

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0011 of 2013
[High Court Criminal Case No. HAC 068 of 2011]

BETWEEN : VILIKESA VOLAU

Appellant

AND : THE STATE

Respondent

Coram : Basnayake, JA
Prematilaka, JA
Perera, JA

Counsel : Mr. Fesaitu. M for the Appellant
Mr. Prasad. Y for the Respondent

Date of Hearing : 08 May 2017

Date of Judgment : 26 May 2017

JUDGMENT

Basnayake, JA

[1] I agree that the appeal should be dismissed.

Prematilaka, JA

[2] This appeal arises from the conviction of the Appellant on a single count under section 207 (1) and [2] (b) of the Crimes Decree, 2009 (now the Crimes Act, 2009) alleged to have been committed on 24 January 2011. The Information dated 29 April describes the particulars of the count as the Appellant having penetrated the vagina of P (name withheld) with his finger, without her consent.

- [3] After trial the three assessors expressed a unanimous opinion that the Appellant was guilty of the said count. The Learned High Court Judge on 07 March 2013 concurred with their opinion in the Judgment and convicted the Appellant. On 08 March 2013 the Learned Judge imposed a sentence of 08 years of imprisonment with a non-parole period of 07 years. It is pertinent to note that in terms of section 18(1) of the Sentencing and Penalties Decree, 2009 (now Sentencing and Penalties Act 2009) that period should really be stated as the period during which the Appellant would not become eligible to be released on parole.

Preliminary observations

- [4] The Appellant had invoked the appellate jurisdiction of the Court of Appeal against the said conviction by way of a letter dated 11 March 2013 addressed to the Court of Appeal Registry. Amended grounds of appeal had been submitted later. Written submissions on behalf the Appellant and the Respondent also had been tendered on all grounds of appeal. Goundar JA had allowed leave to appeal in respect of 02 grounds of appeal on 10 June 2015. The Appellant had not sought to have the application for leave to appeal determined before the Court duly constituted to hear and determine the appeal under section 35(3) of the Court of Appeal Act relating to other grounds where leave was refused.
- [5] The counsel for the Appellant had informed the Hon. President of the Court of Appeal that he would rely on the submissions filed at the leave to appeal stage while the Respondent had tendered fresh written submissions in respect of the hearing of the appeal. At the hearing both counsel informed the full Court that they would confine themselves to the grounds of appeal allowed by Goundar JA.

Grounds of Appeal

- [6] Therefore, the grounds of appeal that would be considered by this Court are as follows.

Ground 1

- (i) *'The Learned Trial Judge erred in law when he did not properly and adequately address the weight that should be attached to the caution interview statement and particularly whether the confession was in fact made by the appellant and that the confession was true.'*

Ground 2

- (ii) *'The Learned Trial Judge erred in law and in fact when he did not put the case of the appellant to the assessors in a fair and balanced and objective manner.'*

Summery of evidence

- [7] The complainant, a teenager of 14 years had been walking along the beach collecting tamarind. She had seen the Appellant, 49 year old married man, approaching her at a distance but had continued to collect tamarind. Then, the Appellant had come from behind and grabbed her. She had raised cries and even kicked him. The Appellant had gaged her with his hand and undressed her. Thereafter, the Appellant had taken her to the bushes a few meters away, laid her on the ground and inserted his finger into her vagina. She had raised cries as it was painful. Then, the Appellant's wife had come and the complainant, obviously having got freed, had got up, put on her clothes, and gone home.
- [8] The complainant had been medically examined on 27 January 2011, 03 days after the incident and the doctor had found her hymen appearing to be still intact. His evidence in a nutshell was that the injuries may have healed by the time of the examination or the finger may not have penetrated far enough to damage the hymen but he could not confidently say that there had been penetration or not. Thus, the doctor could not medically either confirm or disprove the penetration alleged by the complainant and his evidence at best was, therefore, inconclusive.

- [9] The prosecution also produced the Appellant's caution interview after the trial Judge had earlier ruled it to be admissible upon a *voir dire* inquiry despite the Appellant's challenge. The Appellant had admitted in the caution interview having inserted his finger before his wife had caught him in the act.
- [10] At the close of the prosecution case the counsel for the Appellant had conceded that there was a case to answer. The trial judge also had recorded that there was a case to answer meaning that there was evidence that the Appellant had committed the offence (vide section 231 (2) of the Criminal Procedure Act 2009).
- [11] The Appellant had given evidence and the gist of it, is that from her words and gestures, the complainant appeared to be in need of some sexual pleasure and virtually induced him to follow her a little distance where she had undressed and laid herself in front of him when his wife came and a fight had ensued between the two of them bringing the whole scenario to an end. In other words his position had been one of denial of the act of penetration.
- [12] However, in my view his evidence on the alleged incident carries little credibility and I have taken the liberty to quote a portion of his evidence to demonstrate what according to the Appellant, had happened between this 14 year old teenager and the 49-year-old father of two

'Near a banana tree, Prosecution Witness 1 stood still. I moved to her. Prosecution Witness 1 told me to move back. Prosecution Witness spread her sulu on the ground. She told me to look away. I didn't look away. Prosecution Witness 1 laid down. I knelt on my knees and closed my eyes. After a while, I heard my wife calling. She said, "Vili! What are you doing!" When I opened my eyes, I saw Prosecution Witness 1 lying in front of me naked. My wife came and we fought. Prosecution Witness 1 stood up and ran away. Nothing actually happened. I went home with my wife.'

- [13] Before proceeding to consider the grounds of appeal, I feel constrained to make some observations on a matter relevant to this appeal which drew the attention of Court though not specifically taken up at the hearing. There is no medical evidence to confirm that the Appellant's finger had in fact entered the vagina or not. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.
- [14] Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina. Now the question is whether in the light of inconclusive medical evidence that the Appellant may or may not have penetrated the vagina, the count set out in the Information could be sustained. It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'porked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.
- [15] Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the *actus reus* of the offence of rape. Therefore, in the light of Medical Examination Form and the complainant's statement available in advance, the prosecution should have included vulva also in the particulars of the offence.

Nevertheless, I have no doubt on the evidence of the complainant that the Appellant had in fact penetrated her vulva, if not the vagina. Therefore, the offence of rape is well established. It is very clear that given the fact that her body had still not fully developed at the age of 14, cries out of considerable pain of such penetration would have drawn the attention of the Appellant's wife to the scene of the offence.

[16] I shall now deal with the grounds of appeal.

Ground 1 - 'The Learned Trial Judge erred in law when he did not properly and adequately address the weight that should be attached to the caution interview statement and particularly whether the confession was in fact made by the appellant and that the confession was true.'

[17] The relevant paragraph in the summing up which is challenged as being inadequate on the caution interview is as follows

'In considering the accused's alleged confession, I must as a matter of law, direct you as follows. A confession, if accepted by the trier of fact - in this case, you as assessors and judges of fact - is strong evidence against its maker. However, before you can accept a confession, you must be satisfied beyond reasonable (doubt) that it was given voluntarily by its maker. The prosecution must satisfy you beyond reasonable doubt that the accused gave his statements voluntarily, that is, he gave his statements out of his own free will. Evidence that the accused had been assaulted, threatened or unfairly induced into giving those statements, will negate free will, and as judges of fact, you are entitled to disregard them. However, if you are satisfied beyond reasonable doubt, so that you are sure, that the accused gave those statements voluntarily, as judges of fact, you are entitled to rely on them against the accused.'

[18] Therefore, the Appellant does not *per se* challenge the trial Judge's decision to admit the caution interview at the *voir dire* inquiry as an item of evidence against him. His complaint is on the Judge's direction as to how the assessors should evaluate it at the trial. Nevertheless, I have examined the material pertaining to the *voir dire* inquiry and have no reason to disagree with the trial Judge's decision to admit the caution interview as I myself is satisfied as to its voluntariness.

[19] How a trial Judge should direct the assessors as to a confessional statement or a caution interview has been discussed in a number of cases over the years. In Chand v State Criminal Appeal No. AAU 0015 of 2012: 27 May 2016 [2016 FJCA 61] the Court of Appeal discussed in great detail most of the issues pertaining to voluntariness, admissibility, weight or probative value and truthfulness of a confession or a caution interview and the nature of directions to the assessors. The Court in Chand had considered *inter alia* the decisions in Khan v State Petition for Special Leave to Appeal No. CAV009 of 2013: 17 April 2014 [2014 FJSC 6], Burns v The Queen [1975] 132 CLR 258, Kean v State Criminal Appeal No. AAU 95 of 2008:13 November 2013 [2013 FJCA 117], Kean v State Criminal Appeal No. CAV0015/2010: 12 August 2011 [2011 FJSC 11], Basto v R [1954] 91 CLR 628 at 640 and 641, Chan Wei Keung v The Queen [1967] 2 WLR 552, Wendo v The Queen [1963] A.J.L.R. 77 (Aust.), Prasad v The Queen [1981] 1 A. E. R 319, R. v Murray [1951] 1 Q. B. 391, R. v Cleary [1963] 48 Cr. A. R. 116, R. v Priestly [1966] 50 Cr. A. R. 183, R. v Bass [1953] 1 Q.B. 680, R. v. Sutherland and Johnstone [1959] Crim. L. Rev. 440, R. v Parkinson [1964] Crim. L. Rev. 398, R.v Fudge [1964] 108 S. J. 900, R. v Ward, The Times 18/11/1964, Sparks v The Queen [1964] A. C. 964 and Regina v. Mushtaq (Appellant) [2005] UKHL 25.

[20] The following principles could be deduced from the said decisions.

- (i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a *voir dire* inquiry upon being satisfied beyond reasonable doubt of its voluntariness.
- (ii) Failing in the matter of the *voir dire*, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial ('second bite at the cherry') but such evidence goes to the weight and value that the jury would attach to the confession (Chan Wei Keung, Prasad and Murray) *inter alia* on the premise that there might be cases in which the jury would conclude that a statement is involuntary according to the rule relating to inducement, but nonetheless it is manifestly true (Wendo).

- (iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them.

[21] However, in Mushtaq's case the majority judgment of the House of Lords held that section 76(2) of PACE (Police and Criminal Evidence Act 1984/PACE) requires that the jury should be directed that, if they consider that the confession was, or may have been, obtained by oppression or in consequence of anything said or done which was likely to render it unreliable, they should disregard it and thus, departed from Chan Wei Keung reverting to the approach in Bass. Nevertheless, the Court of Appeal in Chand had said that such a direction is not necessarily required here because there is no statutory provisions similar to PACE in Fiji. The majority judgment in Noa Maya v. State Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30] seems to vindicates that position.

[22] It appears that the Court of Appeal had not been made aware of Noa Maya when deciding Chand. In Noa Maya His Lordship Keith, J also had said that to the extent that there is no statutory provision in Fiji equivalent to section 76(2) of PACE the reasoning in Mushtaq does not apply in Fiji. Yet, without explaining further, His Lordship had recommended that judges (in Fiji) should for the time being, tell the assessors that *'even if they are sure that the defendant said what the police attributed to him, they should nevertheless disregard the confession if they think that it may have been made involuntarily'*. I believe that what his Lordship meant by 'disregarding' was that the assessors should give the confession no weight. Otherwise, it is as if the issue of admissibility *via* voluntariness *per se* is placed before the assessors. Analyzing further His Lordship's comments on this point, I am also of the view that this direction appears to be necessarily required only in a situation where the

trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the confession is voluntary, in my view Noa Maya direction namely '*they should nevertheless disregard the confession if they think that it may have been made involuntarily*' is irrelevant and not required. Thus, I believe that pronouncements in Noa Maya and Chand could co-exist and Noa Maya has only dealt with an aspect i.e. the change of mind by the trial Judge in the course of the trial, not pronounced upon in Chand.

- [23] Needless to say, that Noa Maya direction in the aforesaid context is required in addition to the other aspects of the summing up as already expressed in other judicial pronouncements from time to time enumerated above under paragraph 20. Because, if the accused challenges the voluntariness at the trial and the Judge remains of his original view of the voluntariness by the end of the case, the assessors should be directed for which purposes they are entitled to consider the question of voluntariness and as to how they should evaluate and make use of it to arrive at their opinion where considerations such as making, truth, weight etc. would come in for consideration. Suffice it to say for the time being, that even these considerations do not exist in water-tight compartments.
- [24] We should be also mindful that in assessing the likely effect of any misdirection, non-direction or irregularity upon the assessors based on the aspect of voluntariness of a confessional statement, the observations in Noa Maya and as earlier laid down in Prasad that in Fiji the decision on guilt or innocence is ultimately a matter for the presiding judge whereas the role of the assessors is to render opinions to assist the judge but they are not final deciders of fact, law or the verdict, must be firmly taken into account. On the same logic it could also be deduced from Noa Maya and Prasad that even if the assessors disregard a confession on the basis that it had been made involuntarily, the presiding judge is still entitled to rule otherwise in his judgment as he had already done at the end of *voir dire* inquiry. In Prasad the Privy Council said

'... in Fiji, the mode of trial is not the same as in England or Scotland. There is no jury; the trial is before a judge and assessors.... The judge sums up to them;and the ultimate decider of fact (as well as law) is the judge himself who need not conform to the opinions of the assessors, even though they be unanimous, if he thinks that their opinions are wrong.'

[25] I have examined the impugned paragraph of the summing up and am of the view that the trial Judge has substantially complied with the directions prescribed in Noa Maya on the voluntariness but as complained by the Appellant there are no specific reference to the aspects of weight to be attached to the caution interview statement and also to the question as to whether the confession had been made by the appellant and it was true. It had not been the position of the Appellant either at the *voir dire* inquiry or at the trial that he did not make the caution interview but his position had been that he admitted the allegation of rape because the police asked him not to be make things difficult, not to be smart but to make things easier. Therefore, whether he made the caution interview or not does not arise in this case. However, he admittedly had been informed of his legal rights but not complained to the Magistrate of any unfair treatment by the police. Therefore, the assessors really did not have to concern themselves with the question of the Appellant making the caution interview statement and therefore the trial Judge also was not required to draw their attention in that regard. Yet, the issues of weight or probative value and truth of the confessional statement should have been dealt with by the trial Judge in the summing up.

[26] Dealing with the Appellant's complaint, I need to remind myself of the decision of the Supreme Court in Senijieli Boila v The State (Criminal Appeal No. CAV005 of 2006S: 25th February 2008) where it was observed that

"What is required is a clear direction that the tribunal of fact must be satisfied of the guilt of the accused beyond reasonable doubt (McGreevy v Director of Public Prosecutions [1973] 1 WLR 276, applied Kalisogo v R Criminal Appeal No. 52 of 1984). See also R. Hart [1986] 2 NZLR 408. The adequacy of a particular direction will necessarily depend on the circumstances of the case."

- [27] Similarly, in **Khan v State** Petition for Special Leave to Appeal No. CAV 009 of 2013: 17 April 2014 [2014 FJSC 6] where the Petitioner's counsel had argued that the directions on how to approach the answers in the caution interview were inadequate and there were no adequate directions on weight, the Supreme Court said *' There is no incantation which must be read here. The required guidance need not be formulaic.'*
- [28] Thus, despite the said omissions with regard to the above aspects in the summing up the real question is whether the assessors would have come to a different finding on the evidence available and whether the trial Judge had dissented with their opinion in his judgment being the ultimate decider of facts and law and also on guilt or innocence of the Appellant. He had seen and described the demeanor of the Appellant at the trial as 'evasive and very evasive'. In my view, on the material placed at the trial there was no reason for the trial Judge to change his mind on the admissibility of the caution interview at the end of the trial. By his evidence at the trial, the Appellant had placed himself right at the scene of the incident described by the complainant except admitting the act of penetration. Having had the benefit of the entirety of evidence and a clear direction on voluntariness of the caution interview statement, I am convinced that the assessors would not have expressed any other opinion. I have no doubt that on the evidence led at the trial the case against the Appellant has been proved beyond reasonable doubt. Therefore, in the context of the case, I have no doubt that the omissions complained of, have not resulted in any miscarriage of justice. Thus, I would safely apply the proviso to section 23 (1) of the Court of Appeal Act regarding the first ground of appeal.
- [29] I have also analysed the evidence of the prosecution carefully and I find that the victim's testimony has stood the test of probability, consistency, want of contradictions and promptness. It could be relied upon without any corroboration. In any event, neither the assessors nor the trial Judge was required to look for corroboration in view of section 129 of the Criminal Procedure Act 2009 which states *' Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration'*

[30] It was held in **Kean v State** Criminal Appeal No. AAU 95 OF 2008: 13 November 2013 [2013 FJCA 117] that in Fiji, as a result of section 129 of the Criminal Procedure Decree 2009, a trial judge is no longer required to give a standard warning to the assessors where the evidence of a complainant in a trial for an offence of a sexual nature is not corroborated. In **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280 the Supreme Court of India said '*Corroboration is not the sine-quo-non for a conviction in a rape case.*'

[31] At the same time, there is no apparent motive attributed to the complainant to have falsely implicated the Appellant for having committed rape on her. In a similar context in **Rajinder Raju v. State of H. P.** Criminal Appeal No. 670 of 2003 decided on 07.07.2009, R.M. Lodha, J. speaking on behalf of the Supreme Court of India said

'a woman victim of sexual aggression would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman....; she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her.'

[32] On the other hand at the close of the summing up the defence had suggested to the trial Judge to remind the assessors of the Appellant's evidence that he had been told by the police not to be smart and make things easy with regard to the caution interview and the Judge had complied. However, there was no redirection asked for on the aspects of making, weight and truth of the confessional statement. Dealing with a similar complaint His Lordship the Chief Justice in **Ananda Abey Raj v The State** CAV 0003 of 2014: 20 August 2014 [2014 FJSC 12] quoting the following remarks made in **Segran Murti v The State** Crim. App. No. CAV0016 of 2008S: 12 February 2009 ([2009] FJSC 5) paragraphs 11, 15, 21-23 and **Truong v The Queen** [2004] HCA10; 2004 ALJR 473, said

'In the instant case, counsel for the Petitioner was asked by the trial judge whether he sought any re-direction at the end of the summing up. Counsel agreed with prosecuting counsel there was nothing else to direct on This omission is in itself usually sufficient to disregard a ground such as is raised here.'

- [33] In Ananda Abey Raj's case His Lordship the Chief Justice further commented upon the failure of both counsel to remind the judge of an omission in the direction to the assessors and had this to say.

'The raising of direction matters in this way is a useful function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client's interest. The appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the judge.'

- [34] Therefore, though the first ground of appeal is decided in favour of the Appellant, I dismiss the appeal on that ground in terms of the proviso to section 23(1) of the Court of Appeal Act.

Ground 2 - 'The Learned Trial Judge erred in law and in fact when he did not put the case of the appellant to the assessors in a fair and balanced and objective manner.'

- [35] The Appellant's complaint is based on the following paragraph of the summing up.

'In this case, PW3 said he did not assault, threaten or made promises to the accused before, during and after the caution interview. He seemed to be saying that the accused gave his statements to the police voluntarily, that is, out of his own free will. In question and Answer 22 and 23 of his Caution Interview Statements, the accused confirmed the above. However, in court, he said that Corporal Bower threatened him to give his statements. He said, Corporal Bower talked harshly to him, and he got scared, and gave his statements. In other words, he said he gave his statements without his own free will. You have carefully observed Corporal Bower and the accused, while they were giving evidence. Do you think, the accused, given his built and demeanour, would easily be frightened by Corporal Bower's words? I think not. But it is entirely a matter for you, whether or not to accept Corporal Bower's or the accused's evidence on the voluntariness of the accused's caution interview statements. If you accept Corporal Bower's evidence, then you will accept the accused's confession, and this will further strengthen the complainant's evidence. If you reject Corporal Bower's evidence, then you will reject the accused's alleged confession and you will have to depend entirely on the complainant's and doctor's evidence, in deciding whether or not the accused was guilty as charged. It is entirely a matter for you.'

- [36] The Appellant relies on Tamaibeka v State Criminal Appeal No. AAU 0015 of 1997: 8 January 1999 [1999 FJCA 1] in support of this ground of appeal and more particularly the following passage from the judgment.

'A Judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of a summing up. It is appropriate that he puts to the assessors clearly any defects he sees in either case. But that must be done in a way that is fair, objective and balanced. If it is not, the independent judgment of the assessors may be prejudiced. If all the issues are put in a manner favourable to one party and unfavourable to the other, the assessors may feel bound to follow the view expressed by the Judge.'

- [37] I shall consider a few other decisions that have dealt with similar complaints. Lord Hailsham of St. Marylebone L C in R v Lawrence [1982] AC 510, 519 said:

'A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts.'

- [38] Cooke P. in R v. Fotu [1995] 3 NZLR 129 said as follows

'Considered as a whole the summing up leaves not the slightest doubt about what the judge was putting forward as the only just, proper and correct verdict, although he was careful to say frequently that it was a matter for the jury. A Judge is entitled to indicate his own views of the evidence, provided that as a whole the summing up is a fairly balanced and fair presentation of the case to the jury (Broadhurst v. R [1964] AC 441; R v Ryan [1973] 2 NZLR 611)

- [39] In **R v Clayton** (1948) 33 Cr App R 22 Lord Goddard CJ had this to say about that duty:

"The duty of a judge in any criminal trial is adequately and properly performed if he puts before the jury, clearly and fairly, the contentions on either side, omitting nothing from this charge, so far as the defence is concerned, of the real matters upon which the defence is based. He must give to the jury a fair picture of the defence, but that does not mean to say he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence"

- [40] **R v Wilkes and Briant** [1965] VR 475, 479, Smith J said

'Important amongst the necessary safeguards is the established rule that it is the judge's duty to put the defence fairly to the jury. That rule cannot, save in quite special circumstances, be departed from, without serious risk of a miscarriage of justice.'

- [41] Richmond J in the Court of Appeal of New Zealand in **R v Ryan** [1973] 2 NZLR 611 had this to say.

"There are cases where, in the particular circumstances, it has been held sufficient for a judge to leave the matter to the jury simply on the basis of the evidence they have heard and the addresses of counsel.... On the other hand there have been cases in which the summing up was held inadequate because it emphasised matters adverse to the accused but failed adequately to convey to the jury the answers made by the accused.... In some cases it may be sufficient for the judge to refer in the most general terms to the issue raised by the defence, but in others it may be necessary for him not merely to point out in broad terms what the defence is but to refer to the salient facts and especially those upon which the accused based his defence."

- [42] While agreeing with all the sentiments expressed above, I think that the summation of the above decisions is that there cannot be a set formula for a summing up. The summing up should include all essential qualitative ingredients but its arrangement, length and presentation may vary according to the nature and facts of the case and the presiding judge. In my view, an appellate court is not required to compare and

contrast the summing up, line by line, in appeal with that of an 'ideal' summing up. When it comes to a complaint on the judge having indicated his views on the evidence, what the court of appeal would look for is whether as a whole the summing up is a fairly balanced and fair presentation of the case to the assessors.

- [43] I have examined carefully the paragraph complained of by the Appellant and I think what the trial Judge has said therein is a very fair and a balanced summary of evidence surrounding the caution interview. In the light of the Appellant's evidence that he did not complain even to the Magistrate of any oppression on the part of Corporal Bower, the words '*Do you think, the accused, given his built and demeanour, would easily be frightened by Corporal Bower's words? I think not.*' followed up by the direction '*But it is entirely a matter for you*' could not have prejudiced the assessors.

- [44] **Merumeru v. The State** [1968] 14 FLR 177 the Court of Appeal held regarding a trial judge's far more assertive summing up as follows.

"Later he dealt individually with the evidence of the defence witnesses. It is quite clear from his own Judgment that he did not believe the two principal defence witnesses Viliame Vakarewakuila and Waisaki Madiqi and it may well be that his summing up conveyed that to the assessors. But there is nothing wrong in that, provided he left the matter to the assessors to form their own opinions, and he did that."

- [45] In **R v Cohen and Bateman** 2 Cr. App. R, 197 at p. 208 Channell J said

'In our view, a judge is not only entitled, but ought, to give the jury some assistance on questions of fact as well as on questions of law..... It is not wrong for the judge to give confident opinions upon questions of fact. It is impossible for him to deal with doubtful points of fact unless he can state some of the facts confidently to the jury. It is necessary for him sometimes to express extremely confident opinions.'

[46] The Learned trial Judge in the summing up before us has not certainly expressed what he thought about the Appellant's allegation of having got intimidated by Corporal Bower in such strong terms as to compel the assessors to accept his view. His words had not left the assessors without a choice. In any event he was the ultimate decider of all aspects of the confessional statement irrespective of the assessors' opinion.

[47] In my view, neither the opinion of the assessors nor the verdict of the Learned Judge could be considered as unreasonable. I think, having regard to the evidence led the Appellant could have been convicted of the charge levelled against him and therefore the verdict of guilt against the Appellant could be supported. I would follow Ram v. State Criminal Appeal No. CAV0001 of 2011: 09 May 2012 [2012 FJSC 12] where the Supreme Court held *inter alia* that '*an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case*'. To my mind the verdict of guilt against the Appellant is neither unsafe nor dangerous. I have no doubt that on the available evidence the case against the Appellant has been proved beyond reasonable doubt and on the whole of the facts even without the impugned portion of the summing up, the only reasonable and proper verdict would be one of guilty. At all events no substantial miscarriage of justice has occurred.

[48] Thus, the second ground of appeal is rejected.

[49] Therefore, I conclude that the appeal should stand dismissed and the conviction and sentence be affirmed.

Perera, JA

[50] I have read in draft the judgment of Prematilaka JA and I agree with His Lordship's reasons and conclusions.

The Orders of the Court are:

- 1. Appeal is dismissed.*
- 2. Conviction and Sentence are affirmed.*



.....
Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice V. Perera
JUSTICE OF APPEAL