. I think there is no white man who does not know that."

66. The reference to the word 'accident' was perhaps unfortunate. The incident occurred when the petitioner was being cross-examined with respect to the Cloncurry conviction. The note (p. 762) reads:

"Q. You know what an accident is, do you Max, something that is not your fault?

A. Yeah.

Q. Did you tell Mr. Corbett that you never meant to do anything rude to the little girl, just an accident?

A. I think I must have told him like that, I forget".

There was, so far as we could see, no reason to doubt that—in this instance and generally throughout his evidence—the witness understood the questions put to him, and found no difficulty in answering them, apart from the relatively rare occasions when he indicated that he did not understand, and had the question repeated or reframed.

67. The second respect, in which we find Mr. Strehlow's affidavit misleading, is in relation to the statement in par. 12 that the deponent had "elicited considerably more information than Mr. O'Sullivan was able to obtain from him (Stuart) probably because of language difficulties." So far as we have been told, the only information, which Mr. Strehlow was able to add to that already obtained by Mr. O'Sullivan, was in relation to Stuart's change of attitude with respect to the purpose of his visit to Thevenard. At the trial, the position taken by the defence was that the petitioner had no other purpose in mind than to obtain more liquor. In the signed statement, which he desired to have read to the jury (App. V) he denied that he had gone to Thevenard to see a girl, or that he had ever said that he had gone for that purpose. In this he was contradicting the evidence given by the taxi-driver, Blackham, who was severely cross-examined upon his evidence with respect to a conversation in the taxi. The information obtained by Mr. Strehlow was to the effect that the petitioner had, in fact, gone to Thevenard to look for a girl whom he had seen and spoken to in the 'pictures' on the Friday night, and that he had in fact seen this girl, and had had intercourse with her whilst in Thevenard. That information (if true) was certainly important, but there can be no pretence that the failure to tell Mr. O'Sullivan about it was due to "language difficulties." Mr. Strehlow admitted that the petitioner would have had no difficulty in telling Mr. O'Sullivan what had happened, and the evidence of the petitioner (p. 745) is that his reason for telling Mr. O'Sullivan that he had gone to Thevenard for a drink, and for not telling him about the girl, was that he was afraid that Mr. O'Sullivan would think that he, the petitioner, "was the fella that killed that girl."

68. There were, however, two pieces of information that Mr. Strehlow might have been expected to elicit from the petitioner, that is to say, if the petitioner's evidence is true. The first was that Stuart could tell the time. When they first gave evidence, Mr. Strehlow and Father Dixon were not prepared to credit the possibility that he could, but the fact was proved by other witnesses and was subsequently admitted. The other matter which Mr. Strehlow failed to elicit from the petitioner is the fact—if it is a fact—that, he had returned to the show, on the Saturday afternoon, before 2 p.m., and had had his lunch there. In his evidence the petitioner testified that he had reached the show before 2 p.m. and that he had taken the time of his arrival from Mrs. Gieseman's watch. But according to their evidence neither Mr. Strehlow nor Father Dixon had been able to ascertain from the petitioner the time at which he had returned to Ceduna.

STUART'S UNDERSTANDING AND COMMAND OF ENGLISH

69. In Appendix I we have annotated the written confession, by reference to criticisms directed to the use of particular words and constructions, that were challenged as unnatural or incongruous in the case of an uneducated aboriginal. For the rest, it is sufficient to say that we have ample material to enable us to appreciate the petitioner's capacity to speak English, first, as it was at Alice Springs (N.T. in 1956) secondly, as it was at Cloncurry (Q. in 1957), and, thirdly, as it is now. The fact is that, although the petitioner's vocabulary may be limited, and although he may, from time to time, lapse into what Mr. Strehlow calls 'N.T. English', he can and does speak good or reasonably good English when he wants to. On Mr. Strehlow's showing he speaks about as well as anyone, who can be said to speak 'N.T.E.' As examples of what we regard as good English, we may refer to the question, with which the petitioner parried another question, put to him in cross-examination (p. 761): "Where did she come from in the first place?" or to the answer (p. 730): "I said 'I can, but you will have to wait for a while' ".

70. With respect to the opinion expressed by Mr. Strehlow, that the petitioner would be incapable of giving a concise and connected account of any incident, or of putting sentences together (p. 828), we would refer (1) to his answer to the question put to him in Cloncurry, "Will you tell me what happened that night . . .?" (App. IV 2), (2) to the passages in the Alice Springs deposition (App. IV 1) which we have italicised, and (3) to his answer (p. 772): "He hit me on the ribs, and on the side of the throat, and on the eye, and he tried to *punch me on the side of the head, but* I blocked that". (It should be noted in passing that the words we have italicised are an answer to a criticism by Father Dixon based upon the words of the confession, "I punched her on the side of the head").

71. In the same way we ought to refer to Mr. Strehlow's testimony (p. 829) where, commenting upon the evidence that Stuart had told the police that the girl was wearing a white coat and red bathers, the witness said—

"I should think it would have come out more in this fashion. I think he would have had to be asked 'What was she wearing' and he would have said 'bathers', and the next question should have been 'anything else', and he might have said 'a shirt' and a further question 'What colour were the bathers' and he would have said 'red' and then 'the colour of her shirt' and he would have said 'white' ".

That is, of course, Mr. Strehlow's opinion, but, if we turn to the evidence, we can see what the petitioner did actually say, when questions like that were put to him:

"Q. How were you dressed? A. Trousers and shirt" (p. 731), and again "Q. When you went down the town what did you have on then? A. White overalls" (p. 732). And again (p. 794): "Did they ask you what clothes you were wearing? A. Yes. Q. What did you say? A. I said trousers and shirt".

72. Following upon the evidence about the bathers, Mr. Strehlow was asked to comment upon the police evidence (p. 53) *i.e.* "Turner said 'Why did you kill her?', he (Stuart) said 'So she could not tell anyone what I had done'." The question put to the witness was 'Do you think that is an answer which could be produced by Stuart?", and he deposed, "I don't think he would have used the word 'So', it is the subordinate clause coming in again". But this opinion ignores the fact that the word 'So' is used, repeatedly, in the same way in the Alice Springs deposition (App. IV 1) and it is used again in the Cloncurry interrogation (App. IV 2). Compare also (at p. 793) "I do not know *what* I said at that time" and (p. 758) "Yeah. That is *what* he said to me". Another word, which according to Mr. Strehlow, is rarely used in N.T.E. is *'but'*. That may be, but we noticed that, in his evidence, Stuart used it freely and correctly.

73. With a view to demonstrating that the written confession could not have been dictated by the petitioner, Mr. Strehlow gave evidence of what he regarded as a test of the petitioner's capacity. For that purpose he had translated the document from English into Aranda, sentence by sentence, while the petitioner was translating his Aranda version back into English. This was recorded on a tape machine. The record was played to us and put in evidence, together with a phonetic rendering of the two versions. According to Mr. Strehlow the petitioner's reproduction should have been at least as good as the original, but it was, in fact, a debased version. We agree that the test was interesting and instructive, but we cannot agree with the conclusion that Mr. Strehlow sought to draw.

74. We have, of course, to take Mr. Strehlow's word for it that the petitioner is not only as fluent in Aranda as he is in English, but, also, that he was doing his best, and, further, for Mr. Strehlow's ability to reproduce—in Aranda—the exact sense and significance of the English words and idioms. That is, we think, a difficult assumption. (The exposition that we had from Mr. Strehlow indicates that the two languages do not lend themselves to any straight forward translation. For example, there is the sentence "*Then* we *were* talking to one half caste bloke" which appears in the test as "we *was* talking to one half caste bloke." We were told that the literal significance of the Aranda words was—"Then—"we two"—"man"—"half-caste (with a suffix or particle denoting 'with' or 'then')"—"spoke.") But, be that as it may, a simple explanation, for the petitioner's inability to render the Aranda translation into good English, is that—however fluent he may be in either language—he is not in the habit of turning either into the other, and, when he is called upon to do so, he finds it difficult to transpose the Aranda form and idiom into the English convention. In the result (when he is translating from Aranda into English) he is inclined to talk in the pidgin, which forms a sort of half-way house between the two conventions. It may well be that this is what happened when, at his first interview with the petitioner, Mr. Strehlow was talking to him in Aranda (or Arunta) and pidgin. It *may be* that this is how Mr. Strehlow came to form the impression that pidgin was the best that the petitioner could do do in the way of English.

75. In that Mr. Strehlow was wrong, as he was obliged to admit when the petitioner had given his evidence. In doing so the petitioner began by speaking good English, with no suggestion of the characteristics of 'N.T.E.' as described by Mr. Strehlow. Later as he gained confidence he tended to follow the lead of his counsel (*e.g.* p. 725, "Q. What you say? A. I tell 'im Moir be along directly."). But as another example of the petitioner's diction we might quote his answer (p. 760) "They said something, I don't remember what they said". From the outset the plain fact was that the petitioner had no need to translate the questions into Aranda. He was obviously bi-lingual in the sense that he was not only speaking, but was actually thinking, in the English language and idiom. His vocabulary may be limited, although it is certainly not as limited as Mr. Strehlow would have given us to believe, but, for the last two years or more, it has clearly been sufficient for all ordinary purposes. In particular it was sufficient to enable the petitioner to follow the evidence given by the taxi driver, Blackham, and by the witnesses who testified to the disappearance of the little girl at some time between the hours of 2 p.m. and 4 p.m. on the day in question.

76. To this we should add that the impression that we formed of the petitioner when giving his evidence was that, although uneducated, he is—by any standard—intelligent and quick-witted. If he had given evidence at the trial, he might, of course, have been cross-examined upon his previous convictions, that is to say, if his defence was an attack upon the police witnesses, but, subject to that possibility, we can see no reason why the petitioner (if he was innocent) should not have given his evidence on oath. If his desire was to put his version of the facts to the jury we can see no reason, whatever, for his refusing the offer of assistance in making his unsworn statement.

THE CONFESSION COMPARED WITH THE KNOWN FACTS

77. At this point it is convenient to set out the clearly proved and almost undisputed facts, which form the background of the confession.

The Gieseman show had arrived in Ceduna on Friday, 19th December, 1958, in the morning. It had opened on that evening but for lack of attendance it had closed early, and some of the employees, including Stuart and Allan Moir, had gone to the pictures in the Ceduna hall. At the pictures Stuart and Moir were sitting in the row immediately behind three girls from the Thevenard Hotel, the witnesses Veda Miller, Brenda Kent, and Olive Betts. The girls say that Stuart was kicking their chairs and trying to attract their attention, but he denies that. His evidence is that there was another girl sitting behind him to whom he spoke in the interval.

After the pictures Stuart and Moir had returned to the Showground where they slept in one of the stall tents. On the following morning they were awakened by the two witnesses Wells and Chester. According to McNeish (p. 327) that would be before 8 a.m. The evidence is that the usual breakfast hour was 7-8 o'clock, and various members of the troupe testify to the fact that the petitioner had breakfast with the others.

Shortly after breakfast (the confession says at about 10 a.m., but according to Mr. and Mrs. Gieseman it was about 9 or 9.30) the petitioner and Moir left the Showground and walked together down to the jetty. There may be some question as to the exact sequence of the events, but the proved and undisputed facts are very much as described in the confession, namely, that they met the 'half-caste bloke' and that the three of them were drinking together in a little cave on the beach, (we note that the little cave is mentioned in Exhibit 15). There is no doubt that, after drinking there for a while, the three of them came up to town and that Allan Moir returned alone to the Showground. There is no doubt that the petitioner "got a flagon (of wine) off a white fellow" whom he met near "the Ceduna pub", and that the white fellow was drunk (as mentioned in the confession). That may have been before Moir left the petitioner, and returned to the Showground, but there is no reason to doubt that, when Moir had gone, the petitioner returned to the beach to drink from the flagon (as the confession states).

The fact that Moir returned to the Showground is vouched for by the other members of the troupe. Mr. Gieseman says that Moir came back at about 11.30 a.m. (p. 43). Mrs. Gieseman was out 'broadcasting' from 10 to 12 o'clock, but she testifies (p. 85) that Moir was working at one of the stalls when she returned.

78. The undisputed fact is that, after drinking from the flagon, the petitioner put it in a sugar bag, and carried it up to the town, where he left it (as the confession says) down "behind the Picture Show wall." After that, the petitioner came into the main street, and was, for a time, talking to a 'few dark fellows' outside the picture hall. There he was seen and accosted by Allan Moir, who had left the Showground and come into town to buy a tin of boot polish. After meeting Moir the petitioner entered the shop and arranged with the shopkeeper, Spry, to telephone for a taxi. It was some time in coming, as both Spry and the driver, Blackham, testified. When it arrived the petitioner and Moir got into it, and were driven to the Showground. On the way, there was the conversation (par. 67 *supra*) in which the petitioner spoke of the purpose for which he was going to Thevenard, and refused to allow Moir to accompany him, upon the ground that Moir was "too young". The fact (which is no longer disputed) is that the petitioner followed Moir into the Showground, telling Blackham to wait for him, and then returned to the taxi, and was driven to Thevenard. At Thevenard he told Blackham to stop outside the hotel where he got out.

79. In the confession all this is covered by the three sentences—"I jumped in a taxi. Went down to the Thevenard pub. I got off there." The expression "I *jumped* in a taxi" can be identified as the petitioner's (see App. I note 11) and "I got *off* there" is used in his evidence (p. 726). It seems to us that, taken together, these somewhat unconventional expressions have an evidentiary value which approximates to that of a finger print. The inference is obvious, and the same inference can be drawn from the account which the confession gives of the petitioner's actions in Ceduna as well as in Thevenard. The full statement includes incidents which are not referred to in the confession, but, so far as the confession goes, it is referring to matters that are—quite plainly—true, and which the police could have learned from no-one but the petitioner.

80. From this point the confession takes up the story. "I was sitting down outside the pub". This is confirmed by the petitioner's admission to Strehlow (p. 448). The confession goes on, "I think that I must have stopped there about an hour I think". This is not an unreasonable estimate in view of the evidence given by the witnesses Veda Miller and Brenda Kent. Veda Miller's evidence is that, as she was leaving the hotel after finishing her work for that day, she noticed the petitioner sitting on the verandah outside the hotel. She recognized him as the man whom she had seen at the pictures on the previous night, and, when he saw her, he came across and spoke to her. He asked her whether she had a boy friend, and she told him that she had. He then asked her where the other girls were, and she told him that they were resting inside. On that he went back to the seat and sat down again. She went back inside and told Brenda Kent what had happened. Brenda came to the door, and recognized the petitioner, but returned inside without attracting his attention.

Brenda Kent (aged 15) confirms this, and adds that, some time after that, she had occasion to go to a shop across the road. When she did so, Stuart accosted her and asked her where the other girls were. She told him that they were in the hotel. She then went inside and did not see him again.

81. The confession continues, "Then I seen a fellow with a bottle of wine. He offered me a drink. He had a little bit. I said to him 'I think I will buy this off you.' He said 'You can have it for nothing. I got it off him. Then I started walking back." In his evidence (p. 439) Mr. Strehlow refers to this as a 'cryptic conversation', and suggests that it is an invention, but the evidence of Father Dixon (p. 567) shows that, if it is an invention, it was invented by the petitioner and not by the police. There is no corroboration for the next passage in the confession, *i.e.*

> "Just after coming out of Thevenard town I stood and I finished that bottle. I walked back to the pub again. Could not see that bloke when I came back."

But, be that as it may, there is no doubt that, after walking for some way on the road, the petitioner did (as the confession relates) "walk down to the beach" and that he was (as the confession puts it) "pretty full then".

82. Passing over the passage in the confession which relates to the commission of the crime, it is common ground that the petitioner returned to Ceduna by the route mentioned in the confession, that is, he followed the road for a while and then—in his own words—'cut across along the beach', then (as the confession puts it) he "got on the road from the beach near the Church" or (as he deposed) he left the beach "up there near the Church . . . not far from the railway line" (p. 805). That was the track or roadway to which the footprints led, and where they ended. It was about 300 yards from the cave in which the body was found. From this point the confession records the petitioner's movements as follows:—

> "I went around the back streets to where the caravan park is. Got a flagon of wine. That was the one I had left in a bag. I drank that. I then went back to the Show."

This is the undisputed fact. It is the account given by the petitioner in his evidence (p. 730) and before that to Father Dixon (p. 567). It is, however, supplemented by the testimony of a witness (Roy Wells) who saw the petitioner coming into the main street from the direction of the caravan park, and by three other witnesses (Mrs. Betts and the two Kellys) who saw him in the main street on his way back to the Showground. It is common ground that in the main street, he was accosted by the two Kelly brothers, who asked him whether he could buy them some wine, and entrusted him with thirty shillings for that purpose. After that they accompanied him to the Showground, where they described how he washed, and changed from trousers and shirt into white overalls, and then went to work at the 'darts' stall. They describe how he and Allan Moir left the Showgrounds together at some time after 5 p.m.

83. So far as the confession relates to the petitioner's movements and actions on Saturday, 20th December, it concludes as follows:—

> "I worked around there (*i.e.* at the Show) for about two hours. About sundown me and another fellow (*i.e.* Allan Moir) went down to the jetty. Then we saw two blokes sitting down drinking. When we went down there they put the bottle away. I had more wine that night with them."

The latter part referring to the other fellows with whom they were drinking is more or less what the petitioner and Moir have told us, but there are some points of interest in the reference to working for about two hours, and leaving about sundown, and, to the two of them going 'down to the jetty.' The reference to the jetty is not perhaps important, but it is worth noting that, in this respect, the 'confession' is more reliable than the unsworn statement (App. V) which the petitioner signed with a view to having it read to the jury. The unsworn statement deals with the matters to which we are now referring as follows:

> "When I got back I worked at the show for a while. At tea time I went down to the hotel to get a drink."

In the course of his cross-examination, the petitioner was asked about this; and maintained that he had gone down to the jetty and not to the hotel.

QUESTION OF TIMING

84. The references to 'two hours' and to 'sundown' are a very different matter. From what has been said, it is apparent that there is really no dispute as to the petitioner's movements on the day in question. The dispute is with respect to *the timing* of the various events, and, here again, we find that the confession—"I worked around there for about two hours"—is the statement of an undisputed fact. But the crux of the case—the hinge on which the alibi turns—is the contention, on the part of the petitioner, that the period of about two hours began at or before 2 p.m. and ended shortly after 4 p.m., whereas the contention on the other side is that the evidence establishes *the truth of the confession,* namely, that the petitioner returned to the Showground after 4 p.m., worked around there for about two hours, and then left 'about sundown.' At first sight this conflict between the confession and the alibi might easily be avoided by imagining a gap between the end of the two

hours, during which the petitioner was working, and sundown, when he went down to the jetty with Moir. But the evidence definitely excludes that possibility. One after another the witnesses (Gieseman, Mrs. Gieseman, Betty Hopes and McNeish) say that the petitioner returned to the show, and had his lunch, shortly before 2 p.m., that he worked 'the darts' until about 4 p.m., and that he and Allan Moir left the Showground at about 4 p.m. or shortly afterwards.

85. It may be that this was not altogether a matter of choice. Before the hunt for the Giesemans started the petitioner had given his story of the afternoon to Mr. Strehlow and Father Dixon, and that story—as he had given it to them—left no room for any gap. In the course of his evidence Mr. Strehlow emphasised the fact that Stuart had never told him what time it was when he (Stuart) went to Thevenard, or when he returned to the Show. As this has a very definite bearing upon the good faith of the petitioner's testimony, the evidence should, perhaps, be quoted (p. 448).

"Q. Have you ever had from Stuart his account of what he did on that afternoon? A. The account he gave to me ran along something like these lines—that he had gone to Thevenard in a taxi and that he had sat down outside on a seat.

Q. Did he give you any indication of what time? A. No, he did not give any to me, not exactly.

Q. I do not mean exactly, but about when? A. From the way he was talking it seems he had gone there in the forenoon—and this is purely an impression on his own statement—that he had met the girl there . . . he had walked back and had then gone on with his duties at the Show. He, of course, did not tell me what time the Show was, so I am not going to make any suggestions about what time he could have got back to the Show. He *worked there for a couple of hours, and then* he had gone to town to meet some of his drinking companions . . .

Q. You understood he had got back to the Show and worked about two hours before going off? A. That is what I understood.

Q. Is that the last he saw of the Show? A. Yes. That is the impression I had—that after that he went into town and met the other people and got on the grog again . . ."

86. Father Dixon's testimony is a little more definite. After giving the petitioner's account of the day, very much as we have set it out, including his meeting with the Kelly brothers and being given 25 shillings to buy wine for them, the witness continued (p. 568):

"He then tells me he worked around in the darts until about sundown.

Q. Did he tell you how long he was working at the darts? From how long before sundown? A. He didn't say. About a couple of hours was his remark.

Q. You understood a couple of hours before sundown. Finishing at sundown? A. I did not know what to understand.

Q. What did you understand from him? A. I did not know what to. Just that he worked around some time during the afternoon.

Q. It was sundown when he went to town again? A. I have asked him several times on that point since, and he points to the sun being 'up there'. I said 'really dark'. He said 'No, when the sun up there, when it starts to go down'."

87. We think that on this point we should refer to Allan Moir's evidence. This witness had given so many conflicting accounts, and his evidence was so unsatisfactory that it was impossible to rely upon anything that he had said; but, nevertheless, there are occasions when a cross-examination which tears a witness to shreds seems to get down to bedrock, and to leave an impression of reality beneath the debris. Moir had testified that the petitioner had returned to lunch at about 2 p.m. and had worked at the darts until 4 p.m. or thereabouts; but he had gone on to say that he and the petitioner had left the showground together at some time after 4 p.m. According to him it "would be later than 5 p.m.", it was late afternoon and the sun was low on the horizon, when he and the petitioner reached the beach, say 10 minutes after leaving the show. In cross-examination it was pointed out to him that in December the sun would not go down until 7 p.m. or later, and he was confronted with his declaration, in which he had said that he and the petitioner had left the show at 4 p.m., and he was called upon to account for the two hours or more between his knocking off work and sundown. He and his evidence were utterly demolished, but it was apparent that his belief—for what his belief might be worth—was that the sun was on the point of going down when he and Stuart reached the beach.

88. We have, of course, the petitioner's testimony that he returned to the show and had his lunch in the tent at about 1 p.m., before going to work on the darts at about 2 p.m., and that he and Allan Moir had left the showground shortly after 4 p.m. He said at first that the time of starting work, 2 p.m., was taken from the sun, but later (p. 748) that it was taken—as was the lunch time 1 p.m.—from Mrs. Gieseman's watch. He said that the hour of 4 o'clock was by Mr. Gieseman's watch. He said that he had always known that he had had his lunch in the tent and that he had worked from 2-4 p.m., but that he had not told Mr. O'Sullivan about it because Mr. O'Sullivan had not asked him. It would be very difficult to believe this in view of the signed statement (App. V), prepared by Mr. O'Sullivan on the petitioner's instructions. In that statement his return to the show is described as follows:—

"I walked back to Ceduna *in the afternoon.*
I walked on the road first and then on the beach . . .
When I got back I worked at the show for a while.
At tea-time I went down to the hotel to get a drink."

But in view of Father Dixon's evidence (see par. 86 *supra*) the petitioner's evidence upon this subject is plainly incredible, and adds nothing to the weight of the evidence tendered in support of the alibi.

ALIBI: GIESEMAN EVIDENCE

89. We do not wish to impute to the Gieseman's or their employees any deliberate intention to falsify their evidence, but, when it is considered in the light of facts which are not in dispute, we find it far from convincing. In the first place, when Moir's statement had been taken, it is somewhat difficult to believe that the other members of the troupe could be as disinterested as they say that they were. Having regard to the dreadful nature of the charge that was being brought against the man, who had been one of their number at the time when the crime was committed, it seems strange that they should make no attempt to follow the course of the trial and the evidence.

90. Be that as it may, the fact is that, when the petitioner returned to the show on the Sunday morning, Gieseman told him to take off his overalls and to get out. There can be no doubt that this is what Gieseman told Det. Phin in Whyalla on the following day. The petitioner's evidence (p. 735) shows that Mrs. Gieseman knew what had happened. He deposed that she had told him (Stuart) that it was his own fault. But if we are to believe Gieseman the petitioner was never 'sacked' from the show. Gieseman's account of the parting (p. 49) is—

> "He (Stuart) said that he had got himself a job on the Saturday morning at the Wheat Board and he would not be coming with us, and thanks us very much for everything and shook hands. We parted on the best of terms. There were no hard words between us and we were polite to one another. I am sure of that."

Mrs. Gieseman (at p. 99-100) remembers the petitioner throwing his overalls upon the ground "because her husband was going crook on him outside," but she too was prepared to say that—immediately after that—Stuart came into the tent and told her "about the job". We find it difficult to accept this evidence. We cannot believe that Mrs. Gieseman was altogether happy under cross-examination upon this subject (p. 119), but it is sufficient to say that, if the witnesses are mistaken in their recollection of this—an out of the way—occurrence, they may well be mistaken as to the time when the petitioner came back on the Saturday.

91. It seems to us that it would be dangerous to rely upon Betty Hopes' recollection of the matters to which she testified. Her account of the petitioner returning to the show, and being given his dinner, differs in minor details from that given by Mrs. Gieseman, but a more serious criticism is that she is plainly mistaken as to other matters. She was sure that the petitioner had been working at the show on the Friday night until 10 p.m. (p. 122A) whereas the evidence is that on that night the show closed early, and that the men (Stuart, Moir and McNeish) went to the pictures. Then, again, she said that, on the Saturday morning, she and the petitioner were working together as they did in the afternoon. She says that they were doing this until about 11 a.m., when she went to prepare the midday meal and left him still working at the stall. This is contrary to all the other evidence. Lastly, she says that she was there when the petitioner came in on the Sunday morning and told them that he had a job. It appeared to us that, as in the case of the Giesemans, her account of this incident was not entirely candid.

92. So far as McNeish was concerned, he, at least, was prepared to admit that the petitioner had been dismissed on the Sunday, and that the parting had not been entirely friendly. But we should have some hesitation in relying upon his recollection of matters in which he had, apparently, very little interest. In his evidence (p. 330) he deposed that on the Saturday, at about 4 p.m., he had given the petitioner a cup of afternoon tea, not—as he explained—the evening meal, but we notice that in his statutory declaration (Ex. 6) he has given a somewhat different account:

> "He (Stuart) came home . . . late for dinner—I should say between half past one and two. I *think* he was working on the darts, in the same stall as Betty Hopes. We had tea as usual, some time after four and before dark while we were getting ready for the show which begins between half past six and seven. Max had tea with us there in the tent. I saw him go away with Allan Moir."

This—that 'Max had tea with us there in the tent'—is what the petitioner testified, but Gieseman's evidence is that the petitioner was not there for the evening meal. It seems to us that, in this instance Stuart may, perhaps, have told the truth, that is to say, that he was given or allowed to take something to eat when he came home at or after 4 p.m.

ALIBI: ANSWERING EVIDENCE

93. In contrast with the evidence in support of the alibi, the circumstantial evidence which supports the confession is clear and coherent. It relates to a series of incidents of which it can be said, first, that they did indubitably happen, and, secondly, that the only connection between them is that they

relate to the movements of the petitioner. In this way their bearing, upon the vital question of the timing of the events, is from different angles, and in the result we have, as it were, three or four cross bearings, all pointing to the same conclusion. It may be conceded that every one of the seven or eight witnesses concerned must be allowed some margin for error, with respect to the timing of the event to which he or she is testifying, but the suggestion that they could all be as much as two hours astray is really incredible.

94. Before referring to the witnesses tendered by the Crown, we should refer to the times mentioned in the confession, namely, half past eleven, when Allan Moir returned to the show, and one o'clock, when the petitioner set out from Thevenard to walk to Ceduna. (We note that, in the oral interrogation (Ex. 1 p. 51), one o'clock is given as the time when the petitioner 'got the taxi around to Thevenard'). Gieseman's evidence is that Moir returned to the show at about 11.30. Mrs. Gieseman says that he was there when she came at 12 noon, and Moir's evidence is that it was after 1 p.m. when he went into town for the second time, and met the petitioner outside Spry's shop. On the Giesemans' evidence this could not have been before midday, and, that being so, the gesture described by Father Dixon—'the sun up there'—would imply some time after noon. It seems to be a reasonable inference that the times mentioned in the confession are those given by the petitioner to the police. In this connection we note that the petitioner was not prepared to agree that he had awakened at 7 a.m., or had left the showground at 10 a.m. (as stated in the confession) but the evidence of McNeish shows (as we have said) that the petitioner was in fact awakened by the witnesses Wells and Chester well before the time—9 a.m.—to which he deposed, and the evidence of Father Dixon (p. 566) is that Stuart told him that he thought that it was about 10 a.m. when he went down to the beach.

95. As the evidence was left at the trial, there was nothing to fix any particular time for the petitioner's return from Thevenard to Ceduna, apart from Blackham's evidence that it was after 2 p.m. when the taxi left Spry's shop, but—on the other hand—the question of the timing had not been seriously contested. In these circumstances we agreed to Blackham being recalled for further cross-examination, in the course of which he said that he had made a number of trips to Thevenard on that day, and that it was possible that he could be mistaken as to the time. Finally he was asked, "If I put it to you that it might have been 1 p.m. when you picked him up, that might be true, mightn't it?", and answered "Yes".

That is, of course, a possibility that has to be considered, but the likelihood of the witness being so far mistaken is very much reduced by a number of circumstances. The witness testified that the regular hour for lunch in his home was 1 p.m. He remembered that on that day his lunch was late, and that he was finishing his lunch when the call came. It was true that he had made a number of trips to Thevenard before this one, but this was his last trip for the day. On his return he had handed over the cab to his mother, who had driven it for the rest of the afternoon. At the trial he was cross-examined on the subject of the conversation he had overheard, and doubt was thrown upon his veracity, but the jury accepted his evidence, and, as we now know, he was telling the truth. It seems to us that the whole incident was one that the witness might be expected to note and to remember.

96. With Blackham's evidence we must take the evidence given by the witness Spry—the shopkeeper—who called the taxi for the petitioner. He testified (p. 191) that the petitioner came into his shop at about a quarter to two, on the Saturday afternoon, and asked him to ring for a taxi. The petitioner gave his name as Stuart, and then Spry rang up Blackham who said that they could not come immediately. According to Spry, it was 15 minutes or more before the taxi came. In the meantime the petitioner waited outside. He came back into the shop two or three times to know why the taxi had not come. On the third occasion, while he was asking Spry to ring again, the taxi arrived and the petitioner left. The time, a quarter to two, was fixed by reference to the fact that Spry's staff were in the habit of going home to lunch from 12.30 to 1.30 p.m., and they had been to lunch and had returned before the petitioner came into the shop. The witness was quite unshaken in cross-examination. It was true that he had not been approached for a statement of the evidence that he could give until shortly before our hearing opened, but, on the other hand, it was apparent that he had realized very shortly after the event that the man, for whom he had summoned the taxi, was the Stuart who was being charged with the crime, which must have startled and appalled the small community amongst whom it had been committed.

97. We have already referred to the evidence relating to the petitioner's trip, first to the Showground and then to Thevenard, and to what happened there (see para. 80 *supra*), but the evidence of the two girls Veda Miller and Brenda Kent is that they had waited upon the diners, in the public dining room. The dinner was timed for 12 o'clock (according to Veda Miller) or 12.30 p.m. (according to Brenda Kent). After that the girls had had their own dinner, and had washed up. After finishing work they had spent some time cleaning out their room, changing, and having a shower. In fixing the time at which Veda Miller spoke to the petitioner at 2.30 they are guessing, but it is very difficult to believe that they could be wrong by more than, say, half an hour for the first encounter, and we see no reason to doubt Brenda Kent's evidence that the petitioner was sitting outside the hotel for some time after the first encounter.

98. The next group of witnesses are Roy Wells and Mrs. Betts and the Kelly brothers whose evidence is referred to in para. 82. Roy Wells was one of the two men who had awakened Stuart and Moir on that morning. His evidence is that he saw the petitioner coming up to the main street from the direction of the caravan park, and later told Mrs. Betts, who had seen him in the main street, who he was. These were purely casual encounters, and it may seem strange that the witnesses should have any recollection of them. But the explanation is, of course, that this was a small and isolated community, in which the stranger was an object of interest, particularly to those of his own colour. Neither of these two have any means of fixing the time, and, if it were a matter of half an hour or even of an hour either way, it might be difficult to rely upon the time they give; but, when the suggestion is that, what they honestly thought to be 4 p.m. or thereabouts, was in fact about half past one, it passes belief.

99. The evidence of the two Kellys is even more intractable. In the first place these witnesses had driven in by taxi from Koonibba Mission, which is 25 miles from Ceduna. They had had dinner at the Mission at 12 o'clock, and had come into Ceduna in the taxi driven by Mrs. Blackham. They say that they had left the Mission at about 3.30 p.m. That was no doubt an estimate, but, allowing something over half an hour for the drive of 25 miles, it is plainly impossible that these witnesses could have been in Ceduna before 2 p.m. Their evidence does not stop there. The admitted fact is that they entrusted the petitioner with the money which he gave to Betty Gadd to buy the wine that she bought for him. And when the Kellys speak of going with the petitioner to the show, and accompanying him to the tent, where he washed and changed from trousers and shirt into overalls, they are speaking of something that must have happened, in so far as it is clearly proved that he was wearing trousers and shirt in the afternoon and wearing white overalls at night. It would be very difficult to believe that the Kelly brothers have invented this account of accompanying the petitioner into the Showgrounds, and, if this is what happened, it disposes of the Giesemans' account of Stuart coming in to lunch before 2 p.m. In this connection we notice that the petitioner's evidence (p. 819) is that when he came back from Thevenard, and walked into 'the fun fair', Moir was working on the 'knock-em'. That is consistent with the evidence given by the Kelly brothers, but it cannot be reconciled with Gieseman's evidence (p. 43, p. 45) that Stuart came back and had his lunch, and that, after that, he (Gieseman) looked at his watch, saw that it was 2 p.m. and said "it is time to start".

ALIBI REJECTED

100. On this survey of the evidence relating to the movements of the petitioner on Saturday, 20th December, 1958, we are clearly of the opinion that, so far from establishing an alibi for the petitioner, or casting any doubt upon the truth of the confession, the new evidence leads to the necessary conclusion that the petitioner did, as the confession relates, walk back from Thevenard to Ceduna along the beach, in the vicinity of the cave in which the body was discovered, at some time between the hours of 2.30 p.m. and 4 p.m., that is to say within the period during which the child must have been raped and murdered.

101. On this finding it can no longer be said—as it was said at the trial—that there was really no evidence of the petitioner's guilt, apart from his oral and written admissions of the fact, but, as the petitioner has done what he declined to do at the trial, namely, to give evidence on oath, it remains to consider the effect of his testimony.

THEVENARD INCIDENT

102. For this purpose an important aspect is the petitioner's evidence that he had not only gone to Thevenard in search of the girl to whom he had talked when he was at the pictures on the Friday night, but that he had found her and had had intercourse with her. In relation to that it is necessary to follow the course of the hearing. In para. 67 we have referred to the way in which the purpose of the visit to Thevenard was treated at the trial, but there may be some significance in Mr. O'Sullivan's cross-examination of Blackham as follows (Ex. 1, p. 20):

> "I believe there are young girls in the Thevenard Hotel that men used to visit . . . I had heard of it. Apart from what Stuart told me, I would not have guessed that that was why he was going to Thevenard . . . I am sure I did not suggest that myself but that he told me."

In due course when Veda Miller and Brenda Kent were called, and gave evidence (par. 80 *supra*) their cross-examination by Mr. Shand left no doubt as to the identity of the girl, whom the petitioner had expected to see in Thevenard, namely, the third girl from the Thevenard Hotel, who had been sitting in the pictures with Veda Miller and Brenda Kent.

103. According to Mr. Strehlow all that the petitioner could tell him about the girl in question was that "she was a slightly short and stumpy girl," but the account which the witness gave (p. 420-2) of this conversation was:

> "He (Stuart) merely said he had seen this girl at the pictures at Ceduna and that is the reason why he had gone to Thevenard on the following day. Q. Looking for the girl? A. Yes, looking for the girl. That is what he told me. Q. Looking for a girl he knew worked at the Thevenard Hotel? A. Yes. Q. And he had found her? A. Yes. Q. Did someone go in

and get her from a room? A. He said, when he first got there he sat down outside the hotel on a seat and a girl came out. He asked her and she went in and got the other one. Q. Got the other girl—the one he was looking for—is that right? A. That is what he said."

This evidence was given on 4th September, and, on the same day, the girl Olive Betts was called. Compared with the other two girls, she could be described as 'slightly short and stumpy,' but her evidence disposed of the suggestion that she had had anything to do with the petitioner. She deposed that the day in question was, as the other girls had testified, her day off. While the petitioner was sitting outside the hotel, she was spending the day with her sister, and, to clinch the matter, a medical practitioner was called to testify that she was in fact "virgo intacta.'

104. When the petitioner came to give his evidence—on 13th October—there was yet another change of front. He deposed that the girl, with whom he had had intercourse, was not one of three from the hotel—who were sitting in the row in front of him—but another girl who was "sitting in the back." He said that he had talked to this other girl in the interval. She had said to him, "You come and see me tomorrow," and he had said, "I see." According to him, she had pointed over her shoulder, and had said to him, "You can come over there tomorrow." His evidence was that, up to that time, he had never heard of Thevenard, but learned on the following morning that there was a place of that name lying in the direction in which the girl had pointed. That was, according to him all that he knew about the girl, when he set out for Thevenard upon the chance of seeing her.

105. His evidence was that, while he was sitting in front of the hotel, a girl came out. He recognized her as one of the three who had been sitting in front of him at the pictures, and accosted her. He said that he "asked her about the other girl" and she replied "She is asleep." He deposed that she asked him about Allan Moir and that he told her that Allan Moir was drunk. He said that, after that, the girl went back into the hotel, and then he saw the other girl, the one to whom he had been talking at the pictures. He could not say where she had come from, but she was standing on the footpath. She said to him "You come down all right" and he said "Yes". He said "What are we going to do now" and she said "We go down the back." He said that, thereupon, he followed her to the back of the hotel, and there in the open he had intercourse with her. He said that he had given the girl £4, which he had borrowed from the native with whom he had been drinking in the morning, and that after that he left her. He was shown some photographs, and identified one (Brenda Kent) as the girl who had come out of the hotel, and another (Olive Betts) as the girl with whom he had had intercourse.

106. We find this story quite incredible. Taking what the petitioner said to Blackham in the taxi, with the account that he gave to Mr. Strehlow, we can see why the petitioner went to Thevenard, and why he was sitting on the seat outside the hotel. On that his questions to Veda Miller and Brenda Kent about 'the other girl' are quite intelligible. But, on this new story, there is no rhyme or reason in what he did or said. If the 'other girl' was working in the hotel, either Veda Miller or Brenda Kent might be expected to know who she was, but, on this story, they could have no clue to what he was talking about. The whole story of the girl appearing from nowhere, taking him round to the back of the hotel, and intercourse occurring, presumably, on the ground in the back yard, sounds like a fairy tale, but the first question is, who was the girl? Is she, or is she not, supposed to be Olive Betts? If she is supposed to be someone else the whole story is fantastic.

107. There is an obvious similarity between this last excursion into fantasy and the conduct which the police attribute to the petitioner when they were questioning him. In the first instance he tells the police that he had spent the day drinking on the beach at Ceduna. When it appears that the police know of his visit to Thevenard, he says that he will tell the truth, and admits what he thinks that they already know, and so it goes on. In the same way, when he had heard Blackham's evidence at the trial, he determined to tell the truth, but to take the sting out of it by adding a false ending to the story. It was a good story, which seemed to offer a possible line of retreat, but, unfortunately for the petitioner, the loophole was closed, and he was left with no story to tell except a palpable falsehood.

CHARGES AGAINST POLICE

108. It remains to consider the petitioner's charges against the police, namely, that the confession was extorted from him by intimidation and actual violence.

So far as we can gather (*i.e.* from Mr. O'Sullivan's cross-examination at the preliminary hearing and at the trial and from the petitioner's unsworn statement in App. V) the petitioner has never deviated from his complaint that, at an early stage of his interrogation in the police station at Ceduna, he was assaulted by Const. Jones and by Sgt. Walker. Without referring to the evidence in detail it is sufficient to say that, in this respect, his testimony follows, very closely, the allegations in the unsworn statement (App. V).

109. The allegation of intimidation stands somewhat differently. In his cross-examination at the preliminary hearing (Ex. 40, p. 115) we find Mr. O'Sullivan putting it to Const Jones:—"I suggest that at this stage (*i.e.* after Sgt. Walker was supposed to have choked the petitioner) *another officer* held up a razor blade and said 'I'll skin you with this'. A. No that never took place . . . Q. You are sure *one of the local policemen* didn't have a razor blade at any time? A. No razor blade was produced to the defendant at any time."

The deposition at the trial was taken in narrative form but, so far as we can find, the only reference to 'a razor blade,' was in Mr. O'Sullivan's cross-examination of Const. Jones. The note reads (Ex. 1, p. 67): "There was no officer with a razor blade, and nothing like 'Come on, I will skin you with this' was said by any one." In the unsworn statement (App. V) the petitioner gives his version "When they searched me they found a blade from a razor in a coat pocket. It was lying on the desk. *One of the policemen* picked it up. He said 'If you don't tell us I will skin you', or 'kill you', or something like that."

Before the petitioner gave evidence (that is while he was refusing to have any part in the enquiry: see pars. 9 and 10 *supra*) Det. Sgt. Turner was questioned on this subject (p. 596) as follows:—

> "Q. Did you notice amongst his possessions any razor blade or blades of any description? A. Yes. Q. What was done with that? A. I do not recall now. I think there were 19 blades in a little container. They were blades of a leather knife about the size of a razor blade. Q. Were they taken from a pocket in his jacket? A. Yes. Q. At what stage in the proceedings were they taken. A. Early. Q. What was done with them? A. Immediately afterwards they were placed on the office table. I cannot recall what happened after that. Q. Immediately after they were discovered? A. Yes . . Q. Did any officer handle those blades during the interrogation? A. Not after they were placed on the office table—not that I can recall. Q. Who was the officer who took them from the pocket and put them on the table? A. I do not recall who that was. It was not me. Q. Was that officer the only one who handled those blades? A. No. *I examined them.* Q. Was anything asked of Stuart about those blades? A. I cannot recall. *I may have asked him what they were or something* of that nature."

110. When the petitioner came to give his evidence, he was no longer in any uncertainty as to the identity of the policeman who had threatened him. His version (p. 738) is that it was Turner who took the blades out of his (Stuart's) coat pocket, and put them on the table, and, later on, picked them up and said, "See these razor blades here, I will skin you alive, tell us the truth now."

In due course, when Turner was recalled for cross-examination by Mr. Starke, he denied that he had picked up the blades to threaten the petitioner with them. According to his cross-examination he had asked the petitioner about the blades, and the petitioner had said that they belonged to someone at the Gieseman show. He added, "I think he said he borrowed a coat and they were in the pocket." This is, more or less, the evidence, namely, that the blades belonged to Moir, who had borrowed Stuart's coat, and left them in the pocket.

111. We can see nothing improbable in the account given by the detective. As the officer in charge it is, perhaps, unlikely that he would, himself, search the petitioner, but, as the blades were laid on the table, he might be expected to pick them up, and look at them, and to ask the petitioner what they were, and it is not unlikely that the petitioner would have answered as Turner says that he did. If that is what happened—if the incident occurred while the petitioner was being searched, or before he was told to sit down at the table for questioning—we can see nothing sinister in the fact that the other officers, with the exception of Sgt. Walker (p. 107b), have no recollection of seeing the blades on the table or in Turner's hand. This evidence was taken nine months after the event, and it was not as if any stress had been laid upon the blades at the trial. Neither can we see any significance in the fact that, on the following morning, when Const. Green was noting the petitioner's property in the Property Book, he failed to include the blades, which, according to his evidence, were then lying on Sgt. Walker's table. Our view upon this conflict in the evidence is that the petitioner has been found untrustworthy in other respects, and it would be very dangerous to rely upon his testimony, in relation to a matter which has no intrinsic probability, and, all the more so, where, as in this instance, his testimony appears to be an embellishment of the instructions given to his counsel for the purposes of the trial. We reserve final judgment upon the point until a later stage, but we cannot agree with Mr. Starke's contention, that the evidence relating to this incident adds anything to the weight of the petitioner's testimony in support of his charges of actual violence.

112. When we come to the petitioner's charges against Jones and Walker, we have to remember that this is very much the issue that was tried and determined by the jury. We have, indeed, the petitioner's testimony, which was not before the jury, and we have had the advantage of a very forceful and searching cross-examination of all the police witnesses. If we could feel that there was any credible evidence in support of the petitioner's charges, it might be a question whether the evidence for the prosecution had been so shaken or impaired as to render it unsafe to uphold the conviction; but we think that we ought to accept the verdict of the jury unless—on our own view of the witnesses—we are inclined to trust the evidence of the petitioner, or to distrust the evidence of the police witnesses.

PETITIONER'S EVIDENCE UNCONVINCING

113. We have referred to certain respects in which we find the petitioner's evidence untrustworthy, but there are others. For example, in his evidence he was prepared to swear that the confession was not read over to him, until after he had signed it, whereas in his unsworn statement (App. V) he says "The man with the typewriter was using it while they were talking to me. They kept asking

me questions all the time until he had finished. One man read it. He said 'that's true isn't it.'. I said 'yes'. He told me to write my name. I wrote my name because I knew they would hit me again if I didn't''. But apart from anything of this kind we feel some difficulty in accepting the petitioner's account of the way in which he says that he was assaulted.

In the first place it is difficult to fit the assaults described by the petitioner into his account of the interrogation. In the unsworn statement (App. V) he had said:—

> ''They took me to the police station. Mr. Turner said 'Come on you know that you killed the girl.' I said 'No.' He said it a few times. Mr. Jones said 'Take your clothes off.' I took them off. They looked at me . . . Mr. Turner pulled some hairs out of my head and some from my legs. He didn't ask me if he could. They told me to get dressed. I got dressed. They told me to sit down. I did that. Mr. Jones said, 'Come we know you did it.' I said 'No.' He said 'Yes. Come on tell the truth.' I said, 'I didn't do it.' Mr. Jones punched me over my eye . . .''

His evidence in chief (p. 737) was more or less to the same effect:

> ''Q. When you got to the Police Station, Max, policemen talk to you and you talk to policemen? A. Yeah. Q. As far as you can remember, will you tell us what the police said and what you said and what happened at the police station. When you got there what was said? A. He take my trousers off and shirt. Q. What about your shoes? A. Took them off. Q. Did they say anything? A. They said there is a mark there. Q. . . . Do you know what they were talking about? A. No. Q. What else was said? A. He asked me to tell the truth. Q. What you say? A. I said 'I can't tell you the truth. I don't know nothing about it.' Q. What else do you remember? A. Jonesey punched me . . .''

It will be seen that in neither of these accounts is there any reference to the preliminary questions, that must necessarily have been put at the start of the interrogation.

114. The cross-examination (pp. 780-6) puts a very different complexion upon this aspect. It concedes that Jones' evidence of the questions and answers, in the early stages of the interrogation, is substantially correct. It shows that the confession is a faithful record of what the petitioner said to the police upon this subject, but, in addition, it suggests that, for a time at least, the petitioner was quite cool and collected. It appears he was prepared to correct or qualify the account given by the prosecution. The note reads:—

> ''Q. . . . they told you the little girl had been murdered and raped on the beach, and they asked you if you knew anything about it? A. Yeah. Q. You said 'No. I never did it'? A. No. I didn't say that. Q. What did you say. A. I said 'I don't know nothing about it.' Q. Did Turner say 'Whoever raped this little girl would probably have scratches on his knees'. A. Yeah. Q. Did Turner say 'You have scratches on your knees, how did they get there?' A. Yeah. Q. What did you say? A. I said 'I don't know.' Q. Did they tell you to undress because they wanted to see if you had any other scratches? A. Yeah. Q. Did they then say 'How did you get these scratches on your back?' A. I said, 'I dunno.' Q. Did Turner say 'Did you get the sack on Monday morning because you were missing from work on Saturday?' A. He didn't say I got the sack . . . He asked me why I didn't go to the show . . . Q. What did you say? A. I said 'I got the sack' . . . I told him I didn't work that night. Q. Did you say you got on the booze? A. Yeah. Q. Then did Turner say, 'Tell us what you did on Saturday'. A. Yeah. Q. Did you say 'I woke up about half past seven and had a drink of tea? A. I didn't say half past seven . . . I told him I woke up at nine o'clock.''

115. In this way the questioning proceeds—without any sign of heat or stress—all through the incidents recorded in the confession, up to the point at which the petitioner takes the taxi to Thevenard. This is introduced as follows (p. 783):

> ''Q. Did you tell Turner that you were all day with some blokes at Ceduna? A. Yes . . . Q. Did Turner say 'We have reason to believe you were round at Thevenard on Saturday afternoon'? A. Yes. Q. Did you say 'Yes. I will tell the truth. I did go round to the pub there'? A. Yes. Q. 'Because I couldn't get any more wine at Ceduna'? A. Yes. Q. 'So I caught a taxi to the Thevenard pub'? A. Yes . . . Q. Did Turner say 'How did you get back to Ceduna'? A. Yes. Q. Did you say I walked back? A. Yes. Q. Did Turner say 'What time was that'? A. Yes.''

And so it goes on, the petitioner agreeing that he had told Turner that it was about 1 o'clock when he had taken the taxi to Thevenard, and that he had said, in the first instance, that he had gone by the road, and, later, that he had cut across the beach.

116. This was, no doubt, the way in which the interrogation commenced. It was obvious that, at least up to this point, the petitioner had known what he was saying, and remembered what he had said. He had tried to withhold the fact that he had been to Thevenard, as he had withheld his reason for going there, but there is really nothing to suggest that he was—in any way—agitated, or otherwise

than self-possessed—that is to say up to this time. In these circumstances it is very difficult to believe that he was assaulted and intimidated at the outset of the questioning, and, if he was assaulted after that, he should be able to describe how—and at what point—that came about.

117. There are other circumstances, which suggest that the petitioner's evidence is either untrue or much exaggerated. For example, he describes the first punch by Jones as 'a big heavy punch' which 'just about knocked me off the chair'. According to his evidence there was a cut over his eye which started bleeding, so that he couldn't see for the blood running down and getting into his eye. He says that, on the following morning when he washed his face, the cut started to bleed again, and that it was a couple of weeks before it healed. As support for this testimony, our attention was called to a police photograph, taken in Adelaide on the petitioner's arrival from Ceduna on 23rd December, 1958. It was suggested that, under a 'microscope,' this shows a wound in the course of healing, where the petitioner says that the cut was. The police photographer, who was called to give expert testimony upon the subject, was not prepared to accept the suggestion, and, on our own inspection of the photograph, we are unable to express any opinion one way or the other. But what seems to us to show that the petitioner's evidence must be, at the very least, a gross exaggeration, is the fact that the injury was unnoticed by anyone, who saw the petitioner at or about the time. When the confession had been signed, the petitioner was brought out into the yard (as mentioned in par 31 *sup.*) where he was seen by the two black-trackers, and by the two local constables, who had not been present at the interrogation. In the cross-examination at the trial, it was not suggested to any of the witnesses that the petitioner's face was cut or bleeding when he was brought out. On the other hand, there is the evidence of the Justice before whom the petitioner was brought on the following morning. In his evidence at the trial, he testified that he had 'had a good look at' the petitioner, who 'made no complaint of ill treatment, and showed no signs of having suffered any violence.' On his arrival in Adelaide the petitioner was photographed, as already mentioned, and in due course he was seen by the medical officer of the gaol. The evidence of Const. Harrison (who supervised the taking of the photograph) and of the medical officer is negative, but it seems unlikely that an injury of the severity described by the petitioner could have passed unnoticed by all these people.

118. A further circumstance which points in the same direction, is proved by an affidavit, which was admitted by consent. This is by Mr. Kleinig, a welfare officer in the service of the Aborigines Department stationed at Ceduna. The deponent had been asked by Sgt. Walker to make some enquiries at the Koonibba Mission Station, and his affidavit states that, on his return to Ceduna, he went to the Police Station, and *stood outside the open doorway of the office.* He saw Stuart seated at the table. Detective Whitrod was typing, and he noticed two other officers in plain clothes, whom he afterwards ascertained to be Det. Sgt. Turner and Const. Jones. He says:

> "I was outside the office at the Police Station for about a quarter of an hour, and could hear the typewriter going, and the voices of all persons in the office were very subdued. I could not hear what was said."

119. Yet another circumstance, that might have supported the petitioner's allegation of violence, but fails to do so, is the lock of hair which he alleges was pulled out by the roots, whereas the police say that it was cut off. We have looked at the hair (Ex. T) under a magnifying glass and it appears to have been cut and not pulled.

The last circumstance to which we need refer is the petitioner's signature to the confession. We have other specimens of his signature, six in all, including one supplied to us in the witness box. Comparing the signature on the confession with the others, we are quite unable to discover in it any sign or indication of agitation or nervousness.

On our observation of the petitioner we doubt whether he would be easily cowed. When in drink he was ready to answer back to Sgt. Walker (p. 733). When sober he was probably less truculent, but, in this connection, it is not irrelevant to observe that, for three months or so, the petitioner had toured the north of Queensland as a pugilist, prepared to take on all comers, in a travelling show or boxing booth.

EVIDENCE OF THE POLICE

120. It is in these circumstances that we approach the evidence of the police witnesses. As we have said, their testimony has been subjected to a forceful and searching cross-examination, and to severe criticism directed to the general conduct of the investigation, as well as to the actions and testimony of the individual officers. We do not propose to refer to this criticism in detail, but there are some matters to which we think it right to refer.

121. In the first place we should, perhaps, refer to the so called identification of the footprints. As an identification the test was plainly valueless, and it has never been treated as affording any evidence against the petitioner. In the course of their cross-examination the circumstances in which the test was held have been used as a means of disconcerting and discrediting the police witnesses. That was fair enough, but—however valueless the test may have been as evidence—we see nothing in the incident going to the integrity of the witnesses.

122. The next matter to which we must refer, is that we feel obliged to point out that the need for this inquiry could hardly have arisen, if the evidence which we have taken had been made available to the court of trial. The *locus in quo* was, no doubt, difficult of access, with infrequent communications,

and the time was a few days short of Christmas, but the plain fact is that the prosecution was content to rest its case upon the confession, without seeking for the testimony by which it has now been fortified. In the same way, it seemed to Det. Phin that the statement taken from Allan Moir covered the ground, as no doubt it did for the purpose for which he was taking it, but, with a view to the trial upon a charge of this nature, it would have been prudent to take statements from the other members of the Gieseman troupe.

123. There is another line of criticism, which was directed to the evidence given by Constable Jones, but which, as we see it, touches a question of policy. This relates to the fact that this witness, who was—as it were—the spokesman for the whole party, had taken no notes of the interrogation whilst it was proceeding. The notes that he used at the trial had been made on his return to Adelaide, that is to say at about 5 p.m. on the following day, Tuesday, 23rd December. In this connection there would seem to be two schools of thought. There are those who hold that questions and answers should be recorded on the spot, and those who hold that the sight of a note book and a pencil dries up sources of information that might otherwise be fruitful. It is, no doubt, a matter of opinion, or perhaps of policy, which course is to be preferred, but there are two points that should be made. In the first place, if the notes are not made at the time, they should be made at the first possible opportunity, and, secondly, it should be realized that, as against any advantage that there may be in not taking notes on the spot, there must be set the disadvantage—the element of doubt and uncertainty—which lays the testimony open to the criticism to which the evidence has been subjected on this occasion.

124. Another criticism, to which Const. Jones' testimony is admittedly open, is that, in giving his evidence at the trial (Ex. 1, p. 61), he was led into claiming (or at any rate into appearing to claim), first, that his account of the oral interrogation was word perfect, and, secondly, that the words used in the written confession (App. I) were what the petitioner had said, *i.e.* "**they are exactly his** words, except as I said before where he was spoken to by Turner and the first part (**referring to** Appendix I 'A' and 'B')."

In saying this we have no doubt that the witness was speaking incautiously, and with less than the care that is expected of a police witness in a case of this kind. As a matter of common sense, and speaking from some experience of the way in which these things are handled, we have no doubt that the witness—who had been entrusted with the task of noting and remembering what was said—was doing his best to remember the exact words, but it is always foolish to claim infallibility, and, it stands to reason that the witness would relax his attention, when Whitrod was taking the statement down on the typewriter. We have no doubt that the petitioner had more help with the wording of the written confession than Jones was prepared to admit. The evidence is that the first part (App. I 'B') was the result of question and answer reduced to narrative form, and we think that it was conceded that the dates and times were generally the result of questions, for example, "was that 19th December, 1958?" or "what was the time when (so and so)?" The fact that "the show was situated at the Ceduna Oval" would no doubt be elicited in the same way, and it is not unlikely that the word, 'unconscious', was the result of a question intended to clarify an expression which was regarded as ambiguous. The sentence "I killed her . . ." ('H') was admittedly the answer to a question, and the conclusion "I cannot read English . . ." ('J') was added after the statement had been read over to the petitioner.

125. But conceding that the evidence is open to this criticism, the plain fact is that there is ample support for Jones' recollection of the oral interrogation. In the first place his notes were dictated to and typed by Turner, who followed them as they were dictated. Secondly, the written confession follows the same lines, and, assuming good faith upon the part of the police witnesses, it corroborates the oral confession. Thirdly, the petitioner protests that many of these things were put into his mouth, but a fair reading of his evidence is that the questions followed the lines of the interrogation to which Jones testified, and that, up to the point of the actual confession (App. I 'E'), the petitioner answered them very much as Jones has testified that he did. Lastly, if we exclude the actual confession, we can see that the oral interrogation and the written confession are, so far as they go, a faithful record of the petitioner's movements and actions on the day in question. All that remains is the question whether the actual confession (App. I 'E') is the petitioner's account of what he did or a wicked fabrication invented by the police for the purpose of convicting the petitioner on a capital charge.

126. We are unable to go all the way with Mr. Starke in his attack on Sgt. Walker, based upon the arrest of the petitioner and his friend Herbert Sumner. It appears that, at different times on the Saturday evening, the sergeant gave directions for the arrest of these two men, and that they were locked up and released upon the following morning, without any entry being made, as it should have been made, in the Station Journal, and without their being brought before a Justice of the Peace to be dealt with according to law. The fact is, of course, that very shortly after the second arrest, the search for Mary Hattam was organized, and that for the next two days, the local police were fully occupied. But the evidence is that following upon Sumner's release a summons was issued against him and he was brought before a Magistrate and duly convicted. Sgt. Walker tells us that, when the petitioner was arrested upon the charge of murder, he thought that there was no need to prosecute

him on the charge of being an aborigine drinking liquor. There is, no doubt, that the sergeant's action was irregular, in that the charge should have been entered in the Station Journal, and that the men should not have been released, without being brought before a Justice, or their giving bail (which the sergeant could have taken) for their appearance to answer the charge.

As a further criticism of this witness Mr. Starke relied upon entries in the Station Journal, relating to the arrest of the petitioner, and to information supplied by Detective Phin from Whyalla. Having regard to the fact that these entries were not made until the Tuesday afternoon, and that Sgt. Walker was not in charge of the investigation, we cannot regard shortcomings of this kind as justifying any doubt of his integrity. On our view of the witness we see no reason to doubt his oath that he was an onlooker, interested, but taking no part, in the interrogation that was going on in his office.

127. The position, as we see it, is that the jury, who heard these witnesses at the trial, were satisfied that their evidence was given in good faith. We have heard and seen them subjected to a third cross-examination, in which the fullest use has been made of all the material available as the result of the previous hearings. In the result we are of the same opinion as the jury at the trial. It seems to us that the testimony was given in good faith.

128. This may be said to answer the question that has been submitted to us, namely, as to the effect of the evidence that was not available to the jury at the trial, but we think that there are some observations that we should add.

The first is in relation to the argument used by Mr. Strehlow, namely, that this is not 'a black man's crime'. We agree with that but we cannot agree that the crime is one to which white men are addicted. It may be regarded as an act committed when the self-control and the sense of decency which normally restrain the actions of men (whether white or black) are for some reason so released or overcome as to allow lust and passion to have its way. A possible explanation for that is strong drink, and there can be no doubt that, on this afternoon, the petitioner had been drinking fairly heavily.

129. Another matter to which we would refer is Mr. Starke's argument as to the improbability of the petitioner acting in the manner described in the confession, namely, stripping off his clothes prior to committing the act, and, after committing it, running in to the pool to wash on the open beach. That is a fair argument, and it was put very powerfully to us, but we think that there can be no doubt that this is what the murderer did—*i.e.* the man whose footprints ran down to the pool and back again—whether he was the petitioner or another. And here again we think that it is easier to believe that this was the petitioner than another, in so far as it was a risk that a man like Stuart might take when he had been drinking, whereas he might not take it when sober.

130. The question which the new evidence raises is this. The new evidence proves that Stuart must have passed along the beach at or about the time when the thing happened. If the footprints are not his, whose can they be? It is an extraordinary coincidence—if it is coincidence—that, before they ever saw him, the blacktrackers should have said that the prints were those of a man answering to his description. (In his cross-examination at the trial (Ex. 1, p. 69) Const. Jones was asked what the tracker 'Sonny Jim' had told him, and said "He did tell me that they were most probably made by a man who came from the north of Australia. He did not tell me he was a stranger to Ceduna, but he could not understand why he was at Ceduna when he came from the north of Australia"). It is significant that the bare footprints came to an end at, or about, the point at which the petitioner left the beach. Remembering his reluctance to disclose the fact that he had been to Thevenard, his reluctance to disclose his reason for going there, and his attempt to confuse the issue by false testimony, we think that there is ample evidence to support the verdict of the jury without recourse to the confession, and, in these circumstances, it is difficult to see why there should be any doubt with respect to the fact.

THE EVIDENCE GIVEN BY THE WARDROP FAMILY

131. At our sittings on the 17th August, 1959, Mr. Shand, Q.C., announced that it had come to the knowledge of counsel acting for Stuart, that on Friday, 14th August, 1959, three independent witnesses had given a statement to the solicitor instructing Mr. Brazel, Q.C., "that one of the police concerned uttered these words in their presence—'We bashed it out of the black bastard' ". It appears that no such statement was ever given to the solicitor, but, having regard to the wide publicity which was given to Mr. Shand's statement at that time, we feel obliged to deal with the facts and the evidence at some length.

132. The three witnesses referred to by Mr. Shand were Alan Haig Wardrop, Mary Ellen Wardrop, his wife, and Christine Elizabeth Mary Wardrop, their daughter. As it appeared subsequently, the signed statements had not been obtained by Mr. Ligertwood (the solicitor instructing Mr. Brazel) until the 17th August, 1959, and failed, when they were obtained, to support Mr. Shand's opening. The statements concerned Det. Whitrod, the police officer who had typed the confession. The witness Alan Haig Wardrop had conducted a cafe at Port Lincoln for 8 years prior to 20th February, 1959. Det. Whitrod had, at all material times, been stationed at Port Lincoln. He and Wardrop were members of the Port Lincoln sub-branch of the Returned Sailors, Soldiers and Airmen's Imperial League of Australia. Whitrod had been a member of the Police Force for 20 years, and a member of the Criminal Investigation Branch since 1948.

133. According to Mr. Wardrop's statement to Mr. Ligertwood there had been two separate conversations. The first was said to have occurred on the evening of the 26th December, 1958, when he, Whitrod, and one Baker (the Secretary of the R.S.L. Club at Port Lincoln) were standing at the bar of the club. According to Wardrop the Stuart murder was discussed. He could not remember the exact words of the conversation, but, from what Whitrod said, he "could come to no other conclusion but that Stuart had been subjected to physical violence." He went on to say "From something which Whitrod said (but which I am unable to remember) Baker said 'You gave it to him, did you Frank?' I can't remember Whitrod's reply, but I said 'The bastard deserved it anyway'. I can't remember any other details of the conversation."

The second conversation was said to have occurred some time later in the kitchen of Wardrop's shop at Port Lincoln, when Det. Whitrod had come there, late at night, for something to eat. According to Wardrop the conversation was between Whitrod and Mr. and Mrs. Wardrop, in the presence of their daughter, and, in referring to the Stuart case, Whitrod had described the injuries done to the murdered girl. The statement went on "I can remember Whitrod telling us that they put sand down and got Stuart to walk across it, and as soon as he did this Sonny Jim, a black tracker, said pointing with his finger (as demonstrated by Whitrod) 'Him do it—him do it.' As he was telling us his story Whitrod was obviously excited and upset and he said 'I've got kids of my own—you've got kids. When he confessed we did our blocks and really belted him.' "

134. In her statement Mrs. Wardrop corroborated her husband's story that, on a night after Christmas 1958, there had been a conversation in the kitchen of their shop at Port Lincoln during which Det. Whitrod had discussed, in the presence of Mr. and Mrs. Wardrop and their daughter, some details of the murder and the police investigation. Her version of the conversation was that Whitrod had told them how the blacktrackers had identified Stuart's footprints in sand sprinkled on the 'floor' (*sic*). According to her statement, Whitrod had said "He (Stuart) showed no emotion—he couldn't have cared less. It was then we really belted him up—you know what it's like—having children of our own—we were really upset." She could remember saying "I know how you must have felt—I would feel like killing him."

135. Christine Wardrop in her statement said she remembered the conversation in the shop kitchen (between Det. Whitrod and her parents during which the murder was discussed by Whitrod). She felt embarrassed by the details which Whitrod gave and was not taking particular notice of what he said. She did not remember him saying anything which suggested that Whitrod or any of the Police had hit Stuart.

136. The three Wardrops gave evidence before the Commission on 4th September, 1959. They were examined by Mr. Brazel, Q.C., assisting the Commission and cross-examined by the Crown Solicitor. (There was at that time no counsel representing Stuart). Mr. Wardrop was subsequently recalled at the request of Mr. Starke, Q.C., and was further examined and cross-examined.

137. In his evidence Wardrop gave a different version of the alleged conversation at the R.S.L. Club. His evidence relating to that occasion was as follows "Was any reference made to this murder?—Yes, it did come up. Who first spoke of it of the trio?—Mr. Whitrod. What did he say?—He said he had been up there. He said that Stuart had "got his corner." Was that addressed to you or to Mr. Baker, or both?—Both. We were in a sort of half circle. Was anything said in response to that?—Horrie (*i.e.* Baker) said to him 'You gave it to him Frank.' I do not remember that Frank said anything (by Frank I mean Mr. Whitrod) and I said 'Well, it serves the bastard right.' Do you remember any other things that were said that night?—No, not that night."

He also gave his account of the conversation in the kitchen of the shop when according to him Whitrod said that, after Stuart confessed, "the police did their blocks and really belted him." He denied having told anyone that Whitrod had said "We bashed it out of the black bastard", but admitted having discussed the alleged conversation with a brother-in-law (who is a sub-editor of the "News") and having told his brother-in-law that he intended to go to the Secretary of the Commission to give particulars of such conversation.

138. Mrs. Wardrop's version of the conversation in the kitchen was that Whitrod, after discussing details of the injuries to the murdered child and telling how the blacktrackers had identified Stuart's footprints at the Police Station, said "When he confessed we really belted him. You know what its like, you have got children of your own.

Christine Wardrop confirmed that there was a conversation in the kitchen when Whitrod gave some details regarding the investigation, but she did not remember him saying anything which would suggest that the police had used violence towards Stuart. She said she had been out of the kitchen during portion of the conversation.

139. In the first instance Det. Whitrod gave evidence on the 7th September, 1959. He denied that Stuart had been subjected to any violence on the night of his interrogation. He also denied having said anything to Wardrop at the R.S.L. Club, or anything in the shop kitchen that could be understood as indicating that Stuart had received any violence at the hands of the police. In particular he denied that he had ever used the expression Stuart "got his corner." He had heard the expression "get

his corner'' but to his mind it ''was associated with gambling. It is used by gamblers to indicate their share of the proceeds.'' He had never heard it used in any other sense. He admitted that he had been in the habit of getting a meal in the Wardrops' shop from time to time, and would not deny that he might have talked to the Wardrops about the Stuart case. At a later stage he was recalled and cross-examined by Mr. Starke, Q.C. In answer to Mr. Starke he admitted that the whole of the two conversations as detailed by Mr. Wardrop, except the admissions of violence, might have occurred.

140. Mr. Baker, Branch Manager of Motor Traders (S.A.) Ltd., and Secretary of the Port Lincoln Sub-branch of the Returned Sailors, Soldiers and Airmen's Imperial League of Australia gave evidence on 4th September and 20th October, 1959. He gave a point blank contradiction to the story of the conversation in the Clubroom. He denied that Whitrod had ever said anything to him about the Stuart case when Wardrop was there on 26th December, 1958, or at all. Under cross-examination by Mr. Starke, Q.C., he said that Wardrop had telephoned him from Adelaide on 12th August, 1959, and that, after some discussion of R.S.L. sub-branch business, the following conversation had occurred. ''He (Wardrop) said 'I am very worried.' I said 'What are you worried about'? He said 'I am worried about this murder case.' I said 'What connection is that with you?' He said 'You remember Frank Whitrod saying they bashed this chap?' I said 'Alan, I have never heard that. You are romancing.' '' When pressed in cross-examination he went on to add that from his knowledge of Wardrop as a member of the sub-branch, he was a stupid man who 'talked too much and too much rot.'

141. Following Baker's cross-examination we allowed Mr. Starke to recall Wardrop to give his account of this telephone conversation which was given as follows:

> ''I asked Horrie if he remembered that night when we were in the R.S.L. and Whitrod came in and he told us that Stuart had got a hiding up at Ceduna and he said 'Eh' and he paused. He said 'I have got a faint recollection, yes, that is right, what about it?' I said 'Well, Horrie, I have worried and worried and worried about it, I think I had better go and tell the Commission.' He said 'You don't want to do that, all this new evidence that has come up, it doesn't look as if Stuart—it looks as if Stuart is going to get out of it, it looks to me as if this young lad Allan Moir did it.' I said 'Be that as it may, I am still going to go along to the Commission.' He said 'Well, you have always been in trouble, you may as well be in some more.' I said 'Well, I am going anyway.' ''

142. As we have said our reason for setting this evidence out at length is that wide publicity had been given to the statement made by Mr. Shand, Q.C., and that Mr. Starke, Q.C., has urged that the evidence of the Wardrops must seriously affect the credit of Det. Whitrod, and, through him, the credit of the other police witnesses who were present at the interrogation. In these circumstances we think it right to make the following comments:

(*a*) Stuart has never alleged that *Whitrod* ever used any violence towards him.

(*b*) Any admission by Whitrod could only affect his own credit. His admissions (if made) could not properly be used to impair the credit of the other police witnesses.

(*c*) Wardrop does not suggest that Whitrod has ever said that violence was used to induce Stuart to confess. The allegations (p. 459) relate to violence used *after* Stuart had confessed and *after he had walked through the sand.*

143. We are unable to regard Wardrop as a reliable witness. He was giving evidence concerning the details of conversations which had taken place about 8 months earlier, and to which, so far as we can see, he attached no importance at the time. He claimed in evidence that he had a clear recollection of the actual words used by Whitrod, but the discrepancies between the account given to Mr. Ligertwood, and the account given in his evidence, must necessarily suggest a grave doubt as to the truth of this assertion. In his first statement (with regard to the Club conversation) he had said ''the murder was being discussed. I cannot remember the exact words of the conversation, but from what he said I could come to no other conclusion but that Stuart had been subjected to physical violence.'' In his evidence concerning the same conversation he deposed that Whitrod had said that Stuart 'had got his corner', and that it was in response to that remark that Baker had said, ''You gave it to him Frank.'' Under cross-examination he swore that he had always had a clear recollection of the exact words used. When faced with his written statement, and asked whether he could have forgotten the conversation, he replied ''No to me it is just *a legal technicality,* I am not familiar with this. Physical violence, getting his corner, give him the one two three, what's the difference, it's all the same.'' His explanation for Mr. Shand's mistaken impression that Whitrod had said ''We bashed it out of the black bastard'', is (p. 1098) that he had given his version of the conversation to his brother-in-law, who was a sub-editor of the ''News,'' and that this enlargement was his brother-in-law's '*imagination*'.

144. There were other passages in Wardrop's evidence which raised doubts as to his reliability. In particular, (*a*) he testified that he had taken no interest in the trial of Stuart, and had not read any reports of the trial until he saw an account of the summing up on the last day of the trial (23rd April, 1959). As against that his wife gave evidence that he had followed the course of the trial in the newspapers, was interested in the reports, and had always read them. (*b*) he testified that he

did not know whether his daughter had been present in the kitchen when Whitrod made the alleged admissions, and that he had not questioned her as to whether she had heard them. As against that we have the evidence of Mrs. Wardrop and the daughter that, after the publication of Mr. Shand's statement, they had held a family conference, which lasted *from midnight until* 4 *a.m.*, when the conversation with Whitrod had been freely discussed between the three of them.

145. In her evidence Mrs. Wardrop told us that she had given no thought to the conversation with Whitrod until about 4 months later, when her husband asked her if she remembered what had been said. It appears that, from then on, there were discussions between husband and wife, upon the subject of the conversation, until Wardrop decided to make his statement. Her evidence was substantially in agreement with that of her husband, but it seemed to us that, having regard to the frequent discussions as to the details of the conversation, it was really impossible to distinguish between recollection and reconstruction.

146. As against the unconvincing evidence of the Wardrops, we have Whitrod's denial that any violence was ever used to Stuart, and his denial that he had ever said anything of the sort, and we have Baker's denial that Whitrod had ever said what Wardrop attributed to him. Whitrod was subjected to a very searching cross-examination by Mr. Starke, Q.C., but it seemed to us that he came through it unshaken, and we believed his denial. It seemed to us that Baker was an honest and reliable witness. There may have been some conversation at the Club between the three of them, but we think that, if Whitrod had made any suggestion of violence being used by the police, Baker would have remembered it, and we could see no reason for distrusting Baker's testimony. We should add that we prefer his account of the telephone conversation to that given by Wardrop. According to Wardrop, Baker is supposed to have said that 'it looked to him as if this young lad Allan Moir did it'. Baker's evidence was that, up to that time, he had never heard of Moir, and we could see no reason to think that he was not telling the truth.

147. On the question of probability there is considerable force in Mr. Chamberlain's contention that it is most unlikely that Whitrod would have talked in this way to Wardrop. Whitrod had been 20 years in the Police Force. If he had been party to an attack on a person in custody it was a serious breach of duty which must almost inevitably have involved his dismissal from the police force. It seems to us that, if Whitrod felt impelled to unburden his soul, it is unlikely that he would do so to all and sundry. Baker's evidence is that Wardrop had a reputation in the sub-branch for being too talkative, and, on our own observation of the witnesses, we think that it is unlikely that Whitrod would have chosen Wardrop as a confidant. Another consideration which weighs heavily with us is that what Whitrod is said to have admitted is something that never happened according to the petitioner, and could not have happened according to all the evidence that we have heard. On this point the affidavit of Mr. Kleinig is really conclusive.

148. In the result we accept Whitrod's testimony, but we would not suggest that Mr. and Mrs. Wardrop have deliberately concocted or invented the conversation to which they deposed. We are prepared to believe that there was some conversation between Whitrod and the Wardrops concerning the murder, and that he did tell them some of the details of the investigation. It may well be that there were expressions of horror and indignation emanating from Whitrod or with which he agreed. It may, indeed, be that it was suggested to him that the police *must have felt* like meting out summary justice to Stuart after he had confessed, and it is not impossible that Whitrod might have said something that was taken as assenting to that suggestion, but, as we have said, the Wardrops are attributing to Whitrod an admission of something that never happened, and *that* fails to make sense.

HAIRS FOUND IN CHILD'S HANDS

149. There is one other matter to which we should perhaps refer. In his first submission, Mr. Shand indicated (p. 25) that he proposed to raise a question, and presumably to lead evidence, with respect to two hairs that had been found, one in each hand of the child's body. On Mr. Shand's retirement from the case we called for, and obtained, the report of the expert to whom the exhibits had been submitted. It will be found in Appendix VII. When Mr. Starke came into the case there was no further reference to the matter.

SUMMARY AND CONCLUSIONS

150. For the reasons indicated in para. 16 we have been compelled to state the facts and the evidence at length, but, in doing so, we have tried to give a strictly factual and objective account. To that end, we have omitted any reference to evidence given by Moir and by the Kelly brothers, which was calculated to heighten suspicion against the petitioner, without affording any secure basis for a conclusion. We have no doubt that, on the Saturday night, the petitioner had said something to Moir which frightened the lad, and Mr. Shand's cross-examination of the Kelly brothers satisfied us that the petitioner had called their attention to some abrasion or bruising of his right fist. Whether the other remark (to which the brothers testified in different forms) had the significance, which they said that they had attributed to it, is another matter. If this evidence had been given at the trial the jury might have attached some importance to it, or they might not, but, be that as it may, it seems to us that it would be unsafe to use this evidence to found or fortify any inference adverse to the petitioner, and we have therefore left it out of our consideration.

151. In much the same way we excluded evidence, which was tendered by the Crown, to prove what the petitioner had said to the warders guarding him, as he was leaving the court-room after receiving his sentence, and, later, in the gaol.

In the first instance, this evidence was tendered and excluded in the absence of the petitioner, that is, when he was not represented before us and was refusing to take any part in the inquiry. At a later stage, when the petitioner had given evidence charging the police with assault and perjury, Mr. Chamberlain applied to cross-examine him with a view to calling this evidence if the fact should be denied. This did, undoubtedly, put the question in a new guise, but—rightly or wrongly—we adhered to the previous ruling, and recommended Mr. Chamberlain to refrain from putting the questions in cross-examination. As we have indicated, our decision was given after grave hesitation, but it seemed to us that a departure from the previous ruling might be open to misconstruction, and that it would be better to reach our conclusion without recourse to what could—and in all probability would—be represented as a harsh and oppressive exercise of our discretion.

152. For the purpose of our inquiry we start from the fact that the petitioner has been found guilty by the verdict of a jury, after a trial which has come in review by the highest courts in the State, and in the Commonwealth, and, finally, by the Queen in Council. The finding of all these Courts is that the petitioner has had a fair and lawful trial, and that the verdict of the jury was a reasonable conclusion upon the case made, and the evidence given, at the trial.

153. The evidence that we have heard has been directed to the three topics or questions: (1) the petitioner's understanding and command of the English language, (2) the suggested alibi, and (3) the circumstances in which the confession was obtained, but these questions cannot be kept separate and apart, in so far as, the answer given to any one question is liable to have a bearing upon the others.

154. On the first question (which is dealt with in paras. 65-76) we find that there is no truth in the suggestion that the petitioner's knowledge and understanding of the English language was inadequate, for the purpose of enabling him to follow the evidence and instruct his counsel or to give his version of the facts to the jury, whether upon oath or as an unsworn statement. There is, in our opinion, no truth in the suggestion (see Mr. Strehlow's affidavit: App. II 1) that the 'petitioner is considerably handicapped when confined to the English language' or that the written confession (App. I) was 'beyond his mental and linguistic capacity'.

155. The fact is that the petitioner understands and speaks English. His vocabulary is, no doubt, limited, but when he wishes he can speak English, not pidgin or what Mr. Strehlow has described to us as 'N.T. English', but reasonably good English, that is to say, that he speaks English as it is commonly spoken by people who have had some but not a great deal of education.

156. It follows that there was no reason why the petitioner should not have told his counsel, or, for that matter, the jury where he was on the afternoon in question. He says that the reason why he did not tell Mr. O'Sullivan that he had returned to the show at Ceduna before 2 p.m. was that Mr. O'Sullivan had never asked him what time it was when he returned. In his unsworn statement the petitioner says "I walked back to Ceduna in the afternoon." We are unable to believe that Mr. O'Sullivan would have prepared the document in those terms without putting the question to the petitioner. The obvious inference would seem to be that, if the petitioner had in fact returned to Ceduna before 2 p.m., he himself was not aware of the fact.

157. The alibi set up by the statutory declarations, mentioned in our commission, is that the petitioner returned to the Gieseman Show in Ceduna before 2 p.m. on the day in question and was working there until after 4 p.m.

The crime must have been committed between the hours of 2.30 and 4 p.m., and, if the petitioner was working in the show between those hours, he cannot be guilty of the act.

We have given anxious consideration to the evidence tendered in support of the alibi and to the evidence called by the Crown to answer it. In the result we are clearly of the opinion that, so far from proving that the petitioner was working in the show, when the little girl was attacked and murdered, the new evidence proves quite conclusively, that, the petitioner did, as the confession relates, walk back from Thevenard to Ceduna along the beach, in the vicinity of the cave, in which the body was subsequently discovered, at some time between the hours of 2.30 p.m. and 4 p.m., that is to say, within the period during which the child must have been raped and murdered. (Our reasons for this finding are in paras. 77-100).

158. We find that the petitioner's movements on the day in question (20th December, 1958) were substantially as they are described in the written confession (App. I "B", "C", "D" and "F"), apart from the fact that it must have been after 3 p.m. when the petitioner started to walk back from Thevenard to Ceduna.

159. We have heard the petitioner's evidence in support of his allegation that the written confession (App. I) was extorted from him by threats and violence, but, for the reasons which we have set out above, we are quite unable to accept the petitioner's testimony. On the other hand, we have had the advantage of seeing and hearing the police witnesses subjected to a vigorous and searching cross-examination, and, in the result, we have come to the conclusion which was reached by the jury at the trial. We have considered the criticism to which their evidence has been—quite properly—subjected, but we have no doubt that their testimony was given honestly.

160. It follows that we can see no valid reason for apprehending any miscarriage of justice. In the course of our inquiry we have heard a mass of evidence that was not before the jury, and, in addition, counsel for the petitioner have claimed the right to cross-examine the witnesses on whose evidence the verdict turned. In the result we have been more or less forced to review the evidence and to assess the weight of the testimony. In these circumstances we think it right to say that, if it were a question for us, we should have no hesitation in coming to the conclusion to which the jury came at the trial. Taking the evidence that we have heard, in conjunction with the evidence that was taken at the trial (and not canvassed before us) we think that the conclusion is one to which any reasonable jury would come after a proper direction on this evidence.

161. Dealing with the matters specifically referred to in our commission, we report as follows:

(1) our report upon the facts purporting to be disclosed in the declarations will be found in para. 157.

(2) our report upon the movements of the petitioner during Saturday, 20th December, 1958, will be found in para. 158.

(3) the only reason that can be assigned for the statements not being furnished to any appropriate authority, before the dates when they were respectively made and furnished, is that it never occurred to the petitioner, or to his advisers, or to Det. Phin, when he was making his enquiries at Whyalla, that the declarants could give any evidence that would assist the petitioner on his trial.

(4) the circumstances in which the declarations were obtained and made are, so far as we have been able to ascertain, as set out in paras. 50 and 51.

162. We wish to acknowledge the help that we have received from Counsel, and we are deeply indebted to Mr. J. S. White, who has acted in the capacity of Secretary.

J. M. Napier.
G. S. Reed.
D. Bruce Ross.

J. S. White, Secretary.
3rd December, 1959.

APPENDIX I

THE WRITTEN CONFESSION

(Put in at the trial as Exhibit "P"—see par. 30)

Note: For convenience of reference we have broken up the document into lettered paragraphs, and have italicised expressions to which attention has been directed, and have added annotations, but in the original document par. "A" stands as a caption and the rest runs on as a single uninterrupted paragraph.

A.—I, RUPERT MAX STUART, aged 27 years, labourer, of Alice Springs, having been warned by Detective Sergeant Turner, that I need not make this statement do so voluntarily without any fear, threat, reward or promise of any nature state the following:—(1)

B.—"I came to Ceduna, on Friday 19th December, 1958, at about 9 a.m. as an employee of Fun Land Carnival, a travelling show owned by Norman Keasman. There was a show on Friday Night and I slept in the show tent at Ceduna. At about 7.30 a.m. on Saturday, 20th. December, 1958, I *awoke*(2) and started work at the Show.(3)

C.—I had a drink of tea first but nothing to eat. I worked at the Show until *10 o'clock*(4) and then I left. The show was *situated*(5) at the Ceduna Oval.

D.—Me and Allan walked down to the Jetty. Then we were talking to one half caste bloke. He's the bloke that lives around the beach but I don't know his name. We walked down the beach near the Jetty and into a little cave. *The*(6) three of us *sat*(7) down and drank a flagon of wine. *The*(6) three of us came up to the town here. Allan went back to the Show Ground. It was then *about half past eleven I think.*(8) I got a flagon off a white fellow I met near the Ceduna pub. He was drunk I gave him eighteen shillings to get it. I went down to the same place. I stopped there by myself and drank the flagon. No I only drank half of it. I *put*(9) the half flagon in a sugar bag. I came into town carrying the bag. I left the bag with the flagon in it down behind the *Picture show wall.*(10) *I jumped in a taxi.*(11) Went down to the Thevenard pub. I got off there. I was sitting down outside the pub. I think I must have stopped there *about an hour I think.*(8) Then I seen a fellow with a bottle of wine. He *offered*(12) me a drink. He had a little bit. I said to him, "I think I will buy this off you." He said, "You can have it for nothing" I got it off him. Then I started walking back. It was *one o'clock I think.*(8) Just after coming out of Thevednard town I stood and I finished that bottle. I walked back to the pub again. Could not see that bloke. Then I came back. I walked down to the beach.

E.—Then I *saw*[13] this little girl. I was pretty full then. She was *standing*[14] in a pool of water *playing.*[14] I said to the little girl, "There is some little birds over there" I pointed up towards the cave. She said, "I will go and have a look" She walked in the cave. No I am wrong I crawled in the cave first and she crawled after me. She said, "Where's the birds," I said, "They are gone now" I punched her on the side of the head. She *went unconscious.*[15] I took her bathers off. Then I raped her. She was hard to root. I done her. Then I *hit*[9] her with a stone. Before I *raped*[15] her I took my clothes off. I was wearing a *shirt and pants.*[16] I also took my boots off. I think I *hit*[9] her six times with a stone. I left her. I think she was dead. I went and had a wash in the sea. I had no clothes on. I went back to *near the cave where I had taken my clothes off and put them on.*[17] I started to walk back along the beach towards Ceduna town.

F.—I got on the road from the beach near the Church. I went around the back streets to where the caravan park is. Got a flagon of wine. That was the one I had left in a bag. I drank that. I then went back to the Show. I worked around there for about two hours. *About sun down*[18] me and another fellow *went down to the Jetty.*[18] We were looking for other fellows drinking. Then we saw two blokes sitting down drinking. When we went down there they put the bottle away. I had more wine that night with them.

G.—On Sunday morning *21.12 1958* I got the sack from the Show. A friend of mine named "Herby" helped me get a job with the Wheat Board. I started work there on Monday, *22nd. December, 1958, at 8 a.m.* I slept at the Wheat Board with another native in a tent. We went to bed at about *7 o'clock* tonight and I went to sleep and after a while I got up to go to the *lavatory.*[19] When I went back I seen a car standing in front of the tent and you blokes then spoke to me and took me to the Police Station.

H.—I killed her because I did not want her to tell what I done.

J.—I cannot read English. I have heard this statement read to me and it is true and correct in every detail.

ROPERT MAX STUART"

ANNOTATIONS

(1) Up to this point there is no suggestion that the statement was dictated.

(2) Mr. Strehlow points out that 'awoke' is not a word in common use, but see the next note.

(3) Up to this point it seems that the statement was elicited by question and answer reduced to the form of narrative. It may well be that the question put to Stuart was, "when did you wake?" In that event no significance would attach to the word 'awoke.' But, as a matter of interest, it may be pointed out that Stuart is familiar with the word 'awake'. See (App. IV 2) "I lay awake until all the others asleep".

(4) According to the evidence this could have been elicited by question "What time was it when you left?" But, however that may be, this was the time given by Stuart to Father Dixon (evidence p. 566).

(5) This, in all probability, was elicited by a question.

(6) Mr. Strehlow maintains that Stuart would not say "the three of us". The confession reads "The three of us came up to the town here". Stuart's translation of Mr. Strehlow's rendering into Aranda is "We went into Ceduna town, t'ree of us." But compare the A.S. dep. (App. IV) "then the four us went . ."

(7) Sat.: This word is challenged but it was used by Stuart in his cross-examination (p. 784): "I didn't say I *sat* down."

(8) The reference to the time looks as if it had been elicited by a question. (See however par. 94).

(9) In his memorandum to the Chief Secretary, Mr. Strehlow comments upon the fact that "the writer of the police confession knew that the preterite of 'put' and 'hit' show no change of form whatever." Stuart knew this. For his use of 'put' see the A.S. Dep. (App. IV) for his use of 'hit' see his translation of Mr. Strehlow's rendering into Arunta.

(10) Mr. Strehlow asks "how many white Australians could correctly explain the trick of English grammar that lurks behind the construction of this phrase". Be that as it may, this phrase should be compared with that used by Stuart in the A.S. dep. (App. IV) "I stopped in the Stuart Arms verandah".

(11) "I jumped in a taxi": For Stuart's use of this expression, see the A.S. dep. (App. IV) and his evidence (at p. 726).

(12) Mr. Strehlow maintains that Stuart would not say 'offered'. He says that in translating this phrase into Aranda the literal sense of the words was "He (to) me to drink held out (or produced)." This was translated by Stuart as "He gibb (or give) me a drink"; but in the A.S. dep. (App. IV) the word 'offered' is used twice. It is also used by Stuart in his evidence (p. 725). According to Stuart he said to the man 'Give us a drink, mate,' and

the man said "All right" (p. 729). In his evidence (p. 439) Mr. Strehlow began by casting doubt upon what he referred to as this 'cryptic conversation', but there can be no doubt that this was Stuart's account of an actual incident (per Father Dixon p. 567).

(13) Mr. Strehlow comments that in 'N.T. Eng.' 'seen' is more commonly used than 'saw'. That appears to be Stuart's usage but (p. 824) he does use the word 'saw'.

(14) Father Dixon makes a point that this construction is seldom if ever used in 'N.T. Eng.'. But compare the A.S. dep. (App. IV 1) "another four playing," "I seen Peter Fraser standing drinking". "After a while we were sitting down smoking cigarettes", and again "we were sitting down smoking."

(15) It is said that Stuart did not understand the meaning of either of these words. There is, of course, no means of testing the accuracy of that statement. In his evidence here (p. 742) he said that he did not know the meaning of 'private parts', although he had had no difficulty in understanding it when questioned in Cloncurry in 1957 (see App. IV 2).

(16) This is the evidence (p. 731).

(17) This is one of the passages to which Mr. Strehlow refers as being in "opposition to all the stylistic and grammatical features of 'N.T.E.'." That may be so, but compare this with the question (mentioned in para. 69), namely, "*Where did she* come *from in the first place?*", in which practically every word departs from the usage which Mr. Strehlow regards as typical of 'N.T.E.' That is to say, (1) the three prepositions, 'where', 'from' and 'in', are all used correctly, (2) the 'she' is not 'he' or ' 'im' as in N.T.E., (3) the 'did' is not only in the right tense, but is a proper use of the irregular auxiliary, (4) 'the' is not usual in 'N.T.E.', and (5) the idiom, 'in the first place', owes nothing to 'Arunta' or 'pidgin' or to anything but English.

(18) These references are correct, according to his testimony (p. 765). In his unsworn statement (App. V) he speaks of going to 'the hotel' at 'tea time', but, according to his testimony, that should be as here stated 'to the jetty.'

(19) Lavatory: Mr. Strehlow questioned the use of this word, but it was freely used by Stuart in his evidence (*e.g.* p. 735).

APPENDIX II

EXTRACTS FROM THE DIRECTION GIVEN TO THE JURY AT THE TRIAL

* * * * * * * * * * * * * *

(1) "This morning I referred to the defendant's statement. You are probably now familiar with the terms of it. He does allege in his unsworn statement that acts of violence were done to him, that they choked him, they hit him and they said he was the man who had done it; and the effect of his statement is that they more or less, apart from violence, harassed him into making a confession. This, gentlemen, is a most important question for you to consider, and I will say at once, that unless you are satisfied beyond any reasonable doubt that the evidence, the questions and the answers, the answers obtained as a result of the questions, and the defendant's statement, were obtained without any threat of violence, without any violence, without any promise or inducement, without any conduct on the part of the police which was an unfair taking advantage of their position, well gentlemen, then you will no doubt reject the confession, and the evidence of the answers, which are very much to the same effect. In other words, if you are going to act on that confession as an admission of the guilt of the defendant, the first thing to be satisfied on is that it was free and voluntary, and that he really intended to say that in the sense that it was not forced out of him, and that he was not threatened, and no undue advantage was taken of him. If you cannot say that you are satisfied beyond any reasonable doubt of that, gentlemen, then no doubt you will reject the confession and the answers which preceded it."

* * * * * * * * * * * * * *

(And again towards the end of the summing up).

* * * * * * * * * * * * * *

(2) "I think the only other matter . . . that I need deal with is the position which would arise if you were not prepared to accept the answers of the defendant and his written statement . . . I repeat what I said this morning . . . that apart from the answers of the defendant and the signed statement there is really not a great deal in the case."

APPENDIX III

PART I

AFFIDAVIT BY MR. T. G. H. STREHLOW

filed in the High Court in support of the petitioner's application for Special Leave to appeal to that Court.

"I Theodor George Henry Strehlow . . . University Lecturer make oath and say as follows:—

1. I have known Rupert Max Stuart since he was a small child.

(Paras. 2, 3, and 4 deal with the deponent's qualifications.)

5. I was absent from South Australia during the trial of the said Rupert Max Stuart and until after his appeal to the Full Court of South Australia had been heard. I returned to Adelaide on the 11th day of May 1959.

6. In the company of his solicitor, Mr. J. D. O'Sullivan, I have since interviewed Stuart at the Adelaide Gaol and have had a long conversation with him in Arunta and in pidgin English. I have also perused the statement allegedly dictated by Stuart to the police officers.

7. Of my own knowledge I know that Stuart did not ever attend a school and cannot read or write. His father is a full-blooded aboriginal and his mother a three-quarter caste. I saw Stuart frequently until 1953. From my past knowledge of Stuart and my conversation with him in pidgin English at the Adelaide Gaol I can say his knowledge of English is inadequate.

8. Having carefully perused the confession which Stuart is alleged to have dictated to a police officer I am of the opinion that it has been composed by a person well acquainted with the structural features of the English sentence and of common spoken English idiom. In my opinion it could not have been dictated by a totally illiterate part-aboriginal who has never had any formal education of any kind. It includes many words, phrases and sentences which do not resemble any form of pidgin or broken English spoken in the Northern Territory. The style of the document is not in any way akin to the mode of expression found in the Arunta language which is the only tongue in which Stuart has any complete fluency of expression.

9. The document itself contains certain pidgin English phrases and expressions which are more in keeping with Stuart's normal mode of expression when he tries to talk in English.

10. Such phrases serve to emphasise the general stylistic and linguistic hotchpot of the document.

11. In point of subject matter on the other hand this statement appears to me to be an admirably concise document which sets out lucidly, skilfully and in logical and chronological order all the details of the alleged crime which would have value as evidence in a Court of law, but which would be in my opinion well beyond the mental and linguistic capacity of Stuart.

12. I have also read a written statement which I am informed and verily believe contains the whole of Stuart's original instructions to his counsel. In my questioning in Arunta I have elicited considerably more information and detail than Mr. O'Sullivan was apparently able to obtain from him, probably because of language difficulties. Stuart can freely express himself in Arunta but is considerably handicapped when confined to the English language.

PART 2

EXTRACTS FROM THE SHORTHAND NOTE OF THE PROCEEDINGS BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON 28TH JULY, 1959.

"LORD TUCKER: Mr. O'Sullivan, if he was able to convey to you or someone else on his behalf what his defence was, it may be in a halting and difficult manner, why was not he able to do the same thing in court?

MR. O'SULLIVAN: It is a question of the language difficulty and the degree of imperfection, if I might explain. The petitioner speaks what might be described as Northern Territory, or perhaps the phrase better known in this country would be pidgin English. His language is Arunta.

LORD TUCKER: My question remains the same: If he was able to convey to you what his defence was, why could not he convey it to the court?

MR. O'SULLIVAN: His conveying to me, if I may explain how it did happen, was by long interviews conducted in very simple English, disregarding answers to questions that made it obvious that the questions had not been understood, stopping him from long irrelevant unintelligible statements about matters that appeared to have nothing to do with this and over a period of many days using simple English, monosyllabic words, ascertaining the police case against the prisoner, ascertaining some of the facts of the case from other sources, what had happened and where the girl had been killed and all the geography and times and relevant dates from other sources and filling them in by asking him questions, and that occurred over a period of months."

* * * * * * * * * * * * * *

"MR. O'SULLIVAN: . . . to get this man's statement to the jury at all I would have had to prompt him sentence by sentence, which from the jury's point of view I submit would have been absolutely useless.

LORD TUCKER: It would have been so highly desirable that the jury should have been in a position to judge by seeing and hearing the man as to the extent of his difficulty with the English language. I should have thought it would have assisted him greatly, *if he was as you describe him,* that the jury should have been able to hear his faltering effort to describe his movements and judge therefrom as to the value of any statement made to the police.

MR. O'SULLIVAN: Had I prompted him phrase by phrase, the jury would have heard no more than a parrot-like repetition of phrases put to him by his counsel.

LORD DENNING: Supposing he had not had any previous convictions and you put him in the box to give his evidence and you were not afraid of any cross-examination, you would have had to do just the same and take him through his story in examination in chief and get it out, and, as my Lord says, in that way the jury would have seen his difficulties.

MR. O'SULLIVAN: I could not let him give evidence in English for the reason your Lordship has just given. It was obvious from the start, because of the previous convictions—none of which were serious in fact but several had a sinister connotation—that this man would not be giving evidence on oath or, if he was, he would need an interpreter, but there was never any question that he would give evidence on oath in English, because he could not be led.

VISCOUNT SIMONDS: That would have been seen, of course.

MR. O'SULLIVAN: That was the problem there. Then there was the question of whether he would give evidence on oath at all; but I may say, for example, in the event of a re-trial and so on the prisoner from now on would give evidence on oath *in the Arunta language through an interpreter,* because the police have carefully told every satisfactory juryman about the previous convictions in case a new trial emanates or results from here. So, as the result of the widespread publicity which this case has obtained, in the event of there being any opportunity to ever tell the story, the prisoner will be able to and will give his evidence on oath through the interpreter Mr. Strehlow, because the considerations then applying do not apply now. We did not know that Mr. Strehlow existed then and we do now, and, in the event of a re-trial, even if the Crown did not bring it up, the defence would have to canvass his convictions and explain them.''

APPENDIX IV

PART 1

EXHIBIT 31. BEING A DEPOSITION TAKEN AT ALICE SPRINGS IN POLICE *v.* RUPERT STUART (No. 590 OF 1956) ON A CHARGE OF ''SUPPLY OF LIQUOR TO AN ABORIGINAL''.

NOTE: The first petition (see par. 54) contained the following explanation of this document:

> ''I was a defendant in a case at Alice Springs in 1956 when another aboriginal, one Sansbury who could read and write, assisted me by writing out a statement which I wished to present to the Court and I did in fact present such statement to the Court. I was also assisted in Court on that occasion by the Native Welfare Officer ''

The statement that a document (not this document) was written out by Sansbury and presented to the Court (in the sense that it was handed to the Magistrate) is literally true, but it is not the whole truth. The truth (as the petitioner admitted: p. 805) is that the Magistrate refused to read the document, and insisted on the petitioner giving his evidence in the ordinary way. He was not, on that occasion, 'assisted in Court' by any Welfare Officer or anyone else. The truth (as he admitted: p. 802) is that he was then an 'exempt aborigine' and 'treated as a white man'.

RUPERT STUART duly sworn states

My full name is Rupert Stuart I live at Alice Springs my occupation stockman-drover.

I am the defendant in this case. I now desire to make some remarks in answer to this charge.

I was at the racecourse on Mon afternoon I was with old Tom Williams the drover, this was about Monday afternoon about 1.0 o'clock. I seen a taxi coming at the race course and me and Tom *jumped in that taxi,* then we went to the Stuart Arms, we *stood* in the front of the Stuart Arms, that was about nearly 2 o'clock. Then I asked old Tom Williams to come down to Underdowns and have a drink with me, *so* when me and Tom Williams walked into Underdowns Hotel and then I seen *one of my mates* Noel Beardsley, I *tapped* him on the left shoulder I sd. Good day Mr. Beardsley and Noel Beardsley said Come and have a drink with me. I sd. sure mate I will drink with you. Then I looked around and seen Peter Fraser *walk in,* I bought 4 glasses, schooners, one for Peter, one for Tom Williams, one for Noel Beardsley one for myself, then Peter Fraser walked out from the bar, then Noel Beardsley and me stopped in there on our own, we had quite a few drinks in there, then I said to Noel Beardsley I think you and I had better go up to the billiard room and have a game of billiards. There was in the billiard room *another 4 playing.* I left Noel Beardsley a little while after *cause* I was in a hurry to go back to Underdowns. Then when I walked down I seen Peter Fraser *standing*

drinking, then Peter shouted me a few drinks then we kept on drinking and I sd. to Peter Fraser, I have to go back and get my mate now Noel Beardsley cause he might be waiting for me. *When I went back I walked up near the taxi rank couldn't see nobody I stopped on Fogarty's corner, I looked up towards the police stn.* seen nobody there *so I walked up to the billiard room, then when I seen Noel Beardsley I never talked to him at all as he was still playing billiards.* I stopped in *the Stuart Arms verandah* then I never go in the hotel at all.

Then when it was just getting on dark, I walked down to Underdowns. When I walked in to Underdowns and I ran into Peter Fraser, then he shouted me a few drinks then I shouted him a few drinks, then he walked out, I stopped in there, then just about on closing time I *bought* a bottle of west end and a bottle of sweet sherry. I had a bottle of sweet sherry in my hip pocket and I had a bottle of beer in my hand, When I *bought* them two bottles I walked around into the other bar I seen Peter Fraser there and beside Peter Fraser there was another half caste fella and a white fella. This white fella *offered* me a drink but I couldn't be served *because* it was closing time. We walked over towards Underdowns cafe, then this white fella went in to buy some fish in the shop I walked in too, I bought a box of matches. When I was looking straight ahead I could see a girl I know she come up to me. her and I had a few yarns and I told her I see her later on *so* i walked out.

Then the four of us went around in the front of the bank of new south wales, we was standing there in front of B. of N.S.W. and I said I better get a taxi and this white fella said I got a truck over there you can come back with us. *Three of us* was on the back, the white fella himself was driving. We went around the corner at Heenans then we went down the Gap Road. Then we pulled up down old Jimmy Butlers place, I walked in with this bottle in the room I opened this paper bag then I opened the cork left him on the floor Peter Fraser grabbed the bottle, he drank that, then the half caste chap he grabbed it, then I grabbed this bottle. After a while *we were sitting down smoking cigarettes* I *offered* them a drink again they both said they don't want anymore, *so* I kept on drinking myself I had abt. 4 inches left in the bottle and we were *sitting down smoking,* then me and Peter Fraser walked out, Peter Fraser went that way (indicating to the Gap) and I came up this way (indicating town) When I got to the Mission gate I thought abt. this bottle of west end *well I thought* to myself well it is no need for me to go back for it it is too far *so* I drink that bottle of sweet sherry, then I *put* it in my hip pocket, then I went into the mission block, then I stopped near the mission house with a bit of a laneway and there is a house on the left hand side going in, stopped in that corner and I drank that and I drank that sweet sherry again. I didn't know what I was doing after that I was just about blind. I walked into Stanley's place cause I knew Stanley for a long time, I said Goodday mate how you going. I dunno whether I had that bottle or not I dunno, then we stopped there, we must have had a drink there, then after a while Stanley and his wife started an argument, when I picked up me swag and me wife we went down the Todd River we camped there for the night. *Next morning when I woke up* I *put my boots on I was sitting down thinking there for a while so then I started walking up the Todd.* I never go into the Mission Block that morning, then when I got up town I seen old Tom William, we bought a couple bottles of wine, half a dozen beer, we went up to the race course in a taxi. When we got there we couldn't see his plant, plant shifted back behind the trucking yard *so* we went over there the trucking yards we stopped there just about all day, stop out there drinking and I said to old Tom Williams you and I better walk into town, Tom Williams said All right son, when we got to town I bought a couple of bottles of beer and a bottle of lemonade we went out to the racecourse, that was about nearly half past five, I opened one bottle of beer and me and old Tom Williams filled two glasses and then drank it. I was just about full you know, when I finished that bottle I went to sleep when I was laying down Old Tom Williams wake me up about half an hour after, I had tea when I woke up as I was having tea I see the police car coming down. I can hear someone singing out Rupert Stuart. I said Shut up old Tom, instead of old Tom singing out it was the Constable singing out *so* I walked over to see the constable, the constable wanted to see me at the stn. When we got up to the stn. he sd. you know this tracker Stanley. I sd. I dunno if I see his face I know it. He sd. you supplied liquor to Stanley tracker, I sd. No. and Constable asked me you know Gracie Miller. I sd. I have known her for years. Con. sd. to me again, You know Mary Stuart, Yes I sd. supposed to be my wife I said, Constable asked me how long you was married, I sd. Going on for about three years now. Then he took me up and locked me up. Little while after I had gone to sleep the constable over there (indicating Con. Falconer) came and took me over to the station. He told me to sit on the chair. He sd. You give this Stanley a drink all right, I sd. No. and constable sd. to me I got three witnesses right here who know, they called Stanley first sd. to Stanley You know this man. Stanley sd. Yes, Stanley looked up to me. *I am wrong there* they called Mary first I think They said you know this man, Yes. and after they called Gracie Miller and sd. to Gracie Miller you know this man. Rupert Stuart After they bring Stanley in, I was sitting down and he was standing behind the Constable he couldn't see my face and I couldn't see his face. Constable said to Stanley you are sure you know this man. Yes I know him he said and Stanley went away. They took me in the lock up then. That is the end of my story. Prosecutor Cross examin.

I remem telling the Magistrate when I arrived at Stanleys place that night we must have had a drink, I sposed we must all have had a drink of wine. I brought the wine there, I didn't have first drink myself I am sure about that. I am not too sure when I arrived at Stanleys house whether I had

it in my pocket or not. There would have been about 4 inches of wine in the bottle when I arrived at Stanleys house, that is when I was talking to Stanley, about a third of a bottle when I got home, Stanley had the first drink, I am pretty sure of that.

The girls had a drink. The drink that Stanley had was out of the third of a bottle I brought home, I *put* about 1½ inches in a pannikin.

PART 2

EVIDENCE OF CONSTABLE CORBETT, OF CLONCURRY, QUEENSLAND

ALFRED JAMES CORBETT, (Sworn), Plainclothes Constable, 1st Class of Police, Cloncurry, Queensland.

* * * * * * * * * * * * * *

EXAMINED BY MR. CHAMBERLAIN Q.C.

In September 1957 you were stationed at Cloncurry?—Yes.

Did you there investigate a report of an offence which led you to interrogate the defendant Stuart?—Yes.

And that Stuart is the man whose picture is there?

(Witness is shown photograph).

—Yes, I knew him as Rupert Stuart or Rex Sullivan or Ron Sullivan.

You questioned him and made notes of your questioning of him—Yes at the time.

Did you question him in English?—Yes.

Did you have any difficulty in understanding him, or did he have any apparent difficulty in understanding you?—No, no difficulty.

What was the conversation between him and you?—I have notes of that conversation. As the conversation proceeded, I took it down question and answer.

Will you give us the conversation?—I questioned him on 12th September, 1957 at 11.10 a.m. in company with Constable Deacon and Constable Lane. I had previously had a conversation with Stuart in connection with some reports on other matters. He knew me at this time. In connection with this offence I said to him "I am going to ask you some questions about what you were doing last Monday night, that is not last night or the night before, but the night before that. When I ask you any questions, you need not answer them unless you want to, as anything you tell me I will be telling the man over at the court, that is the Magistrate you were before this morning. Do you know what I mean? I say you need not answer anything unless you want to".

Stuart replied "Yes, I know."

The day before yesterday a girl told us that she was sleeping in her bed with her sister at the Council Reserve Cloncurry and she woke up when she felt someone feeling her leg. She tried to push this person's hand away and the person pushed his hand up under the leg of her pants and touched her on her private part. Do you know what a girl's private part is?—Yes, c....

The girl said she started to call out and this person put his hand over her mouth but her mother woke up and sat up in bed and the person ran out of the room.

Who tell you that?

A girl named Oriel May Simmons, who is 9 years of age. Her mother and her father has also told me other things.

It was me who did that, I was staying at that place.

Will you tell me what happened that night, but remember you don't have to if you don't want to?—*Yes, I was at that place in the evening and we all go to sleep. I sleep outside near house, and I lay awake until all the others asleep. I got* up *and feel like girl,* so I *go to girl's bed and I put my hands under the girl's pants and touched her c.... The girl called out and I put my hand over her mouth but her mother came in and I ran back to bed.*

What happened then?—The man came and chased me away.

Did you know that you shouldn't have done that to the little girl?—Yes, I know it's wrong, I felt like f...., but I didn't know any big women over here, where I can get one.

Why did you do it?—It makes me feel good when I feel little girl's c...

Will you come with me to the girl's house and show me where you did this?—Yes, all right.

(At house)—Where is the bed the girl was sleeping in?—That one there, she was on this side. I was sleeping outside.

Did the girl struggle and try to get away?—Yes, she yelled.

You will have to go to the Court about this and we can have the Court tomorrow if it suits you—Yes, that will do me.

* * * * * * * * * * * * * *

Did he say anything at any stage about the effect of liquor on him with regard to women?—Yes, he said he could not control himself when he had "liquor taken", when he had been drinking he could not control himself.

Was there any Welfare Officer present or Protector of Aborigines present in these proceedings?—Stuart had been before the Court on two charges of stealing. We had asked when he was first interrogated whether he was under the provisions of the Aborigines Protection Act, and he advised us he was not.

He was treated as a white man because, as you understood it, he was not under the local or other legislation?—Yes.

You have legislation which covers the procedure with relation to aborigines?—Yes.

Stuart was not an aborigine for that purpose?—Yes, he told us so.

By Mr. Brazel Q.C.—

Did Stuart ever tell you at any time in relation to that particular offence that he had gone to the room where the little girl was and made his way out by touch, feeling with his hands and he was going out and then attacked the little girl?—That was in respect to another charge. He was charged with being unlawfully on the premises on another charge. There were no children at that house.

That explanation was put forward in regard to another offence, and was not in connection with the child you have described?—Yes.

* * * * * * * * * * * * * *

How would you say Stuart can express himself and understand English compared with other aborigines?—We have numerous aborigines there who cannot speak English as near as well as Stuart can. He can get around with them and talk with them all right. *He did not have any difficulty in speaking. At the Court, the Magistrate explained to him his right of trial by a judge and jury,* that he could be dealt with summarily if he so desired. *He elected that the Magistrate could deal with him.* He was served with a summons, and the Magistrate intimated that he was entitled to have an adjournment for three days if he wanted to, but he said he wanted it dealt with at that stage.

APPENDIX V

THE UNSWORN STATEMENT WHICH RUPERT MAX STUART ASKED TO HAVE READ TO THE JURY AT THE TRIAL

The Statement of Robert Max Stuart

I am an aboriginal.
I cannot read or write.
I was at Ceduna the day the girl was killed.
I did not kill her.
I did not ever see her.
I went in a taxi to Thevenard to get a drink.
I did not want a girl.
I did not tell anyone I did.
I had some wine there.
I was not drunk.
I walked back to Ceduna in the afternoon.
I walked on the road first and then on the beach.
I did not walk near the place where the girl was found.
I walked in my boots all day.
I did not walk bare-foot.
I did not take my clothes off and wash myself in the water.
I did not see the little girl or the litte boys.
When I got back I worked at the Show for a while.
At tea-time I went down to the hotel to get a drink.
There were two dark fellows on the beach near the hotel.
They gave me a drink of wine.
I went up the street later with Herby.
He was my friend from the Show.
The Policeman came and took me to the police station.
That was before the pictures started.
The policeman let me out next morning.
I got the sack from the Show.

I got a job with the wheat Board.
On Monday night I was in bed.
I went to have a shit
When I came back the police were there.
I was not hiding.
When I came back they were looking at my swag.

(S) ROPERT MAX STUART

Mr. Turner said. "What is your name?"
I said "Max Stuart."
He said. "You are the fellow we are looking for for murdering the girl."
I said. "I did not do it."
He said I was hiding.
I said. "I was not hiding."
Turner said "You didn't go to the lavatory".
I said "I did."
I showed them where I had walked in the sand.
I cannot track.
I did not tell anyone I could.
It was easy to see my tracks there.
Any fellow could see them.
They looked at my clothes.
They said they were looking for blood.
They did not look at my knees.
They took me to the police station.
Mr. Turner said. "Come on you know that you killed the girl."
I said. "No."
He said that a few times.
Mr. Jones said, "Take your clothes off."
I took them off.
They looked at me.
One policeman behind me said. "There are some marks."
I could not see what they were looking at.
Mr. Jones said. "How did you get them?"
I said. "I don't know".
They pointed to a mark under my right arm on my ribs.
I said. "That has been there for years."
Mr. Turner pulled some hairs out of my head and some from my legs.
He didn't ask me if he could.

(S) ROPERT MAX STUART

They told me to get dressed.
I got dressed.
They told me to sit down.
I did that.
Mr. Jones said. "Come we know you did it."
I said. "No."
He said. "Yes, come on tell me the truth."
I said. "I didn't do it."
Mr. Jones punched me over my eye.
I nearly fell off the chair.
When I stood up he hit me again on the side of the throat and on the ribs.
He tried to punch me again.
I stopped it with my elbow.
Then Sergeant Walker grabbed me round the throat with two hands.
He kept pushing his thumbs into my throat.
I could not breathe.
I thought I was going to die.
The other policemen were all around me.
The Sergeant said. "you had better tell us the bloody truth, now you know."
The Sergeant let me go.
The policeman with the typewriter said "You killed the little girl."
I was frightened.
My head and my throat were hurting.
I could hardly breathe.
They were all saying things to me.
I can't remember it all.

One said. "We have found the dead girl. You must have done it."
I said "Perhaps it was a white man."

(S) ROPERT MAX STUART

When they searched me they found a blade from a razor in a coat pocket.
It was lying on the desk.
One of the policemen picked it up.
He said. "If you don't tell us I will skin you, or kill you," or something like that.
I thought they would kill me if I didn't say what they wanted.
Then I said "Yes" all the time.
They told me the trackers would say they were my tracks.
I can't remember all the things they said.
They asked if a white man made me do it.
I said "Yes".
One of them said. "It is all bull shit about a white man doing it. We were only saying that. We knew it was a black man."
One of them said. "She was hard to root wasn't she?"
I said "Yes".
The man with the typewriter was using it while they were talking to me.
They kept asking me questions all the time until he finished.
One man read it.
He said. "That is true isn't it?"
I said "Yes".
He told me to write my name.
I wrote my name because I knew they would hit me again if I didn't.
I did not kill the little girl.
I never saw her and I never touched her.

(S) ROPERT MAX STUART

APPENDIX VI

ON THE PRACTICE OF THE COURTS

(see report para. 61)

The practice of the courts in relation to setting aside the verdict of a jury upon the ground of 'fresh evidence' has been clearly set out by *Sir John Latham* (in the case of ***Green v. The King*** (1939) 61 C.L.R. 167, 174) as follows:

> "It is a ground for a new trial that fresh evidence has been discovered, but the courts have always been most cautious in granting such applications. It has been required that the evidence should be evidence that could not with reasonable care have been discovered previously, and that it should be of such a character that, if it had been tendered, it would have been of such weight as, if believed, to have an important influence on the result. These . . . principles . . . are applicable, not as independent rules, but as related to the subject of miscarriage of justice. They should not, particularly in the Court of Criminal Appeal, be regarded as absolute or hard and fast rules. The relevant proposition in that jurisdiction is that ('in Australia', though not in England) an appeal may be granted if the court thinks 'that on any ground there was a miscarriage of justice.' . . In considering whether there has been a miscarriage of justice the court should consider all the circumstances of the case. If, for example, there being no elements of fraud, mistake or surprise, an accused person has, by himself or by his legal advisers, deliberately decided to set up a particular defence, he cannot complain as of a miscarriage of justice for the sole reason that, that defence having failed, he comes to the conclusion, or a court comes to the conclusion, that he might succeed if he sets up another defence. Thus, if an accused person deliberately chooses to abstain from calling evidence which is available to him, it cannot be said that the course of justice has miscarried for the sole reason that it cannot be asserted with certainty that the result would have been the same if such evidence had been given. There is no miscarriage in such a case. Thus the rules as to the availability of alleged fresh evidence and the weight of that evidence must enter into a consideration of the propriety of granting a new trial in a criminal case. These rules . . . are based upon important principles of public policy. There is grave risk of impeding the administration of justice if new trials are readily granted

upon the ground of the discovery of fresh evidence. If persons who become subject to the processes of the law were allowed to try again because they had chosen not to use evidence which was available, or which with reasonable diligence would have been discovered by them, legal proceedings would tend to become interminable and grave injustice would, in practice, result in many cases."

For the reasons indicated by Sir John Latham the (English) Court of Criminal Appeal has laid down the rule that "it will only hear an appellant who did not give evidence at the trial in very exceptional circumstances; otherwise defendants would take their chance of not being witnesses below . . . There is hardly any instance of an appellant, not called below, giving evidence here, and none in a murder case except the wholly exceptional case of W. J. Robinson." (*Joseph Rose* (1919) 14 Cr. App Rep. 14).

In the joint judgment of *Rich and Dixon JJ.* in *Craig v. The King* (1933) 49 C.L.R. 429, 439) there is a passage which deals with the character or quality of the evidence that is required before the courts will set aside a verdict on this ground:

> "The authority to do so (*i.e.* to set aside the verdict) is contained in the power to set aside a conviction when a miscarriage of justice has occurred and to order a new trial when the miscarriage can best be so remedied. It is evident that the exercise of a power to direct a new trial because fresh evidence is forthcoming must be attended both with danger and with difficulty. It is the function of the jury to determine questions of fact in a criminal trial. When they have found a verdict they have performed that duty. If after a verdict of guilty the mere fact that a prisoner produced further relevant evidence required the Court to vacate the conviction and submit the question of the prisoner's guilt to another jury, then in a jurisdiction where perjury is rife great abuses would ensue. A Court of Criminal Appeal has thrown upon it some responsibility of examining the probative value of the fresh evidence. It cannot be said that a miscarriage (of justice) has occurred unless the fresh evidence has cogency and plausibility as well as relevancy. The fresh evidence must, we think, be of such a character that, if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected. Such evidence should be calculated at least to remove the certainty of the prisoner's guilt which the former evidence produced."

The practice upon a reference (under statutory provisions corresponding to our s. 369) gives the Court a freer hand in the matter of admitting evidence that could have been given at the trial (See *Herbert Collins* (1950) 34 Cr. App. Rep. 146: *V. G. Sparkes* (1956) 40 Cr. App. Rep. 83, 91), but however that may be, we think that the Commission, which directs us to enquire and report, implies two things. First, an enquiry which cannot be restricted by the practice of the courts, and, secondly, a report which expresses our considered opinion upon the questions submitted to us. But, in order to avoid any misunderstanding, we should add that we approach the proof as it is approached *in a court of trial or in a court of appeal, namely, upon the assumption that any charge of a crime* must be established with the appropriate degree of certainty. That may be described in different ways. In directing a jury we speak of 'proof beyond reasonable doubt'. A court of appeal may ask 'whether it is safe to uphold the conviction', or 'whether a reasonable jury properly directed would or could come to a different conclusion' (see Collins, *ubi sup*) but, whatever the formula may be, it comes back to the question that was put in the case of Craig (*ubi sup*): Is the fresh evidence of such a character that, if considered in combination with the evidence already given upon the trial, the result ought in the minds of reasonable men to be affected, or, in other words, is the fresh evidence calculated to remove the certainty of the prisoner's guilt which the former evidence produced?

APPENDIX VII

REPORT OF PATHOLOGIST *RE* HAIRS FOUND IN CHILD'S HANDS

Neil Dennis HICKS, Clinical Pathologist, Institute of Medical and Veterinary Science, Frome Road, Adelaide, states:

I have been employed at the Institute of Medical and Veterinary Science for eight years. On 6th April, 1959, at 2.45 p.m. Detective Turner handed me an envelope labelled "Hair from Mary Hattams hands" containing two hairs. On examination the hairs had the characters of human hair. I thoroughly examined the two hairs produced and compared them with others submitted said to be taken from Stuart and from the deceased girl.

An opinion could not be given as to whether or not the hair came from the head of any particular individual as the variation in hair is so great on the head of any one person.

I quote from Sydney Smith's textbook "Forensic Medicine":

> "If a definite answer is required as to whether a certain sample of hair is that of a certain individual, the investigator is strongly advised to refuse to go further than to state that the hairs are similar. One can often find greater differences in hairs from the same individual than in hairs from different individuals, therefore no one, whatever his experience, is entitled to give a categorically positive answer even when the presence of some disease renders the question much more certain."

I have conferred with Dr. J. A. Bonnin, Deputy Director and Senior Clinical Pathologist, who has agreed that very little reliance can be placed upon the examination of a small number of individual hairs regarding their exact origin and identification.

(Signed) N. D. HICKS.