

REGINA -v- EPHREM SURAIHOU

High Court of Solomon Islands

(Muria ACJ)

Criminal Case No. 33 of 1992

Hearing: 20 January 1993

Sentence: 1 February 1993

R. B. Talasasa, for the Crown

J. Wasiraro for the Accused

MURIA ACJ: The accused in this case is charged with the murder of Atanasio Houkao on 10 May 1992 at Raraihata Village, Malaita Province. He pleaded Not Guilty to the charge.

The Accused called the deceased his father, as the deceased was the brother of the Accused's own father. No evidence had been adduced before the Court showing any previous problem between the Deceased and the Accused.

There is evidence that the Accused had previously been admitted to the National Mental Unit at Kilu'ufi on 17 February 1983. While he was at the Mental Unit, he was given a provisional diagnosis of paranoid schizophrenia. That diagnosis was difficult as then he was not communicating well and for long periods he refused to speak at all. He was discharged and was put on a fortnightly injection of a depot phenothiazine.

After the Accused arrived back at his village in Small Malaita, he went and lived by himself in the bush.

On 10 May 1992 the deceased went to see the Accused bringing with him some yams for the Accused. When the deceased arrived at the Accused's house in the bush, the Accused was not in the house. The deceased then proceeded to the Accused's garden where he found the Accused.

When the deceased spoke to the Accused in the garden the Accused hit the deceased with a stick (which was used for digging potatoes and also used for making mounts for planting of potatoes). That stick was described by PW1 as about 4 feet long

and about 2 or 3 inches in diameter. The Accused hit the deceased with the stick about two or three times.

The medical evidence showed that the cause of death was internal bleeding from the blood vessels. The injuries found were one lacerated wound behind the left ear lobe, and bruises on left lower face, behind both left and right shoulders and on both the left and right side of the ribs.

PW1 gave evidence that after the deceased went to see the Accused, he and his small daughter went to the bush to a cocoa plantation which was near the Accused's garden. When he and his daughter were close to the Accused's garden, he heard the Accused talking to the deceased, asking where he (deceased) was going. PW1 then heard the deceased replied and said that he was bringing food for the Accused.

Not long after that, PW1 heard the deceased called out his name saying that the Accused 'killed him' (deceased). PW1 then ran toward them and saw the Accused hitting the deceased with the stick several times.

When PW1 shouted and asked what the Accused was doing to the deceased, the Accused turned to PW1 and cut him with a bush knife on his shoulder. PW1 fell down and the Accused cut him again on the leg, wrist, back, arm (l) and head. Despite being cut, PW1 managed to grab the Accused and tie him up with bush ropes. By then PW2 arrived and helped PW1 to tie the Accused up.

Having tied the Accused, PW2 went to get help. The people took both the Accused and deceased home. The deceased was then transported to Tarapaina Clinic. Attempt was made to take him to Afio Area Health Centre but he died on the way. PW1 was treated at Afio Area Health Centre.

In his record of interview the Accused did not deny assaulting the deceased with a stick and cutting PW1 with a knife. The Accused said that the reason why he fought (hit) the two men (deceased and PW1) was because of some talk the two men had done to him. His answers to Questions 11 to 21 clearly show the Accused's story as to why he hit the deceased and PW1. That part of his record of interview is as follows:-

"Q11. *Was it true that you murdered your father Atanasio Houkao?*

A11. *It is true that we fought but at the moment I think he is now recovered.*

Q12. *Why did you fight with your father?*

A12. *We fought because of their own stories.*

- Q13. *It is also alleged that you too fought with Atanasio Manehunita. Was this true?*
- A13. *I did not fight him, he was the one who fought me.*
- Q14. *Why did Atanasio Manehunita got wounds on his body?*
- A14. *I cut him with a knife because I was very angry.*
- Q15. *Why do you fought that two men?*
- A15. *Those are rubbish men, they are stupid.*
- Q16. *What did you hit Atanasio Houkao with?*
- A16. *I hit him with a stick.*
- Q17. *It was alleged that when you hit Atanasio Houkao he was bringing you some food is this true?*
- A17. *That time I did not see any food with him they are telling lies.*
- Q18. *Do you know that this man Atanasio Houkao died because you hit him with that stick?*
- A18. *I do not know whether he is death or he is still alive. The time I hit him it was his son that make things wrong for him. He should not run behind.*
- Q19. *Do you know how many times you hit Atanasio Houkao with the stick?*
- A19. *I only hit him two (2) or three (3) times.*
- Q20. *You said that you cut Atanasio Manehunita with a knife. How many times did you cut him?*
- A20. *I cut Atanasio Manehunita only once.*
- Q21. *Do you have anything else concerning the fight between your father, your brother and you?*
- A21. *These man Atanasio Houkao and Atanasio Manehunita both approach me wrong. I went for potato in the garden and then they came and spoiled me. That is all."*

There is no dispute that the Accused assaulted the deceased and PW1. It is further not disputed that the deceased died as a result of the injuries he suffered from that assault upon him by the Accused.

Counsel for the defence relied on the case of *R -v- Joyce [1970] SASR 184* and submitted that the prosecution cannot put in issue the Accused's state of mind as the Accused did not give evidence and so did not raise the issue of the state of mind of the Accused. Counsel, however, did not go on to add that where the defence put in evidence of the state of mind of the Accused either by calling witnesses or by cross-

examination of prosecution witnesses (even though it may not be for the purpose of establishing the ~~defence~~ of insanity but for some other purpose) such evidence could properly be put to the jury to decide on the question of insanity and the jury could properly find insanity if there is evidence for them to do so.

In the present case, defence counsel's cross-examination of the prosecution witnesses clearly raised the question of the state of mind of the Accused. Indeed at the close of the prosecution case, the prosecution made available the Doctor who examined the Accused together with his report on the Accused. Defence counsel then cross-examined the doctor on his report touching on the mental state of the mind of the Accused.

The Court must, therefore, consider in this case the state of mind of the Accused at the time he attacked the deceased.

Mr Wasiraro, submitted that on the evidence, the Accused, at the time of the attack, was suffering from a disease of the mind, such that he did not know what he was doing or that he did not know that what he did was wrong. Counsel submitted that the common law test is that stated in *R -v-Windle* [1952] 36 Cr. App. R. 85 where it was contended for the appellant that the defence that the Accused did not know that he was doing what was wrong meant that the Accused need only show that what he did was not morally wrong, that is wrong according to the ordinary accepted standard of reasonable men. The Court of Appeal, in dismissing the appeal held that "*wrong*" meant, contrary to law. Thus if the appellant raised the defence of insanity, contending that owing to a defect of reason due to the disease of the mind he did not know that he was doing what was wrong, it must be established that he did not know that he was doing what was contrary to law, ad not simply to show that he believed that it was not morally wrong.

The onus of proof where the defence of insanity has been raised, is on the defence. The burden of proof is on the balance of probabilities: See *R -v-Oliver Smith* (1911) 6 Cr. App. R. 20 and *R -v-Carr-Briant* (1943) 29 Cr. App. R. 76.

The law in England and other countries of common law jurisdictions on insanity and the test to be applied have been well settled. In England the test is basically that which was stated in *R -v-Windle* (supra). In Australia the High Court did not follow *Windle's* case when considering what the test of insanity was in *Stapleton -v-R.* [1952] ALR 929; 86 CLR 358. In that case the Court held that the test was whether the accused person knew that his act was wrong according to the ordinary principles of reasonable men, and not whether he knew it was wrong as being contrary to law as laid down in *R -v-Windle*.

In Solomon Islands the test on insanity must be found in the words as expressed in section 12 of the Penal Code which provides:-

"12. Subject to the express provisions of this code and of any other law in force a person shall not be criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission:

Provided that a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission"

When one reads the language used in section 12 of the Code, one sees clearly the difference between language of that provision and that of the common law. Section 12 refers to "**any disease affecting the mind.**" The other difference that can be drawn is that whereas in the Code, it speaks of "**capacity to understand**" and "**capacity to know**", the common law simply refers to actual knowledge.

Having observed section 27 of the Western Australia Criminal Code (which is identical to section 12 of the Queensland Criminal Code) on insanity, the phrases "**capacity to understand**" and "**capacity to know**" have been used. Although the text of section 27 in the Western Australia and Queensland Criminal Codes are slightly different to our Code, the parts of our Code that I have referred to above as being distinct from that of the common law position are in a similar position as well regarding section 27 of the Western Australia and Queensland Criminal Codes and the common law.

It would be observed that section 12 of the Code treats as insane people who are to the extent that they do not have the capacity to -

- (a) understand; or
- (b) know that they ought not to do the act done or omitted to be done.

That is very much expressing the test of moral capacity as found by the High Court of Australia *R -v- Porter* (1933) 55 CLR 182; *Sodeman -v- R* (1936) 55 CLR 192 and *Stapleton -v-R.* (1952) 86 CLR 358.

In my judgement the appropriate test to be applied in Solomon Islands when applying section 12 of the Penal Code on the question of insanity is the test as applied by the High Court of Australia in *R -v-Porter* (supra) and *Sodeman -v-R.* (supra) where Dixon said in *Porter's* case:-

"Could this man be said to know whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make the act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong. What is meant by "wrong"? What is meant by "wrong" is wrong having regard to the every day standards of reasonable people"

and later be reiterated that opinion in *Sodeman's* case saying:-

"In general it may be correctly said that if the disease or mental derangement so governs the faculties that it is impossible for the party accused to reason with some moderate degree of calmness in relation to the moral quality of what he is doing, he is prevented from knowing that what he is doing is wrong"

The Accused having raised the issue of the state of his mind now carries the onus of satisfying the court that owing to a disease affecting his mind he did not have at the time of committing the offence any of the capacities mentioned in section 12 of the Penal Code. It will also be observed that even if a disease is shown to have affected his mind but he has not shown that the disease had deprived him of any of the capacities mentioned, then he has failed in satisfying the onus resting upon him.

The accused elected not to give evidence nor call witness in this case. Thus the court must decide this case on the evidence that has been made available to the court.

Apart from the evidence adduced by PW1 and PW2, there are also the Statement under Caution from the Accused and the Medical Report on the Accused.

In his record of interview, the Accused clearly stated that he knew he assaulted the deceased and that the reason why he assaulted the deceased was because of things said by the deceased. He knew he hit the deceased with a stick two or three times. The Accused knew that he cut PW1 and that he did so because as he said, he "was angry". He also stated that it was the way the deceased and PW1 approached him that caused him to assault them. That story which he gave to the police did not show it coming from a person of unsound mind.

Dr. MacBride-Stewart's report shows that the Accused has some aspects of schizophrenia. But his behaviour was rational. Dr. MacBride-Stewart stated in his report on the Accused as follows:-

"It is not possible to reach a definitive psychiatric diagnosis at present and will be difficult at any time. He has some aspects of schizophrenia but no good evidence at first rank symptoms."

Much of his behaviour is rational and appropriate though he remains very withdrawn and uncommunicative. It is my opinion that the patient is probably fit to plead at this time."

There is no evidence to disprove that the Accused had some aspects of schizophrenia. However, even if I accept that schizophrenia was a "disease" affecting the Accused's mind, it clearly did not deprive him of any of the capacities mentioned in section 12 of the Penal Code. The Accused therefore must still be criminally responsible for his act in the present case.

The next question is what is the extent of the Accused's criminal responsibility in the present case? The answer to this question really turns on the proof of the matters stated in section 195 of the Penal Code. Those matters are;

- "(a) an intention to cause the death of or grievous bodily harm to any person, whether such person is the person actually killed or not; or*
- (b) knowledge that the act which caused death will probably cause the death of, or grievous bodily harm to, some person whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused."*

Again the evidence here came from PW1 and the Accused's own Statement Under Caution. PW1 stated in evidence that when he approached the Accused's garden he heard his father. (deceased) called out desperately saying that the Accused "killed" him. PW1 ran to them. The Accused then turned to PW1 and cut him with a knife. Although the Accused stated in his statement that he cut PW1 only once, the evidence showed that PW1 received a number of cuts on his body.

As I have already said, his answers to Questions 11 to 21 in his record of interview clearly show the Accused's story as to why he attacked the deceased and PW1.

It appears from those evidence that the Accused was putting up the reasons for the "fight" between the deceased and himself and also between PW1 and himself. When asked if it was true that he killed his daddy (the deceased), the Accused agreed they fought and that he thought his father was alright after the fight. It appears from the evidence that the fight between PW1 and Accused occurred after the Accused had already hit the deceased with a stick. The deceased was by then already lying down in great pain.

There was evidence to suggest that it was PW1 who made things worse for the deceased. The Accused appeared to be saying that there was provocation on the part of PW1.

I am satisfied on the evidence that PW1 came to the scene to assist his father who had been beaten by the Accused.

The fight between the Accused and deceased was over some words which the deceased had said to the Accused. I do not think any suggestion of provocation can succeed here.

The evidence clearly points to the conclusion that the Accused was of a violent character. He violently hit the Accused with the stick which was a locally made garden tool such that it led to the sole cause of the death of the deceased.

I am satisfied beyond reasonable doubt that the Accused intended to cause grievous bodily harm to the deceased and that further he knew his act would probably cause serious bodily harm to the deceased. That is murder in law.

I find the Accused guilty of the murder of the deceased and he is convicted as charged.

(G.J.B. Muria)
ACTING CHIEF JUSTICE