

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

CORAM: CLARKSON, J.

THE QUEEN

v.

POGI-WAP

UNDAGI-MAK

WAMA-KOU

KEWA-YAGA

NANGAP-NORI

and

KERUA-POMP

REASONS FOR JUDGMENT

1969
Sept 9,
10, 11, 22.
M. HAGEN
Clarkson, J.

The six accused are jointly indicted for the wilful murder of one Tubuga-Kuna on the 4th August, 1968. The deceased was a Councillor and the leader of the Jiga-Agalimbo clan. His killing was the result of only one of a number of attacks which occurred on that day in the course of fighting between the deceased's clan and the Jiga-Mugamana clan, and not unnaturally after such a long period the evidence is to some extent confusing.

It is clear that Councillor Tubuga and other members of his clan were on the day of his death engaged in preparing a road on land which was the subject of a dispute between the two clans. It is unnecessary to detail the cause of the dispute, but it is clear that on the day before Tubuga's death members of the Mugamana clan had put signs on the disputed land which indicated clearly enough that they objected to the Agalimbos working on it.

On Sunday, the 4th of August, 1968 the Mugamanas were also working on a road nearby which followed a slightly different course from that which the deceased and his men were preparing. The Mugamanas appear to have finished their task first and I am quite satisfied that then a group of them approached Tubuga and his companions to dispute the right of the Agalimbos to be where they were. This group attacked and killed Tubuga. A Mugamana man, Terema,

was wounded at about the same time, probably immediately after Tubuga was attacked, and subsequently another member of the Agalimbo clan was also attacked. With these two latter attacks I am not concerned.

The real problem which arose during the trial was whether the members of the party which attacked Tubuga could be sufficiently identified.

The Crown case was that this group consisted of the six accused. On the other hand, the accused did not deny that Tubuga had been killed by a party of Mugamana men, but each of the accused, except Wama, denied being present at the killing and Wama claimed that although present at about the time when Tubuga was killed, he did not see the killing because he was acting the role of peacemaker and trying unsuccessfully to prevent the fight which was developing.

The Crown case depended largely on the evidence of four of Tubuga's relatives who were present at the scene - Riam and Kiap, adult sons of the deceased and Kundi, a wife of the deceased and Tena the wife of Kiap.

The evidence of the witness, Kundi, as to the killing was that the six accused approached Tubuga, that Wama held the deceased's hands behind his back, that the woman Pogi pulled the deceased's head down by his hair and that the deceased was then struck in succession by Kewa on the head with an axe, by Kerua on the head with an axe, by Undagi on the head with a stick, and finally by Nangap on the head with an axe.

This same sequence of events with no significant variation and preserving the exact order in which each accused attacked, was repeated in turn by Riam, Kiap and Tena. Although these four persons have been living together for the thirteen months since the killing, both Kiap and his wife denied that the events of that day had ever been discussed between them or with their two relatives.

It would have been remarkable if four independent observers had agreed in such detail on what occurred,

and it would be even more remarkable if four relatives of the deceased, themselves probably in some danger, had been able firstly to observe exactly the same things occurring when the group of Mugamanas surrounded Tubuga and, secondly, without any consultation, to recall it in complete detail and in the same order some thirteen months later. I formed the clear impression that these four witnesses were telling a story which they had carefully prepared and memorised.

This in itself does not necessarily render the story worthless for it may have been a composite picture of their respective observations, but there is another factor which, for me, makes their story quite unreliable.

The uncontradicted medical evidence is that the deceased suffered a severe laceration involving extensive fractures of the skull in the left occipital area and two minor lacerations, one above the left ear and the other over the right eyebrow. The main injury was caused by a blow from an instrument such as an axe or conceivably by two blows which coincided at the same spot. It is by no means certain that the two minor lacerations were caused by separate blows. The doctor's opinion was that there was only one heavy blow to the head and that it was unlikely that there had been a severe blow to the head with a stick.

Accepting this evidence as I do, it immediately becomes apparent that whatever the course of events in the attack on the deceased, it could not have been as these four witnesses described. On their account one would expect to find three axe wounds to the head and some evidence of a fourth blow by a stick, but no reasonable construction of the medical evidence can be reconciled with this account.

If, as it appears, the sequence of events has been fabricated by these witnesses, there seems to be little reason for accepting their identification of the persons inflicting the injuries. There is evidence that the five male accused are influential men in their clan, and in a inter-clan fight, it is not unlikely that

an attempt would be made to cast the blame on those known to be the leaders.

Some of the identifications made by these Crown witnesses were quite unsatisfactory. Kumdi said that there were many men present, that Anis, Wagi and Timbi, other Mugamana clansmen, could have been present at the time of the killing and that the six accused were the only persons whom the witness recognised and the only Mugamans whose names the witness knew. In the same way, the woman, Tena, who identified the accused as the attackers, admitted that she did not know any other Mugamans.

In addition, there is a significant body of evidence that there were a number of other Mugamans in the party which attacked Tubuga. There is the evidence of Kumdi to which I have already referred. Riam identified Anis, Timbi and Terema as being present. This witness admitted, however, that he could not see properly the faces of the attackers. In addition, there was evidence from the defence witnesses Rombak and Pala that Wagi, Anis, Timbi, Terema, Pala and Yak were in the party of attackers.

At this stage it is desirable to mention evidence from other sources against the accused, Kerua and Wama.

The witness, Koim, was perhaps the nearest to a truly independent eye witness amongst those who gave evidence. From a distance of some 30 or 40 yards from the killing he said he saw Kerua attack the deceased with a stick. When pressed in cross-examination by Kerua's counsel, Koim said "I have showed you the distance I was, I think I saw Kerua bringing a stick and hitting the Councillor". Against this was evidence from Kerua, supported by Pala and Nongor, that Kerua was not in the attacking party. I regard Koim as an honest witness, but, as his evidence showed, he had forgotten significant portions of his deposition as taken in the committal proceedings and his identification of Kerua with the qualification which the witness made, does not satisfy me beyond reasonable doubt that Kerua

was present at the killing. I add also that the identification of Kerua as the man who wielded a stick was, of course, inconsistent with the story told by the other Crown witnesses.

Wama requires special consideration because he was the only one of the accused who admitted being at the scene of the killing. For reasons which I have already given I reject the account of the four Crown witnesses whom I have earlier named, and I am left with the evidence of Wama himself supported by Paia that Wama's activities were restricted to unsuccessful attempts to stop the fighting. In these circumstances I cannot feel satisfied that the Crown has discharged the onus cast on it in respect to this accused.

In the result, although I am completely satisfied that Councillor Tubuga was murdered by a group of Mugamana men, I am not satisfied that the Crown has shown that any of the six accused was a member of the attacking party. I would have had little difficulty in concluding that the members of the attacking party aided each other in the attack so as to make them all liable as principals under Section 7 of the Criminal Code, but in the absence of evidence which satisfies me that one or more of the accused was in that party, none of them can be convicted on the present indictment.

I have listened carefully to all the talk about this trouble and since the hearing finished I have thought a lot about it. I am quite satisfied that a party of men from the Mugamana clan attacked and killed Councillor Tubuga. I am also satisfied that there was no good reason for their doing this. Although I am satisfied that the Councillor was killed by some Mugamana men this does not mean that I am able to

convict anybody of the killing. I cannot send the whole of the Mugamana clan to gaol. Before I can punish anyone for this killing I must be satisfied that I know the names of the men who did the killing, and it is the job of the Government to produce evidence showing exactly who these men were. This the Government has not been able to do. I do not believe all that the Councillor's relatives have said nor do I believe all that the Mugamans have said.

This killing of the Councillor was a bad wrong. The Mugamana clan and all other clans must learn that killing people is not the way to settle a dispute. If there is a dispute over land then the people must take their troubles to the Court. Because the Government has not shown clearly that these people are the people who killed the Councillor, they will be released from gaol.