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

CRIMINAL APPEAL NO. AAU0050 OF 2008S
(High Court Criminal Action No. HAC030 of 2007S)

BETWEEN:

JEFFERY V.V. COLATA

Appellant

AND:

THE STATE

Respondent

Coram:

Byrne, JA
Bruce, JA
Lloyd, JA

Hearing:

Friday, 14th November 2008, Suva

Counsel:

G. O 'Driscoll for the Appellant
A. Elliott for the Respondent

Date of Judgment: Wednesday, 19th November 2008, Suva

JUDGMENT OF THE COURT

[1] Jeffery Veibataki Vulikivavalagi Colata ('the appellant'), pursuant to the provisions of s21(1) of the Court of Appeal Act, appeals to this Court against his conviction on 29 April 2008 for the offence of manslaughter and against the sentence of two years imprisonment imposed upon him by a High Court judge on the same day for his commission of the offence.

The brief facts and chronology of events

- [2] On 25 November 2006 the appellant was working at a coffee shop called Barista's as a coffee maker and waiter. On the afternoon of that day the deceased Lepani Rokoduvunivosa and three of his workmates were attending a party hosted by their employer Three Kings Construction. They had all been drinking heavily throughout the afternoon and sometime after 5 pm that day they decided to leave the party and head home. Around 5.30 pm they were walking along Knolly's Street towards a bus stop. As they were walking along, one of them (who was quite drunk) was attempting to tackle cars. This took place whilst they were in the vicinity of Barista's coffee shop. Someone then yelled from the balcony of Barista's '*are you people mad*'. A person from Barista's then came down to where the deceased's group were standing. This person was the appellant.
- [3] The account of events given at trial by the eye witnesses of what then took place differ in significant respects. According to two members of the deceased's group (one of them being the deceased's brother), the appellant and the deceased engaged in conversation outside Barista's and then the appellant punched the deceased three times in the face, as a result of which the deceased fell backwards hitting his head on the edge of the concrete pavement. The deceased lay motionless on the ground. A taxi was stopped and the deceased was taken to hospital by his friends. At hospital the deceased was admitted to the Intensive Care Unit but he did not regain consciousness and died some 10 days later as a result of cranio-cerebral injuries caused by his head connecting with the pavement after he fell backwards on being punched by the appellant.
- [4] One of the members of the deceased's group admitted under cross examination at trial that the deceased was angry and confrontational towards the appellant.

- [5] According to three of the appellant's co-workers at Barista's, each called by the prosecution to give evidence at the trial, the appellant made his way to the front of Barista's to ask members of the deceased's group to leave the driveway of Barista's as they were trespassing. They each gave similar accounts of what then took place. They said that the deceased threw a punch at the appellant, which punch the appellant dodged. The appellant pushed the deceased away but the deceased came at the appellant again. The appellant moved backwards, the deceased followed and threw more punches at the appellant. One punch hit the appellant on the chest. The appellant then threw one punch only at the deceased, which punch hit the deceased in the face, knocking him backwards onto the footpath.
- [6] The appellant gave sworn evidence at trial. He said that when he was on the driveway the deceased was swearing at him and being aggressive towards him. He said the deceased pushed him several times and threw some punches at him, one of which grazed his chest, and another of which hit his chest. The appellant said *'I was scared they might do something bad like pulling out a knife'*. The deceased kept charging at him so the appellant threw a punch at the deceased, the punch connecting with the face of the deceased and causing him to stagger backwards and to fall on the roadway. In his record of interview with the police given late on the night of the incident the appellant had told police that the deceased had only thrown one punch at him and he (the appellant) had thrown two punches at the deceased, both of which punches connected with the deceased's mouth.
- [7] On the death of the deceased the appellant was charged with the offence of manslaughter.
- [8] The appellant was tried before a High Court judge and three assessors from 21 to 29 April 2007. On 29 April 2007 the appellant was convicted and, after a hearing in mitigation was sentenced to a two year term of imprisonment for committing the offence.

The grounds of appeal against conviction and sentence

[9] The appellant's sole ground for appealing his conviction is that the judge in the High Court misdirected the assessors on the issue of self defence. The grounds of appealing the sentence are that the sentence was too severe and that the sentence should have been suspended.

The directions on self defence

[10] It is convenient for us to set out the entirety of the judge's directions to the assessors on the issue of self defence. They are as follows:

(Near the commencement of the Summing Up)

"I now turn to the requirement that the act should be unlawful. As a matter of law I must direct you that when a man or woman acts in self-defence to protect himself or his family, he or she is not acting unlawfully. The law defines self-defence as a legal right to defend oneself and to do anything that is "reasonably necessary" to protect oneself from attack or injury. The law on self-defence is not a charter for revenge or retaliation. So you should think carefully about whether the deceased attacked the accused, and whether in punching the deceased the accused was doing what was necessary to protect himself or whether he was acting out of anger and retaliation. In considering whether the Accused acted reasonably, you must ask yourselves what a reasonable man in the Accused's shoes would have done to defend himself.

There are of course inconsistent accounts of what occurred outside Barista's Coffee Shop on the 25th of November 2006, and you must first ask yourselves which version of the evidence you accept as being reliable. Once you have done that you need to ask yourselves the following questions:

- 1. Did the deceased attack or assault the Accused?*
- 2. Did the Accused believe that he was under attack?*
- 3. Did the Accused punch the deceased in order to defend himself?*
- 4. Was his assault on the deceased reasonably necessary to defend himself? Was it proportionate to what the deceased was doing to him?*

5. *In considering whether the Accused acted reasonably ask yourselves what a reasonable person in the Accused's shoes would have done? Would he have punched the deceased in the way that he did? Could he have removed himself from the situation instead of punching him?*

Remember in considering self-defence, that the entire incident occurred within about 20 minutes and that in a sudden incident it is not always easy to assess what is reasonable self-defence and what is not. At the spur of the moment a person may act without thinking.

However in considering self-defence, think of the deceased's conduct and the accused's conduct. Was the Accused acting in retaliation? Compare also the height and build of the accused to the deceased. Was it natural for the Accused to fear the deceased's assault? These are the questions you must ask yourselves.

As a matter of law, once the Accused raises the issue of self-defence as he has done in this case, the burden is on the prosecution to prove that the Accused was not acting in self-defence and you must be satisfied of this beyond reasonable doubt. Because self-defence is a complete defence, if you believe that the Accused punched the deceased in self-defence, or if you have a reasonable doubt about it you must give your opinions that the Accused is not guilty of any offence.

Furthermore if you are satisfied beyond reasonable doubt that the Accused was not acting in self defence, but you do have a reasonable doubt about whether his punch caused the death of the deceased, you should similarly express an opinion that the Accused is not guilty.".....

(Near the end of the Summing Up)

"The question of self-defence must be determined by you on the version of the facts that you accept as being reliable. Did the deceased attack the Accused? Or did the Accused come downstairs to challenge the deceased and his friends? Why did the Accused come downstairs? Did the deceased push the Accused several times, and punch him? If so, was it necessary for the Accused to defend himself? In punching him either once, according to his evidence and of the evidence of the other employees of Barista's, or if you accept the evidence of the caution statement, twice, or the evidence of the deceased's brother, three times, was this necessary self defence? Could the Accused have avoided the situation and protected himself by moving away from the deceased? What would a reasonable person of the Accused's build and height, faced with the deceased have done?

These are the issues you should consider. Remember that you must be satisfied beyond reasonable doubt that the Accused was not acting in self-defence if you find that he did an unlawful act in punching the deceased."

Were the directions on self defence sufficient in law?

- [11] In his written submissions counsel for the appellant submits that '*Self defence is by its nature a subjective matter...and it is our submission that the appellant's evidence regarding what he thought at the time should have been given some mention in the Judge's summing up, but it was not*'. Counsel submitted to us that the judge should have specifically directed the jury to consider the appellant's sworn evidence at trial that he thought the deceased and his group might do something bad like pulling a knife and that is why he punched the deceased.
- [12] Section 17 of the Penal Code, Cap.17 provides that subject to any express law, criminal responsibility for the use of force in the defence of person shall be determined according to the principles of English common law. The section does not incorporate the common law of Australia. The issue the subject of this appeal is the failure of a trial judge to direct assessors on the appellant's subjective belief at the time he purportedly acted in self defence. The English common law on this aspect of the defence of self-defence is stated in *R v Palmer* [1971] AC 814 (at page 832).
- [13] The defence of self defence has been definitively restated in Australia in the case of *Zecevic v Director of Public Prosecutions* ((1987) 162 CLR 645). The Supreme Court of Fiji in its recent judgment in *State v Li Jun* ([2008] FJSC 18) said that although there may be some differences between the common law on self defence in England and Australia, those possible differences were not material to the facts the subject of *Li Jun* (at [44] to [45]). The same comment can be made on the facts of this case. The common law as stated by the High Court in *Zecevic* adequately deals with the issue the subject of this appeal.

[14] In its judgment in **Zecevic** the High Court said that an explanation (to a jury) of the law of self defence requires no set words or formula. The High Court said that in the end only a simple question need be asked. And that question is as follows (at page 661 of the judgment):

'[Did the accused believe] upon reasonable grounds that it was necessary in self defence to do what he did? If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.'

[15] The High Court went on to say that where homicide is involved some elaboration by the judge to the jury may be required. In this regard the High Court said (at page 662):

'When upon the evidence the question of self defence arises, the trial judge should in his charge to the jury place the question in its factual setting, identifying those considerations which may assist the jury to reach its conclusion'.

[16] In its judgment in **Li Jun** the Supreme Court said (at [46]):

*'It is important to appreciate that the test as stated in **Zecevic** is not wholly objective. It is the belief of the accused, based on the circumstances as he or she perceives them to be, which has to be reasonable. The test is not what a reasonable person in the accused's position would have believed.'*

[17] In our opinion there is no doubt that the Supreme Court of Fiji intended for trial judges, when directing assessors, to sum up to them the relevant evidence as to the subjective belief of the accused at the time he/she acted in purported self defence. In the instant case, the appellant gave evidence at the trial as to his subjective belief at the time immediately after the deceased punched him and just before he punched the deceased, causing him to fall backwards to the ground. The appellant said in his evidence;

'When I saw that [the punch from the deceased], I was scared that they might do something bad like pulling out a knife...The deceased kept

charging at me, I stepped back and threw a punch at him...[and he] fell backwards on the road’.

- [18] In our opinion much the same shortcomings that the Supreme Court found in the summing up in the trial of *Li Jun* are to be found in the instant case. The issue raised by the present case was whether the accused believed on reasonable grounds that it was necessary in self defence to do what he did to the deceased. In this case the summing up did not make it clear to the assessors that this was the issue they had to address. Further, the summing up did not direct attention to the significance of the appellant’s subjective perception of the threat he faced after (according to his evidence) he was punched by the deceased. As occurred in *Li Jun*, the summing up used objective language when explaining the issues to the assessors. The assessors were not told that the question of reasonableness had to be determined by reference to the appellant’s subjective perception of the threat he faced at a particular point in time. The evidence of the appellant given at trial which we have quoted above addresses this question. The assessors were not reminded of that important evidence in the summing up, nor of its relevance to the question they had to decide.
- [19] The function of the summing up is to tell the assessors what the issues of fact are on which they have to make up their minds in order to determine whether the accused is guilty of an offence (*Li Jun* at [55]). An accused is entitled to have his case fairly put to the assessors in the summing up (*Li Jun* at [57]). That did not occur here.
- [20] No objection was taken by counsel for the appellant at trial to the summing up. As a general rule, it is counsel’s duty at trial to draw the judge’s attention to deficiencies in the summing up and failure to do so may prohibit the accused from taking the point on appeal (*Evans v R* [2007] HCA 59 at [236]). But as stated by the Supreme Court in *Li Jun* (at [58] and [95]) the authorities support the proposition that even where a complaint about a summing up was not made at the time, where an appellate court is satisfied that despite the lack of objection to a summing up at trial,

an injustice may have occurred, it may quash the conviction (see also *La Fontaine v The Queen* (1976) 136 CLR 62 at 72 and 81).

Conclusion


[21] It is apparent from what we have said above that there were deficiencies in the summing up to the assessors in this case, which deficiencies justify the appellant's conviction for manslaughter being quashed. We have given consideration to the application of the proviso found in s23(1) of the Court of Appeal Act, but we cannot say that the result of the trial would have been the same had the assessors been properly directed on the issue of self defence. As was stated in *Seru v State* [2003] FJCA 26, the proviso is applied only where the Court considers that had the error in question not occurred, without doubt the appellant would still have been convicted (see also *Weiss v R* (2005) 224 CLR 300). Given the seriousness of the offence charged and the fact that the prosecution case is not a weak one, it is appropriate that the appellant be retried for the same offence of manslaughter on which he previously stood trial.

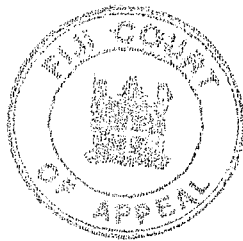
[22] Given our views on the appeal against conviction there is no need for us to deal with the sentence appeal in this matter.

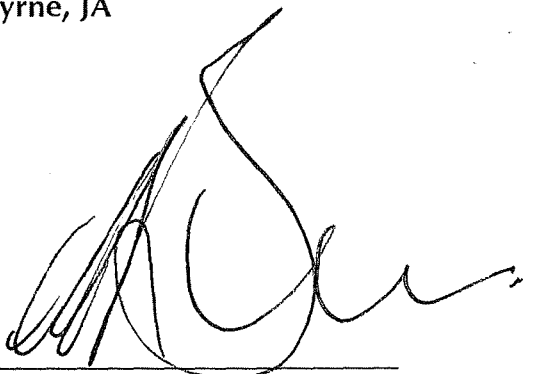
Orders


[23] This Court orders that:

- (1) The appellant's conviction for manslaughter be quashed;
- (2) The appellant's sentence for manslaughter be quashed;
- (3) The appellant be retried for the offence of manslaughter.


Byrne, JA




Bruce, JA


Lloyd, JA

Solicitors:

O' Driscoll and Company, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent