SUPREME COURT OF THE TERRITORY OF PAPUA AND NEW GUINEA

THE QUEEN
against
GAMUMU, son of DURUBU

The Supreme Court, (The Chief Justice) in its Criminal Jurisdiction on Circuit at Rigo, Papua, 6th June, 1960.

Criminal Law - Manslaughter - Accident
Manslaughter - Cause of Death - Accident
Accident - Cause - Effect.

The scene immediately before death was a remote jungle village with the deceased woman sitting at the bottom of the steps leading from the ground to the raised verandah of the house of a man named WI. WI himself sat on his verandah. Beyond these the facts are readily available in the report. At the trial no evidence was called for the Defence and speeches of Counsel were as follows:-

Paul Quinlivan, for the Crown:

Manslaughter is the residue of unlawful killings not wilful murder or murder (s.303). But the killing must be unlawful, one such as requires the State to invoke the criminal law or justifies it doing so. I have never heard anyone express the view which your Honour is reported to have said

> "has been a widely held view in the Territory that.... any killing, unless authorised, justified or excused by law, is manslaughter, (sic.) however accidental and unintentioned may have been the actions of the accused."

and that: "The view which I have referred (to) as widely held in the Territory seems to be based on the notion that the crime of unlawful killing depends upon the performance by the accused of a simple act of "killing" (i.e. the destruction of human life), and that it matters not whether the act was intentional or not" (R. v. DIRU s/o KUMUGA, Madang Sessions, 26th May 1960).

I dissociate myself from any such view and notion. GAMUMU is certainly not indicted on that footing.

In some of the books it is said that "death, however unforeseen, which has been brought about by a man engaged on any unlawful course of conduct will be at least manslaughter" (Kenny: Criminal Law:17 Ed. 1958 p. 132) but FRANKLIN (1883) 15 Cox C.C. 163 was the critical case here, and there is at least doubt whether this "constructive manslaughter" is law. It is not on this footing either, that GAMUMU is charged.

The Code (s. 304) makes manslaughter what would otherwise be wilful murder or murder were it not for provocation. Apart from this category the Code does not exhaustively say what it means by "manslaughter" or by "justified or excused by law" and so the State sees itself required to invoke the criminal law or justified in doing so in several categories of cases.

Without being necessarily exhaustive, the first of two of these categories is when death results from criminal negligence or criminal recklessness in the performance of an act or in pursuance of a course of conduct which has an element of danger for others but which is not done or undertaken with any intent to cause harm - these are the "criminal negligence" cases and do not concern us here.

A second such category is that where death results directly from unlawful conduct which was neither intended to cause nor to risk causing death or grievous bodily harm, but which the killer did intend to cause, or to risk causing, physical harm to some person. This is the footing on which the prosecution is brought. It is the recommendation of H.M. Commissioners on Criminal Law in 1839 (see Kenny, Criminal Law, 17th Ed, 1958, p. 170) but it was also the common law at that time (see MARTIN(1832) 5 Car. & P., 172 E.R. 907; CONNER (1835) 7 Car. & P., 173 E.R. 194; WILD (1837) 2 Lewin, 168 E.R. 1132; MURTON (1862) 3 F. & F., 176 E.R. 221) and still is (Kenny, ibid). It has always been, I submit, the view of this Court on this question.

Here GAMUMU vented his ire by hitting the widow DOGAI with a digging stick. The stick is made of very hard wood. The blows were not light - the evidence showed the stick sang as it whooshed through the air and each blow left its long pink imprint which remained on the skin. He is a young man. The victim was an aged fragile skinny woman just recovered after two weeks recuperation from a recent bout of her lifelong illness. It is submitted there is

no authorisation, justification or excuse for his disproportionate conduct. She was irritating, yes, but he intended to do her physical harm (but no more) and she died immediately after the second blow and as soon as a bystander got to her.

It is a question of fact. If it is found as a fact that she died as a result of his blow, unlawfully delivered with an intent to do this aged woman physical harm, I submit he is guilty of manslaughter.

As to the illness and infirmity, see s. 296. She had been ill all her life. This was one of the days she was most well. She had every expectation of getting ill again in the future and recovering. She was alive and remonstrating before he hit her and she died when he stopped after the second blow which landed on the side between the hip and the floating ribs. There is no medical evidence of death but "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" (DIRU, ibid.) that this possibility exists and in any event GAMUMU knew she was ill and infirm.

R. S. O'Regan, for the Defence:

Section 23 of The Criminal Code applies to manslaughter (see DIRU, Madang, May 1960). The range of its application depends on two questions. Firstly, does excuse for "an event which occurs by accident" depend on the lawfulness or unlawfulness of the willed act of which the event is a consequence? It does not.

R. v. Callaghan 1942 St. R. Q'd 40 per Philp J., obiter, and article by Philp J. "Criminal Responsibility at Common Law and under the Criminal Code - some impressions" 45 Q.J.P.J. p. 17 at p 22 et seq. The contrary opinion of Webb C. J. and E. A. douglas J, obiter in R. v. Callaghan (supra) was founded on the assumption that the maxim that a person is deemed to intend the natural and probably consequences of his act applied under the Code. This common law rule finds no expression in the Code. R. v. Smeltzer Qld Crim Code Supp. 96 implicitly states the proposition later made explicit by Philp J. in R. v. Callaghan (vide comment in 5 Q.J.P. 129). Therefore it is submitted that even if the jury finds that GAMUMU's action in striking his sister-in-law constituted an unlawful assault this of itself does not render him liable for her subsequent death. However it is submitted that his action was lawful because provoked.

Secondly what is the test for determining when an event occurs by accident? It is submitted it is causation not forseeability and S. 23 should be read disjunctively because this is the only way in which it matches and complements the provisions of the Code relating to negligent acts and omissions. Moreover the trend in English law has been to eschew metaphysical complexities of causation and to select a single substantial cause based on broad notions of criminal responsibility - see "Causation and Criminal Responsibility" 1955 Cambridge L. J. 163 per Lord Wright. An event occurs by accident when its substantial cause is not the act of the accused. In this case the event (death) occurs by accident because substantial cause of death was the pre-existing physical condition of deceased - her sickness. It is not clear from the evidence what disease or diseases the deceased was suffering from. However it is clear that she was a chronic invalid. On these submissions verdict should be not guilty of manslaughter but guilty of unlawful assault.

However provocation (vide S. 268 and 269) is a defence to a charge of manslaughter under the Code R. v. Smeltzer (supra) and R. v. Coupland Q'ld Crim. Code Supplement 94, because manslaughter is "an offence of which assault is an element". Words may amount to provocation under S. 268.

In this case there was oral provocation for an assault. The accused had received news of the death of his sister in a neighbouring village and while he was mourning his sister-in-law (whom he had always cared for though she had no claim to his bounty) kept nagging him about a pig belonging to him which he had killed and distributed among other relatives. In the circumstances the blow was not disproportionate to the insult offered. It was a sharp, though not vicious blow directed at her generally, not in any particularly vulnerable part of the body, e. g. spleen.

S. 296 has no application to the facts of this case. It is submitted that "the disorder or disease arising from another cause" must be necessarily fatal and the Crown has not proved this beyond reasonable doubt.

MANN, C.J.

REASONS FOR JUDGMENT.

The accused was charged with the unlawful killing of his sister-in-law Dogai, who was an elderly widow.

Apart from her advanced age Dogai was in a very poor state of health and suffered from illness which frequently caused her to stay at home and rest. The accused was helping to look after her and provided her with a house and food for herself and daughter. Dogai worked in the garden when she was able to, but as often as not was too ill. She walked very slowly and was unable to work hard. Her illness was not identified and there was no medical evidence. She was very thin, the bones showing plainly through her skin and she customarily gasped for breath and had a bad, persistent cough. When she was ill she was very weak.

On the day before the occasion in question the accused had killed a pig which he regarded as his own and he distributed the flesh amongst his relatives according to the usual practice. Dogai complained about this, claiming that the pig was hers because she had looked after it and given it food.

On the date in question a message was received at the village where the accused and Dogai lived, to the effect that a sister of the accused who lived in another village had died. On receipt of this news the accused started keening, according to the usual practice on such occasions. He was sitting on the verandah of his house. Wi, who lived in a house nearby was sitting on the doorstep of his own house and the deceased Dogai was sitting on the

bottom step of the ladder leading up to the verandah of Wi's house. Dogai called out to the accused "That pig, I looked after it and gave it my food" and the accused replied "That talk about the pig finished yesterday. My sister died at Pipitagoro and a message has come to me, and I am crying and I don't want to hear about the pi . I finished with that yesterday." The evidence does not make it clear how long this dispute continued but it seems apparent that Dogai had been complaining about the pig during the previous day as well as on the day in question and that she was angry and persistently argumentative about it.

When this argument was going on the accused got up and got a stick about eighteen inches long and about the thickness of a person's thumb. It was of very dense timber of the kind used for digging-sticks. Taking up the stick the accused crossed over to where his sister-in-law was and struck her on the shoulder and then when she tried to move to stop him he struck her again with a backhanded action on the side at about the height of the waist. They were not heavy blows but were delivered with sufficient force to leave two red marks on the skin. Immediately after the blows were delivered Dogai collapsed on the ground and when Wi went to pick her up she was dead.

In the recent case of R. v. Diru (Madang 25/5/60) I held that Section 23 of the Criminal Code affords a defence in cases of Manslaughter, where the event which was caused by the act of the accused, was accidental. It is necessary again to consider the meaning of the word "accident" as used in Section 23.

I was invited by Mr. Quinlivan to adopt the view that a person is guilty of manslaughter when death results directly from conduct which, although neither intended to cause nor to risk causing death or grievous bodily harm, is such that the killer intended to cause, or to risk causing physical harm to some person. Mr. O'Regan for the Defence, argued that under the provisions of Section 23 a willed act does not contaminate an accidental event, and either of these elements may operate independently as a justification or excuse. He referred to R. v. Callaghan 1942 Q. St. R. page 40 per Philp J. and the article by Philp J. in 45 Q.J.P.J. pages 22-23. I agree with this view. He also invited me to adopt as a test of accident for the purposes of Section 23 the notion of causation

rather than forseeability, upon the footing that the basis of cessation of criminal responsibility is a matter of causation and that the law is concerned with establishing a test of substantial cause beyond which criminal responsibility should not attach. See "Accident and Legal Responsibility" Lord Wright 1955 Cam. L. J. 153.

Again it seems to me that although in formulating principles of common law, questions of substance arise in this way, and it is desirable to evolve substantive tests which will simplify rather than complicate distinctions upon which criminal responsibility is to depend, my present concern is with the interpretation of the Code itself and I cannot adopt a test of causation which would conflict with the pattern of responsibility upon which the Code is based.

In ordinary speech "accident" includes such events as motor car collisions which are certainly not intended to occur but some of which are due to criminal negligence. On the face of it Section 23 is appropriately expressed to excuse events which occur by accident, subject to the provisions of the Code relating to negligence.

Mr. O'Regan invited me to construe Section 23 so that the opening words, saving the provisions as to negligent "acts and omissions" would only apply to an "act or omission" which occurs independently of the exercise of a person's will. The remaining words dealing with accidental events are, according to this construction, to be read disjunctively, and not subject to the opening words of the Section. Whilst this construction seems to suit the words employed, it does not seem to me to reach the intended meaning of the Code.

In its context, I think that the word "accident" must have a meaning:-

(a) which includes cases where the event was due to criminal negligence (which are saved by the opening words of the Section), or,

(b) which excludes cases of criminal negligence altogether and is based on causation as a question of substance (i.e. the question "Was it due to accident or to criminal negligence?" poses strict alternatives.)

Meaning (a) requires that the whole of the first paragraph of Section 3 should be governed by the opening words, so that all unwilled acts and events due to accident are excused, subject only to question of negligence. Meaning (b) would not require the opening words of the Section to apply to accident, for an accident then becomes something which is never culpable. Thus a death caused by criminal negligence could never be described as an accident, and it would never be necessary to consider the standards of care prescribed by the Code in relation to the event of death; although these standards would be applicable when considering the quality of the act or omission to which the death was due in cases of unwilled acts or omissions.

I think it is clear that a willed act producing an unexpected event, remains culpable if the case falls, for example, within Section 289. Section 289 looks to the event which takes place as much as to the act which causes it, for the accused is expressly made responsible for having caused any consequences which result from his act or omission, not only by reason of the quality of his act but also by reason of his failure to perform the duty of care imposed on him by the Section, which may involve other acts or omissions than those which fall for consideration under Section 23. The duty cast upon the accused by Section 289 might require him in the particular circumstances to take precautions not only against negligent acts of inadvertence

but also to guard against the effect of possible accidents, whatever meaning "accident" is to have. A person who intentionally places a dangerous object in a position in which the slightest mishap might cause destruction of life, could scarcely escape from responsibility if bystanders were killed from what turned out to be a genuine accident, for Section 289 might require him to take special care in the circumstances to meet the possibility of mishaps of an unpredictable nature. I think the more reasonable construction of the Section is that however inadvertent the act of the accused may be and however accidental the event, the accused must still face a further inquiry whether in the circumstances of the case he has observed his duty to take care.

In my opinion therefore the Code requires that accidental events should in the first instance include events directly or indirectly caused by willed acts. It follows that when a finding of accident is reached it is still necessary to enquire whether that accident was due to some negligent act or omission contemplated by Section 289.

The test of forseeability which I put forward in Diru's Case is no more than an attempt to divide accidents which are to be subsequently tested for culpability by virtue of Chapter XXVII from those which are not. I have adopted the test in the absence of any other. The word "unforseeable" imports the notion of abnormality and chance, rather than setting up an additional duty of care. An intended or expected event or one which would normally occur in the known circumstances cannot be accidental (See Stroud's Judicial Dictionary "accidents" "accidental" "misadventure").

I cannot accept causation as the sole test, for "indirect cause" is sufficient for the purposes of Section 293. Were it not for this Section the appropriate test might well be whether it was right to regard the event as being really due to the actions of the accused, or to some mischance for which he ought not to be held responsible in the absence of negligence. Such a description may well describe a distinction already made, but affords no guidance towards the making of a distinction in the next case. It amounts to saying "He should not really be blamed for it, he could not help it, it was mere chance". or something of the kind.

The test of forseeability seems to me to be most appropriate. It expresses much the same notion "It could not be forseen". It does so objectively so as to require the accused to abide by a reasonable standard of responsibility, rather than expressing the notion subjectively, (e.g. it was not forseen) which would involve accepting the thoughts and actions of the accused as sufficient justification for the event.

On the facts of the present case I think that the actions of the accused were not justified. The woman Dogai was old and sick and the accused struck her two fairly strong blows. There was no medical evidence and it is not known from what disease or diseases Dogai suffered. She may have had chronic asthma, heart disease of various sorts, she may have had thrombosis or ruptured a blood vessel in the brain or elsewhere, she may have had bronchitus or pneumonia or tuberculosis, or a spleen which was dangerously close to rupturing. The cause of death was not established and on this question the result depended on whether I should infer from the known facts, that death was due to the blows delivered by the accused. Dogai died instantly after the blows were delivered and in the absence of any known factors indicating the contrary, I thinkthat I should infer from the circumstances that the blows were in fact the cause of death, but by what means I do not know.

The question then arises according to the test which I have indicated, whether the death was an event which occurred by accident? AlthoughI think that the blows constituted an assault and were struck intentionally, I must ask whether a person in the position of the accused could have forseen that they might endanger Dogai's life. Bearing in mind that the inference which I have drawn that the death was due to these blows is based on knowledge of her immediate death which is being considered after the event, I do not think it reasonable to say that a village native, without medical knowledge, could appreciate before the event occurred, that his actions were likely to endanger the old woman's life or health, however wrong it might have been for him in the circumstances to hit her at all.

I think therefore that the event not being forseeable in the circumstances, was due to accident and that the killing is one excused by law unless it comes within the terms of Section 289. This Section would impose upon the accused a duty to take care in using the stick for the purpose. Although this Section strongly suggests that the ordinary degree of negligence obtaining in civil cases is to be applied, it appears that the duty involved is a duty to take

precautions to avoid danger to life, safety, or health, and that this has to be construed as setting up a standard of negligence corresponding with the common law concept of criminal negligence involving reckless disregard for the life and safety of others. In the particular circumstances of this case the question as to negligence becomes "ought he to have exercised greater care, either to guard against risks, known or unknown, or to avoid any possible consequences?" In the circumstances the failure to guard against the consequences which occurred, does not in my opinion violate the standard required by Section 289.

The Defence also relied upon Provocation. I have already indicated that in my view the accused had no justification for striking the woman Dogai, but it is more appropriate for me to deal separately with this defence. Provocation under the Code has no bearing upon the event which follows the assault, but if applicable would excuse the assault which is one of the elements of the crime of manslaughter in the present case, and applies to cases where the act or omission was not involuntary. Sections 268 and 269 constitute a departure from the common law under which provocation, whilst mitigating the penalty, was not an excuse so as to render the assault lawful. Under the Code a provoked assault is an act for whichthe person committing it is not criminally responsible if certain stated conditions are fulfilled. If therefore the act which is excused by law causes death, the killing cannot be unlawful for the purposes of Sections 291 and 293. (Compare Section 31.)

On the facts of this case I am satisfied that the accused was in fact provoked by conduct on the part of Dogai, which in all the circumstances was likely to deprive a village native living in the cultural environment of the accused, of the power of self-control and to induce such a person to assault the offender. I am also satisfied that the whole attitude of Dogai at the time was insulting to the accused in the particular circumstances operating at the time. I am satisfied that the accused did in fact lose his self-control and acted immediately in a way that might well have been expected. I am satisfiedthat he did not intend to cause any real harm to Dogai but only intended to make her keep quiet so that he could continue with his keening for his deceased sister, which at the moment was a very important and emotionally upsetting process for him. It is apparent after the event that the blows struck were in fact likely to cause considerable harm to the old woman and to involve risk to her life, but considered objectively were not of a character which would be ordinarily regarded as involving any such risk.