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

CORAM : MANN C.J.

REGINA v. KAMBE-PARE

REASONS FOR JUDGMENT

Kagua.
20th and
21st June,
1966.
Pt.Moresby
4th August,
1966.

This case was tried at Kagua on the 20th June, 1966. The facts were not greatly in dispute, although witnesses varied considerably in some important details.

It appears that KUNDIBA, the brother of the accused, had married twice and that he was not getting along very well with his second wife. After he acquired her KUNDIBA had been in the habit of having his meals with her and eating the food that she had cooked. After some time, however, he lost inclination to follow this practice and refused to eat her food and had his meals with the first wife instead.

There appears to have been some hostility between the two wives, although there is not much detailed evidence about this. It is clear, however, that the first wife killed a pig, claimed by the second wife to be her property. The pig was left lying on the ground and the circumstances suggest that there was a considerable element of hostility or contempt involved in this action.

The accused had a conversation with his sister-in-law, the first wife, and proposed that the pig should be cooked in an underground oven of hot stones, (mumu), a process which occasioned considerable work. The first wife was unwilling to undertake this task and so the accused did so himself. The pig was duly cooked and eaten by a family group, which did not include the second wife, and it appears that the second wife would not have been welcome if she had joined the party.

On the occasion that the alleged offence occurred, the accused and his brother KUNDIBA and other members of the family and friends, were attending a mission church service conducted by the Catechist NARI-MARAMBE. They were in the vicinity of NARI's

house at Lombo, where preparations were being made for the construction of a small chapel. Bush materials were at hand in a stack nearby.

While the people were sitting around in a group, the second wife told the accused that she was going to divorce her husband and that he, the accused, owed her a pig and that he must give her a pig in satisfaction of the debt. Although he had cooked and helped to eat the pig, he had not, in fact, killed it, and he rejected the claim. He said that the first wife had killed the pig and that he did not owe a pig to the second wife. Saying this the accused walked up towards the second wife and at a short distance in front of her drove his axe into the ground in such a manner as to suggest that he was making a gesture of some emphasis. The husband, KUNDIBA, then came up and picked up a handful of earth which had been disturbed by the axe and, holding this in his hand, said "Now we can go to Court." He also had in his hand what was described as a "small knife". By this the witnesses apparently meant something smaller than a large machete or bush knife, and the only indications of actual size suggest that it is most likely that it was a kitchen knife with a blade approximately 10" long. At all events KUNDIBA made no attempt to attack the accused with this knife at any stage.

In response to KUNDIBA's assertion about going to Court, the accused said "I do not want to go to Court. You can go if you want to." At this stage KUNDIBA went across to the stack of building materials and selected a pole, apparently of a kind commonly used for roof construction. He cut off a length of timber using the knife with a quick chopping action to cut it. It was variously described by witnesses, and comparisons were made indicating that the stick came within the range of 3'6"-4'0" in length and was a little over 2" in diameter. Having done this, KUNDIBA came across to where the accused was standing and struck him a heavy two-handed blow on the shoulder.

The group of people present, and especially the Catechist NARI had tried to separate the two men. KUNDIBA at this stage was clearly the aggressor and

NARI stood facing towards him when he came between the two brothers. So far as the evidence goes, the accused was, at this stage, standing still. NARI warned KUNDIBA not to fight, but realising that he could not stop him he stood aside and said "Alright if you must fight you must fight." Apart from being the aggressor at this stage, KUNDIBA was larger and more powerful than the accused. It is not clear whether he intended to strike the accused on the shoulder, or whether the accused managed to dodge the blow to that extent. The accused immediately responded by striking out quickly with the axe that he was carrying in order to disable and disarm his opponent. At no stage did he use the axe in such a way as to suggest that he intended striking a mortal blow. The knife played no part in the fighting, and I infer that each of the two brothers intended not to attack the other with a sharp instrument in such a way as to be likely to cause death.

When the accused struck out at KUNDIBA with the axe it was not a heavy downward blow but more of a thrust aimed at KUNDIBA's arm at the end of the delivery of the heavy blow with the stick. There was a suggestion that KUNDIBA appeared to be preparing to deliver a second blow, and there cannot be much doubt that he would have done so. His arm at the time of contact with the axe was more or less downward rather than raised and was most probably moving at the instant of contact. The result was that the sharp edge of the axe cut the fleshy part of the forearm from a point near the elbow to a point close to the wrist. The cut described a curved path and severed most of the large blood vessels in the forearm. KUNDIBA immediately dropped the stick and fell to the ground, losing blood very rapidly.

The wound was bandaged and KUNDIBA was taken into hospital, but the crude remedies taken by the local people were not nearly adequate for the purpose and, in spite of their efforts to hurry him to hospital, KUNDIBA reached there in a condition so weak from loss of blood that he died. The Medical Orderly did what he could with saline solutions, but KUNDIBA had lost so much blood that he could not be saved.

I am satisfied that the accused did not have

the intent of causing his brother's death, or of inflicting either the actual wound inflicted or any other wound which would be a likely cause of death or major injury. He said that he meant to strike his brother with the back of the axe and the instrument slipped in his hand as he was delivering the blow. I do not believe this; nor do I believe that he was delivering the kind of blow which would be delivered with the back of the axe. I do believe he may have been confused, but there is no evidence which I can accept to indicate that he intended to do otherwise than inflict a relatively unimportant wound in the region of the forearm in order to make his opponent drop the stick and to put him temporarily out of action. The blow was, of course, extremely dangerous, but the outcome was not involved in any element of intent.

On the facts, therefore, as I see them, the Crown case appears to me to be a case of manslaughter in which the two men were fighting with weapons, each of which in the circumstances constituted a lethal weapon, and could easily cause death, and one did so.

The defences of provocation and self-defence were raised. Some attempt was made to establish that the conduct of the accused in striking his axe into the ground in front of the second wife was a provocative act. It is easy to see in this incident an enactment of the traditional European practice of earlier days of throwing down the gauntlet and the suggestion was that KUNDIBA, in picking up the earth, was accepting a challenge to fight, or that the incident was so much of an affront to the woman and the others concerned, that it provoked the subsequent attack. I cannot accept the evidence as establishing that there was any particular ritual significance in this conduct which would be recognised by the participants as a known incident of their cultural background.

Witnesses yielded to the ever present tendency to strive to give some sort of working explanation, and some said that such a gesture means, in effect, that the actor either intends to kill the person addressed or would like to do so. The variations in the explanations afforded were such as to show that it is not possible to give a direct literal meaning to this behaviour.

The actions and the manner of the accused would convey to an observer a generalized impression that the accused was probably rejecting the woman's demand for restitution of her pig, and doing this with special emphasis, and with a gesture of hostility which could not be clearly defined, but would not necessarily involve an actual threat of violence.

It is impossible to say whether KUNDIBA cut off the length of stick in response to the demonstration with the axe, or whether he did so because the accused refused to go to Court. Both elements may have prompted the subsequent attack, but at least it was after the axe had been stuck into the ground that KUNDIBA proposed the unwarlike solution of going to Court. Whether he had in mind going to Court to dispose of the claim for the pig, or whether he thought that the Court might impose some punishment for the hostile gesture is not established. I think, therefore, that KUNDIBA, being the larger and stronger man, and the aggressor, carried an unprovoked attack with the stick to the place where the accused was peacefully standing, even if angry and ready to stand his ground if necessary. The only alternative possibly open to the accused at this point would have been to run away. Had he done so he would have lost the psychological battle that was involved, and the situation would undoubtedly have cost him the pig, which in this context is of very substantial value. He might also have jeopardised his life.

The defence of self-defence was put on two grounds. First under Section 271 of the Code it was contended that KUNDIBA made an unprovoked assault upon the accused and that the first blow struck with the stick was of such a character as to cause reasonable apprehension of death or grievous bodily harm, whereupon it was open to the accused to take such action as would prevent KUNDIBA from delivering a second, and possibly final blow.

In the alternative, it was put under Section 272 that if the action of the accused did provoke KUNDIBA's assault, then the provoked assault was carried out with such violence as to cause the same apprehension

and induce a reasonable belief that the blow struck with the axe was necessary for the preservation of the accused.

On the evidence I must find that KUNDIBA's assault was unprovoked. I think that the accused is entitled to this finding because, on the substantial weight of the evidence, KUNDIBA was acting with apparent self-control and any conclusion that he was sufficiently provoked by an insulting ceremonial gesture with the axe would incorporate a very substantial element of doubt.

In argument I was referred to two cases which I had not seen for a considerable time, and which were not available at Kagua. Since they indicated a possible divergence between the position at Common Law, as determined by the High Court, and the position under the Queensland Criminal Code, as determined by the Court of Criminal Appeal in Queensland, I thought it appropriate to adjourn the hearing and conclude the trial at Port Moresby after the circuit.

The first case is that of The Queen v. Howe (1958) 100 C.L.R. p.448. The point material to the present case is that stated in the headnote, as follows :

> " To retreat before employing force is no longer to be treated as an independent and imperative condition if a plea of self-defence is to be made out. Whether a retreat could or should have been made is merely an element for the jury to consider as entering into the reasonableness of the conduct of the accused."

In the Queensland case, The Queen v. Johnson (1964) Qd. R. p.1, the Court of Criminal Appeal decided that regardless of the position at Common Law, the position under the Queensland Criminal Code is clear and does not justify resort to Common Law Rules in order to resolve a question arising under Section 271 of the Code. Stanley J. sounds a warning that some further consideration may possibly apply to cases arising under Section 272. At all events he leaves any such question open, (p.14).

The point with which I am concerned is governed by the passage in Stanley J.'s judgment on pp.13-14. I should ask the two questions :

"(1) Whether the nature of the assault was such as to cause reasonable apprehension of death or grievous bodily harm.

(2) Whether the person using the force by way of self-defence believes on reasonable grounds that he could not otherwise protect the person defended from death or grievous bodily harm.

I do not hesitate to answer the first question in the affirmative. The answer to the second question is not quite so obvious.

As is pointed out by Stanley J., by turning away from an aggressor one might obviously lead to ones own destruction. This fully applies to the kind of situation with which I am dealing. It might be thought possible to escape from a stick, but in expert hands that stick would give an assailant adequate reach and speed to prevent escape. I have previously said that any withdrawal would have cost the accused a good deal in the psychological situation involved and this would influence his perception of the practicability of taking any course other than the one he did.

In the absence of any element of intent other than to stand his ground in a situation brought about by a quarrel between the two wives of KUNDIBA, and in the consequential situation which arose between his brother and himself, and then to defend himself from uninvited attack, I conclude that the accused was justified in striking at his brother with the axe.

There is one other matter. The last part of Section 271 permits the accused, not to use such force as he <u>believes</u> necessary, but rather to use any such force as <u>is</u> necessary. It might be argued in the present case that he was bound to carry out the mildest attack which would, in fact, have been effective for his purpose. Reliance might be placed on Section 283 of the Code which provides that "in any case in which the use of force .... is lawful the use of more force

than is justified by law under the circumstances is unlawful." Section 24 might have a bearing on the point.

Certainly a blow differently aimed or managed might have produced the required result with less damage, but in the fraction of a second which was available to the accused he only had one suitable instrument to hand, and the very long and curved wound is some indication that the handling of the axe was in some way mismanaged, or aggravated by movement. It was not a typical axe wound. I think that the only footing upon which I can assess the course taken by the accused is that there was no other course which he could have taken. It would have been much better had the accused found some other way of meeting the situation, but in imposing standards upon him in a situation like this, I must treat him as the village native that he is, living in a situation in which lightning movement is not infrequently essential for the preservation of one's life, and in which one might not infrequently be attacked with lethal weapons.

In my opinion the provisions of Section 271 excuse the blow struck by the accused.

Verdict : Not Guilty.