IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 67 of 1984

Between:

1. METITA KOTUA — Appellants
2. TIMAMA MIKAERE

and

R E G I N A M — Respondent

Mr. H.L. Patel for the 1st Appellant
Mr. N. Dean for the 2nd Appellant
Mr. G.E. Leung for the Respondent

Date of Hearing: 2nd & 3rd July, 1985

Delivery of Judgment: 20.7.85

JUDGMENT OF THE COURT

Mishra, J.A.

The two appellants, tried jointly, were convicted of murder by the Supreme Court at Labasa and sentenced to imprisonment for life. Each appeals against his conviction.

On the night of 3rd October, 1983, the deceased, a Rabi Islander living at Tabewa, went to sleep on the floor of his front room with his head near the unlocked door. At about 2 a.m. his sister-in-law Merina Taremon sleeping on a bed in the same room was awakened by a gurgling noise and, in the

light of a lantern which had been kept burning, saw a man crouching over the deceased, with his back to her. She screamed and the intruder jumped out of the open door in the same crouching position. She was unable to see his face. The deceased's throat had been slashed with a knife and he died soon after.

The only evidence relied upon by the prosecution at the trial was two statements allegedly made by each appellant to the police during interrogation. These were admitted in evidence after a lengthy trial within a trial - during which allegations of violence and oppression were levelled at the police.

Substantially the same issues were raised again during the trial proper and, for the defence, each appellant, in an unsworn statement, denied the truthfulness of his statement to the police. Each disclaimed all knowledge of how the deceased had come by his death.

After a long summing-up the three assessors expressed their unanimous opinion that each accused was guilty.

Admissibility of the statements is not an issue in these appeals. The sole ground for the first appellant urges that the learned Judge erred in not leaving the issue of provocation to the assessors and the second appellant's main ground relates to alleged misdirections in the judge's summing-up concerning his role as an aider and abetter. Two other grounds included in the second appellant's notice of appeal viz drunkenness and provocation were not seriously pursued and require no comment.

We will first deal with the appeal of the first appellant. In view of his complete denial of any participation in, or knowledge of, the murder of the deceased the issue of provocation was not raised by the defence. We accept Counsel's submission that the law nevertheless requires that issue to be left to the assessors if evidence, whatever its source, suggests that the accused might have been acting under what amounts to provocation in law. The evidence which the assessors accepted was the statement made by the first appellant to the police and it is there that one must look to see if there was anything in the reason for, and the manner of, the killing which might raise the defence of provocation.

There was undisputed evidence from the deceased's own wife and sister-in-law suggesting that in the small Rabi community he, the deceased, was known to be something of a philanderer. The police had been making enquiries on the island for several weeks before interviewing the first appellant. During the interview he was asked :-

"Q: Is it not true that you saw Koraua in your compound on 2.10.83 and you suspected that he was there to have love affairs with your wife?

A: No.

Q: Is it not true that you chased Koraua on 2.10.83 in the day time and he ran away to the plantation of Tione?

A: That is not true. "

Later in the interview when the appellant had admitted killing the deceased, he was asked :-

"Q: Were you really hurt about what he did to your wife?

A: Yes, I was really hurt. "

And again -

"Q: Did you have any enmity with Koraua before his death?

A: Yes because one time he had entered our room whilst I was drinking grog at the farm and my wife had told me after I had returned from drinking grog that she had seen Koraua inside the room and when she yelled out he ran away.

Q: What Koraua did is it insulting in Gilbertese custom?

A: Yes very insulting. "

Counsel suggests, with some force, that the date of the provocative act was known to the police and should have been accepted in the appellant's favour as being 2.10.83, the day before the murder, and that there was evidence in the interview to suggest that the appellant, in his anger, had gone around looking for the deceased during the intervening period. There is also suggestion in the evidence that, during that period, the first appellant's house had been stoned for which also he suspected the deceased.

We respectfully accept the dictum in Lee Chun Chuen v. R. (1963 A.C. 220) that there has to be a credible narrative of events indicating the elements necessary to constitute provocation in law before the defence can require it to be left to the assessors. This court has, however, held that provocation, being itself an issue of fact, the Judge, in border line cases, should seek the advice of the assessors who are

better acquainted with conditions of the community to which the accused belongs. In Ram Lal v. The Queen (3 of 1958) this Court quoted with approval the following passage from Chacha v. Reginam (20 E.A.C.A. 339 at 346) :-

> " The present English Rules as to provocation are of comparatively recent growth. In particular, the question whether in England mere words can be sufficient provocation for causing death was answered finally by Holmes's case in 1946. It was answered with special reference to the pacific and controlled temperament of the ordinary, modern civilized Englishman. There is no need to question the conclusion of the House of Lords that such a person could not be provoked to cause death by mere confession of adultery. But what relevance has such a conclusion to the case of an armed and primitive native? Can it truthfully be said that an ordinary person of such a community could not thus be provoked to cause death? Leaving aside rules and precedents for a moment, we do not believe that an affirmative answer can with confidence be given. If that is so, it appears to us that the issue could not be withdrawn from jury or assessors, to the question of the existence of provocation, loss of self-control, and reasonable relation of provocation and reaction must be treated as questions of fact. Prima facie questions of provocation are questions of fact, and a Judge assumes a heavy responsibility in withdrawing the issue. "

Courts in Fiji therefore, whenever in doubt, have considered it desirable to leave the issue of provocation to the assessors as, for example, in Rejjab Shah v. R. (11 FLR 98) where the alleged insult to a farmer's wife was offered some nine days before the death of the deceased. It may well be, as learned Counsel for the Crown submits, that in this case the evidence of provocation, such as it is, is anything

but strong, but it is difficult for us to say what weight would have been attached to it by a panel of assessors knowledgable in the ways of the Banaban people of Rabi.

We have, therefore come to the conclusion that the appeal of the first appellant must succeed.

Appellant 2.

The second appellant alleges -

(a) misdirection as to the evidence against him of being the principal offender; and

(b) inadequacy of directions as to his role as an aider and abetter.

Learned Counsel for the Crown concedes that there was no suggestion whatsoever in the second appellant's statement to the police that he had struck, or even touched, the deceased. The first appellant, however, had told the police that it was the second appellant who had actually cut the deceased's throat. This, admittedly, was inadmissible and could not be taken into account against the second appellant.

In dealing with the first appellant's case the learned Judge read out his statement containing the following passage :-

> "Timama held the knife in his left hand and stabbed his neck. After that I crawled outside. When I was outside I heard Merina yelling. I looked back. I saw Timama crawling towards the west. The knife fell from his hand in front of the door. I went back and picked it up. "

This passage he repeated in his summing-up later again while discussing the first appellant's case. Though he had directed the assessors in general terms that what one appellant had said to the police against the other was no evidence against that other, he did not after the passage referred to, which contained such damaging allegations against the second appellant, remind them that it was no evidence against him. Towards the end of his summing-up the Judge while dealing with the second appellant said :-

> "On the other hand if the prosecution has satisfied you beyond any reasonable doubt that he was one of the persons who deliberately struck the deceased with the intention of either killing or causing him grievous harm then you must express the opinion that he is guilty of murder. "

And again -

> "On the other hand if the prosecution has satisfied you beyond reasonable doubt that Accused 2 either alone or in participation with another voluntarily and with intention of either killing Koraua Beibeti or of doing him grievous harm or with the knowledge that what he was doing would probably cause death, struck the deceased and death resulted, you must express the opinion that he is guilty of the offence of murder. "

There was, however, no evidence at all, other than that contained in the first appellant's statement to the police, that the second appellant had at any time struck the deceased. We accept the submission that the assessors would, from this direction, have understood it open to them to find that it was the second appellant who had actually struck the deceased with the knife. If so, it was clearly a serious misdirection.

As for the second appellant's role as an aider and abetter, he had admitted drinking toddy with the first appellant that night and accompanying him to the deceased's house where he had stood outside a window and watched the first appellant do the killing. This, however, he said he had done merely to see for himself if the first appellant was really going to execute his plan to kill the deceased. He repeatedly denied complicity in the killing and these denials run into almost two pages. At one place among those denials, however, this appears in the record of the interview :-

> "Q: Is it true that you purposely stood there to be on guard?
>
> A: Yes. "

And again -

> "If I see someone I will yell out to Metita. "

The learned Judge read out to the assessors the whole of this part of the interview and toward the end of the summing-up said :-

> "However, if 'A' is present at the killing of 'B' by 'C' and 'A' knew that 'C' intended to kill 'B' and his presence was for the purpose of assisting 'B' to kill 'C' for example by keeping a watch or giving alarm if somebody arrives or to stop 'C' from escaping, then this would make 'A' equally guilty of the offence of murder even though he does not actually strike any blow himself. Similarly if 'A' knows that 'C' intends to kill or do grevious harm to 'B' and he consciously encourages him to do so, this would amount to abetting and 'A' can be convicted

of being a party to the offence of murder if death ensues. "

While there can be no quarrel with the direction as it stands, it was, in our view, inadequate under the circumstances. The situation called for a detailed analysis both, of specific denials on the one hand, and admissions referred to above on the other to make clear to the assessors circumstances which, if accepted, would constitute aiding and abetting. In view of the course we have decided to take it would be undesirable for us to commend further on that evidence.

The appeal of the second appellant is also allowed.

The nature and the quality of the evidence against each appellant, however, is such that in our view, the appropriate order for this court to make would be one for a new trial in both cases.

It is ordered accordingly.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL