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IN THE FIJI COURT OF APPEAL

At Suva

Criminal Jurisdiction

CRIMINAL APPEAL NO. 4 OF 1991
(High Court Criminal Case No. 2 of 1991)

BETWEEN:

RAJESH PRASAD (f/n Shiu Prasad) — Appellant

and

S T A T E — Respondent

Mr. K. Bulewa for the Appellant
Mr. I. Mataitoga for the Respondent

Date of Hearing : 3rd March, 1992
Date of Delivery of Judgment : 13th March, 1992

J U D G M E N T

The accused was charged with acting with intent to cause grievous bodily harm contrary to S.224(a) of the Criminal Code by an information laid on 4th February, 1991.

He was tried by Mr. Justice Saunders and 3 assessors on 14th, 18th and 19th February, 1991 in the High Court at Lautoka. He was convicted of the offence as charged and sentenced to six years imprisonment. He lodged a notice of appeal to this Court on 18th March 1991.

The facts that must have been accepted by the assessors in reaching their finding are in short compass:

One Ramendra Prasad, who is hereafter referred to as Mr. Prasad, was living with his wife Prem Lata at a house at Tavakubu. There were a number of members of the same family living in that house, including the accused who was a cousin of the victim, Mr. Prasad.

The Court is able to conclude that the quarters were pretty cramped. It is also clear that the room which Mr. Prasad and his wife occupied was next to that occupied by the Appellant.

On the night of 29th June 1990 Mr. Prasad was away from the house doing some repairs to a vehicle. At about 8.45 on that night the Appellant came home. He had been drinking. He knew that Mr. Prasad was not at home because the latter's vehicle was not there. At about 9.30 p.m. there was a knock on the door of Mrs. Prasad's room. The accused went to his own room and banged on the wall between the two rooms. According to Mrs. Prasad he called out to her from there. She became frightened, sought help, and was taken off to someone else's house nearby.

At about midnight Mr. Prasad returned home. He had been drinking. Mrs. Prasad told him what had happened. Whether she had by this time returned to her room or was still at the nearby house does not matter. According to the facts as put to the assessors by the learned trial Judge, thereupon Mr. Prasad, the victim, *"was hammering, kicking and beating at his (the Appellant's) door and threatening to kill him"*. He, the Appellant, took a cane knife, and emerged. He went after Mr. Prasad, who by then was outside the house on his way to his vehicle with the object of going to the police station to report the matter. He gave him three blows, causing very serious and permanent injuries. This was about midnight. There was evidence given that before the Appellant came out of this room and while Mr. Prasad was beating on his door, Mr. Prasad had called out to his wife to get a knife from the kitchen.

The Appellant gave evidence at his trial and asserted that when he came out of his room with the cane knife Mr. Prasad was right there with a penknife in his left hand and that he *"ran towards me"*. This was not supported by any other evidence, and the assessors were presented with overwhelming evidence that there was no penknife, and that the attack by the Appellant occurred outside the house as Mr. Prasad was moving away.

The next morning at about 8 a.m. the Appellant went to the Police Station. He made a statement. In it he admitted that he had gone after his victim outside the house and struck him three times as alleged, once after the victim had fallen to the

ground. He made no mention of any penknife, and the following question and answer are recorded (record p.34)

> *"Q38 : Do you want to say anything about this incident?*
>
> *A : I got angry thats why I hit my cousin with a knife and I want to pay compensation to him."*

Mrs. Prasad gave evidence. Portion of her evidence reads thus:-

> *"My depositions are wrong. Husband did not ask for knife until after he was hit. (He) did not have a penknife. My husband never asked me to get the knife."*

Naturally enough, her statement to the Police, which must be what was meant by *"depositions"* was not put into evidence.

On 2nd July 1990 the Appellant was charged before a Magistrate with the offence in question. He was unrepresented and pleaded guilty. The Magistrate remanded him for sentence until 9th July. When the matter came back before him Counsel appeared for Appellant and announced that the Appellant wished to change his plea to one of not guilty. That was acceeded to, and the accused eventually stood trial before the High Court as previously referred to.

There were three grounds of appeal against conviction in the notice of appeal filed on behalf of the Appellant, and on his appeal against sentence four were listed. Leave to appeal pursuant to S.21 of the Court of Appeal Act was given.

When the matter came on for hearing before this Court, counsel for the Appellant confined himself to one aspect of appeal only, namely that the trial Judge was biassed against the accused and had exhibited this in various ways, resulting in a mistrail that ought to be corrected by this Court.

The gravamen of the complaint on this score was that the trial Judge had allowed the fact that the Appellant had pleaded guilty to the offence, had been remanded for sentence, and then had been allowed to change his plea, wrongly to influence his approach to the case. Counsel relied, inter alia, on some remarks that the trial Judge made when pronouncing sentence. We shall refer to these later.

Other matters to which counsel adverted in support of the submission of bias were:

1. Some events which it is alleged took place in the chambers of the Judge before the trial began.

2. The way in which the trial Judge summed up the case to the assessors.

3. The failure of the trial Judge to refer the assessors to the conflicting versions of the witnesses and inconsistencies in the evidence of the prosecution witnesses.

4. The sentence imposed on the accused and the remarks made in the course of imposing it.

5. His Lordship's failure to invite the assessors to retire in order to consider their opinion.

6. The emphasis that the Judge placed on the Appellant's failure to raise self defence at the hearing before the Magistrate in his charge to the assessors when considered in the light of the fact that it had been so raised there.

7. The use of the word *"killing"* by the trial Judge in his charge to the assessors instead of the word *"wounding"*. The particular passage is to be found at p.26 of the record and reads thus:-

> *"I will now advise you on the law. When it is necessary to defend oneself the use of such force as is reasonably necessary is not unlawful. As the prosecution has to prove, inter alia, that the killing was unlawful, where on the evidence the issue of self defence is fit to be left to the assessors, the onus is on the prosecution to prove beyond a reasonable doubt that the accused was not acting in self defence when he wounded the victim."*

To assert that a Judge is biased in a particular case is a very serious matter indeed. The learned Judge was not asked to disqualify himself at any stage during the hearing, although reliance is now sought to be placed on a matter that preceeded the hearing. Apart from this, the complaint now made seeks to rely upon what the Judge said during the course of his charge to the assessors and the remarks he made during the course of pronouncing sentence. No objection was taken at the hearing by counsel for the Appellant in the Court below, although Mr. Bulewa has placed before us an affidavit in which the deponent swears inter alia:-

> *"6. THAT in the actual trial I felt and verily believe there was bias evident from the receipt of evidence of Defence witnesses and disbelief of their evidence by the learned Trial Judge as well as the Assessors not retiring to consider the learned Judge's complicated summing up and their verdict as well as the approach taken to mitigation given by me for the Defendant and the actual words used in sentencing."*

In fairness to any judicial officer against whom such a serious charge is levelled, we feel that it is incumbent upon counsel to raise the matter in the proceedings and there and then give such officer an opportunity to deal with the matter as he may think proper.

The complaint of bias which is partly based on the remarks made by the trial Judge in the course of sentencing the accused requires those remarks to be set out in full, namely (record p.30):-

"*SENTENCE*

The Accused elected trial in Magistrate Court and pleaded unequivocally guilty to this charge on 2:7.90. He admitted the facts and offered compensation. He made no suggestion of self-defence. He was convicted.

Following a practice which this Court deplores and which sows the seed of corruption, as is clearly shown in this case, the trial Magistrate adjourned the matter of sentence for a week.

During that week something happened and for no proper reason the trial Magistrate allowed the Accused to change his plea to not guilty and to elect for trial in the High Court, defended by Counsel.

It is clear that in this trial his witnesses have perjured themselves. This story of a penknife, never mentioned in the Magistrates Court by the Accused, never mentioned to the police, was cooked up prior to or as soon as Accused was allowed to change his plea, after his conviction. This is a matter which should be investigated by the Director of Public Prosecution.

Counsel's mitigation seeks sympathy for the Accused. Sympathy is not to be taken into consideration in sentencing anyway. Most of Mr Vuetaki's mitigation would have been better said on a plea by Accused, as he originally made of guilty. Then there might have been something to be said for him.

But after the perjured evidence in this trial I can find little in favour of Accused.

I sentence Accused to 6 years imprisonment.

(sgd) (M.J.C. Saunders)
JUDGE"

We think it preferable to confine our remarks here about this outburst to its relevance on the matter of bias. It certainly must be considered on the matter of sentence, and we do that later. While it hardly demonstrates the degree of judicial detachment and objectivity that one has come to expect from Judges, nevertheless we are not satisfied that it relates back to the trial itself in a way that would establish bias. The outburst clearly reflects the pent up feelings of the Judge, required to hear over three days a case in which he felt that the Appellant had no merits at all, and which resulted from a practice with which he thoroughly disagreed. Whatever might be thought about the wisdom of a Judge expressing those feelings in the terms that he did, it does not establish that he was biased in the handling of the case itself.

A Judge may often form strong views about a matter before him which his oath, training and duty require him to place completely on one side. In relation to the actual hearing on this occasion and the conduct of it by the Judge, we think it preferable to give more weight to how that was conducted and what was said and done in relation to that aspect of the hearing than to the remarks which we have already quoted. We have, however,

not overlooked taking them into account along with the other matters which have been relied upon.

The first of those matters is what happened in the chambers of the Judge before the trial began. Two affidavits have been placed before us in relation to this. They were originally filed in support of an application to release the Appellant on bail pending appeal.

We do not think this is an appropriate occasion to consider the propriety of raising matters that occur in a Judge's chambers in relation to a trial that is about to commence. It may be that different approaches ought to be adopted to remarks made by or the demeanour of a Judge depending on whether they occur during an application in the proceedings that is being dealt with in chambers or during a private interview with counsel. We do not have to form any view, because the sworn evidence filed and sought to be relied upon by the Appellant is contradicted by sworn evidence filed on behalf of the State. It would be impossible for this Court to decide what actually took place, nor to take this aspect into account in any adverse way.

The second matter is the terms of the summing up. It appears to have been given extempore. It can certainly be described as abrupt. Parts of it do not correctly reflect the evidence that was adduced. It was a summing up strongly in favour of a conviction. It did not explain the different roles of the Judge and the assessors in a criminal trial. The defence

turned on whether the wounding has done a self defence, which in turn depended on whether the victim had a penknife with which he threatened the Appellant before he was attacked. As to this the trial Judge said (record p.25):-

> *"Whether there was a penknife in victim's hand or not is a fact for you to decide but other related indisputable facts show that there was no penknife."*

What followed this might indicate that the Judge was expressing his own opinion. Further in connection with the matter of self defence the trial Judge said (record p.27):-

> *"The Accused should be given the benefit of any doubt in his favour regarding his thoughts while listening to PW2 bashing at his door. You may think that he was frightened and decided it was better for him to attack first, no matter what happened. He did not care what the situation was outside and he came out of the door with the intention of hiting PW2 before PW2 could get a weapon. The fact that PW2 was, at that time, leaving the premises to get into the van to go and fetch the police, as the defence witness DW5 said in evidence, made no difference to Accused's intention to strike PW2 (Mr. Prasad)."*

We have referred to these extracts from the summing up because they indicate the tenor of the summing up in general. We think that if a Judge is disposed to express his views about the facts, particularly when he does so in the strong way the learned Judge adopted here, he ought also to direct the assessors in a way that leaves a clear impression with them that when they are part of

a trial the very basis of the criminal justice system is that they and they alone must make decisions on matters of fact, no matter what views they think the Judge may have formed or expressed.

We believe that if a trial Judge decides to express any views that he may have formed based on the evidence adduced in the trial, he should do so with caution and restraint, the more so when he has not informed the assessors that they are not bound to accept those views, as was the case here.

While the charge to the assessors could, in this instance, hardly have failed to influence them, we do not think it is sufficient to demonstrate bias on the part of the Judge. We have taken it into account along with the other matters.

The third matter is the assertion that the trial Judge failed to draw the attention of the assessors to the conflicting versions of the witnesses and the inconsistencies in the evidence of the prosecution witnesses.

The crucial aspect of the conflicting versions was the presence or otherwise of a penknife, and the Judge drew attention to this. There is nothing of substance in relation to alleged inconsistencies in the evidence of the prosecution's witnesses.

The fourth matter is the matter of sentence; we have already referred to the remarks made in the course of imposing it. I t seems to us that there was no proper consideration given to the matter of sentence. We can remedy that. It is clear that it was fixed as the result of the matters we referred to earlier, which we deprecate. But it does not establish bias at the hearing, although, as before, we have taken this into account on that matter.

As to the matter of the failure of the assessors to retire to consider their opinion, there is no material before us to indicate how this came about. It may be that they indicated that they did not wish to retire. While it is more probable that the trial Judge invited them to give their opinions forthwith, we would not be prepared to proceed on the basis that this did happen. In any event it is only consistent with the opinions that the Judge had expressed to them. There is nothing intrinsically wrong with assessors being asked whether they wish to retire to consider their opinion or to give it forthwith.

The next matter concerns the failure of the Judge to refer, in his charge to the assessors, to the fact that the accused had raised the matter of self defence at the hearing before the Magistrate.

The simple fact is that it had not been so raised. If it was given to the Magistrate as a reason why the Appellant should be permitted to change his plea of guilty, that is not a matter which is alleged to have been known by the Judge, and could not possibly have been mentioned at the hearing in any event.

The final matter is the use of the word *"killing"* instead of *"wounding"* in the passage set out earlier herein. It was clearly a slip of the tongue. We are sure it had no effect on the assessors at all. But whatever may have been the position, it is not indicative of bias.

The matters we have considered do not, taken separately or cumulatively, satisfy us that bias has been established. We think it preferable if he refrain from expressing any other views about the adequacy or otherwise of the summing up.

In the circumstances the appeal against conviction is dismissed.

It is Mr. Bulewa's contention that the sentence of six(6) years' imprisonment is manifestly excessive having regard to the circumstances in which the injuries were inflicted.

He submits that there was, in addition, extreme provocation and that some pre-emptive action was called for.

Furthermore, he argues, that the Judge's displeasure at the change of Appellant's plea from *'Guilty'* to *'Not Guilty'* is reflected in the sentence.

Mr. Mataitoga on the other hand submits that the sentence is not manifestly excessive having regard to the weapon used and the fact that the victim was moving away at the relevant time. However, he concedes that a six-year sentence was on the high side of the normal tarrif. He also concedes that it was irrelevant for the Judge to take into consideration the change of plea.

We are in no doubt that there was no premeditation on the part of the Appellant and furthermore we are satisfied that there was initially extreme provocation offered by the victim's conduct and utterances. We do not also rule out that the Appellant apprehended some danger to himself and felt that some pre-emptive action was called for although the extreme measure he took was not justified. Our view of the initial situation is supported by the trial Judge's own assessment which in turn is supported by the evidence before the Court. The 2nd paragraph of his summing up reads as follows:-

> *"You then have Accused, woken from his sleep by PW2 who, inflamed by rum, was hammering, kicking and beating at his door and threatening to kill him. Accused then came out and slashed at PW2 with a cane knife. I suggest that these are the true facts up to that point."*

There is also some merit in Mr. Bulewa's complaint that the trial Judge's refusal to give any consideration to the mitigating factors as urged by Mr. Vuataki, counsel for the Appellant in the High Court. In sentencing the Appellant, the trial Judge observed that *"most of Mr. Vuetaki's mitigation would have been better said on a plea by Accused, as he originally made, of guilty. Then there might have been something to be said for him".*

A trial is not complete until a sentence (if warranted) is passed. We therefore feel that it was not proper to adversely refer to the change of plea.

Dealing with sentencing in wounding or causing grievous bodily harm with intent cases Mr. D.A. Thomas the learned author of "Principles of Sentencing" (2nd Edition) has this to say at page 95:-

> *"Within the bracket of three to five years' imprisonment, the sentence will vary according to such factors as the nature of the weapon used, the degree of the injury intended, the actual injury inflicted and the degree of provocation, if any.---"*

He, however, cites examples of shorter sentences than 3 years where unusually strong mitigating factors are present and longer than 5 years, e.g. where there is no provocation and a lethal weapon is used with some premeditation.

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The Appellant is a first offender and there is nothing on record to show that he is a person of a criminal bent of mind. He is only 23 years of age. He has offered compensation and does appear to be genuinely remorseful. On the other hand the Courts cannot overlook the fact that the injuries were inflicted by a dangerous weapon, i.e. a cane knife and that they were not only serious but multiple in nature. An immediate custodial sentence was therefore justified. However, having regard to the circumstances in which the injuries were inflicted, particularly the high degree of provocation offered and bearing in mind the Appellant's antecedents and the failure of the trial Judge to take into account the mitigating factors for the reason given by him, we are of the opinion that the sentence was on the excessive side. At least the fact of extreme provocation and absence of premeditation should have been taken into account. We therefore allow the appeal against sentence, set aside the sentence of six years' imprisonment and impose in lieu thereof a sentence of three(3) years' imprisonment.

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Justice Michael Helsham
President, Fiji Court of Appeal

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Sir Moti Tikaram
Justice of Appeal

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Sir Mari Kapi
Justice of Appeal