

# REGINA -V- JOHN WAIWAI

High Court of Solomon Islands  
(Muria, CJ.)

Criminal Case No. 41 of 1994

Hearing: 11 April 1995

Judgment: 9 June 1995

*DPP for Crown*

*M.B. Samuel for Respondent*

**MURIA CJ:** The accused John Waiwai has been charged with the murder of his wife Roselyn Alide (deceased) on 13 July 1994. He pleaded Not guilty to the charged.

I remind myself that the prosecution must prove the guilt of the accused beyond reasonable doubt. Any doubt left in the mind of the court must be resolved in favour of the accused.

The case for the prosecution is that in the morning of the day in question, the accused was at his place of work, when he heard rumours about his wife having an affairs with another man by the name of Lionel Houkuru. As a result he became angry and went back to his house to see his wife to discuss the matter with her.

It is further alleged that when the accused reached the house he found his wife at home. He then ordered his wife to go and sit on a plank under their house. His wife did. An argument then ensued between the accused and his wife.

PW3, who is their daughter was there near her mother and saw what had happened. She heard her father asked her mother (deceased) as to who her mother had been having an affair with. PW3 heard the deceased denied having an affair with any man. PW3 stated that in the course of the argument, the accused pulled the knife out from his side and stabbed the deceased.

According to the accused the act of stabbing the deceased was an accident. Alternatively if that is not accepted, then it is a case of provocation.

The accused's case is that having heard rumours about his wife having an affair with another man, he went back to the house to discuss matter with the deceased when an argument ensued between them. In the course of the argument, the accused asked the deceased as to who was the man who made her pregnant. In response the deceased replied saying that if she was pregnant, would that be painful inside him(accused)? Upon hearing that provocative response the accused said that he then slapped the deceased. According to the accused, the deceased immediately put her hand over the knife which was

strapped to the side of the accused's trousers. A struggle between them ensued leading to the knife injuring the deceased.

I have given a great thought about the accounts of the incident as given by the prosecution and that given by the defence in this case. There is no doubt that the marriage between the accused and the deceased had not been a happy one.

I accept as facts that on Monday 11 July 1994, the deceased and the accused had an argument in the course of which the deceased swore at the accused saying that he should have sexual intercourse with his mother if he was to stay in their house. By then it was in the early hours of the morning of Tuesday 12 July. I accept that as a result of the swearing which was considered by the accused as a serious matter in their custom, the accused left the house and went to stay with his cousin brother by the name of William Aruhane at Ranadi.

The accused attended work on that Tuesday and returned to sleep at his cousin brother's house. On Wednesday 13 July, the accused also attended work in the morning. He was still upset and so he rang the deceased's sister and told her to tell his wife (deceased) to pay compensation for the swearing. The deceased's sister slammed the phone on him.

It was about 9.30 am that morning that he was told by John Fonosimae (PW2) that the deceased was having an affair with another man who was from the Western Province. In court PW2 was asked both by the prosecution and defence about the conversation he had with the accused when it was alleged that he told the accused about the deceased having an affair with another man. I believe PW2 was not telling the Court a true account of his conversation with the accused at that time. I watched PW2 give his evidence and formed a clear view that he was holding back something which he was not prepared to truthfully tell the Court. As to the conversation that morning on 13 July 1994, I accept the accused's version, that is to say, he was told by PW2 that his wife was having an affair with another man who was from Western.

The evidence also showed that the argument with the deceased that morning on 13 July followed immediately after the accused reached his house shortly after his conversation with PW2. I have no doubt whatsoever in my mind that the accused at the particular time was very upset by what he was told.

Again the evidence also shows that when the accused arrived at the house, he asked the deceased if the man from Western made her pregnant. In response the deceased answered:

"I am pregnant. What about it? Is it painful with you?"

The Pidgin version as given by the deceased is: "Me babule hem how? Hem soa long you?" Upon hearing that response, immediately the accused became angry and slapped the deceased.

The account as to how the knife injured the deceased given by the prosecution differs from that given by the defence. The accused's version given to the police in his record of interview is also different from that he gave to the Court. In his record of interview, he said that when he slapped his wife (deceased), the deceased immediately reached for the knife which was strapped to his side, "shutting" the knife. He went on to say that the knife hit the deceased when he whipped her hand with the knife resulting in the knife landing at and penetrating the left side of the deceased's stomach. He then pulled the knife out and ran away.

PW3 who was standing close to the deceased at the time saw the accused and deceased struggled. She saw the accused pulled the knife out from his side and stabbed the deceased. She demonstrated what she saw happened. I accept her account. There was nothing to dissuade the Court from accepting her description of how the deceased was stabbed.

On the evidence I am satisfied so that I am sure that the accused, after slapping the deceased, reached for his knife at his side. I am satisfied so that I am sure also that it was then that the deceased tried to stop the accused from using the knife by also holding onto the knife. I am satisfied beyond reasonable doubt that the accused intended to use the knife and did use it on the deceased resulting in her death.

The accused raised two defences - the defences of accident and provocation. In view of the finding I have just made the prosecution clearly has discharged its obligation in excluding the defence of accident and that defence can now be simply put to rest.

On the defence of provocation Mrs Samuel for the defence argued that the accused in this case was provoked by what the deceased said to him in response to his question as to whether the man with whom she was having an affair made her pregnant. The deceased's response, "I am pregnant. What about it? Is it painful with you?" argued Counsel was provocative in the circumstances of this case and which was sufficient to cause the accused to lose his self-control.

The learned Director of Public Prosecution on the other hand argued that in the present case there was no evidence to justify reliance on the defence of provocation. He argued that the accused was not angry when he left his work place to go to his house to see his wife(deceased). He went home to see his wife to discuss with her the rumour about her having an affair with another man. As such the learned Director argued that there can be no reason for the provocation as claimed by the defence.

The defence of provocation in a murder charge is provided for under sections 197(a) and 198 of the Penal code. These provisions are:

"197. Where a person by an intentional and unlawful act causes the death of another person the offence committed shall not be of murder but only manslaughter if any of the following matters of extenuation are proved on his behalf, namely -

(a) that he was deprived of the power of self-control by such extreme provocation given by the person killed as is mentioned in the next succeeding section;"

198. Where on a charge of murder there is evidence on which the court can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be determined by the court; and in determining that question there shall be taken into account everything both done and said according to the effect which it would have on a reasonable man."

It will be observed that provocation under the Code can be either by things done or by things said or by both together and must be such as to deprive the accused person of the power of self-control. The question whether the provocation was enough to make the accused lose his self-control and to do what he did is to be decided by the Court taking into account everything both said and done.

It must be pointed out that the defence, having raised the defence of provocation, the onus is on the prosecution to exclude it beyond reasonable doubt. Clearly the prosecution must do so on the evidence shown to the Court.

I do not need to repeat the evidence here, but I feel that in considering this issue of provocation in this case, the Court must look at the whole circumstances immediately prior to and at the time of the act done by the accused. The circumstances spoken of must be those affecting the relationship between the accused and the deceased.

The evidence in this case shows that the relationship between the accused and the deceased had been a continuous upsetting one for days. It resulted in the accused being chased out of the house through a very serious swearing in custom which was literally telling the accused to have sexual intercourse with his mother if he did not leave the house. A swearing of such a nature is an extremely serious matter in custom, including that of the deceased. That occurred in the early hours of Tuesday 12 July 1994.

There is no evidence that that swearing had been amended. The accused attempted early Wednesday morning, 13 July, to discuss the matter of compensation over the swearing, but he was scolded by the deceased's sister.

Then came the news that his wife (deceased) was having an affair with another man who comes from Western. The accused naturally became very upset and went to their house to ask his wife about it. I have watched the accused give evidence on his own behalf and my assessment of him when giving evidence was that he must have been severely upset by the news that his wife was having an affair with another man.

Having reached his house, the accused saw his wife and called her. He asked her about her alleged affair with another man. She at first denied having an affair with another man. This came the crucial moment for the accused. He asked his wife if the other man made her pregnant, to which she replied "I am pregnant. What about? Is it painful with you?" To the accused that was an admission by the deceased of an illicit intercourse and a boasting of an adulterous affair.

In a community such as where the accused come from and I have no doubt also in many other communities in Solomon Islands, an admission of adultery or a boasting of illicit sexual intercourse and an adulterous affair would reasonably be considered as constituting provocation. In the present case, I found that the deceased's boastful response to the accused of her pregnancy by another man constituted a very serious provocation sufficient to induce a reasonable man in the accused's position to lose his self-control and to do what he did.

I have searched for evidence from the prosecution to the contrary in this regard, but I have found none. The evidence of PW4 and other prosecution witnesses are of no assistance to the prosecution on this question of provocation. The deceased's provocative answer has not been controverted and so must be left to be accepted by the Court. I do so in this case.

On the evidence before the Court, the prosecution has failed to negate the defence of provocation in this case and the accused must be entitled to the benefit of that failure. The defence has succeeded in showing the defence of provocation applies in this case and in terms of sections 197(a) and 198 of the Penal Code, the accused cannot be said to be guilty of murder.

The accused in this case had undoubtedly and deliberately committed an unlawful act of killing the deceased. Had he not done so under extreme provocation, I would have found him guilty of murder. I find the accused not guilty of murder but guilty of manslaughter.

Verdict:           Acquitted of Murder.  
                       Guilty of Manslaughter.

(Sir John Muria)  
**CHIEF JUSTICE**