

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

CRIMINAL APPEAL NO. AAU0019 OF 2001S  
(High Court Criminal Action No. 5 of 1999S)

BETWEEN:

NANISE WATI

*Appellant*

AND:

THE STATE

*Respondent*

Coram:

Sheppard, JA  
Tompkins, JA  
Gallen, JA

Hearing:

Tuesday, 9<sup>th</sup> March 2004, Suva

Counsel:

Ms B. Malimali for the Appellant  
Mr J. Naigulevu with Ms A. Prasad for the Respondent

Date of Judgment: Friday, 19<sup>th</sup> March 2004

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JUDGMENT OF THE COURT

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BACKGROUND

On the 28<sup>th</sup> of April 1999 Nanise Wati the Appellant in these proceedings and one Daniel Azad Wali were charged with the murder of Reena Bibi on the 5<sup>th</sup> of October 1996. The trial began in the High Court on the 12<sup>th</sup> of August 1999 and on the 20<sup>th</sup> of September 1999 both the accused were found guilty of murder and sentenced to life imprisonment. Daniel Azad Wali appealed against his conviction and sentence and his appeal came before this court on the 22<sup>nd</sup> of May 2001. At the hearing of the appeal the 16 grounds of appeal on which the appellant Daniel Wali had relied were reduced to 3 which can be summarized as follows:

- (1) Failure by the trial judge to give the assessors an adequate or proper direction on corroboration of the evidence of an accomplice Sophie Radrodro.
- (2) Failure by the trial judge to comment adequately or at all on inconsistencies in the evidence of Prosecution witnesses.
- (3) Failure by the trial judge to direct the assessors on important facts which favoured the defence.

After considering the factual background of the appeal in some detail, the court came to the conclusion that the only substantial ground of appeal related to the matters the judge put to the assessors as capable of corroborating Sophie Radrodro's evidence. The court held that a number of the incidents which the judge had referred to assessors as having a corroborative effect in respect of the evidence of Sophie Radrodro did not meet the requirements of corroboration according to law because the particular incidents did not satisfy the test of implicating the accused. The court therefore came to the conclusion that the appeal ought to be allowed and the conviction and sentence quashed. The court however directed that a new trial take place. That trial eventually took place and Daniel Azad Wali was acquitted. The present appellant sought leave to appeal out of time and that application was granted by this court. Her substantive appeal now falls to be considered.

### **THE FACTS**

Neither the case nor the appeal can be understood without a consideration of the facts of the case in some detail.

The deceased, Reena Bibi was staying in the bottom flat at 48 Milverton Road, Raiwaqa which she was renting from one Mohammed Shaheem. As Shaheem had moved to live in America his brother, Mohammed Yusuf looked after the house which contained two flats. The one rented by Reena Bibi had two bedrooms, a sitting room and a kitchen and a place for washing clothes. There was an entrance to this flat through the garage. At

the time of her death, Reena Bibi was staying alone and had been renting the flat since February 1996. Since September 1996 the top flat had been vacant and Yusuf used to come every day about 6.00 p.m. and switch on the verandah lights and turn them off each morning about 6.00 a.m. He lived nearby. He did not touch any lights that belonged to the flat rented by Reena Bibi. On Wednesday 2<sup>nd</sup> October 1996 Yusuf switched the lights on the top flat at about 6.00 p.m. and met Reena Bibi that day. The next morning about 6.00 a.m. he switched off the lights and noticed the porch light of the bottom flat was still on. He took no notice of this. On Friday, the 11<sup>th</sup> of October 1996 when Yusuf went to switch off the lights about 6.00 a.m. he noticed a bad smell and saw flies coming from Reena Bibi's flat. He informed the Police who came and broke open the flat and found Reena Bibi's dead body in her bedroom.

Inspector Jerome Kanimea of the Raiwaqa Police Station came to the flat with other Police shortly after 8:30 a.m. He found the doors and windows of Reena Bibi's flat securely locked. There was a bad smell coming out of the flat. The doors were forced open with a piece of iron that was found in the area. The bedroom in which the body of Reena Bibi was found was also locked. When Inspector Jerome entered the room he saw the body of the deceased lying on a mattress. The body was decomposing with maggots all over the floor. There were blood stains scattered in the room and blood splashed on the walls. There were two suitcases in the room which appeared to be ransacked. One suitcase was closed and the other was open with clothes scattered. There were no keys and the doors and windows were locked. Photographs were taken. Inspector Jerome found sandals outside the doors (these were later proved to have belonged to Nanise Wati). The beads that were hanging on the doorway were broken and scattered on the garage floor.

A Police photographer took photographs of among other things the door lock leading to the garage. There was tape covering the key hole of the lock which was of a type that could be locked both from inside and outside. The deceased was taken to the CWM Hospital mortuary where the body was identified by Jane Aisha Bibi the sister of the deceased.

The post mortem was carried out by Doctor R.B. Cayari who said that in his opinion the cause of death was a "slashed injury to the neck" which caused severe haemorrhaging, and that a sharp instrument was used to cause the injury.

There was evidence that the door from the carport appeared to be more frequently used for going in and out of the flat.

Detective Sergeant Ram Jattan was appointed the Investigating Officer on 11<sup>th</sup> October 1996. He said the doorway from the carport/garage had beads hanging from it and there were broken beads lying on the floor of the house. He said there appeared to be a struggle at the entrance and the person or persons who killed the deceased left the flat locked after they had killed her. No keys or any murder weapon were found at the scene.

On 14<sup>th</sup> October 1996 a Prosecution witness Aisake Pene was interviewed by the Police. He said he came to know Reena Bibi in July 1996 and from September 1996 spent week-ends at her flat. The two were like husband and wife. Pene said that because of pressure from the Police he admitted in an interview that he killed Reena Bibi. Later he denied this to a senior Police Officer DPC/S Kevueli.

Aisake Pene had first denied going to Reena Bibi's flat at 48 Milverton Road, Raiwaqa on 5<sup>th</sup> October 1996. He was confronted by defence witness Talim Buksh during the interview. Buksh said that on the 5<sup>th</sup> of October 1996 which was a Saturday he took Pene to 48 Milverton Road about 2:30 p.m. Buksh who was a part-time taxi driver said the taxi fare was paid by a lady from the place where Aisake Pene disembarked.

SSP Kevueli Bulamainaivalu said that on 15<sup>th</sup> October 1996 he walked into the room where Aisake Pene was being held. Superintendent Kevueli at the time was Divisional Police Commander/Southern. He said he wanted to know the progress made in the investigation. He said Aisake Pene was not interviewed at that time. Superintendent Kevueli said Aisake Pene at first admitted to him that he had killed the deceased, Reena Bibi by stabbing her with a knife in her neck and he threw the knife at the Cathedral.

Superintendent Kevueli said Aisake Pene had told him he had stabbed the deceased in front of the kitchen near the bedroom door but Superintendent Kevueli said that this could not be true because of the evidence the Police had as to where the deceased was found. Superintendent Kevueli then said that before he left the room Aisake Pene denied killing Reena Bibi.

Another witness for the Prosecution Mafai Mausio said he was a school teacher and assisted in organizing a Rotuman Rugby Tournament. He said Aisake Pene was his nephew and had played rugby on the 5<sup>th</sup> of October 1996 for the Satarua Team. He said that Pene did not leave the ground on the 5<sup>th</sup> of October 1996.

A very important witness for the Prosecution was Sophie Radrodoro who said that she knew the deceased, Reena Bibi quite well. They were both prostitutes and first met in a Club. The two were very good friends.

Sophie Radrodoro lived with Reena Bibi in her flat at 48 Milverton Road from about July to September 1996. She said Reena Bibi used to wear very heavy jewellery and had good clothes. She said that at one time Nanise Wati also stayed with Reena Bibi before Sophie Radrodoro did. Reena Bibi had accused Nanise Wati of stealing her clothes and jewellery. Reena Bibi kept her jewellery inside a jewellery box which was kept in a suitcase. The flat had two bedrooms and in the spare bedroom Reena Bibi kept her shoes and clothes. All three – Sophie Radrodoro, Reena Bibi and Nanise Wati knew each other well. Sophie Radrodoro said Nanise Wati stayed with the Appellant at 66 Nayau Street, Samabula. They all used to visit various clubs and public bars.

Sophie Radrodoro said that on Saturday 5<sup>th</sup> October 1996 she went to Chequers Night Club about 7.00 p.m. She met Nanise Wati and Daniel Wali there. Nanise Wati asked Sophie Radrodoro if she could take them to Reena Bibi, as Nanise Wati knew Sophie Radrodoro and Reena Bibi were good friends. About 10.30 p.m. the three left for Reena Bibi's flat in a taxi driven by Pita Nasedra. There was another person with them. Daniel Wali led them to the taxi which was in Waimanu Road, Suva. Daniel Wali sat in the front passenger's seat while Nanise Wati, Sophie Radrodoro and another person sat in the back of

the taxi. They all went to 48 Milverton Road and got off at the driveway. The taxi drove away with the other person. The driveway leading to the house was quite steep. Sophie Radrodro said she knocked at the door and called out Reena Bibi's name. Reena Bibi upon hearing her voice opened the garage/carport door. Sophie Radrodro said she took them there because Nanise Wati had told her that she had something to give to Reena Bibi. After she had opened the door Reena Bibi started to walk back inside followed by Sophie Radrodro. Sophie Radrodro said Reena Bibi must have walked back in the passage a few steps and then turned back and when she did so she saw Nanise Wati and Daniel Wali. Nanise Wati by this time had already crossed the doorway. Reena Bibi rushed back, going past Sophie Radrodro and tried to push Daniel Wali out of the house. A struggle followed between Reena Bibi and Daniel Wali at the doorway. During the struggle bamboo beads which were hanging at the doorway broke and fell on to the floor. Sophie Radrodro said Daniel Wali dragged Reena Bibi into the bedroom. Nanise Wati followed Daniel Wali into the bedroom but before doing so had closed the garage Door. As Reena Bibi was dragged into the bedroom she kept yelling, "Sophie why are you doing this to me?" After a while the yelling stopped. Sophie Radrodro said she was so scared and just stood in the passage until finally she went in to the bedroom and saw what had happened. She said she saw Reena Bibi lying on a mattress and blood coming from her neck. Blood was all over the place. She said she saw Daniel Wali kneeling down near Reena Bibi. She said she saw a blade not very long in Daniel Wali's hand. This blade was covered with blood. At this moment Nanise Wati said to Sophie Radrodro "Do you remember what you and Reena said about me?"

Sophie Radrodro said she saw Nanise Wati taking rings from Reena Bibi's fingers and Daniel Wali taking ear-rings, bracelets and chains from Reena Bibi's body. Reena was wearing those that night. Sophie Radrodro said she saw Nanise Wati opening Reena Bibi's suitcase, taking out the jewellery box and she took some clothes out. Sophie Radrodro identified the suit case from which Nanise Wati had taken the jewellery box and the clothes. She said Nanise Wati packed all these items in Reena Bibi's travelling bag. Sophie Radrodro said she saw Daniel Wali covering Reena Bibi's body with a brown blanket and at that time Daniel Wali said to her, "If ever you say what happened to Reena Bibi then the same thing will be done to you Sophie." Sophie Radrodro said she

was very scared. She said that Nanise Wati took Reena Bibi's shoes and three dresses from the other bedroom and she later identified those dresses in Court when shown to her as belonging to Reena Bibi.

Sophie Radrodro then said that Daniel Wali locked the flat. She said he put a tape on the lock. The lock was in the door-entrance from the garage. The tape was placed from inside in the key hole and Daniel Wali took it from Nanise Wati's bag. She said Daniel Wali had broken this tape by his teeth. Sophie Radrodro identified this lock when it was produced in Court. She said Daniel Wali then went into the kitchen and washed his hands.

After Daniel Wali had locked the flat all three came out and walked down the driveway. Sophie Radrodro said that when they came out of the flat Daniel Wali again threatened her saying if she ever told any one what she saw there that night the same thing would happen to her. She said Daniel Wali told her that if Police ever questioned her she was to say that she was taken in Benjamin Bharat's taxi with Dean. Daniel Wali said Sophie Radrodro could always go to him for any assistance.

Sophie said that about a week after Reena Bibi's body was found she met Daniel Wali. He came and held her hand from the back. The time was about 8.00 p.m. Daniel Wali asked her what she had told the Police. She said she told the same story that Daniel Wali had told her to say about Benjamin Bharat and Dean. Sophie Radrodro said that Daniel Wali then gave her \$200.00 cash.

Sophie Radrodro said that in 1997 she went to the place where Nanise Wati and Daniel Wali were staying. Nanise Wati was there and gave her \$60,00 and a sleeveless dress belonging to Reena Bibi. Sophie Radrodro identified this dress in Court.

In cross-examination Sophie Radrodro said she told lies to the Police when first questioned. She told the Police that Benjamin Bharat had taken her and Dean to Reena Bibi's flat that night. Dean was carrying a bag. She told the Police that Dean was dropped at Reena Bibi's flat and Benjamin Bharat took her back to the Chequers Night

Club. She said she was scared and she was told to give the story about Benjamin Bharat and Dean to the Police by Daniel Wali. Sophie Radrodro said she could not hold the truth back any longer and told the truth to the Police in 1999. She admitted under cross-examination that when confronted with Benjamin Bharat by the Police she accused him of being the taxi driver who took her to Reena Bibi's flat that night. This was false.

We interpolate here that the Police could not trace anyone by the name of Dean to connect him with the murder although they interviewed more than 200 persons by the name of "Dean".

In her evidence Sophie Radrodro said, "I could not take any more. I had to tell the truth. I had no one in whom I could confide."

Sophie Radrodro also said that the reason why she finally told the truth about the murder was that she had confidence in the new team of Police Investigators brought into the case.

### **THE GROUNDS OF APPEAL**

The grounds that were filed on the appellant's behalf were as follows:

1. That the Learned trial Judge erred in law in that:
  - (a) he failed to direct the assessors on the law relating to manslaughter, and the possibility of manslaughter being an alternative verdict;
  - (b) he failed to direct the assessors on the law relating to joint enterprise (Section 22 of the Penal Code);
  - (c) he failed to direct the assessors on the evidence, or lack of evidence relating to joint enterprise



- (d) he failed to direct the assessors on the law relating to principal offenders (section 21 of the Penal Code);
- (e) he failed to direct the assessors on the evidence, or lack of evidence, relating to the Appellant aiding and abetting or procuring the co-accused;
- (f) he failed to adequately direct the assessors on the implications that could not be drawn from the Appellant's failure to give evidence.

2. That the Learned trial Judge erred in law and fact in that:

- (a) he failed to properly direct the assessors on corroboration of the evidence of an accomplice, Sophie Radrodro;
- (b) he failed to adequately or at all explain to the assessors the requirement for them to be satisfied beyond reasonable doubt of the guilt of each accused, having regard to the evidence alleged in each case;
- (c) he failed to direct the assessors on the issue and/or evidence of whether it was established beyond reasonable doubt that the Appellant had the necessary intent (to cause death or grievous harm);
- (d) he failed to explain to the assessors that the evidence, if established, of the Appellant having in her possession items belonging to the deceased, did not prove her guilt;
- (e) he did not adequately direct the assessors on the inconsistencies in the evidence of Prosecution witnesses;

- (f) he failed to direct the assessors adequately or at all on the inconsistent evidence of the accomplice Sophie Radrodro, who may have had her personal interest to serve and/or protect.

At the hearing the Appellant relied however on 4 main grounds. These were:

1. that the direction on intent was inadequate.
2. that the direction on joint enterprise was inadequate.
3. that the Judge failed to adequately direct the assessors on the law relating to principal offenders and whatever part the appellant may have played and
4. that the summing up contained errors of law with regard to corroboration.

#### **PARTIES**

We were informed from the bar that the prosecution's case was conducted on the basis that Daniel Wali was principal offender and the present appellant a party to that offence. The prosecution was therefore obliged to prove as against Wali an intention to murder within the meaning of the criminal code. The Judge dealt with this in his summing up to the assessors but did so in terms which did not clearly differentiate the position of the present appellant. An example is found at page 43 of the record where the Judge said "If you are so satisfied does that prove beyond reasonable doubt that each of the accused is guilty of the offence of murder – that is that they deliberately and intentionally attacked the deceased, Reena Bibi, as described by Sophie Radrodro with an intention of killing her or causing her grievous harm." We were informed the prosecution case did not however rely upon any allegation that such an intention was established against the present appellant. The prosecution actually relied upon the provisions of s.21 (1) of the Penal Code which is in the following terms:

*"S.21 (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say*

- (a) every person who actually does the act or makes the omission which constitutes the offences;*
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;*
- (c) every person who aids or abets another person in committing the offence;*
- (d) any person who counsels or procures any other person to commit the offence."*

In his summing up the Judge stated "Both the two accused have been jointly charged with the murder of Reena Bibi ... .. in doing so the prosecution rely on the provisions of s.21(1) of the Penal Code. The Judge went on to refer to s.22 of the Penal Code which deals with a common intention to prosecute an unlawful purpose and which may conveniently be described as dealing with a joint enterprise. The Judge did not do other than read that section to the assessors. If he considered that it had any application to the circumstances of the case then it was incumbent upon him to explain the application of the section and to inform the assessors of evidence which might justify its application. We were informed that the prosecution did not in fact rely on s.22. If the section did have application then it was necessary to explain it and if did not have application than it was merely confusing to refer to it in the course of the summing up.

The prosecution did however rely upon the provisions of s.21 and contended that the present appellant had been guilty of aiding and abetting the principal offender. The Judge properly referred therefore to aiding and abetting during the course of the summing up. At page 16 of the record he is reported as having said in the summing up "And an aider and abetter is a person who by his or her presence in the vicinity encourages the commission of a crime."

In the circumstances of this case the Judge ought to have explained to the assessors that mere presence does not of itself constitute aiding and abetting and he ought to have gone on to set out those circumstances upon which the prosecution relied in order to establish both that the present appellant did some act or acts which could properly be categorised as aiding and abetting and in doing so had the necessary criminal intention. The closest that the Judge came to giving such an explanation is set out on page 43 of the record where he said “..Sophie Radrodro said that Nanise Wati was going through the suitcase and stealing the properties. Was Nanise Wati an aider and abetter? or was Nanise Wati only interested in taking Reena Bibi’s clothes, shoes and jewelleryes.” While no doubt the Judge had in mind that if those actions were proved to have taken place, they had some significance in determining the state of mind of the present appellant, the reference does not adequately explore whether or not the actions described could have amounted to aiding and abetting or the intent necessary. Involvement in a crime as a party involves difficult concepts which need to be explained with some care to assessors as lay people.

In the circumstances of this case we think the assessors may well have been left in some confusion as to the state of mind which the prosecution needed to prove before the appellant could be convicted and this was compounded by the lack of any adequate explanation as to what might have constituted aiding and abetting in the particular case. The situation was further confused by the reference to s.22 without any explanation of what this might have meant or its significance to the case, especially as there were circumstances which might have justified the application of this section.

### CORROBORATION

The case against both co-accused was dependent to a considerable extent on the evidence of Sophie Radrodro. Since she was an accomplice there was an obligation to advise the assessors that it was dangerous to convict on her evidence unless it was corroborated to a material extent. The concept of corroboration is a technical and a legal one and is often confused with confirmation. Before the evidence can be corroborative it must directly implicate the accused in the crime.

We discussed this matter in the case of Daniel Wali and came to the conclusion that a number of instances of evidence which the Judge advised the assessors could amount to corroboration, did not do so. It was for that reason that Wali's appeal was allowed. The situation in this case differs in that there is only one piece of evidence which the Judge advised the assessors could amount to corroboration of the evidence of Sophie Radrodro against the present appellant, which does not legally amount to corroboration. That was evidence of the damage to the bead door. This clearly could not have amounted to corroboration since it did not implicate the present appellant. There was however other evidence which could have amounted to corroboration and the incorrect characterization of the bead evidence might not in the circumstances of this appeal of itself have been enough to justify setting aside the conviction of the present appellant. When taken in conjunction however with our concerns over those parts of the summing up which relate to the application of s.21 and s.22 of the Penal Code we are left in no doubt that the conviction must in this case be set aside and the appeal allowed.

#### WHETHER OR NOT A NEW TRIAL SHOULD FOLLOW

If a new trial were to be ordered the question would arise as to whether or not the assessors could be informed that Daniel Wali had been retried following on his successful appeal and had been completely acquitted. In the case *Hui Chi – Ming v R* 1991 3 All ER 897 the court had to deal with a situation where a group of young men had been charged with the murder of another man arising out of a family dispute. The principal offender was acquitted of murder but with the others convicted of manslaughter. When subsequently a further youth was charged with murder, the court ruled that the evidence of the acquittal of the principal offender was irrelevant and could not be led. The accused was convicted of murder. The Privy Council upheld the ruling of the Judge and pointed out that there was no inconsistency, separate juries were involved, and the outcome of the earlier trial was irrelevant. This conclusion has been applied in subsequent decisions and it may now be accepted that evidence of an acquittal of another person in such circumstances will not be admissible unless there is some special circumstance which in the interests of justice requires such evidence to be available on the trial of a person subsequently accused. Such exceptional circumstances were held to exist in the cases of *R.v Hay* 77 CR.APP.R.70 and

**R v. Cooke** 84 CR.APP.R.286. In the case of Cooke the exceptional circumstance was that the credibility of the same witness was directly in issue in both cases and it was held that the rejection of that witness's evidence in the first case, leading to an acquittal made the acquittal relevant for the purposes of the second.

In this case the credibility or otherwise of the witness Sophie Radrodro was critical in respect of both the accused. That is why the question of corroboration assumed such a significance in the case of Daniel Wali.

Mr Naigulevu pointed out that the corroborative evidence upon which the prosecution might rely with regard to the evidence of Sophie Radrodro differed as between the two accused and that therefore there was a distinction which would justify the exclusion of evidence in any retrial of the present appellant to that effect that Wali had been acquitted.

While we accept that there is some force in Mr Naigulevu's argument in the end the credibility or otherwise of Sophie Radrodro is crucial and of course it should not be forgotten that she had changed her story from that which she originally gave to the police to that which she gave in court.

We are therefore of the opinion that in the circumstances of this case, if the present appellant were to be retried, the assessors could be told that Daniel Wali had been acquitted.

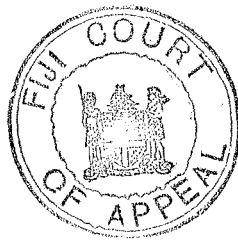
Such an acquittal could only have occurred if the assessors had not been prepared to accept the evidence of Sophie Radrodro as credible. While therefore it may be that there was more to corroborate the evidence of Sophie Radrodro as to the implication of the present appellant, looking at the facts of the matter it is quite unreal to suggest that on the material adduced before the court at the first trial a distinction in the outcome between the co-accused would be a just result even bearing in mind the legal distinctions. If the account Sophie Radrodro gave was rejected as against the alleged principal offender it could hardly be decisive against another party.

In all the circumstances we think this is an appropriate case to quash the conviction and not to order any new trial.

OUTCOME

The appeal is allowed.

The conviction of the appellant is quashed and there is no order for a new trial.



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Sheppard, JA

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Tompkins, JA

A handwritten signature in black ink, appearing to read "R. Gallen", written over a horizontal line.

Gallen, JA

Solicitors:

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Office of the Director of Public Prosecutions, Suva for the Respondent