

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

CRIMINAL APPEAL NO. AAU0053/99S
(High Court Case No. HAC005/99S)

BETWEEN : DANIEL AZAD WALI - Appellant

AND : THE STATE - Respondent

Coram : The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Sir Rodney Gallen, Justice of Appeal
The Hon. Mr. Justice John E. Byrne, Judge of Appeal

Hearing : Tuesday, 22nd May 2001

Counsel : A.K. Singh for the Appellant
J.K. Naigulevu, Director of Public Prosecutions
for the Respondent

Date of Judgment : Thursday, 24 May 2001

JUDGMENT OF THE COURT

On the 28th of April 1999 Nanise Wati and the Appellant Daniel Azad Wali were charged with the murder of Reena Bibi on the 5th of October 1996. The trial began in the High Court on the 12th of August 1999 and on the 20th of September 1999 Nanise Wati and the Appellant were found guilty of murder and sentenced to life imprisonment.

Nanise Wati did not appeal against her conviction and sentence but the Appellant did and his appeal is now before the Court.

Altogether 16 grounds of appeal were given but before this Court these were reduced to three which can be conveniently summarised as:

- (1) Failure by the trial judge to give the assessors an adequate or proper direction on corroboration of the evidence of an accomplice Sophie Radrodro.
- (2) Failure by the trial judge to comment adequately or at all on inconsistencies in the evidence of Prosecution witnesses.
- (3) Failure by the trial judge to direct the assessors on important facts which favoured the defence.

THE FACTS

The facts of the case are as follows:

The deceased, Reena Bibi was staying in the bottom flat at 48 Milverton Road, Raiwaqa which she was renting from one Mohammed Shaheem. As Shaheem had moved to live in America his brother, Mohammed Yusuf looked after the house which contained two flats. The one rented by Reena Bibi had two bedrooms, a sitting room and a kitchen and a place for washing clothes. There was entrance to this flat through the garage. At the time of her death, Reena Bibi was staying alone and had been renting the flat since February 1996. Since September 1996 the top flat had been vacant and Yusuf used to come every day about 6.00 p.m. and switch on the verandah lights and turn them off each morning about 6.00 a.m. He lived nearby. He did not touch any lights that belonged to the flat rented by Reena Bibi. On Wednesday 2nd October 1996 Yusuf switched the lights on of the top flat at about 6.00 p.m. and met Reena Bibi that day. The next morning about 6.00 a.m. he switched off the lights and noticed the porch light of the bottom flat was still on. He took no notice of

this. On Friday, the 11th of October 1996 when Yusuf went to switch off the lights about 6.00 a.m. he noticed a bad smell and saw flies coming from Reena Bibi's flat. He informed the Police who came and broke open the flat and found Reena Bibi's dead body in her bedroom.

Inspector Jerome Kanimea of the Raiwaqa Police Station came to the flat with other Police shortly after 8.30 a.m. He found the doors and windows of Reena Bibi's flat securely locked. There was a bad smell coming out of the flat. The doors were forced open with a piece of iron that was found in the area. The bedroom in which the body of Reena Bibi was found was also locked. When Inspector Jerome entered the room he saw the body of the deceased lying on a mattress. The body was decomposing with maggots all over the floor. There were blood stains scattered in the room and blood splashed on the walls. There were two suitcases in the room which appeared to be ransacked. One suitcase was closed and the other was open with clothes scattered. There were no keys and the doors and windows were locked. Photographs were taken. Inspector Jerome found sandals outside the doors (these were later proved to have belonged to Nanise Wati). The beads that were hanging on the doorway were broken and scattered on the garage floor.

A Police photographer took photographs of among other things the door lock leading to the garage. There was tape covering the key hole of the lock which was of a type that could be locked both from inside and outside. The deceased was taken to the CWM Hospital mortuary where the body was identified by Jane Aisha Bibi the sister of the deceased.

The post mortem was carried out by Doctor R.B. Cayari who said that in his opinion the cause of death was a "slashed injury to the neck" which caused severe haemorrhaging, and that a sharp instrument was used to cause the injury.

There was evidence that the door from the carport appeared to be more frequently used for going in and out of the flat.

Detective Sergeant Ram Jattan was appointed the Investigating Officer on 11th October 1996. He said the doorway from the carport/garage had beads hanging from it and there were broken beads lying on the floor of the house. He said there appeared to be a struggle at the entrance and the person or persons who killed the deceased left the flat locked after they had killed her. No keys or any murder weapon were found at the scene.

On 14th October 1996 a Prosecution witness Aisake Pene was interviewed by the Police. He said he came to know Reena Bibi in July 1996 and from September 1996 spent week-ends at her flat. The two were like husband and wife. Pene said that because of pressure from the Police he admitted in an interview that he killed Reena Bibi. Later he denied this to a senior Police Officer DPC/S Kevueli.

Aisake Pene had first denied going to Reena Bibi's flat at 48 Milverton Road, Raiwaqa on 5th October 1996. He was confronted by defence witness Talim Buksh during the interview. Buksh said that on the 5th of October 1996 which was a Saturday he took Pene to 48 Milverton Road about 2.30 p.m. Buksh who was a part-time taxi driver said the taxi fare was paid by a lady from the place where Aisake Pene disembarked.

SSP Kevueli Bulamainaivalu said that on 15th October 1996 he walked into the room where Aisake Pene was being held. Superintendent Kevueli at the time was Divisional Police Commander/Southern. He said he wanted to know the progress made in the investigation. He said Aisake Pene was not interviewed at that time. Superintendent Kevueli said Aisake Pene at first admitted to him that he had killed the deceased, Reena Bibi by stabbing her with a knife in her neck and he threw the knife at the Cathedral.

Superintendent Kevueli said Aisake Pene had told him he had stabbed the deceased in front of the kitchen near the bedroom door but Superintendent Kevueli said that this could not be true because of the evidence the Police had as to where the deceased was found. Superintendent Kevueli then said that before he left the room Aisake Pene denied killing Reena Bibi.

Another witness for the Prosecution Mafai Mausio said he was a school teacher and assisted in organising a Rotuman Rugby Tournament. He said Aisake Pene was his nephew and had played rugby on the 5th of October 1996 for the Satarua Team. He said that Pene did not leave the ground on the 5th of October 1996.

A very important witness for the Prosecution was Sophie Radrodoro who said that she knew the deceased, Reena Bibi quite well. They were both prostitutes and first met in a Club. The two were very good friends.

Sophie Radrodoro lived with Reena Bibi in her flat at 48 Milverton Road from about July to September 1996. She said Reena Bibi used to wear very heavy jewellery and had good clothes. She said that at one time Nanise Wati also stayed with Reena Bibi before Sophie Radrodoro did. Reena Bibi had accused Nanise Wati of stealing her clothes and jewellery. Reena Bibi kept her jewellery inside a jewellery box which was kept in a suitcase. The flat had two bedrooms and in the spare bedroom Reena Bibi kept her shoes and clothes. All three - Sophie Radrodoro, Reena Bibi and Nanise Wati knew each other well. Sophie Radrodoro said Nanise Wati stayed with the Appellant at 66 Nayau Street, Samabula. They all used to visit various clubs and public bars.

Sophie Radrodoro said that on Saturday 5th October 1996 she went to Chequers Night Club about 7.00 p.m. She met Nanise Wati and the Appellant there. Nanise Wati asked Sophie Radrodoro if she could take them to Reena Bibi, as Nanise Wati knew Sophie

Radrodro and Reena Bibi were good friends. About 10.30 p.m. the three left for Reena Bibi's flat in a taxi driven by Pita Nasedra. There was another person with them. The Appellant led them to the taxi which was in Waimanu Road, Suva. The Appellant sat in the front passenger's seat while Nanise Wati, Sophie Radrodro and another person sat in the back of the taxi. They all went to 48 Milverton Road and got off at the driveway. The taxi drove away with the other person. The driveway leading to the house was quite steep. Sophie Radrodro said she knocked at the door and called out Reena Bibi's name. Reena Bibi upon hearing her voice opened the garage/carport door. Sophie Radrodro said she took them there because Nanise Wati had told her that she had something to give to Reena Bibi. After she had opened the door Reena Bibi started to walk back inside followed by Sophie Radrodro. Sophie Radrodro said Reena Bibi must have walked back in the passage a few steps and then turned back and when she did so she saw Nanise Wati and the Appellant. Nanise Wati by this time had already crossed the doorway. Reena Bibi rushed back, going past Sophie Radrodro and tried to push the Appellant out of the house. A struggle followed between Reena Bibi and the Appellant at the doorway. During the struggle bamboo beads which were hanging at the doorway broke and fell on to the floor. Sophie Radrodro said the Appellant dragged Reena Bibi into the bedroom. Nanise Wati followed the Appellant into the bedroom but before doing so had closed the garage door. As Reena Bibi was dragged into the bedroom she kept yelling, "Sophie why are you doing this to me?" After a while the yelling stopped. Sophie Radrodro said she was so scared and just stood in the passage until finally she went into the bedroom and saw what had happened. She said she saw Reena Bibi lying on a mattress and blood coming from her neck. Blood was all over the place. She said she saw the Appellant kneeling down near Reena Bibi. She said she saw a blade not very long in the Appellant's hand. This blade was covered with blood. At this moment Nanise Wati said to Sophie Radrodro "Do you remember what you and Reena said about me?"

Sophie Radrodro said she saw Nanise Wati taking rings from Reena Bibi's fingers and the Appellant taking ear-rings, bracelets and chains from Reena Bibi's body. Reena was wearing those that night. Sophie Radrodro said she saw Nanise Wati opening Reena Bibi's suitcase, taking out the jewellery box and she took some clothes out. Sophie Radrodro identified the suitcase from which Nanise Wati had taken the jewellery box and the clothes. She said Nanise Wati packed all these items in Reena Bibi's travelling bag. Sophie Radrodro said she saw the Appellant covering Reena Bibi's body with a brown blanket and at that time the Appellant said to her, "If ever you say what happened to Reena Bibi then the same thing will be done to you Sophie". Sophie Radrodro said she was very scared. She said that Nanise Wati took Reena Bibi's shoes and three dresses from the other bedroom and she later identified those dresses in Court when shown to her as belonging to Reena Bibi.

Sophie Radrodro then said that the Appellant locked the flat. She said he put a tape on the lock. The lock was in the door-entrance from the garage. The tape was placed from inside in the key hole and the Appellant took it from Nanise Wati's bag. She said the Appellant had broken this tape by his teeth. Sophie Radrodro identified this lock when it was produced in Court. She said the Appellant then went into the kitchen and washed his hands.

After the Appellant had locked the flat all three came out and walked down the driveway. Sophie Radrodro said that when they were out of the flat the Appellant again threatened her saying if she ever told any one what she saw there that night the same thing would happen to her. She said the Appellant told her that if Police ever questioned her she was to say that she was taken in Benjamin Bharat's taxi with Dean. Appellant said Sophie Radrodro could always go to him for any assistance.

Sophie said that about a week after Reena Bibi's body was found she met the Appellant. He came and held her hand from the back. The time was about 8.00 p.m. The Appellant asked her what she had told the Police. She said she told the same story that the Appellant had told her to say about Benjamin Bharat and Dean. Sophie Radrodro said that the Appellant then gave her \$200.00 cash.

Sophie Radrodro said that in 1997 she went to the place where Nanise Wati and the Appellant were staying. Nanise Wati was there and gave her \$60.00 and a sleeveless dress belonging to Reena Bibi. Sophie Radrodro identified this dress in Court.

In cross-examination Sophie Radrodro said she told lies to the Police when first questioned. She told the Police that Benjamin Bharat had taken her and Dean to Reena Bibi's flat that night. Dean was carrying a bag. She told the Police that Dean was dropped at Reena Bibi's flat and Benjamin Bharat took her back to the Chequers Night Club. She said she was scared and she was told to give the story about Benjamin Bharat and Dean to the Police by the Appellant. Sophie Radrodro said she could not hold the truth back any longer and told the truth to the Police in 1999. She admitted under cross-examination that when confronted with Benjamin Bharat by the Police she accused him of being the taxi driver who took her to Reena Bibi's flat that night. This was false.

We interpolate here that the Police could not trace anyone by the name of Dean to connect him with the murder although they interviewed more than 200 persons by the name of "Dean".

In her evidence Sophie Radrodro said, "I could not take any more. I had to tell the truth. I had no one in whom I could confide".

Sophie Radrodro also said that the reason why she finally told the truth about the murder was that she had confidence in the new team of Police Investigators brought into the case.

THE JUDGE'S SUMMING-UP

After dealing with other evidence the trial judge then came to the evidence of Sophie Radrodro. He told the assessors she was a very important witness for the Prosecution but one who had made statements inconsistent with the evidence she gave in Court. He told them that the statements, which were put to her were not in any way part of the evidence in the trial and that they had to put their contents out of their minds when considering the evidence. He said that the inconsistent statements were something which the assessors had to take into account in considering her credibility as a witness. He reminded them that it was well after two years that she implicated the two accused Nanise Wati and the Appellant in the killing of Reena Bibi. He then told them that in law Sophie Radrodro was an accomplice and so was a witness whose evidence needed to be scrutinised with the greatest care. He said the evidence of an accomplice was generally suspect because there may be all sorts of reasons for an accomplice to tell lies to implicate other people. She might do so in order to shift from herself the blame for the crime or she might have some equally strong motive.

He said at page 30 of the record, "Where a witness in Court is an accomplice in an alleged crime, it is the duty of the Court to warn you that although you may convict upon her evidence, it is dangerous to do so unless her evidence is corroborated.

Corroboration is any evidence which comes from an independent source and which affects an accused person by connecting or tending to connect him or her with the crime in question.

It must be evidence which implicates an accused person, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the accused person committed it."

He then referred to the inconsistent statements Sophie Radrodro had made and said that because of this it must make the assessors seriously wonder whether she could be believed or not. He then said:

"As a matter of human experience if a witness has given two different stories of the same incident or event, 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. It is for you to decide whether Sophie Radrodro told the truth from the witness box. Obviously if Sophie Radrodro has given two completely different versions of the events she is describing, then you will be justified in treating her evidence in this Court with suspicion. It was not until she gave her statement on 14/1/99 when she implicated these two accused persons. Sophie Radrodro said she was threatened by the second accused, Daniel Wali and she was scared. She said she told the truth to the new team of police who were investigating this crime. This was before any question of granting immunity from prosecution ever arose.

Credibility of Sophie Radrodro as a witness is therefore of the highest importance because if she is believed on her evidence, then clearly you may think the case against each of the two accused persons - Nanise Wati and Daniel Wali has been made out.

In assessing and deciding whether or not Sophie is Radrodro is reliable and trustworthy as a witness, you will need to look at and consider carefully all the relevant evidence and circumstances of this case.

You may think that there are several items of evidence which though not amounting as such to corroboration of her evidence in relation to these two accused persons are nonetheless of a nature which, if believed, may be regarded as tending to support her general reliability as a witness. These items of evidence include - the evidence of EMILY CAKAU (PW15) the barmaid at Chequers Night Club. This witness said that in the night of 5/10/96 she saw Sophie Radrodro, a.k.a. Sophie Naisara, Nanise Wati and Daniel Wali at the Chequers Night Club. She knew them well. She saw the three walking out of the club at 10.00 p.m. that night. Daniel Wali had denied going to the Club in his interview. Sophie Radrodro had said the three went to Reena Bibi's flat that night from Chequers Night Club. Nanise Wati had said in the interview that she went to Signals Night Club that night and was there till about 1.00 a.m. the following morning. Emily Cakau said 5/10/96 was a Thursday. The defence witness, Pita Nasedra, has said that he was drinking with the accused, Daniel Wali at Chequers Night Club in the night of 5/10/96 which was a Saturday."

After mentioning evidence which he said the assessors might think corroborated Sophie Radrodro's evidence against Nanise Wati he then turned to evidence which they might think corroborated Sophie's evidence against the Appellant and said this at pages 33 and 34:

"Corroboration of Sophie Radrodro's evidence in relation to both the accuseds - Nanise Wati and Daniel Wali is also provided, you may think, by the broken bamboo beads that were found lying on the garage floor. Sophie Radrodro had stated that these beads were hanging on the doorway of Reena Bibi's flat and were broken during the struggle. Reena Bibi and Daniel Wali had a struggle when Reena Bibi was trying to push Daniel out of her flat on the night of 5/10/96. These broken beads are Exhibit 20.

Corroboration of Sophie Radrodro's evidence in relation to Daniel Wali is also provided, you may think, by the lock on the door. Sophie Radrodro had said as Daniel Wali was locking Reena Bibi's flat to get out he had placed a tape on the door lock. This door lock is Exhibit 6 showing the tape on the keyhole.

Corroboration of Sophie Radrodro's evidence in relation to Daniel Wali, is also provided, you may think by the evidence of Dr. Cayari, the Pathologist. Dr. Cayari had said that in his opinion a sharp instrument was used to inflict that injury in the neck of the deceased, Reena Bibi. Sophie Radrodro in her evidence had said she had seen Daniel Wali kneeling down near Reena Bibi's body in the bedroom with a sharp object like a small knife in his hand. The knife had blood on it as well as on Daniel Wali's hand."

He then concluded this part of his charge by saying:

"As we have noted Sophie Radrodro is an accomplice to the alleged murder of Reena Bibi. Therefore in assessing and evaluating her evidence you must bear in mind, Lady and Gentlemen assessors, the warning I have already given you that although you may convict on the evidence of Sophie Radrodro, it is dangerous to do so unless her evidence is corroborated."

At page 39 the learned judge then considered the evidence of the defence and said this:

"And now we come to the defence and you cannot of course reach a considered opinion as to accuseds' guilt or innocence until you have considered all the evidence including the accuseds' own version of what had happened. The defence is a complete denial of any involvement with the victim in any way on the day she met her death. In their respective interviews both denied going to the flat of Reena Bibi at 48 Milverton Road, Raiwaqa in the night of 5/10/96. I have dealt with their

interviews earlier. When the two accused were charged they refused to give any statements. Any person suspected of a criminal offence or charged with one is entitled to say nothing when he or she is questioned about it. You may not therefore attach any adverse significance to Nanise Wati's and Daniel Wali's silence or their refusal to answer questions."

He then referred to the fact that the Appellant had gone into the witness box and given sworn evidence which he was not obliged to in law.

The judge then mentioned the evidence of the Appellant in some detail and then concluded his summing-up.

The only substantial ground of appeal relates to the matters the Judge put to the assessors as capable of corroborating Sophie Radrodro's evidence that Wali killed the deceased. The three factors - i.e. the discovery of beads on the floor, the police evidence of tape on the lock and the pathologist's evidence of a knife wound - tend to support her evidence that there was a struggle at the entrance; that the lock was taped; and that the victim's throat was slashed. But none of this amounts to independent testimony tending to show that the person involved in these events was Wali. There is only Sophie's word for that, and she could have said the same about the mysterious "Dean" or Pene or any other man. Accordingly we are driven to the conclusion that this evidence put to the assessors as corroboration did not satisfy the test of implicating the accused which has now become firmly established as part of the Criminal law of Fiji.

As much has been said in this case about corroboration we consider that time has come to examine the current law in Fiji on this subject. We first note that corroboration as a rule of law was abolished in New Zealand many years ago and more recently in England. We are also aware that recommendations were made in Fiji to the Law Reform Commission to abolish the law on

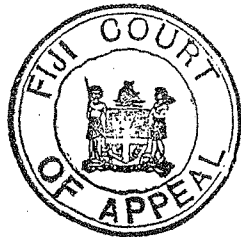
corroboration and to replace it with a general judicial discretion to give whatever weight the Court thought it should be given to evidence which might be considered unreliable for various reasons. Unfortunately we do not know how far these recommendations have progressed.

RESULT:

Appeal allowed. The conviction and sentence are quashed and a new trial is ordered.

M. Casey
.....
Sir Maurice Casey
Presiding Judge

R. Gallen
.....
Sir Rodney Gallen
Justice of Appeal



John E. Byrne
.....
Mr. Justice John E. Byrne
Judge of Appeal

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