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

CRIMINAL APPEAL NO: AAU 0046 OF 2012
CRIMINAL APPEAL NO: AAU 0011 OF 2012
(High Court Criminal Case No: 22/08 [LTK])

BETWEEM	:	**THE STATE**	*Appellant*
		JOAPE DRAUNA	*1st Respondent*
		TEVITA KAMA	*2nd Respondent*
		TEMO LUTUMAILAGI	*3rd Respondent*
AND	:	**TEMO LUTUMAILAGI**	*Appellant*
	:	**THE STATE**	*Respondent*

Coram	:	**Chandra JA** **Gamalath JA** **Fernando JA**
Counsel	:	**Mr Waqainabete for the 1st, 2nd & 3rd Respondents in Case No: AAU 0046/12 and the Appellant in Case No: AAU 0011/12.** **Mr M Korovou for the Appellant in Case No: AAU 0046/12 and the Respondent in Case No: AAU 0011/12**
Date of Hearing	:	**15 February 2018**
Date of Judgment	:	**08 March 2018**

JUDGMENT

Chandra JA

[1] I have read the draft judgment of Fernando JA, and agree with the reasons, findings and the proposed orders.

Gamalath JA

[2] I agree with the reasons and conclusions of Fernando, JA.

Fernando JA

[3] This an appeal arising from a case tried before the High Court in Lautoka, where the 1st, 2nd and 3rd Respondents in appeal number AAU 0046/12 stood indicted for robbery with violence and the 3rd Respondent under a separate count in the same indictment also for murder. At the close of the case for the prosecution the learned Trial Judge on a submission of no case, had acquitted the 1st, 2nd and 3rd Respondents from the charge of robbery with violence, by his Ruling dated 28th February 2012. The case had then proceeded against the 3rd Respondent, on the charge of murder. At the conclusion of the trial the 3rd Respondent had been convicted of murder and sentenced to life imprisonment with an order that he shall not be eligible for parole for 12 years.

[4] The DPP aggrieved by the decision of the learned Trial Judge of acquitting the 1st, 2nd and 3rd Respondents on the charge of robbery with violence, has preferred an appeal against such decision while the 3rd Respondent has appealed against his conviction of murder by the High Court. The appeal of the DPP is numbered AAU 0046/12 and the appeal of the 3rd Respondent against his conviction for murder is numbered AAU 0011/12. The 3rd Respondent in AAU 0046/12, is the Appellant in appeal number AAU 0011/12. Since both appeals arise from the same case, they were consolidated and argued together.

Charges

[5] The 1st, 2nd and 3rd Respondents were jointly charged under count 1 with having committed robbery with violence contrary to section 293(1)(b) of the Penal Code, Cap

17; for having robbed Sin Har Sue of 1500 dollars on the 1st day of December 2007 at Nadi. The 3rd Respondent was in the same indictment separately charged under count 2 for having murdered the said Sin Har Sue. According to evidence that transpired the 3rd Respondent had murdered the deceased Sin Har Sue after the 1st and 2nd Respondents left the shop.

Facts in Briefs

[6] The deceased was 71 years old and was running a Chinese Gift shop by the name of 'John Lui'in Nadi town. On the 1st of December 2007 the three Respondents along with a juvenile, against whom charges had been dropped, had entered the shop in broad daylight, ransacked it and stolen money. The Appellant in appeal number AAU 0011/12 had slashed the deceased with a cane knife causing her death after the other three persons left the shop.

Appeal in AAU 0046 of 2012

[7] I shall first deal with the appeal by the State against the acquittal of the1st, 2nd and 3rd Respondents on the charge of robbery. In essence the State's appeal is to the effect that the learned Trial Judge erred, in misconstruing the meaning to be attributed to "no evidence" in section 231 (1) of the Criminal Procedure Act 2009, by holding that confession evidence on its own does not suffice to constitute proof beyond reasonable doubt and that the salient and important factors of a confession had to be proved by independent evidence. The DPP has requested "that the appeal against acquittal be allowed and that the matter pertaining to count 1 for robbery with violence be ordered for retrial".

[8] The main item of evidence against the 1st, 2nd and 3rd Respondents in relation to the charge of robbery and against the Appellant in AAU0011/12 in relation to the charge of murder was their respective confessions.

Ruling on No Case to Answer

[9] According to the reasoning of the learned Trial Judge in his 'Ruling on No case to Answer', acquitting the 1st, 2nd and 3rd Respondents, of the charge of robbery, the confessions by the 1st, 2nd and 3rd Respondents alone did not suffice. The learned Trial Judge had been of the view that: "Admitting the statements made during the caution

interview do not mean the case is proved, the prosecution should prove the confession. It doesn't mean that they have to prove all of the confession but the salient and important factors of the confession had to be proved by independent evidence" and in the absence of such evidence the Court has to consider that there is no evidence and record a finding of not guilty as laid down in **section 231 (1) of the Criminal Procedure Act 2009**.

[10] Section 231 (1) reads as follows:

> "*When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty* ***if it considers*** *that* ***there is no evidence*** *that the accused person (or any of several accused) committed the offence.*" (emphasis added by me)

[11] In the case of **Lepani Rokolaba, Crimnal Appeal AAU 0057 of 2012,** this Court held in interpreting section 293 (1) of the Criminal Procedure Code, Cap 21 which was almost identical to section 231 (1) of the Criminal Procedure Act 2009: "*Section 293 has been subjected to interpretation in several cases. The test on case to answer is that there must be some relevant and admissible evidence, direct or circumstantial, touching on all the elements of the offence. The credibility, reliability and weight of the evidence are matters for the assessors (Sisa Kalisoqo v. State Criminal Appeal No. 52 of 1984, State v. Mosese Tuisawau Criminal Appeal No. 14 of 1990)*".

[12] The learned Trial Judge had come to the conclusion that there was no evidence on the basis that: "None of the witnesses speak of a Robbery or Theft of money at the place of the deceased. In other words there is no evidence that there is a theft on the 1/12/2007 at the scene of crime. The Investigating Officer, Waqa who visited the scene had observed the drawers were pulled and the till was opened but doesn't speak of any money missing from the deceased." This according to him amounted to a failure by the Prosecution to prove a basic element of the offence of robbery, namely theft.

[13] The learned Trial Judge had also, which in my view correctly surmised, that a 'prima facie case' should have been established at the conclusion of the Prosecution case, so that the court should be able to convict the accused even if the defence opted not to

offer any defence. Obviously the Prosecution that carries the burden of proving its case cannot expect the Defence to fill in any gaps in the Prosecution case. But where the learned Trial Judge erred is when he concluded that there was no prima facie case made out in relation to the charge of robbery.

[14] In essence the State's appeal is to the effect that the learned Trial Judge erred in misconstruing the meaning to be attributed to "no evidence" in section 231 (1) of the Criminal Procedure Act 2009 by holding that confession evidence on its own does not suffice to constitute proof beyond reasonable doubt and that the salient and important factors of a confession had to be proved by independent evidence.

[15] In stating that "None of the witnesses speak of a Robbery or Theft of money at the place of the deceased, in other words there is no evidence that there is a theft on the 1/12/2007 at the scene of crime", the learned Trial Judge had undoubtedly misdirected himself. It is correct that there had been no direct evidence from the prosecution witnesses to prove that a specific sum of 1500 dollars as set out in the charge had been stolen, but the confessional statements of the 1st, 2nd and 3rd Respondents clearly show that a theft had taken place and the Prosecution appeared to have worked out this figure on the basis of their confessional statements. The learned Trial Judge had failed to realize that it was through the Prosecution witnesses that the confessions of the 1st, 2nd and 3rd Respondents, in which all three of them admit to have stolen the money were led; and this was evidence.

[16] PW Joseva Bale had stated that he had seen the 1st, 2nd and 3rd Respondents, on the date of the incident, at a place in close proximity to where the incident occurred, around the time the incident took place. The inference you can draw from this evidence is that the three Respondents had an opportunity to commit the offence. Further the observations made by PW Tuivaga, who was in charge of the investigation and who visited the scene, that the drawers had been pulled and the till was opened; is indicative of a theft having been committed. This was circumstantial evidence of a theft having taken place and "independent evidence to prove the salient and important factors of the confession" even as per the test, laid down by the Trial Judge, himself. The learned Justice of Appeal who heard the Leave to Appeal application had correctly commented that the prosecution witnesses could not account for any missing money because the victim was

killed in the robbery and that only the victim could have accounted for the missing money. There is also no other possible motive that could be attributed to this crime.

Confessions of the 1st, 2nd and 3rd Respondents

[17] I have summarised the cautioned confessional statements of the 1st, 2nd and 3rd Respondents, which clearly show the involvement of each of them in the robbery. I am conscious of the fact that the confessions are evidence only against its maker and cannot be made use of, to convict the others involved in the robbery. I have referred to the 1st, 2nd and 3rd Respondents as 1R, 2R and 3R for purposes of brevity.

[18] The 1st Respondent in his cautioned confessional statement had said that he along with 2R, 3R and a juvenile (against whom charges were later dropped), had planned to rob the Chinese shop in Nadi while they were at the back of the Civic Centre in Nadi. He had been standing in front of the door of the Chinese shop, while 2R, 3R and the juvenile had entered the shop and closed the door. About 3-5 minutes later 2R and the juvenile had come out and he had walked along with them to the back of the Civic Centre. 2R had given him 500 dollars from his bag. About 5 minutes later 3R had come out of the shop wiping his hands with a face towel and the three of them had followed 3R. 1R had agreed to show to the police the places he had mentioned in his statement and had shown them.

[19] The 2nd Respondent in his cautioned confessional statement had said that he along with 1R, 3R and a juvenile (against whom charges were later dropped) had entered a Chinese woman's shop to steal. According to 2R, 1R was the last one to enter. They had taken money from the till. 3R was holding the Chinese woman with a knife in his hand. After stealing from the shop 1R, the juvenile and himself had come out of the shop while 3R remained inside. He had heard the Chinese woman yell but had not looked back into the shop as he was rushing out to get out of the shop. They had run towards the children's park and 3R had joined them later. 3R had gone to wash his hands at the tap beside the Civic Centre. The money they had taken from the shop was shared amongst them and his share had been 500 dollars. 2R had agreed to show the places mentioned in his statement to the police and had shown them.

[20] The 3rd Respondent in his cautioned confessional statement had said that he along with 1R, 2R and a juvenile (against whom charges were later dropped) had entered a Chinese woman's shop to steal. While the others were taking the money from the drawers he had "got hold of the Chinese woman (*deceased*) and was holding her head with his left hand." The deceased had struggled and had been trying to get free by moving backwards. Then he had picked up a long handle cane knife that was lying on the floor, where they were standing and "struck the Chinese woman". On being questioned as to in which part of the Chinese woman's body he had struck, the Appellant had said "I strike her twice on her head and then on her face". According to the Appellant after striking her "The Chinese woman yelled and bowed down." Having struck her, he had run outside and "walked quickly to the Bowzer, which was on the same side of the road as the Chinese shop." The reference to the 'bowzer' is the Service Station. By this time the1R, 2R and the juvenile had already gone. He had run to the Service Station to wash his hands at the tap at the Service Station as his hands were stained in blood. The blood of the Chinese woman had spattered on both his hands. The Appellant had said that an Indian man working at the bowzer had seen him. He had told the Indian man that "Someone die there and I help". Thereafter he had met the1st and 2nd Respondents and the juvenile who had given him 500 dollars stolen from the shop. He had identified the cane knife with a long handle, which was found inside the shop, as the one he had attacked the deceased with. 3R had agreed to show the places mentioned in his statement to the police and had shown them.

Voir Dire

[21] The learned Trial Judge at the conclusion of the Voir Dire had admitted the confessional statements made by the 1st, 2nd and 3rd Respondents on the basis they were obtained without assault, threat oppression or unfairness and therefore made voluntarily. He had therefore ruled that they "are admissible in evidence and may be used in the trial on the general issue". In disbelieving the Respondents version of assault by the police, the learned Trial Judge had stated "If all three were assaulted in the manner they attested to, they would have been hospitalized rather than taken before a very senior medical officer who found no external injuries on their bodies apart from a bruised ear on the first accused (*reference here is to the 3rd Respondent*), which is in itself not proof of assault, given that he was arrested while playing a game of rugby."

[22] Once a confession is admitted as having been made voluntarily by the Trial Judge all that remains to be determined is the making of it, the truthfulness/weight and probative value/sufficiency to be attached to such confession. There is no legal bar to convict by solely relying on a confession without any other independent evidence to corroborate it. All that matters is the reliance that could be placed on it and whether all the elements of the offence stand to be proved by the confession. The presence of other independent evidence to corroborate it, will only add to its weight.

[23] In **Hassan and two Others v Reginam [1978] FJCA 18, Criminal Appeal 57 of 1977** this Court held citing earlier authorities "*It is well established law that a man may be convicted, even of murder, solely upon his confession R V Sykes (1913) 8 Cr. App. R.233. McKay v The King (1935) 54 CLR 1. It has been stated in this Court that it is customary to look for some evidence of surrounding circumstances which are consistent with the confession. Such evidence need not be corroboration in the strict sense of the term, but merely evidence of facts which are not inconsistent with those set out in the confessional statements. In this case there was the medical report which stated that death was due to severe head injuries consistent with being caused by a blunt object. Nothing stated in the medical report was inconsistent with these injuries having been caused by a stone.*" A similar view was held in **Khan v The State Criminal Appeal No AAU 0069 of 2007**.

[24] I therefore agree with the submission of the State that: "In this case, the trial judge should have ruled that there was a case to answer and placed the confessions before the assessors to consider the truth of the confessions in determining the guilt of the accused." This certainly was not a case where there was 'no evidence' that the 1st 2nd and 3rd Respondents committed the offence of robbery. The respective confessions of each of the Respondents were relevant and admissible evidence against each one of them. The confessions were direct evidence that satisfied all the elements of the offence. I also find that the learned Trial Judge had contradicted himself when he convicted the 3rd Respondent and the Appellant in AAU 0011/12 of murder, mainly based on his confession.

[25] I am therefore of the view that the appeal against the acquittal of the 1st, 2nd and 3rd Respondents in AAU 0046/12 by the DPP should be allowed. The next issue to be determined in this matter is whether a retrial should be ordered as requested by the DPP.

The issue of Retrial of the 1st, 2nd and 3rd Respondents on the charge of robbery

[26] I wish to state that the hearing of this appeal has come up almost 6 years after the acquittal of the 1st, 2nd and 3rd Respondents by the High Court on the charge of robbery and 10.3 years after the alleged robbery. The learned Justice of Appeal who heard the Leave to Appeal application of the State in granting leave had been constrained to comment: "However the first and second respondents say that they have moved on with their lives after their acquittals and that any further criminal proceedings will adversely affect them. I accept that some prejudice is inevitable because the first and second respondents' personal circumstances changed with the passage of time after they were acquitted."

[27] **Section 23(2)(b) of the Court of Appeal Act** states: "*Subject to the provisions of this Act, the Court of Appeal shall if they allow an appeal against acquittal, either set aside the acquittal and direct a judgment and verdict of conviction to be entered, or if the interests of justice so-require, order a new trial.*" (emphasis by me)

[28] The power of the Court to order a retrial is discretionary and as such the power must always be exercised judicially as was said in **Shekar v State [2005] FJCA 18**. The Privy Council in **Au Pui-Ken v Attorney General of Hong Kong [1980] AC 351** said: "*The power to order a new trial must always be exercised judicially. Any criminal trial is to some degree an ordeal for the accused; it goes without saying that no judge exercising his discretion judicially would require a person who had undergone this ordeal once to endure it for a second time unless the interests of justice required it.*" In **Aminaisi Katonivualiku v The State CAV 0001/1995S, 17 April 2003** it was said that the overriding consideration in the exercise of the power is the interests of justice.

[29] In my view the ordering of a new trial in the circumstances of this case where as stated earlier, the offence had been committed 10.3 years ago, namely on the 1st of December 2007 and the 1st, 2nd and 3rd Respondents had been acquitted 6 years ago, namely on the 28th of February 2012; is a matter that has to be determined taking into consideration articles 14(g), 15(1), 15(3) and 11(1) contained in Chapter 2 of the Constitution of the Republic of Fiji dealing with the 'Bill of Rights'. That is because the Constitution is the supreme law of the State. Article 6 contained in Chapter 2 of the Constitution states at 6(1) "*This Chapter binds the legislative, executive and judicial branches of government at all levels, and every person performing the functions of any public office.*" Article 6(6) states: "*Subject to the provisions of this Constitution, this Chapter applies to all laws in force at the commencement of this Constitution.*"

[30] Article 14(g) states: "*Every person charged with an offence has the right to have the trial begin and conclude without unreasonable delay.*" Article 15(1) states: "*Every person charged with an offence has the right to a fair trial before a court of law.*" Article 15(3) states: "*Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time.*" These are absolute and non-derogable rights and have not been subjected to any limitations by the Constitution or any other law as envisaged under article 6(5) of the Constitution.

[31] In the case of **Tevita Nalawa v The State, 13th August 2010** the Supreme Court of Fiji said in a Petition for Special Leave to Appeal from the decision of the Court of Appeal No. CAV 0002/09: "*Most common law jurisdictions recognize the right of an accused person to a fair trial without unreasonable delay. That right is set out in article 8 of the Universal Declaration of Human Rights... and in article 9(3) of the International Covenant on Civil and Political Rights...The Courts here have shown at all levels their respect for the rights of accused persons to a fair trial which includes the right to trial without delay.*" According to article 7(1)(b) of the Constitution when interpreting and applying chapter 2 containing the Bill of Rights a court may if relevant, consider international law, except to the extent that it is inconsistent with chapter 2. The case of Nalawa, cites the case of **Apaitia Seru v State [2003] FJCA** where the question of delay was considered under the 1977 Constitution and the Court held that because there had been a 4 year 10 months delay, prejudice was presumed.

[32] This case in my view is different from many of the appeals that have come up before this Court on the issue of retrials under section 23(2) of the Court of Appeal Act, for they have all dealt with the issue, whether a retrial should have been ordered when a conviction has been quashed, and not when an acquittal has been quashed on appeal. In those cases until the decision of the appeal quashing the conviction is conveyed to the appellants, they have remained as convicts, not knowing what the future holds for them. But in this case the 1st and 2nd Respondents had been acquitted 6 years ago and would have moved on with their lives. It is only after 2.4 years after their acquittal that leave had been granted to the DPP to proceed against their acquittals. Now to put them on trial 10 years after the commission of the offence in my view will be totally unfair.

[33] In **Au Pui-Ken v Attorney General of Hong Kong [1980] AC 351** the Privy Council said that the exercise of discretion to order a retrial requires the consideration of a number of factors, some of which may weigh in favour of a retrial and some against. The interests of justice are not confined to the interests of either the prosecutor or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice and should not escape it merely because of a technical blunder by the judge below. One factor to be considered is the strength of evidence against an accused and the likelihood of a conviction being obtained on a retrial. The weaker the prosecution case, the less likely a retrial would be ordered. Another factor would be identifiable prejudice to an accused whilst awaiting a retrial such as might cause him to be unable to get a fair retrial.

[34] This Court in the case of **Abdul Ahamed Ali and Roshini Devi v The State, Criminal Appeal AAU 105 0f 2008** in allowing an appeal and quashing a conviction of the appellants had to determine whether in the interests of justice a new trial should be ordered pursuant to section 23(2)(a) of the Court of Appeal Act. The Court said that the decision as to whether to order a retrial requires the exercise of judgment after balancing various factors involving the public interest and the legitimate interests of the appellants. In that case this Court held that it was over 12 years since the offence had been committed and even allowing for the fact that in respect of serious offences it was common for trials to take longer to come to court, the Court could not recall a re-trial being ordered some 12 years after the offence had been committed. It was the view of

this Court that any evidence given at a re-trial after a lapse of 12 years is more likely to be based on reconstruction than memory. The Court therefore had concluded taking into consideration also the quality of the evidence available, that it was not in the interests of justice to order a retrial.

[35] In the case of **Azamatula v The State, Criminal Appeal No AAU0060 of 2006** which was an appeal against a decision of the High Court which had ordered a re-trial after quashing a conviction by the Magistrate's Court, this Court held: "*We are mindful of the appellant's constitutional right to have his case determined within a reasonable time...We feel an almost 10 year delay in coming on for trial is unreasonable. Little of the delay in this case can be placed at the feet of the appellant and given the time that has now elapsed (and will continue to elapse until a retrial can be heard) since the events in question and given the weakness of the prosecution case, we are of the view that the interests of justice are best served by there being no retrial.*"

[36] I therefore refuse to order a retrial.

Appeal in AAU 0011/12

[37] The Appellant in Appeal number AAU 0011/12 had been granted leave to proceed with the following grounds of appeal as was contained in his amended grounds of appeal dated 25th June 2014:

1) The Learned Trial Judge erred in law and in fact when he failed to direct and guide the assessors on how to approach the answers contained in the Caution Interview and the weight to be attached to the disputed confession considering that he denied the allegation in Court.
2) The Learned Trial Judge erred in law when he misdirected the assessors on the definition of malice aforethought under English Lexicon.

[38] In relation to ground (1) the Appellant's statement in the Caution Interview is to be found at paragraph 19 above. What the Appellant therein said also relates to the charge of murder that was preferred against him.

[39] PW Dr. R. P. Gounder, testifying before the Court in relation to a post-mortem report prepared by Dr. L. Tudrau on the body of the deceased had said that there were two incised wounds on the face and head of the deceased, caused by a sharp weapon, one of which was a deep incised wound across the face below the eyes, penetrating the maxillary bones. There had also been a crushed injury on the occipital region of the skull. The doctor had said that the injuries could have been caused by the long handled cane knife found at the scene of the crime and identified by the Appellant as the one used by him to cause the injuries on the deceased. The injury to the skull could have been as a result of a fall. He had attributed the cause of death to loss of blood from the deep cut wounds on the face. In answer to questions in cross-examination from the Appellant the doctor had said that the injuries on the face were necessarily fatal injuries. Dr. Gounder's evidence is certainly evidence which is consistent with the confession of the Appellant, namely that he struck the deceased twice on her head and face with a long handled cane knife that he found at the scene of crime.

[40] PW Surendra Lal, a bowser attendant, working at the service Station in Nadi, had said that on 01/12/2007 a person had come to him and asked where the tap was and he had pointed it out to him. Ten minutes later he had been informed by another person of a murder. Surendra Lal's evidence is also evidence which is consistent with the confession of the Appellant, that having struck the deceased with the cane knife, he had walked quickly to the Service Station to wash his blood stained hands at the tap there and speaking to an Indian man working at the Service Station.

[41] Thus the evidence of Dr Gounder and Surendra Lal goes to prove the salient and important factors of the confession of the Appellant, namely the Appellant's evidence that he had attacked the deceased twice with a cane knife on her head and face and that he had gone to the tap at the Service Station to wash his blood stained hands after the murder.

[42] The learned Trial Judge in dealing with the evidence of Ela Waqa who recorded the cautioned confessional statement of the Appellant, in his Summing Up had said: "13th witness was Elia Waqa. He is also an experienced Police Officer with 22 years' service. He told Court that he interviewed the 1st accused (reference herein is to the Appellant) under caution. Interview was conducted in Fijian language. The record of the caution

interview is marked as P1 and the English translation as P1A. I want you to read these documents very carefully. This witness submits that the interview was conducted after due caution and the 1st accused made the statement voluntarily, but the 1st accused says that the statement was taken after use of force. In this case this statement is an important document. You should consider them carefully and compare with the other evidence before the court and take your own independent decision". Having summarised the evidence of the prosecution witnesses the learned Trial Judge had repeatedly told the assessors to assess all evidence and then decide for themselves whether the accused is guilty or not guilty of the offence he is charged. He had said that they could find the accused guilty only if satisfied beyond reasonable doubt and sure of his guilt. The learned Trial Judge had said "The most important question here for you to decide is who caused these injuries. The Prosecution says that the 1st accused together with others entered the shop of the deceased and slashed her with a cane knife. The 1st accused says that he didn't do it and he doesn't know anything about the incident"

[43] I agree with the submission of the State that it is clear from the directions of the Trial Judge that he had left the weight and truthfulness of the cautioned confessional statement for the assessors to consider with all the evidence led in the trial before making a decision. There is no need to mention the words *'weight and truthfulness'* in directing the assessors nor is there a specific direction to be given. In **Volau v The State Criminal Appeal No AAU 0011 of 2013** it was held that once a confession is ruled as being voluntary by the Trial Judge, *"the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force and if those allegations were thought to be true to decide whether they should place any weight or value on them and what weight or value they should place on them. It is the duty of the trial judge to make this plain to them."*

[44] The learned Trial Judge in his judgment had said: "The Prosecution had produced the caution interview statement and proved the truthfulness of the same through independent evidence." I therefore dismiss ground 1 of appeal.

[45] The second ground of appeal about the learned Trial Judge misdirecting the assessors on the definition of malice aforethought is not consistent with the Appellant's defence that he does not know anything about the incident. Although the complaint is that the

learned Trial Judge erred in law when he misdirected the assessors on the definition of malice aforethought under English Lexicon, I find that that the learned Trial Judge had in fact referred to the very elements found in the definition of malice aforethought in section 202 of the repealed Penal Code, Cap 17, in explaining 'malice aforethought to the assessors; so far as relevant to the facts of this case, when he said: "It is the intention to cause death or grievous harm to the victim or knowledge that death or grievous harm would probably be caused". It was not incumbent for the Trial Judge to have quoted the exact wording of section 202 of the Penal Code. I therefore see no merit in this ground of appeal and dismiss it.

Orders of Court:-

1) *Appeal in Case No: AAU 0046 /12 against the acquittal of the 1st, 2nd & the 3rd Respondents is allowed and the acquittal set aside.*
2) *Application for a retrial of the 1st, 2nd & the 3rd Respondents is refused.*
3) *The appeal in Appeal in Case No: AAU 0011/12 against the conviction is dismissed.*
4) *The conviction of the Appellant is affirmed.*

Hon. Mr. Justice S. Chandra
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL