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

CRIMINAL APPEAL NO.AAU 071 of 2019
[In the High Court at Suva Case No. 377 of 2017]

BETWEEN	:	**STATE**
		Appellant
AND	:	**NOA RAVUTANASAU** **MELACI TIKOMAIRARATOGA**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Vosawale for the Appellant**
	:	**Ms. S. Nasedra for the Respondents**
Date of Hearing	:	**19 March 2021**
Date of Ruling	:	**22 March 2021**

RULING

[1] The respondents had been charged in the High Court of Suva on a single count of murder contrary to section 237 read with section 45 of the Crimes Act, 2009 committed on 30 November 2017 at the Total Service Station car park at Suva in the Central Division. The charge read as follows.

'Statement of Offence

MURDER: *Contrary to Section 237 read with section 45 of the Crimes Act of 2009.*

Particulars of Offence

NOA RAVUTANASAU and MELACI TIKOMAIRARATOGA *on the 30th day of November 2017, at the* ***TOTAL SERVICE STATION*** *car park at Suva in the Central Division as joint principles or either aiding and abetting the other murdered* ***RUSIATE VAKALAKOVI.***

[2] After the summing-up on 14 November 2019 the majority of assessors had opined that the respondents were not guilty of murder but guilty of manslaughter. In the judgment delivered on 20 November 2019 the learned trial judge had disagreed with the majority of the assessors and acquitted the respondents.

[3] The state had filed a timely appeal against acquittal on 13 December 2019 and written submissions on 13 August 2020. The Legal Aid Commission had filed written submissions on behalf of the respondents on 24 December 2020.

[4] In terms of section 21(2)(a) & (b) of the Court of Appeal Act, the appellant could appeal against acquittal without leave on a question of law alone and with leave of court on a question of mixed law and fact respectively. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[5] The sole ground of appeal against acquittal urged on behalf of the appellant is as follows.

> ***Ground (a)*** - *That the verdicts of acquittal are unreasonable and cannot be supported having regard to the evidence in that:*
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> *(i) it was not properly open to a reasonable judge to find that either of the Respondents may have honestly believed that their conduct in continuing to assault the defenseless deceased on the ground was necessary to defend themselves.*
>
> *(ii) it was not properly open to a reasonable judge to find that the conduct of both of the respondents in continuing to assault the defenseless deceased on the ground was a reasonable response in the circumstances as he or she perceived them.*

[6] The summary of evidence set out in the judgment read as follows.

> *5. The prosecution alleges the first and the second accused had assaulted the deceased on his face and stomach by punching, kicking and stepping on, in the early morning of the 30th of November 2017 at the car park of Total Service Station. The said assaults by the first and second accused had ruptured and damaged the liver of the deceased and also caused severe injuries to the head of the deceased, causing hemorrhage in the brain of the deceased. Due to these injuries the deceased had succumbed to death.*
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> *6. The defence through their cross examination of the witnesses of the prosecution tries to establish the first and second accused had acted in self-defense as the deceased came and assaulted them.*
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> *7. According to the evidence presented by the prosecution, the deceased had started swearing at the first accused when he was going to the car park with the second accused. The deceased was at the railings when he started swearing at the first accused. The first accused had told the deceased on several occasions that he does not want to fight with the deceased. However, the deceased kept on coming towards the first accused, swearing and challenging him to fight. The deceased had told that he was not afraid of the built of the first accused. When the first accused ignored and said that he does not want to fight, the deceased had punched the first accused on his face with his both hands. The first accused had fallen down on the ground. The deceased had kept on punching the first accused even after he fell down on the ground. The second accused had tried to stop the deceased and in that process she was also got punched by the deceased.*
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> *8. According to the evidence of Mr. Sakopo, when the first accused got up, the deceased was still challenging the first accused to fight. The first accused then punched the deceased when he came towards the first accused lifting his fist up in the air. There is no specific evidence whether the first accused had punched the deceased twice or more. The deceased then fell down and the first accused and the second accused then kicked the deceased.*
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> *9. According to Mr. Leone, who went and helped the deceased, the deceased was aggressive. The deceased wanted to fight with Leone as well and had punched Leone when he tried to take the deceased to the hospital.*
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> *10. Mr. Sakopo who claimed in his evidence that he saw the entire incident, initially said the first accused not only kicked the deceased but also stepped on the stomach of the deceased. However, during the cross examination, Mr. Sakopo changed his earlier version and said the first accused never stepped on the deceased. The evidence of Mr. Dharmendra and Mr. Bainivalu are not precise to confirm whether they have actually saw the incident clearly. Mr. Dharmendra said that his view of the incident was obstructed by the crowd. Mr. Bainivalu is not specific whether he saw the incident or he heard the sounds of punching and shouting.*

Ground of appeal

[7] It is clear that the main issue to be resolved in this appeal is whether the respondents were acting in self-defense in attacking the deceased though they had not testified that they were acting in self-defense. Section 42(2) of the Crimes Act, 2009:

> *"A person carries out conduct in self-defense* ***if and only if*** *he or she believes the conduct is necessary:*
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> *(a) to defend himself or herself or another person; or*
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> *(b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or*
>
> *(c) to protect property from unlawful appropriation, destruction, damage or interference; or*
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> *(d) to prevent criminal trespass to any land or premises; or*
>
> *(e) to remove from any land or premises a person who is committing criminal trespass —*
>
> *and* ***the conduct is a reasonable response in the circumstances as he or she perceives them.***"

[8] It was held in **Naitini v State** [2020] FJCA 20 AAU135 of 2014, AAU 145 of 2014 which in turn had quoted from **Vasuitoga v State** [2013] FJSC 1; CAV001 of 2013 (29 January 2016) regarding the duty of the trial judge when self-defense is relied upon by an accused.

> *'[28] It is settled that when an accused relies on self-defence, the trial judge should direct the assessors to consider whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds. As the Privy Council said in* ***Palmer v The Queen*** [1971] AC 814, *831-832:*
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> > *"The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable ground that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal."*
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> *[29] In* ***State v Li Jun*** *unreported CAV0017/2007S; 13 October 2008 Sackville JA referred to the English and Australian authorities on self-defence and said at [46]:*

"It is important to appreciate that the test stated in Zecevic is not wholly objective. It is the belief of the accused, based on the circumstances as he or she perceives them to be, which has to be reasonable."

[30] We also refer to what Lord Lowry CJ said in ***R v Browne*** *[1973] NI 96 which is cited in the unreported decision of the English Court of Appeal of* ***Balogun*** *[1999] EWCA Crim. 2120. Lord Lowry said at p 106:*

"To justify killing or inflicting serious injury in self-defence the accused must honestly believe on reasonable grounds that he is in immediate danger of death or serious injury and that to kill or inflict serious injury provides the only reasonable means of protection."

[9] In **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) Calanchini P said of section 42(2) of the Crimes Act, 2009 as follows.

[30] The defence of self-defence is now, as a result of the words "if and only if", available as a statutory defence. The defence will exonerate an accused person in the event that the prosecution fails to establish beyond reasonable doubt that the conduct of the accused was not a reasonable response to the circumstances as they were perceived by the accused. This is the only basis upon which the use of force in self-defence will negate criminal responsibility for an offence.

[31] The common law defence of self-defence was discussed in the judgment of Sackville J in ***The State –v- Li Jun*** *(unreported CAV 17 of 2007; 13 October 2008). Although the judgment of Sackville J was a dissenting judgment, the judgment of the majority does not appear to take issue with the principles to be applied by a trial judge when directing the assessors and himself on self-defence. Sackville J having formed the view that although it may be possible that there are some differences between the common law of self-defence in England and Australia concluded that they were not material to the appeal before the Supreme Court in that case. The Supreme Court was concerned with a petition for leave to appeal against conviction for murder of four family members where the defences of self-defence (at common law) and provocation were in issue. Sackville J referred to the decision of the High Court of Australia in* ***Zecevic –v- DPP*** *[1987] HCA 26; (1987) 162 CLR 645 at 661 and concluded that there was no inconsistency with the statements made by the Privy Council in* ***Palmer v The Queen*** *[1995] 1 AC 482. Sackville J then made the following observations as to the nature of the test for self-defence at common law in paragraph 46:*

"It is important to appreciate that the test stated in Zecevic is not wholly objective. It is the belief of the accused based on the circumstances as he or she perceives them to be, which has to be reasonable. The test is not what a reasonable person in the accused's position would have believed. _ _ _ It follows that where self-defence

is an issue, account must be taken of the personal characteristics of the accused which might affect his appreciation of the gravity of the threat which he faced and as to the reasonableness of his or her response to the threat."

'[32] There is in my judgment no inconsistency between the common law principles of self-defence and section 42 of the Decree.

[33] In my judgment the summing up did not adequately explain the subjective element of the test under section 42 of the Decree. The actions of the Appellant will be considered necessary for the purposes of self-defence if the conduct was a reasonable response in the circumstances as they were perceived by the Appellant. In my judgment the summing up does not direct the minds of the assessors or the Judge himself to the importance of the Appellant's perception of the threat that he faced on the afternoon of 10 September 2011. There is in the summing up an emphasis on the objective nature of the test. For example, the assessors were told that in considering whether the accused acted reasonably you must ask yourself what a reasonable man in the accused's shoes would have done to defend himself. It was not made sufficiently clear that the issue of whether the conduct was necessary must he considered in the context of reasonableness which in term had to be determined by reference to the Appellant's perception of the threat that he faced. The Appellant's defence had at all times been that as an immediate response to the stone hitting him he had swung the cane knife in the direction of the deceased.

[10] In **Naravan v State** [2020] FJCA 189; AAU0610.2017 (6 October 2020), I had the occasion to remark:

*'[14] In my view, in the case of a defense of self-defense the primary question similar to that of provocation is whether such a defence arises on the evidence – or to be more precise, whether there is "a credible narrative of events suggesting the presence of" such a defence [see the decision of the Privy Council in **Lee Chun Chuen v R** [1963] AC 220 and Fiji Supreme Court decision in **Naicker v State** [2018] FJSC 24; AAV0019.2018 (1 November 2018)]. If and when the factual matrix giving rise to 'self-defense' is believed, the assessors have to then consider whether it could be said that the accused believed upon reasonable grounds that it was necessary in self-defense to do what he did. If the accused had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. **However, the test is not wholly objective and it is the subjective belief of the accused based on the circumstances, as perceived by him, that counts but that belief should be objectively reasonable in those circumstances that he was in immediate danger of death or serious injury and that to kill or inflict serious injury provided the only reasonable means of protection.** The fact that an appellant has taken up 'self-defense' in his evidence does not necessarily make it a credible story and the assessors should always act upon it.*

[11] The trial judge had directed the assessors to consider the issue of self-defense at paragraphs 66-70 and asked them to find the respondents not guilty if they had acted in self-defense. The trial judge particularly said:

> *[69] If you are sure that the two accused were the aggressors and do not believe they were under threat from the deceased then no question of self-defense arises. If, however, you consider it was or may have been the case that the accused were or believed they were under attack or believed they were about to be attacked you must go on to consider whether response of the accused were reasonable. If you consider what the accused did was, in the heat of the moment when fine judgments are difficult, no more than the accused genuinely believed was necessary, that would be strong evidence that what accused did was reasonable; and if you consider accused did no more than was reasonable, accused was acting in lawful self-defense and not guilty of any offence. It is for you to decide whether the force used was reasonable and you must do that in the light of the circumstances as you find accused believed them to be. If you are sure that even allowing for the difficulties faced in the heat of the moment accused used more than reasonable force, then accused were not acting in lawful self-defense.*

[12] The judge also directed the assessors on manslaughter as follows.

> *79. If you find the first accused is not guilty of murder, then you can proceed to consider the alternative count of manslaughter.*
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> *80. If you are satisfied that the prosecution has proven beyond reasonable doubt that the first accused has committed the offence of manslaughter, you can find the first accused guilty of the said offence of manslaughter.*
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> *81. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the first accused has committed the offence of manslaughter, you must find the first accused not guilty of manslaughter.*
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> *82. Likewise, if you are satisfied that the prosecution has proven beyond reasonable doubt that the second accused has committed the offence of Murder as charged, you can find the second accused guilty of the said offence of Murder.*
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> *83. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the second accused has committed the offence of Murder as charged, you must find the second accused not guilty of the said count of Murder.*

84. If you find the second accused is not guilty of murder, then you can proceed to consider the alternative count of manslaughter.

85. If you are satisfied that the prosecution has proven beyond reasonable doubt that the second accused has committed the offence of manslaughter, you can find the second accused guilty of the said offence of manslaughter.

86. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the second accused has committed the offence of manslaughter, you must find the second accused not guilty of manslaughter.

[13] Clearly, the majority of assessors had not accepted self-defense the respondents attempted to bring to the focus in cross-examination, for they did not give evidence and take up that defense. The majority had not believed that the prosecution had proved murder either. They had thought that a case of man-slaughter had been made out beyond reasonable doubt by the prosecution.

[14] Having examined the evidence as quoted above the trial judge had remarked in the judgment as follows in acquitting the respondents.

11. In view of the evidence presented by the prosecution, it is clear that the deceased had ignited this commotion by swearing and challenging the first accused. He had then punched the first accused until he fell down on the ground. The deceased continued his assault on the first accused even after he fell down on the ground. When the first accused got up, the deceased had come toward the first accused lifting his fist up in the air. The first accused had then punched the deceased. The first and the second accused then kicked the deceased when he was lying on the ground. According to Mr. Sakopo, the first accused had stopped the kicking on the deceased when the crowd shouted to stop it.

12. Accordingly, it appears the first and second accused assaulted the deceased in order to defend themselves from the assault of the deceased. I now take my attention to consider whether the responses of the two accused by assaulting the deceased were reasonable. The both accused were drunk, so did the deceased. This incident had unleashed suddenly and unexpectedly. The first accused had tried to avoid the confrontation on several occasions. Taking into consideration the circumstances prevailed at the time of this incident, I find the two accused were not in a position to make a fine judgment of the situation. They have instantly and instinctually responded to the threat came from the deceased by punching him and then kicking him when the deceased fell down. In view of these reasons, there is a reasonable doubt whether the two accused have responded reasonably in exercising their rights of self-

defense when the deceased aggressively assaulted the first accused. Therefore, I find the prosecution has failed to prove beyond reasonable doubt that the two accused guilty of the offence of murder. Moreover, the prosecution has failed to prove beyond reasonable doubt that the two accused guilty of the alternative offence of manslaughter.

13. In view of the reasons discussed above, I have cogent reason to disagree with the opinion of the first assessor, who found both accused guilty of murder. I concur with the opinions of the second and the third assessors who found the two accused not guilty of murder. However, I have cogent reasons to disagree with the opinion that the two accused guilty of manslaughter by the second and third assessors.

14. In conclusion, I hold the two accused not guilty of the offence of murder as charged in the information and acquit them from the same accordingly.

[15] In my view, the trial judge's summary of evidence in the judgment does not reflect the accurate picture of what had transpired between the deceased and the respondents as revealed by the narration of evidence in the summing-up. The respondents had got inside their car possibly to leave the scene but got off from it a little while later. Paragraph 25 and 26 gives the rest of the events in a nutshell. Paragraphs 27-39 contain details of what had followed.

[25] .....Thereafter, the man and the woman went down to the car park of the service station which is located about 2 ½ meters below the railings. They then got into the car but in a while got off from the car. Then he saw the deceased was swearing at the man. The deceased swore at the man saying that "I am not afraid of how big you are, we can punch each other. I am not afraid of how big you are". The deceased then came and punched the man, falling him down. The man then stood up and the lady also came in. The man then punched the deceased. The deceased then leant on the vehicle and then fell on to the ground.

26. When the deceased fell down, the man punched the deceased on his face and chest and then stepped on the stomach of the deceased. The fight lasted for about 10 to 15 minutes. The man was kneeling down and punched the deceased when he fell down on the ground. He punched with the force. You saw the witness demonstrated the way the man stepped on the stomach of the deceased. The lady also punched and stepped on the deceased. The lady had stepped on the stomach and the chest area of the deceased and also kicked the deceased. Sakopo saw blood was coming from the boy. The deceased was lying on the ground. Then a man who was standing on the side had brought a vehicle and loaded the deceased into the vehicle.

[16] Further, the trial judge had not applied the correct tests formulated in the above decision in coming to his conclusion that the respondents had exercised their right to self-defense. In my view when both the objective and subjective tests are applied to the totality of circumstances, a case of self-defense cannot be said to be made out. Though, there was a credible narrative of events suggesting the presence of self-defense, in my view, the respondents had exceeded their right of self-defense. However, I am not convinced that the prosecution had proved beyond reasonable doubt the charge of murder. I agree with the majority of assessors that the respondents were guilty of manslaughter.

[17] Therefore, there is a reasonable prospect of success in this appeal.

Order

1. Leave to appeal against acquitted is allowed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL