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

CRIMINAL APPEAL NO. AAU0058 OF 2002S
CRIMINAL APPEAL NO. AAU0021 OF 2002S
(High Court Criminal Action No.HAC004 of 2001S)

BETWEEN:

PECELI MASIDOLE
MOSESE SETARIKI

Appellants

AND:

THE STATE

Respondent

Coram: Tompkins, JA
Gallen, JA
Ellis, JA

Hearing: Friday, 12th March 2004, Suva

Counsel: Mr O'Driscoll for the Appellant
Mrs A Prasad for the Respondent

Date of Judgment: Friday, 19th March 2004

JUDGMENT OF THE COURT

Introduction

[1] The two appellants and their co-accused Lokimi Rusiate were charged with the murder of Peceli Veremo Senior on 2 November 2000. Following a trial before Shameem J and assessors, they were found guilty, convicted and sentenced to life imprisonment. They have applied for leave to appeal out of time against their convictions.

[2] Many of the relevant facts were agreed. It was not disputed that the deceased, an 80-year-old Fijian man, died as the result of the fire at his home on 2 November 2000. The three accused were present at the time. Following the fire and in the course of police investigations and medical treatment, the three accused made statements that amounted to admissions. Later they were charged with murder either as a principal or as a party.

The trial

[3] The trial commenced on 3 April 2002. The three accused were represented by counsel. They advised the Judge that the admissibility of all admissions by each of the accused would be challenged. After hearing some of the trial evidence, the Court commenced, on 10 April 2002, to hold a *voire dire* to determine the admissibility of the admissions. The *voire dire* was concluded on 16 April 2002. On the next day the Judge delivered her decision, in which she held that, other than the statement of the first appellant to Adre Nama of 2 November 2000, the admissions made were admissible.

[4] The trial concluded on 25 April 2002. The unanimous opinions of the assessors were that the first and second accused, the first and second appellants, were guilty. The third accused was not guilty. The judge agreed with the assessors' opinions. The first and second appellants were convicted of murder and sentenced to life imprisonment. The third accused was acquitted.

The appeals

[5] By a petition of appeal presented on 4 June 2002 and received by the Court on 7 June 2002, the second appellant applied for leave to appeal out of time. The accompanying letter set out five grounds of appeal.

[6] By a petition of appeal presented on 19 December 2002, apparently received by the Court on the same day, accompanied by a letter of that date, the first appellant gave notice of appeal against conviction. The accompanying letter set out four grounds of appeal.

[7] It is apparent from the accompanying letters that both appeals were prepared and presented without the benefit of professional legal advice. Both appeals were out of time, the second appellant's by a few days, the first appellant's by about seven months. Although the first appellant's petition and supporting letter did not seek leave to appeal out of time we will treat them as an application for such leave.

[8] The State raising no objection, both appellants are granted leave to appeal out of time. The time for the first appellant to appeal is extended to 19 December 2002, the time for the second appellant to appeal is extended to 7 June 2002.

[9] In both cases the grounds of appeal stated are against questions of fact alone. Pursuant to s 21 (1) (b) of the Court of Appeal Act, leave is required where the grounds of appeal raise questions of fact only. In both cases, we will treat the petitions of appeal as notices of applications for leave to appeal.

The grounds relied on

[10] Counsel for the appellants submitted that the statement made by the first appellant to Special Constable Iowane should not have been admitted as the first appellant was drunk when he made that statement. He submitted that the statement by the second appellant to Sergeant Aca White should not have been admitted as the second appellant was drunk and tired when he made that statement.

[11] Counsel responsibly accepted that there were no bases upon which the other grounds of appeal set out in the accompanying letters could be supported.

[12] The issues now relied on were considered by the Judge in her decision on the *voire dire*. Concerning the first appellant she said:

> "As to his alleged state of drunkenness, I accept the evidence that he was smelling of alcohol and that his eyes were blood-shot. However, in order for the questions to be unfair, the alcohol consumption must have affected the accused's ability to speak freely and without oppression."

[13] After reviewing the evidence on this issue that was available, she concluded:

> "I therefore find, that although the first accused had consumed alcohol, he was not drunk when he spoke to SC Iowane. I am further satisfied beyond reasonable doubt that there was no unfairness or oppression on the part of SC Iowane on speaking to him and I hold that this admission is admissible in evidence."

[14] Concerning the formal statements made by both appellants to Sergeant White the Judge said:

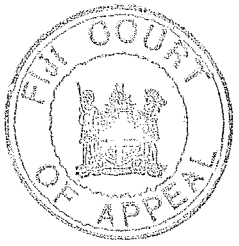
> "I accept Sergeant White's evidence that the accused were each speaking normally and were not drunk although their clothes smelled of liquor. I accept that Sergeant White was in the best position to assess, (as SC Iowane was earlier) whether the accused persons were capable of understanding the significance of the questions put to them, and, in Sergeant Aca's [Whites's] case, the significance of the caution. The questions put to the accused were plain and simple and easy to understand, particularly in the Fijian language. The first accused's response was similar to his earlier response (and to his later interview at Navua) and I am satisfied beyond reasonable doubt that the admissions were both voluntary and fairly obtained."

[15] Neither appellant gave evidence. The extent to which, if at all, alcohol affected the appellants when they were making the admissions is entirely a question of fact. There can be no suggestion that the Judge approached this issue taking into account irrelevant factual evidence or omitting to take into account relevant factual evidence. On the contrary, on the evidence before her, the conclusion she reached was clearly appropriate. These grounds of appeal cannot succeed.

Result

[16] There are no other grounds on which the convictions can be challenged. The application for leave to appeal of each appellant is dismissed.

Tompkins, JA



Gallen, JA

Ellis, JA

Solicitors:

Messrs. O'Driscoll and Shivam, Suva for the Appellants

Office of the Director of Public Prosecutions, Suva for the Respondent