

IN THE HIGH COURT OF KIRIBATI) HIGH COURT CRIMINAL CASE No. 65 OF 2004
CRIMINAL JURISDICTION)
HELD AT BETIO)
REPUBLIC OF KIRIBATI)

THE REPUBLIC
VS
TIOTI TOROMON
TOKANTETAAKE KATIA

FOR THE REPUBLIC: MR DAVID LAMBOURNE, SOLICITOR GENERAL WITH
MS EWEATA MAATA

~~FOR BOTH ACCUSED: MR BANUERA BERINA~~

DATE OF HEARING: 21 & 22 FEBRUARY 2005

J U D G M E N T

Last October something was seriously wrong on Butaritari. I do not know the cause of the trouble but it resulted in the tragic events which have led to Tioti Toromon and Tokantetaake Katia being charged with murder:-

On or about the 27th day of October 2004 at Temanokunuea, Butaritari in the Republic of Kiribati, Tioti Toromon and Tokantetaake Katia murdered Tooni Timon.

The old men of Butaritari decided that all or some or one of the inhabitants of the village of Temanokunuea should be punished. I have used the words "all or some or one" because the oral evidence from the two accused is that Barentarawa was the only target: his house was to be stoned. However the old men had directed (again according to the accused) that one young man from each household in their villages, Tanimaiaki and Tanimainiku - and it seems other villages as well - was to muster, armed with some weapon, at the airfield and go to Temanokunuea on the evening of Wednesday

27th October. Some hundreds answered the call. It is beyond belief that so many would be assembled to throw stones at one house. I conclude that the aim (which was pretty well carried out) was to attack the village and do harm to the village and its inhabitants to punish them for some real or fancied bad conduct.

Acknowledging the strong authority of the unimwane in Kiribati society, the more so on outer islands, and having heard the evidence of the two accused (whose evidence I accept on most matters except their own parts in the death of Tooni Timon) I conclude the accused acted under duress:

“duress is a defence to all crimes except murder”
(Archbold, 2003 edition para 17-119)

Section 16 of the *Penal Code*:

16. A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury do not excuse any offence.

I emphasize the last words “threats of future injury do not excuse any offence”. Any threats against Tioti and Tokantetaake were of punishment later; they had suffered no injury beforehand.

Duress was not argued as a defence.

The facts not in dispute are that on the morning of the 27th October the Butaritari unimwane gave a direction that the young men should assemble, armed, at the airfield to go to Temanokunuea. About 9 o'clock in the evening the men went on trucks - about 40 to a truck with three unimwane - as far as Watikano; they got off the trucks and walked the remaining three or four kilometers to Temanokunuea. Once there the mob - that is what it was - set about stoning and burning houses: terrifying the inhabitants. Tooni Timon protested. The mob set upon him. He was stoned to death.

I come now to the evidence of the three prosecution eye witnesses.

The first was Nei Tabwakea Timon, aged 20, the sister of the deceased. She and others including her mother Nei Baabo and Nej Kaabo were at her elder brother's house. It was being burnt. The mob was 100 or more. Nei

Tabwakea was terrified. She with her infant and the others went next door, to Nei Kaboo's house.

Were very frightened. They chased after my brother Tooni: he had come from the main road. I saw from inside Kaboo's house - Tokantetaake and Tioti. I had known them before; they usually come to our place. Caught up my brother under verandah of Nei Kaboo's house. I went out as my child crying - to take him to maneaba. Saw brother being punched up, hit. Only two I recognised from maybe 10+ punching him, others standing around. Others helping Tokantetaake. I saw Tokantetaake punching my brother: he was using a stick. Tioti same thing - saw him hit Tooni holding something in his hand, torch.

Didn't hear anything said. Brother not making any sound: when no one around went up to him - over seawall - saw them throw him over. They all went to Nakareke's house. (Examination in chief).

Known Tioti and Tokantetaake long time: could not have mistaken them. I saw them throw him over. (Cross examination)

Nei Baabo Burantemwanoku, 55, is the mother of the victim and of Nei Tabwakea:-

We were in Burantarawa's house being burnt. Nei Tabwakea and Kaboo and Burantarawa inside. They came, threw stones, set fire to house. They set fire not to house we were in but to bigger house. The owner told us "All run away". When on fire we all ran away. I went to Nei Kaboo's house - the next house. Tooni came along. Talking to men standing by main road "You have burnt my brother-in-law's house down". "Chase after him". Can't recognise them. Chased him until Nei Kaboo's house: he reached verandah - only recognised Tioti and Tokantetaake as throwing stones at him. I came outside, went beside my son said "I'm begging you all. Don't recognise my son. He's heavily injured". Tooni was under Kaboo's house. No one answered. My son said to me "Baaboo my head is injured". I replied "You are a man". The group was very near. Tooni inside house and some were within 5m. He did not enter: he was under verandah. I then let him out of the house as windows of Nei Kaboo's house were being broken. Told him to go outside as throwing did not stop. Let your uncles and cousins kill you. They were still throwing stones at him when he was under the verandah. The only two I recognised were the first to come on him and punch him and the rest of the people came. Tokantetaake was using a torch and Tioti a torch and a stone Then I heard words "Throw him over seawall". Didn't recognise voice. My eye and forehead being punched, my chest also hit. I left my son and went by Nei Kaboo on cement.

When no one around I saw him then. Saw but didn't recognise (who threw him over). He was dead. (Examination in chief).

I saw them with my eyes and it's in my statement. They wrote it down. Threw stones at him and hit with a torch: that's Tioti and Tokantetaake Son did not run out and jump over seawall. He was beaten to death. He didn't jump: thrown over. They pushed me - no idea it was Tokantetaake who dragged me away (to safety) (Cross examination).

Nei Kaboo Botara, 49, was drinking hot tea with others at Burantarawa's house:-

Between 2000 and 2100 50+ came: almost 10 came with a torch. Shone torch. Told Barentarawa to look for own safety I ran to house - each to look for own safety. My house very near - 7 or 8m. These mendidn't catch Barentarawa - let him into my brick house and sat on cement. Barantarawa's house on fire Watching to see if fire jump to my house. Young boy walking on main road, Ten Tauwai. He spoke to the crowd "You are setting fire". They laughed "You have no love/mercy". Tauwai went to place on fire. Tooni walked along main road. "Oh! So you are really setting fire". They shone a torch on him. "Chase after him and kill him" a voice said: not familiar with it. First beat him up at house on fire. Tooni said "One at a time" while beating him up. Tooni freed himself, ran away: running to lagoon side: crowd started coming. Crowd headed for my house. Recognised Tokantetaake shouting to check my bathroom in case anyone hiding inside: saw him. Known him all time I've been on Butaritari. "He's not here. Damage house" - Tokantetaake. "And you guys. You are standing around. Are we the only ones to carry out the decision made?" - Tokantetaake. They attacked again: some to my brick house. I recognised Kaibeti and Namboiaki. My verandah being hit - seemed like stones. "Tooni underneath verandah". I said "I'm a female: my house being damaged. "Kaboo, Let Tooni come out of your house". I went with Nei Baaboo begging them. Baaboo's son already severely injured: when he was beaten up - I saw it from where I was sitting.

After Tooni had gone outside - voice saying to work to carry out decision made - Beating up continued - I sat on cement. Only heard sounds. "Is he dead? Kill him properly. Throw him over seawall". Saw him lying dead. Body thrown over my seawall: like a dog lying dead.

Saw Tokantetaake amongst crowd: he had torch. (Examination in chief).

Some wearing things over head or eyes. Tokantetaake was there in crowd: nothing over his head or eyes Over the seawall, on the beach, in the sea. Like a dog being thrown away. I did see it with my

own eyes when he was lying dead Saw him carrying a torch. Only Tokantetaake I recognised. (Cross examination).

The final prosecution witness was Nei Bunita Sefanaia (also known as Bunita Tioti) the medical assistant. She examined the body of Tooni Timon at 7 o'clock the next morning. He had severe wounds on the back of his head: his skull was cracked. The injuries caused his death.

Having heard the three ladies and the two accused I have to consider whether I can accept the prosecution evidence beyond reasonable doubt. If accepted it is sufficient to prove the charge. I am confident I should accept it. I believe the witnesses were telling the truth, giving the facts as they remember them. Their recollections pretty well coincide.

Mr Berina cross examined each closely and put to them their statements given the next day to the police. The statements (those of Nei Tabwakea and Nei Baaboo are exhibited) are not as full as their evidence. In his final address Mr Berina emphasised what he said were discrepancies between statements and evidence. For that reason Mr Berina argued, I should not accept the ladies' oral evidence as reliable beyond reasonable doubt.

The Solicitor General rebutted Mr Berina's arguments by reminding me (it is not in evidence but is common knowledge of which I take judicial notice) that the next day the police had their hands full trying to calm the situation on Butaritari. Not a good atmosphere in which to take statements.

I also make a general observation regarding police statements, after long experience both at the Bar and on the Bench. Police officers are not necessarily experts at taking statements: mistakes are made: there are omissions. Just because a statement has been taken by a police officer it is not necessarily reliable and accurate.

I accept beyond reasonable doubt the truth and accuracy of the three ladies' evidence.

But there is more. This is identification evidence. Mistakes in identification may be made. I refer to what I said in the *Republic vs Temeauqa Berata & Ors* (Criminal Case 30/1999) at pages 8-9). The situation is similar in this case. Tioti and Tokantetaake were identified by Nei Tabwakea and Nei Baaboo: Tokantetaake was identified by Nei Kaabo. They had known each accused for a long time. Each accused acknowledged, when he gave evidence, that he was wearing nothing over his face or head: others were wearing some disguise. This would have made identification easier and more certain. No witness was shaken in cross examination.

I may have been prepared to accept identification by one alone of the witnesses. Tokantetaake was identified by three witnesses and Tioti by two: identification by three and two is overwhelming. I find beyond reasonable doubt that each accused was engaged in the activities described by the prosecution witnesses.

Both accused gave evidence. Each admitted that he was at Temanokunuea village that night. Each denied taking part in the attacks on Tooni which caused his death. Tioti Toromon:-

Number of old and young men to Temanokunuea village. Purpose - decision of old men. Had to go to attend that village: if one does not comply then some thing would apply to him. Only one house - Barentarawa's - to throw stones at it. I went under decision of unimwane - no choice. Tooni (appeared) didn't see him arrive. Not true I chased him. Didn't take part in beating Tooni up. Beaten on the shoreline. We were on top of seawall. Went to see his beating up. Watch. When left (my village) carried a stick - about 70cm/2': told by our old men. Didn't use it. Threw stones at house attacked on way back - Nakareke's. didn't throw stones at Kaboo's house. (Examination in chief).

Everyone had some weapon - my stick from coconut, smooth: war cub - made from coconut - light Had nothing to do with attack on Tooni. Went to top of seawall to see him being beaten. Watching scene - heard "He's dead" - ran away Knew Tabwakea and Baaboo before this. No problems with them. (Cross examination).

Tokantetaake Katia:-

Chairman of Butaritari unimwane delivered decision to unimwane of our village. I was afraid of their decision so I went along with it - if I didn't stones at my house Get off at Watikano village, walk - three trucks going back and forth. I stayed at back of group. Fire - saw fire being lit from back: I was 80m away. No idea where coming from. I didn't bring anything with me.

Tooni - I didn't chase him. I didn't shout to look for him in back room. I didn't (urge people on). I didn't take part in stoning etc. Tooni.

Didn't see Tooni being attacked under house. Baaboo not attacked but hurt: saw her injury. I came and took her away. I ran away (to save being attacked). Didn't cause Tooni's death. (Examination in chief).

Carrying nothing. I complied with decision of unimwane Led Baabo to corner of house and I ran away Witnesses mistaken to say I had stick or torch. (Cross examination).

The attack on Temwanokunuea village was a joint enterprise by some hundreds of men at the direction of the unimwane of Butaritari. The two accused were part of the joint enterprise. I refer to what I said about joint enterprise in Temeauaa's case (at pages 7-8). It was approved by the Court of Appeal (Court of Appeal No. 6/2000).

Section 22 of the Penal Code:-

When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

This was a joint enterprise. Tioti and Tokantetaake were on their own admissions two among many who were part of it. The aim was to do harm in Temwanokunuea village. It was an aim against the law. Inevitably it was violent and in the course of the violence Tooni was killed. It does not matter who threw the stones which killed him, the accused being part of the joint enterprise which led to his death are equally responsible with others for it.

The Solicitor General submitted that the accused were guilty on both grounds - they were identified taking part in the attack on Tooni by witnesses and they were part of a joint enterprise on their own admissions. I accept the Solicitor General's submissions.

There is only one thing I add. Even though approved by the Court of Appeal the Solicitor General expressed a reservation about the completeness of my exposition of joint enterprise in Temeauaa's case. He reminded me that section 22 of the *Penal Code* is the same as section 8 of the *Queensland Criminal Code*. He referred to the commentary on section 8 in *Carter's Criminal Law of Queensland* (10th edition) (at pages 56-58).

On a charge of murder against those engaged in a joint enterprise, if the actual perpetrator has gone beyond the scope of the original joint enterprise, formed an intention to kill and killed then another partner in the joint enterprise may be convicted not of murder but of manslaughter (*R v Jervis* (1993) 1 Qd. R 643).

I have considered the facts in this case to see whether the perpetrators went beyond the scope of the original joint enterprise. There is no

evidence at all that they did go beyond the original purpose. Applying either a subjective or objective test the scope of the original purpose of this enterprise must have had as a probable consequence - and the accused must have known it - that someone could be killed. Of course, apart from joint enterprise, they were identified as being at the forefront of the attack on Tooni. The evidence is too strongly against the accused for there to be any reasonable doubt. Not only were they engaged in the joint enterprise but they took an active part in the stoning which killed Tooni.

I would very much have preferred to have been able to find them guilty of manslaughter. That would have given some discretion in fixing penalty. Finding them guilty of murder the only penalty is life imprisonment. Duress is no defence to a charge of murder but the Court should be able to take it into account on penalty. As the law stands the Court can impose only one penalty for murder, life imprisonment.

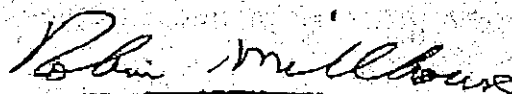
I suggest most strongly a change in the law. The Court should, as it does in many jurisdictions, have the duty of fixing for all offences not only the head sentence but also the non-parole period, the period which must elapse before a prisoner may be considered for release. The Parole Board would still have the decision as to when, after the expiration of the non-parole period, the prisoner should be released and on what terms.

Not all crimes of murder are the same, committed in the same circumstances or with the same degree of brutality; nor are the circumstances of murderers the same. Each crime of murder is unique. This should be reflected in length of the period of detention before release may be considered.

I have expressed these views before. I repeat them and earnestly commend them to the Government and to Parliament.

As it is I find both Tioti Toromon and Tokantetaake Katia guilty of murder and sentence each to life imprisonment.

Dated the 28th day of February 2005



THE HON ROBIN MILLHOUSE QC
Chief Justice