R v Puli'uvea

Supreme Court, Nuku'alofa
Hampton CJ
Cr 883/96

27, 28, 29, 30, 31 January, 3, 4, 5, & 6 February, 1997

Criminal law - murder - manslaughter - diminished responsibility
Defences - diminished responsibility - murder - onus of proof
Evidence - previous conduct - intent
Sentencing - manslaughter

The accused, a soldier was tried for the murder of his woman friend, by shooting her with a service pistol. His trial was before a jury and extracts from the summing up are reported below. The defence of diminished responsibility had been allowed to be put to the jury.

The extracts include the direction on such matters as:

1. The respective duties of the judge and the jury.
2. The basis for drawing inferences i.e. logical reasonable and fair deductions from facts that have been proved.
3. The burden and standard of proof of the elements of the crime charged (on the Crown, beyond reasonable doubt).
4. The burded and standard of proof of the defence of diminished responsibility (on the accused, on the balance of probabilities).
5. The ingredients of murder (a homicide or killing; that was culpable or blameworthy; carried out with a murderous intent).
6. The differences between intent and motive; and the relevance to intent of evidence of previous conduct.
7. The use which can be made of statements by an accused.
8. Intoxication and the use of such evidence as to formation of requisite intents.
9. Diminished responsibility which was allowed to be put foward as a defence (and only to murder) by the effect of the Civil Law Act resulting in s.2 of the Homicide Act 1957 (UK) being applicable in Tonga.
10. Diminished responsibility which meant that a person would not be convicted of murder, but manslaughter only, if he proved on the balance of probabilities that she was suffering from such abnormality of the mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as to substantially impair his/her mental responsibility for his/her acts and omissions in doing, or being a party to, the killing.

11. The elements of diminished responsibility; and definitions of mind and abnormality..
12. The jury having returned a verdict not guilty of murder but guilty of manslaughter the judge sentenced the accused to 12 years imprisonment taking the view that the offending was at the most serious end of the spectrum of offences of manslaughter.

Statutes considered

Criminal Offences Act
Evidence Act, s7
Homicide Act 1957 (UK) s.2

Counsel for prosecution	:	Mr Cauchi and Mr Havea
Counsel for deceased	:	Mr Niu and Mr V Foliaki

Summing up

The Issue

On the night of Saturday 27 April 1996, in that living room of that flat you were in on Thursday of last week, when Petelo Puli'uvea used this Glock 17 pistol and fired at, shot and killed Anarieta Tapeso, has the defence proved to your satisfaction on all the evidence, (by showing that it is probable, more likely than not) that he (Petelo Puli'uvea) was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts? i.e. has the defence proved the defence of diminished responsibility? (for that is what it is called). That is the real question for you at the end of this trial - as the trial has unfolded. And that is really the only issue or question you will have to decide when you retire. If your answer is Yes - the defence has proved that defence of diminished responsibility , then the accused is not guilty of murder but guilty of manslaughter and that would be your proper verdict. If you answer is No - the defence has not proved that defence of diminished responsibility then your proper verdict would be guilty of murder.

As I have said that, I believe, is what this trial comes down to; because it seems to me, listening to the Crown witnesses, the cross-examination of them by Mr Niu, the evidence of the accused himself and of Dr Puloka, and the addresses, that there is no question but that a culpable homicide occurred, a deliberate shooting of Ana by Petelo and with the necessary murderous intent (and I will explain these things further a little later) so that murder has been made out or proved beyond reasonable doubt by the prosecution. It follows then that is murder (as defined in our law) and that must be your verdict unless you find proved by the defence, (as more probable than not) that at the time the accused was suffering from diminished responsibility. Such a finding would reduce murder to manslaughter.

Duties

Having said that I turn back to some of the general things which are said to every jury in a criminal case and which I must say to you as part of my duty. First my job now is very different to yours and much easier. Mine is to tell you what the law is, how to apply that law to the issues of fact that you have to decide and remind you of the important

evidence on those issues. As to the law - you must accept what I tell you.

As to the facts however, you alone are the judges. It is for you to decide what evidence you accept or reject or of which you are just unsure. I stress this:- If I appear to have a view of the evidence or of facts or of a witness with which you do not agree, reject my view. Findings of fact and decisions on the credit of witnesses are for you, not me. And it is in those areas of finding facts, deciding on credit of witnesses, that your common-sense, your collective experience of the world and people and the way people act and react, is of great value. You are people of this community of diverse backgrounds - between you, you have a wealth of experience and common-sense. Use it. It is your best tool.

Look:- Is this just a story - oft - told throughout human history, of human passion and emotions, of lovers, of jealousy, of quick temper, of an attitude of:- "if I cannot have you, nobody will"; or is it more - is it a story of abnormality of mind, of diminished responsibility? That is the reason you heard some of the evidence about the deceased and her past which I cautioned you about last week (you will recall I said to you then, and I remind you - the deceased is not here to be able to answer these things said about her and to put her side of the story. So take care). Use that evidence only as to how it may have affected the mind of the accused. And this perhaps puts it in balance in any event - here was a man, the accused, who apparently had a child by another woman, yet denied that to the deceased. Is it a matter of the pot calling the kettle black? And remember - this was a relationship of only a few months - the question of marriage had been discussed and then it drifted away apparently, the money borrowed by the accused spent on food and not on air fares to Fiji. So you might ask yourself - what long-term commitment was there by either of them in this relationship in any event? What ties were there, really? All part of the background against which you have to view these events, I suggest.

Evidence

Second thing: You must decide the case only on the evidence which has been put before you, in this Court (and at the view last week). You do not decide on the basis of speculation or guess work e.g. about what other evidence there might have been. There will be no more. You consider the whole of the evidence, including the exhibits which you will have with you when you retire.

In the case of each witness (and this includes the accused) consider whether he or she has been telling you the truth and whether he or she has been accurate in the account given. So consider not only what has been said but also how it has been said. How you assess a witness's demeanour may be a valuable aid in assessing his or her reliability and credibility. With each witness you can accept or reject all, or some, of what he or she has told you.

As I said at the start of the trial last week - if any of you have any previous knowledge of this case, or of any person involved in it, put that knowledge entirely out of your mind. The accused is entitled to be judged only on the evidence. So likewise you ignore, banish entirely from your minds, any newspaper or radio or other accounts you may have seen or heard (whether before or during the trial). It is your view - not a journalist's - that counts.

And again likewise, you must reach your decision uninfluenced - not at all affected by - prejudice or sympathy. If emotion enters, logic and reason too often departs. You are the judges - no judge should ever allow a feeling of prejudice against, or sympathy for, any accused, or any victim, or any witness to influence the decision which must be made.

I have said you must not speculate or guess. I repeat that. But in your consideration of the evidence you are entitled to draw inferences from facts which have been properly proved to you. To infer is not to guess. To infer is to draw logical, reasonable and fair deductions from facts that have been proved. So e.g. here the Crown asked you, in opening it's case, to infer that the accused intended to kill or at least cause bodily harm to the deceased from his firing at her, at very close range 3 shots from this powerful weapon, a type of gun which he well knew, was well versed and trained in, and had fired often before. If you find those facts proved do you then go on to infer those intents? The Crown say - well what else could he have intended. A matter for you. You may draw inferences. And I add that, as you have now heard when the accused gave evidence, that intent or those intents the Crown asked you to infer in fact, you may think (but it is for you) have been confirmed well and true by the accused as in his mind at the relevant time.

Burden & Standard of Proof

The fundamental, and very important, matter in all criminal trials in this. The prosecution must prove the guilt of the accused. That is called the burden (or onus) of proof. That burden of proving the essential ingredients of this charge of murder against this accused is on the Crown from start to finish. Subject to what I have already said about diminished responsibility and will explain again shortly, there is no onus on an accused to prove his innocence. So it follows that he need not give evidence. He is entitled to sit there and require the prosecution to prove its case, if it can. The fact that he has given evidence does not alter this part of the burden of proof. But in reality here his evidence, you may well think (but it is for you) reinforces the Crown case - he accepts he fired at least 2 shots at Ana, intending to hit her, knowing that would injure her, at least, or kill her.

I have told you of the Crown's burden of proving the charge - that burden is to satisfy you by proving the charge - the essential ingredients of the charge - beyond reasonable doubt. Reasonable doubt does not mean some vague or fanciful doubt. It means that before you can convict an accused, this accused, of murder - you must be sure of his guilt. If you are not sure of his guilt of murder then it is your duty to find the accused not guilty.

But if, and only if, you are sure of those matters, i.e. proof of murder, then you must go on, in this case, to consider whether the accused was in a state of diminished responsibility at the time he shot and killed the deceased (and that, you might reasonably think, is why he gave evidence before you). That is for the defence to prove on all the evidence, on the balance of probabilities - a lesser standard than beyond reasonable doubt i.e. by showing that it is possible, more likely than not, than he was in a state of diminished responsibility when he shot and killed Anarieta. If you conclude that probably he was in such a state at the time you would find him not guilty of murder but guilty of manslaughter. If you do not find that, then, providing that the Crown has made you sure of what it has to prove, you must find him guilty of murder.

Unanimous

The fourth point - general point - is that your verdict whatever it is, must be unanimous. That means that every 1 of you must be of the opinion that the accused is guilty of murder; or not guilty of murder but guilty of manslaughter; or in theory (and it is not claimed here in this trial by the defence - and nor could it be claimed, on the evidence) not guilty of anything (i.e. an outright acquittal).

Each 1 of you must be of that opinion - but having said that I stress :- each 1 of

you does not have to reach that opinion by the same route or reasoning. You may well have different views on some aspects of the evidence - 1 of you may think 1 piece of evidence very significant and helpful; another of you may not. That matters not - as long as you are unanimous in your verdict. When you return, I will have you asked whether you are unanimously agreed on your verdict because it has to be the verdict of you all. If you are agreed you, Mr Foreman, will then be asked for the jury's verdict.

And as I have said - the way the case has proceeded your verdict will either be (and I ask Mr Foreman that you note this): Guilty of murder; or Not guilty of murder but guilty of manslaughter.

Charge

You have a copy of the charge - the indictment. It reads:-

> "Petelo Puli'uvea is charged with ... murder, contrary to ss.87(1)(a) or 87(1)(b) of the Criminal Offences Act" in that he "did on or about the 27th April 1996 at Nuku'alofa murder Anarieta Komaīnausa also known as Anarieta Tapeso".

That charge requires proof of 3 essential ingredients or elements.

Homicide

First - a homicide or killing. (Read s.85 Criminal Offences Act: "Homicide is the killing of a human being by any means whatsoever and is either culpable or not culpable"). So a homicide is the killing of 1 human being by another by any means howsoever. It must be proved here that Petelo killed Ana by some means i.e. the way the Crown case is here that he shot her and that caused her death (by a bullet rupturing her lungs, cutting through her trachea or wind pipe, and causing as well loss of blood and shock). Here you have (i) direct eye witness accounts not only of the events between the 2 of them leading up to the shooting but also, and quite unusually, of the shooting itself - eg the dramatic accounts of Isapela and, even more vivid, Kinisian; (ii) the admissions made by the accused both on the night to friends and fellow servicemen (acknowledging he'd shot and killed her) and later to Detective Sergeant Ma'u in writing. (Exhs 21 & 22 will be with you - look at those questions and answers nos. 48, 49 & 50 in Exh 21 which the accused acknowledged in evidence as being true); (iii) the clearest of admissions of his acts in his (the accused's) own evidence before you; and (iv) the evidence of the pathologist (Dr 'Akau'ola) and his post mortem examination and what he found.

As with all elements of a crime it is a matter for you to decide if the Crown has proved this particular element to the required standard - beyond reasonable doubt. It is a matter for you but you might think that is clear and that there has been no attack on that by the defence; no suggestion that has not been proved.

Culpable Homicide

Secondly then the Crown must prove that the homicide was culpable or blameworthy. (s..85: "Homicide is the killing of a human being by any means whatsoever and is either culpable or not culpable"). (s.86: "Culpable homicide consists in the killing of any person ... - (a) by an unlawful act;).

So homicide is culpable (blameworthy) when it consists of killing a person by an unlawful act, and to deliberately use force on another, to aim and fire a pistol at another, is an unlawful act. You must be satisfied (beyond reasonable doubt) that this alleged killing was by an unlawful act. If you conclude that the Crown have established beyond reasonable doubt that Petelo Puli'uvea did fire at Ana and if you are already satisfied that

he in effect caused her death then the accused must be found guilty by you of, at least, manslaughter. Again - it seems to me (but it is a matter for you) there is no dispute as to that. So - 1st stage was it homicide?; 2nd: was it culpable or blameworthy?

Murderous Intent

The third stage - 3rd ingredient - of murder is what is called a murderous intent. I will read - s.87(1a) (1b) which the Crown rely on here: "Culpable homicide is murder in any of the following cases - (a) if the offender intended to cause the death of the person killed; or (b) if the offender intended to cause to the person killed any bodily injury which the offender knew was likely to cause death and was reckless whether death ensued or not".

The Crown's case against the accused is first that he meant to cause her death. It hardly needs explanation. You must decide on all the evidence whether he, at the time he fired the fatal shot, actually meant to cause death. You can take account of his own evidence which you have heard. Is it not clear from that evidence, any way, what he intended? It is for you but in any event the Crown says; well that is really the only inference you can draw from what he had said in the presence of others, not long before (i.e. a threat to get a gun or knife and kill her - and taken as so real by the deceased as to warrant an immediate trip, for help, to the Police Station); from his going in secrecy and breaking in to the Armoury and getting this gun, 2 magazines, 100 rounds of ammunition; from his loading and bringing the gun into the flat eventually; cocking and aiming it at her, shooting her twice one straight after the other, and then, having chased a witness apparently and threatened another, coming back in and firing at her, on the floor by then - still moving - a third time; from his subsequent conduct and from what he said in Exhs 21 & 22 - the interview & statement - ("I shot her twice with the pistol and killed her" - from Exh 22). So you look for, and decide, intent by regarding what the accused did or did not do and by what he said or did not say. You should look at his actions before, at the time of, and after, the alleged shooting. All those things may shed light on his intention, and his state of mind, at the critical time if that is not abundantly clear, as I have said, from his own evidence.

You have heard some evidence of the previous conduct of these 2 people Anarieta and Petelo. In particular you have heard something of previous beatings, assaults and threats by the accused on or towards the deceased. You heard evidence about those acts not as painting the accused as a person of bad or violent character (and you must not use them for that) but solely on this matter of intent.

s.7 of our Evidence Act allows such evidence - of acts which point to or show intention. It is a commonsense and reasonable provision and I read it to you now.

"s.7. Where there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, evidence may be given that the act formed part of a series of similar occurrences in each of which the person doing the act was concerned."

So here - the question is whether this fatal shooting was done with murderous intent. The evidence of previous assaults and, most especially you might think, of threats of death by this accused directed at the deceased may be used as evidence of, of proof of, his intent on this occasion on 27 April last year.

I add this because motive has been mentioned - motive is different to intent. The Crown do not have to prove a motive in a murder trial (although here a motive is, I

suggest, quite apparent and related to the - unhappy - state of the relationship of Petelo and Ana. She apparently wanted no more of it; he could not or would not accept that - that is the claim made, indeed by the accused himself it appears (both to others and in evidence it seems to me). Motive in circumstances such as those here really means the emotion - or the emotional reason - that prompted Petelo to act as is alleged. He was, he told you, very angry that she was attempting to finish their relationship - would not accept him back; he adds, in evidence, that he was angry when she apparently accepted the truth of her alleged other relationship. An intent prompted by anger or jealousy is still an intent. So also is a drunken intent i.e. it is still an intent, and I will come to the question of intoxication soon.

The Crown allege a second alternative intent i.e. that the accused intended to cause Ana bodily injury which was known to him to be likely to cause death and he was reckless whether her death ensued or not. That breaks down to the Crown having to prove 3 things:

1st: does the evidence establish the accused intended to cause bodily injury or injuries to the deceased (gun shot wounds as described here are such injuries).

2nd: does the evidence establish the bodily injuries were likely to cause death i.e. did he have in his mind, when he fired the fatal shot, an actual appreciation that death was a likely consequence of his acts. The Crown say - look he was a soldier, an armourer's assistant - he of all people well knew the capabilities of, and the likely consequences of firing, such a powerful weapon at close range at another human (he had live fired it over 100 times, you will recall). In his evidence, again, (but it is for you) you may think he accepted that he had in mind that shooting at her could injure her, at the least, if not kill her.

3rd: does the evidence establish that the accused was reckless whether death ensued or not i.e. did he know the risks involved yet was he willing to take that risk? What it really comes to is this - is there proof that the accused actually appreciated that death was a likely consequence of his shooting and that he was just willing to run the risk of that? Again (it is for you) but is that not perfectly clear from his own evidence?

So the 2 claimed intents - either of which the Crown must prove beyond reasonable doubt:- the first is concerned with a deliberate, an intentional killing; the second is concerned with deliberately taking the risk of killing.

Again as I understand the defence and as I listened to the accused's evidence - but it is a matter for you - this third element of murderous intent as I have defined it for you is not in dispute. (It is a matter for you; but you may think - well it cannot really be disputed - what else could he have intended in firing 3 shots with such a weapon at close range at this deceased - look at the third shot - what other purpose or intent than to finish her off? It is for y ou.) And if that is the case then, subject to proof on behalf of the accused of the defence of diminished responsibility, which I will come to soon, your proper verdict would be guilty of murder.

Perhaps it is appropriate to mention 1 or 2 other matters, briefly, before I come then to this defence of diminished responsibility. Both are connected with matters of intent, and proof of intent.

First: amongst the evidence you consider - and particularly on matters of proof by the Crown of murderous intent and on the question of proof by the defence of diminished responsibility - are the statements of the accused and the use you may make of those statements - both orally (to e.g. drinking companions and fellow soldiers; to police) and

in writing (to the Police - Exhs 21 & 22). You have heard evidence of those statements - they were not made under oath by the accused. You have heard the manner in which these statements were made; and they are properly part of the material for you to consider. The truthfulness accuracy and weight of those statements are for you. You may attach different weight and importance to different parts of the statements. Again a decision entirely for you. But you have heard Mr Niu get from the Sergeant the fact the accused cooperated and that he confessed of his own free will. So you may well feel that those incriminating parts of the statements - of his shooting the deceased - are likely to be true - for why else would he have made them? And, of course, much if not all of those statements, you may think, have now been confirmed as true by the accused in his own evidence - particularly, as I have said, those important questions and answers in Exh 21 - 48, 49 & 50.

He has given evidence - he did not have to; it does not change the general onus of proof on Crown; but his evidence can be looked at as to how it affects (if at all and as I have already discussed it) the proof of murder (i.e. homicide; culpable or blameworthy; with murderous intent) beyond reasonable doubt by the Crown.

More importantly - and with care - his evidence is to be looked at, in relation to the defence of diminished responsibility and whether his evidence assists the defence in proving such a defence on the balance of probabilities: I will return to that account of his, on oath, soon.

The second thing then before the defence of diminished responsibility is this. You have heard a bit - quite a lot - about the drinking (of alcohol and methylated spirits) which took place this day - including drinking by the accused. So you are clear - generally speaking intoxication is not in itself a defence.

"S.21(1): Save as provided in this section intoxication shall not constitute a defence to any criminal charge."

S.21(2) goes on to say that intoxication is a defence if the accused was so intoxicated that either he did not know at the time of the act (i.e. the shooting here) that act was wrong or he did not know what he was doing and he was by reason of the intoxication insane at the time of hte shooting. Such a defence is not claimed here - and nor could it be given the evidence - the accused from all accounts, including his, knew what he was doing and that it was wrong. So you do not have to be concerned with that.

And nor, I add, with any suggestion of insanity. Mr Niu mentioned it in passing in opening saying it did not apply as the accused was not insane at the time. So forget about any such notion of a defence of insanity here (whether caused by intoxication or otherwise). It is not and cannot be relevant. There is no evidence of that at all - and Dr Puloka is very clear about that. In April 1996, and now, the doctor concluded the accused was fit to plead i.e. to appear in Court and go to trial and that he was not insane within the meaning of s.17 of our Criminal Offences Act. So do not bother yourself further with questions of insanity. They are irrelevant.

Back then to intoxication - What our law says is this - S.21(4): "Intoxication shall be taken into account for the purpose of determing whether the person charged had formed any intention specific or otherwise in the absence of which he would not be guilty of the offence."

So intoxication may be relevant to a decision as to whether the accused had the necessary murderous intent at the time of the fatal shooting. Has the Crown proved such

an intent? You should taken account of all the evidence you have as to his intent, including the evidence as to his state of intoxication and draw such inferences as appear to you to be proper in the circumstances. Was he so intoxicated he did not intend what is alleged against him? Well again - you have heard the accounts of what he said and did; his own accounts of what happened, made both out of court and in court. I will not repeat what I said earlier about those matters of proof of intent. They will be fresh in your minds.

But what I do say is that an absence of intent because of drunkenness is a conclusion that is not to be lightly reached. A drunken intent is still an intent.

Diminished Responsibility

This is a defence which is not contained in our Criminal Offences Act; but is in the English Homicide Act 1957. Because of the absence of such a defence in our Act, and because of the effect of our Civil Law Act (Cap 25 - ss 3 & 4) the defence created by the English Act is applicable here. This is not a defence of insanity and you will recall what I said to you just before about that.

First then I read to you s.2(1)(2) & (3) of the Homicide Act 1957:

"2(1): Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

(2): On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

(3): A person who, but for this section would be liable, whether as principal as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter."

This means:-

(i) it (Diminished responsibility) is a defence only to murder

(ii) it becomes relevant to consider it only when the Crown has proved (beyond reasonable doubt to your satisfaction) murder

(iii) if successful it is only a partial defence i.e. it reduces liability for what would otherwise be murder to manslaughter

(iv) the burden (onus) is placed on the accused to prove the elements of the defence.

Before then I go on to tell you the three elements of this defence I repeat what I said earlier about this burden of proof on the defence here. It is a burden which is not as heavy as that of the prosecution's in proving guilt i.e. proof beyond reasonable doubt. Here it is enough if the defence satisfies you on the evidence that its case is more probable, more likely than not, to be true. If it does that (and I underline if) you must find the accused not guilty of murder but guilty of manslaughter. If it does not your duty is to return a verdict of guilty of murder.

What then are the 3 elements. First I will read s.2(1) again (relevant pieces only):-

"Where a person kills another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from any inherent

causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts in doing the killing".

3 elements:- to be proved - each of them - by the defence:-

1. an abnormality of the mind
2. which arises from: (as Dr Puloka has explained to you, here)
   - any inherent cause
   or which is: induced by disease
   or induced by injury
3. which substantially impairs the accused's mental responsibility for his acts in doing the killing

As to that first element - abnormality of mind

"Mind" in this context includes perception, understanding, judgment and will. And "abnormality" means a state of mind so different from that of ordinary human beings that the reasonable person would call it abnormal. That is what the defence have to show here.

Look at the evidence - all the evidence - before you as to the accused and his state of mind at the time of the fatal shooting. As I have said - mind includes perception, understanding, judgment and will. So in considering this issue you should look at questions such as the 3 I now pose for your guidance:-

(i) whether the evidence shows he did or did not know what he was physically doing? A soldier, trained in firearms, firing such a gun three times at the deceased given the violence and threats (to get such a gun and kill), the determined and thought out in advance efforts by him to get the gun leading to him breaking in to get the pistol (i.e. along the ceiling space and through, by breaking, the hardboard ceiling - which he knew of; of putting the pistol outside the security wire so his hands were free to climb out); the loading, concealing and cocking of the gun and so on; his threats to others and to himself afterwards. What do all those things tell you? What did he know of what he was doing. Looking at his own evidence before you - did he know what he was doing (e.g. in loading it - he told us of the difficulties with 1 magazine you will recall; in cocking the gun - he told us he did it when she ran out of that bedroom; of firing the first 2 shots)? From Dr Puloka's examinations what is revealed as to his knowledge of what he was doing? The fact he may now have blocked out some of the events (e.g. the third shot, the subsequent threats) from his mind perhaps as a sort of psychological defence mechanism does not necessarily mean (as Dr Puloka told us) that the accused did not have clear thought processes at the time of the shooting. You will recall the questions to, and answers of, the doctor as to that.

(ii) whether the evidence shows that at the time he shot and killed the deceased he knew, and he had the ability to know and form a rational judgment, whether the act of shooting was right or wrong? Look e.g. after he fired the first 2 shots and before he fired the 3rd, if you accept the evidence, he pursued and threatened the witness Isapela who ran out; and later threatened Kini - with the baby, - still inside (i.e. the 2 who had seen what he had done); and what he said to Mikaele and later to his Colonel. What do those things tell you as to that? Again what of the evidence of threatening to take his own life? Does that not tell you something as to whether he knew he had done wrong?

(iii) whether the evidence shows that the accused had ability at the time of the shooting, to exercise will power to control his acts (of shooting at Ana) in accordance with that rational judgment i.e. does the evidence show whether he could not resist his impulses? You see the abnormality of mind must be one which does impair (substantially when I come to element 3) his mental responsibility. Again look with care at all he did that evening over a period of time - the alleged threat to kill her; the decision, carried out, to go and break in and get the gun; the return with it; the loading of it; the going in with it concealed; the cocking of it; the firing of it twice at her; the chasing after, and threatening, of others; the third shot. What do those things tell you? What does Dr Puloka's evidence of "a degree of loss of impulse control" tell you?

Those 3 questions I have posed, and my comments, are for your guidance in this area. But as I stress, the matters are for you - it is your view that counts.

So you have to consider the extent his mind was answerable for his physical acts and that includes your considering the extent of his ability to exercise will power to control his physical acts.

Whether he was suffering from such an abnormality of mind at the time of the fatal shooting is a question you must answer on all the evidence. Has the defence proved it? The medical evidence of an anxiety and a panic disorder (and that is the factor to be looked at here - you must disregard the effect of alcohol in this defence as I will explain to you shortly), is undoubtedly important but you are entitled (and expected) to take into account all the evidence including the acts and statements of the accused and his demeanour (how he looked and behaved). You are not bound to accept the medical evidence if there is other evidence before you which in your good judgment conflicts with it and outweighs it. Do we not all panic - do we not all have anxiety attacks? Dr Puloka says, yes, but that it is a matter of degree. Did they reach a sufficient degree in this man to make it a mental abnormality? That is for you; for you to decide on all the evidence.

Dr Puloka says that given the anxiety and panic disorders he has told us of, the accused was suffering at the time from a mental disorder, a mental illness, and that, acting in combination, he had 3 factors affecting him: namely the predisposing (anxiety and panic disorders); the precipitating (alcohol abuse); and the perpetuating (his relationship with, jealousy towards, Anarieta). I tell you that in terms of our Mental Health Act 1992, to which Dr Puloka referred, "mental disorder" means "mental illness ... and any other disorder or disability of the mind"; and "mental illness" means "a psychiatric disorder which substantially disturbs a person's thinking, feeling or behaviour and impairs the person's ability to function". Well, for you, but what evidence is there of the accused's ability to function being impaired? A trained soldier sorted out especially for duty in Bougainville and employed as the assistant armourer.

Then the second element. Have the defence proved that if such an abnormality of mind existed it arose from (and these are the 2 put forward by the doctor) an inherent cause, or that it was induced by disease or injury. I summarise his evidence on this point. He says that this claimed abnormality "possibly" (his word) arose from an inherent cause (but he cannot say from what, as I understand his evidence), but does not really know and cannot answer whether it was induced by disease or injury.

It is for the defence to prove - more probable than not is the test as I have said. Where does the doctor's evidence leave you on this point? Again in these circumstances you can

consider not only that psychiatric evidence but also the whole facts and circumstances of the case including the nature of the killing, the conduct of the accused, before, at the time, and after and any history indicating any mental abnormality. I suggest you should approach this in a broad commonsense way.

Now the third element - has the defence proved as more probable than not that this claimed abnormality of mind (if you find it proved) substantially impaired the accused's mental responsibility for his acts in killing the deceased.

That is entirely a matter for you. It is a question of degree. If you find an abnormality of mind proved then how bad was it? Was it "substantial"? Approach that word in a broad commonsense way, again. It means more than some trivial degree of impairment which does not make any real or appreciable difference to a person's ability to control himself. However it does not have to be total impairment.

The medical evidence again is relevant. But it is a matter for you on all the evidence. Again your view may properly differ from that of the doctor depending on your view of the evidence and what has been proved to you. This is a trial by jury - by you - not a trial by experts.

On this aspect, the doctor's evidence was that there was a degree of loss of impulse control - but he does not really spell out what degree or extent. He does go on to say that without the mental disorder he found in the accused this shooting would not have happened. As I say - use a broad commonsense approach - your most valuable tool, I add.

So as I have said if it is proved that the accused could not resist his impulse, was unable to exercise will power to control his physical acts, provided that was due to abnormality of mind, that would be sufficient to entitle the accused to the benefit of this defence of diminished responsibility. It is a matter for you - the view you take of all the evidence.

Now I return, briefly to intoxication. Where as here alcohol is a factor - and it is on the doctor's own evidence - you are directed by me to disregard what, in your view, was the effect of the alcohol (and I include the methylated spirits) upon the accused since abnormality of mind induced by alchohol is not due to inherent causes or induced by disease or injury and is not within this defence.

Therefore you must exclude that (the doctor's "precipitating factor") and concentrate on, and consider, whether: first do the combined effect of the other matters (the anxiety disorder and panic disorder together with his jealousy or possessiveness towards Ana) fall within the defence i.e. are they, without the alcohol an abnormality of mind and secondly: did they amount to such abnormality of mind as substantially impaired the accused's responsibility. Has the defence satisfied you that it is more likely than not that if the accused had not taken drink (i) he would have killed as he in fact did & (ii) he would have been under diminished responsibility when he did so? That follows from what s.2(1) of the Homicide Act says. It must be an abnormality of the mind which impairs substantially the mental responsibility and alcohol is not an abnormality of the mind. I repeat - have the defence satisfied you that it is more likely than not that if the accused had not taken drink (i) he would have killed as he in fact did and (ii) he would have been under diminished responsibility when he did so? This is important. Has that been proved when, on the doctor's own evidence, alcohol was the precipitating - the starting - factor? Without alcohol would this have happened? That question is for you - but may there not be a difficulty here for the defence on the doctor's own evidence? (He said that without alcohol

it - the killing - may have happened or it may not have. He could not answer that, he said).

That is all the help I can give you.

Remember:-

1. You are the judges - your view, (not mine, not counsels') is the one that counts.
2. Your verdict must be unanimous.
3. The way the case is your verdict will be either:
   (a) Guilty of murder; or
   (b) Not guilty of murder but guilty of manslaughter.

I now ask you to retire to consider your verdict. The exhibits will be brought in to you. If, during your deliberations, you have any question you wish me to clarify for you please put it in writing and it will be brought to me. I will then answer it, as best I can in Court.

SENTENCE

Petelo Puli'uvea, I take into account what Mr Niu has just said in relation to you and in relation to this matter. I take into account also what has been said in evidence by Dr Puloka about you and what he had earlier written in those two reports. I have given careful thought to those reports and the contents of them.

I consider that you have been the subject of a merciful verdict by this jury. That is their absolute prerogative and right to return merciful verdicts.

You have been convicted of manslaughter and that means that you are liable to imprisonment for a maximum term of 15 years. Manslaughter can cover a whole spectrum or range of offences of various seriousness. At one end of that range there are occasions where the liability or culpability of the person convicted of manslaughter is very low indeed. At the other end of the spectrum or range of offences there are those that come to close to the border line with murder. I say immediately that I view your offending here, even though I have heard the evidence from the doctor as to diminished responsibility, as being towards that most serious end of the spectrum or range.

I am sure that you became obsessed with the deceased woman. And I am sure that your attitude was that if you could not have her, that no one else would. And those were the very threats that you made from time to time, leading up to this shooting.

Even taking account of everything the doctor has said about your state of mind, still on your own account you acted with considerable deliberation, you threatened that you were going to kill her, by getting a pistol from the armoury, and you did that. You did not just make threats, you carried them out and went down, in secrecy, broke in to the armoury, stole a gun, stole the ammunition, went back and then in confronting her again, shot and killed her.

It is those elements, that deliberation and aforethought, even with the diminished responsibility put forward on your behalf by the doctor, which leads me to the view that your offending is at the most serious end of the spectrum.

You fired 3 times at the deceased and you killed her. I am certain on the evidence that you intended to kill her as you had said you would. You have been subject, as I have said, to a merciful verdict at the hands of the jury, reducing the crime from murder to manslaughter.

You are 23, you have no previous matters; your history has been traversed by the doctor. The offending by you and the seriousness with which I view it must be marked

by a considerable term of an imprisonment. I would be failing, I believe, in my duty to this community if I did not impose a significant and lengthy term of imprisonment upon you for such an offence.

It may be as the doctor has said that some of the things that you suffer from are remediable. I hope that is so. You will be a young man even after a lengthy sentence of imprisonment is served by you. I have said I trust or hope that what the doctor has spoken of is treatable because if it is not, then on what was described by him, you are a danger or a potential danger to other women with whom you may have association or form a close asssociation in your future life.

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That is in my view a further reason why the sentence of this in Court must be a heavy one. In all the circumstances and weighing the matter as best if I can, my view is that the appropriate sentence is a sentence of imprisonment for a period of 12 years. And that is the sentence. It is effective from, and runs from, today.