SWADESH KUMAR SINGH v STATE (CAV0007 of 2005S)

SUPREME COURT — CRIMINAL JURISDICTION

FATIAKI P, FRENCH and IPP JJ

10, 19 October 2006

Evidence — corroboration — murder — life imprisonment with non-parole term of 17 years — identification of inconsistencies in evidence — Supreme Court Act 1998 s 7(2).

The Petitioner allegedly murdered Mrs Devi (deceased) in her house. It was found later that her children's bank passbooks together with some loose cash and fabric were missing. The Respondent, apart from tendering police and forensic evidence, relied on the testimony of the three witnesses: (1) Shalendra Narayan (PW1); (2) Bimlesh Prasad, alias Pillu (PW2); and Ms Maya Wati (PW3), all of whom knew the deceased and were related to each other. Two police officers testified giving virtually identical evidence of unrecorded confessional statements made by the Petitioner at a time when he was not yet a suspect. PW1 and the Petitioner were arrested at about the same time for the murder but the charge against PW1 was soon withdrawn. PW1 and the Petitioner were neighbours and PW1 was an eyewitness to the murder. The High Court found the Petitioner guilty of murder and he was sentenced to life imprisonment with a minimum non-parole term of 17 years. The Petitioner's appeal against his conviction was dismissed in the Court of Appeal. The Petitioner applied for special leave to appeal and, if granted, an appeal against his conviction. The issue was whether there was a need for the judge to identify the inconsistencies in the evidence of the accomplice PW1.

Held — There was a pressing need for the judge to identify the inconsistencies in the evidence of the accomplice PW1. There were several reasons for this.

(1) The first reason derived from the fact that accomplices were a notoriously unreliable class of witness. The inherent dangers in the testimony of an accomplice required a trial judge to point out to the assessors any significant inconsistencies in the accomplice's evidence. The accomplice warning must not be given in a formalistic or mechanical way. It must relate the knowledge that judicial experience over centuries has accumulated concerning the risks attendant upon accomplice evidence, in general, to the specific evidence given by the accomplice in the particular case. The judge does not have to go into unnecessary detail. The criterion was fairness; and fairness demands that inconsistencies that have significant bearing on the credibility of the accomplice be exposed to the assessors. It was no answer that counsel may previously have carried out this task. Genuine problems that exist in an accomplice's evidence should be communicated to the assessors by the judge with the full authority and force of the judicial office.

(2) In a case that ran as long as this one did, with a break in the middle as long as that which occurred here, fairness demanded that the judge bring the crucial issues to the attention of the assessors in a focused way.

(3) Where a witness had made a statement on oath directly inconsistent with evidence he or she gave in court and particularly when that evidence implicated the accused person, the assessors should be informed of the importance of statements made on oath. They should also be told that they should be cautious before they accept a witness's sworn evidence that conflicted with a sworn statement the witness previously made. The judge should remind the assessors of the explanations given by the witness for the earlier sworn statement and instruct them that the evidence in court should be regarded as unreliable unless the assessors were satisfied in two particular respects:

(a) that the explanations are genuine; and

(b) that despite the witness previously being prepared to swear to the contrary of the version the witness now puts forward, he or she is now telling the truth (compare

Gyan Singh v R; *Hari Pal v R*; *Bijai Prasad v R* and *R v Zorad*). The need for these cautions was particularly acute in the case of a witness who was also an accomplice.

Appeal allowed.

Cases referred to

Bijai Prasad v R (1984) 30 FLR 13; *Carr v R* (1988) 165 CLR 314; 81 ALR 236; *Davies v R* (1937) 57 CLR 170; [1937] ALR 321; [1937] VLR 205; (1937) 11 ALJR 69; *Gyan Singh v R* (1963) 9 FLR 105; *Hari Pal v R* (1968) 14 FLR 218; *McKinney v R* (1991) 171 CLR 468; 98 ALR 577; *R v Zorad* [1979] 2 NSWLR 764; *Ratten v R* (1974) 131 CLR 510; 4 ALR 93, cited.

Jenkins v R (2004) 211 ALR 116; [2004] HCA 57, explained.

A. K. Singh for the Petitioner

R. Gibson for the Respondent

[1] Fatiaki P, French and Ipp JJ.

The principal issue

[2] This is an application for special leave to appeal and, if granted, an appeal against the Petitioner's conviction on a charge of murdering Mrs Sandhya Devi.

[3] At the time of her death, Mrs Devi was a married woman, aged 37 years, living on a rural native land allotment with her husband and two children. The Petitioner was an unemployed man and her neighbour.

[4] The Petitioner was found guilty of the offence by unanimous decision after a trial before Govind J and three assessors. He was sentenced to life imprisonment with a minimum non-parole term of 17 years. The Petitioner appealed to the Court of Appeal against his conviction but his appeal was dismissed.

[5] The application for special leave to appeal raises issues of importance, namely, the nature of a trial judge's directions to the assessors in relation to serious inconsistent statements by prosecution witnesses, the corroboration of accomplice evidence and the late recollection by police witnesses of an implicit admission by the accused. In this case:

One critical prosecution witness who was an accomplice gave evidence in conflict with what on its face is a previous sworn statement made out of court.

Another critical prosecution witness was declared hostile by reason of her initial testimony in chief being contrary to a police statement she made (which, at that point, she stated was not true) and, on cross-examination by the State, she recanted, asserted her police statement was indeed true, and implicated the accused in the crime.

Police witnesses gave virtually identical evidence of unrecorded confessional statements by the accused, the significance of which they first appreciated more than two years after the accused is arrested.

The State case

[6] On 18 April 2001, Mrs Devi's husband returned home from picking-up their children from school. He found his wife dead in her bedroom with her throat cut. She had also received two severe wounds in the occipital region where, it was apparent, she had been struck. Entry to the house had not been forced. The only damage in the house was to some beading apparently torn from a curtain hanging in the passage. Later it was found that the children's bank passbooks together with some loose cash and fabric were missing.

[7] In proving its case, the State, apart from tendering police and forensic evidence, relied on the testimony of three witnesses (Shalendra Narayan, Bimlesh Prasad, alias Pillu, and Ms Maya Wati) all of whom were related to each other and all of whom knew Mrs Devi.

[8] Shalendra Narayan and the Petitioner were arrested at about the same time for the murder, but the charge against Narayan was soon withdrawn. Narayan was a neighbour of the Petitioner. He was an eyewitness to the murder and identified the Petitioner as the murderer. he was the only witness to do so.

[9] Narayan testified that, on the day of the murder, the Petitioner told him that he was going to Mrs Devi's house where he wished to talk to her husband. The Petitioner asked Narayan to go with him and Narayan agreed to do so. They found Mrs Devi washing clothes in a tub. The Petitioner told Narayan that "he wanted a fight and revenge". The Petitioner put his hand over Mrs Devi's mouth and, with the other, hit her on the head with a foot-long pipe that he had picked-up outside the house. She was thereby rendered unconscious. This occurred before she could take any defensive or evasive action. Narayan assisted the Petitioner in carrying Mrs Devi into a bedroom where, eventually, they put her on the floor. The Petitioner lifted her dress and said, "there is a bandage" (indicating that she was menstruating). He touched her private parts, tied a cloth around her mouth, held her head, and cut her throat.

[10] Thereafter, according to Narayan, the Petitioner walked into the sitting room and, in so doing, broke some beads hanging from a curtain. When returning home, the Petitioner told Narayan that, if he opened his mouth, he, the Petitioner, would kill Narayan, his wife and his children, and burn his house.

[11] Pillu testified that he knew the Petitioner but had not visited him for some time. He was friendly with Mrs Devi and was accustomed to call her "sister". Narayan was his cousin. Pillu testified that, on the day of the murder, the Petitioner requested him to accompany him to Mrs Devi's home, saying that he wished to have sexual intercourse with her. Pillu said that he refused the Petitioner's request. Later that day, the Petitioner told Pillu that he, the Petitioner, had killed Mrs Devi. The Petitioner warned Pillu that if he said anything to anyone about this he would kill Pillu, his wife and his children.

[12] The police took Pillu into custody at the time of Mrs Devi's funeral. After he had been in custody for 2 days, he told the police that the Petitioner had murdered Mrs Devi. He was then released.

[13] Ms Wati, who was Pillu's aunt, worked for Mrs Devi as a maid. Ms Wati testified that on the day of the murder the Petitioner had been away from the house but returned while she was washing clothes in a tub. On his return, the Petitioner washed his hands, legs and face in the tub. Ms Wati noticed that, immediately after the Petitioner had finished washing, the water in the tub was red (although no clothes, from which red colouring could have escaped, had been washed).

[14] Two police officers testified (giving virtually identical evidence) that, in the course of casual conversation with the Petitioner at a time when he was not a suspect, the Petitioner commented, "how can anyone have sex with [the victim] while she was having menstruation". The significance of this statement was that Mrs Devi was indeed menstruating at the time of her death and it was open to the assessors to infer that the Petitioner knew of this fact because he had acted as

Narayan had testified. It was only some two-and-a-half years after the murder, however, that the police officers remembered this unsolicited comment and its significance.

The application to lead fresh evidence

[15] At the commencement of the hearing before this court, the Petitioner applied for leave to adduce further evidence. The application was dismissed and the court indicated that it would deliver its reasons for that decision when giving judgment on the application for special leave to appeal and the appeal.

[16] The well-established general rule is that fresh evidence will be admitted on appeal if that evidence is properly capable of acceptance, likely to be accepted by the trial court, and is so cogent that, in a new trial, it is likely to produce a different verdict: *Ratten v R* (1974) 131 CLR 510; 4 ALR 93; *Davies v R* (1937) 57 CLR 170; [1937] ALR 321; [1937] VLR 205; (1937) 11 ALJR 69.

[17] In an application for special leave to appeal or in an appeal to this court in relation to a criminal matter, the general rule is further qualified by the nature of this court's jurisdiction under s 7(2) of the Supreme Court Act 1998 and this court's role as ultimate appellate court. Leave will only be granted to lead fresh evidence before this court if a clear and compelling case is made out, satisfying all the criteria applicable.

[18] The evidence the Petitioner sought to adduce was contained in a statutory declaration purportedly signed by Narayan on 22 November 2003. The declaration states:

> I was forced by police officers … to give a false statement against [the petitioner] so that he could be put into prison. He is innocent. The actual people who killed Narend's wife are Bimlesh Prasad (Pillu) and Apsai. I am saying this because I was there and saw them killing the woman. [The petitioner] was not there. Police told me to blame him. Since I have been discharged by the High Court for the offence of murder and want to tell the truth that Bimlesh and Apsai killed the woman, not [the petitioner].
>
> And the statement which I gave to my lawyer Parvesh Akbar on 02/06/01 is also a true statement and not false as stated in the 17/11/03 statement.

[19] Accompanying this statutory declaration was a letter from the solicitor who attested it. According to the letter, the solicitor concerned did not personally know the person signing the document. The letter states:

> The person came with the document for witnessing. It was not prepared by this office.
>
> We cannot confirm whether the person who signed was Sarendra Narayan or comment as to the truth or otherwise of the contents.

[20] The Petitioner made an affidavit supporting his application. He stated that his wife was an uneducated person who did not know how to read and write English; that after his appeal was dismissed by the court of appeal, a man came to his wife and handed her the statutory declaration "on behalf of Sarendra Narayan"; that in December 2005 his wife came to visit him and gave him that declaration; that he asked his wife to hand the declaration to his lawyers but she forgot to do so and misplaced the document. According to the Petitioner, his wife found the declaration "recently" and handed it to his lawyer.

[21] The declaration of 22 November 2003, if made by Narayan, would be of the utmost importance in determining the guilt or otherwise of the Petitioner. The evidence as to the making of the declaration, however, lacks probative value in that the Petitioner's contention that the declaration was in fact made by Narayan

is questionable and there is a paucity of detail as to how the declaration came to be made and as to how it came into the possession of the Petitioner's wife.

[22] First, no attempt was made to call Narayan to testify, or to establish by other evidence that Narayan himself made the declaration, even though it was apparent from the letter of the solicitor who attested the declaration that he could not throw any light on this issue. Narayan testified at trial that he could not read English. No explanation was proffered how it came about that the declaration was written in English and purported to be signed by Narayan without any evidence that it was translated to him.

[23] Second, the fact that the Petitioner's wife is an uneducated person who does not read or write English did not preclude her from making an affidavit explaining how the declaration came to be given to her, how she came to lose it, and how she came to find it. The Petitioner's assertion that his wife forgot to hand the declaration to the Petitioner's lawyers and lost it is inherently doubtful, particularly as he must have explained the importance of the document to her. The omission to give details of the date, time and place where the declaration was handed over, and the identity of the person who gave the declaration to the Petitioner's wife, materially detracts from the cogency of the evidence. The omission to support the application by an affidavit from the Petitioner's wife reinforces the lack of cogency.

[24] The evidence that the Petitioner sought to tender did not comply with the criteria for the leading of fresh evidence, generally, let alone the more stringent requirements applicable to the admission of fresh evidence before this court. The evidence lacked cogency and plausibility to a material degree.

[25] For these reasons, the application to lead fresh evidence was dismissed.

The need for accomplice warnings

[26] On the State case, Narayan was an accomplice of the Petitioner. Moreover, Narayan was given immunity from prosecution. These matters required the trial judge to give specific warnings to the assessors.

[27] The common law requires trial judges to warn of the dangers of convicting on evidence that is potentially unreliable. Generally the law endeavours to avoid inflexible rules and leaves it to judges to sum up in the manner best suited to the facts of the particular case. In general, judges should be free to tailor a summing-up to the exigencies of the case: *Carr v R* (1988) 165 CLR 314 at 318–19; 81 ALR 236 at 238–9 (*Carr*).

[28] There are, however, categories of cases that require departure from that general rule. One of these categories is "where the evidence suffers from some intrinsic lack of reliability going beyond the mere credibility of a witness": *Carr* at CLR 319; ALR 239.

[29] An accomplice, or a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the prosecution, is accepted as falling within this description: *Jenkins v R* (2004) 211 ALR 116 at 121–22; [2004] HCA 57 (*Jenkins*). The law requires a warning to be given about the danger of convicting upon the evidence of an accomplice, unless that evidence is corroborated. the reason for this rule was explained by the High Court of Australia in *Jenkins* at [30] as follows:

> The rule exists for a reason. That reason is related to the potential unreliability of accomplices, an unreliability thought to be so well known in the experience of courts that judges are required, not merely to point it out to jurors, but to tell them that it would

be dangerous to convict upon the evidence of an accomplice unless it is corroborated. The principal source of unreliability, although it may be compounded by the circumstances of a particular case, is what is regarded as the natural tendency of an accomplice to minimise the accomplice's role in a criminal episode, and to exaggerate the role of others, including the accused. Accomplices are regarded by the law as a notoriously unreliable class of witness, having a special lack of objectivity. The warning to the jury is for the protection of the accused. The theory is that fairness of the trial process requires it. It is a warning that is to be related to the evidence upon which the jury may convict the accused. The reference to danger is to be accompanied by reference to a need to a need to look for corroboration.

[30] The High Court went on to say at [32]:

Although the common law rule about accomplice warnings is a rule of law, and although (subject to the proviso) in the ordinary case the requirement for a warning does not depend upon a request being made by trial counsel, the rule is not so mechanical as to call for a warning in any case in which an accomplice gives any evidence which may be relied upon to establish the prosecution case. The application of the rule must be related to its purpose, and will require a consideration of the issues as they have emerged from the way in which the case has been conducted.

[31] A further warning was required in this case due to the fact that Narayan was given immunity from prosecution. the reason that such a warning is required is that a person seeking immunity from prosecution may be tempted to implicate another person falsely in order to achieve his objective.

The accomplice warnings

[32] The trial judge directed the assessors as follows in regard to Narayan's evidence:

Before you consider the evidence of this witness, I wish to give you two directions. These directions are not given because I wish to convey to you any view of the credibility of this witness, but because in every such case the law requires that I give you these directions.

The first is that you must treat this witness as an accomplice. The law says that it is dangerous to convict on the evidence of an accomplice, unless it is corroborated, although you may do.

Corroboration means some independent testimony which affects the accused by connecting him or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some material particular not only that the crime has been committed, but also that the accused committed it.

In this case the evidence of Bimlesh alias Pillu relating to the conversations with the accused on the 18th, and the evidence of Maya Wati about the accused coming after she had returned from her home and seeing reddish water in the tub, and the evidence of the two police officers about the accused's talking of the deceased's menstruation are pieces of evidence which are capable of providing corroboration, if you choose to accept those pieces of evidence. It is for you to decide whether in fact they do corroborate or not.

But before you look for corroboration, you must accept the evidence of Shalendra Narayan as being the truth or else there is nothing to corroborate.

[33] The second warning the judge gave concerned the immunity afforded to Narayan. The judge said:

The second is that you are aware that this witness was granted immunity. The grant of immunity is quite legal. It is not uncommon, and is often given to a lesser player in any crime in order to bring the main perpetrator or perpetrators to justice. But it can happen that a person to attract immunity may falsely implicate another person so have a motive for telling lies. You must therefore scrutinise his evidence with great care.

[34] The judge concluded in regard to Narayan's evidence:

> Ladies and gentleman, it is for you to decide whether this important witness was truthful, whether he was trying to minimise his role or whether as Mr Singh suggests an outright liar. Remember that the defence does not have to prove that this witness or any other witness was a liar. It only has to create a reasonable doubt. The prosecution must satisfy you of the credibility of each witness.

The judge's references to inconsistencies in the evidence of the State witnesses

[35] The trial was unusual in that it was interrupted for a lengthy period in the middle. The trial commenced on 1 December 2003 and continued until 4 December 2003. It was then adjourned to 11 February 2004 and continued from that date until 19 February 2004 when the assessors delivered their verdict. There is no apparent explanation for the adjournment of some two-and-a-half months.

[36] Because of the duration of the trial and the lengthy adjournment in the middle of it, the judge, after making some preliminary remarks, conscientiously read through the evidence from beginning to end.

[37] Defence counsel, in his address, had emphasised particular inconsistencies and other problems in the evidence of Narayan and Ms Wati. After reading to the assessors his summary of all the evidence, the judge repeated, in the same order as counsel, details of the arguments that both counsel had advanced in regard to the case as a whole. His honour, however, did not isolate the specific issues that arose concerning to the credibility of Narayan and Ms Wati, made no comments himself on these issues and did not focus the attention of the assessors on the inconsistencies in the evidence of these two witnesses.

[38] The only independent mention the judge made of the inconsistencies was early in his charge, when he gave the following general direction:

> Of course in any trial there are bound to be some inconsistencies in the evidence of a witness and inconsistency with others. You are to ask yourselves did the inconsistency relate to peripheral matters or did the inconsistency go to the core of the witness's evidence and was it of sufficient significance to affect his or her credibility.

[39] The judge's charge was reduced to writing and was 30 pages long (in single spacing). It took more than 2 hours to deliver. The last-mentioned general direction as to inconsistencies appears on the second page and was given very early in the charge. The judge's description of the arguments of counsel begins on the 24th page and must have been given more than an hour after the general direction as to inconsistencies was made. The account the judge gave of counsel's arguments was largely confined to the comments counsel made concerning the various witnesses, and these references to inconsistencies were diffuse. The judge did not attempt to link the general direction as to inconsistencies (made at the inception of the charge) with the various defence arguments (recounted, intermittently, much later in the charge) that were directed to the particular inconsistencies in the evidence of Narayan and Ms Wati.

The inconsistencies in the evidence of Narayan and the need for them to be identified to the assessors

[40] On 2 June 2001 Narayan made a statutory declaration that became Ex J at the trial. In this declaration he said that on the day of the murder he went to Mrs Devi's house and, through the window, saw Pillu and a man known as Sai with Mrs Devi in the bedroom. He said that Pillu was holding her hair and Sai

had a knife in his hand. The knife was "full of blood" and there were bloodstains on the clothes of the two men. Narayan thereupon ran away but the men saw him and called on him to stop. He did not do so. Later, Sai threatened Narayan and told him that if he reported the matter to the police he would kill Narayan's wife "as well". Narayan said that he was afraid of Sai who had once beaten him badly. Narayan stated that the Petitioner did not commit the murder and knew nothing about it. He stated that one of Pillu's in-laws was a police officer who had arranged for Pillu to be a prosecution witness and for Narayan and the Petitioner to be blamed for the murder. Narayan stated that he was later severely beaten by the police who told him to implicate the Petitioner, otherwise they would beat him further. Narayan concluded the declaration by repeating that Pillu and sai had murdered Mrs Devi (and not the Petitioner).

[41] In the course of his evidence-in-chief, Narayan said that, while in gaol, the Petitioner told him that a lawyer by the name of Akbar would come and see him. A few days later Narayan was indeed visited by a man called Akbar. Narayan testified that Akbar showed him a document (the statutory declaration — Ex J) and told him that it concerned Narayan's bail. Akbar asked him to sign the document and said that it would get him released on bail. Narayan thereupon signed the document.

[42] Narayan said that the document was in English and he could not read English. Therefore, he did not read the document and it was not read to him. he said that Akbar did not witness the document in his presence.

[43] Narayan was cross-examined on Ex J. He said that when he signed the declaration, two identified prison officers were present. He denied that the document was translated to him in Hindi. Narayan admitted that, in proceedings before the magistrate, he told the magistrate in relation to Ex J:

> I did not read this letter. It was translated to me in Hindi. Then left read in the office. The [Prison] Officers Ucialevu and Apiusai were present.

[44] Narayan said that he had lied to the magistrate because the Petitioner had threatened him with assault. He was asked again why he had lied and he said that the Petitioner was threatening to kill him and his family and burn his house.

[45] Narayan admitted that he told the magistrate that he had been assaulted by a Fijian man but said that he had done so because the Petitioner told him to implicate a Fijian man otherwise he would be assaulted. Narayan testified that the Petitioner had asked him to implicate Sai and become a prosecution witness so that they would both be safe. He had agreed to this proposal.

[46] Neither the two prison officers nor Akbar was called to testify. The evidence contained in Ex J directly contradicted the oral evidence given by Narayan that he saw the Petitioner killing Mrs Devi.

[47] Exhibit J was not merely an inconsistent statement. It was an inconsistent statement that purported to be given under oath. The attestation clause of the declaration read:

> sworn by the said Narayan at Lautoka this 2nd day of June 2001 in my presence after the contents hereof was[sic] read over and explained to him in the Hindustani language and he appeared fully to understand the meaning and effect thereof:
>
> (signed:S Narayan)

underneath Narayan's signature appeared the words, "a commissioner for oaths", "Parvez Farook Akbar", "Barrister and Solicitor".

[48] There was a pressing need for the judge to identify the inconsistencies in the evidence of the accomplice, Narayan. There were several reasons for this.

[49] The first reason derived from the fact that accomplices are a notoriously unreliable class of witness. The inherent dangers in the testimony of an accomplice require a trial judge to point out to the assessors any significant inconsistencies in the accomplice's evidence. The accomplice warning must not be given in a formalistic or mechanical way. It must relate the knowledge that judicial experience over centuries has accumulated concerning the risks attendant upon accomplice evidence, in general, to the specific evidence given by the accomplice in the particular case. The judge does not have to go into unnecessary detail. The criterion is fairness; and fairness demands that inconsistencies that have significant bearing on the credibility of the accomplice be exposed to the assessors. It is no answer that counsel may previously have carried out this task. Genuine problems that exist in an accomplice's evidence should be communicated to the assessors by the judge with the full authority and force of the judicial office.

[50] Second, in a case that runs as long as this one did, with a break in the middle as long as that which occurred here, fairness demanded that the judge bring the crucial issues to the attention of the assessors in a focused way.

[51] Third, where a witness has made a statement on oath directly inconsistent with evidence he or she gives in court and particularly when that evidence implicates the accused person, the assessors should be informed of the importance of statements made on oath. They should also be told that they should be cautious before they accept a witness's sworn evidence that conflicts with a sworn statement the witness previously made. The judge should remind the assessors of the explanations given by the witness for the earlier sworn statement and instruct them that the evidence in court should be regarded as unreliable unless the assessors are satisfied in two particular respects. First, that the explanations are genuine. Second, that, despite the witness previously being prepared to swear to the contrary of the version the witness now puts forward, he or she is now telling the truth: compare *Gyan Singh v R* (1963) 9 FLR 105; *Hari Pal v R* (1968) 14 FLR 218; *Bijai Prasad v R* (1984) 30 FLR 13; *R v Zorad* [1979] 2 NSWLR 764 at 770–1 (*Zorad*). the need for these cautions is particularly acute in the case of a witness who is also an accomplice.

The inconsistencies in Ms Wati's evidence and the need for them to be identified to the assessors

[52] Prior to the trial, Ms Wati made a statement to the police. When she commenced her evidence-in-chief, she gave evidence directly inconsistent with that statement. She said that, on the day of the murder, she did not see the Petitioner leaving the house. She said that she did not recall fully what occurred on the day of the murder. She said that if she were asked about that day she would answer that she could not recall. Counsel for the prosecution asked her whether the statement she had made to the police was true. She said that it was not.

[53] On the application of counsel for the State, Ms Wati was then declared a hostile witness. The judge's reasons were:

> I have considered learned counsel's submission to declare this witness hostile and what the counsel for the defence had to say. I have been shown the statement of this witness made and the inconsistencies contained therein. I have also noted the demeanour of this witness in the box. I am of the view that there is nothing wrong with

her memory. I am of the view that her departure [from] her statement to the police is due to a hostile animus she bears to the state. I therefore will declare her hostile and allow the state to cross-examine her.

[54] Ms Wati proceeded to give evidence in accordance with her police statement, the truth of which she had, minutes before, disavowed. She testified that the Petitioner had left the house on the day of the murder and when he returned she was washing clothes. He then washed his hands, legs and face in the wash tub and immediately after that, when she went to the kitchen, she noticed red water in the tub.

[55] In cross-examination, Ms Wati admitted that she had initially stated that her police statement was not true. She now asserted, however, that that statement was true. She later admitted, however, that she could not see the wash tub from the kitchen.

[56] As with Narayan, there were serious inconsistencies in the evidence of Ms Wati. We shall summarise them. In court, she first said that she did not recall what occurred on the day of the murder and, on that day, she did not see the Petitioner leaving the house. She later gave directly contrary evidence. She first stated in her police statement that she saw red water in the wash tub after the Petitioner had washed in it, she said in evidence-in-chief that her police statement was not true, she then testified that it was true and finally admitted that she could not see the wash tub from the kitchen where she said she had been when she saw the water run red in it.

[57] These inconsistencies, too, were capable of materially undermining Ms Wati's testimony. Significantly, she gave no explanation for her vacillating evidence and opposing versions.

Defects in the charge to the assessors

[58] Narayan's testimony was open to serious question by reason of the sworn statement he purported to make: Ex J. Not only did that document appear on its face to be an affidavit sworn in the presence of a commissioner of oaths, but Narayan gave two conflicting versions for having signed it. The first was that he signed it because he did not know its true contents, and thought that it related only to, and would assist him in, his bail application. The second was that he signed it because of the threats made by the Petitioner against him and his family and his home. These inconsistencies materially undermined Narayan's credibility. They called for specific comment by the judge. No such comment was made.

[59] There is no inflexible rule that assessors should be instructed that the evidence of a witness (such as Ms Wati), who is declared hostile, should be regarded as unreliable: *Zorad* at 771. But, where inconsistencies that lead to such a declaration being made bear a significant relationship to the issues determinative of guilt (as was the case with Ms Wati), fairness requires the judge, at least, to draw the inconsistencies to the assessors' attention and to warn them that they should give particular attention to the reliability of the witness concerned. This, his Lordship did not do.

[60] The general remarks the judge made as to inconsistencies were quite inadequate to deal with the very serious questions that had arisen as to the credibility of the two crucial witnesses, Narayan and Ms Wati. The omission to identify and explain the inconsistencies in an appropriate way was a fundamental error in the charge to the assessors.

[61] There were other problems with the judge's charge.

[62] The evidence of the two police officers that the Petitioner made a casual remark indicating that he knew that Mrs Devi was menstruating on the day of the murder was also open to question in at least two respects. These are:

> It is well-recognised that a heavy practical burden is involved in raising a reasonable doubt as to the truthfulness of police evidence of unrecorded confessional statements: *McKinney v R* (1991) 171 CLR 468 at 475; 98 ALR 577 at 581. In the context of the police evidence in the circumstances of this case it is sufficient to say that "police witnesses are usually practised witnesses and it is not an easy matter to determine whether a practised witness is telling the truth". *McKinney v R* at 476.
>
> the police evidence as to what the petitioner said was remarkably similar. The similarity was remarkable not least because it took both police officers some two and a half years to remember the petitioner's comment and its significance.

[63] This is not the case to consider whether, in Fiji, a full-scale *McKinney v R* (1991) 171 CLR 468; 98 ALR 577 — type warning needs to be given whenever there is contested unrecorded police evidence of confessional statements. It is sufficient to say that, having regard to the importance of the police evidence in this particular case, the judge needed to make some appropriate comments about that evidence. It would have been appropriate for the judge to draw the assessors' attention to the two stated respects in which the police evidence was open to question. The comments needed to appear as emanating from the judge, himself, with the weight and force of judicial authority and not merely as remarks by the judge in the course of his Lordship acting as a conduit of counsel's arguments. The judge, however, made no such comments.

[64] We have pointed out the questionable aspects of Narayan's statutory declaration: Ex J. From Narayan's evidence it appeared that the two prison officers who were present when Akbar discussed the statement with Narayan should have been able to throw important light on what had occurred. Narayan was a state witness and, in these particular circumstances, fairness required the judge to draw the attention of the assessors to the state's unexplained omission to call the two prison officers. He did not do so.

[65] We repeat that the judge said:

> remember that the defence does not have to prove that this witness or any other witness was a liar. it only has to create a reasonable doubt. The prosecution must satisfy you of the credibility of each witness.

[66] The statement that the defence "only has to create a reasonable doubt" was an erroneous qualification of the onus of proof. The defence is not required to "create" anything; the prosecution must prove its case beyond a reasonable doubt.

[67] The judge, in other parts of his charge, directed the assessors quite properly as to the standard of proof and, having regard to the charge as a whole, the assessors might have regarded the statement that the defence was required to "create a reasonable doubt" as a slip of the tongue to be treated as having no significance. Against the background, however, of the judge's omission to deal adequately with the serious inconsistencies in the evidence of the important prosecution witnesses, the judge's incorrect statement as to the onus of proof was capable of having affected the assessors' deliberations.

[68] In the course of his charge, the judge said:

> But before you look for corroboration, you must accept the evidence of Shalendra Narayan as being the truth or else there is nothing to corroborate.

[69] This statement is unfortunate in two respects. First, it suggests that the task of determining whether corroboration exists is a two-stage process (first, examining the evidence of the accomplice in order to decide whether he is telling the truth and, second, taking up the question of corroboration itself without reference to the credibility of the accomplice). That approach is incorrect. The task of deciding whether the evidence is corroborated is a holistic exercise and should not be segmented. The exercise is correctly described in the rest of his Lordship's directions as to corroboration that we have quoted above. Second, the judge's statement is capable of suggesting that, were the assessors to decide that the evidence of the accomplice, looked at on its own, was true, they could ignore the need to examine the question whether reliable corroborative evidence exists. That, again, is incorrect, is potentially unfair to the accused person, and ignores the holistic approach to the issue that the law requires.

[70] There may of course be cases in which an accomplice's evidence is so inherently incredible that it cannot be rescued by any corroborating evidence and will be rejected by the assessors without further ado. It may be that that was what his Lordship meant — that the assessors must first decide whether the accomplice's evidence was capable of belief and then whether, having regard to the corroborating evidence, it was true. That was not what he told them.

[71] We have not in these reasons referred to the judgment of the Court of Appeal. The reason for this is that in their reasons for judgment they make no mention of the defects in the judge's charge to the assessors that we have identified. Some of these defects were raised by Mr Singh before the Court of Appeal, others emerged during the course of argument before this court.

Conclusion

[72] For the reasons we have stated, special leave to appeal is granted and the appeal allowed.

[73] The orders of the Court of Appeal dismissing the Petitioner's appeal are set aside and the conviction of the Petitioner is quashed.

[74] Counsel for the Petitioner sought only an order for a new trial. A retrial is ordered.

[75] Of course, the question whether there is to be a retrial is a matter within the sole discretion of the director of public prosecutions. No doubt the director will have due regard to the inconsistencies in the evidence of the state witnesses recounted in these reasons, and to the time that has elapsed since the murder, when exercising that discretion.

Appeal allowed.