

REGINA -V- WILLIE WANEBURI

High Court of Solomon Islands
(Palmer CJ)

Criminal Case No. 321-04

Date of Hearing: 3rd - 5th, 8th, 9th and 11th November 2004

Date of Judgment: 18th November 2004

S. Cooper for the Prosecution

K. Anderson (Ms) for the Defendant

Palmer CJ: The defendant, Willie Waneburi (hereinafter referred to as "the Defendant") is charged with the offence of murder contrary to section 200 of the Penal Code, that on 7th September 2001 at the Central Market, Honiara he murdered Leslie Aukona (hereinafter referred to as "the Deceased").

The Prosecution case is that on the morning of 7th September 2001, the Defendant arrived at the market with a knife hidden at the side pocket of his trousers, approached the Deceased and without any form of provocation, argument, tussle or fight, stabbed the Deceased on the chest with a yellow handle knife. He ran off after this and jumped into a taxi parked nearby and told the driver to drive off after showing him the knife with its blade still covered with the blood of the Deceased. Frightened by this sudden intrusion the taxi driver Jethro Wence ("JW") complied and drove off hurriedly with the Defendant. He dropped the Defendant and another person accompanying him at Ranadi at the house of Nelly Talifoa ("NT").

Prosecution alleges that the Defendant intended to cause the death of the Deceased when he stabbed him with the knife. This mens rea of the Defendant can be gleaned from the surrounding circumstances, where a yellow handle knife with a blade of about 8-10 inches (20-25 cms) long was used by the Defendant to inflict the fatal wound which caused the subsequent death of the Deceased. Prosecution alleges, the degree of force used, the words spoken and actions of the Defendant at that crucial time, support the existence of the requisite mens rea. Prosecution also say that the existence of a grievance or dispute between the Defendant's family and the Deceased and his brother or family, confirmed by the Defendant in his evidence, accounts for the animosity felt towards the Deceased and indicative of the motive for the stabbing, which in turn supports the allegation that the stabbing was intentional.

In the alternative, they say the Defendant knew what he was doing that the act which caused death will probably cause the death of or grievous bodily harm to the Deceased.

The Defence on the other hand says that although the Defendant made the initial approach to the Deceased it was with the intention of sorting out their problem or dispute between their families back at their homes. Instead the Deceased reacted angrily and then attacked him, resulting in a fight. The Defendant says he was provoked by the reaction of the Deceased as he was already under the influence of liquor at the said time and which resulted in the fight. Defence alleges the Deceased kicked the Defendant resulting in an injury above his right eye brow which bled. After kicking him, the Deceased punched him with his right fist but which he blocked. This caused him to stumble, in the process he took out his knife which he carried in his basket for cutting sugar cane, coconut, betel nut etc. and stabbed the

Deceased with it. Defence argues he did this in self defence and then ran off fearing that the Deceased might chase him and kill him as he was bigger than him. Defence argues that even if self defence is negated the requisite mens rea for malice aforethought has not been proven to the required standard by the Prosecution.

Findings of facts not in dispute

The stabbing of the Deceased by the Defendant with a yellow handle knife at the locations (see "Exhibit 1") identified by Prosecution witnesses at the Central Market Honiara and the escape route taken by him to a parked taxi and the subsequent route taken by the taxi (see "Exhibit 2") to Ranadi to NT's place are not in dispute. The identity of this Defendant was never in issue.

Findings of facts that are in dispute

A number of vital facts are in dispute. Depending on the ruling of this court on those disputed facts, that will ultimately affect the issues of law raised in this case. It is important to note this at the outset as there are two completely different versions being presented before this court; Prosecution says the attack was unprovoked, unexpected and sudden consistent with an intentional act, whilst Defence say the Deceased provoked the incident by reacting angrily when approached initially by the Defendant about their problem at their home and attacking the Defendant resulting ultimately resulting in being stabbed. Had the Deceased not reacted angrily, no fight and stabbing would have occurred. The issue of self defence only arises if this court accepts the version of the Defendant. If I reject the version of the Defendant the issue of self defence becomes irrelevant.

What actually happened?

Who was telling the truth? The crucial evidence of the stabbing came from two eye witnesses present at the scene. These were two women, Mirriam Kinita ("MK") and Nelly Rebita ("NR") who had gone to the market to sell their market produce that morning. Both were not very far from the scene itself and gave direct eye witness account of what they say transpired that morning.

NR's evidence was the subject of an application under section 264 of the Criminal Procedure Code ("CPC") on the second day of trial for an additional witness to be called by Prosecution. No statement had been taken from her earlier by the Police. On Monday 1st November she was interviewed by Prosecuting Counsel in the mistaken belief that she was NT another prosecution witness. It transpired she was a different person but had been present also at the crucial time. Mr. Cooper explained the circumstances under which her evidence became known and made application for further time for the requirements of section 264 to be complied with. I gave leave and allowed her evidence to be given as an additional witness to this case.

In cross examination the credibility of her evidence was sought to be discredited but with little success. For instance, when she was asked: "*What did you tell her last week?*" referring to the Police Officer who spoke with her on Thursday the previous week, she replied: "*I told her everything last week. I was there too when this incident happened.*"

Question: "Did she ever describe a knife to you?"

Answer: "She told me but I also told her about the same yellow knife."

Question: "Did that police officer describe to you what happened?"

Answer: "No."

Question: "Did that police officer tell you where the stabbing took place, the position of the tables etc.?"

Answer: "No."

Question: "Had you told that man anything?" (This relates to another man who had brought her over from Gela where she was).

Answer: "They called wrong name but I said I was also there when this thing happened."

Question: "How did you know about this stabbing in 2001?"

Answer: "It was the first time in my history to see this sort of thing and so that's why I remembered it."

Question: "Did he tell you about the knife?"

Answer: "No."

Question: "Did he tell you any details about what other witnesses saw?"

Answer: "No."

After carefully considering her evidence, her mannerisms and demeanour in court, I am not satisfied I this witness's credibility had been tarnished in anyway by the fact that no statement was taken from her earlier until this year 2004 or that her evidence was tainted with police assistance and suggestions. I am not satisfied what she stated in her statement or told the court, were words put in her mouth by anyone other than arising from her own observations and what she heard occurred at the scene of the crime. No motive, reason or explanation as well has been established or put forward which could explain why her evidence should not be relied on now. She explained that since September 2001 she had never been approached by anyone about the incident; this is not unusual. It would not be unusual or unreasonable in such extreme situations to expect her to come forward to volunteer information unless approached. While others may have resiled from coming forward, she has not even at this late hour and no reasonable or satisfactory explanation has been put forward as to why she would now come to court to lie about the events of 7th September 2001 other than to simply relate what happened on that fateful day regarding the Deceased. I accept her as a credible witness and her evidence reliable.

The evidence of Mirriam Kinita and Nelly Rebitai

Their evidence as to what transpired that morning is to be contrasted with the evidence of the Defendant in which a different version of the events was described.

The Defendant says in his evidence given under Oath that there was a confrontation between him and the Deceased following which a fight took place resulting in him being kicked in the face, a facial injury caused and bleeding to occur. He says he was punched by the Deceased but which he blocked causing him to stumble. He took out a knife from his basket strung over his shoulder at this point of time and stabbed the Deceased with it. He then ran off to escape capture by the Deceased and got a taxi nearby to drive him away from the scene.

Prosecution witnesses MK and NR however deny the version given by the Defendant. They say that when the Defendant arrived at the market, after confronting the Deceased he immediately reached for his knife at his side, said words to the effect "you nao ia"¹, before stabbing the Deceased with it. He then ran off immediately thereafter.

Both witnesses deny hearing anything being said by the Deceased to the Defendant or seeing him do anything even as much as moving towards the Defendant. Both witnesses gave clear, firm and concise evidence that the Defendant was the aggressor and attacked the Deceased without any form of provocation from the outset. Both heard the Defendant say words to the effect "you nao yia" before the stabbing took place. They said it happened so quickly and that no warning was given. They denied any suggestions of a fight or any provocative act on the part of the Deceased prior to the stabbing.

Both also denied any suggestions put to them that the Defendant took his knife from a basket he had at his side. Both remained firm about the fact that the Defendant reached for his knife from the side pocket of his trousers before stabbing the Deceased with it.

The only witness who mentioned that the Defendant had a bag was NT. Her recollection of that bag however was different from the Defendant. The Defendant referred to a small bag, whilst NT described a long custom basket.

Having heard the evidence and observed the witnesses in evidence, I am not satisfied the Defendant reached for his knife from his basket before stabbing the Deceased. I accept the evidence of MK and NR as to what happened at the Central Market including their evidence that they saw the Defendant reaching for his knife at the side of his trousers. But even if MK and NR may have been mistaken about that, I have no doubt in my mind that they were not mistaken about what happened regarding the stabbing and what transpired that time. I believe their evidence, that no fight occurred prior to the stabbing; that the attacker and aggressor from the beginning was the Defendant and reject the evidence of the Defendant.

There is simply no evidence whatsoever to support the claim of the Defendant that he had been injured, which would have been consistent with a fight. He said in his evidence that he had an injury to his face. If this was true and the kick had hit his face it would have caused a major injury to his face. No one however describes seeing the Defendant with any injury on his right face. In fact the witnesses, MK, NR, NT and JW were never asked this question in cross examination. I would have expected such evidence to have been put to the other witnesses. Even in the recorded interview with Police nothing was mentioned about any injuries despite being specifically asked by Police (see page 29 of the transcripts). The absence of any injuries is also consistent with the version of Prosecution witnesses that no fight actually took place.

On the issue of whether he had a basket on him or not, whilst it is possible that the Defendant may have had a bag strung over his shoulder at the time of the stabbing that does not detract from the substantive matters in evidence of MK and NR that they both saw the Defendant reaching for his knife at the side of his trousers rather than from any basket. They denied seeing any basket on the Defendant at the said time. Secondly it does not detract from their substantive evidence that they witnessed no fight before the stabbing. NT's evidence is to be confined to the description of a long custom basket. This does not accord with the description of the Defendant of a much smaller basket.

¹ It implies words to the effect that "you are the one that I have been looking for"

It is also significant that when the Defendant was asked in cross examination about the type of trousers he was wearing he could not remember this, when asked about the shirt he was wearing however he could remember that quite easily. I find the Defendant to be evasive when it came to this piece of evidence.

There were suggestions that those two witnesses may not have been able to see clearly what was happening as there were many people also walking around at that time; that their line of vision may have been obstructed or hindered somehow. Their evidence however has been quite consistent throughout. MK says the market was busy, that there were people walking around some even in between them and where the incident took place, but at no time did she ever concede that her view of the actual stabbing and what transpired was ever obstructed. Her evidence has not been sufficiently discredited. The same applies to NR's evidence as to the number of people around at that time. When she says two or three, it wasn't to be taken literally, rather implying a few. She explained this further when she said "*Not staka too much, many people but not too many.*" Their evidence has been confirmed by other witnesses who all said similar things about the market being not so busy at that time as it was still in the earlier part of the day. JW for instance says that "*not many people were around yet at that time*", John Rolleni ("*JR*") says that the market was "*not very busy as yet, there were people looking around to put their things, two or three people were there but not too many*".

I am not satisfied the field of vision of those two crucial witnesses, their sight or their ability to observe what happened, has been so discredited to the point where their evidence is rendered unreliable.

I have listened carefully to the evidence of these two witnesses and observed their demeanor in court. I find no reason whatsoever to doubt their sincerity and thereby credibility in court and the accuracy of their observations. I find them to be frank and truthful witnesses throughout, sincere and objective but also very brave. MK was actually the first person to help the Deceased before others came onto the scene to assist. She then stood on a table to watch where the Defendant had run to and was able to see him getting into a taxi. Both witnesses had no reason (none has been suggested apart from the accuracy of their powers of recall and observation) to come to court and lie about what happened that day. These were women seeking to go about their normal daily business of selling their market produce that morning when something so drastic happened. NR expressed it as follows when she was queried about her knowledge of the events which occurred some three years ago. She was asked in cross examination "*How did you know about this stabbing in 2001?*" The implication sought to be raised was how she could have remembered what was done a long time ago, some three years back. Her answer was: "*It was fust time in history to see this sort of thing so that's why I remembered it.*" I do not think it can be expressed any better by anyone seeing such violent act for the first time, that they would forget it so easily, certainly not for NR, the events remained etched vividly in her memory and the same it seems would been the case with MK.

I am certain there were other people around who must have witnessed what happened but decided for one reason or another, not to come forward to Police to assist with their enquiries. These two women however have not held back anything relevant as to what they witnessed at that time. They must be commended for their courage to come forward as witnesses to assist the court in arriving at the truth of what happened that day.

One of the prosecution witnesses who was standing quite close to the scene was Peter Wanelolea ("*PW*"). According to the evidence led before this court, it would seem that he was not very far from where the Deceased had placed his market produce and so it can be

deduced that he would not have been very far from the actual scene of the stabbing. He recalls being approached by someone enquiring about the Deceased but did not look up to see who was talking to him. He says he was busy with his market at that time. Although this witness was not asked about whether he was aware of any struggle or fight taking place it only seems logical, that in view of the distance he was from where the stabbing took place, that if there had been a fight or struggle as claimed in the evidence of the Defendant, he would certainly have been aware of this. Instead his evidence was confined only to events after the Deceased had been stabbed. His evidence in my respectful view is consistent with and supportive of the evidence of MK and NR that no fight or struggle occurred before the Deceased was stabbed.

Did the Defendant threaten the Taxi Driver with the knife?

The Defendant says he did not threaten the taxi driver JW with the knife when he jumped into the taxi and told him to drive off immediately. He also says that he placed the knife he was carrying on the dashboard of the taxi en route to Ranadi.

The evidence adduced by Prosecution witnesses, and which I accept as the correct version, was that the Defendant actually showed the knife to the taxi driver and told him to drive off. MK says she saw the Defendant holding the knife against the neck of the driver. JR who was near the scene and saw the Defendant jumping into the taxi also said the same thing, that he saw the Defendant holding the knife to the neck of the driver. The taxi driver (JW) himself confirms this in his evidence. He says the Defendant held the knife under his shirt when he jumped into the left front seat of the taxi and then showed him the knife. He told him he was in trouble and to take off (drive off) immediately. When asked how far the knife was from him he said it was very close; estimated to be about a foot from him. He says he became frightened when he saw the knife. In cross examination he said he got very frightened when he saw the knife with blood on it.

JW denied any suggestions that the knife was put on the dashboard of his taxi. He said the Defendant held it in his hand throughout and when he walked out after being dropped off at Ranadi, held it under his shirt.

This evidence is consistent with what NT told the court about the knife she saw with the Defendant on arrival at her house at Ranadi. She told the court she did not see the knife initially until it was shown to her by the Defendant. When asked if this was because the knife was hidden in his bag she denied this.

How many men got into the taxi with the Accused?

The Defendant says no one else jumped into the taxi with him. This is to be contrasted with the evidence of JR (who was the person that JW had just dropped off and was in the process of unloading his market produce), and JW the taxi driver, who both saw the Defendant and another person getting into the taxi. NT also confirmed seeing the Defendant and another man arriving at her residence at Ranadi. All three witnesses had no reason to lie to the court about the presence of another person with the Defendant at that time. On the other hand, the Defendant had reason to lie about the identity of another person if he was trying to cover up for him in relation to that incident. I accept the evidence of Prosecution Witnesses on this matter and discount the evidence of the Defendant.

Did the Defendant admit the stabbing to others?

Did the Defendant admit to the taxi driver about the stabbing? In his evidence, JW says that after showing him the knife and telling him to drive off the Defendant told him that he had killed a man, that he was in trouble and that the man he had stabbed must have died or most likely was going to die. In cross examination he remained firm that he heard the Defendant say those words that the man he had stabbed "must have died", indicating certainty about what was said. NT also told the court that the Defendant admitted to her that he was in trouble and when she queried him about what he meant he admitted that he had killed a man at the market.

The Defendant denies saying words to that effect, however I reject his evidence on that. I accept instead the evidence of Prosecution witnesses on this.

MALICE AFORETHOUGHT

The essential ingredient in a murder charge is the requisite proof of malice aforethought (see section 200 and 202 of the Penal Code) and may exist even where the act is unpremeditated, where (a) there is an intention to cause the 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 the 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.

The burden of proof is always on Prosecution to discharge, that is, proof beyond reasonable doubt. Where a defence of self-defence is raised the onus is on Prosecution to negative that assertion provided there is sufficient evidence before this court to justify invoking such defence. In this instance, the situation is slightly different. The defence of self-defence becomes relevant only if the court finds the facts in a certain way and in this case in favour of the version of the Defendant. This entails an initial assessment of the disputed facts by this court and only if this court should find the facts in favour of the Defendant will that defence become relevant. The reason being, that the version of events are quite distinctive to each other.

In rejecting the evidence of the Defendant regarding the issue whether a fight did precede the stabbing, the defence of self-defence must necessarily fail. It stands or falls on the version of the Defendant, which this court has rejected, after assessing the evidence carefully. In contrast, there can be no justification for any defence of self-defence in the version of Prosecution witnesses; I note Defence have not sought to raise any such claims in the event their version is rejected.

The Prosecution in any event is still obliged to prove that malice aforethought was present when the Defendant stabbed the Deceased and caused his death.

Intention to cause death or grievous bodily harm

Express malice may be established by proving that the Defendant intended to cause the death of or grievous bodily harm to the Deceased. Intention however is a matter of the mind and entails the elements of the will, emotions and intellect of a person. The window to the mind of a person is through his actions, what he says, his emotions and his behaviour or conduct. This is drawn by inference and can be gleaned also from what the witnesses

including the Defendant himself said happened at that particular time, including the nature of the injuries sustained and the weapon used².

Motive of the Accused

The proof of motive (if any) is a strong indicator of the state of mind of the Defendant. In this instance, there is undisputed evidence that there was a grievance or dispute between the family of the Defendant and the Deceased's family. This related to allegations that the Deceased and his brothers had been stealing the Defendant's family's pigs, chickens and swearing at their father at their home village. The Defendant admitted this in his recorded interview with the Police and also in his evidence in cross-examination. He admitted to the extent that when he approached the Deceased that morning, it was to ask him about those problems or dispute; he says his intention was to settle the matter between them. His version of what transpired thereafter but which I do not accept as the correct version was that when he spoke with the Deceased, instead he was attacked.

In rejecting his version of being attacked, his admission of a grievance or dispute, and of approaching the Deceased in that frame of mind, to sort out the problem in my respectful view, was but to disguise his state of mind, that when he stabbed the Deceased it was nothing less than an intentional act. He stabbed the Deceased because he was offended, he had a grievance against him and his brother, for stealing their pigs and chicken and for swearing at their father. Nothing else could explain his extreme behaviour/act at that time. A normal ordinary person does not go around stabbing another person without a cause or reason. There is no evidence to suggest that the Defendant was abnormal or suffering from any disease of the mind at the said time, other than that he had consumed some beer prior to coming to the market. That is no defence however as there is no suggestion that he did not know what he was doing. Despite his denials, which I reject, I am satisfied so that I am sure, he was cross with the Deceased for what had happened in his home village. The existence of an unresolved offence or grievance back in his home village provided the motive for the killing.

The evidence on this is entirely consistent with the observations of Prosecution witnesses at the scene. Both MK and NR heard words spoken clearly by the Defendant to the effect "*you now yia*" before the Deceased was stabbed. Those words are common pidgin words used consistent with an intentional act. They reveal the mind of the speaker when directed towards another person. I can find no other reasonable or logical explanation for the use of those words in the context of this case (none has been suggested). The nearest English translation would be words to the effect "so, you are the one!"

The use of the knife to effect the fatal wound and with considerable force described by MK and NR, and confirmed in the evidence of Dr. Tovosia, who carried out the postmortem, are all consistent with an intentional act.

What happened subsequently is also consistent with the acts of a man that intended to cause the death of or grievous bodily harm to the Deceased. After stabbing the Deceased the Defendant ran off, not because he had any concerns or fear of being chased by the Deceased, but to escape capture. His admissions to the taxi driver JW that he had killed a man and that the man stabbed would die are all consistent with an intentional act, and that he was running away to evade capture. He repeated his admissions to NT and showed her the knife used. Later that day he traveled to Lungga where he threw the knife into the

² see also the case of R. v. Jimmy Viu (1991) HCSI-CRC 15-93

Lungga River; again acts consistent with that of a man with a guilty conscience seeking to get rid of the murder weapon. A day or so later, he traveled across to Malaita in an attempt to run away further from the Police.

When the evidence as accepted by this court is considered in their entirety, there is only one clear conclusion that can be reached by this court or any reasonable tribunal for that matter, that the Defendant had the necessary mens rea to cause the death of the Deceased at that time, but even if somehow that was not the case, I am satisfied it was with intention to cause grievous bodily harm to the Deceased.

Knowledge of the act which caused death

Even if the element of intention to cause death or grievous bodily harm may not have been accepted, express malice may still be established by proving that the Defendant knew that the act which caused death will probably cause the death of or grievous bodily harm to the Deceased.

Did the Defendant know that the act of stabbing the Deceased with a knife with a blade of some 8-10 inches long, would probably cause the death of or grievous bodily harm to the Deceased? MK, NR, JW and NT all described the length of the blade of a yellow handle knife which the Defendant had (not disputed), as between some 8-10 inches. The evidence of the depth or length of the wound inflicted by the knife was estimated by Dr. Tovosia as from 20-25 cms. He determined that the wound stretched right through the left anterior chest wall into the pleural cavity, through the left lung the pericardium and into the left chambers of the heart. When asked to express an opinion about the degree of force that might be required to inflict such wound, he commented that it would be consistent with the use of considerable force. This is consistent with the evidence of MK and NR when describing the actions of the Defendant when he stabbed the Deceased.

When a knife with a blade of some 8-10 inches long is applied with considerable force to the chest of the Deceased, the Defendant cannot fail to realize that it would probably cause the death of or grievous bodily harm to the Deceased. The admissions of the Defendant to the taxi driver JW and NT are consistent with such knowledge. He obviously knew that what he had done would probably cause the death of the Deceased or grievous bodily harm, hence admitting that the Deceased would die or was going to die from the wound inflicted.

Credibility of the Accused

It is clear to me that the Defendant had perjured himself throughout whilst giving evidence on oath. He lied about a fight taking place before he stabbed the Deceased; no fight according to the clear evidence of MK and NR took place. He lied about getting into the taxi himself placing the knife on the dashboard. JR, JW and NT all confirmed seeing another person with him. The taxi driver who took him had no reason to lie about not seeing any knife on the dashboard or that he did not feel threatened throughout by the actions of the Defendant. It is clear he was trying to paint a picture that the stabbing of the Deceased was not intentional throughout and that he acted in self-defence.

Decision

Taking everything into account and bearing in mind throughout where the burden of proof lies, I am satisfied Prosecution had discharged the onus required of them to prove that this Defendant had the necessary specific intent or malice aforethought when he inflicted the

fatal wound on the Deceased that morning. Accordingly I find him guilty as charged and convict him of the offence of murder.

Sentence

There is only one sentence once a conviction is entered for murder, **life imprisonment**. The Defendant is accordingly sentenced to prison for life.

THE COURT.