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

THE QUEEN

against

DIRU of BUNDI

Supreme Court (The Chief Justice) in its Criminal Jurisdiction on circuit at Madang, New Guinea, 23rd, 25th and 26th May, 1960.

Criminal Law - "accident".

Accused, a youth aged 15 but very small for his age, was quarrelling with his sister, aged 12, at Bundi when his sick father awoke and remonstrated with him saying : "People don't hit their sisters. Why are you always fighting your sister?" A. hit his father and an altercation between the father and son took place. Evidence was adduced tending to show that, in the course of this A. kicked his father in the body , just below the left ribs. The father died of a rupture of his enlarged spleen which weighed 40 ounces after death.

HELD

(i) An act or omission which causes death is culpable unless that act or omission occurs independently of the exercise of the will of the Accused, or unless the event of death (which occurs as a result of that act) is accidental and not within the scope of Section 283 and 289 (see para. 9).

(ii) An event occurs by accident when, at the time of performing the act which in fact caused the death it would not have been reasonably forseeable to a man in the position of the Accused that the life, safety or health of any person might be endangered. (see para. 13).

(iii) The opening words of Section 23 refer to Sections 285 and 289. (see para. 9).

(iv) In manslaughter cases no distinction arises between the words "event" and "result" used in Section 23. (see para. 10).

Observation

The trial Judge made the following observation in paragraph 15:-

"The risk of rupture of an enlarged spleen is so great and so well known in the Territory at the present time as a very common cause of death, that the application of any objective test to the Accused would render him liable for the consequences of his intentionally kicking his father in the abdomen."

L. Cervetto, Crown Prosecutor,
argued that in Section 23 the provision relating to "acts or omissions" does not apply here because the acts were deliberate, and constituted an unlawful assault. The death was the direct result of this unlawful assault. Nothing intervened. The other provision in Section 23, i.e., "an event which occurs by accident", also does not apply because the word "event" refers here, not to the death but to some intervening event, such as a man hitting his head on an unnoticed hard obstruction like a concrete block in his fall after a blow. The act is the blow, the event occurring independent of the will is the hitting the obstruction and the result is death from the hitting of the head on concrete. Section 23, by separately using the words "event"

and "result" shows this distinction.

R.S. O'Regan, for the Defence,
argued that Section 23 applies to manslaughter cases except where the accused breaches a duty under Chapter XXVII of the Code, and submitted that the first limb of paragraph 1 of Section 23 excuses a person for an accidental act and the second limb excuses a person for the accidental outcome of an act. The event referred to is the death (see R. v. Callaghan 1942 St.R.Qd.40 per Philp, J., at p. 50 - although Webb, C.J. and E.A. Douglas, J. contra:- R. v. Scarth 1945 St. R. Qd.38.). Therefor the fact that the original act (the blow) was willed and unlawful does not deprive the accused of a defence that the remotely consequential "event" (the death) was accidental. Further, the Crown has failed to negative the defence of accident. (Mullen v. R. 1936 St. R.Qd.97.).

MANN, C.J.

The accused is charged with the manslaughter of his father KUMUNGA. The Crown case alleges that the accused was quarrelling with his sister, the witness WAURA, and in the course of the quarrel, kicked her and made her cry. (1)

The father, KUMUNGA, who was ill, and lying asleep in the house, woke up at this stage and told his son that he must not strike his sister, whereupon the accused made an unprovoked attack on his father, in the course of which he kicked his father in the abdomen, causing his enlarged spleen to rupture, resulting in KUMUNGA's immediate death. (2)

The Crown case is not very strongly supported by the available evidence. The only persons present were the deceased and his two children. The two witnesses KASPAR and TONGIA heard noises which caused them to come to the house, but the events which caused KUMUNGA's death had already taken place. WAURA, a small child of little if anything over twelve years of age, was crying and did not see or hear much of what (3)

happened. The evidence for the Crown therefore leaves open a possible defence of accidental death if such a defence is open under the Criminal Code. I think it appropriate to consider whether and to what extent such a defence may be open before considering whether the evidence to support the Crown case is sufficient to exclude that defence on the facts.

The defence arises, if at all, by the application of (4) Section 23 of the Code, to a charge of manslaughter. It has been a widely held view in the Territory that the Section does not apply to cases of manslaughter, because the statutory definition of unlawful killing does not involve any element of intent, and therefore any killing, unless authorized, justified or excused by law, is manslaughter, however accidental or unintentional may have been the actions of the accused.

This is an important question which frequently emerges (5) in circuit cases where we have few facilities for legal research, and having had the assistance of Counsel's argument I propose to interpret the sections involved and state my reasons, with an intimation that in the absence of other authority, I propose to adopt the same conclusions in other cases.

The view which I have referred to as widely held in the (6) Territory seems to be based on the notion that the crime of unlawful killing depends upon the performance by the accused of a single act of "killing" (i.e., the destruction of human life), and that it matters not whether the act was intentional or not. Otherwise, once intent came into the question the crime would become wilful murder. This single notion of killing involves a direct act of destruction on the part of the Accused. Some support for this view arises on the wording of Sections 291, 300 and 303, but Section 293, in defining "killing", makes it clear that this is not a single act, but consists of some action on the part of the accused which directly or indirectly causes death. Life and death are not caused by a human being, but the process of life may continue or cease by reason of causes or conditions introduced by human agency.

Section 7 of the Code makes it clear that various (7)
kinds of actions or omissions are sufficient to constitute that part of a criminal offence which is performed by the offender, and Section 23 (Parts 2 and 3), would establish, if applicable, that in cases where intent as to a particular result is not part of the offence the actual intent of the accused in not material.

Section 23 is on the face of it intended to have (8)
general application and under Section 36 the provisions of the former Section are made applicable to all offences against the statute law of the Territory, which includes the Criminal Code. As a matter of construction I can see no sufficient reason for excluding Section 23. Indeed its exclusion would result in considerable redundancy in the Section itself with regard to cases of negligence, and would lead to some very harsh verdicts entirely contrary to the notion that crime is something which deserves punishment. The argument that the Court can meet these cases by imposing no sentence does not carry weight, for liability to conviction of manslaughter is no trivial matter.

The result of applying Section 23 to manslaughter cases (9)
is that any act (or omission, etc.) which caused death is culpable unless it (i.e., the act, not the death), occurs independently of the exercise of the will of the accused, or unless the event of death (which occurs as a result of that act) is accidental. Thus a death due to an act which the accused did not intend to do does not render him responsible, nor does an accidental death caused by some intended act. The last passage would elimiate cases of criminal negligence, but cases of this kind come within the terms of Sections 288 and 289 are saved by the opening words of Section 23.

I do not think that any distinction in regard to (10)
manslaughter cases arises between the word "event" in the first paragraph and the word "result" in the second paragraph of Section 23. A result is an event which occurs in consequence

of a cause, and in cases of manslaughter at least the death is both an event which happens, and a result of some act of the accused.

In applying both these parts of Section 23 to manslaughter, it is however, clear that there may be a difference between an accidental event, and an intended result, for the latter is irrelevant in such cases. (11)

It is therefore in my opinion, open to the Accused in this case to set up a defence either - (12)

(a) That the actual blow which caused the ruptured spleen was not part of an intended assault and not itself an intended act.

(b) That the death which followed was not legally referable to any blow, but arose accidentally by virtue of circumstances not attributable to any blow delivered by him or to any assault made by him.

So far, my interpretation of the relevant sections appears to have the support of authority. It appears to be directly supported by R. v. Scarth 1945, St.R.Qd.38, and by Philp J., in Dearnley v. R. 1947, St.R.Qd.751, and in R. v. Callaghan, 92 St.R.Qd.40. The only authority available to me which would support a contrary view consists of the views of the majority of the Judges, obiter, in Callaghan's case (supra), a case which appears readily distinguishable.

There remains a point on which I have no authority to assist me, and that is as to the meaning of the words "by accident" in Section 23. That they do not mean "unintentional" seems clear, for in these cases intention as to a result is irrelevant. That it is not purely a test of causation is also clear, for a direct or indirect cause must have been established, to satisfy Section 293. (13)

In the absence of authority, I hold that an event has occurred by accident when, at the time of performing the act which in fact caused the event (of death) it would not have been reasonably forseeable to a man in the position of the accused that the life, safety or health of any person might be endangered. I adopt this definition by analogy with Sections 288 and 289, for it is in cases of accident that those Sections apply the standards of care required to be observed.

In the application of Section 289, an unforseeable (14)
accident, if the risk in fact is present, might still require the person concerned to exercise care, but a death indirectly caused by the accused by an act which involved no forseeable risk would, if Sections 288 and 289 did not apply, be attributable to mere chance and would therefore be an accident excused by law for the purposes of Section 291.

The risk of rupture of an enlarged spleen is so great (15)
and so well known in the Territory at the present time as a very common cause of death, that the application of any objective test to the accused would render him liable for the consequences of his intentionally kicking his father in the abdomen. I hold therefore, that the event which took place, that is the death of KUMUNGA, if caused by the voluntary act of the accused, was not accidental.

The remaining question therefore, is whether on the (16)
evidence the Crown has established that the death was caused by a voluntary act on the part of the accused.

WAURA, under cross examination, revealed that she did (17)
not see the accused kick his father, but assumed that he had kicked him in the abdomen by the sounds she heard and from her knowledge that a kick in the stomach would kill him. She also heard her father say "You have kicked my stomach and it is no good."

She saw them struggling together at one stage, but (18)
since she was crying and her eyes were smarting from contact 10

with taro peelings, she did not see much, and she was evidently making too much noise to hear all the conversation.

I think that the evidence is too slender to satisfy (19) me beyond reasonable doubt that an intended kick caused the spleen to rupture. The accused is a boy of about 15 and may have struggled to elude his father, or the ruptrue may have been due to some other intervening cause or even some action on the father's part. The medical evidence was of necessity rather sketchy and does not enable me to select with any certainty a voluntary kick as the cause. Since there is no reliable account of the events which occurred which gives a complete picture, I cannot say with sufficient assurance that the rupture occurred as part of an assault, although an assault by the accused undoubtedly did take place.

Verdict: Not guilty as charged, but guilty of common assault

Sentence: One (1) month imprisonment.

R.S. O'Regan, instructed by the Public Solicitor.

Publlished by P.J. Quinlivan, Barrister-at-Law, from a judgment made available by the trial Judge, summaries of arguments supplied by Counsel and material made available by the Supreme Court and Crown Law Office records.