IN THE FIJI COURT OF APPEAL, FIJI ISLANDS
AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAUOO43 OF 2005S
(Labasa High Court Criminal Case No.012 of 2001L)

BETWEEN	:	JOHN MILLER PITA TOKONIYAROI SAMUELA ROGOIVALU	*Appellants*
AND	:	THE STATE	*Respondent*

BEFORE THE HON. JUDGE OF APPEAL JUSTICE JOHN E. BYRNE

Counsels	:	Ms J Nair for the 1st and 3rd Appellants In Person for the 2nd Appellant Ms A Prasad for the Respondent
Date of Hearing :		6th of September 2007
Date of Ruling :		11th September 2007 at 2.15pm

RULING

(Leave to Apply for Additional Grounds))

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[1] On the 3rd of May 2005 the Appellants were convicted of the murder of Lalit Kishore on the 14th of November 2000 at Ba. They lodged Grounds of Appeal against their convictions but have now applied to this Court for leave to appeal on additional grounds. At the trial at the High Court in Lautoka the Appellants were represented by counsel and had been granted legal aid. However the second Appellant until the 6th of September 2007 elected not to be represented by counsel. At the hearing before me however after listening to Ms Nair making submissions on behalf of the 1st and 3rd Appellants he requested that he be given legal aid for his appeal also. Consequently I heard submissions from

Ms Nair for the 1st and the 3rd Appellants and the Respondent represented by Ms Prasad.

[2] After close questioning by me, Ms Nair, very sensibly in my view, abandoned the grounds relating to inadequate directions on malice aforethought and joint enterprise and relied only in the end on what she termed failure by the trial Judge to direct the assessors on the law relating to manslaughter. To her credit Ms Nair did not give up easily but as any advocate must do, persisted with her arguments until she was forced to concede that they could not be supported by any matter in the summing up on the grounds which were abandoned.

[3] The first general ground of appeal was that the Summing Up as a whole was flawed and did not achieve the purpose of providing a clear and concise explanation to the assessors. As far as manslaughter was concerned she argued that the learned Judge failed to adequately direct the assessors on the availability of manslaughter being an alternative verdict and he failed to adequately direct the assessors on why manslaughter was available as an alternative verdict. She drew my attention to the fact that there were mistakes made by the Judge after his summing up which were later pointed out to him by counsel and then corrected by the Judge. She submitted that this would have been confusing for the assessors.

[4] The great English jurist, Stephen J. once said "murder is unlawful homicide with malice aforethought. Manslaughter is an unlawful homicide without malice aforethought". – Doherty (1887), 16 Cox C.C. 306 at p.307.

[5] The test to be applied was stated in R. v . Church [1966] 1QB 59:

> *" ... an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognize must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm" (at pp.70).*

[6] It is true as counsel for the Appellants submits that there is just one sentence in the summing up that deals with manslaughter. This comes at the end of the Judge's direction on murder. It is important to quote the whole passage which I now do.

> *"Did they when they tied him up as they did especially with a towel tightly around his mouth knowing already that he was injured in the head and bleeding, know that either*
>
> *a) That death would occur or*
> *b) That grievous harm would result.*
>
> *If you are satisfied beyond a reasonable doubt that any or all the accused had such knowledge of death or serious harm occurring then you will advise me that such accused is guilty of murder. If you are not so*

> *satisfied you will advise me that the accused are guilty of manslaughter".*

I have little doubt that the learned Judge also had in mind the definition of manslaughter contained in Section 198 of the Penal Code Cap 17 which reads:

> *"Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm".*

[7] I have read the summing up very carefully and consider that as a whole it was very fair. It is true that the learned Judge did not for example quote the passage from **R v. Church** nor the remark of Stephen J. in Doherty which appears at the beginning of his summing up to the jury in that case. Nevertheless I consider that this was a proper and adequate direction on the availability of manslaughter as a verdict.

[8] At the very beginning of his summing up he said to the assessors at page 74 of the record, ***"On matters of fact, you are free to make up your own minds and reach your own conclusions"***. Shortly afterwards he said ***"in arriving at your conclusions, you must have regard only to the evidence you heard in this case .... You must base your opinions on your own objective analysis of the evidence"***. Finally at the end of page 74 he said to the assessors ***"I wish to point out that you the assessors, chosen from the community represent a pool of common sense and experience of human affairs. You do not leave that common sense and experience behind***

when you enter the Court room. You are expected to and indeed required to, use that common sense and experience in your deliberations. In deciding upon any proposition put to you, you are to ask yourselves whether it accords with your common sense or is it an affront to your common sense and experience".

[9] Ms Nair argued that there were mistakes on facts made by the Judge at the time of the summing up which were later pointed out to him by counsel and then corrected by the Judge. She said that this would have been confusing for the assessors. I seriously doubt this. My reason for quoting the beginning of the learned Judge's charge to the assessors was to show, as most Judges do when summing up, that assessors are drawn from the ordinary community and have common sense. I have no doubt from the opinions returned by the assessors in this case that they used their common sense and would not have been confused by the re-directions given to them.

[10] Counsel referred to the remarks of the Court of Appeal in **Anjula Devi v. The State,** Criminal Appeal No. AAU017 of 1999S in a judgment delivered on the 16th of May 2003. At page 22 the Court referred to the essential quality of a summing up and said ***"in short what is called for is an orderly objective and balanced analysis"***. I consider the learned Judge's summing up met that requirement. I can find no fault in it which would warrant my granting leave to add additional grounds of appeal and for that reason I dismiss the present application.

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[John E. Byrne]

JUDGE OF APPEAL

At Suva

11th September 2007