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

CRIMINAL APPEAL NO. AAU0041 OF 2005S
(High Court Criminal Case No.3 of 2004L)

BETWEEN:

MOHAMMED SAIYAZ HUSSEIN AND
MOHAMMED SHANNEN HUSSEIN

Appellants

AND:

THE STATE

Respondent

Coram: Ward, President
Eichelbaum, JA
Penlington, JA

Hearing: Tuesday 7th November 2006, Suva

Counsel: Amrit Sen for Appellants
R Gibson for the Respondent

Date of Judgment: Friday, 10th November 2006, Suva

JUDGMENT OF THE COURT

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[1] The appellants were convicted of manslaughter following a trial in the High Court at Labasa. The trial commenced on 24 May 2005 and concluded on 1 June 2005. The appellants were represented by separate counsel. At the conclusion of the trial the assessors found both appellants guilty and each appellant was sentenced to 18 months imprisonment. The appellants thereupon appealed against both conviction and sentence.

[2] The State case rested on an allegation of manslaughter by gross negligence. See Archbold Criminal Pleading, Evidence and Practice 2006 para 19-108 and following and ***R v Adomako*** 1995 1 AC 171 HL.

[3] The charges arose out of the death of a young woman in the early hours of the morning of Sunday 3 August 2003 at Savusavu. The deceased was found lying in the middle of a road in a pool of blood some distance away from a road junction at Buca School outside Savusavu. Earlier in the evening she and her sister had attended a dance at Savusavu. There they had met the two appellants about midnight and gone with them to a beach at Naqaqa where some whisky was consumed.

[4] After the drinking episode the deceased was a passenger in the front of the first appellant's small truck. He was at all material times the driver.

[5] While she was in the front of the truck the second appellant indecently touched her. The deceased asked to be dropped off at the Baca junction. She was told that she would be dropped off after the first appellant had dropped off the second appellant. After that she travelled as a passenger in the back of the first appellant's truck. When the first appellant reached the second appellants' place to drop him off it was found that the deceased was not on the truck.

[6] Two State witnesses found the deceased on the road as stated above. She obviously had suffered very serious injuries. They took her to the Savusavu Hospital. She was dead on arrival. A post mortem was carried out. The cause of death was found to be a "cranio-cerebal injury in a case of trauma (unnatural)".

[7] The State case was that the only reasonable inference that the assessors could draw was that the deceased jumped from the van because she feared a further sexual assault and that she thereby suffered severe injuries which caused her death. There was no direct evidence of her exit from the van.

[8] Each appellant put in issue whether he acted negligently, whether he caused the death of the deceased and whether the negligence was gross and deserving a criminal sanction.

[9] The first appellant made an unsworn statement while the second appellant gave evidence on oath and was cross examined.

[10] At the conclusion of the evidence counsel addressed the assessors. First, counsel for the prosecution and successively counsel for the first appellant and counsel for the second appellant. The Judge then summed up. At the conclusion of the summing up and before the retirement of the assessors there were no submissions by any of the counsel engaged in the case.

The Reference to the State v. Hemant Chand

[11] At the end of the prosecutor's final address to the assessors, in relation to the topic of gross negligence, he referred to the case of the ***State v. Hemant Chand*** Cr. Case No.004 of 2004. This was a similar case – a manslaughter charge with a victim falling off the back of a vehicle and suffering fatal injuries. On the entry of a conviction the trial Judge gave reasons. Then there was an appeal. At the time of the appellants' trial the appeal had not been heard by this Court.

[12] The prosecutor handed the assessors a copy of the judgment in the ***Hemant Chand*** case. He submitted to the assessors that the facts in that case were "very similar" the facts in the present case. The prosecutor then concluded his final address by making a submission that the appellants' conduct was so gross that it deserved criminal punishment.

[13] Counsel for the first appellant then addressed the assessors. No doubt because the prosecutor had just concluded his address with a reference to the ***Hemant Chand***

case he responded. He submitted to the assessors that case was now in the Fiji Court of Appeal and that it had a considerable chance of success.

[14] We were informed from the bar by Mr Sen (counsel for the first appellant at the trial) that before the summing up he conferred with Mr A Kohli counsel for the second appellant as to whether the matter should be mentioned to the trial Judge. In the event counsel decided not to raise the topic. The trial Judge did not mention the matter at all in the summing up.

Amended Ground of Appeal

[15] An amended ground of appeal, pursuant to leave given was that the trial Judge erred in failing to intervene and "to disallow the prosecutor from providing the assessors with the copy of the case of ***Hemant Chand",*** that that was prejudicial to the defence case and that the trial Judge should have adequately directed the assessors to disregard the comments of the prosecutor thereon.

The State's Concession

[16] Very responsibly counsel for the State in his written submissions, ahead of the hearing of the appeal, conceded that the prosecutor should not have referred to the case of the ***State v. Hemant Chand*** in the course of his address and that he should not have handed a copy of a decision of the trial Judge in that case to the assessors. He cited a number of helpful cases to which we shall later refer.

[17] Counsel for the State accepted that there was a danger that the assessors could have been diverted from focusing on the evidentiary matters in the case before them. Once the Judge's decision in the ***Hemant Chand*** case had been handed to the assessors and mention had been made of the case, counsel for the prosecution before us conceded that the use by the prosecutor of that case called for a strong

direction by the trial Judge to disregard all references to it, notwithstanding that there had been no request to do so by defence counsel.

[18] Counsel for the State accepted that there was a real danger that assessors might have been unduly influenced by the decision referred to (when it bore no relevance to the case in hand). The State conceded that the appeal ought to be allowed on this ground and that there should be a new trial.

The Appellants' Response

[19] The appellants' counsel did not resist the course put forward by counsel for the State.

Appeal Allowed

[20 After briefly hearing counsel we allowed the appeal and ordered a new trial. We now add some comments on the case and of general application.

Quoting Law to the Assessors

[22] We deprecate what the prosecutor did in this present case, first in referring to the facts of another case and suggesting that they were "very similar", and secondly in handing to the assessors a copy of the judgment in that case. We are in complete agreement with counsel for the prosecution's concession in this court that what the prosecutor did at the trial could have led to the assessors being diverted from focusing on the evidentiary matters in the case before them. There was a real danger that the assessors may have been unduly influenced by the decision and that they may have considered that they were compelled to follow it. Further, we consider that notwithstanding the absence of any submission from counsel, the trial Judge ought to have given a strong direction to disregard completely the submissions of both counsel for the State and the counsel for the first appellant on

the ***Hemant Chand*** case and judgment. Indeed the judgment itself should have been withdrawn from the material which the assessors had with them when they retired.

[23] In ***R v. Giffin*** (1971) Qd R 12 the Court of Criminal in Queensland Appeal (Hanger ACJ Lucas and Hoare JJ) made some useful observations on the practice of quoting law in counsel's address to a jury. Hanger ACJ in delivering the Judgment of the Court said:

> ***"Before dealing with the matter of sentence it is desirable to say something in relation to the use made by counsel of a statement in Wigmore read to the jury by defence counsel, in the course of his final address. It is apparent that some counsel appear to misunderstand the use of statements in judgments in other cases, or in text books and the like. It may be that (as may be inferred from the report of the presiding judge in this case), trial judges have refrained from checking counsel in the course of their addresses out of consideration for counsel and this consideration has encouraged some counsel to persist in an incorrect practice.***
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> ***As to matters of law, it is of course never doubted that the jury must follow the directions of the trial judge. It is of the utmost importance that the principle that the trial judge's directions on law are what must be followed by the jury, should not be eroded. Such erosion will almost certainly follow if the growing practice of some defence counsel and some Crown prosecutors each making unduly lengthy submissions on the law, is allowed to continue.***
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> ***It is proper for defence counsel and the Crown prosecutor to submit "with the permission of and subject to the directions of His Honour" or some such expression, using what he suggests are the basic principles of law necessary to enable the jury to understand better the evidence to be adduced or evidence that has been adduced, as the case may be.***
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> ***However, it is highly desirable that any reference to any legal principles apposite, be as brief as possible and certainly no more lengthy than is reasonably necessary to explain the evidence adduced or to be adduced.***
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> ***On this aspect it is of the utmost importance to recognize the clear distinction between a basic principle of law and instances of the application of some basic principle to the facts of some other case or cases. It is proper to refer to a basic principle of law but it is wrong***

> ***for counsel, in an address to the jury, to read extracts from judgments or text books, which may contain some propositions of law but which inferentially refer to the facts of some other case. It is likewise quite incorrect for counsel to read an opinion of some kind expressed by some person in a text book or other publication telling the jury the source of the opinion. Of course if a witness in the case in which the address is made has expressed the same opinion, and adopted it as his own, different considerations apply. In such cases counsel would no doubt refer to the opinion of the witness as given in evidence."***

[24] As we have said earlier counsel for the State in this court referred us to some helpful cases. We are grateful to counsel. The observations in those cases underline the strong views which we have expressed.

[25] In ***R v Sugarman*** (1935) 25 Cr. App. R 109 counsel had cross examined the accused about dishonesty matters unrelated to the indictment. The Court of Criminal Appeal said at page 115:

> ***"It would be deplorable if any counsel for the Crown should refuse to stand on the real strength of his case and think that he can strengthen and support it by things collateral in a manner contrary to the letter and spirit of English law."***

[26] And in another Queensland case, ***R v Callaghan*** (1994) 2 Qd R 300 (CA) the Court said:

> ***"We observe however that it is not appropriate that the Crown Prosecutors use the dignity of their office in order to "tell" a jury something that is not in evidence."***

[27] See also ***R v Hay & Lindsay*** (1968) Qd R 459 and ***R v Chandler*** 63 Cr App. R 1 at page 3.

Irregularity; Counsel's Duty

[28] The mentioning of the ***Hemant Chand*** case to the assessors was an irregularity. Where an irregularity occurs, defence counsel are under a duty to bring the irregularity to the attention of the Judge at the earliest possible moment ***R v Neal*** (1949) 2 KB 590 CCA 596.

Result

[29] To recapitulate, we confirm that the appeal is allowed, the convictions are quashed and a new trial is ordered. The appellants are on bail. It is to continue on the same terms. The appellants are to answer to their bail in person at the High Court at Suva on Friday 17 November 2006 at 9:30 a.m.

Ward, President

FIJI COURT OF APPEAL

Eichelbaum, JA

Penlington, JA

Solicitors:

Maqbool and Company, Labasa for the Appellants
Office of the Director of Public Prosecutions, Suva for the Respondent

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