

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

Criminal Appeal No. AAU 0142 of 2014
(High Court Case No. HAC 052 of 2013)

BETWEEN : **SAILASA MOCIU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka
Bandara, JA

Counsel : **Ms. S. Nasedra for the Appellant**
Mr. Y. Prasad for the Respondent

Date of Hearing : **22 May 2019**

Date of Judgment : **6 June 2019**

JUDGMENT

Gamalath, JA

[1] I have read the judgment of Bandara, JA in draft and I agree with the reasons and conclusions therein.

Prematilaka, JA

[2] I have read the draft judgment of Bandara, JA and agree with reasons and conclusions therein.

Bandara, JA

- [3] Consequent to a trial in the High Court in Suva, the Appellant was convicted of the murder of his wife and sentenced to life imprisonment. The appellant would have to serve a sentence of 20 years before becoming eligible for a pardon. The assessors had unanimously given the opinions that the appellant was guilty and the learned trial judge had concurred.
- [4] Being dissatisfied with the said conviction and sentence the Appellant filed a timely application for leave to appeal to the Court of Appeal advancing 5 grounds of appeal against the conviction and one ground of appeal against the sentence.
- [5] The single Judge who heard the application on the 13 December 2016, made a ruling refusing to grant leave to appeal against all grounds on conviction and sentence.
- [6] On 15 May 2019, an amended renewal notice of appeal against conviction has been filed before the full court, pursuant to Section 35(3) of the Court of Appeal Act, advancing a single ground of Appeal against the conviction.

The factual back ground

- [7] The appellant (aged 42 years) had been married to the deceased (aged 33 years) for 17 years and, together they had four young children aged between 6 and 14 years. The accused earned a living from farming. The family lived together happily until September 2012, when the Appellant returned home after serving a prison sentence in an unrelated matter.
- [8] They started having problems in their marriage, when the deceased started going out, and went clubbing with her friends. On one occasion when the Appellant rang from Nadi, a man from the deceased's village answered her mobile phone. Suspicion and mistrust

aggravated the situation further, resulting in the deceased and the appellant getting into constant arguments. At times the deceased swore at the accused.

- [9] On the 8th January 2013, the day prior to the incident the family was at the deceased's village (Naisaumua Village, Tailevu). Around 7 pm, the deceased and the accused got engaged in a grog session along with some family members which went on till the early hours. Even though at one point the deceased wanted to leave and go out with her friends, she was stopped by an uncle. When the deceased and the appellant retired to sleep, an argument started between them which went on till around 5.00 am, when the accused decided to go to his village, in Nadi.
- [10] In the early hours of the 9th January 2013, the Appellant along with the deceased and two of her relatives walked towards the main road intending to catch a vehicle to Nadi. The accused walked in front followed by the deceased and her two female relatives. When they reached a point close to the bridge the accused suddenly took out a kitchen knife and proceeded to repeatedly stab the deceased three times. The deceased sustained serious injuries, the fatal one being the stab wound on her right top shoulder, which severed a major artery causing excessive bleeding.
- [11] She was rushed to Korovou Hospital where she succumbed to her injuries. Accused fled the crime scene, and absconded for a period of 13 days.
- [12] The eye witness, Aliti's testimony of the incident was, that the deceased had woken her up between 5.30 am and 6.00 am, asking her to join to take her husband to the main road. The deceased too had accompanied the Appellant in the walk to the main road along with the witness. On the way, the witness saw a knife falling off the Appellant's bag and the latter putting it back into the bag.
- [13] Furthermore narrating the incident of stabbing the witness had testified that; "*While walking and when we reached the edge of the bridge, Kasaya told Mociu (the Appellant) to*

go and we are to return home. "Kasaya was lazy to walk with him to the road. We turn to go back to the village. Mociu ran towards Kasaya. He got hold of Kasaya and started stabbing her. He then repeatedly stabbed her....I looked back and I saw Mociu pushed Kasaya into the creek".

- [14] Witness, Akanisi, who came to the scene after the incident of stabbing testified that; "I saw Kasaya being pulled up from the creek. She was laid beside the creek".

It was the contention of the prosecution that the appellant stabbed the deceased with the intention to cause her death.

The Defence Case

- [15] At the trial, the Appellant pleaded not guilty to the charge of murder. At the end of the case for the prosecution, the Appellant gave sworn evidence and did not call witnesses. The Appellant giving evidence at the trial, admitted having stabbed the deceased on the right shoulder, and stated that he wanted to teach the deceased a lesson for "***neglecting the children and drinking excessively***".

- [16] However, the Appellant categorically stated in his evidence, that he did not intend to kill the deceased stating that;

*"I stabbed Kasaya (the deceased) on her shoulders. I stabbed her twice on the arm and shoulder. I wanted to teach her for neglecting the children and drinking excessively. **"I did not intend to kill her. If I wanted to kill her I would stab her on the neck, stomach or from the back"**. (Emphasis added)*

- [17] In the course of the cross examination the Appellant had admitted that he sharpened the knife used for the stabbing, one week prior to the incident, in the presence of his son who had seen it.

[18] However in the caution interview the appellant had stated the following:

Q: Do you know that this knife can kill a person?

A: Yes

Q: How can you say that?

A: Because it is very sharp.

[19] The Post Mortem Examination of the deceased discloses the following injuries:-

- (1) a large cut on the right shoulder and along the right anterior axillary line measuring 14 cm x 8 cm.
- (2) A deep elephical cut in the lateral mid aspect of right arm, measuring 3.2 cm x 2.0 cm.
- (3) A deep cut in the thenar, aspect of the left hand, 1 cm below the meta ocap – phalange joint measuring 4.2 cm x 0.03 cm,

[20] Before the Full Court, a single ground of Appeal, against the conviction, was advanced on behalf of the Appellant.

Ground One

“That the learned Trial Judge erred in law and in fact in his summing up in directing the assessors very strongly on the prosecution version of evidence stating that the state had proven the elements beyond reasonable doubt along with stating his view and examples similar to the offending to substantiate this. The trial judge in doing so denied the appellant a fair trial and a substantial miscarriage of justice”.

Relevant law

- [21] In **Noa Maya v State** [2015] FJSC 30; CAV009.2015 (23 October 2015), followed in **State v Jagdish Chand Reddy** [2015] HAC 223/112 (12 November 2015), it has been held that;

“The role of assessors is to tender opinions to assist a Judge. They are not deciders of fact or ultimately of a verdict”.

- [22] The trial judge in his judgment states:-

“After looking and considering all the evidence, I find that the accused when he stabbed his wife to death on 9th January 2013 did so with the necessary intention to kill. The appellant intention to kill the deceased is clearly obvious from the following factors;

- [23] In **Suresh Chandra v The State**; it has been held that:-

“In every case when a judge tries a case with assessors, the law requires the trial judge to make an independent revaluation of the evidence so that he can decide whether to agree or disagree with the opinion of the assessors. The Judge is duty bound to make such an evaluation the decision ultimately is his”.

- [24] In **Silatolu v The State** [2006] FJCA 13; AAU0024.2003S (10 March 2006), the Court of Appeal held that:-

“When summing up to a jury or to assessors, the judge’s directions should be tailored to the particular case and should include a succinct but accurate summary of the issues of fact as to which decision is required, a correct but concise summary of the evidence and of the arguments of both sides and a

correct statement of the inferences which the jury is entitled to draw from their particular conclusions about the primary facts.”

[25] In the instant case, when the Summing Up is considered in its totality, it's not lacking in fairness so as the Full Court to interfere with the conviction entered.

In **Tamaibeka v State** [1999] FJCA 1; AAU0015u.97s (8 January 1999) the Court of Appeal held that:

“A Judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of a summing up. It is appropriate that he puts to the assessors clearly any defects he sees in either case. But that must be done in a way that is fair, objective and balanced. If it is not, the independent judgment of the assessors may be prejudiced. If all the issues are put in a manner favourable to one party and unfavourable to the other, the assessors may feel bound to follow the view expressed by the Judge”.

Did the Appellant entertain a murderous intention?

[26] It is pertinent to note here the issue, whether the Appellant entertained a murderous intention. The Appellant had denied having planned the murder of the deceased. If so, why did he stealthily carry the knife (which he sharpened for the first time a week ago) which was used to do daily household chores (like for peeling cassava as stated by the son)? If the accused did not entertain a murderous intention, he would not have inflicted a fatal injury, in the nature of injury number one, which caused a massive blood loss causing the death of the deceased within a short period of time. The Appellant had stated that *“If I wanted to kill her I would stab her on the neck, stomach or from the back”*. When a necessarily fatal injury is caused to the body, which is capable of causing the death in the ordinary cause of nature with a murderous intention, the location of the injury is not a factor that diminishes responsibility.

Furthermore;

- 1) It is common ground that the Appellant was overwhelmingly distressed over the marital problems he was undergoing.
- 2) He had not stated in his caution interview that he did not intend to kill her (as stated in evidence).
- 3) One week prior to the incident he sharpened the murder weapon which his own son noticed as something unusual.
- 4) The Appellant stated, in his caution interview that he knew the used knife can kill a person since it was very sharp.

[27] In relation to the issue of "...stating his views and examples similar to the offending to substantiate this...", in the ground of appeal, the following portions of the summing up pertaining to the examples, the learned Trial Judge used to explain the elements of the offence of murder were specifically brought to the attention of the Full Court by the learned counsel for the Appellant.

*"Paragraph 10. When A stabs B's shoulder with a kitchen knife, A did a Wilful act.
Paragraph 11. Likewise when A stabs B's shoulder with a kitchen knife, B Later died as a result of severe loss of blood due to severed artery. A's stabbing B with a kitchen knife (wilful cause of B's death)".*

[28] It was the contention on behalf of the Appellant that the using of the above as examples the trial Judge had failed to give the required balanced view to explain the elements of murder.

[29] In Ram v State [2015] FJCA 131; AAU0087.2010 (2 October 2015) it has been held;

".... As to a fair summing up in using an example trial Judge is required to give a balanced view to explain elements of murder." The trial Judges use of a jealous husband throttling his wife after planning it, lacked objectivity and fairness could have been perceived by assessors as bolstering the

prosecution case and not highlighting deficiencies in its evidence unfair to the appellant.

[30] The ratio of the above judgment has no application to the Summing Up given by the learned Trial Judge in this case.


[31] In the instant case we have no valid reasons to come to a finding that the learned trial judge's use of words; in paragraph 10, "A stabs B's shoulder with a kitchen knife" and in paragraph 11 A's stabbing B with a kitchen knife, (wilful act), as examples to explain elements of murder, in any manner affected the objectivity and fairness of the Summing Up.

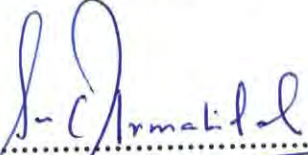
[32] In the above circumstances, I would dismiss the appeal against the conviction and affirm the conviction and sentence passed by the High Court.

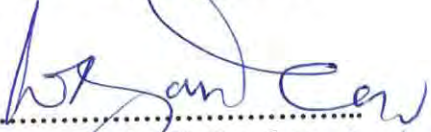
The Orders of the Court are:

1. Appeal is dismissed.
2. Conviction and Sentence affirmed.




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Hon. Justice S. Gamalath
JUSTICE OF APPEAL


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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL


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Hon. Justice N. Bandara
JUSTICE OF APPEAL