

J U D G M E N T.

Victor Hiram Carter and Robert Vincent Clancy stand charged that on or about the 10th of November, 1950 in the Territory of Papua they unlawfully killed Reginald William Charlier. The charge arises out of an episode which took place at about 10.30 p.m. on the evening of the 10th of November at the Aviat Mess at Kenedobu. On that date Carter was an honorary member of the Mess and Clancy was a member of the Mess. Before dinner on that day Reginald Charlier, his two brothers, Roger and Ronald, and four other business associates arrived at the Mess and were given accommodation for the night because of the fact that they could not obtain accommodation at the hotels in the township.

After dinner an impromptu dance took place. Reginald Charlier danced with Heather Grace Kelly the wife of Kevin Franklyn Kelly. At about 10.30 p.m. Reginald Charlier went to a table occupied by a party including, amongst others, Carter and Mr. and Mrs. Kelly. He spoke to Carter and shortly afterwards Carter and Kelly and Reginald Charlier left that table and walked over toward a doorway leading from the room onto a verandah. At the doorway there was a halt. Blows were struck, the deceased was picked up from the floor unconscious and within about $\frac{1}{2}$ an hour he was found to be dead.

On examination at the hospital his injuries proved to be a bruise and abrasions below the right eye, a lacerated wound above the right eye almost down to the bone, three small haemorrhages on the right eye ball and a bruise below the left eye. Post mortem revealed that there was extensive haemorrhage forming a thin clot over the surface of the brain and a thick clot at the base of the brain down towards the spinal cord. The left middle cerebral artery was ruptured near its branching from the internal carotid artery. The vessel appeared healthy. Apart from those injuries no other abnormalities were found.

The events of the evening were brought out in evidence in this court.

It appeared from that evidence that Reginald Charlier had taken some drink. So had others who gave evidence in this case. However, there was no evidence adduced that anybody at the Mess that night was drunk. At my request, Mr. Johnson, Counsel for the Crown, has made inquiries and has received an assurance that the control of the Mess has been tightened up. I have been assured that all honorary members have been struck off and a new rule has been passed to the effect that there shall be no honorary membership and that now the bar is controlled by a select panel of responsible members approved by the Regional Director, and that three of the select panel are on duty each night. I am pleased to have that assurance but I repeat that there is no evidence before me that anybody at the Mess that night was drunk, although in my mind this unfortunate episode arose of drink.

22 Witnesses were called, 15 by the Crown and 7 by the accused; including 4 Medical practitioners, 2 by the Crown and 2 by the accused.

Apart from medical evidence there was much variation as to the actual happenings during the episode at the door when Reginald Charlier was felled to the floor. Counsel for the accused suggested that such variation should bring about a doubt in the minds of a jury. That was their duty to both the accused but I must keep in mind that the whole episode took no more than probably 5 seconds and if a line of witnesses came before me and gave a story out on the same pattern I would begin to suspect that they got together and formulated their story.

Ciancy admitted that he struck the deceased one blow. That was the last blow or, shall I say, the second blow. He also admitted that he struck the first blow and on the evidence from witnesses including the evidence of Dr. Price, who held the post mortem, there were only two blows struck. I could rest there and say that is the end of my function in deciding whether Carter struck the deceased; but as a jury I must consider all the evidence before I decide whether or not Carter struck the deceased; and as a jury I must sit back calmly and view the whole of the evidence within the frame work not looking for a needle in a haystack but seeing if there are any outstanding facts which cannot be shaken at their foundation. If these facts are not apparent in the picture then

definitely Carter must be acquitted.

In the picture of the evidence as adduced to me I see outstanding the story of the episode as given by four witnesses, Albert Frederick Robinson, Kenneth Douglas Pocock and Roger Harold Charlier for the Crown and Kevin Franklin Kelly for the accused Carter. Robinson's credibility was attacked by both Counsel, Mr. White and Mr. Jones, again properly in compliance with their duty to their clients, because of the fact that when he was first interviewed by the Police he did not give a full report as to what he knew of the episode. He withheld from the Police in the first interview part of what he knew. Admittedly that is not commendable in the eyes of the law. But getting down from the legal pedestal his attitude was one which perhaps the average man could expect to find in the average man. He considered that a man had been killed. That was his impression of the episode at the Moss that night, and he did not want to be involved in it. However, when he had the advice of his friend, Pocock, who appreciated the gravity of the position, he came forward and gave the Police a further statement.

The credibility of Roger Charlier was attacked because of the fact that he placed himself inside the room at the crucial moment whereas Pocock placed him outside the doorway on the verandah. But in that particular respect, and on his previous supporting evidence, I am prepared to believe Roger Charlier as to his whereabouts.

Robinson's evidence on the episode so far as it relates to Carter, extracted from my notes in evidence is - "About 10.30 I heard a scuffle inside the Mess. I got off my chair and went inside the Mess and I saw Victor Carter hit deceased and deceased fell to the floor. He hit deceased on the face with his right hand. His hand was closed. It was with his fist. A few seconds afterwards the deceased tried to rise off the floor. I noticed a thin trickle of blood on deceased's face. When deceased was half way up off the floor Bob Clancy rushed in and hit deceased on the left side of the face with his right hand."

The evidence of Pocock relating to Carter, as extracted from my notes of evidence, reads as follows - "Later in the evening about 10.30 I heard a noise inside the Mess. I turned and looked inside and saw Mr. Carter throw a punch at the deceased. At that very moment Roger Charlier rushed into the lounge. After the punch from Carter deceased went to the floor. He fell back on to the floor. Next moment I saw Mr. Clancy come into the picture and throw a punch to the deceased who was rising from the floor. The punch connected to deceased's face." Pocock was asked to demonstrate the attitude of the deceased when he was struck by Clancy. His demonstration as noted by me - "Half up, the body bent and forward over the thighs and knees. Knees bent, arms loose, hands below and outside knees."

Immediately before the episode both Robinson and Pocock were seated on the verandah outside the doorway, Robinson facing the doorway at an angle and Pocock with his back to the wall but in a position where he could, as he alleged, turn his head and have seen what was happening.

The evidence of Roger Harold Charlier on the episode as extracted from my notes of evidence reads - "Reg then proceeded towards the exit leading on the verandah followed by Mr. Carter. Reg stopped at the doorway. Mr. Carter also stopped there. I watched them talk for a couple of seconds. They were then joined by a third party, which I recognised later as Clancy. I then walked slowly towards this group and saw Mr. Carter hit Reg in the face. That was the first blow I saw struck. Mr. Carter hit Reg in the face with his right hand. I would say it struck in the vicinity of the forehead. Reg fell back to a more or less sitting position. I saw Reg trying to get to his feet. I then saw a second blow struck while Reg was still trying to rise. I was stopped from joining, from going any further towards this group, by two Europeans. The second blow was directed at Reg. This blow struck him in the face and it came from either Carter or Clancy. I cannot say definitely from whom. Reg went back on the floor hitting with his head as he fell and lay there motionless." Charlier was asked to demonstrate the attitude of his deceased brother when the second blow was struck. He demonstrated - Half to three quarter way up, both knees flexed and body bent forward

above the thighs. Both arms loose, both hands near rear of thighs.

Taking now Clancy's evidence on the matter up to the first blow. "A group of about three or four people including Carter and the deceased moved from Carter's table towards the door. My attention was distracted for a moment; next thing I looked up and observed the deceased and Kelly struggling in the doorway. They were sort of holding each others arms. You could feel it in bolts. I also observed another chap coming across from the left. I do not know who he was. With that I turned round to chaps at the bar and I said 'Somobody better break this up before it is a free for all'. I moved rapidly to the door. I was just a pace off Kelly and the deceased when they got out of the holt but still facing and close to each other with Carter to the side. I pushed in between Kelly and Charlier and Carter. I gave Charlier a push with my forearm. I said to Charlier 'Break it up.' I turned to the other two with the intention of telling them to break it up. Before I could say it I received a punch on the back of the neck near the ear. As soon as I received that I span around and the deceased was shaping up to me as if to punch. I hit him with my left hand. It landed on his face but I could not say where. He slumped back against the wall with one hand on the floor."

I could have reasonable expected some help from Mrs. Kelly in the matter. Without going to any great length on the evidence leading up to the episode, Reginald Charlier's attention to her were in part, at least, the cause of the disturbance. Reginald Charlier had danced with her that night on three different occasions. He called her by her maiden name and had convinced her that he knew her father. But in her evidence on the episode after explaining how the deceased took her back to the party table after the third dance and how she endeavoured to introduce him to her husband, she states "Mr. Charlier appeared to ignore this, (introduction) and turned away. I began speaking with Mrs. Bugg, a lady in the party, and I did not follow his movements. The next thing I noticed was several people standing in the doorway or the Mess, amongst whom I noticed my husband walking toward the

party. I paid no attention at all to that. I realised that something was occurring but I just thought it would be a matter of a few words and the affair would be broken up. I carried on talking with Mrs. Bugg. I did not see anything at the time other than people grouping at the doorway." That is the extract from my notes of her evidence on the episode itself. But in my mind that must be weighed with other evidence as to events throughout the evening. Reginald Charlier had danced with her during the evening. Midway in the evening there bid fair to be a disturbance centred at the table where she and Carter were seated but that disturbance was nullified, and after which one of the men who may have been involved in the disturbance shook hands with Reginald Charlier. Later she had a dance with Reginald Charlier because, as she alleges, she did not want to create a scene. And her husband had returned to the party table only a few moments before he left to go to the doorway, after having been absent at the bar, on his own evidence, for about an hour. I would have had expected Mrs. Kelly to have had a more humanly curious interest in what was happening - and I think she had, but she did not want to tell me what she saw.

The evidence of Kevin Franklin Kelly on the episode - "Some few minutes later, that was after I returned to the table, which may have been 10 minutes, the deceased returned to our table and he again stood between my wife and Carter and he addressed some remarks to Carter which I did not hear. Carter replied but I did not hear his reply. The deceased then took Carter by the sleeve lightly and motioned towards the front door of the room. Carter got up and he and the deceased moved towards the front door of the Mess room. I followed them to the door and just before reaching the front door I had almost caught up on Carter and the deceased and I noticed the deceased turn. He stood and pushed me away, with his right hand I think, and at the same time

saying 'This is nothing to do with you, keep out of it' or words to that general effect. I pushed him back and said 'Don't push me around' or something to that effect. At that stage somebody came in between Charlier and myself. I think, but I am not sure, that it was Mr. Clancy. Next thing I can clearly remember is the deceased being struck a blow about the face or head. I thought at the time it was Clancy but I was not positive." Under cross examination, and here is where I say that Kelly has helped me in arriving at a decision as to whether or not Carter struck the deceased. "Q. One of the Charlier brothers has said that when you were in holts with Reginald Charlier, Carter struck Reginald Charlier in the face. What have you to say to that? A. I would say he did not. Q. You are certain of that? A. Yes. Q. You have recollected at this last moment? A. No, I am sure Carter would not have struck Charlier. There were only three of us there at the time."

Kelly's last answer as to only three persons being present when the first blow was struck is supported by evidence of Ronald Douglas Charlier on cross examination. "Q. Who else was in the doorway when the first blow was struck? A. I don't know who the people were but I am sure one person was standing next to Mr. Carter. Q. You recall no persons other than your brother Reg, Mr. Carter and the other person being at the doorway? A. No. Q. Is your recollection clear? A. Yes. Q. You know Mr. Kelly? A. No."

Some of the other witnesses giving evidence regarding Carter's part in the episode stated, and I believe them, that they did not see Carter there. I believe those witnesses to whom I am referring now without naming them; because under the circumstances in which they were placed I would not have expected them, within a few seconds, to have gained a complete mental picture of exactly what happened. But there were some other witnesses who belonged to the Mess and who knew Carter but stated that they did not see him. As I weight all the evidence, and having had the opportunity of noticing their demeanours in the witness box, I have come to the conclusion, whether rightly or

wrongly, that they did see Carter at the doorway but so far as this case is concerned they did not want to see him.

Although Kelly's evidence runs contrary to Roger Charlier's evidence on the point I think, as a jury, that Kelly painted the correct picture - that when that first blow was struck at the doorway there were only three people there. They were Kelly, who had followed across from Carter's table, and Carter who had accepted the invitation to come out and see it out. That is despite Clancy's evidence that he moved from the bar and arrived at the doorway very smartly as the party were moving across from Carter's table to the doorway.

Having formed the belief that there were only three people at that doorway when the first blow was struck, then I must reason that the first blow was not struck by Kelly, as that was never alleged, and it was not struck by Charlier himself, therefore it must have been struck by Carter. And as a jury ~~is to find~~ that Carter, not Clancy, struck the first blow and felled Reginald Charlier to the floor.

That finding then brings me to the consideration of Clancy's defence of self defence. His whole ground of defence was that as he intervened he was struck on the back of the neck by Charlier and he turned around to find Charlier in a fighting position ready to strike at him again, whereupon, in self defence, he struck the first blow to the deceased. Reginald Charlier did not receive the first blow from Clancy and when Reginald Charlier was rising to his feet after the first blow he was not in a fighting attitude. As I interpret the evidence and the demonstrations given by different witnesses he was in a semidazed condition and not capable of hitting anybody. Therefore Clancy's defence of self defence collapses.

Which brings me to consideration of the medical evidence and whether the Crown, on that medical evidence, has proved beyond reasonable doubt that Carter and Clancy unlawfully killed Reginald Charlier.

They both struck Reginald Charlier and if the medical evidence

proves that either or both blows were directly responsible for Reginald Charlier's death, or if either blow or both blows precipitated his death both accused are guilty of the charge laid against them.

Dr. Price and Dr. Craggs were called by the Crown. Dr. Tonakie and Dr. Brown were called by the accused. Dr. Price performed the post mortem, and he was in the witness box practically the whole of one day. A great deal of medical evidence was adduced as to what could happen or what might happen in certain events but I, as a jury, have to apply my mind to this one question - "Under the circumstances of that evening and Reginald Charlier being in the condition in which he was - not drunk, but having had some drink - would those blows or either of them, not might they, but would they, probably either have brought about his death or precipitated his death?" On the formally postulated question settled by all three Counsel, Dr. Price expressed the opinion that they probably would. They probably would, but he hesitated to say definitely that they did. Dr. Craggs though it possible but extremely unlikely. Dr. Tonakie did not think it probable and Dr. Brown I think summed the position very well. He would not care to express an opinion.

I must accept the medical evidence as it is put to me and endeavour to construct that evidence as best I can. On the post mortem the only evidence of damage to the brain was the haemorrhage and which all four Doctors unanimously agreed would have followed on an aneurism which was described as a weakening in the wall of an artery and which cannot be diagnosed during life but which can be ruptured spontaneously or from external injury or from blood pressure arising from the consumption of alcohol or brought about by excitement or exertion. I am not for one moment considering placing myself in the position of having to decide whether the consumption of an estimated, but not fixed, quantity of beer would bring about blood pressure in any man nor am I going to endeavour to consider whether Reginald Charlier was the type, or was not the type, of man whose blood pressure would have been raised by the excitement or exertion which he may have

experienced during that evening. All four medical practitioners did agree that had the blow or blows ruptured the aneurism they would have expected to have found some evidence of other injury. They would have expected evidence of other injury but it did not follow naturally as a matter of course that it should be there. On the medical evidence and on the medical opinions and endeavouring to perform my duty as a jury, I hesitate to find that either the blow by Carter or the blow by Clancy brought about or precipitated the death of Reginald Charlier. Therefore on the charge of unlawfully killing Reginald Charlier they must be acquitted. But as I have found that they both struck Reginald Charlier I may, if I so desire, find them guilty under Section 577 of the Criminal Code of any of the following alternatives - unlawfully doing grievous bodily harm to Reginald Charlier, unlawfully assaulting Charlier and thereby doing him bodily harm, unlawfully wounding Reginald Charlier or unlawfully assaulting Reginald Charlier.

Bearing in mind the evidence as to the blows, I find that Carter and Clancy each struck the deceased a blow on which I may find them guilty of unlawfully assaulting Reginald Charlier and thereby doing him bodily harm. And I find both the accused guilty accordingly.

Victor Hiram Carter you have been found guilty that on the 10th of November, 1950 you unlawfully assaulted Reginald William John Charlier and thereby did him bodily harm. Have you anything to say why sentence should not be passed upon you.

Mr White requests leniency on behalf of Carter. No previous convictions, good character, etc. Suggests binding him over.

Crown Prosecutor - I have nothing to say.

Robert Vincent Clancy you have been found guilty that on or about the 10th of November, 1950 you unlawfully assaulted Reginald William John Charlier and thereby did him bodily harm. Have you anything to say why sentence should not be passed u

Mr. White requests leniency on behalf of Clancy. No previous convictions, good character, etc.

Crown Prosecutor - I have nothing to say.

ADDRESS TO ACCUSED.

You should both thank Divine providence that you are not standing in the dock at this moment for sentence for unlawfully killing Reginald Charlier. You have been acquitted on that charge only because I, functioning as a jury, and not as a critical Judge, failed to convince myself beyond reasonable doubt that you were guilty of that charge. You are both in the dock at this moment because of drink. Neither of you were drunk that night but you both had partaken of more drink than was necessary. Neither of you had full control of your faculties.

You, Carter, were foolish enough to take up some other man's domestic affairs. Kelly was present in the Mess that night but on his own evidence immediately before you felled Charlier to the floor, Kelly had been absent at the bar for about an hour; and that either covering the time of the first possible disturbance which was quelled, or, worse still, after that.

What you should have done was to have looked after your own affairs when your mind was befuddled with drink or else to have previously done something which, according to your character as brought out here in evidence, you would have done - that was to exercise your influence and use your reasoning to have Reginald Charlier go off to bed. That should have been done earlier in the evening after the first disturbance had the position been handled properly. But you continued on to the stage whereby you accepted a challenge to come outside, and then at the doorway when Reginald Charlier turned round you felled him to the floor, in my opinion, in a cowardly manner. Kelly had followed in the trail behind you and there was some evidence in this Court that Kelly was in holts with Charlier. It may have been a second or so before

you struck Charlier. There were two men against one and you got in the first blow and felled Charlier to the floor.

But as I have considered the evidence and reasoned it out some of your friends have appeared to stand by you and have endeavoured to help you out of your predicament.

You, Clancy, were foolish in the other direction. You also had taken more drink than was enough for you otherwise you would never have handled the situation as you did. You gave evidence in the box that you went across to the door to prevent the situation extending - because you had been present at a meeting of the Mess some month or so previously at which all those present were exhorted to do the very best for the Mess - tighten up the control so that when the time came for issue of a Licence the Mess would get its Licence. But what did you do? You did not handle the situation in the manner as behove you if that was in your mind. You went over and you crashed in, and you sent Charlier the stranger, not your man, to the floor. You blamed Charlier for the disturbance and you were prepared to deal with him. Then what did you do for the good behaviour of the Mess? On your own evidence there were others milling around the door including two or three men on the floor but you, with your self shouldered responsibility, moved back to the bar and then made some comment excusing yourself for having struck the cowardly blow. You were going to put Reginald Charlier in his place.

Both of you - he is in his grave. That is not his place. He was the type of citizen who had served his country well prior to coming here with his brothers and business associates prepared to stake his future in this Territory. He was the type of citizen this Territory would welcome with open arms.

I repeat again. You are lucky that you are not being sentenced for unlawful killing. Mr. White has asked on behalf of both of you that I treat the matter leniently. This was not a fair fight. It was brought about by drink. If you people drink you must accept the responsibility of what you do after taking drink. I do not feel disposed

to treat either of you lightly. I consider that you were both in the same degree of guilt. You, Carter, on the one foolish angle and you, Clancy, on the other.

You both have been found guilty of assaulting Reginald Charlier causing him bodily harm. Under Section 339 of the Criminal Code you are both liable to imprisonment with hard labour for 3 years. Under Section 19, Sub-Section 3 of the Code, I may, if I so choose, impose upon both of you a fine not exceeding 500. In the hope that you will both learn the lesson from your experience I do not propose sentencing you to imprisonment in the first instance. On the other hand I do not propose allowing you out with a light fine.

Victor Miram Carter, the sentence of this Court is that you be fined the sum of 200 in default of payment that you be imprisoned with hard labour for the term of one year.

Robert Vincent Clancy the sentence of this Court is that you be fined the sum of 200 in default of payment that you be imprisoned with hard labour for the term of one year.

Mr. White asks for time to pay.

This is the only condition which I feel I can apply. It may be drastic but it is the only one that I can see effective.

In default of payment within 14 days or in the event of the said Carter or the said Clancy moving beyond an area limited by a circumference having a radius of 2 miles from this Court before payment of that fine then he be imprisoned with hard labour for one year.

Both understand that? Yes.

I must tie you down so that you will not feel disposed to leave this Territory before paying your fine. You may both feel that I have treated you very harshly, but I must make up my mind what to do with you, and subject to any appeal my finding holds. As I see the position you are both guilty and you are being treated very lightly, but I must make it a condition that you will not have any opportunity of getting away from this Territory before you pay that fine. There-

fore I limit both your movements to 5 miles from this Court - that is by any manner or means. So if either of you move beyond a range of 5 miles of this Court then the condition of your payment collapses and you are subject then to 12 months hard labour.

A. KELLY

J.

02/12/50.