Mr. Justice Kaine

SC 608

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

CORAM: PRENTICE, J.

Monday,

14th December, 1970.

THE QUEEN

v.

HONE DOROPE

1970

December 10 & 14

DARU

Prentice, J.

The charge presented herein is one of murder. From the evidence given by Crown witnesses whose veracity is unchallenged and from the evidence of the accused it is established that the accused hit the deceased, one of his three wives, on the head with an axe.

The preliminary point for my decision is whether the deceased died as a direct result of the blow. The blow delivered was, in my experience of evidence, an unusual one. The axe was held close to its head with the haft upright, and the axe in this position was brought down vertically on top of the deceased's head. The only evidence as to this comes from the accused in his statements to Cadet Officer Arek.

The body of the deceased when exhumed from its grave for examination was inspected only by Cadet Officer Arek and Sister Lindsay of the mission hospital at Suki - a person of nursing qualifications only, of some 19 years. The body had obviously been pregnant - the infant's body could be seen through the stretched skin of the decomposing frame - the baby nearly ready for delivery at 39 weeks estimated pregnancy. There was a hole cut in the skull at the back of the head. There were fractures, one of the occipital bone and one of the immovable joint between the parietal and occipital bones - the latter extending along the immovable joint between parietal and temporal bones. The hole mentioned was two inches long. Cadet Officer Arek's investigations suggest that this happened on Thursday, 9th April, 1970. The deceased died on the following Saturday week - some nine days later. During this time the deceased received no medical treatment and was required by her husband to work at cutting sago and other tasks. At the time the deceased died she was seen by the witness Hindu who saw blood on her head then. It is apparent from this evidence and from the evidence of inspection of the exhumed body, that the deceased had suffered a severe head wound which had not healed at the time of her death. No other physical cause of death was suggested by the accused, who admitted at all stages of the investigation, committal and trial, hitting the deceased on the head; but at the committal for the first time, a suggestion was

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made that "pourri-pourri" had been worked against the deceased some nine days after the blow, at a time when the deceased was "working sago" with the other two wives of the accused. At the trial and for the first time in his evidence (and not through crossexamination of witnesses) it was suggested that the deceased herself complained of sorcery. The accused gave explanation for the failure of this complaint by the deceased to appear in his previous versions, ranging from "the English people stopped me mentioning it", to "the interpreter (before the District Court Magistrate) failed to tell the magistrate, though I told him". It appeared to me that the claim to sorcery was a very late invention, which improved with the successive telling. I was unfavourably impressed by the accused as a witness. The accused stated to the District Court that he examined the exhumed body and "the skull was not broken". I do not accept the accused's evidence as to the skull, or as to the complaint of sorcery allegedly made by the deceased. I am satisfied beyond reasonable doubt that the deceased died as a direct result of the accused's assault upon her and the untreated condition of her wound which did not heal. Even if a belief in so-called sorcery intervened in the deceased's mind (and I am not satisfied as to this) it would appear clearly that the death resulted directly from the wound to the head.

The Crown relies on the act of the accused amounting to murder under Sec. 302(2) of the Code. The matter being decided on circuit, has not been fully argued before me, the defence being content to rely on the citation of Hughes v. The King (1) and the assertion that in so far as the "dangerous" act here was the blow with the axe - it is not a case of a separate unlawful purpose. This may be thought to be a surprising result of the draftsmanship of the Code. It could perhaps be said on behalf of the Crown that the unlawful purpose was the chastisement of his wife, in pursuit of which the accused did the dangerous act of hitting her with an axe. I prefer to allow myself to be constrained by the notes appearing to Sec. 302 in the annotations to the Queensland Code and to rely on the effect of the decisions there noted, being set out accurately. That being so, and the Crown not relying on any other subsection to establish murder, I would find myself not satisfied on the charge of murder. On the other hand I am satisfied beyond reasonable doubt as to the unlawfulness of the killing which I find to have occurred. I therefore make a finding of manslaughter.

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(1) 84 C.L.R. 170

Dr. Hookey presented one of his usual detailed and ingenious defences whereby he sought to arrive at this result by another route. He asked me to distinguish Regina v. Kauba-Paruwo (2) in which Mann, C.J. held that provocation induced not by the victim but by a third person, did not raise a defence of provocation. He cited an interesting legal article in 1968 Criminal Law Review by Mr. R.S. O'Regan on the subject of indirect provocation and misdirected retaliation. The undoubted facts of this case are that one of the accused's three wives who had not prepared food for him in his hut, where there were three distinct cooking places for the use of the three wives, told him it would be more fitting if the wife with whom he had spent the day in the garden (which commonly carries the connotation of uxorial intercourse) should prepare his food for him. It was belatedly suggested that this wife also "swore at him". Upon this, the accused hit on the head, the deceased wife, who was not the one who had spoken, and who was sitting closer to him than the so-called "provoking" one. Dr. Hookey's argument would appear to have been lifted straight from Alice in Wonderland and such as would enable him to justify the Red Queen's actions on grounds other than Royal Immunity. It is no doubt frustrating to him that I do not find it necessary to deal with it. I should certainly have had the greatest difficulty in accepting it; as it involved ruling at his submission (surprisingly for defence counsel) that Sec. 268 did not govern the interpreter of "provocation" in Sec. 304 (apparently on the basis that the assault was not an element in the offence of murder); a contrary result having been fought for strenuously by Territory defence counsel and established before I think, each judge before when it has been argued in many cases over many years. The latest decision to this effect was by my brother Kelly in recent months. I should not have found myself able to avail myself of his arguments even if I had applied a contrary view of the effect of Sec. 302(2); for the very good reason that I was satisfied in any event that I could accept the accused's own statement, that the speech of the untouched wife made him "feel a little bit embarrassed, so he took the axe and hit the (other wife) for nothing". He explained this a little later by saying that he "got a little bit no good". At no stage did he aver anything approaching a "sudden passion which had not had time to cool" (and certainly no loss of control such as is envisaged by Sec. 268). It is to be noted that both Secs. 268 and 269 are restricted to provocation by the person insulting or provoking.

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(2) 1963 P. & N.G.L.R. 18 at p. 19

It would be difficult to conceive of a more trifling and less genuine case of provocation being presented in a court of law, in my opinion.

I find the accused guilty of manslaughter.

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

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