

IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS: CAV 0026 of 2015 and CAV0030 of 2015
[On Appeal from the Court of Appeal No. AAU106 of 2011]

BETWEEN : EPARAMA NIUME
JOVECI NAIKA

Petitioners

AND : THE STATE

Respondent

Coram : The Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court
The Hon. Mr. Justice Sathya Hettige
Judge of the Supreme Court
The Hon. Mr. Justice Suresh Chandra
Judge of the Supreme Court

Counsel : 1st Petitioner in person
Mr. S. Waqainabete for the 2nd Petitioner
Mr. L. J. Burney with Mr. E. Samisoni for the Respondent

Date of Hearing : 10 and 15 June 2016

Date of Judgment : 4 August 2016

J U D G M E N T

Marsoof J

- [1] I have had the opportunity to peruse the judgment of Chandra J in draft, and I agree with his reasoning and conclusions.

Hettige J

- [2] I agree with the reasoning and conclusions of Chandra J.

Chandra J

- [3] This is an application for special leave to appeal against the judgment of the Court of Appeal affirming the Petitioners' convictions and dismissing their appeals.
- [4] The Petitioners were charged and tried on two counts of murder contrary to section 199 and 200 of the Penal Code, Cap.17. On being found guilty they were convicted and sentenced to life imprisonment. The 1st Petitioner was ordered to serve a non-parole period of 25 years' imprisonment and the 2nd Petitioner was ordered to serve a non-parole period of 14 years' imprisonment.

Factual Background

- [5] The victims, Ashok Chand and Mohini Lata who operated a small soap manufacturing business employed the 2nd Petitioner and another accused, Soroveli Quetaki as workers. Though Soroveli was jointly charged with the Petitioners initially, later the charges were withdrawn and he was granted immunity from prosecution by the State. Soroveli's evidence implicated both Petitioners. He had stated in his evidence that he had agreed with the 2nd Petitioner to rob the victims.
- [6] Soroveli stated that the 2nd Petitioner had arranged to meet the 1st Petitioner to discuss the plan to rob the victims and had met to discuss the plan. On 19 December 2009, Soroveli had come to work and so had the 2nd Petitioner. The 2nd Petitioner had been sacked by Ashok for being a slow worker. He had however remained in the premises after being sacked. Shortly before Ashok returned to his office, the 1st Petitioner had sneaked inside the premises and was hiding inside the staff toilet together with the 2nd Petitioner. Ashok

had entered the premises and gone into his office and Mohini had been upstairs in her room. While Ashok was in his office, Soroveli had gone and informed him that the 2nd Petitioner was still working despite being sacked. Thereupon, Ashok had got up and walked towards the soap section and as Ashok had come close to the toilet, the 1st Petitioner had grabbed him by his collar and stabbed him several times. Ashok had been on the floor in a pool of blood and gasping for breath.

- [7] Shortly after, Mohini had come down the stairs, Soroveli had heard the 1st Petitioner telling the 2nd Petitioner to grab hold of Mohini. Soroveli had seen the 2nd Petitioner coming out of the toilet and grabbing Mohini and bringing her to where Soroveli was standing. The 2nd Petitioner had taken Mohini inside the toilet and made her sit on the toilet pan. The 2nd Petitioner had stood beside the 1st Petitioner when he stabbed Mohini inside the toilet.
- [8] After stabbing Mohini, all three had gone upstairs to find the safe which they could not locate. They had fled the scene when they could not find the safe.
- [9] The 1st Petitioner had elected to remain silent at the trial while the 2nd Petitioner had elected to give evidence. His evidence was to the effect that he had agreed with Soroveli to arrange someone to rob the victim's safe. He had arranged the 1st Petitioner and the three of them had met and made a plan to rob the victims. In accordance with the plan he and Soroveli had come to work and they had waited till the 1st Petitioner had arrived in a taxi. They had hidden inside the toilet. The 1st Petitioner had told him to pick up something to use as a weapon and he had grabbed hold of a metal rod which had been handed over to him by the 1st Petitioner. When he heard Ashok coming down the stairs he had dropped the iron rod he had been holding and had told the 1st Petitioner not to harm Ashok. As Ashok had come closer to the toilet, the 1st Petitioner had jumped outside and he had heard Ashok yelling a few times.

- [10] He said further that he had heard Mohini running down the stairs and calling out for help. At that point he had come out of the toilet and seen the 1st Petitioner holding Mohini and trying to strike her with a piece of metal and a kitchen knife. He had seen Ashok lying in a pool of blood outside the toilet. He said that he had intervened to stop the 1st Petitioner from hurting Mohini but the 1st Appellant had swung the knife at him injuring his left eye lid.
- [11] They had gone upstairs but had not been able to locate the safe. They had found \$600.00 cash in the room, which they had shared among themselves. They had also taken Ashok's mobile phone and laptop. They had come downstairs and sat down. They had stayed behind for a while and listened to music on the phone and sung. After a while, they had left the premises around 3.00 p.m. because that was the time they finish work on Saturdays.
- [12] On 5 January 2010, the police discovered the bodies of the victims inside their premises in Valalelva. Both bodies were inside a toilet. Although the bodies were heavily decomposed, injuries to the bodies had been visible. Post mortem examination revealed Ashok was stabbed 17 times while Mohini was stabbed 13 times on the chest. The examination also revealed that a metal object was inserted into the vagina of the female body. Both victims had died of haemothorax (blood in the pleural cavity) consistent with stab injuries to the chests.
- [13] The Petitioners' appeal against their convictions to the Court of Appeal was dismissed by the full Court of the Court of Appeal.

Criteria for Special Leave

- [14] Section 7(2) of the Supreme Court Act 1998 provides:

"In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-

- (a) A question of general legal importance is involved;*
- (b) A substantial question of principle affecting the administration of criminal justice is involved; or*
- (c) Substantial and grave injustice could otherwise occur."*

- [15] This provision has been considered in several decisions of the Supreme Court and it is well settled that the threshold is very high when considering applications for special leave to appeal to the Supreme Court and that such leave is not granted as a matter of course.

The 1st Petitioner's Appeal

- [16] The 1st Petitioner appeared in person and had filed a notice amending his ground of appeal and stated that his ground of appeal was that "the conviction was unsafe and unsatisfactory".
- [17] He had filed written submissions in support of his ground of appeal to the effect that the police witnesses, PW5, PW6 and PW11 in regard to his arrest were not credible witnesses as their evidence were identical word to word and that their evidence was vague and contradicted each other.
- [18] This was not a ground of appeal that was urged before the Court of Appeal. It is usual to disregard such a ground which has not been canvassed before the Court of Appeal. Since the Petitioner was unrepresented this Court would consider it.
- [19] The Police witnesses against whose evidence the Petitioner is making his complaint gave evidence regarding the Petitioner's arrest. They gave evidence regarding the manner in

which the Petitioner was arrested during investigations. Their evidence was not material as far as the alleged incident was concerned which led to the commission of the offences by him.

- [20] There was sufficient evidence before the High Court, that of Soroveli who had been granted immunity and the 2nd Petitioner which were virtually eye witness accounts of the manner in which the offences were committed and on which the Assessors brought in a unanimous verdict of guilt against the Petitioner. There is no merit in this ground of appeal .

The 2nd Petitioner's Appeal

- [21] The 2nd Petitioner in his Notice of Appeal sought special leave and expressed his concern on the following matters:

- (1) The correct approach to secondary liability for murder under section 22 of the Penal Code;
- (2) Non-direction on withdrawal from joint enterprise.
- (3) The approach to evidence given under immunity from prosecution on the basis that the immunity witness lied under oath.

- [22] The same ground regarding secondary liability for murder was canvassed before the Court of Appeal. The Court of Appeal dealt with secondary liability in great detail comparing the approach in Fiji with that in England and New Zealand, and as to how the learned trial Judge had summed up to the Assessors . This Court agrees with the reasoning set out therein.

[23] Justice Goundar in his judgment in the Court of Appeal set out the law applicable in Fiji regarding secondary liability :

[20] In Fiji, secondary liability for murder is governed by statute. At the time of the offending, the relevant provision was section 22 of the Penal Code, Cap.17 (repealed)

[21] At trial, the 2nd Appellant did not dispute that he was part of a joint enterprise to rob the victims. He maintained that stance on appeal as well. His dispute relates to the second limb of section 22, that is, whether murder was a probable consequence of carrying out the planned robbery

[22] The test for secondary liability for murder under section 22 is whether each participant contemplated the probability of death or infliction of serious harm on the deceased in the execution of the planned unlawful purpose (**Kumar & Ors. v R** [1987] SPLR 131,134). The contemplation does not need to be express. It may be implied. As the Privy Council in **Chan Wing Siu v The Queen** [1985] AC 165, 175 said:

“It [the principle] turns on contemplation or, putting the same idea in other words, authorization, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.”

... ..

[23] The 2nd appellant takes no issue regarding the directions on joint enterprise as it relates to him. His complaint relates to lack of evidence to attach secondary liability for murder on the basis that he had no knowledge of the weapon (knife) used by the 1st appellant to inflict the fatal injuries on the victims. This contention has some force if we are to apply the English test for secondary liability for murder as enunciated by the House of Lords in **R v Rahman** [2008] 4 ALL ER 351. In **Rahman**, the test for secondary liability for murder in England and Wales was summarized by Lord Brown at [68] as follows:

“If B realizes (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of venture unless (i) A suddenly produces and uses a weapon of which B

knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B."

- [26] Counsel for the State submits that the English test for secondary liability for murder, which is known as "fundamentally different" test in common law and has no application in Fiji because of the difference in the statutory provision for secondary liability for murder under section 22 of the Penal Code, Cap.17. Mr. Burney refers to a judgment by the New Zealand Supreme Court in **Edmonds v R** unreported SC 57/2011; 20 December 2011 that has carried out a comparative analysis of approach taken in New Zealand and other common law jurisdictions to the issue of secondary liability for murder. In New Zealand, the secondary liability for murder is attached pursuant to section 66(2) of the Crimes Act 1961(NZ), which corresponds closely to section 22 of the Penal Code, Cap.17.
- [27] In the case of **Edmonds**, the New Zealand Supreme Court highlighted the problems associated with the English "fundamentally different" test and considered its applicability in New Zealand when the statutory provision for secondary liability for murder is different. The New Zealand Supreme Court rejected the English "fundamentally different" test
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- [28] While the English "fundamentally different" test was rejected in **Edmonds**, the New Zealand Supreme Court at [48] recognized that there would be circumstances in which knowledge of the weapon direction may be required as part of the trial judge's discussion of the evidence, in particular relation to:
- (a) establishing the extent of the common purpose;
 - (b) deciding whether the party recognized that the commission of the offence was a probable consequence of the commission of the common purpose; and
 - (c) determining whether the offence committed by the principal was in the course of the implementing of the common purpose.
- [29] But whether such a direction is practically required will depend very much on the particular circumstances of the case and the particular charge which the alleged party faces (**Edmonds** at [52])."

[24] In Vasutoga & Anr. v. The State CAV001/2013 (29 January 2016) the Supreme Court of Fiji stated:

“[46] We are persuaded to follow New Zealand’s approach to secondary liability for murder because Section 66(2) of the Crimes Act 1961 (NZ) corresponds closely with Section 22 of the Penal Code, Cap. 17.”

[25] Having set down the law in Fiji on secondary liability Justice Goundar went on to state:

[30] In the present case, the trial judge’s directions on secondary liability for murder under section 22 of the Penal Code, Cap.17 are impeccable. After the assessor’s expressed a unanimous opinion that the 2nd appellant was guilty of double murder, the trial judge made his own finding and agreed with the assessors that the 2nd accused was liable for the double murder pursuant to section 22 of the Penal Code, Cap.17. The trial judge’s reasons are at paragraphs [5] – [8] of the judgment:

“5. Soroveli, the accomplice, gave evidence that the 2nd accused grabbed the deceased Mohini Lata. There was no dispute that the 2nd accused was physically present there to assist the 1st accused in committing the robbery.

6. Apart from Soroveli’s evidence against the 2nd accused, the 2nd accused himself giving evidence admitted that he was involved in the planning of the robbery. The 2nd accused also admitted that he held the iron rod which was given to him by the 1st accused as a weapon. However, he said that the iron rod fell from his hand when he heard Ashok (the deceased) coming towards the toilet. The 2nd accused also admitted that if the iron rod was used it would have caused serious injury.

7. It was day time, and both 1st and 2nd accused knew that both deceased persons were inside the house. Therefore the 2nd accused could have had the knowledge, that it was a probable consequence that grievous hurt or death would result if the deceased persons confront them and if they used the weapon he carried. Common intention to cause grievous harm or death would occur on the spur of the moment. The 2nd accused did not try to escape, in his own evidence, from the scene. Further the 2nd accused had been listening to music with Soroveli in the bleach room for

about 2 hours until 3.00pm even after he knew that Ashok was murdered. He himself admitted in evidence that he feared that the 1st accused would do harm to Mohini. Still he left to search of the safe with Soro leaving Mohini with 1st accused according to him.

8. In the circumstance I find that the prosecution has proved beyond reasonable doubt that the 2nd accused acted in joint enterprise with the 1st accused to commit murder of the deceased persons, Ashok Chand and Mohini Lata.”

- [26] The Court of Appeal was of the view that on the evidence, the trial court was entitled to infer that serious harm was within the 2nd Petitioner’s contemplation when he ventured to rob the victims, with the other accused. This Court agrees with the setting out of the law relating to secondary liability in cases of joint enterprise in Fiji and with the conclusion that the 2nd Petitioner’s guilt for double murder was supported by evidence and has nothing further to add.
- [27] This Court sees no merit in this ground of appeal relating to secondary liability of the 2nd Petitioner.
- [28] The second ground of appeal was as regards the non-direction relating to withdrawal from joint enterprise. This ground too was canvassed before the full court of the Court of Appeal and was rejected.
- [29] The overwhelming evidence at the trial was that the 2nd Petitioner was present right throughout when the murders were committed, which occurred in carrying out their plan to rob in which he was a party, and continued with the plan to steal after the victims had been stabbed and seriously injured. There was no evidence of any withdrawal by him from carrying out the plan to rob the victims. In that situation there was no necessity for a direction by the trial Judge to the Assessors regarding withdrawal from the joint enterprise. Therefore this ground lacks any merit.

[30] The third ground of appeal is regarding the approach to evidence given under immunity from prosecution on the basis that the immunity witness lied upon oath.

[31] Although this ground was not canvassed before the Court of Appeal, this Court would consider it. The learned trial Judge has in his summing adequately dealt with this matter as seen from the following paragraphs of his summing up not only as regards the angle of a witness who had been given immunity but also from the angle of the witness being considered as an accomplice:

“29. I will now direct you on accomplice evidence. The prosecution relies on the evidence, to some extent, of the witness Soroveli. Soroveli in his evidence said that he informed the others about the safe in Ashok’s house. He also admitted in evidence that he was involved in planning of the robbery and that he was also there in the premises at the time the murder was committed. Soroveli is an accomplice in respect of the offences charged.

30. In law, the evidence of an accomplice is considered dangerous to rely upon, because accomplices may have an agenda or a reason to give evidence for the State, implicating the accused persons. In this case charges against Soroveli were dropped, or discontinued on the condition that he gives evidence for the State in this case. The letter of immunity by the Director of Public Prosecutions reads as follows:

‘On the basis of your signed statement to the police dated 6th July 2010 which you have acknowledged as true and correct, and, in the interest of justice; I am prepared to grant you immunity from prosecution in respect of the offence of murder pursuant to Section 199 and 200 of the Penal Code Act 17.

The offer of immunity is made on the basis that you, Soroveli Vura Quataki, if called by the State as a witness in the trial of Eparama Nume, Joveci Naika and Apenisa Lino, will give truthful evidence in accordance with the aforementioned statement. Failure to give evidence in accordance with your statement will invalidate this immunity.’

31. The fact that Soroveli has been given immunity from prosecution means that he has nothing to gain from giving

evidence which might exonerate himself from blame. Nevertheless there is still a danger in accepting his evidence because he may have given a false account to the police in order to save his own skin, and to get immunity. The letter given to him means that if he does not give evidence in accordance with the statement he has given the police, he may be prosecuted for the offences himself.

32. The giving of immunity from prosecution to give evidence in exchange is the reason why Mr. Soroveli has given evidence. On the ground that he is an accomplice and considering the fact that he has been granted immunity from prosecution to give evidence on condition that he gives evidence along the lines of his police statement, I must warn you that it is unsafe to convict the accused persons on Mr. Soroveli's evidence alone, and without corroboration from other sources. Before you consider whether there is corroboration of Soroveli's evidence, you must first ask yourselves whether his evidence is credible, that is, whether it is capable of belief, and then whether you believe the evidence that he gave is such that you can rely upon it, and accept as being the truth.

33. Corroboration is some independent evidence, which implicate the accused in the commission of the offence. In considering the evidence of Mr. Soroveli, you must look for corroboration of his evidence because it is unsafe to convict without such evidence. In the course of this summing up I will direct you as to what evidence is capable of corroborating Mr. Soroveli's evidence. It is matter for you to decide whether you accept the evidence as being corroboration in fact, and whether, you accept the evidence of Mr. Soroveli as being credible and reliable."

[32] This Court considers the summing up of the learned trial Judge on this issue as being quite adequate and therefore there is no miscarriage of justice.

[33] The grounds of appeal raised by the Petitioners do not have any merit and therefore they in no way meet the threshold criteria required for the granting of leave by the Supreme Court.

[34] For the reasons stated above, the appeals of the Petitioners are dismissed and the applications for special leave are refused.

Orders of Court


- (1) The applications for special leave are refused.
- (2) The judgment of the Court of Appeal is affirmed.



Hon. Justice Saleem Marsoof
Judge of the Supreme Court



Hon. Justice Sathya Hettige
Judge of the Supreme Court



Hon. Justice Suresh Chandra
Judge of the Supreme Court