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

CRIMINAL APPEAL NO. AAU 0075 of 2017
[Labasa High Court Criminal No. HAC 01 of 2016]

BETWEEN : **TOMASI WAIMUKA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, AP**

Andrews, JA

Winter, JA

Counsel : **Daunivesi, S & Manulevu, L for Appellant**

Singh, A for the Respondent

Dates of Hearing : **4 November 2024**

Date of Judgment : **28 November 2024**

JUDGMENT

1. The appellant was charged with one count of murder, contrary to section 237 Crimes Decree 2009. He pleaded not guilty. He was tried before a Judge with assessors. After the trial at the in High Court at Labasa, the assessors unanimously found the appellant

not guilty of murder but guilty of manslaughter. The trial judge disagreed with the assessors' verdict and he found the appellant guilty of murder.

2. The appellant was sentenced on 9 May 2017 to mandatory life imprisonment with a minimum term of 12 years imprisonment.

3. The appellant aggrieved with the conviction imposed by the High Court, filed his appeal to the Court of Appeal on 18 May 2017, thus making the appeal timely.

The Appeal

4. The appellant submitted two grounds of appeal against conviction, namely:

   i) The trial judge erred in law and fact when he failed to give cogent reasons for overturning the assessors', unanimous opinion on not guilty of Murder but guilty of manslaughter;

   ii) The trial judge erred in law and fact when he made a finding and accepted that the appellant was in a state of shock however refused to accept the appellants contention that he was in shock when giving his answers in his caution interview, that the contradictory findings of the learned trial judge cannot be relied on to secure a conviction, and as such caused a great miscarriage of justice to the appellant

Leave to Appeal Hearing

5. At the Leave to Appeal Hearing, the appellant submitted two grounds of appeal, set out in paragraph 4 above.

6. At the Leave to Appeal Hearing before the Resident Justice of Appeal, the Hon Justice Prematilaka, the appellant's grounds for seeking Leave to Appeal are the same as those set out in paragraph 4 above.

7. The Resident Justice of Appeal approached his assessment of the grounds of appeal by first setting out, at paragraph [7]-[10] of his Ruling, the trial Judge's summary of the

relevant facts, the report of the pathologist, the evidence of PW1 (Paulina Maria) and evidence of DW1 Lui for the appellant, as follows:

> *The evidence of the prosecution as found in the agreed fact had been summarized by the learned trial judge in the summing-up as follows:*
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> *'13. Because of the agreed facts you must find that on the 26th December 2015, after a day of drinking, both Tomasi and Mone returned home. Tomasi was outside smoking and Mone went inside to flirt with Tomasi's wife. Tomasi heard Mone say to her crudely that he wanted to have sex with her that night. For some reason, Tomasi swore at his wife because of this and she left the house.*
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> *14. You must find that this stage Mone appeared to "crack" and he started damaging things inside the house, breaking the furniture and smashing the kitchen crockery. Tomasi told him to stop but he didn't and threw a basin of dishes out of the house. Tomasi's children work up and started screaming. Mone swore at the children and threatened to hit and kill them. Grabbing a broken table leg he hit Tomasi on the hand and neck. Mone slipped and fell inside the house. At one stage, Mone tried to grab a kitchen knife but Tomasi stopped him doing this.*
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> *15. At about 2 am on the 27th, a badly injured Mone was taken to the local health centre and then eventually on to CWM in Suva. Tomasi went with Mone to the Health Centre and then on to Taveuni Hospital before Mone was transferred to Suva where he died on 31st December or the 1st January.'*

8. The forensic pathologist's evidence had been stated by the trial judge in the following manner:

> *'21. ..... He told us that when he examined the body he found a deep skin tear on the top of the head which would have been caused by "high energy" blunt force trauma. The injury could not have been caused by a fall from standing position and would most likely to have been caused by an instrument rather than a fall. There were multiple injuries on the trunk*

and these injuries were consistent with an attach at Exhibit No.2, the wooden table leg. The ribs were cracked on both sides which again would have been by high energy blunt force. In his opinion the injuries were caused by more than two strikes.

22. The cause of death was acute kidney failure contributed to by blunt force trauma.'

9. The only other witness for the prosecution Paulina Maria's evidence had been to the following effect.

'29..... She told us that she is the younger sister of both the accused and the deceased. She was at home on the night this incident occurred. She saw Mone throwing plates and cups around. He broke chairs and the table. The children were crying and she was trying to get them outside to safety. Paulini was afraid because she saw a kitchen knife and she feared Mone might use it in his temper. She managed to get the kids outside and to the road. She heard Tomasi telling Mone to think of the children. Mone was constantly swearing. She saw Tomasi hit Mone with the piece of wood but it was dark so she wasn't able to see where the wood landed on his body. She was in shock. She saw him hit Mone two times.

10. The appellant's version and the evidence of his only witness Lui too had been narrated by the trial judge.

*"33**.** In telling us of his version of what happened that night, he said that they came home drunk. He was standing outside when Mone was in the sitting room with his (Tomasi's) wife who had been sleeping. He heard Mone say to her "I want to fuck you tonight". He first thought he was joking. Mone then started smashing everything. He upturned the table and broke the 4 legs off. He then slipped and fell backwards landing on his back. When he fell he landed heavily on the edge of the upturned table. He then took the basin holding the dishes and threw them out the door towards the witness. The children were crying and screaming with fear. On hearing that he felt emotional because he loves them so much. Mone swore at them*

in very foul language. Tomasi says he was really touched and felt painful that he was insulting his children. When Mone said to them "you want me to hit and kill you?" he really felt for them and he tried to help them. He told Mone to take it easy at which Mone swore at him and said "I will kill you" and on hearing that he was alarmed and shocked.

34. Tomasi saw him trying to get the kitchen knife but he was able to pull him back. He stood up and hit Tomasi with the wooden leg. He tried to hit him on the head but Tomasi fended off the blow and was hit on the hand and shoulder. Tomasi took the wood off him. Mone fell on his back onto the cement step and slide down. Tomasi ran on to the grass. Mone tried to stand up and said "I'm really going to kill you". He was crawling towards Tomasi, his hands and feet on the ground. Tomasi says he hit him on the right shoulder. He hit him three times. All of the blows in the same place, that it's the right shoulder. Tomasi noticed that when Mone was crawling towards him his head was bleeding. After three blows, Lui came and wrapping his arms around Tomasi and the wooden leg, prevented him from king any further attack. 39. Tomasi's witness was the man Lui. On the night of the 26th he was going home after a grog session when he heard swearing and shouting coming from Tomasi's house. Because he heard children crying he went there. On arrival he saw Mone breaking things and swearing. He slipped and fell three times. He was trying to strike Tomasi swearing and saying he would kill the children and would kill him. Tomasi pulled the wood away from him. He hit Mone twice and was trying to hit him a third time when he intervened and was able to subdue Tomasi. Mone was bleeding from his head before he came towards Tomasi.'

11. The Resident Justice of Appeal in his Ruling at paragraph 12 to 14 stated as follows:

"[12] However, one would not know the real basis on which the assessors had found the appellant guilty of manslaughter because in addition to the issue of want of fault element of murder asserted by the appellant, there was evidence of provocation and self-defense. The learned trial judge had directed the assessors in paragraph 42-45 of the summing-up on the fault

elements of murder and manslaughter and stated that depending on their findings of facts it was open for them to find him guilty of murder or manslaughter. Then the trial judge had addressed them on provocation in paragraphs 46-50 of the summing-up and said that the assessors could find the appellant guilty of manslaughter if they thought that the appellant had caused the death of the deceased under provocation. The trial judge had finally addressed the assessors in paragraphs 51-56 of the summing-up and directed them that if they were satisfied that the appellant had acted in self-defense he should be acquitted. He also informed the assessors that the burden of excluding provocation or self-defense was on the prosecution and not for the appellant to establish it.

[13] The trial judge had not stated in the judgment that it was not open for the assessors to have brought a verdict of not guilty of murder and coming-up with a verdict of manslaughter.

[14] The High Court judge had rejected the finding of manslaughter on the basis that the appellant had given different versions of how many blows he inflicted on the appellant and on the evidence of the forensic pathologist (see paragraph 16 -18 of the judgment). The judge had preferred to accept the appellant's admission at one point of time during the cautioned interview that [he] had kept hitting the deceased 'plenty times' but he could not recount the number. However, the appellant had also stated that he had hit the deceased three times on the shoulder area and prosecution witness Paulina Maria and the appellant's witness Lui had seen the appellant hitting the deceased twice which the trial judge had not believed. In addition the appellant, Paulina Maria and Lui had seen the deceased falling on his back two or three times on the cement step. However, the forensic pathologist had ruled out the injuries having been caused by a fall and there had been multiple injuries (the number is not clear) on the deceased's trunk leading to kidney failure contributed to by blunt force trauma."

12. It is apparent from the above, that there was an inconsistent evidential basis upon which the trial judge's assessment of the evidence is based in his rejection of the assessors opinion of not guilty of murder but guilty of manslaughter. The Resident Justice of Appeal granted leave to the appellant to appeal against conviction, to allow the full court to review the grounds in light of the full court record at the trial.

Ground of Appeal 1: No Cogent Reasons

13. The appellant's first ground of appeal against conviction is that the trial judge erred in law and fact in not providing cogent reasons for rejecting the unanimous opinion of the assessors in finding the appellant not guilty of murder but guilty of manslaughter.

14. The Court of Appeal in **Naulu v State** [2023] FJCA 258 adopted the principles to be considered when disagreeing with the opinions of the assessors, established by the Supreme Court in **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009) at paragraphs [24] to [34]. Section 237(2) of the Criminal Procedure Act recognizes that a judge has the power and authority to disagree with the majority opinion of the assessors. When the judge disagrees with the assessors his or her reasons are deemed to be the judgment of the Court.

15. However, the judge's power and authority in this regard is subject to three important qualifications. First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have 'cogent reasons' for differing from their opinion. The reasons must be founded on the weight of the evidence and must reflect the judge's views as to the credibility of the witnesses: **Shiu Prasad v Reginam** [1972] 18 FLR 70, at 73 (FCA). Secondly, a judge must comply with the requirements of section 237(4) of the Criminal Procedure Act to pronounce his or her reasons in open court. Thirdly, which is related to both the two qualifications raised above, a person convicted of a criminal offence in the High Court has a right of appeal on any ground which involves a question of law alone: section 21 (1) (a) of the Court of Appeal Act 2009; he may also appeal on questions of mixed law and fact under section 21(1) (b) of the same Act.

16. In **Bavesi v The State** [2022] FJCA 2, AAU 044.2015 (3 March 2022), his Lordship Gamalath, JA, had made the following remarks:

> *"[31] In my opinion in relation to this, what matters is not the volume but the essence, in the sense if the reasons for the disagreement with the opinion of the assessors can be distilled into a comprehensive articulation which is consonant with the evidential base upon which the case has been built up, in which there isn't any perceivable discordance based on insufficient, insecure and prejudicial grounds, that in my opinion could be considered as providing sound basis to justify the trial judge's disagreement with the assessors. The test of cogency has to be an objective analysis of the facts in which a holistic view is required with a special emphasis being attached to the nature of the evidence transpired in the trial. In the final analysis, it is the matrix of evidence that becomes the wattle and daub of a case. Having said, I shall now turn to the grounds of appeal."*

17. The Supreme Court in **Avnit Singh v State [2020] FJSC 1** stated the following:

> *"[22] The requirement that a trial judge who has reasons not to agree with the majority opinion of the assessors should pronounce his reasons for differing with such opinion is a fundamental safeguard that ensures that justice is done in every case according to law. The objective of such a requirement is to explain to the assessors, the prosecution and the accused as well as to the society at large, the reasons for the decision, so that the social conscience can rest in the knowledge that justice was done. Candid reasons set out in the judgment of the trial judge, can be of great assistance when an appellate court is called upon to review the decision on appeal.*
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> *[23] In the course of its judgment in Ram v The State this Court succinctly described the role of the trial judge as well as the supervisory function of the appellate court in the following words-*

> *"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case."*

18. The main issue for determination at the trial was whether there was sufficient evidence of the fault element of murder to justify the trial judge's finding the appellant guilty of murder and not manslaughter as opined unanimously by the assessors.

19. In making that determination there are two issues that the trial judge was required to take into consideration at the same time. The first is that in making his determination he must be sure that the prosecution has established beyond reasonable doubt, on the evidence adduced at the trial, the fault element. Secondly, the defences of self-defence and the partial defence of provocation had to be considered. The evidence that the trial judge accepts or rejects on considering these defences must be clearly set out and then evaluated to establish whether it has met the standard of proof required.

20. At paragraph 22 of the Judgement, the trial judge in reference to the issue of self-defence stated:

> *"The assessors were left with the complete defence of self-defence which they obviously rejected. The court agrees with that. Although the deceased had earlier in his rampaging temper threatened to kill the accused and his children, the accused certainly had the "upper hand". He had disarmed the deceased by removing him from a nearby knife and by disarming him of the*

wooden table leg. The deceased was crawling towards the accused, unarmed and seemingly unable to stand. There was no immediate threat to the accused whatsoever and he was presented with an upturned back and head to batter. Even if the accused was in mortal danger, his multiple strikes were clearly disproportionate to the perceived threat."

21. The trial judge's basis for the above decision is set out in paragraphs 16 to 18 of the judgment. The trial judge also said that there were three different versions of 'multiple strikes' which he had to reconcile. How did he reconcile that? He did not, he simply stated at paragraph 18; '*I make an irresistible finding the all the injuries were caused by the accused and therefore his unlawful acts caused the death of his brother."* What is not made clear by the trial judge, is the basis of the *irresistible finding.* There is no evidential basis given by the trial judge for this finding, yet it is critical to the core issue in question at the trial; especially the fault element of murder. The trial judge gave no reasons for his *irresistible finding*.

22. The appellant submits that the assessors had believed the account of events he had submitted, that he did not intend to kill the deceased nor did he intend to cause or was reckless in causing the death of the victim. Paulina Maria, a State witness at the trial was adamant in her evidence that she only saw the appellant hit the victim, twice and the same was also confirmed by Lui a witness for the defendant at the trial: Page 344 Court Record. In addition, there were threats by the victim to kill the appellant's children, while he was smashing things in the house while swearing in very vulgar language: Page 342 Court Record.

23. The appellant further submitted that he had every opportunity and weapons at this disposal [knife/broken dishes] to use to kill the victim. He could have stomped on his head and kicked him when he had fallen twice in the house but he did not do that and instead tried to talk the deceased out of his rage. Even when he was under attacked by the deceased, verbally and physically, he did not retaliate because it was never his intension to kill his brother and his actions in trying to contain the violence perpetrated by the deceased cannot equate to recklessness on his part.

24. On the issue of provocation, which the trial judge covered in his summing-up at paragraphs 48 to 50, in paragraph 50 the trial judge stated the following:

> *"If, however, you conclude that such a person would or might have reacted and done as Tomasi (appellant) did, your verdict would be one of not guilty of murder, but guilty of manslaughter."*

25. The trial judge in his judgment made no reference at all that it was open to the assessors to find the appellant not guilty of murder, but guilty of manslaughter which he referred to in the summing-up, as referenced above. This is a fatal omission on the part of trial judge, because it is evidence of the fact he had formed an opinion of the appellant's guilt without consideration of the totality of evidence at the trial.

26. The finding of manslaughter by the assessors was rejected by the trial judge on the basis that the appellant had given different versions of how many blows he inflicted on the deceased and the evidence of the pathologist. In this regard the trial judge had opted to accept the appellant's admission at one point during the cautioned interview that he kept hitting the deceased 'plenty times'; yet the appellant also stated that he had hit the deceased three times on the shoulder area and this was supported by the prosecution evidence of Paulina Maria and the appellant's witness of Lui. He did not provide reasons why he preferred the version he chose and the reasons for doing so.

27. The Supreme Court in **Lautabui v State [2009] FJSC 7** at paragraph 34 stated:

> *"[34] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge*

to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.

28. This was endorsed in the recent judgment of the Supreme Court in **Bavesi v State [2024] FJSC45**; **CAV0019.2023** (29 October 2024).

29. In reviewing the trial Judge's judgment and summing-up, there were no reasons provided based on the evidence in the case to support his decision not to accept the unanimous opinion of the assessors of not guilty of murder, but guilty of manslaughter. The assessment of the evidence and the determination by the trial judge and the gaps that exist in explaining the issues relating to provocation and guilty intent of the appellant, which were covered in the summing-up, were not referenced in the judgment. The key and critical aspects of the evidence led at the trial with regard to the amount of assault by the appellant, and using a broken table leg, were not assessed critically to determine how many times the deceased was hit, despite the trial judge's finding that the deceased was hit "plenty times", and the evidence of other witnesses that he was hit 2 or 3 times.

30. The trial judge's reasons for rejecting the evidence of Paulina Maria [Prosecution witness] and Lui [defence witness] was simply that it was untruthful: paragraph 15. Then at paragraph 18 the trial judge went on to "make an irresistible finding" that all injuries were caused by the deceased, without setting out a reasoned basis from the evidence. In this regard the trial judge has failed to meet the requirements of section 237(4) of the Criminal Procedure Act 2009, in not providing key elements in the evidence that led him to reach the conclusion he did in this case.

31. Section 299 of the CPA requires the judge to pronounce his decision in open court. Failure to comply with this statutory requirement is sufficient of itself to warrant setting aside a conviction in a case where the judge overrides the opinion of the assessors: **Lautabui (supra) paragraph 30.**

32. I turn to consider whether the provision to s 23 (1) of the Court of Appeal Act 200 may be applied in the interest of justice. This is not an appropriate case for the application

of the provision. In the light of that conclusion, the finding of guilty of murder against the appellant, must be quashed and substituted with a finding of guilty of manslaughter, as unanimously opined by the assessors: section 23(2) of the Court of Appeal Act 2009.

New sentence

33. Section 239 of the Crimes Act 2009 provides that a person guilty of manslaughter is liable to a term of 25 years imprisonment as the penalty for manslaughter.

Guidelines in Manslaughter Cases

34. The Fiji Court of Appeal in **Vakaruru v State [2018] FJCA 124**, provided the following guidelines in sentences for manslaughter:

> *"[46] The current sentencing trend for the offence of manslaughter under the Crimes Act appears to be between 5 years to 12 years imprisonment. The above sentencing range does take into account the objectives of section 4 of the Sentencing and Penalties Act. Section 26 (2) (a) of the Sentencing and Penalties Act gives the High Court the powers to suspend a final sentence if it does not exceed three (3) years imprisonment. Accordingly, there is no need to establish a new tariff for the offence of manslaughter. A sentencing court can impose a suspended sentence based on the circumstances of the offending, a tariff may be construed as a restriction or may even confuse a sentencer. In exceptional cases a sentencing court should consider suspending a sentence.*
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> *[47] In **State v Suliasi Dumukuro criminal case HAC 27 of 2014** Perera J. after considering the sentences for the offence of manslaughter from 2012 to 2016 came to the conclusion that the appropriate tariff for this offending should be between 5 years and 12 years imprisonment. Under section 26 of the Sentencing and Penalties Act a sentencing court has the powers to suspend a sentence if that sentence did not exceed three (3) years imprisonment hence the decision to suspend a particular sentence was a separate consideration.*
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> *[48] I note that a sentence of 5 years to 12 years imprisonment for the offence of manslaughter is in line with the current sentencing regime adopted by the High Court with a suspended sentence to be considered in exceptional circumstances. It does not mean that a sentencing court cannot deviate from the above range. There may be reasons to go below or higher than the range of sentencing between 5 years to 12 years imprisonment depending upon the circumstances of the offending and the sentencing court should provide reasons why the sentence is outside the range."*

35. In sentencing the appellant in this case, the starting point for the sentence is 5 years, for aggravating factors, add 3 years, making the sentence 8 years imprisonment and 1 year is deducted for mitigating factors. The final sentence is 7 years imprisonment with a non-parole period of 6 months imprisonment effective from 9 May 2017.

ORDERS:

1. The Appeal against conviction for Murder is quashed and substituted with conviction for manslaughter, contrary to section 239 of the Crimes Act 2009.

2. The sentence in the High Court is set aside and a new sentence of 7 years imprisonment with a non-parole period of 6 years effective from 9 May 2017.

Hon. Justice Isikeli Mataitoga
ACTING PRESIDENT, COURT OF APPEAL

Hon. Justice Pamela Andrews
JUSTICE OF APPEAL

Hon. Justice Gerard Winter
JUSTICE OF APPEAL