IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Criminal Appeal No. 46 of 1979

AJENDRA KUMAR SINGH s/o Ravendra Singh — Appellant

v.

REGINAM — Respondent

Mr. S.M. Koya for the Appellant
Mr. R. Lindsay for the Respondent

Dates of Hearing : 17th & 20th June 1980
Delivery of Judgment : 30/6/80

J U D G M E N T

Speight J.A.

The appellant was tried by the Supreme Court at Lautoka on a charge that between the 11th and 12th days of December 1978 at Cuvu, Sigatoka he murdered Samista Devi who was, in fact, his wife. After the retirement the opinion of first assessor was guilty of murder, and the opinion of second and third assessors were not guilty of murder but guilty of manslaughter. The learned trial judge concurred with the majority opinion and acquitted the appellant of murder but convicted him of manslaughter and in due course the appellant was sentenced to ten years' imprisonment.

The appeal is against conviction and sentence.

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Before detailing the lengthy grounds, a resume of the evidence is necessary. Appellant and his wife lived with their small baby in their house at Cuvu and there were other neighbouring houses within a short distance from which certain observations had been made of the events of the evening of 11th December and of the morning of the 12th. P.W.5 Kamla Wati who lived nearby was at home on the evening of the 11th and at about 11 p.m. she heard accused and his wife return home and with them the small daughter. P.W.5 said that it was apparent that appellant's wife was very angry and that she heard heated words between the wife and the appellant, both before and after they entered their house. She did not see any sign of either appellant or his wife the following morning though she did notice that the baby's nappies were on the clothes line. They had not been there the previous evening and that was a task that the wife usually performed.

P.W.7 Hari Narayan also lives nearby. He was sitting outside his house sometime between 11 or 12 p.m. on the evening of Monday the 11th and at that time he saw "huge flames" coming out of the kitchen/bathroom side of the appellant's house. This lasted for about one minute. The following morning he saw the appellant pinning the baby's napkins on the clothes line. Later on the morning of the 12th he was away from the area but when he returned as a result of something he was told, he found, along with others, that appellant's wife was inside their house - that she was dead and that she had been badly burnt. Because of the way in which the matters later transpired, it is important to note that at this stage he did not inform the police or anyone else of the flames which he said he had seen shortly before midnight the previous evening.

P.W.8 Ramesh Chand who is an uncle of the appellant, met the appellant at about 10.45 a.m. at a nearby bus stop where appellant told him that the wife had been burnt and had died. He went to the house and found that there was at that time smoke coming from the kitchen - not apparently related to cooking activities but from an accidental or deliberate fire - and he went into the bathroom where he saw the deceased wife. She was in a squatting or sitting position against the wall and obviously dead. The body was burnt and there was fire damage in the bathroom and also in the kitchen.

Later that day the appellant was interviewed by Police Inspector Jai Raj in the presence of Detective Sergeant Raju, both of the Lautoka Police. He was not treated as a suspect at that stage. The Inspector wrote in his notebook the information given to him by the appellant. This was not signed by appellant but there has been no challenge to the propriety of the interview nor of the accuracy of the notes that the Inspector made of the interview. It was a brief statement which related that appellant and his wife had gone to bed shortly before midnight on the evening of the 11th; that the following morning his wife had been up and about the house in apparent good health; she had had tea and biscuit at breakfast; that the appellant had been away to his father's shop and that when he was returning home towards 11 a.m. he saw smoke coming from the kitchen of his house and he walked faster and when he went there he found a fire which, from the description, was fairly small, burning in the kitchen. The baby was in bed but when he went into the bathroom he found his wife in a burnt condition, and he then ran for assistance from others and reported the matter to the police. He also said on that occasion that he, the appellant, had been having an affair with the wife of one Ram Singh.

Several other neighbours gave evidence to the effect that they had seen the accused around his home on the morning of the 12th but had not seen any sign of the wife. Apparently the affair was treated at this stage as either accident or suicide, for it emerged either then or at a later stage that the appellant's wife had been emotionally disturbed on some previous occasions and there was a suggestion that she had previously attempted to commit suicide. Some months later, however, police interest was renewed and this may have been as the result of their learning of the claim by P.W.7 Hari Narayan that he had seen the first shortly before midnight on the evening of 11th December. As had been mentioned he did not give this information to the police until some time after their initial enquiry. Accordingly, a party of police including D/Sgt. Raju went to appellant's home on the 22nd of April 1979 and asked him to go to Sigatoka Police Station for further enquiries in respect of the death.

At Sigatoka an interview took place between Sgt. Raju and the appellant with D/Insp. Subramani also present throughout the interview and another police officer present for part of

the time. Sgt. Raju questioned the appellant at some length and recorded the answers in his note-book. Initially he asked a number of questions relating to the background of the appellant and his deceased wife; details of their marriage and their child and similar matters including an acknowledgement that appellant's affair with Ram Singh's wife was still continuing at the time of the wife's death. Appellant claimed that his wife was not aware of this matter. Sgt. Raju then, using the notes which had been recorded by the Inspector at the previous interview, took the appellant through paragraph by paragraph the account that he had previously given of the events leading up to the claim by the appellant that he had found his wife dead when he returned to the house at midmorning on the 12th of December. The appellant confirmed paragraph by paragraph the correctness of what he had previously related. He was then taxed with some matters which he did not agree with, namely the evidence of the next door neighbour that there had been angry words between himself and his wife after they had returned to the house the previous evening. It was then put to him that the same lady, Kamla Wati, had told the police that she had seen appellant on the porch of the house the following morning and that his wife was not there and nowhere to be seen. Appellant denied this and said that his wife had been there. He was asked whether he wished to be confronted with Kamla Wati whom the police also had at the Sigatoka Police Station and he said that he was agreeable.

Kamla Wati was brought in and asked two or three questions and she confirmed that she had seen the appellant and not his wife at the house that morning. He told Sgt. Raju he did not wish to ask her any questions and that it was true that Kamla Wati may not have seen the wife there. That lady was then taken away and appellant was then told about the neighbour Hari Narayan and the fire at the house late on the night of the 11th. He said he knew nothing of that. He was asked about the incident of the napkins the following morning and he said that his wife had washed them and hung them out. He was then invited to listen to Hari Narayan who was brought in, and Hari Narayan in two or three simple sentences repeated that he had seen the fire the previous evening and that he had seen appellant pinning the napkins on the line the following morning. Appellant was then asked whether what had been said was true. Hari Narayan left and appellant was then told something of the post mortem findings.

Sgt. Raju told the appellant that the post mortem had revealed an injury to the deceased lady's chest inflicted shortly before death and asked how this came about. He said he did not know. He was also told that the post mortem showed that there was no food found in the contents of the stomach, whereas appellant had earlier said that his wife had eaten biscuits that morning. He was asked how this absence could be explained. He remained silent. He was again asked about the injury. He again was silent and he was then asked whether it was true he had caused the injury to her close to the time of her death. The evidence then is that the appellant broke down and said he was prepared to tell the truth. He said that his wife had known about his association with Ram Singh's wife; that they had had trouble and she had threatened to leave. He lost his temper and punched her and she fell down and did not get up again. He thought that she was dead and he became frightened, so he put her in a sitting position in the bathroom and spilled benzine on her and set fire to the body, this being apparently at about midnight. He said that the following day he had been away from the farm and that he had returned again and he had spilled kerosene over his wife's body and again set fire to her and then gone away and raised the alarm. The notebook with all this recorded in it was read back to him and he signed each page including the initial record of the caution in usual form.

There was also evidence of a police corporal who formally charged the appellant. When asked if he had anything to say the appellant allegedly said that he had already said all that he was proposing to say and had signed all he wanted to sign but in a few sentences he reiterated what he had told Sgt. Raju namely, that he punched the woman, that she fell down and that thinking she had died he set her on fire so that no one would know. If this evidence was accepted then a Court would have little option but to hold him responsible for the homicide. The post mortem, however, showed that the lady had not died from the blow to the chest as the appellant claimed he had thought but from suffocation from burning. No opinion was given as to which of the two fires would have been fatal. If one accepts, however, that the appellant caused the death by setting fire to his wife's body when he thought she was already dead, that would be an unlawful act bringing about death but there would not be the necessary

intent to constitute murder. Hence the opinion of the majority of the assessors and the finding of the judge.

Appellant gave evidence in which he said that the true account of the evening was in accordance with the first statement that he had made to the Detective Inspector in December and that his belief was that his wife may have committed suicide as she had shown such tendencies before. He said that the alleged confession taken in writing was not said by him at all, that he understood Sgt. Raju was merely re-writing the initial exculpatory explanation and he was induced to sign this by a promise that he would be allowed to take back some of his things that the police had and then allowed to return home. He denied that he had made the detailed confession to Sgt. Raju or the oral admission to the arresting corporal. Some other evidence was called concerning the deceased lady's alleged suicidal tendencies and there was evidence from two solicitors and the appellant's father which will be referred to later.

Grounds of appeal. There were a number of grounds of appeal which will be set out here and then dealt with in turn:

Ground 1 — It was submitted that the trial within a trial held by the judge to determine the admissibility of the two confessional statements was irregular. Particulars were given in two respects.

Ground 2 — That the trial judge erred in admitting the confessional statements. Nine particulars were given.

Ground 3 — That the judge misdirected himself on the onus of proof in the record of his judgment admitting the confessional statements or alternatively, failed to exercise his discretion to exclude on the basis of unfair or oppressive behaviour.

Ground 4 — The judge misconceived the onus of proof in rejecting the challenge by the defence to the admissibility of the confessions.

Ground 5 The judge erred in failing to direct himself and the assessors correctly on matters relating to the evidence of the pathologist Dr. Gounder, particularly as to the estimated time of death.

Ground 6 That the judge misdirected himself and the assessors on the overall onus of proof.

Ground 7 That there was a misdirection relating to the significance of the confessional statements.

Ground 8 That the sentence was wrong in principle and harsh and unreasonable.

Dealing with the grounds in detail.

Ground 1. At the commencement of the trial it must have been intimated that the defence proposed to challenge the admissibility of the two confessional statements and therefore a trial within a trial would be required. By agreement between counsel for the Crown and the defence, which agreement was acceptable to the learned trial judge, the trial within a trial took place after the appellant had been arraigned and had pleaded not guilty but before the assessors had been sworn and before the Crown counsel had opened the case for prosecution. Mr. Koya submitted to this Court that this procedure is not merely irregular but invalid and he drew attention to the provisions of sections 256, 266 and 269 of the Criminal Procedure Code (Cap. 14). We understand him to mean that as the assessors had not been sworn in the trial had not yet commenced so there was no jurisdiction in the trial judge to hear the matter at that stage. We think that this overlooks the provision of section 260 which says:

> "Every accused person, upon being arraigned upon any information, by pleading generally thereto the plea of 'not guilty' shall, without further form, be deemed to have put himself upon the country for trial."

In our view this clearly indicates that the trial has commenced and that any step which is taken immediately thereafter is a step in the trial. Mr. Koya quoted extracts from a number of authori-

ties which indicate that the preferable course in these matters is for the trial within a trial to occur at the natural place in the evidence where the witness who is proposing to produce a confessional statement usually a policeman is called in ordinary sequence. It is perhaps only necessary to refer the case of Zielinski Vol.34 Cr. App. R. p. 193 at 196. There the Court of Criminal Appeal in criticising the holding of a trial within a trial at the commencement endorsed an earlier judgment in Cole (1941) 28 Cr. App. R. 43 where it had been said at p. 49:

> " In our opinion it is most undesirable that such a question should be argued at such a stage of a trial, and this case is an admirable example of the objectionable nature of that practice. The Court does not say for a moment that the practice may not be convenient as saving a little time in a case where the defence to be raised is a matter of common agreement."

Mr. Koya also drew our attention to the New Zealand case King v. Philips (1949) N.Z.L.R. 316 at 320 where the normal procedure to be followed was outlined as being the correct one. The desirability of this practice being followed is obvious. It is easier for the judge who is to determine a question of admissibility to have the surrounding facts before him. Also counsel for the accused may wish to place reliance in his cross-examination of the policeman on other matters which have been deposed to by earlier witnesses. Hence there is a possibility of injustice if the trial within a trial has been taken too soon thereby depriving counsel and consequently depriving the trial judge of all relevant information on which to deal with the question of admissibility. There can, however, be circumstances in which this disadvantage does not arise and there can be compensating advantages.

In some cases the prosecution relies, as here, almost entirely upon the alleged confession and if the evidence relating to it is rejected there will be no case to go on with. An early decision may therefore save a great deal of time and inconvenience for the Court and the witnesses and for the assessors or, in other Commonwealth countries, the jury. In R. v. Michael Murray (1950) Vol. 34 Cr. App. R. 203 this practice was reviewed by the Court of Criminal Appeal and it was said:

" The only evidence against him was his own confession and, as he was alleging that the confession had not been obtained from him voluntarily .....the learned Recorder at the request of his counsel, and in this case quite properly, heard at the outset evidence on the issue whether the confession had been obtained voluntarily or not. We are now throwing any doubt upon the principle that we have laid down in Zielinski. In this case, it was not only convenient but proper that the matter should be decided once and for all at the opening of the case, because the confession was, as I say, the only evidence against the appellant except the evidence of arrest."

It is to be noted that the members of the Court of Criminal Appeal were the same judges in both Zielinski and Murray. In the present instance it is to be noted that the procedure which was followed was adopted by the judge because of agreement between counsel. Not only did this occur in this case by agreement but members of the Court are aware that this practice is also followed in other jurisdiction in appropriate circumstances. It could be, of course, that a subsequent unexpected development in the course of the trial proper might demonstrate a change of circumstances in which case a trial judge might at his discretion review his previous decision.

Counsel for the present appellant was asked to demonstrate any harm which he suggested had befallen the appellant because of the procedure which was adopted with the consent of his own counsel. Mr. Koya suggested two matters -

(1) That the trial judge did not have the evidence of D/Insp. Jai Raj who had taken the first statement on 12th December 1978 and might have given some indication of the accused's demeanour on that occasion. Nevertheless Sgt. Raju had been present then so that any questions which needed to be asked about demeanour could have been put to him - none were.

(2) That there was one qualification to the post mortem evidence concerning the absence of contents in the deceased women's stomach spoken of by Sgt. Raju

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at the interview. Dr. Gounder said that the stomach was empty but there was some trace of food further down presumably in the bowel or lower intestine.

We fail to see how this minor variation as to the state of the lady's digestion could in any way have affected the propriety of the question which Sgt. Raju put to the appellant concerning his wife's alleged activities on the morning of the 12th. It seems quite plain that the crucial matter with which the appellant was confronted and which caused him to break down was the question about recent injury to the wife's chest. We see no merit in this ground.

Ground 2. It is submitted that the trial judge failed to apply the appropriate test to determine admissibility of confessional statements. Many submissions were made, covering a number of variations of the same topic. Reference was made to the onus of proof upon the prosecution, the inducements allegedly offered, the existence of a previous exculpatory statement, the confrontation at interview with other witnesses, and evidence from two solicitors, Mr. Pillay and Mr. Reddy, concerning an attempt to communicate with the Sigatoka Police Station. We do not propose to discuss all these individual particulars in detail because they all are circumstances to be taken into account in considering the fundamental question of voluntariness. Before dealing with this it is desirable that we refer to the first point taken by counsel for the Crown in this Court.

Mr. Lindsay on behalf of the respondent questioned whether, in fact, this was an appropriate case for a trial within a trial, or to be very precise, whether the judge should have continued with it to the point of giving a ruling. Initially it seems likely that the judge was merely told that there was challenge to admissibility and accordingly the trial within a trial was embarked on. As is so often the case there was apparently no particular indication of the specific ground of objection. When the appellant gave evidence, however, he did not, as the judge noted in his later ruling, claim threats, violence or the like, but merely denied that the statement or anything in it was his at all. He said in effect, "I did not make the statement. It was all written by the policeman and I was tricked into signing it by being told it was some-

thing altogether different." Mr. Lindsay quite properly asks whether this is really the scope of an enquiry as to admissibility upon the lines with which we are so familiar. His submission reduced to its simplest terms is that if a prosecution witness says that accused stated "I committed the crime" and the defence contention is that that witness is a liar and no such thing was ever said, that is not a matter upon which a judge has to rule, for it is not a claim that he was wrongly induced to make a confession but is a denial that he was wrongly induced to make a confession but is a denial that he ever confessed at all. Whether he did or whether he did not is, Mr. Lindsay submits, a factual issue for the Court to determine, not the judge. In appropriate cases this would undoubtedly be the position.

In Robson (1972) 56 Cr. App. R. 450 this matter was discussed and the following passage appears at p. 452:

> "If in regard to a confession, the issue is not whether it was made voluntarily but whether it was made at all that question is solely for the jury's determination; the trial judge has no part to play except to sum up the matter to them."

In the Supreme Court of Fiji in R. v. Fateh Mohammed & Others (Criminal Case 11 of 1974) Tuivaga J. as he then was made certain observations to the same effect. On appeal to this Court under the name Hassan Mohammed & Others v. R. (Criminal Appeals 58, 59 & 60 of 1974) this matter was discussed at length. The Court, after referring to Robson agreed that if the sole question was whether or not the statement was actually made it was a matter for the Court and not for the judge alone. Reference was made to an earlier decision of the Court in Barmanand v. R. (Appeal 37 of 1967) to the effect that the two issues of whether the statement was made and whether it was voluntary can seldom be severed, and when they cannot, a trial within a trial must be held to determine admissibility.

Defences in criminal trials are sometimes on alternative and conflicting lines. A judge is obliged to deal with all possible defences regardless of the tactics taken by the conduct of the defence in merely pursuing one.

So here the trial judge had to face the possibility that the denial of accused in fact making the confession might be rejected, but voluntariness of confession must be proved by the prosecution - hence the period of questioning, the possibility of inducement and many other factors were raised which could be relevant to the question of admissibility. As in Barmanand so here it was necessary for a trial within a trial to be held.

Mr. Koya very clearly put before us the tests which have been approved by the Courts in determining the admissibility of a confessional statement. The classic observation which has stood for many years, of course, is contained in Lord Sumner's speech in Ibrahim v. The King (1914) A.C. 599. There has been the recent and most helpful examination of the same matters in The Director of Public Prosecutions v. Ping Lin (1975) 3 All E.R. 175. In particular it is emphasised that the onus is on the prosecution to show that the confession was voluntary in the sense that it was not obtained from him either because some person in authority excited fear of prejudice or held out hope for advantage as a result of which it could be said that the confession was not the product of a free will but was the consequence of the suspect's power of determination being overborne. It is also set out in the later case as has frequently been said that an appellate Court should not disturb a judge's findings unless it is satisfied that a completely wrong assessment of the evidence has been made, or the correct principles have not been applied.

The complaint which is made in the present instance is based upon an analysis of the ruling given by Dyke J. at the conclusion of the trial within a trial (which took two days). There the judge recited the challenge and said that the allegation that threats or violence or inducement or promises were not raised but merely that the defence had said quite simply that the accused did not make the statements. It was alleged that they were concocted by the police and accused was induced to sign them believing them to be nothing more than an exulpatory interview on same lines as previously given. The judge totally rejected the claim by the appellant that this had occurred. He said that he had no hesitation in accepting the prosecution evidence that the accused had said what he had, that it had been read over to him and had agreed

to it and signed it. That really was the end of the matter for the challenge made either stood or fell on the single issue of credibility which was resolved decisively against the appellant. The learned judge however obviously was bearing the underlying principle in mind when he went on to say that he was satisfied that the statements were freely and voluntarily made.

Now most of the submissions which were advanced against this ruling recited matters which were not referred to in detail by the learned judge. There is no record to show how much of this was put to the judge. We think it desirable to say, however, that challenges to admissibility of this sort are common occurrences in the criminal Courts. The ruling which is attacked is that of an experienced trial judge who used his words with precision, and in this context a finding that statements were "freely and voluntarily made", has a particular and technical meaning. It indicates that the judge has listened to the challenges which have been levelled and turned his mind to the appropriate question. We will, however, deal with the major points put to this Court, to see if there is any ground for holding that evidence has been wrongly assessed or principles wrongly applied. First there was a suggestion that appellant had been induced to sign by a promise that he would be given back his things and allowed to go home. He was disbelieved. There was evidence concerning attempts by a solicitor to ascertain what was going on that afternoon at Sigatoka Police Station. The appellant already had a solicitor acting for him, Mr. Kuver. On the day in question Mr. Kuver was apparently away. Apparently appellant's father became aware that his son had gone with the policeman to the Police Station so he asked Mr. Pillay, solicitor of Nadi, to find out what was going on in case he was "ill treated". Mr. Pillay rang the Sigatoka Police Station and spoke to some policeman who had just come on duty. He said that he was a solicitor and trying to locate Ajendra Singh. The policeman did not know of the matter but said he would enquire. Although Mr. Pillay rang on two or three occasions he was unable to find out whether the appellant was at the Police Station. He was endeavouring to speak to the police officers whom he correctly thought were interviewing Singh but he was unable to get hold of him.

There is room for the view that the policeman who was answering the telephone was being less than co-operative. Later Mr. Pillay deputed another

solicitor, Mr. Reddy, to go to the Police Station and he did this at about 6o'clock. At that time the appellant's interview had been terminated. On this basis Mr. Koya had submitted that the police were acting in breach of recognised practice of the common law that a suspect should not be prevented from seeing his legal adviser if he seeks one. Similar provisions are contained in the introduction to the Judges' Rules at paragraph (c) and in the Constitution of Fiji Clause 5(3) relating to persons under arrest and there are similar provisions in the Royal Fiji Police Force Standing Order No. 768 relating to persons in custody. Courts have on many occasions in this and other jurisdictions expressed censure of police who refused requests from persons whom they are interviewing for a solicitor to be summoned, and conduct of this sort may well be relevant as a factor in exercising a discretion to exclude a statement on the ground that it was unfairly obtained. Nevertheless that situation did not emerge here. There is nothing to show that the appellant was unwilling to talk to the police or that he asked for his solicitor. At its worst the situation is that a solicitor briefed by appellant's father to find out what was going on, may have been somewhat obstructed. We do not think that this amounts to any degree of unfairness or oppression in what took place between Sgt. Raju and appellant to the extent that the learned judge ought to have exercised his discretion to exclude.

Another submission of unfairness was made by appellant's counsel in this Court concerning the production of two of the witnesses namely, Kamla Wati and Hari Narayan who spoke briefly in the presence of the appellant as to what they claimed to have seen, of activities at the appellant's house on the night of the 11th and morning of the 12th. The submission here is that it is improper to confront a suspect with witnesses, that it is contrary to the spirit of the Judges' Rules and may lead to improper practices. We do not accept this submission.

It is of course clear that there is nothing improper in questions being put to a suspect as to what evidence there is against him and witnesses may be quoted as to what they have said concerning his actions. Provided restraint is observed and the situation does not degenerate into bullying tactics or harassment, it appears that it

is not only permissible but also may be desirable in the interests of justice that a suspect can see the witness and hear him or her speak so that there can be no room for misunderstanding or mistake as to the matter upon which he is being questioned. Although counsel was unable to cite any authority in support of his submission that this practice was undesirable there have been numerous cases before this Court where this procedure has been approved; we need only refer to one case Tara Chand v. R. Vol. 14 F.L.R. 73, at page 79 where the practice was discussed and approved. Reference is also made to certain English and Australian authorities to the same effect. We are satisfied there was nothing objectionable in the procedure adopted.

Ground 3 (as amended) and Ground 4 refer to the onus of proof of voluntariness concerning confessions and the evidence given by defence witnesses at the trial within a trial other than the appellant. It has been convenient to deal with these in the discussion of Ground 2 and for the reasons there given we do not see any error along the lines suggested.

Ground 5 relates to the evidence of the Pathologist Dr. Gounder who had conducted the post mortem at approximately 8.30 a.m. on the 13th of December. He expressed the opinion that death had occurred twenty four hours earlier with a possible variation of two or three hours either way. The submission made is that the judge erred in not directing the assessors that this raised a doubt as to the Crown case because it put the events of midnight 11/12th December outside the suggested time. A simple answer to this is that the assessors and the judge had heard the evidence. It will be remembered that in the appellant's statement he had poured benzine or kerosene over his wife's unconscious body on two occasions, once at about midnight and the second time on the morning of the 12th of December. Who is to know which burning was fatal? There is a possibility that the deceased survived the first one and that the second incident was the crucial one, in which case of course the timing would be in accord with the medical evidence, and that was a view which the assessors and the judge were entitled to adopt. On the basis of death at the earlier time however it is to be noted that the learned judge drew the assessors' attention to this discrepancy in the prosecution case. But it was for the Court as a matter of fact to determine.

The doctor's evidence was as to his opinion. Hari Narayan's was of his observation. The summing up drew attention to the discrepancy - it was not required to do more.

Ground 6 is a submission that there was a misdirection on the question of onus of proof in the sixth paragraph of the summing up. A sentence is quoted:

> "Put at its highest it is sufficient for his purposes if he merely raises a reasonable doubt in your minds as to the prosecution case."

And in the thirtieth paragraph:

> "It is sufficient for his purposes if he merely raises a reasonable doubt in your minds."

It has been said time and again that a summing up must be read as a whole and it is quite wrong to take one or two phrases in isolation and examine them away from their context. The two passages just quoted are in paragraphs where the judge had given immaculate directions on onus of proof stressing that the accused did not have to prove anything. Read in context it is perfectly clear that the summing up was entirely proper and we approach the matter in the same way as this Court did in Ali Hassan and Others v. R. F.C.A. Cr. App. No. 57 of 1977. We refer in particular to pages 27 and 28 of that judgment and the reliance there placed on the judgment of the House of Lords in Bullard v. R. (1957) A.C. 635 at 645:

> "But there is no magic formula and provided that on a reading of the summing up as a whole the jury are left in no doubt where the onus lies no complaint can properly be made."

Ground 7 is that a direction was called for that it would be unsafe and unsatisfactory to convict merely on two confessional statements. No argument was advanced in support of this written ground. It is indeed not in accordance with the law. Many cases depend solely upon confessional statements - see R. v. Sykes (1913) Cr. App. R. 233 and McKay v. The King (1935) 54 C.L.R. 1. But in any event there was a quantity of other circumstantial evidence which pointed strongly to the appellant.

The eighth ground of appeal is that the sentence was excessive and in all the circumstances we are not satisfied that this is made out. Accordingly the appeal is dismissed in all respects.

(Sgd.) C.C. Marsack
Judge of Appeal

(Sgd.) G.D. Speight
Judge of Appeal

(Sgd.) B.C. Spring
Judge of Appeal