

IN THE HIGH COURT OF KIRIBATI  
(BEFORE THE HON R LUSSICK C.J.)

HCCrC 15/96

THE REPUBLIC  
AND  
NTAENE NAWERE

Mr D Sim for the Republic  
Mr D Lambourne for the Accused

J U D G M E N T

The accused Ntaene Nawere is charged with murder contrary to section 193 of the *Penal Code* (Cap. 67) in that on or about the 8<sup>th</sup> June, at Betio, he did wilfully and unlawfully cause the death of Temoai Beitaake with malice aforethought.

There is no doubt on the evidence that the accused caused the death of the victim. That fact is not contested by the accused.

The accused stabbed the victim twice in the neck in front of an eye-witness. The first prosecution witness, Nikutabu Amarei, a young man aged 18, said that the victim had been stabbed between 11 pm and 12 midnight. Nikutabu said he had been playing music with another kid, Kakiata, at Taumarea's house. Their cassette broke so Nikutabu went into the sleeping room and took the cassette apart with a knife. While he was doing this the accused Ntaene arrived. Ntaene reached outside, grabbed the victim Temoai by his clothes and pulled him into the house.

The accused then asked the victim: "Why did you deceive me?" The victim replied: "I wasn't deceiving you but there were many people there". The accused at this stage grabbed the knife from Nikutabu and again asked the victim: "Why did you deceive me?" He received the same answer. The accused repeated the question 2 or 3 times and each time received the same answer. The accused had been sitting down. He got up and stabbed the victim in the back of the neck. Nikutabu had been sitting alongside the accused when this happened. Nikutabu became afraid and ran from the house and stood beside the road. He looked back and, through the door, saw the accused stab the victim a second time, again in the neck, while the victim was lying on the floor. Sometime later Nikutabu returned to the house. The accused had gone and Nikutabu saw the victim lying face up on the floor with a lot of blood around him.

The accused has made a formal admission under section 126A of the *Criminal Procedure Code* Cap. 17 that the death of the victim was caused by loss of blood and that either of two stab wounds to the neck could have caused the fatal bleeding.

In cross-examination Nikutabu agreed that at the time of the incident the accused had looked "fully drunk", he smelled of alcohol and was slurring his words. Nikutabu added that he himself had been drinking that night. He had consumed about 4 cups of fermented yeast and 4 cups of sour toddy. He felt a little drunk but not fully drunk.

Leave was granted at a later stage in the trial to recall Nikutabu. Again under cross-examination, Nikutabu said that when the accused spoke the words already mentioned to the victim he did not sound angry - his voice was "neutral" - but Nikutabu could tell by his eyes and the expression on his face that he was very angry.

The second prosecution witness was an old woman named Tekiakia Kaei. The accused had been living with her at the time of the incident. Her house is just south of the maneaba

Santo Rabaere. The accused is related to her; she thinks he is either a grandson or a nephew.

Tekiakia said that she was at the Santo Rabaere maneaba that night when she heard the accused calling to her from outside the fence of the maneaba. She told him to come over to her and he did so. He then said farewell to her as a person was almost dead. Tekiakia did not quite understand what he meant but she took him to her house. In cross-examination she conceded that she could smell a little alcohol on the accused but was not quite sure whether he was drunk or not. She did add, however, that the accused was crying.

According to a sketch plan tendered without objection as exhibit D, the distance from Tekiakia's house to Taumarea's house, where the victim was stabbed, is 120 paces (this distance appears on the plan as: Mi to N = 80 paces; N to Cii = 50 paces). However, the plan is of doubtful accuracy because it also shows the distance from Tekiakia's house to the spot in Taumarea's house where the victim was stabbed to be only 80 paces (shown on the plan as Mi to X). It is safe to conclude that after leaving Taumarea's house the accused would have had to walk at least 80 paces to reach Tekiakia's house. It would be about the same distance to the Santo Rabaere maneaba.

The third prosecution witness, Rotite Nantokana, a young woman of 20, testified that she was with her grandmother Tekiakia at the Santo Rabaere maneaba that night. She said that the accused came to them crying and he apologised to them. The accused told them that a person was nearly dead or dying; he did not know if he had killed him. The accused told them that the person was a homosexual, a faggot. The accused said to them that he had stabbed his neck and may be he was going to jail. The witness said that she did not believe the accused because he was very drunk, although he could stand freely without any support. She also had no trouble understanding what the accused was saying.

The fourth prosecution witness, Biike Aroito, a young woman aged 20, told the court that she was at Tekiakia's house when the accused came and spoke to her. He told her that a person he had been drinking with, an effeminate man, was nearly dying. She replied to the accused that she did not believe him as he was very drunk. The accused told her to go and see the person he was talking about but she did not go. The witness agreed in cross-examination that she knew the accused as a peaceful person but he was different that night. She was unable to tell if he was fully drunk but his eyes were "kind of red", he smelled of alcohol and he talked like a drunk. She could not say whether he had difficulty walking. Although the accused sounded drunk, she could understand what he was saying.

The fifth prosecution witness, Taketiba Mamae, a man aged 27, testified that he had been drinking with the accused and the victim on the night of the incident. The witness was living with his sister, who is the wife of Taumarea. The accused came to Taumarea's house at about 5.00 pm that afternoon and arranged to go drinking with the witness later that night. The accused left but returned about an hour or so later and they both went to Nei Tia's place at the labour line. According to the witness the accused had not been drinking on either occasion that he called at the house. At the labour line the witness and the accused drank sour toddy with some other persons. The witness also saw Temoai there. The witness said that he and the accused and two other persons shared basins of sour toddy. He estimated that a basin held 10 or more cups of sour toddy and that they had about 3 basins, although he was not certain of this. They were all drunk. Sometime after midnight the witness returned to Taumarea's house. There he saw the body of Temoai lying beside the door. Temoai was lying on his back in a large pool of blood. The witness could see a wound in the front of Temoai's neck and another wound at the back of the neck.

The last three prosecution witnesses were police officers.

Constable Meita Kaitu gave evidence that he was in a police van when he received a radio call. Fifteen minutes later he was at the scene and viewed the body. Almost an hour later he and other police arrested the accused. He saw the accused standing in front of the door of the house where he lived. Constable Meita was not prepared to say that the accused was drunk but he said that there was some smell of alcohol. The accused told him that he was angry with the deceased because he was "in love with that effeminate man".

Constable Tetabo Teataata also took part in the arrest of the accused. He said that when he arrived at the place where the accused lived, the accused was leaning against the wall of the house and talking to some people in the maneaba. The witness heard the accused tell the people in the maneaba that he was afraid. The witness agreed that he had made a written statement in which he had said that "from my observation Ntaene was drunk as there was an alcohol smell from him". The witness also agreed that the statement was correct. This witness made a search the following day and found the knife used in the stabbing hidden in some bushes. The spot where he found the knife is shown on sketch plan exhibit D as being 50 paces from the spot where Temoai was stabbed.

Detective corporal Taubuki Tebua took a cautioned statement from the accused which was admitted into evidence without objection as exhibit E. In his statement the accused told police that he was too drunk to remember anything. He only remembered drinking 8 to 10 cups of rumpunch at a house somewhere near the biscuit factory. He said he was alone at the time.

There is contained in this statement, however, a question and answer which are entirely inconsistent with the accused not being able to remember anything about the incident. In question 15 the accused was asked: "According to relevant information you went back to your house after stabbing Temoai and told members of your house that you had stabbed someone who was going to die. What would you say?" The accused replied: "That's correct". So not very long after the

incident, the accused was able to remember enough to tell the people in his house that he had stabbed someone who was going to die, yet when spoken to by police the next day he could remember nothing at all. I find that so implausible as to be untrue.

That was the end of the case for the prosecution.

The accused chose to remain silent and called no evidence.

There is, of course, no onus on the accused at any stage to prove his innocence. The onus of proof beyond reasonable doubt remains upon the prosecution from first to last. The prosecution must prove the charge and each element of the charge beyond reasonable doubt and if it fails to do so then the accused is entitled to be acquitted.

The elements of murder are:

1. Causing death
2. By an unlawful act or omission
3. With malice aforethought (section 193 Penal Code Cap. 67).

As mentioned earlier, counsel for the accused does not contest that the accused caused the death of Temoai. The prosecution evidence on that issue, which I accept, is very definite and I am satisfied beyond reasonable doubt that the death of the victim was caused by the accused.

A defence of self-defence is not available on the facts. I am therefore also satisfied that the prosecution have proved beyond reasonable doubt that the accused caused the death of the victim by an unlawful act.

However, counsel submits that there are 2 factors which reduce the offence to manslaughter.

Firstly, counsel submits, the evidence shows that the mind of the accused was so affected by alcohol that at the time of the stabbing he was not capable of the necessary intent.

Under section 13(4) of the *Penal Code* intoxication must be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

In the present case I accept that the accused was affected by alcohol to some degree. But his intoxication did not prevent him from walking, he was able to speak to other people and make himself understood, and he was able to express remorse and fear of the consequences of what he had done almost immediately after the stabbing. He also had the presence of mind to get rid of the knife.

As to the stabbing itself, the evidence was that the accused had dragged the victim into the house, asked him a question, and was not pleased with the answer he received. At that stage the accused was not armed. If he merely wanted to teach Temoai a lesson he could perhaps have used his fists on him. It is clear from the facts that the accused wanted to do harm to Temoai of a far more serious nature than that. The accused could see that Nikutabu was using a knife to repair a cassette. The accused at that stage armed himself by grabbing the knife from Nikutabu and then asked Temoai the same question perhaps twice more. Upon receiving the same answer the accused deliberately struck Temoai in the back of the neck with the knife. When Temoai fell to the floor the accused again plunged the knife into his neck.

Those facts are not consistent with a mind so affected by alcohol as to be incapable of forming the necessary intent. The facts are very clear evidence of an intention in the mind of the accused and leave no doubt as to what that intention was. I am satisfied that the prosecution have proved beyond reasonable doubt that the accused stabbed the victim twice in the neck with the intention of causing him grievous bodily harm or worse.

Counsel for the accused submits that there is a second consideration which reduces the offence to manslaughter, and that is provocation. Counsel points to the evidence given by the first prosecution witness Nikutabu and the sixth prosecution witness Constable Meita.

Nikutabu testified that prior to stabbing the deceased the accused appeared to be very angry.

Constable Meita gave evidence that the accused had told him that he was angry with the deceased because he loved him. There is other evidence that the deceased was effeminate and homosexual.

The only evidence that the deceased did anything at all to make the accused angry was when he said, in answer to questions by the accused: "I wasn't deceiving you, but there were many people there".

What the victim said seems harmless enough but it appeared to infuriate the accused to the extent that he stabbed the victim twice in the throat. I will not indulge in speculation as to why those words would have that effect on the accused.

On the issue of provocation, section 198 of the *Penal Code* provides as follows:

*"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".*

In the present case, it cannot be said by any stretch of the imagination that upon hearing the words uttered by the



deceased a reasonable man would arm himself with a knife and stab the deceased twice in the throat. It follows that I am satisfied that the prosecution have established beyond reasonable doubt that the provocation was not enough to make a reasonable man react in the manner that the accused did.

In the circumstances there can be no other conclusion but that a conviction for murder is called for.

I therefore find the accused Ntaene Nawere guilty of the murder of Temoai Beiaataake contrary to section 193 of the *Penal Code* and he is convicted accordingly.

