273

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

CRIMINAL APPEAL NO. AAU0004/2001S
(High Court CriminalCase No. HAC 012 of 2000)

BETWEEN:

VINOD LAL

Appellant

AND:

THE STATE

Respondent

Coram: Eichelbaum JA, Presiding Judge
Sheppard JA
Smellie JA

Hearing: Monday, 19 November 2001, Suva

Counsel: Mr. A.K. Singh for the Appellant
Mr G. Allan for the Respondent

Date of Judgment: Thursday, 22 November 2001

JUDGMENT OF THE COURT

On 18 October 2001 this Court dismissed the applicant's appeal against his conviction for murder. He now applies for leave to appeal to the Supreme Court. Under Section 122 (2) of the Constitution, for the applicant to be successful he must persuade this Court to certify that the proposed appeal raises a question of "significant public importance".

In brief the facts were that the applicant strangled and smothered his de facto partner to death after, on his account, she had attempted to strangle him while he was asleep. The principal defence was provocation, which one assessor accepted. However, the majority of the assessors, and

the Judge, rejected it.

The Judge declined to allow applicant's counsel to advance self-defence, a ruling upheld by this Court on appeal. The first ground on which the application for leave is advanced relates to the terms in which this Court upheld that ruling. The applicant wishes to contend that this Court was wrong in saying:

"It is common ground that if there had been a credible evidential foundation for the defence the Judge ought to have directed the assessors about it, notwithstanding that appellant's Counsel had not advanced the defence."

The formula used by the Court was a common shorthand for an approach habitually applied. Instead, according to the applicant the appropriate principle is that "where there is slight evidence which if accepted could raise a prima facie case of self defence, this should be left to the jury, even if the accused has not formally relied upon self defence". The difference between the formula applied by the Court, and that advocated by counsel for the appellant, is subtle. It seems to lie in the substitution of the phrase "slight evidence which if accepted..." for "credible evidential foundation".

An initial comment is that having checked the written submissions filed in support and in opposition to the appeal, we have found no sign of any such distinction being advanced on the appeal. At that stage counsel for the appellant cited many authorities, from different jurisdictions, which dealt with or referred in passing to the sufficiency of the foundation required

before a trial judge was obliged to put a defence to a jury. Understandably they do not all put the test in the same terms, but a common theme, to take words from *DPP v Walker* [1974] 1 WLR 1090, 1095 is that a judge is not obliged to put any impossible defence which human ingenuity might conceivably devise.

The test of a credible evidential foundation has a respectable pedigree. It goes back at least as far as *Lee Chun Chuen v The Queen* [1963] 1 All ER 73 where at page 77 the Privy Council on an appeal from Hong Kong said:

If there was some material on which a jury acting reasonably could have found manslaughter, it cannot be said with certainty that they would have found murder. It is not of course for the defence to make out a prima facie case of provocation. It is for the prosecution to prove that the killing was unprovoked. All that the defence need to do is to point to material which could induce a reasonable doubt.

Then at page 78 the judgment continued:

The truth of an accused's story is always a jury question provided that it is credible, that is, unless there are clear and unchallengeable facts with which it cannot possibly be reconciled. (emphasis added).

Finally at page 79, after referring to the three essential elements making up provocation in law, their Lordships said:

The defence cannot require the issue to be left to the jury unless there has been produced to the jury a credible narrative of events suggesting the presence of these three elements. (emphasis added).

The New Zealand Court of Appeal, sitting as a bench of 5, cited *Lee Chun Chuen* in *R v Anderson* [1963] NZLR 29. Based on the Court's reliance on that authority for the appropriate test, the headnote of the report stated:

What is essential is that there should be produced, either from as much of the accused's evidence as is acceptable, from the evidence of other witnesses or from a reasonable combination of both, a credible narrative of events disclosing material that suggests provocation in law. If no such narrative is obtainable from the evidence the question of provocation should not be left to the jury.

This test has commonly been applied in New Zealand ever since.

When we asked Mr Singh what cases he relied on in support of his preferred formulation of the test he referred to cases he had cited on the hearing of the appeal, *DPP v Bailey* [1995] 1 Cr App R 257 and *R v Tavete* [1988] 1 NZLR 428. The former, a Privy Council appeal from Jamaica, does not contain any reference to a test framed in the appellant's terms. The nearest the judgment gets to it is in referring to evidence on behalf of an accused which is "not strong".

In passing we note that the Board referred to the unlikelihood of the situation where provocation would properly be allowed, but where it would not be appropriate to allow self-defence based on the same facts. In a jurisdiction where words, as well as conduct, may constitute provocation, we have some difficulty with that as a general proposition. We do not see it can have any application to the facts of the present case.

Turning to *Tavete*, this authority does not assist the applicant. To the contrary, at page 430 the Court of Appeal of New Zealand said:

Self-defence should be put to the jury where, from the evidence led by the Crown or given by or on behalf of the accused, there is a credible or plausible narrative which might lead the jury to entertain the reasonable possibility of self-defence.

Counsel was unable to refer us to any case in this Court ruling on the question of the precise formula. We do not consider the issue is one of "significant public importance". First, the formula used by this Court is a well-established one, and no reason has been advanced for departing from it and substituting what counsel evidently regards as a test more favourable to the accused. It is not in the public interest, or in the interests of justice, that defences based on a foundation lacking potential credibility must be put before assessors. They are more likely to confuse than assist the course of justice. Second, this case did not turn, and does not now turn, on any verbal distinction of the kind the appellant wishes to argue before the Supreme Court. At trial, and on the appeal, the question was whether the available evidence justified allowing the defence to be advanced. For the reasons given by the Court in its judgment on the appeal, the evidence was insufficient to allow self

defence to be advanced, regardless of the test adopted. No question of a new principle, or of the amendment of an existing principle, is involved, and the point is not of significant public importance.

As a second ground applicant contended that if unchallenged the judgment will be regarded as establishing that even if a defence counsel was negligent in that he failed to challenge a confession as directed by the accused, or told the accused to admit everything he was asked by the prosecutor, the confession and admissions will be taken as valid and as justifying the conviction.

The short answer is that the judgment will be so regarded only by those who have misread it. The judgment shows the Court was not satisfied that the applicant gave instructions to challenge the confession. It added that in any event there was no indication the appellant was able to give any different account from what was contained in the confession, which was confirmed by similar accounts he gave to other witnesses the admissibility of whose evidence was not open to challenge. As to the contention that trial counsel instructed the applicant to agree with whatever the prosecutor put to him, the judgment said the assertion was so far-fetched as to defy credulity.

The third ground was framed as follows:

That the Supreme Court needs to rule on the interpretation and or the rights of the Accused on the Bill of Rights under the 1997 Fiji Constitution.

Counsel said the particular provision to which this was intended to refers was section

28(1)(d) of the Constitution. In argument counsel was unable to formulate any question relating to the interpretation of that provision, or as to the rights of the accused under it, which arose on the appeal. As will be seen from the judgment counsel had raised a question of the applicant not being afforded his rights but the Court was of the view that the facts did not support this. Before us, eventually counsel withdrew the contention.

Before parting with the case we wish to say something about applications to this Court for certificates under s 122(2). We suggested to counsel that in a future application it would be helpful to hear argument on the approach the Court should take in principle to the issue of what constitutes a question of significant public importance. There may be overseas authority on similar provisions. In the meantime it must be understood that such applications are not simply for leave to re-argue issues in the case. The plain words of the Constitution show that to obtain leave from this Court, the applicant has to demonstrate the existence of a question of public importance, and that it must be a significant one. There may be cases where the test is satisfied notwithstanding that the issue is one of fact alone, but generally there will need to be a significant issue of principle involved before this Court will grant its certificate.

In this case, for the reasons given we dismiss the application.

Result

Application for leave to appeal to Supreme Court dismissed.

Eichelbaum JA, Presiding Judge

Sheppard JA

Smellie JA

Solicitors:

Messrs. A.K. Singh Law, Nausori for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

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