

REGINA -v- KWAI AND HAGAMAE

High Court of Solomon Islands  
(Ward C.J.)

Criminal Case No. 43 of 1990

Hearing: 19 and 20 February 1991

Judgment: 22 February 1991

F. Mwanasalua, DPP, for Crown  
A. Radclyffe for the First Defendant  
J. Muria for the Second Defendant

WARD CJ: The two accused are jointly charged with the murder of John Faeni on 28th September 1990 and the second accused is also charged with unlawful wounding of the deceased's brother, Alick Abufa'asia, on the same date.

On that day, a singing group were performing in Kobito 2 and a number of people attended the event. The victim in count 2, Alick and the deceased man, Faeni, were both there and were asked to move to the area where other Kwaio people were sitting. Alick claims to have no idea why he was asked to move. The defence suggest he and Faeni were asked to leave because they had been drinking and were walking over children. Alick agrees he was, at the time, in an area clearly used by woman and children but he denies either he or Faeni had been drinking or that they were stepping on children.

They did eventually move and a fight broke out. Who exactly was involved and why it occurred is not clear. However, the deceased man's wife who was sitting with her in-laws saw the fight and, on seeing her husband take off his shirt, realised he was intending to fight and asked his sister to go and get him.

She stated that, when he returned to her, as they moved away they were confronted by three men. Two of those were the two accused and the third was not identified to the court. The first accused said, in English, "attack" and the second accused, "grab him." They then did attack and the second accused struck her husband with a chain and the first accused also struck him but whether with a fist or anything else she could not see.

Just prior to that Alick had been struck on the head and chest by the second accused with a chain. That is supported by the witness Kalo and is the sole evidence against the second accused on count 2 except that, the next afternoon, the second accused gave a chain to a neighbour clearly intending her to hide it.

The second accused did not give evidence and I can deal with count 2 at this stage. I am satisfied beyond any reasonable doubt that the second accused did strike Alick with a chain and cause some injury. In order to prove unlawful wounding there must be a wound in the sense of a parting of the skin. The evidence of Alick was that he was struck on the mouth and there was a cut that was "lelebit big" and which he treated at home with medicine. Such a description could I feel cover a number of degrees of injury. I am not satisfied to the required standard that it proved a wound and so he is acquitted on unlawful wounding. However, he did unlawfully assault Alick and caused some actual bodily harm. I therefore convict him of the lesser offence of assault occasioning actual bodily harm contrary to section 238 of the Penal Code.

That leaves the joint charge of murder. The prosecution evidence is that Faeni died as the result of a single stab wound in the back which caused a tear of the posterior vena cava. Despite attempts at the hospital to staunch the bleeding, he died of haemorrhage from that wound. As will also be seen there is no dispute that wound was caused by the first accused with a knife he had carried tucked in the waistband of his trousers. The prosecution suggest that the evidence of the attack as a whole shows a joint enterprise by both accused resulting in the death of Faeni.

The main witness and the only person actually to describe the stabbing was the third prosecution witness, John Kalo. He is related by marriage to the accused and was in his house nearby but came out when he heard the swearing. He saw the earlier trouble and formed the view that Faeni had been drinking. He said the two Kwaio men were angry and swearing. They were led away. He then saw the struggle between the first accused and Faeni. He said he first saw the second accused strike Alick with the chain and then also strike the deceased. He agreed with defence counsel that the deceased struck Kwai first but that they then struggled and for part of the time were struggling on the ground. He later said it was when the deceased struggled with the second accused that he was on the ground.

Eventually, he said the first accused pulled the knife out of his belt and stabbed Faeni once in the back with it by an underarm blow and whilst Faeni was standing up.

The first accused gave evidence on oath. He had been working in Lambi that day and returned in the evening. When the singing was on he was standing near his father's house and saw the trouble start. He agreed he was involved with others in pushing the deceased and Alick away.

At one stage he was pushed by somebody he did not see and was then pushed by the deceased. He fought him and they fell and rolled down the slope. He was able to get up and they struggled and fell again ending up so that the deceased was on top of the first accused and squeezing his throat. It was dark and the first accused could not cry out. He was scared he would be killed and, remembering the knife, he pulled it from his trousers and swung one fatal blow at the deceased's back.

Much of the evidence in court related to the lighting at the time. It was agreed that the singing band were at the top of a slope and the area was lit by two, or possibly three, fluorescent strips powered by a generator. There was no other lighting.

Photographs were shown to the witnesses and, at the end of the evidence, I went to the scene to identify the areas photographed. It is clear that, if the lights were on the top of the hill, areas lower down the slope would receive very little light. The position where the stabbing occurred is well down the slope and, depending on the height the lights were mounted, would receive no or very little light.

Kalo's view of the stabbing was, he told the court, well enough lit to see clearly. He also pointed out that, at the time, the victim's wife was only a few feet from him. Her evidence was that she could not see clearly and that the place was dark. Kalo described how, when the deceased was stabbed, he fell down with his head by Kalo's feet. Alick went to the stabbed man after the stabbing and took him to hospital. He also described the place where he lay as dark.

I have reservations about the evidence of Kalo. He gave a firm account of the incident but he varied the details more than once.

At the same time, it is clear on his own admission that the first accused caused the fatal wound. His case is that he was acting in self defence. The details of the angle and shape of the wound are equally consistent with a stab as described by Kalo or as described by the first accused. The depth of the wound even in the soft tissues of the lumbar region would be slightly more consistent with Kalo's account. Whenever self defence is raised by the defence the burden is on the prosecution to disprove it beyond reasonable doubt.

As far as the details of the stabbing are concerned, I am not satisfied the prosecution witnesses have disproved the evidence of the first accused that he was lying on the ground at the time and acting in self defence. However, even on the accused's account, the court must decide if the force used in self defence was reasonable in the circumstances. By section 17 of the Penal Code this shall be determined according to the principles of English Common Law. Those have been stated more than once by this Court and I do not repeat them here. Suffice it to say that whilst the Court will not expect a man to measure the degree of force to fine degree it will not permit an act of

retaliation which is wholly out of proportion to the necessities of the situation. I accept the accused's account that he was on the ground being attacked by a larger man. The other man had the him by the throat and the accused feared he might be killed. At that stage he drew his knife and stabbed his attacker in the back. The test of whether that was reasonable is not entirely objective. The court is entitled to consider the situation as the accused saw it. I accept he may have been frightened but he was sufficiently in control of the situation to reach behind his attacker, take out his knife and stab him. I feel that was far in excess of the force needed. His hands were clearly free, his assailant was unarmed. Although the accused could not shout and was in a dark place, he knew there were many people around and the vast majority of those people had until a few moments before, been on the same side as had he. He was far from the point that he needed to use such a dangerous weapon and I find the force used was not reasonable.

However the facts as I find them may still be such that the accused did not have the necessary malice aforethought to constitute murder. I accept that, at that moment, the accused did not intend to kill the other man but he had still acted with malice aforethought if he intended to cause grievous harm or where he had the knowledge that his act would probably cause death or grievous harm.

The knife he used was a very dangerous weapon. It was not a weapon he had picked up in the heat of the moment, it was a knife he had taken with him. He knew its dimensions and nature. He chose to use it because it was a more effective means of stopping his attacker than the alternative way of fighting with his bare hands. He didn't show it to the other man to dissuade him but instead he simply swung it at the other man's back. The effect he sought depended on the result of that blow not on anything else. If, as he described, he simply swung wildly at the other man's back without thinking of any possible wounding, he need not have drawn the knife in the first place. I also bear in mind the fact that, in order to reach around and pull out the knife from the left side of his trousers with his right hand and then swing it so it had the blade pointing toward the other man, he had to perform an operation that suggested a considerable degree of mobility despite his evidence of the degree to which he was subjugated.

I am satisfied that, at that stage, he knew he had a very dangerous weapon in his hand and he deliberately plunged it in his attacker's back. He cannot have failed to realise the probable consequence would at least be grievous harm.

That is malice aforethought and he is convicted of murder.

The prosecution's case against the second accused is that the evidence shows there was an agreement between them to attack the deceased. He bases that on the evidence of the deceased's wife that the three men attacked the victim together and the use of the word attack by the first accused and grab by the second accused showed a common intention to attack. That he was aggressively approaching the victim is shown by his previous attack on Alick and his use of the chain on the deceased.

I was not convinced by the evidence of the wife of the deceased on this matter. The conflicts between the account she gave to the police and the court suggest some change in a vital part of her evidence.

I feel there is a distinct possibility that her evidence has to some extent, been crystallised by information she has subsequently heard. I also feel that the evidence of the use of such English words could well have been mistaken. Even if I had accepted they were used, I am far from convinced that the use of the word "attack" by one man and "grab" by another in a case where the man being referred to is being ejected from a public place for making a nuisance of himself demonstrate the two men have a common purpose. I feel there is a distinct possibility that the second accused was intending solely to continue to eject the deceased from the area of the singing performance. Whilst I accept, from the evidence of his attack on Alick and his possession of the chain, that he was prosecuting an unlawful purpose by using extra violence on the man who was being ejected, I am not satisfied the prosecution had proved the stabbing was a probable consequence of such a purpose or that there was a common intention to commit it.

The second accused is acquitted of murder. I feel there is evidence that satisfies me that he did unlawfully assault the deceased but I am not satisfied the evidence sufficiently links his assault with the specific wound on the deceased's forehead. I convict him of common assault on John Faeni.

(F.G.R. Ward)  
CHIEF JUSTICE