

SC 730

J.A. ROSS

IN THE SUPREME COURT }
OF PAPUA NEW GUINEA }

CORAM: WILLIAMS, J.

Wednesday,

28th February, 1973.

R. v. POTOSI, OVAREMI, MASENA and DIBI

JUDGMENT

*PROSECUTOR
J.A. ROSS*

*Defence A. G. H. H.
T. M. H. H.*

1973

Feb 22,
23 and
28.

KEREMA

Williams
J.

These men are jointly charged with the wilful murder of one Kao Sewasi.

As different considerations arise in relation to each of the accused, depending upon the evidence admissible against each, I will deal with each separately.

POTOSI

Kairi Koiara, a patrol officer who investigated this matter, spoke to the accused Potosi whilst on patrol on or about 25th November, 1972. He asked Potosi whether he was one of the men involved in killing Kao, to which Potosi replied, "Yes". There was no further interrogation of Potosi.

Evidence for the Crown was given by one Emetari who said that he saw Potosi and the deceased man leave the village together along a track from the village, and, a short time later, he saw Potosi return alone. He said that Potosi "gave" the deceased man to Potosi's son, Ovaremi, along the track. However, from later answers to questions in cross-examination and re-examination I am not satisfied that the witness saw Ovaremi on this occasion. It may well be that when he said he saw Potosi give the deceased man to Ovaremi he was stating something he subsequently heard rather than what he saw himself. This witness also said he had not seen the deceased man again after seeing him walk with Potosi along the track leading from the village into the bush. He searched for the deceased that night and again on the following morning. On the latter occasion he observed blood on the ground extending from a point about 40 yards from Potosi's house along the track previously referred to and to the edge of what was described as a very deep hole in the ground. He also

1973

R. v.
Potosi,
Ovaremi,
Masena
& Dibi.

Williams
J.

stated that he accused Potosi of having killed the deceased, which accusation Potosi denied.

Another Crown witness, Suau, said that he saw Potosi take the deceased along a track leading from the village into the bush and return alone a short time later. He also gave evidence of having searched for the deceased that night and on the following day without success. He also described the blood marks described by the previous witness. He too stated that he had accused Potosi of the killing of Kao but that Potosi had made no reply.

The remaining evidence admissible against Potosi is to be found in his statement made on affirmation under Sec. 103 of the District Courts Ordinance. I quote it hereunder: -

"I was in my village of Tegerapo and then I went to Sakatau. I killed a pig before I left and went to give it to my relatives at Sakatau. When I arrived I found four men Bai, Ruae, Masena Kuspe and Dibi Biube. I then brought them back to Tegerapo, where they slept in my house. The following morning I sent them into the bush to hide, while I went to get Kao Sewasi. I went to Kao's house in the village, took Kao with me and walked to where the men were hiding. When we arrived Ruae came out of the bush and hit Kao on the back of the head with an axe. Kao fell down. We then heard people shouting so we ran into the bush. We went back to my house, except my son Ovaremi, and a man who is dead now Hame, they stayed behind, dragged Kao's body to a hole in the stones and threw him in it. I stayed in my house that night and the next morning told my family to pack up our things and we went to Sakatau. I made my garden at Sakatau, raised my dogs and pigs and stayed at Sakatau until the Government came. That is all."

Counsel for the accused contended that the Sec. 103 statement should not be construed in a manner adverse to the accused Potosi. It was said that the words, "I then brought them back to Tegerapo, where they slept in my house. The following morning I sent them into the bush to hide, while I went to get Kao Sewasi. I went to Kao's house in the village, took Kao with me and walked to where the men were hiding. When we arrived Ruae came out of the bush and hit Kao on the back of the head with an axe. Kao fell down," contained nothing which necessarily involved Potosi in any criminal activity. No reasons were given for the bringing of the men to Tegerapo and the sending of them to hide and, it was said, that, in the absence of any expressed reason or motive for "bringing" and "sending" the men these statements of Potosi which I have quoted did not establish any prior knowledge or arrangement that Kao would be killed upon being lead from the village into the bush.

I am unable to agree with this contention. The Sec. 103 statement was made in proceedings where Potosi and others including Masena and Dibi were jointly charged with the wilful murder of Kao. In it Potosi stated that he went to Sakatau and brought back four men, accommodated them overnight at his home and the following morning sent them into the bush to hide, while he went to get Kao. He then led Kao to where the men were hiding and Kao was struck down. In my view the only reasonable inference to be drawn from these facts is that there was a pre-arranged plan to which Potosi was a party, if not the author, for the men to hide in the bush in ambush waiting for Potosi to lead Kao into the ambush. The killing of Kao by one or more of the ambush party, was part of the plan and not some mere coincidence or unexpected event, so far as Potosi was concerned, arising after he had instructed the men to hide and await the bringing of Kao by Potosi to the place where they were hiding.

In consequence I am satisfied beyond reasonable doubt that Potosi is guilty of the wilful murder of Kao, by reason of the provisions of Sec. 7 of the Code.

OVAREMI

I do not propose to canvass the evidence against Ovaremi in any detail as his involvement in the killing of

Kao is clear beyond any doubt so much so that his counsel made no submissions in his behalf.

I find him guilty as charged.

MASENA and DIBI

I think the cases against these two accused may be considered together as very similar considerations arise in relation to each.

They were spoken to by the investigating Patrol Officer and asked whether they were involved in the killing of Kao to which they replied in the affirmative. Later a statement was taken from each of them which was written down by the Patrol Officer.

Masena related that he and Dibi were at Sakatau where they were told by Ruae and Bai, and that the latter had been ordered to kill Kao. Ruae and Bai told Masena and Dibi to join them. Masena said that he told them he did not want to be involved in the matter whereupon he was told, in effect, that he was unmanly, which accusation annoyed him. Later that day three men Ame, Ovaremi and Potosi came to Sakatau and told Ruae, Bai, Dibi and Masena to go to Tekerapo which they did and they slept the night there at Potosi's house. The next morning Potosi sent Dibi, Ruae, Bai and Masena into the bush to hide which they also did. Potosi also told them that he would bring Kao and that when he brought him he would call out. Potosi brought Kao to the place where they were hiding whereupon Ruae came from the hiding place and struck Kao with an axe. Kao then fell to the ground. Masena said they heard voices and thinking they had been seen, he and others ran away leaving Potosi, Ame and Ovaremi behind. As he was running away the latter called out to those running away to come back and throw the body away which they ignored.

The accused Dibi made a statement to the Patrol Officer which, for any relevant purpose, was to the same effect as that of Masena.

During his cross-examination the Patrol Officer agreed that when speaking to these two accused on each of two occasions each used words to him to the general effect that they were not in favour of the killing and had gone along to watch.

I turn now to the Sec. 103 statements of these two accused. Masena related that at Sakatau Ruae asked Dibi and himself to go to Tegerapo with others to kill Kao. Masena said that he did not want to do this because it was against the government law to kill people. Bai and Ruae then accused Masena and Dibi of being women and not men. Masena said to Ruae: "I told Ruae it was alright, they could do this work, and I would go with them but only watch. In the afternoon Potosi and Ovaremi arrived and Ruae told them that we had already talked about it and would go with them." He then went on to make a statement to a similar effect as that made to the Patrol Officer.

Dibi in his Sec. 103 statement said that at Sakatau Ruae and Bai asked Masena and himself to help them kill Kao. Dibi said: "I told Ruae that I did not want to help them because it was not a good thing to kill people," whereupon Ruae and Bai claimed that Masena and himself were women and not men. Dibi then said: "I do not want to kill people because I know a bit of Government law."

The last evidentiary matters to which reference should be made are the statements made from the dock by these two accused. Masena's statement was along the lines of his earlier statements with the addition of a statement that after hiding in the bush at Potosi's direction Dibi and himself were standing some 40 yards from the pathway whilst Ruae and Ovaremi were standing on a pathway awaiting the arrival of Kao. He added, "I came with them - there was agreement between myself and Ruae that we would watch only." Dibi in his statement from the dock contented himself with saying, "My story is what Masena has said - we have the same story."

It was contended by counsel for these two accused that there was no evidence to support the conviction of them under any head of Sec. 7 of the Code. It was said that there was no evidence of any act or omission on the part of either of these accused done for the purpose of enabling or aiding another person to kill Kao. It was claimed that these accused had made their position clear to Ruae that they would take no part in the killing and would go along to watch only. "Watching" in this context meant mere observing and that all these two accused were doing was, in answer to the taunts concerning their manhood, proving that they were men who could stand the sight of killing.

The last named proposition is, I think, open to considerable doubt. I think it more likely as was said by counsel for the Crown that the "watching" said to have been agreed to by these two accused meant "standing watch" in the sense that they would keep a lookout and warn against anyone coming on the scene who might disrupt the plan to kill Kao and make some counter attack on the ambush party.

As was said by counsel for these accused there is ample authority for the proposition that mere presence at the scene of a crime is not sufficient to create criminal liability. Reference was made to a passage from the judgment of Cave, J. in Coney's case (1) which is as follows:-

"Now it is a general rule in the case of principals in the second degree that there must be participation in the act, and that, although a man is present whilst a felony is being committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal in the second degree merely because he does not endeavour to prevent the felony, or apprehend the felon.

In 1 Hale, Pleas of the Crown, p. 439, it is said that to make an abettor to a murder or homicide principal to the felony there are regularly two things requisite; 1st, he must be present, 2nd, he must be aiding and abetting. If, says Hale, A. and B. be fighting and C., a man of full age, comes by chance, and is a looker on only, and assists neither, he is not guilty of murder or homicide as principal in the second degree."

On the evidence in this case these two accused were well aware, on the preceding day, of the plan to kill Kao. I accept as a fact that at this time they demurred and stated that they did not want to participate in the killing. They were taunted and then stated that they would go along but only in a watching capacity whatever that may mean. They then went to Tegerapo village and spent the night at Potosi's house. On the following morning they accepted Potosi's direction to hide in the bush with others in the full knowledge that they were members of an ambush party some one or more of which were planning to kill Kao when he was lured by Potosi to the ambush point. There is no evidence that, on the morning of the killing, they expressed

(1) (1882) 8 Q.B.D. 534 at p. 539

any disapproval or objection to the direction given by Potosi, whatever their objections and reservations made on the previous day to Ruae may have been.

In these circumstances the presence of these two accused at the scene of the crime was not by mere chance; rather it was as a result of a deliberate plan. Nor, to my mind, can it be said that they were mere spectators - even if it be accepted as put by counsel for these accused that they went only to watch as spectators rather than in the sense of being "on watch".

It was said in the judgment of the Court of Criminal Appeal in R. v. Allan and Others (2) that - "encouragement, in one form or another, is a minimal requirement before an accused person may properly be regarded as a principal in the second degree to any crime."

In the present case the physical presence at the scene of the crime in the circumstances I have outlined is, in my view, cogent evidence of an encouragement of and support to those who engaged in the actual killing (cf. Wilcox v. Jeffery (3)).

It was said on behalf of these accused that there was no evidence that the killer was in fact encouraged by the presence of Masena and Dibi and the killer or others present had the ability and desire to carry out the plan to kill Kao whether or not Masena and Dibi attended the scene. If this be so it is difficult to understand why Masena and Dibi were asked to join in the enterprise at all. It seems to me that the reasonable inference to be drawn from the fact that their presence was requested is that those directing the activity found comfort in increasing the numerical strength of the ambush party. However, the important thing, to my mind, is that attendance in the circumstances already mentioned gave the outward appearance of encouragement and support.

For these reasons I find both Masena and Dibi guilty as charged.

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

Solicitor for the Accused : W.A. Lalor, Public Solicitor

(2) {1963} 2 All E.R. 897 at p. 901
(3) {1951} 1 All E.R. 464