IN THE SUPREME COURT )
OF PAPUA NEW GUINEA )

CORAM: WILSON, A.J.
Tuesday,
18th September, 1973.

## REG. v. TSAUNAME KILAPE and ABIYA PALINA

### On Sentence

1973
Sep 14 and 18
WABAG
Wilson AJ

Tsauname Kilape and Abiya Palina have been found guilty on their own confession of the wilful murder of one Pawoi Yaluma. I decided, after some consideration, to accept their plea of "guilty". I was thereupon required to find "whether there existed extenuating circumstances such that it would not be just to inflict the punishment of death (Sec. 305(3) Queensland Criminal Code, as adopted). I had no hesitation in finding that such circumstances existed having regard to the manner in which this deceased was killed.

The deceased Pawoi was killed in a vicious attack upon him by the two defendants. As the deceased was walking home from Paiela along a disused part of the road he was set upon by the two defendants. The two defendants had waited to ambush him. As the deceased approached the defendants each threw a spear at him hitting him in the back near his neck as he tried to run away. The two defendants then chased the wounded man and recovered their spears by pulling them from the deceased's body. The defendant Tsauname then jabbed the deceased several times in the back causing the tip of his spear to break off. He then stood back and shot him three times with arrows in his back. Both defendants then ran off, the defendant Abiya having done so in considerable fear after he had recovered his own spear.

The motive for this killing was traditional payback. The defendant Tsauname believed that the deceased had killed his sister when he had been living in the Hewa Census Division - a remote and primitive part of the Western Highlands of New Guinea. Furthermore, the deceased had not given the defendant Tsauname any pigs as compensation for his sister's death. The defendant Tsauname was angry and felt himself to be under considerable tribal pressure to take upon himself a clan responsibility to avenge his sister's death; so he set off to follow the deceased and to kill him. After track-

ing down the deceased, the defendant Tsauname then enlisted the help of the defendant Abiya. The latter was staying at Waionga at the time when he was approached by the former, who asked him to help kill "the man who had killed (his) sister." At first the defendant Abiya was reluctant to be involved, but, when the defendant Tsauname persisted with his request, he finally agreed, somewhat reluctantly. It seems that the defendant Tsauname told his newly-acquired assistant that no trouble would come to him, which assurance the defendant Abiya naively accepted. The two men then planned the ambush and attack which I have already described.

After the deceased had died, the two defendants were spoken to individually, and both freely admitted their involvement in the killing. In fact, with some apparent feeling of pride or achievement the defendant Tsauname, upon leaving the scene of the death, went to Tagoba and volunteered to one Tultul Pare that he had just killed the man who had killed his sister.

After accepting the defendants' pleas, I was handed the depositions, antecedent reports for each defendant, and I heard each defendant's explanation for their conduct. At the request of counsel I noted the physical appearance of the defendants. They appeared to be suffering from some malnutrition and their demeanour supported the claim that they were primitive men who had little, if any, contact with civilization prior to their appearance in Court. Counsel for the two defendants, before urging me to find that extenuating circumstances existed and making a plea in mitigation of penalty, called as a witness a patrol officer, Mr. R.S. Horgan, who told me something about the districts from which each defendant comes. The defendant Tsauname is from the Hewa Census Division and the defendant Abiya is from the Paiela Census Division. Both Divisions are administered from a town called Porgera, where Mr. Horgan had been stationed in 1972 and from where he had carried out his duties on other occasions. The Hewa Division is patrolled very spasmodically, about once every two years on average. It is a totally subsistence and very remote area, inhabited by primitive peoples the majority of whom would have had little or no contact with any outsiders. The Paiela Division is similar to the Hewa Division, but not quite as remote; the likelihood of the

inhabitants having contact with outsiders is slightly greater. The customs of these two regions are primitive. Such customs include the practice whereby it is a clan responsibility to avenge the death of one of their own members in certain circumstances, such as if the death is not adequately compensated for by the payment of pigs. Failure to pay compensation is a possible cause of aggravation between two clans especially if they are in a state of enmity. As a result of the death of the deceased, further claims for compensation may be made. Failure to pay such compensation may lead to further violence depending upon the status quo at the present time and whether "the score is even" at this stage. It is not known whether arrangements have been made for the payment of compensation on account of the death of the deceased. Apart from a decision of this Court to impose the death penalty (a decision which this Court does not intend to make in the special circumstances of this case), the amount of punishment imposed on these two defendants will have little, if any, effect on the future relationships between the clans in the area in question.

It now remains for me to consider what penalty is appropriate for these two defendants.

I take into account the fact that each defendant has pleaded guilty, each has no previous convictions, and that at the commencement of these sittings had been in custody for 8½ and 7 months respectively. I accept that each defendant has lived in a remote and primitive subsistence area with little or no contact with the culture and standards of behaviour of civilized society. Each was not fully cognizant of the significance of the law that makes killing this man a serious crime. There was pressure upon the defendants which gave them sufficient reason in their minds to do what they did. There was a partial cultural justification for this killing. I accept that their culpability or level of moral blameworthiness was reduced. I also take into account and accept that the need for a general deterrent penalty is not so strong in this case as in some others. In this case the area from which these people came has hitherto been comparatively peaceful.

Be that as it may, I feel that I must place some emphasis upon general deterrence in passing sentence in the case of wilful murder. I cannot overlook the fact that, though this is one sentence as far as these two defendants are concerned, the impact of their sentence (especially if it be seen to be too light or too severe) may be felt generally within

the country as a whole, where there is still present a considerable feeling of concern about the number of needless killings.

A man has died. The law says that life is to be preserved. My judicial duty requires that I impose a substantial punishment. The country cannot allow people, however primitive, to take the law into their own hands.

It is appropriate that I should discriminate between the two defendants. The defendant Abiya was a reluctant participant, and only was involved as a result of the pressure exerted on him by the defendant Tsauname, his knowledge of the customary pressure that Tsauname was under, and probably the naive belief (albeit without sufficient foundation) that no harm would come to him if he did participate. I therefore will impose a lesser sentence for the defendant Abiya. I cannot reduce his sentence too much because he, too, was involved in a deliberate unlawful killing. Furthermore his reluctance to become involved in the first place is indication to me that he knew, at least to an extent, that what he was being asked to do was wrong.

I consider that the necessary and appropriate sentence for the defendant Tsauname is 9 years' imprisonment with hard labour. But for the fact that the defendant came from a primitive area, I consider it should have been a longer period of deprivation of liberty.

The defendant Abiya is sentenced to a period of 6 years' imprisonment with hard labour.

The problem here has been to strike a balance between concern for community protection and a concern for individual liberty.

The law proscribes wilful murder, even payback killings of this type, and says that the commission of such a crime is punishable with the severest of methods. On the other hand, the rules relating to the imposition of punishment according to the Western system of law which, with modifications, is the law of this country say that the question of punishment must be related to the defendant's culpability. In this instance, although the crime was serious and the consequences for the victim were such as to promote little sympathy for the two accused, their level of culpability is relatively low. The Court has therefore been faced with an almost insoluble dilemma.

The solution, in a case such as this, is to be found in the application of accepted principles of sentencing (to which I referred in the case of Iki Lida (1), with emphasis being placed upon the notions of general deterrence (associated with a desire to eliminate cults and traditional killings for payback reasons) and rehabilitation. I reject for the purposes of these sentences the notions of retribution, individual deterrence and incapacitation.

The law must be seen to be tough in its attitude to unlawful killing. The law after all proscribes it, even though native custom in some circumstances sanctions it. If the Court is seen to be too soft, then the general populace of Papua New Guinea may exert pressure upon their politicians to legislate for harsher penalties and even for the mandatory death penalty. My duty requires me not to be any more lenient than I have been in dealing with these defendants.

It may be thought that the impact of this type of penalty will be too great upon these men, who have my understanding but little of my sympathy. It may be thought that a desire to make some progress towards the elimination of traditional killings for payback reasons is at the expense of the fundamental freedom of these defendants. It may be thought that the application of this law to a primitive society is incongruous and may tend to bring about injustices. It may be thought that I have been insensitive to the interests of these defendants. It may be thought that I have not given sufficient weight to the kinship obligation which these defendants felt they could not ignore. It is implicit in this judgment that I consider that such criticisms are not justified, if they are made in this case.

I draw attention to Sec. 675 of the Criminal Code (as amended 1970). It seems to me that that section is a first step towards the introduction into this country of a parole system. This case is likely to be a classic case for the application of the principle of release on conditional liberty which is at the heart of parole systems throughout the world and which is the spirit of Sec. 675. Parole is a particularly valuable correctional tool in cases such as this where there is a need for a sentence such as this wherein emphasis has been given to the notion of general deterrence, where the notions of retribution, individual deterrence and incapacitation have little application and where reformation or rehabilitation is seen both as a desirable aim of the sen-

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(1) Wabag, 17/9/73, Wilson A.J.

tence itself and where there would seem to be a real possibility of its attainment.

I feel that I can speak with some knowledge of the prospects of reformation or rehabilitation in this kind of case. I have some knowledge of the major corrective institutions in this country. Last year I visited Bomana, Bihute and Baisu Corrective Institutions and before coming on this circuit sittings I revisited Bomana. I considered it not only proper but essential for me, before undertaking any sentencing in this Court as an Acting Justice, to return, as I did, to Bomana for the purpose of acquainting myself at first hand with what long-term imprisonment involves in this country. I can see that, in line with the most advanced penal institutions in the world, the major corrective institutions of this country recognise that the punishment associated with imprisonment is (and should be) the deprivation of liberty for a long or short time, depending upon the severity of the punishment, where there is a desire to help men to leave prison better men than when they entered prison, where there is a recognition that men are sent to prison as punishment and not for punishment, and where, by means of programmes involving work, the acquiring of skills, and experience in community living, men from primitive subsistence areas (such as where these defendants come from) can be educated and trained to the point where they can make at least as good, if not a better, contribution to their own community upon their return.

In the interests of these defendants, I mention, for the benefit of such authorities as might review their case at some future date and, without in any way intending to direct such authorities what they should do in the exercise of their separate and independent responsibility, that it may be in the public interest to consider the release of these defendants on licence under Sec. 675 perhaps after half or two thirds of their sentence has been served provided that a number of criteria have been met including, inter alia, the following:

(a) that the general deterrent aspect of the sentence has taken effect, in that there is seen to be a lessening of payback killings of this type in the region from which the defendants come;

(b) that the defendants have, by participating in the programmes of the corrective institution to which they are sent, worked hard, acquired some new skills, and generally learnt much, thereby proving to the

authorities that they are on the way to achieving their own rehabilitation or reformation;

(c) that there is no other reason to suspect that the defendants, upon their obtaining their conditional release, would be a danger to the community.

Bearing in mind the hopes that I have for the exercise by the appropriate authorities of their powers under Sec. 675, and the hopes that I have for the defendants, by their own record of behaviour, being able to bring themselves within the ambit of that section, I consider that these sentences of nine and six years respectively are no more than fits the circumstances of this crime. I consider that I have accommodated custom. The undeniable fact in the instant case is that the conduct of the defendants involved reduced subjective culpability and I have manifested the recognition of that fact both in the rejection of the death penalty for these defendants in the imposition of fixed terms of imprisonment, and in the recommendation previously referred to concerning release on conditional liberty.

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

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