IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

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CRIMINAL APPEAL NOS 1 & 2 OF 1991
(Criminal Case No. 15 of 1990)

CRIMINAL APPEAL NO. 1 OF 1991

BETWEEN:

JAY MATI
(d/o Anubhaya Nand) Appellant

and

THE STATE Respondent

CRIMINAL APPEAL NO. 2 OF 1991

BETWEEN:

THE STATE Appellant

and

NARAYAN SINGH Respondent
s/o Jang Bahadur Singh

Mr I. Mataitoga for the State
Mr H. Sharma for the Appellant Jay Mati and
Respondent Narayan Singh

Date of Hearing: 11th March, 1992, 25th June, 1992
Delivery of Judgment: 3rd July, 1992

JUDGMENT OF THE COURT

Jay Mati (Appellant in Criminal Appeal No. 1 of 1991) and Narayan Singh (the Respondent in Criminal Appeal No. 2 of 1991) were jointly charged with the offence of murdering one Davendra Dutt (husband of Jay Mati) at Nadi between the 1st and 2nd March, 1990. They were tried before Mr Justice Michael Saunders at

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Lautoka High Court in January 1991 with the aid of 5 assessors. In the trial in the High Court Narayan Singh was Accused 1 and Jay Mati was Accused 2.

It was the prosecution's case that the 2 accused were lovers and they planned to kill Dutt so they could live together and that in pursuance of the plan the 2 accused strangled the victim with a piece of rope and then hung him by the neck from a mango tree thus giving the impression of suicide by hanging.

The question of voluntariness of Narayan Singh's interview statement to Police which allegedly contained a confession arose right at the outset of the prosecutions's case. In asking for a trial within a trial the Prosecutor said -

> *"That is my position. If these statements are inadmissible, I cannot proceed. There are no other issues or evidence sufficient to prove my case."*

Eight prosecution witnesses unrelated to the question of the challenged statements were heard before the voir dire commenced. The objection to the interview statement of Narayan Singh was based on the ground that it was obtained as a result of the threats and assaults. However, Mr H. Sharma, counsel for Narayan Singh and Jay Mati stated - *"I do not request that assessors retire. I want them in Court for both voir dires".*

The learned judge having ruled that the assessors can remain in Court then proceeded to conduct a trial within a trial. He relied on Ajodha v The State and Other Appeals (1981) 2 All ER 193 for his decision to allow the assessors to remain in Court. But he advised the assessors that they were not to take part in deciding admissibility or otherwise of the statements. We are mindful of the fact that the Prosecutor at the crucial stage did say - *"Contraversial evidence from now on. Assessors should retire perhaps"*. However, no objection as such was taken to the proposed course.

At the conclusion of the trial within a trial the trial judge ruled that both the interview and the charge statements of

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Narayan Singh were inadmissible. He said that the whole atmosphere and situation of obtaining the confession was suspect and he found it difficult to believe that it took six and three quarter hours to record the interview which can be read in 8 minutes. Further at p.24-5 of the trial record he held -

> *"I am unable to decide the truth or otherwise of the other allegations of assault made by A1. I am also unable to say beyond reasonable doubt that A1's interview and charged statements were made without any threats or inducements by the police. All the circumstances suggest otherwise.*
>
> *I must rule that both the interview and the charged statements of A1 are inadmissable".*

As the prosecution had no other evidence to offer the learned trial judge acquitted the 1st accused in the presence of the assessors and set him free. It is against this acquittal that the State has lodged an appeal.

The trial of the second accused, Jay Mati, proceeded after the acquittal of Narayan Singh.

The defence also objected to the admissibility of her statement to the Police and the judge again conducted a trial within a trial in the presence of the assessors but there is no record to suggest whether the defence counsel was asked whether he wished the assessors to remain in Court. However, it is a matter of record that Mr Sharma had earlier asked that assessors remain in Court for both the voir dires. Jay Mati's complaint was that she was intermittently assaulted by several Police officers, that her confession was not voluntarily given and there were fabrications in her statements. The learned trial judge disbelieved her and admitted in evidence both her interview and charge statements.

After the summing-up all 5 assessors expressed the opinion that she was not guilty. The learned judge rejected their unanimous opinion and found her guilty as charged. He imposed on her the mandatory sentence, namely life imprisonment.

Jay Mati has appealed against her conviction on a number of

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grounds and we shall refer to them when we deal with her appeal.

It might be convenient to consider the State's appeal against the acquittal of Narayan Singh first because Mr Mataitoga, the learned Director of Public Prosecutions, has categorically stated that the State's stand against Jay Mati's appeal against conviction would be same as taken by him in respect of the State's appeal against acquittal of Narayan Singh. In both cases he submitted that the trial judge erred in law in holding a voir dire in the presence of the assessors, and, therefore, the trial was a nullity and a new trial was called for. He contended that the State's appeal as well as Jay Mati's appeal should be allowed and a new trial ordered in the interest of justice.

Criminal Appeal No. 2 of 1991
(State v Narayan Singh)

The State has appealed to this Court against Narayan Singh's acquittal on a question of law only by virtue of the newly acquired right of appeal given to it by Section 21(2)(a) of the Court of Appeal Act (Amendment) Decree 1990, which reads as follows:

> *"(2) The State on a trial held before the High Court may appeal under this Part to the Court of Appeal-*
>
> *(a) against the acquittal of any person on any ground of appeal which involves a question of law alone;...."*

The State's grounds of appeal read as follows:

> *"1. The only evidence against the accused (Respondent) was the admissions made by him to Police Officers in his 'interview' and charge statement made on 30th March 1990. The Judge held a trial within a trial for the purpose of determining the admissibility of the said statements in the presence of the five assessors chosen to hear the case. At the conclusion of the evidence given on behalf of the prosecution and the defence the Judge ruled the statements to be inadmissible without giving any reasons therefor.*
>
> *The questions of law upon which this appeal is lodged are:-*
> *(a) The hearing of a trial within trial to determine the admissibility of the statements of the accused in the presence of the assessors is contrary to law.*

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(b) The trial Judge failed to comply with the mandatory requirements of Section 155(1) of the Criminal Procedure Code which requires a judgment to contain the points for determination of the decision thereon and the reasons for the decision."

(a) re Conducting a trial within a trial in the presence of the assessors

We are satisfied that it has been the normal practice in Fiji for the High Court judges to conduct a trial within a trial in the absence of the assessors and to give his ruling in their absence also. East African cases also indicate that the normal practice there was to hold a trial within a trial in the absence of assessors and the East African Court of Appeal regarded the practice as "desirable".

Needless to say admissibility is an issue of law to be determined by the judge alone. We, however, recognise that when adjudicating on admissibility where voluntariness is in issue the judge is both a tribunal of fact and law.

However, does departure from the normal practice make the procedure contrary to law? The Director's argument is two pronged - one is that the departure makes the trial highly prejudicial and therefore it is contrary to law and two, that non-conformity with a settled and recognised practice (which, he submits, has acquired the status of a rule of law) is also contrary to law.

We are of the view that the practice to hold a trial within a trial in the absence of the assessors is essentially a device to safeguard the interests of an accused person, i.e. from any prejudicial effect it might have if the assessors heard the evidence given on the voir dire as to the admissibility of the impugned statement. Similarly their minds could be prejudicially affected if they heard the judge's ruling where he admits the challenged statement as voluntary. There could be enormous prejudicial effect if the judge rules the incriminating evidence as inadmissible and the prosecution nevertheless proceeds to tender other evidence in an endeavour to secure a conviction. Such was not the case here.

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Let us, therefore, first consider whether there was any prejudice or unfairness to the Accused Narayan Singh, or to the State resulting in a substantial miscarriage of justice.

As regards the Accused Narayan Singh, we feel there was no question of any prejudice or unfairness to him -

(a) because his counsel actually requested that the assessors remain in Court as, presumably, it was of tactical advantage to the defence to do so;

(b) that in any case the impugned statements were ruled inadmissible and there was no occasion for the prejudicial effect to come into play because the assessors did not have to consider the probative value of the statements;

(c) no other evidence to further the prosecution's case was offered and the accused was acquitted.

As regards the State, we cannot see how they were put at a disadvantage or prejudiced. Clearly there is no likelihood that the judge would have come to a different conclusion had he held the voir dire in the absence of the assessors. There was no objection from the prosecution to the proposed procedure and the judge was not breaching any written law. He did not abdicate his function - he alone decided the question of admissibility as a question of law. The assessors played no part in it. Indeed he clearly asked them not to participate.

As observed earlier the trial judge relied on the case of Ajodha v The State (already cited) which in our view supports the course he took. This is a Privy Council case arising from an appeal from the Court of Appeal of Trinidad and Tobago a former British Colony. In it their Lordships (per Lord Bridge) made the following observations which are relevant to our circumstances although we have the assessor and not the jury system in this country -

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"Their Lordships would certainly not attempt to lay down an exhaustive code of procedure intended to cover every contingency, but here again it may be helpful to practitioners in some jurisdictions where difficulties seem to have been encountered if they indicate their understanding of the appropriate procedure in a number of not uncommon situations.

1. In the normal situation which arises at the vast majority of trials where the admissibility of a confession statement is to be challenged, defending counsel will notify prosecuting counsel that an objection to admissibility is to be raised, prosecuting counsel will not mention the statement in his opening to the jury, and at the appropriate time the judge will conduct a trial on the voir dire to decide on the admissibility of the statement; this will normally be in the absence of the jury, but only at the request or with the consent of the defence: see R v Anderson (1929) 21 Cr App R 178.

2. Though the case for the defence raises an issue as to the voluntariness of a statement in accordance with the principles indicated earlier in this judgment, defending counsel may for tactical reasons prefer that the evidence bearing on that issue be heard before the jury, with a single cross-examination of the witnesses on both sides, even though this means that the jury hear the impugned statement whether admissible or not. If the defence adopts this tactic, it will be open to defending counsel to submit at the close of the evidence that, if the judge doubts the voluntariness of the statement, he should direct the jury to disregard it, or, if the statement is essential to sustain the prosecution case, direct an acquittal. Even in the absence of such a submission, if the judge himself forms the view that the voluntariness of the statement is in doubt, he should take the like action proprio motu.

3. It may sometimes happen that the accused himself will raise for the first time when giving evidence an issue as to the voluntariness of a statement already put in evidence by the prosecution. Here it will be a matter in the discretion of the trial judge whether to require relevant prosection witnesses to be recalled for further cross-examination. If he does so, the issue of voluntariness should be dealt with in the same manner as indicated in para 2 above.

4. Particular difficulties may arise in the trial of an unrepresented defendant, when the judge must, of course, be especially vigilant to ensure a fair trial. No rules can be laid down, but it may be prudent, if the judge has any reason to suppose that the voluntary character of a statement proposed to be put in evidence by the prosecution is likely to be in issue, that he should speak to the defendant before the trial begins and explain his rights in the matter." (See from g on page 202 to c on page 203.)

For our purposes the most important part of the above quotation is contained in paragraph 1 where their Lordships say - "and at the appropriate time the judge will conduct a trial on the voir dire to decide on the admissibility of the statement; this will normally be in the absence of the jury, but only at the request or with the consent of the defence: see *R v Anderson (1929) 21 Cr App R 178*".

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It will be useful to bear in mind that until Fiji was declared a Republic in 1987 Privy Council decisions constituted the highest judicial authority for the Fiji Courts.

With respect we are unable to agree with the Director's submission that Ajodha's case can be distinguished from the instant case because in Ajodha's case *'admissibility issue arose not because of any suggestion of "involuntariness" due to duress, oppression, etc. but whether the signature at the bottom of the statement belongs to accused'*. We note that Ajodha had contended throughout in his trial that he was threatened and beaten by the Police into signing a preprepared statement. Their Lordship therefore held that *"if the voluntary character of the signature is challenged, this inevitably puts in issue the voluntary character of the statement itself"*. (See h at p.200.)

We are not persuaded that what the trial judge did in this case was in fact contrary to law resulting in a mistrial or a nullity which calls for a new trial. This is not to suggest what happened was not contrary to normal practice in Fiji. On the other hand no written law had been breached and there is no authoritative Court decision to say that to hold a trial within a trial in the presence of the assessors at the request of the defence is contrary to law and must in every case inevitably result in a mistrial calling for a trial de novo. On the contrary the trial judge cannot be criticised for relying on the Privy Council decision and guidelines in the Ajodha case. However, this does not prevent us from enquiring if in fact a substantial miscarriage of justice occurred. This we have done. We are satisfied that on the particular facts of this case no substantial miscarriage of justice has resulted. We, therefore, dismiss the first limb of the State's appeal against acquittal of Narayan Singh.

(b) re Failure to comply with Section 155 of the C.P.C

We now turn to the second limb of the State's appeal namely that the trial judge failed to comply with the "mandatory"

requirements of Section 155(1) of the Criminal Procedure Code which requires a judgment to contain the points for determination of the decision thereon and the reasons for the decision.

The relevant parts of Section 155 of the C.P.C. read as follows:-

> *"155.-(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the court in English, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it:*
>
> *Provided------*
>
> *(2)----------*
>
> *(3) In the case of an acquittal the judgment shall state the offence of which the accused person is acquitted and shall direct that he be set at liberty."*

In dealing with this aspect of the appeal we are proceeding on the basis that the Director is not complaining about any alleged failure on the part of the judge to comply with subsection (3) of Section 155 of the C.P.C. We shall, therefore, confine ourselves to the following alleged omissions -

(i) failure to state the point or points for determination of the decision;

(ii) failure to give reasons for the decision.

It is true that no separate judgment was written by the trial judge for the acquittal. But he did deliver a written ruling giving his reasons why he was not admitting the 2 statements in question. Thereupon the Prosecution stated that it had no further evidence against A1. The judge then said - *"In that case, Assessors, I direct that A1 shall be acquitted and be set at liberty"*. It will be recalled that all this took place in open Court in the presence of the assessors although they were not participating on the voir dire.

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It will also be recalled that right at the outset the Prosecution had made its position clear namely that if the statements are inadmissible it cannot proceed because it had no *"other issues or evidence sufficient to prove its case"*.

There are two reported High Court decisions in Fiji in both of which it was held that failure to strictly comply with the provisions of Section 155 of the C.P.C. was not fatal and that since no miscarriage of justice had occurred in the Magistrates' Court the proviso to Section 325 of the same Code would be applied.

The first case is that of Ram Dayal v Reginam 7 FLR 25 in which the trial magistrate had failed to use the word "convicted" and had also failed to specify the offence of which and the section under which he had convicted the Appellant.

The second case was that of Hasan Raja v Reginam 10 FLR 1. In this appeal the then Acting Chief Justice Hammett held -

> *"That by his reference to the charge the magistrate had made plain the section under which the appellant was convicted, and the date of the judgment was ascertainable from the record of the case. Failure to comply strictly with section 155 of the Criminal Procedure Code had therefore occasioned no miscarriage of justice whatever and the proviso to section 325 of the Code would be applied."*

Although both of these were 'conviction' cases and although they were High Court decisions we are of the opinion that the same principles apply to the present appeal involving acquittal.

It is true that the trial judge did not set out the points for determination nor did he in so many words give the reasons for the acquittal. We, however, feel these are curable defects and hold that the failure to strictly comply with Section 155(1) of the C.P.C. did not occasion any miscarriage of justice at all.

The points for determination and the reasons for the acquittal are patently clear once the only evidence on which a

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conviction could be founded is excluded as inadmissible. There was nothing left for trial to proceed with. What the trial judge did in effect was to withdraw the case from the assessors and acquit Narayan Singh of the only offence charged. We therefore have no hesitation in applying the proviso to Section 23 of the Court of Appeal Act as repealed and replaced by the Court of Appeal Act (Amendment) Decree 1990.

It follows that the second limb of the State's appeal must also fail.

As we have held that the trial was not a nullity the question of ordering a new trial does not arise.

In the final outcome therefore the State's appeal against acquittal of Narayan Singh in Criminal Appeal No. 2 of 1991 is dismissed.

re Criminal Appeal No. 1 of 1991 - Jay Mati v The State

The following grounds of appeal against conviction have been lodged on behalf of the Appellant Jay Mati:

"1. THAT the learned trial Judge failed to consider medical evidence of Dr Gounder which states that the death of Davendra Dutt was no different from death caused by hanging and erred in fact in concluding that the Appellant had murdered the deceased.

2. THAT the learned trial Judge erred in law in failing to consider other police improprieties raised by the Appellant at her trial and confined his finding to the fact that the police officers had not fabricated the evidence.

3. THAT the learned trial Judge erred in law in failing to consider whether or not the confessions allegedly made by the Appellant to the police were made voluntarily.

4. THAT the learned trial Judge erred in law in failing to consider that the effect of caution given by the police officer under the Judges rules may have waned when the Appellant made the alleged confession incriminating herself.

5. THAT whilst admission of accused's confession is a matter of law, weight and reliability of the confession is a question of fact and the assessors having the advantage of sitting throughout the "trial within

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trial" gave no weight and placed no reliability on the Appellant's confession obtained by the police and returned an unanimous opinion of not guilty and the learned trial Judge erred in law in over-ruling the opinion of the assessors.

6. THAT the prosecution case throughout was that the Appellant and one Narayan Singh jointly murdered Davendra Dutt and the learned trial Judge erred in law and in fact in failing to consider that there was no evidence of joint participation by Narayan Singh in the alleged murder of Davendra Dutt.

7. THAT the Appellant's behaviour upon finding her husband hanging from a tree was a question of fact canvassed before the assessors and the learned trial Judge erred in fact in wrongly finding the Appellant's behaviour as a ground for the Appellant's conviction.

8. THAT the decision of the learned trial Judge in convicting the Appellant and over-ruling the unanimous opinion of the five assessors was unreasonable and against the weight of evidence adduced at the trial."

For the reasons given in our judgment in respect of the State's appeal against Narayan Singh (No. 2 of 1991) we hold that the trial of Jay Mati was also not solely by reason of the presence of the assessors at the trial within a trial a mistrial or a nullity. Whilst there was an irregularity there was no miscarriage of justice because all the assessors expressed the opinion that the accused was not guilty. Therefore, the question of ordering a retrial on that ground alone does not arise.

As learned counsel for the Appellant, Jay Mati, made reference to a substantial part of the judge's summing-up it will be useful to quote the whole of summing-up before we deal with the grounds of appeal:

SUMMING UP

The Accused was charged jointly with Narayan Singh with the murder of her husband, Davendra Dutt.

As pointed out by the State Prosecutor, the only evidence against each was the record of interview and charged statement.

It must be clear to you all that the main thrust of the defence would be to exclude these statements, and in the case of Narayan Singh, the Court held that it was not safisfied with the manner in which they had been obtained, and by law, he must be acquitted.

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The evidence against Accused is her recorded interview, question and answer, and her charged statement. In each she sets out clearly how and why she murdered her husband. Whether she did it with Narayan Singh or not, is now irrelevant. You must decide, beyond reasonable doubt, whether her answers and her statement tell the truth. If you decide that they do, she is guilty. If you have any reasonable doubt that they do, you should find her not guilty.

The post mortem report said "Asphyxia due to hanging". The doctor concerned could not possibly have known what caused the asphyxia. In evidence, another doctor also said asphyxia due to hanging but he was reading the report.

He then said "Obstruction to airways" and that the constriction was usually below the trachea, but not in this case, so you should examine the sketch plan which should tell you whether the deceased hanged himself or not. You will note that the dead man was 5'2" tall and from his neck was 4' of rope. This was attached to a lower branch which was 6'2" above the ground. If you imagine the man standing perpendicularly below the branch, on the ground, you will realise that there is 3' of extra rope between him and the branch, and by no stretch of the imagination could his head have been 3' in length. So there is no "drop". To hang himself, he would need to fall and stop without touching the ground.

He could not do this, and the last two photographs taken of the dead man as he was found, show clearly that he could not have hung in the air. His body is on the ground from the waist down. In fact, he appears to be sitting.

So I suggest that the evidence clearly shows he did not hang himself.

Then there is the reaction of Accused upon finding her husband in that position under the mango tree. I emphasise, in that position. What would you have expected a wife with a loving husband to have done on seeing him in that position? Would she have rushed to him to hold him up and to see what is the matter? or would she have come "not too close" and when he did not answer her question, take her young daughter and go to her neighbour's house with a report that her husband had hanged himself?

Now I turn to the Statements.
As defence counsel has said, you must decide the reliability of their contents. The Accused, giving evidence, said that the answers to the questions in the interview were made up by the officer recording the interview. But this officer was never challenged on this point. It was never put to him that he made up the answers, the challenge was that Accused was forced to make the statement as a result of threats. Can it be that only at this last minute, whilst giving evidence, did Accused decide to say that the answers were false, or did she know all along that the answers were false? You must consider these points.

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Accused then went on to say that perhaps some answers were recorded correctly as she gave them, that is the answers concerning her married life and her children.

You are allowed to consider both statements as a whole, to consider the number of questions, and whether the answers accord with questions. You can also consider the statements separately. You should consider the demeanour of the Accused in the witness box, and decide in your own minds whether she told the truth to the Court, or told the truth in her interview and subsequent charged statement. If there is any reasonable doubt in your minds either way, Accused is entitled to the benefit of that doubt and you must find her not guilty.

You each give your own indidividual opinion as to her guilt or not.'

We now proceed to deal with the grounds of appeal as argued by Mr Harish Sharma.

Ground 1

This ground deals with the medical evidence. Mr Sharma pointed out that Dr Prasad who conducted the whole of the autopsy on the deceased was not available, and so Dr Dhanna Gounder gave evidence on the contents of autopsy report made by Dr Prasad. This report clearly stated that *"cause of death was asphyxia due to hanging"*. And yet, complained Mr Sharma, the learned judge took upon himself to reconstruct the scene where the deceased was found virtually in a sitting position with a rope around his neck and the top end tied to a mango tree. It was the prosecution case that the deceased was strangled with the rope and that he could not have hung himself. For some reason the rope in question was never produced in Court. There is no doubt that the scene as reconstruced by the trial judge in his summing-up (see paragraphs 5 to 8) supported the prosecution case whereas the defence case was that as far as Jay Mati was concerned the deceased had hung himself. As the summing-up clearly shows, the judge did suggest to the assessors that the *"evidence clearly shows he did not hang himself"*. Mr Sharma also pointed out that in order to support his theory the trial judge used the words *"but not in this case"* in the summing-up but they are not to be found in the medical evidence anywhere.

We are not sure whether the Doctor is alleged to have made that observation or whether it is the judge's comment. But we are sure that those words do not appear in the Doctor's evidence nor do they appear in the post-mortem report.

Mr Sharma complained that the trial record is very deficient and notes are very cryptic and sometimes very hard to follow. He pointed out that not a word of his or the prosecution address appear on the record although he says he addressed the Court for at least half an hour. The Director of Public Prosecutions was constrained to agree with Mr Sharma about the general unsatisfactory state of the trial record. We agree that the state of the record leaves much to be desired. For instance, we note that the names and occupations of the assessors were also not recorded when sworn-in. We feel that it is absolutely desirable that the names and occupations of the assessors should be noted in the trial record at the time they are sworn-in. The assessors are an integral part of the trial Court. The Court records should also reveal their presence or absences wherever relevant.

All in all the medical evidence, as recorded, is at best equivocal and yet, from the material before us, it appears that a strained construction was put on it in favour of the prosecution.

Grounds 2, 3, 4, 5, and 8

Mr Sharma dealt with grounds 2, 3, and 4 together. The thrust of his argument was that the confession which was the sole basis of the Appellant's conviction ought not to have been admitted in evidence and if admitted ought not to have been relied on in the absence of any supporting evidence. He argued that there was no proper basis for rejecting the unanimous verdict of the assessors. In fact we propose to examine grounds 2, 3, 4, 5, 7 and 8 together as they overlap and are interrelated. The confession is alleged to have been contained

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in the Appellant's caution interview statement (Ex 4A) recorded by D/Cpl 183 Davendra Vijay and her charge statement (Ex 6A) recorded by PC 1322 Imtiaz Mohammed. Both were recorded at Nadi Police Station on 30/3/90. The defence objected to the admissibility of both these statements on the grounds of assault, oppression and fabrication and a trial within a trial was held in the presence of the assessors. As already pointed out the trial judge ruled these statements to be voluntary and so admitted them. Since the judge's ruling has been attacked on several grounds it will be helpful to reproduce here the ruling in toto -

"RULING *the principles enunciated in respect of the admissibility of previous A1's statement apply equally for A2.*

There are however, very different facts.
A2 came to Police Station voluntarily with her mother. They were shown to his room by Inspe. Chandra and she makes no allegations against him or against the officer who recorded the interview.

Insp. Chandra was present throughout the interview and he denies that any assault took place on A2 either by himself or anyone else.

Insp. Chandra struck me as being a truthful witness and I accept his evidence entirely. This is important because A2 alleges that she was assaulted intermittendly by the other 3 police officers throughout the time she gave her interview record.

She says they came across from the bure, where they were interviewing A1, and beat her.

I do not believe her. I believe Insp. Chandra.

The other accusations by A2 are of assaults by 5 or 6 policemen, including the 3 who gave evidence, that is Cpl Arun Kumar, Sgt Adi Sen and PC Raj Kumar, prior to her going to the shed to give the interview record.

She also made immediate complaint to the Nadi Magistrate and was examined by the doctor, who could not find any injuries.

I believe the police officers. I do not believe that A2 is telling the truth or any part of the truth. The time taken to record her interview has been explained satisfactorily and I am satisfied that she gave the answers to the interview voluntarily, without fear of threats or hope of favours.

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I rule that the interview record and charge statement of A2 are admissible."

The first point that Mr Sharma made about this ruling was that the trial judge misdirected himself on a certain vital evidenciary matter when he said -

"They were shown to his room by Inspe. Chandra and she makes no allegations against him or against the officer who recorded the interview."

Mr Sharma first drew our attention to D/Insp Sushil Chandra's cross-examination at p.25 of the record where he first says, inter alia, *"Deny she was held by hair and dumped on the floor"* and later says - *"Deny a cleaning stick was pointed at corner of the eye and she was told to say what I wanted or she would be shot."*

We then note that in her examination in chief on the voir dire the Appellant is recorded at p.29 as having said as follows:

'Class 3 eduction.

I do not understand English.

Day I was charged I came to Nadi Police Station by myself.

I met Inspector sushil Chandra who took me upstairs and told me to sit there.

Then I was taken by W.P.C. to the bure. All police sitting there I sait in centre. Then all police assaulted me. They made me fall down and they assaulted me. On my neck and on my lips. There was a Fijian P.C. there who tried to protect me and told them not to assaul me. Then they assaulted me further. Raj Kumar and Cpl.

Arun and the PC from Lautoka, Adi Sen all attacked me.

Two held my hands and Cpl Arun pushed a cloth in my mouth and said "if you don't tell anything we shall continue to push this cloth."

Adi Sen pushed a stick in my eyes and told me to tell everything otherwise he would poke my eyes.

Then I was taken to a small hut near the bure. That is where I was interviewed.

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While I was interviewed Adi Sen and Kumar were abusing me. The The other went away and came back again. I made the statements because they assaulted me.

I complained to Nadi Magistrate. I told him 6 PCs assaulted me and sitting on the bench they attacked me.

I went to Nadi hospital. '

In cross-examination the Appellant also said *"They assaulted me."*

We are of the view that the defence case was sufficiently put both by way of cross-examination and in the Appellant's evidence. Unlike the police she is not trained in giving evidence. She cannot be expected to identify each officer by name nor can she be expected to produce any eye witnesses. In short, the contest is very uneven. Bearing in mind that the recording of the evidence is, at places, patently sketchy we are left in considerable doubt whether the defence case received fair treatment especially in the light of the alleged misdirection as to Appellant's evidence on the voir dire.

We are also not sure whether the trial judge fell into the error of judging credibility solely on the basis of demeanour. It is not in dispute that the Appellant is a person of very limited education. She was alone in strange company surrounded by men of authority. The interview alone took over 7 hours during which time 179 questions were put to her. She also made a complaint of assault to a Magistrate at the first opportunity.

We also note that notwithstanding the peremptory and emphatic terms in which the judge rejected the Appellant's evidence as untruthful in the presence of the 5 assessors, they nevertheless took only 15 minutes after the summing-up to unanimously express the opinion that the accused was not guilty. (See grounds 5 and 8.) And this they did inspite of the judge's suggestion that the deceased could not have died from hanging and inspite of the judge's inference that the Appellant's reaction upon seeing the dead body of her husband was not

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consistent with innocence. Can we escape the inference that the assessors as judges of fact and credibility could place no weight and reliability on the confession and hence had no hesitation in coming to the view that the prosecution had failed to satisfy them beyond reasonable doubt that she was guilty as charged? We are aware that in our assessor system of trial the trial judge is the ultimate adjudicator of both fact and law and that under our Criminal Procedure Code he is not bound to accept the opinion of the assessors. We also note that he has given his reasons for rejecting the assessors' opinion but we cannot rule out the possibility that the trial judge having pronounced on the voir dire held in the presence of the assessors his emphatic adverse view of the Appellant's credibility that he found it difficult to come to another view at the conclusion of the trial proper or at least to give her the benefit of any doubt. It will be recalled that on the voir dire he stated, inter alia - *"I believe the police officers. I do not believe that A2. is telling the truth or <u>any part of the truth</u>"* (our underlining). The following quotation from this Court's judgment in <u>Ganga Ram & Another v R.</u> in Criminal Appeal No. 46 of 1983 is apposite:

> *"However in the trial within a trial situation in criminal cases, it is sometimes inevitable that a Judge will be obliged to take an adverse view of the accused person's credibility at a stage part-way through a trial; the pronouncement of his ruling will, of necessity, disclose that fact. Hence the need for particular restraint at that stage. This is especially so in the assessor system as it prevails in this country, for the Judge is part of, indeed may be the ultimate, fact-finding tribunal."*

In view of the conclusion we have come to we do not find it necessary to deal with ground 6 of the Appeal . As we are empowered to deal with this appeal *"by way of rehearing"* and draw inferences from established or uncontested facts, we have come to the clear conclusion, after having reviewed the whole of the evidence, that the Appellant's case did not receive fair treatment and evaluation either on the voir dire or in the summing-up. Further, we are of the view that in the particular circumstances of this case the learned judge ought not to have

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rejected the unanimous opinion of the 5 assessors, whom he had advised - *'If there is any reasonable doubt in your minds either way, Accused is entitled to the benefit of that doubt and you must find her not guilty.'* This is precisely what they did. There is no suggestion in the learned judge's judgment that the opinion of the assessors is perverse or even unreasonable.

We are also of the view that where prosecution relies entirely on challenged confession made in the presence of police officers after lengthy questioning it is desirable to exercise considerable caution before convicting. The need for such caution becomes extreme if all the assessors are of the view that the accused is not guilty notwithstanding the admission of the challenged confession.

The cumulative effect is that we are unable to hold that no substantial miscarriage of justice has occurred in this case. The Appellant is, therefore, to have the benefit of any reasonable doubt.

In dealing with determination of appeals and application of the proviso as they exist in England Archbold (43rd Ed) in para 7-9a at page 939 says -

> *'In any given trial, there may have been an irregularity, but not one which the Court of Appeal deems to have been "material" when considered in isolation----. There may also have been a wrong decision of a question of law, but again, considered in isolation, not one which would demand that the judgment of the court of trial be set aside----. Taken together, however, they may combine to render a conviction unsafe or unsatisfactory ----.'*

We have adopted the same line of approach here as in Archbold in regard to our own provisions and are of the opinion that in view of our finding the application of the proviso is not called for. Nor are we persuaded that the interests of justice require ordering of a new trial.

Consequently, we allow the appeal, quash the conviction and direct that a verdict of acquittal be entered in lieu thereof.

The Appellant Jay Mati is to be set free.

.....
Justice Michael Helsham
President, Fiji Court of Appeal

.....
Sir Moti Tikaram
Resident Judge of Appeal

.....
Sir Mari Kapi
Judge of Appeal