IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO.AAU0014 OF 1996S
(High Court Criminal Case No. 2 of 1996L)

BETWEEN:

DHARAM DEO

Appellant

AND:

THE STATE

Respondent

Coram: **The Rt. Hon. Justice Sir Maurice Casey, Justice of Appeal (Presiding)**
The Rt. Hon. Justice Sir Thomas Eichelbaum, Justice of Appeal
The Hon. Justice Sir Ian Barker, Justice of Appeal

Hearing: **Friday, 4 February 2000, Suva**

Counsel: **Mr. A.C. Kohli for the Appellant**
Mr. J. Naigulevu for the Respondent

Date of Judgment: Wednesday, 9 February 2000

JUDGMENT OF THE COURT

The appellant seeks leave to appeal against his conviction for the murder of his wife at the Batiri Citrus Farm, Seaqaqa on 9th November 1995. He was tried at the High Court in Labasa before the Chief Justice and assessors at a hearing which commenced on 24 June 1996 and which extended over several weeks. On 31st July 1996, the assessors unanimously delivered an opinion of "guilty" with which opinion the learned Chief Justice agreed. Consequently, the appellant was, on that date, convicted and given the mandatory sentence of life imprisonment.

This appeal was filed on 28 August 1996 but the Chief Registrar did not certify the record until 11th September 1998. The file was received by the Court of Appeal office from the High Court in Labasa on 20 September 1996 but the certified record was not received by this Court until some 2 years later. We are concerned that there should have been a delay of this length in the preparation and certification of the record. The appellant was entitled to have his appeal against his conviction of such a serious charge placed before this court with reasonable promptness.

There followed delays on the part of the appellant's lawyers, after the record had been received by the Court Office. It is not necessary to detail these. A fixture for 17 February 1999 did not proceed. Some of these delays were caused by legal aid considerations. Eventually, Mr Kohli, who had appeared as counsel at the trial, was appointed as counsel for the appellant on legal aid at a fixed fee which included no acknowledgment that counsel had to travel to Suva from Labasa for the hearing of the appeal. Because of Mr Kohli's familiarity with the trial, the Court has been assisted by his submissions. We suggest that the Legal Aid authorities look favourably at paying his travel accommodation expenses and other disbursements in connection with the appeal. It is always helpful in major criminal cases for this Court to have assistance from counsel who conducted the trial in the Court below.

The State's case against the appellant was that he bludgeoned his wife to death with some PVC piping at the Batiri Citrus Farm at Seaqaqa where the appellant was employed as a labourer. The appellant claimed to the Police, initially, that he had found his wife lying prone on the ground after she had been gored or trampled on by two bullocks used in the appellant's farming operations. The prosecution led evidence to suggest that the injuries suffered by the deceased could not have been caused by the bullocks but rather by a steady stream of blows from a blunt instrument such as the heavy PVC pipe which had been found on the ground at the Citrus Farm after the incident.

There was no suggestion that anybody other than the appellant and the deceased had been anywhere in the vicinity when the deceased received her injuries. Although there was red colouring found on the PVC pipe, the prosecution did not prove that the colouring was caused by blood. The deceased suffered a subarachnoid haemmorrhage caused by a considerable blunt force. She had two open head wounds and injury to her left cerebullum and her trachea. The pathologist

suggested that the 9 bruises on the deceased's chest could have been caused by an object with a rounded end such as timber, or a pipe or tube. He did not expressly say that the PVC pipe caused the injuries. He was not cross-examined to explore whether any of these injuries could have been caused by the hooves or horns of the bullocks. The ultimate cause of death was rupture to the right chamber of the heart caused by the chest injuries.

The prosecution submitted that the only possible inference from the circumstantial evidence was that the accused had killed the deceased, if the assessors accepted that the injuries could not have been caused by the bullocks. The prosecution further submitted that a confession made by the accused to a Police officer proved the prosecution case beyond all reasonable doubt.

A trial within a trial, in the absence of the assessors, was held, spread over 7 sitting days. The assessors were absent from the trial for a total of 2 weeks. The learned Chief Justice ruled that a written confession statement made in Hindi by the accused to a Police officer was voluntary and admissible. The Chief Justice declined to admit in evidence a further written statement made on 11 November 1995 after the accused had been in custody. It is unfortunate that the assessors were absent from the trial for such a long period. Their memory of what had been said in evidence before their departure must have dimmed, given such a long break. Considerable savings in Court and assessor time have been made (at least in New Zealand) by a procedure which enables prosecution or defence to obtain a ruling from the Court pre-trial on the admissibility of evidence proposed to be called at trial. We commend a similar procedure to the appropriate Law Reform body in Fiji.

The Chief Justice ruled against the appellant on all of the grounds advanced by the appellant for rejecting the statement. These were aimed at voluntariness and fairness: the appellant

alleged misconduct by the Police: i.e. a) breach of Judges' Rules b) unfair means c) inducement d) oppression e) threats of violence and actual assault. The Chief Justice correctly addressed himself to the appropriate onus and burden of proof. He ruled that the statement had been made by the accused voluntarily and that there was no element of unfairness which would justify its exclusion from evidence. In the written statement, the accused initially maintained that the deceased had been attacked by the bullocks, he then admitted that he had struck her on the chest with the PVC pipe until he saw blood coming from her nose. He said that he threw the pipe down and it may then have broken into two - as it was when found.

After conclusion of the of the voir dire, the assessors were re-assembled. The prosecution again led the evidence of the Police officers responsible for the taking and the translating of the statement - the same evidence as they gave at the voir dire. At the conclusion of the prosecution case, the appellant elected to give evidence. He claimed that the bullocks had killed his wife. He gave the same evidence, as he did at the voir dire, of alleged inducement, oppression, unfairness and violence by the Police. He denied that the confession was correct when it recorded him having killed his wife.

In summing up to the assessors, the Chief Justice correctly directed them on the standard and onus of proof and on the ingredients of the charge of murder. He directed them correctly about circumstantial evidence and when it could lead to a conviction. He detailed the evidence given by the accused of police misconduct over the confession. He told the assessors that they had to have regard only to the evidence and that they were free to disregard any view on the facts that he might express.

Although numerous grounds were stated in the notice of appeal, the only ground

advanced by counsel for the appellant at the hearing in this Court, was that the learned Chief Justice in his summing-up failed adequately to put the defence case in 5 different areas.

First, counsel submitted that the learned Chief Justice, when discussing a possible motive for the killing, failed to mention certain evidence favourable to the appellant.

The learned Chief Justice commenced his discussion of motive by commenting that, as a matter of human experience, nobody would kill another person for no reason. That reason, he said, may be jealousy, hatred, anger, greed or some equally strong passion. He then referred to the claim advanced by counsel for the prosecution in her closing address, that the deceased did not like the idea of the appellant and the children forsaking the Hindu religion for Christianity. "She must have regarded it as a betrayal of the Hindu religion about which she had made her feeling known to the accused in no uncertain terms." The Chief Justice then said that the accused took exception to the deceased's attitude and for that reason decided to get rid of her. According to the prosecution, the Chief Justice said, this attitude came out in questions and answers in the statement: i.e.

"Q. Then what happened?

A. I want to tell you when I came home yesterday at 1 o'clock. I saw my wife scrapping coconuts. I said that some Assembly (i.e. Assembly of God, the church which the appellant had joined) Group will come home in the afternoon and for her to make some Nalwa and Gulagula.

Q. Then what happened?

A. My wife said that she don't give a dam to Assembly Group and she will not prepare Nalwa and gulagula."

The Chief Justice then said to the assessors:

> ***"You have also heard evidence how the accused became a Christian. It was the result of his being cured from a serious illness from which he was then suffering by the spiritual help given to him by the Assemblies of God faith. Since then the accused has been and still is a strong follower and supporter of the Assemblies of God faith. Since that time the accused has been a devout and dedicated member of the Church who has been personally deeply involved in and committed to holding prayer meetings for the Church. It may well have been his strongest wish and desire to convert his whole family including his wife to the Assemblies of God religion. That this did not happen because his wife wanted to remain a Hindu must have been a real disappointment to him but whether this was a sufficient reason for him to kill his wife as alleged by the prosecution may or may not be the case. However this is a matter entirely for you, Gentlemen Assessors.***
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> ***I have to direct you that a motive for a crime is not something that the prosecution has to prove. In a criminal case the prosecution is not required to prove motive but proof of motive is always helpful to one's understanding of the case. If the prosecution can prove the motive for a crime, well and good. If they cannot, it is immaterial to the case provided the evidence they are relying on is strong enough to support their case."***

Counsel submitted that the Chief Justice omitted to mention the evidence of the Assembly of God Pastor who had conducted the prayer meeting the previous night at which the deceased had been present. A son of the appellant spoke of other prayer meetings at which the deceased had served refreshments, the attendance by the deceased at prayer meetings held in other locations and that the deceased and the appellant never fought over religion, although they had minor squabbles.

More important was the statement in cross-examination by the Officer in Charge of the case, Superintendent Reddy, that it was not the Police theory that the accused killed the deceased because of religious differences or disputes. This Police officer was unaware of any theory as to why the deceased died.

Although counsel for the appellant is recorded as adverting to Mr Reddy's evidence in his closing address to the assessors, we consider that the trial Judge should have referred to this evidence in his summing up, once he had decided to put the prosecution's theory, which was scarcely justified solely by the questions and answers just quoted.

It would have been sufficient for the Chief Justice merely to have given the standard direction that the prosecution did not have to prove a motive and left it at that. However, having embarked on the topic of a suggested motive, he should, in fairness, have referred to the evidence of this important prosecution witness on the topic. Moreover, the extracts from the appellant's statement read out to the assessors and quoted above do not necessarily lead to the conclusion that the deceased's reported remarks stemmed from religious differences. She may have just become tired of the extra demands for hospitality that were being placed on her by the deceased's new religious confreres.

Secondly, counsel for the appellant submitted that the Chief Justice, when discussing the evidence of the bullocks' involvement, failed to mention items of evidence favourable to the appellant. This evidence can be summarised thus:

(a) Evidence of Durga Wati (d/o Sam Lal) a relative of the appellant who had seen the yoked bulls fighting on an unspecified occasion.

(b) Evidence of Bal Karan (s/o Amika Prasad) who said that after the incident, the red bullock was angry. It tried to attack him when he tied it up. He saw blood on the rope threaded through its nose. He saw blood on the right hoof at the nail portion at the rear. He did not see any injury to the bull.

(c) Evidence of Sam Deo (a son of the appellant) who used to look after one bullock. He said the bulls used to fight with each other and that his mother used to separate them.

(d) Evidence of Ishwar Kumar (s/o Ram Prasad), a nephew of the appellant. He said the bullocks fought on many occasions and the deceased would separate them.

(e) Evidence of Dharmendra Singh, who saw the blood on the rope but who threw the rope in the river for religious reasons.

In discussing the evidence relating to the bullocks, the Chief Justice said:

"According to the prosecution these injuries could not possibly have been caused by the accused's two bullocks. This is because the injuries had to be inflicted with considerable force several times in a sustained manner and on different parts of the body namely the head and the chest.

According to the prosecution the nine semi-circular bruising marks on Maya Wati's chest were caused by the accused when he was hitting her with the open end of a PVC pipe. There were nine over-lapping bruising marks on her chest because, according to the prosecution, she was repeatedly hit with a PVC pipe while lying on the ground and facing upwards. According to the prosecution the PVC pipe must have been struck with considerable force because not only did the PVC pipe break into two pieces but also altogether eleven front ribs of the deceased were fractured including the sternum or the breastbone which was also fractured. The injuries caused by bullocks would have been of a different type. Moreover, the accused's bullocks were said to be rather tame and had been seen grazing normally and peacefully and when approached by people did not turn violent. However this is a matter entirely for you to consider and assess for yourselves."

There was evidence from a veterinary officer who examined the bulls after the incident. He took the rope off the nose of one of them but said nothing about blood being found on it. The horns had been cut to three inches and were blunt. There were no blood stains on the horns nor injuries to the hooves. There were "no aggressive marks" on the ground where the body was supposed to have been found. He concentrated his attention on the light brown bullock because the owner had told him it had been the attacker. Another veterinary officer also checked both bullocks with similar conclusions.

Although the nature of the defence must be explained fairly and adequately, a Judge is not required to traverse all the evidence when summing-up. The assessors need to be told as happened here:

(a) They must act solely on the evidence

(b) They are the Judges of fact and

(c) The Judge's views on facts are not binding on them.

We think that the bullocks being responsible for the attack was not a reasonable possibility given the medical evidence of the injuries to the deceased and the veterinary examination of the animals. The vague evidence referred to by counsel did not need to have been brought to the assessors' attention.

Thirdly, counsel submitted that, when discussing the reliability of the statement, the Chief Justice did not refer to the evidence of Pastor Penaia Koroi who spoke to the appellant in the Police Station after the appellant had made the statement. According to this witness, he appellant was crying and claimed that the Police were blaming him for killing his wife.

The Chief Justice referred to the Judges' Rules and offered the view that the Police were doing no more than the Judge's Rules required of them. He told the assessors that it was for them to decide, on the whole circumstances whether the Police officers or the appellant were telling the truth about the way the cautioned statement had been obtained. He then said:

> ***"It is also important for you to decide the question as to how much weight or reliance can you give to the story given by the accused about the bulls which accused claims attacked his wife and caused the injuries from which she died. So far as you are concerned, Gentlemen Assessors you may feel his story can be evaluated and tested in two ways. The first concerns the way the accused has described the circumstances of the attack on his wife by the two bulls. You have to decide whether his story is probable and is consistent with a kind of attack you would expect from these two bulls . In this regard you have to consider the known behaviour of the two bulls i.e. whether they have a tendency to be violent or whether they are tamed bulls. This will help you to decide whether the accused's story is more probable than not i.e. whether or not it is likely to be true.***
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> ***The second way you can test the accused's story concerns the extent and nature of the injuries found on the deceased. You will have to decide whether the two bulls were capable of causing and inflicting the type of injuries actually found on the deceased."***

Earlier the Chief Justice had summarised no fewer than 17 allegations of Police misconduct which had been alleged by the appellant in his evidence.

It would have been preferable for the Chief Justice to have emphasised that the prosecution had to prove the reliability of the statement as well as its voluntariness (In other words, when the appellant confessed to killing his wife, although the confession is admissible, was it true?).

However, considering the summing- up as a whole, we think that the voluntariness and accuracy of the statement were sufficiently put to the jury. We see nothing in the point that the Pastor's evidence should have been the subject of a specific reference in the summing-up.

Fourthly, counsel for the appellant complains about the lack of evidence about the PVC pipe and how it came to be broken. The appellant in his statement, said that he thought the pipe may have broken when he threw it away. The witness, Darmendra Singh said that he drove his van to the appellant's house to transport the deceased to hospital. He was met by the accused, shouting "Hurry up brother, save my wife, bullock attacked my wife." This witness also claimed he had run over the pipe with his van and broken it.

We see nothing in this submission. We agree with counsel for the State that it is immaterial how the pipe was broken and that the medical evidence is consistent with the pipe having been used in an assault on the deceased.

Fifthly, counsel for the appellant submitted that the conduct of the appellant after the deceased had been injured was consistent with her having been attacked by the bulls and inconsistent with his having attacked her himself. Counsel referred to evidence of appellant's solicitude for his dying wife.

Again there is nothing in this point. The Chief Justice was not required to refer to all the evidence in his summing up. The evidence referred to could have been regarded as indicative of remorse as much as of compassion.

The case against the appellant, given the admission into evidence of the confession, (which admission was unchallenged in this Court) was very strong. The evidence pointed to the deceased's injuries being caused by something like the PVC pipe and not by the bulls. The failure to mention in summing-up the evidence of the Police Superintendent could not justify the overturning of the conviction in the circumstances. We apply the proviso to this ground of appeal which we reject.

Accordingly, there is no basis for upsetting the conviction. Leave to appeal against conviction is granted but the appeal is dismissed. An appeal against sentence was abandoned at the hearing: as it was a mandatory sentence, it could not have been the subject of an appeal.

Result:

1. Leave to appeal against conviction granted.
2. Appeal against conviction dismissed.

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Sir Maurice Casey
Justice of Appeal

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Sir Thomas Eichelbaum
Justice of Appeal

.....
Sir Ian Barker
Justice of Appeal

Solicitors:

Messrs. Kohli and Singh, Labasa for the Appellant
Office of the Director of Public Prosecution, Suva for the Respondent

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