Memories of the liberation of Walgett 1965*

The Hon Michael Kirby AC CMG**

Photo from the Walgett Case 1965 showing Gordon Samuels QC, Malcolm Hardwick and the defendant.

You can all go downstairs, if you like. But they (meaning the Aboriginals) cannot come up here.

It is amazing whom you meet when walking along the streets in the Sydney legal precinct. Recently I encountered someone who looked, and sounded, uncannily like a barrister I had known in the 1960s: Malcolm Hardwick of 7th Floor Wentworth Chambers. It turned out that he was the son of Malcolm, who died some years ago. He told me that he was Nicholas Hardwick and that, unlike his father and grandfather, he had renounced the law and pursued life as an antiquities curator. He mentioned that he had been going through his father's papers:

> 'You didn't happen to see any papers on the liberation of the Walgett cinema did you?' I asked.

He looked perplexed, so I explained a case in which I had briefed his father as junior to Gordon Samuels QC in a matter involving a challenge to the discriminatory policies of the Walgett cinema in 1965.

At that time, I was a partner in Hickson, Lakeman and Holcombe, an up and coming law firm in Hunter Street in Sydney. In my spare time I served on the committee of the NSW Council for Civil Liberties (CCL). We would meet every other Tuesday night above an upstairs Greek restaurant in Castlereagh Street, Sydney, to talk about the cases that had come to attention. One such case involved the Walgett picture show.

The case followed closely on an earlier 'liberation' case, in which Charlie Perkins and Jim Spiegelman (two leaders in student politics at the University of Sydney) had travelled by bus with students to challenge the segregation of the Moree and Kempsey public baths. This time, in Walgett, the challenge was brought by a young student, Owen Westcott. He was the son of Noel Westcott, a judge of the Workers' Compensation Commission, another very talented Sydney lawyer. Owen Westcott heard that the cinema in Walgett discriminated against Aboriginal patrons. It would allow them to purchase tickets in the downstairs stalls. There the seats were

covered with vinyl and the floor covering was lino. Aboriginal patrons were not allowed to ascend the grand staircase to the upstairs lounge section of the cinema. There the floor covering was carpet and the seats were covered in red velvet. That part of the cinema was reserved to 'white' patrons.

For the most part, this differentiation did not apparently shock the good citizens of Walgett or, for that matter, most Australians of those days. These were the times of 'White Australia'. There was a lot of discrimination against Aboriginals and other people of colour. Including in the law. Doubtless taking inspiration from the Moree bus rides and from the earlier challenges to racial segregation in the Deep South of the United States of America, Owen Westcott was determined to do something.

Together with a small group of Sydney University students, he travelled to Walgett, an outback town in central New South Wales. There he met local Aboriginal leaders. Accompanied by a few of them he went to the cinema and purchased the required number of seats. Arm in arm, with his new Aboriginal friends, he climbed the grand staircase, only to be denied entry by the manager.

> 'You can all go downstairs, if you like. But they (meaning the Aboriginals) cannot come up here.'
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> 'But we have tickets', Owen Westcott protested. 'We demand entry.'

A scuffle broke out. The Walgett police were called. Owen and his friends were arrested and locked in the police cells. The next day they were taken to the Walgett Courthouse where they pleaded not guilty in the Court of Petty Sessions to the offence of trespass. They relied on the right of entry that they had secured by the tickets purchased by Owen, acting alone.

Owen Westcott was not a law student. But he thought he had a good case. He went to the Council for Civil Liberties. They sent for me. I decided to go right to the top. So I approached Gordon Samuels, whom I had come to know in compensation cases where he was briefed when the insurers needed 'big guns'. With his cool demeanour and magnificent voice, he was always impressive. He had been born in England, educated at Balliol College, Oxford University and migrated to Sydney in 1949. He had been appointed silk the previous year. Later he was to serve a quarter century as chancellor of the University of New South Wales. I became his colleague on the Court of Appeal of New South Wales. He even rounded off a remarkable career as governor of the state (1996-2001). But back in 1965 he was a freshly minted silk with chambers facing Phillip Street on the 8th Floor of Wentworth Chambers. He immediately agreed to undertake without fee the defence of the Aboriginal accused and Owen Westcott.

Malcolm Hardwick an Australian who had also attended Balliol College, Oxford and was later appointed Silk in 1980, was known for his conservative opinions and black letter approach to the law. Malcolm a strong supporter of the CCL. 'True conservatives', he would tell me, 'want to make sure that law is there for every worthy case.' He agreed to become Gordon Samuel's junior, also without fee. In the heat of Walgett, I never saw either of them remove their coats. Their arrival at the courthouse with the accused caused quite a stir in the town.

We mounted a formidable argument, invoking a famous case where a passenger, half a century earlier, had gone to the Privy Council to uphold his claim based on a penny ticket on a Sydney Harbour ferry.[1] In the end, the magistrate, a benign and, we thought, sympathetic judicial officer, rejected our legal arguments. However, he discharged all of the accused without imposing a conviction, under the then well known 'first offenders' provision' of the NSW Crimes Act, section 556A.

Lawyers, like Rosencrantz and Guildenstern, walk across the dramas of their clients and then depart, knowing little or nothing of how the dramas continue and are eventually play out.

Years later in quiet moments in the Court of Appeal, Gordon Samuels would reminisce about the Walgett case. He would allege, to the mirth of our colleagues, that not only did I never remove my suit coat but had actually turned up in Walgett wearing a waist coat, a most unlikely story.

I had no expectation of hearing further from Nicholas Hardwick about my request. I was pleasantly surprised when, a few days later, he turned up in my chambers.

> 'I did not find any legal opinions of my father about the Walgett case. But I did find these photographs, apparently purchased from the *Sydney Morning Herald* on 18 October 1965', Nicholas Hardwick said.

He then produced three file photographs showing Gordon Samuels, Malcolm Hardwick and, in one of them, a young Aboriginal man, inferentially one of those who, with heart pounding no doubt, climbed the staircase at the Walgett cinema that had previously been forbidden territory for him and members of his race. There were no photographs of Owen Westcott; nor of me, the instructing solicitor for the defendants. But we were minor players in a drama concerned with the slow emergence of Australia and its laws from the racial overtones of colonial and post-colonial times.

There are three footnotes to this story. Years afterwards, I heard that Owen Westcott was involved professionally on the periphery of the HIV epidemic. He was still battling for good causes, in this instance, access by prisoners to protection and medication for HIV infection that was then a serious problem without a cure or effective treatment. Later still I heard that Owen had died. Although he was not a lawyer, he had faith in the law. Although we had not won the case on the merits, at least he and his Aboriginal friends walked away from their trial without the stain of a conviction. And they had made their point.

I did not hear again from the magistrate who presided in the Walgett Courthouse that hot day in 1965. But in the week of my retirement from office in the High Court of Australia, a letter arrived for me, out of the blue. The magistrate, long since himself retired, wrote to me to remind me of the confrontation at Walgett. He paid a tribute to the presentation of the case by Samuels and Hardwick. He wanted me to know that he had not forgotten that occasion and the discriminatory realities that the case had brought to light. He had the good manners not to mention my waistcoat, if any.

The last footnote was contained in the magistrate's letter. It filled in a gap in my knowledge. Lawyers, like Rosencrantz and Guildenstern, walk across the dramas of their clients and then depart, knowing little or nothing of how the dramas continue and are eventually play out. According to the magistrate, a few weeks after his decision in the Walgett Courthouse, the cinema let it be known that the previous upstairs/downstairs policy of discrimination was no more. It was dropped. Aboriginal Australians could, if they had nine pence, ascend the grand staircase, savour the rich carpet and sink into the red velvet seats in the lounge. Once again, justice had prevailed.

A little story from 50 years ago to illustrate the vital need for pro bono lawyering. For guardians of civil liberty at the Bar. And for strict scrutiny of discrimination involving the unequal application of the law.

END NOTES

* Derived from a talk at the Common Room of the NSW Bar Association on the occasion of the celebration of RACS which provides free legal advice to refugee applicants in NSW.

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1 *Robertson v Balmain New Ferry Company Ltd* [1910] AC 295 (PC). A case of false imprisonment, the story is told in Mark Lunney, 'False Imprisonment, Fare Dodging and Federation – Mr Robertson's Night Out' (2009) *31 Sydney Law* Review 537. See also *Balmain New Ferry Co v Robertson* (1906) 6 CLR 397