

20

IN THE PRIVY COUNCIL

No. 28 of 1975

O N A P P E A L
FROM THE FIJI COURT OF APPEAL

BETWEEN:-

(1) CESSION LAL

(2) SHIU LAL

Appellants

- and -

THE QUEEN

Respondent

RECORD OF PROCEEDINGS

WILSON FREEMAN,
6/8 Westminster Palace Gardens,
London, SW1P 1RL.
Solicitors for the Appellants.

CHARLES RUSSELL & CO.,
Hale Court, Lincoln's Inn,
London, WC2A 3UL.
Solicitors for the Respondent.

O N A P P E A L
FROM THE FIJI COURT OF APPEAL

Between:-

(1) CESSION LAL
(2) SHIU LAL

Appellants

- and -

THE QUEEN

Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

No.	Description of Document	Date	Page
<u>In the Supreme Court</u>			
1.	Information	2nd April 1974	1
2.	Proceedings	7th May 1974	2
3.	Summing Up	17th May 1974	4
4.	Assessors' Opinion	17th May 1974	20
5.	Finding and Sentence	17th May 1974	20
<u>In the Court of Appeal</u>			
6.	Notice of Appeal of Cession Lal	3rd June 1974	21
7.	Notice of Appeal of Shiu Lal	3rd June 1974	23
8.	Judgment	2nd August 1974	26
<u>In the Privy Council</u>			
9.	Order granting Special Leave to Appeal in forma pauperis to Her Majesty in Council	25th June 1975	34

DOCUMENTS TRANSMITTED BUT NOT REPRODUCED

Description of Document	Date
<u>In the Supreme Court</u>	
<u>Prosecution Evidence</u>	
Jagdish Mangal	7th May 1974
Ajit Singh	7th May 1974

Description of Document	Date
Frederick Satinand Wilson	7th May 1974
Timoci Rupeni	7th May 1974
Tuliana Rokocum	7th & 8th May 1974
Vaseva Kaibulu	8th May 1974
Taramati	8th May 1974
Jawahir Ram	8th & 9th May 1974
Nacaniela Lavilavi	9th May 1974
Savenaca Vana	9th May 1974
Kavaia Naborisi	9th May 1974
Ilaisa Tubuna	9th & 10th May 1974
Aseri Mulea	10th May 1974
Maika Soqo	10th May 1974
Jawahir Ram (recalled)	10th May 1974
Lasarusa Soqo	10th May 1974
Jitendra Singh	13th May 1974
Shiu Dass	13th May 1974
Ashok Kumar Singh	13th & 14th May 1974
Hubert Joseph Andrew Elliott	14th May 1974
Tevita Nadolo	14th May 1974
<u>Defence Evidence</u>	
Cession Lal	14th May 1974
Shiu Lal	14th May 1974
Proceedings	14th May 1984

E X H I B I T S

Exhibit Mark	Description of Document	Date	Page
5B	Statement of Cession Lal	26th December 1973	
6B	Statement of Shiu Lal	26th December 1973	

In the
Supreme Court

No. 2

Proceedings

No. 2
Proceedings
7th May 1974

IN THE SUPREME COURT OF FIJI
Criminal Jurisdiction

Criminal Case No. 6 of 1974

R E G I N A

v.

- 1. CESSION LAL s/o Shiu Lal
- 2. SHIU LAL s/o Sukhu

} MURDER: Contrary
} to Section 228 of
} the Penal Code.

10

SUVA CRIMINAL SESSION

Before the Hon. Mr. Justice Williams

Tuesday the 7th day of May, 1974 at 9.30 a.m.

Accused person in custody

Mr. F.M.K. Sherani for the Accused
Mr. T. Walker for the Prosecution

Interpreters - J. Bonowai, P.L. Raj

Assessors Sworn as follows:-

- 1. Alfred John Costello
- 2. Anthony Ian King
- 3. Ba Singh
- 4. Frederick William Caine
- 5. Apakuki Coka

20

Mr. Sherani for Accuseds.

I apply to use a tape recorder in these proceedings for my personal and private use. It would be instead of my notes. Would not interfere with the proceedings.

Order: Application refused.

J. T. WILLIAMS

30

(Sgd.) J. T. Williams
J.

Crown Opens:In the
Supreme Court

No. 2

Proceedings
7th May 1974
(continued)

Stabbed and cut him with a cane knife. Died from his injuries. Must be satisfied -

(1) that at the time they intended to cause his death,

or (2) serious injury,

or (3) that they knew that death or serious injury would probably result and did not care whether he was injured seriously or killed.

10

Intention can be demonstrated from actions, i.e.

(1) killing with cane knife and stabbing;

(2) there is motive in this case ill will.

Trace back in time to ascertain motive.

Accuseds are father and son. Jawahir Lal is mentioned. Jawahir Lal spoke to Accused Shiu Lal. Neighbours. Jawahir Lal and Shiu Lal became unfriendly and Jawahir Lal agreed to sell back his house to Shiu Lal. Some money trouble over the transfer.

20

Deceased living nearby. Left home with wife. Truck which was waiting sounded its horn. Trouble about the noise. Fight commenced. Shiu Lal got knife. Threatened wife of deceased with knife.

Later, trouble between the deceased and Shiu Lal about land.

Cane knife and dagger will be identified.

Xmas Day last year quarrel. Shiu Lal found with wounded elbow. Cession Lal heard to say he'd go to kill the whole lot.

30

Police found ground disturbed; scene of struggle. Accuseds were arrested.

I now call my evidence.

In the
Supreme Court

No. 3

Summing-Up

No. 3

Friday the 17th day of May, 1974 at 10.00 a.m.

Summing-up

SUMMING UP

17th May 1974

Gentlemen, in the course of my summing up I will indicate the law relating to this charge, the proceedings and the evidence and you will consider the evidence in the light of that law. You are required to give your opinions after arriving at findings of fact on the issues. The essential issue is the guilt or innocence of the accuseds and it is one which you will not decide without careful consideration.

10

The burden of proving the guilt of the accuseds rests upon the prosecution. They have to satisfy you on all the ingredients that would be required to establish this allegation of murder. The onus never lies upon the accuseds to satisfy you of their innocence and when considering the accuseds' evidence do not be misled into thinking that they were endeavouring to prove their innocence. They are presenting you with other evidence of the facts in the light of which you have to consider the prosecution case. We regard an accused person as being innocent until the prosecution have proved his guilt, and you must give the same careful consideration to the accuseds' evidence as to that of the prosecution witnesses.

20

A high standard of proof is required from the prosecution. You can only convict an accused if you are sure that the prosecution have proved his guilt, and you can only be sure of that after you have attached proper weight to the evidence led on behalf of each accused and noted the careful and considered arguments put forward by counsel on each side. I do not mean that the prosecution have to convince you of the guilt of either accused, because to be convinced of something you usually have to see it, hear it or in some other way experience it for yourself. You would not make a very important decision at work or decide something which would affect your entire life without being sure it was right, and although you may take a calculated risk in your own affairs, you would not do so in determining the issues in

30

40

this trial. If you are not sure that the prosecution have proved the guilt of the accuseds then you will acquit them. You are men of the world and possessed of that common sense which arrives with maturity, and it is common sense that is required of assessors.

In the
Supreme Court
—
No. 3
Summing Up
17th May 1974
(continued)

10 The responsibility you carry is heavy, and whilst that should make you careful it should not make you fearful of arriving at what you think is the correct decision. Do not be swayed by emotions such as anger or disgust at the way of the deceased's death nor by pity for the accuseds. Remember too that you must consider each accused's case separately.

I will remind you again of the charge against the accuseds. It is murder contrary to Section 228 of the Penal Code. The particulars are that the two accuseds on the 26th day of December, 1973 murdered Apimeleki Uruca at Samabula, Suva.

20 It is my duty to explain to you what we mean by malice aforethought. It does not have reference to the popular concept of maliciousness nor does aforethought mean that the act resulting in death must have been deliberately premeditated. Forethought implies that an accused appreciated that what he was about to do would probably result in death. The existence of malice may be shown by:-

30 an intention to cause death or grievous bodily harm or knowledge that the act will probably cause death or grievous bodily harm and the accused not caring whether death or bodily harm is caused.

When you are considering the sworn evidence of an accused it is part of the whole picture. So that an accused's evidence may in your opinion operate for or against his co-accused as well as affecting the one giving the evidence.

40 When you come to consider statements made by the accuseds to the police you must consider them only in relation to the accused who made them. What an accused has said outside of the court cannot be regarded as evidence affecting his co-accused; but it can affect the position of the accused who actually made the statement.

In the
Supreme Court

—
No. 3

Summing Up

17th May 1974

(continued)

In considering the evidence of a witness you may accept or reject the whole of his testimony. If you think that by reason of faulty recollection or because of inaccurate observation at the time some of a witness' evidence is unreliable you may reject that part of it; but that does not mean you must reject it all; you may accept that portion which you are sure is properly recollected version of what he saw and heard. But if you reject part of a witness' evidence because you feel that it is untrue then you should treat the rest of his evidence in the same way. However, contradictions between witnesses and inconsistencies in his evidence does not necessarily point to untruths; all persons do not look at the same thing at the same moment they do not all view it from the same spot; people looking in different directions will not see the same scene or thing. Such differences can be accentuated by darkness, by fear, excitement and other emotions. Treat the evidence given by the accuseds with the same care.

10

20

During the course of the proceedings you may have observed that I have interposed to allow or disallow question. I have insisted that a witness shall not be called a liar. Do not get any erroneous impression from that; it did not mean that I have formed an opinion that the witness is truthful. The art of cross-examination is to show the assessors, and the judge that a witness is not as reliable or as accurate as he may at first have seemed to be. To say to a witness that he is a liar gets one nowhere; he will deny it anyway. Moreover the witness is not in a position to retaliate with the kind of answer which may at once spring to his tongue. His reaction and answers to cross-examination may demonstrate his unreliability or confirm his credibility.

30

If I have given you the impression that I have formed any opinion about this case, or of the veracity or accuracy of any witness please forget it. It was never my intention and you would be very mistaken.

40

As I remind you of the salient features of the evidence, I may indicate corroborative features in the evidence of one witness with another including the accuseds, or some divergence, or the way in which certain evidence may be viewed. In so doing I am simply giving you the benefit of

my experience but do not accept it as a direction or even as an invitation to interpret the evidence in any way.

In the
Supreme Court

No. 3

Summing Up
17th May 1974
(continued)

There cannot be a murder without a corpse as we have heard the deceased person is one Apimeleki who lived in the Mead Road area at the edge of Suva. He has, you may, think been identified very consistently by reference to the photographs Ex. 2 which various prosecution witnesses have testified as being his likeness, apart from the evidence of witnesses who knew him, including his daughter P.W.5 Tuliana.

10

The unfortunate state of affairs with which we are concerned occurred late on 25/12/73 or early morning on 26/12/73.

P.W.2, Dr. Ajit Singh Parmar was at the casualty department of Suva Hospital when the deceased was brought in on 26.12.73. He pronounced him dead. He says it was before 4 a.m.

20

Dr. Wilson carried out the post-mortem on 26/12/73 and described a number of stab wounds and cut wounds which he found on the deceased's body, on the head, the upper limbs, the chest, side and back. Dr. Wilson said the cut wounds could have been caused by any cane knife such as Ex.4 and the stab wounds were very consistent with the short handled short bladed knife Ex. 3. He measured the wounds against the length and breadth of the "dagger" Ex. 3 and found that they matched. There may be numerous daggers similar to Ex. 3 which could have caused such wounds, but how many would be found in this area of Mead Road. The importance of the dagger is that on Dr. Wilson's evidence it is the instrument which dealt the death blow, which was a wound in the chest. Dr. Wilson, P.W.3 said the chest wound gave rise to inter thoracic haemorrhage following a rupture of the heart and that was the immediate cause of death.

30

On that evidence you may be satisfied that the deceased, Apimeleki, was dead on arrival at the hospital before 4 a.m.; so that his death was due to a stab wound in the chest caused by a dagger which was either Ex. 3 or almost identical to it in blade measurements.

40

You may think from Dr. Wilson's evidence that two different weapons were used in an attack upon

In the
Supreme Court

No. 3

Summing Up

17th May 1974

(continued)

the deceased.

How did Apimeleki get those wounds? One finds that the evidence indicates a somewhat emotional background concerning land, and conflicting interests appear to involve the rival claims of different races. In Fiji the subject of land, its use and occupation is one which quickly excites interest, emotions and perhaps passions. It is against this kind of background that you have to examine the evidence before you. Remember, prosecution witnesses are not endowed with the virtues of honesty and integrity merely because they appear for the Crown. A prosecution witness seeking vengeance may be is equally disposed to lie or prevaricate as a defence witness who seeks to avoid a verdict of guilty. 10

The prosecution have adduced evidence and the defence too have made reference to some trouble between Shiu Lal and the deceased regarding land which Shiu Lal asserts was his. There was too some difference between Shiu Lal (Accd.2) and Jawahir (P.W.8) about a piece of land which Shiu Lal (Accd.2) had sold to Jawahir. 20

The prosecution have put forward 2 instances of unpleasant disputes between the deceased Apimeleki and the two accuseds. They are the occasion in July 1973 or thereabouts when Apimeleki (deceased) was going to Gau and October (or thereabouts) which is referred to as the weeding incident. The accuseds do not deny the existence of some mild occurrence, but deny any display of violent bitterness. It is for you to decide where the truth lies. 30

(sic) The "Gau incident" of July 1973 is referred to by P.W.7 Tuliana who describes how her father (deceased) was walking from his house towards the new road to meet a P.W.D. van which was picking him up. They were on the narrow track which you have seen, and the accuseds were on the same track. The van hooted once or twice to announce its arrival. Having viewed the scene, you will appreciate why a driver would sound his horn; it would be much preferable to stumbling in the dark along steep narrow paths. It was about 9 p.m. according to Tuliana (P.W.7). There was an altercation which ended in an exchange of blows between the deceased, Cession (Accd.1) and Shiu Lal (Accd.2) when deceased got into the van and went away. 40

Shiu Lal (Accd.2) called out for a knife and his daughter brought a dagger or daggers or knives. She said that Cession (Accd.1) held a dagger and said he would kill the man who had punched him.

In the
Supreme Court

—
No. 3

Summing Up
17th May 1974
(continued)

10 P.W.6 (Vaseva) the deceased's widow says they were approaching the main road but were still on the hill when the P.W.D. van sounded its horn three times. Shiu, Cession and a third man were in the vicinity and when deceased called to the van Cession told him to shut up and an altercation developed which led to blows between Cession and deceased. She says Cession ran away and called get the knife. The deceased turned on Shiu Lal and struck him and then went to the van. She says Shiu Lal (Accd.2) brandished a dagger and said he would use it on the deceased.

20 The accuseds recollect this as a very slight and trivial incident. Their evidence is simply that it was evening they were on the narrow path and the deceased (Apimeleki) brushed past them, pushing them to one side and making some rude comment to which they made no rejoinder. They flatly deny that there was any wordy quarrel an exchange of blows and the brandishing by either accused of a knife or dagger.

30 You will note that the deceased's daughter (P.W.5) says Cession brandished the knife whereas P.W.6 the widow describes this to Shiu Lal. But P.W.5 in cross-examination said Shiu Lal said he knew the man who had struck him. Does this divergence of evidence as to who brandished the knife arise because they are embellishing a slight incident into something much bigger? If so mother and daughter would have had to get their heads together and invent additions to a trivial incident. If they did conspire in this fashion you may think that they would be consistent with each other. Does the divergence arise because each is telling her recollection of that evening's events quite individually and to the best of her ability?
40 It must be for you to decide.

P.W.5 (deceased's daughter) says that one Elaisa was present on this occasion. He is P.W.12 and he states that P.W.5 (deceased's daughter) ran to his house to tell him of her father being in a fight. P.W.12 says he went to the scene and restrained Cession and then the deceased knocked Cession down and turned and struck Shiu Lal,

In the
Supreme Court

—
No. 3

Summing Up

17th May 1974

(continued)

whereupon the latter called for a knife which was brought by Shiu Lal's daughters as deceased went to the van. He says a cane knife and dagger were brought, Cession handled the dagger and said he would use it on the man who had assaulted him.

Yet another prosecution witness P.W.13 Aseri gave evidence of this incident. She is Elaisa's wife. She says she heard deceased's daughter calling and followed her husband P.W.12 out of the house and she corroborates his evidence about the knife and Cession holding it and making his threat.

10

There are four witnesses testify to the incident. Have they invented this? Does it sound to you as though for some reason, they had got their heads together and allocated to each one the part he or she had to play. They were cross-examined at length about the details of that incident and you will have considered whether they were revealed as unreliable or whether their credibility remained unshaken.

20

The next incident the prosecution drew attention to, is the weeding incident of September (I think) 1973. This had been preceded by Shiu Lal serving a notice upon the deceased relating to the land. P.W.5 gives evidence of that incident and then she goes on to refer to a further incident late that night. She says that about 11 p.m. because of a noise outside, which she described as the sound of "weeding" the deceased looked outside with the aid of a pressure lamp and P.W.5 saw Shiu Lal standing. He had a knife behind his back. His father commented on Shiu Lal (Accd.2) weeding late at night in the dark and without a light, asked if Shiu Lal wished to cut him and that the accused 2's reply was "Of course".

30

P.W.6 gives evidence of the "weeding" incident in similar terms and says that not wanting trouble she called a man named Sakiasi who calmed Shiu Lal (Accd.2) saying -

40

"It is all right".

P.W.5 says she ran and called Elaisa and Jose but when she returned to her home with them Shiu Lal had gone. She says she heard Cession call Shiu Lal and advise him not to fight.

In cross-examination, Cession (Accd.1) was referred to the weeding incident. He says that there was nothing more than a loud exchange of abuse between Shiu Lal (Accd.2) and Apimeleki (deceased) from house to house and he called to Shiu Lal (Accd.2) to go indoors. Shiu Lal's version is that he did not go near deceased's house but merely that the deceased yelled at him from his house to come out and fight and Shiu Lal (Accd.2) replied that he would call the police.

In the
Supreme Court
—
No. 3
Summing Up
17th May 1974
(continued)

It is clear that there was an incident. Was it of the trivial nature described by the accuseds or was it serious enough to cause P.W.'s 5 & 6 to harry off and call someone to mediate in the quarrel. P.W.12 Elaisa says that he was asleep when P.W.5 (Tuliana) called him from his house. As he went towards Apimeleki's place, he saw the latter holding a benzine light and he heard Shiu Lal saying that deceased had called his friends, but Shiu Lal departed before Elaisa actually arrived at the spot.

If the prosecution witnesses are deliberately exaggerating this incident why should Elaisa (P.W.12) not claim to have seen Shiu Lal standing with a knife and confirm P.W.5 to the last detail of her story? Again this is a matter for you to consider.

Turning now to the final incident on Christmas night when Apimeleki met his death. The divergence between the prosecution witnesses and the two accuseds is even wider. P.W.5 (Tuliana) states that she and her parents went to the house of Elaisa (P.W.12) to share yaqona. In the late evening she heard a woman's voice calling that some people wanted to cut their throats. She says that Elaisa, Jose, her father, Asori (P.W.11) and she all ran towards the cries and that she was ahead of her father. The cries came from the house of Jawahir (P.W.8). From a light in Jawahir's house she saw the two accuseds brandishing knives and challenging "Apimeleki's gang". She says the deceased went towards them, she saw the deceased being struck and saw him fall. She says this occurred near Cession's house.

In cross examination she said that Elaisa and Jose who had arrived at Jawahir's house were struggling; they were not fighting she said but Elaisa was apparently stopping Jesse from going to the accuseds.

In the
Supreme Court
—
No. 3
Summing Up
17th May 1974
(continued)

P.W.12 (Elaisa) said that he heard the cries and joined the group running to Jawahir's house. He referred to Jesse arriving there with him. He also said that he held Jesse back from going towards Cession's house to the two accuseds. He says he heard Jawahir's household abusing the accuseds and vice versa. He says that Shiu Lal (Accd.2) threatened to kill anyone who came on to his compound. He states that he saw Apimeleki (deceased) struggling with the accuseds, he saw deceased begin to return, then stagger and fall. He went to him and saw that he was covered with blood and breathing hard and then his breathing stopped. In cross-examination P.W.12 Elaisa repeated that he was holding Jesse back.

10

P.W.13 (Aseri) wife of Elaisa says she followed in the wake of the group who ran to Jawahir's house. She says she was outside Jawahir's, near a pool of water and heard Cession threaten to kill anyone who crossed his boundary. She noticed Tuliana crying and heard her husband Elaisa call for assistance in carrying Apimeleki (deceased). She says the Accuseds were outside Cession's house when she saw them.

20

What originated this trouble on Christmas Eve, causing cries for help if there were any and attracting people to Jawahir's (P.W.8's) house. You have heard from Jawahir and from Cession Lal (Accd.1) that there had been some dispute about a plot of land with a house on it which Shiu Lal (Accd.2) had sold to Jawahir. The latter had agreed to sell it back to Shiu Lal (Accd.2) and had received \$200 in part payment. Thereafter Jawahir did not move. They each blame the other.

30

P.W.7 Tara Mati (wife of Jawahir), says that about 12 a.m., she was asleep and was wakened by the voice of Shiu Lal shouting "Take the money and clear out". Then something thudded on the door; she wakened Jawahir; something else thudded on the door and she released the dog which was outside and urged it towards the disturbance. She says Cession (Accd.1) called -

40

"Mother, mother, bring the knife they have set the dog upon us".

Then she heard a knife being filed and Cession (Accd.1) saying "We will cut them". Thereupon she opened the window and called for help.

Accused 1's version of that is that he had been drinking at Bud Ram's and was going home with his 6 year old son when Jawahir's dog rushed at him. Fearing for his son he threw a stone at the dog but it hit Jawahir's house. Then a woman inside swore; he swore back at them then the woman called in Fijian for people to come. Shiu Lal (Accd.2) was also on his way home from Bud Ram's when he heard Cession (Accd.1) call that the dog had been set upon him. Then Shiu Lal (Accd.2) called out to Jawahir that they should vacate the house and Jawahir replied that they couldn't put him out. He says that some Fijians began to collect in front of Jawahir's door, that Jawahir came to the front of his door. According to the accuseds Tara Mati (P.W.7) had no reason to call out for help.

In the
Supreme Court
No. 3
Summing Up
17th May 1974
(continued)

P.W.8 (Jawahir) says that his wife (Tara Mati) wakened him and he then heard a stone hit the house. His wife loosed the dog and the accuseds swore, and Cession (Accd.1) called for the knife because the dog was set upon them. Then P.W.8 heard a knife being filed. It was then his wife called for help and he says she called to the deceased. Then some Fijian boys appeared at the front of his house.

Were the two accuseds in the somewhat belligerent and threatening mood P.W.'s 7 & 8 describe, thereby causing P.W.7 to call for help? The other P.W.'s say they heard and answered such a call. You may think that it was an accidental and unintentional build up as put forward by the accuseds. It is a matter for you.

P.W.8 Jawahir states that he had opened his door a little and he saw that Apimeleki (deceased) had come into his yard; that he spoke softly to the Fijians and went up the slope towards Shiu Lal's (Accd.2's) house. On hearing what he thought was a blow from a knife he looked outside and he saw people running in the direction taken by the deceased, and he also saw a hand moving with a chopping motion. P.W.8 says that P.W.5 (Tuliana) then appeared and she was shaking her hand. Now P.W.8 describes the way in which P.W.5 was shaking her hand; he held his right hand level with his elbow and shook it. In view of the evidence for the defence you may think that this is significant, because P.W.7 (Tara Mati) says that at a stage in those events Tuliana (P.W.5) appeared; she was weeping and shaking her hand. P.W. 7 described in

In the
Supreme Court

—
No. 3

Summing Up

17th May 1974

(continued)

exactly the same way, this rather strange way in which it was done. The accuseds have said that Jawahir (P.W.8) came out of his house with a cane knife and attacked Shiu Lal (Accd.2) cutting him severely on the right arm. If that had occurred would P.W.8 have seen Tuliana appear at his house shaking her hand in that manner. It is a point for you to consider along with the others. Of course did P.W.5 appear in that manner.

P.W.7 says a Fijian boy came and borrowed a lamp and P.W.8 handed it to him. P.W.8 confirms this.

10

P.W.9 (Nacanieli Lavilavi) says that on Christmas night after he had heard the clock strike mid night he went to his toilet. He says he lives about 45 yards from Cession (Accd.1). As he left the latrine he heard both accuseds swearing at Maika; at least they mentioned Maika's name. He also noticed people grouped near to Jawahir's house. On hearing someone call for a knife Nacanieli went towards Jawahir's and warned them not to approach the accuseds and at the same time, as he passed the accuseds he says he asked Shiu Lal not to fight because someone could be injured. Having warned the persons near Jawahir's house, Nacanieli says he turned, saw a Fijian approaching the accuseds and saw them rush him. He went to stop the fight, but the man fell to the ground and he saw Cession (Accd.1) strike the man who was in a sitting position on the ground with a knife. The man got up to rush away, went a few paces and fell. Nacanieli says he approached the accuseds saying, "What are you doing", and he says Shiu Lal said to Cession "Stop, that is enough". He says that Cession's reply was to smack Shiu Lal on the stomach with a knife and tell him to go home.

20

30

Mr. Sherani, for the accuseds, has invited you to regard Nacanieli as suspect. He submits that he is an unsatisfactory witness. Do you think that account by Nacanieli was fictitious or exaggerated. Turning to Mr. Sherani's cross-examination of Nacanieli one has to consider whether his credibility suffered as a result. He says that he saw Elaisa, Soko and Aseri at Jawahir's house i.e. near to it. Those persons have all claimed to be there. Nacanieli says that behind those persons, in the deeper shadows were others whom he could not distinguish as male or female.

40

Was Nacanieli there at all?

In the
Supreme Court
—
No. 3
Summing Up
17th May 1974
(continued)

Mr. Sherani, for the accuseds explored this aspect in his cross-examination of the prosecution witness. P.W.8 Jawahir, knew few people by name. Nacanieli came into court. P.W.8 did not recognise him. He could not say if he had seen Nacanieli that Christmas night. He says he did not hear Nacanieli give a warning to anyone. According to Nacanieli he merely went to Jawahir's to warn the persons outside and then he apparently went back almost at once because he had noticed Apimeleki moving towards the Accused.

However, P.W.12 Elaisa, in cross-examination by Mr. Sherani, said that he saw Nacanieli. At that time he was 12 yards away from Elaisa and the latter did not speak to Nacanieli.

P.W.13 (Aseri), said that she saw Nacanieli helping to carry the deceased away. In cross-examination she confirmed seeing Nacanieli. P.W.15 Lasarusu (deceased's son) says he heard the call for help; he was at Elaisa's with his parents, but he went in the direction of his home. En route he heard the sound of a blow and when he investigated he saw his father (deceased) on the ground. In cross-examination he said he saw Nacanieli at the scene.

There are several witnesses who claim to have seen the accuseds attack the deceased. They are P.W.5 Tuliana P.W.12 Elaisa and P.W.9 Nacanieli. There is the evidence of P.W.13 Aseri who does not claim to have seen the joint assault on the deceased, but who says she heard threats uttered by the accuseds.

There is also P.W.14 Maika Soqo who says he heard a female voice calling "Trouble, trouble" in Fijian. He went towards the noise and he saw the deceased on the ground and Cession (Accd.1) holding on to the branch of a guava tree and calling that no one was to cross his boundary.

There has been considerable reference to the dagger like knife Ex.3, which Dr. Wilson has said matches the stab wounds very precisely. The prosecution have endeavoured to satisfy you that Shiu Lal (Accd.2) is the owner of that knife. P.W.5 Tuliana said that on the first incident i.e. in July '73 Cession Lal brandished the knife Ex.3 and

In the
Supreme Court

No. 3

Summing Up

17th May 1974

(continued)

she repeated that in cross-examination. P.W.6, deceased's widow, says it was Shiu Lal (Accd.2) who brandished the dagger Ex.3 and she described how at the police station she identified it from among 10 knives. In cross-examination P.W.6 agreed that she had intimated, at the Preliminary Inquiry before the magistrate that she did not recognise Ex.3. Did she select it from among 10 knives by mere chance? Her evidence to you is that it is the knife which Shiu Lal brandished.

10

P.W.'s 10 and 11 Kavaia and Savenaca, described how on 13.12.73 he was at Bud Ram's having drink in company with Shiu Lal who showed them the knife Ex.3. They both say they handled the knife, and that at the time Shiu Lal mentioned some trouble he had with Apimeleki about land.

P.W.18 D/Sgt. Ashok Singh went to the scene on 26/12/73. He saw blood stained grass near the stump of a guava tree and a dagger in what seemed like blood. The dagger is Ex.3. Its significance is that it was found at the scene; the medical evidence reveals a probability that it was used to inflict the stab wounds, and prosecution witness allege that Shiu Lal was in possession of it prior to the killing.

20

Shiu Lal (Accd.2) denies that he carried the dagger Ex.3 around with him. He denies that P.W.'s 10 & 11 saw him at Bud Ram's with the dagger and of course he denies using it on Apimeleki or attacking Apimeleki (deceased).

30

Ex.4 the cane knife which the prosecution allege was used in the attack on the deceased causing the cut wounds as opposed to the stab wounds. It was produced by P.W.16, D/Cpl. Jitendra Singh who visited the scene immediately after the killing. He went to Shiu Lal's house where he saw Shiu Lal lying on a board with a cut on his right arm. Protruding from under the board was a handle and when he pulled it he saw the cane knife Ex.4. He asked whose knife it was and he says that Cession (Accd.1) said -

40

"It is ours".

He took Shiu Lal (Accd.2) to the hospital. Cession (Accd.1) denies that he said the cane knife was theirs. He says that he said "It is not ours". You may wonder how it came to be under the board on which Shiu Lal (Accd.2) lay if it

did not belong to that household or family. D/Cpl. Jitendra Singh says there were fresh red sticky stains on the blade and handle of Ex.4. Although it was night, the D/Cpl. says there was a benzine lamp burning at Shiu Lal's.

In the
Supreme Court

—
No. 3

Summing Up
17th May 1974
(continued)

10 The evidence of Accused 1 Cession is that after the disturbance caused by Jawahir's dog he arrived at the front of his house and he heard people shouting "Hit Shiu" who was about 20 yards from Accused 1, Cession. He said a group of Fijians attacked Accd.2 Shiu Lal who called out that they had cut his hand. He went to the scene with a benzine light; the attackers moved away leaving Shiu Lal lying by the guava tree with a deep cut in his right arm.

20 Shiu Lal (Accd.2) says that at the time of the dog barking incident outside Jawahir's he heard a Fijian say "Indians talk too much". Shiu Lal (Accd.2) remarked that it was his affair and the Fijian attacked him. Then he heard Jawahir (P.W.8) call for a knife and then tell the Fijians to get aside; and approached Shiu Lal striking 3 blows at him; the first two missed and the third one cut his arm. The evidence shows that Shiu Lal received hospital treatment as for a serious wound and was detained for a week. He was recovered when discharged according to medical evidence. How did Shiu Lal (Accd.2) receive his wound? There is some evidence from the prosecution witnesses as to the movements of Jawahir (P.W.8) at the material time. Jawahir (P.W.8) in cross-examination was pressed about being outside his home; he denied getting further than the entrance to his porch. It was not put to him that he had attacked Shiu Lal (Accd.2) with a cane knife. P.W.9 Nacanieli says that when he went to warn people near Jawahir's house that the accuseds were armed he notice Jawahir. Had Jawahir attacked and cut Shiu Lal would P.W.9, apart from others not have seen this. Shiu Lal's (Accd.2's) evidence is that they stepped aside so that Jawahir could use his cane knife on Shiu Lal (Accused 2).

40 P.W.12 Elaisa and his wife (P.W.13) both stated in cross-examination that they did not see Jawahir with a cane knife. P.W.13 says that Jawahir's door was closed but the window was open.

P.W.18 took a statement Ex.7 from Shiu Lal and in cross-examination he agreed that he must have been told by someone other than the accuseds that the deceased had intervened in a dispute between the

In the
Supreme Court

No. 3

Summing Up

17th May 1974

(continued)

accuseds and Jawahir.

The D/Sgt. P.W.18 also took a statement Ex.6 from Cession (Accd.1). They are in Hindustani but 6A & 7A are translations which have been checked during these proceedings as you would observe. The evidence now presented by the accuseds does not differ materially from their statements. Cession's (accd. 1's) statement was made on 26/12/73 within hours of Apimeleki's death. At that time, his father, Shiu Lal was in the hospital. On 29/12/73 Shiu Lal (Accd.2) made his statement Ex. 6 (6B) at the hospital. You may think in the circumstances that it would not be easy for them to get their heads together and agree upon some story. The two statements of the accuseds are not contradictory of each other in any material particular. When you retire you may wish to take the originals and the translations to consider, along with any other exhibits.

10

You will observe that the defence of each accused is an absolute denial not only of the charge of murder, but of any act of stabbing or cutting which could have contributed to the death of Apimeleki. It may well be that a person in the group of persons at Jawahir's house cut Shiu (Accd.2). The same person could have cut Apimeleki. However, there is no suggestion from the accuseds, that they struck a single blow at Apimeleki in anger in provocation or by way of re-defence.

20

30

Did the persons who attacked Apimeleki intend to kill him or to do him grievous bodily harm? It is clear that deadly weapons were used and many wounds were inflicted and on that you would be justified in concluding that there was an intent to kill or at least to cause grievous bodily injury. An intent of that nature would supply the malice which is a necessary ingredient to the charge of murder.

The fatal wound was a stab wound and but it appears that the wounds on the deceased's body indicate two attackers are armed with a cane knife and one with a kind of dagger. In such circumstances it matters little which of the aggressors inflicted the fatal stab wound; it might just as easily have been a blow from the cane knife which ended the deceased's life. One would be as guilty as the other.

40

Therefore, you may well think that an opinion to the effect that one accused was guilty and one not guilty cannot be readily justified. The opinions you return should be that the accuseds are guilty of murder if you are sure that the prosecution have discharged the onus upon them.

In the
Supreme Court
No. 3
Summing Up
17th May 1974
(continued)

If you are not sure then you will acquit the accuseds.

J. T. WILLIAMS

10

(Sgd.) J. T. Williams J.

Note:-

Immediately after the assessors retired both counsel approached me in chambers and pointed out that I had stated in my summing up that P.W.12 Elaisa said that P.W.5 had called him saying that her father was involved in a fight, whereas P.W.12 had really said that P.W.5 told him that her father deceased required help with his luggage. On checking, I found that my summing up was not erroneous in that respect. However, P.W.13, said that she told P.W.12 to help the deceased with his luggage.

20

Crown counsel pointed out that I had remarked that Soko had claimed to be by Jawahir's house when the deceased was attacked. He pointed out that Soko had not said this. P.W.14 Maika Soko had not made any such claim, but P.W.15 Lasarusa Soqo had said that he saw people beside Jawahir's house and that Nacanieli (P.W.9) was theretoo. My summing up notes referred to Soqo not to Soko however, I may have been guilty of a slip of the tongue or may be counsel had mis-heard.

30

To avoid any misunderstanding I re-called the assessors and reminded them that P.W.13 Aseri had stated that she had told P.W.12 Elaisa to help deceased with his luggage and that if they had heard me say Soko had claimed to be at the scene they should disregard it because he had made no such statement in his evidence.

40

The assessors then retired.

J. T. WILLIAMS

(Sgd.) J.T.Williams

Judge.

In the
Supreme Court

No. 4

Assessors' Opinion

No. 4
Assessors'
Opinion
17th May 1974

First Assessor: (Mr. Alfred John Costello)

Accused 1.

Accused 2

Guilty

Guilty

Second Assessor: (Mr. Anthony Ian King)

Accused 1.

Accused 2.

Guilty

Guilty

Third Assessor: (Mr. Frederick William Caine)

Accused 1.

Accused 2.

Guilty

Guilty

10

Fourth Assessor: (Mr. Brij Bahadur Singh)

Accused 1.

Accused 2.

Guilty

Guilty

Fifth Assessor: (Mr. Apakuki Coka)

Accused 1.

Accused 2.

Guilty

Guilty

J. T. WILLIAMS

(Sgd.) J.T. Williams J.

No. 5

No. 5

20

Finding and
Sentence

Finding and Sentence

17th May 1974

FINDING

Accused 1 - Cession Lal Guilty of murder as charged.

Accused 2 - Shiu Lal Guilty of murder as charged.

Accused 1 Cession Lal called upon -

"I did not commit this murder and I should
not be sentenced".

Accused 2 - Shiu Lal called upon -

"I should not be so sentenced".

SENTENCE: Of death according to law.

J. T. WILLIAMS

(Sgd.) J.T. Williams P.J.

No. 6

Notice of Appeal of Cession Lal

IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 29 of 1974

NOTICE OF APPEAL AGAINST CONVICTION AND SENTENCE

To: The Registrar of the Court of Appeal

10 CESSION LAL son of Shiu Lal convicted before the Supreme Court of Fiji at Suva of the Offence of Murder contrary to section 228(1) of the Penal Code, Cap 11 and sentenced to death on the 17th day of May, 1974, and detained in H.M. Prison at Suva.

I, the abovenamed Appellant, hereby give you notice that I desire to Appeal to the Fiji Court of Appeal against my conviction and sentence on the following grounds:-

1. That the Judgment of the learned trial Judge is unreasonable and cannot be supported having regard to the weight of the evidence adduced.
- 20 2. The learned trial Judge erred in law in failing to give adequate Directions to the Assessors as to my Defence.
3. The learned trial Judge erred in law in not leaving the question of provocation to the Assessors.
4. There was no evidence that there was human blood found on Exhibit 3 and Exhibit 4 (the dagger and the knife) (until they were handled by Dr. Wilson at the C.W.M. Hospital) and the learned trial Judge erred in not directing the Assessors accordingly.
- 30 5. The learned trial Judge erred in law in not leaving the question of my self-defence to the Assessors.
6. That the learned trial Judge misdirected the Assessors in not sufficiently directing the Assessors regarding the inconsistencies and the contradictions in the evidence of the witnesses for the prosecution.

In the Court
of Appeal

No. 6

Notice of
Appeal of
Cession Lal

3rd June 1974

In the Court
of Appeal

No. 6

Notice of
Appeal of
Cession Lal

3rd June 1974

(continued)

7. That the learned trial Judge erred in not directing the Assessors that the evidence of the prosecution witnesses and particularly the testimony of Tuliana Rokocuru And Vaseva Kaibulu, as to the identifications of Exhibits three and four (the dagger and the knife) and the possession thereof by me, was unreliable and ought to be rejected and that therefore a substantial miscarriage of Justice has occurred. 10
8. The evidence given by certain material Prosecution witnesses in regard to the occasion when the deceased was alleged to be going to Gau was so thoroughly discredited at the trial that the Assessors ought to have been specifically directed to regard same not only as gravely suspect and unreliable, but that the whole of the testimony of those witnesses was unreliable.
9. The evidence of Jawahir Ram and his wife in material particulars was not reconcilable with the evidence of the other prosecution witnesses And in certain material particulars corroborated my Defence and the learned trial Judge misdirected the Assessors in not directing them accordingly. 20
10. The testimony of Lasarusa Sogo called for a careful and specific direction to the Assessors and the learned trial Judge misdirected the Assessors in not directing them accordingly. 30
11. The learned trial Judge erred in law in not directing the Assessors that if on the whole of evidence adduced at the trial the Assessors were left in a doubt as to my guilt or otherwise I was entitled to be acquitted.
12. That in any event the instant case was a proper case for the imposition of the sentence of life imprisonment and the learned trial Judge erred in law in not exercising his discretion accordingly. 40
13. The learned trial Judge misdirected the Assessors in not directing the Assessors that there was insufficient evidence implicating me with the user of Exhibit three or four (the knife and the dagger) at the material time.

14. The learned trial Judge erred in law in failing to give adequate Directions to the Assessors as to my Defence.

In the Court of Appeal

No. 6

15. The learned trial Judge erred in law in not leaving the question of provocation to the Assessors.

Notice of Appeal of Cession Lal

3rd June 1974
(continued)

I desire to be present on the hearing of the Appeal.

I desire the Court to assign me legal aid.

(Sgd.) Cession Lal
(Appellant)

Dated at Suva the 3rd day of June 1974

No. 7

No. 7

Notice of Appeal of Shiu Lal

Notice of Appeal of Shiu Lal

3rd June 1974

IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 30 of 1974

NOTICE OF APPEAL AGAINST CONVICTION AND SENTENCE

To: The Registrar of the Court of Appeal

SHIU LAL son of Sukhu convicted before the Supreme Court of Fiji at Suva of the Offence of Murder contrary to section 228(1) of the Penal Code, Cap 11 and sentenced to death on the 17th day of May, 1974 and detained in H.M Prison at Suva.

I, the abovenamed Appellant, hereby give you notice that I desire to Appeal to the Fiji Court of Appeal against my conviction and sentence on the following grounds:-

1. That the Judgment of the learned trial Judge is unreasonable and cannot be supported having regard to the weight of the evidence adduced.

2. The learned trial Judge erred in law in failing to give adequate Directions to the Assessors as to my Defence.

3. The learned trial Judge erred in law in not leaving the question of provocation to the Assessors.

In the Court
of Appeal

No. 7

Notice of
Appeal of
Shiu Lal

3rd June 1974

(continued)

4. There was no evidence that there was human blood found on Exhibit 3 and Exhibit 4 (the dagger and the knife) (until they were handled by Dr. Wilson at the C.W.M. Hospital) and the learned trial Judge erred in not directing the Assessors accordingly.
5. The learned trial Judge erred in law in not leaving the question of my self-defence to the Assessors.
6. That the learned trial Judge misdirected the Assessors in not sufficiently directing the Assessors regarding the inconsistencies and the contradictions in the evidence of the witnesses for the prosecution. 10
7. That the learned trial Judge erred in not directing the Assessors that the evidence of the prosecution witnesses and particularly the testimony of Tuliana Rokocuru And Vaseva Kaibula, as to the identification of Exhibits three and four (the dagger and the knife) and the possession thereof by me, was unreliable and ought to be rejected, that therefore a substantial miscarriage of Justice has occurred. 20
8. The evidence given by certain material Prosecution witnesses in regard to the occasion when the deceased was alleged to be going to Gau was so thoroughly discredited at the trial that the assessors ought to have been specifically directed to regard same not only as gravely suspect and unreliable but that the whole of the testimony of those witnesses was as unreliable. 30
9. The evidence of Jawahir Ram and his wife in material particulars was not reconcilable with the evidence of the other prosecution witnesses And in certain material particulars corroborated my Defence And the learned trial Judge misdirected the Assessors in not directing them accordingly. 40
10. The testimony of Lasarusa Soqo called for a careful and specific direction to the Assessors and the learned trial Judge misdirected the assessors in not directing them accordingly.

11. The learned trial Judge erred in law in not directing the Assessors that if on the whole of evidence adduced at the trial the Assessors were left in a doubt as to my guilt or otherwise I was entitled to be acquitted.
12. That in any event the instant case was a proper case for the imposition of the sentence of life imprisonment and the learned trial Judge erred in law in not exercising his discretion accordingly.
13. The learned trial Judge erred in not directing the Assessors that any admission of ownership of Exhibit 4 (the knife) was not evidence against me and did not implicate me sufficiently to establish my guilt.
14. The learned trial Judge erred in not directing the Assessors that before the Assessors could give an opinion as to the guilt of both the accused possessed a common intention at the material time to murder the deceased.
15. The learned trial Judge erred in law in not directing the Assessors that it was necessary for the prosecution to prove that one accused was identified with the purpose of the other before the Assessors could with legal certainty find both the accused of a common intention and guilty as charged.

In the Court
of Appeal

—
No. 7

Notice of
Appeal of
Shiu Lal

3rd June 1974

(continued)

10

20

I desire to be present on the hearing of the Appeal.

30

I desire the Court to assign me legal aid.

DATED at Suva this 3rd day of June, 1974

(Sgd.) Shiu Lal
Appellant

In the Court
of Appeal

No. 8

Judgment

No. 8

Judgment

2nd August
1974

IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction

Criminal Appeal Nos. 29 and 30 of 1974

Between:

1. CESSION LAL s/o Shiu Lal
2. SHIU LAL s/o Sukhu

Appellants

- and -

REGINAM

Respondent

10

Hearing: 25th July, 1974

Judgment: 2nd August, 1974

F.M.K. Sherani for Appellants

G. Trafford-Walker for Respondent

J U D G M E N T

Marsack J.A.

These are appeals against convictions for murder entered in the Supreme Court sitting at Suva on the 17th May, 1974 and also against sentences of death imposed in each case. The two appellants were tried together before a Judge sitting with five assessors. The assessors all expressed the opinion that both appellants were guilty of murder as charged. The learned trial Judge accepted this unanimous opinion, gave judgment convicting each appellant of murder and passing sentence of death in each case.

20

The facts disclosed in the evidence may be shortly stated. The appellant Shiu Lal is the father of the appellant Cession Lal. The appellants, the deceased Apimeleki Uca, and one Jawahir Lal all lived in the same vicinity in Tamavua, Suva. Relations among the neighbours had for some time been unfriendly, the matter in dispute being the lands occupied by the different parties. On at least three occasions towards the latter end of 1973 there were quarrels between the appellants on the one hand and the deceased and his family on the other. No serious

30

incidents occurred in the course of these quarrels until the night of Christmas 1973. Then disturbances among the families concerned broke out late at night. In the course of the troubles Apimeleki sustained a number of stab wounds and cut wounds on the head and upper limbs, the chest, side and back, as a result of which he died the same night. According to the medical evidence the cut wounds could have been caused by a cane knife similar to that produced at the trial, and the stab wounds were consistent with having been caused by a short dagger-bladed knife also produced. The medical evidence was to the effect that the cause of death was a stab wound to the heart. It is clear that Apimeleki, both appellants and one Jawahir Lal, among others, were all in the general vicinity during the disturbance; and the main question for determination at the trial was who had inflicted the wounds on Apimeleki, and in what circumstances.

In the Court
of Appeal

—
No. 8

Judgment

2nd August
1974

(continued)

10

20

A considerable volume of evidence at the trial was directed towards the previous quarrels which had occurred among the parties; but it does not seem necessary to traverse that evidence in detail now. All that it is necessary to say is that it showed the existence of strong ill-feeling between Apimeleki and his family on one side, and appellants and their families on the other.

30

40

The prosecution evidence as to what took place on Christmas night was given in the main by four witnesses. The first of these was the deceased's daughter Tuliana who gave her age as 14. She stated that she and her parents were at the house of one Ilaisa. Late that night she heard a woman calling out that there was trouble. She and her parents rushed outside, and she saw both appellants at Jawahir's house "brandishing their knives" and challenging "Apimeleki's gang". She said her father went towards the appellants who were close to Cession Lal's house. She then stated, "I got the impression that someone was hitting my father with something and my father then fell down".

Ilaisa deposed that he had heard the appellants shouting and second appellant saying in English, "If anyone comes to my compound I will kill him". He noticed the deceased struggling with the accused; it is not clear from the Record if he were referring to either of the accused or both. He saw the deceased coming back staggering and then falling to the ground. He was wounded in the chest and he seemed

In the Court
of Appeal

—
No. 8

Judgment

2nd August
1974

(continued)

to have died. Aseri, the wife of Ilaisa, stated that during this altercation she heard Cession Lal say in English, "If anyone comes in my boundary I'll kill him".

The most direct evidence came from Nacanieli Lavilavi who said that shortly after midnight he heard a disturbance in that general area and heard someone say "Bring a knife". He was afraid of growing trouble and went along to warn the people concerned not to resort to violence. In particular he said to the second appellant, "Shiu, don't fight; somebody could get hurt". He went to the people outside Jawahir Lal's house and warned them that the appellants had knives. He then noticed the appellants rush at a man whom he did not immediately recognise, but who turned out to be the deceased. Nacanieli hurried to try to stop the fight. He then saw the man fall to the ground. He went on:

10

"As I came close I saw Cession Lal with a knife in his hand - he raised his hand with the knife and struck the man on the ground who was in a sitting position. After Cession had chopped at the man, the latter got up and rushed back but he only went a few paces and he dropped to the ground."

20

He went to lift up the fallen man and found that his back was covered with blood. He also identified a cane knife as similar to one he saw in the hand of the first appellant that night.

30

Jawahir Lal deposed that on the night in question the deceased Apimeleki went along the path towards Shiu Lal's house. Then he heard what sounded like a knife blow; and he saw "a hand moving with a knife in a chopping or stabbing motion". He could not identify the persons concerned as it was dark.

Two weapons were produced at the hearing; a cane knife which Nacanieli identified as similar to one that he had seen in the hand of the first appellant, and a dagger-like short knife which Tuliana identified from among ten knives at the police station as that which she had seen brandished by the second appellant.

40

The following day a police detective found bloodstained grass, and the dagger produced, in what seemed like blood, at the scene of the disturbance the previous night. Two other witnesses swore that they had seen the dagger-like knife produced, in the possession of the second appellant. One of these witnesses, Kavaia, swore that on one occasion the second appellant had said, "I will use this knife on Apimeleki".

In the Court
of Appeal

—
No. 8

Judgment

2nd August
1974

(continued)

10 This Court is placed in a position of some difficulty in that there are no findings of fact by the learned trial Judge. We do not derive any assistance from the provision in the 1973 amendment to section 281 of the Criminal Procedure Code, to the effect that the trial Judge may elect to give a short judgment without finding facts, and in such cases the summing up shall form part of the judgment. In the present case there is no part of the summing up from which we are able to deduce a finding of
20 fact on the part of the learned trial Judge.

The notices of appeal submitted fifteen grounds in each case. These were to some extent repetitive and in some cases had in our opinion no substance. Those which required consideration by this Court may be summarised as follows:-

1. That the judgment is unreasonable and cannot be supported having regard to the evidence.
2. That the learned trial Judge failed to direct the assessors adequately and accurately regarding the inconsistencies and contradictions in the evidence of witnesses for the prosecution.
3. That the learned trial Judge erred in law in failing to direct the assessors adequately as to
 - (a) the defences put forward by the appellants;
 - (b) self-defence;
 - (c) provocation.
4. (The second appellant only) That the learned trial Judge did not correctly direct the assessors on the question of common intention at the material time to murder the deceased.

40 It will be convenient to deal with grounds 1 and 2 together. Counsel's argument as to the insufficiency

In the Court
of Appeal

—
No. 8

Judgment

2nd August
1974

(continued)

of the evidence adduced to prove the guilt of the appellants was largely directed towards an examination of the contradictions and inconsistencies between the evidence of one main witness and that of another. A number of these discrepancies upon which counsel for the appellant relied related to the earlier incidents when trouble broke out between the two families concerned. Except to the extent that those particular discrepancies might tend to show that the witness was generally unreliable we do not think that they can have any bearing on the question now before the Court, that is to say what took place on Christmas night when the deceased was killed. Counsel's submission on this point was that if the inconsistencies relating to the previous incidents were ignored then the assessors would be inclined to accept as true the evidence of the witnesses concerned on more important matters. The learned trial Judge comments on the discrepancies in evidence regarding one of the earlier incidents in these terms: 10

" There are four witnesses testify to the incident. Have they invented this? Does it sound to you as though for some reason, they had got their heads together and allocated to each one the part he or she had to play. They were cross-examined at length about the details of that incident and you will have considered whether they were revealed as unreliable or whether their credibility remained unshaken." 30

It may be thought that this is putting the position rather favourably to the prosecution. At the same time it is well established that honest witnesses, giving evidence to the best of their recollection, will often disagree on minor details; and such disagreement is never regarded as a sufficient ground for total rejection of a witness's evidence. In the present case we can find in the evidence no such disagreement on any material point concerning the incidents leading to the death of Apimeleki as to justify the Court in holding that any witness has been untruthful on any material aspect. 40

The accepted evidence establishes beyond reasonable doubt that on Christmas night there was a fight; that the two appellants were holding weapons, one a cane knife and one a knife shaped like a dagger; that they had both struggled with

the deceased and one at least had been seen striking a blow at him; that when the appellants went away the deceased shortly afterwards fell to the ground and died, having received wounds which according to the medical evidence were consistent with having been caused by the weapons produced. Once this evidence is accepted - as it clearly was by the learned trial Judge and the assessors - it could not be said that their verdict of guilty in each case was unreasonable and not supported by the evidence. Accordingly we can find no merit in grounds 1 and 2.

In the Court
of Appeal

—
No. 8

Judgment

2nd August
1974

(continued)

With reference to ground 3(a) it has frequently been laid down that there is no obligation on the learned trial Judge to explain in detail everything that has been put forward by way of defence, provided that his summing up as a whole can be considered adequate as to the facts and in no way unfair to the accused person. We are unable to say that in the present case anything of vital importance to the defence was omitted in the course of summing up. Counsel for the defence was careful to draw the attention of the assessors to what he contended were weaknesses in the prosecution case and the strength of the case for the defence; and there is nothing in the summing up which in our opinion is either unfair to the accused or unduly favourable to the prosecution. That being so we cannot uphold this ground of appeal.

With regard to the ground that the learned trial Judge should have directed the assessors on the issue of self-defence, it is necessary to point out that the appellants both denied on oath that they had inflicted the wounds which caused the death of Apimeleki; and it is accordingly no part of their case that they were acting in self-defence. It would still be the duty of the trial Judge, in accordance with the principle set out in Chan Kau v. R (1955) A.C. 206, to direct the assessors on that issue if there were evidence upon which a defence of self-defence could be based. But here there is no evidence whatever that the deceased had attacked the appellants or had done anything which might cause them on reasonable grounds to fear that their lives were in danger from the actions of the deceased. There was then not one piece of evidence before the Court upon which a plea of self-defence could be based; and therefore there was no obligation on the learned trial Judge to direct the assessors upon that issue.

In the Court
of Appeal

—
No. 8

Judgment

2nd August
1974

(continued)

As to the issue of provocation, it is well established that where there is evidence from which provocation might be deduced, although not pleaded by defence, there is still an obligation on the learned trial Judge to direct the assessors on the point. The evidence of the witness Nacanieli, who must be considered as independent, as he was not connected with either side, makes it clear that the deceased had done nothing which would justify the murderous assault resulting in the death of the deceased. The only evidence which might form a basis for a defence of provocation is that of the second appellant who deposed at the trial:

10

"Then a Fijian came to fight with me. We began to fight. Jawahir was then in front of his door. Many people had gathered. Then I heard Jawahir call, "Bring the knife, bring the knife". Jawahir's wife was at the front of the door. I saw Jawahir's wife in the house with her eldest son; she gave him the knife and he took it to Jawahir. There were 9 or 10 people at this time in front of the door. I was about 20 feet away. Jawahir said in Fijian, "You people get aside and I'll kill this Indian". And he approached me and struck at me 3 times with the knife. I dodged the first two blows but the third struck my arm."

20

The second appellant did not state who was the Fijian who began to fight with him; but in any event that little episode had finished some time before the attack by both appellants on Apimeleki. The assault on the second appellant by Jawahir Lal could not amount to provocation justifying retaliation on Apimeleki unless it could be shown that he was in some way associated with Jawahir Lal in his attack. There is no evidence to this effect. In the result we can find nothing in the evidence either for the prosecution or for the defence upon which a defence of provocation could be founded. Accordingly we consider we should apply the principle set out in the oft-quoted dictum of Lord Devlin in Lee Chun Chuen v. R. (1963) 1 All E.R. 73 at p. 79:

30

40

"Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the

issue to be left to the jury unless there has been produced a credible narrative of event suggesting the presence of these three elements."

In the Court of Appeal

No. 8

As we can find no credible narrative suggesting the presence of the three elements set out this ground of appeal must fail.

Judgment

2nd August 1974

(continued)

10

With regard to the fourth ground of appeal it is perfectly true, as is conceded by Mr. Trafford-Walker, that when two persons are charged with the same offence a careful direction on the subject of common intention is often required. This present case, however, is not one of two persons doing separate, individual acts which the prosecution alleges are being directed to a common criminal end. Here the evidence which was tendered - and clearly accepted by the learned trial Judge and the assessors - was that of a joint attack made on the deceased by both appellants at the same time, an attack which resulted in the death of the victim. In these circumstances the intention of each of the assailants to inflict grievous bodily harm on the deceased was clearly demonstrated by the evidence, and we are satisfied that no specific direction on the subject of common intention was called for.

20

For these reasons we find that none of the grounds of appeal, which were carefully and fully argued by Mr. Sherani, can succeed and the appeals against convictions are accordingly dismissed.

30

Each of the appellants has also appealed against the death sentence imposed by the learned trial Judge. For the reasons which are fully set out in the judgment of this Court in Uday Narayan v. R. (Appeal 49/73) we are of the opinion that we have no jurisdiction to interfere with a sentence of this character. In the result the appeals against sentence are also dismissed.

Appeals Dismissed.

(Sgd.) T. J. GOULD
.....
VICE-PRESIDENT

40

(Sgd.) CHAS. MARSACK
.....
JUDGE OF APPEAL

Suva,
2nd August, 1974

(Sgd.) JOCELYN BODILLY
.....
JUDGE OF APPEAL

No. 9

In the Privy
Council

Order granting Special Leave to Appeal
in forma pauperis

No. 9

TO HER MAJESTY IN COUNCIL

Order
granting
Special Leave
to Appeal in
forma pauperis
to Her Majesty
in Council

AT THE COURT AT BUCKINGHAM PALACE

The 25th day of June 1975

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY
IN COUNCIL

25th June 1975

WHEREAS there was this day read at the Board a
Report from the Judicial Committee of the Privy
Council dated the 14th day of May 1975 in the
words following viz.:-

10

"WHEREAS by virtue of His late Majesty
King Edward the Seventh's Order in Council of
the 18th day of October 1909 there was
referred unto this Committee a humble
Petition of (1) Cession Lal and (2) Shiu Lal
in the matter of an Appeal from the Fiji
Court of Appeal between the Petitioners and
Your Majesty Respondent setting forth that
the Petitioners pray for special leave to
appeal in forma pauperis from a Judgment of
the Fiji Court of Appeal dated the 2nd August
1974 which dismissed the Petitioners' Appeals
against their convictions of murder and
sentences of death pronounced in the Supreme
Court of Fiji on the 17th May 1974: And
humbly praying Your Majesty in Council to
grant the Petitioners special leave to appeal
in forma pauperis against the Judgment of the
Fiji Court of Appeal dated the 2nd August
1974 or for further and other relief:

20

30

"THE LORDS OF THE COMMITTEE in obedience
to His late Majesty's said Order in Council
have taken the humble Petition into consider-
ation and having heard Counsel in support
thereof and in opposition thereto Their
Lordships do this day agree humbly to report
to Your Majesty as their opinion that special
leave ought to be granted to the Petitioners
to enter and prosecute their Appeal in forma
pauperis against the Judgment of the Fiji
Court of Appeal dated the 2nd August 1974
in so far as it relates to the sentences
imposed upon the Petitioners.

40

"AND Their Lordships do further report to Your Majesty that the authenticated copy of the Record produced by the Respondent upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Petitioners) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

In the Privy
Council

—
No. 9

Order
granting
Special Leave
to Appeal in
forma pauperis
to Her Majesty
in Council

25th June 1975

(continued)

10 HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of Fiji for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

20

N. E. LEIGH.

O N A P P E A L
FROM THE FIJI COURT OF APPEAL

BETWEEN:-

(1) GESSION LAL

(2) SHIU LAL

Appellants

- and -

THE QUEEN

Respondent

RECORD OF PROCEEDINGS

WILSON FREEMAN,
6/8 Westminster Palace Gardens,
London, SW1P 1RL.
Solicitors for the Appellants.

CHARLES RUSSELL & CO.,
Hale Court, Lincoln's Inn,
London, WC2A 3UL.
Solicitors for the Respondent.