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

CORAM: PRENTICE, J.

Saturday,
21st November, 1970.

REGINA v. MISAM WAPET

1970

November 5 and 6
MAPRIK

November 21
WEWAK

Prentice, J.

The accused is charged with the manslaughter of his wife Kingwato. The accused is a well set-up man who appeared to me to be in his mid-twenties. He comes from the village of Kilmanglen in the Maprik subdistrict of the East Sepik District. This subdistrict has been under Administration control continuously since the end of the 1939-1945 War and was indeed extensively occupied by the Japanese during the war and was subject to some control pre-war.

On the evening of 13th August, 1970 in a house at Kilmanglen Village the accused, his wife and a group of men were yarning. The occasion was one of pleasantry and banter, until a point at which the accused's younger brother made a joking reference to the deceased having removed what were apparently scabies from the accused's testicles. The accused felt outraged by this exposure by his young brother of his condition, and by his wife's having discussed this marital attention with his brother. He felt great shame. He kicked and hit his young brother. He then vented his displeasure (to use a neutral word) upon his wife by hitting and kicking her at a time when she was holding her child in front of her. The wife then laid down on her bed and suffered a night of pain in which she vomited twice. It became apparent that she was cold and close to death. An attempt was made to revive her by rubbing her with stinging-nettles. She died about 6.00 a.m. the next morning, anxiously and apparently lovingly, attended by the accused and the relatives.

Doctor Stephenson conducted a post-mortem on the body on 15th August, 1970. He found no external marks of violence. There was dependant lividity on the back. There was no abnormality other than in the abdomen. The peritoneal cavity was found to be filled with four to five pints of blood. There was an irregular rupture three quarters of an inch in length of the spleen, which otherwise appeared normal in size and substance. There was an eight weeks old foetus in the uterus. Death was due to the rupture of the spleen which produced a failure of circulation, caused in the doctor's opinion by a blow of some kind or other trauma. From the two factors -

(1) that the ribs over the spleen were neither cracked nor broken, and

(2) that there was a spleen of apparently approximately normal size, and if enlarged at all, only minimally so - whereas a diseased malarial spleen is prone to rupture with minimal trauma;

Doctor Stephenson concluded this injury was caused by a blow of intermediate force. A kick from a side of a foot could have been enough, he considered. A rupture of the kind seen could be caused by a kick to the left back, particularly if delivered to the ninth rib region - that is one inch below the shoulder-blade.

Doctor Stephenson was closely crossexamined as to the possibility that this spleen ruptured spontaneously as in the condition known as mono-nucleosis. In this disease the lymph glands are enlarged. There was no such enlargement on this body. The odds against this woman having died from mono-nucleosis (which the doctor said was virtually unknown in the native population) were several millions to one. A minimal or light blow would be unlikely to have caused a rupture, but could have. This witness had absolutely no doubt whatever that this rupture was not caused by anything but a blow. It was probably of intermediate force but could have been a light blow, in any event it would have caused some pain - considerable pain.

Three eye witnesses described blows and kicks administered by the accused to his wife on the evening in question. There are some discrepancies between the versions of what took place in this hut, lit only as it was by a low fire. All described blows with the open hand to the face. One witness spoke of two hits to the back of the ribs. All described two kicks with the instep of the foot to a region on the left back and each indicated the region of the left ribs, below the shoulder-blade. These witnesses described the kicks variously - the first witness as "fairly easy"; the second witness as "fairly strong - the kicks didn't hurt her very much"; the third as "fairly strongly", "he hit her badly".

The accused made statements to the investigating officer and to the District Court on committal, in which he admitted kicking the deceased once with the side of his foot "not very hard", he "kicked her on the back", "she felt pain for the rest of the night. She vomited twice only".

In crossexamination of the Crown witnesses it was sought to establish that the deceased at the point of death exculpated the accused. Over objection, I allowed the questions, considering there would be other material to constitute the alleged statements dying declarations. I am doubtful whether sufficient circumstances were ultimately disclosed to make such statements admissible as dying declarations within the ambit suggested by my brother Clarkson to be that appropriate to Territory conditions (Regina v. Kipali-Ikarum (1)). But as they were intended to be exculpatory of the accused and indeed similar matter appeared in the two statements of the accused I have not deleted this material from my consideration. The wife's words have been variously given as "My husband did not hit me hard - he was only playing"; "My husband didn't kill me - they worked sorcery on me"; "My husband didn't hit me - I have had sorcery worked on me". The accused's two versions of his wife's statement just prior to death, were: "You didn't hit me. A poison has gone inside me and I will die now" and "You have not hit me - you were only playing around. It is sorcery that has made me like this".

The accused also gave evidence in this Court and said he kicked the deceased once, not very hard, on the back of the neck (after hitting her on the back of the neck twice). He did not hurt her. She did not cry. He did not hit with the leg strongly, only gently. The accused demonstrated a mere pushing movement with the instep of his foot to the shoulder-blade. He did not hit her as if to kill her. She was sitting on a bed at the time. He hit her with the hand on the ribs twice only - not hard - only gently (as mentioned above one witness Waham, also appeared to refer to this).

There was evidence that the deceased prior to this was quite strong. The woman was clearly concerned to exculpate the accused and obviously expected he would be blamed. She did not suggest any other physical mishap, making reference only to sorcery. I find the following facts as established beyond reasonable doubt -

(1) that the accused delivered two kicks to the deceased with the instep of his foot on the left side of her back in the region of the lower ribs;

(2) that these kicks were more than a mere pushing motion and were of fairly strong force;

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(1) 1967-68 P. & N.G.L.R. 119 at p. 131

(3) that the hits and kicks delivered by the accused to the deceased were not a mere exercise to demonstrate to others his disapproval of his wife's conduct but were intended in some anger, to punish, to hurt her, and were intended to cause pain but not serious harm;

(4) that the kicks in fact caused her pain.

I find no evidence that the accused intended to kill his wife and I am prepared to assume that he did not actually foresee her death as a possible consequence of his actions. I am not prepared to find that he could not have foreseen death as a result of the blow.

In his able and eloquent address Mr. Adams submitted that the Crown had not excluded all reasonable possibilities other than that the deceased died from the blows administered by the accused. I am unable to see any other reasonable hypothesis, and I find myself satisfied beyond reasonable doubt that the kicks delivered, in some anger at being shamed, by the accused, which I find to have been delivered to the deceased in the vicinity of the spleen, caused her death.

Mr. Adams contended that even if I were satisfied that the accused's blows or kicks resulted in the death of his wife, that nevertheless his actions were lawful, and he relied on the defence available under Sec. 23 of the Code that the death was an event caused by accident.

The husband's acts here, it is contended, were directed not towards harming but admonishing his wife, disciplining her for the shame she had caused. As I understand his argument it has two limbs. Firstly, that if the accused's acts were justified by custom, then it was lawful. Secondly, that as it was not intended to cause harm the accused's assault was not of such a degree of unlawfulness as to attract a finding of manslaughter. As I understand his argument, he relied upon that portion of Windeyer, J.'s judgment in Mamote Kulang v. Regina (2) where His Honour said "... it is not now enough to constitute manslaughter at common law that a man is killed in the course of an unlawful act of any kind. To make an unintended and unexpected killing a crime at common law, it must now be, generally speaking, the result of an unlawful and dangerous act, or of reckless negligence." His Honour then went on "There is no doubt that at common law a man is guilty

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(2) 1963 P. & N.G.L.R. 163 at p. 175

of manslaughter if he kills another by an unlawful blow intended to hurt, although not intended to be fatal or to cause grievous bodily harm ...."

Unintentional homicide the unexpected consequence of a lawful act done in a careful manner was always excusable under the common law and therefore seemingly under Sec. 291 of the Code (Mamote's case (3)).

The acts of the accused towards his wife clearly amount to an assault within the meaning of Sec. 245 of the Code, to which no authorisation, justification or excuse by law is shown to exist under Sec. 246. A justification or excuse by native custom was sought to be argued, it being suggested that Sec. 7(1)(b) and (c) of the Native Customs Ordinance was applicable. I found difficulty in following counsel's argument at this point; in my opinion this section has no relevance. It seems to me that an excuse or justification requires to be found under the Code (and in so far as it may import the common law principles in that regard, the common law, or some other statutory provision). The only provision made in the Code for domestic discipline, Sec. 280, does not provide for chastisement of wives, which appears clearly to be unlawful (see Mamote's case (4) the judgment of Windeyer, J. and Timbu-Kolian v. The Queen (5)). In any event the evidence of the accused upon which it was sought to rely in support of this argument does not to my mind raise such a justification or excuse even in customary law and indeed discloses that the accused considered himself bound by "Administration law". I would with respect adopt the statement of Ollerenshaw, A.C.J. in Regina v. Mamote Kulang (6) "Violence to the body of any person is dangerous ...."

Having come to the conclusion that the accused's acts were done with intent to inflict some bodily harm, some hurt or pain (I see no distinction between "hurt" and "harm"); the result which ensued, namely death of his wife, constitutes his acts manslaughter (Timbu-Kolian's case, Windeyer, J. (7)) unless the ensuing death was an event which occurred by accident within the meaning of Sec. 23 of the Code. In my opinion this case is on all fours with that of Mamote-Kulang v. Regina (8) and not within the exception, if so it may be called, of

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(3) 1963 P. & N.G.L.R. 163 at p. 176
(4) 1963 P. & N.G.L.R. 163 at p. 179
(5) 1967-68 P. & N.G.L.R. 320 at p. 322
(6) 1963 P. & N.G.L.R. 155 at p. 162
(7) 1967-68 P. & N.G.L.R. 320 at p. 342
(8) 1963 P. & N.G.L.R. 163

Timbu-Kolian's case (9). The act of the accused in kicking his wife was a willed act and there is no room for the view that her death occurred by accident. The act was both unlawful and in the circumstances dangerous - death was the direct consequence of it - there is no break in the chain of causation. The death of the deceased wife the person intended to be hit and kicked was not an event occurring by accident, as was the striking (or death) of the child in Timbu-Kolian's case (10) following upon the attempt there to strike the wife, who unknown to that accused, was holding her child.

I convict the accused of manslaughter.

Solicitor for the Crown : P.J. Clay, Acting Crown Solicitor

Solicitor for the Accused : W.A. Lalor, Public Solicitor

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(9) 1967-68 P. & N.G.L.R. 320
(10) 1967-68 P. & N.G.L.R. 320