

JOSEPH KULIA .V. REGINA**High Court of Solomon Islands
(Palmer CJ.)****Criminal Case No. 202 of 2005****Date of Hearing: 31st August 2005
Date of Judgment: 30th September 2005***Ms. Swift for the Applicant
P. Little for the Respondent/Crown*

Palmer CJ.: The Applicant, Joseph Kulia is charged together with Andrew Toghovotu ("Te'e") and John Gurusu of the murder of Teke Kenisi ("**the Deceased**") on 16 March 2001 at Kuma River mouth, Guadalcanal Province.

Prosecution alleges the Applicant was part of a joint operations group, which involved members of the Royal Solomon Islands Police ("RSIP"), RSIP Special Constables and 50 - 100 other local men to capture the militant leader Harold Keke ("**Keke**") and his supporters from the Guadalcanal Liberation Front ("**GLF**"). The RSIP Patrol Boat LATA 03 was also used in support. High powered weapons were issued to some members of the group and the group split into two with the defendant Te'e heading the group in which the Applicant was included. The second group was led by Adrian Volia. They were to rendezvous with the Patrol Boat at the Kuma River mouth. Along the way, Te'e's group picked up eight persons at Veramoho village which he claimed to be Keke's supporters. As they approached Verasabaha village, a sniper killed one of Te'e's men. When they met at Kuma River, Volia's group had captured four men. Te'e then ordered that those four men be killed in revenge for the shooting of one of his men earlier. In response to his orders, Govu was attacked and killed. On seeing this, the Deceased sought to run away from the group and was fired upon. It is alleged the Applicant was seen to run forward, take up a firing position and fired a number of aimed shots at the Deceased as he attempted to flee. He was heard to say "*Leave him he is my food*". It was alleged he was seen to be using a SR 88 assault rifle. Another member of the group was also seen to fire a machine gun at about the same time towards the Deceased. The Doctors report indicated the Deceased died from a single shot which struck him in the back.

The evidence which Prosecution will rely on comes from three key witness statements; Nigel Eric, Stanley Gouvera and Aldrick Sese.

Prosecution opposes bail primarily on the grounds that the Applicant has been charged with one of the most serious offences in the Penal Code (murder) and that only in exceptional circumstances should bail be granted. Prosecution say the Applicant has not demonstrated that exceptional circumstances exist in his case.

The grounds relied on for bail are: (i) that the Applicant was at the time of commission of offence, 17 - 18 years of age, (ii) has no previous convictions, (iii) has family ties in Honiara, and (iv) that the prosecution case is inconsistent and therefore weak and there is real prospect of an acquittal.

Where the offence is murder rarely is bail granted save in exceptional circumstances - see *R v Kong Ming Khoo*¹:

"Section 106 makes it clear, when the charge is murder or treason, it is only exceptionally that bail is granted. Mr. Young seeks to distinguish between

¹ Unrep. Criminal Case No. unknown of 1991, Ward CJ at page 2

good reason, special circumstances and exceptional circumstances. I am afraid I do not feel such distinctions apply in this case. The effect of Section 106 is that bail in murder cases will only be granted in exceptional circumstances. However, whilst that places a heavier burden on the defence, the same considerations apply as in any bail application. The court must consider them all but bear in mind that the effect of section 106 in a case involving a charge of murder or treason means it is only in rare cases that bail will be granted." (emphasis added)

In so far as the age or youth of the Applicant is concerned, whether he has previous convictions or not and family ties in Honiara, these are normal matters which a court would consider on an application for bail. These however, have to be balanced with the seriousness of the offence being charged with, risk of absconding and possibility of interference with witnesses. Where the offence is murder, that a conviction would entail the imposition of a mandatory life sentence and where the circumstances are serious (it has not been sought to be argued otherwise) unless exceptional circumstances are shown bail will rarely be given.

The circumstances in this case pertain to the shooting of an unarmed prisoner who was trying to make an escape for fear of his life after having seen one of his fellow prisoners cut down in front of him in retaliation for the killing of one of Te'e's men and which cannot be shown to have been directly connected to the Deceased other than a belief or allegation that he was one of Keke's group. The Deceased or Govu, had nothing to do with the killing of Te'e's man. He had been shot by a sniper who had escaped. I do bear in mind though, that the events which occurred that time were equivalent to a war zone situation, where killing and violence was not uncommon or unusual, with the parties having free access to high powered rifles. The shooting of a man in Te'e's group had obviously produced great indignation in his group and a desire for retaliation and revenge to avenge the death of his man. Those however are matters which can be considered at trial and or at mitigation if necessary. The prosecution case must be taken at its highest and with respect I do not find anything exceptional in the grounds raised.

Prosecution relies on the eye witness accounts of a number of witnesses. The first eye witness statement came from Nigel Eric; he was one of the men captured by Te'e's group in that operation. He made two statements to Police. The first one on 5th January 2004, in which he says he saw Alphonse (Te'e's brother) shooting at the Deceased with his machine gun on the back. In his second statement to Police dated 19th July 2005 he sought to clarify his earlier statement by saying that he saw both Gurusu and Alphonse shot at the Deceased but that they must have missed him because he kept running. It was only when the Applicant shot at the Deceased at his back that he fell down. He estimated the distance between him and the Applicant at about 10 metres when the Deceased was shot.

The second witness statement relied on is that of Stanley Gouvera. He was a police sergeant in the RSIP and was with the Joint Operations group. He states he saw the Deceased running towards him and so told him to stop and threatened to shoot him with his pistol if he did not stop. The Deceased however kept running. He states he did not shoot the Deceased when he did not stop as he felt sorry for him; instead he threw his pistol at him. He says it was the Applicant and Alphonse that shot at the Deceased.

The third witness statement relied on is that of Aldrick Sese. He was also one of the persons captured by Te'e's group during the joint operation. He confirms what Stanley Gouvera states and describes seeing the Applicant taking aimed shots at the back of the Deceased. He estimates three shots were fired and seeing the Deceased fall down. He also points out that only the Applicant was shooting from the back of the Deceased whilst others were shooting from the side.

James Saurongo was another of the men captured that day. His version however is that it was Oane Grus who shot the Deceased. Rollen Seleso describes someone shooting the Deceased but did not identify who it was.

The Applicant says the prosecution case is inconsistent and therefore weak with a real possibility of an acquittal. Unfortunately the materials perused before this court show otherwise. Prosecution's case taken at its highest shows there is clear material from eye witness statements who directly implicate the Applicant, which if believed and accepted does not accord with the submission of a real possibility of acquittal; to the contrary the prosecution does have a strong case to present at trial. As to the weight to be attached to what they and others will say at trial and assessments on credibility, veracity and reliability, those are matters for the trial judge to determine. This is not the time to predict how he will rule. I am not satisfied this submission can be relied on therefore as taking over this bail application over the bar of exceptional circumstances and warranting bail.

This is an exceptionally serious case, where an unarmed man was shot whilst trying to make his escape for fear of his life being taken in revenge for the killing of one of Te'e's own group. The circumstances are extremely serious and naturally the stakes must be considered high if the Applicant is released on bail. It is important to bear in mind he has been charged jointly with two others as a group for that killing.

This case had already been listed for trial and commenced and would have been completed but for the further delay engendered when the validity of Mr. Chetwynd sitting as Commissioner of the High Court was impugned resulting in the learned Commissioner having to recuse himself and aborting trial. That was most unfortunate because Commissioner Chetwynd's appointment had never been a secret from the beginning and Counsels given adequate notice during the directions hearings by Commissioner Chetwynd himself. This case is now listed at the earliest for July 2006. The delay must lie where it has fallen. The bail application is denied.

Order of the Court:

Bail denied.

THE COURT.