IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 32 of 1982

Between:

SAMSON RAMOGA — Appellant

and

REGINAM — Respondent

H. Patel for the Appellant
J. Sabharwal for the Respondent

Date of Hearing: 3rd November 1982

Delivery of Judgment: 19th November 1982

JUDGMENT OF THE COURT

Speight J.A.

The appellant was convicted on 29.4.82 in the High Court of the Solomon Islands of the murder of one Boloa on 7.12.81 (Section 193 of Penal Code). He was sentenced to life imprisonment.

The events occurred in the village of Kwailafu. It was night time and dark, but with some moonlight.

Photographs produced show a village comprising detached bamboo and reed houses - mostly on stilts - about 2 - 3 feet above ground level - with primitive stairs of ladder type leading up to the entry doorways.

The principal witnesses were villagers, many of them related to each other and indeed the important prosecution witnesses were close relatives of the dead man

Boloa, and the defence witnesses in turn were mostly close relatives of the accused.

Briefly the matter happened in this way. There was a minor fracas in the village which turned into an affray - relatives of the deceased and of the accused were apparently opposed to each other in this affair. Some persons suffered injuries - clubs and other weapons had been used and one man Tabakwae, a brother of deceased had suffered a severe head wound and was lying on the ground not far distant from accused's house. Accused had seen fighting going on, but claimed in a statement to police and in evidence to the Court that he was disturbed by the fight and had taken himself and family into his house.

Deceased had also been present during the evening - whether he had taken part in fighting or not, is unknown. However he found his brother in distress and assumed that he was dying, and he suspected the accused had been responsible. The evidence does not disclose whether Tabakwae in fact died from his wound, or not.

Deceased made his way to accused's house and mounted the stairs. There were words spoken and then quite shortly the accused, who had a little earlier armed himself with a shotgun and loaded it, fired at Boloa at point blank range striking him in the chest. Boloa jumped or tumbled back onto the ground, collapsed and died. The accused shortly after made off but was later returned to the village. He was interviewed by the police and said that he and his family were frightened and had taken refuge in the house, that people had stoned his house and then deceased had forced his way into the house, armed with a bush knife and had struck him on the head. Being, as he claimed, terrified, he shot in self defence.

Further analysis will be made of the evidence, and of the conclusions of the learned trial Judge at a later stage.

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But first a preliminary matter must be examined, because an application has been made to admit additional evidence - in affidavit form - in accordance with the provisions of rules 7, 48 and 27(2) of the Court of Appeal Rules 1973 (Western Pacific).

There are two affidavits proffered which relate to the medical evidence used at the trial.

At the commencement of the hearing in the High Court counsel for the prosecution with the consent of the defence tendered statements and exhibits from 7 persons who were not witnesses present in person at trial. This somewhat unusual procedure is authorised by section 180A of Criminal Procedure Code of Solomon Islands. This reads, as far as is here relevant:-

> "Subject to the provisions of this section, any fact of which oral evidence may be given.... may be admitted by or on behalf of the prosecutor or accused person, and the admission by any party of any fact under this section shall be conclusive evidence in those proceedings, of the fact admitted. " -
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> There is a saving subsection (4) allowing such an admission to be withdrawn with leave of the Court.

This is undoubtedly a most beneficial provision in appropriate cases. Obviously in the Solomon Islands, with its wide spread areas and, as one gathers, not an over-supply of specialist people such as doctors, police photographers and the like, it is a great convenience to have evidence admitted in this way so long as counsel are satisfied that no injustice is thereby occasioned. And of course it would help in avoiding delays through absence of witnesses.

In the evidence so admitted in this case was the medical report of Dr. Craig. This recorded that he had examined the body on the day following the fatality. It

described the doctor's findings - namely that there was a massive wound in the chest which had caused death. The 5th paragraph of the report reads as follows:-

> " The injury is consistent with what could be expected if this man had been shot at close range with the weapon shown to me at Malu'u Police Station this morning. Measurements quoted on this report are estimated. After hearing the mode of death as reported to the police I felt that the injuries were consistent with the circumstances. Death would have been nearly instantaneous due to the massive destruction of the contents of the central part of the chest. "

Now at the trial there was sharp disagreement between the prosecution witnesses and the defence concerning events at the critical time. The prosecution case in effect was that the deceased had walked in a non aggressive way to the accused's door and was shot in circumstances which did not indicate any legitimate cause for alarm on the part of accused. Defence witnesses however gave a different account. They spoke of a hostile group attacking the house - throwing stones which broke parts of the wall - and then of the deceased forcing his way into the house and striking the accused on the head with a knife.

The acceptance or rejection of one version or the other was crucial to a consideration of the possible defences - of self defence, or of the special type of provocation defence which is available under section 197 of the Penal Code - which section will be discussed in more detail later.

After examining the evidence, the learned trial judge firmly rejected the defence version of events. An important factor in this decision was the learned Judge's view of the evidence from two defence witnesses as to the deceased's movements immediately after being shot in the chest.

He reviewed other discrepancies in the evidence of the two sets of witnesses and then said -

> " Perhaps the most surprising piece of evidence she (Olofea) gave was of Boloa, after being shot, falling off the ladder and then getting up and walking three steps. This is quite inconsistent with the medical report which speaks of "nearly instantaneous" death which is no more nor less than one would imagine would result from a shot gun discharged at short range through the chest.
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> A similar claim for the powers of Boloa was made byFauniala who said Boloa, after being shot, jumped off the ladder, which appears from the photographs to be 2 or 3 feet off the ground, and then took 3 steps before falling down. "

Then, having discussed other supposed inconsistencies in respect of which he preferred prosecution witnesses to defence witnesses concerning events just prior to the shot being fired, he said:-

> " As I am sure that I can reject the two aspects of the defence case upon which the claim of use of force in defence of persons is based it follows that I find that I am sure that there was no attack or honest apprehension of attack such as to entitle the accused to use force against Boloa. Thus the prosecution have made me sure that I can exclude the possibility of the use by this accused of lawful force in defence of himself and his family. "

It will be seen therefore that the general credibility of defence witnesses Olofea and Fauniala had been gravely undermined in the eyes of the learned judge by these apparent contradictions of the admitted medical statement. It is not clear whether the judge concluded that they were merely poor observers, or whether the divergence from what he believed to be the true medical situation was so marked that they could not have been present witnessing that to which they deposed.

However that may be, the apparent discrepancies were crucial in his decision that the defence evidence should be rejected.

Accordingly the application for admission of evidence pursuant to the Rules is obviously very important. The matter which obviously influenced the learned trial Judge was the conflict between the account by these two witnesses, and the phrase in the medical report that death had been "nearly instantaneous".

The additional evidence proffered by way of affidavit was from Dr. Craig himself with brief support in an affidavit from defence counsel as to the unforeseeability of the point raised in the judgment.

. The principles which govern such matters are almost universally the same in common law based jurisdictions. The position is stated in R. v. Parks 46 Crim.App. R.29 and in many other cases. Put briefly the following matters require consideration:-

1. Was the material available on reasonable enquiry and anticipation at the time of trial.

2. Is the proffered evidence relevant.

3. Is the evidence credible.

4. If the evidence had been available and admitted, would it have produced a reasonable doubt about the conclusion reached.

Having listened to counsel's submissions we conclude as follows:-

1. Respondent's counsel submitted that the appellant's counsel, knowing what his witnesses were to say about the deceased's actions after being shot, could have called

> for the doctor to give evidence viva voce or put forward a hypothetical question, for a supplementary explanation of the meaning of the phrase "nearly instantaneous".

We think this is too critical an approach. Even experienced pathologists will seldom predicate how long it took a victim to die, even from a grave injury. In our assessment counsel for the appellant could not reasonably have been expected to anticipate that the evidence of his witnesses, assuming it was in accordance with brief, would be regarded as inconsistent with the assessment of "nearly instantaneous". Nor was there any suggestion during the hearing, particularly in the prosecutor's address that the defence evidence was incompatible with the doctor's statement. It seems clear that had the doctor's evidence been viva voce, he would have dispelled the misunderstanding that the learned judge took from it. We do not blame defence counsel for not anticipating this.

As to Questions 2 and 3, the evidence certainly was most relevant, and of course coming from an unimpeachable expert it must be regarded as credible. Finally would it have put the issue (of credibility) in a different light. We think so.

Additionally we add that weight must be attached to the basis upon which such statements are received. This section is a beneficient dispensation from the ordinary stringent laws of evidence. And it is a dispensation made to facilitate the speedy and efficient administration of justice. It would be undesirable if the willingness of the defence to facilitate proceeding in this way resulted in a penalty against defence interests. Indeed if too stringent a view is taken, defence counsel may in future be reluctant to co-operate in this sensible procedure.

We think the tests for admission of additional evidence are fulfilled and it would be against the

interests of justice to deny him his application.

It is therefore now necessary to consider the grounds of appeal assuming that the doctor's evidence had included statements which appear in his affidavit at paras. 5 and 6:-

> "5. ..... the evidence given by Olofea and Fauniala is (not) inconsistent with my medical report which states that death was "nearly instantaneous". It is possible, even likely, that after having been shot that the deceased would walk or stagger some steps before finally falling down.
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> 6. The actions of the deceased after being shot are consistent with the shooting and my medical report although it is unlikely that the deceased jumped of his own volition but he would probably have been thrown backwards violently by the shotgun blast which may have given the impression of jumping back. "

In the notice of appeal a total of 7 grounds were listed. In submissions however only the first 3 of these and the last were developed - indeed gounds 4, 5 and 6 were really of little relevance and ground 7 was a generalised repetition of grounds 1 and 2.

Ground 3 related to the supposed conflict between the evidence of witnesses DW3 Olofea and DW4 Fauniala as against the doctor's report. This has already been resolved in favour of the appellant.

Grounds 1, 2 and 7 read as follows:-

> "1. That the finding of the learned Judge that there was no attack on the Appellant or honest apprehension of attack by the Appellant was not supported by and was against the weight of the evidence and accordingly the learned judge erred in finding (1) that the appellant was not entitled to use some or any force against the deceased in defence on himself or his family; and (2) that it was unnecessary

for him to consider the question of the reasonableness of the force under s. 197(b) of the Penal Code.

2. That in all the circumstances the evidence that the deceased Boloa was in an angry mood, entered the property of the Appellant and climbed up the ladder to his house door whilst possibly armed with a brush-knife was in itself in law an attack or sufficient to cause the Appellant to honestly apprehend that he and his family were or might be in danger of immediate attack and therefore the learned judge erred in finding that there was no attack or honest apprehension of attack and further erred in consequently rejecting the issue of self-defence and in excluding from consideration the question of the reasonableness of the force used by the appellant and the provisions of s. 197(b) of the Penal Code.

7. That in all the circumstances the conviction is unreasonable and/or cannot be supported having regard to the evidence. "

These grounds merge and were argued together, and they are based on Rule 36(1) of the Court of Appeal Rules 1973 of the British Solomon Islands. In all material respects this is in the same wording as section 23(1) of the Court of Appeal Act (Cap.12) of Fiji - viz -

" that the conviction should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence. "

In considering ground 1 and certain submissions by appellant's counsel it should be noted that the use of the phrase "against the weight of evidence" is inaccurate - and cannot be substituted for the words in the statute Aladesuru v. R. (1956) A.C. 49.

The test is summarised with appropriate supporting authorities in Vol. 10 Halsbury's Laws of England (3rd Edition) at para. 986. (This deals with the Criminal Appeal Act (UK) 1907) - references in the 4th Edition are to the 1968 Act which is substantially different. The relevant passage reads:-

"986. Verdict unreasonable. To establish that a verdict is unreasonable or cannot be supported having regard to the evidence, it is not sufficient merely to show that the evidence given at the trial only amounted to a weak case against the appellant, or that the judge of the court of trial had some doubt about the sufficiency of the case and has given a certificate on that ground though that is a material factor in the case. If there was evidence to support the conviction it will not be quashed even though the members of the Court of Criminal Appeal themselves feel some doubt about it. The verdict must be such that no reasonable jury could properly find upon the evidence given. The Court of Criminal Appeal will not usurp the functions of the jury. "

The case being one which was tried by a Judge alone, one is obliged to examine the judgment of the learned Judge for his findings of fact, measuring them against the evidence given and applying the tests set out above - remembering always that the Judge had the advantage of seeing and hearing the witnesses.

An additional and somewhat unusual factor here is that fresh evidence has been admitted which may well have materially altered the conclusions which the Judge quite understandably took about the credibility of several witnesses. A similar situation arose in Wattem v. R. 36 Crim. App. R. 72 where subsequent evidence admitted by the Court of Appeal threw quite a different light on credibility. The Court of Appeal felt entitled to consider the effect of that change and although other grounds were also involved, said in quashing the conviction that it did so "on the facts as we now know them".

The grounds of defence raised at trial, and again in this Court, were (a) self defence, and (b) the special provision of section 197 of the Solomon Islands Penal Code regarding excessive force.

Section 17 of that Code provides that principles governing the defence of self defence are to be those applicable under the common law of England - viz a person

may use force as is reasonable to defend himself, or his family, or persons under his protection, or his property - he is not obliged to retreat before retaliating but that, together with other means open, is relevant to what is reasonable, as also is the danger with which he was threatened and the nature of his retaliation. The onus being as always on the Crown, once the issue is raised, it is for the prosecution to persuade the fact-finding tribunal that it was not self defence - and failure to do so of course results in acquittal.

Section 197 is somewhat different. It reads:-

> "197. Where a person by an intentional and unlawful act causes the death of another person the offence committed shall not be of murder but only manslaughter if any of the following matters of extenuation are proved on his behalf, namely -
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> (b) that he was justified in causing some harm to the other person, and that, in causing harm in excess of the harm which he was justified in causing, he acted from such terror of immediate death or grievous harm as in fact deprived him for the time being of the power of self-control; "

This section was considered by this Court in Terry Baka'a Tekeua v. Reginam Crim. App. 57 of 1979. Although this provision is not found in many other jurisdictions it covers a situation which can frequently arise.

Although it is not part of the law of England, problems arising from excessive defence are discussed by Edmund Davies L.J. in McInnes (1971) Cr.App.Rep. 551 at 56, and by the Privy Council in Palmer 1971 A.C. 814.

A man, through fear or misjudgment or other cause may retaliate with greater violence than is judged reasonable in the circumstances. This section provides the same type of merciful compromise by reducing what would otherwise be murder to manslaughter, as in cases of provocation - and indeed the philosophy seems not dissimilar being similarly related to the power of self control. The effect

is that under the Penal Code excessive force does not necessarily render self defence of no avail - it may in given circumstance produce a verdict of manslaughter.

We turn to the evidence relating to the actions of the accused, viz-a-viz the allegedly threatening situation, and to the conclusions of the learned Judge on that evidence.

Some matters do not seem to have been in dispute.

There had been a very substantial exchange of violence involving a number of people fighting. The deceased's brother at least, and apparently others had been hurt. There was talk of persons having been killed. A number of the villagers, especially the women, were frightened.

The deceased saw his brother and concluded he was dying. He moved quickly across the 60 yards to the accused's house, where the accused had already taken refuge. There is conflicting evidence as to whether stones had been thrown at accused's house damaging it, but the learned Judge rejected that evidence, as he was of course entitled to do. For whatever cause however, the accused who was certainly disturbed about the fighting had thought it necessary to get out his gun and from the timing spoken of by all witnesses had it loaded, either before the deceased arrived, or just as he did so. There is no evidence that he was making any attempt to come out of his house. So it must have been a legitimate, indeed the only reasonable inference that he armed himself for defence if that should prove necessary.

At some stage about that time he must have received a smallish cut on the head - for he was seen to be bleeding from it when he was accosted by Constable Liosulia later that evening. It was then bleeding and accused said he had been cut by deceased. The wound was

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dressed by a nurse just after midnight. It was then still bleeding slightly - the opinion was given that it had been caused by a sharp object.

The defence witness, i.e. the accused and three supporters claimed that the deceased having arrived at ~~deceased~~ accused's house climbed the ladder and struck the accused a heavy blow with a full overhead swing of a large knife he was carrying.

The learned Judge rejected this, on the grounds that there would not have been room for such a heavy blow with the men facing each other in the confines of the doorway -and the size of the wound in accused's head was not consistent with a full blow from a powerful man. These are valid reasons, and ones which the learned Judge was entitled to rely on, but it must be mentioned that the principal reason for rejecting the defence version in so far as it came from two important witnesses seems to have been the "surprising" evidence from Olofea and Fauniala on the deceased taking three steps before collapsing. The rejection of this evidence seems to have been pivotal in concluding that the defence was a fabrication.

However that may be, the accused had suffered some injury to his head, either in the fight, or from the deceased as he claimed to the constable - albeit not a very serious wound - and one does not overlook that there was blood found inside the house, by a constable. There was evidence from deceased's sister-in-law one Mary Gesurii that she had hit accused on the head at the fight, but the Judge rejected her evidence for what appear to be valid reasons.

Continuing then with unchallenged evidence we have it that deceased believed his brother was dying. He believed accused was responsible. He moved quickly to accused's house and he was angry. Without being invited he climbed the steps. Accused said deceased was carrying a bush knife - an article about 3 feet long.

Other witnesses say he had a brush knife (which is somewhat smaller), others say not. The learned Judge accepted as a possibility that he had a knife. Certainly a brush knife was found lying at the foot of the stairs afterwards.

He met the accused at the top of the stairs - he may have partly entered the house - angry as he was he blamed accused for his brother's death and there was talk of another killing being called for. It was either that accused should now kill deceased as he had his brother, or that deceased would kill accused - on this last point it is significant that there was uncontradicted evidence, regardless of what was in fact said, that revenge is a custom in this society, - a matter doubtless in the accused's mind as the angry man arrived.

Was it then a reasonable possibility that the accused believed himself or his family to be in danger? Was there a situation in which Ramoga could reasonably say that he felt threatened with imminent attack ? - for defence is excusable not only in cases of actual attack but also of reasonable apprehension - Chisam (1963) 47 Cr.App.R.130.

The learned trial Judge gave most anxious consideration to this situation. As has been pointed out he had the undoubted evidence of a man who had retreated from a frightening scene outside, with his family around him, confronted by an angry trespasser, who may or may not have been carrying a knife, but who was certainly inflamed by what he thought was the death of his brother and was speaking of the need for a further immediate killing.

It was a situation in which any adjudicator would find the matter finely balanced as to whether self defence was available. But the defence appears in the mind of the Judge to have overplayed its hand. A tribunal may sometimes discount to some extent the version an accused person gives as being an exaggeration, but the Judge rejected the supposedly independent witnesses DW3 and DW4 because he thought they were lying. It now emerges that

the reason for this conclusion was invalid. They may have been telling the truth - they may not. But we are faced with the situation whereby what might otherwise have been a successful defence of self defence has been rejected for reasons which must be reappraised. In that situation, as this Court now has the evidence, or as a trial Court would have the evidence if the matter was sent back, there would be what we have already described as an equipoise situation.

Namely a confrontation between a frightened but armed man, and an angry intruder. It does seem that in those circumstances a jury, or judge alone could not reasonably say that there was not justification for some self defence, remembering as Lord Morris said in Palmer (supra) that the matter is not to be weighed in too nice a scale.

The learned Judge was not only influenced by what he thought was the erroneous nature of the defence evidence, but also by the drastic nature of the retaliation. He had excluded the major knife blow for a number of valid reasons - so he concluded, and no criticism can be made, that the means of retaliation was in any event disproportionate.

Given the analysis already made of the facts leading up to the crucial moment we are of the view that the accused was however justified in causing some harm, and that the excess arose from terror of grievous harm in terms which are provided in section 197. Although an outright defence of self defence could not prevail, it seems to us, in view of the new light which has been shed on the matter that a reduction to manslaughter would be a conclusion which could not be excluded and in terms of Rule 37(2) of the Court of Appeal Rules we substitute such a verdict.

We then consider all surrounding circumstances in relation to the question of sentence, the appellant being

a man of some 60 years of age; in our view an appropriate sentence is 7 years, which sentence we accordingly now substitute, to run from the date of the original sentence.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL