IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji at Lautoka

CRIMINAL APPEAL No AAU 185/2016
High Court Criminal Case No. HAC 149/2013

BETWEEN **VINEND KUMAR**

Appellant

AND **THE STATE**

Respondent

Coram **Mataitoga, P**
Qetaki, RJA
Andrews, JA

Counsel **Ms L Ratidara, on behalf of the Appellant**
Ms L Latu, on behalf of the Respondent

Date of Hearing : **6 May 2025**

Date of Judgment : **29 May 2025**

JUDGMENT

Introduction

[1] The appellant was convicted in the High Court at Suva on 29 November 2016 on charges of murder and attempted rape, after a trial presided over by Justice Temo (as he then was) sitting with three assessors. The appellant was sentenced on 30 November 2016 to a mandatory life sentence on the charge of murder, and a concurrent term of 4 years' imprisonment on

the charge of attempted rape. He was also ordered to serve a minimum term of 17 years, before being eligible for parole ("the conviction judgment").[1]

[2] The appellant applied for leave to appeal to this Court. His application was refused in a Ruling issued by Prematilaka RJA on 22 July 2020 on the grounds that neither of his two stated grounds of appeal had a reasonable prospect of success.[2] He renewed his application in a Notice of Renewed Application for Leave to Appeal, dated 24 July 2020.

Background facts

[3] In the conviction judgment, the Judge said that the appellant held himself out as a person who could cure women's menstrual problems by prayer and herbal medicines. The deceased, S, invited him to her home in June 2013 for a prayer ceremony, and for him to give her herbal medicines. As part of the prayer ceremony, S gave the appellant gold jewellery. Unbeknown to S, the appellant sold the jewellery and spent the proceeds.

[4] The appellant visited S again in mid-July 2013 for prayer ceremonies and to give her herbal medicine. S asked the appellant to return the jewellery. At first he evaded her questions but on 15 July he admitted that he had sold the jewellery. An argument and physical struggle ensued, during which S fell to the floor. Her skirt came up. She was not wearing underwear. The appellant forcefully lay on top of her and unbuttoned then pulled his trousers down to knee level. S scratched the appellant's face with his fingernails and called out for help. The appellant stood up and hit S with a small coffee table. He then got a grog pounder (iron rod) and hit S with it. The appellant fled and S later died of her injuries.

[5] The appellant surrendered himself to the Police Station at Lautoka. He was taken to the Tavua Police Station and interviewed under caution on 18, 19 and 20 July 2013. The appellant was recorded as saying that he hit S twice with the coffee table, on her chin and then on the right side of her head, and then took the grog pounder and hit her twice on the

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1 *State v Vinend Kumar – Written Reasons for Judgment and Sentence* [2016] FJHC 1111; HAC149.2013L (30 November 2016).

2 *Kumar v State* [2020] FJCA 116; AAU 185.2016 (22 July 2020).

back of her head. He was also recorded as saying that he had forced S onto the floor, her skirt had come up to her hip level, so he unbuttoned his trousers, brought them down to knee level, then lay on top of her. She was not wearing any underwear. The appellant is recorded as having said that he wanted to force his penis into S's vagina but she struggled and he could not do so.

[6] At the time he was charged, the appellant is recorded as having said that he had surrendered himself to the police in Lautoka and then "I admitted the crime to the officers who interviewed me. I admitted the crime on my own free will".

[7] The post mortem report on S stated that she died as a result of having suffered multiple blunt force trauma to her head and a sharp force trauma in front of her left ear. She also had a fractured lower jaw.

The High Court trial

Voir dire hearing

[8] The appellant challenged the record of his caution interview and charge statements. The challenge was the subject of a *voir dire* hearing (in the absence of the assessors) before the Judge at the start of the trial. The appellant claimed that he was hit by police officers with sticks and punched on his back, and that they threatened to rub chillies on his anus if he did not admit the offending. He claimed that at times there were four police officers in the interview room. He said he was threatened by a Justice of the Peace (JP) who was called to the Police Station. He also claimed that some of the recorded admissions were fabricated.

[9] The police officers gave evidence that they did not assault or threaten the appellant, or force him to make his caution interview statements. Their evidence was that there were three officers involved in the interview: the interviewer, an observer, and a third officer who attended to the appellant's welfare (providing food and accompanying him on toilet visits).

[10] The JP gave evidence that on 18 July 2013 the police asked him to attend at the Police Station. He spoke to the appellant in a separate room and asked after his welfare, including as to whether he had been abused or ill-treated by the police. He also accompanied the appellant and the police on a visit to the crime scene on 20 July. His evidence was that the appellant said he had been treated very well by the police, and made no complaints.

[11] At the end of the *voir dire* hearing, the appellant's counsel submitted that the recorded admissions were not made voluntarily but out of fear after the appellant had been assaulted by the police officers, or were fabricated. It was also submitted that the appellant had been threatened by the JP. Counsel submitted that the caution statements should be ruled inadmissible. The prosecutor submitted that the appellant had given himself up to the police, had signed all the pages of the interview notes and had not complained about any untoward police behaviour when he appeared in the Magistrates Court or the High Court. Counsel submitted that the interview record and charge statements should be declared admissible.

[12] The Judge ruled that the caution interview and charge statements were admissible.[3] He said at paragraph 7 of his written *voir dire* ruling:

> *I have carefully listened to and considered the parties' evidence. I have carefully compared and analysed them. I have considered their closing submissions. I have carefully considered the witnesses' demeanour. After considering the total evidence, I find the prosecution's witnesses' evidence more credible than the [appellant's] evidence. Had he really been assaulted by police, he would have complained to the Magistrate Court or the High Court, when he first appeared in those courts, He didn't. To me, that showed he had no complaints against the police, and the consequential inference was that he was treated well in police custody. I accept the prosecution's version of events that he made his caution interview and charge statements voluntarily, and I ruled the same as admissible evidence.*

Evidence at trial

[13] The prosecution relied on the transcripts of the appellant's caution interview and charge statements, the police officers' evidence, the post mortem report, exhibits produced (the grog pounder and coffee table) and witnesses' evidence as to relevant events. While it was

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3 *State v Kumar – Written Reasons for Voir Dire Ruling* [2016] FJHC 1141; HAC149.2013L (23 December 2016).

common ground that there is no audio record or transcript of the trial, the following can be taken from the Judge's Notes of the evidence:

[a] PW2 (S's grandson) gave evidence that on 15 July 2013 he heard the appellant tell S to lie on the floor, then saw the appellant remove S's clothes, then remove his pants and lie on top of S. He saw S push the appellant away, and heard her shouting "help" "help". PW2 said he saw S scratch the appellant's face and the appellant punch S. He said he was scared and ran to his grandfather's house.

[b] PW6 went to S's house around midday on 15 March. S told her to return later, PW6 then went to PW2's grandfather's house. While she was there, PW2 came and spoke to the grandfather. She said that PW 2 "was sweating". She went to S's house and saw S lying on a bed. She saw blood on the floor.

[14] The appellant gave evidence. He said that he conducts "pooja" (prayer ceremonies) and had visited S's place twice to give her herbal medication for her menstrual problems. He admitted that he told S that he had sold jewellery she gave him, and that an argument erupted. The appellant said that S slapped his face and grabbed his neck (breaking a silver chain he was wearing) then went outside and got the grog pounder, threatened to kill him, and hit his wrist with the grog pounder. He said he grabbed the grog pounder from S and hit S once on the back (either the back of her head or her shoulder), then fled the scene.

[15] The appellant also said that the admissions recorded in the caution interview and charge statements were not given voluntarily, and were not true. He said that he had been assaulted and threatened by the police, which led to the admissions. He said that he did not complain to the Magistrates Court or the High Court about being assaulted or threatened by the police, because he did not know he could do so.

[16] The Judge's Notes of the cross-examination of the appellant record the appellant's evidence as follows:[4]

[4] *Vinend Kumar v State: Record of the High Court of Fiji*, at p345.

On 15.7.13 I was 25 years old. I was young and strong. [S] is in her fifties. She was chubby and fat. She is sickly. I am physically stronger than [S]. I took [S's] gold jewellery and sold it without her permission. The argument between us arose out of the above. She brought another grog pounder, she threatened me with a grog pounder. I couldn't think. She bit me and I seized the iron rod. By seizing the iron rod I was in control of the situation. She was no longer a threat to me, she kept coming forward and I hit her.

I heard [the pathologist] give evidence on [S's] post mortem report. I admitted we were the only ones in the room at the time of the assault. I am telling the truth. I hit her once and I ran from there.

Summing Up

[17] The Judge directed the assessors regarding the admissions recorded in the caution interview and charge statements.[5] He directed the assessors that the appellant contended that the caution interview and charge statements should be disregarded, because the police had repeatedly assaulted him and threatened him during the interview, that he never voluntarily gave his caution interview and charge statements and that his alleged answers were "nothing but a police fabrication". He also directed the assessors that it was for them to decide whether the appellant had in fact made the admissions and, if so, whether they were true, and whether the statements were made voluntarily. Finally, on this point, he directed the assessors that if they found the appellant gave the statements voluntarily, and the police did not assault or threaten him, then they might give more weight and value to the statements. If it were otherwise, they might give the statements less weight and value: it was a matter entirely for the assessors.

[18] The Judge also directed the assessors as to the elements both of murder, and a possible alternative verdict of manslaughter. The direction as to the alternative verdict was required because the appellant's counsel had raised the defence of provocation and contended that the appellant did not intend to kill S, but only to cause her serious harm.[6]

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5 *State v Kumar – Summing Up* [2016] HCFJ 1110; HAC149.2013L (29 November 2013), at paragraphs 32-38.

6 Above, fn 5, at paragraphs16-17.

Verdict

[19] Two of the assessors expressed the view that the appellant was not guilty of murder but guilty of manslaughter, and not guilty of attempted rape. The third assessor was of the opinion that the appellant was guilty of both murder and attempted rape. The Judge agreed with the minority assessor's opinion and entered convictions of murder and attempted rape.

[20] The Judge referred again to the appellant's caution interview and charge statements in the conviction judgment.[7] He said, at paragraph 10:

> *After listening to all the evidence, I accept that the police officers who caution interviewed the [appellant] and formally charged him, including the witnessing officers, treated the [appellant] well when he was in their custody and they did not assault, threaten or force him to admit the offences. As to the defence's allegation that the [appellant] was threatened and assaulted while in police custody, I reject that allegation. Although the burden of proof is always on the prosecution, there was no evidence to suggest the police did the above to the [appellant]. When the [appellant] first appeared in the Magistrate Court and later in the High Court, the [appellant] never complained to the Magistrate or the Judge of any untoward police behaviour. This suggested to me that he had no complaints against the police, and the inferences therefrom was that the police treated him well when he was in their custody.*

Appeal to the Full Court

[21] Before this Court, Ms Ratidara submitted for the appellant that the Judge erred:

1. when he expressed his opinion that the fact that the appellant had not complained about his treatment by the police when he first appeared in Court showed that he had been treated well when in custody, and not assaulted; and

2. in failing to make an independent assessment of the totality of the appellant's admissions, and the totality of the evidence as a whole.

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[7] Above, fn 1.

A third ground, that the single Appeal Judge erred in the application of the test for granting leave to appeal was withdrawn at the hearing before the Full Court.

Did the Judge err in determining the credibility of the appellant by reference to the fact that the appellant had not complained earlier about his treatment by the police?

Submissions

[22] Ms Ratidara submitted for the appellant that the Judge erred, and acted unfairly, in relying on the appellant's not having complained earlier, and assessing his credibility against the expectation that he would have made a complaint on his first appearance in court.

[23] She submitted that the caution interview in itself was unfair: on 18 July 2013 he was interviewed from 2.15 pm to 9.30 pm, on 19 July he was interviewed from 7.41 pm to 11.50 pm, and on 20 July he was interviewed under caution from 6.02 am to 9.40 am, and the charge interview was from 11.00 am to 11.51 am. She also referred to the appellant's evidence during the *voir dire* hearing that while he was interviewed by Officer Dutt, there were three other Police Officers present: Officers Deepak, Mahesh and Arunesh, and that he was assaulted by them. She submitted that while Officer Arunesh had denied that he was present, the Station Diary recorded his presence on 18 July.

[24] Ms Ratidara referred to the judgment of this Court in *Temo v State*,[8] in which the Court referred to the judgment of the United States Supreme Court in *Colombe v State of Connecticut*, ruling that a confession obtained from a suspect in custody was not voluntary and should not have been admitted into evidence.[9] In its judgment the United States Supreme Court referred to

> *... the risk ... that the police will accomplish behind their closed door precisely what the demands of our legal order forbid: make a suspect the unwilling collaborator in establishing his guilt. ...*

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8 *Temo v State* [2022] FJCA 63; AAU117.2016 (26 May 2022), at [29]

9 *Colombe v State of Connecticut* 361 U.S. 568 (1961).

[25] In this respect, Ms Ratidara referred to the duration of the caution interview, and the appellant's allegations of assault. She submitted that the Judge acted erroneously and unfairly in that he relied on the appellant's not having made an early complaint, and assessed his credibility against the expectation that a complaint would have been made on his first appearance in Court.

[26] Ms Ratidara also referred to this Court's comments in *Ram v State*,[10] in the context of alleged misdirections in a Judge's summing up to assessors, to the effect that while a judge may "comment robustly" on a case, it "must be done in a way that is fair, objective and balanced".[11] However, that judgment is of little assistance in the present case, as the Judge's summing up contains no reference to the reasons for the *voir dire* ruling, or the fact that the appellant had not made an earlier complaint.

[27] Ms Latu submitted for the respondent that it was fair for the Judge to comment on the appellant's not having made an earlier complaint as he was, at that stage, adjudicating on the challenge to the admissibility of the appellant's caution interview and charge statements and for that purpose was required to assess the reliability and credibility of the prosecution and defence cases.

[28] Ms Latu referred to the comments of the Supreme Court in *Lesi v State*,[12] as to the practice in trials before the High Court for trial judges to give rulings on *voir dire* inquiries "with an economy of words", in order to "avoid situations at the trial which follows any bias on the part of the trial judge". She also referred to the Judge's reasons for the *voir dire* ruling and to his directions to the assessors. She submitted that it was fair for the Judge to make the comments set out above.

[29] She also referred to this Court's observation in *State v Ram; Sami v State*,[13] that where a judge has made a decision about an accused's credibility and formed a different opinion as

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10 *Ram v State* [2015] NZCA 131; AAU0087.2010 (2 October 2015.

11 At [13], quoting from *Tamaibeka & Katonivualiue v The State* (unrep) Cr App No AAU15/1997S; 8 January 1999.

12 *Lesi v State* [2018] FJSC 23; CAV0016.2018 (1 November 2018), at [59].

13 *State v Ram; Sami v State* [1998] FJCA 56; AAU0005u.95s (12 February 1998).

to his guilt from that reached by the assessors, an appeal court, which has not had the benefit of seeing the witnesses give their evidence, should not lightly interfere with the judge's conclusions.

Discussion

[30] When reaching his decision on the appellant's challenge to the admissibility of the caution interview and charge statements (in particular the recorded admissions by the appellant) the Judge was faced with contested evidence: the appellant said the police officers assaulted him and forced confessions from him, while the police officers said that that did not occur. The Judge was required to decide which evidence he found reliable and credible.

[31] It was not contested that the appellant was interviewed under caution over the course of three days. The transcript of the caution interview records that there were regular breaks (for scene reconstruction visits, meals, toilet visits, and brief rests). For the most part, the breaks were not long. However, the Court is not persuaded that the duration of the caution interview is, in itself, grounds to conclude that the caution interview was unfair, such that evidence obtained from it should have been ruled inadmissible.

[32] With respect to the submission that there were four police officers present at the caution interview (presumably intended to suggest unfairness or some form of oppression), there is an inconsistency between the Station Diary and the transcript of the caution interview as to the presence of Officer Arunesh in the interview room. The Station Diary records his presence in the caution interview on 18 July but the caution interview record does not, and Officer Arunesh gave evidence that he was not present, and said the Station Diary was incorrect. However, this Court was not directed to any other inconsistencies, nor to any evidence that anyone other than the identified interviewing officer, the observer, and the welfare officer were present at the interview for any prolonged period. The Court is not persuaded that the presence of three officers, all of whom had a specific and legitimate purpose for being present, in itself gives rise to any unfairness in the caution interview process.

[33] As noted earlier, in the *voir dire* ruling, the Judge said:

> *… After considering the total evidence, I find the prosecution's witnesses' evidence more credible than the [appellant's] evidence. Had he really been assaulted by police, he would have complained to the Magistrate Court or the High Court, when he first appeared in those courts, He didn't. To me, that showed he had no complaints against the police, and the consequential inference was that he was treated well in police custody.*

[34] In the conviction judgment, the Judge said:

> *When the [appellant] first appeared in the Magistrate Court and later in the High Court, the [appellant] never complained to the Magistrate or the Judge of any untoward police behaviour. This suggested to me that he had no complaints against the police, and the inferences therefrom was that the police treated him well when he was in their custody.*

[35] There is some discrepancy between the *voir dire* ruling ("To me, that *showed* he had no complaints") and the conviction judgment ("This *suggested* to me that he had no complaints"). However, this ground of appeal is that the Judge made his decision as to the reliability and credibility of the appellant's evidence with the expectation that he would have made a complaint on his first appearance in court; that is, the fact that the appellant had not made an earlier complaint was decisive for the Judge's conclusion as to the reliability and credibility of the evidence before him.

[36] Decisions as to reliability and credibility must be made on the basis of the facts and circumstances of the individual case. There was no dispute that the appellant did not make any complaint about his treatment by the police when he first appeared in the Magistrates Court or the High Court. The Judge was not incorrect in recording that fact. However it is clear from the *voir dire* ruling that it was not the only matter considered by the Judge in his assessment of the credibility of the appellant's evidence at the *voir dire* hearing: he compared the parties' evidence, the parties' submissions on the application, and the witnesses' demeanour.

[37] In the context of each of the *voir dire* ruling and the conviction judgment as a whole, the Court is not persuaded that the Judge erred in referring to the fact that the appellant had not made an earlier complaint when assessing the credibility of his complaint as to his treatment by the police. It was a matter the Judge considered, but it cannot be said that it was decisive.

[38] This ground of appeal must be dismissed.

Did the Judge err by failing to independently assess the totality of the admissions and the totality of the evidence as a whole?

Submissions

[39] Ms Ratidara submitted that in making his findings on the charges, the Judge failed to independently assess the totality of the admissions, and the totality of the evidence as a whole.

[40] With respect to the charge of Attempted Rape, she submitted that the Judge was required to be satisfied that the appellant, first, intended to commit rape, and secondly, that the appellant, with that intention "did something that was more than mere preparation for committing the alleged offence".[14] She submitted that while there was evidence that the appellant wanted to force his penis into S's vagina, there was no evidence as exactly what the appellant actually did. She submitted that the evidence did not show whether the appellant wore underwear under his trousers, or whether the underwear (if any) was removed. She submitted that the evidence did not constitute "more than mere preparation".

[41] As to the murder charge, Ms Ratidara submitted that the Judge had rightly included the lesser charge of manslaughter in his summing up: she referred to evidence of a struggle, and S being angry at the appellant having stolen and sold her gold jewellery. She also referred to the medical evidence as to the injuries to the appellant's face. She submitted that taking all of the evidence into account, the proper verdict was one of manslaughter.

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[14] Citing *Ram v State* [2017] FJCA 109; AAU0089.2013 (14 September 2017).

[42] Ms Latu submitted that the appellant's contention is that the Judge unfairly convicted the appellant of attempted rape and murder on the basis, only, of the admissions in the transcript of the appellant's caution interview and charge statements. She submitted that the two offences were committed in one transaction: that is, he attempted to rape S then assaulted her to death using the grog pounder and small coffee table. She further submitted that apart from the appellant's admissions, other evidence available to the Judge established the appellant's guilt beyond reasonable doubt.

Discussion

[43] The Court is not persuaded that the Judge failed to make an independent assessment of the totality of the evidence. In the conviction judgment he referred to the post mortem report, stating at paragraph 11 that:[15]

> *… the state of the deceased's injuries as itemized in her post mortem report, and the cause of her death, spoke volumes about how she met her death. She was severely injured in the face and head …*
>
> *When putting the [Appellant's] admissions together with the contents of the deceased's post mortem report, the inescapable inference was that the deceased met her death after [she had] been hit four times with the grog pounder and small coffee table.*

[44] As Ms Latu submitted, in addition to the appellant's admissions and the post mortem report, there was evidence before the Court supporting the appellant's conviction on the two charges in the form of the appellant's acceptance at the trial as to the struggle with S and that he hit S with the grog pounder, and witness statements.

[45] This ground of appeal must also be dismissed.

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[15] Fn 1, above.

Orders

(1) Leave is given to appeal against conviction.

(2) The appeal is dismissed.

Hon. Mr. Justice Isikeli Mataitoga
PRESIDENT COURT OF APPEAL

Hon. Mr. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL