

IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 29 of 1980

Between:

1. SHIU NARAYAN
2. BIJAY NARAYAN

Appellants

and

REGINAM

Respondent

S.M Koya for the Appellants
R. Lindsay with V. Maharaj for the Respondent

Date of Hearing: 17, 18 September 1980
Date of Judgment: 30th September 1980

JUDGMENT OF THE COURT

These are appeals against the conviction of first appellant for murder, and of second appellant of accessory after the fact of murder, which convictions were entered in the Supreme Court Lautoka on the 14th April, 1980. There is also an appeal by second appellant against the sentence of four years' imprisonment imposed in respect of his offence.

The basic facts may be shortly set out. The deceased, named Jitendra, a young man 19 years old, was the nephew of first appellant and lived with him at Lautoka. The second appellant is the son of first appellant and he lived in the same building in a separate flat. About 3.00 a.m. on 22 November,

1979 the body of Jitendra, which had been run over by a locomotive pulling a sugar-cane train, was found on the rail track on Saweni. From the medical evidence it would appear that Jitendra had died between 11.30 p.m. and 1.30 a.m. On the basis of this evidence, the learned trial Judge found that Jitendra was dead when his body was run over by the cane-train. Branches and leaves had been placed over the body, apparently in an attempt to conceal it.

The case for the prosecution, which was based almost entirely upon confessions said to have been made by the two appellants, was to the effect that when appellant arrived home at night on the 21 November, 1979 he found Jitendra in the same bedroom as his daughter and grand-daughter. First appellant had been drinking. He was very angry to find Jitendra in the same room as the girls. He beat his daughter with a hose-pipe and ordered Jitendra out of his house. As Jitendra was walking out of the steps, first appellant picked up a piece of pipe and hit Jitendra on the back of the head with it. Jitendra fell down unconscious and the medical evidence indicates that he died from this blow. Second appellant came running to the scene. Both appellants then wrapped the unconscious Jitendra in a sack and carried him out to a van. Second appellants, on instructions from first appellant, drove the van to Saweni Beach where both appellants lifted Jitendra and placed him on a sharp bend on the railway line and covered him with leaves. They then drove back to their home. About 4 o'clock on the morning of the 22 November, the police went to the scene near Saweni where they found the sugar train derailed, and the body of Jitendra.

The police went to the home of the first appellant where deceased Jitendra had lived, and found blood-stains there. Police Sergeant Raju asked first appellant to come to the Police Station, where he later interviewed first appellant. About half past six p.m. first appellant's solicitor, Anu Patel, spoke to the first appellant and advised him of his legal rights to answer or refuse to answer any questions and to complain if he were ill-treated. Mr. Patel asked if he could be present while first appellant was being questioned, but the police officers concerned refused this request. Some time after eleven o'clock the same evening, first appellant, who had confessed to striking the deceased and placing his body on the tramline, went with Sergeant Raju to his home and showed him the iron pipe with which he said he had struck the deceased.

Shortly before midnight the same night second appellant was brought to the Police Station and interviewed. In the course of that interview he admitted having assisted his father in the disposal of the body of Jitendra. The first appellant was formally arrested shortly before midnight that night and charged with murder. The second appellant was also arrested and charged, at the conclusion of the police interview with him, with being an accessory after the fact to murder.

As some of the grounds of appeal filed concern the actual conduct of the case in the Court, it will be convenient at this stage to set out shortly what took place. The two appellants were brought before the Supreme Court at Lautoka on 5th February 1980 with Mr. Justice Dyke presiding. First appellant was charged with murder and second appellant with being accessory after the fact to murder. A plea of not guilty was entered by each appellant. At request of

the defence the hearing was adjourned until 7th February, the presiding Judge on this occasion being Mr. Justice Williams. The hearing was further adjourned until the 11th February when the three assessors were present. The assessors were released until the following day while counsel made certain submissions. Mr. Koya for the accused applied for separate trials. Mr. Williams for the prosecution applied to hold a voir dire before any evidence was called. In due course the learned trial Judge ruled rejecting the application for separate trials, and allowing the prosecutor's application "that the voir dire be conducted prior to the opening address of counsel".

The trial opened on 12th February; the assessors being recalled and released pending the conclusion of the voir dire. On 26 February the evidence and argument on the voir dire were concluded and judgment reserved. On 5th of March 1980 the learned trial Judge gave a written ruling admitting the statement of each of the accused as voluntary.

The hearing was not resumed until 17th March. Then only two assessors were present, the third having gone to Australia because of the serious illness of his brother. The Court decided to carry on with two assessors only.

The learned trial Judge stated that Mr. Koya has asked for this date to be fixed, as before that he would be engaged before the Court of Appeal in Suva. This request was made, according to the Judge, on 25th February. A further adjournment was asked for on behalf of the defence; as Mr. Koya was still engaged before the Court of Appeal in Suva. The learned trial Judge ruled that the hearing must

proceed, but gave a short adjournment so that appellants might instruct other counsel. The events of the 17th and 18th March are dealt with later in this judgment.

This short statement of the facts will necessarily fall to be elaborated when the grounds of appeal are being considered.

The grounds of appeal are very lengthy and we do not find it practicable to set them out in detail at this stage. Summarised, they are as follows:

First Appellant:

- Ground 1: That the learned trial Judge erred in holding a voir dire before any evidence had been called;
- Ground 2: That the learned trial Judge erred in admitting in evidence the alleged confessional statement made by the first appellant to the police before and after he was charged;
- Ground 3: That the statement should never have been admitted because of the ill-treatment of the first appellant at the hands of the police before the confessional statement was made;
- Ground 4: That first appellant's solicitor was refused permission to see the appellant and therefore the statement made by him could not be held to be voluntary;
- Ground 5: That the trial was irregular and should be treated as a nullity, as after the first adjournment one assessor left Fiji and thereafter only two assessors sat during the hearing. This was contrary to section 268 of the Criminal Procedure Code;

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6.

- Ground 6: That the learned trial Judge erred in refusing an adjournment to enable the counsel of appellant's choice to appear for him at the trial;
- Ground 7: That the learned trial Judge erred in not allowing his original counsel to appear for the first appellant when counsel returned to Court after an absence;
- Ground 8: That the learned trial Judge erred in permitting the prosecution to call as a witness Dr. Kata in rebuttal after the prosecution case had been closed and a substantial portion of appellant's case had been heard;
- Ground 9: That the learned trial Judge erred in not putting the issue of provocation to the assessors and misdirecting the assessors on that subject;
- Ground 10: That the learned trial Judge erred in not adequately directing himself and the assessors as to the effect of provocation and drunkenness on the ability of appellant to form the specific intent;
- Ground 11: That the learned trial Judge erred in directing the assessors that they were judges of fact;
- Ground 12: That the learned trial Judge erred in admitting evidence as to blood-stains found in the living premises of the first appellant;
- Ground 13: That the learned trial Judge erred in disbelieving the evidence of the appellants.

7.

Additional grounds of appeal filed later:

- 1(a) That the learned trial Judge erred in not ordering separate trials of the appellants;
- 10(a) That because of the effect of provocation and drunkenness the proper verdict on that ground would be manslaughter, and the learned trial Judge had erred in not so directing himself.

Grounds of Appeal of Second Appellant:

Grounds 1,2,3,4,7,8,9,10,11,12,13,16 are merely a repetition of the grounds on the same points put forward by the first appellant and do not need to be set out here.

The following are the grounds which are in different terms from those of the first appellant:

- Ground 5: That the learned trial Judge erred in accepting the evidence of the police officers in view of the medical evidence as to what injuries were caused to second appellant while in police custody;
- Ground 6: That the learned trial Judge erred in not rejecting the statement of the second appellant after part of the first appellant's statement had been read over to him contrary to Rules 3 and 5 of the Judges' Rules;
- Ground 14: That if the first appellant is convicted of manslaughter the conviction of second appellant as accessory after the fact to murder could not stand;

8.

Ground 15: That the learned trial Judge erred in not directing the assessors and himself that before a person could be convicted of being accessory after the fact to murder that person must have had prior knowledge that murder had been committed;

Ground 16: (a) That in view of the trial Judge's findings of fact as to the time of death of the deceased, the second appellant could not be guilty to being accessory after the fact to murder;

Ground 16: (b) That in finding the second appellant guilty of aiding and abetting the learned trial Judge convicted the second appellant of an offence with which he had not been charged;

Ground 16: (c) That the learned trial Judge erred in not specifying to the assessors the acts alleged to have been performed by the second appellant to make him guilty as an accessory after the fact to murder.

It is now necessary to deal with the grounds of appeal in detail.

Ground 1 reads:-

"The Learned Trial Judge erred in holding trial within trial, to determine the admissibility of the Appellant's alleged confessional statements given to the Police (before and after charge) on the 22nd day of November, 1979, before adducing the Prosecution's evidence and before the Prosecution tendered the dispute evidence in the trial proper. This was done despite the objection raised by the Defence. The holding of the said trial within trial was irregular. Consequently there has been a substantial miscarriage of justice."

This ground raises a question which has been before the court on a previous occasion, namely in Ajendra Kumar Singh v. Reg. Criminal Appeal No. 46 of 1979, the judgment in which was delivered after the present grounds were framed. It was argued in that case, in rather similar circumstances, that the court had no jurisdiction to hold a trial within a trial at the stage it did, as the assessors had not been sworn and therefore the trial had not commenced. Section 260 of the Criminal Procedure Code (Cap.14) however makes it clear that the trial commences as soon as a plea of not guilty has been entered. The pleas had been taken in this case also, and there is no question of absence of jurisdiction.

That is not the end of the matter however. We do not wish to repeat the references made to authorities in Ajendra Kumar Singh's case; but they indicate that while it may be normal and generally desirable for the trial within a trial to be held when the particular witness is proposing to produce the confessional statement in evidence, in others, particularly those in which conviction depends entirely, or almost entirely, upon the admission of the statements, the balance of convenience favours the earlier hearing.

In the former type of case the judge may be assisted in his appreciation of the evidence and the surrounding facts and counsel for the accused may wish to refer to what other witnesses have said to assist him in cross-examination. On the other hand if the confession is virtually the only evidence its rejection would terminate the proceedings and save a great deal of time and inconvenience for the court and assessors.

There is one difference between this case and that of Ajendra Kumar Singh. The procedure there had the concurrence of counsel for both prosecution and defence. In the present case the defence objected to the prosecution's proposal, the matter was argued and a ruling given. In the course of it the learned Judge commented that it was for the prosecutor to decide at what stage he would call various witnesses and Crown Counsel might well decide to call as his first witnesses the policemen concerned with taking the challenged statements. We do not think that such a course would commend itself to the Crown merely to defeat the adverse ruling.

Be that as it may the learned Judge decided the matter as one of convenience. He said, having considered the authorities:-

" One may contend that there is a danger that the Crown, in the case (of) every alleged confession, may seek to determine its admissibility before opening to the assessors. I think one must leave that to the common sense of Crown Counsel and the trial judge. Must a judge and assessors be bound to hear medical evidence, identification evidence of the body, of where it was found and so forth covering a period of perhaps two or more days of evidence which cannot provide a case to answer and must the judge only then release assessors pending a voire dire and on their return ask them to acquit the accused. Alternatively may the time of assessors, witnesses, counsel and others be save along with certain expenses by placing the Crown in position of saying early in the proceedings " as a result of your Lordship's ruling we will be tendering no evidence", or words to that effect.

I cannot see how such a course can be harmful to the two accuseds in this trial. Indeed Mr. Koya has not pointed out how any injustice would or could arise by following it."

Similarly, before this court Mr. Koya did not demonstrate or argue that prejudice had in fact resulted from the learned Judge's ruling. The main defence

was uncomplicated - that the confessional statements were fabricated, or in any event not voluntary, and the appellants had not performed the acts charged.

We are satisfied that no prejudice in fact arose from the departure from normal procedure and this ground of appeal fails.

In his argument in the second ground, counsel for the appellant submitted that the statement made by the first appellant owed its origin to what was done to him by the police. He conceded that the appellant was cautioned before making a statement, but submitted that the caution given - as set out in Rule 2 of the Judges' Rules - was applicable only when the police officer had reason to suspect the appellant; whereas the police officer, as he had at that stage every intention of charging the first appellant with murder, should have given him the caution set out in Rule 3 of the Judges' Rules. The only difference between the two rules is that under Rule 3 he would be cautioned that he was not obliged to make any statements unless he wished to do so. But the appellant already knew this. His solicitor, Mr. Patel, had explained that carefully to him before the interrogation by the police commenced. The formal arrest of the first appellant, and the charge of murder, did not take place until after the statement had been completed and signed. Counsel contended that the police officer concerned, Sergeant Raju, had sufficient evidence upon which to charge the first appellant before his confessional statement was completed. As we see it, Sergeant Raju may have had cause for suspicion, but certainly no ground upon which the charge could have been brought with every prospect of success. Accordingly, we can find no merit in this ground of appeal.

As to Ground 3, the question of the alleged ill-treatment of first appellant at the hands of the police is entirely a matter of the credibility of the witnesses concerned. The learned trial Judge, who heard all the witnesses, expressed himself as satisfied that statements made by first appellant were made voluntarily and not as a result of any pressure or violence on the part of the police. As is said in DPP v. Ping Lin (1975) 3 All E.R. 175:

" on appeal against the Judge's decision to admit a confession as having been made voluntarily, the Court should disturb the Judge's findings only if the Judge had made a completely wrong assessment of the evidence or had failed to apply the correct principle."

As we find that the trial Judge had not committed either of these errors, we must reject this ground of appeal.

The 4th ground concerns the refusal of the police to allow first appellant's solicitor Mr. Patel to be present when the appellant's statement was being taken. When Mr. Patel saw the first appellant early in the evening and advised him of his constitutional rights, he stated that he would be returning later. After his departure, two other solicitors appeared having been sent by relatives of the appellant, and went in to the Police Station. When Mr. Patel returned at 9.45 p.m. and asked to see the appellant he was told that one of the other solicitors, Mr. Ram Krishna, was now with the appellant and was representing him. Mr. Patel then did not pursue the matter. The trial Judge put this clearly to the assessors, and asked them to consider whether the police at that stage deliberately tried to keep anyone from seeing the first appellant.

In the course of his argument, counsel for the appellants referred to the judgment of the High Court of Australia, in *Driscoll v. R* (1977) 137 C.L.R. 517. At page 522 Barwick CJ says:-

" I also agree that, if practicable, a solicitor should be allowed to be present at an interrogation if the person to be interrogated requests his presence and that a copy of the record of interview should be made immediately available to that person whether or not a solicitor has been present. But failure to follow such good practice does not make the record for that reason inadmissible in evidence".

Of course what may be practicable in Australia may not be necessarily so in Fiji and we consider that the best guide is that contained in paragraph (c) of the Judges Rules (L.N. 14/1967) which states that the Rules do not affect the principle:-

"(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so."

The judgment of the learned trial Judge at the conclusion of the voir dire was in these words:

" I have no doubt that Mr. A. Patel was told that he could not be present when Accused 1 was interviewed and that at 10.00 p.m. or thereabouts he was informed that Mr. Ram Krishna was representing the Accused 1. I conclude that it was the intention of the police to ensure that Mr. A. Patel should not enter the interrogation room until the Accused 1's interview had been completed."

There was no evidence here that the first appellant had asked for his solicitor to be present at that stage. In any event three different solicitors had

informed the police that they had received instructions - two of them from the family - to represent the accused. The learned Judge held that as the accused had already been advised by his solicitor as to his rights, and there was no law providing that a solicitor might intervene during the course of an interview of an accused person by the police, there was no basis for holding that such a statement could not be given as evidence on this ground. With this ruling we agree. On this ground complaint was also made that, though counsel had asked in the Supreme Court that the learned Judge should exclude the statements in the exercise of his discretion, the Judge had not dealt with the question. The main basis of the submission was the intensity of cross-examination to which the appellants had been subjected. While it appears to us that the police may have gone rather further than was desirable in this respect, we are satisfied from the long and careful ruling by the learned Judge on the voir dire that this matter was not merely overlooked but that the ruling amounted to a refusal to exercise the discretion in favour of the appellants.

Ground 5 relates to the fact that at a certain stage of the trial one of the three assessors absented himself without permission and did not return. The trial continued and concluded with two assessors.

The history of the matter is this. The appellants pleaded not guilty to the respective charges on the 5th February 1960. The trial was adjourned to the 7th and then to the 11th February. There is no note of exactly when the three assessors were chosen and sworn (but it was accepted from the Bar that this was done). On the 11th they were released until the next day. They were then released

again pending the conclusion of the voir dire, which continued to the 26th February and the ruling was given on the 5th March.

On the 17th March the trial resumed and the court was indormed that one of the assessors had gone to Melbourne to accompany a brother who had had a brain haemorrhage. He was expected to be away for two weeks. There was another adjournment and when the court resumed on the 18th March the appellants were represented by Mr. M.T. Khan. Counsel discussed the question whether legislation abolishing the death penalty had been enacted and were agreed that it had.

The following sections of the Criminal Procedure Code are relevant:-

"266(1) In each trial the court shall select two or more, and in capital cases not less than four, persons from the list of those summoned to serve as assessors at the sessions."

"267. If, at any time before the finding, any assessor is from any sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable immediately to enforce his attendance, the trial shall proceed with the aid of the other assessors:

Provided that the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors unless at least two, and in capital cases at least four, assessors remain in attendance after an assessor has absented himself or been prevented from attending, or has for any reason been discharged by the court."

In the Supreme Court counsel were agreed that the case was not a "capital" one, Mr. Williams for the Crown wished to continue with the remaining two assessors and Mr. Khan said he held the view that there should be three.

The learned Judge ruled that, applying section 267 (above), it was not practical to try to bring the missing assessor back from Australia, and the trial would continue with the remaining assessors.

Ground 5 of the Notice of Appeal claims that the learned Judge erred in not following "the well established practice of holding the trial of this nature with the aid of at least three assessors." We say at once that as a ground of appeal this entirely lacks merit. If there is a practice that there should be three assessors for murder trials it was complied with in the present instance. The trial commenced with three. It has not been shown that any practice goes far as to require that such a trial, properly begun, may not continue without a minimum of three assessors; if circumstances occur that bring it within section 267 of the Criminal Procedure Code any such practice (and none has been established) would be contrary to the provisions of the section. In the present case, the learned Judge having found that it was not practicable immediately to enforce the missing assessor's attendance, he was directed by the section to proceed with the remaining two. This ground fails.

Grounds 6 and 7 are related and expressed in the following terms:-

"6. The Learned Trial Judge erred in law in refusing the Appellant's Application for an adjournment of the trial to enable his Counsel of his choice, who had acted for him at Preliminary Inquiry and upto the conclusion of trial within trial, to conduct his Defence at the trial proper. The trial proper was resumed at short notice and was fixed for 17th March 1980. The Learned Trial Judge did not exercise his discretion on correct principles in dealing with defence Application to adjourn the matter as aforesaid.

7. The Learned Trial Judge erred in law and acted in breach of rules of natural justice as well as in breach of Article 10 of the Constitution of Fiji in not permitting his former Counsel (Mr. J.M. Koya) who appeared in Court on the 24th March, 1980 to conduct the Defence and appear for the Appellant (and 2nd Appellant) with Mr. M.T. Khan. The case was then partly heard. He did not take into account that his refusal to adjourn the case on 17th March, 1980 had already adversely affected the preparation of the Appellant's Defence because the short adjournment given to the Defence to enable Mr. M.T. Khan to conduct the case was not adequate having regard to all the circumstances. Such refusal rendered the trial as unfair. Consequently there has been a miscarriage of justice."

Section 10 of the Constitution of Fiji provides inter alia that every person charged with a criminal offence shall be permitted to defend himself in person or...by a legal representative of his own choice.

Mr. Koya was present at the trial in the Supreme Court and conducted the case for the appellants from the beginning until the conclusion of the voir dire proceeding on the 26th February, 1980, Mr. Koya made an application that after the ruling on the voir dire had been given the trial should be adjourned until the 17th March, on the ground that he was engaged as from the 3rd March before the Fiji Court of Appeal. If he was not granted this adjournment he would have to hand his brief to another counsel. The learned Judge, though regarding the request as one for counsel's convenience acceded to it.

On the 17th March 1980, Mr. Anand, who had been what he referred to as "note taking" for Mr. Koya, applied for a further adjournment on the

ground that Mr. Koya was still engaged in the appeal in Suva. Mr. Anand said he had tried to take instructions from the appellants but they did not want him.

The learned Judge took the attitude that the trial must continue telling the appellants that their difficulties rested upon Mr. Koya's shoulders. However he adjourned the proceedings until the next day, saying that the court telephone was at their disposal. On the morning of the 18th March, 1980 Mr. M.T.Khan appeared for the appellants, asked that on the following day proceedings should not start until 2.15 p.m. to enable him to become conversant with his brief. This was granted. Mr. Khan asked that Mr. Koya be officially released and this also was done.

We have already indicated to counsel that what the Court is concerned with as an appellate court, is whether the appellants suffered any prejudice from what occurred. It may be appropriate to point out the following rule adopted by the General Council of the Bar in England, quoted from Archbold's Criminal Pleading and Practice (40th Edn.) at para. 350(a):-

1. It is the paramount duty of defending counsel to ensure that an accused person is never left unrepresented at any stage of his trial.

There is likewise a duty upon the courts, and it is well expressed in the following short passage from the judgment of the New Zealand Court of Appeal in *R. v. West* (1969) N.Z.L.R. 555, at 562 -

"Nevertheless it is inescapable that the refusal to grant an adjournment until the next day did have the effect of depriving the appellant of the right he had of being defended

by counsel. That the learned Chief Justice was unaware that his refusal to adjourn would have that effect is we think irrelevant when applying the principle which is fundamental and which admits of no departure therefrom - namely, that every accused person must have the fullest opportunity of putting forward his defence and there is, too, the supplementary principle that it is important in the conduct of judicial proceedings not only that what is done shall in fact be perfectly fair but that it should bear the appearance of fairness."

In the present case we do not find that these principles were ignored. The appellants were pressed to obtain other counsel and the court adjourned for a day to enable them to do so. They were successful in obtaining another senior counsel and he was given the time he requested. The appellants were thus not denied proper and competent legal representation and so suffered no prejudice.

Ground 7 relates to an incident which happened on the 24th March, 1980. Mr. Koya returned to the court and, according to the judge's note, stated that he appeared for the appellants. The ground of appeal alleges that he wished to appear with Mr. Khan and this may be so though the note does not make it clear. The learned Judge refused to permit him to appear. Mr. Khan continued to represent the appellants until the end of the trial. We do not need to consider whether the learned Judge's decision was justified having regard to all the circumstances as the first appellant, apparently speaking for both, in effect disclaimed any prejudice or dissatisfaction. Later that day he asked to speak to the court and said:-

"We engaged Mr. Koya. He came this morning and was sent back. We are satisfied with his court's decision and we have a counsel here."

This ground must also fail.

We now turn to Ground 8. Towards the conclusion of the case for the defence in the trial proper an application was made by counsel for the prosecution to call Dr. Kata, who had given evidence on the voir dire. The purpose of calling him was to obtain further medical details of the alleged injuries caused to the appellants; and in particular of the wound to the finger of deceased as to which evidence was called for the defence and which, in counsel's contention, may well have been the source of the blood which was found on the premises of the first appellant. When counsel for the prosecution applied to recall Dr. Kata Mr. Khan for the appellants raised a formal objection and went on to say "Do not wish to make the objection too strongly." The learned trial Judge ruled that Dr. Kata's evidence would assist the Court, and allowed him to be called at that stage. Dr. Kata had originally been subpoenaed by the defence but was not called by them. We are satisfied that the calling of Dr. Kata at that stage did not cause any injustice to the appellants.

We turn not to consider Ground 9 which alleges that the learned trial Judge misdirected the assessors on the issue of provocation. The ground of appeal for all practical purposes, is couched in the same terms for both appellants. The ground of appeal reads:

- " 9. In the alternative the Appellant complains that the Learned Trial Judge had erred in law in not holding that the Appellant's statements to the Police which were admitted in evidence contained sufficient materials to come

to the conclusion that the Appellant had acted under provocation in assaulting the deceased. Such evidence justified the Court in directing the Assessors and himself that the Appellant was guilty of manslaughter but not guilty of murder as charged. The Learned Trial Judge misdirected himself first as to the nature of evidence contained in the Appellant's confessional statements to the Police, secondly when he held that - "Provocation must be sudden i.e. an immediate re-action to insult or to behaviour which causes a loss of control" and thirdly when he held and directed Gentlemen Assessors that "You measure the provocation against the reaction of a reasonable man" and when he thereafter defined as to who a reasonable man was. He ought to have held that the word "an ordinary man" in Section 235 of the Penal Code meant an ordinary person in the community to which the Appellant belonged. Consequently there has been a substantial miscarriage of justice."

It is apparent from the statement made by first appellant to the police that on the evening of 21st November 1979 first appellant went to check his new building in Ravouvou Street opposite Marine Drive Motors; while at the building he had about 8 to 10 nips of gin - a little less as he said, than half a bottle of gin. Thereafter he returned to his home and found his daughter Kushma aged 13 years; his grand-daughter Suman aged 15 years in Jitendra's bedroom with his son Satish. Kushma was on Jitendra's bed; first appellant thought Jitendra was indulging in sexual impropriety with the girls and he scolded them and sent them to their room. He then had some more liquor and followed this by beating his daughter Kushma with a hose pipe and further slapping; he then ordered Jitendra to leave the house. Jitendra dressed, packed his belongings; as he was descending the stairs to leave the house the first appellant hit him from behind with an iron pipe on the back of the head.

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Mr. Koya submitted -

- (1) that the learned trial judge had erred in not directing the assessors and himself in his judgement that the confessional statements made by first appellant to the police contained sufficient evidence to justify a reduction of the charge of murder to one of manslaughter.
- (2) That the learned Judge should not have used the word "sudden" as it was not included in the definition of provocation contained in Section 235 of the Penal Code; the relevant portion of the definition of "Provocation" is:

"235. The term 'provocation' means, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault....."

- (3) That his direction to the assessors as to the reaction of a "reasonable" man was wrong as the definition of provocation referred to an "ordinary" man.

Mr. Lindsay for the Crown pointed out that Section 235 was preceded by Section 234 of the Penal Code which reads:

"234. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only."

In our view it is essential that Sections 234 and 235 of the Penal Code be read together. Section 234 sets out the circumstances under which a charge of murder may be reduced to manslaughter. Section 235 defines "provocation". The deprivation of self control implies a sudden transition to a state necessarily temporary during which the power of self control is absent. In our view the learned Judge was enjoined by Section 234 of the Penal Code, in explaining the issue of provocation, to direct the assessors that it was the essence of the defence of provocation (which the Crown had to negative) that it was the acts of Jitendra which allegedly caused the first appellant a sudden and temporary loss of self control and rendered him so subject to passion as to make him temporarily not the master of his mind. Mr. Koya referred to the case of Ram Lal v. The Queen F.C.A. 3/1958 in which this Court held that on the facts of that particular case provocation can be cumulative. In Ram Lal's case the evidence showed that there had been a history of the accused witnessing the deceased having illicit sexual intercourse on at least two prior occasions with the accused's cousin, a girl aged 15 years. In this case the facts are quite different as here there was no evidence that the first appellant witnessed any sexual impropriety

between his daughter and grand-daughter and Jitendra; and there could be no suggestion of cumulative provocation, as the evidence reveals.

In this Charge Statement first appellant said:

"Jitendra was very good with me and staying well. Also in evidence the first appellant gave the following answers:-

"Q: You would not be suspicious if Jitendra was in the same bedroom with the girls?

A: They daily studied in the same room. I would not be angry if I saw them all in the same room.

Q: You would have no reason to kill or assault Jitendra if you found him in bedroom with the 2 girls?

A: Jitendra coached Satish, Suman and my daughter were reading for exams. I would never think of such a thing. It is a study room as well as a bedroom.

Q: It would not make you annoyed?

A: I have 16 grand-daughters - if such were my attitude my family would not have expanded. I would have no reason to assault him for that."

Mr. Koya criticised the summing up further and submitted that the learned Judge in his direction to the assessors on the issue of provocation referred to a "reasonable" man, whereas Section 235 of the Penal Code refers to an ordinary persons. We cannot see any merit in this criticism and with respect we reject it; in so doing we adopt the words of Lord Diplock in Director of Public Prosecutions v. Camplin (1978) 67 Criminal Appeal R. 14 at page 18 where the learned Law Lord says:

"The reasonable man referred to by Keating J. (11 Cox C.C. at p.338) was not then a term of legal art nor has he since become one in criminal law. He (or she) has established his (or her) role in the law

of provocation under a variety of different subriquets in which the noun 'man' is frequently replaced by 'person' and the adjective 'reasonable' by 'ordinary', 'average' or 'normal'. "

The issue of provocation was left to the assessors and in his summing up the learned trial Judge said:

" Provocation must be sudden i.e. an immediate reaction to an insult or to behaviour which causes a loss of control. It must be such as would cause a reasonable man to lose control of himself and which in fact caused the accused to lose control of himself making him so subject to passion that for the moment he is not master of himself. One also has to consider whether the act which caused the death bears some reasonable relationship to the provocation.

The accused 1 allegedly says he was disgraced by the behaviour of Jitendra and his shame provoked him to order Jitendra out of the house and strike his head with a piece of heavy metal piping. The retaliation must be proportionate to the provocation. You will have to consider whether Jitendra's behaviour would cause a sober man of accused 1's status to lose his control to such an extent.

The provocation must cause a sudden reaction. If a man does not react for half an hour or so one may conclude that there was not an instantaneous loss of self-control. If there is a period between the provocation and the killing during which an accused's passion has time to cool one would hesitate to regard the killing as done in the heat of the moment. If there is a cooling off period one may wonder whether the accused was contemplating the infliction of serious injury by way of revenge.

If due to drink a man loses self-control but would not have done so when sober he cannot plead provocation. The reasonable man is sober."

The learned trial Judge also dealt at length with provocation later in his judgment. In our view

the learned trial Judge correctly directed the assessors and told them that they apply first the objective test as to whether on the narrative of events as they found them the provocation was in fact enough to lead a reasonable or ordinary man to do what the first appellant did and secondly, that they apply the subjective test, namely, did the first appellant act under the stress of provocation or not.

We are of the opinion that the learned trial Judge in his judgment correctly applied the law as enunciated in Lee Chun Chuen v. The Queen (1963) A.C. 220 at 231:

" Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements."

Mr. Koya submitted that the liquor taken by the first appellant impaired his self control so that he more readily gave way to provocation than if he had been sober. In Attorney General for Northern Ireland v. Gallagher (1961) 45 Criminal Appeal R. 316 it was held by the House of Lords that an accused is not permitted to set up his self-induced intoxication as a defence; the acts of provocation are to be assessed not according to their effect on him personally but according to the effect they would have on an ordinary or reasonable man in his place. Accordingly in our view there is no basis upon which a defence of provocation could be founded in this case, and this ground of appeal fails.

Ground 10 of the grounds of appeal in respect of the first appellant reads:

- "10. The Learned Trial Judge erred and misdirected or alternatively he erred in not adequately directing himself and the Gentlemen Assessors as to what circumstances in law would negative the specific intention required for the offence of murder when considering the following issues:-
- (a) The deceased's provocation of the Appellant before the Appellant struck him with the pipe.
 - (b) The Appellant's drunkenness at the time of the alleged offence."

This ground will be considered with Ground 10(a).

Counsel for first appellant argued that on the evidence the learned trial Judge failed to direct himself and the assessors on the issue that the first appellant by reason of the liquor he had consumed may have been incapable of forming the specific intent to kill or do grievous harm. The law in Fiji as to the effect of drunkenness is set out in Section 13 of the Penal Code which provides in Section 13(1):

" 13(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge."

Section 13(4) provides:

" 13(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

The provision is relevant to the present case and imports into the law of Fiji the principle enunciated by Lord Denning in Attorney General for Northern Ireland v. Gallagher (1961) 3 All E.R. 299 at page 313 which reads as follows:

"The general principle which I have enunciated is subject to two exceptions: (i) If a man is charged with an offence in which a specific intention is essential (as in murder, though not in manslaughter), then evidence of drunkenness, which renders him incapable of forming that intent, is an answer;.... In each of those cases it would not be murder. But it would be manslaughter."

In *R. v. Sheehan and Moore* (1975) 60 Criminal Appeal R. 308 where the conviction of the appellants for murder was quashed on the ground of misdirection by the judge on the effect of drunkenness on mens rea, Geoffrey Lane L.J. (as he then was) said at p.312:

"Indeed, in cases where drunkenness and its possible effect upon the defendant's mens rea is an issue, we think that the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent.

Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent."

In *D.P.P. v. Majewski* (1976) 62 Criminal Appeal R. 262 Lord Salmon at page 275 said:

"If appellant killed or committed grievous harm whilst he was drunk, this factor should be taken into account with all the other evidence in deciding whether he had intended to kill or to commit grievous harm. If this question was decided in the accused's favour, he would be found not guilty of murder but guilty of manslaughter..... This does not mean that drunkenness, of itself, is ever a defence. It is merely some evidence which may throw a doubt upon whether the accused had formed the special intent

which was an essential element of the crime with which he was charged. Often this evidence is of no avail because obviously a drunken man may well be capable of forming and does form the relevant criminal intent; his drunkenness merely diminishes his powers of resisting the temptation to carry out this intent."

The question that now arises is whether the learned trial Judge properly directed the assessors to consider the evidence of first appellant's intoxication in deciding whether or not the prosecution had proved the necessary mental element in the crime of murder.

There was evidence from second appellant in his Charge Statement when he said:

"My father was drunk. He started swearing loudly. He was throwing things about."

In the Confessional Statement second appellant said:

"My father was very angry and was also drunk. He was yelling out and throwing things about."

We think these passages are admissible, as the conviction of the second appellant as accessory after the fact would be affected by the conviction of the first appellant either of murder or of manslaughter. As opposed to this the first appellant displayed clear thinking when he asked his son to assist him in wrapping Jitendra's body in a sack; taking the body to Saweni and depositing it on the railway line at a bend in the track on the locomotive driver's blind side; covering the body with leaves; throwing the sack in which Jitendra's body was wrapped, into the sea.

In his Confessional Statement he said:

"Q: When you hit Jitendra what did you have in your mind?

A: He took my advantage and was spoiling my daughter. I thought to finish him."

Also he was asked:

"Why did you take him so far to Saweni and placed him on the tramline?"

The first appellant replied;

"That was the only ideal place I thought where he would be run over by the engine and there would be no suspicion."

It was necessary in our opinion for the learned trial Judge to direct the assessors to have regard to the whole of the evidence, including that relating to drink, and to draw such inferences from the evidence as they saw fit; and thereupon to ask themselves whether they were satisfied beyond reasonable doubt that at the time first appellant hit Jitendra over the back of the head with an iron pipe the first appellant had the requisite intent to kill or cause grievous harm. The learned trial Judge should in our view have told the assessors that the first appellant was charged with murder, and he could not be convicted unless it was proved beyond reasonable doubt that he inflicted the blow with intent to murder or cause grievous harm. If neither of these latter elements is established, the appellant must be acquitted of murder but may be convicted of the lesser offence of manslaughter.

The issue of drunkenness was raised on the evidence. In our view the extent or degree of intoxication was peculiarly for the assessors properly directed, to determine, and then to express their opinions as to whether it had been proved to their satisfaction that the first appellant,

despite the effect of the intoxicating liquor which he had admittedly consumed, was capable of forming an intent to kill or do grievous harm. The learned trial Judge stated in his summing up:

"Manslaughter for the purposes of this trial arises when a man in the course of an unlawful act causes the death of another without the intent to cause death or serious bodily hurt."

However, in our view he should have directed the assessors specifically on this issue and in failing so to do has deprived himself of the value of their opinion thereon.

In his judgment the learned trial Judge said:

"Accused 1 had been drinking and this no doubt helped to increase accused 1's anger which was not improved by further drinking after the incident. He was sufficiently sober to take the body with accused 2's help to a bend on the track at Saweni and place it on the locomotive driver's blind side of the bend.

Malice aforethought is clearly indicated by the weight of the blow and it being aimed at the back of the head. The medical evidence showed that it caused cerebral oedema from which Jitendra died."

No doubt the learned Judge had in mind the question as to whether, considering the amount of liquor consumed by the first appellant, the Crown had proved the specific intent requisite to substantiate a charge of murder. But at no time in his summing up does he specifically direct the assessors that they should consider whether, at the actual time of striking the blow, it had been proved that he was not so intoxicated that he was unable to form that intent. In our view there was a non-direction of the assessors

amounting to a misdirection on an important issue; and this ground of appeal must therefore be decided in favour of first appellant. Before giving a decision as to the result of our finding on this ground, we shall deal with the other grounds submitted by first appellant.

As to grounds 11, 12 and 13 we are unable to find any merit in these grounds; and at the conclusion of the case for the appellants prosecuting counsel was advised that he was not called upon to reply on any of them.

Ground 1(a) - The law on the subject of separate trials was set out authoritatively in Grandkowski (1946) 1 All E.R. 559:

"Where the essence of the case is that the accused were engaged on a common enterprise it is right and proper that they should be jointly indicted and jointly tried."

As was said by Lord Goddard L.C.J. at page 561:

"The law is and always has been that this is a matter of discretion for the Judge at the trial... The discretion no doubt must be exercised judicially that is not capriciously. The Judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners.

If once it was taken as settled that everytime it appears that the prisoner as part of his defence means to attack another, a separate trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it."

Grandkowski's case was followed in R. v. Buggy (1961) 45 Criminal Appeal R. 298, a case of joint trial of principal and accessory, and we are satisfied that the same principle applies here and that the learned Judge acted correctly in

refusing separate trials.

In the result, first appellant's appeal has succeeded only on Ground 10. For the reasons already given the conviction of first appellant is set aside, and in its place we enter a conviction of manslaughter. On this conviction we impose a sentence of ten years' imprisonment, to take effect from the date when the original sentence was imposed.

Now we turn to the appeal of the second appellant. As has already been stated, many of the grounds are merely repetition of those put forward by the first appellant and have already been dealt with in this judgment. Grounds 5 and 6 do not call for consideration, as nothing has been put forward to show that the learned trial Judge was wrong in admitting the statement of the second appellant.

Ground 14 will be covered by what follows.

Grounds 15 and 16A by the second appellant are connected and relate to the question of his knowledge that the crime of murder, to which he was charged with being an accessory, had been committed when he rendered assistance. As formulated, the grounds reads:-

"15. That the Learned Judge erred in not directing himself and the Gentlemen Assessors that before any person charged with the offence of Accessory after the fact to Murder, it must be proved that the accused had prior knowledge that the principal offender was guilty of murder and that the accused then did receive or give assistance to the principal offender in order to enable the principal offender to escape punishment (See Section 423 of

the Penal Code). There was no evidence that the Appellant had the requisite knowledge as to the guilty of the First Appellant of the crime of murder when the Appellant rendered assistance as alleged by the Prosecution. The Learned Trial Judge's failure in this regard has caused a substantial miscarriage of justice.

16A. In the light of the Learned Trial Judge's finding of fact made by him in his judgment (see page 333 of the Court Record and also his views expressed at page 345 thereof) as to the time of the death of the victim Jitendra, he erred in not holding that the Second Appellant could not in law be guilty of the offence of Accessory after the fact to Murder, contrary to Section 423 of the Penal Code."

The second appellant was charged under section 247 of the Penal Code (Cap.11) which reads:-

"247. Any person who becomes an accessory after the fact to murder is guilty of a felony, and is liable to imprisonment for seven years."

But the definition of an accessory after the fact is contained in the first portion of section 423:-

"423. A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence."

As is stated there, before a person becomes an accessory after the fact he must be aware that the person he assists is guilty of an offence, in this case murder.

The first finding of fact referred to in Ground 16A is contained in the learned Judge's judgment and reads as follows:-

" Following my summing up I am satisfied that the accused's death was to a heavy blow to the back of the head with a substantial weapon. I accept Dr. Gounder's evidence and find that the blow was struck between

10 p.m. and 12 mid-night on 21.11.79 and could not have been inflicted by a cane train after 12.20 a.m. on 22.11.79. I also find that Jitendra lost consciousness almost at once and that he would have to be transported to the part of the rail track where his corpse was found. From the medical evidence I conclude that he must have died not sooner than 11.30 p.m. nor after 1.30 a.m. Therefore he was dead when P.W.11's locomotive ran over him."

The second reference is to the reasons given when sentence was being passed. It is not strictly referable to the question of conviction but in fact merely states what is discernable from a perusal of the record of evidence. The learned Judge said:-

"For all the accused 2 knew he may have been placing a live person on the track."

The point is that there was no evidence that death had occurred to the knowledge of the second appellant at a stage while he was assisting his father in order to enable him to escape punishment, in terms of section 423 of the Penal Code. There is thus no evidence that the felony of murder, which would not be complete until death occurred, had been committed by the first appellant to the knowledge of the second appellant while he was still assisting. It was therefore not open to the court on the evidence to convict the second appellant of being an accessory after the fact to murder.

It was open to the court, however, to adopt an alternative course. It is stated in 10 Halsbury's Laws of England (3rd Edn.) p.303 Note (q) -

"Thus, if A wounds B mortally, and after the wound given, but before B's death, C with knowledge of the wounding, assists A, then

C is not an accessory after the fact to the homicide (2 Hawk, P.C., c.29, s.35); 4 Bl.Com.38); but semble he might be an accessory to the felony of maliciously wounding with intent to murder or to do grievous bodily harm."

In the present case the Supreme Court had the power under section 163(2) of the Criminal Procedure Code to convict of a cognate minor offence if the facts proved reduced the offence charged to such minor offence. Section 163 reads:-

"163.(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

In dealing with a similar section in the Solomon Islands Criminal Procedure Code, in *Gwangario Tulofia v. Reginam* (1971) 17 F.L.R. 228, 234 this court said:-

"Having perused the case of *R. v. Kelly* (1963) 3 All E.R. 558 we are of opinion that subsection (1) does not apply. The charge was murder, the particulars of which do not necessarily include aggravated assault. A section in similar terms to subsection (2) however, has been construed in East Africa as permitting such a substitution provided the lesser offence is cognate in character and provided the accused person had a fair opportunity of making his defence to the alternative charge. We refer to the cases of *Robert Ndecho v. R.* (1951) 18 EACA 171 and *Dracaku v. R.* (1963) E.A. 363. The conditions mentioned are amply fulfilled in the present case."

The minor offence we would refer to here, is the felony of being an accessory after the fact (contrary to section 424 of the Penal Code) to the felony of unlawfully doing grievous harm to Jitendra Singh (Penal Code section 258). It is ample clear from his statements that the second appellant knew that the first appellant had hit Jitendra Singh heavily enough on the back of the head with an iron pipe to render him almost immediately unconscious; and that to the appellant's knowledge he remained unconscious until left on the railway line at Saweni. It is to our mind incontrovertible that the second appellant was appellant was aware of the serious consequences of such a blow and become an accessory after the fact to the offence we have mentioned. The offence is clearly a minor and cognate one, and the second appellant had every opportunity of making his defence to it. It was therefore open to the Supreme Court to have imposed that conviction.

We are satisfied therefore that the case is one which calls for the exercise of our powers under section 24(2) of the Court of Appeal Ordinance (Cap.8) which reads:-

"24(2) Where the appellant has been convicted of an offence and the judge could on the information have found him guilty of some other offence, and on the findings of the judge it appears to the Court of Appeal that the judge must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by such judge a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

We therefore set aside the conviction and sentence of the second appellant on the charge of accessory after the fact to murder and substitute a conviction of being accessory after the fact to the felony of unlawfully doing grievous harm to another, contrary to section 424 of the Penal Code.

The maximum punishment under section 424 is imprisonment for three years and in the circumstances of the case, which we need not repeat, we impose a sentence of eighteen months' imprisonment to run from the commencement of the original sentence.

What we have said on these grounds also disposes of the remaining grounds put forward by the second appellant.

(sgd.) T. Gould
VICE-PRESIDENT

(sgd.) C.C. Marsack
JUDGE-OF-APPEAL

(sgd.) B.C. Spring
JUDGE-OF-APPEAL