

SECOND COURT

Before his Honor Mr. Justice FAUCETT.

HARBOURING AN OUTLAW

Michael Nowlan Connell was indicted for that he did, in October, 1866, afford aid, shelter, or sustenance to one Thomas Clarke, knowing at the time (he said Thomas Clarke to be a proclaimed outlaw.

The prisoner pleaded not guilty, and was defended by Mr. Dalley, instructed by Mr. Scarvell. Mr. Butler prosecuted for the Crown.

Emma Bradley deposed that she had got gin from the prisoner for Tom Connell, and that she had seen Tom Connell in the company of the Clarkes. She had never seen the Clarkes near the prisoner's house.

Lucy Hurley deposed that she had seen Tom Connell frequently at the prisoner's house ; that she knew Tom Connell to be an associate of the Clarkes; and that she had seen the prisoner give something to him.

Mr. BUTLER asked the witness what it was that prisoner gave to Tom Connell ?

Mr. DALLEY objected to the question.

His HONOR said that it had not yet been shown that this man Connell saw the Clarkes, or had any conversation with them, but simply that he had been with the Clarkes, that he saw the prisoner, from whom he got something, and then went away. It was not shown that the something was got for the Clarkes, or that they were in sight at the time,

Mr, Butler said that Connell was proved to be associated with the Clarkes. The prisoner was Connell's brother, and must have known that it was for his association that the things were got. That was evidence which ought to go to the jury.

His Honor said that as yet the evidence was not admissible, though it might be made so.

The witness continued : She had often got things from the prisoner for Tom Connell ; sometimes the prisoner had asked where Tom was, and she had said he was with the Clarkes.

Alexander Bradley, a prisoner undergoing a sentence of six years' hard labour for robbery, deposed that he had frequently been in company with Thomas Clarke, John Clarke, and Thomas Connell, he had never been in company with Pat Connell since his outlawry, Tom Clarke was known throughout the district to be an outlaw, he had twice got grog from the prisoner for the bushrangers, and on each occasion he told prisoner that the grog was for Thomas Clarke, John Clarke, and Tom Connell. Prisoner said it was all right and gave it to him. He was not armed on either of the two occasions on which he went to the prisoner's house for the grog. He had always gone in the daytime, and never had got anything from the prisoner in the night-time, he recollected going one night to the prisoner's place in company with Thomas Connell, who remained in the stockyard, witness went down to the house and rapped at the window of the prisoner's room, the prisoner said, " Is that you, Tom," witness told him that Tom Connell was in the yard, and then went to the yard himself, prisoner came to them a few moments afterwards with a bottle of gin, prisoner shook hands with Tom Connell, and give him a glass of grog, they then conversed together for some time, but at a distance from witness, who was unable to hear what they said, afterwards witness reminded Tom Connell that he wanted a few cartridges, Tom Connell said, "I was just going to forget them, if it had not been for you, ' Tom Connell said he wanted some, and the prisoner said "all right," witness went with the prisoner down to the house, where the latter gave him two loaves of bread and about five or six pounds weight of boiled meat, which witness took up to Tom Connell, a few moments afterwards the prisoner come up and gave Tom Connell a roll of paper which contained cartridges, which Tom Connell took out and put into a pouch which hung alongside of his revolver, prisoner also brought up a bottle of gin, of which each drank some, witness heard nothing said about the Clarkes, but had heard prisoner and Tom Connell saying something about his (Tom Connell's) escape from constable Woodlands, witness had twice got grog for the bushrangers from the prisoner, and on each occasion he told prisoner that the grog was for Thomas Clarke, John Clarke, and Thomas Connell, the grog was used by those persons, witness did not know what had become of the ammunition obtained by Tom Connell , the Clarkes got some of the gin, the bullets given by prisoner to Tom Connell were of a long shape, and were similar to some of those produced , at one time he had got from the prisoner some gun caps for the bushrangers.

Cross-examined by Mr. Dalley I had an interview with Mr, Carroll in Braidwood goal, Mr Carroll was with me for some short time ; this was about a week before I gave evidence at the Police Court; I told Carroll that senior-sergeant Watson had tried to tamper with me coming from Nelligen to Braidwood; I gave evidence against Watson before the Bench at Braidwood; there were two constables examined on behalf of Watson, who was acquitted on their evidence; both of those constables sworn falsely; they committed perjury; I swore the truth; I was employed for about twelve months upon the Foxlowe station which was stuck up three times while I was there; there was an interval of six months between the first and second robberies; I don't know whether the place has been robbed since I left; on the last two occasions that the place was robbed I know that it was going to be robbed; Tom Connell came to my hut on each occasion, and told me that they were going to stick the place up; I did not give information to the police; Tom Connell gave me some of the stolen property; the police got a down on me, and I had to leave Foxlowe; I went to my own place at Jerrabat Gully; I remember the robbery of Taylor's place, Little Bombay; I was concerned in that robbery; I visited the place in company with Tom Clarke, John Clarke, and Tom Connell, and we stuck it up; I was arrested for that affair, and am now under sentence for it; I remember going to the Araluen Mountains on "escort duty" with the bushrangers; I meant to go with them and stop the escort, but I got frightened and turned back; it was planned that we were to attack the escort-two of us were to attack the two men coming up the mountain, and the others were to attack the men

guarding the coach; I rode all day to the place and stopped all night with Thomas Clarke, John Clarke, Tom Connell, and James Griffin on top of the mountain; I got frightened and went back; I never committed any robbery but the one; I was about two months on and off with the bushrangers, but I only was in the one robbery; I used to get grub for the bushrangers; it is true that police sergeant Watson did tamper with me, and tried to induce me not to give evidence against Mick Connell - not to give evidence for Carroll against Connell, or anyone else; just before I was called to give evidence I knew that I was to give evidence against Michael Connell; Carroll told me so; Carroll was the first who told me so; he was the first who said anything to me about the case; I gave Mr. Carroll all the information I could; and he said he would fetch me up to give evidence against the prisoner; Watson told me what I was going up for; he said "You are going up to give evidence against poor old Mick Connell." Watson was the first person who told me that I was going up to give evidence; I was wrong in saying that Carroll told me first; when I said that I forgot that Watson had told me of it, I was first sent to Berrima gaol; from there I was brought to Darlinghurst; I stopped there one night, and then was sent up to Nelligen; I did not say a word in Berrima Gaol which caused me to be removed from there; as near as I can recollect I swore the same at Braidwood as I have sworn to-day; I swore at Braidwood that when I got the gin for the prisoner I said it was for Thomas Clarke, John Clarke, and Thomas Connell ; I did make use of the expression " boys," but I added the names of the bushrangers as well.

Lucy Hurley was recalled, and repeated her evidence with respect to articles having been given to Tom Connell by the prisoner. She said she had got things from prisoner on several occasions for Tom Connell; she had got gin for him, and had get powder and ball for him; on one occasion, Tom Connell had got food and ammunition from the prisoner, the outlaw Clarke being near the house at the time; she had never seen the Clarkes at the prisoner's house or seen the prisoner speaking to them.

Mr. DALLEY asked his Honor to reserve the points he had taken with reference to the admission of the evidence. The evidence had been admitted, although the witness had never seen the outlaw near the prisoner's house.

Mr Butler objected to the objection of the learned counsel being held to apply to the whole train of the witness's evidence.

His Honor reserved the point, and noted Mr, Butler's objection.

The witness was then cross-examined by Mr. Dalley, and said that Tom Connell was at Moruya under committal when prisoner was apprehended - that previous to prisoner's apprehension Carroll and his party stopped for two days and nights in the hut where she and her two sisters were stopping-that she had got a bottle of gin for Carroll from prisoner's-and that just before she gave her evidence at Braidwood she met two of Carroll's party.

The remaining witnesses for the Crown were senior sergeant Byrne, Mr. Henry Zouch, police superintendent, and Mr. Richard Riley, a wholesale dealer in ammunition, &c. Sergeant Byrne deposed to the arrest of Thomas Connell, in whose possession were found the rifle, cartridges and gun caps produced. Mr. Riley, on looking at the cartridges and gun caps, deposed that they were similar to some that he had supplied to the prisoner in July 1866 'the prisoner had ordered a large

quantity of cartridges, &c., from him, and these were like those ordered and sent. They were of a peculiar kind, and suited only a breech-loading rifle such as the one produced. Mr. Zouch described the rifle produced as a Terry and Calisher's breech-loading carbine rifle. The ammunition produced was suitable for no other kind of weapon. The caps produced were like those made for these rifles. Such rifles were not in common use in that part of the country. He had never seen one in the district belonging to a private person. In Queensland, he believed, these rifles were common.

This closed the case for the prosecution. The evidence was throughout given in a very disjointed manner, and was very irregularly elicited. Some of the witnesses were called and re called over and over again, in order to supply links of evidence that were found to be wanting.

His Honor took occasion to remark somewhat severely upon this circumstance, intimating that the case for the Crown seemed to have been got up very carelessly. Mr Dalley addressed the jury for the defence, pointing out that the frequent recalling of the witnesses in the case was an irregularity, as it was most undesirable that witnesses should be in court and hear exactly what particular piece of evidence they were called upon to supply. Under the information, the jury must find that the prisoner aided, sheltered, and gave sustenance to Thomas Clarke. The prisoner might shelter Thomas Connell to the Day of Judgement if he chose. The jury might be told that Thomas Connell was an associate Thomas Clarke, and that the sustenance given to him was intended for the outlaw. The jury must be satisfied of that, and yet the last evidence called proved that the ammunition supplied to Tom Connell could not have been meant for Clarke. It was sworn that the cartridges were adapted for a Terry's breech-loading rifle alone, and as Tom Connell was the only one of the gang who carried such a weapon, he only could have used this ammunition. The outlaw did not possess a breech-loading rifle, and could not have used the ammunition said to have been supplied by the prisoner. He did not require to say a single word more upon that point. This enactment under which the prisoner was charged, and of which it was not too much to say that it was unparalleled in the history of any British colony-an Act that his Honor would most strictly interpret-provided in its 4th section certain penalties for those who should after the proclamation of outlawry give aid, shelter, or sustenance to an outlaw. If the jury came to the conclusion that the prisoner was only assisting his brother, and not Tom Clarke - they must acquit him. However wrongly the prisoner might have acted, he could not for merely aiding Tom Connell be brought within the meaning of this statute, out of which the law intended to keep him. One thing- that must strike the jury in the evidence was, that none of the witnesses spoke of ever seeing the outlaw in communication with the prisoner Not one of the witnesses could swear that they had ever seen the outlaw near the prisoner's house Besides, the prisoner was a licensed publican, who held his license up to the present time, and who certainly would not have been allowed to keep it if he had not borne a good character The man had never been seen in company with Thomas or John Clarke in his life. Here were a whole army of policemen and other persons who were well acquainted with these people, and not one could swear that the case against the prisoner rested alone upon the evidence of Alexander Bradley, whose credibility was questionable. The Crown, perhaps, could not procure any better evidence, but it did not follow that the jury were to believe the evidence that they had got. All these witnesses were associates and accomplices of the Clarkes.

One was the paramour of Tom Connell, and over her Justice had suspended the sword until this case was decided. She was the mistress of Tom Connell, was constantly with the Clarkes, and had been committed for trial on two distinct charges.

What did the law say with regard to witnesses of this character?

In Russell on Crimes and Misdemeanours (vol 3, p 600), it was laid down that if the jury believed the evidence of accomplices, they might convict upon it, although it was uncorroborated, but that it was a general rule, if such evidence were not corroborated in some material point, for the Judge presiding to direct the jury to reject it. In Smith v. Bayle's case [1 Leach] the prisoner was engaged in a robbery, and one of his accomplices turned King's evidence, the Judge, Lord Abinger, directed the jury to acquit, observing that the practice had obtained so much that it deserved all the reverence of law Evidence of accomplices needed confirmation in material parts but not on all points. At one time Courts were of opinion that if a man were giving evidence against five or six prisoners, and said something with regard to one of them only, which was corroborated, the jury might safely accept his evidence. It had since been decided that unless the witnesses were corroborated with regard to all the prisoners the Judge should advise the jury to reject his evidence as far as it touched those respecting whom it was uncorroborated. Pattison, J, stated that the corroboration should be as to some facts which went to prove the charge against the prisoner, and that if the corroboration did not specifically connect the prisoner with the crime it would not be regarded as reliable. The multiplication of accomplices would not avail. If an army of them gave evidence, still their testimony would require corroboration. The learned counsel then proceeded to review the evidence against the prisoner, pointing out that not one of the witnesses had deposed to anything more than that certain things had been given to Tom Connell, ostensibly for the use of the Clarkes. Lucy Hurley swore that she had never seen the prisoner speaking to the Clarkes, and that when Tom Connell got things from the prisoner, the Clarkes were in the bush quarter of a mile from the house. Tom Connell might have received aid from the prisoner, who was his brother. Acts of Parliament would never extirpate human affections, and though the prisoner would never aid the outlaw, he might have yearned to aid his brother. If the jury believed that such was his position there was an end of the case. The prisoner could not be eliminated for simply aiding Tom Connell. The learned counsel impugned the voracity of Lucy Hurley's evidence, and pointed out the discrepancies that existed in the statements of the witness Bradley. He pointed out that both of these persons had been the associates and accomplices of the outlaw, and that their evidence was wholly un-corroborated. He commented at great length upon the evidence of Bradley, showing the contradictions in his evidence when contrasted with his depositions taken at Braidwood, and asserting that his testimony was utterly unworthy of credence.

Mr Butler, in reply, contended that the arguments used by learned counsel with respect to the rejection of uncorroborated evidence of accomplices were not tenable. He said that a Judge had no right to direct a rejection of such evidence, and that a Judge who held that such evidence should be rejected gave an opinion which was contrary to law. Evidence of accomplices was evidence to go to a jury, and the credibility of the witnesses was to be decided by the jury. He combated the attacks made upon the credibility of the witnesses, especially that of Bradley, whose story he contended, bore the impress of truth, however much the man's character might discredit his statements. He remarked that the fact of these witnesses not having sworn directly as to sustenance having been afforded by the prisoner to the outlaw was evidence of their truth. If they were swearing falsely they would not hesitate, to go to the full extent necessary to convict the prisoner. He also averted to the significant fact that large quantities of a peculiar kind of ammunition, for which there could be no general demand in the district, had been supplied to the prisoner by Mr, Riley. There was, he thought, no doubt that this ammunition had been got for the bushrangers, and had been supplied to them by the prisoner.

His Honor summed up at considerable length, commenting upon the evidence, and pointing out that if the evidence proved that aid or sustenance had been passed through the hands of a third person to the outlaw, from the prisoner, there would be sufficient to convict the prisoner. The jury would decide as to whether the aid had been given on compulsion ; or whether the things given were

intended for the outlaw. With regard to the reception of the evidence of accomplices when uncorroborated, He directed the jury to examine their credibility, and decide for themselves as to whether their evidence was worth anything. It was now clear and indisputable law that the jury might convict on the sole and uncorroborated testimony of an accomplice - that is, if, being properly directed by the Judge, they could see reason to trust the testimony and find the prisoner guilty, the Full Court would not set aside their decision as being a wrong one. At the same time, while stating that, as the law, there was no doubt that the Judges were most cautious wherever a case rested on the uncorroborated testimony of an accomplice in directing the jury to weigh the evidence carefully. The late Lord Chief Justice Jervis said upon a case where the prisoner was convicted upon the testimony of three accomplices uncorroborated, and the case was brought before the Court of Criminal Appeal, that the Court could not interfere; and that though they regretted the result arrived at as being contrary to the usual practice, yet it was not a rule of law that accomplices must be confirmed to render a conviction valid. It was the duty of a Judge to tell the jury that they might act on the unconfirmed testimony of an accomplice. But, he went on to say, it was usual in practice for the Judge to advise the jury not to convict on such testimony alone, Juries generally attended to the Judges' direction and required confirmation, but still It was merely a rule of practice and not of law. It was held, too, that an accomplice being received as a reliable witness, his testimony required no confirmation from another witness, and the jury might convict upon it; but this doctrine had been greatly modified in practice, by the rules of which it was held that the testimony of accomplices required confirmation. He was not aware of my recent case which had altered either the law or the practice of the law in this respect. The matter had been much discussed, and he believed that English Judges were now accustomed to take more of a common sense view of these matters than they formerly did. It did seem strange that evidence should go to a jury, and that they should be told entirely to disregard it; but the effect of what he had read appeared to be this - That the testimony of an accomplice might be allowed, but the Court would advise that the said testimony should not be acted upon unless there was some corroboration. It would, of course, be impossible to corroborate the accomplice in every part of his evidence, If that could be done, then the evidence of the accomplice need not be taken at all, His Honor then proceeded to summarise and analyse the evidence, directing the attention of the jury to the salient points thereof and the deductions either of guilt or innocence to be drawn there from.

The jury retired at a quarter past 6 o'clock: and, after deliberating hour and three-quarters, found the prisoner guilty

The prisoner was remanded for sentence, and the Court adjourned until 12 o'clock to-morrow (Wednesday).