IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Criminal Appeal Nos. 41 & 42 of 1985

Between:

1. ASAELI ROKOIRI
2. VILIAME NAGIA — Appellants

- and -

R E G I N A M — Respondent

Dr. G. Gregory Woods, V. Parmanandam & Helu Mocelutu for the Appellants
V.J. Sabharwol for the Respondent

Date of Hearing: 18th July, 1985.

Delivery of Judgment: 20th July, 1985.

JUDGMENT OF THE COURT

Roper, J.A.

At about midday on the 3rd November, 1984, the near naked body of Indar Beer, a taxi driver, was found on an access road to a disused quarry site and about 80 metres from Malau/Labasa Road. His shirt and trousers had been removed. His taxi had earlier been found abandoned with the taxi sign removed at Serecagi Hill near Seaqaqa. It is apparent from the Pathologist's evidence that Indar Beer died as the result of a truly vicious assault. He had multiple abrasions and contusions, a broken nose, a massive depressed fracture of the skull, fractures of upper and lower jaws and two ribs. The evidence was that the

use of a blunt instrument with great force would be necessary to cause the major injuries, although hard punches could have caused the jaw fractures. There can be little doubt that the blunt instrument was a bottle for bloodstained pieces of a broken bottle, one of which also had human hair attached, were found near the body, and glass was found in a wound on the deceased's right eye. Broken bottle glass was also found in the taxi.

On the 4th November, both Appellants (hereafter referred to as Asaeli and Nagia) were charged with Indar Beer's murder and were duly convicted on the 16th April after a trial in the Supreme Court at Labasa before a Judge and three Assessors. The Assessors were unanimous in their opinion and the Trial Judge agreed with and accepted it.

Certain facts are not in dispute and it is appropriate to deal with them before considering the grounds of appeal and Counsels' submissions upon them.

On the morning of the 2nd November, the two Appellants, who are brothers, left their farm at Seaqaqa and went to Labasa. Asaeli went by truck and Nagia by bus. In the course of the bus trip Nagia shared a bottle of methylated spirits with one Jone Coma. On arrival in Labasa the Appellants, and others, went to the Takia Hotel and remained drinking there until the bar closed at 2p.m. Later in the afternoon Asaeli went to one Sanmagam and borrowed $10, he having earlier in the day borrowed $11 from him. By 6p.m. the two Appellants were drinking in the Grand Eastern Hotel, and sometime after 6p.m. they left with three others and hired a taxi

which had the sign "Siberia Cab" on the door. There can be no doubt that it was Indar Beer's taxi. They were driven to Sanmugam's where Asaeli hoped to borrow more money but he was not home. The taxi returned to Labasa with all five passengers still aboard but at the hospital junction all but the two Appellants got out at Nagia's request. The taxi drove off.

Later that night the taxi was back in Labasa without its taxi sign and driver, with Asaeli driving and Nagia as passenger. They had what appeared to be blood on their clothing. The Deceased's trousers were found in Nagia's possession as was a cheque made out to the Deceased.

When first interviewed on the 3rd November, Asaeli denied hiring a taxi the previous night but later admitted the hiring. He said that after the other three passengers had left the taxi Indar Beer was told to drive to Balivaliva where he asked for his fare. Asaeli was then in the back seat and according to him he then held Indar Beer's head while Nagia, who was in the front seat punched him.

Asaeli said he then took the wheel and they drove off to the quarry site where the body was ultimately found. Asaeli denied all involvement in events at the quarry site. He said that it was Nagia who had pulled Indar Beer from the car. He then heard the sounds of a struggle and a bottle breaking. In an unsworn statement made at the trial Asaeli claimed that he was "a bit drunk" that night and denied punching Indar Beer. In the hearing before us an attempt was made to adduce affidavit evidence that the official Interpreter had made an error in

translating Asaeli's unsworn statement but we did not receive the evidence. The time for objection was at the trial.

Nagia, in interview, made no admissions whatsoever, most of the police questions being greeted with silence. At no stage did Nagia claim that he had no recollection of part of the events of the previous night.

In his unsworn statement he claimed that because of his consumption of liquor he suffered a blackout and had no recollection of anything that had happened from the time he got into the taxi until its return to Lobasa.

We turn now to the grounds of appeal.

Dr. Woods relied on five grounds of appeal in respect of Asaeli and two for Nagia but we find it necessary to consider only two of Asaeli's grounds and this is the first :-

> "THAT the Learned Trial Judge erred in law by wholly omitting from his directions any reference to evidence and unsworn statement material about the physical and legal effect of intoxication by alcohol upon the state of mind of the first accused."

There was evidence before the Assessors which, if accepted, could only lead to the conclusion that on the night in question Asaeli was certainly affected by liquor but it is common ground that so far as Asaeli was concerned there was no specific direction that intoxication should be taken into account when considering intent.

It was never Asaeli's case that he had taken an active part in the assault while being incapable of forming the necessary intent through the consumption of liquor, and indeed the thrust of the Crown case against him was that he had been a party in that he aided or encouraged the final assault. It was in this lotter context that intent and intoxication were relevant. If he had so conducted himself that prima facie he had aided and abetted, the question remains whether he intended that result, or whether he was so affected by liquor that he was incapable of, or did not in fact, form the intention to aid or encourage. Did he lack a conscious appreciation of the consequences of his actions?

In our opinion a clear direction on intoxication wos called for.

Mr. Sabharwal, while conceding that no specific direction was given, drew attention to the fact that the Trial Judge did refer to Asoeli's visits to various hotels during the doy and evening. We connot accept that that was enough.

The Trial Judge did give a direction concerning intoxicotion and intent in regard to Nagia but in such a way that the Assessors may have thought thot it could not apply to Asaeli. Nagia's defence was that he could not remember anything that happened in the toxi because of his consumption of liquor. The Trial Judge put that defence to the Assessors as one of insanity, although it was not raised as such, with the onus on Nagia. He then went on to direct the Assessors that if they did not find insanity proven

then they could consider whether Nagia was incapable of forming the necessary intent through the consumption of liquor. The Assessors could have been left with the impression that the defences of insanity and lack of intent through consumption of liquor were necessarily linked and the latter defence could not apply to Asaeli in respect of whom no defence of insanity had arisen.

The second ground in respect of Asaeli is this :-

> "THAT the Learned Trial Judge failed adequately to direct the Gentlemen Assessors with respect to the available alternative verdict of manslaughter particularly:
>
> (a) by failing to spell out the requirements for conviction of manslaughter on the ground of 'unlawful and dangerous act';
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> (b) by leaving the distinct and unfair impression that manslaughter as a possible alternative verdict was one not worthy of much consideration (see Transcript pages 154 and 155)."

Manslaughter as a possible verdict was adverted to by both defence counsel in their addresses to the Assessors. The only reference to manslaughter in the summing-up is in this passage which came at the end of the Trial Judge's directions :-

> "Well, if having carefully considered all the matters, and any other evidence which you think is relevant you find yourselves sure that the two Accused acting together, and acting together with intent, caused the really serious bodily harm from which Indar Bir died then your opinion in respect of both Accused must be guilty. If, on the other hand, in

> respect of either Accused you do not find yourselves satisfied that he intended what occurred then if you are nevertheless satisfied that either or both Accused committed the unlawful act or acts which resulted in Indar Bir's death then you may return opinions of guilty to manslaughter only. As already pointed out, when considering the case against the second Accused and his reply thereto you must also consider the question of temporary insanity through drink. If you find that you are not satisfied that the Crown has proved against either or both Accused either murder or manslaughter then it will be your simple duty to return opinions of not guilty."

We are not impressed with Dr. Woods' submission that the Trial Judge should have directed the Assessors that the unlawful act relied on must also be a dangerous act or one carrying an appreciable risk of really serious harm which is referred to in (a) of the ground. It was not a case which required such a direction.

However, we do agree that it was a case where the Assessors should have been directed as to what constituted the crime of manslaughter and how they could arrive at a verdict of guilty on it. It was only at the very end of the summing-up that a reference is made to manslaughter. Mr. Sabharwal agreed that in the usual summing-up the Assessors are first given a careful direction on what amounts to manslaughter, and are then told what additional matters must be proved to constitute murder. In the present case that course was not followed with the result that the crime of manslaughter was never explained.

We are satisfied that the Assessors were not directed in any significant way on the issue of

manslaughter as they should have been.

There is a similar ground of appeal in respect of Nagia and what has been said above applies equally to him.

The final ground of appeal concerns Nagia and reads :-

> "THE Learned Trial Judge erred in law and misdirected himself and the Gentlemen Assessors on the issue of drunkeness and mens rea. Hence there has been a substantial miscarriage of Justice."

As stated earlier Nagia raised the defence of lack of intent through intoxication which the Trial Judge put to the Assessors as one of insanity and at the end of his direction on insanity said :-

> "If, on the other hand you do not find that it is probable that the second Accused became temporarily insane you will have to consider whether the alcohol he had taken in any way prevented him from forming the intention to kill or cause serious bodily harm which the prosecution allege the second Accused had. A drunken intention is of course still an intention but before you can convict the second Accused you will have to satisfy yourselves so that you feel sure, having considered the evidence as to the drink the second Accused had taken, that he had formed that intention, in other words that if he did something he did not do it by accident or without intending to do what the prosecution say he did."

We are satisfied that such a direction must have caused confusion in the minds of the Assessors.

A rejection of the insanity plea must of necessity have coloured their approach to the questian of whether Nagia was so affected by liquar that he wos incapoble af forming, ar did not form, the necessary intent.

In the result we conclude that both appeals must succeed an all the grounds we have felt it necessary ta consider.

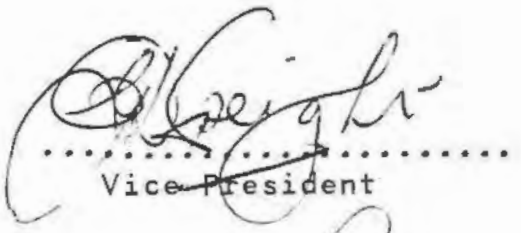
The question remains whether we should order a new trial or take another course open to us. Dr. Waods, with a true sense of respansibility, accepted thot both Appellants were at the least guilty of manslaughter, and urged us to substitute a conviction for that charge in eoch case. Having regard for the Appellants' consumption of liquor we think it likely that on a new trial Assessors properly directed wauld reach the same conclusion.

We are therefare satisfied that the case is one which calls for the exercise of our powers under Section 24(2) of the Court of Appeal Act.

We therefore set aside the convictions and sentences of the Appellonts on the charge of murder and substitute a conviction for manslaughter in each case.

As far sentence we cannot accept Dr. Woods submission that this was a case calling for sentences at the lower end of the scale. It was a brutal business and involved an attack on a taxi driver - a group very much at risk.

Each Appellant is sentenced to 8 years' imprisonment to run from the commencement of the original sentence.



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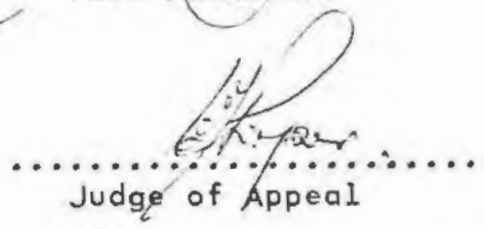

Judge of Appeal

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