

**IN THE SOLOMON ISLANDS  
HIGH COURT****Criminal Case No. 259 of 2003**

REGINA

V

NA'ASUSU TOME  
SILAS EDDIE LAEFIWANER. Talasasa for the DPP  
The Public Solicitor for both accused**At Auki: 4-19 March 2004 and**  
**Honiara: 22 March, 2 April 2004****Before Brown PJ.****The No Case Submission**

At the close of the prosecution case, Mr Averde (for both accused) submitted that they had no case to answer. He pointed to *Galbraith's* case (R -v- Galbraith (1981) 1 WLR 1039; 2 All E.R. 1060; 73 Cr App R 124(CA)) as affording this court guidance on the law. I sit without a jury and am a judge of fact. I mention this self evident matter, for *Galbraith's* case was decided following the emergence of two schools of thought in the United Kingdom about the judges' function on such a submission in jury trials.

The judgment of the court was given by Lord Lane CJ who described the two schools thus – (1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; or (2) that he should do so only if there is no evidence upon which a jury properly directed could properly convict.

In the United Kingdom the judge should not presume to substitute his view of the strengths or weaknesses of the prosecution case, his view of the weight to be placed on the evidence of particular witnesses, or his opinion of their credibility, rather “where on one possible view of the facts, there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty” than it should be left to the jury to decide.

By preferring, where a case can be made for a conviction, to leave it to the jury, the Court of Appeal (U.K) sought to avoid the practice which had gained credence, since the coming into operation of the Criminal Appeal Act 1966 (U.K) of a judge stopping a trial on a no-case submission, where the

judge, in effect was guessing the collective view of an appeal court faced with an argument, that the prosecution case at trial, was "unsafe or unsatisfactory" to support a conviction.

The secret deliberations of jury, concerning witnesses' credibility, the weight to be placed, the strength of the web of evidence, all needed to be voiced by a judge who took upon himself the task of justifying his refusal to accede to a defence request to stop the trial on a "no-case" submission. In other words, the judge would need to show why, in terms outlined, the trial should proceed. He should, in fact, substitute his reasoning for that of the jury.

In *Galbraith*, the appellants sought leave to appeal against conviction on the grounds that the judge wrongly rejected a submission at the end of the prosecution case that the case against him should be withdrawn from the jury for that verdict would be, on the Crown case at that point in time, "unsafe and unsatisfactory." The Court of Appeal (U.K) was faced, then with the trial judge's reasons, pointing to the evidence in detail, as to why he did not accede to defence counsel's request to stop the trial.

The Court of Appeal (U.K) refused leave, in its judgment. It was at some pains to shield, as it were, the judge from criticism of his reasons, (which will form the basis of appeal points), when the judge may properly leave the matter to the jury, as the arbiter of fact.

The Court of Appeal said, (citing Lord Widgery's view with approval) at 1041, 1061, 126;

*If a judge is obliged to consider whether a conviction would be "unsafe" or unsatisfactory, he can scarcely be blamed if he applies his views as to the weight to be given to the prosecution evidence and as to the truthfulness of their witnesses and so on. That is what Lord Widgery C.J., in Reg. -v- Barker (Note (1975) 65 Cr.App.R. 287, 288, said was clearly not permissible:*

*"... even if the judge" – our emphasis – "has taken the view that the evidence could not support a conviction because of the inconsistencies, he should nevertheless have left the matter to the jury. It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury ..."*

A trial judge in the Solomon Islands does have the responsibility to "apply his views". The duty of a trial judge in a criminal case in this jurisdiction, then, goes beyond that envisaged in *Galbraith*. There in the United Kingdom, the judge, once satisfied that, on one possible view of the facts there is evidence sufficient to put to a jury, should go on with the trial. That duty does not adequately discharge the responsibilities on a judge, here, for it does not go far enough.

A judge should apply his reasoning powers; to weigh the evidence; consider witnesses credibility and standing back, look at the evidence as a whole, before asking himself, has the prosecution

shown, "beyond reasonable doubt that there was on the evidence no reasonable hypothesis consistent with innocence."

*"Before he (appellant) could be found guilty of the murder, it was necessary for the prosecution to show beyond reasonable doubt that there was on the evidence no reasonable hypothesis consistent with innocence. See DPP -v- Togiabae (CA 5 of 1986. March 30, 1987. White P., Connelly, Kapi JJA.) To state it another way, there had to be no reasonable explanation of the evidence except that it was the appellant who killed the deceased in circumstances amounting to murder."*

In Martin Sukarake -v- R (Unrep. SI Crim. Appeal No. 6/1994) per judgment of McPherson J A, at 7.

The difficulty when trying to reconcile the authorities, is that the United Kingdom cases address the role of the jury *vis a vis* the judge, affected by the Criminal Appeal Act 1966 (which forms part of our adopted law and which gives sense to the case law relied upon) when in fact, those subtleties are irrelevant when one realizes no jury is interposed, rather the whole responsibility to find facts rests on the judge, here.

#### **The test to be applied by a judge on a non-case submission**

The test to be applied, in the Solomon Islands, in accordance with the *Galbraith* direction, when considering the prosecution case in terms of "no evidence" used in s.269 of the Criminal Procedure Code, is that enunciated by the Court of Appeal in *Sutarake*. The test to be applied by the judge in the Solomon Islands, whether at the end of the trial (Sukarake) or at the time of a no case submission (In case stated by DPP(No.2)(1993)(see below), is, in material respects the same.

The phrase "a jury properly directed" refers to the obligation of a judge to remind the jury of the need to apply their collective mind to the four concepts of evidence, relevance to the issue at trial; admissibility; corroboration where necessary and weight to be afforded the evidence under consideration. The same obligation is to be discharged by a judge sitting on his own.

#### **The prosecution case rests on circumstantial evidence**

The defence has, in its submissions, summarized the evidence which it says is relevant and correctly pointed to the fact that this prosecution rests on circumstantial evidence. There have been no eye witnesses to the killing. Mr Averre referred to cases and principles involved, both in this jurisdiction and elsewhere.

*"Circumstantial evidence is not a different species of evidence. Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved".*

*(Shepherd -v- The Queen (1990) 170 CLR 573 per Dawson J at 579).*

He pointed to a number of cases including DPP -v- Kilbourne (1973) a.c. 729 PER Lord Summon a 758; R -v- Dudley Pongi (unreported SI Crim. Case No. 40/1999 per Muria CJ at 5-12

*"It was necessary for the prosecution to show beyond reasonable doubt that there was, on the evidence, no reasonable hypothesis consistent with innocence."*

This echoes the ratio in the earlier cases and has resonance in Mr Averre's reliance on a South Australian case stated by the DPP, where King CJ said,

*"I would re-state the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses."*

(In Case stated by DPP (No.2)(1993) 70 A. Crim. R. 323, per King CJ at 327).

**Defence counsels' argument on similar fact evidence**

Fred Buka gave evidence about Na'asusu's assault of an Italian tourist, (a visiting doctor) at the mission, with a bush knife. This evidence was given after Mr Averre's objection was overruled. I allowed the evidence for –

*".... the essential features in the Italians case, (some years before), was (i) the use of a bush knife to inflict an injury; (ii) on an expatriate; (iii) for a reason privy only to the accused. (later). What weight I place on (the evidence of Fred Buka) will no doubt, be the subject of address."*

Mr Averre argued that no weight whatsoever should be placed on the evidence, for it was not similar. I presume him to mean this killing was carried out, apparently without witnesses, while the earlier assault was one in full view of the public, by Na'asusu who was then, obviously angry. Two of the issues in this trial are the method and the possible reason (or absence of reason) for this killing. There is independent evidence that a bush knife, of the type carried and owned by Na'asusu very probably was the weapon. The use of a bush knife, then in the earlier assault has probative value but the absence of a reason for the killing cannot be sheeted home to Na'asusu as somehow inculpatory. The weight, then of Fred Buka's story, so long after the event in 2001, to be afforded, is very little. I am expected to suppose (at the height of the Crown case) that Na'asusu is a Kwaio man willing and able to use a bush knife to inflict harm of such magnitude, in circumstances where no anger had been apparent. That may be conjecture, but I am not willing to infer on those earlier facts alone.

He also referred to the matter which I raised about the Kwaio, a trait often expressed as *amoi, amoi, no-ho*. He said on a submission of no case, that trait (if there in fact be one) has no part to play. I have not considered it in relation to this submission, but will leave its relevance or otherwise, to counsel at a later time.

The responsibility on a judge to separately consider each case

As well, I take note that these two accused's claim need be considered separately on this application. Whilst charged together as parties to the one offence, the connection between these two accused is a fact or series of facts, to be proved. But it must be remembered, that the degree of proof in criminal cases need not reach certainty (per Denning J; *Miller -v- Ministry of Pensions* (1947) 2 All E.R. at 373-374).

Once the prosecution has closed its case, in a proper case, a judge is entitled to stop the trial to bring in a verdict of not guilty (analogous to that right in a jury) but he cannot convict until he has heard the whole case. [I invited counsel, in a previous murder trial, to consider a no case submission, at the close of the prosecutor's case, to enable the prosecutor to respond. That would seem a better practice than peremptorily stopping a trial.]

Mr Averre, in his concluding comments spoke of "links," especially in relation to the accuseds' joined in the indictment. It is especially relevant to consider links, for the methodology in approaching a case resting on circumstantial evidence, is often described as connecting "links in a chain" (one weak link will result in a broken chain) or "strands in a cable" (broken strands may not affect the usefulness of the cable).

Mr Averre referred me to David Ross-*Crime* (Law Book Co. 2002), which at 190 (addressing the metaphor, "links in a chain "or" strands in a cable") quotes Dawson J, in the Appeal of *Shepherd*.

*"On the other hand, it may sometimes be necessary or desirable to identify those intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt. Not every possible intermediate conclusion of fact will be of that character. If it is appropriate to identify an intermediate fact as indispensable it may well be appropriate to tell the jury that that fact must be found beyond reasonable doubt before the ultimate inference can be drawn. But where - to use the metaphor referred to by Wigmore on Evidence, vol 9 (Chadbourn rev 1981), pa 2497, pp 412-414 - the evidence consists of strands in a cable rather than links in a chain, it will not be appropriate to give such a warning."*

*(Shepherd -v- The Queen (1990) 170 CLR 573; 51 A. Crim. R 181; at 579; 184).*

Circumstantial case – “strands in a cable”

This case before me is analogous to “strands in a cable” for the happening at the excavation site has been described by very many witnesses, whose strands of evidence, the prosecution seeks to show, make up a cable of such strength that this court can be satisfied, beyond reasonable doubt, of the guilt of these accused. It is not analogous to “links in a chain” which sounds in passages of time, perhaps, leading up to a concluding act.

Later, Ross at 191 quotes Callaway JA of the Victorian Court of Appeal (In *R -v- Kotzmann* (1999) 2 V.R. 123 at 129) who describes the strands as “an accumulation of detail”. Callaway JA opines that, logically it is always/possible to categorise an inference to be drawn from the evidence, as belonging to “links” or “strands” but it is easy to mistake the process of allocation to one or other, and people come to perfectly sensible conclusions every day without analyzing their processes of reasoning.

Such reasoning process is equally apposite, whether referring to a judge (in the absence of a jury) or the collective reasoning of a jury. So it is the web of evidence about this time and place, to about 2pm at this excavation site and hospital at Atoifi, which lead to those inferences both counsel urge on me, in their respective arguments.

The inferences that the Crown seeks to draw

Mr Talasasa for the Crown points to the evidence of Fraser and Joshua, (crucial to the prosecution) both working at various times on the excavation site with the machine and who spoke of Na’asusu Tome at the sign board, adjacent to the site. When Joshua left he saw Na’asusu with others at the sign board and when he came back only Na’asusu was there. No one else was around the site. It was also clear that another employee, Ray Jack (who has since died) had had an argument with the accused Silas Laefiwane when Silas had threatened to kill Jack. Some money was paid Silas by another, Lester, but the inference Mr Talasasa sought to draw from other evidence was that this court should find, in the absence of evidence of compensation moving from Jack to Silas., a wish to kill expressed by Silas. Mr Talasasa must impliedly seek to attribute a similar wish to Na’asusu by maintaining, on the evidence of one Fred Buka, that Kwaio attitudes were such that it is reasonable to suppose the ill feeling evinced by Silas towards Jack (and by implication the hospital personnel) would manifest itself in other Kwaio men, (migrate as it were).

For Na’asusu had the opportunity, he had a weapon, the time frame was such that he was seen to be alone with Lance Gersbach, he may presume to have had colluded with Silas to kill a hospital staff and in fact killed such a person in Lance Gersberck, for there was no one else at the scene before the body was found, *afiori* no one else to do this act.

Mr Talasasa spoke of and relied upon Fraser and Joshua, whose evidence of the events about the excavation site before they both left was absolutely crucial to the Crown case, providing the basis for the inferences that he sought the court to draw. He also pointed to the Records of Interview both accused had had with the police, (as somehow inculpatory).

The defence argument on evidence

Mr Averre, for the accused, said it was in effect, drawing a long bow to suggest a link between the argument Silas had with Ray Jack and the death of the deceased.

The case against Na'asusu relied on opportunity. He was there. He had a knife. To draw inferences from those facts alone, that Na'asusu killed Lance Gersberch ignores other reasonable hypotheses. If the court finds that Silas was not a party to the killing, the court is left without a motive for the killing by Na'asusu, for none has been given in evidence.

Earlier in his submissions, Mr Averre pointed to the weak identification evidence placing Na'asusu Tome at the scene, an argument which rather overlooks the admission in the Record of Interview that he in fact, returned to the scene after leaving the group of boys at the hospital. But the weak identification evidence goes to the credibility of the Crown witnesses, a point I will return to, later.

**The case against Silas Eddie Laefiwane**

The weakness in the prosecution case is that pointed out by Mr Averre. There is no evidence to link the argument this accused had with Ray Jack and the threats to kill, to the killing of another so as to inculpate the accused. The inference which Mr Talasasa wanted me to draw, having drawn out the story of the argument, was that such ill-feeling by Silas towards Ray Jack, was communicated to Na'asusu, who adopted and acted upon it. For the Crown case is that Na'asusu was the perpetrator of the act of beheading. No evidence was led in court to suggest Silas was at the scene, apart from the assertions by the investigating police officer at the time Silas was interviewed, assertions not pursued at trial.

It has not been shown that any communication took place between these two in relation to this supposed ill-feeling. It is not available to the prosecution to rely on the fact of the killing as evincing a wish in this accused, to satisfy some long standing grievance held by Silas, (at its highest, for there is evidence it was resolved) by conspiring with Na'asusu to kill, not Ray Jack but this unfortunate expatriate employee in his stead. These two stories, the killing and the wharf argument, progressed along parallel lines, but no-where have they been connected by direct evidence. Both stories involve different person. Neither has been logically connected. The hypothesis that the reason for the ill-feeling in Silas manifested itself in Na'asusu to give him motive for the killing, of an employee of the mission hospital, is incredible in the absence of some linking evidence. There is none.

The case against Na'asusu Tome

This case is on a different footing. As I said previously, to find a case to answer, in accordance with the direction in *Sutarake* it is necessary for the prosecution to show beyond reasonable doubt that there was, on the evidence, no reasonable hypothesis consistent with innocence. Since a trial judge sits without a jury, following the *Galbraith* direction, the prosecution need show that proof at the close of the Crown case. For it is the judges responsibility to weight up the Crown case, (consistent with the law affecting circumstantial evidence) bearing in mind the four criteria, (i) relevance, (ii) admissibility, (iii) corroboration where needed and (i) weight to be afforded to evidence allowed in.

### Findings on the evidence

The deceased, Lance Gersberch, died, virtually instantly when his head was severed cleanly from his body at the neck, by a forceful blow from a very sharp instrument. The blow was struck from the back, to the base of the skull. Dr. Chester Kuma, when asked, agreed that a long bush knife, shown him in court was such an instrument which very possibly could have done it.

The deceased's head was found close to the commencement of digging work, adjacent to the road, before such work became an excavation into which the body fell. I'm satisfied, on the evidence of the co-workers, and on the photographs taken at the scene that Lance Gersberch was working a line along the ground by cutting away part of the soil to form a continuous step, while facing towards the deeper part of the excavation. His back, then would predominately have been towards a notice board and small casuarinas tree (saru), shown in the photograph A, some metres away.

The bush knife in court, was one belonging to accused Na'asusu, according to his admission in his record of interview of the 9 July 2003. It was not collected by the investigating officer, Inspector Balaga, rather was obtained by another officer, not from the accused's house, as asserted by the inspector, but from the house of a pagan priest. The knife was put in evidence, as exhibit "12".

### The forensic report

Forensic work was done on the knife, in Canberra. A report or statement of witness was admitted by consent and become exhibit "3". It was an unsigned document of 9 pages purportedly relating to the examination of items in the case of the alleged murder of Lance Gersberch (sic). Items were named and tested, items marked as having come from the secure exhibit room at Forensic Services, Australian Federal Police. There was no connecting testimony about the items, including a bush knife. Findings on the tests were non-committal, which is probably just as well. The exhibit did not help me, for I could place no weight on it because of these various failings.

### The Records of Interview

Inspector Balaga conducted records of interview with both accused who were apparently taken into custody in circumstances unknown to the court.

Inspector Balaga's interview with Silas proceeded on the basis that he had beheaded the deceased, accusations that were denied. He was also asked about threats to kill that he had made to one employee of the Atoifi Mission Hospital, Ray Jack, in February 2003, following an argument on Honiara wharf over passage on a ship chartered by the Mission, returning to Atoifi. Admissions were made. He was later asked about threats he again made to Ray Jack at Atoifi wharf, in the week prior to the killing. Again admissions were made.

When asked of his companions about the Atoifi compound (hospital area) he named brothers like Eddie, Lofobata.



When asked whether he told them of his intention to chase Ray from Atoifi because Ray had made him, ashamed, he answered "no".

No questions were put to him about his relationship, if any to his co accused Na'asusu, or whether he had discussed these incidents, suggested killing him or even if he knew of Na'asusu. This interview took place on the 22 May 2003 soon after the killing on Sunday 18 May 2003.

On the 18 June 2003, the inspector interviewed Na'asusu Tome.

This allegation was put to him.

*"The police are carrying out an investigation into an incident which occurred on the 18<sup>th</sup> May 2003 resulted in the death of Lance Gersbach (sic). It was revealed that you Na'asusu was the person who killed him with a big bush knife. You escaped after the killing into the mountains of East Kwaio. You Beheaded his neck and he died instantly. This was occurred on Sunday 18<sup>th</sup> May 2003 at Atoifi, East Kwaio, Malaita.*

He was asked about his relationship to Silas Eddie Laefiwane but was not able to adequately explain it by a bloodline but admitted he knew him; he was a Kwaio man too. He denied meeting Silas on Tuesday 13 May and denied knowledge of ill feeling by Silas towards Ray Jack. As I have said, there was no other evidence brought about these two denied allegations.

He was asked about going to Atoifi on the Friday 16 May and agreed. He was not asked for what purpose he had gone but the Crown did not seek to show any, rather relied on his apparent knowledge that work was in progress about, what I call, the excavation site.

He went again on the Sunday. He stopped and watched the workers, remaining near a sign adjacent to the road, with other boys. He saw the expatriate worker, Lance Gersberch working with a shovel, while a machine was in operation. He was asked –

*Q.64. How long were you on the excavation site?*

*A. I do not take long there. I just went past.*

*Q.65. What is the purpose of your going to Atoifi on that Sunday 18<sup>th</sup> May 2003?*

*A. I went to collect coconut as sent by my father. I took some and went back.*

*Q.66. Did you meet any body when you went past the excavation site?*

*A. I met some boys and they asked me to use my knife to cut their tobacco. I gave the knife to them and we make some smoke.*

*Q.67. Where did you make the smoke?*

*A. Just besides the road.*

*Q.68. I put it to that you met them under the Atoifi Hospital Notice Board cutting tobacco there next to where the excavation site was. What are you going to say on that?*

*A. Yes it just close to the Notice Board under a small tree in language called Saru.*

Q.69. *What happens next after cutting tobacco there?*

A. *We went from there.*

Q.70. *Where did you go?*

A. *I went up to Atoifi Hospital and then came back to return home.*

Q.71. *Where are the boys then?*

A. *We all went together to the Hospital. Then they went back and I return home.*

Q.72. *Who went home first?*

A. *We went back together.*

Q.73. *I put it to you that those who went hom first were the boys leaving you behind in front of the Hospital. What are you going to say on that?*

A. *Yes that's true. They went home first and I leave to home after.*

Q.74. *What road did you use home when you left the Hospital?*

A. *The same road that past the excavation site.*

Q.75. *Did you see the men still working on the site?*

A. *I saw them still working.*

Q.76. *How many of them at that time?*

A. *I do not count them. I just went past.*

Q.77. *Was the expatriate still there working?*

A. *Yes, he still works there.*

Q.78. *I put it to you that you are the one responsible for the killing of the expatriate Lance Gersbach when you went past him there with your knife. What are you going to say on that?*

A. *I cannot say yes to something I didn't do.*

There is nothing inculpatory in this material on its face. If the facts recounted are shown by other evidence accepted, to be untrue, then inferences may be drawn, possibly prejudicial to this accused. Those facts on the face of the record have not been shown to be untrue.

#### The oral evidence

An area constable, Paul Fuemae from Na'au village was called to give evidence concerning the threats made by Silas to Ray Jack. He spoke of being approached by one Peter Telarmo, with a view to resolving this dispute between Silas and Ray Jack over the supposed insult offered Silas by Ray Jack over the passage refusal. He recounted that Telarmo had gone to Atoifi and on that market day, 14 May, he heard from people who had been to Atoifi, that the matter was settled. On Paul

Fu'ea'mae's evidence, he understood from one, Lester, that Silas' anger had been resolved by payment of some money.

He was asked whether he knew Mai'na'adi whom he knew to be a chief of bush Kwaio from these accused's place. This chief's name continually cropped up, but Mr Talasasa never led that aspect anywhere.

Other witness statements admitted by consent

A number of witness statements were read by consent, the statements given exhibit numbers. These various witnesses recounted what they saw about the excavation site, both before and after the killing.

Junior Moli being perhaps one of, if not the earliest on to the scene following the killing. His oral testimony may have throw fresh light on the matter, but the evidence of these witnesses, by and large, followed evidence of others who did come to court.

Except that evidence of Yvonne Reubenheimers who recounted commenting to her husband during lunch (their house standing adjacent to the welcome sign) about the fellow smoking with others near the sign. She stated that she left for a lecture at 1.55pm.

This timing is important, for she could be expected to be aware of time, especially when she was attuned to the need to be at the lecture room, nearby, at 2pm.

No alarm had then been raised. That is not to say the killing had not taken place, for the body may have been in the hole, unobserved from the house. The alarm was raised shortly after 2pm.

Bruce Hand came on the scene about 2.05 and took a video of the area and of the deceased's decapitated body in the excavation. This video became exhibit 2.

Then came a statement, incongruous in the extreme, for the investigating officer had, in the record of interview asserted that Tome's bush knife had been confiscated from his house.

Fueabo c/- Feres Village, a chief certifies Na'asusu's bush knife kept in the priests house. It was taken from the father of Na'asusu. Na'asusu was well known to Fueabo and he recognized the knife. It had been left by Na'asusu in the priests house.

**The oral evidence of the Kwaio visitors and why a court should not be kept from an understanding of the particular traits of peoples where it so obviously has relevance.**

The court then heard from a succession of Kwaio men and boys, who recounted, with varying degrees of openness, of having been watching the work by the machine and the three employees, including the expatriate on the Sunday, when Na'asusu joined them. They used his bush knife to cut tobacco (and smoked it, for Yvonne Reubenheimers evidence accords with that fact) before going up to the hospital where they left Na'asusu at the out patients clinic. They went home it seems but did not pass the work site. (None had watches and none could reliably establish time).

These Kwaio men and boys were Petero Ta'a, Andrew Ngele, and Ita Iri'fau'lamo. My notes in relation to the first to give evidence, Andrew Ngele, were:

"This witness was loath to speak. His answers had to be coaxed from him. He whispered: He looked at his feet throughout. He was asked to look about (for Na'asusu) and refused. He was encouraged to stand up to see if Na'asusu (whom he knew) was in court. He did so, just as Mr Averre objected to this manner of identification. I stopped the witness from walking stupidly about behind the bar table, looking in the air toward the ceiling. This witness was not of great reliance for he was puerile".

Similar views could be expressed about the others. Their evidence, such as it was, clearly called for an explanation about the manner in which it was given.

**All this manner and attitude as I have recounted obviously means something to these Kwaio youths and the two accused watching, quite unlike what it means to me.**

I have no idea what moves the collective will of the Kwaio; it may be the terror of retribution, invisible to the human eye caused this outward manifestation of an inward fear, but who am I to say, in the absence of knowledge or argument.

Ward CJ in *Gouwadi's case* (*Gouwadi v R* (1990) SILR 118) recounted the magistrate's comments made in the case which had come to the High Court on appeal.

*"For prosecution evidence perhaps language used was rather not clear to the Defendant's Solicitor. But as a Melanesian Magistrate listening to what both witnesses had said there was no ambiguity neither the demeanour represent any falsification in their stories. I'm satisfied with their stories". (The Magistrate was dealing with Kwaio).*

Later, when giving reasons at 122, the Chief Justice said –

*"I feel there is a real likelihood here that the magistrate did allow his opinion of the Kwaio to shift to some extent the burden of proof from the prosecution onto the defence".*

I do not criticize the Chief Justice's reasoning about the shifting burden apparent to him from the record, what is clear is the view taken by the magistrate of the Kwaio which presupposed a society differentiated from others in the region.

Dr. Kuma's evidence clearly indicates an underlying difference. I have reproduced the material part of Dr Kuma's comments, which presuppose a society with customary practices and *mores*, which are at odds with what he sees as impliedly as norms.

Clearly the Kwaio have been the subject of anthropological interest as recently as the 1970's. *Solomon Islands* (Lonely Planet Publications 1997 Hawthorn, Vic. Australia) at 207 says that Roger Keesing spent much of the 1970's in east-central Malaita studying the life of a Kwaio chieftain. Later at 219;

*East-central Malaita Island's mountainous interior is only very seldom visited by Westerners and you should think very carefully before going there. As government officials themselves require escorts here, they discourage foreigners from contacting the Kwaio. Nevertheless, trips inland are possible for those who can afford to pay penalty rates for guides, and are prepared for the possibility of an angry, perhaps even violent, rejection by the Kwaio once they find them. The Kwaio may also demand huge compensation.*

When I see these witnesses, when I read this other material above, when the bush knife seems to have been with a pagan priest when collected, when Inspector Balaga keeps referring the accused Na'asusu to one John Maena'adi (supposedly a chief of Kwaio) and the prosecutor speaks of him, too, there is an underlying thread, relating to custom or traits of the Kwaio, which hasn't been explored in this trial but which I venture to suggest is of great importance and most probably would affect how I should treat the evidence of these Kwaio people.

Mr Averre, says in effect, to apply the strict rules of evidence and assess the evidence in the traditional Western manner, (for to do otherwise risks the mistrial found by Ward CJ when considering the magistrates case), and so I must in absence of any proper argument about the Kwaio mores.

But in future, something better must be done to elicit the obvious thread of custom which colours this type of case, and counsel should argue how the court should approach this type of evidence, so coloured by custom or particular traits. Here, I must rely on the bare bones of the evidence given, without understanding, when understanding was apparent in the Magistrate in *Gouwadi's* case, an understanding not given credence on appeal.

#### The oral evidence continued

Dr Arnold Raubenheimer originally from South Africa (who was a relief medical doctor at Aoifi SDA Mission Hospital at this time), gave evidence. He obtained his medical degree in Johannesburg S.A, in 1957, a specialist accreditation in Cape Town in 1969, and is currently the Gynaecologist at the National Referral Hospital. He is an ordained minister of the SDA church.

He came to the Solomon Islands on the 11 April 2003 and to Atoifi. On Sunday 18 May, he had been to the hospital, then home for lunch at about 1pm. At about 1.30pm he left the house for the hospital before going to a lecture theatre nearby, for a lecture by a visiting professor of medicine scheduled to start at 2pm. When he was at the lecture room, someone came running to the door to say a man had his throat slit. He ran to the excavation to find Lance Gersberch flat on his abdomen down the bank. He had been beheaded. An ambulance was called to convey the body to the hospital. The police were informed. Within a short while, 2 airplanes arrived with police, and the doctor described to the investigators, the scene. He confirmed the various position numbers in the photographs in exhibit "1", saw the video, exhibit "2" (which showed the remains of the body in situ) and confirmed he was present when Bruce Hands took the video.

While at lunch in the house immediately adjacent to the site, he saw some 4 to 5 men sitting under the sign outside "one really smoking" (a fact brought to his attention by his wife). He said they were 14 to 20 m away. All were sitting down, but he wouldn't recognize them. He saw Lance Gersberch

there, facing the excavation, using a spade. (He demonstrated digging a line). When he was called to the excavation later, he saw the body in the excavation, a drop of approx. 2m down from the decapitated head, lying above, at the road level.

To reach the hospital and nursing lecture theatre, he left the house by the road, going away from the site, higher up the road.

When he left the house the machine had stopped. He had only been in the lecture room, some 4 to 5 minutes awaiting a start, when the message came. All ran out. He was at the lecture room when joined by his wife.

He described the decapitation as, having been caused by one blow, one swipe, clean as if a surgeon had done amputation.

When shown the bush knife, he opined, (having felt the weight and inspected the blade) that such a knife could decapitate easily. He said one Stewart Lata came to the door of the lecture room to beckon him out. When he felt the body on arrival at the site, it was still warm; a very recent death.

#### The Post Mortem report

Dr Chester Kuma, the Chief Consultant surgeon at the National Referral Hospital Honiara, carried out the autopsy on the deceased, Lens Gersbach (sic), at Honiara after the remains were flown there. He carried out his examinations at approximately 1pm on the 18<sup>th</sup> May 2003. His findings were:-

1. *Adult Caucasian male, identified and confirmed as that of the above named.*
2. *There is complete separation of the head from the rest of the body.*
3. *Presence of a clean oblique cut through the neck through all tissues including skin, fascia, muscles, blood vessels nerve tissues, spinal cord and the hypopharynx.*
4. *The cut commenced from the base of the skull posteriorly at the level of the first cervical vertebrae and exiting just above the larynx anteriorly resulting in complete separation of the head from the rest of the body.*
5. *There is no evidence of any other injuries to the body.*

*Death resulted from sudden cessation of breathing due to a high complete severance of the spinal code (beheading) and sudden, massive exanguination of blood*

In court he was shown the bush knife and said such could very possibly have caused the beheading. Lance Gersberch was a tall, lean person, his neck was not bulky; an adult male with force could do that.

#### The changes in Kwaio

He was asked about changes that he had noticed over the 12 years that he had spent at Atoifi amongst the E. Kwaio people. He commented that he noticed changes to their nature.

*Attitude became more open. Initially, the mountains did not feel welcome, after several years, sleep with them eat and talk with them. That progressed. Usefulness became increased. Review custom practice prevented them coming in but that changed – allowed us to go into their areas, run clinics. Land a big issue but over this period, people willing to share land proper procedures, animosity decreased. People of Kwaio opened up, much more visible way. You can see it, feel it, bring you food, say hello to you.*

Fred Buka, an Atoifi Hospital Station Electrician gave evidence of the argument and threat by Silas towards Ray Jack at the Atoifi wharf on the 13 May. There was no talk of Na'asusu or of any other matters, material to this question I must decide, affecting the Crown case against Na'asusu. His evidence, then had no direct bearing, other than the evidence of Kwaio traits apparent to an outsider.

Peter Telarmo, the Atoifi security also spoke about Silas' threat to kill Ray Jack during the argument. He did not know of the two accused's family relationship, if at all. He did speak of market days at Atoifi being Wednesday, when coconuts were available, there being no market on Sunday.

Lester Asugene of Abutara Village East Kwaio, the nurse educator and acting principal, school of nursing gave evidence about Kwaio custom and the dispute involving Silas. There was no evidence of Tome's knowledge or involvement in this dispute. In fact, \$20 was offered by Lester and accepted by Silas on the Wednesday, the market day.

Again, Constable Martin Ifana'safi of Atori Police Station gave evidence of his attempt to mediate the dispute involving Ray Jack. His evidence does not help me with the remaining question.

### **Two most important witnesses**

They were the men, employees of the SDA Hospital, who were working on the excavator machine on the Sunday while Lance Gersberch was working with the spade.

### The evidence of Fraser Alekevu

Fraser Alekevu originally from North Georgia, Western Province had been with the hospital for 5 years. He was the accountant. On the Sunday, at about 11am he heard the sound of the machine and decided to work, so changed his clothes and went to the excavation site where Joshua was operating the machine. Towards lunch hour, Joshua's friends came from the wharf area so Joshua left with them, leaving Fraser alone operating the machine. Later Lance came down in his working clothes, and they both worked, doing their respective jobs. Later, while operating the loader, it gave a problem so that Fraser decided to look for Joshua, the mechanic and operator. He met Joshua up the road for Joshua was on his back to the site. They both returned to the site until Joshua, after inspection decided to go to the workshop for tools and oil. They asked Lance Gersberch for the keys to the workshop and he told them that the keys were in his house. When they left Lance by himself, "a man was still sitting" by the welcome sign. When asked later about anyone else being there when they left Lance, he said "no-one except the man sitting". When asked whether he recognized him, he said "Yes, I had seen him previously" Although he did not know his name, he was told later that it was Na'asusu. He pointed to him in court.

In examination in chief he had said that he had spoken to the man, as he, Fraser, had walked past the Aru tree (casuarinas) on the way to find Joshua. He greeted him and said "fellow, I'm going this way". There was no reply. Fraser said that the man was sitting down, with a 10 kg. rice bag for his basket, with a bush knife inside, facing towards where they had been working in the excavation, while Lance was at the road level, standing there, working with a spade, when they both left for the workshop at 1.30 pm, going towards 2 pm. When they left, Lance was about 6 to 8 m away from the notice board.

Both Fraser and Joshua went to Lance's house where they were given a drink and the keys by his wife, then they went to the workshop where they were when they heard the news. Fraser felt it was 12.30, 1 pm when Joshua left the first time.

In cross examination he recounted that he had arrived at the site (having left the 11 am lecture) at about 11.30, 12 noon, and had worked together with Joshua for some 40 minutes, up to an hour, before Joshua left with his friends.

In cross examination, he denied that the total time from leaving the site to the news of the killing (while at the workshop) may have been longer than 25 minutes. He said the digger broke down at about 1.30 pm. He recalled seeing a man at the sign, the man who was there when he left to find Joshua, after the digger broke down. The man was sitting under the tree adjacent to the sign.

There was cross examination over Fraser's knowledge of the man, for he did not know his name, previously although in examination in chief, he said he recognized him for he had seen him, he was familiar to him. Mr Averde was able to show that the words "familiar to him" or "knew the man" were not used when describing the man when he gave his earlier statement to the police on the 19 May 2003.

Fraser reiterated in cross examination, that, while he didn't know his name he had seen him before.

In re-examination it was made plain that the police statement was given in pidgin, recorded in English but in the absence of proof that Fraser's original statement to the investigating officer included such terms as "familiar to him" or "knew him before this", the cross examination left me with the distinct impression that the evidence given in court by Fraser differed in these material respects, from the earlier statement to the police. In other words, Fraser had embellished his story.

Fraser could not remember seeing anyone else about the notice board with Na'asusu that morning. This selective recollection of one man, when other witnesses have given evidence of other men at the notice board, does not reassure me of Fraser's memory of the events before the killing, for he was involved with work on the machine which would have taken some concentration.

#### The evidence of Joshua Anisi

Joshua Anisi, the mechanic at Atoifi Hospital Mission gave evidence. He is from North Malaita, and had been 3 years at Atoifi.



He started work at the site about 9 am on the Sunday, using the excavating machine. Later in the morning, Fraser came and he operated the machine. Lance Gersberch came, then Joshua left with a relative, Meke Tarlo for the workshop but they had no key, so they went on to the house to attempt to fix a chain saw, before Joshua returned to the site for the workshop key.

On the way to the site, close to Lesters house (adjacent to Dr. Raubenhaimers house) Joshua met Fraser coming to seek him, for the machine had broken down. They returned to the site together, Joshua inspected the machine then both left the site for Lance's house for he had told them that the key to the workshop was at his home. While they were there for that short time of the inspection of the machinery, there was somebody sitting down under the welcome sign at the entrance.

Both Joshua and Fraser went to Lances house where his wife Joan gave them a lemon drink before they went onto the workshop. Joshua asked Fraser to couple the grader blade to the tractor, and then they realized the front tyre of the tractor was flat but the compressor was not working. While attempting to fix the compressor, a nurse, Naslie Vosoto came to tell them both the news, that their supervisor was killed. Joshua exclaimed, "no we just left him". Joshua drove the ambulance to the site. On arrival he saw the head, separated from the body which had fallen into the excavation beside the machine.

In examination in chief, Joshua said they had only been gone some 5 to 10 minutes before hearing the news. When asked, he said that when he left the site, earlier with Taulo, he had seen some boys sitting down under the sign smoking. He recognized one of them for he had seen him before, about the hospital. On Friday 16 May, he had been watching the scene from the same place. He had been there from 9 am till that evening. Joshua had worked until 4pm and the man had been there the whole day.

When asked, Joshua said he was from the bush on top of Atoifi, from Kwaio. On that day he had a bush knife and had a 5 kilo rice bag with him. Fraser said he usually comes to the hospital or the market and his name is Na'asusu. He pointed Na'asusu out in court. He had occasion to notice Na'asusu because of Na'susu's presence and actions on an earlier occasion at the hospital area.

Joshua said on the Friday he saw him about the area of the sign, walking backwards and forwards, again doing the same on the Sunday. When he left with Fraser for the workshop, Lance was still digging with his spade, facing the excavation, his back towards the road. Na'asusu was sitting under the welcome sign, next to a Sarlu or Aru tree (casurinas).

Lance was digging a line towards a stick that he was using as a marker. (The spade, and stick were recognized by Joshua and were those shown on the plan in evidence and photographs). Joshua also said the bush knife in evidence was similar to that knife Na'asusu had on the Friday preceding, and on the Sunday.

In cross examination he reiterated he had left the site after 1.30, towards 2 pm. It took about 2 minutes to reach Lance's house, they had a lemon drink (some 2 minutes) walked for some 2 minutes to the workshop, then put the blade on, a further 2 minutes.

He said they hadn't been fixing the compressor, long, when Naisley "came and told us".

He made his statement to police on the 19 May, and two further, on the 20 and 28 May.

Mr Averre cross-examined on an apparent conflict between his evidence given in court and his earlier statements, where he was alleged to have said that he saw "two unknown men under the board, staring...."

After having been shown his statements, he agreed with that, but qualified it by saying, when asked "how long after the problem with the digger did you and Fraser leave the site?"

"Before that, I saw several, the 2<sup>nd</sup> time I came to fix the machine, we left – **that was the time we saw him alone**"

Joshua spoke to the policeman in pidgin, it was recorded in English.

Later Mr Averre referred the witness to the statement of the 20 May where Joshua mentioned seeing "an unknown person in his mid 20's, also, two other younger men in their early 20's." Joshua agree. He was then asked whether that related to the time when he checked the digger for the problem but Joshua said "No – the first place, I saw some boys – whilst fixing the machine, I saw only him."

Mr Averre then sought to tender the statements on the strength of the apparent discrepancy between the evidence given and the earlier statements, a discrepancy denied. I admitted the tender. The statement became exhibits 26(1) & (2) and the statement of the 28 May 2003, exhibit "27".

The discrepancy was clear. His statement of the 19 May (Ex. 26(2)) said –

*"Fraser Alekemu and myself return back to the site to found out the back hoe diggers problems. We arrive at the site where the fault back hoe digger was station. I begin to fix the back hoe digger. The hospital accountant Mr Fraser Alekemu was sitting close to the machine which was fixed. While Mr Lance Gersbach (sic) was continuing digging the upper soil using the spade.*

***Two unknown young man were still sitting; staring, watching and stay unspeakable underneath the notice board at main entrance.***

He has clearly changed his story, for on the 19<sup>th</sup> May, the day following the killing he spoke of "two unknown men". There was no suggestion in his statement that he knew or recognized Na'asusu, then. Earlier in his statement, he spoke of seeing the same person whom he had seen on the Friday. His statement to the police said –

*"I was still working at the site engaging myself with the back hoe digger. I could see the same person which I saw two (2) days ago, (Friday 16<sup>th</sup> May 2003). He walks from the airstrip road; up the main road that leads to Atoifi hospital; up a small hill heading towards the main entrance gate and the place where I was working.*

*That particular person was appeared in the same comestic and prescription as mention above as follows: (1) armed with a one (1) metre bush knife; (2) a hand bag of 5 kg bag rice; (3) fair dark skin; (4) white haired; (Thread lock) (5) two black signs on both sides under his eyes; (6) wearing a short trouser; (7) a black T-Shirt; (8) medium size tall and was in his mid twenties."*

Nowhere in the statement does he say that the person seen on the Friday and Sunday was familiar to him or that he had regularly seen him about the hospital precinct or Wednesday market. He in fact, speaks of "two unknown young men", (the word "two" I take to have been previously "the" for white-out is apparent on the original statement, and the word "two" written over whatever went before). The description in the statement could not in my opinion, categorically include Na'asusu as he appeared in court.

Joshua commenced work on the Friday, Ray Jack having previously operated the mechanical excavator for some time before that at the site.

Mr Talasaa, in re-examination, referred Joshua to his statement of the 28 May, particularly para.3. In answer he said,

"I further confirmed that the person been on Friday 16<sup>th</sup> May 2003 was the same person seen upon the excavation site on Sunday 18<sup>th</sup> May 2003. This was hours prior to the incident. I had enquired about this person to find his name was Na'asusu. This man was still under the notice board when Fraser Alakemu left the deceased at the excavator site. He had spoken to him but the man didn't say any thing."

Clearly this enquiry of others, who were not called in this case, to name someone seen by this witness, Joshua, cannot be accepted on its face. It is hearsay, seeking to prove identity of someone not known to Joshua, and not seen after the Sunday, until now in court, by a person or persons who are unknown to this court and whose basis for naming Na'asusu as one of those "two unknown young man were still sitting"; cannot be tested. Again, the reference by Joshua to the conversation Fraser had with the man "still under the notice board" relates to the earlier evidence of Fraser, who spoke of attempting conversation with the man under the sign. This attempt at conversation was at the time Fraser went to find Joshua. So Joshua, in re-examination, was recounting something he had been told by Fraser, not his own eye witness re-collection, for he was not there when this conversation supposedly took place. Clearly this notice board was a congregation site, especially during the course of the excavation work.

### Conclusions

It can be seen from the foregoing that the evidence of these last two witnesses is crucial to the prosecution case. They were the last two persons to have seen Lance Gersberch alive. They worked with him at this site on this fateful Sunday. They left him at the scene around about 1.30pm and both went to the workshops. They were told of the killing sometime after 2 pm. Dr. Raubenheimer had sent to the workshop for the ambulance, shortly after 2 pm.

Now Fraser and Josua's accounts corroborated one another in many material respects.

They both said they had known Na'asusu before that day, for they had seen him at market days and about the hospital. The phraseology was the same. When they left, Na'asusu remained at the notice board.

But both were cross examined on their previous recollections of this Na'asusu, and Mr Averre has shown that Joshua's evidence has changed most materially from that given earlier to the police. Joshua denied the change, but from the material which I have set out and for the reasons that I have given, I find that I cannot rely on the testimony of Joshua, where he asserts, in court that Na'asusu was the one person remaining with Lance Gersberch when he left with Fraser for the workshop. In his statement to the police he says "two unknown boys" were left under the sign. Because of the time since their statements were given the police the similarities in expression now when describing Na'asusu's presence at the scene; his behaviour; the reasons given the court for their familiarity with him, all lose their weight once both have been shown to have embellished their recollections, especially about this crucial issue of having known this Na'asusu before the event. In cross-examination, both were discredited.

Fraser's evidence in chief only spoke of seeing one man under the sign, whom he identified in court as Na'asusu, yet he didn't know his name at the time of the police statement nor was he familiar with him. Court identification in these circumstances has no real worth after so long.

I cannot be satisfied that these two knew this particular accused so well as to categorically state that he was the only one, remaining at the sign, when they departed the scene that last time.

The police evidently thought that a man, remaining, was Silas Laefiwane, for on Thursday 22 May 2003, (some days after the killing) he was the person so accused by Inspector Balaga. Yet the inspector had then, both statements from Joshua and Fraser, which obviously (as has been cogently shown by cross examination of both and by a critical appraisal of Joshua's evidence) did not name Na'asusu as the possible assailant, so as to exculpate Silas.

Na'asusu gave his explanation of his whereabouts, on the 18 June, almost a month later. Silas had denied the direct assertions by Inspector Balaga, that Silas had struck the one blow. The prosecution case completely swung from accusations against Silas, (which presumably relied upon the stories of disputation over Ray Jack) to one against Na'asusu. Yet no cogent evidence has been brought to indicate to the court, why suspicion swung to Na'asusu, and when, or when and why Na'asusu was arrested.

The statement of "Euabo of Forisi Village, Unu district, East Kwaio, a Chief, recounted earlier, was made on the 29 June 2003. He gave Na'asusu's bush knife to the police after speaking to Na'asusu's father and collecting the knife from a priest house where it had been left by Na'asusu. What am I to make of that contradiction, since that was not the assertion by police to Na'asusu at the time of his interview on the 18 June. Inspector Balaga asserted that the bush knife had been confiscated by the police from Na'asusu's house. He acknowledged that it was his knife. Obviously there were reasons why Na'asusu became the prime suspect but those reasons have not been cogently explained before me.

All these reasons were known to police when the indictment against these two was filed in the High Court on the 9 October last year.

Rather I am left with Na'asusu's admission in his record of interview, that he went past the site, about the time of this killing. He did carry a bush knife capable of inflicting such a grievous wound. He was unaccompanied. But his answers, (until his denials) were neutral, in the sense that he accepted the assertions made by the investigating officer. The tenor of his replies, his denials, were consistent and even if I were to ignore them, even at the prosecution cases' highest, his admissions go no further than the rather discredited evidence of Joshua and Fraser, that he was there about this time. Yet so were the Kwaio boys but they have not been inculcated and others who presumably walked up and down the road to the out patients from the wharf area and airfield.

The strands in a cable analogy, causes me to seek to identify the strands which hold.

The Record of Interview does not support the prosecution case by reason of any inculpatory answers.

Nowhere is custom explored to explain the presence of the bush knife (if true), with the priest. Or what I should draw from that fact. It would be conjecture, on my part, to follow that thread and I do not.

Indeed the record of interview contains the accused's plain denials. If he had personal motive to kill Lance Gersberch, it has not been opened upon by the Crown. If he was party to a conspiracy to kill an employee of the SDA Mission hospital, the Crown has advanced no case.

I am left then, on the evidence of Fraser and Joshua, with a weak strand suggesting that Na'asusu was left with Lance Gersberch, about 1.30 pm.

A further strand more securely puts the time of death shortly before 2 pm.

Again, Na'asusu does not dispute that he went past the site, on his way home, and saw men, including Lance Gersberch, still working at the site. (It was never suggested to him that he was alone with Lance Gersberch, while Lance dug the line not far from the welcome sign, where Na'asusu may have remained).

The fact that a sharp bush knife is probably an effective instrument for this type of killing is not disputed.

Dr. Raubenhimer said the road was the route from the wharf and airport to the hospital and was well frequented. It was common practice for men to carry bush knives.

The opportunity to kill was open, presumably any time from about 1.30 pm. to close to 2 pm. The means to kill, a bush knife, was with this accused, Na'asusu.

The nature and extent of the wound, a complete decapitation, does in my view, clearly establish "malice afore-thought" in terms of s.202 of the Code.

I am not satisfied, however, of the perpetrator. How can I be sure, beyond reasonable doubt, on the evidence as it stands when the cable's strands rely on conjecture for their strength, not logical deductions on the evidence? The two crucial witness, Fraser and Joshua, have had their evidence in court (about knowing and seeing Na'asusu) discredited by reason of the material change from that given the police so soon after the killing.

Is it fair to infer that Na'asusu was the one who killed Lance Gersberch, when the investigating officer was at such pains to assert that Silas was that man on the 22 May last year at the time Silas, when the two crucial witnesses' statements were with police from the outset?

**Conjecture**

I must conject that Na'asusu, who went along the same road as used by all, on the Friday, and was there on the Sunday, (seemingly aimlessly with the other Kwaio youths who gave evidence, and were there,) carried out this killing at some time in that half hour period. It would be difficult to infer, on evidence so weakened and in the face of the investigators initial contrary assertions; (that Silas swung the bush knife) and in the absence of better explanation for suspicion to move to Na'asusu. For it must be remembered the police inspector had these crucial witness statements when Silas was accused of the killing. Very good reasons for suspicion are not enough, when this court is not made privy to them.

The detail to make the cable secure is deficient. The Crown case, then really comes down to the accused's presence about the time of this killing, with a bush knife. I cannot be satisfied beyond reasonable doubt that this man Na'asusu killed Lance Gersberch. I have already accepted Mr. Averre's assertions with respect to Silas.

Stand up. You are both acquitted and discharged.

J.R. Brown  
Judge