CRIMINAL CASE No. 1 of 1970.

JUDGMENT.

The accused, a Gilbertese man aged 21 years employed by the British Phosphate Commissioners, is charged with attempt to murder C/S 306 (1) of the Criminal Code of Queensland, an applied statute. The person whom he is alleged to have attempted to murder, Temoanang Tiake, is also a Gilbertese labourer employed by the Commissioners; he comes from the same island as the accused and is reputed to be his cousin. The offence is alleged to have taken place at some time after 8 p.m. on Sunday 12th April, 1970, at the Commissioners' location in Nauru.

It is not disputed that on that day both the accused and Temoanang had been drinking for a good deal of the day, that they were both in a party of Gilbertese men sitting drinking on top of a concrete water tank outside an empty house in the location, that there was a fight involving only the two of them on the ground near the tank and that in the course of that fight Temoanang suffered multiple cut wounds on his chest, back and left arm. It is not disputed that throughout the fight the accused was holding in his hand a small sheath-knife; I accept the expert evidence of Dr. Mulligan that that knife could have caused those wounds. It is not disputed that none of the wounds was a stab-wound but that some had cut deep and must have required a quite considerable amount of force. Finally, it is not disputed that the loss of blood from those wounds was so severe that, even though Temoanang was taken fairly quickly to hospital and attended to there by Dr. Mulligan, he was almost moribund when Dr. Mulligan first saw him. None of the wounds was dangerous in itself but the total effect of the loss of blood had caused the serious condition in which he was when he arrived at the

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hospital. I am absolutely satisfied that, if he had not received treatment so soon, he was most likely to have died.

That it was the accused's knife which caused the majority of Temoanang's wounds and certainly all the more serious ones there can be no doubt. Dr. Mulligan has given evidence that some of the smaller wounds could have been suffered as a result of rolling on broken glass but he excluded the possibility that the more serious wounds could have been caused in that manner. I accept his evidence in this regard as conclusive. There was no other weapon at the scene which could have caused the more serious injuries except the accused's knife. I find it proved beyond all reasonable doubt therefore that the accused inflicted the majority of Temoanang's wounds and certainly all the more serious ones and that in consequence he caused Temoanang's serious condition.

The circumstances in which he inflicted those wounds and which led up to his doing so have been the subject of the evidence of Temoanang, the accused and of four of the Gilbertese men who were in the drinking party. Unfortunately all of them had had a good deal to drink and this seriously affected their ability to observe accurately and to remember what they observed; Temoanang was unable to remember clearly even his own words and actions. Furthermore of the four other members of the drinking-party, one, Tirebu, left well before the fight and another, Mauria, slept from some time before the fight started until just after it had ended. The one who apparently observed the events most accurately and remembered most clearly was Timoi; but he was prevented from actually seeing the fight in progress. The remaining one, Tengameti (Tangimate) observed little of what preceded the fight and, although he described the fight as fairly fierce, he apparently did not observe it closely, possibly because the place

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was not well lit, and he did not give any more detailed description of it.

Generally the evidence of all those present, including Temoanang himself, is consistent with - or at least not inconsistent with - the account given by the accused himself of - the events which took place before he went down from the tank immediately before the fight started. I find that it has been proved beyond all reasonable doubt that Temoanang was a member of the group on the tank before the accused and Mauria arrived but was absent when they came; that after he had come back, he took offence at some things said by the accused and from then on made a number of remarks intended, or at least likely to provoke the accused; that the accused left and came back some time later and proposed to take Mauria away but Mauria was too drunk and unwell to go, so that the accused sat down again with the group; that he had brought with him the knife; that Temoanang resumed his provocation, jumped down to the ground and smashed two bottles, saying that he could do the same to any man; that he then threw a box of matches which hit the accused on the head; that he climbed back on to the tank and the accused then stood up and got down from the tank; and that Temoanang also jumped down.

The accused has given evidence that he left the group in order to get some food; that the mess-room was closed; that he went home and got his knife to take to the boat-harbour to get fish; that he returned to the group only to invite Mauria, who had been his companion all day, to come with him; and that he stayed with the group after that only because Mauria was too unwell to leave. This evidence is not inconsistent with any evidence given by any other witness; it is not inherently improbable. There is no reason to disbelieve the accused in respect of it and I accept

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it as being, at the least, reasonably possible. Thus there is no basis on which this Court can find it proved that the accused went back to the group with the knife with any intention of pursuing a quarrel or of using the knife in a fight.

The accused has given evidence that his intention when he stood up after Temoanang had climbed up onto the tank, was to get away from him. There is nothing in the evidence of any witness which rules out this possibility nor is it necessarily inconsistent with the subsequent events. I accept, therefore, it is reasonably possible that that was his intention.

There is a conflict regarding what happened next between the evidence of the accused and that of Timoi and Tangimate. The accused has given evidence that, trying to get down from the tank,he made a misjudgment in the darkness, failed to land on his feet and fell on to the ground; and that Temoanang sprang upon him while he was on the ground and attacked him. The evidence of Timoi and Tangimate is that the accused landed on his feet; Temoanang's evidence is similar. Timoi has given a detailed account of what happened next, that is that he stood between Temoanang and the accused to separate them but was pulled aside from behind. I have no hesitation in accepting Timoi as a truthful witness and with regard to this particular part of the events in which he was himself involved, I have no doubt that he observed clearly and has remembered accurately. His evidence is corroborrat by Temoanang who, although claiming to be unable to remember his own provocative words and actions, was honest enough to admit that he might have been the aggressor and that he did not see any knife in the accused's hand.

I am satisfied beyond all reasonable doubt that the accused landed on his feet, that he and Temoanang faced one another and that Timoi got in between them to separate them. I have

no doubt that Temoanang was seeking a fight; it seems likely that by this time the accused had decided that he should accept the challenge but this is not the only reasonably possible explanation of his facing Temoanang. The mere fact that he has not told the truth about the start of the fight does not constitute proof that he had accepted the challenge and was not merely going to resist Temoanang's assault.

Learned counsel have not addressed the Court on the question whether, if the accused did intend merely to defend himself, he should have retreated rather than faced up to Temoanang. The common-law rule that a man must retreat if he can has been the subject of recent judicial review in England and it has been held that there is no obligation to flee precipitately, merely to take reasonable steps to disengage from the fight. That proposition seems eminently reasonable. In this case the accused had got down from the tank probably intending to avoid a fight. Temoanang had followed him clearly intending to have the fight on which he had decided. It seems doubtful whether by walking away then the accused could have avoided the fight. It is impossible, therefore, for this Court to find that it has been proved that the accused was not acting in self-defence throughout the fight.

However, a man defending himself against assault may use only such degree of force as is reasonably necessary to enable him to protect himself. It has not been suggested by Mr. Kelly that the deliberate use of the knife by the accused would have been within that limitation; I am certain that it would not. The accused is 21 years old; Temoanang is thirty. Both are of similar build; Temoanang was unarmed.

The accused's defence, however, is that he did not use the knife deliberately. He has given evidence that he had

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been using it to cut his plug tobacco while sitting on the tank and still had it in his hand when he jumped down from the tank. He has stated that, when assaulted by Temoanang, he tried to push him off and forgot that in one of his hands he was holding the knife. That, even though the fight started with both men standing, they fell to the ground and rolled about during their struggle is not in dispute. Furthermore Temoanang has stated that he felt himself being cut at a time when he was lying on top of the accused.

Mr. Kelly has drawn attention to two other facts, the nature and the location of the wounds, as supporting the accused's evidence. He has pointed out that none of the wounds were stab wounds, many were little more than scratches and that all were on the right-hand side of Temoanang's body. Temoanang has admitted that he was facing the accused all the time. The accused gave evidence that he is right-handed and the Court observed that, when asked to demonstrate how he was holding the knife during the fight, he immediately took it in his right hand and held it naturally. Mr. Kelly has submitted that, if the accused had intended to use the knife in the fight, he would have held it in his right hand and stabbed with it; but that the wounds actually suffered are consistent only with it being in the accused's left hand and not inconsistent with his evidence that he simply pushed Temoanang with his hands. There is no direct evidence of how the wounds were inflicted; neither the accused nor Temoanang have been able to give such evidence and no-one else saw the fight clearly.

The prosecution's case is that, however the knife was held and the blows inflicted, the use of the knife by the accused was deliberate and his intention was to cut Temoanang. The

accused has given evidence that he had entirely forgotten that he had the knife in his hand when he was struggling with Temoanang and trying to push him away. He has admitted that before the fight he knew that he had the knife in his hand. It is clear, therefore, that he was not so drunk as to be unaware of what he was doing.

The burden of proving that the accused inflicted the wounds deliberately lies on the prosecution. There is no burden on the defence to establish that they were inflicted unintentionally. If the possibility that they might have been inflicted unintentionally arises, it is for the prosecution to prove that that is not a reasonable possibility.

I have given careful consideration to all the evidence and to all submissions of learned counsel on this matter. I am satisfied beyond all reasonable doubt that the accused was aware that he had the knife before the fight started; that he had it in hi left hand and did not try to inflict any stab wounds with it; that he used his hands to push Temoanang away and to struggle with him. As he did not try to inflict stab wounds, I accept that it is reasonably possible that he did not deliberately try to cut Temoanang with the knife.

In order to prove the offence charged, the prosecution must prove that the accused intended to kill Temoanang. The logic of the ratio in the English case of R v Whybrow (1951) 35 Cr. App. R. 141 appears to be sound and the decision in that case should, I consider, be followed by this Court. It is not sufficient for the prosecution to prove an intention merely to cause injury, even grievous bodily harm.

In my view it is unnecessary, in view of the facts of this case, to decide what is the law relating to the inferences to be drawn about an accused person's intention from his actions.

If this Court followed the decision of the High Court of Australia in Booth v Booth (1935) C.L.R. 1 it would apparently have to hold that the law to be applied in Nauru is that provided by section 8 of the English Criminal Justice Act, 1967.

In this case, however, it has been established that the accused had had a lot to drink and was undoubtedly intoxicated. Section 28 of the Criminal Code provides that "intoxication, whether complete or partial, and whether intentional or unintentional may be regarded for the purpose of ascertaining whether a specific intention existed". The burden or proving affirmatively that, notwithstanding his intoxication, the accused did have the intention to kill rests on the prosecution and the standard of proof is proof beyond all reasonable doubt. Even though it has established that the accused knew that he had the knife in his hand immediately before the fight started, the extent of his intoxication, coupled with the nature of the wounds inflicted, at the very least raise a reasonable doubt about his intentions and I am not satisfied that the intention to kill, even to cause grievous bodily harm, has been proved. If Temoanang had died the accused would have been guilty only of manslaughter, not of murder. I find that he is not guilty of attempting to kill Temoanang, as charged.

I turn now to consider whether, if the facts establish that the accused committed a less serious offence, this Court can upon this present trial convict him of that offence. The circumstances in which persons charged with an offence may be convicted of a different offence are provided for in Chapter LXI of the Criminal Code of Queensland. The offence of attempted murder is not an offence involving circumstances of aggravation; so the provisions of section 575 cannot be applied. Section 584, which

provides for conviction of the offence charged notwithstanding that an offence of a similar nature has been proved and not the offence charged, must clearly apply only where that other offence is itself at least as serious as the offence charged. This leaves only section 579 for consideration. That section provides that, where an element of the offence charged is an intention to cause a specific result and that intention is not proved but the accused person is proved to have had an intention to cause a result of a similar but less injurious nature, he can be convicted of an offence of which such an intention is an element. In this case, the prosecution has failed to provide that the accused had the intention of causing a result similar to but less injurious than death, if indeed any such intention can ever exist.

Consequently, as the charge of attempt to murder has not been proved, the accused is entitled to be acquitted entirely on this present trial. Accordingly I find him not guilty of the offence charged and acquit him.

CHIEF JUSTICE.