IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: AAU0045 OF 2006
(High Court Criminal Case No. HAC 036 of 2005S)

BETWEEN:

TEJ DEO

Appellant

AND:

THE STATE

Respondent

Coram: Pathik, JA
Goundar, JA
Powell, JA

Hearing: Friday 18th April, 2008

Counsel: Ms. J. Nair for the Appellant
Ms. A. Prasad for the State

Date of Judgment: Monday 23rd June, 2008

JUDGMENT OF THE COURT

Background

[1] On 11 July 2006 following trial by the High Court at Suva sitting with assessors, the appellant was convicted for the murder of his mother who was an elderly and a sickly woman. At trial the appellant was represented by a legal aid counsel. The appellant was sentenced to life imprisonment.

Facts

[2] The prosecution led evidence that on 31 May 2005 at 1.00pm the appellant returned home in a taxi from the Nausori town. He called his mother to open the door but received no response from her. The appellant entered the house and broke some window louvres. He came out shouting and called his mother outside. The deceased came out. The appellant took out his wallet and threw his money on the ground. He told the deceased to pick it up. When the deceased bent down to pick up the money, the appellant punched her on the face and kicked her stomach. The appellant told the deceased to get inside the house. The appellant's neighbour witnessed the assault.

[3] On the same afternoon, the appellant took the deceased to the Nausori Health Centre. She was transferred to the CWM hospital. On 2 June 2005 she passed away. According to the medical evidence, the cause of death was intra-cranial hemorrhage on the head.

[4] The appellant was arrested and interviewed under caution by the police. The first interview was conducted on 1st June 2005 when his mother was still alive but admitted at the hospital. The second interview was conducted after the death of his mother. The interviews and charge statements were tendered without objection. In his interviews, the appellant admitted assaulting the deceased.

[5] In his sworn evidence, the appellant gave a contrary explanation to the incident. He said he called out for his mother, but there was no response. He broke two louvre blades because he thought something had happened to her. She opened the door. He said he wanted to hug his mother when he accidently hit her with a frozen chicken which he was holding in a plastic bag and she fell down. He denied assaulting her.

[6] At trial the appellant's defence was of accident and lack of intention to kill or cause grievous harm. The assessors unanimously found the appellant guilty of

murder. The learned Judge accepted the assessors' opinions and convicted the appellant for murder. Obviously, the assessors and the trial Judge accepted the evidence of the neighbour who witnessed the assault on the deceased and the caution statements of the appellant in which he admitted the assault, and rejected the account given by him on oath.

Grounds of Appeal

[7] The grounds of appeal advanced by the appellant are:

1. That the learned Judge erred in fact and law when he failed to direct the assessors on the effect of intoxication in relation to intent.
2. That the learned Judge erred in fact and law when he failed to direct the assessors on the defence of accident.
3. That the learned Judge erred in fact and law when he failed to direct the assessors on an alternative verdict of not guilty of either murder or manslaughter.

First Ground - Intoxication

[8] The gist of this ground of appeal is that the learned Judge should have directed the assessors on the effect of intoxication on the appellant's state of mind despite not being raised as an issue at trial. The appellant submits that he was denied of an opportunity to be convicted of the lesser offence of manslaughter due to the omission.

[9] The law on intoxication as a defence is settled. Self-induced intoxication is usually no defence, except to offences requiring a specific intent such as the offence of murder. In Fiji the common law position on intoxication as a defence has been codified in the Penal Code, Cap. 17. Section 13 of the Penal Code provides:

> Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
> ....

> Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would be guilty of the offence.

[10] Section 13 imports into the law the principle enunciated by Lord Denning in ***Attorney General for Northern Ireland v Gallagher*** [1961] 3 All ER 299. Lord Denning at p 313 of the judgment said:

> "The general principle which I have enunciated is subject to two exceptions: (i) If a man is charged with an offence in which a specific intention is essential (as in murder, though not in manslaughter), then evidence of drunkenness, which renders him incapable of forming that intent, is an answer; .... In each of those cases it would not be murder. But it would be manslaughter."

[11] Following the decision in ***Gallagher***, Geoffrey Lane L.J in ***R v Sheehan and Moore*** [1975] 60 Criminal Appeal R. 308 at p 312 said:

> "Indeed, in cases of where drunkenness and its possible effect upon the defendant's mens rea is an issue, we think that the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was effected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent."

[12] The principle was confirmed in ***DPP v Majewski*** [1976] 62 Criminal Appeal R. 262 by Lord Salmon at p 275:

> "If appellant killed or committed grievous harm whilst he was drunk, this factor should be taken into account with all the other evidence in deciding whether he had intended to kill or to commit grievous harm. If this question was decided in the accused's favour, he would be found not guilty of murder but guilty of manslaughter... This "does not mean that drunkenness, of itself, is ever a defence. It is merely some evidence which may throw a doubt upon whether the accused had formed the special intent which was an essential element of the crime with which he was

> charged. Often this evidence is of no avail because obviously a drunken man may well be capable of forming and does form the relevant criminal intent; his drunkenness merely diminishes his powers of resisting the temptation to carry out this intent."

[13] At trial there was unchallenged evidence that the appellant was under the influence of alcohol at the time of the assault on the deceased. The trial Judge acknowledged this in his summing up when his Lordship said:

> "We know from his own evidence, as well as from other witnesses that he was under the influence of alcohol at the time."

[14] After the incident with the deceased the appellant came in contact with witnesses who observed him to be under the influence of alcohol.

[15] Alisi Nailolo (PW2) said that on 31 May 2005 at around 3pm the appellant came to her home and said:

> "Sister in law, mother has gone to heaven" he told me. ...When he came he was drunk. He was staggering."

[16] Vilisa Cavuduadua, the Staff Nurse at the Nausori Health Centre who attended the deceased, said:

> "The Indian boy was drunk. Smelt liquor."

[17] Rajendra Prasad, the taxi driver who transported the deceased to the Nausori Health Centre said:

> "Tej Deo was smelling of beer."

[18] SC Arvind Narayan who attended to the report of assault on the deceased said:

> "I saw Tej Deo was drinking beer outside. As soon as we entered his compound he broke the beer bottle in front of us. He was

drunk. Then he called us inside the house. We went to the bedroom. His mother was lying on the bed. My Corporal told me to take his mother to hospital. He said you take her. Then he chased us. He was angry with us."

[19] In his first caution interview, the appellant said:

Q. What happened then?
A. I wish to say that on 30/5/05 at about 4pm, I came to Nausori town and bought 4 big bottles of beer and came home.

Q. Where did you buy the beer from?
A. From Ping's store, Nausori.

Q. Who all were at home on 30/5/05?
A. My mother Ram Devi and brother Muni Deo.

Q. Where was your wife?
A. She went to her mother's place at Vatuwaqa.

Q. What happened at home when you brought the beer?
A. When I arrived at home around 6pm, my brother Muni Deo had already slept.

Q. What happened then?
A. I drank about 3 bottles of beer and 1 was left.

Q. What happened then?
A. I then slept around 8.30pm (30/5/05).

Q. What happened next?
A. I wanted to sleep around 8.30pm and saw brother Muni Deo not at home.

Q. What happened then?
A. I then went off to sleep.

Q. What happened next?
A. At about 12.30am (31/5/05), Muni Deo came with half bottle rum and told me to join in.

Q. What was your reply?
A. I declined to drink and went off to sleep again.

Q. Where was your mother Ram Devi at this time?
A. She was sleeping and did not say anything.

Q. What happened then?
A. On 31/5/05 at 7.00am the left over of 1 and half bottle beer was drank by Muni and me.

Q. What happened then?
A. On 31/5/05 at 9.00am myself and Muni Deo came to Nausori town in a taxi driven by my neighbour Unaia.

Q. What happened then?
A. Both of us went to Bob's store, Vuci Road, Nausori and bought 1 carton of beer and came home.

Q. What happened at home?
A. We both brothers drank 8 bottles of beer and the left over put it in the freezer.

Q. Whilst you 2 were drinking beer, did your mother get angry?
A. No.

Q. What happened then?
A. On 31/5/05 at about midday came to Nausori town with Muni Deo.

Q. Why did you two come to Nausori?
A. I wanted to go to my in laws place and do not know where Muni Deo went.

Q. Where is your in laws place?
A. At Wailea Street, Vatuwaqa.

Q. What happened then?
A. I went to my in laws place at 10.30am (31/5/05) and came to Nausori around 11.00am.

Q. Was your wife with you?
A. She was not at her mother's place.

Q. What happened then?
A. At about 11.30am (31/5/05), came to Nausori town, hired a taxi and came home.

Q. Whose taxi did you hire?
A. I hired a taxi from Jays and driven by one Narayan's brother.

Q. What happened upon reaching home?
A. I saw the front door closed.

[20] In his charge statement dated 1 June 2005, the appellant said:

> I wish to say that I hit my mother RAM DEVI and caused her bodily harm because I was very drunk and I know that my mother will forgive me.

[21] It is apparent from the evidence that the appellant had consumed substantial quantity of alcohol before the assault on the deceased.

[22] The question is whether the learned Judge should have directed the assessors on the effect of intoxication on the appellant's state of mind when the appellant was in no way asserting that he was incapable of forming an intention to kill or cause grievous bodily harm?

[23] Our system of justice is rooted deeply in procedural and substantive fairness to an accused. If there is any evidence of a defence, then whether the accused has relied on it or not at trial, the judge must bring to the attention of the jury or assessors and direct on it. This principle may be traced to the decision of ***R v Hopper*** [1915] 2 KB 431, in which Lord Reading CJ at 435 said:

> "We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence – we say no more than that – upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand."

[24] The principle in ***Hopper*** was later approved by the House of Lords in ***Mancini v Director of Public Prosecutions*** [1942] AC 1 and the Privy Council in ***Bullard v The Queen*** [1957] AC 635. The only exception to the principle is that the trial judge does not have to invite the jury to consider hypotheses which the evidence does not reasonably raise.

[25] A clearer version of the principle is found in the judgment of Lord Clyde in ***Von Starck v The Queen*** [2000] 1 WLR 1270, at p 1275:

> "The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for the defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside. The threshold of credibility in this context is, as was recognized in ***Xavier v The State*** (unreported) 17 December 1998; Appeal No. 59 of 1997 a low one, and, as was also recognized in that case, it would only cause unnecessary confusion to leave to the jury a possibility which can be seen beyond reasonable doubt to be without substance. But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury. For tactical reasons counsel for the defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled on the evidence to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an

> acquittal. But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them. In ***Xavier v The State*** the defence at trial was one of alibi. But it was observed by Lord Lloyd of Berwick in that case that, 'If accident was open on the evidence, then the judge ought to have left the jury with the alternative of manslaughter.' In the present case the earlier statements together with their qualifications amply justified a conclusion of manslaughter and that alternative should have been left to the jury."

[26] The dicta in ***Von Starck*** was applied by Sir Robert Carswell LCJ in the Court of Appeal in Northern Ireland in ***R v Shaw*** [2001] NIJB 269 and by Lord Hope of Craighead, giving the judgment of the Privy Council, in ***Hunter v The Queen*** [2003] UKPC 69 and by Lord Rodger of Earlsferry, giving the judgment of the House of Lord, in ***R v Coutts*** [2006] 1 WLR 2154.

[27] The principle has been considered by the Australian High Court in ***R v Gammage*** [1970] 122 CLR 444; and in ***Pemble v R*** [1971] 124 CLR 107 where, at 117-18, Barwick CJ said:

> "Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part."

[28] In ***Vinod Lal v The State*** Criminal Appeal No. AAU0004/2001S (22 November 2001) this Court had to consider whether to grant leave to appeal to the Supreme Court on a decision in which the trial judge withdrew the defence of self defence from assessors. The Court said:

> "Understandably they do not all put the test in the same terms, but a common theme, to take words from ***DPP v Walker*** [1974] 1 WLR 1090, 1095 is that a judge is not obliged to put any impossible defence which human ingenuity might conceivably devise.

> The test of a credible evidential foundation has a respectable pedigree. It goes back at least as far as ***Lee Chun v The Queen*** [1963] All ER 73 where at page 77 the Privy Council on an appeal from Hong Kong said:
>
> If there was some material on which a jury acting reasonably could have found manslaughter, it cannot be said with certainty that they would have found murder. It is not of course for the defence to make out a prima facie case of provocation. It is for the prosecution to prove that the killing was unprovoked. All that the defence need to do is to point to material which could induce a reasonable doubt."

[29] In ***Vidali Yaba v The State*** Criminal Appeal No.AAU0044/2002 (25 November 2005), in considering whether the trial judge erred in not directing the assessors on the defence of provocation, this Court held:

> "Where on the evidence a question of provocation or any other ground arises which may reduce murder to manslaughter, appropriate directions must be given by the judge to the assessors (***R v Mancini*** [1942] AC 1). This is so whether or not the question is raised by the defence. Where, however, it can clearly be seen that no such question can arise it is the duty of the judge not to leave the issue to the assessors ***(R v Thorpe*** [1925] Cr. App. 12 189; ***R v Malcolm*** [1951] NZLR 470)."

[30] This Court's decision in ***Yaba*** was upheld by the Supreme Court on appeal (***Vidali Yaba v The State*** Criminal Appeal No. CAV0003 of 2006 (25 February 2008).

[31] Counsel for the respondent accepts that there was evidence that appellant was under the influence of alcohol but submits that in his police interview the appellant gave a detailed and coherent account of how the assault took place and what he did afterward. We accept this submission.

[32] In addition we have considered the evidence of the appellant at trial. The appellant said:

> "I never meant to punch my mother. I did not punch her. I was drunk at the time. I did not mean to do that. I was not that drunk. I had just 8 bottles. I did not throw the chicken to my mother. I knew what I was doing."

[33] Later in re-examination, the appellant said:

> "I shared the 9 bottles on 31st May with my brother. I was not really that drunk..."

[34] In ***R v Groark*** [1999] Criminal LR 669, the English Court of Appeal considered the issue of whether a direction on self induced intoxication in relation to intent should have been given when the defendant was in no way asserting that he was incapable of forming an intention. The court said:

> "Anything we say in this case is not intended to cast any doubt on that is said in ***R v Bennett*** or any doubt on the proposition that if there is evidence of drunkenness which might give rise to an issue as to whether a specific intention could be formed by the accused, a direction should normally be given; but, as it seems to us, albeit it may be an issue of law as to whether the direction should be given, the direction when given is as to how the jury should approach an issue of fact. It must be accordingly, as we see it, open to the judge to clarify with counsel representing the defendant whether there is an issue of fact which has been raised; a fortiori, where it is clear that the defendant is not contending that he could not form the requisite intention, and the suggestion that he could not form an intention would be in conflict with a defence that he is running. In that situation, as we say, a fortiori it must be open to the judge to see whether defence counsel has any objection to the direction that the judge intends to give, and the judge should be entitled then to act on the clear statement of counsel's position. That is the effect of what happened in this case.
>
> As we would see it also, there could be no criticism of Mr. Cartwright or any counsel not seeking a direction on self-induced intoxication in relation to intent in this case. It was a case in which the defendant was in no way asserting that he was incapable of forming an intention. It was tactically absolutely right to allow self-

> defence to be run without a direction about not being able to form an intention at all.
>
> So in our judgment, as there was no issue for the jury, there was no necessity for the judge to give the direction in this case. In our judgment, on any view, the conviction in this case was safe and we would dismiss the appeal."

[35] In the present case, after the trial Judge had summed up to the assessors, he invited the counsel for the appellant and the counsel for the prosecution to make submissions on any misdirection or omission. We note that the counsel for the appellant did not take this opportunity to seek any direction on the effect of intoxication on the appellant's intention.

[36] Given the appellant's evidence that he was not so drunk, that he knew what he was doing, that he had accidently hit the deceased with a frozen chicken and that he had not assaulted her, we are satisfied that there was no evidential basis requiring directions on the appellant being unable to form the specific intent required for murder due to the influence of alcohol, and we are satisfied that there is no risk of a miscarriage of justice having resulted. This ground of appeal fails.

Second Ground - Accident

[37] We find no substance to the error alleged in this ground. The trial Judge did direct the assessors on the defence of accident. In his directions, the trial Judge said:

> "The second element which the prosecution must prove is that the deceased's death was caused by an unlawful act, as act without justification. This issue goes to the heart of the case. Was it a deliberate act, an unlawful act or series of acts, the assault by the Accused upon his mother? Or was there no assault at all, as the Accused has maintained in his sworn evidence? And that the injuries resulted from two accidents, unintentional mishaps, when his hand came into contact with his mother's mouth and when the frozen chicken in the shopping bag hit her on her side when he tried to hug her? You will need to review the evidence of the eyewitness across the road, the evidence of the pathologist, the evidence of the interviews, what the Accused told the police had happened, and what the Accused told you yesterday in court.

> If you believe the Accused's account and accept the injuries were caused accidentally, then no crime had been committed. If so, you should acquit the Accused. If you have a reasonable doubt on that score, you should find the Accused also not guilty."

[38] We have considered carefully the way in which the assessors were directed on the defence of accident and the evidence in relation to that defence. We are satisfied there was no error of law in the trial Judge's directions to the assessors on the defence of accident.

Third Ground – Alternative Verdict of Manslaughter

[39] This ground is merely an extension of the first ground of appeal. We dismiss this ground of appeal as well. The trial Judge did leave the verdict of manslaughter open to the assessors as revealed by the following passage:

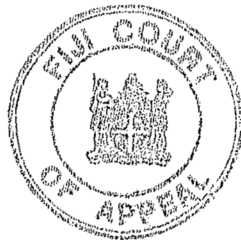
> "Once you have decided what facts you accept you must decide whether, if you find Raijeli's story to be the correct one, the Accused intended by those blows and kicks to cause his mother grievous bodily harm. If you do, then your verdict would be one of murder. If you find that he did not intend to cause grievous bodily harm nor was indifferent whether it should be caused, you could find the Accused guilty of manslaughter, that is if you accept Raijeli's account, largely confirmed by what he told the police."

Result

[40] None of the grounds of appeal have been made out.

[41] The appeal against conviction is dismissed.

Pathik, JA



Goundar, JA

Powell, JA

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