

Politics vs Justice: A fresh look at the third trial following the Myall Creek massacre of 1838

JIM RITCHIE

Introduction

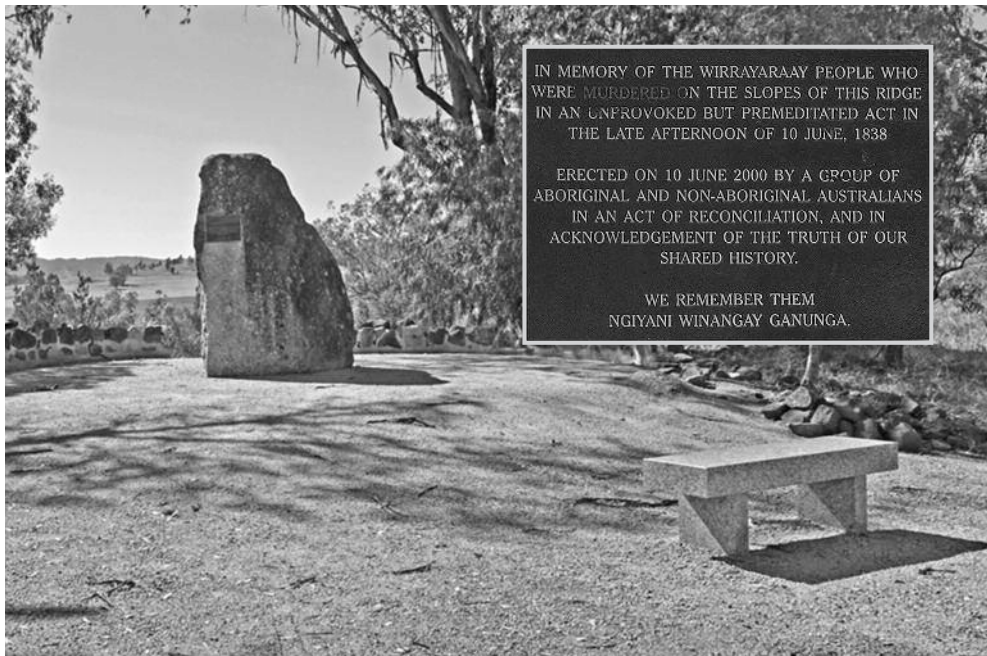
The Myall Creek massacre of 1838 – in which at least 28 Wirrayaraay people, mostly women and children, were murdered – has been the subject of numerous books and articles and one might be forgiven for thinking that there was little more that could be written about this atrocious event and its aftermath.¹ After the massacre the Crown obtained convictions in a second trial against seven of the 11 men accused of taking part in the massacre, but subsequently abandoned a third trial against the remaining four accused. Ostensibly this trial was abandoned because a necessary Crown witness, the Aboriginal stockman Davey, had to be instructed on the nature of an oath to permit him to give evidence as a competent witness, and there was ongoing delay in giving this instruction.² However, there appeared to be no compelling reason why it was necessary for Davey to give evidence, particularly as seven men had previously been found guilty without such evidence. In any event, at the time there was no precedent of any Aboriginal person having been instructed to be a competent witness in a court of justice.

One explanation for the third trial being abandoned is that this occurred for political reasons, particularly to avoid the ‘fallout’ of an additional four men being hanged. An alternate explanation is that the Attorney General, John Plunkett, believed that without Davey’s evidence, a hostile jury would be reluctant to convict the remaining four men in light of the seven earlier executions.³

This article considers these conflicting explanations and in doing so explains what actually occurred at the third trial, which is commonly misunderstood. The article also considers what became of Davey, it having been claimed that he ‘disappeared’ and was probably murdered before the third trial.⁴

The massacre

The pastoral holding ‘Myall Creek’ is about 35 kilometres due west of present-day Inverell and takes its name from the adjoining creek. At the time of the massacre the licensee of Myall Creek was Henry Dangar, a prominent pastoralist who resided



Myall Creek memorial stone and plaque, erected in 2000. (Photos: Jim Ritchie, February 2022.)

at 'Neotsfield' in the Hunter Valley, about 350 kilometres from Myall Creek. Davey was employed by Dangar as a stockman and at the time of the massacre was about 19 years of age.⁵

Davey and his younger brother Billy were at Myall Creek late on Sunday afternoon, 10 June 1838 when 12 armed men on horseback galloped up to the huts occupied by Dangar's employees and rounded up at least 28 Wirrayaraay people who had been camped near the huts.⁶ They were roped together and led to a place about 800 metres away where they were massacred in the most horrific manner, mostly by swords and cutlasses. The men left Myall Creek that evening but returned the following afternoon, camped there for the night, and next morning set about eradicating the evidence of the massacre by means of a fire.

When news of the massacre reached the Governor, Sir George Gipps, he directed Muswellbrook magistrate, Edward Denny Day, to investigate and arrest those responsible. As a result of Day's investigations those involved were promptly identified and 11 of them were brought to Sydney to stand trial. The 12th man, John Fleming, was never caught.⁷

The first and second trials of the Myall Creek accused

The first trial was held in the Supreme Court on 15 November 1838; this resulted in a verdict of 'not guilty'. Gipps believed that Robert Scott, a magistrate and the leader of a group who had raised funds for the defence of the accused, was at least partly responsible for this outcome as he had visited the accused in prison

and advised them not to ‘split’ among themselves, saying that there was no direct evidence against them.⁸

The Crown informed the Court that it was dissatisfied with the jury’s not guilty verdict and asked that the accused be remanded for trial in the week beginning 26 November, to which the Court agreed.⁹ The second trial began on 27 November 1838.¹⁰ At the trial’s commencement Attorney General Plunkett told the jury that they would observe only seven of the 11 men had been put on trial, that it would be competent for the seven defendants to put the other four persons in the dock to establish the innocence of the seven, and their failure to do so was ‘presumptive proof’ of their guilt.¹¹ This was a tactical ploy by the Crown to pressure the defence to call the four men not on trial to give evidence on behalf of the seven accused, thereby giving the Crown an opportunity to cross-examine these four men. Alternatively, if the four were not called to give evidence, this was said to be ‘proof’ of the guilt of the seven. The defence did not call on the four to give evidence, however it is not apparent whether this had any bearing on the trial outcome.

In this second trial the Crown witnesses gave substantially the same evidence they gave in the first trial.¹² At the end of the trial the jury retired and after 45 minutes returned to give their verdict, which was guilty on the first five counts (but not guilty on various other counts). The seven men were remanded for sentencing.¹³ On 5 December an appeal was heard by the Court comprising three judges and was quickly disposed of.¹⁴ The trial judge donned his black cap and passed the sentence of death on the seven men and they were hanged on 18 December 1838.¹⁵

The third trial of the Myall Creek accused¹⁶

The third trial postponement hearing of 6 December 1838

On 6 December 1838 the four accused who had not been tried in the second trial appeared before the Mr Justice Burton. The following report of this hearing comes from the *Sydney Herald*:

John Blake, James Lamb, George Palliser and Charles Toulouse having been placed at the bar the Attorney-General moved that their trials be postponed until next session. The affidavit of Mr William Hobbs stated that a black boy, named Davy, told him that he stood behind a tree and saw the prisoners and others murder the blacks – that Davy is nineteen years of age, can speak English, and, in the opinion of Mr Hobbs, might be sufficiently instructed so as to become a competent witness. The affidavit of the Crown Solicitor stated that it appeared by the depositions that Davy was a necessary and material witness for the prosecution. The learned Attorney-General alluded to several cases in which this course had been pursued. Postponement of trial ordered.¹⁷

The trial was postponed to the first criminal sessions beginning 1 February 1839. The *Supreme Court Papers* held by Museums of History New South Wales State Archives Collection (hereafter StAC) include numerous hand-written affidavits. An

affidavit is essentially a statement of facts which is required to be in a certain format and to comply with certain formalities in order to be accepted by the Court as evidence of those facts. Most of the affidavits on this file comply with these formalities.¹⁸

The above report refers to 'the affidavit of Mr William Hobbs'. William Hobbs was the superintendent at Myall Creek and the most senior employee residing on the property, although he was not present at the time of the massacre. He was a 'free settler', 26 years of age, and had worked for Dangar for three years.¹⁹ The *Supreme Court Papers* include an undated document signed by Hobbs (but not witnessed) which stated:

... on the evening of the fifteenth day of June last an Aboriginal Boy named Davey informed Deponent that during the murder of certain blacks at Myall Creek ... he hid himself behind a tree and saw the whole transaction ...²⁰

Hobbs also stated in this document that Davey was 19 years of age and spoke English 'so as to make himself understood',²¹ and that:

'He *thinks* it is *possible* that [Davey] *might* be instructed as to the nature of an oath so as to give evidence at the Trial by the Criminal Sessions in February next ...' [emphasis added].²²

Such a statement would normally be regarded by a court as carrying limited evidential value because of its vague wording and because it set out no basis for why Hobbs thought Davey might be instructed in the timeframe referred to. In any event, having regard to Hobbs's background he would have had no understanding of what would be required for Davey's instruction or the time this would take.

The above report also refers to 'the affidavit of the Crown Solicitor', who was Francis Fisher. In the *Supreme Court Papers* there is a document which states:

Francis Fisher ... maketh oath and saith that it *appears* from the Depositions taken [by Day] that an aboriginal Boy named Davey would be a necessary and material witness on the part of the Crown and Deponent further saith [Davey] was not a deponent at the Criminal Sessions now past as he clearly did not understand the nature of an oath and Deponent *having been informed* that [Davey] understands English and could be instructed as to the nature of an oath by the next Criminal Sessions *has been directed to cause* steps to be taken for the purpose of endeavouring to teach [Davey] the nature of an oath in order to his being subpoenaed and brought before this Honourable Court by next Criminal Session on the 1st February [emphasis added].²³

This document is undated, unsigned and contains numerous corrections. Having regard to Fisher's position and experience he would have been the logical and appropriate person to depose to Davey's instruction on the nature of an oath being undertaken and completed within the required timeframe, however, he has left this task to Hobbs, with Fisher only being *informed* about this (whether by Hobbs or another he does not say). Fisher should have sworn to his *belief* in the matters of which he was informed, and the fact that he did not suggests he was unable to do this.²⁴

It is possible that there exist final versions of these two documents, but if so, they are not with the *Supreme Court Papers*. The documentary non-compliances referred to suggest that the postponement application of 6 December was made in haste and without too much thought being given to the evidence in support of the application. This is confirmed by the fact that Hobbs's evidence in his affidavit about Davey having witnessed the massacre was not only inconsistent with Hobbs's earlier evidence, but it was also inconsistent with other witness evidence.²⁵ Further, there was almost *no* prospect of Davey being instructed as to the nature of an oath so as to give evidence at the third trial by the time of the next Criminal Sessions or at any time.²⁶

Events after hearing of 6 December 1838

The Crown's application for the third trial's postponement had the result of buying more time for the Crown and but for this the trial would have most likely commenced some time in December. In the period between the above hearing and when the matter next came before the Court (14 February 1839), with one important exception, the Crown was actively preparing for this trial. At least seven Crown witnesses (including Day) had been subpoenaed and transport arrangements were made for each witness.²⁷

Also the 'Indictment' setting out the charges to be made against three of the remaining four accused had been finalised. The charges contained in this document were similar to those raised in the second trial except there were no charges relating to the little boy 'Charley' (these charges had been unsuccessful at the second trial).²⁸ The 'important exception' mentioned above was that the Crown made no attempt in this period to locate their most important witness, Davey.

On 19 December 1838, the missionary, Rev Lancelot Threlkeld, wrote the following letter to the Colonial Secretary, Edward Deas Thomson:

I have the honor to enclose a Supplementary list of Aborigines to whom I sent the surplus blankets remaining after the distribution at this station by my Son at his joint Station with Mr Arndell near the Manilla.

The two lads marked in the list, named, David and Billy are both witnesses to the Atrocities which have been committed in that Quarter, and both must be obtained to render affectual the Evidence ... Their wives ... should also be obtained with the two lads to complete the chain of evidence. They were at the station alluded to, two to three months back and no doubt can be found near those parts [original spelling is unaltered].²⁹

This letter found its way to Governor Gipps because on 26 December he wrote in the margin: '

The men having been found guilty – or at least 7 of them – I do not think it is necessary to search for further Evidence.'³⁰

No doubt Gipps intended this direction be passed on by Thomson to Plunkett and Fisher. It is significant that it is Threlkeld (not the Crown) who was proposing that Davey and the others be 'obtained' to give evidence. Clearly Gipps's direction

not to take evidence from Davey (or Billy and the ‘wives’) is irreconcilable with the Court having being informed three weeks earlier that Davey was a necessary and material witness for the prosecution. Gipps must have been aware of this, and therefore one can reasonably conclude that what he was really proposing was that the prosecution against the remaining four was to end.



*Chief Justice Sir James Dowling, painted by J. Dennis, 1840.
(Source: Mitchell Library, State Library of New South Wales, ML 249.)*

In a subsequent letter of 8 February 1839 from Threlkeld, this time to Mr Justice Burton, Threlkeld acknowledged that he was by then aware the Attorney General wished to procure evidence from Davey, and that Davey and Billy would be brought down if possible from his son's Barraba station, where they had been staying after the massacre.³¹ It seems likely that Threlkeld knew that Davey was required as a witness either because he had been informed of this by Day (with whom he was in contact) or because it was a matter of public knowledge (being reported in the *Sydney Herald* and elsewhere), but in any event it is clear that as at the date of this letter Davey was still not under instruction.

The third trial is abandoned – the hearing of 14 February 1839

On 14 February 1839 Lamb, Palliser and Toulouse came before Chief Justice James Dowling in the Supreme Court (the Crown had not included Blake in the indictment because of insufficient evidence).³² At this hearing Plunkett informed the Court:

[Davey] had been under the tuition of a competent person for two months, *but it was now reported to him* [emphasis added] that he was not so far instructed as to be a competent witness, and it was quite uncertain when he would be; and he [the Attorney General] did not think he should be doing his duty in risking public justice by prosecuting the case without his evidence ...

[Davey] was a very intelligent lad, but had been in a remote part of the country and had been too short a time under tuition to be enabled to judge of what might be accomplished, or in what probable time: and he might add that the hope was a very slender one, as a man named McGill who had been several times before the Court, and who had been educated and in fact reared amongst the Missionaries, under the immediate superintendence of [Threlkeld], was not competent to give evidence having no belief in a future state of rewards and punishments ...

I cannot proceed with the trial with any hope of success without [Davey's] evidence, and affidavits are on the files of the Court, which state that he is a necessary and material witness.³³

On the basis of this concession the Court held that it was bound to presume that the indictment could not be sustained. The men were released and never faced court again.

Why was the third trial abandoned?

Roger Milliss contends that the third trial was abandoned because:

The only explanation of the course that was followed is that from the start it was an elaborate subterfuge on Gipps' and Plunkett's part. They had seized on Davey's alleged vital testimony as a convenient delaying tactic until they saw which way the political wind was blowing. Once Gipps decided the breeze was too stiff, the young Aborigine's supposed failure to respond to 'instruction' could be used as an excuse to abandon the prosecution.³⁴

Mark Tedeschi KC contends that by the time of the 14 February hearing Plunkett faced a 'severe dilemma'; he elaborates:

Without Davey as a witness to the murders, he would have the same challenge as before to prove the identity of another victim. The public mood was firmly against any further prosecutions. Governor Gipps had been affected by the public hostility to the convictions and executions and had lost enthusiasm for a further trial. Plunkett acknowledged to himself that if he went to trial again, the defendants would undoubtedly raise the issue of their prior acquittals, and another special jury might find that the four remaining prisoners were entitled to rely upon the earlier verdict. Even if he won the right to put them on trial again, he would likely face a hostile jury reluctant to convict in light of the seven earlier executions.

Having won the second trial, the last thing he wanted was a contradictory verdict of acquittal at a third trial that would challenge the correctness of the earlier convictions. Plunkett felt that he had adequately made his point that Aboriginal lives were as valuable as white ones, and he did not want to run the risk of diminishing that message by failing to get convictions on the same evidence at a third trial.³⁵

The difference between these two contentions is that according to Milliss, involving Davey was simply a 'convenient delaying tactic', whereas according to Tedeschi, Davey really was an essential witness and without his evidence the Crown could not succeed. The following considers which contention is correct by having regard to what had occurred in relation to Davey's instruction and whether it was correct that the Crown could not successfully proceed with the third trial without Davey's evidence.

Davey's instruction

If Davey was to be placed under instruction, the logical person to provide this, or at least arrange for this, was Rev Threlkeld.³⁶ Based on what Threlkeld wrote in his above letters of 19 December 1838 and 8 February 1839, Davey was not under instruction at any time before the latter date. Further, any prospect that this might occur was overruled by Gipps's direction of 26 December to the effect that it was not 'necessary to search for further evidence'.

Not only was Davey not under instruction, but also there was virtually no prospect of that instruction being successful, either by the third trial or at any time. As noted in the above report of the hearing, Plunkett informed the Court that the likelihood of Davey being instructed to be a competent witness 'was a very slender one'. Further, when asked by the judge whether he 'entertain[ed] any hope that [Davey] would ever be instructed so as to be able to give evidence in the case', Plunkett conceded that 'the case was very improbable, as there was no precedent of any [Aboriginal person] having been so far instructed as to be a competent witness in a court of justice, although the experiment had been frequently tried'.³⁷

Was Davey's evidence necessary for the Crown to succeed?

Plunkett's statement at the hearing on 14 February that he could not proceed



*Reverend Lancelot Edward Threlkeld, 1788-1859 (ambrotype portrait), circa 1850s.
(Source: State Library of New South Wales, MIN 45.)*

with the trial of the remaining three accused with any hope of success without Davey's evidence was said in response to the judge asking him to confirm that Davey was 'a necessary and material witness, and that [Plunkett] cannot safely go to trial without him'.

Day had not taken evidence from Davey, so the Crown only had Hobbs's evidence given at the hearing of 6 December, namely that Davey informed him: 'During the murder of certain blacks at Myall Creek [Davey] hid himself behind a tree and saw the whole transaction.' According to Hobbs, Davey informed him of this on 15 June 1838, five days after the massacre. Day took three depositions from Hobbs between 28 July and 30 July, and it is surprising that what Hobbs stated above was not in any of these depositions. In fact, in Hobbs's deposition of 28 July he stated Davey had told him: 'He went to the place [of the massacre] immediately after they were killed having first heard some shots.'³⁸

Also according to George Anderson, another Dangar employee, who (unlike Hobbs) was actually present when the Aboriginal people were roped together and taken away, Davey remained behind with a female Aboriginal who had been 'given' to him by the armed men, and the following evening Davey told Anderson that he had 'gone and seen some of the blacks dead up the way they went'.³⁹ This is consistent with Hobbs's initial evidence.

In any event, the Crown already had sufficient evidence to convict at least three of the remaining four accused. Although Toulouse, Palliser and Lamb were not part of the second trial, the evidence of various witnesses at this trial extended to their involvement in the massacre. As regards that evidence, Anderson stated that while he did not witness the massacre, he saw the Wirrayaraay people being led away to be massacred by a group of men which included Toulouse, Palliser and Lamb.

John Bates gave evidence that he saw Lamb with other accused both before the massacre and the morning after the massacre. Andrew Burrowes gave evidence that he saw Palliser and Toulouse with other accused before the massacre. Robert Sexton gave evidence that he saw Lamb with other accused both before the massacre and the morning after the massacre. Charles Reid gave evidence that he saw Palliser and Toulouse with other accused before the massacre.⁴⁰ The evidence against the three accused from these witnesses was just as strong as the evidence against the seven men who had previously been found guilty. On the other hand, the Crown had no way of knowing what Davey could say about the three accused as he had never been questioned about them.⁴¹

An area where Davey's evidence would have been helpful would have been in identifying those who been massacred, which was an issue the Crown had struggled with at the first two trials. However, as already noted the evidence suggests that Davey did not witness the massacre, and in any event, the fact that seven men had already been found guilty without Davey's evidence does suggest that it was something of an exaggeration for Plunkett to say the Crown could not safely go to trial without that evidence. More importantly, there was no point in even contemplating Davey giving evidence unless he could be properly instructed in this

regard, which Plunkett conceded was ‘very improbable’.

Regarding what Tedeschi refers to as Plunkett’s ‘dilemma’, it is acknowledged that it was possible that a jury in a third trial might have allowed the three to rely on the issue of their prior acquittals in the first trial; however, this defence had not helped the seven accused in the second trial, and further, the decision in this trial was upheld by the Court comprising three judges. It is also acknowledged that a contradictory acquittal at a third trial might have undone the ‘good work’ achieved by the second trial.

On the other hand, there were three men who were clearly involved in the massacre (one of whom Gipps believed was ‘the most guilty of the whole’ – possibly Lamb)⁴² and the Crown had an obligation to secure convictions against these men if this was reasonably possible, which it arguably was (even without Davey’s evidence). In any event, for the reasons referred to above, without Davey being properly instructed the Crown was never going to be able to secure convictions against the three through his evidence.

Conclusion to why the third trial was abandoned

To summarise the above:

(a) The postponement application of 6 December was made in haste and with little consideration being given to the supporting evidence.

(b) The Crown had made no effort either before or after this application to locate Davey to begin the religious instruction process notwithstanding that: (i) Fisher swore in his affidavit for that hearing that he had been directed to cause steps to be taken for this purpose; and (ii) the Crown was otherwise actively preparing for trial.

(c) It was ‘very improbable’ that such instruction would have been successful.

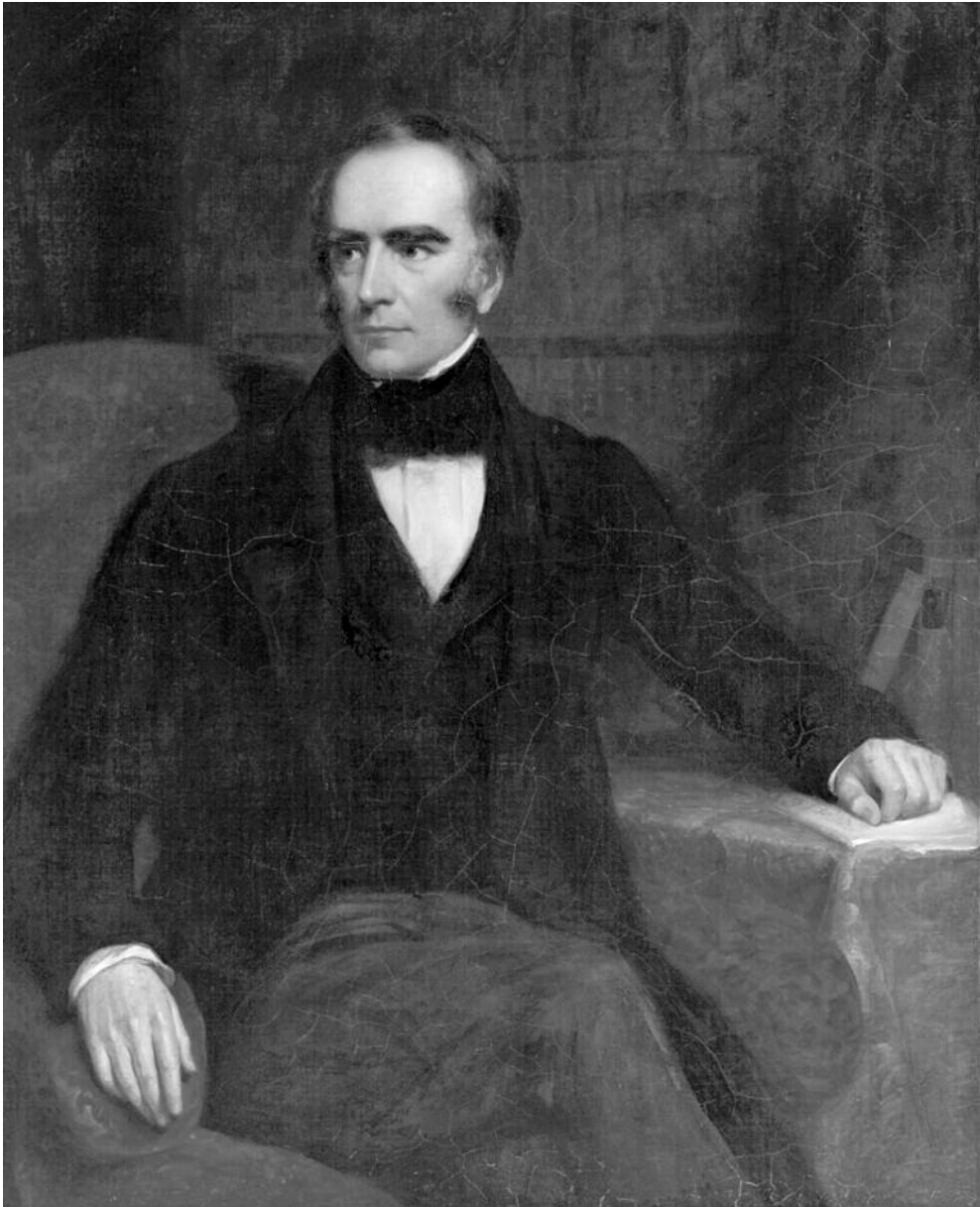
(d) The evidence given by the Crown’s witnesses soon after the massacre suggests that Davey was not a witness to the massacre; and in any event, it was an exaggeration to assert that the Crown could not ‘proceed with the trial with any hope of success without Davey’s evidence’.

(e) Three weeks after the postponement application Gipps indicated that he did not think it necessary that evidence be sought from Davey.

All of this demonstrates that the Crown was simply using Davey’s evidence as a convenient excuse to postpone the third trial, and it never had any intention of calling Davey to give evidence at this trial. Further, since the supposed necessity of Davey giving evidence was the sole reason for seeking the postponement of the third trial, the Crown was obviously buying time to make a final decision on whether or not to pursue the remaining four accused. That decision was made about the time of Gipps’s note of 26 December 1838.

Accordingly, Milliss’s assessment of the situation appears to be correct. That is, the Crown’s postponement application of 6 December was ‘a convenient delaying tactic until they saw which way the political wind was blowing’.⁴³ At that time, and subsequently, that wind was blowing decidedly against the Government.⁴⁴ While Tedeschi acknowledges that the public mood was firmly against any further

prosecutions and accordingly Gipps had lost enthusiasm for a further trial, Tedeschi's explanation for why the third trial was abandoned is that Plunkett believed without Davy as a witness to the murders, he would have the same challenges as before (and he explains those 'challenges') to prove the identity of another victim.



*Portrait of Sir George Gipps [nd] by Henry William Pickersgill.
(Courtesy of Mitchell Library, State Library of New South Wales, ML 4.)*

Today one can only surmise what Plunkett may have believed, but based on what actually occurred, it seems most unlikely that Davey was ever going to be in a position to give evidence at a third trial, and Plunkett knew, or should have known, this. That is, the decision not to proceed to a third trial was not a decision made by Plunkett on any legal basis, rather it was a political decision made by Gipps.

Finally, and for completeness, it is necessary to address a common misconception that the third trial was abandoned because Davey could not be found.⁴⁵ As is evident from the above report of the hearing on 14 February, the possibility that Davey could not be found was not raised by the Crown. The Court was informed by Plunkett that Davey was under instruction but he was not sufficiently instructed as to be a competent witness and in any event the hope that he could be so instructed was 'a very slender one'. It was for these reasons that the three accused (Blake had not been included in the indictment) were released and accordingly the third trial did not proceed.⁴⁶

Conduct of Plunkett and Fisher

Although we know why the third trial was abandoned, the question remains why Plunkett and Fisher, the two most senior legal officers in the Colony, agreed to be part of, and continued to be part of, what Milliss has justifiably referred to as an 'elaborate subterfuge'. Instead of continuing the subterfuge, Plunkett should have simply informed the Court on 14 February that because of the ongoing delay in locating and instructing Davey, the Crown would not be proceeding against Lamb, Palliser, and Toulouse under the existing indictment. It is therefore baffling why Plunkett went much further than this and informed the Court that Davey 'had been under the tuition of a competent person for two months, but it was now reported to him that he was not so far instructed as to be a competent witness, and it was quite uncertain when he would be'.

However, it should be acknowledged that there is some disparity in the reports as to what Plunkett actually informed the Court about Davey's instruction. The above quote comes from the *Australian's* report, which is the most detailed and extensive of all the newspaper reports of the trial. The *Sydney Gazette*, the *Colonist*, the *Sydney Standard* and the *Sydney Herald* all reported that Plunkett informed the Court that 'Davey still remained in the same uninstructed state', which is a not too dissimilar, albeit a condensed version of what the *Australian* reported.⁴⁷ It is unlikely that the *Australian* made up this part of its report, so it may be reasonably assumed that it correctly reflects what Plunkett did in fact inform the Court.

Having regard to Threlkeld's letter of 19 December, and Gipps's note of 26 December on this letter, Plunkett and Fisher should have known that Davey had never been, nor ever would be, under 'tuition'.⁴⁸ The most charitable thing that can be said for Plunkett is that he was acting on Fisher's instructions, as it seems unlikely that someone in his position, and knowing something of his character, would knowingly mislead the Court.⁴⁹ Similarly, in Fisher's case, he was possibly misinformed about Davey's whereabouts and instruction, or possibly he made certain assumptions which were wrong.⁵⁰



*Some baffling decisions: John Hubert Plunkett, Attorney General of NSW from 1832 to 1856.
(Courtesy Museums of History NSW State Archives Collection, NRS-21689, GPO 2-08235.)*

Events after the hearing of 14 February 1839

In Gipps's Despatch to the Secretary of State dated 26 February 1839 he wrote:

I have the Honour to inform your Lordship that the Attorney General finding he had hardly sufficient evidence to put these men on their trial, moved on the 14th instant with my full approbation and concurrence that they should be discharged ...

I think it right to explain to your Lordship that, in assenting to the course proposed by the Attorney General with respect to these four men, I was not so much moved by any doubt of their guilt, as by the hope that the law might be considered as sufficiently vindicated by the executions which had already taken place.⁵¹

It was disingenuous of Gipps to inform the Secretary of State that 'the Attorney General finding that he had hardly sufficient evidence' when it was Gipps who directed that it was unnecessary to search for that evidence after having used Davey as a convenient delaying tactic in the postponement hearing on 6 December.

What became of Davey?

We know that after the massacre on 10 June 1838 Davey, Billy and their 'wives' went to the property of Threlkeld's son and son-in-law at Barraba, about 90 kilometres south of Myall Creek. We also know that in July 1838, Davey and Billy were issued with blankets which were surplus to Threlkeld's needs at Port Macquarie.⁵² They remained at the Barraba property for 'a season'.⁵³ At some point of time in the latter part of 1838, Davey and Billy (with 'wives') left this property. The only other information we have of their whereabouts comes from Threlkeld's letter to Mr Justice Burton dated 8 February 1839 in which he wrote:

... for Mr Arndell, who was here last week, states that on his recent return from the Gwyder [sic] he was informed by a Gentleman that Davey was *put out of the way*, but whether with his throat cut, or only hid, could not be ascertained [original emphasis].⁵⁴

Based on what Threlkeld wrote, the 'gentleman' (who was not identified) referred to two possibilities – that Davey was either dead or in hiding – but Arndell was unable to ascertain which of these possibilities had occurred. Of course, the 'gentleman' may or may not have known the true circumstances of Davey's whereabouts, and in any event what he does say about those whereabouts is equivocal.

If Davey had been murdered, presumably this would have been by someone who had a motive to do so, such as fellow workers, friends or sympathisers of the four accused yet to be tried, or possibly of Fleming who had avoided capture.⁵⁵ The other possibility is that Davey (with Billy and the 'wives') wanted to get well away from the scene of the massacre and he returned to the Kamilaroi people, which was his tribe. The area occupied by the Kamilaroi people included the Peel River, but went

beyond this – broadly speaking it extended from Tamworth in the south to Goondiwindi in the north, and west to Walgett.⁵⁶ Of course this is speculation, but the point is that on the evidence available it is not possible to say with any degree of confidence that Davey was killed or ‘put out of the way’ or ‘was never seen again’.⁵⁷

Conclusion

It is to be hoped that Davey and Billy did return to their people on the Peel River, which was part of Kamilaroi Country. On the other hand, it would be a dreadful tragedy if they were murdered because of the manner in which the Crown had conducted the third trial, particularly by it becoming publicly known from early December 1838 that Davey was a necessary and material witness for the Crown in the prosecution of the four remaining accused. As concluded above, involving Davey in the third trial had all the appearances of a subterfuge instigated by Governor Gipps to avoid the furore that prosecuting the remaining accused would have created. Disappointingly, Gipps was aided in carrying out this subterfuge by the Colony’s two most senior law officers, Attorney General John Plunkett and Crown Solicitor Francis Fisher.

Member RAHS

Notes

1 The most detailed account of the massacre and its aftermath is contained in Roger Milliss, *Waterloo Creek: The Australia Day massacre of 1838, George Gipps and the British conquest of New South Wales*, McPhee Gribble, Ringwood, Vic, 1992, Chapters 10, 11, 17, 18 and 20. See also Brian Harrison, ‘The Myall Creek massacre’ in Isabel McBryde (ed), *Records of Times Past: Ethnohistorical essays on the culture and ecology of the New England tribes*, Australian Institute of Aboriginal Studies, Canberra, 1978, pp 17-51.

2 Davey’s tribal name was ‘Yintayintin’; he is referred to in this article as ‘Davey’ as this was how he was mostly referred to in the newspaper reports of the trials and in many subsequent written works regarding the massacre. For the same reason, Davey’s brother is referred to as ‘Billy’ in place of his tribal name ‘Kuimunga’.

3 The first of these contentions is contained in Milliss, *Waterloo Creek* at p 607. The contrary contention is contained in Mark Tedeschi AM QC (now KC), *Murder at Myall Creek: the trial that defined a nation*, Simon & Schuster Australia, Cammeray, NSW, 2017, p 151 – Location 2365 of the *Kindle* Edition.

4 Lyndall Ryan, ‘A very bad business: Henry Dangar and the Myall Creek massacre’, in Jane Lydon and Lyndall Ryan (eds), *Remembering the Myall Creek Massacre*, NewSouth Publishing, Sydney, 2018, pp 36-37. The relevant chapter (1) begins at p 15, and is based on a paper by Professor Ryan with the same title (online at <https://www.newcastle.edu.au/Henry-Dangar-and-the-Myall-Creek-massacre>, accessed on 6 March 2023).

5 Undated affidavit by William Hobbs, Museums of History New South Wales, State Archives Collection (hereafter MHNSW StAC): NRS-880, Papers and Depositions, Supreme Court Sydney, [4/9090], (hereafter Supreme Court Papers), p 84. This file and the other historical documents and files referred to in this article were viewed at the Western Sydney Records Centre, Kingswood.

6 These and the following details come from ‘The Evidence of Murder’, *Push from the Bush*, April 1985, no 20 (hereafter ‘The Evidence of Murder’) which contains typed transcripts of the evidence (referred to as depositions or affidavits) taken by Magistrate Day from various witnesses as well as from the trial reports referred to hereafter. The original hand-written depositions are contained in the Supreme Court Papers.

7 For a full account of the various theories on how Fleming avoided capture refer Patricia Withycombe, ‘The Twelfth Man: John Fleming and the Myall Creek Massacre’, BA (Hons) thesis, University of Newcastle, 2015 (online at <https://hunterlivinghistories.com/wp-content/uploads/2016/07/patsy-withycombe-honours-thesis-final-draft-27102015.pdf>, accessed 6 March 2023).

8 *Historical Records of Australia* (hereafter *HRA*), vol 19, p 704, at pp 705-706. As a result of Scott’s conduct during the trial his name was omitted from the list of magistrates for 1839.

9 A full report of the first trial, *R v Kilmeister (No 1) [1838]*, can be found online at <https://www.austlii.edu.au/> (enter ‘Kilmeister No 1’ in the search box), accessed 6 March 2023.

10 A full report of the second trial, *R v Kilmeister (No 2) [1838]*, can be found online at <https://www.austlii.edu.au/> (enter ‘Kilmeister No 2’ in the search box), accessed 6 March 2023.

11 *R v Kilmeister (No 2) [1838]* at p 11/27.

12 Davey was not a Crown witness in either trial.

13 *Australian*, 1 December 1838, p 2.

14 *Australian*, 6 December 1838, p 2.

15 *Sydney Gazette*, 18 December 1838, p 2, 20 December 1838, p 2.

16 The expression ‘third trial’ is not strictly correct because at the hearing on 14 February 1839 the remaining accused were not tried, they were released on the basis that the indictment against them could not be sustained. However, for convenience this hearing is referred to in this article as ‘the third trial’. A full report of the third trial, *R v Lamb [1839]*, can be found online at <https://www.austlii.edu.au/> (enter ‘Lamb 1839’ in the search box), accessed 6 March 2023.

17 *Sydney Herald*, 7 December 1838, p 2.

18 These ‘formalities’ came from the English common law rules of evidence which then applied because of section 24 of the *Australian Courts Act*, 9 Geo IV, c83.

19 Milliss, *Waterloo Creek*, p 274.

20 Supreme Court Papers, MHNSW StAC: NRS-880, [4/9090], p 84.

21 The following example of Davey’s ‘English’ is taken from Hobbs’s deposition of 14 July 1838: ‘On my return I asked [Davey] if Kilmeister went with the party who killed the blacks he said “Bet that been close up” that is he was not with them, “that been come to me”, meaning that he came and spoke to him.’ (‘The Evidence of Murder’, p 65). Significantly (from a credibility point of view), Davey appears to deny that Kilmeister was a party to the massacre.

22 The reason why it was necessary for Davey to be ‘instructed as to be a competent witness’ was because as an Aboriginal person, he was legally disentitled to give evidence unless and until he had been given some ‘instruction in the ordinances of religion’ so as to be able to take an oath on the Christian Bible: Tedeschi, *Murder at Myall Creek*, p 150 – Location 2341 of the *Kindle* edition.

23 Supreme Court Papers, MHNSW StAC: NRS-880 [4/9090], p 83.

24 Being one of the ‘formalities’ referred to in endnote 18.

25 This evidence is considered under the heading ‘Was Davey’s evidence necessary for the Crown to succeed?’

26 This issue is considered under the heading ‘Davey’s instruction’.

27 Milliss, *Waterloo Creek*, pp 605-606.

28 The ‘indictment’ is dated 12 February 1839 and is held in MHNSW StAC: NRS-13477,

Informations and Other Papers [T52]. Blake was not included in this document.

29 Niel Gunson (ed), *Australian Reminiscences & Papers of L. E. Threlkeld Missionary to the Aborigines 1824-1859*, Australian Institute of Aboriginal Studies, Canberra, 1974, vol II, p 275 and footnote 98 on p 310. A copy of the supplementary list is in MHNSW StAC: NRS-905, Main series of letters received [Colonial Secretary], 1826-1982 [4/2409.2] Missionaries 1838, Letter No 38/13720. Threlkeld was a missionary based at Lake Macquarie. Between 1825 and 1839 he worked closely with Aboriginal people and often acted as interpreter for those on trial in Sydney. His published language studies are now regarded as landmarks in Aboriginal studies: Niel Gunson, 'Threlkeld, Lancelot Edward (1788-1859)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <https://adb.anu.edu.au/biography/threlkeld-lancelot-edward-2734/text3859>. Threlkeld's son Joseph and Threlkeld's brother-in-law, James Arndell, jointly owned the property on the Manilla River referred to in the letter. This was near to what is now Barraba, which is about 90 kilometres south of Myall Creek. Although Threlkeld states in this letter, 'David and Billy are both witnesses to the Atrocities', the balance of this letter read in conjunction with his later letter of 8 February 1839 (refer endnote 31) make it clear that Threlkeld was not asserting that Davey was an eyewitness to the massacre of 10 June 1838.

30 Gunson, *Threlkeld's Papers*, p 311, note 99.

31 Gunson, *Threlkeld's Papers*, p 275. It is not known whether the letter was received by Mr Justice Burton before or after the hearing of 14 February 1839 (which was heard by Chief Justice Dowling); if it was received before the hearing, clearly (having regard to what the Court was informed on 14 February) it was not then passed on to Plunkett or Fisher. The letter is further considered under the heading 'What became of Davey'.

32 Plunkett informed the Court of Blake's position at the commencement of the hearing as follows: 'In the exercise of his discretion, upon looking carefully over the evidence given in the former trial, there did not appear to be sufficient legal evidence to convict him.' *R v Lamb*, p 2/4. Based on the depositions taken by Day, Plunkett was correct about there being no evidence against Blake. Following this hearing Fisher informed the Superintendent of Convicts that although no legal evidence was produced against Blake, 'based on the statement made by Davey', there was not the least doubt Blake was implicated in the massacre: Milliss, *Waterloo Creek*, pp 608-09. There was no such statement by Davey, which suggests that Fisher had a poor knowledge of the Crown's evidence.

33 This is from the published report of the third trial (*R v Lamb*, pp 2-3/4), which is based on the report in the *Australian*, 16 February 1839, p 3 (the published report also includes a shorter report of the trial from the *Sydney Gazette*, 14 February 1839, p 3). At the conclusion of the above report Plunkett refers to 'affidavits ... on the files of the Court'. These were the affidavits relied upon by the Crown at the hearing of 6 December 1838 as there was no affidavit regarding what had been done to instruct Davey (p 3/4).

34 Milliss, *Waterloo Creek*, p 607.

35 Tedeschi, *Murder at Myall Creek*, p 151 – Location 2365 of the *Kindle* edition.

36 Refer endnote 29.

37 *R v Lamb*, p 3/4.

38 'The Evidence of Murder', p 63.

39 'The Evidence of Murder', pp 69-70.

40 The report of the second trial (Kilmeister No 2) has been taken from the *Australian's* report dated 27 November 1838. In reporting some of the evidence given in the second trial, the *Australian* referred back to evidence given 'to the same purport' in its report of the first trial dated 17 November 1838. It is for this reason that some of the following page references refer to both

trials. For Anderson's evidence refer pp 5-6/11 (first trial) and p 13/27 (second trial); for Bates' evidence refer p 7/11 (first trial) and p 13/27 (second trial); for Burrowes' evidence refer pp 7-8/11 (first trial); for Sexton's evidence refer p 13/27 (second trial); for Reid's evidence refer p 8/11 (first trial) and p 13/27 (second trial).

41 As noted in endnote 21, he may not have been a particularly helpful witness in any event.

42 Refer endnote 51.

43 Milliss, *Waterloo Creek*, p 607.

44 Following the second trial the seven men had been sentenced to death on 7 December 1838. From this date on and through into early 1839 there was considerable public hostility directed to the Government, much of which was whipped up by newspapers such as the *Sydney Herald*: see Milliss, *Waterloo Creek*, pp 542-543, 552-561, 598-599 and 601-602.

45 For example, on the Museums of History NSW website it states: '[Davey] could not be found, leaving Plunkett no choice but to release the remaining three men on bail.' (Paul Irish, 'Myall Creek Massacre', <https://mhns.w.au/stories/convict-sydney/myall-creek-massacre/>, accessed 19 August 2023). See also Ryan, 'A very bad business', p 36.

46 The three were released on the basis that they may be charged again should 'circumstances allow', p 2/3.

47 *Australian*, 16 February 1839, p 3; *Sydney Gazette*, 16 February 1839, p 3; *Colonist*, 16 February 1839, p 3; *Sydney Standard*, 18 February 1839, p 3, and *Sydney Herald*, 15 February 1839, p 2.

48 On the other hand it is acknowledged that neither Plunkett nor Fisher were likely to have read Threlkeld's letter of 8 February 1839 containing the then most recent update on Davey's whereabouts – refer endnote 31.

49 This view is based on Tedeschi, *Murder at Myall Creek*, which contains much information about Plunkett and his role in the Myall Creek trials.

50 At the time of the Myall Creek trials Fisher was responsible on behalf of the Crown for both criminal and civil matters. In the Supreme Court Papers there are many documents in Fisher's hand-writing or bearing his name, including before and after the date of the hearing of 14 February. As noted above (endnote 32), Fisher had a poor knowledge of the Crown's evidence, and this might explain the erroneous submissions made to the Court on 14 February.

51 *HRA*, vol 20, pp 39-40. Interestingly, at the 14 December hearing, Chief Justice Dowling in his closing address to the accused expressed similar sentiments (pp 2-3). In an earlier Despatch dated 20 December 1838, Gipps had informed the Secretary of State: 'I have no reason to believe that any man has been executed, who could have been saved; but it is now pretty certain that one of the four men, who have for the present escaped, was the most guilty of the whole.' (*HRA*, vol 19, p 704 at p 706). Milliss suggests it was Lamb that Gipps was referring to (Milliss, *Waterloo Creek*, p 609).

52 Letter from Threlkeld to Thomson dated 19 December 1838: Gunson, *Threlkeld's Papers*, p 275.

53 Letter from Threlkeld to Mr Justice Burton dated 8 February 1839: Gunson, *Threlkeld's Papers*, p 275. In Threlkeld's letter of 19 December 1838 he refers to Davey and Billy being at the Barraba property 'two or three months back'.

54 Gunson, *Threlkeld's Papers*, p 275, which is the same letter referred to in endnote 31.

55 It has been claimed that: 'according to the missionary Lancelot Edward Threlkeld, [Henry] Dangar had arranged for [Davey] "to be put out of the way" for he was never seen again' (Ryan, 'A very bad business', pp 36-37). This claim is based on the passage that Threlkeld wrote as quoted above; however, Threlkeld did not refer to Dangar in connection with the Myall Creek massacre in this quote or elsewhere in his published letters. Norma Townsend, in 'Masters and Men', *Push from the Bush*, April 1985, no 20, p 4, wrote about various 'pastoral masters' and their

employees, and in relation to Dangar stated: 'Certainly there was no tradition of racial violence in his background such as we have seen for the Hawkesbury settlers: rather the opposite.' (pp 13-14). Unlike others in the Myall Creek area who had connections with the five men (including Fleming) still to be tried or caught, Dangar had no motive to have Davey put out of the way once his employee Kilmeister had been found guilty (on 27 November), which occurred before Davey was publicly identified by the Crown as a witness for the third trial (on 6 December).

56 George Anderson gave evidence at the first trial that Davey 'never belonged to [the Wirrayararaay]; he belonged to the Peel River': *R. v. Kilmeister (No 1)*, p 7/11. The Peel River was part of Kamilaroi Country (which is now called 'Gamilaraay Country'), which included not only the Peel but also the Namoi, Barwon and Gwydir Rivers. The extent of Kamilaroi Country can be seen in the *AIATSIS Map of Indigenous Australia* (online at <https://aiatsis.gov.au/explore/map-indigenous-australia>, accessed on 8 March 2023).

57 For completeness it should be mentioned that an extensive search has been made by the author in the StAC for records recording the issuing of blankets by the Government to the Aboriginal people, and in particular to Davey and Billy. According to StAC's records blankets were not officially distributed in Kamilaroi Country until after 1851. Between this date and 1856 blankets were distributed in the Wee Waa area (returns for 1851 and 1856) and in the Gwydir area (return for 1856 – in this return the tribes were recorded but not the names of individuals: MHNSW StAC: NRS-905, [4/3309], Letter No 56/1098). Exceptionally blankets (being excess blankets held by Threlkeld) were distributed in the Manilla River area in July 1838 through Joseph Threlkeld and James Arndell at their Barraba property. The return for this distribution refers to Davey and Billy: Threlkeld's letter of 19 December 1838 to Thomson in *Gunson*, 275 and MHNSW StAC: NRS-905 [4/2409.2] Letter No 38/13720; there was a similar distribution in July 1840, but on this occasion there was no mention of Davey or Billy in the return MHNSW StAC: NRS-905 [4/2599.1] Letter No 40/11956. Of course, none of this is conclusive evidence that Davey and Billy were not then alive; the Kamilaroi peoples were spread over a vast area and not all Aboriginal people received blankets, particularly outside the settled areas (which most of Kamilaroi Country was). On this refer to Michael Smithson, 'A Misunderstood Gift: The Annual Issue of Blankets to Aborigines in NSW 1826-1962', Thesis (M.Litt), University of New England, Armidale, NSW, 1990 (a copy of which is held by the State Library of NSW), where he writes: 'Some Aborigines were probably rarely counted or issued with blankets ... Others, provided with blankets by settlers, who acted as distribution agents far from the distribution centres and who did not submit returns, would also never be counted.' (p 127).