

IN THE HIGH COURT  
OF SOLOMON ISLANDS

(Goldsbrough J)

Criminal Case No. 255 of 2008

Regina

Represented by Mr. Seuika

V

Jimmy Nako Tiko

Represented by Mr. Hou

Date of Hearing: 6, 7 and 8 May 2009

Date of Judgment: 18 June 2009

Judgment

1. Paul Maenu Usi, a young man of about twenty six years, died in the early hours of 12 April 2008. He died as a result of being stabbed in the chest, once, with a screwdriver. That blow punctured his aorta, and death followed. This is not in issue in this trial, nor is it in issue that the accused, himself an even younger man of about sixteen years at the time of the killing, was the man who struck the fatal blow. He is charged with murder and has pleaded provocation as a defence to the murder charge, and maintains that he should properly be convicted of manslaughter.
2. Many of the people involved in giving evidence in this trial had been to one or more nightclubs on this night, and many had been drinking. Some people who were at the scene and in the company of the deceased or the accused have not been called to give evidence. Most of the evidence for the prosecution has been admitted, meaning that the court has only heard from two police officers, on the challenge to the admissibility of a warned and cautioned statement given to the police by the accused, and two civilians who were with the deceased. The accused himself gave evidence to the court.
3. At or near the nightclub, at what was known as the Twin Towers, near Town Ground in the centre of Honiara there was a dispute between two groups of males. The deceased was at some point called by a member of one group, and the accused formed part of the other group. Words including swear words were used. In particular, it is said, and again this is not in issue, that one of the victim's group told the men in the

other group to 'fuck you, fuck you all' or some similarly insulting phrase. It is not in issue that these insulting words did not come from the deceased, but another man in the deceased's group, probably the man who called the deceased over to him.

4. The deceased had been seen around the nightclub by others prior to his death and was acting in his normal fashion as somewhat of a joker. Those who observed him did not feel threatened by him or his behaviour.
5. Provocation was not raised by the accused in his warned and cautioned statement. The reason he gave for this is that he chose not to tell his whole story to the police because he wanted the interview over and done with as quickly as possible. In raising the defence of provocation, the accused gave the following evidence.

"I killed him. I killed him because I was angry from the swearing. The swearing made me feel no good so I got very angry. I was very angry. No one had sworn at me like this before."

6. Provisions in the Penal Code deal with provocation. There are two relevant provisions to be found in section 204 and section 205. Section 204 (a) provides that:-

"Where a person by an intentional and unlawful act causes the death of another person the offence committed shall not be of murder but only manslaughter if any of the following matters of extenuation are proved on his behalf, namely—

  - (a) that he was deprived of the power of self-control by such extreme provocation given by the person killed as is mentioned in the next succeeding section; or . . .

7. Section 205 provides that:-

"Where on a charge of murder there is evidence on which the court can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be determined by the court; and in determining that question there shall be taken into account everything both done and said according to the effect which it would have on a reasonable man."

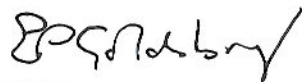
8. The accused has raised this issue through evidence. The evidence is of things said. There is no evidence of anything done. The evidence actually shows that the things

said were not said by the deceased but by one of his friends. This evidence comes from the two civilians who gave evidence, one of whom was the man who himself admits to using the swear words. Those two civilians were in the company of the deceased. There is no evidence from the accused as to whether the words said came from the deceased or not. On the basis of the evidence given I find as a fact that the words complained of were not spoken by the deceased but by another. The provocation raised by the accused, therefore, was not provocation 'given by the person killed'. The provocation, if any, came from another, and the accused killed a different person. The defence seek to submit that the accused made a mistake of fact in that he turned and struck a blow in the direction of the swearing.

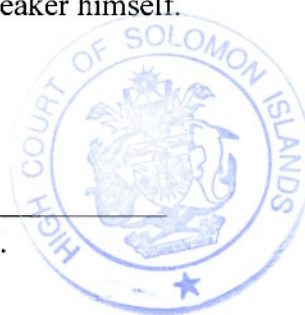
9. Were it necessary to make a finding on whether through mistake of fact the question of provocation can apply to the killing of someone who did not give the provocation I would probably have some difficulty. However, for reasons that will become apparent, I do not find it necessary to address that question.
10. The defence submits that it is not for the accused to prove anything in his trial. I respectfully disagree. He must prove, on the balance of probabilities that extenuation existed (see Section 204(a) supra). Having successfully achieved that, the prosecution bears the responsibility to negate that assertion. The effect of these words on a reasonable sixteen year old nightclub visitor such as this accused should not to be killed. That response is unreasonable. To find otherwise would, in my view, be to diminish the extenuation beyond that which is tolerable.
11. Since I find that the accused has not shown that his response to the alleged provocation was a reasonable response, I do not need to determine the question arising from the mistake of fact. The murder charge should not be reduced to a manslaughter conviction on the grounds of extenuation.
12. I do accept that the accused did not set out armed with the screwdriver which he used to kill this innocent man. I do find that the only reason as to why he was so armed was as he described in his evidence, that he took custody of the screwdriver from a security guard who had confiscated that same from another nightclub patron. That some patrons feel it necessary to go into a nightclub armed with a screwdriver serves merely to reinforce my view that nightclubs are not for the fainthearted.
13. The remaining elements of the offence of murder are not in issue. The deceased died as a result of the infliction of this wound which the accused admits he caused. He is accordingly convicted of murder and will be sentenced after I hear mitigation. He will be sentenced as a person who was a juvenile at the time of this offending, and

therefore not liable to the mandatory sentence of life imprisonment. Such a view was conceded in submissions by the prosecution at the close of the case, and I believe that the concession was rightly made.

14. The test to determine whether the words complained of amount to the extenuation referred to in section 204(a) and section 205 is an objective test. In applying that test the characteristics of the accused must be taken into account. That does not, in my view, make the test any less an objective test. The question that must be answered in this case is whether a reasonable 16 year old Solomon Island boy would react in the way that this young boy did.
15. To answer that question I believe that it is important to not only consider the words used but the context in which they were used. They were not accompanied by any physical threat. They were not addressed to any individual. They did not involve, as some of the cited precedent involved, suggestion of fucking anyone in particular. The example I have in mind is those cases where it was said that a person should go fuck his mother or sister. That additional connotation makes the swearing quite different, in my view.
16. This is a disturbance in the early hours of the morning when most people would be at home sleeping. It followed visits by all (except perhaps the deceased) to nightclubs where alcohol was consumed. These nightclubs are, I would venture to suggest, not for the fainthearted. This is not a quiet custom village setting where, perhaps, such foul language is still rightly taken as an affront to dignity.
17. A reasonable response to hearing such language is not, in my view, to stab the speaker. That is itself in evidence here given that others around who heard the same swearing did not themselves also attack others, or the speaker himself.



Goldsbrough J.



#### SENTENCING

**GOLDSBROUGH, J:** The accused, Jimmy Nako Tiko, was convicted and sentenced with the murder of **Paul Maenu Usi** on the 23<sup>rd</sup> day of June 2009, contrary to Section 200 of the Penal Code.

The Court has considered all the material that has been submitted on your behalf after you have been found guilty of murder. Although it is clear from my judgment, for the avoidance of doubt, the Court finds that the time of this offence you were a person under the age of 18. And it appears to this Court today that you are still under 18. Because of that, you are sentenced as a juvenile. The Court has considered all alternative methods of dealing with you and, in particular, the Court has considered whether you should be committed to the care of your parents or your brother as guardian. That does not seem as if it would be a useful thing to do because, as the Court has been told, you were in the care of your parents and your brother when this offence was committed. It seems that neither your parents nor your brother had any concerns about a 16 year old been out all night visiting clubs and drinking beer. That to me seems a failure on the part of your parents and your brother, and seems to have led substantially to this killing. Putting you back into their care is not going to achieve a great deal. So the Court is going to sentence you to a period of imprisonment. That sentence will reflect these things:

- (1) You are still under 18;
- (2) You have not been involved in any trouble before;
- (3) When you set out that night, you did not set out to kill your victim.
- (4) You were affected by what you heard and thought came from the person you killed, although of course, it did not.
- (5) Your family and the family of the deceased are reconciled; reconciled through customary ways involving the payment of compensation to which you contributed through the wages withheld from you by your brother.
- (6) The Court is told that the two families now live peace because of that customary reconciliation – that is a most important consideration that has affected the length of your sentence.

It is probably not necessary to remind you that if you were an adult, you would receive a life sentence. Given your age, it is hoped that a short sentence will permit you to come out of prison and start your life as an adult. The Court is obliged to mark your offence which was taking the life of another person with a sentence that reflects the gravity of that crime, but also takes into account the sentencing philosophy contained in the Juvenile Offenders Act. You are therefore sentenced to a period of imprisonment of 4 years. Do you understand all of that?

  
THE COURT

