IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 107 of 1985

Between:

1. PITA CAMA
2. VILIKESA BUADROMO
3. LORIMA VATUYABA
4. SEFANAIA FINAU — Appellants

and

REGINAM — Respondent

Mr. A. Qetaki for the 1st and 3rd Appellants
2nd and 4th Appellants In Person
Mr. M.D. Scott for the Respondent

Date of Hearing: 24th June, 1986

Delivery of Judgment: 4.7.86

JUDGMENT OF THE COURT

Mishra, J.A.

The four appellants together with one Toka, were tried before the Supreme Court, Suva, on a charge of murder. The second appellant, Buadromo, and Toka were found guilty of murder by the assessors who, in case of the other three appellants, advised the learned Chief Justice that they were guilty of manslaughter only. He accepted their opinion and convicted the appellants and Toka accordingly.

The appellant Buadromo appeals to this court against his conviction and Cama and Vatuyaba against both their convictions and sentences. The fourth appellant

Finau appeals only against the severity of his sentence. There is no appeal from Toka.

The deceased Shiu Prasad was a watchman employed by the City Transport Company at their garage and offices at Samabula. On the night of 8th August, 1984, while he was sitting in one of the Company buses with two of his sons, both thirteen years of age, five Fijian young men approached the place for the purpose of breaking into the Company's offices in search of money. Surprised by this intrusion the deceased and his sons jumped out of the bus and ran in different directions. The two boys were caught by three of the intruders and held near the buses while the other two, one carrying a pinchbar, chased the deceased to prevent him from escaping. In doing so they inflicted serious injuries upon him of which he died the cause of death being brain haemorrhage and bleeding from several broken ribs.

A taxi driver testified that his taxi had been hired by Cama, the first appellant, whom he knew well and that he had carried him and four other Fijian men from Moti Street to the City Transport garage on the night, and the time, in question. The two sons of the deceased identified the second appellant, Buadromo, as the person who had first entered the bus in which they had been sitting. The first appellant who had refused to attend an identification parade was also picked out by them at the hospital as one of the persons who had held them.

As a result of further enquiries the appellants were interviewed by the police and each made a statement admitting going to the garage and describing the part played by him in what occurred there when they found the watchman, with his sons, guarding the place. These statements, together with some other evidence of identification, constituted the prosecution case.

The first and second appellants gave evidence at the trial denying ever going to the City Transport garage and described their confessions to the police as false, extracted from them through threats and violence. The third and fourth appellants gave no evidence and called no witnesses placing their reliance upon the contents of the statements they had made to the police which, they contended, even if accepted in their totality, could not support a conviction for murder.

We will deal first with the second appellant's appeal against his conviction. His two main grounds may be summarised as follows :-

> Firstly that the learned trial Judge erred in admitting his confessional statement in evidence and;
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> secondly, that there was insufficient basis for differentiating between his case and that of the third and fourth appellants, who were convicted of manslaughter.

During the trial within a trial this appellant had alleged that he was handcuffed at the police station before interrogation began. Three police officers kept punching him repreatedly until the pain became unbearable and he agreed to sign any statement they would require him to. The evidence of the doctor, however, who had examined him soon after the interview spoke of no injury or other indication of any assault having taken place.

The learned Chief Justice said :-

> "Not only do the descriptions of the nature and the extent of the assault sounded fanciful and vague but also no credible evidence in support exist such as might

> reasonably be expected where allegation of assault of a very serious nature have been made. If anything the medical evidence points to the contrary. No marks of violence were found on the second accused. His general condition, upon examination was said to be good."

The learned Chief Justice, in our view, was correct, on such evidence, in rejecting allegations of violence and accepting the prosecution submission as to the voluntariness of the appellant's statement.

As for the other ground there was, no doubt, evidence to suggest that the four appellants and Toka had gone to the City Transport garage for the main purpose of stealing. For this purpose they had taken with them a pinch bar. Upon seeing the deceased and his two sons, however, they took concerted steps to prevent them from leaving the premises to raise an alarm. While the others held the two boys the second appellant and Toka pursued the deceased who had already run a short distance.

In the 2nd appellant's statement to the police occurs the following :-

> "Pita and Lorima grabbed the two Indian boys whilst myself, Seva and Toka ran after the father. Toka grabbed the father and I took out the pinchbar from him and struck the Indian on the back and he went down. I struck him again on the back and he lay on the ground. Whilst lying on the ground, I struck him again on the back close to the head and said he was finished for us to leave."

The learned Chief Justice gave impeccable directions as to the intent required to constitute murder and read the passage cited above to the assessors leaving it to them to decide what weight to give to it and to determine whether or not the required intent was thereby

established beyond reasonable doubt. He accepted their unanimous opinion on the issue. On this evidence, which was obviously accepted by the assessors as representing the truth, it is difficult to see how any other decision could have been arrived at.

The second appellant's appeal against conviction is dismissed.

The sentence in his case is one fixed by law and it is, therefore, unnecessary to deal with references to it in his notice of appeal.

As for the other three appellants, each had made a statement to the police admitting his part in the planned break-in but their involvement, they claimed, was limited to catching the two boys and restraining them from running away. In so doing they used a degree of violence necessarily containing an element of danger, such as administering kicks and blows and pushing one of them under a bus after tying him up. None of the three, however, joined the pursuit of the deceased or inflicted any injury upon him. Their involvement in the crime arose out of participation in a joint enterprise with a common intention. Section 22 of the Penal Code was read out to the assessors :-

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose, an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose then each of them is deemed to have committed the offence."

Later, dealing with the case of the third appellant Vatuyaba (4th accused at the trial) the learned Chief Justice said :-

> "Only if you are satisfied that the 4th accused aided and abetted, or encouraged the carrying out of their common purpose, if such existed, and you are satisfied about it, then as a result of which the watchman was killed, then the 4th accused may be found guilty of murder as charged. Unless you are satisfied with that, then the proper verdict would be one of guilty of manslaughter."

He also told the assessors that the first and the fourth appellants, who were concerned solely with capturing and holding the two boys, were also to be treated, on the issue of culpability in the same manner as the third appellant.

The assessors gave their unanimous opinion that these three were guilty of manslaughter only.

Mr. Qetaki for the first and the third appellant submits (and this submission is equally applicable to the case of the fourth appellant though he does not appeal against conviction) that there was failure on the part of the learned Chief Justice to direct the assessors as to the possibility of there being, at the relevant time, two distinct and different common purposes, one affecting the second appellant and Toka who went in pursuit of the deceased, and the other affecting the first, the third and fourth appellants who remained at the garage, separated from those two, holding and guarding the two boys. Had such a direction been given, he contends, the assessors may have formed the view that the sole purpose of these three, at that time, was to commit burglary without recourse to violence. If so, the correct verdict would have been an outright acquittal.

We are unable to agree. Commission of burglary was indeed the main purpose of the whole group but equally

so was the holding prisoner of the watchman and his sons while the burglary was carried out. This would involve force which these three also intended to, and did, use although the degree of force used by them was neither likely, nor intended, to cause grievous harm.

We accept, however, Mr. Qetaki's submission that at some stage after the two groups became separated the second appellant and Toka failed to remain within the scope of the original common purpose. The learned Chief Justice himself expressed this view when, in his judgment, while agreeing with the assessors, he said :-

> "In those circumstances, I find the second and third accused guilty of murder as charged and convict each of them accordingly under Section 199 of the Penal Code. As for first, fourth and fifth accused (first, third and fourth appellants in this appeal) I accept that the killing of the deceased by second and third accused did go outside and beyond any joint criminal enterprise that might have been subsisting between the five accused so that they could not be found culpable for the offence of murder.
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> In these circumstances, I find the first, fourth and fifth accused not guilty of murder but guilty of manslaughter and convict each of them accordingly."

This, in our view correctly reflects the understanding by the assessors of the directions in the summing-up which, considering the length of the trial, were ample and adequate.

Their appeals against conviction are dismissed.

These three appellants also appeal against the sentence of 8 years' imprisonment on the ground that, in view of the part played by each of them, the sentence is excessive. The learned Chief Justice accepted the view

that the death of the deceased resulted from a departure by the second appellant and Toka from the scope of the common enterprise within the contemplation of these three appellants. Excessive force and the use of the pinch bar as a weapon of violence constituted such departure. For this reason we consider the role played by each of these three appellants in the joint enterprise to have been somewhat less serious than a sentence of eight years' imprisonment would suggest. In the case of Orisi Vosuga & Others v. R. (64 of 1984) where 6 young men of a similar age group had actively participated in a prolonged beating up of a night watchman a sentence of 7 years' imprisonment was imposed upon their conviction of manslaughter.

There is another aspect of this matter that causes some concern. By the time they came to be sentenced the appellants had already spent one year in custody. During this period the third and fourth appellants were prisoners awaiting trial whereas the first appellant was serving a sentence imposed for another offence. In effect, therefore, the third and fourth appellants received a higher sentence than did the first appellant.

We, therefore, allow their appeals against sentence. The first appellant's sentence is reduced to one of 6 years' imprisonment and that of the third and fourth appellants to one of 5 years.

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Vice President

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Judge of Appeal

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Judge of Appeal