IN THE HIGH COURT OF SOLOMON ISLANDS

CRIMINAL CASE NUMBER 173 OF 2003

REGINA

-v-

RONNY OETA AND ALLEN MAELALIA

Hearing: 10th - 14th May, 17th - 19th, 26th May 2004
Judgment: 3rd June 2004

Director of Public Prosecutions (F. Mwanesalua) for the Crown
Public Solicitor (K. Averre) for the First Defendant
D. Evans for the Second Defendant

Palmer CJ.: On the night of 10th February 2003 at approximately 8.20 p.m., Sir Frederick Soaki, (**"the Deceased"**) member of the UNDP Delegation (**"the Delegation"**) for the Demobilisation of Special Constables in the country and former Commissioner of Police was gunned down at point blank range by a lone gunman at Auki Motel whilst he was having his dinner with the other members of the Delegation. The gunman was identified as Edmond Sae, a Sergeant in the Royal Solomon Islands Police Force (**"the Suspect"**). He is still at large but these two Defendants, Ronny Oeta ("**D1**") and Allan Maelalia ("**D2**") (hereinafter referred to together as **"the Defendants"**) stand trial also for the murder of the Deceased.

The Prosecution case:

The prosecution alleges that D1 and D2 assisted the Suspect in the killing of the Deceased. They were seen together in the company of the Suspect outside the CID Office at Auki Police Station. They assisted in confirming the whereabouts of the Delegation and accompanied the Suspect to the Motel. They assisted in helping the Suspect to locate where the Deceased sat in the Motel before departing as planned or agreed to and meeting up later with the Suspect after the shooting.

The Prosecution case is three pronged. The Defendants have been charged under sections 21(b) and (c) and 22 of the Penal Code, as parties to the crime of murder.

> (i) Prosecution alleges that D1 and D2 did or omitted to do any act for the purpose of enabling or aiding the Suspect to kill the Deceased. Prosecution submits that as police officers they had a legal duty under section 21 of the Police Act (cap. 110) to inter alia "*...collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice, and to apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient ground exists.*" They say the failure of the Defendants to apprehend the Suspect and effect an arrest, or to communicate intelligence, enabled or aided the Suspect to kill the Deceased.
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> (ii) Prosecution alleges the Defendants aided or abetted the Suspect to kill the Deceased. This occurred when the D1 and Justin Ma'asia (**"Justin"**) went to check

for the whereabouts of the Delegation, where they resided and later on when D1 and D2 went down to the Clinic to check and confirm where the Deceased was sitting inside the Motel. After the shooting they met with the Suspect and walked back with him to the Police Station.

(iii) Prosecution alleges the Defendants were also criminally liable for the death of the Deceased as they were parties to a common or joint enterprise with the Suspect to gun down the Deceased, under section 22 of the Penal Code. They shared common intention to prosecute an unlawful purpose. They rely on the authority of **Miller v. R**[1] in which the High Court of Australia stated that it requires no evidence of an express agreement to establish the existence and scope of a criminal common purpose; it may be deduced from all the proven circumstances. Prosecution argues that when the totality of the circumstances is taken into account, it is only logical to conclude that the Defendants were part of a common enterprise to murder the Deceased.

The Defence Case

The Defence say that the plan or mission to kill the Deceased was primarily that of the Suspect; he conceived, planned and executed it. They denied being involved in any common or joint enterprise with the Suspect or as confederates. They became aware of his plans only when he told them outside the CID Office at Auki Police Station. And although they accompanied him throughout, they did so unwillingly and primarily through fear of being killed or shot by the Suspect if they disclosed the plan to anyone else or if they decided to try and run away and warn the Police or the members of the Delegation. They denied actively assisting encouraging the Suspect to commit the offence.

The Law

Murder is defined in section 200 of the Penal Code as:

> "*Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder and shall be sentenced to imprisonment fur life.*"

Section 202 defines malice aforethought as:

> "*Malice aforethought may be expressed or implied and express malice shall be deemed to be established by evidence proving either of the following states of mind preceding or coexisting with the act or omission by which death is caused, and it may exist where that act is unpremeditated -*
>
> > *(a) an intention to cause the death of or grievous bodily harm to any person, whether such person is the person 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 nor, or by a wish that it may not be caused.*"

In order to sheet home criminal responsibility for murder Prosecution is required to prove beyond reasonable doubt that the Defendants intended to cause the death of the Deceased or knew that the Deceased would be killed and were responsible for his death. They have been charged as principals in the second degree under sections 21(b) and (c) and 22 of the Penal Code, which read as follows:

> "*When an offence is committed each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it, that is to say -*
>
> > *(a) every person who actually does the act or makes the omission which constituted the offence;*
> >
> > *(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;*
> >
> > *(c) every person who aids or abets another person in committing the offence;*
> >
> > *(d) any person who counsels or procures any other person to commit the offence.*"

Section 22 of the Penal Code deals with joint offenders in prosecuting a common purpose and states:

> "*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 probably consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.*"

Enabling or Aiding

The crucial elements Prosecution is required to prove under section 21(b) are that the acts or omissions of the Defendants were for the purpose of enabling or aiding the Suspect to kill the Deceased. This includes not only in showing that there was a failure under section 21 of the Police Act (cap. 110) to "*... collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice, and to apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient ground exists.*", but that it was for the **purpose** of enabling or aiding the Suspect to kill the Deceased. A mere failure to carry out duty is not sufficient. It may give rise to disciplinary proceedings against the police officer but it cannot be the basis for criminal liability, unless it can be shown that such failures or omissions were for the purpose of enabling or aiding the Suspect to commit the offence. To prove that Prosecution is required in any event to show the existence of a joint or common enterprise.

Section 21(c) of the Penal Code - Aids or Abets

To be brought within the definition of an aider and abettor it is necessary to establish that one is present at the commission of the offence and aids or abets its commission. Presence may be either actual or constructive. In **Archbold Criminal Pleading Evidence and Practice**[2] the

learned Author states:

> "*It is not necessary that the party should be actually present, an eye-witness or ear-witness of the transaction; he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he is near enough to afford it, should occasion arise. Thus, if he is outside the house, watching, to prevent surprise, or the like, whilst his companions are in the house committing an offence, such constructive presence is sufficient to make him an aider and abettor: Fost. 347, 350; 2 Hawk. C. 29, ss. 7, 8; 1 Hale 55; 1 Russ. Cr. 12 ed., p. 140; R. v. Howell (1839) 3 St. Tr. (N. S.) 1087. But he must be near enough to give assistance. R v. Stewart (1818) R. & R. 363;*" - see also **R v. Betts & Ridley**[3] at page 154.

In **R. v. Allan, Ballantyne & Mooney**[4], Edmund Davies J delivering the judgment of the Court at pages 246 - 250 citing the case of Coney (1882) 8 QBD 534 said:

> "*Now it is a general rule in the case of principals in the second degree that **there must be participation** in the act, and that, although a man is present whilst a felony is being committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal in the second degree merely because he does not endeavour to prevent the felony, or apprehend the felon.*" (Emphasis added)

Those words were expressed in the context of spectators at a prize fight who had also been charged as aiders and abettors. It was held in that case that mere spectators were not criminally liable as aiders and abettors of an illegal prize fight. This highlights the distinction that those who may have participated in organising or assisting to set up the prize fight could be held criminally liable as aiders and abettors. Some element of participation was required.

The court continued:

> "*In our judgment, **encouragement in one form or another is a minimal requirement** before an accused person may properly be regarded as a principal in the second degree to any crime.*" (Emphasis added)

In **R. v. Gray**[5] Lord Reading CJ delivering the judgment of the Court said:

> "*It is not necessary that a man, to be guilty of murder, should actually have taken part in a physical act in connection with the crime. If he has **participated** in the crime - that is to say, if he is a **confederate** - he is guilty, although he has no hand in striking the fatal blow. Equally it must be borne in mind that the mere fact of standing by when the act is committed is not sufficient. A man, to become amenable to the law, **must take such part in the commission of the crime as must be the result of a concerted design to commit the offence***." (Emphasis added)

See also **R v. Borthwick**[6]. At paragraph 29.6 of Archbold Criminal Pleading Evidence and Practice[7] the learned Author highlights the point that even if a man is present whilst an offence was being committed, if he takes no part in it and does not act in concert with those who committed it, he does not become an aider and abettor merely because he does not endeavour to prevent the offence, or fails to apprehend the offender - see also 1 Hale 439; Fost 350; *R. v. Fretwell* (1862) L. & C. 161. The learned Author continued in the same paragraph to point out that it was not necessary to prove that the party actually aided in the

commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a convenient distance, in order to favour their escape, if necessary, or was in such a situation as to be able to readily come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present aiding and abetting.

In **R. v. Alfred Maetia & Newton Misi**[8] Muria ACJ as he then was, points out at page 7 that:

> "*The two provisions (sections 21 & 22 of the Penal Code) clearly require to be proved, the presence and participation by the accused in the commission of the alleged offences.*"

At page 8 his Lordship continues:

> "*The general principle of law is that a criminal offence may be the subject of aiding and abetting provided the person accused of aiding and abetting knows the facts constituting the principal offence and actively* ***assists and encourages*** *the principal offender.*" (Emphasis added)

His Lordship then quoted with approval **Johnson v. Youden [1950] 1 KB 544** at pages 546 - 547:

> "*Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence. If a person knows all the facts and is assisting another person to do certain things, and it turns out that the doing of those things constitutes an offence, the person who is assisting is guilty of aiding and abetting that offence, because to allow him to say, I knew of all those facts but I did not know that an offence was committed, would be allowing him to set up ignorance of the law as a defence.*"

His Lordship Muria ACJ then summarises the crucial elements of aiding and abetting:

> "*The authorities clearly show that for a person to have aided and abetting the commission of an offence there must be established that he is present (actual or constructive); that he knows the facts necessary to constitute the offence, and that he is actively encouraging or in some way assisting the other person in the commission of the offence.*"

The crucial elements of aiding and abetting gleaned from the case authorities cited can be summarised as follows:

> (i) That the Defendants were present (actual or constructive);
>
> (ii) That there was a concerted design to commit the offence, or knowledge of the facts constituting the offence; that is, it must be shown that the Defendants knew what the principal was doing; and
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> (iii) That there was participation or some form of participation; encouragement in one

form or another, that is the Defendants intended to encourage and wilfully encouraged the commission of the crime (see **Archbold Criminal Pleadings Evidence and Practice**[9]); actively assisting and encouraging the commission of the offence - see also **Churchill v. Walton**[10], **Maxwell v. DPP for Northern Ireland**[11], **Mok Wei Talk v. R**.[12]; that he is a confederate and not a mere bystander or spectator.

The mental element required in an aiding and abetting case is encapsulated in the second limb - that of participating in a concerted design or joint venture to commit the offence or having the necessary knowledge of the facts constituting the offence and giving assistance or participating therein. Learned Counsel Ken Averre referred to these at page 7 of his written submissions quoting from **Archbold Criminal Pleading Evidence and Practice 1999 edition**. I quote:

> "In *R v Powel and another*; *R v English* (1997) 3 WLR 959, HL, it was held (following *Chan Wang-Siu v R* (1985) AC 168, PC), that a secondary party is guilty of murder if he **participates in a joint venture realising** (but without agreeing thereto) that in the course thereof the principal might use force with intent to kill or cause grievous bodily harm, and the principal does so. The secondary party **has lent himself to the enterprise**, and by doing so, he has **given assistance and encouragement** to the principal in carrying out an enterprise which the secondary party realises may involve murder.
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> Archbold submits that this should be the approach whenever it is alleged that the defendant is guilty as an aider and abettor (someone who assists the commission of the crime) whether by the supply of the instrument or by some means of which the crime is facilitated or committed, by keeping watch at a distance from the actual commission of the crime, by active encouragement at the scene, or in any other way, whatever the crime alleged. **To realise something might happen is to contemplate it as a real not a fanciful possibility**: see *R v Roberts*, 96 Cr.App.R.291. So the mental element required of an aider and abettor is a different one to that required of the principal. The aider and abettor in murder is never going to have the intention to kill. He may, of course, hope or desire that the principal does kill but what needs to be proved is an ***intention to render assistance to another in the realisation that that other may kill and do so deliberately or intending to inflict serious injury***."

Issues for determination:

> **1. This relates to the question whether the caution statement of another co-defendant can be used against another.**
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> **2. Was there a common or joint enterprise?**
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> **3. Was there some form of participation or encouragement in one form or another?**
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> **4. If so, is this negatived by the defence of duress? Prosecution has to disprove this beyond reasonable doubt; that there was no duress in the circumstances such as to render their participation as involuntary or done unwillingly though intentionally.**

1. Acts and declarations of a co-defendant: It is a fundamental rule of evidence that statements made by one defendant either to the police or to others are not evidence against a co-defendant unless the co-defendant either expressly or by implication adopts the statements and thereby makes them his own - see **Archbold**[13], **R. v. Rudd**[14], **R. v. Gunewardene**[15], **R. v. Rhodes**[16]. There is an exception however to this rule for statements made in the course and pursuance of a joint criminal enterprise to which the co-defendant was a party - see **Archbold**[17] in which the learned Author states:

> "*The acts and declarations of any conspirator in furtherance of the common design are admissible against any other conspirator, provided there is independent evidence to prove the existence of the conspiracy and that the persons concerned are parties to it.*"

At paragraph 33-60c, the learned Author sets out the three essential requirements which the court must be satisfied with before any such act or declaration should be admissible as proof against the participation of another:

> "*that the act or declaration (i) was made by a conspirator, (ii) that it was reasonably open to the interpretation that it was made in furtherance of the alleged agreement, and (iii) that there is some further evidence beyond the document or utterance itself to prove that the other was a party to the agreement*" -see also **R. v. Devenport and Pirano**[18], **R. v. Blake**[19], **Tripodi v. R**.[20]

Before the statements of D2 can be used as evidence against D1, Prosecution must prove that a common purpose exists.

The defence of duress

Although under English law the defence of duress for murder is not available - see **Regina v. Howe**[21], it is available under our Criminal Law as a statutory defence - see section 16 of the Penal Code:

> "*A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury do not excuse any offence.*"

The Defence say that the Defendants were under the control of the Suspect throughout the whole incident and that he exercised or had such overpowering influence over them that they did what they did under duress. Having raised this defence and adduced evidence in support it is Prosecution's duty to disprove duress.

2. **Was there a common or joint enterprise?** Is there evidence of a common intention to carry out a common purpose? Prosecution alleges there was a pre-concert plan agreed upon outside the CID Office between the Defendants and the Suspect to kill the Deceased. They allege there was meeting of the minds, a consensus before the plan was effected. What happened thereafter was done in furtherance of that common purpose or design. If one looks at the totality of the circumstances this supports the existence of a pre-concert plan.

The key witnesses for Prosecution of such a plan were the two special constables Hickson Maelofa ("**Hickson**") and Justin. Their evidence however of the existence of any pre-concert plan is quite minimal. If any inference was to be drawn this came only from the evidence of Hickson. He states that shortly after the Suspect arrived he called the Defendants aside and they went ahead of him to the spot outside the CID Office. He remained behind in David Olomea's room listening to a cassette before joining them. He says he saw them talking together but did not know what they were discussing. He joined some 7 minutes later. When he arrived they were telling stories but did not hear or know what they were talking about. Shortly after his arrival he saw the Suspect changing his clothes and heard for the first time that they were to go out on a mission. Initially he thought it was to go and arrest someone but then realised that it was to kill the Deceased. The inference sought to be raised by this witness was that everything had been decided upon before his arrival and that when he arrived it was simply to be told by D2 to accompany them on the mission to kill.

His evidence however is at variance with the evidence of Justin. Justin says that he joined them at the Promenade or leaf haus extension ("leaf haus") before moving to the spot outside the CID Office. He says they were all together at that spot when the Suspect told them about his plans to kill a member of the Delegation. Both D1 and D2's evidence are consistent on this point as well.

Justin says that initially the Suspect had indicated that he was going to kill the Deceased and Ronald Fugui. However he changed his mind and said that he was going to kill the Deceased only. Justin says that Hickson was there with D1 and D2 at the leaf haus when the Suspect arrived. After giving hire a beer, the Suspect told them to go with him to the spot outside the CID Office. He says they all left together.

Justin never mentioned hearing anything about a pre-concerted plan, agreement or joint enterprise between these Defendants and the Suspect throughout the time they were together. There was no suggestion of any prior discussions between the Suspect and the Defendants. If there was Justin would have been aware of it. He says nothing about that in his evidence. Hickson also says nothing about any such pre-concert plans.

Justin's evidence consisted primarily of **a plan communicated to them by the Suspect to go and kill the Deceased and for them to accompany him on that mission**. To that extent his evidence is consistent with that of Hickson and the Defendants. Both denied discussing anything with the Suspect about any plans or agreement to kill any member of the Delegation or the Deceased. There is simply no evidence whatsoever of any pre-concert plan being discussed or agreed to by the Defendants with the Suspect. The inference which Prosecution seeks to draw from the evidence of Hickson cannot be supported by any evidence. The most that can be deduced if his evidence is accepted as true would be that they were seen talking together with the Suspect at some point of time before his arrival and that shortly after his arrival he saw the Suspect getting ready to go on the mission to kill. He stands alone however on that version and in the light of the clear contradictory evidence from Justin which is consistent with the Defendant's version, it would not be safe to accept his version. Further, only Hickson says that it was D2 who told him to go with the Suspect, whilst Justin and the two Defendants all said it was the Suspect who was in charge and control of the whole operation from the beginning and that it was he who told them to accompany him. I am not satisfied any safe inference can be drawn as to the existence of a pre-concert plan or joint enterprise between the Defendants and the Suspect. Prosecution has failed to discharge its

onus on this crucial point.

The consequence of this finding means that in so far as any acts or declarations have been made in the caution statement of D2 implicating D1 are concerned they are inadmissible as against him.

3. Was there some form of participation or encouragement? Even in the absence of any common or joint enterprise or pre-concert plan, it is still possible for these Defendants to be convicted of the crime of murder as principals in the second degree provided Prosecution can demonstrate on the evidence that the Defendants have an **intention to render assistance to the Suspect knowing full well that the Suspect was going to kill the Deceased**. Prosecution must prove that these Defendants intended to assist the Suspect or encouraged the Suspect to carry out the killing although there was no pre-concert plan.

In dealing with this issue however, it is necessary to consider the issue of duress in conjunction, because whilst the Defence denies any form of voluntary or willing participation, assistance or encouragement, at the end of the day the essence of their submission is that it was all done through duress.

There is no dispute that the Defendants knew at quite an early stage (outside the CID Office) that the Suspect planned and intended to kill the Deceased. He had a pistol, he had his change of clothes and hat to assist with his disguise ready and changed into them outside the CID Office in their presence. He wore an overall type of trousers, a long hand shirt and a hat with a transparent covering similar to a sweat rag over the hat to provide some sort of covering for his face from being recognised. He was seen loading his pistol with a magazine and cocked it before putting it in the pocket of his trousers. The Defendants do not deny that they knew that the Suspect intended to kill the Deceased and that this was not a fanciful possibility rather it was a real certainty. And so when they stayed with him and accompanied him right through, it was under that clear knowledge and understanding that it was for the purpose of killing the Deceased. The Defendant therefore cannot say and they have not sought to deny, that they did not know what was happening, what the mission was, where they were going and for what purpose. The mission, plan and purpose from beginning to end was to kill the Deceased. The killer was going to be the Suspect and the victim the Deceased.

The Prosecution's task in this however is not merely to prove that the Defendants aided and, abetted the Deceased but to disprove that their actions were not motivated by the compulsion of duress. Having raised the defence of duress which they were entitled to under section 16 of the Penal Code, Prosecution also has to disprove it to the required standard.

Did Justin and Dl go to ascertain where the Delegation stayed and communicate that to the Suspect?

It is not in dispute that Justin and D1 went as directed by the Suspect to find out or to confirm the whereabouts or location of the Delegation. Justin, D1, D2 all confirmed that Justin and D1 went to a shop below the Auki Motel. All of them were consistent in their evidence that the Suspect did all the talking and issued the orders throughout. They all say that D1 and Justin went as instructed by the Suspect but that this was out of fear for their lives. They said they went and bought some cigarettes at the bottom of the shop. They say D1 met a man from Africa, a Dr. Ishmael who was a member of the Delegation in the shop and spoke with him. The identity of this man has never been in contention and so the court can take judicial notice

of the fact that he was the UNDP representative in the team. Justin says that D1's interchange with Dr. Ishmael was short and comprised primarily of a question asking where he stayed and eliciting a response from Dr. Ishmael confirming that they lived upstairs at the Auki Motel. D1 says that the interchange was more casual and consisted of much more than a single question. Whatever the correct version may be that visit confirmed to them in any event where the Delegation were accommodated.

It is important to bear in mind that there is no evidence to suggest that this trip to the shop below the Auki Motel was done voluntarily, willingly or as part of an agreed plan that they had with the Suspect. The evidence adduced from both key Prosecution witnesses and consistent with the evidence of the Defendants has been quite plain and clear, that they went because they felt compelled to go; if they did not go they feared they would have been shot or harmed. Justin says he feared for his life that he would be shot if he did not go. He also says that when the Suspect spoke to them he spoke roughly at them. D1 also expressed the same concerns.

Could Justin and D1 have escaped or warned the Deceased or members of the Delegation to hide?

I think without a doubt the answer to those two searching questions must be yes. They had opportunity to escape or to warn the Delegation. D1 had an opportunity to save the life of an innocent victim, the Deceased when he spoke with Dr. Ishmael, but he did not. Justin had opportunity to tell the shop keepers about what the Suspect was planning to do, he did not. They had opportunity to act heroically, courageously but did not; cowardice and fear according to their evidence got the better of them.

It is for Prosecution to prove not only that the failure by D1 and Justin to warn the Deceased or members of the Delegation staying at the Motel or to escape and warn or report the plan of the Suspect to the Police at that particular point of time was for the purpose of enabling the Suspect to carry out his plan, but to disprove that they acted under duress.

Unfortunately apart from that failure the link has not been sufficiently established. It is not to be disputed that because they failed to take action at that time, that it enabled the Suspect to continue with his evil plan. But the evidence adduced does not support any suggestions that this was because they were in concert with the Suspect in his plans. The case of **Rubie -v- Faulker**[22] can be distinguished on the grounds that in that case there was a direct relationship between the Supervisor and the driver. The Supervisor was required to advise and counsel the driver as to what should be done as the driver came under his direct responsibility. In this instance, apart from the duty imposed by law the nexus between D1 and the Suspect has not been sufficiently established. True they were together and they came as directed by him, but he was not under their direct control or responsibility and could be told what to do so that his actions can be imputed to them as their actions as well. To suggest therefore that an inference should be drawn or can be drawn by the Court in such circumstances is not supported by the evidence. D1 and Justin have given clear and uncontroverted evidence that even if they were to escape or to report the matter to the Police they still feared for their lives. They were of the view that the Suspect was capable of locating them and shooting them if he found out that they had reported the matter to anyone. It is important to bear in mind throughout as well although this was never raised in evidence, that law and order at that time unfortunately was still haphazard and unpredictable. The Police had some control but it was not complete and total control. The nation had just come through an atrocious period of violence, intimidation,

harassment and fear. Those who had guns were still capable of exerting influence and controlling events at that time. The situation on the ground is a matter of judicial notice which everybody in the country was aware of. It was common knowledge too at that time that the Police Force was tainted with rogues. It was common knowledge too that there were still many ex-militants who still had access to high powered rifles. It is important to keep in mind what the scenario on the ground was to be able to have a proper understanding of the state of law and order and security at that time. There was still much fear around engendered by the presence of illegally held high powered firearms.

D1 and Justin returned to where the Suspect was knowing full well where the Delegation were accommodated. The Defence says that no communication was made with the Suspect on their return; Prosecution says it can be inferred from the evidence that some form of communication must have been made. I think it is unnecessary to somewhat try and drag or stretch logic beyond breaking point. The Suspect told D1 and Justin to find out or perhaps the more accurate word to use is to confirm where the Delegation were accommodated. D2 was of the view that the Suspect knew all along where they were staying. He had been with the Delegation at the meeting conducted earlier on that day. But whether there was in fact any communication of that fact or not, the evidence indicates that shortly after their arrival they left in the direction of the Motel. It would seem to suggest that there was some form of communication or confirmation of the fact to the Suspect before they left for the Auki Motel via the road behind the Police Barracks up past St. Paul's Anglican Church Building past the Development Bank of Solomon Islands (**'DBSI'**) building and stood opposite the Auki Clinic.

The fact that such an inference is drawn however is not necessarily evidence of complicity or of a common design or enterprise. Prosecution still has duty to prove that such communication was done intentionally for purposes of facilitating and aiding and abetting the commission of the offence by the Suspect and to disprove the element of duress raised by the Defence as the prime motivating factor throughout. As regarding the former, I am not satisfied Prosecution has demonstrated that even if any such communication were made that this was done willingly for the purpose of facilitating or enabling the Suspect to carry out his evil plans. The common thread throughout has been a real fear of reprisal or of being physically harmed or shot by the Suspect if they crossed his line or path.

Did D1 and D2 assist the Suspect in locating the Deceased outside the Auki Clinic?

Descriptions of what happened at the Clinic when D1 and D2 went down to check for the exact location of the Deceased differ slightly. Justin says that the Suspect asked for someone to go down but no one was willing to go so he ordered D1 to go down. D2 later followed him. Justin and Hicks were told to move further away. They waited at a spot marked 'C' in Exhibit 4, which was opposite the Auki Primary School playing field. Both did not see what happened thereafter. The only evidence of what happened came from the oral evidence and statements under caution of the Defendants. Much of their evidence on what happened at that time and the contents of their caution statements are consistent but again with some differences. In his statement made to Police on 7th April 2003 D2 states that the Suspect went down to where they were standing and then told them to go away. In his evidence on oath he says that he went down and told D1 to run away when the Suspect went to put his bag down by a hibiscus. This is quite a variation from his original statement but unfortunately this has never put to him either by Prosecution or Defence to explain. It is possible he may have embellished his version in court. The essence of their evidence however remains uncontroverted, that when D2 arrived where Dl was he told him for them to run away.

Prosecution seeks to draw inference that whilst at that spot near the Clinic's water tank D1 and D2 could see where the Deceased was sitting inside the Motel and the fact was communicated to the Suspect before he went into the Motel. That information enabled him to go in, open the door, turn and shoot the Deceased. Unfortunately the evidence does not support such an inference. In his statement given to Police on 7th April 2003, D2 states:

> "*Me no actually lookem anyone ia but only tufala door where hem blong entrance waitem other one blong balcony or verandah ia.*"

No evidence of any sighting of the Deceased from that spot or of any communication to the Suspect has been adduced. The only other evidence which Prosecution seeks to rely on such inference was from the evidence of Albert Samani, one of the members of the Delegation who was sitting at the same table with the Deceased. In his evidence he says that when the Suspect came into the room he turned to where the Deceased was sitting and shot him. His evidence however has to be balanced with the evidence of the owner of the Motel Colin Ramo who was also sitting at the same table. He says that the Suspect came into the room looked around before resting his eyes on the Deceased and shooting him. I am not satisfied any inference can be drawn from Albert Samani's evidence.

The Court also took a *locus in quo* of the scene on the evening of 21st May 2003 and stood at more or less the same spot where it was alleged D1 stood and observed if someone from that spot could look into the Motel with similar lightings and the curtains drawn in the same way. Unfortunately it was quite clear that even someone from that spot at night, would not be able to see anyone inside other than the doors outside and the verandah.

The Prosecution however has duty throughout to disprove that what occurred at the Clinic was not under duress.

Apart from that, there has been no suggestion whatsoever that the Defendants or even Justin or Hicks were told to act as a lookout or to stay around the scene in case the Suspect needed help to carry out his evil purpose. The evidence adduced was that they all took off after they had left the Suspect and walked away down to the market area before returning to the Police Station after the second shot had been discharged.

Evidence of participation or encouragement:

There is virtually no dispute that the Defendants with Hickson and Justin met up with the Suspect on the evening of 10th February 2003 and despite being told about his plans to kill the Deceased, they remained and accompanied him throughout. They did as told and accompanied him right through to the Motel where they left him to shoot the Deceased before meeting up with him again at the Auki Police Station.

Hickson says that what happened after they left the Suspect at the Motel was also pre-arranged by the Suspect; he told them exactly what to do when they left him, the route they were to take and what to do when they heard the second gun shot. Justin on the other hand (and his evidence is consistent with that of the Defendants), gave no evidence of any such instructions from the Suspect. Their evidence as to the route taken and their subsequent actions were more or less along the lines Hickson had described as instructions from the Suspect. But even if what was done after the shooting was in accordance with instructions of

the Suspect there is no evidence to suggest that this was done willingly or by agreement or that it was part of a pre-concert plan with the Suspect. There is no direct evidence from Hickson himself on this. No adverse inference therefore can be drawn from this. But even if what Hickson says is accepted as the correct version it would rather go to support the contention of the Defendants any way that the Suspect had such overbearing control over them to the extent that they felt compelled to comply or be dealt with by him. The evidence even from Hickson himself was that he felt obliged to go along with everything done and said through fear and apprehension.

One of the Prosecution witnesses, Sgt. Taroimae who was on duty at the Auki Police Station at that time saw the Defendants arriving at the Station from the direction of the market area and says that he heard D2 calling out to the others to "*go for Sae*" or "*go get Sae*". Prosecution seeks to suggest from this too that this is supportive of a pre-concert plan or agreement and willingness to participate in the commission of the crime. Unfortunately, to draw an inference from such evidence in the absence of clear evidence from the two key Prosecution witnesses, Justin and Hicks is drawing a long bow.

Did the Defendants provide encouragement to the Suspect by being present throughout and accompanying him to the Motel? In **Archbold**[23] the learned Author points out that to establish aiding and abetting on the ground of encouragement, it must be shown that the Defendant **intended to encourage and wilfully encouraged** the commission of the crime.

> "*... the fact that a person was voluntarily and purposely present witnessing the commission of the crime, and offered no opposition, though he might reasonably be expected to prevent and had the power to do so, or at least ex press his dissent, might in some circumstances afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted, but it would be purely a question of fact for the jury whether he did so or not.*"

The Prosecution has also submitted that the court should draw inference from the fact that the Defendants were present throughout, that they offered little opposition though they might reasonably be expected to prevent and had power to do so, or to express their dissent and or to escape and inform the relevant persons or authorities of the plans of the Suspect. The fact they did not should be inferred as evidence of wilful encouragement.

The evidence adduced both from Prosecution witnesses however, including Police Officers who were at the scene at that time and those who carried out investigations expressed extreme fear and concern for their lives. This is a simple but significant fact which this court cannot ignore. The evidence of complicity, involvement or participation to that extent was overshadowed by the element of duress which the Defence relies on as explaining their actions that night; that whilst they did go with the Suspect, it was as involuntary or unwilling participants throughout. It was unfortunate for them that they got entangled in the evil web of the Suspect at the start and found to their dismay they could not extricate themselves without dire consequences to their personal safety.

Some of the witnesses who gave direct evidence connected to the events of that fateful night did not hide their fear of the Suspect. There is clear evidence before this court that even though the identity of the killer was known at an early stage of investigations, no one was prepared to arrest the Suspect until much later. For instance, Collin Ramo, who was present at the time of the killing, was able to identify the Suspect on the spot when he came in to the

Motel room and shot the Deceased. He informed investigating officers of this at a very early stage but they did not arrest the Suspect. There were other civilian witnesses who saw the Suspect as he escaped from the Motel and were able to give first hand description of his identity. Even a senior police officer, Sgt. Foufaka when giving his evidence at one stage in court declined to answer certain questions on personal security grounds. He described the Suspect as a 'bad boy' and that he had access to a gun, was short tempered and violent.

In his evidence, Collin Ramo told the court that after the shooting he went to his village and stayed away for about five months before returning to Auki, through fear for his own safety.

Also another Prosecution witness Sgt. Taroimae who was on duty at the Auki Police Station that night told the court that he had to run away from Auki back to his home village at Makira as he also feared for his life. He told the court that because he was from another province and was on duty at the time of the shooting he feared he might be shot by the Suspect.

Both Justin and Hickson expressed extreme fear and apprehension of the Suspect. The Defendants also expressed the same. They gave accounts in court of incidents of violence involving the use of guns they had personally witnessed in which the Suspect had been involved in. These included an incident in which the Suspect had shot up the Provincial Commanders Office with a gun. Despite those incidents the Suspect had never been pulled up or arrested. Since his escape he is yet to be accosted and is still hiding in the jungles in Malaita. He was described as unpredictable, short tempered with a penchant for violence and had a bad reputation. He was described also as uncontrollable, a law to himself and accounted to no one for his actions - a dangerous man. Both Justin and Hickson admitted giving false stories initially to Police as they feared for their lives until the Suspect was arrested before they felt safe enough to tell the truth about what had happened. This also explained the reason why they did not report the matter to the Police immediately after the shooting.

These descriptions of the Suspect have been virtually unchallenged. If other prosecution witnesses and police officers who came and gave evidence before this court could express open fear and apprehension of the Suspect how much more these two Defendants, Justin and Hickson.

I have carefully considered the applicability of section 16 of the Penal Code, in so far as the defence of duress which has been raised by the Defence would apply and is relevant in the circumstances of this case. Although there was no direct evidence of threats of shooting or killing coming from the lips of the Suspect, the overwhelming evidence from the Prosecution witnesses and these two Defendants was that such threat was present throughout without it having been spoken or expressed. There is evidence of sternness, control and dominance displayed by the Suspect and some elements of threats in what was said which were sufficiently perceived by the Defendants as amounting to a real threat on their safety if they did not comply. D1 did say that at one stage he remonstrated with the Suspect by asking why he should kill the Deceased. The Suspect however turned on him and told him to shut up and not to ask too many questions. He says he clamped up thereafter and did as he was told. These two Defendants also pointed out that they were confused about the whole situation because the Suspect was more senior than them in rank and was ordering them around. I am satisfied on the evidence before me that the fear described by the Defendants and other witnesses was not only fear of future reprisals but that it was direct and immediate, engendering a feeling of helplessness and hopelessness, that there was nothing they could do in the circumstances.

I have also considered the question whether such fear was that which a man of reasonable firmness sharing the characteristics of the Defendants would not have given way to the threats as did the Defendant - see test of objectivity approved in **R v. Howe** (ibid). This test of reasonable firmness is based primarily on the duty owed to an objective innocent victim. I say this because if there was a more direct relationship between the Defendants and the victim that standard of reasonableness may not be the same. For instance, if the victim was the brother, or father, or uncle of the Defendants, or vice versa, would they have acted in the manner they did? Would they simply have allowed the killer to go ahead and shoot their brother, or father or son? I do not think so! In this case however, that is not the situation that I am faced up with. Apart from some suggestions of connection through marriage D2 claims he has with the Deceased and some bold statements that had he had a gun he would have challenged the Suspect, there was no other evidence of any particular relationship to the Deceased other than what may be regarded as an innocent victim. In those circumstances what would a person of reasonable firmness have done? Would they have acted in similar fashion? This is not an easy question to answer because people do behave and act differently in similar situations. Whereas one may have acted cowardly through fear as has happened in the case of these Defendants and Justin and Hickson, others may have acted differently and warned members of the Delegation to hide. I know of instances during the ethnic troubles this nation went through where even women demonstrated a lot of courage and saved the lives of others. The evidence adduced before me however indicates that the actions of the Defendants in the circumstances possibly could not have been much different than what a man of reasonable firmness may have done. If other senior police officers and other prosecution witnesses (Justin and Hicks) depicted much fear even after the shooting and during the investigations, even to the present time, how much more fear would one expect someone in the shoes of the Defendants to have. They were with the Suspect throughout, heard him disclose that he was going to kill the Deceased and observed his mannerisms at that time, they knew what he was capable of doing at that immediate time and anytime thereafter. Justin, Hickson confirmed the evidence of the Defendants of an immediate perception of danger of death or physical harm if they crossed the path of the Suspect. There is clear evidence of an overpowering sense of fear and an inability to resist the Suspect in his evil scheme. The evidence depicts the picture of a controlling and domineering man taking extreme advantage of his free access at that time to guns and controlling people with it through fear. From what has transpired, taking into account the totality of the evidence, the Suspect could have done the job on his own, but that it seems he wanted others to go along with him, perhaps more out of a sense of guilt. Having two or three others (in this case four) to go with him perhaps will make the burden of guilt much less to bear than if he had done it himself. Once he had taken them into his confidence and confided to them his plans to kill the Deceased, they came under his control and could not free themselves from him thereafter even if they wanted. They became mere followers thereafter, doing what he commanded or ordered without questioning or resisting or making any serious efforts to get him to desist. He used them to assist in achieving his evil purpose.

Decision:

The Prosecution has failed to disprove that duress did not apply to the circumstances of this case beyond reasonable doubt. To that extent the Defendants have succeeded in excluding the requirement of criminal responsibility for their involvement in the events of that fateful night and accordingly must be acquitted of the charge of murder.

The Court.

Endnote

[1](1980) 32 ALR 321 (HC) at 326
[2]43rd edition paragraph 29-4
[3](1930) 22 Cr App R 148 Avory J.
[4](1965) 47 Cr App R 243
[5](1917) 12 Cr App R 244 at 246
[6](1779) 1 Doug. 207
[7]43rd Edition
[8](unreported) HCSI-CRC No. 42 of 1992 per Muria ACJ at pages 8-10
[9]43rd Edition at paragraph 29-11
[10][1967] 2 A.C. 224, H.L.
[11]68 Cr. App. R. 128, H.L.
[12][1990] 2 A.C. 333 P.C.
[13]Criminal Pleading Evidence & Practice (1999) at 15-368, (2003) at 125-295
[14]32 Cr. App. R. 138, CCA
[15][1951] 2 K.B. 600, 35 Cr. App. R. 80 CCA
[16]44 Cr. App. R. 23 CCA
[17](ibid) (2003) at 15-358
[18][1996] 1 Cr. App. R. 221, CA
[19](1844) 6 Q.B. 126
[20](1961) 104 CLR 1 at 7
[21][1987] 1 All E.R. 771
[22][1940] 1 All E.R. 285
[23]Criminal Pleading Evidence and Practice 43rd Edition at paragraph 29-11