

IN THE SUPREME COURT )  
OF THE TERRITORY OF )  
PAPUA AND NEW GUINEA )

THE QUEEN

v.

PAMBOA-TAKAI

MANN C.J.  
WABAG  
27.11.62

REASONS

The accused was a cousin of the deceased. They grew up together and within their own society were to all intents and purposes, brothers.

Socially, as a matter of prestige, they were in the same class, not of any special standing or wealth but not to be despised.

Between the two there had been a long history of conflict, and the evidence indicates that the deceased was the aggressor. It is a firm practice, in case of conflicts within the clan, for the people themselves to avoid fighting and to settle the dispute amicably between themselves. The evidence gave some examples of how the embarrassment of "loss of face" is avoided. The importance of unity within the clan is such that the settlement of a dispute is frequently a compromise, in which the rival claimants share the property in question or divide it equally, or in which presents or compensation of equal value are exchanged so that nobody need assume the role of loser, and prestige is maintained.

The obvious weakness of this system is that a party who does not truly place the community interest uppermost is able to take advantage of his clansmen by making false claims, in the expectation of at least gaining a half share of what is involved.

The deceased, TEKAI or TEKIAGARI, made an accusation against the accused some years ago to the effect that accused had had sexual intercourse with TEKAI's wife. Both accused and TEKAI's wife denied it, and accused appeared to be quite genuine in his assertion that it was a false claim. It is not quite clear what machinery was employed to settle the dispute, but it appears that TEKAI enlisted the aid of YANGO, an interpreter stationed at Lumis, and that both these men made the accusation against accused and told him that they would have him taken to Wapenamanda and charged with the offence.

With the aid of two other clansmen accused secured two pigs which he gave to TEKAI as compensation. He hoped that one would be returned to him, following the clan pattern of saving face by making concessions to fellow clansmen. There are "Moga" ceremonies which are recognized occasions for settlement of outstanding debts of this and other kinds, but during a succession of such ceremonies no pig was returned to accused. Instead TEKAI gave one pig to YANGO the interpreter who had helped to make the accusation.

According to accused, it was at this time that TEKAI was told by YANGO that he was to be appointed Tultul. Some time later TEKAI was so appointed and at a later stage became Luluai.

There is a strong suggestion that TEKAI obtained his official appointment on YANGO's dishonest recommendation, possibly as an episode connected with their false accusation against the accused. At any rate, this is how it appeared to accused. Amongst the native people, TEKAI bore the reputation of a man who did not carry out his official duties properly, and at least in some quarters had a reputation for dishonestly using his very considerable official power and influence to his own ends.

After becoming a Luluai, and whilst accused was still hoping for the return of a pig, TEKAI told other people that he had won his dispute with accused when he was just another clan member, but now that he was a luluai nobody could touch him.

The accused was subjected to considerable shame within his clan over this end, although he was prepared to support the clan by compromising disputes, had the feeling that in any conflict with TEKAI he would lose the decision, because TEKAI would not compromise and kept asserting false claims, and using official powers to gain his ends.

Thus the position stood at the time of the last conflict.

Accused had used a plot of land for gardening and on it had planted several pandanus trees of a kind known as "Marita". These trees bear fruit which are highly prized, and the tree being of a permanent character, is regarded as belonging to who never plants it, regardless of ownership of the land.

When his other crops had finished and the other pandanus trees had fallen, one tree remained, and was bearing fruit. Accused propped up a branch bearing a very large fruit to support its weight, and tended the land at the foot of the tree. TEKAI, apparently perceiving this, purported to start a garden on this land, and removed the prop supporting the fruit put there by accused and replaced it with his own. This, of course, was an unmistakable claim to ownership.

When accused saw what had been done he removed TEKAI's prop and went off to find Tultul LAMOA, to settle the dispute. As he went off the pandanus tree broke under the weight of the fruit, which must have disappointed the accused greatly.

Accused found LAMOA and spoke to him. He apparently agreed to help settle the dispute. Called as a witness, LAMOA said that the garden and the tree belonged to accused. He said that he thought that TEKAI did not do his official work properly and accepted bribes. He would have given the decision in favour of accused. LAMOA was a crown witness and his credit was not challenged, nor his evidence contradicted.

When accused was returning from his interview with LAMOA, he saw TEKAI who, instead of stopping went straight on and consulted the policeman stationed at Lumis. There was some delay whilst accused awaited LAMOA's arrival, and in the meantime TEKAI returned from his visit to the policeman and the two parties met.

Accused protested against TEKAI taking the matter to the police and said that they should settle the matter between themselves.

TEKIAGARI answered, "Brother, you may feel you have a way of winning this dispute, but this afternoon we will go up to see the policeman, and I will lead you away with a rope on your wrist."

It appears that each party was at this stage trying to outmanoeuvre the other. TEKAI's answer was characteristic, for he had a reputation for being overbearing and antagonistic, and with some show of official support which accused dare not deny, it became a race to see whether TEKAI could get accused into police custody before clan support arrived for accused with facts that TEKAI could not refute. Accused no doubt felt himself in a position in which, without clan support, he would be the loser again.

TEKAI ordered accused to go with him to the policeman and TEKAI went first, showing signs of haste. Accused followed but looked back in the hope of seeing a clansman Tultul arrive, and TEKAI showing much impatience, pushed accused to make him hurry.

Accused gave evidence of much conversation taking place at this point but it is clear that much of this is based on his own thoughts and his appreciation of TEKAI's gestures and actions rather than on what, if anything, was actually said.

At some stage at about this time accused appears to have offered to share the disputed fruit with TEKAI, but TEKAI refused to release him.

When TEKAI pushed accused he tried to get accused to go first, but after some protest from accused, he went on first allowing accused to follow. As TEKAI resumed his journey and was turning to go on ahead, accused struck him forcibly on the neck with his bush knife, inflicting what was probably a fatal blow. TEKAI fell to the ground whereupon accused delivered another and very powerful blow to his neck, almost severing it.

According to accused, he had no idea of attacking TEKAI until TEKAI pushed him. Accused protested against being treated like a stranger, and resented the haste to get to the police before the Tultul could arrive.

It was the frustration of being outmanoeuvred in this way by the misuse of TEKAI's official position and powers and TEKAI's attempt to get him to go in front that gave accused the idea of attacking him. When he realized that he would have to go to gaol in any event for killing TEKAI, he delivered the second and harder blow, although he says that TEKAI was then dead already. He then went and gave himself up to the policeman.

The view that accused was trying to get out of going to Court on a legitimate dispute, by enlisting clan support against TEKAI is not tenable, for in this area of frequent land disputes, the people are officially encouraged to settle clan quarrels within the clan, without going to Court. Thus, accused was in fact carrying out not only clan tradition, but also what amounted to official instructions which he would regard as proper.

*Accused*  
From his previous experience of the accused using an official interpreter, whose de facto powers would be great, to gain his ends by threat of Court action, and from TEKAI's present assertion of official authority, and his statement that accused would be taken into police custody (after TEKAI had been to see the policeman) the accused would have gained a clear picture that he was not going to be dealt with according to law, right, but by a fraudulent and dishonest device, against which he would be powerless. He would have no reason to suppose that the clan could help him once TEKAI got police authority to arrest accused and take him to Wapenamanda.

The accused relies on the pushing as provocation. Under Section 304, the provocation must be sudden. The real cause of this attack accumulated over a long period of time. The pushing gave accused the idea, but this on its own, would be disproportionate to the provocation (Reg. v. HAMO). Nevertheless, I think that the push must be considered, as one of many incidents, but as the incident most likely to satisfy the test of suddenness under Section 304, against the whole background of events and experiences which would affect its provocative character, when applied to a reasonable native of this social climate, in the same position as accused.

The real character of this push, in the circumstances was that it was meant to hustle the accused along, to get him out of range of clan help, and to assert a dominion over the accused contrary to clan behaviour and in rejection of any obligation to accused.

Subjection to such treatment, by a virtual brother, falsely and in abuse of official power would have a great effect on the self control of a man in the position of accused. With all the background to this incident, I think that there would be a grave risk that a reasonable man of the class involved would suddenly attack the oppressor. The suddenness of the attack, and its nature, contrary to the strictest clan traditions, and contrasting with the whole previous course of conduct by accu-

sed in upholding his obligations in spite of his undeserved sufferings, give some confirmation of this view.

A further aspect of the matter is that the pushing was an unprovoked assault, and an assertion of an unlawful restraint on liberty, amounting to a false arrest. The accused was therefore, apart from provocation, entitled to resist. On the facts, however, he was not trying to escape from or prevent unlawful arrest.

It now becomes a question whether the nature of the attack made by accused was justified by the provocation or whether the provocation constitutes a matter proper to be taken into account on the question of punishment only.

In my opinion, although the actions of the deceased do amount to provocation of the character contemplated by Sections 304 and 268, a reasonable man ought not to have been provoked to the extent of killing his adversary. He ought to have been prepared, as he had been up to this point, to go to Court to seek redress, in spite of the fact that his only normal access to responsible officers would be through native police, interpreters and village officials, whom he had every reason to distrust. His own life was not in danger, and I think that the insult involved was not such as to justify an intentional killing. Thus the attack actually made, though provoked, was disproportionate to the provocation offered, and was due, in my opinion, to a hatred of the man, and a fear of further suffering at his hands.

Looking at the position of the accused subjectively I have every sympathy for him, but I hold that his conduct did not satisfy the necessary objective tests.

Verdict: Guilty of Wilful Murder  
Sentence of death recorded.