

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 112 OF 2011
(High Court HAC 204 of 2011)

BETWEEN : ABDUL AZIZ

Appellant

AND : THE STATE

Respondent

Coram : Calanchini P
Basnayake JA
Madigan JA

Counsel : Mr M Yunus for the Appellant.
Mr L Burney with Ms S Serukai for the Respondent

Date of Hearing : 8 May 2015

Date of Judgment : 13 July 2015

JUDGMENT

Calanchini P

- [1] The Appellant was charged with one count of murder under section 237 of the Crimes Decree 2009 (the Decree) and one count of criminal intimidation under section 375(1) (a) of the Decree. Following a trial in the High Court, the assessors returned

unanimous opinions that the Appellant was guilty on both counts. The learned Judge agreed with the opinions of the assessors and convicted the Appellant on the counts of murder and criminal intimidation.

[2] On 7 October 2011 the Appellant was sentenced to life imprisonment on the conviction for murder and to 18 months imprisonment on the conviction for criminal intimidation. The judge stated in paragraph 7 that he declined to fix a non-parole term under section 18(2) of the Sentencing and Penalties Decree 2009 (the Sentencing Decree). The Appellant's appeal is against conviction only. The grounds of appeal will be addressed shortly.

[3] However an important issue arises as a result of the learned Judge's decision to decline to fix a non-parole term under section 18(2) of the Sentencing Decree. Section 18 makes provision for the fixing of non-parole terms by the sentencing court. For the purposes of this case reference need only be made to the following sub sections of section 18:

"18-(1) Subject to sub-section (2) when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole.

(2) If a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section 1."

[4] It is apparent that section 18 is an enactment that has general application which must be considered whenever a court sentences a convicted offender. It is of no consequence to the sentencing court whether there is a parole board in existence or in what manner the executive has chosen to give effect to the imposition of a non-parole term. However what must be borne in mind is that the words "*parole*" and a "*non-parole term*" have specific meaning. A non-parole period is defined in section 2 of the Sentencing Decree as "*any period fixed under Part V during which an offender who is sentenced to a term of imprisonment is not eligible to be released on parole.*" It is apparent from section 49(1) of the Corrections Service Act 2006 that release on parole is release on licence. Such release is subject to conditions and any person

released on parole may be recalled to prison to serve part or all of the remainder of the sentence.

[5] That, however, is not the end of the matter. Under section 237 of the Crimes Decree the penalty for murder is expressly stated to be a mandatory sentence of imprisonment for life with a judicial discretion to set a minimum term to be served before a pardon may be considered. This is a particular sentencing enactment that applies specifically to an offender convicted of murder. Pardon is part of the prerogative of mercy exercised by the President on the recommendation of the Mercy Commission under section 119 of the Constitution. The pardon may be free or conditional (section 119 (3) (a)). The effect of a free pardon is to clear the person from all consequences of the offence for which it is granted and from all statutory or other disqualifications following upon conviction, but not to remove the conviction (8 (2) Halsburys 827).

[6] Although section 18 of the Sentencing Decree is a general enactment which ordinarily would apply to a life sentence imposed for murder, the particular enactment in section 237 of the Crimes Decree must be operative and in such case the maxim of interpretation "*generalia specialibus non derogant*" (general things do not derogate from special things) should be applied. The provisions of section 18 of the Sentencing Decree will have general application to all sentences, including where life imprisonment is prescribed as a maximum sentence unless a specific sentencing provision excludes its application. In my judgment a sentencing court is not expected to select either a non-parole term or a minimum term when sentencing for murder under section 237 of the Crimes Decrees. As a result any person convicted of murder should be sentenced in compliance with section 237 of the Crimes Decree. For the same reason the discretion given to the High Court under section 19(2) of the Sentencing Decree, being an enactment of general application, does not apply to the specific sentencing provision for murder under section 237 of the Crimes Decree.

[7] It should be noted that under section 119 of the Constitution any convicted person may petition the Mercy Commission to recommend that the President exercise a power of mercy by amongst others granting a free or conditional pardon or remitting all or a part of a punishment. Therefore the right to petition the Mercy Commission is

open to any person convicted of murder even when no minimum term had been fixed by the sentencing judge in the exercise of his discretion.

- [8] Turning now to the appeal against conviction. The Appellant was refused leave to appeal against conviction by a justice of appeal. The application before the justice of appeal was for an extension of time to apply for leave to appeal against conviction. The application appeared to proceed on the basis that the appeal raised grounds of mixed fact and law. Although the Appellant had forwarded his handwritten application for leave to the Corrections Office within time, there was a slight delay in typing the application and forwarding it to the Registry. As a result it was filed six days out of time. On the basis that either the application was deemed to have been filed within time or that the delay of six days was not an issue to trouble the Court, the learned Justice of Appeal proceeded to determine the application as an application for leave to appeal. As a result this is a renewed application for leave to the Court of Appeal under section 35(3) of the Court of Appeal Act Cap 12. In his amended notice of appeal filed on 15 April 2015 by the Legal Aid Commission, the Appellant relies on the following grounds:

"A. The Learned Trial Judge erred in law and in fact when he failed to adequately consider the defence (self-defence) raised by the appellant.

B. The Learned Trial Judge erred in law and in fact by not adequately directing the assessors on the issue of provocation."

- [9] It should be noted at the outset that it is not apparent from the wording of these two grounds whether this appeal raises errors of law only in which case leave to appeal is not required. If, on the other hand, the Appellant is relying on errors in the trial Judge's directions to the assessors and himself that relate to both the law and facts then the Court must first determine the question of leave.

- [10] The background facts may be stated briefly. The Appellant had lived with Samina Bibi from 1981 for about 26 years. She had then left the Appellant and about 12 months prior to 10 September 2010 had entered into a de facto relationship with the deceased Abdul Rauf. On 10 September 2010 Samina Bibi and the deceased Rauf

visited Samina's sister, Amina Bibi, in the early afternoon at Togoru Navua. It was Eid and the apparent purpose of the visit was to celebrate the occasion together. The Appellant and Amina Bibi lived in separate adjacent houses on freehold land owned by Samina Bibi. It would appear that in August 2010 Samina Bibi had instructed a legal practitioner to obtain vacant possession of her land and as a result a notice to quit had been served on the Appellant. There was evidence before the court that upon seeing Samina Bibi arrive with the deceased Rauf the Appellant started sharpening a cane knife which, on the Respondent's case, a short time later he used in an unprovoked and unlawful attack against Rauf resulting in Rauf's death. At the trial the Appellant gave evidence that Rauf threw a stone at him which struck his head and he swung the knife which hit Rauf.

- [11] It was as a result of that evidence that the learned trial judge gave directions to the assessors and for himself as to the law relating to self-defence and provocation. The Appellant's grounds are to the effect that the learned Judge (1) failed to adequately consider the defence of self defence and (2) failed to adequately direct the assessors (and himself) on the issue of provocation. The Appellant was not represented at the trial and could not have been expected to raise these matters with the trial Judge at the end of his summing up to the assessors.
- [12] The evidence relating to these two issues starts with the record of interview which had been admitted into evidence without any challenge by the Appellant. In the interview the Appellant stated that he was at his house on the morning of 10 September 2010. He said that after his meal he slept till about 1.00p.m. Then the following questions and answers appear (grammatical/spelling errors have not been corrected):

“Q 25 What did you do after that?

A: after that I started sharpening my cane knife.

Q 26 Where were you sharpening your knife?

A: beside my house under a guava tree.

Q 27 Can you recall as what time it was?

A: it was about to be 3 o'clock.

Q 28 What were you going to do with the cane knife?

A: I was about to cut grass beside my house

Q 29 Can you recall how long did you sharpen your knife?

A: about 3 minutes

Q 30 What happened after that?

A: after that I saw Karimulla and Shamina coming from behind my house

[earlier in the interview the Appellant stated that Karimulla's real name was Abdul Rauf]

Q 31 not relevant

Q 32 Did you know where they were returning from?

A: from Amina's house whose house is at the back of my house

Q 33 What did you do after seeing them?

A: both have come onto my compound and I went to them and asked why you eloped with my wife?

Q 34 What happened next?

A: he replied that he will keep Shamina what will I do

Q 35 What did you do next?

A: after saying this he threw a stone at me which hit me on my head

Q 36 Had you seen the sone in Karimulla's hand?

A: I did not see the stone before when he threw the stone then I saw the stone.

Q 37 At this time Karimulla was at what distance from you?

A: about 2 metres away.

Q 38 What did you do?

A: I was holding a cane knife in my hand and I struck on Karimulla.

Q 36 Did you see which part of Karimulla's body hit the cane knife?

A: no"

[13] There followed a series of questions put to the Appellant to the effect that witnesses saw the Appellant approach the deceased, conversed briefly and then struck him with the cane knife. The Appellant denied each claim put to him by the interviewing officer. It was also put to the Appellant that the injury to his head occurred after he had struck the deceased when a witness threw a piece of timber that hit the knife and as a result the knife hit the Appellant's head. The Appellant denied the claim. The

Appellant maintained in all his answers to these questions that each witness was lying. He maintained that some of the witnesses were not present at the time. Then at the end of the interview:

"Q 64 Why did you hit Karimulla?

A: he eloped with my wife and gave a vacating notice to me to move off the land. He kept roaming in front of me with my wife. Notice from Collin Singh and Company which I gave to Apetia Seru."

[14] Although the interview was conducted in the Hindi language, the English translation was read at the trial without objection from the Appellant. The English version was admitted as prosecution exhibit 3.

[15] At the trial the Appellant gave sworn evidence but did not call any other witnesses. His evidence was brief and is set out in one paragraph at page 209 of the Record as follows:

"I want to tell this court that Abdul Rauf threw the stone at me which hit my head and I got injured and in my hand I had the knife where I swing the knife and it hit Abdul Rauf. Before this incident I reported the matter about the location of the land to Mr Col. Aziz in PM's office and twice at Navua Police Station. That is all."

[16] Under cross-examination the Appellant maintained that the deceased had thrown a stone at him and that he swung the cane knife at the deceased in response. He maintained that the injury to his head was the result of the stone hitting him.

[17] The medical evidence concerning the deceased was given by Dr R P Goundar who tendered into evidence the post mortem report prepared by Dr Tarera Parera. On page 5 of the report the following appears:

"The deceased had a single deep sharp cut injury to the left side of the face and head, cutting the major artery and part of the neck vertebra. The major artery supplies blood to the left half of the brain."

This is an injury which causes extremely rapid death due to cutting off the major portion of blood to the brain and no treatment could have saved his life.

The injury is due to assault.

No other injuries were detected on the body."

The cause of death was stated to be deep cut injury to the head.

- [18] The medical evidence in relation to the Appellant was given by Dr A Vakamocea. The doctor stated that he briefly examined the Appellant on 10 September 2010. On 11 September 2010 the doctor again examined the Appellant and subsequently completed two medical examination forms provided by the Police. The doctor recorded on one of the forms the history of the injury and the results of his having examined the Appellant both the previous afternoon and on 11 September 2010. That report was admitted into evidence along with the second report compiled after a subsequent examination later on 11 September 2010 as exhibits 1 and 2.
- [19] In the first report the doctor recorded that the Appellant had claimed that he was assaulted with a heavy rock on the head after an argument. The doctor recorded that he observed a minor laceration on the scalp.
- [20] The doctor recorded his professional opinion to the effect that the nature of the injury was consistent with a sharp object. He stated that lack of tissue swelling and bruising made the history of assault with a heavy rock questionable. The doctor also noted that when the Appellant presented in the afternoon on the day before (i.e. on 10 September 2010) upon initial questioning the Appellant said that he was hit with a stick by someone other than the person that he allegedly struck with a knife.
- [21] Under cross-examination the doctor confirmed that there was no localised tissue swelling and bruising consistent with having been struck by a heavy rock.
- [22] The prosecution witnesses gave evidence that contradicted the Appellant's version of events leading up to the fatal assault on the deceased. In particular each witness who

was present on that day stated that they had not seen the deceased throw a stone at the Appellant.

Self-defence

- [23] The issue of self-defence was not raised by the Appellant when he made his application for an enlargement of time to appeal before a justice of appeal. It is raised for the first time in his renewed application before this Court. The learned Judge's directions on self-defence commence in paragraph 18 of his summing up where he says:

"You must first consider whether you believe or accept the truthfulness of the above piece of evidence of the accused. If you believe the said evidence, then you must consider whether the accused acted in self defence.

As a matter of law I must direct you, that when a man or a woman acts in self-defence to protect himself, he or she is not acting unlawfully. The law defines self-defence as a legal right to defend oneself and to do anything that is reasonably necessary to protect oneself from attack or injury. The law on self-defence is not a charter for revenge or retaliation. So you should think carefully about whether the deceased Abdul Rauf, attacked or tried to attack the accused, and whether in assaulting the deceased with the cane knife, the accused was doing what was necessary to protect himself or whether he was acting out of anger and retaliation. In considering whether the accused acted reasonably, you must ask yourself what a reasonable man in the accused's shoes would have done to defend himself. You need to ask yourselves the following questions:

- 1. Did the deceased attack or assault the accused?*
- 2. Did the accused believe that he was under attack?*
- 3. Did the accused assault the deceased with the cane knife in order to defend himself?*
- 4. Was his assault on the deceased reasonably necessary to defend himself? Was it proportionate to what the deceased was doing to him?*
- 5. In considering whether the accused acted reasonably, ask yourselves what a reasonable person in the accused's shoes would have done? Would he assault the deceased in the*

way that he did? Could he have removed himself from the situation instead of inflicting the said injury?

You may also consider the nature of the injury the deceased Abdul Rauf, had received.

However in considering self-defence, think of the deceased's conduct and the accused's conduct. Was the accused acting in retaliation? Was it natural for the accused to fear the deceased's assault? These are the questions you must ask yourselves.

As a matter of law, once the accused raises the issue of self-defence as he has done in this case, the burden is on the prosecution to prove that the accused was not acting in self-defence and you must be satisfied of this beyond reasonable doubt. Because self-defence is a complete defence, if you believe that the accused assaulted the deceased in self-defence, or if you have a reasonable doubt about it you must give your opinion that the accused is not guilty of any offence. If you are sure that the force the accused used was unreasonable, then the accused cannot have been acting in lawful self-defence."

- [24] The submissions filed by the Appellant on this issue are brief. There is a reference to section 42 of the Crimes Decree 2009. The Appellant then draws the Court's attention to brief selected extracts from the evidence given by witnesses at the trial concerning the claim that the deceased had thrown a stone at him and his swinging the knife as a result. The submission on self-defence concludes at paragraph 11 with the following:

"The Appellant submits that there was enough evidence before the Learned Trial Judge to consider the defence of self-defence raised by the Appellant, however the learned Trial Judge failed to adequately consider the defence on the entirety of the evidence before it, this was a serious miscarriage of justice therefore the conviction is unsafe."

- [25] In his submissions before the Court Counsel for the Appellant submitted that the direction on self-defence was inadequate. It is therefore open to the Court to regard the challenge to the directions on the basis first that the directions were inadequate on the law and secondly were inadequate since the learned Judge did not consider all the evidence that goes to self-defence.

- [26] The written submissions filed by the Respondent considered both these issues. The Respondent submits that it is arguable that in paragraph 19 of his summing up the learned Judge did not direct attention to the significance of the Appellant's perception of the threat that he faced at the relevant time. In other words, that the test is partly subjective as well as objective. The Respondent submits that although arguable the error does not give rise to a miscarriage of justice and therefore the appeal should be dismissed under section 23(1) (a) of the Court of Appeal Act.
- [27] On the issue of the onus of proof in respect of self-defence, the Respondent submitted that although there may be some questionable remarks in paragraphs 18 and 19, when the summing up is considered in its entirety, the Judge has clearly directed the assessors and himself that it was the Respondent that had the onus of establishing that the Appellant did not act in self-defence.
- [28] On the issue whether the summing up adequately and fairly placed before the assessors the evidence upon which the Appellant relied at the trial, the Respondent submitted that the learned Judge clearly set out the Appellant's evidence about the stone throwing at paragraphs 17 and 67 of the summing up. It is submitted that the learned Judge in a fair and balanced manner also referred to the evidence of Samini Bibi denying that the deceased threw a stone at the Appellant and the testimony of Gulnaz Bibi, Amina Bibi and Adam Dean as to how the Appellant had suffered an injury to his head.
- [29] The defence of self-defence is set out in section 42 of the Crimes Decree which states:
- "42(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.*
- (2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:*
- (a) to defend himself or herself or another person, or*
(b) - (e) ———
and the conduct is a reasonable response in the circumstances as he or she perceives them."

[30] The defence of self-defence is now, as a result of the words “*if and only if*”, available as a statutory defence. The defence will exonerate an accused person in the event that the prosecution fails to establish beyond reasonable doubt that the conduct of the accused was not a reasonable response to the circumstances as they were perceived by the accused. This is the only basis upon which the use of force in self-defence will negate criminal responsibility for an offence.

[31] The common law defence of self-defence was discussed in the judgment of Sackville J in The State –v- Li Jun (unreported CAV 17 of 2007; 13 October 2008). Although the judgment of Sackville J was a dissenting judgment, the judgment of the majority does not appear to take issue with the principles to be applied by a trial judge when directing the assessors and himself on self-defence. Sackville J having formed the view that although it may be possible that there are some differences between the common law of self-defence in England and Australia concluded that they were not material to the appeal before the Supreme Court in that case. The Supreme Court was concerned with a petition for leave to appeal against conviction for murder of four family members where the defences of self-defence (at common law) and provocation were in issue. Sackville J referred to the decision of the High Court of Australia in Zecevic –v- DPP (1987) 162 CLR 645 at 661 and concluded that there was no inconsistency with the statements made by the Privy Council in Palmer v The Queen [1995] 1 AC 482. Sackville J then made the following observations as to the nature of the test for self-defence at common law in paragraph 46:

“It is important to appreciate that the test stated in Zecevic is not wholly objective. It is the belief of the accused based on the circumstances as he or she perceives them to be, which has to be reasonable. The test is not what a reasonable person in the accused’s position would have believed. — — — It follows that where self-defence is an issue, account must be taken of the personal characteristics of the accused which might affect his appreciation of the gravity of the threat which he faced and as to the reasonableness of his or her response to the threat.”

[32] There is in my judgment no inconsistency between the common law principles of self-defence and section 42 of the Decree.

- [33] In my judgment the summing up did not adequately explain the subjective element of the test under section 42 of the Decree. The actions of the Appellant will be considered necessary for the purposes of self-defence if the conduct was a reasonable response in the circumstances as they were perceived by the Appellant. In my judgment the summing up does not direct the minds of the assessors or the Judge himself to the importance of the Appellant's perception of the threat that he faced on the afternoon of 10 September 2011. There is in the summing up an emphasis on the objective nature of the test. For example, the assessors were told that in considering whether the accused acted reasonably you must ask yourself what a reasonable man in the accused's shoes would have done to defend himself. It was not made sufficiently clear that the issue of whether the conduct was necessary must be considered in the context of reasonableness which in turn had to be determined by reference to the Appellant's perception of the threat that he faced. The Appellant's defence had at all times been that as an immediate response to the stone hitting him he had swung the cane knife in the direction of the deceased.
- [34] The circumstances of the Appellant which might have affected his perception or appreciation of the seriousness of the threat included the following: the deceased stood alone, the Appellant did not see any stone in the deceased's hand prior to it being thrown and it was the Appellant who approached the deceased. There was no evidence that the deceased had come to the location with a malicious intent. There may have been words exchanged. It is apparent from the evidence that it was the Appellant who had reason to feel ill-will towards the deceased.
- [35] So the only circumstances that would generate a perception of danger or harm on the part of the Appellant was a stone being thrown by the deceased and hitting the Appellant on his head. The question for the assessors should have been framed in terms of whether the Respondent had established beyond reasonable doubt that there were no circumstances that would justify the Appellant perceiving that he faced a threat or danger that justified the response of swinging the cane knife at the deceased. In other words the Respondent must establish beyond reasonable doubt that there was no factual basis for the Appellant perceiving that it was necessary for him to swing the cane knife at the deceased. If they were so satisfied then the assessors should reject the defence of self-defence.

- [36] On the issue of self-defence I have concluded that the directions on the law so far as the subjective element of the test is concerned were inadequate. I find that there was a misdirection on the law.
- [37] It is, of course, possible that if the assessors accepted that there was no stone throwing incident, then the Appellant had never faced a threat of physical harm and there would be no need to consider whether the Appellant had acted in self-defence. Another way of looking at the facts is that the Appellant had reacted to the stone hitting him. There was no evidence that the deceased was in the process of throwing another stone, or was advancing towards the Appellant in a manner that would give rise to a perception that he was in danger of further harm. The evidence indicated that there was no basis for the perception on the part of the Appellant that it was necessary for him to strike a pre-emptive blow.
- [38] In his summing up the learned Judge has pointed out that it was first necessary for the assessors to determine whether they accepted the truthfulness of the Appellant's evidence that a stone was thrown and hit them. From this it would appear that the assessors were being told that it was the Appellant who was required to establish that a stone was thrown by the deceased. This is not correct. The direction should have been to the effect that it was necessary for them to be satisfied that the stone was not thrown by the Appellant and that it was for the Respondent to prove that beyond reasonable doubt.
- [39] It should then have been indicated to the assessors that in the event that they did not accept the evidence of the witnesses for the prosecution or had some doubt about that evidence, they should then proceed to consider self-defence.
- [40] In paragraph 19 there are comments that may have left the impression that the onus of proof was on the Appellant in respect of self-defence. However in paragraph 21 the learned Judge has clearly and correctly stated the position when he said:

"As a matter of law, once the accused raises the issue of self-defence as he has done in this case, the burden is on the

prosecution to prove that the accused was not acting in self-defence and you must be satisfied of this beyond reasonable doubt."

[41] In the light of this direction and the general directions given in the summing up on the onus of proof, the assessors and the Judge himself could not have been in any doubt that it was for the Respondent to establish that the Appellant was not acting in self-defence.

[42] I do not accept that the learned Judge has failed to adequately consider the evidence raised by the Appellant in relation to self-defence. The Judge fairly summarized the evidence of the prosecution witnesses and the Appellant concerning the disputed stone throwing incident. The Judge alerted the assessors to the evidence of the witnesses and the medical evidence along with the brief evidence given by the Appellant in a fair and balanced manner.

Provocation

[43] The issue of provocation as a defence and the directions given to the assessors on provocation were raised as grounds of appeal in the leave application. The Justice of Appeal refused leave. The learned Judge's directions on provocation commence at paragraph 23 of his summing up where he says:

"Provocation is not a complete defence, leading to a verdict of 'Not guilty'. It is a partial defence, reducing what would otherwise be murder to the lesser offence of manslaughter. Because the prosecution must prove the Accused's guilt, it is for the prosecution to make you sure that this was not a case of provocation, and not for the Accused to establish that it was.

Provocation has a special legal meaning, and you must consider it in the following way.

Firstly, you must ask yourselves whether the Accused was provoked in the legal sense at all. A person is provoked if he is caused suddenly and temporarily to lose his self-control by things that have been said and/or done by the deceased rather than just by his own bad temper. The Accused says that the deceased threw a stone at him.

If you believe the story of the Accused and if you are sure that the Accused was or might have been provoked, in the sense which I have explained, you must then go on to weigh up how serious the provocation was for this Accused. Is there anything about this

Accused which may have made what was [said and/or done] affected him more than it might have affected other people?

Finally, having regard to the actual provocation and to your view of how serious that provocation was for this Accused, you must ask yourselves whether a person having the powers of self-control to be expected of an ordinary, sober person, of the Accused's age and sex, would have been provoked to lose his self-control and do as this Accused did. If you are sure that a person would not have done so, the prosecution has disproved provocation, and the Accused is guilty of murder. If, however, you conclude that such a person would or might have reacted and done as the Accused, your opinion would be 'Not guilty of murder, but guilty of manslaughter by reason of provocation'."

- [44] The learned trial Judge has directed the assessors on the law of provocation on the basis that the evidence relied upon by the Appellant for the defence was the stone throwing incident. The Justice of Appeal in his leave ruling has considered the ground of appeal on the basis that the Appellant was claiming that there was an error of law in the directions. The Justice of Appeal considered the directions to be proper and in accordance with the law.
- [45] However in his written submissions filed before the hearing of the appeal Counsel for the Appellant has taken a different approach to the issue of provocation. In paragraphs 16 and 17 the Appellant claims:

"16. *The Appellant submits that prosecution evidence suggests that it was Eid celebration day which the incident occurred. There was evidence to suggest that the Appellant saw his wife and the deceased celebrating the religious festival with other family members. He told his daughter they are coming, after that he asked the daughter for the knife and file to sharpen the knife.*

17. *The Learned Trial Judge had failed to direct the assessors to consider what sentimental value Eid plays on Islamic religion. Whether the Appellant lost control of his temper when he saw his wife celebrating Eid with another man, visiting the close families? Whether there was reasonable cooling off period when the Appellant first saw the deceased and his wife going to her sister's house? What an ordinary person in the shoes of the Appellant would have done in this situation."*

- [46] At the hearing Counsel for the Appellant relied on Eid as the evidence in support of the ground of appeal and submitted that the Judge erred in law and in fact by not adequately directing the assessors on the issue of provocation.
- [47] There appears to be no dispute that 10 September 2010 was the date for celebrating Eid and also that the Appellant, the deceased and the Bibi sisters were muslims who had gathered at the residence of Amina Bibi to celebrate the occasion.
- [48] The Respondent submits that the learned Judge has made reference to the gathering for Eid celebrations and has directed the assessors that they should consider all the circumstances relating to the Appellant's conduct, knowledge and intentions. The submissions point out that in accordance with the Supreme Court decision in Codrokadroka –v- The State (unreported CAV 7 of 2013; 20 December 2013) it would have been a wrong direction in law for the learned Judge to direct that the Appellant being a Muslim was relevant. Unless the words spoken or actions were aimed at the culture or ethnicity of the accused, the religion of the Appellant was not relevant. The Respondent points out that at the trial there was no evidence given by the Appellant that he had lost self-control. His only evidence was to the effect that he had swing at the deceased after he had been hit by a stone. The evidence as to Eid and a gathering to celebrate Eid on 10 September 2010 had come from the Respondent's witnesses.
- [49] The Respondent submitted that the directions given on provocation were in accordance with the decision of the Supreme Court in Codrokadroka (supra) and were correct. The only question that this Court needs to consider in view of the Appellant's written submissions is whether the learned Judge was required to give a direction on provocation that related to the deceased and the Appellant's former partner of some 26 years attending a family celebration of Eid together. On the Appellant's own evidence it was the throwing of a stone by the deceased that had prompted the Appellant to swing the cane knife at the deceased. There was also evidence that the Appellant was angry about having been served with a notice to quit about a month earlier which the Appellant considered was at least in part instigated by the deceased as much as by his former partner. Although there may have been a brief conversation between the deceased and the Appellant concerning Samina Bibi, this

had occurred before the stone throwing incident. Furthermore the relationship between the Appellant and Samina Bibi had come to an end more than 12 months before 10 September 2010.

- [50] The question in this case is not to what extent can the Appellant rely on cumulative anger to explain a sudden loss of self control? The question rather is whether, considering the conduct of the deceased, the Judge was required to give directions on provocation relating to Eid. In my judgment there was simply no evidence of a loss of self-control caused by either the arrival of the deceased with Samina Bibi or the conversation between the deceased and the Appellant. In my judgment there was no requirement for the learned Judge to direct on provocation based on the fact that the people present were celebrating Eid. I would reject this ground of appeal altogether.
- [51] As a result the only point that I find in favour of the Appellant is the issue concerning the inadequacy of the direction on the law of self-defence with particular reference to the subjective element of the test.
- [52] Section 23 (1) of the Court of Appeal Act provides that the Court shall allow the appeal if the Court thinks that (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any other case the appeal must be dismissed. The proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the Appellant if the Court considers that no substantial miscarriage of justice has occurred.
- [53] The interesting point here is that although a miscarriage of justice may enable the Court to decide the ground of appeal in favour of the Appellant, the appeal will nevertheless be dismissed on the application of the proviso if the Court considers that there has been no substantial miscarriage of justice.
- [54] In attempting to obtain guidance on the application of section 23(1) of the Court of Appeal Act from the English decisions, reliance can only be placed on those decisions

prior to 1968. Section 23(1) is in virtually identical terms to section 4(1) of the Criminal Appeal Act 1907 (UK) which remained in force until 1966. From 1968 the bases upon which the English Court of Appeal must allow an appeal have changed in substance to the point where since 1995 the only test to be applied is whether the conviction is unsafe. This is not the law in Fiji. In addition since 1995 in England there is no longer any provision for the application of the proviso. As a court created by statute the powers of the Court of Appeal in criminal appeals are derived from and are confined to those given in Part IV of the Court of Appeal Act Cap 12. The Court of Appeal does not have an inherent jurisdiction in relation to criminal appeals since the appeal itself is a creation of statute: (See R –v- Jeffries [1969] 1 QB 120 and R –v- Collins [1970] 1 QB 710).

- [55] The approach that should be followed in deciding whether to apply the proviso to section 23(1) of the Court of Appeal Act was explained by the Court of Appeal in R v. Haddy [1944] 1 KB 442. The decision is authority for the proposition that if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the Court of Appeal Act.
- [56] This test has been adopted and applied by the Court of Appeal in Fiji in R –v- Ramswani Pillai (unreported criminal appeal No. 11 of 1952; 25 August 1952); R –v- Labalaba (1946 – 1955) 4 FLR 28 and Pillay –v- R (1981) 27 FLR 202. In Pillay –v- R (supra) the Court considered the meaning of the expression “no substantial miscarriage of justice” and adopted the observations of North J in R –v- Weir [1955] NZLR 711 at page 713:

“The meaning to be attributed to the words ‘no substantial miscarriage of justice has occurred’ is not in doubt. If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred.”

- [57] This will be so notwithstanding that the finding of guilt may have been due in some extent to the faulty direction given by the judge. In other words the misdirection may give rise to the conclusion that there has been a miscarriage of justice (ground 4 in section 23(1)) by virtue of the faulty direction but when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.

In **Vuki -v- The State** (unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:

“The application of the proviso to section 23(1) ___ of necessity, must be a very fact and circumstance – specific exercise.”

- [58] However the application of the proviso is not necessarily the end of the matter. As with a jury verdict, the opinions of the assessors are given without reasons. If this had been a trial by jury the guilty verdict would have been the end of the matter since the trial Judge would have proceeded to convict and pass sentence as a matter of course. In a trial by judge sitting with assessors it is the task of the Judge to indicate whether he agrees with the opinions of the assessors. The fate of the accused depends upon the decision of the trial Judge. Under the Criminal Procedure Decree the trial Judge is required to give cogent reasons if he disagrees with the opinions of the assessors. Although there is no statutory requirement for the trial Judge to give reasons when he or she is in agreement with the opinions of the assessors, there is long standing authority in the form of Supreme Court decisions and decisions of this Court to the effect that it is of great assistance to the appeal courts if the trial Judge in his judgment gives reasons in the form of an indication as to the evidence upon which he relies for his decision to accept the opinions of the assessors. (See: **Sheik Mohammed -v- The State** unreported CAV 2 of 2013; 27 February 2014).

- [59] To that end the learned trial Judge in this case has indeed provided reasons in his judgment for accepting the guilty opinions of the assessors and proceeding to formally convict the Appellant. Having considered the evidence of the prosecution witnesses and the Appellant, the learned Judge concluded that he did not accept the evidence that the deceased had hit the Appellant with a stone. He accepted the evidence of the

Prosecution witnesses and by implication was satisfied beyond reasonable doubt that the deceased had not thrown a stone at the Appellant. There was therefore possibly no need for the assessors and certainly for the trial judge to consider the defence of self-defence in this case.

[60] On the evidence, it is not difficult to understand how both the assessors and the Judge were satisfied beyond reasonable doubt that the Appellant had not acted in self-defence. The evidence was overwhelmingly in favour of a finding beyond reasonable doubt that a stone had not been thrown by the deceased and that the Appellant had not been hit by a stone or a rock.

[61] The effect of the findings of fact by the learned trial Judge which resulted in his concurrence with the opinions of the assessors is that the defence of self-defence did not fall to be considered at all. There was no need to consider the tests to be applied in order to determine whether the Appellant should be exonerated on the basis that he had acted in self-defence. The faulty direction was of no consequence since it was not necessary to consider either the subjective or objective components of the test.

Consequently, there was no miscarriage of justice and as a result pursuant to section 23(1) of the Court of Appeal Act the appeal must be dismissed. There is no requirement to consider the application of the proviso. In my judgment, had it been necessary to consider the proviso the conclusion that there had been no substantial miscarriage of justice would have been open to the Court.

[62] In conclusion then, I would grant leave to appeal on ground 1 and dismiss the appeal. I would refuse leave to appeal on ground 2.

Basnayake JA

[63] I agree with the judgment of Calanchini P.

Madigan JA

[64] I have had the opportunity of reading in draft the judgment of the President of the Court. I agree with his view of the import of the specific pardon provision peculiar to

section 237 of the Crimes Decree 2009. I also agree with his conclusion that the appeal must be dismissed for the reasons he states therein.

Order:

Appeal dismissed.

W. Calanchini

Hon. Mr Justice W.D. Calanchini
PRESIDENT, COURT OF APPEAL



E. Basnayake

Hon. Justice E. Basnayake
JUSTICE OF APPEAL

P. Madigan

Hon. Mr Justice P. Madigan
JUSTICE OF APPEAL