IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

Criminal Appeal No: AAU0034/06
[High Court Action No: HAC 035/05]

BETWEEN:

ISOA CODROKADROKA

Appellant

AND:

THE STATE

Respondent

Coram: Byrne JA
Shameem JA
Scutt JA

Hearing: 3rd March 2008

Counsel: Appellant in person
Ms K. Bavou for the respondent

Date of Judgment: 25th March 2008

JUDGMENT OF THE COURT

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[1] The Appellant was convicted of murder by Winter J on the 8th of May 2006 in the Suva High Court. He was sentenced to life imprisonment. This is his appeal against

conviction and sentence. His main ground of appeal is that the issue of provocation should have been left to the assessors. For the reasons we give, his appeal against conviction is dismissed. However, we find that the learned judge should have considered recommending a minimum term to be served under section 33 of the Penal Code. We vary his sentence accordingly.

The history of the case and the evidence

[2] The Appellant was charged on the 13th of May 2005, with the murder of Dale Raymond Groeger, on the 7th of May 2005. On the 9th of June 2005, his case was transferred to the High Court for trial. On the 8th of May 2006 his trial commenced in the High Court.

[3] The facts, which were not disputed at the trial, were that Dale Raymond Groeger (the deceased) was a visitor to Fiji from Australia. He was 22 years old. He arrived in Fiji on the 5th of May 2005. On the 6th of May 2005, he boarded a bus from Nadi to Suva, and sat next to the appellant. They became friendly. The appellant was then 21 years old. They drank rum and coke on the journey, and became so unruly that they were asked to get off the bus at the Pacific Harbour Police Post. They then boarded another bus, and checked into the Peninsula Hotel in Suva. At the hotel, the deceased asked the appellant to take out some of the money the deceased stored in his Bible to pay the receptionist. At 10pm the appellant and the deceased left the hotel for the Friends Night Club, and the Melrose Night Club. There, they both drank more alcohol. They returned to the Peninsula Hotel at some time between 1am and 2am and they both drank yaqona with the hotel security guards before retiring to their room.

[4] Thereafter, at the trial, there were two versions of what occurred. The first version was that contained in the appellant's interview with the police, on the 12th of May

2005. He said firstly that he had assaulted the deceased but had not intended to kill him. In response to the question "Why you assaulted him?" the appellant said: "Before we went to the nightclub the second time, Dale had put some money inside the Bible in his room and when we returned he found the money missing from the Bible. He blamed me for stealing and we had a heated argument. We exchanged blows but I punched him hard on his head and fell down back near the toilet. I left him there and wore his canvas and picked a blue bag and walked out of the hotel when I was stopped by 2 security officers and they took the bag, Australian $100 and canvas and they chased me away."

[5] Later in the interview he said:

> ***"I opened the door of the room and I entered first. As soon as I went in the room, I was lying on the bed next to the T.V as there was 2 beds in the room. As I was lying on the bed, Dale went to get his Bible which was on top of the table as soon as he opened the Bible, I saw his face changed and he looked to me and said "Where's my $500 bucks." I told him that I do not know as we were together in the nightclub. Then I was getting up when Dale threw a punch on my face and one on my head, then I fell down on the floor and he was sitting on my back with his knee and he said "I will kill you." He kept on pressing his knees on my back and then I turned and hit him on his balls with my elbow then he moved back, then I stood up and punched him on his face and he fell back and hit his head on the floor. I saw him lying on the floor and I thought that he may just knocked out, so I was sitting on the bed for about 20 minutes before I decided I better not sleep in the room."***

[6] He then took the deceased's watch, canvas shoes and the money scattered on the floor. Later in the interview he was asked "You stated that Dale all of a sudden got angry and punched you. What did you do when Dale was punching you?" His answer was: "I just want to protect myself."

[7] He admitted to two punches, one on the deceased's throat and neck, and one on the forehead. He also admitted to strangling the deceased before he inflicted the punches.

[8] The second version of the events inside the hotel room came from the appellant's sworn evidence during the trial. He said that he was 22 years old, and lived in Tailevu with his family. He was educated up to Form 6. He said that when he and the deceased returned to the Peninsula Hotel, the deceased was swearing and they were both very drunk. The appellant lay down on a bed to watch television. The deceased came and stood beside his bed. The court record then reads:

> ***"He was looking down at me. He was staring at me. He was staring at me for 3-5 minutes. He told me to take off my clothes. I stared back at him. I thought nothing. He stood beside my bed. He was trying to open my zip and take out my t-shirt .... After he removed his shoes he took off his shirt and put it on top of table.***
>
> ***When Dale tried to open my zip he was seated on the bed I was lying on .... as he tried this I was looking at."***

[9] Then his evidence was:

> ***"He tried to kiss me then I pushed him back. I pushed away his hand and I said to him 'I am Fijian you are also a man and I will not do what you are meaning to do.' At that time he stood up from bed there was a change in his expression. He was a bit angry. I was staring at him trying to see what he would do next. As he got up from bed he took hold of Bible, opened and closed it ..... He asked me where's my $500.00. He was really angry. I said I didn't know anything about the dollars. We left bible there we went out we came back then he asks me about missing money.***
>
> ***I tried to stand up from bed and he punched me on my left eye and all over my face 3 or 4 blows at me and I was lying down. In my mind I was thinking he was angry because what he wanted did not***

happen on that night. He was angry that I did not remove my clothes and he was trying to do something to me."

[10] He then described an attack on him by the deceased, during which he was punched and bitten on his left hand. He said that the deceased threatened to kill him, that he had grabbed the appellant's hair and was banging his forehead against the floor. Counsel then asked the appellant -: "What were you thinking?" The appellant answered in examination-in-chief: "Something took over me to be strong and not to die as I heard from him that he would kill me. He was a very strong person. I was not able to do anything. I knew he would kill me that day. I tried to stand up and I could not. I threw back my hand and it landed on his penis (testicle). The elbow of my right hand hit him in testicles. He fell backwards and tried to stand up again. At that time I was able to stand up and defend myself. I punched Dale. He punched back. As he threw punch he held my neck. Threw two punches at his neck and forehead. He then began to slowly fall backwards. I tried to punch him but I could not so I also tried to hold on to his neck. We held necks not legs. Dale held my neck really tight. I held his, holding his neck tight I threw punches with other hand and landed on his head. Then he let go of my neck. I threw another punch it landed on his neck and another one on his forehead."

[11] He then said that as a result of the punches, Dale fell backwards. The appellant went to the bathroom and washed off bloodstains from his own injuries. When he returned he saw the deceased's legs moving. He sat for 15 to 20 minutes, then he left so the deceased "won't punch me again." He said he had not told the police about the deceased's homosexual advances because he was ashamed.

[12] The appellant was medically examined on the 12th of May 2005. He told the doctor that he had been punched on the left eye on the 6th of May 2005 and that he had also been bitten on the left hand by the same person. The doctor found linear abrasions before the left eye and on the side of the nose. They were possibly

scratch marks. There was an old bruise below the left eye, an abrasion above the left elbow and a bite wound (possibly) on the web space between the left thumb and the index finger.

[13] The deceased's body was found in the hotel room on the 7th of May 2005 at 5.32am. He died as a result of asphyxiation due to manual strangulation, and multiple brain concussions as a result of assault.

[14] The post-mortem examination showed multiple bruising on the forehead, eyebrow, cheeks, lower lip, the inside of the upper lip, the back of the head, the right elbow, the right knee joint, the right shin, the left arm, the left side of the chest, over the 10th and 11th ribs, the left arm, the back of the left hand and the left knee. There was a 23 x 3 x 1.5cm bruise on the front and both sides of the neck on the thyroid cartilage forming a semicircle. The thyroid cartilage was fractured and there were areas of haemorrhage on the fracture areas.

[15] In his evidence, Dr. Prashant Sambekar the pathologist said that the neck injury reflected "extreme force over larynx required average 14-15kg." He said the multiple bruising suggest assault of more than two blows.

[16] Both the State and the defence addressed the assessors on the basis that the appellant had raised self-defence. The relevance of the homosexual advance was presented as a factor showing a "cultural misunderstanding" leading to an attack on the appellant by the deceased. The defence suggested that it showed the appellant's naivety and that his conduct that night should be seen in the light of a misled, confused and drunk village boy.

[17] In the summing up, the trial judge defined murder, malice aforethought and self-defence to the assessors. He also directed them on the relevance of intoxication. He summarized the defence case as follows:

> ***"The defence say this simple village lad was just being friendly and compliant with the Australian tourist and was led into an inevitable homosexual encounter that he could not foresee.***
>
> ***He was set upon when the gay proposition was frustrated and simply defended himself measure for measure. When Dale fell to the floor, all Isoa thought was that he had made him unconscious and he never intended to kill him. He could not escape the fight or call for help. His actions are not consistent with the robber but a panicked village lad escaping from harm. He never reported the homosexual advance as he was ashamed. The State have not excluded self-defence."***

[18] It is not evident from the record how long the assessors retired for after the summing up, but they were unanimous in their opinions that the appellant was guilty of murder. They had been asked to consider whether the appellant was guilty of murder, or guilty of manslaughter (on the basis that there was a reasonable doubt about malice aforethought) or not guilty of either (on the basis that the appellant acted in self-defence).

[19] The trial judge agreed and convicted the appellant. He sentenced him to life imprisonment. The State did not ask for a minimum term.

The appeal

[20] The appellant presented his appeal in person. His grounds of appeal, set out in a letter written to the Registrar of the Court of Appeal are:

1. *That the time I spent with the deceased was based entirely on mutual understanding and companionship ever since we met in Nadi.*

2. *That our relationship was true and honorable after sharing our meals and friendly conversation on the bus we boarded to Suva.*

3. *That trusting each other with the alcohol consumption on against our transport rates and regulation bonded us more and especially for me having an expert friend that related to me in a many ways.*

4. *That my action during the offence was based on rejection from sexual advancement made by my drunken friend while we are drinking in the hotel room.*

5. *That his conditions advancement on having gay sex disgruntled me, even though I tried to stop him on its early stage.*

6. *That his sexual persistence provoked my retaliation without understanding or was I aware of the outcome of my actions.*

7. *That I even though have committed an offence, all I ask is for this honourable court to address the fact that my actions were not once intentional but a reflex of action provoked at the spire of that moment.*

[21] He later filed further submissions to the court which added very little to his initial grounds. He did assert more than one alleged homosexual advance however at this very late stage the Court was not minded to accept this as credible but rather a recent invention.

[22] What is clear from these grounds, and from his submissions at the hearing of this appeal is that the appellant's complaint is that provocation was never put to the assessors, and that it should have been because the deceased's homosexual advance had caused him to act as a result of a sudden loss of self-control.

[23] State counsel summarized the issues before us as follows:

> *(i) Was there any evidence of provocation fit to be left to the assessors?*
>
> *(ii) Did the learned judge err in law in failing to direct the assessors on the defence of provocation?*

[24] Counsel submitted that the answer to both questions should be "no." In her comprehensive submissions she referred to the principle set out in **Lee Chun-Chuen v. R** [1963] 1 ALL ER 73, and in particular to the judgment of Lord Devlin which contained the following paragraph:

> ***"Provocation in law consists mainly of three elements – the act of provocation, the loss of self control, both actual and reasonable and the retaliation proportionate to the provocation. The defence cannot require the issue to be left the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other – particularly in point of time, whether there was time for passion to cool – is of the first importance. The point that their Lordships wish to emphasis is that provocation in law means something more than a provocative incident."***

Provocation

[25] Section 203 of the Penal Code provides:

> ***"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only."***

[26] Section 204 of the Penal Code provides:

> ***"The term "provocation" means, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.***
>
> ***When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.***
>
> ***A lawful act is not provocation to any person for an assault.***
>
> ***An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.***
>
> ***An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who believes and has reasonable grounds for believing the arrest to be unlawful."***

[27] The law on provocation in Fiji is based on the statutory definition of the defence. That definition in turn is based on the common law definition, the only real departure being the use of the words "ordinary person" from the original "reasonable man." In essence, the Fiji definition is no different from the definition on provocation in the English Homicide Act which provides (section 3) that "where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury;

and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

[28] The law in England is that where there is any evidence of specific provoking conduct by the deceased, and any evidence that the provocation caused the accused to lose his self-control, the issue should be left to the jury even where the circumstances suggest revenge rather than a sudden loss of self-control, and even where the issue has not been raised by the defence. Indeed, if there is such evidence, it should be left to the jury, even where the defence would prefer it not to be left to the jury (**R v- Dhillon** [1997] 2 Cr. App. R.104). But there must be **some** evidence of specific provoking conduct, and of the accused reacting to it. Mere speculation is not enough (**R v. Acott** [1997] 2 Cr. App. R. 94. It is the duty of the judge to point out to the jury the specific sources of potential provocation, and this is particularly important where there is more than one source (**R v. Humphreys** [1995] 4 ALL ER 1008).

[29] Provocation can arise from a series of provocative acts or deeds. The English courts, notwithstanding the statutory definition in the Homicide Act 1957, continue to rely on the definition of provocation of Devlin J in **R v. Duffy** [1949] 1 ALL ER 932. That is:

> ***"Provocation is some act, or series of acts, done [by the dead man to the accused] which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind."***

[30] The Fiji definition in sections 203 and 204 of the Penal Code is based on these definitions. It is a condition precedent to the availability of the issue, that there should be a link between the loss of self-control and the act which causes death.

[31] This then raises a question relevant to this appeal. Where there are several potentially provocative acts (a homosexual advance, an accusation of theft and a physical attack) to what extent are each of these acts relevant? To what extent may an accused person rely on a **history** of provocation to explain a sudden loss of self-control? The law on cumulative provocation has developed considerably in other jurisdictions. How far back in history provocative acts can be relied upon depends on the facts and circumstances of particular cases. In **R v. Ahluwalia** 96 Cr. App. R. 133, and **R v. Thornton** (No. 2) [1996] 2 Cr. App. R. 108, the English courts considered the relationship between years of violent abuse suffered by the accused in the hands of the deceased and the sudden loss of self-control triggered by a minor incident to find that the jury could hear such evidence to allow the minor incident to be seen in its proper context. It would appear therefore, that in deciding whether or not to leave the issue to the assessors, the judge is entitled (and should) take into account **all** the conduct of the deceased which is alleged to have contributed and led to the cause of death. Evidence of such conduct is both relevant and admissible depending on the facts of each case.

[32] In a case referred to us by State counsel, **Shiu Bachan Singh and Deo Mati** (1981) Crim. App. 28 & 25 of 1981, the Fiji Court of Appeal considered an appeal against conviction for murder on a ground that the trial judge had failed to direct the assessors on provocation. In that case, the deceased and the appellant had been out drinking together. The 1st appellant's lover (the 2nd appellant) was the wife of the deceased. There was a quarrel between the 1st appellant and the deceased over a photograph of the 2nd appellant in the deceased's house. The deceased threatened the 1st appellant with an iron bar, which the 1st appellant snatched and used to beat the deceased to death.

[33] Provocation was not put to the assessors. Self defence was put to them, as was intoxication. Referring to the judgment of Lord Devlin in **Lee Chin Chuen** (supra) the court found that there was ample evidence of an act of provocation, of the loss of self-control, and of "credible narrative of .... retaliation proportionate to the provocation received." The Court held that provocation should have been put to the assessors on "a view of the evidence most favourable to the accused" (**Holmes v. DPP** [1946] AC 585, 597).

[34] In **Dharam Deo v. The State** [2003] CAV006/2000S the Supreme Court of Fiji considered a similar question. The petitioner had been convicted of the murder of his wife. In his police interview, he admitted striking his wife with a pipe until she died. At his trial, his defence was that she had been trampled to death by bullocks. On appeal however, the petitioner raised the issue of provocation, relying on passages in his police interview in which his deceased wife had allegedly told him that she had caused their daughter to commit suicide, in which he said that she had threatened to kill him, and that she had refused to make sweets for a religious gathering. In submissions to the Supreme Court, counsel for the petitioner said that this last act of the deceased was "the last straw" and was an insult to any Indian man who culturally expects his wife to obey him. The court rejected the argument that provocation was a trial issue, saying that "there was no suggestion on the record of interview or anywhere else in the evidence relied upon by the petitioner, that the petitioner had suffered a loss of self-control at the time he killed his wife. The fact that he killed his wife does not of itself support an inference of loss of self-control."

[35] Finally, in a case similar to the appellant's, in **Josateki Solinakoroi** [2005] CAV005/05, the Supreme Court considered an appeal against conviction for murder on the ground that provocation should have been left to the assessors. In that case the deceased had made homosexual advances, not to the petitioner, but to a person in his care (according to custom), and not in the presence of the petitioner. The

majority decision of the court (per Fatiaki CJ and Handley JA) was that the issue of provocation should not have been ruled out by the trial judge at the end of the prosecution case, because the evidence led by the defence might have disclosed sufficient evidence for the assessors to consider provocation. A retrial was ordered.

[36] Ward JA, in his dissenting judgment agreed that the issue should not have been withdrawn at the stage that it was, but said that the defence evidence was inconsistent with an attack by a man who has lost self-control and that at any retrial it was not possible that provocation would succeed. His view was that, there was no substantial or grave injustice and that leave to appeal should be refused.

[37] The remarks in both judgments about when provocation should be left to the assessors are, strictly speaking, obiter, because the issue for determination was whether the trial judge should have allowed the defence to raise it in the defence case. Nevertheless, the remarks are indicative of the accepted judicial approach to the applicability of provocation.

[38] This approach can be summarized as follows:

1. *The judge should ask himself/herself whether provocation should be left to the assessors on* ***the most favourable view*** *of the defence case.*

2. *There should be a "credible narrative" on the evidence of provocative words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.*

3. *There should be a "credible narrative" of a resulting loss of self-control by the accused.*

4. *There should be a "credible narrative" of an attack on the deceased by the accused which is* ***proportionate*** *to the provocative words or deeds.*

5. *The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a* ***sudden*** *loss of self-control depends on the fact of each case. However cumulative provocation is in principle relevant and admissible.*

6. *There must be an evidential link between the provocation offered and the assault inflicted.*

[39] This appeal raises one further matter of law and principle which must also be dealt with. We do not think that this issue has been dealt with by the Fiji courts in the past, although it has arisen in the course of submissions in our appeal courts. This is the question of the relevance of ethnicity and gender in assessing what the "ordinary person" would do in the situation the accused found himself or herself in. In directing the assessors, does the judge tell them that they must ask what an ordinary Fijian person would have found provocative? Is an ordinary Indo-Fijian more susceptible to provocation and to the sudden loss of self-control than an ordinary Fiji-Chinese or European? Is the ordinary person an ordinary Fijian man? Or woman? Or is culture and gender of no relevance at all? Is taking into account cultural characteristics when assessing the loss of self-control an example of cultural sensitivity? Or is it an inequality before the law?

[40] The English courts have held that in the context of provocation, the "reasonable man" means "an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today" (per Lord Diplock in **DPP v. Camplin** [1978] AC 705, 771). Lord Simon in the same case (at page 726) said that a reasonable man is "a man of ordinary self-control." These

definitions were approved by the majority in **Att-Gen for Jersey v. Holley** [2005] 2 AC 580 (Privy Council). The majority decision was that the jury should take the accused exactly as they find him. This included an especially violent temperament, but having considered the gravity of the provocation offered, the standard of self-control by which he/she will be judged is that of a person of the accused's age and gender exercising the ordinary powers of self-control to be expected of an ordinary person of that age and gender. The majority also held that specific characteristics of the accused, such as for instance, homosexuality, or alcoholism, or disability are relevant but **only if they are related to the provocation offered**. Thus, where a person has a (relevant) disability and the provocative words are directed to him being a "cripple", or where the accused is homosexual and he is taunted for his homosexuality, then those personal characteristics are relevant and the question for the assessors will be whether an ordinary person who is homosexual would find the words provocative and would thereby lose self-control to assault the deceased in the way he did. It follows that ethnicity and cultural background are relevant only if the words spoken or deeds done are aimed at the culture or ethnicity of the accused. Racial taunts are therefore capable of being provocative if the taunts would have provoked an ordinary person of the accused's race, gender and age.

[41] This approach is not only one which is consistent with the common law. It is also consistent with the principle of equality before the law. To allow the law of provocation to have different thresholds for different racial groups would be to entrench racial stereotyping in the legal system. To say that indigenous Fijians have a lower capacity for self-control than other races, is to say that the indigenous Fijian community is more prone to violence, and other ethnic groups are less so. Philosophically, such a position is racist and unjust. An ordinary person is one of any ethnic group. All ethnic groups are presumed to have the same powers of self-control. The only relevance of the ordinary person's ethnicity is that it must be taken into account when the provocative words or deeds are racist in character, and

are aimed at insulting the accused's community or ethnic background. It has no other relevance and should play no part in the trial judge's summing up to the assessors.

[42] This has also been the approach of the High Court of Australia in a number of cases. Section 23(2)(b) of the NSW Crimes Act requires that the provocative conduct be "such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon the deceased." In **Stingel** (1990) 171 CLR 312, the defendant stabbed to death a man who was engaged in sexual activities with the defendant's former girlfriend. When the defendant opened the car door interrupting the activity, the man abused him. The defendant got a butcher's knife from his own car and stabbed the man to death. The Tasmanian Criminal Code contained a statutory definition of provocation. The trial judge did not put provocation to the jury. The High Court held that in principle, any of the defendant's personal characteristics, that is age, gender, race and personal attributes, as well as past history may be taken into account to objectively assess the gravity of a wrongful act or insult. However in assessing the extent of the power of self-control of the "ordinary person", the personal characteristics (other than age) of the defendant are irrelevant. The court said (per Mason CJ, Brennan, Dean, Dawson, Toohey, Gaudron and McHugh JJ):

> ***"No doubt there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average. Indeed, it may be that the average power of self-control of the members of one sex is higher or lower than the average power of self-control of members of the other sex. The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterized as ordinary. The lowest level of self-control which falls within those limits or that range, is required of all members of the community. There is, however, one qualification which should be made to that general approach. It is that considerations of***

fairness and common sense dictate that, in at least some circumstances, the age of the accused should be attributed to the ordinary person of the objective test."

[43] On the question of the test to be used by the trial judge before leaving the issue to the jury, the court held that the test was, whether on the version of events most favourable to the defence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked.

[44] In relation to the relevance of ethnicity, in **Masciantonio** (1995) 183 CLR 58 the High Court of Australia said (per Brennan CJ, Dean, Dawson, and Gaudron JJ) that in assessing the gravity of the provocation, the personal characteristics of the accused were relevant, and these included age, sex, race, ethnicity and personal relationships. Having assessed the gravity of the conduct in this way, the next question is whether the provocation could cause an ordinary person (of no particular racial background) to lose self-control and act in the manner the accused did. That is, there is a 'two part' test. The first allows for race/ethnicity, age, sex, personal relationships. The second relies on the ordinary person who (apart from age) is judged according to an 'ordinary person' test based in equality under the law.

[45] McHugh J dissented saying that the **Stingel** test was unrealistic. He said that in a multi-cultural society, the notion of "the ordinary person" of no racial background or culture is artificial, and the provocation test ought to allow the ordinary person to have the same racial characteristics as the accused.

[46] Although McHugh J's dissenting views may have some persuasive force if it were to be assumed that some racial groups have lesser powers of self-control than others, we believe that it would be dangerous and patronizing to make any such assumption in Fiji. It can be said however, that where provocative words are aimed

at ethnicity for instance, then the "ordinary person" should be given the ethnicity of the accused for the purpose solely of determining the question as to the import of provocation – but **not** the response to it.

[47] On the relevance of gender, the Australian and English authorities part company. In **Holley** (supra) the Privy Council gave the ordinary person the same gender as the accused. The risk in giving the ordinary person the powers of self-control of any one gender, is of allowing the law to entrench gender stereotypes. To suggest for instance that women have a lower threshold of tolerance to provocation is to give in to gender stereotyping that women are less rational and more emotional than men. What might be a just approach to this dilemma is to assess the relevance of gender in relation to the history of provocation and the nature of it. Gender may for instance be relevant when considering a long period of abuse in a spousal relationship.

[48] This principle that ethnicity has limited relevance to the provocation test is of particular relevance to Fiji. It is of relevance in this case where the appellant suggests that a homosexual advance was particularly insulting to him because he is a Fijian man. We come to the applicability of this test to this appellant in the next part of this judgment. For the present, we add one further principle to the list of principles relevant to the law of provocation.

> ***7. The "ordinary person" under section 204 of the Penal Code, is the ordinary person of the accused's age with the ordinary powers of self-control expected of a person of that age.***

[49] In directing assessors, the accused's racial background, sexual orientation or disability are only relevant if the provocation offered is specifically aimed at insulting race, sexual orientation, or personal characteristics such as disability.

This appeal

[50] The evidence setting out possible sources of provocation arose from the appellant's caution interview and his sworn evidence. Taken at its highest, the provocation offered was a homosexual advance, an accusation of stealing and a physical assault. Certainly, all three matters are cumulatively and individually capable of being provocative.

[51] They are also capable of causing a loss of self-control in an ordinary 22 year old man. The appellant's difficulty is that the evidence indicates that if anyone lost his self-control, it was the deceased. Indeed, the appellant raised the homosexual advance issue at the trial, not to explain his own conduct, but to explain the deceased's sudden offensive behavior. He said that when he spurned the deceased's advances, the deceased became angry and accused him of stealing.

[52] The appellant's second difficulty is that the deceased desisted from making any further advances when the appellant made it clear that they were not welcome. The appellant's third difficulty is that the post-mortem report does not reflect proportionality of the retaliation.

[53] Taken from the most favourable view of the defence case, there was no evidence at all, and certainly no credible narrative of an actual loss of self-control, nor of proportionality of the attack. The appellant's conduct after the deceased fell is also entirely inconsistent with a loss of self-control. He took the deceased's watch, his shoes and his money and left the hotel after washing his hands in the bathroom and after sitting on the bed for 15 or 20 minutes. There was no credible narrative of a sudden loss of self-control.

[54] Finally, in assessing whether or not the homosexual advance was capable of being provocative, the appellant's racial background is irrelevant. His state of intoxication which was not the subject of the alleged provocation offered, was also irrelevant.

[55] The facts and evidence did not produce a need to direct the assessors on provocation. The trial judge did not err. The appeal against conviction is dismissed.

Sentence

[56] The State asks us to consider recommending a minimum term of imprisonment.

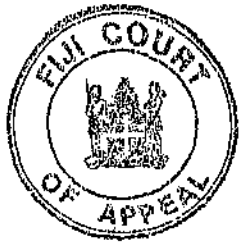
[57] Section 33 provides that a judge may recommend a minimum term and in the recent decision of this court of **Josaia Tukana v. The State** Crim. App. AAU0042/06 it was held that such a minimum term should be considered. The effect of fixing a minimum term is to lengthen the period of imprisonment which the appellant must serve before he is entitled to parole. At present, those who serve life terms must serve at least 10 years imprisonment before parole can be applied for. In **Tukana** a minimum term of 15 years was recommended in a case of a man beating his partner to death.

[58] In this case, the appellant attacked the deceased in a most brutal manner, causing extensive injuries, multiple concussion and strangulation. In these circumstances we consider that a minimum term of 15 years should be served before he is entitled to parole.

Result

[59] The appeal against conviction is dismissed. Sentence is varied to include a minimum recommended term of 15 years imprisonment.

Hon. Justice John Byrne
Judge of Appeal



Hon. Justice Nazhat Shameem
Judge of Appeal

Hon. Justice Jocelynne Scutt
Judge of Appeal

Solicitors:

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Office of the Director of Public Prosecutions for the respondent