

THE KING

-v-

JAMES ALLEN SWALLOW

JUDGMENT DELIVERED 14th SEPTEMBER, 1951.

The accused, James Allen Swallow, stands charged that on the 17th July, 1951 in the Territory of Papua he unlawfully killed one GAWALE.

The deceased was a native employee of Robinson River Plantations Limited at Robinson River. The accused is also an employee of the Company.

The Crown case is, briefly, that the accused kicked the deceased in the stomach thereby rupturing the deceased's spleen and causing his death.

The defence is, briefly, a complete denial of the alleged kick.

The Crown and the defence are on common ground to this extent - On the evening of the 16th July the deceased was ill. On the morning of the 17th July the deceased was very ill; so much so that he could not walk. At about 6 a.m. on the morning of the 17th he was carried by two natives who occupied the same hut to the sick line and placed near a tool store, which store was in proximity to the grass labour line fallen in on a main road through the Plantation. The deceased was placed on the side of the store opposite that facing the grass labour line. Within a few minutes of being placed near the store the deceased was examined by Robert Farrar Byrne, the Company's Plantation Manager, when the deceased was found to be vomiting and defecating. He was promptly taken to hospital, but died about two and a half hours later.

Robert Farrar Byrne, called by the Crown, gave evidence to the effect that on the morning of the 17th, as he was proceeding to inspect the grass labour line, and when he was

approximately 250 yards distant from the store he saw the deceased being carried towards the store, and approximately 40 yards distant from the store. Very shortly after that, he noticed the accused walking past the grass labour line going in the same direction as the witness. As he realised that the native being carried was ill, he made a hurried inspection of the grass labour line and proceeded to the far side of the store and inspected the native ~~GAWALE~~ GAWALE. At the time of his arrival at the spot the native, whom he later ascertained to be KONEMENTAI, was standing close to the deceased. The accused arrived at the spot practically simultaneously with the witness. A discussion took place between the witness and the accused as to the condition of GAWALE, but there was no suggestion at that stage that such conversation was directed to any accusation against the accused. Immediate steps were taken to have the sick native removed to hospital.

The witness stated that he did not have a clear picture of what he saw as he hurried down the road, but he did remember seeing the sick native being lowered to the ground with the accused standing fairly close by.

The witness also gave evidence to which I shall refer later in dealing with the medical evidence.

Rolf Charles Cambridge, District Manager for the Company, who was called by the Crown, gave brief evidence in chief to the effect that he heard a complaint that the accused had kicked the deceased, whereupon he called the accused before him and asked the accused if that was true, to which the accused replied it was untrue. On being recalled by the defence to rebut part of the evidence of a native witness IAUKULE he stated that a foot pad track alleged by IAUKULE as unusable on account of wet weather was in fact dry and in good condition and usable.

Verdun Brien McNeil, Inspector of Police, called by the Crown, gave formal evidence regarding photographs of the location taken by him.

James Joseph Kenny, European Medical Assistant, employed by the Administration, gave brief medical evidence, to which I shall refer in dealing with the medical evidence.

In addition to the above witnesses, the Crown called Doctor Leonas Eugenijus Petrauskas, qualified Medical Practitioner - to whose evidence I shall refer later in dealing with the medical evidence. - and four native witnesses, KOPIA, IAUKULE, ~~KONEARE~~ // ~~and~~ / KONEMENTAI and KONEARE.

KOPIA was the "boss boy" of the grass labour line. I disassociate from my mind the whole of the evidence of this witness. I do so firstly as the trial Judge. The general rule of law in cases such as this is that a witness giving evidence of the circumstances supporting the charge, or of circumstances denying the charge, should not be in Court whilst other witnesses of the same category are giving their evidence. This rule is well founded - allowing for human nature a witness sitting in Court and hearing the evidence of other witnesses may be inclined to colour his evidence to fit in with the story which he hears in Court. But to my mind, the position was much worse regarding this witness KOPIA. A Coronial inquiry was held on the death of GAWALE; and at the Coroner's Court KOPIA did not give evidence, but he acted as interpreter. This aspect may have appeared in a slightly better light had KOPIA first given his evidence in the Coroner's Court, and then acted as interpreter. But in either event, either procedure is in no way to be commended or upheld. It may transpire in the most unusual circumstances that the Crown may be forced into the position of having one person act as interpreter and at the same time as a witness. But those circumstances would be most unusual and rare. I, as a Judge, cannot envisage those circumstances applying to this particular case. And ~~the~~ rule of law is, "Not that justice is done, but justice must appear to all to be done." On this latter aspect of the rule the accused is quite entitled to contend that KOPIA's evidence would be coloured, and if necessary, formulated to fit in

with the evidence which he conveyed to the Coroner's Court whilst acting as interpreter to the witnesses appearing before that Court; and that he would have brought before this Court the impression which he gained from the several witnesses appearing before the Coroner's Court. Secondly, I would arrive at the same conclusion, as a member of the Jury, regarding KOPIA's evidence. Being informed of the rule of law on the point I would ask the question "If KOPIA knew anything of the circumstances, why did he not come forward and volunteer his information to the Coroner's Court?" That question may answer itself that there was some technical difficulty in bringing KOPIA's evidence before that Court. But that explanation to an ordinary man, a jury-man, would be hard to understand.

IAUKULE was the personal native servant of the accused. He was not bound to attend line in the morning. He, with KONEMENTAI and KONEARE, occupied the same hut as the deceased GAWALE. On the relevant issue he gave evidence in chief that on the morning of the 17th he heard GAWALE say that he was sick and was unable to walk and required assistance to the sick line; and that he saw KONEMENTAI and KONEARE carry GAWALE from their hut to the sick line at the tool store. He further stated in evidence in chief that he went to the accused's house by way of the tool store and along the main road - which he admitted was a greater distance than he would have travelled had he gone by his ordinary foot pad track from his hut to the accused's house.

In cross-examination he admitted that he did not hear GAWALE's conversation about being sick and requiring help to the sick line at the tool store; but he claimed that he ^{first} saw KONEMENTAI and KONEARE at the foot of the steps of the hut helping GAWALE to the sick line.

He explained that he took the longer route to the accused's house because his normal route was unuseable on account of recent rain. This latter route was a little over one half the distance of the route taken by him via the tool store than along the main road. It could well be reasoned that he

followed his three hut-mates to the tool store out of natural curiosity. But when he arrives there, according to his evidence, he places the sick native GAWALE in almost the reverse position as indicated by two of the main actors in his scene. KONEMENTAI and KONEARE placed GAWALE with his back to the wall of the tool store whereas IAUKULE placed GAWALE half right facing the wall of the tool store.

Having had an opportunity of seeing IAUKULE in the witness box and noting his demeanour I, as a jury, have arrived at the conclusion that he saw little of the episode and that the material portion of his evidence is hearsay. Therefore I dismiss his evidence from any consideration in arriving at a decision in the case.

KONEMENTAI came from the same district as the deceased. He occupied the same hut as the deceased. Apart from the matter on which the Crown and the defence are on common ground KONEMENTAI gave evidence in chief that early on the morning of the 17th GAWALE stated that he was unable to walk and asked to be taken to the sick line whereupon he lifted GAWALE by the legs and KONEARE lifted GAWALE by the arms with GAWALE's arms held by KONEARE around KONEARE's neck. On arrival at the tool store the three natives were met by the accused who struck both KONEMENTAI and KONEARE with a cane across the buttocks and ordered them both to fall in with ^{the} grass labour line. According to KONEMENTAI he and KONEARE promptly let GAWALE roughly to the ground and hurried to the grass labour line - according to KONEMENTAI some five yards distant on the opposite side of the tool store and on the main road. He states that on arriving at the end of the grass labour line he turned round and saw the accused in the act of kicking GAWALE. He demonstrated the kick as a medium kick high up on the stomach in the region of the diaphragm. At that moment, according to this witness, GAWALE was seated with his back to the wall of the tool store and about two feet four inches from the wall; and immediately after being kicked GAWALE fell backwards on to his back with his arms flexed above his head and both legs

flexed loosely. According to this witness, immediately after receiving the kick GAWALE commenced to vomit, with blood coming from the mouth and nose. In his demonstration this witness was not asked to indicate the distance, if any, between the accused and the deceased when the accused commenced moving to kick; but he did place the deceased immediately before the kick in a sitting posture on crossed legs with hands loosely in the triangle of the lap.

KONEARE was also from the same District as the deceased GAWALE. He occupied the same hut as the deceased. Apart from the common ground between the Crown and the defence, he gave similar evidence to that given by KONEMENTAI, but with two distinctions. He places GAWALE, immediately before the kick, with his back to the wall of the tool store and three feet six inches from the wall; and secondly, he claims that the kick was a strong kick. He demonstrated the accused as taking up a position about nine feet away from, and in front of, GAWALE, thence walking up smartly and delivering the kick to the deceased. But later, on a second demonstration of the kick, he demonstrated a medium strength kick.

KONEARE's evidence in this Court must be viewed by a jury with some degree of suspicion, although not necessarily disbelieved altogether. He gave evidence at the Coroner's Court on the day after GAWALE's death. He gave evidence in the first instance as follows "On Monday about 11 o'clock I was working on the grass line with the deceased native and he told me that he had fever. That night he lay down by the fire then I helped him to go bed. The deceased told me that he had a sick in the stomach and I felt him and he was hot a little bit but not like fever. I then went to sleep. Morning time the deceased said 'I want some medicine.' He was not frothing at the mouth. I helped carry him outside and we put him on the grass. He was then frothing at the mouth and passing motions. Later I helped put him in hospital then went to work then I heard that GAWALE was dead. I knew GAWALE well, he was from my place. "

Later on during the same day he was recalled, when the following evidence was taken from him. "Did Mr. Swallow hit you with a stick : Yes Did you see Mr. Swallow strike Gawale: Yes I saw Mr. Swallow kick Gawale in the stomach strongly."

His explanation in this Court for his omission to give evidence about the kick in the first instance was that he did not hear things properly, that he was overcome with grief and when the question was put to him he answered it.

In this Court he stated he heard the accused immediately before kicking the deceased say "You Chimbus are always a humbug." And he claimed that he gave that evidence also in the Coroner's Court. It will be noted from his evidence in the Coroner's Court, quoted above, that he did not give such evidence in that Court. Nevertheless he held strongly to his assertion, and finally Mr. Johnson, Counsel for the Crown, in order to obviate Mr. White, Counsel for the defence, calling the Coroner to prove the issue, admitted on behalf of the Crown that KONEARE did not give such evidence of that conversation in the Coroner's Court.

The accused entered the witness box and gave evidence ^{denying the charge} ~~in his own behalf~~. He explained the usual morning routine and that it was customary for two men to inspect the line but on this particular morning he preceded Mr. Byrne by some little time. I quote from his evidence on the material aspect "On the way (down to the line) I noticed two boys carrying another boy. They were about forty feet from me when I first noticed them and about twenty feet from the tool store. The boy being carried was frothing at the mouth and appeared to be very ill. (After giving KOPIA, the boss-boy some instructions about the grass labour line) I passed on and turned left between the tool store and the factory. There were about five sick boys squatting against the wall of the tool store. (After giving instructions to some of those sick natives) I went on to the far side of the tool store. The two Konis ^{carrying} ~~carried~~ GAWALE were then just arriving. They

appeared to be awaiting instructions. I told them once or twice to put him on the ground. GAWALE at this stage appeared in a very bad condition. I noticed that his eyes were very yellow and that the froth on his mouth was dribbling down, vomiting slightly, and was yellow and also tinged with reddish brown. His face was bloated and the skin yellow about the jowls. The two Konis appeared hesitant. I tapped them both lightly on the buttocks with my cane (claimed elsewhere as being carried to support a recently sprained ankle) and indicated the cement. The Koni in the rear released GAWALE's legs and went away to the line. The Koni in front hastily released GAWALE into a crouching position. He then also left for the line. (After describing GAWALE's crouching position) I stepped forward. As I did so GAWALE fell over sideways. I grasped him and propped him against the wall with his head against the wall."

Accused's evidence then continued to the effect that he went to the factory to arrange for a stretcher for GAWALE, that he returned to the scene, discussed with Mr. Byrne GAWALE's serious condition, that they both commented on his jaundiced appearance, and that instructions were given to KOPIA to remove GAWALE to hospital.

Accused denied IAUKULE, his native servant, was at the scene. He claimed in evidence in chief that neither he nor GAWALE would have been visible to anybody in the ~~line~~ grass labour line on the road on the opposite side of the tool store. However, after a strong cross-examination on the point, he finally wavered and admitted that it may have been possible but extremely unlikely.

Under cross-examination he stated he was on friendly terms with the members of the grass labour line, had never had any trouble with them, and considered them a well-trained line.

At the Coroner's Court the accused gave evidence to the effect that Mr. Byrne accompanied him on the inspection of the line that morning. His explanation for the discrepancy in his evidence in this Court is that at the Coroner's Court he did not mean that they accompanied each other in person, but

they both inspected the line. The explanation is difficult to understand.

At the Coroner's Court the accused did not admit that he struck KONEMENTAI and KONEARE with his cane. He did not endeavour to explain away that discrepancy in this Court.

Dealing now with the medical evidence -

Mr. Byrne gave evidence that when he examined the deceased (which would have been within a few minutes after the alleged kick) the eyes and skin were distinctly yellow.

Mr. Kenny examined the deceased on the 18th July, the day after death. He made only an external examination. He states the eyes were distinctly jaundiced.

Doctor Petrauskas conducted the post mortem. He gave detailed medical evidence. The post mortem disclosed a ruptured spleen and a minor affection of one lung. In his opinion the minor affection of the lung was not connected with the death; but death was caused by the rupture of the spleen.

The spleen was twice its normal size, affected by malaria and was ruptured at the lower lobe, with a maximum of one pint of blood with splenic matter spread over the organs in the lower portion of the abdominal cavity.

Doctor Petrauskas expressed the opinion that the rupture of the spleen would have been caused by severe force, and that death would have ensued within a few hours after the injury.

On cross-examination Doctor Petrauskas stated that there was a very slight affection of the liver, not showing any serious signs of malarial infection. He explained that the affection of the liver was so insignificant that he did not consider it worthy of mention in his evidence in chief.

Doctor Petrauskas made a careful external examination but found no signs of external injury. The post mortem was held on the third day after death, and Doctor Petrauskas explained the decomposition had set in and therefore any slight external injury would escape notice.

Doctor Petrauskas was cross-examined at some length on jaundice condition. He explained that *a severe haemorrhage with* absorption of the 257

blood from the abdominal cavity into the body could set up a jaundiced condition, but at the time of the post mortem any such jaundiced condition would not be apparent.

Doctor Douglas Jamieson was called by the defence. He was in the witness box for a day and a half. Mr. White, Counsel for the defence, directed his main line of examination to the jaundiced condition of the deceased. There is no doubt a jaundiced condition was evident in the eyes and skin on the day of death, and in the eyes on the day after death. This, to my mind, transpired to be a most important feature in this case.

Doctor Jamieson explained that a jaundiced condition is usually evident in a very rare type of malaria - bilious remittant malaria, or again if there is some complication in malaria. However bilious remittant malaria was not suffered by the deceased. The liver did not show any signs of any such infection. In Doctor Jamieson's opinion the jaundiced condition was brought about by the blood ^{lost} in the abdominal cavity, and he explained that the breaking down of the tissues to bring about a jaundiced condition usually takes from six to eight hours. On that evidence a jury could only arrive at the conclusion that GAWALE's spleen was ruptured at least six hours before he was examined by Mr. Byrne at six o'clock on the morning of the 17th July.

Doctor Jamieson is of the opinion that GAWALE's spleen would have been further ruptured by the method of his transportation from his hut to the sick line at the tool store.

As Doctor Jamieson holds very high degrees in tropical medicine I, as a Judge, must accept his opinion; and more so as a jury.

Doctor Jamieson explained that the blood which was apparent in the vomited matter could not have come from the abdominal cavity as there was no injury to any organs other than the spleen, and the blood from the spleen could

only have reached the stomach through a rupture in the wall of the stomach. There was no such rupture in the wall of the stomach. In his opinion that blood was a pre-terminal sign of death. So also, in his opinion, was the defecation.

Nevertheless the accused can still be convicted ~~of~~ of manslaughter if it is found that he did kick GAWALE and accelerate his death.

As to the alleged kick, which was fairly demonstrated to him, ~~by~~ Doctor Jamieson states that he would ^{expect} ~~expect~~ some injury to the stomach muscles which would be apparent on post mortem; and depending upon the method of application of the kick as to whether some external injury would be apparent on the post mortem. According to Mr. Byrne the accused was wearing either boots or shoes. It was not cleared up by the accused as to which he was wearing.

All this evidence leaves me, as a jury, faced with two propositions.

One - did the accused administer to the deceased a kick much lighter than that demonstrated by KONEMENTAI and KONEARE, which kick could have accelerated GAWALE's death but at the same time leave no trace which would be visible on the post mortem?

Two - did the ^{accused} ~~deceased~~ administer to GAWALE a kick as demonstrated by KONEMENTAI and KONEARE?

The arrival at a decision in this case has caused me much concern. As often as I feel myself convinced on the Crown evidence that the accused did kick the deceased, I ^{lose} ~~raise~~ to myself the question "On the medical evidence for the accused, could that be so?"

As to the first proposition; I am bound to consider the Crown evidence as it is put to the Court. I do not think I would be functioning correctly as a jury were I to reason in my own mind that KONEMENTAI and KONEARE, being over-anxious to ^{justly} ~~gain~~ retribution against the accused for the death of their friend, have exaggerated to the stage, in their mind, of the impossibility of the accused's escape. I must accept their

evidence as to the strength of the alleged kick. At least they demonstrated a medium strength kick, administered from the front with either a shoe or a boot, which knocked from GAWALE/off his haunches flat on to his back. Which by no stretch of imagination can be deemed to be a light kick, such as would not leave any trace behind it.

As to the second proposition. There was no evidence on the post mortem of any such kick. Therefore I am not entitled to find that it was administered.

My decision on the issue is that the accused did not kick GAWALE. And I find the accused Not Guilty.