

POLICE v MOLI (MANUTULILA)

and

ENI (SEGA MANUTULILA)

Supreme Court Apia
8 March 1979
Nicholson CJ

CRIMINAL LAW (Offences) - Murder - Two accused charged jointly both admitting to have assaulted deceased - No medical evidence establishing which administered the fatal blow, or whether the fatal injury was the result of the combination of both assaults - No evidence of common intent pursuant to s 23(2) of the Crimes Ordinance 1961 - Submission of no case to go to the assessors upheld: R v Abbott [1955] 2 QB 497, Reilly v Police [1967] NZLR 842, Mohan v R [1967] 2 All ER 58 considered.

PROSECUTION on a charge of murder.
Charge dismissed.

Sapolu for prosecution.
Epati for defence.

NICHOLSON CJ. The two accused are charged with murder and at the close of prosecution case Mr Epati, for both accused, submitted that there was no case to go to the assessors.

The facts of the case as presented by the evidence so far show that on the night of 14th October, 1978 the deceased had discharged a rifle and was engaged in a struggle with one Ieremia as a result of which the deceased was knocked to the ground and Ieremia then proceeded to smash the rifle belonging to the deceased against a nearby tree. A considerable number of people gathered at the scene. The accused Sega's Police statement appears to say that, while the deceased was attempting to get up after this fight with Ieremia, Sega hit him on the left side of the head with two blows of a stone held in his hand. Subsequently, the deceased was assisted to his feet and was being helped to walk away from the scene when the accused Manu, according to his own statement, approached him from behind and administered a blow to his head with the broken gun butt of the rifle. One witness, Penitito, says that blow was to the left side of the deceased's head. The medical evidence shows that the deceased died next day in hospital as a result of an extra-dural haematoma, which appeared to be directly related to a compressed fracture of the skull above the left ear. This fracture in turn was directly beneath the site of an 'L' shaped wound, which could have been the result of one blow or more than one. The medical and other evidence is such that it is impossible to say which of the accused administered the fatal blow to the deceased, or whether their joint efforts resulted in the fatal injury. In these circumstances, Mr Epati for the defence submits, on the authority of Reg. v. Abbott [1955] 2 Q.B. 497, Reilly v. Police [1967] N.Z.L.R. 842 and Mohan v. Reg. [1967] 2 All E.R. 58, that the two accused can only be convicted of this charge if the prosecution case establishes prima facie that they were acting with a common intent. He submits

that there is no evidence of common intent, while Mr Sapolu for the State argues that the totality of the evidence of the circumstances suggests that there was a common intent. Under section 23(2) of the Crimes Ordinance 1961, it is provided:-

Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by anyone of them in the prosecution of the common purpose if the commission of that offence was or ought to have been known to be a probable consequence of the prosecution of the common purpose.

Ieremia's evidence shows that he did not see either of the two assaults in question, and the witness Asiasiga also says that, while he saw Manu at one stage of the incident at the scene, and Sega holding a stone later on after the deceased was injured and had been taken away, he, too, did not see the actual assaults. Witness Penitito gave evidence that he saw Sega throwing a stone at the deceased which hit his head, that he saw Manu present at that time and that he saw Manu strike the deceased with the gun butt and that Sega was present at that time. Moreover, he says he saw Sega, after Manu's attack, rushing at the deceased, but that he was stopped by Ieremia. Under cross-examination, he contradicted himself saying that he did not see Sega throwing a stone, and in re-examination he changed his account again and repeated that he had seen Sega throw a stone. I think it significant that Sega's Police statement does not say he threw a stone, but that he punched the deceased twice with a stone in his hand.

I accept the proposition that where there is evidence that two accused persons administered blows to the deceased as entirely separate assaults without a common purpose, and the evidence does not disclose which of those two accused persons caused the death of the deceased, then both accused must be acquitted.

Turning to the question of common intention, I refer first to the evidence of Penitito. Normally, the question of the credibility of the witness would not be subject to ruling at this stage of an assessor trial, but where the evidence of a witness is so unreliable that it would be obviously unsafe to rely on his uncorroborated testimony, I think it is incumbent on the Court to address itself to the question of the credibility of that witness in deciding whether or not a prima facie case has been made out. I have no hesitation in concluding that Penitito's contradictory evidence is in the category of completely unreliable testimony in view of the serious contradictions in his evidence in regard to Sega's part in this affair. I therefore put aside the evidence of Penitito.

What evidence of common intention is there? Clearly each accused intended to do bodily harm to the deceased but, unlike Mohan's case, there was no simultaneous attack, but instead two separate incidents, albeit only a short time apart. Moreover, there is no acceptable evidence that Sega was actually present at the time of Manu's assault. They appear to have arrived at the scene at different times and by different routes. Again, unlike Mohan's case, they were not using similar weapons. Perhaps most significantly in their otherwise frank written confessions of their assaults, neither indicated that he was even aware of the other's assault on the deceased, much less that he acted in concert with the other. Sega's statement suggests he was alone when he heard the gunshot. He reacted by picking up a stone and running to the scene where he saw deceased on the ground and several others including Manu standing by. He then assaulted the deceased with the stone. He says that he was then knocked unconscious by Ieremia. Manu does not mention Sega's presence at the scene at all.

I therefore find that there is no case made out to go to the assessors that the two accused acted with a common intention and the charge is dismissed. Both accused are discharged.

I should add that in the light of the terms of section 39(2) of the Criminal Procedure Act 1972, there appears to be no bar to proceeding against the two accused upon lesser charges in relation to this matter.

Finally, I mention that in reaching my conclusions in this case I have not overlooked my ruling in the case of Police v. Samuelu and another in 1978 where I rejected an argument that where the evidence did not disclose which of the two accused had caused the death of the deceased they should both be acquitted. At the time, I advanced the view that such a principle was not appropriate to a homicide case. In the light of authorities subsequently drawn to my attention I now accept that the principle should apply to homicide cases. It should be remembered however, that in that case I was dealing with a situation where the medical and other evidence showed that both of the accused had administered injuries to the deceased, which by themselves would each have caused the death of the deceased, a very different situation from the case now before me.