IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 105 OF 2008
(High Court Action HAC 1 of 2003 at Labasa)

BETWEEN : **ABDUL AHAMMED ALI**
and ROSHNI DEVI

Appellants

AND : **THE STATE**

Respondent

Coram : **Calanchini AP**
Chandra JA
Lecamwasam JA

Counsel : **Mr S Waqainabete for the Appellants**
Ms M Fong for the Respondent

Date of Hearing : **14 May 2013**

Date of Judgment : **30 May 2013**

JUDGMENT

Calanchini AP

[1]. Following a trial in the High Court (at Labasa) by Judge sitting with three assessors, the Appellants were convicted on 17 October 2008 of the murder at Nayaca near Labasa, of a woman by the name of Rukhmani. The First Appellant was sentenced to

life imprisonment with a minimum sentence of 17 years. The Second Appellant was sentenced to life imprisonment with no minimum term fixed by the learned trial judge.

[2]. Initially the Appellants and one other man by the name of Uma Dutt were named as defendants in a charge that was filed in the Labasa Magistrates Court on 26 February 2001. By an amended Information dated 17 September 2008 filed by the Respondent, the two Appellants were charged with the offence of murder contrary to section 199 and 200 of the Penal Code Cap 17. It alleged that they had murdered Rukhmani on 18 February 2001 at Nayaca (near Labasa).

[3]. By letter dated 17 September 2008 the Director of Public Prosecutions granted immunity from prosecution in respect of the offence of murder for which the Appellants were charged to Uma Dutt on the basis that if called by the Respondent as a witness at the trial he would give truthful evidence in accordance with a signed statement dated 17 September 2008 that he had given to the Police.

[4]. The Appellants had pleaded not guilty and the trial commenced on 2 October 2008 following a lengthy voir dire hearing. The transcript at page 260 of the Court record indicated that Counsel for the Respondent during the course of his opening address to the assessors made reference to the immunity from prosecution granted to Uma Dutt. The prosecution called 19 witnesses to give evidence including Uma Dutt and Ashwin Kamal both of whom claimed to have been present at the place and time of the murder. Ashwin Kamal was eight years old at the time of the offence and 15 years old at the time of the trial.

[5]. At the conclusion of the evidence for the Respondent the Appellants through their Counsel, submitted that there was no case to answer. The learned trial judge heard submissions from the parties and, concluding that there was sufficient evidence for the assessors, properly directed, to form an opinion that the Appellants were guilty, dismissed the application. The Appellants both gave evidence and a third defence witness gave alibi evidence for the First Appellant.

[6]. Following the learned trial Judge's summing up, the assessors unanimously found both Appellants guilty of murder.

[7]. In 2007 an application had been made by the Appellants and Uma Dutt, who had been jointly charged with the murder of Rukhmani, for a stay of proceedings and for separate trials. Both applications had been dismissed on 27 July 2007 by a Judge of the High Court. The Appellants and Uma Dutt appealed to the Court of Appeal the decision refusing to grant a stay of proceedings. On 14 April 2008 the Court of Appeal dismissed the appeal on the basis that there was no right of appeal to the Court of Appeal against an interlocutory judgment or order given or made by the High Court in the exercise of its criminal jurisdiction.

[8]. On 11 March 2009 a single judge of this Court granted leave to the First Appellant to appeal against his conviction. Although there is no material in the Court record, the Court was informed by Counsel for both parties that the Second Appellant had also been granted leave to appeal against conviction.

[9]. Amended grounds of appeal were filed on 6 September 2010 by the Legal Aid Commission on behalf of the Appellants. The grounds of appeal are:

> *"1. That the Trial Judge erred in law in refusing to grant the Stay of Proceedings application.*
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> *2. That the Trial Judge erred in law in failing to outline to the Assessors that one of the Prosecution witnesses was granted immunity and the legal consequences of an accomplice giving evidence.*
>
> *3. That the Trial Judge failed to direct the assessors on the credibility and quality of the witnesses' evidence given that the offence occurred in 2001 and the trial commenced in 2008.*
>
> *4. That the Judge failed to direct the assessors on the allegations of the Appellants that the confessions were the result of police brutality.*
>
> *5. That the sentence for Abdul Ahmed Ali is harsh and excessive."*

[10]. The appeal came on for hearing before the Court on 11 November 2010. However judgment had not been delivered before two of the three presiding judges had left the Bench. As a result a re-hearing of the appeal was necessary.

[11]. Before proceeding further, it is convenient at this point to explain the basis upon which the appeal re-hearing proceeded before this Court. In respect of ground one, it was acknowledged by Counsel that there did not appear to be any material in the Court record to indicate that the learned trial Judge had determined an application for a stay of proceedings. It therefore appeared that ground one was a reference to the earlier interlocutory decision of a different High Court Judge who had heard and determined the stay application the previous year in Labasa.

[12]. In so far as ground 4 was concerned, Counsel for the Appellants acknowledged that the confessions had been ruled inadmissible following the voir dire hearing and that no reference had been made to confessions by the learned trial Judge during the course of his summing up to the assessors. There was, of course, therefore no need for the trial Judge to discuss the circumstances under which the confessions had been obtained. Counsel applied to withdraw ground 4 and leave was granted accordingly.

[13]. It was acknowledged by Counsel that the appeal against sentence by the First Appellant should be treated as an application for leave to appeal (out of time).

[14]. The main ground of the appeal (ground 2) is that Uma Dutt was called as a witness but that the learned trial Judge in his summing up did not give the assessors the warning which it was submitted was appropriate and necessary in relation to the evidence of a witness who was or might be an accomplice.

[15]. It was submitted that there was a requirement for such a warning and that since it was not given, the convictions must be quashed. Coupled with this matter is the issue of immunity from prosecution and what if any direction should have been given to the assessors. The other remaining grounds of appeal against conviction will be considered later in this judgment.

[16]. During the course of his summing up the learned trial Judge discussed the evidence of both Uma Dutt and Ashwin Kamal in paragraphs 44 to 53:

> *"44] Two of the prosecution witnesses, said that they saw the 1st and 2nd accused kill the deceased. This is the eye witness evidence of Uma Datt and Ashwin Kamal. Both say they were with the 1st and 2nd Accused under the Raintree near the Labasa hospital on 18 February 2001, when the deceased Rukhmani first joined them.*
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> *45] They both said that shortly after Rukhmani joined them, the 1st Accused drove them all to an area beside the Labasa river in Longbay where the 1st Accused again parked under a raintree. When they arrived, Uma Datt said that the 1st Accused and him continued to drink beer.*
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> *46] At some time shortly after, Uma Datt and the 1st accused had sexual intercourse with Rukhmani. Uma Datt said that he was the first to have sex with Rukhmani. He also said that he and the 1st accused had to slap her and hold her down so that he could do so. When he finished having sex, he returned to the taxi which was parked close by. The 1st accused had sexual intercourse with Rukhmani immediately after.*
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> *47] Uma Datt said that while he was sitting in the taxi, and after the 1st accused had stopped having sex with Rukhmani, Rukhmani stood up and said that she was going to report the matter to the police. The 1st accused then hit her with a beer bottle which made her fall to the ground. He then stood on her neck for about 2 to 3 minutes while the 2nd accused used both of her hands to press down on her mouth. He says that she did this for about 5 to 6 minutes. Uma Datt said that this is how the 1st and 2nd accused murdered Rukhmani.*
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> *48] Once Rukhmani was dead, Uma Datt said that he and the 1st Accused loaded her body into the taxi and drove with the 2nd accused and Ashwin Kamal to a creek which was about half a mile from Longbay. There, they stopped and dumped the deceased body in the creek, which was close to the Nacaya sub division road.*
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> *49] Ashwin Kamal, who was about 8 years old in February 2001, said that he was the natural son of the 2nd Accused. He said that he met the 1st accused, the 2nd accused, and another man when they all sitting in a car*

that was parked under a rain tree on the road at the bottom of the Labasa Hospital.

50] Ashwin said that this was not the first time that he had met the 1st accused, and that he also knew him by the name of "Shorty". He said that he saw them near the Siberia road while collecting bottles in the area. He said that his mother, the 2nd accused, called him over, so he joined them. At that time, he said they were all drinking beer. He also said that while they were there, another woman called Rukhmani also joined them. Ashwin said that he had known Rukhmani since his aunties daughter had married her son.

51] Ashwin said the 1st accused then drove them in his taxi to the riverbank near Longbay. He said when they arrived, they all got out of the taxi and sat under a rain tree.

52] Ashwin said he remembers seeing Uma Datt and 1st accused remove Rukhmani clothes. Ashwin said he saw Uma Datt and the 1st accused having sex with Rukhmani. He said this went on for about 20 minutes. Afterwards, Ashwin said that the 1st accused and Uma Datt punched the deceased, while the 2nd Accused pushed down with her hands on her mouth. He said that when the 1st accused used his foot to press down on her neck, the deceased was struggling, but could not get free.

53] When this stopped, Ashwin said the 1st accused, who he referred to as Shorty, drove his taxi up to the deceased. The 1st Accused and Uma Datt lifted her body into the car. They all then drove to a drain where the 1st Accused and Uma Datt left her body. Ashwin said that this is where the 2nd accused threw her clothes and flip flops."

[17]. It is clear that this evidence would, on proper directions to the assessors, have been sufficient to support an opinion of guilty since it established that the Appellants had by their actions caused the death of Rukhmani and had done so with intent to kill or cause grievous bodily harm.

[18]. However the Appellants have submitted that the summing up by the learned trial Judge was improper by failing to warn the assessors of the danger of reaching an opinion of guilty on the evidence of an accomplice without corroboration. It is quite apparent that the learned trial Judge did not give any such warning to the assessors. It

is submitted that this omission is fatal and that under those circumstances the conviction must be quashed presumably on the basis that there has been a misdirection that constituted a *"wrong decision on a question of law"* under section 23 (1) (a) of the Court of Appeal Act Cap 12.

[19]. This ground of appeal requires a brief analysis as to the scope of the rule that a judge should warn assessors concerning the evidence of an accomplice. A second issue raised by the submissions is the question who is an accomplice for the purpose of the rule. It is then necessary to assess how the evidence given by Uma Dutt is to be treated in the context of the analysis of the rule.

[20]. Relevant to the scope of the rule are the three propositions quoted with approval by Lord Simonds LC in **Davies v DPP** [1954] AC 378 at page 399. The first proposition is that in a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the assessors that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated. The second proposition is that the rule, although a rule of practice, now has the force of a rule of law. The third proposition is that where the judge fails to warn the assessors in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless this Court can apply the proviso to section 23 (1) of the Court of Appeal Act. These propositions were adopted by the Supreme Court in **Delaibatiki and Metui –v- The State** (unreported CAV 6 of 2011 delivered 20 August 2012).

[21]. Therefore the common law rule concerning the warning about accomplice evidence is still applied in this jurisdiction. However the warning is no longer required for the evidence of a complainant where a person is tried for an offence of a sexual nature (section 129 Criminal Procedure Decree 2009).

[22]. The rule is dependent upon the witness being an accomplice. The question what is an accomplice was considered by Lord Simmonds LC in his speech in **Davies –v- DPP** (supra). At page 400 the following appears:

"There is in the authorities no formal definition of the term "accomplice" _ _ _. On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category:

(1) On any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) _ _ _. This is surely the natural and primary meaning of the term accomplice.""

[23]. In the same speech the Lord Chancellor identified two further classes of persons who although not strictly accomplices, have been held to be accomplices for the purpose of the rule. They are not relevant to this appeal. This definition was cited with approval by the Supreme Court in **Lalagavesi –v- The State** (unreported CAV 14 of 2012 delivered 24 October 2012).

[24]. The evidence given by Uma Dutt at the trial clearly places him at the scene of the murder and in my view was sufficient for the assessors to conclude that if he was not a principal, he was certainly an accessory after the fact. His role in assisting with the removal of the body and placing it in the car and then dumping the body in the river under the bridge was clear evidence of his participation as an accessory after the fact.

[25]. The position here is that there was no warning given by the learned trial Judge to the assessors about the danger of convicting the Appellants on the evidence of the accomplice Uma Dutt.

[26]. Although it may be inferred that if there is evidence from another witness that confirms or corroborates the evidence of the accomplice no such warning is required to be given, the third proposition in **Davies –v- DPP** (supra) suggests that a warning is always required when reliance (and in this case substantial reliance) is placed by the prosecution on that evidence. This view is clearly supported by the observation of the Supreme Court in **Mudaliar –v- The State** (unreported CAV 1 of 2007 delivered on 17 October 2008). At paragraph 70 the Court said:

"70 The trial judge did remind the assessors that Abhikesh had been granted immunity from prosecution. He told them that this related to his possibly having been implicated in the

> *abortion itself. What he failed to do was to explain to the assessors precisely why Abhikesh's evidence may have been tainted by an improper motive. That is a fundamental aspect of any accomplice warning, but it applies with equal force to those cases in which, though technically an accomplice warning is not required, a warning closely analogous thereto should be given."*

[27]. However, putting that issue to one side, it is necessary to consider what constitutes corroborating evidence and to what extent, if at all, was the evidence of the accomplice Uma Dutt corroborated in this case. As to what constitutes corroboration, the Court of Criminal Appeal in **R v Baskerville** [1916] 2 KB 658 at page 667 set out a definition which was adopted in **Daniel Azad Wali –v- The State** [2001] 1 FLR 192. This Court (quoting from the headnote) held that corroboration *"is any evidence which comes from an independent source and which affects an accused person by connecting or tending to connect him or her with the crime in question. Further it must be evidence which implicates an accused person that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the accused person committed it."*

[28]. The rationale for the rule requiring a warning as to the danger of convicting in the absence of corroboration was stated by Lord Diplock in **DPP –v- Hester** [1973] AC 296 at page 325:

> *"Accomplices form the commonest category of witness whose evidence in criminal cases became subject to the common law requirement of a warning to the jury as to the danger of convicting upon it unless it was confirmed by evidence from some other source, and most of the reported cases are about the evidence of accomplices. But a similar rule of practice at common law grew up as to the evidence of two other categories of witnesses whose reliability either generally or as to particular matters was liable to be suspect for other reasons. These were: children [who although competent] are yet so young that their comprehension of events and of questions put to them or their own powers of expression may be imperfect and [victims of sexual offences].*
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> *The danger sought to be obviated by the common law rule in each of these three categories of witnesses is that the story told by the witness to the jury may be inaccurate for reasons not applicable to other competent witnesses, whether the risk be of deliberate inaccuracy, as in the case of*

accomplice, or unintentional inaccuracy as in the case of children _ _ _. What is looked for under the common law rule is confirmation from some other source that the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged."

[29]. In the present case, the Respondent called its second witness whose purpose no doubt was to corroborate the evidence of the accomplice Uma Dutt. The second witness was Ashwin Kamal. He is the son of the Second Appellant although it appears that he resided most of the time with his aunt (Ms Jai Wati). At the time of the murder in 2001 he was 8 years old and at the time he gave his evidence at the trial he was about 15 years old. He stated that he knew the First Appellant before 18 February 2001 because his mother, the Second Appellant, was in a de facto relationship with the First Appellant.

[30]. In this case the Prosecution relied on evidence as corroboration from a 15 year old based on his memory and recollection of events that had occurred seven years earlier when he was only eight years old. It is, in my view, evidence which, because of his age at the time of the murder and lapse of time from then to the date of the trial, must be put into the category of evidence that is subject to the same rule as that of an accomplice. It is also, therefore, evidence requiring a warning as to the danger of convicting upon it unless confirmed by evidence from some other source.

[31]. So, in effect, here was a situation where there appears to be mutual corroboration between witnesses who belong in different categories each of which requires corroboration. Uma Dutt because he is an accomplice and Ashwin Kamal because although 15 years old at the time of giving his oral testimony was eight years old at the time of the murder and at the time he made his statement to the police. On this point it must be remembered that this is not a situation where one accomplice's evidence is being adduced to corroborate the evidence of another accomplice. There is only one accomplice in this case, that is Uma Dutt. However the criminal law may have classified the participation of Ashwin Kamal, being under 10 years old he was not criminally responsible for any act or omission (section 14 (1) Penal Code Cap 17).

[32]. The issue of *"mutual corroboration"* was the subject of some discussion in **DPP –v- Hester** (supra). As Lord Cross observed in his speech at page 330:

> *"It is true that it had been established that the evidence of an accomplice could not be treated as corroborated by the evidence of another accomplice in the same crime. _ _ _ This was not an instance of any general rule as to the legal meaning of corroboration but a special rule laid down to meet the obvious danger that the two accomplices might agree together to throw as much as possible of the blame on the accused."*

[33]. However, as Lord Diplock in the same decision observed in his speech at page 326:

> *"_ _ _ the same reason does not apply where the reason for regarding each of the witnesses as suspect is different or, although the same, is not one which makes it likely that they will connect together to tell the same false story. There is no case in the books to support the practice of treating the evidence of one suspect witness as incapable in law of corroborating the evidence of another except where both suspect witnesses are accomplices in the strict sense of being participes criminis with the accused in the crime with which he is charged."*

[34]. Therefore in the present case the suspect evidence of Ashwin Kamal was capable of corroborating the evidence of the suspect evidence of Uma Dutt. In saying this I am not making any judgment as to the quality of the suspect evidence of Ashwin Kamal. What is meant by the statement is that the evidence of Ashwin Kamal, if accepted, lends support to the conclusion that Uma Dutt was telling the truth.

[35]. There was, however, in this case, an obligation on the trial judge to warn and explain to the assessors that the evidence of both witnesses was regarded by the law as suspect evidence, although for different reasons and that if they accepted the evidence of Ashwin Kamal, it did no more than allow them to conclude that Uma Dutt was telling the truth. This was not done.

[36]. Turning to the issue of the immunity from prosecution granted to Uma Dutt as an accomplice. In **Singh –v- The State** (unreported CAV 7 of 2005 delivered 19 October 2006) the Supreme Court at paragraph 31 stated:

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

[37]. It must be noted that the immunity was given on the basis that Uma Dutt would give evidence for the State in accordance with the statement he had provided to the Police on 17 September 2008 being the day before the voir dire hearing commenced. That statement clearly implicated the Appellants. In addition the conditional nature of the immunity granted to Uma Dutt implied that he would adhere to that statement otherwise he would face prosecution himself. These are all matters about which the learned trial judge was required to direct the assessors in his summing up. This was not done.

[38]. It is clear that Uma Dutt had reason for ensuring that his evidence of what had occurred conformed to the Respondent's case that the Appellants had murdered Rukhmani. There was on the record an initial account of events concerning his first police statement made in 2001 that was different from the testimony given by Uma Dutt at the trial after he was granted immunity. The directions given by the learned judge on these issues were inadequate. The directions in paragraphs 91 to 95 of the summing up were confusing and unhelpful.

[39]. The evidence given at the trial by Uma Dutt and Ashwin Kamal was the evidence upon which the Respondent relied, almost wholly, for establishing its case against the Appellants, being the only direct evidence adduced. Its acceptance by the assessors was absolutely essential if they were to return opinions that the Appellants were guilty. In my view, by failing to give the warnings that have been discussed above and which I shall summarise below the Appellants have been deprived of the chance which was otherwise open to them of being found not guilty.

[40]. The learned judge should have warned the assessors of the danger of finding the Appellants guilty on the basis of the evidence of an accomplice whether it was corroborated or not. The judge should also have warned the assessors of the danger of finding the Appellants guilty on the basis of evidence given by the accomplice, who

had only the day before signed a police statement for which in return he had been granted immunity from prosecution. The trial judge should have directed the assessors that the evidence of the witness Ashwin Kamal, being only 8 years old at the time of the crime and when he made his statement to the Police should also be regarded as suspect. They should have been directed that his evidence although capable of corroborating the evidence of Uma Dutt must be carefully examined and if accepted, did no more than establish that Uma Dutt was telling the truth.

[41]. In my opinion the failure by the trial judge to give any of those warnings or directions to the assessors constitutes a misdirection. Although in this trial before the judge with the aid of assessors, the judge was not bound to agree with their opinions, he was required to take them into account. Consequently, if the assessors were misdirected on an issue that has been described as a *"rule of law",* then the opinions of the assessors must be regarded as invalid or defective. The failure of the trial judge to warn and direct the assessors about these matters in his summing up and apparently to consider them in his judgment constituted a wrong decision on a question of law which predicated both the verdict and the conviction.

[42]. In view of my conclusion in relation to the main ground of appeal, I intend to comment briefly on the remaining grounds. The first ground of appeal relates to the interlocutory judgment refusing to grant a stay of proceedings. It is clear that this is a proper ground for the consideration of the Court of Appeal in an appeal against conviction. In **Mudaliar –v- The State** (supra) at paragraph 20 the Supreme Court observed:

> *"_ _ _ it is well established that where an earlier interlocutory judgment has influenced the outcome of a later final judgment, an appeal against that final judgment may be based on an error in the earlier interlocutory judgment."*

[43]. After considering the submissions and having read the interlocutory decision I am not satisfied that the learned judge who determined the application has made any error identifying the appropriate legal principles or in the application of those principles to the facts of the case. The delay was not the fault of the prosecution. Even if the delay

was unreasonable, the material did not establish sufficient prejudice to conclude that a fair trial was not possible. I would reject this ground of appeal.

[44]. The third ground of appeal relates to a claim that the learned trial judge failed to direct the assessors on the credibility and quality of the evidence adduced by the Respondent at the trial in 2008 in respect of a charge of murder that occurred in 2001.

[45]. The warnings and directions that should have been given to the assessors by the trial judge in relation to the evidence of the accomplice have been discussed already in some detail. Apart from what has already been said about the evidence of Uma Dutt, it would have been appropriate for the learned judge to direct the assessors that Uma Dutt's evidence given in 2008 was based on his recollection of events that occurred in 2001. It should also have been part of that direction that the statement made to the police on 17 September 2008 could also only be based on his memory of events that had occurred seven years earlier. This is because there is no material in the record to indicate that Uma Dutt had refreshed his memory by referring to any earlier statement made by him to the police in 2001.

[46]. However it is the evidence of Ashwin Kamal that did call for a clear direction from the trial judge that his evidence should be viewed with caution. There are at least two reasons why this direction should have been given. The first has already been discussed. The evidence given by Ashwin Kamal at the trial when he was 15 years old was based on his recollections and memory of events that he had observed some seven years earlier when he was only eight years old. The assessors should have been warned that before accepting his evidence they must take heed of the fact that because of his age at the time of the murder his evidence was suspect on the basis that it may be unintentionally unreliable. This lack of reliability is heightened by the fact that the evidence is being given seven years later. The assessors should have been given a direction to the effect that the evidence under such circumstances is more likely to be based on reconstruction than memory.

[47]. The second reason is that this evidence was at odds with that of Uma Dutt on some material facts surrounding the murder of the deceased. There is inconsistent evidence as to who was sitting where in the car as the First Appellant drove to Longbay. Uma

Dutt said that the First Appellant and he were in the front with the Second Appellant, Rukhmani and Ashwin Kamal in the back (p.265 Record). On the other hand, Ashwin Kamal stated that the Second Appellant (his mother) was in the front next to the First Appellant (the driver) with Rukhmani, Uma Dutt and himself in the back (p.289).

[48]. There is inconsistent evidence about the actions of the four adults in the period from when the vehicle arrived at Longbay and when the two males raped Rukhmani. More importantly Uma Dutt's evidence was that he had non consensual sex with Rukhmani first and then the First Appellant did the same (p.266 of the Record). However Ashwin Kamal stated that it was the First Appellant who had non-consensual sex with Rukhmani followed by Uma Dutt (p.290 Record).

[49]. There is further conflict in the evidence concerning the time when the Second Appellant became involved in the events leading to the death of Rukhmani. Uma Dutt stated that the Second Appellant remained seated in the vehicle whilst the two males raped Rukhmani. He stated that the Second Appellant left the vehicle and placed her hands over Rukhmani's mouth only after the First Appellant had placed his foot on Rukhmani's neck (p.268 Record). Ashwin Kamal stated that the Second Appellant was pressing Rukhmani's mouth *"as Uma Dutt on Rukhmani"* (p.290).

[50]. As previously noted the learned judge summarised the evidence of the two witnesses without making any reference to these inconsistencies. There is no reference anywhere in the summing up to the inconsistencies nor how those inconsistencies should be considered by the assessors.

[51]. I am satisfied that the assessors have not been adequately directed as to the evidence of Ashwin Kamal. I am of the view that had they been properly directed that evidence may not have been accepted either for the purposes of corroboration nor as being reliable as to the facts relied upon by the Prosecution to establish its case beyond reasonable doubt. As a result I would allow this ground of appeal.

[52]. Having concluded that grounds 2 and 3 of the appeal have been established it is necessary to consider whether the proviso to section 23(1) has any application to this

appeal. In other words, notwithstanding that I am of the opinion that two grounds raised in the appeal against conviction have been decided in favour of the Appellants, should I dismiss the appeal on the basis that no substantial miscarriage of justice has occurred?

[53]. In my opinion, taking into account the serious shortcomings in the summing up which have been detailed and the substantial reliance placed upon the evidence given by Uma Dutt and Ashwin Kamal by the Respondent to establish its case beyond reasonable doubt, this is not an appropriate case for the application of the proviso.

[54]. As a result I would allow the appeals and quash the convictions of both Appellants. The remaining question is whether in the interests of justice a new trial should be ordered pursuant to section 23(2) (a) of the Court of Appeal Act. The decision as to whether to order a retrial requires the exercise of judgment after balancing various factors involving the public interest and the legitimate interests of the Appellants. The position is discussed in 2012 Archbold at paragraph 7.112:

> *"The former was generally served by the prosecution of those reasonably suspected on available evidence of serious crime if such prosecution could be conducted without unfairness to, or oppression of, the defendant. The legitimate interests of the defendant would call for consideration of the time which had passed since the alleged offence and any penalty already paid."*

[55]. Although mindful that a stay of proceedings was refused in 2007, some six years after the original offence was committed, it is now over 12 years since the offence was committed. Even allowing for the fact that in respect of serious offences it is now common for trials to take longer to come to court, I cannot recall a re-trial being ordered some 12 years after the offence had been committed. In my view any evidence given at a re-trial after a lapse of twelve years is more likely to be based on reconstruction than memory. The Appellants have been tried once already although they have only served about five years of their sentences. Taking into account the fact that the evidence given by the two principal witnesses fell into two of the three recognised categories of suspect evidence and the quality of that evidence it is my conclusion that it is not in the interests of justice to order a retrial.

[56]. It is not necessary to consider the application for leave to appeal against sentence.

Chandra JA

[57]. I agree with the judgment of Calanchini AP and his proposed orders.

Lecamwasam JA

[58]. I also agree.

<u>**Orders:**</u>

1. *Appeals allowed.*
2. *Convictions of both Appellants quashed.*
3. *Sentences of both Appellants set aside.*

HON. JUSTICE W. CALANCHINI
ACTING PRESIDENT

HON JUSTICE S. CHANDRA
JUSTICE OF APPEAL

HON JUSTICE S. LECAMWASAM
JUSTICE OF APPEAL