

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI ISLANDS

CRIMINAL APPEAL NO. AAU0031 OF 1998S
(High Court Criminal Case No. HAC 0010 of 1998L)

BETWEEN:

RAVIN CHAND
SATYA KUMAR

Appellants

AND:

THE STATE

Respondent

Coram:

The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Sir Mari Kapi, Justice of Appeal
The Hon. Mr. Justice Michael Scott, Judge of Appeal

Hearing:

Monday, 21 February 2000, Suva

Counsel:

Mr. A. R. Jungwirth for the Appellant
Mr. J. Naigulevu for the Respondent

Date of Judgment: Thursday, 24 February 2000

JUDGMENT OF THE COURT

The appellants are brothers and were convicted in a joint trial of murdering Dinesh Kumar between 18 and 19 November 1997 and on 8 October 1998 they were sentenced to life imprisonment by Lyons J in the High Court at Lautoka. They were both represented by the same counsel, Mr Hancock. They gave notice of appeal in person against conviction and sentence on 9 February 1997 on various grounds of mixed fact and law, in respect of which leave to appeal against conviction was required under s 21 of the Court of Appeal Act, and these grounds have since been expanded by their counsel. As the sentences were fixed by law, there can be no appeal against them. They applied for leave to appeal out of time at the start of the hearing before us, and there quite properly being no objection by the State, we granted the application and in the circumstances treat the notice as constituting an application for leave to appeal also.

The deceased was married to Ravin Chand's sister, Premila Wati, who gave evidence that there had been bad feeling between her husband and the two appellants over a water pipe supplying the his house and garden, which ran across neighbouring land farmed by Ravin. She said he believed they were responsible for regularly cutting the pipe. At about 6 pm on 18 November 1997 she was going to water the garden and he went out to re-connect the hose-pipe as they had no water, which she said came on about 15 minutes later. However, he did not return and the following morning a search party found his body buried and called the police. It was exhumed and his left hand was seen to have been cleanly amputated and was buried with it in a plastic bag. The body was tied several times with a rope around the chest and legs. His clothes were reported by the attending pathologist to be drenched with kerosene and there was a ligature mark around the neck to which he attributed the cause of death as asphyxia due to strangulation. He found bruising both before and after death to the body and face, bleeding of the scalp and dislocation of the arm bone. He also noticed blisters, leading him to conclude the body had been in contact with fire. He could make only a broad estimate of the time of death at between 11 pm on 18 November and 4 am on the 19th. The police found marks of dried blood on the grass by a creek or drain near Ravin's house and signs of fire in that area.

The appellants made statements to the police, Ravin admitting that he killed the deceased and his younger brother Satya Kumar said he helped him dispose of the body by burying it. Both gave evidence. Ravin said he was at home about 6.30 pm on 18 November when he heard his wife call for help outside and found the deceased holding her. He let her go and she ran to the house while he followed him down the hill towards the creek, where he said the deceased attacked him with a long-handled cane-knife and chased him as he ran away. The deceased fell and Ravin was able to get the knife and in the ensuing struggle he cut off the

deceased's hand and then kicked and punched him, so that he fell into the creek. He ran back home and got his wife to attend to the cuts he sustained from the knife attack, but did not tell her what had happened. He said he thought the deceased was still alive at that time. About half an hour later he went out and found he was dead. In his police statement he gave a different version, saying the deceased fell in the drain and he went to see him after punching him and saw that he was properly dead and not moving. He added that if he had known he was not dead he would have hit him again with the knife. In cross-examination he said that statement was a lie (presumably by the police) and he did not intend to kill him. He called out his younger brother Satya who lived nearby, and told him what had happened.

He said he was unwilling to go to the police, as his brother had urged, for fear of being assaulted, and he asked him to help dispose of the body. Satya agreed and they used Ravin's bullocks to pull it out of the creek with a chain and rope tied around its chest. The first attempt at getting it up was unsuccessful and it fell back into the creek. The chain was re-attached and they got the body up the bank and tied it onto a tyre, dragging it to a site near the bush and burying it. They spread kerosene over the top of the grave to deter dogs; and he went home to bed.

Satya's evidence corresponded with that account. He said he did not go down to the creek bed, but held the bullocks while Ravin attached the body to the rope leading down to it from the yoke and chain so they could pull it out. He said he did not see Ravin attach the rope, and that after getting the body on the tyre they dragged it with the bullocks to the burial site. He was then handed the knife by his brother and accidentally broke the wooden handle which he took home and burned, throwing the blade away. Satya's credibility must have been severely

compromised in the eyes of the assessors because of his concession that much of his police statement was untrue.

Ravin's wife, Ved Mati, also gave evidence for the defence. She said she was about to untie the hose when Dinesh abused and held her and she called for help. Her husband Ravin came and told her to go inside the house where she stayed until he returned a few minutes later and asked her to put iodine on his shoulder, but would not tell her what had happened. He then went out and was still away when she went to sleep. She was cross-examined on a statement she made to the police which differed in important respects, but she maintained that it had been given under pressure and that what she told the Court was the truth. The evidence given by the two appellants was also challenged in cross-examination because of some discrepancies with their police statements, which were produced in evidence.

The grounds of Appeal

There were six grounds of appeal pursued in this Court.

1. The verdict in respect of each appellant was unsafe and unsatisfactory and was otherwise unreasonable and against the weight of evidence.

This is in effect a complaint that the verdicts were unreasonable and cannot be supported having regard to the evidence, being the ground specified in s 23(1) of the Court of Appeal Act (Cap 12). Mr Jungwirth submitted that there was a lack of evidence of the "malice aforethought" required to constitute murder as defined in s 202 of the Penal Code - namely an intention to kill, or knowledge that the act or omission causing death will probably cause grievous harm, although that knowledge is accompanied by indifference whether such harm is caused, or by a wish that it may not be caused.

In his charge to the assessors the Judge discussed the evidence relevant to the theory that the deceased was strangled as he was dragged from the creek, either accidentally in the belief he was dead (as contended for by the appellants), or in their belief that he was alive (or were indifferent to whether he was alive or dead) when they wound the rope around his neck to pull him out, as the respondent submitted. He reminded them that Dinesh was a big man, six feet tall; and that the drain or creek was about six feet deep; and that Ravin said he was lying there head downwards. After pointing out the problems inherent in these theories, he left the matter in the assessors' hands, telling them they must acquit if they could not be satisfied beyond reasonable doubt that the cause of death was at some point due to the activity of the accused; otherwise they must determine whether they were criminally liable for it.

He then directed them about the elements of murder and the definition of "malice aforethought" in ss 199(1) and 202 of the Penal Code, in the context of the State's submission that the accused could not be believed; and that far from acting in self-defence, both of them attacked Dinesh in a pre-planned move and cut off his hand and assaulted him, causing him to fall into the creek from where they pulled him out by means of the rope around his neck; and that they did not check to see if he was still alive or were totally indifferent to his circumstances.

In this Court Mr Naigulevu for the State pointed out that there was no evidence of other marks from pressure of the rope on the deceased's body, as might have been expected if the appellants were telling the truth that they wrapped it around his chest to pull him up. If it had slipped up around his neck while he was being dragged out, this should have been obvious when they got him to the top, yet the appellants made no mention of it. This theory of accidental strangulation may well have been seen by the assessors as no more than speculation.

The only realistic alternatives appear to be that Dinesh was garrotted with the rope after he had been injured, but this possibility was not part of the State's case. Otherwise he was dragged up from the creek with it around his neck, in which event we think it was open to the assessors to conclude that Ravin at least was indifferent to the possibility that he was still alive and therefore indifferent to whether death or grievous bodily harm would be caused to him by such conduct. There was the history of dissension between the two families in which he was closely involved, and from which it can be inferred that he was badly disposed towards the deceased, escalating to hatred as a result of the fight that afternoon, whether or not he was acting in legitimate self-defence. On his own admission Ravin punched and kicked Dinesh and left him lying in the creek after he had been badly wounded and was probably bleeding to death, yet he did nothing to get help.

Ravin made the admission in his statement referred to above that he would have hit him again with the knife if he thought he was still alive. Although he said this was a lie in cross-examination, the statement was admitted without challenge and the assessors could treat it as evidence of his attitude to Dinesh. The cumulative effect of these circumstances could justify the conclusion that Ravin wanted to see him dead, and was recklessly indifferent to the possibility that he was still alive when pulled out of the creek. Accordingly, on this view of the case against Ravin (which was advanced by Mr Naigulevu in his written submissions to this Court), we think there was sufficient evidence of malice aforethought to justify his conviction.

However, there is a more straightforward view of the case against him which Mr Naigulevu touched on in his oral submissions. At the trial the prosecution contended that the attack on Dinesh was planned by the appellants, setting in place the chain of events which led to his death by strangulation; and that Ravin's evidence of self-defence should be rejected. This

was how the judge described the prosecution case to the assessors, and it corresponds with his record of its counsel's address to them. Accordingly, it is difficult to escape the conclusion that the verdict of guilty must have been arrived at on that basis. But if there was any kind of murderous attack on Dinesh then, regardless of whether or not the appellants believed he was dead when they pulled him out of the creek, the attacker would be guilty, because the situation falls within the principle enunciated by the Privy Council in Thabo Meli v R [1954] 1 All.ER 373. There a group of men thought they had killed their victim and threw his body over a cliff to escape detection. In fact he was not then dead but died later of exposure. Their Lordships rejected the defence argument that there was no guilty mind in the event causing his death and said at p 374 that it was much too refined a ground of judgment to say that, because they were under a misapprehension that their guilty purpose had been achieved before in fact it was achieved, therefore they could escape the penalties of the law.

In that case it was clear the accused had set out to kill the deceased. In R v Church [1996] 1 QB 59 the Court of Criminal Appeal applied Thabo Meli to a situation in which the accused had attempted to strangle a girl who had provoked him and, mistakenly thinking she was dead, threw the body into a river where she drowned. The trial Judge had told the jury they could not convict of murder and left the case to them as one of manslaughter. The Court was critical of this, saying at p67:

".....such a direction was unduly benevolent to the appellant and ... the jury should have been told that it was still open to them to convict of murder, notwithstanding that the appellant may have thought his blows and attempt at strangulation had actually produced death when he threw the body into the river, if they regarded the appellant's behaviour from the moment he first struck her to the moment when he threw her into the river as a series of acts designed to cause death or grievous bodily harm"

In the present case , if the assessors had rejected the claim of self-defence (about which they were given a full direction) there can be no doubt that Ravin was rightly convicted of murder. Similarly if they had accepted his account of an attack by Dinesh, but thought he had gone too far in defending himself. Even if they regarded the blow with the cane knife as justified self defence, there could have been no call for the subsequent kicking and punching of a disabled man in circumstances clearly indicating that Ravin did not care whether he lived or died. On his own statement (if accepted as true) he clearly wanted to see him dead, and thought he had killed him. He cannot escape conviction for murder on the grounds that the victim's death was the result of his efforts to dispose of the body.

We see nothing of substance in the complaint under this ground about the inadequacy of the police enquiry into the cause of death, which was believed to be from the blow with the knife until the pathologist reported that it was due to strangulation. The appellants say that their police statements were made before this was known and their attention was focussed on the earlier events, so that they did not say much about the dragging of the body from the creek. However, they had the opportunity to enlarge on this in their evidence and did so, and there was no significant inconsistency between that and their earlier accounts. Furthermore, the lack of more detailed police investigation was drawn to the assessors' attention by His Lordship in discussing the alternative of manslaughter, which he decided was not open on the evidence. We refer to this next in dealing with grounds 2 and 3.

We are satisfied that the first ground of appeal as regards Ravin has not been made out, and that there was ample material on which the assessors could reach their verdict, which cannot be regarded as unreasonable.

Mr Jungwirth submitted that there was no evidence implicating Satya Kumar in the events which led to the death of Dinesh by strangulation. We are satisfied that this submission must succeed. Both he and his brother said he did not come onto the scene until the latter, believing he had killed Dinesh, asked for his help in disposing of the body. Even if both men were disbelieved, there is nothing in the rest of the evidence to establish his presence earlier, and the prosecution case that he was a party to assaults on the deceased must be regarded as no more than speculation. Equally lacking is any evidence that he knew or suspected that Dinesh was alive when they were pulling him out of the creek. He had been told that Ravin had killed him and apparently believed him to be dead. The most Mr Naigulevu could advance in support of his guilty involvement were totally unsuccessful attempts in cross-examination to get the appellants to admit that they noticed movements of the rope from side to side, indicating that Dinesh was struggling as he was being hauled up the bank.

For these reasons we are satisfied that Satya Kumar's appeal must be allowed and the verdict of murder against him must be set aside on the ground that it cannot be supported having regard to the evidence.

Grounds 2 and 3: Manslaughter

His Lordship withdrew manslaughter from the assessors' consideration and the appellants claim this was a misdirection. The trial was conducted on the basis that it was murder or nothing, but it is well established that even though counsel do not raise the point, manslaughter must be put by the Judge as a possible verdict if it is available. In this case we are satisfied His Lordship did not err when he decided that on the evidence it was not. We also find

the reasoning in Thabo Meli and Church persuasive and the Court of Criminal Appeal made its view very clear that in circumstances such as these, murder was the appropriate verdict. Accordingly grounds 2 and 3 are rejected.

Ground 4: failure to direct that murder committed by strangulation required malice aforethought; and to direct on circumstantial evidence.

The Judge did give an adequate direction about malice aforethought when discussing the proposition that the appellants put a rope around the deceased's neck when pulling him from the creek. As to circumstantial evidence, we agree with Mr Naigulevu that directions of the kind now suggested on behalf of the appellants were unnecessary. They called evidence and the strength of the case against them depended very much on their own credibility and that of Ravin's wife, and the inferences to be drawn from their testimony as well as from the evidence of the prosecution witnesses. The assessors were given full and careful directions about all this material. We think an added direction about circumstantial evidence may have tended to confuse them, and significantly in our opinion, trial counsel did not ask for one when given the opportunity at the end of the summing up. These grounds are rejected also.

Ground 5: failure to direct properly about the medical assessment of the cause of death.

This complaint seems directed at the Judge's failure to tell the assessors that there was no evidence from the pathologist that would exclude the appellants' version that Dinesh's death was due to accidental strangulation. We have difficulty in understanding its significance, given the fact that defence counsel had the opportunity of cross-examining him about any

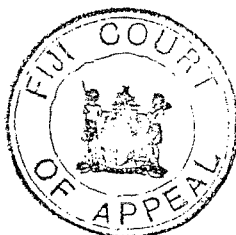
relevant material he might have wished to bring out in favour of his clients. We see nothing of substance in this ground.


Ground 6: failure to direct on common intention.

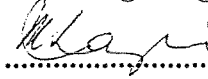
This was in effect a submission that there was no evidence implicating Satya Kumar in the events leading to the death of Dinesh. This has been dealt with under ground 1 in his favour.

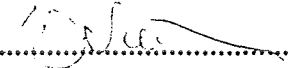
Result

1. Ravin Chand's application for leave to appeal against conviction is granted but his appeal is dismissed.
2. Satya Kumar's application for leave to appeal against conviction is granted. His appeal is allowed and his conviction and sentence are quashed and we direct a judgment and verdict of acquittal to be entered.




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Sir Maurice Casey
Presiding Judge


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Sir Mari Kapi
Justice of Appeal


.....
Justice Michael Scott
Judge of Appeal

Solicitors:

Messrs. Vijay Naidu and Associates, Lautoka for the Appellants
Office of the Director of Public Prosecutions, Suva for the Respondent