

Raine, J.

679

IN THE SUPREME COURT )  
OF PAPUA NEW GUINEA )

CORAM: RAINE, J.  
Thursday,  
11th May, 1972.

THE QUEEN

v.

KAPOI JOHARUMBA and YASIO ARINA  
both of IKANOFI

1972

May 8,  
9.10.11  
GOROKA

RAINE, J.

The accused have been charged with wilful murder, to which they have pleaded not guilty. The facts are within a short compass. As there has been an important legal submission advanced by Mr. Bradshaw of Counsel for the accused, I will set out a number of facts that I find to be established beyond reasonable doubt, so that it is possible to follow the submission and my reasons. They are:-

(i) The accused live in the village of Ikanofi. This is a village which, while close to the main road, is far from being very sophisticated. The social group of which the accused men form a part lives its life in an old-fashioned and traditional way. It is a group which believes in sorcery, sorcerers are believed to "have extraordinary powers which can be used sometimes for good purposes but more often for bad ones". See preamble to the Sorcery Ordinance, 1971. These beliefs are strongly held, as strongly held as the belief of some more sophisticated people in miracles and visions. The preamble to the Sorcery Ordinance goes on "and because of this belief many evil things can be done and many people are frightened or do things that otherwise they might not do".

(ii) On the day in question there was a motor vehicle accident and a child, although not an Ikanofi child, was injured.

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RAINE, J.

It has been accepted by Counsel, although the evidence is scanty, that the deceased was the driver of or connected with the motor accident, and was fleeing from the scene of the accident. Apparently he broke away from the main road and burst through the bush into a coffee garden. Ikanofi village was some way from the scene of the accident. In his statement from the dock Yasio said, "When I was at my village I heard a singing out come from a long way away". He was no doubt referring to the commotion on the road. Following this there was a cry of "Sanguma man" within the village.

(iii) I am not satisfied beyond reasonable doubt that thereafter somebody did not call out something about Sanguma men coming, in fact I rather lean towards accepting that somebody did call out. It could be a convenient excuse for putting to death some unfortunate driver or passenger in some cases, but I do not think the accused realised what had happened on the road, and I must give them the benefit of the doubt.

(iv) The two accused went to the coffee garden in company. I am satisfied that they went with their minds made up to kill the intruder or intruders if they got the chance. Yasio had his bow and at least two arrows, Kapoi had an axe. I also find that they did not give away this intention, for Yasio fired at least two arrows and Kapoi hit the deceased at least twice with the axe after the arrows had taken effect.

(v) The deceased died as a result of an axe blow.

In these circumstances Mr. Bradshaw says that at the worst his clients should only be convicted of manslaughter, and he relies on the combined effect of Section 20 of the Sorcery Ordinance, 1971, and Sections 24, 268 and 204 of the Criminal Code. Section 20 of the Sorcery Ordinance reads:-

"20. Sorcery as provocation,

(1) For the avoidance of doubt, it is hereby declared that an act of sorcery may amount to a wrongful act or insult within the meaning of Section 268 of the Criminal Code.

(2) It is immaterial that the act of sorcery did not occur in the presence of the person allegedly provoked, or that it was directed at some person other than the person allegedly provoked.

(3) The likely effect of an act of sorcery relied on by virtue of this section shall be judged by reference, amongst other things, to the traditional beliefs of any social group of which the person provoked is a member.

(4) .....  
....."

Section 4 says that unless the contrary intention appears an "act of sorcery" means any act (including a traditional ceremony or ritual) which is intended to bring, or which purports to be able or adapted to bring, powers of sorcery into action or to make them possible or carry them into effect.

The sections of the Criminal Code referred to are as follows:-

"24. A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist."

The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

"268. The term 'provocation', used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal, relation, or in the relation of master or servant, to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is

done or offered.

When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

A lawful act is not provocation to any person for an assault.

An act which a person does in consequence of incitement given by another person in order to induce him to do the act, and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault.

An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality".

"304. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute wilful murder or murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only".

Thus, applying the facts or possible facts of this case to Section 24 it might read something like this, in combination with Section 20 of the Sorcery Ordinance:-

"If the accused men do acts of violence under an honest and reasonable, but mistaken belief that an act of sorcery has been committed, then, if the likely effect of that imagined act of sorcery, viewed in the light of the accuseds' groups' traditional beliefs could have serious effects, then the accused men would not be criminally responsible for their violent acts to any greater extent than if an act of sorcery actually had been committed".

In other words, if I accept that there was an honest and reasonable, yet mistaken belief that there had been an act of sorcery or am not satisfied

that there was not, it is submitted that the accused may claim to be criminally responsible to a lesser extent than would have been possible prior to 8th July, 1971, when the Sorcery Ordinance came into effect, because, if the imagined act of sorcery was the product of an honestly, reasonably held belief, Section 268 is brought into play and Section 304 can be called in aid by the accused.

I say that Section 304 can be called in aid because I hold what might be termed "the popular view" here, namely that Sections 268 and 304 are related. Sed quaere whether this is now a vexed question, but I regard as correct decisions and statements found in cases such as R. v. Sabri Isa, (1), R. v. Herlihy, (2), R. v. Johnson, (3), R. v. Zariai-Gavene, (4) and R. v. Iawe Mama, (5). I agree with the learned Judges who support what I have termed "the popular view" here. I will not impede others who support the view with my assistance by writing any more on a much debated subject.

So far as Section 268 is concerned I am satisfied that the accused, although mistakenly, acted suddenly and at a time when deprived of the power of self-control.

I had failed to follow Mr. Bradshaw when he advanced a similar argument during his "no case" submission, however, because of the other reasons I gave for refusing to hold there was no case to answer, the result was no different. However, the matter has now been argued more fully, and I think the submissions are well founded, and that the several sections can be welded together to produce the result sought by Mr. Bradshaw.

I now come to consider whether, as a matter of mixed fact and law, the accused should, if all else goes against them, have a

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(1) (1952) Q.S.R. 269

(2) (1956) Q.S.R. 18

(3) (1964) Qd. R. 1

(4) (1963) P. & N.G.L.R. 203 at 209

(5) (1965-66) P. & N.G.L.R. 96 at 101

possible finding of wilful murder reduced to one of manslaughter.

In my opinion, appreciating of course that under Section 20(1) of the Sorcery Ordinance, an act of sorcery may but does not of necessity amount to a wrongful act within the meaning of Section 268, I do find here that here it would have amounted to a wrongful act if the deceased had been a Sanguma man. Sanguma men in this area do not merely "point the bone" at victims. They kill in the physical sense. I am not satisfied beyond reasonable doubt that the accused did not have an honest and reasonable belief that powers of sorcery were about to be put into action. I find it was a mistaken belief if so held by them, and this finding is essential to the success of the submission. In my earlier findings I have already made it clear that the traditional beliefs of the social group of which the accused man were members made it more than likely that they would react with uncontrolled violence to acts of sorcery or the belief that some act had occurred which was intended to bring powers of sorcery into action or make them possible to be carried into effect.

So far as Section 268 is concerned, the fact that the deceased was a stranger and was running, and that he was near a coffee garden, where Sanguma men often pounce on unsuspecting villagers as they work, makes it clear that the accused believed the sorcerer would have been involved in "forbidden sorcery" contrary to the Sorcery Ordinance, and therefore unlawful. This sorcery would be directed, in the village of Ikanofi, towards all and sundry, and probably at persons who stood in a parental, filial or fraternal relationship to the accused. As the accused ran after the deceased when they heard he was in the offing it might be doubtful whether, but for Section 20(3) of the Sorcery Ordinance, they could suggest, in the run of the mill case, that the wrongful act was done to them, as "ordinary person(s)" within the meaning of Section 268. However, Section 20(3) seems to me to get over this difficulty.

For these reasons I am of opinion that if I am left in a

situation where, but for the Sorcery Ordinance, I would have found the accused men guilty of wilful murder, then they should only be convicted of manslaughter, as I regard the appearance of the deceased as "sudden" within the meaning of Section 304, and I am satisfied there would have been no time for their passions, quite certainly aroused, to cool.

I therefore now ask myself this question. Was it, but for the Sorcery Ordinance, wilful murder that was committed? I am of opinion that this should be answered in the affirmative. The killing was unlawful and unauthorised, and ordinarily there would have been no justification or excuse. Section 23 of the Criminal Code was never raised, Section 24 only arose in the case because of the Sorcery Ordinance, but otherwise had no application. It could never have been suggested that Section 25 arose or could arise, and but for Section 20 of the Sorcery Ordinance I fail to see how Section 268 of the Criminal Code would have applied. It was an intended killing.

In Exhibit "A" Yasio admitted picking up his bow and arrows. He says, "Then a man came running out from the coffee garden. I shot him with my arrows.....I fired my first arrow and shot him on his chest. I fired my second arrow and shot him on his right stomach".

It was a joint venture, Yasio and Kapoi went to the garden together. Kapoi had an axe. When the arrows caused the deceased to halt or fall Yasio says, "Kapoi then got the axe which he was carrying in his hand, went over to the man lying on the grass and struck several hard blows on the man's forehead with the back of the axe....."When Kapoi had struck several hard blows on the man's forehead with the back of the metal piece of the axe, I then pulled out two of my arrows from the man's chest and stomach". He says Kapoi accompanied him.

Kapoi tells much the same story, except that he substituted

Antipio in his story for Kasio, Antipio having been "marked" to take the blame for Kasio. He told the Inspector, "As the man fell on the grass I rushed over to him and struck him several times with the back of the axe I was carrying".

The medical evidence makes it quite clear that one of the three axe wounds Dr. Hill saw caused death. The three arrow wounds the doctor saw did not cause death and would not have done so in any event. However, there is no shadow of doubt that a piece of one of Yasio's arrows was found in the body of the deceased. Compare the splinter which is Exhibit "E" with the darker bow which is part of Exhibit "D". Yasio admitted the shooting in his statement from the dock. It is quite clear that in a very real way Yasio aided Kapoi to kill the deceased and is caught by Section 7(c) of the Criminal Code and is thus a principal offender notwithstanding that his arrows did not cause death. I do not think I need consider Section 8.

Mr. Bradshaw puts to me that the scene at Ikanofi was confused, not only was the deceased running through the bush from the road, but one Ephraim Bun, whom I assume was a companion of the deceased, was also fleeing from the highway accident. In addition there was a deal of shouting. The accident would have caused a great stir but the calling out "Sanguma man" would certainly have upset and excited everybody. We know others were around when the killing took place, for instance, Arisino and Touie. There were probably more. Everything certainly happened very quickly.

Then Counsel also points to the fact that Yasio said he only fired two arrows, yet three arrow wounds were found by Dr. Hill. Arisino also only mentions two arrows. Arisino says as well that Kapoi only hit the deceased twice on the forehead with his axe, although he does agree they were very strong blows with the back of the axe head. The doctor thought the wounds were caused with the cutting edge. However, the doctor is not very experienced, and could be mistaken.



Counsel rightly mentioned all these matters, and I have given them serious consideration. However, one of Yasio's arrows certainly hit the deceased, and it caused the most significant wound of the three. Kapoi himself says he hit the deceased "several times". Arisino might well be mistaken as we know from the doctor that one axe wound was negligible, and the blow causing it might not have made an impression on Arisino, or, if Arisino is correct, the slight wound might have been caused by a sort of ricochet from one of the other two blows, which were undoubtedly heavy.

I am satisfied beyond reasonable doubt that were it not for Sections 4 and 20 of the Sorcery Ordinance and their effect when viewed with Sections 24, 268 and 304 of the Criminal Code, that both accused men would have been guilty of wilful murder.

However, because of the view I have expressed on the law, viewed in the light of the facts I have found, I find them guilty of manslaughter, but not guilty of wilful murder.

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