



HIGH COURT OF KIRIBATI

Criminal Case N° 2/2019

THE REPUBLIC

v

TENANAI OTEN

*Pauling Beiatau, Director of Public Prosecutions, for the Republic
Maere Kirata for the accused*

*Dates of hearing: 12-13 August, 19 August 2019
Date of judgment: 26 August 2019*

JUDGMENT

- [1] By information filed on 6 March 2019 Tenanai Oten is charged with the murder of Terabuna Eritai, contrary to section 193 of the *Penal Code* (Cap.67). The offence is alleged to have been committed on 16 September 2018 at Taburao village, Abaiang. The accused has pleaded not guilty.
- [2] The first of 4 witnesses called for the prosecution was Mereki Riino, a 46-year-old resident of Taburao. On the day in question he was at the house of the accused, in an area of Taburao known as Temoa. He and the accused were fishing companions, and it had been agreed the day before that they would come together to work on their fishing gear. They were seated on the accused's *kiakia*, fashioning plastic pipe into tools with which to catch sand worms for bait. Both men were sober. The wife of the accused, Tiebane, was on a nearby *buia*. Mereki saw the deceased walk past, heading towards the ocean-side. She had several young children with her, including Mereki's 3-year-old son. The deceased stopped on the path next to the accused's garden, which was surrounded by logs. One of the logs was blocking the path. The deceased spoke to the accused. She was about 10 to 20 metres from the *kiakia*. Mereki is hard of hearing, and did not hear all of what she said, but he gathered from her tone that she was scolding the accused. She appeared to be angry.
- [3] Mereki heard the deceased ask the accused why he had built his garden on the path. The accused responded, "Where are we going to plant our plants?"

There's room to get past." The argument continued for some time. Mereki saw that the accused was angry, and he looked like he was going to get down from the *kiakia*. He restrained the accused, and the deceased continued on her way.

- [4] The 2 men then continued chatting as before. They had finished working on the fishing gear and put it to one side. Mereki described the accused's mood as normal, and he did not appear to have been affected by his argument with the deceased. After a while – perhaps 10 minutes – the deceased returned, accompanied by the children. From where she had been standing earlier, next to the accused's garden, she called again to the accused. Mereki heard the deceased say, "Tenanai, why didn't you make space for the path?" She spoke at length, although Mereki was unable to say what else she said. She sounded angry. The accused responded, and the argument resumed.
- [5] Mereki could see that the accused was angry. He said to the accused, "Don't go over to her. If you do anything you'll go to prison." The accused then got down from the *kiakia* and went around to the other side. He retrieved a large bush knife. Mereki did not see where the bush knife came from, but he saw the accused move as if extracting something from the thatch of the *kiakia*. Mereki had not seen the bush knife before – it was not one of the tools they had been using to work on the fishing gear. He described the knife as long, about the length of his arm. The blade was as long as the distance from his elbow to his fingertip.
- [6] The accused then quickly approached the deceased, holding the bush knife. She did not move, and was still arguing with the accused. Mereki told Tiebane to stop her husband. Mereki was concerned more for his son and the other children, who had run away when the accused got down from the *kiakia*. Mereki took his son and left. As he walked away, he could hear the deceased and Tiebane screaming. He heard Tiebane say, "A person is dying." He heard the deceased call out for Teanako, who lived nearby. She said, "Teanako help me. I'm going to die." Mereki went home with his son.
- [7] In cross-examination, Mereki was asked about the accused's garden. He said that, while it was encroaching onto the path, there was room to get past. He agreed that Terabuna had initiated the argument. Mereki said that, because of his hearing problem, he could not say if the deceased called the accused a thief or a bastard, nor did he hear her say that the accused had no land. He agreed that she was speaking loudly.
- [8] It was put to Mereki that the bush knife had been on the floor of the *kiakia* beside them while he and the accused were chatting. Mereki said that it might have been, but he had not seen it until it was in the accused's hand after he got down from the *kiakia*.

- [9] The second prosecution witness was Aata Itimaera. He is 45 years old and lives not far from the house of the accused. He testified that, at about 2:00pm on the day in question, he was at home with his wife, watching a video. He heard a woman scream – it sounded like the deceased. The scream came from somewhere to the ocean-side of his house. Aata ran towards the place. As he did so, he heard Taatinta, the mother of the deceased, asking him to save her daughter. He saw the accused striking at something with a bush knife, although he could not see what the accused was hitting. He saw maybe 3 or 4 blows. There was blood on the blade of the bush knife.
- [10] Aata approached the accused. The deceased was on the ground, at the foot of a pandanus tree. From about 5 paces away Aata said, “Tenanai, that’s enough. Your victim is dying, so I will go and get the police.” The accused then threatened to cut Aata’s throat. Aata returned home to get his motorcycle, so that he could go and seek help from the police. As he went to leave, he saw the accused standing on the path, blocking his way. The accused did not say anything. Aata turned around and went to the main road by a different route. When he returned later, he saw the deceased on the ground. She was dead. One of her hands had been cut off. There were injuries to her head.
- [11] Aata was shown a bush knife, which he identified as the knife wielded by the accused when he saw him that day. It was tendered as exhibit 1. The blade of the knife is 46 centimetres long, with a 14-centimetre handle. The handle of the knife is bound in part with some fishing line, giving it a distinctive feel. The knife is quite heavy.
- [12] Under cross-examination, it was put to Aata that he had told the police that he had been 30 paces away from the accused at the time he confronted him. Aata could not recall what he had told the police, nor could he remember if he had read the statement prior to signing it. When the statement was shown to the witness, he claimed to be unable to read it. He maintained that he had been only 5 paces away when he called on the accused to stop.
- [13] Aata admitted that he was afraid at the time, but he rejected the suggestion of counsel for the accused that he was lying when he testified to having seen the accused striking the deceased with the bush knife. He agreed that the accused appeared to be out of control.
- [14] When asked in re-examination why he had formed the view that the accused was out of control, Aata said that the accused appeared very pale.
- [15] The third prosecution witness was Nei Taatinta Aara, the 73-year-old mother of the deceased. She testified that Tiebane, the wife of the accused, is her granddaughter, the daughter of her eldest child. The deceased was her third child, and had been aged 36 at the time of her death.

- [16] On the day in question, Taatinta was at home in the area known as Temao, where she lived with the deceased. She was housebound, having had 1 of her legs amputated some years previously. Taatinta was on her *kiakia*, making string. She asked the deceased to go and tend to her plants at their garden on the ocean-side. The deceased left, accompanied by her 2 children, aged 7 and 8. It was about 1:00pm. To get to the garden, the deceased would have to pass by the house of the accused, who lived on the same plot of land. The accused and his wife lived towards the ocean side of Taatinta's house. Despite being close by, Taatinta's view of the accused's house was obscured by another *buia*.
- [17] Shortly afterwards, the deceased's 2 children returned, very distressed. As a result of what she was told by the children, Taatinta feared for her daughter's safety. She saw Aata come running from his house. She spoke with him, and he continued in the direction of the accused's house.
- [18] Not long after that, the accused approached Taatinta as she sat on the *kiakia*. He was holding a bush knife and seemed agitated. He struck out at a nearby post with the knife. The accused said to Taatinta, "Now is the time that I have to kill you. You have to die with your daughter." He put down his knife and punched her in the face, knocking out 3 of her teeth. The accused then left, taking the bush knife with him.
- [19] Later, the husband of the deceased and some young men brought the body of the deceased to the house. Taatinta saw that the deceased had many injuries. Her left hand had been severed completely, and there was a wound on her head. Taatinta described the deceased's left foot as "hanging off".
- [20] Taatinta said that there had been some tension in the family's relationship with the accused and his wife. She had little to do with the accused, and dealt mostly with his wife. She described 2 previous occasions where the accused came to her house, armed with a toddy knife, and behaved in a threatening manner towards her and the deceased. On the first occasion he talked of 'burying' the knife in their skulls. The second occasion had been maybe a week prior to the death of the deceased. The accused was angry because Taatinta had wanted him and his wife to return her things. He wanted to take his pig. He said that he would stab the pig, and that it would be like stabbing Taatinta and the deceased.
- [21] At the conclusion of Taatinta's testimony, counsel for the prosecution tendered, by consent, a report prepared following examination of the body of the deceased by the island's Medical Assistant (exhibit 2) and the record of the accused's interview with police (exhibit 3).

- [22] The medical report, prepared by Medical Assistant Berekita Ereman, records that Terabuna was dead at the time of the examination. There were 8 wounds seen on the deceased's body, as follows:
- a. the left hand was severed at a point 3 to 4 inches above the wrist;
 - b. there was a cut, 7 inches in length and 3 inches deep, to the top of the head, with a related skull fracture;
 - c. a second cut to the scalp was 4 to 5 inches long and 2 inches deep;
 - d. a wound to the left leg, just below the knee, 7 to 8 inches in length and 4 to 5 inches in depth;
 - e. a wound on the left ankle was 6 to 7 inches long and 4 to 5 inches deep;
 - f. a wound on the right knee, 4 to 5 inches long and 2 to 3 inches deep;
 - g. a wound to the right ankle, 1 to 2 inches long and half an inch deep;
 - h. a minor laceration to the right hand.
- [23] The police interview with the accused was conducted on 9 October 2018 by Detective Constable Mareko Kabuati. At the beginning of the interview, it was explained to the accused that he was alleged to have struck Terabuna with a knife, causing her death. The accused was asked to explain what had happened. He said that, in the course of an argument over the location of his garden, the deceased had said that he was an illegitimate child, and accused him of stealing a pig. Her words caused him to lose his mind, and he struck her with a knife. He had no recollection of where on the deceased's body he hit her, as he was out of his mind with anger. He then cycled to the house of Titera. While the accused was talking with Titera, Tiebane came and was very distressed. Only then did he realise what he had done. He left his knife and bicycle at Titera's house and went into the bush to hide. After a while he went and surrendered himself to the police. In the course of the interview he was shown a knife (exhibit 1). He agreed that it was the knife he had used to attack the deceased.
- [24] The final prosecution witness was Titera Tebwebwe, a 63-year-old resident of Ewena village on Abaiang. He is related to the accused by marriage. At about 3:00pm on the day in question, the accused came to Titera's house by bicycle. He had blood on his hands and on his leg. There was a lot of blood. The accused had with him a bush knife belonging to Titera, which he had borrowed more than a year earlier. There was blood on the knife. The accused asked if he could have something to eat, as he was hungry. He said that he was sad because he had a problem. Titera was in a hurry to leave, as his wife was due to fly to Tarawa, and the truck had arrived to take them to the airport. His daughters gave the accused some food. In the presence of the accused, the driver of the truck told Titera that Terabuna had died at Temoa, and that the accused had killed her. The accused said nothing. Titera took the bush knife and hid it under his sleeping mat. He then left for the airport on the

truck. The accused remained behind, eating. When Titera returned from the airport, the accused had gone. Titera then went to see Terabuna's body at Temoa.

- [25] Titera was then shown the knife (exhibit 1), and he agreed that it was the knife that the accused had brought to his house that day.
- [26] In cross-examination, Titera agreed that Tiebane had showed up at his house that afternoon, crying. That was just after the driver of the truck had told him what had happened to Terabuna.
- [27] In response to a question from the Court, Titera said that, when the accused had brought the knife to him, its blade was in good condition and well-honed.
- [28] That brought the prosecution case to a close.
- [29] I formally found that the accused had a case to answer and informed him of his rights, as required by section 256(2) of the *Criminal Procedure Code*. Defence counsel advised that her client would be giving evidence, and no other witnesses would be called.
- [30] The accused is now 39 years of age. He lives at Taburao on Abaiang and is married with 1 child. On 16 September last year, the accused was on his *kiakia* with Mereki. They were working on their fishing gear. Terabuna came and was angry because the accused's garden blocked the path. The accused told her that there was still room for her to get past. Terabuna then continued on her way towards the ocean-side.
- [31] After a time Terabuna returned. She was still angry about the garden. She told the accused that he had come there like a show-off. She said that he was nobody's son, a bastard. She said that he had stolen a pig. The accused was embarrassed by what Terabuna had said and lost his mind. He got down from the *kiakia* and picked up what he thought at the time was one of the plastic water pipes he had been working on with Mereki. He approached Terabuna. She did not say anything. The accused started hitting Terabuna with what he thought was the pipe. He then left and went to the house of Titera.
- [32] When he arrived at Titera's house, he went to the beach and washed himself. He then sat with Titera and had a smoke and a chat. Tiebane then arrived at Titera's house. She was crying. She told the accused that Terabuna had died. He went and hid himself in the bush.
- [33] Under cross-examination, the accused agreed that Terabuna had been standing next to the garden, close to his toilet. He rejected the suggestion that this spot was 30 metres from the *kiakia*, instead insisting that it was only 5 or 6 paces away. Very little was said on the first visit of the deceased.

- [34] The accused said that he had been living with his wife's family since their marriage in 2009. He denied having deliberately constructed the garden to block the path to the ocean-side of the plot. He maintained that there was enough room for people to pass by.
- [35] The accused agreed that there had been children with Terabuna that day. She was angry when she returned. He rejected the suggestion that he hated Terabuna, but said that he believed that Terabuna and Taatinta hated him.
- [36] The accused accepted that he was responsible for killing Terabuna, by striking her several times with the bush knife. He maintained however that he had lost his mind at the time, and did not know that he was hitting her with a knife. Only when he had calmed down did he realise that the thing in his hand was a knife. That was not until he was walking away. He was not aware of any blood coming from the deceased as he struck her. He does not recall hearing Aata say anything to him, although he was aware of his presence. The accused accepted that he told Aata that, if he came any closer, he would hit him with the knife.
- [37] The accused said that he had been using the bush knife to work on the fishing gear earlier in the day. When Terabuna came, the knife was on the floor of the *kiakia* nearby. When he got down from the *kiakia*, he picked up the knife from where it was, believing it to be one of the pipes they had been working with. The accused does not recall Mereki saying anything to him, nor does he recall hearing his wife asking him to stop.
- [38] The accused accepted that he then went to Taatinta's house, but denied threatening her or assaulting her. He said that he did not know then that Terabuna was dead. He told Taatinta that she was the cause of the problem. He believed that Taatinta had encouraged Terabuna to get angry with him, as part of a plan to chase him and his family away.
- [39] The accused said that the bush knife was normally kept in the thatch of the *kiakia*, but there were other places where it might be kept as well.
- [40] In answer to questions from the Court, the accused said that he had built the garden about a week before the day in question. It was being used to grow *kumara* (sweet potato). The garden was fenced using the trunks of coconut trees. He said that his problems with Taatinta and Terabuna had only arisen during 2018, and that relations had been cordial prior to that. He had not been aware of Terabuna's injuries, including the severing of her hand, and he only realised that he was covered in blood once he arrived at Titera's house.
- [41] That brought the defence case to a close.

- [42] In considering the evidence in this case, I remind myself that it is not for the accused to prove his innocence. His evidence is to be assessed like the evidence of any other witness. Even if I reject his evidence, I still need to be satisfied beyond reasonable doubt of the prosecution case before the accused can be convicted. The burden rests with the prosecution to prove, beyond reasonable doubt, each and every element of the offence charged.
- [43] In order to convict the accused of the offence of murder, I must be satisfied to the required standard of each of the following elements:
- a. that Terabuna Eritai is dead;
 - b. that the accused caused Terabuna's death by an unlawful act or omission;
 - c. that he did so with malice aforethought, as that expression is defined in section 194 of the *Penal Code*.
- [44] Counsel for the accused concedes that each of these elements has been proven. She argues however that the prosecution has failed to negative the defence of provocation.
- [45] Section 197(a) of the *Penal Code* provides that an accused who would otherwise be guilty of murder is guilty only of manslaughter if the accused was provoked by the deceased into losing his self-control. Section 198 requires the provocation to be enough to make a reasonable person act as the accused did. The Court of Appeal has said the following about the process to be applied when considering the defence of provocation:

It is established that there is a dual test for provocation. First, was the accused actually provoked into losing his self-control as a result of which he committed the act which killed the deceased? Secondly, was the provocation such that it was capable of causing a reasonable person to lose self-control and to act in the way that the accused did? When the law speaks of a reasonable person in this context, it refers to an ordinary person – a person having the power of self control to be expected of an ordinary person of the sex and age of the accused. The test is an objective one, in that the jury or judge trying the facts has to consider whether an ordinary person would have reacted as the accused did. However the gravity of the conduct said to constitute the provocation must be assessed by reference to the relevant characteristics of the accused...

Sometimes it is said that the retaliation must be proportionate to the provocation. That simply means that the reaction of the accused must not have exceeded what would have been the reaction of a reasonable man, or, in the words of section 198, that the provocation was enough to make a reasonable man do as he did.

In applying these tests it is necessary to have regard to the entire factual situation – the whole of the deceased's conduct. Acts and words which considered separately could not amount to provocation may, in combination, or cumulatively, be enough to cause an ordinary person to lose his self-control and resort to the act of violence that caused the death.¹

¹ *Republic v Beretia Bakaatu* [1996] KICA 1. See also *Ruoikabuti Mataroa v Republic* [1998] KICA 2, and *Tamuera Bebeunga v Republic*, Court of Appeal Criminal Appeal 1/2019, 21 August 2019.

- [46] Despite what might be thought to be the clear language of section 197 (“proved on his behalf”), the burden of negating the defence of provocation remains on the prosecution throughout.²
- [47] Counsel for the accused submits that I can be satisfied that her client actually lost his self-control by relying on the following:
- a. the severity of the injuries sustained by Terabuna;
 - b. the accused’s failure to realise that he was wielding a bush knife;
 - c. his non-responsiveness when spoken to by Mereki, Tiebane and Aata.
- [48] Counsel for the prosecution counters by pointing to the circumstances in which the accused came to be holding the bush knife in the first place. Mereki denies that they had been using the bush knife while working on the fishing gear. Whether the knife came from the thatch of the *kiakia* or some other place, it required a conscious act of the accused to retrieve it and arm himself. Furthermore, it is submitted that the suggestion that the accused believed himself to be holding nothing more than a piece of plastic pipe is fanciful. No mention was made of this when the accused was interviewed by the police in the weeks after Terabuna’s death. While acknowledging that the accused did not respond to either Mereki or Tiebane, counsel for the prosecution submits that his exchange with Aata is not consistent with a man who was out of control.
- [49] On this point, and having considered the evidence, I am satisfied that the accused was provoked into losing his self-control, as a result of which he struck Terabuna repeatedly with the bush knife, killing her. The sheer savagery of the attack is enough to satisfy me of that. The injuries were such that the accused must have struck Terabuna at least 7 times, as a result of which her skull was fractured, her hand was severed and her foot all but hacked off. My finding is supported by the accused’s failure to respond to the pleas of Mereki and Tiebane. The exchange with Aata should be viewed in light of the fact that it took place after the attack, at a time when the accused was regaining his self-control.
- [50] I would add that I do not accept the accused’s evidence that he believed that he was striking the deceased with nothing more than a piece of plastic pipe – even in his agitated state of mind, there is nothing about the bush knife that would lead him to think that he was wielding a pipe. His familiarity with the knife, its heft, and the nature of the handle, with the fishing line binding, mean that he could not possibly have mistaken it for a pipe. My rejection of this evidence does not detract from my finding that the accused had actually been provoked into losing his self-control.

² *Republic v Beretia Bakaatu* [1996] KICA 1.

- [51] However, a loss of self-control is not by itself enough. I must look at the conduct of the deceased and determine whether it was capable of causing a reasonable person (with the characteristics of the accused) to lose control and to act in the way that the accused did.
- [52] The accused testified that he was provoked into losing his self-control by the deceased's use of insulting language towards him. She said that he was behaving like a show-off, he was illegitimate and had stolen a pig. The fact that Terabuna insulted him in the presence of both Mereki and Tiebane magnified the impact of the taunts. The suggestion that the accused was a thief was particularly cruel – it is often said in Kiribati that to be called a thief is worse than being called a murderer.
- [53] Only the accused has given an account of the words spoken by the deceased. I have no reason to doubt his evidence on this point. However, while I have no difficulty in finding that Terabuna insulted the accused in the manner he describes, I am of the view that her words and deeds were not such as would cause an ordinary I-Kiribati man to lose control and react as the accused did. The accused had no special characteristics that might render him especially susceptible to such provocation. His response far exceeded what would have been the reaction of a reasonable person. While the accused was entitled to be annoyed, or even angry, at Terabuna for what she said, her words, and the circumstances in which they were uttered, were not such as would be capable of causing a reasonable person to lose self-control. Indeed, such insults are often hurled in the heat of an argument in Kiribati. I am therefore satisfied that the prosecution has negated the defence of provocation beyond reasonable doubt.
- [54] Having been satisfied beyond reasonable doubt of the necessary elements of the offence of murder, and being further satisfied that the defence of provocation has been negated, I find the accused guilty of the offence of murder. He is convicted accordingly.
- [55] While there is only one sentence that can be imposed on a conviction for murder, I will hear counsel as to the fixing of a non-parole period, if any.


Lambourne J
Judge of the High Court

The seal of the High Court of Kiribati is circular with a red border. The text "HIGH COURT OF KIRIBATI" is written in red capital letters around the top inner edge. In the center, there is a red shield featuring a white sun with rays, a white bird, and a white anchor. Below the shield, the text "TEHINI AE E RIETATA I KIRIBATI" is written in red capital letters around the bottom inner edge.