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

CRIMINAL APPEAL NO.AAU0004 OF 2001S
(High Court Criminal Case No. HAC 012 of 2000)

BETWEEN:	VINOD LAL (f/n Bidurji)	*Appellant*
AND:	THE STATE	*Respondent*

Coram: The Rt. Hon. Sir Thomas Eichelbaum, Presiding Judge
The Rt Hon. Justice John Steele Henry, Justice of Appeal
The Hon. Sir Rodney Gerald Gallen, Justice of Appeal

Hearing: 10 October 2001, Suva

Counsel: Mr A.K. Singh for the Appellant
Mr Gregor Allan with Ms Lynda Tabuya for the Respondent

Date of Judgment: 18 October 2001

JUDGMENT OF THE COURT

The appellant appeals his conviction for the murder of his de facto partner Shaleshni Shalini Devi. It was not disputed that the cause of death was asphyxia due to manual strangulation, and that the appellant was responsible. The account of the fatal events depended entirely on what the appellant told friends and relatives immediately afterwards, and a written statement he made to the police. The statements made by the appellant varied in matters of detail but the broad account was as follows. After an evening at home during which the appellant drank alcohol, and where later he and the deceased twice had intercourse, he went to sleep at about midnight. He awoke twice experiencing some difficulty in breathing. On the second occasion, feeling a weight on his back he saw that the deceased was sitting on his back. She was holding a cord around his neck and he believed she was trying to strangle him. He got her off his back, apparently without difficulty, by holding her neck. Then he untied the rope from his neck and tried to apply the same cord to her neck but the cord broke.

He put a bedspread over her face and pressed it hard "to make sure that she dies". He then lay down and fell asleep. When he awoke in the morning he found she was dead. At trial, the appellant admitted he had strangled his partner for five minutes, until she was motionless. The principal defence advanced was provocation, which if successful of course would have reduced murder to manslaughter. One of the assessors in fact brought in a finding of manslaughter, but the other two made a finding of murder and the Judge agreed with them.

On behalf of the appellant Counsel has argued four grounds with which we deal in turn.

The first and principal contention was that the Judge ought to have directed the assessors on self-defence. 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 appellant said he awoke to find his wife trying to strangle him. When it is necessary to defend oneself the use of such force as is reasonably necessary is not unlawful.

In the post-mortem report the deceased was described as a skinny young adult female. The appellant had no difficulty in removing her from his back and preventing the continuation of her attempt to strangle him. Certainly there was a credible narrative by virtue of which the assessors could have found that any force he used up to that point was justified. However, there was no evidence at all that could possibly justify the appellant continuing to assault the deceased to the stage of strangling her. He was no longer in danger. That he did not consider himself in danger is shown by the fact that on his own statement, believing she was still alive he simply went back to sleep again. Had he had any residual concern about a further threat she might pose he could have left the house. On any view the force he used was excessive. The Judge was correct in not directing the assessors on self-defence.

Under the second ground Counsel attacked the part of the summing-up dealing with provocation. He contended that the Judge ought specifically to have pointed out that if there

was any reasonable doubt about provocation, the defence succeeded. But that is the effect of the direction the Judge gave. There is no merit in this ground.

The third contention was that the Judge failed to direct the assessors to consider the question of intention. The Judge gave a clear direction about the elements of murder which the prosecution had to prove, including the accused's state of mind. Again, this ground is without merit.

The final ground related to the instructions given to trial Counsel (not Mr Singh) and the competence with which the appellant was defended. Three main headings were developed. First, Counsel's failure to challenge the appellant's confession; second, advice allegedly given to the appellant to agree with whatever the prosecutor put to him, as this would result in a verdict of manslaughter; and third, in allowing certain statements to be read.

Under the first heading Mr Singh asserted there was a breach of the appellant's rights under the Constitution in that he was not advised of his right to consult a solicitor, but the record does not bear this out. It was also contended that the appellant did not make inculpatory statements, in other words that the record of interview produced was not a true record but the appellant's affidavit did not provide any detail and in his submissions Mr Singh identified only one specific passage in a long interview which the appellant claimed was wrongly attributed to him. When the appellant was called to give evidence at trial however he commenced his evidence in chief by saying he gave his statement voluntarily and that he was happy with the statement. We are not satisfied that the appellant gave any instructions as claimed and in any event, there is no material before the Court to indicate that the appellant was ready to give any account of events differing in a significant way from what he was recorded as telling the police, which was consistent with the account he gave to friends and relatives.

Thus, not only are we left without any evidence of a tenable basis for challenging the admissibility of the appellant's police statement, evidence to the same effect would have been before the Court in any event. Further, there was no evidence that the appellant would have

157

been able to give any alternative or more favourable version of events, than that contained in his caution statement.

As to the second contention, affidavits filed on behalf of the appellant maintained that trial Counsel instructed him to agree with whatever the prosecutor put to him when he gave evidence. Not surprisingly, trial Counsel denied giving any such instruction. The assertion is so far-fetched as to defy credulity.

Turning to the third sub-heading, the written statements were by friends and relatives. They contained the accounts given by the appellant the morning after the fatality. It was advantageous to the appellant's case to have these before the Court, to support the defence of provocation. It is true that the written statements contained a good deal of irrelevant information, which need not have gone before the Court. However, we do not consider this prejudiced the appellant. Counsel pointed to comments to the effect that there had been discord in the relationship between the appellant and the deceased, but this cut both ways, in that it gave some credibility to the appellant's account that his partner should attack him after a seemingly harmonious evening together.

For these reasons we do not find any merit in the fourth ground of appeal either, with the result that the appeal is dismissed.

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Sir Thomas Eichelbaum
Presiding Judge

FIJI COURT OF APPEAL

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Rt. Hon John S. Henry
Justice of Appeal

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Sir Rodney Gallen
Justice of Appeal

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