

## STATE v LEONE LAUTABUI and Ors

HIGH COURT — CRIMINAL JURISDICTION

5 SHAMEEM J

14 January, 1 February 2002

[2002] FJHC 268

10 **Criminal law — offences — murder — attempted murder — conviction — guilt beyond reasonable doubt — returned opinions of the assessors — whether the Accused are not guilty on all counts — joint unlawful enterprise.**

15 The three Accused were found guilty by the judge on all counts charged in the information. Two of the assessors returned opinions that all the Accused were not guilty on all counts. One assessor had given his opinion that the 1st and 3rd accused was guilty on counts 3 and 4 of Attempted Murder. However the facts relevant to the counts of Attempted Murder are the same as for Murder. If the Accused were guilty on the basis of a joint enterprise in respect of counts 3 and 4, then it follows that the same joint enterprise existed in respect of the Murder counts.

20 **Held** — (1) Taking all the evidence into account, the judge did not concur with the Assessor's opinions. There was compelling evidence that all five persons including the three Accused were part of a joint unlawful plan to take over the Sawani Police Post and checkpoint. The plan gave rise to a compelling case of a joint unlawful enterprise. Therefore, they are guilty beyond reasonable doubt.

25 (2) The shooting by the Accused at Qiolevu Road was a probable consequence of the unlawful joint plan and that each Accused knew that by their reactions when the vehicles arrived.

30 (3) Each Accused participated in the unlawful enterprise voluntarily and not under duress. The Accused had many opportunities to remove themselves from the plan prior to the shooting and if the threats existed were not of a continuing nature to instantly kill or injure the Accused.

All three Accused convicted on each count accordingly.

No case referred to.

35 *Hamilton-White* and *K. Tunidau* for the State

*E. Veretawawtini* for the 1st Accused

*R. Matebalavu* for the 2nd Accused

40 *N. Vere* for the 3rd Accused

### Ruling

45 **Shameem J.** The prosecution invites me to withdraw the defence of compulsion from the assessors on the ground that on an objective test, there is insufficient evidence that each Accused committed the offences while under a continuing threat of death or grievous harm, for the assessors to consider.

Section 16 of the Penal Code provides:

50 *A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or to do him*

*grievous bodily harm if he refuses; but threats of future injury do not excuse any offence. Although in other jurisdictions, the defence is not available for the offences of murder or attempted murder, section 6 of our Penal Code makes no exception and is therefore available in principle for these offences.*

5 The test relevant for this defence in common law jurisdictions is both objective and subjective, 1) Was the threat such as to cause a sober reasonable person of reasonable fairness sharing the Defendant's characteristics and placed in the same situation to act in the same way as the Defendant acted? and 2) Was the Defendant in fact compelled to commit the offences?

10 However, a direction to the assessors strictly along the lines laid down in s 16 of the Penal Code and that is whether there was an irresistible and imminent threat to life placing the Accused in an inescapable dilemma, was approved by the Court of Appeal in *Prakash Wati Amos and Ors v R* Crim App No 41 of 1986.

15 In *Amos*, the matter was left to the assessors although in the words of the Court of Appeal, the Defendant Ralulu, "had ample opportunity to escape from his predicament earlier in the evening", and it was clearly left to the assessors in *Chaudhar Masih Hilmuk v R* (1963) CA 9 FLR 92.

20 In this case the Accused have all denied that in fact they had an opportunity to escape from Nimacere, and in all the circumstances the question of whether or not there was such an opportunity, given the individual characteristics of each Accused, the presence of firearms, the darkness, and the presence of the surrounding villages and bush land is a matter for the Assessors.

The application to withdraw "compulsion" from the Assessors is refused.

25 *All three Accused convicted on each count accordingly.*

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