

**IN THE COURT OF APPEAL**  
**[On Appeal from the High Court]**

**CRIMINAL APPEAL NO. AAU 0105 OF 2010**  
**[High Court Criminal Case No. HAC 68 of 2008]**

**BETWEEN** : STANLEY SANJAY SUDHAKAR  
*Appellant*

**AND** : THE STATE  
*Respondent*

**Coram** : Fernando JA  
Goundar JA  
Madigan JA

**Counsel** : Mr. S. Sharma for the Appellant  
Ms. S. Puamau for the Respondent

**Date of Hearing** : 16 November 2015

**Date of Judgment** : 3 December 2015

**JUDGMENT**

**Fernando JA:**

I agree with the judgment of Goundar JA.

**Goundar JA:**

[1] Following a trial in the High Court at Suva, the appellant was convicted of murder and sentenced to life imprisonment with a minimum term of 14 years. This is an appeal against conviction on the following grounds:

**GROUND ONE**

**THE** learned trial Judge erred in law when he failed to direct the assessors that the burden of proof was on the prosecution which was beyond reasonable doubt and it was for the prosecution to prove all the elements of the offence beyond reasonable doubt.

**GROUND TWO**

**THE** learned trial Judge erred in law and in fact when he did not properly direct the assessors on how to approach the previous inconsistent statement of prosecution witness Abdul Shafil.

**GROUND THREE**

**THE** learned trial Judge erred in law and in fact when he did not properly direct the assessors in respect of circumstantial evidence.

**GROUND FOUR**

**THE** learned trial Judge erred in law when he did not adequately deal with the defence of the Appellant causing a substantial miscarriage of justice.

**GROUND FIVE**

**THE** learned trial Judge erred in law and in fact when he did not direct the assessors to disregard the evidence of uncharged offence of assault on the victim by the Appellant.

**GROUND SIX**

**THE** learned trial Judge erred in law when he did not direct his mind during the *voir dire* that the burden of proof was on the prosecution to prove beyond reasonable doubt that the confession of the Appellant was voluntarily obtained.

**GROUND SEVEN**

**THE** learned trial Judge erred in law when he failed to direct the assessors about the following in respect of the defence of alibi:

- a) That the prosecution must disprove the defence of alibi beyond reasonable doubt; and
- b) Even if the assessors concluded that the defence was false that does not by itself entitle them to convict the Appellant.

[2] The deceased was the appellant's biological mother. At trial, the defence did not dispute that the deceased was murdered. The deceased's body was discovered inside her home at

Rose Place in Samabula on 4 May 2008. At the time of her death, she was 57 years. The appellant was her only child. She raised him all by herself since he was ten months old when her husband left her. She lived on her FNPF pension and occasional financial support from her relatives. The appellant lived with his mother and operated a canteen business selling grog, cigarettes and lollies.

- [3] On 3 May 2008, at about 4 pm, the appellant accompanied the deceased to attend a family gathering at Avinesh Kirpal's home. The purpose of the gathering was to meet Uncle Francis who had come for a visit from Canada. Uncle Francis was the deceased's brother. They had food and drinks at the gathering. Avinesh said there was an argument between Uncle Francis and the appellant regarding Uncle Francis not supporting them enough. The appellant left the gathering when he was asked to leave for getting angry. Later in the evening, Avinesh accompanied Uncle Francis and the deceased to the Purple Haze nightclub. The appellant was also in the same nightclub. Avinesh saw the appellant approach Uncle Francis and started talking. Avinesh could not hear exactly what was being said, but he heard some abusive words about Uncle Francis not supporting the appellant. Avinesh told the appellant to stay away from Uncle Francis. Although Avinesh did not give the exact time, he recalled that the deceased got a taxi home before they left the nightclub.
- [4] Another witness who was present at the family gathering was Sanjiv Kirpal. However, he left the gathering at 7 pm to go to work at the Purple Haze nightclub. At around 9 pm, the appellant turned up at the nightclub all by himself. When Sanjiv asked the appellant why he was on his own, the appellant said he had an argument with Uncle Francis. Sanjiv worked till 11 pm when his family had arrived at the club. He left the club at about 12.30 am shortly after his family had left for home. At about 4 am, he got up to the noise of a car horn in the driveway. He saw the appellant in the driveway and he was saying "Hurry mum is lying in a pool of blood, something is wrong". By that time the rest of the family were up. The appellant told them that he had not called the police or ambulance and that they were the first people he had come to see.

- [5] The third prosecution witness was Abdul Shafil. Abdul was the taxi driver who took the deceased home at Rose Place after picking her up from outside the Purple Haze nightclub. When Abdul returned to the club, the appellant got in his taxi, to be dropped off at Rose Place. When they arrived at Rose Place, the appellant told Abdul to wait which he did for half an hour. When the appellant got back in the taxi, Abdul saw him wiping blood off his hands with a towel using water from a bottle that was in the taxi. During the journey, the appellant told Abdul that he had assaulted his mother and the witness was not to report that to anybody or harm would be done to him.
- [6] The post mortem report of the deceased was tendered as an agreed fact. The cause of death was asphyxiation as a result of manual strangulation. There were also significant injuries to the head as a result of impact by a blunt object.
- [7] When the police caution interviewed the appellant, he gave a detailed account of how he had killed his mother. His most incriminating answers were as follows:

Q149. The first time you arrived home, what was your mother doing?  
Ans: She was having dinner.

Q150. What was she eating?  
Ans: Roti and curry fish.

Q151. Where was she having her meal?  
Ans: In the Kitchen.

Q152. Then what happen?  
Ans: We had an argument.

Q153. What was the argument about?  
Ans: It was regarding my uncle Francis, for refusing to help us going to overseas.

Q154. Then what happened?  
Ans: Whilst arguing my mum stood up, went to the sink and washed her plate and she went back to her bedroom. Then I picked up a torch from the sitting room, followed her to the bedroom just before she reached her bed, I hit the torch on the back of her head and she fell to her bed facing upwards. When I hit her, the torch broke.

- Q155. What happened next?  
Ans: When she was about to yell I pressed my left hand on her neck on the bed, and also hit her head with the torch whilst she was facing me.
- Q156. How long have you been pressing her neck?  
Ans: I kept pressing her neck whilst she was trying to call for help mildly. I keep pressing until I could see her eyes starting to close slowly. After a while I lifted my hand from her neck and I could see that she wasn't moving much but shaking a bit.
- Q157. Did your mother struggle while you were pressing her neck?  
Ans: Yes.
- Q158. What did you do next?  
Ans: I took the torch (broken) into my bedroom and hide it under my bed. Went to the sitting room, took the \$10.00 on the black bag and went out. I locked the door and the grill.

- [8] When the police attended the crime scene, they found a broken torch under the bed in the appellant's bedroom. During the interview, the police showed the torch they recovered from the crime scene to the appellant. The appellant admitted that was the torch he had used to assault his mother (Question & Answer 159).
- [9] In his evidence, the appellant retracted from his caution statement saying the police had obtained his statement using force. He denied displaying any animosity towards Uncle Francis either at the family gathering or at the club for not helping him. He said after attending the family gathering, he went to the nightclub at about 9.20 pm. Later his mother came to the club with his uncle. At around 1 am he left the club. He went and bought a meal to eat. He then got a taxi and arrived at his home around 3 am. He spent a considerable period of time calling his mother to open the door. When there was no response, he then went to the rubbish bin and retrieved his keys which he always kept there. When he entered the house, he was shocked to see his mother lying in a pool of blood on the floor. He went out and called his neighbour but when he got no response, he took a taxi to where his uncle was staying. He also called a close friend and then went to the police station.

**Ground 1 – Burden and Standard of Proof**

[10] The appellant contends that the trial judge failed to direct on the burden and standard of proof. At trial, it was not an issue that the victim was murdered. The only issue was whether the State has proved that the Accused was the murderer. The Summing Up was tailored on this sole issue. When it came to burden and standard of proof, the trial judge gave the following direction to the assessors at paragraph [4] of the Summing Up:

*“The Accused is put on trial by the State and it is for the State to prove that he is guilty of the allegation of murder. It is not for the Accused to prove anything let alone his innocence; the burden of proof rests upon the State. How does the State prove the guilt of the Accused? To what standard must guilt be proved? The standard of proof is best expressed in this way: you will not find the Accused guilty unless you are sure of guilt; if you have a reasonable doubt as to his guilt then you will find him not guilty. “*

[11] It is well established that in criminal cases, the burden of proof is upon the prosecution and the standard is proof is beyond a reasonable doubt. In Summing Up, the trial judge must direct the jury upon the burden and standard of proof (**R v Lawrence** [1982] AC 510, 519). When directing on the burden and standard of proof, no formula has to be followed slavishly. What is required is that the assessors understand that it is for the prosecution to establish the accused’s guilt and before they can convict they must be satisfied beyond a reasonable doubt or be sure of the accused’s guilt.

[12] Counsel for the State submits that the direction on the burden and standard of proof given by the trial judge has been approved by the England and Wales Judicial Studies Board and is used by the English courts. I agree with this submission. Not only is the direction an approved model direction in England, the direction has also been approved in Fiji by this Court in **Baram Deo v The State** unreported Cr. App. No. CA10/1988; 18 May 1990 and in **Lepani Maiwaqa v The State** unreported Cr. App. No. AAU0039/98S & AAU0019/00S; 14 August 2014. This ground fails.

## **Ground 2 – Previous Inconsistent Statement**

- [13] This ground relates to the evidence of Abdul Shafil. At trial, Mr Shafil agreed that he had not said anything to the police about seeing blood when the appellant returned to his taxi on the night of the incident. His explanation for the omission was that the police initially treated him like a suspect and that the police had not written things down properly and they had got things wrong. The appellant contends that the trial judge did not properly direct the assessors on how to approach the previous inconsistent statement of Mr Shafil.
- [14] When a witness in a criminal trial gives evidence that is materially inconsistent with his earlier statement or for that matter omitted a material fact in his earlier out of court statement, then the trial judge should direct the assessors to treat the witness's evidence with caution. The trial judge should also direct the assessors to consider whether any explanations given by the witness for the inconsistency or omission are genuine and whether the witness's evidence is true despite the inconsistency or omission (**Praveen Ram v The State** unreported Cr. App. No. CAV0001 of 2011; 9 May 2012 at [61])
- [15] The trial judge dealt with Mr Shafil's evidence in detail at paragraphs [18] - [23] of the Summing Up. The trial judge reminded the assessors that Mr Shafil said things in the statement he made to the police that were different from the evidence that he gave in the trial. The trial judge also directed the assessors that any explanation for the inconsistency was a matter for them and that they may approach the evidence of Mr Shafil with caution. In my judgment, no error has been shown regarding the direction on Mr Shafil's evidence. This ground fails.

## **Ground 3 – Circumstantial evidence**

- [16] The appellant contends that the trial judge's direction on circumstantial evidence was inadequate. The impugned direction is contained at paragraph [10] of the Summing Up:

*“Circumstantial evidence in a case may be powerful evidence; however it is important that you should look at it with care. In particular, before drawing any inference as to the Accused's guilt from circumstantial*

*evidence, you must be sure that there are no other co-existing circumstances which would or might weaken or destroy the inference. Furthermore, there is an important distinction to be drawn between, on the one hand drawing an inference based upon reliable circumstantial evidence and, on the other hand, simply speculating. You must not engage in mere speculation."*

- [17] The adequacy of a particular direction will necessarily depend on the circumstances of each case and the trial judge is not obliged to give a special direction on the use of circumstantial evidence (**Boila v The State** unreported Cr. App. No. CAV005 of 2006S; 25 February 2008). The direction on circumstantial evidence at paragraph [10] is impeccable and this ground fails.

#### **Ground 4 – Defence case**

- [18] This ground is vague. The appellant contends that the trial judge did not adequately deal with his defence.

- [19] The appellant's defence was alibi. There is no rigid rule governing how the trial judge should deal with the defence of an accused. All that is required of a trial judge is to give a fair picture of the defence, without necessarily commenting on every argument presented by the accused (**R v Clayton** (1948) 33 Cr App R 22). The assessors were clearly reminded of the evidence of the appellant and his witnesses. The issue was very narrow. The issue was the identity of the killer. The appellant said he was not the killer because he was in town when his mother was killed. In Summing Up, the trial judge gave a fair picture of the appellant's defence. This ground fails.

#### **Ground 5 – Uncharged offences**

- [20] At trial, evidence was led that the appellant had assaulted his mother on five previous occasions. The uncharged assaults were admitted by the appellant in his caution interview. The appellant's trial counsel did not object to the admissibility of this evidence. The fact that the evidence revealed uncharged offences did not necessarily



make it inadmissible. The question is whether the evidence was relevant (Makin v A-G for New South Wales [1894] AC 57, 65). In my judgment, the evidence was relevant because it gave an insight into the relationship between the appellant and his mother. In any event, the trial judge gave a careful direction to the assessors on how they may use the evidence at paragraph 14 of the Summing Up:

*“In the course of the latter stages of the interview the Accused allegedly told the police that he had assaulted his mother on 5 previous occasions. How do you approach that? First of all you will have to be sure that he made this admission; if you are not sure then you will disregard it completely. Even if you are sure that he did make this admission and that it was true it does not prove that he murdered his mother; you must decide that on the evidence placed before you relating to the allegation of murder. You also heard evidence that at the party on the Saturday afternoon the deceased was seen to have an area of bruising to her right thigh; there is no evidence that the accused was in any way responsible for that and the safest course would be to disregard it.”*

- [21] No issue was taken by the appellant’s trial counsel regarding the above direction. The direction on uncharged offences is impeccable and this ground fails.

### **Ground 6 – Voir dire ruling**

- [22] The appellant contends that the trial judge did not direct his mind to the correct burden and standard of proof when admitting his confession in evidence. The admissibility of the appellant’s confession was determined in a voir dire. The trial judge gave a written ruling admitting the confession in evidence. I accept that the trial judge erroneously referred to the English Police and Criminal Evidence Act 1984 when directing on the law regarding admissibility of a disputed confession. The English legislation had no application in Fiji. But in my judgment there has been no error made by the trial judge regarding the burden and standard of proof required to admit the confession. The trial judge clearly directed his mind that the burden was on the prosecution to prove admissibility and that he was satisfied to the criminal standard, which is beyond a reasonable doubt, that the confession was admissible. This ground fails.

**Ground 7 – Alibi**

- [23] This ground has no substance. The appellant contends that the trial judge failed to direct the assessors on the defence of alibi.
- [24] The trial judge gave clear direction on alibi in accordance with **Laisenia Bese and Are Amae v The State** unreported Cr App No AAU0067 of 2011; 27 February 2015 and **R v Anderson** [1991] Crim. LR 361, CA, at paragraph [6] of the Summing Up:

*“The Accused says that he did not commit the murder and he was elsewhere when the murder was committed; the legal terminology is that he advances an alibi for the time that the offence was committed. It is not for the Accused to prove that he was elsewhere at the time the murder was committed, it is for the State to prove that he was not elsewhere and that he committed the murder. What is the position if you reject the defence of alibi? Even if you reject his alibi you must not convict the Accused solely on the strength of that rejection; to convict him you must be sure that he murdered his mother.”*

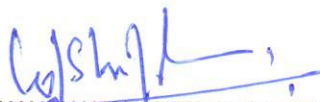
- [25] Given the appellant has not succeeded on any ground of appeal; I would confirm conviction and dismiss his appeal.

**Madigan JA:**

I have read in draft the judgment of Goundar JA, and would dismiss the appeal for the reasons he gives.

**Order of the Court:**


Appeal dismissed.



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Hon. Mr. Justice S. Fernando  
**JUSTICE OF APPEAL**



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Hon. Mr. Justice D. Goundar  
**JUSTICE OF APPEAL**



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Hon. Mr. Justice P. Madigan  
**JUSTICE OF APPEAL**

**Solicitors:**

Office of the Legal Aid Commission for the Appellant  
Office of the Director of Public Prosecutions for the State