

REGINA -V- DAVID FOLITALANA

High Court of Solomon Islands

(Muria, CJ.)

Criminal Case No. 2 of 1994

Hearing: 18, 19, 26, & 30 October 1995

Judgement: 7th November 1995

DPP for Crown

J. Remobatu for the Accused

MURIA, CJ: The accused David Folitalana has been charged with the murder of the deceased Tome Maelapu, under section 193 of the Penal Code. The incident was alleged to have occurred on 13 November 1993 at the Saloon Bar, Chinatown in Honiara. The accused pleaded not guilty to the charge.

Before proceeding further to consider this case, I remind myself that the onus is on the prosecution to prove the guilt of the accused and that the prosecution must do so beyond a reasonable doubt. If I have any doubt as to the guilt of the accused, he must be acquitted.

I deal briefly first with the facts alleged by the prosecution. After returning from a picnic in the afternoon on 13 November 1993, one Leslie Salanga (PW1) went to the Mataniko Saloon Bar at Chinatown at about 3.30 or 4.00 pm. On the way he met Henry Aukwai (PW3) at MP Kwan Store and together they proceeded to the Saloon Bar to have some drinks. Just before arriving at the Saloon Bar, they met one Leonard Iro who accompanied them to the Saloon Bar where they had one can V.B. Beer each. The tables at the bar area were all occupied and so PW1, PW3 and Leonard Iro came out and had their three beers at the sitting place outside the bar area but which is still in the Saloon Bar. This was the place between the first entrance door into the Saloon Bar and the door (second door) leading into the bar. This was after 4.30 p.m.

It was about 5.30pm when Tome Maelapu (deceased) came to the Saloon Bar. He appeared to have been drinking earlier as he was described by PW1 as "too drunk" when he arrived. He asked PW1 & PW3 to pay a beer for him but they refused to do so since he was already drunk. They continued talking with each other in their own Kwara'ae language while they stood at the entrance of the first door into the Saloon Bar. The deceased was standing one foot on the last step at the top of the stairway and the other foot on the floor at the entrance while he was talking with PW1 & PW3.

It was at this time that the accused came with his brother named Wadili. The accused came up to the steps and grabbed the deceased's hand and swang him down to the ground on the tar-sealed road. The accused followed the deceased down and kicked him on the left side of his neck. The deceased collapsed and never moved. Attempts made to save him but it was unsuccessful. He was pronounced death on arrival at hospital.

The evidence.

I do not recite all that had been said in Court except to recapture on the main parts of the evidence as I see them. The prosecution called four(4) witnesses. In addition, the Doctor's medical report had also been admitted in evidence.

Leslie Salanga (PW1) gave evidence that when he, PW3 & Leonard Iro got to the Saloon Bar it was still open. This was after 4.30 pm. He said he had one V.B. beer and Henry Aukwai and Leonard Iro also had one V.B beer each. They were sitting down drinking their beer in the Saloon Bar when the deceased came and asked them to buy a beer for him. PW1 & PW3 stood up and had conversation with the deceased at the entrance of Saloon Bar. They refused to pay beer for the deceased as he was took drunk. PW1 further stated that it was then, about 5.30 pm, that the accused came with his brother also to the Saloon.

PW1 said that he and PW3 were still standing with the deceased when the accused who was not wearing any shirt came up to the steps and without saying anything grabbed the deceased's right hand and swang him down to the ground. The deceased fell into the ground landing on the tar road on the right side of his upper body. PW1 said that immediately the accused followed the deceased and jumped at the him and delivered a kick on the left side of the deceased's neck as the deceased turned his neck, trying to look up. The accused kicked the deceased with his right leg. The accused was also wearing a black leather shoe at the time.

As soon as he was kicked, the deceased fell down back again onto the tar road. He was not able to move or talk nor was he breathing. PW1 tried to revive the deceased by mouth to mouth resuscitation but to no avail. He and PW3 then took the deceased to Hospital where he was pronounced dead.

PW1 also in evidence stated that he & PW3 were with the deceased when the accused came to the Bar and that he had not seen the deceased ever hit the accused at all.

In cross-examination PW1 reiterated that there was no argument between the deceased and the accused and that the accused was not wearing any shirt when he came to the Saloon Bar. After kicking the deceased, PW1 saw the accused and his brother ran away.

Richard Puis Tovavaki (PW2) is the witness who took photographs of the scene and of the body at the hospital. He stated also that from the ladder to where the deceased fell was only 3 to 4 metres.

Henry Aukwai (PW3) confirmed basically what PW1 said about the behaviour of the accused at the Saloon Bar that afternoon of 13 November 1993 and what the accused did to the deceased, that is, swinging him to the ground and kicking him at the neck (left side). He also reiterated that the accused was not wearing any shirt at the time. He was there at the Saloon Bar with PW1 & deceased when the accused came, grabbed the deceased's right hand and swang him forcefully down to the ground outside causing the deceased to land on the tar-sealed road.

Salathiel Sau (PW5) gave evidence that he interviewed the accused followed the incident. Much of what is in the interview contains self-serving statements. The prosecution does not rely much on the record of interview although the defence has no objection to the whole of the Statement.

The other evidence for the prosecution is the Medical report which I admitted in evidence. The doctor who conducted the post mortem examination had already left the country. The defence did not object to the report, although they would wish to have clarified some of the terms used by the doctor in his conclusion. After argument on the matter, the Court ruled that the medical report be admitted in evidence.

The accused gave evidence on his own behalf. He also called a witness, Peter Haego. The accused's evidence is that in the afternoon on 13 November 1993, he went to the Saloon Bar. He said that when he arrived at the first entrance door was still open but the door inside leading to the bar area was already closed. He said the time must have been 6.00 pm already. He said he knocked at the inner door to the bar and that it was then that the deceased came and hit him at his back. He said he turned and hit the deceased and then continued to knock on the second door. He said that after hitting the deceased, he did not know what happened to the deceased although he said that the deceased fell down. Where and how the deceased fell, he said he did not know.

The accused also agreed he saw the deceased when the first arrival at the Saloon Bar at the first entrance door and that the deceased was then talking to two boys whom he said he did not know their names. He further stated that after hitting the deceased, he was taken away by his brother.

In cross-examination the accused said that it was after drinking 9 SB Beer that he went to the Saloon Bar. He confirmed that when he arrived, the deceased was at the entrance door while the two boys stood next to him (deceased). He agreed he wore a leather show. He also said that he hit the deceased but did not know where he fell.

Between the inner door and the outer door (entrance into the Saloon Bar) there was a space. That was where the accused said that he hit the deceased who fell down. But when he turned around he said he could not see the deceased on the floor.

On his way out with his brother the accused said he saw plenty of people there outside the Saloon Bar near the ladder at the entrance but that he did not know what was going on. When pressed in cross-examination, the accused agreed that he hit the deceased and that he (deceased

fell onto the road but not on the tar-sealed part of the road. Again when pressed on cross-examination he remember that it was the second time he hit the deceased and the deceased fell onto the road, not far from the ladder to the entrance of the Saloon Bar.

The Defence witness Peter Haego gave evidence and said that the deceased and accused argued and then the deceased hit the accused.

This was around about 5.30 pm on that day 13 November 1994 at the Saloon Bar. It was then that the accused first hit the deceased and then pushed him. Peter Haego then said that he saw Tome (deceased) fell down in front of the Saloon Bar onto the ground beside the ladder at the entrance. This witness was standing outside watching. He saw the deceased fell down outside onto the road and after that the deceased never stood up anymore.

Again Peter Haego gave evidence that after the deceased fell down outside onto the ground, he saw the accused followed the deceased down outside and stood close to where the deceased was lying down (about 2 to 3 metres away). He further said in cross-examination that when the accused hit the deceased, he (deceased) fell down and rolled down the ladder hitting his head on the last step at the bottom of the ladder and stopped at about 2 metres out from the latter and this was at the road.

The injuries

The injuries as noted by the doctor are contained in the medical report. The external injuries found are: 4½ cm vertical abrasion over the left deltoid muscle (shoulder); abrasion on the left scrotal sac; two (2) small lacerations of the right frontal region; and abrasions on the back over the bumbar spine and on the lower chest. The internal examination revealed a large amount of blood around the brain stem; there are large haemorrhages around the cerebellum and both temporal lobes with a little less blood around the frontal lobes. The doctor concluded that death has been caused by haemorrhages around the brain stem, cerebellum and temporal and frontal lobes, all of which have been damaged.

The injuries are, according to the doctor, compatible with external blunt injury to the head probably of a repeated nature. There were abrasions of the back and shoulder and lacerations of the forehead which the doctor said, were compatible with repeated injury.

Conclusion on the evidence

The evidence of PW1 & PW3 in chief had been given, in my view, with firmness and coherence. Both individually and together their evidence withstood the long and strenuous cross-examination by the defence.

Firstly, as to the time when the accused is said to have entered the Saloon Bar, PW1 & PW2 put it at about 5.30 pm. This is confirmed by the Defence witness Peter Haego who followed the accused and saw the accused going into the Saloon Bar.

The accused's version is that he entered the Saloon Bar after it was already closed which must have been 6.00 pm or after. If the timing mentioned by PW1, PW3 & the Defence witness is accepted (which in this case I do) then the bar was still open when the accused entered the Saloon Bar and there was no need for the accused to knock on the inside door into the bar. There were still people having their drinks at the bar. There were people still occupying the tables inside the area where the bar was. That was the reason for PW1, PW3 & Leonard Iro to come and sit at the verandah area to have their drinks there. PW1, PW3 & Leonard Iro were still having their first can of beer each when the deceased came to the Saloon Bar and shortly followed by the accused.

Thus the only conclusion that is reasonable on those facts is that when the accused went to the Saloon Bar it was between 5.30 pm and 6.00 pm and the bar was still open. The accused's story of knocking on the inside door to the bar because it was closed on the evidence cannot be accepted.

Then there is the incident in which the accused is said to have punched and swang the deceased down onto the ground outside the Saloon Bar. While the accused and his witness said that it was the deceased who first punched the accused while he (accused) was knocking at the door in the Saloon Bar, prosecution witnesses PW1 & PW3 were firm in their evidence that at no time did the accused ever knock on that door and that the deceased did not hit the accused at all. I have already concluded that the bar was still open at the time. I accept the prosecution evidence that the bar was closed immediately after the incident occurred. I do not accept that the accused knocked on the inner door into the bar. As such I also do not accept the suggestion by the accused that the deceased followed the accused to the inner door and hit the accused. The evidence given by the accused and his witness on this account is simply unconvincing and do not stand up to the evidence given by the prosecution witnesses.

To further illustrate the weakness of the defence story on this aspect, it will be noted that the accused said that the deceased hit him as he was knocking on the inner door to the Saloon Bar and it was at that time that he hit the deceased who he said, fell down on the floor between the outer door and the inner door. Yet when he (accused) turned to see where the deceased fell, there was no sign of the deceased lying on the floor. Later in cross-examination he said he did not know where the deceased fell. I simply do not accept his story on this.

The truth of what happened at the Saloon Bar that day is that described by PW1 and PW3 and to some extent confirmed by Peter Haego, the defence witness. The deceased was standing above the steps at the entrance door to the Saloon Bar together with PW1 & PW3. The accused came up the steps and with two hands, he held the deceased's hands and swang the deceased down causing him to fall outside onto the ground. The deceased eventually landed three yards (18 ft) away (see Exh. 2) which was on the tar-sealed road.

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It is further the prosecution case that after the deceased fell onto the road, he tried to get up. He turned his head. It was then that the accused delivered a strong kick to the left side of the deceased's neck. The deceased then fell back on to the ground and never got up again. The

evidence of the kicking were given by PW1 & PW3. They were there with the deceased. They were the ones who tried to revive the deceased after he was kicked and fell. They took the deceased to the Hospital. They saw the accused was wearing a leather boot and they saw him kicked the deceased. The accused agreed he wore a leather boot. The defendant witness also said so.

The accused denied following the deceased down to the ground and kicking the deceased although in cross-examination he eventually agreed to following down the deceased after he made the deceased fall onto the road. The accused was very cautious not to agree to anything which may indicate that he touched the deceased when he (deceased) was on the ground. The accused only said he followed the deceased down but stood a short distance away (about 3 metres). Peter Haego also said that the accused followed the deceased down to the ground but also say that the accused did not go close to the deceased. I think the accused and his witness have been very cautious not to mention anything about kicking or hitting the deceased's neck.

Unfortunately for the defence the untruthfulness of their witnesses story is once again unravelled when one turns to the record of interview which is admitted in whole: *R -v- Pearce* (1979) 69 Cr. App. R 365. I turn to that record of interview and to Question 19 in particular. It reads:

"Q19. What nao happened time you hittim long neck belong him?"

A19. Hemi fall down long road."

While the accused may not wish to agree that he kicked the deceased's neck while the deceased was trying to get up from the ground, he cannot deny hitting the deceased's neck. In his answer to Q18 put to him during the police interview, the accused has indicated that it was the right side of the deceased's neck that he hit. In Court, he said he saw people gathering around something outside the Saloon Bar on the road after the deceased fell onto the road but he said he did not know why those people were gathering there.

I must say that I have great difficulty in accepting the accused's story in this case. His evidence simply do not hold together. I am satisfied beyond any doubt whatsoever that the accused is not telling the truth. I disbelieve his account of what he said on 13 November 1993. I also consider the suggestion by defence regarding the earlier injury which the accused is said to have sustained in his right hand. I don't accept that if there was any such injury that it made him unable to use his right hand on 13 November 1993.

The medical evidence in this case as to the injuries is in my view consistent with the evidence produced in court by the prosecution and to some extent supported by the evidence of the defence witness. I accept the doctor's report and his conclusion, I am further satisfied so that I am sure that the injuries described were a direct result of the acts of the accused.

The prosecution have made me sure that the accused forcefully swang the deceased from the first entrance door of the Saloon Bar down onto the ground and landing on the tar-sealed road. It

was there that when the deceased tried to get up that the accused delivered a kick onto the neck of the deceased. The deceased fell back onto the ground and never regain his breath. Attempts to revive him had been made immediately but it was unsuccessful. The deceased died immediately thereafter as a result of the act of the accused.

The accused might not have intended to kill the deceased but he certainly in my judgement could not have failed to realize that when he forcefully swang the deceased from up the entrance of the Saloon Bar down to the ground and landing on the hard tar-sealed road, serious bodily harm would be caused to the deceased. Then by following that with a strong kick to the neck of the deceased, an even more serious harm would result to the deceased. The accused could not have failed to realise that as well. This, I am satisfied, was the state of mind of the accused at the time and that is malice aforethought within the meaning of section 195(b) of the Penal Code and as reiterated in *Joel Aosi -v-Reginam* (1988/1989) SILR 1,

On the evidence before the Court, I am satisfied that the prosecution has established the guilt of the accused beyond a reasonable doubt and I convict him of the crime of murder.

Verdict: Guilty of Murder.

Sir John Muria
CHIEF JUSTICE