IN THE FIJI COURT OF APPEAL

334

At Suva

Criminal Jurisdiction

CRIMINAL APPEAL NO. 11 OF 1989
(Criminal Case No. 137 of 1987)

BETWEEN:

IFEREIMI KUBUKAWA	1ST APPELLANT
SERU MOCE	2ND APPELLANT
APISAI KOROI	3RD APPELLANT
AISAKE TUISAUMA	4TH APPELLANT
SAULA SUCU	5TH APPELLANT
PITA KEWA	6TH APPELLANT
KAMINIELI VECENA	7TH APPELLANT
SALACIELI KAVUI	8TH APPELLANT

-and-

S T A T E RESPONDENT

Mr. Q. B. Bale for the 1st to 6th Appellants
Mr. K. Vuataki for the 7th and 8th Appellants
Mr. I. Mataitoga for the Respondent

Date of Hearing : 27th August, 1992
Date of Delivery of Judgment : 13th October, 1992

JUDGMENT OF THE COURT

Early on the morning of 11th February 1987 five prisoners escaped from the Naboro Medium Security Prison. Not long after the Emergency Unit from the prison went out in search of them. The Emergency Unit comprises a group of Prison Officers who have had training in the recapture of escaped prisoners. Members of this Unit located the prisoners later that day in various places and all were recaptured. In the process they suffered injuries in varying degrees.

335

The result was that nine prison officers were together charged with various offences on a total of five counts. Those charged in counts 1, 2 and 3 were all acquitted. On count 4 six of the accused, who had been charged under s.227 of the Penal Code with maliciously doing grievous harm to one Alipate Raivalita, were convicted of the lesser offence of assault causing actually bodily harm (s.245). On that Count two other accused were convicted of the lesser offence of common assault (s.244).

On count 5 the same six accused, who had been charged with maliciously doing grievous harm to one Waisake Rugua, were convicted of the lesser offence of assault causing actual bodily harm. On that count another accused was convicted of the lesser offence of common assault and the charge was withdrawn against the remaining accused.

To avoid confusion we set out the position regarding the present eight appellants in tabulated form:

Count 4

APPELLANT	NO	CONVICTED OF
Ifereimi Kubukawa	1	Assault causing bodily harm
Seru Moce	2	" " " "
Apisai Koroi	3	" " " "
Aisake Tuisauma	4	" " " "
Saula Sucu	5	" " " "

336

Pita Kewa	6	" " " "
Kaminieli Vecena	7	Common assault
Salacieli Kavui	8	" "

Count 5

APPELLANT	NO	CONVICTED OF
Ifereimi Kubukawa	1	Assault causing bodily harm
Seru Moce	2	" " " "
Apisai Koroi	3	" " " "
Aisake Tuisauma	4	" " " "
Saula Sucu	5	" " " "
Pita Kewa	6	" " " "
Kaminieli Vecena	7	Common assault
Salacieli Kavui	8	Charge withdrawn

Each of appellants 1 to 6 was sentenced to 9 months imprisonment on each of counts 4 and 5 the terms to be concurrent. Appellant 7 was also sentenced to 9 months imprisonment concurrently on each count and appellant 8 was sentenced to 9 months imprisonment on his conviction on count 4. The sentence in respect of appellants 7 & 8 were suspended for 2 years.

Each of the 8 appellants appeals against conviction and sentence.

337

Appellants 1 to 6

We deal first with the appeals against conviction by appellants 1 to 6. In each case there were 10 grounds set out in the Notice of Appeal but two of those grounds were abandoned. We deal with the remaining 8 grounds in order, first stating in each case in summarised form the essence of the contention:

> *1. That the Judge erred in failing to deliver "a proper written summing-up."*

This was a trial of nine accused on five counts which occupied 33 hearing days. The task of summing-up was therefore bound to be a difficult one. It must be said at once, however, that there is no principle of law or of practice which requires the summing-up to be reduced to writing and given to the Assessors in that form. No doubt different Judges follow different practices in the way in which they prepare or deliver their summing-up. On this occasion the summing-up was delivered ex tempore immediately following the completion of the addresses of counsel. We find no fault with that practice. It is, if convise, expected that counsel will take their own notes of what is said.

We understood the principal concern under this ground to be that the transcript of the summing-up was not available to counsel for some three years after the conclusion of the trial. It was said that this caused difficulties for counsel in formulating their grounds of appeal.

It may have been expected that if counsel detected anything which thought was wrong in the summing-up, they would have note it at the time and been in a position to formulate a notice of appeal. However, in the end a number of grounds of appeal were set out and fully argued and we do not consider the appellants' were disadvantaged.

2 & 3 That there were inadequate directions to the Assessors in respect of their right to find the appellant guilty on the lesser charge.

On each of Counts 4 and 5 each appellant was charged under s.227 of the Penal Code that he "unlawfully and maliciously did grievous harm" to the named person. In the result each was convicted of the lesser charge of assault causing actual bodily harm (s.245). The argument for the appellants was that a verdict of guilty on the latter charge was not open to the Assessors on the Court because a necessary ingredient in the offence charged in the indictment because cauing grievous harm could result from something other than assault. Reliance for this submission was placed up the decision in R. Qustin (1973) 58 Cr. App. R. 163 and other cases which followed that decision.

While it is true that the indictment did not specify the manner in which the grievous harm was alleged to have been caused we think it necessary to observe that the prosecution case was at all times throughout this very long trial conducted on the basis that the grievous harm alleged had been caused by assaults

339

of various kinds. It was never the case that the prosecution alleged any other cause.

In these circumstances there was never any doubt as to the nature of the case which the appellants had to meet. If it is the case upon a strict application of the English authorities that there was a defect in the description of the charge in the indictment then we are satisfied that there was at no stage any likelihood of a substantial miscarriage of justice occurring. We accordingly consider it an appropriate case for applying the proviso to s.23 of the Court of Appeal Act Cap. 12.

4. That the Judge failed to direct the Assessors correctly in respect of the Identification parade.

While it was true that certain witnesses failed on an identification parade to identify some or all of the six appellants, this does not appear in the circumstances to have any significance.

One of the submissions made for the appellants was based on the fact that there were a number of incidents in respect of which there were allegations of assaults by the appellants causing grievous harm and that these incidents occurred in different places. We accept that this was so. If the ingredients of the offence upon which the appellants were charged were established in respect of any one of those incidents then the verdicts of guilty would be properly founded. In our

340

consideration of the appeal we have directed our attention particularly to the incident which occurred in the vicinity of the Father Law Home. What was alleged there was that each of the two escaped prisoners, Alipate Raivalita and Waisake Rugua was in turn pulled from a van and assaulted by all six appellants. Rugua in evidence identified three of the appellants, namely numbers 3, 4 & 5, as being prison officers he knew, because they were officers at the prison in which Rugua had been an inmate. His evidence to this effect was not challenged on cross-examination. He also picked each of them out on an identification parade. Rugua said that there were two others whom he was unable to identify. Two of the appellants, numbers 5 and 6, each made caution statements in which he admitted being with the Police van on the occasion that Rugua said he had been assaulted. No further proof of identification of these two was necessary so far as their presence was concerned.

In addition there was the evidence of Sergeant Raitini who was present on this occasion and who identified appellants 1, 2, 3, 4 and 5 as being there and as having assaulted the prisoners. He adhered to those identifications under cross-examination.

In view of this evidence, which was available to the Assessors if they accepted it, the comment by the Judge that the identification parades were not very important would seem to be justified.

341

5. That the summing-up was inadequate in respect of common intention.

All six appellants were charged together under counts 4 and 5. It was open to the prosecution to seek to prove either that each was guilty as a principal party, or alternatively that each was party to a common intention in terms of s.22 of the Penal Code so as to be guilty in respect of the acts of one or more of them.

The legal position with regard to this distinction was dealt with at some length by the Judge with particular reference to counts 1 and 2. These were the major counts in the indictment, and in particular count 1 which was an allegation against all nine accused of murder. When summing-up as to the other counts, however, the Judge made it clear that the principles as to common intention applied similarly to those counts. He also said, "But, if common intention is not established, if the injury was not caused in the course of the common enterprise then each individual accused will be guilty only of his own offence."

In the end, however on counts 4 and 5, the Assessors may well have put aside any question of common intention because of the evidence of Sergeant Raitini which, if accepted, was that each of the appellants was a principal offender.

6. This ground was abandoned

342

7. That there was no direction as to the onus and standard of proof in respect of any lesser charge.

At the start of his summing-up the Judge gave a full and careful direction as to the onus and standard of proof. In the course of that he included the customary observation that the burden to prove the case beyond reasonable doubt lay on the prosecution throughout the case.

The entire case was conducted on the basis that the onus of proof rested on the prosecution. At no stage was there any suggestion that this may not be so, or that any lesser standard than proof beyond reasonable doubt applied. We are unable to accept that the Assessors could have been under any misapprehension as to the onus and standard required in respect of the lesser charges.

8. This ground was abandoned.

9. That there was a failure to direct on the inability of the witness Nagalu to specify the individual acts of each appellant.

The witness Nagalu was present when the incidents which were the subject of counts 4 and 5 occurred. He referred to having seen six prison officers beating a man in the vicinity of a van near the Father Law Home and later saw another man also being beaten. He was not able to identify the six prison officers and nor did he say which of them performed any

individual act of assault. The effect of his evidence if accepted, however, was to establish that each of the six prison officers he saw had individually committed acts of assault on the two men taken from the van. As already discussed, there was other evidence as to who those six prison officers were, and also evidence that the two men assaulted were the two named in Counts 4 and 5. In these circumstances it was not necessary for the Judge to draw particular attention to the facts that Nagalu could not specify which prison officer committed which acts of assault.

> *10. That the verdict and findings of the Judge and the Assessors on counts 4 and 5 were unreasonable and could not be supported on the totality of the evidence.*

It is unnecessary for us to discuss this ground in detail. For the reasons already given we are satisfied that there was ample evidence which, if accepted, justified the verdicts and findings.

Appellants 7 and 8

Appellant 7 was convicted of common assault on each of counts 4 and 5, and appellant eight was convicted of common assault on count 4.

The grounds set out in the Notice of Appeal were in the end condensed into three maing grounds:

344

(a) That the Judge was biased in expressing the view that the act of the appellants towards the two complainants may have smacked of sadism and revenge and that this view led to his disagreeing with the opinions of the Assessors that these appellants were not guilty.

It is true that the Judge gave a fairly strong indication to the Assessors of his own view as to the evidence against these appellants. At the same time, however, he was careful to make it clear on several occasions in his summing-up that the Assessors should ignore any view expressed by him if they disagreed with it. Immediately following the remarks complained of he said, "These are matters for you to decide". No doubt it was upon the basis of such a direction that the Assessors returned their findings of not guilty.

The question then is whether the view expressed by the Judge was his reason for differing from those findings or whether there was a proper basis in the evidence for his having done so. It is apparent from the remarks of the Judge when delivering his judgment that it was the latter. He directed particular attention to the fact that the opinions of the Assessors appeared to have overlooked the evidence of an independent witness, Vakalolo.

The prosecution case in respect of appellants 7 and 8 on Counts 4 and 5 was apparently directed at an incident in the Naboro Prison after Raivalita and Rugua had been returned there. Vakalolo was a prison officer who was present at that time. His

345

evidence was that both both prisoners were having difficulty in walking and that he saw blood on Raivalita's face. He also said that he saw the 7th appellant strike Rugua on the back more than once with a piece of timber, and the 8th appellant punch Raivalita about the face two or three times. It was this evidence to which the Judge had directed attention in his summing-up, and which he considered the Assessors had overlooked or ignored. That evidence, taken in conjunction with the confessions of both appellants, which were in effect acknowledgments of the correctness of Vakalolo's evidence, which entitled the Judge to differ from the Assessors and the strong remarks he had made would not seem to have affected that.

> *(b) That, as a matter of principle, the Judge was not entitled in the circumstances to overrule the assessors.*

This submission was based upon the observations of this Court in the case of Mataiasi Raduva & John Heatley v. Reginam F.C.A. Appeal No. 109 of 1985. In that case the trial Judge had differed from the Assessors, and this Court said, at p.4 of its judgment:

> *"Now there are cases from time to time in Fiji where a Judge does so convict in the face of contrary assessors' opinion. These cases are rare and in our experience are ones where the evidence against an accused is so overwhelming and so affirmatively established that one can say that the assessors' conduct was perverse."*

346

And at p.5:

> *"In matters of this sort, where credibility is in issue, we would like to say, from not inconsiderable experience on the bench in criminal proceedings, that the status of being a Judge does not confer any advantage, in the field of assessing truthfulness, over any other man of the world. Indeed, the contrary is sometimes suggested. That is why we have assessors or juries."*

It must be observed at once that the present case was not one in which the Judge differed from the assessors on an issue of credibility. He made it clear that his position was that the confessions of the appellants, supported by the independent evidence of Vakalolo, made an overwhelming case against both appellants. In these circumstances he was entitled to follow the course which he did.

> *(b) That the Judge had not adequately directed the assessors that the appellants were entitled in the performance of their duty to use force, and that the force used was reasonable in the circumstances.*

It hardly needed emphasising to the assessors that all the appellants were carrying out their duties in seeking to recapture the escaped prisoners. That was the basis of the whole case. It was pointed out by the Judge that, when they set out on that task, the appellants were involved in a lawful purpose. It was also pointed out that "their mission can become unlawful if and when they acted together to punish and assault them after recapture". The whole prosecution case was based on

the allegation that the appellants had indeed punished and assaulted the prisoners after recapture. In the course of the evidence the guidelines for prison officers dealing with prisoners were read out and put in evidence. Those guidelines make it clear that, when force to a prisoner is applied, "only the very minimum of force may be used".

The evidence already discussed of what each of these two appellants did make it clear that far more than a minimum of force was used. In view of the fact that both prisoners were back in custody and within the confines of the prison it is difficult to see what the justification for using any force at all on them could possibly have been.

We consider there could have been no doubt as to the general principle the assessors were expected to apply.

Summary

We think that this case is a good illustration of the principle that a summing-up is to be read as a whole, and in the context of the whole trial. This was a very long trial and involved a substantial number of matters upon which the Judge was required to give directions. There were likely to be some minor matters which could be criticised by the purist, but we think that, read as a whole, it provided a fair and accurate explanation to the Assessors.

None of the grounds of appeal against conviction has any validity and the appeals of all eight appellants against conviction must be dismissed.

Appeals against sentence

Each of the appellant has appealed against severity of sentence. We have already tabulated the conviction and sentence in respect of each appellant. It will be convenient to deal with the appeals against sentence lodged by the first six appellants. However, because of the length of time that has elapsed since the sentences were imposed it is desirable that we set out the chronology of events which is as follows:

- 11th February 1987	- Offence occurred.
- 15th May 1989	- Trial commenced in the High Court.
- 29th September 1989	- Trial completed and sentence imposed.
- 6th October 1989	- Appeal lodged.
- 20th October 1989	- Bail granted to all 6 appellants pending appeal.
- 27th February 1992	- Trial Record released to counsel.
- 27th August 1992	- Appeal heard.

349

We will not go into the factors that caused the delay in heaing this appeal except to note:-

(a) that the Appeal Record consists of 5 volumes totalling 2280 pages and

(b) that the appellants did not contribute to the delay.

We have examined the sentence passed on each of the appellants and find that the punishments imposed on them cannot be characterised as either harsh and excessive, or wrong in principle. But the appellants have been on bail since 20th October 1989. We are informed that they have been suspended and have been on half pay for over 5 years although they still retain some of the privileges such as housing. The events which occurred after the sentence were beyond their control. In the exceptional circumstances pertaining to this case we feel it would be extremely harsh and unjust to return the appellants to prison to serve the balance of their prison sentence. We therefore vary the sentence passed on the first six appellants to the extent that the term of imprisonment passed on each one of them is suspended for a period of 2 years from the date of the sentence, i.e. 29th September 1989.

This means that since the operational periods of their sentences have run their full course they are deemeed to have served their punishment. The appellants are therefore now free

of any obligations arising out of the provisions of Section 29 of the Penal Code. They are also released from their bail bond and are now free to leave the Court.

As regards appellants 7 and 8 we note that their sentences were suspended for 9 months on 29th September 1989. Their suspended sentences were not put in abeyance. Therefore their operational periods have also expired. We do not find it necessary to vary their sentences even for record purposes as we do not consider that the trial Judge erred in his assessment.

Appellants 6 and 7 are also released from their bail bond and they are also free to leave the Court as they are deemed to have served their sentences.

In summary the Order of the Court is as follows:

Appeal against conviction of all the eight appellants dismissed. Appeal against sentence of appellants 1, 2, 3, 4, 5 and 6 varied to the extent that their imprisonment sentences are suspended for 2 years with effect from 29th September 1989.

Appeal against sentence of the 7th appellant dismissed.

Appeal against sentence of the 8th appellant also dismissed.

351

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Mr Justice Michael M Helsham
President, Fiji Court of Appeal

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Sir Moti Tikaram
Resident Judge of Appeal

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Sir Peter Quilliam
Judge of Appeal