SC585

IN THE SUPREME COURT
OF THE TERRITORY OF
PAPUA AND NEW GUINEA

CORAM : PRENTICE, J.

Wednesday,

22nd July, 1970.

REG. v. AMUJUONYE

1970

Jul. 21, 22.

MENYAMYA

Prentice, J.

The charge preferred against the accused is one of wilful murder of one Kalitsulako. The actual killing is undisputed. It was done with the accused's bush knife, witnessed by the deceased's wife, and admitted by the accused to the Assistant District Commissioner and in statements to the District Court and to this Court.

On behalf of the accused, Mr. Dillon has raised defences of self-defence and provocation. He contends primarily that self-defence has been shown and that thereunder an acquittal is called for. In the alternative he submits provocation has been shown such as warrants a verdict of manslaughter (under Sec.304), rather than of wilful murder or of unlawful killing. Defence Counsel of course relies for his primary defence on the second paragraph of Sec.271; contending that such an assault was made on the accused by the deceased as to cause reasonable apprehension in the accused of death or grievous bodily harm to himself. Such a reasonable apprehension it is said, arises from the circumstances that -

(a) the deceased had threatened the accused previously;

(b) the accused was distraught and fearful;

(c) the deceased was "tracking" the accused;

(d) the accused had run away;

(e) the accused finally stood up in the bush and waited for the deceased;

(f) the accused did not strike the first blow;

(g) the area was one where police were not available or accessible.

No evidence was given which directly spoke of a belief on reasonable grounds in the accused that he could not otherwise preserve himself from death or grievous bodily harm than by the use of force. But the defence points to the circumstances catalogued above as establishing such a belief by inference.

The wounds on the deceased's body as described by Constable Gawi Lomtoma and by the now deceased Manjawas Yetiamioko

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in their statements, which I admitted in evidence in the exercise of my discretion; and as appears from the statements of the accused to the two courts; were grievous and extensive to the head and neck, being on one count, 4, and on another count, 5. In directing submissions to the fact of blows subsequent to the first, Mr. Dillon contended that the deceased may have arisen from a prone position after the first cut was inflicted. This cut was inflicted across his forehead with a bush knife (a weapon exhibited in court as some 2 to 3 feet long), and cut through the skull to the brain. He contended that the accused inflicted upon him the further blows as a consequence of the deceased "taking up the fight" again. Alternatively, he submits that when delivering the subsequent blows the accused may have been doing no more than slashing vengefully at an already dead body (cf. Reg. v. Jaminyen & Sirinjui (1)). Thirdly, as I understand his argument, he seeks to separate out these later blows by saying they were caused by the heat of provocation.

Of course the Crown bears the onus of establishing beyond reasonable doubt the negative of each of Mr. Dillon's submissions, once these defences are fairly raised by the evidence.

Defence Counsel's submissions on provocation were brief and amounted to the statement that the deceased's assault was a wrongful act such as would deprive an ordinary person (in the accused's position of an inhabitant of a remote village) of the power of self-control. He contended that the requirements of Sec.304 - as to heat and non-cooling of passion - appeared. He also relied on provocation as excusing the blows consequent upon his client's first blow, as set out above.

Self Defence

The body of the deceased was not found until some days after the killing; and no examination by qualified medical personnel proved possible. But I am satisfied that the description of the injuries inflicted to the deceased, as given by Gawi and Manjawas after a physical examination by each of them of the body, may be relied on. It seems more probable than not to me that the deceased's neck was broken, either by the infliction of the blows to the left ear, cheek and base of the skull or in the process of the accused's "standing on" the neck of the deceased. There is no evidence that the first blow in fact caused actual death; or would in a short space of time have of itself necessarily caused death. However, the accused stated that before inflicting the other injuries he told the deceased's wife he had "killed" the deceased. And the wife said she thought (at that

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(1) (unreported) Smithers J, Judgment No. 264 of 27/10/62, Wewak.

time) her husband was "dead". After the dealing of the first blow, she saw no others as she ran away pursued by the accused. It appears to me that the use in these two contexts of the words "killed" and "dead" indicated no more than that the deceased had been grievously hit, struck down, and had fallen to the ground, possibly unconscious.

I draw the conclusion of fact from the circumstances that the accused first pursued the wife some distance, had some conversation with her, and then returned and inflicted further wounds and injuries on the deceased; that he the accused then believed (a) the deceased not to be actually dead, and (b) that further blows were called for to effectuate his purpose whether that purpose be that of murder or (as Mr. Dillon suggests) self-defence.

The evidence establishes that a blow was first struck by the deceased with his axe, but that this axe blow missed and either became a throw or a slip whereby the axe hit a tree. Deceased's wife said that thereafter the deceased neither sought to regain his axe nor to use his bush knife. There is no evidence that the deceased ever got up from the ground or tried to do so. The accused made no reference to any movement of the deceased after he had cut him - in either of his statements to the District Court or this Court.

I am satisfied beyond reasonable doubt on all the evidence and in particular on my finding as to the accused's belief in the necessity for the further blows so as to account for the deceased - that Kalitsulako's death resulted from a combination of the blows inflicted (cf. my consideration of a somewhat similar problem in Reg. v. Tiendeli Pakale (2)).

If a reasonable belief in the necessity of using the force actually used is to be found, it must be found by inference. No mention was made in the accused's statements of such a belief. But I consider no such belief could be established, indeed that it is negatived by the accused's statement after the deceased had struck at him but missed him - "are you going to kill me" or "are you trying to kill me", coupled with the reference "it had started out as a game". For the reason above I would be satisfied beyond reasonable doubt that the defence of self-defence could not be relied upon.

However, even if such a defence were available as to the first blow, from all the material put before me I find myself quite unable to conclude either that at the time of infliction of the subsequent blows (which I have found contributed to

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(2) (unreported) Judgment No. 565 of 17/4/70. Port Moresby

the death) there could then have been a reasonable apprehension of death or grievous bodily harm to the accused or that at that time the accused or an ordinary man in his position could entertain a belief on reasonable grounds that the further force used was necessary in such self-defence.

The Crown Prosecutor submitted that such a reasonable belief (as to necessity of using the force used) could not have been entertained as to the first wounding, because of the possibility of retreat open to the accused at that time. There was no evidence that Kalitsulako intended to or did make any further assault on the accused after missing with, and losing possession of, his axe. I am not satisfied that the accused would have found retreat impracticable or unwise and consequently I am not left with a doubt whether the accused had only one course open to him. I find positively that other courses were open to him - he could have retreated or used force of a lesser nature than he did in fact use to ensure merely self-defence (Reg. v. Johnson (3) and R. v. Keith (4)).

Because of the possibility of retreat, a fortiori, such a belief could not have been entertained about the subsequent woundings.

I summarise my findings as to self-defence as follows:-

(a) I consider that the initial assault of the deceased was such as could have caused reasonable apprehension of death or grievous bodily harm to the accused;

(b) I am left in some doubt as to whether the accused had such a reasonable apprehension;

(c) I am satisfied that the accused did not have reasonable grounds for believing that he could not otherwise than by the use of the force which he (i) initially, and (ii) subsequently, used, preserve himself from death or grievous bodily harm;

(d) I find no evidence from which I should infer such a belief in fact;

(e) I find that even if the accused had such a reasonable belief the force actually used, either initially or subsequently, was not necessary to preserve the accused from death or grievous bodily harm.

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(3) 1964 Qd. R. 1 at 13
(4) 1934 St. R. Qd. 155 at 168

Provocation

I assume in the accused's favour that the initial axe blow or throw by the deceased was unlawful. However, there appears to be no evidence from which I might infer that the accused was raised to such a state of anger thereby as to deprive him of self-control - even as to the first wounding. Fear is spoken of, and puzzlement perhaps. But the heat of passion with no time for passion to cool, does not appear. When one considers the picture of the accused running after the wife and speaking to her, cautioning her against disclosing his act, and then his return and infliction of further injuries on the deceased - one can see no room whatever for the operation of the doctrine in relation to these further injuries. Accordingly I find that the Crown has negatived the onus qua provocation as allowable under Secs. 268 and 304 to the charges of wilful murder or unlawful killing.

I wish to deliver myself of further reasons for judgment herein and I shall do so on my return to Port Moresby.

I now convict the accused of wilful murder.

FURTHER REASONS FOR JUDGMENT

1970
Jul. 26.
PT. MORESBY

In my consideration of whether it became necessary for the Crown to disprove self-defence I have considered Reg. v. Johnson (op. cit.) (5), and in particular the passage in the judgment of Stanley, J. at 168 reading: "of course there must be some evidence before the jury to warrant consideration of these conditions" (i.e. those set out in the second paragraph to Sec. 271). I have assumed, without deciding, that it may be contended that such "evidence" may be found by inference from facts proved, without any statement by the accused of an actual belief in terms of the section.

I was satisfied beyond reasonable doubt that because of the possibility of retreat after the deceased's initial strike at the accused, coupled with the deceased's failure to make any further aggressive movement, that on this basis also a reasonable belief in the need to use the force used by the accused in his first blow could not have been entertained by him.

Mr. Dillon, as I stated in my judgment given at Menyamya, based his defences on the twin pillars of self-defence requiring an acquittal, and provocation (requiring a reduction of finding to manslaughter). A third possibility was open but not

(5) 1964 Qd. R. 1 at 13

argued. That is, that in an attempted self-defence, more force was used than was necessary; and that therefore by the application of the common law doctrine of "excessive force" the Court should bring in a lesser verdict of manslaughter. It has been contended that such a reduction is called for in New Guinea, though not Papua if (a) the reasonable apprehension of death or grievous bodily harm of Sec. 271 is not negatived; (b) under a reasonable belief in the necessity to use force to avoid such a threatened harm, more force was used than necessary.

Because of my finding that I was left in doubt whether the accused had such an apprehension perhaps I should advert to the position which I adopted in Reg. v. Kampangio (6). The other members of the Full Court did not find it necessary to deal with the question of the availability in New Guinea of the common law principles for purposes of reduction of a finding from murder to manslaughter. As at present advised I see no reason to depart from the conclusion to which I came in that case, viz. that the doctrine of excessive force is not available under the New Guinea Code to reduce the charge from murder to manslaughter.

Solicitor for the Crown : J.G. Smith, Acting Crown Solicitor

Solicitor for the Accused: W.A. Lalor, Public Solicitor

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(6) (unreported) Full Court Judgment No. 6 of 1/6/70, Port Moresby.