SC 796

IN THE SUPREME COURT) CORAM: RAINE, J.

OF PAPUA NEW GUINEA) Monday,
24th June, 1974.

THE QUEEN v. WARAGO WAIYAPE, TAMU ANGAYA, WAPIRA TAJIA, KIPILA ELAPE and TIBARU ELAPE all of Homa

1974
June 18, 19,24
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RAINE, J.

Introduction

The Gospel according to St. Mark, Chapter XVI, Verses 16 and 17, reads:-

> "16. He that believeth and is baptized shall be saved; but he that believeth not shall be damned.
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> 17. And these signs shall follow them that believe; in my name shall they cast out devils; they shall speak with new tongues."

The above, and other references to the extirpation of bad and unclean devils and spirits in Chapters 1, 5, 6, 7 and 9, are important in this trial. See also St. Luke, Chapter VIII, Verses 27 to 35. It seems clear beyond peradventure that an over literal application of these references by largely untutored, uneducated and simple people resulted in the death of one Pororo Nari on the 19th March, 1974. I am satisfied beyond reasonable doubt that the accused, four men, and one woman, either as principals or aiders, stamped out, as they believed, an evil spirit or devil that inhabited Pororo. In fact, what they did was to stamp Pororo to death with their feet. Pororo's death, a physical and real event, is the matter that concerns me first of all, because the five accused are all charged with his wilful murder. The devil or evil spirit believed to reside in Pororo and its effect on the accused is the second major matter I have to consider, because the defence is automatism, and Mr. Russell of Counsel for the accused submits that what his clients did, or helped others of their number to do, was com-

1974

The Queen

v.

Warago Waiyape & Ors.

RAINE, J.

pulsive and non-malicious, and stemmed only from their literal application of the adjurations, per the New Testament, of Jesus Christ.

Facts

Homa is a village, or the name of a group of houses and people in the area inhabited by the Huri or Huli people, the administrative capital of which is the pleasant town of Tari. The evidence is that the Huri people have a belief in spirits, so that when told about spirits, or bad devils, by European missionaries, it must have been easy for them to embrace this part of the Christian doctrine. I have been to Tari on several occasions, and it is apparent to me that the Huri people, charming though they can be, are apt to become fierce and excitable at times.

About a decade ago a European religious group decided that the gospel should be taken to the Huri people. This was the Unevangelised (sic) Fields Mission. It has now been re-named, and is the Asian Pacific Christian Mission, or A.P.C.M. It is comprised of missionaries from many Protestant faiths, but once in A.P.C.M. these people are responsible, in the corporate sense, to A.P.C.M. It is a group that might be called Low Church, I was told that High Church Anglicans would probably not be adherents, whereas Low Church Anglicans might be. The reason for this is easy to see. Mr. Gould, of whom we will hear later, told me that A.P.C.M. was "solidly scripturally based," and that it was Evangelical, which possibly explains the change of name, the "unevangelised", as the group curiously described itself in the past, having achieved, in its view, I imagine, its ultimate salvation by faith.

According to Mr. Gould, who is a senior person in A.P.C.M., a very large proportion of the Huri people is under A.P.C.M. spiritual domination. The "solidly scripturally based" teachings of A.P.C.M., its Low Church approach, its deadly earnestness, and deep devotion, because Mr. Gould has convinced me, not only

as to his earnestness and devotion, but also of A.P.C.M.'s, means that the Bible is the fountain from which all teachings flow in Huri areas affected by A.P.C.M. It is important to appreciate this. As I understand it there is a vast difference between the High Church and the Low in the Anglican faith, the latter being far more rigid in its application of Biblical teachings, and far less willing to abandon rigidity of interpretation in favour of a rather more sophisticated and intellectual approach.

An understanding of these matters is required, as will be seen when I set out what I find to be the facts. I might add that Mr. Russell did not say a word in his address about the manner of the death of the deceased. He did not seek to absolve any one of his clients "qua" physical participation. As a result of some remark that fell from the Crown Prosecutor, I invited Mr. Russell to address me on what I might call "the physical issues". He did not do so, and I do not make that observation critically. There is abundant evidence that all the accused played major roles in the killing of Pororo.

I am satisfied beyond reasonable doubt that the five accused persons killed Pororo, Tamu being, on the highest of probabilities, the man who actually caused his death. But all the other four played significant roles, and I have not got the slightest doubt that all five accused would be guilty of murder or wilful murder, but for the defence of automatism. I should add that unlike the recent case in Maprik, no attempt was made to raise insanity, nor could it have succeeded, in my view. All the accused seem to me to be basically sensible, normal people, I saw no signs of mania, they all behaved in a collected sort of way, and they followed the trial closely.

The trouble commenced on the Sunday prior to the death of the deceased. On this day he apparently saw all or some of the accused and spoke about their adherence to religion in a slighting way, no way to speak to Huris who believe that the Thing Holy, or Holy Spirit, is in them. All or some of the accused responded to this slight in the cruel and violent way that has marked many Christian religionists over the centuries. The mocker was violently assaulted, the

Faith defended, and Pororo was hurt, and quite seriously so. The accused said that the Devil was in or with him.

Pororo was obviously a man of some spirit. He protested the beating he had received, he put the accused to the test and suggested that the religionists try their hand on his deaf and dumb father, thus proving the Holy Spirit they innocently believed dwelt within them. He went to his father, told him of the problem, and the old man, as he must have been, submitted himself to the accused. Far from receiving any miraculous relief, the deceased's father had a comb, or part thereof, inserted in his ear by Warago. The old man ran away, the promised boon of hearing was not for him. No doubt the bamboo comb hurt.

Unfortunately the deceased, no doubt rather irritated at having been beaten up on Sunday, returned to the fray. On the day of his death he taunted the religionists with their failure to effect a miracle, and threatened them with secular Court proceedings for assaulting him on the previous Sunday.

One of the accused, at least, suggested that the Sunday treatment had not succeeded in getting the Devil out of Pororo, and a more earnest endeavour to do so was then made. Probably Tamu played the most significant role, but all the other four accused helped in a very real way. See Section 7 of the Code.

One needs little imagination, hearing the evidence, to imagine why Pororo died. However, his body, and it was established beyond all doubt that it was Pororo's body, was exhumed, and examined by Dr. Helmer quite a long time after burial. It was remarkably well preserved, although the brain tissue had decayed. Dr. Helmer was therefore unable to say whether there was cerebral damage flowing from massive injury to the jaw of the deceased. Be that as it may, he was able to find clear evidence pointing to at least one cause of death, for five-sixths of the deceased's ribs had been fractured, and about half of these had multiple fractures. The ends of some would have perforated the contents of the chest cavity on each side, and such was the state of

preservation the doctor could detect signs of bleeding from the lower lobe of the left lung. But regardless of the effects of a puncutred lung left untreated, Dr. Helmer stated, and I accept him, that Pororo would have perished in any event, as a result of the mechanical obstruction to his breathing. The doctor discounted the possibility that some or all fractures were caused by pall bearers dropping the body after death. I accept Dr. Helmer on this point. In any event, there is no evidence that the corpse was dropped.

I am satisfied beyond reasonable doubt that the accused killed the deceased. The violence associated with his death, and the background of irritability, would convince me that the accused either meant to kill or seriously harm the deceased, but for the defence of automatism, which could bring section 23 of the Code into play.

The defence of automatism

I thank both counsel for their hard work in referring me to just about every useful reference to the defence of automatism that there is, because this is the first time, as a barrister, or a judge, that I have ever had to consider the problem, barring a case I had involving duress, many years ago. On my return to Port Moresby during the weekend I only found one other authority, the one I thought existed, and mentioned to Counsel during argument. This is the case of Ryan v. The Queen (1). With great respect to the High Court I found its discussion of critical cases such as Bratty v. Attorney-General for Northern Ireland (2) of great assistance. Ryan's case (supra) (3) and R. v. Quick, R. v. Paddison (4) it seems to me, round off the law on the subject. Factually Ryan's case (supra) (5) is not helpful, it was an "involuntary squeeze of the trigger" case, but this does not mean that the discussion of principle was of no value to me.

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(1) (1966,1967) 121 C.L.R. 205
(2) 1963 A.C. 386
(3) (1966,1967) 121 C.L.R. 205
(4) (1973) 3 A.E.R. 347
(5) (1966,1967) 121 C.L.R. 205

Having heard the evidence, and given due weight to the statements from the dock, which, making allowance for the type of people the accused are, raise the automatism issue, I certainly accept that the accused were angry and upset. I also accept that they were carried away to a considerable extent by their understanding of new beliefs, which touched on ancient beliefs of their own "qua" the spirit world. A.P.C.M. teachings, reduced into the Huri or Huli language, large segments of the scriptures having been translated into Huri by Mr. Gould, are clearly a dominant feature of Huri life, in areas dominated by this missionary body.

Mr. Gould, when pressed, expressed the view that the people acted from "a definite misunderstanding." He said, "They have interpreted everything from their own cultural belief." However, he did agree that his group believed, and preached, that humans could be inhabited by devil beings, not necessarily the so-called Devil, meaning Satan, but devil beings who come from a spirit world. He clearly distinguished the case of persons with inbuilt personality weaknesses from the case of those inhabited by these spirits.

But without making any attack on Mr. Gould, whom I think is a decent man, I do believe, with great respect to him, and his fellow-missionaries, that the efforts to proselytize the Huri people have led, very largely, to the death of Pororo.

An over literal application by simple folk of teachings as to the casting out of devils will probably only lead, as here, to disaster. I fear that I incline strongly to the view that over-rigid teaching and non-comprehending acceptance of the Bible is at the root of this quite unnecessary death. It is not the first time, nor will it be the last, that the boons brought by missionary zeal are somewhat cancelled out by other factors. See Mr. Alan Moorehead's brilliant work, The Fatal Impact.

I believe I have sufficiently stated my views on the underlying situation that led to the killing of Pororo. Is automatism a defence?

Firstly, is the defence raised? Should it be left to my jury half to consider? Of course, once it is, then, unlike insanity, the onus is upon the Crown to prove that the accused were not acting independently of their will.

From the numerous authorities and writings I had the chance to read during the weekend it is tolerably clear that the courts lean against allowing the defence to be raised for flimsy reasons. Thus, in Quick (supra) (6) at p. 355, Lawton, L.J. said, ".....this quagmire of law seldom entered nowadays save by those in desperate need of some kind of a defence....." And see the underlined portions I have quoted (infra) from the judgment of Barwick, C.J. in Ryan (supra) (7) at p. 217.

In Bratty v. Attorney-General for Northern Ireland (supra) (8) at p. 413 Lord Denning, after discussing the presumption of mental capacity, "a provisional presumption", as he puts it, and distinguishing, "qua" onus of proof, the onus situation there from the situation in the case of insanity, said, "In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary." And at p. 414 His Lordship continued, "Once a proper foundation is thus laid for automatism, the matter becomes at large and must be left to the jury. As the case proceeds, the evidence may weigh first to one side and then to the other: and so the burden may appear to shift to and fro. But at the end of the day the legal burden comes into play and requires that the jury should be satisfied beyond reasonable doubt that the act was a voluntary act."

In Ryan (supra) (9) at p. 217, Barwick, C.J. said, "If voluntariness is not conceded and the material to be submitted to the jury wheresoever derived provides a substantial basis for doubting whether the deed in question was a voluntary or willed act of the accused, the jury's attention must be specifically drawn to the necessity of deciding beyond

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(6) (1973) 3 A.E.R. 347
(7) (1966,1967) 121 C.L.R. 205
(8) 1963 A.C. 386
(9) (1966,1967) 121 C.L.R. 205

all reasonable doubt that the deed charged as a crime was the voluntary or willed act of the accused. If it was not then for that reason, there being no defence of insanity, the accused must be acquitted. No doubt care will be taken by the presiding judge that the available material warrants the raising of this specific issue.....Although a claim of involuntariness is no doubt easily raised, and may involve nice distinctions, the accused, if the material adduced warrants that course, is entitled to have the issue properly put to the jury." (The underlining is mine).

At first I was rather doubtful, but on reflection I have decided that the evidence and the statements of the accused discloses sufficient material to raise the defence. In Ryan (supra) (10) at pp. 214 and 215, Barwick, C.J., so it seems to me, says, in a different way, what Lawton, L.J. said in R. v. Quick (supra) (11) at pp. 354 to 356, and I will set out the two passages in a moment. It is not easy to grapple with the problem. The reasons for this are, with respect, made very clear by Windeyer, J. at pp. 244, 245 and 246 of Ryan (supra) (12).

At pp. 214, 215 of Ryan (supra) (13) the Chief Justice said, and he was referring to Bratty (supra) (14):-

> "Before taking any passages from the report of the second of these cases, I should like to make some observations upon it. The involuntary quality which was claimed for the deed in that case was said to be due to psychomotor epilepsy and was described as automatism. But it is important, I think, in citing from their Lordships' judgments not to regard this description as of the essence of the discussion, however convenient an expression automatism may be to comprehend involuntary deeds where the lack of concomitant or controlling will to act is due to diverse causes. It is that lack

(10) (1966,1967) 121 C.L.R. 205
(11) (1973) 3 A.E.R. 347
(12) (1966,1967) 121 C.L.R. 205
(13) (1966,1967) 121 C.L.R. 205
(14) 1963 A.C. 386

which is the relevant determinant. Lord Denning ((1963) A.C., at pp. 409, 410) indicates some of the various states of mind or of memory which need to be distinguished from this lack of accompanying or controlling will. It is of course the absence of the will to act or, perhaps, more precisely of its exercise rather than lack of knowledge or consciousness which, in my respectful opinion, decides criminal liability. It is quite clear that his Lordship's emphasis in his speech in Bratty v. Attorney-General for Northern Ireland ((1963) A.C. 386) is really upon the lack of the exercise of will, for he includes amongst the deeds which automatism may cover, a dead the result of a spasm, of a reflex action or of a convulsion. And with this treatment of the matter I would respectfully agree.

I would then observe that a distinction must be maintained between an unwilled act and a willed act the product of a diseased mind which knows not the nature or quality of the willed act. To express it with what may well be technical inexactitude, it may be said that in the latter case the act is willed by a diseased will in contradistinction to the act which is not willed at all. That to my mind is the core of Bratty v. Attorney-General for Northern Ireland ((1963) A.C. 386), and the essence of the distinction between the case of a sane and an insane accused."

In R. v. Quick (supra) (15) at pp. 354, 355 and 356 Lawton, L.J. said:-

"There has, however, been a decision in Victoria about the criminal responsibility of a woman alleged to have been suffering from concussion when she did the criminal acts alleged against her, namely wounding with intent to murder, wounding with intent to do grievous bodily harm and dangerous driving: see R. v. Carter ((1959) V.R. 105). At the conclusion of the evidence in that case the

(15) (1973) 3 A.E.R. 347

trial judge, Sholl J, had to rule whether the evidence about post-traumatic automatism raised an issue of insanity for the jury to consider. He decided that it did not. He stated that he was not satisfied that the mental condition associated with concussion did amount to a defect of reason and that even if it did, it could not be said to have arisen from a disease of the mind. He said ((1959) V.R. at 110):

'The term 'disease' in the M'Naghten ((1843) 10 Cl & Fin 200, (1843-60) All E.R. Rep. 229) (sic) formula is not used, I think, with reference to a temporarily inefficient working of the mind due only to such outside agencies as alcohol or drugs or applied violence producing trauma, and I say that notwithstanding the width of the words used by Dixon, J., in Porter's Case ((1935) 55 C.L.R. 182 at 188, 189), when he said to the jury '..... his state of mind (the accused's) must have been one of disease, disorder or disturbance. Mere excitability of a normal man, passion, even stupidity, obtuseness, lack of self-control and impulsiveness, are quite different things from what I have attempted to describe as a state of disease or disorder or mental disturbance arising from some infirmity, temporary or of long standing.....That does not mean .....that there must be some physical deterioration of the cells of the brain, some actual change in the material, physical constitution of the mind, as disease ordinarily means when you are dealing with other organs of the body where you can see and feel and appreciate structural changes in fibre, tissue and the like. You are dealing with a very different thing - with the understanding. It does mean that the functions of the understanding are through some cause, whether understandable or not, thrown into derangement or disorder.' As I say, His Honour's words are perhaps wide enough, as indeed are perhaps some words of Devlin, J., in Kemp's Case ((1956) 3 All E.R. 249, (1957) 1 Q.B. 399) to cover any temporary malfunction or disorder of the mind, but I think that I ought

not to take the words 'disease of the mind' so far.'

In the course of argument in this case, counsel for the Crown, who no doubt had in mind what Viscount Kilmuir, L.C. and Lord Denning had said in Bratty v. Attorney-General for Northern Ireland ((1961) 3 All E.R. at 528, 535, 536, (1963) A.C. at 403, 414), conceded that Carter's case ((1959) V.R. 105) was rightly decided notwithstanding that it is not easy to exclude on any logical basis mental malfunction due to concussion from the embrace of the concept of disease of the mind as defined by Devlin, J. in R. v. Kemp ((1956) 3 All E.R. at 253, (1957) 1 Q.B. at 407). If concussion is to be excluded, why should not imbecility arising from gross brain damage caused by an injury also be excluded? In one case the brain damage is probably limited to bruising, in the other to severe lesions. When asked by the court why an accused person seeking to relieve himself from responsibility for a criminal act by leading evidence about concussion should not be deemed to be raising an issue of insanity, counsel for the Crown answered: 'Expediency.'

In R. v. Foy ((1960) Qd.R. 225) the Queensland Court of Criminal Appeal dealt with a case in which an accused had put forward a defence of automatism alleged to have been brought about by epilepsy. The decision turned on problems of evidence and the onus of proof, but one of the judges, Philp, J. traced the legal concept of 'disease of the mind' back to Hale's Pleas of the Crown ((1682) Vol. 1 Ch. IV) and came to this conclusion ((1960) Qd.R. at 243):

'In my view the expression 'disease of the mind'... means the dementia of every description to which Hale referred.....In modern parlance the expression 'disease of the mind' can certainly include any disorder or derangement of the understanding - any destruction of the will.'

If by 'modern parlance' the learned judge meant 'as

commonly understood', we disagree.

In Cooper v. McKenna, ex parte Cooper ((1960) Qd.R. 406), the full court in Queensland, in a case involving a defence of automatism based on concussion, followed Carter's case ((1959) V.R. 105) and in the course of his judgment Stable, J. said ((1960) Qd.R. at 419) that he was unable to accept the wide concept of 'disease of the mind' which Philp, J. had supported in Foy's case ((1960) Qd.R. 225).

In this quagmire of law seldom entered nowadays save by those in desperate need of some kind of a defence, Bratty v. Attorney-General for Northern Ireland ((1961) 3 All E.R. 523, (1963) A.C. 386) provides the only firm ground. Is there any discernible path? We think there is - judges should follow in a common sense way their sense of fairness. This seems to have been the approach of the New Zealand Court of Appeal in R. v. Cottle ((1958) N.Z.L.R. 999) and of Sholl, J. in R. v. Carter ((1959) V.R. 105). In our judgment no help can be obtained by speculating (because that is what we would have to do) as to what the judges who answered the House of Lords' questions in 1843 (10 Cl & Fin 200, (1843-60) All E.R. Rep. 229) meant by disease of the mind, still less what Sir Matthew Hale meant in the second half of the 17th century ((1682) Vol. 1, Ch. IV). A quick backward look at the state of medicine in 1843 will suffice to show how unreal it would be to apply the concepts of that age to the present time. Dr. Simpson had not yet started his experiments with chloroform, the future Lord Lister was only 16 and laudanum was used and prescribed like aspirins are today. Our task has been to decide what the law means now by the words 'disease of the mind'. In our judgment the fundamental concept is of a malfunctioning of the mind caused by disease. A malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences cannot fairly be said

to be due to disease. Such malfunctioning, unlike that caused by a defect of reason from disease of the mind, will not always relieve an accused from criminal responsibility. A self-induced incapacity will not excuse (See R. v. Lipman (1969) 3 All E.R. 410, (1970) 1 Q.B. 152) nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as, for example, taking alcohol against medical advice after using certain prescribed drugs, or failing to have regular meals whilst taking insulin. From time to time difficult borderline cases are likely to arise. When they do, the test suggested by the New Zealand Court of Appeal in R. v. Cottle ((1958) N.Z.L.R. 999) is likely to give the correct result, viz. can this mental condition be fairly regarded as amounting to or producing a defect of reason from disease of the mind?"

(The underlining is mine).

Having held that the defence is raised, and after a consideration of the above, and other authorities, I now come to consider whether it succeeds. I pause to say that the factual aspects of the defence do not put me off. History has given us many instances of what can happen when people are gripped by strong emotions. "Mob hysteria" is a rather overworked expression, but, nevertheless, one is impelled to believe that there have been instances of it. Where the "mob" is comprised of simple folk, easily convinced, easily roused, and still fairly primitive, then the "hysteria" is more likely to be real hysteria, and mind destroying, the more likely to cause "malfunctioning of the mind", or "the lack of the exercise of will." Thus it is I do not dismiss a defence such as this out of hand.

However, giving it my best attention, and appreciating that the Crown bears the onus of proof, I am satisfied beyond reasonable doubt that the defence has not been made out, or, put more correctly, I am satisfied beyond reasonable doubt that what the accused people did was voluntary, and that their minds went with their acts.

For a start, there is no medical evidence. This is by no means fatal to the accused. There will be many cases where it would be quite unnecessary. Thus, where there was plenty of evidence that a man had received cerebral injuries, and the changes in his behaviour became clearly visible to trustworthy witnesses called at his trial, then I do not think that a judge would always need a medical practitioner to guide him, although I hasten to add that this would be preferable. In many cases, however, a medical assessment would be essential.

The view I take in this case is that while medical assistance might have been helpful, and I mean specialist assistance, it was not vital. The evidence of an anthropologist familiar with the Huris might also have helped.

These matters I have adverted to in a general way were very carefully considered by Williams, J. in R. v. Hembopi Nakipi (16). I was greatly assisted by this judgment, if I might say so. The facts, however, are very different than in the instant case.

In deference to the care with which the defence was developed, and argued, I have dealt at some length with matters raised by Mr. Russell, and it is not out of disrespect that I deal very shortly with the only real issue raised in the case.

Let me say immediately that I accept that the accused were upset and hurt by the deceased, and were angry with him, and I also accept that they had an over-literal understanding of the need expressed in the Bible to drive evil spirits out of human bodies. As I have already indicated, the accused were simple, rather primitive folk. No doubt they were upset when their Thing Holy or Holy Spirit was doubted and their attempted cure of Pororo's old father was a great failure. He remained deaf and dumb.

But all this had started the previous Sunday to the killing. It is quite clear to me that these people thought

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(16) Unreported, No. 646, 16th September, 1971

they had been over generous to Pororo on Sunday, and that when he jeered at them on the day of his death they clearly remembered Sunday, and were made angry and aggressive. Their ability to restrain themselves was probably lessened to some extent, but that is not to say that their minds did not go with their acts.

There is a vast difference between bad, or even foul temper, and "malfunctioning" of the mind, where the malfunction results in "transitory" changes that result in the victim behaving in a quite out of the ordinary way, in a way quite foreign to him.

I find that what happened on the Sunday, and the failure to work a miracle on the deceased's father, put the accuseds' noses well and truly out of joint.

It is quite clear to me that preceding events were very well remembered by the accused on the day of the killing, they knew perfectly well what they were doing, albeit that they were aroused and angry. I feel compassionate, but my present task is to decide on the question of guilt. I am satisfied beyond reasonable doubt that the accused set out either to kill Pororo, or to do him grievous bodily harm. I see no room for a verdict of manslaughter, "Except in point of compassion under the common law" as Barwick, C.J. puts it at p. 219 of Ryan (supra) (17). Such a merciful approach might be taken by a jury of twelve, but I cannot see my way clear to adopt it.

My choice is between wilful murder and murder. After anxious reflection I am unable to be satisfied beyond reasonable doubt that the accused meant to kill Pororo, that they deliberately put him to death. I do accept, as I have indicated, that they were well and truly worked up. However, I am completely satisfied beyond reasonable doubt that they set out to inflict the most serious and grievous bodily harm and that Pororo died as a result thereof. I therefore acquit the accused of wilful murder as charged, but find them guilty

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(17) (1966,1967) 121 C.L.R. 205

of murder.

On the question of sentence it will be obvious to Mr. Russell that this judgment raises matters that will deter me from imposing sentences at the higher end of the scale.

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

Solicitor for the Accused: G.R. Keenan, Esq., Acting Public Solicitor