

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

CORAM : FROST, J.
WEDNESDAY,
18TH FEBRUARY, 1970.

R. v. KIKI KAU'AU.

REASONS FOR JUDGMENT.

1970.
Feb. 17, 18.
KEREMA
Frost, J.

The accused man is charged under Section 306 of the Criminal Code that on or about the 19th November, 1969, he attempted unlawfully to kill a female, one Kau'a Imahai.

Mr. Wall, who appeared to prosecute, submitted that various alternative verdicts (which he did not specify) were open, relying on the provisions of Section 598 of the Code which he submitted were analogous. But in my judgment the position under the Code is the same as in England and no alternative verdict is open. The usual course is to include in the indictment an alternative count under Section 317 of the Code, or even some lesser offence. Thus, if the present charge fails, it will be necessary for fresh proceedings to be instituted against the prisoner under Section 317.

It is accepted that the Crown must prove an intent actually to kill in a case of attempted murder, The Queen v. Bauoro-Dame (1). The other elements of the crime to be proved by the Crown are to be found in Section 4 of the Criminal Code, which provides:-

"Attempts to commit offences. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt to commit the offence."

Thus the Crown must prove beyond reasonable doubt all the elements of the offence which are as follows:-

(1) (1956-66) P.N.G.L.R. 201.

- (1) The accused intended actually to kill Kau'a Imahai,
- (2) He had begun to put his intention into execution by means adapted to its fulfilment, and
- (3) He had manifested his intention by some overt act.

The facts are that the accused man had been married to the prosecutrix, but she had later married another man. The accused was prepared to accept that the marriage was at an end, but he was determined to recover the bride price. However, the prosecutrix and her people refused to pay. Over a period of time, he had endeavoured to obtain the efforts of various people in authority to assist him to recover the bride price. On more than one occasion he had spoken to a local government councillor and he had complained to the District Officer at Kikori, but nothing was achieved. On the 18th day of November, 1969, he called on Mr. Scarlett, the patrol officer at Baimuru, but before any action could be taken, he brooded over the matter, and having on the morning of the 19th November drunk some beer, he went to a house in a labour compound at Baimuru, where his wife was. The only other persons present were two old men, both of whom were called as witnesses and one of whom walked with a limp. On arrival at the house, he produced a knife, which he had tucked into the back of his shorts and rushed at his wife. She jumped through the window and he followed her. He chased her for a short distance; he caught up with her and cut her twice across the right upper back and then down the upper arm, penetrating past the bone. The first wound across the back sliced through the woman's scapular bone and one rib and penetrated the pleural cavity. The other wound, which was in the same part of the body, formed an acute angle and in the gaping edges of these wounds a large bloodclot was formed in the angle. These wounds would have caused the woman's death, had not medical aid been obtained. Both counsel agree that the only point in the case was whether the Crown has shown that the accused man had the requisite intention, for if the Crown had shown such an intention, it was plain that the accused had put his intention into execution by means adapted to its fulfilment and had

manifested his intention by some overt act.

Shortly after the attack, the accused man went to Mr. Scarlett's office at Baimuru. He produced a bush knife and said in English "I have killed her, you go down and see". He handed the knife, which was a sharp one, to Mr. Scarlett. Mr. Scarlett went to the scene, where he found the girl seated on the floor of a house, bleeding profusely. He arranged for her to be taken to the hospital where she was seen by Dr. Calvert about an hour later, or a little less. The latter found Kau'a to be in a shocked condition, with loss of blood due to the wounds on the back of her chest, which he described as severe. He said her life was in danger for two or three days. He considered that considerable force would have been required to make the wounds. On the following day, the accused made a statement to Mr. Scarlett after being cautioned, and I am satisfied that the statement was a voluntary one. Again he spoke in English and signed the statement at the request of Mr. Scarlett, after it was reduced to type. The statement is as follows:-

"Before Kau'a's father (Kakau) gave me his daughter. When I went to work for A.P.C. Kakau gave her to another man. When I finished work with A.P.C. I said to Kakau, "Give me my pay back". Kakau said "You go and see her husband, he can give you the pay." When I went to see the husband he said "Go and see her mother, she can give the pay back to you." All the time this talk went on and my heart was heavy. (angry). I came to see the patrol officer on Wednesday morning and I told him about this. I went back very angry. When I went home I thought about killing and then I went to the store and bought beer. When I drank the beer I went to kill the woman. I then came to this office and gave my knife to the Patrol Officer."

Mr. Scarlett was satisfied that the accused man understood English clearly. He was not prepared to say that the accused was fluent in English, but the simple English in which he made the statement was quite clear. Mr. Scarlett was asked in cross-examination by Mr. Stevenson who appeared for the accused whether the accused used the word "Kill" instead of the word "cut" and he replied "It would be possible, but I doubt it. I do not see how it could be confused." Mr. Wall, who appeared to prosecute, relied strongly on the statement and also on the

following passage from the accused's statement made in the Court below which again he made in English:-

"Wednesday morning I came to the Patrol Officer and he said to wait and Friday I will go up to Ipigo. I was very angry because all the time they talked the same way. When I went back to the house I was still thinking about 'What will I do'. I went and bought some beer at the store.

I bought four beer. I said to the storeman that when I finish this beer I will go and kill the woman. He said that is your business. I went to the wharf shed and I opened some beer and I drank. I told the interpreter APOS that I was going to kill the woman and I showed him my knife.

When I finished my beer I put my knife in the back of my trousers and I went to the house. I went into the house and there were people there and I saw her. I pulled out my knife and she saw it and jumped out the window. I followed her. I cut her on the back, in all three times. She went to the house. I held my knife and walked up here. I came and gave the knife to the Patrol Officer. I said this morning I came to see you now I have killed. He said where? I said in the sawmill.

That is all."

The learned prosecutor considered it proper to call Apos, the man referred to by the accused, and Apos gave no evidence of any threat being made by the accused.

The accused gave evidence, commencing with a long and detailed account of his efforts to recover the bride price, which showed how much this matter had rankled in his mind and indeed I am satisfied he had a strong feeling of injustice having been done to him. The accused said his intention was to cut his wife with a bush knife, he did not try to kill her, he only meant to cut her body with a knife. He gave as his reason that her people had refused to pay the bride price. Asked why he stopped cutting her, he answered "I was not trying to kill her, just to teach her". He said he used the word "kill" when he spoke to Mr. Scarlett because he thought it meant "to cut". When he told Mr. Scarlett "I have killed her", he said he knew she was still alive. However, in cross-examination, he was asked "Did you stop cutting her because you thought you had killed her?" and he said "Yes".

Mr. Stevenson submitted that I should not act on the accused's statements to Mr. Scarlett or to the District Court, having regard to the uncertainty whether the accused understood the meaning of the word to "kill". Further, though the accused had told Scarlett he had killed Kau'u, when he left her she was still alive. Mr. Stevenson further submitted that I should not draw an inference of intent from the wounds inflicted by the accused. He relied on the evidence of Ariki, who in demonstrating the action of the accused in stabbing his wife, said that the accused could have used more force, and submitted that if the accused wanted to kill Kau'u, he could have done so.

The facts of this case fall within a narrow compass, but I find it useful to set out a passage from the judgment of Lord Goddard in R. v. Steane (2):-

"While no doubt the motive of a man's act and his intention in doing the act are, in law, different things, it is, none the less, true that in many offences a specific intention is a necessary ingredient and the jury have to be satisfied that a particular act was done with that specific intent, although the natural consequences of the act might, if nothing else were proved, be said to show the intent for which it was done. To take a simple illustration, a man is charged with wounding with intent to do grievous bodily harm. It is proved that he did severely wound the prosecutor. Nevertheless, unless the Crown can prove that the intent was to do the prosecutor grievous bodily harm, he cannot be convicted of that felony. It is always open to the jury to negative by their verdict the intent and to convict only of the misdemeanor of unlawful wounding. Or again, a prisoner may be charged with shooting with intent to murder. Here again, the prosecution may fail to satisfy the jury of the intent, although the natural consequence of firing, perhaps at close range, would be to kill. The jury can find in such a case an intent to do grievous bodily harm or they might find that if the person shot at was a police constable, the prisoner was not guilty on the count charging intent to murder, but guilty of intent to avoid arrest. The important thing to notice in this respect

is that where an intent is charged in the indictment, the burden of proving that intent remains throughout on the prosecution. No doubt, if the prosecution prove an act the natural consequence of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a view of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted." Ibid at page 1004.

Whilst the accused was giving evidence, I endeavoured to make an assessment of his veracity and his knowledge of English. He had had opportunities to learn and use the language. He had been to Mission school, he had spent several years in Port Moresby, and he was conducting the business of a storekeeper. Whilst he was under some strain, he did seem to express himself clearly. However, upon the relevant facts of the case, I was unable to accept him as a witness of truth. But despite this, if the only evidence against him was his statement to Mr. Scarlett and to the District Court, I have reached the conclusion that it would not be safe for me to act on that evidence. There is a common confusion in the minds of indigenous people who speak English, particularly those who also speak pidgin English, as to the meaning of "kill", and it is not uncommon for the word to be used as meaning inflicting a wound without necessarily causing the death of the victim. Accordingly, I have reached the conclusion that there is insufficient evidence of intent in the words used by him in the two statements.

But this case has to be considered on the whole of the evidence including the force of the attack, the weapon used and the nature of the wounds, the natural consequence of which would have been the death of the prosecutrix had she not had medical assistance. I accept Dr. Calvert's evidence and I was much impressed by it. I saw the two long scars of the

wounds on the woman's back. I am satisfied that these were severe wounds caused by the use of considerable force by means of the accused's sharp knife. The crime was a premeditated one, as the accused said in his statement, he was angry. His motive was plain. He was out to seek vengeance on the woman, to execute the "pay back" because, as he said, the woman was the cause of his troubles and represented her people who refused to repay the bride price. That he had no mere minor attack in mind is shown by his not only taking a knife but also by hiding it in the back of his shorts. The two eye-witnesses were old men and quite unable to assist the woman. Their presence would not have deterred him from making a fatal attack. When he left her, the woman was covered with blood. It is doubtful whether the woman fell to the ground; if she did fall to the ground, she was certainly able to move the twenty yards or so back to the house. However, I am satisfied that he ran off in the belief that the woman would die from her injuries. It is quite common in the Territory for the back or front of the chest to be selected as the target for a fatal attack. Upon the totality of the evidence, and the inferences to be drawn from it, I am satisfied beyond reasonable doubt that the accused did intend actually to kill Kau'u and I thus convict him of the crime with which he is charged.

UPON SENTENCE.

Although this is a very serious offence, I take into account as extenuating factors, first, that the accused had, as he thought, exhausted all lawful means to recover his bride price and, secondly, that Kau'u has apparently made a good recovery. He is accordingly sentenced to three years' imprisonment with hard labour.

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

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