Raine, J. 825

IN THE SUPREME COURT OF PAPUA NEW GUINEA

CORAM: Prentice, SPJ.
Friday,
28th February, 1975.

THE QUEEN v. SIGO SASAWARI

1975
26, 27, 28 Feb.
LAE
Prentice, SPJ.

The accused stands arraigned for the wilful murder of Matthew Ute. It is undisputed that the acts of the accused caused Ute's death - the accused hit him with a large baulk of sawn timber a number of times. One of his blows fractured the deceased's skull causing his death.

The defence raised is that of provocation, which was said to have arisen from the act of a woman companion of Ute, who, while Ute and the accused were fighting, threw a stone striking the accused on the forehead and drawing his blood. The accuracy of recollection and veracity of the Crown witnesses was not really sought to be or in fact, shaken in any respect. I accept their evidence generally.

I make the following findings of fact:-

1. On the afternoon in question the accused had been having some beer to drink and was somewhat affected. He saw Ute walking down the street accompanied by a number of Highland girls - the accused is a Highlander;

2. The accused was spoken to by one of these women and gave her an apple he was eating;

3. Not unnaturally he thought his attentions would be encouraged, and he suggested that Ute, described as a fat handsome Siassi man, could spare him the company of one of his women friends;

4. Ute resented this suggestion and a fight involving mutual punching between Ute and the accused, developed;

5. This fight commenced near the entrance to the Rice Industry Company's flats in

Bowerbird Street and thence onto, and along the road some fifty feet, to where at another point the fight was resumed. At different stages both Matthew and the accused were knocked or pushed down;

6. At this point one of the women accompanying Matthew threw a stone with one hand which hit the accused on his forehead causing it to bleed - apparently rather profusely as is common with a head injury. The accused fell to his knees on the ground and remained there a couple of seconds and rose, dazed and stumbling;

7. Matthew and the women walked down to the Rice Industry Company's flat. The accused remained a minute on the road talking to a New Guinean friend who had arrived;

8. The accused then walked down the road and broke a rectangular shaped baulk of timber, some four to five feet in length and three inches by two inches in dimensions, off a home-made rubbish can stand of which it had formed a leg;

9. The accused then walked at a leisurely pace into the driveway of the Rice Industry flats, a distance of some forty-five feet;

10. He went to a doorway on which he bashed with the timber. Matthew came out and the accused hit him with a heavy two-handed blow of the baulk of timber, delivered from above his head;

11. The accused hit the deceased with at least two possibly three <u>more</u> blows of the timber which must have been forceful;

12. One of the blows was delivered while the deceased was lying on the ground;

13. One of these blows caused an extensive fracture of the deceased's skull from the

right ear to the crown of his head. This fracture also went through the base of the skull. There was a massive blood clot under the skull. The blow or blows that caused this injury must have been delivered with considerable force. There was also a bruise on the left cheek. The fracture of the skull and associated injuries to the brain caused his death;

14. The accused then walked out of the driveway and for some time marched, apparently in mock military fashion, up and down the road with the timber "shouldered";

15. The accused at this time stated "I hit him three times and he's dead" and "I can't run away - I'll take this timber and go to the police";

16. The accused was motivated to attack with the wood, by the sight of his blood loss.

Mr Kaputin has argued that the throwing of the stone and cut caused thereby, constitute provocation on which the accused may rely so as to reduce his guilt to that of manslaughter only. He seeks to distinguish Reg. v. Kauba Paruwo (1) which is authority for the proposition, if authority be needed, that a defence of provocation is not open if the only provocation which induced the accused to kill his victim, was offered not by the victim but by a third person, although that third person be closely related to the victim. The Chief Justice, Sir Alan Mann's decision therein was arrived at on a consideration of both the Section 268 definition of provocation and also that available under the common law. In that case a man whose father was killed, being unable to retaliate on the killer, attacked the killer's son.

It is also sought to distinguish Reg. v. Tsagoroan Kagobo (2) a case in which a retaliation (for insult) directed at his wife caused not her but a child's death.

---

(1) (1963) P.N.G.L.R. 18
(2) (1965-6) P.N.G.L.R. 122

Here, it is said, the act of the woman is properly to be viewed as the dead man's, as he and she were jointly engaged in attacking the accused.

Mr Kaputin contends again in this case as in an earlier one, that s.268 is to be read with s.304 (the 1974 amendments to the Criminal Code are not yet in force). And he asks me to follow The Queen v. K.J. & Anor (3) rather than any logical consequences of Kaporonovsky's case (4) and not to follow my own decision in The Queen v. Kopal Wamne (5).

Apparently he seeks for this position, in the effort to avoid any application of the concept of disproportionate retaliation. I have already on this circuit stated, in another judgment, that I remain unpersuaded that my decision in The Queen v. Kopal Wamne (6) (supra) in which I considered the High Court's decision to be correct and binding on me; was wrong.

However even if s.268 is regarded as applicable, I consider its terms such that it is incapable of being applied to the situation herein. I am of the opinion that the Highland woman's act in joining the fray and throwing the stone, was in no way to be considered the deceased's act. Section 268 refers to a person being induced "to assault the person by whom the act .... is done ....". Neither thereunder, nor under the common law as I understand it, does there appear room for the doctrine of transferred malice or misdirected retaliation or indirect retaliation. My view then is that the act of the woman cannot constitute provocation for the assault with the timber upon a third person the deceased.

But any decision I might make on both that point or of the applicability of s.268 to s.304 are strictly unnecessary to my decision, it seems, in the view which I hold of the facts.

The facts I have found establish to my mind beyond reasonable doubt that there was no such loss of

(3) Unreported FC 41
(4) (1973) A.L.J.R. 296
(5) Unreported Judgment 809
(6) Unreported Judgment 809

self-control or heat of passion as amounted to "provocation". The accused appears to have acted with a deliberate vengeful policy - no doubt inspired by great anger. But his acts spell out no "transport of passion" "abdication of reason" or "temporary suspension of reason", to use some of the phrases used by Judges of this Court to exemplify a true case of provocation. There was no rush to pick up the timber; no rush to the battery. He walked some considerable distance after a conversation with another man (an elapse of a minute or so), called out the deceased man's name, and struck when the deceased emerged.

And I am satisfied that the retaliation was out of all proportion to any provocation that might be thought to have been offered; and that no reasonable man in the accused's situation would have acted with such savagely punishing determination for such a provocation.

Even if s.268 be applied with s.304; for the reasons I advance above, as to the position under the common law in s.304; I am satisfied that such provocation as was thought to be shown was not "sudden provocation" causing a "heat of passion" of the insensate variety.

I therefore reject the defence of provocation.

In that event the defence contends for a verdict of manslaughter only. It is said that no evidence of intent to murder appears.

It is true that no affirmation of intent to murder was, or has been expressed. The nature of the weapon used, the number and severity of the blows administered, have given me cause to ponder. But in the result, I do not find myself persuaded to the necessary extent - that beyond reasonable doubt - that the accused positively intended to kill. I therefore acquit of wilful murder.

However I am satisfied that the force inflicted, the number of the blows and the weapon used, and the location of the injuries (on the head) establish that the

accused intended to inflict grievous bodily harm. If I be wrong in that; at the very least it must be said that the evidence establishes the death was caused by an act done in the prosecution of an unlawful purpose which act was of such a nature as to be likely to endanger human life (s.302 (2)). I therefore convict of murder.

Solicitor for the Crown: P.J. Clay, Crown Solicitor.

Solicitor for the Accused: N.H. Pratt, Acting Public Solicitor.