STUDENT OPINION

A Decade of the Defence of Accident—1960-1970*

Brief History of the Code

The Queensland *Criminal Code* was adopted at different dates in Papua and New Guinea. By Section 1 of the *Criminal Code Ordinance* 1902,[1] Papua adopted the Code on the first day of June 1903. By Section 4 thereof the provisions of the *Code* have exclusive application over all indictable offences except where it is expressly provided by the legislation creating the offence that the *Code* has no application.

The Territory of New Guinea did not adopt the *Code* until a much later date, 9th of May, 1921.[2] Section 16 of the *Laws Repeal and Adopting Ordinance* also adopted the principles and rules of common law and equity as they exist in England on the 9th day of May, 1921. It therefore appears that for any indictable offences, in New Guinea, the defences available at common law apply in conjunction to the defences under the *Code* if consistent with the terms of the *Code* itself.[3] In Papua, however, one has to fall back on the *Code* for defences. Common law defences are not available at all, as the adopting legislation provides for the *Code's* exclusive operation—unless expressly provided otherwise by the legislation creating the offence.

Defence of Accident

The defence of accident is provided by section 23 of the *Code* as adopted by both Territories. The section itself provides:

> "23. Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.
>
> Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission, is immaterial.
>
> Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."

This Section is available to all persons charged with an offence but if inconsistent with any subordinate legislation that created that offence then the local legislation prevails by virtue of Section 13 of the *Laws Repeal and Adopting Ordinance*.[4] The essential paragraph in that section is the first one which contains three parts. It provides for the defence of accident as well as the defence of where an act or omission occurs independently of the exercise of one's will. Both these defences are made "subject to the express provisions of this Code relating to negli-

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1 No. 7 of 1902; p. 1287 of Laws of Papua 1888-1945 Vol. II.

2 *Laws Repeal and Adopting Ordinance* 1921, s. 13, 2nd Schedule.

3 See Windeyer J. in *Timbu Kolian* (1968) 42 A.L.J.R. 295.

4 *A. A. Thick* v *F. C. Hoeter* [1963] P.N.G.L.R. 87.

gent acts and omissions . . ." These "express provisions" are found in Chapter XXVII of the *Code*, that is, sections 285-290.

The essential words as found in section 23, for the purposes of this article are ". . . a person is not criminally responsible . . . for an event which occurs by accident." It is interesting to note that the Tasmanian *Code* uses the word "change"[5] instead of "accident" as used in The Queensland *Code*. Speaking of the distinction between an "act" and an "event", Windeyer J. in *Vallance's* case[6] said "The Common law rule was that a man was not criminally responsible for an occurrence that was pure chance, but that he was responsible for an accidental death if it arose out of his doing an unlawful act." He went on to quote Hale as saying, in relation to the distinction between "pure chance" and "chance-medley",

> "So it is if he be doing an unlawful act, tho not intending bodily harm of any person, as throwing a stone at another's horse, if it hit a person and kill him; this is felony and homicide, and not per infortunium, for the act was voluntary, tho the event not intended; and therefore the act itself being unlawful, he is criminally guilty of the consequences that follows."[7]

His Honour further went on to say that the test was objective by saying:

> "The statutory provision only operates in cases where the event was not foreseen by the actor and would not have been expected by reasonable men as an outcome of his actions. . . . The probability that harm will result from a man's acts may be so great, and so apparent, that it compels an inference that he actually intended to do that harm. Nevertheless, intention is a state of mind. The circumstances, and probable consequences of a man's act are no more than evidence of his intention."[8]

This in fact is the adoption of the common law theory that there is sufficient *mens rea* arising from the unlawful intended act to make the doer guilty of its accidental consequences. At common law, an act done by accident is excused for want of mens rea, but a person will be responsible for the accidental outcome or event of a willed act according to whether that act was lawful or unlawful. It appears however that under the *Code* the unlawfulness or the lawfulness of the act is not the only deciding factor as the guilt of the accused. So in manslaughter cases it may be for the jury or judge[9] to determine whether, in fact, upon the evidence the death was an accidental event.

The Decade 1960-1970

In the decade concerned there were a good many cases in Papua New Guinea in which the accused person raised the defence of accident. In these cases, the judges in the Territory have not reached a consensus on the question of what constitutes "accident". Some applied the "foreseeability" test while others argued that the test should be whether the act complained of was the direct consequence of an intentional act. The question is also raised whether the lawfuness or unlawfulness of the act is also a determining factor in deciding the applicability of the defence of "accident".

The decade thus began with the case of *R* v *Diru*,[10] on the 26th of May, 1960. This was a case in which the accused was charged with the manslaughter of his father when he kicked him in the abdomen, thereby causing his enlarged spleen to rupture. The late Chief Justice, Sir Alan Mann held that a death occurs by acci-

5 Section 13(1) of Tasmanian *Code*.
6 (1961) 108 C.L.R. 56 at p. 80.
7 Pleas of the Crown, 1, 38.
8 (1961) 108 C.L.R. 56 at p. 82
9 In Papua New Guinea the judge carries out the functions of the jury. A judge is both a judge of fact and of law.
10 [1963] P.N.G.L.R. 115.

dent when at the time of the performance of the act which in fact causes the death, it would not have been reasonably foreseeable to a person in the position of the accused that the life, safety or health of the person killed might be endangered thereby. Foreseeability, therefore, was understood by the late Chief Justice to be a test for determining whether or not the defence of accident is available.

The second case was *R* v *Gamumu*[11] which occurred in the same year. In this case, Mann C.J., also held, following the first case, that the actions of the accused were not justified, but found that a village native such as the accused, without medical knowledge, could not reasonably foresee that his actions were likely to endanger the deceased's life or health and therefore since the event of her death was due to accident and subject to section 289 of the *Code*, he was under no criminal responsibility in respect of the death of the deceased. He went on to hold that the standard of care prescribed by section 289 had been observed by the accused and found the accused guilty of common assault which is an alternate verdict in cases of manslaughter by virtue of section 577 of the *Criminal Code* (Papua). It therefore appears from this case that the foreseeability test is more likely to favour the accused in a community where medical knowledge is rudimentary.

In both of these cases, the late Chief Justice appears to interpret section 23 as subject to the specific provisions of the *Code* relating to negligence. That conclusion is inevitable but he appears to address himself to the question of whether or not the defence of accident applies before deciding whether or not the specific provisions relating to negligence apply. That may not be the correct approach and is certainly inconsistent to the observations of McTiernan and Menzies JJ. in *Eugeniou* v *R.*[12] If the duty of care required has not been observed, then there is no necessity to go on to the further question of the applicability of the defence of accident.

In *R* v *Manga Gabi*[13] although Ollerenshaw J., did consider *R* v *Diru* and *R* v *Gamumu*, he decided not to follow them and instead followed the Queensland case of *R* v *Martyr.*[14] In that case the Queensland Full Court decided that it was not a case of "accident" where, due to an inherent constitutional defect, death followed a deliberate striking. This decision takes us back a century to the old common law rule that a person is responsible for the direct consequences of his intentional act if the act was unlawful.[15] What would have been the decision if in *Martyr's* case, instead of the deceased having an eggshell skull, he instead fell and struck his head on a stone and cracked his skull. The common law rule is that there should not be an intervening factor (actus reus interveniens). If there is, then there is no responsibility.

After Ollerenshaw's judgment, Smithers J. in *R* v *Talu*[16] (a month later) decided not to follow *R* v *Martyr* and held that an event which occurs by accident is one in which the person committing the act did not foresee the consequences, as a possibility substantial enough to be worthy of attention in deciding whether or not to do the act and which was so unlikely to result from the act that no ordinary person similarly circumstanced could fairly have been expected to take into account.

In *R* v *Miawet,*[17] Minogue J. adopted the views expressed in *R* v *Diru, R* v *Gamumu, R* v *Talu, Vallence* v *R*[18] and tried to distinguish *R* v *Martyr* by saying that the Full Court of Queensland agreed that "the defence of accident is available where in consequence of an intentional act by the accused (whether lawful or unlawful) an unintended and unforeseen happening occurs which is the proximate

11 [1963] P.N.G.L.R.
12 (1964) 37 A.L.J.R. 508.
13 [1963] P.N.G.L.R. 98.
14 [1962] Qd. R. 398.
15 Note: *Martyr's* case did not explicitly say that the unlawfuness of the act is relevant.
16 [1963] P.N.G.L.R. 136.
17 No. 281 of 1963 unreported.
18 35 A.L.J.R. 182 or 108 C.L.R. 56.

cause of an injury resulting in death, *but* because in that case the death was regarded as the direct result of the willed act, the Court held that that death was not the result of accident."[19] It is difficult to see any distinction, factually, between the spleen cases and *Martyr's* case, except that *Martyr's* case deals with the case of eggshell skulls. [Neither Minogue J. nor Smithers J. applied themselves to the question of whether or not *Martyr's* case is a good law.[20]]

In *R* v *Mamote Kulang*,[21] Ollerenshaw J. drew upon his reasoning in *R* v *Manga Gabi* and stressed the point that death was *not* "an event" within the meaning of section 23 of the *Code* and that death is a "result" referred to in the second paragraph of section 23. He went on to argue that in that second paragraph there is an express provision (when read in conjunction with the definition of manslaughter) making the intention to cause death immaterial. [A question therefore arises: Should the second paragraph of section 23 be read in conjunction with the definition of manslaughter? It may be argued that the second paragraph is part and parcel of section 23 and therefore should not be read in conjunction with the definition of manslaughter—for in doing so would be to defeat the primary purpose of section 23 as a provision creating a defence for general application. Yet the other reasoning is acceptable (as it undoubtedly was by Ollerenshaw J.).]

Ollerenshaw J. argues that death is not "an event"—it is the "result" of an act. This may be if the death was the result of an axe wound in the chest or a bullet wound in the head. But the cases of inherent physical weakness should be accepted as exceptions. Death resulting from an inherent physical weakness is "an event" and not the "result" of an act. The test in such cases ought to be, "if it weren't for the particular peculiar inherent physical weakness, would the deceased still be living?" If the answer is in the affirmative then the death resulting therefrom is an event. If the answer is in the negative then death is the result of the act complained of. There is a clear distinction between the defence of ". . . an act or omission which occurs independently of the exercise of his will" and that of ". . . for an event which occurs by accident". The second paragraph of section 23 refers to "an act or omission" and "the result intended to be caused by an act or omission". Ollerenshaw J. appeared to relate the result of an act or omission with the defence of "an event which occurs by accident". It is however apparent that the words "the result intended to be caused by an act or omission" refers to the first defence of ". . . an act or omission which occurs independently of the exercise of his will."

The ultimate effect therefore should be that people who are aware of their inherent physical weakness owe a duty of care towards each other as ordinary citizens to see that they do not place themselves in situations where the life and liberty of the other ordinary citizens would be in danger. In other words, people with eggshell skulls ought to take extra preventive precautions to see that they do not provoke or cause other people to loose their self control or to retaliate against them.

In the recent case of *R* v *Wak Kalit*,[22] Prentice J. adopted the late Chief Justice's approach (whether consciously, is uncertain) by considering first the question of whether or not the defence under section 23 applies to the case and then the question of the applicability of section 289.

In *Eugeniou* v *R*,[23] Mann C.J., in a case of unlawful killing, held that unless the accused was excused by section 23 of the *Code*, he was guilty of unlawful killing whether or not he had been negligent. On appeal to the High Court, it was held that Mann C.J. had erred in making a finding of guilt based on the applicability of section 23. *McTiernan* and *Menzies* JJ. found that Mann C.J. in applying section 289 was embarrassed by the course he took in considering in the first place

19 At page 9 of 281 of 1963 unreported.
20 Professor O'Regan however was of opinion that it was perhaps because *Martyr* was decided by a strong bench including Philip J. an acknowledged authority on the *Code*.
21 [1963] P.N.G.L.R. 155.
22 No. 620 of 1971 unreported.
23 [1964] P.N.G.L.R. 45.

whether the appellant was guilty of manslaughter unless excused from liability by section 23 of the *Code*.

> "That section had no application because of the opening words: 'subject to the express provisions of this Code relating to negligent acts and omissions'. His Honour however seemingly considered that unless the appellant was excused by section 23, he was guilty of unlawfully killing whether or not he had been negligent provided that he had caused the death of the deceased. With respect, we are satisfied that it was wrong to have dealt with the case independently of section 289."[24]

Whether or not Prentice J. in *R* v *Wak Kalit* had recourse to this judgment is uncertain as there was no mention of it. He however did consider section 289 only after he had decided on the question of the applicability of section 23.

In the later case of *R* v *Tsagoroan-Kagobo*[25] Mann C.J. quoted *Evgeniou's* case and held that the accused's failure to discharge his duty to use reasonable care and take reasonable precautions to avoid danger, was a breach of duty of such degree as to satisfy the test of criminal negligence and that the question of the defence of accident may only arise if the accused's negligence did not amount to criminal negligence.

In an identical case (though the High Court distinguished it on the facts) to the previous one, R v *Timbu Kolian*,[26] Clarkson J. found that there was no criminal negligence but brought in a verdict of guilty of manslaughter. However on appeal to the High Court,[27] the Court allowed the appeal and distinguished *Momote Kulang* instead of overruling it; thus complicating further this defence of accident in the last decade in question.

In the case of *R* v *Kipali-Ikarum*,[28] Clarkson J. held that this was not a case of an unexpected result following on an intended blow as the blow of the axe handle was as likely to cause and was intended to cause the same injury as the falling wood was assumed to have caused. That the intended injury was inflicted in a manner different from that intended did not absolve the accused from criminal responsibility under section 23 of the *Code*. This case is distinguishable from *Mamote Kulan, Martyr's, Vallence* and *Tralka*.[29] In the first two cases, the intended blow struck home but had unexpected results. In *Vallence's*, the bullet fired by the accused inflicted the wound although its path may have been altered by ricocheting. In *Tralka*, the wrong person may have been hit merely because of the unexpected halting of the vehicle.

In *R* v *Yofia Abone*,[30] Minogue J. held that to sustain a charge of unlawfully doing grievous bodily harm contrary to section 320 of the *Code*, the Crown must prove that the act causing grievous bodily harm was unlawful either because it amounted to an act of criminal negligence under section 289 *or* because though not itself a criminally negligent act, its result, the infliction of grievous bodily harm, was not "an event which occurred by accident", within the meaning of section 23. The evidence did not establish either form of unlawfulness. Minogue J. further held that the blow suffered by the child was "an event which occured by accident" within the meaning of section 23. This judgment seems fair enough: an act is not unlawful if it does not amount to criminal negligence under section 289 *or* if it is excused under section 23.

In conclusion, it appears that in this decade, Ollerenshaw J. had a misconception as to the meanings of act, event and result as used under section 23. He is however plagued with the idea that human beings should have self-control of themselves and

24 [1964] P.N.G.L.R. 45 at p. 47.
25 [1965-66] P.N.G.L.R. 122.
26 [1967-68] P.N.G.L.R. 310.
27 [1967-68] P.N.G.L.R. 320.
28 [1967-68] P.N.G.L.R. 119.
29 [1965] Qd. R. 225.
30 [1967-68] P.N.G.L.R. 277.

could not recognise any exceptions where the accused in his own environment regards certain acts and words as capable of depriving him of any self control. It is natural among humans to attack each other, sometimes their actions could be justified, sometimes they cannot. His Honour does not seem to recognise this basic nature at all. For he is of opinion, it seems, that any violence to the body can be dangerous, and an attacker cannot subsequently escape criminal responsibility for his victim's death by pleading that such death was accidental because of some unknown physical weakness.

Minogue J. was of opinion in *Miawet's* case that to hold otherwise, would be reverting to the earlier common law view that death caused in the doing of any unlawful act is manslaughter, and to be out of line with what he conceived to be the developing modern tendency to equate criminal responsibility with moral culpability. Even this part of his judgment was not considered by Ollerenshaw J. in *Mamote Kulang*.