

REGINA -V- JOHN TANA, AUGUSTINE NAMONA, HOMAS TALIKANGA AND NAPHTILI NAPIABO

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.).

Criminal Case No. 175 of 2002

Date of Hearing: 25th, 26th, 27th, 28th August & 1st, 2nd, 3rd, 4th, September, 2003 at Lata.
Date of Judgment: 5th September 2003 at Lata.

Mr S. Balea for the Crown
Mr T. Kako for the Accused

JUDGMENT

Kabui, J. The four accused, namely, John Tana, Augustine Namona, Thomas Talikanga and Naphthali Napiabo were charged on 3rd July 2002 with the murder of Andrew Niedo (the deceased) near Bamoi village on 11th October 2001 in the Temotu Province. At the conclusion of the Prosecution case, I recorded a finding of not guilty against Thomas Talikanga and Naphthali Napiabo on the basis of there being no evidence against them for the murder of the deceased. I acquitted them accordingly. The other two remaining accused, namely, John Tana and Augustine Namona, did have a case to answer at the conclusion of the Prosecution case. The accused each gave evidence on oath and called witnesses for the defence. I must first of all remind myself that the Prosecution bears the burden of proof beyond reasonable doubt in the trial of the accused.

The undisputed facts.

Nifa village and Bamoi village are two separate villages some distance apart on Lord Howe Island off the coast of Santa Cruz Island. Each village is populated by Reef Islanders all of whom had lived in the village of Lipe in the Reef Islands in the past. They had left Reef Islands and are now living on the said Lord Howe Island. They are interrelated by blood but of course they do have their differences over the years. The cause of death to the deceased was a gun-shot wound on the left side of the body of the deceased. The gun-shot wound consisted of tiny multiple penetrated wounds. There were also a few scattered tiny penetrated wounds around the center of the affected area of the body of the deceased. Blood had been oozing from the tiny multiple wounds up until the arrival of the Police officers from Lata and a nurse. The medical opinion was that the gun-shot wound was located at a place above the positions of the left kidney, the spleen and part of the intestine. The continuous oozing of blood was therefore an indication of severe internal haemorrhage in the abdominal cavity. Death was said to have been caused by cardiac arrest triggered by the impact of the gun-shot causing severe internal haemorrhage.

The lack of arrest of the accused etc. and its consequence.

I wish to deal first with two issues raised by Defence Counsel, Mr. Kako, before I proceed to discuss the evidence in this case. Mr. Kako, in his submission on a no case to answer at the close of the Prosecution case on 1st September 2003, challenged the lawfulness of the trial because he argued that all the accused had not been arrested and interviewed by the Police. Counsel cited section 10

of the Criminal Procedure Code Act (Cap.26) ("the CPC") and section 5(1)(f) and (2) of the Constitution. In my ruling the next day, I rejected that argument on the basis that it was inappropriate to raise it under section 269(1) of the CPC which allows a no case to answer submission to be made at the close of the Prosecution case. When the Defence opened its case on 2nd September 2003, Mr. Kako called John Tana (accused No. 1) to give evidence in his own defence. In his evidence, he said that all the accused including himself had not been arrested and interviewed by the Police. He said they were simply collected from Bamoi village and brought to Lata and then transferred to Honiara. He said they spent 2 days in custody in the Lata Police Station before they were taken to Honiara. The Defence also called Samson Maloaki (DW5) who said that Jacob Laule (PW2) had reason to settle old scores with the members of the family of the deceased. He also said that the Lata Police Armoury had been emptied of its content implying that guns and ammunition used to be kept there had found their way into Bamoi village. This suspicion had arisen because the then Provincial Police Commander for Temotu Province was the co-author of a letter dated 8th July 2001 addressed to DW1, which contained a demand for compensation from the people from Nila for swearing and showing disrespect to certain persons from Bamoi village. PW2 was therefore implicated in the murder of the deceased and putting up a deadline for the people of Nila to pay that compensation or else they would be killed and their houses and properties destroyed. Before adjournment on 3rd September 2003, I pointed to Counsel for the Crown, Mr. Balea, the existence of section 272 of the CPC and the need to rebut any new matters raised by the defence. Counsel said that he would deal with any matters of such nature in his final submissions at the conclusion of the defence case. However, in opening his final address yesterday, Counsel decided to call evidence of rebuttal in respect of new matters raised by the defence. Mr. Kako resisted this move on the basis that the Prosecution had had enough time to rebut evidence and to do so at the eleventh hour was not acceptable. He asked me to reject the application by Mr. Balea on that ground. I accepted Mr. Kako's objection and ruled against Mr. Balea's application. It was obvious that Mr. Balea was not too sure about what to do and was holding up the progress of the trial unnecessarily. However, Mr. Balea quickly pointed out that arrest under section 10 of the CPC were of two kinds, the first being that in making an arrest, the police officer must actually touch the person to be arrested and second being to confine the body of the person arrested. He argued that all the accused had been confined in the Lata Police Station for 2 days and that being so was lawful arrest of all the accused under the latter kind described in section 10 of the CPC. Mr. Kako however argued that whilst that might be so, there was no evidence to suggest that all the accused had been informed by the Police in the language that they understood of the reasons for their arrest. He argued that non-compliance with section 5(1)(f) as read with (2) of the Constitution was so serious that it would render the trial of the accused a mistrial or a miscarriage of justice. I do not agree. Any breach of any constitutional rights under Part 2 of the Constitution can be vindicated under section 18 of the Constitution by claiming damages against the Police. I do not think a breach of section 5(1)(f) as read with section (2) of the Constitution is intended to halt any criminal trial of any accused being tried for the offence of murder such as this trial. Section 5 of the Constitution protects personal freedom of the individual from unlawful arrest and detention by the Police on behalf of the State. The Police as the law enforcement agency of the State must also follow the law in respecting the freedom of the individual and that is why the Police are expected to do the right thing. They must follow the correct procedure in effecting arrest and placing an arrested person in custody. However, the freedom of the individual from arrest and detention by the Police as a fundamental right is no bar to the prosecution of any person who has committed a crime. Any person who feels that his or her personal freedom has been breached by the Police is entitled to claim damages under section 18 of the Constitution. The accused are at liberty to do that but cannot use such a breach as a sword to halt the wheels of justice rolling against them for the offence of murder as alleged by the Prosecution. The information filed against them by the

DPP on 3rd July 2002 is a valid one under section 238 of the CPC. I reject the argument that the trial of the accused be treated as a mistrial or miscarriage of justice as alleged by Mr. Kako due to non-compliance with section 5 of the Constitution. The next issue raised by Mr. Kako was that the information filed by the DPP puts Bamoi village as being the place the murder took place whereas the scene of the murder is some distance ahead of Bamoi village. Section 251 of the CPC governs the amendment of information duly filed. Subsection 1 of this section demands that any objection to formal defects on the face of the information must be taken immediately after the information has been read over to the accused and not later. In this case, the scene of the murder is the road leading into Bamoi village. That part of the road does not seem to have a name and so it is difficult to be exact in drawing up the information. The nearest place to the scene of the murder is Bamoi village. It is now too late for the Court to intervene and amend the information without someone giving a name to the scene of the murder. I do not think any miscarriage of justice would be caused by maintaining the same information in its present form. That issue as an objection under section 251 of the CPC is also rejected.

Prosecution's role in a criminal trial.

I do not know what happened in this case at the committal stage. I have however noticed that there is no record of a Police interview with the accused, if any, included in the depositions so that the information about arrest and a Police interview can be seen in the depositions. This omission was the cause of the challenge against the trial being labelled a mistrial or miscarriage of justice. I have also noticed the omission of photographs in the depositions although photographs were referred to in George Henry Bonnie's statement (PW9) to the Police. I would have wanted to visit the scene of the murder but for the potential risk of a fight breaking up between the parties at the scene. Photographs of the general nature of the vegetation around the scene of the murder would have been useful evidence about the general outlook of the area around the scene of the murder. A witness statement by Lionel Laibei was also excluded from the depositions perhaps on the basis that the witness statement could be compromised at the trial by the Lionel Laibei due to some form of intimidation by the accused. The statement by Lionel Laibei became known to the Court when Mr. Balea used it to cross-examine John Tana, accused No.1, so as to discredit the accused's evidence. The defence did not call Lionel Laibei as a defence witness so that his previous statement to the Police could be used by the Prosecution to reveal inconsistencies between his evidence in chief and his previous statement to the Police. This rule of practice had been misapplied by the Prosecution and Mr. Balea took the point and immediately stopped after I queried his line of questioning of John Tana. DW4 had made a statement to the Police previously which was obviously favourable to the defence. This statement had been withheld by the Prosecution without the knowledge of Defence Counsel. This statement came to the knowledge of the Court when Mr. Balea referred to it when cross-examining DW4. I raised with Counsel the issue of disclosure of statements taken by the Police which were favourable to the defence in the context of the Prosecution being fair to the defence in a criminal trial. As a reminder I cited from Emmins on CRIMINAL PROCEDURE, by JOHN SPRACK, Fifth Edition, 1992 these words-

"... Counsel for the prosecution is not in court to win the case at all costs. Of course, he should present the prosecution evidence as persuasively as possible, and cross-examine the defence witnesses with all proper vigour and guile. Nevertheless, as Avory J. put it in *R. v. Banks* [1916] 2 K.B. 621, prosecuting counsel 'ought not to struggle for the verdict against the prisoner, but they ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice'..."

I will now turn to the evidence in this case.

The probative value of the evidence.

The evidence adduced by the Prosecution is in direct conflict with the evidence adduced by the defence. The evidence given for the defence came from both accused. John Tana, accused No.1, denied that he had been in possession of any gun on the day the deceased was shot dead. The implication clearly is that it could not have been him who shot and killed the deceased on the day of the murder. The other accused, Augustine Namona, accused No.2, denied urging John Tana to shoot to kill anyone. They both denied being near the spot where the deceased had been shot and killed. The Prosecution witnesses, on the other hand, were equally adamant that what they said in evidence could not be anything else but what they heard and what they saw. The credibility of the witnesses therefore becomes a crucial factor in determining the guilt of the accused. That is to say, which of the witnesses on both sides had told the truth during the trial.

The scene of the murder.

The spot where the deceased was shot and killed is near a road junction from which the road to Bamoi village runs in the north-west direction. The deceased was on his way back to Bamoi village when he was shot and killed. The area south-east of the road junction is an area for gardening with general bush vegetation. John Vaike of Bamoi village has a coconut plantation further down from the gardening area. He also has a copra-drier in his coconut plantation. The land occupied by the coconut plantation appears to be disputed by Naphthali Napiabo, the brother of John Tana.

The confrontation of the parties near John Vaike's coconut plantation a coincidence?

PW2 is Jacob Laula of Bamoi village. He said that on the day of the murder, the deceased asked him and others to accompany him and leave Bamoi village to search for his missing pig in and around John Vaike's coconut plantation. He said the others were Morris Bolam (PW3), Titus Tavera (No.2) (PW4), John Leinga (PW13), and John Nokali. He said he agreed but suggested that they take with them a gun for security purpose as there was likely to be tension arising between them and the Nila villagers following destruction of their gardens and properties by the Nila villagers recently. He said, PW3 brought a 303 rifle with seven bullets and he took possession of the rifle and the bullets. He said when they got to John Vaike's plantation, he heard banging sound coming from the direction of John Vaike's plantation. He said PW3 was sent to investigate. He said PW3 reported seeing Thomas Tolikanga putting up a notice on the wall of John Vaike's copra-drier and Naphthali Napiabo looking on whilst that was being done. He said he heard voices and people talking and then a conch-shell sound followed by whistle sound and shouting coming towards them from the direction of John Vaike's direction. He said the noise was closing up on them and he fired his 303 rifle in the air to frighten them off. He said the deceased was with him that time. He said the noise kept coming towards them and he again fired the second time at a different location and began to retreat. He said he later fired the third time and then sat down. He said he had only one bullet left after the third time he fired his rifle. PW3 confirmed the evidence of PW2. He said the accused's groups were shooting at them with stones, arrows and spears as they were closing up on them. PW 4's evidence is also consistent with the evidence of PWs 2 and 3. PWs 2, 3, 4, and 13 are from the same village of Bamoi. PWs 6, 7, 8 and 12 are from Nibanga Noi, another village, past Nila village. Each of the PWs from Nibanga Noi village described in various ways what in effect was a preparation by the accused to fight the people of Bamoi village on the day of the murder. In this respect, PW6's evidence was a little more detailed. He said that there was a

meeting at Nila village of the accused and other men in the village. He said he sat with them. He said heard that they were going to fight the Bamoi people. He said those at that meeting were holding spears, bows and arrows and sling-shots. He said heard Augustine Namona, accused No.2 saying that anyone who refused to go with them would fuck his own mother. He said he also heard John Tana said that he would kill anyone from Bamoi village who was trying to be smart and the body of that person would be eaten by the crabs. The accused of course denied the Prosecution case. The version of the events described by both accused is of course different from what was said in evidence by PWs 6, 7, 8 and 12. The version given by both accused was that Chief Mede Sam from Bibe village arrived at the Nila Extension School with a letter from the Headmaster of Bibe School addressed to Michael Medai (DW1), the Deputy Headmaster of the Nila Extension School. The content of that letter was the message that that day was the deadline date put for the Nila people after whom they would be killed and their houses burnt down and their properties destroyed. The letter advised that the Nila Extension School was to be closed and the teachers teaching there to be re-posted elsewhere. The message was then communicated to the accused and other men in the village. Napthali Napiabo was in fact the Chairman of the Nila School Committee. As they were discussing the message from the Headmaster of Bibe School, the wife of Thomas Tolikanga, Ellen Sibwe rushed up to them in tears and reported that PW2 had fired at them in the garden and one of them, Mary Lagiou might have already been killed. She said the other two women were still in the garden. The accused and other men quickly got up and went towards the direction of the garden. When they got to the garden, the two women were not hurt but Mary Lagiou had just regained consciousness after she had suffered shock caused by the sound of the shot fired by PW2. When they got to John Vaike's coconut plantation, they were fired upon by PWs 2, 3 and 4. PW2 had a 303 rifle and PWs 3 and 4 had a shot-gun each. PWs 2, 3, and 4 fired several times but no one was hurt and eventually the accused's group retreated and returned to their village. The defence called 5 witnesses to support the case for the defence. DW1 did confirm the deadline date told to them in the letter sent to him by his colleague from Bibe School through Chief, Mede Sam. DW1 also confirmed Ellen Sibwe's report to the accused at Nila village in the morning part of that day. DW2 confirmed that she was one of the three women being shot at by PW2. She said she was the one who was left behind to attend to Mary Lagiou who had been unconscious out of shock. She said PW2 shot at them when they reached DW1's garden a location some distance ahead of John Vaike's coconut plantation and before one reaches the scene of the murder. The deadline and the need to close the Nila Extension School had been the advice from the Principal Education Officer in Lata to the Headmaster of the Bibe Primary School. DW5 revealed that the deadline was the work of PW2 and his group from Bamoi village. I have therefore come to the conclusion that the confrontation had been caused by PW2 and his group from Bamoi village. This is evident from his shooting at the three women from Nila village in the morning and later his advice to the deceased that they needed to carry a gun in case there was an attack by the Nila people that same day. Although he did not mention the word 'attack' to the deceased and others with him, he himself was obviously expecting that possibility from the Nila people and sure enough it came when they got to John Vaike's plantation. If anything was to be said about PW2, I would say he was the ring-leader of the Bamoi group. He was the man on the ground that brought about the confrontation between the two groups. It is possible that the deceased, PWs 3, 4 and 13 did not know about the deadline set for the Nila people. Only PW2 would have known about it as made plain in DW5's evidence. It is obviously the case that PW2 had gone down in the direction of Nila village in the early part of the morning and fired at the Nila women in the garden. The report of that shooting to the accused and others infuriated them and they responded in the way they did that day. The confrontation was not coincidental as far as PW2 and the accused were concerned. PW2 would have expected a response from the people from Nila to his provocative conduct towards the three Nila women in the early part of that day.

Where the truth lies.

I believe DW2 when she said that she and her two companions had been shot at by PW2 in the early part of that morning. I believe that Ellen Sibwe did report that shooting to the accused at Nila village. I believe that one of the three women had suffered shock as a result of the firing of a gun by PW2. I believe that Ellen Sibwe was crying when she arrived and made the report to the accused and other men in Nila village. I believe that the news of the shooting had angered the accused and wanted to respond to that threat to members of their community. It is only natural for them to be angry at the way PW2 had treated their women-folks. For them, the shooting at their women by PW2 on that very day of the deadline was the confirmation of that fact, a threat to which they must respond. And they did. I do not however believe both accused when each said in evidence that they got up and went towards the garden to confirm the report made by Ellen Sibwe. I do not believe them when each said that when got to John Vaike's coconut plantation, they were fired at by PWs 2, 3 and 4 and eventually they retreated and went home. I do not believe John Tana when he said that he only held a bush knife in his hands. Instead, I believe the evidence given by PWs 6, 7 and 8 about the events that were taking at Nila village in the morning part of that day. DW1 confirmed the evidence of PW 6 that DW1 had cancelled working in his garden that day due to the events unfolding at Nila village. He said a man by the name of Bamete blew the conch-shell and John Ningalo wrote the notice. It is not disputed that the same notice was put up by Thomas Tolikanga on the wall of John Vaike's copra-drier. PW3 confirmed that stones, arrows and spears were being shot at them as they were retreating before the deceased was shot dead. He said that when the men stood up at the end of the meeting at Nila village, John Tana, accused No.1, went back to his house. When he came back, his left hand was over his left side supporting something that was inside his cut shirt and cut trousers that he was wearing that day. He said a little later, John Tana lifted his shirt and he saw a gun hidden inside his shirt and extending downwards inside his trousers in a vertical position. He said John Tana threatened again to kill anyone from Bamoi village who tried to be smart with him and the body of that person would be eaten by crabs. PW7 too said he saw John Tana with a gun hidden in his shirt and trousers. He said the colour of the gun was brown. PW8 too saw John Tana with a gun hidden as described by PWs 6 and 7. He said John Tana also threatened to kill anyone from Bamoi village who tried to be smart and his body would be eaten by crabs. He said John Tana boasted that he only had a few cartridges and he would not waste them. PW12 said he saw John Tana had on him an object that looked like a gun. He said he asked John Tana what it was and the reply was not direct but the implication was that it was a gun. He said John Tana again threatened that he would kill anyone from Bamoi village who was trying to be smart and that person's body would be eaten by crabs. PWs 6, 7, 8 and 12 all said the gun was short in length. PW6 estimated its length to be 22 inches long. PW2 said that he saw John Tana holding a gun near the scene of the murder. He confirmed that John Tana wore a cut shirt and cut trousers. He said John Tana was darting across an open space when he saw John Tana holding a gun. He said the gun looked like a shot-gun. He said that he saw John Tana after he heard two shot-gun sounds from the direction of the accused's group. He said that after he fired the first shot, the deceased retreated from where he stood. He said he did not see the deceased again until the deceased had been shot dead. PW3 also saw John Tana held a gun in his hand in a forward position and darting. He confirmed that John Tana was wearing a cut shirt and cut trousers at that time. He said he retreated and told the others that John Tana had a gun. On being cross-examined by Mr. Kako, he said that he saw John Tana's side elevation because the place is clear being a garden area. He said he saw John Tana once. He said he retreated and then ran back towards Bamoi village. He said he nearly fell over the body of the deceased as he was already lying on the ground. PW4 said he also saw John Tana in the area near the scene of the murder. He said

John Tana was holding a shot-gun aiming it at PW2 and later at PW4 but both took cover in good time. It was not disputed that PWs 2 and 4 later discovered the dead body of the deceased and helped to carry it back to Bamoi village. PW13 was at the scene of the murder. He said that he was frightened and began to run back to Bamoi village. He said he met the deceased who told him to tell PW2 not to kill anyone. He said he told the deceased that PW2 was firing in the air. He said as he turned to run, his eyes caught John Tana aiming his gun in their direction. He said he instinctively dived to the ground and John Tana fired. He said that when he got up he heard the deceased saying that he was in a bad state and was struggling to die. He said that he and the deceased were only a metre apart when John Tana aimed his gun in their direction and fired. He said John Tana was about 10 metres from them. PW13 was an eye witness to the murder. I do not have any reason not to believe him.

The role played by Augustine Namona in the murder.

Again, there is direct conflict of evidence in this regard. However, I prefer the evidence of the Crown witnesses who gave evidence against this accused. This being the case, sections 21 and 22 of the Penal Code Act (Cap. 7), ('the Penal Code.') become relevant for consideration. Section 21 states-

"..When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-

- (a) every person who actually does the act or makes the omission which constitute the offence;
 - (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
 - (c) every person who aids and abets another person in committing the offence;
 - (d) any person who counsels or procures any other person to commit the offence..."
- The remaining part of this section is not relevant and so it is omitted.

Section 22 states-

"... When two 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..."

I do not think section 22 arises for consideration in this case because there is no evidence of common intention being in issue here. Whilst PWs 6, 7, 8 and 12 spoke of a meeting of the accused and others taking place at Nila village on 11th October 2001, nothing was agreed than a general wish to fight the Bamoi people. Uttering strong words, swearing and holding traditional weapons were to be expected in the context of the general atmosphere in Nila village at that time. In the village context, the possession of traditional weapons is a normal part of village life. The unlawful use of them against another person is what is not permitted by the law. From the evidence of PWs 6, 7, 8 and 12, it is clear that the accused did not move out of Nila village in a single unit with an agreed

plan to attack the Bamoi people. The accused with others simply moved out quickly in the direction of Bamoi village. PWs 6, 7, 8, and 12 were also moving in the same direction of the accused but DW1's garden was their final destination. PW6 said that he went along because Augustine Namona had sworn that anyone who did not go with them would fuck his own mother. The main persons who took the lead in the Nila camp were John Tana, Augustine Namona, Thomas Toikanga, Naphali Napiabo, John Niganlo and Bamete. John Ninaglo wrote the notice that was put on the wall of John Vaike's copra-drier and Bamete was the man who blew the conch-shell at Nila village and must be the one during the confrontation. The fact that those mentioned above might have used their weapons against PW2's group, the fact is that no one was injured. That is, if there was anything to suggest a common purpose, the confrontation was the fight agreed at the Nila meeting. No one was injured on both sides. The next point is whether or not Augustine Namona had been aiding and abetting in the murder of the deceased or in any way making it possible for John Tana to kill the deceased within the meaning of section 21 of the Penal Code. I find that there is no evidence to show that Augustine Namona had assisted John Tana in any way to cause the death of the deceased. The shouting by him to shoot and kill was not being directed at John Tana nor to anyone else in the same group. Rather, it was a general shouting expressing the wish for anyone in their group to hurt anyone from the Bamoi people with their traditional weapons. John Tana, though was part of the Nila group was rather on his own. He followed the others from Nila village a little later. This was why he was able to meet and speak to PWs 6, 7, 8 and 12. He seemed to have moved away and ahead of the main Nila group after PW2 fired his first shot in the air but towards the Nila group. In fact, John Tana needed no assistance from anyone. He had gun giving him confidence to act alone. After assessing the evidence against Augustine Namona, I find that he contributed no assistance to John Tana in the murder of the deceased. There is no evidence to show that he provided the gun or cartridges to John Tana or distracted the deceased so as to enable John Tana to shoot the deceased. He was not even standing near or with John Tana when John Tana shot the deceased. To hang the words, 've ve nanubo' meaning, 'shoot to kill' in the Reef Islands language, on his neck and conclude that he assisted John Tana in the murder of the deceased is not and cannot be proof beyond reasonable doubt to find him guilty of murder and to convict him on that basis. It would have been different if the Nila camp were him and John Tana alone on a mission to attack the Bamoi people and he uttered the same words in the presence or within hearing distance of John Tana as he was aiming his gun at the deceased. This is not the case here. I find him not guilty of the murder of the deceased and I acquit him accordingly. He is free to leave the court room a free man. I will now deal with John Tana.

The law on murder and the evidence.

Section 200 of the Penal Code states-

"... Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder and shall be sentenced to imprisonment for life.

The term 'malice aforethought' is defined in section 2002 of the Penal Code. That section states-

"... Malice aforethought may be expressed or implied and express malice shall be deemed to be established by evidence proving either of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated-

- (a) an intention to cause death of or grievous bodily harm to any person, whether such person is the person actually killed or not; or
- (b) knowledge that the act which caused death will probably cause death of, or grievous bodily harm to, some person whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused..."

So, the term 'malice aforethought' is a state of mind expressed or implied and exists before or at the same time the act or omission occurs which causes death to occur. The term can also mean a state of mind where the act that caused death is not intentional in the first place but by its nature was reckless knowingly or that the act was done with disregard to the risk of death occurring not caring whether death would occur or not or wishing that death would not occur. Where then does the evidence place John Tana in this case? PWs 6, 7, 8 and 12 each saw John Tana with a gun. PWs 6 and 7 saw this at Nila village. PWs 8 and 12 saw it again after John Tana left Nila village making his way in the direction of Bomai village. PWs 2, 3 and 4 saw it again near the scene of the murder. PW 13 saw it when John Tana fired it to kill the deceased. He had threatened in the presence of PWs 6, that he would kill anyone from Bamoi village who was trying to be smart and the body of that person would be eaten by crabs. He uttered the same threat against PW 2 in the presence of PW8. He also boasted in the presence of PW8 that he had only a few cartridges and would not waste them, meaning that he would kill at the first opportunity. PW 13 was the eye witness to the murder of the deceased. There can be no better evidence than the evidence of an eye witness such as PW 13. When I asked why PW 13 should be lying in Court, John Tana could not say why PW 13 should be lying except to say that PW 13 was somewhat related to PW 2. He simply said he did not know how the deceased met his death. He never really attacked the credibility of PW 13 or the other PWs. I have taken into account the fact that the parties in this trial are members of the same line that migrated from Reef Islands years ago. They are therefore interrelated in many ways. I have also taken into account the implication in DW1's evidence that PW2 did have a reason to settle old scores with the family of the deceased. I do not believe DW1's evidence to that extent. Whilst there may be slight inconsistencies in the evidence adduced by the PWs regarding the number of shots fired on both sides from various positions, such is of no significance in determining the guilt of the accused, John Tana. The evidence of PW 13 being the eye witness to the murder is beyond reproach. It is consistent with the evidence of the other PWs that John Tana was in possession of a gun that day threatening to kill someone from Bomai village and proceeding for that purpose towards Bomai village and executing his intention by shooting dead the deceased. The murder weapon has never been found. Whilst there is some allegation by DW1 that the Bamoi people did have guns supplied to them by the Provincial Police Commander for the Temotu Province who himself comes from that village, it is not disputed that John Tana had been an employee of the Tobacco Company Ltd. in Honiara. He himself did say in evidence that he was at Nila village on holiday at the relevant time. It is therefore not impossible that the gun used by John Tana could well have been smuggled in from Honiara either by himself or someone else. DW1 described PW 2 as the ring-leader of the Bamoi group claiming compensation from the Nila people but be that as it may, PW 2 had made the fatal mistake of provoking the Nila people by firing at their womenfolk in the early part of the morning and having responded, John Tana killed the deceased. I observed John Tana in the witness-box. He appears to be of aggressive and forceful character. He was capable of doing what he did. The fact that the murder weapon has not been found is regrettable but the fact that the deceased had died from multiple and tiny gun-shot wounds

cannot be denied. It is common knowledge in Solomon Islands that a gun that fires a cartridge packed with tiny pellets is a shot-gun or a pigeon-gun as opposed to a .22 rifle. I take judicial notice of this fact. These weapons are not military type but all the same, they are lethal if used against another person. The observation reached by PW 10 when he carried out the external examination of the dead body the next day was that the multiple tiny wounds on the left side part of the body were consistent with pellets from a shot-gun. The person with a shot-gun that day of the murder was John Tana. The evidence by the PWs clearly points to him. Although I accept that PW 2 might have used another type of gun to scare off the Nila women in the morning, he clearly had a .303 rifle which he fired three times during the confrontation of the parties near the scene of the murder. I do not believe John Tana when he said that PWs 2, 3 and 4 each had a gun and were firing at them near John Vaike's copra-drier. I believe PW 2 and 3 that the deceased left them after PW 2 fired the first warning shot. The deceased was obviously concerned that he told PW 13 to tell PW 2 not to kill anyone. Unfortunately for him, he became the victim of the confrontation between the parties. The .303 rifle that PW2 had was a high power weapon with a long range capability. PW 2 could have killed anyone from Nila village that day if he really meant to do so. As a matter of fact, he fired in the air to frighten off the Nila group during the confrontation. In fact, PWs 2, 3, and 4 and the deceased were retreating from the Nila group when the deceased met his death. Also, PW 2 could have killed any of the Nila women in the early part of the morning but he did not. It might well be that PW 2 was a trouble maker from Bamoi village but clearly he did not wish to kill anyone from Nila that day. He did not even go after the Nila people after he discovered that the deceased had been shot dead by John Tana. Obviously, the Nila people were on the offensive and the Bamoi people were retreating towards Bamoi village. John Tana had shot the deceased who was clearly unarmed. He had the intent to do so within the meaning of the term "malice aforethought" as defined in section 202 of the Penal Code. I find him guilty of the murder of the deceased and convict him of that offence accordingly. The penalty for murder is imprisonment for life. The prisoner had been on bail since he was taken by the Police and kept in custody for sometime. The prisoner is to serve a term of imprisonment for life in Her Majesty's Prison at Rove. The prisoner is at liberty to appeal my finding and conviction.

F.O. Kabui,
Judge