THE QUEEN v. MAKO of LABU

MADANG.

19.10.60

Mr. Karlik for Crown.
Mr. Lalor for Accused.

Accused was tried on a charge of rape.

During the hearing the Defence sought to elicit evidence as to the behaviour and state of mind of the accused on previous occasions when he had suffered attacks of an epileptic nature. The Crown Prosecutor objected that since the accused claimed that he was not conscious of his actions during these attacks he could not give evidence of them or of his state of mind.

Counsel for the Defence argued that the evidence was tendered not in proof of the facts in question but to provide the case history of the accused as a foundation for assessment of the mental condition of the accused and to establish that the fits were of an epileptic nature and constituted a mental infirmity.

No expert medical evidence on this specialised topic was available.

RULING - as to admissibility of evidence.

(1) The need of the accused to establish a fact not provable without hearsay evidence not necessarily ground for departure from rule.

(2) If expert evidence were available expert could as part of case history of accused consider his past reputation as a patient.

(3) No expert called to assist the Court and the Court must if it can form its own opinion on a question calling for expert knowledge.

(4) The Court has some experience of related matters and so far as it may hereafter find itself in a position to arrive at any opinion on the point would need to know the reputed case history.

(5) I admit evidence of what accused has been told - as repute only. As a matter of form the question should not be so phrased that the answers might be taken to prove the facts but only the reputation of the accused as to those facts.

At the conclusion of the trial the following Reasons were given:-

REASONS:

I am not satisfied that penetration took place. Circumstances indicating more than a probability that it did not are:-

(a) The youth, inexperience and consequential probability of ~~smallness of the~~ female organ, considered in relation to the facts indicated by the evidence;

(b) Both accused hands were otherwise occupied;

(c) The girl resisted and struggled continuously;

(d) The duration of her struggles;

(e) The apparent clumsiness of accused in his present condition;

(f) The high state of sexual excitement of accused, indicating that he probably did not need penetration to obtain relief.

On the affirmative side the evidence is not strong because:-

(a) The direct eye-witnesses had no doubt in their minds about what accused was doing and I think they perceived no need to apply either their minds or their eyes to the actual question. They rationalised instead of observing;

(b) They could scarcely have seen the parts of the body in question;

(c) The medical evidence does not go nearly far enough to raise an affirmative picture of any real probability, and contains as many and as weighty negative as positive indications.

My conclusion is that on the facts the accused is not guilty of rape.

~~X~~ As to other possible offences the Defence relies on Sections 26 and 27.

There are several possibilities at once apparent:

(a) The accused was suffering from a mental disease ~~or infirmity~~ of long standing which affected his behaviour occasionally under unknown ~~circumstances~~.

This on the evidence seems to be an established fact, but the relevance of this fact is a matter of inference to connect the disability with the events of the day in question.

(b) The accused had excited himself sexually by his sing-sing with the girl Andamongo, and his means of excitation was abruptly cut off by the girl running away.

Again this is established but its relevance depends on inference.

(c) The accused having been suddenly frustrated and left in a state of excitement in the presence of others, may have run

.../3

amok aimlessly seeking some outlet for his feelings; or may have encountered the prosecutrix and her party whilst still running round looking for the missing girl, and in either case adopted the prosecutrix for the purpose of gratifying his desires.

(d) Accused may have become hysterical either before, during or after the event, leaving his perception and self-control, as well as the bona fides of his condition, very much a matter of degree requiring expert investigation and understanding not available to the Court at the trial.

I must approach these questions on a broad basis of evidence and fact first. I cannot place as much reliance on the events occurring after the main incident as those which occurred before, owing to the fact that at the later time he had strong inducement to rely on his history of mental instability and assume a form of self-induced madness.

From his own evidence it appears that the accused was not entirely unaware of his actions; he was aware of falling, meeting the women, asking for food and other incidents. His movements were purposeful and reasonably effective. I do not think his evidence shows clearly that he was unaware of his actions, and I have great doubt whether it shows affirmatively that he lacked capacity to know that he ought not to do them. The real case, I think, if established is that he could not control himself within the meaning of the statutory defence. My task has been to decide whether, without medical evidence to assist me, I can reach an affirmative conclusion, having regard to the possible alternatives.

If the lack of control which I think is fairly established as a fact was due to disease or infirmity, the accused was not guilty but insane. As a matter of experience, there are cases which resemble hysteria, in which excitement could produce the same or similar results.

I think I should accept the evidence of the accused as to the nature of the sing-sing in which he was indulging to the extent of inferring that if this caused his hysteria it was not intended or calculated to produce such an effect, and was not therefore entirely a self-induced state of mind affecting his volition rather than his capacity. I cannot arrive at such a conclusion with clear conviction that it is right, but I think that the presumption of fact set out in Section 26 having been replaced by prima facie evidence of insanity and loss of control, there is no longer any presumption in favour of the Crown on the subject, and of the various possible explanations there is nothing affirmatively proved,

and nothing appearing sufficiently strongly to displace that prima facie evidence.

On the wording of Section 26 I think that the onus is in the present circumstances fully on the Crown to prove capacity. The question arose during the Crown case and the affirmative case set up by the accused is not in my view sufficiently met by the existence of a risk based on unexplained experience rather than evidence that his apparent lack of control was voluntary.

VERDICT:

Accused found insane at the time and not guilty by reason of insanity.

ORDER under Section 647 committing him to Bomana Corrective Institution until Her Majesty's pleasure be known.

MANN, C.J.