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

CRIMINAL APPEAL NO. AAU0065 OF 2005S
(High Court Criminal Action No.HAC001 of 2005S)

BETWEEN:

RUSILA VUKI

Appellant

AND:

THE STATE

Respondent

Coram: Byrne, JA
Goundar, JA
Bruce, JA

Hearing: Thursday, 19th March 2009, Suva

Counsel: F. Vosorogo for the Appellant
P. Madanavosa for the Respondent

Date of Judgment: Thursday, 9th April 2009, Suva

JUDGMENT OF THE COURT

Introduction

1 On 4 August 2005, the Appellant was convicted after trial in the High Court (Shameem J and Assessors) on one count of murder. The Assessors returned unanimous opinions of guilty. Shameem J, having considered the opinion of the Assessors, found the Appellant guilty. The Appellant was sentenced to life imprisonment. The Appellant was the 1st accused at trial. Her co-accused was acquitted.

2 The Appellant applied for leave to appeal to the Court of Appeal. On 22 February 2006, Ward P refused leave. The Appellant renewed her application for leave to appeal to the Full Court of the Court of Appeal. Leave to appeal was granted and the Court of Appeal ordered that she have the benefit of Legal Aid.

3 The Appellant is now represented.

4 In strict terms, the only grounds of appeal before the Court appear at page 3 of the record. Based on the issues identified when this was last before the Court of Appeal for leave, the written submissions supplied by the Director of Legal Aid have by way of three questions posed encapsulated the issues that need to be considered in the determination of this appeal. The questions are (slightly adapted):

(a) Whether the issue of self-defence was correctly left to the Assessors?

(b) If there was an act of self-defence, was the self-defence excessive and, if so, what verdict might flow from that circumstance?

(c) If the direction in relation to self-defence was not correctly left to the Assessors, whether after a consideration of the evidence proved at the trial no miscarriage of justice was occasioned thereby?

5 The written submissions focus of the first question of the three questions posed.

The case at trial

The facts

6 At trial, it was common ground that on 14 and 15 October 2004 there existed a dispute between Monika Koroivuki, the Appellant and the former co-accused of the Appellant. The nature of the dispute between them was itself in dispute. There was some evidence that it arose from jealousy between Monika on the one hand and, on the other hand, the Appellant and the former co-accused of the Appellant. The issue was in respect of a component of the relationship between Monika's husband and the Appellant and her former co-accused. The position of Monika was to deny this and

she gave a different account based on an alleged swearing incident outside Monika's house on 14 October.

7 There was a further incident on 14 October. Apparently, Monika was at the home of her relative in a neighbouring settlement and the Appellant and her former co-accused wished to see her. That was, apparently, unsuccessful. It would appear that the Appellant and her former co-accused found Monika the next morning and punched her. The explanation by the Appellant was that she had punched Monika because she had sworn at the parents of the Appellant. Apparently the Appellant and her former co-accused actually reported this to the police themselves. The Appellant admitted that she was in possession of a knife before going to report the matter to the police, she temporarily disposed of the knife before reporting the matter to the police and then re-took possession of that knife after the report was made. According to her interview under caution which was not disputed to be a voluntary account, she said she carried the knife so she could strike Monika if she came across her. In her summing up, the learned trial judge told the Assessors: "You may think that because they are the accused's own undisputed account of what had occurred, only days after the death of Siteri, they are significant." Siteri was the victim of the killing.

8 A little later on in her summing up, the learned trial judge said: "If you accept the contents of the caution interviews, then you will find that the accounts in them contain admissions from the [Appellant] that she wanted to kill Siteri. The [Appellant] in her statement said nothing about using the knife to protect herself." The learned judge observed that at least in this respect, there were significant differences between the version proffered by the Appellant in her testimony at trial and what she had said in her caution statement. We will return to the version proffered by the Appellant in her testimony in a moment.

9 The case for the prosecution and for the Appellant was fundamentally different. The case for the prosecution was that the Appellant had armed herself with a knife with the intention that if she came across Monika she would use the knife on her. The case for the prosecution was that the stabbing of Siteri was an aggressive act and not motivated by self-defence. The case of the prosecution was, in essence, that it was not so much that the knife was to be used against Monika, but against anyone who confronted the Appellant. In her record of interview, the Appellant (question 49) was asked "Why were you carrying [the knife]?" The Appellant said: "To stab Monika if I had come across her." As we have already noted, the learned trial judge correctly observed that nowhere in the interview under caution did the Appellant ever mention self-defence in the context of the violent encounter with Monika, Siteri and others. She admitted (see question and answer 71) that she had used the knife to stab and kill Siteri.

10 The Applicant in her testimony before the learned trial judge and the Assessors said: (transcript page 111-112)

> When returning [from the police post] we met on the way. We fought. I picked the knife on my way home. Susana saw me pick the knife. She asked me - "what is that knife?"

A short time later in her testimony, the Appellant testified that when speaking to Susana she said:

> I replied - "if anyone else wants to fight again, that person will get the knife."

11 The Appellant then said that the words she had spoken to Susana were said when she had already seen Monika and Siteri and others. At that point, they were about 25 m away.

12 A little later in her testimony, the Appellant said: (transcript page 113)

> When we saw Monika on the bridge, she called out to those people coming, "you assault them." I carried on walking. Siteri asked me "Why did you punch Monika?" I said nothing. She threw a punch at me. At this point, Susana went past me and went in front. Monika at that time was coming back towards us again. Siteri punched me, and we fought. We were fist-fighting. Susana

intervened to stop us and Monika punched her also. While we were fighting, I slipped and fell down at the pipe. While we were exchanging punches, Rosa came to stop Watisovo. She brought a stick with her. I saw the stick.

When I fell down, the others all surrounded me. By "all" I mean, Rosa, Lusiana, Vasenai. They were all three hitting me with a stick while I was on the ground. Siteri continued fighting. I was fighting with her, when they were hitting me with a stick. We were fist fighting.

A short time later, the Appellant testified: (transcript page 114)

> At the time we were fighting I was only concerned about myself. This is because I was frightened of those people hitting me with a stick. At that time they were hitting me, I did not know how to escape. I knew something would happen to me as they were hitting me with a stick. I was falling down. I just used the knife on her. She was standing. She was swearing at me. I used the knife on her because I was concerned for my safety and I did not know what else to do.

13 In cross examination, the following exchange took place with the prosecutor: (Appeal bundle page 116)

> Q: You wanted to kill her, and from the stabbing and dragging of the knife, you intended to cause grievous harm?
>
> A: Yes, I didn't know what else to do.
>
> Q: You knew that Siteri would die from that injury or sustain serious harm?
>
> A: At the time I was really frightened. I just used the knife.

A little later in the cross examination, the prosecutor asked:

> Q: Suggest the reason for throwing it [*ie* the knife] away was because you intended to use it as you confirmed in your caution interview? Were you going to use it on Monika and anyone else confronting you?
>
> A: If so, I would have used it when I first punched her.

In the context, in that last exchange "her" must have meant Siteri.

14 The essence of the case for the Appellant appears to be that while she was carrying the knife with a view to using it on Monika (see statement under caution), the part of the incident where she was outnumbered, was on the ground and was being beaten by a stick was an unexpected event and that she had found herself in a situation where she perceived the necessity to use force. It is ambiguous on the evidence as to

whether she perceived the necessity to use lethal force or simply force which may well cause grievous bodily harm.

The summing up

15 But for one matter to which we will shortly return, the summing up was impeccable. The summary of the facts of the case was couched in a manner which was calculated and must have the effect of providing considerable clarity for the Assessors in their deliberation as to the advice to render to the Court.

16 The direction as to the elements of murder is also impeccable. As to causation, the learned judge directed the Assessors as to how this impacted on the Appellant. She said:

> In this case there is actually no dispute that it was Ruslia Vuki's act of cutting the deceased's neck with a knife of that caused the death of Siteri Momoivalu.

17 The learned judge then directed the jury in relation to whether the killing was unlawful. The learned judge directed the Assessors as follows:

> The second element is that the act of the accused was unlawful. An unlawful act is simply one that is against the law. Usually any assault such as a stabbing or knifing is unlawful, unless it is done in self-defence. In this case the 1st Accused says that she acted in self-defence because she was attacked by three women.
>
> The law says that a person who is attacked may defend herself in a way that is reasonably necessary. However it is important that you differentiate between what are reasonable and proportionate acts of self-defence, and acts which are motivated by revenge and aggression. In considering what is an act of reasonable self-defence, you must ask yourself what a reasonable person of the first Accused's build and physical characteristics, would have thought was appropriate. The questions are for you in considering self-defence are: was the act of the stabbing Siteri Momoivalu an act of self-defence, or one of aggression and anger? What would a reasonable person in the first Accused's shoes have done in the circumstances? Was the first Accused in fact under attack either real or anticipated by Monika, Siteri and one other woman? If she was under attack, was the use of the knife in the circumstances reasonably proportionate or was it excessive force? Did the first Accused need to use the knife on Siteri to defend herself? And is this what a reasonable person of her height and build, age and gender [would] have done in these circumstances? These are the questions you should ask yourselves. In considering self-defence, the

prosecution must prove beyond reasonable doubt that the issue of self-defence has no basis in this case. If you think this is a case of self-defence or if you have a reasonable doubt about it, then the effect of such a finding is to find both the first and second Accused not guilty of any offence. That is because there would be no unlawful act.

18 The learned the judge then went on to describe the third element of the offence: malice aforethought.

19 Shameem J summarised the case for the defence. (Appeal bundle, page 19-20) The learned judge in the course of summing up the case for the Appellant said: "She said she was frightened of this attack and she used the knife on Siteri." The learned judge concluded her review of the testimony of the Appellant by reminding the Assessors that:

> Under cross examination [the Appellant] admitted stabbing Siteri with a knife, knowing she would die or be seriously injured and that she thereby caused her death. She said she did so to defend herself from attack.

Advice of Assessors and verdict

20 The Assessors were unanimous as to the guilt of the Appellant. Shameem J in her judgement indicated that she had directed herself in accordance with summing up. She said that she agreed with the Assessors in their opinion. She then held:

> I am satisfied beyond reasonable doubt that the fight at the water pipe occurred not as the accused described it but as the prosecution witnesses Monika and Rosa Tawake described it. I disregard the evidence of Paula Navunisarivi. I am satisfied beyond reasonable doubt that the 1st Accused acted unlawfully and not in self-defence, and that she acted with malice forethought and cause the death of Siteri Momoivalu. I convict her accordingly.

Sentence

21 Shameem J sentenced the Appellant to life imprisonment.

Issues on appeal

22 The principal issue on appeal is whether the directions of the learned trial judge in relation to self-defence were correct. The Appellant contends that judge did not

direct the Assessors that that they were required to consider was the state of mind of the Appellant. The complaint is that they should have been directed to ask themselves whether the Appellant believed on reasonable grounds that it was necessary in self-defence to do what she did to the deceased. Shameem J had told the assessors that what they had to consider was what a reasonable person would consider necessary in self-defence in the circumstances in which that person found herself. In the decision by the Supreme Court in ***State v Li Jun*** [2008] FJSC 18, followed ***Zecevic v Director of Public Prosecutions*** (1987) 162 CLR 645. It was held:

> It is important to appreciate that the test 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.

23 The Supreme Court in ***State v Li Jun*** made the point that a killing in self-defence is not unlawful even if the accused intended to kill. The Supreme Court added: "Of course, for a plea of self-defence to be available, the perceived threat has to be such as to reasonably call for a lethal response." In the present case, the fact that the Appellant may well have intended to kill Siteri when she struck a blow that resulted in Siteri's death the issue remains whether or not the Appellant believed her response was, in the circumstances, reasonable.

24 In ***Jeffrey VV Colata v The State*** Criminal Appeal No. AAU 0050 of 20085 this Court followed ***State v Li Jun*** and applied it to a direction which was, in its terms, very close to the one which is impugned in this case. In that case, the Court of Appeal held:

> 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 that he/she acted in purported self-defence.

25 In our judgment, the question that the Assessors by the direction of the trial judge to should have been required ask themselves was whether the Appellant believed, based on the circumstances as she perceived to be whether her response was reasonable. It did not matter that she may in fact have intended to apply lethal force.

The issue is not what a reasonable person of the age and characteristics of the Appellant would have thought. In short, the Assessors were asked only to consider what a reasonable person of the age and characteristics of the Appellant would have thought was a reasonable response. They should have been asked to consider what the Appellant thought was a reasonable response. In the result, the direction does not conform to the principles in ***State v Li Jun***.

Proviso

26 Counsel for the Respondent submitted that in the event that we held that the Assessors were not properly directed on the issue of self-defence, that we should apply the proviso to section 23(1) of the Court of Appeal Act.

27 The proviso to section 23(1) of the Court of Appeal Act empowers this court notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the Appellant, to dismiss the appeal if they consider that no substantial miscarriage of justice has occurred. The meaning of the phrase "no substantial miscarriage of justice" was considered in the Court of Appeal in ***Pillay v R*** (1981) 27 FLR 202. In that case, Gould VP, Henry & Spring JJA held:

> The expression "no substantial miscarriage of justice" was dealt with in *R v Weir* [1955] NZLR 711 and at page 713 North J, said:
>
> > The meaning to be attributed to the words 'no substantial miscarriage of justice has actually occurred' is not in doubt. If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred notwithstanding that the verdict actually given by the jury may have been due in some extent, to the irregularities which are proved to have occurred.

The decision in ***R v Weir*** [1955] NZLR 711 is reflective of the interpretation and application of similar legislation to be found elsewhere in the common law world:

Stirland v DPP [1944] AC 315, 321; ***Commissioners of Customs and Excise v Harz*** [1967] 1 AC 760 at 823–824; ***Sooklal v The State*** [1999] 1 WLR 2011; ***Stafford v The State*** [1999] 1 WLR 2026; ***HKSAR v Launder*** [2002] 1 HKLRD 150; ***Pringle v R*** [2003] UKPC 9. This test was followed in the English Court of Appeal in cases including ***R v Edwards*** (1983) 77 Cr App R 5 and ***R v Donoghue*** (1987) 86 Cr App R 267, 273.

28 The issue of what the Appellant thought and did in the situation in which she found herself was at the very heart of the issues in the case. As we have already said, that issue was not left to the Assessors. On the direction that was given to the Assessors (and which direction the learned judge, as the ultimate tribunal of fact, gave to herself) they must have found that at the time she stabbed Siteri, the Appellant intended to kill or to cause grievous bodily harm. However, they may have rejected the defence of self-defence because they were satisfied that the prosecution had excluded the possibility that the conduct of the Appellant was an act of self-defence because the prosecution had proved beyond reasonable doubt that a *reasonable* person did not need to use the knife on Siteri to defend herself. As we have already observed the Assessors never grappled with the critical issue which was whether the Appellant on the circumstances as she perceived them to be believed upon reasonable grounds that it was necessary in self-defence to do what she did.

29 The application of the proviso to section 23 (1) of the Criminal Appeal Act must, of necessity, be a very fact and circumstance-specific exercise. It is easy to see how, if the Assessors had asked the correct question they would have rendered the same opinion on this evidence. The evidence could readily be viewed as strongly against the Appellant. It is easy to see how the Assessors could have readily rejected the testimony of the Appellant as to the critical issue. She did testify as to her state of mind as to why she used the knife in the circumstances as she found them. A properly directed group of Assessors might well have roundly rejected her version.

30 However, the issue is not as simple as that. This is because Shameem J in deciding whether or not to accept or reject the opinion of the Assessors made or purported to make some findings of fact of her own. (The use of the word "purported" is not meant in any disrespectful way for the reasons which will shortly appear.) As we have already quoted, in her Judgment (Appeal Bundle page 6) the learned judge not only recorded that she agreed with the opinion of the Assessors but also said "I have directed myself in accordance with my summing up and I agree with them." If the matter had been left as a simple acceptance of the opinions of the Assessors, then any verdict in those circumstances would have suffered from the same problem as arose from the directions to the Assessors because the judge would have asked herself the wrong question and, by her direction, not have asked the right question. If the learned judge had left the matter there, then we would have held, although not without reluctance, that it could rarely be appropriate to apply the proviso to section 23 (1) where the Assessors were not only not directed to ask the right questions on the central issue of the case but were in fact directed to ask the wrong question. We would have gone on to hold, in those circumstances that, although not without considerable hesitation, we could not have said that the court would have without doubt convicted the Appellant on the evidence as presented.

31 But that is not where matters ended. The judgment of Shameem J then continues: "I am satisfied beyond reasonable doubt that the fight at the water pipe occurred not as the accused described it but as the prosecution witnesses Monika and Rosa Tawake described it." In plain terms, the judge was saying that she rejected the Appellant's version of events. That logically must include a rejection of the Appellant's testimony as to her state of mind. On that view of the facts, it is plain that Shameem J, even if, in law, on her directions had asked herself the wrong question in relation to self defence and had not considered the correct question, on the view of the facts that she held, those questions never even arose. (There is nothing on the prosecution case to support self-defence.)

32 The issue that then arises is whether, as a matter of law, we can take account of what Shameem J said about the version of the Appellant in determining whether or not to apply the proviso to section 23(1). Is everything she said after indicating that she agreed with the Assessors, however much we instinctively respect the views of Shameem J, simply something we cannot, as a matter of law, take into account? The choice is clear and simple. If the answer is that we can take it into account then the proviso can be applied because we can say notwithstanding the errors in relation to the directions to the Assessors (which were the directions that Shameem J gave to herself) concerning self-defence that no substantial miscarriage of justice actually occurred because we can say that the court would, without doubt, have convicted. This is because Shameem J disbelieved the account of the Appellant. Central to this proposition is that, as section 299 of the Criminal Procedure Code provides, the opinions of the Assessors are not binding on the judge. Where the judge does not agree with the advice rendered by the majority of the Assessors, section 299 provides:

> when the judge does not agree with the majority opinion of the Assessors, he shall give his reasons, which shall be written down and be pronounced in open court, for differing with such majority opinion and in every such case the judge's summing up and the decision of the court together with, where appropriate, the judge's reasons for differing with the majority opinion of the Assessors, shall collectively be deemed to be the judgment of the court for the purposes of this subsection and of section 157.

However, here the judge agreed with the Assessors. Thus, the question is what it is or what is deemed to be the judgment of the court in such a situation? The first part of section 299, having declared that the judge is not bound to conform to the opinions of the Assessors provides:

> notwithstanding the provisions of subsection (1) of section 155, where the judge's summing up of the evidence under the provisions of subsection (1) is on record, it *shall not be necessary* for any judgment, other than the decision of the court which shall be written down, to be given, nor for any such judgment, if given, to be written down or to follow any of the procedure laid down in section 154 or to contain or include any of the matters prescribed by section 155. [emphasis added]

The reference to the procedure laid down in section 154 of the Code is the requirement that the judgment of any criminal court including the High Court must be pronounced in open court. The reference to section 155(1) of the Code is a reference to requirements that: "Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the court in English, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it." As will readily be seen, where there is a summing up on record and the judge has agreed with the Assessors, it is not *necessary* to record those things which would otherwise be required by section 155(1). Thus, we are of the view that in law while it was not *necessary* for Shameem J to make the observations that she did about the testimony of the Appellant, those observations are, as a matter of law, part of the judgment of the court and we are entitled to take them into account in determining whether or not to apply the proviso. Once Shameem J rejected the testimony of the Appellant in the way that she has, then the issues about self-defence fell away.

33 For these reasons, the appeal must be dismissed. Had we *declined* to apply the proviso to section 23(1), we would have held that a retrial was clearly warranted and we would have ordered a re-trial and to that end we would have also ordered that the Appellant be remanded in custody to be brought before the High Court as soon as practicable and in any event within 14 clear days of this judgment. For these reasons, the order of the court is that the appeal is dismissed.

Byrne, JA

Goundar, JA

FIJI COURT OF APPEAL

Bruce, JA

Solicitors:

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