IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION: CAV0015 OF 2024
[Court of Appeal No: AAU0021 of 2020]

BETWEEN : **THE STATE**

Petitioner

AND : **MARVIN RAY KETENILAGI**

Respondent

Coram : The Hon. Mr Justice Salesi Temo, President of the Supreme Court
The Hon. Mr Justice Terence Arnold, Judge of the Supreme Court
The Hon. Mr Justice William Young, Judge of the Supreme Court

Counsel: Ms N Tikoisuva for the Petitioner
Respondent in Person

Date of Hearing: 3rd April, 2025

Date of Judgment: 29th April, 2025

JUDGMENT

Temo, P

[1] I agree with His Lordship Mr Justice Arnold's judgment and conclusions.

Arnold, J

[2] Following a trial before a Judge and three assessors, the respondent, Marvin Ketenilagi, was convicted of the manslaughter of Shiri Chand and sentenced to six years imprisonment with a non-parole period of four years. On appeal, the Court of Appeal quashed his conviction for manslaughter and substituted a conviction for an included offence, assault occasioning actual bodily harm. The Court made no order in respect of the respondent's sentence, which he had by then served.[1]

[3] The Court of Appeal allowed the respondent's appeal essentially because it considered that the State had not established beyond reasonable doubt that the respondent's actions substantially contributed to or hastened Mr Chand's death.

[4] The State now petitions this Court for leave to appeal against the Court of Appeal's decision and seeks an enlargement of time to do so. The State's concern is with the Court of Appeal's approach to causation, which, it says, is not consistent with the approach the courts have taken to date to intervening causes (as reflected in the principle "*novus actus interveniens*").

[5] I note that the respondent appeared for himself at the hearing of the petition. He did not file any written submissions but said he relied on the written submissions filed on his behalf in the Court of Appeal.

Summary

[6] Before I set out the background, I will summarise the conclusions I have reached:

(a) First, I would grant the State's application for an extension of time. The application for leave to appeal was filed 17 days late as a result of an oversight on the part of State counsel. I would extend time because the issue raised by the leave application is important, the period of delay is short, and the delay has caused no prejudice given that the respondent has completed his sentence.

(b) Second, I would grant the State leave to appeal. While the Court of Appeal's decision in this case might be viewed as a "one-off", and therefore of little

[1] See *Ketenilagi v The State* [2024] FJCA 177.

precedential effect, I accept the State's submission that it may well be interpreted as being more significant and adopting a different approach to causation than that which courts have adopted to date. On that basis, it involves a question of general legal importance and so meets the test in section 7(2)(a) of the Supreme Court Act 1998.

(c) Third, I would allow the appeal, quash the conviction for assault occasioning actual bodily harm substituted by the Court of Appeal and reinstate the respondent's conviction for manslaughter. This has no consequences for the respondent's sentence, which he has served.

I will explain the second and third of these conclusions in what follows.

Background

[7] The respondent, 39, was a doctor. He was married with three children but was separated from his wife. He had been out clubbing with some friends and was returning home by himself around 3.30am one morning. As he was walking through the area by the Suva Handicraft Centre and Westpac building in central Suva on his way to a catch a minibus, he came across Mr Chand and his taxi. According to several eyewitnesses (mainly security personnel who were on duty in the area), the petitioner was very drunk – he smelt heavily of alcohol, was staggering and was acting aggressively. The petitioner acknowledged that he was drunk but said that he was still capable of making decisions.

[8] The victim, Shiri Chand, was a 56 year old taxi-driver. He had a serious heart condition (badly clogged arteries) and had previously suffered a heart attack. He was working in the early hours of the morning and had with him in his cab a young Indian boy. The boy was the child of a friend and Mr Chand had agreed to look after him while his friend went to work.

[9] The respondent took exception to Mr Chand having the young boy with him in the taxi at that time and in that locality. While there was no independent evidence as to the start of the altercation, several security guards and a hotdog seller in the vicinity heard shouting and went to see what was happening. They gave evidence that the respondent was verbally abusing Mr Chand for having the young boy out at that time of the

morning in that particular location and was behaving very aggressively towards him. They indicated that, besides verbally attacking Mr Chand, the respondent punched him hard at least twice, once on the jaw and once in the chest, and chased him in the vicinity of his cab, causing Mr Chand to fall over several times.[2] Some said Mr Chand threw stones at the respondent to defend himself. Witnesses described Mr Chand as "*shaking*", "*lost*", "*frightened*", "*weak*", and "*scared*".

[10] The police were called. The attending officer said that the respondent was "*really angry and aggressive*" and that Mr Chand's "*whole face and his whole body was shaking*". The police officer got into the taxi with the young boy and Mr Chand and directed him to drive to the police station. In the meantime, the respondent ran off, but he was chased by some onlookers and ultimately caught.

[11] After the taxi had gone a short distance, the police officer, who was sitting in the back seat, noticed that Mr Chand's hands were not on the steering wheel and that he had slumped forward and was breathing heavily. The officer leant over to take control of the steering wheel and hit Mr Chand twice on the back as a form of cardio-pulmonary resuscitation (CPR), which caused Mr Chand to take a deep breath. The officer said Mr Chand was unconscious, so he called a police vehicle to take him to the hospital. On arrival at the hospital, Mr Chand had no pulse and was not breathing, so CPR was commenced immediately. After about 40 minutes when it was apparent that Mr Chand could not be revived, CPR was stopped.

The cause of death

[12] Two medical witnesses gave evidence at trial. First, the emergency doctor who attended Mr Chand when he arrived at the hospital said that CPR by way of chest compressions commenced as soon as he arrived as he was unresponsive and not breathing. CPR was maintained for about 40 minutes, during which time Mr Chand was connected to a defibrillator that showed ventricular fibrillation (or an unstable arrhythmia). Besides CPR, Mr Chand was given electric shocks and medication; but none of this changed his condition and around 4.50am CPR was stopped.

[2] In his evidence, the respondent accepted that he had punched Mr Chand on the jaw. He said he did not remember punching Mr Chand in the chest but accepted he had pushed or shoved him. He described Mr Chand as the aggressor, a contention that the assessors and trial Judge obviously rejected.

[13] In the course of cross-examination, the doctor was asked whether it was fair to say that Mr Chand was dead when he arrived at the hospital. The doctor said she could not say, she was not sure. She said he may still have had a heartbeat, but it was irregular. The doctor also said:

> In any person the last thing to go is the heartbeat so the first response usually is to feel for the pulse because the last one to go is the heartbeat, so as soon as you feel that the pulse is low or not active at all that's when you start CPR straight away because the last one to go is the heart.

The doctor agreed that a person may not be breathing and may not have a pulse, but their heart may still be pumping.

[14] Second, a forensic pathology registrar carried out a post-mortem. She concluded that Mr Chand had died from severe coronary artery disease and listed the antecedent causes as being (i) severe cardiovascular atherosclerotic disease, (ii) multiple traumatic injuries and (iii) old posterior myocardial infarction. She identified one external cause, namely blunt force trauma.

[15] In terms of physical injuries, the pathologist identified swelling on the left side of Mr Chand's jaw, bruising on both knees, fractures and cartilage damage in the chest area, and a tear to the liver. She expressed the opinion that blunt force trauma was responsible for all these injuries and gave examples of the type of trauma that could cause them. For example, the injury to the jaw could have resulted from being hit (eg by a punch) or from the jaw striking something hard as the result of a fall; trauma to the knees most commonly resulted from falling down; injuries in the chest area could result from car accidents, assaults, falls or from CPR; the tear to the liver could have been caused by any trauma to the area.

[16] The pathologist said that trauma to the chest could cause heart dysfunction. She acknowledged that some of the injuries to Mr Chand's chest would have resulted from the CPR and said that the effect of a heavy punch to the chest could be hidden or masked because of the extent of the chest injuries caused by CPR. The pathologist also said that where trauma causes pain, that could increase the heart rate, which could in turn cause a heart with a pre-existing problem not to function properly. Similarly, unusual physical activity such as running around could have the same effect. Where

the heart is not functioning properly, so that blood is not circulating through the body as it should, the result can be death.

Causation

[17] The respondent was charged with manslaughter on the basis that he had caused Mr Chand's death by assaulting him while being reckless as to the risk that his conduct would cause Mr Chand serious harm (s 239(a), (b) and (c)(ii) of the Crimes Act 2009). The defence case was that there was a reasonable doubt about whether the respondent's actions had caused or substantially contributed to Mr Chand's death.

[18] Two of the assessors expressed the opinion that the respondent was guilty of manslaughter, one that he was guilty of assault occasioning actual bodily harm. The trial Judge agreed with the majority. As I have said, the Court of Appeal disagreed, concluding that the State had not established beyond reasonable doubt that the respondent's actions had caused or substantially contributed to Mr Chand's death. Against this background, it is important to understand the criminal law's approach to causation.

[19] The courts tend to identify two questions when addressing causation:

(a) Is there factual causation? So, if the death would not have occurred without the accused's conduct, there is causation in fact. While this assessment will often be straightforward, sometimes identifying the operative cause or causes of death as a matter of fact will be more difficult.

(b) Assuming factual causation, is there legal causation? That is, should the accused be held legally responsible? The answer to this may flow inevitably from the finding that there is factual causation depending on the type of factual causation involved; but it can involve policy choices, some of which are reflected in the statutory provisions dealing with causation, as I now illustrate.

[20] Section 246(1) of the Crimes Act provides that conduct causes death or harm if it *substantially contributes* to the death or harm. Consequently, there can be several causes of death where, for example, there is a series of events leading to a person's death.

[21] Section 246(2) goes on to identify situations where a person is deemed to have caused death of another even though their conduct is not the immediate or sole cause of death. Relevant to the present case is s 246(2)(d). It imposes liability on a person who has hastened the death of another who is suffering from a disease or injury which, apart from the accused's conduct, would have resulted in their death. So, the fact that a victim has a pre-existing condition or illness from which they will soon die will not protect an accused from liability where their conduct hastens death. The State contended at trial that this applied in the present case and the trial Judge directed the assessors on this basis.

[22] Although it is not directly relevant, I also mention s 246(2)(a) because it casts some light on the policy behind the law on causation. Where a person (A) assaults someone (B) and B requires medical treatment and dies as a result of it, A will be deemed to have caused B's death, provided that the medical treatment was undertaken in good faith and with common knowledge and skill. Put another way, good faith, competent medical treatment causing death will not be treated as having interrupted the chain of causation, that is, it will not be treated as a material intervening act (a *novus actus interveniens*).

[23] This is significant because the State argues that the effect of the Court of Appeal's decision in this case is to expand or misapply the concept of novus actus interveniens (although the Court did not explicitly mention it).

The Court of Appeal's decision

[24] As I have said, the Court of Appeal allowed the respondent's appeal, essentially because it considered that the State had not established causation beyond reasonable doubt. This appears to have been because there were material "contradictions, inconsistencies and omissions" in the eyewitness evidence and uncertainties as a result of the medical evidence. The Court appears to have been troubled as to the possible role of CPR in Mr Chand's death, given the pathologist's evidence that trauma to the chest can result from CPR and it was not possible to distinguish any trauma that the respondent may have inflicted from that caused by the CPR.

[25] In the Court of Appeal, the respondent's counsel, who was not his trial counsel, filed written submissions in which he pointed to various "contradictions, inconsistencies and omissions" in the accounts of the various eyewitnesses. For example, he highlighted that some eyewitnesses said they had seen the respondent punch Mr Chand on the jaw and the chest, others had described only a punch to either the jaw or the chest; some had said that Mr Chand threw stones at the respondent, others had not mentioned that; some described Mr Chand as running away from the respondent but falling over, others did not mention one or other, or both, of the running away or the falling. The Court of Appeal appeared to give some weight to counsel's submission.

[26] I make three points:

(a) First, these alleged "contradictions, inconsistencies and omissions" were not matters highlighted by defence counsel in his closing address at trial, nor were they addressed by the trial Judge in his summing up.

(b) Second, in his evidence, the respondent accepted that he had punched Mr Chand in the jaw. In relation to Mr Chand's chest, the respondent said that he was not sure he punched him but could remember "pushing his chest back" or "shoving" him. So, he accepted that he had applied force to Mr Chand's jaw and chest. In addition, he accepted that he had chased Mr Chand. So, key elements of the witnesses' accounts were not in dispute, as the respondent's trial counsel acknowledged in his closing address.

(c) Third, the eyewitnesses were security men and others working in the area. They were alerted to the fact that something was going on because they heard shouting. They went to the scene at different times from different directions. This would obviously have affected what they observed. It is, of course, unrealistic to expect that eyewitnesses will give accounts that are in all respects identical. Observation and memory simply do not work in that way. Moreover, the witnesses were giving evidence some two years after the event. As the respondent's trial counsel noted in his closing address, this may have meant that there were some "loose ends" in the evidence. In these circumstances, it is not surprising that there were variations in their accounts. The important point is that the witnesses' evidence was largely consistent on certain key points, such

as that the respondent was the aggressor, that he was very drunk, loud and aggressive towards Mr Chand and that Mr Chand was frightened and attempting to escape the respondent's attention.

Accordingly, I do not regard the alleged *"contradictions, inconsistencies and omissions"* as material.

[27] This brings me to the medical evidence. In some cases, a pathologist will be able to identify the cause of death in a way that clearly implicates an accused. For example, where an accused stabs someone in the chest with a knife and the victim dies, the pathologist will likely be able to explain precisely how the stab wound caused the victim's death.

[28] In the present case, the pathologist was able to identify the cause of death (severe coronary artery disease) and was able to explain how the respondent's physical and psychological aggression towards Mr Chand could have caused his diseased heart to fail when it did; but she could not be definite about the casual connection, especially as some of the blunt force trauma to Mr Chand's chest would have resulted from the CPR.

[29] In my view, when the timeline of events and medical evidence are considered, it was clearly open to the majority of the assessors and the trial Judge to conclude that the State had established beyond reasonable doubt that the respondent's actions had caused Mr Chand's death, in the sense of accelerating it.

[30] Mr Chand collapsed at the wheel of his car very soon after the respondent's unprovoked attack on him. The police officer who was sitting in the back of the taxi said Mr Chand had slumped forward and was "unconscious". Mr Chand was taken to the hospital, where it was found that he had no pulse and was not breathing. Accordingly, CPR was begun immediately. To the extent that Mr Chand had a heartbeat, it was irregular and none of medical interventions were successful in re-establishing a viable heartbeat. As he did not respond to any of the treatment he was given, CPR and other interventions were stopped.

[31] The evidence indicates that Mr Chand's condition did not change in the 40 or so minutes between his arrival at the hospital and the cessation of CPR. In short, Mr Chand was effectively dead when he arrived at the hospital.

[32] As I have said, the medical evidence identified various elements of the respondent's conduct towards Mr Chand as being capable of stressing Mr Chand's heart in a way that could result in his death – the physical trauma the respondent inflicted, his causing Mr Chand to run around in an effort to protect himself and the psychological stress of the unprovoked confrontation. There was a very close proximity in time between Mr Chand's death and the respondent's attack on him, which is strongly indicative of a causal relationship.

[33] In the result, I consider that the evidence does not support a conclusion that what occurred at the hospital might reasonably have been causative of Mr Chand's death to the extent that the respondent's conduct played no causative role in his death. Accordingly, I consider that the Court of Appeal was wrong to quash the respondent's conviction for manslaughter. As a consequence, I would allow the appeal, quash the petitioner's conviction for assault occasioning actual bodily harm and reinstate his conviction for manslaughter. As I have said, this has no impact on the petitioner's sentence.

Young, J

[34] I agree with the judgment of Arnold J but wish to make a few additional comments.

[35] Mr Chand died in the early hours of the morning of 25 January 2018, following the assault on him by the respondent.

[36] In allowing the respondent's appeal in relation to causation, the Court of Appeal appear to have been troubled by:

(a) whether attempts to resuscitate Mr Chand at the hospital may have caused or contributed to his death; and
(b) a more general concern that Mr Chand may have died when he did even if he had not been assaulted.

[37] As to the first, I agree with Arnold J that Mr Chand was effectively dead when he arrived at hospital. He had no pulse and was not breathing. While the resuscitation attempts may have caused some of the injuries to his chest later detected on post mortem examination, they were self-evidently not responsible for the condition Mr Chand was in when he arrived at hospital. What is critical to the causation issue before us is why he was in that condition.

[38] As to the second, I accept that the state of Mr Chand's cardiovascular system meant that his health was precarious and that it is theoretically possible that he may have died even if not assaulted. It is, however, important to recognise that proof beyond reasonable doubt is not proof to a state of absolute mathematical or scientific certainty. This means that theoretical possibilities do not necessarily equate to a reasonable doubt.

[39] On 25 January 2018, two things happened to Mr Chand. The first is that he was assaulted by the respondent and the second is that his heart failed, as a result of which he died. The respondent's case as to causation assumes that these two events are entirely unrelated (in the sense that the first did not even hasten the second). The underlying premise of his case is it is just a coincidence that they both happened on 25 January. However, I see this coincidence as so implausible as to not raise a reasonable doubt. This is for the following reasons:

(a) Although Mr Chand's state of health was precarious, he had been in broadly the same state since his prior heart attack. So, prior to the respondent assaulting him on 25 January 2018, there was no reason to think that he was facing a substantial risk of imminent death that is of dying that morning.
(b) The respondent's attack (and related circumstances) were just the sort of events that could have caused his heart to fail.
(c) In the immediate aftermath of the attack, Mr Chand was shaking, and it was very shortly after this that he lost consciousness. This was while he was on his way to hospital as a result of the attack. There was thus close proximity in time, and no break in the continuity of events, between the attack and Mr Chand becoming unconscious.

Orders:

1. ***The application for an extension of time to file the petition is granted.***

2. ***The petition for leave to appeal is granted.***

3. ***The appeal is allowed.***

4. ***The order of the Court of Appeal quashing the respondent's conviction for manslaughter and substituting a conviction for assault occasioning actual bodily harm is quashed.***

5. ***The respondent's conviction for manslaughter is reinstated.***

The Hon Mr Justice Salesi Temo
PRESIDENT OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon Mr Justice Terence Arnold
JUDGE OF THE SUPREME COURT

The Hon Mr Justice William Young
JUDGE OF THE SUPREME COURT