# CASE NOTE

# COMING CLEAN IN THE COLONIAL COURTS: THE 1822 'CONFESSION' TRIAL OF HATHERLY AND JACKIE

**BRENT SALTER***

## I INTRODUCTION

The official account of the extraordinary 1822 murder trial of two Indigenous men named Hatherly[1] and Jackie is one of the earliest, if not the first, of the court records in Australia's European history to consider the admissibility of an Indigenous confession. The trial is also one of a handful of cases from the first forty years of the colony that provide an insight into the ambiguous legal status of Indigenous people in the infant years following settlement.

## II THE PROCEEDINGS IN THE TRIAL OF HATHERLY AND JACKIE

### A *The Depositions*

On December 2, 1822 Commandant James Morisset of Newcastle sent a set of depositions to the Judge Advocate's Office to commence formal proceedings in the trial of Hatherly and Jackie for the murder of the settler John McDonald. In his brief cover letter to the depositions, Morisset stated that

*Visiting Fellow, Macquarie University, School of Law.

[1] The name is spelled variously as Hatherly and Hatherley in the official documents. Quotations in this Note will follow the spelling used in the relevant part of the original text.

'[t]he Motive for committing the Murder was no doubt Plunder',[2] however 'there is no proof that the act [of breaking and entering the victim's cottage] was done by Hatherley and Jackie'.[3]

The Commandant enclosed three depositions. Richard Binder, the District Constable, deposed that a native named George, who had an intimate working relationship with the settlers, told him he had heard that McDonald had been murdered by the two prisoners. George, Binder and a dispatch of men proceeded to a swamp

> where we found the Body laying knee deep in water laying flat on his back [sic] … and found his [McDonald's] head on 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.[4]

Although the deponent was unable to identify the deceased, he and the other men found a hat at the scene which the deponent positively swore was the property of John McDonald.[5]

Furthermore, the deponent stated that, after the dispatch found the body, the two prisoners arrived at the house of William Hickey where they were arrested. The deponent 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'.[6]

William Hickey deposed that he could not positively swear that the hat belonged to the deceased, but further stated that, when the prisoners arrived at his house and were arrested, 'Hatherley confessed to striking McDonald the first blow, and put down the axe and when Jackie struck him a hard blow on the head and that there was another native named Mannix with them'[sic].[7] Hickey concluded his deposition by stating that he 'ha[d] no doubt' the deceased came by his death by the blows to the head.[8] In the third deposition

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[2] State Records NSW: Court of Criminal Jurisdiction; NRS 2703, Informations, Depositions and Related Papers, 1816-1824; [SZ800 no 1], 1-2.
[3] Ibid 2.
[4] Ibid 3.
[5] In another rather gruesome detail, the deceased also had a dead dog under his arm when lifted from the swamp: Hickey deposition, ibid 5.
[6] State Records NSW: Court of Criminal Jurisdiction; NRS 2703, Informations, Depositions and Related Papers, 1816-1824; [SZ800 no 1] 4.
[7] Ibid 6.
[8] Ibid 6.

Robert Browne stated that he saw the body when it was found and confirmed it was the body of John McDonald. Browne also deposed that the hat belonged to McDonald.[9]

In a curious fourth statement taken by Morisset, the native George, 'who was not sworne being ignorant of the nature of an Oath'[10] said that a black boy told him McDonald had been murdered. According to George, Hatherly had hit McDonald a 'gentle blow' and, upon McDonald stooping to look for a snake which had been pointed out by Jackie, 'Jackie hit him… very hard on the Head'.[11] Morisset concluded this deposition by stating

> Richard Binder's evidence being explained to the Black Natives, Hatherley and Jackie they voluntarily confessed, as far as they could be understood from their broken English that what was therein stated was correct, as far as concerned themselves, relative to the Murders.[12]

### B *Correspondence from Judge Advocate Wylde*

When Judge Advocate John Wylde received the depositions from Newcastle he therefore had two witnesses deposing that the prisoners had confessed to the assault. In addition, although Morisset had concerns that there was no substantial proof linking the men to the murder, he deposed that they had voluntarily confessed 'relative to the murders'.[13] 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 anterior Circumstances, which might lead to acknowledge [sic] of the Motives inducing the Natives to the Assault - and whether taking place in Quarrel, deliberate Malice, or for the purpose of robbery.[14]

In a letter sent back to Newcastle less than two weeks before the trial, Wylde would once again express 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

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[9] Ibid 9.
[10] Ibid 7.
[11] Ibid.
[12] Ibid 8.
[13] Ibid.
[14] Ibid 12.

> if the Prisoners be known at all in the settlement … their general Demeanor and spirit in general Intercourse: while also to support the Suggestion in the Depositions as to the nature of the Confession made it will be requisite that some person, who was present at the time and who can speak to the spontaneous nature of the same, should be forthcoming for examination on the Trial…[15]

Wylde concluded his letter by stating that it was a matter of 'public justice' that immediate 'attention and exertion' were desirable in order to throw any further light on the events. The Judge Advocate stated that such attention was desirable as a result of the prisoners being 'so ill-able and with so much difficulty, if at all, to be instructed as to the grounds of defence upon trial before the Court'.[16] When the indictment was drafted, Jackie appears to have been identified as the party who committed the act, while Hatherly was described as 'aiding helping abetting and comforting assisting and maintaining' Jackie in the commission of the act.[17]

### C *The Trial*

In these early years after settlement, criminal courts were presided over by a bench composed of members of the military and functioned without the aid of legal assistance. The Judge Advocate was only one member, with one vote, on a panel of seven. Nevertheless, the office of Judge Advocate played multiple and conflicting roles, the incumbent being not only magistrate, public prosecutor and judge, but also burdened with having to decide on the legality of informations and indictments that he himself had drafted. The early court records do not show what legal reasoning, if any, might have been in operation. In so many of the early cases, any legal principle underlying the decision is usually to be inferred from its facts and outcome, which are all the information that we have.

The only surviving record of the court proceedings in the trial of Hatherly and Jackie can be found in a brief report in the *Sydney Gazette*, Australia's first newspaper.[18] The newspaper report of the trial states that the victim was left in charge of a tobacco plantation and had been missing for a fortnight when,

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[15] Ibid 13.
[16] Ibid.
[17] Ibid 16.
[18] Reproduced in Bruce Kercher and Brent Salter (eds), *The Kercher Reports: Cases from the Superior Courts of NSW (1788-1827)* (in press) (hereafter 'NSW Sel Cas (Kercher)'): *R v Hatherly and Jackie*, (1822) NSW Sel Cas (Kercher) 734. With thanks to Dr Lisa Ford for first drawing my attention to this case.

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'.[19] 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'.[20]

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

> [t]he court … 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.[21]

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.[22] The caution displayed by Judge Advocate Wylde throughout the process suggests that he was acutely aware of the unique circumstances of the trial.

## III QUESTIONS REMAINING TO CONSIDER

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 conclusively indicate why the confessions were inadmissible: was it because non-Christian Aborigines were unable to give evidence and so unable to confess, or was it because of a concern about their lack of understanding of legal processes? Were they acquitted for the simple fact that there was not enough evidence to convict? If so, the trial is not that extraordinary at all. Were they acquitted because no accused persons

[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] 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* (1816) NSW Sel Cas (Kercher) 563.

were permitted to give sworn evidence on their own behalf under the First Charter of Justice.[23] Did the prisoners even know what they were confessing? The Indigenous prisoners in this instance were acquitted, so why should it matter that their confessions were not admissible?

Although one can speculate about the reasons why the court rejected the confessions, based on the particular circumstances of the trial, the proceedings in *Hatherly and Jackie* followed a similar course to the handful of other trials involving settler-Indigenous interactions from the first forty years of settlement. In the instance of Hatherly and Jackie, however, the invisibility of Indigenous people within the legal system (outlined further below) was ironically fundamental in securing their acquittal.

In the trials of *R v Hawker,* 1822,[24] *R v Luttrell,* 1810,[25] *R v Powell,* 1799[26] and *R v Hewitt,* 1799,[27] where settlers were tried for acts of violence against Indigenous victims, no Aboriginal witness gave evidence in 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'[28] of 1805 that 'the evidence of [p]ersons not bound by any moral or religious [t]ye 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;[29] but, beyond these reasons, Indigenous exclusion must also be understood as a consequence of there being no single body of law in operation, but rather a plurality of them, interacting with one another.[30] The effect of the plurality of laws in the new colony was most acute in the cases concerning Aborigines. Settler-Indigenous violence was generally dealt with outside of the formalities of the colonial courts through acts of violent

[23] The Court of Criminal Jurisdiction was established under (1787) 27 Geo 3, c 2. The King established the court by Letters Patent on 2 April 1787, which became known as the First Charter of Justice.
[24] (1822) NSW Sel Cas (Kercher) 719.
[25] (1810) NSW Sel Cas (Kercher) 419.
[26] (1799) NSW Sel Cas (Kercher) 209.
[27] (1799) NSW Sel Cas (Kercher) 154.
[28] Richard Aitkins, 'Opinion on Treatment to be Adopted Towards the Natives' in Frederick Watson (ed), *Historical Records of Australia* (1915) series 1, vol 5, 502.
[29] See Alex Castles, *An Australian Legal History* (1982) 532-3.
[30] On the plurality of law in colonial NSW see Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Harvard University Press: forthcoming (2009)).

retaliation and settler-Indigenous diplomatic negotiation.[31] In the very few instances that a matter of settler-Indigenous violence made it to trial, the assertions of settlers carried disproportionate weight. Usually framed in terms of a rudimentary form of self defence or provocation plea, evidence of the imminent threat of Indigenous violence, or of the need to retaliate against Indigenous violence, would often be successfully invoked by settlers to justify their own acts of violence.[32] Despite Hatherly and Jackie being acquitted of the murder of John McDonald, the proceedings profoundly demonstrate how Indigenous people had little to no influence on the way that law in the new colony would be shaped.

[31] Ibid.

[32] See Brent Salter, 'Beyond the Rudimentary and Brutal: Procedure, evidence and sentencing in Australia's first criminal court' (2009) 33 *Criminal Law Journal* 87.