IN THE SUPREME COURT OF)
PAPUA NEW GUINEA)

CORAM: PRENTICE, J.

3, 4 October, 1974
MOUNT HAGEN.

MOUNT HAGEN
7 Oct. 1974

THE QUEEN
v.
KOPAL WAMNE

The accused stands charged with the wilful axe-murder of his true brother, Temgar Wamne. The deed is admitted. The intent is admitted. The sole defence is that of provocation, which, it is said, should reduce the accused's conviction to one of manslaughter. Provocation is said to lie only in the words spoken by the deceased immediately before Kopal attacked him and dealt one single strong blow which severed the spinal cord and caused instantaneous death.

The case therefore proposes perhaps the most difficult problem now besetting the Supreme Court of Papua New Guinea. What is the law to be applied in regard to provocation in charges of wilful murder under S.301 of the Criminal Code? Provocation having been raised in cross examination of the Crown witnesses, it is for the prosecution to establish beyond reasonable doubt that no ameliorating provocation such as is allowed by S.304 was offered. Defence counsel has not requested a reference of the point in issue to the Full Court for decision; and on reflection I consider the accused is entitled to a decision by me, despite the extraordinary difficulty one encounters when one studies the recent decision of the High Court of Australia Kaporonovsky v. The Queen (1) alongside the decisions of the courts of this country, those of the U.K. and those of the Australian States. To properly instruct my approach to the facts proved, I must first endeavour to discover what the present law is.

Defence Counsel submits that I should regard the majority decision of the Full Court in The Queen v. K.J. & Anor (2) as binding on courts of first instance in Papua New Guinea, to the effect that S.268 is still to be read as governing S.304 of the Code; and that provocation can be constituted by verbal insults. Counsel suggests that inasmuch as the judgments of the Justices of the High Court in Kaporonovsky's case (3) may be said to state that S.304 must be read without the aid of S.268, they are obiter and should not be regarded as binding on me.

Alternatively, he suggests that if I consider myself bound by the High Court decision to rule that S.304 stands alone, and is intended to state compendiously the common law position or otherwise, then I should seek to find that the common law as applied to this country, should allow

---

(1) (1973) 47 A.L.J.R. 472 (2) Unreported F.C. Judgment 41
(3) (1973) 47 A.L.J.R. 472

../2

for verbal insults themselves to constitute provocation. If that position be reached by me, then, says counsel, I should take note of the absence from S.304 (in contrast to S.269) of any reference to disproportionate retaliation; and I should not rule out the accused's reaction to insult as amounting to provocation on the basis of its disproportion to the insult.

In Papua New Guinea many judges had construed the Code to the effect that the provisions of S.268 were to be read together with those of S.304. (The sole exception was Selby, A.J. in Reg. v. John Bomai (4). This construction while in line with that adopted by the Western Australian judges as to the Western Australian Code, contrasted with that adopted by the Court of Criminal Appeal in Queensland since Reg. v. Herlihy (5), on the Queensland Code. Without having given a considered judgment on the point, I, and I believe other judges from time to time, have followed the line of single-judge decisions in P.N.G. as a matter of comity.

In The Queen v. K. J. & Anor (6) (supra) the Full Court on a reference of questions of law was concerned to decide how S.24 of the Code should be read in conjunction with questions of provocation. The mistaken belief involved therein, related to an imagined act of sorcery. The Sorcery Act provided that an act of sorcery may amount to a wrongful act or insult within the meaning of S.268 of the Code. In the argument addressed to the Court it was assumed, in the setting of previous single-judge decisions that the Sorcery Act reference to S.268 imported a reference to S.304, the questions having arisen from a charge of wilful murder. I myself considered that in the absence of argument on the subject, the questions should be dealt with on that assumption, without a binding decision being made as to whether the decisions of the Queensland Court of Criminal Appeal should be followed or not. The majority decided such a decision should be made, and expressed the view that the decisions of the judges of the Court sitting at first instance were correct and that S.268 should be used in the construction of S.304 of the Code. The facts being considered related to "wrongful acts" rather than "insults".

In Reg. v. Marumyup Usek (7) Clarkson, J. followed the decision of the Full Court and declined to follow the subsequent decision of the Queensland Court of Criminal Appeal in Reg. v. Kaporonovsky (8) (supra) that Ss. 268 and 269 are applicable only to offences the definition of which in the Code includes the word "assault". The decision of the High Court affirming the Queensland decision was not then available.

In Reg. v. Galamu Obu (9) Denton, A.J. in considering a submission similar to that put to me, decided that he should follow the principle established by the High Court in affirming the Queensland

---

(4) (1964) P.N.G.L.R. 278
(5) (1956) Q.S.R. 18
(6) Unreported F.C. Judgment 41
(7) Unreported Judgment 774
(8) (1972) Q.R. 465
(9) (1973) 47 A.L.J.R. 472

../3

Court of Criminal Appeal decision in Reg. v. Kaporonovsky (10). He found himself unable to distinguish the position obtaining in Queensland under the Queensland Code from that under the Queensland Code as adopted and amended in Papua New Guinea. With respect I agree with Denton, A.J. in being unable to appreciate how S.577 of the Papua New Guinea Code with its proviso, and the Sorcery Act of Papua New Guinea, could render the High Court decision inapt and distinguishable for purposes of P.N.G. The terms of the proviso to S.577 provide another alternative procedure on a trial of wilful murder, murder or manslaughter, namely that of bringing in a verdict of guilty to a lesser charge. They do not to my mind touch the question of whether S.268 is to be read conjointly with S.304. As at present advised I am unable to agree with his Honour that S.20 of the Sorcery Act was intended to make sorcery available as showing provocation in all cases including homicide, though that may be its effect in relation to wrongful acts, if not insults. But with respect, I agree with his Honour that this section was not intended to bring about any amendment to the Code.

The majority of the High Court in Kaporonovsky v. The Queen (11) (supra) (McTiernan, A.C.J., Menzies, Walsh JJs), agreed that S.269 does not provide a defence of the crime of unlawfully doing grievous bodily harm. As I understand the judgments, they hold that the provocation provided for by S.269 is restricted by S.268 to cases where assault is an element (i.e. seemingly, the word "assault" is used in the definition) of the offence charged. McTiernan, A.C.J. and Menzies, J. stated "It is abundantly clear that S.269 has no application to a person unlawfully killing and that S.304 provides exclusively where there is provocation for killing." (This would seem to carry the necessary implication that Reg. v. Marumyup Usek (12) (supra) in which provocation was alleged as a defence to manslaughter was wrongly decided.) Their Honours stated "It is not necessary to examine the other considerations which tend against treating the words "sudden provocation" in S.304 as "provocation" described in S.268. They stated "S.291 is inconsistent with incorporating the definition in S.268 into S.304, and expressed the view that the words "sudden provocation" themselves suggested that the definition in S.268 should not be taken into S.304.

Walsh, J. considered it unnecessary to discuss the problems of the relationship of Ss. 268 and 269 to Ss. 291 and 303, and of the applicability of the definition in S.268 of "provocation" to the use of that word in S.304 of the Code. He went on "No doubt my conclusion may have logical consequences in relation to the questions whether the term "provocation" is used in S.304 in the sense attributed to it in the definition in S.268, and whether S.269 is applicable in some cases of

---

(10) (1973) 47 A.L.J.R. 472

(11) (1973) 47 A.L.J.R. 472

(12) Unreported Judgment 774

../4

alleged manslaughter."

With respect, I consider the judgments of the majority all have logical consequences in the direction indicated by Walsh, J. Wilful murders, murders and manslaughters do not necessarily include the commission of assaults. An assault is not an element (the word "assault" is not used in the definition) of these offences. If for the reasons advanced in Kaporonovsky v. The Queen (13) (supra) the amplified type of provocation alleged by S.268 cannot apply to the lesser offence of unlawfully doing grievous bodily harm, I am unable to appreciate how it can logically or in intention apply to the greater of wilful murder./

/ I conclude, as did Denton, A.J. in Galamu's case (14) (supra), that I am bound to apply the principle of the High Court decision, rather than the election of the Full Court in The Queen v. K. J. & Anor (15) (supra) to follow the previous single-judge decisions. I hold therefore that S.268 of the Code does not apply to cases to which S.304 applies../

I must now proceed to consider whether verbal insults alone may not yet constitute provocation in Papua New Guinea.

In earlier centuries it was apparently the practice to regard spoken words as sufficient to raise the question of provocation, if only in exceptional circumstances. (Windeyer, J. in Parker v. The Queen (16)). BrennanA.J. in Reg. v. Awabe Pala (17) gave consideration to what might be the position in Papua irrespective of S.268 of the Code, - in the following terms:-

> "Should the alternative view be adopted that the term 'provocation' in S.304 is used in its Common Law connotation, it seems to me that in this particular set of facts it might still well be open to the accused to rely upon the uttering of the words referred to as amounting to provocation. It is of course true that in civilised Western Communities which apply Common Law principles, the view that words alone cannot be relied upon as provocation has hardened since the 17th century. As a general proposition that thesis is hardly open to dispute, but it does not necessarily follow that the same principle should apply in a Native Community where sophistication does not approach to that of, say, 17th century England, where a type of insult such as the one here in question is calculated and not infrequently intended to throw a man into an ungovernable rage.

---

(13) (1973) 47 A.L.J.R. 472
(14) Unreported Judgment 786
(15) Unreported Judgment F.C. 41
(16) 111 C.L.R. 610 p.653/4
(17) Unreported Judgment No. 170

../5

> The elasticity which should properly govern the approach to this question of provocation was emphasised by Viscount Simon in delivering judgment in which the learned law Lords concurred in Holmes v. Director of Public Prosecutions (18): 'There are two observations which I desire to make in conclusion. The first is that the application of common law principles in matters such as this must to some extent be controlled by the evolution of society. For example, the instance given by Blackstone (Commentaries, BookIV., p. 191, citing an illustration in Kelyng p. 135), that if a man's nose was pulled and he thereupon struck his aggressor so as to kill him, this was only manslaughter, may very well represent the natural feelings of a past time, but I should doubt very much whether such a view should necessarily be taken nowadays. The injury done to a man's sense of honour by minor physical assaults may well be differently estimated in differing ages. And, in the same way, one can imagine in these days at any rate, words of a vile character which might be calculated to deprive a reasonable man of his customary self-control even more than would an act of physical violence. But, on the other hand, as society advances, it ought to call for a higher measure of self-control in all cases'".

That by 1946, currents of opinion were again drawing the courts towards the earlier practice of finding provocation in spoken words alone, a practice which I might speak of as remaining in gremio the common law, appears in a further passage in Holmes' case (19) (supra) where Viscount Simon states: "Words alone in circumstances of a most extreme and exceptional character could be accepted as sufficient". In commenting on Holmes' case (20) (supra) Dixon, C.J. in Parker's case (21) (supra) stated: "In Holmes v. Director of Public Prosecutions (22) (supra) it was held that provocative words without action did not afford sufficient provocation to reduce to manslaughter a homicide that otherwise amounted to murder. This was not laid down absolutely" (emphasis mine) "but subject to an explanation of what was meant by "mere words", and an allowance of the exclusion of cases where there are circumstances of a most extreme and exceptional character; apparently what was in contemplation were words of a 'violently provocative' nature'". It will be noted that there was apparently a doubt in New South Wales whether mere words would suffice - accordingly statutory amendments were made in 1883

---

(18) (1946) A.C. 588 p.600/1
(19) (1946) A.C. 588 p.600
(20) (1946) A.C. 588
(21) 111 C.L.R. p.631
(22) (1946) A.C. 588

.../6

to allow for "aggravating insulting language" (Windeyer J. in Parker's case (23) (supra)). That such a statement of the law in line with earlier learning had once again become necessary was exemplified by the words of the amending Homicide Act 1957 (U.K.) where provocation is declared to arise potentially from "things done or by things said or by both together". Lord Denning in Nyali's case (24) ennunciated the desirability of shaping and moulding the common law to the necessities of altered environments in which it was planted, so that it might accord with the needs of particular peoples. Smithers, J. in Reg. v. Rumints Gorok (25) apparently intended to make such a shaping of the common law in ruling that in Papua New Guinea the commission of adultery followed by a later discovery of it could in the circumstances of the primitive society be allowed to constitute provocation. This despite his Honour's understanding that in England there was a Rule of Law that only the discovery of a spouse flagrante delicto could be regarded as sufficient to induce loss of control leading to fatal violence.

The principles and rules of the common law and equity that were in force in England on 9 May 1921 are to be applied in New Guinea so far as the same can be applied to the circumstances of the Territory. (See S.16 Laws Repeal and Adopting Act 1921/33). Patently, it has been the experience of the judges of the Supreme Court in Papua New Guinea, that the vast majority of the cases in which provocation is argued are cases involving verbal insults of a most colourful character. It has been repeatedly accepted by the courts that such predispose Papua New Guinean men, at least, to violent savage reaction. That the courts consider it necessary to have available some such amelioration of the laws of homicide under the Code, as was provided by the doctrine of provocation, in the numerous cases involving verbal insults, is sufficiently shown by the almost total unanimity of the judges in seeking to find S.268 operative alongside S.304 in homicide cases. This attitude was being maintained against the persuasive decisions to the contrary on the parent Queensland Code by the Queensland Court of Criminal Appeal in the Code's home State. If the attitude to verbal insults prevailing in the U.K. in the late 19th and 20th centuries were to have been followed in Papua New Guinea then a result completely unsuitable to the circumstances of Papua New Guinea, would in my opinion, and I confidently state in that of all judges who have served here, have been effected. By such an interpretation I do not think it could be said that the principles of law and equity were being applied - for in effect there would have been little or no amelioration of the strict law as to homicide. If the statements holding verbal insults alone did not constitute provocation, were applied in Papua New Guinea; then it would not I think be an exaggeration

(23) 111 C.L.R. p.631 (24) (1956) 1 Q.B. (25) (1963) P.N.G.L.R. 81

../7

to say that for most practical purposes, the principle of provocation was not being applied. If they represented the common law then they could not practically be applied to the then (and since) circumstances of the Territory without rendering the doctrine of provocation almost nugatory.

On one view I take, the older learning that verbal insults alone could constitute provocation, ought to be viewed as remaining in gremio the common law, ready to be applied to suitable exceptional and extreme circumstances. And I would regard the temperament and undoubted susceptibilities of the primitive peoples of Papua New Guinea as raising such exceptional and extreme circumstances, calling for the application of that older doctrine.

Mann, C.J. in Murray v. Brown River Timber (26) was considering the rather different ambulatory common law adoption provisions of the Papua act (Courts and Laws Adopting Act 1889 Papua (amended)). He said "If there is no law on a subject it is the function of the Common Law Courts to extend and mould established principles to make the case .... I think the judges should be ready to fill omissions as well as to make judgments .... It is a proper interpretation of the Ordinance that the function of this court is to develop the common law so as to fill what would otherwise be a gap."

Alternatively, then if the statements of the law as to provocation in the twenties could not be applied suitably to the circumstances of the times in New Guinea, and for the reasons above I hold they could not be, and it was considered no suitable law as to provocation by verbal insults was available, the courts should in my opinion mould the law, or fill the gap so as to make the common law suitable to the needs of the people and the times.

In my opinion, on a correct understanding and application of the common law to Papua New Guinea, it should be held, irrespective of S.268 that verbal insults alone may constitute provocation under S.304 of the Code.

Holding the view as I do that S.304 of the Code is merely a short form statement of the common law doctrine of provocation, I attempt to direct myself by noting that "it is only to the common law to which reference can be had to determine the circumstances in which provocation however defined, reduces a killing from murder to manslaughter". Kaporonovsky v. The Queen (27) (supra).

Up until and including Mancini's case (28) it was held that "the mode of resentment must bear a reasonable relationship to the

---

(26) (1964) P.N.G.L.R. 167
(27) (1973) 47 A.L.J.R. p.475
(28) (1942) A.C.1.

../8

provocation if the offence is to be reduced to manslaughter". Following upon the 1957 U.K. amendments, Viscount Simon's words as quoted have been commented on in Phillips v. The Queen (29) by Lord Diplock, and in Reg. v. Brown (30) by the Court of Criminal Appeal in the light of the statutory amendment in 1957 - as requiring qualification. However the law to be applied by me in considering the doctrine of provocation at common law, should be as I understand, that laid down by the High Court in DaCosta's case - (31) an appeal from the Northern Territory (cp. Reg. v. Minihan (32). The doctrine of proportionate retaliation and the importation of the concept of the reasonable man into the definition of provocation, has aroused academic criticism - but nevertheless seems firmly entrenched. As Windeyer, J. states in Parker's case (33) (supra) commenting on Lee Chun Chien v. The Queen (34) :-
"An insult may cause strong resentment but an ordinary man does not on that account so far forget himself as to use a deadly weapon. The rule that the act provoked must bear some reasonable relation to the provocative act is now authoriatively recognised by the common law".

I would substitute for purposes of considering a Papua New Guinea village situation, the phrase "An ordinary villager does not on that account so far forget himself as to use a deadly weapon with deadly intent."

The prosecution must discount a provocation consisting of three elements, an act of provocation, the loss of self-control actual and reasonable, and a retaliation proportionate to the provocation.

I propose to turn now to a consideration of the evidence in this case. But before doing so, I remind myself that the words of the House of Lords in Holmes' case (35) (supra) "where the provocation inspires an actual intention to kill .... or to inflict grievious bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies", have not been approved in their apparent meaning; but should be limited to premeditated intention formed independently of the provocation - Dixon, C.J. in Parker's case (36) (supra) as approved by Privy Council (37).

The evidence established that there had been a history of difficulties between the accused and his wife. Apparently the accused had on previous occasions sought and been refused the help of his brother (the present victim) to ensure the return to him of the accused's wife and child - apparently by the satisfaction of bride price payments. I have no doubt that the accused smarted under this refusal. On the fatal day which dawned raining, and in the dim light of faggots inside the house, the brothers discussed whether

---

(29) (1969) 2 A.C. p.138
(30) (1972) 2 Q.B. 234
(31) 118 C.L.R. 186
(32) (1973) N.S.W.L.R. p.665
(33) 111 C.L.R. p.688
(34) (1963) A.C. p.231/2
(35) A.C. 588 p.398
(36) 111 C.L.R. p.632
(37) 111 C.L.R. p.681

../9

work should be undertaken in the gardens that day. The accused again raised the question of his grievance with his wife - he felt her absence on such a day; - the brother being tired of the subject used strongly abusive words. These were translated from Mid Wahgi into English as "Go and sleep in the toilet and tell about it there". A phrase comparable in meaning to, but stronger in effect than, that common in other societies among the immature and those seeking to abuse "Go to the . . . " (using a vulgarism). Undoubtedly the remark was intended to annoy and it did greatly anger the accused. He appears to have jumped up immediately and swung a blow with the cutting edge of his axe to the back of the speaker's neck with very considerable force. The speaker was seated. He died instantaneously. The accused admitted that he intended to put his brother to death. There was evidence that the phrase used about sleeping in the toilet was a 'rubbish' word that would be used by a villager who was cross and wished to annoy someone, and that when such an expression is used - I quote the apparently vernacular and no doubt imperfect Australian/English translation - "We get crook" - "It really upsets us" - "We feel like taking an axe on the person that says that". But the witness had apparently never seen anyone get up and cut another who had used comparable words.

I pause to say that obviously there are many ways of using an axe either with the flat head or by way of a lesser cut even, to express resentment, short of a homicidal attack. We come across such incidents fairly frequently.

I observed the accused closely throughout the trial and the manner and delivery of his statement from the dock. My impression is that he is of a bold, assertive and somewhat aggressive manner. I am satisfied that the insults used were such as might cause an ordinary villager to lose control of himself, and that it did so affect the accused.

I am satisfied he killed his brother in the heat of passion caused by sudden provocation and before there was time for his passion to cool.

I bear in mind the onus on the Crown to establish beyond reasonable doubt to the contrary of the factors which would admit of provocation reducing the sentence. I find established to my mind beyond reasonable doubt by the evidence, that the act of the accused in attacking his blood brother with the cutting edge of the axe with great force, with the intent to kill, was so out of proportion to the insult offered that no reasonable man in the accused's situation would have so acted. The weapon used, the fashion, the force, and fell intent of the blow, render the retaliation of a kind out of all proportion to the insult offered; so disproportionate as to disentitle the accused to the benefit of a

finding of provocation.

I convict the accused of wilful murder.

Crown Prosecutor	J. Greville-Smith	Public Solicitor	N.H. Pratt
Counsel	Georgeson and Maino	Counsel	K.R. Roddenby