

SYD1788

Court of Criminal Jurisdiction, Minutes of Proceedings, State Records N.S.W., 1147A
- 65[1]

[murder, first murder trial in the colony]

R. v. Baker and Others

Court of Criminal Judicature

Collins J.A., 17 November 1788

[65]

Cumberland

To wit

17th November, 1788

At a Criminal Court of Judicature, held by Virtue of a Precept under the Hand and Seal of His Excellency, Arthur Phillip Esq; Governor in Chief and Captain General in and over the Territory of New South Wales, and its Dependencies, etc. etc. etc. for the Trial of such Prisoners as should be brought before it.

Present,

The Judge Advocate:

Lieutenant H. L. Ball, Supply

Captain John Shea, Mariner

Captain Lieut W Tench, Mariner

1st Lieutenant Thomas Davey

1st Lieutenant Thomas Timins

2nd Lieutenant Ralph Clark

His Excellency's Precept for assembling the Court being read, and the Members duly sworn:

James Baker

Luke Haines

Richard Askew

Richard Dukes

Indicted for that they not having the Fear of God before their Eyes, but being moved and seduced by the Instigation of the Devil, on Friday the Seventh Day of November, in the 29 Year of the Reign of our Sovereign Lord George the third now King of Great Britain, did with force and Arms in Sydney Cove, in the County of Cumberland in and upon one **THOMAS BULMORE**, in the Peace of God and our said Lord the King then, and there being feloniously, wilfully and of their malice aforethought, did make an assault; and that the said **JAMES BAKER, LUKE HAINES, RICHARD ASKEW, and RICHARD DUKES**, with both their Hands and feet, the said Thomas Bulmore cast to and against the Ground, then and there feloniously, wilfully and of their malice aforethought, did cast and throw; and the same John [sic] Bulmore, [66] they the said J. Baker, L Haines, R. Askew and R. Dukes, with their hands and feet aforesaid, in and upon the Head, Stomach, Back and Sides, then and there feloniously, wilfully, and of their malice aforethought, did strike and beat, giving to the said Thomas Bulmore, as well, by the said casting and throwing of him the said Thomas Bulmore to the ground aforesaid and also by striking, beating and kicking the said Thomas Bulmore in and upon the Head, Stomach, Back and Sides of him the said Thomas Bulmore with their hands and feet aforesaid and then the said J Baker, L. Haines, R. Askew and R. Dukes, one Mortal Bruise, of a kick one mortal Bruise, the said Thomas Bulmore from the said Seventh Day of November in the Year aforesaid,

until the Eleventh Day of November following, in the same year, at Sydney Cove in the Country of Cumberland, did languish and languishing did live until the said Eleventh Day of November, in the 29 year of the Reign of our said Lord the King, the said Thomas Bulmore, in Sydney Cove, in the said County, of the aforesaid Mortal Bruise Died. – the said J. Baker, L. Haines, R. Askew and R. Dukes, the said Thomas Bulmore in manner as aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder against the Peace of our said Lord the King his Crown and Dignity.

The Prisoners having been severally arraigned, and having pleaded Not Guilty to the Indictment.

JOHN NEAL, being sworn, deposed that he is acquainted with the Prisoners perfectly – that he was [67] acquainted with the Deceased – that he was present on Thursday night the 6th Instant, about 10 o'clock at a disturbance that happened in the Women's Camp – that the Prisoner and Bulmore were there – that the first he heard of it – was as he was going thro' the Women's Camp, he heard a noise – at a Hut – in which was the Prisoner Baker – at the door of his Hut was the Deceased – endeavouring to get the Door open – that he could not consequently open it and called several times to Baker to open it – that he heard the Deceased say to Baker "if he did not open it, he should be obliged to kick him when he did" – that after some time, he (the deceased) got the Door open – that he went in, telling Baker to get up – that he would fight him – that if he did not get up and fight him, he would be obliged to strike him in the Bed, which he did not wish to do – that the Deceased came out of the House, and Baker then came out in his shirt – wanting to shut the Door – telling him to go away – and if he wanted any thing with him, to come to him in the morning, for he would not fight him then – that Baker pulled the Door to several times – the Deceased, pulling it as after open, telling him he should not shut it for he would fight him – that he saw the Deceased several times punch Baker with his Hand against his Breast, with an intention to provoke the Prisoner Baker to fight him – that [68] Baker then went into the Hut and put on his trousers – that he came out thereupon and went to fight – fighting between that and another Hut – that the Deceased said he had got enough – that he would fight no more – that other people were present – that no-body attempted to separate them – that the Prisoner Haines was Second to Baker and he at the Deceased's request was his Second – that they fought about ten minutes and stripped – the blows were all given by the Hand – that the Prisoner Baker, did not receive many blows – that the Deceased was much beat about the face – that he was much in liquor – that Baker appeared to him to tire and weaken – that he does not remember to have seen the Deceased fall – he staggered once against the corner of the Hut – that he assisted the Deceased in washing after the fight, and that he had no marks or bruises on him anywhere, but about his face – that he seemed as if he would have two black eyes – that after he was washed, he said he was getting sober and fresh, that he would go back and fight again – that he endeavoured to prevail on him to desist – that he could not succeed – for he got back to the Hut, and forced open the Door – that he went with him back again – that he called to Baker again to come out and fight – Baker got up and dressed [69] himself – telling the Deceased he would not fight him any more – that if he wanted any thing with him to come to him in the morning – the Prisoner Baker then went away – the Deceased made no reply – that he tried to prevail on him to go away or go home with him, neither of which he would do – that he then left the Deceased standing outside the Hut, that he saw no more of Bulmore or Baker that night.

Question from the Prisoner Baker to Neal. As you was standing at the end of the Hut, did you not hear Bulmore strike him.

Answer: That he heard him threaten him, and at last heard him say “There if you are a Man, get up” – that he heard no blow.

Question: When the fight was over did you not see him pull him by his great coat, endeavouring to get him to fight a second time.

Answer he cannot say he remembers any such thing.

Question: Did you notice me shake hands at the corner of the Hut before we parted.

Answer Baker came to him and shook hands with him – telling him that if he wanted any thing more to come to him in the morning.

[70] **JAMES MACKAY**, being sworn deposed, that on Thursday Night the 6th Instant about Ten o’Clock, he heard a Disturbance – he was in his own House, that on going out to see what Disturbance it was, he saw the Deceased pulling at the Door of **MARY PHILLIPS’** Hut – that he demanded Entrance – swearing many bitter Oaths that he would have Entrance by fair or foul means; for that no Cock should have his Hen that Night – that no Answer was made from within – that he pulled at the Door to force it open, saying he would not be flung out of his Bottle of Liquor so that finding he could not Open the Door with his Hand, he got a large stone – with which he forced the Door open – that he then went into the Hut, & he then heard him strike either a Man or Woman he is not certain which – that he heard him say, Damn your Eyes, I have found you – Get up you Dog & give me Satisfaction – the Man (the Prisoner Baker) advised him to be peaceable & go Home – that he said he would not until he had a few Taps at him – that Baker asked him, if he wished to hurt him – the Deceased said he would try ? – that by this time, the Prisoner got up in his Shirt parleying with the Deceased near the Door - that he heard Baker say, if you want to fight me, I will fight you tomorrow the Deceased answered, Damn your Eyes you [71] you know I am for found tomorrow - you want to put me off it because you are afraid to fight me – By this time the Deceased was without the Hut – that the Prisoner made several attempts to shut the Door, but the Deceased would not suffer him – Baker still asked him to go Home & be peaceable – that he stood close to both Parties: - Baker was still in his Shirt - the Deceased said Damn yr Eyes put on yr Trousers – do not be Standing there like a Woman in Petticoats - on wch Baker went in, & he saw him come out with his Trousers, his Shoes, a long blue frenchcoat & a Hat – saying to the Deceased that he would much rather not fight that Night, to make any Disturbance – that the Deceased upbraided him, saying to him “ You are a Cowardly Dog, & no Man” – Baker replied, this is not a fit Place, we will go somewhere else – that they went about 20 Paces, Bulmore saying there is no fear of Disturbance, this is as good a Place as we can go to – Baker replied, if you wish to fight me, I will fight you here. The Deceased replied Ay my Boy that is something like – Bulmore was the first stripped – fixing on J Neale to second him - & a Man of the name of Martin to second Baker – that the Prisoner Haines, put his Head out of an Hut & Said My Boys let there be fair Play - & when they closed on fighting the first round [72] he observed Haines seconding Baker – him & first him. that Martin did not ? him. The Deceased made a Step in at which time the Prisoner might have struck him, but did not - saying he wd then nothing but fair Play – the Deceased said he wd do the same - they continued fighting at 9 or so Minutes – that while they were fighting the Deceased making a Blow at the Prisoner, missed him & fell forward, hitting the side of his Face against one of the Door Parts - he got up again saying, that is no thing – that he then told Baker, he was the best Man for the present – that Baker shook Hands with him before they fought & wanted to do so afterwards, but the Deceased swore he wd not – that he

went to some water with him & Neale, & held his clothes while he washed himself – that he perceived the Cut over his Eye (occasioned by his fall) but no other Mark appears about his Body – there he wiped himself & then advised him to go Home – that he swore he would not go Home, or sleep upon it, for he was a great Deal fresher then than when he first began - that he refused to accompany Neale – determining to stay & see it out – that he then went Home & left the Deceased – at no great Distance from the Hut where the Fray first began. That he heard no more of it that Night That the Deceased appeared about half drunk Baker perfectly sober that [73] during all this Business he only saw the Prisoner Haines - & another Soldier with fair Hair, but who, he is not certain – that he saw no other Interference on the part of Haines, than picking up Baker when he was down. That no Blows were given with any thing but the Hand. That there were a Dozen Falls during the Fight – sometimes one was uppermost, some times the other. That towards the End of the Fight he saw the Deceased shake his Head, & clap his Hand on his Side – the Standersby at this Time said the Deceased had recd a severe Blow that wd make him give up. That he did not see Blood come from any other Part, than his Eyebrow, & his mouth or nose.

Mary Phillips being sworn deposes, that she lives on the other side of the water – that there Is an Hut of wd she has one End & a woman of the name of Wilkes the other – that she knows the Prisoner Baker & Haynes & has seen the others passing up & down – that on Thursday Night the 6th Instant, the Prisoner Baker was With her in her Hut – that she saw him that Evening passing thro' the Camp – that the Man she had lived with lately was gone up the Harbour – that Baker asked her or told her he would come to her Hut that Night – that she consented – that the Deceased wanted her to go with him when they first came on Shore, that she refused - & he said he would give [74] her a good beating when he could catch her – That Baker came to her Hut between 9 & 10 that Night – that Baker undressed himself & went into Bed – that the Deceased sent S McCormick to her, to tell her that he wanted to speak with her - that he was then in another Hut – that she went to him, according to his Desire, leaving Baker in Bed – who did not know where she was going – that the Deceased asked her to stay with him & sleep there, which she refused, telling him that she had some one with her – that she staid a Minute or two – then went away – that the Deceased came after her – insisting on having the Door opened – that she refused, desiring him to go Home – that he would come in, & at last forced the Door open – that he had sent her word by McCormick that he had a Bottle of Liquor - but she saw none – that when he got into the Hut, he fell on the Bed & found some one there – insisting on knowing who it was – that she told him – that he wanted Baker if he was a Man to get up & fight, who refused & advised him to go Home – that then Bulmore, struck the Prisoner two or three Blows – swearing that he would give him a good licking before he went Home – Baker got up saying he wd put his Clothes on & go to Camp - that the Deceased laid hold of Baker and the Deceased who denied him to be a good fellow & go to [75] Camp and he would go with him – Bulmore would not. Baker said if he would fight him in the morning, when he was sober he would fight him, but not then. The Deceased pulled Baker out by man force striking him several times before Baker struck him. - Then he saw them fight between the Huts – to the best of her remembrance, Baker first said he would not fight any more – that Baker after the Fight returned to the Hut thinking it was over – Bulmore after being washed returned saying he was sober and wanted Baker to fight again – but he would not fight with him – but put on his clothes and went away. That Bulmore followed Baker a little way and then returned to her Hut – wanting to come in and threatening her – that she complained to the women - that Bulmore staid[sic] in her Hut the remainder of the

night – that she does not know if he slept – that she thinks he did not, crying frequently out that Baker should either lick him or he lick Baker in the morning – that after the Beating he went away saying he would beat Baker like a Dog if he could find him – that he returned from Camp to the Hut to look for Baker, not having found him – that this might be about ten past 6 – that he then seemed perfectly sober – that he then went away – that she saw no more of him till that night [76] when she saw him at the bottom of the camp in a blue great coat – he was with another Soldier – that the Deceased afterwards came up to her, struck her several times and called her names – that she said she would complain of him – he replied he would track her all the way – that she saw the Deceased fall back against the Hut, during the fight – that she does not remember to have seen either of the three other Prisoners. - That Baker did not return the Blows he received in the Hut.

Question from Baker. Did I not advise you to lay until when L. McCornish came to the Door.

Answer. He did – but I did not tell him where I was going.

EDWARD DIVAR. Sy – of Marines, being sworn deposes that to the best of his knowledge he saw the four Prisoners, early on Friday morning the 7th Instant – it might be about 5 o'clock – that he was at the back of the Hill on the Western side, cutting fire-wood when he saw the Prisoners – that they observed him looking at them, and then went away to another place – that he does not remember to have seen Bulmore with them. That is when he first saw them, they were moving towards him, but on seeing him they made a stop, seemed to consult and then turned off – that at first he thought they were going to bathe, but on seeing them turn away, he suspected they had some bad doings – [77] that they had no stick or weapon in their Hands – nor Side Arms or shell, that they were in their Red Clothes. That he saw no more of them. Haines was that morning on Duty with him.

JAMES SCOTT, Surgeon. Being sworn deposes that, on the Morning of Friday the 7th Instant he saw the four Prisoners coming down the Hill, about 5 or 6 o'clock – that the Deceased was then in Company with them, walking close by Haines – that he seemed as if he had been fighting – that his face appeared black – particularly about his eyes – they had their Clothes on – that there seemed no anger or animosity between the Prisoners and the Deceased – the Prisoner Baker had a Blue Great Coat on – the others were in Red Clothes – that about 8 o'clock, Bulmore came to him to request he would not report him – that he would make his guard up - - for he was to have mounted the Evening Guard, but was in Liquor – that he appeared to have been beaten – that he said he was not able to mount his Guard. That he did not mention any of the particulars of the fight. That he was sent by Captain **CAMPBELL**, on Saturday Morning to find out who Bulmore had been fighting with – that he asked the Prisoners Askew and Dukes, who denied having been there – he then asked the Prisoner Haines who was there besides himself, he said, Baker, Dukes, Askew, himself and Bulmore. [78] That he does not recollect any malice towards Baker and the Deceased or any of the other Prisoners – That they did not mess together then – but had he believes, formerly.

JOHN WHITE: Esq. Surgeon, being sworn, deposes that on the Saturday Morning, he was told by Mr Comider that the Deceased had been at the Hospital. Mr Comider said he appeared bruised very much and in a shocking condition – that the next Morning he went to see him with Mr Comider and found him as he represented him – and very senseless and stupefied, appearing by his moans and restlessness to be in great pain and anxiety, that he endeavoured to find out the cause of his illness – but he could not get any answer from him. That he remained in that State until the Day

before his Decease – that when he visited him then, his eyes were open appearing very wild – the pupil of the eyes very much dilated – which is generally an indication that the Brain is affected – that he was mentioning the name of Haines, and shipmates - that he asked him if Haines or any of his Shipmates had made him ill – to which he replied in the most unequivocal manner – No – and shook his Head – and that on asking him how he came so beaten or what was the cause of his illness, he replied, a violent Cold – that he then went into a stupor – but afterwards said H..., but said no more. [79] That he died the next Day – that on opening the Body he found it as stated in the Deposition made before R Ross Esq Lt Governor, hereunto asserted that he supposes had a Blow been given on the hinder part of his Head, it would have appeared in a Contusion on the Scalp or soft parts – but he found none – that on seeing a little oozing he tried it with a probe, but cannot say whether it was or was not occasioned by a fracture. That he is of opinion, that extravasation of the blow on the hinder part of head, was the occasion of his Death.

DENNIS COMIDER Esq, Surgeon being sworn deposes that, on Friday evening the 7th Instant the Deceased first made application to him – that he asked, seeing the marks on his face, what he had been about – telling him he had been fighting, which he denied – that he then gave him the necessary application, that he was present when the Body was opened, and was of opinion, that the Death was occasioned by a rupture of the Blood Vessels occasioning extravasated Blood on the Brain – that the oozing was not occasioned in his opinion by any Blow . That the extravasated Blood, must have been occasioned by some external violence. That he did not complain of any particular pain.

[80] **JOHN McCARTHY**, Private Soldier being sworn deposes that he messed with Thomas Bulmore, the Deceased – that he attended him during his Illness except when he was on guard – that on Friday morning the 7th Instant on going into his Hut he asked his Shipmate (Coward) where Bulmore was – who answered that he had been called on and by the Superintendent to carry some baggage down to the water side – that he had been out all night and had been fighting – that he had asked him to lend him a pair of trousers, his own were so blooded – that before he returned for the supervision he met Baker, and went out, and he was informed, to fight. That very shortly after, he returned (about 7) very much beat – and desired him to get another man to mount guard for him – being very much bruised – that when he saw him, his trousers and the frill of his shirt – that he asked him who he had been fighting with, he answered, it was no matter-it was all over – that he went to Bed and lay there for a considerable part of the day – that on his return from carrying his shipmate's dinner, the Deceased told him Baker had been with him, asking him to go with him to Captain Campbell and tell him he had not been fighting with him – that he refused to do so, as he would not say a Person had been fighting him that had not – that in the Evening Bulmore told [81] Haines that he would bear him company to the Hospital – that he never had any more conversation with him. That he attended him during his illness, and never heard him lay his Death on any one. That on Thursday evening the Deceased left him, and was then very much in liquor. That he complained very much of his Side or Ribs – saying he feared some of them were broken.

JOSHUA COWARD: Private Soldier, being sworn, deposes, that he was a shipmate of the Deceased – that early on Friday Morning he was wakened out of his sleep by the Deceased – that he appeared in a very bruised condition, his mouth running with Blood – that he asked for a Pair of Trousers, his own being Bloody – that on his return, he asked the Deceased for the trousers – which he gave him, they were bloody – and he imagines he must have been fighting a second time – that he

then went on guard and when he returned, the Deceased was then stupefied. That the Blood on his trousers, that he had lent him, appeared to be clean Blood – that from his mouth was clogged and mixed with spittle. That he knew of no malice between the Deceased and the Prisoners.

THOMAS O'BRIEN: Private Soldier, being sworn deposes, that on Friday morning the 7th Instant he was on the Qr guard – that the Prisoner Haines came to him between 6 and 7, saying there was some one in his Hut wanted to speak with him, - that he did, and there [82] he saw Bulmore – who asked him to mount guard for him that Day – as he was not fit to mount himself – that he refused – that he went back to his Guard, and asked Luke Haines who the Deceased had been fighting with – he said James Baker – that he never heard the Deceased lay his Death to any one, or mention having fought twice with him.

John McCarthy desired to be called in again, having omitted something in his Testimony. He was called in again and further deposed, that on the Saturday Morning following, on asking the Prisoner Haines some questions about the fight, Haines said, he was glad it happened as it did, for if Baker had not fought him, he should have done so – that he said to Haines, he supposed as Baker had no Blemish on his Body, that Bulmore did not get any blows at him – Haines replied, “yes several, he did, and would have several times given out, if he (Haines) had not prevented him.” That on Monday following, when he was giving the Deceased some Sago, Haines was there with some Men who remarked, that the People present, at the fight, were to blame to suffer him to be beat so. Haines, replied, that if they killed one another on the spot, he would never have parted them until [83] one or the other gave out.

Question from Haines: Did any other Person make sure of these words.

Answer: No.

The Prisoner Baker being put on his Defence says that when he was in M Phillips' Hut, the Deceased came to the Door, insisting on its being opened – no one answered until he forced the Door open; - he came in and asked who was there – he replied “it is Baker” – he insisted on his getting up and going away. He refused – and then he laid hold of his shirt as he lay on the Bed – saying he would beat him like a Hound as he lay there, if he did not get up. He asked the Deceased his reason why he wanted to quarrel and fight with him – he then said “Ask my arse – get up or I will kick you” – that he endeavoured to prevail on him to go Home and if he wanted to fight, to come in the Morning – he said he would not have any such Home – he would strike him where he lay if he did not get up. He then struck him with his Fist, once upon his Chin, another time on his Breast – saying “if you are a Man, you will get up” – he cursed and swore - got up in his Shirt – as he got up, the Deceased went out, saying “come on”, he then parleyed with him, - the Deceased replied as before –laying hold of his Shirt sleeve wanting to drag him out of the Hut – [84] which at last he did, rather than have his shirt torn – but begged him to go home, and in the Morning he would give him satisfaction. He then spat in his Face, telling him he was no Man, only one shadow of one – he then bade him put on his trousers and come out – that he did, still begging him to say no more until the Morning – that he would not be pacified – that he pleaded the late hour of the night – that the guard would hear them if they fought and confine them – he said, he would stand the same fate as himself – that at last he stripped and fought betwixt two Huts shaking hands before they began ...that with the force of a Blow under the jaw, the Deceased reeled against the end of a Hut and fell back with violence – that he soon after gave out – that he would not shake hands with him – that in an Hour the Deceased came again to the Hut wanting him again to fight, which he refused to put off till the Morning – that he would not be

pacified - that he dressed himself and went up to his own Camp – that in the Morning he came to his Tent where he was, betwixt 2 and 5, with Luke Haines – forcing open the Door, insisting on his getting up – that he made him no answer – Haines being the outside Man – the Serg Major happened to see him – and called Haines, telling him that he wanted him to assist in some Duty – on coming close to the Hut he saw the Deceased and took him with Haines. During their [85] absence Richard Dukes came to him asking if he had seen Bulmore that morning. He replied telling him where they were gone. Dukes said, hearing the Deceased call Haines, he got up and came after them to see if they were gone to fight. Bulmore having performed his Service returned – by this time he had got up, and went into the woods on his private business, - that on coming back with Dukes, he met the Deceased, Haines and Askew. The Deceased said, He was the very Man he was looking for – to decide that matter - going towards the other Boy, seeing Sgt Divan, they were all afraid of being confined, if they went to fight. The Deceased then proposed going some where else – he still tried to make him stop it, but he would not. They then went to a level piece of ground, and stripped – shook hands – and fought ten or a dozen rounds – Haines seconding him, Askew the Deceased, - they shook hands afterwards and drank together at night. The Deceased said he had no animosity to him – that he wish it not to be known that they had been fighting, for fear of his grog being stopped – they were as intimate as two Brothers. He has nothing further to say, hopes the Court will consider him.

Luke Haines says he never struck the Man.

Richard Askew says he happened to be there and saw fair play – he had known the Deceased

[86] Richard Dukes says he knows nothing more than Askew.

James Baker	}	Not Guilty of Murder, but Guilty of
Luke Haines	}	Manslaughter – to receive each two-hundred
Richard Askew	}	Lashes, on their bare Backs, with a Cat of
Richard Dukes	}	Nine Tails.

David Collins,

Judge Advocate

Notes

[1] We would like to thank Clare Jones, Trish Moon and Leonie Simon for their assistance in transcribing this document.

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