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

CRIMINAL APPEAL NO. AAU0022 OF 2002S
(High Court Criminal Case No. HAC 020/01)

BETWEEN:	ADRIU VOLAVOLA	*Appellant*
AND:	THE STATE	*Respondent*
Coram:	Reddy, P Tompkins, JA Ellis, JA	
Hearing:	Tuesday, 5th November, 2002, Suva	
Counsel:	Mr I.V. Tuberi for the Appellant Mr V. Vosarogo for the Respondent	
Date of Judgment:	Friday, 15th November, 2002	

JUDGMENT OF THE COURT

The Appellant was tried and convicted by Shameem J., sitting with three assessors, in the High Court at Suva, in May this year on an indictment that he murdered Alifereti Turagarua (the deceased) at Suva, in the Central Division, on the 3rd day of March 2001. He now appeals against this conviction.

We will first deal with the application to call fresh evidence.

Mr Tuberi, for the Appellant, filed an application for leave to call fresh evidence under Section 28(b) of the Court of Appeal Act. He proposed that Mereani Naivalu, the deceased's estranged wife be allowed to give evidence. Mereani Naivalu was initially jointly charged with the Appellant. The case against her was withdrawn. She was with the Appellant during the early hours of 3rd of March 2001, when the deceased received the fatal injuries. She saw how he received the injuries and made a detailed statement about it to the police. Her statement was "handed up" to the Magistrate as part of the State's case at the Preliminary Inquiry, and formed part of the depositions. However, she was not called by the State at the trial. Neither did the defence.

No application was made to the Court that she be called. After the Appellant had given evidence, Counsel for the accused, informed the learned trial Judge that she had no other witnesses. The Appellant was aware that Mereani Naivalu's evidence was available at the trial, but chose not to call her.

In these circumstances there is no basis upon which we can allow the fresh evidence to be called. The principles governing the reception of fresh evidence on appeal are settled and well understood. In Waisake Tuimereke, Apenisa Ralulu v The State, Criminal Appeal No. AAU0011 of 1997S, in dealing with a similar application, this Court said:-

> *" In Lawless v. R (1979) 142 CLR 659 Stephen J. referred to Ratten's case and said that it contained "a definitive pronouncement of appropriate principle" in respect of the concept of fresh evidence. He said that it required "that the evidence in question, not being before the jury at the trial, was not then available to be called by the defence." Barwick C.J. and Mason J. applied that principle and Aickin J. expressly agreed with it. Murphy J. dissented but on the ground that the evidence of the proposed new witness had been suppressed at the trial.*
>
> *Section 23 of the Criminal Appeal Act 1968 (U.K.), particularly in the provisions of subsection (2), differs in significant ways from section 28 of the Court of Appeal Act (Cap. 12). The provisions of section 28 make it more appropriate for this Court to seek guidance from Australian cases than from English cases. However, it is to be noted that in the circumstances in which the appellants are seeking leave to adduce fresh evidence the courts in England would almost certainly not admit the evidence (see e.g. Stafford and Lavaglio (No. 1) (1968) 53 Cr. App. R.1 and particularly Edmund Davies L.J.'s comments at page 3).*

In this appeal the appellants have not presented any evidence that the witness whom they wish to call was not available to give evidence at the trial. Indeed Mr Lala did not even assert that. In view of the first appellant's statement at the trial that he intended to call the witness there, the evidence before us tends to show that his evidence was available at the trial. The application for leave to adduce the evidence of the witness cannot succeed; we dismiss it."

Since the evidence that Mr Tuberi now wishes to call was available to the defence at the trial, but was not called, the application cannot succeed and it is refused.

THE EVIDENCE

The evidence in the case is contained within a narrow compass. The Prosecution case was that the Appellant, a police officer, assaulted the deceased on two separate occasions during the early hours of 3rd of March 2001.

A night watchman on duty at the Government Printery on Viria Road saw the first assault. According to the witness, the Appellant, and Special Constable Mereani Naivalu were walking along Viria Road, followed closely by the deceased, when the Appellant turned around, and punched the deceased twice, once on his right cheek and once on the right chin. The force of the blow or blows was such that the deceased was lifted up, fell back heavily on his head and lower back, the head hitting the tarsealed surface of the road. The deceased started to 'shake', and became unconscious. Immediately, the Appellant started to call out to the deceased, "Alifereti, Alifereti" and to massage his head, and continued to do so till he regained consciousness.

After the deceased regained consciousness, he tried to board a taxi, but because the taxi driver refused to take him, he got off and was seen to stagger away. By this time, there were a number of policemen from the nearby police post at the scene, but no one realized that the deceased had received serious injuries to his head.

The second assault took place at approximately 6.00 a.m., almost an hour after the first. It appears that the deceased walked a short distance from the scene of the first assault, and

was lying down on the pavement outside the Penguin Ice Cream factory. Two police witnesses, who were on foot patrol with the Appellant, saw him punch the deceased once as he sat up, on the right side of his chest. The deceased again fell to the ground, and remained in that position for some twenty minutes, while his chest was massaged, because he could not breathe properly. He was then told to go home, got up, and walked away. Again, none of those present realized that he had suffered serious injuries to his head.

Other than the three punches, the first two of which caused him to fall heavily on his head, there was no evidence that the Appellant inflicted any other violence on the deceased.

The deceased was seen outside his house at about 7.00 a.m. by his sister. He was sitting down, and spitting. He then got up, went into his room and went to sleep. His brother could not wake him up at midday, and took him to the CWM Hospital, where he was found to be dead.

According to Dr Loata, who conducted the post mortem examination on the deceased, the cause of death was due to extensive blunt impact on the back of the head, which caused the skull to crack and the brain to bleed, and swell into the respiratory part of the spinal cord which caused the deceased to cease breathing. The depressed skull fracture on the back of the head, the subdural haemorrhage in the brain, haemorrhage in the inferior aspect of both frontal lobes and the right lobe, were all consistent with injuries to the deceased's head, due to the heavy fall on the tarsealed surface.

There is no doubt that the deceased died as the direct result of the injuries to his head.

The injuries to the right chin (intra-muscular bleeding), and to the right eye (bleeding of soft tissue) did not cause or contribute to the deceased's death.

The second assault, no doubt resulted in the fracture of the 8th rib, and laceration and abrasion to the spleen, but there is no suggestion, that these injuries caused or in any way contributed to the deceased's death.

The Appellant gave evidence on oath. He said that Special Constable Mereani Naivalu was his friend. He was walking with her along Viria Road, when he heard someone call out her name, and then saw the deceased assault her. He went to stop the assault, when the deceased grabbed his neck from the back and punched him on his left ear. According to the Appellant, he then swung his left hand back to defend himself, and was not sure where his left hand landed on the deceased. He saw the deceased fall, and then called out to him "Alifereti, Alifereti" and massaged his head till he got up, and went to the taxi which had arrived at the scene, and he saw Mereani go up to the deceased and punch him. He then saw the deceased walk away from the taxi.

As to the second assault, the Appellant admitted going out on foot patrol with the two police witnesses referred to earlier, and saw the deceased sitting on pavement outside the Penguin factory, he denied assaulting him.

THE APPEAL

The amended Notice of Appeal sets out 13 separate grounds of appeal. Learned Counsel for the Appellant, reduced these to four broad and general submissions, which may be summarized as follows:-

1. That the verdict is unreasonable and cannot be supported having regard to the evidence (Grounds (1), (2), (9), (10) and (11)).

2. That Mereani Naivalu should have been called as a witness - failure to do so has resulted in miscarriage of justice (Grounds (3), (4), (5) and (6).

3. That the medical report signed by Dr Eka Buadromo, should not have been admitted in evidence (Ground (7)).

4. That the learned trial Judge erred in not directing the assessors that the deceased's death was accidental and/or due to the failure of timely medical

attention (Grounds (8), (12) and (13).

SUBMISSION 1

Causing the death of another with malice aforethought is murder. Section 202 of the Penal Code defines malice aforethought:-

> *" 202. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-*
> *(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;*
> *(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused."*

It was incumbent upon the State to prove that at the time the Appellant inflicted the two blows to the deceased's chin and the cheek, he did so with malice aforethought, either as in (a) or (b) of the definition.

Under (a) the State had to prove specific intent to cause death or grievous harm. Nothing less would suffice. Under (b) the State had to prove that at the time the Appellant inflicted the two blows he knew that it will probably cause the death of or grievous harm to the deceased. Both (a) and (b) involve determining the subjective state of the Appellant's mind at the time he struck the two blows. In order to make that finding the trial Judge and the assessors had to pay attention to all the relevant circumstances, including what the Appellant did and said. As was said by the Court of Appeal of New Zealand in R v Ramsay [1967] NZLR p.1005 at p.1015:

> *"Though these paragraphs provide subjective tests, those tests are, of course, to be applied against the background of all surrounding circumstances properly proved. And so here in the present case the jury were entitled to have regard to all the appellant's actions of that night, not because they made up one indivisible course of action, but because and to the extent that they assist to reveal the state of mind, including knowledge of likely consequences, at the moment of the commission of the*

act which caused death."

No weapons were used. The Appellant struck the two blows with his bare hand. The blows were not the immediate cause of the fractured skull. The skull was fractured as a result of the deceased taking a heavy fall and striking his head against the tarsealed surface of the road. If the deceased's head had not struck the surface of the road, in the way it did, he would not have received the fatal injuries. The bleeding on the epicardial surfaces on the right chin, the right eye and eye socket and the soft tissue bleeding in the mid upper lumbar region, were no doubt caused by the two blows, but these injuries did not cause death and cannot be described as really serious bodily harm, which is what "grievous harm" means.

There was no pre-plan to assault the deceased, let alone a plan to kill or to cause grievous harm to him. It would appear that the deceased and the Appellant met up on Viria Road either by chance, or the deceased had gone looking for his wife who was a Special Constable and posted at the Viria Road Police Post, saw her with the Appellant, and confronted him. Curiously, Mereani Naivalu, was not called by the State. The night watchman did not say what transpired before he looked across the road, and saw the Appellant land two punches on the deceased.

The Appellant's response, after the deceased fell to the ground is significant. According to undisputed evidence, after the deceased fell to the ground the Appellant called out "Alifereti, Alifereti" and started to massage his head, in an obvious attempt to revive him, and, continued to do so, until he was conscious. These were not the words and actions of a man who intended to cause serious harm or had the knowledge that his action would cause death or serious bodily injury.

When the learned trial Judge summed up the case to the assessors, she made reference to this evidence, but did not explain or expand on its relevance to the two issues of intent and knowledge at the relevant time. We think that the learned trial Judge should have done so.

As to the second attack, the learned trial Judge summed up as follows:-

" If you believe SC Uraia and Jone and having heard the pathologist's evidence, you will no doubt realise that (if you accept the prosecution evidence) this second assault caused injury to the chest which was not a cause of death. If you accept that the deceased had already received his fatal blow then the second assault could in no way have been a significant cause of his death.

However the relevance of the second assault, if you accept that it happened, is to show what was in the mind of the accused. By inflicting a second assault on a man who had already sustained injuries and who was sitting on a footpath not causing harm to anyone, you are entitled to infer that the person inflicting such a second assault must have intended to cause at least grievous bodily harm, if the same person had already inflicted the earlier fatal injuries.

In other words the second assault as well as the nature of the first may assist you in deciding whether or not the accused acted with malice aforethought, or with intention to cause really serious harm to the deceased."

As stated earlier, the state of the Appellant's mind at the time he inflicted the first two blows was critical.

Unfortunately, the passage we have cited above from the summing up does not make that clear. The effect of the summing up was, in our view open to the inference that the assessors could regard both assaults as constituting a series of acts from which they could infer the intention or knowledge constituting malice aforethought. In our view, it should have been made clear to the assessors that they were concerned with the state of the Appellant's mind when he struck the first two blows, and not at any other time. The summing up fell short of doing so, and this was an unfortunate omission in what was otherwise a thorough and well-structured summing up.

Again, as stated by the New Zealand Court of Appeal in R v Ramsay (supra) (at 1015) :-

".....The position is perhaps even clearer when we turn to the language of para. (d). There the statute says ". . . does an act that he knows to be likely to cause death, and "thereby kills. . . ." It is the knowledge surrounding the act that kills which is put in issue by the paragraph. And so it seems to us that while it may sometimes be useful to view conduct as a whole to ascertain whether there was a dominating intention running throughout a series of acts which can fairly be taken as the intention actuating the fatal act, nevertheless when it comes to ascertaining knowledge of the likely consequences of a particular act, one does not get the same help from looking

at a course of conduct in that way. A course of conduct doubtless sometimes reveals a persisting intention sufficiently plainly to enable one to say without doubt that every part of that conduct was directed by that intention; but we doubt whether one can ever determine from the overall character of a sequence of actions what knowledge there was in the mind of the actor of the likely consequences of a particular act. To ascertain that knowledge one should look at the act as an individual act, though not in isolation from the surrounding facts, including, naturally, prior conduct of the accused. We consider, then, that in every case involving paras. (b) and (d) of s. 167, whether there is a series of interconnected acts or not, the knowledge to be ascertained is always the knowledge at the time when the act causing death is committed. The mens rea prescribed by the statute must exist at that point of time."

The second assault was separated from the first in time and place. There was no evidence that the Appellant knew at the time of the second assault that the deceased had suffered serious injuries to his head as a result of the earlier fall. Neither did the two police officers who were with the Appellant.

Relevant part of Section 23(1) of the Court of Appeal Act as amended provides:-

"23.–(1) The Court of Appeal–

(a) on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence....."

We have reviewed all of the evidence in the case, and have come to the clear conclusion that this appeal must be allowed. The totality of the evidence,in our view, raises more than a reasonable doubt if the Appellant intended to cause death or serious injury. He could not have foreseen that the two blows would cause death or serious injury. Death is not a natural or probable consequence of two blows. In our view the evidence did not establish mens rea required by statute, beyond reasonable doubt. Section 299(1) of the Criminal Procedure Code requires the trial Judge to sum up the case, after the case on both sides is closed. Each assessor is required to give his or her opinion orally, and the trial Judge is then required to give judgment, but in doing so is "not bound to conform to the opinion of the assessors".

It was stated by this Court in Tangavelu v R Vol 4 F.L.R. 57:-

> *" In this Colony assessors are not members of the Court and have no power to appreciate the evidence in such a manner as to bind the trial Judge. They sit to assist him. Their opinions, which are individual and not collective, must no doubt have due regard paid to them, but it is the Judge who decides the case on the facts as well as the law; he is not "bound to conform to the opinions of the assessors, " section 308 (2) Criminal Procedure Code. In the words of the judgment of the Privy Council in R. v. Joseph (Privy Council Appeal No. 93 of 1946) the assessors have "no power to try or convict", their duty is to offer "opinions which might help".*

It was open to the learned trial Judge not to accept the advice of the assessors, provided she gave reasons for not doing so. In our view she should have done so in this case.

The conviction for murder must be set aside on the ground that it is unreasonable and cannot be supported having regard to the evidence. The assault on the deceased was unlawful, and it caused his death. A verdict of manslaughter must be substituted.

SUBMISSION 2

Mr Tuberi criticised the State for not calling Mereani Naivalu. Her statement supported the State's case in some respects, and the defence in other respects. Her account was credible and explained the circumstances in which the Appellant came to inflict the two blows on the deceased. While we think that she should have been called, we are unable to say that the decision not to call her was taken for any improper motives. There is no suggestion that the Prosecution wished to suppress the evidence, as proof of Naivalu's evidence was readily available to the defence. In Gyan Deo v Reginam 13 FLR 44 at p.46 this Court said:-

> *" We were referred to a number of authorities touching the question of whether a duty lies upon the Crown to call all witnesses whose names are on the back of the indictment. The most recent case is R. v. Oliva [1965] 3 All E.R. 116 and the gist of that decision is that, while the Crown must have in court all such witnesses, there is a wide discretion as to whether the Crown will call them. The discretion must be exercised so as to further the interests of justice and at the same time be fair to the defence. There is a duty well recognised, to call a witness whose evidence is capable of belief."*

Mr Tuberi submitted that the learned Judge should have intervened, and directed the Prosecution to call Mereani Naivalu or that she should have called the witness herself. In Oliva [1965] 1 WLR 1028 at page 1036 Lord Parker CJ stated:-

> ***"If the prosecution appear to be exercising that discretion (not to call a witness) improperly, it is open to the judge of trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness, and if they refuse there is the ultimate sanction in the judge himself calling that witness."***

In the circumstances of the present case, it was neither proper nor desirable for the trial Judge either to direct the prosecution to call Mereani Naivalu or to call her herself. This ground of appeal fails.

SUBMISSION 3

There is no merit in this complaint. The State called Dr Loata Vunimo, Registrar Pathologist, who conducted the post mortem examination on the deceased. The post mortem was conducted under the supervision of Dr Eka Buadromo, the Consultant Pathologist, at the CWM Hopsital, Suva. Dr Buadromo signed the pathologist's report in Dr Loata's absence, and we see nothing wrong in this. No objection was taken at the trial. It is clear from a reading of Dr Loata's evidence that she gave evidence of her findings and not the opinion of Dr Buadromo. This submission fails.

SUBMISSION 4

None of the matters urged upon us under this heading have any merit. There was the clearest evidence that the Appellant punched the deceased twice. The two blows caused significant injuries, and caused the deceased to fall heavily on his head. The medical evidence was that the injuries received as a result of the fall, caused death. The fact that there was a delay of several hours before the deceased was taken to the hospital is irrelevant.

We would like to add that the conduct of this trial was made difficult for the learned

trial Judge by the defence. A number of defences were raised. It was said that the Appellant acted in self-defence, that he was provoked, that the act causing death was an accident, that it was Mereani Naivalu who caused death. None of these defences were realistically available on the evidence. Nonetheless the learned trial Judge had to devote a considerable part of her summing up to these issues, with the result that the all important issue of the Appellant's mens rea at the relevant time did not receive the focused attention that it deserved.

RESULT

1. The appeal is allowed.

2. Conviction for murder is set aside.

3. Conviction for manslaughter contrary to Section 198 of the Penal Code is substituted.

4. The case is remitted to the High Court for sentencing.

.....
Reddy, P.

FIJI COURT OF APPEAL

.....
Tompkins, JA

.....
Ellis, JA

Solicitors:

Tuberi Chambers, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

D:\CHAND\AAU0022U.2002S.wpd