IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO: AAU0096 of 2013
[High Court Case No. HAC029 of 2004]

BETWEEN	:	**ALESI NALAVE** **KELERA MARAMA** ***Appellants***
AND	:	**THE STATE** ***Respondent***
Coram	:	**Gamalath JA** **Goundar JA** **Temo JA**
Counsel	:	**Mr T Lee for the Appellants** **Mr M Korovou for the Respondent**
Date of Hearing	:	**23 August 2017**
Date of Judgment	:	**14 September 2017**

JUDGMENT

Gamalath JA:

[1] I have the advantage of reading the draft judgment of my brother Goundar JA. I am in agreement with the reasoning adduced therein and his conclusion. The appeals should be dismissed.

Goundar JA:

[2] Both appellants (Ms Nalave and Ms Marama) appeal against their murder convictions. The case has an unfortunate history of delay. In 2004, the appellants were jointly charged with murder contrary to sections 199 and 200 of the Penal Code. The victim was Xiaolu Li also known as Sherly Li. She was 31 years old and a businesswoman.

She operated a nightclub called Frequency Lounge in Nadi. The alleged incident occurred on the night of 10 June 2004 inside the nightclub. In their caution interviews, both appellants confessed to the allegation.

[3] On 2 August 2005, both appellants pleaded guilty to murder in the High Court at Lautoka after the trial judge ruled their confessions admissible. On 6 September 2005, both were sentenced to life imprisonment. On 24 October 2008, the Court of Appeal quashed the appellants' convictions and sentences on the ground that the guilty pleas were not a genuine and true expression of guilt because they were not freely and voluntarily made (*Nalave v State* [2008] FJCA 56; AAU0004.2006; AAU005.2006; 24 October 2008). A retrial was ordered.

[4] On 3 October 2012, the retrial commenced before another judge but that trial had to be vacated later when one of the lawyers representing the appellants was suspended from practice due to professional misconduct arising from an unrelated matter.

[5] On 16 September 2013, the appellants were tried by a different constituted court. The assessors unanimously found both appellants guilty. The learned trial judge agreed and convicted the appellants. On 1 October 2013, the appellants were sentenced to life imprisonment. Ms Nalave was ordered to serve a minimum term of 6 years while Ms Marama was ordered to serve a minimum term of 4 years.

[6] On 19 June 2015, the appellants were granted leave to appeal pursuant to section 21(1) of the Court of Appeal Act 1949. The grounds of appeal are:

> **Ground 1** – The Learned Judge wrongly allowed dock identification of the Appellants which was prejudicial thereby causing a miscarriage of justice.
> **Ground 2** – The Learned Trial Judge erred in law and in fact when he failed to direct on unreliability of the Police statement and unsteady (sic) upon request incorrectly gave a Turnbull direction implying that the witness had identified the second Appellant, when the witness had never stated thereby causing a miscarriage of justice.

Ground 3 – The Learned Trial Judge erred in law and in fact when he failed to give direction on the issue of prior inconsistent statement thereby causing a miscarriage of justice.

Ground 4 – The Learned Trial Judge erred in law and in fact when he misdirected the assessors on the issue of alibi raised by the appellants in their sworn testimony and implied that she had to give notice of alibi when he ought to have known that such notice applied to alibi witnesses and not to the appellants.

Ground 5 – The Learned Trial Judge erred in law and in fact when he failed to direct the assessors on the missing exhibits and incorrectly directed the assessors that this was not a trial overseas or a TV program implying that the prosecution did not have to produce the exhibits which was requested by the defence thereby causing a miscarriage of justice.

Ground 6 – The Learned Trial Judge erred in law when he failed to deliver a fair, objective and balanced summing up to the assessors by highlighting points favourable to the State and highlighting weaknesses in the defence case thereby causing a miscarriage of justice.

Ground 7 – The Learned trial Judge erred in law and in fact when he attempted to respond to address by counsel for the first appellant by providing answers and explain with difficulty the reference to a knife and no reference to a bottle in the autopsy report thereby causing a miscarriage of justice.

Ground 8 – The Learned Trial Judge erred in law and in fact when he directed the assessors that police officers who gave evidence had received commendation implying that their evidence was to be preferred over the appellants on the issue of weight to be given or admissibility of the record interview thereby causing a miscarriage of justice.

Ground 9 – The Learned Trial Judge erred in law by failing to make an independent assessment of the evidence, before affirming a verdict which was unsafe, unsatisfactory and unsupported by the evidence giving rise to substantial miscarriage of justice.

[7] At the hearing of the appeal, counsel for the appellants confined his oral submissions to grounds 1-6 and 8. No submission was made on grounds 7 and 9.

Unlawful killing not an issue

[8] At the trial, it was not an issue that the victim was unlawfully killed. The issue was the identity of the perpetrator. The victim was attacked inside her nightclub on 10 June 2004 between 10 pm and 11 pm. Earlier on in the evening she was seen serving drinks to the customers in the club. Shortly after 11 pm, a barman and a security guard at the nightclub discovered the victim lying on the office floor in a pool of blood. She was alive but unconscious at the time. The employees took her to the hospital. On 15 June 2004, she was evacuated to a hospital in Auckland, New Zealand. She died on the same day without regaining consciousness.

Cause of death and malice aforethought not an issue

[9] The coronial autopsy report was prepared by a forensic pathologist at Auckland hospital in New Zealand. The report was admitted in evidence by the consent of the parties. Autopsy revealed that the victim had sustained extensive injuries. The nature of the injuries indicated that the attack on the victim was ferocious and the perpetrator's intention was to at least cause grievous bodily harm. According to the pathologist, death resulted from the head injuries. The details of all the injuries and the pathologist's comments were as follows:

1. Face and Head

(a) There were three sutured lacerations above the right eye (in the eyebrow region) over a length of 6 cm.

(b) An area of bruising o the right side of the face involving the right ear and the skin of the upper neck below the ear. This area of bruising was over an area of 7 cm in vertical extent and 2 cm in horizontal extent.

(c) Above the right ear there was a sutured laceration, 2 cm in length and place in a transverse fashion. Above this sutured laceration there was another sutured laceration 4 cm in length and an area of abrasion in between these two lacerations.

(d) There were sutured surgical incisions, placed in a vertical fashion, over the left ear.

(e) Scattered minor abrasions on the face in an area between the eyes and the bridge of the nose and over the left cheek region between the angle of the mouth and the ear.

(f) A U-shaped very superficial abrasion was present over the region of the right cheek bone.

(g) Extensive spreading bruise seen on the scalp, which appeared heaviest over the right parietal region and towards the vertex.

(h) There was linear fracture of the skull. This commenced some 3 cm above the mastoid process on the right side and extended downwards and

medially across the anterior part of the petrous temporal bone to reach the pituitary fossa.

(i) On the back of the head, 2 cm above and 2 cm to the right of the external occipital protuberance, was a 2.5 cm laceration of the scalp with an extensive area of underlying bruising and a 1 cm abrasion just above the laceration.

2. Right Arm and Hand

(a) An irregular laceration at the base of the little finger in the region of the wrist. This had raise a flap of skin measuring 1.5 cm in length and based on a 1.5 cm area.

(b) A 1 cm incised wound on the inner aspect of the middle finger over the proximal phalanx.

(c) A 1.5 cm incised wound which had raised a flap on the inner aspect of the ring finger over the middle phalanx.

(d) An area of bruising on the front of the right forearm in an area measuring 9 cm in vertical extent x 5 cm in transverse extent from just below the fold of the elbow.

3. Abdomen

(a) On the front of the abdomen, 10 cm to the right and 6 cm above the umbilicus was a very superficial 7 mm long stab wound which was place vertically. This had just entered the skin.

(b) 12 cm above and 5 cm to the left of the umbilicus, and just below the lower margin of the left rib cage, was a very faint bruise with a very fine scratch extending above it.

4. Back

An area of irregular abrasion was noticed in the region of the back, 20 cms above the natal cleft.

Comments:

1. The deceased received a heavy blow (or blows) to the right side of the face and head which resulted in the skull fracture and brain injuries.
2. The incised injuries to the right hand are defense type injuries and might have been caused by a knife. I consider glass as to be unlikely to have caused these injuries.
3. The bruise to the left forearm probably a defense type wound.
4. The small stab wound to the front of the abdomen was caused by a knife.
   IN MY OPINION DEATH RESULTED FROM HEAD INJURIES

Identification an issue

[10] Two civilian witnesses placed Ms Nalave at Frequency nightclub at the time of the alleged murder. The first witness was Sesenieli Vugakoto. Ms Vugakoto and Ms Nalave were friends. Ms Vugakoto's evidence was that Ms Nalave accompanied her and her boyfriend, Dean to Frequency nightclub at around 8 pm on 10 June 2004. Dean did not give evidence. Later in the night at around 9.30 pm, Ms Vugakoto said

that Ms Nalave wanted to know who the owner of the club was. She told Ms Nalave that the owner was a Chinese lady and her office was at the back of the club.

[11] At around 10 pm, Ms Vugakoto came out of the club to have a meal. When she went back inside the club after 15 minutes, Ms Nalave had disappeared. She looked around but Ms Nalave was nowhere to be seen. At around 11 pm, she came out of the club with Dean to go home. While she was leaving, she realised Ms Nalave was following her. She noticed that Ms Nalave was sweating. She asked Ms Nalave about her disappearance from the club. Ms Nalave did not respond. Ms Nalave accompanied Ms Vugakoto to Dean's home. When they arrived at Dean's house, Ms Nalave had a shower and washed her clothes before drying it with an iron. Ms Nalave slept overnight in Dean's house and left in the morning at around 6 am.

[12] The second witness placed both appellants at Frequency nightclub on the night in question. The witness was Laisiasa Ulunikoro. He was employed as a security guard at the club. On 10 June 2004, he commenced work at 6 pm. He said that at around 7 pm, Ms Vugakoto came to the club accompanied by two men and two girls. Ms Vugakoto and the two men entered the club first. The two girls followed afterwards. He had known Ms Vugakoto and the two men, but he had not seen the two girls before. He stopped the girls from entering because they came to the club for the first time. He saw them carrying a file and they told him they wanted to meet the boss (referring to the owner of the club). He allowed them in and directed them to see the manager inside the club.

[13] At around 11 am, Ms Vugakoto left the club with her male companions. The two girls followed shortly. The first girl forced her way out. She was carrying a plastic bag when she came out of the club. Mr Ulunikoro identified Ms Marama as that girl. The second girl had a tea towel wrapped around her hand. Her shoes appeared to be covered with stains that looked like blood. Mr Ulunikoro tried to stop her but she pushed him and ran away. He identified Ms Nalave as that girl. Shortly after the girls had left, Mr Ulunikoro found the victim lying on the floor of her office covered with blood.

Confessions

[14] Under caution, both appellants confessed to their involvement in the alleged killing of the victim. They admitted entering the victim's office to steal money. While they were inside the office, the victim came and confronted them. They each took an empty liquor bottle and struck the victim in the head, rendering her unconscious. Ms Nalave said that when she struck the victim in the head, the liquor bottle broke (Q140 of the Caution Interview). Ms Marama admitted striking the victim twice with a liquor bottle (Qs 82-83 of the Caution Interview). They struck her to stop her from raising alarm. After striking the victim unconscious, the appellants fled the scene.

Ms Nalave's defence

[15] Ms Nalave's defence was denial of the crime. She admitted being present at Frequency nightclub on the night in question, but was not involved in the commission of any crime. She said she did not see Ms Marama the entire time she was in the club. She explained her disappearance from the club (between 10 pm and 11 pm) saying she was outside the club talking to her father on a mobile phone. She also explained that the reason she had a shower and washed her clothes after returning from the club was because she was feeling hot and sweaty. She said her confession was involuntary and fabricated.

Ms Marama's defence

[16] Ms Marama's defence was alibi. She said she was working as a waitress at Bollywood nightclub in Lautoka on the night of 10 June 2004. She commenced work at 7 pm and finished off at 2 am in the morning. She also said her confession was involuntary and fabricated.

Dock identification

[17] At the trial, Ms Nalave did not dispute her identification by Ms Vugakoto and Mr Ulunikoro. She challenged their credibility. In her evidence she admitted being present at Frequency nightclub on the night in question, but had nothing to do with the alleged murder of the victim. Dock identification did not add anything to the prosecution case as far as Ms Nalave was concerned.

[18] Ms Vugakoto did not implicate Marama. Mr Ulunikoro did. His evidence placed Ms Marama at the scene of the crime. At the trial, Mr Ulunikoro identified Ms Marama as the person who accompanied Ms Nalave to Frequency nightclub on the night the owner of the nightclub was attacked in the office. His evidence was that he had ample opportunity to see Ms Marama in good lighting condition when she entered the club and when she left the club. Ms Marama's trial counsel did not object to the dock identification.

[19] However, after the summing up was delivered, counsel sought redirection on dock identification. The learned trial judge acceded to the request and told the assessors that that the dock identification of Ms Marama by Mr Ulunikoro had very little weight. This direction was given in addition to earlier direction on identification in paragraphs 31 and 32 of the summing up:

> 31. Evidence that the accused has been identified by a witness as doing something must, disputed by the accused, be approached with special caution because experience has demonstrated, even honest witnesses have given identification which have been proved to be unreliable. I give you this warning not because I have formed any view of the evidence, but the law requires that in every case where identification evidence is involved, that the warning be given.
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> 32. In assessing the identification evidence, you must take following matters into account:
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> (i) Whether the witness has known the accused earlier?
> (ii) For how long did the witness have the accused under observation and from what distance?
> (iii) Did the witness have any special reason to remember?
> (iv) In what light was the observation made?
> (v) Whether there was any obstacle to obstruct the view?"

[20] Although the direction on identification followed the guidelines in the case of *R v Turnbull* [1977] 63 Cr App R 132, the learned trial judge did not point out to the assessors any weakness in the identification evidence. Mr Ulunikoro identified the appellants for the first time in the dock. The courts have taken the view that identification of an accused for the first time in the dock is highly undesirable (*Cartwright* [1914] 10 Crim App R 219, *Caird* [1970] Crim LR 656). Such a form of identification is suggestive and highly prejudicial to the accused. However, the

discretion to allow dock identification lies with the trial judge after weighing its probative value over its prejudicial effect (*Wainiqolo v State* unreported Cr App No AAU0027 of 2006; 24 November 2006).

[21] In the present case, Mr Ulunikoro's initial identification of the appellants was not a fleeting glance. He had an opportunity to observe both appellants on a number of occasions when they were in the club on the night of the alleged incident. He even had a conversation with the women when they arrived at the club. No objection was taken to the admissibility of dock identification of the appellants by their respective trial counsel. In any event, the prejudicial effect of the first time dock identification diminished when the learned trial judge told the assessors to attach little weight to the dock identification.

Previous inconsistent statements

[22] Grounds two and three were argued together. The complaint relates to Mr Ulunikoro's evidence. The appellants' contention is that the learned trial judge should have directed the assessors to consider the inconsistencies in Mr Ulunikoro's evidence and his police statement. This contention is incorrect. The learned trial judge dealt with the alleged inconsistencies in paragraphs 46-47 of the summing-up:

> 46. The next lay witness for the prosecution was Laisiasa Ulunikoro. He was a security officer attached to the Frequency Lounge night club in 2004. The owner of the night club was Sherly Li. She was working that night. On 10.6.2004 he had started work at 6.00 p.m. At about 7.00 p.m. Niraj, Deen, Sesenieli had come followed by two other women. He had known Niraj, Deen and Sesenieli earlier. The two girls had told him that they want to meet the boss. He had asked them to go and meet manager Mosese. Deen, Niraj and Sesenieli had gone out around 11.00 p.m. One of the two girls had come and pushed him and run. There was something like blood on her canvas. She had a tea towel wrapped around her hand. Her hair was not tight. The 2nd girl had a plastic bag in her hand. Her hair was also not tight. She had forced her way out. He identified the two girls as the two accused. After the two girls left the barman had come running and informed him that boss was injured and lying on floor. He had gone

running to the room. There was blood all around her. Her head was badly injured. They have taken the deceased to a doctor. Under cross examination by the 1st accused, it was suggested to him that he failed to mention to police that 1st accused came looking for a job. He had denied that. His statement to police was marked as document for 1st accused marked D (1) (1).When cross examined by the 2nd accused, he said that he was taken to police after he went home and having 'Grog'. He admitted that he had told about only four persons in the police statement.

47. You saw him giving evidence in Court. He had given prompt answers to questions put to him by the defence. The statement made by him is with you. There are inconsistencies between his police statement and his evidence given at court. It is up to you to decide whether you could accept his evidence or part of his evidence beyond reasonable doubt. If you accept his evidence in full, the prosecution wants to draw the inference that both accused were there in the night club at the time of the incident. If you only accept part of his evidence that 1st accused came, then that corroborates the earlier evidence of Sesenieli that 1st accused came.

[23] At the trial, counsel for Ms Nalave suggested to Mr Ulunikoro that he did not mention in his police statement that Ms Nalave came to the nightclub looking for a job. Mr Ulunikoro's evidence was that he told the police that Ms Nalave came to the nightclub looking for a job. No material discrepancy was established from counsel's cross-examination.

[24] Counsel for Ms Marama also cross-examined Mr Uluikoro regarding omissions in his police statement. But the omissions were not serious enough to render Mr Uluikoro's evidence incredible. As this Court in *Nadim v State* unreported Cr App No AAU0080; 2 October 2015 said at [13]:

> But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be

annexed with undue importance (see Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280) (per Prematilaka JA)

[25] There are many reasons why a court may not attach much weight to minor discrepancies. Some of those reasons were carefully articulated by the Supreme Court of India in *Bharwada Bhoginbhai Hirjibhai v State of Gujarat* (1983) 3 SCC 217 at 222-223:

1. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.
2. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.
3. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss is image on one person's mind, where as it might go unnoticed on the part of another.
4. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.
5. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.
6. Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.
7. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out

> of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness is giving a truthful and honest account of the occurrence witnessed by him – Perhaps it is a sort of psychological defence mechanism activated on the spur of the moment. (per Thakkar J)

[26] Some of these reasons explained the discrepancies in Mr Ulunikoro's evidence and his police statement. Although there were omissions, but they were not so serious as to cast doubt about Mr Ulunikoro's credibility. The assessors were told to consider the discrepancies. In my judgment, there is no miscarriage of justice arising from the manner in which the learned trial judge dealt with Mr Ulunikoro's evidence.

Alibi

[27] This complaint relates to Ms Marama only. Her contention is that the learned trial judge should not have told the assessors in paragraph 73 of the summing-up that she was required to give a notice of alibi. Ms Marama gave her notice of alibi on 18 September 2013, that is, well outside the prescribed period of 21 days from the date of transfer to the High Court. The submission that the requirement to give notice only applies to witnesses and not to an accused flies in the face of the clear statutory requirement for an accused to give a notice of alibi. Section 125(1) and (2) of the Criminal Procedure Act 2009 states:

> (1) On a trial before any court the accused person shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused person has given notice in accordance with this section.
> (2) A notice under this section shall be given –
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> (a) within 21 days of an order being made for transfer of the matter to the High Court (if such an order is made); or
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> (b) in writing to the prosecution, complainant and the court at least 21 days before the date set for the trial of the matter, in any other case.

[28] This case was transferred to the High Court for trial on 17 August 2004. When Ms Marama gave her notice of alibi pursuant to section 125(1) (2) (a) of the Criminal

Procedure Act 2009 on 18 September 2013, the notice was late by nine years. The learned trial judge was correct to tell the assessors that Ms Marama's notice was outside the prescribed statutory period for giving notice of alibi. No error is shown in that regard.

[29] Ms Marama's further contention is that the summing-up was unfair because the learned trial judge did not tell the assessors that the non-compliance of the statutory period for notice was a matter that went to the weight of an alibi. The direction on alibi is in paragraph 71 of the summing-up:

> The 2nd accused's defence is one of alibi. She says that she was not at the scene of crime when it was committed. As the prosecution has to prove her guilt so that you are sure of it, she does not have to prove she was elsewhere at the time. On the contrary, the prosecution must disprove the alibi. Even if you conclude that alibi was false, that does not by itself entitle you to convict the accused. It is a matter which you may take into account, but you should bear in mind than an alibi is sometimes invented to bolster a genuine defence.

[30] I accept that the learned trial judge did not tell the assessors that the late notice went to weight of the alibi, but I am not convinced that Ms Marama was prejudiced by the omission because the learned trial judge clearly told the assessors to consider the alibi and that it was not for the accused to prove alibi but it was for the prosecution to disprove it. There is no error in the direction on alibi.

Missing exhibits

[31] At the trial, witnesses made references to clothes and shoes worn by the appellants but none of those items were produced in court as exhibits. The deadly weapons were liquor bottles. They were not produced as exhibits. The appellants' contention is that these items should have been produced in court as exhibits. Both appellants were represented by counsel at the trial. They made no complaint to the trial judge regarding missing exhibits such as clothes and bottles. If they would have raised the issue with the trial judge, then the court could have called for an explanation from the prosecution regarding missing exhibits. But by not taking an issue with the trial judge, the complaint was waived. Only in very exceptional circumstances that this Court will

review a complaint that could have been taken with the trial court but was not. In any event, I am not satisfied that the missing exhibits caused a miscarriage of justice.

Weight of confessions

[32] The appellants challenged the admissibility of their confessions on the basis that they were obtained using violence and threats by police. Another judge had earlier ruled the confessions admissible after hearing the evidence in a voir dire. The admissibility ruling is not being challenged on appeal. The weight of the confessions is being challenged on appeal. The appellants' contention is that the learned trial judge misdirected the assessors by telling them to consider the voluntariness instead of the weight of the confession. The impugned direction is in paragraphs 55 and 60 of the summing-up:

> 55. It is up to you to decide whether the 1st accused made a statement under caution voluntarily to this witness. If you are sure that the caution interview statement was made freely and not as a result of threats, assault or inducements made to the accused by persons in authority then you could consider the facts in the statement as evidence. Then you will have to further decide whether facts in this caution interview statement are truthful. If you are sure that the facts in the caution interview are truthful then you can use those to consider whether the elements of the charge are proved by this statement.
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> 60. It is up to you to decide whether the 2nd accused made the caution interview statement voluntarily to Cpl. Delai in the presence of this witness. If you are sure that the caution interview statement was made freely and not as a result of threats, assault or inducement made to the accused by persons in authority then you could consider the facts in the caution interview statement as evidence. Then you will have to further decide whether facts in this caution interview are truthful. If you are sure that the facts in the caution interview statement are truthful then you can use those to consider whether elements of the charge are proved by this statement.

[33] Involuntariness of a confession is an admissibility issue to be determined in a voir dire by the trial judge (*Kean v State* unreported Cr App No AAU 95 of 2008; 13

November 2013, [24] per Calanchini P). But if involuntariness remains a live issue before the assessors, the trial judge should tell the assessors that even if they are sure that the accused said what the police attributed to him or her, they should nevertheless disregard the confession if they think that it may have been made involuntarily (*Maya v State* unreported Cr App No CAV009 of 2015; 23 October 2015), [23] per Keith JA).

[34] In the present case, the appellants continued to challenge the voluntariness of their confessions before the assessors and the trial judge after it was ruled admissible in a voir dire. In the summing-up, the learned trial judge told the assessors to first consider whether the caution statements were made freely and not as a result of threats, assault or inducement and if they were so satisfied, then they were to consider the truth of those statements. Clearly, the weight of the confessions was left to the assessors and the appellants' contention that they were not is incorrect.

[35] In the caution interviews, although the appellants admitted to assaulting the victim with liquor bottles, they also made statements to minimise their roles in killing the victim by blaming each other. In the summing-up, the learned trial judge fairly summarized the evidence for both the prosecution and the defence. The assessment of the evidence was carried out in the summing-up. It was open on the evidence for the assessors and the trial judge to find the confessions were true and rely on it to convict the appellants. The guilty verdict is supported by the evidence of the appellants' confessions.

Conclusion

[36] The grounds of appeal have not been made out. I would dismiss the appeals.

Temo JA:

[37] I agree with Goundar JA that the appeals should be dismissed.

Order of the Court:

Appeals dismissed.

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Hon. Mr Justice S Gamalath
JUSTICE OF APPEAL

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Hon. Mr Justice D Goundar
JUSTICE OF APPEAL

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Hon. Mr Justice S Temo
JUSTICE OF APPEAL

Solicitors:
Office of the Legal Aid Commission for the Appellant
Office of the Director Public Prosecutions for the Respondent