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

CRIMINAL APPEAL NO. AAU0017 OF 1999S
(Labasa High Court Criminal Case No. 4/98)

BETWEEN:

1. ANJULA DEVI
2. DAVEN LAL — *Appellants*

AND:

THE STATE — *Respondent*

Coram: Gallen, JA
Smellie, JA
Ellis, JA

Hearing: Tuesday, 13th May 2003, Suva

Counsel: Ms J. Nair for the 1st Appellant
Ms M. Waqavonovono for the 2nd Appellant
Mr J. Naigulevu for the Respondent

Date of Judgment: Friday, 16th May 2003

JUDGMENT OF THE COURT

Introduction

This murder trial took place at Labasa between the 1st and 26th of February 1999.

The deceased victim was found drowned in a river adjacent to her son's house with serious head wounds. The pathologist's conclusion was that death was a result of drowning and loss of blood from the head wounds.

The Crown was unable to adduce any evidence of the appellants' direct involvement other than oral and written statements they both made a day or two after the victim's death and when they were being held for questioning as suspects. Both appellants pleaded not guilty. Appellants were taken into custody in mid May 1998 and have been in custody ever since. At the conclusion of the trial both were convicted and sentenced to life imprisonment.

Prosecution's case at trial

In opening the prosecutor referred to sections 119, 204 and 224 of the Penal Code regarding the charge of murder and sections 21 and 22 of the Code regarding principal offenders and parties to an offence.

The thrust of the Crown case was that separately or together the appellants had murdered the deceased. The principal evidence against the first appellant ("Anjula") was the admissions she had made to the police that there had been an altercation that she had struck the deceased with a stick and the deceased ended up in the river. The head wounds she said had been inflicted by the second appellant and that she had not been involved and had run off. The second appellant (Lal) in his written caution statement admitted striking the deceased and wounding her with

a knife or chopper. He said Anjula encouraged him and assisted to put the victim in the river.

At trial however both appellants gave evidence. Both denied that their statements were voluntary. The evidence of Anjula being that she had struck at the deceased with a stick but had not made contact and that she had then run off and did not know what happened after that. The second appellant Lal however swore that he had not been present at all and knew nothing about the matter.

The second appellant's grounds of appeal

It is convenient to deal with the second appellant's appeal first. Two grounds were advanced. First that although granted legal aid the trial Judge was not prepared to adjourn the case until Counsel could be assigned and appear. Also that during the course of the trial when the voire dire concerning his confession was about to commence the trial Judge again declined to allow Lal to be legally represented even though the record indicates that Mr Kohli legal practitioner of Labasa was willing to appear for him on the trial within a trial. The State opposed the application for representation at that point in the trial. The Judge did not say why he refused the application but it is clear that he did.

The second ground of appeal was that the written caution statement given by Lal was not given voluntarily. On the contrary his allegation was that he had been beaten and had chillies applied to various parts of his body which caused him great

pain and resulted in him being prepared to say whatever the police wanted him to. It is significant that he is an illiterate fisherman whose education did not go beyond primary level.

Section 28 subsection 1(d) of the Constitution dealing with the rights of persons who are charged provides:

> *"28--(1) Every person charged with an offence has the right:*
> *(d) to defend himself or herself in person or to be represented, at his own or her own expense, by a legal practitioner of his or her choice, if the interests of justice so required, to be given the services of a legal practitioner under a scheme of legal aid."*

Also in section 29(1) of the Constitution it is provided as follows:

> *"29—(1) Every person charged with an offence has the right to a fair trial before a court of law ."*

And in section 38(1) of the Constitution:

> *"38(1) Every person has the right to equality before the law."*

Chronologically the trial record is as follows:

10/11/98	Mr Kohli appeared advising the Court that the second appellant's sister in Canada would try to arrange fees. Mr Kohli indicated however that he could not do the

case on legal aid. Under those circumstances the trial was adjourned to the next session.

1/2/99 When the trial opened on the 1st of February Mr Kohli was given leave to withdraw. Lal then advised that he had applied in November of 1998 for legal aid but had not had a response. He indicated that he wanted one week's adjournment to find a lawyer and that otherwise he would defend himself. The Deputy Registrar of the Court, however, was able to advise that legal aid had been granted but that he (the Deputy Registrar) could not find a lawyer to take the brief. The State opposed the application for an adjournment and at that stage the Court ruled that it was not in the public interest for the trial to be adjourned and that the second accused had had every opportunity to obtain Counsel.

However at 2.15 on the first day of the trial Lal indicated that a Mr Amrit Sen barrister was willing to take his case and that he could appear the following day. The Judge indicated that if Mr Sen appeared the following day he would be permitted to represent the

2/2/99 second appellant. Next day Lal's mother was in Court

and told the Judge Counsel had said he would be there. Mr Sen, however, did not appear and Lal at that stage, indicated that he understood the circumstances and that he needed time, if he couldn't find a lawyer, to read the record and prepare to conduct his own defence. State suggested an adjournment of one day. The Judge, however, adjourned for a full week to the 9th of February.

9/2/99 — The trial resumed, the second appellant appearing for himself and it proceeded until the 16th of February when the assessors were released for the duration of a trial within a trial.

17/2/99 — The voire dire commenced. The second accused outlined his objections to his statement being adduced but initially the evidence called was primarily in relation to the confessions of the first appellant.

22nd of February (9.00 am) — The second appellant Lal indicated to the Judge that Mr Kohli had come to see him while in prison and was prepared to represent him at the trial within a trial. The State Counsel opposed the application and the trial

Judge appears to have refused it but without giving any particular reason for doing so.

Early in the second appellant's submissions on appeal we enquired of Ms Waqavonovono whether she could assist as to the situation in Labasa at the time of the trial regarding to the number of practitioners there, the availability of other Counsel and the possibility of the Director of Legal Aid finding somebody from elsewhere in the Republic to take the case. As Counsel is also the Director of the Legal Aid Commission she was able to advise from her background knowledge (although of course she was not the Director at the time of the events that are under discussion). It appears however that there were at least six or eight practitioners in Labasa who were competent to take on this legal aid assignment. At that time the Director of the Legal Aid Commission had no in-house Counsel and legal aid itself had only been up and running for some six months. Everybody was still getting used to the new regime. Mrs Waqavonovono, pointed out, however, that in this case the matter had come to trial very quickly. The alleged offending was on the 18th of May 1998. The first occasion when the Court was prepared to hear the case was six months later on the 10th of November 1998 and the trial was well underway by 1st February of 1999 just nine months after the alleged offending. We can accept, in view of our experience as appellate judges in this jurisdiction, that in many instances trials do not commence until one year or more after the laying of the charges. On that basis it was submitted that however inconvenient it may have been for the Court, Counsel and witnesses, nonetheless, to have granted a further

adjournment of six to nine months would not have resulted in this case coming to trial other than in an acceptable and quite normal timeframe.

Basing herself upon the provisions of the Constitution and relying upon authorities from the United Kingdom, Canada and Australia Ms Waqavonovono submitted that in this case there was no question but that the second appellant was entitled to representation his application for legal aid having been granted. The only issue therefore was whether or not there were other circumstances which justified the Court in not granting an appropriate adjournment to allow the accused to obtain Counsel. It is true that when Mr Sen did not turn up the trial Judge granted another seven days adjournment but on the basis that the accused had agreed to represent himself. But as Counsel pointed out Lal was an illiterate fisherman who could not, and would not have been able to, put forcefully to the Court that he was not capable of defending himself and that he wished to insist upon his right to representation.

The main authority relied upon was Dietrich v The Queen [1992] 177 CLR 292 a decision of the High Court of Australia, the headnote of which reads as follows ***"The common law of Australia does not recognise the right of an accused to be provided with counsel at the public expense. However the courts have power to stay criminal proceedings that will result in an unfair trial. The power to grant a stay extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence. 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 of his own is unable to obtain legal representation, should adjourn, postpone or stay the trial until the 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 appellant court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial."

Although it would be wrong to suggest that without qualification conditions that prevailed in Australia in 1992 should provide the answer for Fiji, nonetheless the issues identified in the headnote of the Dietrich case are all relevant on this appeal. Clearly, how a Judge should resolve the situation when faced with circumstances such as those arising in this case calls for careful consideration and recorded reasons if the application for stay or adjournment is refused. Save for treason there can be no more serious charge than murder and in this particular case it was apparent from the outset that the only evidence the Crown had which could establish guilt beyond reasonable doubt so far as the second appellant was concerned was his written statement given under caution. A vital issue therefore, was whether or not such statement was given voluntarily. As the trial record shows the second appellant alleged that the four or five police officers involved had treated him in a despicable and unlawful way in order to force confessions out of him. He pursued those allegations unsuccessfully both at the voire dire and subsequently before the assessors. It was an undertaking which called for a level of skill,

knowledge and judgment that the second appellant clearly did not have but which could be expected from competent counsel.

We can appreciate that as the Constitution of 1998 had not been in force long and the Legal Aid Commission was in its infancy that the circumstances presented greater difficulties than would be the case today. Nonetheless the trial Judge was aware of both the Constitution and the law surrounding the admission of police statements. He would have been fully alive to the complexity of the task that would face the second appellant in trying to avoid his confession being adduced in evidence. Given all those circumstances we are forced reluctantly to the conclusion that on this ground alone the conviction must be set aside and a new trial ordered.

This was also a case, as Ms Waqavonovono submitted where the 'equality of treatment' should have been considered and applied. In the decision of this Court in Attorney General of Fiji v Timoci Silatolu (Civil Appeal No. Misc. No. 1 of 2002S) delivered on 6th March last the Court said in relation to the recent treason trial at p22

> ***"It was clearly anomalous and wrong that one treason accused should have had legal aid counsel provided by the State and the other no counsel at all. But that factor was just one of many to be taken into account by the Judge in assessing the "interests of justice". Clearly, the interests of justice required both accused to be represented – not just in their own interests, but in the interests of the Court, assessors and witnesses. All Judges know the difficulties in maintaining a fair trial where there are unrepresented accused – particularly ones facing a charge of such seriousness."***

Those observations are equally applicable to this case the charge being murder and the first accused bereft of Counsel.

So far as the second ground is concerned we say little about that save to observe that the evidence given on oath by the second appellant was to the effect that he was not at the scene at all. Testimony diametrically opposed to what he said in his writtten caution statement.

The first appellant's grounds of appeal

The first appellant's grounds of appeal were as follows:

"1. The learned trial Judge erred in law in that he failed to consider adequately or at all and/or to direct the assessors on the law relating to joint enterprise particularly under section 22 of the Penal Code; Cap 17;

2. The learned trial Judge erred in fact in that he failed to consider adequately or at all and/or to direct the assessors on the evidence regarding joint enterprise;

3. The learned trial Judge erred in law in that he failed to consider adequately or at all and/or to direct the assessors on the law relating to manslaughter;

4. The learned trial Judge erred in law and fact in that he failed to consider adequately or at all and/or to direct the assessors on the possibility of manslaughter being an alternative verdict;

5. The learned trial Judge erred in law and in fact in that he failed to adequately direct the assessors on the requirement for them to be satisfied beyond reasonable doubt of the guilt of each Appellant, having regard to the evidence alleged in each case;"

As earlier mentioned Anjula made statements to the police prior to trial. And at trial she gave viva voce evidence which in several important particulars was at variance with what she had said out of Court .

Essentially in an oral statement before she was warned Anjula said that in an altercation with the deceased she had struck with a wooden stick and the deceased fell into the river. A young woman police officer who kept this appellant company while she was in police custody said that in the statement just referred to she admitted murdering the deceased. But that is not supported by the officer to whom the statement was made and although the trial Judge did not mention it we are satisfied that it was not evidence which could properly be relied upon. Had it been drawn to the trial Judge's attention he surely would have directed the assessors to ignore it. It appears not to have been relied upon by the prosecution.

Coming then to the formal caution statement. In it the first appellant said that she struck the deceased with a stick and pushed her into the water but then changed that and said that the second appellant had gone and acquired the knife or chopper and attacked the deceased with it about the head and pushed her into the water. The first appellant then changed her story and said that she had struck at the deceased but had missed. That they had both fallen down and it was at that stage that Lal intervened. He had attacked the deceased and wounded her with a knife or chopper but by then she (Anjula) had run off.

When she was charged Anjula made another statement which was reduced to writing and signed. It is to be found at p288 of the record and reads

> ***"I only hit my mother-in-law with the stick but I did not want to kill her. Because of Davend Lal my mother-in-law died and he had hit her with a knife on her head."***

Finally at the end of the trial Anjula gave evidence. She said that she had picked up the stick but it slipped from her hand and that both she and the deceased fell down and that it was at that point that the second appellant intervened and chased her away. She didn't know what had happened after that. In cross-examination she denied that she had ever used a knife or that she brought the knife to the second appellant at his request.

It will be apparent immediately that in respect of the stick and how it was used the first appellant was inconsistent. She either struck with it, attempted to strike but missed or the stick slipped out of her hand. Other significant discrepancies were that in her caution statement she said that she and the second appellant were having an affair whereas in her evidence at the trial she said that was not so. In her caution statement she said she had been frightened to say what the second appellant had done because he threatened her but in the witness box she said that was not so.

Issues in relation to the first appellant

At the end of the evidence and Counsel's addresses most importantly there was the issue of intent so far as the first appellant was concerned. Was there evidence admissible against her to establish beyond reasonable doubt that she intended to cause the death of the deceased or alternatively to inflict grievous harm. And did she know and intend that her acts would have those consequences.

Secondly, if the intention necessary to establish the crime of murder with malice aforethought was absent was there evidence which would support the verdict of manslaughter on the basis that the level of intention or knowledge required for murder was absent but nonetheless an unlawful act or acts had caused death.

Thirdly in view of the fact that the Crown had opened relying upon both sections 21 and 22 of the Code was there any evidence of a predetermined plan. Fourthly if only section 21 could be relied upon what evidence admissible against the first appellant was available to establish that she was a party to the offence of murder and/or manslaughter. Did she aid and/or abet? Was there any basis for a conviction on the grounds that she counselled or procured the first defendant to murder?

Finally is the knowledge referred to in section 202(b) of the Code to be judged on an objective or subjective basis and was a direction as to that issue

required. Most of these issues in one way or another are picked up in the five grounds of appeal advanced on behalf of the first appellant.

The summing up

The summing up tendered to mirror the way in which the prosecution advanced the case. The prosecution's contention was that both appellants acted in concert and there seemed to be no attempt to identify which particular pieces of evidence were admissible against one appellant or the other to establish either a preconceived plan (section 22) or aiding, abetting, procuring or counselling (section 21). The summing up followed fairly conventional lines; the functions of Judge and assessors; judge only on the evidence adduced; standard and burden of proof. Sections 199 and 202 were discussed and the essential ingredients identified on page 229 of the record as

> *"I) an intention to kill or to do grievous harm;*
>
> *ii) knowledge that the act causing death would probably cause the death or grievous harm to some person, although such knowledge was accompanied by indifference whether death or grievous bodily harm would be caused or accompanied by a wish that it may not be caused."*

There were no references to whether the knowledge was to be judged on an objective or subjective basis. The summing up then proceeded as follows. *"The prosecution case is that Anjula Devi and Davendra Lal acting together and assisting each other caused the death of (the deceased) and in so doing each of*

them intended to cause her death or caused her grievous harm or in any event knew that their action would cause her death or grievous harm or was indifferent to the consequences of their action that morning in relation to the deceased." The assessors were then directed to judge each case separately and that confession statements of one were not evidence against the other. The necessity for the confessions to be voluntary was followed by reference to the first appellant's evidence p231 as follows: *" If you accept that Anjula Devi told D/Cpl Vishwa Goundar in her answers as substantially representing the truth of what happened so far as she is concerned, you may think that Anjula Devi was implicated in the death of the deceased. That is a matter for you."*

Anjula's position was again referred to at pages 234 where the Judge referring to the sworn evidence she gave said

> *"According to her the stick she had and was holding to defend herself had slipped from her hand and that as a result she never hit her mother-in-law at all. If you think she was telling the truth in her evidence or if her evidence created in your minds a reasonable doubt so that you are not sure whether or not she was implicated in the killing of her mother-in-law, then it will be your duty to say that she was not guilty of murder.*
>
> *However if you do not accept her evidence as truthful or reliable then you must act on it to consider and decide what you think really happened in this case."* (and at the bottom of the page) *"The prosecution case is that both accused planned together and acted in concert that morning in killing the deceased."*

On page 235 the Judge further directed *"You may well think on the other hand and on the evidence that what really may have happened and this is entirely a matter for you is that each of you is that each of the accused was acting*

separately on their own account." And having referred to the fact that the fight started quite unexpectedly and that the deceased started it, at the bottom of the page ***"You may think that it was a fight that got out of hand with both accused getting themselves into a state of panic and continued the assault on the deceased which tragically ended in her death. In other words you may think it was a case of extended brawling which ended fatally. If you think that that was a true situation in this case then this cannot be in law a case of murder but one of manslaughter. The reason you may think is that the whole thing happened so quickly that with each accused having no time to fully appreciate their actions and consequences. However that's a matter entirely for you."*** On the following page the Judge came back again to possibility that they ***"Decided to act jointly in aiding each other and causing the death of the deceased. "***

The Judge then somewhat surprisingly gave a direction on provocation pointing out that if both accused were provoked then it would be manslaughter not murder but adding that provocation would not be available unless the jury accepted that the accused were lovers.

Before considering the individual grounds of appeal we give our assessment of the above summing up. We are obliged to say that we think it was inadequate so far as the first appellant is concerned. The intention of the first appellant in the whole matter was a vital consideration. No assistance was given to the assessors on how they should go about deciding what her intention was and which portions of the evidence were admissible against her in that regard. Nor were the assessors

told, as in our view they should have been, that whether or not the first appellant had the necessary knowledge to make her liable pursuant to s202(b) of the Penal Code, had to be judged subjectively not objectively. We were told from the bar that in this jurisdiction following the decision of Gwangario Tulofiu and Safa'a Irota v R [1971] 17 FLR 228 test is objective. The common law has moved on since 1971. The now accepted position in United Kingdom, Hong Kong, Australia and New Zealand is that knowledge is to be judged subjectively. The leading authority in New Zealand is R v Piri [1987] 1 NZLR 66 in which the Court of Appeal led by Cooke P, (as he then he was), affirmed the subjective approach. At page 77 of the judgment after reference to the definition of murder in the New Zealand Crimes Act. The judgment of the President reads: ***"The only change in the current section 169 from the older New Zealand legislation is that in (d) the words "or ought to have known" have been dropped after "knows". It is generally understood that this was because the decision of the House of Lords in Director of Public Prosecutions v Smith [1961] AC 290 was considered to be "unhappy". (Lord Scarman's description of it in R v Hancock [1986] 1 All ER 641, 650) and it was desired, contrary to what was seen as the effect of that decision to make plain that the intent for murder is always subjective. No point about that arises in this case. Summing up the Judge made it very clear that the jury must be satisfied "that the accused appreciated and knew – it is not should have known – but that they actually appreciated and knew that leaving her there in those conditions was likely to cause death. The Crown does not have to prove that the accused foresaw precisely how death would occur. But it does have to prove beyond reasonable***

doubt to your satisfaction that the accused had an actual conscious appreciation of the likelihood of death". That was impeccable."

The Piri decision was delivered on the 13 March 1987. 10 days before on the 3 March the Privy Council in the landmark case of Frankland v The Queen [1987] 1 AC 576 held as follows (p594)

> *"Their Lordships, having had the benefit of extended argument, and, particularly in the light of recent cases, have concluded that the decision in Director of Public Prosecutions v Smith [1961] AC 290, in so far as it laid down an objective test of the intent in the crime of murder, did not accurately represent the English common law."*

In the 6th Edition of Criminal Law (1988) Smith & Slogan at page 328 discussing "The Mens Rea of Murder" say:

> *" In 1960 in the notorious case of Director of Public Prosecutions v Smith the House of Lords laid down a largely objective test of liability in murder – the test was "not what the defendant contemplated, but what the ordinary reasonable man or woman would in all the circumstances of the case have contemplated as the natural and probable result". In Hyam the House declined to overrule Smith, holding that its effect had been modified by s.8 of the Criminal Justice Act 1967; but in Frankland and Moore v R the Privy Council (comprising five judicial members of the House of Lords), acting on the dicta of Lord Diplock in Hyam, Lord Bridge in Moloney and Lord Scarman in Hancock, held that in so far as it laid down an objective test, Smith did not represent the common law of England. Though the Privy Council cannot formally overrule a decision of the House of Lords, it can probably be taken, for all practical purposes, that Smith is overruled."*

And we now formally hold that Gwangario Tulofiu (supra) is overruled and the test of intent in the crime of murder is subjective.

So here, in our view, it was necessary for the trial Judge to make it clear that so far as the first appellant was concerned the assessors had to be satisfied that she actually knew and appreciated that striking the deceased with a stick and either pushing her, or allowing her to fall, into the water was likely to cause death or grievous harm. This in contradistinction to the second appellant in respect of whom the assessors were entitled to conclude that he had wounded the deceased seriously with a knife or chopper and had then thrown her in the water.

It was also necessary for the trial Judge when dealing with sections 22 and 21 to give some clear instruction. We think it inescapable that there was no plan to kill or seriously injure the deceased prior to the altercation and the "brawl" as the trial Judge described the fight that broke out. It follows that that possibility, which apparently had been seriously advanced by the prosecution should have been firmly put out of contention. But there was no mention of it.

So far as section 21 is concerned again subsection (a) required a clear direction. The evidence in the trial was that death was caused by loss of blood from the wounding to the head and drowning. There was no admissible evidence that the first appellant had been involved in the wounding unless it could be said that she encouraged it by being present. But if that possibility was to be left to the assessors a careful direction was required explaining how she could become a party in those circumstances. On the evidence admissible against the second appellant he was much more closely associated with the acts which caused death than the first appellant (in that he struck the blows with the chopper or knife and admits to

placing the body in the water). The distinction between the two should have been pointed out to the assessors and a clear warning given of the care they needed to take in that regard. As the summing up shows the Judge like the prosecutor tended to treat both accused as in the same position. The Judge also used the expression more than once that the assessors might think that the first appellant was "implicated" in the death of the deceased. That was so imprecise and inaccurate as to be misleading. Section 21 of the Code sets out very precisely how a person can be guilty of murder as a party. It was necessary for both Judge and assessors to analyse carefully what evidence, if any, there was that the first appellant was a party in terms of that provision.

Although the Judge raised the possibility that what had happened was manslaughter rather than murder again he made no distinction between the first and second appellants and gave no clear instruction as to how manslaughter would differ from murder. Nor how the evidence admissible against the first appellant was different to that admissible against the second appellant on the issue of manslaughter.

Despite the Judge's failure to identify and properly instruct the assessors on the question of manslaughter he nonetheless gave a fairly full instruction on the issue of provocation which he correctly explained could reduce murder to manslaughter. We confess to some bewilderment that the Judge should concentrate on provocation when so far as the first appellant was concerned self defence was a

much clearer possibility which could have resulted in a verdict of manslaughter rather than murder. But not a word was said about it in the summing up.

In making these criticisms of the summing up we are guided by the classic statements of Lord Hailsham LC in R v Lawrence [1982] AC 510 at 519 which were strongly endorsed by the New Zealand Court of Appeal in R v Fotu [1995] 3 NZLR 122 Cooke P delivering the judgment of the Court. The Lord Chancellor said –

> ***"A direction to a jury should be custom built to make the jury understand their tasks in relation to a particular case, (we would aid – or the assessors in relation to a particular accused). Of course it must include references to the burden of proof and the respective roles of jury (assessors) and judge. But is must also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences the jury (assessors) are entitled to draw from their particular conclusions about the primary facts."***

In short what is called for is an orderly objective and balanced analysis. We do not consider that the summing up in this case met those requirements.

The first appellant's grounds of appeal

We can deal now fairly expeditiously with the grounds of appeal. Ground 1 was that the Judge failed to direct on joint enterprise particularly under section 22. As we have already said in this case the Judge should have directed the assessors to ignore section 22 as that there was no room for a finding of a preconceived plan.

Ground 2 was to the effect that the Judge had failed to adequately direct regarding a joint enterprise. This of course is a complaint that the Judge's reference to Anjula's "implication" in the death of her mother-in-law was no substitute for a proper instruction on such of the various possibilities envisaged by s21 of the Code which were open on the evidence.

The third ground of appeal was that the Judge failed to consider adequately and direct appropriately on the law relating to manslaughter. That ground is clearly made out. The references to manslaughter, as distinct from provocation, were inadequate and unhelpful. But the ground is made out primarily because manslaughter should have been put on the basis that the first appellant was acting in self-defence. That is not to say that the assessors would have necessarily agreed. Nonetheless it is clear on the evidence that Anjula was being attacked by the deceased and she took up the stick to defend herself or ward off her attacker. Even if the jury concluded that the blow or the allowing of the deceased to fall into the water or the pushing her into the water was the act that caused death, nonetheless judging her intention and knowledge subjectively at that time, manslaughter was clear possibility that should have been explained to the assessors. Ground 4 is really a repetition of ground 3. It has been adequately covered in what we have had to say so far. Ground 5 is that the standard and burden of proof instructions were not adequate. In general terms the trial Judge's directions were appropriate and correct. But the assessors were given no help in terms of isolating the facts which applied to each accused so that independent assessments could be made on

admissible evidence to see whether it carried the assessors to the point where they were satisfied beyond reasonable doubt of guilt.

We were told from the bar that it is not usual for trial judges to direct assessors on the effect of lies told by an accused whether before giving a caution statement, during such a statement or in viva voce evidence at trial. As indicated earlier there were varying accounts given by Anjula regarding for example her relationship with the second accused and whether or not she actually struck the deceased with the stick. Obviously some of what she said was untrue. We cannot improve on the way the issue was put in the judgment of the New Zealand Court of Appeal delivered by Cooke P in R v Toia [1982] 1 NZLR 555 at 559 l5 to 25 where it was said

> " *First, occasionally they (lies) are capable of adding something to the Crown case, whether as corroboration or simply as strengthening evidence. But, as pointed out by this Court in R v Collings [1976] 2 NZLR 104, 116-117, most lies are not in that category. For example a false denial of being at the scene of the crime often does nothing to help prove that the accused committed the crime; he may simply want to avert unjust suspicion. It is only when a lie is more consistent with guilt than with innocence, as when it suggests that the accused cannot give an innocent explanation, that it can add anything to the case against him. We think that not enough heed may have been paid to the warning given in Collings against too readily relying on lies as links in a chain of proof. We are fortified in repeating that warning when we note that the Court of Appeal in England in a judgment delivered by Lord Lane CJ has recently stated the law substantially as it was stated in Collings. The case is R v Lucas [1981] QB 720; [1981] 2 All ER 1008.*
>
> *Secondly, and more commonly, proved lies by an accused, whether in evidence or in statements out of Court, may be relevant to credibility. This is no more than a matter of common sense. They may help the jury to decide whether the evidence for the prosecution should be preferred to an account put forward by the accused.*
>
> *To jump to the conclusion that an accused who has lied must be guilty is a human tendency that has to be guarded against. So, whenever*

lies by an accused figure in a case, it is customary and desirable to give a warning to the jury, as the Judge did here, on the lines that people may have various motives for lying and that a lie does not necessarily mean guilt. As stressed in R v Gibbons [1973] 1 NZLR 376, a summing up must always be adapted to the particular case and no specific formula is automatically suitable in dealing with lies."

In this case in the absence of a warning not to jump to the conclusion that because Anjula lied she must be guilty, we see a real danger that the assessors may have fallen into that error. An obvious explanation for some at least of the untruths was that having been threatened by the second accused she was too frightened to recount what really happened.

Although the point was not taken by Counsel for the first appellant and in isolation may not have been sufficient to warrant setting aside the verdict, it is, nonetheless, an added factor which has weighed with us in the conclusion we have reached.

Conclusion on the first appellant's appeal

The appeal is allowed for the reasons set out above, the guilty verdict is set aside and a new trial is ordered.

Orders

1. The guilty verdicts of both accused are set aside.
2. New trials are ordered.

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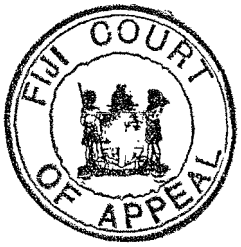
Gallen, JA



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Smellie, JA

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Ellis, JA

Solicitors:

Office of the Legal Aid Commission, Suva for the 1st and 2nd Respondents
Office of the Director of Public Prosecutions, Suva for the Respondent