New Zealand Lost Cases Project

The Queen v Native (Ratea alias Kai Kararo)

(This case should be read with *R v Rangitapiripiri* 1847)

1 September 1849

Supreme Court, Wellington, Chapman J

Keywords: Maori; murder; *inter se*; interpreter; conquered colony; abrogation; *malum in se*

Main Source: *The New Zealand Spectator and Cook's Strait Guardian*, 5 Sept. 1849, 2-3

Additional Sources: [HS Chapman] Notebook entitled Criminal Trials No. 5 1847-9, Hocken Library, Dunedin (HL), MS-0411/013, entry for Monday, 3 Sept. 1849, 205-219; *The Wellington Independent*, 12 Sept. 1849, 3; 5 Sept. 1849, 2 **[1];** H.S. Chapman 'Legal Notes', c. 1858, Alexander Turnbull Library, Wellington (ATL) MSPapers-8670-047

The matter is mentioned in passing in several early accounts of New Zealand. See Arthur S Thomson *The Story of New Zealand: Past and Present – Savage and Civilised*, Vol II (John Murray, London, 1859), 175-176. He also mentions the case of Mararo, also 1849) (at 173). Edward Jerningham Wakefield also refers to the case in passing in his *Adventure in New Zealand from 1939-1844*, Vol II (London 1845).

Counsel: Attorney General William Swainson; Hugh Ross for the defendant

Significance: *R v Native* and *R v Rangitapiripiri* together constitute the first significant attempt to assert jurisdiction over matters *inter se* matters, ie those between Maori. Both concerned murder. Together they are significant as they outline the approach of the Supreme Court (or at least of the one judge who heard these decisions) to the application of British law to *inter se* matters. According to the Colonial Office, New Zealand was designated a settled colony. Chapman agreed (Chapman 'Legal Notes'). However, as far as the law to be applied in the new colony, this only indicated that as between the settlers, or the settlers and Maori that English law should applied. For the purposes of determining matters *inter se* Chapman J chose to treat the colony as conquered. Thus, Maori laws and customs remained in place unless specifically abrogated on the basis that they were *malum in se* or against the law of humanity. According to Chapman, small matters of custom were to be left to the Maori themselves (Chapman 'Legal Notes'). Thus jurisdiction was based primarily on status, although there was little doubt in Chapman's mind that the Crown had effectively asserted jurisdiction over the whole of New Zealand. This is in contrast to the emerging assertion of jurisdiction based on territory which characterized the Australian colonies.

The defendant was Ratea or Kai Karoro ('Gull Eater'), occasionally spelled 'Ratia'. The victim was Parata-Wanga. The matter was apparently one of utu, on the basis that Parata-Wanga had seduced Ratea's wife. Parata-Wanga's death occurred in March 1843. It is first mentioned in the *New Zealand Colonist and Port Nicholson Advertiser*, 1/67, 21 March 1843, p2 [the date of the paper is Tuesday 21 March 1843. However, the Tuesday was in fact the 20th]. It took some time for Ratea to be brought to justice. Occasional mentions are made of him between 1843 and 1849. He is mentioned as being the "robber" of some huts at Makara in 1844: see Police Court Deposition (given to M'Donough, Esq, Chief Police Magistrate), William Ed Vincent, 11 July 1844: *New Zealand Gazette and Wellington Spectator*, V/353, 17 July 1844, p3. Ratea was eventually arrested on Thursday 2 August 1849. Upon venturing

into Wellington he was "recognised and taken into custody and brought before H St Hill, Esq, Resident Magistrate": *New Zealand Spectator and Cook's Strait Guardian*, V/418, 4 August 1849, p 2.

Further Information: Shaunnagh Dorsett ""Sworn on the Dirt of Graves": Sovereignty, Jurisdiction and the Judicial Abrogation of Barbarous Customs in New Zealand in the 1840s", (2009) 30 *The Journal of Legal History* 175; Damen Ward, 'A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia', 1 History Compass (2003), AU 049, 001 – 024.

Transcript of the Decision

Ratea otherwise Kai Karoro an aboriginal native, was indicted for the murder of Parata Wanga another aboriginal native in the month of March 1843. The Attorney-General conducted the prosecution, the prisoner was defended by Mr. Ross assisted Mr. Kemp as interpreter. Mr. Deighton was sworn as interpreter for the Crown.

Mr. Ross applied to the Court for a mixed jury to be composed of Europeans and aboriginal natives, but his Honor refused the application, stating that the prisoner was clearly not entitled- to the right as a foreigner, as he was now a British subject, and that the provisions of the Jury Amendment Ordinance by which the Governor and Executive Council might provide a list of natives to serve on mixed Juries had not yet been carried out. The prisoner, who had a quiet respectable demeanour, was habited in a suit of black clothes. He pleaded Not Guilty. The trial excited very great interest among the natives who attended the Court in considerable numbers.

The Attorney-General having opened the case called

Dr. Fitzgerald, Coroner, who stated that he had held an inquest in March 1843, on a native named Parata Wanga, witness described the wounds on the body of deceased which appeared to have been inflicted by slugs or small bullets ; no post mortem examination had been held ; he believed the person came by his death by these wounds and, in his opinion, that between the ribs produced death ; he had seen the body shortly after it was shot.

Te Kiri Karamu, sworn. - Was stopping at Tiakawai when prisoner came to this place; could not remember how long ago ; when he heard prisoner was arrived he went up to the pa Kuao, which was on the hill above Tiakawai found prisoner and deceased talking together, they talked some time and then sat down ; witness sat with (hem near the fire . prisoner said he intended to return to Ohario in the evening ; witness told him he would be benighted, but" he replied that be should have time ; saw him take a gun off a bundle of fire wood ; witness heard the report of a gun ; his back was at that time turned towards the prisoner; on turning round he saw that Parata Wanga was shot.

Mr. Ross here objected that the Attorney General could not give evidence of the two shots, as there was only one count in the indictment, he must therefore be confined to one shot, and the Jury must be convinced that death was caused by that shot.

His Honor held that the Attorney General must elect which shot he would prove but that he could not prove two.

The Attorney General elected to go upon the first shot.

Examination resumed - At the first shot deceased fell on his elbow; he was nearly dead and his eyes were closed.

Ko Ti, wife of the last witness - Recollects Parata Wanga's death ; recollects seeing prisoner ; it was at the pa Kuao ; saw prisoner fire at Parata Wanga ; Parata Wanga fell ; he appeared not dead, his eyes were open, he was looking as they were at the present moment.

Thomas Barrow, carter, Karori. - In 1843 was making bricks on the Karori road; thinks it was in March ; heard two shots fired ; on hearing the second shot he looked up and saw a native make a jump and then run up the hill ; when he reached the spot the natives were moving a dead body into a hut ; saw wounds on the body ; there was not time to load the gun between the two shots ; deceased was quite dead when he got there ; he did not know deceased.

George Crocker, police constable, proved that he apprehended the prisoner on the 3rd August, last.

Dr. Fitzgerald recalled and cross-examined by Mr. Ross - Deceased had many wounds ; could not say which of them produced death without a post mortem examination; did not think the wound in the thigh would have produced death ; the wound between the ribs might have caused death, or that under the shoulder blade ; the natives would not allow a post mortem examination.

Mr. Ross objected that the Attorney-General bad made out no case to go to the Jury, he had proved the shot, and that Parata Wanga fell ; but he did not prove any of the wounds stated in the indictment, nor did he ask the witnesses any question as to such wounds, and he had not proved that the deceased was the man on whose body the inquest was held.

His Honor considered that there was sufficient evidence of identity to go to the Jury.

The Attorney- General addressed the Jury for the Crown.

Mr. Ross addressed the Jury for the prisoner.

His Honor the Judge then explained to the Jury, that if they were not satisfied that the deceased died of at least one wound produced by the first shot, they must acquit the prisoner. If they considered that the second shot Only produced the mortal wound, or if they thought that death was the result of both shots together, they must acquit the prisoner. If they considered that deceased received one mortal wound at the second shot, and one also at the first, they might convict ; but if, on the whole, they had any doubt whether the first shot produced a mortal wound, the prisoner must have the benefit of the doubt. The Jury retired, and the Court adjourned for twenty minutes. On the return of the Jury into Court, the foreman declared the verdict to be "Not guilty."

(New Zealand Spectator and Cook's Strait Guardian, 5 September 1849, p3)

Transcript of Chapman J's Notebook

Mr Ross applied for a Jury de medietate linguae on behalf of the native prisoner.**[2]**

Read Preamble of the Jury Amendment Order 7 Vic No 2 which provides that "any Aboriginal Native of NZ whose capability shall be certified under certain regulations to be from time to time issued by the Governors and the Executive Council shall also be held duly

qualified and liable to serve as a person on a mixed jury in the trial of any case civil or criminal in which the property or person of any aboriginal Native of New Zealand may be affected."**[3]**

Held that the Regulations for qualifying such having been issued the Courts had no subject matter to act upon. The preliminary step not yet been taken by the Govt and Council the Court had no power to grant what Mr Ross asked. ____ ____ thus (?) remitted (?) to the Common Law under which the privilege of a mixed Jury was only granted to an alien – whereas Native was a British Subject.

As to the justice of the case – I felt no want of confidence in a British Jury. From the experiences we had had here I thought a native was at least as safe in there [sic] hands as in those of Native Jurors who might be hostile. Mr Ross assented but said that he should be glad if natives had the option especially in a case like this in which much would depend on Native Custom.

I ans^{d} Native Custom could hardly come into question in a case of murder.

Common Jury then empannelled [sic] and sworn.

Prisoner: Plea Not Guilty.

Mr Deighton sworn as interpreter.

Mr Kemp assisted Mr Ross as Interpreter for the Prisoner.

Mr Attorney-General opened the Case –

John Fitzgerald MD Coroner. I held an inquest on an Aboriginal in March 1843. **[4]** Parata-Wanga.

Wound inside of the thigh – another between the 5 & 6 rib – another near the shoulder bland – another in the other shoulder blade and one or two slugs or small bullers under the skin.

A post mortem examination then took place.

I believe the person came by his death by these wounds and as far as I can judge the wound between the ribs produced death. I saw the body the night he was shot - the body was warm.

Te Kiri Karamu Ohariu (sworn).

I was stopping at Tiaki wai and the prisoner came to this place.

He (?) has no idea of the _____ of _____.

When he heard the prisoner arrived he went up to the Pah Kuao (Tiakiwai is on the beach Pa Kuao is on the hill above)

I found Prisoner and the man since dead talking together. They talked some time together and then they sat down.

I sat down with them at the side of the fire. Prisoner said he intended to return to Ohariu(?) in the evening. I told him he would be _____ he said "no I shall have time. I then saw take a gun from off a bundle of fire woods. **[margin note 'taken gun']**

When my back was turned towards prisoner I heard the report of a gun. I started at the sound and turned round. I saw that Parata Wanga was shot. **[margin note 'shot'].**

[Mr Ross objected that Mr Wakefield could not give evidence of two shots that he ought to have laid two shots in two distinct Counts". Mr W must therefore be confined to one shot – and the Jury must be convinced that the death would was caused by that shot.

Held that the Attorney General having laid one count and one shot – he must elect which shot he would prove in evidence that he could not prove two.

The Attorney General elected to go on the first shot.]

At the first shot the deceased fell on his elbow. – The deceased was nearly dead his eyes were closed.

I was as near the deceased as I am to the _____.

Ko Ti. Wife of the last witness.

I recollect Parata Wanga – I recollect the time of his death.

I recollect seeing the Prisoner. We were all at Pa Kuao.

I saw the Prisoner fire a shot at Parata Wanga. I stooped down.

I saw Parata Wanga fall after the first shot. He appeared not dead. His eyes were open - he was looking as we are all looking now.

Thomas Barrow Karori Carter

In 1843 I was making bricks on the Karori Road. I heard a gun go off. I think it was in March when I heard the first fun I looked up and soon after I heard a second. I then saw a native make a jump and run up the hill. When I got up they were moving the dead body in to a hut.

I looked at the body and saw wounds.

There was not time to load a gun between the two shots.

The deceased was quite dead when I got there. I did not know the native who was killed.

George Crocker Policeman. I took the Prisoner into custody within 3 days.

Dr Fitzgerald recalled and cross examined by Mr Ross.

The deceased had many wounds. I cannot say what wounds produced death without post mortem examination.

The wound in the thigh would not probably have produced death.

I cannot say whether the wounds in the shoulder blades produced death.

I found a wound between the ribs which probably may have produced death - or the wounds under the shoulder blades.

The natives would not allow a post mortem examination.

Mr Ross objected that the Atty General had made out no case to go to the Jury. He had proved the shots and that Parata Wanga fell – he did not ask the witnesses any question as to wounds nor did he prove that the deceased was the man on whose body the subsequent inquest was held.

Held that the witnesses said one Parata Wanga was shot at and fell and as Dr Fitzgerald swore one Parata Wanga had certain wounds on his body a sufficient chain of identity had been made out to go to the jury.

Mr Ross also objected that the causes of the wounds were not stated with sufficient certainty.

Overruled

Mr Wakefield addressed the Jury for the Crown.

Mr Ross addressed the Jury for the prisoner.

Charge: The points to put to the jury as to the two shots (the Atty General having been compelled to elect) –

1. The jury to find the prisoner died of at least one wound produced by the first shot, or they must acquit,
2. if they think the second shot only produced the mortal wound – they must acquit.
3. If they think death was the result of both shots together if ____ that_____ the first ____ I have ____ and you must acquit.
4. If you think that he received one mortal wound – the second shot and one also at the first you may convict.
5. If on the whole they doubt whether the first shot produced a mortal wound – the prisoner must have the benefit of that doubt.

Verdict: Not Guilty **[5]**

[1] The entry in Chapman J's notebook is headed "Monday 3 1849". However, the *New Zealand Spectator and Cook's Strait Guardian* dates the trial to Saturday 1 September 1849: 5 September 1849, Vol V, Issue 427, p 2. The same date is given by the *Wellington Independent* in both its reports: Saturday 8 September 1849, p 3; Wednesday 12 September 1849, p 2.

[2] A mixed jury – literally 'half-tongue'. The jury was first used in medieval England, where Jews were afforded by Charter the right to a half-jewish jury when suing Christians (1190, affirmed 1201). After the banishment of the jews in 1290 the practice was afforded to foreign merchants: See 27 Edw III, c. 8 (1354); 28 Edw III, c. 13 (1354) 8 Henry IV, c. 27 (1429). See Marianne Constable *The Law of the Other* (1994); Deborah Ramirez "The Mixed Jury and the Ancient Custom of Trial by Jury de Medietate Linguae: A History and a Proposal for Change (1994) 78 BUL Rev 777. Chapman J dismisses a request for a common law jury de medietate linguae on the basis that it only applies to juries of mixed subjects and foreigners

and that under the *Treaty of Waitangi* Maori are to be considered as British subjects. A note of interest is that mixed Native American-Colonist juries were ocassionally used in the American Colonies: see Yasuhide Kawashima *Puritan Justice and the Indian* (1986); colonies, presumably on the basis that they were not 'subjects' but considered aliens: *Notes on the Indian Wars in New England*, Vol XV *N.E. Hist. & Geneological Reg.* (Samuel G Drake, Boston, 1861, in Ramierez "The Mixed Jury", 790-791.

[3] *Juries Ordinance* 1843.

[4] The Coroner's Inquest took place on 20 and 21 March 1843, and is reported in the *New Zealand Colonist and Port Nicholson Advertiser* I/68, 24 March 1843 [query that this was actually 23 March], p2. John Fitzgerald was the Coroner and there was a "respectable jury" present. A number more witnesses were sworn than appeared at trial. The evidence is similar to that later given at trial. From the evidence of E Kiri we learn that Ratea's wife, Neke, had apparently been cohabiting with Parata-Wanga. Ratea took off towards the Hills. The jury returned a verdict of wilful murder and "the extenuating circumstances of the case were left to a higher court for discussion". The *New Zealand Colonist and Port Nicholson Advertiser* 1/67, 20 March 1843 [actually March 21], had earlier reported that "[i]t appears that the murdered man, whose name was E wanga, had about four months since, taken away the wife of Kai Karoro, and had, since that time, kept out of the way, and had concealed himself so thoroughly that the husband, although constantly on the lookout, had never been able to meet with him": p2. The matter, and the Coroner's Inquest, was also reported in substantially similar terms in the *New Zealand Gazette and Wellington Spectator* III/230, Wed March 22 1843, p3.

[5] The *New Zealand Spectator and Cook's Strait Guardian* reported that Ratea had been acquited on a technicality: "[o]wing, however, to the glorious uncertainty of the law, Ratea is acquitted though a flaw in the indictments, through a legal technicality." *New Zealand Spectator and Cook's Strait Guardian*, 5 September 1849, Vol V, Issue 427, p 2. The newspaper noted that not all the facts of the case had been brought out at trial. Ratea had apparently killed Parata Wanga as utu for the seduction of Ratea's wife. However, the paper further noted that the "skilful counsel "must have considered it his duty to rest his case on the strong legal grounds which ensured his client's acquittal, and not to weaken his defence in a legal point of view, by admitting his client's guilt, and proving in extenuation the provocation under which he had acted." *New Zealand Spectator and Cook's Strait Guardian*, 5 September 1849, Vol V, Issue 427, p 2.

For further details please contact Shaunnagh Dorsett.