IN THE COURT OF APPEAL
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0063 OF 2010
[High Court Case No. HAC 54 of 2009]

BETWEEN	:	**MESULAME WAQABACA** **TIKO UATE** ***Appellants***
AND	:	**THE STATE** ***Respondent***
Coram	:	Calanchini P Almeida Guneratne JA Goundar JA
Counsel	:	Ms S. Vaniqi for the 1st Appellant Mr. J.Savou for the 2nd Appellant Mr. S.Vodokisolomone for the Respondent
Date of Hearing	:	17 November 2015
Date of Judgment	:	3 December 2015

JUDGMENT

Calanchini P:

I have read in draft the judgment of Goundar JA and agree that the appeals should be dismissed for the reasons stated in his judgment.

Almeida Guneratne JA:

I have read in draft the judgment of Goundar JA and agree that the appeals should be dismissed for the reasons stated in his judgment.

Goundar JA:

[1] The appellants were jointly charged with three others on one count of murder contrary to sections 199 and 200 of the Penal Code, Cap. 17. Following a trial in the High Court at Suva, the appellants were convicted of murder while the others were acquitted. Mesulame Waqabaca (the first appellant) was sentenced to life imprisonment with a minimum term of 14 years. Tiko Uate (the second appellant) was sentenced to life imprisonment with a minimum term of 12 years.

[2] Both appellants applied for leave to appeal against conviction. After hearing, a single justice of appeal granted the first appellant leave on the following grounds:

> *i. Whether the direction to the assessors on the defence of intoxication was adequate; and*
>
> *ii. Whether the direction to the assessors was sufficient as regards manslaughter given the circumstances of the case.*

[3] The second appellant was also granted leave on the grounds:

> *1. That the learned trial judge erred in law and in fact in not adequately directing the assessors in respect of the law regarding the charge of murder.*
>
> *2. That the learned trial judge erred in law and in fact, given all the circumstances of the case, the charge of murder should be reduced to manslaughter.*

Facts

[4] During the trial, both appellants pled not guilty to murder but guilty to manslaughter in the presence of the assessors. Their guilty pleas to manslaughter were not accepted by the State and the trial proceeded on the murder charge.

[5] The background facts were not disputed by the appellants. The victim was a male hairdresser. He worked in a hair salon in Nausori, but lived in Makoi, Nasinu. At the time

of his death, the victim was 31 years. The appellants were in their early twenties and lived in the same neighbourhood as the victim.

[6] The alleged incident took place on 16 May 2009 at about 8 pm when the victim was returning home from work. After getting off a bus at the main road, the victim took a dirt track that led to his home. The appellant and others were apparently drinking liquor at a spot close to the Makoi Methodist School. In his caution interview, the appellant told the police that he started to drink with others around midday after a game of rugby. He started with a bucket of homebrew and then shared three cartons of beer with his friends. After drinking beer, the appellant moved to the place where the alleged incident occurred and drank a bottle of rum (26 ounce) with others. It appears that the group had run out of liquor when the first appellant noticed the victim walking down the track. The plan to attack the victim was initiated at that moment by the first appellant. The second appellant agreed with the plan. It appears that others did not agree with the plan and they did not get involved in assaulting the victim.

[7] Both appellants acted on their plan. The first appellant approached the victim and punched him. The victim fell on the ground. In order to restrain the victim, the second appellant pressed his neck and head down while the first appellant continued to punch the victim with his fist. Little resistance was offered by the victim while he was restrained and being punched. There was evidence that the victim had his face covered with his hands when he was on the ground and being punched. One of the boys in the group tried to intervene to stop the violence, but he was chased away by the first appellant. The violence stopped when the first appellant noticed the victim gasping for breath. The second appellant snatched the victim's mobile phone before fleeing the scene together with the first appellant. The phone was later discarded near a creek but recovered by the police. A third accused who was acquitted of the charge said that he took off the clothes of the victim while he was unconscious to embarrass him. This accused also noticed that the victim had defecated in his pants.

[8] At around 10pm on the same night, the victim's naked body was discovered by one Filipe Biuqali. It was an agreed fact that when this discovery was made, the victim was dead. The estimated time of death according to the pathologist was 9 pm. Post mortem revealed a cut over the left brow at the outer edge measuring 210mm x 70mm. Internal injuries were noted on the scalp and skull as follows:

1. *On dissecting the scalp, there is hemorrhage in the left temporal muscle.*
2. *Left petrous part of the temporal bone has hemorrhage into it.*
3. *There is extensive subarachnoid hemorrhage over bilateral cerebrum.*
4. *There is extensive subdural hemorrhage over pons and medulla oblogata.*

[9] According to the pathologist, the victim died of brain injuries consistent with a heavy blow to the head with a fist. In his caution interview, the first appellant admitted punching the victim in his stomach and ribs. He also said that although he was drunk, he knew what he was doing to the victim. In his caution interview, the second appellant denied punching the victim. He admitted restraining and robbing the victim.

Mesulame Waqabaca's Appeal

[10] The two grounds concern inadequacy of direction on intoxication and manslaughter. The impugned direction on intoxication is set out at paragraph 15 of the Summing Up:

> *"The consumption of homebrew and liquor had been a major part of this case, prior to the alleged murder. Counsels have also touched on the topic during their submissions. As a matter of law, intoxication is no defence to a criminal charge. However, you must take it into account, as one of the many factors to be considered, when ascertaining the accuseds' intentions as mentioned in paragraph 9(iii) (a), (b) and (c) above. Since the prosecution is not relying on paragraphs 9(iii) (a) and (b) in proving its case, you must take intoxication into account, as a factor to be considered, when ascertaining the accuseds' knowledge in paragraph 9(iii) (c)."*

[11] The impugned direction on manslaughter was explained with reference to the mental element for murder at paragraphs 12-13 of the Summing Up:

> *"The third element of murder is outlined in paragraphs 9(iii) (a), (b) and (c) which concerned the accuseds' mental state at the time of committing the unlawful act. As a matter of common sense, no one can look into a person's brain, to ascertain the person's intention, at the time of him doing the unlawful act. Nevertheless, his intentions could be inferred from his physical actions and spoken words, and the surrounding circumstances. You must put yourselves in the shoes of the accuseds, and from his physical actions, spoken words, and the surrounding circumstances, you will be able to ascertain his intentions at the time, he was doing the unlawful act.*
>
> *In this case, you will not be required to decide on the accuseds' mental state in paragraph 9(iii) (a) and (b), because the prosecution is not running its case on these mental states. It had the option to do so, but it choose not to do so. The prosecution is simply relying on the mental state mentioned in paragraph 9(iii) (c), to prove its case against the accuseds, beyond reasonable doubt. So, when referring to the example we discussed in paragraphs 10 and 11 above, if the prosecution proved that when I threw the punch at the person's at the person's head, I knew at the time, that death or serious injury would be caused on the person, but nevertheless I threw the punch at him, I would be guilty of murder, because they have satisfied beyond reasonable doubt the mental element mentioned in paragraph 9(iii) (c)."*

[12] Counsel for the first appellant submits that the directions are inadequate because the assessors were not told that if they found the appellant did not have the requisite mens rea for murder due to his state of intoxication at the time of the offending, then they may find the appellant not guilty of murder but guilty of manslaughter. At trial, the parties were given an opportunity to seek re-directions after the Summing Up was delivered. Counsel for the appellant did not seek any re-directions. No explanation was offered for not seeking re-directions on matters which are now appealed. One can only assume that by not seeking re-directions, counsel for the appellant did not find the alleged inadequacy in the directions on intoxication and manslaughter significant.

[13] Intoxication as a defence to a criminal charge is governed by section 13 of the Penal Code, Cap. 17. Section 13 provides:

"13.-(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –

(a) The state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) The person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section "intoxication" shall be deemed to include a state produced by narcotics or drugs."

[14] Intoxication in the present case was voluntary and self induced. Section 13(2) did not apply. The appellant relied upon section 13(4). Section 13(4) applies to self induced intoxication. But the operation of section 13(4) is restricted to acts that require proof of any intention, specific or otherwise. In other words, intoxication can be taken into account to determine whether the accused had formed the intention required for the alleged offence due to his state of intoxication. It could be argued that the phrase "any intention, specific or otherwise" applies to both specific and general intent and that section 13(4) is not restricted to specific intent offences like in England (**Attorney General for Northern Ireland v Gallagher** [1961] 3 A11 ER 299, **DPP v Majewski** [1976] 62 Criminal Appeal R. 262).

[15] The question whether self induced intoxication should be restricted to specific intent offences was considered by the courts in New Zealand and Australia. In **R v Kamipeli** [1975] 2 NZLR 610, the accused was charged with an offence that required proof of intention or recklessness. In that case, the New Zealand Court of Appeal observed that the evidence of intoxication was relevant to the question whether the accused acted with the intention or recklessness required by the charge and said at p 614 that no distinction should be drawn between cases where a general intent suffices and those where a particular intent is required. Similarly, in **R v O'Connor** (1980) 146 CLR 64, the High Court of Australia in a majority judgment supported a general rule that self induced intoxication may be relied on in support of a denial of any required mental element, including a basic intent, or a requirement that conduct be conscious and voluntary.

[16] In the present case, the prosecution did not allege that the first appellant had the specific intent to kill or cause serious harm when he carried out his unlawful act. The prosecution alleged that the first appellant knew that his unlawful act of assaulting the victim in the head with a fist would cause serious harm. It could be argued that the legislative provision in Fiji precludes the application of self-induced intoxication when the mental element alleged for murder is not intention but knowledge. But in my judgment, there would be practical problems with this narrow interpretation of section 13(4) of the Penal Code Cap. 17. The difference between intention and knowledge, at times, can be blurred in murder cases. There are cases where one could argue that an accused had both murderous intent and knowledge. In those cases, where does the trial judge draw a line between intention and knowledge when deciding whether intoxication applies or not? Also, there is no logic in saying that intoxication reduces criminal responsibility for murderous intent but not for knowledge.

[17] The trial judge correctly drew the attention of the assessors that consumption of alcohol had been a major part of the case prior to the alleged offending and that they must take intoxication into account when ascertaining the accused's knowledge in paragraph 9(iii) (c). Unfortunately, the trial judge did not remind the assessors what he had said in

paragraph 9(iii)(c) of his Summing Up. The direction also fell short of telling the assessors that they could find the appellant guilty of manslaughter if they found the appellant did not know that his act would probably cause death or serious harm. The question is whether there has been a miscarriage of justice.

[18] When the Summing Up is read as a whole, it was made clear to the assessors that intoxication was relevant in determining whether the appellant knew that his act would cause serious harm to the victim and if they had reasonable doubt regarding that state of mind, then they were obliged to find the appellant not guilty of murder but guilty of manslaughter. There was evidence from which an inference could be drawn that the appellant knew his unlawful act would cause serious harm to the victim. The most crucial evidence that supported this finding was the appellant's caution interview where he said that he knew what he was doing to the victim. The appellant also gave a coherent account of his actions leading to the assault of the victim. In my judgment, it was open to the assessors and the trial judge to infer that the appellant knew his act would cause serious harm to the victim despite his state of intoxication. I am satisfied that there is no risk of miscarriage of justice having resulted by any inadequacy in the directions on intoxication and manslaughter. For these reasons, the grounds of appeal fail.

Tiko Uate's Appeal

[19] I deal with the second appellant's grounds together. The first ground alleges that the trial judge did not adequately direct the assessors in respect of the law on the murder charge. However, at the hearing of the appeal, counsel for the appellant did not take any issue regarding the law on murder as it existed when the offence was committed. The gist of the second appellant's complaint relates to the use of examples by the trial judge to explain the elements of murder. It was argued on behalf of the second appellant that the trial judge used examples that supported the prosecution case, and that the defence case was not adequately put to the assessors.

[20] At trial, like the first appellant, the second appellant also pled guilty to the lesser offence of manslaughter in the presence of the assessors. The guilty plea to manslaughter clearly

indicated that the second appellant did not dispute that he was responsible for the death of the victim. His contention was that he did not intend to cause death or grievous harm, or he did not have knowledge that his unlawful act would cause death or grievous harm. He relied on his caution statements to show that his intention was only to rob the victim and not to kill or cause serious harm to him. His defence was that he lacked the prerequisite intent or knowledge to be guilty of murder.

[21] In explaining the elements of murder, the trial judge did use examples based on the prosecution case, but in directing on the second appellant's defence, the trial judge clearly explained to the assessors that the appellant's defence was that he did not contemplate any serious harm to the victim. The guilty verdict means that the assessors and the trial judge did not accept the second appellant's defence. The evidence was that when the victim was being punched by the first appellant, the second appellant had restrained the victim by pressing his neck.

[22] In his Summing Up, the trial judge clearly left the alternative charge of manslaughter to the assessors on the basis that if they were not satisfied that the appellants had the knowledge that their unlawful act would result in death or serious harm, then they may return a verdict of not guilty of murder, but guilty of manslaughter. The lesser verdict of manslaughter was rejected by the assessors and the trial judge. On the evidence led by the prosecution, it was open to the assessors and trial judge to find that the appellant knew his unlawful act would result in a serious harm to the victim. The grounds of appeal fail.

[23] For the reasons given in my judgment, I would confirm the conviction of both appellants and dismiss their appeals.

Order of the Court:

Appeals dismissed.

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Hon. Mr. Justice William Calanchini
PRESIDENT

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Hon. Mr. Justice Almeida Guneratne
JUSTICE OF APPEAL

.....
Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

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