IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 60 of 1983

Between:

KRISHNA KIRAN NAIDU s/o Appal Naidu — Appellant

and

R E G I N A M — Respondent

Mr. S.M. Koya for the Appellant
Mr. J. Sabharwal for the Respondent

Date of Hearing: 4th July, 1984

Delivery of Judgment:

JUDGMENT OF THE COURT

Mishra, J.A.

The appellant was convicted by the Supreme Court, Suva, of Murder and Attempted Murder under two counts in the same Information.

He appeals against his convictions.

The brief facts were:

The appellant's marriage had broken down and, some time before the commission of these offences, his wife Evangaline had left him and gone with their child,

Roneel, three years of age, to live with her grand parents. Some days later the appellant brought the child back in the hope that this would induce his wife to return to the matrimonial home.

She did, but with a court bailiff and an order requiring him to give up the custody of the child. He refused whereupon the bailiff threatened to arrest him.

Angered, the appellant picked up a long-handled cane knife and went after them. The bailiff ran back to the taxi that had brought them. Evangaline received several blows, all landing on her arms, some causing compound fractures of the bones. The child, Roneel, who was also in the vicinity received a blow on the head and died. Evangaline was taken to the hospital and survived. The appellant was charged with the murder of Roneel and attempted murder of Evangaline.

Application was unsuccessfully made at the commencement for separate trials of the two offences. One of the grounds (ground 10) of Appeal complains that the Learned Judge erred in exercising his discretion against severance. We are unable to agree. The two offences arose out of the same incident and the evidence to establish them would be almost identical coming from the same witnesses. Evangaline would be the main witness in each case. This made it a proper case for a joint trial. Even so the Learned Judge said -

> "On the other hand, should it appear at any later stage of the trial that the accused may be prejudiced by the joinder, the application may be reopened and separation may be ordered at any stage."

Application was not renewed.

We do not consider any special feature of the joint trial indicated prejudice or embarrassment to the appellant and the Judge's discretion was properly exercised.

Sixteen grounds of appeal have been put forward covering nine typed pages and will, therefore, be unnecessarily cumbersome to set them down here in their entirety.

The first four, which may conveniently be dealt with together, relate to adequacy and correctness of the directions to the assessors on malice aforethought necessary to establish the offence of murder in the special circumstances of the case.

The appellant's defence was 'accident'. He was not, he said, aware of the presence of the child near him when he had, unknown to the appellant, run into the path of one of his blows aimed at his wife. The medical evidence indicated only one blow on the body of the deceased. The appellant's deep love for the child was not challenged.

The prosecution evidence, disputed by the defence, was that the appellant, after striking several blows upon Evangaline, had turned around and struck a deliberately aimed blow at the deceased.

In dealing with the issue the Judge said :-

> "It is laid down in the Penal Code that any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. The term 'malice aforethought' is an old term which has remained part of our law and which may be misleading

if not explained. Malice aforethought is 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; and

(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.

For the purposes of this case you need only to confine yourselves to the first part of the definition. As I have said it is not in dispute and it is acknowledged by the accused that he caused the death of his son. So all that we are concerned with here is whether the prosecution has proved beyond all doubt that malice aforethought was present at the time. Again it is a question of intention. "

He then dealt in some detail with the prosecution evidence indicating a deliberate well-aimed blow to the head and drew attention to discrepancies and contradictions. He did not, in as many words, say that, if they accepted the prosecution version it would be a clear case of murder but we have no doubt that would have been obvious to the assessors.

The Judge then went on to deal with the appellant's evidence. He said :-

"It is the contention of the accused that the striking of Roneel was an accident. That is to say, while he was chopping his wife with the knife,

> his son ran between them and received a knife wound meant for the accused's wife. "

After dealing with some other aspects of the appellant's evidence, the Judge said :-

> " If you accept as true or as something which may be true, the evidence of the accused as to the killing of Roneel, then you must consider what the position is in law. If, while the accused was striking his wife he intented to cause her death or to do grievous harm to her and if in the course of that action, he accidentally caused the death of his son then malice aforethought is deemed to be present. A man who shoots another intending to kill or cause grievous harm to him is guilty of murder of any other person who is killed by his bullet. So the intention of the accused in the course of his attack on Evangaline is material to the charge of murder on the accused's own version of events. "

This direction, submits Counsel, was inadequate and erronous. The Judge, according to him, should have asked the assessors to consider if the deceased's death was covered by section 9(1) of the Penal Code which reads :-

> "9(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident. "

This section, in our view, has no application to the facts of the present case even if the version put forward by the appellant himself were accepted. If he was wielding a cane knife with the intent of causing death or grievous harm to his wife the act on his part did not occur independently of the exercise of his will. If by this act death was caused to someone other than his wife the position would be covered by the express provisions of the Penal Code which the Judge quoted in the passage cited above and which include the words "whether such person is the person actually killed or not".

No reason has been shown why these express words should be so construed as to limit their application to persons who, to the knowledge of the offender, were likely to be exposed to danger of harm.

Even in case of manslaughter where no such express words appear in the Code "accident" cannot be raised by way of defence where a deliberate and unlawful act results in the death of a person other than the one at which the act was directed. In R. v. Mitchell (1983 2 All E.R. 428 at 431) the Court of Appeal Criminal Division said :-

> "We can see no reason of policy for holding that an act calculated to harm A cannot be manslaughter if it in fact kills B. The criminality of the doer of the act is precisely the same whether it is A or B who dies. A person who throws a stone at A is just as guilty if, instead of hitting and killing A, it hits and kills B. "

The position, in our view, would be no different if the person throwing the stone was unaware of B's presence.

The Learned Judge's directions on the issue were clear and correct, and covered both the situations i.e. where the appellant directly aimed the blow at the deceased as well as where he aimed the blow at his wife and inadvertently struck the deceased.

The Grounds fail.

Ground 5 complains of the following passage in the Learned Judge's summing-up.

> " I propose to deal first with the second count on the Information, namely, the attempted murder of Evangaline. It is essential that each count of the indictment be considered separately. However, in this case for reasons which I shall explain to you, your view of the intention of the accused on the count of attempted murder may affect your assessment of his intention on the count of murder, because, the incident involving the wife of the accused preceded in time that involving his son. "

This, says counsel, made it impossible for the assessors to consider the two counts separately. In view of the defence put forward by the appellant, this objection is difficult to comprehend. Separate attack on the child was denied. The assault was on the wife alone, the injury to the child being last in time and accidental in nature. Evidentially the two events were inextricably intertwined. The order in which the Judge dealt with the two offences was logical from the point of view of time sequence and his invitation to the assessors to consider the issue of intent in relation to the admitted assault on the wife was not only legitimate but necessary.

Ground 6 has also little to commend itself to us. Part of the defence case rested on the argument that the

appellant's deep love for his son would make it impossible for him to form an intent to harm him. The Learned Judge asked the assessors to accept his undoubted love for the child. He said :-

> " I do not think that you should doubt that the accused loved his son. His attitude is confirmed by his wife. However, love is no protection against human passion. To some people love cannot be divorced from the idea of possession. Some people cannot endure the idea of being parted from the beloved, be it a man or woman, a child, a favoured animal, a painting or other object of art. There are people who would rather destroy the object of love than lose it and there have been many cases over the years in which husbands, wives, lovers and even children have been destroyed as a result of thwarted or rejected love. It is for you to consider whether the accused, who was faced with the loss of his child is such a person. "

We see nothing objectionable in the passage which was followed by a detailed discussion of the evidence of witnesses testifying to the manner in which the injury to the deceased was occasioned and the appellant's own evidence as to his knowledge and intent. The matter was then left fairly with the assessors. Taken in its entirety this part of the summing-up is, in our view, balanced and fair with no likelihood of prejudice occurring to the appellant from the paragraph complained of.

Grounds 7, 8 and 9 deal with discrepancies and conflicts in the evidence of prosecution witnesses Evangaline, the bailiff Bir Chand, the taxi driver Bhagauti Prasad and Nakitalena all of whom were present at the scene the whole, or part, of the time. It is clear from the record that these discrepancies were exhaustively dealt with by counsel in their addresses to the assessors and would have been fresh in their minds. It is not easy for

a trial Judge to decide the precise extent to which he must go into the details of evidence without making the summing-up cumbersome and confusing. In our view the Learned Judge's references to, and treatment of, the conflicts and discrepancies were sufficiently comprehensive. In case of Evangaline, in addition to dealing with discrepancies, he warned the assessors -

> " Evangaline has suffered severely at the hands of the accused. Not only was she injured with the cane knife but she saw her son Roneel destroyed before her eyes. Such a tragedy is likely to leave behind a feeling of great bitterness. It is for you to decide whether Evangaline has coloured her evidence and added things that did not happen in an effort to make things worse for her estranged husband. "

In case of Makitalena there was, apart from other discrepancies a significant difference between her evidence and what she had told the police about the exact position of the child in relation to the appellant at the time he was struck. About this the Judge said :-

> "Again she was confronted with her previous statement and there is a certain measure of confusion in her testimony as to whether at the time she was struck Roneel had passed his father and was on his way to his mother. Again it is for you to decide on the reliability of this witness. "

This, taken by itself may appear somewhat cursory. Immediately before Makitalena's evidence, however, the Judge had dealt with the evidence of the taxi driver where he had said :-

> "The taxi driver said that he saw the child run behind his father and that the accused turned and struck him with a knife. In cross-examination he said that the child was running whilst he

> was struck. A previous statement made by this witness to the police was put to him in which it was pointed out that he did not mention that he saw the accused turn before striking the child. It is for you to decide whether such inconsistencies as may exist between what this witness said to the police and what he told the Court are material enough for you to doubt the reliability of his evidence. "

Both the witnesses had been cross-examined in detail and explanations they gave were fully before the assessors. The directions taken together would have left no doubt in the assessors' mind that the testimony of these two witnesses called for specially careful scrutiny. Materiality of the omission in one case and of the discrepancy in the other was, in our view, properly left to them.

Ground 11 and 12 relate to the charge of attempted murder and together they allege first that the standard of proof was not put to the assessors with sufficient clarity and secondly, that the directions to them on finding the appellant guilty on lesser offences were inadequate.

Assault with the knife was admitted. So was the infliction of numerous injuries. The Judge told the assessors that there was no question of an outright acquittal. He stated clearly that the standard of proof required was one of satisfaction beyond reasonable doubt. He later stated :-

> "It is for you to decide whether on all the evidence you are satisfied that the accused, when he attacked his wife with the cane knife (which can be described as a lethal weapon,) had at the time an intention to bring about her death. If you are not satisfied on this point or if you are doubtful, then the accused must be given the benefit of that doubt. In these circumstances it would be in order for you to bring in an alternative verdict. "

The words "beyond reasonable doubt" do not here follow "satisfied". Nor is there any specific direction requiring the assessors, in case of doubt, to find the appellant not guilty of attempted murder but guilty of an alternative lesser offence. We are, however, convinced that the statement could not possibly have left any doubt in the assessors' minds as to their function.

As for alternative offences, the Judge referred to the medical evidence and expressed the opinion that they should find the injuries as amounting to serious harm. There were ten knife wounds, all on the arms, four of them having caused compound fractures of the bones. The Judge then said :

> "If you consider that to be the position and that the accused intended to cause grievous harm, then it will be in order for you to express the opinion he is guilty of unlawful wounding with intent to do grievous harm contrary to section 244 of the Penal Code, or in the further alternative causing grievous harm contrary to section 227. "

The passage is quite clear as to the specific lesser offences of which the appellant might have been found guilty. The grounds, therefore, are not sustainable.

Not much was urged in support of grounds 13 and 15 and we say no more than to express the view that the Learned Judge's directions on the matters referred to were correct and adequate.

The remaining ground 14 concerns the statement made by the appellant to the police a short time after the incident. No coercion or inducement was alleged but exclusion was urged as a matter of judicial discretion. The Learned Judge declined to exercise his discretion in the manner suggested.

Reasons for complaint were firstly that the interviewing officer, in the caution, had stated that he was enquiring into the matter in which the appellant had murdered his son Roneel and assaulted his wife causing her grievous bodily harm; and secondly, that at the end of the statement the officer had asked him if he wanted to tell him anything else whereupon the appellant had remarked "I wanted to finish off my wife so she won't be there nor would there be any more trouble".

As to he first complaint it was urged that the use of word "murder" in the caution was objectionable, being likely to cause apprehension in the mind of the appellant in support of which proposition counsel cited Sheik Hassan (9 F.L.R. 110). The Learned Judge, quite correctly, found the facts of the two cases completely dissimilar. In Sheik Hassan vigorous interrogation had taken place over a long period during which Hassan's Counsel were disallowed contact with him. The Court there found five distinct items of impropriety in the conduct of superior police officers who among other things had used the expression "murder" during the questioning. It held that the cumulative effect of all these items amounted to harassment and oppression. Even there, it said,

> "It is perhaps true that no single matter of objection set out above would in itself be sufficient to make the statement inadmissible. "

In the present case no actual harassment of any kind is alleged. The appellant was himself on his way to report the matter to the police and to hand in the knife. He never at any stage denied that he had caused the death of the deceased. The Learned Judge was correct in saying :-

> " There is no evidence in the present case that the accused was impressed by the words used by the Inspector. He

launched forth into a lengthy statement and was on one occasion during a break in the proceedings reminded of the caution administered to him at the outset. "

As for the question put by the Learned Judge towards the end of the interview the Judge said :-

"I know of no case in which has been held that a suspect who makes what amounts to a confession in the course of his narrative must be immediately treated under Judge's Rule III. The question as framed by the Inspector was innocuous and it was natural to put it in the circumstances. Whatever the accused said thereafter cannot in my view be declared inadmissible on the grounds that the question was unfair. "

We concur.

Ground 16, on severity of sentence for attempted murder, was not pursued.

The appeal is dismissed.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL

ADDENDUM

Since the completion of this judgment we have been, by consent of both counsel, referred to the text book Criminal Law of Queensland by R.E. Carter, particularly to section 23 of the Criminal Code of that state (which is in terms identical with those of section 9 of the Fiji Penal Code) and the commentary thereunder. We do not find anything there which will persuade us to come to a view different from that expressed in the judgment. The appellant's act in this case was a "willed" act and the "intent" was to cause serious bodily harm. Nothing about those two elements was accidental. What was unforeseen, if the defence version were accepted, was the sudden appearance of the child in front of the appellant. Under the definition of malice aforethought in the Fiji Penal Code it is immaterial that the blow aimed at the wife with the necessary intent fell upon the child. The directions on the issue were, therefore, in our view correct.

Dealing with Timbu Kolian v. R. (119 C.L.R. 47), a case decided under the Queensland Code, the learned authors of Criminal Law - Smith and Hogan (5th edition, footnote at p.62) say -

> "Under the Queensland Criminal Code transferred malice is inapplicable."

We find it unnecessary to comment on that case. It might well be, however, (though we express no view on it) that on the facts of this case where the appellant was aware of the presence of the child in the vicinity, the appellant's act, on a proper direction, could be held to be murder even under section 302 of the Queensland Code (which defines murder).

In any case, under the Fiji law and the English cases, which our courts consider binding, there seems little doubt that the rule relating to transferred malice, as enunciated by the Learned Judge, would be applicable to the version put forwarded by the appellant.

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