

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

CRIMINAL APPEAL NO. AAU0026 OF 2005S
(High Court Criminal Action No. HAC 13 of 2005)

BETWEEN:

SHANEEL SEN

Appellant

AND:

THE STATE

Respondent

Coram:

Scott, JA
McPherson, JA
Ford, JA

Hearing:

Tuesday, 20th March 2007, Suva

Counsel:

V. Vosarogo for the Appellant
D. Gounder for the Respondent

Date of Judgment: Friday, 23rd March 2007, Suva

JUDGMENT OF THE COURT

- [1] Shaneel Sen was on 14 March 2006 convicted of murder after a trial before a Judge sitting with assessors in the High Court at Lautoka. On 16 March he was sentenced to imprisonment for life, with a recommendation that he not be released before serving a term of seven years. He appeals to this Court against that conviction and sentence.

- [2] The deceased was the appellant's stepfather. The appellant lived with him and the appellant's mother and his brother in the ground floor flat in a suburban house in Lautoka. At about 10:30 pm on 26 April 2005, his parents returned from visiting friends or relatives down the road. They went into their bedroom and began arguing or "fighting", as they sometimes did when they had been drinking, and as they had been doing that night.
- [3] When the appellant came out of the bathroom he heard his parents making a noise fighting in their bedroom. He knocked on the door and asked his mother to open it. She opened the door and his stepfather stepped out and became abusive to the appellant. The appellant began to be concerned for his safety and, when his stepfather became more aggressive, he obtained a knife from the kitchen and warned him that he must behave or the appellant would "hit" him with the knife. His stepfather kept on coming towards him and the appellant swung the knife cutting him in the face. The father still came on and the appellant swung at him again, this time striking him in the front of the left chest. The wound penetrated to the lower left lung and lacerated the apex of the heart. His stepfather was taken to hospital, but died soon afterwards.
- [4] In summing up, the Judge directed the assessors on the mental state required to establish murder under the Penal Code. There could be no doubt that it was the blow struck by the appellant to the deceased's body that had killed him. The assessors and the Judge found that the appellant had done it with the intention requisite for murder, on which the Judge directed the assessors.
- [5] His Lordship then proceeded to sum up on the issue of self-defence. He directed the assessors that it was for the prosecution to prove beyond reasonable doubt that the appellant was not acting in self-defence, which concept he explained. He directed the assessors that they must acquit unless the appellant was proved to their satisfaction beyond reasonable doubt not to have been acting in self-defence; but

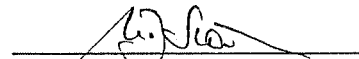
that if he did have the necessary intent for murder, they must then proceed to consider the question of provocation. On this matter, the Judge directed that "if you have a reasonable doubt about it, or indeed if you accept that he was provoked, you will go on to consider provocation", which he proceeded to explain.

- [6] In respect of provocation, the learned Judge also directed that the assessors must be satisfied beyond reasonable doubt that the appellant had not been provoked by his stepfather. On this occasion however, the Judge did not expressly direct, as he had done in the case of self-defence, that the onus of proving absence of provocation lay on the prosecution as in the case of self-defence. In the result, the burden of proof on provocation was not explicitly assigned to the State or prosecution as it had been in the case of self-defence. On this footing, Mr Gounder on behalf of the Office of the Director of Prosecutions acknowledged that in this respect there was a defect in the summing up.
- [7] In these circumstances several different courses are open to the Court. One would be to order a new trial, which would effectively leave it to the discretion of the Director whether the appellant was tried again for murder as distinct from manslaughter. Mr Gounder has intimated that the Director's Office has no wish to enter upon a fresh trial of the murder charge, having regard particularly to the delay that would ensue before such a trial could be had. Both he and Mr Vosarogo for the appellant accept that, if the murder conviction were set aside, a conviction of manslaughter would be substituted in its place. That would be the result if provocation succeeded, and it appears to us to be capable of being achieved under s.24(2) of Court of Appeal Act (Cap.12). In terms of that provision, the case is one in which appellant has been convicted of an offence (murder) and the Judge must therefore have been satisfied of facts which proved him at least to be guilty of another but lesser offence (manslaughter) under s.198 of the Penal Code committed by means of an unlawful act causing the death of another person. The unlawful act was the knife blow to, or wounding of, the body with the knife but without the accompanying intention that had to be proved to make it the offence of murder.

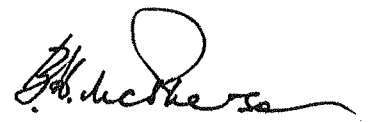
[89] Reducing the offence from murder to manslaughter means that the appellant must now be sentenced for the lesser offence of manslaughter in place of the penalty of life imprisonment imposed for murder. There is not very much personal information before the Court about the appellant himself. He was 20 years old at the time of the offence. He was unmarried and has a brother, who also lived at home with their parents. He also has an adult sister and possibly one or more other siblings. He had attended school and is described in the record as a Boat Builder. He has no prior convictions and appears not to have exhibited violent behaviour towards his stepfather or others in the past. The latter seems to have been inclined at times to bouts of excessive drinking, during which his conduct towards his step children and their mother sometimes became aggressive and insulting. There is little doubt that the appellant did not positively wish to kill his stepfather and the Judge accepted that he was genuinely remorseful about what had happened.

[10] We would therefore:

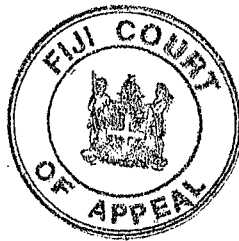
- (1) Allow the appeal against the conviction and sentence for murder, set them aside, and enter judgment of acquittal on the charge of murder.
- (2) Substitute a conviction for manslaughter.
- (3) Sentence the appellant to imprisonment for a term of seven years commencing on 16 March 2006.




Scott, JA



McPherson, JA





Ford, JA

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent

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