

IN THE COURT OF APPEAL
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU0066 of 2008
(High Court Action No. HAC 55 of 2007)

BETWEEN : **FILIMONE VETAU**
Appellant

AND : **THE STATE**
Respondent

Coram : **Calanchini P.**
Malalgoda JA.
Madigan JA.

Counsel : **Mr. J. Savou (L.A.C.) for the Appellant.**
Mr. S. Vodokisolomone for the Respondent

Date of hearing : **15 May 2014**

Date of Judgment : **29 May 2014**

JUDGMENT

Calanchini P.

I agree with the reasons and the conclusion of Madigan JA that this appeal should be dismissed.

Malalgoda J.A.

I agree with the findings of Madigan J.A.

Madigan J.A.

- [1] The Appellant faced trial in April 2008 at the High Court at Labasa with two co-accused, all three being charged with murder, Robbery with Violence and Unlawful Use of a Motor Vehicle. The Appellant entered pleas of guilty before trial to the Robbery count and to the Unlawful Use count and proceeded to trial with his two co-accused on the murder count.
- [2] The facts of the case were that on the 7th July 2007, the three accused had been drinking in the afternoon in Labasa and decided in the evening to go to a shop in Vulovi to buy more beer. The shop was closed and, being in taxi, they decided to steal money from the driver but fortunately for him a Police patrol car arrived at the scene. They paid the fare and got out of the taxi and started walking. It was decided to take another taxi and rob the driver. They stopped a taxi, got in and directed the driver towards the hospital. On the journey there, they told the taxi driver to stop; they got out and the Appellant (the first accused at trial) went to the driver's door, opened it and pulled the driver out. He pushed him against the car and demanded \$25. They put the driver lying down in the back seat and with the second accused driving the taxi, they drove to Bocalevu, a remote area. The appellant took the driver's mobile phone from him. When the vehicle was stopped the Appellant pulled the driver out of the car dragging him some metres away from the car. He took the driver's shirt off and tied it around his mouth, knotting it at the back. The appellant then punched him 6 times in the face, punches which produced blood. The Appellant took a sack from the taxi and put it over the driver's head with the assistance of the third accused and the driver's hands were tied so he couldn't remove the sack or shirt and then the Appellant pushed him, so tied, into the river. The Appellant said he heard the splashing in the river – they then got back into the taxi and drove to Labasa town.
- [3] After trial the Appellant was found guilty in the unanimous decision of the assessors, an opinion with which the Judge agreed and he was convicted of murder. He was sentenced to life imprisonment, a sentence fixed by law and was ordered to serve a minimum term of 18 years before being eligible for

parole. His two co-accused were found guilty of and convicted of manslaughter.

[4] This appeal is against conviction only and is premised on the following grounds: (reworded for clarity of meaning)

- *The learned trial Judge failed to conduct a voir dire to determine the voluntariness of the cautioned interview*
- *The learned trial Judge used the unassessed caution interview to the prejudice of the accused in directing the assessors*
- *The learned trial Judge erred in law in not addressing the assessors on the doctrine of joint enterprise and thereby allowing the assessors to find his co-accused guilty of manslaughter while he was found guilty of murder.*
- *The learned trial Judge failed to direct the assessors on the partial defence of intoxication in the commission of the crime.*

[5] The first and last of these grounds can be dealt with in short measure.

[6] The Judge's notes of trial, while seeming to be exceedingly sparse, disclose that the trial started on 21st April 2008. It was not until the 25th April after fourteen witnesses had been called for the Prosecution that the record discloses this:

"Trial within a trial held: held and completed"
and then

*"Ruling at 2.15pm: Caution and Charge Statement
Admissible Evidence in trial. "*

[7] Considering that there were three accused, all of whom had made admissions under caution, the note is unsatisfactory in that it makes no reference as to which accused the trial within a trial related to, or whose statements were being admitted into evidence.

first accused told the court that “Accused 1 not disputing Caution Interview Statements”.

It can probably be assumed then that the proceedings on the 25th April did not concern the Appellant and his caution interview(s), because their admissibility was not disputed.

- [9] It would appear that this (admissibility) concession by counsel for the appellant (the first accused) at trial was overlooked by Counsel for the appellant in these proceedings because when the concession was pointed out to him at the hearing of this appeal, he quite properly withdrew his first two grounds of appeal.

- [10] On the issue of intoxication, it could be perhaps a partial defence to the specific intent of murder if it was actually an issue at trial. There was evidence from PW5 a taxi driver who had carried them earlier that they smelt of liquor and one of them (and PW5 identified a co-accused in Court) was vomiting. The appellant (first accused at trial) gave sworn evidence in his own defence. The only reference he made to alcohol in his evidence was that on the day of the murder/robbery, “I was drinking at Royale”. There was no reference to time spent or quantity consumed and certainly no reference by him to alcohol as a possible defence to his actions later that evening. In fact the appellant in his evidence gave a very detailed account of his actions at the scene that night, details that he would not have been able to recall if he were inebriated.

- [11] The third accused at trial (Manoa Koroï) in giving sworn evidence said that at the Royale, he was drinking with the Appellant “– a few glasses”. He himself had drunk methylated spirits “with some boys”. He didn’t refer to the appellant as one of the “boys” in that pursuit.

- [12] The evidence of intoxication not being present and not being relied upon to any extent at trial, there was no need whatsoever for it to be the subject of a direction to the assessors.

- [13] The appellant's first ground (no voir dire) and his fifth ground (no direction on intoxication) are not made out and they fail.

Parties to a crime

- [14] The thrust of the Appellant's remaining Grounds of Appeal (his original Grounds three and four and my Grounds two and three as simplified in paragraph 3 hereof) arise out of a grievance on the part of the Appellant that his two co-accused were found guilty of manslaughter while he was found guilty of murder.
- [15] While the facts of the case give rise to little difficulty in concluding that the Appellant by his actions satisfied all of the legal elements of murder, including an intention to at least cause grievous bodily harm to the driver, the directions in the summing up on joint offenders are unsatisfactory and as a consequence extremely favourable to the Appellant's two co-accused. There is no direction on joint enterprise and there should be. There is an unnecessary and unsatisfactory direction on aiding and abetting. Above all, there is no definition of, or direction on manslaughter, when there should be; especially when it is left as an alternative verdict for the assessors to find in respect of the two co-accused and indeed a finding that they did return with.
- [16] By section 21(c) of the Penal Code, Cap. 17 (which was operative at the time of this offence) any person who aids or abets another person in the commission of an offence is guilty of that offence.
- [17] More relevantly section 22 of the Code states:
- "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*
- [18] The factual situation in this case would lead to an irrefutable conclusion that the three parties were acting together in the unlawful purpose of robbery of a

taxi driver. The third accused had even entered a plea of guilty to robbery at the beginning of the trial.

- [19] Participation in an offence can range from counseling and procuring, through aiding and abetting to full participation in a joint enterprise. Usually in a crime the distinction will be obvious from the factual scenario elicited at trial and it will be easy for the Judge to identify the particular roles the secondary parties play and address the assessors accordingly. There are some cases however, and this case is a good example of those cases, where the participation of the secondary parties is ambiguous and if the Judge cannot decide, it must be left to the assessors to decide whether there is full participation in which a joint enterprise direction will be necessary or where there is some activity by the secondary parties which assists in the crime but where there has been no agreement to undertake an unlawful enterprise or knowledge of the unlawful activity. In the latter case there need only be a direction on aiding and abetting.

- [20] The irony of the dilemma is that in both cases the secondary parties are guilty of murder if the actions of the principal are murderous in law, and they can only be deemed to be guilty of the lesser offence of manslaughter, or not guilty at all, if it can be said in a joint enterprise that they could not have possibly contemplated the foreseeability of the ultimate deeds of the principal offender, or if they have been found to have withdrawn from the agreement. Those obviously are findings for the assessors to make and in this case those essential questions were withheld from them.

- [21] There is no doubt from the evidence both direct and circumstantial that the unlawful enterprise of robbery of the taxi driver was agreed upon and in that joint enterprise the crucial question to be decided upon by the assessors (and the Court) is: was the appellant's murder of the driver a reasonably foreseeable consequence of the robbery in the way they agreed the robbery should be effected?

- [22] We are of the view that it was clearly a joint enterprise and that a joint enterprise direction should have been given to the panel. We think that the answer to the question posed in paragraph 21 (*supra*) is most likely "yes", but

there is scope for a no answer in which case a detailed manslaughter direction is certainly needed.

- [23] All of these failures by the Judge, though very unfortunate, were to the unwarranted advantage of the secondary parties, the Appellant's two co-accused, and had the State appealed the convictions of manslaughter on the grounds of errors of law, then it is very likely that such an appeal would have succeeded.
- [24] Most unfortunately for the Appellant the errors in law in the Summing Up do not assist him. They were errors made in respect of the legal status after trial of his two co-accused and no proper direction could have taken away the indisputable evidence that he alone was responsible for unlawful acts occasioned to the driver which were the cause of his death and which by his own admissions in his cautioned interview were to kill the driver. Without those admissions what more evidence would be needed of malice aforethought than to tie up a victim and throw him in a river?
- [25] The unfortunate deficiencies in the Summing Up, while assisting the second and third accused cause no prejudice in any way to the Appellant and his appeal is dismissed.



W. Calanchini

HON JUSTICE W. CALANCHINI
PRESIDENT

V.K. Malalgoda

HON. JUSTICE V.K. MALALGODA
JUSTICE OF APPEAL

P. Madigan

HON. JUSTICE P. MADIGAN
JUSTICE OF APPEAL