IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO.8 OF 1995
(High Court Criminal No.11 of 1994)

BETWEEN

SENIBUA SŌKOYAWA — APPELLANT

-and-

THE STATE — RESPONDENT

Mr. T. Savu for the Appellant
Mr. K.D. Wilkinson for the Respondent

Date and Place of Hearing: 12 August, 1996, Suva
Date of Delivery of Judgment: 16 August, 1996

JUDGMENT OF THE COURT

The appellant was convicted in the High Court at Suva of murdering his eldest son following a trial before Kepa J. and assessors. He has appealed this court seeking a new trial, relying on three grounds namely:

(1) Misdirection of the assessors on the issue of malice aforethought,

(2) Misdirection and non direction on the issue of corroboration,

(3) Bias against the accused in the summing up

The deceased aged 9 died at Nasinu on 19 January 1994 as the result of blows inflicted on him by the accused, his father, on 11 and 12 January 1994, the cause of death being intracranial bleeding. The accused, a cash crop farmer, lived

with his wife and their four children, including the deceased, at Naisogo. His wife worked six days a week at the Pizza Hut Suva. Undisputed evidence for the prosecution established that on 11 January 1994 the accused believed that his eldest son had taken a banana from a box containing ripe bananas which had been opened. The boy denied doing this, and the accused then gave him a severe beating. When his mother returned from work that evening the boy was lying on his mat, unable to walk, bleeding from his nose, and covered with bruises and cuts all over his body.

The accused admitted in his statement to the Police that he had used a belt to chastise his son but denied using a stick. According to his wife he told her that he had used a belt and a stick.

The accused's wife rose early the following day to go to work and did her best to help her son. She attempted to carry him to the toilet but had to put him down on the top step of the house because he was too heavy. According to her the accused then kicked his son so hard that he flew through the air and hit the ground. The top step was about 5 feet from the ground.

The accused was questioned by Police about this incident but refused to answer the questions.

Apart from the wife of the accused, the prosecution called her mother, one of her brothers, one of her sisters, an uncle, several police officers, and Dr. Alera, the consultant pathologist at the CWM Hospital. The other family witnesses gave evidence of admissions by the accused before and after the death of his son.

After the prosecution had closed its case the trial judge ruled that a prima facie case had been established, whereupon the defence elected to call no evidence.

Ground 1

The trial judge in summing up the elements of murder to the assessors said:-

> "From the evidence which you have heard in this case you may have no doubt that it was the accused's act that caused the death of the deceased.
>
> Secondly you may have no doubt that the act of the accused was deliberately done to harm the deceased and was not done under any mistake of fact on his part.
>
> Thirdly, and, also on the evidence in this case you may have no doubt, and this is a matter for you, that in beating the deceased, the accused either intended to

> kill him or at least to cause him grievous bodily harm or alternatively, the accused's beating of the deceased was done with reckless indifference to human life."

Appellant's counsel challenged the third direction. His first point was that the prosecutor, in his closing address to the assessors, had said:-

> "Akosita deceased's mother has given evidence. It is up to you to decide whether you believe Akosita. If you do then the kick that the accused gave deceased was a fatal one as the deceased flew out of the steps."

Appellant's counsel submitted that the trial judge erred in directing the jury with reference to "the beating" which the boy received from his father, when the prosecution case was that the kick had been the fatal blow.

We reject these submissions. The error was at most one of fact in that the judge is alleged to have misdescribed the nature of the case presented to the assessors in the closing address for the prosecution. An error of fact in the summing up does not necessarily justify setting aside a conviction, especially where the error did not relate to the evidence in the case and where no re-direction was sought by experienced defence counsel.

However, we are satisfied that the trial judge made no such error at all. The case for the prosecution in its closing address was not limited to the kick as the blow causing death. The record at page 44 contains references by the prosecutor to the accused chastising his son, and "constantly" beating him, which in context must refer to the day before the kick. On page 45 there are references by him to the beating the boy received on 11 January, to the fact that blows had been delivered all over his body, that the boy's injuries went far beyond proper chastisement, and involved brutal force, and that his injuries causing death were consistent with the beating on 11 January. In closing counsel for the prosecution said at page 46:-

> **"The injury which caused death of deceased was as a result of beating on 11/1/94 compelled (coupled) with the kick by the accused which caused the deceased to fly off the steps in front of front door."**

Following discussion with the Court, the appellant's counsel formally abandoned this ground, but we considered that we should record the reasons which led to it being abandoned.

Ground 2

This ground alleged error by the trial judge in directing the assessors on the question of corroboration. The relevant passage in the summing up was as follows:-

"...it is not disputed that the accused punished the deceased for eating a banana. The prosecution case is that the accused used a stick and a belt to punish deceased inflicting injuries which caused his death and not a belt alone as claimed by the defence.

If you are satisfied with the evidence of Akosita - PW2 as true, then you may treat such evidence as corroborating the admission of accused in his statement Ex. 8 given to Cpl Apakuki - PW1.

Corroboration is any evidence coming from an independent source which implicates or tends to implicate an accused person in the commission of the offence, but these are matters for you to decide."

Counsel for the Appellant submitted that the judge erred in directing the assessors that if they accepted the evidence of the wife they could treat her evidence as corroborating the admission of the accused in his statement to the police. Counsel however acknowledged that the references in his written submissions to the wife as an accomplice were inappropriate, because it was never suggested by the State or the accused that she had been involved in beating her son either as principal or accessory.

Corroboration was not required by law in this case, neither was a warning on the danger of convicting on the uncorroborated evidence of the wife. It is therefore unfortunate that the trial judge referred to corroboration at all in his summing up. It had not been raised in the closing addresses of either counsel.

The judge's direction as to the relevance of corroboration was unfortunate for another reason. The accused's statement to the police (Ex.8) had not been challenged by the defence. In that statement he had admitted hitting his son with a belt but denied using a stick. His wife however, had given evidence that he had admitted to her that he had used a stick. This was challenged by the defence, and if any evidence required confirmation it was this evidence of the wife.

The judge however directed the assessors that if they accepted the (disputed) evidence of the wife, which included the admission by the accused of using a stick to beat their son, they could accept that evidence as corroborating the (undisputed) evidence of the police officer of the accused's admission of using a belt. Mr Savu submitted that the assessors' would have understood the direction as meaning that they could treat the accused's admission to the police as corroborating or confirming the disputed evidence of his wife. However the judge did not give a direction in those terms and while the actual direction

was inappropriate, and may have been confusing, it did not prejudice the accused, and may have operated in his favour. Experienced defence counsel did not seek any further direction. In these circumstances we are satisfied that the inappropriate direction on corroboration did not occasion a miscarriage of justice and we therefore reject this ground of appeal.

Mr Savu raised another matter under this ground relating to the English translation of the accused's statement in Fijian to the police. In Ex.8 A in the Fijian language the accused in his answer to Q.18 used the word "mokuta" which was translanted in Ex.8 B, the English translation, as "whipped". Mr Savu submitted that the correct translation would have been "chastise". However according to the record (10) PW1 Cpl Apakuki read out the record of interview in Fijian and we presume it was translated by the court interpreter into English. The trial judge therefore could compare this translation with the police translation in Ex.8 B. This was the proper time to take any objection of this nature. If objection had been taken the trial judge could, if necessary, have conducted a trial within a trial to determine the accuracy of the translation and the admissibility of the answer to Q18 in the English translation Ex. 8 B. The judge would then have had the benefit of evidence on this point on which he was well qualified to rule, since Fijian was his first language.

An appellant who does not take such a point at the trial but seeks to take it before this court must do more than assert it in the written submissions of his counsel on the appeal. Such a point cannot be established by the record at the trial and this Court cannot take judicial notice of the correct translation of Fijian into English. The point must be supported by evidence, and the Court has the necessary powers in s.28 of the Court of Appeal Act and r.57 of the Court of Appeal rules. The point fails in this case because no attempt was made to adduce evidence before this Court to support it.

Mr Savu acknowledged that "mokuta" involved physical punishment. The assessors in convicting the accused of murder must have accepted the evidence of his wife and rejected his denials to the police of using a stick to beat his son. It is clear therefore that no error in translating the accused's record of interview could have occasioned any miscarriage of justice and the appeal on this point was bound to fail. See Court of Appeal Act s.23(1)(a) as amended by the Court of Appeal Act (Amendment) Decree 1990.

Ground 3

This ground alleged that the summing up was "biased" against the accused. As this ground was developed by Mr Savu it became clear that the submission was really that the summing

up failed to fairly put the case of the accused before the assessors and that the judge really summed up for a conviction of murder.

The judge having explained the ingredients of the charge of murder to the assessors gave them the directions on those ingredients that we have already quoted. His directions on the first two ingredients - that some act of the accused caused the death, and that act had been done deliberately to harm the boy and not under any mistake of fact, did not suggest that there could be any doubt on those matters. However they were left to the assessors for their determination. Moreover defence counsel had addressed in support of a verdict of manslaughter rather than for an outright acquittal.

The argument of defence counsel was that the accused had beaten his son as a parent by way of punishment, and that he did not intend to kill his son and if they found that his punishment was excessive and unlawful the proper verdict would be manslaughter.

The critical issue in this case related to the intent of the accused. The judge gave a different direction on this issue saying that "from the evidence in this case you may have no doubt, this is a matter for you" that the accused had an intention which made him guilty of murder. In our opinion this was not a misdirection. A trial judge is entitled to comment in his summing up on the facts of the case and express his own view

on the facts provided the assessors are not directed to convict or otherwise coerced or overborne. In our view the summing up fell well short of these limits.

The judge later referred (58) to the fact that it was "not disputed that accused punished the deceased for eating the banana". However he did not otherwise remind the assessors that the defence case was that the accused never intended to kill his son and had not acted with reckless indifference to human life.

Immediately before the end of his summing up the judge said:-

> "Lady and Gentlemen, Assessors, only if you are satisfied beyond any reasonable doubt from the whole of the evidence in this case that it was the accused who did the act that caused the death of the deceased, and that the act was a deliberate voluntary one on the part of the accused; and that the act causing the death was done with the intention to kill or inflict really serious bodily injury or done with reckless indifference to human life, in such a case your verdict will be one of Guilty of Murder as charged.
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> If you are not satisfied that murder has been proved then you may return a verdict of guilty of manslaughter."

This direction properly presented the issues of murder or manslaughter to the assessors, although it did so in terms of the issues the State had to prove. The judge did not remind the assessors of the prosecution case which was that the necessary intent could be inferred from the brutal nature of the boy's injuries and he did not remind them of the defence case on that issue either. In our view the judge should have reminded the assessors of the arguments of the prosecution and defence on the critical issue of intent and not simply left the issues to them to decide. The essential requirements for a summing up were explained by the High Court of Australia in Alford v. Magee (1952) 85 CLR 437 in a passage which we consider helpful. The Court in their joint judgment said at 466:-

> "... it may be recalled that the late Sir Leo Cussen insisted always most strongly that it was of little use to explain the law to the jury in general terms and then leave it to them to apply the law to the case before them. He held that the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case. He held that the only law which it was necessary for them to know was so much as must guide them to a decision on the real issue or issues in the case, and that the judge was charged with, and bound to accept

> the responsibility (1) of deciding what are the real issues in the particular case and (2) of telling the jury, in the light of the law, what those issues are. If the case were a criminal case, and the charge were of larceny, and the only real issue were as to the (taking),probably no judge would dream of instructing the jury on the general law of larceny. He will simply tell them that if the accused did a particular act, he was guilty of larceny, and that if he did not do that particular act, he was not guilty of larcency."

We reject the submission that the summing up was unfavourable to the accused because it failed to remind the assessors of the defence case. The summing up was defective because it failed to put the case of either side on the facts before the assessors but for this reason was even handed. It is again significant we think that experienced defence counsel did not object to the summing up and ask the judge for further directions to the assessors on the respective arguments for each party on the facts. Any further directions on this issue must inevitably have focused the minds of the assessors not only on the defence case but on the strong circumstantial case for the prosecution and possibly, if not inevitably, operated to the disadvantage of the accused.

The judge correctly directed the assessors that they had to be satisfied beyond reasonable doubt that it was the accused who did the act that caused the death of the boy and that this act was a deliberate voluntary act on his part. However he failed to give them the further direction that if they were not satisfied on these issues the accused was entitled to a complete acquittal. Defence counsel did not argue for a complete acquittal on these issues but the assessors had to be satisfied beyond reasonable doubt on those matters, and the judge should have given the further direction as a matter of course. Again no further direction was sought from the trial judge. Although the directions on the issues of causation and voluntariness, and on the facts relating to the issue of intent, were not appropriate or complete the accused was not deprived thereby of any realistic possibility either of an acquittal, or a conviction of manslaughter. We are satisfied that there has been no miscarriage of justice in this case. The appeal is therefore dismissed.

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Sir Moti Tikaram
President, Fiji Court of Appeal

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Justice G Ward
Judge of Appeal

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Justice K Handley
Judge of Appeal