IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 377 of 2017

STATE

vs.

1. **NOA RAVUTANASAU**
2. **MELACI TIKOMAIRARATOGA**

Counsel: Ms. Kantharia B, Ms. J. Fatiaki and Mr. L. Burney for the State
Ms. Prakash A for Accused 1
Ms. Ratidara L for Accused 2

Date of Hearing: 07th, 8th and 12th November 2019

Date of Ruling: 12th November 2019

RULING

[On Amendment Document]

Introduction and Background

1. The two accused are being charged with one count of Murder, contrary to Section 237 read with section 45 of the Crimes Act. The particulars of the offence are that:

Statement of Offence

MURDER: *Contrary to Section 237 read with section 45 of the Crimes Act of 2009.*

Particulars of Offence

NOA RAVUTANASAU and MELACI TIKOMAIRARATOGA *on the 30th day of November 2917, at the* ***TOTAL SERVICE STATION*** *car park at Suva in the Central Division murdered* ***RUSIATE VAKALAKOVI.***

2. The hearing of this matter commenced on 29th October 2019. The learned counsel for the prosecution made her opening address outlining the case of the prosecution. The prosecution then presented the evidence of seven witnesses. The defence opted to remain silent, hence, no evidence was adduced for the defence. The learned counsel for the prosecution and the defence then made their respective closing addresses.

3. At the conclusion of the closing addresses of the counsel, the court invited the prosecution and the defence to make submissions on the correctness of the information. According to the statement of the offence of the information, the prosecution has alleged that the two accused have committed this offence as an aider, abettor, counsellor or procurer. However, the particulars of the offence merely states that the two accused on the 30th of November 2017, murdered one Rusiate Vakalakovi. The particulars of the offence have not stated the nature of the participation or the nature of the responsibility of the two accused. The learned counsel for the prosecution in her opening address did not make any reference stating that the prosecution case against the two accused is founded on the basis of the principle of secondary offenders. Furthermore, the learned counsel for the prosecution did not mention anything about aiding, abetting, counselling or procuring during her closing addresses. Therefore, it appears that the prosecution has either changed the nature of the allegation against the two accused or has conducted the hearing on a completely different basis than of the information.

4. Ms. Kantharia, the learned counsel for the prosecution initially stated that the case of the prosecution is founded on the principle of joint enterprise, but was not able to explain the reason for charging the two accused under Section 45 of the Crimes Act. The two learned counsel for the defence were not aware of this situation until the court raised this issue. The two learned counsel for the defence admitted that they failed to properly read the

information, hence, they were not aware that the two accused had been charged as aiders, abettors, counsel or procurer pursuant to Section 45 and 237 of the Crimes Act. Moreover the two learned counsel for the defence submitted that they have conducted the defence presuming that the two accused have been charged on the basis of joint enterprise. The two counsel for the defence submitted that they have no objection to amend the information if the prosecution amends the information to include the principle of joint enterprise from aiding and abetting. The learned counsel for the prosecution and the defence then sought further time to prepare themselves to make further submissions in order to assist the court to determine the correctness of the information.

5. The hearing of this issue had to adjourn on several occasions as the prosecution was not properly ready to make helpful submissions. Ms. Kantharia and Ms. Fatiaki informed the court that the prosecution finds no defectiveness in the information. However, they informed that they cannot explain in their submissions how the information is not defective. Mr. Lee Burney, the Acting Director of Public Prosecution then appeared for the prosecution and made submissions on this issue, stating the information is not defective. The learned counsel for the two accused made no helpful submissions either, apart from stating, they conducted the defence on the presumption that the prosecution case is based upon the principle of joint enterprise.

The Law and Analysis

6. Article 14 (3) of the International Covenant of Political and Civil Rights has recognized that every person who is charged with a criminal charge has a right to be informed in details the nature and cause of the charge against him. It is one of the main components of the right to have a fair and public hearing. Article 14 (3) of the International Covenant of Political and Civil Rights states that:

> *"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To*

he informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."

7. In line with this international human rights standards, Section 14 (2) (b) of the Constitution of the Republic of Fiji states that every person charged with an offence has the right to be informed the nature of and reasons for the charge. Section 14 (2) (b) of the Constitution states that:

> *"Every person charged with an offence has the right –*
>
> > *"to be informed in legible writing, in a language that he or she understands, of the nature of and reasons for the charge."*

8. The criminal proceedings in the High Court is conducted on the basis of the information. (*vide Section 213*). According to Section 198 of the Criminal Procedure Act, an information charging an accused person shall be filed by the Director of Public Prosecution. Section 198 of the Criminal Procedure Act states that:

> *"An information charging an accused person and drawn up in accordance with section 202 shall be filed by the Director of Public Prosecutions or by the Commissioner or Deputy Commissioner of the Fiji Independent Commission Against Corruption with the Chief Registrar of the High Court within 21 days of the order for transfer except that the High Court may grant leave to extend the 21 days. The power of the Director of Public Prosecutions to file information may be delegated by him to a public prosecutor in writing."*

9. The information must be drawn up in accordance with Section 202 of the Criminal Procedure Act. Section 202 of the Criminal Procedure Act states that:

1. The practice of the High Court shall be applied as determined by a judge hearing any criminal proceeding or trial, and shall be as is —

a) prescribed by the provisions of this Decree, and any Regulations made under this Decree:;

b) prescribed by the provisions of any Act Decree or Promulgation relating to the administration and jurisdiction of the High Court;

c) provided for in any Practice Direction issued from time to time by the Chief Justice.

2. Subject to sub-section (1), the practice of the High Court in its criminal jurisdiction shall be as nearly as circumstances will admit to the practice of High Court of Justice in England, and the inherent powers of the High Court of Justice shall be deemed to be the inherent powers exercisable by the judges of the High Court in Fiji.

10. Once the Director of Public Prosecution files the information and served it to the accused as required under Section 199 of the Criminal Procedure Act, the court must read the information to the accused. *(vide Section 213).* The court must explained the information if the accused requests an explanation. For that reason, the information files by the prosecution is the main document that explains the accused the nature of and the reasons for the charge.

11. Sections 58 and 61 of the Criminal Procedure Act stipulate what should contain in the charge or information. It states that:

"Every charge or information shall contain—

i) A statement of the specific offence or offences with which the accused person is charged; and

ii) Such particulars as are necessary for giving reasonable information as to the nature of the offence charged."

12. Section 61 of Criminal Procedure Act states that:

> *1. A count of a charge or information shall commence with a statement of the offence charged, and this shall be called the statement of offence.*
>
> *2. Each statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence.*
>
> *3. The charge shall contain a reference to the section of the law creating the offence.*
>
> *4. After the statement of the offence, particulars of the offence shall be set out in ordinary language, and the use of technical terms shall not be necessary.*

13. The statement of offence and the particulars of offence are the two main components in the information. The statement of offence describes the offence and the particulars of offence explain the nature of the charge. It is not required to use the language of legal parlance in the statement of offence and particulars of offence. It should be in ordinary language, avoiding as far as possible the use of technical terms. Moreover, it is not necessary to state all the essential elements of the offence in the information as long as it clearly provides the offence and the nature of the offence to the accused.

14. The Fiji Court of Appeal in **Shekar & Shankar v. State (Criminal Appeal No AAU0056 of 2004**) has discussed the purpose of a charge, where it held that:

> *"The purpose of the charge is to ensure that the accused person knows the offence with which he is being charged. Whilst the particulars should be*

as informative as it reasonably practicable, it is not necessary slavishly to follow the section in the Act."

15. In **State v. Singh (Criminal Appeal No AAU0097 of 2005S)** the Fiji Court of Appeal held that:

> *"The purpose of the particulars of offence is to indicate to the person accused of the offence the nature of the case the state intends to present. It does not need to set out the whole evidence and it is sufficient if it indicates how the case will be presented. What is important is the evidence the prosecution adduces."*

16. The Fiji Court of Appeal in **Yang Xieng Jiong v State [2019] FJCA 17; AAU0077.2015 (7 March 2019)** states that:

> *"The purpose of the charge is to ensure that the accused person knows the offence with which he or she is charged (Per Goundar J. in Kamlesh Lata Arun v State [2009] HAA 52-55/08L 23 October 2009)."*

17. The Sections 58 and 61 of the Act and the above discussed judicial precedents have clearly outlined the scope of the information, which is in line with Section 14 (2) (b) of the Constitution.

18. Section 2 (3) of the Constitution states that all the public officers must upheld and respect the constitution and also fulfil the obligation imposed by the constitution. Accordingly, the Director of Public Prosecution in instituting and conducting of criminal proceedings, must fulfil the obligation imposed by the constitution.

19. As a result of Sections 58, 61, 198, 202 and 213 of the Criminal Procedure Act and Sections 2 and 14 (2) (b) of the Constitution, the Director of Public Prosecution is required to draft

the information in order to clearly disclose the nature of and cause for the charge to the accused.

20. Mr. Burney, during the course of his oral submission, explained that the prosecution is not sure whether both the accused have committed this offence as joint offenders or one as the principle and other one as the secondary offender. Therefore, stating Section 237 read with section 45 of the Crimes Act clearly provides the defence the nature of the case and no need to specifically state the two alternatives that the prosecution is relied upon in this case.

21. In order to substantiate his position, Mr. Burney relied on a passage from the Crown Court Compendium on Jury and Trial Management and Summing Up. Precisely he relied on the paragraph 3 of the chapter 7-2 of the Compendium, which I reproduce it as follows:

> *"It has always been sufficient to prove that D was with the principle or accessory (123). It is not necessary to specify what role D is alleged to have played (124). The crown should draw the particulars of the offence in such a way as to disclose with greater clarity the real nature of the case that the accused has to answer" (124).*

22. The three foot notes in this passage have referred to three cases. They are that **Fitzgerald (1992) Crim LR 660, Gianetto (1997) Cr App R 1 CA** and **DPP of Northern Ireland v Maxwell (1978) I WRL 1350.**

23. The issue of this hearing is not whether the prosecution could charge an accused on alternative basis. When the prosecution is not sure whether the accused has committed the offence as a principle or as the secondary offender, the prosecution can charge the accused on the basis of two alternatives. The issue is whether the prosecution has clearly disclosed the two alternative basis in the information.

24. Mr. Burney submitted that according to **Gianetto (supra)** there is no need to mention the specific role played by the accused. In **Gianetto (supra)**, the appellant was charged with the

murder of his wife. The crown's case was that he had either murdered the wife by himself, or had got someone else to do so. The appellant was convicted and appealed against his conviction on the ground that the trial judge had erred in failing to direct the jury that they must be unanimous as to which of the two competing versions of event put forward by the crown they accepted. The Court of Appeal of England held that the judge was right in not directing the jury that before they could convict the appellant, they must all be satisfied as to whether the appellant had killed his wife or that he had got someone else to kill the wife. Kennedy LJ in his judgment held that the Jury is entitled to convict if they were all satisfied that if he was not the killer he at least encouraged the killing. Kennedy LJ went on further and held that the prosecution must make it clear to the accused what case he had to meet if the case is based upon either as the principle or as the secondary offender, where Kennedy LJ held that:

> *"There are two cardinal principles. The first is that the jury must be agreed upon the basis on which they find a defendant guilty. The second is that a defendant must know what case he has to meet. When the crown allege, fair and square, that on the evidence, the defendant must have committed the offence either as principle or as secondary offender, and make it clear that they cannot say which, the basis on which the jury must be unanimous is that the defendant, having necessary mens rea, by whatever means caused the result which is criminalised by the law."*

25. I concur with the submissions made by Mr. Burney that the prosecution is not required to specify in the information what role the defendant have allegedly played. However, **Gianetto (supra)** has specifically stated that the prosecution must make it clear to the defence the nature of the alleged responsibility.

26. In **DPP for Northern Ireland v Maxwell (supra)**, the appellant was charged with doing an act with intent to cause an explosion by a bomb, contrary to Section 3 (a) of the Explosive Substance Act and with possession of a bomb contrary to Section 3 (b) of the Act. The Appellant was convicted on both offences as an accomplice. He appealed contenting that

since he did not know what form the attack would take or of the presence of the bomb in the other car, he could not properly be convicted of aiding and abetting in the commission of crimes of which he was ignorant. The correctness of the indictment was not a ground in the appeal. However, Lord Viscount Dilhorne expressing his concern about the indictment said that:

> *"No objection could be taken to the form of these counts as by statute aiders and abettors can be charged as principles, but the particulars to each count give no indication of the case the prosecution intended to present and which the appellate had to meet. In the particulars to the first count, he is charged with placing the bomb in the Crosskeys Inn; in the particulars to the second with having had it in his possession or under his control. The prosecution did not attempt to prove that he had places the bomb or that he had been present when the bomb was put in the inn, not was any attempt made to eatables that at any time he had the bomb in his possession or under his control. It is desirable that the particulars of the offence should bear some relation to the realities and where, as here, it is clear that the appellant was alleged to have aided and abetted the placing of the bomb and its possession or control, it would in my opinion have been better if the particulars of offence had made that clear."*

27. Lord Hailsham of St Marylebone in **DPP for Northern Ireland v Maxwell (supra)** expressed his view on the deficiency of the indictment in the following manner:

> *"It will be seen that in the above counts, the appellant was charged, as the general law permits, as a principle, but the real case against him was that, as the driver of the guide car, he was what used to be known as an accessory before the fact. Although, no complaint is made about the form of the counts, I agree with the view expressed by my noble and learned friend, Viscount Dilhorne, of the desirability in these cases of aiding and abetting, counselling and procuring, of drawing the particulars of offences*

in such a way as to disclose with greater clarity the real nature of the case that the accused has to answer."

28. Lord Edmund Davies in **DPP for Northern Ireland v Maxwell (supra)** has also expressed his concern about the indictment, where he said that:

> *"I nevertheless respectfully share the view expressed by my noble and learned friend, Viscount Dilhorne, that where, as here, the role of an accused is that of a principal in the second degree, it makes for clarity if the particulars of the charges explicitly assert it. Such a course is likely to prove helpful to the judges of fact. It is also preferable for the purpose of the record of convictions that such distinction should be drawn in the particulars of the charges preferred. Furthermore, as the Earl of Reading CJ said in Gould & Co v Houghton, 'when considering the sentence to be imposed these are convenient expressions to distinguish between the degrees of actual participation by the various offenders..."*

29. Three judges in **DPP for Northern Ireland v Maxwell (supra)** have clearly expressed their views, stating that the desirable practice is to clearly state the role or the nature of the responsibility of the accused in the particulars of the offence.

30. Accordingly, it is clear that Mr. Burney's contention, that the Crown Court Compendium on Jury and Trial Management and Summing Up has given a guideline on the drafting of information, stating the prosecution is not required to clearly state the nature of the responsibility or the participation in the particulars of the offence is misconceived. Even in a situation, where the prosecution is not sure whether the accused have committed the offence as a principle or as the secondary offender, the prosecution must make it clear about the two alternative basis of the Prosecution's case to the accused in the information.

31. Nawana JA in **Yang Xieng Jiong v State (supra)** held that the accused is entitled to know the basis upon which the case against him is presented by the State. In **Xieng Jiong (supra)**

the appellant was charged with one count of murder. The information stated that appellant was charged on the basis of individual criminal liability. However, the learned counsel in the opening address had mentioned about the group offending. Moreover, the appellant was convicted on the irrelevant evidence outside the scope of the information. Nawana JA in his judgment found that:

> *"The appellant was entitled to know the basis upon which the case against him had been presented by the state; and, that basis had not been anything else other than on the basis of the individual criminal liability as presented by the information by the DPP. This cannot be changed by making an opening statement on a totally contrary line and bring in a completely different case, which would certainly have entailed the involvement of different legal principles. This, in my view, is not permissible as it is against the fundamental rules of criminal procedure. The issue is made clear in view of the mandatory provisions of Section 58 of the Criminal Procedure Act, which states:*
>
> *Every charge or information shall contain-*
>
> *a) A statement of the specific offence or offences with which the accused person is charged; and,*
> *b) Such particulars as are necessary for giving reasonable information as to the nature of the offence charged.*
>
> *The purpose of the charge is to ensure that the accused person knows the offence with which he or she is charged (Per Goundar J. in Kamlesh Lata Arun v State [2009] HAA 52-55/08L 23 October 2009.*
>
> *This court, in the case of Lal v State; AAU 154.2014; [2018] FJCA 147 (04 October 2018) adopted the ruling of the Supreme Court of Canada in H. M the Queen v N. H. Rooke and R. C. De Vries; [1990] 1990 CanLII*

1131 (SCC) and Morozuk v The Queen; 1986 CanLII 72 (SCC), [1986] 1 S.C.R. 31, which held that it was a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved; and, permitting the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial.

In the circumstances, I conclude that the prosecuting state counsel is not empowered to conduct the case totally on a different basis by making an opening statement, which is manifestly different to the information presented to court and served on an accused person by the DPP without an amendment to the information, if such amendment is warranted. I am unable to agree with the submission of the learned counsel for the state that the prosecuting counsel's opening statement has had the effect of giving sufficient notice of the basis of charge to the appellant.

32. In this case the statement of offence states the two accused are charged with murder contrary to Section 237 read with Section 45 of the Crimes Act. Accordingly, the statement of the offence clearly indicates the two accused are charged with this offence of murder on the basis of adding, abetting, counselling or procuring. However, the particulars of the offence have not specifically stated the nature of the alleged participation, but merely stated the two accused had murdered the deceased. As discussed in paragraph 13, the statement of offence must explained the offence and the particulars of offence must describe the nature of the said offence.

33. It appears the statement of offence alleges the two accused as the secondary offenders while the particulars of the offence alleges them as joint principle offenders. The statement of offence describes the offence on the basis of aiding, abetting, counselling or procuring.

However, the particulars of offence explain the nature of the charge as principle offenders, making the information fundamentally defective.

34. In consequence of the above finding, I am not able to concur with the submission of Mr. Burney where he said this information is a text book drafting of an information. However, I find it otherwise. Yet, I do not wish to go to the extent of commenting this is one of the text book examples of a defective information.

35. Mr. Burney further submitted that there is no point or purpose of making any amendment to the information as the hearing of the case is already concluded. The purpose is very clear that the court cannot proceed with a defective information as it is the duty of the court to provide the accused a fair trial.

36. Section 214 (2) of the Criminal Procedure Act allows the court to make an appropriate order for the amendment of the information at any stage of the trial, if it thinks necessary to meet the circumstances of the case. Section 214 (2) of the Criminal Procedure Act states that:

> *"Where, before a trial upon information (or at any stage of such trial), it appears to the court that the information is defective, the court shall make such order for the amendment of the information as the court thinks necessary to meet the circumstances of the case, unless the required amendments cannot be made without injustice, having regard to the merits of the case."*

37. The court needs to take into consideration the risk of prejudice to the parties if it contemplates to make an order for the amendment of the information. (**Johal (1973 (QB 475, Collision (1980) 71 Cr App R 249**).

38. The prosecution presented the evidence to establish the first and the second accused had assaulted the deceased on his face and stomach by punching, kicking and stepping on him. Both counsel for the defence cross examined the witnesses of the prosecution in order to

point out that the two accused had exercised their right to self-defense when the deceased came and assaulted the first accused. Moreover, the defence suggested in their cross examination the existence of the defence of provocation.

39. In view of the evidence presented by the prosecution and the cross examination of the witnesses of the prosecution by the defence, I do not find any prejudice would cause to the defence if the court orders the prosecution to amend the information in order to explain the two alternative basis of the responsibilities on which the Prosecution is relied upon.

40. I accordingly order the prosecution to amend the information in order to explain the two alternative basis of the responsibilities of the two accused.

R.D.R.T. Rajasinghe
Judge

At Suva
12th November 2019

Solicitors
Office of the Director of Public Prosecutions for the State.
Office of the Legal Aid Commission for the 1st Accused.
Office of the Legal Aid Commission for the 2nd Accused.