

REGINA V. STANLEY KINDA SURILAMO

High Court of Solomon Islands  
(Palmer J.)

Criminal Case Number 171 of 2002

Hearing: 10<sup>th</sup> February, 12<sup>th</sup>-14<sup>th</sup>, 17<sup>th</sup>-19<sup>th</sup>, 20<sup>th</sup>, 26<sup>th</sup> February 2003  
Judgement: 28<sup>th</sup> February 2003

*R. B. Talasasa and H. Kausimae for the Crown*  
*D. Hou for the Defendant*

**PALMER J.:** The Defendant, Stanley Kinda Surilamo ("Defendant") is charged with the murder of Mason Gwalelea (hereinafter referred to as "the Deceased") contrary to section 200 of the Penal Code Act [Cap. 26]. The murder was alleged to have been committed on 8<sup>th</sup> March 2002 at the Club Paradise in Honiara. Club Paradise is one of the nightclubs in downtown Honiara City.

#### Facts not in dispute

Much of the facts concerning the events, which occurred that evening at the Club Paradise are not in dispute. The National Bank of Solomon Islands Limited ("the Bank") had organized for that evening 8<sup>th</sup> March 2002, a fundraising dance in the VIP room of Club Paradise. The Defendant had been invited by his estranged wife, Judith Sangafo'oa (PW1) to attend the dance. PW1 was a member of the staff of the Bank and had purchased tickets for herself and the Defendant. There is unchallenged evidence, which showed that the Defendant had been drinking and was already drunk when he went to the Club.

The Defence does not dispute the sequence of events, which occurred that evening culminating in the stabbing of the Deceased by the Defendant. According to the undisputed evidence of prosecution witness Ben Sikwa'ae (PW5), it all started when the Defendant dragged PW1 from the dance floor when she was dancing it appears with another person. This was confirmed by PW2 who confirmed witnessing an argument and PW1 falling down. She was quite close to the Defendant when she fell supporting the evidence of PW5 that it was the Defendant who was responsible for her fall. PW2 also confirmed seeing the Defendant having an argument with the security people at the Club at this point of time.

According to PW5, one man tried to intervene but was pushed over by the Defendant causing him to fall down. PW5 also intervened joined by the Deceased. Instead the Defendant slapped the Deceased in the face. PW5 and the Deceased then dragged the Defendant out from the VIP room. They succeeded in taking him to the front door but couldn't push him out completely as he held tightly onto the front door. When the Deceased tried to push him out he couldn't do it and broke the Defendant's shirt. PW5 then told the Defendant to go back as he was too drunk. Instead the Defendant reached down towards his shoe and pulled out a knife (Exhibit 6). On seeing this, PW5 ran back to the Bar and told the Deceased and another man to keep away from the Defendant as he had

a knife in his possession. The Defendant then jumped back into the center of the dance floor brandishing the knife (Exhibit 6) in a threatening manner.

At this point of time, the Deceased despite being warned by PW5 not to approach the Defendant, started walking towards him with his hands raised in a friendly or peaceful gesture to try and calm his "uncle" (the Defendant) down. Instead the Defendant stabbed him. He fell down not long after this and was later taken to the Central Hospital but died from his wounds. The Defendant ran off after this and was later arrested and taken to the Central Police Station.

### Defence of the Defendant

The Defendant does not deny what happened that evening of the 8<sup>th</sup> March 2002 at the Club Paradise. He does not deny that he stabbed the Deceased with his knife. What he denies is the necessary mens rea accompanying the fatal stabbing to prove malice aforethought for any conviction to be made on a charge of murder. He says that he was so overwhelmed by alcohol that he did not know what he was doing that night. His mental faculties had been so impaired to the extent he was incapable of appreciating the effect of his actions or risks it would cause to others.

### The Law

Section 13(2) of the Penal Code Act recognises that intoxication can be a defence to any criminal charge on two grounds; where the person charged did not know that such act was wrong or did not know what he was doing (a) where the state of intoxication was caused by another person without his consent or (b) where such person was temporarily insane by reason of the intoxication. Sub-section 13(4) provides:

*"Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."*

It has been established as early as 1980 in **R. v. Kauwai (1980/1981) SILR 108**, and affirmed in **R. v. Kenneth Iro (Unrep. Criminal Case No. 66 of 1993) Muria CJ** at pages 2-3 that intoxication is available as a defence in murder cases whether intoxication was self-induced or not. His Lordship Muria CJ had succinctly summarized the test as:

*"The question is whether the accused's mind was so affected by alcohol that he could not have formed the intention to do what he did or that his mind was so affected by alcohol that he did not know what he was doing at the time."*

This test had been propounded in earlier English cases cited by the learned authors in Archbold, Pleading, Evidence and Practice in Criminal Cases, forty-third edition, at paragraph 17-50 (f) page 1371:

"Where, however, the prosecution has to prove any other mental element, such as intent or knowledge,..., the jury must consider any evidence of intoxication in determining whether the necessary mental element has been proved. "In cases where

*drunkenness and its possible effect upon the defendant's mens rea are in issue, the proper direction to a jury is first to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way which he would not have done had he been sober did not assist him at all, provided that the necessary intention was here. A drunken intent was nevertheless an intent. Secondly, subject to that, the jury should merely be told to have regard to all the evidence, including that relating to drink, to draw such inferences as they thought proper from the evidence, and on that basis to ask themselves whether they felt sure that at the material time the defendant had the requisite intent." R. v. Sheehan and Moore (1975) 60 Cr. App. R. 308, C.A. See also R. v. Pordage [1975] Crim. L.r. 575. When the question of drunkenness arises, it is not a question of the capacity of the defendant to form the particular intent which is in issue, what is in issue is simply whether he did form such an intent: R. v. Garlick, (1980) 72 Cr. App. R. 291, C.A." [Emphasis added]*

Learned Counsel Mr. Hou for the Defence has usefully cited authorities in other jurisdictions in which similar sentiments have been expressed. In Australia, this is set out clearly in *Viro v. The Queen* [1976-78] 141 CLR 88 at 111 per Gibbs J:

*"In the case of such a crime the issue is not whether the accused was incapable of forming the requisite intent, but whether he had in-fact formed it. The crown must prove beyond reasonable doubt that the accused actually formed the special intent necessary to constitute the crime."*

In New Zealand, this was addressed in *R. v. Kamipeli* [1975] 2 NZLR 610 by the Court of Appeal as follows:

*"Drunkenness is not a defence of itself. Its true relevance by way of defence, so it seems to us, is that when a jury is deciding whether an accused has the intention or recklessness required by the charge, they must regard all the evidence, including evidence as to the accused's drunken state, drawing such inferences from the evidence as appears proper in the circumstances. It is the fact of intent rather than capacity for intent, which must be the subject matter of the inquiry."*

The same test had been applied by Sir Leslie Herron, Chief Justice of New South Wales in *R. v. Farrel* [1964] NSW 1143 quoted in *R. v. Kamipeli* (supra at page 616) and approved by the Court of Criminal Appeal of New South Wales in *R. v. Gordon* [1963] SR (NSW) 631:

*"The question is whether he had in fact, formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming or did not in fact formed the intent required, he could not be convicted of a crime which is committed only if the intent is proved."*

### Definition of murder

Murder is defined in Section 200 of the Penal Code Act as follows:

*"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder and shall be sentenced to imprisonment for life."*

Prosecution is required in this case to prove beyond reasonable doubt that the Defendant had malice aforethought; the *actus reus* of the offence not being contested. Malice

aforethought under section 202 can be established in two ways, (1) that the Defendant had an intention to cause the death of or grievous bodily harm to any such person or (2) that he knew that the act, which caused death, will probably cause the death of or grievous bodily harm to, such person.

In the circumstances of this case, Prosecution is required to prove beyond reasonable doubt that the Defendant intended to cause the death of or grievous bodily harm to the Deceased or that he knew that what he was doing would probably cause the death of or grievous bodily harm to the Deceased.

It is common knowledge that the effect of alcohol weakens the restraints and inhibitions, which normally govern a person's conduct and impairs his judgment. A man therefore may well commit an offence for example, theft when he is drunk which he would never dream of committing when sober. The crucial element in such situation in any event is for Prosecution to prove beyond reasonable doubt that the accused did have the necessary *mens rea* (the intention or knowledge) to commit that crime. If the verdict is yes, then he is guilty, even if the drink may have impaired or negated his ability to judge between right and wrong.

In *R. v. Jimmy Viu (1994) CRC 15 of 1993 (HC)* (unreported judgment of 11 February 1994) his Lordship Muria CJ addressed the issue of *mens rea* as follows:

*"The accused state of mind must be established, of course, on the evidence before the court and must be done so by the prosecution beyond reasonable doubt. Such evidence would include what the witnesses including the accused, said happen at the time of the incident or immediately prior to or after the incident, so far as is relevant...."* (Upheld by the Court of Appeal in *Jimmy Viu v. R (1994)* judgment delivered on 17<sup>th</sup> June 1994).

#### The Defendant's case

The Defendant's case raised by way of defence was that he was so intoxicated by alcohol to the extent that he did not know what he was doing that evening which culminated in the fatal stabbing of the Deceased. Without actually saying so, the defence basically was that he was behaving and acting like an automaton at the Club that evening.

I have considered the evidence regarding the amount of alcohol taken by this Defendant commencing on the morning of the 8<sup>th</sup> March 2002, when it was taken and its effect on him right up to the time he went to the Club Paradise. I accept the evidence adduced showed that this Defendant was already drunk when he attended the fundraising dance at the Club Paradise with PW1. I do not need to recount the evidence on this as much of it came from the Defendant himself and has not been contradicted. I accept that the Defendant was already under the influence of alcohol when he arrived at the Club.

The evidence adduced regarding his behaviour and conduct at the Club was consistent with this conclusion. At the Club he bought and drank a glass of hot stuff. The Defendant described his own state of drunkenness as being full drunk. PW1 and PW2 also described him as being very drunk. PW2 also made the observation that the Defendant must have

been drunk for sometime and wasn't controlling himself properly when dancing on the dance floor. PW5 also observed that the Defendant was very drunk.

### **The Issue for determination**

The issue for determination before this court is whether the Defendant intended to cause the death of or grievous bodily harm to the Deceased or knew that the act of stabbing the Deceased on the chest would probably cause the death of or grievous bodily harm to the Deceased whether he intended to cause such injury or not.

Prosecution is required to prove the element of intention or knowledge and I need to be satisfied so that I am sure that the Defendant intended to cause the death of or grievous bodily harm to the Deceased, or that he had the knowledge that his actions would probably cause the death of or grievous bodily harm to the Deceased.

Did the Defendant intend to cause the death of or grievous bodily harm to the Deceased? To try and ascertain the state of mind of the Defendant, it is necessary to consider the evidence as to his actions and behaviour that evening and his own recollections under oath and statements obtained under caution.

### **The evidence of PW1**

The evidence of PW1 as to the behaviour and actions of the Defendant that evening is quite contrary to any suggestions which the Defendant may have wanted this court to believe, that he was acting more or less like an automaton at the direction of PW1. There was no suggestion that she (PW1) led the Defendant by the hand up the ladder into the Club, in fact she was not asked about this in cross-examination by Counsel for the Defendant and so was not given opportunity to affirm or refute any such suggestions or impressions by the Defendant. It was neither suggested that throughout that evening, she had to assist, lead or support the Defendant in any way inside the Club. Her evidence is to the contrary. That prior to any disturbance at the Club, the Defendant was sitting around the table with others including PW1 drinking, conversing and dancing, although of-course being under the influence of alcohol his actions were consistent with that of a drunken man. The observations of PW2 and PW5 confirmed this. When the Deceased approached them and spoke with him, he responded and shook hands with him. PW1 also stated in evidence that the Defendant had asked her for \$20.00 that evening which she gave to him. He had then walked unaided to the Bar to purchase his drinks. There was no suggestion that PW1 may have entertained any doubts as to whether the Defendant understood or knew what he was doing that evening, apart from the fact that he was clearly affected by alcohol.

### **PW2's evidence**

PW2 confirmed that the Defendant was obviously drunk and had had one too many drink. His observations of the Defendant's actions on the dance floor were consistent with that of a drunken man, uncoordinated and uncontrolled. He confirmed seeing the Defendant arguing with the security officers and PW1 falling down as a result of the actions of the Defendant. This witness also confirmed seeing the Defendant chasing people in the VIP room with the knife and later escaping along the main road.

**PW5's evidence**

PW5's evidence in relation to the state of mind of the Defendant is crucial. He was responsible in trying to get the Defendant out from the Club when he started to become a nuisance and to cause a disturbance in the Club. He confirmed that the Defendant was obviously very drunk. He and the Deceased had initially dragged the Defendant as far as the front door of the VIP room but did not succeed in completely pushing him out as the Defendant strongly resisted by holding onto the door. The Deceased then left him and walked off. It was at that point of time that PW5 observed the Defendant reaching for a knife hidden in his socks and so yelled out to warn the others and ran off back to the Bar. The Defendant then pulled out his knife from his leg and jumped into the center of the dance floor, brandishing the knife in a threatening manner.

It is my respectful view that the actions of the Defendant at that point of time were that of a man who knew or understood what he was doing. He had been told to go out by the security as he was becoming a nuisance and causing disturbance in the Club. It is normal for security guards in such places to physically remove anyone they consider is misbehaving and causing disturbance. There is no evidence to suggest that this Defendant was being unfairly treated and asked to go out or being handled over and above what was necessary by the security, PW5 or the Deceased. Rather, the evidence showed that when this Defendant refused to go out of the front door, they left him there and moved away from him. A normal person in his right mind would accept the physical eviction and leave. Instead of complying however, this Defendant refused and resisted. He took out his knife which he had hidden in his socks and threatened people in the Club with it. When the Deceased approached him to try and calm him down, he stabbed him. Again a normal person would have been able to assess and distinguish the difference between a person approaching in a peaceful manner as opposed to one approaching in a threatening manner, more so if he was a relative; not the Defendant in this case. After stabbing the Deceased, the Defendant jumped onto the Bar, damaged it before running out and making good his escape from the scene.

**Statements of the 9<sup>th</sup> March 2002 and 16<sup>th</sup> April 2002**

In his answers to question 27 of the statement obtained under caution on 9<sup>th</sup> March 2002, the Defendant could recall being apprehended by the security guards for purposes of controlling him. In the process he claimed he was badly beaten up. This caused him to take out his knife and stab the person facing him. In a later interview conducted on 16<sup>th</sup> April 2002 with the Police he explained why he stabbed the Deceased.

*"Q21. You save talleem what now in cross long hem that night ia?"*

*A21. Story hem oslem. After Judith givem \$20.00 long me, me go long bar and baem beer. Barman givem change but me argue moa say change no stret. That time me drunk now so me no control. Every security come and holem me and downem me long floor and killim me. That wan now me cross long hem now me outem knife and stabbem Mason. Me nothing save that Mason now be stabbem ia."*

He was obviously angered by the way he was being handled and controlled by the security.

### Conclusion on the state of mind of the Defendant

After careful consideration, it is my respectful view that the actions of the Defendant that evening with regards to the fatal stabbing of the Deceased can only be described as those of a man who intended to cause the death of or grievous bodily harm to the Deceased. In his own words recorded by the Police in his statement of the 16<sup>th</sup> April 2002, he stated that he was **angered** by the way in which the security guards were trying to control him. He did not like how they were holding him or attempting to control him and remove him from the Club. A normal person or perhaps one not too worse for drink would have been able to appreciate and understand what the security guards were trying to tell him or to do to him. Not the Defendant in this instance. He retaliated by pulling out his knife and stabbed the Deceased. According to the unchallenged evidence of PW5, the Deceased being a relative of the Defendant was merely trying to calm him down. Tragically for him, he was stabbed to death. The intention necessary to establish malice aforethought in my respectful view could not be clearer.

The fact that the Defendant could not distinguish clearly or identify who he had stabbed is immaterial to the question of intention. The fact he could not judge correctly or appreciate clearly what the security guards were trying to do to him, or tell him to do because he was intoxicated and over-reacted to their efforts and attempts to calm him down and have him removed from the Club Premises is immaterial to the issue of intention. The fact that he was unable to judge between what was right or wrong or to appreciate the risks involved in his actions as a result of being intoxicated is also immaterial to the question of intention. It is clear and I am satisfied so that I am sure that this Defendant **intended to stab the Deceased**. This intention can be seen in what he said in his statements of the 9<sup>th</sup> March and 16<sup>th</sup> April 2002 and his recollections of what transpired that evening, which do not differ in any great way from the evidence of other witnesses. This intention can also be seen in his actions when he pulled out his knife from the side of his socks, jumped into the center of the dance floor, brandishing the knife in a threatening manner and stabbing the Deceased when he was approached. His subsequent actions thereafter in chasing others with the knife and damaging the bar before escaping from the Club are all consistent with the actions of a man who knew and understood what was happening.

His actions and behaviour throughout that day but more especially from the time he entered the Club and left showed that he knew or was able to appreciate and understand what he was doing. I have considered the evidence on drunkenness carefully but cannot be satisfied that a reasonable doubt had been raised in my mind about the state of mind of this Defendant, that he did not know what he was doing. There is overwhelming evidence to the contrary.

The suggestion that the Defendant was so drunk that he had to be carried in by the Police and was seen lying on the floor by the duty officer, PW9, later that evening can be distinguished in that it related to events after the stabbing of the Deceased. The duty officer received a report at about 11.00 p.m. that night and sent officers to attend the scene. The Defendant was brought in sometime later. Whilst it is consistent with the state of drunkenness of the Defendant as described by PW1, PW2 and PW5, the fact remains and

which I am satisfied with, that Prosecution had discharged the onus placed upon it in showing to my satisfaction beyond reasonable doubt that the act of stabbing could only have been accompanied with an intentional desire or mind to either cause the death of or grievous bodily harm of the person stabbed. I am satisfied so that I am sure that the fatal wound was inflicted intentionally, out of anger. The fact that the Defendant may not have been able to control his actions or his movements, his anger or his judgments, does not detract from the fact that it was an intentional act. Whether it was an over-reaction or a misjudgment is immaterial. I find him guilty and convict him of the offence of murder. He is sentenced to life imprisonment. He has a right of appeal to the Court of Appeal within thirty days herewith. Learned Counsel shall explain to the Defendant his rights of appeal again before he leaves the courtroom.

**ALBERT R. PALMER**

The Court.