IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM: Prentice, SPJ.
Wednesday,
26th February, 1975.

THE QUEEN v. JAMES TAKATA

1975
24, 25, 26 Feb.
Lae
Prentice, SPJ.

The accused has been arraigned on a charge of manslaughter involving the death of a fellow labourer at Mambu Creek near Wau. An assault by the accused upon the deceased is admitted; but the defence raised is one of provocation. It is submitted that by virtue of s.269 of the Code, if provocation be established, the accused is entitled to an acquittal.

As I understand the brief submissions of Mr Kaputin for the accused, it is contended that the Crown have not negatived such (statutory) provocation arising from either the actual fact of the deceased's having stolen corn and kau kau from the accused's garden, or alternatively, from an honest and reasonable if mistaken belief that the accused had so stolen his vegetables. (The defence relies on the majority decision in The Queen v. K.J. & Anor (1) a decision of the Full Court of Papua New Guinea - as establishing for general purposes, and not merely in respect of the Sorcery Act, that s.24 of the Code could thereby render ss.268 and 269 applicable).

The defence I understand seek to rely also on The Queen v. K.J. & Anor (2) (supra) which was a decision of the Full Court as constituted before the abolition of the right of appeal to the High Court of Australia, as establishing that s.268 of the Code is applicable to offences more serious than those in which the word "assault" is used in the Code definition of the particular offence. The effect of this decision should now be followed, I understand it to be suggested, rather than that of the High Court in The Queen v. Kaporonovsky (3) because the Full Court of this Court is now a Court of Final Appeal. Towards the end of

(1) Unreported No FC 41
(2) Unreported No FC 41
(3) (1973) A.L.J.R. 296

1974 in the case of The Queen v. Kopal Wamne (4) in Mount Hagen I had cause to consider whether, sitting as a single Judge of this Court I should then follow the High Court decision or that of this Court in The Queen v. K.J. & Anor (5) (supra). I decided therein, if I recollect correctly (my decision is not available to me), that I was bound to follow the logical consequences of Kaporonovsky's case, (6) (supra) and that in any event I believed it to be correct. Kaporonovsky's case (7) (supra) insofar as it establishes that s.268 and s.269 do not (in the Queensland Code) extend to such offences as unlawful wounding or doing grievous bodily harm, would if followed, urge even more compellingly, I consider, that the Section could not apply to manslaughter. Clarkson, J. in November 1973 in The Queen v. Marumyap Usek (8) before the High Court's decision in Kaporonovsky's case (9) (supra) was available, came to the conclusion that s.269 was available to require a charge of manslaughter to result in an acquittal; and he collected in that decision a number of obiter dicta of Judges of the Court to similar effect.

The very difficult questions of stare decisis and judicial precedent in the hierarchy of Courts involved, have not been argued. But if it were necessary for me to decide, I think I should find it difficult to distinguish the position as to the effect if not the legal force, of the High Court decision vis-a-vis that of the Full Court of this Court as it was in November 1974, from that which exists now.

However I do not think it necessary to come to that decision. The evidence plainly establishes that the deceased died very quickly perhaps in a minute or two, from a ruptured spleen, following an assault upon him by the accused. There are one or two aspects which have caused me to scrutinise the evidence of the eye-

(4) Unreported Judgment No. 809
(5) Unreported FC 41
(6) (1973) A.L.J.R. 296
(7) (1973) A.L.J.R. 296
(8) Unreported Judgment No. 774
(9) (1973) A.L.J.R. 296

witnesses with care. But I am satisfied from that evidence and the admissions of the accused that he slapped the deceased Sem three times on the head with the open palm - causing him to fall down - and that those blows must have been substantial. I am satisfied beyond reasonable doubt also that he then kicked Sem three times while Sem lay on the ground - once on the right lower rib, once on the left lower rib and once on the front of the belly. I am so satisfied, that these kicks were hard, delivered with considerable force with a labourer's bare foot. I am satified that the kicks caused Sem's death.

I am satisfied by the evidence that the sight of the pilfered garden and his belief that Sem either alone or with associates was responsible, angered the accused. I am prepared to accept that such a sight could in some circumstances deprive a person in the defendant's setting of the power of self-control. However it is clear to me beyond reasonable doubt that the evidence establishes that he was not deprived of the power of self-control - but that he acted impelled by anger it is true, with the idea of chastising or correcting Sem. I may say inter alia that his reaction was not on the instant such as one has frequently in the case of inflammatory verbal insults - but after he had run fifty yards to his own house, then fifty yards to the house where Sem was busy building a bed; and after he tried to question and upbraid Sem (if I am to believe his own version). I come to the conclusion that there was no such "transport of uncontrolled passion" or "abdication of reason" or "temporary suspension of reason" to use some of the phrases which Judges of the Court have used to express the degree of loss of control necessary to constitute the defence.

If I be wrong in this conclusion, I would consider that the nature and force of the kicks administered to the recumbent Sem were entirely disproportionate to such provocation as may be considered to have been offered. I am also satisfied to the extent required beyond reasonable doubt that the retaliation was such as was certainly likely at least to cause grievous bodily

harm to a New Guinean man - and indeed likely to cause his death. In reply to a question by me the accused said that a blow to his own body in the position I indicated to him between his ribs on the left side would hurt his body. He didn't know very well whether it would kill him. Of course this may represent his understanding now after the incident involving the death of his wantok. It may not have represented his knowledge at the particular time. I am afraid that after all the experiences I have had and those of other Judges I have read of, I form the opinion that New Guinean native men well understand that a severe blow or blows to the left side under the ribs may cause death from a ruptured spleen but it does not appear necessary to consider the matter from the subjective point of view in regard to a particular defendant's understanding. I therefore find that the Crown has negatived to the necessary extent the defence of provocation. I am left with the conclusion on the evidence that the accused caused the death of the deceased by an assault which was unlawful and in the circumstances dangerous. I consider his conduct should properly be considered recklessly dangerous. I convict him of manslaughter.

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

Solicitor for the Accused: N.H. Pratt, Acting Public Solicitor.