Mr. Justice Keine

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IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM: WILSON, A.J.
Friday,
14th September, 1973.

REG. v. UNO TAM and MARAU U'U

Judgment

1973

Sep 11, 12 & 14

WABAG

Wilson AJ

Uno Tam and Marau U'u, both of the Pindagin tribe, were charged on indictment for that they on the 12th February 1973 at Liamas, Tehak Valley in New Guinea wilfully murdered Tum Piau of the Yanun tribe. It was alleged that during a two-day tribal fight between two unfriendly neighbouring tribes, the Pindagins and the Yanuns, the deceased met his death as a result of an arrow fired from a bow, which arrow penetrated the front of the deceased's chest below the left nipple and pierced his heart. The Crown alleged that, shortly before the deceased met his death, he was in the company of Marl Kundak and Kalak Nanu. The three of them, all of the Yanun clan, carrying bows and arrows went with two others to join the fight at about 11 a.m. on Monday morning (the 12th February) and upon sighting two of the enemy Pindagins, Uno and Marau, had their bows and arrows at the ready. However, it was then alleged that Marau fired at Tum with his bow and arrow and that Uno did likewise. It was alleged that both arrows struck Tum, one striking him in the chest as described and one striking him on the back of his body. Tum, it was alleged, then fell down mortally wounded and subsequently died. Marl and Kalak ran off in fear.

It appears that the tribal fight during which the deceased died lasted during the Monday and the Tuesday. The deceased was the only man to die, although numerous minor injuries were received and extensive property damage was done, including the destruction of some 30 buildings which were burnt. The fight had arisen as a result of a dispute over a house on a piece of land on the boundary of the Pindagin and Yanun land and the subsequent burning by the Pindagins of a Yanun funeral house. Many men from both tribes were involved in the fight which took place mainly at the place called Liamas on open ground.

The two accused are charged on indictment for that they committed the crime of wilful murder in contravention of Sec. 301 of the Criminal Code (Queensland, as

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adopted for New Guinea). It was submitted on behalf of the Crown that, although only one of the two accused could have fired the arrow that killed the deceased, each accused was liable as a principal offender having regard to the provisions of Sec. 7(c) of the Code, or alternatively Sec. 8 of the Code, or alternatively Sec. 23(A) of the Ordinances Interpretation Ordinance.

At the commencement of the trial, after the presentation of the indictment, I satisfied myself that the two accused men were the two persons named in the indictment and then proceeded to arraign the two accused after explaining to them the court procedure and the crime alleged against them. Mr. L. Roberts-Smith appeared for the Crown and Mr. W. Andrew appeared for the two accused. Following the opening of the Crown case, a number of witnesses were called: -

1. Marl Kundak purported to give eye witness evidence and identify the two accused men.
2. Kalak Nanu purported to do likewise.
3. Ikio Napili purported to identify the body of the deceased to the doctor who later certified the deceased to be dead.
4. Assistant District Commissioner Fanning purported to give evidence as to the finding of the deceased's body and as to other general matters.

The depositions of a doctor, Dr. Binns, were received as evidence pursuant to the provisions of Sec. 109 of the District Courts Ordinance.

At the conclusion of the case for the Crown, Mr. Andrew submitted on behalf of the two accused men that there was "no case to answer". I was called upon to give my ruling as to whether the Crown evidence was sufficient to warrant the two accused having to present their defence.

In a case such as this, where the confusion must have been great, where fighting went on for hour after hour, and where feelings were running high, it was important to examine closely the evidence against the two accused men which purportedly identified them as the persons responsible for firing the two arrows one of which caused the death of the deceased. There was certainly some evidence before me at the close of the case

for the Crown upon which I could find that the deceased's death was so caused. There was also evidence before me at that time upon which I could find that the person or persons firing the arrows which struck the deceased intended to cause his death. Therefore, apart from any question of self-defence or provocation, which were, in my view, prima facie excluded by the Crown case, the most important aspect of the case against the two accused related to the issue of identification of the two accused as the men who fired the two arrows which struck the deceased.

Three aspects arose for consideration. First, it was to be noted that the only evidence adduced by the Crown going to the identity of the man or men who fired the arrows in question was given by the two alleged eye witnesses, Marl and Kalak. Neither accused is alleged to have made a confession or a statement in the nature of an admission. It was not surprising that there was no scientific evidence to support a charge of wilful murder alleged to have occurred in circumstances such as these.

Secondly, the two men Marl and Kalak had been evasive in giving their evidence, the latter more than the former and, in particular, refused to answer in a direct manner questions concerning other arrows that were or could have been flying through the air at the time when, and in the general vicinity of, the place where Tum was struck. I felt that both witnesses understood the questions being asked of them, but preferred to evade the questions and, in the case of Kalak, to repeat with monotonous regularity words to the effect "These men shot Tum. Tum said 'I am dying', so we ran away". Furthermore both witnesses had strong motives for implicating the two accused and for doing so falsely. They admitted that there had been much trouble between the two tribes for a long time, that the deceased was a close relative, and that they were either upset or angry that he had died in the fight.

Thirdly, the two witnesses Marl and Kalak gave a quite different account of how the deceased actually came to be shot and by whom and in what sequence. Marl said that Tum was facing towards Uno who was standing some distance to the right of Marau (as Tum was facing). Marl said that Marau fired the first arrow which struck Tum in the back and that Uno then fired the second arrow which struck Tum in the chest. Kalak, on the other hand, said that Tum was facing towards Marau who was standing some distance to the right of Uno (again as Tum was facing) and that Uno was to his left, that

Marau fired the first arrow which struck Tum in the chest, whilst Uno fired the second arrow which struck Tum in the back. Both witnesses said the arrows were fired from positions about 20 to 25 feet away from the deceased. These two accounts of what happened were entirely inconsistent with one another. Each account was different both as to the places where the assailants fired from and also as to the sequence of the firing of the arrows.

To use the jury test of "no case to answer" a reasonable jury, if properly directed, could have been satisfied upon that evidence that Marau and Uno or either one of them was responsible for Tum's death. However, each of these three aspects were matters affecting credibility and/or weight of evidence. For the purpose of deciding the point at issue (i.e. whether there was a case to answer) I considered that I should not have regard to matters which affected weight rather than the sufficiency of the evidence so far adduced. I therefore did not take these three aspects into consideration in reaching a decision.

The question at that time was not whether there was no evidence (not even a scintilla) in support of the Crown case. The question was whether there was no evidence that ought reasonably to satisfy a jury (properly directed) or judge of fact that the fact sought to be proved (in this instance the identity of those who fired the arrows) was established. The test I applied was whether there was sufficient evidence which, if uncontradicted, would justify men of ordinary reason and fairness in affirming the proposition which the Crown alleged.

It was my opinion that the evidence of the witnesses Marl and Kalak (accepting such evidence at face value and notwithstanding the conflicting nature of it) if left uncontradicted or indeed without comment was evidence which would justify a fair or reasonable person in concluding on the balance of probabilities that the two accused fired the arrows in question. See Bridges v. N. London Rail Co. (1) and also Wilson v. Buttery (2).

I did not overlook the principle that a judge should direct that there is no case to answer, although there may be evidence "to go to the jury", if the proof is such that the jury could not reasonably give a verdict for the prosecution. See Hiddle v. National Fire and Marine Insurance Company of New Zealand (3). There must be sufficient satis-

(1) (1874) L.R. 7 H.L. 213 at p. 233 per Brett J.
(2) (1926) S.A.S.R. 150
(3) (1896) A.C. 372

factory evidence.

I therefore found that the evidence as it then stood (questions of weight and credibility having been ignored for the purposes of arriving at such a finding) was sufficient to require the two accused to answer the case (such as it was) against them. I ruled that there was a case to answer.

Neither of the two accused men gave evidence or called any witnesses. It now remains for me to decide whether I am satisfied beyond reasonable doubt as to each of the essential matters to be proved by the Crown if this charge of wilful murder is to be sustained. The proof of the charge contained in the indictment in this case depends on the establishment beyond reasonable doubt of a number of matters not the least important of which is the identification of the two accused as the persons one of whom fired the arrow which killed the deceased. This matter of proof may otherwise be described as "attribution of homicide" within the broad notion of causation: see Howard's Australian Criminal Law (2nd Ed.) at p. 31.

I have held earlier that there is evidence reasonably capable of supporting the conclusion that the two accused men have been identified or, in other words, that the conduct of the two accused was a substantially contributing factor at the time of the deceased's death having regard to the manner of his death. I must look at the evidence as a whole. The only direct evidence against the two accused men which purports to implicate them as the men responsible for firing the fatal arrow was, as I have stated previously, that given by the witnesses Marl and Kalak. Without repeating those earlier observations, I refer to them again in the present context. They are relevant at this stage even though, for the purpose of deciding whether there was a case to answer, I felt obliged to disregard them.

I must take care in considering evidence of personal identification particularly in a case such as this where the deceased met his death in what may be described as "the heat of battle" and in circumstances where there has been long-standing ill-feeling between the tribes involved in "the battle".

There are well-known dangers in momentary observation purportedly leading to identification. The powers of human observation and memory are not infallible. The real possibility of mistakes of identity must always be borne in mind. The possibility of deliberately falsifying evidence of identification should not be overlooked. However, this is not to say that

eye witnesses can never be relied upon to identify the offenders, because of course every case must depend on its own facts.

The reliance to be placed on personal identification will depend upon a number of factors including, inter alia, the following: -

1. The impression left by the eye witness as to his reliability and accuracy.
2. The existence of a motive for giving false testimony as to the identity of the offender or offenders.
3. The circumstances in which the person to be identified has been observed.
4. The circumstances in which the eye witness finds himself when making the observation.
5. The existence or otherwise of the evidence of other witnesses confirming or contradicting the evidence of the original eye witness.
6. The existence or otherwise of other evidence, direct or circumstantial, of facts or circumstances independently proved.

In the instant case I am not satisfied beyond reasonable doubt that the two accused men or either of them have been identified as the persons or person who shot the fatal arrow. It follows that I am not satisfied beyond reasonable doubt that the conduct of the two accused, or, for that matter, the conduct of either one of them, was a factor substantially contributing to the death of the deceased.

The two witnesses Marl and Kalak each were, in my opinion, unreliable. Each had a motive for giving false testimony, and it was possible, if not probable, that they did give false testimony, although it is not necessary that I should reach any firm conclusion as to this matter. Each said that he was in a position to make observations, but I consider that the circumstances were not good for making accurate observations. Even if they were not lying and were honestly trying to tell the truth, one or other of them was, of necessity, mistaken as to what happened and the order in which things happened. Plainly both of these witnesses could not have been right. There is real doubt as to where the truth lies and indeed whether the truth is to be found in the account given by either of them. Each witness contradicted the other. There is no evidence either direct or circumstantial of any other fact or circumstance which purports to identify the two accused or either of them as the persons or person who fired the fatal arrow.

It is unnecessary for me to deal with the matters of whether or not the evidence raises a possible defence of self-defence and whether or not the Crown has excluded such a defence.

I therefore enter a verdict of "not guilty" as against each accused. No other verdicts are possible in the circumstances. Each accused will be discharged.

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

Solicitor for the Accused : G.R. Keenan, Acting Public Solicitor