IN THE FIJI COURT OF APPEAL

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CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0001 OF 1994S
(High Court Criminal Case No. 6 of 1993)

BETWEEN

MESAKE SESENABARAVI — APPELLANT

-and-

THE STATE — RESPONDENT

Mr T. Savu for the Appellant
Mr D. McNaughtan for the Respondent

Date and Place of Hearing : 14th November, 1994, Suva
Date of Delivery of Judgment : 17th November, 1994

JUDGMENT OF THE COURT

For the hearing of this appeal the Court, with the consent of Counsel for both parties, was constituted by two judges, the President being of the opinion that it was impracticable to summon a Court of three judges (Court of Appeal Act (Cap.12) section 4(2)).

On 5 October 1993 the appellant was convicted of manslaughter, an offence against section 198 of the Penal Code (Cap.17). He was sentenced to serve three years' imprisonment. He lodged personally a notice of appeal headed "Notice of appeal against conviction/sentence". He stated somewhat incoherently five grounds of appeal, none of which was expressed in terms of being an appeal against sentence. Subsequently he was

represented by a firm of solicitors. They stated two grounds of appeal both of which concerned the conviction and not the sentence. Written submissions in respect of those grounds were filed by the solicitors; the Director of Public Prosecutions by one of her officers, Mr McNaughtan, then lodged written skeleton arguments.

The grounds of the appeal as stated by the appellant's solicitors in their written submissions were :-

> *[1] That the learned trial Judge erred by shifting the burden of proof onto the Defence, when the Prosecution had failed to prove their case beyond reasonable doubt; and*
>
> *[2] The learned trial Judged erred by failing to find any self-defence as being led by the Defence.*

Neither of the two grounds of appeal as formulated appeared to us to have any merit. However, there was within the second ground a hint of what appeared to us a matter which warranted full argument and consideration. So, when the hearing of the appeal began, we indicated to the parties that we considered that a new ground ought to be formulated and argued, namely that the learned trial judge, in convicting the appellant in spite of the assessors' opinions that he was not guilty, failed to explain why he found that there had been no self-defence. Mr Savu then adopted that ground as his own and abandoned the two grounds formulated by his firm. He was given a short time to prepare argument on the new ground. He also sought, and was given, leave

to appeal against the sentence.

The person whom the appellant was charged with unlawfully killing was a small boy aged four years. There was undisputed evidence at the trial that the cause of his death was severe head injuries, a fracture of the right temporal bone and a fracture of the middle cranial fossa extending posteriorly into the occipital bone. It was also not in dispute that the child suffered those injuries at Lautoka market; but there was dispute as to the manner in which he suffered them. Two eye witnesses gave evidence at the trial that the appellant and another man, Lekima Dakua, were fighting in the market, that Lekima fell down and that the appellant, in attempting to punch Lekima, missed his target and instead punched the child on the jaw. The other version was given by the appellant in an interview conducted by the police a few hours after the incident and again by him at the trial in an unsworn statement.

We consider it necessary to draw attention an important error in the English translation, tendered in evidence at the trial by the prosecution, of an answer given by the appellant in the Fijian language during the interview. He was asked:

> "What happened when he swore at you?"

The answer was translated:

> *"I was so angry that I go for him and when I moved nearer to him he then threw a punch at me but it missed and I then fisted him."*

The correct translation of the phrase underlined is "I went

towards him." In the Fijian language the words used bore none of the overtones of aggression which are inherent in the phrase "I go for him". We consider it most unfortunate that such an inaccurate translation, distorting the meaning of the appellant's answer, should have been made. There is nothing on the record to indicate that it influenced the mind of the learned trial judge, who is not an expatriate, when he made his findings of fact but the risk was certainly present that it might do so, particularly as he read the English translation of the record of the interview to the assessors when summing up to them. We hope that much greater care will be taken in future by those preparing translations of statements and records of interview to ensure that they are accurate and do not distort the meaning.

At the interview the appellant said that he "fisted" Lekima. He said "I fisted him twice and he fell down and whilst falling down he then bumped into the small boy who was then heavily thrown to the ground". He said that the child had been pushing a trolley at the time when he punched Lekima and when Lekima bumped the child. In his unsworn statement the appellant said that, when he punched Lekima, "Lekima flew back and bumped the small boy standing behind". He also said that, when he threw the punch, he did not see the small boy at the back of Lekima. To some extent the statement which he made at the interview and what he said in the unsworn statement was supported by the evidence of Lekima who said:

> *"Accused punched me once - one landed on me. I fell down. I tripped on the trolley..... I was backing, tripped on the*

trolley and I fell down."

He said that, after he stood up, someone else punched him. He made no reference to having bumped the child or having been aware of the child's being there.

The learned trial Judge summed up to the assessors in an almost exemplary manner. He explained carefully the standard of proof required to support a conviction and that the onus of proving that the appellant was guilty rested entirely on the prosecution and never shifted to the appellant. Counsel for the appellant had drawn the attention of the Court to evidence contained in the unsworn statement that the appellant struck Lekima only in self-defence. His Lordship explained that defence carefully to the assessors and told them that, if they concluded that the appellant was, or that he might have been, acting in necessary self-defence, they must acquit him. He explained to them that, if they found that the appellant had assaulted Lekima, and if further they found that a punch intended for Lekima had struck the victim and caused the injuries from which he died, that would constitute manslaughter. He went on to deal with the second version of how the child received his injuries. He explained that, if the child was injured as a direct immediate result of the appellant's dangerous act, even though it was not directed at the child, and if the child died as a result of it, it was open for the assessors to conclude that the child's death was caused by the appellant's act and that he was guilty of manslaughter. His Lordship did not explain as he should have done, that the act which was dangerous had also to be unlawful

(see D.P.P. v Newbury [1976] 2 All ER 365) for the accused to be guilty of manslaughter. However, towards the end of the summing up, after he had reviewed the evidence, he said:

> *"Does the prosecution make you feel sure that the accused was not acting in self-defence? If you cannot feel sure it was self defence or if you conclude it was self-defence, you will acquit the accused".*

The assessors, after retiring for approximately half an hour, returned and stated their opinions. All three expressed the opinion that the appellant was not guilty. However, His Lordship, giving judgment, found him guilty. He observed that the assessors appeared to have formed the view that the appellant was acting in self-defence but that he himself found "no element of self-defence". He said that the prosecution "had proved beyond reasonable doubt that there was no basis for self-defence". He found as fact that the child met his death when he was bumped by Lekima, who had been punched by the appellant; he accepted that version of the cause of the child's injuries because the fractures of the child's skull were not such as would have been caused by a punch on his jaw. He said that the appellant's actions had been dangerous and had been the immediate cause of the child's death. He recorded a finding that the appellant unlawfully punched Lekima causing him to bump the child who was standing immediately behind him. On that basis he found the accused guilty of manslaughter and convicted him.

Section 199(1) of the Criminal Procedure Code (Cap.21) provides that in a criminal trial in the High Court the judge is

not bound to conform in his judgment to the opinions of the assessors but that, if he does not agree with the majority opinion of the assessors, he must give his reasons in writing and they must be pronounced in open court stating why he is differing from that opinion. In this present case His Lordship said that it appeared that the assessors had formed a view that the appellant was not guilty of manslaughter because he had been acting in self-defence. We are of the view that, if that was not the reason for their opinions, their opinions would have been perverse. So it is likely, we conclude, that His Lordship identified correctly the basis on which they gave their opinions. To some extent, therefore, His Lordship stated his reason for differing from those opinions, that is to say he stated that he found as a fact that the appellant had not acted in self-defence, whereas the assessors had at least regarded that as being reasonably possible.

But he did not examine the evidence relevant to the issue of self-defence and state why he made that finding of fact. He recorded simply that the appellant had said that he was going away with his shopping when Lekima swore "at his mother" and that he "went and punched" Lekima. Lekima, by his own admission, swore about the appellant's mother: there was no evidence that the appellant's mother was present. It appears, therefore, that His Lordship intended to write "about his mother" rather than "at his mother". That finding accorded with the evidence given by Lekima but was inconsistent with the unsworn statement of the appellant, where he said that when he heard the swear words, he

went and asked Lekima why he had sworn at him, that Lekima punched him and that he punched Lekima in self-defence. The English translation of the relevant answer given by the appellant during the interview on the day of the incident to which we have referred above might have appeared to His Lordship to afford some corroboration of Lekima's evidence but in the original Fijian language did not do so. However, as noted above, His Lordship did not examine, or refer to, any of that evidence in his judgment, so we do not know how he evaluated it.

Although, where a judge disagrees with the opinion of the majority of the assessors, the judgment of the Court is deemed to include his summing up to the assessors (see proviso to section 299(2) of the Criminal Procedure Code), in the present case that does not reveal why His Lordship was satisfied beyond all reasonable doubt that there was no self-defence when all the assessors apparently at least considered that it was a reasonable possibility.

Although a judge is not bound to conform to the opinion of the assessors, it is well established that, if he intends to differ from their opinions, he must have cogent reasons for doing so (Shiu Prasad v R. (1972) 18 FLR 68 at 71). In Mataiasi Raduva and John Heatley v R. (Cr. App. No. 109 of 1985) this Court observed:

> *"In matters of this sort, where credibility is in issue, we would like to say, from not inconsiderable experience on the bench in criminal proceedings, that the status of*

> *being a judge does not confer any advantage, in the field of assessing truthfulness, over any other man of the world. Indeed the contrary is sometimes suggested. That is why we have assessors or juries."*

That means that the judge must explain his reasons for coming to any different conclusions of fact from those to which the assessors came.

In Litiwai Setevano v The State (Cr. App. No 14 of 1989) this Court said:

> *"It is clear that a Judge in Fiji is entitled in law to disagree with the majority opinion of the assessors, and even when they are unanimous, but his reasons for doing so must be cogent and they should be clearly stated. In our view they must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial."*

We have given anxious consideration to whether the evidence, meagre as it was on the issue, was such that His Lordship could properly make the finding of satisfaction beyond all reasonable doubt which he did contrary to the unanimous opinions expressed by the assessors. We have come to the conclusion that he could, but he needed to give cogent reasons why he did so as the opinions of the assessors were clearly not without some support from the evidence. That he failed to do. We have decided, therefore, that the appeal must be allowed. If His Lordship had not failed to comply with the letter and the spirit of the statute, the conviction could have been upheld. We, therefore, considered whether we should remit the matter for retrial.

However, the appellant has already served 13 months of his sentence; when remission is taken into account, that is more than half the period he would probably have served had this appeal not been allowed. In our view the sentence, although not harsh or severe, was at the high end of the scale of what was appropriate. We have come to the conclusion, therefore, that it would be unfair to subject the appellant to a new trial and possibly a sentence of further imprisonment. So we have decided not to remit the matter for retrial.

Decision

Appeal allowed.

Conviction quashed.

Sentence set aside.

Sir Moti Tikaram
President Fiji Court of Appeal

Mr Justice Ian R. Thompson
Judge of Appeal