VOLUME 2
PART 2

MEMOIRS OF THE QUEENSLAND MUSEUM
CULTURAL HERITAGE SERIES

PO Box 3300, South Brisbane 4101, Qld Australia
Phone 61 7 3840 7555
Fax 61 7 3846 1226
www.qm.qld.gov.au

National Library of Australia card number
ISSN 1440-4788

A Guide to Authors is displayed at the Queensland Museum web site
http://www.qm.qld.gov.au

A Queensland Government Project
Typeset at the Queensland Museum

THE TRIAL OF THE KENNIFF BROTHERS: 'AUSTRALIA'S LAST BUSHRANGERS'

ANTHONY J.H. MORRIS, QC

Morris, Anthony J.H. 2002: The trial of the Kenniff brothers: 'Australia's last bushrangers'. *Memoirs of the Queensland Museum, Cultural Heritage Series* **2**(2): 259-268. Brisbane ISSN 1440-4788.

The careers of 'Australia's last bushrangers', Patrick and James Kenniff, culminated in a showdown at Lethbridge's Pocket on Easter Sunday 1902, leaving two men dead. A massive manhunt resulted in the Kenniffs being captured near Mitchell, and their subsequent trial for wilful murder in the Queensland Supreme Court. The presiding judge, Chief Justice Sir Samuel Griffith, was one of the defining figures of Australia's history: a Premier of Queensland, a leading federationist, a major contributor to the drafting of the national Constitution, and first Chief Justice of the new nation's High Court. He also drafted the Queensland *Criminal Code*, under which the Kenniffs were tried, which came into effect on 1 January 1901. Yet there is a real question whether the Kenniffs received justice. They were denied a trial before a 'jury of their peers'. Their lawyer was barely competent. Significant procedural irregularities occurred. The trial judge, Griffith, also presided at their appeal, despite having announced that he agreed entirely with the jury's verdict. Applying modern legal standards, the prosecution should not have succeeded. Even by the standards of the time, justice was not seen to be done. ❒ *Kenniff trial, Patrick Kenniff, James Kenniff, bushrangers, Sir Samuel Griffith, Criminal Code, Justice Patrick Real, T.J. Ryan.*

Anthony J.H. Morris, QC, Level 13, MLC Centre, 239 George Street, Brisbane 4000, Australia; *received 16 September 2001.*

The murder trial of Patrick and James Kenniff, in the Queensland Supreme Court in November 1902, brought together a number of the defining Queensland personalities at the time of Federation: a former Premier, Sir Samuel Griffith, a later Premier, T.J. Ryan, and the notorious Kenniffs themselves. Arthur Hoey Davis, better known as Steele Rudd, author of *On Our Selection*, officiated as under-sheriff at the execution of Patrick Kenniff. The trial provides insights into some of the legal and social changes then taking place in Queensland: the introduction of a *Criminal Code*, the end of the bushranging era, and the involvement of Aboriginal Australians in the judicial system. Serious reservations exist regarding the fairness of the trial.

SIR SAMUEL GRIFFITH AND THE QUEENSLAND *CRIMINAL CODE*

The Queensland *Criminal Code* came into effect on 1 January 1901, and the Kenniff trial was amongst the first major trials to be conducted under the code. Although the idea of placing the entire body of criminal law into a single Act had been discussed in England for over a century, Queensland was the first place in the British Empire to adopt such a code. The *Criminal Code* was almost entirely the work of the Queensland Chief Justice, Sir Samuel Griffith (Fig. 1). Although best remembered as Premier (on two occasions), as a leader of the Federation movement, and as the first Chief Justice of Australia, Griffith's work as a statutory draftsman possibly represents his most enduring legacy. The significance of his role in drafting the Australian Constitution has been questioned recently – in my view, unfairly – but there is no doubt that the *Criminal Code* was almost entirely his work. It is a testament to Griffith's drafting skills that the Code remains today almost entirely as he drafted it, save for changes to suit modern circumstances and standards.[1] It has been adopted in a variety of places,[2] both in Australia and elsewhere.

'AUSTRALIA'S LAST BUSHRANGERS'

The Kenniffs are frequently referred to as 'Australia's last bushrangers'. One author calls Patrick Kenniff 'Queensland's Ned Kelly'.[3] The *Macquarie Dictionary* defines a 'bushranger' as being 'a bandit or criminal who hid in the bush and led a predatory life'. Possibly there are more recent instances of bandits and criminals who hid out in the bush and led predatory lives; in this respect the *Macquarie* definition may be too wide. The word 'bushranger' brings to mind the likes of Dan Morgan, Ben Hall, Bold Jack Donohue, Captain Thunderbolt, Captain Moonlight, and, of course, the Kelly gang: outlaws distinguished by their skills as horsemen, their ability to survive in the bush, their use of carbine firearms, and their ruthlessness as

FIG. 1. Sir Samuel Griffith, Chief Justice of Queensland, who presided at the Kenniff trial. (John Oxley Library, Brisbane, neg. no. 54626)

robbers and, in many instances, murderers. The Kenniffs surely fit this mould. There can be little doubt that Patrick Kenniff did commit the murder for which he was convicted and hanged, and that James Kenniff's involvement in the same murder was at least sufficient to justify his sixteen year prison term. But did they get a fair trial?[4]

Brothers Patrick (Fig. 2) and James Kenniff [5] grew up in New South Wales, where both had brushes with the law from a young age, mainly for stealing livestock. They came to Queensland in the early 1890s, to start a new life as honest stockmen. However, in March 1895 they were convicted of horse-stealing, and served time at St Helena Prison, where both were described as 'model prisoners'. By 1897, they were out of gaol and, with their father, took up a grazing lease known as 'Ralph' in the Carnarvon region of central Queensland. When the manager of a neighbouring property, 'Carnarvon', claimed that over 1,000 head of cattle were missing, the owners of 'Carnarvon' bought 'Ralph' at an inflated price, and evicted the Kenniffs. The Kenniffs then took to a nomadic existence and were often seen riding armed. This caused such alarm that a police station was established at Upper Warrego, on the former Kenniff property.

In early December 1897, the Kenniffs stole forty horses in the Carnarvon region, and made for Yuelba. To lure the local police away from town, they held up Hunter's general store (Fig. 3), stealing merchandise, cash and cheques, and then created a false trail leading out of town. As the police followed this trail, the Kenniffs circled back into town, and loaded the stolen horses on a train for Toowoomba. The train reached its destination after dark, by which time there were no stock inspectors at the Toowoomba Railway Station, as the Kenniffs had planned. So they were able to sell the horses and, after a spending spree, returned to their home-country. But Patrick Kenniff cashed a stolen cheque at a Toowoomba hotel, and was recognised by the three witnesses. During 1898 and 1899, the Kenniffs were stealing livestock over an area ranging from the Carnarvons west to Augathella. Both brothers were captured. They benefited from the sympathy of local juries who had scant respect for wealthy land-owners, and admired the outlaws' courage and daring. On 22 August 1899, however, Patrick Kenniff was convicted over the theft of the cheque from the Yuelba store. He received a three year sentence and was released on 12 November 1901.

THE MURDER AND TRIAL

On 21 March 1902, a warrant was issued against the Kenniffs for stealing a pony on or about 25 October 1901, and was wired to the Upper Warrego Police Station with instructions to find and arrest both men. The officer in charge, Constable Doyle, set out with the manager of 'Carnarvon', Albert Dahlke, and an Aboriginal Tracker, Sam Johnson (Fig. 4). On the morning of Easter Sunday, 1902, the posse arrived at Lethbridge's Pocket, a known Kenniff campsite. Johnson, riding in the lead, spotted the Kenniffs. They fled, and during the ensuing chase Doyle and Dahlke caught and dismounted James. Patrick escaped. When Johnson returned from retrieving the party's packhorse, neither Doyle nor Dahlke was to be seen. The Kenniffs galloped towards Johnson, who fled for help. A later expedition found bullet marks in the surrounding trees; the remains of three small fires, containing clotted blood; a large rock bearing burnt blood; and fragments of broken bones. The pack-bags of Doyle's horse were found to contain 200 pounds of burnt human remains, and personal belongings of Doyle and Dahlke.

A reward of £1,000 was offered for information leading to the Kenniffs' arrest, and a massive

FIG. 2. Patrick Kenniff. (John Oxley Library, Brisbane, neg. no. 7948)

man-hunt was organised, involving more than fifty police, fifteen of them trackers, working for several months. Surprised at a camp near Mitchell, the Kenniffs gave up without a fight. They were transported to Rockhampton, and then committed to stand trial for the wilful murder of Doyle and Dahlke at Brisbane before Chief Justice Griffith (Figs 5 & 6).

The only surviving witness to the events at Lethbridge's Pocket was the Aboriginal Tracker, Johnson, whose evidence was a controversial feature of the case. Not being a Christian, Johnson's testimony was not given on oath. The defence lawyer tried to discredit him, urging jurors that they should not convict on the 'evidence of one blackfellow'. Cross-examining Johnson as to the time when the gun-fight had occurred, he asked, 'What time of day was it when the bullets were flying about – sun go up, go down, or him on other side?' Johnson answered, 'About 8 o'clock', producing much laughter in the public gallery, but also reinforcing his credibility as a witness. Griffith had no sympathy with racial prejudice. As Premier, he had taken a strong and controversial stand on the importation of South Sea Islander labourers to work on the northern canefields in conditions of virtual slavery. In summing up to the jury, Griffith firmly rejected the defence argument against the 'evidence of one blackfellow', and directed the jury to treat Johnson's evidence equally with that of other witnesses.

After Griffith's summing-up in 'clear, cold tones of measured directness', the jury took only one hour to return with a verdict of 'guilty', and the Judge added that he 'entirely agreed'. The law allowed only one sentence for wilful murder, and in a 'shaken' voice Griffith condemned both Patrick and James Kenniff to death by hanging. There could be no appeal from the jury's verdict, but the new *Criminal Code* allowed Griffith to reserve questions of law for consideration by the Full Court. At the defence lawyer's request, Griffith reserved two questions: whether there was sufficient evidence of death, and whether there was sufficient evidence to convict both men. These questions were considered by a Full Court comprising the trial judge (Griffith), and Justices Cooper, Chubb and Real. All agreed there was sufficient evidence of death, and sufficient evidence to convict Patrick. By majority, three of the four judges upheld the conviction of his brother. The fourth judge, Real, did not accept that James's guilt had been proved beyond any reasonable doubt. The evidence showed that James was in the custody of Constable Doyle when Doyle was last seen alive, and Justice Real argued that the shooting of Doyle and Dahlke may have occurred as Patrick attempted to free his brother, without James being involved.

Although the majority of the Court upheld James's conviction, the Government considered that sufficient doubts had been raised that he should not be put to death. Patrick Kenniff was hanged in Boggo Road Gaol on 12 January 1903. James's sentence was commuted to life imprisonment, and he served sixteen years. He then returned to central Queensland and worked as a stockman, and later a miner. He died in 1940.

TRIAL BY A 'JURY OF THEIR PEERS'

It is a misconception that *Magna Carta* greatly enhanced citizens' rights. Largely, *Magna Carta* ignored ordinary citizens; it was concerned with the rights of the barons who prevailed on King John to sign it at Runnymede, near Windsor, on 15 June 1215. Where *Magna Carta* does give rights to ordinary citizens, this is a by-product of the barons' efforts to shore up their own rights. One of the barons' concerns was that they should

FIG. 3. Hunter's Store at Yuelba, scene of a Kenniff robbery in 1897. (Queensland Museum, neg. no. LE 474-3A)

not be tried by juries of their 'inferiors', so the 39th clause states that:

> No man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, ... except by the lawful judgement of his equals ...[6]

The same principle was included in the United States Bill of Rights, guaranteeing to 'the accused ... a speedy and public trial, by an impartial jury'[7]. The Australian Constitution also guarantees the right to a jury trial in respect of serious federal offences.[8] Blackstone's *Commentaries on the Laws of England*, published from 1765 to 1770, and still widely regarded as the greatest work on English law, states:

> The right of trial by the jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter.

The Kenniffs, however, were tried, not by a 'jury of their peers', but by a select or 'special' jury, comprising men from entirely different walks of life – professionals, accountants, merchants, and brokers – in other words, better educated and more affluent men, who would have little sympathy for the Kenniffs.

For thirty-five years prior to 1902, there had been a statute allowing the Crown to apply for a 'special jury', but that power had 'hardly ever been availed of'[9]. A few previous applications had been granted in exceptional circumstances, such as a trial of bank directors charged with issuing false balance sheets, requiring the jury to examine complex sets of accounts,[10] or where a previous trial before an ordinary jury had been aborted.[11] Disturbingly, Justice Virgil Power, who granted the Crown's application, considered that special circumstances were not required, and seems to have thought that the Crown's application should be 'granted as a matter of right'.[12] This was plainly incorrect.[13] He was not informed of an earlier case, where such an application had been refused.[14] The circumstances relied on by the Crown Solicitor were:

1. The complicated nature of the evidence for the prosecution.
2. The large number of important exhibits.
3. The technical nature of the evidence of medical experts to be called for the prosecution.
4. The mass of circumstantial evidence to be considered.

At that stage, the Kenniffs were represented by a young but extremely able counsel, T.J. Ryan, subsequently a Queen's Counsel and Premier of Queensland. But Ryan's hands were tied. He was not permitted to challenge the Crown Solicitor's affidavit, nor to be informed of details of the Crown's case. The hearing became a veritable 'slanging match' between bench and bar, with the Judge allowing no challenge to the Crown Solicitor's good faith, describing him as 'a high official having knowledge of the matter', whose 'power is not likely to be abused'.[15]

Obviously a 'special jury' was sought to avoid the possibility of a sympathetic jury. Defence counsel should have been permitted to challenge the Crown's assertion that the complexity of the case necessitated a 'special jury', and Justice Power should have exercised his own judgement

FIG. 4. Sam Johnson, the Aboriginal Tracker whose evidence convicted the Kenniffs, despite the defence lawyer urging the jury not to convict on the 'evidence of one blackfellow'. (Courtesy of the Queensland Police Museum, Brisbane, neg. no. PM 325 B)

rather than deferring to the opinion of the 'high official' responsible for the prosecution. It is debatable whether there was any substantive miscarriage of justice, insofar as the Kenniffs were denied the chance of a sympathetic jury. But they were deprived of their right to a 'jury of their peers', and deprived of this right by a proceeding which was plainly wrong in law.

The blame does not lie solely with Justice Power, nor with Ryan. Much of the blame must be carried by the prosecuting authorities who, under our legal system, ought never to engage in tactical manoeuvres to deny an accused person every advantage which the law allows. Prosecuting authorities are 'ministers of justice', whose duty is to place the evidence fully and fairly before the court, and not to 'struggle for a conviction'.[16] The entire pretext for the Crown's application to empanel a 'special jury' disappeared when, at the commencement of his summing-up, Griffith informed the 'special jurors' that 'The facts of the case [are] very simple'.[17]

COMPETENCE OF DEFENCE REPRESENTATION

Before Justice Power in Rockhampton, the Kenniffs had the benefit of competent, though inexperienced, counsel. In the Full Court, their representation was highly competent. Yet at trial, where it mattered most, no barrister appeared for them; they were represented by a solicitor, of no great prominence, against two of the State's leading barristers. With the benefit of a century's hindsight, it is easy to criticise an advocate of limited experience in an unusually difficult case. Even so, the Kenniffs' solicitor made some very fundamental errors.

He launched a scathing attack on Johnson's reputation, suggesting he was called 'Deadwood Dick' or 'Joe the Liar', assertions which Johnson denied. No witness could be produced to support these allegations. An accused person may not be cross-examined as to matters of character or reputation unless the defence has squarely attacked the character or reputation of a prosecution witness.[18] All the solicitor achieved by attacking Johnson was to expose his own clients to cross-examination regarding their character and reputations, a very risky course in the case of the Kenniffs. Cross-examining Johnson in pidgin English was an extraordinary blunder. Any competent advocate, indeed any intelligent person, could have seen that Johnson was reasonably fluent in ordinary English. This

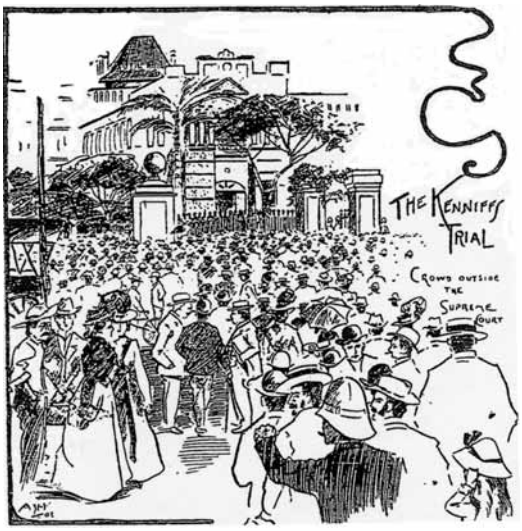

FIG. 5. The Kenniff trial drew large crowds to the Supreme Court in George Street, Brisbane. (*Truth*, 9 November 1902)

attempt to denigrate Johnson was always going to back-fire in exactly the way it did.

It was also a mistake to call hopeless alibi evidence, from witnesses claiming to have seen the Kenniffs near Roma at Easter of 1902. The witnesses were friends of the Kenniffs, and persons of poor character; the prosecution was in a position to thoroughly discredit them. There was little chance that this evidence would be believed, given its weakness and the weight of evidence against it. So its only effect was prejudicial to the defendants. People do not manufacture false evidence except to conceal their own guilt, and the jurors were entitled to infer that, by producing false evidence, the Kenniffs displayed a consciousness of their own guilt.

The Kenniffs' solicitor failed to advance any intelligible or coherent case, let alone any plausible case. Apart from the worthless alibi evidence, his main argument was that Doyle and Dahlke might not be dead. This was the strongest aspect of the prosecution case. It is true that no witness, not even Johnson, saw their lifeless bodies. But they had entered Lethbridge's Pocket in search of the Kenniffs, armed with a warrant for their arrest, and were never again seen alive. The physical evidence showed there had been a gun-fight in Lethbridge's Pocket, that blood had been spilt, and that burnt human remains were left in the vicinity, including personal items identified as belonging to Doyle and Dahlke. There was no doubt that Doyle and Dahlke died at Lethbridge's Pocket. If there was any doubt, it was whether both brothers were responsible for their deaths.

Faced with such evidence, there was little that any advocate could have done to save Patrick Kenniff from the gallows. The same cannot be said of his brother. As Justice Real showed, a logical hypothesis was open, consistent with James's innocence.[19] Representing both brothers, the solicitor was in a difficult position. Whilst they both maintained their innocence, their solicitor was bound by those instructions. Despite other defects of character, the Kenniffs had a strong family loyalty. The trial could have taken a very different course if an experienced advocate had clearly explained to Patrick Kenniff that, though he had no chance of saving himself, there was a chance of saving his brother.

The defence solicitor's approach amounted to an 'all or nothing' proposition: if the Kenniffs' alibi story was believed, they were both innocent; if that story was disbelieved, they were both guilty. The jury was never invited to consider that, whilst Patrick might be guilty, there remained reasonable grounds to doubt that James participated in the deaths of Doyle and Dahlke. The jury needed to be satisfied that James's role was something more than that of a passive onlooker to the murders. The evidence showed him to have been unhorsed and unarmed, in Doyle's custody, when Doyle and Dahlke were last seen alive. Rudimentary forensic examinations suggested that shots had been fired by a man mounted on horse-back, and there was nothing to suggest any shots fired by a man standing on the ground. It was not enough to show that James might have participated in the murders; his guilt had to be proved beyond any reasonable doubt.

'ACTING IN CONCERT'

Being dismounted, unarmed, and in Constable Doyle's custody, James could not have instigated the course of events which led to the deaths of Doyle and Dahlke. The only reasonable hypothesis is that Patrick did so. The case against James therefore rested on sections 7 and 8 of the *Criminal Code*,[20] under which a person is guilty of an offence, not only for doing the act which constitutes the offence, but also for aiding, abetting, counselling or procuring the offence, or where the offence is committed whilst pursuing a

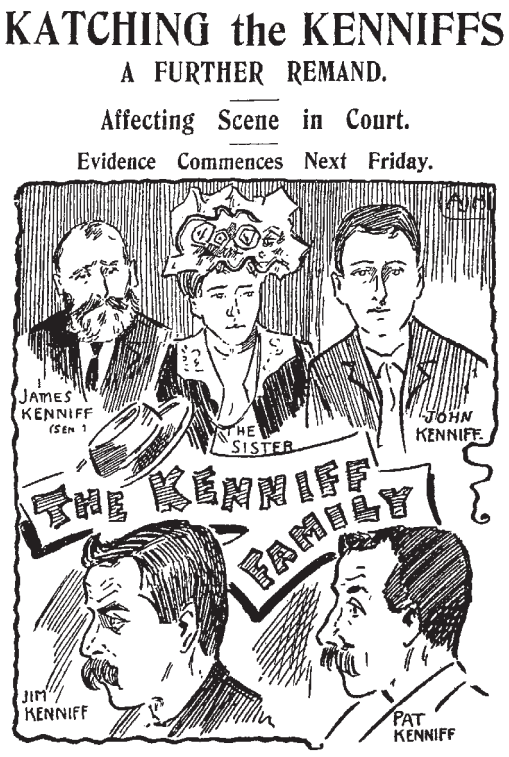

FIG. 6. The family of James and Patrick Kenniff were present in court throughout the trial. (*Truth*, 20 July 1902)

common unlawful purpose. Chief Justice Griffith suggested that the deaths occurred whilst the brothers were pursuing an unlawful purpose, saying:

> If they were acting in concert, both were guilty. If both formed the purpose before Dahlke was shot, and determined to resist apprehension and for that purpose fired at Doyle, they were guilty.[21]

It is difficult to see how such a case can be constructed from the evidence. There was no suggestion that, before the arrival of Doyle, Dahlke and Johnson at Lethbridge's Pocket, the Kenniffs were doing, or intended to do, anything unlawful. Doyle came to arrest them, holding a warrant for that purpose. The warrant was based on the alleged theft of a pony on or about 25 October 1901. On that date, however, Patrick Kenniff was in gaol, and was not released until 12 November that year.

The Kenniffs fled to avoid arrest. Did this establish any common unlawful purpose? A common unlawful purpose can be formed without verbal communication. But it is difficult to see how any opportunity arose for them to form a common intention, rather than each of them acting instinctively and independently to avoid being taken into custody. James was captured, dismounted and restrained. From that moment, he was in no position to form any common intention with his brother. They might have agreed in advance that, if either was captured, the other would attempt to rescue him. But there was no evidence of any such pact, and it is at least equally probable that Patrick acted of his own volition in coming to his brother's rescue. As Griffith suggested, Dahlke was probably shot first. If so, it occurred whilst James remained in Doyle's custody, and it is impossible that James could have participated in Dahlke's death.

The circumstances of Doyle's death are a matter of conjecture. Perhaps James broke free from Doyle's custody whilst Doyle was still alive, or perhaps Doyle released James so as to defend himself. But even if James was free from Doyle's custody for a brief period before Doyle's death, there was no evidence that James had access to a firearm, or otherwise had the means to kill Doyle, let alone evidence that he actually did so. James was probably anxious to escape from Doyle's custody, and Patrick probably intended to achieve that result. But section 8 of the *Criminal Code* does not apply merely because two people, independently of each other, intend to achieve a similar outcome.

In the Full Court, each member of the majority – Justices Cooper,[22] Chubb,[23] and Griffith[24] – considered that the existence of a joint common purpose could be inferred from the fact that, following the deaths of Dahlke and Doyle, both brothers charged at Johnson. This reasoning does not bear scrutiny. It assumes that James would only have joined with his brother in charging at Johnson if James was criminally implicated in the deaths which had already occurred, and that James would have acted differently if he had been an innocent bystander to the murders committed by his brother. At worst, James Kenniff's conduct made him an accessory after the fact to the murders.[25] It cannot support an inference that he was criminally implicated in those murders. Justice Cooper also reasoned that an adverse inference could be drawn from the attempt by both Kenniffs to manufacture a false alibi.[26] Where an accused person relies on false evidence, a 'consciousness of guilt' may be inferred. But this simply begs the question, what guilt might James have been conscious of? An unsophisticated bushman would not understand the

technical rules of law relating to accessory liability for a criminal offence. James knew that he had escaped from police custody, knew that his brother had assisted him in escaping from police custody, knew that his brother had committed murders in assisting him to escape from police custody, and knew that he had assisted his brother in escaping apprehension for those murders. If his conduct showed a 'consciousness of guilt', there was more than sufficient guilt for him to be conscious of – including his brother's guilt of murder, and his own guilt as an accessory after the fact to the murders committed by his brother – without inferring that he was conscious of being a murderer.

In 1902, the law did not allow for any appeal against a criminal conviction by a jury,[27] and the reservation of questions for the Full Court was restricted to questions of law. If, as a matter of law, the evidence was sufficient to support a guilty verdict, the Full Court could not review the merits of the jury's verdict. Nowadays, there are more extensive rights of appeal in criminal cases, and guilty verdicts are often overturned because the verdict is 'unsafe and unsatisfactory'. Today, this is precisely the approach which any appellate court would take in respect of James Kenniff's murder conviction.

THE COURSE OF THE TRIAL

The Kenniffs were initially charged with the murders of both Dahlke and Doyle. Chief Justice Griffith ruled that there must be a separate trial in respect of each alleged murder, and required prosecuting counsel to elect which of the charges would proceed. But the election was not made until all prosecution witnesses had given evidence. Throughout the entire prosecution case, the defence solicitor did not know whether he was defending charges of murdering Dahlke, Doyle, or both. The evidence on either charge might have been similar. However, some evidence relevant to the charge of murdering Dahlke was irrelevant to the charge of murdering Doyle. A conversation between the Kenniffs and the head stockman at 'Carnarvon', just two days before the murders, when Patrick, brandishing a revolver, uttered the words, 'Whatever Dahlke gets, you will get the same', was relevant to prove animosity towards Dahlke, but had no connection with Doyle. The same applies to an earlier altercation between James and Dahlke, following a muster at 'Carnarvon'.

A fair criminal trial requires the accused to know precisely what charge he is facing. What occurred at the Kenniff trial may have seriously prejudiced the conduct of the defence. Evidence which could have been objected to, as irrelevant to one charge, may have been left before the jury as relevant to the charge which did not proceed. In cross-examining prosecution witnesses, the Kenniffs' solicitor could not know whether to focus on issues concerning Doyle's death, or that of Dahlke. It is obvious why prosecuting counsel eventually elected to proceed with the charge in respect of Doyle's death.[28] But that election should have been made at the outset, rather than at the conclusion of prosecution evidence. The defence solicitor did not complain about the unusual course taken at the trial, and did not ask to have that issue reserved, as a question of law, to the Full Court. It is impossible to say whether the evidence would have been different if the trial had taken a more regular course. The proceedings were irregular, and there was a possibility that the irregularity might have been harmful to the defence.

FULL COURT PROCEEDINGS

The trial judge (Griffith) sat as a member of the Full Court to review the proceedings which he conducted at first instance. This was not strictly irregular, because the proceedings in the Full Court did not technically constitute an appeal. However, Griffith should not have participated, because he had prejudged the issues reserved to the Full Court. At the close of the prosecution case, the Kenniffs' solicitor argued that there was no case to go to the jury, but Griffith rejected that submission,[29] thereby ruling on the very questions which were later reserved to the Full Court. Following the jury's verdict, Griffith expressed himself, 'in a voice that betrayed some emotion',[30] as entirely agreeing with the jury's verdict, and failing to see 'how they could have given any other verdict'.

Where it is reasonably apprehended that the judge has a predetermined view of the issues, the judge should not sit. The remarks made by Griffith following the jury's verdict, if not his earlier ruling regarding the sufficiency of evidence, raised (at the very least) a reasonable apprehension that he had already formed a concluded opinion on these questions. Counsel for the Kenniffs did not object to Griffith's participation in the Full Court proceedings. Had the Full Court been evenly divided, Griffith, as the presiding Judge, would have had the casting vote. His participation in the Full Court proceedings became irrelevant, since only one of the four judges would have quashed James's conviction. But this ignores the powerful influence which the presiding Judge, and

especially a Judge of Griffith's eminence, carries with his judicial brethren. His participation was quite vocal, drawing attention to evidentiary matters supporting the jury's verdict, and engaging in heated exchanges with Justice Real.[31] Even strong and independent minds like those of Justices Cooper and Chubb could possibly have been swayed by the Chief Justice's arguments.

According to modern legal standards, Griffith should not have participated in the Full Court proceedings, and his participation would be regarded as having so infected the independence of the other members of the bench as to result in a miscarriage of justice.[32] Even by the standards of the time, Griffith ought not to have sat on the Full Court, and his very presence contaminated the proceedings.[33]

CONCLUSIONS

Despite all that has been said, it may safely be concluded that both Patrick and James Kenniff got what they deserved, according to the law and standards of punishment in 1902. There is no real doubt that Patrick Kenniff murdered both Dahlke and Doyle, and received the ultimate punishment which the law then mandated for such an offence. James Kenniff may have had some active participation in the deaths, but his guilt was not proved beyond a reasonable doubt. He was plainly an accessory after the fact to wilful murder, and therefore liable to life imprisonment.[34] That, in fact, is the sentence which he received, serving sixteen years in gaol for his part in the murders. Justice was done.

Justice was not, however, seen to be done. The trial of the Kenniffs was a miscarriage of justice, and a regrettable blemish on the otherwise distinguished judicial career of Sir Samuel Griffith.

The final words should go to Justice Real, whose courageous dissenting judgment in the Full Court, and whose heated exchanges with the Chief Justice during the course of argument, demonstrate a commendable passion for the belief that even the worst villains – and nobody could doubt, for a moment, that the Kenniffs were villains of the worst order – deserve a fair trial:

> I do not see any real evidence that James Kenniff ... took part in the shooting. We have no right to draw the inference that because he could have done so he did. The probability is that he did, but the British law requires some proof.[35]

ACKNOWLEDGEMENTS

I wish to acknowledge the valuable assistance of others in the preparation of this paper: Judith McKay and Donna Miles of the Queensland Museum, and my research assistant Christian Jennings.

ENDNOTES

1. The death penalty, and punishment by flogging, have been obliterated, while new offences, to cope with modern technological innovations, have been introduced. Some penalties have been increased and others reduced, whilst some conduct has been decriminalised. But, for the most part, Griffith's words survive.
2. Griffith's draft was adopted, virtually without change, in Western Australia, in Papua New Guinea, and in the British African colonies of Lagos, the Sudan and Nigeria. Tasmania and the Northern Territory also have *Criminal Code*s strongly influenced by Griffith's drafting.
3. Colin Newsome, *Paddy Kenniff: Queensland's Ned Kelly,* (Glen Innes, New South Wales: C. Newsome, 1996).
4. It is proper, at this point, to declare a personal interest in the Kenniffs. My great-grandfather owned Hunter's Store in Yuleba, then spelt 'Yuelba', which was robbed by the Kenniff gang in December 1897.
5. Information about the Kenniffs has been abstracted from many sources, including: E.G. Heap, 'The ranges were the best: the Kenniff story', *Queensland Heritage*, vol. 2 no. 1, November 1969, pp. 3-23; Hugh MacMaster, *Mostly Murder* (1999); *Australian Dictionary of Biography*, vol. 9, 1891-1939, pp. 568-69; and newspaper reports from the *Truth, Brisbane Courier*, *The Worker* and *Wide Bay and Burnett News*. Reference has also been made to the summary of evidence provided by Chief Justice Griffith for the Full Court, at [1903] State Reports (Queensland) (hereafter St.R.Qd.) 17, pp.17-23. The summary of facts set out in the text does not purport to be a comprehensive analysis: where conflicting accounts have been published, preference has been given to Griffith's version, based (as it was) on the sworn testimony of eye-witnesses. In the Full Court, lawyers for the Kenniffs did not challenge the accuracy or fairness of Griffith's summary.
6. Translation by G.R.C. Davis, British Library, 1989.
7. *The Constitution of the United States of America,* Amendment VI; see also Article III, sec. 2, sub-s.3, and Amendments V and VII.
8. *Commonwealth of Australia Constitution*, s.80, adopted from Sir Samuel Griffith's draft of 1891.
9. *R v. Patrick and James Kenniff*, [1902] St.R.Qd. 239, per Power J. at p. 242.
10. *R v. Hart and Others*, 26 September 1898, per Real J.
11. *R v. Lancefield*, 7 September 1876, Full Court.
12. *R v. Patrick and James Kenniff*, [1902] St.R.Qd. 239, per Power J at p.242.
13. The decision of Justice Power was not followed on the next occasion when such an application was

made to the Supreme Court some 20 years later: *R v. Connolly and Sleeman*, [1922] St.R.Qd. 273, at p. 277.

14. *R v. Vosper,* 27 May 1891, per Chubb J; mentioned by Macnaughton J. in *R v. Connolly and Sleeman*, [1922] St.R.Qd. 273 at p. 276.
15. *R v. Patrick and James Kenniff*, [1902] St.R.Qd. 239 at pp. 241-42.
16. *R v. Puddick*, (1865) 4 Foster and Finlayson's Reports 497, per Crompton J at p.499 [176 English Reports 662 at p. 663].
17. *Truth*, 9 November 1902.
18. Halsbury (ed.), *The Laws of England*, 1st Ed. (1909), vol. 9, para. 774, p. 404.
19. *R v. Patrick and James Kenniff,* [1903] St.R.Qd. 17, at pp. 33 to 41.
20. As Justice Cooper noted in the Full Court, these provisions are effectively declaratory of the rules which previously applied under the Common Law: ibid*,* at p. 28.
21. *Truth*, 9 November 1902.
22. [1903] St.R.Qd., at pp. 27-28.
23. Ibid*,* at pp. 32-33.
24. Ibid, at pp. 42-43.
25. *Criminal Code*, s.10.
26. [1903] St.R.Qd., at p. 28.
27. The Court of Criminal Appeal was not created until 1913: *The Criminal Code Amendment Act*, 1913.
28. Four reasons can be suggested. First, there had been a troubled history between Dahlke and the Kenniffs, and a sympathetic jury might have thought that Dahlke brought the Kenniffs' enmity upon himself. Secondly, Doyle was acting in pursuance of his duty as a police officer, but Dahlke was acting in an entirely voluntarily capacity. Thirdly, even a sympathetic jury might regard the murder of a police officer as a particularly serious matter. Fourthly, the evidence tended to suggest that Dahlke was the first to die, whilst James Kenniff was still in Doyle's custody, making it somewhat more likely that James was directly involved in Doyle's death.
29. [1903] St.R.Qd., at pp. 29-30.
30. *Truth*, 9 November 1902.
31. *Truth*, 7 December 1902.
32. See, for example, *R v. Sussex Justices; Ex parte McCarthy*, [1924] 1 King's Bench Reports 256; *Stollery v. The Greyhound Racing Control Board,* (1972) 128 Commonwealth Law Reports 509; *Carruthers v. Connolly*, [1998] 1 Queensland Reports 339.
33. Fifty years earlier, in a celebrated case of *R v. The Justices of Suffolk* (1852) 18 Queen's Bench Reports 416 at p. 420 [118 English Reports 156 at p. 158], the Lord Chief Justice of England (Lord Campbell) said:
    'I am glad, for the sake of a pure administration of justice, that the application has been made. The proceedings in question are much to be censured. [The Justice], as a rated inhabitant of the appellant parish, was clearly interested in the appeal. If he had done his duty, he would have withdrawn from the Court during the hearing of the appeal. ... He did not vote; nor was there any voting; but he remained in Court, as a member of it; and therefore his presence vitiated the proceedings'.
34. *Criminal Code*, s.10, s.307.
35. *Truth*, 7 December 1902.