

IN THE COURT OF APPEAL, FIJI
AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO: AAU0007 OF 2010

HIGH COURT CRIMINAL CASE NO: HAC 064 OF 2007LB

BETWEEN:

1. RUPENI MOCEI
2. ESALA DELANA
3. SAKIUSA TALEMAILODONI
4. SIALENI TEMO
5. SIMIONE NABECA

APPELLANTS

AND: THE STATE

RESPONDENT

Counsel:

For the Appellant	-	Mr Terere, T.
For the Respondent	-	Ms. Madanavosa, P.

Date of Ruling: 26th August, 2010

R U L I N G

Appellants were charged with one count of Murder. Having convicted for a lesser offence of manslaughter Appellants were each sentenced to 4 years imprisonment. This application is made for leave to appeal out of time against the conviction of the High Court.

Appellants proposed grounds of appeal are as follows:

- [i] THAT the Learned Trial Judge erred in law in that he did not properly and/or adequately direct the assessors to disregard the alternative count of manslaughter as the State conducted strongly its case on murder and have failed to prove the essential elements of the charge to the required standard when in particular the defence did not raise provocation as a defence.
- [ii] THAT the Learned Trial Judge erred when he misdirected the assessors on the issue of causation.
- [iii] THAT the Learned Trial Judge erred when he agreed with all of the assessors in returning a guilty plea of manslaughter when in fact a direction of manslaughter charge as the alternative was not clearly and adequately put to the assessors.
- [iv] THAT the Learned Trial Judge erred in law and fact when he agreed with assessors' verdict of manslaughter when in his summing-up he clearly over-emphasized points in favour of the defence regarding the Pathologist's evidence in relation to the nature of the assault on the deceased.
- [v] THAT the Learned Trial Judge erred in law when he failed to direct the assessors to consider the relevance of the statement of a deceased prosecution witness who was with the deceased before the alleged assault took place and which was also raised by defence counsel during trial.
- [vi] THAT the Learned Trial Judge erred in law in convicting the Appellant with manslaughter when malice aforethought and joint enterprise as crucial elements of the charge of murder were not established beyond reasonable doubt by the State (pg.14).
- [vii] THAT the Learned Trial Judge erred in law and fact when convicting the Appellant with manslaughter when there was no evidence of planning involving the Appellant led during trial.

Section 26(i) of the Court of Appeal Act Cap. 12 sets time limit on appeal.

Section 216(i):

"Where a person convicted desires to appeal under this Part to the Court of Appeal, or to obtain leave of that Court to appeal, he shall give notice of appeal or notice of this application for leave to appeal in such manner as may be directed by the rules of Court within thirty days of the date of conviction or decision. Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given, may be extended by the Court of Appeal."

On leave to appeal out of time, it is submitted on behalf of the Appellants that due to the geographical isolation of their detention center, the Appellants were all faced with difficulties in instructing legal counsel or re-engaging legal representation from the Legal Aid Commission, Suva for their appeal to this court. Further it is submitted that the Appellants were of the view that the Legal Aid would automatically pursue their appeal upon conviction and sentence.

It is submitted further that the Appellants due to their financial difficulties and several miscommunications and disagreements between them and family members delayed to re-engage Legal Aid to pursue their appeal.

It is not in dispute that the appeal is more than 6 months out of time.

In ***Seresere v State [2008] FJCA 71; AAU0032. 2008S (5 November 2008)*** the Court held:

*"The appeal or leave appeal is about one month out of time but the practice of the Court has been to accept that delays of up to three months are excusable where the Appellant has been in prison since conviction. **Accordingly leave to appeal out of time will be given unless the appeal has no merit.**"*

The delay in this case is more than 6 months and when considering the period of delay the reasons adduced by the Appellants cannot be considered satisfactory. Therefore now I consider whether on the face of it, there is merit in their grounds of Appeal.

Ground 1

The Appellant were charged of Murder. Although the defence did not take the defence of provocation, if the evidence suggests, it is the duty of the Trial Judge to direct the Assessors on lesser offence of manslaughter.

Lord Clyde in Von Starck v The Queen (2000) 1 WLR 1270 said :

"The function and responsibility of the Judge is greater and more onerous than the function and the responsibility of the Counsel appearing for the prosecution and for the defence in a criminal trial. In particular Counsel for the defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The Judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the Judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them.

This position in Fiji, was stated in ***Vidali Yaba v The State Criminal Appeal No. AAU0044/2002 (25 November 2005)***. It was held:

"Where on the evidence a question of provocation or any other ground arises which may reduce murder to manslaughter, appropriate directions must be given by the Judge to the Assessors (R v Mancini [1942] AC 1). This is so whether or not the question is raised by the defence. Where, however, it can clearly be seen that no such question can arise it is the duty of the Judge not to leave the issue to the Assessors (R v Thorpe [1925] Cr. App. 12 189; R v Malcolm [1951] NZLR 470)."

Therefore it is clear, that if the evidence suggests, even if the defence has not taken up, it is the duty of the Trial Judge to direct the Assessors on provocation.

Hence, this ground of appeal has no merit.

Ground 2

On causation the learned Trial Judge in his Summing Up in page 14 said that the cause of death of the deceased given by Dr. Abha Gupta is uncontradicted, and according to Dr. Gupta's findings Joseva Cavu died from Intra-Cranial Haemorrhage due to assault, consistent with blows from blunt instrument.

Dr. Gupta's evidence was uncontradicted and unchallenged. Therefore this ground has no merit as there was no misdirection by the Trial Judge.

Ground 3

The learned Trial Judge in page 8 and 9 of his Summing Up clearly, correctly and adequately directed the Assessors on provocation.

On the evidence placed before court the learned Trial Judge was correct in agreeing with the Assessors verdict of manslaughter and therefore this ground of Appeal should necessarily fail.

Ground 4

In his Summing Up, in page 14 the learned Trial Judge mentioned that "according to Dr. Gupta's findings Joseva Cavu dies from intra-cranial haemorrhage due 'to assault, consistent with blows from blunt instrument". The learned Trial Judge has never over-emphasized points in favour of defence but adequately directed the Assessors and also stated the case of both sides when analyzing. Therefore this ground is without merit.

Ground 5

The said prosecution witness was never called to give evidence as he was dead. It was not part of the trial, and therefore there is no failure on the part of the Trial Judge in not directing the Assessors on his statement.

Ground 6

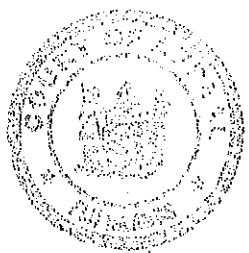
The learned Trial Judge directed the Assessors properly and adequately on malice aforethought and joint enterprise. The Assessors heard all evidence placed before court. The learned Trial Judge said in his Summing Up that the Assessors may, look for circumstantial evidence, in the absence of direct evidence on specific intention. On facts it is for the Assessors to decide what is proved, and to draw proper inferences. The learned Trial Judge was satisfied on the Assessors verdict based on the evidence and on his Summing Up. Therefore this ground should necessarily fail.

Ground 7

This ground is similar to ground 6 and for the same reasons above this ground is without merit.

For the reasons above I find, the reasons for delay adduced by the Appellants cannot be accepted, and that there is no merit on the face of the grounds of appeal.

Hence I decline the Appellants application for leave to appeal out of time to full court.



A handwritten signature in black ink, appearing to read "Priyantha Fernando", is written over the seal.

Priyantha Fernando

Judge of Appeal

At Suva

26th August, 2010.