

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

CRIMINAL APPEAL NO. AAU 137 OF 2017
Suva High Court No. HAC 67 OF 2014

BETWEEN : **LIVAI LINO** *Appellant*

AND : **THE STATE** *Respondent*

Coram : Prematilaka, RJA
Mataitoga, JA
Qetaki, JA

Counsel : Ms T. Kean for the Appellant
Ms U. Tamanikaiyaroi (Office of the DPP) for the Respondent

Date of Hearing : 01 May, 2023

Date of Judgement : 25 May, 2023

JUDGEMENT

Prematilaka, RJA

[1] Having read the draft judgement of my brother, Mataitoga JA, I agree that the appeal should be dismissed.

Mataitoga, JA

In the High Court

- [2] The Appellant was charged with one count of murder contrary to Section 237 of the Crimes Act, 2009. At the conclusion of the trial, the assessors returned a unanimous guilty verdict. The learned High Court Judge concurred with the opinion of the Assessors and convicted the appellant.
- [3] The Appellant was sentenced on 22nd August 2017 to life imprisonment and to serve a minimum period of 17 years before being eligible for pardon.
- [4] In the High Court the appellant did not give evidence but instead his defence counsel had taken up the medical impairment defence in terms of section 28(1) of the Crime Act 2009.

Leave to Appeal to Court of Appeal

- [5] The Appellant filed a timely notice of appeal setting out the following ground of appeal against conviction:

“That the learned trial Judge erred in law and in fact in not adequately assessing and/or considering the defence of mental impairment as per Section 28(1) of the Crimes Act, in light of:

(i) The evidence of Dr Biukoto stating that he was unsure whether the Appellant could or could not control his conduct at the material time.

(ii) That contradictions between the evidence given in terms of the reports given in evidence by Dr Biukoto and his evidence of being unsure as to whether the Appellant could or could not control his conduct at the time of committing the offence.”

- [6] The following facts were referred to in the Leave to Appeal Ruling;

“The deceased was standing in front of the Navakari Dairy and Bakery Shop, when suddenly the Appellant had taken the kitchen knife he had with him and stabbed the deceased in the right side of the chest and fled from the scene. The deceased had been rushed to Nadi Hospital where he had succumbed to his injuries. The accused was 27 years old, unemployed and had been a former patient of Saint Giles Hospital and had been spending most of his time roaming around Nadi town.”

- [7] It was submitted on behalf of the Appellant that the medical evidence given by Dr. Biukoto had been to the effect that he was not sure whether or not the Appellant could control his conduct at the material time. On that basis it was argued that the learned Trial Judge had failed to adequately to assess and consider the defence of mental impairment.
- [8] In the submissions of the State, it was submitted that the learned trial Judge had in his summing up referred to 3 reports provided by the psychiatrist and that the reports had not established limbs (a) and (b) of section 28(1). The issue was that the Doctor could not confirm limb (c) of Section 28(1) which is to the effect that the Appellant was unable to control the conduct.
- [9] In view of this position it may be necessary to consider the entirety of the Doctor's evidence and the psychiatrist's reports that were made available at the trial.

Court of Appeal

- [10] The appellant submits one ground of appeal against conviction. It states:
- "That the learned trial judge erred in law and fact in not adequately assessing and/or consider the defence of mental impairment as per section 28(1) Crime Act 2009, in light of (1) the evidence of Dr Biukoto stating that he was unsure whether the appellant could or could not control his conduct at the material time; (2) that contradictions between the evidence given in terms of the reports given in evidence by Dr Biukoto and his evidence of being unsure as to whether the appellant could or could not control his conduct at the material time."*
- [11] The appellant did not give evidence at his trial. However, the appellant submits that during the course of the trial and from evidence led by the state, it was clear that the defence of mental impairment was raised by the evidence of Dr Biukoto. From the record of the trial on 15 August 2016 in the Judges notes at page 113, counsel for the appellant had stated: 'we rely on the defence of mental impairment'. This earlier indication to the court of the appellant's defence was maintained throughout the trial.
- [12] At the conclusion of the prosecution case during the trial, both parties agreed that there was "A case to answer" on the evidence before the court. The defence decided not to call any

evidence and opted to address the issue of mental impairment in their closing statements to the assessors.

- [13] In reference to the three limbs of Section 28(1) of the Crimes Act 2019, again both parties agree that paragraphs (a) and (b) of Section 28(1) are not satisfied. The appellant's contention is limited to paragraph (c), that the appellant was unable to control the conduct constituting the offence. To support this contention, the appellant relies on medical report of Dr Peni Biukoto dated 25 September 2013 and his oral evidence during the trial of the case.

Mental Impairment

- [14] Section 28(1) of the Crimes Act 2009 defines mental impairment as follows:

- "28. (1) A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that —*
- (a) the person did not know the nature and quality of the conduct; or*
 - (b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or*
 - (c) the person was unable to control the conduct.*
- (2) The question whether the person was suffering from a mental impairment is one of fact.*
- (3) A person is presumed not to have been suffering from such a mental impairment. The presumption is only displaced if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from such a mental impairment.*
- (4) The prosecution can only rely on this section if the court gives leave.*
- (5) The court must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment."*

[15] There are two important points to note right away from the above statement on mental impairment and these are:

- (i) Section 28(2) states whether a person suffers from mental impairment is one of fact. Whether or not the facts presented disclose a state of mental impairment is for the assessors to decide based on all the evidence and proper directions of the trial judges on the matter;
- (ii) Mental impairment is only available as a defence, if it is proven on a balance of probabilities by either the state or defence that the accused person may be suffering mental impairment.

Review of Evidence Relevant to Medical Impairment

[16] In the context of this trial, there are three items of medical evidence that were mentioned by the Justice of Appeal sitting alone that may be considered by the full court, which may be relevant to the claim by the appellant. They are as follows:

- (i) Appellant's interview with Dr Sefanaia Qaloewai, Prison Clinic, Suva Remand;
- (ii) the written report dated 25 September 2013 submitted to the Suva Magistrate Court by Dr Peni Moi Biukoto;
- (iii) the evidence given by Dr Peni Biukoto in Court during the trial.

[17] The appellant's defence is based solely on the evidence of the expert witness Dr Peni Biukoto who provided a medical report on 25 September 2013. That report stated the following at page 3 of Dr Biukoto's Medical Report, under subtitles:

Medical Assessment

The accused has a personal history of Schizophrenia. He also has a personal history of not taking medications prescribed by doctors to keep him mentally stable.

Medico-Legal Assessment

On the issue of his knowledge of his actions at the time of the alleged offence, in my opinion it is more likely than not that the Accused was aware of his actions and understood the health consequences of the act of stabbing another person. [my emphasis]

It is possible that he was acting under the influence of persecutory thoughts (i.e. others persecuted him). However, it is not possible to ascertain whether this was based on reality or mental illness, due to his lack of clarification of his thoughts.

On the issue of his fitness to plead, in my opinion, the Accused does not have the capacity to advise his lawyer in his defence.

Recommendation

- 1. The Accused does not express any emotional concern over his legal circumstances and the health status of the victim of stabbing. The Accused shows more concern about returning to his village. The Accused does not take medications on his own accord. Family members appear to show low interest in his adherence to prescribed medications.*
- 2. On interview with Dr Qaloewai, the Accused stated that the victim bothered him. The Accused stated that others in the village bothered him in a similar manner. The Accused did not clarify his statements. The Accused stated ignorance of name of victim. The Accused stated he used a kitchen knife with intent to injure the person. He did not express any intent to cause death. He did not show any sign of remorse over death of the victim. He showed a lack of concern and anxiety over his legal circumstances. He denied hearing commanding voices around time of alleged offence. The Accused was alert and oriented to time, and person. The Accused cooperated with interview and did not show agitated or aggressive behavior.*
- 3. On interview with Dr Biukoto, the Accused said that he allegedly stabbed a male Fijian of Indian ethnicity ('kai Idia') at the store at Namotomoto. He stated the alleged stabbing occurred on a Friday in the afternoon, outside in front of the store. He stated a kitchen knife was used to stab the male. He stated he met the male at the bus stop. He stated he looked for a knife with intent to stab the person. He denied intent to cause death. He took the knife from a home belonging to a family member. The Accused claimed the male "marked" him, so he followed the male to the store. The Accused did not clarify meaning of his statement. He claimed the people of Namotomoto (i.e. the i-Taukei) and Fijians of Indian ethnicity often teased him. The Accused denied influence of delusions or hallucinations. The Accused showed a lack of concern over his legal circumstances. The Accused was alert and oriented to time, and person. [emphasis mine]*

Mental State Examination

He appeared alert. He appeared calm. He walked into the interview area with a normal gait. He did not display any odd or bizarre behavior. He waited calmly

during questions posed by interviewer. He remained seated in one spot throughout the interview. He displayed acute awareness of surroundings. He showed little interest in the interview. He did not appear concerned about his legal status.

- [18] Now at pages 121-123 of the Court Record in the High Court Dr Peni Moi Biukoto's evidence during the trial is set out. His examination in chief is similar to the parts of the report referred to para 16 above. At page 122, Dr Biukoto's evidence is recorded as; 'In all the reports (that is three now) I maintained that the accused was aware of the nature and quality of his conduct at the time of the alleged offences. In the first report, the accused was not fit to plead. Second report, he was fit to plead. Third report, he was fit to plead.'
- [19] At page 123 of the Court Record, Dr Biukoto during re-examination answered a question thus: 'He was aware of the nature and quality of the conduct. He knew the conduct was wrong. I am not sure on whether or not he can control his conduct.
- [20] The appellant submits on the basis of the medical evidence referred to above, in particular the last sentence of Dr Biukoto's evidence referred to in para 18, the defence of mental impairment was available to be put to the assessors under cover of proper directions of the trial judge. That did not happen, and it prejudiced the interest of the appellant to a fair trial. In this regard the appellant also submits that the presumption raised in section 28(3) of the Crimes Act 2009 had been displaced after the evidential burden referred to in section 59(6) of the Crimes Act 2019 had been discharged.
- [21] Taken alone in the narrow context of the apparent contradiction in Dr Biukoto's medical evidence there may be sufficient basis for the defence of mental impairment to be considered by the assessors and the trial judge. In reviewing the court record, it is noted that the trial judge did address the issue of mental impairment in summing up to the assessors. I will come to this later in this judgement.
- [22] There were other evidence adduced that provide some criteria which the trial judge might use to make his determinations. Some of the answers given by the appellant to questions put to him during the caution interview were relevant evidence informing his mental state

at the time of the offence. These are referred to below, in paragraph 24. It showed that the appellant was aware of what he was doing and indeed his actions on the date the offence showed that he was in control of his actions.

- [23] The relevant parts of appellant's caution interview is set out below. The caution Interview statement are at pages 81 to 84 of the Court Record (page 4 of the Caution interview statement is missing) where the appellant answered certain questions put to him by the Police Officer as follows:

At page 3 of the cautioned interview the following Q & A with the Appellant:

Q38 *When you arrive who were in the house?*

A *Neumai and her husband*

Q39 *Who is Neumai?*

A *Bea's daughter*

Q40 *Did you bring anything from that house?*

A *Yes*

Q41 *What did you bring?*

A *A kitchen knife with a wooden silver handle.*

At page 4 of the Cautioned Interview the following Q & A with appellant

Q43 *Then what happened next?*

A *I came to Nomotomoto shopping centre*

Q44 *What did you do?*

A *I stabbed then ran away*

Q45 *Whom did you stab?*

A *Indian man*

Q46 *Which particular part of his body you stab?*

A *His chest*

Q45 *Did you know this man*

A *No*

At Page 5 of the Cautioned Interview the following Q & A with the Appellant:

Q57 *Where was the blade?*

A *I didn't know*

Q58 *Where was the handle you have taken it with you?*
A *I threw it on the road side towards Namotomoto village.*

(SEARCH WAS CONDUCTED WHERE HE POINTED OUT BUT IT WAS NOT LOCATED)

Q59 *Why did you stab the Indian man?*
A *Because I hated him.*

Q60 *According to a witness he said that you demanded from him but he refused. What will you say about that?*
A *I didn't do that.*

Q61 *There must be a reason why you have done this? Can you tell me.*
A *Refuse to answer.*

Q62 *After stabbing this man how did enter Namotomoto village?*
A *I ran.*

Q63 *Why did you run?*
A *Because I knew I have injured him.*

Q64 *Did you know what happened to this Indian man?*
A *He is dead.*

Q65 *Do you wish to say anything?*
A *No.*

Q65 *Do you wish to read or hear the contents of the interview in the form of questions and answers?*
A *I wish to read it after it is printed out.*

Q81 *Do you wish to correct, alter or add anything in your statement?*
A *No.*

Q82 *Was there any threat, promise or inducement held over to you to give answers to these foregoing questions?*
A *No.*

Q83 *Are these statements consisting of 05 pages true?*
A *Yes.*

Q84 Have you made these statements of your own freewill?

A Yes.

Q85 Can you sign on all documents to acknowledge that the interview was made in our presence?

A Yes.

Expert Opinion

[24] The appellant has based his main ground of appeal on the contradictions in the expert opinion given by Dr Peni Biukoto. Whether or not the facts disclose a state of mental impairment is a question for the assessors. Expert opinion does not determine the outcome of a case on its own unless accepted by the trial judge. In law, the role of the expert witness was explained by Lord President Cooper in *Davie v Edinburg Magistrates* [1953] SC 34, 40 thus:

"Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."

[followed by the Fiji Supreme Court in *Chandra v the State* [2015] FJSC 32: CAV 2015 (10 December 2015)]

[25] In assessing the above statements given by the appellant during his caution interview dated 22 June 2013, in the presence of Sergeant Atunaisa, it is open to the assessors as a matter of a fact-finding exercise, as required under section 28(2) of the Crimes Act 2019, to accept it as sufficient to remove the doubt created by Dr Biukoto's medical evidence and reach the verdict they reached at trial. The assessors are not bound to accept the opinion of medical witnesses, however experienced. The evidence relevant for the assessors consideration includes not only expert opinion but all connected facts as well as statements, if any, of the appellant himself. It is a finding of fact on the evidence adduced in court which the assessors may accept in reaching their verdict.

[26] From the above analysis of the relevant law applicable and evidence, the Appellant's submission that the trial judge did not place adequate weight on the medical evidence of Dr Biukoto has no merit and is dismissed.

**Trial Judge Did Not Adequately Assess
and Consider Mental Impairment in Summing up**

[27] It would be useful to state the law relating to burden of proof and standard of proof for the defense like in this case, where a law creates a presumption that the matter exists unless the contrary is proved. Section 59 (1) Crimes Act 2019, states, that subject to section 60, a burden of proof that a law imposes on a defendant is an evidential burden only. Section 59 (7) defines evidential burden as 'the burden of adducing or pointing to evidence that suggest a possibility that the matter exists or does not exist'. Section 60 (b) and (c) state that a burden of proof that the law imposes on the defendant is a legal burden if and only if the law expressly –

(b) requires the defendant to prove the matter or

(c) creates a presumption that the matter exists unless the contrary is proved.

Section 61 of the Crimes Act states that a legal burden of proof on the defendant must be discharged on the balance of probabilities. In terms of section 28(3), a person is presumed not to have been suffering from a mental impairment and that presumption is displaced only if the contrary is proved on a balance of probabilities by the prosecution or defense (whoever asserts it). Thus, the burden of displacing the presumption that he was not suffering from mental impairment at the time of committing the offence was upon the appellant (when he asserted it; the prosecution did not assert it in this case) and as a result of section 60 (b) and (c) it is a legal burden to be discharged on a balance of probabilities. Legal burden means the burden of proving the existence of the matter [vide section 57(3)] as opposed to adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

[28] The appellant having referred to the medical evidence of Dr Peni Biukoto as evidence which states he was unsure whether or not the appellant could control his conduct at the material time, thus pointing to only a possibility that he was mentally impaired. However,

the legal burden of rebutting the presumption that he was not suffering from mental impairment at the time of committing the offence remained with the appellant until discharged on the balance of probabilities.

[29] Despite this evidence being pointed out in their closing statements, the appellant submits that the trial judge did not adequately assess and consider the mental impairment in his summing up. The appellants did not provide any guidance based on law that would address what would be an "adequate assessment" by the trial judge during his summing up.

[30] It is trite law and in the interest of trial fairness, that where there is evidence before the court which could justify the finding by the assessors of not guilty due to mental impairment, it is the duty of the trial judge to give the appropriate direction to the assessors and to leave the decision thereon to them notwithstanding that the defence does not seek to raise such an issue. In this case the evidence of mental impairment could have been better, if more were extracted in cross-examination from Dr Biukoto and the medical report of Dr Sefanaia Qaloewai, referred to in page 143 July 2013 of the Court Record, was made available.

[31] In reviewing the summing up of the trial judge to determine whether it was fair and reasonable, given the evidence in this case. The following passage are relevant:

(i) On directions relating to the defence of mental impairment, the trial judge stated:

"16. *In their closing submission, the defence submitted that the accused was not guilty of murder, by reason of 'mental impairment', pursuant to section 28(1) of the Crimes Act 2009. Firstly, as a matter of law, a person is presumed not to be suffering from any mental impairment. Secondly, this presumption can be displaced by the defence if it proves on the balance of probabilities that the person was suffering from such a mental impairment. Thirdly, a person is not criminally responsible for an offence of, at the time of carrying out the conduct constituting the offence, the person was suffering from mental impairment that had the effect that:*

(a) The person did not know the nature and quality of the conduct; or

- (b) *The person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or*
- (c) *The person was unable to control the conduct.*

17. *The question whether the person was suffering from a mental impairment is one of fact for you. 'Mental impairment', as a concept, encompasses various types of mental conditions. It includes 'senility, intellectual disability, mental illness, brain damage and severe personality disorder'. One could easily argue that any person having any type of 'mental illness', could escape criminal liability, even for an offence of murder, as in this case. However, the law does not give a blanket cover to people suffering from any type of mental illness to escape criminal liability.*
18. *For the defence of 'mental impairment' to succeed, the defence must prove, on the balance of probabilities that: (1) the accused is suffering from a mental illness, at the material time; (2) the accused did not know the nature and quality of the conduct, at the material time; OR (3) the accused did not know the conduct was wrong; OR (4) the accused was unable to control the conduct. If the defence succeeds on the above, then the accused is not guilty of murder, because of mental impairment.*
[Pages 63—64 Court Record]

[32] The court then directed the assessors as follows on the relevant state evidence;

32. *The State next referred to Doctor Peni Biukoto's (PW2) sworn evidence, PW2 was the former medical Superintendent of Saint Giles Hospital from 2012 to 2016. He is a doctor by profession and specialized in psychiatric health and treatment. He is an expert in this field. On this particular case, he had prepared three psychiatric reports to the court. The first report was dated 25 August 2013 and it was tendered as Prosecution exhibit No. 16. The second report was dated 20 August 2014, and it was tendered as Prosecution exhibit No. 17. The third report was dated 13 April 2015 and it was tendered as Prosecution Exhibit no. 18. The reports examined the accused's mental state at the time of the offending. According to Doctor Biukoto, the accused did not know the nature and quality of his conduct at the time he stabbed the deceased, and well knew it was wrong. He said he was not sure on whether or not he can control his conduct at the time. According to the State, Doctor Biukoto's above opinions meant the defence of 'mental impairment' is not available to the defence. It is the State's argument that when the accused stabbed the deceased, at the material time, he intended to cause his death.*

33. *Alternatively, the State argued that when the accused stabbed the deceased in the right chest, at the material time, he was reckless I causing his death. Was the accused aware of a substantial risk that the deceased would die if he stabbed him in the right chest with a kitchen knife? Having regard to the circumstances known to him (i.e. he had in his possession a kitchen knife, the deceased was unaware of his plan to stab him and if the knife was used as a weapon, it will cause injuries), was it justifiable to take a risk by stabbing the deceased in the right chest? In my view, he was not justified in taking a risk of stabbing he deceased in the right chest. In any event, it is a matter entirely for you.*
34. *If you find, after considering the above that, the accused intended to cause the deceased's death by stabbing his right chest with a kitchen knife; or alternatively, that he was reckless in causing his death, then you must find the accused guilty as charged. If otherwise, you must find the accused not guilty as charged. It is a matter entirely for you.*

[Page 67-68 Court Record]

[33] The trial judge also directed the assessors to the evidence for the appellants.

35. *Although the accused choose to remain silent and called no witness, in their closing submission they submitted that the accused was not guilty of murder, because when he stabbed the deceased at the material time, he was mentally impaired. On this point, you will have to carefully consider the evidence of Doctor Peni Biukoto (PW2) and the contents of the three psychiatric report he submitted on the accused. Doctor Biukoto was of the view that the accused, when he stabbed the deceased in the chest on 21 June 2013, was aware of the nature and quality of his conduct at the time, and knew that the same was wrong. PW2 was unsure whether or not he could control his conduct at the time. In terms of section 28(1)(a) and (b) of the Crimes Act 2009, it would appear, given Doctor Biukoto's opinion, the defence of mental impairment was not available to the defence. How you treat Doctor Biukoto's opinion, is a matter entirely for you. If you accept his opinion, you will have to find the accused guilty as charged. If otherwise, you will have to consider the strength of the prosecution's case."*

[Pages 68-69 of Court Record]

[34] From the passages quoted above from the trial judge's summing up covering the issue of the defence of mental impairment and the reference to the relevant evidence adduced in court on the same and in the light of all the other evidence, it is unreasonable to submit as the appellants have, that his defence was not adequately summed up to the assessors.

[35] Rather, a more robust cross examination of the evidence carefully examining matters such as (i) the mental illness history of the appellant and (ii) Dr Biukoto's oral evidence and of

the Medical Reports that he tendered, to flesh out how he reached the findings espoused in his Reports, is likely to have been helpful in establishing mental impairment. The answers elicited in such an exercise may have provided a more meaningful and fulsome picture of the mental impairment issue in question here. The difficulty of the appellants complaints is that on the evidence available to the court, the summing up by the trial judge is adequate.

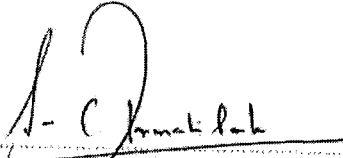
[36] On the basis of the totality of evidence adduced at trial, I conclude that despite the complaint raised in the appellant's appeal against the trial judge's summing, there is no miscarriage of justice. There being no other basis upon which the finding of trial court may be impugned, I conclude that the appeal against conviction has no merit and is dismissed

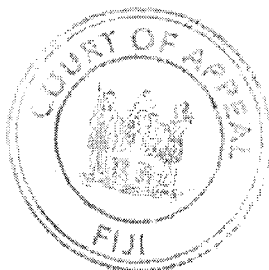
Qetaki, JA

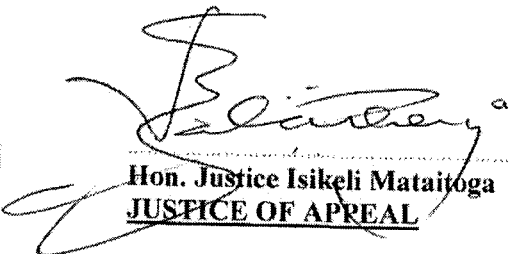
[37] I have read and considered the judgement in draft and I agree with it and the reasoning.


ORDERS:

1. Leave to appeal refused.
2. Appeal against conviction is dismissed


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Hon. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL




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Hon. Justice Isikeli Maitoga
JUSTICE OF APPEAL


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Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL