IN THE SUPREME COURT) CORAM: DENTON, A.J.

OF PAPUA NEW GUINEA) Wednesday,
15th May, 1974.

REG. v. WASIDO NOLODA and HAMAIGE MAIA

J U D G M E N T

1974
May 14,
15
TARI

DENTON,AJ

These accused were indicted before me at Tari on 14th May, 1974 on a charge of wilful murder of Kuari Kese described as a sorceress.

The evidence, which is not in dispute, shows that Sobosei, the wife of the accused Wasido, died and that on that day both accused killed Kuari with knives, throwing the body into the Sewa River.

The two accused and Kuari lived in the same house and after Sobosei died Kuari ran away. Wasido asked Hamaige, his brother, to help him kill Kuari. They chased her for about 1½ miles and killed her. They both considered that she had killed Sobosei by forbidden sorcery.

It is said that their crime is reduced to manslaughter by the operation of s.304 of the Code. It is submitted that this is the case whether or not s.268 applies, but nevertheless the question whether s.268 applies was argued and in particular it was put that adopting the principle stated by Lord Denning in Nyali Ld. v. Attorney-General (1) the mode of application of the Code to Papua New Guinea is different from its application to Queensland, because of different conditions and requires that s.268 be applied to all cases of provocation. It was also put that other differences in the law made the decision in Kaporonovski v. Reg. (2) inapplicable, and further that in its application to s.304 there is no more in that case than evenly balanced obiter

(1) (1956) 1 Q.B. 1
(2) 47 A.L.J.R. 472

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dicta. For reasons which I gave in Reg. v. Galamu Obu (3) on the 6th of this month, I hold that s.268 does not apply, not being convinced by the additional arguments advanced on this occasion that I should alter my previous decision.

A further submission was put without much enthusiasm that in view of the enactment of the Sorcery Ordinance, provocation by sorcery is available under s.304. In my opinion, notwithstanding the reference in s.20 of that Ordinance to s.268 of the Code, the Sorcery Ordinance is intended to apply to all cases, including those to which s.268 does not apply. I do not consider that the interpretation of the Sorcery Ordinance is governed by this reference.

The first question in applying the law to the facts of the case is whether the provisions of s.304 operate. I treat the evidence of the circumstances and that the accused were "angry" as raising sufficiently the issue of provocation, and the Crown therefore has the onus of negativing that the accused were provoked. The fact that the deceased and Kuari lived in the same house from which Kuari ran after the death of Sobosei indicates the possibility of some act by Kuari in their presence at or about the time of Sobosei's death amounting to evil or forbidden sorcery. The evidence does not provide any detail, such as might have been expected to be available, but I think that I should infer that the accused may have believed that Kuari had committed an act of sorcery, thereby causing a doubt in their favour and being sufficient otherwise within the test stated in R. v. K.J. and Anor. (4).

The Crown takes up the position that factually the elements stated in s.304 do not exist, the case being one of revenge not involving loss of self-control. As an alternative possibility to revenge there may be a desire to do what was con-

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(3)
(4) (Unreported, 17th November, 1972 No. FC41)

sidered to be justice, and in the case of the accused Hamaige the Crown alleges a mere helping of his brother. I am unable, with respect, to agree with Devlin, J. in R. v. Duffy (5) that the motive of revenge as against provoked action necessarily involves a different mental process, and I consider that I am obliged to consider whether the accused were carried away and whether they were provoked, as distinct questions.

It is convenient to consider first the case of the accused Wasido, who clearly has a stronger case of provocation than his brother.

I am not satisfied, taking the ingredients of s.304 one by one, that he did not cause death in the heat of passion. There is some evidence of passion and none to the contrary save lapse of time, that lapse being a matter of minutes. I do not think that pausing to make the agreement to act in concert necessarily negatives passion. One does not know sufficiently how it was arrived at; perhaps a word and a gesture were sufficient. As to whether there was time for the passion to cool, applying an objective test of the average Huli villager, I am not satisfied of this either. I find some difficulty with the phrase "time to cool" but if the test be subjective, it is satisfied by my finding as to the event in fact happening in the heat of passion. In view of the Statute it is not significant whether the test is actual cooling (as put in some of the common law cases, perhaps those where obviously the time was short enough for passion to cool) or time to cool. As to whether the provocation was "sudden" again, especially with the lack of evidence as to what the presumed act or series of acts was, I consider myself bound to find in favour of the accused. Although mere belief that Kuari was a sorceress is clearly not enough, her running away suggests to me that there may have been some recent act by her.

There remains the question whether what occurred had the quality of being provocation. I do not consider that the result produced in the accused is the test of ascertaining this, but that he must be provoked in the sense in which

(5) (1949) 1 All E.R. 932

that word is used in s.304. The common law test is clear, and is accurately stated in R. v. Duffy (supra) (6) except, I consider, for the qualification just stated and with the further qualification arising from the reversal of the view stated in Mancini v. Director of Public Prosecutions (7) in R. v. Brown (8). The case put for the accused is that the evidence does not negative an honest and reasonable although mistaken belief that Kuari had worked an act of sorcery thus bringing about the death of Sobosei, testing the reasonableness of that belief, again, by the criterion of the Huli villager, citing R. v. Manga Kitai (9). It was said that the relevant belief occurred about the time of the death of Sobosei, the degree of retaliation being considered according to the test stated in R. v. Brown (supra) (10).

Counsel were unable, not surprisingly in Tari, to cite any case in which sorcery had been accepted as provocation in any common law jurisdiction. It is possible that English or American authority on this subject may exist, although trials of witches seem to have been the practice rather than trial of those who dealt with them. Provocation classically is of quite a different nature and I hold that sorcery or acts of sorcery cannot and did not in this case amount to provocation at common law.

I have already indicated however that I consider the Sorcery Ordinance applicable. I therefore must consider whether the evidence fails to negative an act of sorcery by Kuari causally connected with the accuseds' conduct. I have already stated my views as to the state of the evidence on this point, and find that there may have been an act, and as evil sorcery, a wrongful one. Except the case of R. v. K.J. & Anor. (supra) (11), which was finally a decision to the contrary, there appear to be few or no instances of provocation by sorcery succeeding as a defence. The nature and effect of provocation does not differ in such cases apart from the requirement that the wrongful act or event may be an act of sorcery, and as I have indicated I find factually

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(6) (1949) 1 All E.R. 932
(7) (1941) 3 All E.R. 272
(8) (1972) 2 All E.R. 1328
(9) (1967-68) P.N.G.L.R. 1
(10) (1972) 2 All E.R. 1328
(11) (Unreported, 17th November, 1972, No. FC41)

in the accused's favour by virtue of the onus of proof. This decision would entitle the accused Wasido to an acquittal on the charge of wilful murder, but leaves the case of Hamaige. He is assisted by s.20(2) of the Sorcery Ordinance, but the question remains as to whether he was provoked in the same way as Wasido. I find it impossible, in view of the paucity of evidence and the provisions of s.20(2), to distinguish between them, and propose therefore to make the same finding in his case.

I acquit both accused of wilful murder and convict both accused of manslaughter.

Solicitor for the Crown: P.J. Clay, Crown Solicitor
Solicitor for the Accused: G.R. Keenan, Acting Public Solicitor