a trial judge — Table Assessors' findings of not
ty of murder;

Criminal Law - Murder - 335
confession
Assessors - Opinions of
Criminal Law - Murder - Assessors' role
Criminal Law - Murder - Intent - Inference
- Intoxication
Courts - Practice & Procedure - Judge's role
in summing up

IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No.45 of 1981

Accused convicted of murder. At trial, trial judge chose
disregard the opinion of assessors, one of whom found Appellant
guilty of murder, & the other 2 finding him guilty only of
manslaughter.

Between:

APAKUKI SAUKURU — Appellant

and

REGINAM — Respondent

Vula for the Appellant
Seru for the Respondent

Date of Hearing: 2nd November, 1981
Delivery of Judgment: 27 NOV 1981

JUDGMENT OF THE COURT

Gould V.P.,

The appellant was tried by the Supreme Court of Fiji at Lautoka on a charge of murdering Sarju Prasad s/o Baldeo on the 15th November, 1980. The trial was before a judge and three assessors and on the 2nd July, 1981, the learned judge summed up to the assessors, one of whom then gave the opinion that the appellant was not guilty and the other two were of opinion that he was not guilty of murder but guilty of manslaughter. On the 3rd July, 1981, the learned judge delivered a written judgment in which he did not accept the opinions of the assessors and found the appellant guilty of murder: he imposed the statutory penalty of imprisonment for life.

Under the system of criminal trials in the Supreme Court of Fiji the judge sits with assessors,

whose opinions at the close of the case are to be stated orally, and recorded. By section 299(2) of the Criminal Procedure Code (Cap.21 - Revised Laws of Fiji - Ed. 1978) the judge is then required to give judgment but, "in doing so shall not be bound to conform to the opinions of the assessors:". A proviso to section 299(2) reads (in part):

> "..... when the judge does not agree 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."

This procedure was followed here and the learned judge's "reasons" were incorporated in his written judgment. We will have occasion later to refer to decided cases which provide some guidance in the proper exercise of these particular judicial powers.

The evidence against the appellant as presented by the prosecution fell within very small compass, though once a confession signed by the appellant is accepted (involving the rejection of his case as presented in court) it amounted to a strong case. The deceased was an Indian 52 or 54 years of age. He was found injured but still alive on the 2nd November, 1980, at 11 a.m. by police constable Jone Latianara lying unconscious in some ruined buildings known as the old South Seas Club. He was taken to hospital where he died several days later. He had a number of injuries to the head with haematoma all over the scalp and temporal muscles - mild haemorrhage between covers of the brain, left side of brain swollen and fluid in brain, haemorrhage on left of brain with haematoma 5 cms. in diameter. There was fluid in the lungs and haematoma of the pericardium, in the liver and in the abdomen. The medical evidence indicated four or five blows to the skull, several to the abdomen and several to the chest. The injuries could have been caused by severe blows by a fist. The

brain injuries could not have been caused by a fall. The cause of death was a collection of blood on the left side of the brain increasing pressure within the skull.

An important witness for the prosecution was Sereana Ciba, a barmaid who lived at 5 Leka Street near the old South Seas Club. A group of people had been drinking at a tree seat not far away and at about 5 p.m. she saw the appellant, with an Indian male, approach the ruins of the South Seas Club, and push the Indian into one of the ruined rooms. She saw the appellant put his hand into the Indian's pocket. She raised a call of "police" and the appellant began to push the Indian back to where they had come from. She went to bed that night at about 10 p.m. - 11 p.m. There was no rowdiness from the old South Seas Club but noise of drinking; there were a lot of drunks round the area.

The next aspect of the prosecution's evidence comprises a statement, Ex.P1, which the appellant made to P.I. Govind Raju at the police station on the 19th November, 1980. We would mention here that when Insp. Raju went into the witness box, counsel for the appellant is recorded as saying (in the absence of the assessors) that he was told that the appellant was under the influence of liquor when he made the statement, and referred to prejudicial effect. No specific application for a trial within a trial seems to have been made and the learned judge ruled that it was a matter for the assessors and the evidence would continue in the usual way. No ground of appeal has been formulated or point taken before this Court arising out of this episode.

The statement made by the appellant, who described himself as a professional boxer and also a casual dock worker, was detailed and lengthy. The first part of it was agreed to be correct by the appellant when he gave evidence, and we will convey the content

of that part by quoting a portion of the learned judge's summing up. It reads :

" In it the accused says he had $5.00 between 10 a.m. and 11 a.m. on Saturday 1st November, 1980 and joined a group of males in consuming a carton of beer. After 11 a.m. they pooled money and consumed another carton. The accused contributed $2.00. Then they drank at the Lautoka hotel and the accused joined another group and paid $1.00 towards another carton which they drank under a tree. Then the deceased joined them and gave accused $20.00 to purchase a carton of beer and accused says he gave back the change.

At that stage according to the accused's statement he had spent at least $3.00 of his own money and could not have had more than $2.00 left. If the accused had any money left he was letting other people do the paying and sticking to his $2.00. It must have been around this time that P.W.1, Sereana saw the accused with the deceased near the ruins of the South Seas Club; that is if you accept her evidence. She says it was about 5.00 p.m. and the accused said they finished that carton by 6.00 p.m. or 7.00 p.m. and went back to the Lautoka Hotel.

His statement shows the accused had three or four more glasses of beer which other people purchased. Once again the accused is relying upon others to buy his beer. Was that because he had no money left. Do you think he still had $2.00 in his pocket?

Ex. P.1 shows that at 8.00 p.m. the deceased and the accused went to the beer garden of the Lautoka hotel but did not pay to enter and did not stay there. Accused refused the deceased's invitation to accompany him home and for curry and the deceased departed saying he was taking a taxi home."

The last part of the appellant's statement was made after the interrogating inspector had referred to an earlier statement of the appellant and alleged statements by others. We quote it verbatim :

"Q: Furthermore your friend Sitiveni alias Greeno has made a statement to us that one Mafi told him that you punched that Indian man. What do you say about all this?

A: Silent for about 30 seconds and said 'I can't take it anymore. I must tell the truth and clear out my conscience. I did not mean to kill that Indian man when I went to the Whiskey Town I realise I had no money. I want to borrow money from the Indian man. I came out from the Whiskey Town and went to look for the Indian man I saw him going towards the Taxi Stand. He was at Naviti Street near BPs I call him he came to me. I told him I fixed one girl for him at the Old South Seas Club where he had drank. He came with me. I took him inside one room inside the old South Seas Club and asked him for money. He said to bring the girl first. I got annoyed and punched. I gave him many punches he fell down and I knocked him. He knocked out. I searched his pocket and took out some money. He had $10 note and some loose change left. I took them all out I don't know how much loose change he had with. I took out his shirt, it got torn and left the place. I wrapped the shirt around my head so no one can know me. When I reach the steps beside the M.H. I threw the shirt away and went to spent all the money there. I am very sorry now I did not know this Indian man gonna die. I only wanted to take his money but don't want to kill him. This was all about 9.30 p.m. I feel sorry for this man. I was feeling guilty all the time. I prayed that he should be well but now that he died I am very sorry for him.

Q: How did you know that this Indian man had money left with him?

A: Yes he souted me beer, when he said he was going to get taxi to go home I know he had money. He showed me some money to me when we left the South Seas Club. He had $10 note.

Q: Do you want to say anything else?

A: Whatever I told is the truth. I am honest I am sorry for the Indian man."

The appellant gave evidence on oath and challenged the portion of the statement which we have just quoted. He said the deceased took a taxi to go home and that was the last he saw of him. He himself went home by taxi about 10.30 p.m. - the fare was $2 and he had to borrow $1 from his wife at home to be able to pay it. His wife Lusiana Tanai confirmed this in evidence, putting the time of his arrival at 11.30 p.m., or before midnight.

The defence called one Ane Lupe Tuifagalele (D.W.4) who lived opposite the old South Seas Club. She said that about 6.30 a.m. on Sunday the 2nd November, that is the day following the material day, she went looking for firewood in the vicinity of the Club. She looked into every room but did not enter any; she saw no one lying there. Her companion Siteri did enter the rooms but she did not give evidence.

Another defence witness Vasiti Baravilala (D.W.5) claimed to have seen an Indian man, with two Fijians and a girl Alena late at night (presumably, though not stated to be, the Saturday night in question). She was shown a photograph and said it contained a picture of the Indian she saw. There is no evidence about this but the learned judge made this adverse comment in his summing up :

> "She was shown a photo of the deceased's body and she said he was the man. The photo was not put in but I am directing that it be placed now among the exhibits as Ex.D.1. D.W.5 says she saw a man, whom she did not know; it was night although the streets there are lighted as you know. She had no occasion to pay attention to his appearance. Now she claims to recognise the bruised face of the corpse as the face of that man whom she saw for an instant about 8 months' ago. Do you think she could remember for 8 months the face of a man whom she casually passed in the street; a man whom she did not know and has never seen since?"

On the same lines a further witness Maleli Satala (D.W.6) said that on the Saturday night in question he saw an elderly Indian male, two Fijians and the girl Alena lying down near his house in Namoli village. Counsel for the accused (Mr. Vula, who appears also in this Court) obtained an adjournment to trace Alena, but having done so, he elected not to call her.

Iletia Mbeka Voginiso (D.W.3) also gave evidence of having seen the appellant on the Saturday

night in question at 9 p.m. and at some later time at the Sports and Social Club.

On this evidence it is clear that if the assessors accepted the statement of the appellant at its face value there was ample evidence to justify the majority verdict of manslaughter. All that the appellant could say was that he had been drinking beer before he made it and as the learned judge pointed out he agreed that the first six pages were correct. On the appeal there has been no attack on this aspect of the matter. It was open to the assessors to reject the whole or part of the evidence of the witnesses called by the appellant and there is indeed very little of it which, if accepted, would be inconsistent with the appellant's having been able to commit the assault in question.

Mr. Vula formulated his grounds of appeal as follows (a fifth ground was abandoned) :

"1. That the Learned Trial Judge erred in usurping the role of the Assessors as Tribunal of Fact in overruling their unanimous finding of not guilty of murder hence there was a gross miscarriage of justice.

2. That the Learned Trial Judge erred in not adequately warning the assessors as to the extent to which they may accept or reject his Lordship's comments on the facts.

3. That the Learned Trial Judge did not adequately or correctly direct the Assessors that quite apart from the other issues raised at the trial, the Assessors the question whether in the light of all the circumstances and in particular the cumulative effect of the Appellant's intoxication the required specific intent to commit murder was negatived or there was a reasonable doubt about it. Consequently there has been a substantial miscarriage of justice.

4. That the Learned Trial Judge erred in not adequately warning the Assessors that if

> they have any reasonable doubt about the truth of the Confession, then they ought to give the benefit of that doubt to the appellant."

Mr. Vula argued Grounds 1 and 2 together and the burden of his submission was that the learned judge had failed to warn the assessors sufficiently that on questions of fact it was their own view that mattered and that any expression of opinion by him was not binding on them. Counsel quoted the case of Broadhurst v. R. /1964/ A.C. 441 which was cited (and distinguished) in a case before this Court Appana v. Reginam (Criminal Appeals Nos. 71, 72 and 73/80).

The learned judge's direction on this subject commences with his opening words. "You are judges of fact. I will advise you as to the law which you will accept from me." This concise passage might be thought to be unduly brief unless augmented. However a little later the direction includes advice as to the treatment by the assessors of the evidence of witnesses which would indicate the task is for them. Lower down is the passage which counsel submits is inadequate -

> " I will remind you of the salient features of the evidence and will make comments for your guidance. However, I am not inviting you to come to any particular conclusion. It is your independent opinions that are wanted, but I may offer the benefit of my experience in your approach to the evidence."

It is argued that this does not make it clear that the assessors are not bound to accept an opinion of the learned judge, though that seems to us clear enough from the phrase "It is your independent opinions that are wanted."

Counsel gave examples of the possibility of prejudice. One is :

" If you accept the evidence of the doctor the deceased had received a severe beating up punches being rained upon his head, chest and abdomen knocking him unconscious."

The point there is, of course, that it is the assessors' acceptance of the evidence of the doctor which is important. The rest seems to us a logical deduction.

The next example given was not a question of opinion but an accidental error by the judge. He quoted the alleged confession as stating the appellant's estimate of the time of the assault as about 8.30 p.m. whereas it in fact reads 9.30 p.m. Though, if meticulous timing was an issue this might have a bearing on the evidence of D.W.3 that he met the appellant about 9 p.m., as we see the case it was not one in which exact timing meant anything at all.

Counsel's next example of possible prejudice is a comment concerning the possibility of D.W.4 being mistaken when she failed to see any person in the ruins early on Sunday morning. The judge said "If deceased's prostrate form were placed in the ruins after 6.30 a.m. someone would have had to carry him there. It would be a very risky operation in daylight." We fail to find cause for complaint here; it seems a statement of the obvious.

Exception was also taken to this passage :

" It is for you to bring your commonsense and experience as men of the world to bear upon these matters and to arrive at a common sense conclusion. The accused does not have to satisfy you that it is untrue; the onus is upon the prosecution to satisfy you of its truth."

It was argued that the reference to common sense as men of the world implied that the defence evidence which had been under discussion should be rejected. We are unable to agree with this submission.

Concerning the amount of money the appellant had when he arrived home objection was taken to this passage in the summing up -

> "If the accused had robbed the deceased he may have had enough money to pay the $2.00 taxi fare; the defence state that he did not have the taxi money and therefore could not have robbed the deceased. That is a matter for you. Of course it would depend on where the accused went and what he spent after the alleged robbery. It might not take long to spend $10.00 or so at late night dances in clubs. It could also depend on what time accused did in fact go home; you have to decide to what extent you accept the evidence of the accused and his de facto wife."

It will be noticed that the words "That is a matter for you" appear in the middle of that passage. We find nothing objectionable in the mention of possibilities the assessors obviously had to consider.

Counsel also complained that some of the queries put by the learned judge appeared to indicate the required answer – an example was :

> " Looking at the confession does it appear to be the confession of the man who assaulted the deceased or is it a very ingenious fabrication by Insp. Raju?
>
> What reason would Insp. Raju have for fabricating a confession? Why fill several pages with questions before coming to the point where he includes a fabricated confession?"

We agree that this shows the learned judge's own view but not, in our opinion, beyond what is permissible on such a topic.

As to Ground 3 Mr. Vula indicated that though in terms this ground was limited to the summing up he intended it to include a reference to the judgment. The various passages he relied on were as follows. From the summing up :

(1) " A person's intentions are unlikely to be announced if they involve murder or other serious crime. Usually the wrong doer will try to carry out his crime where no one can see him. Consequently there is usually no direct evidence in such cases of an accused's intention and his intention can only be deduced from his behaviour and actions before during and after the alleged crime. It is for the prosecution to prove that the accused intended to kill or cause grievous harm to the deceased and it is not for the accused to satisfy you that there was no such intention.

Alcohol affects a person's mind and under the influence of drink he may execute some action without intending the consequences which in fact result from it. Section 13(4) of the Penal Code states that intoxication shall be taken into account to assist in determining whether an accused had formed a specific intention in the absence of which he would not be guilty of the offence charged.

As I have pointed out murder requires the specific intention to kill or to cause grievous harm to the victim. There is evidence that the accused had been drinking up to the moment of the alleged crime and you may conclude his behaviour was affected by drink. You have to determine whether, in spite of what he had had to drink, the accused had the intention to cause death or grievous harm to the deceased."

(2) " The accused in his statement to the police says that he had been drinking. He seems to have commenced about 11.00 a.m. and continued on and off until 8.30 p.m. when he allegedly beat up the deceased. In that time he could have consumed enough alcohol to affect him mentally and have some effect on his ability to form a specific intention. As indicated in the statutory definition of malice aforethought the accused does not have to say to himself 'I have decided to kill', or 'I am going to cause him serious injury' to have a specific intention. If the accused beat the deceased into unconsciousness with the fists and muscles of a professional boxer and then kicked his head as he lay on the ground would he, in spite of the beer, know that he was likely to cause grievous harm? You can scarcely bash a man on the head with an iron hammer and say at the same time 'I have no intention of causing him grievous harm.' A drunken intention is still an intention. The

fact that drink causes a man to give way readily to greed and violence does not mean that he does not intend to rob and assault. The question for you to decide is whether the accused by reason of the drink he had taken might not have had the necessary intent to cause grievous harm. The onus is not on the accused to satisfy you that he had had so much to drink. It is for the prosecution to make you sure that in spite of the beer he had drunk the accused had the necessary intent."

From the judgment :

(1) " I regarded D. Inspector Raju as a truthful witness and it appears the majority of the assessors did so. The long account given by the accused albeit by question and answer reveals considerable clarity of recollection on the part of the accused. Thus he remembered that the doorman at the Lautoka Hotel Beer Garden chased the deceased and the accused on the evening in question; that he bought a beer for Tui Vitogo at the Sports and Social Club; and such like. His reference to removing the deceased's shirt and putting it around his own head as a disguise is consistent with the prosecution evidence of P.W.1 Sereana that the Indian had a brown shirt and of P.W.2 Jone that on the following morning he had no shirt. On reading accused's statement one would expect witnesses to say something like the evidence of P.W.s 1 and 2 as to the deceased's shirt or absence of it. I am also mindful of my observations in the summing up.

I am sure that the confession made by accused to Det. Inspector Raju was true. The detail in the statement leads me to conclude that the accused's recollection of that fateful day's events indicate that he was very aware of what he was doing and where he was going and what he wanted. There is no suggestion of his being so drunk that he could not recollect who he was with including the deceased.

The statement shows that he was sober enough to form the intention to steal from the deceased; he was sober enough to formulate a scheme for luring the deceased to a deserted kind of place where he could rob him. I find he was sober enough to form the intention of overcoming the deceased's resistance to any attempt to rob him."

(2) " Nevertheless from a careful consideration of all the evidence and the accused's statement Ex.P.1 in particular I am satisfied that notwithstanding

> the effects of drink the accused was aware that the numerous heavy blows he was inflicting on the deceased would probably cause grievous harm."

Counsel's submission was that the opinions of the majority of the assessors showed that they had decided that the appellant did not have the intent to cause grievous bodily harm. Subject to the comment that they may well have been left in doubt, we agree, though in Fiji section 202(b) of the Penal Code (Cap.17 - 1978 Ed.) provides that knowledge that the act or omission will probably cause grievous bodily harm is enough to constitute malice aforethought. But in our opinion an attack upon the directions given to the assessors becomes pointless in the light of the fact that the majority of them returned an opinion of manslaughter. That renders it obvious, not only that they accepted the appellant's confession as being factual, but also that they appreciated the learned judge's direction concerning drink in relation to intent. His reference to manslaughter was in fact contained in the last sentence of the summing up. It reads :

> " Should you come to the conclusion that by reason of drink the accused did not have the required intent then the opinion you would return is one of manslaughter. The latter offence occurs when a person in the course of an unlawful act intending to hurt another without intending grievous harm causes the death of that person. Manslaughter, unlike murder requires no specific intention to kill or cause grievous harm."

The majority opinion of the assessors showed that they had appreciated the directions and were at least left in doubt whether, by reason of drink, the appellant had had, at the material time, the intent to cause grievous bodily harm. We would pause at this point to say that had the judgment of the court been, in accordance with the majority opinion of the assessors,

one of manslaughter, none of the grounds of appeal argued so far would have justified this Court in interfering with it. The last few lines of the passage from the summing up that we have marked (2) contain a sufficient direction on the onus on the prosecution and Mr. Vula's argument on the intrusion of the learned judge's opinion on matters of detail was not in our opinion of weight to result in a complete acquittal.

It becomes necessary, however, to consider the fact that the learned judge, contrary to the opinions of the assessors, convicted the appellant of murder. Though the first ground of appeal appears to cover this aspect of the matter in terms, Mr. Vula did not at first seek to rely upon it, conceding that the learned judge had the necessary power under the Criminal Procedure Code to do what he did. Nevertheless he later sought to rely on authorities to which attention was called by the Court and which we will now consider.

The earliest case appears to have been Ram Lal v. The Queen (Cr. App. 3/1958) in which the following passages appear. We quote them from the judgment in Ram Bali v. Reg. (1960) 7 F.L.R. 80 at 83 -

> "' In order to justify a Court in differing from the unanimous opinion of the assessors who were in a favourable position to assess the reactions of a man of the class and race they would find the accused to be, there must be very good reasons reflected in the evidence before that Court.'.....
>
> 'A trial judge would require to find very good reasons indeed, reflected in the evidence, before being justified in differing from an unanimous opinion of the assessors on such a question of fact.'"

With reference to that passage, however, it was said in Ram Bali's case, at p.83 -

" It will be observed that, in both of these passages, the Court was careful to limit its propositions to the particular sort of question which arose in that case, namely, the probable reactions to alleged provocation of a man of a particular class and race; and this present Court does not doubt that, on such a question, the Judge ought not to differ from a unanimous opinion of assessors unless he can find - and can find 'reflected in the evidence' - very good reasons for so doing. But it would be wrong to erect this into a general proposition applicable in all cases. In general, it is enough if, as in the present case, the Judge proceeds on cogent and carefully reasoned grounds based on the evidence before him and his views as to credibility of witnesses and other relevant considerations."

The Privy Council in P.C. Appeal No.18 of 1961 upheld the action of the trial judge in Ram Bali's case and sustained the conviction, saying -

"' This was a strong course to take but there is no reason to think that the learned Judge did not pay full heed to the views of the assessors or to the striking circumstance that they were unanimous in favour of acquittal. Nor is there reason to think that he was unmindful of the value of their opinions or of their qualifications to assess the testimony of the various witnesses in a case of this nature. In his summing-up he had said that their opinions would carry great weight with him. The decision of the learned Judge was based upon his own emphatic conclusions in regard to the evidence.'

' Their Lordships can discern no error in the approach of the learned Judge in arriving at his positive and affirmative conclusions: it is manifest that his acceptance of certain witnesses and his rejection of others made him satisfied beyond even 'the slightest shadow of doubt' of the guilt of the appellant.'"

In Narend Prasad v. Reginam (1971) 17 F.L.R. 200 this Court having quoted that passage of the Privy Council's judgment, said, at p.220 :

" The judgment of the Privy Council upheld the action of the trial Judge and sustained the conviction. We are of the opinion that the passages

> quoted from their judgment would apply with equal force to the case before this Court. We are satisfied that ample reasons did exist for the action of the learned trial Judge in differing from the opinion of the assessors, and that proper consideration had been given by him to all the factors involved."

The same authorities were referred to in Shiu Prasad v. Reginam (1972) 18 F.L.R. 68, and at page 71 this Court said :

> " As regards the second ground of appeal, it is true that if a Judge is to differ from the opinions of the assessors he must have cogent reasons for doing so and those reasons must be founded upon the weight of the evidence in the case and must of course also be reflected in his judgment."

And later, referring to the Ram Bali case :

> "That is the case here. Those 'emphatic conclusions' expressed in his judgment are all the reasons which a trial Judge requires for differing from the opinions of assessors. The learned Judge, in his lengthy summing up to the assessors, stressed that he would give weight to their opinions, and we have no doubt that he considered them carefully."

In the present case there is a slight distinction to be noted. Though the assessors were unanimous in their opinion that the appellant should be acquitted of murder they were not unanimously of the opinion that he should be acquitted altogether. Therefore there was not such a violent clash of opinion between the learned judge and the majority of the assessors. Mr. Vula on the other hand took the point that the learned judge had not said in his summing up that the opinion of the assessors would carry great weight with him as was done in the cases quoted.

The judgment of the learned judge commences with the statement that the majority view of the assessors indicates that they regard the confession as being true,

but that having regard to the amount of beer he had consumed the appellant did not have the intent to kill or cause grievous harm. Subject to the comment that the assessors may only have been left in doubt, we think this conclusion is justified and accounts for the fact that the judgment pays scant regard to the evidence relied on by the defence to support appellant's denial that he in fact committed the assault. The issue to which the learned judge accordingly devoted the bulk of his attention, rightly so in our opinion, was the question on which he was about to differ from the majority of the assessors, the matter of the appellant's intent.

Having said that he did not concur in their opinions he continued by indicating -

(a) That he was satisfied Sereana (P.W.1) was truthful and that appellant was at about 5 p.m. interested in the deceased's pockets.

(b) That appellant had had a considerable amount of beer to drink between 11 a.m. and 8.30 p.m.

(c) Insp. Raju was truthful and the statement revealed considerable clarity of recollection of incidents. His reference to removing the deceased's shirt and using it as a disguise was consistent with other prosecution evidence.

(d) The confession was true. Appellant's recollection of detail leads to the conclusion that his recollection indicated that he was very aware of what he was doing and where he was going and what he wanted.

(e) The statement showed that he was sober enough to form the intention to steal, to formulate a scheme for luring the deceased to a deserted place, and to form the intention to overcome the deceased's resistance.

Finally (on this topic) the judgment reads :

" I do not suppose that the accused in a perfectly sober state would have wanted to steal or that he would have used his boxer's fists to beat up and rob the deceased. I accept that the effect of the beer aggravated his dismay at having no money to attend the dances which attracted him; the effect of beer no doubt weakened his resistance to the temptation to steal from a person whom he knew had money. No doubt drink dulled his conscience at the time.

Nevertheless from a careful consideration of all the evidence and the accused's statement Ex.P.1 in particular I am satisfied that notwithstanding the effects of drink the accused was aware that the numerous heavy blows he was inflicting on the deceased would probably cause grievous harm."

Though the last few words in the last quoted passage put the test correctly, the judgment read as a whole gives the impression that the learned judge is equating the ability to remember events with the presence or absence of intent. We quoted those passages from the judgment earlier. The same idea is conveyed by this passage in the summing up which follows the second passage we quoted from it above :

" There is no independent witness to enlighten you as to the degree of the accused's sobriety at the material time. If you accept his statement Ex.P.1 it may suggest that no inconvenient gaps occur in his recollections of that evening. It details his movements from about 9.00 a.m. until he went home. It describes the deceased giving money to accused and the amount, the purchase of boiled eggs, movements between clubs and pubs and that accused found himself without money and still wanting to visit clubs or night clubs. It reveals the accused's plan to lure the deceased to the ruins with the pretext of a prostitute's charms for the purpose of robbing him. The assault and robbery are described in detail with the amount in notes '$10.00 and loose change'. If the accused's recollections of that evening are so clear how drunk was he? It is a matter for you."

All is no doubt part of the evidence going to intent, but as the case of Garlick (1981) 72 Cr. App. R. 291, shows, though an accused person may have a clear memory of events the question to be answered was not his capacity to form an intent, but simply whether he did or did not form such an intent. That was a case of almost parallel facts to the present one in which also the appellant had a clear recollection of events, and a verdict of murder was reduced to one of manslaughter by reason of lack of clarity of the direction on this subject.

We do not deal with this case on the ground of specific misdirection. But on the decided cases the learned judge was required to give cogent reasons for differing from the assessors. His direction to them ran on the same lines as his judgment, emphasising the clarity of the appellant's recollection; he left it to the assessors to give the appellant the benefit of the doubt, though he used the formula "sure of the guilt" - "If you do not feel sure then it is your duty to acquit him". When they seemingly acted on this approach there is no apparent reason for anyone to say that they failed to appreciate the evidence. The line of division between their view and that of the learned judge must have been fine indeed. As it appears to us, it was not a case where there was evidence of differing categories and cogency in which the learned judge's long experience of such matters gave him an advantage.

What we are leading up to is the question - if the majority of the assessors thought there was a doubt, has the learned judge given emphatic conclusions, reflected in the evidence, for excluding that doubt. He has not purported to say why he differed - merely that he disagreed. He has summarized the evidence. In many, probably most, cases, that could be sufficient, particularly if there could be seen aspects of the evidence which the assessors have clearly failed to

appreciate. That is not the case here - all of the evidence was summed up to the assessors and the divergence is hardly more than one of personal opinion as to the inferences which ought to be drawn. The learned judge and the majority of the assessors must have had similar views of the appellant's credibility.

We are most reluctant to apply the principle we have been discussing and certainly do not wish to extend it in any way, but when a judge adopts what the Privy Council called a strong line and overrules unanimous assessors, we agree with the decided cases that his reasons must be cogent, and his own approach to the relevant law should be impeccable. As to the first we consider this a case in which we consider that a mere summation of the evidence was insufficient, and as to the second, we have already suggested that the emphasis placed throughout the case on the appellant's ability to remember events was such as to make that factor alone decisive of the question of intent; in our opinion that was not correct.

We therefore conclude that the learned judge was not justified in overruling the assessors in the case and it follows that we allow the appeal, set aside the conviction of murder, and substitute a conviction of manslaughter contrary to section 198 of the Penal Code (Cap.17). There is no need for us to make any reference to Ground 4 of the Notice of Appeal.

The sentence of life imprisonment is set aside, but the offence remains a grave one and we impose a sentence of ten years' imprisonment to run from the same date as that of the original sentence.

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Vice President

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Judge of Appeal

27 NOV 1981

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Judge of Appeal