

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

CRIMINAL APPEAL NO. AAU 107 OF 2011
(High Court No. HAC 047 of 2010)

BETWEEN : **NIKASIO TUPOU** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Calanchini P**
Gamalath JA
P. Fernando JA

Counsel : **Mr. J. Savou with Mr. A. Chand for the Appellant**
Mr. M. D. Korovou for the Respondent

Date of Hearing : **14 November, 2016**

Date of Judgment : **29 November, 2016**

J U D G M E N T

Calanchini P

1. I have had the opportunity to read the draft judgment of Gamalath JA and agree that the conviction should be set aside and a new trial ordered.

The Background

2. On 4 February 2010, around 1pm the appellant using a cane knife caused several severe cut injuries to the deceased, who was his de facto partner. According to the evidence in the case, at the time of this incident the deceased was pregnant by the appellant. Initially, the whole episode started as a result of an estrangement of their relationship. It appears from the evidence that when the argument reached the boiling point the appellant resorted to violence by inflicting cut injuries with a cane knife which he picked up from his own house. During the attack the deceased received over twenty cut injuries, and four of them were described by the medical officer who conducted the post mortem examination as necessarily fatal. The attack started inside the house of the appellant and it appears that being chased from behind by the appellant who continued to inflict more cut injuries, the deceased had run for her life and collapsed in the front yard of the appellant's house where she breathed her last.
3. Luisa Mocea, who is an immediate neighbor of appellant, being alerted by the wailing of the deceased stepped out of her house to witness the unfolding tragedy in the appellant's yard, where the continuation of the stabbing took place.
4. Ramaswamy Ponnuswamy Goundar, the Director of Fiji Institute of Forensic Science, who conducted the post mortem on the deceased, had explained in detail the 20 cut injuries, and four of them were described as necessarily fatal. Particularly, the injury to the skull was identified as an injury with which the deceased's fate must have been sealed.
5. The Appellant faced the trial in the High Court at Suva on a charge of Murder, contrary to Section 237 of the Crimes Decree No. 44 of 2009.

6. The nature of the evidence upon which the prosecution placed reliance was uncomplicated and straightforward.

The Defence

7. It is evidence in this case that soon after resorting to this act of violence the Appellant had tried to take his own life by suffocating by the use of a wire. His mother and the relatives have intervened and rescued him.
8. Whether or not the act of attempted suicide should be considered as a genuine reflection of his remorse, the appellant's consistent version in explaining his violent behavior had been that he lost self-control as a result of being suddenly provoked by the conduct of the deceased.
9. Relying on the defence of provocation at the High Court trial the appellant took up the position that the incessant rage with which he hacked the deceased was caused by the compromising position in which he found the deceased with an unknown man in his own bedroom, under his own roof. This unknown man, having seen the arrival of the appellant had taken to his heels and bolted out of the house.
10. It is clear from the proceedings in the High Court trial that there had been clear evidence to consider 'the defense of provocation' as an extenuating factor.
11. Therefore, in the circumstances it is a primary duty of any trial court to deal with the defense of provocation to the exact precision and to guide the assessors accurately, *inter alia*, with regard to not only on the conceptual matrix of provocation as a defense, but also on issues such as how does the burden of proof operate in a situation where the defense of provocation is raised, and the standard of proof as per the principle of law requires .

12. In this instant appeal very clearly the Learned Trial Judge has failed to fulfill this requirement . His approach to the entire case reveals some fundamental mistakes on many matters including the correct interpretation of some basic matters such as Murder, Manslaughter and even the interpretation of the defence of provocation. As it should be obviously expected the approach adopted by the Learned Trial Judge had a serious impact on the final outcome of the trial. It is based on such process of evaluation only the final conclusions on this appeal shall be drawn.

The Grounds of Appeal

13. Altogether there were four grounds of Appeal on which the appellant relied in assailing the conviction and sentence passed on him;
- (1) That the Learned Trial Judge erred in law and in fact when he misdirected the assessors on the law of provocation.
 - (2) That the Learned Trial Judge erred in law and in fact when he speculated and addressed the assessors to consider that the alleged offending was committed in revenge or by way of retaliation when there was no evidence to support this contention resulting in substantial miscarriage of justice.
 - (3) That the Learned Trial Judge erred in law and in fact when he speculated and addressed the assessors to consider that the alleged offending was committed due to the jealousy when there was no evidence to support this contention resulting in substantial miscarriage of justice.
 - (4) On the issue of the Sentence ;
That the Learned Trial Judge erred in principle in ordering 16 years of non-parole period by not taking into account the fact the appellant himself was a victim of deceit, betrayal and distrust by the deceased.
14. The Learned Single Judge having delved into the grounds had correctly decided that the grounds of appeal are based on sound reasons and accordingly the leave to proceed was granted on 29 November 2013.

The fundamental issues involved in the appeal

15. It is obvious that the Learned Trial Judge's directions to the assessors on the interpretation of the offence of Murder was completely erroneous; the Learned Trial Judge, due to an obvious mistake left the assessors with the following interpretation on Murder;

Page 3 of the Summing up:-

"[8] The offence of murder has three elements which prosecution must satisfy you beyond reasonable doubt. They are:

- 1. That the accused did an unlawful act.*
- 2. That this unlawful act caused the death of the victim.*
- 3. That the accused acted with malice aforethought."*

16. Similarly, the Learned Trial Judge parted with the assessors a wrong interpretation of the term Provocation.

Paragraph 17 – 21:

"[17]. The only matter to be discussed is the defence of grave and sudden provocation.

[18]. Oxford Advanced Learners Dictionaries New 7th Edition defines provocation as 'the act of doing or saying something deliberately to make somebody angry or upset; something that is done or said to cause this.

[19]. The English Lexicon defines provocation as 'being provoked to commit a crime or to carry out an action which you had not intended.

[20]. Provocation is a word that has a special meaning in the context of the criminal law. It means a wrongful act done towards the Accused of such a nature as to be likely to deprive the Accused of the power of self-control and to induce him to commit murder. It is for the State to prove that the Accused was not provoked to kill the deceased; it is not for the accused to prove that he was.

[21]. The law says that where a person unlawfully kills another in the heat of passion caused by sudden provocation and before there is time for his passion to cool he should be found not guilty of murder but guilty of manslaughter."

17. Undoubtedly this is a misdirection of serious nature. The impact that it may have had on the assessors should taint their objectivity expected to have throughout the trial and in arriving at a correct conclusion with regard to the issues involved in this case.
18. Compounding the confusion further, the Learned Trial Judge had tried to take corrective steps towards the final part of the summing up.

Accordingly, towards the last parts of the Summing up, having been informed by both learned counsel for the appellant as well as the State Counsel that his directions should be corrected to be compatible with the correct provisions of the relevant laws, the Learned Trial Judge made attempts to rectify the situation by citing the correct sections of law as found in Sections 237 and 242 of the Crimes Decree 2009. It seems that in doing so he had perfunctorily read over the said sections of law and left the rest for the assessors' conjecture. I have no doubt to think that this must have left the assessors in a state of complete confusion.

19. While seemingly glossing over the whole thing in a rush, in one terse sentence the Learned Trial Judge had invited the Assessors to replace the term 'malice aforethought' with 'intent to cause', the correct terminology as one finds in Section 237 of the Crimes Decree. This is obviously unsatisfactory to say the least.
20. Obviously, the Learned Trial Judge had made a genuine mistake due to either an oversight or even due to ignorance of the existence of the legal definitions of the relevant words and phrases as contained in the Crimes Decree 2009.
21. These matters taken together have caused a serious miscarriage of justice in this case.
22. It is axiomatic that in a case of this nature, it is the bounded duty of the Learned Trial Judge to explain in simple words, with clarity and accuracy, the law as it stands relevant to the issues involved in the case.

Rather than directing the assessors on the correct path it seems as the learned trial Judge himself had been not clear in his mind as to what the correct law should be in relation to the issues of this case.

Misdirections on facts

23. In the summing up the learned trial Judge had concluded at one point that the appellant became violent due to feelings of jealousy. There is no factual basis to support this position.

Non Directions

24. Apart from giving wrong directions on provocation he had failed completely to explain the issue of the burden of proof, *vis-à-vis* provocation as a defense; no directives have been given on the interpretation on 'an ordinary man's test', as laid down in Section 242(1)(2) of the Crimes Decree 2009. This is undoubtedly a fundamental error in the summing up.
25. Further, there is clearly no directions that had been left for the consideration of the assessors as to what it means in law 'to deprive him or her of the power of selfcontrol.'
26. There mistakes are galore in the approach taken by the Learned Trial Judge and they are all mis-directions or non-directions tantamount to misdirections capable of causing a serious miscarriage of justice.

The final outcome of the trial

27. On 13 December 2010, the Assessors returned a verdict of guilty for murder. It was a unanimous verdict. Based on the verdict the learned Trial Judge convicted the Appellant for murder.
28. On 16 December 2010, the learned High Court Judge sentenced the appellant for life imprisonment, and fixed 16 years of non-parole period.
29. As discussed earlier, the judgment of the High Court had been based on fundamentally wrong principles of law. The misdirections on the whole had made the verdict unsupportable.
30. In the presence of the misdirections referred to above, there is no doubt that the conviction should be set aside. However, the facts as unfolded in this case present a serious case of killing of a pregnant woman and the appellant's liability for committing the crime should still be carefully adjudged by a properly guided court of law. In the circumstances, the conviction for murder should be set aside.
31. Moreover, the consistent assertions of the appellant has been that he resorted to violence under grave and sudden provocation. The truth or otherwise of these assertion should still be decided at a properly guided trail. To take that away completely from the judicial process will not be in the interest of justice. In the circumstances, in this case a new trial is ordered.

Fernando JA

32. I agree with the conclusions of Gamalath JA.

Order of the Court

1. *Conviction for Murder set aside.*
2. *In the interest of justice a new trial ordered.*

W. Calanchini

**Hon. Mr. Justice Calanchini
PRESIDENT, COURT OF APPEAL**



Andreas

**Hon. Mr. Justice Gamalath
JUSTICE OF APPEAL**

P. Fernando

**Hon. Mr. Justice P. Fernando
JUSTICE OF APPEAL**