

R. -v- ALICK WALE TABEU & KALISTO GENIUFARIA

High Court of Solomon Islands

(Ward C.J.)

Criminal Case No. 6 of 1990

Hearing: 21, 22 & 23 May 1990

Judgment: 25 May 1990

F. Mwanosalua for the Crown

A. Radclyffe for the First Accused

J. Muria for the Second Accused

Ward CJ: On 22nd December 1989 the victim in this case, James Symes, was driving a Suzuki jeep from Honiara to Lavuro plantation with the wages for the workmen on the estate. At about midday, when he reached Bahi Hill, a log was placed across the road forcing him to stop. He alighted to remove it and was murdered and the wages stolen.

A taxi had been seen dropping some men in the vicinity that morning and their names were obtained from the driver. This accused was interviewed by the police on 31st December 1989 and the details of the prosecution case depend largely on the answers he gave which are not disputed by the defence except for one passage. The accused elected to remain silent and called no evidence.

He explained to the police that he had come to Honiara from Kwaio to sell pineapples at the market and was approached by another Kwaio man, Bikinem, and asked to go with him to rob Symes. He was not keen and deliberately missed the truck on which they were to travel the evening before. Bikinem then arrived early the next day in a taxi driven by his brother and they all went to Bahi Hill. At that time the accused knew Bikinem had a number of weapons including a bush knife, a metal spear and a diving knife.

Having dropped them at the scene, the taxi returned to Honiara and the two men cut and trimmed a tree in the bush and carried it to the roadside. The accused was then posted on a small hill above the bend from where he could see some distance back along the road towards Honiara whilst Bikinem hid a few feet from the roadside in a well concealed hiding place.

When the accused saw the vehicle he threw a stone to warn Bikinem who quickly pulled the log across the road and returned to his hiding place with the bush knife, spear and diving knife. I have visited the scene and it is clear that, in order to have seen this action, the accused had already moved from his look-out point to the top of the slope immediately above the road block and was, therefore, on his way to join Bikinem.

When the vehicle stopped and Symes bent to move the log, Bikinem ran over and

called out 'Hey'. He was carrying his weapons and Symes turned and raised his hands as if to surrender but was stabbed in the chest. At this stage the accused was running to join Bikinem and arrived to see blood pouring from a wound on Symes and watched him stagger and fall at the roadside.

Bikinem then took the box containing the wage packets and, after a chiding reference to the fact the accused had not helped, they ran into the bush. Once there, they removed the money from the wage envelopes and took it with them, abandoning everything else. They subsequently spent the night in the bush, stole a canoe to Tambea and took a truck to Honiara. A few days later, the accused was arrested in his village in Malaita.

Many details of this account are confirmed by other evidence and by my view of the locus and I am satisfied that the account is substantially true.

The defence case is that this accused is guilty of robbery, despite his plea, but that he did not intend or realise the victim was likely to be killed. Therefore he should be acquitted of murder and, at the most, convicted of manslaughter.

On the facts in this case, I am satisfied beyond any doubt that the victim died as a result of the stab to the chest by Bikinem and that blow was struck with an intention to cause the death of or grievous bodily harm to the victim. That is clearly murder.

I should not comment further on the culpability of Bikinem but, as his identity and whereabouts are known, it seems most unfortunate that he is not being tried at the same time as this man.

The court heard an account of the attempt to arrest him that, by any standards, presents an extraordinary picture. The police had clear evidence to justify his arrest for this murder. On their first attempt to arrest him in his village in Kwaio, he was armed and had a number of relatives with him. Because of this, the police were unable to prevent him escaping although they could hardly have been surprised to have found him armed in the circumstances. The situation, once he had escaped, would suggest a need for firm and urgent police action but, instead, the Court was told of an arranged meeting in the bush where the suspect was asked if he would be willing to surrender to the police and, unremarkably, declined. At that the police withdrew and left him.

I hope I am not being unfair to the police officer who told the court of this strange meeting if I say he appeared embarrassed by the whole situation. He had good reason so to be. He explained that he was acting under orders to proceed in this manner and could therefore do no more. He was unable to tell the Court what is now intended. I say no more than that this appears to be a mockery of the system of law enforcement and it is to be hoped

that proper and effective steps are taken to arrest this man. The whole situation causes me considerable disquiet.

What then, on the evidence, is the culpability of this accused?

By section 22 of the Penal Code, when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and, in the prosecution of such purpose, an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

I am satisfied beyond any doubt that the accused and Bikinem formed a common intention to commit a robbery. In order to effect that purpose, they agreed to attack the victim and when they entered the taxi, the accused was aware weapons were being carried. Once at the scene he again saw that his accomplice had the weapons with him both as they were approaching and when he moved the log.

He told the police (Q96)

"The same moment I shot the stone, Big Name then ran out to the main road with these things (1) bush knife (2) a spear about 3 yards long sharp ended in one hand and a diving knifehanging along his waist without taking it off"

He then describes how he put down the bush knife and spear as he moved the log into position and then *"he picked up the two weapons and return to hide in the bush"*.

Mr Muria for the accused has referred to a number of English cases on the question of culpability for the actions of an accomplice. I accept these cases set out the principles involved under English law and assist in interpreting section 22.

In *R. v. Anderson & Morris* (1966) 50 CAR 216 @ 221 Lord Parker CJ adopted the arguments of counsel as correctly stating the principle involved -

"that where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, that that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise; but (and this is the crux of the matter) that if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act. Finally, it is for the jury in every case to decide whether

what was done was part of the joint enterprise, or went beyond it and was in fact an act unauthorised by that joint enterprise".

That was accepted in the recent case of *R. v. Ward* (1987) 85 CAR 71. The Court of Appeal there presided over by Lord Lane CJ (who was counsel in the case of Anderson and Morris) quoted the summing up of the trial judge as accurately expressing the law of joint enterprise.

"If it is provedthat the second man whose act did not directly kill, but nevertheless acting with the first man in pursuance of an unlawful joint enterprise, in which the second man must have contemplated or foreseen that the other man might possibly kill or cause grievous bodily harm as part of this joint enterprise then, of course, the second man is also guilty of murder."

I feel that under section 22 the test is different to the extent that the prosecution must prove that the act that caused the death must have been a probable consequence of the original unlawful enterprise.

In this case the accused agreed to rob Symes. He knew that would involve a joint attack on him. He also knew weapons were carried by Bikinem and as such I am satisfied beyond doubt he foresaw the probability of their use. The nature of the weapons was such that any use of them was very likely to cause grievous harm to the victim. In that knowledge, he joined in the attack.

I am satisfied beyond any doubt that the prosecution have proved the common purpose to rob, that the use of weapons was within the scope of that common purpose and that the infliction of grievous bodily harm was a probable and foreseeable consequence of that use. I am equally satisfied this accused willingly joined in the enterprise.

An intention to cause grievous bodily harm amounts to malice aforethought and the accused is convicted of murder.

From his own admission he is also guilty of robbery and I so convict him.

(F.G.R. Ward)
CHIEF JUSTICE