IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court

CRIMINAL APPEAL NO. AAU 020 OF 2018
[Lautoka High Court Case No. HAC 52 of 2014]

BETWEEN : **MATAIASI ULUI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, JA**
Qetaki, JA
Bull, JA

Counsel : **Mr S. Waqainabete for the Appellant**
Mr L. J. Burney for the Respondent

Date of Hearing : **4 May 2023**
Date of Judgment: **14 June 2023**

JUDGMENT

Mataitoga, JA

[1] I have read the judgement prepared by Madam Bull JA. I agree with her reasons and conclusions.

Qetaki, JA

[2] I have read in draft the Judgement and the conclusion of Madam Bull, JA and I agree with the reasoning therein and her conclusions.

Bull, JA

High Court

[3] In the High Court of Fiji at Lautoka, the Appellant and three others (Maikeli Loko (Accused 2), Rakesh Kumar (Accused 3), and Vinod Segran (Accused 4)) were jointly charged with the murder of Vasu Dewan Naidu (victim/deceased) on 14 April 2014 at Nawaicoba, Nadi.

[4] All pleaded not guilty to the charge and the matter proceeded to trial before a Judge and four assessors. The Appellant and all accused persons were represented by counsel.

[5] The evidence at trial was that the Appellant (Accused 1), Accused 2 and 4 worked for a small manufacturing company in Nadi Town owned by Accused 3. All four of them knew the deceased well. He was a subcontractor to Accused's company and was known to all the accused.

[6] In a Judgment delivered on 5 February 2018, the learned trial Judge summarised the evidence as follows:

> 4] It was suspected that the deceased was using witchcraft to have an effect on one or more of the accused. At a meeting arranged to discuss company business, the discussion turned to his alleged practice of witchcraft and the deceased was asked to account for himself. He was told it had been noted that he had been seen practicing dubious rituals. This verbal challenge turned violent and the deceased was set upon by the first and second accused and perhaps others too. He was assaulted, by both the first and second accused and the assault ended with the first accused picking the deceased up, swinging him around and dashing him head first on to a concrete floor. The deceased sustained severe injuries to the skull and brain as a result and died some 27 hours later.
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> 5] The evidence against the first and second accused came from admissions they made in their respective interviews under caution. The admissibility of the records of these interviews was tested in pre trial proceedings and the Court found then to be voluntary and admissible. There was no contest to their provenance or content at trial.

> 6] The prosecution case against the third and fourth accused was founded on two hypotheses. First, the reported accusations of the deceased himself in the hours before his demise, in which he is said to have named both the third and the fourth accused as two of his assailants. Secondly circumstantial evidence that the State claimed was enough to place them in the joint enterprise.

[7] The pathologist's evidence is that the deceased died at the Lautoka Hospital on 15 April 2014. The post mortem examination was conducted on 17 April 2014 at the Lautoka Hospital mortuary after the body was identified by the deceased's brother. The cause of death, he said, was the fractured skull and the haemorrhaging between the skull and the membranes between the skull and the brain, caused by the assault.

[8] In his cautioned interview, the Appellant said that he had punched Arun on the mouth and then lifted and threw him down with his back landing first. He also stated that the deceased had landed head first.

[9] When charged by the Police, he again admitted punching the deceased but said he did not intend for him to die. He asked for forgiveness.

[10] The Appellant, Accused 2 and Accused 3 chose to remain silent. Only Accused 4 gave evidence in his defence.

[11] At the end of the trial, the assessors returned with unanimous opinions that the Appellant and Loko were guilty of the lesser offence of manslaughter, and Kumar and Segran, not guilty of any offence.

[12] The learned trial Judge disagreed with the assessors' opinions in respect of the Appellant and convicted him of murder. He concurred with the assessors' opinions in respect of the other three accused. Loko was accordingly convicted of manslaughter and Kumar and Segran, acquitted.

[13] In rejecting the assessor's verdict in respect of the Appellant, the learned trial Judge stated:

> The assessors have expressed a unanimous opinion that the first accused is guilty of the lesser offence of manslaughter. The Court rejects those opinions and finds him guilty of murder.
>
> The difference between the two offences is of course the recklessness as described in sections 237 and 239 respectively of the Crimes Act 2009.
>
> To throw a person head first on to a concrete floor is reckless in the extreme. Any sober and reasonable person would appreciate that indulging in such conduct would risk mortal damage to the head the part of the body most vulnerable to injury.

Court of Appeal

[14] Unhappy with the decision at trial, the Appellant filed in person a timely appeal against conviction and sentence. His homemade grounds of appeal were subsequently amended by counsel from the Legal Aid Commission as follows:

> Appeal against conviction
>
> Ground 1: The learned trial Judge erred in law and in fact when he gave inconsistent verdicts upon conviction to the Appellant and his co-accused's at trial when joint enterprise was available on the evidence.
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> Ground 2: The learned trial Judge erred in law and in fact in not giving cogent reasons for his disagreement with the unanimous decision of the assessors.
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> Appeal against sentence
>
> Ground 1: The learned trial judge erred in law and in fact in imposing a sentence with a high minimum term of 15 years.

[15] Given the nature of the grounds of appeal, leave was required pursuant to section 21 (1) (b) and (c) of the Court of Appeal Act (the Act).

[16] In a Ruling delivered on 16 July 2021, the single judge of appeal, Prematilaka RJA granted leave to appeal against conviction and refused leave to appeal against sentence.

[17] The Single Judge rejected the complaint about inconsistent verdicts in Ground 1 on the basis of the established principles set out in ***Balemaira v State*** [2013] FJSC 17: CAV0008 of 2013 (06 November 2013) and ***Vulaca v State*** [2013] FJSC 16; CAV0005.2011 (21 November 2013).

[18] In ***Balemaira*** (supra) at [21] – [22], the Supreme Court stated:

> [21] Whether a guilty verdict is unreasonable or inconsistent requires careful consideration of the evidence. The principles to be applied in such cases were summarised by the Court of Appeal in ***Nemani Tuinavavi & Semi Turagabete*** Criminal Appeal No. HAC0002/2005L at paragraph [23]:
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> > "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] HCA 32; (1982) 148 CLR 668 (per Murphy J)."
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> [22] More recently, in ***Lole Vulaca v The State*** Criminal Appeal No. CAV0005 of 2011 (21 November 2013), this Court endorsed the above principles at paragraph [67]:
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> > "As was observed by the High Court of Australia in *Mackenzie v R* (1996) 190 CLR 348, at 366-7 [Gaudron, Gummow and Kirby JJ], the test that is applied in dealing with questions of inconsistent verdicts, "is one

> of logic and reasonableness." In the course of its judgment, the High Court of Australia cited a passage in an unreported judgment of Devlin J in *R v Stone* (13 December 1954), to the effect that an accused who asserts that two verdicts are inconsistent with each other, "must satisfy the court that the two verdicts cannot stand together".

[19] We agree with and adopt the findings of the learned Single Judge dismissing the complaint of inconsistent verdicts. The contention that the conviction of the appellant for murder is inconsistent with Accused 2 being convicted of manslaughter, cannot be sustained in light of the authorities above.

[20] Having found against the complaint of inconsistent verdicts at trial, the learned Single Judge went on to consider whether the conviction for murder against the Appellant could be sustained on its own merits. He found that the learned trial judge had based the Appellant's criminal liability on his own act and not on the basis of joint enterprise. The learned Single Judge was of the view that the trial Judge's assertion that the Appellant had thrown the deceased head first on to a concrete floor was not borne out by the evidence and resulted in a wrong verdict of murder instead of manslaughter.

[21] This finding was significant in the ultimate decision granting leave to appeal against conviction.

[22] We find that there was in fact, evidence of the deceased landing on his head. It came from the Appellant's answer in the cautioned interview in the following terms:

> Q88: When Arun was thrown down, on what surface did he land?
> A: On the cement floor
>
> Q89: Which part of Arun hit the cement first when you threw him down?
> A: When I swing (sic) him then his head landed first.

[23] Earlier in the interview, the Appellant gave the following answers:

> Q72: When you people were asking Arun what happened?

A: The first, second, third questions asked was denied by Arun and I got really angry and moved closer to Arun and punched his mouth, I stood up hold the collar of his shirt and his trousers lifted him up and threw him down with his back landing first.

[24] Both counsel agree there is evidence of the deceased hitting his head on the cement when thrown by the Appellant. Mr. Waqainabete submitted that the deceased landing on his back lessened the impact on the head. Mr. Burney for the Respondent submitted there was no evidence or at least no unambiguous evidence that the Appellant had thrown the deceased head first.

[25] It is clear the learned trial Judge's reasons for rejecting the four assessor's verdict of guilty of manslaughter against the Appellant was from what he perceived as recklessness on the part of the Appellant in throwing the deceased head first.

[26] The evidence of throwing the deceased onto the cement floor was taken from the Appellant's cautioned interview statement.

[27] We agree that the interview record simply states that the deceased had landed on his head. However we would not go so far as to say that the Appellant had thrown or dashed him head first. An explanation as to how this conclusion was reached was necessary, and in its absence, any ambiguity in this finding of fact must be held in favour of the appellant.

[28] In the Appellant's charge statement, he admitted having punched the deceased but said he did not mean for him to die.

[29] In their unanimous opinions that the Appellant was not guilty of murder but guilty instead of manslaughter, it appeared the assessors were not sure that he had been reckless as to a substantial risk of causing death but were certain as to recklessness as to a real risk that he would cause the deceased serious harm.

Disagreement with Assessors' Verdict

[30] Disagreeing with the assessors opinions require written reasons to be pronounced in Court. (Section 237 (4) Criminal Procedure Act).

[31] Where a Judge overrules the unanimous opinion of assessors, he must provide cogent reasons for doing so "and his own approach to the relevant law should be impeccable." (***Saukuru v Reginam*** [1981] FijiLawRp 21; [1981] 28 FLR 6 (27 November 1981).

[32] More recently in ***Singh v State*** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) at [21], Marsoof J referred to the duty to give cogent reasons under s. 237 above as follows:

> [21] These provisions and similar provisions in prior enactments[14] have been examined by our courts in several important judgments. and it has been observed that the trial judge must have "very good reasons"[15] for differing from the assessors. In *Ram Bali v Regina*[16] it was emphasised that the trial judge should proceed on "cogent and carefully reasoned grounds based on the evidence before him and his views as to credibility of witnesses and other relevant considerations". This latter case went up on appeal to the Privy Council, which observed that the trial judge was taking "a strong course" by differing from the unanimous opinion of the assessors, but concluded that his decision was justifiable because it was based upon his own "emphatic conclusions in regard to the evidence". In *Shiu Prasad v Regina,*[17] *Rokopeta v State*[18] and *Likunitoga v State*[19] it was reiterated that the judge must have "cogent reasons" for differing from the assessors.

[33] In this case, the learned trial Judge's reasons are given in paragraphs [12] – [14] of the Judgment. It is that the learned trial Judge found that the Appellant had thrown the deceased head first on to a concrete floor and so was reckless as to the risk of causing death. For the ambiguity in the evidence as to whether the Appellant had thrown the deceased head first given in [46] above, we do not consider the reasons sufficient for the purposes of explaining the basis of the disagreement with the assessors.

Directions on the law

[34] In summing up to the assessors, the learned trial Judge directed them and himself to

> Look at each accused separately because the evidence in respect of each is different. Just because you may think that one accused is guilty, it does not mean that the others are.

[35] The charge however in the summing up to the assessors at [24] in respect of Accused 2, is as follows:

> Your approach to the second accused should be therefore:
>
> - If you think he was there just to stop the fight and for no other purpose, then you will find him not guilty. If you think he was assisting the first accused in beating up Arun then he is jointly liable.
>
> - If you find that it was foreseeable that the beating up would lead to the death of Arun then Maikele is guilty of whatever you find Matai guilty of; that is murder or manslaughter.
>
> - If you find that the death was not foreseeable then you will find Maikele not guilty of anything.

[36] The learned trial Judge upheld the assessors' opinions of guilty of manslaughter against Accused 2 on the following basis which is, with respect, on a different footing from the directions in the summing up:

> There can be no doubt that he was acting in concert with the first accused. As a secondary party he must bear some responsibility for the resultant death but not a responsibility for the recklessness.

[37] We consider the reasons for the conviction for murder to be not adequately supported having regard to the evidence relied upon in the reasons for overruling the unanimous decision of the assessors.

[38] In the interest of consistency and fairness, we consider it just to allow the appeal against conviction.

[39] On the facts before the court, we are of the view that the learned trial Judge could on the information for murder have found the Appellant guilty of manslaughter. Both Mr. Waqainabete and Mr. Burney appear to agree that a conviction for manslaughter could be substituted in its stead.

[40] The conviction for murder means the trial Judge had been satisfied that the Appellant had engaged in conduct which caused the death of the deceased, though without the mental element which would have made it murder.

[41] The course we have decided to take means the Appellant now has to be sentenced for manslaughter.

[42] According to the sentencing remarks of the learned trial Judge, the Appellant at the time of sentencing for murder was 34 years old and married with two children. He had a clean record and was of good character prior to this conviction. He had offered to plead guilty to manslaughter but was rejected by the DPP. He spent 9 – 10 months in custody awaiting trial.

[43] The maximum penalty for manslaughter is 25 years imprisonment. The sentencing tariff is from a suspended sentence to 12 years imprisonment, covering a very wide set of varying circumstances which in turn attract different sentences. (***Kim Nam Bae v The State*** Criminal Appeal No. AAU0015 of 1998S)

[44] The level of violence on his part was higher than Accused 2 so a higher starting point is justified. The mitigating factors are the previously clean record and good character. He cooperated with the Police and admitted the physical elements of the offence. He expressed remorse for his actions in the charge statement. His offer of a guilty plea to manslaughter,

if accepted, would have entitled him to about 1/3 discount in sentence. It was also an indication of remorse. The period of 9-10 months is taken as part of sentence served.

[45] From a starting point of 10 years, 3 years is added for the violent nature of the assault. Four years is deducted for previous good character, cooperation with the Police and remorse. For the early offer of a plea to manslaughter, 3 years is discounted, leaving now an interim total of 6 years. A further deduction is made for the 10 months spent in remand, leaving a sentence of 5 years 2 months.

[46] The Appellant has served 5 years 4 months imprisonment and, having effectively served out the sentence for manslaughter, is to be released forthwith.

Orders of the Court

For all of the above, we would:

1. Allow the appeal against conviction for murder and accordingly set it aside.
2. Substitute a conviction for manslaughter.
3. Sentence the Appellant to 5 years 4 months imprisonment, from 8 February 2018.
4. Order that he be released forthwith, having served the full term of his sentence.

Hon. Justice Isikeli Mataitoga
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Justice Siainiu Bull
JUSTICE OF APPEAL