IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

Criminal Appeal No: AAU0056/2006
[High Court Action No: HAC032/2005)

BETWEEN:

ASHWIN CHAND

Appellant

AND:

THE STATE

Respondent

Coram:	Shameem JA Mataitoga JA Scutt JA
Hearing:	4th April 2008
Counsel:	Ms B. Malimali for the appellant Mr. N. Nand for the respondent
Date of Judgment:	14th April 2008

JUDGMENT OF THE COURT

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[1] The appellant was convicted of murder in the Lautoka High Court. He appeals against his conviction upon the following grounds:

1. The learned trial judge erred in law in not giving the appellant time to engage a lawyer of his own choice.

2. The learned judge erred in law and fact by not properly directing the assessors on the evidence of fingerprints found at the scene.

3. The learned trial judge erred in fact when he failed to properly direct the assessors on the evidence of the belt found on the deceased.

The trial

[2] The appellant was charged on the 17th of October 2005, of the murder of Premila Wati. The case was first called in the Nadi Magistrates Court on the 17th of October 2005. He was told of his right to legal representation and to legal aid. The appellant denied committing the murder, complained of police assault and said he signed his caution statement in fear. He said the police had poked needles into his fingers under the nails. The magistrate ordered a fresh medical examination. His case was transferred to the Lautoka High Court.

[3] It was called before Connors J on the 28th of October 2005. The appellant said he was going to instruct counsel of his own choice. The case was again called on the 16th of November before Connors J. The Information was read. The appellant pleaded not guilty. He asked for bail. One of his grounds was that he needed to make arrangements for legal representation. Bail was refused.

[4] The case was then called before Govind J on the 6th of February 2006. There was another application for bail. It was also refused. On the 13th of March 2006, the appellant did not appear. The matter was adjourned to the 27th of March 2006. On that day, Mr. Shankar appeared for the appellant. The matter was adjourned to the 28th of April for mention, and to the 7th of April for a further bail application.

[5] On the 7th of April, Mr. Naivalu appeared for the appellant. The bail application was adjourned to the 26th of April. On that day, Mr. Naivalu applied for bail for the appellant, on the ground of the conditions of custody. It appears that the trial date had already been set, because the parties referred to "5 weeks to go before trial." Bail was granted on the grounds of the conditions of custody, the appellant's wish to be with his wife when she had just delivered a baby, and that "this is not the strongest of prosecution's cases for murder."

[6] On the 5th of June 2006, the appellant was represented by Mr. Khan and Mr. Naivalu. The case was adjourned to the 7th of June for trial. Bail was extended. On the 7th of June, Mr. Naivalu said that he was ill and had difficulty in speaking. The prosecution did not object to an adjournment. Mr. Naivalu said that counsel had agreed to facts, there would be no voire dire and that the trial would only take two days. The trial was adjourned to the 13th of June 2006. Bail was extended.

[7] On the 13th of June 2006, Mr. Naivalu told the court that his instructions had been withdrawn. He asked for leave to withdraw as defence counsel. The appellant said that his father would be in the country the following week and that he would arrange for counsel. The court stood the matter down, presumably to allow the appellant to speak to counsel. On their return, Mr. Naivalu said that the appellant did not want him to represent him, and the appellant said he wanted another lawyer and that he would pay him. The learned judge granted Mr. Naivalu leave to withdraw. The prosecution was ready to proceed. The record reads:

> ***"Court: Whole thing of accused [own] making. No reason for discharging Mr. Naivalu. Witnesses are here for prosecution. Will adjourn matter until 9.30am tomorrow 14.6.06. Witnesses warned."***

[8] On the following day, the appellant said that he would defend himself and that he needed two weeks to study the disclosed documents. He said he had not had them earlier, and that he wished to challenge the admissibility of his statements to the police. He alleged assault by three police officers. The court stood the case down for one hour to read the statements for the voire dire. The learned judge then explained the meaning and function of the voire dire to the appellant. The appellant said he understood and expressed concern that his previous convictions would be disclosed. The judge assured him they would not be, and that he would get a fair trial.

[9] The voire dire then proceeded. The appellant alleged assault by Cpl. Sushil Deo, the interviewing officer and said that Cpl. Deo had assaulted him by hitting his fingers on the table with a baton, and by punching him on the mouth whilst handcuffed. He also alleged that Sgt. Davendra Vijay punched him and hit his hands with a baton.

[10] At 2pm, the appellant asked for two weeks adjournment to get lawyers. He said he did not know about the law. The learned judge told him that he would guide him on the law. The appellant then said "It is OK."

[11] After hearing the evidence of 9 prosecution witnesses the court adjourned to the 15th of June 2006. More police officers were called. One of them, DC Meli Doughty said that after leaving the courthouse on the 17th of October 2005, the appellant was sitting in the police station with his set of disclosures. He saw the appellant inserting the paper clip from the disclosure underneath his fingernails. DC Doughty told him to keep his hands on the table and told PC Nilesh the appellant's escorting officer, to remove the paper clip.

[12] Kevueli Tunidau, the Assistant DPP then gave evidence that the appellant had complained of police assault in court. He had said that the police had poked needles into his finger nails. The appellant gave sworn evidence, saying he had been kicked on the back of his neck, punched in the stomach and told to sign a statement in Hindustani which he could not understand or read. Under cross-examination he repeated the allegations of having his fingers hit with a police baton, and said that in the police bure at the Nadi Police Station, he was continuously slapped on the head. He said lit cigarettes were also thrown at him during the interview. He said that when he was first medically examined, the doctor only took off his shirt and did not see his injuries. That medical report was tendered. It listed no injuries. The second, on the 17th of October 2005, recorded a small laceration under the left upper lip and a slight haematoma under the left middle fingernail.

[13] The appellant told the judge that he had a witness to call, and the case was adjourned to the 16th of June. The appellant called his wife Ulamila Nai. She said that she was at the Namaka Police Station on the 15th of October 2005, when she saw a police officer punching the appellant in the stomach. She heard him calling out "Don't hit" in Hindi. She said that the officer assaulting him was Cpl. Sushil.

[14] The learned judge ruled the confessions admissible on the 19th of June 2006. He said that the appellant's versions of police assault were varied and inconsistent, that he had falsely said that he could not understand Hindi, when his evidence had been taken in Hindi and that the injuries found on him on the 17th of October were inconsistent with any of his accounts. In particular he had told the doctor that the injury under his fingernail was caused by the police stepping on his fingers with their boots. This is not what he had said in his sworn evidence.

[15] After the trial within a trial ruling, the appellant said he was ill and wanted an adjournment until the 22nd of June. The doctor attending him was called. The court released the appellant from further medical examination.

[16] The trial proceeded on the 20th of June. The appellant said he was well. The trial proper proceeded. The evidence was that on the 14th of October 2005, the police found the dead body of Premila Wati in a pool of blood in her house in Waimalika. A kitchen knife with a broken handle, a bag and a belt were taken as exhibits from the scene.

[17] Premila Wati's husband Jai Ram said that the bag had $1000 in it when he left the house on the 13th of October 2005. He knew the appellant. He was known to him as "Chinnu" who was his cousin brother's son. Jai Ram said that "Chinnu" had visited their house in the past and had asked for money on four occasions. He identified the belt found at the scene as one he had seen the appellant wearing. He said that he had never seen another belt like that one. He returned to his home at 11.30pm and found his wife lying in the bedroom. There was blood on the sitting room floor. He called his neighbor Mohammed Farook Dean and the matter was reported to the police. Constable Penai Druma described how he entered the house and found the deceased facing upwards with a black belt around her neck. Her body was cold.

[18] Sgt. Patemosi Mate gave evidence of a trail of blood from the sitting room to the bedroom and of stab wounds on the deceased's chest. Her neck was severed. The leather belt was tied loosely around her neck. The scene was dusted for fingerprints and one fingerprint from the door frame was found. It did not match with the prints of Jai Ram, Farook Dean or the deceased. It did not match with the appellant's fingerprints either.

[19] The appellant's statement to the police was tendered after the deletion of some questions and answers by the court on the ground that they were prejudicial. In the statement, the appellant was alleged to have said that on the night of the murder, he had met one Pravin and taken a lift in his van. He had a knife, his belt and a "pompon" in the car. They went to the deceased's house. The appellant gave the knife, belt and pompom to Pravin. He said that at the house, he saw Pravin strangling the deceased with the belt, and then cutting her neck with the knife. He said that he then left. He identified the belt shown to him as his, and the deceased' s handbag. He said he was not sure which knife was used to cut the deceased's neck but he admitted giving a knife to Pravin. In his charge statement he said that he and Pravin had gone to the deceased's house to look for money but that Pravin had strangled the deceased with the belt. When the appellant went to look for money, Pravin cut her neck.

[20] At 2pm, the appellant asked to go to hospital. The court told him that he had absconded from hospital and that he had taken medicine from home and felt well. The assessors were called in and the trial proceeded. The appellant repeated his allegations of police brutality from the trial within a trial. He again said he felt sick but the trial judge told him he was 'grandstanding" and that when he was given a chance to see a doctor he had chosen not to go but instead had absconded. The trial proceeded and the appellant continued to cross-examine.

[21] A Justice of the Peace gave evidence that the appellant had seen him at the Namaka Police Station, and that he had complained of assault. Pravin Kumar gave evidence that on the day of the murder he was in Lautoka and on his farm with one Uday Kumar and one Sunil Kumar Pala. His alibi was confirmed by these witnesses.

[22] The pathologist gave evidence of a cut throat wound extending from ear to ear, severing all the neck muscles nerves and larynx and exposing the cervical spinal column. There were penetrating chest wounds, one of which was 85 x 20 mm which was gaping. There were 5 wounds showing penetration of the sternum.

[23] ASP Mosese Rokobera gave evidence that no fingerprints were found on the belt, a tumbler, a gray bag or the knife. He explained why in his opinion prints could not be found on the knife blade. He said "Gloves protect fingerprints." In cross-examination by the appellant, he said he had found only one print, on the bedroom door frame and that it did not match the accused.

[24] The appellant gave sworn evidence, saying he knew nothing about the murder, and that on the day of the murder he had dropped his wife at Votualevu, and then returned to his house at Waqadra where he remained until 10pm. He did not go to the scene of the crime, and when the police came looking for him, he ran away from them because he had a pending bench warrant. In cross-examination, he denied that the belt found at the scene was his, or that the knife was his.

[25] The case was then adjourned for the appellant's alibi witnesses. On the 26th of June, there were no alibi witnesses. There was a further adjournment to the 30th of June. The appellant failed to appear. There was no trace of his witnesses. The case was again called on the 3rd of July 2006. The appellant did not appear, although a bench warrant had been issued for him. He finally appeared under arrest on the 31st of July 2006. The trial continued on the 9th of August 2006. The appellant said he was not calling any further witnesses. The prosecution and the appellant addressed the court. The judge summed up on the 10th of August. The assessors gave their unanimous opinions that he was guilty of murder. He was sentenced to life imprisonment with a minimum recommended term of 12 years imprisonment.

Legal Representation

[26] The main ground of appeal is that the appellant should have been given time to instruct counsel of his own choice, and that he was prejudiced by lack of representation.

[27] The right to legal representation is provided under section 28(1)(d) of the Constitution. The right is a qualified right, to be balanced with the right to trial without delay and the general interests of justice. The criteria relevant to the right were discussed by this court in ***Attorney-General v. Silatolu [2003] FJCA 12*** a case involving alleged treason and a constitutional redress application for counsel to be appointed by the Legal Aid Commission. The court referred with approval to the criteria set out by the trial judge as being relevant to the question of whether legal aid was required in "the interests of justice." They were: the seriousness of the charge, the length and complexity of the case, the potential maximum sentence and the inability of the applicant to contribute effectively to his own defence.

[28] They are similar to the criteria adopted by the European Court of Human Rights in relation to Article 6(3)(c) of the European Convention. That article guarantees the right of a defendant in criminal proceedings "to defend himself in person, or through legal assistance of his own choosing or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." The purpose of the right is to ensure equality of arms so that the defendant is not in a position of disadvantage compared with the prosecution.

[29] In this case the appellant was unquestionably given the right to legal representation, and he exercised that right. At various stages of the pre-trial hearings, he was represented by Mr. Shankar, Mr. Khan and Mr. Naivalu. It was he who dispensed with the services of counsel.

[30] In ***X v. United Kingdom (1980) 21 D.R. 126***, an analogous situation arose. In the course of a voire dire, the defendant departed from his instructions and admitted that he had told the truth in his confessions to the police. He wanted defence counsel to continue to represent him on the basis that they were untrue. Counsel withdrew. The judge ruled that any new counsel appointed would be unavoidably embarrassed by the admissions made by the appellant. The trial continued with the judge assisting the defendant. The European Commission of Human Rights found that the defendant was entitled to no more. At paragraphs 6-8, the Commission said:

> ***"An accused person cannot require counsel to disregard basic principles of his professional duty in the presentation of his defence. If such an insistence results in the accused having to conduct his own defence, any consequent 'inequality of arms' can only be attributable to his own behavior ... "***

[31] In that case it was found that the trial had been scrupulously fair and that there had been no prejudice to the defendant. We do not suggest the reason given there for counsel's withdrawal is what applied in the appellant's case here. No indication of such a reason appears in the material and we do not speculate. However, the principle espoused as to an accused's own behavior resulting in his having to conduct his own defence applies. At the same time, other cases from the European Court have resulted in findings that there can be a violation of the right without proof of prejudice, prejudice (or the absence of it) becoming relevant only in the determination of the appropriate remedies (***Artico v. Italy (1981) 3 EHRR 1***).

[32] In New Zealand in the case of ***Shaw [1992] NZLR 652***, defence counsel told the Crown that he was unavailable on the date of trial. The Crown did not inform him that there would be objection to an adjournment until five days before the trial. The judge refused to adjourn and the accused was forced to conduct his own defence.

The New Zealand Court of Appeal found that his right to legal representation had been violated and that counsel's understanding of the law and ability to cross-examine might have affected the outcome of the trial.

[33] The Australian High Court in ***Dietrich v. The Queen [1992] 177 CLR 292***, described the right to legal representation as a component of the right to a fair trial. The Court held (as summarized in the headnote):

> ***"In the absence of exceptional circumstances, a Judge faced with an application or a stay by an indigent accused charged with a serious offence who, through no fault of his own is unable to obtain legal representation, should adjourn, postpone or stay the trial until the legal representation is available. If the application is refused and by reason of the lack of representation, the trial is not fair, a conviction must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial."***

[34] This headnote was cited with approval by this court in ***Anjula Devi and Others v. State AAU0017 of 1999*** a case of murder with two defendants with separate and distinct defences. Prior to the trial, their lawyer had withdrawn and they were given time to engage another. They were unable to do so, and were given a week to prepare for the trial. They appeared in person. During the trial within a trial, one of the appellants told the court that his first lawyer was now willing to represent him for the trial within a trial. The trial continued without counsel, the judge apparently refusing the application. The Court of Appeal held that the seriousness of the charge, the importance of the question of the admissibility of the confession and the nature of the allegation of police brutality had "called for a level of skill, knowledge and judgment that the second appellant clearly did not have but which could be expected from competent counsel." The Court of Appeal allowed the appeal on this and other grounds of appeal, and ordered a retrial. It is significant that the appeal was not allowed on this ground alone.

[35] In ***Drotini v. The State [2006] AAU001.2005S,*** this Court considered an appeal against conviction for one count of indecent assault and two counts of rape. The Court said that it was preferable that all persons facing serious charges should be represented by counsel but that this is not always possible. In such circumstances "the trial court should ensure that the defendant has been allowed reasonable time to instruct counsel. Once he has, the court also has a duty to hear the case as expeditiously as possible. Whenever an accused is unrepresented the court should explain the procedure sufficiently for the accused to be able to conduct his defence." The court found that the appellant had not been prejudiced by lack of representation.

[36] Turning therefore to this appellant, we find that he was given more than sufficient time to instruct counsel. For at least five weeks before trial he was on bail and represented. When he dispensed with the services of counsel (who had represented him most competently for the bail application) no reasons were given to the court. However the court's refusal to give him two weeks to prepare himself for the trial and to instruct alternative counsel might have constituted a violation of his section 28(1)(d) right if it were not for one inescapable fact. That fact is that the trial was not concluded until the 10th of August 2005. For several weeks the trial was adjourned because the appellant had absconded. There is no indication that at any time during this period of time, did he make any attempt to instruct alternative counsel. Indeed at the hearing of this appeal he would have remained unrepresented if the Legal Aid Commission had not been ordered to represent him. An adjournment by the trial judge to allow him to instruct new counsel would have been to no avail. The history leads us to the inescapable inference that there never would have been any new counsel.

[37] The next question is whether the appellant was prejudiced by representing himself. It would have been advisable to give the appellant a short adjournment of two days before the trial within a trial commenced. This is because he told the court he did not have time to read the disclosure. However, a perusal of the court record shows that he cross-examined each police officer competently. Further, we note the police evidence that the appellant had the disclosures and was reading them at the police station. The grounds of his challenge to the confession were clear and were consistent with his cross-examination. Counsel at the hearing of this appeal suggested that he was prejudiced in that there were inconsistent versions of the alleged assault before the court, which then led to the judge disbelieving the appellant. It is true that the appellant's various explanations were inconsistent, but the presence of counsel would not necessarily have prevented that. The advantage of counsel is legal skill and expertise. It is not to suppress or manufacture the truth. The evidence of the paper clip, and of the appellant's complaint to the doctor would have been disclosed to the court, with or without counsel, with the same consequences.

[38] The record shows that the learned judge conducted the trial with scrupulous fairness. Further, when the trial proper commenced on the 21st of June, the appellant had had a full six days to read the disclosures and prepare for trial. We do not consider that he was in any way prejudiced. This ground of appeal is dismissed.

The fingerprints

[39] There was no evidence of the appellant's fingerprints at the scene. The evidence of ASP Rokobera was that if a person wore gloves, there would be no fingerprints. The defence case was that the "confession" was an attempt by the police to frame him and place him at the scene. He submitted that his absence from the scene was supported by the lack of fingerprints. The prosecution position was that the exhibits

were awash with blood and that no fingerprints could be detected in the circumstances.

[40] In directing the assessors, the trial judge said this:

> ***"This is called circumstantial evidence. There is no direct evidence of the presence of the accused at the scene. There is no evidence e.g. of any fingerprints. You have heard from police experts that numerous articles were considered for finger printing but they were considered unsuitable for lifting of prints. One fingerprint was uplifted from the door frame inside the house but the prints did not match that of the accused, nor that of Jai Ram nor Farook Dean. Assistant Superintendent Rokobera told you that no fingerprint would be available if a person was wearing gloves."***

[41] It is not clear why the learned judge referred to this last piece of evidence in his direction to the assessors. There was no evidence at all that the perpetrator of the murder had been wearing gloves. Regrettably, the reference might have invited the assessors to speculate about a hypothetical possibility which was not supported by any evidence. Such speculation might have led to prejudice to the appellant.

[42] However, in this case we are satisfied that it did not. Firstly it was prefixed by a direction that there was no direct evidence against the appellant and that his fingerprints were not found at the scene. Secondly in summarizing the sources of circumstantial evidence relied upon by the prosecution, the fingerprint evidence did not feature at all. Unfortunate though the reference is, we are satisfied that in the light of the other evidence there was no prejudice to the appellant.

The belt

[43] The significance of the belt was that it was identified by Jai Ram as belonging to the appellant, and that it was found tied around the neck of the deceased. The

appellant denied that it was his, but in his statement to the police he admitted that it was. The learned judge referred twice to the appellant's denials in this regard and it was clear what the defence position was. We find no misdirection or unfairness in his summing up in relation to the belt. This ground is dismissed.

Result

[44] For the reasons we have given in this judgment, this appeal is dismissed.

Hon. Justice Nazhat Shameem
Judge of Appeal

FIJI COURT OF APPEAL

Hon. Justice Isikeli Mataitoga
Judge of Appeal

Hon. Justice Jocelynne Scutt
Judge of Appeal

Solicitors:

Legal Aid Commission for appellant
Office of the Director of Public Prosecutions for respondent