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

Criminal Appeal No. AAU 0042/06
(High Court Criminal Appeal)

BETWEEN:

JOSAIA TUKANA

Appellant

AND

THE STATE

Respondent

Coram:	**Byrne JA** **Pathik JA** **Mataitoga JA**
Hearing:	**28 August 2007**
Counsel:	**Mr I.Q. Samad for the appellant** **Ms A Prasad for the Respondent**
Judgment:	**22 October 2007**

JUDGMENT OF THE COURT

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1. Josaia Tukana, the appellant was tried and convicted in the High Court at Suva on one count of Murder, contrary to Section 199 of

the Penal Code, Cap 17. He was sentenced to life imprisonment, as mandated under section 200 of the Penal Code, Cap 17.

2. By a Petition of Appeal dated 14 July 2006, he appealed against the life imprisonment sentence imposed by the High Court. The matter was considered by the President of the Court of Appeal, Mr. Justice Gordon Ward, sitting alone, on 14 August 2006. Leave to appeal was granted, against sentence. The narrow ground for appeal referred to the Full Court for consideration by the President is:

> "That there is no evidence the sentencing judge considered her powers under section 33 of the Penal Code, Cap 17".

3. The Full Court on 11 June 2007 reviewed this matter and decided that the interest of justice require the appellant to be assigned counsel to advise him on appeal against conviction and to represent him at the hearing.

4. Mr I.Q. Samad was appointed counsel for the appellant by the court and he has tendered a written submission on behalf of the appellant setting out the grounds of appeal against conviction and sentence.

Grounds of Appeal

5. The grounds of appeal against conviction submitted on behalf of the appellant by Mr Samad may be summarized as follows:

a. there was an error of law and fact in convicting the appellant, when mens rea was not proven by the prosecution;
b. there was an error of law and fact in convicting the appellant when there was no evidence from the prosecution to rebut provocation;
c. there was an error of law and fact in the summing up with regard to causation of death due to medical negligence and or from the assault by the appellant on the deceased;
d. The learned trial judge failed to adequately analyse the evidence before convicting the appellant.

6. During the hearing of this appeal, counsel for the appellant relied almost exclusively on the written submission he had filed in the court. In response to clarification the court sought, on the exact nature of the error of law and fact alleged in the first three grounds of appeal, the response of counsel for the appellant was that his entire submission was based on the discussion he had with the appellant after he was appointed to act for him on this matter.

7. This was most unhelpful because any grounds that should have been advanced to attack the conviction in the High Court have to be based on the evidence adduced during the trial and the applicable law that should have been applied. Making a submission in an appeal to this court based on what the appellant may have said to counsel when visited in prison is unacceptable and inadmissible as a matter of law for the purpose of the appeal proceedings.

8. Be that as it may, the court will consider the grounds advanced in the written submissions and review the record of proceedings in the High Court and reach its own conclusion on whether there has been any error of law and fact to vitiate the conviction of the appellant.

Against Conviction

i) Lack of mens rea i.e. malice aforethought

9. On this ground of appeal the appellant submits:

> "the learned trial judge correctly adopted the definition of malice aforethought **but totally failed to address the issue to the assessors adequately**. The learned trial judge heavily relied on the evidence of PW1 Sekove Soronakadavu notwithstanding that he gave two inconsistent statements of the facts in this case"

10. The relevant passage for the court to consider in evaluating this ground of appeal is at page 18 [page 14 of summing up] of the Court record. The learned trial judge in summing up on the issue of malice aforethought stated:

> "The second issue for you to decide is whether the Accused acted with malice aforethought. Did the Accused assault Naomi by kicking, punching and stomping on her? Did he cause her to fall on the tarsealed road, and did he assault her knowing that she would probably be seriously harmed? If you accept the Accused's version of events in his caution

interview and reject the version of Sekove Soronakadavu, bearing in mind that the prosecution has the burden of proving the Accused's guilt, **are you satisfied beyond reasonable doubt that when he punched her he did so knowing that she would probably be seriously harmed**?

In considering malice aforethought you may wish to consider also the evidence of the two doctors who expressed views that the injuries were caused either by one hard blow or trauma, or by several blows in the head region. It is a matter for you to decide whether or not the Accused acted with malice aforethought. If you have a reasonable doubt about it, you must find the Accused guilty of the lesser offence of manslaughter."

11. In the view of this court, the summing up by the learned trial judge quoted above, on the issue of malice aforethought was correct. It was fair in putting the evidential issues to the assessors, leaving it for them to decide which testimony to believe or not. It also specifically directed that it was the prosecution who must satisfy the assessors beyond reasonable doubt that when the accused punched the deceased he did so knowing that she would probably be seriously harmed.

12. On the matter of the inconsistent statement by PW1 Sekove Soronakadavu, the learned trial Judge put this issue to the assessors to consider and in so doing to be satisfied beyond reasonable doubt which version of events to believe. The

assessors rejected the accused's version of the assault and accepted Sekove Soronakadavu's version of it.

13. This court in **Tauamori Bauro v. Reginam 17 FLR 190**, a similar domestic dispute situation, held that it was quite impossible that the wife [the deceased] could have been beaten so severely by her husband without his intention to cause her grievous bodily harm. The same applies in this case.

14. We are satisfied that the trial judge's summing was adequate. This ground of appeal fails.

ii) Misdirection on Provocation

15. The appellant's submission is that the prosecution did not adduce evidence to rebut provocation. In support, it referred to a passage at page 76 of the court record where the appellant said during his caution interview by the police that he punched his wife [the deceased] because he lost self control after being sworn at. The caution interview was admitted in evidence and tendered as exhibits 3 [original Fijian version] and 3A [English translation].

16. The appellant further submits that once the evidence of provocation was adduced in court the prosecution was required to rebut it by calling relevant evidence. According to the appellant, the prosecution did not adduce evidence to rebut provocation, therefore the learned Trial Judge was obliged to specifically address this to the assessors and give proper directions in law with regard to its effect.

17. In reviewing the court record on this issue, it clear that the learned Trial Judge considered that sufficient evidence of provocation had been adduced for it to be put to the assessors. This approach is consistent with this court's view in **Maha Narayan v. Regina Crim. App No. 1/1972**, where the court said that the issue of provocation should be left to the assessors only if there is a credible narrative of events suggesting the presence of the act of provocation, the loss of self control, both actual and reasonable and the retaliation proportionate to the provocation.

18. Was there anything wrong with the trial Judge's summing up on the issue of provocation? The two relevant paragraphs are:

i) at page 11 of the court record:

> "Provocation is an act done which causes death, which is done in the heat of passion caused by sudden provocation and before there is time for the passion to cool. You must look at all the evidence and ask yourselves whether the deceased did an act, which if done to a reasonable Fijian man of the Accused's age and physical characteristics, would have caused the reasonable person to assault the deceased in the way he did. You must ask yourselves, was there an act of provocation committed by the deceased on the Accused? Did the act cause the Accused to lose self-control? Did it cause him to assault the deceased? And would an ordinary Fijian person in the Accused's shoes have assaulted the deceased in the way he did, given the nature of the provocation? In considering

what an ordinary person would have done and in considering whether the Accused did in fact lose control on the 16th of February 2005, there are several factors which you may consider:

1. The swear words alleged to be used by Naomi Marama.
2. The nature of their relationship.
3. The nature of the assault on Naomi. Do you accept the Accused's version of the assault as he told the police, or the version given by Sekove Soronakadavu? And do you consider the assault you believe is the reliable version of the facts, proportionate to the provocation offered to him?

I will return to these matters later in this summing up. However if you believe that the Accused acted under provocation in assaulting Naomi in the way you believe that he did, or if you have a reasonable doubt about it, you must find the Accused not guilty of murder but guilty of the lesser offence of manslaughter".

At page 19 of the court record:

ii) "If you are satisfied beyond reasonable doubt that the accused acted with malice aforethought, you must go on to consider whether he acted under provocation. Did Naomi Marama swear at him? **Did it provoke him into assaulting her**? **Would it have provoked an ordinary man in the**

accused's shoes? And was the assault on her proportionate to the provocation she offered? If you are satisfied beyond reasonable doubt that the accused caused the death of the deceased with malice aforethought and not provocation, you may find the accused guilty of murder. If you have reasonable doubt whether he was provoked or whether he had malice aforethought, you must find him guilty of manslaughter..."

19. The court in **Asaeli Lesu v. The State [2003] FJCA 1** after discussing section 203 and 204 of the Penal Code, Cap 17 which deals with provocation held that:

> "It is settled law that, once there is evidence in a case, capable of supporting a finding that the accused was provoked, the burden is on the prosecution to prove beyond reasonable doubt that the case is not one of provocation".

20. On the facts of this case there is little doubt that there was provocation and therefore it was mandatory for the trial judge to leave the matter to the assessors after giving them proper directions in law. From the second passage referred to in paragraph 16 above, the learned trial judge gave her directions on the law on the issue of provocation and again we see nothing wrong with those directions. They fully satisfy the tests for directing juries [assessors] held in **Holmes v. DPP [1946] AC 588**, which was approved by this court in **Praneel Kumar v. Regina Crim App No. 25 of 1972.**

21. In the end, the assessors rejected provocation after careful directions on the law from the trial judge. It is evident from the passage in paragraph 16 above that the required onus and standard of proof was clearly given in the directions.

22. We find this ground of appeal has no merit and it is dismissed.

iii) Causation – Medical negligence or Assault by Appellant

23. The appellant submits that the learned Trial Judge misdirected the assessors on the cause of death in this case. The deceased died not from the assault by the appellant but through the negligence of the doctors who attended to the deceased when she was admitted to hospital.

24. The learned Trial Judge stated the following in addressing the assessors on the issue of causation:

> "What are the issues for you to decide in this case? Firstly, that of causation. Was Naomi Marama's death caused by the assault on her by the Accused, or by medical treatment which was not applied in good faith and with common skill and knowledge? You have seen and heard the evidence of Dr. Josese Turagava and of Dr. Prashant. Are you satisfied that the doctors at CWM did all they could in good faith and using whatever resources they had, to save her life? Are you satisfied beyond reasonable doubt that the Accused caused his partner's death by assaulting her? Do you accept the evidence of Dr. Prashant that Naomi would have died anyway from the head

injury and that there was no relationship between her death and the surgery conducted on her?"

25. The submission by counsel for the appellant relies on the answers to two questions that were put to Dr. Josese Turagava PW6 in cross-examination at page 130 of the copy record, which is quoted:

"Q: You do not have adequate and ideal equipment at CWM?

A: I agree. For this day and age.

Q: If you had, her life could have been saved?

A: Possibly"

26. In complicated medical treatment like that which was given to the deceased, the realm of what may be possible always exists but whether that may be likely to save the patient is fairly difficult to be sure of. That the cause of death was directly the result of the assault inflicted by the appellant on the deceased is not in doubt on the evidence of Dr. Sambekaar Prashat PW7, the consultant Pathologist who carried out the post mortem on the deceased.

27. In the English Court of Appeal in **R. v. Smith [1959]2 All ER 193**, Lord Parker CJ said:

" It seems to the court that, if at the time of death the original wound is still an operating cause and substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can

it be said that death does not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that death does not flow from the wound"

28. The above statement was accepted by this court in **Vereimi Ikaniwai v. Reginam (1986) 32 FLR 156.** We also accept as applicable in this instance.

29 The assessors were correctly directed on the issue of causation by the trial judge.

30. This ground of appeal has no merit and is dismissed.

iv) Failure to adequately analyse evidence before convicting

31. The written submissions provided to the court by counsel for the appellant on this ground simply restate the same allegations of facts or law that were advanced earlier to underpin the submission on the three grounds of appeal already discussed above and which we have dismissed as having no merit.

32. For example, it is submitted that the trial judge's reliance on the evidence of PW1 Sekove Soronakadavu to convict the appellant was unsafe. This submission is untenable given the fact it is the assessors who decide which evidence they believe or not. The trial judge merely gives them directions on the law and at the end of the trial accepts their verdict on the facts, as is the case here.

33. This ground of appeal also fails.

Against Sentence

34. There is only one ground advanced against sentence - that it is harsh and excessive.

35. This ground as a matter of law must fail because once the appellant is convicted of murder under section 199 of the Penal Code, Cap. 17, the sentence of life imprisonment is mandatory under section 200.

36. However, the court's attention was drawn to Section 33 of the Penal Code, Cap 17, which states as follows:

> "Where an offence in any written law prescribes a maximum term of ten years or more, *including life imprisonment*, any court passing sentence for such an offence *may* fix the minimum period which the court considers the convicted person must serve"

37. Taking the plain meaning of the words in section 33, it is clear that the trial judge should have at least considered the issue of minimum sentence and whether there existed evidence to support the fixing of one. The record of the trial before this court does not give any indication that the need to fix a minimum term of imprisonment was considered. It should have been considered.

38. This court has powers under section 33 of the Court of Appeal Act to rectify the oversight. Based on the evidence in the trial

and having considered the submission on the appeal, we amend the sentence, by fixing a minimum period of 15 years imprisonment to be served by the appellant.

39. The appeal against sentence partially succeeds to the extent that a minimum period of 15 years of imprisonment is fixed to be served by the appellant effective from the date his current sentence commenced.

Byrne JA

Pathik JA

Mataitoga JA