

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

CORAM : CLARKSON, J.

Monday,

19th May, 1969

R. v. PARI-PARILLA

The accused stands charged with the wilful murder of one Ami-Andale. It is an unusual case and I propose therefore to summarise the evidence and set out my reasons for the conclusion I have reached.

The accused Pari is a young man who came from the village of Sungube near Tari in the Highlands.

About fifteen years ago his mother died and he returned to his mother's village of Piribu and attended a nearby Mission School. Some three years later he came to Mount Hagen where he continued his schooling to Standard 5. For three years he worked as a painter.

In 1964 he went to Port Moresby and completed a six-months course of training as a warder at Bomana. He then served as a warder in Port Moresby and in the Eastern Highlands for about 2½ years.

Ultimately he returned to employment as a painter and was so employed in Mount Hagen in August 1968. He, with a friend Ambuabe, also of Piribu, were both living in the house of a Wabag man, Suip.

On a day which it is not disputed was Friday 9th August 1968, these two met Ami in the street. Ami, hearing his own place talk, came up to them and shook hands. He told them he had just arrived that day from Rabaul where he had been working for some years, that he was looking for somewhere to sleep and was returning to his village. Pari and Ambuabe took him to the house where they were staying and the three of them spent the night there.

On Saturday morning Pari and Ambuabe went to work and Ami was left to his own devices. In the afternoon Pari and Ami went to a tea plantation where a number of people from their area were employed. Ami spent the night with one of his new-found friends, Okopu. Pari spent the night in the same area returning to his home on Sunday morning. Ami, Pari and Ambuabe met again on Monday. After work they called briefly on friends and then went to the hotel.

This is a simple account of the movements of the three men until early in the night of Monday 12th August, but during this time other developments had occurred.

At some time, probably late on Friday night, Pari and Ami found that they had been small boys together in the village. On the following day, Saturday, Pari told Ambuabe that Ami's father had killed Pari's mother. Whether this was so or not it was a belief which Pari held and which troubled him. He told Ambuabe he was thinking of this trouble and of fighting Ami.

Ambuabe tried to dissuade Pari. He told him the thought was not good to think about and not to act on it. Pari's explanation of this at his trial was that he was only joking. It was put to Ambuabe in cross-examination that he had not taken the conversation seriously, to which he replied that he didn't believe what Pari said and that he told Pari not to think so much about trouble which happened so long ago. Nothing more was said.

I have said that on Monday evening the three men went to the hotel. They stayed for two or three hours drinking. The impression given by both Ambuabe and Pari is that when they left to go home they were a little affected by liquor. Ambuabe preceded the other two and got some distance ahead and then waited for them. The only direct evidence of what then occurred between Pari and Ami until Ambuabe found them is contained in the accounts of Pari. It is undisputed that the two men fought and that in the course of the struggle they rolled into a nearby stream. When Ambuabe, looking for his companions, returned, he found Ami's body, with head submerged in the water and mud of the stream, apparently lifeless. He spoke to Pari and the two of them left the scene. There is a conflict between Ambuabe and Pari as to what was said. Ambuabe says Pari told him he had killed Ami. According to Pari, he told Ambuabe to look at Ami and that Ambuabe, having done so, told Pari that Ami was dead.

It is undisputed that Ambuabe decided to return immediately to the Tari area and that on the following day, Tuesday 13th August 1968, he did so. Before he left Pari gave him \$12 and some of Ami's personal belongings including a wireless set, and a message for the old man Muna.

Ami's body has not been found.

Early in October Inspector Twigg was conducting investigations into the disappearance of Ami. He spoke to Pari on 11th October and again on 18th October. On the latter occasion, after cautioning Pari, the Inspector said that he had been told something by Ambuabe. The accused said he knew Ambuabe and also Ami. He said he had seen Ami last in August in Mount Hagen when Ami was on his way back to his village. He added, "On Monday he came back to the house and got his cargo. He bought an airline ticket to Tari. He went to Kagamuga (the airfield) and I think he slept there that night. I haven't seen him since. "

On 21st October after an appropriate caution Pari went with the Inspector to a spot in Mount Hagen on the Kunniga River about 60 yards from the Highlands Highway. Ambuabe was also present. When told that Ambuabe said he had killed Ami at that spot Pari at first said that Ambuabe was making up his story and after a delay said, "Yes, Ami died here, we both killed him. Ambuabe is as much to blame as I am."

Inquiries were continued and on the evening of 23rd October 1968, Inspector Twigg again interviewed the accused. A record of the interview was made by Inspector Gibben which the accused signed as a correct record. The following extracts are from it:

" Pari: We were walking along the road and I began to think about my mother and the manner in which she had died many years ago I remembered that my Mother had kau kau in her mouth when they were going to bury her I remember that she seemed to have been badly treated. I remembered that I had been told by my village people that AMI's Father ANDALA had murdered my mother and I remembered that the Patrol Officer did not hear a court. I remembered that I had heard that ANDALAS brother had killed my mother with ANDALA and that they both had paid pigs but I was not satisfied. I began to think that if my mother was still alive I would have a home to go to the same as other people and I got very upset.

Twigg: Did you say anything to AMI about this feeling

Pari: I kept thinking about it. I didn't say anything till we got to the small track that runs from the road down to the river a short way from my house and I said to him "Before your Uncle killed my Mother, do you think this is true or not".

He said "I have heard of this but I dont know if it is correct" I said "You know very well that this is right you cant tell me lies" He kept saying that he didnt know if this story was true and I began to get very angry with him. He said "This is something that happened a long time ago and it doesnt interest me now" I began to get very angry and I grabbed hold of AMI by the arm and I pulled him. He grabbed hold of me and we grappled. We fell on the ground and we rolled down an embankment to the waters edge. I finished up under neath AMI and he was on top of me. I said "Alright we will fight this out one of us will die over this" AMI said "allright we will see". We then began to wrestle about on the ground he held his hands around my neck he had one hand on my neck and one hand around me trying to hold me still I felt around for his face and I pushed my open hand into his face. AMI bit two fingers of my hand causing great pain. (PARI shows right middle and ring fingers ring finger shows laceration on nail and slight marks on skin) I called out for AMBUABE but I was short of breath and apparently he did not hear me. Ami and I then struggled some more and we went into the water I rolled him over and I was on top of him. The lower parts of both our bodies were out of the water on the bank and our shoulders and heads were in the water. The ground was very soft and muddy. I got on top of AMI and I held him around the neck with both hands. I tightened my grip he pulled my hair but I kept my grip on his neck. He pushed me and tried to turn me so that he would be on top. This broke my grip on his neck but he couldnt turn me over. I quickly grabbed his neck again and I held him and used preasure he seemed to get very weak and he stopped struggling I held his head under the water, he was face up and he was swallowing water. The water was bubbling around his mouth as air came out. He went very limp I held him under the water for about five or ten minutes his hands fell away from me and he didnt move. I let him go with my hands but I was lying on top of him when AMBUABE came along. I got off AMI and I stood up AMI did not move he was lying on his back in the water and the water was covering his face.

Pari also said that at the time of the fight, the water was about waist deep and

8 feet wide and swiftly flowing because of rain, that, when the river subsided a little, he went back to the scene about three weeks later but could find no sign of Ami. Finally, I quote:

" Twigg: Was the water at the scene flowing strong enough to carry a man away.

Pari: At the time it wasnt. It would have been strong enough to carry a child or pig but not a man. Afterwards very heavy rain came along and the creek then swelled up I heard it during the night our house was very close to the water.

Twigg: AMBUABE gave a statement to a Patrol Officer to the effect that you told him on the Saturday or the Sunday that you was considering killing AMI.

Pari: I did tell him on the Sunday that I wanted to fight AMI thats all. I didnt say that I wanted to kill him.

Twigg: When you fought with AMI why did you hold his head under the water after he loosed his grip and did not resist.

Pari: I was very angry. He bit me on the hand and I knew then that our fight was to try to kill.

Twigg: When you realised that AMI could no longer breath did you try to help him out of the water.

Pari: No.

On 26th and 27th October, Inspector Twigg, with another Inspector and six policemen, searched the Kumniga River and dragged the deeper portions of it to within 100 yards of its confluence with the Kum River, without finding any remains of Ami.

On the assumption that Ami had in fact died that night and that the record of interview was a proper record of what Pari said, there is no doubt in my mind that Pari made a clear confession of wilful murder.

But the defence has urged a number of matters in opposition which must now be considered. The first is whether the Crown has established to the requisite degree of proof that Ami died on that night. The Crown called a number of witnesses whose evidence was directed to that issue. There is first the undisputed evidence that Ami was held with his head submerged, that he swallowed water, that air bubbled from his mouth and that he went limp. Also that he remained apparently lifeless with his head submerged for at least the time it took for Ambuabe to speak to accused, get down and inspect Ami and then leave with the accused. It was a dark night and probably after 152

10.00pm when the accused and Ambuabe left the scene, and there is no evidence of anyone else being in the vicinity.

At the interview on 23rd October, Pari said that when Ambuabe returned to find him he told Ambuabe that he had killed Ami. Ambuabe in his evidence confirmed this. Pari in evidence however said that he did not appreciate Ami was dead until Ambuabe examined him.

On the Crown case of wilful murder, if any doubt had occurred to the accused whether Ami were dead the accused may not have bothered to investigate, but Ambuabe was in a different position. He appears to have been well disposed towards Ami and had not sought his death. Whether or not Pari told Ambuabe he had killed Ami, it would be natural for Ambuabe to see for himself and if there had been any doubt in his mind to remove Ami from the water, if only because it might assist his friend Pari.

In any event, Ambuabe did examine Ami and concluded he was dead and Pari accepted that this was so if he had not already formed the same opinion.

What is perhaps most important in determining this issue is the situation in which Ami was left. He was not an unconscious man left lying on the ground and who might have recovered consciousness. His lungs contained water and his head was submerged. If he was not already dead, every second he remained in that position brought death nearer.

There was a body of evidence, which I will not detail, that despite enquiries by the police throughout the Territory including New Britain, Ami cannot be found. He has not returned to his village and his bank account which he transferred from New Britain to Mount Hagen has not been operated on. Also, I am unable to think of any reason, and defence counsel did not suggest one, why Ami, if still alive, should be in hiding.

It is true, as defence counsel pointed out, that of the persons called to say they had not seen or heard of Ami, some he had only met in his few days in Mount Hagen and others had not heard from him for five years. But from all that was said it appeared that Ami was returning to his village after some years' work in New Britain, and he has not done so. It is also true that no trace of his body has been found. Pari's evidence is that the river in which he left Ami flooded shortly thereafter and Inspector Twigg said that there are many wild pigs in the area through which it flows.

In this country where the remains of persons who died 25 years ago in war are still being found it is not difficult to accept that whatever remains of a body swept away in a flooding river in mid-August would not be discovered by a search over two months later.

In a trial for wilful murder the death of the victim is of course one of the essential facts to be established in order to support a conviction. But it may be established by circumstantial evidence as well as by direct evidence of the finding of the body. Peacock v. R. (1) was such a case. See also R. v. Onufrejczyk (2), R. v. Horry (3) and the comments of Dixon C.J. and Menzies J. in Plomp v. The Queen (4).

Having considered the evidence I have no hesitation in concluding that Ami died that night in the river as a result of his struggle with the accused. This is, to use the words of Barton J. in Peacock "an inference which exists actually and clearly and so completely overcomes all other inferences and hypotheses as to leave no reasonable doubt."

To consider the other submissions made by the defence it is first necessary to take account of the evidence given by the accused at the trial.

I commence at the beginning of the period covered by the extracts I have quoted. The accused said he was not really angry with Ami because Ami's family was responsible for the death of the accused's mother. He asked Ami about it, trying to get the truth, and was upset because Ami disregarded his enquiries and refused to talk about it. Then he said "I held his hand, but as he was groggy he tried to shake me off. I was determined to hold him so I held him more strongly."

This led to the two grappling with each other and falling to the ground with Ami on top. The accused, to get rid of Ami, pushed his hand into Ami's face whereupon Ami bit into one of his fingers and held on. He said to Ami, "We are fighting in a dangerous area, if we keep fighting like this one of us might die". By this he meant they could be injured by bottles and other garbage lying around if they rolled down the bank. Of necessity he rolled down the bank with Ami, because Ami still held his finger in his teeth and wouldn't let go.

(1) 13 C.L.R. 619.

(2) (1955) 1 All E.R. 247.

(3) (1952) N.Z.L.R. 111.

(4) 110 C.L.R. 234.

They rolled into the water and the accused was able to get on top. The accused was pushing Ami's head into the water to get him away and Ami was trying to grasp the accused's hair. As Ami was pushed under, he let go the accused's finger and accused was then able to use both hands to hold Ami away and get his breath back. He continued to hold Ami down while he sought a firm footholding to enable him to stand and get away from Ami. He did not let Ami up because he thought Ami would come back at him. When he was holding Ami and trying to get out, Ami wasn't moving and air was bubbling out of his mouth and he went limp. Later the accused let him go. He did not then pull Ami out because his right hand was sore and he thought that if he pulled him out, Ami might start fighting again. He had no intention of killing Ami and would have stopped fighting earlier if Ami had only let go his finger.

On the foundation of this version of events defence counsel submitted that the Crown could not disprove that the killing was made in self-defence and that the Crown had not shown an intent to kill. On this basis it was argued the verdicts reasonably open were not guilty or guilty of manslaughter. Before considering these submissions I return to the facts.

It will be seen that the accused's story told at the trial is very different from that recorded on 23rd October and it is a matter for comment that neither counsel asked the accused to say whether or not he had made each of the statements he was alleged to have made to Inspector Twigg. Those that were put to him he admitted. For instance he agreed he had said, "You know very well that this is right you can't tell me lies", which was hardly consistent with his merely seeking information. He agreed that he had said that Ami became very limp and he held Ami under water for five to ten minutes, adding that this was only a guess. He agreed that he said, "We will fight this one out - one of us will die over this", but made the qualification that he said this after Ami and he had rolled down the bank, not before.

As far as my recollection goes, aided by my notes, there was not one statement recorded on 23rd October which the accused denied making. It was not suggested that the conduct of the police officers in their dealings with the accused was in any way improper. It was put to Inspector Twigg in cross-examination that he had asked many more questions than the record of the 23rd October showed. The Inspector denied this and said that the accused spoke quite freely as the record indicated. The accused in examination-in-Chief

made no effort to explain the differences between his evidence and his statements of 23rd October. At the conclusion of his re-examination I put to the accused three of the statements he was alleged to have made and asked if he had made them. He said he had. I did this, as I explained to counsel, because I felt the accused should be given the opportunity of denying if he thought fit that he had said what was alleged. It was after this that the accused offered an explanation of the discrepancies. He agreed that the police had not put many questions to him and said that during the interview "my head was clear but.... I was afraid of what was going on and what I said was not completely straight. When they read it back and said was everything right, I was afraid and said it was right when not sure whether it was". Even here there was no allegation that what he had said to Inspector Twigg was wrong and I am satisfied that what he said to Inspector Twigg was said in words of his own choice and that with the inevitable pauses which occurred when Twigg was translating to English, the accused had ample time to consider his answers. He further said he was not afraid "because they were shooting questions at me or anything. I was just afraid."

There was no serious suggestion of any language difficulties. In fact the accused in the course of several hours in the witness box showed himself to be proficient in Pidgin and an articulate speaker.

From what I have said, it will be seen that the accused has given four different versions of what occurred on the night of his struggle with Ami. The first was that on that Monday, Ami had picked up his belongings, bought a ticket to Tari and slept the night at the airport, presumably waiting for his aircraft.

The second was that Ambuabe and he had killed Ami.

The third was his detailed account to Inspector Twigg which if accepted could only be construed as I have said as a confession of wilful murder.

The fourth was in his evidence at the trial which made him out to be, at least at times, an unwilling participant in the struggle.

I have no hesitation in accepting the grimly compelling account which was given to Inspector Twigg, and in rejecting the substance of the accused's evidence at the trial. To attempt to explain the statement,

"Alright we will fight this out, one of us will die over this" by reference to the possibility that one of the two men might be hurt by bottles or garbage on the ground on which they were struggling is utterly unconvincing. To admit to holding his opponent under water until the breath had left his body and he had lapsed into unconsciousness and then to say that with no intent to kill he continued to hold the victim under water because he feared the victim's further attack, is to me incredible.

I am satisfied that the accused having made the statements of 23rd October has in the meantime attempted to fabricate a variation which cast Ami rather than himself in the role of attacker, and which to me is highly unconvincing.

The true story emerges clearly enough. Ami's unexpected reappearance in the accused's life prompted thoughts of a payback for the wrong, real or imagined, done many years before by Ami's relatives. The counsel of Ambuabe did not allay these thoughts although nothing might have come from them but for the combination of circumstances which occurred on that Monday night. Pari, somewhat affected by liquor, found himself at night alone with Ami. He raised his grievance and became annoyed when Ami treated the subject as one best forgotten. He grabbed Ami by the wrist and Ami resisted. The struggle developed and the accused, thoroughly aroused, formed the intention to kill Ami and effect the payback. He made his intention clear when he said, "We will fight this out and one of us will die over this."

Unfortunately for Ami, when the two men rolled into the water and mud of the stream, Ami was underneath and so positioned that his head could be forced backwards into the water. The accused then deliberately drowned Ami, watching him as he ceased to struggle and swallow water, and watching the air bubbling from his mouth. He made sure he had accomplished his end by holding Ami under water for some further period then left him with the water covering his upturned face.

When asked why he held Ami's head under water after Ami loosed his grip, the accused replied, "I was very angry. He bit me on the hand and I knew then that our fight was to try to kill."

The accused in evidence said that if he had wanted to kill Ami, he could have done it earlier and at least would have armed himself with some weapon. The simple answer is that the intention to kill was not formed until 157

the fight commenced.

The accused told Ambuabe to tell no-one except the old man, Muna. His explanation in his words was, "I wanted him to know that I had paid back for the death of my mother. It is the custom of my people to tell the old men of the village and they decide whether I should be punished or not."

One further matter should be mentioned here. The Crown suggested to the accused that when he said they would fight to the death and Ami replied, "Alright, we will see", the two men were fighting a duel by agreement. I do not think this was so at all. The accused was telling Ami what was going to happen and Ami had no choice but to fight for his life, as he did unsuccessfully.

On the facts as I find them I can see no defence open to the accused. He was clearly the aggressor throughout. It was not suggested, and I can see no grounds for suggesting, that Ami provoked the assault. The consequences of holding Ami under water were not only foreseeable but foreseen by the accused and desired. What he said and did compels the conclusion that he intended to kill.

I did not understand defence counsel to challenge the conclusions I have just stated. His argument was based on the version of the facts given by the accused at the trial, which he said I should prefer.

Even on this basis, I doubt whether any different result would follow. Again, the accused was the unprovoked aggressor and could hardly complain because Ami tried to immobilise one of his attacker's arms in the way he did. The accused did not suggest that before the combatants entered the water he was in fear of death or grievous bodily harm, and when he says that he told Ami to let his finger go and that if Ami had done so the fight probably would not have gone on, he did not at any stage decline further conflict. He was the one who said it was a fight to the death and once he said this, Ami was entitled to defend himself as best he could. Finally, it was plainly ridiculous for the accused, while admitting that he continued to hold the head of his unconscious opponent under water with the effects he described, to attempt to justify this action on the basis that he feared his opponent might still get up and continue the fight before the accused could get away.

I have concluded the Crown's case has been proved beyond reasonable doubt and that there is only one verdict I can return - guilty of wilful murder.

SENTENCE

This is a tragic case in more ways than one. It is tragic that a young man like Ami should die brutally and uselessly as he did.

It is tragic that the prisoner with his education training and experience should be so dominated by a primitive and savage custom as to cause that death.

No case could better illustrate the degrading and anti-social tendencies of the custom of payback which perpetuates violence and inhibits the development of a unified society. Because of it, a man is not safe from violent death at the hand of another who has ostensibly befriended him.

Also because of it, some gossip heard as a child induces a man to put aside all he has learnt and experienced in 15 years away from village environment. He puts himself above the law of the land which, incidentally, he has helped to enforce. He acts as a self-appointed executioner and then refers the question whether he has acted rightly or wrongly to tribal law.

I am told compensation has been given. Prisoner has said compensation had been paid for his mother's death, but he was not satisfied and as a result he murdered this man.

Presumably on his thinking he would agree that the next to be murdered should be his only child. Fortunately that is not what the law says.

The existence of the custom must be recognised and steps to weaken its grip must be taken with patience and understanding. This case will serve as a warning that no easy or early solution will be found.

This Court will continue to play its part by insisting that no-one is above the law and by punishing for payback killings.

I find that extenuating circumstances exist within the meaning of Section 305 of the Code. I am influenced principally by the fact that despite outward appearances the accused has not been able to remove himself from the grip of the customs of his forbearers. Also, I am satisfied that this was not a premeditated crime and was not for material gain. I accept that he formed no intention to kill until after the argument and struggle had commenced. But I cannot accede to counsel's submission that the proper punishment would be a short sentence. For a case such as this, the punishment should be substantial.

(To Accused) - For some years you worked as a warder, looking after some of those who had broken the law.

You knew that the law applied to everyone including yourself and that the law forbids payback killings.

By killing Ami you put yourself above the law and made yourself an executioner.

You are not just an ignorant villager who has had no chance to go to school and to go to other places.

You have seen that people can live quite happily without paybacks. They let the Courts settle their disputes.

Everyone must learn this is the proper way.

I have heard what Mr. Hilsen and Inspector Gibbens have said and I am told you have not been in trouble before.

I don't think you planned beforehand to kill Ami. All these things I take into account.

But I must also remember that this was a savage and brutal murder of a man who had done no wrong to you. You, because of your education and training, should have known better.

You will go to gaol for 15 years.