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

CRIMINAL APPEAL NO. AAU 0014 OF 1998S
(High Court Criminal Case No.HAC022 of 1996)

BETWEEN:

1. ROMANU NACEVA
2. TUETA NUKUVEIWAQA
3. URAIA JEKE
4. ILIASERI SAQASAQA
5. VILISE LEWENI

Appellants

AND:

THE STATE

Respondent

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

Hearing: Thursday, 17 May 2001, Suva

Counsel: Dr. J. Cameron for the 1st to 4th Appellants
Mr. N. Shivam for the 5th Appellant
Mr. K. Tunidau for the Respondent

Date of Judgment: Thursday, 24 May 2001

JUDGMENT OF THE COURT

The above-named appellants were tried in the High Court of Fiji at Suva on a charge of murder contrary to sections 199 at 200 of the Penal Code. All appellants other than Saqasaqa were also charged with assault occasioning actual bodily harm contrary to section 245 of the Penal Code. The appellant Jeke pleaded guilty to that charge. The other appellants pleaded not guilty to all charges. During the course of the trial the State withdrew the charge of assault occasioning actual bodily harm against the appellants Naceva and Nukuveiwaqa.

The first four of the above-named appellants were all found guilty of manslaughter convicted and sentenced to 7 years imprisonment. The fifth named appellant Vilise Leweni who has separately appealed was found guilty of murder convicted and

sentenced to life imprisonment. On the charge of assault occasioning actual bodily harm Vilise Leweni was convicted and sentenced to 9 months imprisonment to be served concurrently with his sentence of life imprisonment. The appellant Jeke who had pleaded guilty to the charge of assault occasioning actual bodily harm was sentenced to 18 months imprisonment concurrent with his sentence on manslaughter.

The trial commenced before Townsley J. on the 21 of April 1998. All accused, who had been granted legal aid, were represented by Mr. J. Maharaj. The State case depended upon an allegation that the appellants were acting in concert and were charged as parties although Dr Cameron complains the State never clarified the allegations.

The trial proceeded through the prosecution case until the 22 of May 1998. On that day Mr. Maharaj opened the case for the appellant, Naceva. He indicated to the court that there had been a development,that the first accused wished the second accused to testify for him and sought an adjournment to interview an additional witness. An unsworn statement was made from the dock by the appellant Naceva.

On Tuesday the 26 of May when the hearing resumed Mr Maharaj indicated that he was about to move onto the second accused. The Judge reminded Mr Maharaj that he had previously indicated the second appellant was going to give evidence as a witness for the first appellant. Mr Maharaj informed him there had been a change but he wished to confirm it. The Judge properly pointed out that if the second appellant did give evidence he would be subject to cross-examination as to the whole case and as to credibility. Mr Maharaj replied by informing the Judge that he was uncomfortable with certain things that had been told to him that morning after the assessors retired. Mr Maharaj indicated that it appeared there would be a conflict between the defences of the second and third appellants but he did not know to what degree. There was a further adjournment while he sought further instructions. At 10.48 a.m. Mr Maharaj advised the Court that he would have to withdraw from the defence of the second and third accused. He indicated that they fully understood what was being said and accepted the withdrawal but indicated their desire to have Counsel. The

Prosecutor then stated that the State had no objection to 48 hours adjournment for the second and third accused to get counsel. The Court asked Mr Maharaj whether it was necessary for them to have fresh Counsel each and Mr Maharaj explained that one Counsel for both would be sufficient. The hearing was then adjourned to Friday the 29th of May.

On the 29th of May Dr Cameron appeared as amicus curiae and Mr Maharaj appeared for the first, fourth and fifth appellants. Dr Cameron informed the Court that he had spoken to all accused and that the first four accused had given him instructions to move for a mistrial. He noted that they had a right to independent Counsel and he stated to the Court that the defences of the accused were contradictory. He stated it was impossible that they could continue to be represented by single Counsel and that the defence could be described as "cut-throat". He informed the court that the conflict from the outset was irreconcilable. He also stated that if the application for a mis-trial were not acceded to.he would not be in a position to appear.

Mr Maharaj indicated he had sought leave to withdraw from defending accused numbers 2 and 3. He did not see any conflict of interest up to that point and did not concede that there was a conflict right from the outset. He saw no reason why the trial should not proceed. The prosecutor submitted that conflict between the accused was no ground to abort the trial. She pointed out that it was in its sixth week and submitted there was no grave irregularity justifying a new trial.

The Judge stated that the mere fact of conflict between the defences of the accused should have been ironed out in the time that had elapsed since the 17th of April. He noted that Mr Maharaj did not consider that he should not act until the 26th of May. He saw no reason to declare a mistrial and considered that it should proceed. There was then a short adjournment for counsel to take instructions after which Mr Maharaj indicated he withdrew from the defence of accused numbers 1 and 4 as well as 2 and 3. He continued to act for accused number 5.

Dr Cameron stated that he objected to Mr Maharaj continuing to act for accused number 5 as he would be in breach of confidence with accused number 4 who in fact is the son of accused number 5. Mr Maharaj considered that there was no conflict. Dr Cameron then sought a temporary stay so that Counsel could be sought under the legal aid certificates. This was opposed by the prosecutor and the Judge took the view that in the circumstances of the history of the trial and the stage it had reached he was of the view that the application for stay should be refused and the trial should proceed.

Dr Cameron then withdrew with the leave of the Court and the trial proceeded with Mr Maharaj representing the fifth accused. All other accused were from that stage forward unrepresented. The Judge then asked the first accused if he wished to call the second accused. He received the reply "yes", and the second accused was then called by the first accused. The second accused is then recorded as having stated that he understood that he abandoned his right to silence and would be exposed to cross-examination by counsel and other unrepresented accused. The case then proceeded to a conclusion after which the convictions already referred to were entered.

The factual background, although complex in detail, can be referred to in very short summary. It appears that the deceased and his wife who lived at Qauia Village believed that a fuse wire had been removed from a fuse box at their house. They were suspicious that this had been done by several young people from the village and they pursued their suspicion by inquiries. They also reported the incident to the police station and named three boys as suspect. The second and fourth accused were two of the three so named. All that occurred on the 2nd of December 1995. On the 4th of December 1995 the deceased was drinking at a house in the village when a group of persons including the accused approached that house. There are varying accounts of what subsequently occurred but there is no doubt that the deceased received a number of kicks and blows and was stomped on the back while he was lying on the ground. He was removed to hospital and died there. According to the post-mortem report (which was available to Counsel although not produced during the course of the hearing), he died from a massive sub-dural hematoma right fronto temp. parietal.

The original grounds of appeal put forward by the first four appellants were apparently adduced by them without the assistance of Counsel. They were replaced for the purposes of this hearing by amended grounds of appeal filed by Dr. Cameron who appeared on behalf of all four. These were conveniently set out in the amended grounds of appeal filed by him in the following terms:

The Judge

(a) breached the rights of the Appellants under sections 29(1) and 28(1)(d) of the Constitution of Fiji when he refused the Appellants'applications.:

(i) that he declare a mistrial; or

(ii) that he stay the prosecution until such time as the Appellants should be provided with separate legal representation; or

(iii) that he adjourn the trial to enable the Appellants to seek separate legal representation; and having refused such applications

(iv) refused to direct that their former counsel withdraw from the representation of the accused Vilise Leweni; and

(v) permitted their former counsel to continue his represenation of the co-accused Vilise Leweni and to conduct his defence in breach of his fiduciary duty to the appellants and of his duty to the Court.

(b) failed to put adequately or at all the Appellant's defence based upon the inconsistency between the evidence of the prosecution eye-witnesses as to the prolonged and vicious attack on the deceased on the one hand,

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and the absence on the evidence of prosecution witnesses adduced by the prosecution of injuries on the body of the deceased consistent with such an attack on the other; and

(c) failed to leave the defence of accident to the assessors; and

(d) failed to impress upon the assessors their duty to be satisfied beyond reasonable doubt of the guilt of each individual accused considering his case separately from that alleged against his co-accused.

The first of the grounds of appeal arises out of the situation which developed at the conclusion for the case of the prosecution when Mr Maharaj, who had up until that time represented all five accused decided that it was inappropriate to continue to do so and from that point on represented only the fifth appellant. The Judge was at this point confronted with a difficult situation. The trial had already been proceeding for some six weeks. A large number of witnesses had given evidence and the prosecution had completed its case. To direct a mis-trial and commence the hearing from the beginning was not an attractive prospect and understandably so. All the appellants had up until that time the support of representation by Counsel. They had made it plain from the outset that they wished to be represented by Counsel. In the circumstances, to have adjourned the matter to allow fresh Counsel to be appointed would have created some degree of inconvenience. Furthermore, on Dr Cameron's submission it could have resulted in the necessity to recall a number of witnesses to cross-examine them in a manner which had not been done earlier in the hearing, in order to ensure that the separate interests of the various appellants were dealt with. The Judge then made a decision to proceed with the hearing as has already been indicated. It proceeded with the fifth appellant being represented and the others appearing on their own behalf, despite the fact that they had previously been represented and had sought representation.

This was a complex case giving rise to difficulties of both fact and law. In

support of his submissions Dr Cameron put forward various contentions which depended upon factual material which he submitted was not before the court and ought to have been. One of his submissions was that the Judge ought not to have withdrawn the defence of accident from the assessors. This contention depended upon questions relating to causation, intention and forseeability. These are not concepts which would be readily understandable by persons with the background of the appellants. These aspects of the case were further complicated by questions arising as to which of the sections of the Penal Code dealing with parties were relied upon by the State during the course of the proceedings. Assuming that both were before the assessors, a certain sophistication was necessary in formulating questions for cross-examination. We cannot accept that this could reasonably have been expected from the appellants.

Quite apart from the complex questions of law and fact, the appellants faced other difficulties of which they were unlikely to have been aware. Problems arose when a decision had to be made as to whether or not the second appellant would be called as a witness by the first appellant. That decision involved an assessment of the interests of both first and second appellants. That needed to be considered in the light of the fact that the statement made by the first appellant to the police was exculpatory of himself and inculpatory of other appellants. By the time it was necessary to make a final and formal decision Mr Maharaj was representing only the fifth appellant and in no position to advise either the first or second appellants of what was in their best interests. The Judge properly informed the second appellant of the disadvantages of his giving evidence in a situation where he could be cross-examined as to matters which affected his own position. He was called upon to make that decision without the advantage of direct and personal legal advice. Dr Cameron put an emphasis on the fact that any information which the first or second appellants had given to their former Counsel, Mr Maharaj, would be difficult if not impossible to isolate from the interests of the fifth appellant whom he continued to represent. We note that in advising the Court of the difficulties which were arising Mr Maharaj indicated that those were complicated by information he had been given that day. We cannot of course speculate as to what that information was but it must have related to the interests of one or

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more of the appellants.

In summary then, this was a difficult and complex case both as to fact and law. The appellants had sought legal assistance but through no fault of their own at a comparatively late stage of the trial, they were deprived of that assistance. It was moreover a state of the trial where decisions had to be made which reflected their separate interests as distinct from those of the other appellants. This gave rise to conflicting interests, a situation which was further complicated by the fact that counsel who had previously represented them continued to represent the fifth appellant. We are satisfied that the interests of justice required the trial to be brought to an end when Mr Maharaj withdrew from representation of the first four appellants and that in spite of the difficulties and expense such a decision would have entailed the trial ought to have been commenced de novo with all appellants being separately represented.

The question then arises as to what is an appropriate outcome at this stage. The first four appellants were all acquitted of murder. If the matter is to be retried, they ought only to be retried in respect of a charge of manslaughter. On the conviction on the charge of manslaughter they were each sentenced to 8 years imprisonment. When the period on remand is taken into account, each has already served in excess of five years imprisonment. It is now 5 years from the date of the trial and there are bound to be problems with witnesses. Having regard to the circumstances, we have come to the conclusion that there ought not to be a retrial in respect of the four appellants. The appeal will be allowed. The convictions in respect of manslaughter will be quashed in respect of each of the four appellants.

Before leaving the appeal of the first four appellants we think it right to comment on a submission made by Dr Cameron as to the relevance of the defence of accident in manslaughter cases of the kind at present before the Court. He submitted following. ***The Queen v. Taiters (1966) 87A Crim. R. 507 (Ca Qld)*** that the Crown must prove that an ordinary person in the position of the appellants would reasonably have foreseen death could follow from his or her actions.

We do not accept that is a correct statement of the law of Fiji. The position in this country is set out in the decision of the House of Lords in ***DPP v. Newbury*** [1977] A.C., 500 quoting from ***Rex v. Larkin*** (1942) 18 where it was said

> ***"where the act which a person is engaged in performing is unlawful then if at the same time it is a dangerous act, that is an act which is likely to injure another person and quite inadvertently the doer of the act causes the death of that other person by that act then he is guilty of manslaughter."***

The House also approved the statement illustrating the meaning of "dangerous" - in ***Reg v. Church*** [1966] 1 QB 59:

> ***"For such a verdict" (guilty of manslaughter) "inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm."***

It follows that the Judge in this case was right to withdraw the defence of accident from the assessors.

Appeal by Fifth Appellant

That leaves the appeal by the fifth appellant. He alone was convicted on a charge of a murder. He was in fact represented throughout by Mr Maharaj. His appeal is accordingly much more limited than that of the first four appellants. It depends upon a contention that the State did not establish the intention necessary to meet the requirement of malice aforethought. This contention depends upon an assertion that the appellant was intoxicated at the time and incapable of forming the necessary intent. Counsel referred us to various authorities which relate to the effect of the consumption of alcohol on criminal intent. There is no dispute that intoxication cannot of itself constitute a defence but is relevant only in a case where a necessary specific intent is said to be negatived by the degree of intoxication

of the accused person. As assessors are frequently reminded, a drunken intent is still an intent.

Mr Shivam quite properly drew attention to the evidence of five state witnesses whose evidence established that the appellant was drunk, that he wasn't still and that when he spoke his body was moving from side to side, and that he was speaking harshly and staggering. This material certainly goes far enough to indicate that the fifth appellant was affected by alcohol. However that must be considered against the fact that he made an unsworn statement from the dock in which he gave an account of what he had done during the day and of going up the hill. His account was coherent and dealt with such detail as the fact that he could see a lantern light inside the house. He spoke of bringing a person down. Neither in that statement nor in the statement that he made to the police did he suggest that he was so affected by alcohol as to be unable to form an intention. Most significantly, however, the record indicates that before Mr Maharaj made his final address to the assessors on behalf of the appellant, he was specifically addressed by the court in the following terms "and you have expressly resiled from the use of intoxication Mr Maharaj and anything following from the medical evidence." Mr Maharaj, "yes my Lord." In his summing up to the jury the Judge correctly stated that before drunkenness can affect the existence of an intent, it would have to be fairly far advanced which, if anything, puts the matter favourably for the appellant. Under those circumstances we could not possibly find that the material upon which Counsel relies is sufficient to establish that the assessors could not have found the necessary intent to justify conviction. The appeal of the fifth appellant must therefore be dismissed.

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Result:

1. The appeals by the first four appellants are allowed, their convictions for manslaughter are quashed and we direct that judgments and verdicts of acquittal are to be entered.

2. The fifth appellant's appeal against his conviction for murder is dismissed.

Sir Maurice Casey
Presiding Judge

Sir Rodney Gallen
Justice of Appeal

Mr Justice John E. Byrne
Judge of Appeal

Solicitors:

Office of J. Cameron Esquire, Perth Australia for the 1st and 4th Appellants
Messrs. G P Lala and Associate Suva, for the 5th Appellant
Office of the Director of Public Prosecutions Suva, for the Respondent

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