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

CRIMINAL APPEAL NO. AAU0032 OF 1998
(High Court Criminal Case No. HAC 36 of 1997)

BETWEEN: SHEIK M. HUSSEIN (f/n Mohammed Hussein) *Appellant*

AND: THE STATE *Respondent*

A N D

CRIMINAL APPEAL NO. AAU0034 OF 1998
(High Court Criminal Case No. HAC 0036 of 1997)

BETWEEN: THE STATE *Appellant*

AND: PRAKASH CHETTY (f/n Arjun Chetty) *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: 9 October 2001

Counsel: Mr S D Sahu Khan with Mr M Raza for Appellant Hussein
Mr Peter Ridgway for the State (in both appeals)
Mr A K Singh for the Respondent Chetty

Date of Judgment: 18 October 2001

JUDGMENT OF THE COURT

Background

Sheik Mahmood Hussein and Prakash Chetty were charged with murder and robbery with violence. Chetty pleaded guilty to the robbery count. At a joint trial on the other charges, held in September – October 1998, the Assessors and the Judge found Chetty not guilty of murder. They found Hussein guilty on both charges. The State has appealed against Chetty's acquittal, while Hussein has appealed against his convictions. The appeals have been heard separately, but it is convenient to give our reasons for judgment in a single judgment.

Evidence at trial

Chetty, who sold mats door to door, had called on the victim, Mrs Devi, previously. He and Hussein, who was staying with him, called at her house on the morning of 26 September 1996. At the time Mrs Devi was alone with her infant son. Later in the day, she was found dead, having suffered several stab wounds. According to the pathologist the cause of death was an incised neck wound, inflicted with a knife. In the post-mortem report, the cause of death was given as multiple incised wounds to the neck .

A witness who lived opposite identified the two appellants as having been at Mrs Devi's house in the morning. Later that day, the appellants and an acquaintance named Abbas pawned jewelry and other items taken from the house.

The direct evidence of the fatal events consisted of the statements made by the appellants. Chetty was interviewed on 29 September 1996, and the following account is taken from the English translation of the written record of his interview. He said that earlier in the week he had been selling mats in Dilkusha Road, where the deceased lived. However, initially he denied calling on Mrs Devi on the 26th. The interview was interrupted while the police conducted a search of Chetty's

home, and again for an identification parade. On resumption, he was told that two witnesses had identified him as being in Dilkusha Road on 26 September. Chetty then said he had been telling lies. He said that he and Hussein (referred to as "Yasin"in the record of the statement) had gone to Mrs Devi's house to steal things. Mrs Devi invited them inside, and gave them water to drink. He referred to her as "the woman whom we cut". Asked what they cut her with, he said it was a vegetable knife. He said he held her legs while Hussein cut her neck. Hussein had obtained the knife from the kitchen when visiting the bathroom. Hussein was wearing socks he had brought from Chetty's home. Chetty said the killing had not been planned, and that killing Mrs Devi had been Hussein's idea. Asked about a sack found in the house, containing a tape deck and radio, he said he and Hussein had filled this, but it was left behind as he got frightened.

The interview was suspended again while the accused was taken to the scene to show police where he went and what he did. When the interview resumed, Chetty was asked whether there was anything more he wished to say. He replied that he had helped Hussein "in cutting that woman". He did not take anything from the house as he got frightened when Hussein cut her.

When charged, Chetty gave a more detailed account of the killing. He said that Hussein put socks on his hands and followed Mrs Devi into the bedroom. Soon afterwards he heard her scream. When Hussein asked him to come in Mrs Devi was lying on the bed, bleeding from the neck, while Hussein was pressing her mouth with a pillow. At Hussein's request he grabbed her legs, while Hussein cut her neck further and pressed his hand on her mouth. Four or five minutes later her body went slack and he knew she had died.

The record of the interview with Hussein is dated 30 September 1996. He said that on 26 September he went to Dilkusha with Chetty to sell mats. Mrs Devi invited them inside and they had a drink of water. When Mrs Devi went into the bedroom with her son, Chetty followed and told him to shut the door. At Chetty's request Hussein took a radio from the sitting room, then he went into the bedroom

where he found Mrs Devi sitting on the bed crying. She was bleeding, apparently from a cut on her hand. She pleaded with Hussein to see that Chetty did not kill her. Hussein asked Chetty why he had hit her, to which Chetty responded that she was making a noise. Chetty then told him to keep guard at the door. After a few minutes, the woman cried out loudly and Hussein ran into the bedroom. He found Chetty sitting on Mrs Devi's chest, holding her mouth with one hand and with the other on her neck. On pulling Chetty away he saw that Mrs Devi was bleeding from the neck and that Chetty had a knife in his hand. He said that when they left Mrs Devi was still alive. Chetty gave him some jewelry which he pawned. He denied any plan to rob Mrs Devi. When charged, on the following day, he gave a similar although briefer account.

Both accused elected to give evidence. Chetty said that when they called at Mrs Devi's house, they knocked but no one answered. Hussein then went around the back, and on returning said there was "some gold" and a blower there. They then went by bus to Suva, where Hussein asked Abbas to pawn a bracelet. They each gave Abbas $5.00. Chetty gave lengthy evidence about his questioning by police, claiming he had not given many of the recorded answers. In particular, he maintained he had not said he had entered the house, and denied having anything to do with the killing. He said neither he nor Hussein had entered the house. He said his statement was not read back to him, and that he simply signed what was put before him. He denied making any statement when charged. Chetty also gave evidence about his state of health, saying he had been injured in an accident 10 years ago, as a result of which he suffered from fits, and had to take medication. In cross examination, Hussein's counsel put to him the version of events given by Hussein in his statement, but Chetty again denied having even entered the house. He said the account attributed to him by the police, where he blamed Hussein for the killing, was false. He maintained his denials under cross examination by the prosecution. He agreed he had not previously given the account he was telling in court.

Hussein gave evidence on the lines of his earlier statement, in which he admitted taking part in the robbery, but denied any responsibility for the killing. He said that Chetty took the jewelry, and persuaded him to pawn some of it in Suva. He denied there was any plan to rob or kill Mrs Devi. After leave had been given to counsel for Chetty to cross examine on previous convictions, Hussein accepted he had been convicted of robbery on an earlier occasion. He said that he did not seek help or tell anyone what had happened because Chetty had threatened him.

The State's appeal against Chetty

The appeal was brought on the following grounds:

1. The Judge ought to have overturned the assessors' opinion.
2. The Judge misdirected the jury on separate cases and joint enterprise
3. The Judge misdirected on the elements of robbery with violence, and failed to consider the implications of Chetty's guilty plea
4. The Judge failed to consider and highlight to the assessors relevant and significant circumstantial evidence.

Ground 1

In brief, the critical evidence available against each accused on the murder charge was as follows:

Chetty

His admission that he committed robbery with violence.

His statements to the police, that he held the victim's legs while Hussein cut her throat.

Hussein's evidence, that Chetty stabbed Mrs Devi.

Thus, if the Court accepted the police evidence regarding the circumstances in which Chetty's statement was made, and rejected Chetty's evidence, this would justify a verdict of guilty, regardless of the view taken of Hussein's evidence. Alternatively, even if left in doubt regarding the truth of Chetty's statement, if the Court accepted Hussein's account at trial, a guilty verdict was tenable. Clearly, neither eventuality happened. The Assessors must have at least been left in doubt regarding the truth of Chetty's confession, and likewise, been left in doubt regarding Hussein's account, or rejected it.

Hussein

On his own statement and evidence, Hussein played no part in the killing. At one point of his evidence at trial, Chetty said *neither* entered the house, but this is inconsistent with other evidence he gave, that Hussein brought valuables away with him. The Assessors were entitled to reject the part of Chetty's account stating that Hussein did not enter the house, while accepting the rest.

It would be fanciful to suggest that any other person was responsible for the killing. Thus if the Assessors rejected Hussein's evidence, and accepted Chetty's that he did not enter the house himself, there was a tenable basis for finding Hussein guilty of murder. That this was the Assessors' reasoning is consistent with both the verdicts on the murder counts.

From the Record, the route evidently taken by the Assessors does not stand out as the most likely. Even on the assumption that the police falsified numerous of Chetty's answers, undoubtedly Chetty commenced by telling lies, so his credibility was suspect. Hussein gave a consistent account throughout. Further, it is not easy to reconcile the outcome with Chetty's guilty plea on the robbery charge, although conceivably the Assessors may have reasoned that he acted as the lookout to a planned robbery.

However, an appeal is not a second trial, and an appellate court cannot recapture the impressions made on the adjudicators who heard and saw the vital witnesses. The Assessors reached a unanimous conclusion with which the Judge fully agreed and, as shown above, the outcome can be reconciled with the available evidence.

The State submitted that the finding of the Assessors on the murder count against Chetty was perverse, and that the Judge should have declined to follow it. In terms of Section 299(2) of the Criminal Procedure Code (Cap 21) the Judge is not bound to conform to the opinions of the Assessors. This Court has previously held that the opinions of the Assessors may be overturned where the evidence against the accused is so overwhelming and so affirmatively established, that one can say the Assessors' conduct was perverse. Given the conflicting accounts advanced by the two accused, this is not such a case. This ground must fail.

Ground 2

In his summing up the Judge appropriately directed the Assessors that they must consider the cases against each accused separately. Then, under the heading "Jointly Charged" he said:

> ***"Where an offence is committed jointly by two or more persons each of them may play a different part, but each is guilty of the offence.***
>
> ***But before you can convict either of these defendants here you must be sure that he committed each of these offences himself, or that he did an act or acts as part of a joint plan with the other to commit it. Put simply: are you sure that they were in the murder of this lady and the robbery from her together?"***

This was the totality of the direction on parties and joint enterprise. If the Assessors were to accept Chetty's statement, that he held the victim's legs while Hussein cut her throat, he aided and abetted Hussein in committing murder, in terms of section 21 (1) of the Penal Code. The first sentence in the passage quoted might be regarded as an introduction to that subject, although an adequate direction

on the topic should also refer to the necessary state of mind of the accused, that is knowledge, in broad terms, what it is the principal offender is doing, or intending to do, and doing the act in question (that is, the act said to constitute the aiding or abetting) with the intention of assisting or encouraging the other in that activity. However, contrary to the next sentence of the summing up, it is not a prerequisite to guilt on the basis of aiding and abetting that the alleged secondary party did an act or acts as part of a joint plan with the other to commit it. The State also complained about the failure to direct regarding a joint enterprise, where the actual offence is not contemplated; see section 22, dealing with the probable consequence of the prosecution of the unlawful purpose

Counsel for Chetty maintained that the State never presented its case on the basis of aiding and abetting, nor on section 22, but had simply contended that the two accused acted together in killing the deceased. This would explain the terms of the directions, which as was appropriate, were tailored to the way the case was presented. Counsel for the State felt unable to challenge that account of the course the trial had taken. Read against that background the directions were sufficient. A Judge is not obliged to construct alternative theories for the prosecution, and indeed, generally it would be dangerous to do so.

Further, since the Assessors manifestly did not accept the prosecution evidence of Chetty's account of events inside the house, the absence of a direction on aiding and abetting, which depended on Chetty's statement, made no difference to the outcome. Accordingly, this ground fails.

<u>Ground 3</u>

The State submitted that the trial Judge failed to direct the Assessors on the significance of Chetty's plea to the charge of aggravated robbery. The contention was that the element of violence could only have been provided by the infliction of the same injuries which caused the victim's death. Thus, it was submitted, in

admitting the charge of robbery with violence, it was inescapable that Chetty also admitted his role in the fatal wounding.

We do not accept this argument. Chetty could have regarded himself as involved as a lookout while Hssein committed a robbery. It did not necessarily follow that he was guilty of murder and in any event, the prosecution does not appear to have presented its case that way.

Ground 4 was not pursued in the written submissions.

Accordingly, in the case of the State's appeal against Chetty's acquittal, leave to appeal is refused.

Hussein's appeal

The grounds of appeal were as follows:

1. Misdirection on corroboration of accomplice evidence
2. Misdirection on burden and standard of proof
3. Misdirection on circumstantial evidence
4. Non direction on relevance of previous convictions
5. Misdirection on common purpose
6. Failure to direct appropriately on the defence, or to consider the defence adequately
7. Verdicts inconsistent and not supported by the evidence
8. Verdicts unsatisfactory and unsafe, and not supported by the evidence.

Ground 4

It will be convenient to go straight to this ground, since in our view it is determinative of the appeal. Abbas was called on behalf of the prosecution. While being cross examined on behalf of Chetty, it came out that in 1996, Hussein was

serving a sentence as an extra mural prisoner. Later, when cross examined by Hussein's counsel, he said he called Hussein Master, because in prison everyone called him that. The Judge took no action in respect of these two pieces of evidence but in light of the subsequent evidence about Hussein's conviction, nothing further need now be said about that. At the time, the reason why Hussein was then in prison was not disclosed.

When Chetty gave evidence, Hussein's counsel cross examined him on the lines of Hussein's caution statement, and put it to Chetty that he was responsible for the killing. The Judge gave leave to Chetty's counsel to cross examine Hussein on his previous record. The correctness of that ruling has not been put in issue. It then emerged that Hussein had a conviction for robbery in 1985, and another for escaping from custody.

In *Donnini v The Queen* (1972) 128 CLR 114, 123 Sir Garfield Barwick CJ said that there is a high degree of possibility that a jury will be prone to reason towards guilt by the use of the fact of prior conviction as indicative of a disposition to crime on the part of the accused. So where evidence of a prior conviction is properly before the jury for the sole purpose of combatting a suggestion of good character, or to weaken or destroy an accused's credibility, the trial Judge must expressly and with emphasis tell the jury that they may not use the fact of prior conviction as tending to the guilt of the accused. Again, in *BRS v R* (1997)148 ALR 101 where similar fact evidence had been admitted for the purpose of rebutting the good character of the accused, but the Judge did not give any direction as to the use to which the evidence might be put, the High Court of Australia said such a direction should have been given, and set aside the convictions. In New Zealand, the Court of Appeal directed a new trial where the significance of evidence of prior convictions was not explained, *R v Kalo* [1985] 1 NZLR 219. Although the requirement for a direction need not be regarded as an absolute one, we are of opinion that these principles are equally applicable when the trial is with Assessors, and represent the law of Fiji also.

Here, the Judge did not give any direction about the permissible use of the evidence. The only permissible purpose for admitting the previous conviction was to cast doubt on Hussein's credibility, in particular on his assertion that Chetty killed the victim.

We have already noted that on the evidence, it was inconceivable that any person other than the two accused was responsible for the killing. As the case was presented the Assessors were faced with three possibilities – Hussein killed the victim without Chetty's involvement; Chetty killed her without Hussein's involvement; or the accused acted together and were jointly responsible. Since the Assessors rejected the third scenario they must have given thought to the respective merits of the first two. A relevant consideration would have been which (if either) of the accused was the ringleader. The revelation that one of them had committed a robbery previously may have played a significant part in their deliberations. In a case where robbery, rather than murder, was the predominant motive for the offending, the earlier conviction had the potential to be highly prejudicial. The potential prejudice could have been heightened by the earlier evidence that Hussein was referred to as "Master" in prison. In the absence of directions the Assessors may have thought the previous conviction indicated a propensity by Hussein to commit such offences and that he was therefore more likely to have taken the initiative in the present event. It is because of the risk of propensity reasoning that the Courts take such care to keep knowledge of an accused's record from juries or Assessors.

In these circumstances, by a majority the Court is of the opinion that the absence of a direction regarding the permissible use of the evidence amounted to a miscarriage of justice.

Where there has been a misdirection or non-direction the Court may still uphold the conviction if satisfied that the jury would have reached the same conclusion. In a closely fought trial such as the present, where either (or both) accused could have been held responsible, the admission of the conviction could

have swung the balance, in the absence of an appropriate direction. We cannot apply the proviso, with the result that Hussein's convictions must be set aside.

It is desirable that we deal with some of the remaining grounds, for the assistance of the Judge presiding at the retrial.

Ground 1

While each accused gave evidence incriminating the other, we do not accept counsel's argument that the circumstances called for a full corroboration direction. As this Court stated in *The State v Ram, Sami v The State* Criminal Appeals Nos. AAU4 and AAU5 of 1995, judgment dated 12 February 1998 the requirement of a direction regarding corroboration of the evidence of an accomplice applies only if he is called as a witness for the prosecution. The judgment continued:

> ***"Authority suggests however that the Judge should warn the assessors and himself to treat the evidence of an accused that tends to incriminate a co-accused with care".*** (p6)

This approach reflects the current position in England. *Archbold, Criminal pleading evidence & practice, 2001* para 4-404n states that *R v Prater* [1960] 2 QB 464 was the high point in terms of any court saying that in such cases, as well as those where the accomplice was called by the prosecution, a full corroboration warning was necessary. Subsequent decisions showed a retreat from that position. According to *Archbold* the current leading case is *R v Knowlden & Knowlden 77 Cr App R 94(CA)* to the effect that in exercising the discretion as to how to direct the jury, where defendants have given evidence against each other, the Judge is expected to give a clear warning to examine the evidence of each with care, because each has or may have an interest of his own to serve. This approach was confirmed in *R v Cheema* 98 Cr App R 195 (where the Court of Appeal reviewed the authorities at length).

The same view has been taken in New Zealand, see *R v Hartley* [1978] 2 NZLR 199, 206 where the issue whether there was any requirement *in law* to give an accomplice warning was specifically addressed and rejected. One aspect discussed in that case which it may be useful to record is that where the evidence is partly favourable and partly unfavourable, it is good practice to consult counsel before deciding whether or not a warning is given, see *R v Royce-Bentley* [1974] 2 All ER 347.

In Australia different States have taken a differing approach on the issue, as shown in *Webb v The Queen* (1994) 181 CLR 41, 93.

In the present case, it was patent that each accused was trying, or hoping, to off-load responsibility on to the other (Chetty's evidence only implicated Hussein by inference). In terms of the authorities cited above, the warning given by the Judge was adequate. This ground fails.

Ground 2

This ground, too relates to the caution given by the Judge regarding the evidence of a co-accused. Counsel for Hussein complained that the effect of the caution was to mislead the Assessors into thinking that in respect of the evidence given by Hussein which was exculpatory of his own participation, that evidence was to be regarded with caution. They might even have thought, said counsel, that the result was an onus on the accused to establish his innocence.

Often, as was the case here, the evidence given by a co-accused, which exculpates that accused, may be broadly the same as that which inculpates the other accused. There is then obvious difficulty in finding a formula that is ideal from the point of view of both accused. To say overtly that the assessors ought to regard the same evidence in one light for one purpose, but in a different way for another, may seem logical to lawyers, but is likely to puzzle and confuse lay persons. This point was well made by Brennan J. in *Webb v The Queen*. Although that was a dissenting

judgment as to the outcome of the appeal, in regard to matters of principle the Court was unanimous that in the case of co-accused implicating one another there cannot be any inflexible rule as to the terms of the direction. (See also the decision of the Supreme Court of Canada to the same effect in *Vetrovec v The Queen* [1982] 1 SCR 811, cited in *Webb* at 94.) In *Webb*, Toohey J., whose judgment on this issue had the concurrence of Mason CJ, Deane J and McHugh J, said

> ***"It follows that in the present case the trial judge was not obliged to give the accomplice corroboration warning but that he was not in error in doing so. The problem is whether, in so directing the jury, his Honour placed the evidence of Hay in a disadvantaged position. He had to maintain a balance between the interests of Webb on the one hand and Hay on the other. This ground of appeal can only succeed if it is shown that his Honour failed to maintain that balance and that, as a result, Hay suffered a substantial miscarriage of justice."*** (94-95)

We agree that essentially the Judge's task when giving a warning of this nature is to convey the caution in a way which maintains a fair balance between the rights of each accused. Generally this will be achieved by keeping elaboration to a minimum. That is what the Judge did here, and we do not consider that the terms in which he did so contained any error, or led to any injustice to the other accused. Accordingly this ground of appeal fails.

We did not require the State to respond to the remaining grounds, which were without merit. In regard to grounds 7 and 8, what we have said in dealing with the State's appeal against Chetty (ground 1) is sufficient to dispose of these also.

<u>Manslaughter</u>

The State, while resisting other contentions made for Hussein, purported to concede that the appeal should succeed on a ground not advanced by the appellant; namely that the Judge omitted to give sufficient directions regarding a manslaughter verdict. Specifically, this related to the possibility that the guilty verdict on the murder count against Hussein was premised on Hussein aiding Chetty. The

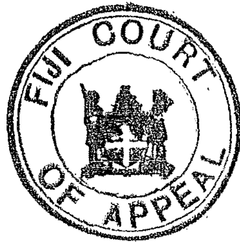
contention was that in assisting Chetty to commit robbery, Hussein could have foreseen that an assault might well occur, but not an assault committed with one of the intents required to constitute the crime of murder.

Had the prosecution presented its case at trial on any such a basis, this reasoning would have merit. However, as noted in dealing with Chetty's appeal, the State's case was that the accused acted together in killing the victim. In the circumstances the Judge was correct telling the Assessors it was murder or nothing. So we do not accept the State's contention about misdirection.

For the reasons given under Ground 4, we allow Hussein's appeal, set aside the convictions and sentences, and order a new trial on both counts.

Sir Thomas Eichelbaum
Presiding Judge

Rt Hon John S. Henry
Justice of Appeal



Sir Rodney Gallen
Justice of Appeal

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