BOOK REVIEW

THE TRIAL OF 'INDIAN JOE': RACE AND JUSTICE IN THE NINETEENTH CENTURY WEST BY CLARE V MCKANNA JR (LINCOLN: UNIVERSITY OF NEBRASKA PRESS 2003). 155 PAGES (HARDCOVER). PRICE: $45 ISBN 0 8032 3228 4.

JUSTICE GILLES RENAUD*

The most recent volume in the "Law in the American West" Series[1] under the direction of Professor John R Wunder of the University of Nebraska-Lincoln is entitled *The Trial of "Indian Joe" Race and Justice in the Nineteeth-Century West*. This elegant and well-illustrated book provides a rich and riveting understanding of the many obstacles to justice faced by an aboriginal, mixed cultured and largely non English-speaking impoverished defendant charged with the most horrific of crimes, the double murder of an elderly white couple in an isolated community near San Diego, California in 1892. As an historical account of injustice, it is both compelling and challenging in confronting racism, lack of effective resources with which to mount an effective defence, and systemic obstacles to justice based on communicative and cultural misunderstandings. However, one would be mistaken in limiting the guidance found in Professor McKanna's book to purely historical lessons of injustice; indeed, one questions whether the many issues raised by the author have ceased to apply to contemporary criminal prosecutions.

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[1] I commend in particular Volume 5 by Blue Clark, *Lone Wolf v. Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century*, [University of Nebraska Press, 1995] and Volume 1, *Federal Justice in California: The Court of Ogden Hoffman, 1851-1891*, by C.G. Fritz, [University of Nebraska Press, 1991].

By way of background, note that the defendant Mr José Gabriel was a Mexican national of mixed aboriginal-Spanish descent whose first language was Borjeňo, a sub-Yuman dialect. Although he had learned some Spanish, he possessed only a rudimentary understanding of English, and apparently was deprived of any interpreter at the preliminary inquiry, not to speak of representation as will be discussed subsequently, and of effective interpretation throughout the trial. More damaging to the cause of justice, Mr Gabriel was described throughout the proceedings by almost everyone in authority including his counsel as 'Indian Joe', a racist appellation that the author links ably not only with the general discriminatory attitude of the period being the late 1890s in Western America, but within the context of the prevailing and popular culture as inspired by the works of Mark Twain. As we read at pages 107-109 in particular, books such as *Adventures of Tom Sawyer* helped to convey the image of aboriginals as either "savages" or "drunks", if not both. Nothing occurred in the course of the trial to dispel this racist situation, either by means of a direction by the trial judge or as a result of a protest by Mr Gabriel's representative, and Professor McKanna is quite successful in making plain how the defendant came to be further marginalized before the jury of his "non-peers" to a degree greater than what he faced in his daily travails as a common labourer. As we read at page x (and as illustrated at various points in the book): "In nineteenth-century California, whites, many of whom perceived Native peoples as a threat, controlled the criminal justice system. California Indians, who could neither vote nor serve on juries, lived virtually unprotected in a white world. By labeling him 'Indian Joe' white members of the local community rhetorically distanced José Gabriel from themselves and marginalized him, making it more difficult to identify and sympathize with the defendant during the trial."[2]

Having introduced the subject in general terms, it will be instructive to point out that the author's purpose was to demonstrate that the defendant did not

[2] On the issue of further marginalizing a defendant who is already viewed by the dominant culture as an "other", but who is neither a member of a visible minority or otherwise outside the dominant ethnic group at least in terms of the information consigned in a census questionnaire, consider the striking analysis advanced by Professor Chris Greer in his essay "Crime, Media and Community: Grief and Virtual Engagement in Late Modernity" in *Cultural Criminology Unleashed,* edited by J. Ferrell, K. Hayward, W. Morrison and M. Presdee, [GlassHouse Press: London, 2004]. For example, page 110 includes the observation: "Whole categories of individuals are stigmatised, criminalised and excluded on the basis of their look, their style, their demeanour – their perceived 'risk' or 'dangerousness'".

receive a fair trial and to provide him with a voice, as he has been largely unheard of in both his lifetime and the trial that marked the end of his existence. That is not to say that Professor McKanna concludes that the defendant[3] was innocent. As a careful historian, he amassed all extant evidence and carefully considered the incriminating testimony and evidence and contrasted it with the many elements of information that ought to have raised a reasonable doubt, notably the absence of any blood on the soles of the bare feet of Mr Gabriel at the scene of a quite bloody encounter. In so doing, we are treated to a thorough exposition of contemporary police investigative techniques, trial tactics, medical expertise in homicide, and to a comparatively rare example of jury involvement in the questioning of witnesses, including Mr. Gabriel.

This type of legal historiography is important if not essential in order that we may profit from the lessons of the past in forming a better understanding of the legal obstacles to justice confronting us today. In this sense, the trial record's multiple references to what we now call the damaging elements of a racialized fact-finder demonstrate what must be avoided to achieve justice. A related example, albeit describing the pernicious consequences of bias resulting not from racial prejudice but by reason of a gender-based and sexualized prejudice in fact-finding, is seen in Professor Constance Backhouse's magisterial essay, "'Don't You Bully Me … Justice I Want If There Is Justice To Be Had': The Rape of Mary Ann Burton, London, Ontario, 1907".[4] A further related example may be cited, in this case of a culturally biased fact-finding, if we assume that racism was not involved. Indeed, the evocative book, *Arctic Justice On Trial For Murder, Pond Inlet, 1923*[5] by Professor Shelagh D Grant lays bare how the ignorance of the Canadian justice officials of European descent as to the inherent rules of self-defence and of restorative justice in the Aboriginal context resulted in a miscarriage of justice in the Canadian Arctic. Interested readers may also

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[3] Developments in Canada resulting from a recent number of wrongful convictions have focused attention on the danger of describing the person charged in any pejorative or non-neutral fashion, lest prejudice result in the minds of the juror. Consider the instruction found in *Examination of Witnesses in Criminal Cases (Fifth Edition*), by Earl J Levy QC [Carswell: Toronto, 2004], at pages 62-64 on the importance of humanizing the person who is charged with an offence.

[4] Refer to *People and Place Historical Influences on Legal Culture*, edited by J Swainger and C Backhouse, University of British Columbia Press: Vancouver, B.C., 2003, at pages 60-94. The author has published a book review at *Canadian Journal of Criminology and Criminal Justice*, Spring 2004, Volume 46(3).

[5] McGill-Queen's University Press: Montreal, 2002. Refer to my book review (2003), 8(1) *Deakin L.R.* 205-208.

consider the plight of the aboriginal accused persons described at pages 28-32 in *Donald Thomson in Arnhem Land*,[6] and the general description of the role of the constabulary in keeping First Nations' members 'in line', so to speak, in the introductory pages of *An Apostle of the North Memoirs of the Right Reverend William Carpenter Bombas*,[7] particularly pages xxxi-xxxiv.

Leaving aside all of these valuable insights touching upon the attacks upon the fair trial ideal that we strive for resulting from the myriad ways in which prejudice and ignorance infect fact-finding, *The Trial of "Indian Joe": Race and Justice in the Nineteenth-Century West* is invaluable in reminding us of two signal elements to the fair trial paradigm: the need for adequately funded defence counsel having adequate time to prepare and the need for a judicial officer who is fair and open-minded. In both respects, the trial of Mr. Gabriel was deficient. Firstly, defence counsel who was appointed was inexperienced, not funded in any fashion, unpaid save for the money found on his client's person that was pointed to by the prosecution as damning evidence of guilt, and given inadequate time to prepare.[8] Having to contend with such difficulties, it is not surprising that defence counsel failed to impeach the weak medical evidence, and to demonstrate and uphold the absence of exculpatory evidence, leaving aside the failure to poll the jury when some doubts touching upon unanimity emerged at the time the verdict was taken and the refusal to initiate an appeal. As for the presiding judge, Professor McKanna does not submit it, nor does the writer of this review, that modern rules of judicial conduct as defined by the animating jurisprudence ought to have been the standard of the day;[9] it is contended however that it is within the province of the Court to ensure that a fair trial is afforded to the person charged and in this instance, this right was breach in the most egregious fashion. Racism infected the letter and the spirit of the proceedings, fear of the "other" dominated the media reports available to the jury pool and the actual jury and no attempt was made to ensure adequate representation. The trial judge also failed to honour whatever minimal standards of justice

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[6] By Donald Thomson, compiled and introduced by Nicolas Peterson [The Miegunyah Press: Carlton, Victoria, 2003.

[7] Introduction by W.R. Morrison and K.S. Coates [University of Alberta Press: Edmonton, Alta, 2002].

[8] A useful reference is Professor Nancy Ogle's article "With the Benefit of Modern American Laws and Competent Legal Representation, They Might Not Have Been Les Miserables" (1991), 30 *Washburn L.J.* 477-500.

[9] A quite useful source of reference is the recently released title, *Criminal Evidence*, by Paul Roberts and Adrian Zuckerman, especially at pages 45-57 [Oxford University Press: Oxford, 2004]. Refer to my reviewe in (September 2005), Vol. 50(4) *Criminal Law Quarterly*, pp. 508-512.

prevailed at the time by permitting the jury to question the witnesses to an undue degree.

Leaving aside these significant concerns, the trial of Mr Gabriel also serves to underscore the inherent dangers of our methods of criminal trial, tributary as they are to the ability of the defendant to present compelling "oral" testimony. As discussed skillfully by Professor Jenny McEwan in her text *Evidence and the Adversarial Process The Modern Law*[10] at Chapter 4, pages 101-139, many witnesses have a legitimate grievance when their inability to express themselves adequately, let alone well and in the language of the triers of fact. What greater harm may befall a witness who is the accused, a person who has no peer in the room at any level, and who cannot speak well when answering questions?

In the final analysis, this is a timely reminder that injustices are possible at all times and in any setting and, more to the point, they will continue to plague the criminal justice system[11] unless we are able to purge all elements of racism from the trial process, if at no other stage.

[10] Blackwell Publishers: Oxford, 1992.

[11] It goes without saying that racism must be eradicated at all levels. In this respect, consider the penetrating analysis presented by Dr Antonio D Buti in *Separated Aboriginal Childhood Separations and Guardianship Law,* Sydney Institute of Criminology: Sydney, 2004.