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

CRIMINAL APPEAL NO. AAU 103 OF 2008

BETWEEN:	**SIMON JOHN MACARTNEY**	***Appellant***
AND:	**THE STATE**	***Respondent***

Coram: Byrne, A.P
Madigan, J.A
Fernando, J.A

Counsel: G. Reynolds QC with him Ms. A. Neelta for the Appellant
Ms. P. Madanavosa for the Respondent

Date of Hearing: 5th and 6th May 2010
Date of Judgment: 24th May 2010

JUDGMENT OF THE COURT

---

[1] On the 06th day of May 2010, this Court having heard submissions from Learned Senior Counsel for the Appellant and learned Counsel for the State, quashed the conviction recorded in the Court below and so acquitted and discharged the appellant. We said then that detailed reasons for our decision would follow and these then are those reasons.

[2] On the 4th November 2008 the Appellant was found guilty of the murder of his wife Ashika Lata on the unanimous opinion of 5 assessors and the trial Judge after a trial over 14 days in the High Court at Suva.

[3] The prosecution case at trial was that the deceased was the Fijian born wife of the accused, an Australian. The accused (this appellant) had remained in Fiji whilst the deceased had resided in Australia earning time to obtain permanent residency status. On obtaining that status, the wife then decided to return to Fiji. She arranged for the appellant to collect her at Nadi International Airport on the 22nd October, 2007 and transport her back to Suva and then on to her parents in Nadera. The appellant hired a rental car in Suva and did in fact meet the deceased when she arrived on the flight from Australia. They drove to Nadi and stopped at Chicken Express for a meal. Their presence at the fast food restaurant was recorded on the premise's CCTV camera. After spending approximately 20 minutes there they drove in the white rental car on to Sigatoka where they stopped for coffee. On the prosecution case they had then carried on to Deuba where the car took a small detour on to a *"slip road"* called Vunibuabua Old Road. [It was beside this slip road that the deceased's body was eventually found]. An eye witness, PW6 Ms. Vatucicila said she saw a white car parked there at about 7.00pm and that she observed the scene from about 50 metres away. She saw two people near the car. She said that one was an "Indian" female with her hair loose, and the other was a white man wearing blue jeans and brown sandals and with hairy hands. The man was kneeling over the woman and she heard heavy breathing. The white car had a yellow number plate and was a rental car. It had a logo on the door. We shall return to this evidence in due course.

[4] On the 2nd November 2007 there was a report of a decomposing body found at Vunibuabua Old Road. It was uplifted and taken to Navua Hospital for pathological examination and identification. The body was identified by the deceased's father, and the Pathologist determined that the cause of death was throttling or manual strangulation. It was part of the prosecution case that the accused returned to his own flat in Suva from Deuba and he had with him two of the deceased's suitcases. Over the next few days he moved these bags from location to location, thereby, the State says, trying to conceal their existence.

The Appeal

[5] Senior Counsel for the Appellant filed fourteen "Supplementary Grounds of Appeal" on the 16th day of April 2010. The first four grounds relate to the evidence of the "eye – witness", Ms. Vatucicila's, the fifth ground pleads error on the part of the Judge to accede to a no case submission. Three grounds refer to the evidence of Ms. Gadivi who saw the accused in the Deuba area one week **after** the body was found; the tenth ground prays that the trial judge erred in failing to stay proceedings on the ground of destruction and loss of vital evidence by the prosecution. The 13th ground alleges incompetence of trial Counsel, two grounds allege deficiencies in the Judge's summing-up relating to circumstantial evidence and to fairness to the accused and one final "catch all" ground in that the conviction is unsafe, unsatisfactory and unsupported by evidence.

[6] In his submission before us, Senior Counsel confined his arguments solely to the issues relating to Ms. Vatucicila's evidence and to the destruction and loss of vital evidence.

Ms. Vatucicila's evidence

[7] Ms. Vatucicila was the "eye witness" who when walking along the Queen's Highway at 7.00pm saw a white rental car and two persons, who she said in cross examination she thought were having sex by the roadside.

[8] The witness had originally given a statement to the Police on the 4th November, 2007. In that statement she said it was getting dark. She said the Indian lady was of dark complexion and had hair loose to her shoulder. She could not recall what the lady was wearing but "one of them" was wearing "jeans, low pants". She was certainly unable to identify any facial features.

[9] Two days after that statement was recorded, the appellant appeared in the Magistrates Court and a *nolle prosequi* was entered by the D.P.P. Following the appellant's release as a result of this *nolle prosequi* there appeared in the Fiji Times of 7 November 2007 (Exhibit P6 at trial) a report of the appellant being discharged. It is most disturbing to read in that report the rather brazen and chilling statement issued by the D.P.P's Office which statement is reprinted as: *"The Office of the Director of Public Prosecutions confirmed in a statement that Mr. Macartney would be recharged once new evidence was ready. "We will consider relaying the murder charge after the Police have obtained the necessary evidence".*

Obviously the lack of evidence was something that the Police and the D.P.P were going to take it upon themselves to rectify.

[10] Three days after this statement was issued Ms. Vatucicila was called in to make a second statement. In this statement she said she thought the couple were having sex, but that the man still had blue jeans on. He was also wearing brown sandals. She added that the man whom she had not described before was a very fair European man with hairy hands. She added at the end that there was something long and black written on the door of the "front left passenger".

[11] Ms. Vatucicila gave sworn evidence in the trial below. In addition to her evidence of hairy hands and a white car with a logo on the door she positively identified a pair of blue jeans shown to her as those she saw "the man" wearing that night, as well as a pair of brown sandals shown to her during her examination-in-chief. She was shown a photograph of the rental car which she identified as the car she saw that night.

[12] It was agreed between the appellant and the State that the sun set at 5.55pm on the 22nd of October 2007 and therefore Ms. Vatucicila's observations were made one hour after sunset, in conditions in which she said in her first statement were "getting dark".

[13] The Judge quite properly told the assessors to take account of what Ms. Vatucicila had said in her previous statements to the Police and in doing so to decide how much weight they could place on her evidence. Whatever that state of her evidence and no matter how much unease we feel as to the provenance of the evidence, it would not be sufficient in itself to allow this

appeal on those grounds alone. The assessors were quite correctly apprised of the background to her evidence and after appropriate directions from the Judge, it was a matter for them.

[14] However Ms. Vatucicila's evidence must be examined in the context of undisclosed material and it is in this context that we are of the view that the appellant had not been afforded fair process.

[15] When the appellant and the deceased stopped at the Chicken Express in Nadi for refreshment their presence was recorded on the closed circuit television equipment operated by that restaurant. The film would show them ordering their food, seated at a table and approaching the counter to pay for their meal. During the investigation the Police did seize the tape from the system and ten randomly selected photographs were made from the tape and the tape returned to the store where of course it was recorded over. No copy was made of the tape nor did the Police consider it necessary to retain it for evidentiary purposes.

[16] Not only was the tape thereby destroyed as an exhibit, but most oddly the ten photographs became worthless because the colours and images they depicted were obliterated while they were being held in Police custody during the investigation. It was suggested at the appeal that alcohol that was for some reason seized from the appellant's residence accidentally spilt over all of the photos causing the damage. We have seen the photographs and we do

conclude that they are worthless and of use neither to the appellant nor the respondent.

[17] From very early on in the proceedings below the accused through his then Counsel had been asking for the CCTV tape in pre-trial hearings before Shameem J. It was of course unavailable to be disclosed because it had been destroyed.

[18] The relevance of the CCTV footage is that the appellant contends that he was wearing neither blue jeans nor sandals that day, and that the tape would be conclusive proof of that contention thereby seriously undermining the evidence of Ms. Vatucicila. He prays that being unable to rely on that tape deprived him of a fair trial.

[19] **In Commonwealth Service Delivery Agency vs. Bourke [1999] SASC** 154, (Supreme Court of South Australia), the respondent had been charged with 70 counts of knowingly obtaining a benefit which was not payable, contrary to the Social Security Act, 1991. However, before he had been charged with the offence, the fortnightly forms that the Respondent had lodged with the Department to apply for the benefits were destroyed. The Magistrate at first instance permanently stayed the proceedings on the basis that the Respondent was deprived of a fair trial and the Supreme Court agreed after the prosecution appealed. Wicks J. said (para 16) "It may well be that the respondent's version of events in this case constitutes a "mere piece of forensic opportunism," however we can never be certain of that without the

fortnightly forms ..... The only evidence which was capable of corroborating the story of the respondent had been destroyed the result of which being that to continue with the proceedings would result in an unfair trial".

[20] We must interpolate here that although the appellant had originally said he had worn blue jeans on the day he met his wife at Nadi Airport, he later resiled from that position saying in evidence that he could not remember at the time he was asked that but subsequently remembered that he was wearing Reebok running shoes, and brown cargo pants. His Counsel gave evidence to say that he had seen the photos taken from CCTV tape before those photos were damaged and he said that the photos showed the appellant wearing cargo pants and "canvas" (a local term for running shoes).

[21] This evidence from the accused and from his Solicitor highlight the importance of the CCTV tape as evidence to either support the defence story or to support the evidence of the "eye witness" Ms. Vatucicila.

[23] In **CSDA vs. Bourke** (Supra), the Court referred to a similar case before the same Court heard a year before, the case of **Duncombe – Wall vs. Police** (unreported, Supreme Court, South Australia, Lander J, 2 July 1998). In that case the appellant was charged with threatening to cause harm without lawful excuse. The Police were called to the Appellant's home to deal with a domestic dispute. The central issue at the trial was who had called the Police, the complainant's son or the appellant. The complainant said she had

asked her son to call the Police because she feared for her safety due to the behaviour of the appellant. The appellant claimed he had called Police because his son had become aggressive towards him. A subpoena was issued for the production of the tape recording of the 000 call which would have proved who called Police. However, before service of the subpoena the tape had been reused thus erasing the relevant emergency call. The tape was the only evidence capable of corroborating the appellant's version of events and if it had done so, the evidence given by the appellant's former wife and son would have had to be rejected rendering it very difficult to find the appellant guilty beyond reasonable doubt. Lander J held that it was essential to a fair trial of the matter that the appellant be given the opportunity to support his version of events and proceeded to order a permanent stay of proceedings. It was not to the point that the prosecution's case was overwhelmingly strong.

[23] When dealing with evidence undisclosed and destroyed the Irish Supreme Court held in **Daniel Braddish** vs. **D.P.P.** (18 May 2001 – unreported) that even if the remainder of the prosecution case was strong, the fact that vital evidence is unavailable is of paramount importance. In that case it was alleged that a man charged with robbery had been caught on video tape. As a result of that tape the appellant Braddish was arrested and he made a confession to the crime. In the nine months it took to bring him to trial the video had been returned to the shop where the robbery had taken place and was no longer available. Handiman J. said

> ***"it is well established that evidence relevant to guilt or innocence must, so far as necessary and practicable, be kept until the conclusion of a trial. This***

principle also applies to the preservation of articles which may give rise to the reasonable possibility of securing relevant evidence" and later

"It is not acceptable, in my view, to excuse the absence of so vital and direct a piece of evidence simply by saying that the prosecution are not relying on it, but prefer to rely on an alleged confession. Firstly the confession is hotly disputed. Secondly a confession should if possible be corroborated and relevant recent history both here and in the neighbouring jurisdiction has unfortunate examples of the risks of excessive reliance on confession evidence. Thirdly the video tape has clear potential to exculpate as well as inculpate".

[24] As so in the instant case. Would the CCTV tape be available it could give rise to the possibility that it confirm the appellant's contention that he was wearing brown cargo pants and Reebok running shoes. This was the only piece of evidence that he could have relied on to support his story and to discredit the already unsatisfactory evidence of Ms. Vatucicila.

[25] The respondent submits that without Ms. Vatucicila's evidence, there is a circumstantial case of some force against the appellant. Counsel for the State submitted that the circumstances implicating the appellant were:

1) *That on the night of the alleged crime the appellant still had two of the deceased's bags and that over the next few days he moved them from place to place and it was only on being questioned by Police that he surrendered them. She submits that in so trying to conceal them, that led to an inference of guilt.*
2) *She further submits that a man thought to be the appellant was seen one week later in the vicinity of where the body had been found, was another*

inference of guilt in that he had obviously returned to the scene of the crime.

[26] Obviously both of these circumstantial scenarios are capable of innocent explanation and we doubt that the appellant would have been convicted on these facts alone without the *"boost"* of the *"identification"* evidence.

[27] There arises the unfairness in the process. The "identification" evidence is crucial and had the CCTV tape been available, then the appellant could have had the reasonable possibility of rebutting that evidence. Unfortunately he was not afforded that possibility because the tape is gone forever.

[28] The trial judge was obviously not in a position to stay the proceedings in the Court below if no application was made for him so to do by the experienced defence Counsel. Senior Counsel for the appellant stressed that in relying on his ground of appeal of unfairness, he was making no criticism of the trial Judge. He said this: *"This is another thing that I should say again as a matter of fairness to the primary Judge is that I don't suggest at all that his handling of the trial in this respect was anything other than perfect. He had no application put to him and no criticism can be made"*. We agree with this whole- heartedly. Perhaps another Counsel being alive to this issue would have made an application for stay of proceedings, but the trial Counsel did not despite having made an issue of non-disclosure from a very early time in the proceedings.

[29] Ever if the circumstantial evidence was strong and we have said above that we do not think it is, it is impossible to say what the panel of assessors would have made of it without the evidence of the *"eye witness"* or more to the point with the evidence of the *"eye witness"* totally discredited. It is not for us to say, because it is a *"jury"* question (on proper directions) but if the panel does not have all of the evidence before them that should have been before them, then the exercise of their deliberations is unfair to the accused.

[30] The case reminds us more than most of the duties and ethical responsibilities of both prosecutors and enforcement agencies. It is the duty of an investigating body to collect relevant and cogent evidence and with that body of evidence to identify a suspect. It would appear to us that in this case that procedure was reversed. After the case had been originally abandoned by the filing of a nolle prosequi, the investigators still had their suspect and then went on to collect more evidence, most of which was neither relevant nor cogent.

[31] It is the duty of a prosecutor to present the evidence, and even present it confidently and robustly, but it should never be the role of a prosecutor to secure a conviction at all costs. The statement which emanated from the Office of the Director of Public Prosecutions, reported in the Fiji Times of 7 November 2007, is both deplorable and unprofessional and it loses sight of the duty of the prosecutor to remain independent of the enforcement agency.

[32] This is one of those very rare occasions where a grant of permanent stay should have been granted had such an application been made but given that it was not, then it is for us as the Court of Criminal Appeal to decide whether justice was really done in this case. In our view it was not and for that reason we allowed the appeal and quashed the conviction.

[33] It is quite apparent that this evidence having been destroyed can never be available for a re-trial, resulting in continued prejudice to the accused. For that reason we did not order a retrial but instead acquitted the appellant of the charge.

Byrne A.P.

Madigan J.A.

P. Fernando J.A.

At Suva this 24th day of May 2010.