

**BARAM DEO v STATE****SHIU CHAND v STATE**

5 COURT OF APPEAL — CRIMINAL JURISDICTION

GALLEN, SMELLIE and ELLIS JJA

14, 16 May 2003

10 [2003] FJCA 20

**Criminal law — appeals — appeal against conviction — whether Appellants were wrongfully arrested — whether there was vitiation in their statements — whether their Constitutional rights were violated — whether the summing-up was inadequate — whether their statements are inadmissible — whether the defence of alibi is admissible — whether the Chief Justice erred in the ruling of the caution interview by Appellants.**

Appellants were convicted for the Murder of Kamla Prasad. They appealed against their convictions on questions of mixed law and fact. The grounds for the appeal were wrongful arrest, violation of their Constitutional rights at the caution interviews, involuntariness and inadmissibility of their statements and inadequateness of the summing-up. Baram Deo (1st Appellant) admitted the killing during the police interview while Siu Chand (2nd Appellant) was arrested based on suspicion by the police officers. The Appellants claimed in the evidence that they adduced to have been at home at the time of the killing thus raising the defence of alibi. Appellants also complained of mistreatment during their detention. The Chief Justice dismissed the allegations by Appellants.

**Held** — (1) The law requires suspicion on reasonable grounds and an objective assessment by the arresting officer is required. The police officer arrested Chand of suspecting him to be criminally involved making the arrest illegal. It is well established that this alone does not render evidence subsequently obtained inadmissible.

(2) Appellate courts are reluctant to interfere with findings on credibility by the judge who heard and saw the witnesses. The Chief Justice's finding is conclusive as to the finding that the Appellants were treated with humanity and with respect for their inherent dignity.

(3) Each Accused was offered the opportunity to consult a lawyer which was refused. Further, Chand was offered legal aid and Deo had a lawyer and asked if he wanted a government advisor or any other person with him. There is no real substance in the objection raised by the Appellants on the facts in this case.

(4) A request to accompany would have been as effective as an arrest and that is how the constable should have proceeded. While it is true that both confessions flowed from Chand's arrest, the voluntary confessions were obtained without significant breaches of the Appellants' constitutional rights and the Chief Justice was correct in ruling the statements admissible.

(5) The reference to the defence witnesses is plainly damaging to the defence and the onus is shifted to the Accused but the criticised passages coming at the end of the summing up are followed by correct instructions on the burden of proof. The burden of disproving the alibi is on the prosecution. The review of the evidence and the whole of the summing-up are not unbalanced or unfair to justify in setting aside the verdicts. The challenges by the Appellants of the summing-up are rejected.

Appeal dismissed.

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**Cases referred to.**

*Blundell v Attorney-General* [1968] NZLR 341; *Fox v Chief Constable of Gwent* [1986] 1 AC 281; *R v Fotu* [1995] 3 NZLR 129; *R v Goodwin* [1993] 2 NZLR 153; *R v Khan (Sultan)* [1996] 2 Cr App Rep 440, cited.

5 *Collins v R* (1987) 38 DLR (4th) 508; *People (Director of Public Prosecutions v Kenny)* [1990] 2 IR 110; *United States v Leon* (1984) 468 US 897, applied.

*R v Johnson* [1961] 3 All ER 969; *R v Khan (Sultan)* [1997] AC 558; [1996] 3 All ER 289; 3 WLR 162; [1996] 2 Crim App Rep 440, considered.

10 *P. Narayan* for the Appellants.

*J. Rabuka* for the Respondent.

**Gallen, Smellie and Ellis JJA.** Both Appellants were convicted of the murder of Kamla Prasad on the night of 28 December 1998 at Legalega, Wainikoro by the Chief Justice sitting at Labasa. They seek leave to appeal on questions of mixed law and fact the grounds of appeal are set out in considerable detail in their amended grounds of appeal but compressed in Mrs Narayan's submissions thus:

1.01 The First Appellant Baram Deo appeals against his conviction. The grounds of appeal briefly are set out as follows:

20 (a) the learned Judge erred and exercised his discretion in ruling the alleged "caution interview recorded by the Police at the Lagalaga Indian School between the period 31/12/98 from 2145 to 1/01/99 at 1030 hours and the "charge statement" as admissible despite the serious breaches of his constitutional rights as enshrined under the

25 (b) the learned Judge erred and exercised his discretion in ruling the alleged "caution interview" recorded by the Police at the Lagalaga Indian School between the period 31/12/98 from 2145 to 1/01/99 at 1030 hours and the "charge statement" as admissible despite the serious breaches of his rights as set out in the Judges Rules;

30 (c) the learned Judge erred and exercised his discretion in ruling the alleged "caution interview" recorded by the Police at the Lagalaga Indian School between the period 31/12/98 from 2145 to 1/01/99 at 1030 hours as admissible despite the fact that the alleged "caution interview" was obtained whilst the First Appellant was in unlawful detention.

35 1.02 The Second Appellant, Shiu Chand appeals against his conviction. The grounds of appeal briefly are set out as follows:

40 (a) the learned Judge erred and exercised his discretion in ruling the alleged "caution interview" recorded by the Police at the Lagalaga Indian School between the period 31/12/98 from 1745 to 1/01/99 at 0917 hours and the "charge statement" as admissible despite the serious breaches of his constitutional rights as enshrined under the 1997 Constitution; and

45 (b) the learned Judge erred and exercised his discretion in ruling the alleged "caution interview" recorded by the Police at the Lagalaga Indian School between the period 31/12/98 from 1745 to 1/01/99 at 091 hours and the "charge statement" as admissible despite the serious breaches of his rights as set out in the Judges Rules;

50 (c) the learned Judge erred and exercised his discretion in ruling the alleged "caution interview" recorded by the Police at the Lagalaga Indian School between the period 31/12/98 from 1745 to 1/01/99 at 091 hours and the "charge statement" as admissible despite the medical report of Dr. Raj.

(d) The learned Judge erred in failing to allow the Second Accused to call a further defence witness namely one Ravind Prasad.

1.03 Both the Appellants appeal against their convictions on the learned Judge's directions given to the assessors, as set out in the Amended Grounds of Appeal.

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Compressed even further the grounds are: first that the Appellant Chand was wrongfully arrested and that vitiates what followed; second the police officers failed to explain their constitutional rights to each Appellant at the caution interviews and so the statements, as are inadmissible; third the police brutalised the Appellants at interview and so the statements were inadmissible; fourth the Appellant Chand was not allowed to call a witness; and finally the summing up was inadequate. This last ground was expanded following questions from the court to include a claim that the burden of proof in respect of the alibi defence was not properly put to the assessors.

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A brief account of the facts will suffice. The deceased's body was found beside Kurukuru Road early in the morning of 29 December 1998. Thereafter a police investigation began and they set up their base at the Legalega Indian School.

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D C Emosi Baleiyasawa together with other officers conducted inquiries during 29 and 30 December and at 10 am on 31 December he was at the house of the deceased where mourners were gathered. In evidence at the voir dire held when the admissibility of the two confessions was challenged he said:

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There were approximately 200 people around there. I was at deceased's place to conduct observations of area and to speak to people there — and to observe movement of people.

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While I was at house of deceased I saw an Indian man who was wearing a green shirt and a pair of long black pants. He was acting in a suspicious manner by his movements. This person was not paying any attention to the prayers that were going on — he was marching up and down on the main road and peeping down at the house of the deceased. He did not come near the shed where people were gathered.

I was standing by the police vehicle which as parked on the road. This person was on same road — he was about 2 chains away when I first observed him — and the shed was about 3 chains from main road.

I could see that he was smiling when everybody else looked sorry and sad.

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I observed for about half an hour — after that the funeral procession proceeded to the grave yard.

From there I went to the scene where the body was found and made other enquiries.

I went to Rajesh's house. At that time I did not know that Indian man's name later I came to know his name. He is Shiu Chand. He is in court in the dock. He is 2nd Accused.

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Later I came to la house about 4 to 5 chains from deceased house. I don't know whose house it was but we were sitting in a bure when I saw Shiu Chand came with another Indian man — they were making together. When they saw the police vehicle and saw us they stopped, then I called him. I told him I would take him for questioning.

After that he started to breath heavily and seemed to be in some difficulty in breathing.

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I decided to take him for questioning as part of enquiring about the deceased on ground of suspicion.

I took Shiu Chand to Lagalaga Indian School.

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D C Emosi said in cross-examination that he arrested Chand because of his suspicion that he had some knowledge about the killing but that he had no information that he had killed the deceased. D C Emosi handed Chand over to ASP Lal and briefed him about his suspicion. It is at this point that the

2nd Appellant challenges the conduct of the trial, and did so before the Chief Justice. The power to arrest on suspicion in contained in s 21(a) of the Criminal Procedure Code which provides:

- 5 21. Any police officer may without an order from a magistrate and without warrant, arrest—
- (a) Any person whom he suspects upon reasonable grounds of having committed cognizable offence.

10 Murder is a “cognizance offence”. The Chief Justice made the following ruling on the challenge:

10 Shiu Chand, 2nd Accused was taken into custody by Cpl Emosi for questioning as he was suspected of having had something to do with the death of Kamla Prasad from the way he was acting suspiciously during the funeral service for the deceased. Given the fact that by that afternoon the police had been making inquiries for three days with people in the area where 2nd and 1st Accused lived, 2nd Accused could not have been  
15 misled or mistaken concerning the reasons why he was being detained for questioning. I am satisfied therefore that the taking in of 2nd Accused after 4 pm on 31 December, 1998 to Lagalaga Indian School was not improper or unlawful. At Lagalaga Indian School Cpl Emosi handed 2nd Accused to ASP Keshri Lal, the directing officer leading the investigation and briefed ASP Lal about the suspicious manner in which  
20 2nd Accused was acting during Kamla Prasad’s funeral service.

In that the law requires suspicion on reasonable grounds, an objective assessment by the arresting officer is required: see the discussion of this power to arrest in *Blundell v Attorney-General* [1968] NZLR 341 CA.

25 In our view D C Emosi did not suspect Chand committed the murder when he arrested him. He said so. On the other hand he suspected him of knowing something about it and possibly being criminally involved. That is not enough. The arrest was therefore illegal. It is well-established that this alone does not render evidence subsequently obtained inadmissible: *Fox v Chief Constable of Gwent* [1986] AC 281 and *R v Khan (Sultan)* [1997] AC 558; [1996] 3 All ER  
30 289; 3 WLR 162; [1996] 2 Cr App Rep 440. However when the evidence in question is confessions a special approach is required: Richard May, *Criminal Evidence*, 4th ed, para 12.06. We will deal with that soon.

Following his arrest Chand was interviewed by D C Pal in the presence of Corporal Mansoor. The interview started at 17.45 on 31 December 1999 stopped at  
35 23.45 for Chand to rest, resumed on 1 January 2000 at 6.50 and ended at 9.17. The interview was in Hindustani and in it Chand told the police he and the Accused Deo (the 1st Appellant) waylaid and killed the deceased by beating and kicking him because Deo considered the deceased had been having an affair with  
40 Deo’s daughter-in-law. Chand was therefore charged with murder and Deo arrested on suspicion of murder. Deo was interviewed by Constable Munsami in the presence of Acting Inspector Keshwan Naidu. The interview commenced at 9:45 pm on 31 December 1999, stopped at 1:30 am on 1 January for rest and resumed at 6:05 and terminated at 10:30. Deo admitted the killing in the police  
45 interview. He was charged with murder.

Before questioning Chand the following is recorded in his statement.

Shiu Chand f/n Ram Dutt I am detective Constable Jai Pal and with me is detective corporal Mansoor Ali, I wish to question you regarding a case in which between  
Monday 28.12.98 7.00 pm and Tuesday 29.12.99 7.00 am at Kurukuru Labasa one  
50 Kamla Prasad f/n Bas Deo was killed and it is believed that you have some information about this case. You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.

Q.1 Have you fully understood the above allegation?

A: Yes.

Q. 2 Have you fully understood the above caution?

A: Yes

5 Q.3 Do you wish to sign?

A: Yes.

Sgd: Shiu Chand      Wit: Jai Pal

Wit: Mansoor Ali

10 Q.4 Do you wish to consult your Solicitors?

A: Not now

Sgd: Shiu Chand      Wit: Jai Pal

Wit: Mansoor Ali

15 Q.5 Do you want any Government Legal aid or any other person to be present here?

A: No.

Before questioning Deo the following is recorded in his statement:

20 Baram Deo Prasad f/n Bhawani Prasad, I am constable number 1547 Munsami and together with me is Acting Inspector Keshwan Naidu and I wish to question you regarding the incident where between Monday dated 28.12.98 at 7 pm and Tuesday dated 29.12.98 at 7 am one Kamla Prasad s/o Bas Deo was murdered and it is believed that you know something about this incident. You are not obliged to say anything unless you wish to do so but what you say may be taken down into writing and given in

25 evidence.

Q.1 Do you understand the allegation properly?

A: Yes.

Q.2 Do you understand the caution put on you?

A: Yes.

30 Q.3 Do you now wish to sign here that you fully understood the allegation and caution put to you?

A: Yes, Sir

Sgd: Baram deo Prasad      Wit: DC1547 Munsami

Wit: A/IP Keshwan

35 Q.4 Before writing your statement, do you wish to consult your lawyer?

A: No.

Q.5 Before giving your statement, do you wish to have a Government advisor or any person with you?

40 A: No.

It is at this point that the Appellants make their second and third challenges to the evidence. The second is that the statements were not voluntary because the police assaulted the Appellants, applied chilli to their eyes nose anus and penis, and in Deo's case tortured him with burning paper. Further humiliations were alleged.

45 The third is that the Appellants were not told of their rights under the Constitution.

These complaints were rejected after a voir dire by the Chief Justice. Further information was placed before him. After the Appellants were taken to the Labasa Police Station and charged they were seen by an independent justice of the peace

50 on 1 January 2000 and then taken to Labasa Hospital where they were seen by Dr Mishra the same day 1 January 2000 to check them for any injuries or

complaints they may have. He saw Chand at 3.20 and Deo at 3:30 pm. He reported Chand's mental state as good; general health good; no injuries seen, movement posture gait and stance as normal. He reported Deo's mental status as calm, general health as affected by asthma for which he had medication, no injuries seen and his deportment as normal.

Subsequently by order of a magistrate, to whom they complained of ill treatment, they two Appellants were seen by Dr Raj on 4 January 2000. She heard their complaints and found Chand to have a healing wound on his left shoulder some 5–6 days old, an abrasion on his left elbow 5–6 days old, no sign of inflammation in his anal or urethral canals and a bruise on his left buttock 2–3 days old. He was otherwise calm and in good health. She found Deo crying but with no external injuries or areas of inflammation in or around his private parts. In evidence she said evidence of the application of chillies would remain for no more than 2 or 3 days and if applied to the anus or penis would cause "excruciating pain".

At the voir dire the Chief Justice heard evidence from the police involved who denied all forms of mistreatment. He heard from the doctors but not the justice of the peace. He then heard the Appellants who repeated their allegations. He concluded in the case of Chand:

The interview was conducted under Judges' rules No 2. According to D/C Jai Pal and Cpl Mansoor Ali no other person was present apart from ASP Keshri Lal who was going in and out. According to these officers 2nd Accused was never assaulted or threatened in any way and what is more no one rubbed chillies on his penis and anus. On that issue I have to say that I find the nature of the assault alleged against the police as so inherently improbable that I am unable to give them any credence at all. In saying this I have given careful consideration to the medical evidence given by Drs Prasanna Mishra and Kamini Raj. I accept Dr Mishra's evidence that he found no injuries on 2nd Accused when he examined him on 1 January 1999. His evidence supports the evidence of D/C Jap Pal and Cpl Mansoor that Accused was not assaulted at all. It also supports the evidence of other police officers against whom 2nd Accused made allegations of assaults and threats. As regards Dr Raj's evidence, I accept she found two small healing abrasions on left shoulder and left elbow of 2nd Accused. I accept the opinion she gave that these two injuries were 5–6 days' old, give a day either way. I believe these small injuries were there on 1st January 1999 but were not easily visible to the naked eyes, indeed the scabs only formed much later according to Dr Raj whose time-frame would have been consistent with the injuries having been caused on the night of 28 December, 1998. The bruise on Accused's left buttock which according to Dr Raj was 2–3 days' old. However, clearly the bruise was caused after 1st January, 1999 when 2nd Accused was seen by Dr Mishra. Whether the bruise was caused accidentally or self-inflicted or by whatever other manner is anyone's guess. In any event I am satisfied they were not caused before the medical examination that was carried out on 1 January 1999 by Dr Mishra.

In the case of Deo he said:

On that same night of 31 December 1999 at Lagalaga Indian School Insp. Keshwan Naidu instructed D/C Munsami to interview 1st Accused under caution with himself to be present as a witnessing officer. The interview which commenced at 2145 hours was conducted under Judges' Rules No 2. No one else was present at the interview of 1st Accused. According to Insp Keshwan and D/C Munsami 1st Accused was never assaulted or threatened in any way and what is more no one rubbed chillies on his penis and anus. On that issue I have to say I find the nature of the assault alleged against the police as so inherently improbable that I am unable to give them any credence at all. I find support in this view from the fact that when he was medically examined on 1 January 1999 by Dr Mishra no injuries were found on him even though one would

have expected some telltale signs if one believes the extent of violence he claimed to have been perpetrated on him. Because of the complaint made to the Magistrate 1st Accused was again medically examined on 4 January 1999 by Dr; Kamini Raj who found no injuries on him.

5 Moreover, I find uncanny similarity in the allegations of assault made by both Accused. To me this seems to be indicative of a concoction of a story planned together by the Accused to discredit the police officers who were conducting investigation at Lagalaga. It does indicate that they were acting in concert in the matter.

10 These are trenchant findings on credibility. It is trite to say that appellate courts are very reluctant to interfere with findings on credibility by the judge who heard and saw the witnesses. We have reviewed the evidence and are satisfied there was ample evidence upon which the Chief Justice could rely and from which he could draw the inferences he did. We therefore reject the challenge to his finding that the confessions were voluntary and, subject to other challenges, should be  
15 admitted in evidence. In terms of the 1998 Constitution s 27(1)(f) we must treat the Chief Justice's finding as conclusive namely that the Appellants were treated with humanity and with respect for their inherent dignity.

It is now well-established in New Zealand and elsewhere that prior to interviews such as those in this case the detained person must be promptly told  
20 of his rights to consult and instruct a lawyer in private and without delay. *R v Kirifi* [1992] 2 NZLR 8 and *R v Goodwin* [1993] 2 NZLR 153. These rights exist in Fiji under the 1998 Constitution s 27(1)(c). Further if appropriate he must be told of his right to legal aid. Further in Fiji the person must be given the opportunity to communicate with his spouse, partner or next of kin or a religious  
25 counsellor or social worker; s 27(1)(d).

We have already set out the initial parts of each statement where each Appellant was offered the opportunity to speak with a lawyer and where each refused. We are also aware that the nearest lawyer would have been some 40 km away by country road and that it was New Year's Day. The Chief Justice's  
30 response to this challenge was to refer to the law in New Zealand enunciated in *Kirifi* and *Goodwin* (above) and say:

As far as this jurisdiction is concerned, and in view of the fact that we still operate under the Judges' Rules and the Principles set out in the preamble thereto, perhaps we may look upon the provisions in the Bill of Rights relating to suspects of cognizable  
35 crimes as an extension of the practices sanctioned by the Judges' Rules. The rights conferred under section 27 of the Constitution are not absolute in terms. But they may be crucial for the court in deciding whether or not to exercise its discretion to exclude a confessional statement though voluntary in nature on the ground of unfairness to the Accused.

I have carefully considered the circumstances under which the police investigated this case. It appears the breakthrough in the investigation did not come until the third  
40 day. Things moved rather quickly so that even if they had been aware of the requirements under section 27(1)(c) and (d) and (2) there was no time to attend to that aspect of the investigation. I do not think the oversight was deliberate on the part of the police investigation team. Given the gravity of the crime under investigation, I do not  
45 think the omission of the police officers at Lagalaga to explain to the Accused their lawyer access right and lawyer information right etc. was deliberately done. In my view the omission was actuated more by the exigencies of the investigation which was going on at the time in a remote and difficult part of the country. In these circumstances I do not think I would be justified in the exercise of my discretion to exclude the  
50 confessional statements of the two Accused. In a situation like this the demands of fairness for Accused persons must be balanced with the general interests of criminal justice.

In the result and having regard to all the circumstances of this case I am satisfied beyond any reasonable doubt that the confessional statements made by the accused were made voluntarily and freely and may be admitted in evidence in the main trial. It is ordered accordingly.

5 In our view, notwithstanding the practical approach adopted by the Chief Justice, in this case the mandate of the Constitution (newly in force but promulgated in July 1997) should have been followed and it was not. In New Zealand the position is discussed in Goodwin (above) and the exclusion of statements obtained in breach of the NZ Bill of Rights Act 1990 is discretionary. The  
10 approach should be rights — centred to meet a country's obligations under the international covenant on civil and political rights as evidenced in its own legislation, and the circumstances of the particular case must be carefully considered.

15 In particular Richardson J referred to *United States v Leon* (1984) 468 US 897, *Director of Public Prosecutions v Kenny* [1990] 2 IR 110 (SC) and *Collins v R* (1987) 38 DLR (4th) 508. He summarised the position at 194 and said:

What circumstances are relevant to the weighing process?

20 There was considerable discussion in argument of the possible relevance of particular factors. So much depends on the particular facts of the case that it would not in my view be wise to embark on any discussion of hypothetical cases. Sufficient to say that a trial Judge should consider all relevant circumstances. Without expressing any view as to their possible significance I note that Lamer J in *Collins* at pp 208–209 cited as those factors the Canadian Courts had most frequently considered: What kind of evidence was obtained? What Charter right was infringed? Was the charter violation serious or was  
25 it of a merely technical nature? Was it deliberate, wilful or flagrant, or was it inadvertent or committed in good faith? Did it occur in circumstances of urgency or necessity? Were there other investigatory techniques available? Would the evidence have been obtained in any event? Is the offence serious Is the evidence essential to substantiate the charge? Are other remedies available?

30 Adopting this approach we are satisfied each Accused was offered the opportunity to consult a lawyer which was refused. If the interviewing officer had added that the consultation could be without delay and in private the response would have been the same. Further Chand was offered legal aid and Deo had a lawyer and was asked if he wanted a government advisor or any other person  
35 with him. We are satisfied there is no real substance in the objection raised by the Appellants on the facts in this case. On the other hand we wish to emphasise that the police must be assiduous in advising detained citizens of their rights and failure to do so will prime facie result in the exclusion of statements taken in breach of those obligations.

40 We were also told from the bar that only now are the police being instructed to proceed in terms of the Constitution, so that issue is immediate and important.

We must now look at the overall circumstances under which the confessions were obtained starting with the illegal arrest of Chand. We observe that no doubt a request to accompany would have been as effective as an arrest and that is how  
45 the Constable should have proceeded. While it is true that both confessions flowed from Chand's arrest we are satisfied that voluntary confessions were obtained without significant breaches of the Appellants' constitutional rights and the Chief Justice was correct in ruling the statements admissible.

50 A separate challenge made by the Appellant Chand claims the Chief Justice wrongly refused to allow him to call a witness Ravind Prasad. Although no brief of evidence is before the court it appears from the record that Chand's counsel



said he would give evidence that he told Corporal Emosi about hearing a fight coming from the direction of Ravind's house. The Chief Justice ruled such to be inadmissible hearsay. We cannot see that the evidence would add anything significant to the defence even if called and Mrs Narayan did not press the matter.

5 The Appellants challenge the summing up of the Chief Justice to the assessors. Before us the challenges first focused on three passages in the summing up. The Chief Justice said first in reference to the claim that the police had fabricated the statements. The underlining is ours to show the passages criticized in their context:

10 Both Baram Deo and Shiu Chand gave evidence about the assault and on how chillies were rubbed on their penis and anus. You may think and this is a matter entirely for you, gentlemen assessors, that the allegations of the rubbing of chillies on the penis and anus are extremely serious because if true, it shows that the police officers concerned were going something so disgusting and inhuman and as well as being unlawful. *The question for you is whether these police officers would stoop so low in order to obtain the alleged confessions of both Accused.*

15 Both Accused claim that the confessional statements in their interviews and charge statements were fabricated or made up by the police officers concerned. In this regard you will have to scrutinize carefully the interview records and charge statements to decide whether they were in fact made up by the police officers who conducted the interviews of the Accused. *You may think that for anyone to fabricate such evidence must have exceptional ability and skill beyond the ordinary human ingenuity and capability which is not given to everyone.* However, as against that you must consider the defence submission that the evidence of interviews was built around the medical report of the injuries sustained by Kamla Prasad which were given by Dr Cayari who did the post mortem on the body of Kamla Prasad. That is to say the incriminatory matters in the interviews ere tailored to the injuries found on the body of Kamla Prasad.

and then in relation to the alleged failure to advise the Appellants of their rights.

30 You have heard a lot of evidence expressing and implying criticisms of the police conduct in the investigation of this case. *References were made to the failure of the police investigating team to inform the Accused about their constitutional rights to consult a lawyer and to communicate with their spouse or next of kin while they were in police custody.*

35 *However, you may think that given the difficult and poor weather conditions existing in the area where the investigation was being carried out, about 40 miles away from Labasa town, it was not possible to arrange access to lawyers which any resulting delay would have impeded the progress and completion of the investigation within a reasonable time.*

40 Counsel for the Appellants rightly drew our attention to the ability of the trial judge to express a view of the facts provided the summing up is balanced; *R v Fotu* [1995] 3 NZLR 129. The Chief Justice had already told the assessors that they were the masters of the facts and were free to disagree with any view he might express. His final instruction to the assessors was that they must be satisfied beyond reasonable doubt from the whole of the evidence that the two Accused killed the dead man before they could express an opinion of guilty plainly this had impact on the assessors because one of them found Chand not guilty.

50 The Appellants claimed in the evidence they adduced to have each been at home at the time of the killing thus raising an alibi. The burden of disproving the alibi is on the prosecution in other words overall reveal the prosecution must

prove that the Accused were there and killed the victim. A good example is found in *R v Johnson* [1961] 3 All ER 969. As to the alibi evidence the Chief Justice said:

5 In this case it is important that you carefully assess the credibility of all witnesses who gave evidence in order to decide which witnesses are reliable and telling the truth. In this regard you must be very careful in assessing the evidence of Ajesh Prasad s/o Baram Deo and Ashneel Chand s/o Shiu Chand regarding the fact that Baram Deo was at home on the night of 28 December, 1998 and the evidence of Umlesh Wati w/o Shiu Chand regarding the fact that Shiu Chand was at home on the 28 December, 1998. 10 These witnesses are very closely related to Baram Deo and Shiu Chand by blood or marriage.

It is natural that people who have close family ties with the Accused persons would have the strongest emotional and psychological interest in the outcome of this case. You may think gentlemen assessors this is a fact of life. In these circumstances you may think these witnesses cannot be regarded as independent or unbiased witnesses. In other 15 words, their relationship with the Accused persons would necessarily affect their reliability as witnesses. Therefore you will have to weigh their evidence very carefully and with great caution before acting on them.

As regard the evidence of Gyanendra Singh s/o Pyara Lal and Ram Prasad s/o Mathura Prasad their evidence must also be scrutinized very carefully before acting on 20 them because by their own admission they had been discussing their evidence they were going to give in this Court. Ajesh Prasad s/o Baram Deo who had already given evidence in this Court had travelled with them in a van from Lagalaga to this courthouse. For that reason you may think their evidence is of little weight or value under the circumstances. However that is a matter entirely for you gentlemen assessors.

25 Now if after considering all the evidence in this case you are not satisfied that the two Accused killed Kamla Prasad or if you have any reasonable doubt about the mater, then it will be your duty to express the opinion that both Accused are not guilty of Murder as charged.

This reference to the defence witnesses is plainly damaging to the defence and appears to shift the onus to the Accused but the criticised passages, coming at the 30 end of the summing up, are followed by correct instructions on the burden of proof.

We have carefully reviewed the evidence and the whole of the summing up. While we agree some of the suggestions made by the Chief Justice were adverse 35 to the Appellants we are not persuaded that it was so unbalanced or unfair to justify setting the conviction verdicts aside. We therefore reject the challenges to the summing up.

These appeals raised some important issues. Under all the circumstances we grant leave to appeal but dismiss the appeals. We conclude by conveying our 40 thanks to counsel for their helpful submissions.

*Appeal dismissed.*

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