IN THE COURT OF APPEAL
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0029 OF 2017
[High Court Criminal Case No. HAC 200 of 2014]

BETWEEN	:	**JULIAN HEINRICH**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka JA** **Fernando JA** **Nawana JA**
Counsel	:	**Mr. Valenitabua S. for the Appellant** **Ms. Fatiaki J. for the Respondent**
Date of Hearing	:	**19 February 2019**
Date of Judgment	:	**07 March 2019**

JUDGMENT

Prematilaka, JA

[1] This appeal arises from the conviction of the appellant on a single count of manslaughter contrary to section 239 of the Crimes Act, 2009. Initially, the appellant was jointly charged with the murder of Sione Tufui with two others. Subsequently, the charge against the others was withdrawn and the charge against the appellant was reduced to manslaughter by the Director of Public Prosecutions. Thus, the Information dated 16 March 2015 alleged that the Appellant on 21 June 2014 with other persons unknown at

Suva in the Central Division assaulted Sione Tufui causing the death of the said Sione Tufui and at the time of such assault was reckless as to causing serious harm to Sione Tufui.

[2] After trial, the assessors on 03 March 2017 brought unanimous opinions of not guilty of the Appellant of the charge of manslaughter. However, the Learned High Court Judge disagreed with the assessors' opinions and convicted the appellant for manslaughter on the same day. The Learned Judge had pronounced the written judgment and sentence on 06 March 2017 and imposed 03 years of imprisonment without a non-parole period on the appellant.

[3] The Appellant had filed a timely application for leave to appeal only against the conviction pursuant to section 21(1) of the Court of Appeal Act. Altogether, 07 grounds of appeal had been urged against the conviction. On 23 November 2017, the single Judge of the Court of Appeal had granted leave in respect of all grounds of appeal, except ground 06 which does not feature in the single Judge Ruling, against the conviction along with bail pending appeal. However, both parties had filed written submissions and made oral submissions at the hearing on all seven grounds of appeal.

Grounds of Appeal

[4] Therefore, the grounds of appeal against the conviction that would be considered are as follows:

1. *That the Learned Trial Judge erred in fact and in law in failing to accept the submission by Defense Counsel, after the voir dire in the court below, that the Appellant was unlawfully detained at the Totogo Police Station during the period of five days in which the Appellant was held in police custody at the above mentioned police station.*

2. *That the Learned Trial Judge erred in fact and in law in holding, after the voir dire in the court below, that the Appellant's Caution Interview was voluntarily and fairly obtained from the Appellant.*

3. *That the Learned Trial Judge erred in fact and in law in failing to address the relevant principles on prior inconsistent statements made by Finau Leone during the trial and in failing to apply those relevant principles to the prior inconsistent statements made to the police by Finau Leone at the Totogo Police Station.*

4. *That the Learned Trial Judge erred in fact and in law in failing to properly apply the evidence in the Appellant's Record of Caution Interview which His Lordship had accepted to have been given with the Appellant's free will.'*

5. *That the Learned Trial Judge erred in fact in holding that the Appellant was part of a joint enterprise with others in the assault on Sione Tufui and in Sione Tufui's eventual death.*

6. *That the Learned Trial Judge erred in fact in not assessing properly extent of the injuries on Sione Tufui's body which, in the circumstance of the Appellant's case, could not have been caused by the Appellant.*

7. *That the Learned Trial Judge erred in law in disagreeing with the unanimous opinion of the assessors without a coherent and rational analysis of the evidence in the trial, thus negating the assessor's statutory or legal role as judges of fact.*

Summary of facts

[5] At the time of the allegation of manslaughter, the appellant was 19 years old and a high school student, schooling in Ba. He was born and raised in Nauru but had come to Fiji for schooling when he was a teenager. When the alleged incident occurred, he had accompanied his friend to Suva in the weekend to watch a rugby match. The deceased was a Tongan national. He was 22 years old and a student at the University of South Pacific. It is common ground that the deceased too was seriously injured in a brawl that took place between two groups of boys outside the Dragons Nightclub on the early hours of 21 June 2014. The witnesses described the two groups as Tongan and Nauruan boys.

[6] On the day of the incident, earlier on in the night these two groups had engaged in a fight inside the club, which had started when the deceased had allegedly struck the appellant in the neck with an empty beer bottle as he approached the dance floor of the club. The appellant had not confronted the deceased because at that moment he had not seen as to who had struck him. The appellant had returned to his friends who were inside the club and one of them noticed that the appellant was bleeding from the neck. His medical

examination form shows that he had got a cut on the right side of the neck. When the appellant informed his friend about the assault, the friend had approached a Tongan boy *i.e.* the deceased who had turned around and assaulted the friend also with a bottle. At that point, a fight had ensued between the Tongan and Nauruan boys. There was no evidence that the appellant participated in the fight inside the club. Both groups had been escorted out of the club by a security officer. After coming out of the club, they had continued with their fight on the pavement outside the club where the deceased met with his death.

[7] Finau Leone, a member of the Tongan group in his evidence had testified that he was in the company of the deceased when the Nauruan boys attacked them. He had said that he saw the appellant repeatedly punching and kicking the deceased while he was lying on the pavement outside the club. He had said that he remembered the appellant's face because he tried to shield off further attacks by covering the deceased with his own body. Later on the same day, he had identified the appellant at the CWM hospital and at the police identification parade. Three other witnesses who gave evidence of the brawl between the Tongan and Nauruan boys had failed to identify the appellant as one of the participants in the attack.

[8] By the time the deceased was taken to hospital, he was dead. The post mortem report has recorded the estimated time of death as about 3.45 a.m. Multiple blunt force injuries were found on the deceased's body. The deceased had died of head injuries.

[9] The appellant had been caution interviewed at the Totogo Crime Office on 21 June 2014. The interview which had commenced at 6.30pm, after numerous breaks and adjournment, had been concluded on 25 June 2014 at 3.30pm. He had been charged on 26 June 2014 and produced before the court on the same day. In the caution interview, the appellant had made some incriminating admissions but the admissibility of it had been challenged at the trial. The caution interview had, however, been admitted in evidence after a *voir dire* hearing.

[10] At the trial, the appellant remained silent. His defence, however, had been that he was not part of the joint enterprise to assault the deceased and that his assault which was carried out after the deceased had already been assaulted by others, was not the cause of death.

[11] I shall now examine the grounds of appeal.

Ground 1

'That the Learned Trial Judge erred in fact and in law in failing to accept the submission by Defense Counsel, after the voir dire in the court below, that the Appellant was unlawfully detained at the Totogo Police Station during the period of five days in which the Appellant was held in police custody at the above mentioned police station.'

[12] The complaint of the appellant under this ground of appeal arises from the following factual context. The appellant was arrested at the CWM hospital in the early hours on 21 June 2014 and detained until 26 June 2014 at Totogo Police Station. Thus, until he was produced before court, the appellant had been held in custody for 05 days. The appellant argues that this 'unlawful detention' constitutes a violation of his rights secured under Article 13(1)(f) of the Constitution of the Republic of Fiji and therefore, his caution interview recorded between 6.30 p.m. on 21 June and 3.30 p.m. on 25 June 2014 is inadmissible.

[13] Article 13(1)(f) of the Constitution of the Republic of Fiji states

'Rights of arrested and detained persons

13.—(1) Every person who is arrested or detained has the right— (a) ..... , (b) ……. (c) ……. (d) …….. (e) …….. (f) to be brought before a court as soon as reasonably possible, but in any case not later than 48 hours after the time of arrest, or if that is not reasonably possible, as soon as possible thereafter; (g) ……'

[14] The appellant's counsel had raised this issue in relation to the admissibility of the caution interview in his oral submissions at the conclusion of the *voir dire* inquiry and there had been a considerable discussion between him and the Learned Judge on this point but the Learned High Court Judge had not gone into it in the written *voir dire* ruling dated 09 March 2017 dealing only with the aspect of voluntariness.

[15] The appellant relies on the case of **State v Dhamendra** HAM58 of 2016:10 May 2016 [2016] FJHC 386 in support of his argument. In ***Dhamendra*** the High Court had examined the propriety of an order by the Magistrate Court, on an application by the Police, to extend the period of detention beyond 48 hours for 07 more days for further investigations without the detainees being produced before court. The High Court had held that Article 13(1)(f) of the Constitution does not allow the Police to detain the persons arrested beyond the limitation of 48 hours merely on the ground of continuation of further investigation. The High Court had, however, not gone into the question of the legal consequences of a prolonged detention on a confessionary statement made by the person so detained. In fact, given the nature of the matter before it the High Court was not required to do so.

[16] Thus, it is clear that what the High Court has said in ***Dhamendra*** is that a person arrested cannot be detained beyond 48 hours of the arrest merely on the basis that investigations are not yet complete. I am inclined to agree with that finding, for there is no legal requirement that investigations into a crime should be completed within 48 hours and the investigation cannot be carried out thereafter and therefore, ongoing investigations alone is not an acceptable reason not to comply with Article 13(1)(f) of the Constitution. The time taken to complete an investigation would depend upon a myriad of factors including the complexity of the matter and if it is not possible to bring the investigation to an end within 48 hours, the investigators are at liberty, and indeed required, to bring the person arrested before a court at least, if not earlier, prior to the expiry of the time period of 48 hours and seek an order to detain him for a longer period until the investigation is completed. What is important here and the purpose of the Constitutional safeguard is to make sure that there is no arbitrary detention of persons arrested. Article 13(1)(f) of the Constitution, therefore, serves as a guarantee against such arbitrary arrest and detention by inviting judicial scrutiny over the persons arrested and detained.

[17] However, the High Court judgment in ***Dhamendra*** has not ruled out but left it open the possibility that for one or another justifiable reason or reasons, a person arrested may be produced even after the lapse of 48 hours of the arrest. This is the kind of situation envisaged under the third limb of Article 13(1)(f) of the Constitution *i.e. 'if that is not*

reasonably possible, as soon as possible thereafter.' Some examples where the third limb may come into play would be the unavailability of a court in some outer islands of Fiji or the prevalence of a state of emergency declared by the State etc. Needless to say, that there is no exhaustive list of such instances. It is only logical to think that if a person who is arrested should mandatorily be brought before a court in less than 48 hours at all times without exception, the third limb of Article 13(1)(f) would be superfluous. It is precisely because that there may be instances where 48 hour stipulation could not be complied with, that the third limb provides that the person arrested may be produced as soon as possible after the expiry of 48 hours. However, the third limb of Article 13(1)(f) could be resorted to, when and only when the person arrested cannot be produced as soon as reasonably possible (first limb) or not later than 48 hours of the arrest (second limb) and where it is not reasonably possible to comply with the first and second limb but such person is brought before a court as soon as possible thereafter. Whether in any given situation, it is not reasonably possible to comply with the first and second limb of Article 13(1)(f) and the person arrested has been brought before court as soon as possible are matters of fact to be determined considering the circumstances of each case.

[18] Therefore, in my view, when there is a failure to bring a person arrested before a court as soon as reasonably possible or not later than 48 hours of the arrest (1) he should be produced as soon as possible thereafter and (2) the party bringing that person to court must place material to satisfy court that it was not reasonably possible to comply with the first and second timelines and that he is being brought to court as soon as possible thereafter. This would be particularly required when there is an allegation that the detention is unlawful for non-compliance with Article 13(1)(f) of the Constitution. Such a course of action would also help demonstrate *bone fides* of the investigating officers. If an extension is sought for detention of the person beyond 48 hours who has been arrested but cannot be or not brought before court, ordinarily and unless it is impossible, the permission of court should be sought before the expiry of the 48 hour period. This would ensure that a person would not be held under detention beyond 48 hours without the knowledge and intervention of a judicial officer even when it is not reasonably possible to bring that person physically before court.

[19] DC Balo has explained that the reasons for not bringing the appellant before court for 05 days were that the High Commissioner for Nauru was to see the appellant, time taken to arrange sufficient number of persons from Nauru to hold the identification parade and the reconstruction of the crime at the crime scene. These are all matters pertaining to the investigation and none of them should have prevented the police from bringing the appellant before court in a timely manner as stipulated in Article 13(1)(f). Considering also the fact that the incident took place in Suva and the appellant was being held at Totogo Police Station, I cannot accept that it was not reasonably possible to bring the appellant before court within 48 hours or that he had been produced to court as soon as possible thereafter in compliance with the third limb of Article 13(1)(f).

[20] However, the matter does not end there. The real issue is whether the detention of the appellant for 05 days would *ipso facto* make his caution interview inadmissible. The appellant argues that the only legal consequence of his 'illegal' detention during which he was caution-interviewed, was its rejection in toto. The respondent on the other hand argues that a failure to bring a suspect before a court within 48 hours by itself would not warrant exclusion of a caution statement unless such statement was obtained under oppression and buttresses that argument by referring to **Varani v State** AAU064 of 2011**:** 2 October 2015 [2015] FJCA 145. Thus, at this stage it is useful to consider ***Varani*** and the other decisions cited therein.

[21] In ***Varani*** the Court of Appeal held as follows

> *'The cautioned statement was recorded after 48 hours of the arrest. This is a completely new point that the appellant has taken. As the learned counsel for the respondent did not object, we obliged the appellant. The appellant submitted that his cautioned interview was recorded after the lapse of 48 hours of his arrest. The appellant submitted that as a result prejudice was caused to him and that human rights were violated. However he did not submit that there was oppression. As this point was taken up for the first time the learned counsel for the respondent could not immediately counter it. If this point was taken up in advance, the respondent would have been able to explain the delay in recording the confession after the lapse of 48 hours. The appellant himself did not explain what he did within the period of 48 hours. The appellant was arrested in connection with many other crimes.* ***Therefore we have no information that the appellant was kept in the police cell for 48 hours****. This point is settled now. In Noa Maya and another v The State (AAU 0053 of 2011; HAC 0086 of 2009, 27 February 2015) the Court of Appeal following a Supreme Court decision (Murti v State [2009]*

FJSC 5; CAV 0016.2008 (12 February 2009) refused to reject a caution interview recorded after being held for 48 hours. In Murti's case the accused was held for more than 60 hours. (emphasis added)

[22] In **Maya v State** CAV009 of 2015: 23 October 2015 [2015] FJSC 30, the Supreme Court said

> *'In addition, **Maya** repeated an argument which the Court of Appeal rejected based on the fact that he had not been brought before a court within 48 hours of his arrest in breach of his constitutional rights. The problem with this argument is twofold. First, the trial judge did not find that there had been any link between the length of time **Maya** had been detained for and the making of the confession. Secondly, the right to be brought before a court within 48 hours of one's arrest is not an absolute one. If it is not reasonably possible to do so, he may be brought before a court as soon as possible thereafter.'(emphasis added)*

[23] In **Murti v State** CAV0016 of 2008S:12 February 2009 [2009] FJSC 5, the Supreme Court held

> *'The argument based on the petitioner's contention that he was in custody for 60 hours prior to giving his statement to the police cannot succeed. The voluntariness of his confession was dealt with in a voir dire at the trial and Goundar J found against the petitioner in this regard. His Lordship's decision in this respect was upheld by Hickie JA on appeal and Hickie JA has not been shown to be wrong. Thus, even if the petitioner was in custody for the period he asserts (and **this has not been proved**), this did not affect the fairness of the trial.' (emphasis added)*

[24] Thus, in ***Varani*** and ***Murti*** there was no proof that the appellant had been detained for more than 48 hours during which his caution interview had been recorded and the pronouncements on the effect of such a prolonged detention on the validity of the confessionary statement may be *obiter*. In ***Maya*** the Supreme Court had ruled out a proposition similar to the one advanced by the appellant on the basis that for a detention of a period beyond 48 hours to be considered to be impacting adversely on the admissibility of a caution interview, there need to be a nexus between the length of time and making of the confession. The necessary implication of the pronouncement in ***Maya*** is that a period of detention not sanctioned by Article 13(1)(f) does not by itself rule out an otherwise admissible confession. However, this argument has not been subjected to a detailed scrutiny in any of the above decisions.

[25] A confession is admissible under an exception to the hearsay rule. The reason for this exception is that what a person says against himself is likely to be true. However, evidence of such a statement cannot be tendered by the prosecution in criminal proceedings unless it is made 'voluntarily', and it is the prosecution which bears the burden of proving that the confession was made voluntarily beyond reasonable doubt. Lord Sumner's classical speech in **Ibrahim v. R** [1914] AC 599, 609 formulated that *'no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority'*. This statement was expressly approved by the House of Lords in **Customs & Excise Commissioners v. Harz** [1967] AC 760 and in **DPP v. Ping Lin** [1975] 3 All ER 175. One addition to Lord Sumner's formulation in Ibrahim are the words 'or by oppression'. In England, these words were added by principle (e) in the introduction to the Judges' Rules of 1964, and were recognized as a proper addition by some of the Law Lords in ***Ping Lin***. The words import something which tends to sap and has sapped that free will which must exist before a confession is held to be voluntary (see Edmond Davies L.J. in **R v. Prager** [1972] 1 All ER 1114, and by Sachs J. in **R v. Priestly** [1965] 51 Cr. App. Rep. 1)

[26] Oppressive questioning is that which by its nature, duration, and other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release), or fears, or so affects the mind of the suspect that his will crumbles, and he speaks when otherwise he would have remained silent (see ***R v. Priestly***). Not only are all the circumstances important, but also their actual effect upon the defendant has to be considered (see **LI Wai-fat & Ors v. R [1977] HKLR 531**). In **Lo Sun-wa** Cr. App. No. 538 of 1979, the Court of Appeal held that answers to questions put to a person in custody are not admissible if the questions are asked in circumstances which amount to pressure of such a nature as to sap the will and make the subject talk. But long interrogation does not necessarily saps the will of the accused and whether it does or not depends upon the circumstances of each individual case; some accused are overborne very easily, others never.

[27] Involuntary confessions are supposed to be excluded on the basis of The Reliability Principle, The Disciplinary Principle, and The Principle of Non-Incrimination. The justification of the Reliability Principle is that a confession not made voluntarily may not be reliable, or that a confession proved to be voluntary is more likely to be reliable than an involuntary one. Though, a confession not made voluntarily may be unreliable, it does not necessarily follow, that all involuntary confessions are unreliable but presently an involuntary confession remains inadmissible even though it may be true. Thus, threats, inducements, or oppression make a resulting confession inadmissible, but it may not apply to all threats or inducements but only to those likely to produce an unreliable confession. Similarly, self-induced confessions are not excluded.

[28] The justification of the Disciplinary Principle is in terms of discouraging improper police methods of obtaining confessions and the justification of the Principle of Non-Incrimination is that a person should not be put under pressure to incriminate himself. However, it is accepted that these principles should be accepted with their own limitations.

[29] A confession may be excluded by a judge in the exercise of his discretion, even if he is satisfied that it was made voluntarily, if it was obtained in circumstances amounting to a breach of the Judges' Rules which, of course, are not rules of law [see **R v Horsfall** (1981) 1 NZLR 116 and **R v Prager** (1972) 1 All ER 1114]. However, even where the statement was both voluntary and obtained in accordance with the Judges' Rules, pursuant to the inherent or residual judicial discretion to exclude any evidence which might operate unfairly against the accused, such statement may still be excluded by the judge (See **Kuruma v R** [1955] A.C. 197, P.C. and **R v Middleton** [1974] 2 All E.R.1190, C.A). However, a decision whether a statement is voluntary and admissible in law is in no way dependent upon any discretionary power of the trial judge. If it is voluntary, it is admissible. It is only after it has been held voluntary and admissible that any discretionary power to exclude it from evidence can arise on the general ground of unfairness by falling short of overbearing the will, by trickery or unfair treatment. There is no discretion to admit into evidence a statement which is not voluntary.

[30] There are two views as to whether breach of the Judges' Rules can activate discretion to exclude for that breach simpliciter. One view is that although there was a caution, and no evidence of pressure, threats, or inducements, the court could proceed to consider the 'reliability' of the recorded confession and on this basis a confession may be excluded despite its voluntary nature in exercise of the overriding discretion. The other and stricter view is that if a voluntary statement is to be excluded in the exercise of the judge's discretion, the basis for such exclusion must be, or at least include, something other than a failure to follow the advice given by the judges to the police. Failure to observe the Judges' Rules was not 'irrelevant'; such conduct may tend to show that the confession was not 'voluntary'.

[31] However, the issue raised by the appellant in this appeal does not concern Judges' Rules but a Constitutional provision regarding the rights of a person arrested and detained. Thus, Article 13(1)(f) of the Constitution is at a higher pedestal than mere guidelines to the law enforcement authorities. Therefore, any breach of rights guaranteed by the Constitution must be remedied by specific avenues for relief. Article 44 of the Constitution, accordingly, makes provision for enforcement of rights guaranteed under Chapter 2 – Bill of Rights which includes Article 13(1)(f). Article 44 states

> *'44.—(1) If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.*
>
> *(2) The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.*
>
> *(3) The High Court has original jurisdiction— (a) to hear and determine applications under subsection (1); and (b) to determine questions that are referred to it under subsection (5), and may make such orders and give such directions as it considers appropriate*

[32] Considering all the matters discussed above, I am of the view that though an accused in criminal proceedings against him is not prevented from making a collateral attack on his confessional statement on the bases of a breach of Article 13(1)(f) by the investigators, despite Article 44 making specific provision for enforcement of his rights under Bill of Rights, the breach of Article 13(1)(f) by itself would not be a bar for the admission of the caution interview in a court of law. However, the presiding Judge in any criminal proceedings is entitled to consider the fact of wrongful detention, length of time the accused was held under arrest, reasons for the delayed production of the accused before court, what impact the prolonged detention has had on the accused etc. in the broader context of oppression *vis-à-vis* the voluntariness of his confessional statement towards its admissibility. After the judge rules the caution interview voluntary and admissible, he may consider, whether it should be excluded on the general ground that it may operate unfairly against the accused, if required by the nature of the case or if the circumstances so warrant or demand.

[33] The appellant has not complained that the detention of 05 days during which his caution interview was recorded, had sapped his free will and affected his mind to such an extent that his will crumbled, and he spoke the self–incriminating words when otherwise he would have remained silent. What is important is not only the prolonged detention but the actual effect it had on the appellant. I do not see even a suggestion from the appellant; nor do I have any evidence to believe that his caution interview was the result of his detention for 05 days or that unduly long period had any real effect on him in so far as his caution interview went. Neither do I see, on the material available before this Court, such a degree of unfairness which would vitiate the caution interview altogether on account of the detention of 05 days.

[34] The Learned High Court Judge, as pointed out above, had not gone onto consider the detention of 05 days in considering the voluntariness of the appellant's caution interview. However, it must be kept in mind that the appellant's counsel challenged the admissibility of the caution interview in the High Court based on Article 13(1)(f) of the Constitution on the basis that it had been made outside the 48 hour time period and not on the basis of threats, inducements, or oppression. Though, he also challenged it on the ground of unfairness based on the witnessing officer having been absent for two days

during the interview and signed the document later, that complaint was not brought before this Court as a ground of appeal in relation to the admissibility of the caution interview.

[35] I have given careful consideration to the proceedings of the *voir dire* inquiry, particularly the appellant's evidence and find that he had not sought to make the caution interview inadmissible on the ground of threats, inducements or oppression. I also find that the appellant had been explained his legal rights under the Constitution, given adequate breaks during the interview, been visited by the High Commissioner of Nauru and a lawyer during the period of the interview. He had communicated with both and not made any complaints of threats, inducements or oppression exercised on him by the investigators before, during or after the caution interview. I have also examined the *voir dire* ruling and no doubt in the correctness of the finding by Learned the High Court Judge that the appellant had made his caution interview voluntarily.

[36] Therefore, in my view the High Court Judge's failure to consider the legal objection of the appellant to the admissibility of his caution interview based on Article 13(1)(f) of the Constitution, in his *voir dire* ruling is an error of law and a miscarriage of justice but not a substantial miscarriage of justice. However, I have given utmost consideration to the same and as already decided, that point cannot be decided in favour of the appellant and therefore, reject the first ground of appeal.

Ground 2

'*That the Learned Trial Judge erred in fact and in law in holding, after the voir dire in the court below, that the Appellant's Caution Interview was voluntarily and fairly obtained from the Appellant.'*

[37] The substantive argument of the appellant under this ground is based on his evidence at the *voir dire* inquiry that the interviewing officer had told him that he had a right to consult a lawyer of the Legal Aid Commission (LAC) but had further told him that even if a lawyer came to sit with him during the interview it would be useless because he would just come, sit down and do nothing. After hearing the interviewing officer, the appellant claims to have decided not to have a lawyer to be present at his caution

interview. The appellant complains that by this conduct on the part of the interviewing officer, his rights under Article 13(1)(c) of the Constitution was violated and his caution interview had been unfairly obtained and ought not to have been admitted by the Learned High Court Judge.

[38] Article 13(1)(c) is as follows

> *'13.—(1) Every person who is arrested or detained has the right—*
> *(a) ……*
> *(i) …....*
> *(ii) …….*
> *(iii) ……*
>
> *(b) ……*
> *(c) to communicate with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission;'(emphasis added)*

[39] The appellant submits that the interest of justice demanded the attendance of a lawyer from the LAC immediately after the appellant's arrest during his detention and before starting with his interview, because he was a very young man, a foreigner and was arrested and detained on suspension of having committed the most serious offence of murder.

[40] I agree with the submission of the appellant that in a given case if the interest of justice so requires a person arrested should be afforded legal advice from the LAC if he does not have sufficient means to engage a legal practitioner of his choice. This is a right afforded to a person arrested and detained in general and not confined to a person facing a caution interview or applicable only at the stage of the caution interview, provided it is in the interest of justice to do so. Yet, it is not mandatory in all cases but whoever in charge of the investigation will have to decide to provide a detainee with legal advice from the LAC on a case by case basis using the criteria *'interest of justice'*. Given the fact that the appellant was a Nauru national who did not have any relatives in Fiji at the time of the arrest, it would have been highly desirable for him to have been provided with the services of a legal practitioner from LAC.

[41] However, I am less convinced of the reason the appellant attributes to him not requiring the presence of a lawyer. Firstly, the appellant had admitted under cross-examination that he spoke with his lawyer on 24 June 2014 at 4.30 p.m. and the question and his answer on this point on the following day is as follows. He had thereafter proceeded to sign the document in affirmation of his position.

> *'Q111: Do you wish to consult any lawyer of your own choice, any family member or a close friend to be present during the resuming of interview?*
> *A: Yes, I already meet (sic) the lawyer yesterday afternoon.*
> *Q112: Do you wish to consult the lawyer again to be present now?*
> *A: No just carry on.'*

[42] He had further said under cross-examination that he had spoken to his Fijian Lawyer in English and not raised any issues or complaints regarding the interview conducted up to that point. The interviewing officer had denied the suggestion put to him of his having told the appellant that even if a lawyer came it would be useless. The interviewing officer's question and the appellant's answer on the right to have legal aid is as follows

> *Q: You also have the right to consult the Legal Aid Commission in which you do not have to pay for anything and if you need, arrangement can be done for you through phone or consult them personally. Do you understand that?*
>
> *A: Yes.*

[43] However, DC Bola had admitted under cross-examination that he had not asked the appellant whether wanted a lawyer from the LAC to be present. In other words the police had explained the appellant his right to counsel but not asked him whether he wanted to exercise that right.

[44] The High Commissioner for Nauru had met the appellant on 22 June 2014 but the appellant had admittedly not raised any concerns on anything regarding the interview including the necessity of legal representation at the interview.

[45] Therefore, while I agree that the police ought to have given the appellant the services of a legal practitioner from LAC, particularly given his personal circumstances and the gravity of the charge faced by him, I do not think that, in the context highlighted above, his caution interview had been unfairly obtained due to the absence of a lawyer at the interview and it had resulted in a miscarriage of justice. Therefore, I reject the second ground of appeal.

Ground 3

> *'That the Learned Trial Judge erred in fact and in law in failing to address the relevant principles on prior inconsistent statements made by Finau Leone during the trial and in failing to apply those relevant principles to the prior inconsistent statements made to the police by Finau Leone at the Totogo Police Station.'*

[46] This ground of appeal relates to the identification of the appellant by the eye-witness Finau Leone. The Learned High Court Judge, having stated that the opinions of the assessors were not perverse and it was open to them to reach such conclusion on the evidence, had nevertheless proceeded to disagree with assessors and dealt with Finau's evidence given at the trial as follows.

> *'As to the nature of the accused's assault on the deceased while he was unconscious on the ground, I also accept Finau Leone's (PW4) evidence on the same. PW4 said, he saw the accused repeatedly punching and kicking Sione on the ground.'*

[47] However, Finau admitted under cross-examination that in his statement to the police, he had described the only assailant out of the group of boys who attacked the deceased and whom he claims to have recognized as a big man with a strong build about 6ft tall having a long hair just below the shoulder. He had given this clear description to the police despite him having seen the appellant at the scene of the fight and at the CWM hospital. Further the defense had elicited from Finau that he had told the police that he had not seen anyone in particular as everything was a blur and cannot recall the assailant's clothing and faces.

[48] It is common ground that the appellant's appearance does not match that of the assailant described by Finau. The assessors and the Learned High Court Judge would have seen that the appellant is in fact the opposite of the person described by the witness in so far as his physical attributes go. This Court too clearly observed it when the appellant appeared at the hearing. Further Finau's evidence under cross-examination that he had not identified or seen anyone in particular and everything was a blur as he was involved in the fight with the Nauruans, cast a reasonable doubt as to his identification of the appellant at the scene. His answer that he had forgotten to mention the appellant in his police statement shows that his description was not relating to the appellant but to another involved in the attack. In addition, it is a material omission which makes his identification even less reliable. Further, Finau's description of the attacker identified by him as *'the one who always in the fight'* does not fit in with the appellant's caution interview relied on by the State where the appellant had said that when he came out of the night club, the others had already punched the deceased and when he landed some punches, the deceased was already lying on the ground and motionless. Finally, Finau under re-examination appears to have said that he saw the appellant for the first time when Sione died.

[49] Considering the totality of all the circumstances aforementioned, I am of the view that Finau's evidence is so unreliable as to his alleged identification of the appellant that it is not worthy of being attached with any credibility or acted upon. His identification of the appellant at the police identification parade is even more unreliable, for he had initially pointed out two innocent Nauruan boys and identified the appellant only after an elimination process, despite Finau having seen the appellant at the hospital before. Now, I shall consider whether Learned High Court Judge had addressed his mind to the law relating to omissions and inconsistent statements and their effects on the credibility of a witness.

[50] Two issues arise when a witness is shown to have made a previous statement inconsistent with the evidence given at the trial. The first is as to the use to which the statement previously made out of court may be put, and the second is as to the effect of the previous statement on the value of the testimony given by the witness in court.

[51] **Driscoll v The Queen** (1977) 137 CLR 517: 10 August 1977, in my view has stated the relevant law correctly as follows.

> *'As to the first of these questions it is clearly settled that the previous statement is admitted merely on the issue of credibility, and is not evidence of the truth of the matters stated in it: Taylor v. The King (1918) 25 CLR 573 ; Deacon v. The King (1947) 3 DLR 772 ; and Reg. v. Pearson (1964) Qd R 471.*

> *'As to the second question, the whole purpose of contradicting the witness by proof of the inconsistent statement is to show that the witness is unreliable. In some cases the circumstances might be such that it would be highly desirable, if not necessary, for the judge to warn the jury against accepting the evidence of the witness. From the point of view of the accused this warning would be particularly necessary when the testimony of the witness was more damaging to the accused than the previous statement. In some cases the unreliability of the witness might be so obvious as to make a warning on the subject almost superfluous. It is possible to conceive other cases in which the evidence given by a witness might be regarded as reliable notwithstanding that he had made an earlier statement inconsistent with his testimony.*
>
> *'……. For these reasons I cannot accept that it is always necessary or even appropriate to direct a jury that the evidence of a witness who has made a previous inconsistent statement should be treated as unreliable.'*
>
> *'……. it cannot be accepted that in cases where a witness has made a previous inconsistent statement there is an inflexible rule of law or practice that the jury should be directed that the evidence should be regarded as unreliable. I agree with the observations made on this point by Stanley J. and Lucas A.J. in Reg. v. Jackson (1964) Qd R 26, at pp 29, 40 . A similar view has been expressed in Canada: Deacon v. The King (1947) 3 DLR, at p 776 .'*

[52] The Court of Appeal in **Prasad v State** AAU105.2013: 14 September 2017 [2017] FJCA 112 said

> *'(v) The law relating to the issue of contradictions and omissions is trite law. Previous statements of witnesses are used to impeach their testimonial trustworthiness. Contradictions and omissions are used for the purpose of evaluating the testimonial trustworthiness of a witness. Contradictions/ Omissions can be inter se or even per se. This means their existence can be within the evidence of a testimony itself or between the evidence of the witnesses called in by the same party to a law suit.'*
>
> *'…… notwithstanding the presence of a contradiction/omission of even serious nature, it is legally permissible for triers of facts to act upon the evidence of a witness. That is when the assessors feel comfortable to ignore the omission/contradiction and to consider the rest of the evidence to find where the truth lies. That happens if the reasons for contradiction /omission can be explained away by the witness. However, what is paramount in this regard is that it is the duty of the Trial Judge to direct and guide the assessors on how to act on the contradictions/omissions*

[53] Unfortunately, the Learned High Court Judge had not addressed the assessors; nor had he directed himself on the law as expected on the material contradictions and even omissions on the part of Finau with regard to the important issue of his alleged identification of the appellant. This is an error of law and has resulted in a miscarriage of justice. I allow the third ground of appeal.

> **Ground 4**
>
> *'That the Learned Trial Judge erred in fact and in law in failing to properly apply the evidence in the Appellant's Record of Caution Interview which His Lordship had accepted to have been given with the Appellant's free will.'*
>
> **Ground 5**
>
> '*That the Learned Trial Judge erred in fact in holding that the Appellant was part of a joint enterprise with others in the assault on Sione Tufui and in Sione Tufui's eventual death.'*

[54] I think it apt to deal with both grounds together as the arguments in both revolves around one main issue. It is whether the appellant could be convicted for manslaughter on the basis of joint enterprise relying on his caution interview. As the evidence of Finau has been ruled out as completely unreliable, the only remaining evidence against the appellant is his caution interview which, I have already held, cannot be ruled out on the grounds submitted by the appellant.

[55] The appellant's argument under appeal ground 4 is based on paragraph 34 of the summing up and paragraph 9 of the Written Reasons for Judgment and Sentence.

> *'34. On the accused's role in the incident, it is particularly interesting to consider questions and answers 74, 75, 77, 84, 85, 86, 92, 93, 101 to 104. The accused admitted above that when he came out of the Nightclub he saw some Nauruan boys punching Sione. He said, in question and answer 77 that he joined them punch Sione repeatedly with both hands. He said, Sione was lying down on the road. In question and answer 86, he said he punched Sione because he wanted to take revenge on him for stabbing him in the Nightclub. It would appear that, on his own caution interview statements, the accused admitted he joined the other Nauruan boys beat Sione to death. He wanted to take revenge for what Sione previously did to him. According to the State, because of the above, the accused had engaged in a conduct with others to beat Sione to death*

> *'9. I also accept the accused's police caution interview statements, which were tendered in evidence, as Prosecution Exhibit No. 3. In my view, after considering all the evidence, I had made the finding that the accused gave his caution interview statements to the police voluntarily and they were the truth. I accept that the commotion between the Nauruan and Tongan boys started when Sione Tufui, the deceased, attacked the accused and a friend in the Nightclub with a broken beer bottle. The accused and his friend were subsequently injured, and this started the fight between the Nauruan and Tongan boys, first inside the Nightclub and then outside the same. I accept the accused's statement, in his caution interview statements that, he later joined the other Nauruan boys repeatedly punched Sione Tufui while he was unconscious on the ground. Please, refer to questions and answers 74, 75, 77, 84, 85, 86, 92, 93 and 102 of Prosecution Exhibit No. 3. As to the nature of the accused's assault on the deceased while he was unconscious on the ground, I also accept Finau Leone's (PW4) evidence on the same. PW4 said, he saw the accused repeatedly punching and kicking Sione on the ground*

[56] The appellant complains that the Learned High Court Judge had imported something into the above paragraphs as underlined above which he had not said in the caution interview. His submission is that it had given a different complexion to his involvement in the incident in that according to him, he acted alone in punching the deceased but not acted along with the others.

[57] The relevant questions and answers from the caution interview are as follows.

Q72: What happened after that?

A: The fight then started inside the club between the Tongan boys. Some Nauruan boys were trying to stop the fight but can't make it.

Q73: Where did you go after that?

A: I went down the steps where I was punched again by some Tongan boys then I ran outside.

Q74: What happened when you reached outside the club?

A: When I was outside, I saw the Tongan boy with orange t-shirt was lying just in front of the club on the footpath. I went to him and started punching him.

Q77: Which part of the body of that Tongan boy you punched?

A: When I came out some boys already punched him, I then joined them in the fight. I recall that I punched the left side of his face when he was lying.

Q83: What was his position when he was lying down at the edge of the footpath?

A: He was lying down on his back with face facing upwards.

Q85: What was his response when you punched him?

A: He was already unconscious.

Q86: Why you punched him when he was already unconscious?

A: Because I just wanted to take revenge of what he did to me from inside the club.

Q92: You told me in Q.85 that he was already unconscious when you punched him on the ground. How did you know that he was unconscious?

A: Because he never replied or move. He was motionless.

[58] It appears that there is some merit in the submission of the appellant that the way the Learned High Court Judge had couched the gist of relevant questions and answers in the summing up and the Written Reasons for Judgment and Sentence, the Judge may have given the impression to the assessors and to himself that the appellant was acting in

furtherance of a common intention to assault the deceased with the other Nauruan boys when such an inference was not unequivocal or inevitable from his answers. On the contrary, the appellant seems to have joined the fight not as part of executing a common intention but as an opportunist to deliver a few punches on the deceased who had assaulted him earlier in the day and injured him but lying motionless on the ground, and was unconscious or probably even dead, in order to satisfy himself in revenge.

[59] Coming to appeal ground 5, the appellant argues that the Learned Trial Judge had erred in fact in holding that the Appellant was part of a joint enterprise with others in the assault on Sione Tufui and in Sione Tufui's eventual death.

[60] Crimes Decree, 2009 in section 46 states as follows.

'*Offences committed by joint offenders in prosecution of common purpose'*

> *46. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.*

[61] The Learned Judge in the summing up had addressed the assessors as follows

> *'14.You will notice in the information that the prosecution in their particulars of offence, began with the phrase, "...JULIAN HEINRICH with other persons unknown, on 21st of June 2014 at Suva in the Central Division, assaulted SIONE TUFUI..." The prosecution is alleging that the accused committed the above offence as part of a group. The fact that the prosecution had not identified the "other persons unknown", does not detract from their allegation that, the accused committed the offence as part of a group. In other words, to make the accused jointly liable with the others, the prosecution is relying on the concept of "joint enterprise".*
>
> *15. "Joint enterprise" is "when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed, of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence" (Section 46, Crimes Decree 2009). In considering the accused's case, you will have to ask yourselves the following questions. Did the accused with the others, form a common intention, to violently assault Sione Tufui? If so, did each of them acted together in violently assaulting Sione Tufui? When Sione Tufui was violently assaulted by the group on 21 June 2014, and when he died later, was his death a probable consequence of the violent assault on him? In answering the above questions,*

you will have to examine and consider the whole evidence called in the trial. To form a common intention in a particular situation could happen by conduct at the spur of the moment, without the formalities of an agreement. It could be by a wink or nod or a common understanding that someone had to be assaulted because of perceived past transgression. If your answer to the above questions for the accused was yes, and you are sure that the elements of the offence as described in paragraph 9 to 12 are satisfied, the accused was guilty as charged. If it was otherwise, he was not guilty as charged. It is a matter, entirely for you.'(emphasis added)

[62] In his Written Reasons for Judgment and Sentence, the Learned Judge had said on the same point as follows.

> *'After assessing the above evidence and on the principle of "joint enterprise," as discussed in paragraphs 14 and 15 of my summing up on 3 March 2017, I found that the accused with the other Nauruan boys did form a common intention by conduct to violently assault Sione Tufui on 21 June 2014, and I find that they acted together, and in pursuance of this violent assault, Sione's manslaughter was a probable consequence of the violent assault. Sione Tufui's post mortem report, which was tendered as Prosecution Exhibit No. 2, showed that as a result of the assaults mentioned above, he died a few minutes later, as a result of his injuries. I accept Doctor James Kalougivaki's (PW5) evidence on the injuries suffered by Sione Tufui and the cause of his death.' (emphasis added)*

[63] I do agree that common intention can be proved by inference, provided the inference is sufficiently strong to satisfy the high degree of certainty which the criminal law requires. **Prasad v Queen** [1959] FJ Law Rp 2; [1958-1959] 6 FLR 160 (11 November 1959) elaborated on section 22 of the Penal Code which is similar to section 46 of the Crimes Decree, 2009 as follows.

> *'Section 22 of the Penal Code indicates a definitive sequence of events, all factual in character. There must first be the formation of a common intention to prosecute, in conjunction, an unlawful purpose. Next there must be the sustained prosecution of that purpose; then finally, an offence must be committed which was a probable consequence of the prosecution of the purpose. The formation of a common intention to prosecute in conjunction an unlawful purpose and the prosecution in fact of that purpose can, like all facts, be proved by inference, provided always that the inference is sufficiently strong to satisfy the high degree of certainty which the criminal law requires. The question which in consequence presents itself in this case is whether the facts proved provided a sufficient basis from which the assessors and the Judge could infer a common intention on the part of the appellants to inflict grievous physical injuries on the deceased, and a continued prosecution of that intention up to the time, the first blow was stuck. Then, of course, arises the further question whether the inference of guilt was a proper inference and whether it had a character of certainty to the degree the criminal law requires.' (emphasis added)*

[64] Considering the above answers of the appellants along with the totality of his caution interview and the other facts spoken to by the prosecution witnesses, I am not satisfied that there is sufficient material to infer with that degree of certainty an inference of a common intention on the part of the appellant in conjunction with others to prosecute an unlawful purpose *i.e.* to violently assault the deceased as stated by the Learned High Court Judge. On the contrary, what emerges from the evidence is that the appellant had acted on his own in landing a few punches on the deceased who was lying motionless on the ground due to the assault by the other Nauruan boys, as an act of revenge for the attack on him earlier in the day. It is clear that the incident in the night club had turned into a 'free-for-all' outside the club on the pavement for the Tongan and Nauruan boys and it is extremely difficult, if not impossible, to infer a common intention on the part of the appellant in conjunction with other participants on Nauruan side in this scenario.

[65] In my view, to impute criminal liability under section 46 of the Crimes Decree, 2009 there must be (i) the presence of two or more persons (ii) forming a common intention among them (iii) prosecution of an unlawful purpose in conjunction with one another (iv) commission of an offence as a probable consequence of the prosecution of such purpose. Thus, there should be evidence of sharing of the intention among the participants for it to become a common intention and similar intentions not shared or different intentions held by individual members would negate common intention. If common intention is to be inferentially established from the facts and circumstances, such inference should be the only inference possible towards the common intention. If more than one inference is possible, then the prosecution cannot be said to have proved a shared common intention among the accused.

[66] Therefore, I think that the appellant is entitled to succeed on appeal grounds 4 and 5 as the Learned Judge's decisions canvassed under those grounds of appeal cannot be supported by evidence and accordingly, I uphold both grounds of appeal.

Ground 6

'*That the Learned Trial Judge erred in fact in not assessing properly extent of the injuries on Sione Tufui's body which, in the circumstance of the Appellant's case, could not have been caused by the Appellant.'*

[67] The basis of the appellant's complaint under this ground of appeal is that the Learned High Court Judge had failed to make a proper assessment of the extent of injuries found on the body of the deceased and not evaluated the same as to whether he could have caused any of the fatal injuries. However, this submission is irrelevant if the appellant's conviction is upheld on the basis of the joint enterprise. The Learned Judge did not have to consider this aspect as he held that the appellant was part of a joint enterprise. I have already decided that the appellant cannot be said to have acted in furtherance of a common intention and therefore, cannot be made liable for manslaughter on the basis of being part of a joint enterprise.

[68] Therefore, what remains to be decided is whether the appellant could be made liable for his own acts. According to the Post-Mortem Examination Report, the deceased had been dead on arrival to the hospital. He had received several external and internal injuries namely multiple traumatic injuries. Severe traumatic head injuries due to blunt force trauma had directly led to his death.

[69] All the prosecution witnesses including Finau Leone had spoken to the deceased being attacked by a group of Nauruan boys by repeatedly kicking and punching on his face. The appellant does not appear to have been part of this group that attacked the deceased at that time. Finau's evidence of the appellant's involvement is unreliable and cannot be accepted. The appellant did not get involved in the fight inside the night club despite being stabbed on the neck with a beer bottle. The attacker appears to have been the deceased. After the fight broke out inside the night club between the two groups, the appellant had gone down the steps where he had been again punched by two Tongan boys and he had run outside only to see the deceased being attacked presumably by some boys. When he saw the deceased lying on the footpath in front of the club, he had gone and punched him with bare hands. He had confessed to having delivered a few punches in revenge only after he saw the deceased lying motionless or unconscious on the ground. Medical evidence does not reveal the exact time of death. Therefore, it is doubtful whether the deceased was even alive when the appellant decided to land some punches on the left side of the deceased's face which could not have led to his death. In the circumstances, it is not possible to sustain the appellant's conviction for manslaughter based on his individual acts as narrated by him in the caution interview.

[70] Therefore, the conviction of the appellant cannot be supported by evidence and I uphold appeal ground 6 as well.

Ground 7

'*That the Learned Trial Judge erred in law in disagreeing with the unanimous opinion of the assessors without a coherent and rational analysis of the evidence in the trial, thus negating the assessor's statutory or legal role as judges of fact.'*

[71] The Learned High Court Judge has disagreed with the unanimous opinions of the assessors when they delivered their opinions on 03 March 2017 and read out a short judgment on the same day and informed the parties that reasons would be given on 06 March 2017. The Learned Judge had delivered the Written Reasons for Judgment and Sentence on 06 March 2017.

[72] Section 237 of the Criminal Procedure Act *inter alia* states

'237. (1) ……..

(2)The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

(3) ……..

(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be —

(a) written down; and

(b) pronounced in open court.

(5) ……'

(6)……

(7|)……

[73] The appellant argues that delivering the judgment on 03 March 2017 without reasons is a violation of the provisions in section 237 of the Criminal Procedure Act. 03rd March 2017 had been a Friday and after the assessors' opinions the Learned Judge had taken a short time, written down and read out the judgment in open court. After that there had been an extensive discussion about the sentence between the Judge and the defense counsel until the court adjourned for the day. As promised, written reasons had been read in court and delivered to the parties by the Learned Judge on next Monday, the 06th March. I think in those circumstances there is substantial compliance with the provisions of section 237 of the Criminal Procedure Act and the appellant's complaint in that regard is ill-founded, if not unreasonable.

[74] The more substantive argument of the appellant is on the ground of want of cogent reasons for disagreeing with assessors in the Written Reasons for Judgment and Sentence delivered on 06 March 2017. The single Judge ruling had set out the law relating to the application of section 237 succinctly, with which I agree, as follows.

> *'[30] ……. In Fiji, it is settled that the verdict, that is, the decision to convict or acquit in the case is always that of the judge (Joseph v The King [1948] AC 21, Ram Dulare & Or v R [1955] 5 FLR 1). The assessors only give an opinion which the trial judge may or may not accept.*
>
> *[31] However, when the judge disagrees with the unanimous or majority opinion, the judge is obliged by law to give written reasons in an open court. The reasons must be cogent and in sufficient detail to withstand critical examination on appeal in the light of the whole of the evidence led at the trial (Ram Bali v R [1960] 7 FLR 80). The obligation to give cogent reasons does not mean that the judge is required to review the evidence in the detail, but findings of credibility of important witnesses and inferences properly drawn from the evidence should be clearly but concisely stated (Roko & Ors v State Cr App 5 and 12 0f 2002; 29 April 2004).'(emphasis added)*

[75] In **Prasad v Reginam** [1972] 18 FLR 68: 23 June 1972 [1972] FJLawRp 14 the Court of Appeal said

> *'…. it is true that if a Judge is to differ from the opinions of the assessors he must have cogent reasons for doing so and those reasons must be founded upon the weight of the evidence in the case and must of course also be reflected in his judgment.'*

[76] **Setevano v State** AAU0014u of 89s: 27 May 1991 [1991] FJCA 3 also it was remarked

> *'It is clear that a Judge in Fiji is entitled in law to disagree with the majority opinions of the assessors, and even where they are unanimous, but his reasons for doing so must be cogent and they should be clearly stated. In our view they must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial.'*

[77] The two critical issues in the case against the appellant were whether he could be convicted on the basis of direct evidence of Finau Leone and if not, solely on his caution interview. I have already considered above and decided that the Learned Judge erred in accepting Finau's evidence and what the appellant had said in the caution interview cannot prove that he was part of a joint enterprise.

[78] The Learned Judge himself had remarked in the Written Reasons for Judgment and Sentence that the assessors' opinions were not perverse and it was open to them to reach the conclusion *i.e.* the appellant was not guilty of manslaughter on the evidence. As I have already concluded, the Learned Judge's reasons for disagreeing with assessors' opinions cannot be said to be cogent and they are not capable of withstanding a critical examination in the light of the whole of the evidence presented in the trial. I accordingly, allow this ground of appeal.

Fernando, JA

[79] I agree with the reasoning and conclusions of Prematilaka, JA

Nawana, JA

[80] I agree with the reasons and conclusions of Prematilaka, JA.

The Orders of the Court

1. Appeal against conviction is allowed.
2. Conviction is quashed.
3. Appellant is acquitted.

.....
Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

.....
Hon. Justice A. Fernando
JUSTICE OF APPEAL

.....
Hon. Justice P. Nawana
JUSTICE OF APPEAL