New Zealand Lost Cases Project

R v McCarthy

17 April 1844

Supreme Court, Wellington, Chapman J

Keywords: larceny, unsworn testimony, Maori, witness, native

Main Source: *New Zealand Gazette and Wellington Spectator*, 1 May 1844, 3 (grand jury bill presented on 17 April 1844); *New Zealand Gazette and Wellington Spectator*, 1 May 1844, 4 (trial).

Additional Sources: [HS Chapman] 'Notebook entitled 'Criminal trials No.1', 1844-5, MS-0411/009, Hocken Library, Dunedin, entry for 17 April 1844, 15-18; Returns of Sittings of Court [Supreme and County] (Clerk of the County Court Wellington), 22 April 1844, IA44/1085 in 'General Inwards Correspondence to the Colonial Secretary, ACGO 8333 IA1/32 1844/1001-1196, Archives New Zealand, Wellington.

Counsel: Crown Prosecutor, Hanson

Significance: McCarthy was indicted for larceny. *McCarthy* was heard at the first session of the Supreme Court in Wellington over which the new Supreme Court judge, HS Chapman, presided. The case itself is not exceptional, rather it is the comments to the Grand Jury on Maori witnesses which are of interest. *McCarthy* involved four potential witnesses, all Maori and is notable for Chapman J's comments on the 'pagan' or 'infidel' evidence rule. *McCarthy* was determined prior to the passing of the *Unsworn Testimony Ordinance* 1844. When the witnesses came to be sworn, they were asked whether they were Christians. Two confirmed that they were, and were sworn. The others are reported to have "answered with a shrug of the shoulders "au" (sic)."[1] However, Chapman declined to further question the beliefs of these potential witnesses, rather he asked the Crown Prosecutor if the trial could proceed without them, and it did. A true bill was presented and John McCarthy was tried. He was convicted on the evidence of the two sworn Māori witnesses, Pukahu and Tokoiwa.

Chapman, although declining to swear witnesses under the 'pagan' evidence rule, instructed the jury on it so as to "satisfy your minds on a point on which I know considerable misconception prevails". According to Chapman "a pagan witness who believes in a supreme being, who will punish him for telling a le, either in the net world or in this, is a good witness, provided he be sworn according to the ceremonial which he believes to be binding on his conscience." This is the rule largely as set down in the English decision of *Omichund v Barker* (1744) 1 Willes KB 85 (95 ER 506); 26 E.R. 15; Willes 538 (125 E.R. 1310). Further, according to Chapman, the fact that the Imperial parliament had just passed a law to admit pagan witnesses without oath was "proof that they could not now be admitted".

At the end of his report of *McCarthy*, the Editor of the *Wellington Spectator* noted for the benefit of his readers that the Imperial Parliament had enacted a measure to allow for pagan evidence to be admitted without oath, and that it was to be hoped that the Governor and Council would soon pass such a measure, as they understood from His Honour's ruling that a gross crime might be committed in the presence of pagan Māori only, as it once could have been in England before Quakers.

In 1844, the Legislative Council passed the *Unsworn Testimony Ordinance* 7 Vic. No. 16 (1844) under the authority of the *Colonial Evidence Act* 6 Vic. c. 22 (1843) (Imp). This allowed Maori to give evidence without taking the oath where they had insufficient religious conviction to come within the common law rules.

For an example of a case in which the Maori witness was sworn under the 'pagan' evidence rules see *R v Maketu*, Supreme Court, Auckland, 1 March 1842, Martin CJ, *New Zealand Herald and Auckland Gazette*, 19 January 1842, 2.

Further Information: Shaunnagh Dorsett "'Destitute of the Knowledge of God': Unsworn Maori Testimony in the Crown Colony Period", submitted to the *Journal of Commonwealth and Imperial History*; Damen Ward "Witnessing Power: Imperial Policy, Colonial Government and Indigenous Testimony in South Australia and New Zealand, c 1834-58" in Shaunnagh Dorsett, Ian Hunter *Law and Politics in British Colonial Thought: Transpositions of Empire*, Palgrave McMillan, forthcoming 2011.

Transcript of the Comments to the Grand Jury[2]

(Charge to the Grand Jury and comments on some aspects of the Case by the Editor).

Friday, April 12, 1844.

After the usual formalities, his Honor delivered the following charge, which, besides explaining the powers and duties of this ancient institution, explains the circumstances which delayed its introduction into the colony:

Gentlemen of the Grand Jury, - Before you enter upon your duties, for the first time in this part of the colony, it is necessary that I should address a few words to you, as well upon your functions generally, as upon the matters you will have in charge.

As the Grand Jury is part of the Common Law of England, it may perhaps have occurred to you that it should have been called into action in the colony, at an earlier period; but I must remind you that in an infant community, the persons qualified to serve on Juries are few in number, and had the ordinary Jury Lists been sifted for the purpose of furnishing a body of grand and special Jurors, the Petit Jury would have been materially impaired in its character. Under these circumstances the Governor and Council wisely determined to preserve the integrity of the common Jury lists, and it was provided in the lace Supreme Court Ordinance, that an indictment signed by the Attorney General or the Crown Prosecutor, should be as valid and effectual in all respects, as if such indictment had been presented by a Grand Jury.

But since the passing of that Ordinance, the colony has so grown and strengthened that the Jury lists of the several districts are sufficiently large and respectable to allow them to spare out of their number both Grand and Special Juror. Accordingly, in the new Supreme Court Ordinance the clause I have mentioned has been omitted, and your appearance here this day is the result of that omission.

Whatever may antiently [sic], have been the character and functions of the Grand Jury, its hold upon public estimation appears to arise from' the security it affords, to , an accused party against the publicity and harass of a trial, if there be no case made out for the prosecution. This valuable feature in the Grand Jury leads me to the consideration of the quantity of evidence you should require to justify you in finding a bill. Let me remind you that your investigation is an inquest or inquiry- not a trial. You hear the evidence, against the accused-

mat the evidence for him; so that where in many cases a common. Jury may acquit, because they have reasonable doubts of guilt, you may justly find a true bill, because no reason for doubt has been disclosed to you. In short, gentlemen, your business is to enquire whether a case has been clearly made out for the prosecution: or to use the language of a great authority, (Blackstone iv. 303,) you are to inquire only on your oaths whether- there be sufficient cause to call upon the party to answer it. Yet as far as the evidence for the prosecution goes, you ought to be persuaded that a case is really made out, and being so far persuaded, it is your duty to find a. true bill.

But you have a further duty beyond the mere finding of bills sent you by the law officer of the Crown. Antiently [sic] the Grand Jury made presentments of their own knowledge, and that power has never been taken away. Without a bill of indictment therefore, you may make presentment to the Court of any offence against the Queen's peace or authority, or against the safety and welfare of her subjects, which may come within your knowledge. After such presentments the ordinary formalities of law must' be complied with, for they are required by subsequent acts and ordinances.

From the station you occupy in society, it also becomes your duty to promote to the utmost of your ability peace and good will among all her Majesty's subjects, as well as to repress and discountenance, not merely actual crime, but even all habits and practices calculated to exert a hurtful influence on the community.

I have spoken of the Grand Jury as a security to the accused. This is materially strengthened by the oath of secrecy you have taken. We are told by the authority I have already referred to (Bl: Com: IV. 126,) that "antiently it was held that if any one of the Grand Jury disclosed to any person indicted the evidence that appeared against him, he was thereby made accessory to the offence, if felony, and in treason a principal," (for in treason, gentlemen, there are no accessories, all being principals) " and to this day," continues Blackstone, "it is agreed that he is guilty of a high misprision, and is liable to be fined and imprisoned."

Some, cases of disclosure have, however, been allowed and enforced by the Courts. At York assizes, some years since, a Grand Juror in Court heard a witness swear directly contrary to what he had stated before the Grand Jury. He at once informed the Judge, who, on consulting with his learned brother then sitting at Nisi Prius, held that the Grand Juror should be examined, which he was, and the witness was committed for perjury, to be tried on the evidence of the Grand Jurors. It is also stated on the authority of a writer of reputation, that in an action for malicious prosecution, a Grand Juror may be called to prove that the defendant was prosecutor. - (Selwyn's N.P. Mai. Prosecu.) It seems therefore, that a superior court of record may, when public policy demands it, absolve you from that part of your oath, but in all other cases the rule as to secrecy is absolute [sic] and unconditional.

Having said this much on your functions generally, I will direct your attention to the cases that will be brought before you. The gravest charge which the calendar contains is for burglary. This offence consists in breaking and entering the dwelling house of another during the night to commit some felony. To fulfill this definition, the evidence must disclose: first, a- breaking, and to satisfy the law on this point even the lifting of a latch is sufficient: second, an entering and this need not be at the same time as the breaking, it may even be on another night (as in case of interruption and return,) provided the breaking and entering be connected with the intent: third, it must be in the night. Formerly there was often great difficulty in proving whether there was darkness enough to constitute night, but now all that difficulty has been gotten rid of by a statute which defines the night for this purpose, to be from 9 o'clock in

the evening until 6 o'clock the morning: fourth, it must be with intent to commit some felony though no felony be in fact committed. These being the several ingredients which make up the offence of burglary, it follows that if anyone be wanting, it is no burglary, and you must throw out the bill ; but to guard against a failure of justice by reason of some failure of proof, it is usual to send up a bill or at least to add a count for larceny.

You will also have before you a bill for maiming or wounding cattle. I am not aware that the offence itself possesses any features which demand remarks from me. But there is one collateral circumstance connected with it which induces me to remind you, than no amount of provocation operates as a justification of so gross an- outrage. For the provocation the' law provides ample remedy, and you are well aware that no man may take the law or rather the remedy into his hands.

There is also a bill for stealing some clothes the property of an aboriginal native, in which all the witnesses are natives also. I' cannot glean from the depositions whether all are Christians, or whether all were sworn. This induces me to state, the circumstances under which a pagan witness is admitted to give evidence. The result of a long line of decisions is that a pagan witness who believes in a supreme being, who will punish him for telling a lie, either in the next world or in this, is a good witness, provided he be sworn according to the ceremonial which he believes to be binding on his conscience. As the witnesses will not be before you until they have been sworn in open Court, I only mention this to satisfy your minds on a point on which I know considerable misconception prevails.

I ought also to remark that where two or more persons are joined in an indictment all may be guilty although the hands of one only has committed the crime. In burglary, for instance, one may break in while another stands by to watch and warn, and a third to receive property. In the eye of the law all are equally guilty.

One point I should, mention to you, Mr. Foreman, it is your duty to see that twelve of your number concur, for without that number no bill can be found.

As the rest of the cases are of comparatively minor importance, I need no longer detain you from your duties.

The Grand Jury then retired to a room provided for them at Cooper's Inn, the miserable barn which is courteously called "a Courthouse", affording no accommodation for them.

Note. - Afterwards when the native witnesses alluded to in his Honor's charge came to be sworn in Court, they were asked, through the interpreter, whether they were Christians? Two answered readily in the affirmative, and were sworn, the oath being interpreted and explained to them. The others answered with a shrug of the shoulders "au." Mr. Justice Chapman then asked the Crown Prosecutor, if he could send the case up without the last witness? And we believe the answer was in the affirmative. His Honor then asked what the practice had been? And the Crown Prosecutor, as we understood, replied that the practice in the County Court had been to take the evidence without oath, and let the Jury give what credit to it they pleased. The learned Judge then intimated, that there was no authority for such a practice, and that, however desirable some relaxation of the rule might be, he could not break in upon the law as it at present stands. The British Parliament had just passed an act to permit the Legislatures of colonies, having aboriginal inhabitants, to pass a law for the admission of pagan witnesses without oath - a proof that they could not now be admitted.

The act in question, 6 and 7 Vic, c.22, after reciting that doubts had arisen as to the validity of any laws made in the colonies for the admission of pagan witnesses, enacts:

"That no law or ordinance made or to be made by the legislature of any British colony for the admission of the evidence of any such persons as aforesaid, in any Court or before any Magistrate within any such colony, shall be or be deemed to have been, null and void or invalid by reason of any repugnancy of, or supposed repugnancy of any such enactment to the law of England; but that any law or ordinance made or to be made by any such legislature as aforesaid, for the admission, before any such Court or Magistrate of the evidence of any such persons a aforesaid, on any conditions thereby imposed, shall have such and the same effect and shall be subject to the confirmation or disallowance of her Majesty, in such and the same manner as any other law or ordinance enacted for any other purpose by any such colonial legislature.

"2. That this act may be amended or repealed by any act to be passed in the present session of parliament."

It is to be hoped the Governor and Council will at once act upon the above statute, and pass an ordinance to render heathen Maories competent witnesses, leaving it to the Jury, under the direction of the Judge, to estimate their credibility. According to his Honor's ruling - and we do not dispute, on contrary we" are aware of its correctness- a gross crime may be committed m the presence of pagan Maories only, with impunity (it was once so in England in the presence of Quakers.) This state of the law cannot be altered by the Court or a Judge thereof. The Judges are bound, to expound the law as they understand it; the legislature alone has power to amend it. We trust that New Zealand may be the first among the colonies to avail itself of the act we have just quoted.

Transcript of the Decision

New Zealand Gazette and Wellington Spectator, 1 May 1844, 4

John McCarthy – larceny. This prisoner was indicted for stealing from a Maori at Pipitea Pah. The witnesses were Maori and the case was clearly made out. Verdict, *guilty*. In passing sentence, his Honour alluded to the fact, that the prisoner had in February been the object of his Excellency's clemency – sentence 12 months imprisonment with hard labour.

Transcript of Chapman J's Notebook[3]

John McCarthy. Larceny.

Plea not guilty.

Mr Clarke interpreter.

Pukahu, I live at Pipitea. I know the prisoner. I remember seeing him on a Friday before the [witness?] went before the magistrate. I was in my own hose when I saw the prisoner. I first saw him enter the house in which I live. I saw the prisoner [groping?] about the place where the box was. It was a little after dusk. I saw him break the box open. I saw him take something out which he afterwards found to be a handkerchief. The prisoner then walked out of the house. I followed him and seized hold of him about a short distance from the house. I

called out to the other natives there is a Pakeha thief or a white person stealing. A good number of the natives rushed out. He had a basket containing the things. I know the things from their general appearance. I then with the other natives led the prisoner to the house of another native named Porutu. I then left him.

Cross examined. I did not then take him into custody because I at first thought it was a native Jacky[?]. I did not see it was prisoner until got to the door. The natives frequently go backwards and forwards into the house some sleep there. Jacky had not been there for some time.

Tokoiwa. I live at Pipitea Pah. Identified the trouser and the waistcoat. They all belong to me. I kept them usually in the box now [word?] in one of Porutu's [houses?]. It is the house in which the lad lives. I heard the other witness call out here: a Pakeha stealing. I was then in another house. He had then the basket in his hand. The things were in the basket. He had seen them [word?] safe on the Thursday. I did not put them there, and I locked the box.

Cross Examined. I am quite certain I saw the articles in his hands.

James Futter. Constable, I am keeper of the lock up. I know the prisoner. About a fortnight ago I was sent to take the prisoner into custody. The natives would not let me take him but I took the box and the articles. I have had it ever since.

Cross Examined. Mr Joyce came to me.

Verdict. Guilty

For further information contact Shaunnagh Dorsett

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[1] Ibid. Rather than “au” (meaning I), the witnesses presumably shrugged and said “aua” – meaning I don’t know, or no.

[2] *New Zealand Gazette and Wellington Spectator*, 1 May 1844, 3

[3] ‘[HS Chapman] 'Notebook entitled 'Criminal trials No.1', 1844-5, MS-0411/009, Hocken Library, Dunedin, entry for 17 April 1844, 15-18