IN THE COURT OF APPEAL
FIJI ISLANDS AT SUVA

[Criminal Appeal No. AAU 0035 of 2007]
(An appeal from the Lautoka High Court Action No. HAC 023 of 2005L)

BETWEEN : DIP CHAND

APPELLANT

AND : STATE

RESPONDENT

CORAM : Byrne, A.P
Calanchini, J.A
Temo, J.A

COUNSEL : Ms. B. Malimali for the Appellant

: M. Korovou for the Respondent

DATES OF HEARING : 27th September 2010

DATE OF JUDGMENT : 19th October 2010

JUDGMENT OF THE COURT

---

[1] This is an appeal against conviction and sentence after leave was granted by a single Judge of this Court pursuant to Section 21 of the Court of Appeal Act on 18th July 2008.

[2] The appellant first appeared in the Rakiraki Magistrate's Court on 6th July 2005 where he was charged with three counts of murder. A plea was deferred because of the seriousness of the offence and to allow the appellant to seek legal advice. The appellant was remanded in custody to appear again on 15th July 2005.

[3] On that date the prosecution applied to have the matter transferred to the High Court and the appellant was further remanded in custody.

[4] The appellant first appeared in the High Court on 11th August 2005 where he was represented by a duty solicitor from the Legal Aid Commission who sought an order that the appellant be taken for Psychiatric Assessment at the St. Giles Hospital, Suva.

[5] The appellant entered a plea of not guilty on 4th October 2005 and the matter was set for trial on the 1st of May 2006.

[6] The trial began on that day and concluded on the 19th of May 2006 when the appellant was convicted of the murder of three young girls aged 19, 18, and 17 respectively.

[7] The charges against the appellant were that:

(i) Between the 26th of June 2005 and the 27th of June 2005 at Rakiraki in the Western Division the Appellant murdered Ashika Sherin Lata contrary to Sections 199 and 200 of the Penal Code, Cap. 17;

(ii) That the Appellant between the 26th of June 2005 and the 27th of June 2005 at Rakiraki in the Western Division murdered Radhika Roshini Lata contrary to Sections 199 and 200 of the Penal Code, Cap.17; and

(iii) That between the 26th of June 2005 and the 27th of June 2005 at Rakiraki in the Western Division the appellant murdered Renuka Rohini Lata contrary to Sections 199 and 200 of the Penal Code, Cap 17.

[8] A ***Voir Dire*** was conducted during the trial as a result of which the Learned Trial Judge held that an interview statement and a charge statement made by the appellant on the 4th of July and 6th of July 2004 respectively were admissible in evidence.

[9] The appellant alleged during the ***Voir Dire*** that he had been assaulted and pressure applied to him by certain Police Officers before the statements were taken and that as a result of the assaults threats and oppression, he confessed to the crimes.

[10] The ***Voir Dire*** Ruling was delivered on the 10th of May 2006 when the trial proper began.

[11] At the trial it was not in dispute that on the 26th of June 2005 the appellant took the three young ladies mentioned in the charges for a picnic and fishing around Malake Island. They were supposed to have returned around 6 pm the same day. When they had not returned, the father of the three sisters, the brother of the

appellant, and others set out to look for them the next day. They came upon the appellant's boat but only the appellant was in it. He told them that some people had come in a red boat. They had hit him and taken the girls away. They had also removed the plug wires of the engine.

[12] The appellant was then towed to land and then went to the Police Station where he made a report of his being beaten up and the three sisters being abducted.

[13] It was also agreed that an extensive search was mounted for the girls and around Malake Island by the Police and professional divers but the girls were not found.

[14] The Learned Judge directed the assessors that as these matters had been agreed between the State and the appellant, the assessors might take the matters referred to as proven.

[15] At the trial the state relied on the admissions of the appellant supplemented and reinforced by circumstantial evidence.

[16] The appellant gave evidence at the trial that what he told the Police in his statements and Mr George Shiu Raj, who was then the Minister for Multi Ethnic Affairs in Suva, that he had killed the three sisters and thrown them in the sea was not true. The appellant said he lied to "get the Police off my back". The appellant said that he had been constantly assaulted and pressured by the Police from the 27th of June till 4th of July when he confessed. The Learned Judge told the assessors that the appellant had gone home during this time but did not complain to anyone of any ill treatment.

[17] The appellant was also visited by a Justice of Peace, Mr Anil Kumar who saw the appellant privately on the 6th of July 2005 after both statements were completed. He said that he had been given proper meals and fair treatment by the Police. He was not forced to sign any confession and he had no complaints against them.

[18] The appellant said that he did not complain to Mr Kumar because he had been told by the Police not to complain to anyone and he was thus afraid.

[19] The defence also produced a Medical Report which showed that the appellant had fractures on ribs 3-7 on the left and rib 8 on the right. The appellant said this was clear evidence of being beaten.

[20] The State answered this evidence by pointing out that the medical report was dated the 14th of July whereas the appellant stated that his assault was on the 4th of July.

[21] In our judgment the assessors were entitled to conclude that the confessions which the appellant made had been made voluntarily and he had not been assaulted by the Police as he claimed.

CIRCUMSTANTIAL EVIDENCE

[22] The circumstantial evidence on which the Prosecution relied may be summarised as follows:

(i) That the appellant and three girls were the only people in the boat on the fishing trip;

(ii) The next morning, the boat was found with only the appellant in it;

(iii) That an extensive search over a number of days mounted over a large area of land and sea, failed to find the girls;

(iv) They had not been found to the date of trial;

(v) That blood stains found in the boat established that the blood of at least two of the girls was found on the jeans of the appellant and in the boat.

[23] The Defence disputed this evidence but the State called evidence of a Forensic Scientist from Adelaide, South Australia. This was in the form of a 10-page report. Summarised, the report stated:

(i) Blood stains found on the jeans of the accused matched that of Renuka Lata. The chances of it belonging to someone else unrelated were one billion to one.

(ii) The sample from the thigh of the jeans also matched that of Renuka Lata and again the chances of it being someone else's were a billion to one.

(iii) The stain on the rear left back pocket matched that of Radhika Lata. The chances of that being of someone else's unrelated were one billion to one.

(iv) The stain on the right side inner edge of the boat matched that of Radhika Lata. The chances of it belonging to another unrelated female were again one billion to one.

(v) The stain on the right side of the boat matched that of Renuka Lata. The chances of it being of some other unrelated female were also one billion to one.

[24] The defence argued that the blood analysis was inconclusive and there was no evidence of how the stains got there. Also there was no evidence of any struggle and no body had been found.

[25] The prosecution argued both in the lower Court and here that in a country of a population of less than one million people, the odds of one billion to one against them being the stains of others, was conclusive proof that, they were the blood stains of Renuka Lata and Radhika Lata. There would have been no blood if the girls had simply been abducted.

[26] The prosecution submitted that this evidence together with the fact that the stains were found on the jeans of the appellant and near the cabin invited only one rational conclusion at least in respect of these two girls, that they were killed in the boat, that this together with all the circumstantial evidence admitted only of the rational inference that all the girls were killed in the boat and their bodies dumped in the sea by the appellant.

[27] The defence also emphasised that no body had been found. If the appellant had dumped them as he confessed to have done, the bodies would have been found.

[28] If the tide took them away, the tide would have brought them back. If the killing had taken place on the boat there would have been evidence of a struggle.

[29] In answer to this submission the State argued that the appellant's story about the abduction was invented to hide the truth, something he had kept from the Police for a week.

[30] The appellant at the trial also argued that he had been provoked by the three girls who he said had made indecent suggestions about him in the boat. He alleged that one of the girls, Ashika Lata swore at him and called him a "mother fucker". This made him angry and so there was an argument and the appellant had hit her. He also said that when the other girls threw stones at him he did not realise what he was doing when he struck both the girls.

[31] The learned Judge instructed the assessors that provocation was not a complete defence but that it reduced murder to manslaughter. This is not correct. Provocation can in certain circumstances reduce murder to manslaughter but nothing hinges on this in this case because the assessors rejected it as a defence, correctly in our judgment.

[32] The above is a reasonable summary of the evidence and submissions of the parties at the trial.

THE APPEAL

[33] The appellant argued in this Court that there were several errors and misdirection in the Judge's Summing Up. He submitted that the common thread throughout it was confusion.

[34] This Court does not agree. We have read the summing up carefully and consider it was balanced and did not over-emphasise the state's case at the expense of the appellant's.

[35] The defence then submitted that the Judge's failure to direct the assessors on the appellant's medical report confirming cracked ribs was an error of law. To this, the respondent replied that the issue of the medical report could not be viewed in isolation and had to be examined in the context of the appellant's confession. The learned Judge, as we have stated above, put the appellant's submission and the reply of the respondent to the assessors, and left it to them to attach whatever weight they wished to this submission. We find that as a matter of law that was all he was obliged to do.

ALLEGED FAILURE BY THE TRIAL JUDGE TO DIRECT ASSESSORS ON THE LAW RELATING TO THE ABSENCE OF BODIES

[36] Again the Learned Judge mentioned this to the assessors and clearly told them that they should decide whether they believed the appellant's story that the girls had been abducted and not murdered or the state's claim that the appellant's admissions to the Police, which the Learned Judge had found were voluntary, indicated beyond reasonable doubt that they had been murdered.

[37] Both the appellant and the respondent referred to the English case of *R v. Onufrejczyk (1955) 1 ALL E.R. 247*. In that case the appellant had been convicted of the murder of a fellow Pole and was sentenced to death. Lord Goddard, C.J. delivered the judgment of the Court of Criminal Appeal. He said that there had, at that time, apparently been no reported case in English Law where a man had been convicted of murder and there had been no trace of the body at all but, he continued at p.248 H, "It is, we think, clear that the fact of death can be proved like any other fact can be proved by circumstantial evidence, that is to say, by evidence of facts which lead to one conclusion, provided that the Jury are satisfied and are warned that the evidence must lead to one conclusion only namely the guilt of the accused".

[38] This test was confirmed by the High Court of Australia in the later case of *Barca v. The Queen(1975) 133 C.L.R 82* where the Court held that where the case against an accused person rests mainly upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are such as to be inconsistent with any reasonable hypothesis other than guilt.

[39] It is noted that although *R v. Onufrejczyk* was mentioned in argument by the respondent it was not mentioned in any of the judgments of the High Court who relied on other cases such as *Peacock v. The King (1911) 13 C.L.R 619, Plomp v. The*

Queen (1963)110 C.L.R. and *Thomas v. The Queen (1960) 102 C.L.R 584* which all confirm the principle we have stated.

Reading the summing-up as a whole we are of the opinion that it was fair and balanced and discloses no appealable error.

[40] We therefore reject the appeal against conviction.

SENTENCE

[41] The Learned Judge in his remarks on sentence stated at the beginning of them,:

> "The three murders of which the accused stands convicted must rank among the most senseless and horrific killings in the country. The killings were done by someone who was trusted by the deceased and someone who was treated like a grandfather by them.
>
> These young innocents aged 19, 18, and 17 years had set out with the accused with the intention of enjoying themselves fishing and picnicking, little realizing that the latent jealousy harboured by the accused would rear its ugly head and stuff out their lives, before it had really begun."

[42] This court sees no reason to disagree with these statements of the Learned Judge.

[43] He then proceeded to sentence the appellant with these words:

> "I therefore sentence the accused to term of imprisonment for life on each count to be served concurrently and also to be concurrent to any other term that he may be serving.
>
> I further recommend that the accused serve a minimum period of 19 years in prison."

[44] In making those remarks, the Learned Judge overlooked the fact that until Act No. 7 of 2003 amended the Penal Code, a Trial Judge could only recommend a minimum term of imprisonment to be served by an accused person. His Lordship's attention was not drawn to this amendment and consequently if the matter were left to rest there the appellant might not have to serve a minimum of 19 years imprisonment which it is clear to us the Learned Judge wished him to do.

[45] This was an exceptionally serious case of cold-blooded murder. Under the amendment to the Penal Code, Section 33 now reads as follows:

Minimum period on sentence of imprisonment for life

"33. Where an offence in any written law prescribes a maximum term of imprisonment of ten years or more, including life imprisonment, any court passing sentence for such offence may fix the minimum period which the court considers the convicted person must serve."

[46] Under Section 22 of the Court of Appeal Act, this Court has the power to substitute a sentence imposed by a lower Court if it considers it is proper to do so. We are of the opinion that in lieu of the Learned Trial Judge's recommendation of the term of imprisonment of 19 years this Court should order, as we now do, that the appeal against the appellant's conviction is dismissed and that he has to serve a minimum term of 19 years imprisonment.

[47] There will be orders accordingly.

Dated at Suva this 19th day of October 2010.

John E. Byrne, A.P

William D. Calanchini, J.A

Salesi Temo, J.A