

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

CORAM: CAMERON-SMITH, A/J.

REGINA

v.

MANGANAPI-SANDEFI

HOMBUME-MALINGU

EMBROSE-MALINGU

and

HAULI-HIBORU

all of JAPARAKA NO.2.

REASONS FOR JUDGMENT

169  
11 23, 24  
1, 28  
WAK  
Cameron-  
Smith, A/J.

These four men were charged with unlawfully killing a man named Gabeiwa-Woropi on Sunday, 26th January, 1969. In the case of Hauli I entered a plea of not guilty and the other three pleaded guilty.

Mr. Peter Waight appeared as Crown Prosecutor.  
Mr. Peter Luke appeared for the first three accused.  
Mr. S. Flood appeared for the accused Hauli.

At the conclusion of the Crown case the accused Embrose gave sworn evidence. The two accused, Manganapi and Hombume, made unsworn statements. The Crown Prosecutor did not object to the applications made on behalf of these two accused to make unsworn statements and stated he would consent to them. I was informed this was a common practice. No reason was advanced to the Court to found what I considered to be a basis upon which the Court could give an appropriate direction upon judicial grounds. I followed what I was told to be the practice, namely to direct by consent that unsworn statements could be made. Hauli did not give sworn evidence or make an unsworn statement. None of the accused called any witnesses.

I have considered the evidence applicable to each case and dealt with each separately.

It appears to me on the whole of the evidence that Gabeiwa, who subsequently died, was involved

in a fight about 7 p.m. on Sunday, 26th January, 1969. He received a number of blows from fists to his body, including the stomach and in particular the chest. He died about midnight.

The doctor conducted a post-mortem at 11 a.m. on Tuesday, 28th January. He said he observed air to be present in the soft tissues of the right chest wall, and went on to say that Gabeiwa suffered from surgical emphysema. He concluded that the man died from asphyxiation caused by a tension pneumo-thorax. Apparently, through being injured by Hombume in the chest region, the air pressure in the chest wall built up and became equal to the atmospheric pressure which prevented the man from breathing properly. Death is not immediate but is protracted. The doctor did not observe any external bruising but stated that this would not be unusual as bruising in the relevant area can take up to five or more hours to develop. He further stated he did not find any broken ribs. Again, he said this was not uncommon as a person can have one or more broken ribs and these cannot be detected either visually or by X-ray. However, he said that because of the nature of the injuries he was of the opinion the man must have sustained one or more fractured ribs. He was also of the opinion that the injuries the man suffered were consistent with having been caused by at least one blow from a fist. He said air would not generally find its way into the tissues of the chest wall by a medium blow from a fist or from a series of medium blows. The deceased man was apparently in good health prior to being engaged in this fight. I am satisfied beyond doubt from this evidence of the doctor and other evidence in the case, that Gabeiwa sustained at least one very heavy or violent blow to the region of his right chest in this fight which caused the injuries described by the doctor and which resulted in the man dying from asphyxiation through tension pneumo-thorax.

The doctor stated that the region of a man's body from the level of the nipples to the level of the hips, front, sides and back, is very vulnerable to heavy blows from fists and the such like. This

of course does not really require medical evidence as it is generally known and would be known to the accused. This would be particularly so in regard to the spleen in this malarial district. This is not unimportant when one bears in mind the number of persons involved in the attack, as I find it, upon Gabeiwa and the mix-up or milling around which must have occurred once the fight started, and when one relates it to the provisions of Section 8 of the Code.

I would only add that in my view it is idle to compare deaths resulting from injuries received whilst voluntarily playing sports, such as football, with deaths resulting from unlawful assaults. In any event there are written and unwritten rules which govern the way sports are to be conducted and certain breaches of the rules may well lead to liability in civil as well as in criminal cases.

I also refer to a submission made to the Court that the man was "unlucky" to die. No doubt it was unlucky that the man died because had a doctor been on the scene or reasonably available he could have been saved from death by an operation. The doctor agreed it was not a common injury but added it was not uncommon and that operations are mostly successful. How can it be a death by accident merely because no one was present to operate in time? It is more to the point in my opinion that it would have been lucky for the accused if a doctor happened fortuitously to have been nearby. Submissions such as the present one take the application of the law from the factual situation into the realms of conjecture and remote hypothetical arguments. Is the law to examine in minute detail the physical, mental, emotional and character (such as intestinal fortitude) of the injured person and say that an accused should be acquitted of murder or manslaughter because the victim had a weak or below average strength in his bone structure, or lacked the will to overcome his injuries and live? The converse is obviously untenable.

I return to the evidence, as I find it, in the cases. On the Saturday before the Sunday (26th January), a witness, Councillor Hambini, heard the accused Embrose say to Gabeiwa that he, Gabeiwa, was not married to Hauli's wife and that he had been committing adultery with her and in effect that he should stop this behaviour. Later that day this witness saw Embrose and Manganapi go to Gabeiwa's house and have a fight with him. He separated them and gave them good sound advice, namely that it was no concern of theirs and that they should mind their own business. As they walked away, Manganapi said "Tomorrow you will fight." Now if a contest had been properly arranged by the luluai on the Sunday when Hauli and Gabeiwa could fight it out between themselves in the singing arena, it would have been a very different matter. But this was not to be the case. It may be that Gabeiwa before he died said in effect that he thought it was a fair fight. His view does not displace the only rational conclusion that I can come to on the evidence, and that is that it was far from being fair. In my view it was most unfair having regard to the numbers of attackers and the places where he was hit and the severity with which the blows were delivered. All the accused are extremely fit and strong. They are very well-built and in my view in the prime of their youth, and are fine physical specimens. The violence used was obviously well beyond that of reasonableness and fairness. No fair fight had been arranged and the evidence all points in one direction, namely that the accused were going to teach Gabeiwa a lesson and to make sure that he would never touch Hauli's wife again by meting out severe punishment. This was the purpose of the assault, and it was the common purpose. This is clear from the evidence and I come to this conclusion, even excluding the evidence of the Crown witnesses going to what was said and done on the Saturday. The accused are all related - Embrose and Hombume are brothers, and Hauli and Hombume occupied the same house. Embrose

and Manganapi were taking Gabeiwa to task on the Saturday and it would be unreal to conclude otherwise than that the four had discussed the situation overnight and on the Sunday. There was ample opportunity for this to have occurred. Hauli and Hombume occupied the same house. Manganapi has stated that Hauli discussed his problem with him on the Sunday afternoon. When Hauli took his wife from the house to Gabeiwa and said "You can have her - come and get her", the other three were hot on his heels. It is clear Manganapi stood by to see that none of Gabeiwa's relations or friends intervened to prevent the prosecution of the enterprise. He says himself he intended to go to Hauli's assistance and he did in fact move in to prevent Gabeiwa's brother, Hianungai, helping to ward off the attack, and when Hauli nearly went to the ground he went to support him and hold him up. Embrose also concedes that he went along to support Hauli if there was going to be trouble, and in fact he did move in to help Hauli but at first he was prevented by Hianungai. However, he shook or fought Hianungai off and went in again to Hauli's aid, and later went to hit Gabeiwa but another man held him back. Hauli was the first to come to blows with Gabeiwa and was undoubtedly the aggressor.

There is no room for self defence or provocation in this case. This was a planned premeditated attack on Gabeiwa. Hauli had seen him a long time before this evening with his wife on his (Gabeiwa's) bicycle and had discussed the general situation with the others. The attack was not done on the spur of the moment or whilst Hauli had lost his self control and before his passion had cooled. No doubt Hauli was annoyed with Gabeiwa's amorous conduct with his wife which had apparently been going on for a long time. There had been a previous complaint, but Gabeiwa carried on regardless. We therefore see Hauli upset at his wife riding on the bicycle, and I think Hauli then went on his way to consider what he would do and to gather his forces. Despite the cross-examination I don't think he was out of his

mind before or during the fight, and I bear in mind the submission that coal had been put on the fire by Gabeiwa's mother hitting Hauli or hitting at him. I don't believe Hauli when he told Mr. McKay he was crazy and out of his mind at the time, and it may be observed that he said nothing about this or losing his self control in Court, either from the witness box or from the dock. The only conclusion I can come to on all the relevant evidence and in the absence of any other evidence is that he was upset and angry with Gabeiwa, but not that he was out of his mind and did what he did before he cooled off.

I do not accept the suggestion that Gabeiwa powdered his face and took the fight to Hauli. I am satisfied beyond reasonable doubt that the Crown has negatived provocation and self-defence and this matter of self-defence applies not only in Hauli's case but also in respect of all the others.

Hauli admits hitting Gabeiwa at least three times and once very forcefully in the stomach. Hauli had no injury to himself, and for that matter neither did any of the others.

Hombume has denied all along having had anything to do with hitting Gabeiwa. These denials and the versions he has given are not insignificant. I accept the evidence of the Crown that Hombume did hit Gabeiwa. I think Hombume has lied deliberately. He was seen to hit Gabeiwa on the right chest and on the ribs near the centre of the chest, and it was then that Gabeiwa shouted out words to the effect that Hombume had beaten him and that he was going to die, and left the scene to go into his house. The fight then finished. I conclude that it was Hombume's very heavy blow to the chest which brought about the symptoms and effects to Gabeiwa as were related by the doctor, and I am satisfied beyond reasonable doubt that Hombume is guilty of this offence as being the one who caused the death of Gabeiwa by unlawfully assaulting him.

I am equally satisfied that the other three men, Hauli, Embrose and Manganapi all took an active

part in this unlawful assault and aided Hombume in his assault which lead directly to the death of Gabeiwa.

I accept substantially the Crown witnesses - I think they are reliable which is more than I can say about any of the accused. Embrose who gave sworn evidence was very obviously untruthful. He is most unreliable. I do not accept the exculpatory versions of Hombume. I furthermore reject Manganapi when he says Gabeiwa started the fight and that he tried to hold Hauli. Manganapi was there for a very good purpose as I have already adverted to and he clearly assisted in the joint attack, even on his own statement.

I consider, in the absence of any other evidence to the contrary, that all accused are at least of average intelligence. Hombume is a student at the Technical College, Embrose is a teacher at the Catholic Mission Primary T School.

All the evidence points to the formation of a common intention to prosecute an unlawful purpose in conjunction with one another. As I have already found, the common purpose was a premeditated and planned joint attack upon Gabeiwa in order to teach him a lesson for having committed adultery with Hauli's wife, to pay him back for his misconduct and to make sure he would stay away from her in the future. I think Hauli's act in telling Gabeiwa to come and take his wife was the planned lead-in to the fight which was to occur. It is abundantly clear that a probable consequence of the prosecution of this unlawful purpose would be the use of violence of such a kind and degree as would probably cause death. Each accused knew fists were going to be used and by one or more persons, and that a melee would most likely occur and which in fact did. In those circumstances it would be most likely and foreseeable by any reasonable person in the position of each of the accused that one or more violent blows with fists could or would be landed on the vulnerable area of Gabeiwa's body and death could follow - particularly if one or more blows were to land, for example, on the spleen. Violence was the

order of the day. They were not satisfied by the fight which took place the day before, and the warning they intended to convey to Gabeiwa.

It will be observed that neither Hauli or Manganapi said at any stage - the interview, the committal proceedings or in this Court - that they did not expect blows to be landed on Gabeiwa's body, or that they would not be heavy or violent blows or that they never expected such a serious result as death to be caused by this attack. Embrose said he only learned this after the fight, but I do not accept this as the truth - Embrose is so untruthful and also it is improbable. I think it is abundantly clear that the nature of the offence was a probable consequence of the prosecution of the purpose, particularly when one bears in mind that violence was to be used by one or more of the accused - death was a probable consequence and a foreseeable one by a reasonable person being in the position of the accused, bearing in mind the kind and degree of violence which was to be brought to Gabeiwa and which was in fact brought.

I don't think any other reasonable conclusion can be arrived at than death might well result from this joint attack.

These blows were "willed" blows and in particular, of course, the fatal blow. Death in my opinion was not an event which occurred by accident as I have already indicated, but was the result of a willed act performed during the prosecution of a common unlawful purpose - done without lawful excuse and without justification.

I find each accused guilty of the charge under Section 8 of the Code. And so far as Hombume is concerned I find him guilty also under S.7(a) and the other three accused guilty under S.7(b) and (c).

I convict all four accused accordingly.

