IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 51 of 1977

Between: MARTIN LEGAI Appellant

A n d: REGINAM Respondent

Mr. C.N. Thomas for the Appellant
Mr. M. Jennings for the Respondent

Date of Hearing : 7th November, 1977
Delivery of Judgment: 25th November, 1977

JUDGMENT OF THE COURT

Henry J.A.

Appellant was convicted in the High Court of the Solomon Islands of manslaughter and sentenced to five years imprisonment. He has appealed against conviction and sentence. The original charge was murder but this was reduced to manslaughter on the ground of provocation. On Xmas Day 1976 a football match took place at Avu Avu between two teams called Talise I and Talise II.

They represented a number of different villages. There were differences and fighting ensued. It was agreed that there should be a further meeting of the two factions on January 3 but, on January 2, men from Talise II went to Sughu which is a village of Talise I, and, after making trouble there, went on to Malaisa a village of Talise I where appellant lived. Appellant was asleep in the custom-house of the Moro Movement which is a semi-religious group. Entry to the custom-house and its compound is forbidden except to members of the movement or by invitation on special occasions. The area is "tabu". Appellant was custodian of the custom house. Appellant had not been present nor was he in any way involved in the earlier events. The disturbance woke him. He went out and told the intruders to go away. Appellant was assaulted by someone who used a piece of bottle as a "knuckleduster" and was punched in the mouth. He was wounded over the left eye-brow and a tooth was loosened. He had earlier been sworn at. He was provoked into considerable anger. He retreated to the custom-house, seized a bush-knife, and emerged brandishing the knife and told the crowd to leave. They all ran away except deceased who was aggressive and wanted to fight. However, deceased finally ran away and appellant pursued him. Deceased fell and appellant inflicted two severe wounds in the back of deceased.

A full description of the wounds according to the medical evidence was:-

(1) A curved laceration over the (R) shoulder blade extending deeply through muscle tissue down to the bone of the scapula. This laceration measured 10" in length.

(2) A long curved laceration across the (R) loin and lower part of the back deeply involving muscles and extending to the peritoneum of the posterior abdominal wall. This laceration measured 12" in length. This laceration had just reached the outer-coat of the large bowel. It also divided the (R) eleventh and twelfth ribs posteriorly and was believed to have entered the pleural cavity on the (R) side.

Deceased got up and walked to a banana tree on the seashore. From there he was taken by canoe to Avu Avu. This was a two-hour journey. There is a clinic at Avu Avu where Nurse Dala (a male nurse) treated the wounds. Deceased was given injections of tetanus toxoid and of penicillin, his wounds were cleaned with a solution of Salvon and water and were stitched up with catgut. The wounds were then swabbed with methylated spirits to dry the stitches and skin, penicillin powder was applied to the wounds and they were covered with plastic. The radio at Avu Avu was out of order so that it proved impossible for air transport to the Central Hospital, Honiara, to be arranged for the deceased. Accordingly he was put onto a ship two days later (the 4th January) and was admitted to the Central Hospital on the 7th January. There his wounds were re-examined and dressed. On the 18th January he contracted tetanus and after eight days of artificial respiration which was discontinued on the 26th January having apparently been successful, the deceased died the same evening.

At the trial counsel for appellant, at the close of the prosecution case, submitted that there was no proof that an act of appellant was the cause of death. Counsel further contended that the treatment given by Nurse Dala was the cause of death. These submissions were expressed with more particularity than we have just stated. They will be examined later. This argument turned solely on the true meaning of Sec. 200(a) of the Penal Code. The relevant portion reads:-

> "200(a) A person is deemed to have caused the death of another person although his act is not the immediate or the whole cause of death in any of the following cases -
>
> (a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill."

The Chief Justice held that the facts brought appellant within that provision and therefore appellant had a case to answer.

Appellant gave evidence. After addresses of counsel the chief justice reviewed the evidence at length, and also the relevant authorities which had been cited, and again held, that the evidence brought appellant within the provisions of Sec. 200(a). He also held that, even if that finding were incorrect, the acts of appellant, at common law, caused the death of deceased. The present appeal is brought against those findings.

The grounds in the notice apply only to Sec. 200(a). These grounds are:-

1. The Honourable the Chief Justice failed properly to direct himself as to the meaning of s.200(a) of the Penal Code and in particular as to the true meanings of the words "mistaken" and "common knowledge and skill" as used in that section.

2. In the alternative, if the Honourable the Chief Justice did properly direct himself, then his finding that Nurse Dala's treatment of the patient was not lacking in common knowledge or skill was contrary to the weight of the evidence.

Counsel for the Crown in this Court argued, first, that the finding at common law was correct and that Sec. 200(a) did not apply. Alternatively, counsel argued that if Sec. 200(a) did apply to the acts of appellant, then the chief justice was correct in finding that appellant's acts caused the death as provided therein.

The chief justice accepted the evidence of Dr. Wilken who was chief consultant surgeon of the General Hospiral at Honiara where deceased was received as a patient on January 7. Death took place on January 26. Dr. Wilken said "the cause of death was respiratory infection caused by severe tetanus caused by severe wounds infected by tetanus organisms at the time of injury." Dr. Wilken further said that he was sure that the tetanus organisms were initially in the wounds and that, whilst subsequent treatment by Nurse Dala may have caused the organisms to grow, he was sure the treatment did not cause tetanus. Dr. Wilken also said that, unless deceased had suffered the wounds, he would not have died. There was some discussion about the possibility of the use of catgut for suturing the wounds being the source of tetanus infection but it is clear that the chief justice ruled this possibility out when he said in the course of his judgment that the onset of tetanus flowed directly from the infliction of the wounds. The finding is clear that the source of infection was at the time of the original wounding.

We have dealt with the finding that the source of infection was the wounding but the finding also added that the treatment was an additional element. The passage reads:-

> "I find that the deceased's death resulted from the wounds inflicted by the accused in that the onset of tetanus flowed directly from the infliction of the wounds and the treatment that the deceased was given for those wounds."

Dr. Wilken went only so far as to say that the treatment may have caused the organisms to grow. On the general question of the growth of tetanus organisms Dr. Wilken said:

> "Tetanus typically results from deep dirty wounds from which light and oxygen are excluded. The organism thrives only in air conditions where oxygen is absent. More deeply it is implanted in tissues of body, more likely it is to thrive, grow and produce its poison. It is effect of poison or toxin which cause symptoms of tetanus. This poison becomes fixed to the nerves. Type of wound suffered by decd. is precisely type of wound in which tetanus is likely to develop."

The above passage appears to mean no more than a finding that the condition and nature of the wounds were such that the closing of the wounds by suturing enhanced the climate in which the pre-existing organisms would thrive and thus increase the toxicity and be a factor in the resulting fatal condition. To that extent the treatment was a "cause" which had a part in bringing about the death. Thus two factors operated namely, the original infection which commenced at the time of wounding and continued till death and the later enhancement of the conditions in which the organisms would thrive by the exclusion of light and oxygen from the wounds by reason of the later suturing.

On the above findings the question is did appellant cause the death of deceased? Sec. 192 (1) of the Penal Code reads:-

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

Sec. 200 provides for five separate sets of circumstances where the act of a person causing bodily harm is not the immediate or the whole cause of death. In each of those circumstances the person who does the act is "deemed to have caused the death". Sec. 200 does not qualify or limit the word "cause" in Section 192(1) which must be given its natural meaning. Sec. 200 either puts beyond doubt what may be a matter of question on the construction of Sec. 192(1), or may extend the meaning of that term. But there is no occasion to resort to Sec. 200 - a deeming provision - if an act comes within the word "cause" in Sec. 198(1). When the chief justice made an alternative finding of the cause of death he was entitled to do that in reliance upon the natural meaning of "cause" in Sec. 192 (1). This appears to have been the manner in which he approached his task. Before dealing with Sec. 200 further we propose to consider whether or not the alternative finding of the chief justice was, as Counsel for the Crown contended, a valid finding.

The authors of Smith & Hogan's Criminal Law 3rd Edition, p. 215 said:-

> Causation is a question of both fact and law. D's act cannot be held to be the cause of an event if the event would have occurred without it. The act, that is, must be a sine qua non of the event and whether it is so is a question of fact.

> But there are many acts which are sine qua non of a homicide and yet are not either in law, or in ordinary parlance, the cause of it.

In R v. Smith (1959) 2 QB 35, 43 (1959) 2 All E.R. 193, 198 in giving the judgment of the Court Lord Parker, C.J., said:-

> It seems to the court that, if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound.

Various expressions have been used in the cases on the question of causation as to when it can be said that a certain prior event was a cause of a subsequent result, so that legal consequences ensue. We do not propose to discuss these expressions but will confine ourselves to the phrase "substantial cause" which appears to be appropriate in the present case. Whatever criterion is adopted to determine whether an act of an accused person which was followed by the death of or injury to another could be considered such a cause as to render the accused person responsible for the result, it is clear that a substantial cause is sufficient for that purpose. The act of appellant in wounding the deceased set up an immediate source of infection from which he subsequently developed fatal respiratory failure. The connection between the initial infection and the final fatal condition was direct and continuous.

It always operated. It was clearly a substantial factor. The suturing, which was an attempt to protect the patient from serious bleeding, was something done to alleviate an effect of the wounding. It was admittedly done in good faith. That it had a side effect of enhancing the climate for another condition, not then apparent, placed it no higher than a contributory factor which also came into operation at that point of time, and which continued till death. The male nurse was faced with the choice of either leaving the wounds open with the consequent risk of serious or fatal bleeding during waiting time and also during the long and arduous journey to hospital, or, alternatively, of suturing the wound with the consequent risk of tetanus infection developing in a more favourable climate than would be the case of open wounds. It was a choice which naturally arose from the act of appellant. Nothing in that act on the part of the male nurse requires a finding that the original wounding was not still a continuing substantial factor in causing death. The original wound, remained at all times such a substantial continuing operating cause of the fatal condition which caused the death.

Counsel for appellant repeatedly in the course of argument used the analogy of links in a chain. He argued that the closing of the wounds broke an essential link. Counsel was, in effect, bound so to state his case if he wished to overcome the finding that the onset of tetanus flowed directly from the infliction of the wounds.

The analogy is unsound because there was not a chain of events in respect of which one could be isolated from the rest. Nor will his argument that the suturing was a supervening event help. It was no more than the treatment of the serious bleeding condition brought about by the act of appellant. The choice between one obvious source of danger, namely, serious bleeding and the chance of tetanus infection (if present) having a better climate to thrive in, will not militate against the original wounding still being an operative substantial cause of the fatal condition which developed. It was argued that some other form of treatment for the bleeding should have been employed but there is no evidence to support this contention. In our opinion a proper finding is that the act of appellant caused the death within the meaning of "cause" in Sec. 192(1).

Since Sec. 200(a) was much canvassed in the Court below and before this Court we propose to make some observations on it. Sec. 200 as a whole, deals with two classes of acts, namely, those not being the immediate cause of death and those which are not the whole cause of death. Subsection (a) refers to persons who inflict bodily injury in consequence of which surgical or medical treatment causes death. Pausing there the subsection makes no reference to the injury causing death or being one which is even likely to cause death. It simply refers to treatment causing death. The subsection provides that, in the case of such treatment causing death, the person who inflicted the injury is deemed to cause the death. Subsection (a) then goes on to say that certain conditions concerning the treatment are immaterial if the treatment was

employed in good faith and with common knowledge and skill. There follows an exception in which the person is not deemed to have caused death and that is if the treatment which was its immediate cause was not employed in good faith or was without common knowledge or skill. We do not propose to attempt to give a definitive interpretation of subsection (a) but from what we have said it particularly refers to those cases where the injury was not the immediate cause of death but the treatment was. The present case is not such a case so there is no occasion to invoke Sec. 200(a). We agree with the chief justice that the nurse, in the whole of the circumstances of this case, acted in good faith and that, with the urgent problems which faced him in a remote area, it could not be said that he failed to use the common knowledge and skill of a nurse faced with the exigencies of that situation.

The appeal against conviction is dismissed.

Appellant also appeals against the severity of the sentence of five years imprisonment. Manslaughter is a crime for which sentences vary greatly by reason of the differing circumstances in which death occurs. Appellant is 40 years old. He has been living with his wife and 7 children whose ages range from 15 years to less than one year. He is of good character and has no history of violent re-action. The provocation was extreme and it is important to note that he made every endeavour to solve peacefully an unwarranted and aggressive intrusion of a number of people into the custom house which had the added insult that they were entering,

in a violent and aggressive attitude, a tabu area. He was seriously assaulted and was outnumbered at least until all the assailants except deceased ran away. Members of his clan have made payment to the family of deceased so tribal custom is satisfied. The report of the Welfare Officer was highly favourable. Appellant's large family are facing considerable hardship both from his forced absence and natural disaster which overtook the area. He is deprived of the opportunity of helping to cope with their plight (as set out in the report) through his reaction to violence, threats and insults suddenly thrust upon him by a large and aggressive mob. Against this it must be conceded that he pursued deceased. Up till then his actions were not inconsistent with self-defence. Further as the chief justice said it was most unfortunate that the death occurred. This referred to the closing of the wounds.

As we frequently have had occasion to say in this Court, it is with considerable reluctance that we interfere with a sentence which has been imposed by a learned judge who not only had had the advantage of seeing and hearing the witnesses, but also is far better acquainted than we are with the local conditions and in particular with local ideas on the subject of punishment. At the same time we are impelled to hold, in the present case, that the learned trial judge has not given sufficient weight to the factors operating in favour of the appellant. We have reached the conclusion, while paying full respect to the reasons of the learned judge, that the term of imprisonment imposed is excessive.

In our opinion, a sentence of 3½ years imprisonment would be, in all respects, adequate. Accordingly, the appeal against sentence is allowed, the sentence of five years imprisonment quashed, and a sentence of 3½ years imprisonment substituted to take effect from the date of the original sentence.

(Sgd.) T. . Gould
VICE-PRESIDENT

(Sgd.) C.C. Marsack
JUDGE OF APPEAL

(Sgd.) T. Henry
JUDGE OF APPEAL

Suva,

25th November, 1977.