IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 50 of 1984

Between:

JITEND PRASAD alias VIJEND s/o Bhagwan Din — Appellant

and

R E G I N A M — Respondent

Mr. S.R. Shankar for the Appellant
Mr. M.D. Scott & Mr. B. Singh for the Respondent

Date of Hearing: 21st October, 1985

Delivery of Judgment: 8.11.85

JUDGMENT OF THE COURT

Mishra, J.A.

This is an appeal against a conviction of murder on two grounds :-

(a) that in his judgment the learned Judge misdirected himself on the issue of provocation;

(b) that the learned Judge erred in holding the statements made by the appellant to the police voluntary.

The appellant, 18 years of age, lived on a farm at Nawaicoba, Nadi, with his mother and his elder brother, Hari Prasad, who was married to the deceased.

The deceased's parents were not on the best of terms with Hari Prasad and his mother and, as the learned Judge found, the deceased's home at Nawaicoba was not a happy one.

On 30th October, 1983, Hari Prasad arrived home from Lautoka to find the deceased lying on the ground outside the house with an injury to her head and the appellant sitting nearby on a log. The police were informed and the deceased was taken to the hospital where she died on 9th November, 1983, without regaining consciousness.

Death, according to the medical evidence, was due to multiple injuries to the head resulting in a compound fracture of the skull.

Interviewed by the police the same day the appellant, among other things, said :-

> "Then I saw my sister-in-law chasing my mother with a cane knife. The same time my mother called out look Vijend she is chasing with knife. Then I went out from the bed onto the porch and saw one iron bar on the porch and I picked that iron bar, and I went out of the porch by then my sister-in-law lifted the knife to hit me then I with iron bar hit on the knife but it missed and landed on her head, my sister-in-law fell down then I threw the iron bar and went and sat down a little distance about ten yards away. "

When charged with wounding with intent to do grievous harm he made a similar statement again in which appears the following:-

"I then raised the iron bar to hit the knife but it missed and hit her on the head. I was angry and I hit her hard and Anjila fell to the ground and did not came up. "

On 11.11.1983, after the deceased's death the appellant was charged with murder and made another statement in which he said :-

"I was then with the iron bar was hitting at the cane-knife and it missed the knife and hit Anjila on the head. Anjila fell down. My mother was still in the process of running away from there I did not know where did she go. I saw blood on the head of Anjila and I kept on hitting her but I do not know how many times did I hit her. I then threw the iron bar away and sat down on a piece of wood. "

At the trial he testified that he had struck the deceased only once in self-defence. He said :-

" By the time I got the pipe Anjila was only 5 feet away. When she was at that distance she swung the knife at me. To defend myself I struck hard at the knife in order to make the knife fall from her hand; I aimed at the knife. The pipe first of all hit the handle of the knife and slipped from the handle on to her head. The pipe struck the handle of P4 on wire on the handle and slipped off (wire about 2 inches from end of handle nearest blade). I used my full force.

Anjila fell forward with her face landing on the ground. I looked at Anjila. I saw that she was bleeding from her head. I didn't strike her any further. "

The defence, having raised self-defence, had no evidence aimed specifically at supporting provocation. The learned Judge, however, made references to parts of the appellant's statement indicating anger and, with

meticulous directions, left provocation for the consideration of the assessors as a possible alternative defence. No objection is taken to these directions. What learned Counsel challenges is the validity of the Judge's reasoning in his subsequent judgment for accepting the unanimous opinion of the assessors.

As this Court has said time and again since Ram Lal (No. 3 of 1958) provocation in each case is an issue of fact which a panel of assessors familiar with the background of the accused is best qualified to determine and a trial Judge should rarely, if ever, reject their assessment. The learned Judge, quite properly accepted that opinion and, in so doing said :-

> " Suffice it to say that I am in reasonable doubt as to whether the accused was provoked.
>
> When it comes to assessing the accused's retaliation to the provocation offered however, I observe that he felled the deceased with one blow, that the knife then dropped from her hand, and that he himself sustained no injury whatever in the encounter. Even if I accept that the deceased was, on Hari Prasad's evidence of an unusual malady, a difficult personality to deal with, considering the abjectly helpless position of the deceased at that stage, I have no doubt that anger and provocation in the ordinary person, again, of the accused's sex, age, education and rural back-ground, would dissipate, and that he would not continue to strike the deceased on the head with a metal pipe with such force as to contribute to the shattering for her skull. I am satisfied beyond reasonable doubt therefore that the accused's retaliation did not bear a reasonable relationship to the provocation offered and I reject the defence of provocation. "

Section 299 of the Criminal Procedure Code provide that where a Judge gives his reasons in a separate judgment such reasons together with the summing-up are deemed collectively to be the judgment of the court. In his summing-up the learned Judge scrupulously followed what was said by the Privy Council in Lee Chun Chuen (1963 A.C. 220 at 231) :-

> "Provocation in law consists mainly of three elements the act of provocation, the loss of self-control, both actual and reasonable and the retaliation proportionate to the provocation. "

In his summing-up the learned Judge dealt with each element in simple language with clarity and no allegation is made of any misdirection against it. All the three elements, he said, must be considered fully while deciding whether or not the defence of provocation was available to the accused.

We are satisfied that the passage from the judgment quoted above reflects in brief his consideration of those elements and cannot be treated as a departure from the directions to the assessors. He recognised the occurrence of an act of provocation and loss of 'actual' self-control but was nevertheless satisfied that the reaction to the provocative act did not constitute "reasonable" retaliation i.e. reaction of an ordinary person.

The passage complained of must be read together with the description of the circumstances of the encounter contained in the summing-up. The deceased, who, in height, come only up to the shoulders of the appellant, was unwell and 8 weeks pregnant. No words were spoken by her prior to the incident which occurred in open ground

outside the house. Not a scratch was found on the appellant's body. All these matters were dealt with in the summing-up which covered self-defence as well as provocation.

In those circumstances the learned Judge found the appellant's reaction, taken in its totality, not to be one which could be expected from an ordinary person of the appellant's age and background. We do not accept the suggestion that the learned Judge in his judgment was expressing the view that the defence of provocation would be available to the appellant if he killed the deceased with only one blow; but not if he used more. To do that would be to disregard totally his immaculate summing-up to the assessors with whose opinion he was in that passage showing his concurrence.

The ground, therefore, fails.

Ground 2

The appellant was interviewed at Nadi Police Station by Cpl. Prasad in the presence of Sgt. Gurnam Singh. He made allegations of serious assault against these men which allegations the learned Judge had no hesitation in rejecting. He accepted the evidence of the two police officers as to the conduct of the interrogation and the making of the record.

There, however, was another allegation. In the trial within a trial the appellant commenced his evidence thus :-

> " On 30.10.83 Mr. Ranjit Singh took me to the police station. Immediately before going to the station I was at the hospital. At the hospital the police opened the front door of the van, invited me to get in. As I was standing by the

> door the police officer kicked me as a result I fell into the van. The police officer locked the door and then drove me to the police station. At the police station the police officer got out his side and then I got out my side of the vehicle. The police officer asked me to walk in front of him saying, "Today I'll fuck your arse". "

This evidence may have come as a surprise to the appellant's counsel who had put none of it to Constable Ranjit Singh, called by the prosecution in the trial within a trial. He had, instead, put to the Constable that he had entered the room at the police station where the interview was in progress and kicked the chair on which the appellant was seated - an allegation that the appellant himself did not substantiate.

Even so the learned Judge felt that there might possibly have been some rough-handling of the appellant at the hospital before he was brought to the police station. He, however, concluded :-

> "I consider the effect thereof was exaggerated by the Accused however. In particular I am satisfied beyond reasonable doubt that the effect of any such assault was well dissipated by the time the statement was taken, in the absence of Detective Constable Singh. There is no evidence to suggest that the Accused's free will was overcome so that he spoke when he might have otherwise remained silent. "

In view of the evidence of Sgt. Singh and Constable Prasad, which the learned Judge accepted in its entirety, we are satisfied that the conclusion was correct.

We do not, therefore, see any merit in this Ground.

The appeal is dismissed.

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