

IN THE COURT OF APPEAL
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 0105 of 2010
(High Court Criminal Action No. HAC 68 of 2008)

BETWEEN : **STANLEY SANJAY SUDHAKAR**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra JA**

Counsel : **Appellant in person.**
Mr L Fotofili for the Respondent

Date of Hearing : **2 September 2013**

Date of Ruling : **1 November 2013**

RULING

1. This is an application for leave to appeal against conviction.
2. The Appellant was charged with one count of murder contrary to sections 199 and 200 of the Penal Code (Cap.17).
3. After trial before the High Court at Suva, the Appellant was convicted of the charge of murder and sentenced to life imprisonment with a non-parole period of 14 years.

4. The Appellant had also applied for bail pending appeal but at the hearing of the application for the leave to appeal application he stated that he was not pursuing his application for bail pending appeal.
5. The case against the Appellant was that he had murdered his mother by striking her on the head with a torch and strangling her with her hands.
6. The Appellant in his amended leave to appeal application against conviction set out the following grounds of appeal:
 1. The learned trial Judge erred in law by failing to consider the sex composition of assessors of which two of the three were females and one male whilst the deceased was a female.
 2. The learned trial Judge erred in law by failing to consider that there was no direct evidence to prove that the accused committed the offence and that the prosecution witnesses offered inconsistent evidence.
 3. The learned trial Judge erred in law by failing to direct himself and the assessors during summing up that each element of the offence of murder should be proved beyond reasonable doubt.
 4. The learned trial Judge failed to adequately direct the assessors about the state's witnesses previous inconsistent evidence on oath and statements on oath.
 5. The learned trial judge's summing up as to circumstantial evidence was wrong and or misdirection and not according to established principles.
 6. The learned trial Judge erred in law and fact in not directing the assessors on the proper weight they should give to the appellants confession in light of the allegation of violence threat and intimidation by the police during before and after the interview.

7. The learned trial judge erred in law by failing to properly and adequately directing the assessors on the onus and standard of proof.
 8. The learned trial judge's summing up did not correctly direct the assessors on the proper method to consider the evidence and the courses open to them.
 9. That the learned trial Judge erred in law and fact when his Lordship's direction to the assessors during summing up did not effectively canvas the defense case thereby encumbering the appellant's right to a fair trial.
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7. In terms of S. 21 of the Court of Appeal Act of 1998 a person convicted in a trial before the High Court may appeal to the Court of Appeal on any ground of appeal which involves a question of law alone or with the leave of the Court of Appeal on questions of fact alone or questions of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal. In **Chand -v- State** [2008] FJCA 53; AAU0035.2007 (19 September 2008) it was stated that Leave is not required if the Appellant appeals against conviction on a question of law alone and in an application for leave to appeal the Appellant has to demonstrate that there are arguable grounds of appeal.
 8. The Appellant as well as the Respondent filed written submissions in respect of the grounds of appeal in the petition of appeal.
 9. As regards ground 1 the Appellant in his submissions raises the issue of the composition of the Assessors as regards gender. He states that since the deceased was a female, two of the three Assessors being females caused prejudice to him. According to s.224 of the Criminal Procedure Decree 2009, the trial judge has to ask the accused either personally or through his or her lawyer whether there is any objection to any of the selected assessors serving in the case. In the present case there is no record of any objection being taken up by the Appellant at the commencement of the trial when the assessors were selected. The

probability of prejudice in relation to gender of the assessors is surmised by the Appellant in formulating this ground of appeal. There is no merit in this ground of appeal.

10. Regarding ground 2, the basis is that there was no direct evidence to prove the commission of the offence and that the prosecution witnesses gave inconsistent evidence. The direct evidence that was available was the confession of the accused which was admitted after a voir dire inquiry. The inconsistent evidence complained of was as regards the evidence of Prosecution witness Abdul Shafil who had not informed the Police about seeing the accused having blood on his hands which he stated when he gave evidence in Court. The learned trial judge in his summing up to the Assessors had stated that they should treat his evidence with caution and he also set out the inconsistencies in his statement and the evidence he gave in Court. In those circumstances it cannot be said that the learned trial Judge erred in law and therefore this ground has no merit.

11. The third ground relates to the direction to the Assessors regarding the burden of proof. The learned trial Judge at the commencement of his summing up directed them on the burden of proof. The directions regarding burden of proof has been very brief in this case and there is no specific direction to the Assessors regarding the ingredients of the offence of murder. It is essential that the assessors be directed regarding the ingredients of the offence charged and that proof should be beyond reasonable doubt. The learned trial Judge in his summing up has stated that if they have a reasonable doubt about his guilt that they would find him not guilty. He has not used the phrase “proof beyond reasonable doubt” and has stated “the sole issue in this case is whether the State has proved that the accused was the murderer”. Since such directions would not suffice in a summing up this ground raised by the Appellant has merit and leave is granted.

12. The fourth ground relates to the evidence of prosecution witness Abdul Shafil, the taxi driver. The learned trial Judge in his summing up summarized the evidence of this witness and cautioned the Assessors about accepting his evidence as he had made inconsistent statements earlier to the Police. In **Gyan Singh –v- Reginam** (1963) 9 FLR 105, it was stated :

“It is the duty of the trial Judge to warn the assessors, and to keep in mind himself, that it is dangerous to accept sworn evidence is in conflict with statements previously made by the same witness; or at least, that such evidence should be submitted to the closest scrutiny before acceptance. It is, however, still the duty of the assessors, and of the judge himself, after full attention has been paid to this warning, to determine whether or not the evidence given before them in court at the trial is worthy or credence and if so, what weight should be attached to it....”

It is therefore arguable as to whether the direction given by the learned trial Judge in his summing up as regards the evidence of this witness was adequate and therefore leave is granted to appeal on this ground.

13. The fifth ground is as regards the adequacy of the summing up in respect of circumstantial evidence. In directing the assessors as regards circumstantial evidence the learned trial Judge has set out the items of circumstantial evidence in the case. But he has not adequately explained to them as to what circumstantial evidence is and what inferences could be drawn from such evidence and the summing up would appear to be inadequate. There is merit in this ground too and leave is granted.
14. The sixth ground is as regards the direction of the learned trial Judge regarding the weight to be attached to his confession. His position was that it was not a true confession as he had been threatened, intimidated and assaulted by the Police to make his statement before and after he was interviewed. He also drew the attention of the Court to the evidence of the

Justice of Peace who had seen him prior to being taken to the medical centre for examination. The learned trial Judge had ruled that his confession was admissible having considered the positions taken up by the Appellant regarding same. Further in directing the Assessors he had set out in detail the evidence of the Appellant to them and invited their attention to consider same. In those circumstances this ground of appeal has no merit.

15. The seventh and eighth grounds relate to burden of proof and the manner in which evidence has to be considered by the assessors which have been dealt above.

16. The ninth ground is as regards the consideration of the defence case and as to how the learned trial judge has dealt with same in his summing up to the Assessors. It is necessary to put before the Assessors the contentions of both sides. Lord Goddard CJ in **R –v- Clayton** (1948) 33 Cr. App. R. 22 stated :

“The duty of a judge in any criminal trial..... is adequately and properly performed..... if he puts before the jury clearly and fairly, the contentions on either side, omitting nothing from the charge, so far as the defence is concerned, upon the real matter upon which the defence is based. He must give to the jury a fair picture of the defence...”

In **Tamaibeka –v- State** (1999) FJCA 1: AAU 0015U.979 (8 January 1999) it was stated:

“A judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of his summing up. It is appropriate that he put to the assessors clearly any defects he sees in either case. But that must be done in a way that is fair, objective and balanced. If it is not, the independent judgment of the assessors may be prejudiced. If all the issues are put in a manner favourable to one party and unfavourable to the other, the assessors may feel bound to accept and follow the view expressed by the judge.”

In the present case the directions of the learned trial Judge in his summing up to the Assessors do not adequately deal with the defence of the Appellant and therefore this ground too has merit and leave is granted.

Order of Court

Application for leave to appeal is allowed.

Suresh Chandra
Resident Justice of Appeal