

# ABORIGINES, EUROPEANS AND THE CRIMINAL LAW: TWO TRIALS AT THE NORTHERN SUPREME COURT, TOWNSVILLE, APRIL 1888

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On successive days in April 1888, James Comes and William Hugh Nicholls appeared at the Northern Circuit Court in Townsville, charged with violent offences committed against Aboriginal women. Although the two cases were unrelated, both men came from the mining community of Thornborough on the Hodgkinson River, and both trials resulted in convictions and prison sentences for the accused. At the time, the results of the trials were considered so extraordinary that they prompted the presiding judge, Mr Justice Cooper, to remark that he supposed Comes and Nicholls were the first two men in Queensland to be 'found guilty of an offence against a member of the aboriginal race'.<sup>1</sup> An analysis of the trials in their social context not only offers some conclusions as to why the two convictions were obtained in 1888, but also provides insights into the workings of the legal system, the changing European attitudes to Aboriginal policy and the relations between black and white on the mining frontier during the period.

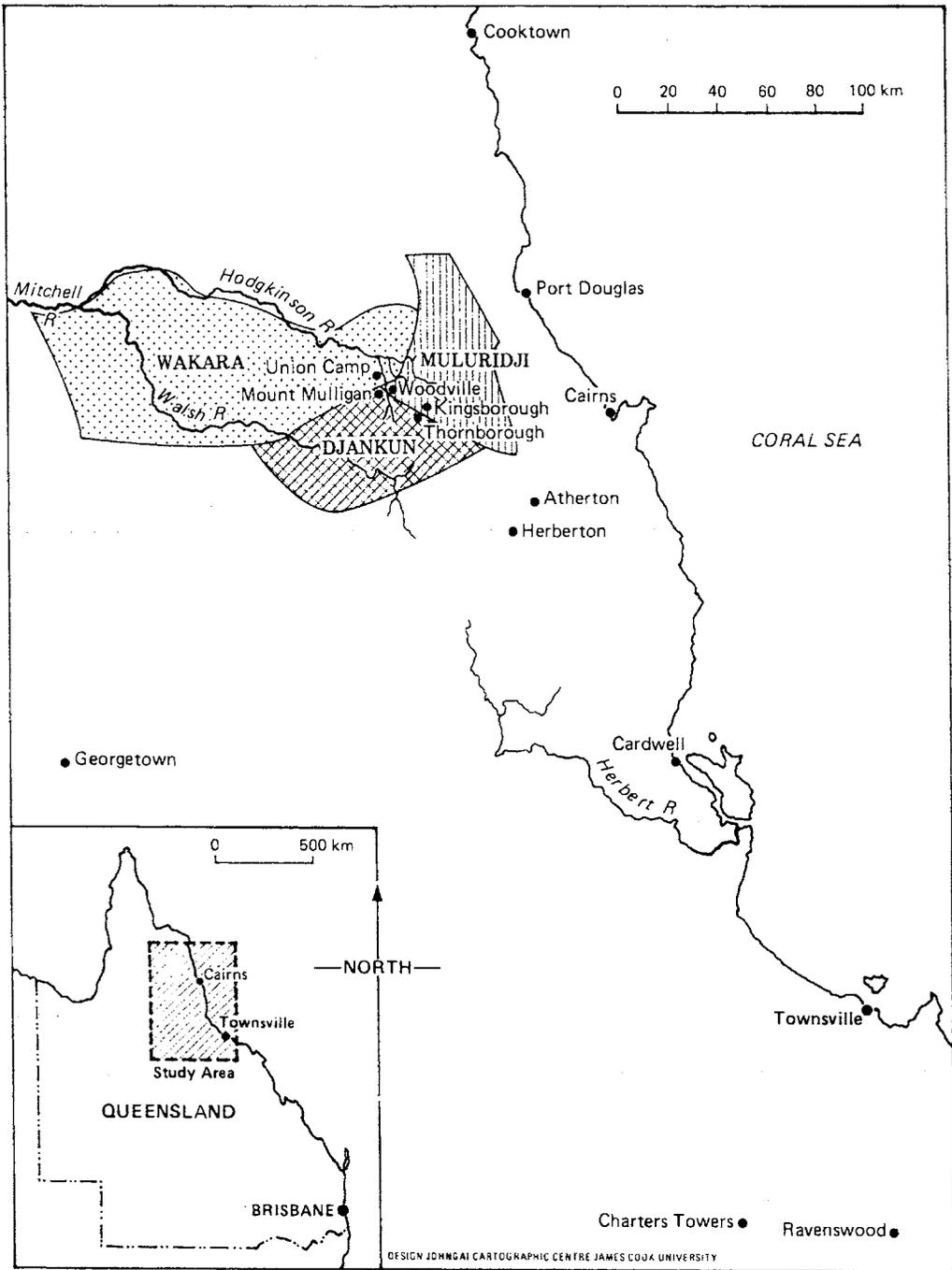
The conviction of James Comes had its genesis at the Union Camp, where Comes had been living along with sixteen or seventeen other Europeans. The Union was about sixteen miles from Thornborough, a town which at the height of its economic prosperity in 1877 had a population of one thousand, as well as a school, two banks, a hospital and a school of arts. By 1888, however, Thornborough was in decline. In that year the combined European and Chinese population of the entire Hodgkinson field was estimated at three hundred and fifty one. This consisted of one hundred and four Chinese, of whom fourteen were miners and ninety were engaged in business and gardens, and the rest Europeans - sixty-two quartz miners, five carters and timber-getters, thirty-four tradespeople and farmers, and one hundred and forty-six listed as women and children.<sup>2</sup>

Comes was one of the Hodgkinson's carters, although it is likely he was already in gaol when the above estimate was taken. He was born in England and had come to Australia in 1834, aged fifteen. After mining at Ravenswood, probably in the early 1870s,

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- <sup>1</sup> The accounts of the trials of Comes and Nicholls are to be found in *Townsville Herald*, 14 April 1888.
  - <sup>2</sup> Because of rushes elsewhere, the Hodgkinson goldfields were practically deserted by 1891; figures drawn from Kirkman 1982:178-185 and *Mining Wardens' Reports for the Year 1888*, Hodgkinson Goldfields, QLC, V&P, 1889:473.

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Townsville-Cooktown region. Map drawn by John Ngai, Cartographic Unit, James Cook University.

he became a long term resident of Thornborough. On New Year's Day, 1888 he committed the offence for which he would be sent to prison. He was sixty-nine years of age.<sup>3</sup>

From what little we know about Comes, it appears that he was not considered to be particularly violent by the other Whites at the camp; according to witnesses at his trials, 'he seemed to be quiet and harmless', one person remarking that: 'In his general manner of being...he would not hurt a child'.<sup>4</sup> However, after having had several draught horses speared by Aborigines from a nearby fringe camp, the old man began carrying firearms - sometimes a rifle, at other times a revolver - with him whenever he went out. After lunch on the first of January, Comes discovered that another of his horses, a foal, had been taken. Stephen Allen, an engineer at the camp, remembered seeing him at about two o'clock that afternoon. Noticing the colt revolver slung in a pouch across his shoulder, Allen said: 'Hullo Jim, are you on the war path again?' Comes answered in an angry tone that, '[the blacks] have got or eaten my foal and I would warm them up for it'. Referring to an earlier incident, to be discussed below, Allen warned him not to 'make a bloody fool of yourself again.' In reply Comes said, 'I don't know what I am about and if I don't, no one can tell me'.<sup>5</sup>

Following this exchange, Comes rode to the fringe camp on the other side of the Hodgkinson. After unsuccessfully chasing a man named Jim Bau Bau for about twenty metres down the river, he wheeled his horse and confronted a woman named Polly, who, with her small child resting on her shoulder, was standing on the bank with two companions. From about ten yards away Comes, with his arm already extended, aimed his revolver and fired. The bullet passed through the baby's thigh and made two wounds in the mother's neck. While Polly staggered across the river to obtain help, Comes trained his gun on an Aboriginal man and forced him to collect up all the spears from the camp.<sup>6</sup>

Unfortunately for Comes, his actions took place only about 250 metres away from a store run by Sarah and Hugh Wason. A large group of Europeans, both locals and visitors, had gathered on the veranda of the store for the New Year's festivities. In the midst of their drinking and rejoicing they heard the danger cry of the Blacks, followed by the crack of Comes' revolver, and they saw his outstretched arm and the puff of smoke curling over his head after the gun fired. On his way back to the store with the newly acquired bundle of spears, Comes was met at the side gate by several of those who had witnessed the incident. While Stephen Allen grabbed the horse's bridle, Hugh Wason dragged its rider off the saddle and a miner named Thomas Scully seized the revolver. By this time, according to witnesses, Comes was in an excited state. He said at first that: 'I don't know nothing about it', but soon after declared that there were two or three white men at the Union Camp that he would like to shoot, that he was an old man with only a few more years to live, and that if he got hung it would not be for a Black. He turned to his friend Allen and said: 'I thought you would be the last one to do this. You offered to poison a bag of flour for me.'

3 HM Jail, Townsville, Description Register, Queensland State Archives (QSA) A-45965, Townsville *Daily Bulletin*, 3 April 1888.

4 The police court depositions are contained in the criminal files of the Supreme Court. Testimonies of Thomas Scully and Stephen Allen in QSA, Supreme Court, Northern District, Criminal files Z1331.

5 A report in the *Wild River Times* claimed that Comes' worry at losing his horses had 'driven him insane'; however, insanity was not offered as a defence at his trials.

6 Jim Bob Bob was also referred to as Jim Bau Bau and Big Kangaroo. Testimonies of Allen, Scully, Sarah Wason, Charles Maines and Hugh Wason in QSA Z1331.

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As the others tied Comes up, Allen set off for Thornborough to report the matter to the police.<sup>7</sup>

Before approaching Polly's attacker, Scully and Allen went over to see how she and her child had fared after the shooting. The mother was sitting, exhausted but still conscious, with her baby in the dry river bed. Scully noticed that the three wounds were bleeding and tried to console the woman by saying to her: 'You hard fellow, you Polly'. After telling them that 'Jimmie Comes did it', she walked up to her employer of four or five years, Sarah Wason, to have her wounds dressed. That evening Comes, who by this time had been untied, approached Polly at the back of the Wason's house. She lifted up a stick and said that if he came any closer she would kill him. Two days later she was taken to the Hodgkinson District Hospital where she was treated by Dr Edward Fitzgerald, who later reported that the wound was not fatal.

On the night of 1 January, Allen returned to the Union Camp with Constable William Montgomery, who met Comes and told him that he had heard that he had shot a 'black gin' named Polly. Although he replied at first that 'he did not think he had shot a black gin', Comes later conceded that 'if he had shot the gin it must have been an accident as the revolver went off'. After inspecting the victim, Montgomery arrested her assailant at eight thirty the next morning.

Comes appeared at the Thornborough Police Court on the thirteenth of January before Justices of the Peace Thomas Templeton and Robert G. Miller, charged with 'shooting with intent to murder an Aboriginal woman named Polly'. Surprisingly, given the turn of later events and the weight of evidence by Montgomery, Allen, Mrs Wason, Scully and Dr Fitzgerald the prisoner was discharged. Polly was present at the trial but she did not testify, the deposition recording only that: 'The Black Gin was produced and the wound exhibited before the Court'.

Undeterred by the findings of Templeton and Miller, Constable Montgomery obtained a warrant and re-arrested Comes at Jacksons Street, Kingsborough on 25 February. On 12 March, Comes once again appeared at the Thornborough Police Court, this time before the Police Magistrate A.H. Zillman, charged with 'shooting with intent to do grievous bodily harm to one Polly, an aboriginal woman at the Union Camp on the first day of January, 1888'. The evidence on this occasion was similar to that presented at the earlier sittings. Montgomery, Allen and Scully once again testified, while Hugh Wason replaced his wife Sarah in the witness box. Dr Fitzgerald, who by this time had begun a practice at Albion near Brisbane, was not called upon to give evidence, although Charles Maines, a goldfields orderly from Thornborough and a visitor to the Union Camp on New Year's Day, was. All of the witnesses except Montgomery claimed to have seen Comes ride in the direction of the fringe camp just prior to the shooting and return with the bundle of spears, and also to have heard the sound of the gun going off. Two of them, including Allen, told the court that they actually saw Comes fire the shot. Allen's testimony was substantially different to that of the first hearing where he claimed he did not see the prisoner shoot Polly. Comes, who was represented by a Townsville solicitor, George Roberts, reserved his defence. He was committed for trial at the next criminal sittings of the Northern Supreme Court in Townsville.

Like Comes, William Hugh Nicholls initially appeared at the Thornborough Police Court. Charged with a capital offence, he was committed to stand trial at the Supreme

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<sup>7</sup> According to another source, Comes' statement to Allen was 'You bugger. I did not think you would do this. You offered to shoot them for me'. *Townsville Herald*, 14 April 1888.

Court after several witnesses had deposed that they had seen him beating an Aboriginal girl named Maggie. As in the Comes case, Nicholls' victim was a female domestic servant.

More is known about Maggie's death than about her fifteen years of life. She was born around the year 1871 and probably made her first visits to Thornborough at the age of eleven, with other members of her people, who had been 'let in' to the town in 1882. By the age of twelve she had begun working as 'a sort of irregular servant' for a Mrs Earlstone. Soon after, she moved into the home of a twenty-six-year-old miner named William Nicholls. She worked for Nicholls, his wife and several children for three years. By the time she was fifteen Maggie was pregnant.<sup>8</sup>

On 19 October 1887 Nicholls left the family house in search of his employee. When he went next door to a deserted humpy formally owned by a Mrs McQuade, he found Maggie lying on her stomach at the doorway and tried to get her to come home. Believing as he did that 'it was necessary sometimes to chastise aboriginals', Nicholls picked up a stick as thick as a shovel handle and gave the girl three to four hard blows to the head. She screamed several times but did not respond when he said to her: 'Maggie, get up and go home'. Nicholls then lifted her off the ground by the hair. She fell back down when he let go. After he had lifted her up again she tried unsuccessfully to walk with the aid of a stick. Nicholls raised his own stick above his head and brought it down on her back. She cried out 'Oh master!' or 'No master!' and fell down. He then swore at her, once again ordered her to go home and raised his foot as if to kick her. Nicholls' brother was present during all of this but did nothing to intervene. When Mrs Nicholls arrived on the scene she put her arm under Maggie's and with her husband's assistance helped the girl home, where she was wrapped in a blanket and placed in the fowl house. The following day Nicholls was observed chopping down a sapling about sixty yards from his house by Mary Ann Lewin, a white domestic servant employed at the nearby Commercial Hotel. After seeing him take the sapling back to his house, the witness heard screams from Maggie and the sound of blows.<sup>9</sup>

Three days later, Constable Montgomery received reports of the incident and went to Nicholls' house to investigate. He asked to see Maggie and was shown to the fowl house where the girl was lying on her back with a blanket rolled around her. After examining her naked body and finding what he took to be 'marks of violence on it', he told his host that, 'he had heard he had been beating the black gin'. In response, Nicholls admitted that he gave her 'two or three light touches with a stick' when she would not come home. Maggie was now unconscious. Montgomery reported the matter to his superior and returned in about half an hour with the senior constable and Dr Fitzgerald. The doctor found five or six slight abrasions of the skin as well as a contusion on the head, and realised that she was dying. Following Fitzgerald's examination, Nicholls was arrested and Maggie was taken to hospital. Later that afternoon the prisoner admitted to Montgomery that he had 'chastised the gin with a whip', and that 'the gin sang out very loud and that might have been what the people were talking about'.

Maggie died that night. The next morning Dr Fitzgerald performed a post mortem examination on her body. Although Maggie's heart, lungs and other internal parts were healthy, the doctor considered that she would have 'suffered great pain in consequence of a

<sup>8</sup> The fact that Maggie lived with the Nicholls family and not in a fringe camp at the edge of Thornborough suggests that she may have been a 'civilised Aborigine' from another area. *Mining Wardens' Reports for the Year 1882*, Hodgkinson and Mulgrave Goldfields, QLC, V&P 1883-4:1558.

<sup>9</sup> *Townsville Herald*, 14 April 1888.

prolonged confinement'. Her empty stomach indicated that she had not eaten for some time. Fitzgerald found the haemorrhage between the skull and scalp produced by the blow and considered that this was a sufficient injury on its own to have killed the girl. The post mortem revealed that the primary cause of death was 'injury and neglect during confinement', and the final cause, 'the subsequent ill-treatment the gin was subjected to'.

Comes and Nicholls were brought before the Northern Supreme Court in the second week of April. The trial of Comes, charged with 'wounding with intent to murder and wounding with intent to do grievous bodily harm', took place first. After stating the case, the Crown Prosecutor, Mr Virgil Power, called Stephen Allen as the initial witness. Allen told the court of his conversation with the defendant on New Year's Day regarding the loss of Comes' foal and his consequent desire for revenge. He then related how he had watched the prisoner's activities from Wason's store and how he had seen and heard the shooting. He identified Polly by the dress she was wearing that day. After denying that he had ever offered to poison a bag of flour for the prisoner, Allen related that he went to Thornborough to notify the police. This testimony was almost identical to the one Allen had provided in the second Police Court trial, and as such, it conflicted with his account at the first hearing. Unlike the earlier witness, Thomas Scully did not change his story in any of the hearings. He maintained once again that he had seen and heard Comes shoot Polly and that he had inspected her wounds and those of her baby. He also related how he had wrenched the revolver, loaded in five chambers, from the defendant. Two further witnesses, Charles Maines and Hugh Wason, supported the previous evidence.

After calling upon Constable Montgomery, who supplied the court with details of Comes' arrest and the first Police Court trial, the Prosecutor summoned Dr Fitzgerald, who stated that judging from the nature of Polly's wounds the shot had been fired from above the victim and that the revolver produced before the court was the likely weapon. Polly herself was the final witness. However, after telling the court that she had been to school but had learnt nothing, the judge considered that she did not understand the nature of an oath, and she was discharged.

The defence called no witnesses, confining its case to a statement by the prisoner, who told the court his version of how he had lost his foal. He explained that he had crossed the river and asked Polly if she had seen it. When she said no, he rode towards eight or nine Aboriginal men camped on the bank of the river. On his approach, they all ran away except one who had a spear in his hand. Comes drew his revolver and put it at full cock, commanding the man to hand up his spear. He placed his gun across the pommel of his saddle and bent down to pick up the spear, whereupon the revolver accidentally discharged. Comes claimed that he had no idea that Polly was standing in the direction his revolver was pointing.

The jury took ten minutes to find Comes guilty on the second count of wounding with intent to do grievous bodily harm and he was sentenced to three years' imprisonment. Mr Justice Cooper explained that it was only the prisoner's age and infirmity that prevented him from passing the heaviest sentence allowed by law - not as a punishment upon Comes, but in order 'to check the lawless gross cruelty with which the race to which Polly belonged was treated'. The judge observed that the prisoner was 'one of the first men ever found guilty in Queensland for an offence against an aboriginal'. He expressed satisfaction that the verdict was proof of 'the advancement and enlightenment of the community at large'.<sup>10</sup>

The next day, Nicholls came before the court charged with murder. After the prisoner had pleaded not guilty, the prosecution called Mary Ann Lewin, who told the court that

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<sup>10</sup> Ibid.

while washing in the back yard of the Commercial Hotel she heard and saw Nicholls beat Maggie about two hundred yards away near the doorway of Mrs McQuade's old humpy. She also said that on the following day she observed the defendant chop down a sapling and take it inside his house and subsequently heard the sounds of blows and of Maggie screaming. This evidence was corroborated by the the second witness, Theodosia Watson, who had seen the events from only forty yards away. The third witness, Mary Ann Gielis, heard screaming on both Wednesday and Thursday, but saw nothing as she was inside her husband's hotel on both occasions.

Once again, Constable Montgomery was called by the prosecution to give details of the arrest and statements made by the prisoner while in custody. He also provided an account, later supported by Dr Fitzgerald, of Maggie's condition when she was in the Nicholls' fowl house. Following Montgomery's testimony, an orderly named Joseph Kavanagh reported on the girl's unconscious state while at the Thornborough hospital. He also provided hearsay evidence that an Aboriginal man named Billy Matthews had beaten the patient, and told the court that the prisoner had visited him on the night of Maggie's death and said that 'the gin was diseased'. Dr Fitzgerald then took the stand and presented the results of his post mortem examination, saying that: 'The damage to the whole system sustained from the blow would certainly hasten death'. On the treatment of Maggie while in the Nicholls' fowl house, he said: 'She had no bed of any kind to lie on. It was not a proper place for anyone in the condition of the gin. Proper care had not been taken of her'. The final witness for the Crown, Dr Joseph Ahearne, the Government Medical Officer of Townsville, supported the evidence of Fitzgerald, remarking that he was 'of the opinion that in the state of health the gin was, the blow sustained would have hastened her death', and that 'from the state of the gin's stomach, twenty four hours or probably more must have elapsed since she partook of food'.

As in the earlier trial, the defence declined to call any witnesses. However, Stephen Allen deposed that he had known Nicholls for the last eleven years and that the defendant had a wife and several children and his character had always been good. The jury took one hour and ten minutes to find the prisoner guilty, not of murder, but of the lesser charge of manslaughter. Before sentencing, Mr Justice Cooper remarked that the defendant had been 'found guilty on very clear, in fact, almost conclusive evidence', and that he was 'probably the second man in Queensland that had been found guilty of an offence against a member of the aboriginal race'. Cooper said that although Nicholls had 'been undoubtedly guilty of a great deal of cruelty and cowardice', he did not 'wish to harrow the prisoner's feelings by dwelling on the details of his perfectly abominable crime'. The judge said that if he were to consult his own feelings he 'would unhesitatingly send [the] prisoner to penal servitude for life'. In his position, however, he had to deal with the case 'without passion and without feeling'. Although he was very sorry that the prisoner's wife and large family 'should be placed in the position they were', the decision of the court was that Nicholls should be sentenced to penal servitude for seven years.<sup>11</sup>

Comes and Nicholls were not, as Mr Justice Cooper said at the time, the first Whites to be sent to prison in Queensland for offences committed against Aborigines.<sup>12</sup> However, the results of their trials were sufficiently remarkable to warrant an editorial in the

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<sup>11</sup> Ibid.

<sup>12</sup> In 1883 Cooper sentenced a Townsville man, Edward Camm, to penal servitude for life for 'having carnally known and abused' an Aboriginal child named Rosie; *Queensland Law Journal*, 2 July 1883:136-137.

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*Townsville Herald* which pointed out that the two convictions were 'the distinguishing feature of the sittings of the Circuit Court'.<sup>13</sup>

The editor of the *Herald* was referring to the fact that while the proceedings of the court were consistent with legal theory, they did not conform to contemporary practice. Since the middle of the nineteenth century, and more particularly since the Victorian trials of *R v Peter* and *R v Jemmy* in 1860, the law had acknowledged that Aborigines were in possession of both the rights and obligations of British subjects.<sup>14</sup> Cooper agreed with this principle when he said, at the sentencing of Nicholls, that he wished to 'deter other men from committing these abandoned acts of gross cruelty to the members of any race'. But the judge admitted that this theoretical position had little practical authority when he spoke out against the 'lawless gross cruelty with which the [Aboriginal] race...was treated' This perception was shared by the editor of the *Townsville Herald*, who pointed out that hitherto 'some people have considered it almost a meritorious act to kill or wound a blackfellow'.<sup>15</sup>

Why then did the theoretical and practical elements of the criminal law act in unison at this time? There had to have been a willingness on the part of the witnesses to testify before the court and of the twelve jurors to provide a verdict not tainted by prejudice. To understand why this occurred on the 10 and 11 April 1888, it is necessary to know something of the legal system, and of the societies of Townsville and Thornborough at the time of the trials.

The crucial factor in the convictions of both men was that the cases for the prosecution did not depend on the testimony of Aboriginal witnesses, but were based on the accounts of Europeans - five in the case of Comes, six in the case of Nicholls. Aside from the obvious question of racial prejudice influencing the reception of Aboriginal testimony, the admissibility of such evidence was undermined by practical difficulties in the courts of nineteenth-century Australia. As Castles explains, there were two basic ways in which the conduct of trials involving Aborigines as witnesses could be seriously affected.

First, there was the basic difficulty of communication when an Aboriginal witness had no knowledge of English, or at best only a rudimentary understanding of the language. This situation was exacerbated when reliable interpreters could not be found. Secondly, as Burton J. of New South Wales outlined it, insuperable difficulty could ensue 'where a proposed witness had been found ignorant of a Supreme Being and a future State.' Under the prevailing notions of English law, sworn testimony could not be received in such circumstances.<sup>16</sup>

According to these principles, Mr Justice Cooper ruled the testimony of Polly inadmissible in the Comes trial as she 'did not understand the nature of an oath'.

A comparison with research undertaken by David Philips on two other Supreme Court trials in 1888 - one in Western Australia, the other in Victoria - illustrates the importance of European witnesses to securing convictions in cases involving violence against

<sup>13</sup> *Townsville Herald*, 14 April 1888.

<sup>14</sup> Daunton-Fear and Freiberg 1977:45, Castles 1982:516; Cranston 1973:63.

<sup>15</sup> The failure of the criminal law to act in accordance with its principles has been noted by modern commentators such as Cranston 1973:66. Allegations of racial bias in Supreme Court trials were levelled also in February 1989, when an all White jury in Broome, WA, found two Whites not guilty of the murder of an Aboriginal man; *Townsville Bulletin*, 25 February 1989.

<sup>16</sup> Castles 1982:532-533.

Aborigines. In the Western Australian trial, a shepherd named Michael Griffin was charged with the brutal murder of an Aboriginal man named Marabool. The defence counsel called no witnesses. Unlike the trials of Comes and Nicholls, however, all of the prosecution witnesses were Aborigines. The defence asserted that as 'the only witnesses were natives', the jury 'should not...depend upon such evidence, unless it was materially corroborated'. The judge agreed, emphasizing in his summation that the prosecution depended entirely on 'the evidence of the black witnesses', and stating that: 'the story was of so brutal a nature that one hated to believe it...It might be that it was an outcome of the barbarous habits of the blacks, but that a white man could be guilty of such brutality it was hard to believe'. Griffin was acquitted.<sup>17</sup>

In the second case, Frederick Wilson and Martin Holly were tried at Hamilton for the rape of an Aboriginal woman named Jenny Green. Although much of the evidence for the prosecution came from Mrs Green, her husband Tommy and another Aborigine, Billy Gorry, all three witnesses could understand English and had spent considerable time living at the Lake Condah Mission Station. In the words of the presiding judge, Mr Justice Webb, the three were 'all intelligent witnesses and speaking the English language fairly well'. Nevertheless, the defence counsel, Sir Bryan O'Loughlen, attempted to discredit their evidence, saying that he 'knew very little of the manners of the blacks, but would leave it to the jury to judge of their social morality, and to consider how far their words and oaths should be respected against those of Christians who understood and revered the Bible'. Fortunately, the accounts of the Greens and Gorry were supported by that of a white witness, Joseph Rawlinson, described by Webb as 'a thoroughly reliable witness, an elderly and apparently respectable farmer'. The jury found Wilson and Holly guilty and they were sentenced to eighteen years' imprisonment with hard labour and two floggings. In analysing the trial, Philips wondered 'what would have happened if the jury had been asked to convict, and the judge to sentence, for a capital crime, on the word of a number of Aborigines alone, without any corroborating "reliable" and "respectable" white witnesses'.<sup>18</sup>

As in the Victorian and Western Australian cases, the presence of European witnesses was essential to the successful prosecutions of Comes and Nicholls. Given that the mining frontier was notorious for its 'brutality and callousness', and that the miners working there probably resorted more easily to the use of firearms than was the case in pastoral areas, it is perhaps surprising that nine of the eleven Europeans who willingly testified in the trials of the two men lived, like the defendants, on the Hodgkinson gold-field - in the town of Thornborough or at the Union Camp about 20 km away.<sup>19</sup> Events in and around Thornborough at the time of the offences committed by Nicholls and Comes suggest a potential for retributive European violence towards Aborigines. At the Union, where the assault on Polly and her child took place, the sixteen or seventeen Whites were considerably outnumbered by the fifty or sixty residents of the Aboriginal fringe camp across the river. According to Bell, a 'state of armed watchfulness seems to have been taken for granted among settlers' in the area from around 1883 to the early 1890s.<sup>20</sup> This comment is supported by the depositions of the Comes trials. During the second Police Court hearing, Charles Maines and Thomas Scully both told the court that it was common practice to

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17 Philips 1987:35.

18 Ibid. :34.

19 Loos 1982:79.

20 Bell 1978:21.

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carry firearms for protection against the Blacks when looking for horses. Scully also mentioned that he had recently been 'stuck up by a blackfellow' who threw a stone at him. Numerous witnesses reported that local Aborigines had frequently been guilty of spearing the horses of Europeans, and Comes himself was said to have 'suffered considerably from the depredations of the blacks'. Constable Montgomery reported that:

Many complaints have been made about the blacks. They have been reported for spearing horses. I have met the blacks often with spears and without them. As a rule they generally have spears with them. They use them for hunting. It's a matter of notoriety that they spear horses.<sup>21</sup>

While this kind of friction between Black and White was typical around settlements on the northern mining frontier in the 1870s and 1880s, Thornborough was different. By 1888, the residents of the town and surrounding area had for the previous six years tried to use conciliation rather than brutal conflict in order to reconcile their differences with the neighbouring clans. In 1882, a local station owner named John Byrnes encouraged a small group of Aborigines, probably from the Djankun tribe, to visit Thornborough in an attempt to stifle their resistance. The members of this first group were fed meat and potatoes and, according to the mining warden, Lionel Towner, were 'kindly treated both by the inhabitants of the field and the representatives of Government'. Soon there were around 150 people camped two miles from the town. Assisted by a government subsidy, the local European residents raised money to supply the Aborigines with rations on a continuing basis. In the first year, Towner reported that 'the blacks...have always shown themselves willing to do work when obtainable'.<sup>22</sup> By 1883 he said that the 'aboriginals have now become an institution'.<sup>23</sup> At the time of the offences committed by Nicholls and Comes, Hugh Wason was receiving an allowance of three pounds a month from the government to supply the fifty to sixty Aborigines at the Union Camp with rations. These people came not only from the Hodgkinson clans, but also from the Muluridji of the Lower Mitchell and the Wakara, whose country to the north west of Mount Mulligan had not yet been invaded by Whites.<sup>24</sup>

Although the Thornborough scheme had government support it was, according to Loos 'regarded as unique and not as indicating a new initiative to be taken with frontier Aborigines'.<sup>25</sup> In his 1896 'Report on the Aborigines of Queensland', Archibald Meston commented that the action of the Thornborough residents 'was successful in effecting a reconciliation between the two races, and the blacks of that district have given very little trouble since...Would that all other settlers had adopted a similar system: it would have been well for them and all concerned'.<sup>26</sup> As the trial depositions indicated, the Thornborough initiative did not completely eliminate Aboriginal attacks on the new settlers and their property. Neither did it make the Europeans in the district put down their guns. A punitive expedition was launched on a Muluridji camp near the Mitchell River in 1891

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21 Testimony of Montgomery in QSA U1331.

22 *Mining Wardens' Reports for the Year 1882*, Hodgkinson and Mulgrave Goldfields, 1883-4; Loos 1982:101.

23 The Queensland government spent some £190 per annum on the Thornborough relief camp, *Townsville Herald*, 10 November 1888.

24 Maines and Wason, QSA Z1331.

25 Loos 1982:102.

26 Meston 1896:11.

by a local station owner named J.F. Crowley, killing at least three people.<sup>27</sup> However, the action of the residents of Thornborough was a unique example on the mining frontier of an attempt to pacify local tribes through the supply of rations rather than brute force. Its uniqueness may have contributed to the willingness of sections of the community to report the crimes of Comes and Nicholls to the police, and to testify at the subsequent trials.

It is more likely, however, that the actions of the European witnesses were motivated by the particular nature of the offences committed by Comes and Nicholls. The victims of both crimes were female domestic servants; they had been known to the white residents for several years, and were considered to be reliable workers. As well as this, both defendants had committed earlier offences. Nicholls was reported to the police after a series of particularly callous beatings and mistreatment of Maggie extending over several weeks. Similarly, Comes had been counselled about his behaviour prior to the wounding of Polly; it was believed that he had shot Polly's husband two months before his attack on her.<sup>28</sup> There is also an indication in the Comes case that what the European residents considered to be appropriate behaviour away from settlement was not to be tolerated near a camp or town. The manager of the Union Mine, Crosbie, told Stephen Allen on the day of the offence that 'This sort of thing can't go on under our noses', before instructing him to send for the police. Finally, both attacks were considered to be unprovoked. As Sarah Wason pointed out when speaking of Comes' victim, Polly: 'I never knew her to spear horses or do any harm to the white population'.

Those present on the day that Comes shot Polly were in universal agreement that the matter should be dealt with by the law. However, there was widespread indignation after he was convicted. According to A.H. Zillman, Hugh and Sarah Wason 'incurred much public ill-feeling' over their part in the case. Similarly, the reported murder of a Chinese man by Aborigines 18km from Thornborough was blamed on the result of the trial by the *Cooktown Independent's* correspondent: 'That the blacks should dare to commit such an outrage so close to the town shows that Comes' affair is bearing fruit. Sub-Inspector Garraway came up to investigate the matter, but could do very little, I fear, for the "poor blacks" must not be touched at all'.<sup>29</sup> A letter to the editor of the *Townsville Daily Bulletin* from H. Witt of Cooktown echoed these sentiments.

It is a pity that the policeman who had charge of Coombes was not better employed in protecting the property of settlers instead of letting the blacks do as they like and then haul a man up for trying to save himself from being cleaned right out. Considering the circumstances of the case a reprimand ought to have been sufficient, and Coombes is entitled to the sympathy of every bushman.<sup>30</sup>

Whether or not James Comes was entitled to this sympathy, he certainly received it. A petition circulated in Cairns, Port Douglas, Charters Towers, Ravenswood, and on the Hodgkinson and Herbert calling for the old man's release. Among the 1164 signatures on what remains of the original document are those of Hugh Wason and the two Justices of the Peace who presided over Comes' first hearing at the Thornborough Police Court - Thomas Templeton and Robert G. Miller. In Port Douglas, where 167 people signed their names, a parliamentarian named W.C. Little addressed the electors at the Masonic Hall, thanked them

<sup>27</sup> Bell 1978:21.

<sup>28</sup> Testimony of Allen and Scully, QSA Z1331.

<sup>29</sup> *Townsville Herald*, 19, 26 May 1888.

<sup>30</sup> *Townsville Daily Bulletin*, 24 April 1888. 'Coombes' is a misspelling.

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for returning him at the recent poll, and declared that he would do his 'utmost above all things to release James Coombes' [sic].

The efforts of Little and the other petitioners were unsuccessful. After the Colonial Secretary instructed him to consider the petition, Judge Cooper saw no reason for changing the sentence he had imposed, saying that: 'The petitioners, of whom there must be many hundreds, seem to think that the Prisoner's act was quite justified because, as they allege, he suspected the blacks with whom the gin was standing at the time of having destroyed a foal of his. I have no sympathy whatever with such views, and must always decline to do anything which could be construed into meaning that I have any other feeling than abhorrence for such an act as the prisoner's'. On 28 September 1888, W.C. Little sent a telegram to the *Cairns Chronicle*: 'the Colonial Secretary can do nothing in the manner of releasing James Coomes'.

The editor of the *Cairns Chronicle* was a most resolute defender of both Comes and the current European treatment of Aborigines in general on the northern frontier. In pointing out what he considered to be the injustice of the Thornborough man's sentence, the editor accurately described Comes as being '70 years of age, in ill-health, and a long resident on the Hodgkinson, where he is universally respected'. He then called Comes' statement at the Supreme Court trial a 'straightforward explanation'. The readers of the *Chronicle* were not told, however, of the ways in which this explanation conflicted with the testimony of every witness brought before the court. According to the *Chronicle* the court's guilty verdict was achieved because of the ignorance of the Townsville jury:

Crowded Townsville has no conception of the losses experienced by settlers north of its town, nor of the particular circumstances under which such an accident as the wounding of Polly could occur. Northerners who are daily suffering from the outrages perpetrated by the blacks, comprehend but too well the position, and no jury north of Townsville would have convicted the accused.<sup>31</sup>

In contrast, the editor of the *Townsville Herald* agreed with the court's decision, writing in relation to the trials of both Comes and Nicholls that 'the jury would have shown a highly reprehensible bias if they had returned verdicts of acquittal'. The hypothesis of the editor of the *Chronicle* that a different result would have occurred had Comes been tried north of Townsville may, however, have been a correct one. While the testimony of the Thornborough witnesses gave the prosecution, in the words of Mr Justice Cooper, 'clear, almost conclusive evidence', the verdicts were also a product of the society from which the jury was drawn.<sup>32</sup>

Townsville, unlike those communities to the north, was not a frontier settlement in 1888. While the white residents were reading in newspapers about the conflict which was still being waged less than 160 km away, their black neighbours, living in fringe camps at North Ward and Ross Island, had been adapting to a post-frontier society for over half a generation. They had begun to perform casual work for the white colonisers and were no longer considered a threat to European life or property.<sup>33</sup> All over Queensland, as resistance was broken, European attitudes changed from the advocacy of violent 'dispersal' at the hands of the Queensland Native Mounted Police to one of protection, culminating in

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31 *Ibid.*, 26 May 1888.

32 *Townsville Herald*, 14 April 1888.

33 Griffin 1983:134-145.

the first Queensland Aboriginal Protection Act of 1897.<sup>34</sup> The verdicts in the cases of *R v James Comes* and *R v William Hugh Nicholls* were consistent with these changes as they occurred among Townsville residents in the late 1880s. *The Herald's* editorial linked the desired shift in general policy to the two trials when it commented on the favourable verdicts by stating that:

The aboriginal population is fast decreasing. It is questionable whether or not the maintenance of the various bands of black troopers is not a more expensive process of dealing with them than would be the plan of confining them to certain districts and supplying them with food &c. They want but little here below, nor want that little long, and surely the colony can afford to adopt a humane policy towards them as a change to the very cruel and utterly demoralising one that everyone knows is expressed by the medium of the black troopers.<sup>35</sup>

Similar ideas found voice in the same paper almost a year later:

The time has arrived when the Government should make some exertion to provide for the remnants of the tribes still in existence...[There] must be a limit to the constant harassing to which the blacks are subjected by the sleuth-hound-like tactics of the Native Mounted Police. Whatever excuses might in the past have been advanced as its *raison d'être* have now become nugatory, and it is necessary that some other and widely different system should come into force in our dealings with them.<sup>36</sup>

Letters to the editors of the *Townsville Daily Bulletin*, *Townsville Herald* and *North Queensland Telegraph* also occasionally concerned themselves with ameliorating the condition of the Aboriginal remnant. One letter by 'Black Maria' stated that 'We have taken their country from them ... and the least we can do is to make some effort to "ease them off" a little more gently in a more Christian-like manner'. 'Maria' called for an association to 'be formed amongst the philanthropic members of our community on the same lines as the Society for the Prevention of Cruelty to Animals, with paid officers'.<sup>37</sup>

Such an organisation had its beginnings in Townsville in 1889, with the formation of a branch of the Queensland Aborigines' Protection Society, its members consisting primarily of the town's religious leaders. Like its parent body in Brisbane, the Society had the following aims:

- (1) To watch over the interests of the Aborigines of this colony - to prevent them from violence as far as possible, and from the evils of intoxicating drink, opium and other vicious influences.
- (2) To obtain clothing and suitable provisions for them.
- (3) To induce respectable families to adopt juvenile Aborigines and educate them.
- (4) To establish a station or stations in suitable districts where they may be collected, and religious education and industrial training imparted.
- (5) To obtain suitable recognition and help from the government.<sup>38</sup>

34 Fitzgerald 1982: 210-211.

35 *Townsville Herald*, 14 April 1888.

36 *Ibid.*, 6 April 1889.

37 *Townsville Daily Bulletin*, 14 March 1888.

38 *Townsville Herald*, 31 August 1889; letters 9668, 8928 and 8169 of 1889, QSA Col/A 5951.

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While these views were particularly strong in Townsville they were also evident in other northern centres at the same time and the results of the two trials should be seen in this light. In 1888 a meeting of all eight northern members of parliament was held in the Legislative Committee rooms in Brisbane to discuss 'the possibility of ameliorating the condition of the aboriginals of North Queensland'.<sup>39</sup> There were also calls to government from local residents for assistance in setting up ration stations similar to the one at Thornborough from such areas as Herberton, Cairns, Cardwell and Atherton in 1888.<sup>40</sup> Around the same time, the Townsville papers received letters to the editor from correspondents in Georgetown, Cardwell, Cooktown, and the South Kennedy calling for greater protection of Aborigines and the abolition of the native police.<sup>41</sup> In some areas this was because the local clans were no longer considered a threat; a letter from Georgetown said that the existence of a native police camp nearby was 'a useless expenditure of the people's money', and pointed out that: 'It would be far better if the money thus saved was spent on improving the roads'.<sup>42</sup> In rainforest areas, where the mounted police were ineffective, protection was seen as an alternative in halting resistance. A writer from Cardwell suggested that protective stations for the Blacks be set up in the region to stop the slaughter of horses and bullocks by Aborigines for food.<sup>43</sup>

The trials of Comes and Nicholls were noteworthy in the 1880s because they were rare examples of the criminal law acting to protect the interests of Aboriginal people. Although the results of the two trials were unusual as far as the practical application of the law was concerned, they were consistent with changing European attitudes towards Aboriginal policy at the time. In 1888, Europeans in North Queensland were faced with the choice of continuing to advocate the violent 'dispersal' of Aboriginal clans by the native police, or of providing for the surviving tribes by setting aside reserves and supplying rations. Almost a decade later the decision was made with the passing of the 1897 Aboriginal Protection Act, but as the aftermath of the Comes trial revealed, in 1888 the future direction was still uncertain. In supporting the verdicts of 10 and 11 April, the *Townsville Herald* referred to Comes and Nicholls as 'wanton and cruel cowards'.<sup>44</sup> In deploring the sentence of James Comes, the *Cairns Chronicle* described him as being 'universally respected'.<sup>45</sup> On the northern mining frontier in 1888, it was possible for one person to be both of these things.

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