

The Big Hill murder and the colonial death penalty

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Abstract

Capital punishment in colonial Victoria had a secretive, penultimate stage that has received comparatively little attention from historians. After a judge sentenced a prisoner to death, the governor of Victoria, advised by government ministers assembled as the Executive Council, decided whether, and when, the sentence would be carried out. The governor had the power to commute the sentence to a term of imprisonment, or even to grant a free pardon and release the prisoner. In reaching their decision, the governor and ministers had few constraints. They followed whatever procedure they chose, and relied on whatever grounds seemed appropriate to them. Their proceedings were confidential, ministers being bound by an oath of secrecy.

The minutes of the Executive Council are a source for the exercise of the prerogative of mercy that has had little systematic use by historians. In some cases, particularly in the 1850s and 1860s, the minutes record revealing details of confidential debates about whether to commute particular death sentences.

This article is a case study of the way the decision to commute a death sentence was reached. The Big Hill murder attracted intense public interest in 1860 and generated extensive records. These document the processes by which the governor and ministers decided to exercise the prerogative of mercy and commute the death sentence of a convicted murderer; they also record the prisoner's later attempts to clear his name. The case shows how commutation of a death sentence was influenced by official perceptions of the degree of certainty with which guilt was established, and illustrates the processes that authorities used to reach, and reassess, that conclusion.

Capital punishment in colonial Victoria had a secretive, penultimate stage that has received comparatively little attention from historians. After a judge sentenced a prisoner to death, the governor of Victoria, advised by government ministers assembled as the Executive Council, decided whether, and when, the sentence would be carried out. Their meetings were separate from meetings of cabinet. Exercising the royal prerogative of mercy, the governor had the power to commute the sentence to a term of imprisonment, or even to grant a free pardon and release the prisoner. In reaching their decision, the governor and ministers had few constraints. Aside from receiving a report from the judge who presided at the prisoner's trial, they followed whatever procedure they chose and relied on whatever grounds seemed appropriate to them. Their proceedings were confidential, ministers being bound by an oath of secrecy; however, the minutes of Executive Council meetings, particularly in the 1850s and 1860s, record revealing details of some of their debates about whether to commute particular death sentences.

Recent studies that have considered the prerogative of mercy in colonial New South Wales, Queensland and Tasmania have investigated the flexible nature of the process that was followed in administering the prerogative and the patterns that emerged in its outcomes, such as lower rates of execution of women prisoners.[1] A South Australian study highlights the severity with which former convicts were punished.[2] Other authors discuss the prerogative as part of legal and constitutional history, outlining controversies concerning the governor's role in its administration.[3] The main historical study of the prerogative in Victoria is a statistical analysis that considers the death penalty in the context of modern debates about sentencing policy. It shows that the proportion of prisoners executed declined steadily during the period of capital punishment, and points out the failings of the process followed in administering the prerogative of mercy when measured against standards of due process.[4]

The Big Hill murder attracted intense public interest in 1860 and generated extensive records, now at Public Record Office Victoria, that document the process by which the governor and ministers decided to exercise the prerogative of mercy and commute the death sentence of the man convicted of the murder, George Nial. The paper trail does not end with his imprisonment. Commutation of his death sentence prolonged the generation of official records, as Nial protested his innocence and tried from prison to have his case reviewed. By contrast, a hanging usually terminated official interest in a capital case.

The Big Hill murder

In 1860, work was under way to link Melbourne to Sandhurst (as Bendigo was then called) by railway. The Sandhurst line was both a construction site and a temporary home for the hundreds of workers building the track, many of whom lived in tents and huts nearby. In February 1860, one such worker was William Bronson, a timekeeper, whose task was to tabulate the number of workers building the track near Big Hill, not far from Sandhurst. He was about 27 years old and had been married to his wife Jane for only six months.

On the night of 21 February, Jane and William were in their tent when they heard a noise outside. William went to investigate. Jane immediately heard a gunshot. She rushed out and found, to her horror, that her husband had been shot and killed. She stated: 'I ... looked about to see if I could see anybody. There was nobody in view ... I then raised a fearful cry of murder, over and over again, no one came to me.' [5] The murderer had escaped, leaving behind no traces other than some fragments of paper wadding that were found near and underneath Bronson's body, evidently fired from the gun that killed him. Rumours that Jane Bronson was the wife of another man led the police to arrest her on suspicion of the murder. The rumours soon proved to be false, and Jane was released with an apology from the coroner, small consolation for what she had undergone. [6]

The police also arrested George William Nial, a 30-year-old Irishman who had served in the British army during the Crimean War before migrating to Victoria. He was working for the railway builders as a carter and lived about 9 kilometres from the Bronsons' tent. [7] Nial had fallen out with Bronson, who had wanted his job as timekeeper. When the police asked Nial about Bronson, his answers were vague and contradictory. He stated that he had been out shooting birds at the time of the murder. John McArthur, who lived between Nial's tent and the Bronsons', testified that he had been approached by a bearded man

with an Irish accent who asked for a drink of water on the night of the murder. He picked Nial out of a police line-up as a man resembling the one who had approached him, but he could not swear that Nial was the man. [8]

Other than this inconclusive evidence, there was nothing to link Nial to the crime. The police were about to release him when they took the precaution of unloading two revolvers they had found among the eight firearms in Nial's tent. Police Sergeant James Babington testified that the wadding from the revolvers consisted of fragments of newspaper. After days spent piecing the fragments together and searching newspaper archives, Babington and his colleagues found that the wadding came from the same newspaper articles as the fragments of paper found at the scene of the crime. What was more, a fragment of paper from one of Nial's revolvers joined up exactly with a piece of gun-wadding found under Bronson's body by the surgeon who had examined the corpse at the scene. [9]

Nial was rearrested and put on trial at Sandhurst for murder. As one of the detectives observed, the paper wadding was 'the strongest portion of the evidence' against him. [10] To rely on technical evidence of this kind in 1860 was unusual, but it was not unique. The standard English legal text on circumstantial evidence gave several examples in which the matching up of torn paper provided crucial evidence. [11] Some of these examples were cited by the judge at Nial's first trial. Also, as Judith Flanders has observed, 'identification of a murderer by gun-wadding had a long pedigree in literature'. [12] The solution of a murder by matching up fragments of paper wadding had featured in novels by Elizabeth Gaskell (Mary Barton, 1848) and Charles Dickens (Bleak House, 1852–1853).

At Nial's first trial, the jury failed to agree on a verdict after one of its members 'stated that he could not "conscientiously convict, as it was all supposition against the prisoner, as given by his Honor and the crown lawyer", but that he (the juryman) "supposed the prisoner was guilty, but could not swear to it"'. [13] At a second trial, the jury found Nial guilty but recommended mercy 'on the ground of the Evidence being Circumstantial'. However, the jury added that: 'In our own consciences, we feel him Guilty.' [14] Nial received the mandatory death sentence.

Before Governor Sir Henry Barkly met with the Executive Council to consider Nial's case, the doubts surrounding his conviction grew. On 13 August 1860, two days after Nial was convicted, a Sandhurst baker named George Jackson signed a statement contradicting the police evidence about the newspaper fragments. He stated that had helped Babington take the wadding out of Nial's guns three or four days after the murder and that the wadding was plain paper, not the newspaper described by the police. Jackson also claimed that Babington had boasted about the money he could get 'if he "could make a good job of it"'.^[15] Babington and two other police officers did indeed later share a government reward of £100 for Nial's apprehension, although (as the police pointed out) no reward had yet been offered when Jackson said he saw Babington.^[16] William Wood, Jackson's employee, signed a statement relating a conversation he had had with Jackson in which Jackson described meeting Babington and seeing the plain wadding.^[17]

When, on 3 September, the Executive Council considered Nial's case, Attorney-General John Dennistoun Wood brought the newspaper fragments to the meeting. Members examined them for themselves, although without the presence of any of the witnesses who could identify the fragments and say where they were found. The council's minutes recorded that the match between the pieces of newspaper was 'so conclusively ascertained, as to leave no doubt on [sic] the minds of His Excellency & the Council of this material link in the chain of circumstantial evidence, having been fully established'.^[18] The council also considered George Jackson's statutory declaration, along with police reports questioning details in Jackson's statement, and letters from Edward Hunt, the surgeon who examined the body, ruling out the possibility that the newspaper pieces he found had been tampered with.^[19]

In reaching their decision, members of the Executive Council had the assistance of the judge who presided at Nial's trial, acting Supreme Court judge Robert Pohlman. In accordance with British government instructions to colonial governors, the trial judge in a capital case reported to the governor before a decision was made to carry out or commute the sentence.^[20] Pohlman attended the Executive Council when it first considered Nial's case. He commented 'at great length' on the evidence and concluded that 'he thought the prisoner was guilty, but on general principles had considerable doubt about expressing his opinion as to whether the recommendation of the Jury should or should not be acquiesced in by the Executive'.^[21] The minutes of the meeting did not explain Pohlman's doubts about

endorsing or rejecting the jury's recommendation; he may have believed that it was inconsistent with judicial independence for him to advise the governor how to exercise his power to commute a death sentence, as distinct from providing information about the case. The roles of governors and judges in capital cases became controversial in the 1870s and 1880s, with the result that the British instructions to Australian governors were changed.^[22]

Persuaded by the evidence of the paper fragments, the Executive Council unanimously advised Barkly that Nial's death sentence should be carried out. Barkly agreed. On 3 September, he signed Nial's death warrant. It still survives, directing that the sentence of death 'shall be carried into execution' by the sheriff (the official responsible for carrying out the orders of the Supreme Court) a week later (see Figure 1).^[23]

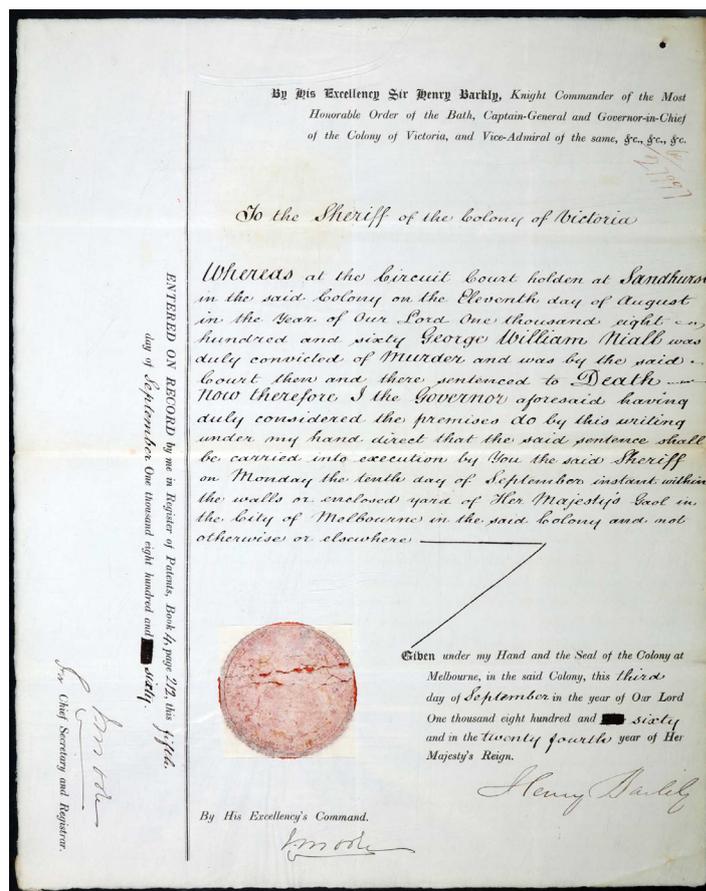


Figure 1: Nial's death warrant, addressed to the sheriff of the colony of Victoria, 3 September 1860, VPRS 1189/P0, Unit 702, Item 60/7997.

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The details of Jackson's statement had been widely reported, and the subsequent confirmation of Nial's death sentence led to protests in Sandhurst. Regarding the case against Nial, the *Bendigo Advertiser* observed that 'the taking away of a man's life on such evidence as this, is no better than murder'.^[24] On 7 September, Jackson appeared at a public meeting said to have been attended by 1,500 people, at which he reaffirmed his statement, 'adding amidst extraordinary sensation that he had not been communicated with by Government'.^[25]

Civil rights and the due administration of justice were taken up by other speakers, indignant that the state was about to take the life of a man seemingly without proper investigation of new evidence. Wesleyan clergyman James Bickford told the meeting: 'Let them send down a monster memorial to show that as subjects of the British Empire in this country, they protested against such an infringement of their rights and liberties. (Applause, and a voice, "No Lynch law in this country.")'.^[26] The meeting adopted a resolution—forwarded to the premier in a telegram—expressing 'utmost astonishment' that Nial's execution had been ordered without what it called the 'necessary & promised enquiry'.^[27] A deputation left for Melbourne to see the governor, and a petition calling for an investigation of Jackson's statement was signed by 15 members of the juries at Nial's two trials, as well as hundreds of other citizens.^[28]

In response, Governor Barkly ordered a reprieve for Nial to allow further investigation of Jackson's statement. The Executive Council could have summoned Jackson and heard from him in person. In two cases in 1853, the council examined a number of witnesses in person, to establish whether prisoners under sentence of death were insane.^[29] However, these time-consuming proceedings had fallen into disuse. Barkly 'was adverse to making use of the Executive Council for such investigation' and, on 10 September, he and his ministers decided 'that the investigation into Jackson's statement should be made by the Law Officers, the Government Shorthand writer being present and that Prisoner's counsel should be allowed to watch the enquiry and to suggest questions'.^[30]

It was not unusual for the law officers (the attorney-general and the solicitor-general) to investigate a capital case for the Executive Council; however, to keep a shorthand record of the investigation and allow the prisoner's barrister to participate, even if only by suggesting questions, was exceptional. Moreover, reporters were allowed to watch proceedings, and the transcript of the investigation was released to the newspapers, probably with a view to placating public concern about Nial's case.

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The inquiry began on 12 September. The attorney-general and the solicitor-general were present, along with Chief Commissioner of Police Frederick Standish, Nial's government-appointed barrister, Joseph Helm, and the member for Sandhurst in the Legislative Assembly, Robert Howard, who was part of the delegation sent from Sandhurst to Melbourne to seek an inquiry into Jackson's statement.^[31]

Jackson confirmed and amplified his statement, while Hunt and Babington reaffirmed the evidence they had given in court, Babington adding that Jackson had called at his quarters while he was sorting (but not extracting) the wadding from Nial's revolvers. Concerning the place where the guns were first unloaded, the nature of the wadding, and the date and substance of Babington's conversation with Jackson, their testimony was flatly contradictory.

William Wood again recounted his conversation with Jackson, although he now said that it had occurred closer to the date of the murder. An auctioneer, Joseph Aarons, called Jackson's honesty into question by testifying that Jackson had tried to use a forged receipt to reduce a debt he owed. Jackson denied the allegation.

There were other witnesses who had not yet been questioned, the most important being Detective Simon O'Neil. He testified at Nial's committal hearing that he saw Babington unload Nial's guns and that the wadding consisted of pieces of printed paper; as to both the place and the date, his evidence was consistent with that of Babington. Illness kept O'Neil from attending the inquiry until it resumed in October, when he confirmed his earlier evidence.

Barkly wanted a decision. 'Long delays in carrying out Capital Punishment are very undesirable', he wrote.^[32] On 14 September, the Executive Council considered Nial's case again. No written report summarised the findings of the inquiry, although the law officers informed the Executive Council of their (unrecorded) impressions of the evidence. The transcript of the inquiry was available for ministers to read. The council also had before it a petition from eight of the 12 members of the jury who had found Nial guilty, saying that they would not have done so if they had known about Jackson's statement. Five members of the deadlocked jury at Nial's first trial also signed.^[33]

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Premier William Nicholson prejudged the outcome of the inquiry by telling parliament on 7 September that the court and the executive would prove to have been right.[34] His comment is a sign of the conservative bias inherent in the administration of the prerogative of mercy, in the sense that governors and ministers were more likely to affirm than commute sentences of death, although, in Nicholson's favour, it might be said that he spoke only after considering the evidence given at the trial and Jackson's written statement. By contrast, the attorney-general took nothing for granted, as is shown by his detailed instructions for investigations into the case.

The Executive Council decided that the evidence was 'not sufficient for them to recommend that the capital sentence should be carried into execution'.[35] Barkly agreed. Nial's sentence was commuted to life in prison with hard labour, the first three years in irons. Nial later wrote that this was 'a sentence infinitely worse than the first'.[36] He was not the only prisoner to say that a life sentence was worse than hanging.[37]

Most details of the murder were little debated after Nial was found guilty. Public comment on his fate centred on Jackson's statement and the government's response, rather than the events of the night of Bronson's death or Nial's background and movements. Journalists and correspondents debated the weight given to circumstantial evidence, contrasted with the testimony of eyewitnesses. The *Bendigo Advertiser* and the *Melbourne Age* sparred over the details of the evidence concerning the newspaper fragments. According to the *Age*, Jackson's statement could 'only be received with caution and suspicion'—it regarded the evidence on both sides as 'most singularly and lamentably unsatisfactory'.[38] The *Advertiser* retorted that it was enough that Jackson's statement threw more doubt on the evidence against Nial, although—like the jury—it did not argue that Nial was innocent: 'Public opinion almost immediately recognised the inconclusive nature of the evidence, and although there was a general opinion that Nial was the murderer, there was also a general opinion that the evidence had failed to show this.'[39] The handling of the case was regarded as yet another blunder by the Nicholson ministry, of which the *Advertiser* was a long-standing critic: 'the very soul and essence of good Government is disappearing, and the people have to govern themselves'.[40]

The theme of this and much other comment was the doubt created by Jackson's evidence, rather than an alternative account of what had happened to the newspaper fragments or of how Bronson met his death. Such doubt was, after all, sufficient to undermine the jury's verdict.

If an explanation for the undisputed match between the various paper fragments was implied, it was that Babington had taken some of the fragments found at the scene and falsely presented them as wadding from Nial's revolvers. Newspapers criticised the carelessness of the police in not securing the guns and paper fragments in such a way as to exclude the possibility of tampering. However, if the evidence of Dr Hunt and Detective O'Neil was correct, Babington never had sole custody of both the guns and the fragments before the various pieces of paper were matched up at Nial's committal hearing, and had no opportunity to take the pieces found at the scene and link them with the guns.

The *Argus* highlighted the apparent contradiction involved in imposing a life sentence on the grounds that the evidence against the prisoner was doubtful: 'The commutation of Nial's punishment is a palpable absurdity. It is acknowledging that, in the opinion of His Excellency's legal advisors, the man might have been acquitted, and this opinion procures him the boon of a life-long imprisonment, instead of death.'[41] The *Argus* argued that Nial should have been granted a new trial; however, that was beyond the governor's powers.

Yet, the Executive Council did not, in fact, conclude that Nial might have been acquitted. They acted on an unstated principle that evidence of guilt could be clear enough to support imprisonment and yet not sufficient for execution. Nial's jurors made the same assumption when they found him guilty but recommended mercy on the grounds that the evidence was circumstantial. This recommendation, too, was criticised. The *Bendigo Advertiser* argued that doubts about the evidence should have influenced the jury's verdict rather than the sentence.[42] For the jurors, as for the Executive Council, if there was conceivable doubt about guilt, the punishment should be imprisonment instead of death.

Imprisonment and release

Nial began his life sentence at Pentridge Prison in September 1860. Prisoners spent the first part of their sentences under the 'separate system', in silence and isolation, forced to wear hoods whenever they left their cells.[43] Nial kept his spirits up, at least for some of the time; he was reprimanded for whistling and dancing. Such behaviour broke prison rules, as did singing, talking and using his own name instead of his prison number (see Figure 2).[44]

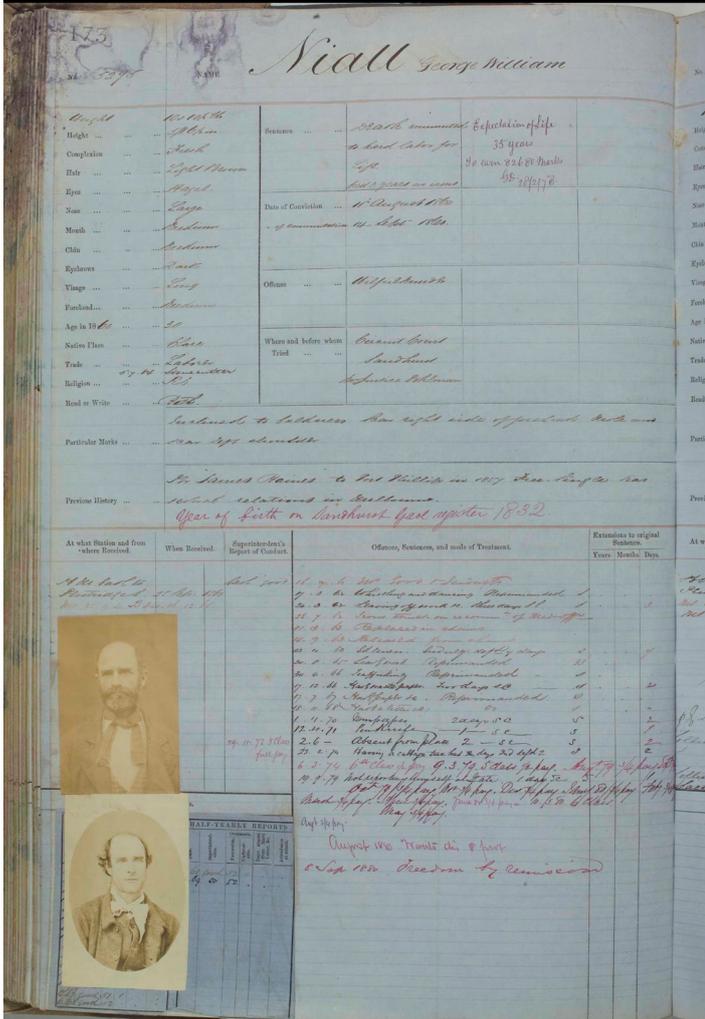


Figure 2: George William Niall's prison register entry, VPRS 515/P0, Unit 8, No 5275 GW Niall.

Public debate about the Big Hill murder largely ceased when Nial's sentence was commuted. However, in private, petitions written by Nial, or on his behalf, called for a review of his case. Their contents suggest that he wrote without legal advice and, at least initially, without access to newspapers or other records. Two Irish Roman Catholic laymen, Hugh O'Loughlen of Smythesdale, near Ballarat, and James B Hickie of St Kilda, signed petitions on his behalf, indicating that Nial, who was said to have a sister in the colony, drew on networks of Irish migrants in Victoria.

A letter from Nial to Henry England, Roman Catholic chaplain at Pentridge, began: 'It is five years since I was convicted of a crime I never committed, and believe my treatment to have no parallel in the history of British jurisprudence.'[45] In Nial's accounts of the Executive

Council inquiry, Jackson conclusively disproved the evidence against him in the presence of the governor or a bench of judges, and a member of the jury declared that Nial would not have been found guilty if Jackson's evidence had been presented. Nial claimed that the evidence of the newspaper fragments was unreliable, even absurd: 'That bits of newspaper should be taken as evidence sufficient to take away a man's life in a British Court of Justice!!!'[46] Nial sought a new trial, a new verdict from the jury taking into account Jackson's evidence, a reduction of sentence, or freedom.

In 1871, Nial drew together his grounds for review in a 19-page statement sent to the premier.[47] The dates and details cited there suggest that he now had access to some newspaper reports of his case. As appeals based on Jackson's statement had had no effect, he ranged more widely, attempting to answer the prosecution case point by point. However, without new evidence, he had little chance of persuading the authorities to take action.

Nial's widowed mother, Johanna Nihill, petitioned both the governor of Victoria and the queen on her son's behalf. [48] Written from Ireland, her petitions used the same grounds, and some of the same language, as petitions written for him in Victoria, with the addition of an account of his service in the British army. To bolster Nial's case, she asked former governor Sir Henry Barkly for a certificate endorsing her summary of the events leading to the commutation of Nial's sentence. Barkly replied that he remembered the circumstances of the case, 'which though by no means establishing the Prisoner's innocence were sufficient to raise doubts as to some portion of the evidence given at the Trial'. He referred her petition to the current governor of Victoria. [49] Nihill's petition to the queen also reached the governor in Melbourne, referred by the secretary of state for the colonies with a request for a report. The result was an examination of the case by Archibald Michie, minister of justice since 1863.

In a memorandum for the governor, Michie emphasised, indeed exaggerated, the strength of the evidence against Nial:

The prosecution was entirely supported by circumstantial evidence, but of so conclusive a character, and so entirely excluding any reasonable theory of the deceased having met his death by any other means, than at the hands of the Prisoner Niall [sic], that no ground can be suggested for questioning the propriety of the Verdict of Guilty, at which the Jury arrived.[50]

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Michie stated the murderer had been described as resembling Nial, but he was mistaken; there was no description of the murderer, only of the man who asked for a drink of water between the scene of the crime and Nial's tent. However, his summary of the evidence concerning the pieces of wadding was accurate.

Despite weaknesses in details, Nial's petitions had one fundamental strength. The inquiry into Jackson's statement had resulted in the commutation of Nial's death sentence. As Nial himself wrote, in an awkward but pointed reference to the reason for his escape from hanging: 'Doubt, the ground of the reprieve, proved.'^[51] This outcome implied that Jackson's evidence had some weight, and that the case against Nial was not as strong as it had seemed immediately after his trial. If the wadding evidence had been undermined, what basis remained for his conviction? The other evidence against Nial was hardly enough to support a guilty verdict. Michie dealt with this dilemma by disagreeing with the decision of the Executive Council, in effect rejecting Jackson's evidence outright. According to him, the death sentence should have been carried out.^[52]

Michie's report became the reference point for official responses to petitions on Nial's behalf. Attorney-General George Higinbotham responded to Barkly's letter with a copy of Michie's report, adding:

It is possible that the prisoner may be innocent, but it is only barely possible. And, seeing that the Executive has more than once done all that it could to sift the evidence on which the prisoner was convicted, & that no new evidence is stated to exist which might establish his innocence, the Attorney General submits that the sentence of the law should be carried into effect.^[53]

The secretary of state was also sent a copy of Michie's report. It convinced one of the Colonial Office staff who reviewed the case in London that 'not only was the man most properly convicted, but that he ought to have been hung'.^[54] All of Nial's petitions were rejected.

As a prisoner serving a life sentence, Nial could hope for release only through a fresh decision on clemency by the governor. Life prisoners, imprisoned with little hope of release, attracted the attention of maverick MP Dr LL Smith, who took up a recommendation by a royal commission that the government should consider their situation. In 1877, there were 25 prisoners serving life sentences. All had been sentenced to death and received commutations. Smith lobbied in parliament for something to be done to provide for their release. Urged on by his repeated questioning, the government responded at

the end of 1877. A death sentence commuted to life imprisonment was now to be for a term equivalent to the life expectancy of the prisoner at the time of conviction, up to a maximum of 20 years, with reductions for good behaviour.^[55]

Nial's life expectancy was judged to be 35 years from conviction, and he served the regulation 20 years. On his release in 1880 he wrote to the premier, Graham Berry. The sense of outrage and the heightened rhetoric of his earlier letters had faded. He now interested himself in prison reform and the policies of the inspector-general of penal establishments, George Duncan:

I have been discharged from the penal department Pentridge after a service of twenty years. Mine was considered the doubtful case amongst the life prisoners. I am sorry to trespass on your time and patience, but I must venture to send you my heartfelt thanks together with those of the other prisoners whose life sentences have been commuted through your kindness and liberality in the face of much difficulty. Some in the conservative camp have been so cruel as to assert that it would make very little difference if we were scuttled in Hobson's Bay. I admit the truth of this, but it was a sign that there was no mercy to be expected from that quarter. Heaven grant that those who have shown such cruelty have themselves a clean default sheet.

If you wish I shall send you an account of the moral development of prisoners in the Department, and also its economical phase which may be useful to a statesman. There are great abuses going on which it is not possible for the public to know except from the pen of an old resident. Mr Duncan is doing no more than throwing sand in the eyes of the public, when he says that the Department is self-supporting.

I left the Department on the 8th and I have been rather sickly ever since from the greatness of the change, but I am recovering fast. According to the rules of the Department I had earned £8, but Mr Duncan had £2 stopped for giving me a suit of clothes. I have great doubts as to whether the order from you to give the three first liberated life prisoners, namely, Leonard, Smith, and Jordan, has been countermanded for me [sic].

With the deepest respect,

I have the honor to be

Sir

your most obedient and humble servant

George Nial.^[56]

Berry sent no reply. With this last letter, Nial disappeared from the official record. Where he went and what he did are unknown.

James Babington remained in the police force until his death in 1881.[57] The later history of George Jackson was more eventful. He lived on in Sandhurst, where, in 1893, he gave evidence at an inquest into the sudden death of his wife, Jane, who died from the delayed effects of a blow to the head. Witnesses testified both to Jane's heavy drinking and to Jackson's aggravated violence towards her over a long period. Jackson's emphatic rejection of these accusations led the coroner to tell the jury, in unusually blunt terms, that he could not be believed as a witness: 'The evidence of Jackson, he pointed out, was entirely worthless. They could attach no importance to what Jackson had said because he had been guilty of the grossest perjury in endeavoring to shield himself'.[58] The jury returned an open verdict, unable to determine how the fatal blows or falls had been caused, but Jackson was charged with perjury. It emerged that he had urged his employees not to tell the truth about his violence, and dismissed one of them for testifying against him. Given the strength of the evidence against him, Jackson was fortunate to be acquitted on a legal technicality.

Conclusion

After a decision on a capital case had been reached, the Executive Council would occasionally note later information that confirmed their decision (or, exceptionally, information that led them to revisit a case and release a prisoner). In 1893, Nial's case was too far in the past for the council to notice the events following the death of Jackson's wife; however, had they shown an interest, they might have seen the coroner's assessment of Jackson's honesty as an indication that they had made the right decision.

In studying how the fate of condemned criminals was decided, historians have emphasised, in varying ways, the freewheeling nature of the process that led to commutation or execution, its outcomes influenced by conceptions of justice, moral judgements, cultural assumptions and policies of deterrence. In many cases, the governor and ministers weighed the gravity of the crime and the social utility of punishment, taking into account motive, premeditation, the backgrounds of perpetrators and victims, and the likely effects of their decisions.

Nial's case highlights a different aspect of the prerogative of mercy—the question of whether the prisoner was guilty and, if so, how clearly that guilt was established. The Executive Council concentrated, to the exclusion of most other questions, on whether the evidence against Nial was strong enough to support his conviction and the imposition of the death sentence.

The governor and ministers could form their own judgement on that question, independently of the jury's verdict. Influenced by public pressure, the unusual nature of the evidence and Governor Barkly's sense of appropriate procedure, in this case they ordered a public enquiry, conducted in the presence of Nial's barrister and reporters, in place of the usual confidential investigations into doubtful questions of fact. Nial's character, the events of the night of the murder and the deterrent purpose of capital punishment were pushed into the background by increasingly single-minded attention to the evidence of the paper fragments, on the part of both the authorities and the public.

Newspapers criticised the idea that Nial should be punished less severely if the jury or the Executive Council saw reason to doubt the evidence that he was guilty; however, that principle pervaded arguments that Nial should be spared from death, but not necessarily released from prison. Campaigning for Nial ceased when his death sentence was commuted. Public opinion seemed to be satisfied with the decision that he would be imprisoned rather than hanged, although his case was sometimes half remembered, with much confusion, as a miscarriage of justice.[59] It stands as an example of the way commutation of a death sentence was influenced by official perceptions of the degree of certainty with which guilt was established, and of the processes used by the authorities to reach, and reassess, their conclusions.

Endnotes

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- [5] PROV, VPRS 30/P0 Criminal Trial Briefs, Unit 137, 3-347-23, deposition of Jane Bronson, 25 February 1860.
- [6] 'The murder at the Big Hill', *Bendigo Advertiser*, 27 February 1860, p. 2.
- [7] The National Archives of the UK (TNA): CO 309/76, folio 559, petition of Johanna Nihill; PROV, VPRS 30/P0, Unit 137, 3-347-23, deposition of James Thorneloe Smith, 5 April 1860.
- [8] PROV, VPRS 30/P0, Unit 137, 3-347-23, depositions of James Babington and John McArthur, 9 March 1860, and George Nial to JT Smith (undated).
- [9] PROV, VPRS 30/P0, Unit 137, 3-347-23, deposition of James Babington, 5 April 1860; PROV, VPRS 266/P0 Inward Registered Correspondence, Unit 274, 74/6002, judge's notes of evidence, pp. 1–3, 9–10, 29–31.
- [10] PROV, VPRS 30/P0, Unit 137, 3-347-23, report from Detective Simon O'Neil to Superintendent Charles Nicolson, 14 July 1860.
- [11] William Wills, *An essay on the principles of circumstantial evidence*, illustrated by numerous cases, 3rd edn, Butterworth, London, 1850, pp. 97, 129–130, 139–141.
- [12] Judith Flanders, 'The hanky-panky way', *Times Literary Supplement*, 18 June 2010, p. 14.
- [13] 'Sandhurst Circuit Court', *Bendigo Advertiser*, 10 August 1860, p. 3.
- [14] PROV, VPRS 266/P0, Unit 274, 74/6002, judge's notes of evidence, p. 41. Jurors said later that only three of them recommended mercy: 'The Big Hill murder', *Bendigo Advertiser*, 14 August 1860, p. 2.
- [15] PROV, VPRS 266/P0, Unit 274, 74/6002, statutory declaration by George Jackson, 13 August 1860.
- [16] PROV, VPRS 937/P0 Inward Registered Correspondence, Unit 437, bundle 2, S3341, memorandum from Frederick Standish to Superintendent of Detectives, 15 March 1861.
- [17] PROV, VPRS 266/P0, Unit 274, 74/6002, statement by William H Wood, 13 August 1860.
- [18] PROV, VPRS 1080/P0, Unit 6, p. 50.
- [19] PROV, VPRS 266/P0, Unit 274, 74/6002, letters from Edward Hunt to Attorney-General, 30 August and 1 September 1860.
- [20] Victoria, 'Governor's Commission and Instructions', *Votes and Proceedings of the Legislative Council*, Government Printer, Melbourne, 1855–1856, no. C 4, p. 4.
- [21] PROV, VPRS 1080/P0, Unit 6, p. 50.
- [22] See Bennett, 'The royal prerogative of mercy', pp. 36–47.
- [23] PROV, VPRS 1189/P0 Inward Registered Correspondence I, Unit 702, 60/Q7997, death warrant, 3 September 1860.
- [24] 'The police and circumstantial evidence', *Bendigo Advertiser*, 17 August 1860, p. 2.
- [25] PROV, VPRS 1189/P0, Unit 702, 60/7997, telegram from JF Sullivan to Chief Secretary, 7 September 1860.
- [26] 'Public meeting in Nial's case', *Bendigo Advertiser*, 8 September 1860, p. 2.
- [27] Telegram from JF Sullivan to chief secretary, 7 September 1860.
- [28] PROV, VPRS 266/P0, Unit 274, 74/6002, petition from Sandhurst and district.

- [29] PROV, VPRS 1080/P0, Unit 1, pp. 238–240, 282. The prisoners were George Whitfield Pinkerton and John Goldman.
- [30] PROV, VPRS 1080/P0, Unit 6, p. 60.
- [31] ‘The case of Nial, convicted of the Big Hill murder’, *Argus*, 14 September 1860, p. 7; ‘The Big Hill Murder’, *Argus*, 18 October 1860, p. 5.
- [32] PROV, VPRS 266/P0, Unit 274, 74/6002, minute by Sir Henry Barkly, 31 August 1860.
- [33] PROV, VPRS 266/P0, Unit 274, 74/6002, undated petition from jury members.
- [34] Victoria, *Victorian Hansard*, vol. 6, p. 1803.
- [35] PROV, VPRS 1080/P0, Unit 6, p. 64.
- [36] PROV, VPRS 266/P0, Unit 274, 74/6002, George Nial to Reverend Henry England, 18 August 1865.
- [37] For example, ‘The Russell Street tragedy’, *Argus*, 24 August 1882, p. 9; ‘The United Devonshire murder’, *Argus*, 8 May 1890, p. 9.
- [38] [Leading article], *Age*, 17 September 1860, p. 4.
- [39] ‘The Big Hill murder case’, *Bendigo Advertiser*, 6 September 1860, p. 2.
- [40] ‘The public meeting in Nial’s case’, *Bendigo Advertiser*, 8 September 1860, p. 2.
- [41] [Leading article], *Argus*, 18 September 1860, p. 4.
- [42] ‘The Big Hill murder’, *Bendigo Advertiser*, 13 August 1860, p. 2.
- [43] ‘The Pentridge stockade’, *Argus*, 6 January 1860, p. 5.
- [44] PROV, VPRS 515/P0 Central Register of Male Prisoners, Unit 8, no. 5275; PROV, VPRS 3991/P0 Inward Registered Correspondence II, Unit 770, Regulations, ‘A’ Division, Penal Establishment, Pentridge, 1865.
- [45] Nial to England, 18 August 1865.
- [46] PROV, VPRS 266/P0, Unit 274, 74/6002, undated statement of facts on behalf of George W Nial.
- [47] PROV, VPRS 266/P0, Unit 274, 74/6002, statement by George Nial, 4 September 1871.
- [48] PROV, VPRS 1096/P0 Inwards Registered Correspondence, Unit 21, N/666, petition of Johanna Nihill; TNA: CO 309/76, folio 559, petition of Johanna Nihill.
- [49] PROV, VPRS 1096/P0, Unit 21, N/666, copy of letter from Sir Henry Barkly to Johanna Nihill, 7 June 1866.
- [50] TNA: CO 309/73, folio 208, memorandum by Archibald Michie, 23 August 1865.
- [51] PROV, VPRS 266/P0, Unit 274, 74/6002, petition of George Nial to Viscount Canterbury, 15 April 1871.
- [52] TNA: CO 309/73, folio 208, memorandum by Archibald Michie, 23 August 1865.
- [53] PROV, VPRS 1096/P0, Unit 21, N/666, memorandum by George Higinbotham, 19 September 1866.
- [54] TNA: CO 309/73, folio 206, minute by Charles Cox, 24 October 1865.
- [55] Victoria, Parliamentary Debates, vol. 26, pp. 588–589; Victoria, Parliamentary Debates, vol. 27, p. 1921; Victoria, ‘Life-sentenced prisoners’, *Votes and Proceedings of the Legislative Assembly*, Government Printer, Melbourne, 1877, no. C2.
- [56] PROV, VPRS 3991/P0, Unit 1178, 80/T9506, letter from George Nial to Graham Berry, 23 September 1880.
- [57] ‘News of the Day’, *Age*, 16 June 1881, p. 2.
- [58] ‘The mysterious death at Golden-Square’, *Bendigo Advertiser*, 15 May 1893, p. 3.
- [59] ‘The value of circumstantial evidence’, *Bendigo Advertiser*, 8 September 1877, p. 1; ‘The Big Hill murder’, *Bendigo Advertiser*, 15 September 1877, p. 3.