

Appeals Court Acquits Four Men Framed For Murder By Prosecutor And Pathologist

Introduction

The win at all costs mentality infects prosecutors around the world, even in the South Pacific country of Fiji. English is a primary language in Fiji, a former British colony whose adversarial legal system like that in the United States, has its roots in British Common Law. In overturning the murder convictions of four innocent men in the following case, the Fiji Court of Appeal candidly described how the prosecutor and forensic pathologist colluded to frame the men with fake evidence.

Tahir Ali, Zafir Ali, Taimur Ali, and Chandlesh Ganesh were convicted on July 7, 2010 of jointly murdering 26-year-old James Shankaran Nair in Nausori, Fiji on January 4, 2010. Nausori is about 15 miles from Fiji's capital of Suva.

On the night of Nair's death the four men, and a fifth person, 16-year-old Zakariyah Ali, were riding in a Ford Ranger crew-cab pick-up searching at about 2:30 am for the person who about 30 minutes earlier burglarized Tahir's house and stole items belonging to his daughter visiting from the U.S. The burglary was immediately reported to the police, who were at the house when the men left to search for a person on foot who could be the burglar. Tahir's daughter traveled to Fiji for her sister's wedding, and the celebration at the family's compound was on January 1 and 2. The celebration was open to neighbors and one of those who attended was Nair.

The men saw Nair walking on the side of the road and they stopped and talked with him. Citizen arrests are legal in Fiji, so the men told Nair they were going to take him to the nearby police station for questioning. Nair agreed to go willingly, and since there was no room in the pick-up's cab, he alone got into the pick-up bed.

Shortly after one of the men noticed Nair was no longer in the truck's bed they came to an intersection where they saw a police car. The men told the police officers about Nair and the area where they thought he must have jumped out of the pick-up as it was moving. The police searched in the dark but they didn't see Nair.

After daylight a driver saw Nair's body lying alongside the road in a concrete culvert. The police arrested the five men that morning about 8:30 am.

The five men gave similar statements to the police describing the events of the previous evening.

The pathologist's autopsy report dated February 24, 2010 stated that Nair died as a result of a severed aorta, which resulted in his chest cavity filling with more than 3/4 of a gallon of blood. That was consistent with him jumping off the back of the moving pick-up in the dark and landing awkwardly in the concrete culvert instead of the soft earth around it.

Although the police investigation found no wrongdoing by any of the men, all except for 16-year-old Zakariyah were charged with manslaughter based on the prosecutors' assertion they were negligent for insisting that Nair ride in the back of the pick-up from which he apparently jumped.

Five days before the trial began on June 10, 2010 the prosecutor, Ms. Jojiana Cokanasiga, filed an amended information charging the defendants with murder. Then the day before the trial started the prosecutor signed a stipulation: "16. It is agreed that the cause of death ... was ruptured aorta as a consequence of a motor vehicle accident".

Zakariyah was the prosecution's first witness. He wasn't granted immunity and testified about the same information that was in his police statement. Zakariyah's testimony established that Nair alone got into the back of the pick-up after the defendants stopped and talked with him as he walked along the road, but it did not implicate them in the commission of any crime.

There were several trial recesses, and then on June 24 the pathologist who conducted Nair's autopsy testified that Nair died from being struck by a blunt object, and not a burst aorta as he described in the autopsy report. To support the pathologist's testimony the prosecutor introduced into evidence the pathologist's second Post Mortem Report dated June 21 that revised Nair's cause of death to being beaten to death with blows to his head from one or more blunt objects. The pathologist's testimony was the first that the defendants -- and the judge -- knew they were being prosecuted based on the pathologist's revised opinion that Nair was beaten to death.

The pathologist's testimony and second

Post-Mortem Report was the only evidence supporting the prosecution's amended charge of murder.



Suva City, Fiji

The defendant's defense was a restatement of their statements when questioned by the police: They saw Nair by the road, they stopped and talked with him, he alone got in the pickup's bed so

they could take him to the police station, and he disappeared while the truck was moving.

The four defendants were convicted of murder based on the pathologist's testimony and the prosecutor's argument that one or more of the defendants beat Nair to death for which they jointly shared responsibility. Although none of the defendants had a criminal record, they were sentenced on July 9, 2010 to life in prison with a minimum of serving 11 years before they could apply for parole.

The defendant's appeal explained the irregularities between the pathologist's original autopsy report and his second Post Mortem Report, the irregularity that the prosecutor's amended charge of murder was unsupported until the pathologist's testimony and second Report was introduced into evidence after the trial had started, and that the evidence didn't support a conviction of either murder or the original manslaughter charge.

On April 1, 2011 the Fiji Court of Appeal unanimously overturned the defendant's murder convictions based on insufficient evidence a crime had occurred because credible evidence established Nair alone was responsible for his death. Justice William Marshall's lengthy opinion in *Ali v State* [2011] FJCA 28; AAU0041.2010 (1 April 2011) states in part:

60. In these circumstances James Nair intended to take the serious risk involved in jumping [from the moving truck]. The five were behaving lawfully and their agreed purpose was wholly within the law [to transport Nair to the police station]. ... Therefore the five did not act recklessly causing the death of James Nair.

....
67. The assigned prosecutor must have realised that there was no evidence on the required elements for manslaughter. But instead of proceeding the matter to a transparent and inevitable acquittal, she decided to approach the pathologist Dr

Fiji cont. on page 11

Fiji cont. from page 10

Ponnu Swamy Goundar. ... That she knew before the trial that Dr Goundar was prepared to wholly change his evidence on cause of death, and rule out that James Nair jumped from a moving vehicle leading to his death, and make it his evidence that James Nair had been beaten to death with blows to the head from one or more blunt instruments is quite clear.

...
100. ... Zakariyah's prosecution evidence was that the vehicle was in motion and travelling at 50-65 m.p.h. when James Nair jumped.

...
109. There is no evidence at all that the Ford Ranger became stationary at any point in Bau Road. If it was in motion then the five remained in the cab and could not have gone to the culvert where according to Dr Ponnu Swamy Goundar hypothesis one or more of them bashed James Nair on the head with a blunt object.

110. ... There is no evidence of any kind against any of the four accused or Zakariyah for that matter that any one of them was involved in a joint enterprise to murder James Nair.

...
118. In this case we are looking at a system in this case that has broken down and has no integrity. There is an obvious connection between the unconscionable behaviour of the prosecutor discussed

above and the claim that the results of the autopsy were wrong. ... the prosecutor goes to see the pathologist. The pathologist then changes his factual evidence of the findings on the autopsy in very material matters. These new matters are used to support an amended charge of murder rather than manslaughter.

...
121. Then as the prosecution case is about to end, the prosecutor mounts an ambush. The extent of the ambush is still concealed because even at this late stage the prosecutor does not serve a statement of evidence from the pathologist, who only reveals the facts allegedly justifying his change of evidence as true once he is in the witness box before the assessors.

...
126. I conclude that the new evidence of Dr Ponnu Swamy Goundar was and is completely lacking in credibility and weight.

...
143. But in any event the prosecutor in this case intended to mislead the Court and the defence.

...
145. ... [The four defendant's] arrest and taking of James Nair for interrogation were lawful and the evidence is that James Nair decided at grave risk to himself to jump to escape police interrogation and other consequences ... The four accused



must have been acquitted and released and should have succeeded on costs given the prosecutor's behaviour. Instead there was a miscarriage of justice with four convictions for murder, and sentences of

life imprisonment with a recommendation of serving 11 years before being eligible to be considered for parole. By the time this judgment is delivered the four accused will have spent nearly 9 months in jail as convicted murderers. The damage to their reputation as gainfully employed persons of good character in their community and in the wider community is very substantial.

The men were released after 9 months of imprisonment for a non-existent murder. Sixty-year-old Tahir Ali told *The Fiji Times* several days after his release: "I am still trying to come to terms with whatever happened and I have to start my shattered life from scratch after whatever happened. The wrongful conviction and sentencing has put my life behind quite a bit, I have lost out financially and it will not be easy for things to bounce back."

Source:

Four face kill charges, *The Fiji Times*, January 7, 2010. Life in jail for 4 murderers, *The Fiji Times*, July 9, 2010 *Ali v State* [2011] FJCA 28; AAU0041.2010 (1 April 2011)

'I've lost out', *The Fiji Times*, April 10, 2011

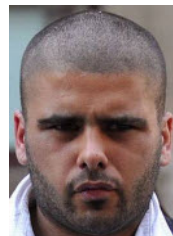


Contempt Conviction For Blowing Bubble In Court Tossed On Appeal

A courtroom might not be the wisest place to chew gum and blow a bubble, since a judge might overreact as Mirza Zukanovic found out the hard way.

In June 2010 the 20-year-old Zukanovic was chewing gum while sitting in a magistrate's courtroom in Moorabbin -- which is about 10 miles south of Melbourne, Australia. Magistrate Rodney Crisp saw him blow a bubble and became so angry that he immediately accused Zukanovic of committing a deliberate and gross contempt in the face of the court. The magistrate then summarily convicted Zukanovic of contempt and sentenced him to 30 days in jail. Zukanovic was taken to jail from the courtroom to begin serving his sentence.

After Zukanovic's lawyer was able to have



Mirza Zukanovic (AAP -JulianSmith)

him released on bail after he was jailed for 12 hours, he filed an appeal of the contempt conviction. Zukanovic's lawyer argued in the appeal, "I think the magistrate, in the vernacular, lost it," by charging and finding Zukanovic guilty beyond a reasonable doubt without giving him the chance to consult with a lawyer, enter a plea, or present evidence in his defense.

Supreme Court Justice Jack Forrest announced the Court's decision on April 20, 2011 that Zukanovic had been denied "procedural fairness" when the magistrate summarily charged, convicted and sentenced him of contempt. Justice Forrest said, "It is fundamental to the administration of justice that where a court's authority is challenged the judicial officer can take steps, including the laying of a charge of contempt to preserve the authority of the court, firmness must be accompanied by

fairness." Since Zukanovic had been denied due process by not having the opportunity to seek legal advice on the charge, to plead guilty or not guilty, or call evidence in his own defense, his conviction was quashed.

Sources:

Court bubble blower Mirza Zukanovic case quashed, *Herald Sun* (Melbourne, AUS), April 20, 2011



Visit Justice Denied's Website

www.justicedenied.org

Back issues of *Justice Denied* can be read, there are links to wrongful conviction websites, and other information related to wrongful convictions is available. JD's online Bookshop includes more than 70 wrongful conviction books, and JD's Videoshop includes many dozens of wrongful conviction movies and documentaries.