

**IN THE SUPREME COURT OF FIJI**  
**APPELLATE JURISDICTION**

**CRIMINAL PETITION NO. CAV 0002 of 2023**  
**Court of Appeal No. AAU 0186 of 2016**

**BETWEEN** : **TARUN KUMAR RAWAT**  
*Petitioner*

**AND** : **THE STATE**  
*Respondent*

**Coram** : **The Hon. Justice Anthony Gates**  
**Judge of the Supreme Court**

**The Hon. Justice Terence Arnold**  
**Judge of the Supreme Court**

**The Hon. Justice Alipate Qetaki**  
**Judge of the Supreme Court**

**Counsel** : **Mr. A. J. Singh and Ms. P. D. Prasad for the Petitioner**  
: **Ms. R. Uce for the Respondent**

**Date of Hearing** : **08 August, 2024**

**Date of Judgment** : **29 August, 2024**

**JUDGMENT**

**Gates, J**

[1] I have read the following judgment of Arnold J in draft. I am entirely in agreement with it, its conclusions and orders.

## **Arnold, J**

### **Introduction**

- [2] The Petitioner, Tarun Kumar Rawat, was charged with the murder of Tevita Tabua contrary to section 237 of the Crimes Act 2009. At his High Court trial, two Assessors were of the opinion that he was guilty of murder; the third considered that he was guilty only of manslaughter. The trial Judge agreed with the majority and convicted Mr Rawat of murder. He sentenced Mr Rawat to life imprisonment, with a minimum period of 17 years to be served before consideration of the possibility of a Presidential pardon.
- [3] Mr Rawat sought leave to appeal his conviction and sentence under section 21(1) of the Court of Appeal Act 1949. The application came before a single Judge of the Court of Appeal.<sup>1</sup> In relation to the conviction appeal, Mr Rawat's essential complaint was that the prosecution had not established beyond reasonable doubt that he intended to cause, or was reckless as to causing, Mr Tabua's death. Leave to appeal was granted on that issue. The application for leave to appeal against sentence was refused.
- [4] Despite the single Judge's limited grant of leave, the Court of Appeal addressed all the grounds of appeal against conviction that Mr Rawat's counsel raised, ultimately dismissing the appeal.<sup>2</sup> Mr Rawat now petitions this Court for leave to appeal against conviction, identifying 12 grounds of appeal.

### **Factual background**

- [5] According to Mr Rawat, he and Mr Tabua were acquaintances who met periodically so that Mr Tabua could perform oral sex on him. The two had agreed to meet for that purpose on the evening in question. As I explain below, Mr Rawat gave two different accounts of what happened, albeit that the accounts have common features.

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<sup>1</sup> *Rawat v State* [2018] FJCA 43.

<sup>2</sup> *Rawat v State* [2022] FJCA 168.

- [6] Mr Rawat's caution interview was spread over four days (from 23-26 July 2011). By way of explanation, when Mr Rawat was arrested around 6.45 pm on 22 July, he appeared to be intoxicated and was given time to sober up. His interview started at 12.25 am on 23 July and that initial session concluded at 1.45 am. The interview resumed at 11.10 am on 23 July and went through until 11.28 am, when the police took Mr Rawat to the crime scene so that he could explain what had happened. There was a further interview from 1.15 pm, before a further scene reconstruction; interviewing ceased for the day at 5.28 pm. There was no interview on 24 July; in fact, the interview did not resume until 2.50 pm on 25 July. The resumed interview lasted an hour and then began again at 8.17 pm, going through until 10.45 pm. On 26 July, Mr Rawat met his solicitor, after which his statement was read over to him, and he signed it.
- [7] Mr Rawat's account in his statement was that he and Mr Tabua had agreed to meet around 7 pm that evening. When they met up, they walked to a compound, where Mr Tabua started to perform oral sex on him.
- [8] Mr Rawat's initial description was that while this was happening, he thought of Mr Tabua having oral sex with other men and became jealous. He said he was angry and started punching Mr Tabua in the head. He then picked up a stone<sup>3</sup> and threw it "full strength" at Mr Tabua's head at a distance of around 1.5 metres. Mr Tabua fell to the ground. Mr Rawat said he checked him but could not feel a pulse. He described himself as "freaked out" and "in a state of shock". He pulled Mr Tabua to a nearby creek to wash his face. He said that he "felt his pulse which was not working and thought he was dead". He pulled Mr Tabua to a grassy area and took his trousers, mobile phone and wallet. He removed the wallet's contents and left the scene to join his girlfriend and another friend, Jole Sole. They went to Mr Sole's place, where they drank kava and rum. Mr Rawat told Mr Sole what had happened with Mr Tabua. Around 5.30 am, Mr Rawat took Mr Sole to the place where he had left Mr Tabua.
- [9] Later in his interview (on the afternoon of 25 July), Mr Rawat gave the second account. In response to a question about what the truth behind the assault on Mr Tabua

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<sup>3</sup> The "stone" was also described as a "rock". I will use "stone" as that was the more common reference.

was, Mr Rawat said that when they met shortly after 7 pm, Mr Tabua saw love bites on his neck (which had been made by his girlfriend). Mr Tabua became jealous and started questioning him about them. Mr Rawat reacted, and the two began to fight. In the course of the fight, Mr Tabua called out several times “Tarun enough” and started to run away. Mr Rawat threw a stone, which hit Mr Tabua on the back of the head. Mr Rawat said he threw the stone “very hard” from close range (“could be about a metre”). Mr Tabua fell to the ground, face down. Mr Rawat turned him over and called his name. Mr Tabua was breathing heavily, but that stopped.

[10] Mr Rawat said that he then went to buy some alcohol and drank it with Mr Sole. He said that he told Mr Sole what had happened with Mr Tabua around 11 pm and that Mr Sole left the house several times after that for short periods of a few minutes. He said that around 5 am he showed Mr Sole where Mr Tabua was. Mr Sole left the house and returned after about 10 minutes and told Mr Rawat not to worry about anything.

[11] Mr Tabua’s body was found by some workers around 7 am. Mr Rawat said that at that stage Mr Sole was holding a cane knife and threatening people. Mr Rawat said that Mr Sole must have done something with Mr Tabua’s body because it was not found where he had left it.

[12] At the conclusion of his interview, Mr Rawat said that this second account was the correct one. In his charge statement dated 26 July 2011, Mr Rawat said:

I know that I cannot go back in life and undo the things I have done. I sadly sympathise with his family and friends. This was not my intention to do so for what happened as I only wanted to hurt him. My sincere apologies to all the people I have disgraced and hope they will forgive me from their hearts one day.

[13] Mr Rawat was taken for a medical examination on 26 July. In her report, the doctor recorded that there were no injuries, haematoma, abrasions or lacerations noted on Mr Rawat’s face, chest, back, thighs or legs.

[14] Mr Rawat largely repeated the second account in his evidence at trial, although he said he did not want to have sex with Mr Tabua and highlighted Mr Tabua’s actions, saying

that he “had gone berserk” about the love bites. He said that when Mr Tabua had run away “into the dark”, he thought he might be attacked and threw the stone in his direction. He said he was “shocked, terrified and panicked” and did not intend to kill Mr Tabua. He denied hitting Mr Tabua with a stone and denied leaving him to die.

## **Jurisdiction**

[15] As is well-known, the Supreme Court may only grant leave to appeal in a criminal case where (i) there is a question of “general legal importance” involved; or (ii) there is a “substantial question of principle affecting the administration of criminal justice”; or (iii) “substantial and grave injustice may otherwise occur”.<sup>4</sup> In some cases, one or other of these requirements will obviously have been met. This is not such a case, however, so it is necessary to examine the issues in more detail to reach a concluded view.

## **Preliminary matters**

[16] There are two preliminary matters to be addressed. The first is that Mr Rawat filed an application for leave to adduce further evidence shortly before the hearing in this Court. The application related to affidavit evidence from a former police officer. Mr Rawat said that the officer had seen injuries on his back on 24 or 25 July (ie during the period of his caution interview) that he claimed had been inflicted by police. He said his father had seen them at the same time and it was his father who had sought the assistance of the police officer. This evidence, Mr Rawat claimed, supported his contention, which the trial Judge had rejected, that his caution statement was not made voluntarily but was the result of police oppression.

[17] Although this application was refused by the Acting President of the Supreme Court, Mr Rawat is entitled under section 11(a) of the Supreme Court Act 1998 to ask the Court to consider the matter afresh. Having considered the matter myself, I have reached the same conclusion as the Acting President, for the following reasons:

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<sup>4</sup> Supreme Court Act 1998, section 7(2).

- (a) First, the evidence is not “fresh”. Mr Rawat’s father could have given evidence about this at the voir dire and/or the trial. He did not do so, however. Moreover, the defence could have taken steps either before or during the trial to ensure that the police officer was available to give evidence, but this was not done.
- (b) Second, the proposed evidence is unconvincing. Mr Rawat was interviewed on his own by a Justice of the Peace at the conclusion of his interview on 26 July 2011 and asked about his treatment by police. He said he had been treated well. Mr Rawat was also taken to a doctor for a medical examination on 26 July. According to the doctor’s report, the purpose was “to examine him [to see] if he was threatened or assaulted while in custody”. The doctor’s overall conclusion was: “no injuries noted on general inspection”.
- (c) Finally, I note that Mr Rawat filed an application in the Court of Appeal to obtain further documentary material going to his claimed injuries, but did not proceed with it. Seeking to re-open that issue now, albeit with different material, is inappropriate.

Accordingly, I would decline leave to file the additional evidence.

[18] The second preliminary matter is that the Record contains only a partial transcript of the evidence at trial. The reason noted for this is “Recording on server is corrupt and cannot play”. This fault affected the bulk of the evidence. Mr Rawat’s counsel, Mr Singh, argued that this made it difficult to conduct a proper appeal.

[19] I agree that it is unsatisfactory that there was such a significant malfunction in the recording equipment. However, Mr Singh did not point to any specific prejudice arising from this feature, perhaps because the Judge’s Notes are available, and they contain a reasonably full note of the evidence and submissions. Accordingly, I do not accept that the absence of a full transcript created any risk of a miscarriage of justice.

## Discussion

- [20] As I have noted, in his evidence at trial, Mr Rawat repeated much of what he had said in his caution interview. It will be recalled that in that interview, he had given two different descriptions of the circumstances leading to the altercation. In the first account, it was Mr Rawat's jealousy of Mr Tabua's other sexual partners that led to the fight; in the second account, it was Mr Tabua's jealousy of Mr Rawat's other sexual partners that sparked the fight. Mr Rawat's evidence at trial was along the lines of the second account. But common to all accounts was Mr Rawat's emphatic denial that he had any intention of killing Mr Tabua. The critical issue at trial, then, was whether Mr Rawat had the mental element for murder.
- [21] In terms of section 237 of the Crimes Act, murder is committed if a person does a wilful act which causes another person's death, either intending to cause death or being reckless as to causing it. "Reckless" means acting while being aware of a substantial risk that death will ensue where, in the circumstances known to the person, taking the risk is unjustifiable.<sup>5</sup>
- [22] The report of the pathologist who examined Mr Tabua's body, Dr Goundar, identified the cause of death as "excessive loss of blood" caused by "laceration of the scalp". The photographs produced at trial include an image showing a deep cut to Mr Tabua's head. Moreover, the report indicated that there was bruising elsewhere on Mr Tabua's head as well as around his ribs and that there were fractures to a number of his ribs. There were also scratch marks, some embedded with sand, on Mr Tabua's back.
- [23] The pathologist who commented on Dr Gounder's report at trial said that the bruising on Mr Tabua's scalp would have been caused by "average to high energy blunt force trauma", such as a kick or a punch. The deep cut to Mr Tabua's head was associated with a harder blunt force object, such as a stone or a safety boot. He said that a person suffering a laceration of the scalp is highly likely to die from bleeding in 10-12 hours without appropriate medical attention. He said that looking at all the injuries

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<sup>5</sup> Crimes Act 2009, section 21.

Mr Tabua had suffered, he would likely have survived if he had received immediate medical attention but without that could have died within 1-3 hours.

[24] To establish intention, the prosecution relied on:

- (a) the nature of Mr Rawat's actions (ie, punching Mr Tabua about his head and body, hitting him on the head with a stone and leaving him without obtaining medical assistance);
- (b) the type and extent of Mr Tabua's injuries (as set out in the post-mortem report);
- (c) Mr Rawat's caution interview and charge statement;
- (d) circumstantial evidence (eg, Mr Rawat's conduct after his encounter with Mr Tabua).

As well as challenging the existence of the mental element for murder, the defence raised both provocation and self-defence and also argued that Mr Sole may have been involved in Mr Tabua's death.

[25] The trial Judge summed up to the assessors on the basis that the prosecution case was that Mr Rawat intended to cause Mr Tabua's death. The learned Judge did state that recklessness was also sufficient for a murder conviction but did not go into the elements of recklessness given that the prosecution had run its case on the basis of intention. Because Mr Rawat had said in his caution statement that he did not intend to kill Mr Tabua, only to injure him, the Judge also explained the elements of manslaughter.

[26] As I have noted, the Petition identified a number of grounds of appeal. Not all were pursued in submissions before this Court. I will address the grounds that were developed in submissions under three headings:

- (a) Was the mental element for murder established?
- (b) The State's reliance on Mr Rawat's caution and charging statements.



(c) Was there a reasonable doubt about who caused Mr Tabua's death?

Provocation and self-defence were raised at trial and the trial Judge directed on both in his summing up. But, as the Court of Appeal correctly said, there was no credible narrative supporting either. Accordingly, I will not address them.

*Was the mental element for murder established?*

[27] Mr Singh argued that the evidence did not establish beyond reasonable doubt that Mr Rawat had the mental element for murder and that a direction on accident was necessary. The fairness of the trial was also challenged, on the basis that the prosecution case was that Mr Rawat intended to kill Mr Tabua but the trial Judge identified that recklessness was sufficient, so that may well have been the basis on which Mr Rawat was convicted.

[28] However, the trial Judge was the ultimate decision-maker, and it was he who convicted Mr Rawat. The learned Judge concluded his judgment with the following statement:

In my view, when you put all the evidence together, especially what the accused had admitted in his caution interview and charge statements, and the effect of the deceased's post mortem report and the doctor's comments on the same, including the other evidences mentioned in paragraphs 45 and 46 of the Summing Up, as the sole judge of fact as to guilt, I find as a matter of fact that the accused, on 21 July 2011, repeatedly punched and attacked the deceased with a stone to death, with an intention to kill him.

Put another way, the Judge considered that the particular circumstances gave rise to an irresistible inference that Mr Rawat had the necessary intention.

[29] Moreover, as the Court of Appeal said, Mr Rawat was charged with murder and either of the two mental elements suffices for liability. In principle, there was nothing inappropriate about the prosecution running its case on the basis of an intention to kill but an accused being convicted on the basis of recklessness if that is what was established beyond reasonable doubt on the evidence. In any event, the Court of

Appeal was entitled to uphold the conviction if it was satisfied that Mr Rawat was reckless as to Mr Tabua's death rather than intending to cause it.<sup>6</sup>

[30] As a practical matter in a case such as the present, the distinction between mental element for murder and that for manslaughter can be a reasonably subtle one, given that the difference between the two concerns whether the accused intended to cause, or was reckless as to causing, the victim's *death* or whether he intended to cause, or was reckless as to causing, only *serious harm* to the victim.<sup>7</sup> Here, however, the trial Judge directed the Assessors on the requirements for both murder and manslaughter and used examples to explain the requirements in each instance. He tied his directions to Mr Rawat's claim in his charge statement that he had not intended to kill Mr Tabua, only to harm him.

[31] The Assessors reached different opinions, two supporting murder, one manslaughter. But the ultimate decision-maker was the trial Judge, who was well aware of the distinction between the mental elements for manslaughter and murder and had to carefully consider that very issue given the Assessors' conflicting opinions. Moreover, the evidence supported a finding that Mr Rawat had either an intention to cause death or an awareness of the risk of death and an unjustified running of that risk.

[32] For example, the evidence indicated that Mr Rawat had targeted Mr Tabua's head with the stone. According to the evidence, the injuries to Mr Tabua's head combined with those to his upper body (as detailed in the pathologist's report) were sufficiently serious to cause death within a relatively short time if not attended to. Given the nature and extent of the injuries and the way they were inflicted, it is difficult to see how Mr Rawat could not have either intended to kill Mr Tabua or been aware of the risk of death.

[33] In addition, there are Mr Rawat's actions immediately after the incident. Although he said he attempted to revive Mr Tabua by splashing water on his face, he took no steps

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<sup>6</sup> See *Rawat v State*, above n 2, at para [39].

<sup>7</sup> "Harm" is defined in section 4(1) of the Crimes Act 2009. There is no definition of "serious harm", however, although there is a definition of "grievous harm".

to obtain medical assistance for him. Rather, he stole Mr Tabua's phone and the contents of his wallet and disposed of his trousers and the empty wallet before going to meet his girlfriend, buying alcohol and spending the rest of the evening and early morning drinking. This conduct was not consistent with causing death accidentally.

[34] In the result, I do not consider that this ground has merit.

*The State's reliance on Mr Rawat's caution and charging statements*

[35] As I have explained, Mr Rawat gave two different accounts of the circumstances in which the fight between him and Mr Tabua occurred. Initially in his caution statement, he said it was because he was jealous of Mr Tabua's other sexual partners (ie, he was the instigator); later he said it was because Mr Tabua was jealous of the love bites his girlfriend had given him (ie, Mr Tabua was the instigator). His evidence at trial was broadly consistent with the second account, although his account of Mr Tabua's response to the love bites was more dramatic, he denied any interest in having sexual contact with Mr Tabua and he gave a modified account of injuring Mr Tabua with the stone.

[36] Mr Singh argued that it could not be proved beyond reasonable doubt which version in Mr Rawat's statements of how the fight with Mr Tabua began was correct. He argued that one or other version had to be a lie and that a lies direction was required.

[37] The essential purpose behind a lies direction is to prevent a jury from engaging in an inappropriate line of reasoning, to the effect that because the defendant has lied, he or she must be guilty. In reality, people lie for reasons besides seeking to conceal guilt, so before the jury could attach any significance to a lie, they would have to be satisfied that there was no innocent explanation for it. The innocent explanation must have some basis in the evidence.

[38] In this case, the prosecution did not suggest that Mr Rawat's changed description of who had instigated the fight indicated an awareness of guilt. Rather, the prosecution in their closing address used Mr Rawat's second account (the love bite version) as the basis of their case. (This version was more favourable to Mr Rawat than the other.)

The Judge did the same in his summing up, although he also noted that even though Mr Rawat had given different reasons for the fight starting, his description of the nature of the fight was consistent (ie, his punching of Mr Tabua and hitting him on the head with the stone). Even though provocation and self-defence were raised, the focus of argument as to the requisite mental element for murder was on the fight itself and its outcome rather than on how it started.

[39] In this case, the ultimate decision-maker was the trial Judge, not the assessors. There is no indication that the trial Judge used the change in Mr Rawat's account inappropriately. Accordingly, I do not consider that this ground has merit.

*Was there a reasonable doubt about who caused Mr Tabua's death?*

[40] The defence submitted at trial that Mr Sole may have been the immediate cause of Mr Tabua's death. Attention was drawn to the pathologist's statement that the wound to Mr Tabua's head could have been caused by a work boot and to Mr Rawat's evidence at trial that he saw Mr Sole wearing boots. Moreover, there was blood on Mr Sole's pants, which was never forensically tested. It was argued that this might have been Mr Tabua's blood.

[41] The evidence indicates that Mr Sole moved Mr Tabua, but at a time when, according to the pathologist's evidence, he was almost certainly dead or on the verge of death. There is simply no basis in the evidence for a viable argument that Mr Sole's actions may have contributed substantially to, or hastened, Mr Tabua's death.<sup>8</sup>

### **Determination**

[42] In the circumstances, I would grant leave to appeal but dismiss the appeal.

### **Oetaki, J**

[43] I have read the judgment in draft, and I agree with it, the reasoning and the orders.

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<sup>8</sup> See section 246 of the Crimes Act 2009 concerning the meaning of causing death or harm.

**Orders of the Court**

1. *The petition for leave to appeal is granted.*
2. *The appeal is dismissed.*



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**The Hon. Justice Anthony Gates**  
Judge of the Supreme Court



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**The Hon. Justice Terence Arnold**  
Judge of the Supreme Court



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**The Hon. Justice Alipate Qetaki**  
Judge of the Supreme Court