REGINA -v- MARITINO SUILAMO, TOME AKWASU'U AND MOLOUSAFI

High Court of Solomon Islands
(Muria ACJ)
Criminal Case No. 3 of 1992
Hearing: 30 April and 1 May 1992
Judgment: 5 May 1992

F. Mwanesalua, DPP, for Prosecution
A. Radclyffe for Tome Akwasu'u
M. B. Samuel for Molousafi
C. Tagaraniana for Suilamo

MURIA ACJ: These three accused, Maritino Suilamo, Tome Akwasu'u and Molousafi, have each been charged with robbery to which they all pleaded Guilty. Each of the accused has also been charged with murder. It is the prosecution's case that the accused on 29 November 1991, at Fanuabaita Village, Malaita Province, murdered **Ann Maria Lofoala.** Each of the accused pleaded Not Guilty to the charge of murder.

It is for the prosecution to prove its case against each of the accused.

The prosecution called seven witnesses who testified against the accused at the trial. In addition the Court admitted the Doctor's Report in this case, the photographs taken and the sketch map made of the scene of the alleged murder under section 180 A of the Criminal Procedure Code.

The evidence for the prosecution is that the accused planned to go to Fanuabaita Village and rob the deceased. On 29 November 1991, the three accused waited until it was dark, set out together from Kwailafa River to go to Fanuabaita Village. On the way, they cut some bush ropes specifically to tie the women. It was evening when the accused arrived at the village. Only the deceased and PW1, Albeta Naoa, were in the village then. All the other residents had gone to a custom feast at Fanoanifaka which is a village further inland.

As soon as the accused arrived in the village, one of them asked for betel nut. It was not clear which of the accused asked for betel nut as Maritino Suilamo said, it was Tome Akwasu'u who asked for betel nut while Tome Akwasu'u and Molousafi said it

was Maritino Suilamo who asked for betel nut for sale. Having been told that there was no betel nut for sale the accused grabbed the deceased and Albeta Naoa and tied their hands with the bush ropes which the accused had cut on their way. The accused tied both of the deceased's hands together behind her back and also tied PW1's (Alberta Naoa) both hands together in front of her. As for PW1, the accused also tied her feet together.

In her evidence PW1 also stated that before the accused tied her and the deceased, she spoke to the accused in Kwaio language asking them where they were going. The accused replied saying that they were just following the sea-shore. She further stated that the accused then asked for betel nut for sale to which she replied that there was none. It was then that the accused immediately attacked them and tied her and the deceased with bush ropes. PW1 saw the accused pushed some stuff into the deceased's mouth. She later saw, after the accused left, that it was a whole piece of uncooked potato which was stuffed into the deceased's throat. PW1 further stated that having tied the deceased and stuffed things into her mouth, the accused then made the deceased lie down. As for herself, PW1 said that the accused pushed a lot of fresh leaves into her mouth and then having tied her both hands and feet, dragged her out of the house. It was then that the accused went into the deceased's house and stole custom money and other things. After stealing custom money and other things, the accused ran away. PW1 was not able to breathe and after struggling she managed to spit out the leaves from her mouth and somehow also managed to loosen her hands from the ropes. She then looked at the deceased who was lying still and when she touched the deceased, she found the deceased not breathing and lying motionless. PW1 then ran to PW2's house shouting for help.

PW2, (Paul Kwate) gave evidence that having heard the shout he went out and saw PW1 who told him of what had happened. Together they went back to where the deceased was lying. PW2 shone a torch at the deceased and saw her lying down with her hands tied behind her back and that her mouth was not closed.

The third witness, Bale Surika (PW3) stated that having been told of his mother's death, left the feast immediately that night and came to see his mother's body. PW3 also saw his deceased mother's hands tied together behind her back and was still lying down on the ground. PW3, confirmed that 121 custom money and $170.00 cash were stolen from his mother's house. PW3 also confirmed that one of the accused, Tome Akwasu'u used to live with the deceased at Fanuabaita.

Harry Inifelo (PW4) gave evidence of how he saw the accused on 30 November 1991. The accused admitted robbing the deceased to PW4 but did not mention anything about the deceased's death.

The doctor's report concluded that the probable cause of death was blockage of the airway by food debris. The doctor found that the throat was completely blocked by food particles.

Each of the accused made a cautioned statement. In their statements each of the accused clearly described how they met at Kwailafa River and the cutting of bush ropes on the way. They clearly stated that the purpose of the bush ropes was to tie the two women. They also said that they waited until it was dark before they entered Fanuabaita village.

In their statements also, each of the accused sought to blame the other on the question of who tied the deceased and PW1. Suilamo said that it was Akwasu'u who attacked the deceased and tied her hands. According to Akwasu'u and Molousafi, it was Suilamo who grabbed the deceased and tied her hands behind her back. It is however clearly admitted by Akwasu'u and Molousafi that they attacked PW1, tied her hands and legs and stuffed leaves into her mouth. They all stated that after stealing things from the deceased's house, they escaped. Also all the accused agreed they met PW4 at Kwailafa River on their way back.

Having considered the evidence, I found the following facts established:

1. **All the three accused knew and agreed to go to Fanuabaita village and to rob the deceased and PW1.**

2. **All the three accused set out together to Fanuabaita village purposely to rob the deceased and PW1.**

3. **All the three accused knew and agreed that bush ropes would be used to tie the two women. It was for that purpose that the accused cut the bush ropes on the way.**

4. **All the three accused waited until it was dark before entering the village.**

5. **All the three accused entered the village when it was already dark and went straight into the house where the deceased and PW1 were sitting.**

6. **Only the deceased and PW1 were at the village at the time when the accused arrived.**

were responsible for the acts of tying the deceased's hands behind her back and tying PW1 both hands and feet. The defence also does not dispute that section 22 of the Penal Code applies in this case. That section states:

> *"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."*

In so far as the charge of robbery against each of the accused is concerned, it would certainly be difficult for the defence to argue otherwise than to accept that section 22 of the Penal Code applies to the accused in this case. Indeed, by their statements under caution, each of the accused tells of his part played before, during and after the incident.

In order that the accused are to be convicted of the murder of the deceased, the prosecution must prove that each of the accused with malice aforethought caused the death of the deceased.

All the accused were present that evening at the house where the deceased died. It is beyond doubt that each of them assisted the other in tying up the deceased and PW1. It is equally beyond doubt that force of violence was used against the two old women. I cannot escape the conclusion that all the accused intended to tie their victims up with the bush ropes which they brought with them and that the accused were prepared to use violence and did use violence against the deceased and PW1. The evidence of PW1 shows that apart from being tied at her hands and feet, there was blood in her mouth resulting from the stuffing of her mouth with leaves. The doctor's report clearly shows that the deceased's ***"throat was completely blocked by food particles and some blood was present from the damage to the lower jaw".***

Do those evidence show that grievous bodily injuries were caused? Mr Radclyffe submitted that in this case there is no evidence that grievous bodily harm was caused to the deceased. If the tying of the deceased is to be considered in isolation, then counsel's argument may be on strong ground. However, I do not think that in the present case the tying of the deceased can be taken in isolation when considering the question whether grievous bodily harm was done to her or not. It must be viewed in the light of all that was done to her. She was an old woman of about 40 years of age. She was attacked by three strong young men. Force of violence was used against her in the course of tying her hands firmly behind her back. Her throat was completely blocked with food debris. There was damage to the lower jaw resulting in blood found in mouth. There was a wound entering the abdominal cavity through the vagina. The

total effect of all these must be that the deceased had suffered severe or serious bodily harm. Of course there are situations when a single wound can be regarded in isolation as a serious bodily injury such as in the case of ***R -v-Alick Te'e*** *Crim. Case No. 1 of 1992* (Judgment given on 1 April 1992). I am satisfied that the deceased suffered serious bodily harm that night of 29 November 1991.

Next the Court must consider what are the acts that caused the death or grievous bodily harm to the deceased?

The only evidence touching on this comes from PW1 and the Doctor's Report. PW1 stated that she saw the accused grabbed and tied the deceased's hands behind her back. Immediately after the three accused left, PW1 looked at the deceased who was still lying on the ground motionless. PW1, after managing to free her hands and feet, went over and touched the deceased and found the deceased already not breathing. PW1 went to call PW2 who came and also saw the deceased lying down and not breathing. The doctor estimated that the deceased died some time between 9 p.m. on 29th and 8 a.m. 30th November 1991 and death was probably caused by blockage of airway by food debris. On those evidence I am left with no doubt whatsoever that the deceased died shortly or not long after the assault upon her and that her death resulted from the cumulative effect of the actions of the accused. In my judgment, there can be no other reasonable explanation to the deceased's death than she died as a consequence of the unlawful acts of all the three accused. This is what is expressed in section 194(1) of the Penal Code as killing in the course of another offence. Section 194(1) provides:

> *"Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence".*

However, the prosecution will still have to show that the killing was done with malice aforethought as defined in section 195 of the Penal Code. I said in ***R -v-Alick Te'e*** that even if the accused said he did not intend to kill the deceased:

> *".....the mens rea to be proved is that of malice aforethought as provided under section 195. Under that section malice aforethought may be expressed or implied .....".*

In ***R -v-Alick Te'e*** the accused stated that he did not intend to cause the death of the deceased and as such the test I applied was that whether the accused's state of mind was such that he intended to cause grievous bodily harm to the deceased or that his state of mind was such that he knew that the act would probably cause grievous bodily harm to the deceased.

In the present case, having found that the deceased suffered severe or serious bodily harm and also that death was the consequence of the unlawful acts of the accused, the Court must ask itself whether the accused's minds were such that at the time of the unlawful acts committed upon her, the accused intended to cause her death or cause her grievous bodily harm or their minds were such that they knew that their acts would probably cause grievous bodily harm to the deceased.

It has been held in ***R -v- Jarmain*** *[1945] 2 All ER 613* following ***DPP -v- Beard*** *[1920] A.C. 479* that a person using violent measures in the commission of a felony involving personal violence did so at his own risk and was guilty of murder if those violent measures resulted even inadvertently in the death of the victim. I take it to be that the Court of Appeal there in ***R -v- Jarmain*** was reiterating the test of foresight of consequence, so that a person who uses violent measures to commit a crime involving personal violence ought to have foreseen the consequences of his violent act and if he does so he would be at his own risk.

However, in ***R -v- Hancock*** *[1986] 2 WLR 357, 363* Lord Scarman made it absolutely clear that -

> *".....foresight of consequences is no more than evidence of the existence of the intent; it must be considered, and its weight assessed, together with all the evidence in the case. Foresight does not necessarily imply existence of intention, though it may be a fact from which when considered with all the other evidence a jury may think it right to infer the necessary intent."*

I feel under our Penal Code the position is made plain by section 195. The two tests under that provision are (1) an intention to cause the death or cause grievous bodily harm and (2) knowledge that the act will probably cause death or grievous bodily harm. Those two tests were enacted and become effective as from 1 April 1963 when the Penal Code came into force. The two mental states under our Penal Code that need to be established in cases of murder are the intent to cause death or grievous bodily harm and the knowledge of probable consequence. This was a move by ***".....society and the law .....away from the primitive response of punishment for the actus reus alone"*** as stated by Dickson J. in ***Leary -v- The Queen*** *(1977) 74 DLR (3rd)* and reiterated by Stephen J. in ***R -v- O'Connor*** *(1980) 146 CLR 64.*

I now ask myself whether the prosecution have made me sure that the accused intended by their unlawful acts to cause the death of the deceased or cause grievous bodily harm to the deceased or did the accused know (foresee) that their acts would probably cause death or grievous bodily harm to the deceased. The state of the evidence before this Court, unfortunately falls short of establishing either of these

mental states of the accused, although clearly proving beyond reasonable doubt that the acts of the accused were unlawful and which subsequently led to the death of the deceased. The benefit of the doubt as to the necessary mental states of the accused in this case must be given to the accused.

Thus I find each of the three accused **Not Guilty** of murder but **Guilty** of causing the death of the deceased by unlawful acts. Each of the accused is convicted of the crime of manslaughter.

(G.J.B. Muria)
ACTING CHIEF JUSTICE

SENTENCE

Each of the accused pleaded Guilty to robbery and have been found Guilty of manslaughter after a trial of murder.

The case is a sad one. It is one of the most serious cases of manslaughter that ever come before the Court in recent times.

Two innocent old women had been attacked by the three of you [accused] for no good reasons at all except for the fact that you were going to rob them.

You agreed to use and did use force of violence against the two helpless old women and as a result of which one of the old women died subsequently.

What you had done to the two old women was horrible, cruel and inhuman. You showed no sympathy to them at the time and the Court cannot be expected to treat you with sympathy.

All the three of you escaped the more serious charge of murder because of the doubt I had as to your mental states when you were carrying out your unlawful acts. But clearly your unlawful acts led subsequently to the death of the deceased.

I am sure you now realise that your actions led to the death of the deceased. I am sure you will not forget it.

But this Court must sentence you for the crimes you committed. There must be some elements of deterrence in the punishment that the Court will impose on you.

I think it is appropriate that the Court takes into account the punitive effect of matters such as your apprehension, arrest, your appearing here in this Court and in the Magistrates' Court on Preliminary Inquiry, the length of time you have been in custody so far, the shame you have brought to your families and relatives and the publicity of your guilt.

I must, however, also endeavour to balance the need of society as against your needs. In particular, the need to balance the need for public protection with the protection of the individual rights and freedom. I bear in mind the effect of the sentence will have on you.

In so far as you Maritino Suilamo and Tome Akwasu'u, I see no justification in distinguishing the two of you. Clearly both of you took active leading roles in the

commission of these crimes. You both planned to tie and rob the two old women. You are both first offenders and admitted the robbery.

In so far as you, Molousafi, is concerned, I accept you are a very young boy. But despite your age of 14 years, you were willing to help and did help in all that it took to commit the crimes for which you have now been convicted. The plea of youth is no longer satisfactory answer to serious crimes. In Solomon Islands there are very limited alternatives available to the Courts in dealing with juveniles and young persons charged with very serious crimes, other than to send them to prisons.

The notion of deterrence must take priority in the cases such as the present one so as to mark the disapproval by the law of your conduct and hope that other people will be deterred from following your behaviour.

For you, Molousafi, your age however is the only thing that justifies my treating you a little lenient than the other two. You are a first offender like the other two also.

Taking all those factors into account together with all that had been said by your counsel on your behalves, I sentence each one of you as follows:-

MARITINO SUILAMO:	**Robbery**	**-**	**4 years imprisonment**
	Manslaughter	**-**	**10 years imprisonment**
	Sentences are concurrent		
TOME AKWASU'U:	**Robbery**	**-**	**4 years imprisonment**
	Manslaughter	**-**	**10 years imprisonment**
	Sentences are concurrent		
MOLOUSAFI:	**Robbery**	**-**	**3 years imprisonment**
	Manslaughter	**-**	**7 years imprisonment**
	Sentences are concurrent		

(G.J.B. Muria)
ACTING CHIEF JUSTICE