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Criminal Appeal Cases 9, 10, & 11 of 1988.

IN THE COURT OF APPEAL FOR THE REPUBLIC OF VANUATU

APPEAL Nos 9, 10 & 11 of 1988

BETWEEN : SILAS NOE
IAWAK FELIX
JERRY NIATU

(Appellants)

AND : PUBLIC PROSECUTOR

(Respondent)

5 and 13 April, 1989.

Mr G. Rissen for Appellant.
Mr J. Baxter-Wright for Respondent.

J U D G M E N T

The Appellants were each convicted of Intentional Assault causing death contrary to Section 107 (d) of the Penal Code Act 1981, before the Supreme Court on the 9th of December, 1988. Silas Noe was sentence to six (6) years imprisonment. Iawak Felix and Jerry Niatu were each sentenced to twelve (12) months imprisonment. They have each appealed against conviction and only Silas Noe has appealed against his sentence as well.

The common grounds of appeal in their separate notices of Appeal were these:

(i) the conviction was against the evidence and the weight of the evidence.

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(ii) the learned Chief Justice misdirected himself and the Assessors as to law with regard to who are co-offenders and accomplices.

(iii) the learned Chief Justice failed to direct the Assessors and misdirected himself on the law with regard to cause of death and the onus on the Prosecutor with regard thereto and on the facts adduced in evidence in respect thereof.

Silas Noe's fourth ground against his sentence was that it was manifestly excessive.

The short facts are these. The deceased, one Selwyn Leo was a young private in the Vanuatu Mobile Force (VMF). On the late evening of Saturday 13th and early morning of Sunday the 14th August, 1988 he was at the Seven Star Night Club with some friends drinking beer. The Appellants were also at the night club at different times during the evening. The first Appellant Silas Noe wanted to fight the deceased because he believed the deceased had sworn at him. He was restrained by friends. An altercation broke out between the Appellant Felix and the deceased. The Appellant Jerry and others ran towards Felix and the deceased. The deceased ran outside the night club, being chased by the Appellants and others numbering between 6 to 8. The deceased was tripped by Appellant Silas Noe. He fell hard onto the ground. The group of 6 to 8 men including the Appellants then kicked him heavily a number of times on the head and body, into unconsciousness. He was found in that condition and taken to the hospital when his attackers fled. He was treated and allowed to go home in the early hours of Sunday 14th August 1988, after 2.00 am. He was brought back later that same morning at about 10.45 am, and again taken home after treatment. He was again taken back to the hospital on Monday morning between 7 and 8 am, and died in hospital later that day, about 7 pm.

The doctor conducted a post mortem on the body. He found 4 fractures of the skull causing serious injury to the brain from which he died.

The Appellants were represented by separate Counsel at their trials. In these appeals they are represented by Mr G. Rissen, the Public Solicitor, who represented the second Appellant at his trial.

The first argument advanced was that the learned Chief Justice failed to direct the Assessors and misdirected himself on the law as to the onus of proof

of cause of death.

In aid of this ground we granted leave for Mr Rissen to file two Affidavits, one by himself and the second by Miss Susan Bothman Barlow, who had represented the third Appellant at the trial, to the effect that at the conclusion of the learned Chief Justice's summing up to the Assessors, Mr Rissen had requested that the Chief Justice direct the Assessors on the onus of proof of death on which he had made quite lengthy submission. The Chief Justice had replied to the effect that:

"I am satisfied myself that the cause of the deceased's death was the assaults on him at the club. It is not necessary to direct the Assessors on this."

Mr Rissen deposed further in the Affidavit that he asked if his request and the Chief Justice's refusal could be noted, to which the learned Chief Justice replied to the effect:

"I am responsible for the record and I will decide what goes into it. I have no intention of entering this into the record, it is unnecessary".

Mr Baxter-Wright did not take issue with the form and substance of the Affidavits of Mr Rissen and Miss Susan Barlow.

Mr Rissen argued that because the issue of cause of death was one of the accused's main defences given the chain of events, the time period from 2 am on Sunday 14th to the estimated time of death at 7 pm on Monday 15th August, 1988, and the lack of evidence as to what the deceased was doing between the times that he was taken to the hospital, it was the duty of the trial judge to have directed the assessors on it. Mr Rissen further complains that the learned Chief Justice erred in his omission or failure to note his request and the courts refusal to direct the assessors.

We consider, with great respect to the learned Chief Justice, that he did err in both respects. The failure to direct the assessors on the issue was a material omission. The Accused's are entitled to have their arguments and line of defence put in the balance, whatever the trial judges own opinion or conclusions might be. Secondly, we consider, with respect to the learned Chief Justice, that the submission by Counsel ought properly to have been recorded and reasons for it's rejection noted.

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Mr Rissen submitted that the combined effect of the misdirection and omission are sufficient to vitiate the convictions.

We do not consider that the omission and the misdirection would have made any difference to the opinion of the Assessors; in the light of the evidence available. The submissions fails.

The second ground argued by Mr Rissen was that there was insufficient evidence to connect the cause of the deceased's death to the actions of the Appellants.

It was argued that because of the time span between the times that the deceased was examined at the hospital to the time of his death, given the lack of evidence as to his precise whereabouts and what he was doing during the intervening times, the possibilities that he might have sustained the injuries resulting in his death from some other source and not at the hands of and as a result of the assault by the Appellants and others had not been disproved. It was not open therefore on such evidence to conclude beyond reasonable doubt that the actions of the Appellants caused the injuries causing death.

It is true that there is no direct evidence as to the deceased's precise whereabouts and what he might have been engaged in, the two times he left the hospital.

It was argued that the learned Chief Justices summing up to the Assessors was wrong in the conclusion that each of the two times that the deceased was taken from the hospital he was taken back to the Vanuatu Mobile Force Camp.

We are satisfied that there was sufficient evidence upon which the learned Chief Justice was entitled to draw that conclusion of fact. The learned Chief Justice also concluded in his judgment that:

"From the evidence of the dresser at the hospital, nurses and deceased's colleagues and of course, the Doctor, I was completely satisfied that the injuries which resulted in the death of the man known as Selwyn, resulted from the attack on him on the night of the 13th/14th August, 1988 near the Seven Star Night Club. I informed the Assessors of this opinion of mine in my summing up to them".

It is true that there is no evidence as to what the deceased did between

2 am and 10.45 am on Sunday 14th August and between 10.45 am on Sunday and about 8 am on Monday morning 15th August, a total period of about 31 hours. There was evidence however that he was taken back to the Vanuatu Mobile Force Camp on both occassions and also taken to the hospital on Sunday and Mond mornings from the Vanuatu Mobile Force Camp.

The Public Prosecutor conceded these gaps in the evidence as to the deceased's precise whereabouts and what he might have been doing, and agreed that there exist the possibilities that the deceased received other injuries in the intervening period. But Mr Baxter-Wright submitted that in the light of the evidence as to the nature of the assault upon the deceased, his conditic when examined, the Doctors post mortem report as to the cause of death, the possibilities become so remote and fanciful that the learned Chief Justice was correct in his finding that the injuries resulting in the deceased's death resulted from the assault on him by the Appellants and others.

We agree. We do not consider that the possibilities are such that it was not open to the learned Chief Justice to have been satisfied that the cause of death resulted from the assault by the Appellants and others. The observations of the deceased that he couldn't talk, and appeared to be drunk are consistent with concussion from unconsciousness resulting from the kicking to his head. The fractures to the skull are consistent with severe trauma to the head by the Appellants and the others. This ground is also dismissed.

The third ground argued against conviction was that there was no evidence that each of the Appellants acted in concert with one another in pursuit of a common purpose. It was also argued that there was no evidence as to who effec the fatal blow or blows.

Mr Baxter-Wright argued that it was not necessary to prove who effected t fatal blows. It was also not necessary to prove precisely what assault each Appellant or participant perpetrated upon the deceased. It was only necessary to prove that each appellant took part in an intentional assault. And if deat results from the damage or injuries received in the intentional assault then all who participated in the intentional assault are guilty of causing the deat

We agree. There is in our view ample evidence, from eyewitnesses and the appellants themselves in their statements that they participated in

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chasing the deceased outside. They participated in the intentional assault of the deceased by actually physically effecting some blows in the case of the first two appellants, or by aiding and abetting others in chasing the deceased outside and being present and giving encouragement if they did not actually deliver any physical blows such as in the case of the third appellant. We can find no basis for disturbing the finding of the trial judge, and this ground also fails.

The Appeals against convictions are dismissed.

Only Appellant Silas Noe appealed against his sentence of six (6) years imprisonment as being manifestly excessive.

We agree. Although this Appellant appeared to be an instigator who wanted to fight the deceased earlier and tripped the deceased to the ground and also kicked him a number of times on the head, there were between 6 and 8 of them involved. The other two co-prisoners each only received 12 months, though their participation was only marginally less than this Appellant's. We consider the disparity between 1 year and 6 years to be so great as to manifest error. We do not consider the facts nor any antecedents warrant such a disparity.

We therefore allow the Appeal against Silas Noe's sentence and vary it by reducing it from six (6) years to three (3) years imprisonment.

Justice E. Goldsbrough | Justice G. Martin | Justice A. Amet