

Wayne Cristaudo*

A CASE TO ANSWER: THE STORY OF AUSTRALIA'S FIRST EUROPEAN WAR CRIMES PROSECUTION

By David Bevan

Wakefield Press, Kent Town 1994

Number of Pages xii, 264

ISBN 1862543232

THE trials of war criminals have constantly pointed to the tensions and antagonisms involved in the legal category of "war crimes". On the one hand, there are the heinous actions committed in an environment where the routine norms of everyday life have become ideals remote from the passions of soldiers, especially of fear, hatred and revenge, and the general helter skelter of carnage. On the other hand, in a war crimes trial some actions which are beyond any reasonable definition of duty are evaluated by a justice system which takes the standards, if not of peace as the natural order, at least of an idealised environment of war. As unsatisfactory as that tension may be, in coming to grips with "the reality" of war there is little else than the slender threads of the principles of *jus in bello* generated from within the just war tradition that non-combatants can cling to in the mayhem. Perhaps it is an illusion to hope that in warfare armed men will respect some fundamental moral precepts and be morally accountable when they overstep the thin moral guidelines that circumscribe the barbarism of warfare. If it is an illusion, it is the kind of illusion we cannot afford to live without.

Unfortunately, the value of legally binding moral guidelines in warfare is all too frequently sullied by war crimes trials in which political passions and ideological currents create openings for violations of the procedures and regularities of justice which are seen as essential in peacetime. One might want to debate the point that all trials are political, but it would be hard to dispute that generally war crimes trials are very political, and that the most famous of them have been show trials which reflect poorly on the justice system. If actions of war are to fall within the scope of a legal system, then

* MA(UQ); PhD(Adel). Lecturer, Politics Department, University of Adelaide.

it is not only important to see the guilty tried but one must also be as meticulous with the procedures of justice as in any other kind of trial. In spite of our overwhelming convictions about someone's guilt in committing war crimes, the accused must be offered the same rights of due process as any other person brought before the law. The weight given to "legal technicalities" may well lead to decisions which will not please those who have suffered so terribly during war. It may well mean that someone is acquitted who "looks" as guilty as hell if the constraints of evidence which operate in the court room are removed. But this is the price one has to pay if a war crimes trial is to be more than just a show trial.

David Bevan's *A Case to Answer: The Story of Australia's first European War Crimes Prosecution* is a useful, albeit journalistic, account of a trial that could so easily have been a show trial, but in which due process played a major part in the acquittal of the accused. Few readers will feel that Ivan Polyukhovich was proven innocent of the crimes ascribed to him, but it was not, as Bevan himself states, the author's intention to reopen the case. What Bevan provides is an often salutary exposition of the events leading up to, behind and played out within the committal and trial.

Ivan Polyukhovich was the first, and only, person to be tried under the 1988 amendment to the *War Crimes Act 1945* (Cth). The politics behind the amendment would be an interesting story in itself. Certainly the Labor Party was able to make a lot of capital out of the Liberal party's willingness after the second world war to allow suspected war criminals into the country.

Although Bevan provides little analysis of the politics behind the amendment, he does go over some of the ground that had led to the amendment of that Act. He mentions Mark Aaron's radio programs on ex-Nazis and collaborators knowingly being allowed entry into Australia after the Second World War and the Menzies report which had resulted from the government's response to Aaron's investigations. He also presents a brief account of the political debate that led up to the amendment. John Stone, for example, claimed Hawke was trying to woo the Jewish vote. Some claimed it was discriminating against certain ethnic groups. The Liberal Party and RSL also opposed the Bill on the grounds that it did not exempt Australian servicemen and women. By limiting the Bill to crimes committed in Europe, thus effectively making sure that Australians would not be prosecuted, the politics of the legislation is all too visible and it is a pity that Bevan does not seriously address the problems of the ad hoc nature of the legislation. It would also have been useful for Bevan, who does briefly

mention the constitutional challenge and the High Court decision (pp 68, 70), to have made reference to Justice Brennan's dissenting judgment in *Polyukhovich v Commonwealth*,¹ where he spells out why the Act is deeply unsatisfactory as a piece of legislative crafting.

But the strength of Bevan's book does not lie in its exploration of the politics which led to the trial, nor in any jurisprudential reflection upon the precise nature of the act. It lies in the story of what may have seemed a water tight prosecution case dissipating under the minor confusions, faulty memories and contradictory testimonies of elderly witnesses recounting their stories about the young forest warden who, they claimed, fifty years earlier had brutally killed men, women, children and babies.

The Special Investigations Unit set up to track war criminals living in Australia had compiled evidence from witnesses in the Ukraine, Israel, the United States and Canada which left members of the unit in no doubt that Polyukhovich had several cases to answer. The most important was his participation in a massacre of 850 people in the village of Serniki. At the time of his arrest in January 1990, a little over three years since a telex had arrived at the *Advertiser* from the Ukraine calling for Polyukhovich's extradition, Polyukhovich's response seemed to provide further evidence of his guilt. Polyukhovich initially denied that he had ever been in Serniki, but at police headquarters he changed his story. He had been born in Serniki but he had moved as a child to Alexandrov. He admitted that he had visited Serniki, but he knew nothing about the killing of the 850 Jews. He also insisted that he had never been married before, thus contradicting his wife's (truthful) claim that she was his second wife. He also denied ever having been called "Ivanechko", the name by which he was known to most of the witnesses.

However, as became so obvious during the course of the committal and the trial, it is the inconsistencies of witnesses, not the defendant, that matter most when guilt beyond any reasonable doubt must be established.

Of the initial nine counts brought against Polyukhovich, it was count five, the charge of the massacre that had been at the centre of the prosecution's case. As the committal developed, changes had to be made to the other counts as some were dropped and others adopted, but the major count came unstuck due to inconsistencies in the evidence of Dmitry Kostyukhovich. Kostyukhovich was a central witness but, during the course of the committal, he was shown to be an unreliable witness.

1 (1991) 172 CLR 501.

Further, the prosecution's case against Polyukhovich on count five was not helped by another eyewitness of the massacre, who said he had seen Polyukhovich at the massacre but he did not see him shoot or hurt anyone.

The other counts also crumbled as the defence found discrepancies between the videoed evidence of the Special Investigations Unit and the statements in Adelaide.

After reading Bevan's account there is little doubt that the witnesses believed that Polyukhovich was a war criminal who had deeply damaged their lives. It is also clear that Polyukhovich had a fair trial, and that the prosecution could not prove its allegations against Polyukhovich. As one of the witnesses exclaimed out of exasperation with the proceedings, if Polyukhovich had been tried in the Ukraine he would have been shot. That may well be true. But, as unsatisfying as the verdict was for those elderly people who flew (often at risk to their health) from various parts of the globe to take part in the committal and the trial had Polyukhovich been found guilty on the evidence surveyed here then a miscarriage of justice may have occurred. Many readers may well feel that Polyukhovich's innocence is not proved, but that is not the purpose of a trial.

Opponents of the legislation may well have felt vindicated, not only with this verdict but with the break up of the Special Investigations Unit and the dropping of the other war crimes cases that the Unit had proposed. The difficulty of proving that someone committed a crime fifty years ago is, as this case may have demonstrated, perhaps insurmountable.

Bevan does not really address the question of whether the trial was a waste of time and tax payers' money. Certainly the majority of the public never gave their support to the legislation. In addition to the costs, if Polyukhovich and the others named by the Special Unit were innocent, then the process that allows old men to go through such a gruelling ordeal may be seen as unjust. On the other hand, if *jus in bello* is to have any force it must be backed up by the law.

However, it may well be that what happened in the Polyukhovich case was a very important lesson for the community. It served to remind that such serious crimes of the past cannot be ignored, but that the justice system is fragile. It is better to respect its fragility by preserving due process than to mould it to get predetermined outcomes. Show trials may alleviate some of the sufferings of past victims, but they create the possibilities for more victims in the future. In spite of the usual media circus surrounding the

arrest, the committal and the trial, due process was preserved. A man who did have a case to answer heard that case and saw the faces and heard the voices of those who accused him. Where the justice system can not reach, it is left to the even more fragile moral protector, conscience, to establish the truth and innocence of one's actions. Polyukhovich and the others who were indicted, or were about to be indicted, now have only their consciences to prove their guilt or innocence.