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

CRIMINAL APPEAL NO.AAU0014 OF 1999S
(Criminal Case No. HAA 016/97,006/97 and 014/97)

BETWEEN:

TEVITA LEDUA

Appellant

AND:

THE STATE

Respondent

Coram: The Hon. Sir Moti Tikaram, President
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Sir Ian Barker, Justice of Appeal

Hearing: Wednesday, 9 February 2000, Suva

Counsel: Mr. J. L. Cameron for the Appellant
Ms L. Olutimayin and Mr. N. Bhindi for the Respondent

Date of Judgment: Friday, 11 February 2000

JUDGMENT OF THE COURT

On 9 April 1995, the appellant and four others were charged with the murder of Manasa Kububoro on 8 April 1995. The appellant was remanded in custody by a Magistrate. On 20 November 1995, appellant and his co-accused were committed for trial in the High Court by a Magistrate and again remanded in custody. On 12 December 1996, appellant was granted bail on terms. On 28 May 1997, the Director of Public Prosecutions ('DPP') filed an information charging the accused with manslaughter not murder. The case first came before the High Court at a call-over on 23 March 1998.

We, cannot countenance such a long delay between committal for trial and first appearance in the High Court. We note that Surman J. was told at call-over by counsel for the prosecution that the committal papers had taken 1½ years to reach the High Court. Magistrates' Courts should process files on cases committed for trial to the High Court with the utmost

despatch. Failure to do so undermines an accused person's right to have the charge against him or her determined within a reasonable period as required by s.29(3) of the 1997 Constitution (or s.11(1) of the 1990 Constitution). Eventually, after several further delays, the trial was listed to commence in the High Court on 27 October 1998. After other adjournments, the trial date was set for on 15th February 1999.

On that date, all accused appeared before Sadal J. in the High Court at Suva. Counsel for the DPP then sought leave to amend the information by deleting the manslaughter charge and substituting two counts of assault occasioning actual bodily harm (Penal Code s.245) hereinafter referred to as ('AOABH'). Counsel for the appellant, who had travelled from Western Australia for the trial stated to this Court that before he had left for Fiji, he had been advised by the DPP's office that the charge was to be reduced to one of causing grievous harm (Penal Code s.227), a charge to which he would not have had advised the appellant to plead guilty. He said that he had always been willing to advise a plea of guilty to "AOABH". Such a course was agreed to by the State but known to him only after counsel had arrived in Fiji. Counsel's statements in this regard were not challenged by counsel for the respondent.

Before Sadal J., counsel for the appellant submitted strongly and in writing that the the appropriate course was for the DPP to enter a nolle prosequi to the manslaughter charge and to then file a fresh information alleging the lesser charges. Counsel submitted that proceeding by way of amendment of the information, deprived the appellant of any rights to costs and/or compensation under ss.159(2) and 160(1) of the Criminal Procedure Code (Cap.21) ("CPC"). He submitted that the appellant might have been entitled to compensation because the charge of murder on which he had been remanded in custody for some 20 months was never sustainable: that the charge of manslaughter, which the DPP had considered appropriate

when the file eventually arrived at her office after its inordinately long journey from the Magistrates Court, was also not substainable because the evidence could not establish that the assault by the appellant on the deceased was a substantial cause of death: that the sister of the appellant, said in the High Court by the prosecutor to have been a vital prosecution witness and out of the country, had never left Fiji and her whereabouts were known to the Police: that the State pathologist was not available for cross-examination on his report, as required by the defence, despite the trial having been adjourned several times at the DPP's request to enable the pathologist to attend. None of these statements was challenged by counsel for the respondent in this Court, who had also appeared for the DPP in the Court below.

After hearing submissions, Sadal J. granted leave for the information to be amended as moved, without imposing any conditions as sought by the defence. The record does not disclose any reasons for his decision. No note of the order for amendment was made under s.274(3) of the CPC. Such a note would have been inappropriate, since s.274(2) relates only to amending defective informations. The manslaughter information was not defective. It was amended not because it was defective, but because the DPP was unable to prove it in the absence of the pathologist's evidence. It would have been preferable if the Judge had given brief reasons for his decision to grant an amendment of the information, particularly after he had received detailed submissions. See Kulavere v. The State (Judgment of this Court, 13 August 1999).

The appellant and his co-accused then pleaded guilty to the lesser charge. After hearing submissions in mitigation, Sadal J. sentenced the appellant and all the co-offenders on both charges of assault to 2 years' imprisonment, each sentence to be suspended for 2 years and to be concurrent.

Despite his plea of guilty to charges, far less serious than that which he originally faced, the appellant appeals against his conviction. The appellant also seeks leave to appeal against sentence.

The grounds for appeal against conviction are technical in the extreme and do not seem to be unduly cluttered with objective merit. Counsel for the appellant submitted that there was no jurisdiction for the amendment of information procedure followed in the High Court. He claimed the prosecution should have either entered a nolle prosequi on the manslaughter charge and then have filed a fresh information for the less serious charges. Counsel referred to English and New South Wales and authorities in support of his proposition. He claimed that the proper procedure under the CPC (which is based on English legislation) had not been followed and that the failure to observe that procedure fundamentally flawed all that followed. In counsel's submission,

(a) the manslaughter charge is still extant.

(b) It should have been the subject of a nolle prosequi.

(c) Fresh charges of "AOABH" should have been laid in the Magistrates Court where the appellant would most likely have been fined or where a Fijian reconciliation process might have been instigated.

(d) The 'AOABH' charges were better filed in the Magistrates Court because there would not necessarily have been any reference in that Court to the death of the victim- a circumstance which, although irrelevant to the sentencing, was known to the High Court Judge.

In Rokotuiwai v. State (decision 13 August 1999), this Court rejected a similar argument against the amendment of information procedure. The Court noted that there is no clear authority in the CPC for amending an information when the DPP wishes to substitute a lesser charge to that alleged in the information. This Court noted the practice of the High Court to allow such amendments. It noted the decision of Pain J. in the High Court in State v. Qoli (11 August 1997) where he said:

> ***"The filing of a second information by the Director of Public Prosecutions is not unique. It is frequently done, usually as in this case*** *alleging a lesser offence than the original charge. There is no express* ***statutory authorisation for this procedure but it is a common practice that has been regularly permitted in this Court. Furthermore in my view, it is a procedure that is authorised by the Common Law"***

This Court in Rokotuiwai found it strictly not necessary to express a view on this question, but made no criticism of Pain J's approach which was followed by Sadal J. on this occasion. We now expressly approve the practice, taking into account what was said in Rokotuiwai.

The Court in Rokotuiwai considered that s.169(2) and s.278 of the CPC, would allow an accused arraigned for murder, to have pleaded guilty to the lesser offence of grievous harm. It follows that, in the present case, had the manslaughter charge not been amended, the appellant could have pleaded guilty to the lesser charge of "AOABH" when asked to plead to the manslaughter charge. This Court also held that the DPP may validly file a second information based on the same committal proceedings, referring to s.248(1) and (2) of the CPC.

The Court upheld Rokotuiwai's convictions.

In summary, a plea of guilty to a lesser charge than that named in the information can be achieved by several procedural routes, including

(a) the cumbersome and wasteful one of the DPP having to file either a fresh information in the High Court or a fresh charge in a Magistrates' Court.

(b) The acceptance of a plea of guilty to a lesser charge provided that charge is subsumed within the more serious charge in the information.

(c) The amendment of the information by leave of the Court.

We consider that the law of Fiji allowed the third option of amending the information. There is nothing in the CPC to say to the contrary and the procedure developed by the High Court Judges seems eminently practical.

Counsel for the appellant sought to distinguish Rokotuiwai from the present because, in that case, the prosecution accepted a plea of guilty to grievous harm instead of to murder as charged, after the trial had opened and after two witnesses had given evidence. Counsel in that case (who was the same counsel for the appellant in the present case), objected to the proposed amendment which was nevertheless granted by the Judge. Counsel sought to distinguish what was done in Rokotuiwai as being authorised by s.169 (2) of CPC which reads:

> **"Where a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although the was not charged with it."**

We assume that the word "minor" in the subsection refers to an offence which, while serious, is of lesser gravity than the offence charged.

S.169(2) was not relied upon by the Court in Rokotuiwai as justification for the course taken there - the same as taken in the instant case. Nor do we see. s.169(2) normally applying before a case has been concluded, i.e. when all evidence has been heard from both prosecution and defence. The fact that the amended information procedure was utilised on Rokotuiwai after some evidence had been heard, does not, in principle, distinguish that case from the present one.

Ideally, the CPC should provide a simple procedure of amendment as do criminal procedure statutes as in other jurisdictions where like Fiji, the criminal law is codified. Reliance on the rather rigid English procedures is not always suitable to local conditions. In the absence of any provision in the CPC forbidding the sensible procedure adopted by the Judge we see no reason why it should not continue to be utilised on an ad hoc basis. We find it difficult to see that a claim under s.160 could arise if there were a nolle prosequi because s.160(1) only operates "on the dismissal of a case." Those words presuppose a charge being dismissed by order of a Judge or Magistrate for some reason or after an acquittal.

We have considered the English authorities on which counsel for the appellant particularly relied i.e. re: Wilson [1985] A.C. 750, R v. Pinfold [1988] 1.Q.B,462: and R. v. Newland (1987), 87 Cr. App. R.118. With respect to counsel, we have difficulty in seeing how the first two authorities are of assistance.

In Newland, the English Court of Appeal felt constrained to quash convictions

without any enthusiasm for so doing. It refused to order a venire de novo because the appellant had almost completed his sentence.

The appellant had been charged in the same indictment with three counts of drug offences and three unrelated counts of assault. Before arraignment, counsel for the prosecution had conceded that the indictment was invalid because the joinder of disparate offences was contrary to a statutory provision. Against the objection of counsel for the accused, the Recorder acceded to the prosecutor's request to order separate trials of each of the two groups of offences in purported reliance on s.5(3) of the Indictments Act 1915 (1mp.)

The Court of Appeal held that the power to amend under s.5(3) applied only to a valid indictment, which the composite indictment was not. No valid trial had commenced because the proceedings which ensued after the arraignment flowed from the pleas made to an invalid indictment, the result of the Recorder's order to sever. The Court had no power to use "the proviso" and thus save the convictions, even though the Court considered there was no prejudice to the appellant if it had dismissed his appeal.

Counsel for the present appellant, on this authority, submitted that there was no valid arraignment of the appellant and his co-accused. The arraignment which had occurred was flawed because it followed on a wrong ruling from the Judge. That arraignment, he submitted, following Newland, was a nullity.

We are not prepared to depart from the view of this Court given as recently as August 1999 on the basis of Newland's case. Whilst it is true that the CPC is based on English procedure, we do not think that the law of Fiji calls for such an inflexible approach as that shown

in Newland.

There is nothing in the CPC to say that the practice which has developed in the High Court is wrong. Maybe it has grown because the statutory procedure for surrounding the procedure for the DPP to file informations and not indictments for criminal offences is obsolete and not particularly flexible. Criminal procedure should be brought in line with the indictment procedures used in other common-law jurisdictions which are not attended by the cast-iron formalism portrayed in some of the English cases. Possibly Pain J. was incorrect in Qoili to opine that the procedure he was following accorded with the common law. We do not need to express any view on that, other than to note that Newland was not based on common law but on a statute.

Apart from these very technical arguments, we agree with Counsel for the State that the Court of Appeal is reluctant to set aside a conviction obtained after a guilty plea - particularly one where the accused had had the benefit of counsel's advice before pleading. R. v. Lee ,79 Cr. App. R.108 is but an example of that principle.

Here there is no miscarriage of justice. The appellant was clearly guilty of the offences to which his plea related. A claim for compensation under s.160(1) can compensate for 'trouble and expense' to which a person has been put by reason of a frivolous or vexatious charge. Prima facie, a murder charge where a man has been killed shortly after attacks by drunken youths might not at first blush, seem frivolous or vexatious. The section does not encompass to a 'general damages' types of award for the pain and suffering of imprisonment on remand. Indeed, the reason for the appellant's long incarceration on remand was the systemic failure founded in the delay in sending the file from the Magistrates' Court to the DPP.

We therefore consider that the appeal against conviction has no legal merit. It is dismissed.

In sentencing the Judge noted that the appellant and his co-accused saw the appellants' sister (the allegedly missing witness) sitting in a taxi with the victim. The first assault by the appellant and three others took place when the victim was in the taxi. The appellant and all the other 5 co-accused then followed the taxi in a van to another location where the accused and 2 others again assaulted the victim, after the van had blocked the taxi's passage. The fact there were two separate assaults explains the two counts in the amended information. The victim's subsequent death could not for the purposes of sentence on "AOABH" be taken into account.

The Judge said:

> **"This is another case where drink was involved and a man had lost his life. The reason given by the prosecution in reducing the charge was the difficulty in getting the witness. I took into account that the accused men have spent considerable time in custody."**

Counsel for the appellant submitted that the appellant was provoked by seeing his sister with the victim in the taxi. The victim fell on the road and some of the injuries could have been caused by the falling. Counsel advised the Judge that the accused was in custody on remand from 9 April 1995 to 12 December 1996. He asked for a suspended sentence.

The agreed summary of facts indicated that the appellant and the other accused had consumed large amounts of alcohol before the incidents. The victim was found by Police

on the side of the road close to where he was assaulted. On examination, he had the following injuries.

> *"1. Haematoma, measuring 4.5 x 4.0 cm of the eyelids right side (black eye).*
>
> *2. Superficial laceration with surrounding area of bruising measuring 3.5 x 0.2 cm of the mucosal surface of the upper lip extending left from the midline.*
>
> *3. Area of bruising 2 x 1 cm on the musosal surface of the upper lip right side.*
>
> *4. Superficial laceration with surounding bruising measuring 1.5 x 2 cm on the mucosal surface of lower lip at the left angle of mouth.*
>
> *5. Area of skin abrasion measuring 1 x 0.5 right knee medical aspect.*
>
> *6. Area of skin abrasions 3 x 1.0 cm right knee below the patella in the mind line.*
>
> *7. Area of skin abrasions measuring 4 x 2 on the left knee."*

No other facts were proved by the prosecution nor did the appellant call evidence at sentencing.

Counsel complained that the Judge should not have canvassed the history of the previous charges and should not have referred to the victim's death. Counsel referred to the situation in Rokotuiwai's case. There, as noted earlier in this judgment the charge was reduced from murder to grievous harm yet the Judge, after quoting from agreed facts, stated that "a man had lost his life" and "The accused had assaulted the deceased for no reason and had left him lying on the road. The deceased died the same day because of injuries."

This Court held that in referring to the death of the victims, and more

particularly to his death "because of the injuries", the Judge went beyond the agreed summary of facts. This Court held that the additional factors had not been established or even supported by evidence at trial. The Judge in that case had imposed a sentence of 18 months' imprisonment which was reduced to 12 months' which taken together with time in custody on remand, resulted in a prison term of 2 years 6 months.

We agree with counsel for the State that the Judge's reference here to the victim losing his life did not go as far as did the Judge in Rokotuiwai's case. Although it would have been preferable for the Judge not to have referred to the death, we cannot say that he was influenced by that fact. He was impliedly critical of the DPP's decision to reduce the charge but we do not know enough about the circumstances of that decision to enable us to comment. The Judge's comments are not such that it follows that he was sentencing on the basis that the appellant's assaults on the victim caused his death.

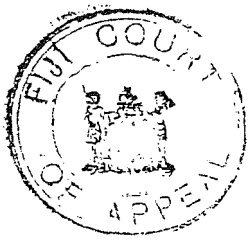
We note that the appellant spent 20 months in custody on remand awaiting trial. That is an equivalent sentence of 2 ½ years imprisonment, allowing for normal remission. This would probably represent a sentence of 3 years' imprisonment after a defended trial, since a guilty plea normally attracts a discount. A term of 2 ½ years on a guilty plea for 2 counts of "AOABH" would seem within the range for this offending. Yet the Judge, purporting to take time on remand in custody into account, added another 2 years' imprisonment, suspended for 2 years.

In the circumstances of the lengthy period in custody in remand, we think a further 2 years' imprisonment, albeit suspended, was excessive. The time he spent in custody was sufficient punishment for this offending.

Accordingly, we grant leave to appeal against sentence and we set aside the sentence imposed on the High Court. We substitute, convicted and discharge in lieu of the sentence imposed.

Result

1. Appeal against conviction dismised.
2. Leave to appeal against sentence granted.
3. Appeal against sentence allowed.
4. Sentence imposed by High Court set aside.
5. In lieu thereof, appellant is convicted and discharged on both counts.The period spent by the appellant in custody on remand being regarded as sufficient punishment.



.....
Sir Moti Tikaram
President

.....
Sir Maurice Casey
Justice of Appeal

.....
Sir Ian Barker
Justice of Appeal

Solicitors:

Messrs. Gates, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

C:\OFFICE\WPWIN\WPDOCS\USHA\AAU0014U.99S