

IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV 0006 of 2016
[Court of Appeal No: AAU 63 of 2010]

BETWEEN : TIKO UATE

Petitioner

AND : THE STATE

Respondent

Coram : Hon. Justice Saleem Marsoof, Justice of the Supreme Court
Hon. Justice Sathya Hettige, Justice of the Supreme Court
Hon. Justice Suresh Chandra, Justice of the Supreme Court

Counsel : Petitioner in Person
Mr. S. Vodokisolomone for the Respondent

Date of Hearing : 14 June 2016

Date of Judgment : 23 June 2016

JUDGMENT

Marsoof J

[1] I have read in draft, the judgment of Suresh Chandra J and am in agreement with his reasoning and conclusion.

Hettige J

[2] I agree with the reasoning and conclusion of the judgment of Chandra J.

Chandra J

[3] The Petitioner seeks special leave to appeal against the judgment of the Court of Appeal dated 3 December 2015 by which his conviction for murder was affirmed.

[4] The Petitioner was jointly charged with 3 others on one count of murder contrary to Sections 199 and 200 of the Penal Code, Cap. 17. Following a trial in the High Court at Suva, the Petitioner and another were convicted of murder. The Petitioner was sentenced to life imprisonment with a minimum term of 12 years.

[5] The Petitioner appealed against his conviction and was granted leave to appeal by a single Justice of Appeal on the following grounds:

1. *That the learned trial judge erred in law and in fact in not adequately directing the assessors in respect of the law regarding the charge of murder.*
2. *That the learned trial judge erred in law and in fact, given all the circumstances of the case, the charge of murder should be reduced to manslaughter.*

[6] The Petitioner's appeal was dismissed by the Full Court of the Court of Appeal by judgment dated 3 December 2015.

[7] The Petitioner's appeal to the Supreme Court is on the following grounds:

1. *That the Court of Appeal erred in law and in fact by inadequately assessing the petitioner's guilty plea for manslaughter as confirmation of responsibility for the death of the victim as stated at paragraph 20 of the judgment dated 03 December 2015.*

2. *That the Court of Appeal erred in law and in fact when they did not properly consider the implications of lack of intent to the charge of murder by joint enterprise which resulted in the confirmation of the petitioner's conviction.*
3. *That the Court of Appeal erred in law when they upheld the conviction of the petitioner on the assertion that the learned trial judge did not err in law or in fact when directing the assessors in respect of the law regarding the charge of murder.*

Factual Matrix

- [8] At the trial before the High Court, the Petitioner and the other accused (Mesulame Waqabaca) who were found guilty at the trial, had at the inception of the trial pleaded not guilty to murder but guilty to manslaughter in the presence of the Assessors. As the guilty pleas to manslaughter were not accepted by the State, the trial proceeded on the murder charge.
- [9] The background facts were not disputed by the Appellants before the Court of Appeal. The alleged incident had taken place on 16 May 2009 when the victim was returning home from work. After getting off a bus at the main road, the victim had taken a dirt track that led to his home. The Petitioner and others were apparently drinking liquor at a spot close to the Makoi Methodist School. In his caution interview, the Petitioner had told the police that he started to drink with others around midday after a game of rugby. They had taken homebrew, beer and rum and it appeared that they had run out of liquor when the first accused had noticed the victim walking down the track. The plan to attack the victim was initiated at that moment by Mesulame Waqabaca the first appellant. The Petitioner (the 2nd Appellant before the Court of Appeal) agreed with the plan. It appeared that the others had not agreed with the plan and they had not got involved in assaulting the victim.

[10] The petitioner and the 1st accused Mesulame Waqabaca acted on their plan. The first accused had approached the victim and punched him as a result of which the victim had fallen on the ground. In order to restrain the victim, Waqabaca had pressed his neck and head down while the first accused continued to punch the victim with his fist. The violence had stopped when the first accused noticed the victim gasping for breath. The petitioner had snatched the victim's mobile phone before fleeing the scene together with Waqabaca, the first accused.

[11] A third accused, Isireli Ledua Naulivou who was acquitted of the charge had stated that he had taken off the clothes of the victim while he was unconscious to embarrass him. At around 10 p.m. on the same night, the victim's naked body had been discovered and it was agreed that when the discovery was made the victim was dead.

[12] The estimated time of death according to the pathologist was 9.00 p.m. The post mortem revealed a cut over the left brow and there had been internal injuries on the scalp and the skull and there had been haemorrhage in the brain. According to the pathologist, the victim had died of brain injuries consistent with a heavy blow to the head with a fist.

[13] In his caution interview the petitioner had denied punching the victim but had admitted restraining and robbing the victim. The first accused had admitted punching the victim.

The Present Appeal

[14] Regarding Ground 1, the Petitioner's submission was that the Court of Appeal had erred by assessing the petitioner's guilty plea for manslaughter as confirmation of

responsibility for the death of the victim as stated at paragraph 20 of the judgment of the Court of Appeal.

[15] Paragraph 20 of the Court of Appeal Judgment is as follows:

"[20] At trial, like the first appellant, the second appellant also pleaded guilty to the lesser offence of manslaughter in the presence of the assessors. The guilty plea to manslaughter clearly indicated that the second appellant did not dispute that he was responsible for the death of the victim. His contention was that he did not intend to cause death or grievous harm, or he did not have knowledge that his unlawful act would cause death or grievous harm. He relied on his caution statement to show that his intention was only to rob the victim and not to kill or cause serious harm to him. His defence was that he lacked the prerequisite intent or knowledge to be guilty of murder."

[16] The Petitioner's contention was that he intended only to grab and run and it is for that purpose he held the victim by his neck and that the punching by Mesulame Waqabaca the 1st accused was his own act and not what was intended by the petitioner.

[17] In his caution interview he had admitted that he together with Mesulame Waqabaca the 1st accused had planned to rob the victim. In carrying out that plan the petitioner had held the victim by his neck and pressed him to the ground while the 1st accused punched the victim.

[18] Regarding this submission of the Petitioner that his intention was only to grab and run, his caution interview statement goes against him and the Court of Appeal dealing with this position stated thus:

"[21] In explaining the elements of murder, the trial judge did use examples based on the prosecution case, but in directing on the

second appellant's defence, the trial judge clearly explained to the assessors that the appellant's defence was that he did not contemplate any serious harm to the victim. The guilty verdict means that the assessors and the trial judge did not accept the second appellant's defence. The evidence was that when the victim was being punched by the first appellant, the second appellant had restrained the victim by pressing his neck."

[19] We see no error in the judgment of the Court of Appeal in paragraph [20] quoted above as it was based on the evidence at the trial which included the caution interview statement of the Petitioner. The Court of Appeal thereafter went on to consider whether the Petitioner had the requisite intention to commit murder after he had pleaded guilty for manslaughter as seen in paragraph [21] quoted above. Therefore there is no merit in this ground of appeal.

[20] Ground 2 is in relation to lack of intent to the charge of murder by joint enterprise and that the Court of Appeal had erred.

[21] It was undisputed that the accused had planned to commit robbery and it is as a result of the implementation of that plan that victim's death was caused. The Petitioner was held liable for murder under the joint enterprise principle. The learned trial Judge had directed the Assessors adequately on the principle of joint enterprise as follows:

"[16] There are five accused in this case. In order to make them jointly liable for the alleged murder of Simione Navulatomata, the prosecution is relying and running its case on the concept of 'joint enterprise'. "Joint enterprise" is "when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed, of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence". (Section 22, Penal Code, Chapter 17) In considering each accused, you will have to ask yourself the following questions: Did each of them form a common intention with each

other to violently rob the deceased? If so, did each of them act together to violently rob the deceased? When the deceased was allegedly murdered as a result of the violent robbery, was this a probably consequence of the same? If your answer to the above questions for a particular accused was yes, and you are satisfied beyond reasonable doubt that the elements in paragraph 9)i), (ii) and (iii)(c) are satisfied, he is guilty of murder.”

[22] The Petitioner played a major role in the incident, as according to the evidence at the trial when they came across the victim he held him by his neck and pressed him down while the 1st accused punched him. Violence was used and that was part of their plan which was therefore proof of acting in furtherance of their common intention to rob the victim. The learned trial Judge in the above quoted paragraph in his summing up had adequately directed the Assessors on the joint enterprise principle and it is on that basis that the Petitioner was found guilty of murder.

[23] As stated by the Supreme Court in Rasaku v State [2013] FJSC 4; CAV 0009, 0013,2009 (24 April 2013):

“[44]. The doctrine of common enterprise has been applied consistently in a large number of criminal cases in England and other common law jurisdictions, including those such as Fiji in which the Penal Code is structured on the foundations of the Common Law of England. The formation of a joint enterprise may be spontaneous, and the fact that the participants acted on the spur of the moment does not negative their criminal liability on the basis of joint enterprise.”

[24] In the present case, the common intention to rob was pre-planned and it is in the furtherance of that common intention that the death of the deceased had occurred. The conclusion reached by the Court of Appeal was that the Petitioner was liable for murder based on the evidence that was available at the trial, the learned trial Judge had

adequately directed the Assessors on the principle of joint enterprise, and therefore there is no merit in this ground of appeal as well.

[25] The third ground of appeal relates to the direction of the learned trial Judge regarding the law in relation to the charge of murder which was upheld by the Court of Appeal.

[26] The learned trial Judge had in his summing up directed the Assessors on the elements of murder as follows:

“9. *Murder, has three essential elements. For the accused to be found guilty of “murder” the prosecution must prove beyond reasonable doubt, the following elements:*

- (i) That the accused did an unlawful act;*
- (ii) That the unlawful act caused the death of the deceased;*
- (iii) That at the time of the unlawful act, the accused either:*
 - (a) Intended to kill the deceased, or*
 - (b) Intended to cause him some serious harm, or that he knew that death or serious injury would be cause on the deceased, but nevertheless went on to do the act.*

10. *An unlawful act is simply an act not justified in law. For example, in attempting to rob someone, I rushed towards him and delivered punches to his body and head. The act of punching, without any legal justification, is an assault and is an unlawful act. It is an unlawful application of force to the person of another, and is therefore an unlawful act. Alternatively, before I punched that person in an attempt to rob him, my friend rushed forward and forcefully held him to prevent him from defending himself, and then I started punching him. My friend’s act in forcefully holding the person, amounts to an “unlawful act”. It is in fact, an assault, that is, an unlawful application of force to the person of another.*

11. *The “unlawful act” must “cause the death of the deceased”. This is the second element of murder. Continuing from the above example, the right hand punch I landed on the person’s head was so hard, he fell to the*

ground. He suffered internal bleeding in his brain, as a result, and subsequently died. My punch therefore, "caused the deceased's death", because it was a substantial cause of the injuries to his brains. Without my punch, he wouldn't have had a brain injury, and therefore would not die. My punch was a substantial and major cause of his death.

12. *The third element of murder is outlined in paragraphs 9(iii) (a), (b) and (c) which concerned the accused's mental state at the time of committing the unlawful act. As a matter of common sense, no one can look into a person's brain, to ascertain the person's intention, at the time of him doing the unlawful act. Nevertheless, his intentions could be inferred from his physical actions and spoken words, and the surrounding circumstances. You must put yourselves in the shoes of the accused, and from his physical actions, spoken words, and the surrounding circumstances, you will be able to ascertain his intentions at the time, he was doing the unlawful act."*

[27] The Court of Appeal in its judgment did not find the above directions inadequate and was of the view that there was adequate evidence led by the prosecution as well as the caution interview statement of the Petitioner for the Assessors to arrive at the conclusion that the Petitioner was also guilty of murder.

[28] In view of the above reasoning, the third ground also fails as being devoid of merit.

Criteria for Special leave to the Supreme Court

[29] Section 7(2) of the Supreme Court Act 1998 provides :

"In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-

- (a) A question of general legal importance is involved;*
- (b) A substantial question of principle affecting the administration of criminal justice is involved; or*
- (c) Substantial and grave injustice could otherwise occur."*

[30] This provision has been considered in several decisions of the Supreme Court and it is well settled that the threshold is very high when considering applications for special leave to appeal to the Supreme Court and that such leave is not granted as a matter of course. **Bulu v Housing Authority** (2005) FJSC 1 CBV 0011.2004S 8 April 2005.

[31] As discussed above the grounds of appeal relied on by the Petitioner in seeking special leave to appeal to the Supreme Court are without merit and therefore are not grounds which can be considered to meet the threshold of Section 7(2) of the Supreme Court Act.

[32] For the reasons herein the appeal of the Petitioner is dismissed.

Orders of Court:

- (i) The application for Special leave to Appeal is refused;
- (ii) The application of the Petitioner seeking special leave to appeal is dismissed.



Handwritten signature of Hon. Justice Saleem Marsoof.

Hon. Justice Saleem Marsoof
JUSTICE OF THE SUPREME COURT

Handwritten signature of Hon. Justice Sathya Hettige.

Hon. Justice Sathya Hettige
JUSTICE OF THE SUPREME COURT

Handwritten signature of Hon. Justice Suresh Chandra.

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JUSTICE OF THE SUPREME COURT