

IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION: Appeal from Judgment of the High Court of Solomon Islands (Naqiolevu J.)

COURT FILE NUMBER: Criminal Appeal Case No. 9 of 2010 (On Appeal from High Court Case No. 10 of 2009)

DATE OF HEARING: 5th October 2010

DATE OF JUDGMENT: 5th October 2010

THE COURT: AULD PA PRESIDENT
ADAMS JA.
HANSEN JA.

PARTIES: MR CYRIL HOALA Appellant
-V-
REGINA Respondent

ADVOCATES:

Appellant: MRS L McSPEDDEN

Respondent: MS R OLUTIMAYIN

KEY WORDS: Appeal against conviction

EX TEMPORE/RESERVED: Ex Tempore

ALLOWED/DISMISSED: Allowed

PAGES: 1 - 14

Introduction

1. This is an appeal from the High Court of Solomon Islands against a conviction of the appellant on a charge of murder alleged to have been committed by him on 11 June 2010 at Gizo in the Western Province. On completion of the hearing of the appeal, the Court ordered that the appeal be upheld, the conviction quashed and the appellant be discharged forthwith, stating that it would publish its reasons in due course. These are those reasons.

Background

2. It was alleged that the appellant was one of a group of armed men who entered at night what was described as a workshop where a number of men and women were sleeping, one of whom was shot and killed. The case for the prosecution was that the appellant was one of the armed gang and, although he had not fired the fatal shot, was liable to be convicted for murder as an accessory. The three fundamental issues in the appeal are, firstly, whether the deceased was indeed murdered by one of the attackers, secondly, whether there was sufficient evidence identifying the accused as having been present; and, thirdly, whether if he was present, there was sufficient evidence that he was part of a joint enterprise to attack the persons in the workshop which had, as one of its incidents, the probability that one of them might be killed.

Statutory provisions

3. The Penal Code provides as follows in respect of accessorial liability for the principal offender's offence --

PART V

PARTIES TO OFFENCES

Principal offenders

21. When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say -

- (a) every person who actually does the act or makes the omission which constitutes the offence;
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) every person who aids or abets another person in committing the offence;
- (d) any person who counsels or procures any other person to commit the offence.

In the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

Offences committed by joint offenders in prosecution of common purpose.

22. 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.

The principal offence

4. It is crucial that, for the purposes of liability as an accessory under sec 22, the nature of the offence which was alleged to be the probable consequence of the prosecution of the unlawful purpose should be clearly identified. Certainly, when premises where others are sleeping are entered by a group of armed men with hostile intent, it would be relatively easy to conclude that a weapon would probably be discharged and thus someone seriously injured. However, whether it would be probable that such an injury would be fatal, let alone that the shot would be fired with the intention to cause death or grievous bodily harm are questions of quite a different order and the answers, if there were no other evidence, likely to be highly speculative. Regrettably, it appears that neither counsel nor the learned trial judge asked these questions, let alone sought to answer them. In short, unless there was evidence that justified a finding beyond a reasonable doubt that the deceased was

murdered, that is to say, the person who caused his death did so by an unlawful act or omission with malice aforethought as provided by secs 200, 201 and 202 of the Penal Code, the accused must have been acquitted of the charge of murder. The prosecution expressly conceded that it was not alleged that the deceased fired the shot that killed the deceased. Accordingly, it was essential to consider the position of the person who did fire that lethal shot. The appellant conceded at the trial that the deceased was killed by an unlawful act but not that the killer acted with malice aforethought. We return to this issue in due course.

Evidence of identification

5. The other crucial matters which the prosecution must have proved (in the circumstances here) were both the presence of the appellant at the scene and that this was pursuant to as part of the joint criminal enterprise. As it happened, each of these matters were live issues at the trial and in the appeal. Before attempting to resolve them, it is necessary to briefly outline the salient parts of the evidence.

Evidence of eyewitnesses

6. The witnesses relied on by the prosecution to prove the presence of the appellant at the scene were Freda Silau, Clarinda Viva and John Memea. Other witnesses who were present at the scene but did not identify the appellant were Graciano Aru and Barnabus William. In the result some of their evidence is no longer material and what follows is its effect so far as it concerns the key issues to which we have drawn attention. We should mention at the outset that, although two witnesses identified "Cyril" as having been present at various stages and having done various things, none were asked whether the person so named was the appellant. It is also important to note that the events in question occurred almost ten years before the trial.
7. Freda Silau testified that she and a number of her friends (four in all, including the deceased) had been sitting outside in the afternoon and into the early morning of the night in question. She had been drinking and had smoked some marijuana and said that she was very much affected by these intoxicants. At about 3am it started

to rain and they then went inside the nearby workshop where there were some hammocks strung up, and some motor vehicle seats. Soon after they lay down and slept. Silau and Graciano (her boyfriend) lay in one of the hammocks, the deceased lay on one of the car seats and Memea (her brother) lay on a cushion next to him. Viva slept near the hammock on which Silau and her boyfriend were sleeping.

8. Silau said at first that the next thing that happened is she woke to a “group of Bouganvilleans...[who] came and bashed us up inside” and then heard gunshots. (She later said that the gunshots woke her.) She was thrown from her hammock. She said this was done by “Barry, Cyril and I’ve forgotten the name of the other one”. She said that they were holding guns and that Cyril hit her on the back of her head with his gun. Her friend Viva was not there, having already run away. The only light was a red bulb some distance away. (Viva’s evidence was that Cyril had taken her out of the shed. I return to her evidence shortly.) She said there were “lots” of men in the workshop, at first numbering them at 35. She said that Cyril asked her, “Where is the gun you are hiding”, to which she responded that she did not know anything about a gun. At that time, she said, Barry and Ivan were bashing up Memea and Graciano, asking about guns. She said that after Cyril hit her “he just stayed inside...”next to where I was standing”. The deceased was about three metres away. They were told to sit down. Silau sat next to the deceased who appeared to be asleep. She attempted to wake him up and, putting her hand behind his head, felt blood. Cyril was still standing nearby. They were told to stand again and Cyril, Ivan and Barry started to hit Memea and Graciano again with the butts of their guns. They were told to go outside and the beating continued there. Cyril had followed Memea and Graciano outside, pointing his gun at them. It was then dawn and they told the three to move up the street. Silau was then told to go home, which she did and did not know what then happened to Memea and Graciano.
9. Silau said that she recognized Barry, Ivan and Cyril because they lived in Gizo, she thought “based” at a boat club called PT109 which was near her house. She had recognized Cyril’s face in the workshop but did not then know his name. She said they went around threatening people. She did not know any of them personally but

she had heard them calling their names. She recognized the other men but did not know their names. She said that there was a light bulb in the workshop near where the group had been sleeping.

10. In cross-examination Silau was taken to her police statement which was made on the morning after the incident occurred. She agreed that she wanted to assist in the investigation of those responsible for the deceased's death and tried to give all the details she could remember about what had happened. In that statement Silau said that she woke to the sound of a gunshot, that about ten Bouganvilleans entered the workshop. She identified one William Amalo and someone named Connie (later identified as Cornelius) and "the Bouganvilleans who used to stay at PT 109 ..." She described the beating of Memea and Graciano and their being questioned about guns and her discovery of the wound to the deceased's head. She described the physical traits of two of the Bouganvilleans whom she said she recognized well because they stayed at PT 109 and she had seen them around Gizo Town. She added further information about the arrival of a police car and being told by William and Tony to go up to it. Then Memea and Graciano were taken to the police station and she was told to go home. Silau said that she did not mention the name Cyril in her statement because she did not know it at the time.
11. In 2005 Silau made another statement to the police about the incident, by which time there had been a great deal of talk about the shooting, and then in 2007 gave evidence in the trial of a number of other men who were alleged to have been part of the armed group. She testified at that time that the men who were beating her were "many ... [but I only recognised Ivan and Pari]" and did not mention Cyril. She said that this was because she "forgot".
12. Clarinda Viva's evidence was in marked contradiction of Silau's in several respects. She agreed that she was with the group comprising herself, Silau, Memea, Graciano and the deceased who went into the workshop to sleep. She said that, towards morning, she heard people talking outside and "coming inside". Cyril kicked her, but not strongly, and asked, "What are you doing here". He "then took me out, it was

when he took me behind [ie, later] that there were gunshots". He had taken her to the back of the workshop where there were a number of old trucks, indicating about 25 metres from where they group had been sleeping. She said that Cyril was angry with her because he was "like a family to me, his dad married to my aunty, and we lived at the same house and he would come and go ... like family". The sense of her evidence was that he was angry with her because she was in the workshop. She said that it was when she was at the trucks she heard the shots and ran outside and hid. She said that Cyril went "back" into the workshop but it was not clear at what point this occurred. After hiding for some time, Cyril came out of the workshop with other men. She said "they" were carrying guns but was not specific as to who "they" were. She said that there were too many for her to see if Memea and Graciano were amongst them. She went to her home and sometime later returned to the workshop to "wash out the blood".

13. Viva was cross-examined about the statement she made to police on the day following the incident. She testified that some of what she had said was true and that other things were not true and said because she was frightened. (Although she later said that the statement was all true, we think that the question she was asked was ambiguous and her answer should not be taken at face value.) She testified, in effect, that she had not initially named Cyril because she was frightened that she would be killed by the Bouganvilleans but ultimately decided to name him because he had been named in village talk as having been involved.
14. In some respects Viva's statement was inconsistent with her evidence in the trial, most markedly in her failure to identify the person who kicked her as Cyril. The other inconsistencies were inconsequential. Not having been adopted by her as truthful, it was not evidence of its contents though any inconsistencies between it and her evidence reflected on her credibility and reliability as a witness.
15. John Memea said that he opened his eyes as when a group of men came inside and saw over ten guns pointing at him. Clarinda had earlier tried to wake him but he ignored her and she had gone by the time the men came up to him. He said there

were two lights in the workshop. The men asked questions about John Fo'ogau (the owner of the workshop), told him to stand up and hit him with a gun, asking where the guns were that "you made in this workshop". He was accused of lying and hit again. He closed his eyes and heard a shot and "[the deceased] fell". There were further threats, including to shoot them as they had done to the deceased. Graciano was also subjected to this treatment. They then asked about another man and, when told that he was elsewhere, said they would go to get him and shoot him and "all of us" at the seaside. He recognized four men, whom he named. They were then taken outside and, as they were coming to the main street, he said he then saw Cyril standing beside a nearby building, out of sight of the workshop "and he told us to stop because there was a police vehicle coming". A man whom he had recognized as Cornelius went up to the police and called him and Graciano to the vehicle and then they were taken to the police station. He identified Cornelius and one Willie Amalo as having beaten him but only saw Cyril outside in front of the nearby building. He had seen Cyril before because he had a car and worked in a taxi service and recognized him. Not only did Memea did not suggest that Cyril was one of the men who questioned or attacked him in the workshop or as he came out of the workshop (as Silau had testified) but it is inconsistent with the substance of his evidence that Cyril had done so.

16. Graciano Aru testified that he was one of the group that went to sleep in the workshop on the night in question. He said that there was (what we understand to be) a bright fluorescent light close to where they were. He was sleeping when the Bouganvilleans arrived, they beat him and Memea and questioned them. He was unable to recognize any of them. He did not know where Clarinda was at that time; Freda was sitting on a stool and John Memea was standing next to him. He saw the deceased lying dead on the car seat. He said that about ten minutes after the beating started he heard a shot. When the beating ended (taking about half an hour in all) "we" (We think meaning him, Silau and Memea) were taken outside, a police truck came to about 20 metres of the entrance to the workshop and the men left them there. He said the men beating him had guns but he could not say whether the others also did.

17. We should mention that another witness was called in the Crown case but his evidence was of peripheral relevance and sheds no light on the issues in the appeal.

18. Admitted into evidence by consent was the report of the autopsy carried out on the body of the deceased by the Medical Officer at Gizo Hospital, which concluded –

The deceased was a previously healthy male who died of a single gunshot wound of the head. It appears that he was shot whilst lying down, but there are some abrasions and a laceration suggestive of a possible recent fight.

The bullet appears to have traversed the skull from left to right, on exit “exploding” the right side of the head.

Lack of soot staining suggests the gun was at least 1 metre away when fired.

19. There was no evidence concerning what had or might have occurred prior to Cyril’s entry into the workshop, nor as to the identity of the shooter, nor as to the circumstances of the shooting.

Grounds of Appeal

20. The first and second grounds of appeal were respectively that the conviction was unsafe and unsatisfactory and against the evidence and the weight of the evidence. Counsel’s written submissions made it clear that these grounds should be read with the third and fourth grounds of appeal which were to the effect that the learned trial judge erred in finding that the Appellant was identified by any Crown witness as having been at the scene. The fifth ground of appeal was that the learned trial judge erred in finding that the person named as Cyril was part of a joint criminal enterprise at the time the deceased was shot.

21. It will be seen that the question whether the evidence established that the deceased was murdered (as distinct from being unlawfully killed) is not raised by the appeal as particularised. Nevertheless, since this is a fundamental element of the offence of which the appellant was convicted, we decided that it should be raised with counsel, both of whom made submissions on the point.

The judgment at first instance

22. His Lordship opened his judgment with a reference to the prosecution case, namely that the accused was a member of the so-called Black Sharks, present at the scene, aiding and abetting the killing of the deceased, having formed a "common purpose with the Black Shark group to carry out some unlawful acts upon the deceased and his friends that night", to which facts, sec 21 and 22 of the Penal Code applied. His Lordship then briefly summed up the defence case, noting that it was not disputed that an unlawful act caused the death of the deceased and it was contended by the defence that the evidence did not prove that the accused was involved. The learned trial judge then summarised the evidence in the case, noting in particular that the person identified by Freda Silau as questioning her and her friends about guns and hitting them was a man named Cyril, who had possession of a gun and whose face she recognized as someone who lived in Gizo at the PT 109 club. In respect of Clarinda Viva, his Lordship mentioned that "Cyril and other men came inside the workshop and woke her by kicking on her back", that Cyril angrily ordered her to leave the workshop immediately and that she knew him because he was a relative. His Lordship, in respect of neither of these witnesses, mentioned the marked discrepancies in their evidence to which we have already referred, including in particular, the questioning of Silea, Memea and Graciano, his wielding a gun, when the shot was fired and where Cyril was at that time, these differences giving rise to significantly different inferences as to his involvement in any common purpose or aiding and abetting the killing of the deceased. Some mention was also made of the evidence of Memea and Graciano.

23. The learned trial judge then moved to what his Lordship referred to as his “Conclusion/Reason”. After referring to the group of armed men entering the workshop and that they were looking for guns, his Lordship mentioned the shooting of the deceased “as a result of the invasion” and identified the matter in dispute as whether the accused was part of the group, acting in concert with them and present at the time of the shooting and the assaults. His Lordship set out a summary of Freda Silau’s evidence as to what the man Cyril had done and, referring to Clarinda Viva’s evidence, said that it supported Silau’s evidence as to the presence of Cyril as part of the group. His Lordship did not, however, refer to the significant differences in their evidence. On Viva’s account, there was a very real doubt as to whether Cyril was indeed a member of the group or, at least, acting in concert with them, and whether he was armed and had participated in questioning or assaults as alleged by Silau. His Lordship’s conclusion that Silau and Viva observed Cyril during the questioning and the assaults was a substantial mistake and misstated the latter’s clear evidence. So far as the evidence of Memea was concerned, his Lordship’s inference that his seeing Cyril in the street tended to “support the presence of the accused [as] part of the group who entered the workshop and proceeded to beat the...people who were asleep at the time” was, in our respectful view, quite unjustified. In fact, it was significantly inconsistent with Silau’s account of events.

24. Finally, it is necessary to refer to two matters that were not mentioned by his Lordship or discussed by him. The first is a matter that was at the forefront of the defence case, namely whether the person named by the witnesses as Cyril was Cyril Hoala, the accused. It is clear that his Lordship assumed that, once the prosecution had proved that a person named Cyril was involved in the attack that night, this was sufficient to prove that that person was the accused. The second is that there was no discussion concerning whether or not the deceased was murdered and, most significantly, no finding that he was murdered.

Discussion

25. In our view, the prosecution case failed at a number of significant points. Firstly – assuming that the appellant was indeed the person named Cyril to whom the witnesses

referred – there was in our opinion no evidence from which it could be inferred that the killing of the deceased was murder. It could only be murder if it were proved beyond a reasonable doubt that the shot had been intentionally fired with the intention of causing death or grievous bodily harm or with reckless disregard for human life in accordance with sec 202 of the Penal Code. In our opinion, there was no evidence capable of negating the reasonable possibility of accident. The mere fact that the group entered with some hostile intent certainly cannot establish that one of them intended to kill any of the persons present in the workshop, let alone that this had been agreed, either explicitly or implicitly. Nor was the fact that the deceased was shot in the head capable of proving, either by itself or together with the other evidence, the requisite murderous intention.

26. The second matter is that (as rightly conceded by counsel for the respondent at the appeal) there was no evidence that proved or tended to prove that the person named by the witnesses as Cyril and the appellant were one and the same, except for the fact that they shared the same first name. Thirdly, it was at least reasonably possible that, if the evidence of Clarinda Viva, which supported to a significant degree by that of John Memea, who only saw Cyril outside, were to be accepted it must have been at least reasonably possible that the appellant (assuming him to have been the Cyril to whom these witness referred) was not a part of the armed gang at all since, although he entered the workshop at the same time as the gang, he was not armed, partook in no questioning, and only attempted to remove her from the scene and went outside some distance from the workshop. By parity of reasoning, it was also at least reasonably possible that he was not part of any agreement that an armed group were to enter the workshop with hostile intent. There was no suggestion by the prosecution or, for that matter, his Lordship that the evidence of either Viva or Memea in these significant respects should not be accepted. The prosecution case accordingly depended upon the virtually complete acceptance of the evidence of Freda Silau, as to the most significant aspects of which it was not only not corroborated but also contradicted, leaving aside the problems necessarily arising from the effluxion of time.

Conclusion

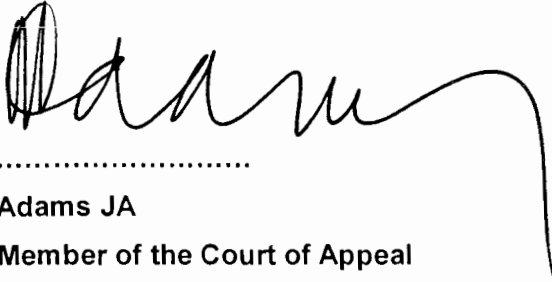
27. It was for these reasons that, at the conclusion of the hearing of the appeal, the Court announced that the appeal was upheld, the conviction of the appellant quashed and his immediate discharge.

Additional comments

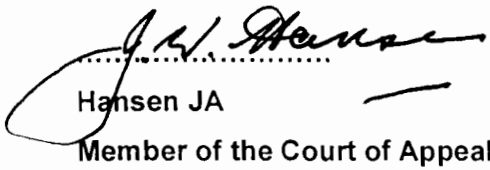
28. We have mentioned the omission of any attempt by the prosecution to ask the eyewitnesses whether they recognized the appellant. It appears that this was not done because it was apprehended that, in light of the failure of the investigating police to conduct an identification parade or photo array identification, such a question invited what is usually called "dock identification" and ought not to be undertaken. It is true that such an identification will usually be of so little probative worth that it should not be attempted although statements in the authorities about its prejudicial effect were made or derived from jury trials and one may safely assume that a judge will not be inclined to give such evidence any more weight than it deserves. However, there is a marked difference between a recognition case and an identification case. Where the witness has had a deal of communication with the alleged perpetrator such that he or she is familiar to the witness, so that the question is whether the witness can recognize the perpetrator from that familiarity, the case is one of recognition rather than identification. The extent of familiarity is, of course, a matter of fact and degree and there is no bright line separating identification and recognition. Before recognition in the courtroom is attempted, there must be evidence of the extent and nature of the familiarity sufficient to lay the ground for the question. This will be a matter for the trial judge to determine in each case before permitting the evidence to be led if there is an objection to the question. In the present case, it may at least have been expected that Clarinda Viva's familiarity with the man she named Cyril indeed provided the basis for being asked whether her relative was the appellant. However, it is not for us to speculate what the answer might have been and we mention this merely as an example of an occasion when it may have been proper to ask the question.



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Sir Robin Auld P
President of the Court of Appeal



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Adams JA
Member of the Court of Appeal



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Hansen JA
Member of the Court of Appeal