IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction
Criminal Appeal No. 63 of 1979

Between: DICK SUINAKWALA — Appellant

and

REGINAM — Respondent

P.W. O'Regan for Appellant
S. Chandra for Respondent

Date of Hearing: 23 June 1980
Date of Judgment: 27 June 1980

JUDGMENT

Marsack, J.A.

This is an appeal against convictions for manslaughter of one Babino Pepeteni and of grievous harm to one William Posala, and of the sentences of 10 years and five years (concurrent) respectively imposed on the convictions. There was also a "Notice of Application for Leave to Cross-Appeal" lodged by the Acting-Director pf Public Prosecutions, alleging misdirection of himself by the learned trial Judge. This notice does not specify what action the Court of Appeal was being asked to take. As it had been held by this Court in the immediately preceding case of Peter Ome v. R, Appeal 19/80 that an appeal by the Crown against an acquittal could not be entertained, Counsel was informed that the same course would be followed in the present case.

This meant that only the appeal would be considered.

Appellant, Dick Suinakwala, was originally charged with murder; but the learned Chief Justice, who sat without assessors, reduced the charge to manslaughter on the ground that there had been some provocation arising from the hostile attitude of the people of the island concerned and the threats uttered by them.

The relevant facts may be shortly stated. On the day in question appellant with three friends went over in the early afternoon to Billy Village; he says they went there to by rice but the shops were not open as it was Saturday and the community is Seventh Day Adventist. He was carrying a bush knife. After six o'clock he was able to buy the rice and all four of them went to the beach; he says with the intention of returning to their island. The villagers were annoyed with the appellant because a girl Oney had reported appellant as saying that he was not afraid of anyone in the village. Rae Boe the Seventh Day Adventist deacon went to the beach to mediate, and he spoke to appellant and his friends, on the beach. The appellant and his friends are referred to in the judgment as "Koio boys".

A row then developed, in the course of which appellant struck both Babino Pepeteni and William Posala with his knife; with the result that Pepeteni died and Posala received grievous bodily injuries. The defence was self-defence, and in the alternative gross provocation. The lengthy Notice of Appeal was based on a submission that the verdict was unreasonable and could not be supported having regard to the evidence, and also that the written judgment

signed by the learned trial Judge subsequently to his "oral judgment" delivered at the close of the hearing, showed substantial differences from the oral judgment and made it difficult to ascertain the learned Judge's findings both of fact and of law.

It is this latter ground which in the opinion of this Court requires the most serious consideration. According to the Record the learned Chief Justice prepared and signed a document, some five foolscap pages in length, which is headed "Summing Up Notes". Towards the end of the "Summing Up Notes" appears the following:

> "I accordingly find accused guilty not of murder but of manslaughter. I also find him guilty of grievous hurt and convict you of both offences."

Then later -

> "Accused: On the manslaughter charge I sentence you to 10 years' imprisonment.
>
> On grievous harm charge I sentence you to 5 years' imprisonment, sentences to be concurrent.
>
> Thank both counsel for their assistance."

Some time subsequently he signed a document labelled "Judgment" and antedated that to the date upon which he had convicted and sentenced the appellant.

It is very difficult to understand exactly what these "Summing Up Notes" are intended to be. They open up with the following lines:

> " DICK SUIN'KWALA you are charged with -
>
> 1. Murder of Babino Pepetoni 193 P.C.
>
> 2. Unlawfully did grievous harm 219 P.C. to William Posala
>
> on the 25th day of August this year."

This would appear to indicate - as did, in fact, the extracts quoted above from near the end of the notes - that what he was saying was intended as a judgment; but further extracts tend to show that they were really notes upon which a judgment would be based. We quote some of these extracts:

> "(Both Counsel spelt out law on self-defence)"
>
> "Listened carefully to what Mr. O'Regan had said; related all the evidence. I picture the scene very well - small village."
>
> "There should be some law to prevent the carrying of these dangerous bush knives in certain areas such as a village or when visiting places."
>
> "I accept doctor's evidence. He is 18 years. (He looks to be more than 18.)"

His later "judgment", though, as we have said, antedated to the last day of the hearing, set out his findings in the past tense. For example:

> "I rejected the defence of self-defence as the only weapons the villagers had were one stick, one coconut branch and a light canoe.
>
> I found him guilty of manslaughter and convicted him of such."

These two sentences give rise to the inference that the learned trial Judge used his "Summing Up Notes", or part of them at least, as the basis of an oral judgment delivered in Court.

Mr. O'Regan who was counsel at the trial, informed this Court that he took longhand notes of the judgment as it was delivered in Court and it differed in substantial respects from these Notes referred to above.

It is most unsatisfactory not to have a proper record of the Judge's directions to himself in law and findings of fact. In the absence of such a record this Court is unable to assess the merit of some of the matters raised on appeal. The main ground advanced was that the Judge erred on the question of self defence. It appears from the "Notes" and also from the post hoc Judgment that the Judge held that the appellant could have run away; whereas the evidence from four witnesses - including a prosecution witness - is to the contrary.

We must express strong disapproval of the procedure adopted in this case by the learned trial Judge, which has rendered it impossible for this Court to ascertain exactly what were the Judge's findings of fact and what was delivered as his judgment in the case, a judgment which must necessarily precede the passing of sentence.

In any event it is clear that the Judge passed sentence without giving the appellant any opportunity of putting forward a plea in mitigation. This was a substantial departure from normal practice of the Courts and in our opinion was a definite injustice to the accused. The chances that any such plea would have resulted in the lightening of the sentence may be small; but that cannot deprive an accused person of his right to put forward such a plea.

For the reasons set forth above and also for the reason that appellant was given no opportunity to make a plea in mitigation before

sentence was passed, we must allow the appeal and quash both convictions. As, however, there is ample evidence upon which the appellant could have been convicted of the offences charged in the course of a properly conducted trial, then it is right that this Court should order a new trial. Accordingly our judgment is that the appeal is allowed, the convictions and sentences quashed, and a new trial ordered.

(sgd.) C.C. Marsack
JUDGE OF APPEAL

(sgd.) G.D. Speight
JUDGE OF APPEAL

(sgd.) B.C. Spring
JUDGE OF APPEAL