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

CRIMINAL APPEAL NO. AAU0096 OF2008S
(High Court Criminal Action No. HAC 88 of 2007)

BETWEEN:

PRAVEEN RAM

Appellant

AND:

THE STATE

Respondent

In Chambers: Randall Powell, Justice of Appeal

Hearing: Tuesday, 4th November 2008, Suva

Counsel: Appellant in Person
for the Respondent

Date of Judgment: Tuesday 4th November 2008, Suva

RULING

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[1] On 1 October 2008, following a hearing on 22-29 September 2008, Pravin Ram ("Mr Ram") was convicted of murdering his father ("the father") and sentenced to life imprisonment.

[2] Mr Ram's father was an alcoholic. On 20 July 2000 the father suffered a head injury and was taken by Mr Ram to Colonial War Memorial Hospital ("the hospital") where lacerations to his head were stitched by a doctor. The father was so heavily

drunk that he could not tell the doctor what happened to him. Despite being asked to stay for neuro-observation the father signed himself out and returned home.

[3] On 23 July 2000 the father was re-admitted to the hospital complaining of stomach pains and a headache. A CAT scan revealed a large collection of blood on the right side of the brain and on 24 July 2000 he was taken into surgery but the size of the clot and his overall condition was too advanced and he died the next day, 25 July 2000.

[4] Mr Ram seeks to appeal on two grounds namely:

[5] Firstly, that the trial judge erred in fact and in law in directing the assessors that he could be found guilty when in fact all three elements of the offence (namely that the accused, acting with malice aforethought, did an unlawful act which act caused the death of his father). This appeal seems to be based on a submission that his father's death was not caused by a head injury but instead by (a) bleeding disorders resulting from cirrhosis of the liver & (b) blood collecting inside the skull.

[6] Secondly, that the trial judge erred in law and in fact in allowing expert evidence of a Dr Biribo who was an anaesthesiologist and not a pathologist.

[7] Section 21of the Court of Appeal Act provides:

> *(1) That a person convicted on a trial before the High Court may appeal under this Part to the Court of Appeal –*
>
> *(a) against his conviction on any ground of appeal which involves a question of law alone;*
>
> *(b) with leave of the Court of Appeal or upon a certificate of the judge who tried him that it is a fit case against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and*

(c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.

[8] Mr Ram's case before the High Court was that he did not touch his father and that his father's injuries were consistent with a fall. However two boys gave evidence that Mr Ram struck his father in the head with an iron bar.

[9] There are some unusual features to this case and it seems to me that it is arguable that Mr Ram has another ground of appeal, namely failure by the trial judge to put the defence of provocation to the jury.

[10] Mr Ram's evidence was that although his father when drunk made problems for his mother his father never attacked him, and of course Mr Ram's case was that he never assaulted his father at all, but it seems to me that is arguable on appeal that it ought to have been put to the assessors that the father's violent behaviour towards the mother and perhaps the accused, if not on the day that he was attacked then in the years leading up to that day, amounted to provocation.

[11] In ***Van den Hoek v The Queen*** [1986] 161 CLR 158 the High Court confirmed that on a charge of murder it is the duty of the trial judge, after proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked. This is whether or not the issue has been specifically raised at trial and whether or not the accused has said in terms that he was provoked.

[12] Provocation only operates to reduce what would otherwise be murder to manslaughter and the provocation must be such as would cause an ordinary person to lose self-control and act in such a manner which would encompass the accused's action and it must be such as could cause an ordinary person to form an intention to inflict at least grievous bodily harm: ***Masciantonio v The Queen*** [1995] 183 CLR 58 at 66.

[13] The test involving the hypothetical ordinary person is an objective one which lays down the minimum standard of self-control required by the law and since it is an objective test the characteristics of the ordinary person are merely those of an ordinary person with ordinary powers of self-control. They are not the characteristics of the accused but the ordinary person may be taken to be of the accused's age, sex, ethnicity and personal characteristics in determining the nature, extent and gravity of the provocative conduct of the deceased: ***Masciantonio*** at pp67 & 71.

[14] In ***Moffa v The Queen*** [1977] 138 CLR 601 where a man killed his wife, the provoking event had to be considered in the light of the previous years of unhappiness and provocation. The Court confirmed that the final event does not have to be looked at in isolation, it can be *"the last straw"* where the relationship between the accused and the deceased has been a long one.

[15] In ***R v Ahluwalia*** [1992] 4 All ER 889 the appellant was a woman who had suffered years of abuse from her husband. One evening she set him alight while he was sleeping. She was convicted of murder and sentenced to life imprisonment. The Court of Appeal held that the defence of provocation was not available to her because there had not been a sudden and temporary loss of control on her part. However if *"battered wife syndrome"* is available on the evidence then provocation can be available as a defence even is cases such as these: ***R v Muy Ky Chaay*** [1994] 72 Aust. CR 1.

[16] In ***Masciantonio,*** where an accused killed his son-in-law, the final act of provocation was an exchange of words, but this had to be seen in the context of the accused's belief that his son-in-law had over a period of time acted violently towards the accused's daughter.

[17] At the hearing Mr Ram's counsel opposed the giving of a direction on provocation and, citing ***Deo v The State*** [2008] FJCA 23 said that there was no evidence at all of provocation.

[18] However it seems to me that evidence of a drunk and abusive father, who was intoxicated at the time of the son's assault, was sufficient evidence to support the giving of a direction, and that it is arguable that the trial judge erred in law in failing to give such a direction even though defence counsel opposed such a direction. I say this bearing in mind that Mr Ram was 18 years old when his father was attacked, he was the eldest of three children and his drunken father was just returning home. A senario involving provocation is easy to imagine.

[19] This is a ground of appeal that does not require leave. In any event I give leave to Mr Ram to appeal on this ground. He is also permitted to appeal on the ground that Dr Biribo's evidence was wrongly admitted because this ground involves a question of law alone and therefore no leave is required.

[20] Section 17(3) of the ***Bail Act*** provides that when a court is considering granting bail to a person who has appealed against conviction or sentence the court must take into account:

(a) The likelihood of success of the appeal;

(b) The likely time before the appeal hearing;

(c) The proportion of the original sentence which would have been served by the appellant when the appeal is heard;

[21] It is clear from the authorities cited by Byrne J including ***Ratu Jope Seniloli & Ors v The State*** Criminal Appeal No. AAU0041 of 2004, that it is mandatory for the Court

to take into account the three matters referred to in section 17(3) of the ***Bail Act*** but also to consider other relevant matters, and that there have to be exceptional circumstances before bail could be granted to a convicted person.

[22] In my view there this is an exceptional case, one where there are strong prospects of success or appeal and where, if the Court of Appeal orders on retrial for manslaughter, a non-custodial sentence might be imposed.

[23] Accordingly I grant Mr Ram bail pending the determination of this appeal and recommend that he be granted legal aid for his appeal.

[24] The orders of the Court are:

[1] Praveen Ram is given leave to appeal his conviction on the following grounds:

[a] Firstly, that the trial judge erred in fact and in law in directing the assessors that he could be found guilty when in fact all three elements of the offence (namely that the accused, acting with malice aforethought, did an unlawful act which act caused the death of his father) were not proved.

[b] Secondly, that the trial judge erred in law in allowing expert evidence of a Dr Biribo.

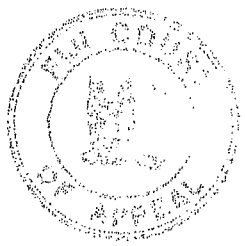
[c] Thirdly that the trial judge erred in law in failing to give the assessors a direction on the defence of provocation.

[2] That Praveen Ram be released on bail pending determination of his appeal subject to the following conditions:

(a) That he reside with his mother until the hearing of the appeal;

(b) That he report to the Nabua police station once a week;

(c) That his sister provide surety.



Randall Powell
Justice of Appeal

Solicitors:

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Office of the Director of Public Prosecutions, Suva for the Respondent