

5C 323

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

CORAM : OLLERENSHAW, J.

Thursday, 16th April, 1964.
at 3 p.m.

THE QUEEN

-v-

HILL

Trial at
Samarai:
6th, 7th, 8th,
9th, 10th,
11th, 13th,
14th, 15th
and 16th
April, 1964.

J U D G M E N T

The accused person, Harold Cyril Hill, is charged that on or about the seventeenth day of September, 1963, he unlawfully killed one PILIPO-SWANSON, that is to say that he killed him in such circumstances as did not constitute wilful murder or murder but still unlawfully and so committed the crime of manslaughter under section 303 of the Criminal Code.

At the material time the accused was the manager of Sewaitaitai Plantation on Normanby Island, some eight hours walking distance from Esa'ala, the Administration station on that island, and Pilipo, the victim, was his "boss-boy" there.

Quite a bond existed between these two people. Pilipo had been the accused's "boss-boy" for five years while he was managing another plantation and when the accused commenced his employment at Sewaitaitai in February, 1963, he took Pilipo with him because of his faithfulness and loyalty.

In the evening of the 17th September the accused had Pilipo with him in his lounge to discuss a plantation labour matter and later Pilipo joined the accused in having a drink with Arebi, the native captain of a small vessel that had called at the plantation that evening.

In the accused's house there were also three house-boys, who were concerned in preparing

his evening meal. When this was ready at seven o'clock the accused did not sit at his dining table but had his meal sitting in his arm chair. Arebi, the captain, was sitting in another arm chair opposite the accused and Pilipo was sitting on the floor. Nearby there was a table on which there were a radio and a tape recorder.

Having had his meal the accused went to interview some twelve labourers, who, so Pilipo had told him, were waiting to see him just outside the tall wire fence that enclosed his house and grounds from the plantation itself. These labourers were requiring or demanding to be paid-off by the accused and this he had no intention of doing, at least, he had no intention of paying-off all of them. Before going to them the accused took his 7.65 (or .32) calibre self-loading M.A.B. pistol from a drawer in which he kept it in his bedroom upstairs in the house and he stuck it in the waist-band of his trousers. He says that he did this because Pilipo had told him that the labourers had their bush knives with them and he, the accused, believed that their attitude was hostile.

The interview was satisfactorily and entirely concluded and the labourers returned to their quarters some 800 to 900 yards away from the back of the house.

The accused and Pilipo returned to Arebi and their places in the lounge. The three house-boys, who meanwhile had cleared away the dining things, came from the kitchen and joined them, sitting with Pilipo on the floor of the lounge room.

Upon returning to his chair the accused put his pistol on another chair, which he had in front of him to support his feet.

At his invitation and instruction the three house-boys were each given a bottle of beer and the accused, Arebi and Pilipo continued to take their drink.

The accused played his tape recorder,

recording and playing back the voices of the natives and later playing music which he had recorded by tape from his radio. It seems that a most pleasant evening was being enjoyed by all these people until Sami, one of the house-boys, who had left to go to his quarters, returned explosively into this agreeable atmosphere. The labourers at his quarters had just made fun of him because of something Ginger, another of these house-boys, had said about him to them and he returned and angrily abused and assaulted Ginger.

The accused, who appears to have been concerned at this outburst in his house, eventually, and after hitting Sami with his open hand, succeeded in quieting him and he caused Sami and Ginger to shake hands.

At some stage, either before he had made Sami and Ginger shake hands or after the disturbance between them was over, he accused took his pistol from the chair, walked from the lounge section of the room through the dining section to his front door and, standing just within the open doorway and facing into the night, he fired two shots to his front. He then returned to his lounge and, the tape on the recorder just about being run out, he replaced it and resumed his seat.

A little while later the dead body of Pilipo with a bullet wound in his forehead and lying outside and near the front doorway was found by one of the house-boys. The evidence as to just exactly where it was is, like much of the evidence in this trial, conflicting but taking the accused's evidence as well as some of the native evidence, the body was slightly to the right of the doorway and the nearest part of it to the doorway was some three to four feet from the doorway.

It is not and could not be disputed that one of the two bullets fired by the accused entered Pilipo's head through his forehead and killed him, either instantaneously or almost instantaneously.

It is not alleged by the Crown that the

accused knew that Pilipo was in front of his pistol when he fired or that the accused fired intentionally to hit or kill Pilipo. That would be wilful murder and the charge is only manslaughter. It is true that upon such a charge it may appear during the trial that it is a case of wilful murder, in which event a jury, or a Judge acting as a jury, may find wilful murder but must return a verdict of manslaughter.

Although a ready solution of some of the mysteries immediately surrounding the death of Pilipo would be to say that it must be a case of wilful murder, the Crown agrees that that course would be improper in this trial. Although I, as a jury, may consider the probabilities as well as the evidence and I may draw inferences from the evidence, I may not go beyond inference to what is merely suspicion. It is part of the glory of our legal system that an accused person must be tried upon evidence and the probabilities and inferences reasonably arising from that evidence. It would be a denial of our principles of justice to try him upon suspicion and speculation.

In this connection it is fair to recall that there was a bond of loyalty between the accused and Pilipo, the result of nearly six years of close association, and that on this very night their relationship continued right up to the last to be of a most harmonious nature. There is not the slightest suggestion from any of the four witnesses, who were in the room with the accused and Pilipo, that anything had occurred to cause even the smallest rift in this relationship.

The Crown case is and must be based upon Section 289 of the Code, which covers the question of the criminal responsibility of a person in charge of a dangerous thing, such as a pistol.

In short, the Crown alleges, as it must that when the accused fired his pistol in the circumstances then existing he was guilty of criminal negligence. It is most important in this trial to observe that it is not merely negligence that the

accused is charged with. Negligence of itself creates no criminal responsibility although it does create a civil liability to pay compensation for injuries or loss inflicted in consequence of the negligence.

It has been decided beyond argument that what must be proved is criminal negligence as it is known in the common law of England. This has been established by the cases: R. v. Scarth (1945) St.R. Qd.38, decided upon Section 289 of our Criminal Code by the Full Court of Queensland, Callaghan v. The Queen (1952) 87 C.L.R. 115, decided by the High Court of Australia upon a section of the Criminal Code of Western Australia in terms similar to Section 289, and Evgeniou v. The Queen, quite recently decided in the High Court of Australia upon our Criminal Code.

The standard of what is called criminal negligence has been considered and described in many cases, perhaps most clearly and emphatically by Hewart, L.C.J., in the classic case of R. v. Bateman (1925) 19 Cr. App. R. 28.

I will not repeat what Lord Hewart there said - it is set out in R. F. Carter's "Criminal Law of Queensland" at page 147 and is cited briefly in the judgment of Taylor, J. in Evgeniou v. The Queen (supra) - nor what other Judges have said in describing criminal negligence.

It all, in my opinion, amounts to this: that a person is not criminally, as distinct from civilly, responsible for his negligence unless he acted with reckless indifference to human life or safety, that is to say in a case like this unless the accused person fired the pistol in circumstances in which a reasonable person, not a peculiarly overcautious person might have expected someone to be in the way of the bullet and did not care whether or not there was such a person whom he might hit.

It is sometimes difficult for lay people to understand this notion of criminal negligence, particularly those people who are interested on behalf of the deceased victim or on behalf of the accused person. One may say: "The accused's finger

deliberately pulled the trigger and his bullet killed the man. Why should he not be convicted and sent to gaol?" Another, on the other side, may say: "He did not know the man was there, he did not intend to shoot him, it was an accident and he should be acquitted and sent away freed of this charge of manslaughter."

Putting it simple the law takes a middle course and says: "Granted that he did not intend to shoot the man and so he should be acquitted unless he fired with reckless indifference in circumstances in which he should have expected someone to be in front of his pistol and not caring whether his bullets hit anyone or not."

The accused has created some difficulties for himself in this trial; firstly, by his early efforts to cover up his shooting of Pilipo from his labourers and to conceal it from the officers of the Department of Native Affairs, who came from Esa'ala to the plantation to investigate Pilipo's death, and secondly, by much of his evidence in his trial. From time to time during this trial I consider that he has shaped his evidence in a way that he thought suited his case and then again, when upon reflection it has occurred to him that what he has already said may really be unfavourable to him, he has changed it. I do not think that I could rely upon his evidence unless it is supported by other evidence or the circumstances or probabilities.

However, because it was a bullet fired by him that killed Pilipo the accused was and has been in jeopardy and I would not be fulfilling my judicial task unless I realised that, although some men in jeopardy bear up with fortitude and truth, weaker vessels behave in different ways and I must, where I think it necessary, protect the accused from himself, in the sense of not judging his criminal responsibility in the event by his conduct after it. I think that this is particularly so in this trial because I do not consider that he, himself, would understand the concept of criminal negligence upon which his criminal responsibility depends. In

fairness I should say that his conduct since the event may have been contributed to by the anxiety state, which he has been certified to suffer from for many years.

There has been much requiring my consideration upon this ultimate issue of criminal negligence, but before stating my conclusion I should refer to some of the subsidiary issues that have been debated.

The accused had the pistol in his immediate possession there in his lounge room because he had got it from his bedroom and taken it to the interview with the labourers. I am satisfied that this was not a measure or precaution necessary for his own or Pilipo's safety, whatever other purpose it may have served.

He claimed, in this trial, that he fired the pistol to assist him to prevail upon Sami to stop his abusing of Ginger and to prevail upon Ginger to stop his crying or wailing. I am satisfied that when the accused fired the pistol this disturbance was already over.

I think that the accused fired the pistol, that was there ready to his hand, to assert his ego as a man with a gun and that this is the "unknown reason" to which he referred in attempting to explain his action to Inspector Holt. I do not doubt that the events of the evening, the interview with the labourers, the conduct of Sami and the accused's part in endeavouring to and succeeding in subduing it, the effect of some drink and the presence there of the pistol all led up to and contributed to the assertion of his ego by firing off the pistol twice.

I would add, in this connection, that it is abundantly clear to me from the evidence of the accused, himself, as well as the evidence of the native witnesses that the accused is a person who should not be permitted to have possession of a firearm and this view is strengthened if not confirmed by the evidence tendered on his behalf to prove that for many years since he was blown up with his gun - a piece of artillery - in the last war the accused

continues to suffer from an anxiety state. If such a prohibition against his possession of a firearm means that he cannot engage in his occupation of a plantation manager upon plantations situated where their circumstances require possession of a firearm as a safety precaution then it must follow that the accused should not be engaged upon such a plantation.

However, these two findings do not conclude the question of his criminal responsibility for the actual firing that killed in the circumstances that existed at the time and I come briefly to some of the issues upon these circumstances.

Was the door open or closed when the accused went to it just before he fired from the doorway?

The significance of this is, it was submitted for the Crown, that if it were open it would have been some indication to the accused that there might be someone out on the front path or front lawn, who had gone out with the intention of returning shortly and so did not close it. As all the other members of the gathering were in the room at the time of firing this could have been only Pilipo, who was not in the room at that time.

Although I think that all the probabilities point to the door being closed, the evidence is so conflicting that it is impossible to come to any conclusion that would be of any safe use. In any event, in the upshot as I see the case broadly for my purpose, I do not think that it makes any difference substantial enough to be real, whether the door was open or shut.

Was the dining room light on?

Here, too, the evidence is most conflicting. Usually this light would have been off when the lounge section, and not the dining section of the room was in use. However, I think that this light would have been switched on when the servant put the food on

the dining table, before the accused took his plate to his arm chair, if at no other time. In all the circumstances, including the presence of the visitor and the party in the lounge section of the room, I think it is not unlikely that it was still on when the accused went to the door to fire. However, the evidence does not permit me conclusively to make a safe finding. In any event, having regard to the case as a whole, I do not think that it makes any difference substantial enough to be a real difference. It is undisputed that the accused, immediately before he fired, had been sitting under the light in the lounge section of the room; he looked out from the dining section of the room, which was lighted to some extent, into the dark outside, and so I think he fired blindly. In all the circumstances I do not think that such light as fell outside through the doorway and one gauzed and one gauzed and curtained window is of real significance.

Did the accused know that Pilipo was not inside when he fired and the issue collateral to this, namely, should he have realised that Pilipo was or might be outside on his front lawn or on the dirt path between the house and the lawn?

Except for one small but significant slip in this trial the accused now maintains and evidence has been led and submissions made by his Counsel to show that the accused did not know and should not have known that Pilipo was not inside in the room when he fired. This was not the purport of his earlier statements.

I am entirely satisfied that the accused did know, when he went to the door and fired out through the open doorway, that Pilipo was not inside in the lounge or dining section of the room.

I would doubt that the accused saw Pilipo leave the room or knew when it was that he left, but I have no doubt that he became aware of Pilipo's absence shortly after his departure.

It is difficult to determine how long it was after Pilipo had left the room that the

accused went to the door and fired, more particularly because of the notorious inability of native witnesses to recall the duration of time lapses and their difficulty in conveying or communicating what their recollection of such lapses may be in other than such phrases as a short time, a long time, a medium time or equally vague variations thereof.

The impression I have from the evidence of the native witnesses, confirmed by the circumstances and probabilities, is that an appreciable time had elapsed after Pilipo's departure before the accused fired. It is probable, for instance, that Pilipo left before or shortly after Sami's outburst and, as I have found, the accused went to the door after the affair between Sami and Ginger had been finally settled.

I consider it not unreasonable to conclude that as far as the accused was concerned, and as far as any ordinary person in his shoes at that time would have been concerned, Pilipo had, as it were, gone out of the picture and out of his mind. If he did happen to think of the possibility of Pilipo returning after the time that had elapsed since he noticed his absence, it was just as likely, if not more likely, that Pilipo would come in by the kitchen door at the back.

Coming to the actual firing and the vital question as to whether, in all the circumstances, it was done with what would amount to a reckless indifference to human life or safety, the evidence shows that the accused fired over an area comprised of his front lawn, situated within the six foot wire-netting fence, which enclosed the grounds associated with the house, and beyond that, between the fence and the sea, a swamp stretching across the front of the lawn and from 300 to 400 yards away from it to the sea.

The lawn was forbidden to natives at any time and the swamp was uninhabited and unfrequented. The entrance to the grounds surrounding the house was by a gate at the back of the house, from which

gate a concrete path led to the kitchen door, which also was at the back of the house. This was the usual means of access to the house, particularly by natives, although from the concrete path there was a dirt path going around the house and past the front door.

In all the circumstances I do not think that the accused or any ordinary prudent man in his position would have expected Pilipo or anyone else to be within his range of fire whether he fired squarely to his front or some degrees to his left or some degrees to his right.

Of course, a very very careful as well as an overcautious person may first have considered all the possibilities, however remote, but the law recognises that the average ordinary person is not so very careful or overcautious and it requires me to consider the accused's conduct and criminal responsibility for criminal negligence bearing in mind that I am dealing with a human being and not a robot.

The accused's conduct may well have been lacking in some care, having regard to the fact that it was a lethal weapon that he fired, but, I could not say of it that it showed a reckless disregard of human safety.

I do not accept his evidence that he looked for one, two or three minutes before he fired his first shot. I think that he fired blindly into the dark but it was towards and over an area where, in all but quite unusual and unexpected circumstances, his bullets should have gone harmlessly to ground.

I find a verdict of: Not guilty, and, I acquit and discharge the accused person.

R. P. R. R. R.
Associate.
28.4.64.