R v Ome [1980] SBFJCA 3; [1980-1981] SILR 27 (27 June 1980)

[1980-1981] SILR 27

IN THE FIJI COURT OF APPEAL FOR SOLOMON ISLANDS

Criminal Appeals Nos. 19 and 21 of 1980

R

v

OME

Fiji Court of Appeal For Solomon Islands
(Gould VP, Marsack and Speight JJA)
Sitting as Court of Appeal for Solomon Islands
Criminal Appeals Nos. 19 and 21 of 1980

June 23 1980
Judgment 27th June 1980

Jurisdiction - Appeal - Whether the Crown has a right of appeal against an acquitted - Western Pacific (Courts) Order in Council 1961 - Court of Appeal Rules (No.2) 1956 – Court of Appeal Rules 1973.

Constitutional Law - Solomon Islands Independence Order 1978 sections 5 (1) and 12 (4) - Forum of appeal hearing pending establishment of Solomon Islands Court of Appeal

Constitutional Law - Solomon Islands Independence Order 1978 section 143 - Establishment of the office of Director of Public Prosecutions - Solomon Islands Independence Order 1978 section 91 (9) - Attorney General's function pending such appointment.

Criminal Law - manslaughter - S 192 (1) of the Penal Code accused charged with murder deprived of the power of self control Ss 197 (a) (6) and 198 of the Penal Code - whether all may apply.

Criminal Law - assault - self defence - S 17 of the Penal Code application of English Law - reasonableness of force used objective or subjective test.

Criminal Law - sentence - factors weighing against mitigation previous convictions - drink - carrying of weapon - principles to be applied by Appellate Court hearing appeals from other territories

Facts:

Following a prolonged drinking session the Appellant, carrying a tobacco knife, began to chase a girl whose fiancé and fiancé's brother, the deceased, sought revenge for this insult. A fight ensued, in the course of which the deceased chased the Appellant who stopped and seeing his pursuer began to run away again but in so doing swung his arm back and holding the knife in the hand of that arm inflicted the wound from which the deceased died.

Held:

1. By virtue of the Western Pacific (Courts) Order in Council 1961 the Court of Appeal in Fiji hears appeals from the High Court of the Solomon Islands in accordance with the then existing rules of court. The Court of Appeal Rules (No.2) 1956. The rules permitted an appeal by an accused person only. The rules were replaced by the Court of Appeal Rules 1973 which clearly (but not explicitly) limit appeals to appeals by an accused person. Pending the creation of a Court of Appeal in the Solomon Islands in accordance with the Court of Appeal Act (1976), Section 12 (4) of the Solomon Islands Independence Order 1978 as augmented by section 5 (1) of the same Order, keeps in force the 1973 rules. In the circumstances the 1973 rules could not be said to have given the Crown a right of appeal against an acquittal, since such right did not exist before 1973 and is not contemplated in the future, such a right would be inimical to the spirit of the legislation.

2. In considering a finding of manslaughter contrary to section 192 (1) of the Penal Code, the Court is entitled to arrive at the conclusion that a charge of murder can be reduced to manslaughter on the grounds mentioned in Ss 197 (a) (b) and 198 of the Penal Code; they are not mutually exclusive.

3. In considering self defence as a defence in relation to S 17 of the Penal Code, the onus of proving the accused did not act in self defence is upon the Crown when the question is raised on or by the evidence. The proper test of the accused's actions in his self defence is an objective one of reasonableness.

4. In the matter of sentencing, comparisons may be made with other sentences for similar offences but such comparisons are difficult and the Court of Appeal, sitting in another territory will consider the judge sitting in the area which the appeal is brought from, is better able to assess sentence.

Legislations referred to:

Western Pacific (Courts) Order in Council 1961 Court of Appeal Rules (No.2) 1956
Court of Appeal Rules 1973
Solomon Islands Independence Order 1978
Court of Appeal Act 1978

Cases referred to:

Palmer -v- R (1971) 2 WLR 831

D Patiaki for the Crown in both cases
P O'Reagan for the accused in both cases

Reported by: D Crome

JUDGMENT OF THE COURT

Gould V.P: These proceedings came before the court by way of a purported appeal by the Crown against the acquittal of Peter Ome (hereinafter throughout called "the appellant") on a charge of murder; he was so acquitted by the High Court of the Solomon Islands at Honiara and was convicted of manslaughter. In addition the appellant has appealed against his conviction of manslaughter; he claims that the learned judge erred in not acquitting him of all charges on the ground of self defence.

As to the Crown's appeal against the acquittal of the appellant on the murder charge the court is by no means satisfied that any such appeal is competent - in fact the relevant legislation over the years indicates the contrary. Going back only so far as the Western Pacific (Courts) Order in Council, 1961, appeal from the High Court lay "in accordance with Rules of Court". The existing Rules were the Court of Appeal Rules (No.2) 1956, which limited the right of appeal in criminal cases to a person convicted on a trial against (a) conviction and (b) sentence.

Those Rules were replaced in 1973 by the Court of Appeal Rules, 1973, which, while they do not specifically refer to appeals by the Crown are clearly limited, so far as appeals from the original criminal jurisdiction of the High Court is concerned, to appeals by persons convicted. A definition of "appellant" in Rule 2 to include the Attorney-General does not materially assist the Crown.

In the Solomon Islands the Independence Order, 1978, indicates the intention to create a new Court of Appeal, but until those provisions are brought into force Section 12(4) of the Order provides that appeals from the High Court shall lie to this court. This rather meagre provision can be augmented by Section 5(1) concerning existing laws, which has the effect of keeping in force the Court of Appeal Rules, 1973.

It is to be noticed that the proposed new Solomon Islands Court of Appeal will be brought into being by the Court of Appeal Ordinance, 1978, (modelled similarly to the Fiji Court of Appeal Ordinance) and in neither is an appeal by the Crown against a High Court acquittal provided or contemplated. It would be strange indeed if it were intended to provide for a Crown appeal from 1973 until the

present time when there was, none prior to 1973 and none is contemplated in the future. The spirit of the legislation therefore indicates that the Crown has no appeal in the present instance.

To this we would add that we were not assisted by any informed argument by counsel for the Crown. Further the purported appeal was lodged and signed by the Director of Public Prosecutions. There is a provision in Section 143 of the 1978 Constitution that the office of Director of Public Prosecutions shall be established no later than the 8th July, 1981, but we were informed from the bar that no appointment to the office had yet been made. There is a further provision in Section 91(9) that during any period that the office of Director of Public Prosecutions is vacant those functions shall be performed by the Attorney-General. These further complications it is clearly the duty of the Crown, in bringing an appeal like the present, to elucidate and explain.

For the reasons given and in the absence of any convincing argument on behalf of the Crown we are not satisfied that we have jurisdiction to entertain this appeal, or that in any event we ought to do so. It is accordingly struck out.

We turn now to the appeal by the appellant against his conviction of manslaughter contrary to Section 192 of the Penal Code. Before the basis of the finding can be fully understood it will be necessary to set out portions of the legislation contained in the Penal Code of the Solomon Islands.

The first part of Section 192(1) reads as follows:

“192. (1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony known as manslaughter.”

"197. Where a person by an intentional and unlawful act causes the death of another person the offence committed shall not be of murder but only manslaughter if any of the following matters of extenuation are proved on his behalf, namely –

(a) that he was deprived of the power of self-control by such extreme provocation given by the person killed as is mentioned in the next succeeding section; or

(b) that he was justified in causing some harm to the other person, and that, in causing harm in excess of the harm which he was justified in causing, he acted from such terror of immediate death or grievous harm as in fact deprived him for the time being of the power of self-control; or"

Provocation is dealt with in Section 198 –

"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."

The learned judge based the conviction primarily upon Section 197(b) when he said – "accordingly I find that the matters of extenuation set out in paragraph (b) of Section 197 obtain in this case so as to reduce the accused's offence from murder to manslaughter".

The learned judge, however, then added a paragraph which, as we understand it, indicates that he considered that the conviction of manslaughter could be equally sustained on the basis of provocation bringing into play the combined effect of Sections 197(a) and 198.

There is no dispute that the deceased died as the result of a deep stab wound in the neck, and that the wound was caused by a blow from a knife wielded-by the appellant. The circumstances are briefly that on Christmas Day, 1979, and the following day, the appellant and two friends, Thomas and James, drank very large quantities of beer. On the afternoon of the 26th December, the three of them were walking along a road towards Kukum and the appellant had with him a knife, all were affected by alcohol.

They saw a girl on the road whom the appellant did not in fact know but he thought fit to chase her. She was in fact Lois Gina the fiancee of Nowell Hamau. How far the appellant chased her is not clear but he did not catch her, and desisted. His companions took no part in the proceedings as they saw other men preparing to intervene on behalf of the girl; they left the scene.

The deceased, Festus Haggai, together with Nowell, who was Festus younger brother and others, were at Festus house when the alarm was raised concerning a man chasing Lois. At least some of them had also been drinking. They ran towards the accused - the girl had vanished from the scene by this time. There was some discussion or altercation, the accused tendering an explanation that the girl was standing near his “wantok’s” house.

One Samuel Fatavangara a friend who had been with the deceased and his family made efforts at the request of the deceased’s wife to stop the trouble and he took hold of the deceased and Nowell. They broke away, he thought because the accused was calling to them to come and settle the matter.

According to Nowell he and the deceased each aimed blows at the accused but missed. Nowell agreed that the witness Samuel was taking him away when the accused called them back and said they would solve the matter. The deceased was then at Ifunaoa's house. Samuel advised them to ignore the accused. Other onlookers warned that the appellant had a knife. He said Festus nevertheless ran at the accused and they both fell down. After they got up they ran towards Suri's house, the deceased following the accused. It was at this stage that the accused made a backward stabbing motion with his knife and undoubtedly inflicted the fatal injury.

The accused in evidence confirmed that the fight was in two parts though he said the first part was stopped by Suri whose house was nearby. He confirmed also that he then called them to come back -

"I was still thinking of solving this matter. So I followed the 3 men. I wanted to ask them the reasons for their attack on me. I was about 15 yards behind them. I said to them 'Come back so that we can straighten this matter out'

They turned round and ran towards me. I stood still. I thought they were coming back to solve the matter with me. 2 of them came towards me - the deceased and his brother Nowell."

After that, he said, the deceased and Nowell chased him. The deceased punched him. He fell down - got up and ran - he was frightened that if he stayed in the area someone might hurt him badly. He then saw Nowell in front of him and had no clear place to run to. He then said -

"So I stopped running and was just standing. The deceased was near me behind. I looked back and saw deceased intended to grab me from behind. So I started to run and was swinging my hands back. I had my knife in my hand. As I started to run I felt the knife hit the deceased's body. Deceased was at my back and preparing to

grab me. I did not stop. I run all the way to Mbua Valley. I did not intend to stick my knife into the deceased's neck."

Nowell's version of the blow with the knife was different. He described how after the deceased and the accused had fought, they got up and the deceased chased the accused. The witness said:

"It was then that I saw the accused make a stabbing motion back at the deceased as he ran away from the deceased. The accused was trying to get away from the deceased. They were running quite fast.

When someone runs fast they use their arms, but accused was not just using his arms in a running motion - he was doing a definite stabbing motion. He was looking back at my brother and I saw him make a stabbing action. At this stage Festus was bending low trying to catch hold of accused and it was when Festus was doing this that I saw accused make a stabbing motion. Festus was trying to catch accused by the hips as in a rugby tackle. Festus did not stop the accused."

The learned judge in considering these different versions, was of the opinion that what the appellant had said in a cautioned statement given eight days after the event, confirmed Nowell's version and he was quite satisfied that the blow which caused death was not struck accidentally but deliberately. We have no reason not to accept this finding and indeed it has not been challenged on the grounds of appeal.

The learned judge then continued, however, that he was also satisfied that in thus striking the deceased the accused was acting in self defence. We do not think that he intended to imply that all elements of a legal defence of self defence had been established for he went on to consider the degree of force employed by the appellant and, a little later, quoted Section 17 of the Penal Code, which reads:

“17. Subject to any express provisions in this Code or any other law in operation in the Protectorate, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English common law.”

The issue before this court, as the case has resolved itself, is within quite a narrow compass. Was the learned judge wrong in not acquitting the appellant altogether on the basis of self defence? He could be said to be wrong if it were shown that he had made and misdirected himself by a relevant and material error in law. In the absence of such an error, as a judge sitting alone, he could only be said to be wrong on a question of fact, if his view were such that it could not reasonably be held by a court properly directed. The principles to be applied are, as Section 17 states, those of English common law, and both counsel have disclaimed any wish to rely upon any gloss to be derived from comparatively recent Australian authorities. It is to be noticed also that under these principles the onus of proving that an accused person did not act in self defence, where the question is raised on or by the evidence, is upon the Crown.

It will be useful to quote here the comprehensive description of self defence contained in the judgment of the Privy Council in Palmer v. Reginam (1971) 2 W.L.R. 831 at 843 - 844. It is as follows:

It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or

punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. ..... If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self- defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence."

Factors relevant to this issue as seen by the learned judge are shown by the following series of passages from his judgment.

"It is quite clear from the evidence of both the prosecution witnesses and that of the accused that the accused was never the aggressor. Without any explanation the deceased and his brother Nowell set upon the accused because, as Nowell said, they were extremely angry that the accused had chased Nowell's fiancée."

With respect, the reason would surely have been apparent to the appellant.

"The accused was knocked down and on getting to his feet, ran away to Suri's house with the deceased and Nowell in pursuit. At Suri's house the two brothers demanded an explanation of the accused's actions and he tried to give an explanation. Unfortunately after the two brothers had been persuaded to leave, the accused followed them calling out to them to come back to straighten out the matter. .....

He said he knew the brothers were angry and that it was not a propitious time to discuss the matter but nevertheless he wanted to see whether his attackers were prepared to sort the matter out. I find I cannot rule out an element of bravado in this course of action by the accused. I bear in mind that he had been drinking

heavily earlier and I also bear in mind that he was still holding in his hand his knife."

The fighting started again and the accused and the deceased both fell down. The accused tried to get away and at this time Nowell had approached and Sam Fatavangara and Anska (a younger brother) were not far away. The learned judge accepted that when the appellant saw Nowell in front of him as he tried to get away from the deceased he feared an attack from Nowell who had attacked him a few minutes earlier.

The learned judge had in mind words included in the passage from Palmer's case we have just quoted to the effect that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. However, he was of opinion that the use of the knife was an unreasonable use of force. He took into consideration:

(a) that the accused knew that the deceased was unarmed and that Nowell was unarmed.

(b) the accused admitted that at the time of the stabbing Nowell was merely standing nearby watching.

(c) the fact that the accused happened to have a dangerous knife in his hand at the moment when self-defence was justified did not in his view mean that the use of the knife was reasonably necessary.

(d) it may be that having the knife in his hand he did honestly believe that his only course was to use it against the deceased.

The learned judge had said that the test was an objective one but apparently was trying to arrive at whether the subjective state of mind of the appellant could be taken as sufficient evidence of the objective reasonableness of his actions.

Nevertheless the learned judge came to the conclusion that use of the appellant's knife against an unarmed man was not a reasonable use of force in those circumstances.

We are not called upon in this appeal to examine the "matters of extenuation" expressed in Section 197 (a) of the Penal Code upon which the learned judge ultimately relied.

As we understand the submission of Mr. O'Regan, who appeared for the appellant, it is that though it is to be accepted that in the end of the test to be applied in assessing the reasonableness of force used in self defence is an objective one there are subjective elements which should affect the question. He relied upon the way in which this question was put in Adams' Criminal Law and Practice in New Zealand (2nd Edn) para. 1230 where the opinion is expressed:

"It is a jury question, and what was 'necessary' or 'reasonable' must depend very much on the circumstances as they presented themselves to the mind of the accused, and subjective considerations cannot well be excluded in determining the question."

Counsel's argument as developed hinged on the words we have already quoted from the judgment –

“It may be that having the knife in his hand, he did honestly believe that his only course was to use it against the deceased”.

Nevertheless the learned judge held that the use of the degree of force was not reasonable. It was sought to call this short passage in aid, to show an error in law, on the basis that the possibility of such a belief being held by the accused should have been accepted by the learned judge who should then have given the appellant the benefit of the doubt. This amounted to a misdirection as to onus.

We do not accept this. The learned judge complied with the law by taking that subjective element into consideration. That being so his conclusion upon its weight becomes one of a number of evidential considerations for his decision as judge of fact. He had not overlooked, for he had quoted the relevant passage, the words used in the judgment in Palmer’s case concerning the potency of such evidence. Therefore the question remained one of fact for his decision in all the circumstances of the case; no error of law has been shown.

As to the learned judge’s finding on the facts of the case as a whole we have not been shown that any relevant consideration has been overlooked and we are definitely unable to say that the learned judge’s final conclusion that the use of the knife against an unarmed man was not a reasonable use of force in the circumstances, was such that no reasonable court, sitting as judge of fact, could arrive at.

For reasons we have given the appeal against conviction is dismissed.

There is also an appeal against sentence. The appellant was sentenced to imprisonment for six years. He is a young man, unmarried but with some family

obligations. His record of previous convictions is fairly heavy for such a young man, though as counsel has pointed out there is no conviction since September 1977. Obviously drink has played a part in his earlier life as it did in the present case.

The learned judge took a serious view of the fact that the appellant having taken a great deal of drink was walking about on the public highway carrying a bare sheath knife in his hand. Counsel has claimed that the carrying of such a knife for the cutting of tobacco (which was the appellant's own explanation) was part of the way of life for people of the appellant's community and this we are inclined to accept. Nevertheless the tendency to be free with such weapons after heavy drinking must also be well known to those who carry them.

Counsel has submitted that the appellant was unfortunate in that his blow landed in the vital area of the neck owing to the attitude of the deceased who was the aggressor so far as the fighting and pursuit went. A list of sentences for manslaughter in the Solomons which was handed to us indicates that the majority were from three to five years but comparisons in such matters are always difficult.

As a court of appeal sitting in another territory we have always taken the view that a judge sitting in the particular area from which the appeal is brought is in a better position to assess sentence than we are. While we ourselves are inclined to view the sentence in this case as a somewhat heavy one, we note that one of the appellant's previous convictions was for causing grievous bodily harm for which he was imprisoned for three years. He does not appear to have profited from this warning.

On full consideration we have decided that the appeal against sentence must also be dismissed.