

PUBLIC PROSECUTOR = v = SILAS NOE

JERRY NIATU

IAWAK FELIX

JUDGMENT

On the 5th December 1988 the three accused and one other (which the Court acquitted and discharged) appeared before me charged that on the 14th August, 1988, they assaulted one Selwyn Leo, which assault resulted in his death.

The three accused pleaded not guilty and were represented by Mr Sacsac for the first accused, Mr Rissen for the second accused and Miss Bothmann for the third accused.

The background facts were these:

Silas Noe, (hereinafter called the first accused), Jerry Niatu, (hereinafter called the second accused), and Iawak Felix, (hereinafter called the third accused) were all at the Seven Star Night Club on the 13th/14th August 1988.

The first to arrive was accused 1 and the evidence against him by George Bolenga, John Godfrey, Frank Rasu, Willie Roy and Moses Iapasei was that accused 1 came up to Selwyn Leo (hereinafter called the deceased) and two friends of his. Accused 1 was introduced and part of the evidence was that he, although having the appearance of having consumed some liquor, was looking for more. Accused 1 was given half a tin of Fosters by one of the three he approached and the deceased was heard to say that if he wanted more beer he could purchase it at the bar. Accused 1 left and returned again and stated that the deceased swore at him. This was denied by the two friends who were with the deceased who never heard such taking place. Accused 1 left and joined some men a distance away and again returned, this time without his shirt as if he wanted to fight the deceased. Accused 1 attempted to punch the deceased but a man named George Lugao who was with the deceased and his friends stopped him.

Accused 2 then arrived on the scene in a truck and was approached by Accused 1 who spoke to him for some time and then went and joined other men.

Then Accused 3 arrived and slapped a young boy who fell down but that incident seemingly was a mistake and an apology was made and accepted. Accused 3 then went to the group where the deceased and friends were standing, he spoke to the deceased who pushed him away with his fist, then Accused 2 and others ran towards the deceased. The result of the actions of the accused persons was that the deceased obviously was afraid and ran away, chased by the three accused and some others. After running some distance, the evidence was that Accused 1 who was chasing the deceased, kicked his leg with the result he fell on the tarred road. Kicks were thrown at the head of the deceased which one witness stated rolled from side to side. The evidence was that the deceased fell on his chest. Attempts were made to ascertain whether the deceased put out his hands to save the fall to no avail. Only one witness said he fell on his chest and it was not possible on his head. The evidence of witness Willie Roy was that Accused 1 was

the first person to kick the deceased on the head and that he was only kicking his head but that he was not wearing shoes. He went so far as to say that Accused 1 did not give him a chance. It was this witness who stated that the head of the deceased moved from side to side as a result of the kicks to his head.

The evidence when the assault finished was that the deceased was lifted into a car, brought to the police station where a report was made and then to the hospital where he was examined by the dresser, Nesam Serel, about 2 a.m. on Sunday 14th August 1988. He examined him and said he had a small scratch over one of his eyebrows. He had no other bruises on the body. He phoned the mobile police to come and collect him.

Melchoir Basile in his statement said the deceased came to his house about 10.30, Sunday 14th August with cuts on his head and body. He asked the deceased how it happened but he did not reply, that he slept for a while at his house and then returned to his single quarters. This witness then told the duty officer to have the deceased taken to hospital.

Ruth Lerr, a staff nurse at the hospital, in a statement offered by the Prosecution stated that she saw some Mobile Force officers with their friend at the hospital at 10.45 on the 14th August. That she took observations which were included in the report of the dresser, Nesam. That she remembered the deceased talking to them and saying he wanted to go to the toilet and later said he was hungry and was given tea and a piece of bread. That he only drank the tea and then said he wanted to go back to camp. She wanted him to stay but he insisted and she allowed him to return to camp, telling his friends that if his condition got worse to bring him back.

George Willie, in his statement said that the deceased did not turn up for work on Monday morning, so he went to his house and had to force an entry. He saw the deceased covered with a blanket, he tried to wake him up. He put some clothes on the deceased and took him to the hospital. That the deceased's eyes were shut all the time and he had saliva running from the mouth. He left him at the hospital.

The deceased was examined by Dr Dumas whose report is Exhibit 1. He saw the deceased on the 15th August in the afternoon. That he had a slight abrasion above the right eyebrow which evidence confirmed that of the dresser when he first saw the deceased.

The Doctor produced 3 X ray photos showing fractures of the skull which, he stated, resulted from pressure on one part of the skull. That the right eye was swollen, being covered with fluid. The right eye was protruding - blood pushing it forward. Such was proof there was bleeding at the base of the skull. Later blood was coming from the right ear canal, i.e. blood of the fracture finding its way out of the ear. He produced the death certificate, Exhibit 3, which contended that death was due to brain injury. He found the injuries to be most serious on the left side, fracture above the left ear and on the right side, above the ear and one going up to the middle of the skull. According to him the cause of the fracture could have been a blunt instrument, not a fist blow, it could have been a heavy foot or by the head coming into contact with the road. If the deceased was hit and kicked and his head came into contact with the road, that would be consistent with his injuries.

In cross examination, he stated that the five fractures could have been caused by a single blow to the head or several blows.

From the evidence of the dresser at the hospital, nurses and deceased's colleagues and of course, the Doctor, I was completely satisfied that the injuries which resulted in the death of the man known as Selwyn, resulted

from the attack on him on the night of the 13th/14th August 1988 near the Seven Star Night Club. I informed the assessors of this opinion of mine in my summing up to them.

Three cautioned statements were admitted into evidence made by the three accused. They are Exhibits 5 (Accused 1's statement), Exhibit 6 (Accused 3's statement), and Exhibit 7 (Accused 2's statement). The English translation of each is in the record and marked Exhibit 5 (a), Exhibit 6 (a) and Exhibit 7 (a) respectfully. No objection was taken by either of the three counsel to the admission of the said statements.

The policewoman officer, Inspector Ruth, was subjected to a severe cross examination and denied that she had in any way offered any inducement, threats, or promises to the accused to make the statements. She further denied that she put words into their mouth. She merely stated that they told her what happened, that she recorded it and read it back to them, that they agreed it was correct and signed the statements. I was impressed with this witness. She answered all questions put to her in a clear manner. I watched her carefully and accepted her evidence as the truth.

In his cautioned statement, Accused 1 stated that he had consumed a lot of drink on the night in question. That he saw his uncle and other men telling stories and that he heard one of them say something like "You fucked your mother" and thought he was swearing at him. That he cried and then he saw Accused 2 and went to him telling him that a person swore at him and that Accused 2 said "Go and hit him". He said he was prevented for a short time from chasing the deceased, by his uncle but managed to escape and that he joined in kicking the deceased. He kicked him at least three times, first with the right foot and then with the left foot, so that his legs were sore but he did not wear shoes. He ended his statement by saying he was the person who started the problem in the death of the deceased.

Accused 2, in his cautioned statement, mentioned that he went to Seven Star Night Club and saw Accused 1 there who told him that he and some of his friends were bashing up a man. Later he said "that he saw Accused 1 and his friends bashing up the boy and that he did throw a punch at him but did not know which part of Selwyn's body his fist landed on. After that the boys chased Selwyn to the main road and that he did join with the boys chasing him to the main road".

John Godfrey said that he saw the deceased push Accused 3 away with his fist; then Accused 2 and others ran towards Accused 3 and the deceased. He said he got the impression that as Accused 2 was running, he was going to fight and that he then saw Accused 2 and Accused 3 and others chasing the deceased. It seems reasonable for me to infer that Accused 2 was taking part in the assault.

Accused 3, in his statement, said "Accused 1 and his friends started fighting the deceased. The deceased ran and banged into me. I fell down and was angry. I got up and joined the others to chase the deceased to the main road. I clearly saw Accused 1 kick the deceased's leg which made him fall down. I remembered I kicked him once on his right leg above his knee".

As there were no witnesses called by the defence I summed up to the assessors who were Mr Edwin Arthur, Director of Survey Department and Mr Joe Kalo, former Director of Public Service, as per my notes attached.

It is clear to me that when the deceased broke free and ran towards the road, he was attacked by the three accused persons and was actually kicked on the leg with the result he fell to the ground. Eventually, he was beaten into submission, his head turning from side to side from the kicks. There is adequate evidence that Accused 1 kicked the head of the

deceased at least three times and that the other two accused hit the deceased at least once. An autopsy revealed that the deceased had sustained four fractures of the skull causing brain injuries which brought about his death. It is my opinion on the evidence that the three accused were party to an agreement that the deceased was to be assaulted and that he was assaulted in pursuance of the agreement and died. It would, in the circumstances, be a joint attack on the deceased in that Accused 2 and 3 were not only intentionally encouraging the assault on the deceased, but rendering active assistance in the assault.

The assessors, educated men, were referred to sections 30 to 33 of the Penal Code which clearly set out the position of a person who aids, counsels, or procures the commission of a criminal offence. Section 31 states that "A co-offender shall mean a person who, in agreement with another, takes part with him in the commission of an offence". Sections 32 and 33 deal with punishment of accomplices and co-offenders and foreseeable consequences. The words in those sections are so explicit that I did not consider that the assessors had to have them further explained. They were intelligent assessors and I certainly did not consider a lesson on interpretation had to be given to them.

I summed up to the assessors before lunch and after lunch the assessors retired and in twenty minutes reached a verdict of guilty which I agreed with and convicted the three.

In considering sentence, I was of the opinion that the three accused took part in the attack on the deceased who made every effort to escape but that Accused 1 clearly was the main attacker. Secondly, that the deceased was defenceless, lying on the ground. Thirdly, the three accused, from the circumstantial evidence, shared a common intent to assault the deceased. Fourthly, Accused 1 kicked the deceased at least 3 times about the head and that Accused 2 and Accused 3 hit the deceased at least once and fifthly, the victim of the attack died.

In the case of *In R v Silver and Another* (1982) 4 Cr. App. R (5) 48, Watkins L.J. in dealing with a case involving a fight following a new year party at a night club which resulted in the death of a youth, had this to say (at p. 50):

"Nowadays, at football grounds, in clubs, in pubs and on the street, no sooner do young men start to fight and one of them goes to the floor, than one or more of the others put in the boot. When that happens and the offenders are apprehended, it is incumbent upon the Courts to inflict serious punishment to match the seriousness of such conduct. Any sentence passed must have in built a measure of deterrence."

In this case, as Accused 1 was the main culprit and he admitted he started the assault in his statement, I imposed a sentence of six years imprisonment. On the other two, I considered a sentence of 12 months imprisonment on each accused was appropriate in all the circumstances of the case. I therefore sentenced each to 12 months imprisonment.

Dated at Vila this 9<sup>th</sup> day of December, 1988.



Frederick G. Cooke

CHIEF JUSTICE