IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 57 of 1979

Between:

TERRY BAKA'A TEKEUA — Appellant

and

REGINAM — Respondent

Mr. P.W. O'Regan for the Appellant.
Mr. D.V. Fatiaki for the Respondent

Date of Hearing: 23/6/80

Delivery of Judgment: 27/6/80

JUDGMENT OF THE COURT

Speight J.A.

The appellant was convicted in the High Court of Solomon Islands on the 10th October 1979 on a charge of having murdered one Masayoshi Uekago on the 16th July 1979 at Tulagi in the Central District. He now appeals against conviction.

The facts were relatively straight forward. Appellant had been employed by a Japanese fishing company at Tulagi and had worked for some time in the power house. The deceased, who was a Japanese, was an engineer at the Tulagi Base and was appellant's superior. At some stage appellant had been taken off his job in the power house and transferred to what he thought was

less favourable employment. He complained bitterly about this on several occasions and to several people.

On the day in question, the 16th July he had consumed a quantity of liquor. In the evening he went to see the Manager with his complaint and was told that he was too drunk and should return tomorrow. However appellant was in a very belligerent mood and made his way to the house of Uekago whom he believed had been responsible for his transfer. What happened then can now only be spoken to by appellant. Certainly Uekago died from a stab wound or wounds delivered by the accused. The post mortem revealed 3 severe penetrations of the chest or abdomen, whereas the accused was only observed to have minor damage to the back of the left hand. There were three sources from which the Court endeavoured to reach a conclusion as to what happened. First there are some remarks appellant made to other men to whom he spoke. Then there are two caution statements which he made to Sgt. Titus Anilasi of the Tulagi Police on the 18th and 20th July. And finally there is evidence he gave at his trial.

More detailed material will be referred to later in this judgment but in summary he said that he was upset about his change of job; he had been told that Uekago had been responsible; he regarded Uekago as a hard man who dealt harshly with the employees. He was not satisfied with what the Manager had promised him on the evening so he went to Uekago's house "to put it right". The place was in darkness so he went inside - there is some suggestion he forced his way in. A man, whom he soon realised was Uekago came out and he claimed that he was hit on the left hand with some object, so he drew a knife from the rear pocket of his trousers and thrust it at Uekago. He agrees that he did this 3 times and he felt it sink into the man's body each

time to the depth of the blade. He said at various times, that he thought he was going to be struck again, that he felt pain and that Uekago was strong - but the sequence of events was not always consistently told.

At the trial no attempt was made to deny that appellant killed the deceased, but a variety of defences was canvassed.

1. Self defence. It was submitted that Uekago was the first to use violence and the appellant did no more than was necessary to defend himself - judging the matter by the standards of a reasonable person of his ethnic group - he was a Gilbertese - and assessed by the circumstances he found himself in - and this should have led to acquittal.

2. Provocation. That in all the circumstances he lost the power of self control in a way which was understandable in a reasonable person of his race, in view of the history prior to and including the event of that evening - and this would justify a reduction from murder to manslaughter.

3. Alternatively to 2. that he could avail himself of the special defence provided by the Solomon Islands Penal Code in section 197(b) whereby excessive force in self defence, although not leading to an acquittal can justify a reduction to a verdict of manslaughter if the accused was acting in terror which deprived him for the time being of the power of self control.

Before we examine the submissions on behalf of counsel, and the relevant evidence, it is necessary to draw attention to certain most unusual matters contained

in the record prepared for the appeal.

In the Solomon Islands jurisdiction trial is by judge alone, or by judge with assessors. In this case the former procedure was followed. Accordingly the judge was the arbiter of both law and fact and it is necessary to examine his judgment to determine the basis upon which the verdict was reached.

Unfortunately three separate documents appear in the record and we regard the procedure followed and the way in which this material has been presented to this Court as irregular.

First there are "Notes for Summing Up". These were obviously prepared towards the end of the hearing but before counsel had addressed the Court, and probably before the final witness was heard at 9.30 a.m. on the last day of the trial - 10th October 1979. The material is, as the heading suggests, notes taken by the trial judge of matters of law and of fact which would need to be dealt with when the time came for delivering his judgment, but it is clear that it was not prepared at one time, for the matters are not in logical time sequence - and some of the later material is obviously last minute notes of some of the submissions by counsel. In our view this material had no place in the appeal book and should not have been included - for there is nothing to show that any part of it was delivered, or that the judge acted upon this interim material.

Secondly there is "Oral Judgment Recorded by Judge's Secretary". This is the proper record of what the judge said in reaching his verdict - and it contains, as it should, his directions to himself in law, a resume of the salient facts, and the conclusions from that law

1/6

and those facts which lead him to his verdict. This is the proper record which should always be taken so that the parties know the basis of the verdict, and so the matter can be properly reviewed on appeal if necessary.

Thirdly there is a substantially shorter document entitled Judgment. This is a precis of what had gone before. It is written in the past tense and appears to be a post hoc explanation of why certain conclusions were reached. We cannot too strongly criticise this practice - for it also emerges in another appeal from the Solomon Islands heard by this Court on the same day.

The only material proper for consideration is that which leads to the verdict - no subsequently compiled resume can have any weight - we draw attention to the quite startling fact that this document was so late in compilation that it appears to refer to grounds contained in the appeal document. We propose to disregard this so called "Judgment".

Three grounds of appeal were developed, altough more had been set out in the notice.

1. At the trial self defence was advanced but was rejected. On appeal Mr. O'Regan straight away conceded that he could not develop this - he acknowledged that he could not quarrel with a ruling that; if this was a situation which gave rise to self defence, the degree of violence used was excessive in the circumstances. This concession was proper. He submitted however that the learned trial judge had overlooked the provisions of Section 197(b) of the Penal Code of Solomon Islands.

117

In its relevant portion Section 197 reads as follows :-

> "197. Where a person by an intentional and unlawful act causes the death of another person the offence committed shall not be of murder but only manslaughter if any of the following matters of extenuation are proved on his behalf, namely -
>
> (b) that he was justified in causing some harm to the other person, and that, in causing harm in excess of the harm which he was justified in causing, he acted from such terror of immediate death or grievous harm as in fact deprived him for the time being of the power of self-control; "

It will be seen that this is a means whereby a charge of murder may be reduced to manslaughter, not as is commonly the case, by absence of malice, or by a finding of provocation, but by excess of force induced by terror. In this respect it is not dissimilar to the position which arises in Australian law - see the cases of McKay 1957 V.R. 560 and Home 1958 C.L.R. 448 and articles in the Criminal Law Review 1964/448, 1972/524 and 1974/397.

However this is a statutory provision and Mr. O'Regan's researches indicate it is peculiar to the Solomon Islands' Code.

If we put aside, as we must, a marginal note in the "Notes for Summing Up" then the record shows that although Mr. O'Regan referred to Section 197(b) in his closing submissions there is no specific mention of the topic in the judgment and Mr. O'Regan submits that this is a failure on the part of the judge to direct himself properly on a material issue which called for determination.

We do hot accept this. If the subsection is examined it will be seen that it is a favourable dispensation available to an accused person if he has been in a self defence situation but has exceeded the bounds of legitimate force, and has done so because terror has deprived him of the power of self control - a subjective test it will be observed and hence a very benevolent provision. However it is a condition that the Court must first find that there was "justification in causing some harm" and then that the accused has gone beyond permissible limits "Because of terror".

If the judgment is examined it will be seen that the judge dealt with self defence most carefully. He discussed the relevant principles and he reviewed the facts, and came to the conclusion that this man was the aggressor throughout. There really was little or no evidence on which any self defence situation could be based and we take the judgment as saying that. It is true that as one of the reasons for rejection is made to the fact that excessive force was used, but read as a whole we take the judgment as negativing any justification of self defence.

In any event if those circumstances existed a consideration of the evidence as a whole indicates it would be quite unrealistic to say there was anything properly suggestive of "terror of immediate death or grievous harm".

In cross-examination the appellant had agreed he did not run away, and said, in part, "My intention was to attack". He used the phrase "it never came to my mind to hide".

There was also substantial doubt as to the claim he was struck first - he told a workmate that "when I was trying to stab the Japanese he had a stick in his hand and he beat him (me) on the wrist". If anything

19

it was self defence throughout by the deceased.

The most cogent evidence was in his first caution statement when he said that he received a blow on his little finger and thereupon he stabbed three times - using a knife which he had in his hand when he entered the room.

However the sequence may have been, there is absolutely no evidence that he was in such a high degree of terror that is requisite for the application of this subsection.

Some questions arose concerning the onus of proof - it will be noticed that Section 197 says in its first part, quoted above,

> "shall not be murder but only manslaughter if any of the following matters of extenuation are proved on his behalf."

Mr. Fatiaki on behalf of the Crown conceded, and in our view very properly conceded that this is not a statutory exception to the general rule laid down in Woolmington v. D.P.P. 1935 A.C. 462 but is what is usually referred to as an "evidentiary onus".

That is to say that before there is a requirement upon a court to consider the possibility of this provision being available there must be evidence, whether called by the defence, or emerging from the prosecution case which can be pointed to as showing the existence of such a possibility - in which event the onus is on the Crown to show that the possibility is excluded.

Even on that standard however there is no evidence of anything approaching the degree of apprehension on behalf of appellant which would

120

call for this to be considered.

2. Provocation was also raised at the trial. Mr. O'Regan drew attention to a passage in the Notes for SummingUp where a number of relevant factors are set out in question form - e.g.

> "Was the hit on the left hand near left finger sufficient for reasonable man to lose self control? (In this case I am considering action of Gilbertese)"

Further similar questions follow and then this passage:-

> "Accordingly I find that you have not discharged the onus on you that would convince me to reduce the charge to manslaughter."

When Mr. O'Regan's attention was drawn to the fact that this was only in notes made during the hearing, he conceded that this was so, but submitted that such an apparently erroneous statement was perhaps in the judge's mind at some stage and may have had its influence at decision making time. We do not know of course whether in making the note the judge was thinking in terms of evidential onus or was indeed revising the Woolmington test.

However we can only repeat the only material that this Court can act on is that contained in the transcript of the Oral Judgment delivered after the close of the case and prior to the verdict. A careful study of that shows the provocation section, No.198 in the Code is set out; the characteristics of appellant's race are considered; the previous history; the encounter between the two men; and the conclusion "I dare not think that a blow on the hand, or the fact that he was transferred would cause a reasonable Gilbertese man to lose so much self control of himself that would in this

121

particular case reduce the charge from murder to manslaughter.....;.....I find that the prosecution in this case have proved their case to me beyond all reasonable doubts."

There is nothing to suggest that the mementary aberration (if it was one) which lead to the earlier note has permeated through to reverse the onus of proof in the judgment.

3. Mr. O'Regan also submitted that the judge took too narrow a view of what factors should be taken into account in assessing the possibility of provocation.

Principally he referred to a sentence used:-

" Was he sufficiently provoked on this particular evening to reduce this charge to manslaughter?"

The submission is that Section 198 which deals with provocation says that "everything done and said shall be taken into consideration" and we were told that Gilbertese people are recognised, and the evidence showed, as persons who harbour a grudge and later erupt.

Well we accept that Mr. Fatiaki's analysis of the judgment has shown that past history as well as immediate events were taken into consideration, and this ground of appeal is not established.

For these reasons the appeal is dismissed.

(sgd.) C.C. Marsack
JUDGE OF APPEAL

(sgd.) G.D. Speight
JUDGE OF APPEAL

(sgd.) B.C. Spring
JUDGE OF APPEAL

SUVA,
27th June, 1980.