

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CRIMINAL APPEAL NO.AAU 0075 of 2017**  
**[In the High Court at Labasa Case No. HAC 01 of 2016]**

**BETWEEN** : **TOMASI WAIMUKA**

**AND** : **STATE**

***Appellant***

***Respondent***

**Coram** : **Prematilaka, JA**

**Counsel** : **Mr. M. Fesaitu for Appellant**  
: **Dr. A. Jack for the Respondent**

**Date of Hearing** : **12 August 2020**

**Date of Ruling** : **13 August 2020**

**RULING**

[1] The appellant had been indicted in the High Court of Labasa on a single count of murder of Filimoni Waqa contrary to section 237 of the Crimes Decree, 2009 allegedly committed at Taveuni in the Northern Division between 26 and 27 day of December 2015.

[2] At the conclusion of the summing-up on 04 May 2017 the assessors' opinion was unanimous that the appellant was not guilty of murder but guilty of manslaughter. The learned trial judge had disagreed with the assessors in his judgment delivered on 05 May 2017 and convicted the appellant for murder. He was sentenced to life imprisonment with a minimum term of 12 years to be served before being eligible for pardon.

- [3] The appellant's timely appeal against conviction had been signed by the appellant on 16 May 2017 (received by the CA registry on 18 May 2017). The Legal Aid Commission had tendered an amended notice of appeal and written submissions on 12 June 2020 and the state had responded by its submissions filed on 06 July 2020.
- [4] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is '**reasonable prospect of success**' (see Caucu v State AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, Navuki v State AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and State v Vakarau AAU0052 of 2017:4 October 2018 [2018] FJCA 173, Sadrugu v The State Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and Wagasaga v State [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see Chand v State [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), Chaudry v State [2014] FJCA 106; AAU10 of 2014 and Naisua v State [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds. This threshold is the same with leave to appeal applications against sentence as well.
- [6] Grounds of appeal urged on behalf of the appellant are as follows.

*'Ground 1 - That the Learned Trial Judge erred in law and in fact when he failed to give cogent reasons for overturning the assessor's unanimous opinion of Not Guilty for Murder.*

*Ground 1- That the Learned trial Judge erred in law and in fact when he made a finding and accepted that the Appellant was in a state of shock however refuses to accept the Appellant's contention that he was shocked when giving his answers in his caution interview, that the contradicting findings of the learned trial Judge cannot be relied on to secure a conviction as such caused a great miscarriage of justice to the Appellant.*

- [7] The evidence of the prosecution as found in agreed facts had been summarized by the learned trial judge in the summing-up as follows.

*'13 Because of the agreed facts you must find that on the 26<sup>th</sup> December 2015, after a day of drinking, both Tomasi and Mone returned home. Tomasi was outside smoking and Mone went inside to flirt with Tomasi's wife. Tomasi heard Mone say to her crudely that he wanted to have sex with her that night. For some reason, Tomasi swore at this wife because of this and she left the house.*

*14. You must find that this stage Mone appeared to "crack" and he started damaging things inside the house, breaking the furniture and smashing the kitchen crockery. Tomasi told him to stop but he didn't and threw a basin of dishes out of the house. Tomasi's children work up and started screaming. Mone swore at the children and threatened to hit and kill them. Grabbing a broken table leg he hit Tomasi on the hand and neck. Mone slipped and fell inside the house. At one stage, Mone tried to grab a kitchen knife but Tomasi stopped him doing this.*

*15. At about 2 am on the 27<sup>th</sup>, a badly injured Mone was taken to the local health centre and then eventually on to CWM in Suva. Tomasi went with Mone to the Health Centre and then on to Taveuni Hospital before Mone was transferred to Suva where he died on 31<sup>st</sup> December or the 1<sup>st</sup> January.*

- [8] The forensic pathologist's evidence had been stated by the trial judge in the following manner.

*'21. .... He told us that when he examined the body he found a deep skin tear on the top of the head which would have been caused by "high energy" blunt force trauma. The injury could not have been caused by a fall from standing position and would most likely to have been caused by an instrument rather than a fall. There were multiple injuries on the trunk and these injuries were consistent with an attack at Exhibit No.2, the wooden table leg. The ribs were cracked on both sides which again would have been by high energy blunt force. In his opinion the injuries were caused by more than two strikes.*

*22. The cause of death was acute kidney failure contributed to by blunt force trauma.'*

- [9] The only other witness for the prosecution Paulina Maria's evidence had been to the following effect.

*'29..... She told us that she is the younger sister of both the accused and the deceased. She was at home on the night this incident occurred. She saw Mone throwing plates and cups around. He broke chairs and the table. The children were crying and she was trying to get them outside to safety. Paulini was afraid because she saw a kitchen knife and she feared Mone might use it in his temper. She managed to get the kids outside and to the road. She heard Tomasi telling Mone to think of the children. Mone was constantly swearing.*

*She saw Tomasi hit Mone with the piece of wood but it was dark so she wasn't able to see where the wood landed on his body. She was in shock. She saw him hit Mone two times.*

- [10] The appellant's version and the evidence of his only witness Lui too had been narrated by the trial judge.

*'33. In telling us of his version of what happened that night, he said that they came home drunk. He was standing outside when Mone was in the sitting room with his (Tomasi's) wife who had been sleeping. He heard Money say to her "I want to fuck you tonight". He first thought he was joking. Mone then started smashing everything. He upturned the table and broke the 4 legs off. He then slipped and fell backwards landing on his back. When he fell he landed heavily on the edge of the upturned table. He then took the basin holding the dishes and threw them out the door towards the witness. The children were crying and screaming with fear. On hearing that he felt emotional because he loves them so much. Mone swore at them in very foul language. Tomasi says he was really touched and felt painful that he was insulting his children. When Mone said to them "you want me to hit and kill you?" he really felt for them and he tried to help them. He told Mone to take it easy at which Mone swore at him and said "I will kill you" and on hearing that he was alarmed and shocked.*

*34. Tomasi saw him trying to get the kitchen knife but he was able to pull him back. He stood up and hit Tomasi with the wooden leg. He tried to hit him on the head but Tomasi fended off the blow and was hit on the hand and shoulder. Tomasi took the wood off him. Mone fell on his back onto the cement step and slid down. Tomasi ran on to the grass. Mone tried to stand up and said "I'm really going to kill you". He was crawling towards Tomasi, his hands and feet on the ground. Tomasi says he hit him on the right shoulder. He hit him three times. All of the blows in the same place, that it's the right shoulder. Tomasi noticed that when Mone was crawling towards him his head was bleeding. After three blows, Lui came and wrapping his arms around Tomasi and the wooden leg, prevented him from making any further attack.*

*39. Tomasi's witness was the man Lui. On the night of the 26<sup>th</sup> he was going home after a grog session when he heard swearing and shouting coming from Tomasi's house. Because he heard children crying he went there. On arrival he saw Mone breaking things and swearing. He slipped and fell three times. He was trying to strike Tomasi swearing and saying he would kill the children and would kill him. Tomasi pulled the wood away from him. He hit Mone twice and was trying to hit him a third time when he intervened and was able to subdue Tomasi. Mone was bleeding from his head before he came towards Tomasi.'*

### ***01<sup>st</sup> ground of appeal***

- [11] The appellant argues that the trial judge had failed to give cogent reasons for overturning the assessors' unanimous opinion. He submits that the assessors had believed that he was only reckless as to causing serious harm based on the evidence of prosecution witness Paulina Maria who had seen the appellant hitting the deceased twice and the appellant's witness Lui who had confirmed the same.
- [12] However, one would not know the real basis on which the assessors had found the appellant guilty of manslaughter because in addition to the issue of want of fault element of murder asserted by the appellant, there was evidence of provocation and self-defense. The learned trial judge had directed the assessors in paragraph 42-45 of the summing-up on the fault elements of murder and manslaughter and stated that depending on their findings of facts it was open for them to find him guilty of murder or manslaughter. Then the trial judge had addressed them on provocation in paragraphs 46-50 of the summing-up and said that the assessors could find the appellant guilty of manslaughter if they thought that the appellant had caused the death of the deceased under provocation. The trial judge had finally addressed the assessors in paragraphs 51-56 of the summing-up and directed them that if they were satisfied that the appellant had acted in self-defense he should be acquitted. He also informed the assessors that the burden of excluding provocation or self-defense was on the prosecution and not for the appellant to establish it.
- [13] The trial judge had not stated in the judgment that it was not open for the assessors to have brought a verdict of not guilty of murder and coming-up with a verdict of manslaughter.
- [14] The High Court judge had rejected the finding of manslaughter on the basis that the appellant had given different versions of how many blows he inflicted on the appellant and on the evidence of the forensic pathologist (see paragraph 16 -18 of the judgment). The judge had preferred to accept the appellant's admission at one point of time during the cautioned interview that he had kept hitting the deceased 'plenty times' but he could not recount the number. However, the appellant had also stated that he had hit the deceased three times on the shoulder area and prosecution witness Paulina Maria and the appellant's witness Lui had seen the appellant hitting the deceased twice which the trial judge had not believed. In addition the appellant, Paulina Maria and Lui had

seen the deceased falling on his back two or three times on the cement step. However, the forensic pathologist had ruled out the injuries having been caused by a fall and there had been multiple injuries (the number is not clear) on the deceased's trunk leading to kidney failure contributed to by blunt force trauma.

- [15] In the circumstances, the trial judge had come to an 'irresistible' inference that the appellant was reckless to the extent that he must have been aware that his assault created a substantial risk that death would occur and that he was not justified in taking that risk but carried on regardless and therefore guilty of murder. However, the trial judge had ruled out the intention to kill on the part of the appellant in paragraph 28 of the judgment.
- [16] Similarly, the trial judge had dealt with the complete defense of self-defense in paragraph 22 of the judgment and agreed with the assessors' rejection of self-defense.
- [17] The trial judge had then turned his attention to the partial defense of provocation in paragraphs 23-26 and concluded that the prosecution had disproved provocation in that the appellant had not lost control of himself and therefore rejected provocation.
- [18] The Court of Appeal in **Naitini v State** [2020] FJCA 20; AAU135.2014, AAU145.2014 (27 February 2020) examined the past decisions and principles relating to provocation and stated as follows.

*'[10] In **Regina v. Duffy** [1949] 1 All E.R. 932 the gist of the defence of provocation was encapsulated by Devlin J. in a single sentence in his summing-up, which was afterwards treated as a classic direction to the jury:*

*"Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary **loss of self-control**, rendering the accused so subject to passion as to make him or her for the moment not master of his mind."*

*[11] The counsel for the appellant heavily relies on the decision in **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017) in support of the sole ground of appeal. In **Codrokadroka v State** [2008] FJCA 122; AAU0034.2006 (25 March 2008) the Court of Appeal in relation to section sections 203 and 204 of the Penal Code dealing with provocation has engaged in an exhaustive analysis and come out with the approach that should be taken as follows.*

*'1. The judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case.*

*2. There should be a "**credible narrative**" on the evidence of provocative words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.*

*3. There should be a "credible narrative" of a resulting **loss of self-control** by the accused*

*4. There should be a "credible narrative" of an attack on the deceased by the accused which is **proportionate** to the provocative words or deeds.*

*5. The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a **sudden loss of self-control** depends on the fact of each case. However cumulative provocation is in principle relevant and admissible.*

*6. There must be an evidential link between the provocation offered and the assault inflicted.'*

*[12] The Supreme Court in **Codroka v State** [2013] FJSC 15; CAV07.2013 (20 November 2013) adopted the above propositions as accurately reflecting the approach that should be taken by a trial judge to the issue of provocation.*

*[13] In **Tapoge** the Court of Appeal had applied both the CA and the SC decisions in **Codroka** to section 242 of the Crimes Decree and further observed as follows*

*'[15] Provocation is not a complete defence to an unlawful killing. It is a partial defence. Killing with provocation reduces culpability from murder to manslaughter. This lesser culpability is the effect of section 242 of the Crimes Act 2009*

*'[16] There is a general duty on the courts to consider a defence, even if it was not expressly relied upon by the accused at trial. The scope of that duty in relation to provocation was explained by Lord Devlin in **Lee Chun Chuen v R** (1963) AC 220 as follows:*

*Provocation in law consists mainly of three elements – the **act of provocation**, the **loss of self-control**, both actual and reasonable, and the **retaliation proportionate to the provocation**. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements.'*

[19] Although the trial judge cannot be criticised too much for not having given cogent reasons for disagreeing with the assessors' finding of guilty of the appellant for manslaughter on the perceived lack of fault element of murder and agreeing with them for having rejected self-defense, I am not sure whether the trial judge had given sufficiently cogent reasons in rejecting the verdict of manslaughter in paragraph 23-26 of the summing-up on the basis of provocation in the light of the above legal principles. This is particularly so, considering the trial judge's directions to the assessors on provocation in paragraphs 46-50 of the summing-up where he had told the assessors in the end:

*'50.....If, however, you conclude that such a person would or might have reacted and done as Tomasi did, your verdict would be one of not guilty of murder, but guilty of manslaughter.'*

[20] I think the above issue raises the question of law whether the trial judge had discharged the burden under section 237 of the Criminal Procedure Act of 2009 with regard to rejecting the partial defense of provocation when disagreeing with the finding of guilty of the appellant for manslaughter by the assessors. Therefore, it technically needs no leave to appeal but I would formally grant leave for the appellant to appeal. Needless to say, that the full court would examine this issue in the background of the totality of evidence not available to me at this stage.

[22] The appellant relies on Singh v State [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) to buttress his submission that the trial had failed to give cogent reasons for his decision to disagree with the assessors.

[23] Hon. Justice Saleem Marsoof of the Supreme Court had quoted paragraph 80 from Ram v State [2012] FJSC 12; CAV0001.2011 (9 May 2012) with approval in Singh:

*'80. A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and 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 in the case.'*

*'81. Of course, as was noted in Ram Lal v Regina (Criminal Appeal No 3 of 1958), the trial judge must have "very good reasons" for differing from the assessors. In Ram Bali v Regina (1960) 7 FLR 80, this Court emphasised that the trial judge should proceed on "cogent and carefully reasoned grounds based on the evidence before him and his views as to credibility of witnesses and other relevant considerations". This latter case went to the Privy Council, which observed that the trial judge was taking "a strong course" by differing from the unanimous opinion of the assessors. Nevertheless, the Privy Council concluded that as the judge had paid "full heed" to the views of the assessors, his decision was justifiable because it was based upon his own "emphatic conclusions in regard to the evidence". In Shiu Prasad v Regina (1972) 19 FLR 68 at 71, it was reiterated that the judge must have "cogent reasons" for differing from the assessors.'*

- [24] In **Ram**, the appellant had been charged with the offence of murder under section 199 of the Penal Code, Chapter 17, and tried in the High Court of Suva before three assessors who had unanimously found him guilty as charged, and the trial judge, agreeing with the assessors, had convicted him and sentenced him to life imprisonment in terms of section 200 of the Penal Code with no minimum term fixed, pursuant to section 33 of the said Code. Court of Appeal had affirmed the conviction and sentence and the appellant had sought special leave from the judgment of the Court of Appeal. Thus, it was a case where the trial judge had agreed with the assessors.
- [25] The Supreme Court in **Ram**, had referred to section 237 of the Criminal Procedure Act of 2009, which had replaced similar provision of the Criminal Procedure Code, and stated that section 237 had followed the same principle that the trial judge *"shall not be bound to conform to the opinions of the assessors"* and stated that the trial judge shall give his reasons for differing from the opinion of the assessors.
- [26] Therefore, in my view the observations of the Supreme Court in paragraph 80 in **Ram** should be taken to apply only when a trial judge disagrees with the assessors but not when the trial judge affirms the opinion of the assessors; the latter is governed by the decision of the Court of Appeal in **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) where it was held

*‘[4] .....Furthermore there is no requirement for the judge to give any judgment when he agrees with the opinions of the assessors under section 237(3) of the Criminal Procedure Act 2009. Although a number of Supreme Court decisions have indicated that appellate courts would be assisted if the judges were to give brief reasons for agreeing with the assessors, it is not a statutory requirement to do so. See: **Mohammed –v- The State** [2014] FJSC 2; CAV 2 of 2013, 27 February 2014.’*

- [27] In **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014) the Supreme Court having examined several decisions remarked

*‘[32] An appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court.’*

- [28] In contrast, in **Singh** the petitioner had been convicted of murder after trial by the High Court judge where the learned judge by his judgment dated 16 September 2014, had overturned the unanimous opinion of the assessors that the petitioner was not guilty of the crime. Upon conviction, the petitioner was sentenced to life imprisonment with a non-parole period of 20 years. The Court of Appeal had affirmed the decision of the High Court judge. The Supreme Court disagreed and the following observations of Hon. Justice Saleem Marsoof so made are applicable to the instant case.

*‘[24] It is always necessary to bear in mind that the function of this Court, as well as the Court of Appeal, in evaluating the entirety of the evidence led at the trial and making an independent assessment thereof, is of a supervisory nature. Unlike in Ram v State,<sup>[22]</sup> where this Court quashed the conviction and acquitted the accused on the basis that on the whole of the evidence led in that case, “it was not open for a judge sitting with assessors to be satisfied beyond reasonable doubt that the accused was guilty of murder”,<sup>[23]</sup> in the instant case, this Court is confronted with the difficulty that the learned trial judge has not dealt with some material questions that arise in the case with sufficient cogency, particularly in regard to the matters already discussed in this judgment pertaining to (1) the voluntariness of the petitioner’s confession and (2) the reliability of the testimony of Sunita Devi, and a few other matters highlighted by Stock, J. under the headings “hearsay and recent complaint”<sup>[24]</sup> and “Intent.”<sup>[25]</sup> In other words, apart from the non-directions and mis-directions adverted to already, the learned trial judge has also fallen into error in the effective discharge of his duty of independently evaluating and assessing the evidence led in the High Court in the course of his judgment.*

*[25] I am therefore of the opinion that the Court of Appeal has in all the circumstances of this case, failed to discharge its supervisory function of considering carefully whether the trial judge had adequately complied with his statutory duty imposed by section 237(4) of the Criminal Procedure Decree. Though an appellate court such as the Court of Appeal and this Court does not have the advantage of seeing the witnesses testify so as to appreciate their demeanour, it is evident on the available evidence that the trial judge had failed to effectively discharge his statutory duty of evaluation and independent assessment of the evidence **when differing with the unanimous opinion of the assessors** that the petitioner is not guilty of murder, and the Court of Appeal erred in affirming the said decision.*

*‘[28] I have given this matter careful consideration, in the backdrop that the Court of Appeal erred in fact and in law in not taking into consideration the trial judge’s failure to properly evaluate the evidence of Sunita Devi regarding the voluntariness of the petitioner’s confession, his failure to caution the assessors and himself regarding possibility that she might have had some interest of her own to protect when testifying at the trial upon immunity from prosecution, and his failure to give cogent reasons in his judgment for overturning the unanimous opinion of the assessors on the charge laid against the petitioner, every one of which circumstance, in turn caused a substantial and grave miscarriage of justice against the petitioner. I have no hesitation in agreeing with Stock, J. that this is not a proper case to apply the proviso to section 23(1) of the Court of Appeal Act.*

- [29] As held in **Ram v The State** (1960) 7 FLR 80 and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)] that the function of the Supreme Court, as well as the Court of Appeal, in evaluating the entirety of the evidence led at the trial and making an independent assessment thereof, is of a supervisory nature. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse (vide **Ram v The State** (1960) 7 FLR 80).

### ***02<sup>nd</sup> ground of appeal***

- [30] The gist of the appellant’s complaint is that it was wrong for the trial judge to have relied on the appellant’s answer that he dealt several blows on the deceased when he had also said in other places, particularly at the trial that he delivered two or three blows as spoken to by a prosecution witness Paulina Maria and the defence witness Lui. The appellant had explained the different accounts in the number of blows in the cautioned

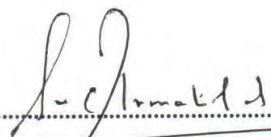
statement by referring to the state of shock he was still in when he was caution interviewed as set out by the trial judge in paragraph 18 and 36 of the summing-up. The judge had not considered the appellant's explanation in the judgment but had accepted his version of multiple blows as medical evidence was supportive of an attack caused by more than two blows. The trial judge cannot be necessarily criticised for his conclusion in this regard.

- [31] This is a matter affecting the establishment of the fault element of the charged offence beyond reasonable doubt and might be considered as an extended part of the first ground of appeal with the complete appeal record being made available to the full court. However, by in its own right it has no reasonable prospect of success at this stage.

### **Order**

1. Leave to appeal against conviction is allowed.



  
.....  
Hon. Mr. Justice C. Prematilaka  
JUSTICE OF APPEAL