

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 44 OF 2011
(High Court HAC 61 of 2009)

BETWEEN : MOREEN LATA PRAKASH
BHARAT LAL
JAYANT LAL

Appellants

AND : THE STATE

Respondent

Coram : Calanchini P
Chandra JA
Waidyaratne JA

Counsel : Mr. A R Singh for the 1st Appellant
Mr. S Waqainabete for the 2nd Appellant
Mr. A J Singh for the 3rd Appellant
Mr. M Delaney for the Respondent

Dates of Hearing : 5 and 24 February 2015

Date of Judgment : 30 September 2016

JUDGMENT

Calanchini P

[1] I agree that the appeals against conviction and sentence should be dismissed.

Chandra JA

- [1] The Three Appellants were charged for Murder contrary to sections 199 and 200 of the Penal Code, Cap.17 and were found guilty and convicted by the High Court at Suva. They were sentenced to life imprisonment with a non-parole period of 20 years imprisonment.
- [2] The Three Appellants namely Bharat Lal, Jayant Lal and Moreen Lata Prakash were named as 1st, 2nd and 3rd Defendants in the High Court but in the Appeal they have been cited and named as Moreen Lata Prakash – 1st Appellant, Jayant Lal – 2nd Appellant and Bharat Lal – 3rd Appellant.
- [3] The case presented in the High Court by the Prosecution as set out in the summing up of the learned High Court Judge was :

- “17. Bharat Lal, the first accused, was 35 years old in 2009. He is married to Kamini Devi, and the two had 2 children. They resided at Lot 7, Salato Road, Namadi Height. Moreen Lata Prakash the third accused, was 30 years old in 2009. She was married to Shalesh Prakash, aged 39 years. Moreen and her husband had 2 children, and they resided at Lot 12, Dadakulaci Road, Nadawa.
18. Bharat Lal and Moreen Lata Prakash have been having an affair, for over a year. They went together to New Zealand in May 2009 and returned in June. Their relationship was so intense that they reached a stage, where they could not afford to live without each other. Bharat Lal's wife chased him away from their marital home. Moreen's husband knew about the affair, but did nothing.
19. Bharat Lal and Moreen Lal planned to kill Shalesh Prakash, so they could live together forever as man and wife. On 20th June, 2009, Moreen Lata pounded some dhatura plants and mixed it with her husband's rum. Late into the evening, her husband drank the rum and got very drunk. Bharat Lal called his nephew, Jayant Lal, accused No.2, to help him execute their plan. Previously, Jayant Lal had agreed to assist his uncle, Bharat Lal, if he was paid \$1,000 plus.

20. *Bharat Lal and Jayant Lal, on 20th June 2009, at night came to Moreen Lata's house, and with her assistance, drove Shalesh Prakash away in his company van, registration no.DD409. Jayant Lal was driving the van, while Bharat Lal was a passenger therein. At a scheduled spot at the Sawani-Serea Road, the two let Shalesh Prakash out of the van, and later killed him by running the van twice over him. They fled the scene in the van to Nakasi. According to the prosecution, all three accused acted as a group in planning and killing Shalesh Prakash by running his company van twice over him, on 21st June 2009, and all should be found guilty of murdering him. ...*

- [4] All three accused had been caution intervened and it was alleged that they had confessed to the charge of murder. As they challenged the admissibility of their statements a voir dire inquiry was held at which 15 witnesses had given evidence for the prosecution, but the accused chose not to give evidence nor call any witnesses. At the conclusion of the inquiry the learned High Court Judge in his ruling held that all three accused had given their caution interview statement to the police voluntarily and that they were admissible as evidence.
- [5] At the trial, the prosecution led the evidence of 23 witnesses and the Appellants chose not to give evidence nor call any evidence.
- [6] The Assessors returned a unanimous verdict of guilt and the learned High Court Judge in his Judgment accepted the verdict of the Assessors and convicted them on 9th March 2011. They were sentenced to life imprisonment on 4th April 2011 with a non-parole period of 20 years imprisonment.
- [7] The three Appellants filed individual notices of appeal seeking leave to appeal from the Court of Appeal.

- [8] When the applications for leave to appeal were taken up before a Single Judge of the Court of Appeal, the 3rd Appellant (Bharat Lal) moved to withdraw his appeal against conviction and wished to proceed with his appeal against sentence.
- [9] The learned Single Judge of the Court of Appeal by his Ruling dated 21st March 2012 allowed the application of the 3rd Appellant to withdraw his appeal against conviction and granted leave to appeal against sentence.
- [10] In respect of the applications of the 1st Appellant (Moreen Lata Prakash) and 2nd Appellant (Jayant Lal) the learned Single Judge granted leave to appeal against conviction and sentence.
- [11] Subsequently, the 3rd Appellant renewed his application for leave to appeal against his conviction and filed amended grounds of appeal to the Full Court which grounds are summarized as follows:

“Against Conviction:

1. *The learned trial Judge failed to give proper directions in this case as the only evidence against the 3rd Appellant was the challenged confession as the Assessors require a special warning in regard to the danger of relying on such confession.*
2. *The learned trial Judge failed to give proper directions regarding the fact that the Assessors must be sure that the confession was both made and is reliable as being true and the Assessors should be directed that the use and probative value of the confession is a question for them.*
3. *The learned trial Judge erred in law when he failed to give proper directions on the use of circumstantial evidence when the prosecution had addressed the Assessors on the issue.*
4. *The learned trial Judge failed to direct the Assessors that except for the record of interview/confession, there was no evidence to implicate the accused and that what one accused says about*

another out of court is not evidence against that other and in those circumstances the direction on joint enterprise was erroneous and it caused a miscarriage of justice.

5. *The learned trial Judge failed to inform the Assessors that time in custody before record of interview and production in court was unlawful and impacted on the voluntariness of the confession.*
6. *The learned trial Judge erred in law in not putting the defence case to the Assessors.*
7. *The learned trial Judge was duty bound to place all defences available to the Assessors even if the defence counsel had not raised them.*

Against sentence:

1. *The learned Sentencing Judge in imposing the minimum term acted on a wrong principle, allowed irrelevant matters to affect him, mistook the facts and failed to take account various relevant consideration.*
2. *In fixing a minimum term the learned Sentencing Judge failed to give the Appellant appropriate discount, having regard to his mental health and diminished responsibility in the circumstances of the case.*
3. *The learned Sentencing Judge erred in law and act when he failed to consider all the factors in mitigation as required by law and as such his sentencing exercise miscarried resulting in manifestly excessive non-parole period.*
4. *The learned Sentencing Judge failed to take into account all factors stipulated in the Sentencing ad Penalties Decree 2009.*
5. *The learned Sentencing Judge failed to give adequate discount for prior good character and prospect of rehabilitation."*

[12] The 2nd Appellant (Jayant Lal) relied on the grounds of appeal filed in his notice of appeal, which were considered by the Single Judge but at the hearing of the appeal pursued only the following ground of appeal:

"The learned trial Judge erred in law and in fact when he failed to consider the two medical reports in deciding the admissibility of the caution interview statement."

[13] The 1st Appellant (Moreen Lata Prakash) filed amended grounds of appeal on 22nd December 2014 as follows:

"Against Conviction:

Incompetent Representation:

- 1. That the Appellant's trial counsel failed to challenge prosecution on the tendering of the dried Dhatura plant (Prosecution Exhibit No.2) which was not supported by any form of expert or scientific report or analysis.*
- 2. That the Appellant's trial counsel failed to challenge the prosecution on the tendering of the supposed dried Dhatura plant (prosecution Exhibit No.2) and on the lack of evidence regarding the effects of the plant.*
- 3. That the Appellant's trial counsel failed to challenge the prosecution on the effect or any effect that the supposed dried Dhatura plant would have on a person.*
- 4. That the Appellant's trial counsel failed to challenge the prosecution on the lack of evidence by way of toxicology report which would have clearly outlined the alcohol content and the state of drunkenness of the deceased.*
- 5. That the Appellant's trial counsel failed to adequately challenge the prosecution on the length of time spent by the Appellant in police custody giving an oral interview before the commencement of the written caution interview.*
- 6. That the Appellant's trial counsel failed to adequately challenge the prosecution on the lack of record kept during the period spent by the Appellant in police custody while being subjected to an oral interview.*
- 7. That the Appellant's trial counsel failed to adequately challenge the prosecution regarding the Appellant's time in police custody giving an oral interview and the evidence gathered during this stage before the commencement of the written caution interview.*

8. *That the Appellant's trial counsel failed to adequately challenge the prosecution regarding the Appellant's time in police custody giving an oral interview without being properly informed about her status while being in police custody.*
9. *That the Appellant's trial counsel failed to adequately challenge the prosecution on the length of time spent by the Appellant in police custody giving an oral interview without having an opportunity to consult a lawyer or seek legal representation.*
10. *That the Appellant's trial counsel failed to adequately challenge the prosecution on the lack of phone evidence despite the prosecution relying heavily on phone calls being made by and received by the Appellant.*
11. *That the Appellant's trial counsel failed to adequately challenge the prosecution case against the Appellant based on the doctrine of joint enterprise as advanced by the prosecution.*
12. *That the Appellant's trial counsel failed to adequately challenge the prosecution on the lack of and insufficiency of evidence that the Appellant acted jointly with the two other accused persons.*
13. *That the Appellant's trial counsel failed to adequately challenge the prosecution case that the Appellant was part of a joint enterprise when the Appellant had mentioned in her caution interview that she had been threatened to be killed by her co-accused Bharat Lal if she did not follow his plan and instructions.*
14. *That the Appellant's trial counsel failed to adequately challenge the prosecution case by not attacking evidence that was prejudicial against the Appellant which included that each person had to be jointly involved and not directed or controlled by threat, force, intimidation or put under duress while forming a common intention and acting jointly under the doctrine of joint enterprise.*

Inadequacy of Directions:

15. *That the learned trial Judge erred in law and fact when he failed to adequately direct the assessors on the lack of evidence tendered by prosecution on the supposed dried Dhatura plant (Prosecution Exhibit No.2) which was not supported by any form of expert or scientific report or analysis.*

16. *That the learned trial Judge erred in law and fact when he failed to adequately direct the assessors on the lack of evidence tendered by the prosecution regarding the supposed dried Dhatura plant (Prosecution Exhibit No.2) and the effects of the plant.*
17. *That the learned trial Judge erred in law and fact when he failed to adequately direct the assessors on the lack of evidence tendered by the prosecution on the effect or any effect that the supposed dried Dhatura plant (Prosecution Exhibit No.2) would have on a person.*
18. *That the learned trial Judge erred in law and fact when he failed to adequately direct the assessors on the lack of evidence by way of toxicology report which would have clearly outlined the alcohol content and the state of drunkenness of the deceased.*
19. *That the learned trial Judge erred in law and fact when he failed to adequately direct the assessors on the length of time spent by the Appellant in police custody giving an oral interview before the commencement of the written caution interview.*
20. *That the learned trial Judge erred in law and fact when he failed to adequately direct the assessors on the lack of record kept during the period spent by the Appellant in police custody while being subjected to an oral interview.*
21. *That the learned trial Judge erred in law and fact when he failed to adequately direct the assessors regarding the Appellant's time in police custody giving an oral interview and the evidence gathered during this stage before the commencement of the written caution interview.*
22. *That the learned trial Judge erred in law and fact when he failed to adequately direct the assessors regarding the Appellant given an oral interview to police without being properly informed about her status while being in police custody.*
23. *That the learned trial Judge erred in law and fact when he failed to adequately direct the assessors on the length of time spent by the Appellant in police custody giving an oral interview without having an opportunity to consult a lawyer or seek legal representation.*
24. *That the learned trial Judge erred in law and fact when he failed to adequately direct the assessors on the lack of phone evidence despite*

the prosecution relying heavily on phone calls being made by and received by the Appellant.

- 25. That the learned trial Judge erred in law when he failed to adequately direct the assessors on the doctrine of joint enterprise as advanced by the prosecution against the Appellant.*
- 26. That the learned trial Judge erred in law when he failed to adequately direct the assessors on the lack of and insufficiency of evidence that the Appellant acted jointly with the two other accused persons.*
- 27. That the learned trial Judge erred in law and fact when he failed to adequately direct the assessors by failing to mention that each person had to be jointly involved and not directed or controlled by threat, force, intimidation or put under duress while forming a common intention and acting jointly under the doctrine of joint enterprise.*
- 28. That the learned trial Judge erred in law and fact when he failed to adequately direct the assessors by only giving corroboration warning on what evidence was capable of lending support to the evidence in need of support and where there was no such evidence to direct the assessors to that effect.*
- 29. That due to the incompetent defence representation at trial, the Appellant was deprived of a fair trial.*
- 30. That this incompetence led to identifiable errors and irregularities in the trial which cumulatively rendered the process unfair and unsafe.*
- 31. That the Appellant's representation by trial counsel at trial fell far short of any defence reasonably accepted standard and therefore the trial was unfair and the conviction unsafe.*
- 32. That the current conviction against the Appellant is a substantial miscarriage of justice, unsafe, unsatisfactory and unsupported by evidence.*

Appeal against sentence

- 1. That the Appellant's appeal against sentence as it is manifestly harsh, excessive and wrong in principle under the circumstances of the case.*
- 2. That the learned trial Judge erred in law in failing to use proper sentencing guidelines in a sentence which was harsh and excessive."*

The 1st Appellant's Appeal

- [14] Counsel for the 1st Appellant based his submissions on Incompetent Representation at the trial and Inadequacy of directions by the learned trial Judge.

Incompetent Representation

- [15] Counsel for the 1st Appellant cited Archbold 14th Edition at 7-83 dealing with Conduct of counsel to the following effect:

*".....in **R v Day** [2003] 6 Archbold News 1, CA [2003] EWCA Crim.1060), where it was that the test is the single test of safety, and the court does not have to concern itself with any such immediate questions; but in order to establish lack of safety in an incompetence case, the appellant has to show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe.*

*In **Boodram v State of Trinidad and Tobago** [2002] 1 Cr.App.R12,PC, it was held that whilst complaints about counsel's incompetence must be approached with a healthy skepticism by an appellate tribunal, if it were demonstrated that counsel's failures were of a fundamental nature, the court should proceed with great care before it concluded that, on the hypotheses that the failures did not occur, the verdict would inevitably have been the same; and if the failings were so fundamental as to have deprived the defendant of due process, the conclusion would be that the defendant had not had a fair trial and the conviction should be quashed without embarking on an inquiry as to the impact of the failings."*

The fact of safety does not apply in Fiji. The question would be whether there was a miscarriage of justice as a result of the incompetency of Counsel. Grounds 1 to 4 of the grounds of appeal relate to the failure of Counsel to challenge the prosecution on Exhibit No. 2 which was a Dhatora plant. The prosecution had sought to make out that Dhatora powder had been mixed with the drink (rum) which had been consumed by the deceased to make him drowsy prior to his being taken away in a vehicle by the 2nd and 3rd Appellants. The prosecution however, had not led any evidence regarding the nature and

effect of the Dhatora powder and therefore was not a matter that had been established by the prosecution. Evidence regarding the Dhatora powder was in the caution interview statement of the 1st Appellant and was a matter which was relevant in establishing the intention of the 1st Appellant to commit the offence. In such a situation Counsel for the Appellant who appeared at the trial cannot be faulted for not going into the nature and effects of Dhatora, the absence of a toxicology report and the state of drunkenness of the deceased as alleged in these grounds as the prosecution had not led evidence regarding same.

- [16] Grounds 5 to 9 relate to the time spent by the Appellant in police custody giving an oral interview before the commencement of the written caution interview and that Counsel failed to challenge the prosecution regarding those matters.
- [17] A voir dire inquiry was held by the learned trial Judge, but the Appellants did not give evidence at that inquiry nor did they give evidence at the trial. The learned trial Judge ruled on the voir dire inquiry that the caution interview statements were admissible. Even if there was a long time taken when the Appellant was interviewed, the record showed that she was informed of her right to have a lawyer, that there were several breaks given to the Appellant and that she was given her meals and was allowed to speak to her relatives. In those circumstances, the Counsel for the Appellant who appeared at the trial cannot be found fault with as he had cross-examined the witnesses for the prosecution at the voir dire inquiry regarding these matters.
- [18] Ground 10 relates to phone calls being made use of by the prosecution. The reference to phone calls was in the confessionary statements of the Appellants and there was no special evidence led at the trial regarding phone calls.

- [19] Grounds 11 to 14 relate to the failure of Counsel to challenge the prosecution case relating to joint enterprise. The main items of evidence in the case were the three caution interview statements. In her caution interview statement she had stated about the 3rd Appellant, Bharat Lal threatening to kill her if she did not follow his instructions and orders. Appellants Counsel submits that the Counsel appearing for the 1st Appellant at the trial had failed to adequately cross examine on these threats. None of the Appellants gave evidence at the trial, and therefore this submission becomes irrelevant. Further the entirety of the statement has to be considered as a whole to assess whether reference to such alleged threats were consistent with the relationship the 1st Appellant had with the 3rd Appellant.
- [20] The caution interview statements if admitted as evidence as being made voluntarily which was the position in this case is only capable of being used as evidence against its maker. As submitted by the State if another defendant makes a voluntary statement in regard to the same matter, the facts established against each defendant can be relied upon to find that there was a combination of actions such as a joint venture.
- [21] On the other hand Counsel for the Appellant had challenged the prosecution case on the basis of there being no direct evidence other than the caution interview statements and thereby challenged the prosecution case based on joint enterprise.
- [22] Counsel for the 3rd Appellant cited the decision of the Court of Appeal of New Zealand in **Joe Loelu Malfoie v. The Queen** [2014] NZCA 419 where it was stated:

*“[9] In order to succeed in an appeal based on alleged trial counsel error, the appellant must demonstrate there has been a miscarriage of justice. In **Sugusuwana v R** [2005] NZSC 57, [2006] 1 NZLR 730, the Supreme Court set out the approach to be taken in such cases. In **R v Scurrah** CA 159/06 (12 September 2006), this Court summarized the approach taken by the majority of the Supreme Court in **Sungsuwan** as follows:*

[17] The approach appears to be, then, to ask first whether there was an error on the part of counsel, and, if so, whether there is a real risk that it affected the outcome by rendering the verdict unsafe. If the answer to both questions is "yes", this will generally be sufficient to establish a miscarriage of justice, so that an appeal will be allowed.

[18] On the other hand, where counsel has made a tactical or other decision which was reasonable in the context of the trial, an appeal will not ordinarily be allowed even though there is a possibility that the decision affected the outcome of the trial. This reflects the reality that trial counsel must make decisions before and during trial, exercising their best judgment in the circumstances as they exist at the time. Simply because, with hindsight, such a decision is seen to have reduced the chance of the accused achieving a favourable outcome does not mean that there has been a miscarriage of justice. Nor will there have been a miscarriage of justice simply because some other decision is thought, with hindsight, to have offered a better prospect of an outcome favourable to the accused than the decision made."

- [23] Grounds 29 to 31 are to the effect that fairness of the trial was compromised as a result of the incompetence of Counsel. The itemized incompetencies have been dealt with above and in the absence of particularizing the areas of general incompetence, these grounds are without any merit.
- [24] Taking into account all the grounds urged relating to incompetence of counsel, Counsel for the Appellant has failed to demonstrate that such incompetencies were of a fundamental nature as to cause a miscarriage of justice.

Inadequacy of Direction by the Trial Judge

- [25] Counsel for the 1st Appellant dealt with grounds of appeal 15 to 18 together on the direction of the learned trial Judge to the Assessor regarding Dhatora plant. His submission was that the learned trial failed to adequately direct the assessors regarding the lack of expert or scientific report or analysis of the effects of dhatora and its effects on a person.

- [26] As stated earlier the matters relating to the dhatora plant was in the caution statement of the 1st Appellant and it was her belief that dhatora when mixed with rum would bring about severe intoxication. It was this belief of the 1st Appellant that went to the establishing of her intention to commit the murder. In the light of that position there was no need for the learned trial judge to give directions to the Assessors regarding the nature and effect of dhatora and any report regarding same.
- [27] Grounds 19 to 23 were taken together by Counsel for the 1st Appellant. His submission was that the learned trial judge erred in law and in fact when he failed to adequately direct the assessors on the length of time spent by the Appellant in Police custody and about her being unable to consult a lawyer. The evidence at the voir dire was to the effect that the Appellant had been informed about her right to consult a lawyer, that she was given sufficient breaks, she was given her meals and that she was allowed to speak to her relatives from time to time. The learned trial Judge in his summing up detailed the manner in which her statement was recorded and therefore it cannot be said that it was inadequate.
- [28] Ground 24 was regarding the learned trial judge failing to adequately direct the assessors on the lack of phone evidence. Again as stated earlier the phone evidence transpired in the caution interview statements and there was no special evidence led at the trial. In those circumstances this submission lacks merit.
- [29] Grounds of appeal 25 to 27 related to the summing up of the learned trial judge regarding joint enterprise. The learned trial judge at paragraphs 15 and 16 summed up to the Assessors regarding joint enterprise which was very balanced.
- [30] Ground 28 is vague and not clear and Counsel submitted that this ground was covered under grounds 15 to 28.

- [31] Counsel for the 1st Appellant in his submissions also took up the position that what was stated by the 1st Appellant in her caution interview statement was true and that she had taken up a defence therein that she had acted under threat or duress from the 3rd Appellant Bharat Lal. If what she had stated her was true that establishes her intention to commit the offence and also establishes her role in the commission of the offence. Apart from what she had stated in her statement there was no other evidence to substantiate same. This submission cuts across the earlier submissions made by him regarding the admissibility of the caution interview statement and therefore the grounds of appeal urged by the 1st Appellant lack merit.

Appeal against sentence

- [32] The grounds of appeal regarding sentence urged by all three Appellants would be dealt together after dealing with the grounds of appeal urged by the 2nd and 3rd Appellants.

The 2nd Appellant's (Jayant Lal) Appeal

- [33] Counsel for the 2nd Appellant relied only on the ground of appeal as to the failure of the learned trial Judge to consider the two medical reports in respect of the 2nd Appellant in deciding the admissibility of his caution interview statement.
- [34] The learned trial Judge in his ruling on the voir dire inquiry referred to the medical reports of this Appellant and had considered them in deciding to admit the caution interview statement. The following paragraphs in the voir dire ruling refer to the two medical reports:

"5. Jayant Lal, through his counsel alleged that, he was assaulted by police and forced into making his police statement. He referred to his medical reports on 26th June and 24th July 2009, as evidence of injuries while in police custody

13. At 2.10 p.m. Jayant Lal was medically examined at Nausori Health Centre by Doctor Danford. His medical report dated

26.6.09, listed no injuries on him, only aches on his thighs. At 2.28 p.m., he was taken to Nausori Magistrate's Court, and was remanded in custody at 3.30 p.m. All the police officers who caution interviewed him, formally charged him, and witnesses the same said, they did not assault or threaten Jayant Lal at any time whatsoever.

14. Both Bharat Lal and Jayant Lal were medically examined on 24th July 2009, as a result of a High Court order. Two medical reports, dated 24th July 2009, were submitted by the examining doctor, Doctor Neelesh Chand of CWM Hospital. From the 26th June to 24th June 2009, both accused were remanded in custody at Korovou Prison. According to Doctor Chand his medical finding does not fit into the history related by the patients. According to him, the injuries found were too recent. It cannot have occurred one month ago, when they were in police custody."

[35] Counsel submitted referring to paragraph 26 of the summing up that the learned trial Judge had merely referred to the medical reports without highlighting the findings of the second medical doctor's report and that had this been referred that the Assessors may have put less weight on the confession made on the caution interview statement.

[36] The learned trial Judge not only referred to the medical reports regarding the second Appellant in paragraph 26 referred to by Counsel, he also referred to the medical reports at paragraph 56 of the summing up as follows:

"56. ... All the above police officers said, they saw no injuries on the accused, when he was in their custody. The Justice of Peace, Moti Lal, said the accused told him he was treated well by Police. Doctor Danford, in his 26.6.09 medical report, found no injuries on him, although he had tenderness on his thighs. Doctor Chand said, his 24.7.09 medical report found the injuries on Jayant were too recent, and it couldn't have occurred in June 2009. These are matters for you to decide after considering all the witnesses' evidence, the documents and exhibits submitted by them."

[37] From the above it would seem that the learned trial Judge had considered the medical reports in his voir dire ruling and had also referred to them in his summing up to the

Assessors. Therefore Counsel's submission on the ground that the learned trial Judge failed to consider the two medical reports, fails.

The Third Appellant's (Bharat Lal) Appeal

- [38] The first ground of appeal is on the basis that when the conviction is wholly or substantially based upon a challenged confession which is uncorroborated that the Assessors require a special warning regarding the danger of relying on such confession.
- [39] Appellant's Counsel cited the cases of **Carr v. R** (1991) 171 CLR 468; **Duke v. R** (1989) 180 CLR 508 and **R v. McKinney** (1991) 171 CLR 468.
- [40] In **McKinney v. The Queen** (supra) it was held by Mason CJ., Deane, Gaudron and McHugh JJ., Brennan, Dawson and Toohey JJ. Contra, that whenever police evidence of a confessional statement allegedly made by an accused while in police custody is disputed and its making is not reliably corroborated, the judge should, as a rule of practice, warn the jury of the danger of convicting on the basis of that evidence alone. The basis of the rule lies in the special position of vulnerability of an accused to fabrication when involuntarily held in police custody in that the detention will have deprived the accused of the possibility of the corroboration of a denial of the making of all or part of an alleged confessional statement. It was stated that such a warning should be given to show that the requirement of a fair trial was satisfied.
- [41] In the present case none of the Appellants gave evidence. The learned trial Judge did not make any adverse comment on this in his summing up to the Assessors which was advantageous to the Appellants. The police impropriety was on the basis of suggestions by defence Counsel. The challenge was regarding voluntariness and not regarding the content of the confessional statement. The Appellant had been given the opportunity of reading over the statement. During the process of recording the statement he was given

breaks and was given the opportunity to speak to relatives. At the voir dire inquiry there was no evidence which pointed out any defect in the admissions. In these circumstances, there was no requirement for a special warning as submitted by the Appellant as the Appellants had a fair trial.

- [42] Under this same ground of appeal, Counsel submitted that the learned trial Judge erred in leaving the question of deciding on the voluntariness of the caution interview statements to the Assessors as admitting such evidence is exclusively the province of the trial judge, and that what remains for the Assessors to decide is its weight. This is the same as the 2nd ground of appeal against conviction and would be dealt together.

- [43] At the voir dire inquiry the learned trial Judge held that the caution interview statement were admissible. In his summing up the learned trial Judge in his analysis of the evidence having summarized the confessions of the three Appellants stated:

“38. Paragraphs 29 to 37 abovementioned summarizes the three accuseds’ alleged confession to the charge of murder. 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.”

- [44] In the above paragraph, the learned trial Judge has left the question of voluntariness of the statements to the Assessors as pointed out by Counsel for the Appellant. This would amount to an error. The question then arises as to whether it miscarried the trial. At

paragraph 57 of the summing up the learned trial Judge in dealing with other evidence, stated as follows:

“57... .. In a sense, the exhibits are nothing more than “aids” to you assessing the credibility of the accused’s statements in their caution interview and charge statements. Of course, the acceptance otherwise of these statements, will depend on you deciding whether or not those statements were given voluntarily to the police.”

- [45] The learned trial Judge in this paragraph having said that the Assessors have to deal with the weightage to be given to the caution interview statements again stated that it would depend on whether or not the statements were given voluntarily.
- [46] In the result, it would seem that that the learned trial Judge had left the question of voluntariness as well as weight to the Assessors. The question that would then be posed would be whether this resulted in a miscarriage of justice. However, as the confessions of the three Appellants which were admitted in the voir dire ruling would clearly show their complicity in the commission of the crime, it would be a fit case to apply the proviso in Section 22(6) of the Court of Appeal Act (Cap.12). Even though this ground of appeal regarding the directions on the voluntariness and weight to be attached to the caution interview statements was in error and is favourable to the Appellants, if there was a proper direction in that regard it is very likely that the Assessors would have come to the same conclusion as they did in the case and therefore there would be no miscarriage of justice.
- [47] After this case was heard, the Supreme Court of Fiji in the recent decision of Maya v. The State [2015] FJSC 30; CAV009.2015 (23 October 2015) dealt with this position. Brian Keith J stated:

“19. There have been two schools of thought in the common law world about this topic in the context of trial by jury. One is

that jurors should be told that they should disregard the confession altogether if they are not sure that it was made voluntarily. After all, what weight can be placed at all on a confession which may have been made as a result of ill-treatment or oppression, or which may have been induced by a promise of some kind, and which made the suspect confess when he might otherwise not have done so? He may have been confessing his guilt, not because he was guilty, but, for example, because he wanted the ill-treatment to stop. The other school of thought takes as its starting point the fact that questions of admissibility of evidence are for the judge to decide, whereas the evaluation of such evidence as has been ruled admissible is for the jurors to make. If the judge is required to direct the jurors to disregard the confession if they are not sure that it was made voluntarily, that would be tantamount to the judge usurping the jurors' function of evaluating the evidence for themselves. On this school of thought, the appropriate direction is to tell the jurors that the weight which they should give to the confession is for them to decide. That is the school of thought which the Privy Council adopted in Chan Wei Keung v The Queen [1967] 2 AC 160.

20. A different view has been taken relatively recently in England by the House of Lords. In R v Mushtaq [2005] UKHL 25, a majority of the House of Lords held that jurors should be directed to disregard a confession if they think that the confession may have been made involuntarily. However, two things informed their view. One was the terms of section 76(2) of the Police and Criminal Evidence Act 1984. The other was the right against self-incrimination implied in the right to a fair trial embodied in Art 6(1) of the European Convention on Human Rights. The right against self-incrimination is enshrined in section 14(2)(j) of the Constitution of Fiji, but there is no statutory provision in Fiji equivalent to section 76(2) of the Police and Criminal Evidence Act 1984. To that extent, the reasoning of the majority in Mushtaq does not apply to Fiji.
21. Which of these two schools of thought is to be preferred is less important in Fiji where the opinion of the equivalent of the jurors – the assessors – is not decisive. In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not. By then, of course, the judge will have ruled the confession to have been admissible.

He will therefore have already found beyond reasonable doubt that it had been made voluntarily. If he remains of that view by the end of the case, the terms of the direction he gave to the assessors if they thought that the confession may have been made involuntarily is irrelevant. The problem will only arise if, in the course of the trial, the judge himself changes his original view about the voluntariness of the confession. Should he direct himself to disregard the confession altogether? Or should he direct himself merely to take the possibility that it may have been made voluntarily into account in the context of the case as a whole?

22. *That problem does not arise in this case. Although the judge did not give reasons why he agreed with the opinion of the assessors, he would unquestionably have said something if had had changed his mind about the voluntariness of the confession in the course of the trial. So the correctness or otherwise of his direction to the assessors in para 16 of his summing-up could have had no impact on the eventual outcome of the case. Since it is unnecessary to decide in this particular case which of the two schools of thought should be adopted in Fiji, I would prefer not to do so, leaving it to be decided in a case in which it needs to be addressed, ie a case in which the judge changes his mind about the voluntariness of the confession in the course of the trial.*
23. *That does not give much help to judges about how to direct the assessors in the meantime. They are entitled to look to the Supreme Court for guidance. If that guidance can only be given by the Court expressing its provisional view on which school of thought should be adopted in Fiji, it seems to me that the Court should not shrink from expressing its provisional view on the topic. In my opinion, the school of thought adopted in Chan Wei Keung puts too much emphasis on the need to maintain clear demarcation lines between the respective functions of judge and jury, and we should adopt the position which says that a confession should be treated as valueless if it may be been made involuntarily. Judges should for the time being, therefore, 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 am not unmindful of the irony here. The judge will have to direct himself on these lines if he changes his mind about the*

voluntariness of the confession in the course of the trial. If he does that, there will never be case in which the issue which we have identified will come up for final determination. But that is sometimes the way things go."

[48] In Maya's case (supra) Gates CJ agreeing with Brian Keith J stated:

- "2. *For my part, I reach the view that the assessors should be directed by the judge in his summing up that if they are not satisfied that the confession was given voluntarily, in the sense that it was obtained without oppression, ill-treatment or inducements, or conclude that it may not have been given voluntarily, they should disregard it altogether.*
3. *In Fiji the judge may admit the confession into evidence after the voir dire, and yet subsequently at the conclusion of the trial proper he or she may arrive at a different opinion. The defence may pursue in cross-examination in the trial proper the same issues of involuntariness in order to persuade the judge as well as the assessors of the rightfulness of such an allegation. The prosecution however bears the burden in the trial proper, as in the voir dire of proving that the confession was voluntary, and must do so to the standard beyond reasonable doubt, as with all other elements of proof required to prove the charge. The position in Mushtaq [2005] UKHC 25 is to be preferred to that of Chan Wei Keung v The Queen [1967] 2 AC 160.*

[49] The decision in Maya's case has been followed by the Court of Appeal in Raitamata v The State [2016] FJCA 66; AAU010 & AAU058.2012 (27 May 2016).

[50] In view of this development in the law, this ground of appeal loses value and does not assist the Appellant.

[51] The third ground of appeal was that the learned trial Judge failed to give directions to the Assessors on circumstantial evidence. Counsel argued that since the State had referred to circumstantial evidence there was a duty on the learned trial Judge to give proper directions regarding same.

- [52] The case depended on the confessions of the three appellants which when admitted as evidence was in the nature of direct evidence. Therefore there was no necessity to give any directions on circumstantial evidence.
- [53] The fourth ground of appeal was on the basis that the learned trial Judge's directions on joint enterprise was erroneous as the evidence of one accused was not admissible against another.
- [54] The learned trial Judge in his summing up had given clear directions regarding this position at paragraphs 15 and 16 of the summing up:

"15. There are three accuseds in this case. In order to make them jointly liable for the alleged murder of Shalesh Prakash, the prosecution is relying and running its case on the concept of 'joint enterprise'. 'Joint enterprise' is 'when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed, of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.' (Section 22, Penal Code, Chapter 17). In considering each accused, you will have to ask yourselves the following questions: Did each of them form a common intention with each other to murder the deceased? If so, did each of them acted together to murder the deceased? If your answer to the above questions for a particular accused was yes, and you are satisfied, he's guilty of murder. It is irrelevant whether or not one committed a minor or major role, if they had the common intention to murder the deceased and acted together, they are each liable for murder.

16. Three accuseds are on trial in this case. Each of the accused is entitled to be tried solely on the evidence that is admissible against him. This means that you must consider the position of each accused separately, and come to a separate considered decision on each of them. Just because they are jointly charged does not mean they must all be guilty or not guilty. Most evidence in this case are admissible against all accuseds.

However, regarding their police caution interview statements and charge statements, which may contain their alleged confessions, the statements therein are only admissible against the maker of the statement, and on no other. In other words, in each accused's police caution interview statements and charge statements, you must totally disregard what the accused said about his co-accused on the commission of the offence. You can only take into account what he said about himself, regarding his role in the commission of the crime. In this case, most of the inadmissible evidence in the caution interview and charge statements have been blotted out, but in any event, you must keep in mind the above rule, when you deliberate on the case."

- [55] In view of this direction this ground of appeal fails as the learned trial Judge has given adequate directions in his summing up on joint enterprise as well as the position of the statement of one accused not being admissible against another.
- [56] Ground five is in relation to the detention of the Appellant prior to the record of interview. This was not challenged in the voir dire inquiry or at the trial. The learned trial Judge in his voir dire ruling set out in detail the detention and the manner of recording his statement before arriving at his decision to admit the statement and therefore this ground has no merit.
- [57] Grounds 6 and 7 refer to the failure of the trial Judge to put the defence case to the Assessors and also for not placing all defences available before the Assessors even if the defence Counsel had not raised them. Counsel made submissions in particular regarding self defence that was available to the Appellant.
- [58] The learned trial Judge having dealt with the prosecution case, dealt with the cases of the accused in his summing up to the Assessors from paragraphs 21 to 27 of the summing up. The directions given therein are balanced and adequate.

- [59] As regards self defence, available to the 3rd Appellant there was no direction by the learned trial Judge. This argument was on the basis that in his caution interview statement, this Appellant had stated that the deceased had sworn at him when he took him out from the drain where he had fallen and started coming towards him at which point he had started running as the deceased was coming after him. At that point the van had been driven by the 2nd Appellant at high speed towards them and had bumped the deceased.
- [60] The deceased had according to this Appellant got off the van and started walking and he had gone towards him thinking that the deceased would fall and before he could reach the deceased had fallen into a drain. It is after the deceased was taken out of the drain according to the Appellant that the deceased is said to have started running towards him. It is difficult surmise as to how these circumstances would show that the deceased was going to attack the Appellant. The possibility of self defence arising in that situation is quite fanciful.
- [61] On the other hand the reliance on this ground of appeal by the Appellant cuts across his earlier stance regarding the admissibility of his caution interview statement. If he was taking up the defence of self defence, he had to rely on the truthfulness of his caution interview statement. If that were so his complicity in the commission of the crime is clearly established. Therefore there is no merit in this ground of appeal.

Appeal against Sentence

- [62] The 1st and 3rd Appellants had appealed against the sentence. The Appellants were sentenced to life imprisonment and with a non-parole period of 20 years.

- [63] According to section 237 of the Crimes Decree, the penalty for murder is a mandatory sentence of imprisonment for life with a judicial discretion to set a minimum term to be served before pardon may be considered.
- [64] The Sentencing and Penalties Decree has no application in sentences for murder as the Crimes Decree in section 237 provides for a mandatory life imprisonment and a discretion on the sentencing judge to set a minimum to be served before pardon maybe considered. Abdul Aziz v. The State Criminal Appeal No.AAU 112 of 2011 (13 July 2015). The learned trial judge was in error when he stated that the Sentencing and Penalties Decree applied.”
- [65] The learned trial Judge set out his reasons regarding the imposing of the non-parole period of twenty years taking into consideration the manner in which the crime had been committed after planning to commit same. Their earlier attempt had failed. The learned trial Judge considered the fact that they were first offenders and the mitigating factors pleaded on their behalf before arriving at his decision.
- [66] We see no reason to interfere with the period imposed except that, the basis of the sentence is amended to read as life imprisonment with a minimum period of 20 years to be served.

Waidyaratne JA

- [67] I agree with the reasoning and the conclusion of Suresh Chandra JA.

Orders of Court

- (1) *The Appeals against conviction of the 1st, 2nd and 3rd Appellants are dismissed.*
- (2) *The 1st, 2nd and 3rd Appellants are sentenced to life imprisonment with a minimum period of 20 years to be served before a pardon may be considered.*



W. Calanchini

Hon. Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL

S. Chandra

Hon. Mr Justice S. Chandra
JUSTICE OF APPEAL

K. Waidyaratne

Hon. Mr Justice K. Waidyaratne
JUSTICE OF APPEAL