

**REGINA -v- PETER FITALI & OTHERS**

**High Court of Solomon Islands**

**(Muria CJ.)**

**Criminal Case No. 39 of 1992**

**Hearing:** 14,15,16,19,20,21,22,23,26,29,30 July  
2,3,4,5,6,9,10,11,12,13,16,23,24,25,26,27,31 August  
1,2,3,6,7,8 & 9 September, & 29 October

**Judgment:** 15 of December 1993

**R.B. Talasasa for Prosecution**

**J. Remobatu for Peter Fitali**

**J. Wasiraro for Gegeo Maefasia**

**Maelyn B. Samuel for Fred Osifelo**

**R. Teutao for John Itea**

**MURIA CJ:** These four accused have been jointly charged with the murder of one **Toloaena Basikona** (deceased).

It is alleged by the prosecution that on 29/12/90, one of the accused, Peter Fitali, took the deceased in a dug-out canoe and brought him out to sea where they met the other three co-accused who were travelling in a light green fibro-glass outboard motor canoe. The accused took the deceased further out at sea and there they killed him by chopping off his hands, legs and neck.

It is also alleged by the prosecution that after killing the deceased, the accused placed his body in an empty bag and sank it in the sea. This incident is said to have happened outside Ata'a sea.

It has also been alleged that after the killing, one of the accused, Peter Fitali, went back home and reported that he and the deceased sank at Fousiu Entrance. Peter Fitali stated that he managed to swim and stay alive while deceased drowned and died.

It is also part of the contention of the prosecution that the accused were all acting in concert with each other to carry out a common purpose, that is, to kill the deceased. In this regard the prosecution relies on section 21 and 22 of the *Penal Code*.

I remind myself that the prosecution bears the burden of proving the guilt of each of the accused. This the prosecution must do so beyond reasonable doubt. If I have any doubt, the accused must be given the benefit of that doubt.

The trial of these accused started on 14th July 1993 and completed on 29th October 1993. Over the period of the hearing, 24 prosecution and 13 defence witnesses gave evidence. Included in the defence witnesses were the four accused who only gave evidence at the voir dire but who had exercised their rights to remain silent after the close of the prosecution case.

Challenges had been made against the admission of confessional statements made by each of the accused. However at the end of the voir dire, those confessional statements had been admitted as evidence in the trial against the accused.

I now turn to consider the evidence against each of the accused.

**The evidence against Peter Fitali.**

The prosecution case against this accused is that at about 10.00 am on 29 December 1990 he went to the deceased's house and asked the deceased to accompany him to Ata'a to sell two dug-out canoes for the sum of \$500.00 and \$30.00 respectively. The proceeds from the bigger canoe of \$500.00 would be used for their New Year party while the proceeds from the sale of the smaller one would be used to purchase tobacco.

Having heard what the accused said, the deceased took his walking stick, basket and a bush knife and followed the accused. They got into the big canoe and paddled to Ata'a. The smaller canoe was towed.

That was the last time that the deceased Basikona, was seen alive. in fact that was the last time he was ever seen at all.

The prosecution case also is that there was prior arrangement between this accused and the other co-accused that John Itea would pick them up at Kwanaone by canoe. They would then meet up with this accused Peter Fitali and the deceased at sea where they would kill the deceased.

The accused Peter Fitali is said by the prosecution to be the mastermind of the killing of the deceased. He took the deceased out to sea as planned and there he met his co-accused who then murdered the deceased.

The evidence supporting the prosecution case against this accused largely comes from his caution statements made on 4th August 1992 and 13 August 1992. In the Caution Statement of 4th August 1992, the accused stated in answers to Question 5 and Question 6 as follows:

"Q5. Which two points do you want to clarify to the police?

A. The first point is that, at about 7.30 pm BASIKONA and I were paddling outside Fousiu when eventually Geo, Irofiala, Talikwai, Fred Osifelo and John Itea reached us by an outboard motor owned by the said John Itea. Geo then ordered BASIKONA to transfer to their boat. Geo held on to Basikona by the hand and forced him to climb on to their boat. I tried to stop Geo and others not to take Basikona but they would not bother to listen to me. Indeed BASIKONA refused very much not to go with them so he held on tightly to our canoe. Even that, Geo pulled BASIKONA by the hand and forced him climb up onto their canoe and took him away.

"Q6. Where did you go after BASIKONA was taken away by Geo and others?

A. I paddled to Ata'a substation."

When the accused was again interviewed on 13th August 1992 he made the follow statements.

"Q1. Would you be willing to clarify any point that I will ask you to clarify?

A. Yes, I am willing to clarify any point that I know.

Q2. Where did you and BASIKONA commenced paddling and where were both of you paddling to?

A. We commenced paddling from Kwanaone village to Ata'a Sub-station. we did want to sell our canoe for \$500.00 and there after to buy a cow for \$400.00. That is our plan and we wanted the cow for \$400.00. That is our plan and we wanted the cow for new years day.

Q3. How many canoes were both of you paddling?

A. Actually we paddled one and towed the other which can only fit two person.

Q4. How were you seated in the canoe?

A. BASIKONA seated at the front whilst I seated at the back.

Q5. What time of the day did you left Kwanaone?

A. BASIKONA and I left Kwanaone at about 10 am.

- Q6. While on your way to Ata'a, did any one meet you?  
A. Yes, Geo, Itea and three others met us whilst opposite Gwaunaia via Fousiu.
- Q7. What are the names of the three other men accompanied with Geo and Itea?  
A. They were Fred Osifelo, Taloikwai and Irofiala.
- Q8. Can you tell the police what actually did the men in the outboard motor told you?  
A. The men just came straight to the side of our canoe and held on to the side of our canoe towed us slowly. Irofiala held on the front of our canoe as he seated at the front of the fibre canoe. Taloikwai and Osifelo seated at the centre seat and Geo seated by the other side of Itea at the driver's seat. We drove on a little further and then we changed direction to the open sea. We drove out a little further and then they killed my granny.
- Q9. Who is your granny?  
A. He is the late BASIKONA who paddled with me.
- Q10. Who caused the death of BASIKONA?  
A. The death of BASIKONA was caused by Geo, Fred, Taloikwai and Irofiala.
- Q11. Which canoe did they killed BASIKONA in?  
A. They killed BASIKONA in the fibre canoe as he was pulled by Geo to go on to the fibro canoe.
- Q12. How did they killed BASIKONA?  
A. Geo killed him by cutting the neck with a bush knife. Geo held the knife with his right hand and swing it to the front o the deceased's neck and had it cut. BASIKONA then fell down in the canoe and died.
- Q13. Did Geo say any word while cutting the neck of the deceased?  
A. Geo said, "Kill now, it is time to kill him".
- Q14. Did you see clearly when Geo killed the deceased?  
A. Yes, I was in my canoe at about 1 metre to the incident. It wasn't dark and so I had a clear view of the incident.

Q15. What did you see Taloikwai did to the body of BASIKONA?

A. I was crying so I didn't look to Taloikwai. I felt very sorry for BASIKONA.

Q16. Which part in the fibre canoe did the incident occur?

A. The incident occurred in between Osifelo & Taloikwai and Irofiala and Geo were sitting. I talked to them by saying "Why do you have to kill my uncle?" but Fred standing over the deceased replied "Asked for what, and then continued in Baegu language, LEDIA URIATE, MANA OGA BINA BAE MAMANA NANA" meaning why are you asking, now the revenge had truly paid.

Q17. Can you tell me whether any other part of the deceased was also cut?

A. I only saw the cut on the neck.

Q18. How far was Taloikwai away from the site of incident?

A. Indeed Taloikwai, Fred and Irofiala were at the site of incident, except for Geo who stood up from where he was at the back seat and went to the front of the canoe where the incident occurred.

Q19. What did you see John Itea did to the body of the late BASIKONA?

A. John Itea was just sitting down and did nothing.

Q20. Where was BASIKONA'S body buried?

A. We didn't burry his body but sunk it in the sea.

Q21. Can you tell the police about the sinking of BASIKONA's body in the sea?

A. Yes, it was a point task by Osifelo, Taloikwai, Irofiala and Geo. They tied one end of the rope to BASIKONA's leg and another end to the half bag of stones and sank the deceased's body in the sea opposite Gwaunaia point.

I left them on the fibre canoe paddled ashore. They then followed me to Sasangasia point and transfered on to my canoe just as I approached the reefs. We then went ashore at Sasangasia point and John Itea drove away in his outboard motor to his home at Fakanakafo.

Fred, Taloikwai, Irofiala and Geo were dropped off at the Sasangasia point and walked off on their own. I then paddled the canoes around the point in order to go in through the passage. I met one namely RADE who had been out fishing and spoke to him. I lied to RADE that BASIKONA

and I had been sink in the sea and consequently BASIKONA had gone missing. RAFE then helped to paddle canoes ashore near the Ata'a clinic.

Q22. Can you remember which canoe was used by Fred, Taloikwai, Irofiala and Itea on that date 29th December 1990.

A. Yes, It was a fibre canoe owned by the Ministry of Agriculture and was kept by John Itea.

Q23. Did BASIKONA had his knife with him when you paddled with him?

A. Did BASIKONA had his knife with him when you paddled with him?

Q24. What did you do with the bush knife after BASIKONA's death?

A. The knife remained in the canoe and I gave it to one namely TIME.

Q25. Who is Time?

A. Time is my son-in-law.

Q26. Why di you give that knife to MR TIME?

A. I told Mr TIME to say that he found the knife at the place I had lied to have sank with BASIKONA."

In their evidence in Court, Lone Lonsdale (PW1) and Ezekiel Sale(PW2) confirmed that the accused, Peter Fitali, came to the deceased's Village at about 10.00 am on 29th December 1990 and asked the deceased to accompany him to Ata'a to sell the two dug out canoes for \$500.00 and \$30.00 respectively. Both PW1 and PW2 are sons of the deceased and they both stated that after the accused left with their father, that was the last time they ever saw their father.

Anthony Mamali Suiti (PW3) gave evidence that he saw the accused, Fitali and the other old man at sea on the morning of 29th December 1990 on the way to drop off families at Manu. PW3 recognised the accused. On his way back, PW3 again met the accused and the other old man. He also stated that the accused and the other old man were travelling in a large dug-out canoe and towing a smaller dug-out canoe as well and were heading toward Ata'a. PW3 was travelling in a 25 feet long fibro-glass canoe with a 25 HP Evenrude outboard motor.

When opposite Onelafa, PW3 met a 21 feet long light green paint fibro glass canoe with five (5) people on board. PW3 recognised two of the people in that canoe as Fred Osifelo and John Itea, both of whom are well known to PW3. The Fibro glass canoe with the five people on it was also heading the same direction as Fitali and the other old man. By then it was after mid-day.

Jiokimo Dafi (PW5) also gave evidence and said that in the afternoon of the 29th December 1990 he went fishing and he was cleaning the fish he caught when he saw outside Fousiu entrance two dug-out canoes. In the bigger one, were two people and the smaller one was towed. He said the canoes were on their way passed Fousiu entrance.

George Fugui (PW6) stated in Court that sometime after 4.00 pm on 29th December 1990 while fishing out in the open sea at Ata'a he saw a light green fibro glass canoe, 21 feet long with five people in it. He said that he heard of the story about the deceased went missing at Fousiu entrance the next day.

Catherine Daroi (PW7) told the Court that at about 9.00 p.m on the night of 29th December 1990 she and her cousin brother Hudson and a friend Aumoi were at the beach at Riverside Village when the accused Fitali approached them and told them that he and the deceased sank at Fousiu. The accused added that he tried to look for the deceased but he could not find him

PW 7 also said that when she saw the accused, she noticed the accused's trousers were dry, his basket was dry, he was carrying his paddle, he had his eye glasses on and his lime container was also dry.

Samuel Satini (PW 9) is a police officer and at the time of the incident, he was on unpaid leave at his home at Subobona Village, Ata'a. On the morning of 30th December 1990, he heard the story about the deceased who said to be missing at Fousiu entrance. He then enquired about it.

In the course of his enquiry, PW9 interviewed the accused Fitali who told PW9 that he and deceased sank at Fousiu entrance and that he managed to save himself while the deceased drowned and could not be found. PW9 then inspected the big canoe which the accused said he and deceased used. PW9 noticed that the canoe was a big canoe which if it capsized, one old man could not possibly turn it up-right at sea. PW9 also noticed that there were personal items belonging to the accused still remained in tact in the canoe. PW9 also was surprised that the accused did not first report the matter to the nearby people but instead he went and reported to people at Ata'a which is very far.

When one looks at the accused's answers to the questions asked, they clearly tell of the accused's involvement in the incident. The evidence confirms the prosecution story that the accused met the deceased on the morning of 29th December 1990 at about 10.00 am and that the accused took the deceased out to sea where they met the other co-accused who killed the deceased.

The accused and the deceased were seen by the various witnesses going together in a canoe at sea, at various points in time on 29th December 1990.

The evidence contained in those statement also tells of a story of the accused being present at the time of the killing of the deceased. He clearly described in details as to what was done to the deceased after he took the deceased to these other co-accused at sea.

The evidence also shows clearly that after the deceased was killed, this accused took the other co-accused in his canoe and went ashore at Sasangasia point where he dropped them. The accused's story that he and the deceased sank at Fousiu passage resulting in the deceased's death or gone missing, the story which he told the Court and PW7, PW9 and others, cannot be true. This is principally because he admitted he lied about that story in his Caution Statement.

The general rule is that the statements made by one accused either to the police or to others are not evidence against a co-accused unless the co-accused either expressly or by implication adopts the statements as his. See *R -v-Rudd (1948)* 32 Cr. App. R 138 and *R -v-Gunewardene (1951)* 35 Cr. Appeal R 80. However the prosecution case is also that the accused were acting in furtherance of a common purpose or a joint enterprise. In that regard, acts and statements made by a party to that common purpose are admissible in evidence against the other parties to that joint enterprise. See *Archbold Criminal Pleading, Evidence and Practice*, 1993 Edition, paragraph 15-357.

It is therefore necessary that there be established by evidence that the accused Peter Fitali had been a party with the other co-accused to carry out the same illegal purpose, that is, the killing of the deceased. In other words, the existence of a joint enterprise must be first established. Then it must be proved that the accused were all parties to that joint enterprise and that the acts of the accused were done in furtherance of that joint enterprise or common purpose.

The proof of the joint enterprise in this case must therefore come from the acts of the parties alleged to be jointly involved in the killing of the deceased. It can also be inferred from the acts of the accused.

Having dealt with the evidence against the accused Peter Fitali, and I now pass on to consider the evidence against Fred Osifelo.

#### **The Evidence against Fred Osifelo.**



As far as Fred Osifelo is concern, his story as contained in his Caution Statement is that it was Fitali who instructed him, Taloikwai and Irofiala to kill the deceased. Part of Osifelo's Caution Statement of 11th August 1992 reads:

"It was on Saturday 29th December 1990, the day which the trouble happened that Fitali has asked me to go to his house. So I went and met him with Taloikwai and Irofiala. That was when I heard Filati had asked me to go with the other two to kill Basikona. It was when I heard what Fitali has said to me that I knew of what he was thinking of. At that time too that I told him that I don't want to go and do as what he wants of us.

When I told him that I did not want to do what he wants or to go with Talikwai and Irofiala, Fitali swore in custom to our devil that I must go. It was because of this swearing that I respected it and went according to Fitali's word. After Fitali has told us to go and kill, he also advised us what to do. Fitali said that he's the one to go first and lead Basikona in a canoe and went to the sea. He has told us that we'll follow him later and will meet John Itea at Kwanaone with an OBM canoe.

Fitali has also said that he already paid John Itea. After Fitali has said those things he left Gwaikwa and went in the morning straight to Basikona's (deceased) house.

It was about 2 o'clock in the afternoon that Taloikwai, Irofiala Gegeo and myself we left Gwaikwa and went to Kwanaone to meet John Itea as Fitali has said. Gegeo was disliked at his home so he left his place and went and stayed with Takofilia so Gegeo stayed with us at Gwaiakwa, thats why he went with us. When we reached Kwanaone about half past two since it was not very far we met John Itea with one OBM canoe. This OBM canoe belongs to the Agriculture Division. When we met him he was at shore and said as "of" I am waiting for you because Fitali has asked me to wait for you"

We left Kwana'one heading to Ata'a. As Fitali has told us we took the OBM cane and followed him and Basikona. We met the two oldmen close to the entrance passage of Fausiu. They came in one canoe and towed another when we met them. Fitali then called us to go close to them saying "you come here". We moved closer to the two oldmen and whilst were at the side of their canoe, Irofiala grabbed a rope of the canoe and pulled it to the side of the fibro canoe. When the canoe was at the side, Irofiala held on to the end of the canoe and Gegeo held to the front of the two oldmen's canoe. Thereafter, Irofiala directed John to drive the OBM canoe further into deep sea. When we were out in the

deep sea Taloikwai asked Basikona to come into the fibro canoe. Basikona came into the canoe and sat down. Just after he sat down, Taloikwai said in language "with an enemy you do it like this". At the same time he said that, he held a bush knife in his right hand and cut off the right hand of Basikona. Again, he cut off the oldman's left hand. At that time I saw both hands of the oldman fell into canoe. After his hands were cut off and while he was still strong Basikona asked as 'why you kill me?'

At the same time Fitali answered him saying 'Because there is one thing in my mind so that it is finished'. After Fitali has said that, I saw Taloikwai gave the same knife which he had used to Gegeo. Whilst that, he said to Gegeo "here is the knife you man from Kwara'ae you kill him with this or else I'll kill you". Whilst Taloikwai was talking like that I saw him handing the knife to Gegeo. At the same time Gegeo held the knife in his right and cut Basikona's neck. After that, I saw Irofiala cut the oldman's head with the same knife Taloikwai had used. The knife was brought by Taloikwai. At that time I saw blood ran down in the canoe".

The accused went on to describe how they disposed of the deceased's body by tying it to a bag of stone and sinking it in the sea. After that all the accused, except John Itea, transferred to the big dug-out canoe and proceeded ashore where Fred Osifelo and the others were dropped off at Sangasia point.

PW3's evidence about seeing a light green 21 feet fibro glass canoe with five people in it on 29th December 1990 confirmed the accused's story about the fibreglass canoe. In addition, PW3 clearly identified the accused Fred Osifelo and John Itea as among those in that canoe.

PW4 also confirmed seeing the light green 21 feet fibro glass canoe with five people in it on 29th December 1990 sometime after 4.00 p.m.

The evidence against Fred Osifelo clearly put him at the scene of the murder as well. Not only was he present but he was also carrying out the plan as Fitali had earlier discussed with him and the other accused. He described in details what each of the accused did from the time they set out to the time they parted after the killing of the deceased.

The evidence from Fred Osifelo also goes to show that he, Gegeo, Irofiala and Taloikwai set out together after receiving instructions from Fitali. They proceeded from Gwaiakwa together and came to Kwanaone where they met John Itea who transported them, proceeding toward Ata'a. They met up with Fitali and the deceased

on the way to Ata'a as planned and thereafter proceeded to complete the execution of their agreed plan.

**The evidence against John Itea.**

The case against John Itea centres around the use of his canoe that day to transport the other accused when the deceased was killed. As far as John Itea is concerned, part of his story as contained in his Caution Statement of 6th August 1992 appears as follows:

"On the 29th December 1990, about 12.30 hrs I left home, Sango Village to go to Ata'a. After I left I called in at Kwanione village when I heard someone had passed news to wait for some people there.

When I arrived at Kwanione Fred and Gegeo had arrived and were already sitting down on the beach. About three (3) minutes later another two men arrived. These two (2) men I don't know their names. Fred then said oh we want to go with you to Ata'a. At that time Fred, Gegeo and another two (2) men whom I do not know their names three (3) of them were armed with three (3) bush knives except for Gegeo who was not arm with any knife but was holding a trousers, shirt and one empty copra sack. We then got into the boat and sit down in the following orders. Gegeo sat down in the front of the canoe. These men whom I do not know their names sat in the centre seat and Fred sat with me at the back on the drivers seat. After this we then set out.

We then arrived opposite Manu and as we started to pass Manu, we met Mr. Fitali and Basikona (Deceased) paddling a dug-out canoe. In fact both of them were paddling a big dug-out canoe and also towed a small dug-out canoe. At that time I heard Fred said a custom saying he said: FUAI MANA OGA BINA BAE MAMANA NAI" which means This is the time which we are going to take revenge. As I heard these words I think twice the next thing I thought of was to full throttle of the engine and read to break the gear. This is that if anything could happen but the gear of the engine had already broken.

As we were approaching the Fousiu entrance Fred directed me. Direction from Fred was to turn the canoe to go out side. I then answered him and said I don't have enough fuel to return. Fred again reply and said you follow my instructions. At the time we went out to the open sea we were going about one and half mile from the reef.

As we were at this distance I started to think like this, who would be at risk Gegeo or myself. Now I was thinking if it happens that they attached me then I will break the gear of the engine and escaped in the small dug-out canoe.

When I saw Basikona (Deceased)'s hands were cut off I said to them I don't want you to do this where I stay if you want to do anything take him to the main land. After I say this Fred replied you stop your inlaw do you want us to cut you like him. As the sametime Basikona (Deceased) looked up to me and asked me for help. He said "Inlaw help me" although he Basikona (Deceased) asked me for help I could not do anything else because they had already threatened me, and if I do anything further to help Basikona (Deceased) they will also cut me with the knife. Because of this I turn backwards and cry this because I felt sorry for the deceased) Basikona.

After this Fred crabbed my hair while I was still stand down to the back and twist my head to face to the front. At that time Fred held a bush knife and made another threat to me. Fred said, "NAU KWALA ANA AKALO NEI MAOA, OKO FRANGO DO NEI MELI ILIA: LEA OE FARONGO ANA KNIFE NAU SIGILIA LUAMU HE, FAI MAA OE KI" Which means I swore to the Maloa devil that if you tell what we had done, this is the knife which I will cut off your neck and your fathers with. At that time I saw the men dragging the bag which Basikona (deceased) put in and sinking it into the deep sea.

After these some of them Mr. Gegeo and the two unknown names but later learned to be Irofiala and Taloikwai three (3) of them jumped into the big dugout canoe and I started the engine behind the Fibro canoe to move away. Not very long after this Fred again jumped into the big dugout canoe. At this time I started to take off but before I escaped from them Mr. Irofiala said, "I will Fix you later". After hearing this final words from the men I take off in a full speed and went away from them and went straight to Ata'a. I arrived at Ata'a I collected my tools where I post and then returned home."

In addition to what has already been mentioned, John Itea's statement of 18th August 1992 gives a more detailed version of what he did and knew happened on 29th December 1990. Asked why he picked up the other accused at Kwanaone, John Itea said in his answer to Questions 2 and 4 of the interview of 18th August 1990 (from the original Pidgin version):

"Q2: What kind place now you stop long hem on your way to Ata'a?"

A2. Me stop over long kwanaone Village for follom talk talk from some fala pikinini that me must call in there for pickim up olketa by wait long Kwanaone for go long Ata'a.

"Q4. Who now name belong olketa pikinini where you tallem that olketa tallem you for pickim some fala people long Kwanaone?

A4. Me cannot specifically tallem or rememberem who now that fala pikinini but me save good, hem olketa pikinini long Gwaiakwa who come for attendem clinic long Sango."

As to the stones which were collected at Kwanaone, John Itea stated in answer to Question 7 of the record of interview of 18th August 1992 (original Pidgin version):

"Q7. What now think think belong you aboutem oketa stones where oketa man ia pickem insaet long bag ia?

A7. Me barava no garem any think think long hem now. Me no think for askem oketa man ia too, but me think that oketa bye usem for motu long hem."

John Itea's story reveals that Fred Osifelo was the one giving instructions and orders as to what to do in the canoe. After the deceased's hands and legs were cut off, Osifelo ordered Gegeo to cut off the deceased's neck.

John Itea was a brother-in-law of the deceased and he was threatened by Osifelo and the others that if he tried to stop them from killing the deceased, he would also be killed like the deceased. He did not do anything. He cried and became frightened. He was also threatened not to tell anyone about what happened.

By his own evidence and that of Fitali, and Osifelo, John Itea was clearly at the scene. He provided the transport and he was present at the time of the killing.

PW3's evidence confirms that Itea was the driver of the fibro glass canoe and that he was present with the others in the canoe when PW3 saw him.

#### **The evidence against Gegeo Maefasia.**

Turning to Gegeo Maefasia's story as contained in his Caution Statement of 3rd August 1992, the following appears in his Cautions Statement:

"I well remembered that I do resides at Gwaiakwa village at Fokanakafo for quite a longer time about seven (7) months. At the eighth month of December on

one Saturday 29th 1990 about mid-day Mr. Fred Osifelo came and asked me to go with him. At that particular time he told me to go and attend church party at Usu'usue, Ata'a. But since I do not have any idea about any plan, I agreed upon the request. Mr. Fred did told me that the canoe will pick us at Kwanaone village. I and Fred Osifelo left at the sametime. But when reaching Kwanaone village I saw a fibro canoe with an engine and the same of oldman Ita who sat 'down at the dry place at the side of the canoe. The name of that body was John Itea.

Arriving there not too long, I saw two people came out from the sea coastal side. There I recognised one name Talokwai who was the brother-in-law of Takifilia of Gwaiakwa village. But the other person I did not know his name. At this very moment I heard Fred spoke in language "Baegu" saying: 'KAMURU DAO NA NAI? KAMELI MASI KAMURU NE'?

Before we took off by the outboard motor they told me to go and sat at the front by myself. The brother-in-law of Takifilia Mr Talokwai and the person whom I do not know his name sat in the centre but both facing backwards to the driver, John Itea. But Fred sat behind with the driver John Itea. At the sametime I sat in the canoe I noticed that there were two big stones in a bag at the front at the place where I also sat down. I saw three bush knives which Fred Osifelo, Taloikwai and the other person were holding. These people although they sat in the O.B.M.Motor they still put their knives at their sides. As I also looked, I saw the driver John Itea sat on an empty copra bag. We travelled on but as we past Manu Passage we caught up with the two oldmen Peter Fitali and the oldman paddling the dug-out canoes travelling towards Ata'a.

At that time I saw these two oldmen were sitting down in the big canoe whilst the small canoe was towed behind. At the time the oldman who was murdered or died sat at the front canoe whilst Peter Fitali sat behind. At this very time I heard Fred Osifelo saying 'Come and let us tow your canoe'. We did towed the dug-out canoes and proceeds on. We came and as we opposite Manasu'u village, I looked but seen the driver do turned the O.B. Motor goes to the open sea. We proceeds and as we now in the open sea, there Mr. Fred Osifelo did asked the oldman (Deceased) to hop into the outboard motor. Then at the very time the oldman which we killed do hop into the out-board motor. As the time the oldman tries to sat down in the centre the same time Mr. Taloikwai held the bush knife in his right hand and cut off completely the left hand of the oldman which later known to me as Mr. Basikona. At the time the deceased fell into the O.B.M. Canoe. The second movement Taloikwai do again cut the right had of the

Deceased off completely. Then this very moment the deceased fell down into the canoe exactly.

At the same time Fred threw the knife over to me said in Pidgin 'HIA GEO YOU KILLIM'. I got the bush knife in my right hand and do cut the neck of the deceased. I cut him at the time but for sure he still alive except for the windpipe I knew it had cut off completely. Then at the sametime Fred held on to the neck of the decease and broke it off the bone except for the skin do held up the head. I saw at the sametime the person whose name I do not know got the bush knife and cut both legs of the deceased which right above both knees. I saw these two cuts were very deep right to the bones. The cutting of both legs was done after the deceased had already dead. He told me not to tell it out or reported them. But if I'm happen to report them they will sent the Agia Devil to come and kill me. Because of these threats I was too afraid. After I stayed there for quite a longer time, so then I had a fear in my mind otherwise they might kill me again one day. I am going to clarify it in this statement that although I went with them on that trip on Saturday 29th December 1990, but I do not know what exactly there plan was all about to kill that oldman".

Gegeo Maefasia further added in his statement that after the killing of the deceased he stayed with Fred Osifelo for about three months and then he returned to Nazareth, in East Kwara'ae. Gegeo Maefasia further confirmed that he admitted to James Rau (PW11) about his involvement in the killing of the deceased. He explained the reason for his admission was because he was from a different place and that the killing of the deceased was weighing to heavily on his mind, resulting in him not settled.

PW11 gave evidence and confirmed that Gegeo Maefasia made the admission to him. According to PW11, the accused made the admission to him so that he could perform some custom to "shut him" or cover up what the accused did.

Ready Iniakalo (PW13) gave evidence also of an admission made to him by the accused Gegeo Maefasia. The accused admitted his involvement in the killing of the deceased. In his Caution Statement, the accused stated that the reason for his admission was the same as that given for his admission to PW11.

The evidence of PW11 also stated that in the course of his conversation with the accused about the accused's involvement in the killing, the accused stated that they used John Itea's canoe tricking John Itea into taking them to Ata'a. After their conversation, the accused told PW13 not to mention what he (the accused) told him to anybody else.

Again the evidence against Gegeo Maefasia is plainly obvious that he was with the other accused from the beginning to the end of the whole incident. He accompanied Fred Osifelo to Kwanaone. He travelled together with the other accused to the place where the deceased was killed. He was present when the deceased was killed. He took part in the killing, delivering one of the fatal blows with a knife to the neck of the deceased.

Gegeo Maefasia admitted in his Caution Statement that he chopped the deceased's neck. However he said he was forced to do so and that if he did not do so, he himself would be killed. Notably the accused, not only confessed to the police in his Caution Statement, but he also made admissions of his involvement in the killing of the deceased to PW11 and PW13.

Was there a combination together of the accused for the same illegal purpose?

The evidence as found, in my judgement, clearly shows that Peter Fitali was the originator of the plan to kill Basikona. He discussed that plan with the other accused, two of whom had already been discharged. Fred Osifelo was put by Gegeo Maefasia as the "boss" in the execution of that plan.

The evidence has established that the accused had conspired together shortly before the execution of the plan. On 29th December 1990 the accused did carry out what they discussed and agreed to do. That clearly must be embarking on a joint enterprise.

On the evidence before the Court, I find it established beyond reasonable doubt that Peter Fitali, Fred Osifelo and the other two accused who had already been discharged had formed a common intention to carry out an unlawful purpose in conjunction with one another. They did carry out that common purpose which was to kill Basikona and consequently killed Basikona.

It is not clear that Gegeo Maefasia was with Peter Fitali, Fred Osifelo and the other two co-accused who had already been discharged when the plan to kill Basikona was discussed. But the evidence shows that he knew of the plan before John Itea picked him and the others up at Kwanaone that day of 29th December 1990.

The evidence of PW13 clearly reveals that Gegeo Maefasia knew of the plan to kill Basikona, at the very least before they set out in the canoe that day. He then joined and participated thereafter in that planned unlawful enterprise to the very end. He is therefore in exactly the same position as Peter Fitali and Fred Osifelo.



The case against John Itea as found on the evidence before the Court is not on the same footing. The evidence shows that the only connection he had with the other accused that day was through the use of his canoe or better still the Agriculture Division's 21 feet light green fibro glass canoe.

It would appear from the evidence of PW13 that John Itea was not aware of what the other accused's plan was. PW13 said in Court that according to the accused Gegeo Maefasia, John Itea was tricked into believing that he was to pick the other accused and to take them to Ata'a.

The Caution Statement of each of the accused who are parties to the joint enterprise do not, in my judgement, show that John Itea knew of the other accused's concerted scheme nor was their sufficient evidence to show that he participated in the prosecution of their joint unlawful purpose of the killing of Basikona.

The prosecution case against John Itea rests solely on the use of his canoe to transport the other accused to the place where the crime was committed. Accepting, as I do, PW13's evidence that according to one of the other accused namely, Gegeo Maefasia, John Itea was tricked, it would hardly be surprising that John Itea became frightened when he found out in the middle of the sea that he was about to witness the killing of an innocent human being. He in fact did see before his very eyes, in his canoe the most barbaric slaughtering of a defenceless old man. Presence alone is not sufficient to make a person become participant in the commission of the crime.

The evidence before the Court is clearly insufficient to prove to the required standard that John can be said to be a party to or participant in the joint enterprise in this case.

At the end of the trial, the Court raised the issue of the body of the deceased not being found. Counsel for the Prosecution submitted that despite the fact that the body of the deceased was not found, the fact of death can still be proved by circumstantial evidence.

Counsel further submitted that in this case, also, the accused had confessed killing the deceased. That is proof of death of the deceased says counsel.

The cautionary rule is that never convicted any person of murder or manslaughter till at least the body be found: see *Archibald, Criminal Pleading, Evidence and Practice* 1992 Ed. Vol. 2 para. 19-9 and the cases cited therein. However the fact of death is provable by circumstantial evidence, notwithstanding that neither the body nor any trace of the body has been found and the defendant has made no confession of any participation in the crime: see *R -v-Onufrejczyk, 39 Cr. App. R.I.*

In the present case, as it turned out, the accused's Caution Statements themselves contained the evidence of the fact of death. In any case the cautionary rule as mentioned earlier would obviously be inapplicable in cases of murder at sea (as is the present case): see *Archbold 1993* Vol. 1 para. 10-3.

In this case, I am satisfied beyond reasonable doubt that the fact of death has been proved.

The evidence before the Court has revealed the killing of Basikona in revenge of some past feud. The evidence shows that the deceased was chopped off his hands and legs and neck. The pieces of the body that had been severed were placed in the bag with stones while the rest of the body was tied to the bag of stone before sinking it into the sea. The only description that benefits such an act is that it is an act of savagery and barbarism committed with the greatest and worst of all malice that the law can imagine.

On the evidence, I am satisfied beyond reasonable doubt that Peter Fitali, Fred Osifelo and Gegeo Maefasia have each committed the crime of murder as charged and I convict each them.

I am not so satisfied as to the guilt of John Itea and he is acquitted.

(G.J.B. Muria)  
CHIEF JUSTICE