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

CRIMINAL APPEAL NO.AAU0001 OF 1998S

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO: ABU0001.1998 IN COURT

BETWEEN : EPELI TULABA

APPELLANT

THE STATE

RESPONDENT

Coram : The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Mr Justice Gordon Ward, Justice of Appeal
The Hon. Mr Justice John E. Byrne, Judge of Appeal

Hearing : Tuesday, 28th November 2000, Suva

Counsel : Mr S. Valenitabua for the Appellant
Mr J. Naigulevu for the Respondent

Date of Judgment : Friday, 1st December 2000

JUDGMENT OF THE COURT

The appellant pleaded not guilty to one count of wounding with intent, two counts of rape and one of murder and was tried in the High Court by Townsley J and three assessors. He was convicted of the wounding, the first count of rape and the murder and acquitted of the second rape. He appeals against those convictions.

The brief facts of the case were that, through the day of 23 December 1995, the appellant had been drinking home brew and then, in the evening, went to a dance at the Whistling Duck in Nausori.

Whilst there he noticed a girl dancing and, as he said in his statement to the police, "I saw her and I wanted her".

He asked her to dance but she pointed out that she was with her boyfriend. The appellant went to another nightclub and later returned to the first dance to find the girl was still there.

She left the dance before it was over and the appellant followed her. Outside he saw her in the road with a man and followed them for some distance. When he saw them eventually go towards the Nausori Primary School, the appellant went to the Rewa Timber yard, picked up a piece of timber and went after the couple.

He found them lying on the ground by a tree on the old golf ground. The man was on top of the girl and the appellant struck the man on the right side of his head with the piece of timber. The man fled and the appellant then struck the girl twice on her left side with the same weapon.

The blow to the man, Etuate, caused a deep wound on the back right side of his head about three quarters on an inch long. The next two blows struck the girl, Verenaisi, on the arm and the head. The former had sufficient force to fracture the left humerus just above the elbow and the second resulted in four areas of fractures to the frontal region of the skull radiating to the floor of the skull with associated extra-dural, sub-dural, sub-arachnoid and intra-cerebral haemorrhaging. Such blows, in the opinion of the pathologist, required a considerable amount of force and would have caused death instantly or, more probably, over a period of three to four hours.

The appellant carried or dragged the girl to another place nearby and raped her. She was not speaking at the time but he was aware of movement in her hand.

He then left her there and slept under a tree not far away. Some hours later he returned and raped her again. He then left her there.

At the end of the learned judge's summing up to the assessors they retired to consider their opinion and returned an hour and thirty-five minutes later.

The record continues;

"2.50 PM ASSESSORS RETURN OPINIONS AS FOLLOWS: -

COUNT 1 : GUILTY
COUNT 2 : GUILTY
COUNT 3 : NOT GUILTY
COUNT 4 : NOT GUILTY OF MURDER BUT GUILTY OF MANSLAUGHTER

COURT: Thank you, assessors, you are free to go."

The first two grounds of appeal are based on the failure of the judge to follow the requirements of section 299(1) of the Criminal Procedure Code:

> *"299 – (1) When the case on both sides is closed, the judge shall sum up and shall then require each of the assessors to state his opinion orally, and shall record such opinion."*

The first ground refers to the failure by the judge to take the individual opinions of each assessor separately and the second to his failure to record them separately.

Mr Valenitabua, who did not appear in the court below, does not say whether the judge did, in fact, take a global verdict. He states that the record is before the Court and that is all we should consider. That record shows the provisions of the section were not followed. It is, he suggests, a mandatory provision and failure to comply with it is a fundamental breach and should result in the conviction being set aside.

Mr Naigulevu for the State sought and was granted leave to file an affidavit from counsel who prosecuted the case in the High Court. In it, she states that:

> *"....at the end of the learned judge's summing up, the three assessors returned unanimous verdict in respect of four counts, each assessor announcing their opinions with respect to each count..."*

The wording of that passage is not as clear as we might have expected from counsel but it does appear to be stating that each of the assessors gave his or her opinion.

Mr Naigulevu also points out that, after the assessors had given their opinions, the judge invited counsel to address him on the apparent inconsistency between the verdicts on count 1 and count 4. Both counsel declined. Had there been a failure to follow the requirements of section 299, counsel should have brought it to the judge's attention.

Whether they were given jointly or individually, we accept that the assessors' opinions were accurately recorded by the judge in the sense that they were clearly unanimous. We cannot accept that, if the opinion of one assessor had differed from that of his fellows, the judge would have failed to record the dissenting opinion. Equally, if the opinions were expressed by one assessor for all three, we do not accept that a dissenting assessor would have failed to voice his or her dissent.

Once the judge has taken and recorded the opinions of the assessors, he must, by section 299(2), *"then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors".*

The subsection then sets out the procedure to be followed when the judge does not follow the assessors' opinion and concludes:

"..... and in every such case the judge's summing up and the decision of the court together with, where appropriate, the judges reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court ..."

Clearly, notwithstanding the fact that it may contradict the assessors' opinion, it is the judge's decision that is the verdict in the case. The assessors' opinion does not make up the verdict of the court. Even where it accords with the judge's decision, it is still no part of the judgment of the court; Joseph -v- The King (1948) AC 215; Ram Dulare & Ors -v- Reginam (1956-57) 5 FLR 1.

It is clear there was a failure by the judge to record these matters properly. It is not so clear that there was an actual failure to take the individual opinions. However, even proceeding on the basis that the opinions were taken in the way suggested by the record, we are satisfied the failure to follow the procedure did not affect the judge's decision after he had considered them. We are also satisfied that no substantial miscarriage of justice occurred and we consider this is a proper case in which to apply the proviso to section 23 of the Court of Appeal Act and dismiss the appeal on this ground. Inasmuch as the same point was urged in relation to the remaining grounds, they also fail to that extent

The third ground challenges the judge's finding that the appellant had the intent to cause grievous harm to the man he first struck.

Mr Valenitabua refers to the appellant's interview with the police in which he stated, "I saw her and I wanted her". He points out that that remark and the appellant's actions as a result show his intention was physically to have the girl he desired. Having established that desire, counsel argues that it was sufficient evidence for the court to find that it blinded the appellant from other girls or women in the nightclub and compelled him to follow the unfortunate girl and her boyfriend. He continues that the blind desire for the deceased also made the appellant blind from perceiving the probability of causing grievous harm to the boyfriend or to the deceased if he struck them with the piece of timber.

That remarkable submission is neither supported by the evidence nor authority. The assessors and the judge heard the evidence of the manner in which the appellant selected his weapon, how he struck the two victims and the injuries caused. Neither, it should be added, is this defence supported by the accused. In his evidence to the court, he did not suggest lack of intent; he denied any involvement in the offence at all. He never saw Verenaisi and, after he had been to the Whistling Duck, he went home at 1.0am and stayed there.

The appellant does not complain of the manner in which the judge summed up on this point. He simply submits that, because of the blinding desire demonstrated by that short phrase in the interview, there is no evidence that the appellant acted with intent to cause grievous bodily harm.. We have no hesitation in rejecting this ground of appeal.

As has been shown, the opinion of the assessors on count four was to acquit the appellant of murder and convict him of manslaughter. The learned judge chose to differ and the fourth and fifth grounds of appeal suggest that he erred in holding the appellant guilty of murder on the ground that the intent in count one supported that verdict or of finding the appellant guilty of murder on the basis of the verdict on count one

Having differed from the opinions of the assessors, the learned judge gave his reasons in writing as required by section 299. When the assessors had first given their opinion, he had remarked on the apparent inconsistency between their opinion on count one in relation to the first blow struck on the man and that on count four in relation to the next two blows struck on the girl.

In his written reasons he acknowledged that it is rare for the judge to overrule the opinion of the assessors and noted that it must be for highly cogent reasons and where the evidence is so overwhelming as to make the assessors' opinion perverse. That was the correct approach. He continued:

> *"Here, I have regretfully come to the conclusion the assessors' opinions that there was a reasonable doubt about murder on count four has to be the result of a fundamental error on their part in appreciation of the mental element in murder.*
>
> *For murder the exact same intent to do grievous harm to Verenaisi was an element as the assessors found the accused intended to do to Etuate. They found that intent existed when the accused struck the first of three blows in what must have been reasonably quick succession.*
>
> *The accused was wielding a big piece of wood, resembling a battle-axe. The first blow hit Etuate on the skull. Using the same weapon, the second and third blows hit Verenaisi on the upper left arm and the left skull. The third blow shattered the floor of her skull and irrevocably damaged her brain.*
>
> *On count one the assessors had no difficulty finding an intent in the accused's mind to grievously harm Etuate...Possessing the intent in regard to Etuate inevitably connoted a knowledge that grievous harm would probably likely result to him.*
>
> *If you intend a consequence you must inevitably know or believe that consequence will at least be likely to occur. Swinging the same weapon to the skull of Verenaisi within moments of swinging the same weapon at the skull of Etuate must mean that the accused was at least aware of what that would cause as a probably likely consequence to Verenaisi.*
>
> *Consistently with their finding on Etuate, the assessors had no option but to find, if not the same intent, at least the necessary knowledge of consequence of serious or permanent harm to Verenaisi as a probable likelihood."*

On that basis, we accept he had every reason to reach the verdict he did.

One further point raised by the appellant on these two grounds was that, as the judge agreed with the assessors' opinion on count one, he did not make an independent decision. There is no merit in that point. Where the judge agrees with the assessors' opinion, he may give a verdict that is the same. It is still his reasoned judgment and it would be ludicrous if it were assumed that, by so doing, he had not reached his own conclusion.

The final ground is that the judge erred in law in overturning the assessors' opinion on manslaughter and finding him guilty of murder on the basis of the verdict on count one.

The only argument put forward in support of this was the same as that advanced for ground three namely, that the verdict of manslaughter was correct because the appellant's desire had overwhelmed him to the extent he was blind to the consequences of his actions. We have already dealt with this.

The appeal is dismissed.

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Sir Maurice Casey
Presiding Judge

FIJI COURT OF APPEAL

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Mr Justice Gordon Ward
Justice of Appeal

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Mr Justice John E. Byrne
Judge of Appeal

Solicitors:

S. Valenitabua, Suva for the Appellant
DPP, Suva for the Respondent

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