IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM : FROST, SPJ.
19th October 1972

SC 710

THE QUEEN v. RICHARD HUTCHINGS

1972

Oct.12,13, 14,16,17, 18, & 19.

WEWAK

FROST, SPJ.

At the end of the Crown case this morning, Mr. Flood, on behalf of the accused man, submitted that there is no case to answer, and it is for me now to rule upon this submission. The accused is charged upon six counts, one of doing grievous bodily harm, on 13th April 1972, to a man called Atupal Indina, and another of unlawfully wounding, on the same day, another man, Utok Abet, and there are to each of those charges alternative counts of unlawfully discharging a firearm thereby occasioning actual bodily harm and also assault. The question for me to decide now is whether on the evidence the accused can be lawfully convicted of any of these counts.

The circumstances at Oksapmin on 13th April were quite special. In circumstances which I shall refer to in one moment, the accused man had for some days been going about his duties armed with a pistol which he carried in his shirt. It is most unusual for an Administration officer in this country to go armed in the course of duty. But a special situation did exist in the Telefomin sub-district at this time. The sitting member from Telefomin, who was a Minister who had stood in the House of Assembly elections early this year, was behind in the count and was in the end defeated. In the event the election was won by a man from Ambunti. However, there was also a candidate from Oksapmin, and feelings ran high in the sub-district when the Oksapmin candidate was leading in the count ahead of the sitting member. Prior to the elections the accused, in my opinion unwisely, had lent the money to provide the Oksapmin candidate with a deposit. This was well known and so the accused was involved in the high feelings which were running. Evidence has been given in this Court that at this time, towards the end of the elections, a plot was suspected endangering the A.D.C. at Telefomin, and it appears

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that in this plot there was involved a man suspected of complicity in the murder in 1952 of the two patrol officers in the Telefomin sub-district. Accordingly the direction was given by the District Commissioner at Vanimo that due precautions were to be taken by all officers within the sub-district.

The course of action that Mr. Hutchings took was to go armed. In this isolated spot, in which he was the only European officer, in my opinion, he could not be criticised for taking that precaution, having regard to the circumstances which then existed.

The counts in the indictment are all founded on incidents which occurred on 13th April 1972 at the Corrective Institution at Oksapmin, where the accused was the patrol officer in charge. On that day the detainees who had been away working on the road and gathering fire-wood, had returned to the Corrective Institution at about 4 o'clock in the afternoon. There were seventeen men and two women. The Corrective Institution itself was certainly not an elaborate building; it was constructed of native materials and it had a thatched roof. It consisted of two cells, one for male and the other for female prisoners. There was an exercise yard in front consisting of a wire fence, access to the building being gained through an entrance to which there was no gate. At 4 o'clock that afternoon the officer on duty was Constable Miro, who was of course responsible to Mr. Hutchings. The events on this evening were triggered off by the fact that there was insufficient food for the detainees, for it transpired that when men were detailed to go to the kitchen for food it appeared that there was rice, but one tin of fish only to be shared by all the detainees. Now if anyone were to think Mr. Hutchings was responsible for this he would be wrong, because it is unchallenged by the Crown that there had been continual complaints by the patrol officer over a shortage of funds from Port Moresby, which was the cause of the lack of supplies. In an apparent laxity of discipline Constable Miro allowed the two prisoners to go up alone and see the patrol officer. He told them to stay outside for awhile, but night

was coming on, so he put them inside in a bedroom and locked the door. Now what happened in that room is not clear, but it is not crucial to this case. What is important is that the two men became terrified. From his evidence in this Court one of them seemed to attach great significance to the fact that a blanket had been put upon him. The men were enclosed in a small bedroom. They said, in this Court, that they had seen the patrol officer coming towards them with a pistol in his hand and they thought he was going to shoot them. They were behind a locked door and anything they saw could only have been a glimpse through the keyhole or a crack in the door. But certainly no one came through the door, the men removed some louvres, there was a crash of glass as they jumped to the ground and ran down towards the Corrective Institution. On the way they passed Miro and he went on and the patrol officer passed him too, as he went down the hill on his motor-cycle to attend to his escaped prisoners. He ordered all the detainees to come out. They were lined up, he counted them, there was none missing, so he then ordered them to go inside the door. He ordered Constable Miro, who by this time had returned and was by his side, to go to the door because when the detainees all went through the door they refused to close it. The patrol officer went to the door with Miro. At this stage he drew his pistol. The prisoner Atupal opened the door and rushed at the patrol officer, and in circumstances to which I will refer, a few moments afterwards he was shot with the pistol. Happily the bullet passed through his stomach so that he was able to be discharged fit and well after two or three weeks at the hospital. That is the basis of the charge of unlawfully doing grievous bodily harm so far as the detainee Atupal is concerned.

The three counts, so far as Utok is concerned, are based, as alleged by the Crown, on Utok being struck on the side of the head by a small portion of a bullet whilst he was inside the Corrective Institution building and before Atupal came out. According to the medical orderly called by the Crown all that he suffered was a slight abrasion. Utok had felt some blood in his hair and felt a bit dizzy. The fragment had lodged in his hair. But to found the indictable offence of unlawful wounding there must be evidence that the whole skin was severed, and a slight abrasion which is consistent with and, in fact, rather indicates, merely a breaking of the outer skin does not therefore constitute

evidence of unlawful wounding. That is the fourth count. So far as the fifth count is concerned, the Crown alleges that Utok was caused actual bodily harm. Under the Criminal Code bodily harm is defined as any bodily injury which interferes with health or comfort (sec.1). But to found this serious indictable offence it could not be said, and now the Crown does not contend, that a slight abrasion constitutes bodily harm within the meaning of the Code, and both those counts are not now pressed.

Turning to the evidence there is circumstantial evidence which is sometimes thought to be weaker evidence; in fact it is stronger in some respects because, as it has been said by Mr. Flood, it is mute evidence and facts and things cannot lie. Now there are three pieces of circumstantial evidence upon which Mr. Flood, for the patrol officer, strongly relies. There were first of all three stones which were found outside the Corrective Institution just near the entrance. It was first thought that there were three markings on them but then the expert, Mr. Gardiner, who came here from Port Moresby and examined these stones at the laboratory at the Wewak Hospital, found that there were four markings upon them and these were found to contain lead, which of course was consistent with the markings having been caused by bullets, for a bullet fragment was shown to contain 98% lead according to the evidence of Mr. McKinnon, the Police ballistics expert, and Mr. Gardiner, the Chief Chemist of the Mines Department. So these stones which had lead markings were significant because they were found in the area where the struggle took place. Could they have been caused by garden tools, Mr. Gardiners was asked by the learned Prosecutor, or hobnailed boots of constables? "No", he said, "because they are made of steel".

The second piece of circumstantial evidence was the evidence, which again cannot lie, that the bullet went through Atupal, so that it could be seen where it went in and where it came out, and so the trajectory of the bullet through the body could be ascertained and it was seen to be slightly upwards. It was not level, it was slightly upwards, and it certainly was not downwards, which indicates, of course, that Atupal could not have been shot from above, and any account based on a shooting from above was untenable.

The third piece of circumstantial evidence was the fact the building was examined and no evidence of any bullet marks at all was found. The Inspector in charge of the investigation went out expressly and went over this building with a fine tooth comb, and anything that looked like a bullet mark was looked at. Two such pieces of the building were thought possibly to constitute bullet marks, and the pieces of this building were cut out, taken down and examined, and it was found that there was no such evidence of a bullet mark.

The oral evidence consisted really of two parts, the first part consisting of Miro's evidence. It was not said by the Crown Prosecutor that Miro was a partial witness; Miro was a constable of police, subordinate to the patrol officer, and there is plain evidence in this Court that there was trouble between the patrol officer and Miro because the patrol officer took objection to the way in which Miro was carrying out his duties, particularly on the day in question. And it is also to be taken into account that Miro was in a position where he could see exactly what happened and he must have, as a policeman, better powers of observation than most. The other oral evidence was that of Atupal and other detainees and these were the people who were inside the building, agitated and upset, Atupal coming out and the other prisoners later following on.

It is very important to look at the setting of this case. Fenana and Wuti, the two prisoners who went up to complain about insufficient food, came back convinced that the patrol officer, from something they might have seen, perhaps through the keyhole of the door - and obviously quite wrongly inferred - was going to kill them. On the evidence there was no justification for it, they were left alone in the room, they had been confined in a strange room, an action which Mr. Gall, who knows these people, said was something which would cause them terror and unease and allow their imaginations to run riot. Mr. Gall thought they would be in a state of fear, and indeed this was apparent, because when the prisoners were lined up, in accordance with a statement made by the patrol officer, it appeared to him that they were in a quite agitated condition. The accused man was armed, he had to deal with a situation in which at least two prisoners

had escaped and had come up to see him, it was at this stage after half-past six, it was in the evening, it was getting dark, and again in these unusual circumstances it may be said with hindsight that this was an unnecessary precaution, but as I said before, on this matter, in this respect also, in my opinion, the patrol officer cannot be criticised for it. Looking back it would have been better had he not taken the pis But he was a young patrol officer in charge of an isolated station, he had received instructions to take due precautions. In fact of course, after the detainees were told to go into the building and he produced the pistol, as the patrol officer's counsel submitted, this caused panic, but it is only with hindsight that that could have been anticipated, having regard to the agitated condition in which they were observed to be.

Miro, from the beginning, was adamant, to use the words of the police officer investigating this case, that no shots had been fired before the cell door was opened by Atupal and he came out. He was questioned time and again, and always he was adamant in his statements to the police officer and when the case came on, that no shot was fired before that cell door was opened. Atupal came out, Miro said, he held the patrol officer about the body, as he demonstrated, a shot was fired into the air, over the prisoner's left shoulder, the two of them struggled back into the yard, a second shot was fired, they were now outside the entrance, a third shot was fired, a fourth, at which Atupal was shot. The patrol officer had been brought to his knees in the exercise yard and at the final stage both of them were struggling on the ground, and then a fifth shot was fired. But according to Atupal it was when he came out and put his arm up trying to get the pistol from the patrol officer and he forced down the arm, and in the struggle, whilst they were both standing, that the patrol officer fired downwards, and shot him. But later on, he also said that he wasshot when they were struggling on the ground, and indeed the entire evidence of Atupal is so contradictory that no weight could be attached to it.

Utok and the other prisoners said that Mr. Hutchings fired shots into the building before Atupal came out, and it was at this time that Utok said he was struck by the flying piece of metal which must have ricocheted.

What the Court must do then is to test this verbal evidence against the circumstantial evidence. The weapon was a six cartridge pistol, and Miro says that 5 shots only were fired. If on the Crown case it is a reasonable hypothesis which is not excluded, that three or four shots were fired outside leaving the marks on the stones, that leaves two, there was the shot that was fired into the air, as Mr. Flood submitted, outside the building, and there was the shot which struck Atupal, which accounts for all the rounds, and there were no rounds left to be fired into the building. There is no evidence of any bullet marks in the building which could be taken to support the evidence of the prisoners that there had been shots fired into the building. Atupal's evidence is discredited by the direction of the wound, and finally there is the improbability that the accused would have fired into the building indiscriminately and at random.

The conclusion that I have come to is that the evidence before this Court, so far as it is credible evidence, is confined to that of Miro, who says that the pistol was fired in the course of the struggle on the ground outside the entrance, and also the statements of the accused, becoming more detailed as he went on it is true, as Mr. Georgeson properly submitted. In his last statement to Mr. Gall the accused said he fired three shots into the ground outside the Corrective Institution, partly to warn the police who were half a mile away, and partly to discharge the pistol so it could not be used against him or the police.

The Crown says that the patrol officer fired purposely (although it does not go so far as to say that he intended to cause grievous bodily harm) or recklessly, and for this purpose the Crown relies upon his statement. But it is well established that the Court must look at all the circumstances of the case, the objective circumstances, as well as statements by the accused.

What are the objective circumstances in this case? It is true that Atupal is a small man, he is a small man and the patrol officer is a tall man, but the facts are that Atupal brought the patrol officer to his knees and later threw him to the ground outside the entrance. There were also sixteen detainees inside the Corrective Institution - if Atupal came out was it likely that they would stay inside? Indeed

that is in fact what happened, all came out, and armed with stones and one man with a stick. To use the words of the doctor from Vanimo, they beat him most severely, causing an injury to the back and lacerations about the head, which are still visible although he has had them treated cosmetically under operation.

On the objective facts it is plain that the Crown has not excluded that there was a reasonable apprehension of at least grievous bodily harm being done to both the patrol officer and Constable Miro, and taking into account his statements and these objective facts which have been described to me in this Court over the last six days, in my judgment the reasonable hypothesis of innocence that the accused was acting in self-defence has not been excluded and, in fact, in my opinion, this is, to me, a case of an accused man acting in self-defence, and that is the effect of the Crown evidence. He was acting in defence of himself and of Constable Miro.

The Crown put this in the alternative - I have said what my finding is - but it has been submitted by Mr. Georgeson that there is a case here of recklessness. But such a case must surely be without support, and in my opinion is without support, having regard to the fact that the patrol officer was not the master of the situation; he was engaged in a struggle, a most violent struggle, with Atupal, and any suggestion that he was able and in a position to take reasonable care to prevent a pistol being fired in those circumstances could not be sustained; nor in my judgment could it be said that to fire a pistol into the ground, as the patrol officer said he did, was reckless in the circumstances. The fact that afterwards the detainees all ran away does not help one way or a another. They did desist, there is evidence that the accused called out enough, they all desisted and they ran away, why they did not continue throwing the stones at him, striking him with the stones and the stick is not clear - they may have been afraid they had gone too far - this does not throw any light on the case at all.

Accordingly, in my judgment, there is no case to answer with respect to the counts 1 and 2, relating to Atupal, that is the charges of unlawfully doing grievous bodily harm or discharging a firearm. Counts 4 and 5 have gone, the Court is left with counts 3 and 6, and the Crown submits that the action of the patrol officer in drawing the

pistol, and, it was alleged, menacing the prisoners as he stood outside the Corrective Institution whilst they were in the room before they came out, constituted an assualt. It is well established of course that to draw a pistol and aim it at a man can constitute an assault. But here you have the patrol officer faced with a difficult situation, the prisoners inside refusing to close the door, shouting, night coming on, agitated, and the evidence is at the very least equally consistent with another conclusion. It seems to me that having regard to the fact that the patrol officer's duty was to prevent the escape of prisoners that he was entitled to use reasonable force to do that. I consider that to take the pistol and level it, and indeed the facts indicate that he covered Miro as he went to the door, constitutes no more than was a reasonable precaution in the circumstances, and one which was done in self-defence of himself and Miro, and not only to prevent the escape of the prisoners. Accordingly in my opinion, on these two counts also Mr. Flood's submission succeeds.

Before leaving the case reference has been made to the failure of the officer investigating this case to produce the stones at the lower Court. My only function in this case is to rule on the submission whether there is a case to answer, and in all the circumstances of the case, and having regard to the background of it, I propose to do no more than that. It is the duty of the police, of course, to produce all credible evidence which touches upon the guilt or innocence of the accused man. The stones were produced here, they could have been produced before, for they were in the custody of the police from the beginning of the investigation, they were in the end examined by experts at Wewak, and they could have been examined before the committalproceedings which did not take place until August. It is true that there was evidence before the Magistrate by Inspector (now Superintendent) Rae, who from the very first day, said those stones appeared to him to have been marked by bullets. This was a fact known to Inspector Grove, the officer who investigated this case. If the Magistrate had had the evidence which this Court has had before it, that would have strengthened Inspector Rae's evidence, but whether it would have affected the result of the committal proceedings it is not possible to say. All I say in this case is that the stones should have been produced.

For the reasons I have given the submission is upheld, there is no case to answer on any of the six counts. The accused man, Mr. Hutchings, is acquitted on each count and is now discharged.

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

Solicitor for the Accused - S.F. Flood, Esq.