IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

Criminal Appeal No: AAU 0094 of 2010
(High Court Case No: HAC 024 of 2006)

BETWEEN : **VAIONE TEGU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini, P**
Jayamanne, JA
P. Fernando, JA

Counsel : **Ms. S. Vaniqi for the Appellant**
Mr. M. D. Korovou for the Respondent

Date of Hearing : **9 February 2016**

Date of Judgment : **26 February 2016**

JUDGMENT

Calanchini P

I agree that the appeals should be dismissed.

Jayamanne JA

Background

1. Two accused were charged in the High Court with two counts. First count was in relation to first accused Leinaitasi Lekanagata. He was charged under section 245 of the Penal Code for causing hurt to one Sairusi Seganaluvena on 27th May 2006.

2. The second count was in relation to the second accused Vaione Tegu under section 199 and 200 of the Penal Code for committing the offence of murder of the said Sinu Seganaluvena on the same day.

3. At the commencement of the trial the 1st accused pleaded guilty to count one and the court accordingly found him guilty and imposed a sentence at the end of trial.

4. The second accused who is referred hereinafter to as the appellant pleaded not guilty to the charge of murder, but pleaded guilty to the charge of manslaughter. Accordingly trial proceeded against the appellant for murder. At the end of the trial three assessors found him guilty for murder. The High Court Judge after having accepted the verdict of the assessors convicted the accused for murder, and imposed a life sentence of imprisonment with a non-parole period of 11 years.

Grounds of Appeal

5. The appellant was granted leave by a single Judge against the conviction under following grounds:

   i. *The judge misdirected the assessors on the defence of intoxication*
   ii. *The failure of the trial judge of giving proper direction to his plea of guilty to manslaughter*
   iii. *That the prosecution has failed to prove all the elements of the offence of Murder.*

Arguments of the counsel for the Appellant in the appeal

6. The counsel for the appellant submitted that she relies on the written submission already filed in the case. In addition she made oral submission in support of the appeal.

7. The bone of the contention of the counsel during her oral submissions was that:

   i. *The accused-appellant was drunk so much so that the accused did not know what he was doing and by reason of intoxication he was insane, at least temporarily.*

   ii. *The trial judge has not given sufficient directions or given misdirection with regard to defense of intoxication and manslaughter.*

   iii. *The prosecution has not established beyond reasonable doubt the causation as there was evidence to show that the blows inflicted by others were responsible for the death of the deceased.*

8. The counsel specifically submitted that the accused in his testimony at page 215 said that he could not recall what had happened that night as he was too drunk. The relevant evidence is as follows:

   'On 26/5/06 we drank grog at Accused No.1's house. Myself, Accused No.1 and his father Ilisoni. I did not eat. We started at 7 pm and finished at 11pm. I brought a bottle of 40 oz rum to wash down. We drank rum after the grog... we later mix the rum and beer in the jug and drank it slowly' .... 'I saw Accused No. 1 punched Sairusi (the deceased) but I cannot pin point the exact spot because I was too drunk'.

9. Referring to further cross examination at page 216, counsel stressed that the accused told the court that he could not remember what he did. Therefore the counsel urged that the accused was so intoxicated.

10. The counsel referred to the testimony of Dr. Gene Perera, the experienced Pathologist which is at page 214 and argued that a drunken person could have gone through a ' black out' and therefore the counsel submitted that assessors should have been directed to consider the offence of manslaughter. The relevant portion of the testimony of Dr. Perera is as follows:

> *"Alcohol affects the body and brain. It slows your reaction and dulls your senses. If you drink alcohol in large amount, on an empty stomach, it could cause a black out. The more you drink, the more it affects your mind".*

11. Counsel invited our attention to an event which occurred at 'Tiki Bar' a few hours prior to the main incident. The evidence is found in the Agreed Facts at pages 155-161. The parties agreed to admit the statements of Keba Philips dated 27/05/06 and 29/05/2006 and the statement of Atelini Nasuka dated 28/05/06. According to Keba Philips, a sister of the deceased they had drinks at the Bar. On their way back one Joshua who also was in the drinking in the Bar, punched the deceased.

12. Counsel referred to the testimony of the appellant at page 215 and showed that the first accused (Lenaitasi) also punched the deceased later in the house of the 1st accused. This had happened one hour prior to the appellant attacked the deceased.

13. In the circumstance counsel argued that the deceased was attacked on two occasions previously. She argued that the prosecution has not established that the blows given by the appellant caused the death.

14. The counsel for the respondent countered the arguments. The gist of the argument is as follows:

    i. *Totality of evidence clearly shows that though the accused was drunk he was aware of what he was doing and in any event the accused was never insane due to the consumption of alcohol. The conduct and utterances made by the accused are clear evidence of the knowledge and the intention.*

ii. *In order to properly comprehend one needs to carefully examine the testimony of Dr Gene Perara. She has merely expressed a general situation that could occur to some drunken persons. The evidence cannot be generalised and arrogated to the accused as Dr Gene Perera or any other doctor has not examined the accused after the incident.*

iii. *In two previous incidents the deceased had not sustained any serious injurious and as such he was conscious. He was even able to walk. Those previous incidents were relating to just cases of assault.*

iv. *Dr. Gene Perera's evidence demonstrates that after receiving the deadly blows to the head, the person should become unconscious immediately.*

v. *Therefore the prosecution has proved beyond reasonable doubt the link between the blows given by the accused and the cause of death.*

vi. *The trial judge has fairly and sufficiently given directions with regard to intoxication, the knowledge of the accused, the elements of murder and manslaughter, causation and evidence relating to drunkenness.*

vii. *There exists no justifiable grounds to convict the accused for lesser offence of manslaughter.*

Facts

15. In order to have proper understanding of the events it is essential to lay down the evidence in chronological order.

Incidents at Tiki Bar

16. The deceased and his friend Josua Colaudolu started drinking at Tiki Bar around 7.30pm on 26th May 2006. Later the sister of the deceased named Keba Philips, her family and one Atelini Nasukau, a friend of Keba also came to the Bar and joined the deceased.

17. They started leaving the Bar and Josua Colaudolu punched the deceased. The matter was settled and the deceased and Josua proceeded towards the house of the 1st Accused who was a friend of them at around 2.00 am.

Events at the residence of the 1st Accused

18. The 1st Accused and his family members and relatives namely Mere Tawakedrau (Wife of the 1st accused), Ratu Ilisoni (Son of the 1st accused) Merelita Marama (sister in law of the 1st accused) lived in this house. Around 7.00 pm on the day in question the appellant who was a cousin of the 1st accused visited them to spend the week- end. The appellant came with a bottle of 40 oz rum. The 1st accused, the male members of his family and the appellant started drinking grog.

19. When grog was over they drank a bottle of rum around 11 pm. When the bottle of rum was over the Ilisoni and the accused went out and brought two bottles of beer. Sometime later when the 1staccused went out, he met the deceased who was returning from Tiki Bar. One Jone also joined them. The 1st accused returned to the house with the deceased and Jone.

20. The deceased was drunk and he could not even remove his shoes. The deceased was talking a lot. Based on the behaviour the witness Illosoni concluded the deceased was so drunk.The deceased is alleged to have winked at the wife of the 1st accused. The deceased and the 1st accused went outside and resolved the issue through a fist fight. The deceased received injuries to his eyes and face. Both came back and the deceased rested in the settee of the sitting room. The appellant also questioned the deceased as to why he winked at wife of the 1st accused.

Events on the road

21. A neighbour named Josua Cakautini, the main witness gave detailed account of the events that led to the death of the deceased. It can be categorised in to three phases:

i. *He heard the yelling of the deceased who said 'Oilei, me'u bula! Olei! I want to live'. The appellant punched more than 10 times on the face of the deceased who was seated on the settee. The appellant kicked the deceased thrice on the face when the witness held the hands of the appellant. Those were kicks were like rugby kicks.*

ii. *When the deceased stood up and started running out of the house the appellant asked him to stop and chased behind the deceased. When the appellant tripped, the deceased fell on the ground. Then appellant kicked on the ribs of the deceased. Again witness held the hand of the appellant. .*

iii. *The deceased stood up started running again and the appellant shook the hand of the witness and followed the deceased. Thereafter appellant punched the jaw of the deceased with his right hand. The deceased was thrown and fell on the tar sealed road. The witness and Illisoni pleaded with the appellant to stop. The appellant told them that 'this person is cheeky, he must die' and thereafter the appellant jumped and stomped twice on the head of the deceased. He observed that the deceased finding it difficult to breath. The witness observed 'deceased sounded snoring and something stuck on his windpipe.'*

22. Around 6.30 am a neighbour, Nanise Ledua found the deceased lying on the ground. The deceased was snoring, his head was bleeding and the face was swollen. He rushed the deceased who was unconscious to the hospital.

23. The deceased suffered from brain injuries and he was pronounced dead on the following day, which is at 3.00 am on 28th May 2006.

Analysis of law

24. The accused was charged with the offence of murder under Section 199 of the Penal Code. One of the important elements of the office is that the accused had the intention to cause death or cause grievous harm. It is the duty of the prosecution to establish the said element beyond reasonable doubt. If the prosecution is unable to prove the intention the accused will be guilty only for the offence of manslaughter under Section 198 of the Penal Code provided that prosecution has proved the unlawful act and the causation. The absence of intention may arise due to a number of reasons. One of the

reasons could be intoxication. Therefore the prosecution must establish that even if the accused is intoxicated, he had the necessary intention. Then only the prosecution shall succeed in securing a conviction for murder.

25. It is also relevant to refer to Section 13 of the Penal Code. The examination of the section shows that intoxication could be used as a defence only if the accused did not know what he was doing and by reason of intoxication he was insane at least temporarily at the time of the act. Section 13 reads as follows:

> "**Intoxication**
>
> *13.-(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.*
>
> *(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-*
>
> *(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or*
>
> *(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.*
>
> *(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply. (Cap. 21)*
>
> *(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.'*
>
> *(Emphasis added)*

26. This means if there is evidence to show that the appellant did not know what he was doing and he was insane due to intoxication he is not guilty of any offence. This would require the court to report the case for an order of the President. The President may order such person to be confined in a mental hospital, prison or other place of

safe custody (vide Section 150 of the Criminal Procedure Code). Under Section 105 of the Criminal Procedure Decree the court shall confine such accused person in a mental hospital, a prison or a declared mental health facility, for safe custody.

27. If we were to consider that the accused did not know what he was doing due to intoxication and he was insane then there must be evidence showing that he was insane at least temporally.

Directions of the Judge

28. The defence during the trial advanced the defence of intoxication and argued that the appellant is guilty only for the offence of manslaughter as the accused did not know what he was doing. The trial Judge at paragraph 39 of the summing up in no uncertain terms directed the assessors that the prosecution must establish that the accused was capable of forming an intention to kill or cause serious harm. In paragraph 40 the trial judge has drawn the attention of the assessors the position of the appellant who said in his testimony that he never intended to kill the deceased. The position of the trial Judge is consistent with principle laid down in **DPP v Majewski** [1976] 62 Criminal Appeal R.262 by Lord Salmon at p275:

> *"If appellant killed or committed grievous harm whilst he was drunk,* ***this factor should be taken into account with all the other evidence in deciding whether he had intended to kill or to commit grievous harm.*** *If this question was decided in the accused's favour, he would be found not guilty of murder but guilty of manslaughter...This "does not mean that drunkenness, of itself, is ever a defence. It is merely some evidence which may throw a doubt upon whether accused had formed the special intent which was an essential element of the crime with which he was charge. Often this evidence is of no avail because obviously a drunken man may well be capable* ***of forming and does form the relevant criminal intent****; his drunkenness merely diminishes his powers of resisting the temptation to carry out this intent."[Underlining emphasis added].*

29. At paragraph 13 the trial judge directed the assessors to consider physical actions, spoken words and surrounding circumstances to ascertain whether the accused had the intention or not. At paragraph 13 the judge reiterates that the prosecution must establish the element of intention beyond reasonable doubt.

30. At paragraph 15 the judge again stresses that assessors must decide whether the accused was so drunk as to be incapable of forming an intention to cause death or serious harm.

31. At paragraph 25 the judge states;

> *'The accused was trying to say that he was so drunk that night, he was incapable of forming an intention to kill or cause harm to Sairusi,and thus, he is not guilty of murder, but guilty of manslaughter. In his evidence, he said he had no intention to kill'.*

32. The Judge at paragraph 41 explains that drunken intent is still intent in law. The learned trial judge has followed the principle laid down in **Romanu Naceva & Others** (2001) 2 FLR 166 AAU 14/98 (HAC 22/96) 24 May 2001 where it was held that intoxication cannot itself constitute a defence but is relevant only in a case where necessary specific intent is said to be negative by the degree of intoxication of the accused person

33. At paragraph 42, the High Court Judge directs that the assessors being judges of facts have to determine the question of intoxication after considering all the evidence in the trial. Paragraph 42 reads as follows:-

> *"42. As a matter of law, self induced intoxication is no defence to a criminal charge. However, you must take into account, as one of the many factors to be considered, when determining whether or not Vaione had formed an intention to kill or seriously harm Sairusi, at the time he was punching, kicking and stomping on him, on 27th May 2006. You must analyse the evidence given in the light of the above direction. Whether or not you accept the defence or State's version of events, on this issue, is a matter for you, as assessors and judges' of facts."*

34. The trial Judge at paragraph 39 of his summing up had dealt with the positions of both sides. He said that:

> ***"The defence's position was that Vaione was so drunk from consuming beer and rum, at the time, that he was incapable of forming an***

intention to kill or cause serious harm to Sairusi. *On the other hand, the State's position was that, although Vaione was extremely drunk, at the time, he was still capable of forming an intent to kill or seriously harm Sairusi at the time. A drunken intent, according to the State, is still an intent, in law." [Underlining emphasis added].*

Consideration of grounds one and two of the appeal: Intoxication

35. The major issue that has to be determined is whether the appellant had the necessary intention to cause either death or serious harm to the deceased. It is the common position of both the prosecution and defence that the appellant was drunk at the time of committing the alleged acts. The cardinal question is whether the appellant due to drunkenness was in a position to form the necessary intention. It is a question of fact and the learned trial judge has sufficiently explained the law relating to the intoxication and how it should be applied. The vital aspect of the case is the degree or the level of the intoxication and the manner it has affected the mental capacity of the appellant. We need to examine whether the trial judge has fairly and sufficiently brought the matter to the notice of the assessors.

36. The accused was not subjected to any clinical or scientific examination soon after the incident. Dr Gene Perara, the experienced pathologist who was summoned to give evidence with regard to the post mortem examination of the deceased expressed general opinion as to the drunkenness. Her testimony was related only to general observation of impact of the mental capacity of a drunken person. The relevant portion of the evidence appears at page 214 which is reproduced in paragraph 10 above.

37. Since the observation of the doctor is very general in nature it does not lend sufficient support to arrive at any conclusion with regard to the degree of the drunkenness and intoxication of the appellant. Therefore it has become more relevant to examine the surrounding circumstance and items of circumstantial evidence to resolve the matter. It is common sense that different people have varied capacity for consumption of alcohol and their response to alcohol. Some people with a small amount of alcohol show signs

of intoxication. Others, however, however much they drink, don't show any sign of intoxication and it is a relative and subjective matter.In the circumstance it is of paramount importance to examine the testimonies of the eye witnesses who have observed the behaviour and conduct of the accused in order to resolve whether in fact the accused had the intention or not.

38. Evidence of Josua Cakautini throws more light on the subject as set out briefly in paragraph 21 of the judge's judgment. The deceased was yelling "*I want to* live' while seated on the settee. The accused was standing and gave more than 10 punches to the face of the deceased. The deceased was in a helpless position and he pleaded the help of the witnesses. When the witness ran and held the hands of the accused; he kicked on the face of the deceased three times. The accused exactly knew who his target was and the area upon which he should direct his blows. He never attacked the witness or attack any region of the body of the deceased which is not. The witness describes the kicks similar to 'rugby kicks'. Even when the hands were held the accused was able to give kicks without losing his balance.

39. When the deceased ran out, the accused was able to chase and trip the deceased. After the fall of the deceased, the appellant decided to kick on the ribs. When the witnesses held the appellant they were not attacked. When the deceased started fleeing the accused chased the deceased again.Thereafter the accused using his right hand punched the jaws of the deceased. The deceased never defended himself. Those punches were very strong to which the deceased got thrown out and hit on the tar sealed road.

40. When Ilisoni, another witness called the appellant to stop the attack the appellant said in clear language: "*No, he is cheeky and he must die*". This shows that the appellant exactly understood what the witness told the appellant and what the accused wanted to do and the reason for the attack. Thereafter the accused jumped and stomped twice at the head of the deceased. Then only the witness Josua realized the '*changing of breathing of the deceased. The deceased sounded like he was snoring and something stuck in his windpipe.*'

41. Dr. Gene Perera provides an opinion as to the nature of the force of the blows. At page 212 she says that those injuries on both side of the skull may have been caused due to blow with blunt object. Repeated blows to head could give rise to swelling of the brain.(page 214)

42. The appellant in court said that he could only remember the puching. But in caution statement he has admitted stomping the deceased twice when he was lying down. (Question no.76, page 169).

43. The analysis made above shows beyond any doubt that the appellant definitely entertained murderous intention and he exactly knew what he was doing. Though it appears that he was drunk there is no evidence of insanity. During the trial the defence never took up the position that the appellant was insane due to intoxication. In any event there is no evidence to show that he was insane. In the circumstance there is no basis to act under Section 13 of the Penal Code.

Consideration of Ground Three of the Appeal: Causation

44. The prosecution is required to prove that death was caused due to the blows of the accused. There had been two previous incidents where the deceased was attacked by persons other than the accused. At the Tiki Bar one Josua Colaudolu had punched the deceased. The sister of the deceased Keba Philips intervened and settled it. Another witness Atelini Nasuku says that Josua slapped the deceased and the fist of Josua landed on the mouth of the deceased. After arrival of the police, the deceased and Josua reconciled and left the place. From all accounts it was a case of minor incident and there were no blows on the head of the deceased. There is evidence that it was not a serious injury and the deceased was conscious and was in a position to walk. Therefore it cannot be the fatal blow that was inflicted on the deceased.

45. At the house, the 1st accused punched the deceased as he has allegedly winked at the wife of the 1st accused. The accused giving evidence said the 1st accused punched the face once (page 215). He doesn't say that the 1st accused gave any blows to the head. The accused attacked the deceased some time later. There is no evidence to the effect that after the punch of the 1st accused, the deceased fell or he became unconscious. The 1st accused pleaded guilty to the charge of assault and he was convicted.

46. Dr. Gene Perera states that the cause of death was due to the injuries caused to the brain arising out of multiple blunt objects. (Paragraph 213). As a result of the blows given to the head a person losses consciousness immediately.Severe bleeding was observed in the brain and it was caused by blows. When pontine in the brain get damaged a person loses consciousness and when taken to hospital he passes out.

47. According to the witness Josua Cakautini soon after the stomping the deceased had difficulties in the breathing and stared snoring. He sounded that something stuck on the windpipe.Therefore the eye witness's testimony is amply corroborated by Dr. Perera. The deceased was conscious up to the point the accused stomped the deceased. Therefore I hold that causation is unequivocally linked to the accused.

48. In support of causation the prosecution advances an additional point too. The appellant pleaded guilty to charge of manslaughter. Therefore the prosecution argued that infact the accused had admitted to the fact that the death was caused as a result of an unlawful act committed by him. I accept the argument of the respondent. I conclude that the medical evidence strengths the prosecution case and has thus established the element of causation.

49. In any event if the unlawful acts committed by the appellant hastened the death of the deceased, the accused is liable for the death. There are several decided cases to support this proposition.

50. The trial judge has given sufficient directions to the assessors with regard to the issue of causation at paragraphs 34-38 of the summing up (Pages37- 40).

51. For the reasons set out above, I hold that three grounds of appeals have not been established.

Conclusion

52. The learned trial judge has adequately directed the assessors with regard to the issues of intoxication and the causation. In any event I do not find that there has been any miscarriage of justice caused to the accused. There exists no merit in the grounds of appeal raised by the counsel for the appellant. Therefore I would dismiss the appeal and affirm the conviction and the sentence imposed by the High Court Judge.

P. Fernando JA

I have read the draft judgment of Jayamanne JA and agree with it.

The Orders of the Court are:

1. Appeal dismissed.

2. Conviction and sentence imposed is affirmed.

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Hon. Mr. Justice W.Calanchini
PRESIDENT, FIJI COURT OF APPEAL

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Hon. Mr. Justice S. Jayamanne
JUSTICE OF APPEAL

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Hon. Mr. Justice P. Fernando
JUSTICE OF APPEAL