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v.

KORUAPU of LUPILA

22nd July, 1957

Mann, G.J.

Criminal Trial, at Tapini, Goilala Sub-district, Central District,
(Papuan Highlands)

Criminal Law - homicide

Provocation - mere words - adultery
person in position of protector.

KORUAPU killed a man SATAI who had committed adultery with K's brother's wife UTAU while K's brother absent abroad. Evidence K. stood to U. in some kind of protector relationship. On hearing of the adultery from UTAU, K. spoke to SATAI and after S. replied K. hit him on the head with the back of the axe which he, in accordance with the usual custom of the Highlands people, was carrying at the time. From this blow S. died.

Held; in the absence of evidence of what reply S. gave to K. before being struck, the inference must be made in favour of K. Therefore, it is probable S. refused to leave U. alone

Held; provocation existed of such a nature as to reduce the crime from murder to one of manslaughter.

FOR PROVOCATION see Criminal Code ss. 268-272, 304

On an indictment for murder if the evidence would support a verdict of either murder or manslaughter the onus is on the prosecution to prove that the offence amounts to murder. (Kwaku Mensah v. The King (1946) Appeal Cases 83 at p.92). In considering the evidence of provocation and in determining what effect the provocation would have had upon the accused, the accused must be considered as an ordinary inhabitant of his own village subject to the circumstances existing there and not as a member of European society living elsewhere. (Ibid at p.93).

NOTE:

In Holmes v. Director of Public Prosecutions (1946) Appeal Cases A.C. p.588 the House of Lords considered whether in English law mere words can amount to provocation and in particular whether a sudden confession of adultery might be treated as equivalent to a discovery of the act itself. The House, over-ruling earlier authorities on the point, decided that such a confession could not be treated on the same footing as the discovery and observance of a spouse in the act of adultery, and further that mere words in their absence of actual violence can never (save possibly in circumstances of a most extreme and exceptional character) reduce the crime to manslaughter. "When words alone are relied upon on the

extenuation the duty rests on the Judge to consider whether they are of this violently provocative character and if he is satisfied that they cannot reasonably be so regarded to direct the jury accordingly."

For a definition of "provocation" in the Territory, see Sections 268 and 304 of the Criminal Code (Queensland, adopted).

See also Judgment of Viscount Simon in Holmes v. Director of Public Prosecutions (supra) at p. 600 "The application of common law perhaps in matters such as this must to some extent be controlled by the evolution of society."

Mr. P. Mallon, of Counsel, for the Crown,

Mr. A. J. Humphries, A.D.O., by leave, for KORUAPU.

MANN, C.J.

I find all the elements of the crime of murder as defined by Section 302 of the Code established beyond reasonable doubt, subject to the question of provocation, which I will consider separately.

I am satisfied on the evidence:-

- (1) That UTAU, the sister-in-law of the accused, was, according to native custom and usage, a ward of the accused, who was responsible for her care and protection during his brother's absence in Rabaul.
- (2) That UTAU was not at liberty under tribal laws to take another husband in her true husband's absence, and that adultery by her in those circumstances was properly regarded by her people as unlawful and disgraceful.
- (3) That the accused was under a duty, as guardian, to protect UTAU from seduction, and owed a duty to his absent brother to intervene and do his best to prevent it.
- (4) That just before the killing of SATAI, UTAU told accused that she had committed adultery with SATAI, and that in the circumstances accused reasonably inferred that this adultery would continue unless he could intervene and prevent it.
- (5) That the accused was greatly enraged by the news and immediately went to SATAI and, after a short conversation, killed him by striking him on the head with great force with the back of the axe (Exhibit "A").

The details of the conversation given were very unsatisfactory owing largely to the lack of education of the witnesses and the inadequate facilities for interpretation. It appears to be certain that accused first challenged SATAI and told him in substance that he could not "marry" UTAU. It appears most probable that SATAI gave some answer to this, and in the absence of satisfactory evidence, I think I should infer that he refused to leave UTAU alone. It is not improbable that whatever answer was given was such, or was given in such a way, as to enrage the accused further. I have no doubt that the killing took place immediately afterwards. I have considerable doubt on the evidence whether the accused would have killed SATAI if SATAI had shown any willingness to cease committing adultery, or had given some different answer.

SATAI's wife, also named UTAU, who was present at the time, was in the best position to give clear evidence of the conversation, but she contradicted herself repeatedly, and her evidence was most unsatisfactory. Moreover, she clearly bore strong resentment

against the accused.

Having regard to the terms of Section 268 of the Code, I have to consider whether the answer of SATAI in the circumstances in which it was given, constituted or might have constituted provocation. I think that having regard to the position of the accused and his responsibility, his most likely reaction, considering him as an ordinary member of his village, would be to make an immediate attack of a forceful kind upon SATAI. Was the answer an unlawful act or insult? I think it likely that whatever was said constituted matter for grave offence, and with some doubt I think that it comes within the phrase "unlawful act or insult". The insulting ingredient which was most probably involved in the answer was, I think, greatly magnified by the circumstances existing at the time, to the knowledge of SATAI.

I think that in all the circumstances, the proper verdict is one of manslaughter, and I find accordingly.

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