REGINA -V- JOHN TANA, AGUSTINE NAMONA, THOMAS TALIKANGA AND NAPTHALI NAPIABO

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.).

Criminal Case No.175 of 2002

Date of Hearing: 25th, 26th, 27th, 28th August and 1st September 2003 at Lata.
Date of Ruling: 2nd September 2003 at Lata.

Mr S. Balea for the Crown
Mr I. Kako for the Accused

RULING

Kabui, J. The accused in this trial are John Tana, (accused No.1), Augustine Namona, (accused No.2), Thomas Talikanga, (accused No.3) and Napthali Napiabo, (accused No. 4). They have been charged with the murder of Andrew Nieda (the deceased) under section 200 of the Penal Code Act (Cap. 26) (the Penal Code). They all have pleaded not guilty to the charge against them. It is the duty of the Court under section 269(1) of the Criminal Procedure Code Act, (Cap. 7) (the CPC) to record a finding of not guilty at the conclusion of the Prosecution case, if the Court considers that there is no evidence at that stage of the trial to show that the accused did commit murder as alleged by the Prosecution. To determine that finding the Court must consider all the evidence before it at the close of the Prosecution case. In this trial, Counsel for the defence, Mr Kako, took upon himself to make a submission of no case to answer at the close of the Prosecution case on two grounds. The first ground was that there was no evidence showing that the accused had been arrested by the Police and charged with murder as well as the accused had not been interviewed by the Police. He argued that the Police had contravened section 10 of the CPC and section 5(1)(f) and (2) of the Constitution. Section 10 of the CPC states-

".(1).In making an arrest the police or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.
(2) ---.
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Section 5 of the Constitution states-

"... (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say-

(a) ---
(b) ---.
(c) ---.
(d) ---.
(e) ---.
(f) upon reasonable suspicion of his having committed, or being about to commit , a criminal offence under the law in force in Solomon Islands;
(a) ---.
(b) ---.
(c) ---.

(d) --.

(e) --

(2) Any person who is arrested or detained shall be informed as soon as reasonably practicable, and in a language that he understands, of the reasons for his arrest or detention.

(3) --.

(a) --.

(b)--.

He argued that non-compliance with these sections would result in a mistrial. To use the words of Counsel, "non-compliance would nullify the whole trial". Section 10 of the CPC describes the mode of arrest unless the person to be arrested voluntarily submits to being taken into custody by word or conduct. Section 5(1)(f) and (2) of the Constitution are about freedom from arrest and the need to tell the person being arrested the reasons for the arrest in a language understood by the person being arrested. Any act that contravenes section 5(1)(f) and (2) of the Constitution may entitle the aggrieved person to seek relief under section 18 of the Constitution. Unlawful arrest, contrary to section 10 of the CPC as read with section 5(1)(f) and (2) of the Constitution resulting in detention may well be false imprisonment for which damages may be claimed by the aggrieved person. As regards the argument on the lack of arrest, Counsel for the Crown, Mr. Balea, said that such an issue would not arise under section 269(1) of the CPC. He said that such an issue should be left to the final submission by the defence, if at all relevant. I agree with Mr. Balea on this issue. The issue of lack of arrest and a no case to answer submission are two separate issues and should not be fused under section 269(1) of the CPC as is being attempted by the defence. I reject that argument at this stage of this trial. Section 269(1) of the CPC is simply about the sufficiency of the Prosecution evidence at the close of the Prosecution case to warrant accused, 2, 3 and 4 to be put on their defence at that stage of the trial. Sufficiency of the Prosecution evidence is the second ground of Mr. Kako's two pronged attack on the Prosecution case. The no case to answer submission was put forward by Mr. Kako in respect of accused 2, 3 and 4 in this trial.

The Law.

The law on a no case to answer submission is well settled in this jurisdiction. I simply would refer again to **R. v. Galbraith** [1981] 2 All E. R.1060, particularly the judgment of Lord Lane, C.J. at page 1062 and other cases in this jurisdiction which I cited in **R .v. Moses Haitalemae and Others**, Criminal Case No.210 of 2001 (unreported).

Evidence against Augustine Namona.

In order to say something about this accused, I must start with the meeting held at Nila village on 11th October 2001. The accused was at that meeting with the other men of the village. At that meeting, PW6 said the accused swore that anyone who refused to go with them would fuck his own mother. He said the men held weapons such as spears, bows and arrows, knives and sling-shots. He said the accused was one of the men who made their way in the direction of Bamoi village. PW2 said that he fired his .303 rifle in the air as a warning as the accused and his group were moving up towards his group and closing up on them. PW3 said that he heard the accused urging someone to shoot and kill in the Reef Islands language. He said the accused's group were raining stones, spears, and arrows upon them whereupon PW2 fired in the air the second time. PW4 confirmed that he too heard the accused urging to shoot and kill in the Reef Islands language. He said he recalled the accused having said in the Reef Islands language, "ve ve nanubo," meaning "shoot and kill." Both PWs 3 and 4 said they did recognize the accused's voice as they knew him very well and familiar with his voice. This is admissible evidence. Whether the accused's conduct does fall within the meaning of section 21 or 22 of the Penal Code is not yet clear at this stage but whichever is the case,

there is the undisputed fact that the accused was one of the men who left Nila village with intention to fight the Bamoi people. His words of encouragement to those in his group to shoot and kill were consistent with that intention to fight the Bamoi people that day of the confrontation. John Tana who is alleged by the Prosecution to have shot and killed the deceased was a member of the accused's group. Iam therefore of the view that the accused does have a case to answer at this stage of the trial. I find so accordingly.

Evidence against Thomas Tolikanga and Napthali Napiabo.

The only evidence against these two accused was being the members of the same group of men who left Nila village to fight the people of Bamoi village. PW s 2, 3 and 4 all said that Thomas Tolikanga was the one who was putting up the notice on the wall of John Vaike's copra-drier. The noise of his banging that attracted the attention of the PWs 2, 3, 4, 13, and the deceased in the first place. Napthali Napiabo was standing near Thomas Tolikanga whilst the notice was being put up. Napthali Napiabo was seen with a metal rod being used as a spear. Apart from that they were never seen again doing anything. Whilst they might have been in the group shouting and throwing missiles at PW2's group and whilst they might have been willing to fight in the first place, they did nothing to cause the death of the deceased. They are innocent of the murder of the deceased. I find that they do not have a case to answer and I acquit them accordingly. Accused No.3 and accused No.4 are free to leave the Court as free men.

F.O. Kabui
Judge