REPUBLIC OF NAURU

SUPREME COURT

CRIMINAL CASE NO. 1 OF 1984

REPUBLIC -v- JASON HARRIS

JUDGMENT

The Charges:

On 2 December 1983 there was a party at the Agadio's home in Meneng. The party was a presentation function for the Panzer Football Club. It began on the Friday evening and continued through until the next morning. Sometime between 7.00 and 8.00 a.m. on 3 December 1983 a large fight broke out. Both Jason Harris (the accused) and one Kiki Ika became involved. The accused had been at the party from early the previous evening. Kiki Ika had arrived about midnight. Both had been drinking.

Kiki Ika went to try to stop the fight, but when the accused turned on him he became involved himself. They fought, the accused fell to the ground, and Ika left him and walked away. Shortly afterwards the accused was seen to come out of the house with a knife. He went up to Kiki Ika who was facing the other way. It is alleged that the accused then struck Ika with the knife embedding it in the back of the head. Ika received a serious injury and soon fell unconscious. He was taken to the Nauru Phosphate Corporation Hospital where an operation was performed to remove the knife. He was later transferred to a hospital in Australia where he remained for some months.

As a result of that alleged attack an information was laid containing five counts against the accused as follows:-

Count 1: Attempt to Murder: Contrary to S.306 of the First Schedule Criminal Code of Queensland, 1899, an adopted statute in Nauru (hereinafter called 'the Criminal Code").

Count 2: (in the alternative) Unlawful Wounding: Contrary to S.317 (1) of the Criminal Code.

Count 3: Grievous Bodily Harm: Contrary to S.320 of the Criminal Code.

Count 4: Assault Occasioning Bodily Harm: Contrary to S.339 of the Criminal Code.

Count 5: Going Armed so as to Cause Fear: Contrary to S.69 of the Criminal Code.

The Evidence:

Although it was said that there could have been some 300 persons at the party and possibly in excess of 200 still there when the fight broke out, evidence was given by only five of the persons who had been present. The injured person, Kiki Ika; Bereka and Melita Agadio; Lanson Thoma; and the accused himself.

There is little, if any, dispute about most of the evidence given for the prosecution. I am in no doubt that all of the witnesses were honest.

I find the following facts to be proved:

Sometimes between 7.00 and 8.00 a.m. on 3 December a fight commenced outside the Agadio house. A number of persons were involved, Kiki Ika went in to try and break it up. A broom was thrown at him by the accused and he then began fighting with the accused. He had not previously seen the accused during the time he had been at the party. When the accused fell to the ground Ika left him and walked away.

Another witness who saw the fight between the accused and Ika, Bereka Agadio, said that the accused did not seem to be fighting, as he seemed to have a sore leg or something.

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Ika said that the accused was drunk and was staggering a bit.

Shortly after this, the accused was seen by Melita Agadio to come out of the house with a knife in his hand. Bereka Agadio did not see the accused come out of the house, but looked up when she heard someone shout "Jason has got a knife in his hand" and saw him holding the knife on his right thigh as if to hide it from sight.

The accused then approached Ika and stabbed him in the back of the head. Ika's back was still towards the accused so Ika had no chance to defend himself or evade the blow. He was struck on the back of the head and the knife became embedded in his skull.

Kiki Ika did not collapse immediately. He turned around and grappled with the accused, then fell to the ground. His friend Lanson Thoma, who had not seen the attack picked Ika up, carried to the side of the road where he stopped a passing car and took Ika to hospital. When Thoma picked up the injured Ika, the accused had gone.

The accused has no recollection of the events described, so is unable to say whether he believes those facts to be accurate. He recalled attending the party and was assisting with the preparation of food until about 9.00 p.m. He also recalled that there was a fight or a brawl in which he was involved, but does not recall how or why it started, nor any details of his actions.

So far as matters of facts are concerned, Mr Keke submitted that there were two knives involved, as the knife which the accused was carrying had a handle, while the knife which was found in Ika's head had no handle. He further argued that the knife may have become embedded in Ika's head by his falling upon it. I reject both those contentions. Not only was the accused seen with a knife, but he was seen to stab the accused with it, the blow striking Kiki Ika in the

back of the head. The knife, minus it's handle was found in the general area where the blow by the accused had struck home. There is no evidence that there was a knife or knives on the ground upon which Ika could have fallen, still less that there was a knife sufficiently well propped up that a person in falling could impale himself upon it. I accept Dr Mario's evidence that the force required to drive the blade of the knife through the bone of the skull would not be generated by a person falling with his head striking the knife. In any event the evidence is that the knife was stuck in Ika's head before he collapsed to the ground.

While it is true that the handle of the knife was not found, and there is no scientific evidence as to the structure of the knife itself, the blow which caused the injury to Ika might well have been of sufficient force to break the handle. It is contrary to the weight of evidence, evidence which was not challenged in cross-examination, to suggest there were two knives involved, and no evidence at all to support the suggestion that the injured person received his injury by falling on a knife.

Both arguments are no more than hypothetical possibilities. Neither raises any reasonable doubt. I find as a fact that it was the knife carried out of the house by the accused that was embedded by the accused in the back of Ika's skull that was removed by Dr Mario, handed over to Acting Inspector Aingimea and produced in evidence as Exhibit P.1.

Drunkenness:

Both the accused and Kiki Ika had been drinking. Although none of the witnesses actually recalled seeing the accused consume alcohol, I do not doubt his evidence that he had consumed a number of cans of beer. The extent to which he was affected by alcohol is difficult to assess. Kiki Ika thought he was drunk and staggering a bit. Bereka Agadio said the accused seemed to have a sore leg, and saw him a little later holding the knife on his right thigh as if to hide it from sight. The accused in evidence said nothing

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about a sore leg, but perhaps he had received a blow or a kick to the leg, perhaps he was favouring his right leg, rather than trying to hide the knife. That evidence admits of no firm conclusions. In precise terms it is not possible to make any findings as to how much beer the accused had consumed. He said at least 10 cans "easily more than 10 cans". He said that he can drink 10 cans and then go to sleep. But there is a difference between drinking 10 cans of beer within a short period of time, and, say, 1 can per hour for 10 hours when the normal metabolism can eliminate some of the alcohol from the body before the last can or cans have been drunk.

When Acting Inspector Aingimea arrived at the Agadio house, he found the party still in progress the persons who were then still present too inebriated to give him much information. The evidence does not disclose the time of Inspector Aingimea's visit, and it is not possible to compare the condition of the accused with those other persons at the time of his visit.

All of the relevant evidence suggests that the accused was intoxicated, and his evidence that he woke up at the Meneng Infant School not knowing how he got there, is consistent with a condition of intoxication.

It is to be noted that an inability to remember, or a "black-out" is not at all the same as a person not knowing what he was doing at the time of performing particular actions. Memory and control of conscious voluntary actions are separate functions of the brain, undertaken by different areas of the brain.

The accused was not unconscious. He was moving around. He was outside fighting with Ika. He was seen to come out of the house with a knife. It is a proper inference that he went inside the house. Whether he picked up the knife outside or inside cannot be inferred. He gave no indication of a hostile animus to anybody other than Ika. The evidence suggests that he went straight up to Ika. Then a very heavy blow was struck. Those are not the actions of an unconscious

person. They are strongly inductive of a person who has an objective in view. A person consciously and voluntarily seeking to produce some end result, even though the precise consequences may not have been in his mind. Although motive is irrelevant, one is not hard to find. He had been beaten in a fight - put on the ground. Perhaps he was bent on revenge. The evidence does not suggest any history of conflict between the two men. The accused said he hardly knew Ika.

I have carefully considered the evidence the submissions and the authorities cited on the question of drunkenness, not only because of its self serving nature, but also because of the tendency which people normally have to close their minds to some terrtble thing they may have done.

There is not the slightest doubt in my mind that the accused knew what he was doing, in the sense of having control over his acts, and that his acts were directed by his mind. That his powers of self control were probably diminished by the consumption of alcohol, that he acted in a way in which he might not have done had be been sober, is not enough. I am persuaded on the evidence that his acts were voluntary. The accused is thus criminally responsible for his acts where those acts and/or their consequences encompass the elements of a criminal offence.

As Stable J. said in Cooper v. McKenna [1960] Q.R. 406, at 419 in respect of post-traumatic automatism: "I would say that it is a defence that must be closely scrutinised. It is common knowledge that "blackout", to use one of its titles, is one of the first refuges of a guilty conscience and a popular excuse."

So it is when the excuse advanced, in support of an accused persons claim that his acts were not voluntary, is drunkenness. That argument cannot succeed as a general defence in this case.

Count 1:

In order to prove count 1 the prosecution must

prove that the accused intended to kill Ika, i.e. that what the accused had in mind when he attacked Ika was to try and bring about his death.

This offence is one where a specific intent must be proved - see Criminal Case No. 1 of 1970 at p.9. Section 28 of the Criminal Code directs that "when an intention to cause a specific result is an element of an offence, intoxication whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed".

It is not enough, for the purpose of proving that intent in this case, to say that Ika nearly died, or might have died, merely from the nature of the injuries, i.e. the result of the attack by the accused. The evidence does not disclose how the blow was delivered, notwithstanding the opinion expressed by Dr Mario. The evidence does not disclose just how each man was standing at the time the blow struck. It is conceivable that the blow was aimed at the body of Ika, but missed its mark and struck his head. A rounded ended knife is an unusual object with which to attack the head. A bludgeon or a solid object or an axe is more usual.

After considering the submissions of counsel in respect of this count, and all of the evidence, there is a reasonable doubt in my mind that the accused intended to cause the death of Ika. I find the accused not guilty of attempting to kill Kiki Ika as alleged in Count 1.

Count 2:

For the prosecution to prove the offence charged in count 2, it must similarly prove a specific intent, that the accused intended to do some grievous bodily harm to Kiki Ika. That is undoubtedly a much wider intention than was the case for count 1. But even so, before finding the second count proved I must be satisfied beyond a reasonable doubt that that intent or purpose (defined in terms of a result) is what the accused set out to achieve. Once again the

choice of weapon is unusual. Perhaps the accused thought he had a carving knife?

Although I think it is probable that the accused intended and set out to inflict some serious hurt to Kiki Ika, there is a reasonable doubt about that matter. The shortage of detailed evidence about the actual attack makes it difficult to draw any inferences as to the state of mind (in terms of intent) of the accused. Did the accused walk up to Ika? Did he sneak upon him? Did he rush at him? How was the blow delivered? etc. Was he struck with the first blow, or is it conceivable on the limited evidence that the first blow missed and he was struck with a second? When the limited evidence is examined in this critical way, once again any inference that might be drawn, from the manner of the attack and the result that was obtained, is not strong enough for a criminal charge where a specific intent must be proved. I think it is a reasonable hypothesis that the accused was merely trying to enact revenge and in his drunken state, while knowing what he was doing, nevertheless did not have the necessary specific intent. He may have had only the general intent of getting back at Ika.

I find the accused not guilty of wounding Kiki Ika with the intention of doing some grievous bodily harm.

Count 3:

The crime alleged in Count 3 is not one which requires proof of a specific intention in R. v Knutsen [1963] Q.R. 157. The examination of S.320 of the Criminal Code by Stanley, J., at pp. 171 and 172 is instructive.

Stanley J., at p. 171 said:-

> "When the offence is defined as in S.320 by its result, and there is no other over-riding guide to its meaning, one is forced to the conclusion that the offender is the person who does an act or makes an omission that causes the result."

The evidence in this case proves beyond doubt that the injury suffered by Kiki Ika was done by the accused. The term "grievous bodily harm" means any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health." - S.1 of the Criminal Code. The evidence of Dr Mario, which was unchallenged, persuades me that the injury received by Ika came within the definition of grievous bodily harm. It was a bodily injury to such a nature as was likely to endanger his life, or (if epilepsy had resulted from the damage to the brain) likely to cause permanent injury to his health. That bodily injury was the direct result of the attack by the accused. Further, there is no possible argument that his acts were lawful. They were unlawful.

As I have previously held, the accused was not so drunk that he was not responsible for his actions. His act was voluntary in the legal sense.

I find the accused guilty of count 3 that he unlawfully did grievous bodily harm to Kiki Ika.

<u>Count 4</u>:

This count alleges an offence against S.339 of the Criminal Code, assault occasioning bodily harm.

In this case also there is no specific intent required to be proved by the prosecution.

S.245 defines assault: For the purposes of the present proceedings it may be abridged. A person who strikes.....or otherwise applies force of any kind to the person of another, either directly or indirectly, without his consent....is said to assault that other person, and the act is called assault.

The accused struck Kiki Ika. Ika had his back turned at the time. He had not consented to the blow he received. The accused although drunk is to be held responsible for his actions. He assaulted Ika.

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The offence charged is another result type of offence. The term "bodily harm" is defined in S.1 of the Criminal Code. It means any bodily injury which interferes with health or comfort. The injury inflicted by the accused on Ika amounted to bodily harm. In fact it went beyond that and came within the definition of grievous bodily harm, but that is not material for the purposes of count 4. It is enough that bodily harm was caused. That injury was caused in or by the assault, it was done thereby.

All of the ingredients of this offence are proved beyond a reasonable doubt. I find the accused guilty on count 4 that he unlawfully assaulted Kiki Ika and thereby did him bodily harm.

Count 5:

I turn finally to count 5; going armed so as to cause fear.

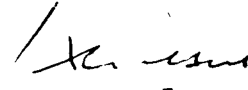
I am of the opinion that Mr Keke's argument that this count is incorrectly drawn should be upheld. S.69 requires the mental element of "terror" to be alleged and proved. In addition, the information may also be defective in that it does not allege that terror was caused to some person or persons e.g. "to persons present at the house of Agadio."

It is unnecessary to consider whether this count is capable of being remedied by amendment, as there is no application for me to do so. Nor did I intend to expand upon the legal argument, because the evidence is insufficient to prove this charge as stated quite apart from the difference in meaning between "fear" and "terror". They are not the same thing.

On the evidence I cannot find that any person who witnessed the accused carrying the knife was afraid, i.e. felt fear. The only witness who gave any evidence of her subjective feelings was Melita Agadio. She said that after the attack on Ika she went away. "I was frightened". That

is not enough to establish that she was in fear because of the manner in which the accused was going armed in public. It might equally have been that she was frightened because of the injuries caused to Ika.

I find the accused not guilty of count 5, going armed so as to cause fear.



CHIEF JUSTICE

14th June, 1984