



## HIGH COURT OF KIRIBATI

*Criminal Case No 8/2017*

**THE REPUBLIC**

**v**

**MATAIO TAKABIRI**

*Pauline Beiatau, Director of Public Prosecutions, for the Republic  
Teetua Tewera for the accused*

*Dates of hearing: 10-11 October 2018*

*Date of decision: 12 October 2018*

### **JUDGMENT**

- [1] The accused has pleaded not guilty to 1 count of murder, contrary to section 193 of the *Penal Code* (Cap.67).
- [2] The information in this case was originally filed on 10 January 2017. That information did not comply with section 70 of the *Criminal Procedure Code* (Cap.17), and a fresh information (in similar terms) was filed by the Attorney-General, dated 11 September 2018 and signed by her. Apart from a minor amendment to the particulars of the offence made on the morning of the first day (without objection), the trial went ahead on the fresh information.
- [3] I should say at the outset that I am aware that this matter proceeded to trial before the Chief Justice during a previous sitting of the High Court in Kiritimati, but was not completed. I have not read the Chief Justice's notes of the evidence taken at that time. The trial started afresh before me, and my verdict is based entirely on the evidence given before me this week.
- [4] Six witnesses were called for the prosecution. Bwatemeta Eteri is a neighbour of the accused in Tereitaki village on Tabuaeran. She testified that on the afternoon of 14 August 2015 she was at home, breastfeeding her child. She could hear voices coming from the accused's *buia*, some 20 metres away. Bwatemeta recognised the voice of Tibwa Teakai, another resident of Tereitaki village. He was speaking in a loud voice. She heard him say the name Takabiri (the father of the accused) and a reference to a pig. There was a second person speaking, but she could not make out what that person was saying.

- [5] Bwatemeta described hearing a slap, after which Tibwa's name was called. She could not tell who was speaking, but she knew that it was not Tibwa's voice. Bwatemeta heard 2 more slaps, with each slap followed by someone calling Tibwa's name. She then heard a commotion, and what sounded like a struggle on the accused's *buia*. She left her *buia* with her child and went to her nearby brick house. Bwatemeta looked over at the accused's *buia* (the floor of which is quite high off the ground), and saw the accused descending the ladder carrying a white bucket. By this time it was about 2:00pm, as her husband had not long before returned to work after lunch. The accused went towards the toilet at the eastern side of his plot. She could not see Tibwa. For a time Bwatemeta's view of the accused was obscured by a banana tree, but he came back into view a short time later and climbed back on to his *buia*.
- [6] Some time later, Bwatemeta heard Nei Roira (the accused's neighbour on the other side) calling for Nabwebwe (Roira's husband), asking him to check on Tibwa. Bwatemeta went close to the *buia* of the accused and saw the accused return from somewhere, accompanied by 2 women. She saw the accused climb up on to his *buia*. She watched as the accused pulled on the legs of someone lying on the *buia*, after which he fell from the *buia* to the ground. The accused then climbed back up the ladder. By this time many people had arrived at the accused's house, and some of them also climbed up on to the *buia*. Bwatemeta saw the accused and others lift the body of Tibwa down from the *buia* and place it in a tub of water near the well. She saw someone try to administer cardiopulmonary resuscitation (CPR) to Tibwa, but he could not be revived. Sometime later, Bwatemeta saw the nurse arrive to examine Tibwa's body.
- [7] Nabwebwe Abetenako is also a neighbour of the accused. He testified that, before midday on 14 August 2015, he heard singing coming from the accused's house. He recognised Tibwa's voice, which was very loud. Sometime later, at about 2:00pm, Nabwebwe was in the kitchen when he was called by the accused, who was standing near to the accused's toilet. The accused said, "Nabwebwe come here. I have something to tell you." Nabwebwe went to the accused, who asked him to go and check on Tibwa. The accused said that Tibwa was sleeping, and he asked Nabwebwe to go and wake him up. The accused was speaking normally, and did not appear distressed or panicked.
- [8] Nabwebwe climbed the ladder up on to the accused's *buia*, followed by the accused. The door to the other half of the *buia* was open, and he could see Tibwa lying on the floor, face up. He was wearing shorts, but no shirt. Nabwebwe saw some blood coming from his mouth. He put his hand on Tibwa's abdomen and he could tell that Tibwa was not breathing. He was dead.
- [9] Nabwebwe said to the accused, "Hey, he's dead." The accused pulled on Nabwebwe's hand and said, "What happened?" The accused began to cry. Nabwebwe left the *buia* to look for help. He ran to the house of another neighbour, Timon. The accused went with him. While Nabwebwe was running to Timon's house, he could hear his wife, Nei Roira, calling for him.

- [10] Nabwebwe saw Timon's wife, who said that Timon was at work. The accused was quite distressed, hitting the house. Timon's wife asked what had happened. The accused responded, "I am to be blamed. Tibwa hanged himself at my house." This was the first time that Nabwebwe had heard the accused say that Tibwa had hanged himself. Nabwebwe then left Timon's house to go and let Tibwa's family know what had happened.
- [11] Anterea Nabakai is another neighbour of the accused in Tereitaki village. He testified that, at around lunchtime on 14 August 2015, he was at Timon's house, talking with a friend, Tawerio. Tibwa arrived, very drunk, swaying from side to side. He almost fell, so Anterea and Tawerio supported him. They took him to the house of Anterea's father, Nabakai. The accused arrived on his bicycle, and said that he would take Tibwa to drink at his house, where the accused was drinking with Takabiri and Kakaake. Anterea and Tawerio helped Tibwa on to the crossbar of the accused's bicycle. Anterea watched the accused take Tibwa to his *buia*, before going to drink at loane's house.
- [12] Later that day, having heard something, Anterea ran to the accused's house, where he saw Tibwa's body in a tub of water. The accused was there and, with others, was trying to revive Tibwa. Anterea saw a scratch on Tibwa's right chest, but otherwise there was nothing remarkable about Tibwa's body.
- [13] Under cross-examination, it transpired that Anterea had not given his statement to Police until a year after Tibwa's death. However, he rejected the suggestion from counsel for the accused that Tibwa had died on a different day to the day on which the accused had taken Tibwa away on his bicycle.
- [14] Debbie Tebutii is a nursing officer on Tabuaeran. She testified that, on 14 August 2015, she was called to the accused's house where she examined the body of Tibwa. Debbie described seeing strangulation marks on Tibwa's neck, as well as a scratch on his right chest. Tibwa was wearing shorts, and she could detect an odour of alcohol from the body. Debbie considered that the marks on the neck were caused by a lavalava or rope. She concluded that Tibwa had hanged himself, and that there was nothing suspicious about the death.
- [15] Some days later, Debbie was called to again examine Tibwa's body. He had already been buried, but the soil was removed from the grave to allow for the second examination. By this time, however, the body was already decomposing, and was swollen and red. Tibwa was almost unrecognisable. The smell from the body was so bad that Debbie could not get close; she simply observed the body from ground level above the grave. She could no longer see the marks on Tibwa's neck, but his eyes were now swollen and bruised. There had been no bruising on Tibwa's face at the first examination. Debbie conceded that her second examination was not done properly, whereas the first examination of Tibwa's body had been a thorough one.

- [16] A medical report dated 21 August 2015 was tendered without objection. The report was in the name of Tabuaeran's Medical Assistant, Nantebwebwe, despite the fact that Nantebwebwe had never examined Tibwa's body. Debbie testified that the report was based on what she had told Nantebwebwe following the second examination, and did not include what she had seen when she first examined Tibwa's body on 14 August. I consider the medical report to be of no assistance at all.
- [17] The fifth prosecution witness was Borau Iotebwa. He now lives on Kiritimati, but in 2015 he was living on Tabuaeran, in Tereitaki village. He described an occasion, sometime after Tibwa's death, when he was drinking with his friend Tiaon at the house of Teakatau. They were drinking fermented yeast, having exchanged it for some sour toddy. The accused came and asked to join them. While they were drinking, the accused became agitated about the fact that Borau had given away the sour toddy in exchange for fermented yeast. The accused then said, "I will kill you the way I killed Tibwa." Borau asked the accused, "That means that you killed Tibwa?" to which the accused responded, "I was blamed for killing Tibwa, which is why I said that." Borau told Tiaon that they should go, and they left.
- [18] Under cross-examination, Borau rejected the suggestion that he had repeatedly asked the accused whether he had killed Tibwa before the accused said that he would kill them. Borau maintained that he had only asked the accused if he had killed Tibwa after the accused had said that he would kill them.
- [19] The final prosecution witness was Teem Ubanaba, the Catholic catechist from Tereitaki village. He testified that, on 14 August 2015, he saw Tibwa's body at the channel, where it had been placed in the sea in a futile attempt to revive him. Teem said that the accused was also there. After Tibwa's body was taken out of the sea, Teem examined it. He could see that the pupils of Tibwa's eyes were enlarged and there were spots of blood on the eyeballs. Teem observed that Tibwa's skin was darker from the neck up. There was a suggestion that Tibwa should again be placed in the sea, but the accused became angry. Teem advised that the body should be taken back to the home of Tibwa's family, and it was.
- [20] Teem spoke of a conversation he had with the father of the accused, sometime after Tibwa's death. The accused was in a hammock nearby but, as there was nothing to suggest that he could hear the conversation, I ruled that the testimony should not proceed as it could only be hearsay.
- [21] That brought the prosecution case to a close.
- [22] I formally found that the accused had a case to answer, and informed him of his rights, as required by section 256(2) of the Criminal Procedure Code. The accused elected to give evidence on oath in his own defence. No other defence witnesses were called.

- [23] The accused is a 35-year-old man. In the morning of 14 August 2015 he had gone to work at the airfield, returning home before lunch. He was alone on his *buia*, drinking fermented yeast. After about 30 minutes, Tibwa came and asked if he could drink with the accused. Tibwa was already a bit drunk. The accused hid the bucket of yeast and told Tibwa that he did not have anything to drink. Tibwa complained and, because the accused felt sorry for him, he gave Tibwa a small bowl of fermented yeast. As they drank, Tibwa told the accused of the problems he was having with his wife. She had gone to Kiritimati for medical treatment, and had told Tibwa that she would not return unless he stopped drinking. Tibwa talked of committing suicide, and the accused tried to console him. The accused reminded Tibwa that he had young children to think about.
- [24] Tibwa complained that there was no one to look after him, and he had not eaten for some time. The accused told Tibwa that he would go and find him some food. As he went to leave the *buia*, he tried to take the bucket of yeast with him, which upset Tibwa. The accused tried to calm Tibwa, because he was worried that his father would find out that he (the accused) was drinking. The search for food apparently forgotten, the accused and Tibwa continued drinking and talking. By this time Tibwa was quite drunk, and sometimes loud. They discussed something that had happened after the death of the accused's brother. Tibwa told the accused that he knew the accused's father, Takabiri, very well, and that he had not expected to be paid for his contribution of a pig.
- [25] Tibwa reminded the accused about his need for food. The accused went down to his kitchen and found that he had nothing to offer Tibwa. He told Tibwa that he would go and get food from his father's house. The accused walked to his father's house, which was some distance away. When he arrived, no one was there, so he returned. He estimated that he was away for almost 2 hours. Back at home, he could see from the ground someone standing and leaning against the internal door that separated the 2 halves of his *buia*. He climbed up on to the *buia* and could see through the security wire that it was Tibwa slumped against the door. He had hanged himself with one of the accused's t-shirts. A knot had been tied in one end of the shirt and jammed in the top of the door. The door was 'locked' with a nail. The other end of the t-shirt was tied around Tibwa's neck.
- [26] The accused pulled on the door, releasing the t-shirt, and causing Tibwa to fall to the floor. The accused put Tibwa on his back and removed the t-shirt from around his neck. When Tibwa had first arrived he had been wearing a t-shirt and shorts, but was no longer wearing the t-shirt. The accused did not know what happened to it. The accused attempted to revive Tibwa. He slapped his face 3 or 4 times, and called Tibwa's name loudly.
- [27] The accused then retrieved the bucket of fermented yeast and hid it down near his toilet, which was close to Nabwebwe's house. He called to Nabwebwe, told him that he thought that Tibwa had hanged himself and asked him to go and check on Tibwa, to see if he was really dead or just playing a prank.

- [28] Nabwebwe and the accused went back up on to the *buia*. Nabwebwe checked Tibwa's body and then left to get help from Timon's house. The accused went as well and told the occupants of Timon's house that Tibwa had hanged himself. When he returned home, many people had started to arrive. They took Tibwa's body and placed it in the tub full of water, in an attempt to revive him. A truck arrived, and someone suggested that maybe Tibwa could be revived by putting him in the sea. That did not work either, so Tibwa's body was taken to his house, where many people had already gathered. The accused stayed there until early evening, before returning home. He testified that he later heard rumours that he was being blamed for killing Tibwa.
- [29] The accused's testimony could not be shaken under rigorous cross-examination. He denied fighting with Tibwa on the *buia*. He denied strangling Tibwa. The accused suggested that it was possible that, when he had first gone to Nabwebwe for help, Nabwebwe had not heard him say that Tibwa had hanged himself because he had problems with his hearing. The accused insisted that the events described by Anterea had not been on the day that Tibwa died. He maintained that he had only said what he said to Borau and Tiaon because he was angry and frustrated at the suggestion that he had killed Tibwa.
- [30] That brought the defence case to a close.
- [31] In considering the evidence in this case, I remind myself that it is not for the accused to prove his innocence. The burden rests with the prosecution to prove, beyond reasonable doubt, each and every element of the offence charged.
- [32] In order to convict the accused of the offence of murder in the circumstances of this case, I must be satisfied to the required standard of each of the following elements:
- a. the accused caused Tibwa's death;
  - b. he did so with "malice aforethought"; that is, with an intention to kill or cause grievous harm (section 195(a) of the Penal Code);
  - c. he killed Tibwa by an unlawful act or omission.
- [33] Counsel for the prosecution concedes that there is no direct evidence that the accused killed Tibwa; the case against the accused is entirely circumstantial. That is not to say that a person cannot be convicted of murder based wholly on a circumstantial case. Circumstantial evidence has been described as being like a rope composed of several cords; whereas one strand of the rope might be insufficient on its own to support the burden of proof, a number woven together could be sufficient.<sup>1</sup>

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<sup>1</sup> *Thomas v R* [1972] NZLR 34

- [34] However, I should only convict the accused if:
- a. I am satisfied of his guilt beyond a reasonable doubt; and
  - b. guilt is the only rational inference that can be drawn from the circumstances of this case.<sup>2</sup>
- [35] If, having regard to the whole of the evidence, there is a reasonable hypothesis that is consistent with the accused's innocence, then I must acquit.
- [36] In considering the evidence of the prosecution witnesses, I find them all to have been credible. But is their testimony enough for me to convict the accused of murder?
- [37] There are some clear inconsistencies between the evidence of the witnesses and the evidence of the accused. It is a shame that counsel for the accused did not ask Bwatemeta how much time passed between hearing Tibwa mention Takabiri and the pig and hearing the slaps. On the accused's version, there would have been around 2 hours between these events, but it appeared from Bwatemeta's evidence that they happened in quick succession. Counsel for the accused also neglected to ask Nabwebwe about his supposed hearing problems.
- [38] Some of the accused's behaviour can certainly be described as odd. It is difficult to understand why one of his first acts on discovering Tibwa's body was to hide the bucket of yeast. It was also extremely unwise for the accused to have made the threat to Borau and Tiaon, even if it was made out of frustration. It was a very stupid thing to say, but the circumstances in which it was said give me reason to doubt that it should be considered an admission of guilt.
- [39] Counsel for the prosecution argues that I can infer from the evidence that Tibwa died following a fight with the accused. However, other than the noises heard by Bwatemeta, there is no evidence of a fight having occurred. There was nothing about the accused's *buia* that suggested that it had been the location of a recent fight, and Tibwa's body showed no injuries consistent with him having been assaulted. The bruising to Tibwa's face observed at the second examination is far more likely to be the result of post-mortem decomposition. The condition of Tibwa's body, as observed by Nabwebwe, Debbie and Teem shortly after Tibwa's death, is entirely consistent with death caused by hanging.
- [40] On a full consideration of the evidence in this case, I find that I cannot be satisfied to the necessary standard that the accused killed Tibwa. It is entirely possible that Tibwa's death occurred in the manner described by the accused. As such, with the first of the 3 elements not proven, I must find the accused not guilty. He is accordingly acquitted and discharged.
- [41] I am aware that this case has caused tensions to run high on Tabuaeran. I am sure that there are people on Tabuaeran who firmly believe that Mataio killed Tibwa.

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<sup>2</sup> *R v Smith* (1985) A Crim R 130

However, I must remind you all that, under our system of justice, it is not enough to believe that we know what happened. It is not enough to have suspicions. It does not matter what we believe; it only matters what can be proved. There must be evidence. An accused person is entitled to be presumed innocent unless the prosecution can prove, beyond any doubt based on reason, that the person committed the offence charged. I ask you to respect the decision of the court, and not be tempted to take matters into your own hands.

  
**Lambourne J**  
Judge of the High Court

The seal of the High Court of Kiribati is circular, featuring a central emblem with a sun, a flag, and a shield. The text "HIGH COURT OF KIRIBATI" is written around the top inner edge, and "TE OWA AE E RIETATA I KIRIBATI" is written around the bottom inner edge.