

IN THE FIJI COURT OF APPEAL

At Suva

Criminal Jurisdiction

CRIMINAL APPEAL NO. 25 OF 1990

(Labasa High Court Criminal Case No. 2 of 1988)

BETWEEN:SUBHASH CHANDRA
AND BAL DEOAppellants

- v -

S T A T ERespondent

Mr. R. L. MacLaren & Mr. J. R. Reddy for the Appellants
Ms. N. Shameem for the Respondent

Date of Hearing: 25th March, 1992Delivery of Judgment: 26th May, 1992JUDGEMENT OF THE COURT

The two Appellants, Subhash Chandra and Bal Deo, together with a third man, Umesh Prasad, were jointly charged that on 5 July, 1990 at Labasa they murdered Ami Chand. Following a lengthy trial both Appellants were convicted on that charge. The third accused was acquitted. The two Appellant now appeal against their conviction.

The principal facts were not seriously in dispute and can be fairly briefly summarised. For convenience we refer to the Appellants by their names.

Bal Deo's truck was taken from his home without his approval by his son Ami Chand. Ami Chand had a substantial criminal record and was thought to have been involved in the deaths of some members of his family. The fact that the truck was missing was reported to the Police. The truck was found later in the day in the possession of Ami Chand, who was told to take it to the Police Station. It was, however, eventually driven to a spot near a service station where it was stopped after a short chase. A group of 8 people had been looking for the truck and were able to block its further progress near the service station, Ami Chand and the other occupant leapt out of the vehicle and ran to the shop or office of the service station in order to use the phone to ring the Police. He and his companion were pursued by three of the group of 8, namely Subhash Chandra and Umesh Prasad and one other. It was the prosecution case that the third man was Bal Deo. The three men carried between them two iron bars and a cane knife. Ami Chand was caught at the service station and severely assaulted with the iron bars and the knife as a result of which he died.

There is no doubt that Subhash Chandra was one of those who assaulted Ami Chand. He acknowledged as much and his defence to the charge of murder was that he was provoked by Ami Chand so that the verdict ought to be one of manslaughter and not murder.

The defence of Bal Deo, however, was that he was not involved at all in what occurred, and that he was wrongly identified as having been there.

We deal with the appeals of the two Appellants separately.

BAL DEO'S APPEAL

The principle grounds of appeal, as summarised by counsel, are :

- (1) The verdict was unreasonable and cannot be supported by the evidence.
- (2) There was a misdirection to the assessors as to prior inconsistent statements made by several defence witnesses.
- (3) There was a misdirection to the assessors as to the question of intention as it related to the defence of provocation.

We deal with these grounds in turn.

(1) Verdict Unreasonable

This ground related to the evidence as to the identification of Bal Deo as one of the three men at the service station. In

brief, there were 5 prosecution witnesses who purported to identify Bal Deo as having been there, and 4 defence witnesses as well as Bal Deo himself who said he had remained at the truck some 4 or 5 chains away.

In this sharp conflict it was plainly necessary for the Judge to give the assessors a very careful warning on the subject of identification.

The leading authority is R v. Turnbull (1977) 1 QB 244. We do not need to set out the well known passages from the judgement of Lord Widgery C J in that case. It is undoubted that there is in every case which depends upon eye-witness identification the need for special caution, and particularly where (as was the case here) no formal identification parade has been held.

The Judge directed the assessors very much in conformity with Turnbull's case, and, with one exception to which we refer shortly, we do not understand counsel to have argued that there was a misdirection or non-direction as to this. In general terms the argument was that the absence of an identification parade, the wide conflicts in the evidence, and the possibility of error meant that it was unsafe for there to be a conviction.

In view of the gravity of the charge it is necessary to set out the evidence in some detail. We give first a summary of the identification evidence given by the prosecution witnesses :

(a) Mohammed Munifi

He saw 3 men running after the deceased. He described the first as tall, with a beard and wearing a blue singlet and black trousers. There seems no doubt this was Subhash Chandra. He described the second as short with long brown trousers and a white shirt. In Court he identified this man as Bal Deo. The third man, whom he knew, was Umesh Prasad.

The witness also referred to the man he identified as Bal Deo as "the old man," and said the old man had an iron bar which he threw at the deceased. He said that the man he identified as Subhash Chandra had a cane knife.

The witness was asked to look at Bal Deo's brother, Jag Deo, who was brought in to the Court for the purpose. He said that was not the man at the service station and said he was sure of his identification.

(b) Meli Jitoko

He saw the 3 men, two of whom had iron rods and the third a knife. The one with the knife was the youngest and was identified as being Subhash Chandra.

The witness identified Bal Deo as one of the other two. This identification is a matter of some importance and we set out the relevant extract from the record (pp. 36 - 37) :

"The third man is short and I have seen him at Seaqaqa. I usually seen him driving a lorry and I saw him for half an hour at Natua in the Sector office when he was having a discussion with our field officer and I was waiting there. I have been seeing this man for the last ten years. He is a cane farmer at Seaqaqa and he stays at a road beside the road which leads to Naividamu."

It should be mentioned that both Bal Deo and his brother Jag Deo gave evidence that they were farmers at Seaqaqa. According to Jag Deo they have adjoining farms.

Jag Deo was brought into Court for the witness to see. The witness said he had seen Jag Deo but had not seen him at Seaqaqa. He did not know Jag Deo had a cane farm next to his brother. He said he did not see Jag Deo at the Service Station.

The witness was first asked to identify Bal Deo when he gave evidence in Court.

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(c) Joana Tasulu

This witness said that the man whom she identified as Bal Deo was carrying a knife. She described him as a short fellow with khaki trousers, and older (presumably older than the other two).

When shown Jag Deo she said that was not the man at the service station.

(d) Suresh Chand

This witness saw Umesh Prasad, whom he knew, and also described an "old man," dressed in a white shirt and long brown trousers. He identified the clothing which had been taken from Bal Deo and produced as an exhibit as the clothing worn by the man he identified as Bal Deo. He said that man had a thick pipe, and identified Subhash Chandra as the man with the knife.

This witness was not shown Jag Deo.

(e) Suruj Prasad

This witness knew Umesh Prasad. He described two other men, one with a stick and one with a knife. He identified the one with the knife as Subhash Chandra and the one with the stick

or rod as Bal Deo. He described the latter as having a short sleeve shirt and long trousers and, *"He was elderly, He was about 5 feet 3 inches tall"*.

Jag Deo was shown to the witness. He said he had seen Jag Deo at the Police Station and was aware he and Bal Deo were brothers. He said Jag Deo had not been at the service station.

Under cross-examination the witness was again shown Jag Deo and again said he had not been at the service station, but had seen him later at the Police Station sitting with his brother.

We next summarise the evidence of defence witnesses :

(f) Bal Deo

He stated that he had remained throughout the incident at the truck and did not go to the service station.

Bal Deo had been interviewed by Sgt. Chetty later that night and signed a statement in which he admitted that he had been at the service station and involved in the assaults on Ami Chand. In his evidence he repudiated that statement and said he had been threatened and forced to sign the statement and that it contained admissions which were not true. That statement was in effect affirmed when he made his charge statement at the prison some 10 days later, although with some embellishments.

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In evidence Bal Deo gave a different account of the matter and said that he had admitted being at the service station as he wanted to take the blame so that Subhash Chandra and Jag Deo "would be out". He said he had lied when he gave his statement.

(g) Jag Deo

This witness said that he had been with Subhash Chandra and Umesh Prasad, had gone to the service station and, when Ami Chand had made an insulting remark to him, had hit Ami Chand with an iron bar. He said Bal Deo was not there.

Jag Deo said he had first told the Police he had been at the service station, but later said he was not as he was scared he would be taken in. Finally, in his evidence he said he was there.

(h) Hans Raj

Said he was at the truck and saw Ami Chand run away. He saw Subhash Chandra follow, and then Jag Deo, and then Umesh Prasad. The witness stayed at the truck with Bal Deo.

He said he had first told the Police that Bal Deo was at the truck but then in a second statement had said it was Jag Deo who remained there. He said in evidence that in the second statement he had been lying.

(i) Mahendra Prasad

Said he saw Subhash Chandra and Umesh Prasad run after the two men, and he himself remained at the truck with Bal Deo. He said this was the account he first gave to the Police. He acknowledged giving a second statement to the Police in which he made no mention of Bal Deo remaining at the truck, but said that in this second statement he had lied.

(j) Bharam Deo

Under cross-examination this witness said that he first told the Police that when he arrived at the truck he saw Bal Deo and two others there. A few days later he made a second statement to the Police in which he said it was Jag Deo who was at the truck, not Bal Deo. He said in evidence that his first statement had been true but that he lied in his second statement.

Reference should also be made to the evidence of the co-accused :

(k) Umesh Prasad

In his evidence this witness said that he saw Subhash Chandra and Jag Deo pursue the deceased to the service station. He acknowledged, however, in a statement to the Police that it

was only Subhash Chandra he had seen. He said he lied to the Police.

SUMMARY OF EVIDENCE

In very brief summary, there were 5 prosecution witnesses who identified Bal Deo as the person they saw at the service station involved in the assaults on Ami Chand. One of those witnesses stated that Bal Deo had a knife. The other four said he had an iron bar or rod. Four of those witnesses were shown Jag Deo and denied he had been present.

Bal Deo stated he had not been involved and Jag Deo said that it was he who was there. In addition three defence witnesses and also Umesh Prasad, said that Bal Deo had not gone to the service station. All four of those witnesses admitted having lied to the Police in statements which they made.

It should be added that while the description of Bal Deo's clothing included a white shirt, Sgt. Chetty said it was a blue shirt. The clothing worn by Bal Deo was produced in evidence and was identified by one prosecution witness as the clothing worn by the person identified as Bal Deo. The witness who produced the clothing described the shirt as a pale short sleeved shirt.

The assessment of these witnesses and the resolution of these conflicts was essentially the very task for which

assessors are called. It was they who saw and heard the witnesses. They were correctly directed as to the difficulties and dangers of identification evidence. On the face of it there may seem to be no reason to interfere with the decision at which the assessors arrived.

Before coming to that conclusion, however, it is necessary to consider an aspect of the matter which was strongly argued on behalf of Bal Deo.

The course which the trial took meant that the many conflicts in the evidence and the fact that many witnesses had given varying and conflicting accounts were, subject to what we will say shortly, all put fully before the Assessors and it was carefully explained to them that the resolution of these matters was for them. It is not in the ordinary course appropriate for this Court to assume the function of the Assessors and to re-try the facts.

It is, however, necessary for this Court to feel satisfied that a conviction has been entered not only after all the evidence has been scrutinised but also after proper directions have been given and the matters of principal importance identified for the assistance of the Assessors.

In the present case it was at the heart of the submissions on behalf of Bal Deo that a matter of special importance was not placed before the Assessors. It was undoubted that Bal Deo made

a statement on the day of the incident which was capable of being regarded as a confession, and that in his charge statement about 10 days later he appeared to have affirmed that confession (although embellished by the remark that he had carried not only a rod but also a knife, which was something consistent with almost no other evidence). It was also the case that all the defence witnesses, on the day of the incident, made statements which placed Jag Deo and not Bal Deo at the service station. Each later gave a second account saying that it was Bal Deo who went to the service station. In evidence each said that in his second statement he had lied.

It was strongly argued for Bal Deo that this raised as a matter of the first importance the question of why there should have been these contradictory accounts. It was said that to leave the matter to the Assessors simply on the basis that these were matters for them to resolve was not enough and that the Judge ought to have given a full direction as to the possible explanations for these changes. It was contended that the most likely explanation was that Bal Deo had in the first instance felt the responsibility lay on him because it was his truck which had been stolen and that all the others had really been helping him to recover it. This was said to explain why the other witnesses, not then knowing of this attitude on Bal Deo's part, gave what were really truthful accounts, and moreover gave them before there had been any opportunity for them to confer. Later, when they realized what Bal Deo had done, they decided to

support him, but then, later again, in evidence, they wished to revert to their original accounts.

It is not, of course, possible for this Court to arrive at a finding of fact on such a matter, but the argument was that this vital question ought to have been put fully to the Assessors for their determination and that as nothing was said as to this it has to be regarded as a serious non-direction.

It was argued further that the Assessors ought to have been invited to consider whether the culture common to Bal Deo and all the defence witnesses may have made it likely that the explanation given for their changed accounts was true.

We are bound to say that this argument has considerable force. If the matter had been put in that way then a number of features of the evidence may well have assumed a different significance for the Assessors. There was the curious fact that in his charge statement Bal Deo added the reference to having a knife, which seems plainly untrue. There is the fact that the prosecution witnesses, apparently firm and convincing, were being asked to make identifications for the first time after some 5 months, and that the one witness who claimed to recognise Bal Deo could have been confusing him with his brother who had an adjoining farm. There is the fact that Jag Deo gave evidence on oath that it was he and not Bal Deo who was there. And there is the overriding fact that no identification parade was held.

We are, of course, quite unable to say that it was indeed Jag Deo and not Bal Deo who was at the service station, but for the reasons we have given we are left with a real feeling of unease as to the verdict in respect of Bal Deo.

We have accordingly arrived at the conclusion that it would be unsafe for his conviction to stand and the appeal should be allowed and the conviction quashed.

In reaching this conclusion we wish to emphasize that we do not intend it to be regarded as in any way critical of the learned trial Judge's charge to the Assessors. The trial was a difficult trial concerning charges of murder. It went on over 16 days, and included what is known as a trial within a trial. There were 19 witnesses for the prosecution, 9 gave evidence for the defence, and there were 10 witnesses called on the voir dire. We do not know upon what matters counsel addressed at the conclusion of the trial, nor what they stressed. We do know that at the conclusion of the summing up counsel did not require the Judge to give any further directions to the Assessors (record p.218). On the evidence it is understandable that the Assessors came to the conclusion which they did, and that the learned Judge confirmed their opinion. We have vacillated about what we should do, our uncertainty of mind generated by the very compelling submissions put to us by Mr. Reddy, one of the counsel for the Appellants. Indeed, it is because of this uncertainty we have decided that we must give the benefit of it to Bal Deo the second Appellant.

SUBHASH CHANDRA

The appeal concerning this accused relies on two aspects only, namely the absence of common intention and provocation, or to put it more accurately, the failure of the prosecution adequately to prove common intention and the absence of provocation.

In discussing this part of the appeal it is necessary for us to bear in mind that the man who was with Subhash Chandra may have been Bal Deo or may have been Jag Deo. This is the uncertainty to which we have already referred. Accordingly, we refer to that person by the neutral expression "the other man".

The assault took place after a group of persons, among whom were Subhash Chandra and the other man, set up a kind of extempore road block. The truck being driven by the deceased with its Fijian passenger was in fact stopped, and the two occupants jumped out and ran to the service station shop or office. Subhash Chandra picked up a cane knife which he had conveniently brought along with him, and the other man picked up an iron rod, which was also conveniently on board. Why did they so arm themselves? Subhash Chandra says (record p.130, exhibits 12 and 13) that he brought the knife along with him because "*Ami Chand (the deceased) gave us a lot of trouble from the morning so I thought to catch him and also thought if he ran away I will use my knife to catch him*". The other man (whichever of them it was) also armed himself with an iron bar.

From the shop or office the deceased and the Fijian tried to escape by jumping out the window. Subhash Chandra and the other man went out through the door and the former gave chase. He hit the deceased several times with the knife and although he says that *"to my knowledge I hit him with the sharp side"* (exhibits 12 and 13) a number of witnesses say that at this stage it was only with the flat side of the blade. In whatever way the blows were struck:-

"Q.32 *With what intention did you hit him?*

A. *I wanted to cause some severe injuries so he does not escape away."*

(ibid). The deceased ran back to the bowzers of the service station where someone caught and held him, and the other man apparently hit him with an iron bar.

At the same spot, Subhash Chandra proceeded to split the deceased's head open with his knife, severing the bowser hosepipe in the process. In his statement to the Police he gave a detailed account of having done this and said he had done so in order to stop Ami Chand from running away.

It may be relevant to note that neither Subhash Chandra nor the other man mentioned ~~of~~ anything that had been said by the deceased inside the shop. By the time he came to make a statement from the dock Subhash Chandra told a different tale.

He said that there was a conversation inside the shop or office in which the deceased made a particularly offensive remark to the other man and then this occurred (record p.143):-

"I said to him, you are a small boy talking like this. He replied "what can you do to me". By the time he uttered these words my father rushed to him to get hold of him. The victim jumped out of the window and began to run away. Hearing those words I was very much provoked and I started chasing him."

(incidentally, "Jag Deo was in fact the father of Subhash Chandra")

From this brief summary it can be seen that there was more than ample evidence of common intention. The party was there to assist Bal Deo recover his truck, which he alleged had been stolen by the deceased. They took with them weapons. When the deceased and the Fijian jumped out of the truck and started to run, they were pursued by Subhash Chandra and the other man, who did not just chase the victim and his associate when they ran into the office, but they grabbed weapons before they did so. It was an inevitable inference that the Assessors were entitled to draw that they intended to use the weapons if the victim tried to escape. He did try to escape and they set out after him with their weapons, Subhash Chandra using his in the first instance for that very purpose. When the victim was caught, both Subhash Chandra and the other man proceeded to lay into him, with the plain intention of doing him serious injury. It seems to this Court that there is not the slightest doubt about

the existence of a common intention, and the Assessors and the learned trial Judge were so entitled to find.

Equally as ephemeral is the submission that there was provocation. In so far as concerns Subhash Chandra, the only provocation that could be alleged is that arising from the alleged taunt that followed his remark "*You are a small boy talking like this*", which he says was "*what can you do to me*" (record p.143). It will be remembered that the stolen truck did not belong to him, the other insulting remarks were not directed to him, that he had set out after the victim with a knife to use if the victim tried to escape, and that he used it when the victim tried to do just that. Apart from the fact that the Assessors and the learned trial Judge were entitled to accept that no remarks of this nature were made to him at all, we believe that in the circumstances the learned trial Judge would have been entitled to tell the Assessors that they need not consider the matter of provocation at all in relation to this accused.

In the submissions to this Court on behalf of Subhash Chandra there are listed 6 matters which it is claimed were "acts capable of constituting serious provocation". Only one could possibly be relied upon in his case, that is the taunt in response to his question in the office which has already been referred to. Even if the offensive remark that it is said was made was directed at Subhash Chandra, and it does not appear to have been, it did not provoke any action on his part. It was

not until the deceased had escaped out the window and Subhash Chandra and the others had chased and caught him that the Appellant administered the blow that resulted in his death. It does not matter how angry Subhash Chandra was at this moment; as the learned Judge rightly said anger does not equal provocation. It seems to us that even if the events in the shop or office might have engendered some hostility, it had little or nothing to do with the attack by way of provocation. Where a person takes a weapon with him to a confrontation with his victim with the express purpose of using it on the victim if he should run away, and the victim does run away, is chased by the person with the weapon who then proceeds to use it *"so I thought now he will not be able to run away"* (see above), then provocation is unlikely to cause any difficulty to persons in the position of the Assessors who are asked to make a decision about it.

In reaching this decision we have not overlooked the submissions made to us about the background and relationship of the persons involved taken in conjunction with the events that occurred on the day in question.

In spite of the absence of anything that in the circumstances of this case could amount to provocation as a legal concept, the learned trial Judge very wisely left it to the Assessors as one of the matters for their consideration. He dealt with the legal aspects of it very fully and carefully. He went on to point out that the events that occurred on the day in

question were sufficient to make the owner, and others, very angry indeed. He said (record p.210):-

"You heard in considerable detail the events of that day and you may think that each of the persons involved in the search for the lorry became very angry also. But the question for you, in relation to the First Accused is not whether he was angry during the day but whether he was subjected by the victim to sudden provocation depriving him of the power of the self control. The aspect of suddenness is important because for provocation to be effective as a defence, an accused person must have suffered a sudden and temporary loss of self control. If therefore you find yourselves of the view that the First Accused, when he heard of the theft of the lorry became angry and decided together with the others to recover the lorry you would not be able to find provocation in that set of circumstances alone."

We agree with this assessment. His Lordship then went on to instruct the Assessors about retaliation, which he did in terms that are unobjectionable. He then went on (record p.211):-

"Prosecuting Counsel has suggested that you ask yourselves whether you yourselves would think it reasonable to react as the First Accused did to the words spoken. With respect, I suggest that that is a very sensible way for you to begin your consideration of the question of provocation."

It is claimed that this was a misdirection resulting in an error of law to the benefit of which Subhash Chandra is entitled.

The essence of the submission was that the Assessors should have been instructed that the test to be applied was not whether they thought it was reasonable to react as the accused did, but whether in their opinion a reasonable person in his position would have so reacted, bearing in mind his age, sex, background and the other surrounding circumstances. The submission continued that because this misdirection rounded off as it were what had previously been carefully explained about the topic, it sent the Assessors away to apply the wrong test.

The law relating to the "defence" of provocation is to be found in s.203 of the Penal Code, Cap. 17. Under the section heading "*Killing on Provocation*" it provides:-

"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only"

The meaning of "*provocation*" as therein used is defined in s.204 which, so far as relevant, provides:-

"204 The term 'provocation' means any insult of such a nature as to be likely, when done in the presence of an ordinary person to another person to whom he stand in a filial relation to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the insult is offered."

It will be seen that the law requires "*sudden provocation*". The whole of the facts here, including the arming of himself by the accused Subhash Chandra before he gave chase to the office, the reason for so arming himself, the subsequent chase through the service station, the blows to the deceased during it and the reason given for them, the final coup de mal grace and the reason assigned by the accused for administering it, establish, we believe, that the act was not done in the heat of passion caused by sudden provocation as required by s.203.

If we thought there was any benefit at all for Subhash Chandra in the "*defence*" of provocation, then we might have felt disposed to consider this matter in more depth. Seeing there was not, and in any new trial the Judge would be entitled to remove the whole topic from consideration by the Assessors, we do not propose to spend any more time on it. Should it be necessary, and we do not believe that it is, we would be amply justified in applying the proviso to s.23(1) of the Court of Appeal Act as the alleged misdirection could not have occasioned any miscarriage of justice.

So far as concerns the appeal of Subhash Chandra neither of the aspects raised in it succeeds. His appeal will therefore be dismissed.

The formal orders of the Court will therefore be:-

First Appellant's appeal dismissed.

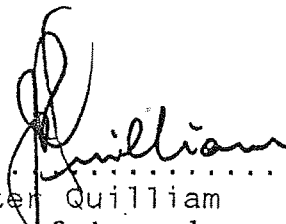
Second Appellant's appeal upheld and the Appellant is
discharged.



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Justice Michael M. Helsham
President, Fiji Court of Appeal



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Sir Moti Tikaram
Justice of Appeal



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Sir Peter Quilliam
Justice of Appeal