

COPY

IN THE SOLOMON ISLANDS MAGISTRATES' COURT
AT HONIARA

Criminal case no. 1707/07

REGINA

v.

PETER SHANEL

Ms M. Chalmers for the Crown

Wilson H. Rano for the Defendant

JUDGMENT

1- At a little before 6 o'clock on the morning of Sunday 19 August 2007 Robert Fulo was on duty as a security shift supervisor at the National Referral Hospital, Honiara. His attention was drawn to Mrs Julie Shanel. He had known Mrs Shanel and her husband, the Defendant, for about 10 years; they attend the same church.

2- Fulo told me that Mrs Shanel was talking loudly and was creating a disturbance. Apparently she wished to visit a relative at the hospital but had arrived outside visiting hours. He was asked by the nurses to speak to her. When he approached her he formed the opinion that she was drunk. He based this opinion on her general behaviour, on the way she walked and on the smell of liquor which she emanated. Before leaving the hospital and walking into the car park Mrs Shanel told Fulo that she had been drinking at Gabriel's place.

3- Fulo told me that he followed Mrs Shanel out into the car park. He saw her go over to where the Defendant's car was parked; there she began a conversation with another woman. He heard Mrs

Shanel raising her voice and becoming more angry. He watched this happen from a distance of about 8 metres.

4- While Fulo was watching Mrs Shanel he saw two young men approach her. The young men also appeared to be drunk. They began talking to Mrs Shanel and an argument broke out. He heard Mrs Shanel and the men swear at each other. He heard Mrs shanel telling them to mind their own business. Suddenly he saw one of the men kick Mrs Shanel and he heard her shout. Then:

“ The Defendant came out of the truck... He cut the man on the face... I did not see any knife or stick in the hands of the two boys... The Defendant got out of the truck after the boy kicked the wife... He got out and went straight to the boy and cut him... After he cut I saw him with a knife. He pushed it upwards... Neither of the boys tried to attack or kick the Defendant except after he had cut the boy... I did not hear the Defendant say anything during the incident... The knife was about 15 inches long... There were lots of people there... I did not intervene in the argument because they were drunk. ”

5- Before hearing from Fulo I heard from another security guard who was on duty at the hospital that morning, Polycarp Gee. Gee told me that he had also been about 8 metres from the incident but he had arrived later than Fulo and had not heard more than a little of the argument. When he came upon the scene there was already quite a large gathering of people. Gee told me:

“The Defendant was in his vehicle. I saw him when he came out and walked up to the boy. When he got to the boy he slashed at the boy in an upwards motion with a knife 15 or 16 inches long... The two boys were not armed with a knife or stick or anything.”

6-In cross examination Gee agreed that he had told the police that he:

“ saw the man move to the woman, kick her and move away... When the defendant went to the man he said to him ‘why did you kick my wife’”

Later in cross examination he told me:

“ The Defendant was in front of me going towards the boy. I saw his back. I saw him slash sideways. I saw his arm come”

7- The young man who was cut that morning was the first prosecution witness, Markfalen Ma'ai. Ma'ai told me that he was drunk that morning. He had been drinking all night and was on his way home to the Lord Howe settlement adjacent to the hospital when the incident occurred. His cousin Patterson who had also been drinking, was with him. When they arrived at the hospital car park, where they were hoping to be able to buy cigarettes, his attention was drawn to the sound of a woman shouting loudly. He became curious and thought that perhaps it was a “madwoman” inmate of the hospital who was making all the noise. He went to have a look.

8- Ma'ai told me that when he and Patterson went up to the woman, and another woman who was standing nearby, the woman who had been shouting abused him and told him to mind his own business. They began swearing at each other but when the woman told him that he, as a Lord Howe Islander should go back to where he came from he became very angry and kicked her:

“I was drunk and could not control myself.”

9- After he kicked the woman she backed away. Then:

“ I was punched on the face. On the right side of the face. I was trying to miss the punch but it was not a punch, it was a knife. I was not actually punched I was cut with a knife on my left cheek. ...I saw who did this [but] I did not see him before he hit me.... After I was cut I took off my shirt and tried to stop the blood. I tried to move closer to the man who cut me . Then a girl came and pulled the knife away from him. I had not seen this girl before.”

10- In cross examination Ma'ai admitted that he was not sure whether the Defendant had asked him why he had kicked his wife. Although he again admitted that he had moved towards the Defendant after he had been cut he denied approaching the Defendant before he was injured and also denied trying to kick him. He rejected the suggestion that he had a bottle of soda and another bottle of liquid in his hands at the time.

11-Ma'ai showed me a scar approximately 8cm long running from just below his left ear to the corner of his mouth. He told me that that this was the scar left by the cut he had suffered that morning. A medical report prepared by Dr Christopher Becher dated 23 August 2007 was admitted by consent. The report discloses that on admission to hospital Ma'ai:

“was bleeding heavily from the lacerated site at the left cheek. Laceration measures about 5-6cm in length through the skin and sub-cutaneous tissue fats severing anterior part of masseter muscles without connecting the oral cavity. Layer(thin) preventing wound from communicating with oral cavity.”

12-The masseter muscles are the muscles which enable the jaw to chew. As is clear from the report Ma'ai's left masseter muscle was partly severed. His cheek was very nearly cut right through into his mouth. It was a serious injury suffered in a very dangerous place.

13- Ma'ai's cousin Patterson also gave evidence. He accepted that he had been drinking that night but claimed not to have been nearly as drunk as Ma'ai. He remembered clearly what had happened. When Ma'ai kicked the woman he tried to drag him away. While he was trying to pull Ma'ai away he saw the Defendant come out of his vehicle and stand for a moment watching what was happening. He had his hands behind his back. Then:

"He came up silently....and cut [Ma'ai] with a bush knife. I did not hear him say 'why did you kick my wife'. I did not hear him say 'she is just a woman'".

After the injury was inflicted he was angry with the Defendant but some other boys intervened and held them back. This was how the argument and the fight ended.

14- The Defendant who has pleaded not guilty, does not deny inflicting the injury on Ma'ai. He faces three charges. He is charged with Unlawful Wounding, contrary to section 229 of the Penal Code and Assault Occasioning Actual Bodily Harm, contrary to section 245; these charges are in the alternative. He is also charged with possession of a weapon in a restricted place without reasonable excuse, contrary to section 84(2).

15- The onus of proving each of these charges beyond reasonable doubt rests on the prosecution. Where a defence may legally be available the onus of disproving that defence also rests on the prosecution. A legally available defence will be successful if shown to be reasonably possible, whether or not the defence is in fact raised. The only exception to this general description of the burden and standard of proof relates to the third charge: section 84(2) places the burden of proving a reasonable excuse for being in possession of a weapon in a restricted place on the Defendant. The standard of proof is on the balance of probabilities (*R v Carr-Bryant* [1943]KB 607; 29 Cr App R 76).

16- The Defendant gave evidence on oath. A number of defences were advanced by him or by Mr Rano on his behalf. The first defence was self-defence including the defence of Mrs Shanel. The principles governing this defence are usefully summarised at paragraph 2646 of the 36th edition of *Archbold* and have been locally considered in *R v Orme* FCA Cr. App 19&21 /1980 and *Jimmy Kwai v R* SICA 3/1991.

17- The second defence was accident. Section 9 of the Penal Code provides that a person:

“...is not criminally responsible for...an event which occurs by accident.”

18- Mr Rano also suggested that the Defendant had acted under a mistake of fact. The mistake, so far as I was able to understand it, was said to be the mistaken belief that either the Defendant or his wife were about to be attacked by Ma'ai. Section 10 of the Penal Code provides that a mistake of fact may amount to a defence where a person:

“...does...an act under and honest and reasonable but mistaken belief in the existence of any state of things..”

Although I doubt whether a belief that an event is about to occur can amount to a belief in the existence *in any state of things* I will also consider this defence on its merits.

19- Finally, Mr Rano suggested that:

“the assault of a wife of another in the context of the Solomon Islands is extenuation.”

While I agree that such an assault may well provide extenuation, it does not provide exculpation. Provocation is only a defence to a

charge of murder: it does not provide a defence to a charge of assault or wounding (*R v Cunningham* [1959] 1QB 288; 43 Cr App R 79).

20-The Defendant told me that he was sitting in his vehicle (variously referred to as a truck, a car or a four-wheel drive) at the hospital car park on the morning of 19 August. He and his wife had come to the hospital to visit his grandson. They were very worried about him. They had not been out all night and had not been drinking at Gabriel's. He did not recall whether his wife had been drinking that night but, while he conceded that his wife had been asked to leave the hospital, he did not agree that she was affected by alcohol. If, in fact, she had been talking loudly then that was because she had a medical condition which left her very hard of hearing. As for himself, he may have had "one or two".

21- When the argument erupted between Ma'ai and his wife he did not at first intervene. When, however he saw Ma'ai kick his wife;

"I was very angry. I could not control myself when I saw my wife being kicked and hence my action at the time"

22- What precisely the "action" was that the Defendant averred he took was, I found, particularly hard to establish. No knife was produced to help me understand what the Defendant suggested had occurred and he did not attempt any demonstration of how the injury had been inflicted. The Defendant told me that he had armed himself with the knife (the size or length of which was not disputed) before he alighted from his vehicle. He accepted that he had then stood for a while with the knife concealed. He then asked Ma'ai why he had kicked his wife. When Ma'ai advanced menacingly towards him he was frightened and tried :

"to deter him from advancing towards me or my wife... it was not my intention to harm the boy but to deter him... somehow

my hand met when he advanced to me...I did not stab him...in a sense it was an accident...I did not deliberately inflict the wound to the cheek....I took the knife from the car when [Ma'ai] advanced towards me aggressively.... I was pushing him away with the knife, this is how the accident occurred."

23-While it was not at all easy to understand the Defendant's explanation of how the injury was sustained it is clear that his account fundamentally differs from the account given by the prosecution witnesses in two major respects. First, while the Defendant's case is that Ma'ai was about to attack either the Defendant or his wife and therefore had to be deterred, the prosecution case was that when the Defendant struck Ma'ai he was not threatening anyone at all. Secondly, the prosecution case is that the blow inflicted on Ma'ai was deliberate and not accidental. As I see it, the resolution of these two issues lie at the heart of this case.

24-The Defendant called two witnesses, Richard Hou and his nephew Felix. Both told me that they had been present in the car park and had seen the whole incident. Although they had not been asked about it until the Monday before the trial commenced, when they were approached by the Defendant's daughter, they remembered what they had seen on the morning in question.

25- I was struck by a number of features of the evidence of these two witnesses. The first was how different their account was from that which I had already heard. The second was how similar their accounts were to each other. The third was the hesitant manner in which they told me their story. According to these two witnesses it was three men who caused all the trouble. After one of them kicked Mrs Shanel they then advanced menacingly on Richard Hou who was sheltering Mrs Shanel from further attack. When the Defendant left his car they turned their attentions to him, advancing upon him with the intention of attacking him. According to Richard Hou one of the boys jumped at the Defendant who was

trying to defend himself. That was how the boy was injured with “a small bush knife”. According to Felix Hou one of the three men tried to jump at the Defendant and threw a punch at him:

“ I could see [the Defendant] clearly, but I could not see if he was angry. He did not lose control. He stood with the knife in front. He blocked the punch. The boy jumped onto the knife with his face. I did not see the Defendant with the knife raised in his hand.”

26- The last witness to whose evidence I wish to refer was the second prosecution witness, Joy Rikimae. Ms Rikimae told me that on the day after the incident took place she had interviewed the Defendant for her newspaper, the Solomon Star. She took notes of the interview. The Defendant told her:

“I did not stab anyone. I was defending my wife. When I saw the boy Kung Fu my wife I was very angry and hit him.”

27-This explanation of what occurred given by the Defendant the very next day is strikingly similar to what the Defendant himself told me and which has already been set out at paragraph 21 above:

“ I was very angry. I could not control myself when I saw my wife being kicked and hence my action at the time.”

It is also notable that the Defendant neither offered self- defence nor accident as explanations of why the injury was inflicted.

28- Having heard and seen the witnesses and considered the evidence filed by consent I am satisfied that the truth of the matter is that the Defendant was enraged by Ma'ai's conduct in assaulting his wife and decided to teach him a lesson. When he decided on this course of action he was probably tired and emotional after a long night. He took the knife from the car with the intention of

using it at the first opportunity. He held the knife concealed because he wanted to surprise his wife's assailant. Keeping the knife concealed is wholly inconsistent with brandishing the knife in order to deter. I accept the evidence, especially the independent evidence of the two security guards, that the Defendant got out of his vehicle and then went up to Ma'ai and struck him. I accept the evidence that neither the Defendant nor his wife were being threatened by Ma'ai at the time he was cut. I reject the evidence to the contrary advanced by Richard and Felix Hou whom I found to be wholly unreliable. I also reject the suggestion that the injury was somehow inflicted by accident. Not only is there clear and convincing evidence to the contrary but I find it inconceivable that such a severe injury (a "scratch" according to Mr Rano's written submissions) could be sustained to the face accidentally. It is plain to me that the blow was planned and deliberate and was a pure act of retribution. I reject the suggestion that there was any mistake of fact on the Defendant's part: I am satisfied that he knew exactly what he was doing and why.

29- I am satisfied that none of the defences advanced by the Defendant to the first two counts can succeed. He is convicted of assault occasioning actual bodily harm as charged.

30- There remains the third count. The Defendant explained that he kept the knife in his car for weeding his garden. In my view that might have afforded an excuse had the knife been kept in the car. It cannot, however provide any excuse for having the knife outside the car and in the hospital car park with the intention of using it for an assault.

31- Mr Rano advanced a number of technical objections to Legal Notices 24/88 and 50/99 which are relevant to section 84(2). They are set out in detail in his very helpful written submissions but I am not persuaded by them. He conceded that the car park was within the restricted areas either of Honiara or Guadalcanal and I find no

material inconsistency between the two notices. The Defendant is convicted on Count 3 also.


M.D.Scott
Magistrate
12 August 2008

