

**REGINA-V-JOHN TOLENI**

HIGH COURT OF SOLOMON ISLANDS  
(Naqiolevu, J)

Criminal Case No183 of 2004

**Hearing:** 27<sup>th</sup>, 28<sup>th</sup> April, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> May 2005

**Judgment:** 20<sup>th</sup> May 2005

Mr. Paul Bannister for the Prosecution  
Mr. Steven Lawrence for the Defendant

**JUDGMENT**

**Naqiolevu, J:** The accused was charged with Murder contrary to section 200 of the Penal Code, Cap. No. 26.

The prosecution case is that the accused had with Malice aforethought caused the death of the deceased by an unlawful act stabbing her with a knife on her backside.

The defence case basically is that the prosecution has failed to prove beyond reasonable doubt the accused had with malice aforethought caused the death of the deceased.

The offence of murder is defined under section 200 of the Penal Code Cap. No. 26 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."***

Malice aforethought is defined under section 202 of the Penal Code Cap. No. 26 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 preceding or co-existing with an act or omission by which death is caused, and it may exist where that act is unpremeditated -***

***a) an intention to cause the death of or grievous bodily harm to any person, whether such person is the person actually killed or not; or***

- b) knowledge that the act which caused death will probably cause the 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".**

The burden of proof vests with the prosecution, to discharge beyond reasonable doubt the guilt of the accused.

### **PROSECUTION CASE**

The prosecution case is that on the 6<sup>th</sup> of March 2004 the accused with malice aforethought killed Nester Iro at a bathing river near Oneone village. The accused committed the offence by approaching the victim who was in the water and by pressing her neck onto and into the water and stabbed her with a 12 inch knife. The accused after committing the act then escaped from the scene. The accused during flight passed three young man who called out to him, the accused responded by swearing at them. The accused returned to Namsioko village where he called out to his grandfather and informed him he was leaving.

On the 7<sup>th</sup> of March the accused went to his cousin's place at Busuba village where he appeared nervous and shaking. The accused was also carrying a knife which was used to stab the victim. The accused cousin asked him what happened and he responded that he had stabbed someone at the village and he had run away, and met some people on the way. The accused spent the night at his cousins' house and on the 8<sup>th</sup> of March his cousin Robert gave him some money for bus fare and told him to report the matter at the Auki Police Station. A police patrol arrived to investigate the incident and during their journey on the road the accused jumped onto the road in front of the vehicle and surrendered to the police. He was then taken to Auki Police Station where he was interviewed. The accused in the record of interview admitted that he had stabbed a woman who was not known to him.

The Crown's case is that the evidence establishes the elements of an intention to kill, but if the court is not satisfied of this beyond reasonable doubt then it at the very least establishes an intention to cause grievous bodily harm.

The Crown maintains there is no dispute that the accused caused the injury that led to the death of the deceased. Therefore the elements of identity and causation are not in dispute. The accused through his counsel raises the question of intoxication and the accused state of mind at the time of stabbing, to assert that the accused is not guilty of murder rather he is guilty of manslaughter.

The prosecution submits that the issue of intoxication does not attach to this incident and the accused state of mind was such that he is properly to be convicted of

murder. The accused own words in his record of interview and evidence, at the time of stabbing he knew he had stabbed a woman not a boy and the accused is not a person whose mind is so affected by alcohol that he did not know what he was doing.

The prosecution on the question of malice aforethought submit this can be proved by way of inference that can be drawn from the surrounding circumstances at the time. This he submit is naturally so as it is impossible to be sitting within the accused mind at the time in order to prove positively what he was thinking. The state of mind must be drawn by way of inference.

The Prosecution asks the court to draw a clear inference in this case that at the time the accused stabbed the deceased he intended to kill him or at the very least cause him grievous bodily harm. The Prosecution in asking the court to make this finding can have regard to the following circumstance:-

- ***The motive of the accused as appear in the record of interview which indicates that there was swearing from some boys at Oneone village.***
- ***The action of the accused after stabbing the deceased and having effected his purpose and intention in either killing or inflicting grievous bodily harm on the deceased fled the scene.***
- ***The evidence of Ms. Ofini where she was able to tell the court if she didn't go with the accused he would kill her.***
- ***The medical evidence of Dr. Kuma who carried out the autopsy on the deceased in March 2004, on the measurements in relation to the width of the wound, the wound described as a sharp penetrating wound made by a sharp object or knife.***

The Prosecution submit that this was not just a nick of a wound, it was a total injury which on the size of the knife would have gone in at least the whole blade or a longer part of the blade some 6-8 inches. The court also heard that moderate to strong force would have been used to inflict the wound. The doctor in his evidence said that if a deceased person's head was held under water strong force would have been required to inflict the type of injury which the deceased suffered. The accused evidence was selective as to what he could remember as to if the persons head was under water or on top of the water. The accused the prosecution submit was selective he could remember all matters in his favour but could not remember if the person was wearing clothes when he was only a matter of 1-2 feet away from the accused realizing that this was a woman.

## **DEFENCE**

Counsel for the accused submit that the Crown is required for a charge murder to prove:

- ***The death of the deceased, being a human being***
- ***That an unlawful act or omission caused the death of the deceased.***
- ***That the accused committed the unlawful act.***
- ***That the accused act was done with any of the following States of mind:-***
  - ***intent to kill***
  - ***knowledge that the act will probably cause the death (so-called reckless indifference)***
  - ***intent to cause grievous bodily harm***
  - ***knowledge that the act will probably cause grievous bodily harm (so-called "reckless indifference.")***

The issue in dispute as submitted by the defence is whether the accused had a requisite mental element for the offence of murder at the time he inflicted a single stab wound on the deceased. The requisite mental element can only be proven if it is proven beyond reasonable doubt that the accused either intended to kill, cause grievous bodily harm or acted with the knowledge that either of those two results would probably have occurred. The accused has denied on oath having the requisite specific intent at the material time.

The defence submit that in order to prove the accused had an intention to kill or cause grievous bodily harm to the deceased the crown must prove that he desired or wanted the consequences of death or grievous bodily harm and result. The accused, counsel submit is presumed not to have had the requisite intention and the prosecution must prove that he did beyond reasonable doubt.

Counsel for the defence further submit that murder is a crime of specific intent and it relates to the distinction between offence for which the prosecution must prove an intent in addition to the intent to perform the basic acts which constitute the offence and its main role has been to delineate which offence intoxication is relevant to and to which it is not. In support of this proposition counsel cited the Australia Authority of *R-v-O'Connor* (1980) 146 CLR.64 where BARWICK CJ described the dichotomy between basic and specific intent offences as follows:

***"The intent to do the physical act which is required as part of an actus reus of a non-purposive kind has been called a 'basic intent' (per Lord Simon in Morgan's case [1976] AC at 216), although, as I have mentioned, his Lordship included in the necessary intent an intent to produce a result of the physical act. Such an intent is, of course, basic in the sense that it must always be***

***present as one of the foundations of criminal responsibility. But the description "basic intent" has been used to distinguish the intent required in a crime in which the actus reus does not require the physical act involved in the charge to have been done to achieve a stated purpose from the intent required in crimes which do so require. The latter are then styled crimes of "specific intent."***

The defence in summary submit the evidence of the accused was consistent and compelling the evidence of his state of mind is corroborated by his interviewers where he stated that he thought the woman was a man and did not know that she had died until he became normal.

In a case where a mental state, must be inferred from the circumstances, the evidence of intoxication is highly relevant, as it bears directly on the persons mental processes and state of mind. The evidence is of significant intoxication from a cocktail of marijuana and alcohol. Counsel submit the test for intent is not objective or subjective, the issue of intent cannot be reasoned against the standards of a reasonable person. The test is whether intent in fact existed.

Counsel submit the evidence for the accused cannot be rejected beyond reasonable doubt, it is a plausible, rational and reasonable version of events, it is corroborated and it constitutes a reasonable hypothesis consistent with his innocence of murder.

## **CONCLUSION**

I must remind myself that the prosecution has the duty to prove each element of the offence beyond reasonable doubt. The prosecutions case is that the accused when he stabbed the deceased had the requisite intent to kill or cause grievous bodily harm. This the crown submit can be borne out by the incident prior to the stabbing where some youth from Oneone Village swore at him. The accused the prosecution maintain after failing to receive any satisfactory result from his claim for compensation from the village chief was determined to cause the death of the deceased. The accused must therefore be convicted of murder. The defence however maintain that the accused whilst admitting to stabbing the deceased did not intend to kill her or caused grievous bodily harm. The accused only wanted to make a (small kill) to use the pidgin word meaning he only wanted to hurt the deceased. This is clear from his evidence under oath and cross-examination and is borne out by single stab wound and close to the arm of the deceased, some few inches away from the arm. The accused at the time was drunk with kwaso and the effect of marijuana taken earlier in the day. The accused was observed to be drunk during the soccer game and clear from PW2 who under cross examination said he was drunk. This also clear from the statement of prosecution witness sworn statement of Peter Ligiau who said, "he was drunk" and I saw him holding a kwaso bottle,

Prosecution witness caution Statement of Peter Mana, confirmed this when he said "Mr. John Toleni was drunk at that time. He was unbalance in his walking and very talkative. He was heavily smell of alcohol."

## INTOXICATION

Clearly Section 13 of sub-section 4 of the Penal Code Cap. No. 26 makes provision for the court to consider intoxication to determine whether a person charged had formed a requisite intention basic or otherwise for any criminal offence. Section 13 sub-section 4 which reads –

***"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."***

Counsel for the accused submit the section clearly establishes that intoxication must be taken into account in determining whether a person had formed the requisite intention (*specific or basic*) for any criminal offence. The court must consider the accused consumption of marijuana and alcohol and its effect upon him and the medical evidence led to intoxication in determining whether it has been proved beyond reasonable doubt that he acted with malice aforethought when he caused the death of the deceased.

The prosecutions case is that the evidence establishes the element of an intention to kill or cause grievous bodily harm to the deceased. The accused on the day in question after being sworn at by some boys at Oneone village was determined to be compensated. The accused after returning to the bathing spot at the river approached the deceased who was in the water at the time pushed her head down onto and into the water and stabbed her on the backside with the 12 inch knife. He thought that the deceased was one of the boys who swore at him earlier, and only realized it was a woman when she shouted.

The court has carefully considered the evidence of Dr. Kuma and the extent of the stab wound which he described as a sharp penetrating wound made by a sharp object or knife. The effect with which the knife was used under the water. The length of the wound from entry to the lung was 6-8 inches and the force of the blow that caused the injury and the resultant cause of death. The court however accepts that it is an estimation which was conceded under cross examination by the doctor.

The court in considering the accused consumption of alcohol and marijuana and its effect treat the medical evidence of Dr. Judy O'Donnell as important. Dr. O'Donnell gave evidence on how alcohol and marijuana interact with the operation of the central nervous system and how the body and brain are affected. The effect

include, reducing and impairing/ judgment, reducing motor co-ordination, a reduced ability to foresee consequence of action, impaired vision and reduced memory. I have no doubt as to the evidence of the doctor and her apparent experience in this field. Dr O'Donnell is a medical practitioner with post graduate qualification in Mental Health who has specialized for many years in Mental health.

I have considered the various cases referred to in support of this proposition.

- **R-v-Warner Godfrey Motui (unreported Criminal Case No. 20 of 1991, where Palmer J (as he then was) still at page 17.**  
**"I must acquit however – if there is doubt in my mind that the accused did not form any intention to kill or cause grievous bodily harm because of drink."**
- **In VIRO-v-R C(1976) 141, CLR 88 at 111 Gibbs J. stated**  
**"It would be contrary to fundamental principles to hold that evidence of intoxication not amounting to incapacity is irrelevant to criminal responsibility where the Commission of the Crime requires a specific intent. In the case of such a crime the issue is to 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 specific intent necessary to constitute the crime. If no more were proved then the accused was capable of forming such intent. The case for the prosecution would not have been established."**
- **R-v-Kenneth IRO (Unreported Criminal Case No. 66 of 1993) MURIA CJ at page 2-3.**
- **"on the question of intoxication as a defence, I agree that intoxication is available as a defence, in case of murder whether such intoxication is self-induced or not, that is to say, all forms of intoxication should be taken into account."**

The court accepts that whilst the provisions of sub-section 4 of section 13 of the Penal Code is not a defence it makes provision for the consideration of intoxication to determine whether the person charged had formed any intention basic or otherwise to commit the offence, it is rather to be taken into account with other factors of the particular circumstances.

I have also considered the case referred to in support of the general proposition of intoxication. *R-v-O'Conner (1980) 146 CLR.64, BARWICK CJ, stated.*

**"In days before the common law fundamentals of criminal liability with which we are now familiar had been reduced and declared, it was said that drunkenness**

***was no defence to an excuse for the commission of crime, indeed it might be an exacerbation of the offence. This formulation still retains some currency. The use of the word "defence" and "excuse" suggests that the saying is based on the idea that drunkenness might furnish a defence to or excuse for an offence otherwise established. But proof of a state of intoxication whether self-induced or not, so far from constituting itself a matter of defence or excuse, is at most merely part of the totality of the evidence which may raise a reasonable doubt as to the existence of essential elements of criminal responsibility".***

I must therefore consider the state of the accused mind at the time he committed the offence as part of the totality of the evidence in arriving at an appropriate conclusion.

The accused prior to committing the offence was intoxicated with both alcohol and drugs having drunk 6 bottles of kwaso and smoked 2 rolls of marijuana. This was clear from his evidence under oath and sworn Statement of prosecution witnesses.

I am of the view that in order for the prosecution to succeed in the charge of murder it must show that the accused with malice aforethought caused the death of the deceased. There must be an intention, this is the crucial element.

The court must consider the accused consumption of marijuana and alcohol and its effect upon him and the medical evidence led to intoxication in determining whether it has been proved beyond reasonable doubt that he acted with malice aforethought when he caused the death of the deceased.

There is no doubt as appear from the accused record of interview and formally admitted in court that he had caused the injury that led to the death of the deceased. The court has carefully considered the motive of the accused. The reaction of the accused after stabbing the deceased. The evidence of Ms. Ofini that the accused immediately after the incident had threatened to kill her if she did not go with him, to the village.

The motive of the accused as established by his evidence under oath was to seek out the youths who sworn at him earlier in the day and to punish them for the wrong done to him and when he returned to the area and saw someone near the spot, he thought the deceased was one of them. He then proceeded to make a small kill on the victim. The hasty retreat of the accused from the scene after the stabbing is not unusual in the circumstances. The evidence of Ms. Ofini that she was threatened was clearly rebutted on cross-examination.

However the substantive issue is whether the accused had the requisite mental element for the offence of murder at the time he inflicted the wound on the deceased.



I accept the defence counsel submission that the accused at the time he committed the offence did not have the requisite mental element to cause the death of the deceased or to cause grievous bodily harm. I have taken into consideration as I am required to do that due to intoxication coupled with the drug the requisite specific intention was not present. The defence has succeeded in creating a reasonable doubt and I consider it unsafe to convict the accused on the charge of murder I must therefore acquit the accused on the charge of murder and find there is sufficient evidence to convict him of Manslaughter.

**Sekove Naqiolevu**  
**Puisne Judge**