IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0025 of 2022
Court of Appeal No. AAU 129 of 2016

BETWEEN	:	**LIVAI KAIVITI RATABUA**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	**The Hon. Justice William Calanchini** **Judge of the Supreme Court**
		The Hon. Justice William Young **Judge of the Supreme Court**
		The Hon. Justice Isikeli Mataitoga **Judge of the Supreme Court**
Counsel	:	**The Petitioner in person** **Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**05 June, 2024**
Date of Judgment	:	**27 June, 2024**

JUDGMENT

Calanchini, J

[1] I have had the advantage of reading in draft form the judgment of Young, J and agree with his reasons and conclusions.

Young, J

The petition seeking leave to appeal

[2] Following trial before a Judge and assessors, Livai Ratabua (the petitioner) was found guilty of murdering Maciu Bakani (the deceased). He was subsequently sentenced to life imprisonment with a minimum term of imprisonment of 15 years to be served before a pardon may be considered.

[3] His appeal against conviction was dismissed by the Court of Appeal.

[4] The petitioner undoubtedly assaulted the deceased. This was part of the sequence of events that resulted in the deceased dying. His petition is based on arguments that raise issues whether his assault on the deceased caused his death, and if it did, whether he appreciated that his conduct carried a substantial risk of causing death and, for this reason, was guilty of murder.

[5] I would grant leave to appeal on both issues. On the first issue, this is because I formed the view that careful analysis of the evidence as to causation was required before I could be confident that there had not been a substantial and grave injustice (s 7(2)(c), Supreme Court Act 1998). In the case of the second issue, it is because the reasoning that led the Judge and assessors to find that the petitioner guilty, while understandable given the way the trial had been run, was erroneous in respects that engage s 7(2)(a), (b), and (c) of the Supreme Court Act

The background to the appeal

What happened

[6] The petitioner, then 18, the deceased, Pauliasi Iliatoko and two others spent the late afternoon and early evening of 7 January 2013 drinking at the Balawa Cemetery in Lautoka. They consumed two bottles of rum and made a start on a third. The group broke up at around 7.00pm or perhaps a little later. One of the group was sufficiently intoxicated to require assistance from the petitioner to get home. The deceased and Mr Iliatoki walked to the latter's home at the nearby Navutu village where they continued to drink what was left of the third bottle of rum. The petitioner later joined them. A

major dispute developed between the deceased and Mr Iliatoko on the one hand and Mr Iliatoko's wife on the other. The petitioner took the side of Mr Iliatoko's wife with the result that the deceased and Mr Iliatoko assaulted him. He managed to escape, somewhat the worse for the assault (in terms of damage to his face) and angry at what had happened. That he was angry was understandable. The deceased and Mr Iliatoko were related to him, appreciably older than he was and had had no justification for assaulting him.

[7] After his escape, the petitioner ran into Etonia Bose, another relative, to whom he complained about what had happened. Accompanied by Mr Bose, he returned to Mr Iliatoko's house. Standing outside that house, they shouted abuse at the deceased and Mr Iliatoko. At this point, Mr Iliatoko had either just passed out from his alcohol consumption or was about to do so. However, the deceased went out of the house and confronted Mr Bose and the petitioner. He threw a punch at Mr Bose. Mr Bose avoided that punch and responded with a punch that knocked the deceased down. The petitioner then attacked the deceased. Bystanders intervened to stop any further violence. They unsuccessfully attempted to get the deceased to sit up and arrangements were made to take him to hospital by minivan. The evidence suggests that he died before he reached hospital.

[8] Associate Professor Ramaswamy Goundar carried out a post-mortem examination of the body of the deceased on 8 January 2013. His report referred to five external injuries:

(a) An abrasion 2 centimetres above the bridge of his nose.

(b) A laceration and surrounding abrasion 4 centimetres to right of the abrasion referred to in (a).

(c) A laceration 2.2 centimetres to the right of injury referred to in (b) in the frontal temporal area.

(d) A laceration 2.2 centimetres above injury referred to in (c) in the parietal area.

(e) An abrasion 3 centimetres in front of the upper part of the left ear.

As will be noted, all these injuries were on the upper part of the deceased's face.

[9] Internal examination revealed:

(a) a large haematoma associated with the injuries referred to in [8] (b), (c) and (d) above;

(b) dislocation of the atlanto-occipital joint;

(c) compression of the medulla oblongata consequential on that dislocation.

[10] The atlanto-occipital joint is the point of articulation between the occipital and atlas bones, where the lower back part of the skull (occipital bone) is attached to the top of the spine (atlas bone). The medulla oblongata connects the brain stem with the spinal canal. The haematoma referred to by the pathologist was under the skin on the outside of the skull. There were no fractures in the skull and no other injuries (including to the mouth and nose area, back of the head and abdomen) were noted.

The law

[11] Under s 237 of the Crimes Act 2009 a person is guilty of murder if:

(a) the person engages in conduct; and

(b) the conduct causes the death of another person; and

(c) the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct.

[12] Section 239 provides for the form of manslaughter relevant to this case in this way:

239. A person commits an indictable offence if—

(a) the person engages in conduct; and

(b) the conduct causes the death of another person; and

(c) the first-mentioned person—

(i) intends that the conduct will cause serious harm; or

(ii) is reckless as to a risk that the conduct will cause serious harm to the other person

"Harm" is defined in s 3 as meaning:

> any bodily hurt, disease or disorder (including harm to a person's mental health) whether permanent or temporary, and includes unconsciousness, pain,

> disfigurement, infection with a disease and physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time) … .

"Serious harm" is not defined but "grievous harm" is defined as including any harm that is "dangerous". I consider that harm that is "dangerous" is "serious" for the purposes of s 239.

[13] Recklessness is addressed in s 21(2) of the Crimes Act. It provides:

> (2) A person is reckless with respect to a result if —
>
> (a) he or she is aware of a substantial risk that the result will occur; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

[14] As to causation, s 246 relevantly provides:

> (1) In this Division, a person's conduct causes death or harm if it substantially contributes to the death or harm.
>
> (2) Without limiting the right of a court to make a finding in accordance with sub-section (1), a person is deemed to have caused the death of another person although the act is not the immediate or the sole cause of death in any of the following cases —
>
> ….
>
> (d) if by any act or omission he or she hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death … .

[15] I defer until later in these reasons my discussion of the statutory provisions as to the relevance of an offender's intoxication.[1]

The trial

[16] At the petitioner's trial, the prosecution case was that the petitioner:

> (a) had caused the death of the deceased by stomping on, and kicking his head;

[1] See below at [55].

(b) had done so recklessly as he was aware that his conduct carried a substantial risk of killing the deceased; and

(c) was therefore guilty of murder under s 237 of the Crimes Act 2009.

[17] The primary thrust of the defence case was that although the petitioner had indeed kicked and stomped on the deceased, and with considerable force, this was only to his abdomen and not his head.

[18] There was also twofold back-up defence theory that was available – along the line that even if the petitioner had targeted the deceased's head, it was nonetheless reasonably possible that:

(a) Mr Bose's punch had dislocated the deceased's atlanto-occipital joint and was the sole substantial cause of his death; and

(b) in any event, the petitioner had not appreciated that he was creating a substantial risk of death.

[19] At trial the causation element of this fall-back defence was pursued, as I will explain. However, there was no detailed attention paid to what the Judge and assessors should make of the petitioner's state of mind if satisfied that he had targeted the deceased's head. Rather, the prosecution case was simply that such a targeting of the head carried a risk of death so obvious that the petitioner must have appreciated it. And because the petitioner did not accept that he had targeted the deceased's head, he was not well placed to dispute that reasoning when he gave evidence and, unsurprisingly, did not attempt to do so. In her closing address, counsel for the defence did not advance an argument to the assessors that even if sure that the petitioner had caused the deceased's death, there remained for them a serious issue as to the petitioner's state of mind having regard to his youth, understandable anger at having been assaulted, his intoxication and the speed with which everything happened.

[20] At the end of the trial, the three assessors concluded that the petitioner was guilty of murder, a verdict which the Judge accepted for reasons which he gave. He accordingly found the petitioner guilty.

The applications to the Court of Appeal for leave to appeal

[21] The petitioner sought leave to appeal to the Court of Appeal. He was not legally represented. His application was refused by a single Judge and his renewed application to the full court was dismissed in a judgment delivered on 29 September 2022.

The basis of the proposed appeal to this Court

[22] The petitioner now seeks leave to appeal to this Court. Boiled down, his challenges to his conviction come down to contentions that:

(a) it was reasonably possible that Mr Bose's punch was the sole cause of the deceased's death, and that this aspect of the case was not dealt with fairly by the Judge.

(b) alternatively, it was also reasonably possible that he did not act with knowledge that his attack on the deceased carried a substantial risk of killing him.

The petitioner in his submissions mentioned provocation, but I took this to be part of his argument that he had not acted recklessly, rather than a contention that provocation should have been separately addressed as a possible defence. At trial, provocation had not been advanced as a defence.

The evidence at trial

Preliminary comments

[23] As I have explained, the primary issues at trial were as to the nature of the petitioner's attack on the deceased and the plausibility or otherwise of the defence theory that the sole relevant cause of death was Mr Bose's punch. In what follows, I discuss the evidence that bears on those issues and do so under the following headings:

(a) Did the petitioner stomp on and kick the deceased's head?

(b) Where did Mr Bose's punch land?

(c) Did the deceased's head hit a rock when he fell after being punched?

(d) Did the deceased attempt to get up after the punch?

(e) What did the medical evidence indicate as to the cause of death?

Did the petitioner stomp on and kick the deceased's head?

[24] Two of the prosecution witnesses (Seremaia Radororo and Josepha Naikere) who saw the altercation that resulted in the deceased's death said that the petitioner had targeted the deceased's head with both stomps and kicks. A third prosecution witness, Lavenia Balielomaloma, described what seem to have been two kicks or stomps to the middle of the deceased's body. Two defence witnesses (Senileba Vosamacala and Asilika Silovate) claimed that the petitioner kicked the deceased three times with the kicks directed to the deceased's abdomen and not his head.

[25] In the hand-written note of the caution interview of the petitioner on 8 January 2013, the following questions and answers were recorded:

> Q 80: When [the deceased] fell down what did you do?
>
> A: First, I kicked him and also stomped his head.
>
> Q81: Did you also punch him?
>
> A: No, I only stomped and kicked him in the head.
>
> …
>
> Q 86: It was alleged by the onlookers that you jumped and kicked [the deceased] on his chest first before you stomped his head. What can you say about that?
>
> A: Yes, it is true.
>
> Q 87: While stomping [the deceased's] head and body did you use the flat surface of your feet or your heels?
>
> A: I used both.

Q 88: What shoes were you wearing at the time of the incidence?

A: My black flip flop which I am now wearing.

At trial, the petitioner claimed that the answers to questions 80 and 81 were fabricated. They are, however, part of a 10-page manuscript, every page of which has been signed by the petitioner and which was read over to him. They are also consistent with his answers to questions 87 and 88 – answers which he did not claim to have been fabricated.

[26] When giving evidence at trial the petitioners' response to the introductory question as to what he did when the deceased fell following Mr Bose's punch, was simply:

I kicked and stomp him My Lord.

He expanded on this by saying that he kicked him once on the chest and twice on the stomach.

[27] The external injuries to the deceased which the pathologist described were consistent with the prosecution case and not easily reconciled with the defence case. There were no injuries to the deceased apart from to his head. So, if there were any blows to the deceased's abdomen, they left no trace. More significantly, to my way of thinking, the defence had no credible explanation for the number of injuries to the deceased's head. There was nothing in the petitioner's narrative to suggest that he had stuck the deceased in the head in the initial altercation at Mr Iliatoko's house and it was common ground that Mr Bose only punched the petitioner once. Conceivably one of the injuries may have been explained by the deceased's fall. In this context, the only logical explanation for most of injuries to the deceased's head was the kicking and stomping attributed to the petitioner.

[28] The Judge and assessors must have accepted that the petitioner kicked and stomped on the deceased's head. I consider that they were right to do so and what I have to say in the balance of these reasons proceeds on this basis.

Where did Mr Bose's punch land?

[29] Most of the evidence, including what the petitioner said in his caution interview and evidence at trial, was of a punch that landed on the deceased's face, most likely around his mouth. Lavenia described a punch to the "area around the nose and mouth." Seremaia spoke of a punch that that was "right on the face", Josepha referred to a punch to the deceased's mouth, the petitioner in his caution interview referred to a punch to the deceased's face and in his evidence said that the punch was to the deceased's right jaw.

[30] The two defence witnesses described the punch said that it had been to the right side of the deceased's neck. The proposition that Mr Bose had punched the deceased on the right side of the neck had not been put by defence counsel to any of the prosecution witnesses. There were other unsatisfactory aspects to their evidence, and it seems unlikely that the assessors and Judge placed any weight on it.

[31] In his evidence, the pathologist said that he did not see any abnormalities on the lower part of the face of the deceased which, to his mind was inconsistent with punch to that part of the face having dislocated the deceased's atlanto-occipital joint. Although defence counsel did not ask the pathologist whether the absence of such abnormalities was inconsistent with the punch landing in the general area of the deceased's mouth, she sought to cross-examine him on the basis that one of the injuries to the upper part of his head had been caused by the punch. Her attempts to cross-examine on this basis were interrupted by the Judge. I will come back this shortly.

Did the deceased's head hit a rock when he fell after being punched.

[32] Lavenia said that when the deceased fell after Mr Bose's punch, his head hit what she referred to as a "stone" but described as being "the same size as [a] 2 litre ice-cream container", which is suggestive of a rock. The drift of her evidence was that the combination of the punch and the contact with the rock rendered the deceased unconscious as she said he was motionless throughout everything that followed, including the attack on him by the petitioner.

[33] The two other eyewitnesses who gave evidence for the prosecution (Seremaia and Josepha) described the deceased falling with his head coming into contact with the gravel surface of the road and then attempting to get up before the petitioner attacked him.

[34] Neither the petitioner nor the eyewitnesses called on his behalf mentioned the deceased's head hitting a rock.

[35] Police photographs of the road show no sign of a rock and the pathologist's report gives no indication of an injury to the back of the deceased's head of the kind that might have been expected if Lavenia's account was correct.

[36] On the basis of the evidence as a whole, I think it most unlikely that the deceased suffered a significant injury to the back of his head when he fell after being punched.

Was the deceased motionless on the ground when the petitioner attacked him?

[37] The petitioner, Lavenia and the two defence eyewitnesses all said that the petitioner attacked the deceased while he was lying motionless on the ground. This contention had the advantage for the petitioner of aligning with the defence theory that it was the punch from Mr Bose that resulted in the dislocation of the deceased's atlanto-occipital joint and thereby caused his death.

[38] Seremaia and Josepha remembered things differently as they referred to the deceased starting to get up from the ground prior to the petitioner's attack.

[39] There were difficulties with the defence eyewitnesses, and I am confident that their evidence was put to one side by the assessors and Judge. Lavenia's account of the deceased lying motionless after the punch had a logical correlation with her contention that the deceased had hit his head on a rock when he fell, a contention that, I have explained, is not consistent with the police photographs or the evidence of the pathologist.

[40] Whether the deceased attempted to get up after the punch is a significant aspect of the case. If the deceased was able to attempt get up, it means that either the punch did not

dislocate his atlanto-occipital joint, or, if it did, that the dislocation did not have any immediately catastrophic consequences. This line of thinking was not explored with the pathologist when he gave evidence. What he did say, however is that there were no injuries to the back of the deceased's head, an observation that is at least consistent with some of the kicking and stomping occurred when his head was off the ground.

[41] Seremaia and Josepha were generally accepted by the Judge and assessors as witnesses of truth. I think it likely, indeed distinctly more likely than not, that their account of the deceased attempting to get up after Mr Bose's punch is correct.

The medical evidence

[42] I have found the evidence of Dr Goundar not as complete as it might have been. This is not his fault. It is rather a consequence of (a) his evidence being given by Skype with the person responsible for preparation of the transcript being unable to transcribe substantial portions of it; (b) the flow of the cross-examination having been disrupted by interventions by the Judge and (c) most importantly, issues that I think were relevant not being explored.

[43] Dr Goundar's evidence in chief was largely based around the post-mortem report. He did say that the dislocation of the atlanto-occipital joint could have been caused by kicking and stomping on the deceased's head. But beyond that, he was not invited in evidence in chief to comment on the competing theories advanced by the prosecution and defence.

[44] Defence counsel's cross-examination of Dr Goundar started in this way:

Ms Choy:	Now doctor, you earlier stated in your examination in chief about assault. The reason for the dislocation of the joint. Now you are uncertain as to what type of assault would you agree with me?
Dr Goundar	Yes
Ms Choy:	And is it possible that the assault could be from a punch?
Dr Goundar:	Could be a punch, right

Later in cross-examination, Dr Goundar again accepted that a punch to the deceased's head could have caused the dislocation of the atlanto-occipital joint and the deceased's death.

[45] During defence counsel's cross-examination of Dr Goundar, there were a number of interventions by the Judge. His view was that a viable defence theory that the punch from Mr Bose had caused the petitioner's death could only be premised on a punch to the lower part of the petitioner's face. This was because, at that stage of the trial, there was no evidence to suggest that it had landed anywhere else.[2] The Judge was also generally sceptical of what he saw as an attempt to blame Mr Bose for the death of the deceased. Defence counsel was not able to induce Dr Goundar to accept that a punch to the lower part of the petitioner's face in the area of his mouth, whether by itself or in combination with a subsequent fall, could have caused the dislocation that resulted in the petitioner's death.

[46] Some issues that might have been helpfully explored with Dr Goundar were not addressed, at least in any detail:

(a) There was no substantive discussion (at least in the portions of the transcript I can follow) whether the dislocation of atlanto-occipital joint was necessarily the result of a single application of force or may have been the result of multiple applications of force coming from different directions. That said, the drift of his evidence was that it may have been the result of a single application of force and what follows proceeds on that basis.

(b) If the punch had caused the dislocation of the atlanto-occipital joint, it seems unlikely that the deceased would have been able to make a start on getting up. It would have been helpful to have the comments of the pathologist on this but, in the absence of such comments there is scope for the application of common sense.

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[2] The defence witnesses who spoke of a punch to the neck had, of course, not yet given evidence and the substance of their evidence had not been put to any of the prosecution witnesses.

(c) If the initial punch and the deceased's fall had dislocated the deceased's atlanto-occipital joint but he had nonetheless been able to start to get up, any further violence to his head would be likely to cause, or severely exacerbate any existing, damage to the medulla oblongata and thus contribute to or accelerate his subsequent death. Dr Goundar was not asked about this, but again there is scope for a common-sense approach.

(d) The evidence of those present in the aftermath of the attack is consistent with the deceased continuing to live for some time after it ceased. So, even if the punch from Mr Bose dislocated the deceased's atlanto-occipital joint and left him motionless, it remains likely to say the least that the petitioners' attack on his head at least accelerated his death. Again, this was not explored with Dr Goundar but once more, resort to common-sense is possible.

(e) It was common ground that Mr Bose punched the deceased with sufficient force to knock him to the ground. However, no injury to the lower part of his face was discernible on post-mortem examination. If it is the case that such an injury would have been discernible, it might be thought to follow that one of the injuries noted by Dr Goundar must have been caused by Mr Bose's punch. Unfortunately, Dr Goundar was not invited to comment on this.

Causation

The approach of the Judge

[47] In summing up to the assessors, the Judge reviewed the evidence. He made it clear that the assessors should acquit the petitioner unless sure that petitioner had targeted the head of the deceased in the manner described in the evidence of Seremaia and Josepha and as admitted by the petitioner's caution interview. As to this, he said that the prosecution had to make the assessors "sure that the confessions were made, and they were true". He also put the substance of the petitioner's case.

[48] He then went on to say:

> When you put the evidence of Seremaia Radaroro …, Joseva Naikere … and the accused's alleged confession to stomping and kicking the deceased's head at the material time, with the evidence of Doctor Goundar … , the irresistible inference was that the accused's stomping and kicking of the deceased's head on 7 January 2013 set in motion a chain of events that led to the deceased's death. If you accept the above, you will have to examine [causation]. If you don't accept the above, you have to find the accused not guilty of murder.

[49] In his judgment convicting the petitioner the Judge said:

> I accept that the accused stomped and kicked the deceased's head several times on 7.1.13. These actions caused the deceased's brain injuries as described by Doctor Goundar in his post-mortem report.

The Court of Appeal

[50] The petitioner's submissions to the Court of Appeal did not explicitly challenge the conclusion that he had caused the death of the deceased. Indeed, as the relief that he sought from the Court was confined to setting aside the murder conviction and substituting a conviction for manslaughter, he implicitly accepted that he had caused the death of the deceased.

The petitioner's submissions to this Court

[51] The petitioner's written submissions do not elaborate much on causation save to say that it was reasonably possible that the punch from Mr Bose caused the dislocation of the atlanto-occipital joint and to refer to the way that the deceased was handled in the aftermath of the assault. He also noted that the Judge was critical of the theory that Mr Bose's punch was the sole cause of death as an attempt to shift the blame. Interestingly, however, the relief he sought was, as in the Court of Appeal, confined to substituting a conviction for manslaughter.

My approach

[52] I have some reservations whether it is safe to find causation solely on the basis that (a) Mr Bose's definitely landed on the deceased's lower face and (b) such a punch, on the evidence of Dr Goundar, could not have dislocated the deceased's atlanto-occipital

joint. This is because I am prepared to accept the possibility at least that those who spoke of a punch to the lower face may have been wrong; a possibility that may draw some support from the absence of any discernible injury to that part of the deceased's face.

[53] I am, however, nonetheless satisfied that causation was established. This is for the following reasons.

(a) There were at least five applications of force to the head of the deceased (corresponding to the five injuries detected on post-mortem examination) and in all probability more than that.

(b) Although there is, in my mind, at least a possibility that Mr Bose's punch was responsible for one of the detected injuries on the upper part of the deceased's face, I think it unlikely that the punch did in fact dislocate the atlanto-occipital joint. This is part for the reasons given by Judge (as I accept it is distinctly more likely than not that the punch landed on the lower part of the deceased's and more generally because of the drift of Dr Goundar's evidence as to the high level of force required to cause such a dislocation.

(c) I think it distinctly more probable than not that the deceased attempted to stand up after the punch. This accords with what Seremaia and Josepha said, and it was their evidence that the Judge and assessors accepted on other but closely related aspects of the case. It is not very likely that the deceased would have been purposefully moving if the punch had dislocated his atlanto-occipital joint. And in any event, if he was able to do so despite having a dislocated atlanto-occipital joint, the consequential instability of the joint meant that any violence to his head carried a high likelihood of killing him or at least accelerating his death.

(d) As earlier indicated, even if Mr Bose's punch dislocated the atlanto-occipital joint and the deceased was totally incapacitated by the time the

> petitioner attacked his head, it is inherently likely that his kicks and stomps at least accelerated the deceased's death.

So, all in all, it is very unlikely that Mr Bose's punch dislocated the deceased's atlanto-occipital joint and, if it did, there is a high likelihood that the subsequent violence to his head contributed to, or accelerated, his death. Allowing for this combination of factors, I see the compound likelihood of the defence theory that the death was solely due of the punch and not even accelerated by the petitioner's actions is so low as not to raise a reasonable doubt as to causation.

[54] Given that I am satisfied that the petitioner caused the death of the deceased, the significance of any possible infelicities in the way in which this aspect of the case was dealt with by the Judge falls away. This is because I am satisfied that irrespective of those possible infelicities, there was no miscarriage of justice.

Recklessness

The Crimes Act provisions that deal with intoxication

[55] The relevance of intoxication to criminal liability is addressed in the Crimes Act, in ss 29 – 33. The scheme of these sections is reasonably complex but, for the purposes of this judgment, it is sufficient for me to refer to s 32(1). This provides:

> If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.

This means that in determining whether the petitioner knew that there was a substantial risk of death, it was relevant to have regard to his intoxication.

The approach of the Judge at trial

[56] When dealing with recklessness, the Judge told the assessors:

> The head of a person contains his or her brain, and certainly, *the accused was aware that [the deceased] would die if he repeatedly stomped and kicked his head on 7 January 2013*. The accused know [the deceased] had fallen to the ground after being punched by Bose, and he knew he was helpless and no threat to him There was no need to stomp or kick [the deceased's] head at the time, because he was helpless. Yet the accused proceeded to stomp him 4 times and kicked his head 3 times. It would appear, he was reckless as to causing the deceased's death, at that time. It was not

> justifiable for him to take the risk. If you agree with the above, you must find the accused guilty as charged. If otherwise, you must find him not guilty as charged. It is a matter entirely for you.
>
> Emphasis added.

[57] There is one aspect of this direction that I should mention, although I see it as being of no moment. The passage that I have emphasised is not a correct summary of the situation. This is because the case against the petitioner was not that he knew that he was killing the deceased, but rather that he recognised that there was substantial risk that his actions would cause his death. However, I see this as just a slip of the tongue as I am confident that what the Judge intended to say was:

> the accused was aware that *there was a substantial risk* [the deceased] would die if he repeatedly stomped and kicked his head on 7 January 2013.

I am also confident that what the Judge said would have been understood by the assessors in this way, given the summing up as a whole.

[58] The logic underlying what the Judge said is that kicking and stomping on the deceased's head carried a substantial risk of death so obvious that it could be safely inferred that it was appreciated by the petitioner. The Judge was also of the view that the question whether this inference could be safely drawn was determined without regard to the petitioner's intoxication. I say this because he addressed the relevance of intoxication in this way.

> … [both the deceased and the accused appeared to be drunk at the time of the incident, in law, self-induced intoxication is no defence to a criminal charge. This is especially so when the fault element relied on by the prosecution is recklessness.

[59] That the Judge did not refer to s 32 of the Crimes Act is understandable. This is because defence counsel had not advanced the argument that the alcohol that the petitioner had consumed was relevant to whether he had appreciated that his attack on the deceased carried a substantial risk of death.

The Court of Appeal

[60] Recklessness and what I see as an included question as to intoxication were in issue in the Court of Appeal.

[61] Prematilaka RJA (whose reasons were adopted by the other members of the Court) noted, correctly, that the Judge had summed up accurately as to what constituted recklessness. He then went on:

> … the petitioner was obviously not of such a tender age as not to understand the natural consequences of his acts or not to know the risk involving his act of stomping and kicking the heard of the deceased. …
>
> Having examined the totality of the evidence I am unable to conclude that petitioner was unaware that there was a substantial risk that the death of the deceased will occur as a result of his acts … .

[62] When dealing with intoxication, Prematilaka RJA referred to *Tapoge v State*[3] as authority for the proposition that:

> … voluntary intoxication is relevant in determining whether the accused had the pre-requisite fault element to be guilty of murder.

However, when applying the law to the facts, he took what seems to me to be a different approach.

> The evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts … .
>
> If an accused fails to prove such incapacity, the law presumes that he intended the natural and probable consequences of his act … .
>
> I have no doubt that on the evidence available the petitioner had no incapacity not to know the natural and probable consequences of his acts as result of consuming liquor which simply had not affected his mind to such an extent. His moves were calculated and predetermined. He may not have had the intention to kill the deceased, but it cannot be said that he was not reckless as to causing his death.

[63] There are three aspects to these reasons that warrant comment:

(a) They appear to proceed on the basis of a reversal of the onus of proof. The issue was not whether the Court of Appeal could "conclude that the petitioner was unaware that there was a substantial risk" of death (see the remarks cited in [61]. Rather it was whether there was a reasonable possibility that this was the case. Likewise, a defendant relying on

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3 *Tapoge v State* [2017] FJCA 140.

intoxication in relation to mens rea does not have to establish a "proved incapacity … to form the intent necessary to constitute the crime" (see [62], above). Rather it is for the prosecution to establish beyond reasonable doubt that a defendant had the necessary intent (or knowledge, as in this case) after taking full account of all relevant circumstances, including intoxication. I do not attach any weight to this aspect of the reasons because they can only have been in the nature of slips of the tongue.

(b) More significant are repeated references to "incapacity" in the passage cited in [62]. The issue is not whether the petitioner was *incapable* of knowing that his actions carried a substantial risk of death; rather it is whether *he did know* that.

(c) Further, and most significantly, there is no presumption of law that person must be taken "to have intended the natural and probable consequences of his actions", as postulated in the passage cited in [62], above).

What I have just said warrants some explanation.

[64] The view that elements of an offence could be established by presumption rather than proof was generally rejected nearly 90 years ago by the House of Lords in *Woolmington v Director of Public Prosecutions*.[4] This case is famous for Viscount Sankey's remark:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt …"

Controversially, this general approach was not applied by the House of Lords in *Director of Public Prosecutions v Smith*.[5] This case proceeded on the basis that a person must be taken to have intended the natural and probable consequences of their actions. I suspect that this is what Premitilaka RJA had in mind. However, *Smith* is now

4 *Woolmington v Director of Public Prosecutions* [1935] 1 AC 462.
5 *Director of Public Prosecutions v Smith* [1961] AC 290.

recognised as having been wrongly decided.[6] So, Lord Sankey's "golden thread" that a prosecutor is required to prove guilt applies to intention and knowledge.

My approach

[65] As I have explained, the only lines of defence relied on at trial were that the petitioner had not targeted the head of the deceased and, mainly, although not entirely, for that reason, causation had not been established. In the course of the trial, consumption of alcohol was referred to but largely just as part of the narrative, for instance as to what had happened at the Balawa Cemetery, or as providing context, for instance as explaining why Mr Iliatoko did not participate in the final confrontation (which was because, at the time, he was in the process of passing out from alcohol intoxication). But although the intoxication of the petitioner was not addressed in detail at trial, it is clear that the petitioner had consumed substantial quantities of alcohol. As the passage I have cited from the Judge's summing up shows, he recognised this.[7]

[66] This is not to say that the petitioner was necessarily significantly physically affected; he had after all been able to escape from Mr Iliatoko and the deceased when they attacked him, and he was able to direct his kicking and stomping accurately to the head of the deceased. He was also able to act purposefully, as his recruitment of Mr Bose to assist, shows.

[67] It is possible that the alcohol he had merely made him more willing to engage in risky conduct than he would be if sober. A merely disinhibitory effect of this nature would be immaterial to his guilt. This is because the general approach of the law, as exemplified by s 29 – 32 of the Crimes Act, is that self-induced intoxication does not excuse criminal conduct. So, if the fault element of an offence is an intention to bring about a particular result, a drunken intention suffices. Likewise, if the fault element is knowledge – as in this case, knowledge of a substantial risk of death – a drunken awareness of a substantial risk suffices.

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6 *Frankland v Director of Public Prosecution* [1987] AC 576. See also *Parker v The Queen* (1963) CLR 610.

7 See [58], above.

[68] On the evidence, I think it was open to the Judge and assessors to conclude that the petitioner had recognised that his assault on the deceased carried a substantial risk of death. However, such inference should only have been drawn when all relevant circumstances were allowed for. In this context it seems to me to have been at least arguable that it was reasonably possible that the alcohol the petitioner had consumed may have affected his cognitive functioning to the point that he did not recognise a risk of death that he would, in normal circumstances, have appreciated. As to the plausibility of this hypothesis, three other factors are material. The first is that the petitioner was only 18 at the time (and young people tend to act impulsively). The second is that he was very angry. The third is that the key events, from when the attack started to when it finished, must have taken only a minute or so, or perhaps less.

[69] I can see why defence counsel may have been reluctant to run an argument that the petitioner had attacked the deceased when so angry and intoxicated that he had not recognised a risk of death. Such an argument would have had the forensic downside of highlighting why the petitioner might have targeted the head of the deceased. That said, it would have been possible for defence counsel at least to raise the issue at trial and do so in way that limited possible prejudice to the petitioner on the causation issue. I consider that she should have done so,

[70] Because defence counsel did not rely on s 32(1) of the Crimes Act, it is understandable that the Judge did not sum up on it. However, when viewed as a whole, his directions were wrong. This is because he treated the petitioner's intoxication as irrelevant; this by the combination of:

(a) his heavy emphasis on what in substance was a natural and probable consequences approach to imputing knowledge as to the risk of death; and

(b) his direction that self-induced intoxication was not a defence, a direction which he linked with recklessness.[8]

[8] See [58], above.

Although I accept that it not satisfactory for an appeal against conviction to be allowed on the basis of line of defence not advanced at trial, I see no alternative to doing so in this case.

[71] Under s 239, the petitioner is guilty of manslaughter if he was reckless as to the risk that his attack would cause serious harm to the deceased. It is practically inevitable that the petitioner, drunk and angry that he was, recognised that that his targeting of the head of the deceased carried the risk of dangerous harm. So, if not guilty of murder, he was guilty of manslaughter as the petitioner in his submissions accepted.

[72] I see not utility in directing a retrial. So, I would allow the appeal in relation to the conviction murder and substitute a conviction for manslaughter.

Sentence

[73] The appellant was sentenced to life imprisonment on 14 July 2016. He has therefore served nearly eight years imprisonment. In all the circumstances, including his youth at the time (18 years of age), absence of prior convictions and the significant provocation to which he had been subjected by the deceased (the unprovoked attack on him), justice will be served if we sentence him now to imprisonment for eight years, a sentence which, with what I anticipate will be an allowance for good behaviour, should result in his immediate or at least prompt release.

Outcome

[74] I would therefore:

(a) Set-aside the conviction for murder and replace it with a conviction for manslaughter.

(b) Substitute (and impose) a sentence of eight years imprisonment for the sentence of life imprisonment imposed in the High Court.

Mataitoga, J

[75] I concur with the judgment of Young, J.

[76] ***Orders of the Court***

1. *Leave to appeal is granted.*

2. *The conviction for murder is set-aside.*

3. *A conviction for manslaughter is substituted for it.*

4. *On the substituted conviction for manslaughter, petitioner is sentenced to eight years imprisonment.*