IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 18 OF 1991
(High Court Criminal Case No. 9 of 1988)

BETWEEN

AMAL DEO s/o PYARE LAL — APPELLANT

-and-

THE STATE — RESPONDENT

Mr. G. P. Lala and Mr. M. Narsey for the Appellant
Mr. Ian Wikramanayake for the Respondent

Date of Hearing : 2nd February, 1994
Date of Delivery of Judgment : 9th February, 1994

JUDGMENT OF THE COURT

On 10 August 1989 the appellant was convicted on an indictment which charged that on 13 January 1988 he had murdered Dharam Raj. He has appealed against that conviction.

The appellant was a nephew of the deceased. The incident which led to the death of the deceased related to the occupancy of adjoining land which had formerly been owned as a single block of 700 acres by the appellant's great grandfather. That block was divided in two so that the family and descendants of each of the original owner's two sons occupied half. The relationship of the two families was not good and disputes concerning the land had arisen.

The prosecution case was that, on the afternoon of 13 January 1988, the deceased and his son, Dirend, were ploughing a field on their half of the land and the appellant was some distance away, on his own half, and in the vicinity of a barbed wire fence. That fence, and the existence of a gate in it, was evidently one of the focal points of the dissension between the families. Evidence was given by the deceased's wife that, on the occasion in question, the appellant was seen to be cutting the fence. She informed her husband who took a knife and a stick and went towards the fence. She did not see what happened after that, but when she went shortly after to where her husband had gone she found him lying on the ground dead and her son, Dirend, being attacked. The appellant was there and she said he made threatening remarks to her.

Later that day the appellant was arrested and he made a caution statement in which he acknowledged having struck the deceased four blows with a knife. This statement, if properly admitted, amounted to a confession, which was then confirmed in the arpellant's charge statement.

In the course of the trial there were two principal defences advanced on the appellant's behalf. The first was that the confessions should not be admitted in evidence as having been improperly obtained, and, if admitted, should not be accepted by the assessors for similar reasons. The second defence was that of provocation. Before considering the grounds of appeal we

should make a preliminary comment concerning the Record as it has reached this Court. Although the typist has done her best to decipher the Judge's handwriting this has defeated her in many instances so that parts of the Record are at times incomprehensible. Unfortunately the Judge had retired from office and left the country before the transcript was available and so it was never referred to him for correction. We have had a good deal of difficulty in trying to determine how the Record should be read. This case is a very clear example of the urgent need for a proper recording system in the Courts of this country. Important appeals (and few are more important than those against convictions for murder) should not have to depend upon whether the transcript of the case is correct.

A further preliminary comment concerns the position of the appellant. On 27 February 1992 the appellant was given leave to appeal out of time, and at the same time was granted legal aid. He was consistently unable to obtain the services of counsel. A fixture was made for the hearing of the appeal on 12 May 1993, but the appellant was unrepresented and counsel for the State was not ready to proceed. A further fixture was made for 17 August 1993 and the appellant was still unrepresented. The inability to obtain counsel was undoubtedly due to the inadequacy of the fees payable to counsel assigned on legal aid. This is frequently a problem and is responsible for many delays in the disposal of appeals. It is another matter which requires urgent attention.

A further adjournment was granted, and, at the request of the Court, Mr. G. P. Lala agreed to accept instructions. The result was that, when the appeal came on for hearing, we had the benefit of full submissions made by Mr. Lala and counsel assisting him. We record our gratitude to them both for the assistance they have given the Court.

In the submissions made on behalf of the Appellant a number of grounds of appeal were raised, but some of these could find little support, and in the end there were only three grounds which were actively pursued. They were:-

1. That the prosecution failed to call a number of witnesses who had been listed on the indictment.
2. That the Judge failed to direct the assessors properly as to the defences of provocation and self-defence.
3. That the Judge erred in his direction to the assessors as to the dock statement made by the Appellant.

As to these, the second ground is the only one requiring any real consideration but we deal with the other two briefly.

1. Witnesses

At the preliminary hearing the prosecution produced the depositions of 22 witnesses and the names of those witnesses were set out on the back of the indictment in the usual way. At the trial the prosecution proposed not to call all of them, and

objection was taken on behalf of the Appellant. It was contended that there was an obligations on the prosecution to call all witnesses shown on the indictment.

In a considered Ruling the Judge held that, while it is normally to be expected that all witnesses on the indictment will be called, this is not an inflexible requirement and the prosecution has a discretion, exercisable on proper grounds, not to call them all. If there is good reason to believe that a witness will not tell the truth then that may be a reason for not calling that witness.

We find no error in the Ruling given by the Judge.

2.(a) Provocation

The appellant's account of what occurred was that he and a nephew, Subash Chand, were about 5 or 6 chains from the deceased and Daya Nand (who was an uncle of the appellant). He heard them quarrelling and heard the deceased say that he would chop off Daya Nand's leg. The appellant, who was carrying a knife, then ran over to where the two men were; and they were shortly after joined by the deceased's son, Dirend. He said Dirend had a knife and said "that he would kill us to-day". Dirend started striking Subash with his knife and the appellant then "swerved the knife on Dharam Raj." He said he struck the deceased who fell down. He was asked why he had struck the deceased and he said, " Dharam Raj turned towards me. I thought

that he would strike me with the knife then I struck him with the knife." He acknowledged that the deceased did not strike him with the knife at any time. The appellant said he first struck the deceased on his hand, and then on his neck. The deceased fell to the ground and the appellant then struck him once or twice more.

Later in the interview the appellant was asked with what intention he had struck the deceased and his answer was :

> *"He told me two weeks ago that he would chop and yesterday again Dharam Raj told that he would chop everyone. I was very annoyed and I struck Dharam Raj with knife. I thought that Dharam Raj will in fact chop some day. That's why I thought to finish off Dharam Raj today."*

It should be noted that the blow to the deceased's arm (referred to by the appellant as a blow to the hand and as the first blow struck) was described by the pathologist as having completely severed the forearm, leaving it hanging by some skin. Each of the three stab wounds to the neck would have caused instantaneous death.

In his summing-up the Judge explained to the assessors the ingredients necessary for there to be provocation as they are set out in the Penal Code. He also emphasised that, where provocation was raised, it was for the prosecution to prove the absence of provocation. We are unable to see any error in the direction which the Judge gave on this topic. The result is that

the issue of provocation was correctly put to the assessors and it was for them to come to a conclusion whether this was such a case. Their opinions indicate that each of them decided that it was not. The Judge properly accepted their opinions. In view of the passage from the Appellant's statement set out above there was plainly a proper basis for the Court's decision.

(b) Self-defence

For the reasons already given in respect of provocation the decision of the Court not to accept that this was a case of self-defence cannot be regarded as open to question. If the Appellant or any other person present was in danger from the deceased then it could never have justified the striking of four separate blows with a knife, each of which was a fatal blow. In view, however, of the Appellant's account of what happened there does not appear to have been any basis for believing that the Appellant was in any serious or imminent danger when he struck the first blow.

Mr. Narsey submitted that the blow was struck in defence of Subash Chand. That is contrary to what the appellant said in his caution statement, namely that Subash was assaulted by Dirend and that he thought that he himself was about to be attacked by Dharam Raj. In his charge statement the appellant did not suggest that he acted in defence of Subash. The first time he did so was in his unsworn statement at the trial. Even if, in consequence of that, the Judge should have directed the assessors explicitly in respect of the defence of killing to protect

another person, we are satisfied that, in light of all the evidence, it would not have affected the assessors' opinions and that no substantial miscarriage of justice has occurred.

Accordingly, this ground of appeal also cannot be sustained.

3. Dock Statement

The Appellant elected not to give evidence, but to make an unsworn statement from the dock. In this he gave an account of what he said had occurred which was at variance with the prosecution evidence.

It was contended that, in his Summing-up, the Judge had referred to the dock statement in terms which invited the assessors to reject it. We do not think there is any substance in this.

The Judge told the assessors, as he was bound to do, that the dock statement differed from sworn evidence which had been subject to cross-examination. He then invited the assessors to consider whether they could place any reliance on the statement, and pointed out that the matters raised by the Appellant in his statement had not been put to the prosecution witnesses in cross-examination. He therefore told the assessors to consider carefully before acting on the dock statement.

We can see no reason for saying that the Judge went further than he ought to have, and in the end he left the decision on the statement to the assessors.

Conclusion

In the result, the appeal cannot succeed and it is dismissed.

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Sir Moti Tikaram
Acting President Fiji Court of Appeal

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Sir Peter Quilliam
Justice of Appeal

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Mr. Justice Ian Thompson
Justice of Appeal