

R v E HIPU

SUPREME COURT WELLINGTON, 1 DECEMBER 1845

*Shaunnagh Dorsett**

This note considers the 1845 decision of the Supreme Court of New Zealand in E Hipu. E Hipu was the first decision of the Supreme Court to apply those provisions of the Native Exemption Ordinance which allowed a fine to be substituted for imprisonment in cases of theft. The Native Exemption Ordinance was a significant mechanism in the early colony by which criminal law was modified in its application to Maori, and was crucial to the framing of Crown-Maori relations.

This note considers the Supreme Court decision in *R v E Hipu*.¹ This case was the first Supreme Court decision to judicially apply those provisions of the Native Exemption Ordinance which allowed a fine to be substituted for the usual punishment of imprisonment in cases of theft by Māori.² The provisions were intended to provide for a penalty which more approximated the traditional approach of 'utu' (reciprocity). The Ordinance had earlier been applied in courts below the Supreme Court, the first recorded decision that has been located being that of a Police Magistrate in *R v William Osborne*.³ These provisions were in turn part of the broader legislative modification of criminal law as it applied to Māori, enacted by Governor FitzRoy in 1844. What is significant about *E Hipu*, therefore, is that it is the first application by the Supreme Court of a law which was crucial to the framing of Crown-Māori legal relations in the Crown colony period, and which was to draw the ire of many settlers.

* Reader, Faculty of Law, Victoria University of Wellington. This case was recovered as part of the New Zealand Lost Cases Project. This project is funded by the New Zealand Law Foundation.

1 *R v E Hipu* Supreme Court (now High Court), Wellington, 1 December 1845 per Chapman J; *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 6 December 1845) at 3; *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 13 December 1845) at 3. [HS Chapman] "Notebook entitled 'Criminal Trials No.2'", 1845-1846, Hocken Library, Dunedin (HL) MS-0411/010 at 101-7; *Wellington Independent* ("Wellington, 3 December 1845) at 3. The Supreme Court was established in 1841: Supreme Court Ordinance 1841 5 Vict No 1. It was renamed the High Court in 1980.

2 Native Exemption Ordinance 1844 7 Vict No 18, cl 9.

3 *R v William Osborne* Police Magistrates Court Auckland, 6 February 1845, reported in the *Daily Southern Cross* (Auckland, 8 February 1845) at 3.

Unlike many other colonies, in New Zealand Māori were considered amendable to British law from the assertion of sovereignty, at least where the matter involved the person/property of Pākehā.⁴ Only weeks after the first signing of the Treaty of Waitangi, Kihi was committed for the murder of Patrick Rooney before a Bench of Magistrates at Kororāreka (later Russell).⁵ Although it was unclear how the trial was to proceed, should Kihi be committed, his amenability to British law was not in doubt.⁶ However, the matter of whether Māori were amenable to British law for matters *inter se* (between Māori) remained unresolved until *R v Rangitapiripiri* in 1847.⁷

It was first suggested in 1840 by Lieutenant-Governor Hobson, in the wake of the *Kihi* trial, that English criminal law ought to be modified in its application to Māori. In May 1840 he wrote to Governor Gipps, enclosing a proposal.⁸ Some months later, in October, Gipps replied, having requested the advice of his Attorney-General, Plunkett, on the matter. Plunkett advised Gipps that a proposal "on so difficult a matter" could not be sufficiently "matured" in time to be brought before the Legislative Council, at least not before the land question was dealt with, a matter which should take precedent. Further, he was not even clear that such a matter "so unusual in nature" could be dealt with consistently with the Governor's instructions, but should instead be directed to the "Home Government". In any case, the necessity for such a law was not yet established. Necessity was required to be shown by "reference to the habits and feelings of the natives, and the general

-
- 4 On Imperial policy see Damen Ward "A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia" (2003) 1 *History Compass* 1. Māori were declared to be "British Subjects" under Art III of the *Treaty of Waitangi*.
- 5 *New Zealand Gazette & Wellington Spectator* (Wellington, 13 June 1840) at 2; Nancy Taylor (ed) *The Journal of Ensign Best 1837-1843* (Government Printer, Wellington, 1966) at 218 and Appendix 2.
- 6 Hobson requested advice from the Attorney-General of New South Wales as to how to proceed: Hobson (Lieutenant-Governor of New Zealand) to Gipps (Governor of New South Wales) (21 April 1840) in Entry Book of Governor's letters, Archives New Zealand (ANZ), ACHK 16591 G36/1 at 71. At the time of Kihi's trial no courts of criminal jurisdiction had yet been established in New Zealand. As New Zealand was not yet separated from NSW the relevant courts with jurisdiction were in Sydney. Some six months later the Attorney-General replied that unless he saw the depositions taken he could offer no opinion. In any case, he advised that there would be no point bringing Kihi to Sydney for trial unless all witnesses were also taken to Sydney: Gipps to Hobson (22 October 1840) Despatches Governor to Lieutenant-Governor New Zealand, Despatch 53/1840, State Records New South Wales (SRNSW), NRS 4530 [4/1651.37]. In the meantime, Kihi was returned to gaol to stand trial. He died some months later of dysentery. See AS Thomson *The Story of New Zealand* (Spottiswoode, London, 1859) vol 2 at 25.
- 7 *R v Rangitapiripiri (alias Kopitipita)*, [HS Chapman] "Notebook entitled 'Criminal Trials No 5'", 1847-1849, HL MS-0411/013, entry for Wednesday 1 December 1847 at 23-36; reported in *The New Zealand Spectator and Cook's Strait Guardian* (Wellington, 4 December 1847) at 2-3. On the application of law *inter se* see Shaunnagh Dorsett "Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of Barbarous Customs in New Zealand in the 1840s" (2009) 30 *The Journal of Legal History* 175.
- 8 Hobson to Gibbs (7 May 1840) Entry Book of Governor's letters, ANZ, ACHK 16591 G36/1 at 81.

circumstances of New Zealand, which are not well understood."⁹ It was not, therefore, until 1844 that measures to modify the criminal law were introduced.

By 1844 Governor FitzRoy was of the opinion that such a measure was necessary. We do not know whether he knew of Hobson's earlier proposal. FitzRoy believed that the practice of imposing terms of imprisonment for stealing offences was highly unpopular with Māori. A number of incidents, most notably the Wairau affair, as well as the snatching of *Te Mania* from the court room on being found guilty of stealing,¹⁰ convinced FitzRoy that some amendments were needed to English law. The *Native Exemption Ordinance* was one of a suite of exceptional laws passed in 1844, the others being the *Unsworn Testimony Ordinance*, the *Cattle Trespass Amendment Ordinance*, and the *Jury Amendment Ordinance*.¹¹ The approach to penalties in the *Native Exemption Ordinance* was later extended to also allowing fines instead of imprisonment in cases of assault.¹²

On introducing the Bill to the Legislative Council Governor FitzRoy noted the unique nature of the Bill and specifically linked this to the 'advanced' nature of the Māori as against other indigenous peoples.¹³ The *Daily Southern Cross*, referring to FitzRoy's comments on the Bill, wrote that "[n]o other colony produced Native inhabitants so well informed as the natives of this colony, but though so much in advance of other natives, it appeared to him [FitzRoy] that no step could be taken that would so effectively set them against us, as the imposing of the entire of our Penal code; such a step would no more or less than insanity".

9 Gipps to Hobson (22 October 1840) Despatches Governor to Lieutenant-Governor New Zealand, Despatch 54/1840, SRNSW, NRS 4530 [4/1651.37].

10 *R v Te Mania* County Court, Auckland, 20 February 1844 per Whitaker J, reported in *Auckland Chronicle* (New Zealand, 22 February 1844) at 4. For the committal see *R v Te Mania* Police Magistrates Court, Auckland, 8 January 1844, reported in *Auckland Chronicle* (Auckland, 10 January 1844) at 2. This case was widely reported and discussed. See, for example, *Daily Southern Cross* (Auckland, 24 February 1844) at 2; *Daily Southern Cross* (Auckland, 23 March 1844) at 2; Major Bunbury to Lord Stanley (Secretary of State for the Colonies) (26 February 1844) The National Archives, London (TNA), CO 209/27: 395. There are a number of primary documents, including sworn witness statements and additional correspondence, relating to this matter in CO209/27.

11 Native Exemption Ordinance, above n 2; Jury Amendment Ordinance 1844 7 Vict No 2; Cattle Trespass Amendment Ordinance 1844 7 Vict No 14; Unsworn Testimony Ordinance 1844 7 Vict No 16. The Jury Amendment Ordinance authorized the Governor to exempt certain Māori from the property qualification and allow them to serve in mixed juries. No proclamation was ever made to authorize this. The Unsworn Testimony Ordinance allowed Māori with no religious beliefs to give sworn evidence. The Cattle Trespass Ordinance required settlers to keep their cattle fenced in, rather than requiring Māori to fence them out of their cultivations.

12 Fines for Assaults Ordinance 1844 8 Vict No 7. The Ordinance was drafted to apply generally, not only to assaults involving Māori.

13 On the (not entirely discreet) strands of 'exceptionalism' and 'assimilation' which underpinned such policies see Ward, above n 4, at 8-10.

Further:¹⁴

The Natives [do] not regard imprisonment as we [do], deprivation of personal liberty often ended in the death of the savage; and regarding them in a transitional state, he [FitzRoy] thought imprisonment would tend to retard their improvement.

The case of *Te Mania* was specifically mentioned.¹⁵

Section 9 provided:

That in case any person of the aboriginal race shall be convicted upon any charge of theft or of receiving stolen goods, either by way of verdict of a jury, or, in the case of theft, in a summary way before any Police Magistrate, every such person may after such conviction, and at any time before sentence passed, pay into the court four times the value of the goods so stolen or received as aforesaid. Such payment being made no sentence shall be passed, but the person so convicted shall be discharged from custody, and shall be in the same condition in all respects as if he had received sentence and undergone his punishment in the ordinary course of the law.

The *Native Exemption Ordinance* was unpopular with many settlers. Newspaper editorials of the time suggested that the "natives have a preference to fine",¹⁶ and excoriated the penalty provisions of the Ordinance as "a positive bonus [is] held out to robbery".¹⁷ Other provisions of the Ordinance, including that which allowed Māori to remain at large on payment of a deposit as security of up to £20 in cases other than murder or rape, were equally unpopular.¹⁸ The deposit was simply forfeited in cases of non-appearance. Newspaper editors suggested that Māori simply saw this as a £20 fine and that it was routinely paid by Chiefs. Hence, newspaper editors suggested that non-appearance was common,¹⁹ although this has not been confirmed by independent data. By contrast, George Clarke Snr, the Chief Protector of Aborigines, reported that the incorporation of utu into English law in this respect had given "very general satisfaction to the intelligent chiefs".²⁰ He acknowledged, however, that the ordinance was so unpopular that "the magistrates have found their

14 Legislative Council Minutes, Tuesday 9 July, printed in the *Daily Southern Cross* (Auckland, 13 July 1844) at 3.

15 Ibid.

16 *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 15 February 1845) at 2.

17 *New Zealand Gazette and Cook's Strait Guardian* (Wellington, 26 July 1845) at 2.

18 Native Exemption Ordinance, above n 2, ss 6-8.

19 *New Zealand Gazette and Cook's Strait Guardian* (Wellington, 26 July 1845) at 2.

20 Clarke (Protector of Aborigines) to FitzRoy (Governor) (1 July 1845) TNA, CO 209/30: 108, in Alan Ward *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (University of Toronto Press, Toronto, 1973) at 67.

moral courage severely tested in carrying [the provisions] into operation."²¹ The *Native Exemption Ordinance* was one of the matters which caused complaints against FitzRoy to be sent home, and his eventual removal.²²

While Governor FitzRoy received much condemnation for this Ordinance, at the time it was passed there was little discussion of the ordinance by the Members of the Legislative Council. They in fact passed the Bill unanimously.²³ Other members of the Council spoke in favour of the Bill, Dr Martin, for example, noting that "the measure met with his entire approbation".²⁴ Nor had all public sentiment been against the Bill at the time. The editor of the *Daily Southern Cross* commented that "we regard the Native Exemption Bill as one of the most important that has been brought before the Council, showing, as it does, a desire on the part of those in authority to act on the principles of humanity and commonsense in their intercourse with the aborigines.". He went on to add that "[w]e are aware that certain persons will argue that it is beneath the dignity of our country to adapt itself, or rather its laws to the condition of the uncivilized people who are under its protection; but such arguments amount to nothing more than the statement that whatever progress human knowledge, social improvement, and religious feeling may have made among the British people, it would be a shame to the Government to acknowledge that these should have any effect upon their proceedings." He concluded that "[t]he abolition of imprisonment for debt, for theft, and other minor offences committed by the Natives is unquestionably right. The object of all penal laws should be to improve the individual and to protect society."²⁵ Passed in the same session, the *Native Trust Ordinance* and the amendments to the *Cattle Trespass Ordinance* were in fact the cause of far more concern to both the public and certain members of the Legislative Council.²⁶

In 1846 the Ordinance was replaced by Governor Grey with the *Resident Magistrates Court Ordinance*.²⁷ In the end, however, while the Ordinance did introduce significant procedural improvements over the *Native Exemption Ordinance*, particularly with respect to committal and

21 Ibid.

22 Ward *A Show of Justice*, above n 20, at 68.

23 While the Minutes only record that the Bill passed, it was usual to note the exact votes if a vote was not unanimous.

24 *Daily Southern Cross* (Auckland, 13 July 1844) at 3, reporting on the proceedings of the Legislative Council for Tuesday July 9 1844.

25 *Daily Southern Cross* (Auckland, 13 July 1844) at 2.

26 Three members of the Council had voted against the Native Trust Bill, and taken the extra step of recording their dissent in a public 'protest' printed in *The Southern Cross* (Auckland, 6 July 1844) at 4. The Cattle Trespass Ordinance was the subject of a number of petitions to the Legislative Council: *The Southern Cross* (Auckland, 13 July 1844) at 4, reporting on the proceedings of the Legislative Council for Tuesday 9 July 1844.

27 Resident Magistrates Court Ordinance 1846 10 Vict No 16.

summary conviction, it actually maintained a number of the disliked provisions of the original Ordinance, including the practice of imposing monetary penalties: sections 10, 11.

E Hipu was committed for trial in September 1844. The Police Magistrate considered "the law against him to have been so clearly proved" that he committed him for trial and remanded him to gaol until trial but noted that "in accordance with the Native Exemption Ordinance I offered him to go at large until his trial."²⁸The condition of going "at large" was a £10 deposit.²⁹The Ordinance required the deposit to be four times the value of the good stolen.³⁰ MacDonogh, the Police Magistrate, estimated that sum to be £10.³¹ Presumably E Hipu was unable or unwilling to pay this. MacDonogh simply noted E Hipu's "non-compliance with such terms". He therefore committed him on warrant to gaol. In any case, despite MacDonogh "cautioning the constable to use every precaution to prevent his escape", on being transported from the police office to gaol, E Hipu "was rescued by upwards of twenty natives".³² He was not recaptured until he was recognised in Wellington more than a year later.³³ Richmond was hopeful that a second trial would pass without incident, as he has become aware that E Hipu was a relative of a local Chief "Epuni". He noted that "with the influence and assistance of this well disposed Chief I hope to be able to avert the mischief which might otherwise arise."³⁴ As with many other trials, it was not the might of British Justice which brought E Hipu to trial, but negotiation with local Māori.³⁵ Ironically, of course, it was incidents exactly like this, the rescuing of Maori by their hapū, which contributed to the passing of the Ordinance in the first place.

In *E Hipu*, the accused was found guilty of stealing a piece of print (in this case meaning cloth). He was ordered to pay £8,³⁶ the print having been valued at £2.³⁷ Hipu was also to be charged with

28 MacDonogh (Police Magistrate, Wellington) to Richmond (Superintendent of Police, Wellington) (4 September 1844) ANZ, ACGO 8333 IA 1/37, 44/2106 at 1-2.

29 Ibid, at 2.

30 Native Exemption Ordinance, above n 2, s 8.

31 MacDonogh to Richmond, above n 28, at 2.

32 Ibid.

33 Richmond (Superintendent of Police, Wellington) to FitzRoy (Governor) (20 November 1845) Auckland City Library, Special Collections, Grey Letters New Zealand (GLNZ) R 11(I).

34 Ibid.

35 For other examples, see the trials of Maketu and Rangitapiripiri for murder: *R v Maketu* SC Auckland, 1 March 1842 per Martin CJ, reported in *New Zealand Herald and Auckland Gazette* (Auckland 5 March 1842) at 2; *R v Rangitapiripiri* SC Wellington, 1 December 1847 per Chapman J reported in *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 4 December 1847) at 2-3.

36 *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 13 December 1845) at 3.

37 [Chapman] Notebook, above n 1.

escaping from custody, but the prosecution of that matter was abandoned. This caused some consternation with the Grand Jury, who handed a presentment to the Chapman J complaining that a similar offence, but with "mitigating circumstances" had been sent to them against a soldier, and the abandonment of the charge against E Hipu was "an unequal measure of justice as between the two races".³⁸ Chapman J explained that where convicted of one offence (here stealing) it was usual to abandon the second. The fact that the escape carried a gaol term, while stealing came under the penalty provisions of the *Native Exemption Ordinance*, may well have been obvious to the Grand Jury.

Transcript of the Decision

Supreme Court, Monday December 1, before Mr Justice Chapman.³⁹

His Honour, in addressing the Grand Jury, observed that the number of cases to be tried at this Session was greater than usual; there were ten offences charged, and six prisoners, some of whom were charged with more than one offence. The first bill which would be sent to them was against E Hipu, an aboriginal native, for escaping from custody. A true bill had been found against him twelve months ago, for stealing a piece of print from Mr. Lyn's store, and for this offence he would be tried; he would also be tried, if a true bill were found by the Grand Jury, for escapement. There was no doubt that the natives come within the perils as well as the protection of the law, and there could not be the slightest doubt that where a European is concerned, they are liable to its perils if they offend against the law.

The bill against the native for escape was abandoned.

The following presentment was made by the Grand Jury:-

The Grand Jury, of the District of Wellington, assembled on the 1st December 1845, for the dispatch of public business, respectfully present:

That, in the charge addressed to them by your Honor this morning, it was intimated that a native of the name of E Hipu would be indicted for breaking away from custody, but it appears that this indictment has been abandoned.

They therefore view with surprise and regret that an indictment for a similar offence but with mitigating circumstances, has been sent to them against a soldier of the 58th regt., which has been found a true bill, and they unanimously consider that the abandonment of the prosecution against the native is an unequal measure of justice as between the two races. (signed) James Kelham, Foreman.

³⁸ *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 6 December 1845) at 3.

³⁹ *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 6 December 1845) at 3. This is an exact transcription from the newspaper, all errors appear in the original.

His Honour, on receiving the presentation, observed that the Court had no power to order a prosecution, and it was usual when a prisoner was convicted of one offence, not to press the other charges against him. The native had been convicted of stealing from Mr. Lon's store, and the other charge had been abandoned.

New Zealand Spectator and Cook's Strait Guardian 13 December 1845 at 3.

(The reports were continued from the last edition).

E Hipu, a native, was tried and found guilty of having stolen a piece of print from Mr. Lyon's store about twelve months since, and sentenced (under the Native Exemption Ordinance) to pay eight pounds, or four times the value of the goods stolen. The fine was paid for the prisoner. The prisoner had escaped from custody and was recaptured only a fortnight before trial.

Transcript of Chapman J's notebook

Monday, December 1 1845⁴⁰

E Hipu – for larceny

David Scott sworn in as interpreter.

Indictment read and explained to prisoner.

Plea – not guilty

The interpreter by direction of the court explained to the prisoner that had any objection to any one of the jurors that juror should retire. He had no objection – he was satisfied with the jurors.

Thomas Tomkins, Shopkeeper, Lambton Quay.

I remember a Maori coming into my shop and offering certain goods for sale similar to the goods produced.

I thought it probable he had stolen them and I detained him. I thought so from the answers [he] has given and from the description of the goods.

I sent for a Constable and gave the prisoner [into his] charge and gave the goods to the Constable. I cannot say other than the prisoner was the maori .

John Barr – shopman to Mr Lyons

I remember missing some goods from our store about August last year. The goods produced are the same. I know these goods. The goods I missed are the same pattern and same quality.

40 [Chapman] Notebook, above n 1. This is an exact transcription from the judge's notebook, all errors appear in the original. Where a word in the original is illegible this is clearly marked in the text.

I went to Mr Tomkin's store and there saw the goods. I saw the prisoner at Mr Tomkin's between 8 & 9. I had seen him before in Mr Lyon's store between 6 and 7.

He came into look at a pair of trousers and to light his pipe. The gingham were not shown to him.

They were on a shelf behind the counter. The native went behind the counter. He asked to go there to see the trousers I had laid aside the day before. The trousers were on the shelf at the level of the gingham. The trousers were close to the gingham - they touched. I never sold any gingham to a native.

He had been in our store before. I knew him by sight. I have often spoken to him. I have no doubt the prisoner is the maori.

Cross-examined.

I have been [a] shopman since January 1843. The gingham had been in the store for more than six months. We had about six pairs different patterns. I saw it about a week or a fortnight before. I cannot swear it was there. I did not miss it at the time. I should have noticed it if it had been taken. I cannot swear it was there three days before. I swear the native was the same.

As to the trousers he came in a day or two before asked me to lay them aside.

Maoris are in the habit of going into Mr Lyon's shop. Scarcely a day passes that there are not some.

The Ex[amination in] ch[ief]

No robbery has taken place since I have been there.

Value of pieces produced in court – 1/5.

I consider the value 1/5 per y[ar]d . But I know not the no [number] of yards. One was whole I cannot swear to the others. When cut it was cut off in [the] drapers. Mr Lyon gave 1/- can [?] take 1/2

No [?] no [?], the goods were bought here.

Burgess Sayer sworn.⁴¹ The pieces of property have not been out of my possession since. I took the prisoner into custody. I took the goods and marked them. Mr Lyon also marked the goods. The portions delivered to Mr Barr were cut from the piece produced one piece was perfect the other had since [been] cut off. As the one perfect I was not quite certain. There was very little difference between them.

The prisoner said he had got them from another native.

Cross Examined

41 Burgess Sayer was Chief Constable of Wellington.

I was examined before the Police Magistrate. The signature to the deposition is mine.

This closed the case for the prosecution.

Mr Hanson for the prisoner:⁴²

Barrs deposition reads "sold 1 drop off each piece. 40 shillings/£2. The value is about £2."

Verdict: Guilty

Value of the property found to be forty shillings.

Natives have had the benefit of the law and of the protection of the court in cases where they have been wronged by Europeans and they must submit to the penalty of the law when they do wrong.

42 Richard Hanson went on to become the Chief Justice of South Australia.