R-v-ANDREW HESE

HIGH COURT OF SOLOMON ISLANDS
(Naqiolevu, J)

Criminal Case No: 310 of 2004

Date of Hearing: *10th October 2005*
Date of Judgment: *10th November 2005*

Mr. S. Cooper for the Crown
Mr .S. Cook for the Defendant

JUDGMENT

Naqiolevu J. The accused is charged with Murder contrary to section 200 of the Penal Code. The accused as alleged by the Crown that on April 2003 murdered his cousin the victim Jack Taka by shooting him at a close range at Pite Beach on the Weathercoast.

CROWNS CASE

In April 2003 the accused was staying near Pite Village on the Weathercoast in Guadalcanal with a group of GLF members that included the deceased, his cousin Jack Taka. The deceased was effectively taken into custody or arrested by members of the GLF on suspicion that he intended to defect to the government forces operating in the area. Discussions were held with the group about how to deal with Jack Taka and as a result of these discussions it was decided that Jack Taka was to be executed. The accused was the person who carried out the task. Prior to the shooting the accused was heard by Saverio to have indicated that Harold Keke had given them an order and they had to kill Taka and another as they were traitors and evil men. On the day in question the two victims were ordered to stand up and they had guns pointed at them. They had their hands tied behind their backs, and they were then marched to the beach which was about 3-5 minute away. The accused then ordered the deceased and the other victim to stand in line at which point he said words to the effect that, **"he was going to shoot the deceased dead because Harold had ordered him to do so. He then pointed the gun at the back of the deceased's head and executed him by firing a shot into his head which killed him instantly. He did not make any comment after the shooting but handed the gun to a Lapo Lordevo and asked him to shoot the other victim. The accused then said words to the effect "Don't worry boys were just following Harold's orders". These two men are evil that's why they die."**

The accused was later interviewed by police officers after the arrival of RAMSI, wherein he admitted killing Jack Taka. The accused during the interview with RAMSI officers further admitted that he was a member, and his involvement with GLF. He stated that he had been a member for about <u>2 years</u> and the Leader of

the organization was Harold Keke. The accused was later charged for the murder of Jack Taka.

DEFENCE CASE

The defence case is that there was no issue that the Accused shot his cousin in April 2003. The evidence clearly raises the issue of compulsion. Counsel for the accused raise the point that there are several undisputed contextual facts in this case. These are that Harold Keke was active in the relevant area of the Weathercoast during the period March and April 2003. In the period leading up to the shooting of Jack Taka a great many people had been violently murdered in public places in the vicinity of where the accused ended up shooting the deceased. It may be fairly said that Harold Keke exercised a blood thirsty reign of terror and disobedience, and suspected disloyalty met with death. Keke was prepared to kill persons close to him including members of his family.

He boasted of his preparedness to do so and had ruthless henchmen in particular Ronny Cawa and Sam Leketo.

The defence raise the issue that while there is a dispute regarding the accused relationship with Harold Keke. this is not the Central issue. The central issue is whether he felt complied to act as he did through threats from Keke. The accused conduct for a man with no known propensity for violence was exceptional. Particularly is this so given that it was a young relative whom he shot, and there is evidence in the prosecution case, that his demeanor was sorrowful from the moment of the shooting.

The defence submit that the prosecution has the duty to disprove the defence of compulsion as raised by the accused. The evidence by the Crown properly analysed is weak. It is not capable of destroying the accused case of compulsion beyond reasonable doubts. The prosecution has not negative the defence of compulsion. The fear of death by Keke, or at his orders, is the most rational explanation for the accused extraordinary conduct on this day. That is not the test It is the sufficient that it remains a reasonably possible explanation for his conduct.

ISSUE

The issue for determination by the court is the defence of compulsion available to the accused for the offence. There is no issue as to, whether he killed the victim in this case. The accused admitted that he participated in the shooting on the day in question but maintained he was ordered by Harold Keke to do so. He feared that if he did not do as he was ordered he would suffer the same fate.

LAW MURDER

1. The offence of Murder is defined under section 200 of the Penal Code.

Section 200

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

Section 202 of the Penal Code – defines malice aforethought as,

"Malice aforethought may be expressed or implied and express malice shall be deemed to be established by evidence proving either of the following states of mind proceeding or co-existing with the act or omission by which death is caused, and it may exist where that act is premeditated -

(a) An intention to cause the death of our grievous bodily harm to any person, whether such person is the person killed or not; or

(b) Knowledge that the act which caused death will probably cause death of, or grievous bodily harm to some person whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused."

COMPULSION

The defence of compulsion is defined under the Penal Code, which says,
Section 16

"A person is not criminally responsible for on offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is coupled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses but threats of future injury do not excuse any offence."

The defence of compulsion/duress whilst may be available to an accused who has voluntarily joined a criminal organization. The defence is not available if the accused fails to take the opportunity to escape the duress/compulsion, or had joined a group known to use violence, such as an illegal paramilitary organization or a gang of armed robbed See *Court of Mr. Martin Brian Shepherd*[1].

In David BRUCE Sharp[2]. *The court of Appeal stated.*

"Where a person has voluntarily, and with knowledge of its nature, joined a criminal organization or gang which he knew might bring pressure on him to commit an offence and was an active member when he was put under such pressure, he cannot avail himself of the defence of duress."

MEMBERSHIP OF GLF

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[1] *[1988] 86 Crim App*
[2] *[1987] Crim App*

The accused clearly is a member of the GLF, he admitted to that in response to a question put to him by Officer Ferns in the record of interview of the 2nd of October 2005. **Q81-86.** In question 83, he responded to the question. Do you belong to GLF, replied *"Oh yeah"* and **Q** - *"How long have you been a Member"* **A** – From the start of the tension. **"I started with them then went to Honiara and I came back again." Q85** - Are you a member or a solider? **A – "I use to join them just as a solider".** He further said that he joined Harold's group and assist them sometime.

The accused in his evidence said that he didn't do anything but just follow them (GLF), and joined the group and do whatever the boss told him to do. The boss being by Harold Keke.

The accused had been a member of the GLF for a over a period of a year and he knew or should be aware of the nature of the organization and the criminal activity they were clearly involved with. The accused had further been seen in the company of Harold Keke and observed carrying a gun. This was confirmed by both PW1 and PW2 in their evidence on oath.

VIOLENT GANG VOLUNTARILY JOINED

The defence of duress is further not available to persons who commit crimes as a consequence of threats from members of violent gangs which they have voluntarily joined. A defendant who joins a criminal gang which could force him to commit crimes can be blamed for his actions. In joining such an gang fault can be laid at his door and his subsequent actions described as inexcusable:

> *In R v Sharp* (ibid). **The defendant was party to a conspiracy to commit robberies who said that he wanted to pull out when he saw his companions equipped with guns, whereupon one of the robbers threatened to blow his head off if he did not carry on with the plan. In the course of the robbery, the robber killed a person. The defendant was convicted of manslaughter and appealed. In dismissing the appeal, the Court of Appeal held that a man must not voluntarily put himself in a position where he is likely to be subjected to such compulsion. Lord Lane CJ said:**

"Where a person has voluntarily, and with knowledge of its nature, joined a criminal organization or gang which he knew might bring pressure on him to commit an offence and was an ac tie member when he was put under such pressure, he cannot avail himself of the defence of duress."

The defence however is, not inevitably barred because the duress comes from a criminal organization which the defendant has joined. It depends on the nature of the organization, and the defendant's knowledge of it. If he was unaware of any propensity to violence, the defence may be available. The court so held in:

> *R v Shepherd (ibid).* **The defendant joined a group of thieves. They would enter retail premises and while one of them distracted the shopkeeper, others would carry away boxes of goods, usually cigarettes. The defendant**

claimed that after the first burglary he wanted to give up, but had been threatened with violence to himself and his family if he did not carry on with the thefts. He was convicted of burglary and appealed against conviction. In allowing the appeal, the Court of Appeal held that the question should have been left to the jury to decide whether he could be said to have taken the risk of violence from a member of the gang, simply by joining its activities.

The Court of Criminal Appeal in Northern Ireland, in *R v Fitzpatrick*[3]. The defendant, who had voluntarily joined the IRA, tried to raise the defence of duress to a charge of robbery. He claimed that he had committed the offence following threats that had been made to him by other IRA members if he did not take part. The appeal court held that the trial judge had been correct in withdrawing the defence of duress from the jury:

As a matter of public policy the defence could not be made available to those who voluntarily joined violent criminal associations, and then found themselves forced to commit offences by their fellow criminals.
*** To do so would positively encourage terrorist acts, in that the actual perpetrators could escape liability on the ground of duress, and further,**
*** it would result in the situation where the more violent and terrifying the criminal gang the defendant chose to join, the more compelling would be his evidence of the duress under which he had committed the offences charge.**

R v Fitzpatrick (ibid) was endorsed by the Court of Appeal in ***R v Sharp (ibid)***, a decision which makes it clear that this not a principle limited to cases involving terrorist organizations.

The principle in *R v Sharp* was extended by the Court of Appeal in:

R v Ali[4]. **The defendant was a heroin addict and seller who had fallen into debt to his supplier, X. From the outset, he knew X to be a very violent man and he had been threatened by him that he would be shot if he did not repay the debt. X gave him a gun and told him that he wanted the money by the following day. X told him to get it from a Bank or building society. The defendant alleged that he was scared that X would get him if he went to the police and so he committed a robbery at a building society. He was convicted despite his defence of duress. The Court of Appeal dismissed his appeal. The defence was not available where the defendant knew of a violent disposition in the person involved with him in the criminal activity which he voluntarily joined. Thus, if the defendant voluntarily participated in a criminal offence with X, whom he knew to be of a violent disposition and likely to perform other criminal acts, he could not rely on duress if X did so."**

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[3] *[1977] NILR 20*

[4] *[1995] Crim LR 303*

I adopt the principle of law in the cases cited above and which was recently restated in the ***HOUSE OF LORDS in the case of Hasan***[5].

I find the Prosecution has negatived the defence of duress in the case by virtue of the accused membership of the illegal organisation the GLF, whose leadership encouraged and committed such brutal and barbaric act against their own people. Anyone who was a threat was executed, family members were killed, brothers, uncles, cousins were ruthlessly executed. The accused intention is clear he chose to execute the deceased who was a cousin brother, he totally disregarded their family connection as he was determined to follow the orders of the leader of the GLF, and the course of the organisation.

I find him guilty as charged of the murder of Jack Taka.

I sentence him to life imprisonment to commence from the day he was taken into custody.

THE COURT

[5] *[Formerly R-v-Z(2005)*