

IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NOS. AAU0017 OF 1995,
AAU0018 OF 1995 AND AAU0019 OF 1995
(High Court Criminal Case No. HAC0008 of 1994)

BETWEEN:

AKAPUSI LEDUA
LEDUA LABATI
SIMELI TELA

APPELLANTS

-and-

THE STATE

RESPONDENT

Mr. A. Kohli for the Appellants
Ms. N. Shameem for the Respondent

Date and Place of Hearing : 8 November 1996, Suva
Date of Delivery of Judgment : 15 November 1996

JUDGMENT OF THE COURT

On 4 March 1994 Kiniviliame Roko was bashed to death in the Whistling Duck nightclub in Nausori in what can best be described as a drunken brawl. The three Appellants were charged with manslaughter and after a trial which lasted from 24 September 1995 to 17 November 1995 all three assessors found them guilty. On 21 November 1995 Hon Mr Justice Kepa convicted them and sentenced each of them to 4 years imprisonment. They all appeal against conviction and the 2nd Appellant also appeals against sentence.

Two grounds for the appeals against conviction are put forward.

- 1) *"The Learned Trial Judge failed to direct the assessors that the evidence against each accused had to be considered separately."*
- 2) *"That the Learned Trial Judge failed to adequately direct the assessors (sic) regarding the evidence of prosecution witnesses whose evidence at Trial were inconsistent with their earlier statements."*

As to ground 1 counsel for Appellants quoted a number of passages on the learned trial Judge's summing up as follows:-

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"In this case it is very important to find out whether it was the act of the accused that caused the death - whether that act caused the death of Kiniviliame Roko; and thirdly was that act unlawful"

"Because this is a joint trial of three persons it is my duty to direct you that you must consider the case of each of the accused separately and individually. This means that the evidence relating to each accused must be considered and evaluated separately. The position is as though you are sitting in three separate trials."

"You must scrutinise the evidence relating to each accused separately and carefully in order to decide whether or not he is implicated in the killing of Kiniviliame Roko and if so in what way and to what extent."

Counsel however failed to quote the subsequent comment of the learned trial Judge on the same page.

"Only then I suggest will you be able to say whether any or some or all of the accused persons played a role in the killing of Kiniviliame Roko."

Counsel also quoted from page 126:-

"If you are satisfied with the evidence adduced by the prosecution beyond all reasonable doubt that it has proved its case against one of the accused or two of them or all of them then in such a case it will be your duty to express the opinion that the accused are guilty of manslaughter as charged."

We accept that a reference to "the accused" could literally be a reference to all the accused but it could also be a reference to each accused individually. The words must be looked

at in the context of the passage in which they appear and the whole of the summing up. Throughout the summing up there were references to the evidence against each accused and when the assessors returned they were each asked whether the 1st then the 2nd then the 3rd accused was guilty. They said separately in each case that that accused was. Having regard to the whole of the summing up and in particular the parts set out before we have no doubt that the assessors were adequately directed on the necessity to consider the evidence against each accused separately.

As to the second ground of appeal on page 121 of the record the Learned Trial Judge is recorded as saying:-

"What a witness says on oath from the witness box is his evidence and is the only evidence you must consider and evaluate.

As a matter of human experience if a witness has given two different stories of the same event or incident then clearly such a witness will not be considered reliable or trustworthy. In such a case, it would not be advisable to rely or act upon the evidence of such a witness.

When we talk about contradictions and discrepancies between a previous statement to the police and the evidence in court, these must of course concern material or important matters to be of any significance in assessing credit and credibility of a witness.

.....

and at page 123:-

Thus the question for you, Lady and Gentlemen Assessors, with regard to the evidence of Vereti Roko on this aspect of the matter, namely on the question of discrepancies and inconsistencies is whether or not the account of events he has told this Court is substantially the same as the events recorded in his statement to the police. What is really under consideration

here is his consistency or lack of it, as the case may be."

Those statements were in particular referable to evidence that was given by Vereti Roko who was main witness for the prosecution. The learned trial Judge commented that he was cross-examined by defence counsel vigorously and at great length and that the object of the cross-examination like that of any other witness was to discredit his evidence and credibility. To that end he said some attempt was made to show contradictions and discrepancies between Vereti Roko's written statement of 5/3/94 and his evidence in court. He referred to the discrepancies. He said at page 123:-

"Obviously if Vereti Roko has given two completely different versions of the events he is describing, then you will be justified in treating his evidence in this Court with suspicion.

But if you think Vereti Roko has given in this Court substantially the same account of events as he gave to the Police in his written statement, then in such a case you may feel that this tends to indicate that he is a reliable and satisfactory witness."

The evidence of Vereti Roko was the only evidence referred to by Counsel for the Appellant in his submissions before us. It was also referred to by 1st accused to whom we gave permission to address us. The Learned Trial Judge carefully directed the jury on the question of inconsistencies and left it to the jury to decide the extent to which such inconsistencies were significant. We have not had put before us any submissions relating to such discrepancies or inconsistencies as would cause us to believe that there was any failure adequately to direct the assessors on that point.

The third ground of appeal referred only to the 2nd accused and was as follows:-

"The 2nd accused was a first offender and therefore entitled to a more lenient or a lesser sentence than the others. The 2nd accused was 28 years of age."

This was a brutal and violent attack. The learned trial Judge took into consideration in his comments on sentencing that the 2nd Appellant was a first offender. He said that the 2nd Appellant was quite active and aggressive in his assault on the helpless deceased and that he could find no good reason why his sentence should be different from the 1st and 3rd Appellants. A man of 28 is quite sufficiently mature to appreciate the consequences of his actions. We could not hold that his sentence was excessive.

Appeals dismissed.

I.R. Thompson
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Mr. Justice I. R. Thompson
Judge of Appeal

P. Hillier
.....
Mr. Justice Peter Hillier
Judge of Appeal

J. Dillon
.....
Mr. Justice J. D. Dillon
Judge of Appeal