

**IN THE COURT OF APPEAL**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO: AAU 112 OF 2011**  
**(H Ct Case No. HAC 189/10)**

**BETWEEN** : **ABDUL AZIZ** *Applicant*

**AND** : **THE STATE** *Respondent*

**BEFORE** : **HON. MR. JUSTICE DANIEL GOUNDAR**

Counsel : Ms. N. Nawasaitoga for Applicant  
Mr. L. Fotofili for Respondent

Date of Hearing : 25 November 2013  
Date of Ruling : 02 December 2013

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**RULING**

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[1] The applicant was convicted of murder and criminal intimidation after trial in the High Court at Suva. He filed an untimely appeal against conviction. The appeal is out of time by six days. The reason for the delay is that the applicant filed the initial appeal in person from the prison and while he submitted the Notice of Appeal within time, the delay was on the part of the prison authorities in forwarding his Notice to the Registry. Since the length of the delay is insignificant, I grant the applicant an extension of time to file his Notice for Leave to appeal on grounds of mixed law and fact.

[2] The proposed grounds of appeal are:

- (1) The Learned Trial Judge erred in law and in fact when he misdirected the assessors on the law of provocation.
- (2) The Learned Trial Judge erred in law and in fact when he speculated and addressed the assessors that a person is provoked if he is caused suddenly and temporarily to lose his self-control by things that have been said and/or done by the deceased rather than just by his bad temper when there was no

evidence to support this contention resulting in substantial miscarriage of justice.

- (3) The Learned Trial Judge erred in law and in fact when he failed to address the assessors on the definition of manslaughter after addressing the assessors on the partial defence of provocation reducing what would if not murder to the lesser offence of manslaughter resulting in substantial miscarriage of justice.

[3] At the leave hearing, ground 3 was abandoned. The remaining two grounds complain of misdirections on provocation relied upon by the applicant as one of his defences at the trial. For the sake of completeness, I set out the trial judge's directions on provocation at paragraphs [24] to [27] of the summing-up:

24. Provocation has a special legal meaning, and you must consider it in the following way.
25. Firstly, you must ask yourselves whether the Accused has provoked in the legal sense at all. A person is provoked if he is caused suddenly and temporarily to lose his self-control by things that have been said and/or done by the deceased rather than just by his own bad temper. The Accused says that the deceased threw a stone at him.
26. If you believe the story of the Accused and if you are sure that the Accused was or might have been provoked, in the sense which I have explained, you must then go on to weigh up how serious the provocation was for this Accused. Is there anything about this Accused which may have made what was [said and/or done] affected him more than it might have affected other people?
27. Finally, having regard to the actual provocation and to your view of how serious that provocation was for this Accused, you must ask yourselves whether a person having the powers of self-control to be expected of an ordinary, sober person, of the Accused's age and sex, would have been provoked to lose his self-control and do as this Accused did. If you are sure that a person would not have done so, the prosecution has disproved provocation, and the Accused is guilty of murder. If, however, you conclude that such a person would or might have reacted and done as the Accused, your opinion would be 'not guilty of murder, but guilty of manslaughter by reason of provocation'.

[4] The first contention of the appellant is that the trial judge failed to direct on the reasonable man test that applies to the defence of provocation. In a recent ruling in

*Nikasio Tupou v. The State* Crim. App. No. AAU107/11 (29 November 2013), I pointed out that the reasonable man test is not part of the provocation law in Fiji. The test in Fiji is the ordinary man test, that is, ‘whether the accused caused the death of the deceased in the heat of passion caused by sudden provocation having reacted to a wrongful act or insult of the deceased which was of such a nature as to be likely to deprive an ordinary person of the power of self control and to induce him or her to commit an assault before there is time for cooling of the passion so aroused’ (*Pravin Ram v. The State*, CAV001 of 2011). It is clear from the summing-up that the trial judge gave the correct directions using the ordinary man test on provocation. This ground is not arguable.

- [5] The second contention relates to the use of the phrase ‘bad temper’ when directing on provocation. Counsel for the applicant submits that there was no evidence of bad temper and that the trial judge should have confined to the statutory definition of provocation under section 242 of the Crimes Decree. No authority has been quoted by counsel to support this submission.
- [6] The direction that ‘a person is provoked if he is caused suddenly and temporarily to lose his self-control by things that have been said or done by the deceased rather than just by his own bad temper’ is a direction on law and not on the facts. The trial judge did not suggest the applicant had anger issues. It is a direction that has been approved in the Specimen Directions of the Crown Court Bench Book, England. There cannot be an arguable point that the said direction is wrong in law. It is a correct direction in law.

### **Result**

- [7] Leave to appeal against conviction is refused.





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Daniel Goundar  
**Justice of Appeal**

### **Solicitors:**

Office of the Legal Aid Commission for Applicant  
Office of the Director of Public Prosecutions for State