

CORRECTION TO AN ARTICLE BY MIRANDA FORSYTH IN THE JOURNAL OF SOUTH PACIFIC LAW

KEN AVERRE*

Miranda Forsyth's article "Duress as a criminal defence in Solomon Islands" (volume 11(2)) criticises both counsel and the judges involved in a number of important cases in Solomon Islands. All of the counsel for the accused involved in those cases were lawyers from the Solomon Islands Office of the Public Solicitor.

The author's criticism states that counsel (presumably for the accused) failed to raise significant issues before the courts. It would appear that the author's research was limited to reading the judgments of the High Court and the Court of Appeal, which – as is often the case in Solomon Islands – do not exhaustively replicate and analyse all submissions made by counsel at trial. This is an understandable practice given the number, length and complexity of the criminal trials which the Solomon Islands courts have been hearing in the past three years. The author appears to have assumed that if an issue is not mentioned in the judgment, it was not raised by counsel in the course of the trial. This is not correct and the transcripts and extensive written and oral submissions of counsel for the accused in the cases mentioned show that the issues identified by the author were in fact raised on behalf of the accused.

The author asserts that counsel failed to raise the significant issue of whether the defence of duress is available for the crime of murder. A perusal of the court record for the *Oeta* case (one of the four cases discussed by the author) would have shown that this issue was the subject of extensive analysis and discussion in defence counsels' closing submissions. Particular care was taken to provide the court with information about the nature of the defence in a range of jurisdictions around the world, demonstrating that duress was more readily available for the offence of murder in civil law countries and much less available in common law jurisdictions. The court was referred to the decision in *Erdomevic*¹ from the International Criminal Tribunal for the Former Yugoslavia. There was considerable discussion as to the English authorities. While the High Court did not examine these arguments in detail in its written judgment, the judgment implicitly demonstrates the High Court's consideration of these submissions and its acceptance that the defence of duress is available for the crime of murder.

The fact that counsel did not raise this issue in the subsequent cases concerning duress is hardly surprising – and in no ways a failure of counsel – given the High Court's acceptance in *Oeta* of the availability of the defence of duress for murder cases, a position which was unchallenged by the Director of Public Prosecutions (DPP). (An appeal initially lodged by the DPP to the Court of Appeal in the *Oeta* case was

* Kenneth Hall Averre is the Public Solicitor for Solomon Islands.

¹ *Prosecutor v. Drazen Erdemovic Appeals Chamber Judgment IT-96-22* [1997] ICTY 3 (7 October 1997).

subsequently abandoned.) Indeed the author's discussion of the cases clearly recognizes the High Court's acceptance of duress for murder in *Oeta*, and its subsequent but more restricted application of the defence in later cases. As such, it is unclear as to why the author makes the criticism she does. It is very relevant to note that in the subsequent decisions of the Court of Appeal, there was no suggestion that the High Court's interpretation of section 16 as applying to the offence of murder required any modification. Is the author suggesting the issue needs to be re-addressed and that the very eminent judges of the Court of Appeal (one of whom formerly sat on the House of Lords) somehow failed to pick up an error as basic as the availability of the defence? Clearly not, from her conclusion.

The author also asserts that counsel failed to raise the issue of the relevance of the age of a defendant when considering the effect of a threat on a defendant. Again, the court record for the *Kelly* case (the only case in which age was a major relevant factor) shows that in fact this issue was the subject of extensive analysis and discussion in defence counsel's submissions, both at trial and on appeal.

It should also be noted that a lack of evidence about the effect of a threat on a young accused is not necessarily the failure of counsel but a sad reflection on the availability of resources in jurisdictions such as the Solomon Islands. In view of the lack of qualified personnel in Solomon Islands to provide a psychiatric evaluation of the defendant, efforts were made to obtain a psychiatric evaluation by an Australian psychiatrist. However, the funding request made by the Office of the Public Solicitor to the Regional Assistance Mission to Solomon Islands (RAMSI) Law and Justice Sector Institutional Strengthening Program (which provides significant support in both terms of personnel, infrastructure and finance to the law and justice sector) was refused. It is hardly surprising that the family of the young accused – people living in a remote village of the Weather Coast of Guadalcanal – were not in a position to pay the expenses of a professional psychiatrist. The Office of the Public Solicitor, which is funded by the Solomon Islands Government, is also not allocated funds to meet such expenditure although it has on one occasion recently managed to secure government funding for a psychiatric report.²

Unfortunately the author's discussion about the *Kelly* case fails to mention the defendant's pre-trial application for a stay of proceedings on the basis of an abuse of process.³ This application focused closely on the age of the accused both at the time of the commission of the offence and also in regard to the trial. That application failed as did a subsequent bail application following a lengthy period of pre-trial detention. Detailed and all encompassing submissions were made in respect of this accused and through the determination of many persons involved in the matter he was released after serving some three years and two months in prison. The criticisms which the author

² The process took something in the region of 18 months.

³ The application was heard on the 25th and 27th May 2005 by His Lordship Mr Justice Naqiolevu and his ruling was handed down on the 12th July 2005. The learned judge dismissed the application for the permanent stay of proceedings. *Regina v K* [2005] SBHC 80 <http://www.paclii.org>.

makes in relation to this case could be more usefully directed to the decision to prosecute in the first place.

Finally, the author asserts that counsel failed to raise the issue of the relevance of a blood relationship between an accused and the victim. Again this criticism is unfounded and is, given that the issue was relevant in only one of the cases referred to (*Hese*), over-stated. The court transcript and counsel's closing submissions, both at trial and on appeal, show that the relevance of the blood relationship was a crucial part of the defence case. The fact that the trial judge failed to place any reliance on it, or in fact mention it, was a decision for him which was open to be revisited by the Court of Appeal.

The author's assertions of failure by counsel are of serious concern, particularly when it appears that rudimentary research was not undertaken by the author. The materials required for the author's research were readily available through the court files and/or enquiries of the relevant officers responsible for the cases. The author's identification of "failures" by counsel misleads the reader into thinking that these "failures" occurred in all of the cases in which duress has been run in the Solomon Islands. This is simply not the case. The author's unsupported criticisms run the risk of undermining the faith and confidence of the people of Solomon Islands in the integrity and ability of the lawyers in the Public Solicitors Office and the justice system in Solomon Islands as a whole.

As a lawyer with significant experience in the Pacific, I encourage efforts to develop and refine the emerging jurisprudence of Pacific island countries. Academic discussion and analysis is obviously an important part of this development. It is imperative that this discussion be based on thorough and rigorous research so that observations and criticisms are valid and able to be supported. Are these not the fundamental skills that we expect of the many students who are aiming to pursue professional roles after their legal studies at the University of the South Pacific?