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

CORAM : MINOGUE, J.

THE QUEEN

v.

TAIMBARI-KESA

J U D G M E N T

PORT MORESBY
7th, 8th and
9th August,
1966.

The accused stands charged before me that on the 29th of October 1965 he unlawfully wounded one Andrew John Craig. The facts fall within a small compass and I find them to be as follows.

The accused on the 29th of October last was employed as a "boss-boi" at the Javarare Plantation in the Segeri area. The manager of the plantation was a Mr. Stewart who on the 27th October had been taken to hospital at Port Moresby for treatment for some foot infection. Prior to his leaving he had arranged with the witness Craig who was the manager of the adjoining plantation Daradae that Craig would keep a supervisory eye on the work of the plantation. This he did by visiting the plantation on the afternoon of the 28th and again on the afternoon of the 29th.

He left Daradae on the latter afternoon at somewhere about 4 p.m. accompanied by his own "boss-boi" one Kama, and went to the factory at Javarare where latex was being processed.

The accused was not there and Craig asked where he was, apparently without getting any information. At the plantation there were also employees gathering firewood and others looking after some cattle on the other side of a river. Craig did not look at the work being done by these employees but having left the factory he drove along the road in his Landrover, on the way enquiring of some employees working on the road as to the whereabouts of the accused and again without result.

He then went to the accused's house where a close relative of the accused named Johuro was present he having recently returned from his work. Whilst there Craig saw the accused coming along the road and he waited for him on the steps leading up to the verandah of the accused's house. The accused had a bush knife in his right hand which gave some slight indication that he was returning from work. The bush knife is a standard or usual working tool. Craig was on the third step which was about two feet from the ground. When the accused came up to the foot of the steps Craig asked him where he had been and why he was not "on the job". The accused replied that he had been working but Craig's attitude to this assertion was as he said in evidence, "I knew different". I cannot see any basis for his disbelief of the accused and in my opinion he leapt to a sudden and unjustified conclusion. Craig was annoyed and spoke to the accused in strong terms and told him that he was a bloody liar. He was standing with his kneecap about in line with the accused's shoulder and being of opinion that the accused was not looking at him whilst he was speaking to him he (Craig) put his left foot out and with some force jerked the accused's head up or backwards with his boot. The boot had a suede upper and a worn rubber sole.

There was a conflict as to whether he had kicked the accused once or twice, the accused and Johuro maintaining twice, Craig saying that it was only once. The whole incident happened very quickly and I am not satisfied that there were two kicks but I am satisfied that there was at least a forcible shoving which constituted a not insignificant and certainly degrading assault and one which was likely to cause any recipient to lose his temper, which I am quite satisfied the accused did. I should

add that the witness Craig did not impress me and my judgment of him is that he is an arrogant and ignorant man who saw and sees nothing wrong in his conduct. Shakespeare well describes his ilk - "man drest in a little brief authority, most ignorant when he's most assured". As Craig said in evidence, "How was I to do anything else? I could not lean down from the step to push his head up. It was convenient for me to push him with my foot. It did not occur to me to say 'Look up when you speak to me, man'". It did not occur to him because he was irrationally angry and a man careless of human dignity either his own or that of any person for whom he felt an arrogant and ignorant contempt.

The accused in his sudden anger, and I am satisfied without reflection, swung with the bush knife which he was all the while holding in his right hand at the leg which had just kicked or pushed him, inflicting a wound about 3" or 4" long just below the kneecap and transverse to and to the left of the shin bone. Craig retreated up the remaining steps on to the verandah pursued by the accused who grasped him by the throat with his left hand. There was a conflict of evidence as to what happened then, Craig maintaining that the accused had the knife raised to strike him on the head, the accused and Johuro, who was present, saying that this was not so. Indeed the accused stated that he had the belief that Craig was looking for a weapon with which to attack him and that was the reason for his pursuit. I do not believe this to be the case. I think the accused was extremely angry and probably had it in his mind to do some further physical injury to Craig but within a few seconds Johuro took the knife from him without any struggle and the accused immediately calmed down. Craig who was bleeding fairly profusely got into the Landrover and drove to his own home where he was assisted by his wife and a medical orderly who inserted a number of sutures into the wound which has now healed completely leaving a small benign-looking scar.

Mr. Heath for the defence urged upon me that there was clearly provocation within the meaning of section 268 of the Code and that the accused was entitled to an acquittal by

virtue of the provisions of section 269. That there was provocation within the meaning of section 268 I have no doubt. True it is that the accused has had a good deal of contact with civilisation and has been in Port Moresby for the past eleven years during four years of which he was a member of the Constabulary. He was in a senior and responsible position on the plantation. But in my opinion any man the subject of the unnecessary, degrading and insulting assault committed on him could be pardoned for losing his power of self-control so as to be induced to assault the provoker. Accordingly I hold that Craig's conduct constituted both a wrongful act and an insult of such a nature as to be likely when done to an ordinary person to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult was done and offered.

There remains to consider whether the accused can avail himself of section 269 so as to be freed of criminal responsibility. The section reads :

"A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault if he is in fact deprived by the provocation of the power of self-control and acts upon it on a sudden and before there is time for his passion to cool, provided that the force used is not disproportionate to the provocation and is not intended and is not such as is likely to cause death or grievous bodily harm."

I find that Taimbari was in fact deprived by the provocation of his power of self-control and that he acted upon that provocation on the sudden and before there was time for his passion to cool. Indeed his reaction was immediate.

The difficulty lies in the proviso that the force used is not to be disproportionate to the provocation. Real, J. in R. v. Foxcroft, a manslaughter case tried in Brisbane in 1911, pointed out that the section called upon a man to guide his anger with judgment and that the law expected an angry man - a man who had lost control of himself - to measure the proportion of the force he used and to weigh the probability or otherwise of the actions he used causing death or grievous bodily harm, which he thought was absurd. I have much the same feeling about this section

as did Real, J. But I must do my best to apply it. In this case I am satisfied that the blow struck by the accused was not intended to cause death or grievous bodily harm nor do I think that it was a blow likely to have such a result. "Likely" I take to mean as reasonably foreseeable as probably having such a result, i.e. foreseeable both by the accused and by the ordinary man placed in the circumstances in which the accused found himself. It seems to me that what happened in this case was that the accused understandably lost his temper when struck and almost blindly struck out a single round arm blow of some force at the leg which had kicked or pushed him. He struck out with a weapon which quite fortuitously was in his hand at the moment and I cannot feel satisfied beyond reasonable doubt as I must be that the force was disproportionate to the provocation. I do not regard this as an extraordinary reaction. Had Taimbari gone in search of his bush knife or some other weapon or had he rained a series of blows on Craig the position would of course have been different. As Taimbari himself said in cross-examination - "If I had intended to cut him I would have cut him seriously", and I have no doubt that this is a true statement of the position.

I want to stress particularly that I am not to be taken as saying that a man is entitled to use a knife or other weapon in retaliation when assaulted or insulted. Generally speaking the use of a knife or other weapon is to be deplored and will merit rigorous punishment. But each case must depend upon its own circumstances and this is a very special case. The presence of the knife was undesigned and there was nothing like any premeditated use. The fact that Johuro had no trouble in taking the knife from Taimbari and that he calmed down immediately this was done further confirms in my mind the view I have formed of a sudden and natural losing of temper and a regaining of control reasonably soon which one would expect of the ordinary man.

For the foregoing reasons I find the accused not guilty and he will be discharged.