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

CRIMINAL APPEAL NO. AAU 0171 of 2019
[High Court at Suva Case No. HAC 377 of 2017S]

BETWEEN : **THE STATE**

Appellant

AND : 1. **NOA RAVUTANASAU**
2. **MELACI TIKOMAIRARATOGA**

Respondents

Coram : Qetaki, JA
Andrews, JA
Winter, JA

Counsel : Mr T. Tuenuku for the Appellant
Mr S. Waqainabete for the Respondents

Date of Hearing : 6th November 2024

Date of Judgment : 28th November 2024

JUDGMENT

Background

[1] In the early morning of the 30th of November 2017, as the Suva night clubs emptied their patrons to the streets, at the Total Service Station car park, the prosecution alleged the first and the second respondents punched the deceased's face and punched, kicked, and stomped him as he lay on the ground. These assaults the pathologist later told the court ruptured the deceased's liver, caused severe injuries to his head, bleeding inside his brain and body, the gathering fluids overcoming his kidneys, which caused his death.

[2] The respondents, Noa Ravutanasau ('Noa') and Melaci Tikomairaratoga ('Melaci') were charged with murder and tried together. By a majority the assessors found they were not guilty of murder but guilty of manslaughter. The trial judge disagreed with that majority and acquitted both.

[3] The State appeal that acquittal urging the verdicts of acquittal were unreasonable and could not be supported by the evidence as:

(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 defenceless deceased on the ground was necessary to defend themselves.

(ii) it was not properly open to a reasonable judge to find the conduct of both respondents in continuing to assault the defenceless deceased on the ground was a reasonable response in the circumstances.

[4] Neither respondent called nor gave evidence at trial, rather, they relied upon the evidence of bystanders, called by the State, to establish the necessary plausible narrative for their self-defence.

[5] This evidence, set out in the judgement, established the angry, drunken, deceased, triggered the confrontation by his swearing and abuse and challenges to the

respondents for a fight as they went to their car park. They ignored him several times and walked away only to have the deceased keep coming at the two of them and punch Noa's head felling him to the ground. The deceased continued to punch Noa as he lay there. Meanwhile, Melaci, when she intervened to stop the attack on Noa, was also punched by the deceased. Inevitably by now a crowd had gathered to watch.

[6] Among them Mr Sekope Meli told the court when the fallen Noa got to his feet the aggressive deceased continued his confrontation and challenges to a fight coming at him with his fist in the air. He was met with a solid punch (maybe two) from Noa, those punches then put the deceased to the ground. Noa did not then, walk away. Rather, both respondents beat up on the deceased and kicked him as he lay there. The pathologist found trauma to the deceased's body consistent with the punches and kicks witnessed by onlookers[1].

[7] The main issue to be resolved is whether the respondents were acting in self defence after Noa punched the deceased to the ground; as both accused then punched and kicked the deceased as he lay there. Remembering neither respondent testified nor called evidence that they were acting in self-defence as described in Section 42(2) of the Crimes Act, 2009.

[8] This requires a short rehearsal of the law on self-defence, and a discussion over the ability of the defence to only rely on prosecution evidence to raise a 'plausible narrative' for their defence of self-defence to be raised. Then the discussion will consider whether the defence of self-defence might justify an acquittal.

Self defence

[9] The Crimes Act s 42(2) relevantly provides:

> *"A person carries out conduct in self defense if and only if he or she believes the conduct is necessary: ...*
> *(a) to defend himself or herself or another person…*

[1] See notes of evidence in High Court Record pages 382-426 especially pages 407-409 and 411,418 and evidence of the pathologist Dr James Kalougivaki pages 452-458 especially pages455, 456 and 457.

and the conduct is a reasonable response in the circumstances as he or she perceives them."

[10] The major elements of self-defence are well-established[2]. There are three questions that should be put to the assessors and answered by a judge. The questions reflect the mixed subjective/objective nature of the test. The first two questions are subjective in nature and the third requires an objective inquiry against the standard of whether the force used was reasonable. The questions are often interrelated.

1. What were the circumstances as the accused believed them to be?

2. Has the State proved beyond reasonable doubt that the accused was not acting in self defence at the time they inflicted force on the victim? The conduct is judged in the light of the factual circumstances as the accused subjectively perceives them, regardless of whether the perception is accurate. The accused may be mistaken about the necessity of the conduct. It is therefore an error simply to ask what a reasonable person would have done.[3]

3. Has the State proved beyond reasonable doubt that the force the accused used was not reasonable having regard to the circumstances as he or she believed them to be. The reasonableness of the response is an objective matter. It is immaterial that the person may have thought the response was reasonable. In the result, a person who overreacts may lose the defence: a subjective belief in the necessity of the response will be of no avail if the response was objectively unreasonable.

[11] In answering these questions, an accused should receive the benefit of a common law doctrine that a person under attack cannot be expected to 'measure with nicety' whether and how much force is needed for defence[4]. The courts have been reluctant to engage in precise calculations. As long as the defensive force was proportionate to the attack, courts have been unwilling to draw fine lines which would second guess

[2] *Naitini v State* [2020] FJCA 20.and see notes 5 and 6 below.
[3] *Aziz v State* [2015] FJCA 91 at [33].
[4] *Palmer v R* [1971] AC 814 at 832

the assessment made by the defending accused. In the result, accused are accorded a margin of error.

Raising Self Defence

[12] The burden of establishing that there is sufficient evidence to raise a particular issue is only the burden of bringing an issue into play, as distinct from adducing sufficient evidence to establish the relevant facts to the relevant standard.

[13] In a trial, an accused who pleads self-defence bears the burden of establishing that there is sufficient evidence to require this issue to be tried. That is there must be evidence capable of supporting a reasonable doubt in the mind of the tribunal of fact as to whether the prosecution has excluded self-defence. However, if the defendant successfully discharges this evidential burden of proof, the legal burden of proof reverts to the prosecution, which must prove that the defendant did not act in self-defence

[14] The duties of a trial judge have been well described in this court since at least 2008[5] and frequently repeated with some refinement[6]. Those cases traditionally leaned into New Zealand, Australian and United Kingdom law to aid interpretation of the defence. The court is obliged to State counsel for supplementary submissions and attached cases on this novel point of law. Their case review indicates when self-defence is raised an accused most often gives evidence to explain the circumstances that caused them to believe they must act in self-defence[7]. However, there is no direct consideration of whether an accused, who wishes to raise the defence, is required to give, or call evidence as to their honest belief that self defence was necessary. In the absence of any decisions from Fiji and in light of the earlier adoption of commonwealth law to guide our trial judges' when self-defence is raised I refer to relevant cases from both Australia[8] and New Zealand[9].

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[5] *State v Li Jun* (unreported) CA17.2007S 13 October 2008 per Sackville JA

[6] *Naitini v State* [2020] FJCA 20 and Tarun Kumar Rawat v State CA AAU0186 of 2016 (24 November 2022)

[7] See for example *Naitini* at note 6 and *Aziz* at note 3

[8] *Colosimo v DPP* [2006] NSWCA 293 at [19]. *Mencarious v R* [2008] NSWCCA 237 at [61], [78], [90]

[9] ***R v Tavete*** [1988] 1 NZLR 428 (CA); ***R v Ranger*** (1988) 4 CRNZ 6 (CA); and ***R v Miller*** CA26/06, 16 June 2006.

[15] The key cases which establish the position in New Zealand are *R v Kerr* and *R v Tavete*.

[16] In ***R v Kerr*** the appellant was found guilty of manslaughter at trial but appealed this conviction. He appealed on the ground that the trial judge had declined to allow the question of self-defence to be put to the jury. In discussing the evidence that must be provided to justify submitting a defence of self-defence to the jury, the Court of Appeal observed:[10]

> *"It is well settled that when a judge has to rule whether there is sufficient evidence to justify a defence of self defence being submitted to a jury, he must consider the matter on the view of the evidence most favourable to the accused. **There is, of course, no onus on an accused to establish such a defence affirmatively but he must be able to point to material in the evidence** which could induce a reasonable doubt…"*

The appeal succeeded, the manslaughter conviction was quashed, and a retrial was ordered.

[17] At his first trial, Mr Tavete was found guilty and convicted of murder. Counsel for Mr Tavete informed the Judge that they did not intend to rely on a defence of self-defence, and they did not address the jury on this matter. The trial judge did not direct the jury on the matter of self defence either. Mr Tavete appealed his conviction for murder, arguing that the Judge should have directed the jury on self defence even though his counsel had informed the judge that they were not relying on this matter and did not raise it with the jury themselves.

[18] The Court of Appeal held that:[11]

> *"The general principle is not in doubt. Self defence should be put to the jury where, from the evidence led by the Crown or given by or on behalf of the accused, or from a combination of both, there is a credible or plausible narrative which might lead the jury to entertain the reasonable possibility of self-defence."*

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[10] *R v Kerr* [1976] 1 NZLR 335 (CA) at 340 (emphasis added).
[11] *R v Tavete* [1988] 1 NZLR 428 (CA) at 430 (emphasis added).

[19] The New Zealand Court of Appeal approach is consistent with the views expressed by the Australian courts. The New South Wales Appeal Court in *Colosimo v DPP* was considering the same issue. After a drunken brawl at a casino between patrons and security officers, who had asked three drunk brothers to leave the premises, minor convictions for affray under s.93C of the Crimes Act 1900 were entered. The prosecution case was based on oral evidence from several witnesses, including the security officers, and a compilation video of the incident. The appellants did not give evidence. Nor did they participate in interviews or give statements to investigating police. Accordingly, there was no version from them before the Court concerning their actions and their state of mind at the time of the relevant incident

[20] The Court of Appeal held that[12]:

> ***It is not essential that there be evidence from the accused as to the accused's beliefs and perceptions: evidence of circumstances from which inferences may be drawn as to the accused's relevant beliefs and perceptions may be sufficient****. However, if the accused does not give evidence of his or her beliefs and perceptions, then generally, in the absence of other evidence suggesting the contrary, inferences have to be drawn on the basis of what beliefs and perceptions a person in the position of the accused could reasonably hold in the circumstances.*

[21] This approach also ensures the primary fair trial right emphasised by the onus and burden of proof in any criminal trial as guaranteed by the constitution, is upheld. An accused is not required to defend themselves; it is the State that must prove them guilty beyond reasonable doubt. Accordingly, an accused is not required to give or call evidence in their defence. Whether there is sufficient evidence from the States case to put self defence into play will be a matter for the trial judge to carefully determine. If there is then the defence must be considered.

[22] Accordingly, for self defence to be raised or left to the assessors I find it is not essential that there be evidence from the accused as to the accused's beliefs and perceptions: but it must be raised fairly on the evidence.

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[12] See *Colosimo v DPP* [2006] NSWCA 293 at [19].

[23] The following summarises the position:

- If the evidence provides a "*credible or plausible narrative*" that might lead the assessors to consider self-defence, the judge is obliged to put the defence to the assessors, even if the defendant expressly disavows it

- In deciding whether to put the issue to the assessors, the trial judge must consider the matter on the view of the evidence most favourable to the accused.[13] In doing so, the trial judge is entitled to assess (at the threshold) all aspects of self defence in deciding whether to allow the defence to go to the assessors

- However, care must be taken to ensure a trial judge does not make factual findings that are properly within the assessor's domain

- Self defence should not be put to the assessors if it would be "impossible for the assessors to entertain a reasonable doubt that the defendant had acted in the defence of himself [or herself] or another within the terms of s 42[14]

- Where there is no evidence from the appellants as to their beliefs or perceptions; the question is, what inferences could be drawn as to their possible beliefs and perceptions from objective circumstances.

Discussion

[24] The trial judge directed the assessors to consider the issue of self-defence between paragraphs 66-70[15] and asked them to find the respondents not guilty if they had acted in self-defence. 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*

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[13] *R v Kerr* [1976] 1 NZLR 335 (CA) at 340; and *Theobald v R* [2018] NZCA 409 at [58].

[14] *R v Wang* [1990] 2 NZLR 529 at 534 (CA); and *R v Winterburn* CA30/98 8 October 1998

[15] Pages 80-82 of the court record.

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-defence."

[25] 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.*
>
> *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.*
>
> *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.*
>
> *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.*
>
> *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."*

[26] Both the direction on self defence and the availability of a manslaughter opinion as an alternate to murder if self defence was rejected was fairly put to the assessors. The choice for the assessors was clear. If they accepted the case on self defence, they could acquit. If they rejected self-defence, they could convict of either murder or manslaughter.

[27] Following these directions the majority of the assessors rejected self defence. The majority did not believe that the prosecution had proved murder either. They believed a case of manslaughter had been made out beyond reasonable doubt by the prosecution.

[28] In acquitting the accused the trial judge remarked[16]:

> *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*

[16] Page 88 of the Court record

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.*

[29] These events unfolded very quickly but in two distinct phases. The first involved the deceased's persistent, unreasonable, angry, and challenging behaviours towards both respondents leading up to his punching Noa and sending Noa to the ground where the deceased continued his attack upon the fallen Noa. Distracted by Melaci's intervention to protect Noa the deceased then punched her. Noa then got off the ground and the deceased came at him again with his fists raised only to be punched hard enough by Noa to cause the deceased then to fall to the ground. Having got the best of the deceased the respondents could have retreated; they never gave evidence as to their belief so we cannot speculate as to why they did not then walk away.

[30] Phase two begins with both respondents beating up the deceased as he lay on the ground inflicting the significant injuries that caused his death. To justify that killing or inflicting that significant injury described by witnesses and the pathologist, they must have honestly believed on reasonable grounds they were at that moment in immediate danger of death or significant injury and that to kill or inflict significant injury provided the only reasonable means of protection.

[31] I find the circumstances of the deceased's belligerence and aggression started this conflict. His attack on Noa and punching Melaci when she intervened to protect Noa provides sufficient evidence to bring the issue of self defence into play. That issue was

properly left with the assessors to decide. They did. They rejected self-defence, they rejected murder, they found by their opinion the respondents guilty of manslaughter.

[32] The trial judge in overturning that opinion and acquitting the respondents conflated the confrontation into one event and so failed to analyse the narrative correctly and in its proper sequence. While in phase one when confronted by the level of aggression and attack from the deceased Noa and Melaci might have had a well-founded defence of self defence that was exhausted once Noa punched the deceased to the ground.

[33] There was no direct evidence from either accused about their belief in the need to defend themselves in phase two from a man Noa had put to the ground. Let alone any explanation by way of objective evidence about why it may have been reasonable in those circumstances for Noa and Melaci to beat that man so severely as he lay on the ground, that he died.

[34] The judge had to rely on drawing an inference about these two critical issues from the available prosecution evidence. Judges cannot guess or speculate about inferences that might be drawn from proven fact. I find the inference drawn by the trial judge that the appellants acted in self defence was wrong. I agree with the State's submission that this was not an available inference for the trial judge to draw.

[35] Furthermore, even if the inference that they acted in self defence could be drawn, judged objectively, the accused then overreacted and lost the defence. Any subjective belief in the necessity of their response is of no avail as the response was objectively unreasonable. Put simply they went too far in that second phase as they both beat up on the deceased as he lay on the ground. In that moment I find they exceeded their right of self defence.

[36] In my view when both the subjective and objective tests are applied to the totality of the evidence at this trial, a case of self-defence cannot be made out.

[37] The State appeal is granted.

A retrial or a conviction?

[38] The decision of the Privy Council in *Reid v R*.[17] describes the approach as "flexible", multi-factorial, and directed at the interests of justice in the particular circumstances.

[39] The serious nature of the alleged offending favours a retrial. As does the need for any future summing up to carefully provide directions on these events in two phases not a conflated single event. The respondents were wrongly acquitted by error of law, I find there is a risk the trial judge may have misdirected the assessors on the defence of self defence which in turn may have mislead the assessors opinion. That risk can only be cured by a retrial. Furthermore, the appellants need to carefully reconsider whether to pursue another trial.

Orders of the court:

1. The States appeal against acquittal is allowed.
2. The acquittal is quashed.
3. The court remits the case back to the High Court for re-trial.
4. First call for mention only to consider any application the State may make upon a date to be set by the registrar and notified to the respondents.
5. Respondents remain at large.

The Hon. Mr Justice Alipate Qetaki
JUSTICE OF APPEAL

The Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL

The Hon. Mr Justice Gerard Winter
JUSTICE OF APPEAL

[17] *Reid v R*