IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI ISLANDS

CRIMINAL APPEAL NO.AAU0004 AND AAU0007 OF 1998S
(High Court Criminal Case No. HAC 015 of 1994)

BETWEEN:

IOWANE TAROGA
TEVITA ROSADRIWA

Appellants

AND:

THE STATE

Respondent

Coram: **The Rt. Hon. Sir Maurice Casey, (Presiding Judge)**
The Hon. Justice Gordon Ward, Justice of Appeal
The Hon. Justice Sarvada Nand Sadal, Judge of Appeal

Hearing: **Tuesday, 16 February 2000, Suva**

Counsel: **Mr. J. K. L. Maharaj for the First Appellant**
Mr. S. Valenitabua for the Second Appellant
Mr. J. Naigulevu for the Respondent

Date of Judgment: **Thursday, 24 February 2000**

JUDGMENT OF THE COURT

In January 1994 the appellants were both serving police officers and were jointly charged with the murder of Inia Vuakilau. They were convicted by the learned trial judge on 6 March 1998 after he received unanimous opinions of guilt from the assessors. It appears that no secret was made of the fact that it was a retrial ordered by the Court of Appeal in February 1996.

The evidence was that, in the afternoon of 21 January 1994, the deceased was standing at the side of the road with a kitchen knife in his hand when the appellants drove past in a police vehicle. The prosecution case, disputed by the appellants, was that he was using the knife to peel and cut a mango.

The police vehicle stopped and reversed back to where the deceased was standing and the first appellant, who was the only officer in uniform, alighted. He approached the deceased who ran away up a driveway. The first appellant pursued him and the deceased ended up on the ground. The second appellant joined them at some point shortly afterwards. The deceased was injured and was placed in the police vehicle apparently unconscious. He was taken first to Valelevu Police Station and then to the CWM hospital where he was pronounced dead. A subsequent post mortem examination found the cause of death to be a cranial haemorrhage.

The prosecution case, based on a number of eye witnesses, was that the first appellant caught the deceased by the collar and either just before or just afterwards struck him a blow with his fist to the back of the head. The deceased fell and was then kicked and punched by the first appellant. When the second appellant reached them, he too joined in the kicking and punching of the man on the ground. By the end, the deceased was not moving and had to be carried into the police vehicle. The injuries were caused entirely by the appellants' attack and caused his death.

The first appellant's case was that he went to speak to the deceased because he was holding a knife in the street. As he approached, the deceased lunged at him with the knife and then ran away up the driveway. As he ran he was apparently trying to get through the hedge but he eventually fell on the driveway. The first appellant punched him twice in the ribs as he appeared to be attempting to get up and, on the second blow, the knife flew out of his hand although the officer was unable to say whether it was the result of the blow or whether it was thrown away.

The officer then took the accused by the collar and, in his words, 'nudged him' with his boot to make him get up. However, the deceased was too drunk to do so and the officer pulled him onto his feet. At that point the officer saw froth around his mouth and noticed he was mumbling. He had to reverse the vehicle to the place where the deceased was and, when he had done so, saw the deceased was lying on the ground unconscious.

The second appellant's case was that it was he who saw the deceased with the knife from the vehicle and told the first appellant. He did not get out initially because he considered it better that the uniformed officer should speak to the deceased. He saw the deceased point the knife in a threatening way at his colleague and then run away pursued by the officer. The second appellant got out of the vehicle and followed. He only walked and, by the time he caught up, the deceased was already on the ground. He denied ever striking the deceased in any way and only felt his stomach to check he was breathing.

The case of both appellants was that they had carried out a normal arrest.

Various grounds of appeal have been advanced by the appellants some of which are common to both. The first three arise from the trial itself.

The first relates only to the second appellant who had no lawyer for the first days of the hearing and suggests he was, therefore, deprived of his constitutional right to a fair trial.

The case had been fixed for hearing on 12 January 1998. On that day, the court was advised that the second appellant had been granted legal aid the previous August and had instructed Mr G. P. Shankar, the lawyer who had represented him at the previous appeal. The

legal aid certificate was produced to the court and had been sent through Shankar's office. Prosecuting counsel, Mr Auld, advised the Court that he had spoken to Mr Shankar the previous week and was assured by him that he would be present on the 12th.

During the overnight adjournment, Mr Auld again spoke to Mr Shankar and was told that he had instructed a Mr Singh to appear on the first day. The Court Registry had been unable to contact either Mr Shankar or Mr Singh but the second appellant had telephoned Mr Shankar's office only to be told by Mr Shankar's secretary that he was busy and Mr Singh was out of the country. The Court adjourned to the following Monday. By that day, the second appellant had instructed a different lawyer, Mr Savu, and an adjournment was requested to enable him to attend.

Not surprisingly, on that day the judge was anxious to start the hearing and pointed out that, when the case was first fixed for 12th, it had been specifically stated there would be no further adjournment except for extraordinary reasons. He added, "Again we find the accused leaving it to the last moment to arrange matters." The adjournment was refused and the trial commenced with the second appellant unrepresented..

Before the court rose at the end of the second day, the record shows the following exchange in the absence of the assessors:

> "Court: Mr Rosadriwa, I am becoming concerned about the continued absence of your lawyer. Where is this Tui Suva? What contact have you had with him?
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> Rosadriwa: He says he is busy.

Court: Well, you say he agreed to take your case. He is guilty of professional conduct in letting you down. You have to get cracking and do something about him to the Law Society. You cannot just sit on your hands, as you apparently have done since October of last year. Mr G P Shankar had a duty to help you get another lawyer last year when he could not act. All these people are grossly discourteous to the court. It is you who are on trial for capital murder. I will contact the Chief Registrar to see if something can be done about these practitioners. Have you got your copy of the magistrates' court depositions?

Rosadriwa: They are still with G P Shankar.

Court: Well, go and get them off him. In the meantime, maybe your co-accused will let you photocopy his."

On the third day of the trial, the second appellant still had no lawyer and the sixth prosecution witness was giving evidence. When the seventh witness, the first eye-witness, was called, the second appellant again asked for an adjournment in order to try and find yet another lawyer.

The court, in the absence of any opposition by either counsel, agreed to adjourn again until the following Monday. On that day Mr Seru and Mr Valenitabua appeared and asked for an adjournment to familiarise themselves with the case. It was refused although the court rose until midday when the trial continued with Valenitabua appearing for the second appellant. The evidence of the seventh witness that had previously been given was read to the court by the judge before the witness continued.

Last minute applications for an adjournment to allow the accused to obtain a lawyer are all too common and trial judges should always examine such requests with care. If the accused has had adequate time to instruct a lawyer and has simply failed to take the necessary action, the judge is perfectly justified in refusing the application and commencing the trial.

However, in this case, despite the comments of the judge, the fault lay with the lawyer not the accused. Mr Naigulevu for the respondent, suggests the accused was under an obligation to check his lawyer was still available. Sensible though such an enquiry would be in all cases, we do not agree there is such an obligation on an accused. Once he has instructed a lawyer, he is entitled to assume the lawyer will attend at all times necessary and advise the accused to do so also.

The trial judge gave the accused time to find an alternative legal representative. During that adjournment it is quite clear the accused was not, in the judge's words, sitting on his hands. He took active steps to contact the lawyer he had already instructed and, when that was fruitless, to find an alternative.

In such circumstances it was wrong of the judge to start the trial when he did. Once it was demonstrated that a lawyer had been instructed and had accepted the case, the judge would have been better advised to require the lawyer's attendance to explain his absence before proceeding with an unrepresented accused. This was a serious charge, albeit not, as the judge suggested, a capital one, and his actions deprived the accused of his right to prepare for trial.

During those first days, counsel for the prosecution, no doubt in recognition of

the situation the second accused was in, confined himself to the relatively formal evidence of the photographers, the plan drawer and identification of the deceased. Once the more contentious evidence started, the judge properly reconsidered the position and allowed further time. We do not consider those events resulted in a miscarriage of justice sufficient to require us to intervene on that ground.

The next ground of appeal is common to both appellants and challenges the admission of the evidence of the pathologist, Dr Alera, although he was not present at the hearing. He had given evidence at the previous trial and the Appeal Court had clearly been aware that he might not be available for a retrial because it included the unusual order:

> " In the event that Dr Alera is not available to give evidence at the retrial, his evidence at the previous trial is to be read into the record as evidence on the retrial."

In this trial the prosecution called evidence of the various unsuccessful attempts they had made to find the pathologist. The evidence was then read from the record of the previous trial and defence counsel were, of course, unable to cross examine.

The pathologist's evidence was, in fact, read out three times during the course of the trial. The assessors requested it be re-read to them at the end of the first appellant's evidence in chief and again about one hour after they had retired to consider their opinion. Although the judge read extensively from the record of the evidence of a number of prosecution witnesses during his summing up, he did not read the pathologist's evidence and only made a

very brief reference to its content. Nowhere does he point out to the assessors that the manner in which it was given prevented defence counsel testing it in cross-examination although he dwelt on the importance of cross-examination elsewhere in his summing up. He also invited the assessors to draw conclusions from that evidence which we find surprising in view of the absence of the witness or any other evidence on the point.

> ***"And you, in assessing medical evidence, such as I've mentioned, you're not slaves of the doctor, either, you don't slavishly adhere to what a doctor says. You can draw inferences about what he says, as well as any other witness. But, of course, in areas of his expertise, which you know nothing about of course, you'd be loath not to accept a professional man.***
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> ***Unless, as Mr Maharaj says, Dr Alera was unduly influenced by the relatives' doctor, who was standing looking over his shoulder. The suggestion being to put a doubt in your mind as to the objectivity and professional independence of the Filipino Doctor, Dr Alera. Well, what do you make of that?***
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> ***Do you think that a Doctor like Alera, reading his evidence, do you think that he'd prostitute his medical oath, his Hippocratic oath, as its called, just because some doctor was there, talking to him discussing the case? How likely is that, you ask yourselves?"***

The defence applied to have the evidence excluded but the judge took the view that the only question for him was whether he was bound by the order of the Court of Appeal. Having ruled that he was, he considered he had no discretion. We accept that the court was bound by the order of the higher court but only to the extent that, if the evidence was to be led, it could be achieved by reading the evidence from the previous trial. We cannot accept that the effect of the order was or could be to remove the judge's discretion to exclude evidence in the trial over which he was presiding any more than it could have obliged the prosecution to adduce it if, for example, it no longer considered it reliable.

However, the appellants could have called other medical witnesses to give their

opinion of Alera's evidence. The first appellant did call such a witness but limited his questions to the effect of the substantial amount of alcohol that had been found in the deceased.

We consider the judge should have given the assessors a clear direction on the relatively limited weight that could be given to evidence which had been challenged but about which the defence had been unable to question the witness. That was a regrettable omission but does not, in the circumstances of this case, give us reason to interfere.

The next ground, which also applies to both appellants, arose from the attempt by Mr Maharaj, for the first appellant, to adduce evidence of the deceased's previous convictions. It appears he had been advised that the deceased had four convictions for robbery with violence.

The judge ruled such evidence inadmissible. That was incorrect. By section 1(f)(ii) of the Criminal Evidence Act, 1898, an accused who seeks to attack the character of the prosecutor or a witness called for the prosecution is liable to be cross examined on his own character. It does not render the evidence inadmissible but simply puts his own character in issue.

In this case, it went further because the deceased was not a witness. In such a case, if the accused seeks to establish the deceased's bad character, he does not lose the protection of section 1(f)(ii). The test is relevance. In this case, as Mr Maharaj made plain to the judge, it was relevant in order to show that the deceased may have had some propensity to violent behaviour and therefore to the sort of threatening acts the appellants described in their evidence and which were strongly challenged by the prosecution. That was a serious error which may have prejudiced the appellants' case. However, we consider it, is insufficient in itself to

give us reason to interfere.

The remaining grounds arose from the summing up. The first was the suggested failure of the judge to give any, or any adequate, direction on the possibility of an alternative verdict of manslaughter.

In a trial for murder, the evidence may fail to establish that offence but succeed in proving manslaughter. In some cases, of course, such an alternative simply does not arise on the facts as they have unfolded in the evidence. Equally the possibility of such a verdict may be so contrary to the defence case that it would be wrong to suggest it. The judge must decide in each case whether, on the evidence, such a possibility exists and, where it does, give a clear and adequate direction on how the assessors should approach it.

In this case, the facts were such that a verdict of manslaughter was a possibility. The assessor's conclusions about the events of that afternoon required them to consider whether there was a lawful reason to pursue the deceased, whether there was an intention to arrest and whether, if so , it was lawful both in terms of the offence for which he was to be arrested and in the degree of force used. The issue of joint enterprise required consideration of how far the second appellant shared the knowledge and intent of the first appellant. The prosecution had specifically limited its case on malice aforethought to an intention to cause grievous bodily harm or knowledge that the actions would probably cause death or grievous bodily harm. Consideration of that could, on the evidence before the court, have lead the assessors to conclude that the death was caused by an unlawful act but that malice aforethought had not been proved either against both appellants or the second appellant only.

In such circumstances, the issues for the assessors to determine were complex and required a very careful direction on the possibility of an alternative verdict of guilty to manslaughter but, in a summing up that took one and a half days, the judge only once made any reference to that possibility. In the last moments of his summing up, the following passage appears almost as an afterthought.

> "I do not know that I can assist you further. If there is a reasonable doubt about any element of the case, such as reasonable doubt as to either, or both of the men, intending to do grievous bodily harm, or reasonable doubt as to their knowledge that grievous bodily harm was probable if they persisted with the blows, and were indifferent or wished that probable result might not happen, but took the risk of grievous bodily harm to Inia, if there is a reasonable doubt as to those states of mind on their part, then in the latter state of affairs, they would only be guilty of manslaughter.
>
> That's because manslaughter doesn't involve any of those mental elements at all. On manslaughter, you only have to consider whether there was a doubt about their doing an unlawful act. That's where the lawfulness of their activities towards Inia comes in. If there was no unlawful act by either of them in the killing of Inia, then they, or either of them, are not guilty of any offence at all."

Although the summing up mentions manslaughter at other times, there is no other reference to the possibility of an alternative verdict. It is a confusing direction and does not

adequately explain the situation to the assessors.

As we have stated, the judge always retains a discretion to decide whether an alternative verdict is a realistic possibility. He should also consider whether the inclusion of such a direction would simply confuse the assessors or unfairly prejudice the defence. If there is any doubt about whether or not to direct the assessors to consider an alternative verdict and especially where it has not been referred to by counsel, he should warn counsel of the view he has taken and allow them to address him.

It is right, as counsel for the respondent points out, that the defence of the second appellant did not suggest manslaughter as a possibility but the evidence as a whole undoubtedly left such a possibility open and the lack of such a direction was a serious omission that may have resulted in a miscarriage of justice. The danger here, as suggested by Ackner L J in R v Maxwell (1990) 91 Crim. App R 61 and 68, is that, in the absence of an alternative, the assessors may have convicted of murder out of a reluctance to see the appellants get away with actions that they found unlawful. On this ground we consider we have no option, regrettable though it is after a previous aborted trial, to order that the case be sent back to the High Court with a direction that it should be tried by another judge.

That concludes the matter as far as this appeal is concerned. We do not, in those circumstances, need to consider the remaining grounds of appeal.

The appeal of both appellants is allowed and the conviction and sentence set aside. The case is remitted to the High Court for trial by a different Judge.

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Sir Maurice Casey
Presiding Judge

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Justice Gordon Ward
Justice of Appeal

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Justice Sarvada Nand Sadal
Judge of Appeal

Solicitors:

J. K. L Maharaj Esquire Suva, for the First Appellant
S. Valenitabua Esquire Suva, for the Second Appellant
Office of the Director of Public Prosecutions Suva, for the Respondent