

SUPREME COURT OF THE TERRITORY OF PAPUA AND NEW GUINEA

THE QUEEN

against

AWABE, son of PALA

The Supreme Court, (Brennan, A.J.) in its Criminal
Jurisdiction, on Circuit at Mendi, Papua
10th June, 1960.

Criminal Law - Wilful Murder - Provocation

Manslaughter - Provocation by Mere Words

Stage of Social Development.

Held: (1) Provocation by mere words is a defence under
the Criminal Code, and will reduce wilful
murder to manslaughter.

Paul Mallon, for the Crown

G. Smith Esq., Assistant District Officer, (by leave)
for the accused.

Judgment was delivered orally and the following was
made available in writing on 18th July, 1960, on the
point on which this case is reported.

BRENNAN A.J.:-

The accused was indicted on a charge of wilfully murdering KEMBUME, the daughter of IABILI. The facts material for present purposes are these:-

The accused met KEMBUME on a roadway when she was accompanied by her daughter. The accused addressed to the daughter a remark which to Western ears sounds a coarse, sexual one, but which apparently is a type of pleasantry indulged in in the Highlands, by no means infrequently. KEMBUME either took exception to the remark or took occasion to ventilate her dislike for the accused. She said to him - "You cannot find a woman to marry, and if you talk like that to a girl child you will die still unmarried." She walked away. The accused followed her apparently for a short distance to her garden, picked up a heavy stick and killed her by striking her over the head.

On those facts a defence of provocation is sought to be set up. The evidence leaves no doubt that KEMBUME's apparently mild rebuke was in fact a mortal insult to which any Native in that area would in all probability respond violently. It reflects most gravely on the person to whom it is addressed, and is in effect the equivalent of the Pidgin term - "Man rothing." The Highland Native appears to be very susceptible to insult and prone to respond to it promptly and violently.

If under the law of the Territory of Papua mere words can amount to provocation which reduces to manslaughter that which would otherwise be wilful murder, there seems no question that such provocation was afforded here. The question is: Is such a proposition sound in law.

At the outset, the question arises whether the Criminal Ordinance codifies comprehensively the principles which are to govern the ambit of provocation in relation to charges of wilful murder and murder, or whether the wording

of the relevant Sections is such as to attract Common Law principles applicable to provocation and so to qualify the meaning of the phrases employed.

The Sections of the Adopted Criminal Code which fall for consideration are Sections 304, 268 and 269. Section 268 defines provocation in relation to an offence of which assault is an element, and prescribes the conditions under which one person is said to give another provocation for an assault. Section 269 provides that a person is not criminally responsible for an assault committed upon a person who gives him provocation for an assault, subject to four defined conditions. Section 304 is in these terms:-

"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."

That Section does not provide its own glossary. The term "provocation" is not defined. It then becomes a question of construction whether Section 304 should be read with Section 268, or whether some other definition - presumably the Common Law one of provocation - should be sought.

In Queensland the question has on two occasions been minutely examined with somewhat inconclusive results. But, with respect, it seems to me that Section 304 can scarcely be tortured into a construction requiring that Common Law principles of provocation be imported into it. If such were the case, the words - "... and before there is time for his passion to cool" - would be completely redundant, or in the alternative, the Section must be read as emphasising gratuitously a single element in the Common Law doctrine of

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provocation to the exclusion of other elements. As Stanley J. put it in The Queen v. Sabri Isa (1952) Q.S.R. 269 at pp. 289 and 290 -

"The language of Section 304 is clear and unambiguous, and one should not go beyond the obvious meaning of the words used. They do not envisage the common law at all. If Section 304 was intended to be the equivalent of the common law doctrine in its entirety, why does it state only part of it? The words, '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' state part of the common law doctrine. Why is that part stated while nothing is said about the necessity to take into account the instrument with which the homicide was effected, or about the mode of resentment bearing a reasonable relationship to the provocation? Is it not a clear case for the application of the maxim - expressio unius est exclusio alterius?"

If one rejects the proposition that the term "provocation" in Section 304 is to bear its common law meaning, the only alternative which in my view is the correct one is to construe it together with Section 268. It is difficult to see why any embarrassment should be occasioned in so doing in relation to wilful murder or murder merely by reason of the presence of the phrase - "An offence of which assault is an element." Wilful murder or murder may be committed in circumstances which involve an assault, or there may be cases where that element is absent. Certainly cases of wilful murder or murder by, say, poisoning or withholding the means of maintaining life are excluded from the purview of the Section, but there is nothing repugnant to common sense in such a principle.

For the reasons indicated I am of the opinion that an insult of the kind indicated in Section 268 may for the purposes of Section 304 be relied upon as provocation.

Should the alternative view be adopted that the term "provocation" in Section 304 is used in its Common Law connotation, it seems to me that in this particular set of facts it might still well be open to the accused to rely upon the uttering of the words referred to as amounting to provocation.

It is of course true that in civilised Western Communities which apply Common Law principles, the view that words alone cannot be relied upon as provocation has hardened since the 17th century. As a general proposition that thesis is hardly open to dispute, but it does not necessarily follow that the same principle should apply in a Native Community where sophistication does not approach to that of, say, 17th century England, where a type of insult such as the one here in question is calculated and not infrequently intended to throw a man into an ungovernable rage.

The elasticity which should properly govern the approach to this question of provocation was emphasised by Viscount Simon in delivering judgment in which the learned law Lords concurred in Holmes v. Director of Public Prosecutions (1946) A.C. 588, at pp 600 and 601 -

"There are two observations which I desire to make in conclusion. The first is that the application of common law principles in matters such as this must to some extent be controlled by the evolution of society. For example, the instance given by Blackstone (Commentaries, Book IV., p. 191, citing an illustration in Kelyng p. 135), that if a man's nose was pulled and he thereupon struck his aggressor so as to kill him, this was only manslaughter, may very well represent the natural feelings of a past time, but I should

doubt very much whether such a view should necessarily be taken nowadays. The injury done to a man's sense of honour by minor physical assaults may well be differently estimated in differing ages. And, in the same way, one can imagine in these days at any rate, words of a vile character which might be calculated to deprive a reasonable man of his customary self-control even more than would an act of physical violence. But, on the other hand, as society advances, it ought to call for a higher measure of self-control in all cases."

On either view, my opinion is that as a matter of law the accused is entitled to rely upon the insult offered to him as amounting to provocation, and on the facts I see no reason why he should not do so successfully.

I find the accused guilty of manslaughter, and sentence him to two years' imprisonment with hard labour.