IN THE FIJI COURT OF APPEAL

SUVA, FIJI ISLANDS

[Criminal Appeal No. AAU0118 OF 2007]
(An Appeal from the Lautoka High Court in Civil Action No. HAC 007 of 2005)

BETWEEN	:	THE STATE
		APPLICANT
AND	:	GRAHAM HAYNES AND LEONARD HAYNES
		RESPONDENTS
BEFORE THE HONOURABLE JUSTICE OF APPEAL	:	Mr. JUSTICE JOHN E. BYRNE
COUNSEL	:	ANTHONY G. ELLIOTT (For the Appellant)
	:	A. KOHLI and A. SEN (For the Respondents)
	:	
Date of Hearings and Submissions	:	2nd June and 23rd October 2008
Date of Ruling	:	14th August 2009 at 10.00 am.

RULING ON FINDING OF NOT GUILTY BY THE HIGH COURT

INTRODUCTION

[1] On the 13th of November 2007 Graham Haynes and Leonard Haynes were jointly charged with acting with intent to Cause Grievous Bodily Harm contrary to Section 224(a) of the Penal Code Cap. 17.

[2] They pleaded not guilty to the charge and the trial began at the High Court in Labasa.

[3] On the 19th of November 2007 the respondents were acquitted as a result of the learned Trial Judge's Ruling upholding the Respondent's submissions of No Case to Answer made pursuant to Section 293(1) of the Criminal Procedure Code, Cap. 21.

[4] On the 14th of December 2007 the State appealed against this ruling on three grounds and sought an order that the Respondents did have a case to answer and that the order of their acquittal should be set aside.

[5] The Notice of Appeal is really an application to a single judge of this court that the appeal should be referred to the Full Court for its decision.

STATEMENT OF OFFENCE

[6] The respondents were jointly charged that on the 13th of November 2004 at Savusavu, with intent to cause grievous bodily harm, they unlawfully wounded CLARENCE LEPPER.

[7] At the close of the case for the prosecution, Counsel for the respondents submitted to the Court that on the evidence called to that stage in the trial, there was no case made out for their clients to be put to their defence or, as it is said in law, that they had no case to answer. The Learned Judge upheld their submissions and acquitted them.

THE GROUNDS OF APPEAL

[8] The appellant seeks to appeal on the following grounds:

(i) that the Learned Trial Judge erred in law in considering irrelevant factors when determining the elements of the offence.

(ii) that the Learned Trial judge erred in law in his assessment of the relevant standard of proof required for a submission of no case to answer made pursuant to Section 293 (1) of the Criminal Procedure Code Cap 21.

(iii) that the Learned Trial Judge erred in law when ruling that the charge was defective on the basis that it failed to disclose the exact nature of the unlawful wounding sustained by the victim.

[9] Each of these grounds raises a question of law alone and therefore the appellant has the right to appeal under Section 21 (2)(a) of the Court of Appeal Act Cap 12.

[10] I shall now consider these grounds in their Order.

[11] In paragraph 11 of the Learned Judge's ruling he stated that in his opening remarks to the Assessors, he emphasized the fact that the charge against the respondents required proof of a specific intent unlike a charge preferred under Section 245 of the Penal Code. That section states that any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour which the Learned Judge said did not require proof of specific intent to cause bodily harm.

[12] In saying this the Learned Judge was correct.

[13] In paragraph 26 of this ruling the Judge stated that he considered the prosecution had failed to prove the element of intent because "***there was no ill will or pre-existing dispute between the two accused and Clarence Lepper***". He further stated that ***"there is no evidence showing that the two accused had planned anything to do against Clarence Lepper".***

[14] I interpolate here that there was evidence that on the afternoon of 13th November 2004 the respondents saw sheep belonging to Clarence Lepper on the roadway. They rang Mr Lepper to tell him that his sheep were out again and that the first respondent was going to shoot them if they were not brought in. This eventually led to a confrontation in which Clarence Lepper was seriously wounded.

[15] In the case of R. v. McKnoulty (1994) 77 A Crim.R. 333 at p344 the Court said:

> ***"The usual direction in relation to such a specific intent is that a person's acts may themselves provide the most convincing evidence of his intention. An intention to inflict grievous bodily harm may be inferred from the nature of the act which is done: Thomas (1960) 102 CLR 584 at 596-597; Stokes and Difford (1991) 51 A Crim. R 25 at 30".***

[16] The appellant submits that whether or not there was evidence of a pre-existing dispute is not relevant to proving the element of intention nor is it necessary to demonstrate any ill-will or pre-existing previous dispute. I accept this submission. I also accept the appellant's submission that in relation to the issue of intention it was necessary for the Learned Trial Judge to consider whether the evidence, taken at its highest, was capable of supporting an inference that there was intention to maim, disfigure or disable or to cause some grievous bodily harm.

[17] The prosecution case was that the respondents had beaten Mr Lepper with the butt of a gun and kicked and punched him. In my view that circumstance was arguably more than sufficient to warrant the drawing of such an inference and I therefore grant leave to appeal on ground one.

GROUND TWO

[18] In paragraph 17 of the Judge's Ruling he stated that the power of the court to find that a case is not made out against an accused person under Section 210 of the Criminal Procedure Code is not unfettered. ***"It must be exercised carefully after taking into consideration the relevant evidence and analyzing them to ascertain whether it supports all the essential elements of the offence charged beyond reasonable doubt".***

[19] I do not accept that as a correct statement of the law. Whilst it is the correct test when determining guilt or otherwise at the conclusion of a trial, it is not the correct test when considering a no case to answer submission. The court in State v. Sainivalati Ramuwai and Others Criminal Case No. HAC 033 of 2005 said that the test under Section 293(1) is :

> ***"Whether there is evidence in respect of each ingredient of the offence. As was said in Sisa Kalisoqo v. State Crim.App.No. 52 of 1984 and State v. Mosese Tuisawau Crim. App. No.14 of 1990, if there is some relevant and admissible evidence, direct or circumstantial, touching all the elements of the offence, then there is a prima facie case. That is the test in a criminal trial in the High Court when the prosecution has closed its case."***

[20] Counsel for the respondents in their submissions stated that the use of the words ***"beyond reasonable doubt"*** in paragraph 17 of the Ruling is unfortunate but this court should not look at the words in isolation. I agree that the use of the words mentioned was unfortunate but with respect it was also wrong in law.

[21] In my judgment the prosecution evidence had addressed all the elements of the offence and had established a ***prima facie*** case.

[22] In paragraph 6 of his ruling the Learned Judge quoted part of the statement of Lord Lane C.J. in R. v. Galbraith,73 Cr.App.R.124 at p127 that: " ***if there is no evidence that the crime alleged has been committed by the defendant there is no difficulty – the judge will stop the case".***

[23] Regrettably the learned Judge did not quote the remainder of Lord Lane's remarks which are as follows:

> ***" The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. Where however the prosecution evidence is such that its strength***

or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury".

[24] Had he done so it is arguable that he would not have misdirected himself as in my view he did on this question.

[25] For these reasons I also grant leave to appeal on Ground 2.

GROUND 3

[26] In paragraph 29 of his Ruling the Learned Judge said that a charge preferred under Section 224(a) of the Penal Code : *" must specify in the particulars of the charge the nature of the unlawful wounding that is alleged against the accused person".*

[27] The purpose of this requirement is to ensure that the accused person knows what the case against him or her is and what he has to meet. The appellant states, and it is not denied by the Respondents, that in this instance State Counsel had opened the case comprehensively and made it plain what the contest was about.

[28] His Lordship then said in the same paragraph: *"it is an essential element of the charge and when it is not included in the particulars of the offence the defect is terminal".*

[29] With respect that statement is wrong in law. In my view details of the wound were a mere particular. It was necessary for the prosecution to prove a wounding, but not necessary to provide particulars in the indictment. Section 119 of the Criminal Procedure Code states :

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".

[30] Furthermore the second schedule to the Criminal Procedure Code sets out the form of stating offences in informations under section 224 of the Penal Code. Nowhere in the form is there a requirement to particularize the exact nature of the unlawful wounding. In my view therefore in so holding the Learned Judge again fell into error. I therefore grant leave to appeal also on this ground.

[31] I consider the appellant has raised arguable grounds for my giving it leave to appeal in this case and I therefore make that order. The case will now take its place in the list of appeals awaiting hearing.

Dated this 14th day of August 2009.

JOHN E. BYRNE

JUDGE OF APPEAL