

The Strange Case of the Speluncean Explorers

The murder case that has come before the Supreme Court of Newgarth presents problems that have not arisen within anyone's memory and for which the dustier volumes of the law reports offer few, if any, precedents. The four defendants have already been tried and convicted in the Court of General Instances of the County of Stowfield for the murder of their traveling companion Roger Whetmore. In accordance with Newgarth's very succinct murder statute "Whoever shall willfully take the life of another shall be punished by death" they had been sentenced to death by hanging. They have appealed to the Supreme Court where you now sit and it is up to you, indeed all of you as Judges of this Court, to affirm or reverse the trial court.¹

The four defendants and Roger Whetmore were all members of the Speluncean Society, a group of amateur cave explorers and archaeologists. In May the five set out to explore the interior of a limestone cavern located in the Central Plateau. While the five of them (three men and two women) were probing the remote inner reaches of the cave, a powerful landslide shook the area. A barrage of massive boulders rained down in front of the cave and blocked its only exit. Although physically unscathed, the five explorers found themselves hopelessly immured in the rubble, with little more than a meager supply of water, wine, and dates to last them through the indefinite future.

The absence of the five explorers was soon noticed. Their families grew alarmed and called on the secretary of the society to undertake a search. It turned out that the explorers had left at the society's headquarters fairly exact indications of their whereabouts, and a rescue party was immediately sent out for them. But freeing them proved far from easy. The society's rescue party was no match for the primordial boulders. Heavy machinery had to be moved in from far away. A whole army of workmen, engineers, geologists, and other experts had to be assembled. Fresh landslides repeatedly intervened to make working conditions hazardous and progress slow. Ten workmen ultimately died in the rescue effort.

As the days wore on, the rescuers grew increasingly anxious that starvation might kill the explorers long before a passageway could be cut through the debris. Though considered hardy souls, the explorers were known to have taken only scant provisions along, and limestone caverns rarely, if ever, contain any nourishing vegetation. On the twentieth day, however, the rescuers learned by accident that the explorers had with them a portable wireless machine capable of sending and receiving messages. A similar machine was installed in the rescue camp and communication established with the imprisoned members of the exploring party. The prisoners turned out to be unexpectedly alert and remarkably rational and detached about their predicament. Roger Whetmore, the most experienced among them, did most of the talking.

¹ This case is a hypothetical case, originally invented by the late Lon Fuller, Professor of Law at Harvard Law School, and published in the *Harvard Law Review*, Volume 62 (1949) pp. 616-645. The present version is adapted from a re-telling of it by Leo Katz in his *Bad Acts and Guilty Minds*, University of Chicago Press (1987).

He asked how long it would take to liberate them. The engineers estimated it would take at least ten more days, provided no new landslides occurred. Whetmore then asked whether any physicians were present and was immediately put in touch with a committee of medical experts. He described to them with precision what was left of the spare rations they had taken with them into the cave. Taking turns, each of the prisoners then described his or her physical condition. Finally, Whetmore asked for a medical opinion whether they were likely to survive the next ten days. Despite some initial reluctance to answer, the committee chairman admitted that there was little likelihood of that.

The wireless machine then remained silent for eight hours. Finally, Whetmore's voice reappeared; he asked to speak once more to the physicians. His voice unnaturally loud and quavering ever so slightly, he inquired of the chairman whether they would be able to survive if they ate the flesh of one of their number. The chairman refused to answer. When Whetmore pressed him, he finally agreed that they probably would. Whetmore then asked if it would be advisable for them to cast lots to determine who among them should be sacrificed. The chairman again refused to answer; this time he remained adamant. None of the other physicians were willing to respond either. Whetmore asked if there were among the party a judge or other governmental official who could answer his question. No one responded, not even the secretary of the society who was in fact a justice of peace. Whetmore asked if there were a rabbi or priest who would answer his question but no one stepped forward, although a priest had only recently performed the last rites on a dying workman. The wireless machine then went dead, and it was assumed erroneously as it turned out that the batteries had been exhausted.

Conscious that time was running out, the rescuers speeded up their efforts. They took risks they would ordinarily have avoided; as a result six more workmen were killed by another unexpected landslide. Eight days after the exchange with Whetmore, they finally laid bare the caves exit. Four of the exploring party (two men and two women) were still alive, although close to expiration. The fifth, Roger Whetmore, was dead. His skeletal remains told most of the story, but the survivors made no secret of what had happened. On the twenty-third day of their captivity the defendants had killed and eaten their companion.

Ironically, Roger Whetmore had been the first to propose such a sacrifice. Not only would this ensure that at least some of them survived, he said, but even the victim had reason to be grateful for being spared the agony of a slow death by starvation. He for one, should the lot fall on him, would prefer it that way. Although at first repelled by the idea, his colleagues acquiesced in Whetmore's proposal when they heard the dire predictions of the medical experts. Whetmore happened to have a pair of dice with him, hence that was the method adopted for choosing the victim. The roll went against Whetmore.

The defendants were treated at length for malnutrition and shock and finally were put on trial. The trial was one of the least contentious in Newgarth's history, since there was little disagreement on the facts. Still, the jury deliberated for a long time. At one point the foreman as it happened, a lawyer asked the court whether the jury might be allowed simply to issue a special verdict finding all the facts and leaving it to the trial judge whether under those facts the defendants were guilty. Both sides agreed to this proposal; and the court acquiesced. Then, having examined the jury's rather unsurprising findings, he held the defendants guilty of murder and, as required, sentenced them to death. This done, the defendant's attorneys immediately filed an appeal and the case has now come before the Supreme Court and before all of you.