Against the law.



IN THE SUPREME COURT )
OF PAPUA NEW GUINEA )

CORAM: RAINE, J.

Tuesday,
17th July , 1973.

THE QUEEN v. ABIBI KERI of Toiawara

R U L I N G

1973.
May 16,
17, 18
MENDI
July 17
Port Moresby

RAINE, J.

The accused has been charged with wilful murder. Mr. Bradshaw of Counsel appears for him. Mr. Bradshaw made it quite clear from the outset that the only issue was whether the accused intended to kill the deceased, and he has not deviated from this. The case he seeks to make is that for a long time, Tiparom Era, the deceased, had been accusing Abibi of having played some part in the death by drowning of the deceased's brother Golu. It is said that this happened again immediately before the killing, when Tiparom made a similar accusation. It is put that this was a case of a straw breaking a camel's back and that Abibi lashed out with an axe, killing Tiparom on the spur of the moment. Mr. Bradshaw hopes that this will result in his client being acquitted of the charge of wilful murder, and convicted of murder only. As I understand Counsel, he believes this is the best he can do, and that a conviction for manslaughter only is unlikely, although not impossible.

Benaia Elimo, a patrol officer, alleges that the accused said in an interview, "I killed this man because he made me angry", and "because I was angry". In cross-examination the witness agreed that the deceased's line had blamed Abibi for the earlier death by drowning of Golu. From what I can gather, the blame has been wrongly put on the accused.

Councillor Pala Yot was one of the road party which included the accused and the deceased on the day of the killing. He was a most unsatisfactory witness, his answers were rarely responsive to the questions put to him. However, in one non-responsive answer he said, usefully for once, "The victim's

brother who was drowned was blamed on the accused who got angry and axed the deceased." He says the accused looked very angry after he had killed Tiparom.

Medical evidence showed that there were four separate axe blows, three of which could have caused death.

In Exhibit "B", the section 103 statement to the lower court, the accused said, inter alia, "Tiparom came up. He asked me if I ha(d) seen anyone kill his brother and throw him in the river. I told him I had no knowledge of his brother. He asked me again and I gave him the same answer. He persisted in asking me over and over again so I got angry and killed him. I told him that when his brother went missing I was in the village pulling logs for a bridge. Tiparom then said that he had given my name to the Police and that I would be in trouble. I asked him why he had done this as I knew nothing of the death of his brother. I became angry and killed him."

The accused told the patrol officer, "Tiparom made me cross when he asked me to go for court case about the possible killing of his drowned brother." He also said that Tiparom kept on saying he killed Golu, which he denied, and said, "From then on, I got very upset so I made the first cut with axe (blade) on the right hand shoulder."

The accused gave evidence. I feel I must set it out in full to do justice to the argument. When his evidence-in-chief concluded the Crown Prosecutor did not cross-examine. It is his failure to do so that gives rise to the problem I will shortly discuss.

The evidence-in-chief was as follows, omitting the formal opening parts:-

"I cut Tiparom with an axe.

Q. What was your thinking?
A. I did not know what I was doing.
Q. Where was the axe immediately before you used it?
A. Left near me, 2 or 2½ feet away.
Q. Before the trouble had Tiparom said anything about his dead brother?
A. Yes.
Q. What?
A. 'We will go to court'.
Q. About what?
A. He said, 'You have seen my brother drowned by someone else and you did not tell me and we will go to court.'
Q. What did you think he meant about you not telling him?
A. I thought Tiparom was blaming me for the drowning.
Q. What did you think this court Tiparom was going to take you to would do?
A. I was scared of what the Court would do. I thought I would be imprisoned. I did not want to go to prison.
Q. Did you kill Tiparom's brother?
A. I did not know anything about it, I was building a bridge on the road.
Q. How long before did Tiparom blame you?
A. In the morning until noon. On the day I killed him. He blamed me for a year and nearly two in years.
Q. Just before you cut Tiparom did something happen?
A. He said, 'You will be going to Court. Your name's down in the Police Station, you are going to Court.' He repeated the same thing over and over.
Q. Just before you cut him describe what happened.
A. I was collecting stones, as soon as I arrived from the river with stones the victim called me to straighten up the Court. Tiparom said, 'Now you are in trouble you did not tell my brother drown, now let us go.' I felt I was going to prison. I was very angry.
Q. Remember chasing the Councillor?

A. I did not chase him, maybe he's trying to Court me. As soon as I axed the victim I was on my way to Poroma with my axe on my shoulder. I ran to Poroma.

TO HIS HONOUR

I can think of 2 axe blows, but after that I can't think properly as to a third, I was in a hurry to go to Poroma."

Mr. Bradshaw then closed his case, there was no case in reply, and Counsel submitted that by the failure to cross-examine the Crown was deemed to have accepted what the accused said, insofar as that bore on the question of intention to kill. He relied on Browne v. Dunn (1) and statements from two or three text books that were in the very limited library at Mendi. Needless to say Mendi did not have The Reports. Nor has Port Moresby, but Browne v. Dunn (supra) (2) is quite fully reported in "Cockle's Cases and Statutes on Evidence". This was not at Mendi.

Mr. Bradshaw submitted that as matters stood this was a case where the Crown should have cross-examined, and that as a matter of law the Crown should be deemed to have accepted the truth of what the accused said in evidence, insofar as it touches on the issue of intent.

Remembering that Browne v. Dunn (supra) (3) was a civil case, and having some recollection of the facts of an English Court of Criminal Appeal case, and the result, but not the reasons, the trial was adjourned so that I could avail myself of the Supreme Court library. In fact, the English case I partly remembered was R. v. Hart (4).

The Crown Prosecutor submits that in view of the evidence of the accused it was pointless and unnecessary for him to cross-examine. He suggests that the evidence was of such a nature, and so slight, that there was no requirement for him to seek to impeach the credit of the accused.

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(1) (1894) 6 R. 67
(2) (1894) 6 R. 67
(3) (1894) 6 R. 67
(4) (1932) 23 Cr. App.R.202

There are not a great deal of cases dealing with this problem. The starting point is Browne v. Dunn (supra) (5) (cf. Flanagan v. Fahy (6)). I set out hereunder some extracts from the speeches in that case that are quoted in Cockle. Lord Herschell, L.C. -

> "LORD HERSCHELL, L.C. . . . . It seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not

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(5) (1894) 6 R. 67

(6) (1918) 2 Ir.R. 361 at 388, 389

deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted . . . .

LORD HALSBURY . . . .....

.....

To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to . . . .

LORD MORRIS . . . . There is another point upon which I would wish to guard myself, namely with respect to laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit. In this case, I am clearly of opinion that the witnesses, having given their testimony, and not having been cross-examined, having deposed to a state of facts which is quite reconcilable with the rest of the case, it was impossible for the plaintiff to ask the jury at the trial, and it is impossible for him to ask any legal tribunal, to say that those witnesses are not to be credited. But I can quite understand a case in which a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box. I therefore wish it to be understood that I would not concur in ruling that it was necessary, in order to impeach a

witness's credit, that you should take him through the story which he had told, giving him notice by the questions that you impeached his credit."

Browne v. Dunn (supra) (7) is referred to in a commentary in Criminal Law Review which I find most helpful. See O'Connell v. Adams (8). It reads:-

"In Browne v. Dunn, a civil action for libel, it was held by the House of Lords that where witnesses had not been cross-examined on a material matter the jury could not afterwards be asked to disbelieve their testimony on that matter. The reason is to afford the witness an opportunity of explaining any circumstances which may suggest that his evidence is false. The rule bars the party who has omitted to cross-examine from asking the jury to disbelieve the witness. Clearly it cannot bar the jury from disbelieving him; and presumably it would be wrong for the judge to tell the jury that they must believe the witness; though he could of course point out that the witness's evidence was unchallenged. Though the magistrates largely fulfil the role of the judge as well as the jury, it seems right that they, similarly, should be untramelled by rules as to what they must or must not believe. On the other hand, it is obviously desirable that it should be brought to the notice of any witness, before he leaves the witness box, that his evidence is doubted in some respect, since it is possible that he may be able to resolve the doubt."

O'Connell v. Adams (supra) (9) was a case where on a prosecution heard by justices, the defendant and witnesses gave careful evidence offering an exculpatory explanation for the events that happened, and which led to the prosecution.

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(7) (1894) 6 R. 67

(8) (1973) Criminal Law Review 113 at 114

(9) (1973) Criminal Law Review 113 at 114

No defence witness was cross-examined, yet the justices convicted. Only on appeal to the Divisional Court did it come out that the justices had thought the defence evidence was too "pat", they disbelieved it. A paraphrased report of the judgment at p. 114 reads:-

> "Held, dismissing the appeal, that, following Browne v. Dunn (1894) 6 R. 67 and R. v. Hart (1932) 23 Cr. App. R. 202, if it was part of the client's case to challenge a witness as not speaking the truth at a trial on indictment, the professional advocate had to put the matter fully and fairly to the witness and, if that was not done and the advocate in his speech tried to rely on the falsity of the witness's evidence, the court should check him at once. However, in magistrates' courts frequently one party was represented by a person who was not a highly qualified professional advocate and was insufficiently skilled to appreciate the necessity of putting such matters to a witness for the other side. Any suggestion that the justices should do so was to be totally deplored. It was not the general practice, certainly it was not to be encouraged, that justices should interfere with proceedings in the same way as a professional judge very frequently could. To suggest that justices should give some indication that they were not believing the evidence would be quite contrary to the general practice in their courts, and would be thoroughly undesirable. Justices were chosen as ordinary laymen whose principal virtue was that they possessed common sense and the ability to decide whether a person was lying or not on oath. It would be a retrograde step if justices were to be instructed that, in deciding whether or not to believe a witness, they had to be bound by such restrictions. It could not be said, as a matter of law, that justices must accept a witness's evidence merely because it was unchallenged. A dissatisfied party could appeal to the Crown Court, and an appeal by way of case stated was useless unless a point of law was involved."

It will therefore be seen that the "ratio decidendi" does not assist me in the instant trial.

R. v. Hart (supra) (10) was a very special case indeed. Quite vital defence evidence was given to support an alibi. On appeal, in answer to a question by Hewart, L.C.J., counsel for the Crown conceded that had the witnesses for the defence been believed the commission of the crime by the appellant, while still possible, was not probable.

At the trial the witnesses were not cross-examined. In delivering the judgment of the court the Lord Chief Justice said, at p. 206, "If the jury accepted (the witnesses') evidence, it appears to be physically impossible that the appellant could have been at the spot" where the alleged crime was committed. His Lordship, at pp. 206, 207 continued:-

> "In other words, none of the witnesses was given the opportunity of dealing with any objections by the prosecution to their evidence-in-chief. Nevertheless, when the trial approached its close, the jury were invited by the prosecution to disbelieve these witnesses. Without disbelieving them the jury could not have found that the appellant was present at and took part in the assault.
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> Our attention has been directed to the summing-up, but in no passage did the Common Serjeant mention the fact that these three witnesses were left without being cross-examined. Although it was, undoubtedly, explained to the jury that the defence was an alibi, nowhere were they clearly told what the difficulties of the prosecution must be if the evidence of Dearing, Bishop and Mrs. Hart should be accepted. Counsel for the Crown, in the exercise of his discretion, had given these witnesses the 'go-by', but the Common Serjeant did not formulate the difficulties arising from the conflict of evidence with regard to time, nor was the fact that the witnesses were not cross-examined mentioned.

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(10) (1932) 23 Cr. App. R. 202

> In our opinion, if, on a crucial part of the case, the prosecution intend to ask the jury to disbelieve the evidence of a witness, it is right and proper that that witness should be challenged in the witness-box or, at any rate, that it should be made plain, while the witness is in the box, that his evidence is not accepted. Here no questions were asked in cross-examination. Having regard to that matter, and also to the summing-up, we have come to the conclusion that the conviction was unsatisfactory and cannot stand, and that the appeal ought to be allowed."

It does not seem to me that any strict rule of law was laid down by His Lordship, I do not apprehend that he goes so far as saying that where critical evidence is given by the defence, and no cross-examination directed to it, that the evidence is always deemed to be accepted by the Crown. In my opinion R. v. Hart (supra) (11) must be read in the light of its very special facts. Harris's Criminal Law, 21st Edn. quoting R. v. Hart (supra) (12) says at p. 738, "As a general rule a witness should be cross-examined upon any part of his evidence which it is intended to be disputed, the failure to cross-examine being usually considered as an acceptance of the evidence." (The underlining is mine). Cross on Evidence, 3rd Edn., at pp. 211, 212 states, "Any matter upon which it is proposed to contradict the evidence-in-chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence-in-chief." (Again the underlining is mine). Professor Cross refers to Browne v. Dunn (supra) (13) and R. v. Hart (supra)(14). He also refers to Dayman v. Simpson (15) and R. v. Jawke (16). I do not think I need refer to Dayman v. Simpson (supra) (17) not out of disrespect to His Honour's judgment in that case, but because it is a classic application of Browne v. Dunn (supra) (18).

Through the ever kind assistance of the Attorney-

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(11) (1932) 23 Cr. App. R. 202
(12) (1932) 23 Cr. App. R. 202
(13) (1894) 6 R. 67
(14) (1932) 23 Cr. App. R. 202
(15) (1935) S.A.S.R. 320
(16) 1957 (2) S.A. 182
(17) (1935) S.A.S.R. 320
(18) (1894) 6 R. 67

General's library in Canberra I have a photostat of the South African case referred to by Professor Cross. The headnote states:-

> "It is undesirable, especially in a criminal proceeding in the Magistrate's court, where the persons appearing often have little experience, to draw the conclusion that the evidence of a witness is accepted as the truth from a failure to cross-examine, unless this intention is clearly indicated. Where the accused had contented himself with a bare denial of the allegations in the evidence and charge and as the result the public prosecutor had asked no questions,
> HELD, that the failure to cross-examine was no admission of the acceptance of his evidence."

If the reporter has correctly head-noted the "ratio decidendi", and I think he has, then it seems that the Divisional Court in O'Connell v. Adams (supra) (19) dismissed the appeal before it for much the same reasons as the appeal was dismissed in the South African appeal.

Van der Riet, J. delivered the judgment in R. v. Jawke (supra) (20) and I find it useful to quote from His Honour's judgment at pp. 188, 189, 190:-

> "It is argued that because the third appellant was not cross-examined his evidence must be accepted, and that he at least should have been acquitted. For authority for this proposition the Court was referred particularly to May Cases and Statutes on Evidence, paras. 574 to 576.
> In Browne v. Dunn, 1894 (6) H.L.R. 67, the House of Lords held that where certain witnesses were not cross-examined on a material point, a jury could not be invited to disbelieve them on such point, upon the ground that in fairness to a witness he should be given an opportunity to elaborate or explain, if his integrity is intended to be impeached. On the

(19) (1973) Criminal Law Review 113 at 114
(20) 1957 (2) S.A. 182

other hand it was accepted that if this intention is otherwise manifest it is not necessary to waste time in putting questions.

Hailsham, para. 831 at p. 787, expresses the proposition thus: 'Where the Court is to be asked to disbelieve a witness, that witness should as a rule be cross-examined', quoting for authority R. v. Hart 1932 C.A.R. 202. But while the Lord Chief Justice expressed the opinion that if the jury is to be asked to disbelieve a witness, it is right and proper that the witness should be challenged in the witness box, or at any rate that it should be made plain while the witness is in the box, that his evidence is not accepted, the ratio decidendi was that inasmuch as this factor had not been explained to the jury in the summing up, the conviction was unsatisfactory. The defence was an alibi and as the three witnesses spoke to this alibi, the cogency of their evidence was important. The fact that their evidence stood without cross-examination was undoubtedly a factor which the jury or any Court should take into consideration, in conjunction with the whole of the evidence, in deciding the issue of credibility.

Under the circumstances the qualified rule of Hailsham appears to me to be more in consonance with the judgment in R. v. Hart than does the more recent statement in Simonds' edition of Halsbury, para. 801 at p. 444, that

'failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence'.

Phipson on Evidence refers to Browne v. Dunn and the effect of the judgments in cases where there was a failure to cross-examine a witness; and Davis, A.J.A., in quoting the relevant passage in R. v. M., 1946 A.D. 1023, states:

'These remarks are not intended to lay down any inflexible rules even in civil cases, and in criminal cases still greater latitude should usually be allowed.'

In R. v. M. the criticism was made on behalf of the Crown that the defence story was never put to the Crown witnesses, who were hardly cross-examined at all. In spite of this serious criticism the evidence for the Crown was held to be insufficient, and the failure to cross-examine ascribed to an error of judgment on the part of the defending attorney.

Clearly therefore the Appellate Division held that the failure to cross-examine was not a fatal factor, but merely a consideration to be weighed up with all the other factors in the case. The approach was the same in a recent review judgment of this Court in R. v. Qgatsa and Others, as yet unreported, (see post p. 191-Eds.) dated the 23rd October, 1956. In that case five accused were tried jointly on a charge of stock-theft and convicted, mainly on the evidence of accomplices. Accused Nos. 3, 4 and 5 gave no evidence, and their conviction was confirmed. No. 1 however gave evidence that he did not participate and was not cross-examined. No. 2 gave similar evidence and under cross-examination could give no reason why the accomplices should implicate him.

In considering the evidence of No. 1 and No. 2, vis-a-vis the Crown case, Wynne, J., after quoting Davis, A.J.A., in R. v. M., continued:

'The magistrate erred in rejecting the evidence of accused No. 1, standing as it did without any challenge through cross-examination, and accepting that of the two accomplices, whose merits as witnesses cannot fairly be said to have been established beyond question. The case of accused No. 2 is not quite so clear, but as in fact his evidence was not shaken in cross-examination, and as the magistrate in his reasons did not see fit to make any adverse comments on his demeanour in the witness box, this Court takes the view that he too is entitled to be given the benefit of the doubt.'

One further example may be given to illustrate the principle and its application in criminal cases. Assuming an accused to be charged with the theft

of a horse, and the evidence for the Crown to be that of the complainant, who deposes to the theft of his horse and the fact that the accused owns no stock, and a photograph is produced of the accused riding a horse similar to the one stolen. If the accused were to give evidence that he has never ridden a horse in his life, failure to cross-examine on this evidence could not possibly affect the issue; indeed in terms of Browne v. Dunn it would be a waste of time, and the susceptibility of the accused need hardly be considered. On the other hand, were the accused to state that he often rode his brother's horse and was doing so when photographed, such evidence might reasonably be true, and failure to cross-examine might well be fatal to the Crown case.

Between these two extremes there may be several shades of explanation with less obvious results. But in every case all the evidence should be considered, giving full weight to the value of the accused's evidence, and taking into consideration whether it is challenged or not. It is undesirable especially in a criminal proceeding in the magistrates' court, where the persons appearing often have little experience, to draw the conclusion that the evidence of a witness is accepted as the truth from a failure to cross-examine, unless this intention is clearly indicated."

With great respect, I agree with Van der Riet, J., and feel that it is dangerous to lay down a cast iron rule. Phipson on Evidence, 11th Edn. p. 649, while not suggesting positively that there is a cast iron rule that failure to cross-examine, with certain exceptions, implies acceptance of the witness, does go rather further than it seems Van der Riet, J. would go.

I am of opinion that a number of situations can arise, and that they all depend on the climate of the trial or the action, on whether the tribunal of fact is a judge or a jury, on the facts of the case, and the significance of the witness who is not cross-examined. I should think, also, that an oversight by counsel might have to be considered.

Let us imagine a heavy case where a witness raises thirty substantial issues during examination-in-chief, and in cross-examination counsel traverses twenty-nine of them, and forgets to traverse one issue. The cross-examiner's case might suffer because of the oversight, but surely not to the extent that the cross-examiner is deemed to have accepted the one issue raised by the witness and overlooked by the cross-examiner.

It seems to me, depending on all or some of the several considerations I have set out above, that a number of situations can arise, namely:-

(1) The failure to cross-examine, in all the circumstances of a particular case, can only be deemed to be an acceptance of the evidence-in-chief.

(2) The reverse of (1), e.g., where the evidence-in-chief is quite stupid, or obviously a pack of lies, or possesses an incredible and romancing character. Or it may be a case where after cross-examining two or three witnesses the cross-examiner has made his point, and does not bother with the rest, where their evidence is much the same. Phipson also suggests that a question of delicacy might excuse cross-examination.

(3) A position somewhere between (1) and (2), where, however, it would certainly have been desirable for counsel to cross-examine.

In my opinion the evidence given by the accused bears on the question of intent to kill. It was not very striking evidence, but the accused is quite a simple villager, and, without flagrant leading, which, even if not objected to, is often not very convincing, counsel for such a man is in a difficult position.

This is one reason, some defence having been raised, why I think it is a pity the accused was not cross-examined.

He could have been asked why he hit the man four times, or even twice, as he remembers it. Why was his axe so handy? On his story a straw broke his back, but it might have been put to him that he had been resentful for a long time, and made up his mind to put his tormentor to death.

Mr. Bradshaw was at pains to suggest that examining-in-chief he was in a limited position. He kept referring to his inability to lead the accused, but where the real issue was intention I quite fail to see why he could not have dealt with some of the matters about which he felt so diffident. Had he done so, and met the issue head on, he might have forced the Crown to cross-examine.

I rather suspect, from what he said in his address, that the Crown Prosecutor chose not to cross-examine because of what might be called tactical considerations. If this is so, then I do not think, in a trial such as this, that there is merit in this. I take the old fashioned view, a good one I think, that the Crown should be more interested in truth than tactics. Quite often a blunt, disinterested cross-examination by the Crown will result in a conviction, and rightly so. If not, then the Crown should have no regrets.

I do not believe that on these facts the first two tests I have suggested should be applied. But I do feel that the failure of the Crown to cross-examine certainly goes to the weight of the accused's evidence. I will now hear final addresses in the light of that ruling.

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