

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

CRIMINAL APPEAL 0045 OF 2014
(High Court Criminal Case No: HAC 042 OF 2012)

BETWEEN : **DEVENDRA NAIKER**
Appellant

AND : **THE STATE**
Respondent

Coram : **Calanchini P**
Chandra JA
Bandara JA

Counsel : **Mr A Singh with Mr D Kumar for the Appellant**
Ms S Alagendra with Ms S Tivao for the Respondent

Date of Hearing : **11 May 2018**

Date of Judgment : **25 June 2018**

JUDGMENT

Calanchini P

[1] I agree that the appeal against conviction should be dismissed and that the minimum term before a pardon may be considered should be reduced to 13 years.

Chandra JA

- [2] I agree that the appeal against conviction should be dismissed, and that the minimum term to be served for consideration of pardon should be reduced to 13 years.

Bandara JA

- [3] The appellant was charged with the following count before the High Court at Suva.

*“Murder: Contrary to section 237 of the Crimes Decree No.44 of 2009.
Devendra Naiker on the 20th day of December 2011 at Nausori in the Eastern
Division murdered Bishal Anand Mishra”*

- [4] The assessors returned unanimous opinions of guilty on the said count charged in the information. The trial judge concurred with the assessors’ opinions.

- [5] Accordingly the appellant was convicted for murder and sentenced to life imprisonment on 11 April 2014 with a minimum term of 20 years before a pardon may be considered. The main grounds of appeal advanced on behalf of the appellant are as follows:

“Grounds of Appeal:

- 1) *That the learned judge erred in law in disallowing the Appellant the opportunity to cross examine the Police witnesses at the trial proper in prior inconsistent statements which arose from their voire dire evidence.*
- 2) *That the learned Trial Judge further erred in law in disallowing cross examination questions on prior inconsistent statement arising from Voire Dire evidence which he uttered in Court that is why he had left the issue for the Assessors to decide when it should have been for him to decide whether or not the statements given to the Police were inadmissible or not.*
- 3) *That the learned Judge erred in law in allowing the Caution Interview statement in evidence without any written ruling on the voire dire ruling until after the sentencing of the Appellant.*

- 4) *That the learned Judge erred in law and in fact in ruling that the caution interview was admissible on evidence when not considering the evidence given by Doctor Upendra Singh after cross-examination, when he agreed that the rib cage tenderness may have been caused by a punch and that the Appellant who was not suffering from Arthritis.*
- 5) *That the learned Judge erred in law and in fact in ruling that the caution interview was admissible in evidence when not considering the evidence given by Doctor Upendra Singh after the cross-examination when he agreed that the rib cage tenderness may have been caused by a punch and that the Appellant was not suffering from Arthritis.*
- 6) *That the learned Judge erred in law and in fact in admitting the caution interview statement into evidence when he did not give proper consideration to the evidence of Pastor Ronald Ram who stated in his evidence that he received a phone call from Ashok Naiker who was at the Nausori Police Station, confirming that the Appellant had been assaulted.*
- 7) *That the learned Judge erred in law in refusing to note down the Appellant's record as requested by the Appellant.*
- 8) *That the learned Judge erred in law in failing to give the assessors the proper warning in dock identification evidence.*
- 9) *That the learned Judge erred in law in failing to direct the assessors in the absence of fingerprints and blood samples evidence, even though there was evidence led that the fingerprints and blood samples on the crime scene was taken.*
- 10) *That the learned trial Judge erred in law when he disallowed Nilesch Kumar in giving evidence by ruling that he was an alibi witness when he was not an alibi witness but was to corroborate the evidence by Rakesh Chand.*
- 11) *That the sentence was harsh and excessive in the circumstances."*

The facts of the case briefly

The case is based completely on circumstantial evidence.

[6] Prosecution witness No.1 Dhiren Prasad was the brother-in-law of the deceased.

On the day of the incident (20/12/2011) the appellant who happened to be a friend of the witness had phoned him and asked where the deceased was and whether the deceased's wife (the sister of the witness) had gone to the market or not. The witness had told the appellant that the deceased had gone to drive the taxi and the sister had not gone to the market on that day.

- [7] The brother of the deceased had testified and said that the deceased was a taxi driver and the taxi bearing registration No. LT 3915 belonged to the witness. On the day of the incident he had been at the taxi base when he saw the appellant going to Pete Fong's shop carrying a small bag with a handle. He knew the appellant as a person living in the same community. When the witness called the deceased over the phone regarding an issue with regard to a tyre the deceased had told him that the appellant had asked him to drop him at Korociriciri. Thereafter the witness had gone home and that was the last time he had heard from the deceased. Later on he had come to know that his brother had been murdered.
- [8] Asish Sami had testified stating that he was a friend of the appellant and on 20/12/2011 as they met after a long time both had decided to go for a drink. He and the appellant had been drinking beer till 4.00pm, at Nausori Club in Nausori Town.
- [9] Witness Melvin Nadan who was a taxi driver whose taxi base was R.B.Patel Taxi base, stated that on 20.12.2011 in the afternoon whilst he was at the taxi base having parked his car there, the deceased had come and spoken to him. Then the deceased had got a hire and had left him. At that point the appellant had come there and asked the witness about the deceased. He had asked whether he saw the deceased. At that point the witness got a hire to be driven and the appellant had gone and spoken to another driver at which point the deceased came back. The time had been around 6.20pm. The deceased had taken the appellant in his taxi and driven away.
- [10] According to witness Divesh Karan (another taxi driver) at 6.45pm, he had been at the R.B. Base and talking to the appellant. After that the deceased had come there in his taxi.

Thereafter he had seen the appellant and the deceased leaving the place in the taxi driven by the deceased.

- [11] Juta Douglas who was working as a Salesman at Peter Pan in December 2011 had told the court in his evidence that they sold kitchen accessories, knives and other items.
- [12] Witness Nand who was a farmer at Korociriciri had proceeded to return home after work around 6pm (he had not been sure about the time). Whilst returning home he had seen a vehicle at Vusuya roundabout. In the vehicle he had seen two people talking.
- [13] According to witness Naqaruqaru he was residing at Vusuya road at the time of the incident. On 20/12/2011 at about 6.30 he had been having dinner, when he heard the sound of a vehicle going past his house on the road. Upon hearing the sound he along with another person had come out. Witness's uncle also had come out and had told them to run after the vehicle.
- [14] When the witness and others started to run towards the vehicle it had stopped. The appellant had come out of the vehicle. Witness and others shouted at him saying "*thief*" whereupon the appellant had started to run. The witness and others have started to chase behind him. Whilst running the appellant had thrown something which the witness was unable to find. The witness and others had given chase and caught the appellant. The appellant had knelt before them and cried. They had given chase to the taxi because it was unusual for a taxi to go at a high speed on that road. The appellant had been with them for about 20 minutes before finally releasing him.
- [15] Witness Ratu Meli who also took part in chasing the taxi and the appellant, had corroborated the narration given by witness Tevita Naqaruqaru. When the witness who was giving chase got close to the appellant he had begged the witness not to catch him. He had told him that he was looking for Christmas money and again he had been making a deal for a goat. Since the appellant kept begging them not to harm him they had felt sorry and finally let him go. However when the witness was taken before the

identification parade to identify the appellant, he had identified a wrong person. In his testimony the witness had explained the reason for his failure to identify him in the following terms.

“When I went to identification parade at Nausori Police all the Indian man in lined in front of me. I was frightened when I saw him. When they told me to point at the person who commit the murder since it was my first time I pointed a wrong man. After that I came back and police officers told me that I pointed a wrong man. And I gave another statement.”

- [16] Witness Rakesh Chandra had been a resident of Korociriciri. On 20/12/2011 at about 7.30pm he had been relaxing at home when he saw the appellant passing by. He had known the appellant for about 11 to 12 years. He had said ‘hello’ to the appellant and the latter had come to his home. Then he had asked for a box of matches since he wanted to smoke. When the witness asked where the appellant had been he had said that he had been in the river catching fish. When he was asked whether he caught any, appellant had said ‘no.’
- [17] Witness Sadya Nand was also a resident at Korociriciri. On 20/12/2011, he had been at his home drinking grog with the neighbor Raj. The appellant had come to his home along with one Peter. The appellant too had joined them in drinking grog. After about 20 minutes somebody called the accused on his mobile phone. Having answered the mobile phone the appellant told the witness that police were waiting for him at his place and left. After about an hour later the appellant had returned and told them that somewhere a murder had taken place and the police asked him about murder. They had continued drinking grog till 1.am.
- [18] According to Detective Corporal Arvind Singh, investigations had revealed that the place where the taxi had been chased by the above said witnesses was close to the crime scene.
- [19] Witness Tevita had further stated that at the time they caught the appellant he had blood on both of his hands. Upon questioning, the appellant had said, that he had gone to buy a

goat with his friend and two Fijian men assaulted him. Appellant had further said that his friend was lying there and he was running away with the taxi.

- [20] The above version had been corroborated by witness Ratu Meli Draunimasi.
- [21] The police investigating officer Arvind Singh had stated that the appellant had come to the police station upon being asked to come and they had proceeded to arrest him.
- [22] The police had found the deceased's taxi abandoned at a place about 1.5km away from the dead body. No finger prints had been recovered from the taxi.
- [23] On 21/12/2011 upon information received at the investigation, Inspector Kumar had gone to the house of the appellant in the early hours and asked him to come to the police station in the evening. When the appellant came to the police station he had been arrested.
- [24] According to Dr Goundar the death of the deceased was caused due to multiple cut injuries.
- [25] At the trial the appellant had given evidence and denied having killed the deceased or causing him injuries. According to him the deceased had dropped him at Korociriciri. He had got into the rear seat of the taxi and whilst travelling they had engaged in a friendly chat. After he was dropped off he had gone to a nearby creek. He had admitted having gone to Rakesh's house and asking for a box of matches and joining a friend to indulge in a session of having grog.
- [26] I hold that the above pieces of circumstantial evidence when taken in its totality overwhelmingly pass the threshold of the irresistible conclusion test pertaining to circumstantial evidence and prove the case against the appellant beyond reasonable doubt.

“In Blackstone’s Criminal Practice 2004 (Oxford University Press 2004) pp.1998 – 1999 define and describe circumstantial evidence.

Circumstantial Evidence : works by cumulatively in geometrical progression eliminating other possibilities (DPP v Kilban [1973] AC 729 per Lord Siman at p.758)

Pallock CB likening circumstantial evidence to a rope comprised of several cords said;

“One strand of the cord might be insufficient to sustain the weight but three stranded together may be quite sufficient strength.

Thus it may be circumstantial evidence – there may be a combination of circumstances no one of which would raise a reasonable conviction or more than a mere suspicion; but the whole taken together may create a strong conclusion of guilt, that is with much certainty as human affairs can require or admit of (Exall 1866) 4F & F922 at page 929.”

- [27] I also consider the following matters in relation to the grounds of appeal that have been raised.
- [28] The learned High Court judge in his summing up at paragraph 7 and 8 had adequately dealt with the issue of how a case should be proved beyond reasonable doubt on the basis of circumstantial evidence.
- [29] On 22/12/2011 Dr (Mrs) Lasaro had examined the appellant. Appellant had told her that he had acted in self defence and in the process he had unintentionally stabbed the deceased several times on the neck and the chest of the deceased. He had also said that he had sustained lacerations on his finger tips on the left hand whilst trying to defend himself.
- [30] In **Senijeli Boila v The State**, Criminal Appeal No. CAV 0005 of 2006, Court of Appeal observed that no specific directions are required of a trial Judge in directing in the case of circumstantial evidence.

[31] Ground 8 of the grounds of appeal regarding dock identification needs specific consideration since the State has conceded that it is arguable.

[32] In **Senijeli Boila v The State** (Criminal Appeal NO. CAV 005 of 2006S, 25th February 2008) it was held:

“what is required is a clear direction that the tribunal of fact must be satisfied of the guilt of the accused beyond reasonable doubt.”

[33] The circumstantial evidence against the appellant is overwhelming. In the circumstances of the case the dock identification pertains only in respect of two witnesses who merely form two chords of the rope.

[34] However, they have stated that the appellant was with them for about 20 minutes which negates the test of ‘*fleeting glance*’ as per Turnbull principle. I hold that no prejudice has been caused to the accused by the said failure on the part of the trial Judge.

[35] Rules that should be followed when a case is to be proved on circumstantial evidence were set out by the Court of Appeal in **Lole Vulaca and two others v. The State** Criminal Appeal No. AAU0038/08: 29th August 2011 [2011 FJCA39], when it endorsed the following directions in the summing up made to the assessors by the High Court Judge.

“Remember that in considering circumstantial evidence you must be satisfied beyond reasonable doubt that the only reasonable inference available to you is the guilt of the accused before you can find them guilty. If you find that there are other reasonable inferences you can draw which are consistent with the Accused’s innocence or if you have a reasonable doubt about it, then you should find each not guilty”

[36] Having regard to the above I would hold that the charge against the appellant is proved beyond reasonable doubt on the circumstantial evidence considered above.

[37] Accordingly I would dismiss the appeal. However I reduce the minimum term before a pardon may be considered to 13 years.

Orders:

1. *Appeal against conviction is dismissed.*
2. *Appeal against sentence is allowed.*
3. *Sentence passed by the High Court is set aside.*
4. *Appellant is sentenced to a mandatory term of imprisonment for life with a minimum term of 13 years before a pardon may be considered.*



Hon. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL



Hon. Justice S Chandra
JUSTICE OF APPEAL



Hon. Justice W.N. Bandara
JUSTICE OF APPEAL