**AVINESH ANAND SINGH v STATE (AAU0011A of 2005S)**

COURT OF APPEAL — CRIMINAL JURISDICTION

WARD P, TOMPKINS and WOOD JJA

6, 10 March 2006

**Criminal law — verdicts — miscarriage of justice — misdirection to jury — direction on provocation inadequate — Penal Code s 203.**

On 3 June 2003 the Appellant was charged with the murder of his wife. After trial, the assessors advised the judge that they found the Appellant guilty. The judge agreed with the findings of the assessors and convicted the Appellant of murder and sentenced him to life imprisonment. The Appellant appealed his conviction and submitted that he should be convicted of manslaughter and not murder on the ground that the State had not proved that the Appellant was not acting under provocation.

The Appellant alleged that his wife had been having sexual relations with her employer. He claimed that 2 days before her death, his wife and her employer had sexual relations in front of him. Likewise, he claimed that the employer had assaulted and threatened him. On the day of the murder, the Appellant claimed his wife refused to have sex with him and a discussion ensued. The Appellant said this made him very angry. Two hours after the discussion, the Appellant killed her. The employer gave evidence for the prosecution and denied that he was having an affair with the wife and denied he ever assaulted and threatened the Appellant.

The appeal against conviction was based on two grounds: (1) that the trial was unfair because one of the three assessors was a former police officer and a prosecutor for the Lautoka City Council; and (2) that the direction given by the judge to the assessors on provocation was inadequate as it referred only single aspect of provocation namely "sudden provocation".

**Held** — (1) The evidence established that the assessor was a town ranger with the Lautoka City Council. The court ruled that even if the assessor had some role with the council involving prosecuting on behalf of the council in the Magistrates Court, there was no reason to conclude that this could cause him to carry out his role as assessor other that fairly and impartially that would justify the setting aside of the decisions of the assessors.

(2) The court ruled that the judge gave a full and detailed direction on provocation which was directly in accord with s 203 of the Penal Code. There was no misdirection there nor elsewhere in the careful and detailed direction the judge gave on provocation. Moreover, there was sufficient evidence established by the State that the Appellant was not acting under provocation. The Appellant on his own statement said that during the 2 hours after the discussion with his wife he considered the possibility of killing his wife and then decided to do so.

Appeal dismissed.

**No cases referred to.**

*A. Khan* for the Appellant

*K. Tunidau* for the Respondent

**Ward P, Tompkins and Wood JJA.**

**Introduction**

The Appellant was charged with the murder of his wife on 3 June 2003. Following a trial before Connors J and assessors, the assessors advised the judge that they found the Appellant guilty. The judge agreed with their findings, convicted the Appellant of murder and sentenced him to imprisonment for life.

He has appealed against that conviction. It was submitted on behalf of the Appellant that he should have been convicted of manslaughter, not murder, on the grounds that the State had not proved that the Appellant was not acting under provocation.

**Factual background**

The Appellant and his wife had been married for about 10 years. Until shortly before her death they and their two daughters had been living with his parents. Differences had developed between them. There was evidence of arguments. It was claimed by the Appellant in his statement to the police and in his evidence before the court that his wife had been having sexual relations with her employer.

According to the Appellant, his wife and her employer had been together on a number of occasions. He described how, 2 days before her death, his wife and her employer had sexual relations in front of him. He said that the employer had assaulted him and threatened him. The employer stayed that night with his wife and left the next morning between 7 and 8 am. On the following day he said that the employer had came to the house with a grass cutter and he, the Appellant, had cut the grass. Later, the Appellant, his wife and her employer drank beer and played cards. The employer left about 9.30 pm.

**[5]** At about 11 pm he went into their bedroom, woke up his wife and asked for sex. She refused. He said that she told him that she would have sex with whomever she liked and he cannot do anything to her. He said he became very angry. He went to the sitting room and made up his mind to kill his wife. At about 1 am — 2 hours after the discussion between him and his wife concerning sex — he took out a scarf, tied this scarf around his wife's neck, pulled it hard, and killed her.

**[6]** He walked to his father's house, told him what had happened and then went to the police. He said he was very scared and was thinking of hanging himself.

**[7]** The wife's employer gave evidence for the prosecution. He said that he was called two or three times by the Appellant and his wife with respect to their disputes and he was called when the Appellant attempted to commit suicide. He consistently denied that he was having an affair with the wife and that he stayed at the house on the night of 1 June. He denied that he ever assaulted or threatened the Appellant.

**The fair trial ground**

**[8]** It was submitted on behalf of the Appellant that the trial was unfair because one of the three assessors was a former police officer and a prosecutor for the Lautoka City Council. The evidence tendered in support of this ground is unsatisfactory. Counsel for the Appellant applied for leave to call further evidence in the form of an affidavit by counsel for the Appellant at the trial. The State not opposing, leave was granted. That counsel deposed:

> 4. That it was sometime after that conviction and sentence of [the appellant] that I saw [the assessor] prosecuting on behalf of the Lautoka City Council in the Magistrates Court at Lautoka.
> 5. That I recognised him to be the same person who had participated in the [appellant's] trial and from further enquiries I learned that [the assessor] was a former police officer.

**[9]** This evidence is unsatisfactory in several respects. The record, where recording the events surrounding the swearing in of the assessors, states that the assessor to whom the former counsel for the Appellant referred is shown as "town

ranger, Lautoka City Council". There is no evidence to show what is the role of the person described as the town ranger. Nor is it clear from the affidavit of former counsel that, when she describes him as prosecuting on behalf of the Lautoka City Council, he was giving evidence in his role of town ranger or whether he was appearing on behalf of the council as prosecutor. The evidence relating to this assessor being a police officer is obviously hearsay. Nor does the former counsel state when or how long before the trial he had been a police officer.

**[10]** It is clear from the record that counsel for the Appellant at the trial knew that the assessor was a town ranger with the Lautoka City Council. She raised no objection. Even if the assessor had some role with the council involving prosecuting on behalf of the council in the Magistrates Court, there is no reason to conclude that this could cause him to carry out his role as assessor other than fairly and impartially.

**[11]** Section 265 of the Criminal Procedure Code sets out the persons exempted from liability to serve as assessors. They include the mayor of any city or town and members of the Fiji police force. There is nothing in the section to indicate an intention that former members of the Fiji police force or employees of any city or town are exempted. In any event, it is apparent from the list of persons exempted that the exemptions are not because of considerations of fairness or impartiality. Rather the persons concerned appear to be exempted because of the importance to the community of the positions they hold.

**[12]** No grounds have been made out to satisfy us that by reason of this person being an assessor there was any unfairness or lack of impartiality of the kind that would justify setting aside the decisions of the assessors, with which the judge expressly stated he was in agreement. This ground of appeal cannot succeed.

**Provocation**

**[13]** The second ground of appeal advanced on behalf of the Appellant was that the direction the judge gave the assessors on provocation was inadequate. In particular counsel for the Appellant submitted that the judge referred only to a single aspect of provocation namely a "sudden provocation".

**[14]** The judge gave a full and detailed direction on provocation. Relevant to the submissions advanced in support of this ground is this direction:

> Provocation is not a complete defence. Its effect is to reduce murder to manslaughter. Such a defence operates only when the act causing death is done in the heat of passion caused by sudden provocation, that is before there is time for such passion to cool.

**[15]** This direction is entirely in accord with s 203 of the Penal Code:

> 203. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.

**[16]** The passage in the summing-up on which the Appellant relied was a correct direction in accordance with s 203. There was no misdirection there nor elsewhere in the careful and detailed direction the judge gave on provocation.

**[17]** We add there was ample evidence on which the assessors could properly find that the State had established beyond reasonable doubt that the Appellant was not acting under provocation. They may have accepted the employer's denial

of any affair with the wife. They may have considered that the Appellant was not a credible witness, particularly having regard to the discrepancies between his evidence in court and his written statement to the police. They may have considered that the 2 hours that elapsed between the offensive words of the wife and the Appellant's act in killing her negatived any suggestion that the act that caused the death was done in the heat of passion caused by sudden provocation. On the contrary, according to the Appellant's own statement, during those 2 hours he considered the possibility of killing his wife, and then decided to do so.

**[18]** This ground of appeal cannot succeed.

**Conclusion**

**[19]** As neither ground of appeal can succeed, the appeal is dismissed.

*Appeal dismissed.*