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

CORAM : KELLY, J.

Monday,

8th June, 1970.

R. v. KINK ABURU

1970
Jun 8,
MENDI.

Kelly,
J.

The accused is charged with the wilful murder of his wife, Alin. It is alleged that he struck her a number of blows with an axe, one of which cut the internal jugular vein and caused intensive haemorrhage which led to her death.

From admissions made by the accused both to a patrol officer, Mr. Ekin, and subsequently on the committal proceedings in the District Court, it is quite clear that the accused killed his wife, that such killing was unlawful and that he struck her intending to cause her death. I am satisfied beyond reasonable doubt of these necessary elements of wilful murder.

However, by reason of certain events which occurred on the evening preceding the killing and also events which are stated by the accused to have occurred on the day of the killing itself and in part immediately prior to it, the question of provocation arises.

As is conceded, the onus is on the Crown to prove beyond reasonable doubt all the elements which constitute the offence alleged, and in view of Section 304 of the Code whereby in certain events what would otherwise be wilful murder is reduced to manslaughter, unless I can be satisfied beyond reasonable doubt that the circumstances which as a matter of law are capable of constituting the provocation did not exist, the Crown has failed to discharge its onus and the verdict would necessarily be one of guilty of manslaughter only.

There is evidence which I accept that on the evening prior to the killing in the presence of other persons the deceased said to the accused, "You come and eat my vagina and the vagina of your sister." There was a conflict of evidence as to the likely effect of such words on a reasonable man from the accused's district, which is the appropriate test, but in all events it caused the accused to make a move as though to strike his wife, though he did not do so.

The accused said in a statement tendered by the Crown that he had seen his wife previously having intercourse with one Yolip and that he believed that intercourse had also occurred prior to that. He says that he decided to watch for them having intercourse on the third occasion and that he would then kill them both.

On the day of the killing when the accused and his wife had gone into the bush to get pandanus nuts the deceased said to him,

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"When Yolip and I have intercourse will you eat the semen and other liquid from our intercourse." The deceased said that she wanted to have intercourse with another man and was leaving, which she did. The accused followed her and eventually came up behind her and asked her where she was going. She said that she was going to have intercourse with another man and asked the accused if he wanted to eat the liquid from the intercourse. The accused then hit her with the axe and killed her.

At this point of time I am not prepared to differ from the views expressed by other judges of this Court, that Section 268 of the Code defines provocation for the purpose of Section 304. I am well aware of the conflict of authority on this point and I should like the opportunity of considering the matter more carefully before commiting myself to a definite view. However, in this instance I shall proceed on the basis that Section 268 does define provocation for the purpose of Section 304.

That being so, I am of the opinion that the words used by the deceased immediately before the accused struck her constituted provocation. I base this in part on the evidence of Mr. Ekin, in part on a number of unreported decisions of this Court referred to by Mr. Hoath in which words alone had been held to amount to provocation, and in part on the view that in any community, European or native, these words would in the circumstances be such as might reasonably be considered to constitute provocation. (cf. R. v. Zariai-Gavene (1)). I also consider that regard may be had to the events leading up to this final incident, which events as has been said "set the stage" for the final provocation. This was, as it were, the last straw which broke the camel's back.

I further consider that it is possible to infer from the evidence that the accused did the act in the heat of passion caused by sudden provocation before there was time for his passion to cool. It is not necessary that the accused should himself testify to this (Rolls v. Reginam (2)). I would think that the numbers of cuts on the body of the deceased would support the view that the accused lost his self-control. The fact that he did not likewise lose self-control on an earlier occasion when he saw his wife in the act of intercourse is not necessarily indicative that he did not lose self-control on this occasion.

I do not consider that the Crown has negatived beyond reasonable doubt that the accused struck and killed his wife in the heat of passion caused by sudden provocation and before there was time for his passion to cool. That being so the verdict which I must return is one of manslaughter only.

I find the accused not guilty of wilful murder and guilty of manslaughter.

Solicitor for the Crown : P.J. Clay, Acting Crown Solicitor.
Solicitor for the Accused: W.A. Lalor, Public Solicitor.

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(1) 1963 P & N.G.L.R. 203 at p.215.
(2) (1965) 3 All E.R. 582. (P.C.).