

IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO:AAU0004 OF 1995S  
(High Court Criminal Action No.HAC 0003 of 1994)

BETWEEN:

THE STATE

APPELLANT

-AND-

ATISH JEET RAM

RESPONDENT

Ms N. Shameem, Director of Public Prosecutions, for the Appellant  
Mr G.P. Shankar for the Respondent

-AND-

CRIMINAL APPEAL NO.AAU0005 OF 1995S  
(High Court Criminal Action No. HAC 0003 of 1994)

BETWEEN:

CHANDAR KUMAR SAMI

APPELLANT

-AND-

THE STATE

RESPONDENT

Mr S.D. Sahu Khan and Mr. M Raza for the Appellant  
Ms N. Shameem for the Respondent

Date and Place of Hearing:

3 February, 1998, Suva

Date of Delivery of Decision:

12 February, 1998

JUDGMENT OF THE COURT

These two appeals arise from the same trial in which the appellant in Appeal number 5/95, Chandar Kumar Sami, the first accused at the trial, and the respondent in Appeal number 4/95, Atish Jeet Ram, the second accused at the trial, faced joint counts of murder and robbery. The appeals were heard separately but we consider it appropriate to deliver a single judgment.

On 19 December 1993, Ramesh Bhindi, the victim was brutally attacked and killed whilst working with the two accused in the workshop of his uncle's jewellery business. Concentrated sulphuric acid was thrown in his face by the appellant, Sami. Whilst incapacitated by that dreadful attack, the victim was further heavily beaten about the head and neck with an anvil with such ferocity that the base of his skull was fractured in many places and the brain stem totally severed. It is clear from the evidence that the acid attack caused appalling injuries but was neither the cause nor a contributory cause of death : that was entirely the result of the blows from the anvil.

Sami and Ram were the only other people working with the deceased in the workshop at that time and both left after the attack, having stayed long enough only to remove approximately \$38,000.00 worth of jewellery from the safe. They remained in hiding for three days before giving themselves up to the Police and returning the major part of the jewellery that was missing. Both were separately interviewed by the Police and made statements in which they gave accounts, broadly similar to each other, of the events on the morning of the attack.

Sami told the police that he had thrown acid at the victim and, as he rushed in the direction of the wash-basin or the back door, Sami said to Ram, "Hit him". Whilst Ram attacked the victim, Sami went to the safe and started taking the jewellery. He was then joined in this by Ram. As they left, Sami again poured acid on the recumbent body of the victim. He told the police that the two of them had planned the attack the previous day in order to steal the jewellery but that he had not told Ram that he had intended to throw acid.

Ram described how Sami threw the acid and then, as the victim ran off, he, Ram, picked up the anvil and hit the deceased on his neck. He said he hit once then and once more as he left the shop, at the time that Sami threw the second bowl of acid. He also said this had been planned by them both the previous day.

In the High Court, there was a lengthy trial within a trial in the absence of the assessors in which each accused sought to exclude his statements to the police on the basis that the police had used violence to force him to sign untrue and partially fabricated admissions. Each accused made a short unsworn statement and called no other evidence. The Judge rejected the submissions and ruled that all the interviews and statements were admissible.

During the trial before the assessors, both accused gave evidence and, in that evidence, each materially altered his earlier account allegedly given to the police.

Sami repeated the earlier admission that he had thrown the acid but said there was no agreement the previous day although he said he had told Ram he would attack the victim. Having thrown the acid, he did not tell Ram to hit the victim nor did he see him hit. Whilst he was rifling the safe, Ram joined him to assist. He, Sami, did not hit the victim but, as they were leaving the shop, Ram told him he had done so.

It was suggested to Sami for the first time in cross-examination that he had forced Ram under threats of death, made both by Sami and his brother, falsely to admit involvement. Curiously, it was Ram's case that the threat was directed, not to absolving Sami, but simply to

Ram taking an equal part of the blame. It was made whilst they were on the run and before they were arrested. Sami denied the suggestion.

Ram's evidence was that he was away from the shop buying cigarettes when any attack occurred. On his return, Sami told him how he had thrown acid at the victim but when Ram said he would tell his aunt and uncle, he was threatened with a similar death by Sami. That threat was repeated by Sami's brother during the days they were in hiding and frightened Ram to such an extent that he made an untrue confession. He said he was too scared to tell the police or the magistrate. Although he repeated his allegation that the police had used violence on him, he did not deny he made the confessions to the police; he said they were untrue and made entirely as result of his fear of Sami and his brother.

The three assessors were unanimous in their opinion that each accused was guilty on both counts.

The trial Judge confirmed the opinion of the assessors in relation to Sami and convicted him. Having given lengthy reasons, he declined to conform to their opinion in relation to Ram and acquitted him on both counts.

These two appeals have arisen from those proceedings; Sami appeals against his conviction in Appeal number 5/95 and the Director of Public Prosecutions appeals against Ram's acquittal in Appeal number 4/95.

5/95 Sami v. The State

Before urging the grounds of appeal, counsel for the appellant raised a preliminary objection to the procedure followed at the committal hearing. Neither accused was represented and committal was by written statements only. The Magistrate considered the evidence on the statements, found a case and committed them for trial. It is clear he failed to follow a number of the requirements of the Criminal Procedure Code. We do not need to recite them here. The test propounded by this Court in Shiu Sami and Shiu Kumar v. The State, Cr App 7 of 1995, demonstrates that the various matters of complaint are breaches of directory provisions only. Having considered them, we are satisfied these breaches have caused no miscarriage of justice in this case.

The first ground of appeal is that the Judge misdirected the assessors on the burden and standard of proof.

Counsel for the appellant directed our attention to a number of passages in the summing-up which, he suggests, show the Judge erred in two ways: first, by appearing to shift the burden of proof to the accused and, second, by failing to direct the assessors on the position they must take if they are left in doubt. It is unnecessary to set out all the passages which counsel drew to our attention. In the first category, three examples will suffice.

When first dealing with the burden of proof, the Judge referred correctly to the presumption of innocence but continued;

*"You must keep uppermost in your mind that the two accused do not have to prove to your satisfaction that they are innocent".*

The accused has, of course, to prove nothing but the unfortunate effect of the extra words 'to your satisfaction' is to suggest that the accused has to prove his innocence although to some lesser degree than the assessors' satisfaction. This effect was heightened by the paragraphs immediately following in which the Judge, whilst taking the unnecessary (and undesirable) step of trying to explain a reasonable doubt, equated it three times to feeling sure and satisfied.

Later, when warning the assessors to bear in mind the possible motive each accused had to implicate the other, in a confused direction, the Judge gave the impression of an apparent requirement to find beyond reasonable doubt in order to acquit;

*"You must keep those conflicting interests in mind and be careful with this aspect of each accused's evidence so that you can be satisfied beyond reasonable doubt in your minds that you are neither finding an innocent man guilty, nor a guilty man, not guilty."*

A similarly confused direction may well have left the assessors with the impression that they needed to be satisfied beyond reasonable doubt of an accused's evidence before they could acquit him;

*"Finally, with regard to the first accused. If you are satisfied beyond reasonable doubt as to the truth of his evidence, i.e. that all he only wanted to do was to steal jewellery, and that the*

*second accused acted on his own part in hitting the victim with the anvil, and that he was forced to confess by the police, then you should find him not guilty on the murder charge.*

*With regard to the second accused. If you are satisfied beyond reasonable doubt as to the truth of his evidence, then you should find him not guilty of both the murder and robbery charges, as he would have taken no part in them."*

This direction is repeated in a similar form on other occasions.

Again it is not necessary to quote all the examples of the Judge's suggested failure to give any guidance on the position the assessors were to take should they find themselves in a position of doubt. Clearly the last example above is deficient in that regard. One further example will suffice;

*"On matters of fact, it is for you to determine and decide where the truth lies. It is for you to decide whether each accused is guilty or not guilty. In reaching your decisions it is for you to decide whom to believe and what actually happened."*

This court has recently warned of the danger of such a direction. In Navunigasau v The State, Cr App 12 of 1996, (delivered since the trial in the present case) it was explained in this way;

*"...a direction to the assessors - and to the trial judge himself as the eventual decision-maker - that they must "determine where the truth lies" carries with it the implication that they must come to a firm conclusion as to the existence or non-existence of the facts and cannot remain in a state of doubt about them. A direction in a summing-up having that effect could deprive a defendant of being given the benefit of a reasonable doubt."*

It should be said that the Judge gave a proper direction on the burden and standard of proof more than once. His fault lay in his attempts further to explain the meaning of a reasonable doubt in ever more ways. Such a course is fraught with danger as is shown only too well in this summing-up. As was pointed out in Navunigasau's case, the effect of such misdirections may be to vitiate the summing-up, notwithstanding that the judge has also included proper directions on the standard of proof.

The effect in a particular case will depend on the effect of the summing up as a whole. The Director of Public Prosecutions correctly referred to the words of Lord Goddard CJ in R v Kritz (1950) 1 KB 82 , 89, which have been adopted in many cases since and which still represent good law and good sense; viz.

*"It is not the particular formula that matters: it is the effect of the summing-up. If the jury are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence, then whether the judge uses one form of language or another is neither here nor there."*

The passages quoted from the present case were serious misdirections and repeated many times in the course of the summing-up. We consider, with some hesitation, that, as there were also clear and proper directions, if this had been the only ground of appeal, we would not have felt it necessary to interfere. However, we must reconsider the cumulative effect of these errors in the summing-up when we have dealt with the remaining grounds.

The second ground of appeal is that the Judge erred in failing to give a direction on the need for corroboration of the evidence of an accomplice. The accomplice was the co-accused in each case.

There is no merit in this ground. The requirement that the evidence of an accomplice should be corroborated applies only if he is called as a witness for the prosecution. Authority suggests, however, that the judge should warn the assessors and himself to treat the evidence of an accused that tends to incriminate a co-accused with care; Loveridge and Loveridge v. R (1982) 76 Cr. App R 125, 127. In the present case, the Judge gave such a warning in clear terms.

Passing to the third ground, the appellant suggests that the Judge erred in directing the assessors that their only concern regarding the purported confessions was whether they were true.

In the Court below, there was a lengthy trial within a trial to challenge the police interviews and charge statements by both accused, at the conclusion of which, the Judge ruled the evidence admissible. Quite properly, defence counsel again canvassed these matters with the police witnesses in front of the assessors. The evidence on the voir dire had been directed to establishing the admissibility of the confessions. Once that had been determined and the statements admitted, it was for the assessors to decide, on the evidence adduced before them,

whether allegations of undue pressure or fabrication by the police may have been true and the weight they could give to the contents of the statements as well as the truth of any confessions in them.

The Judge correctly reminded the assessors of Sami's claim in his evidence that a substantial part of the police record of his interview and statement was not his words but had been concocted by the interviewing officer. He then warned the assessors in the following terms;

*"I direct you that the only thing you must concern yourself about when considering the caution interviews and charge statements of each accused, is being satisfied beyond reasonable doubt that the confessions by each accused in those statements are truthful, i.e. that each accused was telling the truth when they gave those statements to the police. If you believe that one or both the accused made untruthful confessions because they were forced to do so by the police, and additionally, in the case of the second accused, because he was forced to do so by the threats of the first accused and his brother, then you must disregard those documents as evidence against each accused. If on the other hand you are satisfied beyond reasonable doubt that one or both accused spoke truthfully to the police in those documents, then you are entitled to convict that particular accused on the evidence of these statements alone."*

The suggestion in that passage that 'the only thing' for them to consider is whether the statements are true is unfortunate. Clearly, the Judge should also have referred to the need to consider the way in which it was alleged by the accused that those statements had been taken. However, as we have said, the Judge also made separate reference to the accused's allegations that the documents had been concocted. Had this point stood alone, we would not

have interfered. Again, we must consider this deficiency further in assessing the overall effect of this and other misdirections.

We might add that the reference by the Judge to only two alternatives - belief that the accused made untruthful confessions or belief beyond reasonable doubt that the accused spoke truthfully - is clearly deficient and is a further example of the first ground of appeal. We can find no guidance for the assessors in that passage or the surrounding parts of the summing-up as to the possibility of an intermediate position of doubt and to the way they are to treat the evidence should they find themselves in such a position.

The fourth ground challenges the fairness of comments by the Judge during his review of the evidence.

We can dispose of this ground shortly. Some of the words the Judge used may have suggested to the assessors that he had formed a view one way but there are other passages expressed in equally direct terms that suggest a contrary opinion. A judge is entitled to comment on the evidence so long as it is not excessive and he directs the jury adequately on the effect of such comments. In this case, that is what he did. He advised them in clear terms that they could, if they wished, follow opinions expressed by himself or the lawyers but stressed they could also "totally disregard" them. He made it clear that all decisions of fact were theirs alone.

In order for this Court to interfere in such a case, the effect of the judge's comments must be to suggest a view so strongly that he appears effectively to be withdrawing the decision from the jury. The Judge's comments fall far short of such a position.

The fifth ground suggests the Judge misdirected the assessors on common purpose.

The Crown's case was that the first accused threw acid into the victim's face and, as he staggered away, the first accused told the second accused to hit the victim. As a result, the fatal blows were struck.

The Judge's direction needs to be set out in full.

*"Now you have just heard me saying that for a person to be guilty of murder, he must do the act that causes the death of the victim and, at the same time have one of the relevant intentions that I have just referred to above. However, the law recognises in certain circumstances a widening of the interpretation to include persons who do not actually do the act that causes the death, but assists the person who causes the death to carry it out. If for example, a person joins in a plan, or actively and willingly assists another person to murder someone, but does not do the act himself that causes the death, then that person even though not having done the act that causes the death of the victim, is as guilty of the murder as if he had committed it himself. That is because that person has been a part of the plan to murder and has willingly assisted the other person to carry out the murder.*

*“Thus, in this case if you are satisfied beyond reasonable doubt of the State’s version of the evidence, then even though the first accused alleged that he did not do the act that caused the death of the victim i.e. hitting the victim on the back of the head with the anvil, he would nevertheless be as guilty of causing the death of the victim as the second accused because he was part of a plan with the second accused to hit the victim and steal, and actively and willingly participated and assisted the second accused in that regard by throwing acid on the victim and stealing jewellery.*

*“If after being satisfied beyond reasonable doubt in that regard, you were further satisfied beyond reasonable doubt that the first accused, in the plan of hitting and stealing with the second accused, intended to either kill or cause grievous harm to the victim, or knew that the striking of the victim with the anvil would probably kill or cause grievous harm to him but still went ahead not caring less whether death or grievous harm occurred to the victim, then he would be just as guilty of the murder as the second accused, even though he did not strike the victim with the anvil.”*

Common intent is defined in section 22 of the Penal Code.

*“22. When two or more persons form a common intention to prosecute a common purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”*

In many cases, common intent is difficult to prove. Frequently the prosecution would find its task easier if it charged aiding and abetting under section 21 (see the comments of McMullin J. in *R. v Curtis* (1987) 1 NZLR 734, 738) but there seems to be some reluctance to follow that course. However in this trial, the prosecution case was that the first and second

accused were clearly pursuing a common intention although much of the Judge's summing-up appears to confuse the two possible bases for conviction of a secondary party.

Where common intent is alleged, the assessors need to decide whether the evidence has proved, to the necessary standard, the prosecution case that the offence committed was a probable consequence of the unlawful purpose they had both intended.

If the assessors accepted that the first accused had told the second accused to hit the victim, they had to consider whether the blows with the anvil administered as they were, amounted to a probable consequence of the exhortation to "hit him". It was not, as the Judge directed, a question of whether he knew such a blow would probably kill or cause grievous harm. The Judge's words left it open for the assessors to convict the first accused of murder if, having found the first accused intended the second accused only to hit the victim, they were satisfied he knew a blow with an anvil would probably kill or cause grievous harm to the victim. It left unasked the critical question whether the use of the anvil was a probable consequence of the exhortation to hit him.

We consider this a material and serious misdirection as far as Sami is concerned is concerned. It leads to a further difficulty which was not raised in the grounds of appeal but was canvassed at the hearing of the appeal.

It appears neither the prosecution nor the defence raised the possibility of a verdict of guilty of manslaughter but, where there is a real possibility that such a verdict could be reached on the evidence, the judge is under a duty to direct the assessors accordingly.

In the present case, the prosecution allegation was that the first accused told the second accused to hit the victim in furtherance of a predetermined plan and that the nature of the attack was a probable consequence of the words he used. Such a finding would require a verdict of guilty of murder. However, if the assessors did not feel that it had been proved that the attack which occurred was a probable consequence, they should have been directed to consider the next possibility that the first accused was taking part in a joint unlawful attack on the victim but intended no more. In such a case, if that assault had the unintended result of killing the victim, the first accused would be guilty of manslaughter. Similarly, if the assessors reached the conclusion that the first accused carried out the attack alone without the requisite malice aforethought.

It is right to say that the Judge raised the possibility. In his concluding remarks, he repeated the necessary intent for murder and continued;

*"If you are not satisfied beyond reasonable doubt that the first accused had any of those intentions, but are still satisfied beyond reasonable doubt that he acted alone or with the second accused in the attack on the victim, then you should return a verdict of guilty to manslaughter."*

A similar direction was made in relation to the second accused but there is no other mention of manslaughter in the summing up or any direction as to what the word meant.

It is essential that all the various possible interpretations of the evidence that could lead to a conviction for manslaughter are put to the assessors with a careful direction on the law in relation to that offence.

On the evidence before the assessors, a conviction of the first accused of manslaughter was a definite possibility if the assessors found the prosecution version of the events that day proved. The failure to put such a possibility gives rise to a serious miscarriage of justice.

That is sufficient to set the conviction for murder aside but, even without it, the cumulative effect of the other errors to which we have referred, in what we consider was a most unsatisfactory summing-up, would force us to the same conclusion.

The sixth and seventh grounds of appeal do not raise any matters we have not already covered.

The appellant never denied the robbery with violence and was properly and inevitably convicted of that charge. He has not appealed against the conviction or sentence in relation to it.

This killing was a dreadful crime undoubtedly committed by one or both of the people present in the room that morning. The appellant has the right to be tried by assessors and

a Judge properly directed. We consider the interests of justice require us to set aside the conviction for murder and order a fresh trial before a different Judge and assessors.

4/95 The State v Ram

As has already been stated, the Judge did not follow the opinion of the assessors in relation to the second accused, Ram, and after giving lengthy reasons, acquitted him on both counts. The Director of Public Prosecutions has filed four main grounds of appeal suggesting the Judge erred;

1. in that his decision to over-rule the assessors was against the general weight of the evidence;
2. in that he did not give cogent reasons for differing from the unanimous decision of the assessors;
3. by taking irrelevant factors into account; and
4. by failing to take relevant factors into account.

We intend no discourtesy by summarising the detailed grounds submitted and intend to deal with them together.

The right of appeal against an acquittal in the High Court was first given by section 23 of the Court of Appeal Act when it was amended by Decree in 1990. Mr Shankar, for

the respondent, briefly suggested that the amendment was unlawful and contrary to the Constitution. There is no merit in that submission as we think Mr Shankar accepted.

The grounds on which this Court can set aside an acquittal and its powers on so doing are the same as for an appeal against conviction. It is a power that does not occur in many common law jurisdictions although there has always been a right to appeal with the sanction of the Director of Public Prosecutions against an acquittal in the Magistrates' Courts in Fiji under section 308 of the Criminal Procedure Code.

Trial in the High Court is by assessors who, although treated during the trial very much as if they were a jury, are not the sole judges of fact and do not return a binding verdict. Earlier cases here and in other jurisdictions with similar laws reveal that, previously, the role of the assessors was different. Prior to the present section 299, the old law was contained in section 246 and required trial with assessors only where the accused or complainant was "a native or of native descent or of Asiatic origin or descent". The assessors acted to some extent as advisers to the judge on matters such as local customs and sensitivities with which an expatriate judge was unlikely to be familiar (see for example, R v Matiwiwa, (1935) 2 EAR 66). They were sometimes asked to express opinions on particular questions apart from the general determination of guilt - as happened in the earlier Fiji case of Ram Bali v R. (1960) 7 FLR 80.

Section 299 of the Code provides;

*“299.- (1) When the case on both sides is closed, the Judge shall sum up and then require each of the assessors to state his opinion orally, and shall record such opinion.*

*(2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.*

*Provided that, ... where the Judge’s summing up of the evidence ... is on record, it shall not be necessary for any judgment, other than the decision of the court ... to be given ... except that, when the Judge does not agree with the majority opinion of the assessors, he shall give his reasons ... in open court, for differing with such majority opinion...”*

The section also gives the assessors or any of them the right to retire to consider their opinions and to consult with each other even though each must give his or her own opinion and not return a single decision in the manner of a jury.

The Judge gave very lengthy and detailed reasons for his decision not to accept the assessors’ opinions in relation to the respondent. He reviewed the evidence adduced both in the trial within a trial and the trial before the assessors. He referred to the discrepancy between the second accused’s allegations against the police during the trial within a trial and his evidence before the assessors of threats of death by his co-accused. There then followed one of the passages to which the appellant takes exception.

*"As I have mentioned, the evidence by the second accused of death threats against him by the first accused and his brother, in order to force him to confess to an involvement in these offences, was only first raised at the trial before the assessors. That evidence was not adduced, or put in issue by the second accused in the voire dire as part of his challenge to the voluntariness of his confessions in his caution interview and charge statement. His challenge at that time was based solely on an alleged police assault upon him just prior to the commencement of his caution interview.*

*The fact that the further allegation of death threats and the evidence in support thereof was not adduced or put before me in the voir dire, I can only conjecture was either because the second accused and his counsel made a tactical decision not to lead that evidence at that stage, but to wait until the trial proper. Although, if that was the reason I am at a loss to understand why such a course was adopted, the question of the alleged death threats against the second accused by the first accused and his brother, in order to intimidate him into falsely confessing to a part in the murder and robbery, goes directly to the issue of the voluntariness of that confession, its truthfulness, and thus its admissibility which was the reason for holding the voir dire. The only other reason I can surmise for that evidence first arising on the trial, was because it was a recent invention and untrue.*

*After having observed the second accused closely throughout the 40 day trial, and particularly throughout the two days of his sworn evidence, part of which was under forceful and searching cross-examination by both counsel for the first accused and the State, I am satisfied that the evidence of the second accused in that regard was not a recent invention, and thus I can only conclude that the second accused and his counsel made the decision, for whatever tactical reason, to leave that allegation until the trial proper. With respect, I might add that if I am right in my conclusion, I believe that such a choice left much to be desired because given what I am about to say, after having carefully observed the second accused throughout the trial, and having heard that new evidence and, seen it tested in cross-examination, I now have sufficient doubt as to the voluntariness of the second accused's confessions in his caution interview and*

*charge statement. Had I heard that evidence in the voir dire and formed the same view as I now hold, I would have ruled that the second accused's caution statement and charge statement were inadmissible on the trial, and such damning evidence would never have come before the assessors for their consideration."*

The Director points out with some force that the recourse of the Judge to conjecture about the reasons for an assumed deliberate decision to withhold the allegations was wrong. We agree.

The Judge's statement that, had he heard that version earlier, he would have excluded the second accused's confessions could and should, the appellant suggests, have been remedied by telling the assessors to disregard them before they made their decision or, preferably, by discharging them and holding a fresh trial. There is force in that suggestion also.

The respondent points out, correctly, that the Judge has made a decision about the accused's credibility as he is entitled to do and, because his opinion differs from that of the assessors, has not followed them. An appeal court that has not seen the witnesses should not lightly interfere.

It is clear a judge has the power to disagree with the assessors and is not bound to conform to their opinion. Earlier cases give some guidance on how that power is exercised. Some of these were cited by this Court in the cases of Saukuru v R, Cr App 45 of 1981, and Setevano v State, Cr App 14 of 1989. In Ram Bali v R, a case under the old section 246, the Court of Appeal suggested the judge should proceed on cogent and carefully reasoned grounds based on the evidence before him, his views as to the credibility of the witnesses and

other relevant considerations. The Privy Council upheld this decision describing a judge's action in over-riding the unanimous opinion of the assessors as "a strong course to take".

In Saukuru's case, this Court suggested that, when the judge adopts this strong line, his reasons must be cogent and his own approach to the relevant law should be impeccable. In the case of Raduva and Heatley v R, Cr App 109 of 1985, where the judge did not follow the assessors' opinion of not guilty and convicted, the Court suggested such cases "are rare and in our opinion are ones where the evidence against an accused is so overwhelming and so affirmatively established that one can say that the assessors' conduct was perverse." The Court continued later;

*"...where credibility is in issue, we would like to say, from not inconsiderable experience on the bench in criminal proceedings, that the status of being a Judge does not confer any advantage in the field of assessing truthfulness, over any other man in the world. Indeed the contrary is sometimes suggested. That is why we have assessors and juries."*

In Setevano's case this Court referred to the need for cogent reasons clearly stated that must also be capable of withstanding critical examination in the light of the whole of the evidence.

The passage we have quoted from the Judge's reasons in the present case gives us substantial cause for concern. In it, the Judge misdirects himself on a critical point which could well, in itself, have lead him into error in his decision. He also allows himself to base his decision on matters that should not have been taken into consideration and, in comparing the

evidence at the trial with that in the trial within a trial, has based his decision, partially at least, on evidence that was not before the assessors.

The misdirection is the suggestion that, had he heard the evidence of the threats by the first accused on the voir dire, he would have excluded the confessions of the respondent. That would have been a strange decision. This was not an inducement or threat held out by a person in authority. It was the evidence of one accused against his co-accused. Such evidence is for the assessors to decide and a judge would only be justified in withholding it from them in very exceptional circumstances when its admission would be unfair or cause injustice to the accused. We can find nothing to support such an action in this case. Indeed, despite the Judge's conjecture, the reasons why counsel did not raise it on the voir dire may well have been because he realised it was inappropriate at that stage.

In the event, the evidence of the second accused's interview and statement was before the assessors in the trial. When a judge finds he has reached a different opinion from that of the majority of the assessors, he must still decide, and give reasons, why he does not accept the assessors' majority opinion. It is only too apparent from the Judge's reasons in this case that the thought that, had he heard the second accused's allegations during the trial within a trial, he would have excluded the confessions so the assessors would never have known of them, played an important part in his decision not to follow their opinion. We shall return to the effect of that later.

The requirement in Section 299 for a judge to give his reasons clearly envisages the appeal court being able to consider them. It is plain from the same section that the written reasons form part of the judgment. As we have said, earlier cases establish that those reasons must be cogent, carefully reasoned and capable of withstanding critical examination in the light of the whole evidence. The appellant suggests they were not in this case and, further, were against the weight of the evidence. As far as the last point is concerned, the appellant challenged the emphasis and effect of the Judge's apparent reliance on the lack of acid burns on the second accused's clothing when the acid had been so widely spread otherwise and his assumption that the second accused's personality, character and slight build was sufficient to satisfy him "beyond reasonable doubt" that the second accused would not have picked up the anvil and struck the victim with it. It is clear the Judge gives considerable weight to that part of the evidence in support of the view he had already formed, and repeated more than once, of the second accused's honesty. That was a decision the Judge was entitled to make and we do not think we should consider the weight of that evidence further.

It is the reasons for the decision not to accept the assessors' opinion that are to be considered. The yardstick against which they should be measured is whether they are cogent and supported by the evidence - a lower standard than deciding whether they are against the general weight of the evidence.

The reason the section requires the judge to give his reasons when he differs from the assessors but not when he agrees is plain. If he simply agrees with the assessors, any

challenge to the verdict will be based principally on impeaching the summing up. Where the judge reaches a different conclusion from the assessors, the summing-up will no longer provide a sufficient explanation of the way he reached his decision and reasons are necessary. As with the summing-up, those reasons are subject to scrutiny and, where necessary, to correction by an appellate court.

Counsel for the respondent points out that the substantial reason why the Judge differed from the assessors was because he believed the accused. That is plainly a decision the Judge is entitled to make but the reasons for that belief as set out by the Judge may be considered by this Court. In so doing, the Court must bear in mind the advantage enjoyed by the trial Judge especially where, as in the present case, his impression turns on the manner and demeanour of the witnesses.

The Judge pointed out that the whole trial had taken forty days of which twenty four were taken up by the trial within a trial in the absence of the assessors. In the passage quoted above, he refers to his observation of the second accused throughout the proceedings. He returned to the point a number of times.

*"As I mentioned earlier, after having heard all of the evidence in the trial, and having observed both the first and second accused closely over the length of the trial, and in particular the second accused whilst giving his evidence under oath for over two days, I find his explanation credible. The second accused was only 17 years old at the time of these offences, and a youth of simple background and means."* We pause to mention that the second accused was two weeks from his eighteenth birthday.

*“My observations of the second accused lead me to the conclusion that he is a quiet, unsophisticated youth ...”*

*“I am further reinforced in my belief as to the truthfulness of the second accused’s allegation because while I found him to be a quiet, unsophisticated young man whose demeanour impressed me in the witness box, he was never shaken in cross-examination...”*

In contrast, the first accused receives short shrift based, again, on observation throughout the proceedings.

*“When I review his (the second accused’s) demeanour and testimony in the witness box I find myself of the opinion that his evidence impressed me because he was simply telling the truth. Conversely, after forty days of observing the first accused in the same manner I was not impressed with either his demeanour or honesty under oath. I do not believe that he is a truthful witness. He admitted to being the maker of the plan to steal the jewellery, and of not telling the second accused that he would attack the victim with sulphuric acid. My observations of him lead me to the conclusion that he has a much stronger personality than the second accused, is more forceful, and I accept from his own evidence that he was the plan maker of these offences. Although he was only 19 years old at the time of the offences he impressed me as a far more mature character than the second accused.”*

We quote that passage because the Judge bases much of his assessment of the truthfulness of the second accused’s evidence on an acceptance of the truth of much of the first accused’s account although he does not accept that Sami is truthful on any of the vital parts of the case.

The difference between the assessors and the Judge is that he saw the two accused and most of the prosecution witnesses for twenty four days more than did the assessors. The accused are entitled to be tried on the evidence adduced in the trial. Material given in the trial within a trial is heard in the absence of the assessors precisely because it should not form part of the matters they are to consider. It cannot be a proper basis for the Judge to reach a decision that includes evaluation of evidence that was not before the assessors.

The Judge's decision was founded on his assessment of the credibility of the second accused. The passages we have quoted show that assessment was based in no small part on what happened in the absence of the assessors.

We consider that, in itself, might be sufficient to impeach his decision but we would also refer to another matter which has caused more concern.

On the evidence that was placed before them, the fact the assessors convicted both accused on both counts can only have resulted from the acceptance by them of the prosecution version of events; namely that the blows that caused the death of the victim were administered by the second accused. Had they accepted the second accused's version, they would have acquitted him and the conviction of the first accused would have been on the basis that it was he who struck the fatal blows. If their decision had been on the basis of the first accused's version, they would only have convicted him of robbery or, if they had been properly directed, possibly of robbery and manslaughter.

The Judge opens his reasons by stating his agreement with the assessors' opinions on the first accused.

*"After a trial lasting forty days, the Assessors returned unanimous opinions that both the first and second accused were guilty to the charges of murder and robbery.*

*"In so far as the first accused is concerned I confirm those opinions and accordingly convict him."*

It is clear that, as a result of the difference between the Judge's decision and the assessors' opinion about the second accused, they have reached their conclusions about the first accused on opposite bases. The Judge's conviction must be on the basis that the fatal blows were struck by the first accused whilst the assessors' finding must be that those blows were struck by the second accused and that the first accused was involved as the result of a common intent.

In many cases, no certain conclusion could be drawn and in other jurisdictions there is good authority that the court will rarely look behind a jury's verdict. However the law here is different and there is nothing to stop a judge, when giving his reasons for differing from the assessors, analysing the basis of their opinion.

In this case, as far as the first accused is concerned, the difference between the Judge and the assessors would make no practical difference because the sentence for murder is fixed, except possibly when the time comes for his sentence to be considered by the Commission for the Prerogative of Mercy. On the other hand there are many cases where such a difference could have a profound effect on the appropriate sentence.

This point was not fully argued before us and it is unnecessary for us to reach a conclusion.

Dealing with all the grounds of appeal, we find that the possible effect of the manner in which the Judge directed himself on the effect the second accused's allegation of threats by the first accused would have on the admissibility of his confessions, the inclusion of the proceedings on the voir dire in his decision and the speculation about the possible tactics of the accused's legal representative together with the conflicting nature of the final decisions of the Judge and the assessors lead us to consider that there has been a clear miscarriage of justice.

Bearing in mind the conclusion we have reached in the first accused's appeal and the fact that the defects in the summing-up would have affected the assessors equally in respect of this accused, we feel it would be unfair to enter a conviction. We therefore order a new trial in this appeal also before a different Judge and assessors on robbery and murder.

We have considerable misgiving about ordering a person acquitted some three years ago to face trial again for an offence for which he was acquitted. As noted earlier, the provisions for the State, with leave, to appeal against an acquittal on a question of fact is most unusual in common law jurisdictions in situations where a citizen has been acquitted following a jury trial or trial before judge and assessors.

The Director was able to point to a right to appeal against an acquittal only in Tasmania. There, the Crown may appeal against an acquittal on a point of law with leave of the Court of Criminal Appeal. Dixon CJ in the High Court of Australia said of this provision:

*"It is evident that the policy which guided the legislature was rather concern in the operation of the criminal law than of correcting verdicts of acquittal to which the Crown objected."*  
*See R. v. Vallance (1961), 108 CLR 546, 62.*

Other jurisdictions have what amounts to an appeal on a point of law following a directed acquittal. But the decree which inserted this provision into the Court of Appeal Act did not restrict appeal to legal points only. With leave of the Court, factual appeals against acquittal may be entertained. Perhaps the time is now ripe for Parliament to consider the desirability of an appeal against acquittal based on fact alone. We think that this Court should allow appeals against acquittals on factual grounds only in very clear cases and the power should be limited generally to correcting errors of law or mixed fact and law.

Because of the irreconcilability of the advice of the assessors and the poorly-expressed decision of the Judge, this is a clear case. Had the Judge contended himself with an affirmation that the evidence of the respondent had a reasonable possibility of being correct and had not cluttered his judgment with extraneous matters, we should have found it difficult to have interfered with a factual finding which was open to him on the evidence.

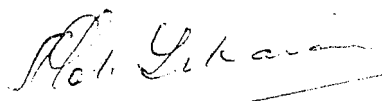
Summary

4/95 The State v. Atish Jeet Ram

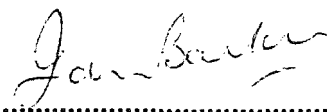
Appeal allowed.  
Acquittal set aside  
New trial of Atish Jeet Ram for murder and robbery before a different  
Judge and assessors.

5/95 Chandra Kumar Sami v. The State

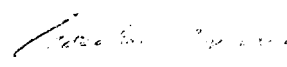
— Appeal allowed  
Conviction for murder set aside  
New trial of Chandra Kumar Sami for murder before a different  
Judge and assessors.



.....  
Sir Moti Tikaram  
President  
FJL COURT OF APPEAL



.....  
Sir Ian Barker  
JUDGE OF APPEAL



.....  
Justice Gordon Ward  
JUDGE OF APPEAL