

IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Criminal Appellate Jurisdiction)

Criminal Appeal Case No.02 of 2003

TOM TUPUN
-V-
PUBLIC PROSECUTOR

Coram: Hon. Justice Bruce Robertson
Hon. Justice John W. von Doussa
Hon. Justice Daniel V. Fatiaki
Hon. Justice Oliver A. Saksak
Hon. Justice Patrick I. Treston

Counsel: Mr. B. Bani for Appellant
Mr. T. McIntosh for Respondent

Hearing Date: 3rd and 5th November 2003
Judgment Date: 7th November 2003.

JUDGMENT

This case arose out of an unfortunate incident involving a large group of men that occurred on the evening of the 14th of October at Enuhup Village, South West Tanna in which a woman was brutally murdered, her husband assaulted and their home burnt to the ground.

Arising out of the incident the appellant and thirteen others were jointly charged with **Unlawful Assembly** (Count 1); **Intentional Homicide** (Count 2) and **Arson** (Count 3). There was also included in the information a charge of **Intentional Assault** (Count 4) against one of the accused arising out of an assault on the husband of the deceased and an additional charge against the appellant (Count 5) for an offence of **Aiding and Abetting the Intentional Homicide** of the woman.

All accused pleaded "***not-guilty***" to the charges and a trial was held at Isangel, Tanna before the learned Chief Justice over 4 days in March 2003. The Prosecution called seven witnesses including the deceased woman's daughter Christine Kema and Sam Nuare.



The prosecution's case was that the appellant, after attending his brother's funeral on the afternoon of 14th October 2002, decided to confront the deceased woman with his suspicions that she had killed his brother using witchcraft. In the evening of 14th October 2002 at about 8pm he went to the deceased's house. There was a lot of people already there when he arrived and knocked on the front door. Christine Kema answered the door and the appellant asked to see her mother. The mother came out and called out to her husband who then joined them outside. Another accused also joined the group outside. The appellant was then heard accusing the deceased woman several times of practising witchcraft and of possessing a '**tabu stone**' and of having used black magic to kill people, including the appellant's recently buried brother.

The appellant's hostile accusations and the deceased woman's equally definite denials continued for a time and it became clear that matters were escalating out of hand. Christine Kema then quickly departed the scene with her two young children leaving her parents behind with the appellant and another man. After leaving she heard stones being thrown onto their house and the voice of her mother (the deceased woman) crying and calling out. She testified to recognizing several of the men who had surrounded the house which she had mentioned in her police statement. She did not name Sam Nuares as one of those present at the scene.

Sam Nuares for his part testified that on arrival at the scene he had confronted several men attempting to attack the deceased's husband and he had heard Tom Tupun's voice urging the crowd to assault the deceased's husband. He was able to dissuade the crowd by pointing out that the deceased's two houses had already been burnt and then he heard a voice say "**If that is so, kill the old lady**". The voice he recognized as Tom Tupun's and almost immediately 3 men came and assaulted the deceased woman leaving her motionless on the ground.

At the conclusion of the prosecution's case six of the defendants including the appellant and a civilian witness testified on behalf of the defence.

The defence evidence whilst confirming some of the details of the prosecution case differed on several matters of substance including, and with particular relevance to this appeal, the identify of the voice that called for the killing of the deceased woman and

the recovery of the '**tabu stone**' from inside the deceased woman's house.

In particular, the appellant denied on oath that he had called out commanding the others to kill the deceased woman or that it was his voice that Sam Nuares had heard calling out: "***if that is so, kill the old lady***".

The learned Chief Justice in his lengthy reasons for judgment, found the charge of Unlawful Assembly, proven against 11 of the 14 accused. His Lordship was similarly satisfied on the charge of Intentional Assault against the 14th accused and against the appellant on the charge of Aiding and Abetting Intentional Homicide. Convictions were accordingly entered in respect of those charges and acquittals were entered on the remaining charges of Intentional Homicide and Arson which his Lordship found had not been proved to the required criminal standard.

After considering the mitigation advanced on behalf of the convicted defendants his Lordship passed the following sentences:

- in respect of **Count 1: Unlawful Assembly** a sentence of 8 months imprisonment was imposed on the 11 convicted defendants.
- in respect of **Count 2** (sic): **Intentional Assault** a consecutive sentence of a further 8 months imprisonment was imposed on Jacob Sae (Acc. 14); and
- in respect of **Count 5: Aiding and Abetting Intentional Homicide** his Lordship imposed a consecutive sentence of 8 years imprisonment on the appellant Tom Tupun.

The appellant now appeals against the conviction entered against him on Count 5 only and advances several grounds of appeal which may be condensed into the following two grounds:

- (1) His Lordship erred in law in that the appellant was convicted of aiding and abetting an intentional homicide in which the principal offenders had been earlier acquitted by the Court (Ground 7); and
- (2) His Lordship erred in making factual findings that were against the weight of the evidence.



His Lordship's findings and conclusions relative to Count 5 are fairly brief and we set them out in full.

"On 14 October 2002, he gave command to others (3 men) to kill Rebecca. Tom Tupun participated before the actual killing in the incident. He gave command to others to kill Rebecca. Tom Tupun and others planned to go to Rebecca's house to ask Rebecca if she has a black magic stone and if she is the person who killed people by the use of witchcraft.

Tom Tupun encouraged others to commit the crime. (kill Rebecca). Tom Tupun commanded others to kill Rebecca. This amounted to procuring through the intervention of others. Tom advised, counsels incited other to kill Rebecca. Rebecca was badly and seriously assaulted on 14 October 2002. Rebecca died after as a result of the assaults on her body. There is no doubt about the mens rea.

There was a direct link between the command of killing Rebecca and the death of Rebecca as a result of such advice counsel, soliciting and procurement. I am not detracted from the fact that the principals are acquitted. The evidence is overwhelming against Tom Tupun."

At the hearing of the appeal Mr. Bani, after some discussion with the bench, accepted that as a matter of strict law and in the circumstances of the case he was unable to pursue the first ground of appeal conveniently encapsulated in ground 7 which reads:

"The learned trial judge erred in law in failing to acquit the appellant on Count 5 when the principal offenders had been acquitted of the principal act."

We turn then to consider the second and principal ground of appeal.

The evidence in this case is overwhelming that the deceased woman was in fact murdered. She was attacked by the three unidentified assailants, kicked several times as she lay helpless on the ground and sustained multiple injuries including several

fractures which ultimately led to her death soon after the attack and before medical assistance could be obtained.

Additionally there was evidence that was accepted by the trial judge that immediately prior to the attack a voice was heard to say: **"If that is so, kill the old lady"**. Such a command or instruction is clear and unequivocal in its intent and purpose and was plainly intended to encourage the homicidal assault on the deceased woman and to render the utterer complicit in and an aider and abettor in the killing of the deceased woman that subsequently eventuated.

Counsel for the appellant sought to draw the Court's attention to various items of evidence which counsel submits raised the possibility of the appellant not being at the scene during the fatal assault on the deceased woman. The credibility of this evidence of alibi is so inexplicably linked to the learned trial judge's determination of the credibility of Sam Nuares that it must be taken to have been rejected by the trial judge when he confirmed his acceptance of Sam Nuares' evidence that the voice he heard was **"that of Tom Tupun"**. There is no merit in this ground of complaint.

The sole live issue remaining in those circumstances was the identity of the voice that called for the old woman to be killed.

We respectfully accept as accurate the statement of the law on the admissibility of voice recognition evidence in the following passage in the judgment of O'Brien CJ in **R. v. Smith** (1984) 1 NSWLR 462 where his Honour said at p. 477:-

"evidence of the voice of a person present at a crime as being the same as the voice of the accused can only amount to positive identification where the witness is very familiar with the voice before hearing it at the crime, or that the voice heard at the crime was very distinctive, ..."

We also respectfully adopt the following passage from the judgment of the High Court of Australia in **Domican v. R** (1992) 173 CLR 555 where the Court discusses the need for warning and caution to be exercised by a trial Court in considering identification evidence at p. 561-562:



"Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed. The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed 'as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case.' A warning in general terms is insufficient. The attention of the jury 'should be drawn to any weaknesses in the identification evidence.' Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it. It follows that the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence."

Although that case was a visual identification case we are satisfied that such approach is equally, if not more applicable, in a case concerning voice identification.

The only evidence of the voice identification before the learned trial judge was that of Sam Nuares who testified that: "**It was the voice of Tom Tupun**". The witness said he recognized the appellant's voice because he had lived with him in the same village and had been in school with him since class 1. He knew and recognized the voice of his childhood playmate and knew the appellant's local language. He had also heard the same voice immediately before the order to kill the deceased woman also calling for the deceased's husband or to be assaulted. On that occasion also he recognised the voice as being that of the appellant.

Whilst we recognize that the judgment in this case did not expressly identify the limitations of the circumstances in which Sam Nuares identified and recognized the appellant's voice, we



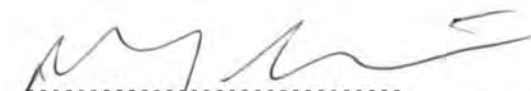
are nevertheless satisfied from the following factors that the conviction of the appellant was **not** thereby rendered unsafe.

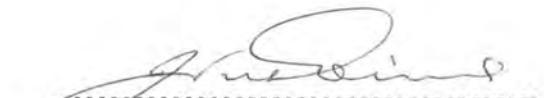
Accepting, as State Counsel does, that the voice identification or recognition occurred in the context of a melee or commotion this was nevertheless a case where the identification witness was, on the evidence, "**very familiar with the voice before hearing it at the crime**"; The witness had heard the same voice issuing a not dissimilar command moments earlier, so he was not relying solely on the few words of incitement immediately before the deceased woman was attacked.

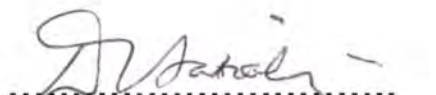
Moreover, there is evidence, accepted by the trial judge, that the appellant had earlier declared his intention to confront the deceased woman, had actually done so, and was present at the scene a short time before the fatal attack on the deceased woman. The nature of the actual words used "**... kill the old lady**" when viewed against an increasingly confrontational and dangerous situation of almost certain impending violence is a factor or circumstance which we are satisfied would have concentrated the attention of all actors who were present at the scene.

The appeal is accordingly dismissed.

Dated at Port Vila, this 7th day of November 2003.


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Hon. J. Bruce Robertson J.


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Hon. John von Doussa J.


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Hon. Daniel V. Fatiaki J.


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Hon. Oliver A. Saksak J.


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