An Infantry Officer In Court – A Review of Major James Francis Thomas as Defending Officer for Lieutenants Breaker Morant, Peter Handcock and George Witton – Boer War

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Introduction

Four men from Australia who joined the Boer war were to be connected by destiny in events that still intrigue historians to this day. Harry 'Breaker' Morant, Peter Handcock, George Ramsdale Witton and James Francis Thomas were to meet in circumstances that saw Morant and Handcock executed and Witton sentenced to life imprisonment following military Courts Martial in 1902.

This article attempts to review the experiences of Major Thomas, a mounted infantry officer from Tenterfield who joined British Forces as a volunteer and ended up defending six officers, including Breaker Morant on charges of shooting Boer prisoners

History of the Boer Wars 1880 - 1902

The Boer War commenced on 11 October 1899, and was fought in three distinct phases. During the first phase the Boers were in the ascendancy. In their initial offensive moves, 20,000 Boers swept into British Natal and encircled the strategic rail junction at Ladysmith. In the following weeks, Boer troops besieged the townships of Mafeking and Kimberley. Phase 1 reached its climax in what has become known as 'Black Week' – 10 to15 December 1899. In this one week, three British armies, each seeking to relieve the besieged townships, suffered massive and humiliating defeats in the battles of Stormberg, Magersfontein and Colenso.

These defeats shook the British Empire. In response, Britain despatched two regular divisions and replaced the ill-starred General Sir Redvers Buller, with the Empire's most eminent soldier, Field Marshall Lord Roberts VC, as its commander in South Africa. These changes marked the commencement of Phase 2. During this phase, the British wrestled the ascendancy back from the Boers, destroying the main Boer forces and capturing Pretoria. At this point, it was assumed that the war was as good as over. Lord Roberts departed South Africa in November 1900 to receive the plaudits of a grateful empire, leaving General Lord Kitchener the task of mopping up the remnant Boer forces. The phase of set-piece battles and sieges was, indeed, over but the fighting was not.

The War now entered its final and most bitter phase. Hard-core guerrilla commanders – de Wet, de la Rey and Louis Botha replaced the old Boer leaders. To these men the only prospect of victory lay in wearing down the will of the British to fight by incessant guerrilla attacks.

Kitchener reacted to the guerrilla operations by burning Boer farms, rounding up civilians and confining them in 'Concentration Camps' and by building block-houses to defend supply points. He then extended the block-house system into a grid pattern across the Transvaal, bottling up the *bittereinders* (die-hards) in isolated areas where they could be systematically hunted down.

The Bushveldt Carbineers (BVC)

The task of hunting down the remaining Boer commandos required new and irregular military formations. These new formations were to be manned, in the most part, by colonial troops who had won a reputation for independence, initiative and 'hardness'. Qualities which matched those of the *bittereinders*.

Morant, Handcock and Witton joined the BVC and served along side volunteers from other countries, including United States, New Zealand, Great Britain and Canada. The BVC was one of many irregular units that fought with the British during the war. In the words of Arthur Davey:

> '*The Bushveldt Carbineers came into being in 1901 for a particular purpose, the subjugation of an out laying area of the Northern Transvaal in which there was sporadic guerrilla activity. In the language of our time, it was to be a counter insurgency unit'*.[1] *In its short life span, the BVC was an effective fighting formation. Its detachments, unencumbered by transport wagons, travelled light and fast. Initiative and combative spirit were evident on more than one occasion."*[2]

The BVC had a reputation for rough play and military action, often undisciplined but effective in fighting a guerrilla war.

> '*The Bushweldt Carbineers certainly had its share of rough characters and scoundrels but these were just the type of men wanted for the job.*'[3]

The BVC's reputation for fighting a guerrilla war under British command created circumstances in which the line between 'war crimes' and fighting to meet conditions adopted by the Boers, became blurred. Author, William Woolmore explained it as follows:

> *'There is no question that war crimes were committed by members of the BVC, even if there were extenuating circumstances and often purposely vague orders from above. Crimes were committed on both sides in this conflict and the BVC officers deserved to be treated with no less consideration than were the Boers who were responsible for similar outrages. The Boers were usually set free by their own military courts and later by civilian courts.*' [4]

James Francis Thomas

Born on 25 August 1861, Thomas attended school in Sydney and graduated in law from Sydney University. He established a law firm in Tenterfield and became a notable community leader. '*In Tenterfield the sort of law that needed practising was pretty straightforward, wills, conveyancing, bills of sale, nothing dramatic or outstanding.*'[5] In addition to his social pursuits, Thomas took active interest in regional politics, the movement towards Federation and all things military. He joined the local Upper Clarence Light Horse as a volunteer and then commissioned into the New South Wales (NSW) Mounted Infantry Regiment based in Tenterfield. In 1894, Thomas completed his training at the Cavalry School of Instruction, promoted to First Lieutenant and took command of the Tenterfield Half Company (A). In 1895, he was promoted to Captain. He purchased the local newspaper, the Tenterfield Times and used it to support the cause of Australian federation.

In South Africa, Thomas was the Officer Commanding A Squadron, New South Wales Citizen's Bushmen. He sailed for South Africa on 28 February 1900 and disembarked on 12 April 1900. His squadron served at the relief of Mafeking. Thomas then served with Colonel Plumer in the General Baden Powell column. Thomas also served with A Squadron as part of the Elands river garrison that was besieged by a large number of Boers under the command of de la Rey. He distinguished himself with three Mentioned in Dispatches and the Queen's Medal with four clasps. He was promoted to the rank of Major. Having served for 12 months in South Africa, the NSW Bushmen's Contingent returned to Australia disembarking on 11 June 1901. In August 1901, Thomas returned to South Africa, having recruited 200 volunteers to fight the Boers. He became disillusioned, when his insistence that the volunteers be identified as Australians, was refused by the British. Thomas resigned his commission and prepared to return to Australia. In January 1902, fate intervened and Thomas was contacted by Major Lenehan (an accused Officer charged with Morant and Handcock) and asked to provide legal representation. Thomas was appointed defending Officer with the rank of Major.

It is against the presence of a bush lawyer and infantry Officer that the author has attempted to assess Thomas' performance in the defence of men tried by Courts Martial, convicted and executed. From outstanding service as an infantry officer, Major Thomas found himself in a situation more challenging to 'fight the fight using law manuals and court room procedures in preference to engaging the enemy on the Veldt.

Major Thomas' Clients

Harry Harboard 'The Breaker' Morant

Harry Morant was born in England on 9 December 1864. He emigrated to Australia in 1883 and settled in Queensland. He worked as a drover and developed a reputation as a womanising, hard drinking charismatic roustabout who had ability as a bush poet and horsemen. He eventually enlisted as volunteer in the 2nd Contingent of the South Australian Mounted Rifles and went to South Africa in 1900. His hard working ethic and ability as a horseman won him attention from his superiors and he was promoted to Lieutenant in the Bushveld Carbineers (BVC) on 1 April 1901.

Peter Joseph Handcock

Peter Joseph Handcock was born in 1869 at Peel, near Bathurst in New South Wales. After an apprenticeship, he worked with the railways as a blacksmith. He married at 21 years and had three children. He enlisted in the 1st New South Wales Mounted Rifles and sailed for South Africa on 17 January 1901.

When his unit returned to Australia, Handcock remained in South Africa. According to author, William Woolmore, Handcock had a reputation as being courteous, hard working obliging, a skilled horseman and respected by soldiers. He obtained a commission as a Lieutenant and joined the BVC in February 1901.[6]

George Ramsdale Witton

George Witton was born in Victoria in 1874 and grew up in a farming family near Korumburra, Victoria. He joined the volunteer infantry regiment, the Victorian Rangers. After two years service, he joined the Victorian Permanent Artillery based at Queenscliffe**.** Like his co accused, he was an expert rifleman and a skilled horseman. He travelled to South Africa as a Corporal in the Victorian Imperial Bushmen. In June 1901, he accepted a commission as Lieutenant in the BVC.

Military Law

During the Boer war, regular British soldiers were subject to the provisions of the *Army Act 1879* (UK), the King's Regulations, the Manual of Military Law (MML), and the Geneva Convention of 1864. Volunteers from the colonies were enlisted under the same provisions.

Charges

On 21 December 1901, Lieutenants Morant, Handcock, Hannam, Picton, Witton, Major Lenehan, and Captain Taylor were charged with offences that occurred between 2 July and 7 September 1901:

- shooting eight Boer prisoners;
- shooting Trooper Van Buuren of the BVC;
- shooting a Boer prisoner named Visser;
- shooting a missionary by the name of Heese;
- shooting three Boers (two men and a youth); and
- failing to report a murder to superiors.

Throughout the Board of Inquiry that commenced on 16 October 1901, Morant and Handcock asserted that they had followed orders from Headquarters relayed through Captain Hunt, that no prisoners were to be taken and Boers wearing khaki (British uniform) were to be summarily shot.

Courts Martial

The Courts Martial of Morant and his co-accused began on **16 January 1902** and finished on **17 February 1902**. In accordance with the provisions of military trial procedure and the MML, the accused were tried by a President and six Officers. A Judge Advocate, (Major Copland) was appointed to decide questions of law.

The Courts Martial were conducted at Pietersburg and Pretoria, two concerned the shooting of the Boer prisoner Josef Visser, and the shooting of eight Boer prisoners, and three Boers. After the second Courts Martial, Morant, Hancock, and Witton were taken to Pretoria and tried for the killing of a Missionary, by the name of Hesse.

Morant, Handcock and Witton pleaded not guilty to murdering Visser, the murder of eight Boer prisoners and Heese. Morant and Handcock also pleaded not guilty to killing three Boers.

Verdicts

Following the Courts Martial, the court found:

- Morant, Handcock and Witton guilty of murdering eight Boer prisoners;
- Morant guilty of murdering the Boer prisoner, Visser;
- Handcock, Picton and Witton guilty of the manslaughter of Visser;
- Morant and Handcock acquitted of murdering the missionary Heese; and
- Morant and Handcock convicted of killing three Boers;
- Lenehan found guilty of failing to report a murder to his superiors; and
- Taylor acquitted of all charges.

Sentences

- Morant and Handcock sentenced to be executed;
- Witton's sentence was commuted to life imprisonment for the murder of Visser;
- Picton was cashiered (dismissed from the Army); and
- Lenehan was reprimanded.

Witton's case was considered by Sir Isaac Isaacs QC, in 1902 (destined to become Chief Justice and Governor General). This review led to a storm of protest from Australians, representations from the Australian and South African Governments and British politicians, including Winston Churchill for Witton's release. Witton's case was reviewed on petition to the British Crown and on 11 August 1904, he was released from prison and returned to Australia.

Recommendations for mercy

The Courts Martial members cited six points of mitigation in their recommendations for mercy for the three convictions of murder including:

- Morant acted under extreme provocation following the mutilation by Boers of his best friend, Captain Hunt;
- Morant's good service record, including his action in capturing Boer Commander Kelly;
- Handcock's good service record, his lack of previous military experience and ignorance of military law, custom and procedures; and
- Witton's good service record and the fact that he and Handcock had acted under orders from Morant.

Courts Martial circumstances

In reviewing Thomas' performance it should be appreciated that:

- Thomas had the task of representing six of the accused which potentially exposed him to a conflict of interest, particularly as two of the accused

(Witton and Picton) claimed they were following the orders of Morant in executing prisoners;

- Thomas was appearing as counsel without assistance from another advocate/instructing solicitor;
- Although Thomas' experience as an infantry Officer was an advantage, he had little experience as an advocate and certainly not before military courts;
- Thomas only had one opportunity to make submissions regarding the law applicable to charges of murder and principles such as following superior orders. He was bound by rulings made by the Judge Advocate.

Major Thomas' performance

From the moment of Thomas' retention to defend Major Lenehan, Thomas faced difficulties. He only had one day to prepare his case and was confronted with representing six personnel. This was a daunting task, notwithstanding the common law principle that accused persons should be represented in a manner that avoided conflicts of interest.

Did Thomas consider that his duty was to ensure that he was sufficiently prepared to represent the accused? Section 33 of the MML stated that:

> *'The prisoner is to have proper opportunity to prepare his defence and liberty to communicate with his witnesses and legal adviser or other friend. The object of the rule is to give the prisoner full opportunity to prepare his defence but not to enable him to postpone his trial'.*[7] MML procedure rule number 13 further provided, *'A prisoner for whose trial by court martial has been ordered to assemble shall be afforded proper opportunity of preparing his defence and shall be allowed free communication with his witnesses and with any friend or legal adviser with whom he may wish to consult.*[8]

Rule 13 also stated:

> *'A failure to give the prisoner full opportunity of preparing his defence and free communication with others for the purpose may invalidate the proceedings'.*[9]

Had Thomas considered this provision it was not apparent as the trials proceeded even though he had only a day to prepare defence cases of six defendants.

With the luxury of post trial research, many documents discovered suggest that Lord Kitchener had issued orders about the treatment of prisoners, including their execution for wearing Khaki. Some of these documents included an order issued by Lord Kitchener on 3 November 1901 to British Commanders in South Africa, two months prior to the Court Martial.

> *'In certain cases of Boers captured disguised in British uniform I have had them shot, but as the habit of so disguising themselves before an attack is becoming prevalent, I think I should give a general instruction to Commanders that Boers wearing British should be shot on capture'.*[10]

Had Thomas been successful in gaining an adjournment, he may have located additional witnesses and documentary evidence that would have established to the requisite standard of proof (balance of probability), that orders to summarily shoot prisoners existed. Further, if Thomas had secured the attendance of Lord Kitchener, he could have raised the existence of verbal or written orders, (including the order of 3 November) to summarily execute prisoners. This would have enabled Thomas to

negate the assertion that what Lord Kitchener had done was approve the execution of prisoners only after they had been tried by Courts Martial and he had not condoned summary executions.

The lack of time for Thomas to prepare the defence cases probably prejudiced a fair trial for the accused and should have invalidated the proceedings in accordance with rule 13 of the MML.

Composition of the Courts Martial. Another issue that may have escaped the attention of Thomas was the procedural rule that stated that a Court Martial must include one Officer from an irregular unit, like the BVC.[11] The court was comprised of six regular British Officers, but this failed to ensure that at least one court member from an irregular unit could account for the rigours that irregulars faced in fighting Boer commandos.[12]

Application for separate Courts Martial. The principle of separate trials by Court Martial for accused persons charged with the same offence/s collectively has been a significant aspect of trial procedure enshrined in common and statue law. In the MML, section 50 provided for separate trials in instances where several prisoners are charged with committing an offence/s. The justification for such an application is that the evidence of one, some or more of the other prisoners will be material to an accused's defence.[13]

There is no evidence in the Judge Advocate's notes or Witton's book[14] that any of the accused made such an application at the instigation of Thomas. It is arguable that in the absence of an application for separate trials by Thomas, the court nevertheless should have raised the issue with Thomas to alert him to the issue and clarify whether he had any objection to joint trials proceeding.

Major Thomas' conduct of the defence

Thomas made a number of submissions to the Courts Martial about the criminal culpability of the accused. He also examined the accused and cross-examined prosecution witnesses.[15]

The evidence led by Thomas and from cross examination of prosecution witnesses focused on:

- Superior orders from Hunt to Morant to take no prisoners;
- what the custom was in dealing with adversaries who used guerrilla tactics to fight the British; and
- the practices used by irregular units, and in some cases regular British troops, against an enemy who failed to fight in accordance with the laws of war and accepted custom.

With respect to the charge of murdering the missionary Heese, Thomas created doubt in the minds of the court members and Handcock and Morant were acquitted of the charge.

Defence of superior orders

Thomas centred his defence of the accused on the argument of obedience to superior orders. He drew evidence from Officers and soldiers who had witnessed, and in some cases, carried out orders to shoot Boer prisoners. In the absence of examining Lord Kitchener or tendering written orders from him about summary execution of Boers wearing khaki, Thomas had to make do with examining Colonel Hamilton, (Lord Kitchener's secretary). Hamilton denied any knowledge of such orders or instructing Hunt to order the BVC to shoot prisoners. In the face of this denial, Thomas changed direction.

He argued that whether or not orders were actually issued by Lord Kitchener or Hamilton did not matter. What mattered was that Morant believed that orders had been issued and he had followed them.

Uncontradicted evidence produced by Thomas established that Hunt had sternly reprimanded his Officers, including Morant, for disregarding his orders not to bring in prisoners and to execute prisoners caught wearing British (khaki) uniform.[16]

The Law

There was common and statute law on the subject of superior orders at the time of the trials and it would have been considered by the JA and court members. The question for consideration is whether the law was applied correctly?

The MML (1899) stated:

> *'If the command were obviously illegal, the inferior would be justified in questioning, or even in refusing to execute it, as for instance if he were ordered to fire on a peaceable and unoffending bystander.'*[17]

Clode also quoted Mr Justice Willes in the case of Keighly v Bell:

> *'I believe the better opinion to be that an officer or soldier acting upon the orders of his superior, not being plainly illegal is justified, but if they be plainly illegal, he is not justified.'*[18]

Arthur Davey considered the law on obedience to superior orders and made a number of references to military law in an attempt to clarify the situation. Davey quoted from several legal sources, including the *Law of the Constitution* by Dicey:

> '*When a soldier is put on trial on a charge of a crime, obedience to superior orders is not of itself a defence. A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in bona fide obedience to the orders (say) of the commander in chief. This of course must be taken with the qualification that if it be such an order as a soldier might reasonably suppose his superior officer to have good grounds for giving, the soldier would not be criminally liable.'*[19]

This quote from Dicey appears to summarise the law as it existed at the time of the Courts Martial. Although each case had to be considered on its merits, the law recognised:

- the principle that obedience to superior orders was an essential aspect of military good order and governance;

- in general, a soldier or officer could not rely on absolute obedience to superior orders as a defence to criminal behaviour;
- however, a soldier or officer could plead superior orders if he believed in good faith and on reasonable grounds that his superior was justified in giving such orders.

Although the Courts Martial members were not persuaded by the evidence, Thomas tried to convince the trying officers that in all the circumstances the accused behaved in accordance with orders they reasonably believed had been issued by Lord Kitchener through orders relayed to them by Captain Hunt.

Military history (including in the present day in conflicts in Afghanistan and Iraq), has many cases in which criminal culpability has been denied because of obedience to superior orders. A successful defence depends on evidence of the accused's state of mind, the circumstances of offence, the orders given and an objective standard of reasonableness.

Morant gave evidence about his state of mind and his belief that he and his subordinates were following orders issued to the BVC by Lord Kitchener:

> *'I alone was responsible. You can't blame the young un's, they did as I told them. They just carried out orders and that they had to do. They obeyed orders and thought they were obeying Lord Kitchener's.'*[20]

Witton also gave evidence at the trials and claimed that he and Lieutenant Picton refused to obey Morant's order to execute the prisoner Visser. In response to the charge of murdering eight Boer prisoners, Witton again stated that he had refused to follow Morant's order to execute the prisoners even though Morant had stated he was justified in following superior orders that had been conveyed to him.

Thomas focused the defence case on superior orders received by irregular units to shoot prisoners in accordance with customs of war and the tactics adopted by Lord Kitchener. The onus of proving that the order to shoot prisoners, including those caught wearing Khaki rested with the defence. Although the standard of proof was on the balance of probability, it appears that the trying officers were not convinced that the accused had acted in accordance with the law pertaining to superior orders that had been conveyed to him.

Again, without sufficient time to prepare the defence cases for each Officer, compel Lord Kitchener to appear as a witness and to discover written documents about orders to shoot prisoners, Thomas faced an impossible task of getting a fair hearing for the accused.
In closing the defence case, Thomas tendered a written submission to the court that stated the case for acquittal. Thomas' submission was precise, devoid of complex legalise and convincing. He challenged the proposition of criminal culpability, focused on the customs of war, the exceptional circumstances in which the accused had to fight the Boers and the accused's belief that they were acting under orders. Thomas' submission clearly demonstrated that he had a clear understanding that the onus of proof in proving criminal acts rested with the prosecution.

Principle of Condonation

Thomas used every opportunity to represent the interests of his clients. During one of the Courts Martial, Pietersburg was attacked twice by Boers, once on 22 January and again the next day. Incredibly, the accused were released from their cells and given

firearms. The accused acquitted themselves bravely and assisted in repulsing the Boer attack.

This action gave rise to the principle of Condonation. This principle is the excusing of an offence by virtue of mitigating circumstances such as an act of bravery after a military offence has been committed. The plea was recognised in section 36A of Court Martial rules of procedure in the MML.[21]

The rules of procedure stated, *'if he offers a plea in bar the court shall record it as well as his general plea.*[22]

Condonation received judicial sanction in the 19th century:

> *'When any offence has been committed by officer or soldier and that offence not punished or forgiven but advisedly overlooked, the person implicated being continued in his employment these circumstances are held to be a good plea of condonation and a bar to further proceedings.*'[23].

In a despatch dated 11 April 1813, Lord Wellington stated: *'No soldier should be put on duty having hanging over him the sentence of a court martial.*[24]

The absence of a plea of condonation by Thomas could have been due to his lack of military experience, insufficient time to discuss the issue with his clients or because he was not aware of its existence.

In 1902, Witton raised a plea of condonation, (through his counsel Issac Isaacs, who later was the Chief Justice of the High Court of Australia and the first native born Governor-General) in his petition to the King after he had been convicted and imprisoned. This along with other matters gained his release from imprisonment.

An opinion of Helen Styles, lecturer in International Communication at Macquarie University and member of the Red Cross Committee on International Humanitarian law summarises the view of the legal proceedings and condonation and concluded the convictions were unsafe:

> '*I agree strongly with the argument that Morant, Handcock and Winton deserve to have the conviction quashed as unsound on technical grounds. They deserve to be pardoned on the basis of military practice and opinion juris, in accordance with Wellington's belief that the performance of a duty of honour and trust after knowledge of a military offence ought to convey a pardon.'*[25]

Review of Sentences

Witton's chilling description of the drama as Thomas desperately tried to save his clients:

> *'During the day Major Thomas visited us, the terrible news had almost driven him crazy, he rushed away to find Lord Kitchener but was informed by Colonel Kelly that the Commander In Chief was away. He then begged Colonel Kelly to have the execution stayed for a few days until he could appeal to the King, the reply was the sentences had already been referred to England and approved by the authorities there. There was not the slightest hope, Morant and Handcock must die'*.[26]

Notwithstanding Thomas' anguish and attempts to have the sentences reviewed, the prisoners were removed to Pretoria without Thomas' knowledge. When Thomas

discovered this, he was furious and rushed to Pretoria. In accordance with the MML, the death sentences were confirmed by Lord Kitchener. Thomas' efforts were also mirrored by Morant and Handcock.

A last desperate plea. According, to Witton in describing Morant's reaction to his sentence of death:

> *'He requested to be provided with writing material and immediately petitioned to Lord Kitchener for a reprieve. Handcock at the same time also wrote, asking neither mercy nor anything else for himself, but begged that the Australian Government would be asked to do something for his three children. To Morant's petition there came a brief reply from Colonel Kelly, second in command at Pretoria, stating that Lord Kitchener was away on trek. He could hold out no hope of reprieve, the sentence was irrevocable and he must bear it like a man. Handcock's letter was returned to him without an acknowledgement. At the same time I sent two telegrams one to Mr Rail at Capetown, another to my brother in Australia. I was officially informed that they had been sent via Durban but I learned later that both had been suppressed.'*[27]

Handcock wrote to the Australian Government and begged for mercy on account of his family. Handcock's letter was returned to him. Witton also claimed that he sent two telegrams to Australia, but later learned they had been suppressed.[28] These actions by the British authorities (if true), were unfair and perhaps designed to frustrate any plea for mercy by Australian authorities and relatives of Handcock and Morant.

The only hope the accused had was for the confirming authority to direct the sentences back to the Courts Martial for revision. In such a case, a court could have substituted a death sentence for a lesser penalty.

Given that the pleas by the court for mercy had been rejected by Lord Kitchener and the sentences approved, it was unlikely that Lord Kitchener would have returned the sentences to the court for revision or commuted the sentences of Morant and Hancock.[29]

An appeal could have succeeded if Thomas had raised evidence of a miscarriage of justice.

> '*The only appeal is by way of memorial to the Crown acting through the Secretary of State. It is the usual practice to refer the matter to the Judge Advocate General and if need be to the Law offices of the Crown for report that no man may suffer from error in the tribunal.*'[30]

Injustice to the end

The circumstances that led to the execution of Morant, Handcock and the sentencing of Witton to penal servitude were characterised by indecent haste and a disregard for the rule of law. Although the MML did not prescribe a process to appeal convictions and sentences, it did contain some checks and balances against excesses in the conviction and sentencing of defaulters.

The author's view is that Morant, Handcock and Witton were denied a final review of their convictions and sentences. They were also prevented from communicating with their relatives, the Australian Government and most importantly the sovereign King who could have examined their pleas for clemency. Had the executions been stayed

for a few days, Morant, Handcock and Witton could have discussed their options with their legal counsel and sought advice from the Australian Government.

The days prior to the officers being advised of their convictions and sentences were characterised by a shameful orchestration by military command to deny the convicted any hope of review. This was contrary to the principles of justice embodied in the laws that governed the theory and practice of military law.

According to the MML, the origin of military law was found in the Court of Chivalry that focused on the regulation of persons in service to the King in times of war. The evolution of military law mirrored the development of civil law established in England by William the Conqueror. The fact that Lord Kitchener made himself unavailable after the sentences were announced denied an opportunity for the accused and Thomas to seek his reconsideration of the sentences imposed on Morant and Handcock. Lord Kitchener's action ignored due process and prevented the accused from seeking revision.

The author's opinion is that Lord Kitchener, either acting on advice or of his own volution ensured that Morant, Handcock and Witton were prevented from:

- contacting Australian government and / or their relatives;
- petitioning Lord Kitchener for a stay in the execution of the sentences so they could consider their option of review;
- seeking, through their legal counsel, Major Thomas a review of the convictions and sentences by the King.

The courts martial were held between 16 January and 19 February 1902. On 21 February and without being informed of the convictions, sentences and recommendations for mercy, the accused were removed to Pretoria and again kept in solitary confinement. *'During this time, the courts' verdicts were transmitted to the military law advisers.*[31] According to Davey, legal advisers to Lord Kitchener, Colonel St Clair and Brevet Colonel, A. R. Pemberton, (Deputy Judge Advocate) with some minor reservations about procedure were in agreement with the verdicts and their opinions (reproduced in Davey's book) were forwarded to the Adjutant General on 20 February 1902. This material was available to Lord Kitchener who confirmed the sentences on 25 February 1902.

Allowing for the process of legal review and confirmation by Lord Kitchener it was a gross tactic on the part of the military command to have the verdicts and sentences announced on 26 February and the sentences carried out at about 0600 on 27th of February. The fact that the accused, either acting on their own or through their counsel, Major Thomas were prevented from petitioning the King was a gross violation of their common law right to review their convictions and sentences.

Judicial executions. A day after receiving their sentences Morant and Handcock were executed in Pretoria prison on 27 February 1902.

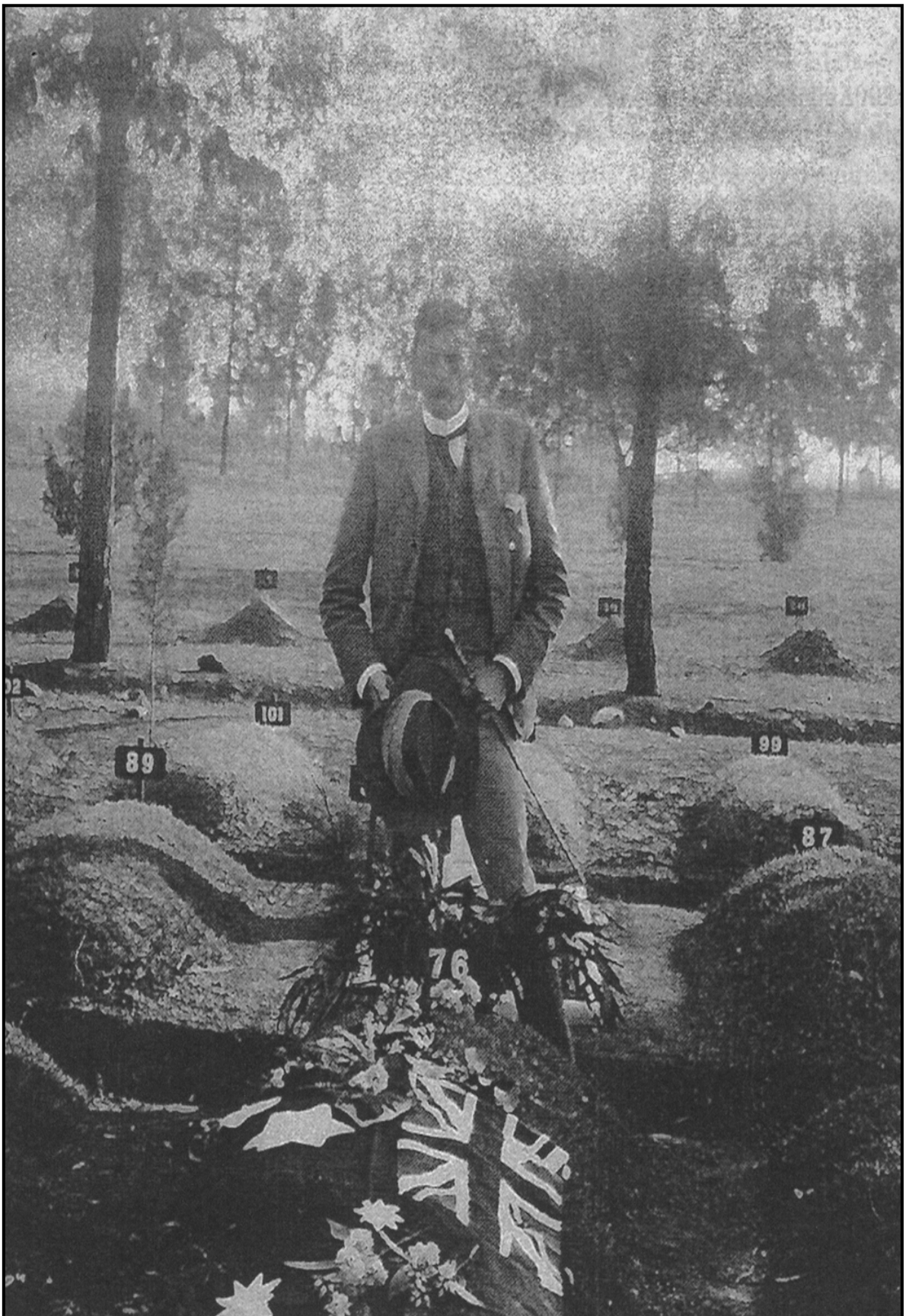
Woolmore's opinion was:

> *The trials and executions had a deep and lasting impact on Thomas and affected the rest of his life in many ways. He believed the BVC Officers had*

been badly and unfairly dealt with. In a letter dated 27 February 1902, the day Morant and Handcock faced the firing squad Thomas wrote, 'I know all that I expect ever will be known, and I am too true an Australian to shirk plain speaking if need be. And need there will be I think, I did not contemplate a sudden and unappealable death sentence[32]

Thomas' body language in the photograph is confronting. In a letter Thomas wrote, he stated, *'I feel quite broken up. It is too painful to write about*.[33]

JF Thomas standing over the grave of the men he couldn't save (photo courtesy of N. Bleszynski)



Following the execution of Morant and Handcock, Thomas completed the painful duty of arranging the burial of both Officers. He then returned to Australia in early 1903.

The view of Major Thomas

In March 1902, the Bathurst National Advertiser newspaper published a letter that was written by Major James Thomas, the counsel for Morant, Handcock and Witton. The letter contains intriguing insight in to the opinion of Thomas about the manner in which his clients had been treated. In one sense, the letter also explains some of the mitigation surrounding the case and is suggested that Thomas' interpretation may explain the rationale behind the recommendations for mercy made by the courts martial. The letter stated in part:[34]

> *'Your son has been sent a prisoner to England and I think it will bewise to defer any active steps concerning him till the Australian government is in possession of the facts. The defence maintained was that under the customs of war the shooting of these Boers was allowable as they were merely running bandits or marauders. It was proved that in other cases exactly the same procedure was adopted and approved of by other officers. Consequently, you will see that from a soldiers' point of view at any rate the crime was not so dreadful as might appear. I only regret that poor Morant and Handcock did not receive a sentence of penal servitude, but poor fellows they were shot at 18 hours notice. As counsel for your son and the other officers I should like to see that all the facts from the prisoners' point of view are fairly brought forward. When everything is known you will not think the disgrace amounts to much of anything. War is war and rough things have to be done.'*

Lord Kitchener's concerns about possible appeals for clemency may have been accurate. In a letter Thomas wrote shortly after the executions had been carried out he reflected on a number of issues, including his efforts to contact Lord Kitchener and petition the King, his views of the mitigating circumstances that should have been applied to Morant and Handcock, that execution was not the appropriate sentence and that their executions had been politically motivated due to their acquittal of the Hesse murder. In part he stated:[35]

> *'Have you heard the news, the awful news? Poor Morant and Handcock were shot this morning at 6am. It has broken me up completely. The order was signed yesterday sometime and Lord Kitchener immediately left town, and could not be approached. There was no time to do anything but directly I heard the decision I went to General Kelly (AAG) and begged and entreated him to ask Lord Kitchener to defer the execution to enable me to cable the King on behalf of the Australian people for mercy, but he was obdurate, and said the order came from England and practically said grave political trouble had been aroused (apparently over the Hesse (sic) murder in particular. I begged especially for Handcock who was merely present as a Veterinary Lieutenant when Morant ordered the Boers to be shot for outrages. I pleaded his want of education and of military knowledge and all that I could plead, but in vain.*
>
> *Poor Handcock was right when he wrote two months or more ago, 'Our graves were dug before we left the Spelonken.' They were dug, I see it all clearly now and why. I know I cannot write in this accursed military ridden country. My God poor Handcock, a brave, true, simple man, and Morant, brave but hot headed. They took their sentence with marvellous braveness.*

> *Their pluck astounded all. Poor Handcock's only trouble was for his three children.*

Major Thomas' Return to Australia

In Tenterfield, Thomas' reputation for generosity of community spirit was recognised. The then Lord Mayor, Thomas Walker, said:

> *'Your fellow townsmen of Tenterfield feel it incumbent on them to present you with a lasting assurance of their sincere pleasure at your return unscathed from the perils of the South African war and of their pride and delight in the heroism with which you and your gallant comrades have maintained and promoted the honour and reputation of this state and district.''*[36]

Thomas later assisted Witton to write his book, *Scapegoats of the British Empire*. He unsuccessfully lobbied the NSW Government to inquire into the Courts Martial and for financial assistance for Handcock's children. He returned to Tenterfield and gradually isolated himself from the community that once hailed him a hero and community leader. He sold the Tenterfield newspaper he had owned for 16 years and his legal practice. He also lost his licence to practise as a solicitor and served 12 months imprisonment for contempt of court orders. His time in Long Bay was described by a fellow solicitor as:

> *'He continued to conduct his practice in jail and work seemed to continue to arrive from Tenterfield and he seemed to also to be the jail solicitor, representing some other prisoners.'*[37]

Thomas' life ended in isolation and loneliness. Perhaps the Morant trials and his experience of British 'justice' had a profound affect on his mental health. Bleszynski summed it up as follows:

> *'Thomas cared too much, he made the cardinal mistake in legal practice of getting personally involved, he was a bloody decent human being, a man Australia has yet to recognise as a figure of national importance*.'[38]

On 11 November 1946, Thomas died from nephritis and malnutrition at his small property at Boonoo Boonoo near Tenterfield.

Notwithstanding the efforts of Thomas, there was little more he could have done to have secured an acquittal on the murder charges, persuade the convening authority to remit the sentences back to the court for revision or convince Lord Kitchener to commute the death sentences. Ironically, it is the view of Lord Kitchener on the administration of justice that has recognised Handcock and Morant. Lord kitchener stated:

> '*It does no good to act without the fullest inquiry and strictly on legal lines. A hasty judgement creates a martyr and unless military law is strictly followed, a sense of injustice having been done is the result'*[39]

Thomas' performance was compelling under the circumstances. He represented six accused, including two British regular Officers, (in hindsight trying to represent so many was a mistake). He had insufficient time to prepare himself to defend Lenehan let alone another five accused:

> '*No matter the outcome of the courts martial there is no way in which James Francis Thomas could have been accused of failure as an advocate.'* [40]

Whatever legacy Thomas left as an advocate, his defence of his clients and support of Witton in his plea to the British Crown were professional. He ensured one outcome was achieved. Following the news of the executions, the Australian Government expressed its concerns about the Courts Martial and the execution of Australian citizens to the British Government. As a result, the Australian Government denied the British military the right to execute members of the Australian forces under British command (for example in World War 1). Since the executions of Morant and Handcock, no Australian has been sentenced to death for a military offence.

Legal Review

The following issues would be relevant to a petition for review of the convictions and sentences:

- The Courts Martial failed to include a trying officer from an irregular unit like the BVC;
- To ensure fairness, the accused should have received separate trials;
- The accused's defence of obeying superior orders was not correctly applied by the trying officers in accordance with the law of the time. The Judge Advocate erred in the application of the law and instructing the trying officers on the subject;
- The accused were denied a 'proper opportunity' to prepare their defence and to communicate with witnesses and their legal counsel. This prejudiced fair trials;
- The trial officers and the presiding JA failed to apply the principle of condonation that should have been a bar to prosecution proceedings;
- The members of the courts martial were not properly directed to a competent standard by the JA on issues including the lawful excuse of obedience to superior orders, evidence of provocation, evidence of the accused's limited military service, their status as volunteers and limited education and ignorance of military law could be used in determining criminal culpability, sentencing provisions and principles in accordance with the Manual of Military Law, admissibility and relevance of evidence of instances of the shooting of Boer prisoners and obedience to orders to shoot prisoners;
- Recommendations for mercy made by the Courts Martial were not given sufficient weight by the reviewing authorities including Lord Kitchener;
- The mitigating circumstances were not given sufficient weight by the reviewing authorities including Lord Kitchener. In all the circumstances, the penalty of execution was excessive;
- The accused were denied an opportunity to communicate with their relatives and the Australian Government following their trials to seek representation to the King against their sentences;
- Lord Kitchener, the confirming authority of convictions and sentences failed to Inform the accused of the verdicts and sentences within a reasonable time so they could seek legal counsel on their rights of review through the military redress of wrongs procedure or petition to the King
- The convictions were unsafe.

There is doubt that Morant, Hancock and Witton received fair trials and the sentences imposed were excessive.

What is certain is that a country solicitor from outback Australia who served his community with distinction as a community leader, newspaper proprietor and as served his clients to the professional standards that reflected his experience and training. In the circumstances, justice demands a review of the trials, the convictions and the sentences imposed on Morant, Hancock and Witton. Until this occurs, Major Thomas' work as an advocate will remain incomplete.

The request for a review of the convictions and sentences (the subject of the petitions) is currently being considered by the British government. It is hoped that a review will take place to consider the case for pardons. Information regarding the case is accessible at breakermorant.com

An online petition is also available for signature at
http://www.gopetition.com/petitions/justice-for-breaker-morant.html

Commander James Unkles has been in the Royal Australian Navy for 28 years as a legal officer (permanent and reserve). In addition to his military service, Jim spent 12 years in practise as a lawyer, specialising in criminal law as a senior prosecutor. He also spent 2 years as a lawyer with the Victorian Aboriginal Legal Aid Service and as a prosecutor with the Victorian and NSWs Police Services. Jim has been an accredited workplace mediator for 12 years in the Defence Force and is also a qualified and accredited substance abuse counsellor.

NOTES

[1] A.Davey, *Breaker Morant and the Bushveldt Carbineers*, 1987, p,xvii
[2] A.Davey, op cit p, xix
[3] William Woolmore, *The Bushveldt Carbineers and the Pietersburg Light Horse*, 2002, p, 14
[4] William Woolmore, op cit, p, 13
[5] K. Denton, *Closed File, The true story behind the execution of Breaker Morant and Peter Handcock*, 1983, p.61
[6] William Woolmore, *The Bushveldt Carbineers and the Pietersburg Light Horse*, 2002, p,199
[7] Manual of Military Law p, 51
[8] MML op cit., p, 583
[9] MML op cit., p,583
[10] Bleszynski, op cit, p, 577
[11] MML op cit., p, 46
[12] N. Bleszynski *Shoot Straight You Bastards, The Truth Behind the Killing of Breaker Morant* 2 nd Edition p, 575
[13] MML op cit., p, 55
[14] Lieutenant G. Witton, *Scapegoats of the British Empire*, 1907
[15] Reference to these submissions and examination of witnesses are included in Witton's book and the notes of the Reuter reporter who attended the trial
[16] Isaac Isaacs, *Legal opinion re the case of Lieutenant Witton* dated 28 Aug 1902, p, 3
[17] A. Davey, *Breaker Morant and the Bushveldt Carbineers*, 1987, p, 159
[18] A. Davey, op cit, p, 159
[19] A. Davey, op cit, p, 158
[20] William Woolmore, op cit, p,116
[21] MML op cit, p,.602
[22] Bleszynski, op cit, p.614
[23] C.Clode, Military Forces of the Crown 1869, p. 173

[24] Isaac Isaacs, op cit
[25] Bleszynski, op cit, p, 628
[26] Lieutenant G. Witton, *Scapegoats of the British Empire,* op cit p, 151
[27] G.Witton, Scapegoats of the Empire, 1907, p.142
[28] Lieutenant G. Witton, *Scapegoats of the British Empire,* op cit p, 151
[29] MML op cit, p, 619
[30] Charles Clode, Military Forces of the Crown, 1869, p,175
[31] A. Davey, *Breaker Morant and The Bushveldt Carbineers 1987*, p.114
[32] William Woolmore, op cit, p,309
[33] Bleszynski, op cit, p, 178
[34] Bleszynski, op cit, p. 621
[35] N.Bleszynski op cit, p.300
[36] Thomas Walker letter dated 15 June 1901
[37] John Stubbs *Major who defended Morant spent a year in Long Bay jail*
[38] Bleszynski, op cit, p.627
[39] Bleszynski, op cit, p.628, Lord Kitchener letter to Secretary of State dated 6 April 1902
[40] K. Denton, op cit, p,145