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

CRIMINAL APPEAL NO. AAU 0039/2003
(High Court Criminal Action No. HAC 21/1998)

BETWEEN:

SUDESH JEET

Appellant

AND:

THE STATE

Respondent

Coram: Smellie, JA
Penlington, JA
Scott, JA

Date of Hearing: 17 November 2005

Counsel: Mr. A.K. Singh for the Appellant
Ms. A. A. Prasad for the Respondent

Date of Judgment: 25 November 2005

JUDGMENT OF THE COURT

INTRODUCTION

[1] On 10 December 2003, following a trial in the High Court at Suva, the Appellant was found guilty on one count of murder and one count of larceny in a dwelling house. He was sentenced to life imprisonment on the first count and to 2 years imprisonment on the second.

[2] On 9 June 2005 a single Justice of this Court gave leave to the Appellant to appeal against his conviction on a number of grounds included in his amended petition of appeal filed on 23 May 2005.

THE PROSECUTION CASE

[3] The deceased, Roshni Lata, lived with her husband Sunil Kumar at Namena Road, Nabua. On the afternoon of 2 June 1998 she was discovered dead on the bedroom floor. She had suffered bruising and lacerations but the actual cause of her death was strangulation with the strap of a sulu. She had a blood alcohol level of 345.0 mg%.

[4] Acting on information received from a neighbour, the Appellant, who was a taxi driver, was arrested. He was interviewed under caution on 3 June and the record of the interview was admitted into evidence at his trial without objection.

[5] In his interview the Appellant claimed that he had taken an unnamed man to Sunil Kumar's house at Namena Road. He knew Sunil who was a friend of his brother and he had been to the house at Namena Road several times before. He used to pick Sunil's wife Roshni from the supermarket on Friday mornings and drop her home with her shopping.

[6] On this occasion when he and his passenger reached the house, Roshni came out and greeted the Appellant. The Appellant then drove away leaving his passenger there. A little later, a second man with a beard hailed his taxi and also asked to be taken to Sunil's house at Namena Road. He took the second passenger to Namena Road and left him there.

[7] About half an hour later, as he was plying for hire he happened to pass the taxi base at Daya Street when he heard the telephone ringing. He answered the telephone and found himself talking to Roshni. Roshni asked if there was a taxi there and asked him to return to Namena Road. When he reached Namena Road

the first man whom he had taken there was standing at the front of the house with the door open.

[8] The man asked the Appellant to reverse his taxi to the porch and to open the boot. The man then brought out a radio cassette player from the house which, together with some other items wrapped in clothes, also brought out of the house, was loaded into the Appellant's taxi. The Appellant then drove the man to Narere where the things which had been removed from Sunil's house were transferred to a carrier which drove away.

[9] Later, on the evening of 3 June 1998, the Appellant was taken to Navua Police Station where he identified one Salesh Nath as the driver of the carrier.

[10] On 4 June 1998 a second man was interviewed under caution by the police. This was Shalend Kumar. In due course Shalend Kumar was given immunity from prosecution in return for giving evidence on behalf of the State.

[11] Shalend Kumar told the court that on the day of Roshni's death he and the Appellant had together gone to a house on Namena Road. The Appellant told him that he had a girlfriend there. Upon arrival at the house, a woman came out and greeted the Appellant. The Appellant then drove off to buy a half bottle of gin. Shalend chatted with the woman, whom he had not known before and shortly after the Appellant returned with the gin. All three then went into the house. The Appellant and the woman shared the gin but Shalend did not join them. The Appellant asked the woman for sex and the two began to argue. At this point Shalend left the house because the atmosphere was becoming unpleasant. He went and stood outside the house.

[12] Shalend Kumar told the court that a little later when he looked back into the house through the window he saw the Appellant with his hands around the woman's neck. Later still, when he was sitting in the taxi, the Appellant came out of the

house: "he was shaking and frightened as if something had happened". The Appellant said "I have killed that lady". According to Shalend the Appellant then reversed the taxi to the front door of the house. He opened the boot of the taxi and proceeded to load it with things taken from the house. Among the items were a radio cassette player, a computer, some speakers and a black carry bag.

[13] Shalend Kumar told the Court that he and the Appellant then drove to the house of one Irshad Ali. Shalend Kumar's evidence was that he offered the computer to Ali at the Appellant's suggestion and that Ali agreed to take it. He himself retained the cassette radio and the black carry bag.

[14] A statement of agreed facts was filed under the provisions of Section 192A of the Criminal Procedure Code (Cap. 21 as amended). Facts 17 and 18 were that the computer was recovered by the police from Irshad Ali's house and the radio cassette player and black carry bag were recovered from Shalend Kumar's house. These items were all identified by Sunil Kumar as being his property.

THE DEFENCE CASE

[15] After the prosecution closed its case the Appellant gave sworn evidence. The judge summarised it as follows:

> "..he gives a version of events that has Shalend Kumar being driven by him to the deceased's house at his request and that he the accused did no more than what was required of him as a taxi driver. He went and purchased the half bottle of gin for Shalend Kumar at his request and in return for the taxi fare and the purchase price of the gin. He did not go into the house of the deceased but only drove into the driveway near the mango tree and later at the request of Shalend Kumar reversed the taxi to the vicinity of the porch near the front door. When he returned to

collect Shalend Kumar at the time nominated by Shalend Kumar he was ready and asked that the taxi be reversed to the vicinity of the porch to load items into the boot. The accused did not see what the items were as they were wrapped and he was sitting in the taxi having opened the boot with the lever and Shalend Kumar having lifted the boot".

THE SUMMING UP

[16] After his review of the evidence the judge explained that Shalend :

> "... has been given immunity from prosecution to give evidence against the accused. This is not an unusual occurrence."

He further explained that Shalend was an accomplice and that therefore it was his duty:

> "to warn you that although you may convict the accused upon [Shalend's] evidence it is dangerous to do so unless it is corroborated in some way. You may think that there is corroboration of his evidence or there is some corroboration of some of it but you must look at each of the necessary elements of the offences."

[17] Apart from this direction, the only reference to corroboration in the actual summing up was at page 18 when the Judge said:

> "the events at the house of Irshad Ali are detailed by Shalend Kumar and corroborated by Irshad Ali."

[18] After giving his general corroboration warning, the Judge returned briefly to the elements of the offences with which the Appellant had been charged and then concluded his summing up. He then quite properly asked both

counsel whether there were any further directions required. Ms. Prasad asked for none but Mr. Singh asked for a further direction that it was the Appellant's case that Shalend had killed the deceased. The following exchanges then took place:

"HIS LORDSHIP: I will emphasise that a little. I thought I had but I take your point and I am happy to do that. Just bear with me for a moment. Lest there be any doubt, lady and gentlemen, you've heard the evidence and I emphasise that it is a matter for you to make your decision based on the evidence before you. In going through my pressing (sic) overview of the evidence I referred you to the evidence of the accused that he maintained and he did nothing more and behaved as a taxi driver in dropping Shalend Kumar to the premises of the deceased in picking him up and buying the gin at his request. Counsel for the Defence points out and asks that I clarify the accused in his evidence and the defence in the conduct of its case, suggests that initially Shalend Kumar was the only person at the house at the time the deceased was killed. Secondly that determined therefore (sic) it was Shalend Kumar and not the accused. That's satisfactory Mr. Singh?

MR. SINGH: Yes my Lord

HIS LORDSHIP: Ms. Prasad you not going to tell me I went too far?

MS. PRASAD: No my Lord. It was just another matter, that the prosecution's case that the record of interview was lies.

HIS LORDSHIP: Why would it be?

MS. PRASAD: The accused had lied.

HIS LORDSHIP: That in itself might amount to some corroboration?

MS. PRASAD: Yes my Lord

HIS LORDSHIP: I am happy to do that. An element suggested that I may have not emphasised sufficiently to you, on the prosecution's point of view, and that is, I gave you a caution that whilst Shalend Kumar is an accomplice and whilst you may convict the accused from the evidence of an accomplice, it is dangerous to do so unless its corroborated in some way. I said to you that you may find there is corroboration of some parts of the evidence or some corroboration of all of it. Corroboration may come about in various ways. It may come about from the evidence of another witness. It may come about from the evidence that is contained in exhibits, that is the document, or it may come about from a combination of these things or circumstances or, how you read a document or the like. The prosecution will invite you to consider that the record of interview, the cautioned interview, a prosecution's case contains lies, incorrect statements and that the fact that it contained lies that that is itself might amount to some corroboration. That's a matter for you. The point I make is, that corroboration may come in

various forms, from the mouth of the witness, from the words of a document or from the general tender of the document. Is that satisfactory for both of you?

BOTH COUNSEL: (Agreed)"

GROUNDS OF APPEAL

[19] Mr. Singh filed a further amendment to his petition filed on 23 May 2005. This included an additional ground of appeal which suggested that the assessors had not been properly appointed. Mr. Singh was not able to point to any admissible evidentiary basis for his submission which he was therefore unable to take any further.

[20] Ground 1 of the Amended Petition of Appeal filed on 23 May 2005 was as follows:

> "(1) that the learned trial judge erred in law in failing to give the assessors an adequate or proper direction on the corroboration of the evidence of an accomplice Shalend Kumar ...".

[21] Grounds 2 (a), (b) and (c) were that:

"...the Learned trial Judge erred in law:

> (a) in allowing the learned prosecutor to comment in the presence of the assessors "that the prosecution case that the record of interview was lies".
>
> (b) in allowing the learned prosecutor to say in the presence of the assessors without any evidence that "the accused had lied".

(c) then without any proper direction or foundation saying in the presence of the assessors that "that in itself amounts to some corroboration."

It will be convenient to take these grounds together.

[22] In her submission to us, Ms. Prasad suggested that the rule of law requiring the trial judge to warn the assessors that although they might convict the accused on the uncorroborated evidence of an accomplice, it was dangerous to do so (see Davies v DPP [1954] A.C. 378; 38 Cr. App. R. 11 and Rex v Baskerville [1916] 2 KB 658) had been abrogated. In support of this proposition she relied on Olowanfuso Makanjuola [1995] 2 Cr. App. R. 469 and a decision of this Court, Seremaia Balelala v. The State (Cr. App. AAU 003 of 2004).

[23] In our view this submission cannot succeed, first, because the judgment in Makanjuola followed the repeal of the rule requiring accomplice corroboration by Section 32 of the English Criminal Justice and Public Order Act 1994, which has no equivalent in Fiji and secondly, because we do not read Balelala as extending beyond the former requirement for corroboration in cases of sexual assault. More fundamentally, however, the question in this case is not whether there was a requirement that a corroboration warning be given (there clearly was) but whether the warnings as actually given both generally and as to the Appellant's alleged lies, were correct and sufficient. We are satisfied that they were not.

[24] As pointed out by this Court in Nanise Wati v. The State (AAU 19/01 – FCA B/V 04/67) the concept of corroboration, which is not the same as confirmation, is a technical and legal concept which must be explained to the assessors. In this case no explanation of the term was offered. Secondly, it was not correct to tell the assessors that whether or not the evidence furnishes corroboration "is a matter for you". Whether certain evidence is capable of being corroborative is a question of

law for the Judge. It is only if the judge holds as a matter of law that the evidence is capable of being corroborative that the assessors should then be directed to consider whether they are in fact satisfied that the evidence referred to is true (R v. Farid 30 Cr. App. R 168, 175 – 76).

[25] Furthermore, it is the duty of the judge when giving the warning precisely to identify the evidence which is capable of corroborating the relevant witness (R v. Cullinane [1984] Crim. L.R. 420). This was not done.

[26] In R v. Honey [1973] 1 NZLR 725, 730 the New Zealand Court of Appeal explained:

> "... it is of little use telling the jury that if they find it necessary to rely on the evidence of an accomplice to convict, it is dangerous to do so without corroboration, unless they know what evidence they may take into account as corroboration and what evidence they may not. On the other side of the picture it is impossible to test on appeal the satisfactoriness of a jury's verdict in a close – run case, unless it is clear that in convicting, if they have obeyed the Judge's direction, they have not relied on something as corroboration, which is not corroboration at all."

[27] As has been seen, the prosecution's case involved the proposition that the Appellants' alleged lies provided part, at least, of the required corroboration. Where such a proposition is advanced by the prosecution then, once again, a careful and precise direction by the judge to the assessors is required. The judge is required to explain to the assessors that an accused person does not corroborate an accomplice merely by giving evidence which is not accepted and which must then be regarded as false. It must be explained that if the assessors are first satisfied that the accused person has in fact lied then they may find the lying to be corroborative only where they are also satisfied:

(i) that the lying was deliberate;

(ii) that the lying related to a material issue;

(iii) that the motive for the lying had to be a realisation of guilt and a fear of the truth; and

(iv) the statement must clearly be shown to be a lie by evidence other than that of the person who has to be corroborated, that is to say by admission or by evidence from an independent source. (see R v. Lucas 73 Cr. App. R. 159)

[28] Grounds 1, 2(a), (b) and (c) must be allowed. In view of this conclusion it is unnecessary for us to consider the remaining grounds of appeal. The next question to be considered is whether to apply the proviso to Section 23 (1) of the Court of Appeal Act.

[29] From our recapitulation of the evidence we think it is plain that this was "a close – run case". Although the Judge suggested to the assessors that there was corroborative material for them to consider, not least the Appellant's suggested lies, Ms. Prasad told us that in her view the accomplice's evidence was not in fact corroborated at all. Given this concession and taking into account the fundamental shortcomings in the summing up which we have detailed, we are unable to say that the opinions offered by the assessors and the verdict entered by the Judge was safe and satisfactory. This is not an appropriate case for the application of the proviso.

RESULT

The appeal is allowed. The Appellant's conviction is quashed. A retrial is ordered.

Smellie, JA

Penlington, JA

Scott, JA

Solicitors

Messrs. A.K. Singh Law for the Appellant
Office of the Director of Public Prosecutions, for the Respondent