PRAVEEN RAM v STATE (CAV0001 of 2011S)

SUPREME COURT — CRIMINAL JURISDICTION

GATES P, MARSOOF and CHANDRA JJ

12 October 2011, 9 May 2012

Criminal law — procedure — directions to assessors — defences — provocation — availability of alternative defence or verdict — where no direction given to assessors on defence of provocation — witnesses — prosecution witnesses — inconsistent evidence — where evidence irreconcilable — miscarriage of justice — circumstances involving miscarriage — verdict unsafe, unsatisfactory and unsupported by evidence — Administration of Justice Decree s 8 — Coroners and Justice Act — Court of Appeal Act s 23(1) — Crimes Decree — Criminal Procedure Ordinance s 84 — Criminal Procedure Code (Amendment) Ordinance — Criminal Procedure Code s 299(2) — Criminal Procedure Decree s 237 — Existing Laws Decree s 2(a) — Penal Code ss 33, 199, 200, 203, 204 — Homicide Act s 3 — International Covenant on Civil and Political Rights Art 9(3) — Supreme Court Act s 7(2) — Supreme Court Act ss 22, 24 — Universal Declaration of Human Rights Art 8.

Courts — appellate courts — supervisory jurisdiction — evaluation of evidence — duty to make independent assessment of evidence

The petitioner was convicted of the offence of murder and was sentenced to life imprisonment after a trial before a judge and three assessors. On appeal, the Court of Appeal affirmed the conviction and sentence. The petitioner sought special leave to appeal to the Supreme Court. The issues in the Supreme Court were:

1. whether the Court of Appeal correctly approached its task in considering whether the trial judge erred in not directing the assessors on the defence of provocation;

2. whether the Court of Appeal erred in its duty to consider whether the trial judge had failed to direct the assessors carefully and in detail on the issue of inconsistent statements made by prosecution witnesses; and

3. whether the Court of Appeal erred in failing to make an independent assessment of the evidence before affirming the verdict.

Held –

(1) It is the paramount duty of the trial judge to decide whether in the state of the evidence in a case, the assessors should be instructed on the availability of any alternative defence or verdict.

(2) The trial judge has a duty to direct the jury or assessors to consider an alternative verdict if there is sufficient evidence placed before the jury or assessors which would justify a direction that they should consider it. The fact that counsel for the defence does not raise any alternative defence or oppose any direction being made on the alternative verdict does not relieve the trial judge of that duty.

Mancini v Director of Public Prosecutions [1942] AC 1; *Regina v Acott* [1997] 1 All ER 706, considered.

Regina v Coutts [2006] 1 WLR 2154, followed.

(3) There was insufficient evidential basis for the making of any direction on self-defence or provocation.

Mancini v Director of Public Prosecutions [1942] AC 1, considered.

(4) The Court of Appeal correctly approached its task when considering whether the trial judge erred in omitting to direct the assessors on the defence of provocation.

(5) The trial judge adequately directed the assessors on the irreconcilability of the testimony of the prosecution witnesses with the agreed facts as well as inconsistencies in their testimony with their prior statements, and the Court of Appeal properly dealt with the direction on appeal.

Singh v The State [2006] FJSC 15, applied.

Regina v Golder [1960] 1 WLR 1169, followed.

(6) A substantial miscarriage of justice may occur in cases in which a trial judge has adequately and properly directed the assessors.

Hemapala v Queen [1963] AC 859; *Dhalamini v King* [1942] AC 583; *Subramaniam v Public Prosecutor* [1956] 1 WLR 965; *Solinakoroi v State* [2006] FJSC 7, considered.

(7) Significant delay in bringing a case to court for trial may result in a substantial miscarriage of justice.

Seru v State [2003] FJCA 26; *Nalawa v State* [2010] FJSC 2, considered.

(8) The function of the Court of Appeal or Supreme Court in evaluating and making an independent assessment of the evidence is of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of the evidence.

(9) The Court of Appeal failed to perform its duty to make an independent assessment of the evidence before affirming the verdict of the High Court.

Morris v Queen [1987] HCA 50, followed.

(10) It was not open to a trial judge sitting with assessors to be satisfied beyond reasonable doubt that the accused was guilty of murder.

(11) The verdict of the High Court was unsafe, unsatisfactory and unsupported by evidence, and gave rise to a miscarriage of justice.

Special leave to appeal granted, appeal allowed conviction and sentence quashed.

Cases referred to

Bedder v Director of Public Prosecutions [1954] 1 WLR 1119; *Holmes v Director of Public Prosecutions* [1946] AC 588, considered.

Bullard v Queen [1957] AC 635; *Chamberlain v Queen* (No 2) (1984) 153 CLR 521; *Chidiac v R* [1991] HCA 4; (1991) 171 CLR 432; *Heron v R* (2003) 197 ALR 81; *Lee Chun-Chuen v Queen* [1963] AC 220 (PC); *Mahilikilili Dhalamini v The King* [1942] AC 583 [PC]; *Pemble v R* [1971] 124 CLR 107; *Phillips v R* [1969] 2 AC 130; *Ram Bali v Regiman* [1960] 7 FLR 80; *Ram Lal v Regina* (Criminal Appeal No 3 of 1958); *Regina v Acott* [1997] 1 All ER 706 [1997] 1 WLR 306; *Regina v Coutts* [2006] 1 WLR 2154; *Regina v Duffy* [1949] 1 All ER 932; *Regina v Governor of Pentonville Prison, ex p. Alves* [1993]284 AC 284; *Robert Smalling v Queen* [2001] UKPC 12; *Sachida Nand Mudaliyar v The State* CAV 0001.2007 [2008] FJSC 25; *Shiu Prasad v Regina* [1972] 19 FLR 68 at 71; *Stingel v R* [1990] 171 CLR 312; *Swadesh Kumar Singh v State* [2006] FJSC 15; *Tej Deo v State,* Criminal Appeal No CAV 0017 of 2008S (18th October 2010); *Van Dem Hoek v Queen* [1986] 161 CLR 158; *Von Starck v Queen* [2000] 1 WLR 1270; *Whitehorn v Queen* [1983] 152 CLR 657, cited.

R. Naidu instructed by *Naidu Law* for the Petitioner.

S. Puamau instructed by *Office of the Director of Public Prosecution* for the Respondent.

[1] Gates P. have read and agree with the succeeding judgment of Marsoof JA.

[2] At the end of the day, the foundations for the conviction were found to be insecure and insufficient. The conviction was unsafe. The testimony of the two main witnesses who did come forward was significantly inconsistent. The initial investigation had lapsed and then later was brought back to life again. Witnesses had therefore to recollect events going back over a long period. The paucity of evidence may have had its origin in the reluctance amongst friends of the family and neighbours to rake over old coals. But this is mere surmise.

[3] The doubts could not be resolved. However no criticism should be made of the judge's handling of the trial.

[1] Marsoof JA. The Petitioner has sought special leave to appeal from a judgment of the Court of Appeal (Inoke JA, Calanchini JA and Temo J) dated 31st March 2011, affirming the conviction and sentence imposed on him for the murder of his father, Paras Ram, by the High Court of Fiji Islands at Suva. He was charged with the offence of murder under section 199 of the Penal Code, Cap 17, and tried in the High Court of Suva before three assessors from 22nd September to 1st October 2008. The assessors unanimously found him guilty as charged, and the trial judge (Daniel Goundar J), agreeing with the assessors, convicted him and sentenced him to life imprisonment in terms of s 200 of the Penal Code with no minimum term fixed, pursuant to s 33 of the said Code.

[2] The deceased died on 25th July 2000, allegedly after the Petitioner struck him a single blow on the head with an iron rod on 22nd July 2000. The Petitioner, who was 18 years of age at the time of the death of his father, and 26 years old at the time of his conviction, had consistently denied hitting his father, and alleged that the deceased came by his injuries which ultimately caused his death, when he fell on a concrete bridge on the driveway to his house.

The factual background

[3] In view of the somewhat complex facts of this case which have a bearing on the matters on which special leave to appeal is sought, it will be useful to outline in some detail, the factual background of this case.

[4] The deceased, who was employed as a barber, lived with his wife, three daughters and the Petitioner, who was his only son, in his home at Nanuku Settlement, Vatuwaqa. On Saturday, 22nd July 2000, on which fateful day the Petitioner is alleged to have dealt the fatal blow on the deceased, the latter had not gone to work. After spending a little time in the morning sharing a quarter bottle of gin with his friend Salesh Prasad seated on a bench outside the barber shop where he was employed, he had proceeded by taxi to a supermarket in Nabua, where Salesh Prasad bought a half bottle of gin, and they congregated in another friend's home in Nacara Street, Vatuwaqa, to enjoy the gin. It is in evidence that at about 2 pm, Salesh Prasad took a taxi and dropped the deceased off at the junction of the Society for the Blind, fairly close to the deceased's home.

[5] The evidence relating to how the deceased spent his time between 2 pm and 6 pm on the date of the incident is somewhat contentious and uncertain, and the agreed facts are of no assistance in this regard.

[6] Several witnesses called by the prosecution adverted to the movements of the deceased between 2pm and 6pm on 22nd July 2000. Sanjay Nand, who lived four houses away from the deceased's, testified in court that he escorted the deceased to his home shortly after 2 pm on that day, and that the deceased smelt heavily of liquor at the time. Mereani Tinai, whose house is two houses away

from the deceased's, stated in evidence that on that Saturday afternoon, she saw the deceased walk past her house 3 times, first at 2 pm on that day, when Sanjay Nand escorted the deceased towards his house, thereafter between 5 pm and 6 pm in the afternoon, when the deceased walked alone towards the road carrying a plastic bag, and finally when the deceased returned home. Another neighbour, Maya Reddy, testified that on that day, at about 5.30 pm almost at the time he returned home after work, the deceased visited his house and asked for a place to stay, and he offered him a bed, which he occupied for about 4 to 5 minutes and left. He said that the deceased was drunk and "he couldn't walk straight."

[7] On the basis of the above testimony, the State attempted to make out a case that when the deceased returned home at 2 pm or thereabout on that fateful day, he was chased away by his wife and the Petitioner, who took objection to the deceased's serious addiction to liquor.

[8] However, the wife of the deceased, Sumintra Wati, who too was a witness called by the State, testified that the deceased did not return home till 6 to 6.30 pm after setting off in the morning saying that he was going to work. Under cross-examination, she said that the deceased got drunk almost every day and when so drunk, he could not walk properly and "he used to fall down" and got hurt. She denied the suggestion made by Counsel for the State that she and the Petitioner chased the deceased from home. The testimony of Subashini Wati, a daughter of the deceased, who was called by the Defence, was in the same lines, and the evidence of these witnesses is consistent with the testimony of the Petitioner in this respect.

[9] The State relied heavily on the testimony of Timoci Delai and Mesake Ravui, who had testified at the trial that they heard an argument between the deceased and the Petitioner which emanated from the deceased's house, and saw the Petitioner hit the deceased on the head with an iron rod while they were in the compound of the house. They had also stated in evidence that upon being hit, the deceased fell down bleeding from the head. None of the other witnesses in the case claimed that they saw the deceased being hit by the Petitioner.

[10] In this case, the Petitioner himself gave evidence, and denied that he had dealt the fatal blow on his father. He testified that his father used to take liquor almost every day, but he did not have any ill feelings towards his father, whom he fondly called "daddy." He said that on the day the incident took place, he was waiting at the door of the house and saw his father walking towards the house after work, but then he lost track of him and went towards the compound and saw the father lying on a concrete bridge bleeding from the head. He said that his father was heavily drunk, but he died of injuries caused to his head when he fell on a concrete bridge on the approach to the house, and not due to any act of the Petitioner. In the course of his cross-examination, he admitted that he had told the police in his caution interview that when drunk his father made problems for his mother, and occasionally, assaulted her. In re-examination, he clarified that these incidents of assault had taken place when he was very young, but he had not seen his father assaulting his mother in the year 2000.

[11] An intriguing feature of the trial was that despite the mutual inconsistency of the testimony of the two State witnesses, Timoci Delai and Mesake Ravui with the testimony of the other State witness Sumintra Wati, the trial judge had indicated to Counsel that he intended to deal with the question of provocation in his summing-up, even though the defence of provocation had not been taken up by the Defence. However, the trial judge refrained from including in his

summing-up any directions on these alternate defences, since the Counsel for the State as well as the Counsel for the Defence had vehemently objected to any directions being made in this regard.

[12] The Petitioner was convicted on 1st October 2008 as already noted after a trial which lasted 7 days at the High Court of Fiji in Suva, for the offence of murder, and was sentenced to life imprisonment. By its unanimous judgment dated 31st March 2011, the Court of Appeal affirmed the conviction and sentence, and the Petitioner seeks special leave to appeal against the said decision of the Court of Appeal.

Special Leave to Appeal

[13] Although at the very commencement of the hearing, Ms Puamau, who appeared for the State, conceded that this is a proper case for the grant of special leave to appeal on the question of provocation, this Court has considered the question independently, in the light of the imperative provisions of s 7(2) of the Supreme Court Act No 14 of 1998 and s 8 of the Administration of Justice Decree 2009.

[14] Section 8(1) of the Administration of Justice Decree confers on The Supreme Court the exclusive jurisdiction, "subject to such requirements as prescribed by law", to hear and determine appeals from all final judgments of the Court of Appeal, and s 7(2) of the Supreme Court Act No 14 of 1998, sets out stringent criteria for the grant of special leave to appeal in the following manner:-

"*In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-*

(a) a question of general legal importance is involved;

(b) a substantial question of principle affecting the administration of criminal justice is involved; or

(c) substantial and grave injustice may otherwise occur."

[15] The Petitioner has sought special leave to appeal against the decision of the Court of Appeal on the basis of several questions set out in paragraphs 5, 6 and 7 of his Petition for Special Leave to Appeal dated 11th May 2011. Having examined the said questions in the light of the extraordinary facts of this case and the legal provisions set out above, I am of the opinion that it would suffice if special leave to appeal is granted with respect to the following questions:-

(a) Did the Court of Appeal correctly approach its tasks when considering whether the trial Judge erred in not directing the assessors on the defence of provocation on the basis that both the Defence and the State had opposed the giving of such direction, and the giving of such direction would have undermined the accused's line of defence?

(b) Did the Court of Appeal err in its duty to consider whether the trial judge had failed to direct the assessors carefully and in detail on the issue of inconsistent statements made by Timoci Delai and Mesake Ravui, who were prime prosecution witnesses?

(c) Did the Court of Appeal err in law by failing to make an independent assessment of the evidence before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence, giving rise to a grave miscarriage of justice?

I am of the opinion that these questions are of general legal importance and are proper questions for grant of special leave to appeal. I am firmly of the view that question (a) also involves a substantial question of principle affecting the administration of criminal justice, and questions (b) and (c) are also necessary to avoid the occurrence of substantial and grave injustice.

The Defence of Provocation

[16] The first question that has to be determined in this appeal is whether the Court of Appeal correctly approached its tasks in considering whether the trial Judge erred in not directing the assessors on the defence of provocation in the context that the Defence and the State had opposed the giving of such direction, and that any direction on provocation would have undermined the accused's line of defence.

[17] Following the closing addresses of Counsel, on 29th September 2008 the trial judge invited the assessors to leave the court room, and in their absence, informed counsel that having considered the evidence of the two prosecution witnesses Timoci Delai and Mesake Ravui, he proposed to include in his summing-up to the assessors, directions on self-defence and provocation. He explained that "if the assessors are satisfied beyond reasonable doubt that Timoci's and Ravui's evidence is true, then there is evidential basis for the proposed directions." (FCA Record, page 284).

[18] Objection was taken by the State as well as the Defence to the proposed inclusion of directions on self-defence and provocation in the summing-up, and in particular, the Counsel for the Defence in his submissions filed on 30th September 2008, contended that there was no reasonable likelihood of either of these pleas succeeding, and that on the contrary, the proposed directions might undermine the defence case, which was that the deceased's death was caused by certain head injuries sustained due to a fall causing blood clotting on the right side of the brain, which were aggravated by the condition of cirrhosis of the liver from which the deceased was already suffering.

[19] In these circumstances, the trial judge refrained from making any directions on self-defence or provocation in his summing-up to the assessors. On 1st October 2008, the assessors returned with a unanimous opinion of guilty on the count of murder as charged, and the trial judge accepted the opinion of the assessors and found the Petitioner guilty of murder.

[20] On appeal, the Court of Appeal agreed with the trial judge's decision, and pointed out that it is in line with the reasoning of this Court in *Tej Deo v The State* , Criminal Appeal No CAV 0017 of 2008S (18th October 2010), in which this Court had observed that-

> "The law requires the trial judge to direct the jury fully and correctly if on the evidence a defence is raised. That is subject to an exception. If there is conflict between the defence that the defendant through his counsel is putting to the jurors or assessors, and some other defence theoretically available on the evidence, *the trial judge should only put the defence not being put, if he has ascertained that there is no objection from defence counsel.*"(*Emphasis added*)

[21] It is obvious that the trial judge in the present case was guided by the above quoted *obiter dictum* from the judgment of this Court in *Tej Deo,* which was a case involving the defence of intoxication in which this Court refused special leave to appeal from a decision of the Court of Appeal on the basis that the exposition of the law made by the Court of Appeal in the context of the facts of the case was "correct and uncontroversial". This Court in that case did not have to look closely at the question of the trial judge's duty to direct the assessors, nor was it intended by the above quoted passage to impose upon the trial judge, any imperative duty to consult counsel before directing the assessors on the availability of an alternate defence.

[22] It was submitted by Mr Naidu, who appears for the Petitioner, that *Tej Deo* was wrongly decided in regard to this issue, and that the Court of Appeal in the present case too fell into error by adopting the reasoning of this Court in *Tej Deo*. He contended that the omission on the part of the trial judge in the present case to make an appropriate direction to the assessors on the question of provocation, despite there being sufficient evidence from two prosecution witnesses suggestive of the said defence, was a grave error. He submitted that this omission on the part of the trial judge eventually led to a serious miscarriage of justice insofar as it prevented the alternative defence of provocation, which could have resulted in a verdict of manslaughter, being put to the assessors. He invited our attention to the following observation of Viscount Simon LC in *Mancini v Director of Public Prosecutions* [1942] AC 1 at 7-

> "The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defense) *does not relieve the judge from the duty of directing the jury to consider the alternative*, if there is material before the jury which would justify a direction that they should consider it". (*Emphasis added*)

[23] Mr Naidu also submitted that the principle so enunciated in *Mancini* was applied in decisions such as *Bullard v R* [1957] AC 635 and *Von Starck v R* [2000] 1 WLR 1270. He specifically invited our attention to the words of Lord Tucker in *Bullard*, wherein in disposing of an appeal to the Privy Council from a decision of the Supreme Court of Jamaica, he said at page 242 that it has long been settled law that "if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and *whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked*, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked".

[24] Mr Naidu also referred us in the course of his submissions to the following observation of Lord Clyde in *Von Starck v R* [2000] 1 WLR 1270 at 1275-

> "The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defense in a criminal trial. In particular, counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration, in a fair and balanced manner, the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place *before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial, whether or not they have all been canvassed by either of the parties in their submissions.* It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them" (*Emphasis added*)

[25] The leading authorities on the duty of the court to leave alternative verdicts in the hands of the jury are the decisions in *Lee Chun-Chuen v R* [1963] AC 220 (PC) and *R v Coutts* [2006] 1 WLR 2154 [HL]. In the first of these cases, the Privy Council recognised the dilemma faced by an accused running other defences which could only be weakened by the admission of a loss of self-control, and observed at page 233 that if the facts "suggest a possible loss of

self-control, a jury would be entitled to disregard even an expressed denial of loss of temper, especially when the nature of the main defence would account for the falsehood." The court stressed that an accused should not be convicted for murder simply because he has lied. Similarly, in *Coutts* the appellant who was charged with murder took up by way of defence, the position that the death was a tragic accident, which meant that any suggestion of provocation would have undermined that defence. The trial judge did not leave to the jury the alternative defence of manslaughter, and the appellant was convicted. The House of Lords allowed the appeal. Lord Bingham, with whom the other Law Lords agreed, set out the relevant principles in paragraph 23 of the opinion as follows:-.

> "The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, *but irrespective of the wishes of trial counsel*, any obvious alternative offence which there is evidence to support." (*Emphasis added*)

[26] It was also submitted by Mr Naidu that the principle enunciated in *Mancini* has also been followed by the High Court of Australia in decisions such as *Pemble v R* (1971) 124 CLR 107, *Van Den Hoek v R* (1986) 161 CLR 158 and *Stingel v R* (1990) 171 CLR 312. In *Pemble v R* (1971) 124 CLR 107, Barwick CJ had at 117-118 emphasised that the fact that counsel for the defence did not rely on available evidence to take up a particular defence "did not relieve the trial judge of the duty to put to the jury with adequate assistance any matters on which the jury, upon the evidence, could find for the accused." Mr Naidu also invited our attention to the following words of Kirby J in *Heron v R* (2003) 197 ALR 81 at paragraph 29, -

> "The obligation of the trial judge, so stated is supported by much authority both in this country and overseas. The question is therefore whether, in the particular case, there is evidence of provocation fit to be left to the jury. If there is, the trial judge's duty is clear. *It is not controlled by the way the case was fought at trial*". (*Emphasis added*)

[27] Ms Puamau, who appears for the State, has stressed that since the Defence had not only refrained from taking up the defence of provocation but had also objected to the trial judge including any directions on provocation in his summing-up, the Defence cannot now be heard to complain. She submitted that post-1957 decisions of English courts should be viewed with caution, as s 3 of the Homicide Act 1957 sought to modify the principles of the Common Law of England, which apply in the Fiji Islands in a pure form untrammelled by statutory modifications. I note that the law in other common law jurisdictions including Australia has also undergone legislative modification, and in England the plea of provocation has been replaced by the Coroners and Justice Act of 2009, by a much broader defence of 'loss of self control'.

[28] It is in this context noteworthy that "the common law, the rules of equity and the statutes of general application which were in force in England at the date when Fiji obtained a local legislature, that is to say, on the second day of January, 1875," continue to apply in the Fiji Islands as provided in s 22 of the Supreme Court Act (Cap 13 of the 1978 Edition) subject to the qualification set out in s 24 of the said Act. All laws that were in force in Fiji immediately before the 29th day of May 2000 have been kept alive by s 2(a) of the Existing Laws Decree of 2000.

[29] There can be no doubt that only so much of the common law, the rules of equity and the statutes of general application which were in force in England "on the second day of January, 1875" apply in Fiji subject to such limitations, modifications and qualifications set out in s 24 of the Supreme Court Act and

s 2(a) of the Existing Laws Decree. s 3 of the Homicide Act 1957 and other post-1875 English legislation that sought to modify the principles of the English common law, as well as the decisions of the English courts that applied the principles of the common law as modified by such legislation, will therefore have no application in the Fiji Islands. The pinciples of the common law in its pure form, without any of the refinements, modifications or other changes brought about by English legislation, apply in the Fiji Islands subject to local legislation, in particular, the provisions of the Fiji Penal Code, Cap 17.

[30] In this connection, it is pertinent to note that as was observed by the Judicial Committee of the Privy Council in *Phillips v R* [1969] 2 AC 130, at 133-

> "The only changes in the common law doctrine of provocation affected by the Offences against the Person (Amendment) Law (Jamaica), 1958 and the Homicide Act, 1957 of the United Kingdom, were (1) to abolish the common law rule that words unaccompanied by acts could not amount to provocation, and (2) to leave exclusively to the jury the function of deciding whether or not a reasonable man would have reacted to the provocation in the way in which the defendant did, and those two changes are inter-related."

[31] It follows that the question whether on the evidence led in a case, there is justification for including in the summing up to the jury or the assessors a direction on provocation or some other such defence that could reduce the verdict from one of murder to one of manslaughter, has been and remains a matter for the trial judge, and s 3 of the Homicide Act did not touch that issue. Lord Steyn, in the course of his illuminating judgment in R *v Acott* [1997] 1 All ER 706; [1997] 1 WLR 306 [HL], after adverting to s 3 of the Homicide Act, went on to demarcate the line that separates the function of the trial judge from the exclusive province of the jury or the assessors after this legislative refinement, and made the following pertinent observation -

> "After the adoption of the reasonable man test in the second half of the last century [19th century], judges withdrew cases where the defendant wished to rely on provocation on the basis of rules or supposed rules which were judicially developed……Plainly proportionality was a highly relevant matter to a defence of provocation. But the perceived mischief was that judges withdrew cases from the jury on the ground of fixed rules of law. In *Director of Public Prosecutions v Camplin* [1978] AC 705 the House of Lords held that s 3 abolished all previous rules linked with the objective requirement as to what can or cannot amount to provocation: see p 716C, *per* Lord Diplock. At the same time s 3 abolished the power of the judge to withdraw provocation as an issue on the ground that there was no evidence on which the jury could find that a reasonable man would have been provoked as the defendant was: Reg v Camplin supra. Henceforth the objective requirement was to be regarded as an issue of fact, or, more realistically as a matter of opinion, within the sole province of the jury. *But importantly, in the context of the present appeal, it remained the duty of the judge to decide whether there was evidence of provoking conduct, which resulted in the defendant losing his self control*." (*Emphasis added*)

[32] The reasoning of Lord Steyn was followed by Lord Bingham of Cornhill, who delivered the opinion of the Privy Council in an appeal from Jamaica in *Robert Smalling v The Queen* [2001] UKPC 12. In the course of his opinion, after referring to Bullard v The Queen, Lord Bingham observed-

> This authority recognises the acute practical dilemma facing a defendant who may have an arguable defence of provocation, giving possible ground to support a conviction of manslaughter instead of murder, but who chooses to deny participation in the killing altogether. Justice requires that consideration be given to a possible defence disclosed

by the evidence even if, for reasons good or bad, the defendant chooses not to advance it. *Before the judge can properly invite the jury to consider a defence of provocation, there must be evidence fit for the jury's consideration that the defendant was provoked to lose his self- control and act as he did.*" (*Emphasis added*)

[33] The post-1957 decisions in *Chun-Chuen*, *Acott* and *Smalling* make it abundantly clear that even under s 3 of the Homicide Act of 1957, the trial judge retained the discretion to decide whether there was sufficient justification to direct the jury on the question of provocation. Be that as it may, as far as the position in the Fiji Islands is concerned, as already noted, the changes in the English common law brought about by s 3 of the Homicide Act of 1957 and other legislation enacted in England after 1875 have no application, and there cannot be any doubt that under the common law as applied in Fiji, *it is the paramount duty of the trial judge to decide whether in the state of the evidence in a case, the assessors should be instructed on the availability of any alternative defence or verdict.*

[34] There remains the question whether in all the circumstances of the instant case, the trial judge had discharged his paramount duty of properly instructing the assessors. Given that ours is an adversarial system where the parties and their counsel take the fullest responsibility for the conduct and presentation of their causes, the trial judge cannot be faulted, in a case of exceptional difficulty, if he consults counsel, and gives his careful consideration to their views. However, the fact that a defending counsel did not raise any alternate defence, or as in the instant case, oppose any direction being made on such a alternative verdict, does not relieve the judge from the duty of directing the jury or the assessors to consider the alternative, *if* there is sufficient evidence placed before the jury or assessors which would justify a direction that they should consider it. As Lord Bingham observed in *R v Coutts* [2006] 1 WLR 2154 [HL] at paragraph 23, the public interest in the administration of justice demands that where there is sufficient evidence to suggest any obvious alternate verdict, the trial judge should consider it his paramount duty to include the same in his summing-up, *subject to any appropriate caution or warning*, irrespective of the wishes of trial counsel.

[35] Deciding whether or not directions on possible alternative verdicts should be included in the summing-up may often prove to be a difficult question for a trial judge, given the complexities of the factual circumstances in which such questions might arise in a particular case. In *Mancini* **v Director of Public Prosecutions** [1942] AC 1 at 12, Viscount Simon L.C set out the following pertinent guidelines which can be of value to any trial judge in a common law jurisdiction such as Fiji:-

"If the evidence before the jury at the end of the case does not contain material on which a reasonable man could find a verdict of manslaughter instead of murder, it is not a defect in the summing-up that manslaughter is not dealt with. Taking, for example, a case in which no evidence has been given which would raise the issue of provocation, *it is not the duty of the judge to invite the jury to speculate as to provocative incidents, of which there has been no evidence and which cannot be reasonably inferred from the evidence.* The duty of the judge to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for *it is on the evidence, and the evidence alone, that the prisoner is being tried*, and it would only lead to confusion and possible injustice if either judge or jury went outside it." (*Emphasis added*)

[36] A trial judge who has to grapple with the question as to whether in a given case, a direction on one or more alternative defences should be included, may find solace in the following observation of Lord Steyn in *R v Acott* [1997] 1 All ER 706 [1997] 1 WLR 306 [HL] at 313-

> "What is sufficient evidence in this particular context is not a question of law. Where the line is to be drawn depends on a judgment involving logic and common sense, the assessment of matters of degree and an intense focus on the circumstances of a particular case. It is unwise to generalise on such matters: *it is a subject best left to the good sense of trial judges*. For the same reason it is not useful to compare the facts of decided cases on provocation with one another." (*Emphasis added*)

[37] Bearing these principles in mind, I have given careful consideration to the submissions made by counsel, in the context of the applicable law. Mr Naidu has contended that there is sufficient evidence in this case, furnished by the prosecution witnesses Delai and Ravui, to justify a direction on provocation. He has stressed that the alleged violent behaviour of the deceased towards the Petitioner and his mother, if not on the day that he was allegedly attacked, then in the years leading up to that day, amounted to provocation which would have required in law appropriate directions for the alternate verdict of manslaughter.

[38] Ms Puamau has invited our attention to the principles of English common law which existed prior to the Homicide Act of 1957 as reflected in the decision of the House of Lords in *Mancini v Director of Public Prosecutions* [1942] AC 1 as well as the decisions of this Court on the various elements of provocation including the character of "suddenness", and has further submitted that the facts of this case did not fall within the parameters of sections 203 of the Fiji Penal Code, Cap 17.

[39] Before considering the provisions of the Penal Code and the local decisions, it might be instructive to look at the decision of the House of Lords in *Mancini v Director of Public Prosecutions* [1942] AC 1 which fairly well settled some of the contentious issues in the common law of provocation, in the context of a factual scenario which had some resemblance to what occurred in the instant case. First, the provocation had to be such as to temporarily deprive the person provoked of the power of self-control, as a result of which he committed the unlawful act which caused death. Secondly, the provocation had to be such as would have made a reasonable man act in the same way. These two requirements are commonly called the subjective and objective elements of the defence respectively.

[40] In *R v Duffy* [1949] 1 All ER 932 the gist of the defence of provocation was encapsulated by Devlin J. in a single sentence in his summing-up, which was afterwards treated as a classic direction to the jury:

> 'Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.'

[41] It must be noted that two decisions of the House of Lords subsequent to *Mancini* added glosses to these principles. First, in *Holmes v Director of Public Prosecutions* [1946] AC 588 it was decided that mere words could not constitute provocation, whatever their effect upon the reasonable man might have been. Secondly, in *Bedder v Director of Public Prosecutions* [1954] 1 WLR 1119 it was decided that the 'reasonable man' is a wholly impersonal fiction to which no special characteristic of the accused should be attributed. Difficulties involving

the application of the test of the "reasonable man", in the context of the defence of provocation, have also been stressed in subsequent English decisions.

[42] Section 203 of the Fiji Penal Code, Cap 17, closely following the pre-1957 English common law principles highlighted above, provides that-

> "When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by *sudden provocation* as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only."(*Emphasis added*)

The above quoted provision of the Penal Code has to be read with the definition of provocation found in s 204 of the Penal Code. The latter section has explained that, "except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an *ordinary person*, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, *to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered*." It is worth noting that the Fiji Penal Code has avoided the problems associated with the application of the test of the "reasonable man" by adopting the more acceptable test of the "ordinary person". Although these provisions of the Penal Code were recently examined by this Court in *Solinakoroi v The State* CAV 0005U.2005S [2006] FJSC 7, that was in an entirely different scenario, where it was alleged that the provocation was offered not to the accused but in his presence to another person to whom he stands in a 'fraternal relation'.

[43] The question that arises in this appeal is whether there was sufficient evidence in this case to suggest that the Petitioner caused the death of the deceased in the heat of passion caused by *sudden provocation* having reacted to a wrongful act or insult of the deceased which was of such a nature as to be likely to *deprive an ordinary person of the power of self-control* and to induce him or her to commit an assault before there is time for cooling of the passion so aroused. In this context, it is noteworthy that although in *Holmes* the common law was construed to insist that mere words unaccompanied by acts could not amount to provocation, that rule may not prejudice Mr Naidu's cause as Timoci Delai has testified that he saw the Petitioner being punched by the deceased prior to being hit with an iron rod. Although Mesake Ravui did not advert to any such provoking act of a physical nature on the part of the deceased, he did concede that there had been an argument between the Petitioner and the deceased, but there is a dearth of evidence as to what the argument was all about or even where it took place.

[44] Ms Puamau has submitted that the Court of Appeal had concluded in paragraph 16 of its judgment that the testimony of Delai and Ravui was "wholly incredible, tenuous and uncertain" - which is a matter that will be considered later in this judgment – and arrived at the conclusion that there was insufficient evidential foundation to put the defence to the assessors. Ms Puamau also stressed that before a trial judge is faulted for failing to direct the assessors on provocation, there should be sufficient evidence to satisfy him or her that *all* the ingredients which constitute the defence of provocation exist in the case. She submitted that the Court of Appeal had disagreed with the view of the trial judge that the testimony of Timoci Delai and Mesake Ravui raised the possibility of an alternative verdict of manslaughter on the basis of self-defence and provocation,

and pointed out that in arriving at this finding, the Court of Appeal relied on the following *dictum* of Lord Devlin in *Lee Chun-Chuen v R* [1963] 1 All ER 73 at 79 [1963] AC 220 at 229 (PC)-

> "Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other - particularly in point of time, whether there was time for passion to cool - is of the first importance. The point that their Lordships wish to emphasise is that *provocation in law means something more than a provocative incident. That is only one of the constituent elements.*" (*Emphasis added*)

[45] In the absence of some evidence of the attendant circumstances that led to the argument and the provocative incident, in particular, the nature of the provocation, its intensity and duration, one cannot assume that the act of provocation or insult resulted in the loss of self control by the Petitioner and that his reaction to it was proportionate. Clearly, neither the witnesses for the State including Delai and Ravui nor the Petitioner or the other witnesses called on behalf of the Defence placed before the assessors sufficient material that could justify the trial judge making any direction on self-defence or provocation, and I see no reason to differ from the view of the Court of Appeal that there was insufficient evidentiary basis for the making of any such direction. As Viscount Simon L.C observed *Mancini v Director of Public Prosecutions* [1942] AC 1 at 12, a trial judge is not expected to invite the jury to speculate as to provocative incidents, of which there has been very little evidence.

[46] For these reasons, I am firmly of the opinion that the Court of Appeal correctly approached its task when considering whether the trial judge erred in omitting to direct the assessors on the defence of provocation. I would hold that question (a) on which special leave to appeal was granted in this case, should be answered in the affirmative, and in favour of the State.

Inconsistencies in the evidence for the State

[47] Question (b) on which special leave to appeal has been granted by this Court is: did the Court of Appeal err in its duty to consider whether the trial judge had failed to direct the assessors carefully and in detail on the issue of inconsistent statements made by Timoci Delai and Mesake Ravui, who were prime prosecution witnesses? In paragraph 18 of its judgment of the Court of Appeal, Salesi Temo J, with whom the other judges concurred, dealt with the inconsistent statements in the following manner:-

> "I have carefully considered the learned trial judge's summing up and the appellant's complaint abovementioned. We particularly refer to paragraphs 35 and 38 to 42 of the summing-up. In our view, the learned trial judge had adequately directed the assessors on the inconsistent statements of Timoci and Mesake."

[48] Mr Naidu submitted that the Court of Appeal had failed to deal with the matter carefully and in detail, and proceeded to attack the decision of the court on a two pronged basis: He submitted that (1) the testimony of Delai and Ravui was inconsistent with the agreed facts, and (2) the said testimony was also inconsistent in many aspects with the statements made by them to the police when the incident was fresh in their minds, and these inconsistencies were not explained properly by the trial judge to the assessors.

[49] With regard to the irreconcilability of the testimony of witnesses Timoci Delai and Mesake Ravui with the agreed facts, Mr Naidu submitted that the testimony of these two crucial witnesses for the State was inconsistent with the agreed facts bearing numbers 15 to 18, and that the trial judge had not adequately directed the assessors on these inconsistencies. The aforesaid agreed facts are quoted below:-

> "15. At or around 6.00pm, Sumintra Wati, Subag Wati, Subashni Wati, and Shereshma Wati were inside their house. The Petitioner was standing at the front door.
>
> 16. Shortly afterward, Subashni Wati noticed that the Petitioner had left the front door and had gone down their driveway.
>
> 17. A short while later, the Petitioner came up the driveway, carrying their father who was bleeding from the head.
>
> 18. Summintra Wati ran out of the house and made the deceased sit on the veranda while she washed the blood from the back of the deceased's head. She then called Reena Narayan, a staff nurse who resided at Nanuku Settlement.

[50] Mr Naidu has submitted that above quoted admitted facts are inconsistent with Delai's testimony which was to the effect that the argument commenced from inside and the deceased's house, and the deceased was hit by the Petitioner just outside the house and he fell on the porch as well as with Ravui's evidence that the Petitioner was hit when he was inside the house. Ms Puamau has equally forcefully submitted that the trial judge's direction in regard to these inconsistencies were proper and adequate.

[51] It is manifest that the testimony of Timoci Delai and Mesake Ravui cannot be reconciled with the agreed facts quoted above. However, I note that the learned trial judge had explained to the assessors in paragraph 36 of his summing-up, that the agreed facts are important in that they form part of the evidence in the case and should be accepted as "accurate and true".

[52] Dealing with the evidence which have a bearing on how the deceased could have sustained his injuries, the trial judge instructed the assessors as follows in paragraph 37 of his summing-up:-

> "It is not in dispute that shortly after 5.30 pm, Paras Ram (the deceased) was at Maya Reddy's house, for about 4-5 minutes. According to Maya Reddy, Paras Ram was very drunk and he could not walk straight. Paras Ram walked towards his house. Mereani Tinai said she saw Paras Ram going towards his home when he walked passed her house at around 6 pm. Mereani's house was after Maya Reddy's house but before Paras Ram's house. It is not in dispute that the road from Mereani's house to Paras Ram's house was a mud track. Some part of the track was covered with old motor vehicle tyres, tin, timber and concrete slabs. There were two small bridges on the track. It is not in dispute that around 6 pm Paras Ram sustained a head injury at a place close to his house. It is not in dispute that at around 6 pm, the accused was standing at the front door of his house. Shortly after the accused left the front door and went down the driveway and returned with Paras Ram who was bleeding from his head".

[53] Having carefully examined the inconsistency of the testimony of the two vital witnesses for the State with the agreed facts, I am of the opinion that the directions of the trial judge were impeccable, and the Court of Appeal has properly dealt with this aspect of the appeal. The question whether the assessors could have reasonably arrived at a verdict of guilty on the charge of murder can conveniently be considered later in relation to question (c) on which special leave to appeal has been granted in this case.

[54] The other aspect of the argument of Mr Naidu related to certain inconsistencies between the testimony of these two witnesses and their prior statements to the police. Mr Naidu referring to the testimony of Timoci Delai, submitted that Delai had in the course of his direct examination said that on the day of the incident, he was playing football at about 6 pm when he heard a scream and that co-incidentally, he ran towards the deceased's house to get the ball he had kicked in that direction, and saw the deceased and the Petitioner fighting on the compound of the house in the course of which the Petitioner got hold of an iron rod and hit the deceased, and the deceased fell on the porch. Under cross-examination, he was asked specifically about the argument, and the witness replied that the argument started inside the deceased's house, but he did not know from where the Petitioner picked up the iron rod with which he struck the deceased.

[55] Mr Naidu pointed out that Delai was confronted with the statement made by him to the Police marked 'D10' soon after the incident in 2000 when the facts were fresh in his mind, and his attention specifically drawn to line 19 of that statement wherein he had stated that while playing with the ball, he saw Praveen standing near the door of his house when the deceased was walking towards it, and saw the deceased punch the Petitioner who fell down, picked up an iron rod "which was on the side of the porch" and hit the deceased with it on the head. When so confronted with the statement marked 'D10', the explanation offered by the witness was that he had been told by his parents not to tell the truth to the Police, and later in the cross-examination he also admitted that he "only told the police half the story" because he felt for the deceased's family.

[56] It is significant to note that the statement given to the Police by Timoci Delai in fact falls in line with the consistent position taken by the Petitioner in his caution interview as well as his testimony in court that he stood by the front door of the house when the deceased was returning home, although it did differ from the version of the Petitioner that when his father did not re-appear, he went towards the compound and saw the father lying on a concrete bridge bleeding from the head. The other significant contradiction was that although Delai told the Police that the Petitioner picked up the iron rod which was on the side of the porch, he had testified in Court that he did not know from where the Petitioner picked up the iron rod with which he struck the deceased.

[57] Mr Naidu has also stressed certain inconsistencies between the testimony of Meaki Ravui and his prior statements to the police, which were also marked during his cross-examination. He submitted that the major contradiction was that while in his testimony Ravui said that after having his lunch he was playing kite with Bola and another boy and stopped playing to go towards the deceased's house as he heard an argument from that house, and saw the Petitioner arguing with the deceased and strike him with an iron rod which he picked up from the roof of the house, in his statement to the police he had said that he had been playing kite with Delai and another boy but went home thereafter and while at home he heard his neighbours run towards the deceased's house, and he too joined them. When confronted, he admitted that what he said to the Police was correct.

[58] Mr Naidu submitted that these were very material inconsistencies and infirmities in the testimony of Delai and Ravui, but the trial judge had not properly and adequately dealt with them, and in particular had failed to sufficiently identify these inconsistencies in his summing-up to the assessors,

which omission had not been considered by the Court of Appeal. Ms Puamau responded by submitting that the trial judge had properly directed the assessors in regard to the inconsistent statements of these witnesses.

[59] We note that the trial judge had in paragraph 41 of his summing-up adverted to the inconsistencies referred to by Mr Naidu in the following terms:-

> "Both Timoci and Mesake were cross-examined on their respective police statements to show inconsistencies in their evidence in court. The inconsistencies were pointed out by the defence and you are to take them into account in assessing Timoci's and Mesake's credibility as witnesses. Their police statements are exhibits. I must direct you that the police statements put to these witnesses and admitted by them to be theirs, is not in any way part of the evidence in the trial. You must put the contents of those statements out of your mind when you consider the evidence. *Secondly, if you are satisfied that they did make the statements (remember they admitted making them) and that is inconsistent with their evidence in court, then take that into account in assessing the credibility of these witnesses*." (*Emphasis added*)

[60] We find that the above quoted direction is proper and fair. It is also consistent with the principle of the common law as expressed by Lord Parker CJ in *R v Golder; R v Jones; R v Porritt* [1960] 1 WLR 1169 at 1172 that "when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should……be directed that the evidence given at that trial should be regarded as unreliable." There may be exceptional circumstances in which the testimony of such a witness may be regarded as reliable notwithstanding the prior inconsistent statement, such as where the witness is able to give a convincing explanation for the inconsistency, and it is also noteworthy that in *R v Governor of Pentonville Prison; Ex parte Alves* [1993] AC 284, Lord Goff of Chieveley, with whom the other Law Lords agreed, stressed that "the credibility of evidence given by a witness inconsistent with a statement previously made was a matter for the jury to consider, subject to a proper warning by the judge as to the weight to be attached to the evidence."

[61] It is pertinent to note in this connection that in *Swadesh Kumar Singh v The State* [2006] FJSC 15 at paragraph 51, this Court emphasised that "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. Having said that, this Court also went on to lay down the following guidelines for trial judges:-

> "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. *Firstly, that the explanations are genuine. Secondly, 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*." (*Emphasis added*)

[62] It remains to be seen whether these somewhat stringent guidelines were applied by the trial judge when directing the assessors in the instant case. I note that in paragraph 42 of his summing-up, the trial judge after cautioning the assessors that it is dangerous to blindly accept sworn evidence that conflicts with the earlier statement or statements made by the same witness, and imploring the

assessors to closely examine their evidence before the same is accepted as true, went on to direct the assessors as follows:-

> "In the absence of any sound and convincing explanation in such a situation the only safe practice is to disregard their evidence as too unreliable to place any weight upon it. If however the witness has given an explanation *and you are satisfied that there is a cogent or understandable reason for the previous inconsistent statement,* then while you must treat the evidence with considerable reserve and give it a most thorough examination, *you are entitled to accept it and act upon it if you are convinced of its truth*. You may consider whether given the passage of so much time, Timoci and Mesake could recall events accurately as they allege in light of the fact that they were of a very minor age in 2000". (*Emphasis added*)

[63] It will be recalled that the explanation offered by Timoci Delai, when he was confronted in the witness box with the inconsistent statement he had made to the Police, was that he had been told by his parents not to tell the truth to the Police. On the other hand, when Mesake Ravui was similarly confronted with what he had previously stated in his statement to the Police, he admitted that what he said to the Police was true. Although in the light of the responses of these two witnesses, the ultimate verdict might have been somewhat perplexing, I am inclined to the view that the above quoted direction was proper and fair, and met the standards set out by this Court in *Swadesh Kumar Singh.*

[64] I accordingly hold that the trial judge had adequately directed the assessors on the irreconcilability of the testimony of Delai and Mesake with agreed facts as well as the inconsistencies of their testimony with their prior statements, and the Court of Appeal did not err in its appellate function in this regard. For these reasons, I have no hesitation in answering question (b) on which leave was granted by this Court in the negative.

Duty to make an Independent Assessment of the Evidence

[65] The final matter arising for decision on this appeal is embodied in question (c), which is: Did the Court of Appeal err in law by failing to make an independent assessment of the evidence, before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence, giving rise to a grave miscarriage of justice? It is relevant to note that the same question was raised by the Petitioner in the Court of Appeal as "Additional Appeal Ground No 1" on which leave to appeal had been granted by that court, but with the slight variation that there his contention was that the trial judge had failed in his duty to adequately evaluate the evidence, resulting in a verdict which was unsafe, unsatisfactory and unsupported by the evidence as a whole.

[66] In paragraph 19 of its judgment, the Court of Appeal responded to this ground in one single sentence, which is quoted below:

> "This ground is really an extension of appeal ground (a). It has no merit. This ground also fails."

Ground (a) on which this appeal was argued in the Court of Appeal was that the trial judge had erred in fact and in law in directing the assessors that the Petitioner could be found guilty as charged despite all three elements of that offence (namely, that the accused, acting with malice afterthought, did an unlawful act which caused the death of his father) being not proved. As the Court of Appeal pointed out in paragraph 7 of its judgment, this ground was formulated extremely wide, and did tantamount to a challenge of all the trial judge's directions to the assessors on the three elements of murder highlighted above within parenthesis. However, what the Court of Appeal unfortunately overlooked is that, so formulated the focus of ground (a) argued in the Court of Appeal was on *the directions to the assessors*, and not on *the duty of the trial*

judge to evaluate the evidence on his own, which was the focus of Additional Appeal Ground No 1, on which question (c) above is based.

[67] Mr Naidu has submitted that the Court of Appeal had not seriously looked into the Petitioner's complaint that the trial judge had failed to evaluate the evidence on his own, before agreeing with the opinion of the assessors that the Petitioner was guilty of murder. He submitted that in the circumstances, the Court of Appeal was bound to independently assess the evidence in the case to see whether there had been a miscarriage of justice, which it had failed to do. He invited the attention of Court to s 23(1) of the Court of Appeal Act, Cap 12, which required a verdict to be set aside if it is found to be "unreasonable or cannot be supported having regard to the evidence" unless in its view, "no substantial miscarriage of justice has occurred."

[68] It was Mr Naidu's contention that a grave and substantial miscarriage of justice has resulted from the conviction of the Petitioner by the High Court and the failure of the Court of Appeal to independently assess the evidence in the case and set aside the perverse verdict. He stressed that the central issue in the trial was whether the Petitioner struck the deceased causing his death, as witnesses Delai and Ravui had stated in evidence, or whether the injuries sustained by the deceased were the result of a fall, as alleged by the Petitioner. He contended that the Court of Appeal as well as the trial judge had failed in their duty to decide whether upon the whole of the evidence, it was open to the assessors to be satisfied beyond reasonable doubt that the Petitioner was guilty of murder.

[69] I have in dealing with question (b) earlier in this judgment, noted the mutual inconsistencies between the testimony of witnesses Timoci Delai and Mesake Ravui as well as the several material contradictions that were highlighted in the course of cross-examination between their testimony in court and their respective statements to the police made 8 years earlier just after the incident, when the various details would have been fresh in their minds. Both these witnesses had admitted in their statements to the police that the Petitioner was standing by the front door to his house when the deceased was walking towards his home, but when testifying in court 8 years later, they had said that the argument between the Petitioner and his father had commenced from inside the house and that they saw the Petitioner hit his father on the head somewhere in the front portion of the house or its compound.

[70] It is noteworthy that the trial judge had taken pains to explain to the assessors in his summing-up that testimony inconsistent with prior statements cannot be relied upon unless there are cogent explanations for such inconsistency. The explanation offered by Delai for the inconsistencies of his testimony with the police statements was that he had been advised by his parents not to tell the truth to the police, but Ravui, admitted what he told the police was true, and the mutual inconsistency between these explanations themselves add another dimension further devaluing their evidence.

[71] I note that the trial judge had also explained to the assessors the evidential significance of admitted facts, which is significant in the context that there were serious disparities between the agreed facts, which undoubtedly constitute evidence in the case. What is significant in the context of how the deceased came by his injuries, is that the testimony of Deali and Ravui is altogether irreconcilable with admitted facts 15 to 17, which establish that the Petitioner, who was standing at the front door, went towards the driveway leading towards the house and came up the driveway carrying his father who was bleeding from

the head, a version which is in accord with the testimony of the Petitioner as well as what he had stated in his caution interview.

[71] Mr Naidu has contended with great force that these and other deficiencies in the testimony of Delai and Ravui raise serious doubts about the guilt of the Petitioner, and no reasonable jury could have convicted him for murder without any reliable evidence to establish that the Petitioner hit the deceased. He relied heavily on the decisions of the High Court of Australia in *Whitehorn v R* (1983) 152 CLR 657 and *Chamberlain v* R (No 2) (Azaria Chamberlain Case and Dingo Case) (1984) 153 CLR 521, and submitted that the failure of the trial judge to evaluate the evidence prior to returning a verdict of guilty as charged, and the failure of the Court of Appeal to independently assess the evidence before confirming the said verdict, have given rise to a grave and substantial miscarriage of justice.

[72] Ms Puamau has in her response emphasised that no substantial miscarriage of justice has occurred in this case as the trial judge's summing up has been impeccable, as I have already found, and has placed great reliance on the following statement of this Court in *Sachida Nand Mudaliyar v The State* CAV 0001.2007 [2008] FJSC 25-

> "…..Both the Court of Appeal and this Court have traditionally focused upon the directions given by trial judges to assessors, when considering whether to permit a conviction to stand…."

[73] I cannot agree with the submission of Ms Puamau, as a substantial miscarriage of justice could occur even in cases in which a trial judge has adequately and properly directed the assessors. Such a miscarriage could occur, for instance, as in *Hemapala v R* [1963] AC 859, where the accused had opted for trial by an English speaking jury but the trial was conducted in the Sinhalese language, or as in *Dhalamini v R* [1942] AC 583 [PC], which was an appeal from Swaziland, where on a trial for murder before a Judge and Assessors, the latter had given their opinions to the Judge in private, and not in open Court as required by law. In the latter case, Lord Atkin at page 590 of the judgment observed as follows:

> "What, then, should be the result of a failure… to hold the whole of the proceedings in public? In this country the omission would be a fatal flaw entitling a convicted criminal to have the conviction set aside … Prima facie, the failure to hold the whole of the proceedings in public must amount to such a disregard of the forms of justice as to lead to substantial and grave injustice within the rule adopted by this Board in dealing with criminal appeals"

[74] Similarly, in *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, where the accused was prevented from leading relevant and admissible evidence, a grave miscarriage of justice was found to have occurred. In *Solinakoroi v The State* CAV 0005U.2005S [2006] FJSC 7, the trial judge through a premature ruling made at the end of the prosecution case, shut out any evidence being led by the defence on provocation, and on appeal this Court had no hesitation in setting aside the conviction and ordering a fresh trial.

[75] Significant delay in bringing the case to court for trial could also result in a substantial miscarriage of justice. I note that, although delay has not been urged as a ground of appeal in this case, there had been considerable delay in charging the Petitioner in this case, and the case was taken up for trial only in 2008, long after the alleged offence which was committed on 22nd July 2000. It is noteworthy that a delay of 4 years and 10 months was considered sufficient to

prejudice the accused in *Seru v The State* [2003] FJCA 26, and in *Nalawa v The State* [2010] FJSC 2, CAV 0002.2009, although a different conclusion was reached on the facts, this Court did emphasise the right of every accused to a fair trial without unreasonable delay, which is guaranteed by Article 8 of the Universal Declaration of Human Rights to which Fiji is a party, and Article 9(3) of the International Covenant on Civil and Political Rights, the provisions of which have since been incorporated into the Crimes Decree of 2009.

[76] Apart from the longer wait for justice which could prejudice not only the accused but even the victims of a crime and society at large, such delays affect the efficacy of the judicial system as material witnesses could die or become otherwise unavailable, and the reliability of testimony diminishes with the lapse of time. The trial judge in the instant case had pointed out to the assessors in the course of his summing up the youthfulness of the vital prosecution witnesses Delai and Ravui, and the substantial delay in bringing the case to court, which too could have had a bearing in the inconsistencies and contradictions in their testimony, which are far more serious to be ignored. Unfortunately, Additional Appeal Ground No 1 raised by the Petitioner was not considered at all by the Court of Appeal which declined the opportunity to make an independent assessment of the evidence as a whole, although it had in fact examined the evidence in the context of the questions raised in regard to the adequacy of directions to the assessors under various grounds of appeal.

[77] It is therefore most ironic, to say the least, that in dealing with ground (c) raised in the Court of Appeal involving the question whether the trial judge had erred in law in failing to give the assessors a direction on the defence of provocation, the court observed at paragraph 16 of the judgment as follows:-

> "Unlike in *Alexander Von Starck v The Queen* (supra) the evidence in this case was "wholly incredible, tenuous and uncertain that no reasonable jury could reasonably accept it." The only evidence of alleged provocation in this case came from Timoci Delai (PWB) and Mesake Ravui (PW9). Delai was 12 years old at the time, while Ravui was 9 years old. Delai said, he saw Paras punch his son, Pravin. He saw "Pravin get hold of an iron rod and whack Paros". He saw "Paras and Pravin fighting. Paros fell down on the floor". Ravui said, he heard an argument and went to the place where the argument was coming from. He saw, "Paras and Pravin arguing". He couldn't hear the exact words. He saw "Pravin take an iron rod and hit his father. Pravin hit his father on the head. Paras fell down". The three essential elements of provocation alluded to by Lord Devlin in *Lee Chun-Chuen v Reginam* (supra), were absent…..There was insufficient evidential foundation to put the defence to the assessors."

[78] Just as much as Timoci Delai and Mesake Ravui were the only witnesses who in the course of their testimony adverted to the facts which were relied upon by the Petitioner to challenge his conviction on the ground that the alternate defence of provocation should have been put to the assessors, they were also the only witnesses who had claimed to have seen the Petitioner deal the fatal blow on the deceased. If their evidence was wholly incredible, tenuous and uncertain for the purpose of the defence of provocation, it is even more incredible, tenuous and uncertain to sustain a conviction for murder.

[79] In this connection it is important to note that the trial in this case was in the High Court of Suva before a judge and three assessors. After the Criminal Procedure Ordinance No 23 of 1875 introduced a system of a trail by a judge sitting with assessors as an alternative to trial by jury with respect to certain selected categories of cases involving the native population, trial by jury was abolished altogether by the Criminal Procedure Code (Amendment) Ordinance

No 35 of 1961. The system of trial by a judge and assessors differs in one important aspect from trial by jury, as unlike under the jury system, even the unanimous opinion of the assessors does not bind the trial judge, who is free in appropriate cases, to differ and pronounce his own verdict. Section 84 of the Ordinance of 1875 simply provided that "…….the opinion of each assessor shall be given orally……but the decision shall be vested exclusively in the judge" but s 299(2) of the Criminal Procedure Code, Cap 21, which was in force at the time of the High Court trial in 2008, expressly provided that the trial judge "shall not be bound to conform to the opinions of the assessors". According to the proviso to the said sub-section, when the trial judge disagrees with the majority opinion of the assessors, "he shall give his reasons, which shall be written down and be pronounced in open court, for differing with such majority opinion, and in every such case the judge's summing up and the decision of the court together with, where appropriate, the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court". Although the Criminal Procedure Code has since been repealed, s 237 of the Criminal Procedure Decree of 2009, which replaced the above quoted provision of the Code, follows the same principle and provides that the trial judge "shall not be bound to conform to the opinions of the assessors" and goes on to re-enact that the trial judge shall give his reasons for differing from the opinion of the assessors.

[80] A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirely of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case.

[81] Of course, as was noted in *Ram Lal v Regina* (Criminal Appeal No 3 of 1958), the trial judge must have "very good reasons" for differing from the assessors. In *Ram Bali v Reginam* [1960] 7 FLR 80, this Court emphasised that the trial judge should proceed on "cogent and carefully reasoned grounds based on the evidence before him and his views as to credibility of witnesses and other relevant considerations". This latter case went to the Privy Council, which observed that the trial judge was taking "a strong course" by differing from the unanimous opinion of the assessors. Nevertheless, the Privy Council concluded that as the judge had paid "full heed" to the views of the assessors, his decision was justifiable because it was based upon his own "emphatic conclusions in regard to the evidence". In *Shiu Prasad v Regina* [1972] 18 FLR 68 at 71, it was reiterated that the judge must have "cogent reasons" for differing from the assessors.

[82] The Petitioner complains that the trial judge uncritically agreed with the opinion of the assessors and failed to perform an evaluation of the evidence as a whole before pronouncing his judgment finding him guilty for murder and imposing a sentence of imprisonment for life. Mr Naidu has submitted that in doing so, the trial judge overlooked an important function vested by law on all judges sitting with assessors to evaluate the evidence in the case to ensure that no

miscarriage of justice results from the verdict. In this connection, one may profitably look at the developments that have taken place in other jurisdictions where trial by judge and assessors is in place, or even jurisdictions such as Australia, where a similar review function is performed by the courts albeit in the context of statutory safeguards woven into the jury system. As Mason CJ pointed out in *Chidiac v R* (1991) 171 CLR 432, in the context of the statutory discretion exercised by the trial judge under s 6(1) of the Criminal Appeal Act of 1912 (New South Wales)-

> "The constitutional responsibility of the jury to decide upon the verdict and the advantage which the jury enjoys in deciding questions of credibility by virtue of seeing and hearing the witnesses impose some restraints upon the exercise of an appellate court's power to pronounce that a verdict is unsafe. I use the word "unsafe" as sufficient on its own to designate the basis on which the court exercises its jurisdiction when no procedural irregularity has been established, though I acknowledge that "unsafe or unsatisfactory" may be a composite expression: see Devlin, *The Judge*, (1979), p 158. *It is not the function of the court to substitute itself for the jury and re-try the case. Nor is it for the court to decide whether a verdict is against the weight of evidence. Rather, it is for the court to determine whether there is a significant possibility that an innocent person has been convicted because the evidence did not establish guilt to the requisite standard of proof*" (*Emphasis added*)

[83] What then, is the proper test to be adopted in deciding whether the trial judge had discharged his statutory function? The following words of Gibbs CJ from page 534 of his judgment in *Chamberlain v R (No 2) (Azaria Chamberlain Case and Dingo Case)* (1984) 153 CLR 521 may prove instructive in answering this question:-

> "…the proper test to be applied in Australia is……to ask whether the jury, acting reasonably, must have entertained a sufficient doubt to have entitled the accused to an acquittal, ie must have entertained a reasonable doubt as to the guilt of the accused. *To say that the Court of Criminal Appeal thinks that it was unsafe or dangerous to convict, is another way of saying that the Court of Criminal Appeal thinks that a reasonable jury should have entertained such a doubt.* The function which the Court of Appeal performs in making an independent assessment of the evidence is performed for the purpose of deciding that question". (*Emphasis added*)

[84] The question is whether in the instant case, the Court of Appeal performed its duty to make an independent assessment of the evidence as required by law. It is manifest that the Court of Appeal did not do so, as it was content that "the learned judge had adequately directed the assessors on the inconsistent statements of Timoci and Mesake." The Court of Appeal did not proceed to examine the inconsistencies and make an independent assessment of the evidence. As Mason CJ observed in *Morris v R* (1987) 163 CLR 454at paragraph 22-

> "The making of a careful independent assessment was essential to the making of an informed judgment on the question whether the jury could reasonably convict on the material facts before them. *The Court's duty was to satisfy itself that there was "a sufficiency of legal evidence to satisfy reasonable men to the exclusion of any reasonable doubt*."(*Emphasis added*)

[85] I am not satisfied that there was in this case sufficient legal evidence to satisfy reasonable men to the exclusion of any reasonable doubt of the Petitioner's guilt. On the contrary, it is my considered opinion that upon the whole of the evidence in this case, it was not open for a judge sitting with assessors to be satisfied beyond reasonable doubt that the accused was guilty of

murder. I would accordingly hold that the Court of Appeal erred in law by failing to make an independent assessment of the evidence before affirming the verdict of the High Court which was unsafe, unsatisfactory and unsupported by evidence, giving rise to a grave miscarriage of justice. I answer question (c) in the affirmative, and against the State.

Conclusions

[86] For the aforesaid reasons, I would allow the appeal, and quash the conviction and sentence imposed by the High Court and affirmed on appeal by the Court of Appeal.

[87] The final question that arises on this appeal is whether a fresh trial should be ordered consequent upon the quashing of the conviction and sentence imposed on the Petitioner. Having carefully considered the initial delay in commencing criminal proceedings, the agreed facts in this case that tended to establish the Petitioner's innocence rather than his guilt and the paucity of reliable evidence, I do not think the interests of justice will be furthered by ordering a fresh trial. Accordingly, I direct that a verdict of acquittal be entered.

Chandra JA.

I have read the judgments of Chief Justice Anthony Gates and Justice Saleem Marsoof in draft, and while concurring with the sentiments expressed by the Chief Justice, I agree with the reasoning and conclusions of Marsoof JA.

Appeal allowed.

Michael Wells
Solicitor