IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal Nos. 71,72 & 73/80

Between: BOB APPANA s/o Appana
APPAL SAMI s/o Sidal
SUBHAS APPANA s/o Balram Appana
JOHN LEO

Appellants

- and -

REGINAM

Respondent

Anil Singh for the 1st and 3rd Appellants
Vijay Maharaj for the 2nd Appellant
E. Vula for the 4th Appellant
John Raza for the Respondent

Date of Hearing: 13, 14 July 1981
Date of Judgment: 31 July 1981

JUDGMENT OF THE COURT

Marsack, J.A.

These are appeals against conviction for murder of one Iosefa Kula entered by the Supreme Court sitting at Labasa on 26th November 1980. There was a joint trial of all appellants before a judge and four assessors. Before this Court the appeals of all four appellants were heard together, though as shown in the head-note, three Counsel appeared for the appellants. In the Supreme Court the trial of the appellants commenced on 7th October 1980 and ended, with the conviction of all four appellants of murder, on 26th November 1980. It is to be noted that the summing-up of the learned trial Judge took over two hours to deliver; but the assessors

returned, after being out less than ten minutes in all, expressing the unanimous opinion that all four appellants were guilty of murder. The Judge accepted this opinion, entered convictions accordingly, and passed sentence of imprisonment for life in each case.

The basic facts put forward by the prosecution may be shortly stated. On the afternoon of Saturday, December 29th, 1979 1st and 2nd appellants, with Iosefa Kula and others, were drinking on first appellant's property at Vuna, Taveuni; and a considerable quantity of liquor was consumed. An argument developed over the puncturing of a tyre of 1st appellant's car by a 5-inch nail, and Kula considered that his children were being blamed for the use of the nail. He indignantly refuted this allegation. Later, about 8 p.m., 1st and 2nd appellants, deceased Kula, and two others, Mikaele and Fabiano, were drinking under a cherry tree in the compound of Balram's store at Vuna. The houses of all four appellants are situated nearby. After Fabiano and Mikaele had left, a dispute flared up among those remaining, and Kula punched 1st appellant who fell to the ground. 2nd appellant punched Kula who retaliated by knocking down 2nd appellant. Then the 3rd appellant, who had been working in his parents' shop, looked out and saw 1st and 2nd appellants and Kula involved in a dispute. 3rd appellant rushed out, seized a spade and hit Kula on the back of the shoulders with it. Kula turned and chased the 3rd appellant who ran away. 4th appellant, who had gone with a torch to attend to some poultry, then arrived on the scene and followed Kula, shining the torch on his face. It was in dispute whether he hit Kula with his fist or not, but Kula fell down. Then 1st, 2nd and 3rd appellants came up armed with knives and struck Kula several times with them, while 4th appellant continued to shine his torch on Kula. A short time later one Petero found Kula lying on the ground. Petero then, with the assistance of 1st and 3rd appellants and some Fijians, put Kula into a car belonging to 2nd appellant and drove some 16 miles to the Taveuni Hospital. There Kula was found dead on arrival.

The medical evidence given at the trial was that Kula had four cuts to the head, two of which penetrated the skull to the brain; and these cuts could have been caused by the cane knives which were produced in evidence. Cane knives were found by the Police in the houses of each of the appellants, but were not identified as those being used at the scene.

The case for the prosecution rested largely on the evidence of two Fijian girls Anatolia and Eliz Vere, who when walking down the road heard shouting from the direction of Balram's store. They hurried to the scene, and in their evidence deposed to the fighting which took place and what they described as the "chopping" of Kula by 1st, 2nd and 3rd appellants, while 4th appellant was shining his torch on Kula as this happened. They then ran off to raise the alarm.

The case for the defence, put very shortly, was that 1st appellant was knocked unconscious by the blow from Kula and he knew nothing about what happened to Kula thereafter; that 2nd appellant acted in self-defence or at least under provocation; that 3rd appellant did not use the sharp edge of the spade and struck the blow only when he was alarmed that Kula was intending violence to one of the others and to a child of one of his relatives; and that in any event there was insufficient light to enable the two female witnesses to see clearly what they deposed to in their evidence; that 4th appellant took no active part in the assault.

As to the grounds of appeal: 1st and 3rd appellants submitted the same grounds and their appeals can be dealt with together. The appeals of 2nd and 4th appellants will require separate consideration.

1st and 3rd appellants have submitted some twenty-four grounds of appeal, including the sub-headings, and it must be observed that these overlap to a considerable degree; while

some do not call for any answer from this Court. For example, one ground reads -

> "4. That there was a miscarriage of justice in that the 1st and 3rd appellants were not separately and/or competently represented at the trial."

In the Supreme Court the 1st and 3rd appellants were in fact represented, as were 2nd and 4th appellants, by Mr. S.M. Koya, Counsel of long and varied experience in the Courts. Moreover, 1st and 3rd appellants were both represented by one counsel, Mr. Anil Singh, on this appeal.

The grounds of appeal of 1st and 3rd appellants requiring consideration by this Court may be briefly summarised as under:

1. That the learned trial Judge erred in admitting into evidence
   (a) production of the cane knives and evidence of blood stains thereon;
   (b) evidence of the Police interviews of 1st and 3rd appellants following their confrontation with one of the principal prosecution witnesses;
   (c) the original Police statements of the two witnesses Anatolia and Eliz Vere;
2. That there was a miscarriage of justice in that the learned trial Judge
   (a) summed up in a manner which was unfair to the appellants in that he commented adversely on their evidence and failed to put their defence adequately to the assessors;
   (b) failed to direct the assessors correctly on the question of lies told by the appellants;
   (c) failed to direct the assessors adequately on the subjects of identification, intent, provocation and intoxication;
   (d) failed to direct the assessors correctly as to the burden of proof.

Ground 1(a): It was Counsel's contention that the production of the cane knives with which the prosecution alleged that Kula had been killed, together with the evidence of blood-stains thereon, at the commencement of the trial, was prejudicial to the appellants in that the assessors would carry those things in their minds throughout the trial. The knives were produced well before evidence was tendered as to any connection between the knives and the appellants. Counsel for the defence raised objection to the intended production of the knives, but after hearing argument from both sides the trial Judge ruled that they could be put into the Court. They were produced to the 2nd witness called then, a constable from Taveuni who merely deposed that he had brought the knives to Court from the Labasa Police Station together with blood samples of the deceased and of the four accused. The next witness was the Laboratory Superintendent at Colonial War Memorail Hospital, Suva who gave evidence that the blood on the knives produced was human blood of Group 'A'. The fifth witness was a Medical Officer from Taveuni Hospital who carried out the post-mortem examination on Iosefa Kula. He testified that the blood group of the deceased was Group 'A'. Later in the trial the defence called Dr. Karam Singh, who gave evidence that the method used by the Laboratory Superintendent to ascertain the blood group of the blood found on the cane knives was not satisfactory; and as a result of his evidence the learned trial Judge, towards the end of his summing up, directed the assessors to ignore all evidence relating to possible blood stains. In Counsel's submission this late direction would not have sufficed totally to remove the impression which had been created in their minds by the production of the cane knives and the evidence as to the blood thereon adduced at the beginning of the case. The fact that the assessors took less than ten minutes to decide upon their verdict indicated, in Counsel's submission, that they had made up their minds some time before, and thus would not be able to give full heed to the learned trial Judge's direction to them, so late, that the evidence as to the blood stains should be ignored. In our view, though there is some merit in Counsel's argument, the totality of the admissible evidence of the association of the appellants with the killing of Kula outweighs the objection put forward on this point.

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Ground 1(b): This ground relates to the evidence given by ASP Somar Singh concerning statements made to him by 1st and 3rd appellants in the Police Station. Each of them was given the appropriate caution before being questioned. The 1st appellant was told of the accusation made against him by the two Fijian girls. He replied that their statements were false. The Fijian girl Anatolia was then called into the office and asked to relate what she had seen. She did so and the 1st appellant again said that her story was not true. Later the Police officer interviewed the 3rd appellant, who denied having been on the scene when Kula was struck. ASP Singh then asked him, "Do you want to be confronted?" 3rd appellant did not reply. Once again Anatolia related what she had seen on the night in question 3rd appellant then said, "I hit him with spade when Kula punched my paternal uncle Bob and my cousin Koki and knocked them to the ground." We are unable to see in what way the defence of either appellant was prejudiced by this confrontation. As is said in a judgment of this Court in Ali Hasan and Others Cr.App.57 of 1977 -

> " We are satisfied that the witnesses were brought before the appellants to let them know what was being said about them."

No objection was raised by Counsel to the admission of this evidence at the trial. We are satisfied that the appellants were in no sense prejudiced by learning, from the witness herself, just what was being said about them. The appellants both denied that Anatolia was speaking the truth and there the matter rested.

Ground 1(c): When Anatolia was being cross-examined she was asked by defence Counsel about the statement she had made to the Police, and as to whether that statement was consistent with the evidence given in Court. The record at this stage says:

"Police statement tendered".

It was read out in English and interpreted to the witness in Fijian. She was then cross-examined on the statement itself. The production of the statement followed logically from the course taken in the cross-examination; and Counsel used that statement in framing his questions to the witness. When the other Fijian girl Eliz Vere was giving her evidence she was cross-examined by Counsel for the appellants on the statement she had made to the Police, and Counsel during the course of this said to the Court:

> "I wish to tender the statement".

It was so admitted accordingly. The learned trial Judge warned the assessors -

> "It is not evidence, but simply to show what she has said or admitted to say on another occasion in relation to the evidence given in this Court."

There is thus no ground of complaint regarding the admission of the statements into evidence; and it was made clear to the assessors that the statements in themselves were not evidence.

Ground 2(a): It is certainly true that the learned trial Judge went to some pains in the course of his summing up to criticise defence Counsel's cross-examination of Anatolia and Eliz Vere, and to convince the assessors that these witnesses were worthy of credit. But he still made it clear that the assessors were not bound to accept his opinion. On this matter he directed them in the following terms:

> " I may make comments on the evidence by comparing or constrasting what one witness says with that of other witnesses. In so doing I am not inviting you to accept or reject any witness's evidence. Should you get the impression that I have formed an opinion of my own which I want you to accept you will be quite wrong. I have no such intention. I may try to assist you in assessing the evidence by giving you the benefit of my experience in that respect but you are independent persons chosen to return your own independent opinions and not something which you think the judge has in mind."

In support of his argument on this ground Counsel cited Broadhurst v. R. (1964) A.C. 441 in which a conviction was quashed on the ground that the learned trial Judge had gone too far in revealing his views, so far that there was a danger of the jury being over awed by them. That case is however distinguishable from the present one; as was said by Lord Devlin at page 464:

> "Their Lordships appreciate that the Chief Justice was anxious only to help the jury to take a true view of the case as he saw it, but unfortunately, in their Lordships' opinion, he saw it wrongly."

Earlier in the judgment Lord Devlin says:

> "But it is very important that the jury should be told that they are not bound by (the opinions of the presiding Judge on issues of facts) nor relieved thereby of the responsibility for forming their own view."

In the present case it has not been shown that the learned trial Judge took a wrong view of the case; and in any event he made it clear in the passage from his summing up quoted supra that were to return their own independent opinions and not something which they thought the Judge had in mind. Accordingly we are unable to say that the summing up of the learned trial Judge amounted to a miscarriage of justice.

Ground 2(b): It is the contention of the Counsel for the appellants that the learned trial Judge made too frequent references to lies told by the appellants, giving the impression to the assessors that the telling of lies by the appellants was a matter definitely to be taken into consideration on the question of their guilt. He cited a passage from the judgment of Lord Devlin in Broadhurst v. R. (supra):

> "It is very important that a jury should be carefully directed upon the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty, and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so."

The summing up of the learned trial Judge on this subject is in these words:

> "In sifting the evidence if you consider that the accuseds or any of them have told lies that is not the reason for regarding the prosecution witnesses as truthful. Lies told by the accuseds are something you can take into account when assessing their credibility and you may wonder why it was necessary for them to tell lies to the police,- if you think they did so. If you think that any witness has told deliberate untruths in this Court then you should be very careful about accepting any part of that witness's evidence."

This direction might have been improved if he had reminded the assessors that an accused person may have motives other than concealment of guilt by lying, e.g. fear.

It is to be noted that he does not definitely state that the appellants have told lies. He invites the assessors to make up their own minds on this point. He follows by directing them that if they conclude that the appellants have told lies that does not mean that the prosecution must necessarily succeed. It is a matter to be taken into consideration in assessing the credibility of the appellants in their evidence. It is a well accepted principle that if a witness is proved to have been lying in some part of his evidence caution must be exercised in the matter of belief in the rest of it. The learned trial Judge in his summing up goes no further than this; and we are unable to find that the appellants have been in any way unfairly prejudiced in this respect.

Ground 2(c): On the subject of identification the learned Judge correctly pointed out that the appellants were recognised by the two Fijian girls who had known the appellants nearly all their lives. Moreover, the 1st appellant in his evidence referred to the presence in the vicinity, at material times, of Kula, 2nd, 3rd and 4th appellants all of whom he had seen personally there. Much of Counsel's argument on this ground was directed to the fact that it was after 8 o'clock at night when the killing of Kula took place and at that time there was

little light in the place generally apart from that of the moon. However, in our view the evidence of identification of appellants was such as to leave no room for doubt as to who were the persons involved in what took place.

The question of the adequacy of the summing up on the subject of intent, provocation and intoxication will be dealt with later.

Ground 2(d): On this ground Counsel submitted that the summing up of the learned trial Judge was inadequate and he cited the passage in which the burden of proof was explained to the assessors:

> "The standard of proof required from the prosecution is very high. You must after considering all the evidence on both sides be sure of an accused's guilt before you convict. If you are sure of his innocence the course you take is obvious. If you are not sure of an accused's guilt you will give him the benefit of the doubt and acquit him."

Counsel complained that not once did the learned trial Judge use the phrase "reasonable doubt" and direct the assessors that they must be satisfied beyond reasonable doubt of the guilt of the accused before expressing the opinion that he was guilty as charged. Counsel argued that a direction in the words "you must be sure of accused's guilt" was not adequate.

In choosing this form of words the learned Judge was of course following the dictum of the Lord Chief Justice in Summers (1952) 36 Cr.App. R. 14 at 15 when he said

> "If a jury is told that it is their duty to regard the evidence and see that it satisfies them so that they can feel sure when they return a verdict of Guilty, that is much better than using the expression 'reasonable doubt'. "

This dictum has been much discussed and has not in fact found universal acceptance. This Court considered the question and discussed the authorities in Shiu Rattan v. Reginam (1970) 16 F.L.R. 181 and we expressed the view that for the purposes of

Fiji the use of the expression "must be satisfied beyond reasonable doubt" was well established. That is not to say that the learned Judge in this case was wrong to use the form of words he did - so long as the assessors are made to understand that the onus is all the time on the prosecution, the choice of words is for the trial Judge.

Grounds submitted by the 2nd appellant may be shortly summarised:

1. The learned trial Judge erred in misdirecting the assessors on the issue of self-defence.

2. Misdirection by the learned trial Judge on questions of intent, intoxication and provocation.

As has already been stated the issues submitted under the second head are common to all four appellants and will be dealt with when the other grounds have been considered.

Ground 1: Counsel refers to the evidence of Anatolia who deposed that she saw Appellants 1 and 2 with Kula and they were punching each other; that Kula struck 1st appellant, and he fell; then 2nd appellant punched Kula who returned the punch, making 2nd appellant fall down. Then 3rd appellant hit Kula with a spade and Kula - not badly hurt - chased 3rd appellant some yards towards Balram's store. Then 4th appellant hit Kula and Kula fell. Then, said the witness, 1st, 2nd and 3rd appellants appeared with knives and struck Kula.

In Counsel's submission the question then arose: Did 2nd appellant honestly and reasonably think that his action was necessary? He referred to the evidence of 2nd appellant to the effect that Kula punched him; and his evidence proceeds:

> "I thought he would kill me or severely beat and injure me. I was afraid of my relatives nearby. A lot of them were calling out.
>
> I held nothing in my hand.
>
> The blow knocked me backwards and as I staggered someone handed me a knife. It was too dark for me to observe who handed it to me. Kula still

had hold of my shirt with his right hand; he released his grip and hit me on forehead with his right hand. I then struck at him with the cane knife. I struck him plenty of times and he fell to the ground. I kept on hitting him."

In his summing up the learned trial Judge directed the assessors that the English common law on self-defence - which under Section 17 of the Penal Code must be applied in Fiji - is that if 2nd appellant reasonably believed his life to be in danger, or that he was in danger of serious injury, he was entitled to use such force as he reasonably believed necessary to prevent and resist the attack. He then invited the assessors to consider the nature of Kula's numerous and severe injuries and whether they regarded it necessary for those injuries to have been reasonably inflicted in self-defence. He then again directed them that the onus lay on the prosecution to prove that the 2nd accused had not acted in self-defence. The Judge pointed out that 2nd appellant in his evidence stated that he did not strike Kula after Kula fell to the ground. He went on to say that if 2nd appellant did chop Kula when he was on the ground the assessors might well consider that 2nd appellant had used more force, and dangerous force at that, than was necessary for his own protection.

Although we have given careful consideration to Counsel's submissions we are unable to find anything in the summing up on this point which was unduly prejudicial to the 2nd appellant. If the evidence of the Fijian girls was accepted - and it appears clear that Judge and assessors did accept it as substantially true - then 2nd appellant also struck blows with his knife to Kula when the latter was on the ground; and in those circumstances it could not be properly said that he was acting in self-defence.

Ground 2 will be considered later.

The grounds of appeal put forward by the 4th appellant, to the extent that they require consideration by this Court, may be shortly set out as follows:

1. That the learned trial Judge failed to direct the assessors adequately on the subject of parties to an offence;

2. That there had been misdirection or inadequate direction on the subject of the proof of intent.

Ground 1: It is clear that the 4th appellant, though early in the proceedings he struck a blow on Kula, took no active part in the final assault with knives which led to the death of Kula. Accordingly his conviction of murder must rest on his being proved to be a party to the crime. The relevant statutory provisions, Section 21(1)(b) & (c) of the Penal Code are:

> "21. (1) When an offence is committed each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say -
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids or abets another person in committing the offence."

No direct reference was made by the learned trial Judge in his summing up to these sections of the Penal Code. That, however, would be of no moment provided that he made it clear to the assessors exactly what had to be proved in order to establish that 4th appellant was a party to the offences committed, within the provisions of the law. In the course of his summing up he refers to the part played by the 4th appellant in what took place. The relevant passages are:

> "If each accused chopped him with that intention it matters not which of them struck the fatal blow or blows they would all be guilty. If you decide that Accd.4 (John) was not simply a passive onlooker but had gone into the road looking for Kula and had held the torch on Kula when he was being chopped that would be acceptable evidence that he was joining in with the others whilst they chopped Kula.
>
> If you consider that to be the correct picture you would find all four accuseds guilty of murder as charged."

"Did Accd.4 spontaneously join in the killing by shining his torch to help them, or to help Accd.2 (Appal Sami)? Or was he innocently caught in an incriminating situation? They are matters for you."

"It does not matter which accused actually struck the fatal blow or blows if you decide that accused 1, 2 and 3 were there chopping Kula. It is sufficient that each one intended to inflict some grievous harm to him and was there assisting. Accused 4, John, is in a similar position if you concluded that although he was not armed he went to the road looking for Kula and stood by intending to assist accuseds 1 & 2 & 3 by shining a torch beam on Kula."

In the last passage quoted the learned Judge directs the assessors that to find 4th appellant guilty of murder they must find that he was assisting the other appellants as they were assaulting Kula. But he does not make it clear that to find him guilty of murder they must be satisfied that he knew the intention of the other appellants was to kill or inflict grievous bodily harm. It may well be, to judge from the last passage quoted, that the learned Judge was of the opinion that the fact that the other appellants were, as the evidence goes, "chopping" Kula with knives, was enough of itself to establish an intent to do grievous bodily harm; and that the 4th appellant, watching what they were doing, must have realised the intent, and still continued to assist by shining his torch on Kula. But in our view the learned trial Judge should have directed the assessors that, to find the 4th appellant guilty of murder by being a party to that offence, they must find it proved to their satisfaction that he knew they intended to inflict grievous bodily harm. That being so, though failure so to direct the assessors might well involve a dismissal of the charge against him of murder, it could properly be found that 4th appellant was aiding 1st, 2nd and 3rd appellants to assault Kula; as that assault resulted in the death of the victim, the proper conviction in his case would be not of murder but of manslaughter.

It is now necessary to consider the ground advanced by 3rd and 4th appellants that the learned trial Judge failed to direct the assessors adequately on intent and provocation, and by the 1st and 2nd appellants on intoxication.

With regard to intent the learned trial Judge directed the assessors in these terms:

> "A person's intentions are in his mind. We are not mind readers and therefore an accused's intention when he commits an alleged crime is not capable of positive proof. Intention can only be proved by conduct on the part of the accused which makes you sure that he had an intention to kill or to cause grievous harm to the deceased. The onus is upon the prosecution to prove that intention and it is never upon the accused to negative it."

What he is saying there is that proof of intent must be a matter of inference from the conduct of the accused. Here in our opinion the actions of 1st, 2nd and 3rd appellants led inevitably to the conclusion that each of them had the intent at least to inflict grievous bodily harm. No other inference, in our view, is possible from the attack of three persons with cane knives on another who was on the ground. The learned Judge also gave the assessors a general direction that they must be sure before expressing the opinion that any one of the accused was guilty; and in explaining that the meaning of "malice aforethought" must, in this case, include the intention to cause death or grievous bodily harm. His direction on this point was, in our opinion, adequate.

As to intoxication: His direction on this subject to the assessors was as follows:

> " The fact that accd.1 or accd.2 was so affected by drink that he acted in a way in which he would not have acted had he been sober does not assist him, provided he had the intention to kill or to cause grievous harm. A drunken intention is still an intention. You must have regard to all the evidence including that relating to drink in deciding whether accd.1 or accd.2 had the necessary intent. If you decide having considered all the evidence including drink that either accd.1 or accd.2 killed or assisted in the killing of Kula but had not the necessary intent to kill or cause grievous harm you would find either or both not guilty of murder but guilty of manslaughter.
>
> If you are not sure whether there was the necessary intent you would give either or both the benefit of the doubt and find either or both not guilty of murder but guilty of manslaughter.

> The onus is on the prosecution to make you feel sure that accd.1 and/or accd.2 was able to form the necessary intent and did form it notwithstanding that they had been drinking."

This direction is strictly in accordance with the provisions of Section 13(4) of the Penal Code which reads:

> "(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

The learned Judge did direct the assessors to take into account the question of intoxication in deciding whether the particular appellants had the requisite intent and to give them the benefit of the doubt if they were not sure. He correctly directed that the appropriate opinion was manslaughter if they were not satisfied. We have discussed the authorities on this subject in some detail in Shiu Narayan & Another v. Reginam Criminal Appeal No.29 of 1980 and do not need to repeat what we said there. This ground of appeal fails.

The directions as to provocation formed the main basis of the arguments put forward on behalf of the appellants. The learned trial Judge read to the assessors Section 234 of the Penal Code which is in these terms:

> "234. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only."

He also explained that the term "provocation" is defined in Section 235 of the Penal Code as meaning -

> "Any wrongful act or insult of such a nature as to be likely, when done to an ordinary person,..... to deprive him of the power of self-control and to induce him to commit an assault of the kind charged."

The learned trial Judge then gave the assessors a direction which Counsel for the appellants strongly contend was wrong and

led to a serious miscarriage of justice. After telling the assessors there must be an immediate reaction he went on to give a direction in these terms:

> "If the person causing death reacted 15 mins.after being provoked that is not a sudden reaction and one would hesitate to regard the killing as done in the heat of the moment."

In the present case there was certainly some evidence of acts which could be regarded as constituting provocation, with assault or attempted assaults by Kula on some of the appellants and his chasing one shortly before his death. In Lee Chun Chuen v. R (1963) 1 All E.R. 73 at page 79 Lord Devlin sets out the requirements of the defence of provocation. These are -

> "Provocation in law constitutes mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and retaliation proportionate to provocation."

The question of the loss of self-control is necessarily linked with that of the time elapsing between the provocation and retaliation; whether or not there had been time for anger to cool. The onus of proving that there had been sufficient time for that lies on the prosecution. The assessors in this case may well have concluded, from the direction in the summing up, that the reaction to the provocation must be immediate, in the very moment of being provoked, to reduce a charge of murder to man-slaughter. The reference in the summing up to 15 minutes is in our opinion open to two objections: nowhere in the evidence is that estimate given of the time which elapsed between the actions of Kula which brought about the retaliation and the actions of the accused persons which resulted in his death; and in any event it cannot be said that, whatever the provocation, 15 minutes is adequate for a cooling off period. This was a matter on which the opinions of the assessors were of the utmost importance.

The trial was lengthy and difficult, and we realise that the learned trial Judge had by no means an easy task to summarise, to the assessors, the evidence of the witnesses and the arguments of Counsel. At the same time with respect to the learned trial Judge it is our duty to consider every aspect of the matters

concerned in the appeal. We have reached the conclusion that the assessors may well have been misled as to the legal requirements of a defence of provocation, with special reference to the necessity of proof that the acts complained of had been brought about through loss of self-control induced by provocation. As we have said we are compelled to find that the summing up on this requirement of the defence of provocation may well have led the assessors to form a wrong conclusion. If they had been correctly directed on this point they may well have expressed the opinion that the accused persons were guilty of manslaughter and not murder. As was pointed out by their Lordships of the Privy Council in Bharat (1959) 3 All E.R. 292 the Judge may well have come to a different decision if the assessors had given an opinion in favour of manslaughter rather than murder.

Accordingly we allow the appeal of all four appellants and quash the convictions for murder. In their place we substitute convictions for manslaughter in each case; and on these convictions we pass sentences as under:

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|---|---|
| 1st Appellant | 10 years' imprisonment |
| 2nd Appellant | 10 years' imprisonment |
| 3rd Appellant | 7 years' imprisonment |
| 4th Appellant | 4 years' imprisonment |

to take effect from 26 November 1980.

In fixing these sentences we have taken into account the youth of the 3rd appellant and his acts at material times, and the fact that the 4th appellant was not armed and played a minor part in the violence which led to the death of Kula.

.....
(Vice-President)

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(Judge of Appeal)

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(Judge of Appeal)