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

CRIMINAL APPEAL N0. AAU0016/2005S
CRIMINAL APPEAL N0. AAU0063/2004S
CRIMINAL APPEAL N0. AAU0014/2005S
[High Court Criminal Action N0. HAC0008/02S]

BETWEEN:

JOJI RAVUWAI
SISARO TALEMAITOGA
OSEA VOLAVOLA

APPELLANTS

A N D:

T H E S T A T E

RESPONDENT

Coram: **Ward, President**
Gallen, JA
Ellis JA

Hearing: **Thursday, 20th July, 2006**

Counsel: **Appellants in person**
A. Prasad for the Respondent

Date of Judgment: **Friday, 28th July, 2006**

JUDGMENT OF THE COURT

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[1] The appellants were all convicted, following a trial in the High Court commencing on 5 July 2004, of murder and robbery with violence. They were sentenced to life imprisonment with a recommendation that they each serve a

minimum term of 15 years for murder and 10 years imprisonment concurrent for the robbery. They each sought leave to appeal on various grounds but were granted leave on two grounds only; first, that the learned trial judge erred in allowing counsel for the first and second appellants to withdraw during the trial and, second, that he erred in allowing dock identifications of all three appellants when no identification parade had been held.

[2] The deceased was a taxi driver and the prosecution case was that, on 26 January 2002, at about 9.0pm, he was hired by a Fijian woman and her teenage daughter. As they were about to board, the three accused approached and asked if they could also travel in the taxi. The women knew the first appellant and so they agreed. After the women had been dropped off at their home in Nausori, the taxi continued with the appellants to the Naselai Feeder Road. Once there, one of the accused put an electric wire round the driver's neck from behind and pulled it tight. Whilst that was being done, the others took about $50.00 cash and also ripped out the taximeter and hid it in the bushes.

[3] They then left the driver in his taxi, walked back to the Bau Road and hailed another taxi to take them back to Nausori where they had some drinks in a night club. The driver of the first taxi was found in his taxi with the wire still tied around his neck. He had died from strangulation.

Ground 1

[4] At the outset of the trial, the three accused were separately represented by counsel. It appears that the first and second appellants had counsel under legal aid. On the first day of the trial, after the prosecution opening, the court heard the evidence of the pathologist, who had conducted the post-mortem examination of the deceased, and of the woman and her daughter who had been in the taxi prior to the death of the driver.

[5] The second day started with the first of the interviewing officers. He was still giving evidence in chief when a short mid-morning break was taken. On the

resumption but before the assessors returned, Ms Malimali for the second appellant indicated to the court for the first time that she would be requiring a trial on the voir dire as a result of fresh instructions from her client.

[6] Shortly afterwards and still in the absence of the assessors, Mr Hanif for the first appellant advised the court that he had received instructions during the break which appeared likely to place him and Mr Tuitoga, who also appeared for the first appellant, in a difficult professional position. He said:

> "We are acting on the instructions we had received for the past year or two and this morning there has been a somewhat substantial change in those instructions. We wouldn't be sure ourselves that we will be acting on the instruction that [we] have received."

[7] The learned judge then remained in the courtroom but continued as a hearing in chambers. This was a sensible step and means this Court has benefit of having a transcript of the discussion. The judge asked Mr Hanif, "Are your respective clients starting to say 'It wasn't me. It was him'." And received the reply, "It appears so. The evidence this morning is a last minute thing."

[8] The judge agreed to give counsel time to discuss the position more with their clients and suggested Ms Malimali might like to refresh her instructions at the same time. She replied, "My instructions have changed. I have prepared myself well and [as] instructed. During our tea break my instructions have changed completely."

[9] On their return from a further break, with the court still in chambers, Mr Hanif explained how his instructions had changed in relation to the need for a trial on the voir dire and some of the admitted facts and concluded, "these instructions that we had received this morning were completely in conflict to the instructions that we had been working on for the past two years."

[10] The judge replied, "This is your belief from the bar that these completely conflicting instructions compromise your position as an officer of the court?" Counsel agreed that was the position and gave further explanation of the conflict that had arisen. He then asked the court to explain the position to his client. The judge agreed and said:

> "Mr Ravuwai, what I'm saying I'm having translated for you. I need to be very clear that you understand what's happening. Your counsel had told me that he has prepared this trial on the basis of what you have told him what he has to do and because of what you have told him he has to do. He's made certain practical decisions on your behalf in his professional capacity. However, this morning as a result of hearing some evidence you have changed your mind and you are telling him now something completely different about this offending. Something completely different than what you told him up until now. This means that you've put him in a very difficult position. He can't continue to be your lawyer because you have changed your mind and he has quite properly asked me for leave to withdraw. If I grant that application, this means that the trial will continue but you will be unrepresented. You will not have a lawyer but I consider you have been given an opportunity for representation and by your own actions you have caused your counsel to have to make this application today. Do you understand what I am saying to you?"

[11] Ms Malimali, who was instructed by the Legal Aid Commission, then asked for time, surprisingly, to consult with the Director of the Commission, "for their decision on whether I should continue or whether the Commission should continue to represent him".

[12] Counsel for the State had expressed his view that the withdrawal of counsel should not lead to the trial being adjourned to allow new counsel to be instructed.

The judge, in agreeing with Ms Malimali's request for time, said to prosecuting counsel:

> "I agree with your submission that this trial shouldn't be adjourned. However, I want to balance that against the risk of a mistrial because I don't want to get into the position of going six steps forward only to re-run another trial because there was some unfairness. It's entirely a matter for you but as I said you've prepared the trial diligently and well based on one scenario. You now may be faced with a completely different scenario. ...
>
> The issue for you in my mind is whether you now continue this trial with the obvious tactical advantages and disadvantages that that brings. Or you make application to me because of these changed circumstances to adjourn this trial and resume it on short notice. My preference whether its adjournment or whether its new assessors in the new trial, is to start on the 19th of July. In other words we were booked for a month; let's get on with it and get it out of the way. I don't think it is being overly generous to the State's position to say that in any respects I will be guided by what it is that you tactically decide is the best thing that the State can do given the circumstances. If you say to me, "Judge I want to continue with these assessors", then its likely we'll resume again depending on what Miss Malimali tells at 2.15pm. We'll resume again tomorrow morning and we'll continue with the evidence and we'll get to a position where her client needs his voir dire and what happens to the voir dire and on Friday we'll adjourn as planned, and we've still got the week that we were not going to use and we'll resume again on the 19th and carry on with these assessors. In the alternative you may decide that it's more advantageous to your position to abandon this trial and start again with fresh assessors on the 19th July. But that's what you need to reflect on as well and I'm not going to call for an answer from you now"

[13] Shortly afterwards, the assessors were brought back to court and the judge explained that he had accepted an application by Mr Hanif and Mr Tuitoga to be excused from representing their client further in this trial. He continued:

> "Now that happens sometimes and its quite appropriate that the counsel [tell] the court that they now have conflicting instructions ... So I'm now going to excuse them."

[14] Shortly after, still in the presence of the assessors, he again addressed the first appellant:

> "Mr Ravuwai, your counsel have been excused. ... From this moment on they will not represent you at this trial. I warn you again of your constitutional right to have counsel and if you can't afford one, you have a right to apply for legal aid. I believe you have been given the right for representation and I am not going to adjourn this trial to allow you more time to get another lawyer. If you want to make arrangements, talk to someone from Legal Aid about getting another lawyer and that you best get on with it quickly."

[15] As had been stated by the judge, after one more day, the case was to be adjourned to 19 July 2004.

[16] Before adjourning for the day but after a short adjournment, the judge heard two applications from Ms Malimali. The first related to the issue of the trial within a trial and need not concern us but the second was to be given leave to withdraw and she explained:

> "...I cannot withdraw except for a good cause. As such my Lord, in order to function properly and for this court to function properly during this case, I have to act with integrity and with my duty to

the court as my formal [foremost?] consideration. My predicament my Lord is that faced with the fresh instructions that I received this morning I cannot honestly say that if I continue to represent this accused I will not be violating my duty to the court. I've received instruction that negate my first set of instructions which leave me in a predicament and that may involve some impropriety on my part during the course of this trial my Lord. And that's the reason I am asking or seeking leave to withdraw."

[17] Counsel told the court that she had advised the second appellant of the result and the learned judge effectively repeated the comments he had made to the first appellant. The case was then adjourned to the following day.

[18] That day, in the absence of the assessors, the judge asked Ms Malimali to outline the nature of the second appellant's allegations in relation to the trial within a trial before she withdrew from the case. The court was then given a detailed account of his case with respect to the admissibility of his statements to the police. The course of that conversation was unusual and, we feel, unfortunate. Whilst the judge no doubt wanted to know the basis of the second appellant's challenge to the statement, it resulted in the prosecution being given an indication of matters it would not normally have heard until examination of its witnesses. However, it is not necessary to go into it for the purpose of this appeal.

[19] The assessors were eventually brought back into court and the judge addressed them:

"As a result of certain instructions she's received Miss Malimali now finds herself in a similar position to Mr Hanif and Mr Tuitoga in that she faces conflict and she can no longer act for her accused. You will recall Ms Malimali was acting for Mr Talemaitoga. And she's made an application to me for leave to withdraw again for the same reasons that Mr Hanif and Mr Tuitoga felt obliged to

relinquish their representation of Mr Ravuwai. The same reasons applied to Miss Malimali. She's now receiving conflicting instructions so she can't continue to act. That's the proper application for her to make. I am doing her the courtesy and you the courtesy of explaining that in open court. She is now formally granted leave to withdraw and with my thanks Miss Malimali you may retire when you are ready to go. The fact that these counsel have retired in the early days of the trial apart from the fact that its an interesting example of the way things go sometimes shouldn't be used in any way as a display of lack of confidence in their clients case or nor should you make any inquiry or guesses to why it is that they have had to retire. They are simply on their professional obligation and in some circumstances it's most appropriate that when there is a conflict between themselves and the client over instructions that are given, they should retire and that's what's happened. It's proper, all you need concern yourself with is the fact it's happened but that's that. Don't take anything from it. It's just the course of proceedings."

[20] There was no further reference to the withdrawal of counsel in the summing up to the assessors.

[21] In the present case, as can be seen from the passages set out above, there are two issues for this Court to consider under the first ground of appeal. The first is the withdrawal of counsel for the first and second appellants and the way the Judge addressed the assessors on it and the other, which arises from it, is the manner in which the learned judge gave the accused an opportunity to seek further representation.

[22] Ms Prasad, for the respondent, has filed detailed, written submissions and we are indebted to her for her industry.

[23] Her principal contention was that the reason the first and second appellants' counsel withdrew was because of the appellants' own action in changing their instructions, that they had been given an adequate opportunity to find fresh counsel because of the court dates and the lack of counsel had not prevented them presenting their cases well. As a result there is no reason to find that they have been prejudiced in the conduct of their defences.

[24] Section 29 (1) of the Constitution enshrines the rights of an accused person to a fair trial and includes the right to be represented if he wishes. That does not give rise to an absolute right. We note that article 14 of the International Covenant on Civil and Political Rights, which contains safeguards similar to those in section 29(1) to ensure 'equality of arms' in criminal trials, does make it a more positive right where the interests of justice so require. Ms Prasad relies on the test in *Dunkley v The Queen* [1995] 1 AC 419, 427 where the Judicial Committee referred to that Covenant but pointed out:

> "Although Jamaica is a signatory to the Covenant it has not been incorporated into Jamaican law which accordingly remains as stated in *Robinson v The Queen* [1985] AC 956. Their Lordships are satisfied that there is no absolute right to legal representation throughout the course of a murder trial although it is obviously highly desirable that defendants in such trials should be continuously represented where possible."

[25] Surprisingly, none of the Pacific Island States has signed the Covenant. However the provisions of Chapter 4 of our Constitution encompass many of its provisions and the courts in Fiji must apply those provisions in accordance with the terms of the Constitution.

[26] In *Robinson's case* the trial judge had refused counsel leave to withdraw but they left the trial in defiance of his ruling. The judge then refused an adjournment and

continued with the trial although the accused were then unrepresented. Lord Roskill, giving the judgment, explained:

> "In their Lordships' view the judge's exercise of his discretion ... can only be faulted if the constitutional provisions make it necessary for the judge, whatever the circumstances, always to grant an adjournment so as to ensure that no one who wishes legal representation is without such representation. Their Lordships do not for one moment underrate the crucial importance of legal representation for those who require it. But their Lordships cannot construe the relevant provisions of the Constitution in such a way as to give rise to an absolute right to legal representation which if exercised to the full could all too easily lead to manipulation and abuse."

[27] In respect of the second issue on this ground, we must ask ourselves whether the adjournment granted was, in the circumstances of this case, sufficient to allow the appellants to find fresh counsel and whether it was reasonable, when the appellants were still unrepresented, to continue with the trial. In *Mc Innis v The Queen* [1979] 143 CLR 575, a case involving a refusal of an adjournment to allow the accused to obtain the services of counsel, Barwick CJ pointed out:

> "The question before the Court of Criminal Appeal was whether or not there had been a miscarriage of justice. It was not simply whether an adjournment of the trial ought to have been ordered. It was whether assuming the adjournment to have been wrongly refused, that refusal resulted in a miscarriage of justice."

[28] Mason J later stated in the same case what needed to be shown to constitute a miscarriage:

> "If the appellate court finds that the course of the proceedings had deprived the accused of a prospect or chance of acquittal then a

> miscarriage has occurred. Or to express the same thought in another way, the conviction will be set aside if the appellate court entertains a doubt as to the accused's guilt. ...The question is primarily to be resolved by looking to the nature and strength of the Crown case and the nature of the defence which is made to it. If the Crown case is overwhelming then the absence of counsel cannot be said to have deprived the accused of a prospect of acquittal. If the accused in such a case has presented his defence with skill that may constitute some confirmation that conviction was inevitable in any event. But if the Crown case is less than overwhelming I have some difficulty in perceiving how in general the conduct of the case by an accused who is without legal qualification and experience can demonstrate that, even with the benefit of counsel, he had no prospect of an acquittal. How is it to be said, for example, that cross examination of Crown witnesses by counsel would not have been more effective?"

We also note that later he accepted, as a correct statement of the test, the previous finding of the majority in the Court of Criminal Appeal that "it had not been shown that there was a possibility that injustice had resulted".

[29] We have some reservations about whether the strength of the prosecution case can ever be the complete answer when counsel withdraw, as Mason J suggests, but it must be a factor for the appellate court to consider.

[30] Section 23 (1) of the Court of Appeal Act requires this Court to set aside any conviction on the ground that "there *was* a miscarriage of justice" (our emphasis). We would suggest the proper question is whether it *may* have resulted in a miscarriage of justice and we note that would accord with the interpretation accepted by Mason J.

[31] Ms Prasad asks the Court to find that the evidence in this case was so overwhelming that there was no chance of an acquittal whether or not the appellants were represented. Each appellant made statements to the police in which they admitted their involvement in the offence. There can be little doubt that an acquittal was unlikely once those statements were admitted.

[32] It appears that, at the outset of the case, counsel had indicated there was to be no request for a trial within a trial on the admissibility of the caution statements. By the time counsel for the first appellant sought to withdraw, the officer who interviewed the first appellant had already read to the court the contents of the main interview in which the appellant admitted involvement in the attack on the taxi driver.

[33] When counsel asked to withdraw, the judge raised the possibility of starting the trial afresh with new assessors. As we have mentioned already, the trial was about to be adjourned in any event until the 19 July and so, if it had restarted then, only three hearing days would have been lost. Counsel for the State objected and the judge appears only to have consulted with him. The passage set out above indicates the judge's approach.

[34] The decision to continue with the trial at that stage meant that the interview with the first appellant was already before the assessors. The judge pointed out to the second appellant that he could challenge the admissibility of his interview and explained how he should proceed if he did.

[35] The first appellant then asked the court if he could challenge the admissibility of the statement that "was currently being read in court". The judge replied:

> "No, its too late. You heard counsel's advice. The evidence has already been given. That's before the assessors. There's no point challenging it now. What you may do and its very much a matter for you is ask questions of the Detective Sergeant indicating that the statement was not voluntary indicating that it might have been

obtained by threat or inducement but all of that information has to be in front of these assessors. Mr Ravuwai if you want to challenge the caution interview however, that evidence hasn't been led yet. We haven't started to lead that. You're entitled to challenge that. I am referring ... to the charge statement. In my view he has a right to say if he wants to have a voir dire on that even at this late stage."

[36] The appellant indicated that he wished to have a trial within a trial and the judge continued:

> "Well if you do that, you are then going to be in a position where you've got one statement where you've said what you said to this witness and then you've got the possibility of another statement made that is in contra-distinction to that, that you are saying he wanted to challenge. ... I need to warn you the prejudice that might make to your overall trial since you're an unrepresented accused."

[37] Clearly the judge recognised the difficulty his decision caused to the first appellant; a difficulty which we consider would have been avoided if he had decided to start the trial afresh.

[38] The decisions, whether or not to allow an adjournment when counsel withdraw and for how long, are entirely matters for the judge's discretion. As with all applications of his discretion, this Court will not interfere unless it may have resulted in injustice in the circumstances of the case. Whether it did so may depend on the grounds upon which the decision was based or on the manner in which it was exercised.

[39] In the present case, the judge stated his reasons for deciding to continue with the trial. The case was already old and it had been fixed for some time. The appellants were going to have nearly two weeks before the trial resumed in which

to find fresh counsel or to renew their application for legal aid. The reason they were no longer presented was because of their own actions and they had been advised clearly of the consequences. On the other hand, no enquiry appears to have been made as to the likelihood that an application for legal aid would be possible in that time nor whether the accused, whilst remanded in custody would be able practically to find fresh counsel. After the court resumed on 19 July, a relative of the first appellant applied for further time to find a lawyer because the family could not afford one. It is difficult from the record of his evidence to understand exactly what he was asking – a difficulty plainly shared by the judge - but the trial simply resumed. There was no apparent enquiry of the first two appellants whether they had been able to make any arrangements for representation or whether they had even tried other than the appearance of the first appellant's relative.

[40] Neither before nor after counsel withdrew does there appear to have been any consideration by the judge of the effect a continuation of the trial would have on the appellants. No doubt the judge felt that the necessary adjournment until the 19 July gave time for alternative counsel to be arranged but the consequences, if the attempt was unsuccessful, does not appear to have been considered. On the resumption, it was clear neither the first nor second appellant had counsel but, as we have said, no enquiry was made whether that was the wish of the appellants or whether it was the result of any difficulty in making alternative arrangements. Similarly, the appellants were not given an opportunity to address the court on the possibility of reconsideration of the decision to continue.

[41] The issue of whether or not to start a fresh trial with different assessors was considered before the adjournment, as we have already mentioned, almost exclusively from the point of view of the prosecution. Certainly the two unrepresented accused were not asked about it. In fact they were advised of it in a manner which, to an accused ignorant of court procedures, must have given a firm impression that it was a decision which had already been made and on which there was no opportunity to address the court.

[42] When counsel seek to withdraw and tell the court they are professionally embarrassed, the judge is right to accept it without further enquiry as to the details. They are officers of the court and the judge must normally trust their judgment. If the trial is to proceed, he should advise the assessors that counsel has withdrawn and the accused will therefore be unrepresented. It is wise to warn them in the summing up to make allowance for the fact they were unrepresented. In this case the judge, at the time, properly warned the assessors not to try and read anything into the fact they had withdrawn. Unfortunately, the value of that warning was largely negated by the manner in which he had already told them of the reason for the withdrawal.

[43] We consider it was unfortunate to advise them that counsel could no longer represent them because the appellants had 'given conflicting instructions' and that there was a 'conflict between counsel and their clients'. No one can say with any certainty what will be the effect of such a direction on the assessors but there is a substantial risk that they would interpret it as suggesting the accused had changed their story and thus cast some doubt on the credibility of the accuseds' case.

[44] Before us, counsel suggested possible reasons for counsel's withdrawal. Such speculation does not assist the Court any more than it would have done the assessors but it is clear that the original instructions that the appellants were not guilty had not changed. In last minute submissions to this Court, the first appellant attempted to suggest the withdrawal was because he refused to accept counsel's advice to plead guilty. That is not a matter this Court can consider at this stage but, as the appellant is not represented, we mention it to point out that counsel would not have been acting properly to have withdrawn for that reason. This Court sees a surprisingly large number of cases where counsel have withdrawn. Once instructions have been accepted it is, or should be, a rare course for counsel to take and then only on very firm professional grounds.

[45] When considering the withdrawal of counsel and the question of whether to start the trial afresh, a judge should always consider the matter from both sides and give the unrepresented accused the same opportunity to address the court as counsel for the prosecution. Only then can a proper decision be made. Taking the overall effect of the manner in which this was done in the present case, we consider that the learned judge failed to take a sufficiently even handed approach before exercising his discretion.

[46] The result of the court's decision to continue without counsel was that the appellants were left in the position of having to decide whether and how to challenge, on the voir dire, the admissibility of the statements, upon which hung the whole case against them. Both did so although, in the case of Ravuwai, he had already been refused the opportunity of challenging the interview and so it related only to his charge statement.

[47] The judge rejected the challenge and the statements were admitted in evidence.

Ground 2

[48] Prior to the trial, the police had not conducted an identification parade or confrontation between the two female witnesses from the taxi and the appellants. In the trial the witnesses were asked to identify the accused in court - so-called dock identifications. Both witnesses told the court they knew the first appellant well both by sight and by name and the second by sight. The mother had not seen the third accused before but the daughter also knew him by sight.

[49] Ever since the case of *R v Hunter* [1969] CrimLR 262, the courts in England have pointed out the dangers of relying on dock identifications. In that case, the court held that they should be avoided wherever possible.

[50] The courts have also long recognised that identification evidence has inherent risks and the likelihood of mistake must always be pointed out to the jury. In *R v Turnbull* [1976] 3 All ER 549, careful guidelines were established as to how the court should warn jurors of the risks of identification evidence. It is not necessary to repeat them. They have been followed in the courts in Fiji and were followed in the present case.

[51] In any case where there is evidence of identification the judge should consider the manner in which it was made and whether to exercise his discretion to exclude it if he considers its prejudicial value outweighs its probative value. That was not the situation in this case and the judge properly left it for the assessors to consider. In his summing up to them, he gave a careful direction warning them of the dangers. We see no reason to criticise his direction.

[52] It is important in this case to bear in mind that the identification of the two women was only of the three men who accompanied them in their taxi. Miss Prasad points out that there was no witness to the murder and the identity of the appellants as the murderers was based on that circumstantial evidence together with the statements each made to the police.

[53] There is no doubt that, on its own without the statements, the evidence of these two women even if accepted by the assessors could not link the appellants to the offence. The judge's direction to the assessors made this point well. After referring to the fact there were no eyewitnesses to the murder but only the identification of the three appellants after they went into the taxi, he continued:

> "...I think it's a good point [and] just shows you the danger of leaping to conclusions – just because you may decide that these three men got into the taxi that night does not mean they robbed and murdered the taxi driver."

[54] What the identification of the appellants did was to strengthen the admissions in the statements because, in those, all the appellants acknowledged they had driven in the taxi with the two women.

[55] This ground has no substance in respect of the first appellant. Although both witnesses identified him in the dock, they were effectively only identifying him as the person they knew well and who they saw on that night. The second also was well known to the witnesses by sight. In the case of the third appellant, the use of dock identification was more questionable but the judge's direction to the assessors was thorough and covered the dangers properly.

Conclusion

[56] In order to decide whether these appeals should be allowed, we must look at the overall effect of the issues raised. There is no doubt that the evidence, if accepted, was very strong but it depended entirely on the statements each of the appellants had made to the police. Those were the statements the first and second appellants attempted unsuccessfully to have excluded by a trial within a trial.

[57] We have expressed our reservations about the comments of Mason J in the passage set out above from *McInnis' case*. Although the strength of the prosecution case cannot, in our view, establish by itself that there would not have been an acquittal, it may still be a relevant and important consideration in cases where the evidence extends far beyond the actual parts challenged. On the other hand where, as here, the whole of the evidence pointing to guilt is challenged, we do not consider that the strength of the prosecution case based on that evidence should be placed in the balance. In such a case, the foremost and essential consideration is the risk that the proceedings were unfair to the appellant.

[58] We recognise the strength of the opening remarks of Murphy J in his dissenting judgment in the same case:

> "Every accused has the right to a fair trial, a right which is not in the slightest diminished by the strength of the prosecution's evidence and includes the right to counsel in all serious cases. This right should not depend on whether an accused can afford counsel. Where the kind of trial a person receives depends on the amount of money he or she has, there is no equal justice."

[59] What decides this appeal is the serious risk that the first and second appellants' credibility may have been reduced in the eyes of the assessors as a result of the judges references to conflicting instructions and the fact that, having expected to be represented by counsel, they were suddenly left unrepresented after the trial had started and had to conduct a trial within a trial in respect of what was effectively the total case against them.

[60] This was not a case of an appellant simply failing to arrange representation. It is clear the reason counsel withdrew was a change in the appellants' instructions and the judge accepted that was sufficient reason to allow them to withdraw. The absence of further information, it is difficult to say the nature of the change in instructions was such that the withdrawal can be said to have been their fault. Neither is there any evidence that they were simply trying to delay the trial once it had started. The result was that the first and second appellants having started the trial expecting to be represented throughout, were left on the second day with no representation. We know that the first appellant had clearly made some attempt to remedy the situation in the time the trial was delayed but there is no evidence of what, if anything, the second appellant did. The result was that they both had to conduct a trial within a trial. The record suggests they put their challenges to the officer and were unsuccessful but how is this Court to decide whether or how effectively it would have been done by counsel ?

[61] As has been pointed out, the whole prosecution case against all three appellants depended on those statements. If they were admitted, the case could be said to overwhelming but, if they were not admitted, the appellants would inevitably

have been acquitted. In those circumstances we cannot exclude the possibility that the withdrawal of counsel in the manner in which it occurred in this case may have resulted in injustice.

[62] The first and second appellants' appeals against conviction succeed.

[63] We have found that the manner in which those two appellants were identified in court was not wrong. However, the third appellant was in a different position from his co-accused. The evidence of the two female witnesses' previous familiarity with him was not strong. Clearly, it only amounted to circumstantial evidence as far as the murder was concerned but it certainly would have strengthened the probative effect of his statements to the police. In itself, this ground would not have affected the conviction.

[64] However, in view of the nature of the allegation that this was a joint offence and the statements given by the appellants in the trial, we consider it could lead to an unfair result if the trial recommences against two of the appellants only. For that reason and acknowledging that it is an exceptional situation, we allow the appeal by the third appellant also.

[65] The appeals are allowed, the convictions and sentences quashed and the case is remitted to the High Court for trial de novo

.....
WARD, PRESIDENT

FIJI COURT OF APPEAL

.....
GALLEN, JA

.....
ELLIS, JA

Solicitors:
Appellants in person
Office of the Director of Public Prosecutions for the Respondent