

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

CRIMINAL APPEAL NO. AAU0042 OF 2006
(High Court Criminal Case No. HAC 0002 of
2003s)

BETWEEN: LI JUN *Appellant*

AND : THE STATE *Respondent*

Coram: Ward, President
Ellis, JA
Penlington, JA

Hearing: Monday 11th June 2007

Counsel: Ms B Malimali for the appellant
Ms A Prasad for respondent

Date of Judgment: Monday 25th June 2007

JUDGMENT OF THE COURT

[1] This is an appeal against conviction on 4 counts of murder. As the appeal is on fact and law leave was required. This was given by the President who limited the argument to the issues of self defence and provocation.

- [2] The killings arose in one incident and the main account of events is in the sworn evidence of the accused. In setting it out we are not making any finding of credibility. The accused was charged with the murder of Li Lianzhan (aged 40), his wife Wei Zhongyun (aged 39), their son Li Chuang (aged 14) and their niece Wei Lan (aged 26). The events arose on 14 June 2002 and the trial took place in November 2003.
- [3] The accused said in sworn evidence that he first met Li Chuang in connection with his application for a visa and went to live with him and his family in their lower flat. He worked for them in their shop. Following a robbery of the shop police came and the accused went away as he did not have a work visa and needed to avoid the police. This did not please Li Chuang or his wife.

The accused said:

“At the beginning relations with the family were very good. I was not getting any wages. I got a pair of trousers and shoes from him. Within ½ a month we sold the paper. Going in his van, I helped him. I was just helping him. Later he asked me to drive. He got a driver’s licence for me.

After I got the driver’s licence, then there was some problem in the shop. Some Fijians came in and took some goods. Due to that robbery some policemen went to inspect the incident. I went away from the shop because I was not meant to work there. It happened in May. The family said they were busy why you go away. Mr Li said nothing. But his wife was particular about it. I told her if I am mistaken I will correct it. If you go on like this you will have to move out, she said.

When she mentioned this, I was in a contradictory state. I had no money left almost. I also owed them for the driving licence. Mr Li had 2 purposes in getting this licence. I could drive the van and sell his goods in the city. When he left for China, I could drive his family members to and from the shop.

He was planning to go to China for a trip. He planned to go in April or May, but due to incident in shop he changed his itinerary several times. He originally planned for me to stay and to drive the van.

It was about 3 or 4 days before the incident before he told me he wanted to leave his place. As I had a little money I tried to look for a cheaper

place I promised to him I would move out before he left for China. On Friday evening he invited Mr Wen and Mr Pan for a dinner. They arrived with Wei Lan. Mr Li told me to move out the following day.

I said nothing because if he wanted me to go I would go. Mr Chan offered me to stay with him for a few days before I found a suitable place for myself. I said I would like to stay there with him for a while. I had agreed to move. In my heart I was planning to find a place. I wanted to stay with some of my friends. I was to move the next day, the Saturday. Mr Li heard this and knew of our arrangement with Mr Chan.

I knocked off from the shop at 5pm. It was around 8pm when they left. Only the 2 men left. Wei Lan stayed. Each of us went to our rooms. I lay on my bed in the sitting room. During that time the family were not happy with me.

I had no contact with the family members before the incident. Li came out and called me, "Li Jun you come I want to talk to you". He said "If I want you to go you must go and don't play any tricks". He was very arrogant and angry. I told him you must have heard what we discussed and I am ready to go. I do not want to stay one day longer if you do not like me. He was very rude. He swore at me. "Don't play tricks on me. You can't do it".

He was using abusing words. I was very angry. "You son of bitch" he said. He slapped me on the face. I fought back. I had nothing in my hands. I punched him on the chest. He was taller and stronger than I. He got me on the floor and we rolled. He was trying to push me on the floor. I was trying to push him off. His family members came out. He is 2" taller than me. He is stout and fat. He weighs more than me.

I was busy struggling with him on the floor. I saw his wife with a knife in her hand say "kill him, kill him." I can recognise the knife she held. It was a chopper (shown P4). This was it. She held it with both hands.

Li Zhan's wife was trying to chop me and I was trying to free myself from Li Zhan. I pushed him aside I was almost standing up. When I stood up they were all in the sitting room. I could not see what they were holding. They were all in the sitting room. I cannot recall their position or what they held in their hands.

I am clear his wife was holding a chopper and wanted to chop me and I kicked her in the stomach. I have no special training in martial arts. When I was 18 or 19 I did do training, horizontal bars, etc.

It was a very short time that this happened. After I gave her a kick she fell down and dropped the chopper. I tried to get the chopper. I

touched it but didn't grab it. Li Zhan was behind me. He was trying to catch the chopper.

I saw Wei Lan holding a long knife and rushed towards me. I could identify it. (Shown P). This is it. She was trying with 2 hands to stab me. I tried to stop her with my 2 hands. I step aside and held the knife with both hands. She is small. I remember I seized the knife. I cannot remember what injuries I received.

From instinct if I was slow I would have been killed. I could not understand what they said. Li Zhan was kicking me. He was very good at kicking. Very short time this happened.

They were all there in the sitting room. They were there with weapons. I also try to stab them. Wei Lan went to the kitchen. She came back. I do not know what she did next. It all took place in a very short time. Only when I saw those 4 people they were not moving.

I was surrounded by those 4 people. I saw the one facing me. A very nervous incident. I could not see clearly. It also means scared – nervous. Who was in front of me I could not see clearly.

I had to be very alert as it was very tense, the struggle, the fight. My impression was there were many people attacking me. I cannot remember their positions. All 4 people I found nonetheless on the floor. I could not remember the whole process. I only remember they were attacking me. The struggle was fierce. When I first saw the chopper I knew they intended to kill me, then the knife and I felt my life was threatened.

When I saw them all quiet on the floor, I asked myself what had happened. I looked around there was a lot of blood stains. I felt more frightened. I was not sure if they would stand up and attack me. I wanted to leave as soon as possible. I planned to get out and go to a police station.

I first took one towel and tried to wipe. I found it was blood stains. I took off my trousers and shoes and I wanted to go out. I could not control myself. I took some clothing from the wall. My hands and body had blood stains. I wanted to wash away my blood stains. So I did wash.

When I saw one knife on the floor, I took it as I was afraid I might be attacked again. After I washed my hands and body I came out of the shower room. I could not find my clothes. I was not myself. I took my shirt and my trousers.

Then I ran out. I went over the fence at the back. I dropped the knife I stopped in Tawake Street. I sat there. I saw vehicles which I tried to stop. Later I saw 2 Fijian boys and called them. I said I am Chinese and I want to go to the police station.

I told the reporter I want to go to the police station. They said police will come and take you to hospital. I had my trousers on but maybe no shirt on.

A police van came and took me to the hospital. I realized I was injured when I was waiting for the police van. I did not realise I was injured.

I had injuries to my leg, my back, fingers, and a lot of minor injuries on my body. When the police came I almost lost consciousness. I had pain from my injuries. I was 1 or 2 days in hospital.

I went to the police station later. I was interviewed. Three officers were there, 1 Chinese translator. Most of the time he was there.

Some records are imagination of the police officers. They say I grabbed and killed. It is impossible for me to grab and kill. My account is 100% accurate. I was very tired and there was pain in my body. When I first went to the police station, I said I cannot remember all the things. I said I am not to deny anything. Most is accurate. During the interview they made assumptions, that is why we had a disagreement at the end.

The first person to attack was Mr Li Lianzhan. It all lasted – I cannot remember how long. During the struggle I could not remember when it was a fierce fight.”

At the conclusion of his cross-examination he said “I think I was doing it for self defence. The chance to run did not exist.”

- [4] On the basis of this evidence the significant features are that Li Chuang started the fight and swore at the accused, his wife joined in saying “kill him, kill him” and tried to chop him with a chopper which she dropped, and Wei Lan the niece joined in holding a long knife and rushed towards the accused who grabbed the knife cutting his own hand. He then used the knife against the 4 deceased and in so doing killed them all. The chopper and knife were found by the police and exhibited at trial. The forensic evidence confirmed that the injuries to the deceased were caused by the knife and that considerable force had been used.

That evidence also confirmed the injuries to the accused were “defensive”.
Further evidence was given by a neighbour Mr Nand who said:

“On 14 June 2002 it was about 9.30pm myself and my wife were having dinner. We started and we heard some noise coming out of the bottom flat. I left my dinner and came out of the house. I thought someone was robbing our tenant. I went half way to the stairs. I saw the burglar grill close and the door open. The sitting room light was not on. The kitchen light was on. I saw 2 Chinese males struggling and the lady was naked in the kitchen. One of them was the one sitting in the dock. They had no clothing on top part. They had trousers on. The other person was the man who was renting the place. The lady had a stool and was trying to throw it, (high above the head, demonstrates). The man struggling was the senior man for the house with the accused.

I was very surprised to see the lady naked. I called my neighbour Lagi and then I went on the telephone. I rang Samabula Police Station.

I was standing at the middle of the stairs when I looked at the flat below. Very clearly I could see the lady. I could see the adult Chinese men. I was roughly about 8 to 10 metres away.

The lady was facing the 2 Chinese adults.”

- [5] The accused did not mention the chair but it was found upside down on top of the body of Wei Lan in the middle of the sitting room.
- [6] The forensic evidence was that Li Chuang had a lot of defensive injuries and must have “given a good fight.”
- [7] A Mr Lagivola gave evidence that he was called by Mr Nand and heard a woman screaming and saw a man and woman struggling on the sitting room floor. The man had something in his hand and it looked as though the woman was trying to get out the door but the man was pushing her inside.
- [8] The above not only is the principal evidence of what took place but it forms the basis of the pleas of provocation and self defence. The appellant submits that the Judge failed in his summing up to direct the assessors (and so himself) adequately

on these two questions, and in particular did not separate the charges properly. The appellant submitted the summing up was in fact confusing.

[9] The Judge initially directed the assessors to consider each charge separately. He said the accused claimed he lacked the necessary criminal intent and quoted the accused's evidence as to how the events started. He then read section 203 of the Penal Code which defines provocation and correctly stated the burden of proof to be on the State to disprove the defence of provocation beyond reasonable doubt, but he said "It is for you to decide whether you accept the accused's account And then repeated the burden of proof correctly. The suggestion that acceptance of the accused's account was necessary to negate the burden of proof on the prosecution may well have confused the assessors. Further before anyone was killed Wei Zhongyan (the wife) and Wei Lan (the niece) had already entered the fray with a chopper and a knife. We realise that when provocation and self defence are raised in the same incident the Judge faces a difficult task in formulating his summing up. In this case while the provocation started the fight, none was killed until the accused was faced with defending himself against 4 people, two of whom were at the time armed with a chopper and a knife. The case turned on the question of self defence.

[10] The contents of a summing up was recently addressed by this Court in Hussein v State[2000] FJCA 1; AAU18.2000 and AAU20.2000 where we quoted the passage from R v Lawrence [1982] AC 510, 519 where Lord Hailsham said:

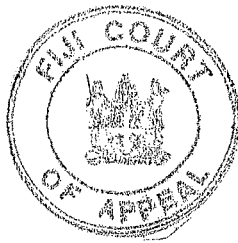
"A direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's notebook. A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should 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 which the jury are entitled to draw from their particular conclusions about the primary facts.”

- [11] We have carefully read the whole of the summing up and we think it does not adequately direct the assessors on the transaction as it affected the accused and each of the deceased. Further he did not direct the assessors precisely and separately on the possible verdicts on each count. It appears he placed too much emphasis on provocation and not enough on self defence.
- [12] Again the Judge confused the burden of proof question when he referred to Mr Lagivola’s evidence mentioned above and told the assessors that the accused denied pulling the woman inside. He said “you will have to decide who is accurate in this important issue”. That is not correct when the burden of proof is on the State throughout.
- [13] While it is not a matter open to the appellant to argue in this appeal the Judge did not correctly approach the claim of non-insane automatism. No doubt this is so because it was only raised by counsel in final address. For the proper approach we refer to Bratty [1963] AC 386 and Cottle [1958] NZLR 999.
- [14] Our conclusion is that the summing up was not sufficiently tailored to the facts of this case and the defence evidence in particular and the appellant may well have suffered an injustice as a result. We accordingly quash the convictions and order a new trial.

Result

The convictions are quashed and a new trial is ordered.



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Ward, President

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Ellis, JA

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Penlington, JA

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