

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO.: HAC 165 OF 2007**

**BETWEEN:**

**THE STATE**

***Applicant***

**AND:**

**PATRICK NAYACALAGILAGI & OTHERS**

***Respondents***

**Counsel: Mr. W. Kurisaqila & Ms. L. Lagilevu for the State**  
**Mr. H.A. Shah & Mr. J. Boseiwaqa for the Respondents**

**Date of Hearing: Monday 9 February, 2009**

**Date of Ruling: Tuesday 17 February, 2009**

**RULING**

[1] All nine Accused persons are jointly charged with one count of murder and four counts of assault occasioning actual bodily harm. The trial commenced before me, sitting with five assessors, on 9 February 2009.

[2] The prosecution case is that the Accused persons were involved in a joint police and military operation on 28 January 2007 in Nadi. The deceased (count 1) and the complainants (counts 2-5), were taken to a military training location in Votualevu where they were assaulted by the Accused persons.

- [3] After leading evidence from the deceased's mother and the complainants in counts 4 and 5, the prosecution makes this application to adduce similar fact evidence. The proposed similar fact evidence is evidence of uncharged acts, namely, five other boys were taken to the military training location by the Accused persons earlier on the same day and were assaulted in a similar manner as the deceased and the complainants subject of the charges. The prosecution submits that the evidence is relevant to prove the identity of the Accused persons.
- [4] The defence objects to the application. The defence submits that the proposed evidence is highly prejudicial and could be misused by the assessors. The defence also questions the timing of the application as evidence of uncharged acts has already been led before the Assessors without any prior notice of intention to lead that evidence. The defence leaves it to the discretion of the court to remedy the prejudice to the Accused persons, if this application to adduce similar fact evidence fails.
- [5] The evidence of uncharged acts that has already been led by the prosecution is that the deceased's brother was assaulted earlier on the same day, that the complainant in count 4 was assaulted in two separate incidents, and that the complainants were made to perform unnatural offence. The prosecution has offered no reasons for not charging the Accused persons with these offences.
- [6] When similar fact evidence is offered to establish the identity of the offender, the court must approach such evidence with care because there is a real danger of being swayed by invalid reasoning (*Queen v Holtz* [2002] NZCA 323 (18 December 2003)). Similar fact evidence is admissible if it is relevant to a fact in issue; there is no reasonable view of the evidence that is consistent with innocence; and the

probative value of evidence outweighs its prejudicial effect (***State v Raymond Rajendra Singh*** Cr. Case No. HAC072 (unreported) 26 January 2009).

- [7] It is not in dispute that the Accused persons were on duty on 28 January 2007 as part of a joint operation between the police and the military to attend reports received at the Joint Operation Command Center based at the Namaka Police Station. It is not in dispute that on the day in question the deceased and the complainants were taken to the military training site in Votualevu and made to undergo physical exercises. What is in dispute is the assaults took place during the physical exercises.
- [8] If identity is not an issue, but the actual commission of the charged offences, then the evidence of uncharged acts must show more than just propensity to commit those offences. The evidence has to be relevant to some fact in issue, for example, the assault was not deliberate but accidental. The relevance of similar fact evidence as offered by the prosecution, in my view, does not show more than just a propensity to commit the charged offences. The law does not permit evidence to be admitted just to show a propensity because the prejudicial effect of such evidence outweighs any probative force it may have. In this case, I am not satisfied that there is a fact an issue for which evidence of uncharged acts is relevant.
- [9] For these reasons I refuse the application by the prosecution to admit similar fact evidence.
- [10] The question now is what remedy is available to cure the prejudice arising from the inadmissible evidence that the assessors have already heard.

[11] The cardinal principle on which our criminal justice system is based is contained in the Constitution. Every accused in this country has the right to a fair hearing which includes the right not to be convicted on inadmissible evidence.

[12] If the jury inadvertently hears inadmissible evidence, any prejudice could be avoided or dispelled by a clear warning to disregard the evidence and enable a fair trial. However, if the circumstances are such that the prejudice to the accused could not be dispelled by a warning to the jury, a mistrial is declared as an appropriate remedy to ensure a fair trial for the accused. The High Court of Australia in **Crofts v R** (1996) 70 AJLR 917 at p. 927 said:

No rigid rule can be adopted to govern decisions on an application to discharge a jury for an inadvertent and potentially prejudicial event that occurs during a trial. The possibilities of slips occurring are inescapable. Much depends upon the seriousness of the occurrence in the context of the contested issues; the stage at which the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial discretion designed to overcome its apprehended impact. As the court below acknowledge, much leeway must be allowed to the trial judge to evaluate these and other considerations relevant to the fairness of the trial, bearing in mind that the judge will usually have a better appreciation of the significance of the event complained of, seen in context, than can be discerned from reading transcript.

[13] The principles in **Crofts** were adopted in **State v Alifereti & Ors** Cr Misc. Case No. HAM0082 of 2008. The Court said:

The cases just referred to above, establish that the threshold that must be achieved before a mistrial will be declared is high. It is not to be seen as an opportunity to seek the re-start in the trial, thus giving parties an opportunity to correct any weaknesses in their evidence so far adduced. Apart from the actual parties to a trial, the other stakeholder is the public at large and their interest is in

ensuring that a trial once started must proceed to conclusion, unless there will be miscarriage of justice if the trial were to continue.

[14] In this case, the evidence of uncharged acts were not inescapable slip of tongue by the witnesses but intentionally led by the prosecution without any notice to the defence. The prosecution has led evidence of uncharged acts through all three witnesses they have called so far. When the evidence of uncharged act was led by the first witness, I cautioned the prosecution, in absence of the assessors. After the caution was given to the prosecution, further evidence of uncharged acts was led in evidence. Evidence of unnatural offence between males which the Accused persons allegedly counseled to commit was led. This evidence which do not even resemble the charged offences received substantial media publicity. At no stage, the prosecution gave notice to the defence or the court to seek a *voir dire* hearing to determine the admissibility of such evidence.

[15] I am concerned about the deliberate conduct of the prosecution to lead evidence of uncharged acts without giving any notice to the defence to object to the evidence, and knowing that the evidence is highly prejudicial to the Accused persons. Section 28 (1) (f) of the Constitution gives an accused the right to challenge evidence. In my view, leading evidence that the Accused persons assaulted other people in a similar manner and that they counseled unnatural offences between males, without any notice to the defence to challenge the evidence in a *voir dire*, are so prejudicial that it could not be dispelled by a warning to the assessors to disregard the evidence. In these circumstances the possibility of a miscarriage of justice occurring cannot be ruled out. The courts have a duty to prevent a miscarriage of justice from occurring by ensuring that the trial of an accused person regardless of his or her social and economic status in the society is fair.

[16] After taking all these factors into consideration I order a mistrial. The assessors are discharged. I order a new trial to commence before me with a panel of fresh assessors.

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**Daniel Goundar**  
**JUDGE**

**At Suva**  
**Tuesday 17 February, 2009**

**Solicitors:**

Office of the Director of Public Prosecutions, Lautoka for the State  
Haroon Ali Shah Lawyers, Lautoka for the Respondents