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

CRIMINAL APPEAL N0. AAU0007 OF 2005S
[High Court Criminal Action N0.HAC025 of 2003L]

BETWEEN:

LUTU CEVAKIBAU

APPELLANT

A N D:

T H E S T A T E

RESPONDENT

Coram: **Ward, President**
Gallen JA
Ellis JA

Counsel: **Appellant in person**
Tunidau for respondent

Hearing: **25 July, 2006**

Date of Judgement: **Friday, 28 July 2006**

JUDGMENT OF THE COURT

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[1] The appellant was convicted of the murder of his six year old daughter and sentenced to life imprisonment with a recommendation that he serve a minimum term of thirteen years. He now appeals against both conviction and the recommendation in the sentence.

[2] The appellant is unrepresented and his grounds of appeal against conviction raise two main topics:

1. the problems arising from his lack of representation in the trial; and
2. that the evidence did not prove malice aforethought and the appellant's actions were done with the intention of teaching the child to be a good daughter.

[3] At the hearing before this Court, counsel for the respondent suggested the Court should also consider that the trial judge did not raise the possibility of the actions having been the result of provocation and this Court raised the lack of any direction on the possibility of a verdict of guilty of manslaughter.

[4] The prosecution case was that the appellant had given his daughter a pencil to take to school. As he did so, he swore at her and marked the pencil telling her that, when she returned after school, the pencil was not to have been sharpened beyond the mark.

[5] On her return, the accused asked to look at the pencil and, on seeing that it was sharpened beyond the mark, started to beat her. He first slapped her and then used a piece of firewood he picked up from the cooking area to beat her. The child's mother asked him to stop but he threatened to cut them both with a cane knife. The beating was of such force that the wood broke into pieces as did two or three more pieces. He was hitting her on her back and her head. At one stage, he told her to run around the house and then kicked her and beat her with a broom handle.

[6] When the mother gave her evidence, the only matter of dispute raised by the appellant was to deny he kicked the child.

[7] Another witness described how the appellant was hitting the little girl on her head. When she fell down, he picked her up and continued to beat her on the head even though blood was, by then, coming out of her mouth.

[8] Eventually the child was left lying the floor. She was badly marked from the beating and was described by a witness as 'snoring'. The mother told the court that she asked to take the child to hospital but the appellant replied that, if she was dead, then she should go and dig a hole and bury her.

[9] Eventually some neighbours took the child to the hospital. She died some days later without having recovered consciousness. She had multiple injuries from the beating. Pieces of coconut from the broom were embedded in her skin and the colour of the wood with which she had been beaten was impressed on her body. The mother told the court that the child had been beaten many times by the father and the medical evidence spoke of numerous old injuries indicating severe abuse previously. The cause of death was head injury resulting in intracranial haemorrhage and oedema.

[10] The appellant was seen by the police on the same day. He admitted hitting the girl that day and on previous occasions. That day he said he had hit her with the wood and the broom stick on her legs, sides and thighs. Once, when she ran out of the house, he told her to come inside and to bring another piece of wood with which he then beat her. He denied he had refused to allow her to be taken to the hospital but said he had told his wife that they should pray first and they did so for about one hour. When she was then taken, he remained at home, he said, and prayed.

[11] He was asked why he beat her so much and replied, "I was really angry as this was not the first time she had been telling lies to me and the students have been telling me about her behaviour."

[12] He was interviewed under caution again the next day and repeated that he had beaten her with a piece of wood and a broomstick and kicked her because "she did not listen to what I told her not to sharpen her pencil in school".

Lack of representation

[13] The record shows that, from the first appearance in the High Court in Lautoka in December 2003, there were eleven appearances before the trial started in January 2005 most of which involved applications for, and then revocation of, bail. At all those appearances and on the day the trial started, the appellant was represented by counsel from Legal Aid.

[14] On the day of the trial, the record begins:

> "Accused – I agree, wish to conduct my own case.
> Court – Very well. Leave granted. Wish to withdraw.
>
> Court – Explains procedure to accused. Asked particularly about confession.
>
> Accused – Not forced or threatened by police or influenced."

[15] The assessors were then brought into court and sworn and the trial commenced.

[16] It is not clear to what the appellant was agreeing at the outset of that passage but the appellant explained to this Court that he represented himself because the lawyer did not speak Fijian. Clearly that must be a difficulty for many defendants, especially those who do not speak good English but there is nothing on the file to suggest the appellant mentioned this or made any application for Fijian counsel. The earlier proceedings show that his lawyer was able to obtain bail on his instructions and to put up a strenuous defence when it was later revoked.

[17] We are not persuaded that was the reason the appellant decided to go ahead without representation. It was his choice. Clearly the lawyer was present and, as the case was fixed for trial, must have been ready to present his defence on

instructions he had already given. We do not accept that language difficulties surfaced only at that time sufficiently to oblige the appellant to go ahead unrepresented. He submits that his lack of understanding of the law prejudiced his case.

[18] In any serious criminal case, it is desirable that the accused should be competently represented by counsel. Far too many trials in the High Court and appeals to this Court are conducted by the accused in person. Frequently that must place the unrepresented person at a disadvantage and may amount to a good ground of appeal. However, in the present case, the appellant was represented by counsel from Legal Aid and could have continued so to do. The appellant himself decided not to continue with counsel. He tells us that the fact the case proceeded the same day was unfair. There is nothing on the record to suggest he made any application for time to instruct alternative counsel. On the contrary, he indicated that he would represent himself.

The criminal intent

[19] In his written grounds the appellant stated:

> "The accused was not intent to kill, but to teach her to be a good daughter, and the accused cannot control his anger due to what he hears from the villages about the behaviour of his daughter, 'A father does not want his kids to be bad behaviour' ."

[20] Malice aforethought is defined in section 202 of the Penal Code and the learned Judge explained that section accurately. Rather than simply read it he broke it down into its constituent parts and the result was a clear and accurate direction. The assessors, having heard, that direction had ample evidence upon which to find that the prosecution had proved the necessary intent beyond reasonable doubt and we see no reason to interfere on this ground.

[21] The law in Fiji and England has long accepted the right of a parent to use reasonable physical force to chastise a child. We doubt whether such a right still

exists in Fiji but it has not been argued before us and we do not rule on it. However, the facts of this case could not possibly fall into any definition of reasonable chastisement.

[22] Its relevance in the present case is whether it was such that it may negative the criminal intent of the appellant. At the trial he elected to make an unsworn statement and told the court:

> "I admit that I hit the girl. What I tried to teach my own daughter as any father would do. I was angry and had little faith. I never expected my daughter to die. When I heard she had died I was lost. I was not in correct frame of mind. I gave myself in. Also scared, not stable. ... I heard over the radio that my daughter had died. Police came and told me and charged me with murder. I told them I was not willing to admit murder but I did admit that I hit her. May God help you and me."

[23] The brief note of his final address to the assessors records that he explained:

> "Purpose to hit her to educate her. Never expected her to die. Ask you to understand my situation."

[24] If the assessors found that he may have believed he had a right to "educate" his child in this manner to such an extent that he did not have malice aforethought, it would have been appropriate to reduce the charge to manslaughter.

[25] The suggestion that he may have believed he was entitled to use violence to chastise his daughter was not put to the assessors. On the extreme facts of the case, it is understandable that the judge may not have considered it could arise but it should have been explained in the summing up. However, we accept that the facts are such that he could not have failed to realise that his assault would probably cause at least grievous harm to a six year old child and cannot have believed that was reasonable.

Provocation

[26] As we have stated, the omission of any reference to the possibility that the assessors should consider provocation was pointed out by counsel for the respondent. Where a killing which would otherwise be murder is committed in the heat of passion caused by sudden provocation, the killer will be convicted only of manslaughter.

[27] Provocation is defined in section 204 of the Penal Code. We do not set it out. The assessors must measure provocation against the effect it would have on an ordinary person and the judge was right to omit it from his summing up. It is beyond the bounds of possibility that any ordinary person would consider the excessive sharpening of a pencil such a provocative act that he would be deprived of the power of self control.

The alternative verdict of manslaughter.

[28] It is the duty of a judge trying a case of murder to direct the assessors on the possibility of an alternative verdict of manslaughter if the accused's case is that he did not intend to cause the death. The appellant's statements to the police and to the court consistently denied any intention to cause the child's death. We have already referred to the Judge's direction on malice aforethought and it is clear that the assessors found it proved. However, the Judge should have directed the assessors that, if they were not satisfied the charge of murder had been made out, they could return an alternative verdict of guilty of manslaughter. The danger of a failure to give such a direction, especially in a particularly distressing case, is that the assessors may have some doubt about the guilt of the accused of murder but feel reluctant to acquit if it would mean the accused will go free despite unlawfully causing the death. A conviction of murder in such circumstances would be a serious miscarriage of justice.

[29] In the present case, the appellant's defence clearly raised the possibility of an alternative verdict of manslaughter. However, unlikely such a verdict was, it was not so wholly unrealistic that it would introduce unnecessary confusion into the assessors' consideration of the evidence. (See *Fazal Mohammed v The State* 91 Cr App R 256) Unlikely though it was, it was a matter for the assessors and the Judge should have directed them accordingly.

[30] The Judge erred in failing to direct on the possibility of an alternative verdict. However, the undisputed seriousness of the assault and the age of the victim leave us satisfied that the assessors could not have formed any opinion other than that the appellant, notwithstanding that he might have wished that they would not do so, undoubtedly realised his actions would probably cause grievous ham and was indifferent whether they did or not. In those circumstances we do not consider that any substantial miscarriage of justice has occurred and dismiss the appeal against conviction under the proviso to section 23 (1) of the Court of Appeal Act.

Sentence

[31] The mandatory sentence for murder is life imprisonment but the appellant asks the Court to reduce the minimum term recommended by the court. He suggests it is harsh and excessive and spoke to us of his wish to return to his family to look after his wife and three and a half year old son.

[32] Having heard mitigation , the trial Judge had this to say:

> "You have been found guilt of the murder of your daughter of six years. For no good reason at all you mercilessly beat this young child to death. In all my years in the law I have never come across such an act of sadistic brutality. ... In your anger you snuffed out a promising young life who had done nothing wrong. You did this in front of her mother who pleaded with you. People such as you treat women and children as chattels. This mentality has to change."

[33] We agree with that assessment; if anything it possibly understates the case. The evidence clearly showed that this child suffered a long and dreadful assault by the person she should have been able to rely to protect her. That attack was, itself, the culmination of previous similar acts of bullying violence.

[34] The appellant's previous convictions show a clear disposition to violent behaviour and his family should be protected. The learned Judge considered that he needed to be removed from normal society for a long time and the recommendation is neither harsh nor excessive. The appeal against sentence is dismissed.

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WARD, PRESIDENT

FIJI COURT OF APPEAL

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GALLEN, JA

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ELLIS, JA

Solicitors:

Appellant in person
Office of the Director of Public Prosecution, Suva for the respondent