Reina 9

IN THE SUPREME COURT) CORAM: DENTON, A.J.

OF PAPUA NEW GUINEA) Monday,
6th May, 1974.

REGINA v. GALAMU OBU

JUDGMENT

1974

Apl.29,
30
May 1,6

PORT
MORESBY

DENTON,AJ

This accused was indicted before me on the 29th and 30th April, and the 1st May on a charge of wilful murder of Girau Muina on the 23rd December, 1973 at Kupiano.

The facts are in a comparatively small compass and are virtually not in dispute. The deceased and the accused are both members of the Goilala group. The deceased murdered a boy named Duba Koga, who is a nephew of the accused, by stabbing with a knife, including cutting the boy's throat. Early on the morning of the 23rd December the accused saw the deceased with spots of blood on his shirt when he came to a fire at which the accused was sitting, and spoke to the accused. Shortly after he had left it was discovered that the boy was missing and the accused and the boy's father thereupon, evidently having formed a suspicion of the deceased, went in the direction from which he had come, which was a track leading into the bush from the compound in which they lived. At a distance down the track of 600 to 700 yards, as indicated by later evidence of a patrol officer, they found the boy's body on a blanket with numerous stab wounds and with the throat cut and with a knife recognised as belonging to the deceased in the body.

The father was crying and the accused said to him, "Do not cry, I will go and kill the man who killed him." The father said, "Do not do that. I have many children, let us leave this to the police." But the accused looked, so the father said, "strong, surprised, stunned and sad." His eyes were red and he ran off with the knife.

The accused ran in the direction in which the deceased had gone and caught him at a distance of about three miles from the position of the body. The deceased was sitting down, or lying down, and the accused killed him with the knife in a very similar fashion to that in which the boy had been killed, going to the length of almost severing the deceased's head. He came up to a patrol officer and told him that he had killed the deceased and handed over the knife, saying that he killed the deceased because, "he killed my brother's child."

In his statement from the dock the accused said that he felt sorry that the boy was killed, and that he lost his mind.

I accept that the accused lost his self-control.

The only issue pursued before me was whether, on these facts, the Crown had established that the accused was not provoked so as to be entitled, under s.304 of the Criminal Code (adopted), to be convicted of manslaughter rather than wilful murder.

The defence claims that in assessing the defence of provocation I am obliged to make use of the definition of that term which appears in s.268 of the Code. The two sections in question are as follows:-

" Killing on Provocation

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."

" Provocation

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."

The two first paragraphs only of s.268 appear to be relevant, and it is not suggested that s.269 is available as a defence.

The Crown, on the other hand, contends that there is no case of provocation and that the test of provocation is based only on s.304 and the common law as to provocation which applies in Papua. The third possibility, suggested

by Selby, A.J. in Reg. v. John Bomai (1), that "provocation" has its dictionary meaning, was not argued.

It was said that the application of s.268 was more advantageous to the accused than the common law rule would be, that the application of the common law had peculiar difficulty (although not in the present case) because of differences in pre-Code law in Papua and the former Mandated Territory, and that it was of general importance that it should be ascertained whether provocation by insult alone remains available, in view of the decision in Kaporonovski v. The Queen (2), provocation by words alone not being available as a defence at common law. These considerations may make it desirable, it is said, for me to refer the case to the Full Court after I have indicated my proposed decision.

The question is one which has been the subject of considerable controversy over the last twelve years. Before that time there was substantial agreement in three areas in which the Code is in operation, that is, Papua New Guinea, Queensland and Western Australia. From 1962 a shift of opinion in Queensland became apparent. Generally the Supreme Court of Papua New Guinea has followed the view originally taken by the author of the Code, namely that put forward by the defence in this case. There are a number of reported decisions of single judges in Papua New Guinea to that effect and the Full Court in The Queen v. K.J. and Anor. (3) stated this as its view by majority. Subsequently to this decision a Bench of five judges in Queensland in R. v. Kaporonovski (4) adopted the contrary view and this was the subject of consideration by Clarkson, J. in The Queen v. Marumyap Usek (5). In that case Clarkson, J. followed Regina v. K.J. (supra) (6) considering that he was not bound by the decision in Queensland but was bound by the decision of the Full Court.

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(1) (1964) P.N.G.L.R. 278
(2) 47 A.L.J.R. 472
(3) (Unreported, 17th November, 1972, Full Court No. 41)
(4) 1972 Q.R. 465
(5) (Unreported, 9th November, 1973, judgment No. 774)
(6) (Unreported, 17th November, 1972, Full Court No. 41)

Before the decision of Clarkson, J., but apparently not cited to him, the High Court had decided Kaporonovski v. The Queen (supra) (7). This High Court decision did not relate directly to s.304 of the Code, but was a decision of principle relating to the application of s.268 of the Code to s.320 of the Code. The decision was by a majority of three to two, and on the question now being considered by me the High Court was equally divided, but it was unnecessary for the Court to decide this point, and the judgments relating to it are, therefore, obiter. The fifth member of the High Court, Walsh, J., agreed with the majority on the point before the Court and said, "No doubt my conclusion may have logical consequences in relation to the questions whether the term 'provocation' is used in s.304 in the sense attributed to it in the definition in s.268 and whether s.269 is applicable in some cases of alleged manslaughter. But these questions are not raised directly by this appeal and I do not think that I need embark upon a discussion of them. This does not mean, of course, that I have left out of account in reaching my conclusion the authorities in which these questions have been discussed."

It could not be submitted to me that the decision of the High Court was wrong, but it has been submitted that there was equal division on the point now before me, and that Walsh, J. left the point open. Therefore, it is said, I remain in the position in which Clarkson, J. was when delivering his judgment in The Queen v. Marumyap Usek (supra) (8), and should properly follow the most recent decision of the Full Court here.

In my opinion I am obliged to consider whether the decision of the High Court does amount to a reversal of the principle upon which The Queen v. K.J. (supra) (9) was decided, and if it does amount to this I am bound, the High Court being a part of the hierarchy of courts of which this is one, to follow principles which it adopts. I consider that the decision of the High Court as to the meaning of the word "element" binds me and that I should

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(7) 47 A.L.J.R. 472
(8) (Unreported, 9th November, 1973, judgment No. 774)
(9) (Unreported, 17th November, 1972, Full Court No. 41)

follow the principle of its decision.

As well as considerations of this kind it was argued that I should not follow the High Court in Kaporonovski's case (supra) (10) because of divergences between Papua New Guinea legislation and Queensland legislation. The reference made was to s.577 of the Code and to the Sorcery Ordinance, and each of these has a different significance.

The relevant portion of s.577 is a qualification of s.576 which appears in s.577 providing for alternative verdicts on indictments for murder. Section 576, as originally expressed, provided that the only possible alternative verdict on a charge of wilful murder was murder or manslaughter. The amending provision, passed in 1920, enabled conviction of four other offences as an alternative, two of those being offences in which the element of assault was stated as being a part, and two being offences which were not so stated. The argument which is put is that this section indicates that the Legislature took an opposite view to that of the Queensland courts and the High Court as to the meaning of s.268 by equating in those provisions cases where provocation would be available as a defence, i.e. where assault is by definition an element, with cases where provocation would not be available. The courts referred to would not have been concerned with s.577 as throwing any light on the interpretation of the Queensland section, as this provision in its form here does not occur in Queensland, although s.576 was referred to in the Queensland Full Court. It appears to me, however, that the result of the introduction of this provision is equivocal, the argument that it brings about capricious results being one which was put to the High Court in relation to its decision and which did not find favour. Possibly it is to be treated as a procedural provision only, bringing into operation in homicide cases provisions as to which provocation could be a defence with those to which it could not be a defence indifferently.

The other provision is that of the Sorcery Ordinance which provides as follows:-

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(10) 47 A.L.J.R. 472

"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) Any defence provided by virtue of this section is in addition to and not in derogation of any defence otherwise available to an accused person or any defence available by reason of any effect attributable, under any other law of the Territory, to the act involved."

It seems clear from this provision that sorcery is intended to be available as showing provocation in all types of cases, including cases of homicide. The reference to s.268 in the Sorcery Ordinance indicates that in all probability the Legislature considered that section to apply to all cases in which provocation arose. It is suggested that it follows from this that the Legislature must be treated as having intended s.268 to apply to homicide cases. The section states that the provision is made for the avoidance of doubt, but it would not appear to me that the doubt referred to was a doubt as to the availability of s.268 in homicide cases, but a doubt as to the availability of sorcery as justifying a defence of provocation. I consider that except in cases where the provocation alleged is sorcery this provision does not introduce s.268 into homicide cases, and even then only as to

the sorcery element, and in all probability does not bring about any amendment to the Code.

It does not appear to me that the process by which the High Court arrived at its decision is affected by either of those legislative differences, although there is clearly a possibility that had the High Court been considering the Papua New Guinea legislation rather than the Queensland legislation there may have been in the almost evenly balanced atmosphere of the case a decision in the contrary sense. I consider that the principle must now be taken as established.

In my opinion the result of the High Court's decision in Kaporonovski v. The Queen (supra) (11) is that s.268 of the Code does not apply to cases arising under s.304 of the Code, and that, therefore, the Crown argument as to the proper test of provocation succeeds.

I have had put to me a number of authorities as to the precise ambit of the defence of provocation at common law, citing a summing-up of Devlin, J. quoted as a model by the Court of Criminal Appeal in England in R. v. Duffy (12). Although this summing-up was a model in the particular circumstances of that case it obviously cannot be treated as a model summing-up for all cases in view of the wide range of circumstances which may be relevant in cases of provocation and its views are modified by later decisions. I have also considered Mancini v. Director of Public Prosecutions (13), Phillips v. R. (14), R. v. Brown (15), Lee Chun Chun v. R. (16), Parker v. R. (17), Da Costa v. R. (18) and R. v. Minehan (19), indicating at that reference that Da Costa v. R. (supra) (20) should be followed in preference to other authority. I have also considered R. v. Jeffrey (21) and R. v. Callope (22). It is not necessary for me to analyse all the elements of provocation dealt with in these cases.

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(11) 47 A.L.J.R. 472
(12) (1949) 1 All E.R. 932
(13) (1941) 3 All E.R. 272
(14) (1969) 2 A.C. 130
(15) (1972) 2 All E.R. 1328
(16) 1963 A.C. 220
(17) 111 C.L.R. 611 (High Court)
111 C.L.R. 665 (Privy Council)
(18) 118 C.L.R. at 215
(19) (1973) 1 N.S.W.L.R. 659 especially at 668
(20) 118 C.L.R. at 215
(21) (1967) V.R. 467
(22) (1965) Q.R. 456

As a starting point in the application of common law rules as to provocation to the present case, there must be the application of the two provisions in s.304 that the act of provocation within that section must be, "in the heat of passion caused by sudden provocation", and, "before there is time for (his) passion to cool."

The principles that there must be some act or series of acts done by the dead man to the accused which would cause in any reasonable person and actually causes in the accused a sudden and temporary loss of self-control rendering the accused so subject to passion as to make him for the moment not master of his mind are applicable. Notwithstanding the criticism of the test "reasonable man" by the editor of Russell on Crime, 12th edn. I consider myself bound by authority to apply it. However, the proper test of a reasonable person, or an ordinary person, which seems a more appropriate term, is the test of the native villager in the environment in question. It is accepted by both Crown and defence that the ordinary Goilala villager is volatile and mercurial, but it is not common ground that he is savage.

I find that the act of the accused, within s.304, was one which caused death in the heat of passion. It is put as to the question whether there was "time for his passion to cool" that this is to be tested objectively, that it is relevant but not conclusive whether his passion did cool, and that I should not regard a period such as would be required for the accused to run a distance of nearly three miles, there being no other instances of provocation during that time, as anything other than a period during which there was time for his passion to cool. I am not satisfied with this approach and the onus being on the Crown, there being little evidence on the subject except that as to the actual state of mind of the accused, I am not satisfied that there was time for a Goilala villager's passion to cool, or that it had cooled.

I consider that if the facts relied on do amount to provocation, that this was "sudden". I find also that what occurred as described above is the cause of the accused's conduct.

However, applying the test of the ordinary man, and having in mind the reaction of the father of the boy, it seems to me unreal to regard the reaction as what might have been expected from an ordinary man in the sense in which that word is used, bearing in mind considerations of the proportion of the reaction to the provocation given. In a sense the use of the knife is a likely reaction, it having been left in the boy's body. This is a different situation from seeing the fatal blow struck.

The extent of the use of the knife was gross. The statements of the accused before the Magistrate bear out the view that his was not an ordinary reaction. He said, "My real father was a trouble maker. I was born from him after he died I followed his way. Girau Muina had killed Duba and at the same time I killed him too."

In my view, as indicated, the accused must on the evidence be treated as "out of his mind", that is, carried away by what he saw. I do not find that this was because he was provoked. His case is most appropriately considered as motivated by the desire for revenge and to become the executioner of his nephew's murderer using similar methods. However natural this may be, and perhaps considered appropriate by some in a Goilala community, it is contrary to the common law and cannot be treated as arising from provocation. As Coleridge, J. said in R. v. Kirkham (23) "Though the law condescends to human frailty, it will not indulge human ferocity."

There seems grave doubt whether an event which occurs otherwise than in the accused's presence can amount to provocation. In The Queen v. Terry (24) Pape, J. referred to the authorities, most of which are collected in Russell on Crime. See also R. v. Oa (25). The door is left open, to some extent, by R. v. Scriva (26). I find it unnecessary to decide the point in view of my findings as just made.

In case the view which I have taken as to the proper law is incorrect, I propose to make findings which apply to

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(23) 8 C & P 115
(24) 1964 V.R. 248
(25) (1967-68) P.N.G.L.R. at 29-30
(26) 1952 V.L.R. 298

s.268. I treat the appropriate provisions to be applied in those circumstances as ss.304 and 268, and my findings as to s.304's provisions are as stated above.

Going to s.268 it may be accepted that those portions of the section as to the relationship between the accused and the boy who was killed and the deprivation of the power of self-control are already decided in the accused's favour or not in question. The inducement to assault the deceased ought, I believe, to be found in his favour also. The problem is whether the following portions of the section, deleting from them reference to matters which do not arise apply to the present case. Reading the section in this way the provision is, "Provocation means and includes..... 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....."

The obvious problem in the way of the application of the doctrine of provocation to the circumstances here is that the nature of the alleged provocation is, to say the least of it, unusual. No case has been cited to me as authority or illustration for the proposition that where a murder takes place and a person finds the dead body and is thereby caused to be angry this is "an act or insult" within the meaning of the section. I am of opinion that it is not such an act or insult.

It was suggested during argument that the act involved embodies all or some of the following component parts: (a) the murder, (b) the meeting of the accused and the deceased, (c) the observation by the accused of the blood spots on the deceased's clothing, (d) the disocvery that the boy was missing, (e) the realisation that the deceased came from that direction and had dew on his face and hair and seeds ("seats") on his legs, (f) the formation of the suspicion that the deceased may have injured or killed the boy, (g) the walking to find the boy, (h) the finding of the boy's body with the knife remaining in it.

I treat the case as being one in which the boy may have been killed by the deceased immediately before he was

seen by the accused. There is no real evidence as to this, the length of time during which the boy had been dead not being shown by any evidence. I, therefore, in dealing with this question of fact, make the assumption which appears most favourable to the accused.

Assuming the circumstances set out above to be capable of being described as an "act", the difficulty in the way of applying the section is that the act or insult is required to be done to an ordinary person or in the presence of an ordinary person to another person. It must also have the quality of being a wrongful act, or a series of acts which may be treated as a wrongful act. This appears to exclude many of the circumstances related above, although all of them played their part in stirring the accused to anger. Clearly the killing was a wrongful act; other factors are not. An act may be done to the accused, although not deliberately directed to him. I consider that the circumstances set out above do not constitute an act to the accused. Further, I find it impossible to hold that the act done to the boy was done in the presence of the accused. I do not consider that a distance of 600 yards can be regarded as in his presence.

Considerable argument was directed to this point, and it would seem that actual sight of a provoking act is not necessary. I consider that the relevant act here is limited to the killing, none of the other factors having the necessary quality of being a wrongful act done to the accused or in his presence to another person.

The circumstances cannot, I think, be regarded as an insult within the meaning of the section.

The defence further claims that the accused's reactions, as to which I have made findings of fact, need not be considered in the light of the question of proportionate retaliation as at common law. The argument I take it is that the section does not provide for proportionate retaliation, s.269 not being applicable and that it is necessary only that an ordinary man would be deprived of self-control and that thereafter, he being ex hypothesi out of control, the nature of the reaction is irrelevant.

Reference was made to R. v. Yanda Piaua (27) where the question was raised but not decided, Mann, C.J. dealing with the matter factually, in a case where the accused concerned was a member of a primitive group. It is not necessary for me to decide this question, although it is, I take it, necessary to decide whether the accused reacted in the way he did to what happened. I find that he did react to what happened but unless what happened was provocation within the meaning of s.268 this does not assist him.

I therefore propose to find that I am satisfied beyond reasonable doubt that the accused was not provoked according to law.

As it has been put to me that the unsuccessful party in this proceeding may wish the matter to be referred to the Full Court I defer the making of my order until the parties have had an opportunity to consider the above reasons.

Solicitor for the Crown: P.J. Clay, Crown Solicitor
Solicitor for the Accused: G.R. Keenan, Acting Public Solicitor

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(27) (1967-68) P.N.G.L.R. 482