



HIGH COURT OF KIRIBATI

Criminal Case No 77/2016

THE REPUBLIC

v

BURANGKE ERITANE

*Pauline Beiatau, Director of Public Prosecutions for the Republic
Mantaia Kaongotao for the accused*

Dates of hearing: 6-7 November 2018

Date of judgment: 9 November 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] An information was originally filed in this case on 26 August 2016. That information did not comply with section 70 of the *Criminal Procedure Code* (Cap.17). On 29 October 2018, the Attorney-General rectified the defect by filing a fresh information (in the same terms) signed by her. The trial proceeded on that information.
- [3] The evidence in this case was fairly straightforward. In the early evening of 26 May 2016, the accused returned to the house of Teeta, close to the Seaman's Hostel in Betio. Teeta was a seller of fermented yeast, and the accused, a self-confessed alcoholic, had been staying there for about a week. On his return, he found the deceased, Timra Eberi, drinking yeast with a man named Teawaki. According to Tekanimaeu Tekiau (Teeta's son-in-law), on seeing the accused Timra exclaimed, "How can you welcome this person to your house? He tried to rape his cousin's wife, which is why he was sent away."
- [4] Bouamatang Mwatiare (another resident of the house) testified that, when the accused arrived, Timra (who was very drunk) said, "Here is the rapist." Timra also said that the accused had been sent away from Bwebwenibure's house because he had done something bad to Bwebwenibure's daughter.

- [5] Both witnesses said that the accused got angry and said that he was going to lodge a complaint with the police. Tekanimaeu described the accused as being “a bit drunk”, while Bouamatang said that the accused was “drunk, but not very drunk”. The accused then left Teeta’s house.
- [6] The accused was next seen at the nearby house of Bibwari Binataake. Bibwari knew the accused quite well, as he had previously stayed with her. It was between 6:30pm and 7:00pm. The accused asked Bibwari if he could borrow one of her kitchen knives, as he wanted to cut some pandanus root as a local medicine for his hepatitis. Bibwari was reluctant, as she was worried about what the accused might be planning, but the accused was persistent, so she gave him a knife. She testified that, in her opinion, the accused was not drunk. The accused left shortly after.
- [7] Tekanimaeu testified that the accused returned to Teeta’s house, having been away for almost an hour. The accused sat on a broken chest freezer. He told Tekanimaeu that what Timra had said earlier was true, but he had exaggerated. The accused said that he wanted to challenge Timra to a fight. Tekanimaeu advised against that because Timra (described by all as “tall and big”) was very drunk. Timra was sitting inside the house, leaning against a low wall made from roofing iron. He was chatting with Bouamatang. The accused wandered away to another part of the house, while Tekanimaeu attended to his cooking. Shortly after that, while Tekanimaeu was standing in the doorway of the house, he saw the accused come up behind Timra and drive a large knife into Timra’s right shoulder, at the base of his neck. Tekanimaeu had not seen the knife in the accused’s possession prior to that. The accused tried to remove the knife, but it was stuck. The handle came off, leaving the blade embedded in Timra’s shoulder. The accused then left.
- [8] Timra stood up and looked like he wanted to fight. He went outside the house and removed the blade, at which point a large amount of blood came from the wound. Timra collapsed, shaking. Someone placed a cloth on the wound, trying to stop the bleeding. The police and an ambulance came, and Timra was taken away.
- [9] Bouamatang’s account of what happened after the accused returned was similar to that of Tekanimaeu, although Bouamatang said nothing of the conversation between the accused and Tekanimaeu while the accused had been sitting on the freezer. Bouamatang thought that, after the initial encounter between the accused and Timra, the accused had been away for more than 10 minutes.
- [10] Tekanimaeu identified a knife (missing a handle) with an 18-centimetre blade as being the knife that the accused had used to stab Timra. Bibwari was shown the same knife and confirmed that it was the one she had lent the accused, although it had a handle when she had last seen it.

- [11] A medical certificate prepared by Doctor Toaiti Oten was tendered by consent, which said that Timra had been brought to the Betio Hospital by ambulance at 7:35pm on 26 May 2016. He was dead on arrival. Cause of death was given as hypovolaemic shock (*ie.* shock due to loss of blood), as a consequence of the stab wound, which was measured as being 2-3 inches long and 2 inches deep.
- [12] The only other witness for the prosecution was Been Bureka. Been is a cousin of the accused and was, at the time, a special constable. He is presently a civilian employee of the Kiribati Police Service. Been testified that the accused came to his house at around 8:00pm on the night in question, asking for bus fare. They chatted, and the accused told Been that he had stabbed Timra at a place close to the Seamen's Hostel and ran away. The accused said that he had used a knife that he had borrowed from Bibwari under the pretext of needing it to get his medicine. He said that he had stabbed Timra in the right shoulder, from behind. He had tried to pull the knife out but it was stuck, and then the handle broke. He had taken the handle with him and thrown it away. The accused told Been that he had stabbed Timra because he was angry with him for always mocking him. Been testified that, at the time, he considered that the accused was "a bit drunk". He smelt of alcohol. However the accused was neither swaying nor slurring his words. The accused told Been to call the police station to confirm what he had been saying. Been tried calling the Betio police station but could not get through, so he called the Bairiki police station. He then told the accused not to leave and, shortly afterwards, police officers arrived and arrested the accused.
- [13] At the close of the prosecution case, I formally found that the accused had a case to answer. I 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.
- [14] The accused is either 51 or 52 years of age. He is married, but he separated from his wife in 2010 as a result of disagreement over his heavy drinking. He became homeless; known in Kiribati as *kain te bururika* (a name given to alcoholics who, during the colonial period, would drink methylated spirits, or *bururika* (literally 'blue liquor')). He roamed around, scavenging to get money to buy alcohol or food, sleeping wherever he could. He would often eat food that had been thrown away. By 2014 he was living at the landfill in Betio with other *bururika* people, collecting cans, bottles and scrap metal to sell for recycling. He was drinking alcohol every day. Late in 2014, Timra Eberi joined the group at the landfill. At first, they got on well together. Timra was big, tall and well-spoken. However, he had a bad temper and could become aggressive when very drunk. In early 2015, for reasons that are unclear, Timra attacked the accused, crushing the accused's throat with his foot and hitting him in the face, knocking out some teeth. The accused now has difficulty speaking because of the damage done to his larynx. From that time on the accused always avoided Timra when he could.

- [15] By early 2016 the accused was no longer comfortable staying in close proximity to Timra, so he left the landfill. For several months he roamed around, usually from one seller of fermented yeast to another, sleeping wherever he could. He was drinking fermented yeast, and getting drunk, every day.
- [16] On the day before Timra died, the accused was at Teeta's house. That night he slept under the *bua*, next to Bouamatang. He recalls waking up very early in the morning, sober. He had a bottle of liquor that he had been given the night before. He left Teeta's house and walked along the seawall towards the hospital. He planned to go and drink the liquor with Kamauti. The accused recalls sitting on the seawall near the hospital, drinking from the bottle. From that point on he remembers nothing of what happened that day. His next memory is waking up in a police cell in Bairiki.
- [17] Having heard the account of his actions, the accused asserts that it was out of character for him to go to Teeta's house when Timra was drinking there, because it was his unwavering practice to avoid him. The accused also testified that he did not know where Been lived, and he did not even know that Been had a house in Betio. He testified that he experienced frequent blackouts when drinking alcohol, and that this day was no different.
- [18] 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.
- [19] In order to convict the accused of the offence of murder, I must be satisfied to the required standard of each of the following elements:
- a. that Timra Eberi is dead;
 - b. that the accused caused Timra's death by an unlawful act or omission;
 - c. that he did so with malice aforethought, as that expression is defined in section 194 of the Penal Code.
- [20] There can be no doubt that Timra is dead; that much is conceded.
- [21] Did the accused cause Timra's death? Counsel for the accused submits that I should not regard any of the prosecution witnesses as being credible. However, despite some minor variations between the evidence given by Tekanimaeu and Bouamatang and their statements to police, I am satisfied as to their explanations for the differences. I found all 4 prosecution witnesses to be credible, and I accept their evidence. None of them could be shaken under cross-examination. The suggestion that someone else might have stabbed Timra is without foundation. I am satisfied beyond reasonable doubt that the accused stabbed Timra, and that Timra died as a direct result of having been stabbed.

[22] In order to be satisfied on the question of malice in the circumstances of this case I must ask myself whether, at the time of the stabbing, the accused intended to kill or cause grievous harm. Ordinarily it would be enough to infer the required intention from the very act of stabbing. However, on this point, counsel for the accused contends that section 13(4) of the Penal Code is applicable. The subsection provides as follows:

Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

[23] It is not for the accused to prove that he was so intoxicated that he could not form the intention to kill or cause grievous harm; the onus remains on the prosecution to prove that he had the requisite intention, despite his intoxication.

[24] Counsel submits that the accused's memory blackout is clear evidence that he had consumed such a quantity of alcohol on the day in question that he would have been incapable of forming the necessary intention to kill or cause grievous harm. I do not accept this. There is very little evidence of how much the accused had to drink on that day. He testified that he woke up sober, and that he drank some of the liquor from the bottle more than 12 hours before Timra was stabbed. From that point onwards, the accused claims to have no memory. There is evidence that he consumed a quantity of fermented yeast at Teeta's house in the early evening, but every witness, each of whom knew the accused and his habits well, testified that the accused was no more than "a bit drunk".

[25] The evidence shows that the accused was functioning at a high level that evening. He was able to conduct lucid and coherent conversations. He concocted and implemented a plan to deceive Bibwari into giving him a weapon. On his return to Teeta's house he concealed the weapon from Tekanimaeu. He was able to sneak up behind Timra without him knowing. Later in the evening, he was able to give Been a full and detailed account of the stabbing. These are not the actions of a man who is so intoxicated as to be incapable of intending the consequences of his actions. I am satisfied beyond reasonable doubt that the accused intended to at least cause grievous harm to Timra when he stabbed him that evening.

[26] It remains then to deal with the issue of provocation. Section 197(a) of the Penal Code provides that an accused who would otherwise be guilty of murder is guilty only of manslaughter if the accused was provoked by the deceased into losing his self-control. Section 198 provides that the provocation must be such as to make a reasonable person act as the accused did. This requires application of a 2-step process:¹

First, was the accused actually provoked into losing his self-control as a result of which he committed the act which killed the deceased? Secondly, was the

¹ *Republic v Beretia Bakaatu*, Court of Appeal Criminal Appeal 1/1995

provocation such that it was capable of causing a reasonable person to lose self-control and to act in the way that the accused did?

- [27] Despite the clear language of section 197 (“proved on his behalf”), the burden of negating the defence of provocation remains on the prosecution throughout.²
- [28] While Timra’s accusations may well be capable of amounting in these circumstances to provocation such as would cause a reasonable person to be deprived of their self-control, I am satisfied beyond reasonable doubt that the accused did not in fact lose his self-control. He was clearly angry, but his actions were methodical and deliberate. The accused went to Bibwari’s house and successfully negotiated for the knife, then returned to Teeta’s house and had a conversation with Tekanimaeu, all between hearing Timra’s insults and the stabbing. The prosecution has negated the defence.
- [29] I am therefore satisfied, beyond reasonable doubt, that the accused killed Timra by an unlawful act, and that he did so with malice aforethought. I find the accused guilty of the offence of murder, contrary to section 193 of the Penal Code, and he is convicted accordingly.
- [30] While there is only one sentence that can be imposed for the offence of murder, I will hear counsel as to the fixing of a non-parole period, if any.


Lambourne J
Judge of the High Court



² *ibid.*