Assistant Secretary (Executive)

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IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM: PRENTICE, J.
Friday,
25th August, 1972.

REG. v. AIVEI IEME and MUMU MURI

Interlocutory Judgment

1972
Aug. 25
PORT MORESBY
Prentice, J.

The accused are charged with unlawful killing. Following a stoning incident at Rabia settlement, the accused Mumu Muri was interviewed by Inspector Hodder in the presence of Constable Bora (interpreting) and other police. The procedure followed was that the inspector made a typed record in English of the conversation he had with the accused, including certain cautions given. The inspector spoke in Pidgin the questions he had typed in English; and his questions were translated by Bora into Police Motu, the language understood by the accused. The latter's answers in Police Motu were translated by Bora into Pidgin. Inspector Hodder then turned the Pidgin into English for the record. At the conclusion of the interview, the English typed script was read through in Pidgin translation, which was turned to Police Motu. The accused was in this fashion asked whether it was an accurate record, and his wishes as to addition or subtractions. He was then invited to sign the record of interview, which he did. A tender is made of the record of interview.

Strictly the record could not have been tendered at this stage, as the accuracy of the Police Motu translation had not then been spoken to. In any event the tender was objected to, not on this ground, but as being hearsay. It was submitted that where confessional material was obtained in a lingua franca of Papua New Guinea which was capable of being written, it should have been recorded in that language. It was urged that in urbanized areas of Papua in 1972, such a confession should be admitted only if recorded in the language of the accused's usage. To allow its admission in any other form was expediency; that should not be allowed. I was referred to a decision of the Chief Justice of last Thursday, 17th August, in which he rejected, though with doubt, a confession obtained by Inspector Hodder in Pidgin and recorded by him in

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English. His Honour had regard to an instruction of the U. K. Home Office to police officers, appearing in noted form in 1964 Criminal Law Review, which directed that a statement obtained from a foreigner should be recorded in the foreigner's own language.

The position as to interpreted confessional statements was settled for Papua New Guinea by Gaio's case in 1960 (1), in which a statement received through a chain of interpreters, was held not to be hearsay from the mouth of the last interpreter, but the very statement of the original speaker communicated through the interpreters as by a telephone connection. This decision has been followed in many thousands of cases. It has always been the practice to use as interpreters, men or policemen, who are usually themselves neither literate, nor trained in detection and the recording of evidence. It would probably be still true to say that the vast majority of the languages of Papua New Guinea (estimated as high as 600 in number), have never been reduced to writing. The effect of ruling in the way sought, would greatly hamper the investigation and recording of evidence in the towns themselves. It has been a matter of public comment that few of the officers and men of the Constabulary for example, speak and (ex fortiori) write, Police Motu. The presentation of verbal evidence in the form actually received from the accused, would probably be rendered impossible, in the present state of training and knowledge of the interpreters. In rural and the most remote areas - the procedures would probably be impossible.

During an adjournment of the court I discussed the matter with the Chief Justice, and he brought to my attention the decisions of Gowans, J., namely in R. v. Fajkovic (2) and R. v. Zema and Jeanes (3). In both of these cases His Honour expressly ruled that a properly accredited document, that is one acknowledged by the accused, could be admissible even if not in the language of the accused. With respect, I consider Gowans, J.'s decisions correct and I propose to follow them. However, in order that the

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(1) (1960) 104 C.L.R. 419
(2) (1970) V.R. 566
(3) (1970) V.R. 566

matter may be disposed of without its finality necessarily being cumbered by the appeal or reference that might follow, I propose to rule that the only other procedure that appears open to the prosecution, also be followed. I direct therefore that the typed record of interview may be put in the hands of the inspector (assuming from my observations of the number of other cases in which he is engaged that he has no independent recollection of the contents of the conversation with this accused). The inspector, refreshing his recollections from the document, may then retail in Pidgin, his questions and the answers as he remembers their being given. The inspector's Pidgin will be translated for the court record by the court interpreter (and to the accused in the running, by the other court interpreter - into Police Motu). Opportunity will thereby be given to at least test the quality of Inspector Hodder's Pidgin. Counsel will no doubt take such steps as they consider appropriate to test Constable Bora's Police Motu. If the case is similar to most, he will be expected to have little or no recollection of the actual content of the conversation between Hodder and the accused.

Meanwhile as counsel informed me there are other aspects which may in their opinion render the confessional material inadmissible for involuntariness, this aspect should be dealt with at this stage.

(A voir dire examination ensued, the conversation was held admissible, and the evidence taken on voir dire noted as being in toto evidence in the trial. The procedure outlined was then begun.)

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At the conclusion of the Crown case counsel submitted that there was no case to answer. I am satisfied that there is a case to answer. I do not propose to deal expressly with the arguments of counsel at this stage. I need say only that I think there are good reasons why it is undesirable that questions such as have been put here, should be decided on a submission of no case to answer; not the least of which is the possible time loss and effort involved, in the consideration possibly twice, of the same propositions, based on different collations of evidence. I feel the comments of Parker, L.C.J. in the Practice Note (4) are apposite. I am grateful to counsel for their careful argument which will be most helpful again on the next stage of consideration.

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(4) (1962) 1 All E.R. 448

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REG. v. AIVEI IEME and MUMU MURI

Judgment

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Aug. 25, 28, 29, 30 and 31.

PORT MORESBY

Prentice, J.

The accused stand charged with the manslaughter (by throwing of stones) of one Aua Ivia. Each of the accused agreed with the other that because of an incident in which Mumu was upbraided and possibly chastised, they would go and throw stones at (which would be understood, and was expressed as, in native expression, "fighting with") one Koivi.

Each intended to harm Koivi to the extent that was described both in the English statement of Aivei and the Motuan statement of Mumu (as translated into Pidgin and thence English), as "cutting his skin". After questioning the interpreter, and in the accuseds' favour, I take this to mean, "make a mark on" Koivi at least to the extent of a bruise, and possibly to the extent of a cut.

The main submissions made to me were on the basis of the application of Sec. 23 of the Code. No willed act to hit Aua was shown and his death was an accident. But as Mann, C.J. pointed out in R. v. Tsaqaroan-Kagobo (5), Sec. 23 could only cause an acquittal where no element of criminal negligence was involved. That case, the facts in which are somewhat similar to the instant one, is to be distinguished from Timbu-Kolian's case (6) by the accused's knowledge in the former of the presence of his child in the hut. Windeyer, J. in Timbu-Kolian(supra)(7) found no ground for questioning that decision, because it was a case of reckless indifference (the throwing of a stick inside a small house).

The witnesses

I am satisfied each of the Crown witnesses was trying to tell the truth. There are discrepancies in their versions of where people were standing, and the sequence in which the stones were thrown. These

(5) (1965-66) P. & N.G.L.R. 122 at p. 132
(6) (1967-68) P. & N.G.L.R. 320.
(7) (1967-68) P. & N.G.L.R. 320 at p. 343

are explicable I think, in terms of the confusion, annoyance, darkness, and distress of the night's incident.

The witness Koivi had given evidence at the committal proceedings, apparently only on identification of the deceased's body. During the trial a proof of further evidence that would be led from him, was furnished to defence counsel. In the witness box his evidence was not in accordance with the contents of this proof, as became clear to me when the proof was handed up to me so that I might rule whether the procedure provided for by Sec. 62 of the Evidence and Discovery Ordinance 1913-1964, might be gone through. I allowed the contents of the proof to be read by the interpreter to Koivi, and the witness then to be asked questions as to whether he made and signed the statement and whether its contents were true. On his agreeing that he had and that the contents were true, I considered that it no longer appeared that he was a hostile witness, and that the Crown would not be entitled to cross-examine him. The statement was not sought to be put in evidence, and the examination did not proceed much further. I have formed the opinion that Koivi was trying to tell the truth, but was possibly confused by the order in which counsel had put questions to him. He works at the Goldie River Army Camp but did not appear to be a sophisticated witness. It is at least clear that he was involved in two incidents that night - one with reproving Mumu, and the other when stones were thrown at him. I have approached his evidence with caution, but I consider I can accept it as showing that he was talking with Aivei about the instant that the stones were thrown, including the stone that hit the deceased, and that he was then standing at some point between the road edge and the ladder in front of his house at a point which may fairly be described as "close to his house". The accused Aivei described Koivi's proximity to the others of the group in the answer, "yeah, somebody was standing next to Koivi". When asked was Koivi standing by himself, he replied, "I think there was may be four". The accused Mumu said that he could see Koivi, the man who was dead, and a lot of other men. Koivi was standing near the front of his house. The deceased was close to Koivi (he indicated two yards away). Koivi's evidence corroborates the admissions of the accused in their records of interview and at the showings, that Aivei was at the scene at the time.

Findings

I make the following findings of fact:

(1) both accused agreed that they would together go and throw stones at, "fight with", Koivi;

(2) in furtherance of their design both went to Koivi's house, picked up stones and threw them at Koivi;

(3) both intended at the time of throwing to hit Koivi;

(4) both intended by throwing the stones to "mark him" in the fashion I have outlined above;

(5) at the time of throwing, Koivi was either standing alongside, or close to, a group of people of whom the deceased Aua formed one;

(6) the stones were thrown from a distance of some five yards or a little more, from where the deceased was standing;

(7) one of the stones hit the deceased on his left side;

(8) that stone was thrown by Aivei;

(9) the deceased died as a direct result of a ruptured spleen suffered in the blow by the stone (it was not argued otherwise);

(10) both accused were able to see Koivi at the time they each threw a stone;

(11) both accused were at the time of throwing aware of the presence nearby of other people including the deceased and saw them when they threw the stones;

(12) the stone which hit the deceased was Exhibit "G". It is of irregular shape, some four inches across by some three inches high (as I have informed counsel I have weighed it on the court office scales at 1 lb. 9 oza.). It has a number of sharp edges. It is of the material of which most stones in the Port Moresby area appear to be constituted - grey-brown in colour;

(13) that the other stones picked up and thrown were comparable in size and nature to Exhibit "G";

(14) the throwing of the stones was highly dangerous to both Koivi and the other persons in the vicinity;

(15) neither the will nor the intent of the accused extended to causing injury to any person other than Koivi;

(16) the circumstances were such that the accused ought reasonably to have foreseen that serious injury might result from the throwing of the stones actually thrown not only to their target, but also to the other persons seen to be nearby;

(17) that Mumu admitted awareness at the time of throwing, that the stones thrown by him, could hurt a man.

It is notorious that a large number of injuries including wilful murders, are inflicted by the use both in cities and rural areas, of rocks and stones (one other such has been ventilated before the Chief Justice and another before Kelly, J. in this session) which, in dimensions similar to that exhibited here, are found on roads and in the towns and vicinity of villages; rocks and stones are being used in such incidents either as hand weapons or as missiles. In my opinion a rock similar in nature and dimensions to that exhibited as having been used by the accused in this case, is an "object of such a nature that in the absence of care or precaution in its use or management, the life, safety, or health of (persons) may be endangered". I have in mind particularly its use or management as a missile. Once such rocks have been picked up with the intent of being thrown offensively (as here), they appear to me to be "in the charge and under the control" of he who picks them up. Far from using reasonable care and taking reasonable precautions to avoid such danger, the accused here threw the rocks with the intention of hurting a particular individual. In my view their actions were carried out with recklessness involving grave moral guilt such as is necessary to establish criminal negligence under Sec. 289 (Evgeniou's case (8)). The accused must be "held to have caused any consequences which result" namely the death of the deceased (Sec. 289). I may say that such stones as Exhibit "G" appear to me to be far more potentially dangerous to life in their use than the stick apparently thrown inside the hut in Tsagaroan's case (supra) (9).

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(8) (1964) P. & N.G.L.R. 45 at p. 47
(9) (1965-66) P. & N.G.L.R. 122 at p. 132

If one is to apply Windeyer, J.'s concept of the modern common law definition of manslaughter, so as to read down the Code definition of manslaughter, namely, an unintended, wholly unexpected and unlikely killing can be manslaughter if the result of an act both unlawful and in the circumstances dangerous, or which is the result of conduct amounting to reckless negligence, (Timbu-Kolian's case (supra) (10)), I would find the acts of the accused here within that definition. In any event, I consider manslaughter within Secs. 291, 293 and 303 of our Code established.

I am of the opinion that Mumu incurred liability equally with Aivei under Sec. 7(c), as being a person engaged in a joint enterprise for an unlawful purpose with a common intent. Each must be said to have aided and abetted the other in carrying out the enterprise engaged upon, and therefore in its result, the unfortunate death of the deceased.

On the view I take as to the applicability of Sec. 289, it is strictly unnecessary for me to consider the arguments of counsel regarding Sec. 23. I must confess to having the greatest difficulty in understanding how Sec. 23 of the Code is to be applied in the quite numerous cases of ruptured spleen deaths which have come before me (I know the other judges of our court also encounter many such cases); the philosophical and legal difficulties that arise in trying to apply the decisions to cases on circuit are formidable. The totality of decisions, including those since Timbu-Kolian's case (supra) (11) in the High Court, has recently been described as incoherent. I would agree that the present result of the exculpatory provisions of the Code is confusion (Professor Ian Elliott, 46 A.L.J. at p. 255). In the interests of simplified administration of justice, and perhaps of the pacification of the country, one wonders whether the time has not come for a radical rewriting of these provisions (as well as of those relating to larceny and fraudulent misappropriation that I have also had to deal with within the last week).

Windeyer, J. in Timbu-Kolian (supra) (12) has stated that an event occurs by accident if it was not intended, not foreseen and unlikely, (and is one) that is not reasonably to be foreseen as a consequence of a man's con-

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(10) (1967-68) P. & N.G.L.R. 320 at p. 333
(11) (1967-68) P. & N.G.L.R. 320
(12) (1967-68) P. & N.G.L.R. 320 at p. 341

duct. On that test of (justifiable) accident, propounded by Windeyer, J. I should think the defendants unable to rely on this defence, as the consequence of serious injury and possible death ought clearly to have been foreseen as the defendant Mumu indeed admitted it was, by him.

Having in mind the well-known position as to manslaughter at common law, (cf. Rex v. Gross (13)); that is the doctrine propounded as "if 'A' shoots at 'B' and kills 'C' he is guilty of murder or manslaughter depending on his intent" (Tsagaroan's case (supra) (14)); I am puzzled as to how Sec. 23 provisions regarding non-willed acts can have been intended to have room for application to a charge of manslaughter, where the facts involved the use of missiles with intent to hurt, against one man known and seen to be standing in the vicinity of other persons, one of whom is hit and mortally wounded by the missile, aimed at but missing the firstnamed man - the circumstances being such that the thrower ought to have foreseen that either the target or another man might have been seriously wounded.

Some attempt was made to differentiate the liability of Mumu from that of Aivei on the score of his age of some 14 years. His appearance in the witness box and the dock is that of an intelligent youth who could be more than 14. If it is necessary for me in order to find him guilty of the similar degree of criminal negligence under Sec. 289 in order to support liability under Sec. 7 (c), I do not hesitate to do so. His answers to Inspector Hodder's questions clearly indicate his awareness that throwing the stone could hurt a man badly, even kill him. His intent was plainly to hurt. I convict both accused of manslaughter.

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

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

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(13) (1913-14) 23 C.C.L.C. 455
(14) (1965-66) P. & N.G.L.R. 122 at pp. 126, 127