SC 456

ROUGH DRAFT

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

CORAM: MANN C.J.

REGINA v. HANJAU-AIKOLO
and FAKAIN-BUKE.

The vital question in this case is whether the two accused persons, who did not take part in the actual killing of the victim, made themselves responsible as principal offenders under Section 7 or Section 8 of the Criminal Code.

It is highly probable that in discussions taking place at or prior to the time that the raid was commenced, some of the accused persons counselled, procured or enabled others to join in the expedition, but the evidence is not sufficient to disclose what was said or who counselled, procured or enabled whom to take part. On the evidence the question really arises under Section 8 relating to offences committed in prosecution of a common purpose. This must be considered at two stages because of the peculiar social background of the people concerned.

First, considering what ~~may be regarded as~~ was the ~~major~~ purpose. It is clear that the four accused set off together in order to accomplish a pay-back killing on behalf of their clan against the opposing clan. It is known that amongst the native people in many parts of the Territory such a pay-back killing could be achieved by killing either the individual person who had committed the acts for which revenge was sought, or by attacking some close relative or member of his family. Under the provisions of

Section 8, this would clearly be an unlawful purpose and if, in the course of pursuing such a common purpose, an offence were committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each ~~of them~~ member of the party would be deemed, by virtue of that section, to have committed the offence.

All the four accused were at least clan relatives and all had the same interest in achieving what is commonly known as a "pay-back" against the rival group. However, the interest of each was not quite identical, and there were relatives of some of the accused who were not identical with relatives of others, or the relationships might not have been identical. So far as their individual family relationships were concerned, each of the accused felt at liberty to join in an expedition in order to murder the intended victim, ~~he~~ he not being within the immediate family relationships which would have prohibited them, ~~from~~ by custom in supporting such a raid.

However, when the four accused reached the house of the intended victim, they found that he had already heard of, or had suspected, the raid, which was in fact being made against him. He, therefore, had absented himself and gone into hiding in the bush. ~~The result was~~ ~~When~~ when the four accused came up ~~and~~ they found only the wife of the intended victim at home, ~~and~~ & according to common practice the wife would be acceptable for the purposes of a pay-back in many cases. // Having discovered that the wife of the intended victim was the only person available, the two of the accused who were close blood relations of hers withdrew from the raid and took no part in the killing of the woman, which was done solely by the remaining two. Thus, there is

evidence of a purported withdrawal by two of the accused from the illegal common purpose before the purpose or objective was achieved or ~~even~~ put into immediate effect.

The conditions under which a withdrawal from a common purpose may be relied upon successfully are discussed in the case of The Queen v. Saylor (which is reported in 1963, Vol. 57 of Q.J.P.R. at p.79). This was a decision of the Court of Criminal Appeal and it was held that the appellant was guilty of the offence charged unless there was evidence fit to be considered by the jury that before the final kicking (in that case) by the other accused on the second occasion, the appellant had not only withdrawn from the prosecution of the common purpose, but had also communicated that fact to the other accused in such circumstance that any subsequent criminal act by the other accused was his separate act, and there was no such evidence in that particular case. It also appears from R. v. Croft, an authority cited in the judgment of Philp S.P.J. at p.83 of the report of Saylor's case, that in the case of a pact to commit a criminal offence, coming within Sec. 7 of the C.C. the accused must show that he expressly countermanded or revoked any advising, counselling, ~~or~~ procuring or abetting which he had previously given. This is not to alter the onus of proof but to demonstrate that any influence exercised on the mind of the persons who actually performed the acts in question had been removed and that he severed his connection or departed from the agreed contract.

In the present case there is no substantial evidence of anything having been said or done to announce the withdrawal from the joint excursion of the two accused who did not actually kill the woman. Nevertheless, the close blood relationship between the two accused

referred to and the woman who became by substitution the victim of the other two accused persons was well-known to all concerned because clan and family lines and relationships are clearly understood and they were all fairly closely related.

It appears from the evidence that the two accused who did not actively participate stood aside, simply holding their weapons, and made no move and committed no act whatever against the woman victim, whilst the other two who were active went round ~~the~~ our opposite sides of the building and they alone attacked her and shot her with arrows.

Looking at the case broadly, I think that to fit in with the social conditions prevailing in many parts of the Territory, this might well be a case for diminished responsibility on the part of the two accused because they did support an actual raid designed to kill an appropriate victim, but they withdrew because of special personal relationships when the substitute victim was adopted by the other two accused. So far as we are able to say from the evidence, I think that the correct social implications are these - that the two accused who did the actual killing would not have expected their companions to accept the substituted ~~purpose~~ victim because they addressed her as "sister". ~~This would be final and~~ Nobody would expect a person to join in to kill anyone addressed as father, mother, brother or sister, whether that relationship were identical to our European concept of family relationships or not. It is a question of recognised relationships which bear words to show a specially close family relationship as recognised in their society. It would hardly be necessary for a lot of express words to be uttered to explain to their companions why or to

that extent they were withdrawing, nor would it be necessary to negative in their minds any support for the ~~original commission~~ which had been ~~made specific~~ varied so far as the victim was concerned.

The evidence, so far as it goes, indicates ~~then~~ that all four were motivated by a customary duty to their main clan to join a pay back killing to equalise the status of the two clans, but two of them having a different interest and a different social duty according to their way of life, withdrew, as they would be expected to, and refused to take any hostile part against the woman who became the substitute victim. There is much that we do not know about the details of the relationships. It is very difficult to get specific evidence about these matters, particularly since it must be obtained through several interpreters, and the words used in English very often do not correspond with precision to any known native word or relationship.

I infer from the evidence that it ~~must have been~~ was perfectly well known to the two accused that the other two companions were fully prepared to join in the excursion against the husband, who was the original victim, but were entitled to withdraw and did in fact stand aside and withdraw when the victim's wife was adopted.

I have considered one possibility arising on the facts, and that is, that even in standing by without making an attack on their sister, the other two accused might well have been lending support to their clansmen by remaining there with their weapons so that they would be in a position to assist in the event of a counterattack, but I think that this would not be in

the normal contemplation of people in that position. There was no evidence to support such a view. They were not expecting a counterattack and they all went off in their separate ways.

There is no evidence, therefore, that could satisfy me that the conduct of these two accused in supporting the pay back raid continued beyond the point at which the specific nature of the operation changed, so I must find these two accused persons Not Guilty of the offence charged, whereas, the other two are guilty of the offence, they having actually committed it by shooting the woman with their bows and arrows.