

3.

THE EXECUTION OF THE SPECIAL CONSTABLES

From 1866, seven murders have been attributed to the Clarke gang. These are the murders of the four Special Constables, of Miles O'Grady, James Dornan and the unidentified body found at Manar. More specifically they are mostly attributed to Tommy Clarke.¹

After the Clarkes were captured, Orridge, under instruction from the Inspector General sent the depositions related to the murder of Billy Noonang and Miles O'Grady² to Sydney on the 5 May 1867 in preparation for their trial in the Supreme Court. It was noted that they could obtain the depositions for the murder of the Special Constables from the Crown Solicitor in Sydney where they were held for the trial of James Griffin. The Attorney General and the Inspector General then decided there was not enough evidence to convict Tommy of any of the murders. We still do not know, who murdered these men.

The boys were charged with wounding Constable William Walsh with intent. This was still a capital charge in Australia, although England had already commuted the sentence for this crime. The Inspector General did not ask for any depositions related to the unidentified body found at Manar or to the death of James Dornan. It appears they may have had the sense to believe those were frivolous accusations.

Peter Smith, apparently without any additional evidence, attributes eight murders to the gang. He adds the murder of Billy Noonang on or about 30 October 1865, an aboriginal possibly mistaken for a tracker. Tommy's father was in gaol, awaiting his trial for this crime. There was no warrant out for Tommy for this murder and he was never charged. The evidence against his father was questionable,³ but Old John died on 7 November 1866, before his trial. His trial had been held up because the evidence gathering by the Braidwood police was incomplete. The *Police Diary* indicates evidence, depositions and subpoenas were being finalised between 21 July 1866 and the 13 October 1866. Billy's body had been found on 13 November 1865, eight to eleven months earlier. Witnesses were expected to remember events, times and dates for up to 11 months before giving this evidence. As a consequence the dates as to when it was Tommy and when it was Billy Noonang they had seen, varied by two days. If the police had carried out their job properly at the time, the evidence would have been more certain and Old John's trial would not have been delayed. He would have served his sentence, if found guilty, in Braidwood. Goulburn gaol at the time was overcrowded, filthy and unsanitary. Many prisoners, including John, became sick and died.

Of these murders, the ones on everyone's lips are the murder of the Special Constables, and so they have been discussed first, the others will follow. It will be shown that whilst we will never know who committed any of the murders, it is unlikely they can be attributed to the gang, or to Tommy. There are many unanswered questions and often unfortunately it is only the reports or the opinions of one person on which suppositions as to the actual events can be made.

Who were the Special Constables?

Special Constables were created in 17th Century England and they were used throughout the colony

1 Smith, *The Clarke Gang*, page 228.

2 NSW SR, *Trial of John & Thomas Clarke, 28 May 1867, Depositions, 1867. 9/6492*. Orridge sent interim depositions.

3 See book for questionable evidence given by Ellen Berriman.

in NSW. They were used when it was considered that the local police could not cope with a particular emergency, hence recognising the inadequacies of the local police. This, of course, did not sit well with the police.

The Special Constables in the Braidwood District, were hired by Henry Parkes, the Colonial Secretary, to capture Thomas Clarke and his associates. Carroll's party was not the first group of Specials hired by Parkes for this express purpose. In April 1866 Parkes hired John Flynn who came with glowing credentials. Thomas Rutledge of Carwoola, considered that he knew the country and could ride well; John C Read, Principal Gaoler said he was trustworthy honest, sober, and hard working; Thomas Baynes, late H.M.XI Regiment said he had attained rank of Corporal. Flynn's Party arrived on the 9 June 1866 but were recalled by 9 July 1866 without success. Officially they were recalled for quarrelling amongst themselves.⁴ Unofficially it was related to Pat O'Connell's alleged relationship with Flynn's sister.

The Special Constables were hired to capture, not to murder. This is an important political point. However, that a gun battle could result in the death of Tommy and/or his associates was recognised with the words *capture dead or alive* used in Henry Parkes letter to John Carroll dated 22 September 1866.⁵ It appears this is a legal point to protect the Special Constables. There had been criticisms over the years in the press at the many instances of police firing on unproven suspects without warning. Then there was a public outcry in Forbes over the manner of the capture and murder of Ben Hall in 1865. Several of the police had continued to shoot after he was wounded, fallen to the ground, and had not returned any fire. The police were considered to have performed a most cowardly act.⁶ Also the ambush and shooting of Pat O'Connell in July 1866 elicited much criticism. We do see the philosophy of capture, as opposed to murder, played out in the subsequent arrest of the boys at Berry's hut in 1867,⁷ where in a shoot-out that lasted intermittently for nearly six hours, neither side was trying to inflict injury, shaking hands after the surrender.⁸

The objection to police behaviour was continued with a ground swell of opposition to the police and the treatment of the disenfranchised, leading to the petition against the hanging of Ned Kelly in November 1880 where 32,424 signatures had been counted in the time allowed. It was estimated that there were a total of 86,000 signatures in support of Ned's life.⁹ The government was between a rock and a hard place as far as their electioneering chances and employment were concerned. They needed to consider those critical of crime on the one hand and on the other hand, those against capital punishment and/or death by ambush and those with empathy for the disenfranchised. However conservative governmental attitudes prevailed and Ned was hanged.

By the terms of his employment in October 1866, John Carroll, the leader, a senior warder at Darlinghurst Gaol, could select his own men, they would be armed with a limited number of weapons of their choice. Carroll would be paid 12s 6d per day,¹⁰ from the day he left Sydney to the day he returned to Sydney, if successful – if he captured the Clarkes, dead or alive. His party, if successful would be entitled to receive 10s per day but only 7s per day if unsuccessful. This equated to £127. 15s per year. A good wage for the time. As well they could act independently of the local police and have special consideration for positions in the public service at the end of this commission. To accompany him Carroll selected Patrick Kennagh, another warder at Darlinghurst, Eneas McDonnell, a warder at Yass Gaol, and John Phegan, currently serving time at Darlinghurst for larceny and forgery.

Carroll was instructed by Henry Parkes that this mission was to be kept secret and they would be sworn in as Special Constables on their arrival in Braidwood, by Messrs Rodd and



4 NSWSR, *NSW Legislative Assembly, Votes and Proceedings No. 3, 1867*, page 271.

5 NSWSR, Legislative Assembly, *NSW Bushrangers, Southern Districts, NSW*.

6 Peter Bradley, *Stories from the hard road*. Yellow Box Books, 2013.

7 See Chapter 7, The Trial, for information related to the capture of Tommy and Johnny.

8 This is possibly related to the reaction of the manner of Ben Hall's death,

9 *The Ballarat Courier*, 9 November 1880.

10 Letter to John Carroll from Henry Parkes, *Votes & Proceedings 1867 Vol 2 p 273.*

Bennison, Magistrates and Justices of the Peace.

This secrecy is interesting and may well indicate that Parkes did not have faith in the police or in many of the magistrates, but it proved to be the undoing of the Special Constables. Secrets were not kept and their independence antagonised magistrates and police alike. And, as Thomas Stewart commented in the Royal Commission on the State of Crime in the Braidwood District 1867¹¹ they came as surveyors, but did not know the boundaries of the blocks they were supposedly surveying. This was obvious to the locals and to the Clarkes. It was not long before the whole district knew the main reason for their presence.

The Special Constables Travel to Jinden.

Carroll had arrived in October 1866, and on the 16 October reported to Parkes that he had visited the principal haunts of Tommy Clarke but he hadn't had any success at finding the boys. By mid-November he decided he would attack the problem by arresting harbourers and conducting trials in court. This had the disadvantage of not only annoying many people, and worrying many others, but it kept him in Braidwood, not out looking for the bushrangers.¹²

Edward (Ned) Smith, manager of Jinden Station, had been seen talking to Carroll on 27 December 1866 at Vider's Hotel in Braidwood.¹³ It was assumed at the time that Edward suggested Carroll come to Jinden to begin his search for the boys. Edward was keen to get on the good side of Carroll. Woodland writes¹⁴ that Carroll was threatening that he would

get up a case against Ned Smith of the Jinden station that would astound him.

This area was inhabited by many of the suspected harbourers and it was an area well known by the Clarke gang. Carroll's decision to go to Jinden proved to be his undoing.

The gang was by then only three people, Tommy and Johnny Clarke and Bill Scott, who had recently joined the boys.

Carroll was running out of money and of standing with the police, magistrates and the community of Braidwood. He was supposedly a man of superior intelligence, but was over-confident, often the signature of a bully, and did not realise the difficulties he would have. His lack of knowledge of the Jingeras; the skills of the gang; the people he could trust; the fact that he would need to increase his expenditure for bribes to the locals for information and extra payments for his men as capture was taking longer than he expected. Also he did not have the support of the local police. Special Constables were very unpopular with police throughout the colony. The only report we have of the Special Constables seeing the Clarkes was on 3 October 1866, 200 yards distant, two days before their camp, was shot up.¹⁵ Would they even be able to recognise the boys at this distance, especially when we consider that many young men, wearing similar clothing were of a similar appearance this far away? This is why it is important to have a description of the horses they own/ride as a means to aid identification. This very relevant point was examined closely in James Griffin's trial for the murder of John Carroll. Further, would the boys be able to recognise the Special Constables?

James Griffin, telegraph and sympathiser, visited Jinden several times before 9 January 1867 riding different horses on each occasion. They were identified as belonging to Tommy. It appears he was looking after these horses for the boys. John Lynn, an employee of Edward Smith, stated in his deposition that when he saw the bushrangers at the cattle camp a week before the murders of the Special Constables, they were riding horses he had never seen before. Tommy and Johnny were not seen in the district from the 4th to the 14th January. On the 14, 15 and 26 January they were suspected of robbery in the Braidwood district. Then it was not until 22 February through to 6 March that they were suspected of more robberies. This time in the Yass/Goulburn district. These suspicions appear to be very questionable.¹⁶ If they were in the local district after the 4 January they were well protected

11 NSW SR, *Votes & Proceedings, 1867/68 Vol 2 Report of Commission.*

12 See page 22 below.

13 Brennan, Martin, *Police History.* page 32.

14 *Queanbeyan Age,* 28 December 1867.

15 NSW SR, *NSW Legislative Assembly, Votes and Proceedings No. 3, 1867,* page 274. *NSW Legislative Assembly, Votes and Proceedings No. 3, 1867,* page 274.

16 See *Area Searched by Stephenson and Berriman*, page 143 below.

from the police and from anyone looking to earn a reward. These people would not think they were murderers.

To travel to Edward Smith's at Jinden, fifty miles away, the Special Constables had to stop and ask directions twice and possibly three times. This journey took more than 24 hours. Carroll had been in parts of the district in November and December 1866, when he arrested many of the suspected family harbourers, but it seems he was not confident of directions. He had been threatening to arrest all possible harbourers. Proving anyone to be a harbourer would not be easy. Their involvement would not be advertised. The chance of conviction under the Felons' Apprehension Act would ensure secrecy.

At Hassall's in Jembaicumbene they asked for a compass bearing to Bendethera. However, they did not go to Bendethera. This may have given rise to another rumour about the reason for their trip. Ostensibly they were in search of the bushrangers, however the Georges of Bendethera were suspected harbourers. Mrs George (Mary Hart) was the sister of Tommy's wife. They also visited Mick Gallagher, another suspected harbourer, at his Hotel in Long Flat. There was also the rumour that they were looking for evidence of police acquiring the spoils of robberies. So, inadvertently this trip to Jinden had many people concerned.

The Special Constables Walk to Watts' Selection.

The Special Constables stayed at Jinden on Tuesday night, 8 January 1867. In the morning they left on foot, about 7am, according to Edward Smith. John Lynn who worked for Edward, thought they left about 7.30am. Woodland suggests that Carroll was led to believe that the boys were at Guinea's.¹⁷ Edward denied in court that he suggested this visit, and denied he suggested they walk, but his changing statements cannot be relied upon. It is not unreasonable to assume that their plans had been discussed with him.

The fact that they were only four men hoping to arrest three bushrangers was very unfortunate. In 1865 when the police shot Ben Hall they had eight policemen for what they thought would be three bushrangers. With reinforcements ten police and two armed black trackers were used when Tommy and Johnny were captured. Carroll's party certainly was in a predicament, they could not call on the police for support and they did not deputise any other people. Likewise the murderers would need more than three people to ensure the success of their mission.

The Specials walked the four miles to Hezekiah Watts' and then, after lunch, onto Daniel Guinea's selection. The average time for fit people to walk along a bush track is about 2.5 miles an hour, so the distance to Watts would take less than two hours, and they should arrive about 9.00 am, if they left at 7 am. According to Watts' evidence they did not arrive until 11 am, and they stayed for three hours. George Smith, an employee of Watts, states in his deposition that they arrived at noon. This discrepancy is not important. No one would have watches.

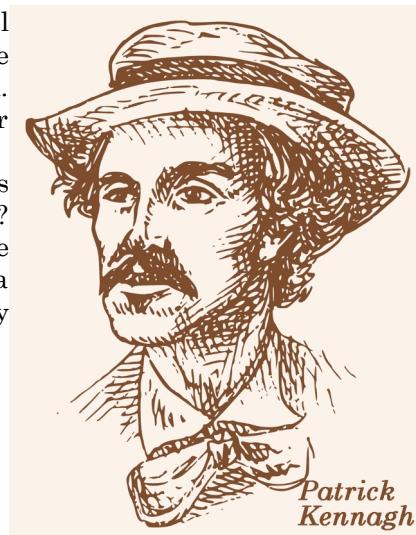
While at Watts', they recognised Daniel Guinea's father, Timothy, ride past as the man they had seen at Stoney Creek the day before. Was he spying on the Special Constables and reporting to people yet unknown? Timothy's life had not been easy. He had arrived in Australia in 1835 as a convict, on charges of assault and stealing a cow.

When they were leaving Watts' place, George Smith, an employee, suggested they see if the boy's horses were at Timothy's, but to avoid Daniel Guinea's as Dan had allegedly threatened to murder Carroll if they came onto his property. This threat was related to Carroll's earlier arrest of Michael O'Connell and Tom Berry for harbouring. Michael was the uncle of the Clarke boys and of Tom Berry. He was also the brother of Tom, Pat and John O'Connell. Daniel Guinea was a free settler and suspected harbourer.

After conversing with Edward at Jinden the Special Constables expected the boys to be somewhere in this area. The suggestion of the boy's presence was also made by George Smith. So, even though the boys had not been seen in the area for almost a week, they were led to believe they were nearby.

Why did the Special Constables walk to Watts' and Guinea's place? Did they think they could surprise the boys more easily? How would they carry revolvers, rifles and water bottles and be prepared for ambush? Did they not think that they would be at a distinct disadvantage if they were on foot? How would they

17 Queanbeyan Age, 28 December 1867.



chase suspects that were probably on horses? Perhaps this is not as unusual as it sounds. Wright's party, when later tracking the boys, before their capture, went on foot from Fairfield Station to Berry's hut. This was in the early hours of the morning when one would reasonably expect the boys to be asleep; Orridge's party, when looking for Ben Hall, near Wombat, walked the short distance to the farm house where they were supposed to be hiding.¹⁸

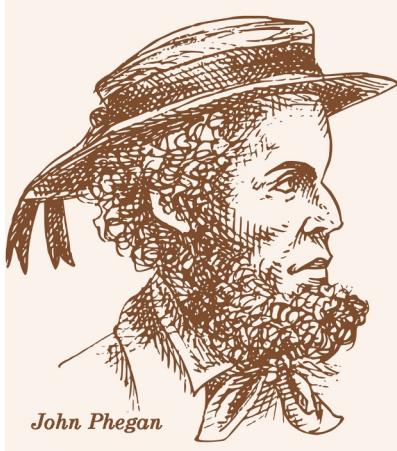
The real significance of the question of walking was that they would have to walk back to Jinden and this is where they would come to grief.

Execution.

The Special Constables were supposed to arrive back at Jinden the same evening, but when they had not arrived the next morning Edward asked one of his young workers, John Lynn, to keep an eye out for them whilst on a message to Bell's Creek. He instructed him to take the route that the Specials took the day before. John left Jinden at about 9 am and found the bodies of Phegan and McDonnell, about 1.25 miles from the Jinden homestead. This message would have to wait for another day.

He reported back to Edward who, after checking the bodies, sent him to Ballalaba, at about 10 am, to inform the police.¹⁹ The Ballalaba police station was located on Hugh Wallace's property at Nithsdale.

Sergeant Daniel Byrne, stationed at Ballalaba, was out and about in the district that day, visiting many properties on electoral business. In Daniel Byrne's deposition for the trial of R v O'Connell & Griffin, Byrne states he arrived at Jinden at 2 pm. Byrne first examined the bodies of Phegan and McDonnell. Phegan had been shot twice, the second shot from close range. McDonnell had bled to death from a wound in his femoral artery. Their Tranter revolvers were found near their bodies. Neither man was robbed. In the newspaper report of the trial of James Griffin for the murder of Carroll²⁰ Byrne states that Edward had left one of his employees, Thomas Gee, in charge of these bodies. No-one was in charge of the bodies of Carroll and Kennagh. Edward, George Smith and Hezekiah Watts were not present when Byrne arrived. They did not meet up with Byrne until the bodies of Phegan and McDonnell were being loaded onto the cart that had been requisitioned from Jinden. What had they been doing all this time? Edward, George Smith and Hezekiah Watts then showed Byrne where the bodies of Carroll and Kennagh were located. Sergeant Byrne recorded in his deposition that they were with him then, but he does not mention this in his evidence at the trial. It was decided that Carroll and Kennagh had been shot in a kneeling position. The bullet entered through Carroll's fourth rib, passing through the left lung and heart. Kennagh died from a bullet though the neck, passing down through his body. Neither man was robbed. Blood money had been placed on Carroll's chest. Their Tranter revolving rifles and ammunition had been taken.



Byrne found footprints and a wad and white paper from a breech loading rifle near a large tree about 23 yards from Phegan's body.²¹ Kennagh's hat was found near McDonnell's body. This, at the time, was thought to indicate that the Specials were walking along the track together.

Byrne also thought he had found the place where James had held the horses. However this information is questionable.²²

Byrne's observations did not point to any particular person as being responsible for any of the murders. It seems he stayed looking for evidence until about 4 o'clock as he did not send the telegram to Orridge until 8pm. It would take about four to five hours to ride the 26 miles back to Ballalaba.

Who Killed the Special Constables?

There are several groups of suspects for these murders. The harbourers, the police and the Clarke

18 Bradley, *Stories from the hard road*, pages 73/74. See also page 84 below.

19 NSW SR, R vs O'Connell & Griffin, 9/6500.

20 *Sydney Morning Herald*, 31 May 1867.

21 See page 12/13 below for the implications of this cartridge paper.

22 Pages 17/18 below for Byrne's contradictory reports.

gang, are each discussed in the next few pages. Unfortunately, nothing, was ever proven.

I have posed questions to you the reader as none of this is straightforward. Apart from the weak case against James Griffin no one else was ever convicted and it is wrong for us to do so today without further evidence and judicial opinion. The actual murderers were very well protected.

There could be several motives for these murders. Protection would be a motive for harbourers and for police. The harbourers need to provide for their families, which they cannot do if they are in gaol; the police did not want criticism for not being able to capture the gang and those police involved in the proceeds of the robberies wanted to protect their lifestyle and reputation.

Key points concerning the suspects at the time are ...

- Daniel Guinea, Michael O'Connell and James Griffin were arrested for the murders.
- James Griffin was acquitted of the murder of John Carroll but later convicted of the murder of Patrick Kennagh.
- Edward Smith, manager of Jinden, also a suspected harbourer, supplied several very questionable statements. William Bede Dalley, lawyer, described him as a confessed perjurer and Sir Alfred Stephen questioned the truth of his statements when advising the jury in the trial of James Griffin for the murder of Carroll. Edward said James Griffin, a suspected harbourer, telegraph and brother of Michael O'Connell's wife, was present at the murder and that Tommy, Johnny and Bill Scott murdered the Special Constables.²³
- Mrs McEnnery,²⁴ a neighbour, also supplied questionable statements as evidence implicating the bushrangers and James Griffin.²⁵ Two of her observations conflicted with Edward Smith's story. It was considered that as she lived much of the time alone in her hut with young children she was worried for her safety.
- Henry Parkes asked for the calibre of the bullets that were retrieved from nearby trees to be checked indicating a possible suspicion of police involvement. It was well known that the police were not supportive of the Special Constables. A good example of Henry Parkes' perceptiveness.
- Orridge, Superintendent of Police in Braidwood immediately suspected the boys of the murder²⁶ and to this day, without any reliable evidence they are still often blamed. The boys denied these accusations until their dying day, offering an alibi for the time of the murders.²⁷



William Bede Dalley. (1831 - 1888)

William Bede Dalley, 'patriot, scholar and statesman', was born in George Street, Sydney, on 5 July 1831. He was the son of convicts. Virtually unknown in the early 1850s, his stirring street-corner speeches on the Constitution bill had thrust him into prominence while his natural geniality and generosity endeared him to most colonists. In December 1856 Dalley was nominated by Sir Henry Parkes for the seat of Sydney. He won this seat after stressing the rights of the native-born to an active political career. Dalley became a leading criminal lawyer, commanding some of the highest fees taken and could hold his place with any barrister.²⁸ Dalley's statue stands in Hyde Park, Sydney, where he can look down Macquarie Street to the Law Courts and Parliament House.

Dalley was to be the defence lawyer for Tommy and Johnny on 28 May 1867, for James Griffin on 30 May 1867 for the murder of

23 See pages 8 - 12 below.

24 McEnnery is spelt various ways. McAnene on the old parish portion maps; McAnnery and McEneny on court documents; other variations in different source materials.

25 See Chapter 7, The Trial.

26 NSW SR, Legislative Assembly, NSW, 1867 *Bushrangers, Southern Districts, NSW*.

27 NSW SR, Col Sec Papers, 67/4049. See letter page 62 below.

28 <http://adb.anu.edu.au/biography/dalley-william-bede-3356>

John Carroll, for Michael Nolan O'Connell on 20 August 1867 and again for James for the murder of Patrick Kennagh on 16 September 1867.

Daniel Guinea, Michael O'Connell and James Griffin Arrested²⁹

Daniel and Michael were arrested on 16 January 1867 but discharged for lack of evidence on 21 February 1867 at Braidwood. Michael however faced further charges of *Giving Sustenance to an Outlaw*. He, along with James Griffin, who was arrested on 19 January 1867, were remanded to Darlinghurst Gaol to await their trials. It appears Michael and James were arrested on the basis of a statement from Edward Smith to Sergeant Byrne on the 13 January 1867, and also on the comments of Anthony Vider - see page 48.

Edward did not officially implicate James or Michael in the murder of the Special Constable until his third statement on 24 February. James faced trial for the murder of John Carroll on 28 May 1867. He was found not guilty. James was taken back to gaol as he had another charge to face, that of the murder of Kennagh. He was held in gaol until his trial in September 1867.

Daniel's arrest appears to be based on the uncorroborated evidence recorded in George Smith's deposition³⁰.....

Guinea said I'll swear if the fat wretch comes this way after anyone he will be shot. He said it was a shame the way he was dragging the two Misses Clarke about the Court. He mentioned Carroll's name as well as calling him the fat wretch. I knew to whom Guinea alluded to when he said the fat wretch. Carroll was a stout man.

George Smith claimed that this was said by Daniel Guinea at Hezekiah Watts' place about three weeks before the murders. But, he did not think Watts heard Daniel say these words.

Legally, private conversations should only be given weight if there is other corroborating evidence. There are five cases of private unwitnessed conversations affecting judicial decisions in statements related to these murders. The statement above involving Daniel Guinea is one such statement. Daniel was acquitted. There were two instances of uncorroborated evidence in Michael O'Connell's trial - the evidence of Lucy Hurley and of Alick Bradley.³¹ The other two uncorroborated statements involve James Griffin. Both Edward's and Henry McCurley's evidence alleged private conversations with James at different times. In September 1867 his trial for the murder of Kennagh had only one piece of new evidence - that of Henry McCurley's uncorroborated evidence.³² Justice Cheeke did not explain the law regarding this type of statement. Nor did he explain the doubt that should be attached to perjured evidence as Alfred Stephens had done for James' trial for the murder of Carroll. Jurors rely on clear judicial direction as to the weight of evidence required to form a criminal conviction. They need also to be clearly advised as to the finer points of the quality of evidence and its presentation. The importance of corroboration is paramount. Had there been money for appeal, James' conviction would probably have been considered null and void.

Mick's arrest appears to be also due to the evidence given by Anthony Vider, publican in Braidwood who stated in his deposition

I heard Connell [O'Connell] say to Carroll if ever I see you or any of your men about my place or in my paddock I'll shoot you like dogs. About a minute after Connell said never mind old man do not take any notice of what I say you know what I am I cannot say whether he Connell spoke in a threatening or joking way.Carroll remained talking to Connell for a few minutes after the expressions were made use of. The people that I have named were within hearing and might have heard what was

29 See discussion of charges and trials on pp 74 - 83 below.

30 NSW SR, *Regina v Michael N O'Connell, Daniel Guinea, Murder.* 9/6500

31 On pages 5 & 6 of Michael O'Connell's trial, on the web page, there is a somewhat confusing explanation of the law regarding uncorroborated evidence in the 1800s. The Lord Chief Justice Jarvis, in England, thought three witnesses were necessary for uncorroborated evidence to be accepted. It is of practice, not of law, for juries to follow the Judge's direction - which in this case was to accept the evidence.

32 See Chapter 7, The Trial.

said. He invited Carroll to call and have a drink at his place if he was going that way. He Connell said to Carroll I am very much obliged for your treatment towards me. They shook hands when parting. Connell seemed to be very well able to ride.

Mick lived sixteen miles from Jinden. This distance would take three hours to ride. It likely that, if involved, he would have been seen travelling to and from the site of the murder. With a £5000 [\$505,000] reward, it would be a huge temptation for one of the many residents along that road to offer information. This did not happen. Robert Vincent, tutor of the O'Connell children, stated at Mick O'Connell's trial that

..... on the 9th January last, Connell [O'Connell], myself and another man were drawing in hay and in the afternoon we were bringing in a log.

Mick, however, was to face court under the Felons' Apprehension Act for harbouring a known outlaw, Tommy Clarke, his nephew.

Edward (Ned) Smith

Edward Smith was the manager of the Jinden run, 50 miles south of Braidwood. He became a self-appointed central figure in the unaccountable murders of the four Special Constable on 9 January 1867. This is still the greatest number of police murdered at the same time in Australia.

There is a strong suggestion that Edward was involved in these murders to prevent his arrest by the Special Constables for harbouring,³³ and later to be in the position to possibly claim a reward for his information leading to the conviction of the persons he claimed to be the perpetrators.

Edward's downfall should have been the many instances of perjury between his first two statements and his third and fourth statement. All statements were taken under oath. Legally his perjured evidence should have been struck from the court record. He should also face a gaol sentence of up to 14 years. This would mean a total lack of information on the murders of four Special Constables. It will be discussed later, that possibly the police and the judiciary committed many legal transgressions for which they were never held responsible.

Edward Smith's Statements.

Edward made four statements under oath, but these statements cannot be taken on face value. They are very contradictory, confused and open to question.

On 17 January, Edward left to take cattle for sale in Gippsland but returned after three weeks, on 7 February. He was subpoenaed in Cooma by Sergeant Lenthall, on his return from Gippsland.³⁴ While Lenthall's only function is to serve and sign the subpoena including the date, time and place, he did have a short conversation with Edward about the murders. Edward, in court, denied some of the previous statements he had made to Lenthall. His depositions made on 14 and 21 February, were therefore full of contradictions. He denies he said anything about the boys or Mick O'Connell's comments on the murders of the Special Constables. When later questioned about these denials he claimed he had been threatened with harm by one of James' brothers if he implicated James.³⁵ Dalley thought Edward's response itself was clear fabrication, as he would have police protection at Jinden and later when he was in Sydney. Edward further claimed he was drunk most of the weekend after the murders when they were being discussed at Mick O'Connell's hotel.

Edward's first two statements were made on 14 February 1867, one at the Police Office and the other

33 See page 3 above.

34 The Gippsland gold mining areas were a good market for beef. The closest gold mining town in Gippsland is Walhalla, with 4000 people. It is 270 miles across country, and at 10 miles per day for driving cattle, 27 days at least would be needed just to get the cattle there. They would lose a lot of value during that journey, especially in the heat of summer. So, presumably Gippsland is another figment of Ned's imagination, and he used a different market. This suggests that many of the cattle may be stolen. Why take them across country when there is a large market in the Braidwood District with over 9000 people at that time. No one appeared to question his movements or motives.

35 One could question this statement based on the fact that this brotherly love did not last. James died alone in Dubbo after early release from gaol for ill health.

at the Police Court in Braidwood.³⁶ It must be remembered that the Special Constables had now been dead for more than a month. His third statement was made on the 21 February 1867. James, as a result of this statement, was to face trial for the murder of Carroll, on 30 May 1867. The fourth statement was a verbal statement which he made as a witness at James' trial for murder and it concurred with his third statement.

Edward's First Statement

Edward's statement contained information about the breech loading rifle which he had loaned James Griffin in November 1866 for shooting wild horses. James had this rifle for eight or nine weeks [due to Edward being away in Sydney]. He kept it in a log near Simon Cody's [Corey's] place in the Jingera. He returned the rifle ten days before the Special Constables were shot. Edward said the rifle was out of order.

Edward thought James knew Tommy and Johnny Clarke and their uncle Tom O'Connell, but he didn't know for sure. Edward also stated that he may have seen James in Tom O'Connell's company eighteen months ago, but not since. He did not see James speaking to the boys when they both visited the cattle camp on 3rd January 1867. Nor did he mention James was riding the bushranger's horses.

The next day James Griffin and Edward went back to the camp where the cattle were, but again Edward said he did not see James talking to the bushrangers. The bushrangers left. He did not see them again. Thomas Lynn, in his statement had said that both Griffin and Edward had spoken to the bushrangers at the camp and that James stayed at the camp with the bushrangers after Edward left on 4 January.

Edward said that James stayed at Jinden the night before the Specials were murdered. Later he says James arrived at 7.30am the next day.

One can surmise that Edward was not wanting to implicate either James or himself, in any way with the bushrangers.

Edward's Second Statement.

The second statement, was also made on 14 February. In this statement, among other things, he says of James Griffin when he arrived at Jinden on the 9 January 1867.

..... he had a drink of gin from a half full square bottle of James' on Wednesday 9th January, the day of the murder. James did not tell me where he got the gin;³⁷ James said nothing about Carroll's party;

Edward saw James Griffin at Mick O'Connell's public house on the day after the Special Constables were murdered. Edward saw him at 11 o'clock on the following Sunday [13 January 1867], James was in the Bar with Mick O'Connell, Edward was writing a letter in the parlour. he said, in part.....

Connell [O'Connell] was drunk, [James] Griffin was pretty well on / I could not hear what was said / I don't remember Griffin telling me anything about the murders / I was not sober / I did not hear them say / I don't remember / I would not swear to it / I left Connell's about 11.30am to go to Ballalaba to post my letter, had dinner with Senior Constable Byrne, then rode back to Connell's / I don't remember Connell saying "he could chop that fat Carroll into mince-meat" – some person said it / I don't remember saying at Cooma [when he was summoned to give evidence on his way back to Jinden from Gippsland], that Mick Connell said he had the Special Constables watched and sent for the boys / I might have said it but I don't remember, I won't swear to it / I never said that I am sorry Griffin was arrested as I would have to bring murder home to him / I was drinking all that Sunday afternoon [13 January 1867] I was so bad I had to go to bed at 8 o'clock / I cannot remember who were at Connell's on Sunday afternoon, I think Denis Dempsey, George Smith, James Lynn were there.

36 NSW SR, Col Sec Papers. *Depositions of Edward Smith.* 4/612, 67/5775; 4/607, 67/6692.

37 See page 21 the relevance of the gin.

Edward denied he knew of anything implicating James and Mick O'Connell (Connell) in the murders. He said he was drunk most of the weekend of the 12th and 13th January and could not remember and would not swear to anything. If these days and times are correct there is very little chance for Edward to encourage James to hold horses on the 9 January, 1867.

Edward's Third Statement & Fourth Statement.

The third statement, made on the 21st February 1867. This statement concurred with what Edward said in his fourth statement, under oath at the trial. These statements contradicted everything he had previously said in relation to his knowledge of the murder of the Specials.

Edward stated that James Griffin had called in to his house about 4pm on the 8 January, on a bay horse, to tell him the Special Constables (Specials) were on the road. They arrived at sundown then left about 7 am the following morning, on foot, to go towards Guinea's.

James called in about 7.30am on 9 January, on a grey horse, and asked for the loan of Edward's breech loading rifle, but Edward did not give it to him. James would have known it was out of order and therefore it is unlikely he asked Edward to lend it to him.

The bay and grey horse were identified as belonging to Tommy.

Edward stated that he next saw James on the Sunday, 13 January, at the hotel when James told him the details of the murders, in a private unwitnessed, therefore uncorroborated conversation near the fence of the hotel (Mick's public house) - saying

.... he brought the boys up the night before the murders / that Tommy, Johnny and Bill Scott fired at and killed Phegan and McDonnell / that Carroll and Kennagh retreated down the flat / that McDonnell kept firing at the boys even though his leg was broken / that Carroll did not fire at all / that Tommy called for a horse to chase them / Kennagh surrendered, Carroll asked for mercy / Tommy said you gave no mercy to my mother and sister / Kennagh was shot by Scott and Tommy killed Carroll / Tommy put the money on Carroll's chest / Bill Scott showed Mick Connell [O'Connell] one of the rifles they had taken from the Special Constables later that night.

When further questioned he said, among other things,

.....that Mick Connell was present and that he asked if the gin had taken effect / James had said that only for the gin he could not get them up to the pitch / when James had come to Ned's place on the morning of the 9th January, he had a square bottle of gin that was half full / he said that he overheard conversations between Connell [Mick] and James / he heard James say that he bought the horses to Tommy / Ned repeats that he told Byrne on the Sunday after the murders and that he was sober, and was sober all day, even though he had a little to drink / he was questioned closely as to whether he was drunk or sober but would not swear to what he had said, nor how much he had had to drink / Ned stated he never invited the Special Constables to his place, and had never seen them before they came to Jinden. Ned says he did not suggest they go on foot the next day, nor did he give them any directions.

Following Edward's evidence, William Bede Dalley, had the second statement read at the trial. Both the second and third statements highlight Edward's perjury and his evidence should have been dismissed and possibly James could have been released.

Questioning after this second statement was read, elicited that he, Edward Smith

.... told Byrne about the murders / and James' involvement in the murders / he claimed James held the horses / when he had dinner with him on the Sunday/ that he had been threatened by Michael, James' brother that he would be shot down if he said anything incriminating about James / and he was worried about the safety of his family / he was sober on the Sunday and was certain James said he took the horses down to Tommy [so Tommy could catch Carroll and Kennagh]; /he did not see the boys on the day of the murder.

Coupled with this was the very long summation of the trial by Dalley.³⁸ Much of this summation was questioning Edward's motives and statements, and questioning if he, either knew what was to happen or if he himself was the perpetrator. Dalley, by these methods succeeded in putting reasonable doubt into the minds of the jury. As well Alfred Stephens in his concluding statement told the jury they had to satisfy themselves that Edward was telling the truth in court. It took the jury 20 minutes to find James not guilty of the murder of Carroll.

When the events of the afternoon of the 9 January, as related by Edward on 21 February in his third and fourth statements, are examined closely, they appear to be very dubious leaving one to wonder at their credibility, even without the contradictions.

Edward's story involving James and the Clarkes hinges on four critical, but very questionable, factors

- He said that Tommy Clarke's motive was due to Carroll arresting his mother and sisters on suspicion of harbouring. Their case was dismissed and Carroll was subjected to criticism from their supporters in Braidwood. This is hardly a motive from someone who on many occasions did not wound the police when they fired at him, without warning.
- That the horses were allegedly held by James 300 yards away. Ultimately there was never any proof of where, these horses were held, or if they actually existed.
- That Tommy was barefoot. Why would Tommy take his boots off in the middle of an active skirmish? It appears Johnny and Bill did not wait for horses, nor did they catch Carroll and Kennagh for half a mile, even though Kennagh allegedly stopped to shoot at them a couple of times. It was reported that Carroll did not fire. The situation was desperate. Would this take the whole hour as reported by Dr Pattison? Mrs McEnnery said she heard a couple of shots, from further away than the first ten or so shots. The last shots she heard were closer. It appears then they ran in one direction then turned and ran closer to Mrs McEnnery's block. Edward Smith said Kennagh fired at the murderers chasing them on several occasions. Just three lots of shots as Mrs McEnnery reported is not many for the hour Carroll and Kennagh were supposedly chased through the bush. A fit person can run nine miles per hour. It is unlikely that Carroll and Kennagh were more than a mile from McEnnery's when the distant shot was fired. Thus an hour between the first and last shots needs to be explained.

Why did James need to come down with the horses? The lead horse would obey a whistle from Tommy and the others would follow. As it was necessary for Edward to have a witness to his story about the murders, it was necessary for James to arrive with the horses. This statement of Edward's was made after James was arrested and no doubt James did not know about his further involvement.

- That after Phegan and McDonnell were shot, Carroll and Kennagh ran into the bush, off the track. Their bodies were found half a mile away. Edward said

Thomas Clarke who had taken up a position behind a tree and when Carroll and party came up he rushed out from behind the tree and called upon them to give up their arms at the same time firing at them in conjunction with Johnny Clarke and Bill Scott who also rushed from behind a tree. Phegan and McDonnell fell (having been shot) the other two Carroll and Kennagh retreated down the flat. Kennagh firing at the Clarkes and Scott frequently from behind trees..... Kennagh kept firing at the gang. Carroll did not fire at all. Tommy Clarke got a horse and rode around the back of Kennagh. Kennagh at the time having Bill Scott and Johnny Clarke covered with his rifle. Tommy Clarke fired a shot at Kennagh and put it in a sapling on the side of Kennagh. Kennagh looked round when Tommy Clarke sang out "lay down your arms" which order Kennagh obeyed by throwing down his rifle on his arm. After Kennagh surrendered Carroll was standing close to his side. Clarke then said to Carroll, "you are Carroll". Carroll replied, not Carroll, Carroll is dead on the road. Then Carroll cried out for mercy – mercy Tommy Clarke. Clarke replied how can you expect mercy, you did not show my sisters or mother mercy. He then went close to Carroll saying "Make up your mind, you have not many

38 Sydney Morning Herald, 31 May 1867. See summation on the web page.

minutes to live" and shot him with his revolving rifle. Kennagh having thrown down his rifle did not ask for mercy and was immediately shot down by Scott through the neck with a double barrelled gun.

Edward's Further Suspicious Behaviours.

Many questions were raised at the time about the extent of Edward Smith's involvement in the murder of the Special Constables. Initially this had to be due to his changing, hence perjured, statements. As the story of the events on that fateful day develops, even more questions have to be asked as his subsequent behaviour appears to indicate there is more to the story than just befriending himself to the Special Constables.

Was the sole purpose of the meeting with Carroll at Vider's Hotel on the 27 December 1866, an attempt by Edward to reduce the alleged charges Carroll was going to serve against him, or was the plan to murder the Special Constables already in the pipeline and this meeting was part of this plan? This would mean Edward was in league with others. Others that would need to have trust in him. W Gregson, former manager of the Joint Stock Bank Braidwood, said he would rather put his life with Clarke than with Smith [Edward Smith].³⁹ He would need many collaborators to successfully accomplish this scheme, if that was the case. At this meeting Edward allegedly invited Carroll to come to Jinden to look for the boys. Edward of course denied this meeting in court. The Special Constables arrived at Jinden on 8 January 1867. Edward was a gracious host, giving them a meal, accommodation and stabling and feeding of their horses.

Despite the fact that he had not seen or heard of the boys for four days he possibly suggested a visit to Daniel Guinea and Hezekiah Watts the next day, the 9 January. It would be reasonable to assume, as they had come to Jinden to look for the boys, they discussed their plans for finding them. The Specials were unfamiliar with the area and its inhabitants. This would put them on the track where they would be murdered later that day. But in his second statement Edward indicated he did not know in which direction the Special's had gone. The track was on Jinden, but it was, in effect a public track, reducing Smith's liability somewhat. It was also thought that he encouraged them to walk rather than ride. This he also denied. Carroll's conversation with Watts and George Smith, his employee, (no relation to Edward), over lunch on 9 January, as recorded in their depositions, also indicated the boys were in the area, despite not being seen since the previous week.

The Special Constables, namely, John Carroll, Patrick Kennagh, Eneas McDonnell and John Phegan were murdered on the track when coming back to Jinden, late in the afternoon of 9 January, 1867.

As stated above John Lynn, Edward's employee, discovered the bodies of Phegan and McDonnell, the next day, 10 January 1867, when taking a message to Bell's Creek. He went back to Jinden to tell Edward. After viewing the bodies, Edward sent Lynn to Ballalaba to inform Senior Sergeant Byrne of the murders. Edward stated he then went to get Hezekiah Watts and George Smith to help him look for Carroll and Kennagh.

Byrne turned up at Jinden at about 2 pm that day, on district business, they would have had about four hours by themselves to search the area. The crime site would not have been secured. It could be assumed that any accidental evidence left over from the murders would have been removed. Any footprints and horse prints found are now not necessarily those of the murderers. The wad and white paper found near the large tree was the only evidence other than foot prints.

Byrne stated in his deposition for Regina vs Michael O'Connell and James Griffin, Murder

I found a wad and some paper belonging to a cartridge of breech loading rifle. I have seen paper like it. I took some similar cartridge paper from Tom Connell.

And in answer to Mr Scarvell, in Braidwood, on the 31 January 1867, Byrne said

The Government cartridges is in yellow paper. Connell's was in white paper. I never saw any white but those of Connell's. Connell's were not used.

The piece of cartridge paper that I picked up at the tree was white. The wad that I picked up was much larger than any found in the bodies

39 *Henry Parkes Correspondence.* Henry Parkes letter wrote to D.H. Campbell President of the Royal Commission, 26 January 1867, stating that W Gregson's opinion of Edward.

The wad usually separates from the bullet but can enter the target when the rifle is fired at close range. It is when a second round is fired that the wad from the previous round is pushed ahead of the bullet.

Tom's rifle, a Calisher & Terry carbine, had been stolen from the police at Morris' Hotel in Mudmelong in February 1866. It was returned to the police when he was arrested in November 1866.

Henry Zouch, Police Superintendent, had stated that Tom's ammunition would only fit the make of rifle Tom owned.⁴⁰ The cartridges needed for Tom's rifle were purchased by Michael O'Connell from Richard Riley of Sydney. Calisher & Terry carbines were police issue. We can be sure the police asked Michael O'Connell if he had sold this type of cartridge to anyone else. The fact that no owner was ever arrested indicates that Michael either hadn't made any other sales or it indicates something more sinister. There is no record in the NSWPG of any rifles of this type being stolen. However someone with access to a Calisher & Terry rifle was with the executioners that day. It is interesting to note that Michael was not charged for supplying ammunition to a felon (his brother) which would mean 15 years gaol, instead of the seven years he received, and released in five years. This was despite the fact that the ammunition dealer, Richard Riley was a witness at his trial to identify the wad and cartridge. Neither was Michael relieved of his assets, which as well as a gaol sentence was normal procedure for harbouring under the Felons' Apprehension Act. Is the light sentence that Michael received and the lack of sequestration evidence of a cover up? Byrne did explain that police cartridges were in yellow paper. It would be highly unlikely that a policeman would use these government issue cartridges. There is no evidence as to why Michael was not charged for supplying ammunition to Tom. But when coupled with Byrne's doubtful evidence relating to the location of the horses⁴¹ and the density of the trees, more sinister explanations are indicated. Another strange piece of information gleaned from Michael's trial was that Richard Riley was not questioned as to whether Michael bought the ammunition from him for any rifles owned by Tommy Clarke.

I have no doubt that Michael was not the only person that was keeping quiet about the identity of the murderers. There is a strong, but untested case, for the involvement of Edward Smith, Hezekiah Watts and George Smith. As well, there were the four people Mrs McEnnery saw crossing the creek. Yet no-one, the police or the harbourers spoke out. And later the judiciary did not ask obvious questions.

Edward, George Smith & Watts were never questioned about their movements during the four hours before Byrne arrived at Jinden on 10 January 1867. They were not questioned when making their depositions nor were they questioned in court about their movements. In fact Watts was not called as a witness in the trial of James Griffin for the murder of John Carroll, or later of Patrick Kennagh. Neither was Edward questioned about his activities on the afternoon of the 9 January. Nor is there any indication that the Attorney General or the Inspector General of Police raised questions about this lack of information in the depositions and statements. Further, without any evidence to the contrary the vagaries in these renders the events open to surmise and questions the trustworthiness of all involved.

Edward, George Smith and Watts also visited Mrs McEnnery on 10 January.⁴² They told her they couldn't find the bodies of Carroll and Kennagh and wanted to know if she could tell them what she had heard. In the court she said she was also visited later by Guinea and again by Watts. These visits could be very intimidating. Did they want to influence her thinking and conclusions in any way? Did it change any evidence Mrs McEnnery would give? Many statements in her deposition made on 13 January were different to her evidence in the trials of James Griffin. This however, did not stop her from claiming a reward and compensation for expenses. Police Inspector McLerie's letter to the Under Secretary states that he had granted her £250 [\$25,250], in addition to the handsome allowance made for maintenance of her family and compensation from the Lands Department for her husband's free selection improvements.⁴³ In the trial George Smith said he knew where Mrs McEnnery (Catherine McInerney) lived but he did not mention that he and Edward and Watts went to talk to her on 10 January, the day after the murders.

One of the key pieces of her evidence was related to her observation of men crossing the creek at the bottom of her block ten minutes after the last lot of shots heard on the day of the murders. In her

40 *Sydney Morning Herald*. 21 August 1867.

41 See pages 17/8 below.

42 *Sydney Morning Herald*, The Jinden Murders, Magisterial Enquiry, 19 January 1867.

43 NSWSR, Col Sec Papers, 4/612, 67/5775.

deposition on the 7 February 1867⁴⁴ she claimed she thought the three or four men were the Special Constables who had called in for directions to Guinea's place that morning.

.... I saw either three or four men crossing the creek after the last firing. I took them to be Carroll and party. They were on foot. I believe them to be Mr Carroll's party returning to Jinden. They crossed a creek towards Jinden but not going to the house. I think they were going towards Jinden mountain. I could not tell if they had firearms. I could only see their head and shoulders.

In her deposition she denied seeing James Griffin on the day of the murders. However in the trial of James Griffin for the murder of Carroll on 28 May 1867, Mrs McEnnery stated

.... I saw four men crossing a small creek eight or nine acres distant, that might have been five or ten minutes after I heard the shots, I recognised the prisoner among these four men; I have known prisoner about twelve months, and I have no doubt that he was one of the four men;

Mrs McEnnery was uncertain about the number of men crossing the creek in her deposition but in Griffin's trials she stated it was four men and was able to recognise these men as being the Clarkes, Bill Scott and James Griffin. It seems apparent that her testimony is influenced by Edward Smith's version of events and therefore not necessarily accurate.

When the Solicitor-General, Robert Isaacs, for the prosecution asked if she had heard the names Thomas Clarke, John Clarke and Bill Scott, she replied

Yes, I have. I could not properly recognise either of the Clarkes at the time; but I saw them the other day, and I now believe that the two Clarkes were two of the persons whom I saw with the prisoner on that day. I had seen Bill Scott before, and I believe he was the fourth man.

There are three problems with this piece of evidence. Firstly, from Map 2 above we can calculate that the distance from her hut (she had previously stated her hut was in the centre of her block of land) to the creek is about 335 yards. When questioned how far she was from the creek, she said *eight or nine acres distant*. When asked for clarification she said *from the Courthouse to the hotel*. This is probably the Commercial Hotel, built 1859, which was about 300 yards from the Braidwood Courthouse. Three hundred yards is too far to accurately identify any person.

The second problem is that these men were walking. From Edward's evidence, James Griffin, Tommy Clarke, Johnny Clarke and Bill Scott had their horses. They would not be walking across the creek. This land, at the time was owned by the Bank of NSW and presumably unsettled. These men were walking unobserved by anyone else, possibly towards their horses. They were not reported by others at the time. Who were they?

Edward just could not remember when questioned about his knowledge of these men for his second deposition, but had a vague memory of it later in court. Walking men did not fit into his story of the events. Unfortunately nothing was made of this information in court.

The third problem, brought to light in the court case, was when examined in the police office at Braidwood Ms McEnnery had sworn that she saw nobody that day that she recognised except John Lynn. John stated he called in to her place on the morning of the 9 January. She also said she was quite certain she had not seen James Griffin that day, and she said that she would not know James if she had seen him. In the trial of James for the murder of Kennagh in September 1867, she stated she had known James for 12 months. She had also denied seeing James when Byrne had called into her house, possibly on the Saturday after the murders. In court she said that because she was scared she denied seeing James on the day of the murders.

I would suggest that the visit to Mrs McEnnery's place by Edward, George Smith and Hezekiah Watt's had a lot to do with her evidence and her fear. In her deposition she denied she had been threatened but later in court she said she had been told she would be shot if she gave evidence. She backed this up with information that one time when she was away in Braidwood, she came home to find her pigs killed and another time her geese had been shot. This would have to be by someone who had

seen her leave for the day. She would pass Edward's place on her way to Braidwood. He could be the likely culprit. She did not name anyone in particular in court for the warnings or threats but said it was all the neighbours.

Furthermore, conflicting evidence was related to the timing of the shots. Edward had stated that, according to James Griffin's account of events, after Phegan and McDonnell were shot, Carroll and Kennagh ran off the track. This would have been in a northerly direction.

Byrne stated in court -

.... I put the bodies of Phegan and McDonnell in the cart, went down the bush about half a mile, leaving Guinea's on the right, Smith's [Ned's] on the left and away from the track, and there found the bodies of Carroll and Kennagh.

Tommy Clarke, who was allegedly barefoot, called for the horses, after Carroll and Kennagh ran off the track, into the bush. Smith said that whilst running, Kennagh would stop and fire at the people chasing him, namely Johnny Clarke and Bill Scott. They were obviously chasing on foot, not waiting for the horses.

In court, on 28 May, Mrs McEnnery stated

.... an hour before sundown I heard the report of several guns go off; there must have been nine or ten reports at the same time; about ten minutes afterwards I heard several shots, but I could not say how many; the second lot of shots seemed further away, I afterwards heard two more, which sounded as if they were nearer; they were the last I heard

If this statement can be believed, it sounds as though they were not running in a straight line - shots from the track, then from further away, then closer. The direct distance from Phegan and McDonnell to where they were allegedly murdered was about half a mile; we do not know the total distance they actually ran. However, the time between the first and last shots is interesting. It raises the possibility of a totally different explanation of the events that happened on that day.

In a telegram from Senior Sergeant Philip Smith at Braidwood, sent to John McLerie, the Inspector-General of Police on 12th January, 1867.

Urgent. Re Murder. Dr Pattison, who made post mortem, returned with message. Special constables stayed at Edward Smith's, Jinden Station, Tuesday night; left Wednesday morning last, on foot. About four o'clock same evening volley heard, and about hour after, few shots

Dr Pattison reported that the time between the two lots of shooting was an hour. Mrs McEnnery did not state the time between the first and the last shots. Unfortunately, the telegram does not state where Pattison had obtained this information. The timing between the first and last shots wasn't questioned in court. What could be happening during this hour? It would only take ten minutes to run half a mile - or 20 to 30 minutes for the route further away from Mrs McEnnery's, then to where they were found. A whole hour for very few shots to be fired. From examining Carroll's weapon, it was decided at the time, that it had not been fired at all! This seems incongruous. Would someone be chased for an hour through the bush and not try to defend themselves?

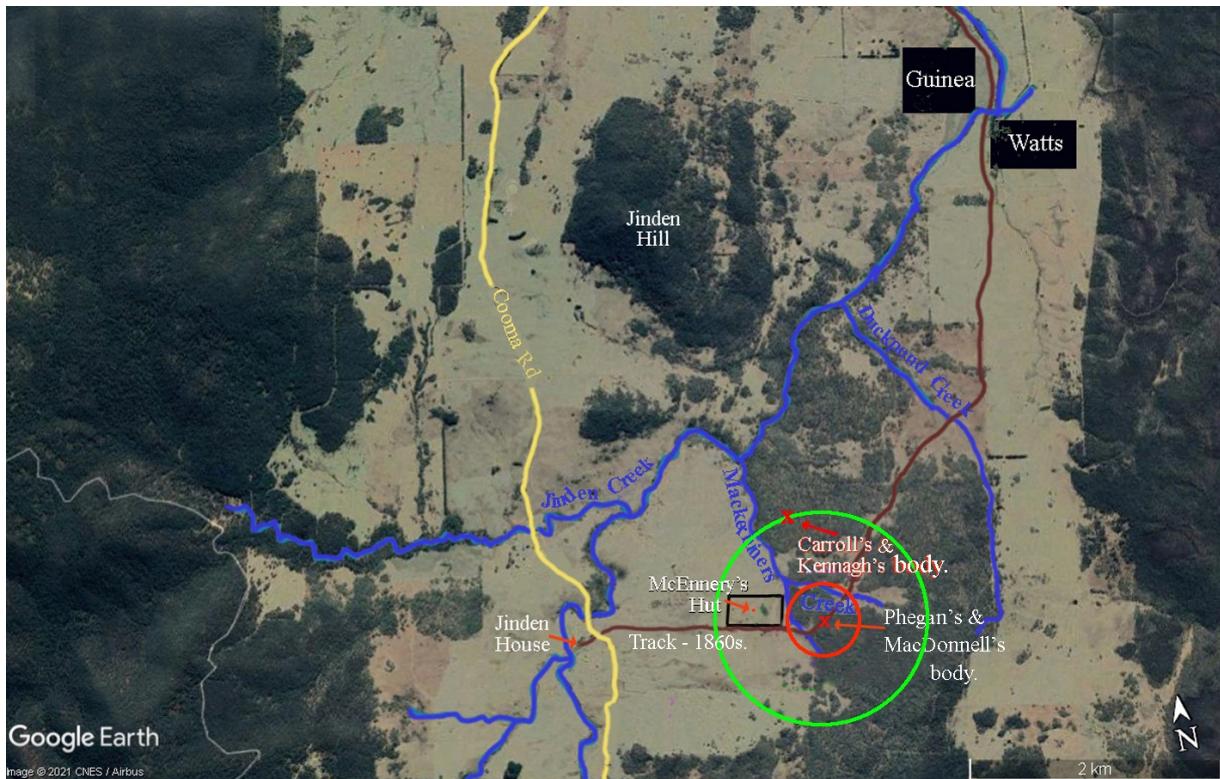
And just to confuse the issue even further, Orridge in his telegram to the Inspector General, the next day, 13 January, said half an hour between shots.⁴⁵ These discrepancies between McEnnery, Pattison and Orridge should have been questioned initially for James' deposition and secondly in court.

Sergeant Byrne's stated

Mrs. McEnnery's house is scarcely a quarter of a mile from the place where I found Carroll's body a person going away from the spot where I found the bodies of Carroll and Kennagh in the direction of McEnnery's would pass within about a quarter of a mile of the spot where the bodies of McDonnell and Phegan lay.

Map 2. The Jinden Track

45 Empire, 15 January 1867.



This map is a compilation of several maps. Google Earth for a better depiction of creeks and topography. The Jinden Parish map of 1935 showed the location of Jinden house and the properties of Watts and Guinea. McEnnery's block was calculated from an 1869 survey map. The **red locus** is 300 yards from the bodies of Phegan and MacDonnell. The **green locus** is half a mile from the bodies.

An adjustment was made to the North direction to relate to the survey map.

N.B. There would be a much greater amount of uncleared land in 1867.

This location, corresponding exactly to the descriptions given at the time by Byrne, is nowhere near the popularly accepted site of Duck Pond Creek, which is further east and along the track.

In Griffin's trial for the murder of Carroll, Byrne said he thought that he found on Saturday 14 January, the location where the horses which James Griffin was allegedly holding, stating,

On the Saturday morning, after finding the bodies, I went to the place where I had found Carroll's body; I examined the ground, and went up to where I found the first two bodies; it was open forest country; I examined the ground near where I found the first two bodies, and about 300 yards off, on the way towards Guinea's, I found the prints of horses' feet; there were the prints of three horses at least; they appeared to have been tied up there; you could see the place where the bodies were found, from where the horses were tied up; cries could have been heard at the distance; I am not sure that there were not more than three horses but there were at least three, I could distinguish the tracks of three.

In the trial for Griffin's murder of Kennagh, held in September 1867, Byrne's evidence, for this particular Saturday, is slightly different

.... and about 300 yards from the bridle-track, in the bush, I found the foot prints of several horses. I saw the foot prints of at least three horses. A man standing here could see what was going on at the place where Phegan's body was found. This spot was about 300 yards from the spot where Phegan's body was found and on higher ground. The ground is open, not scrubby, but large and small trees in places. A voice could be heard distinctly from where Phegan's body lay to where the horses were.

In the second trial the horses are uphill and off the track, in the bush. Initially Byrne gave the impression that it was on the way towards Guineas. Yet, to be on higher ground at a distance of 300 yards in the bush, he will need to be south-east of Phegan and MacDonnell's bodies, not in the north-east direction toward Guinea's block. Byrne does specify in both trials that the bush is open. Today in these areas it would not be possible to see this distance through the bush. It is unlikely that there would be less vegetation 150 years ago. It is more likely to be less vegetation today due to cattle grazing for possibly 150 years. And importantly, there would be many places where you could not get a horse through the vegetation (see photos below). This would make it easier for Carroll and Kennagh to conceal themselves and shoot the murderers. One also has to question how anyone could find these horse marks in an area that amounts to 58 acres⁴⁶ of bush, in one afternoon. Even so, horse prints cannot identify the rider of the horse. Presumably, the reasoning for the 300 yards was so the horses would not be heard or seen. Nor would any conversations or cries, as stated by Edward Smith, be heard.

The most important consideration, overall, to do with the horses, is the involvement of James in these murders. Were there any horses? The horses could obey a whistle from Tommy - they would not hear him call. James' previously had only played the part of telegraph. Could this person, with no motive for murder, play the role assigned to him by Edward Smith? On the other hand, Edward needed James down with the boys so he could relate the story of what happened and claim the reward. Ultimately the way to involve James was to have Tommy barefooted when Carroll and Kennagh ran from the track. This necessitated the horses. This story separates Edward from involvement in the murders. James is successfully being set up as the fall guy.

Unfortunately it was not until 1891 that any accused person could give evidence in court in New South Wales. James could not be questioned about these activities. Byrne's differing accounts of the location of the horses, his belief that voices could be heard from a distance of 300 yards and his statement that it was possible to see through the bush to the track from this distance is very questionable. Was it an attempt to give support to Edward Smith's story? A story that blames the Clarke brothers rather than the police. One has to question Byrne's honesty and motivation. It also needs to be questioned as to why the prosecutor, the Solicitor-general, Robert Isaacs, did not recall Byrne, which would allow him to be cross examined by the Defense, William Bede Dalley. Could it be said that the judiciary were protecting the police?

James Griffin had visited Edward on several occasions before the murders. On the day of the murders James called into Edward's place in the morning, after the Special Constables had left. John Lynn said James left in the direction of Badja, a gold mining area 17 miles south of Jinden house. He was not reported as being seen near Jinden on the 10 January. Edward had stated he saw James at Mick O'Connell's hotel, 16 miles from Jinden, on the 10 January. On 11 January 1867, James went to see his friend James Donoghoe, near Foxlow, a distance of at least 30 miles, which would take more than five hours to travel in the heat. John Lynn did not see James Griffin until the coffins were brought to Jinden following week. As a consequence, the only time Griffin and Edward could have had the discussions related to the horses would be in the days preceding 9 January. Edward's statement about the information he allegedly gained from Griffin on 13 of January was not officially made or reported to the police until after James was incarcerated. However Edward said he had visited Byrne on the 13 January, the day that James allegedly told him about the events of the day the Specials were murdered. Edward Smith, when he made his deposition on 21 February incriminated James by saying he *held* the horses.

Edward on the 21 February 1867, claimed James told him the details of the murders on 13 January outside Mick O'Connell's hotel at Stoney Creek in an unwitnessed conversation. Edward needed a witness to the murders so he could claim the now increased reward. We can't assume James was party to this information as he had been arrested on the 19 January 1867 and not in contact with Edward. Is this why James wanted to submit a statement at his trial?⁴⁷

It appears James wanted to be the first to bring Donoghoe the news of the murders. James told him that he was *with* the horses that day. This is all that Donoghoe claimed he said. Dalley questioned this inconsistency, *with* or *held* the horses in court, but unfortunately did not pursue the matter. James appears not to have given Donoghoe the details he supposedly gave to Edward Smith on the 13 January. Griffin also told Donoghoe that the murderers were the Clarke gang. This, and James' implication of

46 Area = πr^2

47 See Henry Zouch, page 74 below.

The bush today and examples of rocks near the Jinden track



Photos courtesy of Peter Mayberry.

Michael O'Connell, maybe the reason why James was apparently not wanted at home when he was released from gaol in September 1880.

Donoghoe said that James was horrified at the murder of the four men and indicated he was shocked that Clarkes, whom he had known and aided for many years, actually committed these murders. James, in his conversation with Donoghoe, was more concerned with what Alick Bradley may say against him, but he doesn't specify what this is about.

I contend that the reward is one of Edward's motivations as he wrote to Parkes twice and then hired the solicitors Want, Son & Johnson of Pitt St., Sydney in October 1867 and again in November 1867 to act for him, as his applications for reward were being ignored.⁴⁸ One of his letters was written from 80 Swanston St., Melbourne, which was the site of the Princes Bridge Hotel. Edward said he had to leave the colony because of the information he gave in court.⁴⁹

He also said,

he had worked the case up⁵⁰

which may indicate his statements were designed to prove that the Clarkes committed the murders. Edward's claims about James Griffin and the gang's involvement in the murder of the Special Constables is in serious doubt. Supporting his claim, in his third statement Edward had accused James of wanting to borrow his breech-loading rifle which, according to Edward in his initial statement, was out of order when James returned it to him 10 days before.⁵¹ This is another attempt by Smith to implicate James. The special Constables were killed with rifle bullets.

However, for Edward to *work the case up*, he needed James Griffin for additional involvement. He may have hoped that his story would be easily accepted and have the support of the police as it was a

48 NSWSR, *Col Sec Papers*, 67/6692, 4/607.

49 In June 1867 Orridge had written to the police in Melbourne asking them to keep an eye on him as it was not unlikely he would try to "clear out."

50 NSWSR, *Col Sec Papers*, 67/6692, 4/607.

51 See page 9 above.

story that would incriminate Tommy, Johnny and Bill Scott.

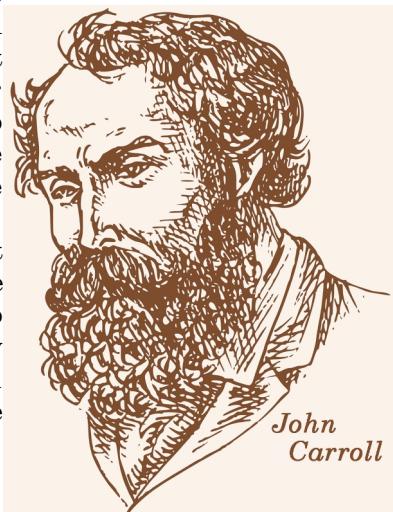
In his letter to the Inspector General, Orridge accepted Edward's evidence that three men were involved in the shooting and a fourth probably held the horses.⁵² In fact Orridge sent a telegram the Inspector-General immediately he heard of the murders saying the Clarke brothers and Bill Scott did it. This is before he had been given any other information and before any evidence had been collected.

Information as to the time Carroll's party would return to Jinden had to come from Watt's end of the track. The murderers needed to be ready, quiet and in position. This point, also, was not raised for the depositions or in the trials. The Attorney General, in recognising that there was not enough evidence to support a charge of murder against the Clarke brothers ended Edward's hopes of being eligible for the full reward. In fact, Edward's duplicity was recognised and he did not appear to be compensated at all for his efforts.

It was never made clear exactly what information from Edward could or could not be relied upon. We can assume that he may have committed perjury over many of his statements. His Honor, Alfred Stephen, in summing up in the trial of James Griffin for the murder of Carroll questioned whether Edward was even telling the truth in court. As a consequence Edward's statements should have been struck from the record and he should have been charged with perjury. Could the government want this to happen? They would then have no one to convict for the murder of the Special Constables. They would have no evidence against anyone. This could mean that the judiciary were not acting independently of the government - very unacceptable practice.

Failure to have unquestioned conflicting evidence in court could indicate collusion between Edward, the police and the involvement of other parties' interests. However there is no admitted evidence for this. Prosecutor, Robert Isaacs, unethically dismissed and made excuses for Sergeant Lenthall's missteps in his summing up.⁵³ A copy of Dalley's speech can be found on the web page.

We need to consider other scenarios.



Whilst we don't have all the information from 1867, we do have access to correspondence between the local police and the government, to the NSWPG, to Henry Parkes correspondence, to newspapers of the day and to the memoirs of a few people that lived in the district at the time. This is collectively more information than the separate groups had in the day. Today all this information is on the public record and much of it is on the internet. Public education has created a large group of people with the time, money and skills who are therefore able, with this collection of information, to give greater insight into the events of the time. On that basis I feel that it is possible to suggest two scenarios that may have occurred. I would love to hear from you regarding your thoughts on this rather tricky set of circumstances.

In the first scenario the murders happened at the same time and place as Edward described. I maintain that more murderers are needed to ensure success. Probably even eight men. This is based on the numbers used in the murder of Ben Hall,⁵⁴ and later in the capture of Tommy and Johnny. I strongly suspect harbourers were involved and based on the events described so far, I suspect Edward Smith was possibly the ringleader as he had the motive to remove the Special Constables who were going to arrest him, presumably for harbouring.

If Hezekiah Watt's deposition is to be believed, he warned the Specials, not to use the track when going back to Jinden. But they were new to the area and would possibly get lost going away from the track and through the bush. Perhaps they walked back using Phegan and McDonnell as scouts and Carroll and Kennagh followed behind. Here the rule of thumb for the distance between the two groups is based on the terrain and on the density of the vegetation near the track. If you can only see through the bush for 20 yards, you follow 20 yards behind. You need to follow more closely where the track is not straight and more closely if you suspect an attack. The track is straight for about 250 yards before

52 O'Sullivan, *The Bloodiest*, pages 104/5.

53 See Chapter 7, The Trial.

54 See page 4 above.

the spot where Phegan and McDonnell were murdered. So the murderers would have seen Carroll and Kennagh run into the bush, if that is what they did. Quite possibly Carroll and Kennagh also realised they were very outnumbered. They may have ran in a NNE/NE direction as Mrs McEnnery had said there was a couple of shots that were further away. Then turning NW to where their bodies were found. They would be running downhill all the way.

Dr Pattison, after performing the autopsy said of Carroll's body

I am of the opinion that death was caused by a gunshot wound, that the wounds already mentioned were inflicted by the bullet removed, which entered the body through the fourth rib anteriorly, passing through part of the left lung, upper part of pericardium, right auricle and right ventricle of heart, passing through lower lobe posteriorly of right lung, fracturing the seventh rib posteriorly close to the spinal column, the bullet lodging in the muscles of the back. I am also of the opinion that deceased must have been in a kneeling position when shot, and only a few yards from the weapon – which I believe to have been a rifle or gun.

Dr Pattison suggested they were kneeling when shot due to the trajectory of the bullet. This may be the case. Being on his knees would reduce his height by 25 percent, making it possible for Carroll to be wounded as stated, negating the need for a very tall executioner. On the other hand a recent suggestion by a medical practitioner was that this trajectory could occur if Carroll was standing below, but close to the murderer.

In the second scenario I suggest that perhaps Carroll and Kennagh were also killed on the track but their dead bodies were moved to a location half a mile away. The extra shots, after the first lot of shots, could be staged for Edward's story. This possibility may seem far-fetched but it fits in with the thinking of Henry Parkes, that they would not run. It also accounts for the length of time between the first and last shots, giving the murderers time to move the bodies. An hour seems too long for people being chased over such a short distance - probably less than a mile. As well the murderers would need to have horses, one so James could be involved to give the story, and two so the horse tracks made by the murderers would be accounted for and the tracks made by Smith, Smith and Watts the following day could be passed off as being made by the murderers. This scenario would also account for the fact that Carroll and Kennagh did not hide behind the rocks and other trees closer to the track, they were already dead. And this also explains why Carroll had not fired his gun - he was killed on the track before he could use his gun.

Blood money was pinned to Carroll's chest, inferring he was a greedy hired gun. Moving the bodies would give the impression they had run and were cowards. This along with Edward's deliberate perjury would be two of the key misdirections, designed to mask the actual events and the perpetrators. Blood money caused utter confusion at the time, as indicated in Myers' speech at the meeting in Araluen in January 1867.⁵⁵ He was of the opinion the Clarke boys would not know of this practice and others were involved.

Another misdirection was Edward suggesting that the Clarke gang and Michael O'Connell were involved. Michael had two alibis for the day of the murders. The Clarke brothers and Bill Scott, innocent under the rule of law, unfortunately picked ex-convicts as their alibis. The word of ex-convicts was not accepted in court at that time. James Griffin tried to give a statement in court, via Zouch, in his trial for the murder of Carroll. This statement was badly handled by Zouch in court. It was not accepted and therefore now it is not a legal document as its provenance cannot be proven. Documents have to be accepted at the time, by the court, to make them legal. This document was perhaps destroyed by Henry Zouch. It is not with all the other documents in the archives dealing with the various trials.

The bodies would have to be moved on 9 January, before John Lynn found Phegan and McDonnell the next day and before anyone else might use the track.

In a letter to Sir John Young, Henry Parkes said ...

Carroll was a man of very superior intelligence for his class, of great physical strength and activity, and I believe as brave as a lion. both he and Kennagh knew the use of firearms well, and were thoroughly acquainted with the character of the class of men they had to deal with. They were men whose lives were not to be taken cheaply if they

55 See Chapter 7, The Trial.

had any chance of resistance. I feel assured they have been the victims of some extraordinary treachery..... at present I incline to the belief that he was betrayed to his death by some person who had offered to put him on the track of the bushrangers, and that the circumstances were such as rendered resistance impossible, or possibly that he was shot down in pure revenge by new enemies whom he had made by his last proceedings..⁵⁶

This statement of Parkes' appears to be a very carefully worded accusation of Edward Smith and the harbourers. As well, Parkes had asked for the bullets to be checked to see if they were police issue. And indeed the wad and white paper found by Byrne was from a police issue rifle - but that piece of evidence in his deposition was ignored. Henry Parkes did need to justify his appointment of the Special Constables against the wishes of the Inspector General of Police, and the criticism of those that thought the Special Constables should have been brought back to Sydney once their cover was blown soon after they arrived.

There are serious problems with Edward's information. Because the gang had not been seen in the district for almost a week, Edward had to invent a scenario where the Clarkes and Bill Scott were brought up. Where were they brought up from? No sightings were reported anywhere in the district since 4 January.

Further, Mick O'Connell had supposedly given James two bottles⁵⁷ of gin to bring the Clarke up on the 8 January. James had a half-bottle of gin with him on the morning of the 9 January, when he called in to Jinden. It seems that one and half bottles of gin amongst four men was supposed to give them courage for 24 hours. Where were the boys on the night of the 8th? Mick O'Connell supposedly asked if the gin had taken effect. Mick had previously been reported as saying he was his own best customer. He would have no doubt as to the effect of any gin.⁵⁸

Despite all of the above points, Edward was not questioned about his activities on the afternoon of 9 January, nor were Edward, George Smith and Hezekiah Watts questioned about their activities on 10 January. They escaped charges. Many obvious questions were not raised in the court procedures. These may suggest cover ups by police and an indefensible ignorance of cultural and physical environments by the Attorney General and the judiciary. Because of Edward's perjured statements the Clarkes have been accused of murder for the last 150 years without any real evidence. This is despite the fact that the Attorney General decided there was not enough evidence for charging the boys with any of the murders of which they were accused.

As well, the terms of the Royal Commission were not comprehensive and failed to ask appropriate questions and did not interview all stake-holders. This resulted in a denial of justice to the Special Constables and their families, and also to the descendants of the bushrangers producing a stain that has existed for many generations.

Planning of the Murders

The planning for these murders probably started before Edward invited the Special Constables to Jinden. If the boys were to do the job, they would need to be part of the planning. But evidence of the boy's presence was sketchy and information on their involvement in planning was non-existent. The horses James was riding, on the two occasions he visited Edward had been identified as owned by the boy's. Edward stated in court that James was riding a bay horse when he came to his place on 8 January, and a grey horse when he came on 9 January. John Lynn in his deposition confirmed the grey horse. He also said that the day after the coffins arrived for the Special Constables, James was riding a stumpy tailed horse, identifying it as belonging to Tommy. Was James looking after and exercising the known horses of the boys? We know that the boys were riding other, unidentified, horses at the cattle camp the week before the murder of the Special constables. Would James even know where they were hiding?

It would appear it is assumed in Peter Smith's book,⁵⁹ that whilst we don't know the details of the conversations happening in the hotel on Sunday, 13 January, that

56 Parkes' letter to Sir John Young, Parkes' Correspondence, Vol 45 pages 57 – 63. Mitchell Library.

57 NSW SR, *Regina v Michael N O'Connell & James Griffin, Murder*. 9/6500.

58 O'Sullivan, *The Bloodiest*, page 93.

59 Smith, *Clarke Gang*, page 482.

it could almost have been an arranged meeting to discuss the murders and the next course of action.

This apparently fabricated statement is made even though the charges against Michael for murdering the Special Constables had been dropped, neither had he been found to be an accessory.

Those customers included older family members, the parents of the informer Thomas Berry, who were not suspected harbourers, a few young unmarried men, Kate Kelly and James Griffin. James was the only person present that had an association with the gang.

If the gang had committed the murders, shouldn't they be the ones concerned with the *next course of action*? However it does not appear that there was a next course of action.

Would not discussions about the murders be on everyone's lips, in every hotel, home, shop, street corner? Is every discussion about the murders a suspected future plan?

We do not know who was involved with these unsolved murders. Such successful planning beforehand would have been done very privately, not at the bar of a hotel.

The Harbourers as Suspects.



John Carroll

The boys robbed those that were best able to afford the loss. They robbed winners coming home from horse races, shopkeepers and hoteliers. Except for Little Bombay the wealthy landowners were not robbed. In 1865 the value of the gold sold in the Braidwood district was £264,035 [\$26,667,535].⁶⁰ There was a great deal of money around, but it was not money that was distributed fairly. Wages were very low, and many were trying to earn a living from small acreages with little equipment or man power and no knowledge of Australian conditions and soils. The Special Constables were threatening to destroy this underground economy by exposing the police and arresting the bushrangers and the harbourers.

The harbourers had good reason to eliminate the Special Constables. Carroll was threatening to arrest all of them, the maximum penalty being fifteen years imprisonment. Who would look after their wife and children whilst they were in gaol?

In November and December 1866 Carroll arrested Patrick and Michael Griffin, the brothers of James; Tom Berry Junior, a cousin of the Clarke boys; Michael O'Connell; Annie and Margaret Clarke, sisters of the boys; and Henry McCurle, a farmer and friend of the Clarkes. All cases except for Michael O'Connell and the Griffin brothers, were eventually dismissed. Michael and the Griffins would have to go to trial for harbouring an outlaw on 27th March 1867. The case against the Griffin brothers was dismissed in Sydney. Carroll's threat to arrest the harbourers carried some weight and could be seen

as one of the reasons he went to Jinden.

Mr Scarvell (the attorney for prisoner's in Braidwood) said of Carroll

A more disgraceful prosecution never sullied the records of this court, and it was only persons like Mr Carroll, who had no position to lose, who would dare to institute a course of the kind. A dangerous power had been placed in the hands of a dangerous man, and there was no telling who he would next pounce upon.⁶¹

Carroll blamed Henry Buckland's allegedly perjured evidence as being responsible for the dismissal of Ann, Margaret and Henry. In a letter to the Principal Under Secretary⁶² he stated he had applied for a copy of Buckland's depositions, including those to do with the case of Old John Clarke at

60 NSW SR, *Votes and Proceedings of the Legislative Assembly*, Vol 4.

61 *Goulburn Herald & Chronicle*, 25 December 1866.

62 NSW SR, *NSW Legislative Assembly, Votes and Proceedings No. 3, 1867*, page 275.

the Goulburn Assizes, for the purpose of proceeding criminally in this matter. Carroll was not making himself popular with many people. Maybe there were more suspects for the murder of the Special Constables.

Farmers have always had guns, even law-abiding farmers. They were, and still are, necessary in the bush against wildlife, to put down sick animals and for defence in this area that was virtually lawless.⁶³ Police issue Tranter double trigger revolving rifles were valued at £12 [\$1,212] each, revolving pistols at £6 [\$606] each and colt revolvers at £5 each [\$505]. Similar prices would apply to other guns. The cost was significant for the harbourers with a low cash income and families to support. However with alleged payments to the harbourers from the money the boys allegedly made in their robberies, they could be easily afforded. Senior Sergeant Francis Duffy, at the Royal Commission, agreed that corrupt police may give ammunition to the harbourers as the police kept no account of the ammunition. This of course acknowledges the fact that the harbourers did have the weapons. There were plenty of guns available for sale. Americans brought surplus guns for sale to the goldfields.

The harbourers thus had another good reason for eliminating the Special Constables. Harbourers were suspected of receiving what was possibly a large percentage of their cash income from the boys, easy money, and they were also thought to be paid in stolen unaffordable necessities.

The Police as Suspects.

The Special Constables were a group of four independent men and it was known that they were very critical of the police who were opposed to them. They criticised the police for their relationships with the bushrangers and their families, and the harbourers. Some police were suspected to be profiting from the bushranger's spoils, and it was commented that the problem was probably more widespread than just those who had been mentioned in reports.⁶⁴ The bushrangers, police and harbourers had a symbiotic relationship which was mutually beneficial to the disenfranchised section of the community, including the lowly paid police force. The boys did not interfere with the police, nor did the police appear to search very thoroughly for stolen goods amongst the harbourers. They had not been successful at catching the boys.

For these reasons the police were another group suspected of being involved in the murder of the four Special Constables. There were very few police in these outlying stations. Their character and their sympathies and involvement with the bushrangers suspected but not always determined. The wad and cartridge paper belonging to the police issue Calisher and Terry carbine, identified near the site of Phegan's and McDonnell's bodies, might have been proof of at least one policeman being involved in the murders.⁶⁵ It could easily follow that favours from locals may be called in for assistance. This in turn may explain why there was no reliable information incriminating the murderers.

John O'Sullivan states

Parkes sent instructions to check the calibre of the bullets taken from the Special Constables. Some took this as indicating a suspicion that certain of the police might have been implicated in the murders, as rumours also had it that the Special Constables had been in Jinden in search of evidence that would prove certain police had shared in the proceeds of the Foxlow robberies.⁶⁶

The police would not be wanting the Special Constables to expose their incompetence by capturing the gang. The relationship between the Special Constables and the local police was not ever going to be mutually advantageous. Carroll's high-handedness and self-importance and the fact that he complained loudly and long to Henry Parkes, about lack of support, would not endear him to the police. Or to the locals it seems. They burnt an effigy of him in Braidwood, when he overstepped his authority by arresting a publican whom he was erroneously told did not have a licence, in December 1866.⁶⁷

63 See the Braidwood Entrance Book (Gaol Records) on the web page.

64 *Royal Commission into Crime in the Braidwood District, 1867.*

65 See discussion above, pp12/3.

66 O'Sullivan, *The Bloodiest*, page 106.

67 Not only was George McLeod arrested, Carroll illegally confiscated £800 worth of alcohol, bought for the Christmas trade. This was stored in the sun in the police yard for a week before being returned on 24 December 1866. The matter went before the Legislative Assembly in August 1867. SMH 23 August 1867.

On one occasion Carroll complained that he had met more opposition from the local police, than the *outlaws*.⁶⁸ That was possibly because he had not come across the *outlaws*. There was only one outlaw remaining. Other gang members had not attained that status.

Trooper Woodland states

*It was, in ordinary phrase, death for a policeman to be seen speaking to him [Carroll]. In fact, we got orders not to recognise either Carroll or his party, nor to interfere with them. Hence there was a spirit of jealousy and dislike fostered against Carroll, who had thus to battle against the moral and secret force of the police. There were frequent disputes of an angry nature in Braidwood between Carroll and the police. I was in court when he accused them. He was not one of ours, he was an intruder. His presence was the seal and stamp of our incapacity, and we hated him.*⁶⁹

Henry Parkes also had reports of police receiving gifts of gold rings and chains from connections of the bushrangers. As well, very little of the goods suspected of being stolen by the boys were ever reported as being found. There were no reports of the police looking for these goods, most of which would have been given to the harbourers, who evidently were able to keep them concealed.

However, there were no reports of police being seen in the immediate vicinity of this isolated area at the time of the murder of the Special Constables. But there was the evidence of the police issue Calisher & Terry wad and cartridge paper which was never officially explained. Nor was it mentioned in court.⁷⁰

The police had their problems. They were not a cohesive group of men. The force was made up of both English and Irish nationalities. Some Irish being Catholic, others Protestant. After gold was discovered the area contained men from all over Europe, from America and from China. The police were governed by English rule which had a high opinion of its importance and superiority and its accompanying class consciousness and disdain of the lower classes and ethnic groups.

According to Woodland the police also had conflict with native born police (the term used to describe those born in Australia with immigrant parents) who considered their skills in the bush, their horse riding, bush manners, knowledge of the customs of bush people and proper saddles, superior to police imported from England and Ireland, and they were probably correct.

Thomas Woodland, as we have seen, was most outspoken against the decisions of his superiors and behaviours of some individual police. No doubt his comments at times need to be questioned as he could display the arrogance and daring of young men. Some examples are

.... you could never get any information from police [from the different police stations] about the boys; they kept all to themselves to prevent others from succeeding. They cared not two pence how long the boys were out, so long as no other police, took them....

and

*Nowhere was the country crying out about people being robbed and murdered, and Carroll accusing the whole lot of us to the Colonial Secretary, and before magistrates, for not doing our duty, when one portion of the police were positively trying to keep the other portion of the police in the district from coming on the bushrangers. No doubt the Ballalaba police would have liked to reap all the honours, but why complain to the superintendent and prevent other parties of police from using their exertions.*⁷¹

Appendix 6c, *Analysis of the Braidwood Police Diary*, on page 201 explores the organisation, difficulties and shortcomings of the police in relation to the bushrangers. The Special Constables, led by Carroll, with his close association with Henry Parkes, was exposing the failures of the police and threatening their future careers.

68 *Goulburn Herald & Chronicle*, 19 December 1866.

69 *Queanbeyan Age*, 21 December 1867.

70 See pages 12/3 above, for discussion on the implications of this evidence.

71 *Empire*, 14 November 1867.

The Clarkes as Suspects.

Orridge immediately, without any evidence, said the murders were committed by the bushrangers. He sent a telegraph to Henry Parkes with this information, as soon as he received word from Senior Constable Byrne.

Woodland wrote,

The accounts of these murders, both oral and printed, and the description of them, as given in Ned Smith's evidence, are so various, that it would be folly for me to pretend to give the correct version. Putting the odds and ends together, I came to the conclusion, that a certain squatter made the plan up, that James Griffin did the telegraphing, and the Clarkes and Bill Scott the shooting part. What share Mick Connell [O'Connell] had in it I cannot say. The above opinion was expressed by me at the time of the murders, but there were officials who could not see it. One of the parties implicated had an official friend in Sydney, and the police, somehow, still had high notions of Mick O'Connell. The worst of the matter was, that some of the local newspapers hinted pretty strongly that the police had a hand in it.⁷²

However, Daniel Guinea had testified, in his trial, that he had not seen the boys since Christmas; Orridge said he had no intelligence of them in the area since the 4th January; Edward did not say he had seen them after Friday 4th January; others had testified at Michael O'Connell's trial for harbouring that they had not been near the hotel.

What motive would the gang have to commit these murders? There is no evidence to suggest that the boys had never initiated confrontations with the police. They could out-ride the police on the rough terrain and the steep slopes, they knew the area and all its bridle tracks, they did not have to ask, even once, how to get to Jinden, and were very proficient in the use of guns. They had easily stayed away from the Special Constables. There were no reports of the Special Constables getting closer than 200 yards to the boys. Without the Special Constables their life was not going to be safe as the police were also hunting for them, and the police knew the area much better than the Specials. They had only ever returned fire when the unidentified local police came upon them suddenly and began firing. Woodland⁷³ recounts the story of having Tommy bailed up behind a tree in February 1866. When Woodland's revolvers misfired, Tommy came at him, with a revolver in both hands, calling him to surrender, but he (Woodland) would not stand for Tommy and so Tommy made a rush to get his horse. Woodland ran his horse away. Tommy disappeared into the bush. Had Tommy ran out of ammunition? It seems he was not willing to fight Woodland. And Woodland, it seems was not frightened of Tommy. The gang were not killers.

Indeed, James McCurley, in his deposition for the trial of James Griffin for the murder of Patrick Kennagh, stated that in a conversation on Christmas Day in 1866 that

Bill Scott said they [the Special Constables] wanted shooting. Tom Clarke said they did not want shooting so much as the Bradleys.⁷⁴

Edward Smith, in his account of the murders, stated Tommy's motive was Carroll's treatment of his mother and sisters. The fact that Carroll was unsuccessful at prosecuting them and was made a laughing stock amongst the locals, was retribution enough. Even the local police shooting at him was not seen as reason for Tommy to kill. In his court case, after the capture, Dalley and Doctor Pattison thought the bullet that wounded Walsh came from the other party of police. This bullet had not done the damage to Walsh that would have happened if it had come, from much closer, from Tommy's gun.

72 *Empire*, 14 November 1867. Woodland had previously stated that Mick was plotting with the boys against Carroll. Now it seems he is unsure. Unfortunately his reports often need questioning as he sometimes he confuses opinion with fact.

73 *Empire*, 25 October 1867.

74 *Braidwood Independent*, 21 September 1867. Alick Bradley had given information to the police saying Mick O'Connell supplied ammunition to his brother Tom and bought some of the goods from the Foxlow robbery. His accusations did not result in any charges to Mick. Alick was the only person charged and in gaol for the Little Bombay robbery. Alick's sister was married to Tom O'Connell, and Alick's wife was Lucy's sister. A few family vendettas going on there.

Sir Watkin Wynn was shot from about the same distance that Tommy was from Walsh and this resulted in an amputation.⁷⁵

Carroll's party had taken two revolving rifles and five revolvers to Jinden. Where are the missing guns? Peter Smith, apparently but incorrectly likes to blame the boys.^{76/77} According to newspapers, they already had two revolving rifles before the murders.⁷⁸ As well the rifle they were accused of taking when they allegedly robbed at Manar on the 24th July⁷⁹ was described loosely as a revolving rifle⁸⁰ / a Spencer repeating rifle⁸¹ / a Lancaster rifle⁸² in various reports. We have no sources suggesting or confirming that there was any attempt to find the guns taken from the Special Constables. It appears the serial numbers were not recorded there would be no proof of their existence.

Where were all the rifles and other guns owned by the gang at their capture, and since? (It is hoped that these would be in Police Museums, not in private collections). Obviously, others are involved. Guns were borrowed and lent all the time. James Griffin had used a log to hide a gun, and in his deposition, *Aiding the Outlaw Thomas Clarke*, Alex (Alick) Bradley had stated that Tom O'Connell had retrieved a gun from a log near Mick O'Connell's place. Alex said he himself, hid a rifle in a log near his place.⁸³ The Gazette⁸⁴ describes a gun found in a log near McElroy's public house. It had been seen in the possession of four men, thought to be miners. Presumably the gang were not the only people using logs as gun safes and we have no idea who would borrow from which log at any given time or examine logs in the hope of finding a gun.

There were many things that were not satisfactorily checked and this begs the question, why did the police not follow these things up? It would seem a natural thing for a policeman to do. Were they followed up with no result and therefore no report, or was it just too difficult and easier to blame the boys? Or was there something more sinister that was uncovered?

Whilst reliance upon accounts relating to guns appears to be anything but certain, as the numerous references indicate, what really happened about guns and their ownership can only be pure conjecture on behalf of anyone trying to make a concrete statement as to their existence and ownership. Inferring that the boys killed the Special Constables because they had revolving rifles is not evidence of murder.

It could be argued, without evidence, that Michael O'Connell in his role as patriarch of the family, or another harbourer, got word to the boys sometime before that fateful day, to stay away from the area and provide themselves with an alibi for what perhaps a few people knew was to happen. This could explain why the boys had not been seen in the area for nearly a week. Later we find that the boys had successfully made themselves scarce for a month from the last week in January 1867 but it seems they were in the district at least some of the time, as Bill Berriman had contacted them on two different occasions.⁸⁵

Mick's sister, Mary, the boy's mother, would expect that her sons would be looked after, especially now that their father had died. Women were important in Irish culture and they had input into decisions and those decisions would be made with their opinions in mind. Irish women were treated as equals in the family as far as rights and finances were concerned. Mary had been running the family farm since her husband, John, was arrested and subsequently died. This aspect of the Irish culture had its genesis in the 7th Century A.D. in early Brehon Law.⁸⁶

The Boys Deny Involvement in the Murders.

At Darlinghurst Tommy and Johnny always denied they murdered the Special Constables. They each had a priest to talk to, and the Sisters of Mercy counselled them as well. They knew, according to

75 See Chapter 7, The Trial.

76 See Chapter 7, The Trial, for discussion of guns in Berry's hut at capture.

77 Smith, p456 says the boys only had one revolving rifle before the murder of the Special Constables.

78 See Appendix 4 below.

79 Ibid.

80 *Freeman's Journal*, 4 August 1866.

81 *Queanbeyan Age & General Advertiser*, 2 August 1866.

82 NSWPG, 8 August 1866.

83 NSWSR, Deposition *Aiding the Outlaw Thomas Clarke*, 9/6500.

84 NSWPG, 29 May 1867.

85 See Chapter 6, Prelude to the Capture.

86 See book, Chapter 8.

their Catholic faith, that if they were guilty of murder and did not confess, then they would spend eternity in hell. Would Father Dwyer write an appeal to Henry Parkes after their conviction of wounding Constable Walsh, if they had confessed to the murders?

The boys composed a letter to Henry Parkes from Darlinghurst Gaol on 17 June 1867.⁸⁷ Parkes asked Orridge to check their alibi.

On the day that Mr Carroll and party were murdered both of us were at Mrs German's [Jermyn's]. (Wallaces Sheep Station) a distance of about 25 or 30 miles from the locality of the murder. Mrs German, her daughter Mrs Blachford [Blanchard] and Mr Blachford [Blanchard] who was a member of the Police Force 3 or 4 years ago were all speaking to us nearly the whole of the day. James McCurley also saw and spoke to us at Mrs German's on or about 1 o'clock on the same day. We were at Mrs Germains until 5 o'clock of the day that Mr Carroll and party were murdered. As the Testimony of the persons we have named can prove on oath, all we have to say in the matter is that we had neither hand, act or part in the murder of Mr Carroll and party.

P.S.

In about a week after the day we were at Mrs Germains we again called at her place and she told us that she saw and read in the newspaper about Carroll's murder and that we were accused of committing the deed – but that she knew that we could not do the deed as we were at her place during the whole day. She also told us that she gave information to Sergeant Hughes of Foxlow Station stating that we were at her place and that Serg^t. Hughes entered it in his book.

On the 19 June 1867 Henry Parkes added

To Inspector Genl,

This letter should be sent to the Superintendent of the District by telegraph with instructions to take any step that may deem necessary to ascertain the truth, using his own knowledge & judgement of character in forming his conclusions.

Did Orridge really want to find that their alibi was in place? That would mean very difficult questions and further investigations for himself and the police. The police and Orridge had much criticism directed at them during the Commission and further problems now would not help Orridge's career. Orridge was 37 years old in 1867 and remained in the police force for the rest of his career, however he received no further promotion beyond his Superintendent status. On the matter of the alibi, Orridge replied to Parkes by telegram on 19th June 1867 with very negative statements saying that the Jermyn's were notorious harbourers and unworthy of credit and that he thought the whole alibi was a lie.⁸⁸

Michael O'Connell, as patriarch of the family, should have made sure the boys found an alibi whose word could be accepted in a court of law. But it has to be remembered that an alibi could be charged with harbouring, if they did not report to the police by the next day.

The Shoalhaven was in flood and it was unsafe to cross. Orridge telegraphed Queanbeyan Police asking them to help. Would he also give them his negative opinion of the Jermyn's? That could colour their enthusiasm for the job. Perhaps they already had this opinion of the Jermyns as Ben was currently in gaol. Orridge then reported that Constable Hughes denied receiving any information from Mrs Jermyn and that Sub Inspector Creaghe⁸⁹ and Senior Sergeant Smith spoke to her about the murders and they said she made no such statement to them. But nowhere does it specifically say they were even asked the question of the boy's presence on 9th January 1867. Nor did the police obtain the very important deposition from the Jermyn's confirming or denying the alibi.

However, as an opinion of the credibility of the Jermyn's had already been made it could therefore be assumed that irrespective of what they said, the alibi given by Tommy would not be believed and not recorded. Alternatively, Mrs Jermyn might be concerned that giving an alibi would lead to prosecution for harbouring or supporting an outlaw. The boys are damned if they did, and damned if they didn't.

It was also reported that the boys had visited the Jermyn's the week before wanting to borrow their double barrel gun. When the number of guns the boys possessed is calculated, according to newspaper

87 NSW SR, Col Sec Papers, 67/4049.

88 NSW SR, Col Sec Papers 67/4049.

89 Spelling of surname as in the Police Service Registers (1852 - 1913). NSW State Records

reports, this statement is very questionable and like Edward's evidence one therefore must question whether everything the police reported was factual.

Benjamin Jermyn was in gaol at this time and his wife would have the concerns of the farm and children. Her only male support was her son-in-law, Frederick Blanchard, and he was on Orridge's payroll as an informer.⁹⁰ She would be intimidated by the presence of three big burly policemen and may not be inclined to volunteer information, and we have no knowledge of her literacy or communication skills. If the boys' alibi was in place there would need to be further investigation. Would it result in finding that the police themselves committed the murders?

Trials of James Griffin and Michael O'Connell.

The trials of James Griffin are a result of Edward Smith's questionable statements about the murder of the Constables, statements that were decided by the Attorney General to be not sufficient evidence and statements that were questioned even by the *hanging judge*, Sir Alfred Stephen, who followed the letter of the law in this trial.

James Griffin's Trial for the Murder of John Carroll, 30 May 1867.

James, Daniel Guinea and Michael O'Connell were arrested and charged with the murders of the four Special Constables. Depositions were taken on the 21st and 31st January and on the 7th and 14th February 1867.

Based on these depositions the Crown Solicitor, John Williams, stated

There is not sufficient in these depositions to justify me in putting these prisoners upon their trial. Let them be immediately removed to Goulburn Gaol and let a further inquiry be had in the gaol or court house there and let Mr Edward Smith and Mrs McEnnery be again examined in their presence. If necessary let the necessary expense be incurred to provide Mrs McEnnery with the means of support out of the Braidwood district until the critical outcome.

It was decided that Daniel and Michael did not have a case of murder to answer. Daniel was released. Michael was charged with sheltering and sustaining the Outlaw Thomas Clarke at various times and would face trial in Sydney. James would face trial in Sydney for the murder initially of Carroll, and if not convicted, for the murder of Kennagh.

Whilst James was in gaol, awaiting his trial for murdering Carroll he was visited by Henry Zouch, Police Superintendent of the Southern District. At the time prisoners could not take the stand so James gave Henry a statement to be read to the court. This matter was not straight forward. In all probability James did not sign the Record of Interview relating to this arrest as this was not mentioned in court. Did he sign any statement related to the murders?

It was assumed in the court that the statement James gave to Zouch indicated he wanted to become a witness and to go Queen's Evidence. The Solicitor - General, Robert Isaacs, and Alfred Stephen supported the admission of the statement but were eventually convinced by Dalley not to accept it. Stephen saying

To receive it seemed to him extremely unsafe as it might be the cause of eventually upsetting the conviction if obtained.

In the end Stephen's statement was very ironic as, at the end of the proceedings, he bent over backwards instructing the jury on the treatment of perjured evidence, and James was found not guilty. Surely it would have been far better to look at all available evidence. This result questions if the discussions are just bumbling on behalf of the various players or does it raise suspicion of a deliberate attempt to confuse? As James had been in gaol since the 19 January, Edward's story of his involvement would be news to him. This could explain why he made the statement, in gaol, to Henry Zouch on 6 April 1867.

90 NSW SR, Col Sec Papers, 66/5675.

This statement was not brought up in James' second trial for the murder of Kennagh in September 1867. Because his statement was not verified by a court at any stage, it is not legally admissible.

Of further interest is that Zouch never made public the information James had given to him. There surely would have been a lot of pressure to do so. Who was he protecting?

The full report of the trial can be found on the webpage.⁹¹ I have confined my information to a summary of the comments from the defence, William Bede Dalley, from the prosecution, Robert Isaacs, and from the Chief Justice, Sir Alfred Stephen. These comments were made at the close of the case for the Crown. The comments were long, taking two and a half hours and I recommend you read the full trial and comments if you would like to form a more complete picture of the case.

Mr Dalley:

This young man stands before you charged with a motiveless murder on his part. There has never been the slightest charge made against him, and the witness for the Crown who has just left the box, [James Donoghoe] and who has known the prisoner since his boyhood, appears to be impressed with a conviction that his character was so high, up to the perpetration of the murder at all events, that no imputation of crime upon him would be believed by those amongst whom he has resided.....

.....Crimes of this sort are not usually perpetrated without some adequate motive. In all cases of murder it is generally insisted on that there is or is not a motive adequate for the perpetration of the offence.....

..... not one murder, but four murders were committed on that melancholy day. What is the story of this murder? It rests on two witnesses, and two witnesses alone. There have been witnesses called here today whose testimony in no degree implicates the prisoner.....

....What shall be said of a case where the Crown has to be represented by two witnesses, [Edward Smith and Mrs McEnnery] who, the moment they open their mouths, say, " We are perjurers - not in one, but in a dozen, nay in fifty instances. We are perjurers from head to foot; and lo! though we have given evidence for the prisoner in one Court, we are here now to give evidence against him; we are here to be transformed into beings that everyone must regard with contempt and horror." There is not a scintilla of evidence beyond the testimony of these self-convicted perjurers, and there is no corroboration of their statement. The Crown dares not to attempt to corroborate them.....

..... such a murder was committed at this man's very door [Edward Smith's]- the victims being men who a few short hours before were the partakers of his hospitality, and whose property was in his keeping and you would hardly imagine that there was a man living who, the moment the fact of this atrocity was communicated to him would not have fled at once to the officers of justice and done everything possible to discover the perpetrators. He sent to the police; but what did he say to the police? On his oath he informs you that it is the 14th of February when he tells a story about the murder, lies about it from first to last, to screen one whom he now says he believes to be a murderer.....

.... [Edward] Smith waits until the 14th of February, and then tells a story which he now declares to be a mass of perjury, the object of which was to interpose his arm between the hand of justice and the body of this young man before the Court told no story of them from that time until the middle of February, after five weeks had elapsed, after the poor victims of one of the foulest crimes lay rotting in their graves. yet the only excuse for the mass of perjuries he uttered was his own personal danger.....

..... and who gave no reason why they went on foot? Do you believe he knew no more of this murder than he has told you? Does not his mass of lies prove that he knew more?

.....The Clarkes were not greater scoundrels if [Edward] Smith, apprehending what occurred, did not say to Carroll and his party do not leave my house without having your weapons ready, and be cautiously on your guard, for those who intend to murder you are near. Presuming, however, as we must, that he did not anticipate the occurrence, if that is true, why did he send his boy to the very place where the bodies lay?.....

.....You must presume that these men were sent away without any apprehension on [Edward] Smith's part that their lives, were exposed to peril, unless you believe him to have been an accessory before the fact to the murder. If he did not expect any occurrence of this kind, how do you account for the fact that next morning he was so interested in their fate and seized with so much alarm, that he sends his boy by a peculiar route for the single reason that he wished to ascertain their fate, and that the boy should so shortly return and inform him of the fact of the murder?

....You heard him try to evade the question whether he was sober on the day he heard the conversations he spoke of, and you heard him at last swear that he was sober; yet at Braidwood he swore as solemnly "I was not sufficiently sober to know what passed that day.....

...."I won't swear," he says that I did not tell Lenthall I was sorry Griffin was apprehended." What! Griffin, the murderer! Griffin, who told that horrible tale of blood and misery and terror, which would frighten the most hardened! And he says that he won't swear he did not tell Lenthall he was sorry Griffin was apprehended! Then he says, "I never said that Griffin would bring home the murder to some one." In the same breath he blasts his testimony.....

....But the fact is, he has gone about the country telling these stories because he felt that the popular suspicion pointed to him - that people were saying, "It is not these young men who are the murderers, but the man at whose houses the corpses were lying." Had he heard that this young man was making statements which implicated him, and then did he go round telling stories to arouse suspicion against Griffin and divert it from himself? Did he do this to purchase his own escape from the gallows? That his is one of the most atrocious cases of perjury that ever came before a judge all must admit.....

....Gentlemen, never send a man to the gallows on evidence so questionable. There are no murders so terrible as judicial murders; there is nothing that will so soon sink a country in the estimation of the world as a fatal mistake in the administration of justice.

....Out of this mass of perjury - of contradictions - of inconsistent statements, covering the whole case as with thick clouds of doubt and falsehood, you will have to grope your way to a conclusion....

Mr Isaacs:

..... and since my learned friend has introduced so many irrelevant matters it is a duty incumbent upon me to try and show that many of his statements are not more worthy of regard than the idle wind which blows about you....

....The learned counsel has told you that the evidence for the Crown rests upon two witnesses, and that none of the other evidence bears in the remotest degree upon the case. But even on the supposition that Mr. [Edward]Smith was an accomplice - which

I do not admit, there is confirmatory evidence to an extent which the law would recognise sufficient to corroborate the evidence of even a proved accomplice. Three or four witnesses bring the prisoner in immediate opposition with Carroll and his party in different parts of the Braidwood district for the three or four days preceding the murder. Why was he thus dogging the heels of Carroll and his party. Even on the supposition that Mr. [Edward] Smith had ' lied ' to adopt the learned counsel's phrase, his testimony had been corroborated by other witnesses. But in every transaction of life there must be only a limited number of persons who can speak of the immediate particulars concerning an action, and in a thinly populated district you cannot expect more than a few witnesses who can positively swear to facts such as have been sworn to by [Edward] Smith and Mrs. McEneny.....

....The Crown cannot be said not to dare to corroborate when they have witnesses But if there was any sincerity in this observation of the learned counsel he was at liberty to call both himself, Lynn and Byrne being in Court.....

....They went to Guinea's on foot, and might not their reason for doing so have been, that they thought they could surprise the bushrangers better on foot? That is quite a reasonable supposition.....

....My learned friend said that the attorney who examined Mr. [Edward] Smith at Braidwood must have been instructed by Lenthall. Very likely he was, but perhaps Lenthall mistook what Mr. [Edward] Smith said to him. Lenthall would, no doubt, be apt to seize everything that he thought would make out a case, and would very likely misunderstand some portions of Mr. [Edward] Smith's statements. These are matters for your consideration....

....I maintain that that piece of evidence which [Edward] Smith gave in answer to a leading question put by me, that Griffin stated to him that when Tommy Clarke was running after Carroll he called for the horses, and he (Griffin) took them to him, was the most damning piece of evidence which he gave. If Mr. [Edward] Smith is to "steeled" in perjury, so "leprous" in perjury as his portrait was drawn by my learned friend there is no reason why he should not have perjured himself on a former occasion as much as on this also....

..... but there was no possible reason why he should perjure himself today....

....As to Mrs. Mc Eneny, I ask you if you ever saw a woman give her evidence in a clearer or more satisfactory manner. But my learned friend says that she "lied" before the magistrates at Braidwood. She tells you that she was under the influence of terror and the depredations committed on her property appeared to show that her apprehensions were not altogether groundless. Her husband was not at home, and her children were there with her.....

His Honor (Sir Alfred Stephen):

.....The case against the prisoner rests almost entirely upon the testimony of two persons who come here and confess that they are perjured. The question is whether to-day they have spoken the truth, because it is perfectly possible that they have perjured themselves to-day, The prejudice against these witnesses must be so strong that I cannot but suppose you feel bound to yield to it unless you feel that you can safely rely upon their latter testimony instead of the former. And I advise you distinctly to acquit this prisoner unless you feel that the evidence of this man [Edward] Smith can be relied on. It can only be relied upon if you thought he was in a state of alarm, fear, or terror, which led him to perjure himself. Perjury is perjury in all cases, but it varies in degree, according to circumstances. He who perjures himself under the influence of terror or charity, under the influence of a desire to save a beloved relation, stands, and must naturally stand, in a very different category to the man who swears

falsely and deliberately for selfishness, gain, or lucre, malice, or vindictiveness. It is said that the prisoner has committed a murder for which no motive is assigned. It may be said that the woman Mrs. McEneny and [Edward] Smith have committed perjury. What motive had they for doing so? If no reward was offered I cannot see how they could have had a motive for what they did. If they swore falsely for the purpose of getting a reward, then that was a most horribly wicked motive.....

.....If, however, [Edward] Smith's evidence be rejected there is nothing in Mrs. McEneny's to convict the prisoner. Then there is the testimony of Donoghoe, which struck me as remarkable, as you will recollect that after being repeatedly asked if he could recollect no more, he began to say in a way that was noticeable and you must consider the impression it made upon your minds - that the prisoner told him that he only held the horses. If that is to be believed, it is of great significance in his case.....

....[Edward] Smith answered most of the questions directly the reverse of what he said to day. He says he did so because he was then under the influence of fear, but a man of strong mind would rather suffer death than perjure himself.....

The jury, retired at twenty minutes past one, and after twenty minutes' deliberation returned into Court with a verdict of not guilty. There was some manifestation of feeling on the part of the crowd in the Court, but the applause was almost instantly suppressed by the police.

Sir Alfred Stephen had gone to great pains to clearly explain to the jury the necessity of basing their decision on their opinion of the truthfulness of Edward's comments.⁹² He also linked this to the truthfulness of Mrs McEneny's comment. He then further emphasised the importance of Donoghoe's statement. It was apparent to Stephen that Edward's comments were not entirely factual. In law, perjury should mean the comments of the perjuring person are not accepted at all. This conduct of Stephen contrasts significantly to his conduct regarding the Clarke boys. In their trial there were several instances of irregular behaviour on the part of Stephen to the detriment of the boys.⁹³ However Stephen should have had Edward charged for perjury. This would then have meant further evidence would need to be found before James or others that he implicated could be charged with murder of the Specials. James would not have suffered 13 years gaol or contracted TB, dying at 29 years of age.

James was later found guilty of the murder of Patrick Kennagh, in September 1867, on the uncorroborated evidence of Henry McCurley, farmer, who alleged, that in a private conversation at the Clarke's house, James had asked him if he wanted to be part of the murder of the policemen. But, the next day, James retracted the statement, saying he was joking.⁹⁴ Dalley, in his summing up in James' trial for the murder of Kennagh accused McCurley of perjury. This is the second private conversation implicating James. This appears to be very thin evidence for sending someone to gaol for 15 years. In fact, in Frank Gardiner's trial in 1864, because of a witness, who also appeared to be lying, it was not considered enough evidence to charge Frank for the Eugowra Rocks robbery. The court had not charged Tommy and Johnny with any murder as the Attorney General had ruled there was not enough evidence. James now was the only hope of convicting someone for murder, and it seems any evidence would suffice. He should have been covered by the Attorney General's ruling.

That Henry McCurley should offer this information about James Griffin is strange. There was, however, a reward involved. Henry married one of Tommy's sisters, Mary-Anne, in 1870 so his information presumably did not affect his relationship with the Clarkes. Information passed down in the family to a grandson of Catherine Clarke's, claims that Henry said that the boys were 400 miles away with cattle in Victoria at the time of the murders. It appears that there were several places the boys were that day.

It was often acknowledged at the time that Edward knew more than he was saying and Dalley as good as accused Edward Smith of committing the murders himself.⁹⁵

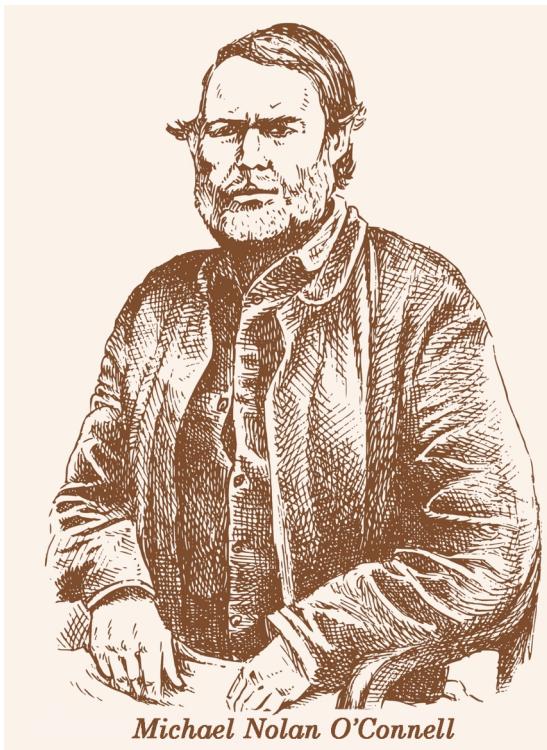
92 www.braidwoodbushrangers.com

93 See Chapter 7, The Trial..

94 *Braidwood Independent*, 21 September 1867. James Griffin's trial for the murder of Kennagh.

95 See above page 30.

Michael O'Connell's Trial for harbouring, 21 Aug 1867.



Michael Nolan O'Connell

The fact that Michael was found not guilty of the murders, convicted only for seven years (and released 17 months early) on the harbouring charge and his property was not sequestered means that authors cannot lay any blame in his direction and keep their credibility, without further evidence coming to light. His harbouring and supply of ammunition causes consternation, but reasons can be offered.

There was evidence that Michael had often supplied his brother Tom with food and alcohol. In the trial, Dalley stated,

the prisoner might shelter Thomas Connell [O'Connell] to the Day of Judgement if he chose.

There was also the evidence that Michael had bought the necessary ammunition for Tom's rifle, a Calisher & Terry carbine. In the judge's summing up and sentencing he explained that if Michael had also been charged with supplying ammunition, he would have been sentenced to fifteen years. He was guilty of that offence but had not been convicted of it.⁹⁶

The judge also lectured Michael for not thinking of his family and what would happen to them in the event of a prison sentence for harbouring. He did not understand that in Irish culture, Tommy and Johnny, being nephews, were also family, and that Michael's role as the patriarch of the family, was to provide sustenance to the boys, now that their father was dead. The judge, like others then and since, made the mistake of referring to Thomas Clarke as a murderer. He had never been convicted of murder. As one trained in the law, and smart enough to know Michael could not be convicted of supplying ammunition without being charged, he should not be making mistakes like that.

As far as ammunition was concerned, Michael was in a predicament. If the police came across the boys they would shoot without announcing their presence, not giving the boys the opportunity to surrender quietly. They had already shot and killed his youngest brother. Unless they are shooting at outlaws, shooting without warning was, and still is, against the law. Tommy was an outlaw, but Johnny and Tom were not. Whether they would have surrendered in each instance, we will never know. The gang had not killed any police when cornered, preferring to escape. When the boys (now just Tommy and Johnny Clarke) were surrounded before their capture, there was a gun battle for six hours, with no fatal injuries. The police were hoping for surrender and waiting for reinforcements, the boys hoping for night time and possible escape.

Michael would have known of these occasions. He would also have known of the behaviour of the police. He would not want another brother in an undefended situation. This was his predicament.

Where did they get their food once Tom O'Connell was incarcerated in early November 1866? We do not know how the boys gained access to ammunition, or whether they had a reliable and continuous supply, or whether they made all of their own bullets. Indirectly the boys may even be supplied by harbourers who had been given police ammunition. These questions were never examined in any court, nor was it followed up later by the police.

James Griffin's Trial for the Murder of Patrick Kennagh, September 1867.

The newspaper report does not give the full report of this trial as the evidence for the prosecution was essentially the same as that in the trial of James for the murder of John Carroll. New evidence and the

summary of the defence, are reported.⁹⁷

Mr Dalley for the defence:

- repeated his criticisms of Edward Smith's evidence, which was a repetition of his comments at James' trial for the murder of John Carroll in May 1867. He also lists all the benefits to Smith from the death of the Special Constables and says

He is placed in the witness box instead of being arraigned as a murderer.

- stated that James Griffin had no motive for the murder of Kennagh.

- states

..... the only evidence on which you are asked to convict this man is the evidence of persons who come into the witness box and confess that they are perjurers. That is a novel feature. It is a novel feature that the Crown establish their case by the evidence of witnesses who confess themselves to be perjurers In olden times the law of England was that a perjurer's tongue should be cut from out his head.

- repeated his criticisms of Mrs McEnnery's perjured comments from James' trial for the murder of John Carroll, adding a very pertinent point

The persons of whom [Edward] Smith speaks were on horseback: the persons she saw after the shots were fired were on foot.

So who did she see? She claimed it was Tommy, Johnny, Bill and James. But according to Edward they had horses. So were there more murderers? Is Edward not telling the truth?

- On Henry McCurley's statement that James had asked him if he wanted to be one of a party to murder Carroll and his party. Dalley points out that there were no witnesses to this conversation and accuses McCurley of perjury.

You saw him crouching down in the witness box, as if fearing that the judgement of Heaven would fall on him while he was bringing forth those perjuries. You heard him lying three times consecutively in answer to the three first questions I put to him.

The newspaper reporter also commented on McCurley

He gave his evidence in a very undecided and confused way, and seemed to be exceedingly stupid, but his story did not vary.

The Solicitor-General then gave his address and His Honor, Justice Cheeke, summed up. However he did not give a similar summary to the jury as Alfred Stephen had in James' previous trial. Stephen's key direction to the jury was to explain perjury and to decide whether Edward was telling the truth. Without this explanation the jury gave a guilty verdict two hours later. They recommended the prisoner to mercy because of his youth and bad associates. James was sentenced to death but this was commuted to life, of 15 years. Previously the Attorney General had issued a statement to the effect that there was no evidence against Tommy and Johnny for any murder. James, according to Edward Smith's perjured evidence, was with the boys when the Special Constables were murdered. Here he is being charged with murder based on a single uncorroborated statement and an inefficient and uncaring Judge.

Findings of the Royal Commission, January/February 1867.

This Commission was set up to investigate the state of crime in the district, questioning the roles and abilities of the police and magistrates. The commission was not before time.

It was reported that some police drank openly in the hotels and frequented the houses socially with those on the wrong side of the law. Some of the police were supplied by the boys. It was known amongst

97 Sydney Morning Herald, 17 & 18 September 1867.

the police that Constable Watson was receiving stolen goods. Henry Parkes had a report to say other police were given stolen jewellery.⁹⁸ It appears throughout that Parkes had inside information, that wasn't divulged. Again these were accusations that were not tested in court. The police were not well paid. The Commission had already probed the question of accountability of ammunition. Why was there not a more thorough investigation amongst the locals of the Jingera? Much more effort would need to be given to answering what was probably impossible given the isolation and consequential lack of witnesses. Much easier all round to blame the boys.

The police force had undergone an organisational change in March 1862. One of the changes meant the police could not take their own initiative and had to wait on orders. This often meant the bushrangers escaped. These changes added to the problems and were criticised in the Royal Commission held in Braidwood in 1867. It appears police were selectively following the rules.

At the Commission questions were asked about Orridge and the police, and several different opinions were given. Mr Musgrave, editor of the Braidwood Dispatch said that he had seen Old Clarke drinking with some of the police (including Constable Walsh) and said Clarke was considered the Jonathan Wild⁹⁹ of the group. He also said that Constable O'Reilly was stated to have been seen kissing Ann Clarke. He thinks the police are too familiar with the harbourers of the bushrangers and this has led to contempt of the police by the public. He thinks the police should track the bushrangers when they lose sight of them, instead of going home.

Of Orridge, Musgrave said

I think he would not wilfully commit any act that was dishonourable; I think he is a gentleman, but I think he is a man wanting in purpose and resolution and apt to be misguided. / leaves them [the police] more to himself than he should / I could not find fault with the sergeants here.

When Musgrave learnt the full powers of a superintendent he altered his opinion and said Orridge was inefficient. Thomas Atkinson thought the police in Araluen were too intimate with the publicans; Joseph Taylor of Little Bombay thought the police were powerless to suppress crime and thinks the system since the Police Act of 1862, is radically wrong; he is supportive of Orridge. He said that only a few police were good bushmen or riders, and they were poorly mounted. The bushrangers horses were usually rested when the police came upon them, and the police could not then keep up with the fresher horses.

Trooper Woodland had previously criticised the efforts of the police, giving many instances where the police did not pursue, but hung back for reinforcements; he accused Sen. Constable Watson of refusing to let Egan shoot Tommy, when he had a clear shot and of stamping his feet to let the boys know they were nearby. Also of writing false reports about their inability to capture the boys at that time.¹⁰⁰ He said Watson was a particular friend of the boys, Pat O'Connell, Tyrie, William Bruce, and, in fact, all the mob. These chaps would never see Watson want for anything, especially beef, which they would bring to him on a pack-horse. Yet Watson was considered very effective by Orridge. Were there similar instances at other stations?

The Commission thought so, stating that

Several instances have been adduced of misconduct and inefficiency on the part of certain members of the police and that it may be inferred that misconduct is more extensive than that which has come under their notice; that Orridge had not exercised strict and proper control over his men; that improper intimacy existed between members of the police force and certain connections with the bushrangers and they were at a loss to understand why Orridge did not know about this.

Were the problems of distance, police equipment and skills, and the strong support base making it almost impossible for the police to bring bushranging under control? Or was Orridge a large part of the problem? Looking at some instances in his career before and after his stay in Braidwood, it appears that Orridge must take his share of the blame.

98 Mitchell Library, Sydney. Henry Parkes Correspondence. Henry Parkes letter to D.H. Campbell, President of the Royal Commission, 26 January 1867, pages 61 - 63.

99 See Appendix 4.

100 *Queanbeyan Age*, 7 December 1867.

Before his assignment to Braidwood, Orridge, on 30th August 1863, had been duped by a telegraph near Wombat NSW. He was told that Ben Hall's gang had taken refuge in a settler's hut nearby. Orridge and his men left their camp on foot. The gang was easily able to overpower the two guards, loot the camp, riddle the tent with bullets and escape with all their horses. Two days later the gang appeared at Webb's store in Burrowa, the police could not do anything as they were drinking at various hotels in the town.¹⁰¹

Orridge, during his term in Braidwood failed to demonstrate leadership and support. From entries in the *Police Diary* we see he seldom joined his men in their efforts to capture the boys. He preferred to hide in his office, spend weekends in Ballalaba, or go out of the district.

Orridge still had not learned his lessons on the consequences of lack of leadership the following year when he was in charge of the escort of H. R. H. Duke of Edinburgh in Sydney. It was three onlookers who managed to prevent the would-be murderer, O'Farrell, from doing further damage. He is not mentioned at all in the Sydney Morning Herald's¹⁰² account of the shooting, but the Australian Police website¹⁰³ hastens to assure us that Orridge did make an appearance once O'Farrell had been taken to the nearby steamer. He managed to prevent some of the onlookers from lynching O'Farrell. Orridge had been promoted to the position of Superintendent in 1864, but was given no further promotions in his career.

The failure to capture the Clarkes was seen by the Commission, as being due to insufficient numbers of police, the nature of the country and character of the residents. These were actual difficulties facing the police, but a leader with better organisational skills, control over his men, initiative and imagination would have had greater success.

The Commission, carried out by English gentlemen, failed to understand the extent of the poverty of the inhabitants. In fact they specifically said that the crime of bushranging had not its origin in want, indicated their total lack of understanding the effects of the continuing disenfranchisement of the poor. Nor did they acknowledge the low pay of the police. They did however acknowledge that the harbourers could be found in the whole of the district. This should indicate extensive social problems.

Conclusion

The police, the government, the judiciary, newspapers and the residents and harbourers in the districts south of Braidwood at the time, only knew, information that was shared. Information was largely kept to each group. This information has only been both on the public record and digitised mostly since Trove came online in 2009. We are more able to come to a greater understanding of history. However our conclusions are unable to be tested in court and so can remain as only opinions. It is up to you, the reader, to form your own conclusions.. I would love to hear from you.

101 Bradley, pages 73/4.

102 *Sydney Morning Herald*, 1 April 1868.

103 www.australianpolice.com.au