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GWANGARIO TULOFIU and SAFA'A IROTA

v.

REGINAM

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[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Spring J.A.), 8th, 15th December]

Criminal Jurisdiction

Criminal law—provocation—assault by deceased on a man of the same line as the accused but not closely related to him—whether could be provocation—Penal Code (No. 12 of 1963) (British Solomon Islands Protectorate) ss. 3, 22, 198, 238.

C

Criminal law—principles of criminal liability—common purpose—intention to "beat up" —deceased killed by spear—use of spear not anticipated by other members of party—death not caused by any act within common purpose of others—conviction of others of manslaughter not justified—Penal Code (No. 12 of 1963) (British Solomon Islands Protectorate) s.22—Crimes Act 1961 (New Zealand) s.66(2).

Criminal law—convicted—substitution on appeal of conviction of minor cognate offence —Criminal Procedure Code (No. 10 of 1961) (British Solomon Islands Protectorate) s.157 —Penal Code (No. 12 of 1963) (British Solomon Islands Protectorate) s.238—Pacific Order in Council 1893 (Imperial) (Rules) r.36(2).

D

An attack by the deceased upon a person who was of the same line as the accused but not closely related, was not (at least in the particular circumstances of the case) provocation within the meaning of that term in the Penal Code.

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Where three persons (who had no preconceived plan) attacked the deceased with the intention of "beating him up" and the deceased was killed by one of the three with a spear, but in circumstances in which the other two would not anticipate that a spear would be used, the conviction of the other two for the crime of manslaughter was unjustified as the act causing death was not an act done pursuant to a common purpose shared by the two, It was open to the court on appeal to substitute a conviction of assault occasioning actual bodily harm for that of manslaughter under section 157(2) of the Criminal Procedure Code.

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Cases referred to :

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R. v. Smith (Wesley) [1963] 3 All E.R. 597; [1963] 1 W.L.R. 1200.

Lee Chun Chuen v. R. [1963] A.C. 220; [1963] 1 All E.R. 73.

R. v. Betty (1963) 48 Cr. App. R. 6.

R. v. Anderson & Morris [1966] 2 Q.B. 110; 50 Cr. App. R. 216.

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R. v. Morrison [1968] N.Z.L.R. 156.

R. v. Kelly [1964] 1 Q.B. 173; [1963] 3 All E.R. 558.

Robert Ndecho v. R. (1951) 18 E.A.C.A. 171.

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Dracaku v. R. [1963] E.A. 363.

Appeals (a) against a conviction of murder and (b) against a conviction of manslaughter in the High Court of the Western Pacific at Honiara.

K. C. Ramrakha for the appellants.

B *G. Mishra* for the respondent.

The facts sufficiently appear from the judgment of the Court.

15th December 1971

Judgment of the Court (read by Gould V.P.) :

C On the 27th August, 1971, three persons were convicted by the High Court of the Western Pacific at Honiara upon charges arising out of the death of Kwaola Kwaoga on or about the 30th June, 1971. They had been indicted and tried together for the murder of the deceased and at the conclusion of the trial the learned Chief Justice convicted the first accused, Benia Ledi, of manslaughter, the second accused Gwangario Tulofiu, of murder, and the third accused, Safa'a Irota, of manslaughter. D In this court Gwangario Tulofiu is the first appellant and Safa'a Irota the second. Benia Ledi has not appealed. It will be convenient, in this judgment, to refer to the people concerned by name.

A brief history of the matter, taken from the judgment of the Chief Justice is as follows. One Beri Iniga wrote a love letter to a girl called Thaone Selina who lived in Falaola village and was a sister of the E deceased. This act was, in the circumstances, a breach of native custom. On the night of the 29th June, 1971, preparations were being made for a feast in Falaola village throughout the night. Beri Iniga had come to the village for the first time since he had written the offending letter to Thaona Selina.

Benia Ledi, Gwangario Tulofiu and Safa'a Irota were staying in the F village on the night in question. They are closely related to each other and at about 3 a.m. they were sitting together in an open sided kitchen belonging to one Diosi. It should be added that the deceased and Beri Iniga were both of the same line as the three accused but were not otherwise related. As Gwangario Tulofiu put it in his evidence — "I deny that I am Beri's uncle. We are relatives but not close."

G It is not in dispute that about the time mentioned there was a fight, within sight of the three accused, between the deceased and Beri Iniga. It was commenced by the deceased, who was a much bigger and stronger man than Beri Iniga. He struck Beri Iniga on the nose and got on top of him when he fell: Beri Iniga drew a sheath knife from his belt and cut the deceased deeply on the left elbow, while the deceased bit Beri Iniga on the right shoulder.

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There has been no challenge on the appeal to the salient facts found by the learned Chief Justice, though there was considerable conflict and we would have considered that a more detailed analysis of the evidence in the judgment would have been helpful. His main findings were that:—

1. Benia intervened in the fight by dragging the deceased away from Beri Iniga and into the Kitchen. There he held the deceased against a vertical post by gripping the arms of the deceased behind him and around the post.

2. Safa'a Irota then struck the deceased on the head with what is described as a fighting ring, which he was wearing on his hand. This inflicted an incised wound on the left side of the head, which was described by the medical witness as a superficial wound.

3. Gwangario Tulofiu then stabbed the deceased in the back with a spear fashioned from a length of reinforcing iron. This resulted in a wound five inches deep, penetrating the lung and causing the death of the deceased.

The findings of the learned Chief Justice upon these broad facts were expressed as follows :—

> "I must now determine the degree of complicity of each of the accused in the death which resulted from the wound inflicted by 2nd Accused, Tulofiu. The three accused were all closely related and were sitting that evening together in the kitchen. There was light in the kitchen from a fire and a hurricane lamp. If the 2nd Accused, Tulofiu had a spear with him it is inconceivable that his friends sitting beside him did not know it and similarly if the 3rd Accused, Safa'a, was wearing a prominent object on his hand like a fighting ring, the other two must have seen it. I have no reasonable doubt but that the presence of the spear and the ring were known to all three of the accused at the time. I am also quite satisfied on the evidence that the assault upon the deceased which ended in his death was not the result of any prearranged plan. It was spontaneous in the sense that when the three accused saw the deceased attack Beri Iniga, their line relative, they became angry and when the 1st Accused, Benia, intervened against the deceased the other two accused assisted him in what was an unprovoked attack upon the deceased with the intention of beating him up The 1st Accused held him while the 2nd Accused slashed him across the head with the ring. There was clearly an intention on the part of those two to cause him harm. When the 2nd Accused drove his spear into the deceased's back he must have known that the natural and probable consequence would be to kill him and in law he is undoubtedly guilty of the murder charged. On the evidence neither provocation nor self defence are in issue. The question remains whether the 1st and the 3rd accused can be said to be parties to the act of the 2nd accused. I do not think, although I have found that the 1st and 3rd knew that the 2nd accused possessed a spear, that it was a natural and probably consequence of Benia's intervention against the deceased that the 2nd Accused would use the spear with fatal results and that therefore the other two accused must have anticipated that."

There is an obvious slip (as counsel agree) in that passage; where it is stated that "the second accused slashed him across the head with the ring" it is clear from other parts of the judgment that the learned judge intended to refer to the third accused, Safa'a Irota. Having quoted a passage from *R. v. Smith (Wesley)* [1963] 3 All E.R. 597, 601 the learned

Chief Justice held that it was clear that though Benia Ledi and Safa'a Irota intended that the deceased should be unlawfully hit and hurt he was not satisfied that they intended that death or grievous bodily harm should be caused. He convicted them of manslaughter. He convicted Gwangario Tulofiu of murder for the reasons given in the passage from the judgment quoted above.

Only one ground of appeal has been relied upon on behalf of each appellant. In the case of Gwangario Tulofiu it reads :—

> "Having regard to the fact that the learned trial Judge found as a fact that the attack by the three accused upon the deceased was "spontaneous", the learned trial Judge erred in law and in fact in finding the first appellant guilty of murder."

Counsel's argument under this head was finally resolved into a submission that the use by the learned Chief Justice of the words in the passage from the judgment above quoted — "It was spontaneous in the sense that when the three accused saw the deceased attack Beri Iniga, their line relative, they became angry . . . . . ", implied a doubt whether Gwangario Tulofiu had been provoked. As a question of construction of the judgment this submission is untenable as the learned Chief Justice went on to say a little later, that on the evidence provocation was not in issue. The only evidence of provocation to which counsel could point was the attack upon a "line" relative.

The section dealing with provocation in the Penal Code (No. 12 of 1963) of the British Solomon Islands Protectorate is both wide and unusual in its terms. It is Section 198, which reads :—

> "Where on a charge of murder there is evidence on which the court can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be determined by the court; and in determining that question there shall be taken into account everything both done and said according to the effect which it would have on a reasonable man."

The effect of English decisions concerning the meaning to be attached to the actual word "provocation" is not, however, excluded, for Section 3 of the Code provides that expressions are presumed to have the meaning attaching to them in English criminal law, so far as is consistent with the context and except as may be otherwise expressly provided.

We do not need to examine the meaning of the section more closely, for the learned Chief Justice held that there was no acceptable evidence of provocation. In so doing he impliedly held that an attack upon a relative of the remote degree shown in this case was not provocation, at least in the circumstances proved. We are not in a position to differ from this finding and indeed, agree with it. This being the only ground, the appeal of Gwangario Tulofiu must fail. On the facts as found the conviction of murder was fully justified. We would add, in deference to the argument of counsel, that we fully accept the law to be that the formation of an intention to kill or to inflict grievous harm does not exclude

the defence of provocation where it can be supported on the evidence: *Lee Chun Chuen v. R.* [1963] A.C. 220. In the present case we agree with the learned Chief Justice that it could not be supported. A

The ground of appeal relied upon for Safa's Irota reads —

> "Having regard to all the circumstances, the learned trial Judge erred in convicting the second appellant of manslaughter when there was no nexus between his assault, and the fatal stabbing of the deceased."

Under this ground it was argued that the wound inflicted by Safa'a Irota with the ring would not normally and did not in the present case cause death — therefore he could not be convicted unless he was a party to a common design; it was counsel's submission that as the learned Chief Justice had found that there was no pre-arranged plan, Safa'a Irota could not have anticipated that, after he himself had struck the deceased, Gwangario Tulofiu would get up and use a spear. That is, in effect, what the learned Chief Justice held. B C

As to the law on this subject the court has referred to *R. v. Smith (Wesley)* (supra), *R. v. Betty* (1963) 48 Cr. App. R.6, *R. v. Anderson & Morris* (1965) 50 Cr. App. R.216 and *R. v. Morrison* [1968] N.Z.L.R. 156

The law appears to be correctly summed up in the headnote to *R. v. Anderson & Morris* (supra) which reads: —

> "Where two adventurers embark on a joint enterprise, each is liable for acts done in pursuance of it and also for the unusual consequence of such acts, provided that they arise from the execution of the joint enterprise; but if one of the adventurers goes beyond what has been tacitly agreed as the scope of the enterprise, his co-adventurer is not liable for the consequences of that extraneous act. D
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> Where, therefore, two persons take part in a concerted attack and one of them departs completely from the scope of the common design and forms an intent to kill or cause grievous bodily harm and uses a weapon in a manner in which the other party had no reason to suspect he would act, and so causes death, the other party is not necessarily liable to be convicted, and may be entitled to an acquittal, of manslaughter." E

The difficulties which arise are those of applying the principle to the facts of particular cases, and in ascertaining what has been tacitly agreed and what is a complete departure from the common design. The test which is frequently applied is whether the particular appellant, who was a party to the design had knowledge of a dangerous weapon carried by another party and whether he should reasonably have foreseen that the other party would or might use that weapon. In *R. v. Morrison* (supra) something called a scrubber was used. The court of appeal said that once the jury concluded that there was a common design to escape by the use of force, then the evidence was overwhelming that the force contemplated was such as to render the constable unconscious or otherwise incapacitated — in other words to inflict grievous bodily injury. The conviction in that case was accordingly of murder. F G

It might be well to mention at this point that whereas in England the matter is one for the common law, in the British Solomon Islands and elsewhere it has been covered by legislataion. In *R. v. Morrison* (supra) for example, section 66 (2) of the Crimes Act, 1961 (New Zealand) is quoted and reads — H

A "Where two or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose."

The provision applicable in the British Solomon Islands is section 22
B of the Penal Code which is in the following terms :—

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."
C

It will be noticed that whereas the New Zealand section has been careful to make the test of knowledge of probable consequences subjective, the British Solomon Islands is worded rather differently. We need not consider that further in the present case, as the evidence of the common intent is all circumstantial and the only way of imputing a subjective
D common purpose to the particular appellant is by considering the circumstances as a guide to what a reasonable man would anticipate as a probable consequence. The appellant's defence was a denial of participation and therefore only the test of what a reasonable man would conclude can be used as a guide to his actual intention.

It is plain that, having considered the case of *R. v. Smith* the learned
E Chief Justice sought to apply the correct test. He found a common purpose in the three accused persons to "beat up" the deceased. He found, however, that the use of the spear by Gwangario Tulofiu was not to be anticipated by Benia Ledi and Safa'a Irota; therefore they were not guilty of murder. They had, however, the intention that the deceased should be unlawfully hit and hurt. On this he concluded that Benia Ledi and Safa'a Irota were guilty of manslaughter.

F We think, with respect, that here the learned Chief Justice fell into error. The death of the deceased was not caused by any act done pursuant to a common purpose shared by these two accused. The death was not an unusual consequence of that purpose as it would have been if, for example, the blow on the head had proved fatal because the deceased possessed an exceptionally thin skull. As hinted in *R. v. Anderson & Morris* it becomes a question of causation. If nothing that Benia
G Ledi or Safa'a Irota did caused death, and if as the learned Chief Justice found, they are to be absolved from responsibility for the act of Gwangario Tulofiu in using his spear with fatal results, they cannot be convicted of manslaughter.

The learned Chief Justice, in finding a common purpose to hit and hurt,
H was adopting words used in *R. v. Smith* (supra) in which it was indicated that if death resulted manslaughter was the appropriate verdict. That is of course so where death results from acts within the common purpose. In Smith's case the appellant intended to hurl bricks at the barman and was aware that the person acting in concert had a knife which might

well be used if the barman resisted. The court said that by no stretch of the imagination could such an eventuality be outside the scope of the common purpose. In the present case the learned Chief Justice has held that Safa'a Irota was not party to a common purpose to cause death or grievous harm, and could not have anticipated the act which in fact caused death. In that case, the effect of section 22 of the Penal Code falls away, for murder was not a probable consequence of the common purpose and Safa'a Irota becomes liable only for his own acts.

For the reasons given the appeal of Safa'a Irota must be allowed. On the evidence and findings of the learned Chief Justice this appellant is obviously guilty of assault occasioning actual bodily harm contrary to section 238 of the Penal Code. Under rule 36 (2) of the rules of this court made under the Pacific Order in Council, 1893, this court has power to substitute a conviction of that offence if the learned Chief Justice could have done so at the trial. A trial judge's general powers in this respect are contained in section 157 of the Criminal Procedure Code (No. 10 of 1961) which reads :—

> 157 (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete lesser offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the lesser offence although he was not charged with it.
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> (2) When a person is chraged with an offence and facts are proved which reduce it to a lesser offence, he may be convicted of the lesser offence although he was not charged with it.

Having perused the case of *R. v Kelly* [1963] 3 All E.R. 558 we are of opinion that subsection (1) does not apply. The charge was murder, the particulars of which do not necessarily include aggravated assault. A section in similar terms to subsection (2) however, has been construed in East Africa as permitting such a substitution provided the lesser offence is cognate in character and provided the accused person had a fair opportunity of making his defence to the alternative charge. We refer to the cases of *Robert Ndecho v. R.* (1951) 18 E.A.C.A. 171 and *Dracaku v. R.* [1963] E.A. 363. The conditions mentioned are amply fulfilled in the present case.

We therefore allow the appeal of Safa'a Irota against his conviction of manslaughter and quash the sentence of three years imprisonment imposed in respect thereof; we substitute a conviction for the offence of assault occasioning actual bodily harm contrary to section 238 of the Penal Code, and a sentence of two years imprisonment to run from the date of his original conviction.

The appeal of Gwangario Tulofiu is dismissed.

Appeal of Safa'a Irota allowed; conviction of assault occasioning actual bodily harm substituted and sentence of two years imprisonment imposed.

Appeal of Gwangario Tulofiu dismissed.