**IN THE COURT OF APPEAL**
**OF SOLOMON ISLANDS**

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| **Nature of Jurisdiction:** | appeal from a judgment of the High Court of Solomon Islands (Muria CJ) |
| **Court File Number:** | Criminal Appeal Case No: 01 of 2000 (on appeal from High Court Criminal Case No: 40 of 1999) |
| **Date of Hearing:** | 5 October 2010 |
| **Date of Judgment:** | 8 October 2010 |
| **The Court:** | Auld (President)<br>Adams JA<br>Hansen JA |
| **Parties:** | **DUDLEY PONGI (Appellant)**<br>v<br>**REGINA (Respondent)** |
| **Advocates:** | Appellant: L McSpedden<br>Respondent: R Olutimayin |

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**JUDGMENT OF THE COURT**

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**The appeal is dismissed.**

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[1] On 11 June 2000, following trial on 10, 11 and 14 January, and 1, 3 and 4 February 2000, Muria CJ convicted the appellant of murder and sentenced him to life imprisonment.

[1] The notice of appeal was filed on 10 March 2000. The delay in bringing this matter on for hearing is considerable. Notwithstanding that extraordinary delay, there is no explanation offered for it in the papers filed. In cases of such delay this Court would expect a proper explanation, and, in normal circumstances, this would require an affidavit from the appellant.

[2] Four grounds of appeal are set out:

i) That the Judge erroneously applied the law applicable to circumstantial evidence when he dismissed the hypothesis put before the Court on behalf of the appellant as being unsupported by the facts.

ii) That the Judge, having found that the fight and the struggle which resulted in the death of the deceased took place on the left side of the taxi, and after having found no reasonable explanation for that fact, should have accepted the defence argument that the deceased was an active participant or initiator of the fight, thereby returning a finding in favour of manslaughter.

iii) Considering the evidence of the appellant's state of drunkenness before and after the murder, the Judge erred in finding the appellant guilty of murder instead of manslaughter, or acquitting the appellant.

iv) The Court failed to take into account the evidence adduced by the appellant that he smoked "joint" during the night of the murder, which could have affected his ability to form an intention to commit murder.

**Background facts**

[3] On the evening of 12 September 1998 the appellant and a number of friends went nightclubbing. It is apparent that in the course of 12 September and the early hours of 13 September the appellant drank a considerable amount of alcohol and smoked some marijuana. Eventually the appellant's group engaged a taxi driven by the deceased to take them home. Others in the party were dropped off. The last person to be dropped off was the accused's brother, Michael Etei. That was at their father's house in Naha where the appellant and Michael lived. At that stage the appellant was sleeping in the front and his brother woke him. He refused to come out of the taxi, and said he wanted to go to Ngossi.

[4] Around 4 a.m. a resident and security guards in Ngossi heard voices and what they said was the sound of a fight. The evidence of these witnesses suggests that one voice belonged to the aggressor and one voice to the victim. One witness said he heard "two of three voices", to which we will return.

[5] These witnesses went to investigate and saw a person, who it is common ground was the appellant, emerge from behind the taxi, walk up the hill, returning and trying to push the taxi, before walking quickly down the hill. He was dressed in a white T-shirt and white jeans which were heavily stained. The witnesses found the deceased's taxi was stopped in a position off the road and at an angle. The deceased was found lying beside the passenger's side of the vehicle. He was clearly dead. There was a delay, said to be up to 15 minutes, between the witnesses first hearing the sound of a struggle and their approaching the car.

[6] The resident witness, Mr Iro, called the police before approaching the scene. Mr Iro called the police a second time when he saw the appellant walking fast down the road, telling them they should pick up anyone dressed in white that they passed. The police arrived at the scene shortly after the second call although one of the security guards said this was some time after they discovered the body and observed the appellant.

[7] In the event, the police attending the scene had passed the appellant, and he was soon apprehended at his cousin's house, asleep on the verandah. At that stage the police could not wake him and had to drag him out and place him in the police vehicle for return to the police station. When apprehended, he was wearing the white T-shirt and pants that were stained as indicated earlier. He was also wearing steel-capped safety boots.

[8] The post-mortem examination revealed that the deceased died from a broken neck. The pathologist said this was consistent with heavy kicks, or blows, to the back of the neck and head. This accorded with the evidence of witnesses at the scene, who described hearing the sound of thumping going on. He also noted non fatal cutting wounds consistent with a knife being used.

[9] The case put by the appellant at trial can be best summarised by a brief opening statement from his then counsel, Mr Nori, that can be found at page 67 of the appeal book:

> Our case is that the accused was drunk. He took the taxi to Ngossi.
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> The last thing he remembered was that he sat at the front of the taxi. He was asleep.
>
> The next thing remembered was when he awoke he saw bright light. He got up and stepped on something like a body. He fell down and slept again. He woke up and walked towards the road where the light was. He walked down the road and went to Tepaika's house. He fell into sleep again.
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> The next thing he remembered was waking up in the police station.

**Submissions**

[10] Ms McSpedden accepted that the Judge correctly identified the caution needed when approaching a case based on circumstantial evidence. However, she said that the Judge was wrong to reject the defence's competing hypothesis, which was said to be supported by the evidence and as a reasonable possibility it could not have been excluded. This hypothesis was that the murder could have been committed by another person, or persons, who had escaped away from the road into surrounding bush. It was argued for the appellant that it was some 15 minutes before the witnesses approached the vehicle, or indeed saw the appellant emerge from behind the vehicle. It was submitted that this time lag meant the appellant could have slept through the assault which could have been carried out by a passenger, or passengers, picked up without the accused's knowledge. Alternatively, it was submitted that the killing could have been carried out by an unknown assailant, or assailants, in the area where the vehicle stopped.

[11] Ms McSpedden also submitted that the knife wounds found by the pathologist were consistent with the hypothesis that the crime was committed by another, or others.

[12] The Crown, however, says that the evidence accepted by the Judge relating to the voices heard by the witnesses showed there were only two people present and the defence hypothesis was simple speculation.

[13] The second ground was advanced on the basis that if it was open to the Judge to find if, it might have been the appellant involved in the altercation with the deceased, that there was no evidence, on the ground advanced, as to the circumstances of the altercation. It is said this prevented a finding of murder as the Crown had not negatived self-defence.

[14] The respondent submits that there was evidence that the deceased was the victim who was pleading for help and was subsequently killed. The Crown further submitted that even if the deceased has instigated the fight, the aggressor should have stopped the assault when the deceased started shouting for help and was overpowered by the aggressor. The Crown also pointed to the fact that in the course of the appellant's evidence there was no suggestion of his acting in self-defence.

[15] Grounds three and four may be taken together. It is submitted on behalf of the appellant that his level of intoxication, coupled with the consumption of marijuana, meant that it was reasonably possible that the appellant was incapable of forming the necessary intent so as to be guilty of murder. It is submitted if the Judge had considered the evidence relating to the intoxication of the appellant he would not have been satisfied the appellant was capable of forming the requisite intent or in fact did so.

[16] The Crown submits that there is no evidence that intoxication from alcohol and marijuana was such that it prevented the appellant forming the necessary intent to do grievous bodily harm or serious injury. To the contrary, the Crown points to the evidence that the thumping went on for some time, despite the deceased's cry for help and the lack of any signs of extreme intoxication when he was observed by the witnesses.

**Discussion**

[17] The Judge correctly identified the necessary caution when approaching circumstantial evidence. He cited from *Peacock v The King* (1911) 13 CLR 619 at 634:

> When the case against an accused person rests substantially upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are "such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused".

[18] In *Plomp v The Queen* (1963) 110 CLR 234 at 252 it was considered that to enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused "it is necessary not only that [his guilt] should be a rational inference but [that it should be the] only rational inference that the circumstances would enable them to draw...".

[19] Finally, again from *Peacock*, at 661:

> ... an inference to be reasonable must rest upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence.

[20] The hypothesis advanced on appeal went somewhat further than that advanced at trial. The allegation that another, or others, killed the deceased is based on his evidence of not being involved and the presence of knife wounds.

[21] The Judge considered the hypothesis advanced by the appellant and stated at page 20 of the appeal book:

> There was no evidence to support the theory of another person being picked up on the way to Ngossi. When that theory is discarded, the inevitable conclusion is that the accused was the only person present at the commission of the crime apart from the deceased. This conclusion is clearly tenable when one puts together the evidence of the witnesses I have mentioned earlier.
>
> The evidence here is largely circumstantial. But having considered all the evidence and the weight to be given to the combined effect of all the circumstances put together, the only rational inference to be drawn there from is that the accused was the only person present with the deceased when he (deceased) was killed.

And further at page 21:

> In this case the vital blow to the deceased's body was that delivered to the back of the neck. The injuries were consistent with kickings with heavy boots applied to that area of the body possibly when the deceased was on the ground lying faced downward. However it was caused, it was done by the accused who was at the time wearing a pair of heavy safety boots. Injuries to the head, shoulder and neck were caused by blunt weapon. That weapon was a pair of safety boots worn by the accused who delivered the vital blows to the body of the deceased. He also inflicted

> the other cuts to the body of the deceased with a sharp instrument. It is not hard to imagine how easy it was for him to discard the sharp instrument after the fight.

[22] It is inherent in these findings of the judge that he rejected the evidence of the appellant. It is also evident that the other prosecution evidence he accepted satisfied him beyond reasonable doubt that the hypothesis advanced on behalf of the accused was untenable.

[23] On the evidence we concur with his Lordship's conclusion. In any event the Judge had the advantage of observing the witnesses, of understanding the language their evidence was given in and considering their demeanour. This court has only the benefit of a translated note, necessarily incomplete to a greater or lesser degree. The issue before the Chief Judge was quintessentially a question of fact. He correctly identified the need for caution when considering circumstantial evidence. He considered all of that evidence carefully, properly, and as he said himself, anxiously.

[24] It is not for an appellate court in such circumstances to substitute its own view. Additionally, one interpretation for the appellant's comments regarding the car, if true, could mean it was broken down and stopped. That could only mean the accused was awake when it broke down and was aware of what occurred.

[25] The judge was entitled to make the finding he did on the evidence and to reject the appellant's hypothesis as untenable. Indeed, on the evidence adduced at trial we consider it inevitable that the alternative hypothesis advanced by the appellant would be found to be unreasonable. It is also clear that the judge was satisfied the requisite elements of the offence of murder had been established beyond reasonable doubt. Again we consider such a finding inevitable.

[26] This ground of appeal fails.

[27] The second ground, self defence, was never advanced at trial. The third and fourth grounds, intoxication, were advanced in a completely different way at trial. They are all dependent upon the appellant being the assailant who killed the

deceased. This is contrary to both his evidence at trial and the case advanced on his behalf by his counsel. We reject self defence for the following reasons :

1. While it was open to the appellant to give evidence claiming self-defence that is not what occurred at trial. He denied he was the person responsible for the death of the deceased. Instead, he said he woke up, effectively stumbled out of the taxi and tripped over something "like a body", gave it a kick and walked away. This stumble was used to explain the staining to his clothes. This evidence would not make it necessary for the Crown to prove this was not self defence or the Judge to consider such a defence.

2. There was evidence adduced that would satisfy the obligation of the Crown to prove beyond reasonable doubt that the accused did not act in self defence:

(i) The evidence of Mr Iro and the two security guards establishes that there was an aggressor and a victim, the latter effectively begging for mercy. Indeed, one of the security guards described the victim as calling for "mummy"

(ii) The medical evidence showed that the deceased had been subjected to an extremely violent attack. As we noted at [23] the judge, as he was entitled to do, found the fatal blows were caused by the appellant repeatedly kicking the back of the deceased's head. It is clear this could only occur while the deceased was lying on the ground. With the deceased in this position there is no tenable basis for the appellant to claim he believed he needed to defend himself by lethal force because of a threat of death or serious injury.

(iii) While the accused's clothes were stained there was no evidence that he suffered any injuries at all. This also suggests that the appellant had no basis to believe that he needed to defend himself. The presence of the knife wounds, inflicted by the appellant on the judge's findings, was also inconsistent with such a belief.

[27] Grounds 3 and 4 may be considered together as they rely on intoxication negativing intent. Ms McSpedden accepted the appellant faced difficulties with these grounds. It matters not that such intoxication arose from the consumption of alcohol or marijuana, or a combination of both. Under S: 13 of the Penal Code intoxication in this case would only provide a defence if it could be shown that the accused could not form the requisite intent. A drunken intent is still intent. Again these grounds of appeal must fail for the following reasons:

(1) It was never the accused's case at trial that his level of intoxication was such he could not form the necessary consent. Rather it was argued in the context of the assailant being someone other than the appellant that it was unreasonable to infer that a small intoxicated man could kill a larger sober man. It was not argued intoxication prevented the formation of the necessary intent.

(2) The medical evidence shows a prolonged and serious assault. This is not consistent with a lack of intent.

(3) The evidence showed that after emerging from behind the car and attempting to push it the accused said in pidgin to Mr Iro "Car ia hem no gud" (meaning that there was something wrong with the car). We have already commented on the effect of this evidence if it was true. Even in that event it is inconsistent with a person incapable of forming intent. If it is untrue, a person capable of saying something to explain and excuse his presence and actions could not be said to be a person incapable of forming intent.

(4). The accused decamped the scene at speed and was seen climbing the ladder to his cousin's house. These are unlikely to be the actions of someone unable to form intent due to intoxication.

(5) In any event we consider that the experienced Judge dealt with this issue correctly notwithstanding the limited way in which intoxication was used by

the accused at trial. At pages 12 and 13 the judge rehearsed the evidence we have just referred to and concluded:

> "When one put (sic) together the evidence of PW2, PW14, PW15 and the accused's evidence in cross examination, the picture suggested by the defence of an intoxicated man cannot stand. Certainly not on the evidence before the court. The prosecution have discharged the onus of showing that the accused was not incapacitated with alcohol at the time he emerged from the scene of the crime"

That this specific issue was before the Judge is clear. (See page 87 of the Case on Appeal). Perhaps the use of the word "incapacitated" was unfortunate but given that the relevance of intoxication went only to intent we accept that the Judge was satisfied the Crown had proved beyond reasonable doubt that the accused was capable of forming the requisite intent.

[28] The appeal is dismissed.

**Sir Robin Auld P**

**Adams JA**

Sir John Hansen JA