

## **"'ROLL A FAG' AND GO FREE": COMPETING DISCOURSES OF SEXUALITY AND SEXUAL IDENTITY.**

**ALLEN GEORGE**, Department of Sociology and Anthropology, The University of Newcastle.

### **Abstract**

Fresh concern has arisen in the past few years over the killing of men who are, or thought to be, homosexual. It is not unusual for the assailant to claim a homosexual advance was made toward him, an advance which caused or called for a violent response. The trials of these cases have seen outcomes where defendants have been found guilty of manslaughter rather than murder, or acquitted altogether. Numerous competing discourses of sexuality and sexual identity were tactically employed in the McKinnon trial where an acquittal was achieved. The outcome of the McKinnon trial raises a number of issues on sexuality in Australian society.

The title of my paper, "'Roll a Fag' and Go Free", was a headline that appeared in a gay and lesbian community paper, the *Sydney Star Observer*, and heralded the outcome of a murder trial. This particular trial, the McKinnon case, added to growing concern that the progress which had been made in the area of public policy, specifically in relation to legal rights and equity within the law for gays and lesbians, had not been reflected in the outcomes of recent murder trials. Sections of the gay and lesbian community have focused upon trials such as these because the victim is often constructed in the courtroom as homosexual while the defendant is constructed as heterosexual, sexual constructions which re-inforce social stereotypes of homosexuals as dangerous individuals.

The Gay and Lesbian Anti-Violence Project convened a public meeting in April 1994 to discuss these types of trials, of which the McKinnon case is one example. A common element in these types of murder trials was claims made by the male defendants that a sexual advance was made to them by another male, an advance that caused the defendant to retaliate with violence. A claim of an alleged sexual advance has meant that the defendant could claim the legal defence of provocation in a bid to have a murder charge reduced to manslaughter, and in some cases, an acquittal.

I decided to investigate these types of trials for my honours thesis. In this paper I will draw on one of the trials I examined, the McKinnon case. While an examination of legal defences are important, I will touch on these only toward the end of the paper. The element of this trial I will concentrate upon is that of discourses of sexuality and sexual identity. Sexuality, or sexualities, are a central theme in this trial as the crime allegedly occurred as a result of a homosexual advance upon a heterosexual. The legal counsels for both the accused and the victim used sexual discourses as tactics, discourses the jury had to contemplate in coming to their verdicts.

Before I review the constructions of sexuality taken from the trial transcript, I should state that it is not my purpose to refute or support the outcome of the trial, a verdict of not guilty of murder or manslaughter for the defendant. Instead, I attempt to highlight the contradictions presented in the trial and the ways in which discourse may have affected the jury's deliberations.

The first two constructions I will outline are McKinnon's presentation of himself as sexual prey, and his construction of the victim, Maurice, as a sexual predator. I draw these

constructions from McKinnon's "Statement from the Dock", an unsworn statement read to the court outlining the defendant's explanation of the events. The use of an unsworn statement from the dock also exempts the defendant from being cross examined. This statement is central to the case as it outlines the only version of the evening's events, McKinnon's version. Maurice, the only other party present, died shortly after the incident as a result of his injuries.

The initial meeting of McKinnon and his victim, Maurice, occurred outside the Eros Theatre in Goulburn Street in Sydney CBD. McKinnon had been playing video games by himself in a nearby Timezone premises on George Street, Sydney. After leaving Timezone, McKinnon wandered about considering where to score some marijuana. He spotted Maurice standing outside the Eros Theatre and approached him with the intention of scoring. Maurice said he was able to supply some marijuana heads, though he did not have the substance with him; it was at his premises in Newtown. McKinnon accepted the offer of returning to Maurice's residence to score.

At the house, McKinnon was asked into Maurice's bedroom to look at the deals. McKinnon recalled how, after being asked to bring along the bottle of wine Maurice had given him to drink:

...we walked down [the hall], he was a bit ahead of me, and as I walked into the bedroom he was waiting for me. He quickly grabbed me, he threw me onto the bed and he pulled my tracksuit pants and underpants down to my knees and he was on top of me at the time and I was confused at that time. (TT 207)

McKinnon claimed that, after pushing Maurice off himself and the bed, he was attacked again. McKinnon responded to this attack by hitting Maurice over the head three times with the wine bottle. The bottle broke on the final blow, cutting Maurice's head. McKinnon's construction of the scenario suggests sexual assault rather than a mere sexual advance. However, although McKinnon presents himself as having been fearful of a sexual assault, he does not suggest that Maurice made any contact with his genitals or attempted to have intercourse with him. The sexual assault was prevented, in McKinnon's account, by his response in fighting Maurice off.

McKinnon's alleged ordeal continued after he escaped from Maurice's clutches in the bedroom. McKinnon said he ran from the bedroom to the only exit from the house, the back door, which he found locked. Maurice is said to have come up behind McKinnon with an angry look on his face, yelling abuse, calling him "a little fuckwit, you little cunt" (TT 208). It was during this exchange that McKinnon "noticed there was something sharp in his hand, a little knife or something. I couldn't see it properly" (TT 208). McKinnon, believing he was in mortal danger, grabbed a knife from the kitchen, and another scuffle ensued. McKinnon claimed he received a small cut to the knuckles of his right hand. After a few blows, Maurice is said to have relented and unlocked the back door, allowing McKinnon to leave. As he reached the back gate, McKinnon felt a scratch down his back and once again entered into a struggle with Maurice. McKinnon fought him off, only to be attacked again outside the back gate. In this scuffle Maurice received a blow to the head as a result of being pushed against a brick wall, and collapsed unconscious.

Maurice was constructed, in McKinnon's statement, as being angry after his initial attack failed. He was supposedly boiling with anger as he approached McKinnon, knowing that the object of his sexual desire was trapped; he then produced what appeared to be a weapon, a shift in events which McKinnon saw as life-threatening. A number of struggles followed as McKinnon tried to escape. The struggles moved out of the house into the backyard. Escape was only made possible when Maurice was finally rendered unconscious.

In the version of events presented so far, McKinnon presents himself as sexual prey. He was lured into Maurice's clutches by the promise of scoring some marijuana, only to end

up the innocent victim of a violent sexual assault. From a legal perspective, McKinnon's reaction to the sexual assault and the continued violence can easily be explained as self-defence. McKinnon's statement shows him to be in control of his passion and able to make rational decisions. McKinnon does say he was confused when his tracksuit pants and underpants were pulled down and he was thrown onto the bed, but confusion falls short of a loss of reason. After escaping from the bedroom and taking a knife from the kitchen to defend himself, he did not lose mental control. He did not attack Maurice in a frenzy of rage, an element common in other murder cases of this type. The statement has McKinnon using only enough measured force to repel Maurice, rather than to render his attacker immediately incapable of any further action.

Even though Maurice lay unconscious, ending any threat to McKinnon's person, the events of this episode continued. McKinnon claimed that, while he was tending to Maurice's wounds after the violence had ceased, he realised he had left his wallet in the house. He returned to the house and found his wallet in the bedroom. He also found a Walkman, which he took, along with a bag of marijuana from a ceramic vase. On passing Maurice on his way out, he took the unconscious man's ring, watch, wallet and car keys. McKinnon then took Maurice's car and drove it back to the North Shore of Sydney, where he lived. McKinnon rationalised the taking of these items as a way of getting even with Maurice for what the latter had done to him. The car was taken as McKinnon had no other way of getting back over the Harbour Bridge to the Northern suburbs of Sydney.

This ends McKinnon's version of that evening's events though the statement continues, outlining events after he left the scene of the crime, as well as some curious justifications. He claimed not to have set out to rob Maurice, though he said he did steal from him as he was mad at what Maurice had done to him. McKinnon later explained to friends that he had "rolled a fag", a story needed as an explanation for those who helped him dump the car and throw the wallet, ring, watch and a small penknife down a storm-water drain. The "roll a fag" story was used because "I didn't want them thinking I hung around with homosexuals and I wanted to make it sound as if I was against them or something" (TT 210). McKinnon claims he only told an ex-girlfriend the true story as she didn't hang around with his group of friends any more. McKinnon finished his statement with an apology for the events of that evening, claiming "I only hit him after he came on to me and from then all I wanted to do was get out of the house" (TT 210). McKinnon had to provide these justifications because he was well aware that witnesses would be called who would testify that he had told them the reason for the initial events of the evening was to find a "mark" to steal from.

The major area of concern over the outcome of the McKinnon trial is that the construction of the accused as the innocent victim was accepted by the jury. This concern arises because there was a second construction of McKinnon, a construction rejected by the jury. This other construction is of a calculating young man with criminal intent, who appeared to have no compunction in using violence to carry out his aim of robbing Maurice. A real worry of the gay and lesbian community is that the operation of the criminal justice system has failed to represent a homosexual victim adequately. Moreover, and more insidiously, as I shall argue, the trial serves as a blatant example of how anti-gay sentiment, in the form of discourse, can be used within the criminal justice system to affect the outcome of a trial. Both of these concerns appear to be well founded, especially when other aspects of the trial, such as the testimony from friends of McKinnon's, and the construction of the victim, are taken into consideration.

The major piece of evidence presented to construct McKinnon as having had criminal intent came from a female witness, Rose, described as having a sisterly friendship with the accused. The witness said that she had spoken to McKinnon on a number of occasions about the events of that evening. Her evidence consisted of recollections of those conversations with

McKinnon. These recollections present quite a different picture from the version of events McKinnon gave in his statement from the dock. Unfortunately, Rose had trouble in recalling parts of these conversations, which occurred some two and a half years prior to the trial. Thus, a total reconstruction of the events told to her could not be presented to the court. However, Rose's testimony does reflect a skeletal version of the events, with a number of gaps.

According to Rose, McKinnon's first contact with Maurice was outside the Eros Theatre as McKinnon came up or down some stairs of the premises. Exiting onto the street, he saw a man sitting in a car making eyes at him, this man being Maurice. McKinnon decided to go and talk to Maurice in an attempt to get some money out of him. McKinnon returned to Maurice's house in Newtown, though the pretext for getting Maurice to take him was unstated. At the house Maurice was said to go into his bedroom to get some marijuana. McKinnon followed him to the room and threatened him with a wine bottle, while demanding some money. Maurice was said to have become upset, and McKinnon responded by saying, "I don't want to have to hurt you, I just want some money" (TT 127). A series of struggles followed. McKinnon was said to have been surprised at the strength of Maurice. McKinnon's barrister put a question to this witness which succinctly sums up the likely motive of the accused:

The effect as you recall it of what the accused was telling you about this incident several days after it, was that he had picked up a gay man in order to rob him of money and that he had had a fight with him in the man's house and had later learnt that a man was dead? (TT 141)

Rose replied, "That's right." The witness was also asked if McKinnon had said anything to her about a sexual advance by Maurice. She replied that he had not.

The construction of McKinnon as a petty thug was supported by testimony from another friend, Pecotich. This witness was a male who helped McKinnon to get rid of the items he took from Maurice. McKinnon was said by Pecotich to have become upset when he heard on the television the news of Maurice's death. McKinnon was said to have started crying, and saying, "I didn't mean to do it ... Why did he have to struggle with me?" (TT 82). Pecotich also mentioned McKinnon had said, "'Why did he try and fight with me' or something, you know, 'Why did he try you know and stop me from leaving' or something like that, fight with him..." (TT 82). The witness also said that McKinnon didn't think he had left any fingerprints behind (which was true). While the defendant was said to have shown some remorse for the death of Maurice, it is difficult to tell if he was emotionally upset for the death of the man he thought was only unconscious, or fearful for his own situation. Immediately after these words were spoken, McKinnon, with the help of his mate Pecotich, put the items taken from his victim down a storm-water drain. These items were a wallet, a watch and a penknife. McKinnon had attempted to sell the Walkman, and kept the bag of marijuana, along with the three hundred dollars from the wallet.

The evidence of both these witnesses suggests that McKinnon's motive was to "roll a fag". However, they were not very good witnesses. Rose had trouble remembering the conversations she had with McKinnon. To help with her recollections, she was given her statement to the police to refer to. Rose kept reading directly from it, which brought immediate objections from McKinnon's barrister. It has to be remembered that these conversations took place in April 1991, and the trial was held in November 1993. The male witness, Pecotich, appeared in the trial as a condition of immunity granted for the part he played in disposing of the physical evidence. He was also a difficult witness who had to be reminded to tell the truth. Pecotich, too, had made a fuller statement to the police, but in court he seemed reluctant to testify against a friend, and was obviously only doing so to avoid charges being laid against him. These factors may have coloured the credibility of these witnesses with the jury. Rose was quite sure of the motives of the crime, as told to her by McKinnon, but Pecotich appeared

reluctant to say anything which might incriminate his friend.

One point on which both witnesses were clear was the question of whether any sexual activity was mentioned by McKinnon. Both said he had not spoken of the alleged sexual assault. This disclosure was drawn out by Bell, McKinnon's barrister, in her cross-examination of these witnesses. She also drew from Rose the revelation that McKinnon's intention was to pick up a gay and rob him. It was necessary for Bell to extract what appeared to be evidence against her client, because this information was necessary to cover the contradictory testimony presented in the trial. McKinnon recounted in his statement that he had told:

...Rose and a few other mates that I rolled a fag because I didn't want them thinking I hung around with homosexuals and I wanted to make it sound as if I was against them or something. The only person I told the real story to was Emma C\_\_\_\_, she was an old girlfriend of mine and she didn't hang around with my group any more. (TT 209)

If Bell had not directly addressed the evidence against her client, evidence based on conversations with McKinnon, it would have been impossible to explain away McKinnon's admissions to his friends. The small section of McKinnon's statement presented above is, in effect, his rationale for saying what he did to others. This rationale is based on the social stigma attached to homosexuality. According to McKinnon, the "real story" of what happened could not be spoken of to any of his peers, only an ex-girlfriend. When asked what McKinnon had told her of the evening's events, the ex-girlfriend said McKinnon's reply was "a guy tried to fuck me up the arse" (TT 210).

The social stigma of homosexuality, which includes homosexuality's threat to heterosexuality, was further expounded upon by the construction of Maurice from police statements made by the two men who shared the house with him. In statements to Newtown police, one flatmate, who had known Maurice for 22 years and had had a relationship with him, outlined his sexual activities. Maurice was described as being a homosexual rather than a gay man, as he never frequents gay bars and never dresses or acts in a gay manner. (The other flatmate, who had only recently met Maurice, was unsure of Maurice's sexuality, as Maurice had told him he didn't go to gay bars or places where homosexuals usually went looking for sexual partners.) Maurice's sexual activities were said to be conducted in places on the commercial sex scene, like the Pleasure Chest in Kings Cross and the Eros Theatre, where he met McKinnon. Maurice also frequented "beats", mostly the toilets in Wynyard and Town Hall railway stations. He was said to be into casual sex, sex which is anonymous and mostly, if not exclusively, oral in nature. It was reported that it would be surprising for Maurice to engage in anal sex, and if he did so it would only be as the active partner. In the search for casual sex, Maurice cruised the main shopping street of Newtown, King Street, looking for partners, and was often successful. He was also successful in chatting up, with a few beers, a security guard, Spiro, with whom he had sex just after Spiro's wife had a child. Maurice was not totally reckless in his desire for casual sex, as he was not thought to have left his phone number on toilet walls. No strange calls were ever received at the house. Sex for Maurice was only to be conducted in public or semi-public and commercial venues. He was said never to bring anybody home into the private sphere, a sphere accepted as the area where consenting adults may indulge in most forms of sexual activity.

Maurice was clearly constructed as a sexual predator. He took opportunities to secure sexual partners in a number of public spaces, "beats" and the commercial sex scene, searching for a conquest. Spiro, the security guard, illustrated Maurice's ability to conquer, "turning" and "seducing" (allegedly) "straight" men. Maurice was said to have a sexual appetite, an appetite that could not be satisfied by members of the gay community. Instead, Maurice "hunted" for men elsewhere. He conducted his sexual activities in a somewhat clandestine manner, but these

activities were well known to his flatmate.

The sexual constructions of McKinnon and Maurice have so far been related to the subjectivity of the individual. McKinnon has been shown to be a heterosexual lured into the clutches of a homosexual predator. An alleged attempt was made by the predator to anally rape an innocent heterosexual. These elements of sexual discourse are also linked to notions of sexual identity, not only individual identity, but also group identity.

The constructions of sexuality used in the trial were based on sexual discourses where heterosexuality is normalised and clearly needs protection from the threat of a dangerous sexuality, homosexuality (Foucault 37-49). However, a normalisation process similar to that which created heterosexuality has occurred with the construction of a gay identity and gay community in the later part of the twentieth century. Homosexuals influenced by the emergence of the gay liberation movement reconstructed the meanings applied to them by the medical (particularly psychiatric) gaze to create a new, normalised identity for themselves. One of the hopes of the gay liberation movement was to free the reconstructed homosexual from the stigma of abnormality, a stigma that had, for some, made homosexual sex a furtive occupation. Peripheral sexual activities, such as sado-masochistic practices and the use of beats, began to be stigmatised by the new, normalised gay sensibility (Brodsky 233-251; Swivel 237-249; Lauritsen 221-232).

Notions of a normalised gay identity and community were exploited in the McKinnon trial by McKinnon's barrister, Bell, in an exchange with a Crown witness. The witness frequented the Eros Theatre and knew Maurice from meeting him there on three or four occasions. Prior to his meeting with McKinnon, Maurice was seen waiting outside the Eros in his car as the witness left the premises to go for a drink across the road at an R.S.L. club. Bell was thorough in her examination of this witness. Some questions asked addressed the appearance of the outside of the Eros Theatre. Bell argued that the outside appearance of the venue was heterosexual in nature. The witness agreed, but re-stated his previous observation that there was always something gay going on in any sex shop, no matter what is portrayed outwardly. When quizzed on the significance of the Eros to the gay community, the witness stated that the Eros was known as a place where men could meet, though exactly what the purpose of a meeting would or could be was avoided. Bell drew a distinction between the Eros and the venues of Oxford Street or Newtown, using, as her example of a place where openly gay men meet, the Midnight Shift (on Oxford Street, Darlinghurst). The witness agreed that there was a difference between the Midnight Shift and the Eros, but still thought there was a gay connection in the latter. Bell was attempting to establish that a person unaware of something gay going on in a sex shop or a venue like the Eros could, in effect, wander in off the street, by mistake, into the gay section. The witness disagreed, restating that there was always something gay going on.

There are a number of important implications for the trial from this exchange. Bell needed to put forward an explanation for her client's exit from the Eros Theatre. McKinnon was said to have come up or down a flight of stairs from inside the theatre. As there are no stairs to come up to exit from the Eros, McKinnon's exit down some stairs suggests that he was in the homosexual section of the establishment on the first floor. As his identity has been closely aligned to heterosexuality, it was important to attempt an explanation for his exit from the gay section. The discussion of the appearance of the outside of the Eros as heterosexual was therefore critical. Bell attempted to show that anyone, without prior knowledge, could wander mistakenly into the upstairs homosexual section.

Having attempted to clear her client for his apparent exit from the homosexual section of the Eros Theatre, Bell moved on to make a distinction between a normalised gay sexual identity, and a deviant homosexual identity. The Eros was used as an example of a venue

where men could meet with the intention of engaging in sexual activity with other men. A distinction was drawn between the Eros and the Midnight Shift (on Oxford Street). The Midnight Shift was presented as a venue where openly gay men went to meet. The presumption is made that it would be improbable for anyone heterosexual to wonder into the Midnight Shift in the mistaken belief it was a "normal" (heterosexual) establishment. If a person did, then it would be a mistake entirely on their behalf as the Oxford Street area is a well known gay precinct. The Midnight Shift and its local represent a normalised gay precinct patronised by gays, whereas the Eros Theatre represents a commercial sexual venue, with homosexuality tucked away behind a predominantly heterosexual exterior. Thus Bell was able to highlight notions of Maurice as someone outside the gay community, someone who rejected a gay identity even though he engaged in sexual acts usually conceived of as defining homosexual/gay identity and sub-cultural affiliation or membership. Maurice is constructed as a sexual deviant or closet case, one who rejects or cannot accept his own "natural" identity and community.

Finally, I would like to mention the legal defences used in the McKinnon case and how discourses of sexuality enter into the deliberations of the jury. The classic defence for murder is the defence of provocation. Simply, provocation is the claim by the defendant that the victim used actions or words which led to a loss of reason for the defendant. In the McKinnon case, a loss of reason occurred when Maurice was alleged to have sexually attacked McKinnon. This claim was accepted in the trial as provocation. As such, the jury then had to apply what is known as the objective or "ordinary person" test. This test involves the jury applying a test that:

... the ordinary man (sic) against whom the actions of the accused are to be judged is one possessing all of the characteristics and idiosyncrasies of the accused himself - age, sex, race, physical defects and so on - that would have affected his conduct in the circumstances in which the accused found himself.... (Cox qtd Gillies 353).

According to this interpretation, a jury must try to take the accused's personality into consideration when deciding whether the actions of the victim were likely to provoke the accused. In other words, the hypothetical "ordinary person" in effect becomes a specific individual', McKinnon. One can only conclude that the alleged actions of Maurice were considered by the jury to have caused a loss of reason for McKinnon.

The jury's acceptance of provocation in itself will only reduce the charge of murder to manslaughter, not an acquittal as was the finding in the McKinnon case. The defence also added the defence of self-defence. McKinnon was believed to have lost reason from the initial attack which would account for the original acts of violence against Maurice, that was the smashing of a bottle of wine over the victim's head. It was the continuation of violence, allegedly instigated by Maurice, which allowed for a plea of self-defence. The combination of these two defences lead to McKinnon being acquitted.

The outcome of the McKinnon trial raises a number of concerns. The most troubling feature of the trial was the re-casting of the victim in the role of suspect. In this new role, the victim was constructed as the instigator of events which caused a violent response in the defendant. The victim, in other words, caused the crime. The motive for the crime was the alleged sexual advance made to the defendant. No proof of a sexual advance was offered. It was merely speculation, judged as a probability based upon the sexual history of the victim.

This role reversal is reminiscent of what used to happen in rape trials, where the defence would introduce a victim's sexual history as a justification for the defendant's actions. It is now recognised that the victims in rape trials were constructed through the discourses of a patriarchal field of reference. But it is not yet recognised that the victims in the trials being

considered here were constructed through the discourses of hegemonic heterosexuality. Their homosexuality, in itself, was enough to make them a threat to supposedly heterosexual males. They were constructed in such a way as to conform to the image of "the homosexual" in the discourses of heterosexual patriarchy. Whatever the truth behind these events, it is clear that the jury assumed that the victim committed the crime of threatening the defendant's heterosexuality.

Constructions of sexual identity were used in the trial as a strategic device, as tactics, in a battle to convict or avoid conviction. McKinnon was constructed in the defence case as a heterosexual who became the prey of a rampaging (homo)sexual predator. The construction of Maurice as a predator was further confirmed by the construction of his sexual identity as being outside that of a normalised gay' identity. So dangerous was Maurice that McKinnon was shown to have been initially provoked by a sexual assault that led to his loss of reason. Provocation was accepted by the jury as was the further legal defence of self defence. Testimony from McKinnon's friend of his intention to in fact "roll a fag" was subsumed by the alleged life or death struggle instigated from a thwarted sexual assault, a sexual assault shown to be out of character with Maurice's past sexual behaviour, a sexual assault which could not be proven with evidence or confirmed in testimony by any witness. Discourses of sexuality and sexual identity aided the defence case as discourse allowed both subjects of the trial to become "known", knowledge from which decisions of guilt and innocence were evaluated. In the McKinnon trial heterosexuality triumphed, not only in showing how homosexuality is still in itself considered a threat, but also how homosexuality can be turned upon it's own subject, Maurice, in repelling a physical threat from heterosexuality. "'Roll a fag' and go free"?

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