**JAMENDRA PRASAD**
**SURUJ PRASAD**
**AJODHYA PRASAD**
**RAM SAMUJH**

*v.*

**REGINAM**

[COURT OF APPEAL (Speight, V. P., O'Regan, J. A., Casey, J. A.)]

Criminal Jurisdiction

Date of Hearing: 9 November, 1984
Delivery of Judgment: 15 November, 1984

*Criminal Law—death caused by blows inflicted of varying degrees of severity by appellants—aiding, abetting, counselling and procuring the death—defences of self defence, lack of intent and provocation—duty of Trial Judge when particular defence disclaimed by counsel for accused even though there had been some evidence to support it—application of proviso.*

*K. Bulewa* for the Appellants
*V. J. Sabharwal* for the Respondent

Appeal against a conviction of 21 May 1984 of the 4 appellants for the murder of one Surendra Prasad at Baulevu Nausori on 3 April 1983.

The circumstances summarised by the Court in its reasons for judgment included that a quarrel occurred involving amongst others the deceased and the appellants on the evening of the relevant day. The events associated with the death of Surendra Prasad were summarised in those reasons thus. Referring to Prosecution evidence, the reasons for judgment proceeded:

> "They then heard the voices of men approaching and these turned out to be the four appellants together with two other brothers Ram Prasad and Akun Prasad. It seemed that these men were intending to confront or attack Surendra.
>
> Satya Nand said that he went towards them and told them to stop but he was told by Jamendra who was leading the group to get out of the way or he too would be hit. According to the evidence of Satya Nand and later his brother Vishwa Nand, all these men were carrying weapons of some sort. They said Jamendra Prasad had an iron rod. Ajodhya had an axe in one hand and a knife in another. Suruj Prasad had a benzine lamp which he later exhanged for Ajodhya's knife and Ram Samuj also had a spear. According to these two prosecution witnesses the men surrounded Surendra. Jamendra struck him twice on the head with a weapon and Surendra collapsed. The others gathered

A round and other blows were struck to the lower parts and legs of Surendra's body. Satya Nand alleged that both Suruj and Ram Samuj struck blows and Ajodhya was also present but was not particularly noticed as hitting the man. It was then said that the attackers stood back and some remarks were made indicating that they concluded, correctly as it turned out, that Surendra had been killed."

B On behalf of the appellants it was submitted:

*(a)* There was evidence that appellants, in particular the first appellant, had acted in self defence. This evidence should have been explained or further discussed with the Assessors even though counsel for the defence at the trial had specifically disclaimed any reliance upon such an issue.

C *(b)* The ingredient in the crime of murder of intent, having regard to the fact that on the evidence only non lethal blows had been delivered to Surendra Prasad after he had fallen to the ground and was then dead or dying, had not been made clear in the summing up. In particular the intention of each appellant separately had not been dealt with by the learned trial Judge.

*(c)* There had been ample evidence of provocation. Accordingly the trial Judge should have rejected the opinion of the Assessors that there should

D be entered a conviction for Murder. The trial Judge should have entered if not in respect of all appellants at least. In respect of the appellants other than the first appellant a conviction for Manslaughter only.

*Held:*

*(a)* As to self defence there had been some evidence, slight though it was

E thereof and in such circumstances it was the duty of the trial Judge to instruct the Assessors in an appropriate way to consider all possible defences of which there had been any credible evidence even though the defence, for tactical reasons had disclaimed them. To the extent that this had not been done and the trial Judge had said there was no need to consider it the summing up was defective. However, by the Court of Appeal Act Cap. 12 S.23 the court even though of the opinion that a point raised on

F appeal should be decided in favour of appellant may nevertheless dismiss the appeal:

" . . . . If they consider that no substantial miscarriage of justice has occurred."

G Although the defence in question had not been put to the Assessors there had been no substantial miscarriage of justice, having regard to the evidence offered at the trial by the appellant(s) and others including the description of the wounds. Had a direction on self defence been given, it would not have been entertained by Assessors, particularly when the experienced counsel for the accused persons had specifically disclaimed it.

*(b)* On the question of intent the appellants, at least the 2nd, 3rd and 4th

H appellants could only have been convicted as parties to the homicide by the 1st appellant if he as principal offender and they as parties had malice

aforethought. Because the evidence that first appellant had struck a number of severe blows to the head of the deceased with a sharp weapon, the Assessors were entitled to conclude that he had the requisite intention either to kill or to inflict grievous bodily harm. The contention of counsel on behalf of the 2nd, 3rd and 4th appellants that the only evidence of violence was of non lethal blows by them but after Surendra Prasad had fallen and was dying if not already dead was a valid submission. Their culpability accordingly must depend upon their having being parties by aiding, abetting, counselling or procurring the commission of the offence. Therefore each must have separately had the intention to kill or to cause grievous bodily harm upon Surendra Prasad. But each of the 4 appellants need not have had the same intention. Upon examination of the evidence and the summing up including that the Judge had reviewed in detail the evidence made it quite clear that the only evidence of fatal blows had come from Jamendra Prasad. The involvement of the others could only be as aiders. and abetters. Since they marched as a group each carrying a weapon it was not surprising that the Assessors and Judge concluded each man had the necessary intent.

*(c)* Since there was some ground for claiming that appellants had been provoked there was clear evidence that after provocative words and behaviour had occurred the appellant had armed themselves with formidable weapons. This was hardly the 'heat of passion' situation wherein the defence of provocation is said to operate. There was no ground for stating that a rejection of such a defence was so unreasonable as to involve any miscarriage of justice. Further the onus of proof on the Prosecution to exclude provocation as a reasonable possibility had been adequately put to the Assessors.

Appeal dismissed.

Case referred to:

*Cession Lal v. Reginam* 20 F.L.R. 82.

SPEIGHT, V.P.:

Judgment of the Court

The four appellants were convicted in the Supreme Court at Suva on the 21st May, 1984, for the murder of one Surendra Prasad at Baulevu, Nausori, on 3rd April, 1983. The case rested upon a primary allegation of homicide against the first named appellant as the principal offender, and the liability of the other three was alleged to arise as accessories. The two principal Crown Witnesses were brothers named Satya Nand and Vishwa Nand. On the evening on the day in question at about 6 p.m. Satya Nand was at the house of his uncle Mr Ram Chandra. There was to have been some family gathering, and a number of men were drinking there, including the eventual victim, Surendra Prasad, a cousin named Satish and other relatives.

Some time after 6 o'clock these people became annoyed by noises coming from the nearby house of the fourth appellant Ram Samuj. That man is the father of the other three appellants: at his house that evening there was also a family gathering, for some religious occasion. His sons were there together with a number of small children and some of the children were beating a drum and singing Religious songs. Ram Chandra and Surendra were disturbed by this noise and Surendra called out

A loudly for the beating to stop. There was much dispute at the trial as to whether this was done in a moderate fashion as Ram Chandra claimed or whether it was accompanied by drunken swearing.

Shortly after that Vishwa Nand drove to the house of Ram Chandra in a small van owned by his brother Satya. These two together with Surendra were intending to depart and they entered the van preparatory to leaving. Satya, who owned the van, B was now the driver. With him in the front seat was a lady and a small child and Vishwa Nand and Surendra were now in the back. According to the prosecution evidence he drove off a short distance, perhaps a chain or so but Surendra banged on the top of the cab for him to stop and reverse back towards Ram Chandra's house. This was said to allow Satish to get to the van for he was still at the house, but it was thought that he was intending to travel with them. According to Satya Nand and Vishwa Nand they had only just stopped when they and their passengers were the C objects of abuse and swearing directed at them from the fourth appellant's house. Satya Nand got out of the driver's seat and went to the back of the van where he saw that Vishwa Nand had remained on the van but his uncle Surendra had alighted. They then heard the voices of men approaching and these turned out to be the four appellants together with two other brothers Ram Prasad and Akun Prasad. It seemed that these men were intending to confront or attack Surendra.

D Satya Nand said that he went towards them and told them to stop but he was told by Jamendra who was leading the group to get out of the way or he too would be hit. According to the evidence of Satya Nand and later his brother Vishwa Nand, all these men were carrying weapons of some sort. They said Jamendra Prasad had an iron rod. Ajodhya had an axe in one hand and a knife in another. Suruj Prasad had a benzine lamp which he later exchanged for Ajodhya's knife and Ram Samuj also E had a spear. According to these two prosecution witnesses the men surrounded Surendra. Jamendra struck him twice on the head with a weapon and Surendra collapsed. The others gathered round and other blows were struck to the lower parts and legs of Surendra's body. Satya Nand alleged that both Suruj and Ram Samuj struck blows and Ajodhya was also present but was not particularly noticed as hitting the man. It was then said that the attackers stood back and some remarks were made indicating that they concluded, correctly as it turned out, that Surendra had been F killed. They then departed to Ram Samuj's house. This was the principal eye witness evidence.

Ram Chandra in his turn described the earlier incident including the beating of the drum and the shouting and swearing words and the departure of the Nand brothers. However, when it was apparent that a fight was going to break out, his daughters combined to restrain him from leaving his house and he claimed not to G have seen the events at the van. Satish gave similar evidence. He did not leave the house either.

The medical evidence was of significance. In particular, there were two or three severe head injuries, one in particular, about 4 inches long, which had fractured the skull and laid open the brain. There were a number of other injuries to the lower part of the body, cuts and lacerations particularly to the thighs and lower legs, with tears H in the clothing indicating penetrating types of thrusts as with a spear. The crux, however, was that death was caused by one or more blows to the head and it would have been comparatively quick—a very few minutes after infliction. None of the remaining injuries to the body would have been fatal. It was always the Crown case.

and the Defence position did not alter the situation, that the first blows, undoubtedly initiated by Jamendra, had been fatal; hence the Crown case, as already stated, was that Jamendra's culpability hinged on the question of his intention at the time he struck, and the liability, if any, of the other three arose from knowing participation in a joint attack, with malice aforethought.

The police of course were called and made intensive enquiries of all persons who had been present. The four appellants and the two other Prasad brothers were taken to Nausori Police Station where they were interviewed, some on several occasions, by police officers, principal among whom was Detective Inspector Subramani. Initially Jamendra Prasad said that neither he nor his brothers nor his father had participated in any acts of violence. Similarly Suruj Prasad said he had been asleep and was unaware of what had happened, so too Ram Samuj initially disclaimed knowledge.

However, it seems that Ram Prasad had given some information which tallied with the statements made by the Nand brothers implicating Jamendra and the others. Consequently some of the suspects were reinterviewed and confronted with Ram Prasad by Detective Inspector Subramani and further statements were taken, particularly from Jamendra and Ajodhya. At one stage Ajodhya purported to take the responsibility himself. He explained later that this was done because Jamendra had other duties on father's property. The statements by no means coincided with each other.

In summary, however, it was claimed by these men that the fault for provoking the incident lay with Surendra and Ram Chandra for abusive behaviour, swearing and invading Ram Samuj's compound. It was then claimed that, angered by this behaviour, the accused followed Surendra back to the van, with Jamendra leading the way and that he had struck Surendra with a piece of timber causing him to fall down. The others clustered around, and then seeing the man apparently dead they left the scene.

These statements were of course produced at the trial to confirm that the men at the van when the injuries were inflicted and that Jamendra had struck Surendra down. The Crown case, however, princially depended upon the eye witness evidence of Satya Nand and Vishwa Nand as to the concerted approach and attack and upon the medical evidence. The admissibility of the statements attributed to the various accused persons was strongly challenged, and a very lengthy trial within a trial was held. Allegations were made that the statements were fabrications in so far as they contained admissions of aggression against the deceased and it was claimed that Detective Inspector Subramani, with the assistance of other policemen, had beaten each of the accused persons until they had agreed to sign false statements. The trial Judge, after hearing a vast amount of evidence, totally rejected these allegations, and admitted the statements.

After the close of the prosecution case, the accused persons each gave evidence after the Crown case concluded. In effect they said that they had been so angered by the offensive behaviour of the deceased and Ram Chandra, and the invasion on their compound that they lost their tempers and chased down to the van to confront those two. It was agreed that Jamendra had struck Surendra in the area of the head as a result of which he collapsed. The other three men said that they had taken pieces of wood with them and several of them acknowledged hitting the fallen man about the legs. The tenor of the defence throughout was that such blow or blows as may

A have been inflicted were the result of provocation arising from disgraceful behaviour by the deceased man and that there had been no intent on the part of any of the four to inflict death, or injury of the kind which comes within the definition of malice aforethought—viz grievous injury.

The learned trial Judge delivered a long and extremely careful summing up, and, after retiring, the assessors returning unanimous opinions of murder. The learned
B Judge agreed with this verdict and convicted all four.

From this conviction, each has appealed and Mr Bulewa represented them in this Court. The primary complaint is of defects in the summing up.

A number of grounds were recited in the notice of appeal.

Some of these overlapped to a certain extent and Mr Bulewa argued these in
C combination—we propose to amalgamate them in a similar way.

*Issues for the Assessors:* (Ground *(a)*).

A submission was made that in the summing up the learned Judge usurped the function of the assessors, and put the case as one to be determined by posing purely legal tests instead of making it clear that it was their primary function to determine the factual issues, in the light of the provisions of the law.

D We have examined the summing up with care. It is true that the appropriate legal definitions on such matters as malice aforethought, and parties to an offence were quoted from the Penal Code—but that was entirely proper. The learned trial Judge then went on, however, to tell the assessors on a number of occasions that their primary task was the evaluation of the evidence. The summing up has many passages in this vein.

E The opening paragraphs says:

> "it is now my duty to sum up to you in this case. In doing so I shall direct you on matters of law and these you must accept and act upon. However, as far as the facts of this case are concerned, what you think really happened, what view you take of the various witnesses, whether they are reliable and telling the truth and so on, these are matters entirely for you to decide for yourselves."

F Later it was said:

> "I shall endeavour to assist you as much as I can by reviewing the broad features of the evidence on both sides as I think necessary, but in the final analysis, as I said, the sorting out of facts in this case, if you would allow me to put it somewhat crudely, is your main function and prerogative."

G There are numerous other passages where, at the conclusion of a discussion on each issue, it was said that the examination of the evidence and the conclusion to be reached was "entirely for you".

We do not see any validity in this ground of appeal.

*Self defence:* (Ground *(b)*).

H This primarily concerns appellant No. 1. At none of the interviews with the police at which he made statements (and there were three) did this appellant suggest that he had acted in self defence. The nearest remark in that is to be found in his charge statement when he said in that context Surendra had had a jack handle in his

hand, but he (appellant) had hit it from his hand and it fell (to the ground) whereupon he hit him several times. A

In giving evidence at the trial, however, appellant said that he approached Surendra, carrying a piece of timber, and asked him why he was swearing at them.

> "All of a sudden he swung a piece of iron rod at me ..... I hit the piece of iron rod. The timber and the iron rod struck his head. The iron rod landed on his right forehead and the stick on the upper head ..... The iron rod fell off his hand (sic)". B

There was also evidence from appellant No. 2 that shortly before, Ram Chandra had called out to Surendra that he would get a knife. Presumably this was suggested as giving rise to apprehension of violence.

Now Mr Bulewa, in submitting that this was evidence of self defence, conceded that it was "tenuous" and he also acknowledged that in his closing address, Mr Koya, who had appeared for all four accused persons, had specifically disclaimed any reliance on self defence, and had submitted that the proper verdict was one of manslaughter, based on provocation. C

Nevertheless, we agree with Mr Bulewa that there was some evidence, slight though it was, and in such circumstances it is the duty of the trial Judge to instruct the jury, in an appropriate way, to consider all possible defences of which there is any credible evidence. And this is so even if, for tactical reasons, the defence has not raised them. *Cession Lal v. Reginam 20 F.L.R. 82.* D

To the extent that this was not done, and the Judge indeed said there was no need to consider it, we accept that the summing up is defective. That, however, is not the end of the matter. Section 23(1) of the Court of Appeal Act Cap. 12 deals with the powers of the Court and contains the following proviso: E

> "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."

In the present case we have reached the conclusion that, although the self defence question was not put to the assessors, no substantial miscarriage of justice has occured. The evidence of the appellant, even taken at face value, spoke only of knocking the jack handle out of the deceased's hand, so that it fell onto his head and thence to the ground. The assessors had before them the very clear evidence of the Pathologist, detailed again in the summing up, concerning the head injuries sustained by the deceased—undoubtedly at the hands of this appellant. They were severe. There were two or more large wounds, one of which at least had fractured the skull, with a fragmented portion lifting off and consequential severe damage to the underlying brain. In the Pathologist's opinion considerable force would have been required from a sharp instrument such as a cane knife or an axe—in one case the blow would have to cut through the skull to reach the brain. All this of course was quite inconsistent with the description of the event as given by the appellant, and could not have been thought to be within the range of what was reasonably necessary in the face of apprehended danger. F G H

A We are confident that had a direction on self defence been given, that defence would not have been entertained by the assessors, particularly when the very experienced counsel for the accused persons had specifically disclaimed it.

*Intent:* Grounds: *(c), (d), (e)* and *(j).*

B Clearly the second, third and fourth appellants could only be convicted as parties to a homicide by the first appellant if he, as principal offender, and they, as parties, had malice aforethought. Given the evidence that the first appellant struck a number of severe blows to deceased head with a sharp weapon, one could hardly quarrel with assessors who concluded that he had intention to kill or inflict grievous harm. But Mr Bulewa submits on behalf of the other appellants that the only evidence of violence by them was of non-
C lethal blows after Surendra had fallen and was dying, if not already dead. That is a valid submission, and their culpability if any, must rest on being parties by aiding, abetting, counselling or procuring the commission of *the offence.* Therefore they must each separately have had the intentionthat the victim would be killed or suffer grievous harm— but each of the four need not have had the *same* intention. Mr Bulewa's submission under these subheadings were that it was not made sufficiently clear that the intention of each must be
D separately proved against him.

Again we have examined the summing up with care and conclude that this criticusm cannot be sustained.

At an early stage in the summing up it is said:

"To establish a case of murder against each of the four accused persons in this
E case the prosecution must satisfy you of three essential matters, namely:

(i) _____

(ii) _____

(iii) that when they attacked Surendra Prasad they intended to cause his death or to do him grievous harm, or they knew that their act would probably cause death or grievous harm."

F Immediately thereafter the learned Judge said:

"Although this is a joint trial of the four accused Gentlement Assessors, the case of each accused must be considered separately. That is to say the evidence in relation to each of them must be evaluated and considered separately. This means that the alleged involvement of each accused must be examined carefully on the whole of the evidence presented before formulating your
G opinions as to the guilt or otherwise of each accused."

and then spoke of " intention to cause death or grievous harm" as being an essential ingredient of the case.

The Judge then reviewed in detail the evidence given by the prosecution, and the statement to the police, and the evidence given in Court by the appellants.

H He made it quite clear that the only evidence of fatal blows showed that they came from Jamendra, and that the involvement of the others could only be as aiders and abettors.

Indeed Jamendra himself had said (as had the Nand brothers) that he struck at the deceaseds head, and he immediately fell to the ground, The other three each said in evidence that they had struck no blows, and even in their various statements they had only admitted hitting the legs after the man fell. Again this coincided with what the Nands had said.

The Judge reminded the assessors that these people had come running down the road together and approached Surendra. He then returned again to the question of intent:

> "Now on the other hand if you accept the evidence given by Satya Nand, Vishwa Nand, Ram Chandra, D/I Subramani and D/Cpl. Jag Prasad, then in that case each of the accused would be criminally implicated in the death of the deceased on the ground that each of them acted in concert i.e. aiding and abetting one another and with the common purpose to beat up the deceased. If you accept that each accused, during the attack had such an intention of causing death or grievous harm or knew that his act would probably cause the death of the deceased or grievous harm to him, then clearly you will be entitled to say that each of the four accused is guilty of murder as charged."

Given such directions, which we accept as fair and correct, and given the evidence that they marched as a group, each carrying a weapon and that even after Jamendra's blow they continued to evidence their animosity to their victim, it is not surprising that the assessors, and the Judge in his turn, concluded that each man had the necessary intent, and we see no fault in the summing up on this topic.

*Provocation by Accident:*

This submission did not seem to relate to any of the grounds in the notice. It was suggested that the summing up should have adverted to the possibility that Surendra's final abusive words were directed not at the appellants, but at Satish and were misunderstood by them. No attention seems to have been directed to this possibility at the trial, and in any event there was incontravertible evidence from the mouths of the appellants themselves in the witness box that they became angry at the close range insults which, so they said, were hurled at them by Surendra as they approached the van.

*Provocation:* Grounds *(g), (h)* and *(i).*

This was the main defence argued at trial. Before this Court Mr Bulewa contended:

*(a)* That there was ample evidence of provocation, and in the circumstances the learned Judge should have rejected the opinions of the assessors and convicted if not the first appellant, then at least the others, of manslaughter only;

*(b)* In any event he had not correctly directed the assessors on the question of onus of proof in a case where provocation was clearly raised.

As to the first of these we simply say that there was some ground for claiming that appellants had been provoked—although the prosecution witnesses said that it was not so. But even allowing full weight to the appellants claims, there was clear evidence that after provocative words and behaviour had occurred, the appellants armed themselves with formidable weapons and set out after Surendra. Hardly the "heat of passion" situation in which provocation is usually said to operate and there

A could be no ground for saying that a rejection of such a defence was so unreasonable as to involve a miscarriage of justice—be it in relation to the first appellant or the others who were his aiders and abettors.

On the second point, we have also looked at the challenged passage to see whether the onus of proof has been correctly placed on the prosecution—that is to exclude this as a reasonable possibility and we are satisfied that that was done.

B In the concluding part of the summing up dealing with provocation, the following appears:

> "However, this is a matter entirely for you, Gentlemen Assessors, to decide on the whole of the evidence. If you have any reasonable doubt as to whether or not there was provocation in this case as I have explained, such a doubt must be resolved in favour of the accused persons and in which case you would be
> C entitled to say that each accused is not guilty of murder but guilty of manslaughter as the case may be."

Mr Bulewa has diligently pursued every possible ground in a manner which reflects great credit upon his energy and ability.

But we find that none of the grounds set out in the notice of appeal, and argued
D before us, has been made out and accordingly all appeals are dismissed. Pursuant to Rule 60, the appellants are to pay the cost of preparation of one set of records to be fixed by the Chief Registrar.

*Appeals dismissed.*