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

CRIMINAL APPEAL NO: AAU 134 OF 2014
(High Court Criminal Case No: HAC 90/ 2011[Lautoka])
(Magistrate's Court at Rakiraki Criminal Case No: 89/11)

BETWEEN : **AVNIT SINGH**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath JA**
Prematilaka JA
Fernando JA

Counsel : **Mr. M. Fesaitu for the Appellant**
Mr. M. D. Korovou for the Respondent

Date of Hearing : **13 September 2018**

Date of Judgment : **04 October 2018**

JUDGMENT

Gamalath JA

[1] I have read in draft the judgment of Fernando JA and I agree with the reasons and the conclusions therein.

Prematilaka JA

[2] I agree with the reasons and conclusions of Fernando JA.

Fernando JA

[3] The Appellant has appealed against his conviction for the offence of murder. Counsel for the Appellant informed us at the hearing that there was no appeal against the sentence and the mention of the word sentence in the Written Submission dated 27th of May 2015 was a typographical error. His Notice of Appeal filed does not contain any grounds of appeal against sentence. The Ruling of the single Judge of this Court granting him leave has made reference only to his appeal against conviction.

[4] The Appellant had been charged as follows:

"Statement of Offence:

Murder: Contrary to section 237 (a) (b) (c) of the Crimes Decree No. 44 of 2009

Particulars of Offence

Avnitt Singh on the 3rd day of May 2011 at Tuvavatu in the Western Division murdered Bal Krishna"

[5] The offence of Murder has been defined in the Crimes Decree 2009 as follows:

"*Murder*

237. A person commits an indictable offence if—

(a) the person engages in conduct; and

(b) the conduct causes the death of another person; and

(c) the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct.

Penalty—Mandatory sentence of Imprisonment for life, with a judicial discretion to set a minimum term to be served before pardon may be considered."

[6] All three Assessors at the conclusion of the Trial had opined the Appellant not guilty. But the learned Trial Judge had by his judgment dated 26 September 2014 convicted the Appellant of the offence of murder and sentenced him to life imprisonment with a minimum term of 20 years. In **Ram Dulare & others –v- R [1955] 5 FLR 1** the Court of Appeal referring to the case of **Joseph –v- the King [1948] AC 215** said: "*...[the assessors'] duty is to offer opinions which might help the trial Judge. The responsibility for arriving at a decision and of giving judgment in a trial by the High Court sitting with the assessors is that of the trial Judge and the trial Judge alone and...he is not bound to follow the opinion of the assessors.*" In **Sakiusa Rokonabete –v- The State Criminal appeal No AAU 0048/05** this Court said: "*In Fiji, the assessors are not the sole judges of fact. The Judge is the sole Judge of fact in respect of guilt and the assessors are there only to offer their opinions based on their views of the facts*" However according to section 237(4) of the Criminal Procedure Act 2009, where the trial Judge disagrees with the majority opinion of the assessors, he must give written reasons for differing from the opinion and those reasons must be pronounced in open court. It has been held that the reasons of the presiding trial Judge must be cogent and they should be clearly stated. They must be founded on the weight of the evidence and the Trial Judge's views as to the credibility of witnesses must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial. See the cases of **Ram Bali –v- Reginam [1960] 7 FLR 80; Ram Bali –v- The Queen Privy Council appeal No 18 of 1961; Shiu Prasad –v- Reginam [1972] 18 FLR 70 and Setevano –v- State [1991] FJA 3**.

[7] A single Judge of this Court had granted leave to the Appellant to proceed on all the grounds of appeal that he had filed against conviction. The said grounds as contained in the Ruling are as follows:

a) *"That the learned Judge has erred in law and in fact when he misdirected himself about the evidence contained in the caution*

interview of the appellant in respect of its truth and/ or credibility and the weight to be given to the confessions.

b) *That the learned trial Judge has erred in law and in fact to admit the confession in voir dire as there was a serious doubt the voluntariness and the truth or correctness of the said confession for the reasons inter alia that prime prosecution witness Sunita Devi in her evidence in chief said, "she had seen the police officers assaulting the accused for 2-3 minutes at Namaka Police Station...At Lautoka Police Station she has told the accused to tell the truth so that they will not beat him".*

c) *That the learned Judge has erred in law and in fact when he did not direct himself that the prosecution witness Sunita Devi, who was granted immunity would have implicated the Appellant.*

d) *That the learned Judge has erred in law and in fact when allowing hearsay evidence of the prosecution witness Subramani Mudaliar and then not directing his mind on the rule against hearsay.*

e) *That the learned trial Judge has erred in law and in fact when he failed to properly direct his mind to the alibi evidence of the Appellant's father.*

f) *That the learned trial Judge has erred in law and in fact when he did not correctly direct himself on how to approach circumstantial evidence and what weight to be attached to it." (verbatim)*

[8] Facts in Brief:

The main witness for the prosecution was Sunita Devi, the de facto partner of the Appellant of 8 months. Sunita was 32 years old and had 3 children and the Appellant was 19 years old. Both of them worked in a farm belonging to the deceased Bal Krishna, a.k.a Dada, and lived in the house of the deceased. There were no other houses nearby. It is Sunita's brother who had arranged for them to work at the deceased's farm. They had gone there about two weeks prior to the incident. The deceased was in the habit of making unwanted sexual advances towards Sunita by touching her and she had reported this to the Appellant. The Appellant had indicated his disapproval of such conduct. On the day of the incident, namely the 3rd of May 2011, around 9 in the morning the Appellant had brought an axe and told Sunita to go and sleep in the next room. The Appellant had then gone to the sitting room where the deceased was having breakfast.

While she was in the room she had heard a loud sound like someone had been hit. She had then yelled and asked the Appellant what he was doing. She had then come out and seen the Appellant standing with a blood stained axe in his hand and the deceased motionless. She had run away from the house but the Appellant had brought her back into the house. Sunita had then gone and packed all their clothes at the request of the Appellant. The Appellant had washed the axe and thrown it to the woods. In court Sunita had identified the axe the Appellant had in his hand. Both of them had then left the house of the deceased leaving the deceased behind. On the way they had met an i-Taukei person who had inquired about the deceased. The Appellant had told him that the deceased was not at home and that the deceased had told the Appellant that no one should come when the deceased was not at home. They had then come on to the road. The Appellant had washed his feet and changed his shoes. Coming on to the road they had got into a vehicle and gone to Rakiraki town. The driver of the vehicle had asked them whether they had done something.

[9] Ranjeet Singh who testified for the prosecution at the trial had told court that around 10 am on the 3rd of May 2011 he had given a lift to a boy and a girl who had wanted a lift to the town. They had a bag with them. He had identified the Appellant as the person whom he gave a lift on the 3rd of May. When he questioned them as to where they were coming from, the Appellant had told him that they were coming from one Bal Krishna's house. Ranjeet did not know who Bal Krisna was. Bal Krishna is the deceased in the case. From Rakiraki town where Ranjeet had dropped them Sunita and the Appellant had boarded a bus and gone to Lautoka and then to the Appellant's parents' house in Nadi. The Appellant had told his parents that he had killed the deceased. Sunita had then called her father and told him that the Appellant had killed the deceased but had told him that the Appellant had warned her not to tell anyone about it. Later the police had arrested both Sunita and the Appellant. The body of the deceased was found in a decomposing state on the 7th of May 2011, i.e. four days after the incident. Under cross-examination Sunita had said that she had seen police officers assaulting the Appellant for 2-3 minutes at Namaka police station. At Lautoka police station she had told the Appellant to tell the truth so that he will not be beaten.

[10] The learned Trial Judge in relation to Sunita Devi's evidence had said *"I observed the demeanor of this witness when she gave evidence. In my mind there is no doubt that she gave truthful evidence in Court. She was prompt in answering the questions put to her by the prosecution as well as defence. She was not evasive in her answers. She had told the father about the incident few days after the incident. There were no contradictions in her evidence. Thus her evidence was consistent."*

[11] Sunita Devi's evidence about the Appellant and her getting a lift to town was confirmed by the unchallenged evidence of Ranjeet Singh who testified for the prosecution at the trial. Subramani Mudaliar, the father of Sunita Devi had in his evidence before the Court said, that his daughter Sunita had told him that the Appellant had killed the man where they were staying at Rakiraki and that the Appellant had told her not to tell anyone about it. It is Subramani who had informed the brother of the deceased and the Rakiraki police about the incident. The learned Trial Judge had also stated in his judgment that he had watched Subramani Mudaliar giving evidence and that there was no doubt in his mind that he was speaking the truth. Namrita Krishna Goundar, the daughter of the deceased had informed court at the trial that when she called the deceased on the day prior to the incident he had informed her that a couple was staying with him at that time.

[12] The medical evidence led in this case is to the effect that death was due to fracture of the skull from a heavy blunt weapon and that such fracture could possibly have been caused by a single blow with the back of an axe.

[13] The Appellant in his Caution Interview that was admitted by the learned Trial Judge after a Voir dire had said how he came to be employed by the deceased and started working for him in his farm from 27th April 2011. Coming to work at the deceased farm and living in his farm house he came to know that the deceased was making unwanted sexual advances towards his partner. On 3rd May 2011, the day of the incident, the deceased had woken him up around 5 am to go and work in the farm. He had worked in the farm and worked till about 8.30 in the morning. Returning back Sunita had told him how the deceased had misbehaved towards her while he was out in the farm. He then thought of a

way to rescue his wife from the deceased. He had then picked up an axe that was in their bedroom, gone up to the deceased who was having his breakfast and hit him hard on his head with the axe from behind. Thereafter, he had told his wife to pack up their clothes as they had to leave the place. He had washed the blood stained axe and placed it in the back compound. The axe had a 4 inch blade and a rusted handle. He had said that he had struck the deceased with the opposite end of the blade and not with the side used to chop firewood. On their way after leaving the deceased's house he had met a '*Fijian*' man who had wanted to know where the deceased was. Since he was frightened he had told the man that the deceased had gone to town. Later they had met a person driving a pajero and had asked him for a lift. While being given a lift, the driver had asked the Appellant whether they had done something wrong and was running away from there. He had thereafter come to Nadi. The Appellant had said that he had told his parents that he had struck a man on his head. He had also said that he had burnt the pants he was wearing when he struck the deceased, thinking there was blood on it. After his Caution Statement the police had taken the Appellant to the scene of crime where the Appellant had shown the police from where he picked up the axe, the place where the deceased was sitting when he struck him with the axe, the place where he washed the blood stained axe, the place where he threw the axe after washing it and various other places reflected in his statement.

[14] The learned Trial Judge had stated at paragraph 33 of his judgment that: "The above three witnesses gave evidence on the caution interview of the accused. I have already ruled that the caution interview of the accused was voluntary in my ruling…I further hold that facts in this caution interview statement are truthful." He had gone on to state that "The caution interview statement alone is sufficient to establish all the elements of the charge."

[15] The Appellant at the close of the prosecution case had opted to give evidence on oath. His defence was one of a total denial. He had stated that he had a de facto relationship with Sunita Devi for about a year prior to the incident for which he was now facing a charge. It was Sunita Devi's brother who had made arrangements with the deceased for him to work at the farm of the deceased. He had gone to work in the deceased's farm on

the 27th of April 2011. Everything worked out well with the deceased. On 3rd of May 2011, which was a Sunday and Mother's day they had left the farm as they wanted to get old clothes to work in the farm. They had left around 7 in the morning and after breakfast having collected everything. By that time the deceased had gone to the hillside for grazing the horse. On the way they had met an i-Taukei man who had asked him where the deceased was and had told him that he was not at home and gone to buy spare parts. They had gone to town in a pajero. They had gone then to his parents' place at Nadi. The Appellant had said that the deceased was aware that they were leaving that morning. On the 8th of May the police had come looking for him saying that Sunita's father had lodged a complaint against him. He had been taken to Namaka police station where they accused him of killing the deceased and had beaten him when he denied the allegation. He had thereafter been taken to Lautoka police station. At Lautoka, Sunita had told him that the police had wanted him to admit the crime and otherwise they would beat him. He had therefore admitted that he killed the deceased. The following morning the police had recoded his Caution Statement. The Appellant had said that not all answers in the caution statement were given by him and they had been recorded by the police on information given to them by Sunita. The Appellant had denied killing the deceased and stated that he had been trapped.

[16] Under cross examination the Appellant had said that they were in a rush to leave soon after breakfast as they had to get to Nadi before dark and that is why they had left the dishes in the condition they were. The Appellant had been represented by a lawyer when he was produced before the court on the 10th of May 2011, but had not told him that he had been assaulted by the police, had injuries and that some of the answers in the caution statement were not true. He had said that he and Sunita had taken all their clothes which were new as they wanted to leave them behind at home and bring some old clothes. He had said that there was no reason for Sunita to say something against him.

[17] The learned Trial Judge had stated in his judgment that the Appellant's evidence is inconsistent with his caution statement and commented that it was not suggested to Sunita that they had made arrangements to leave on the 3rd morning and had there been

such an arrangement there was no reason for them to leave in a hurry without even washing the dishes and this made his version improbable. He had rejected the evidence of the Appellant as untrue. It is also clear that the Appellant had both according to his caution statement and evidence before the court lied to the I-Taukei man he met when fleeing from the deceased's house as to the whereabouts of the deceased. This is confirmed by Sunita Devi. This was a deliberate lie, relating to a material issue and there was no innocent explanation to it and can be taken to support the guilt of the Appellant in accordance with the principle enunciated in **R –v- Lucas [1981] Q. B. 720, 73 Cr App. R. 159 CA.**

[18] In respect of ground (a) of appeal referred to at paragraph 7 above I do not see the learned Trial Judge having misdirected himself in respect of the truth and/or credibility and the weight to be given to the confession of the Appellant. Counsel for the Appellant tried to argue that the learned Trial Judge erred at paragraph 33 of the judgment by making reference to the voluntariness of the confession, in holding that the facts in the caution statement are truthful, as voluntariness and truthfulness are two separate issues. At paragraph 33 of the judgment the learned Trial Judge had said: "The above three witnesses gave evidence on the caution interview of the accused. I have already ruled that the caution interview of the accused was voluntary in my ruling dated 8th September 2014. I further hold that facts in this caution interview statement are truthful…" I do not find that the learned Trial Judge had erred in this regard as sought to be argued by the Appellant's Counsel in making this statement. The learned Trial Judge had stated in his judgment that he is convinced that there was evidence beyond reasonable doubt that the Appellant is guilty of murder on the basis of the evidence of Sunita Devi, the confession of the Appellant and the corroboration of the Appellant's confession that he hit the deceased with the blunt side of the axe by medical evidence. In his view the opinion expressed by the assessors is perverse. Looking at it in another way the confession has been corroborated by the evidence of Sunita Devi, Ranjeet Singh and the medical evidence. The medical evidence is to the effect that the fracture of the skull had been caused by a blunt weapon and the Appellant in his confession has stated he used the blunt side of the axe when he struck the deceased.

[19] In regard to ground (b) of appeal referred to at paragraph 7 above Counsel for the Appellant informed us at the hearing that he was not pursuing the issue pertaining to the voluntariness of the confession but wanted us to consider what Sunita said in her evidence as referred to at paragraph 7(b) above in deciding the truthfulness of the confession. It is to be noted that what Sunita had told the Appellant was to *"tell the truth"*. On the issue of voluntariness although the Appellant's Counsel chose not to pursue it we fail to understand why the Appellant had not decided to call Sunita as a witness on his behalf at the Voir dire. It is to be noted that the Appellant had been represented by a lawyer on 10th May 2011 when he was produced before the court after his arrest and at the recording of his confession. The Appellant testifying before the court had admitted that he had not told his lawyer that he was assaulted by police and he had injuries. There is no evidence that the Appellant had visible injuries. Had the Appellant considered that the evidence of Sunita Devi which came in after the conclusion and ruling on the Voir dire had a bearing on the voluntariness of the confession, as he is now claiming, he could have asked for a re-direction on the matter at the conclusion of the Summing Up. Relying on the cases of **Alfaaz –v- State [2018} FJCA 19, AAU0030 (8 March 2018), Raj –v- State Petition for Special Leave to Appeal No CAV0003 of 2014: 20 August 2014 [2014] FJSC 12 and Varasiko Tuwai –v- State [2016] FJSC 35 (26 August 2016)**, I state that in the absence of cogent reasons for not raising the issue by way of redirection, this Court will be slow to entertain an appeal on this ground.

[20] In regard to ground (c) referred to at paragraph 7 above, Counsel for the Appellant tried to elaborate this ground at the hearing before us by stating that Sunita Devi should have been treated as an accomplice. An accomplice is one who is a *'partcipes criminis'* in the actual crime charged, whether as a principal and accessory. To be an accomplice it must be shown that the witness intentionally gave assistance and encouragement to the criminal activity of the accused. It is not sufficient to be a mere bystander, because a mere bystander is not at risk and therefore lacks the incentive falsely to implicate the accused which is the basis of the rule pertaining to accomplice evidence. It is clear from the evidence of the Appellant, both in his confession and testimony before the Trial Court (paragraph 13, 15 and 16 above), and the evidence of Sunita Devi (paragraph 8 above)

that Sunita Devi was not an accomplice. It was never suggested to her at the trial by the defence that Sunita Devi was an accomplice. The learned Trial Judge had clearly stated in his Summing Up that Sunita Devi was not an accomplice, but yet given the necessary directions to the Assessors that "If a witness is an accomplice it is my duty to warn you that you should look for independent corroboration of that evidence and it is not safe to convict on uncorroborated testimony of an accomplice." This should suffice to dispose of this ground of appeal.

[21] Fiji has followed the common law rule of practice, which had crystallized into a rule of law, and adopted by the UK courts for many years that it was obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person when that person is an alleged accomplice of the accused.

[22] It is of interest however to take note of the development of the law in regard to accomplice evidence in the UK, Canada and Seychelles. In the UK, the requirement that it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of an alleged accomplice has now been abrogated by **section 32 of the Criminal Justice and Public Order Act of 1994**.

[23] In the Canadian Supreme Court case of **Vetrovec –v- The Queen [1982] 1 SCR 811**, it was said "*None of the arguments put forward to look for corroboration of accomplice evidence can justify an invariable rule regarding all accomplices. All that can be said is that the testimony of some accomplices may be untrustworthy. But this can be said of many other categories of witnesses. There is nothing inherent in the evidence of an accomplice which automatically renders him untrustworthy. To construct a universal rule singling out accomplices, then, is to fasten upon this branch of law of evidence a blind and empty formalism. Rather than attempt to pigeon-hole a witness into a category and then recite a ritualistic incantation, the Trial Judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness. If, in his judgment, the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly. If on the other hand, he believes*

the witness to be trustworthy, then, regardless of whether the witness is technically an 'accomplice' no warning is necessary."

[24] The Court of Appeal of Seychelles said in the cases of **Jean Francois Adrienne & another –v- The Republic CR App SCA 25 & 26/2015** and the case of **Dominique Dugasse & others –v- The Republic [SCA 25, 26 & 30 of 2010]**: that it is not obligatory on the courts to give a corroboration warning in cases involving accomplice evidence and that it should be left at the discretion of judges to look for corroboration when there is an evidential basis for it.

[25] Reference was made to such an evidential basis by **Lord Taylor C.J. giving the judgment of the court in Makanjuola, 1995 1 WLR 1348 and R –v- Easton 1995 2 Cr. App. R. 469 CA** when he said: "*Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence.*" Sunita Devi does not fall into anyone of these categories even if this test were to be applied.

[26] Counsel for the Appellant at the very outset of the hearing of this appeal informed Court that he was abandoning ground (d) of appeal referred to at paragraph 7 above and rightly so, as Subramani Mudliar did not give hearsay evidence but only repeated what Sunita Devi had already told court.

[27] In regard to ground (e) of appeal referred to at paragraph 7 above, the learned Trial Judge had rejected the alibi of the Appellant since notice, as required under section 125 of the Criminal Procedure Act 2009, had not been given in writing to the prosecution and the court 21 days prior to the date set for trial. It had been his view that the accused had taken this defence at a very late stage of his trial. All that the Appellant had stated to Court in his evidence is that he was not at the house of the deceased, namely the scene of crime at

the time it was committed. Appellant's father does not in his evidence support this position. However the learned Trial Judge at paragraph 45 of his Summing Up had dealt with the Appellant's defence of alibi, by stating: "The accused took a defence of alibi. He says that he was not at the scene of crime when it was committed. As the prosecution has to prove his guilt, he does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi."

[28] In regard to ground (f) referred to at paragraph 7 above, I find that the learned Trial Judge had dealt with at great length, citing examples on how to approach circumstantial evidence at paragraphs 29-32 and 41 of his Summing Up. This clearly shows that the learned Trial Judge had directed himself more than sufficiently on how to approach circumstantial evidence. This case in my view was more of direct evidence in view of the confession of the Appellant.

[29] I therefore dismiss all the grounds of appeal and have no hesitation in dismissing the appeal and affirming the conviction of the Appellant for the offence of murder.

Orders of the Court:

1) *The appeal is dismissed.*
2) *The conviction and the sentence is affirmed.*

Hon Mr Justice S Gamalath
JUSTICE OF APPEAL

Hon Mr Justice C Prematilaka
JUSTICE OF APPEAL

Hon Mr Justice A Fernando
JUSTICE OF APPEAL

COURT OF APPEAL FIJI