

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

CORAM : PRENTICE, J.
17th April, 1970.

REGINA v. TIENDELI PAKALE

J U D G M E N T

1970
Apr. 13, 14
15, 16, 17.
Pt. Moresby
Prentice, J.

Tiendeli Pakale of Paugunda village in the Tari District, is accused of the wilful murder on the 5th December, 1969 of Yasuara-Kurug a Chimbu; both accused and deceased having been employed at that time at Itikinumu Plantation in the hilly hinterland to Port Moresby.

The deceased on that day received multiple stab wounds from which he died - the killing being undeniably unlawful and clearly intentional on the part of one or more persons. The evidence establishes that the wounds causing the death were done with a knife and that they were actually dealt by one or both of two persons not presently before me; viz, Paragua and Karu.

The questions for my decision may be shortly phrased as :

- (a) whether the accused was a participant in the killing and
- (b) whether he at the time was seized with the intention necessary under Section 305 of the Code of Papua.

Though the Crown Prosecutor opened his intention of proving the accused's guilt as a principal in the 1st or 2nd degrees, terms apt to the legal situation in certain Common Law states, it is clear that the criminality alleged would lie under Section 7(b) or (c) or perhaps Section 8 of the Code, if it lay at all.

The evidence against the accused consists almost entirely of statements made by him to fellow workers just after the killing had taken place, to Sub. Inspector Blackwell, to the District Court where the accused gave evidence at the committal proceedings, and again to this Court.

The incidents took place in the vicinity of the road running through the Itikinumu Plantation. Along this road are to be found in order, a compound named

1970

Regina

v.

Tiendeli

Pakale

Prentice, J.

Patiki (where the deceased a domestic servant slept), a cement bridge, another compound called Epere (where the accused and other rubber tappers, some of whom gave evidence, slept) and Sivitana Sawmill. The distance between Patiki and Epere is said to require "a long time" to travel on foot, that between Epere and Sivitana Sawmill "a short time". Inspector Blackwell estimated the road distance from Patiki to Epere to be about three miles and the cement bridge to be in that section of the road, about one mile short of Epere.

The deceased was seen by a witness Gari to leave Patiki in the company of one Waus, another Chimbu some time after 3 p.m., after he had collected his pay. When last seen by this witness he was carrying a travel bag and going on the main road in the direction of Sivitana Sawmill. The man Waus was found dead in the general vicinity of where the deceased's body was found, but some distance away. This body was not found for some days after 5th December. Yasuara-Kurug and Waus were seen in company later on 5th December by Yagionga Sil at the Epere Compound. There, the deceased borrowed a towel as a protection against rain and left Epere Compound in Waus's company. It is not known in which direction he walked initially but when attacked he was in the vicinity of the cement bridge and would seem to have been returning to Patiki Compound. The borrowed towel was found close by his body.

From blood marks on the road, a pool of blood in grass just off the road and blood marks and tracks through the young rubber there forming the roadside growth, it is apparent that the deceased was attacked in one spot, perhaps taken initially to another, but certainly later (and the evidence establishes this was done by night) to a spot down the course of the creek which flows under the cement bridge. When found the body was covered as to its upper portion in a bag of the type of a cornsack or copra bag. The body was found on 6th December, 1969 - a Saturday morning.

The first witness to speak of seeing the accused that day was Ope Waria, a Tari like the accused. This witness slept after finishing work at 3 p.m. and then went to dig sweet potatoes in his garden. While there,

the time would seem to have been just before or at dusk, he saw the accused approach in the company of Karu and Paragua who were also rubber tappers on the Plantation. He relates that of them only the accused spoke to him saying "forget about what you're doing - you might as well come with us to the house because we have killed a man." He says the accused had a bush knife (which he indicated at about a foot long) in his hand. The accused denied speaking to Ope but says Karu said this. In returning with this group to the compound, Ope says he heard the accused say to two others working in gardens - "we have killed one of the men and left him near the cement. We would like the two of you to come with us to our house." Later Paragua is said in the presence of the accused to have invited one Paija and others to help with the more secure hiding of the body.

Another Tari man, Paija who was apparently one of the last-mentioned two gardeners, speaks of what the accused said to him and states that the accused was carrying a knife. He says that the accused stated "one of the persons is dead near a cement"... "we killed two Chimbu men, one of them is dead - but the other one got away"... "we killed a man and we left him near the cement. Later on we will go and get the body and dump it" (this in answer to a question as to the reason for the killing.) In cross examination the witness said "he (the accused) told me at the garden 'a man is dead near the cement' but when he came back at the compound he told me they killed a man."

It was suggested by defence counsel that these two witnesses, Ope and Paija were exhibiting bias against the accused in that they were wantoks of the other two men alleged to have been complicit to the murder. I cannot quite see the relevance of this submission. It is true that another witness said he saw Paragua carrying a knife. No one else speaks of the accused being in possession of or carrying a knife, and a knife was actually found in the bed of one of the two alleged principals - Paragua. But what these two witnesses say of the accused's admissions is amply backed up and rendered credible by what the accused himself said to others and to this Court.

The accused when questioned by Inspector Blackwell made a statement which was taken down in the form of a record of interview. Some cavil was made at the translation of question and answer into the format of a statement, and the propriety and accuracy of the taking of the statement were searchingly tested by Mr. Lindsay, Defence Counsel; emphasis being laid on there having been no Tari interpreter used. Curiously enough though Inspector Blackwell said he conversed freely and without difficulty to the accused in Pidgin, the accused himself suggested in evidence that a Tari or Huri interpreter was used at least to some extent. In the event the other versions given by the accused through a Huri interpreter (i.e. when he gave evidence in the District Court and in this Court) are substantially identical with that recorded by Inspector Blackwell. Accordingly I see no reason to doubt the accuracy of the record of interview or the propriety of its taking in Pidgin.

The facts which indisputedly emerge from the accused's various statements are that Karu and Paragua invited him to go with them from Epere as they were going "to follow a man". The accused agrees that he knew their intention was to kill that man designated by them. After recovering a cigarette temporarily lost on the floor of his hut, he set out after them. The lapse of time is not established - the accused agreed in cross examination that he went after Karu and Paragua as soon as he found his cigarette. He arrived at a scene near the cement bridge on the Patiki-Sivitana road at a moment when Paragua and Karu were engaged in killing the Chimbu man Yasuara. At Paragua's request the accused put his foot on the leg of the deceased which was shaking or twitching or kicking, while a further stab wound or several wounds were made in the deceased's neck. The three left the scene when satisfied the deceased was dead.

The Crown urges that the accused was engaged in a common enterprise that of killing the Chimbu man who had just left Epere Compound, from the time of the conversation there between Paragua, Karu and the accused. Though it is clear that the accused then knew of Paragua and Karu's intention to kill the Chimbu I am not satisfied beyond a reasonable doubt that at that stage the accused

assented to, encouraged, aided or joined in the enterprise. I am however satisfied that as from the point of the accused's hurrying forward at Paragua's invitation he became a party to a common enterprise of murdering the Chimbu man - assuming the murder had not already been committed. I find a common purpose from the moment he joined the assault, because of his previous knowledge of the intent to kill that man and from his knowledge that the victim was then in a helpless condition and the expressed plan was in process of being put into effect - subject to the above assumption as to non-completion.

It is of course a feature common to many murders in this Territory for fellow clansmen to associate themselves ritually and tribally with a murder which has already been committed, by joining their spears, arrows, axe cuts or knife thrusts into the body of a victim already stricken and killed by their fellows. The question posed for me in this respect is in some respects akin to that faced by Smithers J. in Req. v. Jaminyen and Sirinjui (1).

I turn now to a consideration of the medical evidence. Dr. Wilkie who performed the autopsy and took photos, described a large number of minor and several major stab wounds (all likely to have been inflicted by a knife of the kind identified in evidence as Paragua's). These following he described as serious: one shown in Exhibit D3 to the side front of the chest into the pleural cavity and aorta; one in the back just left of the mid line penetrating the pleural cavity causing bleeding into the left pleural cavity (shown in Exhibits D9 and 10); and two in the right angle of the jaw in the right side of the neck - the upper of which went right across the pharynx (these are those shown under the ear in Exhibit D15). These wounds were in the doctor's opinion the cause of death. The deep wound in the back, the deep wound in the right front of the chest, and those in the side of the neck in the doctor's opinion occurred just before and were the cause of death. There were a dozen or more other wounds.

In cross examination the doctor said that the wound in the supra-clavicular region though inflicted in a classical position for a killing with one stab wound, in fact struck no vital spot and was unlikely to have caused death.

(1) (unreported No. 264 - 27/10/62 Wewak)

Mr. Lindsay starts his submissions for the defence on the basis that from the medical examination a number of the wounds could possibly have been inflicted after death and asks me to find one wound only was caused after the point of time when the accused put his foot on the deceased's shaking or twitching leg; and from these two findings to arrive at a point where I must entertain a reasonable doubt as to whether the deceased was still alive when this one further stab wound was made, and should therefore acquit the accused of the charge.

I must look at the whole of the evidence and not merely the medical evidence in arriving at conclusions as to the causation of death and its point of time during the incidents described.

In the record of interview the accused stated: "I went a bit further and saw Paragua and Karu. These two were killing a man. They were not on the road, they were on the grass a little bit into the rubber. The man was not dead yet, he was lying on the ground and his leg was shaking. I put my foot on his leg and stopped it shaking. I saw where they had pushed a knife into his neck. He was not dead yet and they pushed another knife into his neck. Paragua put the knife in his neck again. I did not see any other Chimbu. When Paragua pushed the knife in the Chimbu's neck he died..." The Crown asserts that this shows at least two wounds made in the accused's presence. I make no specific finding in that regard.

The accused in his record of interview stated that when asked by Paija who killed this man he replied "Paragua, Karu and me. We killed him." I must bear in mind that the Pidgin expression "killim" can be ambiguous and may merely mean "assaulted or wounded". The accused himself seems clearly to have used the word in this sense when he said "we killed two Chimbu men, one of them is dead, but the other one got away"... However this may not be of much significance in the context of this particular enquiry.

The accused says that when in the mortuary and shown the Chimbu's body he saw "a cut on this man's neck. This is the cut I saw Paragua make by pushing his knife in."

After being given the statutory warning under Section 103 of the District Courts Ordinance the accused at the committal proceedings gave evidence and was then cross examined. I pause here to say that such a warning from a person presiding in a Court may not be very effective when an accused is unrepresented; and to draw the authorities' attention to the obvious desirability of ensuring the representation of an accused at committal proceedings at least in capital cases. I bear in mind that under Section 104 of that ordinance what an accused says following the statutory warning by way of statement or giving evidence, including any questions he may be asked by the prosecution, as happened here, becomes admissible in this Court.

In the District Court the accused stated "when they had this Chimbu down on the ground, when I came up he close to death and his leg was twitching and Paragua pushed the knife into the left hand side of his neck, and the Chimbu died then. Karu and Paragua killed him, I only held his leg thats all." "When I came up to them the Chimbu was lying on the ground Karu was standing over him and Paragua was still stabbing at the Chimbu." "Paragua said I'm trying to kill this man but his leg is kicking about - you come and hold his leg."

In this Court the accused again gave evidence. After describing the talk at the compound with Karu and Paragua, he said in chief describing his arrival at the bridge:

"I found them killing a man. Paragua called out to me when I arrived - the man's leg was still shaking - but the man was not dead....on arrival the man was unconscious his legs were still shaking." Mr. Lindsay challenged the interpretation of the accused's phrase which by the time it had been translated from the Huri to Pidgin included the phrase "man i die pinis". He contended that this was at the least ambiguous and could mean "he was dead". Mr. Kukuris the Pidgin/English interpreter after being questioned by Mr. Lindsay with my consent, insisted that in the context of the Pidgin used by the Huri interpreter (Mr. Lakari Imbiak) the proper interpretation was "unconscious".

The accused's evidence continued: "I stopped the shaking leg by placing one of my legs on the person while Paragua was pushing the knife through the neck of

the deceased. Because of what Paragua did with the knife the man died, then we return to our houses." In answer to his own counsel's question "Please say what happened when you put your leg on the deceased" he said "while I had one of my legs on the deceased's leg, Paragua pierced knife through his neck". To the question "What else happened that moment?" "The man died." "What do you mean when you say he died?" "The deceased was not shaking any more - that's why we said he was dead." To his own counsel the accused admitted that he said to Paija "we killed two Chimbu men, one of them is dead, the other got away..." In cross examination, the accused acknowledged the Record of Interview as a correct record, that the talk with Inspector Blackwell had been in Pidgin, though the services of a Huri interpreter Mapria were used to some extent. He stated that at Itikimumu the Tariis do not like Chimbos because there are more Chimbu bossbois than Tari, though the Chimbos arrived later. He admitted he knew when Karu and Paragua left Eperere they intended to kill a particular man.

He was asked as to his first view of the scene when coming to the bridge. Did it appear the man was helpless? And he replied "To me two against one - one person would be unable to defend himself." He said when Paragua saw him Paragua called out to him and asked him to come. He said Karu and Paragua each had a knife in hand. The deceased man was not calling out - the only thing was that his leg was shaking - the rest of the body, there were no movements. Paragua said "I'm trying to kill this man but his leg is kicking about - come and hold his leg", and he thereupon put his foot on the leg to stop it shaking.

Question: "At that stage you saw Paragua stabbing the deceased." Yes. He did not see Karu stabbing - he was standing there doing nothing - "the man was dead".

"When I put my foot on his leg it was still shaking - but the leg stopped shaking when Paragua put the knife into the deceased's neck." Paragua stabbed only once after he the accused put his foot on the deceased's leg - he did not see any other stabbing.

Question. "When you put your foot on his leg you wanted to assist Karu and Paragua to kill him, get rid of him." Yes.

Question. After Paragua stabbed him once - how long did the three of you stay there before you left.

Answer. "We left as soon as the man died."

This is a case where the accused himself has provided evidence repeatedly of his belief that -

- (a) both men he saw were trying to kill the deceased
- (b) that further action to effect that was necessary
- (c) that he assisted that action
- (d) that the further action killed the man

I do not consider this case analogous to Sirinjui's case in that a reasonable hypothesis could be entertained by reference to which the use of words on their face confessional to a killing, are explicable on a basis favourable to the accused - whereby the accused should be given the benefit thereof.

I look at the actions of the accused, Karu and Paragua as those of primitive men familiar with the killing of animals. I am satisfied beyond any doubt that Karu, Paragua and the accused felt at the times Paragua called for and obtained the accused's help that the deceased was not then dead, that further action was required to ensure that he actually died. I bear in mind the doctor's opinion that from the time of infliction of the chest wound shown in D3 the deceased would have taken minutes to die, that it could have taken as long as twenty minutes and less likely thirty minutes. I am satisfied beyond any reasonable doubt that the deceased though close to death was not dead at the time of infliction of the neck wound. by Paragua that the accused observed. I am satisfied that by his actions the accused aided the infliction of the stabbing which finally ended the deceased's life.

An act done by and in pursuance of a common purpose is an act done by all. (R. v. Salmon) (2). Under the Common Law to establish aiding and abetting it was sufficient to show that the accused knew what was going on and did something to further it (R. v. Kupferberg) (3). An act or

(2) (1880) (6) Q.B.D. 79
(3) 13 C.A.R. 168

omission relied on to support a charge of unlawful killing needed not to be the sole or even the immediate cause of death - it was sufficient if it accelerated the death (R. v. Burdee (4) and R. V. Dyson (5)). This Common Law standpoint appears to have been carried into the Code under Section 306.

I am satisfied beyond reasonable doubt that the stabbing by Paragua while the accused attempted to still the kicking leg, accelerated the death. This is probably sufficient to bring the matter under the category of an act which hastens the death of another person who when the act is done is labouring under some disorder (viz. that induced by the earlier woundings) - Section 296.

But as I have said earlier, I am indeed satisfied beyond any reasonable doubt that the stabbing after the imposition of the accused's foot pressure on the deceased's leg was the immediate cause of the deceased's death. Certainly the death was post hoc and I share the accused's obvious belief that it was propter hoc. The trio left the body only when it was undoubtedly dead - viz. after the infliction of that neck wound.

I find that the accused while acting as a principal under Section 7 (b) and (c) and having at the time the intention of causing the deceased's death, unlawfully killed the deceased.

I convict him of wilful murder.

Having given my decision as above I say that the defence was conducted strictly by Mr. Lindsay towards a legalistic basis as he was no doubt required in duty to do. Being similarly constrained by duty I had endeavoured to fulfil my role as judge and jury applying Australian introduced legal concepts - in a similar legalistic way. I have endeavoured to make my decision quite apart from what the thinking of the Tari and Chimbu communities would undoubtedly be, viz. that this man had clearly participated in the killing of this man and would partake of such guilt therefore as the respective communities would ascribe to the deed. I have doubt whether the legalistic approach which I have endeavoured to apply will or necessarily

(4) 12 C.A.R. 153
(5) 1 C.A.R. 13

ought to be applied in the legal system of this country of the future to circumstances such as those shown here. I doubt whether the communities appreciate and understand such an approach. I feel that this kind of case reinforces the need for some kind of association of representatives of the community - the indigenous Papuan and New Guinean community in decisions as to culpability in such circumstances as those shown here. I hope I shall not be regarded as rash in expressing such an opinion as a comparative newcomer to the legal system of this country.

Sentence 8 years imprisonment with hard labour.

Solicitor for the Crown - P. J. Clay, Acting Crown Solicitor
Solicitor for the Accused : W. A. Lalor, Public Solicitor