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

CRIMINAL APPEAL NO. AAU0039 OF 1998S
CRIMINAL APPEAL NO. AAU0019 OF 2000S
(High Court Criminal Case No. 2 of 1998L)

BETWEEN:

LEPANI MAIWAQA

Appellant

AND:

THE STATE

Respondent

Coram: Sheppard, JA
Gallen, JA
Ellis, JA

Hearing: Tuesday, 12th August 2003, Suva

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

Date of Judgment: Thursday, 14th August, 2003

JUDGMENT OF THE COURT

The appellant was convicted on a charge of murder contrary to section 199 of Penal Code Cap.17 in the High Court at Labasa in November of 1998. On the 9th of November 1998 he was sentenced to life imprisonment.

On the 30th of November 1998 the appellant filed a petition of appeal against his conviction in the High Court at Labasa. That appeal was filed within time.

On the 16th of May 1998 having received no information regarding the appeal the appellant filed an application for leave to appeal out of time and on the 24th of May 2000 filed a further appeal against the conviction.

The application for leave came before the President on the 9th of December 2002. He determined that the initial petition had been filed within time and that there was no need to consider the further petition or the application for leave. The President also directed that the substantive appeal be listed for hearing. Since that time amended grounds of appeal on behalf of the appellant have been filed and leave is sought for the filing of them.

This case developed in an unusual way before the High Court. A brief account of the background will suffice. On the morning of 21st April 1998 the victim Sebastiano Vereti was found dead by the roadside in Taveuni. He and others including the appellant and one Rupeni Waqanitoga had been drinking together the previous evening and it was plain that the death followed a serious assault involving a final act of pushing a beer bottle up the anus of the victim.

Following discovery of the body Rupeni took the accused to the Police Station and in short order the accused had signed a full confession to the killing. Defence counsel prepared for trial on this basis and his efforts and instructions were concentrated on the drunkenness of the accused and its effect on the accused's intention. During the prosecution case the confession statement was not impugned and the identity of the killer was not an issue. After the close of the prosecution case the accused instructed his counsel for the first time that he was not the killer, that Rupeni was, and that his confession was made as a result of threats from Rupeni. Rupeni had by then been killed by another man.

Counsel's response was to seek to withdraw from the case. The trial Judge, quite correctly in our view, refused counsel's request.

The accused then gave evidence maintaining he was not the killer and giving his explanation why he had wrongly confessed. Counsel then applied to have a prosecution witness recalled. This was refused. Counsel then addressed and the defence submitted in the alternative that identity was not proved, but if it was drunkenness negated intention. The assessors and the Judge rejected defence contentions and the accused was convicted.

It now transpires that the man who killed Rupeni is held in a mental institution.

Counsel for the appellant raised with us in Chambers the possibility of enquiries revealing the situation maintained by the appellant as being true.

Notwithstanding the above possibility counsel for the appellant filed comprehensive written submissions on the eve of the hearing before us containing numerous criticism of the trial and the Judge's Summing Up. It is unnecessary to detail them as counsel for the State, properly in our view, submitted that although he felt able to contest successfully some of the criticisms, overall he felt bound to concede that the accused had not received a fair trial and that the appeal should be allowed and a new trial ordered.

We too have read the appellant's submissions and agree that a new trial should be ordered. We accordingly allowed the appeal and ordered a new trial. We said we would confirm this in writing which we now do.

There is however one matter raised by the appellant which does require a statement of our views. The trial Judge in his summing up said:

> ***"The standard of proof in a criminal case such as this one is one of proof beyond any reasonable doubt. This means, Lady and Gentlemen Assessors, that you must be satisfied as to feel sure of the guilt of the accused person before you express an opinion that he is guilty of the charge brought against him."***

and then:

> ***"If you have any reasonable doubt so that you do not feel sure as to whether or not the accused person committed the offence of murder or manslaughter then in that case it will be your duty to express an opinion that the accused is not guilty of either of those offences. It is only if you are satisfied so that you feel sure that the accused person committed the offence of either of murder or manslaughter you must express an opinion that the accused is "guilty" either of murder or manslaughter depending on how you assess this case."***

Mr. Singh claimed that this amounted to a misdirection because of the use of the words "feel sure". He submitted that these diminished or confused the concept of "reasonable doubt". He relied on the biting words of the judgment of the High Court of Australia in ***R v. Green*** (1971) 126 CLR 28,32. The summing up in that case involved an elaborate direction on the meaning of "reasonable doubt" and nothing like the comparative simplicity of the words used here. However the headnote we think captures the correct sense of proportion:

> ***"It is undesirable for a judge directing a jury upon the onus of proof in a criminal trial to depart from or attempt to define with precision the traditional direction that they must be satisfied of the guilt of the accused beyond reasonable doubt.***
>
> ***A reasonable doubt is a doubt which the particular jury entertains in the circumstances. It is a misdirection to state that a reasonable doubt is to be confined to "rational doubt" or a "doubt founded upon reason."***
>
> ***It is a misdirection to suggest to the jury that a comfortable satisfaction of the guilt of an accused person is enough to warrant conviction."***

In responding to Mr. Singh's criticism Mr. Allan told the Court that the reference to being "sure" was a standard routine direction in Fiji. This finds strong support in Archbold's Criminal Pleading Evidence and Practice (2003) at para. 4.380 where it is said:

> ***"The judge must always direct the jury upon the burden and standard of proof. No formula has to be followed slavishly, but two points must be made clearly: (a) the burden of proof is upon the prosecution – it is for the prosecution to establish the defendant's guilt; (b) before the jury can convict they must be satisfied beyond a reasonable doubt (or be sure) of the defendant's guilt".***

We are also able to say that this is the position in New Zealand and the use of the words "to be sure" or "to be satisfied" are regularly used. Since preparing this decision we have received from Mr. Allan copies of decisions in this Court in ***Baram Deo*** (CA10/1988 delivered 18 May 19990) and ***Ram and Sami*** (CA.AAU0004 and 5 of 1995S delivered 12 February 1998). The earlier case endorsed the position stated in Archbold while in the latter the Court criticised the repeated reference to feeling sure and satisfied.

In ***Baram Deo*** the Court expressly approved the model direction in the 43rd edition of Archbold (para. 4.425):

> ***"The prosecution makes this allegation of crime and it is therefore for the prosecution to prove it – that burden, or obligation, remains on the prosecution throughout the case. Before you are entitled to convict, the prosecution must have proved the defendant's guilt beyond any reasonable doubt. If guilt has been proved to that extent, then, and only then, will it be your duty to convict. Unless you are sure of guilt beyond any reasonable doubt, it will be your duty to acquit."***

In our view the decision in ***Baram Deo*** states the position correctly in Fiji. We therefore confirm that what was said by the trial Judge in the two quoted passages are proper directions and would not sustain an appeal.

Nevertheless for the reasons earlier given the result is that the appeal is allowed, the conviction quashed, and a new trial ordered.

... ...
Sheppard, JA

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Gallen, JA

... ...
Ellis, JA

FIJI COURT OF APPEAL

Solicitors:

Office of the Legal Aid Commission, Suva for the Appellant
Office of Director of Public Prosecutions, Suva for the Respondent

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