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COPY

IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM :CHIEF JUSTICE.
1960.
Wewak.

THE QUEEN v. DABAT & 15 ORS.

Ruling

The accused were charged with the wilful murder of one Wabuo. The trial was held at Wewak from the 16th to 21st May 1960. Mr. Cervetto, Crown Prosecutor, appeared on behalf of the Crown, and Mr. O'Regan appeared as Counsel for the accused.

During the course of the hearing the Crown had elicited evidence from a native witness to the effect that the alleged offence took place three months previously. This was an obvious error but when the witness was invited to fix the time of other events from which a computation might be made, she stated that each of the events also occurred three months ago or at intervals of three months, and demonstrated that she was unable to give any accurate estimate of time.

The Crown then sought to fix the date by reference to the child of the witness which appeared to be about ten months old and was present in Court. It was proposed to ask the witness whether the child was born before or after her alleged abduction by the accused persons and to ask her who was the father of the child. Objection by the defence on the ground that this evidence might show the child to be illegitimate, or at least to show that it was probably so because the witness' husband, Wabuo, was allegedly killed by the accused in a raid, whereupon she was, according to the Crown case, abducted by one of the raiders, who had since died, and since that time she had been living with her own people. The legitimacy of the child might depend on whether the abduction of the witness was to be regarded as constituting a valid marriage, and what was the marital status of the witness when the child was conceived. It was not clear what circumstances might establish the child's illegitimacy.

RULING AFTER ARGUMENT:

The principle commonly referred to as the rule in Russell v. Russell (1924) A.C.687, does not apply to natives in the Territory unless it is proved that the parties concerned are subject to loss of inheritance of property or to rules of marriage and legitimacy which would support the application of the rule to them as a matter of public policy.

The general rule based on the experience of this Court is that children of natives living in uncontrolled areas are not subject to loss or disgrace by reason of any question of biological paternity. Before the rule could be applied to them in any particular case it would need to be established that there was a native custom relating to the child which satisfied the proper legal tests for a local custom, and which recognised a concept of illegitimacy or subjected the illegitimate person to a status that would justify the application of the rule as a matter of public policy.

The defence contended that the onus on this issue rested on the Crown. This point was not argued or decided.

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The Crown intimated that it was not in a position to call evidence to establish whether the child was affected by any circumstances which would subject it to any stigma associated with any concept of illegitimacy. The present line of questioning was therefore abandoned and an application was made to amend the indictment so that the date of the offence as alleged would be in or about the year 1959. No objection was made and the amendment was granted.

NOTE: In relation to Divorce and Matrimonial Causes; cf. Divorce and Matrimonial Causes Ordinance, New Guinea, Section 44, and Matrimonial Causes Ordinance 1941, Papua, Section 46.

REASONS FOR JUDGMENT

The Crown case is that the sixteen accused took part in a raid which had a dual purpose, i.e. the abduction of women as wives for some of the young men in the raiding party, and the killing and eating of any men who were found in the place from which the women were taken.

The charge against all the accused is the wilful murder of one of these men, who happened to be the husband of one of the women abducted. There is no direct evidence of an agreement between the participants to assist each other in murdering the deceased, Wabuo, so that the common purpose involved is to be found, if at all, from the observed actions of each participant, and from the inferences to be drawn from the conduct of the raiders as a body.

If, as Counsel for the defence ably put it, the purpose was the abduction of women, this circumstance alone does not support any inference that it was part of the plan to kill the deceased. On this hypothesis there is a distinction to be drawn between Section 8 of the Code and the common law. Unless it could be said that the killing of Wabuo was a likely consequence of such a raid, without expert evidence as to the social structure, practices and traditions of the particular people concerned, there is no ground for assuming that in this particular group, raids of this kind generally do or are likely to involve killings. The evidence does not identify or describe the particular culture involved, and known variations in other cultures are a warning against undue readiness to draw inferences against individual participants as to probable consequences.

In the absence of such evidence, therefore, I must decide the case on the actual facts proved.

I have no doubt that Wabuo was killed by a raiding party of Mianmins. The most unusual fact that a woman, Maye, took part in the raid and was allowed to take her brother, the witness Sowasa, captive, to save his life, is most significant. She herself had been captured in an earlier raid and with her Mianmin husband had made the journey with the raiders. I think it is quite clear that before leaving home it was known to some Mianmins that the men were to be killed and that a special exception would be made in favour of Maye's brother, if he submitted to capture by Maye.

I have only one version of the facts. It seems to me that this whole campaign was very carefully planned and ably led by Titimaua, and by Bogugsep, who was evidently setting an example for the younger men to follow. I think that every Mianmin present must have had detailed instructions on every stage of the operation.

It is known that these people live invery hard country with swamps and sago and scattered bush. These people are quite untamed,yet it would be wrong to call them primitive by Territorial standards. It was not a merely destructive raid. It was an economic and social one, designed to enhance the resources of the people. An educational or training programme for the young men is strongly suggested. The cannibalism was not merely a ritual. It was obviously an important part of the operation, for the leader, Titimaua, cut up the first body instantly Apominga was killed, and two senior men, Didepmonabo and Fafato, did likewise instantly the other two men were killed. The killing of the first victim fell to a senior and powerful man, Bogugsep, and thereafter the juniors came in, one by one, each to play his part with precise timing. The whole operation was over in a few moments. It seems to me quite unreal to suppose that any of the participants were unaware of any detail of the campaign.

I find, therefore, that an essential purpose of the raid was to kill any men found at the house, subject to a contingent exception in Sowasa's favour, and to use as much or such parts of their bodies as the raiders needed, for cannibalism.

The next question is whether each accused was proved to have participated in the raid.

The only evidence of identification comes from two captives,who were strangers to the Mianmins, and who observed the raiders under conditions which, to say the least, were most difficult. It is apparent that much aid to memory was supplied by Maye, who knew the men and probably knew the plans in advance. Maye was not called as a witness.

I think that there is no reason to infer that the witnesses made up their stories dishonestly, but they did strive to fix the appearance of the individuals in their minds from the start, with Maye's help, for the express purpose of being able to tell a Court at some future time a consistent story. Such a practice amongst natives is well known; in fact I would think it practically universal. It is often very difficult for the Court or the witnesses to distinguish between direct and second-hand evidence under these circumstances.

Discussions between witnesses to iron out inconsistencies are not objectionable if carried out honestly to help the witnesses arrive at the truth, but the witnesses themselves take such a subjective view of the facts and adopt other people's evidence so readily that discussions such as those that took place in this case must be taken seriously into account in assessing the weight of the evidence.

I have serious doubt as to whether some parts of Eibagei's evidence are really based on her own observation, but her story undoubtedly supports Sowasa's, and I think that a good deal of it was derived from her own recollection. I think that both witnesses showed a very clear recollection of individual faces. Their determined efforts to impress these faces on their memories on the way home was legitimate, and they have had many subsequent opportunities to refresh their memories of details of the appearance of these men. I do not think I should find that Maye did more than help Sowasa to sort out in his own mind and identify as persons those people whom he had just observed in the raid. Some he could not remember, and not all the raiders are in Court.

Each of the accused has been positively identified by Sowasa. His story stands uncontradicted, is complete and realistic, and derives more than general support from Eibagei. I accept his evidence without any feeling of doubt as to its accuracy.

I do not think any of the accused can plead superior orders as a defence. They acted under the pressures and stresses of their own society and environment, and in a broad sense had no real choice. Because we in our society look on raids of this kind with abhorrence, there is no reason for supposing that they regard them as anything but a necessary and desirable means of preserving their own community in its own particular economic and social environment. Section 31 can afford

no defence since no customary authority can displace the law in force.

Section 23, in my opinion, is not applicable, since the raid received the close co-operation and support of all its participants.

I return a verdict of Guilty of wilful murder as charged against each accused.

This case is one involving very special circumstances, and I think it is clearly a case in which I should record, rather than pronounce, Sentence of Death against each accused.

Chief Justice.

21/5/60.