IN THE COURT OF APPEAL, FIJI

[ON APPEAL FROM THE HIGH COURT]

Criminal Appeal Nos. AAU 143 of 2014

(High Court Case No. HAC 176 of 2012)

BETWEEN : **RAJENDRA BAKA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Nawana, JA

Counsel : **Mr. M. Fesaitu for the Appellant**
Mr. A. Jack for the Respondent

Date of Hearing : **12 February 2020**

Date of Ruling : **27 February 2020**

JUDGMENT

Gamalath, JA:

[1] The Appellant faced trial in the High Court at Lautoka, on a charge of Murder, under section 237 of the Crimes Act No. 44 of 2009, and according to the particulars of the charge, on 9 December 2012 at Lautoka he had recklessly murdered one Nancy Shobna Pillay, his *de-facto* wife.

[2] After trial, the assessors returned a unanimous verdict of guilty for murder and accordingly the learned trial Judge convicted the Appellant and sentenced him to life imprisonment with a non-parole period of 20 years.

[3] Against the conviction the appellant filed a notice of appeal on his own and later filed an amended notice of appeal through a counsel which contained the following two grounds;

> *"1. That the learned trial Judge had failed to adequately address the assessors on the confession made by the Appellant in the caution interview particularly as to whether the Appellant had made the confession.*
>
> *2. The learned trial Judge erred in law and in fact in relation to the evidence of Muneshwar Chand (prosecution witness 2) to the extent that;*
>
> *(i) Directing the assessors of what Maika told Muneshwar Chand when in fact Maika was not called as a witness to give evidence during the trial:*
>
> *(ii) Relied on Muneshwar Chand's evidence to convict the appellant; therefore causing a miscarriage of justice to the appellant".*

[4] The learned single Judge granted leave to appeal against conviction on the two grounds of appeal in the amended notice of appeal.

The Facts:

[5] The following were the final agreed facts in the trial;

a) Rajendra (the accused) was born on the 21st of December 1964.

b) Nancy Shobna Pillay is the deceased in this case and also the de-facto partner of the accused.

c) *Nancy Shobna Pillay died on the 9th of December 2012.*

d) *The accused rented a room in the house of one Paras Ram Reddy at Vitogo, Lautoka.*

e) *Paras Ram Reddy also transported them to the deceased mother's house in Rifle Range, Lautoka to visit her children on the 9th December 2012 at around 1.45pm.*

f) *After returning back to their house, they continued drinking but after an argument, they were told by the landlord to go away.*

g) *The accused and the deceased came to the Lautoka Fisheries Wharf with Maika Kaufusi and Ganeshwar Chand to go fishing in Ganeshwar's boat named Spirit of Drunken Master with boat number as WL 082.*

h) *The accused, deceased and Ganeshwar continued drinking beer at the wharf until 5pm when all of them (including Maika Kaufusi) left for the sea.*

i) *The boat was anchored near Bekana Island where they had dinner before lying down to rest for a while; Ganeshwar Chand and Maika Kaufusi were in the open space of the boat whilst the accused and the deceased went inside the deck.*

j) *The accused was arrested from the Lautoka wharf by police on the 9th of December 2012 at around 10pm.*

[6] At the trial the caution interview statement of the appellant was admitted in evidence. To the extent that is relevant to this appeal, excerpts from the Appellant's caution interview statement are stated below;

" Q82/a – " During daytime when Paras Ram told me to go away and Nancy to stay back from that time it was in my mind that Nancy and Paras Ram are having affairs. When I became drunk the same thing that came into my mind and before hitting, I questioned Nancy and she talked back to me. Same time when I tried to slap her whereby she bit my left ring and little finger. I became very angry and picked the knife and poked into her chest".

[7] Further in the answer 84 the Appellant said that;

"When Maika saw Nancy lying dead he questioned me as to why. I had hit her with the knife. At that time he punched me about two or three times. I have received injuries on my mouth and chest. Police took me to the hospital."

[8] As regards above, it could be inferred safely from the above statement that he informed Maika about him stabbing the deceased.

[9] Later during the course of the investigation, the appellant had shown the Police where the knife was placed in the cabin.

[10] At the trial, the appellant objected to the admission of the caution interview statement.

[11] Following the voire-dire inquiry, the learned Trial Judge ruled that the caution interview was voluntary. I find that in the *voire dire* ruling the learned trial Judge had followed the correct legal principles in deciding on its voluntariness and the burden of proof cast on the prosecution to prove it beyond reasonable doubt.

[12] In the *voire-dire* inquiry, under cross examination, the appellant has said as follows:-

Cross Examination

Q4: During that time, did they ask questions? Yes.

Q5: Did you give answers? Yes

Q6: Was it for all questions they asked? Yes

Q7: Did you understand what they were asking? Yes

Q8: Did you understand everything they were asking? Yes

Q9: Answers you gave, did you give them voluntarily? I did give. I was frightened.

Q10: When did you start getting frightened? From the beginning.

Q11: Were you frightened giving personal information? Yes

Q12: During the interview no one came to visit you without? Correct.

Q13: Did the JP come to see you? Yes when they finished writing.

Q14: Did you tell the JP that Police forced to give answers? No, I was told by Police officers before JP came "you do not change anything".

Q15: Were you alone with JP? No.

Q16: Did you place your signature voluntarily? Yes.

[13] In his *voire- dire* Ruling the learned trial Judge decided as follows;

> *"6. It is for me to decide whether interviews were conducted freely and not as a result of threats, assaults or inducements made to the accused by a person or persons in authority. Secondly, if I find that there has been oppression or unfairness, then I can in my discretion exclude the interviews. Finally, if his rights under the Constitution or common law have been breached, then that will lead to exclusion of the confessions obtained thereby, unless the prosecution can show that the suspect was not thereby prejudiced. These rights include such rights as having a legal representative of his choice and having access to family, next-of-kin or religious counselor.*
>
> *7. The burden of proving voluntariness, fairness, lack of oppression, compliance with common law rights, where applicable, and if there is noncompliance, lack of prejudice to the accused rests at all times with the prosecution. They must prove these matters beyond reasonable doubt. In this ruling I have reminded myself of that.*
>
> *23. Under cross examination he said that i-Taukei officer did not force him to give answers. He had told Salen to write whatever he wants. He was asked*

questions and he gave answers for all the questions. He understood everything they were asking. When he was asked whether he gave answers voluntarily? His reply was I did give. I was frightened. He had not told the JP that police forced him to give answers. He was told by police officers before not to change anything. He was not alone with the JP. He had placed his signature voluntarily. He had not made the charge statement voluntarily. He was forced. Pressure was from Salen and the retired officer.

25. *I have carefully considered the available evidence in respect of the caution interview on 10.12.2012 and the charge statement on 11.12. 2012 of the accused.*

26. *Accordingly, I have come to the view that in regard to any allegation of threats, force or pressure by the police during the caution interview and the charge statement, the state had satisfied me beyond reasonable doubt that it did not happen. I reject the evidence of the accused that he was threatened, forced and pressured during his caution interview. I am satisfied that the interviews were voluntary, that those were obtained in fair circumstances, that those were in no way oppressed out of the accused in contravention of his rights either under the Judges' Rules or of the Constitution which was not in operation.*

27. *The caution interview of the accused of 10.12.2012 and the charge statement of 11.12.2012, being voluntary made and not created out of oppression is therefore admissible in evidence."*

[14] Having examined the ruling of the learned trial Judge in the backdrop of the evidence that transpired at the inquiry, I am unable to find anything objectionable or contrary to the well settled laws on the admission of confessions in evidence.

[15] As reflected through the written submissions made by the counsel for the appellant, it is my opinion that the argument raised therein, in support of the first Ground lacks precision and clarity. In support of the Appellant's submission the counsel cited the case **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017). I find it

difficult to understand how the said judgment can be of assistance to assail the manner in which the learned trial Judge had dealt with the subjects of the voluntariness of the confession and the evidential value that should be attached to it.

[16] The appellant's written submissions contain impugned parts of the summing-up to bring home the fact that the learned trial Judge had erred in directing the assessors as to how they should be evaluating the evidential value that should be attached to the confession. (Vide para 5 of the written submissions)

[17] As regards the above passage from the summing up I am unable to find anything objectionable. In my opinion the learned trial Judge was correct in taking the approach as reflected through the said parts of the summing up.

[18] In advancing his position against the admission of the confession in evidence the counsel for the appellant submitted that the learned trial Judge had failed to sum-up as to what consequences would flow if the assessors have reservations about the voluntariness of the confession. In his own words what the counsel has stated goes as follows; *"The learned trial Judge only directed the assessors that if they are sure that the confession was made voluntarily then they can consider the confession. What is not put to the assessors is what happens if they are not sure whether the appellant made the confession voluntarily. In that aspect the learned trial Judge should have directed the assessors if they are not sure the appellant made confession voluntarily then they should disregard the confession"*

[19] The learned trial Judge, directing the assessors on the manner in which they should consider the caution interview statement, had the following to state;

> *"The above witness gave evidence on the caution interview of the accused. It is up to you to decide whether the accused made a statement under caution voluntarily to D/Cpl. Salen Kumar. If you are sure that the caution interview statement was made freely and not as a result of threats, assault or inducements or pressure made to the accused by person in authority then you could consider the facts in the statement as evidence. Then you will have to further decide whether facts in the caution interview statement are truthful. If*

you are sure that the facts in the caution interview are truthful then you can use those to consider whether the elements of the charge are proved by this statement."

[20] What is clear in the above direction is that the assessors should consider both the voluntariness of the caution interview statement and its testimonial truthfulness. By necessary implication the learned trial Judge has conveyed the message that if they have reasonable doubts about any of the two factors mentioned therein, then the assessors do not require to consider the statement in deciding on the case against the appellant. In my opinion the directions are quite in conformity with the legal requirements.

[21] In this case the learned trial Judge had directed the assessors accurately on the evidence of the caution interview. As decided in **R.v Lawrence** [1982] A.C. 510 at 519, HL, "A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts." (per Lord Hailsham L.C.). See also **Silatolu .v State** [2006] FJCA13 (unreported); AAU0024.2003s (10 March 2006).

[22] The State in responding to the contention of the appellant had raised the issue that in the absence of any attempt on the part of the counsel for the appellant to seek a redirection on the matter of the ground under consideration, now the Appellant is precluded from raising it at the hearing of the appeal. In other words it is the submission of the State that the appellant is now debarred from raising any objection based on the alleged non-direction on the issue of what course should the assessors be adopting if they were not inclined to accept the confession as voluntary or reject it on the basis of its untruthfulness. In support of the contention the State cited the oft quoted *dictum* in **Varasiko v State** [2016] FJSC 35 (26

August 2016) [100] to [102] and **Alfaaz v State** [2018] FJCA 19; AAU 0030 .2014 (8 March 2018). I am inclined to agree with the State's submission on this matter. If the counsel for the appellant had considered the issue of the alleged non-direction as serious as he is urging it to be now, he should have raised the issue in the High Court as "the appellate courts will not look favorably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with judge". (See **Alfaz -v-State**); (*supra*).

[23] In the light of above I am unable to find any merits in the first ground of appeal and therefore, in cannot succeed in appeal.

The Second Ground:

[24] This ground is *ex facie* ill-conceived, for taking on the whole there had not been any semblance of material to conclude that the learned trial Judge, acting under a misconception of the evidence, directed the assessors . Counsel for the appellant has sought to derive support from the decision in **Chand v State** [2017] FJCA 139; AAU112. 2013 (30 November 2017), in which it was decided that "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement .It is not hearsay and is admissible when it is proposed to established by the evidence ,not the truth of the statement but the fact that it was made "see also **Subramanian v Public Prosecutor** [1956] 1WLR 965 at 970.

[25] I am perplexed as to how these authorities could render support for the appellant to bolster the contention advanced through the second ground of appeal that he is seeking to rely on.

[26] As already referred to earlier, at the time the deceased received the fatal wounds, it was she and the appellant alone stayed inside the dock .The evidence of the Pathologist is unequivocal that the fatal stab wounds found on the deceased were not self- inflicted. Therefore there had been no controversy over this issue at the trial and in that background there had been ample evidence upon which the assessors could

have arrived at the final opinion of guilt that they expressed, with which the learned trial Judge agreed. In the circumstances, the second ground of appeal is also without any merit.

[27] I, therefore, hold that this appeal should stand dismissed.

Prematilaka, JA

[28] I have read in draft the judgment of Gamalath, JA and agree with the reasons and orders proposed.

Nawana, JA

[29] I agree with Gamalath, JA.

The Order of the Court:

Appeal dismissed.

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Hon. Justice S. Gamalath
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Justice P. Nawana
JUSTICE OF APPEAL