

**PUBLIC PROSECUTOR -v- GRAHAM KENOHO
ERNEST KENOHO**

Coram: Mr Justice Oliver Saksak
Mr Willie Daniel for the Public Prosecutor
Mr Raynold Liu for the Defendants

JUDGMENT

PRELIMINARY MATTERS

The Defendants were committed for plea to this Court by the Senior Magistrate on 13th January, 1997. Both Defendants were remanded in custody since 30th December, 1996. Both Defendants have been charged with Intentional Homicide under Section 106(a) of the Penal Code Act [CAP 135]. On 2nd September, 1997 both Defendants pleaded not guilty to the charge and the case proceeded to full trial for two days being 26th and 29th September 1997.

FACTS

Briefly the facts of the case were that on the early hours of 30th December 1996 at Blacksands Area, Port-Vila, Efate the Defendants allegedly assaulted one Jacob Ermanang (the deceased) causing his death.

AMENDMENT OF CHARGE

In total the Prosecution had about 17 witnesses. Of these, only 7 witnesses were called by Mr Willie Daniel. Mr Daniel applied to amend the particulars of the charge changing the date of offence from 29th to 30th December 1996. There was no objection by Mr Liu and the change was made.

The charge was replead to the Defendants with the amendment. The Defendants maintained their pleas of not-guilty.

SECTION 81 - CRIMINAL PROCEDURE CODE [CAP 136]

The Statement of Presumption of Innocence as provided for under Section 81 of the Criminal Procedure Code Act [CAP 136] was read aloud and explained to the Defendants and recorded accordingly.

PROSECUTION EVIDENCE

The first Prosecution witness was Harry Godden. He told the Court that he attended a fundraising activity at Blacksands Area. The activity started at about 7 o'clock in the evening and closed at about 1 o'clock in the early hours of 30th December 1997. He said that he saw both Defendants and joined them to attend a marriage dance. He said that a row developed and that someone had fought Graham. He told the Court that they had washed Graham with water who regained consciousness. He told the Court that his friends ran up the road and that he followed them when he reached them, the witness said he saw that the fight was over. He said that he held Graham's hand but that he could not stop Graham as he was so cross. He told the Court that he stood and watched Graham assault the deceased until one Hosea came to remove the body of the deceased. He said he heard the deceased breathing. He felt sorry for him but left him and went away.

In cross-examination he told the Court that the Defendants were drunk. He himself was drunk on kava and tusker beer. He admitted that he could not recall what really happened because he was drunk. He told the Court that there were many people but he did not know the exact number because it was dark. On one occasion he told the Court he thought there were 10 people around. He told the Court that he also saw Ernest fight the deceased. He said he saw him pull a punch but that there were many boys around. He told the Court those boys also threw punches at the deceased as it was dark he did not see very well. He could not remember who stood close to him although he said that 2 or 3 boys were there. He could remember one Avock, Robert and John Poita with him who washed Graham with cold water.

The second Prosecution witness was Avock Josiah. He told the Court that on the evening of 29th December 1996 he drank some kava and went to attend a wedding dance. He said that Graham had poured some wine into his mouth on the road. He told the Court that he heard an argument on the road. When he went to have a look he saw Graham and took him to another person's compound and washed him with water. This took about 5 minutes. He told the Court that Graham felt better and he ran to the road. The witness followed. At about 8/9 metres the witness said he saw Ernest and Graham assaulting the deceased. On cross-examination he said the place was dark. Asked if anyone else was there he told the Court that only the two Defendants were there. Immediately after that statement the witness said Hosea was there who stopped the fight. At that point in time the witness left the scene. He admitted in cross-examination having been affected by kava. Further he said that when he reached the scene the fight was just about over. When asked by Mr Liu as to which Defendant fought first, the witness said he did not know. He said that there was much noise about. When asked whether it was dark and he could not see well the witness admitted this was so. He said there were many people around and could not say who they were. He said he only knew one John Siba but reiterated that there was a mixture of people about at that time. Asked if he saw any other people fighting, the witness said he could not say.

Asked who was with him when he washed Graham with water, the witness said Ernest and John.

The third Prosecution witness was Sam Malachi. He told the Court that he was at home on that date. His brother-in-law informed him about a marriage dance and he went to have a look. Another brother-in-law called Daniel met him and they drank some hot stuff (Baggatti/Rum). He said he drank 4 glasses. He told the Court about a fight on the main road. He said he came to the road he saw someone hit Graham who fell down. The assailant was one Sam. He said he saw some boys help Graham. He said he heard Ernest calling to his opponents to stop and fight. He said the boys ran after the opponents and he saw Ernest and Graham fighting. He said he heard the Defendants' sister called Dorothy speak to the Defendants to stop fighting. He said he was standing about 8/9 metres away. He said that other people were there but he told the Court that only the Defendants were fighting. He told the court that a brother of the Defendants came around and took the deceased's body and put him into Nakat's yard. This was Hosea. Then he told the Court that he was afraid and he went home. He told the Court that the deceased was punched and kicked with shoes. The deceased was only a young boy. Asked whether he was close by or a long way away, the witness said he stood a long way. In cross-examination he said that one John Poita was there and others but he could not remember any names. He said there were not too many people. He confirmed he was drunk with 4 glasses of beer. Asked if he heard anyone calling out to stop fight, the witness answered in the negative. He confirmed that he stood at about 8-9 metres away. He said Dorothy stood at 20-25 metres away. He confirmed that other men were around during the alleged fighting. He confirmed seeing John and another person. Asked if he saw anyone else fighting he said that only the Defendants were. He said that Graham threw his hand first and then Ernest followed. He could not say for how long the fight lasted. He said he did not know how many times Graham fought the deceased. Then he confirmed that he did not see Ernest fight. In re-examination the witness confirmed he drank kava and hot stuff. From the Bench, I asked the witness whether he knew of Avock Josiah and Harry Godden and the witness answered in the negative.

The fourth Prosecution witness was John Siba. He told the Court that he had been drinking kava with the Defendants. That he and his wife went to the fundraising activity at about 6 o'clock in the evening where he bought a bottle of white wine and he returned to drink the wine with the Defendants and one Leo. Then they went back for cigarettes and another bottle of wine and then later went to the marriage dance. He told the Court that there were many people at the place of dancing. He confirmed he was with the two Defendants. They danced a while after which they came to the main road and a fight started. They were chased and he hid himself in the compound of a Tongariki man. He said he saw Graham being kicked. He told the Court that someone brought water and they washed Graham with it. He said John Poita went to fetch Hosea. He said that Graham also ran and went ahead of him. He said he was walking and that when he reached the scene the fight was over. He confirmed many people were about and that he saw the deceased at about and that he saw the deceased at about 12 metres away. He said John Poita and Avock were on the road with Dorothy and the two Defendants standing by the deceased. He returned to his house after the incident. There was no cross-examination by Mr Liu.

The fifth Prosecution witness was Iatika Mesak. He told the Court that he was with Hosea and Jack. He saw that the deceased was dead and that it was Hosea who had put the body of the deceased by the road side.

There was no cross-examination by Mr Liu. From the Bench I asked the witness if he saw the fight and he answered in the negative.

The sixth Prosecution witness was George Kapalu. He told the Court that he heard noises in his sleep and was later awakened by it. It was close to his house. He went outside and heard people fighting. He knew this by the sounds of punching and groaning. It sounded like someone was being kicked with shoes. He said he went to have a look through the hibiscus hedges from about 5-6 metres away. He said he heard a woman's voice trying to stop the fight. He said he heard Graham saying that he would kill the boy and then burn some houses. He told the Court that he knew what was being said as the woman spoke in a local vernacular he knew. He said he came to the road and saw one man come and take the body of the deceased and left it on the side of the road. This man returned later and threw the deceased's body into his compound. He heard breathing like the boy was choking on the throat. He was standing at about 5-6 metres away. He said he knew the boy was in trouble and he came to the main road to find transport. When he returned there was no more breathing. It was about 4.30 or 4.45am of 30th December 1996. He said some people came around and later ambulance came and took the body away.

In cross-examination by Mr Liu, the witness said he could not tell who was fighting. He confirmed he only heard noises. He said he did not see because of the hibiscus hedges which blocked his view. In re-examination he said he saw movement of 2 or 3 people fighting and 2 were attempting to stop the fight.

The seventh Prosecution witness was Dr Basil McNamara a consultant surgeon with the Vanuatu Government. He said that the boy was dead before coming to hospital. He told the Court that he had seen two parallelled linear abrasions above the right eyebrow. There were no other injuries on the limb, chest abdomen and back of the deceased. He found that his observations were consistent with a fractured base of the skull and presumed that there was cerebral contusion. His Medical Report was tendered as PW7-Exhibit 1. There was no cross-examination by Mr Liu.

DEFENCE EVIDENCE

No application was made by Mr Liu regarding a no-case submission. Mr Liu informed the Court that the Defendants had chosen to give evidence and that they had one witness to call. I applied Section 88 of the Criminal Procedure Code Act [CAP.136] and proceeded to hear the Defendants.

Graham Kenoho told the Court in his defence that during the day he had gone to garden at Teuma returning later. After shower some boys came to see him. These were John and Masing. They went to a kava bar to have some kava. This was close to their house at Blacksands. This happened at about 6.30 pm. He said he drunk 3 shells of kava. Then John offered them a bottle of wine and they drank it together. He said that his brother Ernest joined them later. After drinking Graham and his friends went down

the road to attend the marriage dance. He said that they were many people coming to the party. They took half of the wine they were drinking. He said that at the entrance to the dancing place a group of boys from North Tanna approached them in fighting mood. He told the Court about how he was trying to stop the fight when someone kicked him with boots and he fell to the ground unconscious. In his words he was "blackout". He said that someone broke his right hand. He told the Court that when he came back to this senses he saw Ernest and Hosea helping him to go to Hospital. He said he was examined in hospital and asked to return on the following Monday for an xray examination. He returned home to Blacksands that morning but felt sore and returned to hospital. He produced his Medical Report as Exhibit D1. In cross-examination Graham denied that he went to hospital after fighting the deceased.

He confirmed that John and Masing were with him. He confirmed that he saw Avock but denied that he fought the deceased as he himself was assaulted and he fell unconscious. He could not remember who fought him.

Ernest Kenoho told the Court in his defence that that on 29th November 1996 he was at home at Blacksands. At about 6.30 pm he went to a kava bar belonging to one August from Pentecost and had 4 shells of kava. He said he went by himself. Later he returned to the house and saw Graham, Masing and John. They were drinking wine and he joined them. Later on the four of them went to a dance. On the road a group of boys from North Tanna approached them and wanted to fight. Graham went to stop them but someone in that group fought Graham who fell to the ground. He said the boys chased them and they separated. He said he thought about Graham and returned to find out what happened to him. He said that when he returned he followed his friends to the compound of a Tongariki man with Graham who were washing him with water. He said these man were from Tongariki who were trying to help Graham. He said he went to call Jack his big brother, a taxi-driver who came and took Graham to hospital for treatment. He said that he went to hospital with Graham and later returned to Blacksands where CID police officers arrested him.

In cross-examination the Defendant confirmed that there were many people at the place of the wedding dance. He confirmed that he was not drunk, that he knew what he was doing. He denied that it was he who allegedly invited the fight from the groups from North Tanna. He confirmed that after this fight they brought Graham straight away to hospital.

Jack Kenoho is Graham and Ernest's brother. He is a taxi/bus-driver. He told the Court that he was sleeping that night. He did not go to the wedding dance. He told the Court that someone woke him up. It was his brother Ernest. He said when he came out he saw Graham sleeping on a mat made from coconut leaves. He said that Ernest, Hosea and himself carried Graham into the taxi and went off with him to hospital. He told the Court that after Graham was treated he took him back to the house at Blacksands and return to work.

In cross-examination by M Daniel the witness confirmed that he did not see how the fight happened.

FINAL ADDRESSES

A) - PROSECUTION

Mr Daniel submitted that there was sufficient evidence that there is a case made out against the Defendants. He argued that there can be no mystery as to who was responsible for the death of a young boy on 30th December 1996. He submitted that it was not in issue as to who caused the assault. He further submitted that the medical report shows that the cause of death was consistent with the nature of the assault. He referred to Section 106(a) of the Penal Code Act which reads :

“(1) No person shall by any unlawful act or omission intentionally cause the death of another person.

*Penalty : (a) if the homicide is not premeditated,
imprisonment for 20 years ;*

*(b) if the homicide is premeditated, imprisonment
for life.*

(2) For the purpose of subsection (1), premeditation consists of a decision made before the Act to make a homicidal attack on a particular person or on any person who may be found or encountered.”

Mr Daniel submitted that the Defendants had no intention until Graham was assaulted after which they developed the intent to commit assault to cause death. Mr Daniel referred to Archbold 1997 Edition which defines murder as involving three elements being sound mind, discretion and intent. Mr Daniel referred to the case of R. v. Moloney [1985]1All ER 1025 which is authority for saying that a judge ought to leave the matter of intent to the jury to assess having regard to the facts of the case. He submitted that here the assault was an act of revenge. He submitted that the actions of the Defendants were unlawful and were done without any lawful excuse. He further submitted that the assault could not in any way have been provoked and any defence of provocation was not sustainable. Further Mr Daniel submitted that the Defendants were of sound mind and could not claim a defence of intoxication under Section 21 of the Penal Code Act. Mr Daniel submitted further that the Defendants had set up an alibi because their witness was their friend. But despite this the Defendants' friends did see them commit the assault before they went to the hospital that morning. On evidence before the Court Mr Daniel submitted that there could not be any doubt that the Defendants had caused the death of the deceased known as Jacob Ermanang.

B) - DEFENCE

Mr Liu for the Defendants submitted that the Prosecution did not discharge the onus of proof upon them. He argued that Prosecution had failed to prove an intention to kill and that Prosecution had failed to prove that the death was the result of the assault. He argued that the Court should be satisfied that the evidence was strong to leave no doubt as to the guilt of the Defendants. He argued that the 7 Prosecution witnesses, 3 were drunk either with kava or

alcohol. 2 witnesses did not see what happened. The 3 main witnesses for the Prosecution gave inconsistent evidence. Mr Liu summarised all the Prosecution witnesses' evidence showing the inconsistencies. Because of such inconsistencies Mr Liu submitted that the Prosecution had not satisfied the Court beyond reasonable doubt that the Defendants were guilty.

FINDING AND VERDICT

As the trier of both fact and law my primary duty was first to consider the facts presented in evidence. I am required to satisfy myself beyond all reasonable doubt that the defendants, from the facts presented in evidence were guilty of intentional homicide. From the facts I find many inconsistencies. I find that there were many people involved in the fights. I find that most facts related to the first fight in which Graham was injured. I find that the evidence relating to the second fight (if there was one) is distorted. I am not even satisfied that there was a second fight. I find that the evidence of the 3 main witnesses needed further corroboration. I find that one useful witness would have been one Hosea Kenoho. Unfortunately the Prosecution did not call him to give evidence and no reason was given. I find that the Prosecution lacked all the facts to show the Court beyond all reasonable doubt that it was the Defendants who had assaulted the deceased causing his death. I find that the evidence shows that many people were involved and in the circumstances it would be unsafe to convict the Defendants. With these findings I reach the verdict of not guilty and accordingly order that the Defendants be forthwith released from custody in accordance with Section 188(1) of the Criminal Procedure Code Act.

Having made those findings it is unnecessary to consider the law.

DATED at Port -Vila, this 29th day of September, 1997

SEALED : 3rd October, 1997

BY THE COURT

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OLIVER A. SAKSAK
Judge