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

CRIMINAL APPEAL NO. AAU0017 OF 2004S
(High Court Criminal Action No. HAC0002 of 2000L)

BETWEEN:

JAI RAM,
AMRESH DEO
ISAIA RAMOKO

Appellants

AND:

THE STATE

Respondent

Coram: Eichelbaum, JA
Gallen, JA
Scott, JA

Hearing: Tuesday, 26 July 2005, Suva

Counsel: Mr G P Shankar for the First & Second Appellants
Third Appellant in Person
Mr K Tunidau for the Respondent

Date of Judgment: Friday, 29 July 2005, Suva

JUDGMENT OF THE COURT

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[1] The appellants and two others were charged with the murder of Dharmendra Prasad, and inflicting grievous bodily harm on Kasi Ram, at Tavua on 29 May 1999. Dharmendra Prasad had left his wife, the first appellant's sister in law; and in brief the prosecution case was that the first appellant, having failed in his attempts to have Dharmendra reunite with his family, formed a plan with the second appellant and another person who was acquitted, to organize a group of young Fijians to call

on Dharmendra. As to the purpose of the visit the view most favourable to the appellants was that it was to persuade Dharmendra, by a show of force, to return to his wife; more sinister implications could be drawn but for disposal of the appeals it is unnecessary to explore that topic further. On the day the first appellant and the Fijians set out for Tavua, the second appellant driving them part of the way in a van to which he had access. After the first appellant had pointed out the house in which Dharmendra was living with other persons the Fijians tricked their way into the house. In the scuffle which ensued, Dharmendra received injuries from which he later died, while Kasi Ram was seriously hurt, the injuries in each case being inflicted by means of a dagger wielded by another accused, Poasa Satoqi.

[2] Following a joint trial the Judge acquitted the two of the accused. The three appellants, together with Satoqi, were convicted of manslaughter while the third appellant and Satoqi were also convicted on the second count of grievous bodily harm. The three appellants have appealed against their convictions and sentences. Satoqi also filed an appeal against conviction and sentence, but withdrew his appeals on 5 May 2005.

Convictions Appeals – Jai Ram and Amresh Deo

[3] There were three grounds of appeal which, put shortly, were as follows:

1. The Judge misdirected himself and the assessors on the question of joint enterprise and/or parties to the offence;

2. The Judge was wrong to admit the confessional statements of the appellants;

3. The verdict was unreasonable and could not be supported having regard to the evidence.

Mr Shankar's submissions focussed on the first two.

First Ground

[4] The prosecution case was that in terms of s.22 of the Penal Code the plan to threaten Dharmendra was a joint enterprise of which all the six accused were part. The Judge directed the assessors regarding the elements constituting murder in terms consistent with the law as stated in *Abendra Kumar and others v The Queen* Criminal Appeals 2,3 & 4 of 1985, 13 March 1987. As there were no convictions for murder we need not consider that aspect further. In regard to manslaughter, the Judge said the assessors were entitled to consider manslaughter if they concluded that Satoqi was guilty of manslaughter. In that event, if the assessors were of opinion that another accused contemplated that some harm may be occasioned and that death or grievous harm was a probable consequence, they were entitled to bring in a verdict of manslaughter.

[5] These directions are correct in law. The assessors must have concluded that Satoqi deliberately injured each of the victims but did not intend to cause death or grievous harm. The appellants' contentions did not include inconsistency of verdicts but for completeness we add there is no inconsistency in those conclusions.

Second Ground

[6] There was a lengthy trial within a trial in the course of which the first and second appellants gave evidence of being assaulted by police prior to making the confessional statements. Their counsel cross-examined the police witnesses all of whom denied there had been any assaults, although in the case of the first appellants, there was a medical report made the day after the appellant's caution statement which spoke of tenderness over the chest area but did not note any other evidence of external injury. Thus the report was inconsistent with the first appellant's account of a severe beating. Significantly, on the same day as the

medical examination an independent witness, a Justice of the Peace, did not notice any signs of a beating when he saw the first and second appellants.

[7] As is usual the voire dire turned entirely on questions of credibility which were for the Judge to assess. He made appropriate findings of fact, in essence accepting the evidence of the prosecution witnesses and rejecting the evidence of the appellants. The conclusions he reached were open on the evidence. As this Court said in *Ajendra Kumar Singh v The Queen* Criminal Appeal 46 of 1979, 30 June 1980 an appellate court should not disturb a Judge's finding unless satisfied that a completely wrong assessment of the evidence has been made or the correct principles have not been applied.

Third Ground

Jai Ram

[8] There was clear evidence that Jai Ram planned with the second appellant and another to recruit some Fijian men who in return for food and money would be prepared to go and "persuade" Dharmendra. As stated earlier, on the day in question the group travelled by transport arranged by Jai Ram and Deo. On the way the group called at a house where one of the Fijians was given a dagger; this was later found. So was the case in which it had been contained, in the van in which the group had travelled. Jai Ram described Dharmendra and pointed out the house in which he was living with others.Thus there was evidence that Jai Ram directed the Fijians to enter Dharmendra's home armed with a dagger, with the intention that they would "persuade" him to return to his wife. If a person organizes an undertaking of that kind knowing his foot soldiers are armed, the inference is open that he contemplated that any weapon might well be used, even though he did not so intend or would have preferred otherwise. In *R v Tomkins* [1985] 2 NZLR 253 the New Zealand Court of Appeal after dealing with circumstances where a co-conspirator could not be held guilty of murder, continued:

....[the jury] can still convict of manslaughter if satisfied that he must have known that, with lethal weapons being carried, there was an ever-present real risk of a killing in some way. (256)

We do not see anything in *R v Uddin* [1998] 2 All ER 744, cited by Mr Shankar, which contradicts this approach.

[9] It is unnecessary to rehearse the evidence in greater detail since on the material set out above alone, the verdict of guilty of manslaughter was justified.

Amresh Deo

[10] Deo's statement contained admissions that he knew the plan was to take Fijians to Dharmendra's house to frighten him, and that he was present when the dagger was handed over. In Deo's case matters went further in that he said the supplier of the dagger told the Fijians "he will give them one thing and they to take it and poke it on the body of Jai Ram's brother in law and demand money and jewellery". For the reasons given in Jai Ram's case, this ground of Deo's appeal must fail.

Ramoko

[11] The only stated ground of appeal against conviction was "where two or more persons are jointly charged with one offence, conviction cannot stand against all of them on evidence that an offence of that nature was committed by each of them independently."

[12] Since no such principle is relevant to this case this appellant's conviction appeal must be dismissed.

Sentence

[13] The appellants also appealed their sentences which were as follows:

	Manslaughter	GBH
Jai Ram	9 years 6 months	-
Deo	8 years 6 months	-
Ramoko	8 years 6 months	6 years 6 months

[14] The sentences for manslaughter and grievous bodily harm were imposed concurrently.

[15] In *Navaitalai Rauve v. The State* Criminal Appeal No. 13 of 1990, 19 October 1990 this Court noted that punishment for manslaughter of a serious kind normally ranged from 7 to 10 years depending on the degree of gravity. The Judge obviously, and correctly, regarded the present case as in the serious category. No doubt Jai Ram was offended by the deceased's conduct relating to his sister in law, but that in no way could mitigate the making of arrangements for strangers to invade Dharmendra's home at night, armed with a knife. Both Jai Ram and Satoqi could count themselves fortunate to escape conviction for murder. The sentence of 9 years 6 months for manslaughter imposed on the first appellant (the same as Satoqi's) was justified.

[16] From the beginning, Deo had an involvement in the arranging of the joint enterprise. However, he played a lesser part than the first appellant. He was a younger man and, it may be inferred, under the influence of the first appellant, who was his uncle. Like the first appellant, he had no previous convictions. We have concluded that the margin of one year between his sentence and the first appellant's did not sufficiently reflect the differing degrees of culpability. Subject to

the backdating issue we propose to reduce Deo's sentence for manslaughter by one year, that is to 7 years 6 months.

[17] Ramoko's history was similar to Satoqi's. Each was married, aged 25, and unlike Jai Ram and Deo, each had previous convictions. Ramoko's part was significantly less than Satoqi's and again, with due respect to the advantages held by the trial Judge to assess degrees of culpability, the difference of one year does not appear to make a sufficient differentiation. Further, the Judge must have considered that Ramoko's culpability equated with Deo's, and since we have decided to reduce the latter's sentence, Ramoko's ought to be reduced for that reason also. Subject to the backdating issue, in Ramoko's case too we propose to reduce the manslaughter sentence by one year, that is to 7 years 6 months.

[18] The Judge noted that the appellants had spent 2 years 2 months in custody. So far as we have been able to ascertain that figure is approximately correct and applies to all three appellants. To allow for this the Judge, in sentencing them on 18 March 2004, purported to backdate the sentences to 18 January 2002. However, there is a line of authority, recently confirmed by this Court (*Koroicakau v The State* Criminal Appeal AAU0033 of 2005S, 15 July 2005) that there is no power to backdate a sentence. We therefore need to adjust the sentences commensurate with their proper commencement date, 18 March 2004. Taking into account the remission to which the appellants normally would be entitled, the allowances for time in custody will equate to 3 years 3 months.

Result

(1) In each case the appeal against conviction is dismissed.

(2) In Jai Ram's case, the appeal against sentence is allowed, solely to reflect the time in custody and the commencement date correctly. The sentence is reduced to 6

years 3 months but we record that the correct commencement date is the date of sentencing, 18 March 2004.

(3) In Amresh Deo's case the appeal against sentence is allowed; the sentence is reduced to 4 years 3 months but we record that the correct commencement date is the date of sentencing, 18 March 2004.

(4) In Isaia Ramoko's case the appeal against sentence is allowed. The sentence for manslaughter is reduced to 4 years 3 months, and the sentence for GBH is reduced to 2 years 3 months, but we record that in each case the correct commencement date is the date of sentencing, 18 March 2004.

(5) We record that each of the adjusted sentences makes an allowance of 3 years 3 months for time in custody.

Eichelbaum, JA

Gallen, JA

Scott, JA

FIJI COURT OF APPEAL

Solicitors:

Messrs. G P Shankar & Co, Ba for the First & Second Appellants
Office of the Director of Public Prosecutions, Lautoka for the Respondent

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