

Elizabeth Scott - the First Woman Hanged in Victoria

How far have we come?

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This article compares two cases in which women were convicted for killing their husbands. Both cases were in rural Victoria, but they occurred over a century apart. Debbie Kirkwood, DVIRC's Publications Worker, argues that although there have been some notable changes in the way that trials are conducted, the cultural and political perceptions of women who kill remain eerily similar. Women continue to be judged according to perceptions of appropriate female behaviour.

Nineteenth Century: Elizabeth Scott

Elizabeth Scott was the first woman to be executed in Victoria¹. At the age of 23, she was executed on 11 November 1863 at the Old Melbourne Gaol. Elizabeth was convicted of murdering her husband, and two men were also convicted for the same murder. A historian, Michael Cannon, has documented Elizabeth Scott's story from archival information².

Elizabeth came to Australia as a child with her parents in 1853 during the gold-rush era. At the age of 13 her parents married her to Robert Scott, who was nearly forty years of age. He was a wealthy miner and a chronic alcoholic. The couple had two children and ran a bush inn. Little information is available about their marriage, however, there is some evidence that the husband was drunk every evening and brutal towards his wife. Elizabeth appears to have formed a relationship with a young man, David Gedge, who was a regular at the inn. They were also friends with another man, Julian Cross, who stayed at the inn. These two men were charged, with Elizabeth, for the murder.

It is difficult to know what happened on the night that Robert Scott was killed. The three accused only gave brief statements

to police, and these were never formally recorded. None of the accused were called to give evidence at their joint trial. It is evident that Robert was shot while he slept in his bed and that a gun was placed in his hand to make it look like a suicide. However, it was obvious to those attending the scene afterwards that it could not have been a suicide.

The stories of the three accused differ. David told police that Julian shot Robert Scott. He said that Robert had been 'scolding' his wife and Julian asked him what was going on. When David told Julian what had happened, Julian pulled out his gun and asked David to make a bullet for it. After David made the bullet, Julian went in and shot Robert. When the police approached Julian he denied the shooting and told the Constable 'I'm innocent, but I know I'll be hanged for it' (Cannon 1994:19). Julian Cross later made a confession to police. He said that he was asleep when David came into his room and told him he had tried to shoot Robert Scott but the gun had not worked and that Julian would have to do it. Julian said that he replied, 'but what if Mrs Scott does not want me to?' (Cannon 1994:19). He claimed that he then went into the kitchen and asked Elizabeth if she wanted him to shoot her husband, and that she said 'yes' and gave him a glass of brandy.

This 'yes' is the only evidence directly implicating Elizabeth in the murder and it is uncorroborated by any other evidence.

¹ Elizabeth was the first of five women hanged in Victoria.

² There is very little information available about Elizabeth Scott. All of the information in this article about Elizabeth Scott is taken from Michael Cannon's book, *The Woman as Murderer: Five who paid with their lives* (1994). Today's Australia Publishing Company, Mornington, Victoria.

Elizabeth herself denied having anything to do with the killing. One witness who came into the room after hearing the gun shot said she saw Elizabeth standing in the kitchen 'struck dumb'. Elizabeth continued to protest her innocence to the end. Moments before she was hanged, she turned to David on the scaffold and said, 'David, will you not clear me?' (Cannon, 1994:34).

The trial of Elizabeth Scott and the two co-accused men was held in Beechworth and lasted only one day. Elizabeth's lawyer did not take the opportunity to cross-examine the police officer; he did not ask him a single question. He also did not give Elizabeth the opportunity to give evidence herself. The wife of a local farmer gave evidence that Elizabeth Scott had told her that her husband was 'so jealous of her she was afraid to leave him'. Witnesses at the trial also said that Robert was extremely drunk and was 'scolding' his wife that evening. However, this evidence only arose in the context of witnesses describing the events of the evening, and was not used to show that Elizabeth was abused by her husband or to make a defence for her.

The all-male jury took thirty minutes to find the three guilty and the judge sentenced them all to be hanged. The judge was known as a conservative 'hanging judge' (Cannon 1994:24). Although he directed the jury to disregard all cross-allegations in the verbal statements made to police by David and Julian, he did not point out that once this was done, there was no evidence left against Elizabeth Scott.

Given what we now know about patterns of abuse in relationships, the fact that Elizabeth Scott's husband was controlling, abusive and jealous towards her indicates that a history of violence in the relationship may have contributed to the circumstances in which her husband was killed. It may be that the co-accused men acted to protect her, with or without her knowledge and involvement.

133 years later: Heather Osland

In 1996, Heather Osland and her adult son, David, were charged with murder for the killing of Frank Osland who physically, sexually and psychologically abused them³. They argued that they had acted in self-defence. David, who struck the fatal blow, was acquitted (at a retrial), while Heather Osland was convicted of murder.



In contrast to the trial of Elizabeth Scott, evidence of the abuse experienced by Heather Osland and her children was heard at her trial and was used to explain her actions. The abuse included being dragged by the hair, held under water, kicked, punched and suffocated. The sexual abuse was ongoing. Heather was frequently stalked at work, if she visited friends, and at places where she went to escape the violence. Heather Osland had to witness the abuse of her children and their pets. For example, Frank Osland broke Heather's daughter's nose for swearing, and beat and killed family pets. He made constant, detailed threats to kill the children. An expert gave evidence at the trial that Heather Osland was a 'classic' example of a person experiencing Battered Woman Syndrome⁴.

Despite evidence of a history of violence and of Heather and David's fear that Heather would be killed, she was found guilty of murder and sentenced to 14 ½ years in prison. In 1997 Heather Osland

3 At the trial, David gave evidence of being sexually abused as a child by Frank Osland.

4 The concept of Battered Woman Syndrome has been used to explain domestic violence and the impact on victims. It has been widely criticised for pathologising women's behaviour. At the time of Heather Osland's trial, skepticism about the syndrome may have contributed to the undermining of the evidence relating to the history of violence against her.

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appealed her conviction and sentence to the Supreme Court, but this was unsuccessful⁵. In 1998 a High Court appeal was also dismissed⁶. A subsequent Petition of Mercy for a compassionate release from prison was rejected by the State Government.

Not all women who kill their husbands receive the harsh penalties given to Elizabeth Scott and Heather Osland. However, there are some elements of both cases that reveal similarities in legal and media responses to women who have killed throughout the ages.

Cultural Expectations of Feminine Behavior

Feminist theorists have long argued that female offenders are judged more for failing to conform to expectations of them as wives and mothers than for the seriousness of their crimes [for instance see the work of Pat Carlen (1998) and Carol Smart (1995)]. A study of women executed for homicide during the first half of the twentieth century in England found that women who failed to conform to traditional expectations in relation to sexuality, respectability, domesticity and motherhood were more likely to be executed (Ballinger 2000: 329).

It would appear that Elizabeth Scott was condemned for being a 'wanton' woman because she had an affair with the man who was involved in killing her husband. *The Herald* newspaper, in reporting on the execution, stated:

'Let us trust that their fate may long remain in the memory of the rising generation of this colony, as a warning against the abandonment of principle and the encouragement of sinful desires' (cited in Cannon 1994: 35).

5 R v Osland [1998] 2 VR 636.

6 Osland v The Queen [1998] HCA 75.

7. Transcript of High Court Appeal proceedings, Osland v The Queen M14/1998 (23 April 1998).

Similarly, Heather Osland was judged in terms of her (non)conformity to the stereotype of a wife and mother. At her trial she was depicted by the prosecution as cunning, manipulative and deceptive, and as having failed as the mother of her children because of the abuse they experienced from Frank Osland.

Gendered notions of masculinity and femininity are based on dichotomies which posit masculinity with aggression and femininity with passivity. Violence by women is therefore viewed as unnatural. For instance, *The Herald* editorial on 6 November 1863, stated in relation to the impending execution of Elizabeth Scott:

'There is something unusually terrible in condemning a woman, even though she be unsexed by her crimes, to a sudden and shameful death...' (Cannon 1994:28).

Women's violence is seen to 'unsex' them because it is deemed to be antithetical to their nature. The historian Michael Cannon makes the following comment in attempting to account for the all-male juries' willingness to convict Elizabeth Scott, despite the lack of evidence against her:

'Perhaps the jurors deduced that if all husbands who drank and mistreated their wives were to be murdered, the male population of Beechworth would be considerably reduced' (Cannon 1994: 27).

Cannon's proposition resonates in comments made at Heather Osland's High Court appeal in 1998. Justice Kirby stated:

*'No civilized society removes its protection to human life simply because of the existence of a history of long-term physical or psychological abuse. If it were so, it would expose to unsanctioned homicide a large number of persons who, in the nature of things, would not be able to give their version of the facts..... there is no carte blanche, including for people in abusive relationships to engage in premeditated homicide'*⁷.

The idea that there is a risk of unleashing an avalanche of homicidal women intent on killing their husbands is clearly ill-founded. Research consistently shows that approximately ninety percent of all homicides are perpetrated by men (Mouzos 2000). Women are at far greater risk of being killed by their partners than are men [Victorian Law Reform Commission (VLRC) 2003]. Whether it is the male or the female who is killed in a domestic homicide, the most common precipitating factor is a history of the man's violence against the woman. Many women in Heather Osland's situation do not live to tell their story at trial.

The Woman as Instigator?

Historically, criminological literature has taken the view that female offenders are cunning and more deceitful than men. Women are seen as the instigators of violence rather than as the perpetrators. The view of women's violence as unnatural has the effect of creating a perception of their violence as 'worse' than men's violence (Lloyd 1995). In the cases of Elizabeth Scott and Heather Osland, a male was accused of doing the act of killing. In both instances the women were perceived to be the instigator of the homicide.

This is evident in the response of an official present at the execution of Elizabeth Scott, who with surprise exclaimed: '...that one so young and of so amiable an aspect should have been the prime mover in so horrible a deed' (Cannon 1994:32). In Heather Osland's case, the trial judge described her as the instigator in the killing of her husband:

You drew in your son, whom you knew has a close, loving and protective feeling for you, to help you carry out your plan. I also believe you already suffer remorse for what you have done to your son in that context.⁸

Justice Kirby again provides a further illustrative quote:

'it may be that when this jury got into the privacy of their room ...they said she is a very bad woman and he is just a simple kid who did what his mother wanted.'⁹



The perception of these women as 'bad' women who manipulate others to kill for them is a powerful image that obscures the context in which the killing occurs. It defies logic that Heather Osland's son, who was 23 at the time of the homicide, was acquitted on the basis that he acted to protect his mother's life, when Heather Osland was not found to have acted to protect her own life.

The Impact of the Politics of the Times

Unlike Elizabeth Scott, some women convicted of murder in the nineteenth century were given a reprieve. For instance, Anne Hayes was convicted in 1860 and sentenced to be hanged. She stabbed her husband in a quarrel after he purchased coffee and sugar from the local store. Although she had previously been in prison for drunkenness and assault, her sentence was commuted to a prison term on account of her youth. Three years later when Elizabeth Scott was convicted, there was a newly-elected premier who was preoccupied with miners' agitation for land reform and who was not willing to commute her death sentence (Cannon 1994:27). The governor at the time was also newly appointed and had been advised by the Colonial Office in London not to interfere in daily political decisions (although there is no indication that he was asked to in this case) (Cannon 1994:28).

⁸ Queen vs Albion and Osland 1996 Bendigo Supreme Court.

⁹ Transcript of High Court Appeal proceedings, (1998) 73 ALJR 173

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Unfortunately, there was little support for Elizabeth Scott in the media and no evidence of any community concern for her predicament.

There are also contemporary cases which contrast with the legal outcome received by Heather Osland. For instance, in March 2006, Claire MacDonald was acquitted of a charge of murder for shooting her husband in Acheron, Victoria. Evidence at the trial showed that Warren MacDonald had subjected his wife to physical, psychological and sexual abuse during their 17-year marriage¹⁰. Claire MacDonald and her five children were forced to live in a cellar with no electricity¹¹. She claimed to have acted in self-defence, telling police that 'if I didn't do it now I would be the one who would be dead'¹².

Claire MacDonald's acquittal is highly significant given that her actions were described by the prosecution as a 'cold-blooded, determined and carefully calculated' execution of her husband¹³. The prosecution depicted her as dressing in camouflage, concealing herself in a 'sniper's nest' and waiting for her husband before shooting him several times with a high powered rifle.

The perception that she had planned the murder was identified as a critical problem for Heather Osland at both the Supreme

Court and High Court appeals. A planned or premeditated killing is seen as cold-blooded and as the most highly culpable, in contrast to hot-blooded killings which occur in the 'heat of passion' (Horder 1992, Knelman 1998). So given that Claire MacDonald planned the killing of her husband, why was the outcome for her different to the outcome for Heather Osland? We can never know the reasons for a jury's decision¹⁴. We do know however, that Claire MacDonald's trial took place at a time when unprecedented law reform was being passed in Victoria in relation to defences to homicide.

In the years prior to Claire MacDonald's trial there had been significant community outrage about the sentence received by Heather Osland. Heather's sentence received extensive media attention and resulted in a lengthy political campaign seeking her freedom and reform of the laws. In September 2001, less than two weeks after the Victorian Attorney-General, Rob Hulls, had rejected a Petition of Mercy for Heather Osland, he announced a review of defences to homicide to be undertaken by the Victorian Law Reform Commission¹⁵. Heather Osland's case was outlined as a reason for the review (VLRC 2002)¹⁶. The State Government did not have the political will to grant mercy to Heather Osland despite recognising that her case demonstrated the need for law reform.

In October 2004 the Victorian Law Reform Commission recommended a range of changes to the law after their review of defences to homicide. In November 2005, the reforms came into operation [see the *Crimes (Homicide) Act 2005*]. The reforms

10 *Herald Sun*, Feb 21, 2006, p.11

11 *Herald Sun*, Feb 23, 2006, p. 18.

12 *The Age*, Feb 21 2006, p 5.

13 *Herald Sun* Feb 21 2006, p.11

14 Although it may be worth noting that Claire MacDonald's trial was held in Melbourne rather than in country Victoria.

15 No reason was given for the rejection of the Petition of Mercy. Heather Osland sought the documents relating to the government's decision, including the advice they commissioned from four Queen's Counsel, under the Freedom of Information Act. In a landmark decision the Victorian Civil and Administrative Tribunal granted Heather Osland access to the documents ([2005] VCAT 1648); however, the Government is now appealing this decision.

16 During this time there has also been considerable community concern and lobbying in relation to lenient sentences for men who kill their wives and claim a provocation defence.



included changes to self-defence that are designed to account for the situation of family violence. The Act now provides that a person may defend themselves, or another person, in circumstances where family violence is alleged and where the person may believe on reasonable grounds that their conduct was necessary, even if the harm is not immediate. It has been argued that the 'evidentiary and legal difficulties experienced by Heather Osland at her trial have now substantially been redressed; had she been tried under the present law, she may well have been acquitted' (Hale et al 2006).

The legislative changes did not apply to Claire MacDonald's trial because the homicide occurred prior to the reforms coming into effect. However, there was an awareness by barristers, judges and the broader community that the laws were being changed because they had failed women in family violence situations. At the public launch of the reforms in October 2005, the Attorney-General Rob Hulls described them as 'the most significant reform of Victoria's homicide laws since the death penalty was abolished 30 years ago'. Hulls also acknowledged that the notion that self-defence requires an immediate response to threats has failed to account for the situation of women who kill violent partners. He said:

Women who kill in response to protracted campaigns of violence by their partners know only too well that any attempt to defend themselves when facing an immediate threat frequently leads to an escalation of the violence against them. Women in this situation are simply not capable of defending themselves then and there, whether because they lack the physical strength, because they are attempting to diffuse the assault or because they are trying to protect children who are, tragically, so often present when this kind of violence occurs.

We should perhaps take comfort from the fact that we no longer have the death penalty and that significant law reform has been achieved in relation to defences to homicide in Victoria. It is, however, important to remember that the application of the laws is as significant as their content. We therefore need to continue to raise awareness of the impact of domestic violence on women who kill violent partners and to monitor the applications of the new laws in the trials of women who kill.

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