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IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

Criminal Appeal No: AAU0045/2005S
[High Court Action No: HAC0002/2005L)

BETWEEN:

NEMANI TUINAVAVI
SEMI TURAGABETE

Appellants

AND:

THE STATE

Respondent

Coram: Byrne JA
Shameem JA
Scutt JA

Hearing: 14th February 2008

Counsel: Mr. V. Vosarogo for the Appellants
Ms A. Prasad for the respondent

Date of Judgment: Wednesday 25th June 2008

JUDGMENT OF THE COURT

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[1] The Appellants were convicted of murder and sentenced to life imprisonment in the Labasa High Court on the 10th of May 2005. A co-accused, Jone Sotia who was tried with the Appellants at the same trial, was found guilty of the lesser offence of manslaughter and sentenced to 4 years imprisonment. The Appellants appeal against conviction and sentence.

[2] The Appellants originally filed their grounds of appeal in person. The 1st Appellant's grounds can be summarized as follows:

1. ***The Appellant was jointly charged with the other two accused of murder, but the 2nd accused at the trial was convicted only of manslaughter.***

2. ***The Appellant had never intended to cause death.***

3. ***The Appellant acted in self-defence.***

4. ***The Appellant's interview record to the police was not properly understood.***

[3] This letter has been treated as an appeal by both Appellants, because a subsequent letter to the court was jointly written, asking for a quick hearing. On the 4th of April 2007 however, the Legal Aid Commission filed amended grounds of appeal on behalf of both Appellants. There are 7 grounds of appeal and are as follows:

1) ***That the learned trial judge erred in law in failing to give the assessors an adequate direction regarding the alternative verdict of manslaughter especially whether there was an intention to kill or cause grievous bodily harm to the victim by the two Appellants.***

2) ***That the learned trial judge erred in law in failing to direct the assessors to proceed with caution where the witness's material evidence was tainted by an improper motive or where there was no proper lighting system or where there was no proper identification parade held to identify the two Appellants. (appeal record page 18)***

3) ***That the learned trial judge erred in law when he failed to properly direct the assessors on effect of the contradictions in the witnesses' testimony and their previous inconsistent statement to police.***

4) ***That the learned judge erred in law when he failed to give proper and sufficient direction on the issues of "lies."***

5) *That the learned judge erred in law by not properly directing the assessors on the question of joint enterprise.*

6) *That the learned judge erred in law when he failed to direct the assessors regarding the statement of the deceased that he gave to the doctor when he was first taken and admitted in hospital (appeal record page 75).*

7) *That the learned judge erred in law when he directed that each Appellant assisted or aided and abets another to commit the offence without any evidence before him (appeal book record page 16).*

[4] At the hearing of this appeal and on the suggestion of the court, further amended grounds were filed by counsel for the Appellants. They were filed on the 21st of February 2008 and are as follows:

(a) That the learned judge erred in law when he failed to adequately and expressly direct the assessors that the onus of proof that provocation did not exist lay on the State and not on the Appellants so that the absence of such direction caused injustice to Appellants and rendered such conviction unsafe; and

(b) That the conviction is unsafe as contradictory verdicts would indicate a fatal misdirection to the assessors and the learned judge erred in law and in fact by not directing his mind on the contradictory verdict of the assessors.

The facts

[5] The 1st Appellant is the father of the 2nd Appellant, and of the 2nd accused at the trial. On the 24th of December 2004, the deceased Salesitino Tumeli Vukivuki a resident of Savusavu, went to the Chong Pong Restaurant. He arrived at 11am with his girlfriend Varanisese. The deceased was drinking heavily during the day and the evening, and became involved in an argument. The restaurant closed early because the customers (including the deceased) were getting unruly. The deceased and Varanisese went to Narain's Park to drink more beer. They then went to

Varanisese's brother's house and drank yaqona. The deceased became violent and got hold of a stick. Varanisese ran away and hid near a raintree. The deceased could not find her and came to the Hot Springs bure where a 17 year old boy Inoke Rokoviti was sitting with one Samu. It was about 8.30pm. The deceased ran after Samu and Inoke and they ran to a nearby street light. While they were standing there he saw the three accused come. One of them said "He's there" when he saw the deceased. All three then punched and kicked him as he lay on the ground. The assault took place over a period of 5 minutes. The three men then went away. The deceased had not fought back when he was attacked. He was seen by Losana Teresia, a waitress, who had been told of the assault by Inoke Rokoviti. The deceased was lying in a drain. She did not make any attempt to take him to a doctor. However a former soldier, Filipo Vonokula saw the deceased lying in the drain and borrowed a car to take him to the Savusavu Hospital. At the hospital he told Vonokula his name and village.

[6] The doctor in charge referred the deceased to the Labasa Hospital. At Labasa Hospital Dr. Ogale, the consultant surgeon attended him on the 26th of December 2004. Surgery was conducted on him on the same day. He died at 9.30am on the 27th of December 2004.

[7] The post mortem report, which was tendered, showed a large blood clot in the tissues and muscles of the lower right chest and upper abdomen measuring 15cm x 0.7cm x 0.1cm. The entire back region showed abrasions. The cause of death was shock due to haemorrhage and septicaemia due to multiple blunt impacts on the head and body. The scalp showed patchy areas of congestion and there was diffuse brain oedema and congestion. There were old abrasions on the right side of the eyebrow, over both cheeks and on the left side of the nose.

[8] The interviews of each accused were tendered at the trial. The 1st accused (the 2nd Appellant) was employed as a security officer for the shop "Bargain Box" in Savusavu. He was at work on the 24th of December 2004 and went home at 5.45pm. He and his brother (the 2nd accused) went to Savusavu together, to go to the Hot Springs Hotel. They got off at the Copra Shed. On their way to the Hotel, in the middle of Narayan's Park, they met the deceased. He was drunk and punched the 2nd Appellant. He then staggered away. The 2nd Appellant and 2nd accused then went to see their father, the 1st Appellant at the Waitui Marina. They informed him about the deceased's conduct, and all three men went to look for the deceased in Narayan's Park. They found him beside the Hot Springs. The 2nd Appellant then said that he punched him continuously on his head, ribs and chest. He said that the other two stopped him when the deceased fell into a drain. All three men then went away towards the town.

[9] The 2nd accused (whose interview record is relevant to this appeal although he did not appeal to this court) told the police that he was with the 2nd Appellant when the deceased punched him on the chest. They decided to go to the Waitui Marina. There his father and the 2nd Appellant told him that they would go to look for the deceased at Narayan Park. At the Park, they saw the deceased and the 1st Appellant punched him on the face causing the deceased to fall backwards onto the road. Then the 2nd Appellant kicked him three times on the jaw, saying "bakola." The 2nd accused then intervened and stopped the assault. He dragged the deceased to the goalpost and went to the Hot Springs Hotel. He denied assaulting the deceased at any time.

[10] The 1st Appellant said that on the night of the 24th of December 2004 he was working at the Waitui Marina. At 8pm, one of his sons (the 2nd Appellant) told him to "go and see a guy who punched him at the Khamodra School ground." His two sons then ran ahead and he followed. He saw the 2nd Appellant "shaping up for a

fight" with the deceased. He told the 2nd Appellant to stop fighting and he saw the deceased fall onto the road as a result of the 2nd Appellant punching him. The 2nd Appellant then continued to punch the deceased. He said that the deceased was very drunk and that he must have died because he fell against the gravel road. The 2nd Appellant did not admit to any assault.

[11] In their charge statements, the 2nd Appellant admitted punching the deceased, the 2nd accused said he had not been involved but that the 1st Appellant had punched the deceased causing his injuries and the 1st Appellant denied any assault saying he had only gone to stop the fight.

[12] The prosecution relied on the evidence of Inoke Rokoviti to say that this was a joint attack and that all three accused had punched and kicked the deceased. The State said that the motive for the assault was revenge.

[13] The defence position that although all three accused persons were present, their statements to the police as to what had occurred were contradictory. Counsel told the assessors that only the 1st accused (the 2nd Appellant) had admitted punching the deceased but that this was inconsistent with the injuries found on him. She suggested that it was possible that he was assaulted by someone else as he lay in the drain and that the 2nd Appellant's assault could not have led to death.

[14] The trial judge directed the assessors on malice aforethought, aiding and abetting, provocation and manslaughter. In relation to provocation he said:

> ***"If you are satisfied beyond reasonable doubt that all the accused were acting together to assault Tumeli to cause him grievous bodily harm, no matter who did the punching, the kicking or the blocking of an escape route, you need next to consider whether the issue of provocation has been disproved by the prosecution. If you find the***

State has failed to disprove provocation your opinion should be one of manslaughter."

[15] The assessors retired at 11am. They returned at 2.30pm. The assessors' opinions were mixed. Two assessors found the 1st accused (the 2nd Appellant) guilty of murder. One assessor found him guilty of manslaughter. Two assessors found the 2nd accused guilty of manslaughter. One assessor found him guilty of murder. Two assessors found the 3rd accused (the 1st Appellant) guilty of murder. The third assessor found him guilty of manslaughter.

[16] The trial judge adjourned overnight to consider their opinions. Clearly he was troubled by the majority inconsistent opinions, that although the 1st and 3rd accused were guilty of murder, the 2nd accused was guilty only of manslaughter. He said he was satisfied beyond reasonable doubt that the deceased died because of an unlawful and serious assault on him. He further said at paragraph [6] of the judgment:

"On Inoke's evidence, I accept that the victim was severely assaulted by the three Accused at Chetty Road near Narain's Park, and that all 3 kicked him when he was on the ground. Both Inoke and Accused 3 accept that the assault lasted 4-5 minutes. From the injuries given to the victim's body, it is clear that the assault was a sustained one and may have lasted for the duration they suggest."

[17] He did not accept the 1st Appellant's version of events in his interview record, found that the State had disproved provocation and found the 1st and 3rd accused guilty of murder. He then said at paragraph [13]:

"I have pondered overnight on the majority opinions of the assessors in the case of Accused 2 Jone, which were in favour of not guilty of murder, but guilty of manslaughter. I am prepared to accept that though Accused 2 was seen to kick the victim on the ground with the other Accused, that there may have been a doubt as to his

intent, and as to whether he did intend to cause grievous bodily harm or was indifferent to it, I accept that doubt and therefore convict Accused 2 instead of manslaughter."

The appeal

[18] At the hearing of this appeal, counsel confined him himself primarily to two grounds of appeal, one that the issue of provocation had been inadequately put to the assessors, and two that a real miscarriage of justice arose from the inconsistent verdicts of the court. It was evident from the hearing of the appeal that any other grounds of appeal had no substance at all.

Provocation

[19] The law of provocation in Fiji is set out in sections 203 and 204 of the Penal Code, and canvassed at length in a decision of this court in **Isoa Codrokadroka v. The State** AAU0034/06. The burden of proof is on the prosecution (once the defence has raised the issue) to show that the accused was not provoked into killing the deceased. Provocation does however require some evidence at the trial of a loss of self-control as a result of provocative words or deeds of the deceased of a proportionate response causing death, and of the hypothetical "ordinary person" responding to the provocation in that way.

[20] The evidence of provocation in this case came from a single punch a month before the incident on the 2nd Appellant, and a single punch on the day of the incident inflicted on the 2nd Appellant by the deceased. The question of whether these assaults had caused an actual loss of self-control on the part of the accused (two of whom were fraternally related to the 2nd Appellant) and whether such provocative behavior would have caused the ordinary person in their shoes to have assaulted the deceased in this way, was put to the assessors.

[21] The trial judge also told the assessors on two occasions that the State had to disprove provocation and directed himself on the burden and standard of proof in his judgment. He found in his judgment:

> ***"The provocation offered by the one single punch by the victim, was not sufficient to rob an ordinary person of self-control, nor did it result in loss of self-control by the Accused here. The Accused all three of whom were sober, were in control of themselves throughout. I am satisfied of all these matters to the standard beyond reasonable doubt."***

[22] We find that the directions to the assessors and the findings of the trial judge on provocation in his judgment to be correct. This ground of appeal is dismissed.

Inconsistent Verdicts

[23] The law on inconsistent verdicts is accepted by both Appellants and respondents is as it is summarized by the Canadian Supreme Court in **R v. Pittiman** [2006] 1 SCR 381. It is similar to that of the High Court of Australia in **Mackenzie v. The Queen** (1966) 190 CLR 348 (per Gaudron, Gummow and Kirby JJ), and in **Osland v. The Queen** [1998] HC 75. It is that a conviction will only be set aside if the different verdicts brought by the jury are such that no reasonable jury, applying themselves properly to the facts, could have arrived at those verdicts. It is the Appellant who must satisfy the court that the verdicts are unreasonable or "an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty" (**Mackenzie v. The Queen** at page 368). See also **R v. Darby** (1982) 148 CLR 668 (per Murphy J).

[24] In **Pittiman**, the three Appellants were prosecuted for sexually assaulting a 14 year old girl. Two were acquitted and one was convicted. At the trial, the evidence

against Pittiman was from a friend of the defendants who was present at the scene of the offending, and from evidence of the victim. There was also evidence of Pittiman's saliva inside the bra of the victim, and of a confrontation between Pittiman and the eyewitness who was accused of "ratting" by Pittiman. The Court of Appeal of Ontario dismissed Pittiman's appeal against conviction. On appeal to the Supreme Court, the verdict was affirmed. The Court said (per Charron J):

> ***"The onus of establishing that a verdict is unreasonable on the basis of inconsistency with other verdicts is a difficult one to meet because the jury, as the sole judge of the facts, has a very wide latitude in its assessment of the evidence. The jury is entitled to accept or reject some, all or none of any witness's testimony. Indeed, individual members of the jury need not take the same view of the evidence so long as the ultimate verdict is unanimous. Similarly, the jury is not bound by the theories advanced by either the Crown or the defence. The question is whether the verdicts are supportable on any theory of the evidence consistent with the legal instructions given by the trial judge. Martin JA aptly described the nature of the inquiry in R v. McShannok (1980) 44 C.C.C. (2d) 53 (Ont C.A.) at p.56 as follows:***
>
> > ***'Where on any realistic view of the evidence, the verdicts cannot be reconciled on any rational or logical basis the illogicality of the verdict tends to indicate that the jury must have been confused as to the evidence or must have reached some sort of unjustifiable compromise. We would, on the ground that the verdict is unreasonable alone, allow the appeal, set aside the verdict, and direct an acquittal to be entered'."***

[25] The Supreme Court went on to describe the function of the jury in a criminal case. It said that where there are several versions of the facts before the court, it is not for the jury to "reconstruct" what happened. It is the jury's duty to decide whether the prosecution has proven each element of the offence beyond reasonable doubt, and where an accused person is charged with multiple counts, the evidence on each count may differ leaving the jury with a reasonable doubt on some and not others.

It is only where the evidence on all counts is impossible to separate, that inconsistent verdicts may be held to be unreasonable. The Supreme Court went on to deal with cases of multiple accused, saying (at paragraph 8):

> ***"The reasonableness of a verdict in the case of multiple accused charged with the same offence will require a consideration of much the same factors. For example, the jury may accept the complainant's testimony as credible in respect of one accused, but reject the complaint against the other. The overall strength of the evidence relating to each accused may not be the same, leaving the jury with a reasonable doubt on the guilt of one, but not of the other. Of necessity, the case of multiple accused will also raise different considerations. For example, when considering a single accused who is charged with multiple offences, there is little to be gained by asking whether the evidence is the same. The evidence, by definition, will be different for each offence."***

[26] The Court said that it was more difficult for an Appellant to show that the inconsistent verdicts were unreasonable in cases of multiple accused, because there is a greater possibility of different verdicts for different accused. However the test remains the same. It is whether the verdicts are irreconcilable such that no reasonable jury, properly directed by the judge, could possibly have rendered them on the evidence.

In **R v. Darby** (1982) 148 CLR 668, Murphy J said (in a case where of two co-conspirators one had been convicted, one acquitted):

> ***"Although the problem arises in its most spectacular form in conspiracy, it is not confined to conspiracy. It arises in all crimes where parties are alleged to have acted in concert with one another, as in riot, where parties to the riot are named; robbery in company where 'the company' is named; and accessory before the fact (see Hawkins, Pleas of the Crown, pp. 621-622; Georgianni v. The Queen New South Wales Court of Criminal Appeal: 12 February 1981; unreported)."***

[27] These are the guiding principles relevant to this ground of appeal. However, there are additional considerations for appellate courts in Fiji. Firstly, the "verdicts" in Fiji are rendered by assessors and not by a jury. Assessors are not required to be unanimous and there are many decisions of assessors in our criminal courts which are "mixed." Secondly, the "verdict" of the court is not that of the assessors, but that of the trial judge, who can, for cogent reasons, differ in his opinion, from the opinion of the assessors. Thirdly, the trial judge in Fiji often gives reasons in his judgment, setting out the basis of his or her conclusions. That occurred in this case. It is therefore possible in Fiji to assess the factual basis for the verdict of the court, and the version of the evidence which the court relied on to either convict or acquit. The "verdict" in Fiji is therefore more transparent. It follows, that if the reasons given in the judgment do not justify inconsistent verdicts, there is a greater chance of a successful appeal against it.

[28] Turning to the opinions of the assessors in this case, State counsel submits that they were not unreasonably inconsistent because the assessors must have rejected the contents of the caution statements of the two Appellants, but accepted the evidence of the caution statement of the 2nd accused. In his statement, the 2nd accused (Jone Sotia) said that he had intervened to stop his father kicking the deceased and that he did not assault the deceased. State counsel submitted in her written submissions that:

> ***"It was open to the assessors to use this evidence to conclude that Jone had no interest in revenge and no malice aforethought. Jone went to a bar and only went out later to look for Semi, not the victim. He says he tried to stop the fight but the assessors and the learned judge were free to reject this part of the interview and accept Inoke Rokoviti's evidence that Jone was involved in the assault as well, but that he lacked the requisite intent."***

[29] We do not of course know what was in the assessors' minds, and that is how it should be. However, if the assessors accepted the caution interview of Jone Sotia, they should have acquitted him even of manslaughter. It was entirely exculpatory. If they accepted it partially (as State counsel suggests) together with the evidence of Inoke Rokoviti, and concluded that Sotia was a part of the joint enterprise, then they could not have got over his evidence on page 57 of the record:

> ***"Then we saw 3 figures, they came. By Morris Hedstrom and Webster Construction they came. One of them saw Tumeli standing and one uttered "He's there." 30ft away from me they were. The 3 punched and kicked Tumeli. All of them took part and kicking him when he was lying. All 3 kicked him."***

[30] If the assessors had a reasonable doubt as to Sotia's mens rea, it is surprising that they did not have a reasonable doubt as to the mens rea of his co-accused. Motive and mens rea must not be confused. To say that Sotia may not have been motivated by revenge, is not to say that he had neither intention to kill or to cause serious harm or was indifferent about causing either.

[31] We do not however know why the assessors had a reasonable doubt about Sotia's intentions. We do however know why the learned trial judge upheld their majority opinions. At page 8 of his judgment, His Lordship said that he accepted the evidence of Inoke Rokoviti, and that he found him to be honest, credible and accurate. He found that "On Inoke's evidence, I accept that the victim was severely assaulted by the three Accused at Chetty Road near Narain's Park and that all 3 kicked him when he was on the ground. Both Inoke and Accused 3 accept that the assault lasted 4-5 minutes. From the injuries given to the victim's body, it is clear that the assault was a sustained one and may have lasted for the duration they suggest."

[32] He then went on to say, that as a matter of fact, he accepted that the 1st and 2nd Accused returned to look for Tumeli "having gathered the added strength of their father Accused 3, all three being determined to teach Tumeli a lesson."

[33] On the basis of this version of the facts, there was no room for a different verdict against the 2nd accused. If all accused were motivated by a desire to teach the deceased a lesson, and if all accused kicked the deceased as he lay on the ground, and if the assault took 4-5 minutes, there was no possibility, on the evidence of a lesser verdict for one of the accused. The learned judge accepted the majority opinions of the assessors on the basis that "there may have been a doubt", about Sotia's intent. However if that were so, then there must also have been a doubt about the intent of the Appellants.

[34] Applying the **Pittiman** test, and having the advantage of knowing the reasons for the inconsistent verdicts, we consider that the convictions for murder for the Appellants cannot stand. They were not possible on the facts accepted by the learned trial judge, and on the evidence of Inoke Rokoviti. The convictions of murder for the two Appellants must therefore be quashed and substituted with convictions for manslaughter. This appeal succeeds on this ground.

Sentence

[35] It follows that the Appellants must be sentenced to the same length of imprisonment as Sotia. The Appellants were sentenced to life imprisonment on the 10th of May 2005 and they have now served almost 3 years of those terms. Taking the period already served, it would be unjust to impose a new term of 4 years imprisonment without taking into account that they have already served 3 years of that period of time.

[36] Their sentences of life imprisonment are quashed and substituted with terms of 4 years each, dating from the date of the original sentence so that each now has 12 months only left to serve.

Justice John Byrne
Judge of Appeal

Justice Nazhat Shameem
Judge of Appeal

Justice Jocelynne Scutt
Judge of Appeal

Solicitors:
Legal Aid Commission for Appellants
Director of Public Prosecutions Office for respondent