'For Want of Evidence': Initial Impressions of Indigenous Exchanges with the First Colonial Superior Courts of Australia

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Abstract

In a study conducted over three years at Macquarie University Law School, Emeritus Professor Bruce Kercher and Brent Salter compiled cases from Australia's first Superior Courts (1788-1827) to be published in a law report in 2009. Amongst the hundreds of records selected, a handful of first interactions between Indigenous Australians and European settlers can be found. In this paper the author argues, at an initial level of inquiry, that language barriers and ignorance of the British legal system were often identified as reasons to justify the exclusion of Indigenous evidence from the first European Courts. However, Indigenous exclusion went beyond these justifications. Settlers would often use court procedure to construct an understanding of Indigenous behaviour that justified acts of violence against Indigenous Australians.

Introduction

In 1998, Bruce Kercher examined two significant criminal trials from the early years of the Supreme Court of New South Wales, which considered whether Indigenous Australians had a recognisable legal system.[1] These cases were *R v Murrell* and *R v Ballard.*[2] Over the past two years, a team

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1 See B Kercher, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales' (1998) 4 Indigenous Law Bulletin 7-9; see also B Kercher, "*R v Ballard, R v Murrell, and R v Bonjon*" (edited law reports, with introduction) (1998) 3 (3) *Australian Indigenous Law Reporter* at 410-425. In 1824 the Criminal Court of Jurisdiction was abolished and replaced by Supreme Court created by the New South Wales Act 1823, 4 Geo 4, c 96, and the Third Charter of Justice.

2 *R v Murrell* (1836) 1 Legge 72 is the founding case on the terra nullius doctrine for Australian law. Kercher writes 'it was not, however, the first time the courts

at Macquarie University has been selecting cases from the very beginnings of European settlement (1788-1823) to be published in a law report in 2009.[3] Amongst the selected cases to be published,[4] are the earliest records involving Indigenous-settler violence tried in Australia's first colonial superior courts.[5]

In the years following settlement, criminal courts were comprised mostly of amateur judges and military members,[6] who were governed by military rules and functioned without legal assistance. Although the Judge Advocate had only one vote out of a panel of seven, the person holding that position had multiple and conflicting roles. The Judge Advocate was not only as a magistrate, public prosecutor and judge, but was also burdened with the responsibility of determining the legality of indictments that he himself had drafted.

The early court records do not demonstrate the legal reasoning that might have been in operation in these trials, if any indeed was. Like so many of the early decisions, any underlying legal principle could only be inferred from its facts and outcome. However, by 1823, judgments as we now come to think of them began to be delivered. Although the criminal court by the end of the period was still military in character, it was presided over by highly trained lawyers, who, on some occasions, began to articulate clearer judicial statements of law.

In this early period of rapid development and uncertainty over the shape the law would take in the new colony,[7] only a handful of records of

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considered these questions'. In 1829, in *R v Ballard*, the same court took a very different approach. See Kercher, above n 1.

3 B Kercher and B Salter (eds), The Kercher Reports: Cases from the Superior Courts of NSW (1788-1827) (2009) (hereafter "NSW Sel Cas (Kercher)").

4 Available online at: Decisions of the Superior Courts of NSW, <www.law.mq.edu.au/scnsw/> (hereafter 'Decisions of the Superior Courts of NSW') (including the R v Ballard , 1829) trial above. The Ballard case is also available in T Castle and B Kercher (eds), Dowling's Select Cases 1828 to 1844 (2005) as *R v Dirty Dick* (1829) NSW Sel Cas (Dowling) 2).

5 The term 'Superior Court' refers to the Court of Criminal Jurisdiction and the Court of Civil Jurisdiction. The court records of proceedings have been preserved at State Records of NSW. Detailed accounts of court proceedings can also been found in Australia's first newspaper, The Sydney Gazette, which started publication in 1803.

6 Members were the six men who sat on the court with the Judge Advocate – all military officers.

7 On reception of English law and the rule of law in the colony see B Kercher and B Salter 'Introduction' in Kercher Reports; D Neal, The Rule of Law in a Penal Colony: Law and Power in Early New South Wales (1991); see also B Salter and B Kercher, 'Birthright(s) and Inheritance(s)': The Rule of Law in New South Wales, 1788-1824' (forthcoming).

Indigenous interactions with the settler superior courts can be found.[8] There is also a notable absence of this information in the thousands of newspaper and archive court records. There are, however, some tentative observations that can be made from a close examination of the cases that were reported or recorded involving Indigenous-settler violence. The commentary provided in this paper regarding the Indigenous cases compiled in the 2009 *Kercher Reports* is merely a starting point for further examination. The hope is that others will use these cases for deeper analysis. However, this paper suggests that the handful of criminal matters tried before Australia's first criminal court indicates, at an initial level of enquiry, that settlers had little reason to fear conviction for crimes committed against Indigenous people.

Excused and denied access: cases involving the murder of Indigenous people

The most common crime to be found in the handful of Indigenous related criminal court records involve settlers being charged with murder. *R v Millar and Bevan*[9] is the first of only four cases involving Indigenous-settler violence to be tried in the twenty-five years after settlement. Judge Advocate Richard Atkins tried this first case, Richard Dore the second and third (*R v Hewitt*[10] and *R v Powell and others*[11]) and Ellis Bent the fourth (*R v Luttrell*).[12]

It was common for the accused European settler in these and later cases to plead self-defence or provocation to secure an acquittal.[13] Other acquittals were based on lack of evidence, as was the case in *R v Millar and Bevan*. In that trial, the prisoners were brought before the Court for assault and murder 'upon a native commonly known as Tom Rowley'.[14] The details of the case in the *Minutes of Proceedings* are scant at best. On 6 October, William Millar 'feloniously, wilfully and of his malice' shot Tom Rowley in the right thigh, inflicting 'one mortal wound'. Millar's

8 These have been found through both our own searches and with the assistance of Victoria Gollan's database: see Victoria Gollan: Aboriginal Colonial Court Cases, 1788-1838, State Records NSW, <http://www.records.nsw.gov.au/archives/aboriginal_ colonial_ court_cases_1788-1838_4525.asp>

9 *R v Millar and Bevan* (1797) NSW Sel Cas (Kercher) 147: the first indigenous related superior court criminal trial.

10 *R v Hewitt* (1799) NSW Sel Cas (Kercher) 154.

11 *R v Powell and Ors* (1799) NSW Sel Cas (Kercher) 209.

12 *R v Luttrell* (1810) NSW Sel Cas (Kercher) 419. This is an assault case and is examined below.

13 See B Salter, 'Early interactions between indigenous people and settlers in Australia's first criminal court' (2009) 83 *Australian Law Journal* 1.

14 *R v Millar and Bevan* (1797).

accomplice, Thomas Bevan, was charged with 'aiding, helping, abetting, comforting, assisting and maintaining' William Millar. With no further details provided in the notes, Judge Advocate Atkins' only judicial pronouncement on the issue of Indigenous Australians in his ten years as the chief judicial officer was that they were 'acquitted for want of evidence'.

Atkins would, however, make a contribution to Indigenous/legal relations in other forums. Atkins was one of the first colonists to raise the issue of whether Indigenous people could give evidence. He asked the question in his widely cited 'Opinion on the Treatment of Natives',[15] written in 1805. Atkins stated that 'the evidence of persons not bound by any moral or religious tie can never be considered or construed as legal evidence'. Alex Castles examined why such attitudes were held:

> There were two basic ways in which the admission of Aboriginal evidence was affected. First, there was the basic difficulty of communication when an Aboriginal witness had no knowledge of English, or at best only a rudimentary understanding of the language. This situation was exacerbated when reliable interpreters could not be found. Secondly, as Burton J of New South Wales outlined it, insuperable difficulty could ensue 'where a proposed witness had been found ignorant of a Supreme Being and a future state.' Under the prevailing notions of English law, sworn testimony could not be received in such circumstances.[16]

This issue regarding evidence given by Indigenous people was central in two of the murder cases of the period. In the 1799 trial of *R v Hewitt*, Thomas Hewitt was charged with the wilful murder of an Indigenous Australian called Willie Cuthie. The report of the case suggests that the widow of the deceased wanted to give evidence, but 'being capacitated to give sufficient testimony to reach the life of the delinquent or substantiate the count laid in the said indictment, he was by the court hereupon acquitted'.[17] Similarly, in *R v Miller*, a few months before the opening of the new Supreme Court, Thomas Miller was indicted for the shooting of Aborigines at Bathurst. However, the matter appears to have not proceeded to trial.

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15 R Atkins, 'Opinion on Treatment to be Adopted Towards the Natives', 20 July 1805, *Historical Records of Australia*, series 1, vol 5 at 502-504. However, see Ford's interesting interpretation of the opinion: L Ford, Settler Sovereignty: Jurisdiction and Indigenous People in Georgia and New South Wales 1788-1836, Ph.D dissertation, Columbia University 2007, (forthcoming revised manuscript: Harvard University Press, 2009).

16 See A Castles, *An Australian Legal History* (1982) at 532-533.

17 *R v Hewitt* (1799) NSW Sel Cas (Kercher) 154. There was also a vagrancy charge against Hewitt where he was convicted and sentenced to receive 300 lashes.

Judge Advocate Wylde held that he:

> cannot hear of any other witnesses in the case of the King versus Thomas Miller, than the Black Natives, and as you inform me in your Letter of 16 January last, that, they are not Competent witnesses in a Criminal Court, I shall not forward them to Sydney.[18]

The common themes of provocation and self defence in cases concerning Indigenous people emerge again in the trial of *R v Hawker*.[19] In this case, Seth Hawker was indicted for the wilful murder of a 'black native woman' at Illawarra. Judge Advocate John Wylde prompted witnesses to excuse Hawker's crime. He asked whether local Aborigines had been 'troublesome' and whether they had been warned about stealing from settlers. Secondly, the Court asked whether witnesses believed that Hawker had fired into the dark cornfield in fear for his life. One witness testified that Hawker was in fear of his life because the barking of their dogs suggested that more than one Aborigine was in the corn, and because of the 'treachery of those people'. Another witness claimed that the local Indigenous population would constantly steal and 'frequently threatened to kill me to burn the wheat and fire the house'.[20]

The *Sydney Gazette's* report of the case stated that 'the natives are excessively troublesome and annoying ...during the corn season'. In the season the act in question took place, the *Gazette* claimed that 'Aborigines had been remarkably active in committing depredations'.[21] In his summing up of the case, Wylde commented that he 'wished it to be properly and lastingly impressed upon the minds of all, that the Aboriginal natives have as much right to expect justice at the hand of the British Law, as Europeans'. In his defense, the prisoner Hawker argued he was merely trying to protect his property. Hawker was acquitted of the murder charge.

The issues of provocation and self-defence were also employed by European settlers in one of the most extraordinary murder trials of the

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18 *R v Miller,* 1824: Decisions of the Superior Courts of NSW; see also *R v Hatherly and Jackie* (1822) NSW Sel. Cas. (Kercher) 734 (examined below); from the new Supreme Court 1824 onwards see also: *R v Fitzpatrick and Colville*, 1824; *R v Parker and Donavan*, 1829; *R v Jackey*, 1834; *R v Murrell and Bummaree*, 1836; *R v Wombarty,* 1837; *R v Kilmeister and others* (No 2), 1838; *R v Long Jack*, 1838; *R v Barclay*, 1839; *R v Hagan*, 1839; *R v Lamb*, 1839; *R v Billy,* 1840; *R v Dundomah*, 1840; *R v Bolden,* 1841 (all available online at Decisions of the Superior Courts of NSW).

19 See *R v Hawker* (1822) NSW Sel Cas (Kercher) 719. See Ford, Settler Sovereignty, above n 15.

20 See Ford, Settler Sovereignty, above n 15.

21 *R v Hawker* (1822) NSW Sel Cas (Kercher) 719 at 720.

period, *R v Powell and Ors*.[22] In this case Constable Edward Powell and farmers Simon Freebody, James Metcalfe, William Timms and William Butler murdered two Aboriginal men and attempted to murder a third. There were various accounts of what had taken place and the reasons behind the murders. It was alleged the victims had murdered another settler named Hodgkinson and an Indigenous acquaintance named Wimbo. There was also evidence that the victims had threatened the lives of a settler woman and her children.

This trial provides the best evidence of the informal operation of the criminal law in instances of Indigenous-settler hostility. The *Minutes of Proceedings* contain numerous accounts of European settlers claiming to be under imminent threat of Indigenous violence. Ford argues that the case 'shows the ways in which settlers constructed their lawlessness to fit within the permissive parameters of legitimate violence – parameters set simultaneously by legal pluralism and by common law'.[23] Indeed, Ford observes that many of the members of the colonial community felt that killing Indigenous people was a necessary part of frontier life in the colony of New South Wales, and was therefore justified. Accordingly, the perpetrators had no reason to deny killing Indigenous people. However, the division of views among the military jury at the end of this case shows that even in 1799, there was no consensus about the value of Indigenous life.

The court found the men guilty of killing two Aborigines but refused to sentence them to death for murder.[24] Governor Hunter referred the case to the Colonial Office and, in the interim, allowed the convicted men to return to their farms.[25] In 1802, the Colonial Office requested that the men be pardoned, regretting that the colony had made a mess of Aboriginal affairs.

Kirby and King Jack: conviction and execution of a settler for an Indigenous murder

The trial of Powell and his cohorts can be contrasted to *R v Kirby and Thompson*,[26] which was the first superior court record of a European settler being tried, convicted and executed for the murder of an

22 *R v Powell and Ors* (1799) NSW Sel Cas (Kercher) 209.

23 See Ford, Settler Sovereignty, above n 15.

24 In John Hunter to Portland, 2 January 1800, *Historical Records of Australia*, Series 1, Governors' Dispatches to and from England, series 1, vol. 1 at 422.

25 Hunter to Portland, 2 Jan 1800, HRA 1:2 at 401-3.

26 *R v Kirby and Thompson* (1820) NSW Sel Cas (Kercher) 661.

Aborigine. This trial took place more than thirty years after British colonisation began, but well before the Myall Creek executions in 1838.

John Kirby and John Thompson were indicted for the wilful murder of Burragong who was a native chief at Newcastle and went under the alias King Jack. The trial record suggests that the two prisoners were convicted criminals who had escaped from Sydney and were still working under the conditions of their sentence. A military party had been dispatched to find the two men when they shortly afterwards came across an Aboriginal woman. She stated that the prisoners were being brought back into town under the custody of a party of Aborigines. The party included King Jack who had allegedly been wounded by the settlers. The settler defendants once again relied on self defence and provocation to justify their violence. On this occasion, however, two settler witnesses deposed that no blow was struck by an Aborigine until after King Jack had been injured. King Jack survived the injury for up to ten days until dying as a result of the wounds.

After a surgeon gave evidence that the wound had ensued from 'an internal mortification in the abdomen', the Court returned a verdict of wilful murder and a sentence of death for Kirby, while Thompson was acquitted. The similarities with the Powell trial are there to be seen in the record: undisputed evidence of the murders, self-defence and provocation issues being raised. Although the result is strikingly different in the case of *Powell*, the offence was once again justified in terms of the larger scheme of Indigenous-settler relations. The fact that the victim was a native chief may suggest that the first formal conviction and execution of a settler for violence against an Indigenous person was a diplomatic gesture as much as it was a conviction under law for an act of criminality.

Confession not enough: Hatherly and Jackie and the inadmissibility of evidence for murder

The trial of *R v Hatherly and Jackie*[27] is one of the earliest, if not the first, court record in Australia's European history considering the admissibility of an Indigenous confession. This remarkable case, like the *Millar* and *Hewitt* trials above, would turn on the inability of Aborigines to give evidence in the colonial courts.

On December 2 1822, Commandant James Morisset of Newcastle sent a set of depositions to the Judge Advocate's Office to commence formal proceedings against Hatherly and Jackie for the murder of the settler John

27 *R v Hatherly and Jackie* (1822) NSW Sel Cas (Kercher) 734.

McDonald. In his brief cover letter to the depositions, Morriset stated that '[t]he motive for committing the [m]urders was no doubt',[28] but 'there is no proof that the act was done by Hatherly and Jackie'.[29]

The Commandant enclosed three depositions. Firstly, Richard Binder claimed that an Aborigine named George, who had an intimate working relationship with the settlers, told him he had heard that the two prisoners had murdered McDonald. George, the deponent and a dispatch of men proceeded to a swamp 14 miles from the Nelson Plains Cottage:

> ...where we found the body laying knee deep in water laying flat on his back... and found his [McDonald's] head in the back, cut open, his skull fractured and a cut behind his right eye, apparently done with an axe, his left arm broke and the right cut'.[30]

Although Binder was unable to identify the deceased, they found a hat at the scene, which he adamantly swore was the property of John McDonald.[31]

Secondly, Binder stated that after the dispatch found the body, the two prisoners arrived at the house of William Hickey. Binder claimed that at this point the two men voluntarily confessed to the assault of McDonald. Although each prisoner charged the other with the most atrocious part of the act, Jackie explicitly acknowledged that he hit 'him [McDonald] thrice blows with an axe'.[32]

Thirdly, William Hickey deposed that he could not positively swear the hat belonged to the deceased, but further stated that when the prisoners arrived at his house 'Hatherly confessed to striking McDonald the first blow, put down the axe and when Jackie struck him a hard blow on the head there was another native [Mannix] with them'.[33] Hickey concluded his deposition by stating he 'has no doubt' the deceased came to his death by the blows to the head. In the third deposition Robert Browne stated that he saw the body when it was found and confirmed it was the body of John McDonald. Browne also deposed the hat belonged to McDonald.[34]

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28 State Records NSW: NRS 2703, Court of Criminal Jurisdiction, *Informations, Depositions and Related Papers*, 1816-1824 [SZ800 (no. 1)] at 1-2.

29 Ibid at 2.

30 Ibid at 3.

31 In another rather gruesome detail, the deceased also had a dead dog under his arm when lifted from the swamp.

32 State Records NSW, above n 28 at 4.

33 Ibid at 6.

34 Ibid at 9.

In Morisset's curious fourth statement, he claimed that the native George 'who was not sworn being ignorant of the nature of the Oath'[35] said that a black boy told him McDonald had been murdered. According to George, Hatherly had hit McDonald a 'gentle blow' and when McDonald stooped 'Jackie hit him... very hard in the head'.[36] Morisset concluded this deposition by stating that:

> Richard Binder's evidence being explained to the Black Natives, Hatherly and Jackie they voluntarily confessed, as far as they could be understood from the broken English that what was therein stated was correct, as far as concerned themselves, relative to the murders.'[37]

When Judge Advocate John Wylde received the depositions from Newcastle, it was clear that there were two witnesses deposing that the prisoners had confessed to the assault. Although Morisett was concerned that there was no substantial proof linking the men to the murder, he claimed that they had voluntarily confessed 'relative to the murders'. Late in 1822, the Judge Advocate's office responded to the enclosures. Wylde expressed concerns about the confessions, writing:

> It would be desirable, if possible, to learn any [ulterior] circumstances, which might lead to acknowledge as to the motives inducing the Natives to the Assault - and whether taking place in quarrel, deliberate malice, or for the purpose of robbery.[38]

In a letter sent back to Newcastle less than two weeks before the trial, Wylde once again expressed his concerns. The Judge Advocate wanted to know when McDonald was last seen alive, whether there was any ill or good will between the deceased and the two prisoners and:

> If the prisoners be known at all in the settlement their general demeanour and spirit in general intercourse, while also to support the suggestion in the depositions as to the nature of the confessions made ...[39]

Wylde concluded his letter by stating that it was a matter of 'public justice' that immediate 'attention and exertion' was required in order to throw any further light on the events. The Judge Advocate stated that such attention was desirable as the prisoners were 'so ill-able and with so much difficulty, if at all, to be instructed as to the grounds of defence

35 Ibid at 7.

36 Ibid.

37 Ibid at 8.

38 Ibid at 12.

39 Ibid at 13.

upon trial before the court'.[40] When the indictment was drafted, Jackie appears to be identified as the party who committed the act, while Hatherly was described as 'aiding abetting and comforting assisting and maintaining'.[41]

The only surviving record of the court proceedings in the trial of Hatherly and Jackie can be found in a brief *Sydney Gazette* report, Australia's first newspaper.[42] The newspaper report of the trial states the victim was left in charge of a tobacco plantation and had been missing for a fortnight when, with the aid of a native named George, a dispatch found his body 'lying in a lagoon in a horribly mangled condition'. The *Gazette* reported: 'it [the body] exhibited such marks of native atrocity as were frequent in former times'.[43] The prisoners were charged with the offence because they were the last people to be seen with the victim in his hut and had become 'invisible about their usual haunts'.[44]

In an extraordinary set of events, the *Gazette* record highlights that the two prisoners admitted to the crime (as deposed in the settler depositions), later confessed to the Commandant (as stated in his own deposition) and *also* confessed while the members of the court had retired to consider their verdict. Despite these confessions:

> ...the court, however, under all the peculiar circumstances of the case as there existed no other proof against the prisoners than their own declaration, which could not legally, in this instance, be construed into a confession, returned a verdict of not guilty.[45]

The trial of Hatherly and Jackie is the only Court of Criminal Jurisdiction record before 1824, found to date, where Indigenous people were tried for the murder of a settler.[46] The caution displayed by Judge Advocate Wylde throughout the process suggests he was acutely aware of the unique circumstances of the trial. Although the two Indigenous prisoners were acquitted, many questions remain unanswered in relation to the reluctance of the Criminal Court to acknowledge the confessions and legal status of the two men. The few surviving records of the trial do not indicate why

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40 Ibid.

41 Ibid at 16.

42 *Hatherly and Jackie*, (1822) NSW Sel Cas (Kercher) 734.

43 *Hatherly and Jackie*, (1822) NSW Sel Cas (Kercher) 734.

44 *Hatherly and Jackie*, (1822) NSW Sel Cas (Kercher) 734.

45 *Hatherly and Jackie*, (1822) NSW Sel Cas (Kercher) 734.

46 Note that an Indigenous man named Mow-watty was tried and executed for the assault of a young woman in 1816: see *R v Mow-watty and Or*, (1816) NSW Sel Cas (Kercher) 563 (examined below).

the confessions were inadmissible. Was it because non-Christians were unable to give evidence and so unable to confess? Or was it because of a concern about Indigenous peoples' lack of understanding of legal procedures? Or, were they acquitted for the simple fact that there was not enough evidence to convict, and therefore, the trial is not that extraordinary at all? No accused victims, including European settlers under the first charters were permitted to give sworn evidence on their own behalf. Did the prisoners even know what crime they were confessing to have committed? The Indigenous prisoners in this instance were acquitted so why should it even matter that their confessions were not admissible?

There are numerous non-Indigenous records around the same period (albeit a few years later) where confessions have resulted in convictions, but other instances where confessions were ignored.[47] The law on the issue of confessions was considered in *R v Feeby*, 1828. In this case, a young woman confessed to the crime of stealing, but was eventually discharged. The *Sydney Gazette* reported the following exchange:

> The prisoner's Counsel pressed it upon the Court, that the confession of the prisoner that the property was in the possession of Baker, was caused by the promise made by the prosecutor that there should be no more about it, if she would make a disclosure, and contended that it should, therefore, be rejected altogether.
>
> The learned Judge over-ruled Mr Rowe's objection, inasmuch as, upon the evidence of the prosecutor, it appeared, that the prisoner had herself offered to tell where the property was, if he would say no more about. His Honor, however, after summing up the whole of the evidence, told the Jury, if they were of opinion that the confession of the prisoner was made under influence of hope from any promise held out to her by the prosecutor, and that the subsequent confession to the constables, was made under the same impression in consequence of what the prosecutor stated, that they would be warranted in finding a verdict of not guilty, upon the humane principle of the British law, which would not suffer an individual to be unwittingly the instrument of his own conviction.[48]

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47 On the admissibility of confessions in the early years of the colony see: *R v Feeby*, 1828; *R v Creighton*, 1832; *R v Wood*, 1838; *R v Bolden*, 1841 (attacks on aborigines). On cases generally showing a wide cross section of results after a confession has been made see *R v Byrne, Wright and Murphy*, 1825; *R v Cossar*, 1826; *R v Curtan and Ryan*, 1826; *R v Langton*, 1827; *R v Ford and Tibbin*, 1828; *R v Parker and Donavan*, 1829; *R v Coleman*, 1830; *R v Rafferty and Timmins*, 1830; *R v Fox*, 1833; *R v Needham*, 1833; *R v Vials*, 1834; *R v Preston and others*, 1835; *R v Kays and Freeman*, 1838; *R v Billy*, 1840 (an indigenous defendant); *R v Bolden*, 1841 (all available online at Decisions of the Superior Courts of NSW).

48 *Sydney Gazette*, 29 August 1828.

A similar principle was at issue in the prosecution of John Colley and William Johnstone on 24 April 1829.[49] Colley's counsel objected to the admission of his written confession to a magistrate. He had confessed after being told by a constable that it would be better for him to speak the truth. Dowling J admitted the confession on the ground that an inducement by one person does not invalidate a confession subsequently made to another. However, evidence of a confession was ruled inadmissible in the prosecution of Mary Ann Gallagher on 13 September 1830. The defendant had been told that 'it would be better for her to confess'.[50]

These examples suggest that in the first years of the colony, the admissibility of Indigenous peoples' confessions was an ambiguous issue. One can speculate about what caused the court to reject the confessions in these cases, however, what is certain is that the proceedings in Hatherly and Jackie followed a similar pattern to other trials involving Indigenous-settler interactions from the early years of settlement. Indigenous people were invisible in terms of their ability to give evidence in the superior courts of New South Wales. In this instance, however, Hatherly and Jackie's invisibility within the legal system was ironically fundamental in securing their acquittal.

Luttrell's assault

There is only one record in the Court of Criminal Jurisdiction in which a settler was charged with an assault against an Indigenous person.[51] In 1810, Edward Luttrell was charged, and acquitted, of the crime of shooting and wounding an Indigenous man named Tedbury.[52] Judge Advocate Ellis Bent was highly qualified for the position, but had only recently arrived in the colony.[53] Bent made attempts to reform the courts. He had some success in the civil jurisdiction, but little in the military structured Criminal Court. He described the local Indigenous people as 'the most ugly savage set' he had ever seen and the 'lowest in the scale of

49 *Sydney Gazette*, 4 April 1829.

50 *Sydney Gazette*, 14 September 1830; see also *R v Carter*, reported in the *Australian* 12 and 23 June 1829 (confession refused in first trial, but found guilty on second trial when confession admitted as evidence).

51 Note that there is one other assault case where an Aboriginal appears to be involved as a victim but it is not clear whether a settler is a defendant in the case: *R v John Henshaw and John Spears,* State Records NSW: State Records NSW: Court of Criminal Jurisdiction, *Indictments, Informations and Related Papers*, 1816-1824, 9 September 1818, [SZ784], COD 444, 301. The case is also online at: Decisions of the Superior Courts of NSW.

52 *R v Luttrell* (1810) NSW Sel Cas (Kercher) 419.

53 CH Currey, *The Brothers Bent* (1968).

human existence, many of them little superior to baboons, tormenting beggars and expert thieves'.[54]

As only white settlers provided evidence in the case, a defence was built around speculation of Indigenous violence:

> Mr Luttrell in his defence says that the day before, he had heard that certain natives had threatened to assassinate some of his family. That on the 19th while he was at tea, two persons called out that the natives had speared his sister. Upon that he rose and went out with his gun and shot Tidbury as he was running away.[55]

Louis Peter 'a native of India and Roman Catholic' and Thomas Nugent provided evidence of Luttrell's provocation, while Elizabeth Anstry also deposed that 'she gave the defendant the alarm that the natives had thrown a spear at his sister'.[56] Here again, provocation and self-defence were successfully used as justifications for violent acts against Aborigines. Political issues may also be important in understanding the decision as Tedbury had previously been involved in acts of violence. Ford writes that Tedbury had been the object of diplomatic negotiations during that period, claiming that local Aborigines had brokered his release from custody in return for a promise of peace in 1805.[57]

The trial and execution of Daniel Mow-watty

According to surviving records, Mow-watty was the first Indigenous person in the colony to be convicted and executed of a crime in the Court of Criminal Jurisdiction.[58] He was also the first to be tried by a superior court in New South Wales.[59] Hannah Russell, the daughter of an emancipated convict, testified that Mow-watty attacked her as she walked

54 Ibid at 48.

55 *R v Luttrell* (1810) NSW Sel Cas (Kercher) 419 at 422.

56 Ibid.

57 See also Ford who writes: 'Tedbury had been the object of diplomatic negotiations in the period – his release from custody had been brokered by local Aborigines in return for a promise of peace in 1805': Ford, Settler Sovereignty, above n 15, who cites for Tedbury's animosity to the colony: Sydney Gazette, 19 May 1805; *Sydney Gazette*, 1 October 1807; *Sydney Gazette*, 15 October 1809.

58 *R v Mow-watty and Bioorah* (1816) NSW Sel. Cas. (Kercher) 563. Bioorah, the second defendant, was discharged.

59 See L Ford and B Salter, 'From Pluralism to Territorial Sovereignty: The 1816 Trial of Mow-watty in the Superior Court of New South Wales' (2008) 8 *Indigenous Law Journal*; Keith Vincent Smith, 'Moowattin, Daniel (c.1791-1816)' *Australian Dictionary of Biography*, Supplementary Volume (2005) at 286-287 (noting that Smith identifies Mow-watty's name as Daniel Moowattin); Lachlan Macquarie, Diary, 1 November 1816, Mitchell Library, A773 at 295.

alone on a country road leading out of Parramatta. She alleged that he raped her, robbed her and beat her repeatedly in the vicinity of 'Mr McArthur's [or Macarthur's] farm'. The trial of Mow-watty is not only exceptional because it is the first record of an Indigenous person tried and sentenced to death by a superior court in Australia, but because the trial can be read in the context of Mow-watty's assimilation into European society. His position was unusual due to his cultural, moral, physical and legal affinities with the colonial community. Evidence was tendered that Mow-watty was raised in European families, spent time in England, Van Diemen's Land and Norfolk Island and worked for colonial settlers.[60] Other evidence was tendered suggesting he was a man of intelligence and linguistic competence who would have been aware of the customs of Europeans. Moreover, witnesses testified that he would have been conscious of what constituted criminal behaviour – an important issue in terms of his eventual fate. Mow-watty was tried and executed in 1816. By this time, he was not working or living with settlers. Although he no longer lived or worked with Europeans, his prosecution was framed by his close relationship with European culture and custom.

The case is also unusual because there are limited details of the trial outside of a report in the *Sydney Gazette*.[61] As a consequence, many questions remain unanswered regarding the trial proceedings. Between the death of Judge Advocate Ellis Bent in late 1815 and the arrival of his successor John Wylde in October 1816, there is a gap in the NSW State Records archives. Frederick Garling was Acting Judge Advocate in this transition period and it is therefore assumed that he was the judge in the trial. One surviving record of the proceedings is a note in Lachlan Macquarie's diaries stating that Mow-watty was executed on 1 November 1816.[62] Despite these limitations, it is suggested that the trial constitutes a landmark: the beginning of a new era of legal process that both eroded and acknowledged Indigenous people's rights in the first decades of colonisation. It has been written elsewhere:

> Of all of the watersheds of 1816, the trial of Mow-watty is the most important because it exemplifies the deeply contradictory strains in legal thought about Indigenous people in early New South Wales. Because he was the first Indigenous person to be tried and executed by the colonial state, Mow-watty showed what was at stake for Indigenous people in the

60 One of the Europeans he was raised with was botanist George Caley, who took Mow-watty with him on expeditions: see G Caley, Reflections on the Colony of New South Wales (1966).

61 Reported in the Kercher Reports at 563.

62 See Lachlan Macquarie, Diary, 1 November 1816, Mitchell Library, A773 at 295; see also *Sydney Gazette*, 2 November, 1816, 2: records Mow-watty was executed for rape.

> efforts of Macquarie and his officers to redefine intimate Indigenous violence as crime in 1816. Violent retaliation against Indigenous people on New South Wales's frontiers was devastating for Indigenous Australians, but the extension of jurisdiction was more intimately erosive of Indigenous rights. When Indigenous violence became crime, British law could no longer share space with Indigenous customary law. Mow-watty's trial may have encompassed a lost, plural vision of British sovereignty that shared space with Indigenous people and their laws, but, read in the context of Macquarie's Proclamation of 1816, the trial also signalled a new determination to criminalize Indigenous behaviours, especially near major British settlements. The trial signalled the beginning of a new legal process that acknowledged, but weakened, Aboriginal legal autonomy in the first decades of colonisation.
>
> Mow-watty's trial also shows that a different paradigm prevailed in 1816, though it was a paradigm fraying at the edges. Read in the context of Macquarie's response to frontier violence in 1816, Mow-watty's case shows the extent of legal pluralism in early New South Wales. Mow-watty's intimacy with the colony, its leading men, its culture and its laws alone justified his trial. As the first Indigenous person to be tried by a settler court in New South Wales, he was the exception that proved the rule...[63]

Conclusion

Each of the Judge Advocates between 1788 and1823, with the exception of Collins, heard at least one case concerning an Indigenous matter. Within thirty five years of settlement, the first Aborigine had been executed for an attack on a European, and the first European executed for killing an Aborigine.[64] Settlers, however, had little to fear in the few instances that an Indigenous matter was tried in the Court of Criminal Jurisdiction. Evidence of the imminent threat of Indigenous violence, or retaliation against violence, was successfully invoked by settlers to justify their own acts of violence. Indigenous witnesses and evidence were excluded from court proceedings. Examining the earliest records of Indigenous interactions with the courts suggests that in the few instances where an Indigenous related matter was formally tried, a narrative of settler authority prevailed.

In the trials of *R v Hawker,*[65] *R v Luttrell,*[66] *R v Powell and Ors*[67] and *R v Hewitt,*[68] where settlers were tried for acts of violence against Indigenous

63 See Ford and Salter, 'From Pluralism to Territorial Sovereignty', above n 58.

64 *R v Mow-watty and Bioorah*, 1816: Kercher Reports, 563 and *R v John Thompson and John Kirby*, 1820: Kercher Reports, 661 respectively.

65 *R v Hawker* (1822) NSW Sel Cas (Kercher) 719.

66 *R v Luttrell* (1810) NSW Sel Cas (Kercher) 419.

67 *R v Powell and Ors* (1799) NSW Sel Cas (Kercher) 209.

victims, no Aboriginal witness gave evidence in any of the proceedings. The second Judge Advocate of New South Wales, Richard Atkins, was one of the first colonists to raise the issue of whether Aborigines could give evidence. Atkins wrote in his widely cited 'Opinion on the Treatment of Natives'[69] of 1805 that 'the evidence of persons not bound by any moral or religious tie can never be considered or construed as legal evidence'.

Language barriers and ignorance of the British legal system were often identified as reasons to justify the exclusion of Indigenous evidence and Indigenous witnesses.[70] But beyond these justifications, Indigenous exclusion must also be understood in the context of a number of bodies of law operating and interacting with one another. The plurality of law in the new colony was most acute in the cases concerning Indigenous people. Settler-Indigenous violence was dealt with outside of the formalities of the colonial courts through acts of violent retaliation and settler-Indigenous diplomatic negotiation.[71] In the very few instances that a matter of settler-Indigenous violence made it to trial, a settler authority continued to prevail. Usually framed in terms of a rudimentary form of self-defence or provocation plea, evidence of the imminent threat of Indigenous violence, or retaliation against violence, would often be successfully invoked by settlers to justify their own acts of violence.[72] The proceedings in Hatherly and Jackie illustrate the complexities and contradictions of the earliest Indigenous interactions with settler courts. Despite Hatherly and Jackie being acquitted for the murder of John McDonald, the proceedings profoundly demonstrate how Indigenous people had little or no influence in the way that law in the new colony would be shaped.

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68 *R v Hewitt* (1799) NSW Sel Cas (Kercher) 154.

69 Atkins, 'Opinion on Treatment to be Adopted Towards the Natives', 20 July 1805, *Historical Records of Australia*, series 1, vol. 5 at 502-504.

70 See Castles, *An Australian Legal History*, above n 16, 532-533.

71 See Ford, Settler Sovereignty, above n 15.

72 See B Salter, 'Beyond the Rudimentary and Brutal: Procedure, evidence and sentencing in Australia's first criminal court' (2009) 33 *Criminal Law Journal* 1; see also B Salter, 'Early interactions between indigenous people and settlers in Australia's first criminal court', above n 13.