

SYD1819

SYDNEY GAZETTE, 10/04/1819

Court of Criminal Jurisdiction

Wylde J.A., 7 April 1819

This was a day of serious trial for the murder of **WILLIAM COSGROVE**, a settlor and district constable upon the Banks of the South Creek, on the first of the present month; by the discharge of the contents of a musket loaded with slugs into his body, of which wounds he died the following day. The prisoners were **TIMOTHY BUCKLEY** by whom the gun was fired; **DAVID BROWN**, and **TIMOTHY FORD**, all of whom had been in the Colony but six of seven months, and prisoners in the immediate employ of Government, and who unhappily had not renounced those propensities which sooner or later were to lead them to an unhappy end.

The first witness called was **THOMAS COSGROVE**, brother of the deceased, whose testimony was conclusive of the fact. The witness stated, that his murdered brother was a district constable at the South Creek; and that he having seen, and believing the three prisoners at the bar to be bushrangers, requested him, the witness, to joining in pursuit of the suspected persons; all of which was readily complied with, and a pursuit accordingly commenced. This was about one in the afternoon; the deceased went up to the three men (the prisoners at the bar), and found then in conversation with two young men who were brothers of the name of York, one of them a son in law of the deceased. The deceased called to the prisoners at the bar, declaring his willingness to point them out the road to the place they were enquiring for, namely the "Five mile Farm;" but appearing conscious that they were armed bushrangers, he hesitated not to rescue their giving themselves up to him, he being a district constable. This evidence further proved that the prisoners at the bar, were in conversation with two Yorks for many minutes prior to the pursuit which was proposed and persevered in by all the persons who joined in it by the manly boldness of the district constable, who, although a man in good circumstances, had reconciled the apprehension of danger with his manifest line of duty.

This witness, who seemed in his evidence to entertain no sort of feeling that could be construed into a vindictive sentiment, went further on to state, that one of the Yorks, the eldest, had joined in the pursuit; that his murdered brother had repeatedly required the three fugitives to surrender themselves; that Timothy Buckley, who had the musket, turned round repeatedly and levelled at them; that one of the fugitives, Ford, had attempted to rest the piece from him, but did not succeed; that the pursuers behaved themselves with great courage and with the most determined zeal in apprehending these three stout men, one of whom was armed with a gun, and appeared only to await the moment of murder until the difference of celerity in his pursuers should mark the most needful object. Brown, who was the tall and most powerful of the three, turned several times upon Buckley, who had the gun, and told him to keep a good look out on such a man, meaning the man who was closest in pursuit, and this was the deceased; who was armed with a pistol, but did not discharge it until after he had received the contents of a musket into his side, breast, and lungs, the charge consisting of eleven or twelve slugs; his pistol afterwards went off, but hurt nobody. Stricken with death, the poor man then sat down on a bank; was taken home; and lived in anguish until the following day.

This witness declared himself the brother of the deceased; and in the sympathetic feeling of humanity, received from the Judge Advocate the following much to be remembered sentence of condolence. "Witness, you have done your duty to Society;

you have acted well in the performance of that duty, and the world has much to regret that you have paid so dearly for it, in the loss of a brother, and of a good member of Society." **CORNELIUS RYAN** sworn. Witness went to last Thursday to the house of the deceased to get some wheat ground at his steel mill, and prior to any other communication the deceased asked him if he had seen three men of suspicious appearance, whom he considered to be bushrangers; to which he answered affirmatively, and consented to go with the deceased, then he knew to be the constable of the district, in pursuit of the run-aways; that the three men, now the three prisoners at the bar, were enquiring of the two Yorks the right road to the Five mile Farm; and the deceased telling them he would shew them the right path, they all ran off: on their doing which the deceased ordered them to deliver themselves up to him, as he was the district constable; that they nevertheless continued to run; the man (Buckley) who was armed with a gun, repeatedly turning around and presenting it at the nearest of his pursuers; that the deceased was armed with a pistol, which went off on the instant after the explosion of a musket contents of which lodged in his body.

Other witnesses gave evidence to the same effect, proving the murder in the clearest possible manner; and also that the whole three of the prisoners at the bar were actuated by the self same spirit of hostility determining on the taking of life rather than surrendering themselves to justice.

The evidence being too clear to admit of a defence the prisoners when called upon acknowledged being together on the unhappy occasion. Brown and Ford making no further observation than that the gun was in the hands of Berkeley, from whom Ford would have wrenched it, as appeared by the testimony of Thomas Cosgrove; but no conception could be entertained that his endeavour so to wrest it was well intentioned; and with respect to Brown, every witness had sworn that when the three were running from their pursuers, he said repeatedly to Buckley, "don't fire until there is occasion." He stated upon the contrary that his expression had not been until there is occasion, but that his actual expression had been, "do not fire, for there is no occasion." Every witness had distinctly sworn to the expression with which he had been challenged, "do not fire until there is occasion for it;" and he became of course a principal in the murder.

TIMOTHY FORD, a very young man, apparently not exceeding two or three in 20 years of age, was placed on the right hand of Buckley, who was in the centre; and from every appearance seemed to have reconciled himself to an unavoidable destiny. The hour of trial and the hour of death are so closely connected in the case of murder, that this unhappy creature had death precisely in his view and as much as animated nature would afford, he might be esteemed the appearance of a moving corpse. The unhappy man upon, each side of him decided themselves upon the principle that they could not prevent the firing; but why they, would the voice of reason say, associate with a man whom they could not control, bind, or manage armed with a loaded gun, and conscious of a punishment resulting to all connected with him for any crime he should himself commit.

The only doubt, His Honor observed was whether the Court was in the possibility of discerning between the unfortunate men at the bar any difference or distinction of crime. That there was only one musket was an established fact; and that this one musket was the identically presumed defence of all, not mattering in whose particular hand it was, circumstances had sufficiently shewn. The only point upon which the Court could doubt of an equal criminality was, whether there might not have been in the course of the transaction a forbearance, a kindness which even in the criminal world be looked at by his judges with regard; but here nothing of the kind appeared.

The man who fired the gun there could be no doubt respecting; but it was the entire wish of the Court to discover if possible a difference in the degree of guilt between the prisoners. One man endeavoured to wrest the musket out of the hands of the actual murderer; and it is only presumable that if he had got possession of it, he would have committed identically the murder committed by his companion. The man, Brown, had repeatedly desired Buckley, by whom the piece was eventually discharged, not to fire until it was necessary. In the terms until it was necessary there was a tendency to murder.

The investigation had been long and patient; and for what reason? Not to pass a verdict for a murder which was clear in its proof, but to consider whether either or both of the accompanying persons were guilty as principals or as merely accessories, the Court considering that its judgement would be final, and establishing its verdict upon proofs which left no doubt behind them. Men meeting and combining in an illegal pursuit, what mattered it of what cast or colour their pursuit might be, they were all equally liable to every danger that might accrue therefrom; and here were three men, escapers from their Government employ, travelling from place to place with a loaded gun; a gun loaded with the eleven or twelve slugs; the whole of which were deposited in the body of a man whose duty it was to apprehend them, and who in the mild performance of his duty was horribly murdered. Brown had said that his words were not "do not fire until there is occasion, but that his expression was, "do not fire, for there is no occasion." In this turn of expression there is a strong difference; but the entire weight of evidence is against him. The Court has been particular upon the point, and every witness has sworn particularly to the expression which brings this prisoner to the crime of murder as its immediate instrument and adviser. You heard the unhappy man who was murdered among you say that he was a district constable; you also heard him require you to give yourselves up to him; you, Brown and Ford, it is melancholy to remark, saw repeatedly the prisoner Buckley turning around and levelling his piece at his prisoners; and at length you heard the explosion; one of you, that is Timothy Ford, having repeatedly told the actual murderer Buckley to keep a strict eye upon his nearest prisoners; having also endeavoured to wrest the gun away from the man who had it, how was it possible to say for what purpose; the whole of his conduct was against the slightest sentiment in favour of him. His Honor the Judge of the Court went to considerable lengths in the retrospection of an evidence which admitted not of contradiction; and performed the painful duty of passing sentence of condemnation with that degree of energetic sympathy which has ever distinguished him as a Gentleman of feeling.

The unhappy men were yesterday executed.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 04/12/1819

Court of Criminal Jurisdiction

Wylde J.A., 3 December 1819

WILLIAM SMITH and JOHN PAGAN were indicted for the wilful murder of **JAMES WHITE**, at Newcastle, on the 11th of October last.

CHARLES POWELL, the first witness called, deposed that the prisoners at the bar, the deceased, and himself worked at the lime kilns, which are distant from the settlement of Newcastle 7 miles; that on the morning of the murder he saw the prisoner Pagan about 500 yards distant from the gaol in a stooping posture among the scrub, with a stick in his hand; and upon proceeding outward a little way his ears were

arrested via plaintive cry; he made towards the spot from whence it proceeded, and saw the prisoner William Smith striking the deceased; upon which witness exclaimed, "you rascal, what are you at?" When he made off, throwing the stick or bludgeoned from him. He, the witness, approached the deceased, who died in 15 minutes after. Upon examination of the head of the deceased it was discovered he had received seven wounds, which were proved to have been the occasion of his death. An immediate alarm was given; the prisoners were secured; and the body conveyed to Newcastle. An inquest was held upon the occasion, and the prisoners at the bar were committed to take their trial for the offence. This witness further deposed, that the prisoner Smith had in his hearing repeatedly avowed himself the murderer.

ROBERT SHAKESPEARE deposed, that he also belonged to the lime-kilns; that the prisoners at the bar, the deceased, and himself had made an agreement to escape into the woods some short time before; that they left their employments on Monday (Sept. 20), with the injection of carrying their plan into execution; that the prisoners Smith and the deceased walked first near the beach, and the prisoner Pagan and himself followed; and during the way Pagan disclosed to him, the witness, their intention to kill the deceased, James White; observing that in case of a discovery the prisoner Smith was to be named the perpetrator, who had a fractured skull, and which was to be the plea for his having committed the murder. Becoming thus accidentally acquainted with this their dreadful intention, he declared he would have no hand in it, and immediately turned back towards the lime-kilns, but was intercepted by the prisoner at the bar, Pagan, who denounced vengeance against him if he revealed what had been told him; in consequence of which threat he made no disclosure for some days afterwards, as he at length did to Dr Evans in the hospital at Newcastle, to which he had been removed on account of illness. This witness (Robert Shakespeare) positively swore that the prisoner Pagan struck the deceased a severe blow on the head with a stick or bludgeoned.

WILLIAM LEE and **THOMAS HOLLAND**, privates in the 48th Regiment, deposed, that the prisoner William Smith repeatedly acknowledged himself to be the perpetrator of the crime.

[A confession, made by the prisoner William Smith before the Commandant at Newcastle, was now read in Court, wear it was stated that the murder was contemplated three weeks before it unhappily occurred, by himself and the other prisoner at the bar; and that he Smith, was to be considered as the principal, entertaining the notion that in the case of his being placed on his trial for the crime, he would doubtless be acquitted on the plea of insanity, the skull being in an injured state.]

The prosecution here closed; and the prisoners were put on their defence, when the prisoner Smith, as he had done in the whole stage of a melancholy transaction, acknowledged himself guilty of the offence, exculpating Pagan from all participation in the crime; who denied his having had any criminal part in the transactions. The Court retired; and after half an hour's deliberation returned a verdict of Guilty against both the prisoners. His Honor the Judge Advocate pathetically exhorted the unhappy men to prepare for that awful change which would shortly take place: – His Excellency the Governor may think proper to direct; and their bodies to be dissected and anatomized.

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SYD1818

SYDNEY GAZETTE, 05/12/1818

Court of Criminal Jurisdiction

Wylde J.A., 5 December 1818

HARRIET MARKS was indicted for the wilful murder of her new born male infant on or about the 20th of September, at Parramatta. It appeared in evidence upon the trial, that upon the 22nd of September, about 10 in the forenoon.

MARY SURTHERLAND, the first witness called, was alarmed by the report of some children, that a dead infant was lying in a ditch, about 15 feet in depth; and on examination no external marks of violence were found upon it, except a small bruise on one of the temples, which by the Medical Gentleman who had examined the body, was pronounced to be insufficient to have occasioned death.

By the testimony of Mr **OAKES**, Chief Constable, it appeared that the state of the infant was reported to him in the forenoon of the 22nd of September; he repaired immediately to the cavity wherein it was found, which he described as leading into a barrel drain that crosses Phillip street, Mr Oakes reported it to the Resident Assistant Surgeon, Mr **WEST**; and having entertained a previous suspicion of the prisoner at the bar concealing a situation which had probably led to this melancholy catastrophe, he had made his suspicion known to her, she being a servant under his official authority, but she denied it to be the case. Induced by this suspicion, he went to the house in which the prisoner at the bar lodged, which was but at a small distance from the cavity wherein the infant's body was found, and the evidence against her becoming manifest, she was confined on vehement suspicion, and was fully committed by the Inquest.

It appeared by the testimony of a man in whose house she lived, that from its dimensions and other considerations it was nearly impossible the incident could have been born alive; but it was evident also that she had cautiously endeavoured to conceal her situation, and had persisted in its denial to her most intimate acquaintances; but shortly after she was taken into custody acknowledged herself the unhappy mother, also making admissions, which connected with the whole tenor of her conduct, left it more than doubtful whether it had not been uniformly her design to perpetrate the crime which there was no living evidence of her having actually committed.

The evidence against the prisoner concluding, she presented a written statement, which the Court was pleased to admit, and it was read accordingly. The contents went to a declaration of innocence as it affected the perpetration of the act of murder, to acknowledge the concealment, pleading in extenuation of this proved, as admitted fact, the dread of the second instance of imprudence becoming public against her, as she already had an illegitimate child of three years of age in the colony, to whom she had always carefully attended.

The reading of the defence being ended, the Court retired to the chamber of deliberation, and in half an hour returned to the Bench; when His Honor the Judge of the Court addressed the prisoner at considerable length, in a language so truly impressive as to affect her almost to a state of convulsion. Did the room of our columns, the space of time before us, and above all, were we happy in the capacity of affording to our readers even an outline of the observations which proceeded from the Learned Judge upon the occasion, we should exult, not in the unhappy duty of exposing to public odium the wretchedness of a fallen creature, but in the occasion it would afford of placing before the many who might be capable of involving

themselves in crime without reflexion, a polished mirror which could not fail in reflecting upon the least inconsiderate mind a sense of duty to society from which the happiest effects might be expected to result.

His Honor, in the course of his address, recapitulated all the points of the evidence that had been adduced in support of prosecution; animadverted upon each in order – denouncing the crime with which the prisoner had been charged as of all others the most direful of offences in every part of the world. It was an offence, which, weighed and considered in all or any of its relative enormities, had been always esteemed as most horrible and unnatural. It was a crime against the public policy and the political advantages of the country; and, as it affected the duties of Religion and reality it exceeded every human power to suggest how it could be possible that such an offence as infant murder by a mother could have ever been committed; the mother to her incident was its natural protectress ; it was a charge consigned to her most tender care and regard; and in the betraying of the solemn trust she must ever evince a depravity which unfitted her for every future purpose in society. From the evidence taken upon the trial there might considerable apprehensions be entertained as to her inducement for the long and continued concealment of a situation which the very act of concealment had by a former law, which His Honor cited, been punished with death, unless a child could by a witness be proved to have been dead-born: by a subsequent act, passed in the 43d of His present Majesty, which strongly discriminated between the death of an infant arising, from the concealing of pregnancy, and its actual murder, although the punishment of death was removed from the offender, yet a punishment was by law provided, which the Court, from all the circumstances of the case, conceded it their duty to enforce. It was therefore the judgement of the Court that she be acquitted of the murder, as there was no proof the child had been born alive, but that for the felonious concealing she should be committed for the term of two years to the gaol of Parramatta.

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