IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No.57 of 1980

DICK SUINAKAWALA — Appellant

v.

REGINAM — Respondent

Timothy Roberts for the Appellant
Suresh Chandra for the Respondent

Date of Hearing: 18th March, 1981
Delivery of Judgment: March, 1981

JUDGMENT OF THE COURT

Henry J.A.

This is an appeal from the High Court of the Solomon Islands against convictions for murder of one Babino Pepeteni and of causing grievous bodily harm to one William Posala. For the offence of murder appellant was sentenced to statutory life imprisonment and on the other offence he was sentenced to five years' imprisonment. Appellant has also appealed against the latter sentence. Both convictions arose from a re-trial ordered by this Court. At his previous trial appellant was charged with the same offences but the trial Judge reduced the charge of murder to manslaughter and imposed a sentence of 10 years' imprisonment. Such reduction was made on the ground that there had been some provocation arising from the hostile attitude of the people of the island concerned and threats uttered by them. The trial Judge in the first trial found as follows :

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

At the commencement of the hearing of the present appeal an application was made to add a ground that appellant ought not to have been indicted for murder on the second trial but for manslaughter only. The Court intended to raise the same question for argument. Counsel for the Crown consented to the addition of this ground. Upon reading the judgment of the Court of Appeal, although at the end of the judgment the words "offences charged" are used, it is quite clear that the offences in respect of which a re-trial was ordered were manslaughter and causing grievous bodily harm. This for the reason that the Crown had appealed against the acquittal for murder. It was held that no appeal would lie against that acquittal. The acquittal thus stood. We need not pursue this question further. This appeal will accordingly be dealt with on the basis that the conviction (if any) should have been one of manslaughter. This eliminates any question of considering whether or not appellant was provoked, except, of course, as a factual matter in the narration of the events which occurred.

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; appellant says they went there to buy 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 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 Boy Logaro the Seventh Day Adventist deacon went to the beach to mediate, and he spoke to appellant and his friends, on the beach. The villagers followed the deacon.

There are two directly conflicting accounts of what happened. Prosecution witnesses state that no provocation was given but that appellant had adopted a hostile attitude and had attacked both deceased and Posala. They denied that they were armed with sticks and stones. Defence witnesses on the other hand said that the villagers initiated an attack, that they were armed with sticks and stones and that appellant was provoked and had acted only in self-defence. Whatever the true position was it is clear that appellant struck the deceased with a knife with great force causing instantaneous death from a large wound to the left root of the neck severing connections between brain and heart. The wound was inflicted from above the body at an angle of 45°, that is in relation to the body when upright. Posala received from appellant more than one blow from the same knife. He sustained a severe wound to the left forearm about 7 inches between the elbow and wrist. Both bones were smashed and the hand (since amputated) was hanging by a narrow band of skin and a piece of muscle. He also had a laceration of the right forearm about four inches long and a small superficial laceration of the right thigh.

The first ground in the notice of appeal reads as follows :

> "1. That the finding of the learned trial Judge that the accused was not entitled to act in self defence was unreasonable having regard to the evidence."

This ground is confined to self-defence but it involves the whole question of determination by the trial Judge of the credibility of the various witnesses. No question has been raised as to the law applied by the trial Judge. The complaint is confined to the approach by the trial Judge to the proof of matters of fact relating to self-defence. Inconsistencies in the evidence of the

witnesses were pointed out but these were all matters which inevitably and commonly arise when events move quickly as they did in this case and the various witnesses give their respective versions of events as they saw and remember them. Also there is their ability to express and explain events whilst in the witness box. A further complaint was made, and it was the principal argument, that the evidence of the witnesses for the defence was subjected to a very critical analysis whilst no such step was taken in respect of the witnesses for the prosecution. This attack on the judgment was based substantially on the final summary of the trial Judge when he rejected the evidence for the defence and accepted the evidence for the prosecution.

The passages, which counsel relied on in particular, were criticised out of the context of the judgment as a whole. We propose to review the finding in its proper context. The trial Judge first dealt with matters which were not in dispute, and, in particular with the nature of the wounds inflicted. Then, after stating that there was a strong conflict between the two sets of witnesses and the likelihood of collaboration, the trial Judge said :

> " I must also take into account the way witnesses gave their evidence and stood up to the fair and full cross examination addressed to them, the internal consistency of their evidence; and the logical consistency of what they said; particularly when it can be related to accepted facts such as the nature of the wounds suffered."

He then reviewed all the evidence first for the prosecution and then all the evidence for the defence. This is important in considering the contentions of counsel for appellant.

The trial Judge then continued by considering certain evidence concerning the blow to the neck of deceased which he concluded was an important matter. He

then gave the reason for dealing with this evidence in some detail and again examined the question further and came to a conclusion that certain evidence was quite inconsistent with the accused's account. The trial Judge then said, and it is the contrast of the treatment of the two versions which counsel for appellant complains about, that

> " Having carefully considered all the evidence and the way it was given I am completely sure that the only course open to me is to reject the defence evidence on these two crucial incidents when it is suggested that these wounds were inflicted.
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> Having done so I turn to the prosecution evidence. I am sure that the events as told by the prosecution witnesses have the ring of truth about them. I am sure that that version of these events is correct and therefore I find in favour of the prosecution on the factual issues."

There is no basis for the criticism of the way in which the trial Judge dealt with the evidence. Counsel appears to be under a misapprehension about the first sentence in the passage just quoted. First it encompassed all the evidence earlier reviewed, and, secondly, the trial Judge was bound to consider specially whether or not he could be completely sure that it was proper to reject the defence evidence because, if this evidence had left him in reasonable doubt, he was bound to acquit. There is no merit in counsel's criticism. Credibility was carefully considered and the onus of proof was properly applied.

Before leaving this topic it is necessary for us to consider the evidence relating to self-defence. In the finding of facts the trial Judge said :

> " I find that POSALA was standing holding a coconut frond to prevent the accused from reaching SILOKO whom the accused wished to attack unlawfully. In my judgment I am sure that POSALA was not attacking the accused in any way. Therefore the prosecution have made me sure that the accused was

not defending himself when he struck POSALA. Even were it said, which I do not consider it can be, that the accused was justified in a measure of self-defence, the force used by him was grossly in excess of the force reasonable in the circumstances even taking into account the accused was a Kwaio man and giving him every benefit of a subjective approach.

I find therefore that I am sure that self-defence has been excluded by the prosecution in relation to Count 2 and that the force used by this accused against POSALA was unlawful."

These are findings of fact which in our view are clearly supported by evidence which the trial Judge has properly found to be credible. Credibility was correctly determined and there was no misdirection in law. When viewed in the context of the judgment it is clear that nothing has been put forward upon which the findings of fact can be successfully questioned on appeal. This ground fails.

Ground 2 was abandoned. Grounds 3, 4 and 5 may be dealt with together. They are :

"3. That the learned trial judge erred in law in permitting witnesses to give evidence in the pidgin language without an interpreter expert in that language being present and in permitting examination in chief and cross examination of the witnesses to proceed in the pidgin language contrary to the mandatory provisions of section 182 of Criminal Procedure Code.

4. That the evidence recorded by the learned trial judge is not an accurate record of what was said by the witnesses but represents an interpretation into English from pidgin made by the learned trial judge.

5. That certain inconsistencies in the evidence of the defence witnesses as recorded by the learned trial judge were the product of loose phrasing inherent in the pidgin language compounded by necessarily subjective interpretations placed upon these phrases by the learned trial judge."

Section 182 reads :

"182. The language of the court in the case of both the High Court and Magistrates' Courts shall be English."

The proceedings were wholly recorded in English. Witnesses for the prosecution gave evidence in pidgin which they thoroughly understood. Judge and counsel were also familiar with pidgin and were able to speak freely with the witnesses. Indeed counsel for the defence stated he conducted his cross-examination in pidgin. Some of the defence witnesses gave evidence in their own dialect (Kwaio) which is appellant's dialect. The services of an interpreter were used apparently for a version in English. No complaint was made in respect of this evidence. Section 182 must be read in the light of the necessity to conduct hearings in different languages and dialects. There ought to be a medium for the record and this is the purpose of Section 182. Section 183 goes on to provide for interpretation of evidence and documents. Section 181 controls the manner of recording evidence before a Magistrate and requires it to be taken down in writing in English. Section 185 deals with the manner in which evidence is to be recorded in the High Court and provides that the evidence shall be taken down in a certain manner. This means in English though the section does not expressly say so. In our opinion Section 182 is confined to the record of the proceedings and it does not have the implications claimed by counsel for appellant. We will return generally to this matter after examining the matters raised in grounds 4 and 5.

The main objection appears to arise from the use of the expression "mi losim ting ting" which was vital on the question of provocation. The trial Judge recorded this as meaning "I lost mental control" and "I lost my thinking". Expert evidence was presented to

this Court in which the deponent said the correct translation was "I lost self-control". We are unable to see any substantial difference. Although provocation is no longer an issue it is nevertheless important to consider this passage in the judgment because it relates to the grounds of appeal now being discussed. The trial Judge said :

> "As no other provocation by the deceased was pointed to I find that there is no evidence that the accused was deprived of his self-control by provocation offered by the deceased. I should add that the accused himself at no time claimed that he had, in fact, lost his self-control. He said he 'lost his thinking and defended himself' and that he was 'frightened' and reiterated that he defended himself time and time again. However in view of my finding above it is not necessary for me to say more."

This passage is far from clear in a judgment which has otherwise carefully dealt with every relevant question. When the trial Judge speaks of a claim and uses the terms "in fact" it seems to be an objective inquiry rather than an inquiry into what appellant says his state of mind (subjective) was. It was a comment after a finding that no provocation was offered by the deceased and may have been added as explanatory of his finding. We will return to the use of this expression by appellant.

The only other expression referred to was "Kafem". On discussion with counsel it seemed to us that the distinction sought to be drawn was not valid. The version of counsel, which we accepted from the Bar, was not substantially different from the record of the trial Judge.

The gravamen of the complaint generally appears to be that appellant was deprived of his right to have the evidence correctly translated into English for the purposes of the record and of any subsequent proceedings.

In dealing with a departure from a code enacted for the purpose of ensuring the jury was familiar with languages used in Ceylon, the Privy Council said in Hemapala v. R. [1963] 3 All E.R. 632, 635 :

> "The assurance given by the foreman of the jury to which the other members of the jury gave no more than a mute assent does not, in their lordships' opinion provide a sufficiently solid foundation on which to assume that all the members of the jury were in fact able to understand and appreciate evidence not given in English and the addresses of the defence counsel. Accordingly their lordships hold that, there having been a departure from the provisions of the code with no certainty that such a departure did not operate to the disadvantage of the appellant, the case must be regarded as one in which there has been a miscarriage of justice necessitating the quashing of the conviction."

It was earlier said at page 634 :

> " Their lordships do not think that the trial in this case can be said to have been a nullity because of the course followed, but there are good grounds for holding that the way in which it was conducted may have resulted in withdrawing from the accused a protection which the code was designed to secure. As was said by Lord Goddard, C.J., in R. v. Neal [1949] 2 All E.R. 438 at p.439:
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> > 'There is no doubt that to deprive an accused person of the protection given by essential steps in criminal procedure amounts to a miscarriage of justice and leave the court no option but to quash the conviction.' "

In applying these principles the question is whether or not appellant was deprived of the protection he was entitled to by reason of his unfamiliarity with the English language and the necessity to have a true record in English of what was said by the various witnesses. There is only the equivocal passage in which the expression "mi losim ting ting" may possibly have not been given its true meaning. Even if there was a

failure to appreciate the exact nuance of the expression the issue to which it referred was no longer in contention. It could not possibly prejudice appellant in the determination of the charge of manslaughter which we are now considering. Appellant was accordingly not deprived of any protection which ought to have been afforded to him by reason of any wrong construction of the pidgin language. Grounds 3, 4 and 5 fail.

The appeal against sentence was stated in ground (c) as follows :

> "That the sentence is manifestly excessive in all the circumstances having regard in particular to the age of the accused and his previous good character."

This ground developed into a claim that, by virtue of the Criminal Appeal Act 1968 (U.K.), the sentence should as a matter of law be dated back to the time of the imposition of sentence at the first trial. It was submitted that the U.K. Statute applied by reason of Rule 7(b) of the Court of Appeal Rules under the Western Pacific (Courts) Order in Council 1961 which applies to the Solomon Islands. This rule reads :

> "7. Where no other provision is made by these Rules, or by any other enactment, the jurisdiction, power and authority of the Court of Appeal and the judges thereof shall be exercised -
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> (b) in criminal proceedings, according to the general course of practice and procedure for the time being observed by and before Her Majesty's Court of Appeal (Criminal Division) in England."

The U.K. Statute is a substantive enactment and is not a matter "in the course of practice and procedure". The law in the Solomon Islands itself provides for the imposition of sentences. We reject any contention that the U.K. Statute applies to the Solomon Islands. No

other submission was made on this ground and therefore it must fail.

The appeal is allowed and the conviction for murder (Count 1) is quashed and in substitution therefor appellant is convicted for the offence of manslaughter contrary to Section 192 of the Penal Code. Appellant is sentenced to imprisonment for a term of 10 years as from September 4, 1980. The appeal is dismissed in respect of conviction and sentence for causing grievous bodily harm (Count 2).

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Judge of Appeal

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