

Case: Queen v. Arthur Akehurst

Prosecution: The Solicitor-General Defence: Mr Archibald Michie and Mr Dawson

Witnesses: Eliza Cox, Gordon Evans – Inspector of Police/Magistrate, William Wills – Surgeon

SUPREME COURT CRIMINAL SESSIONS Thursday 18th January, 1855 (Before His Honor the Chief Justice)

[...]

MURDER Arthur Purcell Akehurst was then placed at the bar, charged with the wilful murder of Henry Powell, on the 8th of December last, at Ballarat. The prisoner, who is a young man of slight frame, apparently twenty-two or twenty-three and of gentlemanly appearance, was defended by Mr Michie and Mr Dawson.

The Solicitor-General opened the case to the jury for the prosecution, saying:– in this trial the information is laid against the prisoner for wilful murder. You are all doubtless aware through the public newspapers, that on the 3rd of December last there was a conflict between the military and the police on the one side, and a number of insurgents on the other side, at Ballarat. The latter had erected a stockade, which the military and police attacked and took. After that it had been alleged that the military and police rode about and cut down various inoffensive people who had taken no part in the fight, but during the time had been peaceably standing at the door of his own tent. Akhurst had most properly acted with the military. He had been Clerk of the Bench at Ballarat and had, unasked, taken up a position on their side; but it was alleged he was one of the parties who were present and assisting at the time and place where Powell was shot. In an unlawful business, each one of a party is held by the law responsible for the acts of the others; but in the lawful business of quelling an insurrection, the law only holds them responsible for their individual acts. Unfortunately it generally occurs in war that ferocious acts of unnecessary cruelty occur; these acts are of course inexcusable; and if people employed lawfully in quelling an insurrection, should unhappily afterwards commit these acts, the Solicitor-General on the part of the Crown, to his utmost to bring such parties to condign and even capital punishment.

The evidence to be addressed would show that Powell was in his tent in bed, that hearing shots fired he went to the tent door unarmed, and then received five sabre and bullet wounds, from sundry troopers or others, and that this caused his death after a lapse of seven days, without any provocation having been offered upon his part. There was however, no evidence to connect Akehurst to the murder except the dying statement of the deceased; but before this statement could be received and admitted as evidence, it be shewn that the deceased believed he was in a dying state, and should be taken before magistrate, and ought to be, if possible, taken in the presence of the accused.; and His honor would have to decide as to the propriety of admitting this statement. The Solicitor-General himself felt doubts as to the admissibility of this evidence, and would call the attention of the court to it without knowing what the feelings of the accused might be in the matter, or calling on counsel on the opposite side to make an objection.

He then called as the first witness – Eliza Cox: I knew the deceased Henry Powell. I lived near to the Eureka Stockade. On the 2nd of December Powell came, he slept in the tent adjoining mine, I recollect fighting going on the morning after. Shots were fired. I saw

Powell put his head into my tent door while the firing was going on. He was afterwards brought to my tent at 5 or 6 in the morning. He was lying on a stretcher wounded but not then dead. He lived until the Saturday following; I saw him dead. He was delirious the first three days. The last four he was perfectly conscious. On the Saturday afternoon that he died he said 'O Misses, I am afraid this is a case with me.' This was before Mr Evans, the Magistrate, came. Powell made a statement to Evans which was reduced to writing. He died at ten o'clock on Saturday evening.

Gordon Evans sworn: I am Inspector of Police and a Magistrate also. I was sent for to take a declaration from Powell on the 9th of December. He was then delirious, but had lucid intervals of a minute or a minute and a half. I took down a statement of his in writing that conveyed everything I could gather from him. The statement was put in. His Honor said that might be easily disposed of, for it commenced: 'Henry Powell am very unwell, but believe I shall recover, at least I hope so.'

The Solicitor-General said he had some other evidence as to the deceased's state of health, and his knowledge of it, and called Henry Cox, who said he knew Powell, and saw him wounded on the 3rd. The people were 30 or 40 yards away and he could not say who wounded him. His Honor said all this was irrelevant. The Solicitor-General said he had no specific statement that he knew of, but wished to call witnesses and exhaust them, to ascertain if there had been any statement as to the knowledge of Powell that he was dying. Mr Michie said that the Solicitor-General, by the course he was pursuing, was endeavouring to build a superstructure, when he admitted he had no foundation.

His Honor did not see any reason why the Solicitor-General should in this case depart from the usual practice. Mr Dawson said Eliza Cox had already said he had made no statement until the Saturday evening. The Crown could not call one witness to contradict another.