IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction

Criminal Appeal No. 63 of 1981

BETWEEN:
1. RAJESH KUMAR
2. TULA RAM
3. SHANTI DEVI
4. CHANDRIKA PRASAD — Appellants

- and -

REGINAM — Respondent

G.P. Lala for the first and fourth appellant
H.M. Patel for the second and third appellant
S.W. Kepa for the Respondent

Date of Hearing: 1st March, 1982
Date of Judgment: 19th March, 1982

JUDGMENT OF THE COURT

Marsack, J.A.

These are appeals by all four appellants against convictions for the murder of one Abdul Rahiman, and of first, second and fourth appellants of attempted murder of Abdul Rahim, entered by the Supreme Court sitting at Suva on 23rd September, 1981. There was a joint trial of all appellants before a Judge and three assessors in the Supreme Court. The appellants were represented by the same counsel as appeared in this Court. From the Record it appears that all three assessors expressed the opinion that all four appellants were guilty on the major charge and first, second and fourth appellants on the minor charge. On the direction of the learned trial Judge they said "not guilty" in the case of the third appellant on the

second charge. The learned trial Judge expressed agreement with the assessors and entered convictions accordingly, passing sentence of imprisonment for life on the first charge and five years' imprisonment, to run concurrently, on the second charge.

The basic facts put forward by the prosecution may be shortly stated. First appellant is the son of second and third appellants, and fourth appellant is the brother of third appellant. All four appellants could then be considered as members of the same family. The deceased Abdul Rahiman lived in a settlement known as "Rampurwa" near Narere, and his son Abdul Rahim lived with him most of the time. They were Muslims by religion. First, second and third appellants, who were Hindus by religion, were next-door neighbours of Abdul Rahiman. Fourth appellant did not live in that settlement. About 7.00 p.m. on 18th January, 1981 the deceased and his son Rahim received physical injuries at the hands of some persons on the Narere feeder road. Deceased had received nine incised wounds apparently inflicted with a knife, two of these wounds having pierced his liver. He had also much bruising on the left shoulder and right arm. Rahim had four stab wounds in the abdomen, one of which had pierced his liver. He also had incised wounds on the arm, hand and finger; and a compound fracture of the skull and injury of the eye. Deceased died shortly after being taken to hospital; Rahim received treatment in hospital for ten days and was required to report regularly to the hospital for several months for a check-up on his condition.

The extent of the injuries caused to both Rahiman and Rahim was well established by the evidence; and the only matters requiring consideration by the Court were the identity of the persons responsible for the wounding, and the circumstances in which the wounding had taken place.

According to the prosecution evidence an argument took place, with some fisticuffs, between Rahim and the fourth appellant, and this was broken up by one Hari Narayan. Then as Rahim was on his way home, he came on the first three

appellants standing on the road; they were shortly joined by the fourth appellant. They attacked Rahim, knocking him to the ground. Deceased came and bent down to assist his son, and according to Rahim's evidence, was at once assaulted by all four appellants, the first two with knives, the third with a hoe and the fourth with a stick. Later the Police arrived and the injured persons were taken to hospital.

The case for the defence, given very shortly, is that there was a fight between Rahiman and Rahim on the one side and some of the appellants on the other; but that the deceased and his son were the aggressors. The first appellant admitted a struggle with Rahim, but only with punches and kicks. He also admitted having picked up a knife at one stage, but said he did not use it; and he denied striking deceased at all. He further deposed that one Ashok came on the scene armed with an iron bar and a knife, with which he struck deceased and Rahim. One defence witness Anita Devi, said that the deceased was running about with a knife and shouting "I will kill everybody". The second appellant denied that he was at the scene at all. The third appellant said that the deceased's wife hit her with a stick and that she did not retaliate in any way. The fourth appellant said that he was attacked by Rahim but fainted, and did not know what happened after that. The case for the defence is somewhat confused in that the evidence given by the appellants in court differed considerably from the statements they made to the Police. As far as this Court is concerned we must take the defence to be based on the evidence given at the hearing.

As to the grounds of appeal: first and fourth appellants submitted the same grounds and their appeals can be dealt with together. The appeals of second and third appellants will require separate consideration.

First and fourth appellants have submitted lengthy grounds of appeal, but we do not consider it necessary to set these out in detail. Those requiring consideration by this Court may be stated shortly as under:

(1) The evidence tendered was insufficient to establish the guilt of the appellants because of -

(a) contradictions in the prosecution evidence;

(b) the fact that the injuries were received in a general fight.

(2) The learned trial Judge failed to direct the assessors correctly or adequately on -

(a) proof of necessary criminal intent;

(b) lies told by witnesses;

(c) issues of provocation or self-defence.

Ground (1)(a): Counsel referred particularly to the evidence concerning a shirt which had been worn by Rahim when the fight started. This shirt was produced in Court and was identified by Rahim as that which he had been wearing. In the course of his evidence Rahim said:

> "I took the shirt off when Hari Narayan had stopped us fighting earlier."

The witness Hari Narayan, on whose evidence the prosecution largely relied, stated -

> "When I saw Rahim again after assault his shirt was torn and soaked in blood. He had it on. I can't say what colour shirt he was wearing. Can't say if this (shirt produced) was the shirt he had been wearing. This shirt is not torn."

Counsel's contention is that the owner of the shirt would be the more reliable witness; and if Hari Narayan could make one important mistake why could he not make others? In counsel's contention this discrepancy in evidence should have been put to the assessors clearly by the trial Judge.

In our opinion this discrepancy - whichever witness is believed on the point - is of no moment in considering the reliability of the evidence of Hari Narayan. His mind at the relevant time would have been concentrated on the infliction of the actual injuries on the persons involved in the fighting; he may have taken little, if any, notice of the boy's clothing at the time. He was a completely independent witness and his truthfulness cannot be

questioned, in our view, by his failure - if it were so - to take more careful notice of the boy's shirt.

(1)(b): Counsel argued that all the injuries sustained on that occasion - and some were received by three of the appellants as well - indicate very clearly that there was a general fight, a fight in which some of those taking part might receive serious injuries in circumstances which would negative any criminal intent. The medical officer called by the defence, gave evidence that she had examined four persons after the disturbance, including the first, third and fourth appellants. It is clear from her evidence that the injuries sustained by the persons examined were of a very minor nature. In the course of his summing up the learned trial Judge said -

> "The prosecution themselves concede that there must have been a struggle during which the accused, Anita Devi and Atma Prasad received their minor injuries."

The evidence makes it clear that there was something in the nature of a general fight; but this in itself would not necessarily excuse the violent attacks which led to the death of Rahiman and serious physical injury to Rahim. The criminal liability for the blows struck on these two persons will largely depend on the question of the proof of intent, which will be dealt with below.

(2)(a): Counsel stressed the principle that before the appellants could be convicted of murder it must be proved that they had the necessary intent and malice aforethought. In the course of his summing up, the learned trial Judge said, in this connection:

> "The prosecution must prove beyond reasonable doubt... that when those injuries were inflicted each of the four accused had the intention to kill him, or at least to cause him grievous harm;" or
>
> "When they inflicted those injuries they had the knowledge that what they were doing would probably cause Abdul Rahiman's death or at least cause him grievous harm."

Counsel pointed out that the definition of murder in the Penal Code reads:

> "Any person who of malice aforethought causes a death of another person by an unlawful act or omission is guilty of murder."

As to what constitutes 'malice aforethought' counsel cited Fallon on "Crown Court Practice - Trial" 1978 at page 307:

> "In any event a man is no longer irrebuttably presumed to have intended the natural consequences of his act. Foresight of consequences is, therefore an essential feature of malice aforethought."

Malice aforethought is defined in the Penal Code, Section 202:

> "Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-
>
> (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
>
> (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused."

We are of the opinion that the summing up by the learned trial Judge based on the Penal Code definition was strictly accurate, and a correct direction to the assessors.

(2)(b): Counsel contended that the conflict of evidence between that for the prosecution and that for the defence is so great that one is forced to the conclusion that there was deliberate lying on one side or the other. As a result it would be difficult to find, from the evidence, a fully reliable and factual summary of what had actually occurred at the crucial time.

In the course of his summing up the learned trial Judge says:

> "The conflict between what the prosecution witnesses Rahim, Sheikh Mahmood, Abdul Munaf and Hari Narayan say and what the four accused

> and their witnesses say is such that there can hardly be any room for confusion or mistake. Either the prosecution witnesses are telling deliberate lies and falsely implicating innocent persons or the four accused and some of their witnesses are telling deliberate lies to shift the blame from themselves.
>
> In this regard I must remind you again that no burden lies upon the accused to prove their innocence. It is entirely for the prosecution to prove beyond reasonable doubt that each of the four accused was involved in the assault from which Rahim and Rahiman received those wounds."

He then proceeds to analyse the discrepancies between the prosecution and defence evidence and to suggest matters which the assessors could take into consideration when assessing the value of each witness' evidence. At the conclusion of the analysis he says:

> "You will consider all these matters and you will no doubt also consider the manner in which various witnesses gave their evidence when you are assessing their credibility."

It is thus clear that the learned trial Judge dealt expressly with the matter of lies which may have been told by some witnesses, and left it to the assessors to use their own judgment as to what evidence they could confidently accept. That being so, his summing up on that aspect of the case is not in our opinion open to objection. It is in any event for the Court to consider all the evidence and decide where the truth is to be found. Upon full consideration of the evidence we are satisfied that the assessors, and the learned trial Judge, were entitled to come to the conclusion at which they arrived.

(2)(c): Although neither provocation nor self-defence was put forward on behalf of the appellants in the Court below, counsel correctly pointed out that the onus is on the trial Judge to direct the jury - or the assessors - upon these issues, or either of them, if there is evidence upon which such a defence could be based. We can find no such evidence. The principle to be applied with regard to provocation is authoritatively set out in Lee Chun-Chuen

(1963) AC 220 at page 231:

> "Provocation in law consist mainly of three elements - the act of provocation, the loss of self-control both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements."

The prosecution evidence, which was clearly accepted by the assessors and the learned trial Judge, was that in the disturbance leading to the death of Rahiman, the appellants were the aggressors. Moreover it cannot possibly be suggested that the violent killing of Rahiman was retaliation proportionate to any provocation which may have been received. In these circumstances we are satisfied that there was no onus on the learned trial Judge to leave the issue of provocation to the assessors.

On the same basis there was nothing in the evidence to suggest that the action taken by the appellants could have been by the way of self-defence.

For these reasons we can find no merit in any of the grounds of appeal put forward on behalf of the first and fourth appellants.

The grounds of appeal submitted on behalf of the second appellant cover mainly the same ground as those submitted for the first and fourth appellants, and have already been dealt with in this judgment. There is however a further ground which may be shortly set out as follows:

> "That the learned trial Judge did not adequately direct the assessors on the evidence called for defence that the second appellant was not present at the fight and that evidence of Dr. Maharaj ruled out the possibility that the stab wounds in Abdul Rahiman could have been caused by a cane knife."

The learned trial Judge in fact in the course of his summing up explained fully to the assessors the evidence given by the second appellant as to his whereabouts at crucial times on 18th January 1981. He quoted a good part of this

evidence verbatim. He pointed out second appellant's evidence that he had taken no part in the affray; and that there was no evidence of any injury having been received by him that evening. He also quoted evidence of other defence witnesses on the same point. Accordingly it cannot be said that the learned trial Judge failed to direct the assessors as to the presence or absence of the second appellant during the fight. He expressly said:

> "Similarly if you come to the view that Tularam, Shanti Devi and Chandrika Prasad were not there at all when Rahim received those injuries you will find each of them not guilty on 2nd and 3rd counts. You will also so find if you have a reasonable doubt on the issue."

With regard to the evidence of Dr. Maharaj, there is nothing in the prosecution evidence to the effect that Rahim was struck with a cane knife. In his summing up the learned trial Judge summarised the position in these words:

> "The prosecution case is that Chandrika Prasad.... Rajesh and Tularam lay in wait for Rahim as he walked back towards his home. They took him by surprise and attacked jointly with a knife, a stick and a hoe."

He later referred to the evidence of Rahim that Tularam had a cane knife; but that cane knife was used to strike his father Rahiman.

As a result we can find no merit in the grounds put forward on behalf of the second appellant.

The grounds of appeal submitted on behalf of the third appellant are, in the main, similar to those of the other appellants, which have already been dealt with in this judgment. The further grounds submitted by the third appellant were set out as under:

> 1. That the Learned Trial Judge after hearing the opinion of all the Gentlemen Assessors concerning the Charge of Murder then again questioned the First Gentleman Assessor whether he still maintained his opinion that Not Guilty on the First Count which subsequently caused him to change his

opinion to that of Guilty whereby caused substantial miscarriage of justice of the Appellant.

2. That the Learned Trial Judge erred in law in not upholding the submissions of no case to answer made on behalf of the Appellant at the end of the Prosecution Case hereby indicating that the Appellant had to prove her innocence in regards to Counts 2 and 3.

3. That there was a miscarriage of justice in that the Learned Trial Judge failed to direct the Assessors correctly on the use and weight to be placed on the Unsigned Statement made to the Police by the Appellant.

As to the first ground: there was nothing in the official Record supporting this contention. No affidavit was filed setting out the alleged facts. Counsel for the third appellant informed this Court that the first assessor at the outset said "not guilty" as to the particular charge but changed his statement to "guilty" when the learned trial Judge spoke to him about it. Counsel representing first and fourth appellants informed this Court that when the learned Judge spoke to the first assessor the latter said "I have made a mistake". There is nothing before this Court to indicate that the learned trial Judge in any way induced the assessor to change his mind, and we have no doubt that he did nothing of the kind. Moreover, it must be remembered that the verdict of the Supreme Court is that of the trial Judge, and the function of the assessors is merely to advise him as to what the verdict should be. As a result we can see no merit in this ground of appeal.

As to the second ground of appeal: it is true that at the conclusion of the case for the prosecution, counsel for the third appellant submitted that there was no case to answer, and his submission was rejected by the learned trial Judge. At the conclusion of his summing up, the learned Judge held that there was insufficient evidence upon which to find the third appellant guilty on the second and third counts, and he directed the assessors to find her not guilty on these charges.

The ruling at the conclusion of the prosecution case, that there was a case to answer, in no sense threw the burden of proving her innocence on the third appellant. The duty of the Judge where such an application is made to him is authoritatively set out by the Court of Appeal in Barker (1977) 65 Cr. Ap. R. 287 at page 288:

> "It cannot be but clearly stated that the Judge's obligation to stop the case is an obligation concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the Judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying."

Such a ruling does not mean that if no evidence is called by the accused concerned, the trial Judge will necessarily enter a conviction.

As to the third ground: the summing up of the learned trial Judge as to this aspect of the case was in the following words:

> "Contradictions between what Shanti Devi said to the Police and what she has said here should be treated largely for the purpose of assessing the reliability of what Shanti Devi has said here in her evidence on oath."

There is in our opinion no basis for the suggestion that this direction was in any way incorrect or prejudicial to the third appellent.

For these reasons we can find no merit in any of the grounds put forward on behalf of the third appellant.

There is one comment as to the appeals generally which we feel called upon to make. Practically all the appeals are based on alleged shortcomings in the summing up by the learned trial Judge. In our opinion these criticisms are totally unwarranted. The summing up covered all the relevant features of the case; and the principles

appropriately applicable to basic subjects such as the burden and standard of proof, and the weight of evidence, were explained fully, clearly and correctly.

In the result all appeals are dismissed.

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Vice-President

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Judge of Appeal

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Judge of Appeal