

IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 9 OF 1992
(High Court Criminal Case No. 293 of 1992)

BETWEEN:

RAJESH NAND

APPELLANT

-and-

S T A T E

RESPONDENT

Mr Haroon Ali Shah for the Appellant
Mr I. Wikramanayake for the Respondent

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| <u>Date of Hearing</u> | : | 11th May, 1993 |
| <u>Date of Delivery of Judgment</u> | : | 21st May, 1993 |

JUDGMENT OF THE COURT

On 21 October 1992 the Appellant was convicted of unlawfully wounding one Shalendra Kumar on 23 March 1992 and was sentenced to 12 months imprisonment. He appeals against that conviction and sentence.

In sentencing the appellant the learned trial Judge, Honourable Mr Justice S.N. Sadal summarised the facts as follows:-

"There is no doubt there was bitter animosity between the accused and the complainant. The complainant was the driver of the bus and he was attacked when he stopped his bus to pick passengers. The attack was in full view of the passengers. A

-2-

A cane knife was used. Accused was angered because complainant had sworn at his wife and made obscene gestures to her."

At the trial the accused was indicted under s.224 of the Penal Code 17. on a charge that "with intent to do some grievous harm, unlawfully wounded Shalendra Kumar s/o Shiu Sami."

Some of the unusual factors occasioned by this incident and charge are these :-

(a) When first interviewed by the police officer he gave some details of the insult to him and his wife by Kumar, and admitted that he "hit" Kumar with a knife. According to the interviewing officer, he also used the expression that he "chopped" Kumar's hand. No further elucidation of the "chop" or "hit" (if these were the expressions he used) was attempted.

(b) Medical evidence at the trial was to the effect that Kumar suffered a cut between the thumb and index finger involving some bone injury and also a cut to the wrist. The medical witness said that all of these injuries could have been caused by Kumar holding the blade of the knife. Kumar was discharged from hospital on the following day.

(c) Although the "attack was in full view of the bus passengers" no other witnesses to the incident, other than the injured man gave evidence for the prosecution.

-3-

(d) The injured man admitted in evidence that he "held the blade" at one stage.

(e) The accused gave evidence of "bad blood" between him and Kumar and that just prior to the incident Kumar made obscene insulting and provoking gestures and statements to him; that Kumar "held the Knife" - "we both pulled" "Kumar got the cut." The accused further swore that he did not strike Kumar with the knife and that after the incident, he (the accused) reported to the police.

(f) The only questions in cross examination of the accused elicited this response "I took cane knife for harvesting. I took knife to frighten him."

On that evidence one would not have been surprised if a jury or assessors or a judge properly directing himself on the appropriate law and particularly the criminal standard of proof, had found the accused not guilty of the offence charge (s 224) and of the so called alternative offence of unlawful wounding (s 230).

Counsel for the defence addressed on both possible offences (in accordance with the learned judge's summing up) and argued strongly for verdicts of not guilty.

-4-

Counsel for the prosecution did not address.

After a short retirement the record shows that the assessors unanimously gave their opinion that the accused was not guilty of the offence charged, namely with intent to do some grievous harm unlawfully wounded Kumar, but was guilty of unlawful wounding.

The learned judge "entirely concurred" with the verdict as recorded, convicted the accused and sentence him to 12 months imprisonment.

The appellant's notice of appeal against conviction raised the question whether an accused on a charge such as the present may be found guilty of the lesser or "minor" offence of unlawful wounding, one of the necessary constituents of the offence charged, when that lesser charge was not formally made in the indictment or by calling upon the accused at the trial to answer the specific charge.

In the view we take of this case it is unnecessary for us to decide this question which could well be covered by S 169 of the Criminal Procedure Code. It should be observed that counsel for the defence and the learned judge both proceeded upon the basis that s 230 governed this issue. What is the appropriate nature of the directions to the assessors and the method of seeking their opinions in such a case can, if necessary, be left

-5-

to another time. It seems to us that there is a quite simple logical course.

It is necessary however to advert to additional material which came before this Court by agreement between the State and the accused. It now appears that on their return the assessors gave their opinion that the accused was not guilty. It seems to us on this material that the assessors had omitted to consider the alternative charge of unlawful wounding, but were required then and there by the Judge to do so without being afforded the opportunity to retire and consider it among themselves. They each then pronounced the accused guilty.

A reading of the summing up does not leave one with the feeling that the trial judge, sufficiently or at all "put" the defence case to the assessors on the question of the unlawfulness of the accused's actions and of the wounding.

After fairly summarising the evidence given in the trial he said "All you must be satisfied with is that the attack with the cane knife was unlawful and injuries resulting amounted to wounds. I suspect that there can't be much room for doubt on either score."

It seems to us that a possible conclusion is that he was satisfied the accused was guilty of "unlawful wounding" and prevailed on the assessors to agree.

In the circumstances of an other wise questionable case for the prosecution, we are of the opinion that it would be unsafe to allow the verdict of guilty to stand.

The appeal is allowed. The accused is discharged. There should be no new trial.

Michael M. Helsham
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Mr Justice Michael M. Helsham
President, Fiji Court of Appeal

Mari Kapi
.....
Sir Mari Kapi
Justice of Appeal

E. S. Williams
.....
Sir Edward Williams
Justice of Appeal