MR. ROSS

SC 743

IN THE SUPREME COURT)
)
OF PAPUA NEW GUINEA)

CORAM : PRENTICE, J.
Tuesday,
29th May 1973.

THE QUEEN v. GEI ALEVA

ON SENTENCE

1973

May 14, 15, 16, 21, 25 and 29.

PORT MORESBY.

Prentice, J.

I have found that Gei Aleva wilfully murdered Gaba Gei. I am required to find "whether there existed extenuating circumstances such that it would not be just to inflict the punishment of death (sec.305(2) Queensland Criminal Code as amended)."

Gaba Gei was a girl of 15 or 16. The accused wilfully murdered her by a knife thrust into her back on 21st December 1972, at Sabama, a village close to Kila Kila, Port Moresby. The setting was a house of European style in which the accused's son and various other people, were living. Gei had come to market from his village at Kwikila (Rigo sub-district) and arrived at his son's house. He sat down outside, and was given a cup of tea by one of his in-laws. He looked angry. He then went inside, grabbed a large knife from the kitchen (he had a smaller knife on his person), went into a bedroom and there menaced and tried to knife Gaba. Another female relative restrained him, saying he could not stab Gaba. The latter fled from the room, but was pursued by the accused. The unfortunate girl fell at the foot of the house steps near a cement slab. The accused came up and deliberately stabbed her once as she lay prone, apparently killing her almost instantly.

The girl's mother, whose sister is married to the accused, is apparently an unstable woman who has had four or five husbands. She has been described by the accused to Dr. Burton-Bradley as a "pamuk" - a prostitute. She at one time lived with her two children (the deceased was one) under the village protection of Gei Aleva. She left to form another association it seems, and left her daughter Gaba with Gei. The girl who was then going to school became, in effect, adopted by Gei and was fed, housed, brought up and schooled by him and his wife Begutu (as was also a nephew), over a period which I accept as some eight years. While still at school, the girl left the village and apparently joined her true mother. It is said that her reason

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for so doing was and is not known in Gei's household. I do not accept this as likely or true. An attempt was made by the Crown in crossexamination to suggest that Gei had proposed taking the girl as another wife, or having intercourse with her. Dr. Burton-Bradley's evidence on narration from Gei, suggests strongly to the contrary. There is no evidence whatever to establish this suggestion or sexual frustration, and I am left without any evidence from which I can properly infer the girl's motive.

In his statement to the lower court on committal the accused spoke of spending moneys on Gaba for schooling and clothing and saving money and putting it in a passbook for her. Gaba left school without his permission and would not return and went to her (true) mother. He said, "I didn't get angry with her about this. It didn't worry me much. The little girl Kila Raka was still staying with us, that's why I didn't get angry with the mother of the girls." He described his fatal visit to the market, the tea drinking, and went on, "After I finished the cup of tea I started to get angry with Gaba. I got the knife and stabbed her in the leg. She then started to run away."

In his statement to the police he said, "My sister-in-law divorced her husband and I have looked after the girl Gaba and her mother who is my sister-in-law. But my sister-in-law left me and went to marry another man. I was very angry because I have been (sic) looked after that girl with her mother. When her mother married to the new man that girl left me as well and went to live with her mother. That's why I killed her." Apparently the girl had deserted Gei to rejoin her mother some time in 1971 - approximately a year before the killing. When the accused came to Port Moresby on 21st December 1972 he did not know Gaba was then in Port Moresby. He just went to see his son at his house at Sabama, and found Gaba to be there. He said he did not start to think of killing until "today when I saw the girl in my son's house at Sabama Village, Moresby"....."I was in the house and I drank some tea, then I saw the girl and I decided to kill her." He concluded his statement to the police as follows, "I have nothing further to say. I have told you that when I came to the house at Moresby I saw this girl in the house. I have no-one to get water for me at the home village. I have looked after this girl for a long time and I was very angry when I saw her in the house. I then decided to kill her."

I infer from the evidence, that the accused must have laboured under a sense of grievance for some time at least,

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perhaps for the period of one year; and that "something snapped in his brain" as the ancient expression goes, on seeing her this fatal day. I do not sufficiently understand Rigo society, to be able to assess whether the accused smarted under a sense of the girl's ingratitude, or whether it was something more akin to anger at her breaking a customary obligation to perform duties to him. Some attempt was made to show through the evidence of Mr. Numana Kila, a law student, directed towards establishing custom under sec.7(e) of the Native Customs (Recognition) Ordinance 1963 that a possible loss of bride price might have operated as an inflammatory factor in Gei's mind. Mr. Kila thought this would be the worry foremost in Gei's mind. On the other hand without knowing of any actual case, he thought it would not be unusual for a girl to leave her adopting father and mother and to go to live with her true mother who had had a number of husbands. Dr. Burton-Bradley reports that the accused related to him, that his resentment was directly related to the possibility of losing bride price.

Defence counsel urges that extenuating circumstances are to be discerned in:-

(a) the accused's village upbringing not conditioning him to personal restraint (when angered), this village still retains fear of sorcery;
(b) his age of some 50 years;
(c) his never having had schooling or employment;
(d) his speaking no English, having a customary marriage and being uninfluenced by any mission;
(e) his blameless record, his uncomplaining acceptance of customary claims upon him to bring up this girl as his own;
(f) a lack of lengthy premeditation;
(g) the matters advanced by Dr. Burton-Bradley.

Dr. Burton-Bradley does not find Gei Aleva to be suffering any mental disorder. He is well-oriented, without it seems hallucinations or delusions. His mood state is subdued. His opinion is that Gei is genuinely remorseful now, that he had knowledge of the nature, harmfulness and wrongfulness of the act at the time in question, and committed the act in a fit of anger when he had lost self-control. He was unable to detect any evidence that the act was the product of senility. Given Gei's lack of education, the custom-bound restrictive social orbit in which he lived, and which clearly influences him greatly, the Doctor's opinion is that Gei was under great and unbearable provocation.

One might pose the question, doesn't anyone who commits murder, so consider himself or herself to be?

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I have had regard to the judgments of The Queen v. Ivoro(1) and of Ollerenshaw J. in The Queen v. Warume (2) and Bogarabi (3) and to the cases on the South African section in Gardiner & Lansdowne at p.358 et.seq. I must consider the accused's culpability subjectively to him - but not subjectively to myself. Thus, though I might have to confess to a pre-disposition against capital punishment, I must remind myself that I must endeavour to carry out the Legislature's intention. While I apprehend I must try to view the matter objectively as I might conceive the generality of judges would; I yet remain the lonely jury of myself, to the good or bad fortune of the accused - with the right in him, but not in the Crown, to correct on appeal an error which I may commit on this matter.

There is no suggestion of cultural justification, or traditional excuse, for this dreadful deed. Clearly one cannot regard uncontrollable anger in the doer as rendering it unjust to punish him for his deed by death. Fifty years ago Judge Murray expressed the opinion then that "a native of the Port Moresby villages knows the law as well as a (European)". With permanent road connection and daily trafficking, Rigo district and Kapa Kapa in particular, could be said to be almost suburbs of Port Moresby now. For years few killings have been reported from among the settled villages of the Rigo - Boera coastal fringe.

After only the most anxious consideration, can I find that extenuating circumstances exist in favour of Gei Aleva. I find I can do so, only on the balance of probabilities, arising from what I consider an absence of significant premeditation of the actual deed (as distinct from possible lasting brooding anger); from the girl's departure in circumstances of apparent failure to appreciate obligation or kinship response, working a provocation to anger understandable in a customary society even if clearly not amounting to legal "provocation"; from his lack of subjection to the restraining influences and training of a European or an urbanised person; from his having a lower threshold of response to a provoking situation - entailing far less ability to resist a sudden impulsive urge to kill.

With considerable doubt, I therefore find extenuating circumstances within the meaning of the section.

The matter of the alternative sentence then to be imposed, itself of course, creates problems. In the attempt to allow room for the influence of native custom to be considered on sentence, I should be distressed if any judgment of mine were considered as lending colour to the supposition that the lives of the old, the weak, the young, and women

(1) (unreported) Full Court Judgment No. FC27 of 30 Nov 71, Port Moresby.
(2) (unreported) Judgment No. 467 of 19 Apr 68, Goroka.
(3) (unreported) Judgment No.468 of 19 Apr 68, Goroka.

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in particular, are of lesser value in the eyes of the law. Any imagined concept that the law should be administered to make Papua New Guinea safe for the "big man" will not I hope receive propulsion or encouragement from any judgment or sentence of mine.

Unfortunately no work appears to have been done to produce figures by which this Court can guide itself in the assessment of the value, aptness or effectiveness of punishment either as rehabilitation or deterrence. One has the impression that the last 90 years has seen the practical elimination of murder as a social instrument (except of the aberrant individual) in almost all of Papua. (Exceptional patterns appear to develop in Port Moresby and areas where tribal mixings and antipathies are given expression to, under the influence of liquor and introduced concepts of payback).

As in this case, one is still concerned frequently to consider the possible existence of a continuing lower threshold of response to anger - anger induced by trivial incidents - a word, a phrase, a motor accident, a spillage of beer. Violent incidents result. One does not know whether punishment of individuals given proper publicity over a long period, has the effect of altering gradually in people the necessity for or inclination towards angry, violent reaction. Looking at the pattern of Papua New Guinea and the obvious policy of the enacted law at present, to work such a change; one hopes such an effect is capable of being produced.

In the past few years the courts have indicated quite plainly that the punishment for violence and killings has increased, and will continue to increase, in the effort so far as the courts can make a contribution, to evolve a thoroughly peaceful society of peoples. For myself, I think it should be predicted that no further warning is called for from the courts as to their intention to be increasingly stern on punishment.

Doing the best I can to assess the facts of this case in comparison with those of others and the punishments thereon, I consider the necessary and appropriate sentence is one of 12 years' imprisonment with hard labour. But for the accused's age I consider it should have been higher.

Solicitor for the Crown : P.J. Clay, Crown Solicitor.

Solicitor for the Accused: W.A. Lalor, Public Solicitor.