

**IN THE SUPREME COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. CAV 0008 of 2016**  
[On Appeal from the Court of Appeal No. AAU 0094 of 2010]

**BETWEEN** : **VAIONE TEGU**  
*Petitioner*

**AND** : **THE STATE**  
*Respondent*

**Coram** : The Hon. Mr. Justice Suresh Chandra  
Judge of the Supreme Court  
The Hon. Madam Justice Chandra Ekanayake  
Judge of the Supreme Court  
The Hon. Mr. Justice Priyasath Dep  
Judge of the Supreme Court

**Counsel** : Mr. M. Yunus for the Petitioner  
Mr. M. Korovou for the Respondent

**Date of Hearing** : 12 August 2016

**Date of Judgment** : 26 August 2016

## J U D G M E N T

**Chandra J**

- [1] The Petitioner was charged with one count of Murder contrary to section 199 and 200 of the Penal Code (Cap 17) and convicted and tried before the High Court in Suva. He was convicted of murder and sentenced to life imprisonment with a non-parole period of 11 years on 9<sup>th</sup> November 2010.
- [2] The Petitioner appealed against his conviction to the Court of Appeal and the appeal was dismissed on 26<sup>th</sup> February 2016.
- [3] By letter dated 29<sup>th</sup> February 2016, the Petitioner filed a timely appeal to the Supreme Court setting out his grounds of appeal.
- [4] The Petitioner through his Counsel filed an amended petition seeking leave to appeal against his conviction on 12<sup>th</sup> July 2016 incorporating the grounds set out in the Petitioner's letter of 29<sup>th</sup> February 2016 in a more formal manner in the first three grounds and added a fourth ground which is a fresh ground of appeal which was not pleaded before the Court of Appeal. The grounds of appeal are:
- "1) That the learned trial Judge erred in law and in fact in not directing himself and or the Assessors that the prosecution evidence before the Court carried serious doubts in respect of the operating cause or substantial cause of death and as such the benefit of doubt ought to have been given to the Appellant.
  - 2) That the learned Trial Judge erred in law and in fact in not directing himself and or the Assessors that the prosecution evidence before the court proved that at the material time of the alleged incident the Appellant was under the influence of liquor as such with his state of mind, he could not form, intention, specific or otherwise, in the absence of such intention, he would not be guilty of the offence.

- 3) That the learned Trial Judge erred in law and in fact by misdirecting the Assessors on the elements of murder causing substantial miscarriage of justice to the Appellant.
- 4) That the learned trial Judge erred in law and in fact when he directed the Assessors about the elements of the offence of murder by giving examples which were similar to the facts of the case against the Petitioner resulting in a substantial prejudice to the Appellant.”

[5] Ground 4 is a fresh ground of appeal which was not canvassed before the Court of Appeal. The amended ground can be allowed only where a substantial and grave injustice might otherwise occur as stated by the Privy Council in **Kwaku Mensah v. The King** (1946) AC 83.

In this ground the Petitioner is submitting that the learned trial Judge in his summing up had given examples similar to the facts of the case against the petitioner when directing the Assessors on the elements of the offence of murder.

Such a direction may amount to a misdirection if the examples provided had bolstered the prosecution’s case. In this case the examples given by the learned trial judge regarding punching, kicking and stomping the deceased’s head were on the basis of the evidence given by the witnesses at the trial and also admitted by the petitioner in his evidence in Court and in his caution interview statement. The examples given by the Judge were not prejudicial to the petitioner and did not bolster the case for the prosecution.

[6] In **Silatolu v. State** [2006] FJCA 13 (unreported) AAU0024.2003S (10 March 2006) the Court of Appeal when dealing with the trial Judges direction to the assessors on matters of fact at paragraph 13 said:

“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] 3 NZLR 129.”

- [7] The summing up of the learned trial judge was based on the evidence at the trial and therefore not prejudicial to the petitioner. This ground does not bring about a situation where a substantial and grave injustice has occurred and therefore there is no merit in this ground.

### **Factual Background**

- [8] On 26<sup>th</sup> May 2006, the Petitioner, Vaione, had sat down to drink grog with his cousin Leanaitasi Lekangata, Lenaitasi’s father and Ilisoni Kinivuwai at Lenaitasi’s home from 7 p.m. to 11 p.m. Leanaitasi’s father had left at that stage but the rest had consumed beer and rum. Later the group had been joined by Jone and Sairusi (deceased). They had continued drinking and a commotion had occurred when Sairusi had winked at Leanaitasi’s wife. Lenaitasi and Sairusi had gone outside the house and resolved the matter through a fist fight. They had come back into the house and Sairusi had rested in Leanaitasi’s sitting room, while Leanaitasi and Jone had gone to buy more liquor. The Petitioner had repeatedly slapped and punched Sairusi while he was seated on the settee. Before being assaulted by the Petitioner, Sairusi already had injuries to his eyes and face with his fight with Leanaitasi and one earlier in the evening. Sairusi had yelled out for help and Josua had seen Vaione repeatedly punching Sairusi in the face and when he held the Petitioner’s hand, the Petitioner had given Sairusi three rugby kicks to the face. Sairusi had then fled outside the house followed by Vaione. Vaione had tripped Sairusi’s legs and he had fallen on the ground. The Petitioner had repeatedly kicked Sairusi in the ribs and when Josua had held the Petitioner’s hand, Sairusi had stood up and run toward the road. Vaione had gone after Sairusi and punched him on his jaw which made him fall and he had his head on the tar-sealed road. Ilisoni had asked the Petitioner to stop punching Sairusi and he had seen the Petitioner jumping and stomping Sairusi’s head twice. In the morning when Sairusi was found lying in front of their compound, Nanise

Ledua, a neighbour, had reported the matter to the Police who had taken Sairusi's body to the hospital. Sairusi had died the following morning. The post-mortem had revealed that death was due to "raised intra cranial pressure due to intra-cranial haemorrhage as a result of blunt impacts to the head, face and neck.

### **Jurisdiction of the Supreme Court**

[9] Section 98(3)(b) of the Constitution of the Republic of Fiji states:

"The Supreme Court has exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the court of Appeal."

Section 98(4) of the Constitution provides:

"An appeal may not be brought to the Supreme Court from a final Judgment of the Court of Appeal unless the Supreme Court grants leave to appeal."

Section 7(2) of the Supreme Act (Cap.13) provides:

"In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless:

- a. A question of general legal importance is involved;
- b. A substantial question of principle affecting the administration of criminal justice is involved; or
- c. Substantial and grave injustice may otherwise occur."

[10] As has been stated in several decisions of the Supreme Court, the threshold for the granting of leave to appeal to the Supreme Court is very high and it has to be shown that the appeal gives rise to resolving points of law of great and general importance or that a substantial and grave injustice has occurred.

### Consideration of the Grounds of Appeal

- [11] Counsel for the Appellant argued that it was not conclusive that the Petitioner's assaults were the operative cause of death and thereby raised the issue of causation. It was his position that the deceased had been involved in two fights prior to being assaulted by the Petitioner and therefore there was a doubt as to causation. He submitted that Dr. Perera who had given evidence at the trial had not been able to state with certainty as to which blow had caused the death. On that basis he argued that the Court of Appeal had erred in concluding that there was no merit in the ground raised by the Petitioner regarding causation.
- [12] The trial judge in his direction to the Assessors on causation dealt with all the assaults on the deceased on the day of the incident and the medical finding of Dr. Perera referring to the Pathologist's Report in paragraphs 35 to 38 of the summing up. The trial Judge had stated in the summing up that it was a matter for the Assessors to decide whether the Petitioner's unlawful acts caused the death of the deceased.
- [13] The finding on causation is a question of fact for the Assessors to consider. In Pagett [1983] 76 Cr App R 279 at 288, Robert Goff L.J. stated:
- “In cases of homicide, it is rarely necessary to give the jury any direction on causation as such. Of course, a necessary ingredient of the crimes of murder and manslaughter is that the accused has by his caused the victim's death. ... Even where it is necessary to direct the jury's minds to the question of causation, it is usually enough to direct them simply that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death, it being enough that his act contributed significantly to that result.”
- [14] The learned trial judge in the summing up referred to had very clearly stated that it was left to the Assessors to decide whether the Petitioner's acts caused the death of the deceased. There was clear evidence at the trial that the Petitioner had assaulted, punched

and kicked the deceased and that while the deceased was lying fallen on the tar-sealed road, that he had stomped the head of the deceased. In fact there was no denial of the assaults on the deceased by the Petitioner as he had pleaded guilty to manslaughter at the commencement of the trial.

[15] The Assessors brought in a verdict of guilt on the charge of murder which was accepted by the trial Judge in his judgment. The findings of the Assessors and the trial Judge on causation was that the acts of the Petitioner caused the death of the deceased.

[16] The Court of Appeal in their judgment also concluded that the assault by the Petitioner and the stomping of the head of the deceased's head by the Petitioner established causation. The Court of Appeal set out the following reasons in their judgment in arriving at that conclusion:

“44. The prosecution is required to prove that death was caused due to the blows of the accused. At the Tiki Bar one Josua Colaudolu had punched the deceased. The sister of the deceased Keba Phillips intervened and settled it. Another witness Atelini Nasuku says that Josua slapped the deceased and the fist of Josua landed on the mouth of the deceased. After arrival of the police, the deceased and Josua reconciled and left the place. From all accounts it was a case of minor incident and there were no blows on the head of the deceased. There is evidence that it was not a serious injury and the deceased was conscious and was in a position to walk. Therefore it cannot be the fatal blow that was inflicted on the deceased.

45. At the house, the 1<sup>st</sup> accused punched the deceased as he has allegedly winked at the wife of the 1<sup>st</sup> accused. The accused giving evidence said the 1<sup>st</sup> accused punched the face once (page 215). He doesn't say that the 1<sup>st</sup> accused gave any blows to the head. The accused attacked the deceased some time later. There is no evidence to the effect that after the punch of the 1<sup>st</sup> accused, the deceased

fell or he became unconscious. The 1<sup>st</sup> accused pleaded guilty to the charge of assault and he was convicted.

46. Dr. Gene Perera states that the cause of death was due to the injuries caused to the brain arising out of multiple blunt objects. (Paragraph 213). As a result of the blows given to the head a person loses consciousness immediately. Severe bleeding was observed in the brain and it was caused by blows. When pontine in the brain get damaged a person loses consciousness and when taken to hospital he passes out.
47. According to the witness Josua Cakautini soon after the stomping the deceased had difficulties in the breathing and started snoring. He sounded that something stuck on the windpipe. Therefore the eye witness's testimony is amply corroborated by Dr. Perera. The deceased was conscious up to the point the accused stomped the deceased. Therefore I hold that causation is unequivocally linked to the accused.
48. In support of causation the prosecution advances an additional point too. The appellant pleaded guilty to charge of manslaughter. Therefore the prosecution argued that in fact the accused had admitted to the fact that the death was caused as a result of an unlawful act committed by him. I accept the argument of the respondent. I conclude that the medical evidence strengthens the prosecution case and has thus established the element of causation.
49. In any event if the unlawful acts committed by the appellant hastened the death of the deceased, the accused is liable for the death. There are several decided cases to support this proposition.
50. The trial judge has given sufficient directions to the assessors with regard to the issue of causation at paragraphs 34-38 of the summing up (Pages 37 – 40).



- [17] The Court of Appeal has adequately dealt with this ground of appeal relating to causation and this Court sees no error in the conclusion arrived at in the judgment of the Court of Appeal.
- [18] The second ground that was urged on behalf of the Appellant was in relation to intoxication, in that the learned trial Judge erred in law by failing to direct the assessors that the Petitioner was under the influence of liquor and therefore did not have the intention to cause death.
- [19] It was in evidence at the trial that the Petitioner had taken liquor prior to the incident. The learned trial Judge in his directions to the Assessors dealt with the issue of intoxication in paragraph 42 and Counsel for the Appellant submitted that the learned trial Judge had rightfully placed the position that self induced intoxication shall not suffice as a defence. However, he argued that the prosecution had failed to prove that the Petitioner had the requisite intention to commit murder and that the trial Judge should have specifically directed the assessors that it was for the prosecution to disprove beyond reasonable doubt that the Petitioner was not intoxicated to that extent that he was unable to form an intention and it was not for the Petitioner to prove his drunkenness.
- [20] It was for the defence to establish the fact that the Petitioner was so intoxicated that he could not have the intention to cause death. The learned trial Judge in his summing up when setting out the defence case at paragraphs 24, 25 and 26 set out in detail the evidence given by the Petitioner at the trial where he had recounted most of the events that occurred that night including his attack on the deceased and how he and another had dragged the deceased and left him in front of the house where the body was discovered on the following day. His evidence in Court by itself established the fact that he was not intoxicated to the level of not knowing what he was doing.

[21] Counsel for the Petitioner relied on the following item of evidence of Dr. Perera:

“Alcohol affects the body and brain. It slows your reaction and dulls your senses. If you drink in large amount, on an empty stomach, it could cause a black out. The more you drink, the more it affects your mind”

and stated that this item of evidence became unchallenged evidence as it was not clarified by the prosecution in re-examination of the doctor. Further that the prosecution had not provided any medical or scientific evidence to rebut the defence, and the Court of Appeal erred in dismissing this ground of appeal.

[22] What Dr. Perera had expressed was a generalized statement regarding the effects of alcohol on a person. The items of evidence that transpired at the trial, which were adverted to by the trial Judge in his summing up and the evidence of witness Ilisoni that when he asked the Petitioner to stop punching the deceased, his response that “No, this person is cheeky. This person must die” and thereafter the Petitioner jumping up and stomping the head of the deceased would indicate that he was fully conscious of what he was doing. Even in his caution interview the Petitioner had stated the different events that had taken place that day.

[23] The Court of Appeal at paragraph 43 of the judgment stated:

“43. The analysis made above shows beyond any doubt that the appellant definitely entertained murderous intention and he exactly knew what he was doing. Though it appears that he was drunk there is no evidence of insanity. During the trial the defence never took up the position that the appellant was insane due to intoxication. In any event there is no evidence to show that he was insane. In the circumstances there is no basis to act under section 13 of the Penal Code.”

Therefore the Court of Appeal concluding that the Petitioner knew very well what he was doing is justified.

- [24] Ground 3 is that the learned Trial Judge erred in law and in fact by misdirecting the Assessors on the elements of murder causing substantial miscarriage of justice to the Appellant.
- [25] Although this ground had been put down as a ground of appeal, when the appeal was argued before the Court of Appeal this ground does not appear to have been pursued by Counsel for the Appellant as the Court of Appeal has stated that Counsel made oral submissions on the ground of causation, the defence of intoxication and the directions of the trial judge on intoxication.
- [26] However, the ground relied upon by the Petitioner is on the basis that the Petitioner was charged in terms of section 199 and 200 of the Penal Code and not under the Crimes Decree, 2009 and that the learned trial Judge had given his directions to the Assessors on the elements of murder as set out in the Crimes Decree. His complaint was that the mental element set out in the Penal Code was in terms of malice aforethought and that the learned trial judge did not direct the Assessors on that basis.
- [27] The element of 'malice aforethought' in the Penal Code definition of murder denotes the mental element required for the offence of murder, and is defined in section 202 of the Penal Code. The direction given by the learned trial Judge regarding the mental element for murder accords with the definition of malice aforethought in section 202.
- [28] Counsel for the Petitioner having stated that there was a misdirection on the elements of murder went on to state that the impugned direction, may not have a substantial bearing on the conviction but if it is not corrected it may otherwise cause injustice to the Petitioner. In effect Counsel for the Petitioner is conceding that it is not a substantial ground and therefore this ground needs no further consideration.

**Conclusion**

[29] None of the grounds raised by the Petitioner in his application have any merit and they do not meet the threshold for special leave to appeal to the Supreme Court.

[30] The application of the Petitioner for special leave to appeal is refused and the application is dismissed.

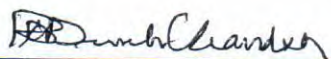
**Ekanayake J**


[31] I concur with the reasoning and conclusions of Chandra, J. I agree that special leave to appeal be refused and the application be dismissed.

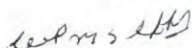
**Dep J**

[32] I agree with the reasons and conclusion reached by Chandra, J.



  
Hon. Mr. Justice Suresh Chandra  
JUDGE OF THE SUPREME COURT

  
Hon. Madam Justice Chandra Ekanayake  
JUDGE OF THE SUPREME COURT

  
Hon. Mr. Justice Priyasath Dep  
JUDGE OF THE SUPREME COURT