**IN THE FIJI COURT OF APPEAL**
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO: AAU0110/2008 & AAU0019/2009**

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| **BETWEEN** | : | **1. NETANI NUTE**<br>**2. ILAISA SOUSOU CAVA**<br>***Appellants*** |
| **AND** | : | **THE STATE**<br>***Respondent*** |
| CORAM | : | Hon. Mr. Justice Suresh Chandra<br>Hon. Mr. Justice Daniel Goundar<br>Hon. Mr. Justice Prabaharan Kumararatnam |
| Counsel | : | Mr. A. Vakaloloma for 1st Appellant<br>Mr. T. Muloilagi for 2nd Appellant<br>Ms Leweni for State |
| Date of hearing | : | 11 February 2013 |
| Date of Judgment | : | 6 December 2013 |

# JUDGMENT

**Goundar JA**

**Introduction**

[1] The appellants were tried in the High Court at Suva on the following charges:

**First Count**
**Statement of Offence**

**Murder:** Contrary to section 199(1) and 200 of the Penal Code, Cap. 17.

**Particulars of Offence**

Netani Nute Moto, Ilaisa Sousou Cava and Manoa Toviriki Qalovaki together with others, between the 24th August 2007 and the 25th August 2007 at Lami in the Central Division, murdered Murad Buksh s/o Azad Buksh.

**Second Count**
**Statement of Offence**

**Larceny:** Contrary to section 259(1) and 262(2) of the Penal Code, Cap. 17.

**Particulars of Offence**

Netani Nute Moto, Ilaisa Sousou Cava and Manoa Toviriki Qalovaki together with others, between the 24th August 2007 and the 25th August 2007 at Lami in the Central Division stole taxi meter valued $199.00 and mobile phone valued $200.00 to the total value of $399.00 the property of Murad Buksh s/o Azad Buksh.

**Third Count**
**Statement of Offence**

**Unlawful use of Motor Vehicle:** Contrary to section 292 of the Penal Code, Cap. 17.

**Particulars of Offence**

Netani Nute Moto, Ilaisa Sousou Cava and Manoa Toviriki Qalovaki together with others, between the 24th August 2007 and the 25th August 2007 at Lami in the Central Division, unlawfully and without colour of right but not so as to be guilty of stealing drove taxi registration LT-724 for their personal use.

[2] On 26 November 2008, the assessors expressed mixed opinions. The trial judge accepted those opinions and gave the following judgment:

| | | | |
|---|---|---|---|
| Nute | - | Murder: | Convicted |
| | | Larceny: | Acquitted |
| | | Unlawful Use of Motor Vehicle: | Convicted |
| Cava | - | Murder: | Convicted |
| | | Larceny: | Acquitted |
| | | Unlawful Use of Motor Vehicle: | Convicted |
| Qalovaki | - | Murder: | Acquitted |
| | | Larceny: | Acquitted |
| | | Unlawful Use of Motor Vehicle: | Acquitted |

[3] Nute and Cava were sentenced to life imprisonment for murder, to be served concurrently with the term of imprisonment imposed on count 3. This appeal by them is against their convictions only.

[4] Initially, Cava was refused leave by Byrne P because he filed his appeal out of time by seven months. Cava renewed his application for leave before the Full Court. We informed Cava that we would take the application for leave under advisement together with the substantive appeal.

[5] Nute filed a timely appeal separately. On 21 October 2009, Byrne P granted Nute leave to appeal on all the grounds advanced by him.

**Evidence led at trial**

[6] The prosecution's case was based on both direct and circumstantial evidence. The deceased was a young taxi driver who was asked to drive to a remote part of Veisari where he was assaulted, strangled with a rope and hung by the neck at a bridge. The cause of death was asphyxia as a result of manual strangulation. The incriminating evidence against the appellants came from Constable Nacanieli who identified them in the deceased's taxi at a roadblock he was manning on the night the deceased was killed. Constable Nacanieli recognized the appellants because he had lived with them in Nadonumai settlement for twenty years. Fingerprints obtained from the taxi matched with the 3rd accused's fingerprints. Nute made incriminating statement under caution. The third accused also made incriminating statement but he said he participated in the offences under duress by the appellants. He gave evidence consistent with his caution statement. The appellants relied on alibi as their defences.

**Nute's appeal**

**Ground 1 – That the learned trial judge failed to give a balanced summing up that resulted in the conviction to be unsafe and unsatisfactory.**

[7] Nute's argument under this ground is that the trial judge did not give a fair and balanced summing up of his case.

[8] Summing up is an important function of the trial judge in any criminal trial held in the High Court. Section 237(1) of the Criminal Procedure Decree provides that 'when the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion' . How a summing up is structured is a matter of style for different judges. But it must include the basic directions such as:

(i) The burden and standard of proof;
(ii) The elements of the offence;
(iii) The function of the assessors;
(iv) The law that is relevant to the issues in the case;
(v) Summary of evidence led at the trial;
(vi) Issues of fact on which the assessors have to make up their minds;
(vii) The case for the accused (see *State v. Li Jun* [2008] FJSC 18; CAV0017.2007S).

[9] Appellate courts have always emphasized the trial judge's duty to give an objective and balanced summing up. In *Silatolu v. State* [2006] FJCA 13 , this Court said:

> "When summing up to a jury or to assessors, the judge's direction should be tailored to the particular case and should include a succinct but accurate summary of issues of fact as to which decision is required, a correct but concise summary of the evidence and of the arguments of both sides and a correct statement of the inferences which the jury is entitled to draw from their particular conclusion about the primary facts; *R v. Lawrence* [1982] AC 510. It should be orderly objective and balanced analysis of the case; *R v. Fotu* [1995] 3 NZLR 129."

[10] However, the duty to give an objective and balanced summing up does not mean that the trial judge have to direct on every argument presented by the defence. As this Court said in *Tamaibeka v. State* [1999] FJCA 1; AAU15u.97s that:

> "The duty of a judge in any criminal trial ... is adequately and properly performed ... if he puts before the jury, clearly and fairly, the contentions on either side, omitting nothing from this charge, so far as the defence is concerned, of the real matters upon which the defence, but that does not mean to say he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence..."

[11] Furthermore, in *Chandra Wati v. Reginam* 8 FLR 70, this Court stressed that isolated passages of the summing up should not be taken out of context to form the basis of a ground of appeal. Appellate courts review a summing up as a whole before upholding a ground of appeal based on unfair and unbalanced summing up.

[12] Nute makes five complaints to demonstrate that the summing up was unbalanced. His first complaint is that the trial judge in her summing up gave lengthy directions on the case for the prosecution while the directions on his defence of alibi were brief. The prosecution led evidence from about twelve witnesses. The trial judge summarised the prosecution's case against the three accused in ten pages. Nute gave evidence and called five witnesses. The trial judge summarised Nute's case in two pages. After summarising all the evidence, the trial judge returned to Nute's case and gave the following directions:

> "The 1st Accused's case is that he was in Nadonumai Settlement when he returned from the Hibiscus festival and that he drank grog with the family of Virisila until 5am. His case is that he knows nothing about the taxi driver who died and that his admissions were obtained by the police by force, oppression and unfairness. He led evidence of his alibi supported by his witnesses."

[13] After giving the above directions, the trial judge gave further analysis of the evidence and what the issues were on each count. No complaints can arise from mathematical proportions that the judge used to summarize the evidence of the prosecution and the defence. The proportions are based on factors such as how many witnesses each party called and what the issues of fact the assessors have to determine. Appellate courts will only interfere with a conviction on the ground of unbalanced summing up, if the trial judge has not fairly dealt with the defence case. In this case, we are satisfied that the trial

judge fairly dealt with Nute's defence in the summing up. Mathematical proportions of each party's case are not a relevant consideration for the appellate courts. As this Court said in *Vesikula v. State* [2001] FJCA 14; AAU0014.1997S; AAU59.1999S:

> "…..We do not think that a submission based on mathematical proportions such as this can succeed. While an unbalanced summing amounting to real prejudice to the defendant may give grounds for an appeal, this is not such a case. The question is whether or not the defences were put and here they were."

[14] Nute's second complaint is that the trial judge in her summing up unfairly directed the assessors that Nute's late notice of alibi suggested his alibi was a concoction. The trial judge's directions on this issue were as follows:

> "Both the 1st and 2nd Accused have raised evidence of alibi that is, that at the time of the offence, they were somewhere else. Ordinarily, accused persons are required to give notice that they will be raising an alibi, to the prosecution within 21 days of the transfer of the case to the High Court. This allows the prosecution to check details of the alibi to be sure that they have not charged the wrong person. It also protects the accused person from allegations of recent fabrication.
>
> In this case neither the 1st nor the 2nd Accused gave the prosecution notice of alibi until just before the trial commenced. You are entitled to take into account the late notice of alibi in deciding what weight to give to the alibis raised as well as the explanations of the witnesses as to why they did not give alibi notice earlier. You will recall that the 2nd Accused's witnesses said that they tried to tell the police and DPP about the alibi but they were told to see Sousou's lawyer. You are also entitled to consider these explanations."

[15] We cannot see any legitimate complaint that can arise from the above directions. Similar directions have been upheld by this Court in *Delaibatiki & Anr v State* Cr. App. No. AAU0018 of 2007 and AAU0029 of 2006. At trial, Nute did not dispute that he did not comply with the statutory notice period for alibi. The non-compliance of the statutory period for notice is a matter that goes to the weight of an alibi. The trial judge fairly put

to the assessors the reasons for the statutory notice period and at no stage she directed that Nute's alibi was concocted.

[16] Nute's third complaint is that the trial judge's irresistible reference to the 3rd accused's evidence damaged his case. The 3rd accused successfully ran the defence of duress at trial. He gave evidence implicating the appellants and said he only participated in the offences out of fear for his life because of threats made to him by the appellants. The trial judge fairly put the 3rd accused's case to the assessors. The fact that the 3rd accused implicated Nute was based on admissible evidence. Nute's defence of alibi may have been prejudiced by the 3rd accused's implication of him, but since the evidence of the 3rd accused was admissible against Nute, no error has been shown in the manner that that evidence was dealt by the trial judge in the summing up.

[17] The fourth and final complaint under this ground is that the trial judge gave no direction on the absence of forensic evidence against Nute. No authority has been cited for the proposition that a trial judge is obliged to direct on the forensic evidence that does not exist. Further, forensic evidence is a broad subject. Nute does not point out what aspect of the missing forensic evidence the trial judge was obliged to direct the assessors on. This complaint is misconceived. None of the complaints under this ground have been made out.

**Ground 2 - That the learned trial judge failed to properly direct herself according to law when the assessors gave inconsistent verdict concerning a case largely built on joint enterprise and that under all the circumstances of the case, the finding of guilt was unsafe and unsatisfactory**

[18] Nute's complaint under this ground is that the trial judge failed to direct the assessors on the law and evidence relating to joint enterprise. The trial judge gave detailed directions on the law relating to joint enterprise at pages 7 to 8 of the summing up. Later in the summing up at pages 28 to 32 the trial judge summarised the evidence as they related to the joint enterprise relied on by the prosecution. Nute's complaint that there were no

directions on joint enterprise therefore has no merits. At the hearing, Nute made a further complaint that the 3rd accused's acquittal is inconsistent with his guilty verdict.

[19] Appellate courts review inconsistency in verdicts using unreasonable or illogical standard (*Lole Vulaca v The State* Cr. App. No. CAV0005 of 2011). The 3rd accused evidence at trial was that he was tied up with a rope and threatened with a knife held at his neck by Nute and was only present at the robbery of the deceased under duress. The 3rd accused argued that he was not part of a joint enterprise to rob or kill the deceased. On the evidence, it was open for the assessors and the trial judge to acquit the 3rd accused of all the charges by accepting he acted under duress. There is a logical explanation for the 3rd accused's acquittal.

**Ground 3 – That the learned trial judge failed to direct on the absence of forensic material/evidence to disadvantage and that the verdict was therefore unsafe.**

**Ground 4 – That the learned trial judge placed undue emphasis and weight in summing up to the evidence by the 3rd Accused [later acquitted of the murder count] against the appellant and failed to draw any evidential reference of how that exercise would have impacted the prosecution case.**

[20] Both of these grounds are an extension of the complaints that were argued under the first ground. We have dealt with those complaints and found them to have no substance.

**Ground 5 – That the learned judge failed to properly direct herself in law on the issue of admissibility of police caution interviews against the Accused based on the evidence of police assault, brutality and unfairness.**

[21] Nute objected to the admissibility of his caution statement on the grounds that it was obtained by force and threats. The trial judge held a *voir dire* and rejected those grounds and admitted the caution statement in evidence. The judge then gave detailed directions to the assessors on the weight to be attached to a disputed confession. The assessors were told that the weight to be attached to a disputed confession was a matter for them. Nute's

submission under this ground is tantamount to re-litigation on the same facts that were litigated in the trial court. Appeals are not the forum to re-litigate facts already litigated in the trial court. The purpose of an appeal is to correct the errors made by a trial court. Unless the appellant is able to demonstrate that a completely wrong assessment of the evidence has been made or the correct principles have not been applied, an appellate court will not disturb a trial court's findings of credibility and fact (*Jai Ram & Ors v State* Cr. App. No.AAU0017 of 2004S). Nute has failed to demonstrate any legitimate basis for this Court to disturb the trial court's findings of credibility and fact.

[22] None of Nute's grounds of appeal have been made out. His appeal against conviction must fail.

**Cava's Appeal**

[23] Cava presented five grounds of appeal.

**Ground 1 – Absence of any direct evidence, reliance on circumstantial evidence**

[24] This ground was abandoned at the hearing.

**Ground 2 – Failure to issue Turnbull direction**

[25] This ground relates to Constable Nacanieli's identification evidence. When a case is wholly or substantially based on identification evidence which the defence contends to be mistaken, the trial judge is obliged to give careful directions on that evidence in accordance with what is commonly known as the Turnbull directions based on the English case of *R v Turnbull* [1976] 3 ALL ER 549. Turnbull directions have three components. The first component is that the trial judge should warn the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification . In addition the trial judge should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the trial judge should direct the assessors to examine closely the

circumstances in which the identification by the witness came to be made. Thirdly, the trial judge should remind the assessors of any specific weakness which had appeared in the identification evidence.

[25] In her summing up the trial judge gave the following directions on Nacanieli's identification evidence:

> "The evidence of SC Nacanieli is very significant because his is the only direct evidence implicating Sousou as being in the deceased's taxi that night other than the 3rd Accused's sworn evidence. In considering Constable Nacanieli's identification, you must consider the circumstances of the identification. What was the lighting like? How slow was the taxi? How well does he know Moto and Sousou? What distance was he from them? How accurate is his recollection? If you accept that he knew Sousou and Moto very well because they come from his settlement, you must ask yourselves whether his identification is reliable. Sometimes we think we recognize people we know but later find that we are mistaken. Sometimes an honest witness makes a mistake in identifying even relatives.
>
> You must consider all the evidence of identification when you consider what weight to put on Constable Nacanieli's evidence.
>
> You may also consider the evidence of WPC Salote who also saw a white taxi with the stickers drive past the checkpoint at 3am that night with an Indian man driving it and two Fijian men at the back seat. She could not recollect if someone was sitting next to the driver. You will recall that neither she nor Constable Nacanieli were carrying their notebooks at the time and made no record in them about the event."

[26] Cava's contention is that since the identification was made by a police officer, the evidence was unreliable because the witness may have recognized Cava because he was a known offender to the witness. Cava submits that the trial judge should have pointed this out as a weakness in the identification made by Nacanieli. There is no merit in this argument. Nacanieli evidence was that he recognized Cava because they lived in the same community and not because he was a known offender. This ground fails.

**Ground 3: Failure to direct on alibi witness**

[27] In crafting his argument under this ground, Cava submits that since he relied on alibi as his defence, the trial judge should have directed the assessors to weigh the evidence of his alibi witnesses against that of Constable Nacanieli's evidence. This argument is misconceived. Just because several witnesses give evidence of an alibi does not make the alibi any more credible than only if one witness had given evidence. Nacanieli's evidence went to identification of Cava. The question regarding Nacanieli's evidence was whether his identification was reliable. The question regarding the alibi evidence was whether it was credible. These were two separate considerations and the trial judge was correct not to merge the two issues. If Nacanieli's identification was found to be unreliable then it was a matter for the assessors to reject it and consider other incriminating evidence against Cava. If the assessors found Cava's alibi to be false, then they still had to consider other incriminating evidence against him before finding him guilty. These matters were fairly dealt by the trial judge in the summing up and we find no merits in this ground.

**Ground 4 - Reliance on evidence of Accused 3**

[28] Cava argues that the 3rd accused was an accomplice. In the summing up the trial judge directed the assessors that they could rely on the 3rd accused's evidence in assessing the guilt or innocence of the appellants. Cava does not suggest that this was a misdirection. Cava's complaint is that the trial judge should have given full accomplice warning to the 3rd accused's evidence (*Mudaliar v State* [2008] FJSC 25; CAV0001.2007, *Singh v State* [2006] FJSC 15; CAV0007U.05S)

[29] Cava's submissions on this ground are misconceived. The 3rd accused was not called by the prosecution to give incriminating evidence against the appellants. The 3rd accused presented what is commonly known as the 'cut-throat' defence. He gave exculpatory evidence for himself and inculpatory evidence against the appellants. There is no rule of law which obliges a judge to give the jury or assessors the warning about corroboration which is often given when an accomplice gives evidence for the prosecution (*Law Chung Ki and another v. HKSAR* [2005] 8 HKCFAR 701). This ground fails.

**Ground 5 – Minimum term imposed**

[30] This ground was abandoned at the hearing.

[31] We grant Cava leave to appeal because we have considered his substantive grounds of appeal. But since the grounds of appeal have not been made out, the appeal against conviction must fail.

**Result**

[32] The appeals are dismissed.


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Hon. Mr. Justice Suresh Chandra
**Judge of Appeal**

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Hon. Mr. Justice Daniel Goundar
**Judge of Appeal**

.....
Hon. Mr. Justice Prabaharan Kumararatnam
**Judge of Appeal**

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