

IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

CRIMINAL APPEAL NO. AAU0011/1999S
(High Court Criminal Case No. HAC 015 of 1997)

BETWEEN:

ENELE CAMA

Appellant/Applicant

AND:

THE STATE

Respondent

APPLICATION FOR LEAVE TO APPEAL

1. In a minute dated 18 October 2001 I dealt with the applicant's application for an extension of time for filing a notice of appeal and granted it. In relation to his application for leave to appeal (see s 21(1)(b) of the Court of Appeal Act as amended) I stated that it was not possible to make a decision without considering the trial evidence and I directed that the notes of evidence should be prepared and placed before me. I have read the notes and considered the written submissions made by both parties at an earlier stage.

2. The applicant's trial for murder commenced on 2 April 1998. The accused was represented by counsel, and continued to be represented by counsel throughout the trial.

3. In opening the prosecution stated that the case it would present was that the accused caused the death of the deceased by the unlawful act of stabbing him in the head with a knife, intending to kill him or cause him grievous bodily harm. In brief, the deceased and the accused had been drinking during the day, they went to Miss Savu's home, an argument developed and the accused stabbed the deceased.

4. Miss Savu stated that on her way to do some shopping she met the deceased and another person. She invited the deceased to her house. Both he and his companion were drunk. On returning home she joined some other people who were there drinking. The deceased arrived and they drank for some hours until they ran out of beer. In the meantime the accused had joined them. When Miss Savu went to prepare some food she found that all the groceries she had bought were missing. She questioned the deceased and one of his companions about a plastic bag of groceries which they had, which she suspected contained the missing articles. Miss Savua told them to leave. An argument developed over the groceries, and she saw the accused take a kitchen knife. She asked him to give the knife back because she was sure there is going to be a fight but he declined. As the deceased went to leave words were exchanged between the accused and himself and the deceased pulled the accused by the singlet. The witness followed them outside but did not see what happened at that crucial time. She saw the deceased lying on the ground, unconscious, and tried to revive him. She found he was bleeding from a gash in his head. He was taken to hospital but died shortly afterwards.

5. The next witness, Lepani Vakaotia was one of the accused's drinking companions. He said the deceased became angry when the accused challenged him with having taken Miss Savu's groceries. The deceased made to attack the accused but the witness told them if they were going to fight they would have to go outside. He did not see what happened but heard someone fall to the ground and then found the deceased lying there.

6. The next witness, Samuela Navali was also at the party at Savu's house. He did not see anything of the encounter between the accused and the deceased. Miss Savu called out to the accused to bring the knife back, but it seems this was after stabbing. After this there was some formal evidence and several statements was read by consent. A police constable deposed that the following morning he located the accused and under caution asked whose knife was used in the stabbing to which the accused

answered it was Miss Savu's. At the officer's request the accused went and found the knife. The hospital medical officer who first attended the deceased on admission gave evidence that the deceased suffered a single stab wound above the left ear.

7. At this stage, 6 April, the trial was adjourned with the intention that the hearing would continue in the absence of the assessors to determine the admissibility of a detailed written statement made by the accused to a police officer the day after the stabbing. That there would be such a challenge had been foreshadowed before the opening of the trial. The Court had requested counsel for the accused to file a statement detailing the grounds on which the objection to admissibility would be based. When the trial adjourned on 6 April the statement was still not available, a state of affairs which the Court criticised. The hearing adjourned on the basis that the statement would be provided by 8:30 a.m. the next morning. When Court resumed at 9:30 a.m. on 7 April counsel stated he was no longer objecting to the admissibility of either the caution interview or of the brief statement made by the accused when charged. These statements were then produced. The accused's caution statement generally was consistent with the evidence that has already been related. The accused said he had taken the kitchen knife "in case someone do something to me" when he would stab that person. He said the deceased came over to him and threw a punch which however did not connect. He then pulled the accused by the shirt. The shirt tore and then the accused stabbed the deceased with the knife, once. In the charge statement he said he had done this through drunkenness and did not mean to kill the deceased.

8. A pathologist gave evidence that the wound had penetrated the dura and had gone into the left temporal lobe of the brain. The total depth of penetration from the point of entry was about 4.5 cm. The pathologist said it would have required considerable force to cut through the skull. In his opinion death was caused by loss of blood, internal and external, from the wound. A number of statements were read to the Court by consent but they do not add anything of critical significance to the evidence already recited.

9. When on 8 April, the fifth day of trial, the prosecution case closed accused by his counsel elected to give evidence. In his opening counsel said the defence was based on the absence of intention or knowledge to kill or cause grievous bodily harm. It was not disputed that the accused stabbed the deceased, that it was an unlawful act and that it caused the victim's death. In his evidence the accused said the answer he gave about why he had the knife meant that if someone wanted to do something to him he could protect himself. He said the deceased had hit him with one punch and then grabbed his T- shirt. He was scared when the deceased started pulling him outside. He said that the only thing that came to his mind was to find a way of getting away. "When I came to my senses (the deceased) was lying on the ground." The accused then realised he had the knife in his hand. He had not known the deceased previously. He said he did not know he had stabbed him, he had not intended to stab him and he did not intend to stab him in the head. He had drunk a considerable amount during that day. In cross-examination he denied that he had said anything provocative to the deceased, although he agreed he had spoken to him, and that the deceased then came back towards him and threw a punch at him. In his caution statement he had said he had stabbed the deceased on the left side of the head, and the statement also contained an account of a demonstration of the stabbing given by the accused. In cross-examination he accepted that in relation to many important answers in his statement he was "totally himself" but not when he gave the answers to which the reference has just been made. He maintained that when he went to the kitchen door he had forgotten he had the knife. He said that at the time he hit the deceased he did not know what he did.

10. In his final address prosecution counsel, referring to the accused's statement that he did not know that he had the knife and did not know what he was doing, described this as unbelievable, and contrasted it with what had been said in the caution statement. Counsel said that the accused's subsequent actions of taking the knife with him and washing it, and remaining in his house, showed that he knew what he had done. The medical evidence indicated that considerable force had been used. Then

prosecution counsel said that defences of intoxication and self defence had been presented. He dealt with those, saying that in relation to self defence that the force used had to be reasonable in the circumstances. He pointed out that the deceased was unarmed and submitted that to stab an unarmed, intoxicated man in the head was a disproportionate response. He also pointed out that the accused had not suffered any injury. Counsel for the defence in his address pointed to inconsistencies in the evidence of Miss Savu. He said that intoxication played an important role. The crux of the defence was whether the necessary intention or knowledge to cause death or grievous bodily harm had been proved. He did not rely on intoxication as a defence, which in any case is precluded by law, and the notes make no reference to self defence. Counsel described the incident as "unfortunate."

11. Following the addresses there was a record of a discussion in chambers between the Judge and Counsel with the accused present. Counsel accepted that in the view of the concessions there had to be at least a finding of manslaughter. Counsel for the defence accepted that provocation had not been raised and was not available. Notwithstanding that counsel said he had not relied on self defence, the Judge said he intended to direct on that subject. The Judge said he would give a direction about the relevance of drunkenness but only on the question of its effect on intent. At the conclusion the Judge said:

*"I intend to direct the only issue is intent or malice
aforethought. If that is proved it is murder, if not proved it
is manslaughter. "*

12. Both counsel agreed and did wish to raise anything further. The summing up took from 9:45 to 11:40 am, subject to a break the length of which has not been recorded. After a retirement of less than half an hour the assessors returned with a majority opinion of guilty of murder, one assessor being of the view that the verdict ought to be manslaughter. The court delivered judgment finding the accused guilty of murder but there is no record of the terms of the judgment.

13. In the appellant's first letter he made the following points:

- (1) No one saw him strike the deceased.
- (2) He wished the court to hear his case on self defence or provocation.
- (3) The reason he was holding a knife was that he wanted to open a tin of beef.
- (4) When they fell down together by mistake the knife must have struck the deceased's head but he did not mean to hit him.
- (5) He made admissions to the Police because they forced him to give the statement while he was drunk.

14. The appellant's subsequent letter again referred to the question of intent, and challenged any implication that he brought the knife from the kitchen in order to use it on the deceased.

15. Dealing with the points raised:

- (1) Even putting aside the accused's own statement, there was ample evidence to establish that the accused stabbed the deceased.
- (2) There was no sufficient foundation for putting provocation to the jury. The actions of the deceased would not have deprived the ordinary person of the power of self control. I will return to the subject of self-defence.
- (3) & (4) These were questions of fact to be decided at trial. They do not constitute arguments on an appeal.

(5) No foundation exists for raising this now.

16. This leaves the question of self defence. I have been unable to ascertain whether the Judge directed the assessors on self defence. A search has been made at my request but no record or notes of the summing up has been found. State counsel was unable to say, with any certainty, and I was told the whereabouts of defence counsel were unknown. The Judge is no longer serving in Fiji. The record of the discussion before the summing up (see para 11 above) is ambiguous on the point.

17. All this illustrates the problems that arise when it is sought to bring an appeal so long after the trial. Had I known of the difficulties at the time, I would not have extended the time for appealing.

18. A person may use such force in self defence as is reasonable in the circumstances as he honestly believes them to be. He is not expected to weigh to a nicety the exact measure of his necessary defensive action.

19. It is apparent that defence counsel did not rely on self defence. His tactics were to try to raise a reasonable doubt about intent. The accused's evidence supported that. Self defence, involving a deliberate action, would have been inconsistent with the main line of defence. However, that would not absolve the Judge from the need to give a direction on self defence, provided there was a tenable foundation for it in the evidence.

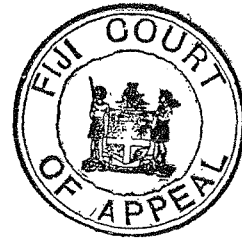
20. The question is quite finely balanced but I do not consider that the evidence was sufficient to oblige the Judge to put self defence to the assessors. The accused had had his shirt pulled, and may honestly have feared that worse would follow. However, to immediately strike a forceful blow to the head, with a knife, could not constitute reasonable force, on an objective basis.

21. In summary, my opinion is that first, the applicant cannot overcome the initial hurdle of showing that no direction on self defence was given. Second, even assuming that no direction was given, I do not consider one was required.

22. Since the applicant has not shown any tenable ground of appeal, I refuse the application for leave to appeal

23. Under s35(3) of the Court of Appeal Act the applicant is entitled, if he so elects, to have the application for leave determined by a full bench of judges.

DATED at Suva this 7 May 2002.



Thomas Eichelbaum

.....
Thomas Eichelbaum
Justice of Appeal