

**IN THE COURT OF APPEAL, FIJI ISLANDS**  
**APPELLATE JURISDICTION**

**Criminal Appeal No: AAU0051/2007**  
[High Court Case No: HAC 043 of 2004S]

**BETWEEN:**

**THE STATE**

***Appellant***

**AND:**

**URAIA RACULE**

***Respondent***

**Coram:** Byrne JA  
Shameem JA  
Goundar JA

**Hearing:** 6<sup>th</sup> March 2009

**Counsel:** Mr. A. Rayawa for State  
Mr. F. Vosarogo for Respondent

**Date of Judgment:** 24<sup>th</sup> March 2009

---

**JUDGMENT OF THE COURT**

---

[1] The Director of Public Prosecutions appeals against an acquittal by the Suva High Court on a charge of murder on the 10<sup>th</sup> of May 2007 on the following grounds:

"4. THAT the Appellant wishes to appeal to the Fiji Court of Appeal pursuant to S.21(2)(a) of the Fiji Court of Appeal Act Cap 12 upon the following grounds:

[a] That the learned trial Judge erred in law in not directing the assessors on the presumption of law that states that everyone is presumed to have intended the natural consequences of their actions.

[b] That the learned trial Judge erred in law in failing to direct the assessors on the last limb of the statutory definition of malice aforethought provided for under section 202 (b) of the Penal Code Cap 17, which states: "or by a wish that it may not be caused."

[c] In all the circumstances the Summing Up was inadequate and unsatisfactory."

[2] The petition seeks an order quashing the acquittal and substituting a conviction for murder.

### **The facts**

[3] The trial of the Appellant commenced on the 6<sup>th</sup> of May 2007. The case had been transferred to the High Court in December 2004, but there was delay because the Appellant was not represented by counsel. By the 6<sup>th</sup> of May 2007, he was represented by the Legal Aid Commission.

- [4] The issues at the trial were very limited. There were extensive agreed facts. The deceased Lin Quan Chi, a Chinese national ran a farm at Waibau with his brother Lum Moon Woot. They employed one Ulaiasi Dua and his wife Miri to work on the farm. These employees lived in a house on the farm. Their nephew was the Appellant, Uraia Racule. In his interview to the police (which was not disputed by the defence at the trial) the Appellant had explained that a week before the deceased's death, he and his two companions from the village, had planned to rob the deceased because Ulaiasi had told him that the deceased was going to terminate his employment and ask him to vacate the house. The Appellant also worked for the deceased on the farm.
- [5] On the 26<sup>th</sup> of November 2004, between 12 midday to 1pm, while the deceased lay sleeping on his bed, the Appellant went to the deceased's house armed with a branch from an African tulip tree. The local name for the tree is "vuni pasi" and the branch was 3 feet long and had the thickness of a table leg. His two companions assaulted the deceased's brother Lum Moon Woot. The Appellant hit the deceased twice as he lay asleep on the bed. Both blows landed on his face. The Appellant said that he inflicted these blows to "knock him out" so that he could proceed with the robbery. He then stole \$40 from the deceased and ran away to the house of Ulaiasi. In his interview he was asked whether he knew that his blows "can cause his death." He said "No." He also made the following statement at Question 70 of his interview:

*"Yes I wish to state that I had no intention at all to kill the Chinese man (LIN) as we only went there to go and rob them with cash. I knew very well that the deceased had just about to go to sleep so I strike him with the wood on the face to knock him out and can*

*search money from him. I gathered that he was still alive when I ran out of the scene."*

[6] The post mortem report was an agreed fact. So were the photographs of the deceased. Photograph No. 26 shows the deceased's face covered with blood, and disfigured by serious injuries. The post mortem report, which was an agreed fact, showed that the deceased was a 36 year old man, who died of maxillo-facial and cranio-cerebral injuries due to blunt impact to the head or face as a result of assault. There was a fracture of the right orbital lobe and the middle of the base of the skull. The deceased had a 15cm x 06cm area of impact abrasion across the face directed from right to left with a tear measuring 04cm x 0.8cm from the nasal septum up to and beyond the left ala of the nose. His face was completely disfigured due to the blunt impact, causing depression on the right side of the face and causing swelling on the left side. Both eyes were depressed, right more than the left with bilateral black eye more prominent on the left. On an extended dissection of the face, multiple fractures were felt and there was bilateral fracture of the orbital bone, both maxillas, nasal bones, and upper and lower jaw bones. Two upper jaw incisors were broken, with only one found in the oral cavity. On dissection of the facial skin, the entire facial soft tissue was covered with haematoma.

[7] These facts were not disputed by the defence.

[8] Giving evidence at the trial was Dr. Finau Ricketts, the doctor who first saw the deceased when he was brought to the Nausori Health Centre with no sign of life. He said that he saw that the deceased had a multiple fracture to his facial bones, such that his bones crumbled under the doctor's fingers on examination. The

deceased's mouth was full of blood. The court record reads in examination-in-chief:

*"... If we feel our bones they are nice and smooth and steady. When I said crumbled I meant that they were just, they would be moving they were nowhere near being stable and we need to have good stability in order to maneuver around the mouth to get the tube in to maintain the airway for breathing."*

### **The prosecution case**

[9] The prosecution closing address was not completely transcribed because of a breakdown in the audio-recording. The affidavit of Aca Rayawa was permitted to supplement the court record with the consent of the Respondent. It is not in dispute that the prosecution alleged that this was a premeditated plan to rob and attack the deceased and his brother because the Respondent's uncle and his family had been ordered to vacate the house they occupied on the deceased's farm, as a result of an employment dispute. The State alleged that the Respondent was motivated by spite and a wish to punish the deceased. State counsel opened in this way:

*"The State will obviously be running an argument that yes, the use of that stick on the face of the deceased while he was sleeping, the accused should have reasonably foreseen that it would have caused his death – grievous harm. Grievous harm is coupled with the indifference that, yes, **I really don't care. I will just strike him anywhere because I want to steal from him.** That is sufficient to establish malice aforethought. Also the law quite clearly states that as well. Even though he was striking he was wishing, **I wish he does not get hurt.** That is also in the law."*

[10] Counsel went on to define malice aforethought in this way:

*"The third element that the Prosecution needs to prove is that when the accused person committed the unlawful act, which caused the death, he did so with the required mental state. This mental state is called **malice aforethought**. There are three (3) states of mind that could amount to malice aforethought.*

*(i) The intention to cause death.*

*(ii) The intention to cause grievous bodily harm to the victim.*

*"Grievous Harm" – means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense.*

*(iii) Knowledge that death or grievous harm would probably be caused, accompanied by indifference whether it is caused or not or by a wish that it may not be caused.*

*Lady and Gentlemen Assessors, the prosecution does not have to prove all three (3) states of malice aforethought but proving one state of the three (3) states of mind will suffice."*

[11] State counsel then, in apparent contradiction to this above passage said:

*"The main issue in contention is whether the accused actually intend(ed) to kill when he used the African Tulip Branch to strike the deceased twice on the face."*

[12] In his summing up, the trial judge said this about the prosecution case:

*"The prosecution's case is that the accused together with two other persons planned to rob the deceased and his brother. They executed the robbery. During the robbery the deceased who was sleeping in a separate room from his brother was struck on the head by the accused two times causing injuries which led to his death and at the time the accused either intended to kill him, or cause him really serious harm, or thought really serious harm or death might happen but was indifferent about the consequences of his unlawful actions."*

### **The defence case**

[13] The defence was invited, unusually, to open to the assessors after the prosecution opened its case. The prosecution did not object to this, nor was the matter raised on appeal. However, the procedure of a criminal trial is governed in Fiji by the Criminal Procedure Code. Section 294 of the Code provides that the appropriate time for the defence opening speech is after the close of the prosecution case and before the accused person gives evidence. The defence has another opportunity to address the assessors at the close of the defence case, also pursuant to section 294.

[14] The defence case was summarized in this way during this opening speech by counsel:

*"..... the reason we are in court today is because my client has been charged with murder and he is pleading not guilty because he did not intend to kill the deceased. If anything, we ask you to come back with a decision of manslaughter because he did go, he did hit him, but there was no intent to kill or cause grievous bodily harm."*

[15] In her closing address, defence counsel said:

*"Is it possible that my client hit him not realizing the extent of the injuries? He was there to conduct a robbery. He wanted to neutralize the victim so he hit him twice. When you are looking at the post mortem photos you will see there are no extensive injuries on the length of his body, just to his face .... Is it reasonable to think that two hits on the head would cause such grievous bodily harm?"*

[16] The learned Judge summarized the defence case in this way:

*"On the other side, the defence say to you 'yes' he committed the unlawful act of hitting the deceased twice on the head with a piece [of] wood. Yes this led to death. Yes the accused is guilty of manslaughter. Counsel concedes to you but that is all. He is not guilty of murder because he had no intent to kill. No intent to cause really serious harm, no recklessness about the outcome of his actions."*

[17] The record is silent on the opinions of the assessors. Nor does it include his Lordship's judgment; or the Respondent's conviction for manslaughter. However from the submissions of both counsel, it appears that the assessors were unanimous in their opinions that the Respondent was not guilty of murder, but guilty of the lesser offence of manslaughter. The Respondent was sentenced to 8½ years imprisonment.

[18] In his sentencing remarks the learned Judge said at paragraph [4]:

*"Such was the force of your blows that you knocked out the deceased's front tooth. The Doctor who attended the deceased was unable to intubate the patient because the bone structure of his face had been shattered by the force of the blows you struck. The Doctor said in evidence that the deceased's face crumbled when she tried to gain some stability about the jaw to insert the tube."*

And at paragraph 11 of the sentencing remarks:

*"This was completely reprehensible conduct. Driven by greed and spite you planned and then set about to rob these hardworking folk. In the process of that crime you intended violence. You hit this man twice in the face with a heavy wooden baton. You crushed his face and killed him."*

### **This appeal**

[19] Both grounds (a) and (b) of the Director's petition of appeal relate to one complaint, that is, that the learned trial judge failed to adequately direct the assessors on the law on malice aforethought, and on the facts relevant to the question of malice aforethought.

[20] In submissions filed in court, counsel for the State said that the learned judge failed to direct the assessors on the evidence of spite, and its relevance to malice aforethought, failed to properly direct the assessors on other relevant facts including the evidence of Dr. Rickets, and erroneously referred to the darkness of the room as being relevant to the question of intent. While conceding that appellate courts are generally reluctant to interfere with acquittals, State counsel submitted that an appeal against acquittal is more likely to succeed where there is a clear error of law rather than of fact.

[21] The error of law pointed to in this case was the failure to direct on motive, the failure to refer fully to the statutory definition of malice aforethought as defined by section 202 of the Penal Code and the failure to refer fully to those pieces of evidence which showed, at least, criminal recklessness.

[22] Counsel for the Respondent submitted that the duty of a judge in summing up is “to tell the assessors what are the issues of fact on which they have to make up their minds in order to determine whether the accused is guilty of an offence ....” (***State v. Li Jun*** *Supreme Court CAV001/2007S*), and that the learned trial judge did not err in this regard. Counsel further submitted, relying on the decision of the High Court of Australia in ***Dominican v. R*** (1992) 173 CLR 55S that it was not necessary for the trial judge to refer to all the matters relevant to the accused’s case as long as the jurors “have sufficient knowledge and understanding of the evidence to discharge their duty to determine the case according to the evidence.” The only question is therefore whether the trial judge acted on a wrong principle or misled the assessors on the law or the evidence such that “a substantial wrong has in fact occurred.” (***House v. The Queen*** (1936) 55 CLR 499 per Dixon, Evatt and McTierman JJ)

### **Malice Aforethought**

[23] Section 202 of the Penal Code provides a statutory definition of the term malice aforethought in the following terms:

*“Malice aforethought shall be deemed to be established if evidence proving any one or more of the following circumstances:*

*(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;*

*(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person,*

*whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused."*

- [24] In **Adriu Volavola v. State** [2002] AAU0022/02S this court, differently constituted, held that under section 202(a) the prosecution had to prove the full specific intent to cause death or grievous bodily harm, and that under section 202(b) the prosecution had to prove that at the time of acting, the accused knew that his act would probably cause the death of or grievous harm to the deceased. Relevant to the question of what the accused had in his mind are the acts and thoughts of the accused, and these matters should be carefully drawn to the attention of the assessors. The test is a subjective one requiring a consideration of what the accused believed would probably occur as a result of his unlawful act.
- [25] The decision in **Volavola** accords with the way the legal definition of "recklessness" has evolved in England. In **R v. Cunningham** [1957] 2 QB 396, 41 Cr. App. R. 155, recklessness, or maliciousness, was defined by the English Court of Appeal as foreseeing that the particular harm might be done, but going on to take the risk anyway. In **R v. Mowatt** [1968] 1 QB 421, it was held by the same court that the harm foreseen need not be of the same degree as the harm prohibited. Thus in **R v. Savage; DPP v. Parmenter** [1992] 1 AC 699, on a charge of wounding or inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act it was held that where the accused foresees some physical harm might be caused to some person (even if such harm is of a minor character) he/she is culpable.

- [26] In ***R v. Caldwell*** [1982] AC 341, a case of criminal damage, the House of Lords revisited this definition of criminal recklessness, saying that the ***Cunningham*** definition applied only to the term “maliciously” under the Malicious Damage Act 1861. The word “reckless” in the context of criminal damage had no special meaning beyond the popular understanding of conduct which is careless, or regardless or heedless of the possible consequences of one’s acts. This definition was applied by the House of Lords in ***R v. Lawrence*** [1982] AC 510, a case of reckless driving. The result was an objective test of recklessness.
- [27] Neither ***Caldwell*** nor ***Lawrence*** had any effect on the definition of malice aforethought in Fiji, because section 202(b) requires knowledge of probably causing death or grievous harm. However in England the House of Lords reconsidered the meaning of the word recklessness in ***R v. G*** [2004] 1 AC 1034. Although the case itself was in relation to a charge of criminal damage, the definition of recklessness applied generally to all criminal offences which could be committed recklessly. The House of Lords held that a person acts recklessly when he/she is aware of the risk of the existence of circumstances, or is aware that those circumstances will exist, **and** it is unreasonable to take that risk. Thus to prove criminal “intention”, the prosecution had to prove **either** an intention to cause an injurious result, **or** a knowing disregard of an appreciated and unacceptable risk of causing an injurious result **or** a deliberate disregard of such risk. ***Caldwell*** was overruled.
- [28] The definition of recklessness in England has therefore moved closer to the definition of “reckless” malice aforethought in the Penal Code. However there is one qualification. It is that there must, in Fiji, be evidence of knowledge of the

probability of death or grievous harm. Knowledge of a risk is not enough. However, evidence that the accused was indifferent to whether death or grievous harm would be caused, or evidence that the accused did not want to seriously harm the deceased is distinguishable from the elements of malice aforethought. **Foresight** of the probability of death or serious harm, and **motive or lack of motive** are two different things. Assessors must be carefully directed on the difference.

[29] The prosecution's case was based on both matters. Firstly the prosecution's case was that when the Respondent used the weapon (the pasi tree branch) on the face of the deceased as he lay sleeping he foresaw at least serious harm. This is because the injuries on the face were so serious that considerable force must have been used to inflict them. Secondly the prosecution's case was that the Respondent had a motive for committing the assault. He planned the robbery and the assault because of revenge, and he took the tree branch with him to inflict the violence. The violence inflicted was gratuitous, and the **motive** for the offending was greed and spite.

[30] These two distinguishable parts of the prosecution case do not appear in the summing up. There is no reference at all to the dispute between Ulaiasi and the deceased, and no reference to that portion of the Respondent's caution interview which refers to that dispute. The learned judge in summarizing the facts said at paragraph 37 of the summing up, that Lum Moon Woot and Lin Quan Chi were resting at their farmhouse at midday on the 26<sup>th</sup> of November 2004, when the Respondent and two others arrived, armed with branches of the Pasi. They had earlier planned to rob the two men. The summing up then reads:

*"Each of these three were armed with a piece of African Tulip "Pasi" branch. In addition Mateo Talea had with him a knife. Josefa and Mateo set about beating up Lum. At the same time Uraia went into the deceased's room and finding him asleep hit him twice on the face with a piece of African Tulip branch. Uraia then took some money from the deceased."*

At paragraph 51 of the summing up, the learned judge said:

*"It is agreed by the State and the Accused that the one point for your consideration is whether the accused at the time of striking the deceased had murderous intent."*

Earlier, at paragraph 23, he said:

*"Murder is committed when a person causes the death of another person by an unlawful act with malice aforethought. Malice aforethought is the state of mind required to be proved in the offence of murder. An easier way to talk about malice aforethought is to simply call it murderous intent. It is defined by the Penal Code and it requires either:*

- (1) an intention to cause the death of or to do grievous harm to another person; or*
- (2) knowledge that the act causing death will probably cause the death of or grievous harm to some person although such knowledge is accompanied by indifference whether death or grievous harm is caused or not."*

[31] Missing from this definition are the last few words of section 202(b) of the Penal Code, that is the words:

*"... or by a wish that it may not be caused."*

[32] At paragraph 55 his Lordship summarized the issues for the assessors in relation to malice aforethought in this way:

*"You must ask yourselves these questions:*

- *Did the accused intend to kill the deceased when he struck these two blows; or*
- *Did the accused intend to cause really serious harm when he struck these two blows; or*
- *Did the accused know the two blows struck to the head of the deceased would probably cause death or really serious harm but remained indifferent whether death or really serious harm would be caused; or*
- *Would he foresee these dangerous consequences but chose to take risk of these consequences anyway;*
- *Were these consequences the accused recognized could well happen or of which there was a substantial risk;*
- *Look at the size of the tulip branch recovered from the scene and shown to the accused. How large is it?*
- *As a fresh cut branch how heavy would it be?*
- *If it was used to strike anyone in the head would it or could it cause really serious harm or death?*
- *How careful would you have to be if you used such a piece of wood when striking someone on the head in a dark room?*
- *Consider all the evidence of injury. The Doctor's statement about an unstable force on presentation at Nausori.*
- *The Pathologist's evidence.*
- *What force might have been used?*
- *What does that tell you about the accused's intent or indifference."*

[33] The learned Judge's definition of malice aforethought was correct in law. It is true that he omitted the words "or a wish that it may not be caused" in his

direction to the assessors. Certainly a complete definition is always desirable. However, was a reference to those words so necessary to the prosecution case? After all the prosecution case was based on the premise that the Respondent **was** motivated by a wish to harm the deceased because of an existing dispute between his uncle and the deceased. Indeed if the assessors accepted the evidence of premeditation, there was evidence of a wish to harm. Further the evidence of premeditation was not in dispute. The contents of the caution interview which included an admission of premeditation, were not in dispute. The omission to refer to the last few words of section 202(b) was not prejudicial to the State's case.

[34] The learned Judge also failed to direct the assessors on motive, and on the difference between motive and malice aforethought. This omission might have been prejudicial to the State's case if the alleged motive was to cause serious harm or death, as a result of revenge. However, the motive of revenge and spite could have equally resulted in a plan to rob albeit with foresight of some harm. A direction on motive would have been desirable, but we do not consider that such a direction would have necessarily strengthened the prosecution case on the facts of this case. After all, the defence conceded a plan to rob. The defence did not concede a plan to cause serious harm, and there was no direct evidence led of any such intention. Evidence of motive therefore whilst being relevant to sentence, was of limited relevance to the issue of malice aforethought.

[35] Thus while we accept that the summing up was sparse in relation to the factual issues for determination by the assessors, and that there was no reference to motive at all, we do not consider that these omissions constituted errors of law

which should lead to a substitution of a verdict of guilty of murder. Certainly we are of the view that his Lordship explained the law on malice aforethought adequately to the assessors and left the question of fact to them to decide after referring to the relevant evidence in the case. We are also conscious that the assessors had the post mortem report, the photographs of the deceased and the Pasi branch to look at when they retired. These matters quite clearly demonstrated the State's case on malice aforethought. We are not persuaded in these circumstances, that their opinions should be substituted on appeal with a verdict of guilty of murder.

[36] For these reasons this appeal is dismissed.

---

**Hon. Justice Byrne JA**

---

**Hon. Justice Shameem JA**

---

**Hon. Justice Goundar JA**

**Solicitors:**

Director of Public Prosecutions Office for Appellant

Legal Aid Commission for Respondent