

CHAPTER 7

THE TRIALS

7.1 THE FACTS

In March and early April 1866, 36 prisoners were charged in the Supreme Court in Auckland with various offences relating to the killings of Völkner and Fulloon. The main charges had already been the subject of courts-martial in Opotiki from 6 to 27 November 1865 on the basis that the arrests had been effected during the proclamation of martial law.

The courts-martial comprised Major George, who presided, and seven other commissioned officers (one of whom was designated judge advocate). Appointed to represent the defendants was none other than Smith, the civil commissioner responsible for ensuring their arrest and obtaining evidence against them. The court interpreter was Major Mair, who had conducted the campaign at the head of the Arawa troops. The trials found 28 men guilty, and all were sentenced to death.

The Attorney-General of the time, James Prendergast, brought into question the legality of these trials. He considered that martial law was not recognised by the law, except to the extent provided under the Mutiny Act 1865, which applied only to 'Officers in the Army, Soldiers and persons employed in Military affairs'. He advised that a general proclamation of martial law was contrary to an express prohibition in the English Act known as the Petition of Right 1627. He added that the trial of ordinary subjects by court-martial was inconsistent with stipulations of the Great Charter (Magna Carta), as affirmed by the Act of Parliament 1297, that 'no man ought to be adjudged to death but by the lawes established'. Both these statutes applied in New Zealand in 1865.

Having determined that the courts-martial were legal nullities, Prendergast saw that the defendants could not raise the legal principle against 'double jeopardy', which states that no one may be tried for the same offence before two court jurisdictions. In his view, the trials under martial law were a simple nullity and would not be recognised in the Supreme Court. As a consequence, the defendants were put on trial for their lives before two jurisdictions but were unable to invoke the 'double jeopardy' defence.

Prendergast also saw a number of deficiencies in the evidence presented at the courts-martial. He pointed out that 'no evidence has yet been obtained proving that any individual person was seen to strike any particular fatal blow, or to fire any

particular shot causing death' and that it had not been 'very clearly proved that the men alleged to have been murdered were dead and were buried'.¹

The Government nullified the proceedings and ordered that the defendants be subjected to a further trial. This involved a depositions hearing before a resident magistrate and thereafter a criminal trial in the Supreme Court.

In the Supreme Court, five were charged with the murder of Völkner. One, Paora Taia, was acquitted. The remainder were sentenced to death, but with a recommendation to the Governor for clemency in respect of Penitito, who was 19 years old. Three – Hakaraia, Mokomoko, and Heremita Kahupaea – were hanged, and the penalty for Penitito was commuted to one year's penal servitude.²

Sixteen were charged with the murders of Fulloon and seaman Ned (and also with piracy).³ All were found guilty of murder and sentenced to death. The judge recommended clemency in all but one case. In the final result, one – Kirimangu, the apparent instigator and leader of the party that reboarded the *Kate* – was hanged, seven were to serve life imprisonment, five were given 14 years' penal servitude, and three received penal servitude for four years.⁴

Ten who remained on the shore were charged as accessories before the fact. Whether one of them was in fact present was unclear, and he was acquitted on this charge but convicted of receiving stolen goods, as referred to below. The remaining nine were sentenced to death, but with recommendations for clemency in all but one case (which concerned the prophet Horomona, who was hanged). The sentences were commuted to life imprisonment in the case of Te Hura and three others, and to seven years' penal servitude in respect of four.

Six were charged with receiving goods stolen from the *Kate*, all were found guilty, and all were sentenced to three years' hard labour.

Accordingly, five in all were hanged, three for Völkner and two for Fulloon (in 1872, after his later capture, Kereopa Te Rau was also executed for Völkner's murder). One was acquitted. Eleven received life imprisonment and 19 were imprisoned for terms of between one and 14 years.⁵

It was reported that imprisonment was seriously affecting the 30 left serving terms, three dying within the first year and one in the second. Then, in late 1867 and early 1868, pardons were issued to the five serving three years (the sixth had died), the three serving four years, four of the nine serving terms of seven or 14 years, and one of the 11 imprisoned for life. The remaining 13, including 10 sentenced to life, served out their terms (that being, in the case of those serving life sentences, until the Governor released them at his discretion, after not less than 14 years).⁶

1. Prendergast to Stafford, 23 December 1865, JC22-3A AG65/1992, NA Wellington (doc C10(2)); for an overview, see doc C9, pp 49–61; doc I5, pp 44–53

2. Document A18, pp 93–94, 98–99

3. Once the accused had been found guilty of the murder of Fulloon, it was decided that the trial for the murder of seaman Ned would proceed but that the indictments for the murders of Captain Pringle and first mate Robinson would be withdrawn: see *Daily Southern Cross*, 17 March 1866, p 4; 6 April 1866, p 5.

4. Wetini Tainui described Kirimangu as the instigator: report of evidence of Wetini Tainui, *New Zealand Herald*, 16 March 1866, p 5. He was the only eyewitness to the murders on deck not accused of any crime.

5. For an account of the charges and trials and a list of the men accused, see document A18, pp 92–99.

6. *Daily Southern Cross*, 5 April 1866, p 5; 6 April 1866, p 5; doc A18, pp 98–99

7.2 CONCLUSIONS

The record of the trials consists of the judge's notes and accounts in two newspapers, all three of which are consistent.⁷ Using that record and a report by the judge, the claimants contended that the trials were unfair. It was argued that the majority found guilty were not in fact involved, that the penalties were excessive, and that political motives intervened. It was alleged that this was evident in the judge's report to the Governor, which stressed the importance of demonstrating British justice to Maori.⁸

On our reading of the evidence, we are unconvinced that the majority found guilty were not in fact involved. At most, something might be said for those who claimed that they intervened to save 'our pakeha', Bennett White, whose life was eventually spared, despite the orders said to have been given by Horomona.

However, for reasons of public policy, we decline to review formally the evidence and the strength of the Crown's case at the trials and confine our observations to some general matters. While the public has the licence to review murder trials, it would compromise the integrity of the legal system for an official body, not specifically charged with that function, to do the same.

There is not sufficient evidence that the sentences were manifestly excessive according to the standards of the day. Nor is there sufficient on which to say that the trials were show trials. Newspapers record the considerable public interest in the trials, with expressions of outrage and the need to deal harshly with 'Hauhau fanatics', demands for expeditious hangings, and suggestions that the trials were superfluous in view of the war. However, the judge's report to the Governor does not indicate that show trials had taken place. That which the judge hoped to impress on Maori minds was in fact no more than that British justice was tempered with mercy. He wrote to recommend that the Governor commute the mandatory death penalty in some cases. Although he did not say so, the judge may have had in mind that the Maori law of utu was more harsh.

The claimants argued that the trials were inadequate because the defendants were not separately represented, the defence counsel did not raise cultural defences open to the accused, and the judge and jury were insufficiently familiar with Maori law to assess evidence on the aukati and Maori intentions. Amongst other things, it was claimed that a comment made by the judge during sentencing that the aukati was 'unlawful and highly criminal' showed that he was unaware of the cultural and factual circumstances. It was pointed out that the Government was fully aware of the Maori law on aukati, and far from treating it as criminal, the Government had specifically supported Te Arawa in placing an aukati against the East Coast contingent.⁹

No doubt a better cultural awareness, especially by counsel, would have assisted matters, but it does not follow that the trial was unfair, and we are unconvinced that the cultural defences would have made a difference. The fundamental question was

7. Judge Arney's notes of proceedings and evidence of *R v Kirimangu and Others* and *R v Te Hura Te Tai and Others*, JC22-3B AG66/968, NA Wellington (doc 15(c)); *Daily Southern Cross*, 13 March–6 April 1866; *New Zealand Herald*, 13 March–6 April 1866

8. Arney to Grey, 10 April 1866, JC22-3A AG66/968, NA Wellington (doc c10(2))

9. Document c18, pp 38–41

whether, irrespective of Maori law, the accused knew that their acts were contrary to the ‘Governor’s law’ and would invite the Governor’s retribution. For the reasons below, we think it likely that they knew.

It was further claimed that the accused should have been tried by a jury of their peers.¹⁰ Technically, that is right in terms of British law, but it assumes that an accused’s peers, the ordinary representatives of an accused’s community, generally subscribe to the law to be enforced, in principle, even if they are unaware of the legal detail. That was not the case here. It was unrealistic to have expected a jury from amongst the people of Matata or Whakatane.

The more compelling arguments in terms of our jurisdiction were that the arrests and trials were misconceived on two grounds. The first is that English law had no practical application in the district at the time and should not have been retrospectively enforced.¹¹ The second is that the killings were acts of war. For example, Mikaere Kirimangu said before his sentencing that ‘you pakehas think it murder; we think it only an act of war’.¹² The claimants therefore contended that the punishments were excessively severe.¹³

Even applying Maori law, the accused are not spared. The argument is that Völkner compromised the security of local hapu and Fulloon breached the aukati and that, in this time of war, both ought to have appreciated the likely consequences. Looking at the case of Fulloon, we consider that the Pai Marire aukati, which was the aukati enforced, had no validity at Maori law, as we have discussed.

Further, it was inconsistent with the aukati of the Ngati Awa runanga, which was more benign and more clearly for the traditional purpose of keeping the peace. There, the restriction was on those entering with hostile intent, and Fulloon had earlier been admitted when seeking information on Völkner’s killers. This aukati had been proposed at Whakatane with the involvement of the local people and before a much larger crowd than that at Matata and had been communicated to Te Arawa and the Government immediately after it had been made.

The Pai Marire aukati was made only at Matata and was simply unreal, covering an area from Cape Runaway to Taranaki. It was proposed by Horomona, who was from outside the district. It may well be that the Matata people could impose a separate aukati of their own, but not in respect of Whakatane Harbour without the approval of the Whakatane people. This was not forthcoming. The record is that the Whakatane hapu were not persuaded by Pai Marire policy – they had admitted Fulloon before and had released those captured on the *Mariner*, for example. Further, Fulloon was a close relative of the local people and of Wepiha Apanui in particular.

It was said at the trial that, in proposing the second aukati, Horomona purported to be merely confirming the aukati of the runanga.¹⁴ In fact, he was changing it and presuming to take control.

10. Document A18, p 97

11. Ibid, pp 41–42; doc 11, pp 1–29

12. *Daily Southern Cross*, 5 April 1866 (cited in doc 11, p 39)

13. Document A18, p 97

14. Report of defence submission at trial, *New Zealand Herald*, 16 March 1866; report of judge’s summing-up, *New Zealand Herald*, 5 April 1866

We are also not convinced that English law was seen as irrelevant. The question of whether the offenders knew that the killing was against the ‘Governor’s law’ and was likely to result in the Governor’s ‘retribution’ must be answered in the affirmative. Earlier in this report, it was considered that Maori law was the only law that in practice applied in this territory at the relevant time (see sec 3.5). English law had still to gain acceptance in this remote place, there were few Europeans in the area, the missionary influence had not been large, and Maori remained convinced that their own law should apply. Nevertheless, it appears to us that certain basic missionary principles had spread even to remote places, and in varying degrees Maori law had undergone some changes to suit. Throughout the country, there had been major changes with regard to infanticide, cannibalism, death by sorcery, and summary killings for offences.¹⁵

Moreover, as we have said, we think that the news would have spread, even to remote places, that the Governor would not tolerate the cold-blooded murder of Europeans. This had been known from the beginning of government in New Zealand, even if, on occasion, as in the killings at Wairau in the South Island, it was not practical to effect arrests (see also sec 5.2).¹⁶ The Pai Marire adherents in particular must have known this. The Governor was seeking to arrest those who had committed alleged atrocities in Taranaki even before Völkner’s death.¹⁷

The question, then, is whether, as a matter of politics, the Governor should have brought into account that this was an act of war. While we accept that an atmosphere of war prevailed and that the killings would not have taken place but for the war that the Governor began in Taranaki, the fact remains that the killings were not perpetrated in the heat of battle.

Accordingly, we consider that the Governor’s action in effecting arrests ought to have been expected. It makes no difference that the Governor was wrong in starting the war and had often failed to charge Europeans who had killed Maori in other than the heat of battle. While it appears that the Governor had a selective and unbalanced approach to the enforcement of the law, and no matter how wrong or unfair he may have been on other occasions, the wrong then could not make right the murders in the Bay of Plenty.

The same principle applies to the fact that, immediately prior to the arrests in this case, Ngati Awa men and women, sometimes defenceless, were attacked by Te Arawa

15. The status of English law among Maori at a distance from colonial law officers was discussed in an 1842 letter from Acting Governor Shortland to the Colonial Secretary, Lord Stanley, in which Shortland referred to an opinion by the New Zealand Attorney-General, W Swainson, that it was necessary to gain ‘the intelligent consent of the natives’ and then only from those ‘who had acknowledged the Queen’s authority’ before they were governed by English law: Shortland to Stanley, 31 December 1842, BPP, vol 2, pp 456–457. For Swainson’s opinion, see BPP, vol 2, pp 470–471. The issue and Swainson’s opinion were discussed at the Executive Council: BPP, vol 2, pp 457–461. In a dispatch dated 21 June 1843, Lord Stanley strongly disagreed with Swainson’s opinion, but allowed that in certain circumstances, which he discussed, Maori should be permitted to live among themselves according to their natural laws or usages: see BPP, vol 2, p 475.

16. We might note in this case, however, that Governor FitzRoy found that the Europeans who died had been in the wrong: A D McIntosh, *Marlborough: A Provincial History*, Christchurch, Capper Press, 1977, p 81.

17. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, p 105

forces in Government employ. The troops were not charged with offences, but again, that wrong cannot validate the murders.

Looking at the matter in Treaty terms, the Treaty of Waitangi obliged the Governor to make laws for peace and good order between the races. While as a matter of broad principle the Governor was bound to respect Maori law, he was also justified in imposing other laws to maintain the necessary standards for all. He had somehow to establish and maintain laws that would in time be accepted by both cultures. To that end, he was obliged to take strong measures to enforce the law to protect lives. In this respect, he was applying a law of universal acceptance. No law is an absolute truth, and the laws of all cultures, English law included, must bend to the dictates of universal standards.

Having regard to the standards of the day and to local exigencies, we are also of the view that the Governor was not unreasonable in failing to commute all the death penalties and in not making pardons earlier than he did. It is a legitimate purpose in sentencing to provide a deterrent to others. Later, it would not have been practicable to release those prisoners at a time when Te Kooti was being pursued for alleged murders both in Poverty Bay and at Whakatane. While Ngati Awa were engaged with Government forces thereafter in the pursuit of Te Kooti, it had still to be made clear that those responsible for murder could expect harsh treatment.

There is one matter, however, that ought not to have been allowed in the light of Maori custom. Custom requires that the dead should be mourned over and interred with their ancestors, no matter their status or what they had done in life. It was contrary to the principles of the Treaty of Waitangi, and the respect due thereunder to Maori custom, that the English practice was not modified in this case and, more particularly, that those who were hanged or who died in prison were interred without ceremony within the prison walls. We see no reason why this extra penalty, effectively imposed on the soul of the prisoner and the heart of every Ngati Awa at home, should have been carried out. The result was to convey a deep bitterness and disrespect for English law for generations. Throughout those generations, there were regular requests for the bones. They were not released for reinterment with their families until 1988. (It is true that Maori took and then reviled the bones of their enemies, but this custom was for the particular purpose of beginning or maintaining a war.)