	Show Notes – Series 5, Episode 2 Trials: Murder on the High Seas and Trial by Jury	THE NATIONAL ARCHIVES

In the second episode in our mini-series on trial records, we look at the long and colourful history of trial by jury. First, we hear about the sensational Victorian case of two sailors who resorted to cannibalism after being stranded on the high seas. Then a barrister and historian explains the origins of trial by jury, how juries have evolved over 600 years, and why it's so important to understand their history.

Documents from The National Archives used in this episode: DPP 4/17; HO 144/141/A36934; KB 6/6.

If you're interested in finding out more about our trial records take a look at our criminals, courts and prisons research guides. For help navigating our catalogue you can watch our top level tips on using Discovery.

Listeners, we need your help to make this podcast better! We need to know a bit more about you and what themes you're interested in. You can share this information with us by visiting smartsurvey.co.uk/s/ontherecord/

Transcript

[Intro – clips taken from the episode set to music]

Euan Roger: This is On the Record at The National Archives: uncovering the past through stories of everyday people.

I'm Euan Roger

Laura Robson-Mainwaring: And I'm Laura Robson-Mainwaring.

Euan and I are both historians at The National Archives in Kew, West London, where we research, look after, and help our audiences better understand the archives' collections of historical government and public records.

You're listening to the second installment in a three-part series examining some of our most sensational, significant, and intriguing trial records.

Euan: The subject of our episode today is trial by jury. Juries have been around in Britain since the Middle Ages, in some form or another, but the differences between the earliest juries and a modern jury might surprise you. To find out more about the history and evolution of trial by jury, we called up a leading criminal defence barrister, who also happens to be a historian of the common law.

Laura: But first, let's start with a story from our records about one of the most famous trials of the late 19th century. It's a story about the case that determined whether or not necessity is a valid defence for murder. As such, this episode will contain descriptions of violence and cannibalism which may not be suitable for all listeners.

Our colleague Chris Day took a look through the documents in our collection related to this case, which is interesting both for the precedent it sets and the way those in charge of the case managed to get around the expected trial by jury that the defendants were entitled to at the time.

[outgoing ringing tone]

Chris Day: So my name is Chris Day. I'm Head of Modern Domestic Records at The National Archives. That means that I get to work with lots of records to do with domestic British government departments from 1782, so the late 18th century, up until today…seek to understand

what's in them, how they work together, and get people interested in researching or just learning about the things that we can learn, the stories we can learn from them.

Laura: So the case, Regina v Dudley & Stephens (Regina referring to her Majesty the Queen) is pretty sensational, what's the story behind this set of records?

Chris: It changes legal precedent in English common law that, not to spoil it too much, that necessity is not a defence against the charge of murder, which has lots and lots of legal let-alone philosophical knock-ons.

So two people who are the defendants in this case are two sailors called Tom Dudley and Edwin Stephens. They were shipwrecked in 1884. They were sailing a yacht called the Mignonette. It's a very small yacht, and they were sailing it from Southampton to Sydney in Australia, which is, if you know anything about sea voyages in the age of sail, it's a pretty perilous journey of the best of times, but even more so if you're doing it in quite a small pleasure craft, in this case, which really isn't made for those sort of open ocean journeys. Dudley was the captain of the yacht. Along with Stephens, they were accompanied by another man who's called Edmund Brooks, and also a 17-year-old orphan called Richard Parker, not an experienced sailor, who was to serve as the cabin boy.

So, they were about one and a half thousand miles or so off the Cape of Good Hope down at the bottom of the African continent on the 5th of July, 1884 on this journey when they get struck by a wave. It's a very fierce gale, the storm, and the yacht is damaged so badly that it's certain it's going to sink. So Dudley says, "Let's get the lifeboat out." So they got into this open lifeboat in the middle of a very stormy ocean, and they have to get off the boat so quickly that they can take some navigation instruments with them, but very little food. No drinking water, two tins of turnips, about a pound each. That's the only nourishment they take with them.

They are in the open ocean. They are at least 700 miles from the nearest land mass, which is St. Helena, which is a barren outcrop in the Atlantic Ocean. It's where Napoleon spent his final days. They were in a desperate struggle to survive now. So they've got these two tins of turnips. They also managed to pull a turtle aboard, and they consume that for some days, but they are quickly running out of food. They're relying on rain water, which they are struggling to capture. So by the 17th of July, more or less, they are without fluids and without food. So they're beginning to starve and slowly dehydrate. Very dangerous, obviously. So they're drinking their own urine, which is not a predicament anybody wants to be in!

Richard Parker, so the young man who was serving as cabin boy, he falls into a coma, possibly from drinking seawater is generally the assumption and certainly the account which Dudley and Stephens give in the record that we have for the trial. So at this point, they basically start to consider their options because, as they say in their statements, they had been seven days without food and five without water. And they start to talk about cannibalism, or as they put it, 'what should be done if no succor came'. That someone should be sacrificed to save the rest. This is something which happened in other shipwrecks before Dudley and Stephens did this; they would have been aware of this. And they also believed, at least they seem to have believed, they were protected by something called the 'custom of the sea'. It's a code that mariners obey on the open ocean that says that this sort of thing is not pleasant, but for one to die, for others to survive, in many of the cases, people have drawn lots. It's okay.

But they don't immediately come to an agreement about what to do about this. Dudley seems to be the one who raised the idea that they kill the comatose Parker, because he would likely die before the others anyway, because he's in a really quite desperate state himself even compared to the others on the boat, so that they could drink his blood and they could eat his flesh. Stephens seems to have agreed with him, but not Brooks, the third man on the boat.

But then on around, as far as we can work out, around the 24th of July, so some days, over a week into their journey, they say, Stephens and Dudley in their statements to the courts, say Dudley offered a prayer, asking for forgiveness of them should they be tempted to commit a rash act. And he then subsequently, he says, went to the boy and, telling him his time was come, put a knife into his throat and killed him. And Stephens apparently held him while this was happening just in case he struggled. And then the three men then, over the coming days, consumed Parker's body, which must've been just a terrible, terrible thing to witness for any of them.

Laura: Mmm yeah it sounds really shocking.

Chris: Yeah, but it keeps them going. It nourishes them, as they say. It gives them what they refer to as 'succor'. And by the 29th of July, Dudley, Stephens, and Brooks are sighted by, they're rescued by a German ship, and they're returned to Falmouth in Cornwall on the 6th of September.

And there, they give a pretty candid and matter of fact explanation of exactly what's gone on with the boat because, as I've said, they seem to have expected, that because of the circumstances they were in, it is okay. But a police sergeant overhears their confessions and thinks they should be arrested. And the details get passed to the Board of Trade first in Whitehall, and then subsequently to the Home Secretary himself. And this begins one of the most sensational trials of the late Victorian period because the Home Secretary believes that these men should be

prosecuted and convicted for murder. Although he probably thinks they should be pardoned for the death sentence they would certainly get at that time for being convicted of murder.

So there's that fact, but also public opinion starts to come into a little bit. Even by the time they appear before a magistrate before being committed to the trial at the Assizes, people believed that they should not be tried, they should not be punished for this, that they did what they had to do. Especially, they're in a town like Falmouth. It's a maritime town and people are aware of sort of the desperate situations and the fear of shipwrecks.

This is clear from the way they talk about it, their justification, their petitions, and the records we see. So they said they would have starved and all died if not for the nourishment that Parker provided. And they say, even with consuming his flesh, by the time they are rescued, it's proof of how desperate their situation was. At the time they were picked up by this German ship, they say they were still alive, but in the lowest state of prostration.

Laura: So what happens in court?

Chris Day: Brooks has no evidence brought against him, and that's because the Crown wants him to be a witness for the prosecution so they can get the case to move along. Otherwise people would just remain silent and there's not really a trial to be had. And the trial was presided over by a guy called Sir John Huddleston, who's quite famous for doing this sensational case in the late 19th century.

So we talk about this being a trial by jury, but it's not really, because
basically Huddleston strong arms the jury into returning what's called a ‘special verdict’. So rather than actually giving a pronouncement on guilt of the defendants, they are just to state the facts of the case. Because what Huddleston wants to do is then take the case to a higher court, the Queen's Bench Division, a much more superior court in the legal hierarchy of Britain, and then he and a panel of judges, as opposed to a jury of the defendant's peers, will decide the guilt or otherwise. And I think it's pretty clear that they want them to be guilty.

Laura: So is there any reason why they want to make an example of this specific case. Because you said before that at sea there’s different rules usually at play, and it’s usually ok to protect yourself in these desperate situations?

Chris: I think the motivation is less to make an example of Dudley and Stephens. I think there's probably a recognition of their situation, but it's because there is a fear that otherwise they start to establish a precedent and a defence of necessity for homicide, and that could be a problem.

So in the judgment, the panel of judges that are convened in December to finally settle in this case at the Queen's Bench Division, they say that to accept a defence of necessity would create 'a legal cloak for unbridled passion and atrocious crime'. And so they're found guilty. And as is the practice at the time, if you're found guilty of murder, you are sentenced to death automatically.

Laura: Oh, wow

Chris: Yeah

Laura: So it kind of feels like their desperation is all for nothing I guess.

Chris: But they're sentenced to death with a recommendation from mercy, which seems like an odd thing to do, but that's the way the Victorian legal system operates. So they're basically dependent on the royal prerogative of mercy. So just as they're being tried by Regina Queen Victoria, they're also dependent on Regina Queen Victoria for her mercy or some sort of pardon. Although, she acts on the recommendation of the Home Secretary....because...constitutional monarchy.

What happens in the end becomes an exercise in public relations as well, because as these men are convicted, public opinion starts to turn against them. So they can't just let them go, but they can't execute them either, because that would be in no one's interest. So eventually, they decide on six months imprisonment, which I think Dudley and Stephens are very unhappy about. But it's probably, I would say, personally, on balance, better than the gallows. And I suppose all the punishment they must've had was to relive and think about the horrifying ordeal and the horrifying deeds that they had committed to try and get out of it for the rest of their lives.

Laura: So were there any lasting implications relating to this verdict?

Chris: So this was a massive, massive thing at the time, and it's still famous and sort of infamous as a case now. If you've read the novel or seen the film, The Life of Pi, he's shipwrecked on an open lifeboat with a Bengal tiger called Richard Parker. And indeed, Richard Parker seems to be a name that pops up in quite a few different shipwrecks. He seems to have been killed in various ways and shipwrecks a few times in sort of relatively infamous cases. It's sort of an archetype for a shipwreck story, really.

So it's had this lasting cultural legacy. But it has a massive legal legacy in that this firmly settles in English law that you cannot claim necessity as a defence against homicide. But also it's infamous because of the way the legal system is subverted.

Huddleston forces a jury in the jury trial to return a special verdict. They don't want to have any discussion of law, or case law, or precedent. They're there to just get this matter over and done with.

Most serious criminal trial was, by this point, were done by trial by jury. So your peers would decide whether you were guilty or not. So this is pretty unusual for that, and that's what makes it such a big public interest, such a big public cause both for and against Dudley and Stephens.

Laura: So were the public for them then, in general...or the media and the public?

Chris: Yeah, the media and the public is initially behind them, because they're very candid from the beginning about what they did. And they say time and again, 'Look, we wouldn't have lived. None of us would have lived if we hadn't done this. And as it is, we barely lived anyway. And he was going to die, the boy was going to die'. And they showed remorse, and so at first the public is quite fond of them, and that that's a concern for the government and for the legal system.

And then as I've said, after they're convicted, there's this bit of a change. That becomes also an issue for policy makers. And so, like any major trial now, there's a court of public opinion as well. And the law sometimes, not bends towards that, but there's an influence of that. And the importance of this mass media society that we have in the late 19th century, it's very similar to sort of modern day to a certain extent, except we don't have Twitter.

Euan: I can see why the Dudley and Stephens story has inspired so many writers over the centuries. Lots of big questions about morality and choice against the background of a desperate shipwreck. But I think the drama of the courtroom would make just as good of a film: Dudley and Stephens awaiting their fate in jail and arguing their case, Huddleston having dramatic conversations behind closed doors. It's good stuff.

Laura: ....so is the rest of the history of juries, which brings us to our outside guest, a Mr. Harry Potter, who we called up to help us understand the evolution of trial by jury. He also happens to have a particular interest in the Dudley and Stephens case, so we asked him a question about that as well.

[outgoing ringing tone]

Harry Potter: I go by that unlikely name of Harry Potter, and it is true. It was before the books. I'm a criminal defence barrister. I've been doing criminal trials and trials by jury for many, many years. I'm also a historian. I've written several books on legal history and other aspects of history. I've written a short history of the common law. This is a subject of great interest to me.

Euan: Brilliant. So the first question I've got for you today, when and why did the jury become a common part of the legal system? I think people listening might assume it was linked to the Magna Carta in 1215, because that's how lawyers in the 17th centuries interpreted it, but that's not quite right, is it?

Harry: It's not right at all. Magna Carta has got nothing to do with trial by jury at all. Jury trials, in the criminal sense, do have a start date, and that's 1220, although the significant date is 1215, the same year as Magna Carta, but several months later, the Fourth Lateran Council. That's when the Pope essentially abolished the previous means of proof in cases, which were ordeal. And ordeals were controlled by the Church because they had a divine sanction. He withdrew that support, not only in this country but on the continent. They had to find alternative means of doing it.

We opted for trial by jury. The continent opted for the inquisitorial system, by which primarily the evidence was to be gained from getting confessions, often induced by torture. Torture has never been part of the English common law.

But trials by jury predate Magna Carta as well, not in the sense of criminal trials, but in the sense of popular participation. They were 'juries of presentment' from Anglo-Saxon times. Those were sworn people – jurors just mean people who are sworn – sworn free men who would present to the court the people they suspected of committing crime in the neighbourhood.

We're talking about a time when there's no fingerprint evidence, let alone DNA or CCTV. If a sheep gets stolen and nobody sees it being stolen, and nobody finds the sheep in your backyard, how do you know who stole it? 'Well, John Lam's got a reputation for being a bit nimble with other people's property, we think he did it'. Those sworn people would bring the accused before the court.

Similarly, in civil cases, when people were trying to establish land ownership, for instance, right up to the Doomsday Book under William the Conqueror, when they wanted to find out who owned what, how many pigs they had, they swore a group of people: Locals again. Free men, because not all men were free, and it was only men who could sit on juries. But those juries would then be asked questions, like, '20 years ago, who owned that farm?' Some old codger would say, 'Oh that

was Sam Gubbins'. They would be juries providing evidence rather than assessing evidence, or juries bringing the suspects before the court but not proving guilt. That was done by other means, either by compurgation, which was oath supporting or trials by ordeal, all based, of course, on a Christian dispensation, where everybody thought that if they told a lie or if they gave false testimony, not only will they be punished in this world, they'd be punished in the next. It was quite an effective way of doing things. So juries existed, or popular participation existed, for centuries.

Euan: So you're describing the early form of juries that coexisted with trials by ordeal and combat. But when does the jury become a regular part or more of a fixture in the justice system?

Harry: It was when the Pope effectively abolished trials by ordeal. The King in 1219 sent out his judges to try and determine another way of proving guilt. We can't, anymore, duck people in ponds. We can't get them to take up hot iron. We can't get them to fight judicial combat, although those did persist for some time. We needed another system. And the judges plumped for popular participation. This made the common law completely distinct. On the continent, law was professionalised. It was professional judges who carried out the investigations and made the decisions. In England, it was popularised. In other words, popular participation became a hallmark of the common law.

Euan: Brilliant. Thank you. When these jury trials start coming in, do you think the Crown and do you think people see them as a positive change, a positive change from ordeal, for example, or is it something that's quite difficult to set up? It's quite time-consuming. It's a civic duty, but not a welcome one.

Harry: How popular it was, is very difficult to say. We're not sure how popular trials by ordeal were. They seem to have been quite effective because most people, if they were guilty, ran away before having the ordeal. Most people who had the ordeal were acquitted. In other words, if you dared to take the ordeal, you were saying before God, 'I'm not guilty of something', and on the whole, God exonerated you, or so the records seem to indicate.

So I'm not sure if it was more popular. It was just inevitable. Because without the involvement of the clergy in the ordeals, which was a judgment of God, 'judicium dei' as it was called in Latin, without the clerical involvement in that, they had no basis anymore. They had to have an alternative. Certainly, we know, in 1220, the first jury trial, when it was still in that fluid transition period, that people who were indicted actually opted for trial by jury. They were perhaps a bit foolish. Because out of the seven defendants, six were hanged, and one was acquitted.

Euan: [Laughs] And could you tell us a little bit more about how trial by jury has evolved since then? So in the early days, in the 13th century, the 14th century...if a modern juror went back to that time now, what would they experience? How would their duties and responsibilities be different?

Harry: Well, the role of juries has changed considerably. One of the most dramatic changes is that early jurors were appointed because they knew the people involved and knew the locality. That is the absolute opposite now. If a juror knows the defendant in the dock, or works for a bank that's been defrauded, or has a friend who's a police officer in the same police station [as those] who were investigating a case, they don't sit on the jury. They excuse themselves, or the judge has them removed from the jury. Whereas, in the early days, it was local knowledge that was the credential for jury service, now it disqualifies you from jury service.

Other aspects became important as time went on as well. We know, for instance, by the 14th century, there was a division in function between the judge and the jury. The judge dealt with the law and the jury with the facts. That only was established over centuries, that strict division, which we have now.

It was only in 1670, that it was absolutely established that the jury should be independent. This was the case of Penn and Mead. They were both Quakers. In fact, Penn was the guy who founded Pennsylvania. They were on trial at the Old Bailey for preaching, which bizarrely was an offense in those days unless you were an Anglican. They defended themselves, both being lawyers. They put it to the jury that the jury had the right to acquit them, even though they didn't deny what they had done. The jury did and were sent away three times, one time spent the night in the jury room without even a pisspot, and eventually were imprisoned.

This went to Chief Justice Vaughan. He said that juries had the absolute right to bring in any verdict that they wanted. This is very important constitutionally. We call it a 'perverse verdict'. The Americans call it 'jury nullification'. It means that even if somebody admits to an offence but goes not guilty, you can still acquit.

It just meant that juries have this complete sacrosanct independence and cannot be told by the judge to convict. Judges can make it pretty clear what they think of the evidence, but they have to be careful. They can tell juries to acquit. They can't tell juries to convict.
So there have been a number of changes. I suppose the obvious one is that people would notice there were no women sitting in juries for the first 600 years of their existence, but there were quite a lot of other changes as well.

Euan: So we've been looking at the Dudley and Stephens case as part of this episode. How would you say it fits into the larger history of trial by jury?

Harry: Well, I would say it doesn't fit into the history of trial by jury at all because it wasn't trial by jury. There was a grand jury, which we no longer have. That's another change. A grand jury was to decide whether there was a prima facie case. We abolished that many years ago. The Americans still have it, interestingly enough. It went before a petty jury. That's the trial jury or what the trial juries used to be called, but because the judges wanted to establish a point of law and the point of law being that the law of the sea, which allowed you to eat cabin boys when you were peckish, was not the law of the land.

But in order for it to be decided by judges in London, what the law was and to establish English law, and it still is English...law, they had to have a conviction. But they have to have a conviction for murder. The real problem they faced with Dudley and Stephens is...there was a lot of sympathy for what Dudley and Stephens did. Even the brother of Richard Parker, whom they had killed and eaten, shook hands with them and put on his brother's grave, an inscription saying, 'Let it not redound against them', or words to that effect.
The danger was a jury might well acquit them. Alternatively, the jury might well find them guilty of manslaughter, a lesser charge, but that would have been a disaster. So it was deliberate judicial manipulation. The case was taken out of the hands of the jury. It was removed from the jury, brought to London where the judges by legal shenanigans, again, effectively constituted themselves as the jury as well as the judges. It's the only time the death penalty has ever been passed in the Royal Courts of Justice because the Royal Courts of Justice doesn't do trials, except on this occasion.

The senior judiciary decided that they really had to effectively clamp down on the custom of the sea. The custom of the sea had become an almost rival legal system. What you could do at sea was not necessarily what you could do at home. This is why when Dudley and Stephens arrived back in Falmouth, and they were asked what happened, and, 'How on earth did you survive?' They didn't say, 'Oh, we ate a turtle', which they did. They say, 'We ate the cabin boy, of course', because that's what they're expected to do. That's what you did when the ship went down.

Now, the judges thought that the British way should be the Birkenhead way. The Birkenhead was a steamship troop carrier that had sunk off South Africa. This is where we get the phrase 'women and children first' because the soldiers on the Birkenhead stood on the deck, stood to attention, and played their band until they sank under the seas, while the women and children got away. That is the British way of doing things.

The judges actually used that case, in other words ‘preserve the young, not sacrifice the young’. The judges wanted to ensure that this happened. As far as I know, this is the only time it ever happened. It was a very dodgy procedure, but it probably came to the right result. It wouldn’t happen these days, our judiciary would not behave like that. But in this one particular case, they did. But it was a bit of a one-off. The law was established that necessity is no defence to murder, and that’s what the judges wanted but they weren’t prepared to leave it in the hands of the jury.

Euan: Great. Thank you. And the final question I've got for you: why do you think it's important to look at the history of trial by jury? Why should it matter to everyday people today?

Harry: Well, I tend to think that the more knowledge of history people have the better because it helps to understand why things are the way they are. To know that the jury dates back right to Anglo-Saxon times and has been a hallmark of the common law since at least the 13th century….and the fights that are carried on in order to ensure that juries survive, both independently and representatively: male and female, Black and White, and so on…I think is very important in order for people to understand why it is a significant role for them to play.

It's the only time probably in their lives when they will be asked to make a reasoned decision affecting the life and livelihood of another human being. I mean, how many people read party manifestos before a general election? But you take those same people, ordinary people like you or me, and you tell them all the facts and say, ‘You've got to make a decision which is going to affect the life and livelihood of that individual, or those individuals in the dock’. They take it very seriously. It's very important for a democracy.

Also, fundamentally, it is a safeguard against tyrannical government if you have an independent jury – not paid judges under the control of the executive. We have an independent jury who can't be controlled and who can act against what the government wants if they so desire. For the general public, to have some understanding that this was not pulled out of the air in 1900 or imposed upon us by some external force, but is really just a continuation of that fundamental aspect of English criminal law… For all those reasons, some understanding of its history and significance, I think, go some way to help protect it. And it’s worth protecting.

Laura: The National Archives holds records of thousands and thousands of criminal and civil trials. Like with the Dudley and Stephens case, these records tell us more than just the accusation and the verdict. They give us glimpses into the unique historical context of each case and the individuals who were drawn into these legal dramas.

Euan: And that's the subject of our next episode: evidence. The actual items of courtroom evidence that survive in our collections...and a more figurative look at how our legal records are evidence of the past that would otherwise be lost to history. So make sure to subscribe so you don't miss the final episode in this series.

Laura: Thanks for listening to On the Record, a production of The National Archives at Kew.

To find out more about the documents discussed in this episode, the history behind them, and The National Archives, follow the link from the episode description in your podcast listening app or visit nationalarchives.gov.uk.

Listeners, we need your help to make this podcast better! We need to know a bit more about you and what themes you're interested in. You can share this information with us by visiting smartsurvey.co.uk/s/ontherecord. We'll include that link in the episode description and on our website. You can also share your feedback or suggestions for future series by emailing us at OnTheRecord@nationalarchives.gov.uk.

Euan: Thank you to all the experts who contributed to this episode. This episode was written, edited, and produced by Hannah Hethmon for Better Lemon Creative Audio.