



Précis Paper

The Polyukovich Case

A discussion of *Polyukovich v The Commonwealth* [1991] HCA 32.

Discussion Includes

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- The War Crimes Act
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The Polyukovich Case

1. In this edition of BenchTV, Gregory James AM QC (Barrister, 11th Floor Garfield Barwick Chambers) and Stephen Griffiths (Solicitor, AR Conolly and Co) discuss the case of *Polyukovich v The Commonwealth [1991] HCA 32*.

Background to the case

2. In February 1987, the Special Investigations Unit within the Attorney-General's Department was set up to investigate and recommend possible prosecutions to the Director of Public Prosecutions (DPP).
3. Greg James and Deputy Director Grant Niemann were retained by the DPP to advise on and prosecute charges against persons referred to the Director by the Special Investigation Unit. In particular, to prosecute the charges against Ivan Polyukhovich and Heinrich Wagner.

The War Crimes Act

4. Originally the Australian *War Crimes Act 1945* set up military tribunals for trial in the Pacific arena.
5. The Act under which the prosecutions proceeded was the *War Crimes Amendment Act*, which had specific statutory protections to provide for proceedings being stayed as an abuse of process. The Act was the first real attempt after the Nuremberg Statute to produce an international standard war crimes prosecution act.

Precedents

6. The principles underlying crimes against humanity had been articulated since ancient times but never put into a regime enforceable by trial, until Nuremberg.

Dealing with officials from the USSR

7. The task of negotiating with Soviet officials was the role of Robert Greenwood.

How did the plaintiff come to notice?

8. The plaintiff had kept up correspondence with his sister and people in the village of Serniki. There was no question that he was the right person or of identifying him.

Constitutional issues

9. Polyukovich's solicitors raised issues of constitutionality.
10. It had been expected that Michel Abbot QC would have been briefed for the defense. Some difficulty arose with Michael Abbot having given evidence to the Commonwealth Director of Public Prosecutions, and this it was thought precluded him from acting for the defense.
11. He had however raised constitutional issues and there had been some debate particularly with regards to the constitutional competence of the Commonwealth Parliament to pass legislation which, whether supported by a treaty or not, dealt with events so far away and so long ago.
12. Section 80 of the Constitution provides that a trial on indictment of offenses against the laws of Australia shall be by jury and shall be conducted in the state in which the offense was committed, or if not in one state then at such place as the Parliament may direct.
13. The *War Crimes Act* and the *Judiciary Act* made provision for the trial to be conducted in the state of residence of the person concerned, which in this case was South Australia.

How the case changed Greg James

14. The case gave much valuable experience, however it changed his life especially because he afterwards found himself a criminal lawyer, previously being a more general practitioner with skills in land law and administrative law.

Victor's justice

15. After WWII, the ironic phrase 'Victor's Justice' was levelled at trials for war crimes. However, true victors justice would be a summary execution, such as happened to Mussolini. Winston Churchill was persuaded to go to trial.
16. The point of the trials was to make it clear as could be that an international process would assure that justice, as far as it could be in that context, was being administered.

Future war crimes trials in Australia

17. Australia is not currently engaged in overseas activities likely to result in Australians being charged with crimes against humanity or genocide.
18. The jurisdiction of the International Criminal Court (ICC) has been invoked a number of times now either by reference from participating countries or by way of the ICC taking up jurisdiction where the prosecutions have not been launched, or not been launched adequately by countries subject to their jurisdiction.

19. This means that the likelihood of a war crimes prosecution in Australia as a factual proposition is remote.

Take-aways

20. Australia is an exemplar as far as the quality of justice it provides is concerned.
21. In this sort of field, it is not a conviction at all costs that should be the goal, but the display of the process that is being conducted as fair trial according to law.

BIOGRAPHY

Gregory James AM QC

Barrister, Garfield Barwick Chambers, Sydney

Greg has returned to the bar after serving as a Supreme Court Judge and Royal Commissioner. He advises and appears in criminal and administrative appeals, commissions and inquiries. He also prepares special leave applications, including to the High Court. Greg was also the former President of the Mental Health Review Tribunal of New South Wales.

Steven Griffiths

Solicitor, AR Conolly and Company Lawyers, Sydney

Steven Griffiths graduated from the Queensland University of Technology (QUT) in 2003 obtaining a Bachelor of Laws. He had previously studied at University of New South Wales, obtaining a Degree in Sport Science. He was admitted as a solicitor in 2004 to the NSW Supreme Court and worked as a Government solicitor from 2004 to 2017 advising senior departmental staff and appearing in a wide variety of matters in the NSW court and tribunals including Supreme, District and Local courts as well as the State Parole Authority and Coroner's Court. He opened his own practice in 2017 specialising in criminal law and is currently the Director of Bench TV.

BIBLIOGRAPHY

Focus Case

Polyukovich v The Commonwealth [1991] HCA 32

Judgment Link

<https://jade.io/article/67634>

Legislation

War Crimes Act (Cth)

War Crimes Amendment Act 1988 (Cth)

Judiciary Act 1903 (Cth)