IN THE COURT OF APPEAL
AT SUVA

CRIMINAL APPEAL NO. AAU 81 OF 2011
(High Court Criminal Action No. HAC 91 of 2010S)

BETWEEN	:	**1. SALESI BALEKIVUYA** **2. SAIMONI TUKANA**
		Appellants
AND	:	**THE STATE**
		Respondent
Coram	:	**Chandra RJA**
Counsel	:	**Ms. N. Nawasaitoga for the Appellants** **Ms. M. Fong for the Respondent**
Date of Hearing	:	**30 January 2014**
Date of Ruling	:	**26 March 2014**

RULING

[1] This is an application for leave to appeal against conviction and sentence from the High Court at Suva.

[2] The Appellants were jointly charged with Attempted Robbery (Counts 2 and 3) contrary to section 44(1) and 310(1)(a)(i) of the Crimes Decree 2009 and with murder (Count 5) contrary to section 237 of the Crimes Decree 2009. The 1st Appellant was also charged with Damaging Property (Count 1) contrary to section 369(1) of the Crimes Decree 2009.

The 2nd Appellant was also charged with Theft contrary to Section 291(1) of the Crimes Decree 2009.

[3] The learned trial Judge accepted the majority verdict of the Assessors and convicted both as follows:

1st Appellant – Guilty of Count 1 (Damaging Property) , Count 3 (Attempted Robbery) and Count 5 (Murder), Not guilty of Count 2 (Attempted Robbery).

2nd Appellant – Guilty of Count 2 (Attempted Robbery), Count 4 (Theft) – Pleaded guilty and Count 5 (Murder) Guilty of manslaughter and Not Guilty of Count 3(Attempted Robbery).

[4] The 1st Appellant was sentenced to life imprisonment for murder with a non-parole period of 20 years, 9 months for damaging property and 9 years for attempted robbery, the sentences to run concurrently.

[5] The 2nd Appellant was sentenced to 12 years imprisonment for manslaughter with a non-parole period of 10 years, 9 years for attempted robbery and 9 months for theft, the sentences to run concurrently.

[6] The amended grounds of appeal filed on behalf of the Appellants are:

> *"Conviction*
>
> *(1) The Learned Trial Judge erred in law when he disregarded the medical report of the Appellants which was suggestive of police improprietory whilst in police custody. Furthermore, the Prosecution had not rebutted the evidence of the Appellants resulting in substantial miscarriage of justice.*

(2) *The Learned Trial Judge erred in law when he failed to define the words "self induced intoxication" to the assessors and also failed to inform them that self induced intoxication was a valid defence available to the appellants resulting in substantial miscarriage of justice.*

(3) *The Learned Trial Judge erred in law when he misdirected the assessors on one of the elements of murder under section 237 of the Crimes Decree 2009 in that there has to be a willful act on the part of the Appellants to cause the death of the deceased. This essentially meant the Learned Trial Judge was adding an additional element of the offence resulting in substantial miscarriage of justice.*

(4) *The Learned Trial Judge erred in law and in fact in not reminding the assessors of the words used by the victim to provoke the Appellants which would have assisted the assessors in coming to a decision whether the words were provocative in nature or not resulting in substantial miscarriage of justice.*

(5) *The Learned Trial Judge erred in law when he directed the assessors that they could find provocation was not available to the Appellants without considering the objective test on provocation resulting in substantial miscarriage of justice.*

Sentence

(1) *The Learned Trial Judge erred in principle when he did not fix a non-parole period in accordance with the aggregate period of imprisonment that the Appellants will be liable to serve under all the sentences imposed contrary to section 18(5) of the Sentencing and Penalties Decree 2009.*

(2) *The Learned Trial Judge erred in principle when he did not consider;*

a) The length of time the Appellants spent in remand; and
b) A lower starting point considering the fact it was not premeditated or planned or calculated killing."

[7] On Count No.1, it was alleged that the 1st Appellant willfully and unlawfully damaged Salesh Chand's motor vehicle, on Count 2 it was alleged that both appellants attempted to violently rob Rajnesh Chand, on Count 3 it was alleged that both Appellants attempted to violently rob Ashwin Chand, on the 4th count the 2nd Appellant had committed theft (for which he pleaded guilty) and on the fifth count it was alleged that both appellants murdered Krishneel Singh.

[8] The two Appellants after drinking and smoking marijuana with others had gone to Shalimar Street, Samabula at about 5 p.m. The deceased had offered two of his friends a lift in his station wagon and had to pick up some tools from his father's rented house at Shalimar Street. After reaching Shalimar Street, he had parked the vehicle at the top of the driveway and gone to fetch the tools while his two friends were in the vehicle. The second Appellant had approached the deceased's friend who was in the front seat of the car and forcefully demanded money from him. When he was told that he had no money the 2nd Appellant had repeatedly punched him. The 1st Appellant had repeatedly punched the other friend who was in the rear seat of the vehicle, and when he had managed to get out of the car and was running away, he had been pursued by the 1st Appellant and kicked. When the 1st Appellant had rushed back to the car, a tenant in the deceased's house had hit him with a crowbar, dropped it and fled. While the 2nd Appellant was punching the first victim, the deceased had come up the driveway with a spade and he had hit the 1st Appellant's back with the spade. Both Appellants had then tried to snatch the spade from the deceased. The deceased had kicked the Appellants but the 1st Appellant had punched the deceased who had fallen down. When the deceased was lying fallen, both appellants had kicked him on the head, and the 1st Appellant had picked up the spade and repeatedly hit the deceased's head with it. The Appellants had gone away but after sometime the 1st Appellant had again run back to the deceased and had hit him on the head with the spade again. The deceased had died when taken to the hospital soon after and death had been due to extensive skull fractures with extensive brain injuries due to blows to the head with a blunt object.

[9] The first ground of appeal is as regards the caution interviews of the Appellants. The complaint is that the learned trial Judge disregarded the medical report of the Appellants. The learned trial Judge in his summing up dealt with the caution interviews of the Appellants the allegations of police assaults and the medical reports at paragraphs 42 to 44 of his summing up. In view of this position the ground made out by the Appellants is not arguable as it lacks merit.

[10] The second ground of appeal is in respect of the summing up of the learned trial Judge regarding self induced intoxication as a defence. Their complaint is that the trial judge had failed to explain to the Assessors the definition of self-induced intoxication and that they were not directed regarding the effect of such intoxication as a defence. The learned trial Judge referred to the fact that the Appellants had commenced their confrontation with the deceased and his two friends after they had been drinking liquor and also smoking marijuana. In those circumstances the question would arise as to the direction of the learned trial Judge to the Assessors regarding self induced intoxication of the Appellants. This brings about a question of law and therefore no leave is required for this ground.

[11] The third ground of appeal is relating to the elements of murder and whether there was an adequate direction by the learned trial Judge. Here the complaint is that the learned trial Judge had stated that there has to be a willful act on the part of the Appellants to cause the death of the deceased. The learned trial Judge in his summing up had explained the nature of a willful act and the consequences of such an act by citing examples. Since this ground relates to the elements of the offence of murder alleged against the Appellants, that too would give rise to a question of law for which no leave is required.

[12] The fourth ground of appeal is as regards the failure of the learned trial Judge to remind the provocative words allegedly uttered by the deceased to the accused in his summing

up. The learned trial Judge had in his summing up referred to the defence case and had therefore placed the defence case as well as the prosecution case before the Assessors. The cause of the incidents which resulted in the death of the deceased was the fact that the Appellants had intended to rob the deceased's friends who were in the car waiting for the deceased. In the process of the scuffle words appeared to have been uttered by the victims which would have been provocative. In such a situation a balanced summary of the incident as had unfolded in Court was placed by the learned trial Judge before the Assessors.

[13] As cited by the Respondents the dictum from **Silatolu –v- State** [2006] FJCA 13 clearly demonstrates the manner in which a trial Judge should direct the assessors:

> *"When summing up to a jury or to assessors, the judge's directions should be tailored to the particular case and should include a succinct but accurate summary of the issues of fact as to which decision is required, a correct but concise summary of the evidence and of the arguments of both sides and a correct statement of the inferences which the jury is entitled to draw from their particular conclusions about the primary facts;* ***R –v- Lawrence*** *[1982] AC 510. It should be an orderly, objective and balanced analysis of the case;* ***R –v- Fotu*** *[1995] 3NZLR 129."*

[14] The summing of the learned trial Judge appear to come within the parameters set out in **Silatolu** (Supra) and therefore this third ground of the Appellants lacks merit.

[15] The fifth ground is as regards the direction of the learned trial Judge in his summing up that provocation was not available for the Appellants. This was a matter that should have been left to the Assessors to consider without giving his view on the issue. Therefore this would bring about a question of law which can be considered by the Full Court.

[16] The grounds of appeal regards the sentence relates to failure to fix a non-parole period in accordance with the aggregate period of imprisonment, the length of time spent in custody and the taking into account of a lower starting point as it was not a premeditated or planned or calculated killing.

[17] The 1st Appellant was found guilty of murder and was given a life imprisonment with a non-parole period of 20 years. His sentences for Count 1, damaging property was 9 months and for count 3 – Attempted Robbery, 9 years imprisonment, the terms to run concurrently. The mandatory sentence for murder is life imprisonment and was a fixed sentence and no appeal would lie against the imposition of such a sentence. The only question that would remain would be non-parole period of 20 years, which was usual in cases of murder. As for the sentences for the other two counts they too are within the tariff for such offences and therefore there is no merit in the grounds of appeal against sentence as regards the 1st Appellant.

[18] The 2nd Appellant was found guilty of manslaughter and sentenced to 12 years with a non-parole period of 10 years. He was also sentenced to 9 years for attempted robbery and 9 months for theft, the sentences to run concurrently. These sentences are within the tariff and therefore there is no merit in the grounds of appeal against sentence as regards the 2nd Appellant.

[19] For both Appellants the ground of appeal was taken up as regards the period of time spent in remand before trial not being considered by the learned trial Judge. Except for murder, as to whether this is an aspect that should have been considered by the learned trial Judge in imposing the sentences for the other offences may be arguable and is left to the Full Court to consider.

Order of Court:

Leave to appeal against conviction and sentence is allowed for both Appellants.

Hon. Justice S. Chandra
Resident Justice of Appeal