

REGINA -v- REX FUNUMALEFO

High Court of Solomon Islands
(Muria, C.J.)

Criminal Case No. 1 of 1994

Hearing: 10 July 1995

Judgment: 26 July 1995

J. Faga for the Crown
B. Titiulu for the Accused

MURIA CJ: The accused Rex Funumalefo had been charged with the crime of Murder contrary to section 193 of the Penal Code. He pleaded Not Guilty to the charge. As it is always the case in a criminal trial the onus is the prosecution to prove the guilt of the accused beyond a reasonable doubt and nothing less.

It was alleged that the accused stabbed the deceased Fred Makisi on Saturday 10 July 1993 at the Irish Jetty at Point Cruz following an argument and fight with the deceased. The incident was alleged to have occurred on that day following the arrival of MV Ramos I from Auki.

The version of the events leading up to the stabbing as given by the prosecution is that the deceased and his two brothers John Emmanuel and Henry Kabolo went down to the wharf (the Irish Jetty) at Point Cruz at about 1.30 pm to meet their parents who arrived by ship (MV Ramos I) from Auki. When they arrived the ship was already at the wharf.

There is a fence constructed at the entrance to the wharf area to control passengers. It is alleged by the prosecution that on arrival at the wharf, the two brothers, John Emmanuel and Henry Kabolo entered the gate with the permission of the accused who was the security man controlling the people at the gate. The deceased was waiting outside the gate. The two brothers then began carrying bags of food and betel nuts brought by their parents from the ship to side of the gate in the course of which an argument arose.

The argument was said to be over the freight of \$2.50 for one of the bags which the security man had insisted that the parents of the two brothers had not yet paid. John Emmanuel told the security man that he had already given \$10.00 to the shipping clerk and that he was waiting for his change. It was then that the deceased came inside through the gate and was to take the bag outside.

The security man did not believe John Emmanuel paid the freight for the bag and refused to allow the deceased to carry the bag outside. An argument then ensued between the security man and the deceased and his brothers resulting in the accused pulling out his knife and stabbing the deceased on the left chest. The deceased fell down and died shortly after that.

The accused version of what had happened at that time is that he was one of the security men employed by Senior Security Service to provide security service at the wharf whenever MV Ramos I arrived. He was on duty on 10 July 1993 controlling passengers arriving from Auki as well as controlling people from entering onto the wharf area.

The defence version goes on to say that it was the deceased and his brothers and their wantoks who were aggressive, lasted open the gate which struck the accused causing him to fall to the ground. Further it is said that as soon as the accused stood up the deceased jumped at him and punched him. The accused said he defended himself with his right hand. Again the accused said that the deceased then kicked him causing him to fall, at which time the deceased sat on him and squeezed his neck to a point of nearly choking him. He said he felt he was going to die as he could not breathe.

At that point in time the accused said he saw a knife, while lying on the ground, which he picked it up and was holding it over the back of the deceased who was then still sitting on top of him. He also said he was swinging the knife while lying on the ground trying to ward off other attackers.

The accused denied having in his possession any knife at the time. Although he said he saw the knife on the ground when he was lying on the ground and taking hold of it, he did not say that he used it to stab the deceased in self-defence or under provocation. Yet his defences relied on are self-defence and provocation.

The prosecution called twelve witnesses. The accused gave evidence on his own behalf and called two other witnesses to testify in support of his defence.

I listened and watched each of the witnesses, in court, gave their evidence including the accused. In the course of their evidence, I could see a distinct picture each side was trying to impress upon the court. Yet those who had given evidence in court were said to be present at the time and place where the incident was alleged to have occurred.

Before I consider the evidence of each of the witnesses, let me deal with the facts which are not in dispute in this case. On the evidence before the court, there can be no dispute whatsoever that the deceased died as a result of a stab wound. I can do no better to confirm this undisputed fact than by quoting the findings of the doctor:

"There was an 8.5 cm cut on the left side of the front of the chest going obliquely towards the midline. The middle of the cut was 3.5 cm from the midsternal line. The cut was about 4 cm wide at its widest and tapered off at each end. The skin was not cut continuously and clearly but there were a couple of angles to it suggesting that the weapon inflicting it had slipped considerably or had been applied repeatedly. In continuity with this cut, and running obliquely downwards below it was a superficial cut of the skin pointing to the weapon sliding along the skin.

The main cut divided the left upper rectus muscle and passed into the chest, with a cut through the lowest costal cartilage in continuity. This would let through a 5 cm hole in the anterior pericardium into the pericardial cavity which was full of blood. The pericardial would led downwards to a 1 cm hole in the right cupola of the diaphragm, below which the liver was intact.

Inside the pericardial cavity, the right ventricle had an almost vertical cut 5 cm long in the antero-inferior wall. The rest of the heart was normal".

I also find as a fact not in dispute that the accused was the only person in whose hand the knife was found with blood on it and that he and the deceased were found to be covered with blood. It is further not disputed that the accused was the only person arrested immediately in connection with the stabbing of the deceased. Also not in dispute is the knife produced in court as being the murder weapon.

I now turn to the disputed facts in the case. It is disputed by the defence that the accused had started the fight. It is said that it was the deceased and his wantoks who provoked the fight. The defence also disputed the allegation that the accused had in his possession, the knife. Further although not directly stated, the accused did not admit stabbing the deceased and on that basis it must be taken as being a matter in dispute.

I now turn to see what the witnesses say. Detective S/Sgt Wilson Auga (PW1) did not see how the fight began. He only heard people shouting that there was a fight before he turned to the scene. He turned to the direction of the gate and saw the accused with the knife in his right hand in a stabbing motion. He saw the accused completed the act of stabbing the deceased as he was only 7 yards away from where the deceased and the accused were.

From where he stood he also saw the accused pulled the knife out from the deceased and moved toward another man with whom the accused had an argument also. He (PW1) and PW4 then ran toward the accused and deceased and grabbed the accused. After some struggle with the accused, PW1 removed the knife from the accused. The knife was full of blood. He saw the deceased collapsing and saying that he was going to die in North Malaita language.

The accused was arrested by PW1 and PW3 and taken to a police vehicle. PW1 stated that it was him who took the knife and handed it to P.C. Tupiti at the Central Police Station.

Jonathan Lui (PW2) did not see how the fight started but said that when he heard the shouting of a fight, he turned and saw the accused involving in the fight.

This witness also saw the accused holding the knife. He said that he in fact saw the accused pulled the knife out from his side, held it up and stabbed the deceased. He saw blood spurting out onto the accused and the deceased. He also heard the deceased saying the was going to die.

According to PW2, the knife was taken away from the accused by Sgt Auga (PW1) after a struggle with the accused who, after stabbing the deceased, was moving around aggressively with the knife in his hand intending to stab the deceased's father as well.

The prosecution witness Chief Inspector Silas Solomon Auga (PW3) was there at the wharf but outside the gate. He saw something that drew his attention; it was the deceased trying to force his way through the small gate. PW3 saw the deceased pointing finger at someone inside the wharf area as though he was arguing with the person he was pointing at. PW3 then saw the deceased entered through the gate and almost immediately he heard people shouting that there was a fight. PW3 saw three other men climbed over the fence and went to where the fighting was. Seeing that there was a fight, PW3 went to assist the other police officers who were already at the scene. As he was making his way in he saw a hand with a knife in it raised. Because of the people in front of his view, PW3 was not able to see whose hand it was that was raised with the knife in it.

When PW3 managed to get to the scene, he saw the deceased had a cut on his chest. PW3 also saw the other police officers struggling with the accused trying to take the knife which was covered in blood out from his hand.

Allen Maenuia (PW4) was at the gate at the time. He saw the deceased standing at the outside of the gate arguing with the accused who was at the inside of the gate. He heard them arguing in their North Malaita Language. In the course of their argument PW4 saw the deceased become angry and booted open the gate and entered. Two other men also went toward the accused.

In cross examination PW4 also said that the deceased forcefully kicked the gate open and as soon as that was done the accused jumped one side and told the deceased that if he wanted to fight then they should do so. The accused then pulled out his knife. PW4 then saw the deceased kicked the accused at his right side and others joined in to attack the accused.

Having pulled out the knife, PW4 said that he saw the accused swinging it and wielding it at those around him. This witness saw the oldman and the deceased fighting the accused who was still holding the knife.

In the course of the fight PW4 saw the accused, the oldman and the deceased fell on the bags of betel nuts on the ground. PW4 went and lifted the deceased and the old man and he noticed the deceased has a cut on his chest.

Stephen George (PW5) gave evidence and said that he saw John Emmanuel went in through the gate to carry bags from the ship. He took some bags outside at first and when he wanted to go back inside, the security man (accused) stopped him. John Emmanuel forced his way inside. As he was carrying a bag on his way out, the accused stopped him and said that he (accused) would punch anyone who forced his way through the gate.

According to PW5, John Emmanuel then hit the accused and kicked him but the accused defended himself. The accused then pulled out his knife and said to John Emmanuel that he would break his (John Emmanuel's) mouth with the knife into pieces.

Upon seeing the knife, PW5 stated that, John Emmanuel told the accused that he was going to report him to the police for being in possession of a knife in public. John Emmanuel then left. But he returned not long after and told the accused to throw the knife away so that they could fight with bare hands. PW5 told the court that despite being told to throw the knife away, the accused did not do so. It was then that some other supporters joined in and argued with the accused. One of those who joined in the fight was the deceased who jumped at the accused.

At that time the accused was still holding the knife but PW5 could not see the knife when the accused and the deceased were struggling. It was when they fell down that PW5 again saw the knife in the accused's right hand, held around the back of the deceased who was on top of the accused.

When they were separated the deceased tried to stand up. It was then that PW5 saw the deceased had a cut on his chest. The accused stood up, still holding the knife. PW5 stated that it was after some struggle before the knife was removed from the accused.

John Emmanuel (PW6) went into the wharf area and took out bags of food and betel nuts from the ship. He said he called for his brother (deceased) to help carry the bags but the accused stopped him from coming in. There was an argument between the accused and the deceased during which, PW6 said that, the accused showed a knife to the deceased.

Throughout his evidence PW6 denied having any argument with the accused and even taking part in the fight with the accused. As to the stabbing, PW6 saw the accused pushed the knife into the deceased's belly and then pulled it out.

Enley Bengasi (PW8) was one of the security men on duty in the area at the time. He was there when the gate was forced open and saw the deceased came in straight at the accused and hit the accused. PW8 saw the accused holding a knife in his hand when the deceased and others came at him, although PW8 could not see what the accused did with the knife. When the fight broke out PW8 ran away into the ship.

Henry Kabolo(PW11) gave evidence and said that he saw the accused argued with his brothers (PW6 & the deceased) over freight. He saw the deceased pulled the bag while the accused was holding tightly at the other end of the bag. He was only 2 metres away from them.

In the course of that struggle with the bag, the accused struck the deceased across the chest from under the bag. PW11 saw the accused used a knife. The deceased then fell down. The accused then

tried to hit PW6 with the knife and he (PW11) tried to defend his brother resulting in the knife cutting his hand as well. It was the police who had to remove the knife from the accused.

George Rifasia (PW9) gave evidence and produced a sketch of the scene of the incident. His evidence clearly indicated the movement of the fight and the place where the deceased fell after being stabbed. Gibson Ado (PW10) took photographs of the scene of the incident and the body of the deceased.

In his defence the accused gave evidence that he was at the gate at the time controlling people passing in and out from the gate. He said that when he stopped people entering the gate, one of the men kicked open the gate, striking him and causing him to fall down. He said he saw "stars" when the gate struck him and fell.

As soon as he stood up, he said the other man (deceased) hit him. He defended himself. Again, he said, the deceased kicked him and that made him fall. It was then he said, the deceased sat on him and squeezed his neck causing him difficulty to breathe. It was then that he saw the knife lying on the ground and picked it up with his left hand.

According to the accused, he was still lying down when he was swinging the knife trying to defend himself from his attackers. He said it was after the man sitting on him was taken away that he saw blood on his (accused's) body and on the knife. He denied using the knife on any body including on the deceased.

Defence witness Andrew Ashley Liolea gave evidence that an old man argued with Enley (PW8) over freights for the bags taken out from the ship. This led to some people outside the gate making rude remarks at the security boys. Shortly after that, the gate was kicked open hitting the accused who almost fell to the ground. Mr. Liolea testified that one of the men hit and kicked the accused making him fall to the ground. That man then sat on the accused and squeezed the accused's neck.

As far as Mr. Liolea was concerned, and he was just behind the accused at the time, the man who sat on the accused was different from the man who was stabbed. The man who kicked the gate open was the man who sat on the accused.

This witness in chief confirmed other witnesses' evidence that the knife was removed from the accused after some struggle. He however changed his story in cross examination and said that the accused voluntarily surrendered the knife to the police in the truck.

Defence witness Wilson Arudona saw the fight. He saw the accused held a knife and tried to defend himself with it. Arudona stated that when the accused was using the knife to defend himself, those who attacked him stood back about two(2) metres and watched how they could attack the accused again. This was after the witness saw the deceased already covered in blood. Arudona confirmed that the knife was taken from the accused by the police at the scene.

Those, in the main, are the evidence presented to the Court. I can appreciate that each witness was trying to recall what took place two years ago. Memories do fade with time.

As I have said there is a difference in the picture presented to the Court by each side in this case and I have no difficulty in appreciating the reason for that. However, putting together the evidence for the prosecution on one side and those of the defence on the other side, I find the evidence for the defence to be lacking in coherence and it is unconvincing. On the other hand the prosecution witnesses, despite slight variances in the way they tried to relate what happened that day, were consistent in what I consider to be the vital areas in their evidence.

The evidence of PW1, PW2, PW4, PW5, PW6, PW8, AND PW11 all showed that the accused had the knife with him in his hand while he was standing during the fight. PW2, PW4 and PW5 saw the said accused pulling out the knife from his side. PW8 who was one of the security man working with the accused saw the accused holding the knife when the deceased came toward him (accused). PW3 saw a hand being raised with a knife in it. When he arrived at the scene he saw the accused was holding a knife with blood on it and that police and others were struggling to remove it from him.

The evidence of PW3 is consistent with the evidence of PW1 and PW2. It is also consistent with the evidence of other prosecution witnesses as to how the deceased was stabbed as well as to the removal of the knife from the accused.

I do not accept the defence story that the accused found the knife on the ground while he was lying down on the ground. That I have no doubt in my mind is a desperate attempt to cover up the truth. The truth is that the accused took out the knife from his side and used it during the fight.

The only knife that was found to be covered with blood was the one held by the accused who was himself also covered with blood and so was the deceased. That same knife was the one removed by the police from the accused after some struggle as confirmed by the defence witness Andrew Ashley Liolia in his evidence in chief.

When one puts all these evidence together the inevitable truth is crystal clear, that is to say, the deceased suffered his death at the hand of the accused. There is no other possible conclusion.

On the evidence before the Court, I am satisfied beyond reasonable doubt that the accused caused the death of the deceased by stabbing him on the chest. The stabbing caused fatal injuries to the organs of the deceased as described by the doctor who examined the deceased.

I now turn to consider the defences raised on behalf of the accused. The defences having been raised, it is for the prosecution to exclude them beyond a reasonable doubt based on the evidence before the Court.

I deal first with the defence of self-defence. It is the defence case that the accused had to do what he did because he would be killed if he did not. He was attacked by a group of men and the only way to defend himself was to use the knife.

It must be remembered that the defence have never agreed that the accused had the knife, nor did they agree that the accused used the knife and that it was in self-defence. In truth the defence is relying on self-defence only should the Court finds that the accused did use the knife at the time to stab the deceased.

The law on self-defence has been well established. A person who is attacked is entitled to do what is reasonably necessary to defend himself. This really depends on the facts and circumstances of the particular case.

In the present case, the evidence of PW1 showed that after stabbing the deceased the accused pulled the knife out and advanced toward another man with whom the accused also had an argument. PW2 saw the accused pulled his knife out, held it high in readiness to stab anybody. Having stabbed the deceased, the accused was moving about aggressively with the knife in his hand as though he was intending to stab other people who might come near him.

The evidence of Chief Inspector Silas Solomon Auga (PW3) also showed that when he heard the fight, he went inside and saw that those who were at the scene of the actual stabbing were police officers, accused, deceased and few others. The crowd had moved away by then.

The evidence of PW4, confirmed the evidence of PW2 that the accused was swinging the knife around at those who were close by. PW5's evidence showed that the accused attacked the deceased with the knife stabbing him. The oldman then came to assist the deceased. It was then that they fell down with the accused underneath them.

The evidence of the defence witness Andrew Ashley Liolea tend to support PW4's evidence in this respect. Liolea saw the deceased person being stabbed first and fell then followed by another man who fought the accused. PW4 also gave evidence that when the gate was forced open causing the accused to fall, the accused stood up, moved to the side, took out his knife and stood in readiness.

The evidence of PW5 and PW6 also support the other witnesses evidence that the accused was acting in an angry manner with the knife in his hand. There is no evidence to show that the accused ever used the knife when he fell to the ground.

From the evidence, I am satisfied so that I am sure that the accused stabbed the deceased first and subsequently being hit by others causing him to fall. After he stood up, the accused continued to act aggressively with the knife still in his hand ready to stab others with it. This caused some difficulty in removing the knife from him at first. Eventually the police officers overpowered him and removed the knife from him.

Those are not evidence of a man acting in a manner which was reasonably necessary for the purpose of defending himself. They are clearly evidence of a man in aggression with a weapon in his hand ready to use it against anyone who was prepared to face up to him.

PW5's evidence which stated that he saw the accused pull out his knife and said that he would use it break PW6's mouth only goes on to confirm the aggressive behaviour of the accused when he was confronted at the time.

The defence's submission that the circumstances in which the accused found himself at the time justified the defence of self-defence is rejected.

The prosecution evidence against the accused is so overwhelming in this case that the defence of self-defence cannot succeed. I am satisfied beyond a reasonable doubt that the prosecution has succeeded in excluding the defence of self-defence.

The second defence relied on by the accused is that of provocation. That defence is set out in sections 197 & 198 of the Penal Code. The essence of this defence is that there must be a sudden and temporary loss of self-control on the part of the accused.

The evidence from the witnesses, both from the prosecution and defence, suggests that the only time when it can be said that there might be some form of provocation was at the gate. The witnesses testified that the gate was kicked open striking the accused and causing him to fall. In his own words, the accused said he saw "stars" when the gate hit him.

But the evidence also showed that the accused having stood up after being hit by the gate, move to one side of the gate, took out his knife and stood ready to face his attackers. The evidence also shows that the accused indicated he would use the knife. Thereafter the fight ensued during which the accused did in fact use the knife on the deceased.

Clearly, I find the evidence to be inconsistent with provocation. The remarks by members of the crowd against the security men, the argument with the accused about the bags and the forcing open of the gate which struck the accused were in fact circumstances which cause the accused to become angry and consciously decided to use the knife which was in his possession at all time. Even the continuous use of the knife to threaten others after stabbing the deceased do not tell in favour of the notion of provocation as well.

In the circumstances as I have found, the prosecution clearly has discharged its duty of excluding the defence of provocation in this case. Like the defence of self-defence, the defence of provocation is rejected.

Having rejected those two defences, this Court is only left with the obvious conclusion. The prosecution has proved beyond a reasonable doubt that the accused had unlawfully killed the deceased in the circumstances amounting only to murder and I am satisfied of that beyond a reasonable doubt.

I find the accused guilty and convict him of the crime of murder.

(Sir John Muria)
CHIEF JUSTICE