

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 60 OF 2011
(High Court No. HAC 21 of 2009)

BETWEEN : LUKE DIKEVI TUKANA

Appellant

AND : THE STATE

Respondent

Coram : Calanchini P
Bandara JA
Temo JA

Counsel : Ms. S. Vaniqui for the Accused
Mr. M. D. Korovou for the Respondent

Date of Hearing : 2 February 2017

Date of Judgment : 23 February 2017

J U D G M E N T

Calanchini P

[1] I agree that the appeal should be dismissed.

Bandara JA

- [2] The appellant was charged with the offence of murder contrary to section 199 and 200 of the Penal Code Cap. 17 for having committed the murder of Naelesoni Vunivi Nadumu (known as Nelson) on 26th day of February 2009 at Votua Housing, Korolevu, Sigatoka in the Western Division.
- [3] The appellant was convicted of the offence of murder by a majority verdict of 2 out of 3 assessors which was upheld by the trial judge in his judgment dated 4th May 2011. One assessor found the appellant guilty of manslaughter only.

Preliminary observations

- [4] On 3rd June 2011 the appellant had filed six grounds of appeal against conviction and sentence. The notice of appeal was out of time.
- [5] On 14th March 2014 a Single Judge refused application for an extension of time to appeal and refused leave to appeal on conviction and sentence.
- [6] Thereupon on 31st March 2014 the Appellant (in person) filed Notice of Appeal against the decision of the Single Judge of Appeal, indicating he would seek leave to file further and /or amended grounds of appeal.
- [7] On 18th September 2014 the Appellant (through counsel) filed notice of application for the extension of time within which to appeal conviction and sentence where the appellant is pursuing four grounds of appeal to the Court of Appeal.
- [8] Although the appellant has filed notice of appeal against the refusal to grant an enlargement of time there is no right to appeal against that decision. However Section 35(3) permits an appellant to renew his application for an enlargement of time to the Court of Appeal. Therefore these proceedings will be regarded as a renewed application for an enlargement of time to seek leave to appeal against conviction and sentence.

[9] Section 21 of the Court of Appeal Act Cap.12 provides that “A person convicted on a trial held before the High Court may appeal under this part to the Court of Appeal:-

- (a) Against his conviction on any ground of appeal which involves a question of law alone;*
- (b) With the leave of the Court of Appeal or upon the certification of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone; or a question of mixed law and fact on any other ground which appears to the Court to be a sufficient ground of appeal; and*
- (c) With the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.*

Grounds of Appeal

[10] The appellant is advancing (4) grounds of appeal before the Court of Appeal.

- (i) That the learned Judge erred in law when he failed to direct the assessors properly in regard to the inherent weakness of the prosecution case.
- (ii) That the learned judge erred in law and in fact when he failed to direct the assessors about inconsistencies in regard to the post mortem report and testimony evidence given in court which resulted in miscarriage of justice.
- (iii) That the learned Judge erred in law and fact when he failed to assist the appellant given the incompetence of the defence counsel which was obvious in light of the disclosure evidence and that being tendered in court by the prosecution.
- (iv) That the learned trial judge erred in law and fact when he failed to weigh and/or analyse the prosecution case presented in court with that disclosed by way of disclosure so as to assist the appellant given the inadequate defences that was mounted, which resulted in a miscarriage of justice.

[11] Ground one of the grounds of appeal was not further pursued at the oral arguments and the 3rd ground of Appeal was not strenuously advanced at the appeal hearing.

[12] In **Praveen Ram v. State** [2012] FJSC12; CAV0001.2011 (9 May 2011) it has been held that “the function of the Court of Appeal or Supreme Court is *evaluating and*

making an independent assessment of the evidence of supervisory nature”; (emphasis added). It is useful to evaluate the evidence of the instant case being mindful of the above principle.

Synopsis of the Prosecution case

[13] The facts of the case are fairly straight forward and largely uncontested.

As to the events that took place, at the drinking party at Sanaila’s house, at Votua Housing, that ultimately led to the death of the deceased on the fateful day in question, are narrated in the following evidence led at the trial:-

- (1) Testimonial evidence given by PW1 Rusiate Ravara
- (2) Testimonial evidence given by PW2 Mataiasi Uludole
- (3) The caution statement of the Appellant, which has been admitted without dispute, is part and parcel of the statement of agreed facts by the prosecution and the defence. (Page 135 of the court proceedings),
- (4) The testimonial evidence given by the Appellant himself at the trial court.

As regards the credibility of the caution interview the Appellant in his testimonial evidence states that “**I rely on my caution interview**”. (Page 292 of the Court Proceedings)]. Therefore Appellant’s caution interview stands as an unchallenged piece of evidence.

[14] It is common ground that on 25th February 2009 the appellant joined a drinking party at Sanaila’s house at Votua Housing which started around 8.00pm and continued until the wee hours. Persons by the name of Sanaila, Anasa, Emori, Maureen, Vitalina (Vita), Josephine, (the cousin of the Appellant) Emori, a European girl, the deceased and the Appellant were among the attendees of the party. The party proceeded in full swing with beer, rum, grog and other hard stuff flowing, and atmosphere being live with drunken high voices, chatter and laughter.

[15] Whilst the party was in progress a feeling of displeasure arose between the appellant and the deceased over two issues, which soon turned into a hostile aggression. The two issues were,

- (i) The deceased accused the appellant of stealing his mobile phone.
- (ii) The deceased tried to court two girls attending the party, which annoyed the Appellant.

[16] In his caution statement and testimonial evidence at trial the Appellant has stated that the deceased accused the appellant of stealing his mobile phone. The two lay witnesses (PW1 and PW2) called by the prosecution do not speak about an incident of the deceased accusing the Appellant about stealing of a mobile phone.

[17] In his caution statement the appellant states, (Para. 264 of the proceedings):

"I told Qilu that I hate Naelesoni because he was blaming me that I stole his phone.

... He (the deceased) then asked me about his phone and I answered that I didn't know and then he pulled my shirt."

[18] In his testimonial evidence appellant states (Page 291 of the proceedings)

"While drinking an argument arise. First Nelson blamed me for stealing his mobile ... I told him I didn't take the phone. Nelson swore at me – didn't know why blaming me for stealing phone."

(However the dispute that arose between them over stealing of the deceased phone is not corroborated by the evidence of PW1 and PW2).

[19] The deceased's behavior of courting two girls at the party had annoyed the appellant and the latter refers to the said behaviour of the deceased both in his testimonial evidence and the caution statement.

(Testimonial Evidence page 291 of the court proceedings).

[20] It is a noteworthy factor, that in the course of his examination in chief, of the testimonial evidence, the Appellant appears to have deliberately refrained from

revealing the incident of deceased's attempt to court the two girls attending the party, which the former did not like - which appears to be the true reason that gave rise to the dispute. Only the incident relating to stealing of the phone was highlighted as the prime reason for the dispute that arose between them, which rather appears to be an ostensible reason for the dispute. This is a fact that goes against the credibility of the Appellant.

- [21] But when the State raised the issue in the course of cross examination the appellant responded in the following manner.

(Proceedings at page 292)

"2 girls there?

Yes.

...

Giving more to the girls than boys.

Yes.

You didn't like that?

Correct it was unfair."

(Page 293)

"Put it to you, you angry at Nelson because of less drink to boys and more to girls?

One reason."

Court: Annoyed because Nelson stopping you chatting up Vita?

"Yes.

As soon as he was unconscious you went back and had sex with her.

Yes."

- [22] In his caution statement the appellant has stated the following on the same issue.

Q103. In his statement Qilu says that you hated Nelson because he wanted to take charge of the girls and the drinks. What can you say?

A Yes it is true.

Q105. Why did you hate Nelson in regards to the girls and the drinks?

A Because I didn't like him talking to Josephine and he was also trying to pull Vita away when I was trying to talk to her.

Q106. *Why did you want to talk to Vita?*

A. *I wanted to have sex with Vita.*

Q107. *Why did you hate Nelson regarding the drinks?*

A. *Because he was serving more drinks to the girls and less to the boys.*

...

Q216. *I'm telling you that you assaulted Nelson because you were jealous of Vitalina. What can you say?*

A. *I was not jealous of Vitalina but only hated Nelson because he was trying to court Josephine and he was preventing me from trying to court Vitalina.*

[23] From the above excerpts of the caution statement and the testimonial evidence of the Appellant it is clear that the hostility that arose between the deceased and the former was over the issues:

- (1) That the appellant did not like the deceased's attempt to draw the attention of the girls towards him by serving them more liquor than he served the males.
- (2) That the Appellant did not like the deceased's attempt to court Josephine who is appellant's cousin.
- (3) The fact that the deceased attempted to pull Vita away greatly annoyed the Appellant since the latter himself was courting Vita with the intention of having sex with her. (In fact the Appellant has admitted that after he made the deceased incapacitated having subjected him to a grievous bodily assault, he went to bed with Vita and after chatting a little, had sex with her.

[24] When it comes to the assessment of the evidence given by the Appellant it is pertinent to note the principle highlighted by Brand AJA in **S v. Shackell** 2001 (4) SA 1(SCA) on para 30;

"It is trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof of a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonable possibly true in substance the court must decide the matter on the

acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities, but it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."(Emphasis added)

[25] According to the narration of events of the incident, given by the appellant in his testimonial evidence and caution statement, he had assaulted the deceased on three occasions, whilst the party was going on.

[26] The first occasion was when he left the drinking party to buy some cigarettes and whilst returning, encountering the deceased on the footpath. According to the Appellant an argument had erupted between them over the stealing of the phone. The appellant states that in the course of the argument the deceased punched him on the chest and thereafter driven by anger the Appellant had proceeded to punch the deceased until he fell down. Thereafter he had joined the party again.

[27] Presumably PW1 Rusiate Rarawa had eye witnessed the aforesaid first incident of assault, stating in his testimonial evidence, (page 282 of the court proceedings).

"When I was going home, I was on footpath heard screaming and punches. I saw Luke throwing punches ... I called him and he looked. He then told me to shut up... Couldn't see who he was punching. Luke said none of my business ... Could only see Luke. I told him to stop and sleep. He went off after that".

[28] Rarawa had apparently not identified the person whom the Appellant was assaulting.

[29] The second assault had taken place sometime after the first one, when the appellant came out to relieve himself. On that occasion, upon hearing the deceased coughing, he had gone up to the deceased and punched him again and had rejoined the party.

[30] The third incident of assault had taken place, when the Appellant decided to go back to the scene of the incident again accompanied by PW2 Matai. A relentless and

merciless third attack was unleashed on the deceased, by the Appellant, even though the former was lying unconscious on the ground presumably consequent to the fatal injuries received from the previous two attacks.

- [31] According to Matai the deceased at the time, was lying unconscious on the ground. Narrating how the 3rd assault on the deceased took place Matai has stated in his testimonial evidence;

(Page 285 of the Court Proceedings)

“Luke was the last person who took me to where Nelson was lying behind another house. Luke kicked Nelson in the ribs, kicked him once, pulled him up holding his shoulders and released and he fell on the ground. I then told Luke to stop, but he didn’t stop. He forcefully kicked Nelson. Nelson didn’t respond. After releasing him, he then kicked him again in the ribs forcefully, went back to the party.”

- [32] Matai’s testimony as to how the fatal assault took place has been fully corroborated by injuries indicated in the Post Mortem Report and by the testimonial evidence given by the forensic pathologist who has testified to the effect that, (page 289 of the proceedings.)

*Abrasions to skin, elbow, broken nose, bruises on chest and abdomen.
Blood clot around head may mean fracture of skull.
Swelling of the brain from trauma may be concussions, may be blows.
Haemorrhage in the third layer base of the skull.*

“these injuries could have been caused by blunt force trauma of significant force .
Repeated trauma.”

- [33] Rusiate and Matai can be categorized as independent witnesses since they had obviously been friends of both the Appellant and the deceased.

- [34] The following views expressed are pertinent to note when it comes to the assessment of testimony of independent witnesses.

"When considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinized with some care. The independent witness will normally be preferred to an interested witness in case of conflict. Matters of motive, prejudice, partiality, accuracy, incentive and reliability have all to be weighed (Vide, Halsbury Laws of England 4th Edition para 29)

"Therefore, the relative weight attached to the evidence of an interested witness who is a near relative of the accused or whose interests are closely identified with one party may not prevail over the testimony of an independent witness". (Vide Hasker v. Summers - Australia; Leefunteum v. Beaudoin - Canada).

- [35] Moreover the credibility of two lay prosecution witnesses' evidence had not been shaken by the cross-examination by the defence.

It was held in S v. Ndlovu [2002] (2) SACR 325 SCA, by Mlambo J that:

"Cross examination was an integral part of the armoury placed at the disposal of an accused person to test, challenge and discredit evidence tendered against him or her".

- [36] The Post Mortem Report on the deceased (Ex. P1) reveals the following external and internal injuries:

"External Injuries

- 1. Abrasions seen at both elbows (1 on the left, 2 on the right).*
- 2. Linear abrasions across left shin covering an area of 22 x 6cm.*
- 3. Right and left maxillary area bruises seen*
- 4. Froth and blood noted at nostrils.*
- 5. Both lips swollen with a laceration of the upper lip measure 2.0 x 1.0cm; lacerations of the lower lip measuring 0.5cm x 1.0cm (right edge), 2.0 x 1.0cm (middle), and 0.5 x 1.0cm (left edge).*
- 6. Nasal bridge fracture.*
- 7. Multiple bruises over anterior chest and abdomen, irregular shaped and not exceeding 2cm in diameter.*

Internal Injuries

- 1. Cephalohaematoma noted on the right fronto-parietal and the left temporo occipital area.*
- 2. Cerebral oedemo of the brain is noted grossly.*
- 3. Subarachnoid haemorrhage noted at the base of the brain over the cerebellum."*

[37] Forensic Pathologist has further stated in his testimony that, "If he was placed against something and blow was struck if he lost conscious, if he fell suddenly from standing to ground he may have suffered."

[38] In Taylor's Principles and Practice of Medical Jurisprudence, (11th Edn. Vol. 1, at page 232), it is stated:

"A wound may cause death either directly or indirectly. A wound operates as a direct cause of death when the wounded person dies either immediately or very soon after its infliction, and there is no other cause of death. In wounds which cause death indirectly the deceased survives for a certain period, and the wound is complicated by inflammation embolism, pneumonia, tetanus, or some other mortal disease which is a consequence of the injury. Cases which prove fatal by reason of surgical operation rendered imperatively necessary for the treatment of injuries presuming that these operations have been performed with ordinary skill and care, also fall into this category.... It would be no answer to a charge of death from violence to say that there was disease in the body of the victim unless the disease was the sole cause of death."

[39] In the instant case the death of the deceased was caused as a direct cause of the grievous injuries, soon after its infliction - no supervening cause whatsoever intervening without giving grounds to a lessor culpability than 'murder'.

Did the Appellant have the necessary intent (*mens rea*) to commit the crime he is charged with?

[40] Murder, defined by Lord Coke in the 17th century as the unlawful killing of a person with malice aforethought, can be regarded as the most serious offence in criminal law, as there is no greater harm that can be inflicted on a person and no higher wrong than the culpable causing of a person's death.

[41] It is known that malice aforethought, as the mental element required for murder, means intention to kill or to cause grievous bodily harm.

[42] Section 202 of the Penal Code is to the effect that:

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused”.

- [43] In the instant case there can be no doubt whatsoever, that the necessarily fatal, grievous injuries that caused the death of the deceased, (at the scene of the crime itself) were inflicted by the Appellant. However in his caution statement he had stated that,

(Q217. *Did you know that what you did to Nelson cause him death?*)
A. *I did not mean to kill him but I heard the Nelson is dead.*

- [44] The general rule that ignorance of law is no defence to criminal prosecution is a deeply rooted principle in legal systems. It is a salient principle of law that a person is presumed to have intended the natural and probable consequences of his voluntary and deliberate acts.

- [45] In Hyam v. Director of Public Prosecutions [1975] AC 55 it has been held

“ ... that a person who, without intending to endanger life, did an act knowing that it was probable that grievous, in the sense of serious, bodily harm would result was guilty of murder if death resulted.”

- [46] In Reg. v. Nedrick ([1986] 1 WLR 1025);

(a) When determining whether the defendant had the necessary intent, it may therefore be helpful for a jury to ask themselves two questions.
(1) How probable was the consequence which resulted from the defendant's voluntary act?

(2) Did he foresee that consequence? If he did not appreciate that death or serious harm was likely to result from his act, he cannot have intended to bring it about. If he did, but thought that the risk to which

he was exposing the person killed was only slight, then it may be easy for the jury to conclude that he did not intend to bring about that result. On the other hand, if the jury are satisfied that at the material time the defendant recognized that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, that is a fact from which they may find it easy to infer that he may not have had any desire to achieve that result

(b) Where a man realizes that it is for all practical purposes inevitable that his actions will result in death or serious harm the inference may be irresistible that he intended that result however little he may have desired or wished it to happen. The decision is one for the jury to be reached upon a consideration of all evidence."

[47] In the instant case, given the manner how the fatal injuries were caused on the deceased, and their grievous nature (as has been discussed above), the appellant could well have been virtually certain that his action will result in death or in the least, causing grievous bodily harm to the deceased.

[48] When one voluntarily inflicts the injuries that are of the grievous nature, as sustained by the deceased in the instant case, no inference can be drawn other than that the perpetrator intended to cause grievous bodily harm.

Can the Appellant raise the general defences of grave and sudden provocation or drunkenness with a view to reduce the culpability to Manslaughter?

Defence of Grave and Sudden Provocation

[49] The factual position is not disputed in so far as the Appellant had admitted inflicting the injuries on the deceased, which later turned fatal and caused his death at the scene of the incident itself. It is pertinent to consider here whether he was actuated by grave and sudden provocation.

[50] Section 203 of the Penal Code deals with "killing on provocation" and provides that:

"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder,

does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only."

- [51] Provocation is defined in section 204 of the Penal Code

"The term "provocation" means, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the absence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

- [52] The acts done by the deceased mentioned in paragraphs 15 and 22 above does not amount to *wrongful acts or insults which if done to an ordinary person could deprive him of the power of self control inducing him to commit an assault.* (emphasis added).

- [53] The *locus classicus* on this point is the landmark decision in **K.M. Nanavati v. State** of Maharashtra, 1962 SC 605, where it was held that:

"1. The test of grave and sudden provocation is whether a reasonable man placed in the situation in which the accused was placed, would be so provoked, so as to totally lose his self control"

2. The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence.

3. The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion has cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation."

- [54] To gauge the 'graveness' of provocation, the background and surrounding circumstances of a particular case become extremely crucial. The afore discussed evidentiary material available in the brief of the instant case, does not disclose any

remark made or action done by the deceased, that could have gravely provoked a reasonable man placed in the situation of the appellant.

- [55] The second and third assaults made by the Appellant on the deceased are highly uncalled for. They had been done clearly, after the passion that arose consequent to the first argument and fight that occurred at the footpath when the Appellant was returning after buying cigarette had been cooled down, and when the deceased was helplessly lying unconscious on the ground. The said circumstances negate the availability of the defence of grave and sudden provocation to the Appellant.

Was there a sudden fight between the accused and the deceased?

- [56] The fact that the deceased has sustained massive grievous injuries, and the Appellant had sustained none, negates the inference that there could have been a sudden fight between the Appellant and the deceased or the former acted in self defence.

Drunkenness

- [57] Section 12(1) of the Penal Code provides that:

13.-(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –

Section 13(4) specifically provides that:

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

- [58] Intoxication does not constitute a defence to any criminal charge. However if evidence of drunkenness, which renders an accused incapable of forming an intent is an answer it would not be murder but manslaughter. The test is whether on the evidence while accused is incapable of forming the requisite intent or in reasonable

doubt whether he was capable or not. (Pyara Singh v. Reginam (1965) 11 Fiji LR 92).

In the instant case intoxication was not such as to render appellant incapable of forming an intent to kill or cause grievous harm.

[59] To gauge the drunkenness it is important take into consideration the following admission made by the appellant in his caution statement.

262 – Q75. *How did they behave?*

A. *They were very drunk*

Q76. *How did you know?*

A. *They were talking and laughing very loudly.*

Q77. *What about you?*

A. *I was little bit drunk.*

Q78. *That means that you are aware of what's happening inside?*

A. *Yes. I was observing what is happening inside.*

[60] The above response of the accused clearly shows that he was not that much under the influence of alcohol so as to be deprived of the capacity to form the intent to commit the crime. Moreover after the assault and soon after the party was over the appellant had had sex with Vita after lying down with her and talking to each other a little bit, an act which clearly indicates that the mental faculties of the accused were properly working without being impaired due to drunkenness.

268 - Q211 *What did you too do ?*

- *"We lay down talked with each other little bit and had sex."*

Has the learned High Court Judge properly directed the assessors and himself on the general defences available to the Appellant?

[61] On the question of whether the appellant was entitled to the general defenses of provocation, drunkenness or self-defense, the learned High Court Judge in his summing up had properly directed the assessors in the following manner.

(Paragraph 21)

"Such issues are in law "provocation"; and once the accused raises that you must consider it. The burden of proving that the accused was not provoked when he attacked Nelson is on the prosecution and you must ask yourselves whether the prosecution has proved beyond reasonable doubt that he did not act under provocation. Provocation is a defence to murder because it is a reasonable explanation for the lack of intent to kill or to cause really serious harm to the victim. (Page 86).

27 (3) was he so drunk that he was not able to form an intention to kill or cause very serious harm to Nelson? If yes – then guilty of manslaughter. If no – then guilty of murder.

27(4) Was he provoked? Yes – then guilty of manslaughter only. If no then murder or manslaughter ?

27 (5) Did he act in self defence? If yes then guilty on nothing.

- [62] By way of making the summing up in the aforesaid manner the learned High Court Judge has followed the observations of Viscount Simon LC in **Mancini v. DPP** [1942] AC 1 at page 7-

*"The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defense) **does not relieve the judge from the duty of directing the jury to consider the alternative**, if there is material before the jury which would justify a direction that they should consider it". (Emphasis added)*

Is there merit in the 2nd Ground of Appeal

- [63] The 2nd ground of the appeal was the most strenuously argued ground in the course of the oral arguments.
- [64] The following assertion made by the forensic pathologist in his testimony has been taken completely out of context and given an inaccurate interpretation in the fourth ground of appeal.
- [65] Forensic pathologist has stated that, *"Danger is that these are hidden injuries; can even be sent home from hospital."*

- [66] The above, highly *hypothetical assertion* made by the forensic pathologist is not part and parcel of the Post Mortem report.
- [67] The said hypothetical assertion of the medical expert pertains only to internal injuries sustained by the deceased. But the photographs taken at the post mortem examination clearly shows visible serious injuries caused to the face of the deceased.
- [68] Based on the above observation made by the forensic pathologist the defence tried to advance the contention, that since the injuries could not be seen with the naked eye, the accused would not have realized the seriousness of the damage he was causing, when he inflicted them especially in the course of the second and third assaults on the deceased. This contention is based on a highly groundless hypothesis ignoring practical realities and lacks merits.
- [69] Moreover according to the caution statement of the Appellant he had seen the deceased bleeding from his mouth and nose.

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Q206. Did Nelson bleed when you assaulted him.
A. Yes from his mouth and nose.

- [70] It is common ground that if an injured goes to a hospital with the type of injuries seen on the post mortem photographs available on the brief, (indicating the massive damage caused to the face and the head), he would invariably be subjected to various types of medial scans, which would reveal the serious damage caused to the internal organs of the skull.
- [71] Moreover according to the caution statement of the Appellant he had seen the deceased bleeding from his mouth and nose.

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“Q206. Did Nelson bleed when you assaulted him.
A. Yes from his mouth and nose.”

- [72] As regards evidence of the forensic pathologist, the learned High Court Judge has properly directed the assessors stating in his summing up:

(Paragraph 25)

"The evidence of the pathologist is probably the most important in this trial. He fixes the cause of death as being subarachnoid hemorrhage with cerebral oedema which is bleeding around the outside brain tissue and swelling of the brain. The doctor says that this could be brought about by blunt force trauma such as punches and would not be caused by a normal fall." (Page 89)

The 3rd Ground of Appeal

- [73] In relation to the third ground of appeal it is pertinent to note that the rule set out in **Silatolu v. State** [2006] FJCA13; AAU0024.2003S (10 March 2006), when considering the law, where incompetence of counsel is alleged on appeal which applied the decision by the Court of Appeal in England and said (at paragraphs 121 and 122):

*"The manner in which the Court of Appeal in England has approached the matter of the competence of counsel is explained in **Ensor v. R** [1989]89 Cr. App. R. 139, 144 where the Court cited with approval the statement of Taylor J in the unreported case of **Gautam** 4 March 1987 that:*

... it should be clearly understood that defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been unwise, that generally speaking has never been regarded as a proper ground for an appeal."

- [74] We cannot see any ground on the court record which shows lack of competent advocacy on the part of the counsel for the defence. Therefore this ground of appeal which was not strenuously argued has no merits.
- [75] In **Praveen Ram v. State** (supra) it was held that an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence.
- [76] In **Harper** [1980] 1 SCR 2, 1979, Justice Estey of Canada's Supreme Court wrote:

"An appellate Court should be extremely reluctant to interfere with the exercise of a discretionary power by a trial judge. However, there are cases ... where justice demands that the exercise of discretion be reviewed. If a judge proceeds on principle properly applicable to the facts of a case and makes a decision judicially, in the exercise of his discretion, this Court will not interfere. But, if it appears that a judge has misdirected himself, or that his decision is so clearly wrong as to amount to an injustice, the Court can and should review the facts upon which the judgment ought to be given."

[77] It is well established, that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed in appeal. The appeal of the Appellant is hereby dismissed.


Temo JA

[78] I agree with the proposed orders of Bandara JA.


The Orders of the Court are:

1. *Appeal dismissed.*
2. *Conviction and sentence affirmed.*

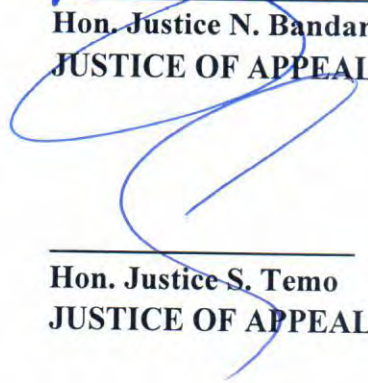




Hon. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL



Hon. Justice N. Bandara
JUSTICE OF APPEAL



Hon. Justice S. Temo
JUSTICE OF APPEAL