IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

CRIMINAL APPEAL NO. 10 OF 1981

Between:

KASI RAM s/o Shri Ram — APPELLANT

- and -

REGINAM — RESPONDENT

Mr. J. Reddy for the Appellant.
Mr. M. Raza for the Respondent.

Date of Hearing: 27th July, 1981.

Delivery of Judgment: 31 JUL 1981

JUDGMENT OF THE COURT

Spring, J.A.

The appellant was convicted by the Supreme Court of Fiji at Lautoka on the 16th February, 1981, of the murder of Bal Ram of Malaqereqere, Sigatoka, on the 22nd August, 1980. The trial was held before a Judge and 3 assessors. Two of the assessors returned an opinion that the appellant was guilty of murder while the remaining assessor returned an opinion of not guilty. The learned trial Judge in a written judgment concurred in the majority opinion of the assessors convicted the appellant of the murder of Bal Ram and passed sentence of life imprisonment.

The facts may be shortly stated. The appellant was aged 20 years 10 months at the time of the offence and was living at the home of his father which is on the Queen's Road near the junction of Malaqereqere feeder road travelling towards Sigatoka; the appellant

assisted his father in cane farming operations. The deceased Bal Ram lived with his wife Subadra and children at Malaqereqere about 40 to 50 chains away from the home of the appellant; Bal Ram worked at the Fijian Hotel about 2 miles away.

At about 9.30 p.m. on 22nd August, 1980, Davendra Mani, a nephew of the deceased attended the home of his grandmother at Malaqereqere in preparation for a religious ceremony to commemorate the death of his grandfather who had died 12 months previously; after Davendra Mani had been there for about one hour, he heard a commotion and noise coming from the direction of the creek; shortly thereafter he heard some children calling out and thereupon he went to Subadra's house - spoke to her, obtained a light, and immediately went with her towards the creek which was approximately 15 chains from Subadra's house and in the direction of the house of his grandmother. They came across the body of Bal Ram who was conscious when Davendra Mani first saw him, but was unable to speak. It was a moonlight night although drizzling; the body of Bal Ram was lying in the shadows. Subadra then ran to the grandmother's house and obtained a motor van which was used to take Bal Ram to Sigatoka Hospital. Upon arrival at the hospital Bal Ram was pronounced dead by a doctor.

The police having been notified of Bal Ram's death travelled to Malaqereqere at 7 a.m. on 23rd August, 1980; two pools of what appeared to be blood were found in a dry creek together with foot marks; the police arranged for the body of Bal Ram to be taken to the Lautoka mortuary. Rameshwar Prasad, Deputy Superintendent of Police interviewed Subadra and others. Subadra was re-interviewed and as a result of what the police officer was told appellant was sent for.

A pathologist at the Lautoka Hospital Dr. Gounder carried out a postmortem examination on Bal Ram's body on

the 23rd August, 1980, at the Lautoka Hospital. Dr. Gounder stated that there were injuries on the top and at the back of the head of the deceased which gave rise to an extensive subdural haemorrhage affecting the whole of the brain tissue; these injuries according to the doctor were consistent with skull damage caused by a heavy blunt object; Doctor Gounder expressed the opinion that these injuries were caused by 6 distinct blows inflicted with a fair degree of force; thereafter death would ensue in not more than one hour; unconsciousness would be immediate; the cause of death was extensive subdural haemorrhages into the brain with death occurring about 11.30 p.m. on the 22nd August, 1980.

The appellant was interviewed at Sigatoka Police Station at 3.30 p.m. on 23rd August, 1980, by Deputy Superintendent Prasad; Senior Superintendent Bal Ram was also present. Appellant freely volunteered to give a statement which was recorded in Hindi. The statement was read to the appellant in the presence of the two police officers; the appellant also read the statement himself and thereupon signed the statement. The interview was suspended at 4.40 p.m. when the appellant accompanied the police officers to the place where the police had found the two pools of what appeared to be blood; appellant was again cautioned and he pointed to the red stained area and stated that this was the place. Thereupon he took the police officers in the direction of his house and about 8 chains from the home of one Subramani and under a partly fallen lemon tree surrounded by knee high grass pointed to a vaivai stick and said "this is the same stick with which I had assaulted Balram". The police took possession of the vaivai stick which was stained at one end with what smelt like blood. The appellant then led the two police officers along a track saying it was the route he followed to his home after leaving the house of the deceased. The police officers and appellant returned at 5.20 p.m. to the Sigatoka Police Station where appellant's statement was extended to cover the matters relating to the visit to the scene of the crime and the finding of the vaivai stick. The interview concluded

at 5.58 p.m. on 23rd August, 1980. At approximately 6 p.m. on 23rd August, 1980, the appellant was charged with murder by Detective Corporal Jitendra Kumar at Sigatoka Police Station. The appellant when charged wished to make a further statement which was taken down in Hindi and read over to the appellant by Detective Cpl. Kumar; the appellant also read the statement and signed same. The taking of the statement concluded at 6.42 p.m. on 23rd August, 1980. A Justice of the Peace was called to the Police Station to see the accused and inquire if appellant had any complaints to make as to his treatment by the Police.

The statements taken from the appellant and produced by the prosecution at his trial as a confession allegedly made by him to the police are conveniently summarised in the following passage taken from the summing up by the learned Judge in the Court below :

> " In his versions to the police and to this Court the accused explains a deeply emotional involvement with Subadra, wife of Bal Ram (deceased). He may be truthful when he describes her as his mistress with whom he frequently had intercourse in her home when her husband was absent. At the age of 21 years he would probably be biased and vulnerable to matters affecting Subadra adversely. You should take this into account in considering the part you think he played - if any - in the death of Bal Ram.
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> According to his police statements the accused's visit to Subadra on the evening of 22nd of August 1980 was one of many secret meetings they had planned. Those statements allege that Subadra complained that Bal Ram was suspicious, had beaten her because of her association with the accused and that she asked the accused to take her away. He had said he would do so when he had settled with Bal Ram. On the night in question he visited her about 10.30 p.m.; they hugged and kissed and she again asked him to take her away. He replied that he would finish Bal Ram that night and would take her away. As they talked the dogs began to bark warning of someone's approach. It appears there had not been time for intercourse for his police statement makes no reference to it." It says that he got the stick Ex. 3 went down the slope and met Bal Ram who abused him and asked what he was doing. The accused's version to the police is that he hit Bal Ram on the head from

the front felling him and as Bal Ram tried to rise he again struck him to the ground followed by four further blows. He thought Bal Ram was dead and ran home and hid the weapon and en route. As you have heard ne later showed the police where it was hidden.

As I have reminded you the accused stated twice again to the police that he had killed Bal Ram."

At his trial in the Supreme Court the appellant presented a totally different account as to what happened on the night of 22nd August, 1980; he gave evidence and alleged that Subadra killed her husband Bal Ram. The learned trial Judge in his summing up to the assessors detailed appellant's version given in Court, as to how Bal Ram met his death and said :

"He now says he arrived at Bal Ram's between 10.00 and 10.30 p.m. entered the house and had intercourse in bed with Subadra. About 11.30 p.m. Bal Ram knocked on the door and whilst the accused was still trying to get under the bed Subadra for some reason opened the door exposing the accused. The accused tells you that Bal Ram beat Subadra and ran towards the kitchen saying he would chop them. The accused ran outside and fled down the slope. He was overtaken in the creek bed by Bal Ram who tried to strike him with a weapon. The accused twisted Bal Ram's arm causing him to drop the weapon but Bal Ram seized his throat, over-powered him, sat on him and was beating him. The accused covered his face with his hands. Suddenly he heard a blow and Bal Ram fell off the accused. The accused says he heard more than one blow but did not know the number. He told Subadra he thought Bal Ram was dead. In her distress she begged the accused to take the blame and promised to use her financial resources to extricate him from the consequences of such a confession. He says he agreed because of his deep love for her and Subadra then told him to hide the weapon."

The appellant has appealed to this Court and the following three grounds of appeal only were argued before us; the other grounds of appeal were abandoned.

"1. That the decision is unreasonable and cannot be supported having regard to the evidence.

2. That the learned trial judge, while drawing the attention of the Assessors to certain parts of the evidence in his summing up, failed to draw their attention to a crucial part of the evidence, namely, the visit of the deceased's wife, Subadra d/o Yengtaiya, to the prison and the conversation she is alleged to have had with the Appellant.

8. That the learned trial judge erred in law in failing to direct the minds of the Assessors to the defence of provocation and the law relating to manslaughter."

The evidence tending to establish the guilt of the appellant was contained in the confessions made by appellant to the police. At the trial Counsel for appellant did not challenge the voluntariness of the confessions which were admitted in evidence.

Turning to Ground 1 - Counsel for appellant submitted that the issue before the Court below was whether the truth had been told by the appellant in his confession to the police or when he gave evidence at his trial. The two versions were very different as in the confessions to the police the appellant accepted full responsibility for the killing whereas in Court he stated, on oath, that it was Subadra who killed Bal Ram.

Counsel for appellant submitted that the conviction could not be supported by the evidence. Dr. Gounder had stated that in his opinion the assault had taken place at 10.30 p.m. whereas the appellant in his confession stated he called at Subadra's house at 10.30 p.m. on the night of the crime and that they hugged and kissed and talked for a while until the barking of the dogs disturbed them whereupon appellant armed himself with a stick and went down the slope to meet Bal Ram.

Mr. Reddy submitted that the time of the assault, and the time of death, as given by Dr. Gounder could not be relied upon.

The learned trial Judge summed up the evidence as to the time of the assault and the time of death and left the issue to the assessors - he said :

> "In his confession he puts the time of attack on Bal Ram at 10.30 p.m. which coincides with Dr. Gounder's evidence that Bal Ram died at 11.30 p.m. and it would take about an hour for death to occur after the injuries.
>
> The accused's version in Court indicates that it was 11.30 p.m. when the deceased was struck which is an hour later than Dr. Gounder's estimate.
>
> There is also some evidence from P.W.8, Davendra, as to the time of the assault upon Bal Ram. P.W.8 says that he arrived at his grandmother's, three-quarter mile from Bal Ram's about 9.30 p.m. He had been there about an hour when he was called by Subadra's children and went to Subadra's house. He then went back along the track towards his grandmother's with Subadra and a light. They found Bal Ram in a dying condition in the dry creek bed about five yards from the point where the path crosses it. Subadra saw the body and called out. Subadra went to the grandmother's got a pic-up or van and brought it to the creek and took P.W.8 Davendra and Bal Ram to Sigatoka hospital.
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> In cross-examination, Davendra confirmed that he had been about an hour at his grandmother's, not two hours, when he heard the alarm. His evidence indicates that it was about 10.30 p.m. may be shortly after when the alarm was given. It corresponds with the time mentioned in the accused's confession namely 10.30 p.m. as the time that Bal Ram was attacked.
>
> Was Bal Ram attacked at 10.30 p.m. as stated in accused's confession; is that time corroborated by the evidence of Dr. Gounder and P.W.8 Davendra?".

Mr. Reddy argued that the version recounted in the Court below should be accepted; it was a question of fact to be decided by the assessors and the learned trial Judge who saw and heard the witnesses.

The learned trial Judge in his judgment says :

> "As I have said Dr. Gounder's evidence shows the deceased received his fatal injuries about 10.30 p.m. The accused's confession is that he attacked Bal Ram about 10.30 p.m. His confession is that he went from Bal Ram's house to meet Bal Ram leaving Subadra behind. It says he intended to settle with Bal Ram and armed himself with the stick. The time of the attack 10.30 p.m. is corroborated by the evidence of Dr. Gounder and P.W.8 Davendra.
>
> The confession shows that accused hit Bal Ram six times. Clearly he was present at the time of the killing because Dr. Gounder says there were six distinct heavy blows."

There is no merit in the defence contention that the evidence of Dr. Gounder could not be relied upon as fixing the time of the assault on Bal Ram and the time of his death.

We are of the opinion that the learned trial Judge dealt fully with this matter and on the evidence there was little or no discrepancy between the evidence of Davendra Mani, the appellant and Dr. Gounder as to the time of the assault on Bal Ram.

Next, the defence Counsel said that the learned trial Judge made an unfair observation in his summing up when he said :

> "Do you think it strange that she should wield it with such ferocity against her husband"?

Mr. Reddy submitted that in the circumstances it was not strange as Subadra had kept a lover and hated her husband; that the appellant's version of the killing as told in Court should be accepted and that when Subadra arrived on the scene and saw her husband sitting on the appellant's chest punching him her moment of opportunity had arrived for her to rid herself of a husband she loathed and her lover would then be free to take her away as he had promised.

The learned trial Judge fully canvassed these matters in his summing up to the assessors and left the issues to them when he said :

> "If the accused's evidence is true Subadra killed her husband to save the accused. That suggests that she loved the accused with the same unselfish devotion that he claims to have felt for her. If she loved the accused so intensely as to kill her husband to save him would she now desert the accused in his hour of need? He says he is now revealing her as the killer because she has broken her word to help him.
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> Probably the accused as an impressionable youth caught up in illicit intercourse with a mature married woman would go to great lengths to save her from being charged and tried for murder. No doubt it is entirely probable that such a young man in the early flush of strong sexual emotions would unhesitatingly accept responsibility for his lover's crime if it was caused by their love. Is that what happened in this case?
>
> The same approach may suggest that such a youth could come to resent the husband. Knowledge that the rival (husband) had ill-treated the woman would perhaps incense the young man; knowledge that the ill-treatment arose because of the wife's infidelity may incense the young man further causing him to rashly and emotionally decide "to have it out" with the husband.
>
> Those are the issues which lie before you. It is your duty to consider them carefully and to arrive at an honest opinion.
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> If you are sure of the accused's guilt your opinion will be guilty accordingly.
>
> If you entertain a doubt then you must give the accused the benefit of it and find him not guilty."

In our view there is no merit in the criticism levelled at the summing up of the learned trial Judge by defence Counsel; all the facets of the argument advanced on behalf of the appellant had been dealt with by the learned trial Judge and left for the assessors to make their findings thereon.

Mr. Reddy further submitted that in making a decision as to which version of the events as told by the appellant should be accepted as the true one reference should have been made by the learned trial Judge in his summing up to the barking of the dogs. In his confessions to the police appellant stated when he was speaking to Subadra at her house at 10.30 p.m. on 22nd August, 1980, the dogs barked and the appellant knew immediately that Bal Ram was approaching. In his evidence in Court he said he was in bed with Subadra and suddenly there was a knock on the door about 11.30 p.m. when Bal Ram entered - there was no barking of the dogs heralding his approach. Mr. Reddy submitted that dogs do not bark at their master and that the evidence as given in Court was the more likely account and accordingly the learned trial Judge should have commented thereon with a view to its acceptance. There is no validity in this argument as the appellant in the course of his evidence in Court said :

> "Bal Ram had dogs. They knew me. They did not bark at me during the day; but did so at night - but stopped when I drew close.
>
> On night of 22nd August, 1980, the dogs barked as I approached in the distance.
>
> They barked when Bal Ram approached."

Accordingly, we reject this submission and criticism of the summing up.

There were various other arguments advanced by Counsel for appellant as to the reasons for the appellant's reversal of the story as told in his confession to the police and the story as told in Court. However, the learned trial Judge in our view very fairly put the issue to the assessors as to which of the two versions as told by the appellant was the truth and which should be accepted when he directed the assessors in his summing up as follows :

"Turning now to the accused's allegation in Court that Subadra killed Bal Ram, how does that appear in the light of Davendra's evidence as to Subadra's conduct. Having killed Bal Ram did she cause an alarm and institute a search and pretend to find his body? It would be good acting for one who had just viciously battered Bal Ram, her husband, to death. Her pretence would be continued by getting the van and taking him to Sigatoka hospital.

Subadra knowing the accused had gone to meet Bal Ram and not seeing either one of them arrive back at her house may have wondered what had happened and then created an alarm.

The version the accused has given in this Court is an account which is not fantastic. It is the kind of thing which could happen. As I have told you the accused does not have to satisfy you that that is the true version. On the other hand the prosecution have to satisfy you that it is not true and that you should accept the accused's confession as true. The accused does not have to satisfy you that his confession was untrue.

If you think that the version given in Court by the accused is untrue that is not a reason for concluding that his confession is true.

Bring your common sense to bear on all the evidence you have heard and form your conclusion from that which you regard as credible and which you consider to be accurate and reliable. If you cannot make up your mind as to the accused's guilt or innocence you must resolve your doubts in his favour and acquit him.

It is only if you are sure of his guilt that you will convict him."

Accordingly in our view Ground 1 fails.

Turning to Ground 2, Mr. Reddy submitted that the actions of Subadra supported the sequence of events as given by the appellant in Court; that Subadra led the way to the creek and that this was strong evidence that she must have known where the body of her husband lay.

Davendra Mani, however, stated that when he first heard the noise it came from the creek. Further in

cross-examination he said :

> "she did not lead us except that she was ahead of us."

Mr. Reddy further criticised the actions of Subadra in sending her children to get assistance from her nephew Davendra Mani rather than going herself.

Finally he submitted that the learned trial Judge erred in not putting to the assessors that Subadra was heavily involved in the whole affair and that her visit to the prison to see the appellant was indicative thereof.

The appellant when giving evidence in Court admitted that he at first denied killing Bal Ram. The record of his cross-examination is as follows :

"Q: Why involve Subadra in that way if your plan was to keep her in the background?

A: The police said that Bal Ram was dead because of both of us.

Q: So the police prompted the lie which caused you to involve Subadra?

A: It was the only reason I could invent on the spur of the moment. There was no reason for me to kill him. It started when he caught us in the house.

Q: Why not tell police what you said to-day?

A: Police asked why I killed him and I thought of my promise to Subadra to take the blame.

If I did not admit to police when they accused me of the killing they may have assaulted me.

Q: In this court the result could be worse than a beating. Will you lie to avoid the consequences in this Court?

A: I have told the truth.

Q: Did police threaten you?

A: Detective Raju said I had killed Bal Ram; when I denied it he went for me saying 'You are the one; why do you deny it.'

Q: So at first you denied killing Bal Ram?

A: Yes.

Q: Why deny it when you told Subadra you would take the blame?

A: I do not understand.

Question repeated.

A: I knew this officer Raju; I thought that if I denied it he would let me go.

Question repeated.

Q: 'Why deny the killing when you told Subadra you would admit it?'.

A: I thought the officer would let me go.

Q: What did you mean when you told the Court you decide to take the blame because of your love?

A: Yes. Especially when I saw her weeping. I decided to tell the truth when I heard she had another lover.

Q: But you denied it to Inspector Raju?

A: Yes.

Q: Why change your mind on that occasion?

A: Because I thought he would let me go."

The learned Judge in his judgment said :

> "Yet a further flaw in the accused's version in Court arises from his confession to the police. If the accused was accepting the blame for a killing by Subadra, why did he create a completely new story to the police? His confession could have been the same as his story in Court but excluding Subadra's part in it. All accused need to have done was to leave out Subadra's arrival and say that he killed Bal Ram in self-defence after the latter had found him in such compromising circumstance.
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> The accused's evidence does not impress me. Moreover, he was not an impressive witness. I do not believe him and regard his evidence in Court as untrue.
>
> Of course that does not mean that his confession must be true."

In our view having read the transcript of evidence the summing up and the judgment of the learned Judge we are satisfied that there was no miscarriage of justice; the appellant gave evidence that Subadra visited him at Natabua

prison on 30th October, 1980 - some 2 months after the killing of her husband - the assessors and the Judge heard this evidence and in our view there was no misdirection or omission on the part of the learned trial Judge in his summing up; the defence raised by appellant was adequately put before the assessors; the learned trial Judge reminded them of the evidence and commented upon it; he stated "the version the accused has given in this "Court is an account which is not fantastic. It is the "kind of thing which could happen." The decision was left to the assessors to decide whether they accepted the confessions as recording the true sequence of events on the night of 22nd August, 1980.

The case for the prosecution rested substantially on the confessional statements made by the appellant to the police and the majority of the assessors and the learned Judge accepted these statements as setting forth the true narrative of events; the surrounding circumstances which we have detailed go far to support the truth of the confessions, or at least are entirely consistent with them. Accordingly the appellant at his trial was not prejudiced by any misdirection or lack of direction on the part of the learned trial Judge and Ground 2 must also fail.

Ground 8 states :

> "8. That the learned trial judge erred in law and in failing to direct the minds of the assessors to the defence of provocation and the law relating to manslaughter."

Mr. Reddy submitted that the abuse which the appellant received from Bal Ram at the time he struck him and which is referred to in his confessional statement was sufficient to cause the appellant to lose his self control and that the learned trial Judge should have left to the assessors the question whether the appellant was provoked as a consequence of the abuse.

The relevant portion of the confessional statement reads :

> "I said I will finish Balram tonight and will take you away. Subhadra did not say anything and in the meantime the dogs started barking. We knew that someone was coming. I went down the slope and waited for Balram. I picked a vaivai stick from the slope near Balram's house. I then saw Balram descending the slope. Balram recognised me and said 'FUCK YOUR MOTHER, WHAT ARE YOU DOING HERE'. I knew that he had recognised me, then I struck his head with the stick from the front. Balram fell from the single blow and as he tried to rise again, I struck him on the head again. Balram again fell. I repeatedly struck him four blows with the stick, very hard blows."

The issue of provocation was not raised at the trial but Counsel for appellant submitted that this fact did not absolve the learned trial Judge from directing the assessors on the issue.

It is clear that in a trial for murder if there is any evidence upon which a verdict of manslaughter could be given the accused has the right to have the issue left to the assessors. Bullard v. Queen /1957/ A.C. 635. The test laid down in Holmes v. Director of Public Prosecutions /1946/ A.C. at 597, and quoted by the Privy Council in Lee Chun Chuen v. Reginam /1963/ 1 All E.R. 73 at 78 is -

> "If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death, it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict."

Applying these principles to the present case we are unable to say that there has been produced a credible narrative of events suggesting the presence of these three elements. There was no material anywhere in the evidence which could possibly have justified provocation being put to the assessors by the learned trial Judge. The appellant had armed himself with a weapon - the vaivai stick - and intended to strike down and kill Bal Ram. The fact that Bal Ram abused the appellant did not in our opinion provoke the appellant who was already determined to 'finish Bal Ram' that night. Without taking into account the fact that the appellant in his own evidence made no claim of being provoked, we are satisfied that according to the principles laid down in Lee Chun Chuen v. Reginam (supra) there was a complete absence of the necessary elements which would make it incumbent upon the learned trial Judge to direct the assessors on the issue of provocation.

Accordingly this ground of appeal fails.

In our opinion, therefore, there was ample evidence which if accepted by the learned trial Judge, and the assessors - and it was so accepted by a majority of the assessors and the learned trial Judge inevitably led to the conclusion that the appellant was guilty of murder.

For these reasons we dismiss the appeal.

Vice President

Judge of Appeal

Judge of Appeal