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Joel Butler

Bond University, Joel_Butler@bond.edu.au

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Australia's First Criminal Trial

Joel Butler
Senior Teaching Fellow
Faculty of Law
Bond University

Setting the scene – the first Australian criminal court

When the motley crew that comprised the members of the First Fleet stepped ashore in their new colony in New South Wales, they brought with them a good portion of the laws of England – and it was not too long before the new colonists were called upon to put those laws into action.

The Act of Parliament that established the first criminal court in New South Wales was *27 Geo. III c. ii*. (The title of older Acts is based upon the year of the reign of the particular monarch in which it was passed – so this was the second chapter of the law passed by the Parliament in the 27th year of the reign of King George III). This Act established a 'colony and civil government' in New South Wales, and authorised the King to establish a court of criminal jurisdiction.

The Act stated, in the legal language of the time:

And whereas it may be found necessary that a colony and civil government should be established in the Place to which such convicts shall be transported...and that a Court of Criminal jurisdiction should also be established within such place as aforesaid, with authority to proceed in a more summary way than is used within this realm, according to the known and established laws thereof...That his Majesty may, by his Commission under the great seal, authorise the person to be appointed Governor, or the Lieutenant Governor in the absence of the Governor, of such place, as aforesaid, to convene from time-to-time as occasion may require, a Court of Judicature for the trial and punishment of all such outrages and misbehaviours as, if committed within this realm, would be deemed and taken according to the laws of this realm, to be treason, or misprison thereof, Felony or Misdemeanour...²

A 'Judge Advocate', who was a military officer, presided over the criminal court, and a group of six other military officers (appointed by the Governor) effectively acted as a jury. This was the structure of the criminal court that would exist for the first years of the fledgling colony. Proper juries did not exist in New South Wales for many years to come, primarily because there were not enough free citizens to serve on them. Most of the inhabitants of the colony were of course convicts, who were unable to serve as jurors.

The landing at Sydney Cove and what happened afterwards...

After Governor Phillip and the marines had landed at Sydney Cove, the first male convicts were also landed, and set about clearing the ground to pitch tents and build huts.

Soon after, on 6 February 1788, the women convicts began to come onshore. What happened next was described by Watkin Tench, a young officer who had travelled with the fleet, in a rather roundabout way:

While they were on board ship the two sexes had been kept most rigorously apart, but when landed their separation became impracticable, and would have been, perhaps, wrong. Licentiousness was the unavoidable consequence, and their old habits of depravity were beginning to recur. What was to be attempted? To prevent their intercourse was impossible, and to palliate its evils only remained. Marriage was recommended, and such advantages held out to those who aimed at reformation as have greatly contributed to the tranquillity of the settlement.³

Though many of the happy couples may have later settled down to the quiet pleasures of married life, the first night the women came ashore was certainly a cause for celebration. One of those celebrating was Samuel Barsby, who was originally tried at Exeter in March 1786 for having stolen two pieces of cloth of 50 yards in length, worth about 40 shillings. He had been sentenced to hang, but his sentence was commuted to transportation for seven years.⁴ Barsby's drunken celebration continued for two days. It was this celebration and drunkenness that led to Mr Barsby becoming the first defendant in the new colony of New South Wales.

The charges against Barsby⁵ were that he personally abused Benjamin Cook, Drum Major to the detachment of marines, and

...striking John West, a drummer in the said detachment, with a cooper's adze, thereby putting him in fear of his life, and, for repeatedly abusing the sentinel, and other soldiers of the guard, while in custody, on the afternoon of Friday the 8th instant.⁶

The Trial

A marine (Clark) gave evidence before the Court that he had seen Barsby and the Drum Major arguing with 'high words' passing between them. Apparently Barsby had wanted to fight with another convict, but on being stopped by Cook, had struck him. When Cook ordered him to be taken to the guard he was 'very refractory' so had to be restrained and removed by a detachment of the guard. Barsby's behaviour did not improve while in custody, being described as very loud and abusive, referring to the guard and sentinels as 'bloody bougres' [sic].⁷ The witness stated that Barsby appeared to be 'in liquor' but he had no idea where Barsby might have got it.

Drum Major Cook also gave evidence, saying that he had come across two convicts 'wrangling' with each other, and told them to get back to work, Barsby had asked Cook what business he had with ordering him about, and told Cook to mind his own business. When Barsby appeared to be about to hit Cook with his adze Cook struck him with his cane. Barsby resisted further when other officers and the drummer came to Cook's aid, with Barsby hitting the drummer. A number of other witnesses also gave evidence that corroborated that of Cook and Clark.

Barsby then gave his evidence. According to him, he had been working when he broke his axe and, coming to the other side of the camp to get it fixed, was approached by a group of seamen looking for the women's camp. After obliging them with directions they provided Barsby with $\frac{3}{4}$

of a bottle of rum, which Barsby promptly drank. Still looking for someone to fix his axe, he came across the other convict, Ames, ‘with whom he had some general animosities’. The liquor took effect and the rest is history. The minute of the Court record notes that Barsby could not recollect ever having seen Cook or the drummer or any of them before as ‘he was in such a state of insensibility.’

Barsby said he did not remember anything else. He apologised profusely for his behaviour. He sought the mercy of the Court and promised to behave in the future. Unfortunately for Barsby, the Court found him guilty and ordered him to receive 150 lashes ‘on his bare back, with a cat of nine tails.’⁸

In relating the case, Captain Tench noted that Barsby’s punishment was significantly less than the sentence that a soldier would have received in similar circumstances.⁹ Barsby was not the only unfortunate convicted that day: Tench also notes that during the same day’s proceeding two others were convicted.¹⁰ One (their crime is not recorded by Tench) was sentenced to 50 lashes, but pardoned by the Governor. Another, for the crime of stealing a biscuit from another convict, was sentenced to be sent to a small island in Sydney harbour with only bread and water for a week, earning the island the name of ‘Pinchgut’, but now known as Fort Dennison.¹¹

So finished the first day’s operation of the criminal court in New South Wales: a Court that was kept busy in the first years of the colony with very similar proceedings. It could even be said that the criminal jurisdiction in New South Wales has not changed much— with assault when intoxicated a regular occurrence still testing the patience of judges and magistrates across the State now, more than 200 years later.

References

- ¹ The long title of the Act is ‘An Act for the effectual transportation of felons and other offenders and to authorise the removal of prisoners in certain cases, and for other purposes therein mentioned.’
- ² *27 Geo. III c. 2, sec. 1.*
- ³ Watkin Tench, ‘A Narrative of the Expedition to Botany Bay’, reproduced in Tim Flannery, *1788* (1996) 45.
- ⁴ ‘Samuel Barsby’, in John Cobley, *Crimes of the First Fleet Convicts* (1970) 18.
- ⁵ The details of the case are taken from *R v. Barsby* [1788] NSWKR 1, in Bruce Kercher and Brent Salter, *The Kercher Reports: Decisions of the New South Wales Superior Courts, 1788 to 1827*, (2009), 1-7.
- ⁶ *Ibid.*, 1-2.
- ⁷ *Ibid.*, 6.
- ⁸ *Ibid.*, 7.
- ⁹ Tench, n. 3, 49.
- ¹⁰ *Ibid.*
- ¹¹ Although this may seem a little extreme by today’s standards, it needs to be remembered that food in the early colony was a very precious resource. There would be times, in the first two years of the colony’s existence where it was literally on the verge of starvation. Despite the penalties imposed for stealing food – even when a sentence of death was imposed – the thefts continued.

Further research

What eventually happened to Captain Tench in the colony of NSW?

Many notable figures in crime and punishment in NSW were not judges but priests. Investigate Samuel Marsden, also known as ‘The Flogging Parson’.

Was the death penalty used in the Colony of NSW prior to 1800?

