

IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0002 OF 1997  
(High Court Criminal Case No. 12 of 1996)

BETWEEN:

BIRJA NAND

APPELLANT

-and-

THE STATE

RESPONDENT

Mr. J. K. Maharaj for the Appellant

Mr. J. R. Auld for the Respondent

Date and Place of Hearing : 8 August 1997, Suva

Date of Delivery of Judgment : 14 August 1997

JUDGMENT OF THE COURT

On 24 March 1997 the appellant pleaded guilty to the murder of his father Shambhu Prasad; he was convicted and sentenced to the mandatory term of life imprisonment with effect from 15 May 1995. That was the date when he was formally committed from the Magistrates Court to the High Court. However, it was not until 14 August 1996 that the depositions were finally forwarded to the High Court – a totally unreasonable and unacceptable delay of 15 months for the Magistrates Court to attend to this formality.

The circumstances of this unfortunate event are not in dispute. The appellant is aged 38. He has admitted that on 23 October 1994 following an argument with his father earlier in the day he threw a can of benzine over him and then set him alight. As a result his father, aged 83, suffered third degree burns to 30% of his body. He subsequently died on 1 December 1994.

The appellant now appeals against that conviction. Mr. Maharaj supported the appeal with comprehensive written submissions based upon the following grounds:-

- (a) That the learned trial judge failed to ensure that the Petitioner was granted legal assistance and/or aid in view of the capital nature of the charge which omission seriously and adversely affected the Appellant's ability to present his defence, resulting thereby in a miscarriage of justice.
- (b) That the learned trial judge failed to take into account of the Appellant's mental state at the time when the alleged offence was committed since there was evidence of the Appellant having been under psychiatric care and medication at the time when the alleged offence was committed.
- (c) That the learned trial judge failed to consider the legal and factual issues of provocation when to have done so may have resulted in the Appellant being given the lesser sentence of manslaughter.
- (d) That, as a matter of public policy, it appears inhumane and unlawful for the Appellant to be imprisoned for life, and subjected to the penal ramifications of a custodial sentence, when the proper verdict ought to have been 'not guilty on

grounds of insanity' which verdict would have placed the Appellant under medical care and confinement to the St. Giles Hospital, by an order of the President of Fiji as required by the relevant provisions of the Criminal Procedure Code, Chapter 21.

**Absence of Legal Representation**

Counsel conceded that the appellant had been granted legal aid but that despite the best endeavours of the Chief Registrar no barrister and solicitor was prepared to accept the brief and act for the appellant. Mr. Auld confirmed that the difficulty of obtaining legal representation in Fiji for serious criminal cases is quite common and of real concern. The trial Judge referred to the lack of legal representation in the course of sentencing.

Such a state of affairs we believe becomes the responsibility of the Fiji Law Society. It should arrange that its members provide legal representation in serious criminal cases. To that end an appropriate panel of barristers and solicitors should be compiled to ensure that the provision of such a service is fairly and equitably spread throughout the whole profession and so does not become a financial burden on just a few responsible members or firms. The members of the council or governing body of the society might consider giving the profession a lead by putting their names upon the panel and undertaking to act if assigned.

The consequences of failing to address this problem have been considered by the High Court of Australia in Dietrich v The Queen (1992) C.L.R 293 which decided that:-

*“In the absence of exceptional circumstances, a judge faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault is unable to obtain legal representation, should adjourn, postpone or stay the trial until legal representation is available. If the application is refused and, by reason of the lack of representation, the trial is not fair, a conviction must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.”*

Having made those observations we are satisfied that both the Chief Magistrate in the Magistrates Court and His Lordship Scott J in the High Court took appropriate actions to ensure that the appellant had a fair trial and was not prejudiced in any way as a result of his lack of representation.

The Chief Magistrate had considered a medical report; a pathologist report; and three psychiatric reports before he committed the appellant to the High Court.

His Lordship not only considered those five reports but obtained a further up to date psychiatric report.

Consequently we are satisfied that in this present case no miscarriage of justice has resulted in the appellant not having legal representation.

### Mental State of the Appellant

Mr. Maharaj relied principally upon this ground of appeal. He submitted:-

*"... that the manner in which the prosecution handled the case and the manner in which the learned trial judge dealt with the issue of insanity was fundamentally irregular and not consonant with the principles of law applicable in such cases."*

The Chief Magistrate considered three psychiatric reports before he committed the appellant to the High Court.

- (1) The first was a report dated 6 July 1992 referred to by Dr. Singh and which related to a Court appearance by the appellant in 1992. The Doctor reported from that report as follows:-

*"A court report was also submitted on 6.7.92 re his criminal case No. 542/91 wherein he was diagnosed as suffering from Organic Personality Disorder with manifestation of persistent personality disturbances consisting of recurrent outbursts of aggression and rage, instability in his mood and suspicious of others motives. The organic cause of his illness had originated from injuries to his brain from boxing assaults and assaults from drunken brawls during his adolescent years. He still suffers from the same diagnoses. His features are intensified under the pressures of psychosocial stress factors. The current life situation at the Remand Prison is one of these stress factors."*

- (2) Dr. Singh provided a report dated 18 November 1994 following an examination of the appellant on 8 November 1994 just 2 weeks after he had attacked his father and prior to his father's death on 1 December 1994. Dr. Singh's assessment of the appellant's mental state at that time was as follows:-

*"On his mental status examination he was well dressed and well nourished; and maintained a coherent dialogue with logical sequence in his thought processes; his memory was not impaired for recent or past events, was well oriented to time and his surroundings; he did not admit to any hallucinations nor to any delusions. He is not suffering from attacks of epilepsy or fainting attacks; and states that he does not indulge in Substance abuse drugs. His relationship with his mother is amicable and there appears to be a symbiotic relationship between the two.*

*He has no psychopathology; but there has been a cancerous and attitudinal problem between his father and himself.*

*In my opinion Birja Nand is fit to plead in a Court of Law."*

- (3) Dr. Singh was asked to examine the appellant on 9 March 1995. He included that part of the 1992 report already referred to in (1) above. In addition he introduced his report by saying:-

*"A psychiatric report dated 18.11.94 had been submitted to you. This report mentioned that he had no overt psychopathology; that he was aware of his actions during the commission of the offence as charged; and that he was fit to plead in a Court of Law.*

*The whole sordid affair was premeditated and was not due to any delusion but was due to personality clashes with his father."*

Dr. Singh concluded his report as follows:-

*"He also features historionic manifestations wherein he becomes vain, inconsiderate and demanding. He develops angry scenes and displays emotional outbursts and exhausting others with tantrums of rage. He is given to tell elaborate lies; and at times he becomes stubborn with the belief that he is right when all the facts show that he is not. At other times he develops such behaviours to be manipulative and attention seeking.*

*Currently he is on chemotherapy to treat the manifestations of his Organic Personality Disorder.*

*He is fit to plead in a Court of Law."*

While those three reports were included in the depositions presented to Scott J in the High Court, a further report was ordered no doubt because of the time lapse between committal and trial. As a result Dr. Karim another psychiatrist assessed the appellant between 18 and 20 March 1997 and certified the appellant's condition as follows:-

*"His mental state was examined with particular reference to:-*

- 1. Whether he was sane or insane at the present time, and*
- 2. If sane, whether he was capable of understanding the proceedings in a court of law.*

*On the basis of my examination of the accused, I formed the opinion that he was not insane at the present time, and was fit to plead in court.*

*His mental state examination revealed that his cognitive functions were intact. His memory, orientation, perception, attention and concentration spans, recall and abstract thinking were within the normal ranges, and as he had been formally educated up to form VI level, I formed the opinion that he should be capable of understanding the proceedings in a court of law."*

The earliest report dated 6 July 1992 does diagnose the appellant as suffering from organic personality disorder and postulates boxing and drunken brawls as a cause of that condition. But that assessment was made more than 2 years before the attack on the appellant's father. Both the Chief Magistrate and the learned trial judge were entitled to rely on those medical assessments dated 18 November 1994 and 9 March 1995 and

prepared so soon after the offence. Likewise Scott J was entitled to rely on the further medical assessment by Dr. Karim who "...formed the opinion that he (the appellant) was not insane at the present time and was fit to plead in Court". That report was dated 20 March 1997 just 4 days before the appellant was sentenced.

Our review of those psychiatric reports satisfies us that even without the benefit of legal representation the appellant was not disadvantaged nor deprived of a fair trial.

### Provocation

The depositions disclose that the appellant's argument with his father occurred between 2 p.m. and 3 p.m. He set alight to his father at about 5 p.m. some 2 to 3 hours later. Mr. Maharaj relies on the two letters which the appellant presented to the Court on sentencing. Those letters in our opinion do not support a defence of provocation. What those two letters do indicate in our opinion is that, when the appellant wrote them, he was very aware of the distinction between the offences of murder and manslaughter and the different penalties attributable to each offence.

### Public Policy

The final ground of appeal submitted by Mr. Maharaj claims that "the proper verdict ought to have been 'not guilty' on grounds of insanity" and that consequently "...it appears inhumane and unlawful for the appellant to be imprisoned for life...."

We have already considered in some detail the mental state of the appellant. Dr. Singh as a result of his examination on 8 November 1994 just two weeks after the attack certified the appellant as fit to plead; Dr. Singh gave a similar certificate on 9 March 1995; while Dr. Karim on 20 March 1997 certified that the appellant "...was fit to plead in Court".

We have not been referred to any evidence that would support a verdict of "not guilty on grounds of insanity". The medical evidence is to the contrary.

In this context Mr. Auld referred us to the English case of The King v Forde [1923] 2 K.B. 400 at 403:-

*"A plea of guilty having been recorded, this court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or (2) that upon the admitted facts he could not in law have been convicted of the offence charged."*

We are satisfied that the appellant did appreciate the nature of the charge he faced. The letters he prepared and submitted to the learned trial judge confirm that fact. When asked to plead, he replied - "I accept the charge of murder." That plea and those letters in our opinion identify an understanding as well as an intention to plead guilty to the charge of murder.

There were two additional medical reports included in the depositions. Dr. Wata was the Surgical Registrar of the burns unit at the C.W.M. Hospital to where the deceased was admitted. On 13 January 1995 Dr. Wata certified the cause of death as follows:-

*“Cause of Death probably not directly related to the burns he had. The main cause of death in burns are usually shock in the initial 48 hrs after burn or infection thereafter. But it may contribute to it through prolonged immobilisation and inactivity.”*

The pathologist Dr. Sharma completed his post mortem report on 2 December 1994 and certified that the direct cause of death was due to:-

1. Pulmonary odema;
2. Cardiac failure;

and as an antecedent cause of death:-

3. Burns (30%) healing.

At sentencing, the prosecuting Counsel in outlining the facts stated:-

*“The cause of death was pulmonary oedema and second degree cardiac failure caused by burns.”*

It could be said that statement does not reflect precisely Dr. Wata's opinion but it was not inconsistent with it. Dr. Wata believed that the “cause of death (was) probably not

*directly* related to the burns he had” but he regarded them as possibly having contributed causally in an indirect manner. The judge was entitled, in our opinion, to accept that there was evidence in the committal documents which established a causal link between the appellant’s actions and his father’s death, so that it was proper for him to convict the appellant on his plea of guilty.

For all those reasons the appeal against conviction is dismissed.

We have already expressed our concern that legal representation is not available in Fiji for accused persons charged with serious offences. In those circumstances might we suggest that it would be desirable in a serious case such as murder that if no legal representation is available the judge might say to an accused:-

***“Before I accept your plea of guilty I wish to be sure you understand the consequences of entering such a plea. Do you understand that on a plea of guilty to murder, the Court is required by law to sentence you to imprisonment for life. The Court cannot impose any lesser sentence nor has it any power to reduce the charge from murder to manslaughter.”***

If the accused acknowledges that he or she understands what has been explained then the Judge can proceed with the sentencing process. If the accused does not acknowledge the explanation provided then the judge could stand the case down and arrange for Counsel to advise the accused. In the present case prosecuting counsel drew attention to the mandatory sentence. While we consider that a procedure such as we are

proposing is desirable for the reasons already stated, failure to adopt such a practice would not of itself invalidate either a conviction or a sentence.

*I. R. Thompson*

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Mr. Justice I. R. Thompson  
**Judge of Appeal**

*Savage*

.....  
Mr. Justice Savage  
**Judge of Appeal**

*J. D. Dillon*

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Mr. Justice J. D. Dillon  
**Judge of Appeal**