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

CRIMINAL APPEALS N0.AAU0026 OF 2004S
AND AAU0027 OF 2004S

BETWEEN:

SURESH SANI AND DEO RAJ

APPELLANTS

A N D:

T H E S T A T E

RESPONDENT

Coram: Ward, P
Tompkins, JA
Smellie, JA

Counsei: Mr. Suresh Sani in person
Mr. R. Chand for Deo Raj
Ms. A. Prasad for respondent

Hearing: 14 and 15 March 2005

Date of Judgment: 18 March 2005

J U D G M E N T

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[1] The appellants were charged with the murder of Ashok Kumar on 31 December 1999. They first appeared before the Magistrates' Court on 25 June 2002 and, after numerous adjournments, were committed on 9 May 2003 to the High Court for trial.

[2] That trial started on 19 January 2004 but, after the assessors had been sworn in, they were sent away whilst the court held a trial on the voir dire to determine an objection by both accused to the admissibility of statements made

by them under caution. The trial within a trial was strongly contested and continued for 11 days.

[3] On 9 February 2004 the learned trial judge ruled that the statements were admissible and the trial started before the assessors on 11 February 2004. It continued over 15 days until the learned judge summed the case up on 24 March 2004. During the trial the defence raised, before the assessors, the same challenge to the manner in which the statements under caution had been taken.

[4] The prosecution case was that the appellants, Suresh Sani (Sani) and Deo Raj (Raj), together with the deceased, Ashok Kumar (Kumar), had formed a company known as Zeir Second Hand Part Dealers. The lives of the deceased and Sani were insured in favour of the company. Some months later the beneficiary under the policy insuring Kumar was changed to Sani so that, on the death of Kumar, he would benefit in the sum of $75,000.00. It appears from the evidence that the beneficiary under Sani's policy was changed to Kumar at the same time

[5] On 1 January 2000 Kumar's body was found at the side of the Koronivia Road having apparently been run over. He had died as the result of massive internal bleeding in the chest resulting from multiple rib fractures and laceration of the pulmonary vein. The police were not satisfied that this was a traffic accident and their investigations continued until 2002 when both the accused were arrested and interviewed.

[6] In those interviews, Sani gave three different versions to the police and Raj gave two. The prosecution case is that the last account in each case is effectively the truth. Those accounts vary in some details between the two appellants but generally describe how the two accused were drinking gin with Kumar during the evening of 31 December 1999. Kumar was very drunk and passed out. Sani and Raj then drove to the Koronivia road, lay the stupefied

Kumar on the road, drove the van over him and left.

[7] In fact, it appears that both appellants had made statements during the earlier investigation which were, presumably, exculpatory but the actual nature of the explanations given then were not put in evidence.

[8] At the trial, both accused gave sworn evidence. The account given by Sani in the witness box differed from all three previous accounts and that of Raj was an alibi broadly similar to his first statement under caution.

[9] Sani's evidence was that Kumar died in an accident at the garage where they both worked. Both were drinking gin at the time and, whilst bleeding the brakes of a truck, an operation which required the engine to be running and Kumar to lie under the vehicle, Sani's foot accidentally slipped off the clutch. The vehicle drove forward so that it fell off the jack and landed on Kumar killing him. Sani put the body into a vehicle and started to take it to the hospital but then panicked and drove home instead. Later, he dumped the body on the Koronivia road where it was later found. He said he had given the three previous statements to the police in order to try and escape violence the police were meting out to him.

[10] Raj's evidence was that he was at home the whole of the previous evening until 6.0 am on 1 January 2000. He told the court that the second statement to the police was made up by the police and he only signed it because of violence by the police.

[11] As has been stated, the allegation of mistreatment by the police was the basis of the challenge on the voir dire by both appellants and was repeated in the trial before the assessors.

[12] At the conclusion of the trial the assessors retired for 40 minutes. On their return, they stated their unanimous opinion that the accused were both not

guilty. The learned trial judge then retired for an hour before she delivered her judgment. She gave reasons why she could not accept the assessors' opinions and convicted both accused of murder.

[13] The grounds of appeal of both appellants in effect raise the same issues. The grounds are repetitive and can be summarised in four main issues:

1. The judge was wrong to rule the statements under caution admissible.

2. The judge was wrong to find the appellants guilty because:

(a) the evidence did not prove the offence;

(b) she gave undue weight to the prosecution witnesses; and

(c) should not have accepted the confessions as there were different versions.

3. The judge appeared to have predetermined the conviction in the ruling on the trial within a trial.

4. The judge erred in her reasons for disagreeing with the unanimous opinions of the assessors on the basis:

(a) that they could only be accepted if one takes the view that the confessions were false, fabricated and forced and that she erred in the reasons she gave for not agreeing; and

(b) that the confessions were consistent with the post mortem report and the way the body was found.

[14] An additional ground referred to the alibi evidence of Raj. Mr Chand based his submission on the suggestion that it had not been challenged by the prosecution. The record shows that it was and counsel did not pursue that ground.

[15] Sani, who represented himself at the appeal, raised the issue of the admissibility of the statements under caution on the ground that they were induced by improper conduct by the police. That conduct he suggests breached his rights under section 27 of the Constitution. He is clearly correct that, if the actions described by him had taken place, they would have been a serious breach of his constitutional rights. However, the learned judge dealt with those issues in the ruling in the trial within a trial and found it proved that they did not occur. There was evidence upon which she could reach that conclusion and we see no reason to interfere with her decision. We reach a similar conclusion on the general ground that the judge's findings of fact were against the weight of the evidence. Mr Chand for Raj did not pursue those issues at the hearing and the appeal proceeded principally on the third and fourth issues summarised above.

1. Predetermination of the issues in the trial within a trial.

[16] As has been stated, there was a strongly contested trial within a trial on the admissibility of the statements made by both appellants under caution. The prosecution called nine witnesses. Both appellants gave evidence and Sani called three witnesses and Raj called one.

[17] The judge gave a very full and detailed ruling. She expressed concern at the time the appellants had been in custody for the questioning by the police but was satisfied that the conditions were not oppressive. After a careful review of all the evidence and submissions, her conclusion was:

> "I am satisfied beyond reasonable doubt that the interviews were voluntary, obtained in circumstances which were not oppressive and that there were no breaches of Constitutional rights. They may be admitted in evidence. The question of whether the interviews are true and which version of the events is more

reliable, are matters for the assessors, in the context of all the evidence in this case."

[18] The general rule is that all evidence should be adduced in the presence of the assessors but where the admissibility of a particular piece of evidence is challenged by the defence, they may require the judge to determine that issue in the absence of the assessors. Where, as here, the prosecution was relying entirely on confessions to establish its case against the accused, it is a sensible course to determine admissibility before the case is heard with the assessors. If successful the case will effectively be resolved by the exclusion of that evidence. That was the procedure followed in this case.

[19] The judge's duty is to determine whether the confessions were made voluntarily and the burden is on the prosecution to prove they were voluntary to the usual criminal standard of proof beyond reasonable doubt. In order to do so the judge must hear the evidence relating to that issue including any evidence by the accused and any defence witnesses and rule on it. Inevitably that decision requires a determination of the credibility and truthfulness of the witnesses. If the judge rules, at the end of a trial within a trial in which the accused has given evidence of the allegations, that the confessions are admissible, the burden of proof means that it must follow that the defence evidence has been rejected.

[20] The appellants' case is that, having made such a determination, the judge will inevitably be evaluating the evidence called before the assessors having already decided that the appellants are not credible and have lied on the voir dire.

[21] This is a question that must arise in the majority of cases where there has been an unsuccessful challenge to admissibility in a trial within a trial. In other jurisdictions where the members of the jury are the sole judges of fact, the judge's view will not be communicated to the jury and so the problem should not

arise. However, the provisions of section 299 of the Criminal Procedure Code mean that, in Fiji, the decision in the case is always that of the judge. The assessors only give an opinion which the judge may or may not accept. The judgment is made on the evidence in the trial before the assessors even though the judge has already ruled on the credibility of many of the witnesses including, generally, the accused.

[22] A similar situation arises in any trial where there is no jury and the judge is the judge both of law and fact as occurs, for example, in the magistrates' courts. In such cases, the judge has to put the earlier evidence out of his mind and to hear the evidence afresh. We accept that has been done in innumerable trials without impugning the justice of the final decision.

[23] In a case where the judge's conclusion does not accord with that of the majority of the assessors, it would be wise specifically to state that the decision does not rely on the earlier evidence and is based on the evidence called before the assessors to make it clear both judge and assessors are basing their decision on the same evidence. That will be particularly important in a case such as this where the sole basis for differing from the assessors' opinions is the confessions whose admissibility has been the subject of the trial within a trial.

[24] However, we do not accept that the fact the trial judge has had to predetermine issues of credibility in a trial within a trial in itself makes the judge's subsequent decision unreliable or unjust.

2. <u>The reasons for not accepting the opinions of the assessors.</u>

[25] Although the assessors in the High Court are treated in the same way as jurors in many other jurisdictions, their function is not the same. They are directed in the summing up to determine the facts in the case in a similar manner to a jury but are advised that they will, individually, be required to state their opinion on the guilt or otherwise of the accused and that their opinion may

or may not be accepted by the judge.

[26] Frequently the judge agrees with their opinion but the verdict of the court is that of the judge and it is his duty to reach his own conclusion on the evidence: ***Joseph v The King*** [1948] AC 215. In ***Ram Dulare and others v R*** [1955] 5 FLR 1 this Court referred to Joseph's case and continued:

> "...[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 assessors is that of the trial Judge and the trial Judge alone and ...he is not bound to follow the opinion of the assessors."

[27] The procedure he must follow is stated in section 299 of the Criminal Procedure Code. Where, as in the present case, the judge differs from the verdict of the majority of the assessors, subsection (2) requires reasons:

> "...where the judge's summing up of the evidence ... is on record, it shall not be necessary for any judgment, other than the decision of the court which shall be written down, to be given ... except that , when the judge does not agree with the majority opinion of the assessors, he shall give his reasons, which shall be written down and be pronounced in open court, for differing with such majority opinion and in every such case the judge's summing up and the decision of the court together with, where appropriate, the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court ..."

[28] In the present case the judge did not agree with the unanimous decision of the assessors and so, in accordance with the section, gave her written reasons:

"The three assessors have given their unanimous opinions that the two accused are not guilty of murder.

I cannot concur with their opinions. Their opinions can only be accepted if one takes the view that the confessions were false, fabricated and forced. For the same reasons I gave in my ruling at the trial within a trial, I cannot agree.

I do not accept that the accused were assaulted and oppressed. Nor do I accept that the police made up the confessions to falsely frame the accused. I am satisfied beyond reasonable doubt that the accused each told the police false, partly exculpatory statements at first to exonerate themselves. Then, faced with the documentary evidence and the knowledge of the nature of the investigations they each decided to confess. I accept the evidence of Dr Rickets, Mr Nand Singh and the police witnesses in this regard.

The confessions constitute a complete admission to the murder of Ashok Kumar which is entirely consistent with the other evidence in this case, in particular the post- mortem report, and the way the body was found. The discrepancies in time referred to by the defence are quite understandable because of the lapse of time between the death and the interviews.

I reject the evidence of the two accused. Not only did their evidence lack credibility as to their conduct, but the demeanour and manner of the two accused left me with no doubt that I could not put any reliance on their evidence."

[29] The appellants do not challenge the judge's view that the assessors' opinions must mean they found the confessions false. Whether or not they found them also to be fabricated or forced by the police does not need to be determined. The challenge is to the next sentence where the judge explains she cannot agree for the same reasons she gave in her ruling at the trial within a trial.

[30] The question of the truth or falsity of the final confessions by each accused were central to the issue of guilt in this case. It was only through those that the appellants could be linked to the charge of murder. The assessors heard the challenge to the manner in which the police had conducted the interviews and the judge had correctly directed the assessors that the allegations of malpractice by the police were relevant to their decision as to the credibility of the accused and whether or not to accept the truth of their confessions:

> "However, there is other evidence which may help you decide the issues in this case. The main source of that other evidence is the evidence of the caution statements of the accused whilst in custody.
>
> In respect of those interviews, the second accused says that they are an elaborate concoction made up by the police to frame him. The first accused says he lied to the police to escape the beating. It is for you to decide whether the accused persons gave these statements to the police and what weight you should put on them."

In any case such at this, the judge may be taken as having also directed herself in the same manner she has directed the assessors.

[31] However, at the trial within a trial, the judge had been required to apply a different test. There it was solely to determine whether or not the prosecution

had proved that the confessions were voluntary and not the result of oppression. It is not part of the judge's function at that stage to ascertain the truth of the confessions as the judge herself correctly stated in the final sentence of the conclusion to her ruling which we have set out in paragraph [17] above.

[32] The appellants suggest that the judge's reference to the reasons she had given in her earlier ruling at the trial within trial therefore cannot be the reasons why she accepted the truth of the final confessions. We accept that must be correct but, in the next paragraph, the judge does give reasons for her decision as to the truth of the confessions. The reference to the earlier ruling as a reason for accepting the truth of the confessions was not particularly felicitous but we do not consider it is sufficient in itself to overturn the judge's finding.

[33] However it must also be considered with the other ground of challenge, namely the manner in which the judge explained the reasons for her finding that the confessions constitute a complete admission. Clearly the judge means the final confessions because, by accepting the truth of those, she is rejecting the truth of the accounts in the earlier statements under caution and the evidence given by the accused at the trial.

[34] Where the only evidence to link an accused person with the crime is a confession, the court should always look to see if there is any other evidence which confirms the account given in the confession. An apparent confession may not be true as was the first accused's case here. Similarly the second accused's case was that it had been fabricated by the police. In such circumstances, the court may be assisted by consideration of independent evidence which may demonstrate or at least support the truth of the alleged admissions.

[35] The experienced trial judge in this case looked for, and found, other evidence which she considered supported her finding and concluded, in the fourth paragraph of her reasons, that the confessions were entirely consistent

with the other evidence, "in particular the post mortem report and the way the body was found".

[36] The duties of the judge with regard to his reasons for disagreeing with the assessors are well established from a line of cases. In the early case of ***Ram Bali v R*** [1960] 7 FLR 80 it was stated:

> "In general, it is enough if ... the judge proceeds on cogent and carefully reasoned grounds based on the evidence before him and his views as to the credibility of witnesses and other relevant considerations."

[37] This Court pointed out in ***Raduva and Heatly v R*** Cr App 109 of 1985 that the status of being a judge does not confer any advantage, in the field of assessing truthfulness, over any other man in the world. Indeed the Court pointed out that the contrary is sometimes suggested and that is why we have assessors or juries. The Court went on to describe as rare the cases where a judge convicts in the face of contrary assessor opinion and only where the evidence against an accused is so overwhelming and so affirmatively established that one can say the assessors' conduct was perverse.

[38] We would not accept the second proposition as a reliable summary of the position and would prefer the test as stated in ***Setefano v State*** Cr App 14 of 1989:

> "It is the reasons for the decision not to accept the assessors' opinion that are to be considered. The yardstick against which they should be measured is whether they are cogent and supported by the evidence – a lower standard that deciding whether they are against the general weight of the evidence. ... Where the judge reaches a different conclusion from the assessors, the summing up

will no longer provide a sufficient explanation of the way he reaches his decision and reasons are necessary. As with the summing up, those reasons are subject to scrutiny and, where necessary to correction by an appellate court."

[39] That passage was quoted with approval in ***Roko and others v State*** Cr App 5 and 12 of 2002 delivered 29 April 2004. The Court continued:

"The authorities to which we have referred make it clear that the reasons for the Judge not agreeing with the majority opinion of the assessors must be cogent and in sufficient detail to enable this Court critically to examine them in the light of the whole of the evidence and reach a conclusion on whether the decision to reject the majority opinion of the assessors is justified. ... We do not mean that the judgment should review the evidence in the detail that we have done in this judgment, but findings of credibility of important witnesses and inferences properly drawn from the evidence should be clearly but concisely stated.

If the requirement of the section to give clearly stated cogent reasons for departing from the opinions of the assessors are not adequately complied with, this Court may conclude that the convictions should be quashed and a new trial ordered."

[40] The post mortem report referred to by the judge in her judgment was an admitted document. It described the injuries to the body of the deceased but did not state any opinion as to the cause of death. That was part of a number of admitted facts:

"9. It is agreed that there is no dispute with the Post Mortem Report and the cause of death was massive internal bleeding in the

right side of the chest due to multiple rib fractures and laceration of major blood vessels (pulmonary vein) resulting from motor vehicle accident."

The post mortem report described the internal injuries as:

"1. Rib fractures complete 2,3,4,5,6 left anterior and posterior
2. Haemopericardium with 200cc
3. Haemothorax, 1000cc right
4. Liver laceration 3cm right lobe lateral aspect."

[41] Apparently associated with the injuries to the chest was an external injury described as "multiple abrasions on the chest wall 17 x 0.5 cm, 9 x 1 cm which appears to be like tyre mark". There was also an extensive abrasion 17 x 5 cm on the left elbow and the upper third of the forearm.

[42] At the trial the pathologist was not called. We have been advised by counsel that she had left the country some time before the trial. The report was admitted but the defence did not request the attendance of any medical expert to analyse those injuries.

[43] Our concern stems from the fact that the confessions which the learned judge accepted as true and consistent with the post mortem report described how the van was driven over the body of Kumar. Clearly the weight of the vehicle was sufficient to fracture five adjacent ribs on the victim's left side both front and back. In those circumstances, an obvious question must be why, as the vehicle passed right over the victim's chest, only the ribs on one side of the chest are fractured?

[44] The evidence shows that the vehicle must have run over the victim's body from his left to right. If it was heavy enough to crush the left side ribs, it is surprising that it did not also fracture the ribs on the victim's right side especially

as the fracturing of the left ribs would leave the right side ribs largely unsupported.

[45] The first appellant's evidence at the trial was that Kumar had been killed when the vehicle on which they were working fell off a jack and onto him. The rib fractures would be, at the very least, consistent with such an account. Either version could also explain the tyre marks.

[46] It is correct to say that this analysis was not raised at the trial by any counsel and it is understandable that the judge, therefore, did not deal with it in her summing up. However, she gave it as a particular reason for disagreeing with the assessors because she felt it was entirely consistent with the final admissions of the appellants but gave no further explanation why she found it so.

[47] In view of the nature of the injuries and their relationship to either account, it is impossible for this Court to say that it is a cogent reason or that it has been correctly drawn from the evidence.

[48] The other matter of evidence the judge found particularly relevant in demonstrating consistency with the final version of the accuseds' admissions - the way the body was found - is also stated without further explanation. The precise meaning of the phrase is open to question. It could have meant the way in which the body was lying on the road, the condition in which it was found or the fact it was in that particular location on the Koronivia road.

[49] As with the post mortem report, we do not consider the learned judge's reason is sufficiently clearly stated for us to make any determination of its relevance to her acceptance of the final confessions under caution. It is further obscured by the judge's statement when she was analysing the evidence in her summing up:

"You have heard counsel cross-examine on the position of the body on the Koronivia road, but on the prosecution version of the facts no one saw it and before it was discovered by the police. Indeed if the prosecution case is accepted the body would certainly have moved when a vehicle was driven over it. *So the position of the body is not conclusive.*" (our emphasis)

[50] What we consider could be relevant to a consideration of the way the body was found is that nowhere in the evidence is there any reference to blood either on the body or the ground by the body or to any embedded stones in the body although the evidence was that it was gravel road at that point. That could be considered to be consistent with the account given in the witness box by the first appellant. He told the court that he had moved the body from the garage into a van, wiped some sand and oil off the victim's chest and noticed some bleeding from the injury on Kumar's arm. He covered the body with a tarpaulin and drove home arriving there shortly after 9.0pm. The body then remained in the van for at least 3 ½ hours until it was dumped on the Koronivia road some time after 12.30am.

[51] As with the injuries described the post mortem report, we cannot say whether these possibilities are correct. What we must say is that the judge's inclusion, without further explanation, of those two aspects as particularly showing consistency with the admissions she accepted as true does not satisfy the requirements of section 299(2).

[52] As was stated in Roko's case, if the requirement to give cogent, i.e. compelling, reasons for departing from the assessors' opinions is not adequately complied with, the convictions may be quashed and a new trial ordered. That is the situation in this case and that is the order we must make.

ORDER:

Both appeals allowed.

Convictions of both appellants quashed.

Case to be tried de novo before a differently constituted court.

We have referred to the time that was spent on the trial within a trial. The finding by the trial judge that the statements under caution were admissible was not, in the event, challenged in the appeal. It may not be in the public interest to pursue an uncontested aspect of the earlier proceedings at the retrial.

The question was not addressed in the appeal whether, when this Court orders a retrial, it has the power also to order that the unchallenged decision on admissibility shall stand and not be reopened.

If either party wishes to make submissions on this issue they shall apply to the Court within fourteen days. The Court will then fix a hearing in chambers to set a timetable.

We are making no order at this stage and, if no application is made, it will be open to the accused to repeat their challenge at the retrial.

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WARD, PRESIDENT

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TOMPKINS, JA

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SMELLIE, JA

Solicitors:

Mr. Suresh Sani in person
M/S Ram Chand & Co., Nausori for Deo Raj 2nd appellant
Ofice of the Director of Public Prosecution, Suva