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

CRIMINAL APPEAL NO. AAU0016 of 2004S
(High Court Criminal Action No.HAC0014 of 2001L)

BETWEEN:

SWADESH KUMAR SINGH

Appellant

AND:

THE STATE

Respondent

Coram: Smellie, JA
Penlington, JA
Scott, JA

Hearing: Tuesday, 22 November 2005, Suva

Counsel: Mr A.K. Singh for the Appellant
Mr K. Tunidau for the Respondent

Date of Judgment: Friday, 25 November 2005, Suva

JUDGMENT OF THE COURT

Introduction

[1] This is an appeal against conviction for murder. The assessors unanimously found the appellant guilty of murder on the 20 February 2004. Later on the same day the trial Judge Govind J. sentenced the appellant to life imprisonment with the minimum parole of 17 years.

[2] The appellant was charged with the murder of Sandhya Devi the wife of Narendra Prasad. The deceased and her husband had two children. The murder was alleged to have taken place at the home of the deceased and her husband on the 18 April 2001 between 10 am and 4.15 pm in the afternoon.

[3] At 4.15 pm on the day of the murder the deceased husband son and daughter returned to the house at about 4.15 pm. The daughter and father entered the house. On opening her mother's bedroom door the daughter found her mother with her throat cut lying in a pool of blood.

The Background Facts

[4] Initially the appellant was charged with Shalendra Narayan. Subsequently the charge was withdrawn against Narayan after the State granted him immunity and he then gave evidence against the appellant. The case was heard before a Judge and three assessors the evidence taking some six days, addresses of counsel two days and the Judges summing up one day. Because there had been delays between the taking of some of the evidence, the addresses of counsel and the Judges summing up, His Lordship elected to a read almost all the evidence (examination and chief cross examination and re-examination) to the assessors. Inevitably the summing up was very long. Nonetheless as the evidence started in early December of one year and did not complete until early February of the following year the decision to read the evidence was understandable.

The State's Case

[5] The State's case depended primarily on the evidence of the accomplice Shalendra Narayan who according to his evidence was with the accused at the time he cut the victim's throat. It also depended on the evidence of Bimlesh Prasad alias Pillu who claimed that on the day of the murder the appellant had requested him to accompany him to the home of the victim the appellant saying he wished to have

sexual intercourse with her. Pillu's evidence was that he refused to accompany the appellant and that later in the day the appellant spoke to him saying he had killed the deceased, and threatened that if Pillu said any thing he would kill him, his wife and his children. The State case also depended on the evidence of Maya Wati who assisted with domestic duties in the appellant's household and was able to give evidence that on the day of the murder shortly after the appellant had washed in a tub she noticed that the water was red although she had not been washing any clothes from which the red colouring could have escaped. There was no confession from the appellant but there was forensic and photographic evidence that set the scene and established the cause of death. In addition however, there was an admission against interest made by the accused to two police officers although the significance of the admission was not appreciated by the prosecution until some 2 ½ years after the murder and some short time before the trial. So the State was able to call an eye witness of the murder by the appellant; another witness to whom the appellant had admitted guilt; the maid who observed the red colouring of the water after the appellant had washed on the day of the murder and the two police officers to whom the appellant made a significant statement against interest. The prosecution was also able to call a witness to refute an alibi which the appellant advanced.

The Defence Case

[6] The appellant's defence was that he denied that he was the murderer. He alleged that the evidence against him had been fabricated by the accomplice Narayan and by Pulli (also alleged by the defence to be an accomplice) and that the maid, who resiled from her police statement, should not have been declared hostile. Also that the evidence of the two police officers was inherently unreliable because it came to light so late. In addition the appellant put forward an alibi that at the alleged time when the murder took place he was elsewhere. His contention was that he was with an old friend drinking grog at that time. The old friend had since died but his

widow was called by the police to say that he had not been with her late husband on the day of the murder.

The Grounds of the Appeal

[7] The appellant's eight grounds of appeal may be summarised as follows:

(1) The Judge failed to direct correctly on corroboration especially in relation to the acknowledge accomplice Narayan but also in relation to the other alleged accomplice Pillu.

(2) The Judge failed to direct properly on the effective contradictions in the testimony of various State witnesses.

(3) The Judge erred in law and failed to follow the correct procedure in declaring the witness Maya Wati hostile.

(4) The fourth ground alleged a series of short comings in the Judge's summing up especially in relation to the two police officers whose evidence came to light late, but in addition the significance of the forensic evidence, the absence of motive and the unreliability of evidence called to rebut his alibi. This "rolled up" ground however, was argued in conjunction with ground number 7.

(5) That the Judge failed to give a direction on the question of lies which had been raised by the State in the closing submissions.

(6) That the Judge's directions were not clear and intelligible and were confusing and thus there has been a miscarriage of justice.

(7) (This ground to be run in conjunction with 4 above). That the Judge erred in law and in fact when he failed to put the appellant's case properly and sufficiently to the assessors.

(8) That the trial Judge had failed to overturn the decision of the assessors on the basis that their conclusion was unsafe and unsatisfactory and otherwise unreasonable and against the weight of evidence.

For completeness we mention that a further ground that the trial was a nullity because the assessors were not duly Gazetted as required by s.264 of the Criminal Procedure Code (Cap.21) was abandoned because the appellant failed to adduce evidence to lay a factual basis upon which that ground could be advanced.

Ground 1

The Judge failed to direct correctly on corroboration especially in relation to the acknowledged accomplice Narayan but also in relation to the other alleged accomplice Pillu.

[8] We deal first with the submission that the witness Pillu should have been declared an accomplice on the basis that pursuant to s.388 of the Criminal Code he should have been regarded as an accessory after the fact. The slender ground upon which this was advanced was that Pillu should be seen as having assisted the appellant after the murder because he was slow to come forward with evidence of what the appellant had told him before he went to the deceased's home and his admission of guilt after he returned. We reject that submission. Pillu had been threatened with the death of himself his wife and his children if he disclosed his knowledge of the appellant's guilt. His initial reticence was entirely understandable and was not intended in any sense to assist the appellant.

[9] Turning now to the major issue of corroboration of the evidence of Narayan. In that regard the trial Judge directed as follows on Shalendra Narayan's evidence (pages 67 to 69 of the court record);

> *"Before you consider the evidence of this witness, I wish to give you two directions. These directions are not given because I wish to convey to you any view of the credibility of this witness, but because in every such case, the law requires that I give you these directions.*
>
> *The first is that you must treat this witness as an accomplice. The law says that it is dangerous to convict on the evidence of an accomplice, unless it is corroborated, although you may do.*
>
> *Corroboration means some independent testimony which affects the accused by connecting him or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some material particular not only that the crime has been committed, but also that the accused committed it.*
>
> *In this case the evidence of Bimlesh alias Pillu relating to the conversations with the accused on the18th, the evidence of Maya Wati about the accused coming after she had returned from her home and seeing of reddish water in the tub, and the evidence of the two police officers about the accused's talking of the deceased's menstruation are pieces of evidence which are capable of providing corroboration, if you choose to accept those pieces of evidence. It is for you to decide whether in fact they do corroborate or not.*
>
> *But before you look for corroboration, you must accept the evidence of Shailendra Narayan as being the truth or else there is nothing to corroborate.*
>
> *The second is that you are aware that this witness was granted immunity. The grant of immunity is quite legal. It is not uncommon, and is often given to a lesser player in any crime in order to bring the main perpetrator or perpetrators to justice. But it can happen that a person to attract immunity may falsely implicate another person so have a motive for telling lies. You must therefore scrutinize his evidence with great care." (emphasis added)*

[10] The Learned Trial Judge further said at page 72 of the record:

> *"Ladies and Gentlemen it is for you to decide whether this important witness was truthful, whether he was trying to minimize his role or*

whether as Mr Singh suggests an outright liar. Remember that the defence does not have to prove that this witness or any other witness was a liar. It only has to create a reasonable doubt. The prosecution must satisfy you of the credibility of each witness."

[11] Despite Mr Singh's vigorous attack on the Judge's summing up in this area of the case, our judgment is that His Lordship delivered a clear, plain and precise warning to the assessors of the dangerous and inherent risks of convicting an accused person upon the uncorroborated evidence of an accomplice. We reject the submission that what was said fell short of what is required by long established case law on accomplice evidence.

Ground 2

The Judge failed to direct properly on the effective contradictions in the testimony of various state witnesses.

[12] As far as the witness Narayan was concerned his statements were consistent through out. But there were inconsistencies in other parts of the State's case e.g. the witnesses were at variance among themselves as to whether on the day of the murder the appellant was wearing a yellow or a blue shirt. And Maya Wati initially denied the truth of her statement to the police although subsequently having been declared hostile she confirmed it in its essential particulars.

Early in his summing up (page 9 of the record second paragraph) the Judge said to the assessors

"of course in any trial there are bound to be some inconsistencies in the evidence of the witness and inconsistency with others. You are to ask yourselves did the inconsistency relate to peripheral matters or did the inconsistency go to the core of the witnesses evidence and was it of sufficient significance to affect his or her credibility."

First we observe that long experience of witness actions enables us to say that such inconsistencies almost invariably occur and that if they did not, one's suspicions would be aroused as to whether or not the witnesses had been schooled to tell the same story.

[13] Also in this attack there seems to be a element of the appellant's counsel contending that it is the Judge's job to pick up and identify any significant inconsistencies which defence counsel has not mentioned in his or her final address. Such a proposition is of course untenable. If the Judge were do that for the defence, he would have to do it for the prosecution also. There would then be an ever present risk that instead of his summing up presenting a balanced summary, he would find himself descending into the arena and evitably attracting criticism from both sides for not having covered every point, significant or otherwise. We are not at all persuaded that there is substance in this second ground.

Ground 3

The Judge erred in law and failed to follow the correct procedure in declaring the witness Maya Wati hostile.

[14] Here the complaint is that when Maya Wati was called to give her evidence she initially denied the truth of her police statement. The submission was that the Judge should have conducted a ***voir doir*** or at least have given defence counsel a greater opportunity to resist the suggestion that the witness should be declared hostile. In the absence of the assessors, the Judge heard both counsel on the only topic and noted that he ruled as follows: (page 132 of the record)

> *"I have considered learned Counsel's submission to declare this witness hostile and what the counsel for the Defence has to say. I have been shown the statement made and the inconsistencies contained therein. I have also noted the demeanor of this witness in the box. I am of the view that there is nothing wrong with her memory. I am of the view that her departure from her statement to the police is due to a hostile animus she*

bears for the State. I therefore will declare her hostile and allow the State to cross-examine her. For the guidance of Counsel the practice regarding hostile witnesses is set out in a recent judgment of the Court of Appeal in Armogam and Others Cr. App No. AAUoo32 of 2002.

In the cross-examination I order that Counsel for the State first establish whether after acquainting the witness as he says that it is false and if so, the cross examination is to be confined only to what has derogated from the State's case. She is to be acquainted with her statement in absence."(obviously in absence of assessors).

[15] Having considered the record of the build up to ruling set out above, we are satisfied that the Judge substantially followed the procedure laid down in ***Armogam*** and that the witness was properly declared hostile. Also as counsel for the State submitted the Judge adequately covered the fact that what she said on oath was the evidence, not what she said in her out of court statement. Early in his summing up (page 11) of the record he said:

"There are numerous other references to statements made to the police and other out of court statements. Let me tell you that such statements are not evidence. Evidence is what you have heard in court and the exhibits tendered herein. If such out of courts statements are proved to have been made, then you may take that into account in assessing the credibility of the witness. Out of court statements only become evidence if any part of that has been adopted by the witness on oath as being true. "

Ground number 3 is without merit.

Ground 4

As this ground was (as set out on page 4 above) argued in conjunction with ground number 7 we will deal with it when we reach that ground.

Ground 5

That the Judge failed to give a direction on the question of lies which had been raised by the State in the closing submissions of counsel.

[16] The appellants contention is that the question of lies was raised by the prosecutor when she was discussing the evidence of the two police officers to whom, the State contended, the appellant have made an admission against interest and also when referring to the evidence of the widow of the man the appellant claimed he was with on the day of the murder.

[17] What happened so far as the two policemen were concerned was that they were making routine inquiries regarding the murder in the neighbourhood of the appellant's home. The appellant had cooperated with the police on other inquiries from time to time and was on this occasion accompanying the two constables. While in their company according to their evidence, quite sponteneously the appellant had said ***"how can anyone had sex with her while she was menstruating"*** The two police officers said that they were surprised at this unsolicited comment but failed to recognise its significance until very much later at a debriefing. The point being of course that according to the pathologist's – confirmed by the photographs taken at the scene – the deceased's private parts had been interfered with and she was menstruating. This information, however, could only be known by someone (outside of the police and pathologist of course) who had been at the scene at or about the time of the murder. Against that background the prosecutor in her final address submitted to the assessors that the appellant's unsworn statement at the trial, to the effect that had someone disclosed this information to him while standing about under a mango tree with other people a day or so after, was untrue. The appellant had also claimed that he was a police informer and Counsel for the State had put it to the assessors that if that was so, why did he not tell the two constables and give the name of the person who was supposed to have told him this important piece of information. State Counsel submitted ***"the only reason is because it was a lie."*** Furthermore a little later when discussing again the appellant's unsworn statement that he spent the day of the murder drinking alcohol with an old friend now deceased, the prosecutor referred to the fact that the State had called the widow of the old friend who denied the appellant had been at their

home that day. In respect of that matter the comment made to the assessors was ***"the prosecution called that bluff."***

[18] At the end of the summing up the Judge enquired of Counsel whether there was any other matter which either of them thought should be put. Counsel for the appellant asked for a direction on lies based upon the two statements made by the prosecutor outlined above. The Judge declined to give such a direction.

[19] The first thing to be said is that the way the two issues were raised by the prosecutor did not suggest the more serious category of lies which can be said to point to guilt. At their highest they would effect credibility only. That being so the Judge could not have said more then that the lies possibly strengthen the prosecution case. As was pointed out by the New Zealand Court of Appeal in ***R v. Gye*** [1990] 1 NZLR 528 the mere fact that the defence evidence is rejected as untrue does not by itself add anything to the prosecution case.

[20] The view we take of this matter is that what the appellant said during the course of his unsworn statement at the end of the trial (which by definition was not evidence) could not be put to the jury as constituting lies which could go to credibility. The direction defence counsel called for, in our view, could well have introduced a significant prejudice to the accused which at the time was not present. It was an unusual set of circumstances and we think the Judge was quite right to decline to give the direction. Mr Singh seemed to accept that at the close of his submission on this ground.

Ground 6

That the Judges directions were not clear and intelligible or confusing and thus there has been a miscarriage of justice.

[21] We have read the Judges summing up carefully more than once. Its begins with a clear exposition of the standard directions and concludes with an equally balanced summation of those things which the assessors must keep clearly in mind. Sandwiched in between those expositions of the law and directions to the assessors of things they had to be careful and cautious about was a complete re-reading of substantially all the evidence. Unfortunately in this case there was a significant gap between the first four days of evidence and the conclusion of the trial. In the circumstances the Judge followed the cautious and arguably safe course of reminding the assessors of all the evidence that had been called so that when they retired it was fresh in their minds. We reject the submission that the directions were ***"not clear and unintelligible, or confusing and as such their had been miscarriage of justice."*** On the contrary we think the Judge did a sound workmanlike job of directing the assessors and that although reading all the evidence back, is in the vast majority of cases unnecessary and undesirable, it is understandable why it was done in this case. This ground provides no foundation for interfering with the guilty verdict.

Ground 7

This ground (which was run in conjunction with ground 4) contends that the Judge erred in law and in fact when he failed to put the appellant's case properly and sufficiently to the assessors.

[22] This ground is to be combined with ground number 4. Counsel for the appellant criticises the Judge saying that he erred in law by not drawing to the attention of the assessors and directing them to a series of events and series of circumstances which are identified as follows:

(a) Directing inappropriately regarding the evidence of the two police officers that surfaced some 2½ years after the murder when the

unsolicited comment regarding the victim menstruating at the time of her death assumed importance.

(b) Failing to direct as to the weight to be given to this evidence which emerged just before the trial.

(c) Failing to direct on the significance of the scientific expert evidence.

(d) Failing to direct that there was no motive for the appellant to commit the murder.

(e) Failing to draw attention to the fact that all the State witnesses were related to the accomplice Narayan and that the statement of Sushila Devi (the widow of the friend he said he has been drinking grog with) was taken to 2½ years after the incident.

(f) That until November 2003 the police had no evidence against the appellant as such.

[23] A fair reading of the summing up shows that the Judge was alert to the significance of the points made and dealt with them appropriately and adequately. We repeat our earlier comment, it was not the function of the Judge to perform the task of defence counsel.

Furthermore the last subject of any length the Judge dealt with was to summarise the submissions that had been made by defence counsel. That summary commenced at the page 63 of the record and continues through to the middle of page 67. In those pages the Judge faithfully rehearsed all the challenges that were made to the State witnesses and particularly the challenge to the evidence of the accomplice. At page 65 the Judge completed his survey of all the criticisms of that witness saying

> *"Ladies and Gentlemen it is for you to decide whether this important witness is truthful, whether he was trying to minimise his role on the matter or whether as Mr Singh suggests an out right liar. Remember that defence does not have to prove that this witness or any witness was a liar. It only has to create a reasonable doubt. The prosecution must satisfy you of the credibility of each witness"*

The Judge then went on specifically to consider the forensic evidence and once again in our view covered it adequately and faithfully as he did the other major matters which Mr A.K. Singh at the hearing before us drew our attention to.

In all the circumstances we are far from persuaded that the combination of grounds 4 and 7 provide a basis upon which the verdict of murder in respect of the appellant could be or should be overturned.

Ground 8

That the trial Judge had failed to overturn the decision of the assessors on the basis that their conclusion was unsafe and unsatisfactory and otherwise unreasonable and against the weight of evidence.

[24] This is something of omnibus ground, but within it the appellant sought to make something of the fact that when the three assessors came back with their verdict of guilty the learned Judge said:

> *"I do not have sufficient reasons to disagree with their opinions. Accordingly and accordance with their unanimous opinion I convict the accused of murder as charged."*

[25] The prosecution case was not an overwhelmingly strong one in that it had to rely principally upon an accomplice who had been, albeit somewhat reluctantly, very much a party to the murder. Also there was the fact that one witness had to be declared hostile and that two other pieces of significant evidence came to light

some 2½ years after the murder. That adds up to, if not a difficult case, certainly not one where a conviction could be confidentially predicted. But at the end of the day the assessors were unanimous and the Judge without any real reservation in our opinion, agreed with them. Under those circumstances it was a bold submission to suggest that the decision was so are unreliable and unreasonable that the learned Judge should have taken the highly unusual step of disagreeing with the assessors. This ground also fails.

Decision

[26] Having read the appellant's voluminous submissions and having considered the authorities that Counsel placed before us and having done our best to the weigh the points taken for the appellant, our conclusion is that none of the grounds advanced either individually or collectively provides a legitimate basis for this court to interfere with the guilty verdict and the conviction entered by the trial Judge. The appeal is dismissed.

FIJI COURT OF APPEAL

Smellie, JA

Penlington, JA

Scott, JA

Solicitors:

A.K. Singh Law, Nausori for the Appellant
Office of the Director of Public Prosecutions, Lautoka for the Respondent

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